Protecting the Fetus: The Criminalization of Prenatal Drug Use

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INTRODUCTION

The police arrested Malissa Ann Crawley on February 27, 1998 for violating a South Carolina child-endangerment law that prohibits the use of illicit drugs during pregnancy.\(^1\) South Carolina is the only state whose supreme court has ruled that a late-term fetus is a person under its child abuse and endangerment laws.\(^2\) Crawley's case is one recent example of the fiercely-debated questions concerning both the status of the fetus and the appropriate remedies for drug-effected babies.\(^3\) One undisputed fact is that many pregant women suffer from substance abuse problems.\(^4\) This Note focuses the use of controlled substances by pregnant women and the failures associated with various state efforts to combat this problem. Part I examines the new approach taken by South Carolina and its place in the growing movement to criminalize drug abuse by pregnant women. Part II analyzes the constitutional questions raised by state intervention in this area. Part III discusses the social policy concerns of criminalizing the drug abuse of pregnant women versus other methods of controlling the drug

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3. See Charles Condon, Clinton's Cocaine Babies; Why Won't the Administration Let Us Save Our Children?, HERITAGE FOUND. POLY REV., Spring 1995, at 12 (criticizing the federal government's economic and political pressure which ultimately caused South Carolina to abandon its drug treatment program which aggressively confronted pregnant women who used drugs with a treatment-or-jail choice); Ted Gest, The Pregnancy Police on Patrol: Authorities Are Charging Women Who Endanger Their Fetuses, U.S. NEWS & WORLD REP., Feb. 6, 1989, at 50 (discussing the attempts of prosecutors to criminalize prenatal drug use); Jan Hoffman, Pregnant, Addicted—and Guilty?, N.Y. TIMES, Aug. 19, 1990, at 34 (discussing and criticizing a Michigan case involving the prosecution of a woman under a drug-delivery statute); Holly Mullen, Should We Punish Pregnant Addicts?; A New Push to Punish Addicts, SALT LAKE TRIB., Feb. 10, 1998, at A1 (discussing Utah's attempt to prosecute a woman for child abuse after delivering a daughter with methamphetamine, cocaine, and marijuana in her bloodstream).
4. Over 500,000 children are estimated to be exposed prenatally to cocaine and other illicit drugs each year, and approximately 300,000 of them suffer some damage from the exposure. See Deborah Rissing Baurac, Cocaine Babies: Researchers Optimistic About Normal Childhoods, CHI. TRIB., Mar. 7, 1993, at 11. Death rates for crack babies may be twice as high as compared to other babies. See Douglas J. Besharov, Whose Life Is It Anyway? Pregnant Crack Users Act as Child Abusers, NAT'L L.J., Mar. 4, 1991, at 15. Cocaine babies suffer withdrawal shortly after birth, displaying symptoms such as high pitched cries, tremors, seizures, sweating, and gastrointestinal upset. See Ira J. Chasnoff, Newborn Infants with Drug Withdrawal Symptoms, 9 PEDIATRICS REV. 273, 275 (Mar. 1988).
abuse problem. Finally, Part IV suggests a framework from which to begin addressing this social dilemma. Although much has been written on this subject, new developments in the law require attention and any possible solution to the fetal drug abuse problem must address these considerations.

II. CRIMINALIZATION

Over the last decade, an increasing number of prosecutors have brought charges against drug abusing pregnant women. Until the Supreme Court of South Carolina decided *Whitner v. State* in October of 1997, prosecutors stretched their authority by charging women under existing drug laws. Such attempts have included charging women for giving birth to children who test positive for drugs, usually under statutes criminalizing the delivery of a controlled substance. Prosecutors have also charged women under pure use statutes and involuntary manslaughter statutes. Examining the use of these laws in prosecuting pregnant women for harming their fetuses illuminates the inherent difficulties in the use of these laws and explains the movement toward child endangerment statutes.

*Johnson v. State* is the most notable trial in which the government used an existing controlled substance statute to prosecute pregnant women. The court determined that Johnson

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6. *See infra* notes 8-10 and accompanying text.

7. *See* Whitner, 492 S.E.2d at 777.

8. *See*, e.g., *People v. Hardy*, 469 N.W.2d 50 (Mich. App. 1991) (dismissing a felony charge against a mother for delivering cocaine to her fetus through the umbilical cord); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992) (dismissing a felony charge against a mother for the delivery of a controlled substance to her fetus through the umbilical cord); *People v. Morabito*, 580 N.Y.S.2d 843 (N.Y. Sup. Ct. 1992) (dismissing a felony charge of child endangerment against a mother who smoked crack while pregnant).


10. *See id.* at 551-52 (describing a woman who was prosecuted for involuntary manslaughter in Rockford, Illinois “because her baby was born with cocaine in her system and then died.”).

took cocaine knowing that the cocaine would pass to her fetus, and after the birth of her child, both mother and child had traces of cocaine in their bodies. Johnson was convicted of delivering a controlled substance to her minor child. The Florida District Court of Appeals affirmed the lower court’s decision, stating that “[l]ogic lends us to say that appellant violated the statute.” The District Court of Appeals concluded that the fetus was a person under Florida law and the transmission of cocaine from the mother to her newborn via the umbilical cord constituted a violation of the statute.

The Florida Supreme Court ultimately reversed the District Court of Appeals decision. The Florida Supreme Court’s underlying rationale was that it was absurd to apply the drug delivery statute to this scenario. The court questioned whether it was even medically possible to deliver drugs from the mother to the fetus via the umbilical cord. The court also challenged whether Johnson could plausibly have the requisite intent because of the difficulty, based on the inherent uncertainty of when the birth was to occur, in timing the “delivery.” Beyond these logical inconsistencies, the court also focused on the legislative intent and found that the lower court erred in its interpretation of the statute.

Using state drug trafficking statutes to prosecute mothers for the transmission of drugs to the fetus via an umbilical cord is extremely problematic. First, due process concerns exist. A criminal statute must “give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.” The drug delivery statutes are not vague; the delivery of drugs to

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12. See id.
13. See id. The Florida statute provides:
   "It is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years, or to use or hire a person under the age of 18 years as an agent or employee in the sale or delivery of such a substance, or to use such a person to assist in avoiding detection or apprehension for violation of this chapter. Any person who violates this provision with respect to: (A) A controlled substance . . . commits a felony of the first degree"

FLA. STAT. ANN. § 893.13(4) (West 1998).
15. Id.
16. See id.
18. See id.
19. See id. at 1292.
20. See id.
21. See id. at 1292-95.
minors is clearly prohibited. The application of the statute is what is troubling. Arguably, a pregnant woman of ordinary intelligence will not read a drug delivery statute and believe she could be prosecuted for taking drugs because there is technically “delivery” to her “minor” (fetus) via the umbilical cord.

Second, the use of these statutes is too narrow to effectively deal with drug-abusing women who harm their fetuses. Drug trafficking statutes necessarily limit prosecution to those cases in which drug use occurred immediately prior to birth.

Third, an evidentiary problem exists. In order to avoid the question of whether a fetus is a person, prosecutors have waited until a moment or two after the child’s birth before tracing the drug’s transmission through the umbilical cord to the child. The evidentiary problem arises from the medical dispute as to the accuracy of measuring such transmission. Courts have been

24. The Florida statute in question illustrates this fact. See supra note 13. While the language does include delivery of illicit drugs to a minor, the statute continues by criminalizing the hiring of minors to sell drugs or using minors to assist in avoiding detection or apprehension. A fetus obviously cannot perform these latter activities. Additionally, the Supreme Court of Florida restricted its interpretation of the statute to voluntary acts, such as affirmatively giving barbiturates to a sixteen year-old girl, not “involuntary act[s] such as diffusion and blood flow.” Florida v. Johnson, 602 So. 2d 1288, 1292 & n.3. Thus, the language of the statute and the common sense interpretation of the law supports the implausible reading necessary for a conviction.
26. In order to successfully show that any “trafficking” occurred, evidence of drug transmittal is required. See infra notes 27-28 and accompanying text.
27. See Hoffman, supra note 3, at 34 (citing an affidavit by Dr. Ira J. Chasnoff supporting the defendant in a Michigan case. In this affidavit, Dr. Chasnoff doubts the theory that cocaine is passed through the umbilical cord just before it is clamped. Dr. Chasnoff testified: “Good ethics and good law have to be based in good science . . . and we just don’t have that kind of data.”). See also Johnson v. State, 602 So. 2d 1288, 1292 (Fla. 1992) where the expert medical testimony offered by the defendant indicated that: it was impossible to tell whether the cocaine derivatives which appeared in these children’s urine shortly after birth were the result of the exchange from the mother to her children before or after they were born because most of it took place from womb to the placenta before the birth process was complete. He also testified that blood flow to the infant from the placenta through the umbilical cord to the child is restricted during contractions. . . . Dr. Kandall admitted that it is theoretically possible that cocaine ore [sic] other substances can pass between a mother and her baby during the thirty-to-sixty-second period after the child is born and before the umbilical cord is cut, but that the amount would be tiny.

Id.
reluctant to accept such evidence as sufficient to prove "delivery" under drug-delivery statues.\textsuperscript{28}

Prosecutors also use pure-use statutes to charge pregnant women who used drugs during pregnancy.\textsuperscript{29} These statutes are designed to penalize women for using an illegal drug, not for harming their fetuses. Such statutes also carry the evidentiary problems of proof, and states are reluctant to pass pure use statutes to prosecute drug-addicted women.\textsuperscript{30}

Additionally, prosecutors use involuntary manslaughter statutes to prosecute women who harm their fetuses through prenatal drug use.\textsuperscript{31} The first problem with such prosecutions is that the baby must die.\textsuperscript{32} Babies suffer numerous harmful effects from maternal drug use, and the problem extends far beyond fetal death.\textsuperscript{33} The second problem is that legislative intent does not support such a reading in most cases.\textsuperscript{34}

These attempts by prosecutors to charge drug-using women under drug trafficking, pure use, and involuntary manslaughter statutes have universally failed. The last legal recourse by prosecutors has been child neglect, abuse, and endangerment statutes.\textsuperscript{35} Until the Whitner case,\textsuperscript{36} these too have failed.\textsuperscript{37}

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\item[\textsuperscript{28}] See Johnson, 602 So. 2d at 1296; People v. Hardy, 469 N.W.2d 50 (Mich. App. 1991); People v. Morabito, 580 N.Y.S.2d 843 (N.Y. Sup. Ct. 1992).
\item[\textsuperscript{29}] See Glink, supra note 9, at 551.
\item[\textsuperscript{30}] See id.
\item[\textsuperscript{31}] See id.
\item[\textsuperscript{32}] Prosecutors have charged women when the child has died shortly after childbirth. See Jury in Illinois Refuses to Charge Mother in Drug Death of Newborn, N.Y. TIMES, May 27, 1989, at 10. These efforts have failed. See id. They have also charged women when their fetuses have died prior to childbirth. See id.; see also Whitner v. State, 492 S.E.2d 777 (S.C. 1997), cert. denied, 118 S. Ct. 1857 (1998). The success of this case resulted from a guilty plea, most likely resulting from the legal precedent established by Whitner. See id.
\item[\textsuperscript{33}] See supra note 4 and accompanying text. Effects of a child's exposure to drugs can last well beyond infancy. For example, a two-year study of 263 children by the National Association for Prenatal Research and Education reported that drug-exposed two-year-olds scored poorest on developmental tests that measure their ability to socially interact, concentrate, and cope with an unstructured environment. See Michelle D. Wilkins, Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches, 39 EMORY L.J. 1401, 1403 (1990).
\item[\textsuperscript{34}] See Glink, supra note 9, at 551-52 (discussing case of grand jury refusing to indict a woman for the death of a fetus because the legislative intent to extend the statute so far was absent).
\item[\textsuperscript{35}] See infra note 37.
\item[\textsuperscript{37}] See Reyes v. Superior Court, 75 Cal. App. 3d 214 (1977); Marcia Chambers, Charges Against Mother in Death of Baby Are Thrown Out, N.Y. TIMES, Feb. 27, 1987, at A25 (discussing the case of Pamela Rae Stewart Monson where the trial judge dismissed charges of child neglect because the statute in question was not meant to criminalize a woman's prenatal conduct).
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Whitner marks a significant departure from other jurisdictional interpretations of child abuse, neglect, and endangerment statutes. The Whitner court held that "the word 'child' as used in that statute includes viable fetuses." The court cited a list of cases recognizing viable fetuses' legal rights and privileges in the areas of wrongful death and murder statutes. The court applied this reasoning to the case before it, stating:

Similarly, we do not see any rational basis for finding a viable fetus is not a "person" in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse. Our holding in Hall that a viable fetus is a person rested primarily on the plain meaning of the word "person" in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word "person" has changed in any way that would now deny viable fetuses status as persons.

The South Carolina Supreme Court distinguished Whitner from child endangerment cases in other jurisdictions based on precedent set in South Carolina. Neither California nor Kentucky courts have interpreted the word "person" in their homicide or manslaughter cases to include a fetus. Massachusetts, however, has a body of case law similar to South Carolina, yet has held that the transmission of cocaine from a woman to her fetus is not criminal.

38. Whitner, 492 S.E.2d at 778 (interpreting South Carolina's Children's Code, S.C. CODE ANN. § 20-7-50 (1985)).
39. See id. at 779. See also Hall v. Murphy, 113 S.E.2d 790, 793 (S.C. 1960) (concluding that "a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person."); Fowler v. Woodward, 138 S.E.2d 42 (S.C. 1964) (holding that a viable fetus injured while still in the womb need not be born alive for another to maintain an action for the wrongful death of the fetus.).
40. See Whitner, 492 S.E.2d at 780. See also State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984) (holding that S.C. CODE ANN. § 16-3-10 (1976) applied to a fetus and that it would be "grossly inconsistent... to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context.").
41. Whitner, 492 S.E.2d at 780.
42. See id. at 782.
43. See id. (citing Commonwealth v. Welch, 864 S.W.2d 280, 281 (Ky. 1993) and Reyes v. Superior Court, 75 Cal. App. 3d 214, 217 (1977)).
44. See id. (citing Commonwealth v. Pellegrini, 608 N.E.2d 717 (Mass. 1993)).
The South Carolina Supreme Court distinguished its decision in two ways. First, the Hall, Fowler, and Horne decisions in South Carolina were "decided primarily on the basis of the meaning of 'person' as understood in the light of existing medical knowledge, rather than based on any policy of protecting the relationship between the mother and child." Second, the Whitner court cited several cases decided by the United States Supreme Court which held that states have a compelling interest in the preservation of the life of a viable fetus.

Beyond any questions of pure statutory interpretation, criminalizing women's behavior regarding their fetuses raises constitutional issues. Part II examines the impact of the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment on this issue.

II. CONSTITUTIONAL ISSUES

A. Cruel and Unusual Punishment

One aspect of the Eighth Amendment's Cruel and Unusual Punishment Clause is that it limits the conduct that can be defined as criminal. The United States Supreme Court recognized in Robinson v. California that drug addiction is an illness and therefore a statute prohibiting drug addiction violates the Eighth Amendment by punishing a "status" instead of an act. However, six years later the Court found in Powell v. Texas that the Eighth Amendment does not preclude punishment for criminal conduct

48. Whitner v. State, 492 S.E.2d 777, 783 (S.C. 1997) (indicating that Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984) and Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989) both held that a viable fetus should only be accorded the rights of a person to vindicate the interest of its mother or both of its parents).
50. U.S. CONST. amend. VIII ("nor cruel and unusual punishments inflicted.").
51. See Robinson v. California, 370 U.S. 660 (1962) (holding that the Cruel and Unusual Punishment Clause of the Eighth Amendment, as incorporated to the states through the Fourteenth Amendment, prevents a state from criminalizing drug addiction).
52. Id.
53. See id. at 665-667.
that results from addiction.\textsuperscript{55} The dissent in \textit{Powell} argued that although the facts were different (public intoxication), the constitutional claim was the same as in \textit{Robinson} because the defendant was powerless to avoid drinking and, once intoxicated, could not prevent himself from appearing in public places.\textsuperscript{56} However, the plurality in \textit{Powell} rejected an expansion of \textit{Robinson} to include compulsive conduct. It noted that such an expansion would undermine "the constitutional doctrine of criminal responsibility,"\textsuperscript{57} underscoring the concern that "involuntary" conditions (such as alcoholism or addiction) would justify the commission of crimes beyond the scope of the condition itself.\textsuperscript{58}

If the Eighth Amendment does not prevent a state from criminalizing the conduct of an alcoholic,\textsuperscript{59} then the Amendment, by the same token, should not prevent the state from criminalizing the conduct of a drug addict.\textsuperscript{60} The statutes used in prosecuting pregnant drug-using women proscribe the underlying criminal conduct,\textsuperscript{61} not the status of being an addict.\textsuperscript{62} The Court in \textit{Powell} correctly worried about the results of excusing criminal behavior because of a compulsive condition. The \textit{Powell} decision reflected society's interests and need to control destructive acts. An involuntariness defense would undermine and cripple effective law enforcement and administrative efforts.

\section*{B. Equal Protection}

The Fourteenth Amendment to the United States Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."\textsuperscript{63} It is argued that prosecutions of pregnant women based on their drug use violates

\textsuperscript{55} See id. at 532-536 (upholding a conviction based on a statute prohibiting public intoxication and finding that the proscribed criminal act was the public intoxication and not the alcoholic status).

\textsuperscript{56} See id. at 567-68 (Fortas, J., dissenting).

\textsuperscript{57} Id. at 534.

\textsuperscript{58} See id.

\textsuperscript{59} See supra notes 54-58 and accompanying text.

\textsuperscript{60} See Margaret P. Spencer, \textit{Prosecutorial Immunity: The Response to Prenatal Drug Use}, 25 Conn. L. Rev. 393, 425 n.145 (1993) (citing numerous cases to support the proposition that "lower court cases . . . have . . . held that chronic alcoholism is not a defense to a charge of public drunkenness, and drug addiction is not a defense to a charge of use or possession of drugs.").

\textsuperscript{61} See supra notes 8-10 and accompanying text.

\textsuperscript{62} However, it does not necessarily follow that women prosecuted are addicts merely because they have harmed their fetuses through the use of drugs. See Spencer, supra note 60, at 423 n.134.

\textsuperscript{63} U.S. CONST. amend. XIV § 1.
the Equal Protection Clause of the Fourteenth Amendment.64 This argument suggests that because only women are prosecuted when a baby has tested positive for drug use, such prosecutions constitute gender discrimination.65 A first response to this Equal Protection concern is that the use of toxicology evidence against pregnant, drug-abusing women is most likely not gender-based discrimination.66

The Supreme Court in Geduldig v. Aiello67 held that a classification based on pregnancy was not a gender-based classification. That case involved the denial of insurance benefits for pregnancy-based disabilities. Female employees argued that the program constituted invidious discrimination. The Court noted, however, that both men and women had received benefits under the program and women had therefore benefitted from the state action. The Court concluded that because no evidence demonstrated that the state program harmed all women, rather than just pregnant women, there was no Equal Protection violation.68 There have, however, been many criticisms of the Geduldig decision.69

Criticisms are similar to many of the points made in the dissent in Geduldig. The insurance policy in question covered “virtually all disabling conditions without regard to cost, voluntariness, uniqueness, predictability, or ‘normalcy’ of the disability. Thus, for example, workers are compensated for . . . disabilities unique to sex or race such as prostatectomies or sickle-cell anemia. . . .”70 Despite this broad coverage, compensation was denied for any disabilities connected with a pregnancy.71 In Justice Brennan’s view:

65. See Roberts, supra note 64, at 1445.
66. See infra notes 69-80 and accompanying text.
68. See Geduldig, 417 U.S. at 496 n.20 (“While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.”); see also Massachusetts v. Feeny, 442 U.S. 256 (1979) (holding that the state’s practice of granting absolute lifetime preferences to veterans applying for civil service positions did not discriminate against women in violation of the Equal Protection Clause. The Court found no evidence that the disparate effect upon women was anything more than a foreseeable but undesired by-product of the basic decision to favor veterans); Spencer, supra note 60, at 412.
70. Geduldig, 417 U.S. at 499-500.
71. See id. at 500 (citing CAL. UNEMP. INS. CODE §§ 2626, 2626.2 (Supp. 1974)).
By singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double-standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex.\(^7\)

Ultimately, the Geduldig decision can be supported by three primary factors. First, in Planned Parenthood of Southeastern Pennsylvania v. Casey,\(^7\) the Court found that while pregnancy-based restrictions are “burdensome,” they are not “unduly burdensome,”\(^7\) which would be impermissible state interference.\(^7\) Second, the Court has stated early in its Equal Protection analysis that the Equal Protection Clause does not “demand that a statute necessarily apply equally to all persons [or] require things which are different in fact . . . to be treated in law as though they were the same.”\(^6\) Third, the Court has subsequently relied upon the biological differences between men and women to deny applying intermediate scrutiny to state laws.\(^7\)

Utilizing the rationale espoused in Geduldig, the use of prenatal drug exposure evidence against pregnant women is not invidious discrimination in violation of the Equal Protection Clause. Two rationales support this conclusion. First, the criminal drug use statute applies to men as well as to women. Pregnant women are therefore not singled out because they are pregnant; they are prosecuted because the state believes them to have used drugs.\(^7\) Second, even if pregnant drug users are singled out, they are not subject to such treatment universally. Only those women who give


\(^7\) See Spencer, supra note 60, at 413. Spencer notes further that “if medical technology subsequently determines that a newborn’s positive toxicology screen indicates drug use by the father, such evidence could be used against fathers of drug-affected babies.” Id.
birth to drug-affected babies are subject to criminal action. No legal effect exists upon non-pregnant, drug-using women.\textsuperscript{79}

Assuming that gender-based classifications could be established, there must be a discriminatory purpose to the challenged legislation in order to violate the Equal Protection Clause.\textsuperscript{80} Women in these cases are prosecuted because they use drugs, a situation which is not related to their status as women or as pregnant women. Without some proof that the statutes were enacted with a discriminatory purpose against women as a class, the statutes must prevail.

Even if the statutes are deemed to be gender-based action and have a discriminatory motive, they will likely pass the Court's test for gender discrimination. Traditionally, intermediate scrutiny applies to these cases, requiring that "to withstand constitutional challenge, . . . [a governmental restriction] must serve important governmental objectives and must be substantially related to achievement of those objectives."\textsuperscript{81} However, the Court adopted a more stringent "exceedingly persuasive justification" test regarding gender-discrimination in \textit{United States v. Virginia}.\textsuperscript{82}

In \textit{United States v. Virginia}, the Court struck down Virginia Military Institute's (VMI) all-male enrollment policy.\textsuperscript{83} The Court did not apply the most rigorous review of strict scrutiny to gender discrimination, but held that such classifications will undergo "skeptical scrutiny"\textsuperscript{84} and will be upheld only if the state demonstrates an "exceedingly persuasive justification"\textsuperscript{85} for any gender-based governmental action.

Even under this heightened intermediate scrutiny, the prosecution of drug-using pregnant women will be upheld. The Court in \textit{Virginia} struck down VMI's enrollment policy based on generalizations or "tendencies" of the differences between genders. The Court held that "[s]tate actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and

\textsuperscript{79. See id.}
\textsuperscript{80. See Massachusetts v. Feeny, 442 U.S. 256 (1979) (holding that in order to prove purposeful discrimination, a challenger must prove either (1) that the legislature enacted the legislation with a discriminatory purpose to harm women, or (2) that a gender-neutral action has a disparate impact which can be deemed per se intentional).}
\textsuperscript{81. Craig v. Boren, 429 U.S. 190, 197 (1976).}
\textsuperscript{83. See id. at 556-58.}
\textsuperscript{84. Id. at 531.}
\textsuperscript{85. Id.}
females.” However, in the context of prosecuting drug-using pregnant women, the policy is centered on real biological differences, not generalizations that enforce some stereotype. The Court’s rationale in *Michael M. v. Superior Court of Sonoma County* is directly applicable to the constitutionality of the prosecution of drug-using pregnant women.

The Court in *Michael M.* upheld a statutory rape law that prohibited only men’s conduct, recognizing that teenage pregnancies have “particularly severe” social, medical, and economic consequences for mothers, children, and the state. Having recognized these consequences, the Court found that the state’s interest in preventing teenage pregnancies sufficiently outweighed the discriminatory impact of the statute. Prenatal drug use also has severe social, medical, and economic consequences impacting women, children, and society in general. The same reasoning should apply in the present context. Thus, even if actions taken against women to remedy prenatal drug-use were considered gender-based or discriminatory, these actions would pass constitutional muster because of the gravity of the state’s interest in preventing pre-natal drug abuse.

C. *Due Process Clause*

1. *Maternal Rights*

The last, and perhaps greatest, constitutional challenge to prosecuting prenatal drug use falls under the *Due Process Clause*. The right to privacy implied from the guarantee of liberty under the *Due Process Clause* includes the right to bodily integrity.

The right to bodily integrity was established as early as 1891. The Court clearly stated in *Terry v. Ohio* that every individual has...
the right to "possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." This right includes the right to refuse unwanted medical treatment, even if the refusal would result in death.

Closely related to this right to bodily integrity is the right to privacy. The Supreme Court first discussed a privacy right in Griswold v. Connecticut, when it found a statute prohibiting married couples from using contraceptives unconstitutional. The Court discussed the "penumbras of privacy" secured by the Constitution, and held that these "penumbras" included the right of married couples to use contraceptives without interference by the state. This privacy right was extended in Eisenstadt v. Baird when the Court struck down a Massachusetts statute prohibiting the sale or distribution of contraceptives to an unmarried person. The Court stated that "[i]f 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.

Soon after Eisenstadt, the Supreme Court applied the privacy analysis to pregnant women. In Roe v. Wade, the Court held that a statute prohibiting abortions infringed upon a woman's fundamental right to privacy. One of the underlying rationales for the establishment of this right was the denial of constitutional protection to fetuses: "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." This privacy right is balanced against the state's interests, and any restriction must further a compelling state interest. One such compelling interest is the potential life of the fetus, which is considered after

93. Id. at 9 (quoting Botsford, 141 U.S. at 251).
95. 381 U.S. 479 (1965).
96. Id. at 483.
98. Id. at 453.
100. See id. at 153.
101. Id. at 158.
102. See id. at 155-56.
viability. The Court, in Planned Parenthood v. Casey, further explored the contours of the right to privacy in the abortion context.

The "essential holding" of Roe was upheld in Casey. The Casey Court held that "[a] woman has the right to terminate a pregnancy before viability without undue interference from the state, but the state can restrict abortions after fetal viability because it has a legitimate interest in protecting the health of the woman and the life of the potential child." The Court also discarded the trimester approach used in Roe and applied a more relaxed "undue burden" standard of judicial review on state actions. For a state's regulation of abortion to be held unconstitutional, the state's regulation must have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Such action is impermissible because it fails to serve legitimate ends.

Privacy rights also extend to matters of the family. The United States Supreme Court stated in Cleveland Board of Education v. LaFleur that "freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Furthermore, the Court has upheld the right of parents to decide how their children will be educated and raised on numerous occasions.

103. See id. at 159-64.
105. See id. at 845.
106. Spencer, supra note 60, at 418.
107. The Court divided pregnancy into three trimesters and held that different rules apply to the rights of mothers and fetuses depending on the stage of the mother's pregnancy (trimester). The overall rationale behind the division was the health risks to the mother and the child balanced with the state's interest. During the first trimester, a state may not ban or closely regulate abortions—the decision is left to the woman. See Roe v. Wade, 410 U.S. 113, 149-50 (1973). The Court reasoned this way because the mortality rate for women having abortions during the first trimester is lower than the rate for full-term pregnancies. Id. at 150. During the second trimester, the state's interest in the mother's health is given more weight. It is allowed to regulate the abortion procedure in ways that are "reasonably related" to the mother's health. The state is not, however, allowed to extend its protection to the fetus' life. Id. at 163. The third trimester marks the viability point of the fetus, and the state then has a compelling interest in protecting the fetus such that the state may proscribe abortions after the point of viability. See id. at 163-64.
108. See Casey, 505 U.S. at 874.
109. Id. at 877.
110. See id. at 897-898 (using this analysis to strike down Pennsylvania's spousal notification requirement).
112. See Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state law prohibiting the teaching of foreign languages to children in the school or the home); Pierce v. Soc'y of
The rights afforded by the Due Process Clause to bodily integrity and privacy are not absolute, however. The state's interests are considered in each instance and must be examined to create an understanding of the scope of protection the Fourteenth Amendment gives to drug-using pregnant women.

2. State's Interests

A state may intervene when the right to bodily integrity is implicated only if the intrusion is necessary to achieve the state's objective and that objective outweighs the woman's right to bodily integrity. The Supreme Court of New York found one such permissible objective in Crouse Irving Memorial Hospital v. Paddock. The Crouse court upheld the administration of blood transfusions to a mother and her child during surgery over the mother's religious objections because the Court found that the state's interest in protecting the health and welfare of the unborn child outweighed the parent's interest. Additionally, the Georgia Supreme Court in Jefferson v. Griffin Spalding County Hospital Authority ordered a caesarian section performed over a mother's objections where there was a ninety-nine percent chance the child would not survive vaginal delivery and a fifty percent chance the mother would not survive vaginal delivery. The court wrote:

"the state has an interest in the life of this unborn, living human being . . . the intrusion into the [lives of the parents], is outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live." "

Despite Justice Brandeis' often quoted language in Olmstead v. United States that the right to privacy is "the right to be let

Sisters, 268 U.S. 510 (1925) (invalidating a statute that required parents to send their children to public schools); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (recognizing that "[t]he rights to conceive and to raise one's children have been deemed 'essential.'").


114. See id. at 445-46; see also In re Application of Jamaica Hosp., 491 N.Y.S. 898 (N.Y. Sup. Ct. 1985) (holding that a patient's interest in exercising her religious beliefs was not sufficient to override the state's significant interest in protecting the life of a midterm fetus).


116. Id. at 460. But see Judy Peres, State Role Regulating Pregnancy Thwarted; Jehovah's Witness Mom Wins Appeal, CHI. TRIB., Mar. 29, 1998, at C1 (describing a case where a Jehovah's Witness won an appeal in the Illinois Appellate Court after a hospital forced a blood transfusion upon the mother during her pregnancy).

117. 277 U.S. 438 (1928) (Brandeis, J., dissenting).
alone," the right to privacy is not absolute. The United States Supreme Court clearly stated in Roe that it was reluctant to give a woman an "unlimited right to do with one's body as one pleases" and that states have an "important and legitimate interest in protecting the potentiality of human life." The Court laid out in Prince v. Massachusetts the state's ability to protect the interests of children, stating "[i]t is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." To this effect, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." The basis of this power rests with the state's parens patriae authority.

Under this authority, the Supreme Court has held that certain constitutional rights may be overcome when "it is necessary to further an important public policy." The Court in Maryland v. Craig found that the state's compelling interest in protecting child abuse victims was sufficient to overcome the Confrontation Clause of the Sixth Amendment and allowed a child witness in a child abuse case to testify against the defendant at trial outside of the defendant's physical presence. The same rationale was used in Baltimore City Department of Social Services v. Bouknight, where the Court overrode the Fifth Amendment's right against self incrimination for a woman who refused to comply with a court order to produce a child suspected of being abused. The Court stated that the interest in protecting the child fell within "a regulatory regime constructed to effect the state's public purposes unrelated to the enforcement of its criminal laws."

118. Id. at 478.
120. Id. at 162.
121. 321 U.S. 158 (1944).
122. Id. at 165.
123. Id. at 167.
126. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").
127. See id. at 851-57.
129. See U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").
131. Id. at 556.
Beyond the state's *parens patriae* power lies its broader police power. "The police power is the state's inherent plenary power both to prevent its citizens from harming one another and to promote all aspects of the public welfare." The Court relied upon this power in *Prince v. Massachusetts*, holding that the interest in protecting children is within the state's authority to use legislative action, regardless of parental claims to control the child.

An analogous use of the police power involves physician assisted suicide, evidenced by the "right to die" cases. The Supreme Court in *Washington v. Glucksberg* held that the State of Washington could prohibit physician-assisted suicide on the basis of its "unqualified interest in the preservation of human life." Although the Court used a rational basis level of review because there is no fundamental interest in physician assisted suicide, the "unqualified interest in the preservation of human life" reasoning applies with similar force in the prenatal drug abuse context. As discussed above, the compelling interests of the state in relation to the health and life of the unborn can outweigh the interests of the mother in being "let alone." If the state may prevent one from harming oneself or taking one's own life, it follows even more so that it has the power to prevent the harming or taking of the life of another, such as the fetus.

The Court has affirmed through its holdings concerning child well-being, and analogously through its right-to-die jurisprudence, that there is a strong state interest in life. Accordingly, the Court has afforded the states the power to intervene when such life is in jeopardy. Here, the weight of the state's interest in preserving fetal life through its *parens patriae* and police powers outweighs the general privacy interests of women in these situations. Therefore state action is permissible.

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134. See id. at 168-69.
137. Id. at 2272 (citing *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 282 (1990)).
138. See id. at 2271 (indicating that the rational basis test requires a given state action be rationally related to a legitimate government interest).
139. See id. at 2267-71.
140. Id. at 2272.
141. See supra notes 113-34 and accompanying text.
143. See supra notes 114-42 and accompanying text.
III. POLICY ISSUES

Criminalizing prenatal drug use may be legally permissible, however, it may not be wise from a policy standpoint. Opponents of criminalization cite many concerns with the practice, including endangering women's abortion rights, deterring prenatal care, being too intrusive on the family, and the slippery slope nature of such state control. Each one of these concerns must be addressed.

A. Endangerment to Abortion Rights

One of the most fundamental concerns held by opponents of criminalizing prenatal drug use is that it endangers the abortion rights guaranteed to women under Roe v. Wade. Critics question the line between the illegality of fetal abuse or neglect and the legality of an abortion, which results in fetal death. There are several arguments in response to this concern.

First, the Court in Roe placed limitations on a woman's right to an abortion by holding that "this right is not unqualified and must be considered against important state interests in regulation." As discussed below, concerning state interests, viability triggers the state's power to intervene in the abortion context and should not be troubling in its extension to fetal harm. Examples of state intervention in other late-term pregnancy cases, many of these

144. See supra Section II.
145. See generally Jonathan Dube, Case Raising Questions About Pregnant Drug Users, TAMPA TRIB., Dec. 28, 1997, at 18 (evaluating critics' arguments that criminalization laws could encroach upon the right to abort fetuses for medical reasons); Peres, supra note 116, at C1 (evaluating arguments in favor and opposed to the criminalization of prenatal drug abuse).
147. See Thompson, supra note 146, at 371; Stovall, supra note 146, at 1280; Fetal Abuse, supra note 132, at 1009-10.
149. 410 U.S. 113 (1973).
150. Id. at 154. See also supra notes 119-20 and accompanying text.
151. See infra notes 160-62 and accompanying text.
cases involving blood transfusions and cesarean sections also evidence the Court’s willingness to protect the viable fetus. “Compared to such invasive surgical procedures, proscribing maternal drug use during pregnancy is a minimal intrusion upon a woman’s rights.”

Roe and its predecessors never directly dealt with fetal rights outside of the abortion context. The current issue revolves around what rights a woman has in relation to her fetus when she chooses not to abort. It is argued that once a woman chooses to keep her fetus, she has a moral and legal duty to protect her fetus from harm. Despite the Supreme Court’s failure to squarely address fetal rights outside of the abortion context, it has been consistently held that a state interest in the health and well-being of developing children exists. A second argument addresses the illogical result that critics claim exists at the core of punishing fetal abuse and neglect, but not abortion. One author suggested that this result is not as illogical as it seems, referencing dicta from a court speaking to this exact conclusion in the tort context: if “a child born with Tay-Sachs disease sued the delivery hospital for wrongful life . . . and the situation arose where the parents knew that proceeding with pregnancy would harm the child, it would have no compunction to hold them liable for damages.” Such a liability is consistent to the Good Samaritan rule in tort: Though a person is not required to take any action to help another, once she does undertake such a role, further obligations may arise. A woman who wished not to help a fetus into existence could avoid further obligations through legal abortion. Once she accepted the role of mother, however, she would owe certain duties to the child. This might entail prenatal care measures to counteract as much as possible the harm already caused by substance abuse.

152. See supra notes 113-14 and accompanying text.
153. See supra notes 115-16 and accompanying text.
155. See Fetal Abuse, supra note 132, at 1012.
156. See In re A.C., 533 A.2d 611, 614 (D.C. App. 1987) (recognizing that, as a matter of law, the right of a woman to have an abortion is separate from her obligations to the fetus once she decides to carry the child to term); see also supra notes 115-24 and accompanying text.
158. Id. (citations omitted). Denison makes the additional point that the problem of when responsibility begins is then avoided by adopting his framework, and the true concern is the
When framed in terms of assumed responsibility, the illogical line drawn between abortion and child abuse/neglect disappears.

A third argument addresses the fundamental rights in question. Unlike having an abortion, using drugs is not a “fundamental” right. The debate centers on some conception of privacy rights of the pregnant woman who is using drugs, but, as discussed later in this note, these rights are weighed against the interests of the state. Thus, while the question is not strictly a juxtaposition of abortion rights versus responsibility for abuse/neglect, the focus settles on the inclusion of abortion and the exclusion of drug use as “fundamental” privacy rights. Moreover, the possession and use of illicit drugs is a crime. The state clearly has the power to restrict criminal behavior, and in this instance, that restriction includes the possession and consumption of illegal drugs.\(^\text{159}\)

One problem encountered with juxtaposing the abortion analysis against the child abuse/neglect analysis is the viability line. If the two analyses are to be reconciled, intervention must be allowed only after viability. However, considerable damage may occur to a fetus before viability.\(^\text{160}\) The only cognizant response to this very real concern is born of necessity and comes in three forms.

First, a woman’s right to have an abortion is firmly established, and the perceived danger of infringing upon this right by supporting the criminalization of prenatal drug use would become a reality if the viability line was erased. Second, the issue of when criminal liability attaches to women who abuse drugs while pregnant has been heavily debated. Three options as to when criminal liability should attach exist: (1) when she knows she is pregnant; (2) when she misses her first period; or, (3) when she is attempting to get pregnant.\(^\text{161}\) This debate can be effectively settled if viability is maintained, since pregnancy at this point should be noticeable.

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159. This argument could be expanded to include tobacco and alcohol, but this expansion is beyond the scope of this Note. See Sam S. Balisy, Note, Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus, 60 S. CAL. L. REV. 1209, 1220-21 (1987).

160. Some scholars argue that limiting state intervention only after viability renders protection to fetuses useless. See Kristen Lichtenberg, Comment, Gestational Substance Abuse: A Call for Thoughtful Legislative Response, 65 WASH. L. REV. 377, 391 n.25 (1990) (articulating the damage caused to fetuses during the first and second trimesters as a result of gestational drug use. This fetal damage includes neurobehavioral deficiencies, the rate of which remains the same whether or not the woman ceases to use cocaine after the first trimester, and urogenital malformations, which are primarily associated with the first trimester. The risk of malformation does not decrease if cocaine use ceases after the first trimester.).

161. See Thompson, supra note 146, at 371-72.
Third, although some evidence of the pre-viable fetus exists, there still remains the well-documented extensive damage to the post-viable fetus caused by prenatal drug abuse.\(^{162}\)

Abortion rights and the criminalization of prenatal drug use are not mutually exclusive. This false dichotomy is illuminated through the qualified nature of the right to an abortion contrasted with the absence of any right to possess or consume drugs. This dichotomy is further demonstrated by the illusory contradiction between intervention in abuse and the right to terminate a pregnancy before viability.

\section*{B. Deterrence of Prenatal Care}

The well-being of the fetus is the driving force behind criminalizing prenatal drug use. However, critics claim that such measures will result in the avoidance of prenatal care by drug-abusing pregnant women because they fear prosecution.\(^{163}\) Several responses to this argument exist.

First, this argument fails to recognize that medical care is not a priority for the majority of drug-using women.\(^{164}\) Other reasons these women fail to seek prenatal care also exist, "such as shame or lack of money to spare from their expensive habit."\(^{165}\) Several experts question the effectiveness of prenatal treatment programs for pregnant drug-using women because of this lack of priority or concern for the health of the fetus.\(^{166}\) Precisely because of this inability or lack of desire to seek prenatal care, criminalization is necessary and effective. It is the "carrot" that will get these women into drug treatment programs and enable healthcare professionals to administer prenatal care. "She must be encouraged to select treatment and participate in available programs, or else risk prosecution for her prenatal ingestion of illegal drugs."\(^{167}\) This "carrot," however, requires prosecutorial immunity.

\begin{footnotes}
\footnote{162. See Spencer, supra note 60, at 408 n.64 (citing Margery W. Shaw, \textit{Conditional Prospective Rights of the Fetus}, 5 J. LEGAL MED. 63, 88-89 (1984) who states that the "fetal brain develops rapidly in the last two months of pregnancy, and a pregnant woman's ... drug abuse is especially harmful to the fetus at this time.").}
\footnote{163. See supra note 146 and accompanying text.}
\footnote{164. See Coady, supra note 154, at 687.}
\footnote{165. Id.}
\footnote{166. See Spencer, supra note 60, at 403 (reporting the belief of these experts that "addicts, and some drug-using non-addicts, cannot act responsibly and will not voluntarily seek treatment.").}
\footnote{167. Id. at 403.}
\end{footnotes}
Prosecutorial immunity is essential. Without such immunity, women will turn away from prenatal care. An important factor to consider is that these women may actually be inclined to seek drug treatment precisely because they are pregnant—for the sake of their child. Through guaranteed prosecutorial immunity upon seeking treatment, these women could receive the treatment they and their children require, without the fear of prosecution. The details of how such a system would operate will be discussed in the conclusion, as part of the description of a model approach.168

C. Intrusion into the Family

Opponents of criminalizing prenatal drug-use argue that prosecutions have too destructive of an effect on the families of individual women who are prosecuted for pre-natal drug abuse.169 One author suggests that “imprisonment means that the woman is no longer available to care and provide for her family, and fines reduce whatever resources are available to support the family and provide medical care for the pregnant mother herself.”170 A few responses to this argument must be made.

First, imprisonment should be a last resort. The threat of imprisonment is the most important element in an effective policy curbing prenatal drug abuse. Prosecutorial immunity is applied if a woman enters a treatment program, thereby avoiding the harmful effects that result from the removal of the mother from the family. This is not to say, however, that women who test positive for drug use while pregnant will not be prosecuted if they fail to seek treatment. For such a system to work, such threats of prosecution must be enforced in the face of non-compliance.171

This legal tough-stance leads to the second point: the law can and should intervene in such abuse/neglect cases. Courts have traditionally recognized the parental domain in child-rearing. The United States Supreme Court explained this recognition:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgement required for making life's difficult decisions. More important, historically it has recognized that

168. See infra notes 180-91 and accompanying text.
169. See supra note 147 and accompanying text
170. Thompson, supra note 146, at 371.
171. See Spencer, supra note 60, at 409-10.
natural bonds of affection lead parents to act in the best interests of their children.\textsuperscript{172}

While the veracity of this presumption usually applies, it is absent in the case of drug-using pregnant women. The drug use by these women harms their fetuses and their refusal to seek treatment is at odds with the notion that they "act in the best interests of their children."\textsuperscript{173} It cannot seriously be maintained that criminalizing pre-natal drug abuse would lead women to live "in constant fear that any accident or 'error' in judgement could be deemed 'unacceptable' and become the basis for a criminal prosecution by the state or a civil suit by a disenchanted husband or relative."\textsuperscript{174} Despite the portrayal of the prosecutor's office as "pregnancy police,"\textsuperscript{175} the notification of such use would be through instituted standard toxicology screening during prenatal care or during an arrest for drug use. Presumably, the police would handle "tips" about prenatal drug use as they handle such information in other situations—using their professional judgements and procedures to screen accusations.

Although state intervention in this area necessitates an intrusion into the family unit, such action is necessary to protect the life of the fetus. Intrusion is kept at a minimum because prosecution is a last resort. The state has the interest and the power to intervene in these circumstances in order to protect human life.

D. Slippery Slope Argument

As a last policy consideration, the argument exists that the criminalization of prenatal use of illegal drugs will have a "slippery slope" effect. Opponents argue that imposing liability for illegal drug use during pregnancy will extend liability for all potentially harmful maternal conduct, such as drinking alcohol, smoking tobacco, maintaining an unhealthy diet, or even standing too long.\textsuperscript{176} Such a concern is unwarranted, however.

At its core, the issue is that drug use is illegal and these other behaviors are not. The line between legal and illegal activities must

\textsuperscript{173} Id.
\textsuperscript{174} Thompson, supra note 146, at 371 (citing Dawn E. Johnsen, Note, The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 YALE L.J. 599, 607 (1986)).
\textsuperscript{175} See Gest, supra note 3; When a Fetus Is a Person, ECONOMIST, Jan. 10, 1998, at 24.
\textsuperscript{176} See supra note 146 and accompanying text.
be drawn to ensure that fair notice is given, as required under the Due Process Clause. While it is true that smoking tobacco and drinking alcohol cause fetal harm,\textsuperscript{177} they are nevertheless legal activities.\textsuperscript{178} Even if the restrictions were extended to include alcohol and tobacco use based on some notion of harm to the fetus and supported by the regulated nature of the commodities in question, this does not lead to a further extension to eating habits and work behaviors. Certainly the restrictions fall on a continuum. However, the line that is already drawn between legal and illegal activities allows for a logical separation, thus avoiding this feared parade of horribles.\textsuperscript{179}

\textbf{IV. CONCLUSION AND MODEL APPROACH}

With all of the legal and policy considerations addressed, what would a model system effectuating the goal of protecting fetuses while respecting, as much as possible, the rights of the women involved look like? The approach discussed below is comprised significantly of a combination of the efforts by South Carolina and Margaret Spencer's notion of prosecutorial immunity.\textsuperscript{180}

First, pregnant women would be susceptible to existing child endangerment, neglect, and abuse statutes based on the classification of the viable fetus as a person. As discussed above, the South Carolina Supreme Court, after examining the precedent of its

\begin{footnotesize}
\textsuperscript{177} See Lichtenberg, supra note 160, at 378-79 (listing the effects of alcohol on the fetus); see also Balisy, supra note 159, at 1209-16.

\textsuperscript{178} One author indicates that these activities could be regulated by laws as well. The limitations imposed upon cigarettes and alcohol could logically be extended in the context of prenatal use. The use of these commodities are already regulated, such as smoking prohibitions in public places, age restrictions on the purchase and use of these commodities, restrictions on advertising, and criminal proscriptions of drinking and driving. These regulations are accepted because of the dangers that exist in each context. See Denison, supra note 64, at 1124. There would still remain the vagueness concern regarding the women's knowledge of wrongdoing, but such a concern could be addressed under the child endangerment laws themselves, e.g. through a recklessness state of mind requirement. See id. at 1127 n.154 (discussing the Model Penal Code's definition of recklessness as "consciously disregard[ing] a substantial risk [where that] disregard involves a gross deviation from a standard of conduct that a law-abiding person would observe in the actor's situation."); see also People v. Pointer, 151 Cal. App. 3d 1128, 1134 (Cal. App. 1984) (interpreting California's child endangerment law as governing reckless behavior).

\textsuperscript{179} The Supreme Court has already held that the potential for child bearing cannot be an appropriate basis for excluding women from a hazardous work environment. See International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (striking down a battery manufacturer's sex-specific fetal protection policy because it violated Title VII, as amended by the Pregnancy Discrimination Act).

\textsuperscript{180} See Spencer, supra note 60, at 402-10; see also discussion of South Carolina's approach, supra notes 37-48 and accompanying text.
\end{footnotesize}
particular case law, interpreted its statutes to include viable fetuses.\footnote{See supra notes 37-47 and accompanying text.} This interpretation could be expanded to other states, however, by relying on the United States Supreme Court's holdings that states have a compelling interest in the life of a viable fetus.\footnote{See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989). Additionally, because the Supreme Court denied certiorari to Whitner v. State, 492 S.E.2d 777 (S.C. 1997), cert. denied, 118 S. Ct. 1857 (1998), other states are free to follow South Carolina's lead.}

The perennial argument concerning the role of the legislature and the court—that the legislature should enact laws specifically directed at combating this social problem and that the courts should not judicially legislate—still remains. Such a jurisprudential discussion is well beyond the scope of this Note. However, the legislative response in addressing prenatal drug exposure has been slow or non-existent, and those actions that have been taken have, for the most part, been misguided.\footnote{For example, the bulk of these responses have failed to consider why pregnant women who use drugs avoid prenatal care and available drug treatment. Legislation generally takes the course of punishing women who give birth to drug-addicted babies, rather than intervening to give these women the ability and motivation they lack to seek help for themselves and their fetuses. See Spencer, supra note 60, at 402.} Given this legislative failure, it seems reasonable to allow courts to interpret existing child endangerment, neglect, and abuse statutes to protect viable fetuses.

Prosecutorial immunity is the first necessary tool in this model approach. Spencer describes this as

a promise of nonprosecution. This immunity would prohibit the state from using the mother's prenatal drug use, or the infant's positive drug screen, as evidence in a subsequent prosecution. The scope of this nonstatutory immunity would be determined by the state. Use and derivative-use immunity would preclude prosecution based on prenatal drug evidence and any other evidence directly or indirectly derived from the prenatal drug use. Transactional immunity would bar prosecution for any transaction or matter relating to the prenatal drug use. Together, these immunities would sufficiently insure that a mother's prenatal drug use would not lead to the infliction of criminal penalties. Because prosecutorial immunity would be provided through an agreement, rather than a formal court order, the state may be able to tailor the scope of the immunity to the case.\footnote{Id. at 398 n.21.
The use of prosecutorial immunity will allow pregnant drug-using women to get the help they need, while not being punished for seeking this help.

Immunity should be granted for women who participate in available treatment and rehabilitation programs or who agree to participate in such programs when they become available. Successful completion of the program cannot be a condition to immunity because it may not occur during the pregnancy period. However, “some level of participation, which includes ‘substantial’ attendance, is necessary to receive immunity.”

A second element of this model approach requires mandatory reporting of all drug-exposed newborn infants. There have been criticisms of requiring newborn toxicology screens, such as it “disproportionally affects poor women and women of color, violates a woman’s right to privacy, interferes with the physician-patient relationship [and] frightens expectant mothers from drug treatment and prenatal care programs.” However,

These arguments are misplaced when used in the context of newborn screening because only the newborn’s results are reported. Moreover, there is no reporting of prenatal screens or the mother’s postpartum screen, screens would be required at both private and public hospitals, and the compelling state interest in obtaining the results would outweigh any privacy interest of the mother.

A third component of this model approach concerns physician-patient confidentiality. For this system to be effective, health care professionals, in both public and private institutions, should screen

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185. See id. at 408. An unfortunate shortage of available drug treatment programs for anyone exists, especially for pregnant women. See Andrew H. Malcom, In Making Drug Strategy, No Accord on Treatment, N.Y. TIMES, Nov. 19, 1989, at 1 (indicating that an estimated four million drug addicts are seeking drug abuse treatment in the U.S. but facilities are not available); Rorie Sherman, Keeping the Babies Free of Drugs, NAT’L L.J., Oct. 16, 1989, at 1 (describing a 1989 New York City study that found that of out of seventy-eight drug treatment programs in the City, 87% excluded pregnant crack addicts on Medicaid, 67% excluded pregnant women on Medicaid, and 54% denied admission to all pregnant women).

186. Spencer, supra note 60, at 408 n.64.

187. See id. at 409 (“Several states have passed legislation that requires hospitals to perform toxicology screens on all newborns and report positive results to child welfare authorities [and] many hospitals also interpret state child abuse reporting laws to require reports of positive results.”).

188. Id. at 409 n.67 (summarizing the arguments made by Moss, supra note 148, at 292-96).

189. Id.
pregnant women for substance abuse and question them about drug use. Confidentiality is vital for honest responses, and written and verbal confirmation of this confidentiality should be given. If drug treatment is warranted, the health care professional should advise the woman that prosecutorial immunity is granted to prenatal drug users who complete drug treatment programs.\textsuperscript{190}

The last part of the model approach requires prosecution of mothers who refuse to participate in available drug treatment programs. In order for the “carrot” to be effective in motivating pregnant drug users to seek treatment, the consequences of failing to do so must be enforced. A positive toxicology result on a newborn could lead to charges being filed against its mother, who has not been granted immunity because of her failure to participate in a drug treatment program.\textsuperscript{191}

While this model approach is by no means perfect or complete, it does give an outline of a program to protect the lives of fetuses from drug-using women. Without the threat of criminal sanctions, these women will not seek treatment and their, and their fetuses’, lives depend on state intervention. An approach such as the one advocated in this Note balances the interests involved and attempts to maximize the protection of the unborn and the rights of the pregnant women who carry them.

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\textsuperscript{190} See id. at 407-08.
\textsuperscript{191} See id. at 408-10. Spencer discusses the prosecution of women under “drug use” statutes, but under this model approach, such prosecution would fall under child endangerment/abuse statutes.