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Comment

FETAL EQUALITY?: The Equality State's Response to the Challenge of Protecting Unborn Children.

INTRODUCTION

Child abuse has become an increasingly pervasive problem in recent years. Graphic stories in major national magazines and on television news shows have piqued the interest of individuals and groups across the nation. The perceived failure of states to provide effective child protection services has been debated for many years. In the last two decades, the actual failures, such as lack of an effective response to emergency situations and children languishing in foster care for the majority of their childhood, have culminated with several states being forced by courts into consent decrees designed to improve their service delivery.¹

Receiving renewed and impassioned consideration is what to do about children who were exposed *in utero* to illegal drugs and alcohol. One response which is quickly growing in popularity, is to use the legal system to punish mothers for child abuse if they are found to have used illegal drugs or alcohol while they were pregnant.

The use of illegal drugs and alcohol among the general population of the United States has had staggering and tragic consequences on the economy, law enforcement, education and families.² The increased criminalization of the illegal drug industry has also focused attention on the littlest victims of drug warfare, children born addicted or affected by drug and alcohol exposure *in utero*.³ The situation is

1. *Angela R. v. Clinton*, 999 F.2d 320 (8th Cir. 1993); *LaShawn A. v. Barry*, 69 F.3d 556 (D.C. Cir. 1995); *Wilder v. Bernstein*, 49 F.3d 69 (2d Cir. 1995); *Joseph A. v. New Mexico Dep't of Human Servs.*, 69 F.3d 1081 (10th Cir. 1995) (*terminating consent decree*); *L.J. v. Massinga*, 699 F.Supp. 508 (D.Md 1988).

2. See generally JAMES W. LANGENBUCHER, SOCIOECONOMIC ANALYSIS OF ADDICTION TREATMENT, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES PUBLIC HEALTH REPORTS, Vol. 3, No. 2, Mar. 1996, at 135.

3. "*In utero*" is defined as "in the uterus, before birth." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 636 (9th ed. 1990).

ripe for media attention: a fetus⁴, with no mode of defense, is exposed by its own biological mother to illegal drugs and alcohol which can kill or disfigure it. A fetus which is harmed by the only person who is capable of offering it protection,⁵ its mother, provokes the societal outcry to a level which is capable of deafening the ears of even the most prudent of legislators and judges, making it difficult to remain objective.

This comment focuses on the effects of illegal drug and alcohol use on unborn children and the approaches society in general, and the legal community in particular, have taken and those they could take to deal with this problem.⁶ Additionally, the current state of Wyoming law will be addressed and the choices Wyoming courts and the legislature should make to confront this tragedy will be explored.

BACKGROUND

How Drugs and Alcohol Affect and Damage the Fetus

In the not so distant past, biological abnormalities at birth were often attributed to the whims of Mother Nature.⁷ As medical technology has advanced, so has our awareness of prenatal threats. These threats derive from a number of sources, including "social and environmental hazards . . . such as poverty, malnutrition, and inadequate medical care."⁸ But as often happens when society seeks a solution for it's ills, only those

4. A "fetus" is defined as "[a]n unborn child . . . [S]pecifically the unborn offspring in the post embryonic period after major structures have been outlined (in man from seven or eight weeks after fertilization until birth)." BLACK'S LAW DICTIONARY 621 (6th ed. 1990). From conception until seven or eight weeks, the unborn child is defined as a Zygote, however for the purposes of this article, the term "fetus" will be used generally to denote an unborn child's status from conception until birth.

5. *But cf. infra* notes 69-70.

6. Although there are many elements, called teratogens, which can harm a fetus *in utero*, this comment is limited to discussing the use of illegal drugs (hereinafter referred to as drugs) and alcohol. "[A] teratogenic agent" is an element "causing developmental malformations and monstrosities." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1216. *See also* COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS, COMPLETE GUIDE TO PREGNANCY 103 (1988).

7. The shift in how society views the cause of birth defects is described by Schroedel and Peretz:

Adverse birth outcomes were usually attributed to nature rather than human causes. The prevalence of birth defects among children born to mothers who had taken thalidomide while pregnant led to a rethinking of the reasons for birth defects. Once the cause of birth defects moved from being attributable to nature to being a result of human actions, solving the problem became a matter of human intervention.

Jean Reith Schroedel & Paul Peretz, *A Gender Analysis of Policy Formation: The Case of Fetal Abuse*, 19 J. HEALTH POL. POL'Y & L. 335, 351 (1994).

8. *Id.* at 336.

which have readily identifiable causes are addressed. In reality, a variety of factors can effect fetal development.

The effect of any agent on the fetus depends not only on obvious variables such as dose and route of administration but also on the time in gestation that the insult occurred, the length of time that it continued, on the genetic makeup of the mother, father and the fetus, in addition to interaction with other agents.⁹

Additionally, everything from tobacco to lead paint has been shown to have at least a marginal effect on fetal development.¹⁰

When a woman abuses drugs or alcohol during pregnancy there are, certainly, profound effects to the fetus. Alcohol has been shown to have the more damaging effect on a developing fetus, both in terms of the number of children affected and the extent of the harm. "Nearly four in every 10,000 babies born in the United States suffer from fetal alcohol syndrome (FAS), a birth defect brought on by the consumption of alcohol during pregnancy."¹¹ FAS babies are often shorter and lighter than normal babies. They may also be born with smaller heads and abnormal features of the face, head, joints, and limbs. They are often mentally retarded and exhibit a wide variety of behavioral problems.¹² Not all children who are exposed to alcohol *in utero* will exhibit these symptoms because "the effects of drinking during pregnancy lie on a continuum. The effects can range from severe to subtle, depending on the amount of alcohol consumed during pregnancy."¹³

Illegal drugs such as cocaine, heroin and methamphetamines also have a devastating impact on a fetus. Women who use cocaine during pregnancy can cause especially damaging effects to the fetus. For example, "[p]regnant women who use cocaine have a 25% higher chance of having a pre-term birth. Their babies are at risk for being small for their age and are often more irritable and fussy."¹⁴ Drugs like cocaine received *in utero* can also be addictive to the newborn, who may experience symptoms of withdrawal after birth "which may be more indicative of central nervous system changes rather than a withdrawal pattern."¹⁵

9. KIM OATES, CHILD ABUSE: A COMMUNITY CONCERN 42 (1982).

10. PATRICK YOUNG, DRUGS AND PREGNANCY 31, 53-61 (1987).

11. Local News, *Alcoholism Council Schedules Program for Pregnant Women*, THE POST STANDARD, May 15, 1996 n.p.

12. THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PLANNING FOR PREGNANCY, BIRTH, AND BEYOND 84-91 (1990).

13. GARY E. MCCUEN, BORN HOOKED 44 (1991).

14. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 12, at 87.

15. MCCUEN, *supra* note 13, at 10. "Nationwide authorities estimate that approximately 400,000 babies annually are born addicted." *Id.* at 9. Withdrawal symptoms "include: hyperirritability

Society's response towards mothers who use alcohol and drugs while they are pregnant has been largely punitive.¹⁶ These mothers are undeniably in the wrong, however, to really understand the problem requires a careful analysis of the particular situation in which some pregnant women find themselves. Treating pregnant addicts as a problem which can be solved by the criminal justice system is overly simplistic. There are at least two fundamental problems with this punitive approach. First, there are studies which indicate that research has not clearly shown that exposure to cocaine by a fetus causes lasting damage, and there are reports that this research has been dismissed by the scientific community.¹⁷ Second, a "significant number of women are unaware that they are pregnant in the first 60 days of pregnancy when agents can cause miscarriage and major and minor birth defects."¹⁸ These examples indicate the difficulty in prosecuting women for a crime, the effects of which are open to speculation and for which they may not be aware they are committing.

The Nature of Addiction

Many people may wonder why women don't choose their baby over drugs. However, addiction is not a choice. In fact, "[m]ost experts see [addiction] as a dependence on a drug that may be physical or psychological or both. It is a progressive disease; that is, it keeps getting worse."¹⁹ The nature of a person's personality, their relationship with others, and their interactions with social institutions is invariably altered when drug or alcohol addiction begins.²⁰ The fact that millions of Americans are addict-

ty, poor feeding patterns, abnormal suck and swallow, increased respiratory and heart rates, tremors, frequent startles and irregular sleeping patterns." *Id.* at 10.

16. For example:

[A]t least 167 women in 24 states have been prosecuted for taking illicit drugs while pregnant; seven states have passed civil child abuse and neglect statutes that declare drug and/or alcohol use during pregnancy to be constitutive or portentous of child abuse; and at least one state has included prenatal exposure to illicit drugs in its definition of criminal child neglect.

Katherine Beckett, *Fetal Rights and "Crack Moms": Pregnant Women in the War on Drugs*, 22 CONTEMP. DRUG PROBS. 587, 587 (1995). See *infra* notes 86-109 and accompanying text.

17. "[S]tudies that found a connection between cocaine use and poor pregnancy outcome had a better than even chance of being accepted . . . while studies that found no connection had a negligible chance-although the latter were better designed." Katha Pollitt, *A New Assault on Feminism*, 250 THE NATION 409, 409-411 (1990). "In fact, there have been a series of studies that indicate that the long-term effects of intrauterine cocaine exposure are unclear and that the claims of severe and irrevocable brain damage are widely overblown." Schroedel & Peretz, *supra*, note 7 at 351.

18. OATES, *supra* note 9, at 46 (1982). See note 158 *infra* and accompanying text.

19. JONATHAN HARRIS, DRUGGED AMERICA, 101 (1988).

20. Minorities are especially at risk:

As drug use declines among affluent Americans, the drug problem is increasingly identified with poor, inner-city minorities Because minorities are so closely linked with

ed to illegal drugs and alcohol²¹ speaks volumes about the nature of addiction. As drug use increases, awareness of the shame attached to being an "addict" lessens. Once a person becomes an addict in the eyes of society, even after successful rehabilitation he may no longer exist in the same way as he or she once did because "[a]n addict may conquer the habit and stop taking drugs, but he must always consider himself only a recovering addict."²²

Pregnant addicts have generally been viewed as lacking some intrinsic moral compass.²³ Pregnant addicts are described as "individuals who willingly put themselves and their unborn babies into psychopharmacological prisons where their actions, feelings and experiences are determined by the damaging effects of the drugs they take."²⁴ Research has focused only on the effect of drugs and alcohol on the fetus, rather than on preventing and treating drug and alcohol abuse before a woman becomes pregnant. This approach ignores the causes and focuses only on the result, which does nothing to stop harm to future fetuses. It is simply impossible to separate the cause of alcoholism and drug abuse from the effect on fetal development. Attempts by researchers to do so "not only fails to view women's experiences in their macro-context, but lacks an understanding of pregnant women's experiences beyond the confines of her womb."²⁵

The American Psychiatric Association designates substance dependence as a mental disorder.²⁶ The Diagnostic and Statistical Manual,

illegal drugs in America, our political leaders, with strong popular support have increasingly turned to law enforcement as the major weapon in the war on drugs.

MATHEA FALCO, *THE MAKING OF A DRUG-FREE AMERICA: PROGRAMS THAT WORK* 15 (1992). In fact, "Blacks constitute only 12 percent of the total population, but they account for 41 percent of drug arrests and a third of criminal drug convictions nationwide." *Id.*

21. This is demonstrated by the fact that:

The United States has the highest rate of drug abuse of any industrialized country in the world. Twenty-six million Americans used illicit drugs in 1991, almost half of them at least once a month The National Academy of Sciences estimates that 5.5 million Americans have serious drug problems that require treatment.

Id. at 3. Additionally, it appears women are at a higher risk of developing an addiction than men. "The study reports that because of body weight and metabolic differences, women get drunk faster on less alcohol. It also concluded that women get addicted to drugs quicker than men. However, the researchers are not sure why this happens." Brenda Rodriguez, *Study Shows Women's Rates of Addiction; Drug Statistics Differ by Gender, Report Finds*, DALLAS MORNING NEWS, June 6, 1996, at 1A.

22. HARRIS, *supra* note 19, at 101.

23. "The recent campaign against pregnant women who use drugs, then, reflects the coincidence of the punitive orientation of the 'war on drugs' and the fetal rights discourse: the construction of drug use as an immoral choice reinforces the emerging image of the negligent mother" Beckett, *supra* note 16, at 590.

24. Katherine Irwin, *Ideology, Pregnancy and Drugs: Differences Between Crack-Cocaine, Heroin and Methamphetamine Users*, 22 CONTEMP. DRUG PROB. 613, 614 (1995).

25. *Id.* at 631.

26. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MEN-*

Fourth edition (DSM-IV) defines "Substance-Related Disorders" as "disorders related to the taking of a drug of abuse (including alcohol), to the side effects of a medication and to toxin exposure."²⁷ Substance dependence "is a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues use of the substance despite significant substance-related problems."²⁸

The DSM-IV describes dependence as a pattern of compulsive substance use.²⁹ Pregnant women are similar to other addicts, although it is possible to argue a pregnant addict should have a stronger incentive to quit than the average addict. However, even though she may be aware of the danger drugs and alcohol pose to her unborn child, she may be unable to discontinue her abuse.³⁰

The Emergence of Fetal Rights

Historically, fetal rights were not recognized for purposes of tort recovery.³¹ The reasons advanced for not allowing recovery for prenatal injury in a tort context included "first, that the defendant could owe no duty of conduct to a person who was not in existence at the time of his action; and second, that the difficulty of proving any causal connection between negligence and damage was too great."³²

TAL DISORDERS IV 175-272 (1994). The U.S. Supreme Court recognized addiction to be a disease in *Linder v. United States*, 268 U.S. 5, 18 (1925). In *Robinson v. California*, 370 U.S. 660, 667 (1962), the Supreme Court reaffirmed that addiction to drugs is a disease and not a crime.

27. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV, *supra* note 26, at 175.

28. *Id.* at 176.

29. *Id.* The following behaviors are included in a pattern of compulsive use: continuing to take the substance in larger amounts or over a longer period than intended; expressing a persistent desire to cut down or regulate substance use; many unsuccessful efforts to decrease or discontinue use; spending a lot of time obtaining the substance, using the substance, or recovering from using the substance; having virtually all of the person's daily activities revolve around the substance; giving up important social, occupational, or recreational activities; withdrawal from family activities and hobbies, and; continuing to use the substance despite recognizing the contributing role of the substance to a psychological or physical problem. *Id.* at 175-79.

30. Drug and alcohol addiction may be a coping mechanism developed by women who have been victims of physical, sexual, and emotional abuse or have otherwise been exposed to violence persistently throughout their childhood and into their adult lives. McCuen, *supra* note 13, at 38.

31. See *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884); *Allaire v. St. Luke's Hosp.*, 56 N.E. 638 (Ill. 1900); *Gorman v. Budlong*, 49 A. 704 (RI 1901); *Drobner v. Peters*, 133 N.E. 567 (N.Y. 1921); *Magnolia Coca Cola Bottling Co. v. Jordan*, 78 S.W.2d 944 (Tex. Comm'n App. 1935); *Newman v. City of Detroit*, 274 N.W. 710 (Mich. 1937).

32. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 55 at 367 (5th ed. 1984).

More recently, the issue of duty for purposes of common law tort actions turns on the determination of fetal rights, and when these rights arise. Thus, the viability of the unborn child has been addressed in tort law.³³ Some courts have allowed recovery for prenatal injuries only if the fetus was viable,³⁴ or at least quick,³⁵ at the time of the injury.³⁶ However, many courts have allowed recovery for injury prior to viability, arguing that viability is not a proper standard to determine when fetal rights arise.³⁷

The issue of causation has not received as much attention. Commentators suggest that "there will certainly be cases in which there are difficulties of proof, but they should be no more frequent . . . than to many other medical problems."³⁸ The causation issue has typically arisen in the course of determining the status of a fetus for recovery by a parent. The issue becomes more difficult where a child has attempted to bring a tort action against his mother for injuries sustained *in utero* because of the biological connection between mother and fetus at the time the injury was sustained.

At common law, a fetus was not viewed as an entity unto itself. Thus, "[u]nder American and English common law, the unborn child was considered inseparable from the mother, and the unborn were not regarded as legal persons 'in the whole sense.'"³⁹ Early American courts "adopted a general rule refusing to allow actions between parent and minor child for personal torts."⁴⁰ Reasons advanced for parental immunity included the promotion of domestic tranquility and the need for parental control and discipline.⁴¹ The intrafamily tort immunity doctrine has been abrogated in many jurisdictions. The reasoning behind the abrogation was explained in *Grodin v. Grodin*.⁴²

33. See generally *id.* at 369.

34. "Viability" is defined as "the ability to live, grow and develop." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY *supra* note 3. See also *infra* note 77 and accompanying text.

35. To "quicken" is "to reach the stage of gestation at which fetal motion is felt." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, *supra* note 3, at 967.

36. See *Damasiewicz v. Gorsuch*, 79 A.2d 550 (Md. 1951).

37. See *Bennett v. Hymers*, 147 A.2d 108 (N.H. 1958); *Sinkler v. Kneale*, 164 A.2d 93 (Pa. 1960); *Smith v. Brennan*, 157 A.2d 497 (NJ 1960); *Sylvia v. Gobeille*, 220 A.2d 222 (R.I. 1966). "Viability of course does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development." KEETON ET AL., *supra* note 32, §55 at 369.

38. *Id.* at 368. See also *infra* notes 133-145.

39. Beckett, *supra* note 16, at 593.

40. KEETON ET AL., *supra* note 32, § 122 at 904.

41. *Id.* at 905.

42. *Grodin v. Grodin*, 301 N.W.2d 869 (Mich. Ct. App. 1980). See also *Goller v. White*, 122 N.W.2d 193 (Wis. 1963).

In *Grodin* a child was allowed to bring an action for damages against his mother for continuing to take the drug Tetracycline during pregnancy, which caused the child's teeth to be discolored at birth.⁴³ The court in *Grodin* relied on *Plumley v. Klein*,⁴⁴ which held there were two exceptions to the abrogation of intrafamily tort immunity. These exceptions were "(1) where the alleged negligent act involves an exercise of reasonable parental authority over the child; and (2) where the alleged negligent act involves an exercise of reasonable parental discretion."⁴⁵ The *Grodin* court found, therefore, that "[t]he focal question is whether the decision [to continue taking drugs during pregnancy] reached by a woman in a particular case was a 'reasonable exercise of parental discretion.'"⁴⁶

Wyoming has also abrogated the doctrine of parental immunity.⁴⁷ In *Dellapenta* a father brought a negligence action against his wife on behalf of his daughter and deceased son, claiming she had acted negligently in not requiring their children to use safety belts.⁴⁸ The Wyoming Supreme Court relied heavily on its previous abrogation of the interspousal tort immunity doctrine⁴⁹ in reaching its decision that parental immunity should not be applied in Wyoming. In *Dellapenta*, the Wyoming Supreme Court reasoned that driving is not a parental activity, therefore it does not fall under the "parental immunity umbrella" and "an action in automobile negligence by an unemancipated minor child against a parent will be recognized in Wyoming."⁵⁰ *Dellapenta*, unlike *Grodin*, did not involve the abrogation of parental immunity with respect to injuries sustained prenatally. However, it does indicate that the Wyoming Supreme Court

43. *Id.* at 869. In its decision, the Michigan Court of Appeals first discussed the case of *Womack v. Buchorn*, 187 N.W.2d 218 (Mich. 1971), in which the Michigan Supreme Court, addressing whether or not a child could bring a negligence action against a tortfeasor who was not the child's parent held that "an action does lie at common law for negligently inflicting prenatal injury Justice requires that the principle to be recognized that a child has a legal right to begin life with a sound mind and body." *Womack*, 187 N.W.2d at 222. *Accord* *Smith v. Brennan*, 157 A.2d 497, 503 (N.J. 1960).

44. *Plumley v. Klein*, 199 N.W.2d 169 (Mich. 1972).

45. *Id.* at 172-73.

46. 301 N.W.2d 869, 871 (quoting *Plumley*). The reasoning in *Grodin* was subsequently questioned. *Thelen v. Thelen*, 435 N.W.2d 495, 497 n.1 (Mich. Ct. App. 1989) ("We find the reasoning of *Grodin* . . . flawed [T]he focus must be placed not on the reasonableness of the parent's conduct, but on the type of activity the parent was involved in at the time of the alleged negligence.").

47. *Dellapenta v. Dellapenta*, 838 P.2d 1153 (Wyo. 1992).

48. *Id.* at 1155.

49. *Tader v. Tader*, 737 P.2d 1065 (Wyo. 1987). "The age-old contentions of invoked family disharmony and conjectural insurance fraud weigh no greater with this court than with a present significant majority of other jurisdictions where also rejected." *Id.* at 1068.

50. *Dellapenta*, 838 P.2d at 1157.

would be willing to engage in an analysis of the particular activity to determine whether it is parental. Drug and alcohol use during pregnancy is clearly not a parental activity.

Essentially, *Grodin* reaffirms the idea of a woman as a mere "vessel" for her unborn child, characterizing the decisions a woman makes for herself and those she makes for her unborn child as separable.⁵¹ This characterization has turned pregnancy into an adversarial rather than a symbiotic relationship between mother and fetus by viewing the rights of the fetus and the rights of the mother as distinct.⁵² It has also led to an increased focus on how far a woman can go to end an unwanted pregnancy. Anti-Abortion groups consequently have been seen as leaders in the fight to establish rights for unborn fetuses.⁵³

*Recognition of Fetal Rights in Wyoming*⁵⁴

Wyoming currently does not recognize a fetus as a person for purposes of the child abuse statutes. Wyoming has historically recognized rights for a fetus, without reference to viability, in other contexts including criminal and tort actions, property rights, welfare programs and worker's compensation benefits.

Wyoming provides that a person may be convicted of aggravated assault and battery for "[i]ntentionally, knowingly or recklessly caus[ing] bodily harm to a woman whom he knows is pregnant."⁵⁵ Furthermore, the Wyoming Supreme Court has held that it is not double jeopardy to punish a person for the death of a fetus and for the death of the mother arising from the same act.⁵⁶ In *Goodman v. State* the defendant was convicted of killing an unborn child by assault on the mother and of man-

51. This philosophy has a historical basis:

This view of women as vessels can be traced to Aristotle, who believed that while men impart the spirit or "human essence" to the child, women serve as passive receptacles in reproduction. Similarly, the Roman Catholic Church has suggested that the male seed constitutes the "active principle" while women are the "receptacles, or the seed gardens, as it were, for human reproduction."

Beckett, *supra* note 16 at 590-91 (citations omitted). Additionally, many 19th century doctors campaigned against abortion in an effort to promote the idea that women were only "containers" for the developing fetus, and arguing that the rights of the fetus were undeniable. *Id.* at 591 (citing KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984)). See *infra* note 25 and accompanying text.

52. *Id.* at 587.

53. *Id.* at 589.

54. See generally Richard A. Erb, Jr. & Alan W. Mortensen, *Wyoming Fetal Rights-Why the Abortion "Albatross" is a Bird of a Different Color: The Case for Fetal-Federalism*, 28 LAND & WATER L. REV. 627 (1993).

55. WYO. STAT. ANN. § 6-2-502 (Michie 1977).

56. *Goodman v. State*, 601 P.2d 178 (Wyo. 1979).

slaughter for killing the mother.⁵⁷ The Supreme Court of Wyoming held that the statute making it a crime to commit manslaughter of another human being⁵⁸ and the statute that made it a crime to kill an unborn child⁵⁹ are "separate and distinct and are intended to suppress different evils."⁶⁰ The court based its ruling on the general rule that "in crimes against the person there are as many offenses as individuals affected though arising out of only one act."⁶¹ It is interesting to note that the court made no mention of any difficulty in classing an unborn child as an "individual" under this general rule.⁶²

Wyoming also recognizes property rights of an unborn child. Wyoming Statute § 2-4-103 states that a posthumous person is entitled to inherit "as if they had been born during the lifetime of the decedent."⁶³ Prior to this statute, Wyoming had followed English common law.⁶⁴ In discussing the common law, the Wyoming Supreme Court in *Burns v. Burns* said that "there is no doubt that children born before or after the execution of a testament stood on exactly the same footing insofar as the annulment of the testator's will is concerned."⁶⁵ However, this recognition of an unborn child's equality with his already-born siblings seems to stem not from any interest the state has in protecting its children, but instead from the general rule that a decedent is assumed to have wanted to provide for all of his offspring.⁶⁶

Further, Wyoming recognizes an unborn child as a dependent child for purposes of determining eligibility for Aid to Families with Dependent

57. *Id.* at 180.

58. WYO. STAT. ANN. § 6-4-107 (Michie 1977) read: "Whoever unlawfully kills any human being without malice, expressed or implied, either voluntarily, upon a sudden heat of passion or involuntarily but in the commission of some unlawful act, or by any culpable neglect or criminal carelessness, is guilty of manslaughter and shall be imprisoned in the penitentiary not more than twenty (20) years." The current version of the statute is located at WYO. STAT. ANN. § 6-2-105 (Michie 1977), and is substantially similar.

59. WYO. STAT. ANN. § 6-4-507 (Michie 1977) read: "Whoever unlawfully kills an unborn child or causes a miscarriage, abortion or premature expulsion of a fetus, by any assault or assault and battery willfully committed upon a pregnant woman, knowing her condition, is guilty of a felony and shall be imprisoned in the penitentiary not more than fourteen (14) years." The current version of this statute is located at WYO. STAT. ANN. § 6-2-502 (Michie 1977) and reads in pertinent part: "A person is guilty of aggravated assault and battery if he: . . . Intentionally, knowingly or recklessly causes bodily injury to a woman whom he knows is pregnant." The current version of the statute does not specify injury to an unborn child.

60. 601 P.2d at 185.

61. *Id.*; *Vigil v. State*, 563 P.2d 1344 (Wyo. 1977).

62. 601 P.2d at 185.

63. WYO. STAT. ANN. § 2-4-103 (Michie 1977).

64. *Burns v. Burns*, 224 P.2d 178 (Wyo. 1950).

65. *Id.* at 181.

66. *Id.* at 182.

Children benefits.⁶⁷ A pregnant woman is also eligible to receive medical assistance.⁶⁸ This reflects society's interest in promoting healthy babies by insuring that women are taken care of during the course of pregnancy.

In *Wyoming Worker's Compensation Division v. Halstead*⁶⁹ the Supreme Court of Wyoming rejected the Wyoming Worker's Compensation Division claim that the fetus was not dependent on her father at the time of his injury or his subsequent death, stating that "the law specifically provides parental obligations which have effectuation upon birth."⁷⁰ Thus, the court recognized that a child, unborn at the time the right to the benefit accrues, is entitled to those benefits at birth (if parentage is sufficiently established). However, the court never held that a fetus is a person for purposes of the Worker's Compensation Statute.⁷¹

Finally, Wyoming recognizes a tort cause of action for the wrongful death of a fetus. Although the wrongful death statute does not indicate who the action may be brought on behalf of, the Wyoming Supreme Court has held that "the decedent's heirs at law in accordance with the intestacy statutes were the intended beneficiaries of a wrongful death action."⁷² Wyoming recognizes a fetus in the intestacy context.⁷³ Further, Wyoming has said that those persons who are entitled to bring a cause of action for wrongful death are also proper parties to bring a cause of action for negligent infliction of emotional distress. However, the interest of the Wyoming Supreme Court in providing monetary compensation to a child does not translate into an all encompassing belief that a fetus is entitled to all the rights of a child, nor that a fetus is a person.

67. "In addition to any other state or federal regulation and subject to W.S. 42-2-103(e), an assistance unit qualifying under W.S. 24-2-103(a) with a dependent child is eligible for financial assistance under the aid to families with dependent children program For purposes of this subsection, a dependent child includes any: (i) unborn child". WYO. STAT. ANN. § 42-2-104(b) (Michie Supp. 1996).

68. *Id.*

69. 795 P.2d 760 (Wyo. 1990).

70. *Id.* at 767 (citing *Heather v. Delta Drilling Co.*, 533 P.2d 1211 (Wyo. 1975)). In *Heather*, the Wyoming Supreme Court established illegitimate children as having the same rights as legitimate children in Wyoming, illegitimate children being "dependent" to the same extent and in the same manner as legitimate children. *Heather*, 533 P.2d at 1212-13. The Court held that even a newborn was entitled to support. *Id.* at 1216-17.

71. Erb & Mortensen suggested that "[t]hrough the court's holding is premised upon unconstitutional classifications of the legitimacy of the child, the court implicitly recognizes that a fetus is entitled to dependency benefits under Wyoming worker's compensation law." *Supra* note 54, at 632.

72. *Wetters v. Eisele*, 682 P.2d 1055, 1061 (Wyo. 1984) (involving a cause of action accruing to the siblings of a deceased person and not to a cause of action specifically relating to an unborn fetus). See also *Butler v. Halstead*, 770 P.2d 698 (Wyo. 1989). Wyoming Statutes §§ 2-4-101 through 2-4-214 (Michie 1977 & Supp. 1996) are the intestacy statutes. See also *supra* note 63 and accompanying text.

73. See *supra* notes 63-66 and accompanying text.

Abortion Rights

The most vigorously debated area of the law in recent years has been the right of a pregnant woman to obtain an abortion.⁷⁴ The abortion debate brings forth many issues which are beyond the scope of this comment. However, abortion cases do contain language and analysis which is helpful in determining the scope of fetal rights and the extent to which the law can become involved in the mother/fetus relationship. "Some recent legal decisions have embraced this view of the fetus as a separate person who must be accorded not only medical but legal protection from an increasingly hostile maternal environment."⁷⁵

In 1973, the Supreme Court expounded on the right of privacy⁷⁶ when faced with the question of whether or not states can completely prohibit a woman from receiving an abortion.⁷⁷ The Supreme Court in *Roe v. Wade* specifically rejected the State's argument that a fetus was a "person,"⁷⁸ reasoning that the predominate view throughout history has been that "life does not begin until live birth."⁷⁹ The Court did, however, recognize the sensitive nature of the abortion issue, and the competing interests at stake.⁸⁰ Thus, in *Roe* the Supreme Court drew a fine line between the mother's constitutional right to privacy, and a state's interest in

74. See, e.g., *Webster v. Reproductive Health Servs.*, 492 US 490, 559 (1989)(Blackmun, J., dissenting). "Today's decision involves the most politically divisive domestic legal issue of our time." *Id.*

75. Beckett, *supra* note 16.

76. The Supreme Court recognized the right to privacy as a fundamental constitutional right in 1965. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (involving a law which proscribed the use of contraceptives, and also prohibited aiding or counseling others in the use of contraceptives). The Supreme Court held that although never specifically laid out in the Constitution, the right of privacy exists in the penumbra of various other guarantees found in the Constitution, thus creating a zone of privacy. *Id.* at 484.

77. *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe* the Supreme Court established a trimester system which said, essentially, that a woman could not be prohibited from receiving an abortion in her first trimester. *Id.* at 163. In the second trimester a state may only regulate abortion in a way which is reasonably related to its interest in the mother's health. *Id.* However, the Supreme Court held that in the third trimester a state may regulate or even prohibit abortion, unless an abortion is needed to protect the life or health of the mother. *Id.* at 163-64. The Supreme Court based its system on viability, or the time at which a fetus is capable of sustaining life outside of the mother's womb. The Court held that once a fetus reaches the stage of viability, the state's interest in protecting the life of the fetus becomes compelling, overriding the mother's constitutional right to privacy. *Id.*

78. "All this, together with our observation . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158.

79. *Id.* at 160. The Court stated that "[t]his was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained." *Id.*

80. *Id.* at 159-60. The Court stated that at some point, the mother's interest in privacy is "no longer sole and any right of privacy she possesses must be measured accordingly." *Id.* at 159.

protecting the unborn child.

When the issue came before the Court again, many hoped *Roe* would be overruled.⁸¹ The Court in *Planned Parenthood v. Casey* affirmed the "essential holding"⁸² of *Roe*, which the court divided into three parts:

First is a recognition of the right of a woman to have an abortion before viability and to obtain it without undue interference from the State Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.⁸³

While upholding the principles enumerated in *Roe*, the Court held that the trimester system was rigid and unnecessary,⁸⁴ and said essentially that abortions may be regulated by a state as long as the regulations do not impose an "undue burden" on a woman who wishes to obtain an abortion.⁸⁵

Current Responses to the Problem of Fetal Abuse

A. Responses from Other States

State legislatures and courts have been attempting to deal with the problem of fetal abuse for two decades.⁸⁶ In addition to Wyoming,⁸⁷ twelve states have attempted to prosecute women for their abuse of drugs and alcohol during pregnancy.⁸⁸

81. The opportunity came in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Abortion clinics and physicians challenged the constitutionality of five provisions of the Pennsylvania Abortion Control Act. The Court, relying heavily on the doctrine of stare decisis, only partially overruled *Roe*.

82. *Id.* at 846.

83. *Id.*

84. *Id.* at 872.

85. *Id.* at 874.

86. See *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977).

87. See *infra* notes 101-105 and accompanying text.

88. Arizona in *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. App. 1995); Florida in *Johnson v. State*, 602 So.2d 1288 (Fla. 1992); Georgia in *State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992); Kentucky in *Kennucky v. Welch*, 864 S.W.2d 280 (Ky. 1993); Massachusetts in *Commonwealth v. Pellegrini*, No. 87970, slip op. (Mass. Dist. Ct. Oct. 15, 1990); Michigan in *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991); Nevada in *Sheriff of Washoe County v. Encoe*, 885 P.2d 596 (Nev. 1994); Ohio in *State v. Gray*, 584 N.E.2d 710 (Ohio 1992); Pennsylvania in *Commonwealth v. Kemp*, 643 A.2d 705 (1994); South Carolina in *Whitner v. State*, 65 USLW 2066 (S.C. 1996); and Wisconsin in *State v. Kruzicki*, 541 N.W.2d 482 (Wis. Ct. App. 1995).

The first case of fetal abuse to result in a conviction was a prosecution for the delivery of a controlled substance to a minor.⁸⁹ Prosecutors argued in 1991 that, although Jennifer Johnson's fetus was not considered a child under the statute⁹⁰ (and therefore not a "minor"), there was approximately one minute after the birth of Johnson's baby where drugs were delivered from mother to child via the umbilical cord. The Florida appellate court reversed the conviction and was affirmed by the Florida Supreme Court. This prosecutorial theory has been tried in other states and has also failed.⁹¹

Possibly the most important decision in this area was handed down in South Carolina in 1996.⁹² Cornelia Whitner pled guilty to criminal child neglect for "causing her baby to be born with cocaine metabolites in its system by reason of [the mother's] ingestion of crack cocaine during the third trimester of her pregnancy."⁹³ The South Carolina Supreme Court refused to grant post conviction relief, stating that the word person as used in the criminal child neglect statute did include a viable fetus.⁹⁴ This is the first case of its kind which resulted in a conviction upheld on appeal. The difference between this case and previous failed attempts to prosecute women for using drugs and alcohol during their pregnancy seems to rest with the South Carolina court's reliance on the term "viable fetus."⁹⁵

In a more recent case, a woman in Racine, Wisconsin was charged with attempted homicide and reckless injury for abusing alcohol while she

89. *Johnson*, 602 So.2d 1288.

90. FLA. STAT. ANN. § 893.1(1)(c)1 (West 1989).

91. *See People v. Hardy*, 469 N.W.2d 50 (Mich. 1991).

92. *Whitner v. State*, 65 USLW 2066 (S.C. 1996). Cornelia Whitner pled guilty in South Carolina Circuit Court to criminal child neglect and was convicted. Whitner subsequently filed a petition for post conviction relief (PCR). Her petition was granted on the grounds that the circuit court lacked subject matter jurisdiction to accept her guilty plea and ineffective assistance of counsel. The South Carolina Supreme Court reversed the grant of the PCR petition. *Id.* at 2066.

93. *Id.*

94. *Id.* at 2061. The South Carolina criminal child neglect statute states:

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

S.C. CODE ANN. §20-7-50 (Law Co-op 1976). *See also infra* note 110 and accompanying text.

95. On a television broadcast just after the ruling, several legal experts agreed that the United States Supreme Court will likely hear this case, and speculated that the Court would uphold the ruling. The panel consisted of Lynn Paltrow, director of special litigation at the Center for Reproductive Law and Policy; Patricia Bast Lyman, a legal analyst for the Human Life and Reproduction Project; C. Rauch Wise, defense attorney for Cornelia Whitner; Victoria Toensing, criminal defense attorney and; Jay Monahan, criminal defense attorney. *Rivera Live* (CNBC television broadcast, July 16, 1996), available in WESTLAW, 1996 WL 7051755.

was pregnant.⁹⁶ Prosecutors say that the woman's baby was born with a blood alcohol content (BAC) of 0.199.⁹⁷ The case has not yet been decided by the Wisconsin Criminal Court.⁹⁸ The possibility of a conviction for *alcohol* use while pregnant, especially following so closely on the heels of the *Whitner* decision (which involved illegal drug use while pregnant) raises an important issue because of the legal status of alcohol.⁹⁹

Several states have passed legislation specifically addressing the issue of women using drugs and/or alcohol during pregnancy.¹⁰⁰ These statutes generally provide for the use of fetal exposure to drugs and alcohol as the grounds for intervention by state child welfare agencies.

B. Wyoming's Response

Wyoming was, for a time, at the very heart of the fetal abuse controversy. In 1990, prosecutors in Albany County attempted to prosecute a woman¹⁰¹ for using alcohol during her first trimester of pregnancy.¹⁰² After a failed attempt to appoint a guardian ad litem to protect the fetus, the woman was arrested after a day of binge drinking. Prior to being arrested, the woman had been severely beaten by her husband.¹⁰³ As a result of the beating the woman called the Laramie SAFE project¹⁰⁴ which assisted her in getting to the hospital to receive medical attention. Once at the hospital, the woman was arrested on a charge of criminal child abuse. Subsequently, the judge dropped the charges because the State failed to demonstrate injury to

96. Joe Rogers, *Attempted Homicide Alleged in Fetal Intoxication Case*, USA TODAY, Sept. 6, 1996, at 8A.

97. *Id.*

98. *Id.*

99. See *infra* notes 129-131 and accompanying text.

100. These states include Florida, FLA. STAT. ANN. § 415.503(9)(a)(2) (West 1993); Illinois, ILL. COMP. STAT. ANN. 37/802-803(1)(c) (West 1990); Indiana, IND. CODE ANN. § 31-6-4-3.1(1)(A),(B) (Michie, 1993); Massachusetts, MASS. GEN. LAWS ANN. ch. 119 § 51A (West Supp. 1993); Minnesota, MINN. STAT. ANN. § 626.556(2)(c) (West Supp. 1996); Nevada, NEV. REV. STAT. § 432B.330(1)(b) (Michie 1991); Oklahoma, OKLA. STAT. ANN. tit. 10 § 1101(4) (West 1987); and Utah, UTAH CODE ANN. § 62A-4-509(1) (1993).

101. All identifying references have been excluded to protect the identity of the parties. This case is discussed for illustrative purposes.

102. During the first trimester of pregnancy a woman has a legal right to obtain an abortion in Wyoming. WYO. STAT. ANN. § 35-6-102 (Michie 1977). In this case, therefore, the woman could have avoided prosecution by getting an abortion.

103. "In Wyoming, a pregnant woman was arrested for drinking when she presented herself at the hospital for treatment of injuries inflicted by her husband. Those charges were dropped (to be reinstated, should her baby be born with defects), but none were instituted against her spouse." Katha Pollitt, *supra* note 17, at 416.

104. The Albany County SAFE project is a shelter for victims of domestic violence and provides referrals to other agencies.

the child, leaving the door open for prosecutors to reinstate the charge after the birth of the child.¹⁰⁵

This case clearly illustrates the competing policy interests at stake. A woman should not drink alcoholic beverages during her pregnancy. However, if this baby had been born with some abnormality or disability it would be difficult to prove that it was purely the effect of the alcohol ingested by the mother.¹⁰⁶ The abuse by the unborn child's father, inflicted upon the mother at a critical stage in her pregnancy, could have had a profound effect on the development of the fetus.¹⁰⁷

In response to this problem, and the perceived failure of existing child abuse statutes and administrative procedures, Wyoming State Representative Bruce Hinchey introduced a bill which would allow for the punishment of pregnant women under the child abuse statute for using controlled substances while pregnant.¹⁰⁸ While this bill did not pass into law,¹⁰⁹ it does indicate a growing level of concern about this issue in Wyoming.

ANALYSIS

Whether the United States Supreme Court agrees with the South Carolina Supreme Court that a viable fetus is considered a person under

105. For media accounts of this case see Charles Pelkey, CASPER STAR TRIB., Feb. 8, 1990; Staff Reports, WYOMING TRIB. EAGLE, Feb. 2, 1990, at A1; David Rubin, *Motherhood on Trial*, PARENTING, June/July 1990, at 74. The charges were never refiled by the county prosecutor.

106. See *infra* notes 133-145 and accompanying text.

107. See *infra* notes 137-142 and accompanying text.

108. H.B. 15, 53 Leg. Budget Session (Wyo. 1996). The proposed revision would change Wyoming Statute § 14-3-202 to read :

(a)(ii)(A) 'Mental injury' means an injury to the psychological capacity or emotional stability of a child as evidenced by an observable or substantial impairment in his ability to function within a normal range of performance and behavior with due regard to his culture and may include the effects of substance abuse as defined in W.S. 35-1-613(a)(viii) by the mother; (a)(ii)(B) 'Physical injury' means death or any harm to a child including but not limited to disfigurement, impairment of any bodily organ, skin bruising, bleeding, burns, fracture or any bone, subdural hematoma, substantial malnutrition or the effects of substance abuse as defined in W.S. 35-1-613 (a)(viii) by the mother; (a)(ii)(C) 'Child' means any person under the age of eighteen (18) and may include an unborn child for the purposes of investigating the illegal use of any controlled substance listed in W.S. 35-7-1014 or 35-7-1016 by an expectant mother. *Id.* (emphasis in original).

Note that Rep. Hinchey's bill aims to punish the use of controlled substances by pregnant women but does not go so far as to attempt a regulation of all teratogen exposure (including alcohol) by the mother. See *supra* note 6 and accompanying text.

109. Telephone Interview with Rep. Bruce Hinchey (R-Casper) (Sept. 18, 1996). Rep. Hinchey states that his interest in proposing the legislation was to find an effective way to deal with the problems facing children born after being exposed to illegal drugs *in utero*. He withdrew the bill prior to introduction after pro-life and pro-choice groups voiced their opinions and objections to the bill. Rep. Hinchey stated that involvement in the abortion debate was not the purpose of the bill. *Id.*

child abuse laws is unknown. To do so, the Court seemingly must overrule its pronouncement that a fetus is not a person.¹¹⁰ For Wyoming and other states, the choice of how to handle this problem may not turn on what happens in South Carolina, but rather what other choices, besides prosecution, can be made to curb the use of drugs and alcohol by pregnant women.

The most troubling part of Representative Hinchey's proposed bill,¹¹¹ and the part which raised the ire of many abortion activists, was its inclusion of a fetus in the definition of a person. Abortion rights advocates argue the broad language of such a statute would be of little help in reaching a solution to the problem.¹¹² Furthermore, the attempt to classify a fetus as a person fails to acknowledge the unique relationship between mother and fetus. "Attempts to define fetal rights in accordance with existing legal classifications founder upon an unworkable understanding of fetuses as entities wholly independent from their mothers."¹¹³

Representative Hinchey has stated that his main reason for introducing the bill was "to generate some thought and discussion so people would consider looking at what we could do in the interim and get some good debate on it."¹¹⁴ Passing laws can often be an effective way to get people to start thinking about the consequences of their actions. But in some instances, laws passed for these purposes can actually do more harm than good. A better approach is to facilitate discussion through reasoned analysis of the history of fetal rights and our current knowledge of the circumstances surrounding drug and alcohol abuse in order to determine how to eliminate *in utero* drug and alcohol exposure. Thus, the first issue facing the State of Wyoming is whether or not a fetal abuse statute would be constitutional under the current law of fetal rights. The second, and arguably more important, issue is whether or not a fetal abuse statute is desirable, and if not, what social policies should Wyoming pursue in order to resolve the dilemma posed by women using drugs and alcohol while pregnant.

110. *Roe v. Wade*, 410 U.S. 113 (1973). See also *supra* notes 77-80 and accompanying text.

111. See *supra* notes 108-109 and accompanying text.

112. Jon Sarche, *Abortion-rights Group Gearing Up for Fight Against Abuse Bill*, LARAMIE DAILY BOOMERANG, Feb. 16, 1996, at 7.

113. J. DOUGLAS BUTLER & DAVID WALBERT, *ABORTION, MEDICINE, AND THE LAW* 300 (1992).

114. Sarche, *supra* note 112, at 7.

Could a Fetal Abuse Statute be Passed into Law?

A. Fourteenth Amendment Right to Privacy

Under *Roe*,¹¹⁵ a woman's right to have an abortion is a fundamental privacy right, requiring a state legislature to have a compelling state interest prior to regulating abortions. But in *Casey*¹¹⁶ the Supreme Court refused to hold that abortion was a "fundamental right" and required only that a state avoid imposing undue burdens on a woman's right to choose an abortion. After *Casey*, it seems clear that a state may regulate what a woman does to her body when it has an effect on her unborn fetus. The Court in *Casey* held that a state has "an interest in protecting the life of the unborn."¹¹⁷

While a pregnant woman still has the choice to abort her fetus in the first trimester, once the decision not to abort has been made, the state does have an interest in protecting the health of the fetus. Moreover, there is no fundamental right to use drugs or alcohol. Therefore, when a pregnant woman uses drugs or alcohol she is not engaged in an activity which implicates her fundamental rights, and while simply being pregnant does not amount to an abdication of her personal freedoms, the state does retain a legitimate interest in protecting the fetal life she carries.

In *Whitner*, the South Carolina Supreme Court phrased the issue as "whether or not a viable fetus is a 'person' for purposes of the Children's Code."¹¹⁸ Similarly, the proposed Wyoming statute contains the passage: "'Child' . . . may include an unborn child for the purposes of investigating the illegal use of any controlled substance . . . by an expectant mother."¹¹⁹ It is simply unnecessary, under the existing state of constitutional analysis, to decide whether or not a fetus is a person or even to utilize a viability standard to determine when a state may intervene to protect a fetus.¹²⁰ *Casey* clearly held that a state has a legitimate interest in the pro-

115. 410 U.S. 113, *supra* note 77.

116. See *supra* notes 81-85 and accompanying text.

117. *Id.* at 873.

118. 65 USLW 2066 (S.C. 1996), *supra* note 92.

119. H.B. 15, *infra* note 108 (emphasis in original).

120. However, in prosecutions of pregnant women under criminal child abuse statutes, the doctrine of strict construction of criminal statutes may bar a general statute which uses the word "child" or the word "person" from including the fetus. See *Keeler v. Superior Court*, 470 P.2d 617, 625 (Cal. 1970) ("[I]t is clear the courts cannot go so far as to create an offense by enlarging a statute, by inserting or deleting words, or by giving the terms used false or unusual meanings.") But there are statutes which specifically address harm to a fetus as a category distinct from harm to a "person." See WYO. STAT. ANN. § 6-4-502 (Michie 1988), *supra* note 55.

tection of a fetus from the outset of pregnancy.¹²¹ Drugs and alcohol received *in utero* by a fetus are significantly damaging.¹²² The state thus has an interest in protecting the fetus from this exposure from the outset of pregnancy, not only after viability.¹²³

B. Equal Protection

The Supreme Court has held that under the Equal Protection Clause of the Fourteenth Amendment,¹²⁴ a state may not discriminate against an individual on the basis of his or her gender.¹²⁵ However, a state may articulate classifications based on gender if there is an important governmental objective which the classification is substantially related to achieving.¹²⁶ A statute which prohibits women from using alcohol or drugs during pregnancy is not a gender based classification and is instead a regulation based on physical condition.¹²⁷ Furthermore, even if it was gender based, such a statute would pass the test set out in *Craig v. Boren*¹²⁸ because of the important governmental objective involved, protecting the health of the fetus.

When a pregnant woman uses alcohol, a more difficult constitutional question arises because alcohol causes severe damage to the growing fetus.¹²⁹ Yet alcohol is a legal substance and can be purchased by men and women alike. If pregnant women are unable to consume alcohol because

121. See *supra* note 83 and accompanying text.

122. See *supra* notes 7-15 and accompanying text.

123. "[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability by prohibiting it before viability." *Webster v. Reproductive Health Servs.*, 492 U.S. 490 at 519 (1989). See also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 795 (1986) (White, J., dissenting) ("[the State's interest, if compelling after viability, is equally compelling before viability.]").

124. The Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1.

125. See generally *Reed v. Reed*, 404 U.S. 71 (1971) (holding that classifications based on gender differences must bear a rational relationship to the state objective sought to be advanced by the statute); *Craig v. Boren*, 429 U.S. 190 (1976) (holding some gender classifications should receive heightened, or immediate level scrutiny).

126. *Reed*, 404 U.S. at 75; *Craig*, 429 U.S. at 199.

127. *Geduldig v. Aiello*, 417 U.S. 484 (1974). See also *infra* notes 130-31 and accompanying text.

128. *Craig*, 429 U.S. 190 (1976); *supra* note 125.

129. See *supra* notes 11-13 and accompanying text.

of their pregnancy, the statute could create a classification of pregnant women as against all other people who are legally allowed to consume alcohol. However, in *Geduldig v. Aiello*,¹³⁰ the Supreme Court allowed the exclusion of pregnancy-related disabilities from insurance coverage. The Supreme Court held that this was not discrimination on the basis of gender, but merely a classification based on physical condition, and was therefore permissible.¹³¹ Thus, a statute which prohibits pregnant women from drinking alcohol may not be an impermissible classification based on the fact that the pregnant woman is female, but instead would be a permissible classification based on the pregnant woman's physical condition, her pregnancy.

A statute such as the one proposed in Wyoming¹³² could be constitutionally passed into law. This statute would be neither a violation of a woman's right to privacy, nor a violation of equal protection by discriminating against a woman on the basis of her sex. The analysis does not necessarily end there, however. The implications of a statute such as this, and the consequences of subsequent prosecutions should be examined carefully before a decision can be made about the worth and the desirability of the statute.

Are Fetal Abuse Statutes Desirable?

A. The Difficult Question of Causation

Wyoming's child abuse statute¹³³ allows for the conviction of an adult who is at least six years older than the victim of a felony if "[t]he actor intentionally or recklessly inflicts upon a child under the age of sixteen (16) years" physical or mental injury.¹³⁴ This crime requires that the defendant's conduct be the actual and the proximate cause of the injury to the child.¹³⁵ In a prosecution for fetal abuse, the first difficulty is

130. *Geduldig*, 417 U.S. 484.

131. *Id.*

132. See *supra* notes 108-09 and accompanying text.

133. WYO. STAT. ANN. § 6-2-503 (Michie 1977).

134. *Id.*

135. Actual cause means that the injury would not have occurred "but for" the defendant's conduct. WAYNE R. LAFAYE ET AL., CRIMINAL LAW, § 3.12 at 279 (2d ed. 1986). Proximate cause requires that:

the forbidden result which actually occurs must be enough similar to, and occur in a manner enough similar to, the result or manner which the defendant intended . . . or the result or manner which his reckless or negligent conduct created a risk of happening . . . that the defendant may fairly be held responsible for the actual result even though it does differ . . . from the intended or hazarded result.

Id. at 278.

establishing injury. The second problem is establishing that the conduct of the mother caused the injury. Under the second prong, the behavior of the biological father is often overlooked.¹³⁶ Paternal behavior can have a profound effect on genetic material and can cause birth defects.¹³⁷

Another paternal behavior that has significant consequences for a fetus is battering. Domestic violence can have significant effects on a fetus, both directly and indirectly. "Pregnant women are not only more likely to be battered but the type of battering they endure is more intense and more likely to be aimed at the fetus,"¹³⁸ and can cause direct physical harm to a fetus.¹³⁹ Indirectly, the results can be even more devastating. Battering can lead to inadequate prenatal care because an abusive partner may prevent, or prohibit, a pregnant woman from seeking medical care.¹⁴⁰ Battering can lead to miscarriage and stillbirth, and there is a correlation between violence during pregnancy and low birth weight.¹⁴¹

In Wyoming, one has to look no farther than his/her own backyard to see an example of the causation difficulty. In the Albany County case¹⁴² the pregnant woman was arrested after being treated at the hospital for injuries sustained in a battering by her husband. In dismissing the case, the judge gave the county prosecutor leave to refile the charges if injury to the child caused by the mother's alcohol use could be demonstrated upon the child's birth. The effect on the child of the father's abuse of the mother while she was pregnant was not considered by the court. The legal profession's disregard of the causation element in its quest to prosecute away this problem is graphically demonstrated by this case.

136. There has not been consistent opposition to the use of punitive measures against women who use drugs and alcohol during pregnancy because of the sensitive nature of the subject. The unfortunate result of this response is that currently abnormalities caused *in utero* are seen as purely the result of the actions of the mother. See generally Schroedel, *supra* note 7, at 340-42.

137. Some studies show that men are often heavier drinkers than women and that this habit may have an effect on the genetic material carried in the male sperm. *Id.* at 341. "Laboratory studies of rats sired by alcoholic males indicate that fathers who drink heavily before their mates' pregnancy can be as responsible for damage to their offspring as alcoholic mothers." McCuen, *supra* note 13 at 15. Research in this area is new, however, "[r]esearchers have identified 1,491 occupational and environmental agents that are believed to damage sperm." Schroedel & Peretz, *supra* note 7, at 343 (citing Devra Lee Davis, et al. *Male-Mediated Teratogenesis and other Reproductive Effects: Biologic and Epidemiologic Findings and a Plea for Clinical Research*, 6 *REPROD. TOXICOLOGY* 289-92 (1992)).

138. Schroedel & Peretz, *supra* note 7, at 343.

139. "We consider it a delusion to think that the fetus is exempt from the hazards of an environment in which child abuse and spouse abuse are commonplace." Martha A. Morey, Michael L. Begleiter & David J. Harris, *Profile of a Battered Fetus*, 2 *LANCET* 1294, 1295 (Dec. 1981).

140. Schroedel, *supra* note 7, at 345.

141. *Id.* at 346.

142. See *supra* notes 101-05 and accompanying text.

The issue of male culpability is raised to illustrate the difficulties in attempting to ascertain the cause of prenatal injuries. It is well known that poverty, domestic violence, and substance abuse are interwoven in a self-perpetuating cycle. To isolate of any one part of this cycle is to stand at the top of the theoretical "slippery slope." Once courts and legislatures begin to punish the mother for using drugs and/or alcohol while she is pregnant, it may be difficult, and perhaps impossible, to stop the regulation of activities which might effect the fetus. It is entirely feasible, and not merely a "parade of horrors," that activities such as the use of tobacco,¹⁴³ caffeine,¹⁴⁴ and over-the-counter medications¹⁴⁵ could be governmentally regulated and even prohibited for pregnant women because of their causal connection to various birth abnormalities.

B. Punishment and its Effects

Seeking retribution is an understandable reaction to hearing about a woman who has injected, smoked, or snorted an illegal drug while pregnant; or one who to have delivered a baby with a blood alcohol content high enough to convict adults in most states of driving under the influence. Incarceration may even be perceived as the best way to ensure that a pregnant woman does not abuse drugs or alcohol while pregnant. In reality, however, jail or prison is the least effective alternative, primarily because women generally receive little or no prenatal care in prison or jail. As Schroedel and Peretz explained;

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

143. "Smoking negatively affects the whole spectrum of reproduction: fertility, conception, the development of the fetus in the uterus, labor and delivery, and the child's maturation." COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS, *supra* note 6 at 103-04.

144. "One recent study of 3,135 pregnant women has shown that women who consumed moderate to heavy amounts of caffeine daily . . . were more likely to have late first and second trimester spontaneous abortions." *Id.* at 106-07.

145. "Before even trying to become pregnant, it is advisable to stop using all over-the-counter drugs, including medicated creams and sprays, aspirin products, cough mixtures, and cold and allergy drugs." *Id.* at 109-11.

contingency plans for medical needs during the night.¹⁴⁶

Miscarriage rates are also substantially higher among the prison population than in other segments of society.¹⁴⁷ Furthermore, forced withdrawal from drugs or alcohol due to confinement in a correctional facility may be harmful to the fetus.¹⁴⁸

Additionally, the prospect of sending many pregnant women, or women who have already given birth, to overcrowded prisons, and sending the children (both the newborn and other children some women may already have) into the crowded, and some say broken, foster care system should not be seen as a positive alternative.¹⁴⁹ This alternative will "require [society] to spend even more supporting these women and their children with welfare, medicare, foster-care and prison."¹⁵⁰ Since federal funding for social programs has been drastically cut, sending more women to prison, and, therefore, more children into foster care is neither socially nor fiscally advisable.

C. Deterring Prenatal Care

Prenatal care¹⁵¹ is vital to a healthy pregnancy.¹⁵² Most researchers agree that the quality, quantity and timing of prenatal visits contribute to the effectiveness of prenatal care.¹⁵³ In 1988, between one-third and one-fourth of all pregnant women received insufficient prenatal care.¹⁵⁴ The rates for women in at-risk populations, such as minority or poor women, are even high-

146. Schroedel & Peretz, *supra* note 7, at 350 (citations omitted).

147. *Id.* at 350-51.

148. "Doctors never recommend that a pregnant woman withdraw cold turkey because it can cause the woman to miscarry or it can damage the unborn child." Janet W. Steverson, *Stopping Fetal Abuse with No-Pregnancy and Drug Treatment Probation Conditions*, 34 SANTA CLARA L. REV. 295, 328 (1994).

149. *Id.* at 328. "This flooding of the foster care system has important ramifications for a system which was already overburdened and lacking sufficient resources. For example, from 1986 to 1988, the average stay in foster care increased 30 percent, from 15 months in 1986 to 20 months in 1988." MCCUEN, *supra* note 13, at 38.

150. Rorie Sherman, *Keeping Baby Safe From Mom*, NAT'L. L.J., Oct. 3, 1988, at 25.

151. Prenatal care encompasses a variety of services:

[I]t is useful to recognize that the term 'prenatal care' describes an inexact constellation of procedures and interactions. To some people, the term suggests a minimum set of medical services offered by health care providers on a well-defined schedule, while to others it means those services plus an array of educational, social, and nutritional services provided in a culturally appropriate, flexible fashion.

SARAH S. BROWN, *PRENATAL CARE: REACHING MOTHERS, REACHING INFANTS* 23 (1988).

152. See generally AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 12, at 49.

153. BROWN, *supra* note 151, at 27.

154. *Id.* at 26.

er.¹⁵⁵ The threat of criminal prosecutions can only serve to compound this problem and create disastrous results for newborn babies.¹⁵⁶

An addict is likely to be involved in the "drug lifestyle." This may decrease the chance that a pregnant addict will receive prenatal care¹⁵⁷ as well as make it easier for her to ignore her pregnancy during the first trimester.¹⁵⁸ As pregnancy progresses, it becomes increasingly important for a woman to see an obstetrician.¹⁵⁹ When a woman is abusing drugs or alcohol she likely will be reluctant to seek prenatal care if her doctor is required to report her actions as fetal abuse.¹⁶⁰ Under both the proposed legislation in Wyoming¹⁶¹ and existing child protection statutes,¹⁶² medical professionals would be required to report fetal abuse, if a fetus is designated a person. "Turning doctors into whistle-blowers only teaches drug-abusing women to shun the prenatal care and hospital-supervised births their children, because of the presence of drugs, need most."¹⁶³ Thus, public policy clearly favors an approach which will enhance the care of a fetus already in a precarious situation.

More Appropriate Response

A. The Importance of Education and the Availability of Treatment

Many scoff at the suggestion that more education is necessary to solve social problems. In the current political arena, promoting more government is taboo. However, government intervention between a mother and a fetus is far

155. *Id.*

156. "So what do you want? You wanna help these women or you want a bunch of dead babies, finding them in the garbage can, throwing them down ho'-town garbage chutes and that, because they're scared of what the government or the police or CPS is gonna do to them, you know? 'Cause that's what's gonna end up happening." Margaret H. Kearney, *Damned if you do, damned if you don't: Crack Cocaine Users and Prenatal Care*, 22 CONTEMP. DRUG PROB. 639, 654 (1995) (quoting research interview with pregnant substance abuser).

157. "[W]omen with insufficient prenatal care were far more likely to report use of heroin, cocaine, or both than women who obtained care early in pregnancy." BROWN, *supra* note 151, at 79.

158. Kearney, *supra* note 156, at 644.

159. "In general, 'low-risk' pregnant women, that is, women between the ages of 18 and 35 with no known medical problems, will see their obstetricians once a month until week 28 of pregnancy. As they enter the last trimester, they see their doctors every other week until week 36; and, from then on, every week until the baby is delivered. Women with risk factors may have to see their obstetricians as often as every week from the beginning of pregnancy, depending on the severity of their risk." COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS, *supra* note 6 at 140-41.

160. "[W]omen's groups are arguing that criminal prosecutions of substance abusers will only teach addicts to avoid the doctors their children so desperately need." Rorie Sherman, *Free of Drugs: Pregnant Substance Abusers face Prosecutions and Loss of Custody*, NAT'L L.J., Oct. 16, 1989, at 1, 28.

161. See *supra* note 108.

162. WYO. STAT. ANN. § 14-3-205 (Michie 1977).

163. Sherman, *supra* note 150, at 24.

more intrusive than promoting, and financing, increased awareness of the effects of drug and alcohol use and increasing treatment programs. In fact, "[i]ncreased funding for programs that are designed for pregnant women and for mothers and their infants would be a constructive use of money now directed into law enforcement and foster care programs."¹⁶⁴ Treatment which is designed specifically to confront pregnant substance abusers would make far more progress towards eliminating the problem than case by case prosecution. This is beyond dispute, demonstrated by the fact that "[b]eyond the legal debate . . . all sides agree the real solution is drug rehabilitation programs, not the stop-gap measures now being taken."¹⁶⁵

Treatment options are severely limited for pregnant women. Treatment "is available for less than 10 percent of the 300,000 pregnant women who abuse illegal drugs."¹⁶⁶ Essentially, a pregnant addict is left with no choice but to have an abortion. The question thus arises whether or not the state is encouraging a woman to have an abortion by opening the door to prosecution and the possibility of incarceration if she is found to be using drugs or alcohol during her pregnancy.¹⁶⁷ Furthermore, treatment programs which are designed with the needs of women in mind are scarce.¹⁶⁸

Prosecution will not solve the fetal abuse problem. Instead of encouraging a loving and supportive relationship between the mother and her child, criminal prosecution pits the woman's self protective instinct against her maternal instinct.¹⁶⁹ Providing education to curb the abuse of alcohol and drugs, and treatment to cure it will go much farther in solving this problem. "If lawmakers are concerned with safeguarding fetal health, that worthy goal is not furthered by punishing the person most vital to the fetus's well-being but by channeling private and governmental resources into educational and rehabilitative programs that promote and provide prenatal care."¹⁷⁰ Therefore, it is up to society as a whole, and not the legal system, to develop a solution.¹⁷¹

164. Kearney, *supra* note 156 at 659.

165. Sherman, *supra* note 150, at 24.

166. FALCO, *supra* note 20, at 29.

167. "Some addicted women who recognize that they will not be able to obtain adequate prenatal care or drug treatment will be forced to turn to abortion to avoid prosecution." Kary Moss, *Substance Abuse During Pregnancy*, 13 HAR. WOMEN'S L. J. 278, 299 (1990). See also *supra* note 102 and accompanying text.

168. "Current treatment models for chemically dependent patients are based on male-oriented approaches." IRA J. CHASNOFF M.D., *DRUGS, ALCOHOL, PREGNANCY AND PARENTING* 13 (1988).

169. See generally Irwin, *supra* note 24, at 588; Kearney, *supra* note 156 at 644.

170. BUTLER & WALBERT, *supra* note 113, at 301.

171. "It is becoming increasingly evident that physicians, nurses, social workers, and other health care professionals must take the leadership in providing interventions and treatment for pregnant women, as well as developing coordinated multidisciplinary models for prenatal and postpartum

B. Utilization of Existing Laws

The dilemma posed by drug exposure *in utero* is quite clearly out of the hands of the legal profession. While it is not wise for members of the legal and criminal justice professions to intervene prior to birth, the situation changes once the child is born. Courts may become involved after birth if the child and family become involved with the child protective services program. At this point then, it is important for judges and lawyers to understand the complex social and environmental hazards associated with parental drug use, and to utilize existing laws in a manner consistent with the approach promoted throughout this comment.

In Wyoming, the local child protective agency is authorized by the legislature to investigate known or suspected child abuse, including "physical or mental injury, harm or imminent danger to the physical or mental health or welfare of a child . . . by reason of intentional or unintentional neglect."¹⁷² If a child protective agency receives a report of a child who, by reason of his mother's drug or alcohol use, is at risk of being neglected, the agency is clearly authorized to investigate the situation. The child welfare agency may then follow agency procedures in assessing risk and preparing a treatment plan. Although at the time of this intervention the *in utero* damage has been done, it is clearly not possible to protect a fetus *in utero* from drug exposure where a pregnant woman is already addicted.¹⁷³ Existing child abuse statutes are sufficient to ensure the safety of a newborn child and promote the unity of the family, as opposed to criminal prosecutions which do not.

Prosecuting pregnant women who use illegal drugs is an ineffective way to deter drug use in society. While punishment and incarceration are often used as a general deterrent, because of the nature of drug addiction,¹⁷⁴ general deterrence is not achieved where illegal drugs are involved.¹⁷⁵ If society is concerned with decreasing or eliminating the use of illegal drugs, existing laws are designed for that purpose.

care." MCCUEN, *supra* note 13, at 103.

172. WYO. STAT. ANN. § 14-3-202 (Michie Supp. 1996).

173. See *supra* notes 146-48 and accompanying text.

174. See generally *supra* notes 19-30 and accompanying text.

175. "There is very little, if any, evidence that the threat of criminal punishment deters pregnant women as a group from using drugs." John E.B. Myers, *A Limited Role for the Legal System in Responding to Maternal Substance Abuse During Pregnancy*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 747, 757 (1991).

CONCLUSION

To prosecute women for child abuse for exposing a fetus *in utero* to illegal drugs and alcohol is to stand at the top of a slippery slope. With medical knowledge regarding the possibility of harm to the fetus from any number of sources increasing every day, it is unwise and possibly unconscionable to continue the current trend of isolating and blaming mothers. Public policy supports maintaining the integrity of the family and working within existing systems (family, education, health care, etc.) to remedy problems created by drug and alcohol use generally, and specifically those created by fetal exposure to such elements.

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