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What to Expect When You're Expecting: Fetal Protection Laws that Strip Away the Constitutional Rights of Pregnant Women

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WHAT TO EXPECT WHEN YOU'RE EXPECTING: FETAL PROTECTION LAWS THAT STRIP AWAY THE CONSTITUTIONAL RIGHTS OF PREGNANT WOMEN

JENNIFER HENRICKS *

Abstract: Many states have enacted fetal protection laws as a way of promoting fetal health and combatting the problem of in utero fetal drug abuse. These laws, however, unduly compromise the constitutional rights of pregnant women, implicating a woman's rights to privacy, due process, and equal protection under the laws. Additionally, such laws compromise both maternal health and fetal health by discouraging at-risk pregnant women from seeking medical attention. Requiring procedural protections before the enforcement of fetal protection laws may mitigate the laws' extensive constitutional problems. Additionally, enacting programs that provide pregnant women with positive incentives to promote fetal health throughout their pregnancies would be more effective in promoting fetal health than fetal protection laws.

INTRODUCTION

On July 2, 2013, twenty-eight-year-old Alicia Beltran went to a clinic at St. Joseph's Hospital in Wisconsin for her first prenatal visit.¹ Then fourteen weeks pregnant, Alicia divulged a prior addiction to the painkiller Percocet when describing her medical history to the physician's assistant.² Alicia explained how she had become addicted the year before her pregnancy, but "willed herself" to stop using Percocet in November 2012.³ Because she could not afford Suboxone, a prescription drug widely used to treat drug addictions, she acquired some from a friend and weaned herself off of the Suboxone three days before her scheduled prenatal visit.⁴ The skeptical physician's assistant offered to write Alicia a Suboxone prescription, suggesting that she resume taking the medicine.⁵ Alicia declined because she had already ceased her Sub-

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¹ Erik Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. TIMES, Oct. 24, 2013, at A1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

oxone use and “[didn’t] want to go back on it.”⁶ A urine test conducted that day confirmed what Alicia had told the physician’s assistant, finding traces of Suboxone in her system but no signs of any other drugs.⁷

Two weeks later, a social worker arrived unannounced at Alicia’s home, telling Alicia that if she still refused to resume taking Suboxone, a court would order her to do so.⁸ Upset, Alicia again refused to take the unnecessary medication.⁹ On July 18, 2013, Alicia was transported in handcuffs to St. Joseph’s Hospital where she was forced to submit to a medical examination.¹⁰ She was then taken to a holding cell, and brought before a family court commissioner in shackles.¹¹ Alicia’s requests for a lawyer were denied, despite the fact that the court had appointed her fetus a legal guardian.¹² A Wisconsin law, colloquially referred to as the “cocaine mom” act¹³ gives the state the authority to forcibly confine pregnant women that use illegal substances or alcohol “to a severe degree” when there is “a substantial risk” of endangering the health of the fetus while in utero and after birth.¹⁴ Despite multiple urine tests confirming that Alicia had stopped using Percocet, she was confined to a drug treatment center

⁶ *Id.*

⁷ *Id.* When tested two weeks later, Alicia no longer had any traces of Suboxone in her system. *Id.*

⁸ *Id.*

⁹ *See id.*

¹⁰ *Id.*; Application for Writ of Habeas Corpus, *Beltran v. Loenish*, 2:2013cv01101, at 9 (E.D. Wis. Sept. 30, 2013) [hereinafter Application for Writ of Habeas Corpus]; *see* WIS. STAT. § 48.133 (2009–2010).

¹¹ Eckholm, *supra* note 1; *see* § 48.133; Application for Writ of Habeas Corpus, *supra* note 10, at 9.

¹² Eckholm, *supra* note 1; *see* § 48.133. The denial of Alicia’s requests for a lawyer was also in violation of a Wisconsin state law that guarantees that, when a petition is brought under the fetal protection statute, and contested by the expectant mother, “no expectant mother may be placed outside of her home unless the expectant mother is represented by counsel at the fact-finding hearing and subsequent proceedings.” *See* WIS. STAT. § 48.23 (2009–2010).

¹³ *See* § 48.133; Eckholm, *supra* note 1. The Wisconsin statute provides that,

The court has exclusive original jurisdiction over an unborn child alleged to be in need of protection or services which can be ordered by the court whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control. The court also has exclusive original jurisdiction over the expectant mother of an unborn child described in this section.

§ 48.133.

¹⁴ WIS. STAT. § 48.23; Eckholm, *supra* note 1.

for seventy-eight days under the threat of jail time if she refused to comply with their treatment directives.¹⁵

Bolstering the state's case against Alicia was the statement of an obstetrician at the clinic Alicia visited, stating that Alicia "openly admitted" to taking opiates while pregnant, and that she "exhibits lack of self-control . . ." adding that "[t]he child's life depends on action in this case."¹⁶ The obstetrician writing this statement, however, never personally met with or examined Alicia.¹⁷ The doctor who did examine Alicia immediately following her arrest declared both Alicia and her pregnancy healthy, declined to conduct a drug test, and stated, "that he considered in-patient treatment to be unnecessary in this case."¹⁸

After her court-ordered stay at a drug treatment center, Alicia was allowed to return home.¹⁹ Then six months pregnant, she spent the last portion of her pregnancy in fear that government officials would return once her baby was born and intervene in her relationship with her child.²⁰ In addition, as a result of her confinement, Alicia lost her job, forcing her to spend her third trimester looking for temporary work rather than enjoying what she believed was "supposed to be the happiest part of [her] pregnancy[.]"²¹

The Wisconsin law that forcibly confined Alicia to a drug treatment facility is not unique.²² Oklahoma and Minnesota have similar laws that specifically

¹⁵ Eckholm, *supra* note 1. Alicia left the facility on October 4, 2013, when the center sent her home. *Id.* While in custody, Alicia filed a petition for a writ of habeas corpus seeking immediate release from custody in the Federal District Court of the Eastern District of Wisconsin. Application for Writ of Habeas Corpus, *supra* note 10, at 9–10. In her petition, she alleged that the Wisconsin statute used to confine her violated the Due Process Clause of the Fifth and Fourteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment, and her constitutional right to privacy. *Id.* at 11–13. Alicia also alleged that the statute violated the Eighth Amendment protection against cruel and unusual punishment, the Fourth Amendment protection against unreasonable searches and seizures, the Fifth Amendment protection against self-incrimination, and the Sixth Amendment right to counsel. *Id.* at 14–15. As of publication, the court has not yet ruled on the petition. See *Beltran v. Loenish*, 2:2013-cv-01101-CNC (E.D. Wis., Sept. 30, 2013).

¹⁶ Eckholm, *supra* note 1.

¹⁷ *Id.*

¹⁸ Application for Writ of Habeas Corpus, *supra* note 10, at 9.

¹⁹ Eckholm, *supra*, note 1. Even though she never tested positive for any drug other than Suboxone, the recommendations of the obstetrician at the clinic that Alicia visited persuaded the court that Alicia needed to be confined under Wisconsin's law. *Id.* Alicia was threatened with incarceration if she refused to comply with the treatment program and thus remained at the facility until the treatment center sent her home. *Id.*

²⁰ *See id.*

²¹ *Id.*

²² *Id.*; see MINN. STAT. § 253B.065 (2012); Oklahoma Prenatal Addiction Act, OKLA. STAT. ANN. tit. 63, § 1-546.1–5 (West 2004); WIS. STAT. § 48.133 (2009–2010).

empower authorities “to confine pregnant women for substance abuse.”²³ Other states draw upon child-protection laws, civil confinements, or even criminal laws to protect the fetus from in utero harm.²⁴ The effect of these laws is to punish pregnant women for using drugs or force them into treatment programs.²⁵ The American College of Obstetricians and Gynecologists (ACOG) has stated that incarcerating or threatening to incarcerate pregnant women is an ineffective step in reducing the rates of drug and alcohol abuse among pregnant women.²⁶ Instead, the ACOG reports that these procedures discourage women from seeking the prenatal care that would greatly reduce the negative impact their substance abuse would have on their fetus.²⁷

Part I of this Note discusses the evolution of fetal rights, the development of the maternal-fetal conflict, and the introduction of fetal protection laws. Part II analyzes the modern plight of pregnant women under these laws, identifying how these laws infringe on the constitutional rights of pregnant women, compromise their maternal health, and conflict with decades of Supreme Court jurisprudence. Part III details a set of statutorily defined procedures and requirements that could be implemented to prevent fetal protection laws from being both over-inclusive and under-inclusive, and discusses an alternative method of achieving the goal of promoting fetal health in the absence of, or in lieu of, fetal protection laws.

²³ Eckholm, *supra* note 1; see MINN. STAT. § 253B.065(c) (“The court may order early intervention treatment if the court finds by clear and convincing evidence that a pregnant woman is a chemically dependent person.”); Oklahoma Prenatal Addiction Act § 1-546.1(B) (“[I]n some instances it may be necessary to use the authority of the state to intervene for the purpose of preserving and protecting the health and well-being of the child.”); S.D. CODIFIED LAWS § 34-20A-70 (2011) (instructing that a “petition [for involuntary commitment] shall allege that the person is an alcoholic or drug abuser who habitually lacks self-control as to the use of alcoholic beverages or other drugs and . . . [i]s pregnant and abusing alcohol or drugs”).

²⁴ See Krista Stone-Manista, Comment, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823, 824 (2009); Eckholm, *supra* note 1. For example, in January 2013, the Alabama Supreme Court upheld the practice of applying a chemical endangerment law, enacted for the purpose of protecting children, from the moment of conception. *Ex Parte Ankrom*, 143 So. 3d 58, 73 (Ala. 2013), withdrawn from bound volume (including unborn fetus within meaning of word “child” in Alabama child endangerment statute). *But see* State v. Stegall, 828 N.W.2d 526, 528 (N.D. 2013) (declining to apply North Dakota child endangerment statute to unborn fetus).

²⁵ Eckholm, *supra* note 1.

²⁶ The Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion No. 473: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician–Gynecologist*, 117 OBSTETRICS & GYNECOLOGY 200, 200 (2011); Eckholm, *supra* note 1.

²⁷ The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26, at 200; Eckholm, *supra* note 1.

I. DEVELOPMENT OF FETAL RIGHTS, THE MATERNAL-FETAL CONFLICT, AND THE INTRODUCTION OF FETAL PROTECTION LAWS

Historically, a fetus was viewed under the law as an inseparable part of a pregnant woman, with no independent legal rights.²⁸ There were always some limited exceptions to this rule, however, that granted the fetus limited rights in certain contexts.²⁹ These traditional exceptions typically required a fetus to be born alive, although as the fields of science and medicine have progressed, many jurisdictions have turned away from this requirement.³⁰ The modern trend is to recognize rights of an in utero fetus independent of its mother.³¹ Under a system where both mother and fetus have independent rights, when a pregnant woman's wishes conflict with the medical advice of her prenatal care provider, a maternal-fetal conflict arises.³² To address this conflict, a majority of states have enacted fetal protection laws to offer varying degrees of protection for the developing fetus.³³

²⁸ See *Roe v. Wade*, 410 U.S. 113, 162 (1973); Jean Reith Schroedel et al., *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89, 94 (2000); Scott R. DeBonis, Comment, *The Fetal-Maternal Conflict: Judicial Resolution Based Upon Constitutional Rights*, 22 OHIO N.U.L. REV. 479, 487 (1995); 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, 599 (1986); Nora Christie Sandstad, Note, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 LAW & INEQ. 171, 175 (2008).

²⁹ See, e.g., N.C. GEN. STAT. § 29-9 (2013) (allowing children unborn at the time of the decedent's death to inherit as if alive in the lifetime of the decedent, if born within 10 lunar months of the decedent's death); *Volk v. Baldazo*, 651 P.2d 11, 12 (Idaho 1982) (allowing claim for death of an unborn yet viable fetus under Idaho's wrongful death statute).

³⁰ Compare *Bonbrest v. Kotz*, 65 F. Supp. 138, 140, 142-43 (D.D.C. 1946) (allowing a cause of action on behalf of a child, once born alive, for prenatal injuries inflicted upon the child when it was a viable fetus), with *DiDonato v. Wortman*, 358 S.E.2d 489, 490 (N.C. 1987) (allowing recovery under North Carolina's Wrongful Death Act for the death of a viable yet unborn fetus), *Salazar v. St. Vincent Hosp.*, 619 P.2d 826, 829-30 (N.M. Ct. App. 1980) (including a viable fetus within the definition of "person" in New Mexico's wrongful death statute), and Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994, 1004 (1988) [hereinafter *Maternal Rights*].

³¹ See *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457, 461 (Ga. 1981) (upholding trial court's decision to order a Caesarean section performed against the wishes of the mother); DeBonis, *supra* note 28, at 487. But see *In re A.C.*, 573 A.2d 1235, 1237 (D.C. 1990) (determining that trial court's order of a forced Caesarean section was in error).

³² See Margo Kaplan, "A Special Class of Persons": *Pregnant Women's Right to Refuse Medical Treatment After Gonzales v. Carhart*, 13 U. PA. J. CONST. L. 145, 182 (2010) (describing court ordered Caesarean sections against the wishes of the mother); DeBonis, *supra* note 28, at 479-81 (describing court ordered Caesarean sections against the wishes of the mother); see, e.g., TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2010) ("A person may not withdraw or withhold life-sustaining treatment . . . from a pregnant patient.").

³³ See, e.g., MINN. STAT. § 253B.065 (2012); Oklahoma Prenatal Addiction Act, OKLA. STAT. ANN. tit. 63, § 1-546.1-.5 (West 2004); WIS. STAT. § 48.133 (2009-2010); see also Shona B. Glink, Note, *The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 1991 U. ILL. L. REV. 533, 546

A. Traditional View of Fetal Rights

Fetal rights are a relatively recent development in American jurisprudence.³⁴ In *Roe v. Wade*, the U.S. Supreme Court confirmed that “the unborn have never been recognized in the law as persons in the whole sense.”³⁵ The exceptions to this general rule give fetuses limited rights in certain contexts; for example, for inheritance purposes, a fetus that is subsequently born alive has a right to inherit as if the fetus were alive from the moment of conception.³⁶ In family law, Texas allows for the filing of suits to terminate parental rights before the birth of the fetus, and Louisiana recognizes proof of parentage, with subsequent rights to heirship and support, as a property right of an unborn child.³⁷

With regard to tort claims, the first recovery for in utero harm was awarded in 1946.³⁸ Since then, courts have heard claims regarding pre-birth injuries in tort contexts such as parental negligence, wrongful life, and medical malpractice.³⁹ Still, these exceptions traditionally hinged on a live birth occurring,

(using child abuse laws, controlled substance laws, usage laws, and homicide statutes to target the behaviors of pregnant women).

³⁴ DeBonis, *supra* note 28, at 488; Johnsen, *supra* note 28, at 599; Sandstad, *supra* note 28, at 175. Compare LA. CIV. CODE ANN. art. 26 (2013) (a fetus not born alive has never existed as a person, “except for purposes of actions resulting from its wrongful death”), and *Roe*, 410 U.S. at 162 (acknowledging that the unborn had not been legally recognized as persons), with *DiDonato*, 358 S.E.2d at 490 (allowing recovery under North Carolina’s Wrongful Death Act for the death of a viable yet unborn fetus), and *Jefferson*, 274 S.E.2d at 461 (upholding the trial court’s decision to order a Caesarean section performed against the wishes of the mother).

³⁵ *Roe*, 410 U.S. at 162.

³⁶ See, e.g., N.C. GEN. STAT. § 29-9 (2013) (allowing children unborn at the time of the decedent’s death to inherit as if alive in the lifetime of the decedent if born within ten lunar months of the decedent’s death); *Volk*, 651 P.2d at 12 (allowing claim for death of an unborn yet viable fetus under Idaho’s wrongful death statute); *Nelson v. Galveston*, 14 S.W. 1021, 1023 (Tex. 1890) (granting an unborn child the same rights to damages from deceased father’s lawsuit as a child born at the time of the involved accident); DeBonis, *supra* note 28, at 488.

³⁷ See TEX. FAM. CODE ANN. § 161.102 (West 2014); *Malek v. Yekani-Fard*, 422 So.2d 1151, 1153 (La. 1982).

³⁸ James Denison, Note, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1103, 1113 (1991); see *Bonbrest*, 65 F. Supp. at 140, 142. The U.S. District Court for the District of Columbia allowed recovery on behalf of an infant, born alive, for injuries sustained while in utero. *Bonbrest*, 65 F. Supp. at 142. The court reasoned that if the child “has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy” *Id.* at 141.

³⁹ *Curlender v. Bio-Science Labs.*, 165 Cal. Rptr. 477, 488–89 (Ct. App. 1980) (holding that genetically disabled child had valid wrongful life claim); *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1255 (Ill. 1977) (holding that prematurely born child had valid negligence claim regarding a blood transfusion occurring prior to the child’s conception); Denison, *supra* note 38, at 1113 (citing *Grodin v. Grodin*, 301 N.W.2d 869, 869–70 (Mich. Ct. App. 1981) (considering negligence and medical malpractice claims as a result of medicine taken by mother while pregnant that resulted in brown and discolored teeth for her child)).

meaning that a fetus that was not born alive would be precluded from tort recovery.⁴⁰ Most jurisdictions have now changed this rule to allow for the initiation of wrongful death suits on behalf of the fetus.⁴¹ In such cases, recovery is typically limited to situations where the fetus was medically viable at the time the tort occurred.⁴² These cases, however, are most often viewed as a way for the parents to vindicate their interest, rather than recognizing the fetus as a person with interests independent of the parents.⁴³

B. *Modern Approach to Fetal Rights*

As science has advanced, courts have granted to an in utero fetus rights independent of its mother.⁴⁴ Beginning with *Roe*, the Supreme Court first identified a government interest in protecting the health of a fetus.⁴⁵ Under *Roe*'s trimester system, the regulation of abortion was permissible only when narrowly tailored to promote a compelling state interest, with the interest of the fetus not outweighing the rights of the mother until the third trimester.⁴⁶ The Supreme Court overruled this trimester system in *Planned Parenthood v. Casey*, establishing the modern principle that the state has a legitimate interest in protecting the health of the mother and the life of the fetus from the beginning of the pregnancy.⁴⁷ Still, *Casey* dictates that a state cannot prohibit pre-

⁴⁰ *Maternal Rights*, *supra* note 30, at 1004. *But see* LA. CIV. CODE ANN. art. 26 (2013) (a fetus not born alive has never existed as a person, "except for purposes of actions resulting from its wrongful death").

⁴¹ *See, e.g., DiDonato*, 358 S.E.2d at 490 (allowing recovery under North Carolina's Wrongful Death Act for the death of a viable yet unborn fetus); *Salazar*, 619 P.2d at 830 (including a viable fetus within the definition of "person" in New Mexico's wrongful death statute); *Maternal Rights*, *supra* note 30, at 1004.

⁴² *See DiDonato*, 358 S.E.2d at 490; *Salazar*, 619 P.2d at 830; *Maternal Rights*, *supra* note 30, at 1004.

⁴³ *See Roe*, 410 U.S. at 162; *DiDonato*, 358 S.E.2d at 490. Because the fetus was not born alive as a result of the alleged tort, these claims allow parents to vindicate their interests affected by the loss of a medically viable fetus. *See Roe*, 410 U.S. at 162.

⁴⁴ *See Jefferson*, 274 S.E.2d at 461 (upholding trial court's decision to order a Caesarean section performed against the wishes of the mother); DeBonis, *supra* note 28, at 487. *But see In re A.C.*, 573 A.2d at 1243–44 (determining that trial court's order of a forced Caesarean section was in error).

⁴⁵ *See Roe*, 410 U.S. at 162; DeBonis, *supra* note 27, at 287.

⁴⁶ *See Roe*, 410 U.S. at 163–64. Reflective of historical abortion laws that made distinctions based on quickening, *Roe* established a trimester system that dictated the balance between maternal and fetal rights. *Id.* at 163. Under this framework, during the first trimester a woman has an unfettered right to abort the pregnancy. *Id.* During the second trimester, the state has a legitimate and important interest in the health of the mother, and can regulate abortion only if the regulation is designed for the health of the mother. *Id.* During the third trimester, the point at which the fetus has attained viability under the *Roe* decision, the state has an interest in protecting the fetus and can prohibit abortion, so long as there is an exception for instances when abortion would be necessary to protect the health or life of the mother. *Id.* at 163–64.

⁴⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 873 (1992).

viability abortion because, at that stage, the rights of the mother outweigh the interests of the government in protecting the health of the fetus.⁴⁸ Even after fetal viability, where the state may legally choose to restrict abortions, any restriction must maintain an exception for pregnancies that endanger the life of the mother.⁴⁹ Thus, at all stages of the pregnancy, the rights of the mother must be balanced against any rights that the fetus may have—or any government interest in protecting the fetus—and the health of the mother will always trump any such fetal interests.⁵⁰

Since the Supreme Court established fetal rights in *Roe* and reaffirmed these rights in *Casey*, the modern conflict has been over finding the right balance between mother and fetus, namely how much control a pregnant woman should have over decisions she makes during her pregnancy.⁵¹ Advancements in medical technology have made it possible for doctors to treat a fetus directly, while still in utero, rather than limiting the promotion of fetal health to focusing on maintaining maternal health.⁵² Beginning with the first fetal surgery in the early 1980s, which involved draining the urinary tract of the fetus by inserting a needle through the abdomen of the mother and into the fetus, medical science has developed increasingly more significant and invasive procedures.⁵³ In some instances, advanced technology has led to court-ordered medical procedures to promote fetal health in utero, over the wishes of the mother.⁵⁴ Some states have codified these developments, including twelve states

⁴⁸ See *id.* at 846. Viability is defined as the interim point, between conception and birth, where the fetus is “potentially able to live outside the mother’s womb, albeit with artificial aid.” *Roe*, 410 U.S. at 160. At the time of *Roe*, viability was considered to be twenty-eight weeks, but at the time of *Casey*, viability was placed earlier in the pregnancy, at twenty-three to twenty-four weeks. *Casey*, 505 U.S. at 860; *Roe*, 410 U.S. at 160. Science, rather than the courts, determines the definition of viability, and the definition has changed and may continue to change as science progresses. See *Casey*, 505 U.S. at 860.

⁴⁹ See *Casey*, 505 U.S. at 846.

⁵⁰ See *id.*; *Roe*, 410 U.S. at 163–64; Sandstad, *supra* note 28, at 177.

⁵¹ See *Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 162; DeBonis, *supra* note 28, at 483.

⁵² DeBonis, *supra* note 28, at 479.

⁵³ *Id.* at 482–83. Later procedures performed on fetuses involved removing the fetus completely from the womb, operating on the fetus, and then returning the fetus to the womb. *Id.*

⁵⁴ *Id.* at 480–81; see also *Jefferson*, 274 S.E.2d at 461 (upholding trial court’s decision to order a Caesarean section performed against the wishes of the mother). But see *In re Baby Boy Doe*, 632 N.E. 2d 326, 330 (Ill. App. Ct. 1994) (affirming lower court’s decision denying state’s motion to force performance of Caesarean section); *In re A.C.*, 573 A.2d at 1237 (determining that trial court’s order of a forced Caesarean section was in error); Kaplan, *supra* note 32, at 174 n.109 (citing *New Jersey Div. of Youth & Family Servs. v. L.V.*, 889 A.2d 1153, 1158 (N.J. Super. Ct. Ch. Div. 2005) (interpreting the New Jersey constitution to uphold right of pregnant women to refuse medical treatment “even at the risk of her death or the termination of her pregnancy”)).

that have statutes automatically invalidating a pregnant woman's advanced healthcare directives.⁵⁵

A woman's right to decide whether to deliver her baby vaginally or via Caesarean section has also played out in the courtroom.⁵⁶ In the majority of cases, natural birth is not determined to be detrimental to the fetus until the mother is already in labor.⁵⁷ When the mother refuses to allow the doctors to perform a Caesarean section, a fetal-maternal conflict arises.⁵⁸ Because of the pressing time requirements of these cases, laboring mothers are appointed counsel quickly, with no time for their attorney to investigate the constitutional rights embroiled within the issue or even meet with the mother.⁵⁹ Courts face similar time constraints, and typically "err on the side of a healthy baby."⁶⁰ Procedures are performed within hours of the issuance of the court order, meaning that appellate review is not an option until after the procedure is performed and

⁵⁵ See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2010) ("A person may not withdraw or withhold life-sustaining treatment . . . from a pregnant patient."). Marlise Munoz was kept on life support after collapsing at her home when she was fourteen weeks pregnant on November 26, 2013. Manny Fernandez, *Pregnant Woman's Life Support Ordered Cut*, N.Y. TIMES, Jan. 25, 2014, at A1. On January 24, 2014, a judge ordered the hospital to take Marlise off of life-support. *Id.* Although the U.S. Supreme Court has recognized that clear and convincing evidence of a person's wishes can be required before life-sustaining support is withdrawn, statutes similar to the one in Texas do not allow for the withdrawal of life-sustaining support regardless of how much evidence is provided of the woman's wishes. See § 166.049; *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280 (1990).

⁵⁶ See *Jefferson*, 274 S.E.2d at 461 (upholding trial court's decision to order a Caesarean section performed against the wishes of the mother); DeBonis, *supra* note 28, at 480–81. *But see In re A.C.*, 573 A.2d at 1237 (holding that trial court's order of a forced Caesarean section was in error); *In re Baby Boy Doe*, 632 N.E. 2d at 330, 335 (affirming lower court's decision denying state's motion to force performance of Caesarean section).

⁵⁷ DeBonis, *supra* note 28, at 480.

⁵⁸ *Id.*

⁵⁹ *Id.* Because the women are in labor and unable to be present at the hearing, their need for adequate representation is even more pressing. See *id.*; see also *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (holding that welfare recipient must be allowed to retain an attorney, if desired, for a pre-termination hearing). "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Goldberg*, 397 U.S. at 270 (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)). In contrast, the fetus has guaranteed representation through the state actor petitioning for performance of the Caesarean section. See *In re Baby Boy Doe*, 632 N.E. 2d at 328 (fetus appointed guardian ad litem); Eckholm, *supra* note 1 (fetus appointed counsel).

⁶⁰ DeBonis, *supra* note 28, at 480–81. "In eighty-eight percent of known cases, court orders for Caesarean sections were obtained in less than six hours, with nineteen percent being obtained in one hour or less." *Id.* at 492. Overriding the mother's wishes and performing a Caesarean section exposes the woman to an invasive and major abdominal surgery, with a much longer recovery time than a natural vaginal delivery and a risk to the pregnant woman's life that is four to five times greater. Kaplan, *supra* note 32, at 182. Ten percent of patients who undergo a Caesarean section will require a blood transfusion for excessive hemorrhaging, and women who undergo a Caesarean section will often require a Caesarean section in any future pregnancies. *Id.* at 182–83.

the issue has become moot.⁶¹ In the rare cases where the decisions were reviewed by an appellate court, these courts have split over deciding whether a physical intrusion into the mother's body for the sake of the fetus is justified.⁶² In a case with highly uncommon circumstances, a pregnant woman was informed that she would need to deliver via Caesarean section several weeks before going into labor, allowing the Illinois Appellate Court enough time to review the case prior to the performance of the Caesarean section.⁶³ The court refused to employ a balancing test, holding that "a woman's competent choice to refuse medical treatment as invasive as a cesarean [sic] section during pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus."⁶⁴ Both mother and baby were healthy, after a natural delivery.⁶⁵

Advancements in medical technology have also made it possible for doctors to have a clearer understanding of the types of activities that pregnant women engage in that are correlated with birth defects or other health consequences for the fetus.⁶⁶ Traditionally, doctors have provided pregnant women with a list of recommendations and restrictions, encouraging them to eat certain foods while staying away from substances that would be harmful to the developing fetus.⁶⁷ States such as Wisconsin have gone one step farther and

⁶¹ DeBonis, *supra* note 28, at 481; *see In re A.C.*, 573 A.2d at 1237 (vacating trial court's decision ordering performance of the Caesarean section months after the procedure was performed and both the mother and fetus died as a result).

⁶² *See Jefferson*, 274 S.E.2d at 461 (upholding a Caesarean section performed against the mother's wishes). *But see In re A.C.*, 573 A.2d at 1237, 1241 (finding trial court's order of a forced Caesarean section was in error after procedure performed and both mother and fetus died); *In re Baby Boy Doe*, 632 N.E. 2d at 330, 335 (denying state's motion to force the performance of Caesarean section).

⁶³ *See In re Baby Boy Doe*, 632 N.E.2d at 327, 329. Doe was informed at thirty-five weeks of gestation that her viable fetus was receiving insufficient oxygen and the safest option for the fetus was to perform a Caesarean section or induce labor. *Id.* at 327. In an emergency hearing before the Illinois Circuit Court, the court denied the state's request for a court order requiring Doe to undergo an emergency Caesarean section to deliver the fetus. *Id.* at 327–28. Three days later, an Illinois Appellate Court affirmed this decision. *Id.* at 329.

⁶⁴ *Id.* at 326.

⁶⁵ *Id.* at 329. Although somewhat underweight, Doe's baby boy appeared to be normal and healthy after a non-induced vaginal delivery. *Id.* The Supreme Court denied a petition for writ of certiorari. *In re Baby Boy Doe*, 632 N.E.2d 326, *cert. denied*, 62 U.S.L.W. 3574 (U.S. Feb. 28, 1994) (No. 93-7437). Scholars highlight this case as an example of the "inherently imprecise" nature of medicine, with risks of potential harm to the fetus and the need for court-ordered intervention often overestimated by physicians. Kaplan, *supra* note 32, at 170. In six of the twenty-one cases reported, as of 1987, where court orders compelling treatment of pregnant women were sought, doctors incorrectly assessed the potential harm that would occur to the fetus. *Id.* at 171 n.103 (citing Robin M. Trindel, Comment, *Fetal Interests vs. Maternal Rights: Is the State Going Too Far?*, 24 AKRON L. REV. 743, 757 (1991)).

⁶⁶ *See Denison*, *supra* note 38, at 1110–11.

⁶⁷ *See id.*; *see also* The American College of Obstetrics and Gynecology, *Frequently Asked Questions: Nutrition During Pregnancy*, AM. COLL. OBSTETRICS & GYNECOLOGY (Sept. 2013),

codified some of these recommendations, namely those involving alcohol and drug use, into mandates that a mother now must follow under so-called “fetal protection laws.”⁶⁸

C. Development of Fetal Protection Laws

Statutes used to protect fetuses fall into two general categories.⁶⁹ The first category contains statutes specifically enacted to protect the fetus from acts of violence.⁷⁰ These acts are largely designed to target fetal homicide and other similar acts of violence against the fetus, or acts of violence against pregnant women that result in harm to the fetus.⁷¹ Historically under American common law, for a fetus to be “murdered,” the fetus needed to be born alive and subsequently die because of injuries sustained in utero.⁷² Currently, the majority of jurisdictions—including the federal government—no longer require the fetus to be born alive for the fetus to be considered a victim of violence.⁷³ Some states have expanded their statutory definitions of “victims” or “persons” to include fetuses, while other states have enacted separate feticide laws.⁷⁴ Cur-

<http://www.acog.org/~media/For%20Patients/faq001.pdf?dmc=1&ts=20140226T1155441611> [hereinafter *Nutrition During Pregnancy*] (recommending pregnant women ingest daily prenatal vitamins but avoid foods such as swordfish and cold cuts).

⁶⁸ See, e.g., WIS. STAT. § 48.133 (2009–2010).

⁶⁹ See, e.g., Unborn Victims of Violence Act of 2004 § 2, 18 U.S.C. § 1841 (2012) (codifying federal law enacted specifically for the protection of the fetus from acts of violence); Glink, *supra* note 33, at 546 (using child abuse laws, controlled substance laws, usage laws, and homicide statutes to target the behaviors of pregnant women).

⁷⁰ See, e.g., Unborn Victims of Violence Act of 2004 § 2.

⁷¹ See *id.*; Jennifer A. Brobst, *The Prospect of Enacting an Unborn Victims of Violence Act in North Carolina*, 28 N.C. CENT. L.J. 127, 135 (2006).

⁷² See Brobst, *supra* note 71, at 133. Being “born alive” typically required the fetus to engage in some activity, such as breathing independently after the cutting of the umbilical cord, that demonstrated the existence of the fetus separate from the mother. *Id.* Pregnant women were rarely prosecuted for causing or contributing to the death of the injured fetus under these born alive laws. *Id.* at 133–34.

⁷³ See Unborn Victims of Violence Act of 2004 § 2 (federal statute making it a separate offense to cause death or bodily injury to a fetus in utero). Under the Unborn Victims of Violence Act, the punishment for causing death or bodily injury to a fetus is the same as the punishment for the harm or death that occurred to the pregnant woman, regardless of whether the perpetrator had knowledge of the pregnancy. *Id.* When a perpetrator intentionally kills or attempts to kill a fetus, punishment is equated with the punishment for “intentionally killing or attempting to kill a human being.” *Id.*; see also MD. CODE ANN. CRIM. LAW § 2-103 (LexisNexis 2014) (criminal liability for murder or manslaughter of a viable fetus); Brobst, *supra* note 71, at 140. Some states limit their definition of “victim” to viable fetuses, while other states protect fetuses from the moment of conception. *Id.*

⁷⁴ See Brobst, *supra* note 71, at 136 (citing GA. CODE ANN. § 16-5-80 (2014) (Georgia feticide statute)); IDAHO CODE ANN. §§ 18-4001, -4006 (2014) (including a fetus as a victim of murder and manslaughter, respectively); see also Sandstad, *supra* note 28, at 183 (naming Missouri, Louisiana, and Texas among states expanding definition of “person” to include fetus).

rently, thirty-eight states enforce some form of fetal homicide laws.⁷⁵ Four states continue to follow the common law “born alive” rule.⁷⁶

The second category of laws utilized for fetal protection target the behaviors of pregnant women that may harm the fetus.⁷⁷ Many states use existing laws to try and accomplish this goal, painting pregnant women as perpetrators against their fetuses.⁷⁸ Child abuse laws,⁷⁹ child endangerment laws,⁸⁰ controlled substance statutes,⁸¹ usage laws,⁸² and even homicide statutes⁸³ have

⁷⁵ Ruth Graham, *Whose Rights?*, BOS. GLOBE, Feb. 16, 2014, at K1; National Conference of State Legislatures, *Fetal Homicide State Laws*, NAT’L CONF. ST. LEGISLATURES (Feb. 2013), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> [hereinafter *Fetal Homicide State Laws*] (listing the states with fetal protection laws). Typically passed after a highly publicized tragedy, these laws are usually framed as a means of protecting pregnant women from acts of violence. See Graham, *supra*. Twenty-three of these states clearly include a fetus as a victim of homicide from the point of conception. *Fetal Homicide State Laws, supra*.

⁷⁶ See Brobst, *supra* note 71, at 143; *Fetal Homicide State Laws, supra* note 75. The four states are Connecticut, New Jersey, New York, and Vermont. See Brobst, *supra* note 71, at 143; *Fetal Homicide State Laws, supra* note 75.

⁷⁷ See, e.g., Glink, *supra* note 33, at 546 (citing S.C. CODE ANN. § 20-7-50 (Law Co-op. 1976 & Supp. 1990) (considering laws used to charge woman when urine tested positive for cocaine immediately after she delivered her child)); Sandstad, *supra* note 28, at 179–80 (discussing the laws used to charge woman who was four months pregnant seeking medical treatment for domestic violence injuries when tests showed increased blood alcohol level).

⁷⁸ Glink, *supra* note 33, at 546 (using child abuse laws, controlled substance laws, usage laws, and homicide statutes to target the behaviors of pregnant women); Sandstad, *supra* note 27 at 179–80 (using child endangerment laws and child abuse laws to prosecute women for drug use during pregnancy); Stone-Manista, *supra* note 24, at 825, 829 (using child endangerment laws and controlled substance statutes to prosecute women for drug use during pregnancy). Between 1985 and 2000, thirty-four states prosecuted pregnant women for “fetal abuse” under a variety of criminal statutes. Schroedel et al., *supra* note 28, at 102.

⁷⁹ Schroedel et al., *supra* note 28, at 94; Glink, *supra* note 33, at 546 (citing S.C. CODE ANN. § 20-7-50 (Law Co-op. 1976 & Supp. 1990) (considering laws used to charge woman when urine tested positive for cocaine immediately after she delivered her child)); Sandstad, *supra* note 28, at 179–80 (discussing laws used to charge woman who was four months pregnant seeking medical treatment for domestic violence injuries when tests showed increased blood alcohol level). “Although some family courts, in the noncriminal context, hold that the presence of illegal substances in the bloodstream or urine of a newborn constitutes per se neglect, these courts are ruling on the custody of the child and not the criminal liability of the mother.” Glink, *supra* note 33, at 549, 551.

⁸⁰ Schroedel et al., *supra* note 28, at 94; Sandstad, *supra* note 28, at 180–82; Stone-Manista, *supra* note 24, at 825.

⁸¹ Glink, *supra* note 33, at 549; Stone-Manista, *supra* note 24, at 829; see *Johnson v. State*, 602 So.2d 1288, 1297 (Fla. 1992) (overturning woman’s conviction for delivering controlled substances to minors because she transferred illegal drugs to her fetus via the umbilical cord); Patrick Reardon, *Grand Jury Won’t Indict Mother in Baby’s Drug Death*, CHI. TRIB. (May 27, 1989), http://articles.chicagotribune.com/1989-05-27/news/8902040602_1_indict-grand-jury-perinatal-addiction-research (noting court’s refusal to indict woman on charges of involuntary manslaughter and delivery of a controlled substance for use of cocaine while pregnant that resulted in fetus’s death after birth).

⁸² See Glink, *supra* note 33, at 551. Although only existing in a minority of states, these statutes make the mere presence of drugs in the bloodstream of an individual a crime. *Id.* As applied to pregnant women, presence of illegal drugs in a newborn’s bloodstream would be enough for a conviction. *Id.*

been applied to pregnant women for actions taken while pregnant in the name of fetal protection.⁸⁴ Scholars criticize such statutory interpretation that includes fetuses as potential victims as an abuse of judicial discretion, raising both constitutional and jurisdictional issues.⁸⁵ Some state appellate courts agree and have struck down convictions of pregnant women based on broad statutory interpretation, although other state appellate courts continue to support prosecution under these laws.⁸⁶

States such as Wisconsin have enacted statutes specifically designed to protect the fetus by targeting the behavior of pregnant women.⁸⁷ These statutes specifically created for fetal protection give states expansive jurisdiction over fetuses while still in utero.⁸⁸ Under the Wisconsin law, the court has exclusive original jurisdiction over both the unborn child and the expectant mother when an expectant mother

habitually lacks self-control in the use of alcohol beverages, controlled substances, or controlled substance analogs, exhibited to a

⁸³ Schroedel et al., *supra* note 28, at 94; *see* Sandstad, *supra* note 28, at 179, 182; *see also* Rear-don, *supra* note 81 (noting a mother charged with involuntary manslaughter for allegedly consuming drugs while pregnant); Associated Press, *Mom gets Probation in C-Section Case*, TUSCALOOSA NEWS, Apr. 30, 2004, at 4A (profiling woman charged with murder for delaying a Caesarean section that could have saved the life of one of her twins who pled guilty to child endangerment and received eighteen months' probation).

⁸⁴ *See* Johnson v. State, 602 So.2d 1288, 1297 (Fla. 1992) (overturning woman's conviction for delivering controlled substances to minors because she transferred illegal drugs to her fetus via the umbilical cord); Associated Press, *supra* note 83 (profiling woman charged with murder for delaying a Caesarean section that could have saved the life of one of her twins who pled guilty to child endangerment and received eighteen months' probation).

⁸⁵ *See* Kristen Burgess, Comment, *Protective Custody: Will It Eradicate Fetal Abuse and Lead to the Perfect Womb?*, 35 HOUS. L. REV. 227, 265–66 (1998); Glink, *supra* note 33, at 558–59. Critics argue that this is a decision better left to state legislatures and interpreting these statutes in a way that makes them applicable to fetuses frustrates legislative intent. *See* Burgess, *supra*, at 266; Glink, *supra* note 33, at 559. Other critics note that such statutory interpretation is a way of divesting pregnant women of the personal jurisdiction requirement that acts as a procedural safeguard. *See* Burgess, *supra*.

⁸⁶ *See* Stone-Manista, *supra* note 24, at 830; *see also* State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992) (holding that transmitting drugs through umbilical cord is not grounds for prosecution under state drug transmission statutes because of statutory requirement that drugs be passed between persons “outside of their bodies”); Sheriff v. Encoe, 885 P.2d 596, 599 (Nev. 1994) (holding that transmitting illegal substances to newborn child through the umbilical cord does not allow for prosecution of mother under state child endangerment statute). *But see* Ex Parte Ankrom, 143 So. 3d 58, 73 (Ala. 2013), withdrawn from bound volume (applying state child endangerment statute to unborn fetuses, beginning from the moment of conception); Whitner v. State, 492 S.E.2d 777, 778 (S.C. 1997) (upholding prosecution of new mother under state criminal child neglect statute for injuries resulting from mother's prenatal substance abuse).

⁸⁷ *See* WIS. STAT. § 48.133 (2009–2010).

⁸⁸ *See id.* (giving courts “exclusive original jurisdiction over an unborn child alleged to be in need of protection or services . . . [and] exclusive original jurisdiction over the expectant mother of an unborn child described in this section”).

severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment⁸⁹

The lack of guidance as to what is meant by a “habitual lack of self-control” that is “exhibited to a severe degree,” or what constitutes a “substantial risk” to the health of the fetus leaves a large portion of the law up to the discretion of the Wisconsin judiciary.⁹⁰

II. THE MODERN PLIGHT OF PREGNANT WOMEN UNDER FETAL PROTECTION LAWS

As states have transitioned from the common law approach, in which rights attach only to fetuses born alive, to the modern approach of enacting new statutes or pursuing statutory interpretations that protect fetuses, fetal rights have continued to increase.⁹¹ This increase in rights, however, comes at the expense of pregnant women.⁹² Fetal protection laws designed to protect the fetus by targeting the prenatal behavior of pregnant women conflict with established constitutional rights of these women.⁹³ Additionally, many scholars believe that these efforts to protect the fetus have the unfortunate side effect of compromising maternal health, which in turn puts fetal health at risk.⁹⁴

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *See* Unborn Victims of Violence Act of 2004, §§ 2–3, 18 U.S.C. § 1841 (2012) (federal statute protecting fetus from acts of violence); WIS. STAT. § 48.133 (Wisconsin has jurisdiction over unborn child in need of protection or services); Glink, *supra* note 33, at 546 (discussing the use of child abuse laws, controlled substance laws, usage statutes, and homicide statutes to target the behaviors of pregnant women).

⁹² *See* Denison, *supra* note 38, at 1130, 1136 (noting that fetal protection laws compromise pregnant woman’s right to privacy and endanger her health); Glink, *supra* note 33, at 563 (arguing that fetal protection laws violate equal protection clause by placing extra burdens on pregnant women, rather than benefits).

⁹³ *See* U.S. CONST. amend. XIV, § 1 (stating that no person can be deprived of “life, liberty, or property, without due process of law . . . [nor shall any State] deny to any person within its jurisdiction the equal protection of the laws”); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (affirming a right to privacy implicit within the Constitution); Schroedel et al., *supra* note 28, at 107; Stone-Manista, *supra* note 24, at 827.

⁹⁴ *See* Schroedel et al., *supra* note 28, at 105; Stone-Manista, *supra* note 24 at 830; *see also* Denison, *supra* note 38, at 1112, 1130 (noting that detoxification process poses risks to maternal and fetal health); Eckholm, *supra* note 1 (discussing how the threat of incarceration/punishment discourages honesty with physicians and deters pregnant women from seeking prenatal care).

A. *Infringement on the Constitutional Rights of Pregnant Women*

Fetal protection laws conflict with a pregnant woman's established constitutional rights to privacy, due process, and equal protection.⁹⁵ The Supreme Court has recognized a right to privacy implicit within the Constitution as the basis for rights such as abortion.⁹⁶ The due process clauses of the Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life, liberty, or property without due process of law.⁹⁷ The equal protection clause of the Fourteenth Amendment guarantees equal protection of the laws to all persons.⁹⁸ By intruding into private aspects of women's pregnancies without the protection of procedural safeguards, fetal protection laws compromise a pregnant woman's right to these critical constitutional protections.⁹⁹

1. Right to Privacy

The right to privacy is grounded in the guarantee of liberty in the due process clause of the Fourteenth Amendment and encompasses rights such as "personal autonomy" and "bodily integrity," including the right to abortion.¹⁰⁰ Also protected within the right to privacy is the ability to make decisions that have an impact on the realms of family and marriage without any governmental intrusion.¹⁰¹

⁹⁵ See Schroedel et al., *supra* note 28, at 107; Denison, *supra* note 38, at 1129, 1136; Glink, *supra* note 33, at 563; Stone-Manista, *supra* note 24, at 827.

⁹⁶ See *Roe*, 410 U.S. at 152.

⁹⁷ See U.S. CONST. amend. XIV, § 1 (no state shall "deprive any person of life, liberty, or property, without due process of law").

⁹⁸ See *id.*

⁹⁹ See Schroedel et al., *supra* note 28, at 107; Stone-Manista, *supra* note 24, at 827; see also U.S. CONST. amend. XIV, § 1 (no person can be deprived of "life, liberty, or property, without due process of law . . . [nor shall any State] deny to any person within its jurisdiction the equal protection of the laws"); *Roe*, 410 U.S. at 152 (right to privacy implicit within Constitution).

¹⁰⁰ Glink, *supra* note 33, at 562; see *Roe*, 410 U.S. at 152. The right to personal autonomy and bodily integrity describes an individual's right to have control over his or her own self, free from government intervention. See Kaplan, *supra* note 32, at 164; Schroedel et al., *supra* note 28, at 109; Glink, *supra* note 33, at 562; Johnsen, *supra* note 28, at 615; see also Sandstad, *supra* note 28, at 195 ("[T]he Supreme Court has consistently upheld an individual's right to privacy . . ."). This right "to be let alone" has long been upheld by the Court. See, e.g., *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."); *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person . . .").

¹⁰¹ See Schroedel et al., *supra* note 28, at 109; Glink, *supra* note 33, at 562; Sandstad, *supra* note 28, at 195; see also *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (holding that the right to marry is included within right to privacy). While pregnancy itself has yet to be addressed by the Supreme Court under the privacy framework, scholars suggest that pregnancy "fits into the stage between [other] protected activities," such as sexual intercourse and childrearing, and "logically deserves the safe-

The Supreme Court has considered the right to privacy to be a fundamental right, which requires that courts apply strict scrutiny in analyzing laws that curtail the right to privacy.¹⁰² Under this standard, laws must be narrowly tailored to serve a compelling state interest.¹⁰³ In *Planned Parenthood v. Casey*, the Court analyzed the progression of the government's interest in protecting the health of the mother from "legitimate" to compelling.¹⁰⁴ *Casey* acknowledged that the government has a legitimate interest in protecting the health of the mother and the life of the fetus from the beginning of the pregnancy.¹⁰⁵ This interest becomes compelling at the point of viability.¹⁰⁶ The *Casey* Court also concluded that the rights of the mother outweigh the interests of the government in protecting the health of the fetus before the fetus is viable.¹⁰⁷

In contrast, fetal protection laws do not afford a similar level of deference to the interests of pregnant women prior to the viability of the fetus.¹⁰⁸ Fetal protection laws such as Wisconsin's do not distinguish between periods of pregnancy the way that abortion laws must under Supreme Court precedent, which establishes a period during which a woman may legally choose to terminate her pregnancy.¹⁰⁹ The practical implication of this lack of distinction in fetal protection laws is that, under these laws, a woman could be confined or restricted because she is allegedly harming her fetus even when she could still choose to legally end her pregnancy under abortion jurisprudence.¹¹⁰ This significantly compromises a pregnant woman's constitutionally established right to privacy because her confinement under fetal protection laws prevents her

guard of privacy." Sandstad, *supra* note 28, at 195–96; see Michelle D. Mills, Comment, *Fetal Abuse Prosecutions: The Triumph of Reaction over Reason*, 47 DEPAUL L. REV. 989, 1022 (1998).

¹⁰² DeBonis *supra* note 28, at 487; see *United States v. Carolene Prods. Co.*, 304 U.S. 134, 152 n.4 (1938) (predicting the need for heightened scrutiny in cases involving fundamental rights). *But see* *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (replacing strict scrutiny with an "undue burden" standard within the limited context of abortion).

¹⁰³ See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) ("The means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.")); Schroedel et al., *supra* note 28, at 109; DeBonis, *supra* note 28, at 487.

¹⁰⁴ See *Casey*, 505 U.S. at 846.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 860.

¹⁰⁷ See *id.* at 846.

¹⁰⁸ See, e.g., WIS. STAT. § 48.133 (2009–2010) (stating that a court's jurisdiction over fetus and pregnant woman not dependent on whether fetus has attained viability).

¹⁰⁹ See *id.*; see also WIS. STAT. § 940.15 (2009–2010) (women able to receive abortion at any point before fetus reaches viability); Eckholm, *supra* note 1.

¹¹⁰ See § 48.133; see also § 940.15 (women able to receive abortion at any point before fetus reaches viability); Eckholm, *supra* note 1 (describing how Alicia was confined at fourteen weeks, when she could still have obtained an abortion, yet released when she was six months pregnant and could no longer legally receive an abortion).

from exerting control over her own body, and she cannot make her own choices regarding her health and body.¹¹¹

Although the use of illicit drugs is not included within the right to privacy, the right to privacy does protect a woman's physical autonomy.¹¹² Fetal protection laws implicate a woman's physical autonomy because they force women to undergo drug treatment simply because they are pregnant.¹¹³ This type of physical invasion, meant to effectuate the state interest in protecting the fetus, is a serious physical intrusion on the privacy rights of a pregnant woman.¹¹⁴ American common law is "quite clear" that, when one individual's bodily integrity conflicts with the needs of another individual's bodily integrity, there exists no obligation to sacrifice oneself, "even if the harm were minimal and the benefit to the other great."¹¹⁵ Fetal protection laws undercut this notion by forcing a pregnant woman to undergo drug treatment for the benefit of her fetus.¹¹⁶

2. Right to Due Process

Lack of access to attorneys during pre-confinement hearings, the unique problems posed by the potentially long-lasting effects of substance use by pregnant women, and the lack of a knowledge or intent requirement in fetal protection laws all conflict with due process and present a need for procedural safeguards within these laws.¹¹⁷ Under the due process clause of the Fourteenth Amendment, no state shall "deprive any person of life, liberty, or prop-

¹¹¹ See Denison, *supra* note 38, at 1136; see also Eckholm, *supra* note 1.

¹¹² See Denison, *supra* note 38, at 1136–37.

¹¹³ See § 48.133; Denison, *supra* note 38, at 1136.

¹¹⁴ See Denison, *supra* note 38, at 1136. The law has provided violent criminal offenders with greater protection in the realm of personal autonomy than fetal protection laws provide pregnant women. Compare *Winston v. Lee*, 470 U.S. 753, 755 (1985) (holding Court would not order performance of surgery to remove bullet from suspect's head that would provide evidence of the crime), and *Rochin v. California*, 342 U.S. 165, 166, 174 (1952) (holding that involuntary pumping of criminal suspect's stomach to retrieve evidence violated the 14th amendment), with § 48.133 (allowing involuntary treatment for substance abuse for pregnant women).

¹¹⁵ Sandstad, *supra* note 28, at 197 (quoting Amy F. Cohen, *The Midwifery Stalemate and Child-birth Choice: Recognizing Mothers-to-Be as the Best Late Pregnancy Decisionmakers*, 80 IND. L. J. 849, 871 (2005)).

¹¹⁶ See Kaplan, *supra* note 32, at 188; Sandstad, *supra* note 28, at 197. Scholars contrast the notion of forcing a pregnant woman to make certain medical decisions for the good of her fetus with the lack of duty that runs between a parent and a child that has been born. See Kaplan, *supra* note 32, at 188; Schroedel et al., *supra* note 28, at 109. For example, a parent would not be legally required to donate bone marrow to his or her child, even if the bone marrow transplant was necessary to save the life of the child. Kaplan, *supra* note 32, at 188. Even a procedure as simple and non-invasive as a blood test cannot be forced upon a parent by his or her child. Schroedel et al., *supra* note 28, at 109.

¹¹⁷ See § 48.133; *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); Denison, *supra* note 38, at 1112, 1127; Eckholm, *supra* note 1.

erty, without due process of law”¹¹⁸ As interpreted by the Supreme Court, “[t]he fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner.”¹¹⁹ In cases such as Alicia Beltran’s, discussed in the introduction of this Note, where a deprivation of liberty hinges on contested factual premises, this principle requires both adequate and timely notice delineating the reasons for the proposed loss of liberty, as well as the opportunity to confront any adverse witnesses and orally present one’s own arguments and evidence.¹²⁰

In *Mathews v. Eldridge*, the Supreme Court created a test for balancing the governmental interest with an individual’s private interest, while protecting the due process rights of the individual.¹²¹ In analyzing whether existing procedural protections for deprivation of life, liberty, or property are sufficient, courts are directed to balance the private interest with the government interest.¹²² Courts must first look at the private interest that will be affected by the governmental action.¹²³ Second, courts must assess the risk of an erroneous deprivation of this interest through the current procedures and the value that new or improved procedural safeguards would add.¹²⁴ Finally, courts must balance these two factors with the government’s interest, including determining what, if any, burden additional procedures would place on the government.¹²⁵ The more important the privacy interest, the more procedural safeguards the court will require.¹²⁶ Conversely, the higher the burden on the government to

¹¹⁸ U.S. CONST. amend. XIV, § 1.

¹¹⁹ *Goldberg*, 397 U.S. at 267 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

¹²⁰ *See id.* at 267–68; Eckholm, *supra* note 1. Within family law, the Court has been inconsistent on the degree of due process that is required in the context of parental rights where no loss of physical liberty will occur based on the outcome of the litigation. *Compare* *Little v. Streater*, 452 U.S. 1, 16 (1981) (holding that failing to provide indigent defendant with paternity test was violation of due process), *with* *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26–27, 33 (1981) (holding that failing to provide indigent defendant with counsel was not violation of due process because no loss of physical liberty would occur as result of litigation). In contrast, actions involving fetal protection laws often involve a deprivation of liberty, so there is no reason to anticipate the Court deviating from its standard interpretation of due process with regards to these cases. *See* WIS. STAT. § 48.133 (2009–2010); *Lassiter*, 452 U.S. at 26–27; Eckholm, *supra* note 1. As typically applied within the drug context, fetal protection laws allow states to forcibly commit pregnant women to drug rehabilitation facilities for the duration of the pregnancy. *See* § 48.133; Eckholm, *supra* note 1.

¹²¹ *See* *Little*, 452 U.S. at 13; *Mathews*, 424 U.S. at 335. In *Mathews*, a recipient of Social Security disability benefits alleged a due process violation after his benefits were terminated without a hearing. 424 U.S. at 324–25.

¹²² *See* *Mathews*, 424 U.S. at 335.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See id.*

provide additional procedural protections, the less likely the court will be to require additional procedures.¹²⁷

Because the government's interest in promoting the health of the fetus conflicts with the maternal interest, the *Mathews* test is appropriate to apply to fetal protection laws.¹²⁸ In applying the *Mathews* factors to fetal protection laws, the private interest at stake—loss of liberty—is an important interest that will tend towards the addition of procedures.¹²⁹ The Supreme Court has repeatedly held that involuntary commitment produces “a massive curtailment of liberty” that necessitates the protections of due process.¹³⁰ As Alicia Beltran's case demonstrates through her forced confinement into a rehabilitation facility despite multiple negative drug tests, the potential risk of erroneously stripping pregnant women of their liberty under current procedures is likely high, and could be mitigated by additional procedural safeguards.¹³¹ The burden on the government of providing additional procedural safeguards would likely be minimal in situations such as Alicia's where the government is already bearing the costs of providing the pregnant woman with a hearing.¹³²

A pregnant woman's ability to have a lawyer present when challenging her confinement under fetal protection laws stems from her right to due process under the laws.¹³³ Alicia's inability to have a lawyer present at her hearing conflicts with the Supreme Court's ruling in *Goldberg v. Kelly*.¹³⁴ In *Goldberg*, the Court reaffirmed its statements from *Powell v. Alabama*, that “the right to be heard would be, in many cases, of little avail if it did not comprehend the

¹²⁷ See *id.*

¹²⁸ See *id.* at 334–35; Kaplan, *supra* note 32, at 167 n.88 (discussing the nature of the conflict).

¹²⁹ See *Mathews*, 424 U.S. at 340 (holding that termination of disability benefits did not require additional procedures because not based on financial need); *Goldberg*, 397 U.S. at 269 (holding that termination of welfare benefits required additional due process protections because potentially eligible recipients would have been denied means by which they live while resolution of dispute over termination was pending). In *Goldberg*, the Court identified the ability to cross-examine witnesses as a necessity to due process when important decisions will turn on factual issues. 397 U.S. at 269. Under fetal protection laws, due process concerns are implicated because of the threat of the mother's loss of liberty when faced with confinement. See WIS. STAT. § 48.133 (2009–2010); Eckholm, *supra* note 1.

¹³⁰ *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); see *Addington v. Texas*, 441 U.S. 418, 425 (1979).

¹³¹ See Eckholm, *supra* note 1. Procedural safeguards such as providing Alicia with an attorney at her hearing, or only applying fetal protection laws to women who test positive for drugs would have likely led to a different outcome for Alicia. See *id.*

¹³² See *id.* In Alicia's case, the government already assumed the financial burden of holding a hearing and providing Alicia's fetus with a lawyer at this hearing. *Id.* The additional cost of also providing Alicia with a lawyer, or simply allowing her the time necessary to consult with a lawyer before the hearing would be minimal, especially in light of the Wisconsin law that purports to provide expectant mothers with attorneys at these hearings. See WIS. STAT. § 48.23; Eckholm, *supra* note 1.

¹³³ See U.S. CONST. amend. XIV, § 1; *Goldberg*, 397 U.S. at 270.

¹³⁴ See *Goldberg*, 397 U.S. at 270; Eckholm, *supra* note 1.

right to be heard by counsel.”¹³⁵ While the Court did not hold that counsel must be provided in all civil cases, the Court stated that individuals “must be allowed to retain an attorney if [they] so desire[.]”¹³⁶

Fetal protection laws involving a pregnant woman’s substance use present a unique need for procedural safeguards to protect maternal rights.¹³⁷ Because drug-induced birth defects in babies have been traced to mothers’ drug consumption years before conception, women who used drugs years prior to conception may still give birth to a child with drug-related birth defects.¹³⁸ With no way of definitively proving at what point in time a woman’s drug use may have harmed her fetus, procedural safeguards help distinguish between women who actively used drugs while pregnant and women whose drug consumption years prior to their pregnancy was the cause of fetal harm.¹³⁹ Women who ceased drug use immediately upon learning of their pregnancy, but had already unknowingly harmed their fetus would also be protected through procedural safeguards.¹⁴⁰

Another element of fetal protection statutes that compromises a pregnant woman’s right to due process is the lack of a knowledge or intent requirement in the statutes.¹⁴¹ Without having some sort of requirement that a woman knew or should have known of her pregnancy before liability attaches, a woman unaware of her pregnancy could face convictions for fetal abuse, with no regard for whether her substance abuse continued after she became aware of her pregnancy.¹⁴² Although women using illicit drugs would already be committing a crime, women who consumed alcoholic beverages would have no reason to suspect they were in violation of a law, yet could still be confined under statutes similar to that which is in place in Wisconsin.¹⁴³

¹³⁵ *Goldberg*, 397 U.S. at 270 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

¹³⁶ *Id.*

¹³⁷ See *Denison*, *supra* note 38, at 1112.

¹³⁸ *Id.* at 1112 & n.63; Allen S. Goldman, *Critical Periods of Prenatal Toxic Insults*, in *DRUG AND CHEMICAL RISKS TO THE FETUS AND NEWBORN* 9, 10 (Richard H. Schwarz & Sumner J. Yaffe eds., 1980). Even if the woman never used drugs, exposure to drugs while she was in utero and her ovaries were developing can produce effects in her offspring. Goldman, *supra*, at 11.

¹³⁹ See *Denison*, *supra* note 38, at 1112.

¹⁴⁰ See *id.* (stating the most serious damage to long-term health and survival of fetus may occur during the early months of pregnancy). In Alicia’s case, because she was denied access to a lawyer at her hearing, she was likely unable to adequately represent her interests and challenge the critical testimony of the obstetrician from the clinic that had never examined her. See *Goldberg*, 397 U.S. at 267–68; Eckholm, *supra* note 1.

¹⁴¹ See, e.g., WIS. STAT. § 48.133 (2009–2010); see *Denison*, *supra* note 38, at 1125. Women who conscientiously use contraception yet fall within the small percentage for whom birth control fails would have no reason to suspect a pregnancy until several weeks or months into the pregnancy when they start observing the symptoms and signs of a pregnancy. See *Denison*, *supra* note 38 at 1129.

¹⁴² See *Denison*, *supra* note 38, at 1127.

¹⁴³ See § 48.133; *Denison*, *supra* note 38, at 1127.

3. Right to Equal Protection

Although the Fourteenth Amendment guarantees equal protection to all persons, fetal protection laws uniquely impact pregnant women.¹⁴⁴ The equal protection clause of the Fourteenth Amendment states that no state “shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁴⁵ It remains unclear, however, whether pregnant women and non-pregnant women must be treated equally under the Amendment.¹⁴⁶ The Supreme Court confronted this issue in the employment context in *Geduldig v. Aiello*.¹⁴⁷ As one commentator notes, the holding in *Geduldig* circumvented equal protection by finding that “discrimination on the basis of pregnancy is not discrimination on the basis of gender, but rather discrimination between pregnant and nonpregnant [sic] people.”¹⁴⁸ In 1978, Congress responded to the Court’s decision in *Geduldig* and subsequent cases by amending Title VII to include the Pregnancy Discrimination Act (PDA).¹⁴⁹ Under the PDA, discrimination on the basis of pregnancy is outlawed as discrimination based on sex.¹⁵⁰

Because the PDA was designed to address the issue of pregnancy-based discrimination solely in the employment context, whether the equal protection clause requires equal treatment of pregnant and non-pregnant women outside of that context is unclear.¹⁵¹ Women’s rights advocates argue that the *Geduldig* analysis should not be controlling outside of the workplace context, because such an extension “places additional burdens, not benefits, on one specific class of individuals—pregnant women.”¹⁵² Other advocates of a woman’s right

¹⁴⁴ See U.S. CONST. amend. XIV, § 1; Denison, *supra* note 38, at 1131; Glink, *supra* note 33, at 563; Stone-Manista, *supra* note 24, at 853.

¹⁴⁵ U.S. CONST. amend. XIV, § 1.

¹⁴⁶ See *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974); Glink, *supra* note 33, at 562–63.

¹⁴⁷ *Geduldig*, 417 U.S. at 494. In *Geduldig*, appellees claimed a violation of equal protection because a California law excluded pregnancy-related disabilities from coverage under their disability insurance system. *Id.* at 486. The Court held for the employer. *Id.* at 494, 496–97. The Court affirmed the *Geduldig* holding in *General Electric Co. v. Gilbert*, holding that pregnancy was not within the framework of the equal protection clause because it is not a gender based classification. See 429 U.S. 125, 136 (1976); see Sandstad, *supra* note 28, at 190.

¹⁴⁸ Glink, *supra* note 33, at 562; see Kaplan, *supra* note 32, at 195–96.

¹⁴⁹ Sandstad, *supra* note 28, at 190; see Pregnancy Discrimination Act, 42 U.S.C. § 2000e (2012).

¹⁵⁰ Sandstad, *supra* note 28, at 190; see Pregnancy Discrimination Act, § 2000e.

¹⁵¹ See Glink, *supra* note 33, at 563; Sandstad, *supra* note 28, at 190. Cases following *Geduldig* have not addressed disparate treatment of pregnant and non-pregnant women outside of the workplace setting. See Glink, *supra* note 33, at 563.

¹⁵² See Glink, *supra* note 33 at 563. The contrasting of burdens and benefits is important to these advocates because *Geduldig* dealt with the issue of whether employers were required to provide additional *benefits* to pregnant women, rather than addressing any additional *burdens* placed on pregnant women. See *Geduldig*, 417 U.S. at 494; Glink, *supra* note 33, at 563. In contrast, criminal prosecution of pregnant women additionally burdens pregnant women. Glink, *supra* note 33, at 563. An extension of *Geduldig*’s holding that pregnancy does not fall within the framework of the equal protection

to self-autonomy focus on the gendered aspects of pregnancy as an equal protection issue, arguing that the fundamental analysis of pregnancy-based discrimination as sex-based discrimination in the PDA should apply to other areas.¹⁵³ Because substance abuse by males has also been linked to chromosomal damage in offspring, the only remaining difference between female and male drug users is their ability to become pregnant.¹⁵⁴ Although a male's continued substance abuse would not further harm the fetus after the moment of conception, situations may likely arise where a male is providing a female with drugs, despite knowledge of her pregnancy.¹⁵⁵ In such situations, holding only the female culpable while having no recourse against the male seems not only inequitable, but a violation of equal protection under the laws.¹⁵⁶

Fetal protection laws have an even further disparate impact on additional subcategories of women.¹⁵⁷ Women of color are significantly more likely to be arrested and tried for drug use during pregnancy than white women.¹⁵⁸ Poor women are also more likely to be prosecuted for drug use during pregnancy, partly because they are often treated at public hospitals and physicians are more likely to test them for drug use.¹⁵⁹ Negative stereotypes based on race and class exacerbate this impact, making these women easy targets for prosecution rather than prenatal care.¹⁶⁰

B. *Prioritizing the Fetus Compromises Maternal and Fetal Health*

The Supreme Court, in a series of cases considering abortion, has recognized that a woman's health is always paramount over the health of her fetus.¹⁶¹ Fetal protection laws, however, can prioritize fetal health over a wom-

clause beyond the employment context would, advocates of women's rights argue, allow pregnant women to be burdened by regulation of and sanctions for their behavior while pregnant. *See Geduldig*, 417 U.S. at 494; Glink, *supra* note 33, at 563.

¹⁵³ *See* Denison, *supra* note 38, at 1131; Sandstad, *supra* note 28, at 190.

¹⁵⁴ *See* Goldman, *supra* note 138, at 11; Schroedel et al., *supra* note 28, at 111; Denison, *supra* note 38, at 1131.

¹⁵⁵ *See* Denison, *supra* note 38, at 1131–32.

¹⁵⁶ *See id.* at 1131.

¹⁵⁷ Stone-Manista, *supra* note 24, at 836.

¹⁵⁸ *Id.*; *see* Michelle Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781, 873 (2014); Schroedel et al., *supra* note 28, at 110.

¹⁵⁹ *See* Schroedel et al., *supra* note 28, at 110. This disproportionate prosecution of poor pregnant women of color runs contrary to statistics that show that educated, wealthier, white women are highly likely to use prescription pain medication during pregnancy, a practice which has been directly linked with risks to fetal health. *See* Goodwin, *supra* note 158, at 873–74.

¹⁶⁰ Goodwin, *supra* note 158, at 873–74.; *see id.* at 874.

¹⁶¹ *See, e.g., Casey*, 505 U.S. at 846 (holding that restrictions on abortion must maintain an exception for pregnancies endangering the life of the mother, suggesting that maternal health trumps fetal health); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 768–69 (1986)

an's health.¹⁶² Such laws compromise maternal health by discouraging women from disclosing information to their doctors and seeking out medical care during their pregnancy.¹⁶³ Additionally, fetal protection laws do not adequately protect fetal health because they protect only against a specific set of maternal behaviors that may cause harm to the fetus, discourage women from seeking vital prenatal care, and are somewhat ineffective in reducing the instance of alcohol and substance abuse among pregnant women.¹⁶⁴

Fear of prosecution under fetal protection laws may discourage women from seeking vital prenatal care during their pregnancy.¹⁶⁵ Even sporadic reports of pregnant women being detained may have a discouraging effect, making pregnant women with a dependency problem or a history of drug or alcohol abuse too wary to attend doctor's appointments while pregnant.¹⁶⁶ A desire to avoid prosecution or confinement under these laws encourages women with addictions to forego medical treatment throughout their pregnancy, avoid giving birth in a hospital, or, in even more extreme cases, seek out abortions to terminate the fetus that could be responsible for their loss of liberty.¹⁶⁷ Additionally, prenatal care that pregnant women with addictions may avoid could mitigate some of the negative side effects of drug use during a pregnancy.¹⁶⁸

(invalidating abortion statute that failed to require the physician's paramount consideration to be maternal health, rather than fetal health).

¹⁶² See Denison, *supra* note 38, at 1112, 1130 (noting that detoxification process required by many fetal protection laws compromises maternal health).

¹⁶³ See The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26 (describing how the threat of incarceration and punishment discourages honesty with physicians and deters pregnant women from seeking prenatal care). If Alicia Beltran had not sought prenatal care or had hidden her previous addiction to Percocet from her doctor, she would most likely not have been confined under Wisconsin's fetal protection law. See Eckholm, *supra* note 1. Her story may serve as a deterrent to others in similar situations from obtaining prenatal care. See *id.*

¹⁶⁴ See The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26; Burgess, *supra* note 85, at 272; Denison, *supra* note 38, at 1130; Eckholm, *supra* note 1.

¹⁶⁵ See Goodwin, *supra* note 158, at 872; Schroedel et al., *supra* note 28, at 105; Burgess, *supra* note 85, at 272; Denison, *supra* note 38, at 1130; Stone-Manista, *supra* note 24, at 830; Eckholm, *supra* note 1.

¹⁶⁶ Eckholm, *supra* note 1; see Burgess, *supra* note 85, at 273 (“[A]s prosecutors congratulate themselves for preserving the health of a few infants by jailing or confining their mothers, the health of a great many more may be sacrificed.” (quoting Helene M. Cole, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2666 (1990) (internal quotation marks omitted))); Stone-Manista, *supra* note 24, at 830 (“[T]he prosecution sent the message to women: [d]on't seek emergency medical care.” (internal quotation marks omitted)).

¹⁶⁷ See Goodwin, *supra* note 158, at 872; Denison, *supra* note 38, at 1130; Stone-Manista, *supra* note 24, at 833–34. Because of the incentive for addicted mothers to terminate their pregnancies, pro-life groups and anti-abortion lobbies, such as Texas Right to Life, have publicly advocated *against* these prosecutions. Stone-Manista, *supra* note 24, at 834.

¹⁶⁸ See The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26; Eckholm, *supra* note 1. According to a 2011 report by the American College of Obstetricians and Gynecologists, mandated testing and reporting leads women to avoid prenatal care that “greatly reduces the negative effects of

Because of the concern that pregnant women will avoid prenatal care rather than terminate their drug use, many prominent public health and medical associations, including the American Medical Association and the American Academy of Pediatrics, oppose criminal prosecution and punishment of pregnant drug users.¹⁶⁹

For women that choose to seek prenatal care during their pregnancy, scholars believe that fear of being prosecuted under fetal protection laws plays a negative role in the relationships they have with their doctors.¹⁷⁰ Stories such as Alicia Beltran's, where her openness and honesty with a doctor led to her forced stay in a rehabilitation facility, may scare similarly situated women and discourage them from disclosing a history of substance abuse to their doctor.¹⁷¹ Without a full medical history, a doctor will not be able to provide the maximum level of care to best promote both maternal and fetal health.¹⁷² According to Dr. Cresta W. Jones, an obstetrician and fetal medicine specialist at the Medical College of Wisconsin, allowing women to be honest leads to better outcomes for their pregnancies.¹⁷³

While fetal protection laws are touted as ways to promote the health and welfare of the developing fetus, these laws instead can compromise fetal health during critical stages of development.¹⁷⁴ The most vulnerable time for a fetus, and the most critical stage for the fetus in development, is the first few weeks of pregnancy, when many women would likely not know that they are pregnant.¹⁷⁵ Fetal protection laws do not adequately protect fetal health during this stage, unless all women of childbearing age that use illicit substances are to be monitored, and then confined from the moment they become pregnant.¹⁷⁶

substance abuse during pregnancy." The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26; Eckholm, *supra* note 1.

¹⁶⁹ Stone-Manista, *supra* note 24, at 836.

¹⁷⁰ See The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26 (discussing how fear of prosecution discourages honesty with physicians and deters pregnant women from seeking prenatal care); Burgess, *supra* note 79, at 272; Stone-Manista, *supra*, note 24, at 838; Eckholm, *supra* note 1.

¹⁷¹ See Stone-Manista, *supra* note 24, at 838; Eckholm, *supra* note 1.

¹⁷² See Burgess, *supra* note 85, at 272 n.379 (citing Cole, *supra* note 166, at 2666 (describing how a physician's ability to provide medical care to pregnant patients and their fetuses is "seriously impair[ed]" when these patients withhold information)).

¹⁷³ Eckholm, *supra* note 1. Dr. Jones frequently sees pregnant patients with histories of alcohol or drug abuse. *Id.* According to the National Institute on Drug Abuse, medications such as methadone and buprenorphine are effective in mitigating the effects of prenatal drug abuse on a fetus after birth for heroin and opioids, respectively. *Topics in Brief: Prenatal Exposure to Drugs of Abuse*, NAT'L INST. ON DRUG ABUSE (May 2011), <http://www.drugabuse.gov/sites/default/files/prenatal.pdf> [hereinafter *Topics in Brief*].

¹⁷⁴ See Burgess, *supra* note 85, at 267–68; Denison, *supra* note 38, at 1130.

¹⁷⁵ See Burgess, *supra* note 85, at 268–69; Denison, *supra* note 38, at 1112.

¹⁷⁶ See Burgess, *supra* note 85, at 268–69; Denison, *supra* note 38, at 1130.

Additionally, the detoxification process required by fetal protection laws can pose significant health risks to both maternal and fetal health.¹⁷⁷ Making an effort to cure an addiction while pregnant could increase complications surrounding the pregnancy or increase the risk of spontaneous abortion.¹⁷⁸ Because of the risk of early labor and fetal distress, prenatal care providers recommend against traditional drug rehabilitation during the early and late stages of pregnancy.¹⁷⁹ Prenatal care practitioners typically avoid prescribing detoxification for pregnant patients before the fetus is fourteen weeks along and after the pregnancy reaches thirty-two weeks of age.¹⁸⁰

Further, simply arresting and incarcerating pregnant women based on substance use is not guaranteed to improve the health of the fetus.¹⁸¹ Drugs are readily available in prisons and incarceration alone does not ensure that pregnant women will no longer have access to these harmful substances.¹⁸² Additionally, the conditions in these prisons do nothing to improve the health of the fetus, especially in circumstances where women give birth while in prison.¹⁸³

Studies suggest that fetal protection laws are not successful in reducing the incidence of alcohol or drug abuse among pregnant women.¹⁸⁴ For exam-

¹⁷⁷ See Denison, *supra* note 38, at 1112, 1130; The Am. Coll. of Obstetrics & Gynecology, *Frequently Asked Questions: Tobacco, Alcohol, Drugs, and Pregnancy*, AM. COLL. OBSTETRICS & GYNECOLOGY (Dec. 2013) <http://www.acog.org/-/media/For%20Patients/faq170.pdf?dmc=1&ts=20141008T2231039852> [hereinafter *Tobacco, Alcohol, Drugs, and Pregnancy*] (recommending women with addiction problems seek treatment rather than quitting on their own as withdrawal can cause harm to the fetus, including miscarriage).

¹⁷⁸ Denison, *supra* note 38, at 1112. Spontaneous abortion, often referred to as a miscarriage, refers to the involuntary loss of a fetus and can occur for a variety of reasons. T. Yee Khong, *Spontaneous Abortion and the Pathology of Early Pregnancy*, in *FETAL AND NEONATAL PATHOLOGY*, 102, 102–05 (Jean W. Keeling & T. Yee Khong, eds., 4th ed. 2007).

¹⁷⁹ Denison, *supra* note 38, at 1112 & n.61.

¹⁸⁰ *Id.* at 1112 n.61.

¹⁸¹ See Schroedel et al., *supra* note 28, at 105; Sandstad, *supra* note 28, at 184.

¹⁸² See Stone-Manista, *supra* note 24, at 837; Stephen Betts, *Drug Use Remains Prevalent Inside Maine State Prison*, BANGOR DAILY NEWS (Nov. 23, 2012), <http://bangordailynews.com/2012/11/30/news/midcoast/drug-use-remains-prevalent-inside-maine-state-prison>. For example, in 2011, thirty-eight inmates in the Maine State Prison were charged with drug crimes while incarcerated. Betts, *supra*. In October 2012 alone, twelve inmates were indicted on drug offenses within the walls of the prison. *Id.* In California prisons, an estimated “one thousand ‘drug incidents’—seizures of marijuana, heroin and other drugs”—are reported every year. *Drugs Inside Prison Walls*, WASH. TIMES (Jan., 27, 2010), <http://www.washingtontimes.com/news/2010/jan/27/drugs-inside-prison-walls>. In Florida, 1.6% of inmates who were randomly drug tested in 2008-2009 tested positive. *Id.*

¹⁸³ See Sandstad, *supra* note 28, at 184. In 2005, a pregnant woman named Kari Parsons was arrested in Maryland because of drug use and incarcerated specifically for the health of her fetus, even though incarceration was not the standard practice for her offense. *Id.* After several hours of labor, during which her pleas for medical help were denied, she gave birth completely alone inside her jail cell, “furnished only with a toilet and a bed with no sheets.” *Id.* at 184 nn.101 & 103 (citing Julie B. Ehrlich & Lynn Paltrow, *Jailing Pregnant Women Raises Health Risks*, WOMEN’S ENEWS (Sept. 20, 2006), <http://womensenews.org/story/health/060920/jailing-pregnant-women-raises-health-risks#.VDiAmr789UQ>).

¹⁸⁴ See The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26; Eckholm, *supra* note 1.

ple, according to a 2011 report by the ACOG, “incarceration and threat of incarceration have proved to be ineffective in reducing the incidence of alcohol or drug abuse.”¹⁸⁵ While fetal protection statutes focus largely on the use of illicit drugs, experts now believe that the effect of illegal drug use by pregnant women on their developing fetuses is “generally less serious and more treatable than popularly believed.”¹⁸⁶ Other legal substances, such as tobacco, may have more harmful effects on the fetus than illegal drugs do, and yet those substances are generally not included within the scope of fetal protection laws.¹⁸⁷

In addition to compromising fetal health in these ways, fetal protection laws may compromise maternal health and discourage bonding between the mother and the fetus.¹⁸⁸ As a result, a woman may view her developing fetus as something that is working against her to curtail her legal rights, thus causing hostility in a mother toward her fetus.¹⁸⁹

III. A MODIFIED STATUTORY SCHEME AND NEW FETAL HEALTH PROGRAMS TO END THE PROSECUTION OF PREGNANT WOMEN UNDER FETAL PROTECTION LAWS

As fetal protection laws develop to address the problem of in utero fetal abuse, women are being stripped of their constitutional rights of privacy, due process, and equal protection under the law.¹⁹⁰ In addition, these laws can compromise maternal health and the health of the fetus.¹⁹¹ The solution to this

¹⁸⁵ The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26; Eckholm, *supra* note 1.

¹⁸⁶ See Eckholm, *supra* note 1.

¹⁸⁷ See WIS. STAT. § 48.133 (2009–2010); Sandstad, *supra* note 28, at 176; Stone-Manista, *supra* note 24, at 836. Although the Wisconsin statute also accounts for alcohol consumption, other legal substances are not accounted for, yet they pose an equal or greater threat to developing fetuses. See § 48.133; Sandstad, *supra* note 28, at 176 (noting that taking certain prescription drugs while pregnant can cause harm to the fetus); *Tobacco, Alcohol, Drugs, and Pregnancy*, *supra* note 177 (explaining that smoking while pregnant decreases the amount of oxygen the fetus receives, increases the risk of preterm birth, leads to lower birth weight, and increases a fetus’s risk of suffering from asthma, colic, childhood obesity, and sudden infant death syndrome (SIDS) after birth).

¹⁸⁸ See *Maternal Rights*, *supra* note 30, at 1009–10.

¹⁸⁹ See *id.*

¹⁹⁰ See Schroedel et al., *supra* note 28, at 107; Denison, *supra* note 38, at 1126; Glink, *supra* note 33, at 559–60; Stone-Manista, *supra* note 24, at 827; see also U.S. CONST. amend. XIV, § 1 (no person can be deprived of “life, liberty, or property, without due process of law . . . [nor shall any State] deny to any person within its jurisdiction the equal protection of the laws”); *Roe v. Wade*, 410 U.S. 113, 152 (1973) (holding there is a right to privacy implicit within Constitution).

¹⁹¹ See Schroedel et al., *supra* note 28, at 105; Burgess, *supra* note 85, at 272; Denison, *supra* note 38, at 1112, 1130; Stone-Manista, *supra* note 24, at 830; see also The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26 (explaining that the threat of incarceration is an ineffective deterrent of prenatal substance use and deters women from seeking prenatal care); Eckholm, *supra* note 1 (noting that the threat of incarceration discourages honesty with physicians and deters pregnant women from seeking prenatal care).

problem should take two forms: modify existing fetal protection laws to better protect maternal rights and develop new programs to provide women positive incentives to promote fetal health.¹⁹²

A. *Modification of Existing Fetal Protection Laws to Avoid Violating the Constitutional Rights of Pregnant Women*

Existing fetal protection laws must be modified to avoid compromising the constitutional rights of pregnant women.¹⁹³ Incorporating a timeframe into these laws that parallels the timeline of states' abortion laws will help remedy the privacy concerns associated with these laws.¹⁹⁴ A set of statutorily defined procedural requirements would be a relatively simple solution to address the problem of existing laws being both over-inclusive and under-inclusive.¹⁹⁵ While fetal protection laws will still have lingering problems, these simple changes will correct the most flagrant flaws related to a mother's rights to privacy, due process, and equal protection.¹⁹⁶

1. Modifying These Laws to Guarantee the Right to Privacy

As outlined above, the right to privacy, grounded in the due process clause of the Fourteenth Amendment, is a fundamental right.¹⁹⁷ The Supreme Court has held that in the context of abortion, the rights of the mother outweigh the government's interests in protecting the health of the fetus before viability.¹⁹⁸ Despite this holding, fetal protection laws can deprive a woman of her liberty through involuntary confinement in the name of fetal health.¹⁹⁹ Because a woman can be temporarily deprived of liberty during the same period of her pregnancy in which the Court has declared her privacy interest in an abortion to be controlling, fetal protection laws create an unprecedented level of protection for a

¹⁹² See Denison, *supra* note 38, at 1139–40; Glink, *supra* note 33, at 571; *Topics in Brief, supra* note 173.

¹⁹³ See Denison, *supra* note 38, at 1125–26; Glink, *supra* note 33, at 571.

¹⁹⁴ See DeBonis, *supra* note 28, at 486; Denison, *supra* note 38, at 1126; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (holding that the rights of mother outweigh state's interest in the health of the fetus pre-viability); *Roe*, 410 U.S. at 163 (establishing that the rights of a mother before fetal viability outweigh a state's interest).

¹⁹⁵ See Denison, *supra* note 38, at 1126; Glink, *supra* note 33, at 559.

¹⁹⁶ See Denison, *supra* note 38, at 1126; Glink, *supra* note 33, at 559.

¹⁹⁷ See *Roe*, 410 U.S. at 162; DeBonis, *supra* note 28, at 487; Glink, *supra* note 33, at 562; see also Sandstad, *supra* note 28, at 195 (“[T]he Supreme Court has consistently upheld an individual's right to privacy . . .”).

¹⁹⁸ See *Casey*, 505 U.S. at 846; *Roe* 410 U.S. at 163.

¹⁹⁹ Compare WIS. STAT. § 48.133 (2009–2010) (outlining that fetal protection law gives court exclusive jurisdiction over unborn child and expectant mother of unborn child with no time restrictions) with WIS. STAT. § 940.15 (2009–2010) (stating that women are able to receive abortion at any point before fetus reaches viability).

non-viable fetus.²⁰⁰ Rather than maintain the constitutional guarantee of personal autonomy and bodily integrity for pregnant women, fetal protection laws sacrifice this right for the benefit of the fetus.²⁰¹ A pregnant woman is unable to exert control over her own body or her choices regarding her health and body, which unconstitutionally compromises her right to privacy.²⁰²

To remedy this contradiction in the law, fetal protection laws should incorporate a timeframe during which women may face punishment or confinement in treatment facilities for actions they take that may harm their fetus.²⁰³ This timeframe should parallel the state's abortion laws, to ensure that women are neither committed to rehabilitation facilities nor incarcerated for harming a fetus at a time in their pregnancy when they could still legally choose to terminate the pregnancy.²⁰⁴

2. Guaranteeing the Right to Due Process

As previously discussed, fetal protection laws largely ignore the Fourteenth Amendment's due process clause, which guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law."²⁰⁵ Instead, fetal protection laws deprive pregnant women of their liberty without basic procedural safeguards or determinations of how much process pregnant women are due.²⁰⁶ In addressing this problem, existing fetal protection laws should be modified to include basic procedural protections and impute a knowledge requirement into the law.²⁰⁷

The first procedural protection that should be incorporated into fetal protection laws to mitigate due process concerns is a requirement that pregnant women have access to a lawyer before any deprivation of liberty.²⁰⁸ As deline-

²⁰⁰ See *Casey*, 505 U.S. at 846 (holding that the rights of the mother outweigh the interests of the government in protecting the health of the fetus pre-viability); *Roe*, 410 U.S. at 163 (holding that the state cannot regulate abortion pre-viability of the fetus).

²⁰¹ See *Denison*, *supra* note 38, at 1136; *Glink*, *supra* note 33, at 562.

²⁰² See *Denison*, *supra* note 38, at 1136; *Glink*, *supra* note 33, at 562.

²⁰³ See *DeBonis*, *supra* note 28, at 486; *Denison*, *supra* note 38, at 1126; see also *Casey*, 505 U.S. at 846 (rights of mother outweigh state's interest pre-viability); *Roe*, 410 U.S. at 163 (rights of mother outweigh state's interest pre-viability).

²⁰⁴ See *Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 163; *DeBonis*, *supra* note 28, at 486; *Denison*, *supra* note 38, at 1126.

²⁰⁵ See U.S. CONST. amend. XIV, § 1; *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); *Denison*, *supra* note 38, at 1112, 1127.

²⁰⁶ See WIS. STAT. § 48.133 (2009–2010); *Mathews*, 424 U.S. at 335 (holding that courts must balance the private interest to be affected by governmental action, and the risk of erroneous deprivation of this interest through the current procedures and the value of new or improved procedures with the government's interest); *Eckholm*, *supra* note 1.

²⁰⁷ See *Goldberg*, 397 U.S. at 267–68; *Schroedel et al.*, *supra* note 28, at 107–08; *Denison*, *supra* note 38, at 1125.

²⁰⁸ See *Goldberg*, 397 U.S. at 270; *Goodwin*, *supra* note 158, at 802.

ated in *Goldberg v. Kelly*, one of the basic procedural safeguards required before a deprivation of liberty may occur is the opportunity for a meaningful hearing.²⁰⁹ When states are eager to confine women to rehabilitation facilities and even provide their fetuses with legal guardians, there is a high risk of a pregnant woman's liberty interests being underrepresented unless she is also provided a lawyer.²¹⁰ If all other parties involved have lawyers, pregnant women will simply be unable to raise sufficient legal arguments to contradict the claims of the state without the assistance of legal counsel.²¹¹ By denying them access to counsel, the state impedes the ability of these women to effectively argue against their loss of liberty.²¹²

The second procedural protection that should be incorporated into existing fetal protection laws is a requirement for affirmative evidence that a pregnant woman is an active substance abuser before any loss of her liberty occurs.²¹³ Urine tests that are positive for the presence of drugs would be the strongest evidence, but it is also possible to imagine situations where other evidence, such as oral testimony about the pregnant woman's substance use, would be sufficient.²¹⁴ Fetal protection laws are designed with the purpose of protecting the fetus from the mother's potentially harmful behavior during pregnancy.²¹⁵ Women who are not actively engaging in substance abuse, however, should not be deprived of their liberty simply because they have a history of substance abuse.²¹⁶

These two additional procedural protections would help to fix the problem of these laws being over-inclusive, sweeping up women who are not actively engaging in substance abuse in the broad strokes of these fetal protection laws.²¹⁷ If Alicia Beltran had been granted a lawyer at her hearing, the lawyer would have been able to raise due process concerns, most notably that the state of Wisconsin was seeking to deny Alicia her liberty without demonstrable evi-

²⁰⁹ See *Goldberg*, 397 U.S. at 267.

²¹⁰ See *id.* at 270. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)); Goodwin, *supra* note 158, at 802.

²¹¹ See *Goldberg*, 397 U.S. at 268, 270; Goodwin, *supra* note 158, at 802.

²¹² See *Goldberg*, 397 U.S. at 270–71; Eckholm, *supra* note 1.

²¹³ See Eckholm, *supra* note 1.

²¹⁴ See *id.*; Application for Writ of Habeas Corpus, *supra* note 10, at 9. In Alicia's case, for instance, the doctor who examined Alicia immediately following her arrest declared both Alicia and her pregnancy to be healthy, declined to conduct a drug test, and declared "in-patient treatment to be unnecessary in this case." Application for Writ of Habeas Corpus, *supra* note 10, at 9.

²¹⁵ See, e.g., WIS. STAT. § 48.133 (2009–2010).

²¹⁶ See *Goldberg*, 397 U.S. at 269; Eckholm, *supra* note 1.

²¹⁷ See Eckholm, *supra* note 1.

dence of drug use.²¹⁸ The use of drug tests would have bolstered Alicia's argument that she was not in violation of the statute.²¹⁹

In addition to procedural protections, imputing a knowledge requirement into existing fetal protection laws would further address due process concerns.²²⁰ Strict liability statutes such as Wisconsin's raise due process issues by failing to state that knowledge of one's pregnancy is required to violate the statute.²²¹ Liability under the law should not attach until a woman knows, or should know, of her pregnancy.²²² Actual knowledge of a pregnancy would be relatively easy to demonstrate through medical records documenting that the woman's doctor confirmed her pregnancy or a woman's statements to friends and family members that she is pregnant.²²³ The stage of pregnancy when knowledge should become constructive, meaning a woman should know that she is pregnant, is slightly less clear.²²⁴ This problem is better addressed by legislatures than through interpretation by courts, because legislatures have the ability to consult experts in the field for assistance in drafting legislation.²²⁵ Imputing a knowledge requirement into existing fetal protection laws rather than interpreting them as strict liability statutes would help correct the due process concerns with these statutes and prevent women from being liable under these laws until they knew or should have known of their pregnancies.²²⁶

3. Right to Equal Protection

The Fourteenth Amendment guarantee that no state will "deny to any person within its jurisdiction the equal protection of the laws" provides that all persons similarly situated will be treated the same.²²⁷ Fetal protection laws compromise a pregnant woman's right to equal protection because pregnant women, non-pregnant women, and males are all capable of harming the fetus

²¹⁸ See § 48.133; Eckholm, *supra* note 1. Alicia was sent to the rehabilitation facility even though multiple urine tests demonstrated that she did not exhibit "to a severe degree" a habitual lack of self-control regarding controlled substances, as required by the Wisconsin statute. See § 48.133; Eckholm, *supra* note 1.

²¹⁹ See § 48.133; Eckholm, *supra* note 1.

²²⁰ See § 48.133; Denison, *supra* note 38, at 1125.

²²¹ See § 48.133; Denison, *supra* note 38, at 1125.

²²² See Denison, *supra* note 38, at 1125.

²²³ See *id.* at 1129.

²²⁴ See *id.* at 1125.

²²⁵ See *id.*; see also *Metro Broad., Inc. v. Fed. Comm'n Comm'n*, 497 U.S. 547, 572 (1990) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980) ("[The] special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue.")).

²²⁶ See § 48.133; Denison, *supra* note 38, at 1125.

²²⁷ See U.S. CONST. amend. XIV, § 1; Glink, *supra* note 33, at 562.

by enabling the drug use of the pregnant woman.²²⁸ Thus, in order to provide pregnant women with the equal protection afforded to them by the Constitution, fetal protection laws should be altered so that they apply to both pregnant women and non-pregnant persons.²²⁹

There are several ways that a gender-neutral statute could be constructed.²³⁰ One approach would be to punish any person who knowingly provides a pregnant woman with the harmful substances identified in the statutes.²³¹ This approach, however, creates a wealth of prosecution problems.²³² Whether a person knew the individual was pregnant, or far enough along in her pregnancy for liability to attach, and the ability of the woman to obtain the substance in question from other sources would likely become major obstacles to prosecution of non-pregnant persons for such crimes.²³³ Another statutory approach available would be to punish the actions of men who damage offspring by passing on defects through their semen at the time of conception.²³⁴ The estimated period during which this can occur, however, is sixty-four days, leaving such a statute open to the criticisms that it is a violation of due process to punish someone for actions taken so long before conception.²³⁵ Such a gender-neutral approach, while addressing the equal protection problems of fetal protection laws, would increase the due process problems created by these laws.²³⁶

4. Lingering Problems with Fetal Protection Laws

Although many modifications may be made to existing fetal protection laws in order to mitigate the constitutional violations, these modifications still cannot correct all of the problems associated with these laws.²³⁷ First, the right to privacy violation associated with the physical intrusion of pregnant wom-

²²⁸ See Goldman, *supra* note 128, at 11–12; Denison, *supra* note 38, at 1131–32; Glink, *supra* note 33, at 563. While the ultimate decision of consuming drugs will likely be made by the pregnant woman, one scholar suggests the framing of the issue in a way similar to drug trafficking: not only will the end user (in this case the pregnant woman) be punished, but also punished are those supplying her with the illicit substances. See Denison, *supra* note 38, at 1132.

²²⁹ See Denison, *supra* note 38, at 1132.

²³⁰ See *id.*

²³¹ See *id.*

²³² See *id.*

²³³ See *id.*

²³⁴ See *id.*

²³⁵ See *id.* Moreover, punishing men for this action raises questions of willingness: if a woman became pregnant on accident, holding her sperm provider strictly liable is a harsh repercussion. See Luis Treacy, *Drugs in Pregnancy*, HEALTH GUIDANCE, <http://www.healthguidance.org/entry/9892/1/Drugs-in-Pregnancy.html> (last visited Mar. 27, 2015).

²³⁶ See Denison, *supra* note 38, at 1132.

²³⁷ See, e.g., WIS. STAT. § 48.133 (2009–2010); see also Denison, *supra* note 38, at 1132.

en's bodies cannot realistically be avoided.²³⁸ Without this portion of the law, fetal protection laws would have no enforceability, as there would be no real consequence for violating the law.²³⁹ Additionally, the under-inclusivity of laws aimed at protecting fetuses from the mother's behavior cannot rationally be avoided.²⁴⁰ The wealth of legal activities that pregnant women could engage in or legal substances that they could consume that could potentially cause any amount of harm to the fetus is too broad for a law to incorporate all of these harms.²⁴¹ Unless a law made a pregnant woman culpable for all possible activities she could engage in that go against the recommendations of her doctor, these laws will always be under-inclusive.²⁴² Because statutory modifications alone will not be able to solve the problems associated with fetal protection laws, new programs should be created to promote fetal health.²⁴³

B. *Creating New Programs to Promote Fetal Health While Respecting the Rights of Pregnant Women*

In addition to these constitutional concerns, protection of the fetus through forced rehabilitation and confinement of pregnant women is not an effective means of preventing substance abuse during pregnancy or promoting fetal health.²⁴⁴ Already willing to violate drug laws, pregnant women who were previous or are current drug users are unlikely to respond to additional penalties.²⁴⁵ Rather than discouraging women from abusing drugs and alcohol while pregnant, states with fetal protection laws are actually discouraging women from seeking vital prenatal care that would mitigate some of the negative effects that substance abuse has on a developing fetus.²⁴⁶

²³⁸ See, e.g., § 48.133; see also Denison, *supra* note 38, at 1137.

²³⁹ See, e.g., § 48.133; see also Denison, *supra* note 38, at 1139.

²⁴⁰ See Denison, *supra* note 38, at 1122.

²⁴¹ See *id.* (noting that riding on amusement park rides despite signs warning pregnant women not to ride or driving recklessly could endanger fetus); *Nutrition During Pregnancy*, *supra* note 67 (recommending pregnant women do not consume sushi made with raw fish).

²⁴² See Denison, *supra* note 38, at 1122; *Nutrition During Pregnancy*, *supra* note 67.

²⁴³ See Denison, *supra* note 38, at 1139; Glink, *supra* note 33, at 574; see also *Topics in Brief*, *supra* note 174 (explaining that providing incentives for maintaining abstinence from drugs “increase[s] treatment retention and prolong[s] abstinence in pregnant women with cocaine, opiate, and nicotine dependence” more than standard treatments).

²⁴⁴ See *The Am. Coll. of Obstetricians & Gynecologists*, *supra* note 25, at 200; Eckholm, *supra* note 1.

²⁴⁵ See Denison, *supra* note 38, at 1139.

²⁴⁶ See WIS. STAT. § 48.133 (2009–2010); *Topics in Brief*, *supra* note 173. Medications such as buprenorphine and methadone treatment plans can improve both the maternal and fetal health consequences of heroin abuse, when combined with prenatal care throughout pregnancy. See *Topics in Brief*, *supra* note 173.

Instead of enacting fetal protection laws, a better solution to the problem would be creating new programs designed to provide pregnant women with positive incentives to seek prenatal care and substance abuse counseling.²⁴⁷ Such programs are likely to be as effective, if not more effective, than the current statutory schemes of forced rehabilitation, and would avoid compromising the health or constitutional rights of women.²⁴⁸ These programs should incorporate two main components: education and positive incentives for seeking voluntary prenatal care.²⁴⁹

Education about the risks of using certain substances while pregnant may incentivize some women to avoid harmful substance use during pregnancy.²⁵⁰ Especially for users of legal substances made illegal by fetal protection statutes, such as alcohol, casual users may be likely to cease their substance use for the duration of the pregnancy once they become aware of the extent of harmful effects the substance may cause.²⁵¹ Information about the effects of drugs and alcohol on a fetus could be provided to women at prenatal care facilities and drug rehabilitations centers, and proactively taught to students as a portion of high school health classes.²⁵² The most effective route for dissemination of this information would come through state statutes that require the distribution of this information at all state facilities and in public high schools.²⁵³ While not all women would respond to this information or cease illicit substance use or abuse because of it, this is still a worthwhile avenue

²⁴⁷ See Denison, *supra* note 38, at 1139–40.

²⁴⁸ See *id.* at 1139.

²⁴⁹ See *id.* at 1139–40.

²⁵⁰ See FLA. STAT. § 381.0045 (2011); OR. REV. STAT. § 430.905 (2013); Denison, *supra* note 38, at 1140. Oregon and Florida have codified the need for education-based programs by enacting statutes specifically designed to provide pregnant women with outreach programs and educational information. OR. REV. STAT. § 430.905; FLA. STAT. § 381.0045. The Oregon statute specifically includes meeting the “informational and educational needs” of pregnant women with regard to substance use as a part of its holistic approach to “achieve . . . results such as alcohol- and drug-free pregnant women and healthy infants” OR. REV. STAT. § 430.905.

²⁵¹ See WIS. STAT. § 48.133 (2009–2010) (“alcohol beverages” included within statute); Denison, *supra* note 38, at 1140; *Tobacco, Alcohol, Drugs, and Pregnancy*, *supra* note 177. While the harmful effects of alcohol and drug use differ based on the type of substance, the amount and frequency of usage, and the stage of pregnancy, consumption of alcohol while pregnant can lead to a variety of physical, mental, and behavioral problems (known as Fetal Alcohol Syndrome) while consumption of drugs can lead to birth defects, miscarriage, and preterm birth. See *Tobacco, Alcohol, Drugs, and Pregnancy*, *supra* note 177.

²⁵² See Denison, *supra* note 38, at 1140.

²⁵³ See *id.* Connecticut and Tennessee have both enacted statutes suggesting dissemination of information via high school classes as a method of combating the problem of pregnant women abusing substances. CONN. GEN. STAT. § 17A-710 (2013); TENN. CODE ANN. § 33-10-104 (2014). Kansas even established a toll-free information phone line, giving information on the resources available to pregnant women with substance addictions and referring these women to treatment programs that accept pregnant women. KAN. STAT. ANN. § 65-1,166 (2002).

because some individuals may respond to the information, and further its dissemination does not compromise the constitutional rights of pregnant women in any way.²⁵⁴

In addition to education, states should also offer several forms of positive incentives for women to seek voluntary prenatal care.²⁵⁵ First, simply increasing the number of outpatient treatment programs available to pregnant women would likely increase the number of women that utilize such programs.²⁵⁶ Currently, only a minority of drug treatment programs accepts pregnant women, and even fewer give these women priority over other patients.²⁵⁷ Of those programs that do accept pregnant women, the treatment is not always appropriate for an expectant mother.²⁵⁸ Unlike patients in full-time inpatient treatment programs, women involved with outpatient treatment could maintain their jobs and other important elements of their lifestyle while still getting the treatment they need.²⁵⁹ Additionally, women similar to Alicia Beltran who have a history of substance abuse but no longer abuse controlled substances could turn to

²⁵⁴ See Denison, *supra* note 38, at 1139–40.

²⁵⁵ See *id.* at 1139 (suggesting offering women immunity from prosecution if they seek prenatal care); Glink, *supra* note 33, at 573–74 (proposing increasing the number of rehabilitation programs).

²⁵⁶ See The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26, at 201; Glink, *supra* note 33, at 573; see also Stone-Manista, *supra* note 24, at 833, 835 (noting that while pilot programs tailored towards pregnant women have been successful, these programs are “neither widely available nor well-funded”).

²⁵⁷ The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26, at 201; see Glink, *supra* note 33, at 573; see also Stone-Manista, *supra* note 24, at 833 (highlighting that “there are few to no drug rehabilitation programs willing to work with pregnant women.”). Many rehabilitation programs refuse to accept pregnant women for fear of exposing the facility to liability. Glink, *supra* note 33, at 573. Increasing the number of facilities would help to meet the need for and encourage women to make use of these programs. See *id.* In 2010, only nineteen states had drug treatment programs available for pregnant women, and only nine of these facilities gave pregnant women priority. The Am. Coll. of Obstetricians & Gynecologists, *supra* note 26, at 201. Several states give pregnant women priority status at existing facilities. See KAN. STAT. ANN. § 65-1,165 (2002); MO. REV. STAT. § 191.731 (2000); TENN. CODE ANN. § 33-10-104 (2014); UTAH CODE ANN. § 17-43-201 (LexisNexis 2013). Utah’s statute provides women with interim services if the facility they apply to cannot admit them within twenty-four hours, contacting the Division of Substance Abuse and Mental Health for further assistance if the facility cannot admit the pregnant woman within forty-eight hours. UTAH CODE ANN. § 17-43-201. Tennessee’s statute suggests that facilities hold spots exclusively for pregnant women, at both residential and outpatient facilities, yet this is only a suggestion for the pilot programs that are authorized under the statute, *if* they are established. TENN. CODE ANN. § 33-10-104.

²⁵⁸ Stone-Manista, *supra* note 24, at 833. For example, participating in a methadone-based heroin recovery program while pregnant will still result in a drug-addicted newborn, yet pregnant women have been admitted to these types of programs. *Id.* Some states have sought to rectify this problem by enacting statutes to ensure pregnant women will get appropriate treatment. See COL. REV. STAT. § 27-80-112 (2014) (creating substance abuse treatment program specifically designed for pregnant women); VA. CODE ANN. § 37.2-407 (2011) (providing that licensing authorities must ensure that licensed substance abuse service providers develop programs and policies for the treatment of pregnant women).

²⁵⁹ See Eckholm, *supra* note 1.

outpatient treatment programs to make sure they do not have a relapse due to the stress of pregnancy.²⁶⁰

A second positive incentive that would encourage women to seek vital prenatal care is offering these women immunity from prosecution under fetal protection laws, or other laws applied to the prenatal substance use of women, if they seek prenatal care throughout their pregnancy.²⁶¹ A woman should receive immunity for the duration of her pregnancy, as long as she attends regularly scheduled prenatal visits with her obstetrician throughout her pregnancy.²⁶² This prenatal care would be vital to helping to correct some of the adverse effects of substance use during pregnancy, and would also serve as a means of educating women about the harmful effects their substance use could have on their developing fetuses.²⁶³ Offering immunity to these women would correct the disincentive to seek prenatal care created by fetal protection laws, and instead encourage pregnant women to seek prenatal care and cultivate an open and honest relationship with their doctors.²⁶⁴

CONCLUSION

As states seek statutory solutions to address the problem of in utero fetal abuse, the constitutional rights of pregnant women are becoming increasingly compromised. Through fetal protection laws, the right to privacy that pregnant women have has been all but taken away, as they suffer an invasion of their personal autonomy and bodily integrity and are, ironically, forcibly confined for harming a fetus that they still have a legal right to abort. In these situations, a woman's constitutional right to due process is annihilated, as she is afforded no procedural protections before suffering a loss of liberty. Further, her right to

²⁶⁰ *See id.*

²⁶¹ *See Denison, supra* note 38, at 1139. A South Dakota statute offers immunity from all civil and criminal liability to “any physician, physician’s assistant, nurse, nurse practitioner, nurse midwife, counselor, social worker, licensed or registered child welfare provider, employee or volunteer of a domestic abuse center, chemical dependency counselor, or safety sensitive position . . . who provides services to a pregnant woman” if they refer pregnant women to alcohol or drug prevention programs. S.D. CODIFIED LAWS § 34-23B-6 (2011). There is, however, no similar incentive offered to pregnant women seeking treatment. *See id.* A Tennessee law promises that the department of children’s services will not seek protection of the newborn or seek to terminate the mother’s parental rights solely because of the patient’s drug abuse. TENN. CODE ANN. § 33-10-104. The law only applies to prescription drug abuse however, and would not protect the mother from any criminal liability or any action by the department of children’s services for a reason other than her prescription drug abuse. *Id.*

²⁶² *See Denison, supra* note 38, at 1139–40.

²⁶³ *See id.* at 1130, 1139; *Topics in Brief, supra* note 173.

²⁶⁴ *See Burgess, supra* note 85, at 272; *Denison, supra* note 38, at 1130; *Eckholm, supra* note 1; *see also Topics in Brief, supra* note 173. The National Institute on Drug Abuse reports that positive incentives for maintaining abstinence from drugs “increase[s] treatment retention and prolong[s] abstinence in pregnant women with cocaine, opiate, and nicotine dependence” more than standard treatments. *Topics in Brief, supra* note 173.

equal protection under the laws disappears, as men and non-pregnant women can also cause harm to a developing fetus, yet these classes avoid any liability for such harm.

In addition to this loss of constitutional rights, fetal protection laws compromise the health of both the mother and her fetus. Forced detoxification creates a high level of risk to both maternal and fetal health. Additionally, women are dissuaded from seeking prenatal care or from being honest with their prenatal care provider if they know they could face incarceration. This inhibits a doctor's ability to offset some of the side effects of prenatal drug use, creating an even greater harm to both mother and fetus.

Simple procedural protections guaranteeing that no woman will be denied her liberty under fetal protection laws without having access to a lawyer and without evidence showing that she is an active drug user are vital to ensuring pregnant women receive constitutional protections. Additionally, educating women about the harmful effects of prenatal drug use and creating positive incentives for pregnant women to seek prenatal care will promote fetal health while maintaining the constitutional rights of pregnant women.

When Alicia Beltran was forcibly confined to a rehabilitation facility for a seventy-eight day stay for a drug problem that she no longer had, she was afforded none of the procedural protections guaranteed to her under the Constitution. Enacting basic procedural protections and creating programs designed to provide pregnant women with positive incentives for seeking prenatal care will ensure that situations similar to Alicia's do not happen again.