

# Prosecuting Pregnant Women: Should Washington Take the Next Step?

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## I. INTRODUCTION

On March 16, 1996, in Racine, Wisconsin, Meagan Zimmerman was born with nearly a .20 blood alcohol level.<sup>1</sup> Her mother, Deborah Zimmerman, arrived at the hospital drunk and screaming: "If you don't keep me here, I'm just going to go home and keep drinking and drink myself to death and I'm going to kill this thing because I don't want it anyways."<sup>2</sup> She was eight and one-half months pregnant. A few hours later she gave birth to Meagan by Cesarean section. Meagan now suffers from symptoms of fetal alcohol syndrome.<sup>3</sup>

On June 10, 1996, Deborah Zimmerman was charged with attempted first degree intentional homicide for her actions prior to Meagan's birth,<sup>4</sup> the first known prosecution for such actions in the United States.<sup>5</sup> Meagan now lives in a foster home, while her mother fights both to defeat the charges brought against her and to gain custody of the child she tried to kill.<sup>6</sup>

This case brings to the forefront the issue of punishing pregnant women for intentional harm inflicted upon their fetuses. The issue raises many important policy and legal concerns, including: constitutional rights, the duty of the state to both the mother and the unborn child, the effectiveness of punishment as a deterrent, the effectiveness

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1. See Edward Walsh, *In Case Against Alcoholic Mother, Underlying Issue is Fetal Rights: Attempted Murder Charge Presents "Minefield" of Legal Questions*, WASHINGTON POST, Oct. 7, 1996, at A4, available in LEXIS, News Library, Curnws File.

2. *Id.*

3. See *id.*

4. See *id.*

5. See Summons and Complaint, *State v. Zimmerman*, No. 96-F-368 (Wis. Cir. Ct. filed June 10, 1996) [hereinafter Summons and Complaint].

6. See Walsh, *supra* note 1, at A4.

of other measures as deterrents, and, most important, the legal authority to punish women through criminal charges.

Wisconsin authorities believe that they can charge pregnant women for harm intentionally inflicted upon unborn fetuses within the confines of the United States Constitution, the Wisconsin Constitution, and applicable statutes and case law.<sup>7</sup> The prosecution argues that Wisconsin cases support this position because the definition of a homicide includes the death of a fetus from injuries inflicted upon the pregnant mother.<sup>8</sup> Therefore, the prosecution argues, it is a natural extension to allow the prosecution of a pregnant woman for harm she intentionally inflicted upon her fetus.<sup>9</sup>

In contrast, current Washington law probably would not allow such a prosecution.<sup>10</sup> However, numerous policy reasons support recognition of such charges in Washington. These reasons include Washington's acknowledgment of an affirmative duty toward a viable fetus, the need to deter mothers from harming unborn children carried to term, and the necessity to hold a mother accountable should she intentionally harm her unborn child.<sup>11</sup> Therefore, Washington should change its criminal laws to permit prosecution of a Zimmerman case.

The first section of this Comment will analyze the case against Deborah Zimmerman and the court's reasons for refusing to dismiss the charges against her. The second section will examine current Washington law and why similar charges could not be brought in this state. The third section will look at the policy rationales for changing Washington law to allow charges to be filed against women for attempting to intentionally endanger the life of a viable fetus. This Comment argues that Washington law should be so amended in order to achieve these policy goals.

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7. See State's Memorandum of Law in Support of State of Wisconsin's Criminal Complaint, *State v. Zimmerman*, No. 96-CF-525 (Wis. Cir. Ct. filed June 10, 1996) [hereinafter *State's Memorandum*].

8. See *id.* at 3 (citing *State v. Cornelius*, 448 N.W.2d 434 (Wis. Ct. App. 1989)). See also discussion *infra* notes 16-19, 38-44, 62-63, 92-94 and accompanying text.

9. See *State's Memorandum*, *supra* note 7, at 3.

10. See *State v. Dunn*, 82 Wash. App. 122, 128-129, 916 P.2d 952, 955-956 (1996) (holding mother could not be charged with second-degree criminal mistreatment of a child for continuing to ingest cocaine while pregnant because fetus was not within the statutory definition of a child).

11. See discussion *infra* section IV.

## II. STATE OF WISCONSIN V. DEBORAH J. ZIMMERMAN

A. *The Criminal Charges*

On June 10, 1996, Deborah Zimmerman became the first woman in the United States charged with attempted first degree intentional homicide for harm inflicted upon her unborn child.<sup>12</sup> The complaint states that the defendant did "unlawfully, intentionally, and feloniously, attempt to cause the death of another human being with intent to kill that person . . . ."<sup>13</sup>

Following a July 3, 1996 preliminary hearing, the criminal complaint was supplemented by a memorandum of law that emphasized that the case did not implicate abortion rights because Meagan was considered a "person" protected by the United States Constitution because she was born alive.<sup>14</sup> However, the State conceded that "had M.M.Z. been stillborn due to the alcohol intoxication, an argument may have been made that the defendant successfully aborted a viable fetus and could not be prosecuted . . . ."<sup>15</sup>

The prosecution additionally argued "[t]he law in Wisconsin . . . is well established that the death of an infant from fetal injuries constitutes homicide."<sup>16</sup> It cited *State v. Cornelius*, a 1989 Wisconsin case which applied the "born alive" rule to determine when an alleged

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12. See Summons and Complaint, *supra* note 5, at 1. The statute reads in part: "[W]hoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony." WIS. STAT. §940.01(1) (1996).

Attempt is statutorily defined:

An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

WIS. STAT. § 939.32(3) (1996).

13. Summons and Complaint, *supra* note 5, at 1.

The Complaint also reads:

As a result of Deborah Zimmerman's prenatal alcohol abuse, Meagan Zimmerman [M.M.Z.] was born suffering fetal alcohol effects including: Mild Dysmorphic features consistent with fetal alcohol effect. . . . Deborah Zimmerman has stated she was aware that alcohol consumption could lead to birth defects. Ms. Zimmerman was repeatedly warned by family and health care personnel of the risks of alcohol consumption while pregnant and ignored all warnings and on March 16, 1996, attempted to kill the unborn child through alcohol toxicity, knowing that the child's condition was deteriorating over time. A Cesarean section was necessary because of fetal intolerance to labor and suspected intra-uterine growth retardation.

14. State's Memorandum, *supra* note 7 at 3.

15. *Id.* at 3.

16. *Id.* (citing *Cornelius*, 448 N.W.2d at 435-36).

victim becomes a separate being for the purpose of a homicide prosecution.<sup>17</sup> Under the born alive rule, a fetus becomes a separate being for purposes of homicide the instant it is born alive.<sup>18</sup> In *Cornelius*, the infant died two days after birth from injuries suffered in utero when the car driven by his intoxicated father left the road and struck a telephone pole, severely injuring both the driver and the child's mother.<sup>19</sup> The court held that the father could be prosecuted for the death of his infant.<sup>20</sup>

In Deborah Zimmerman's case, the State also emphasized the logical absurdity that would occur if Zimmerman could not be prosecuted for attempting to drink her fetus to death when a third party who provided a pregnant woman with alcohol could be charged with feticide if the child were born alive, but died later as a result of alcohol toxicity.<sup>21</sup> This hypothetical argument emphasized the irony in statutes that allow only for prosecution of third parties who intentionally cause harm to a fetus and not a mother who does the same thing.

The prosecution further argued that Zimmerman's words and actions showed an intent to kill the baby and that "it should be left to a jury to determine if the defendant's conduct fits the statute."<sup>22</sup> The prosecution asserted that Zimmerman did not have an unlimited right to do what she pleased to her viable fetus.<sup>23</sup> Under *Roe v. Wade*, once a fetus is viable, the state's interest in the potentiality of human life is compelling and the state may regulate or prohibit abortions, so long as the health of the woman is not in jeopardy.<sup>24</sup> Therefore, because Deborah Zimmerman's child was viable, the State had a right to regulate the mother's behavior by prosecuting her for harmful acts done to her child.

The State's policy arguments demonstrated that the charges were not based on Zimmerman's reproductive rights, but on the "child's quality of life, her health and well-being, and the State's interests in assuring the right of every child to be free of life-threatening injuries, toxins and conduct once the child is viable."<sup>25</sup> The State concluded

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17. *Cornelius*, 448 N.W.2d at 437.

18. *See id.*

19. *Id.* at 435.

20. *See id.*

21. *See* State's Memorandum, *supra* note 7, at 5-6; WIS. STAT. § 940.04 (1996).

22. State's Memorandum, *supra* note 7, at 3.

23. *See id.*

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

25. State's Memorandum, *supra* note 7, at 5.

that the law must evolve with science and technology by being fluid enough to address advances in medicine and technology:<sup>26</sup> "In an era where thousands of women give birth to cocaine and alcohol addicted babies, accountability must attach to those reprehensible acts of the mother or all of society, as well as the child, shall suffer the permanent irreparable harm done."<sup>27</sup>

On August 13, 1996, the defense moved to dismiss the criminal complaint.<sup>28</sup> The defense put forth three major arguments to support dismissal of the charge of attempted first degree intentional homicide.<sup>29</sup>

First, the defense argued that the State charged Zimmerman with a noncrime because a woman who kills her unborn child commits no crime.<sup>30</sup> Because the defendant could not have been charged with a crime if she had succeeded in killing the fetus before it was born, the charges must be dismissed.<sup>31</sup> The defense argued a point already conceded by the State, that had the child been stillborn, Zimmerman could argue that she successfully aborted a viable fetus, thereby placing her under the protection of Wisconsin abortion laws.<sup>32</sup>

Second, the defense argued that the victim of this alleged offense was not a human being at the time it occurred.<sup>33</sup> The literal definition of human being includes only currently living people, not viable

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26. *See id.*

27. *Id.*

28. *See* Notice of Motion and Motion to Dismiss Criminal Complaint, *State v. Zimmerman*, No. 96-CF-525 (Wis. Cir. Ct. filed June 10, 1996).

The motion reads in part:

[T]he defendant asserts that:

1. as to Count 1: the alleged victim, the then-unborn child M.M.Z., was not a "human being" as defined by Wis. Stats. Section 939.22(16);
2. as to Count 2: there is no allegation that the alleged victim suffered "great bodily harm" as defined in Wis. Stats. Section 939.22(4); and
3. no statute nor caselaw in Wisconsin allows the State to criminally charge a pregnant woman for any action taken against her fetus.

WIS. STAT. § 939.22(16) defines a human being as "one who has been born alive." *See also* Brief in Support of Defendant's Motion to Dismiss Information for Failure of the State to Adduce Probable Cause at the Preliminary Hearing, *State v. Zimmerman*, No. 96-CF-525 (Wis. Cir. Ct. filed June 10, 1996) [hereinafter Defendant's Brief].

29. *See* Defendant's Brief, *supra* note 28, at 3.

30. *See id.*

31. *See id.* at 4. Had the defendant succeeded in killing the fetus, she would have been exempt from prosecution under Wisconsin abortion statutes. *See* WIS. STAT. §§ 940.04, 940.13, and 940.15 (1996).

32. *See* Defendant's Brief, *supra* note 28, at 4; State's Memorandum, *supra* note 7, at 3.

33. *See* Defendant's Brief, *supra* note 28, at 4.

fetuses.<sup>34</sup> Therefore, the State should be unable to prosecute a pregnant woman for the death of her viable fetus.<sup>35</sup>

Finally, the defense claimed insufficient evidence existed to sustain a finding of probable cause on all elements of the crime.<sup>36</sup> The defense argued that the State had not put forth sufficient evidence to prove its *prima facie* case.<sup>37</sup>

The defense, like the prosecution, offered a review of current Wisconsin case law.<sup>38</sup> The defense first attempted to distinguish *State v. Cornelius*, which the prosecution offered as support.<sup>39</sup> The defense emphasized that *Cornelius* did not address the fetus' rights as opposed to those of the mother.<sup>40</sup> It further argued that *Cornelius* was inapplicable because the Zimmerman case juxtaposed the rights of the mother against the rights of the fetus, an important issue that *Cornelius* did not address.<sup>41</sup> The defense also distinguished *Cornelius* by pointing out that the time frame is different for homicide versus attempted homicide because a homicide cannot be completed until someone dies.<sup>42</sup> In *Cornelius*, the child died after it was born alive, thus making the homicide statute applicable.<sup>43</sup> However, in Zimmerman's case, the alleged act of attempted homicide was completed at a time when the fetus arguably was not a human being, thus making the attempted homicide statute inapplicable.<sup>44</sup>

The defense additionally cited *State v. Black* and *State ex rel. Angela M.W. v. Kruzicki*, two cases not originally offered as support by the State.<sup>45</sup> The defense argued that *Black* further supported the notion that a mother could not be charged for causing the death of her unborn child.<sup>46</sup> In *Black*, the defendant-father was charged with the crime of "feticide" for causing the death of his viable unborn child by violently assaulting the unborn child's mother five days before the expected date of birth.<sup>47</sup> The statute under which Black was charged

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34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

38. See Defendant's Brief, *supra* note 28, at 4.

39. *Id.* at 5; *Cornelius*, 448 N.W.2d at 434.

40. See Defendant's Brief, *supra* note 28, at 4; *Cornelius*, 448 N.W.2d at 434.

41. See *id.*

42. See Defendant's Brief, *supra* note 28, at 5-6; *Cornelius*, 448 N.W.2d at 434.

43. *Cornelius*, 448 N.W.2d at 434.

44. See Defendant's Brief, *supra* note 28, at 5-6; WIS. STAT. § 939.32 (1996).

45. *State v. Black*, 526 N.W.2d 132 (Wis. 1994); *State ex rel. Angela M.W. v. Kruzicki*, 541 N.W.2d 482 (Wis. Ct. App. 1995).

46. See Defendant's Brief, *supra* note 28, at 6.

47. *Black*, 526 N.W.2d at 132.

specifically exempted the mother of the fetus from prosecution which, according to the Zimmerman defense, further demonstrated the legislative intent that a mother should not be charged for harming her fetus.<sup>48</sup>

In *Kruzicki*, the court upheld the detention and protective placement of a viable fetus and hence its mother.<sup>49</sup> In this case, Angela M.W.'s obstetrician suspected that she was using cocaine, a suspicion later proved correct by blood tests.<sup>50</sup> The doctor suggested that Angela seek treatment, but she refused.<sup>51</sup> The doctor then reported this to the Department of Health and Human Services, which ordered the viable fetus to be taken into protective custody.<sup>52</sup> This order, in effect, forced Angela to go to the hospital for inpatient drug treatment.<sup>53</sup> The Zimmerman defense argued that in *Kruzicki* the court dealt not with criminal charges, but with the appropriateness of detention of a pregnant woman using drugs in order to protect the child under the Children's Code, which was far from endorsing criminal charges against the mother.<sup>54</sup>

Finally, the Zimmerman defense argued that the closest precedent in Wisconsin case law was *Vandervelden v. Victoria*.<sup>55</sup> In *Vandervelden*, a child attempted to sue a doctor for injuries received during an unsuccessful abortion to which the mother had consented.<sup>56</sup> The defense alleged that *Vandervelden* was closely related to the Zimmerman case since it was the only case in Wisconsin that dealt with actions by the mother.<sup>57</sup> The *Vandervelden* court cited *Roe v. Wade* for the proposition that a "person" as used in the Fourteenth Amendment does not include the unborn and held that to allow a battery action against the doctor could create a right not in existence in Wisconsin law.<sup>58</sup>

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48. See *id.*; see WIS. STAT. § 940.04 (1996).

49. *Kruzicki*, 541 N.W.2d at 482.

50. See *id.*

51. See *id.*

52. See *id.*

53. See *id.*

54. *Kruzicki*, 541 N.W.2d at 482; Defendant's Brief, *supra* note 28, at 6. The Children's Code, WIS. STAT. ch. 48, represents a proper and tailored means by which the state of Wisconsin may exercise its compelling state interest in promoting the health, safety, and welfare of a viable fetus.

55. See Defendant's Brief, *supra* note 28, at 6; *Vandervelden v. Victoria*, 502 N.W.2d 276 (Wis. Ct. App. 1993).

56. *Vandervelden*, 502 N.W.2d at 277.

57. See Defendant's Brief, *supra* note 28, at 6.

58. *Vandervelden*, 502 N.W.2d at 279-280. But see *supra* notes 19 and 20 and accompanying text.

In summary, the Zimmerman defense relied mainly on the lack of precedent for charges against pregnant women, as well as on the statutory argument that a fetus is not considered a human being under Wisconsin law.<sup>59</sup>

The prosecution responded to the defense's arguments by re-emphasizing many of the points in its original brief.<sup>60</sup> First, it emphasized that this was not an abortion case; therefore, Zimmerman could not be given the broad protections from prosecution allowed in the abortion statutes.<sup>61</sup>

Second, the prosecution cited *Cornelius* to establish that in Wisconsin, through the use of the "born alive" rule, the death of an infant from fetal injuries constitutes a homicide.<sup>62</sup> The State emphasized this case to support its contention that precedent existed for prosecuting someone for the death of a viable fetus.<sup>63</sup>

Finally, the prosecution again discussed *Roe v. Wade* and how the *Roe* Court balanced a mother's interests against those of her unborn child.<sup>64</sup> Under *Roe*, during the third trimester of pregnancy, the state has a clear and recognized interest in the potential life of the viable fetus.<sup>65</sup>

The prosecution also countered many of the arguments offered by the defense. It factually distinguished *Vandervelden* because that case involved a less than three-month-old nonviable fetus, as opposed to Zimmerman's nearly full-term, viable fetus.<sup>66</sup> The prosecution also emphasized the timing of Zimmerman's acts. Her words and actions showed an intent to kill the baby, whether before or after birth.<sup>67</sup> Voluntary intoxication should not be a defense because Zimmerman knew her actions threatened the life of her unborn child.<sup>68</sup> Had Zimmerman killed her child thirty seconds after its birth, there would be no question as to the validity of the charges.<sup>69</sup>

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59. See Defendant's Brief, *supra* note 28, at 6.

60. See State of Wisconsin's Brief in Opposition to Defendant's Motion to Dismiss the Information for Failure of the State to Adduce Probable Cause at the Preliminary Hearing, *State v. Zimmerman*, No. 96-CF-525 (Wis. Cir. Ct. filed June 10, 1996) [hereinafter *State's Response*]; *State's Memorandum*, *supra* note 7.

61. See *State's Response*, *supra* note 60, at 3.

62. See *id.*

63. See *id.*

64. See *id.*

65. *Roe v. Wade*, 410 U.S. 113, 159, 163 (1973); *State's Response*, *supra* note 60, at 5.

66. See *State's Response*, *supra* note 60, at 6; *Vandervelden*, 502 N.W.2d at 276.

67. See *State's Response*, *supra* note 60, at 4.

68. See *id.*

69. See *id.*



Finally, the prosecution argued the applicability of the recent South Carolina Supreme Court decision in *Whitner v. State of South Carolina*.<sup>70</sup> In *Whitner*, a mother pled guilty to criminal child neglect for using cocaine throughout her pregnancy thus causing her baby to be born addicted to cocaine.<sup>71</sup> The court held that a viable fetus is a person for purposes of the Child Abuse and Endangerment Statute.<sup>72</sup> The court said:

[W]e do not see any rational basis for finding a viable fetus is not a "person" in the present context. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse . . . . We do not believe that the plain and ordinary meaning of the word "person" has changed in any way that would now deny viable fetuses status as persons.<sup>73</sup>

The Zimmerman prosecution urged the court to adopt the reasoning of the South Carolina court and allow the charges against Deborah Zimmerman for first degree attempted homicide to stand.<sup>74</sup>

### B. The Judge's Decision

On September 18, 1996, Judge Dennis J. Barry ruled that sufficient probable cause did exist to allow the charges to stand.<sup>75</sup> He emphasized that the decision turned upon the unique set of facts as viewed under the existing laws of Wisconsin.<sup>76</sup>

Judge Barry first decided that this was not an abortion case:<sup>77</sup> "The massive consumption of alcohol by a mother when her pregnancy has virtually reached full term hardly qualifies as an abortion attempt under any reasonable or common sense view."<sup>78</sup> Judge Barry found that the fetus in this case was both viable and full term,<sup>79</sup> noting that

[a]lthough this is not an abortion case, the term "viability" is defined in the Wisconsin abortion statute, WIS. STAT. § 940.15(1),

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70. *Whitner v. State of South Carolina*, No. 24468, 1996 S.C. LEXIS 120 (S.C. July 15, 1996).

71. *Id.* at 3.

72. *See id.* at 1.

73. *Id.* at 9.

74. *See State's Response*, *supra* note 60, at 6.

75. *See Decision and Order Denying Motion to Dismiss*, *State v. Zimmerman*, No. 96-CF-525 (Wis. Cir. Ct. filed June 10, 1996) [hereinafter *Decision*].

76. *See Decision*, *supra* note 75, at 15.

77. *See id.* at 5.

78. *Id.*

79. *See id.*

as "that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him or her, there is reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support." This appears to be a standard medical and legal definition.<sup>80</sup>

The court concluded that because this was not an abortion case "it removes the defendant from the sweeping abortion protections made available to a pregnant woman . . . ."<sup>81</sup>

Judge Barry then found that the defense's reliance on a strict reading of the definition of "human being" as "one who has been born alive" was misplaced for several reasons.<sup>82</sup> First, Judge Barry noted that the fetus was indeed born alive within hours of the defendant's conduct.<sup>83</sup> Second,

the proximity in time of the alcohol consumption by the defendant to when the child was born is highly determinative in this case. The child was born while the destructive effects of the defendant's massive consumption of alcohol were still ongoing. At the time when the infant became a human being, as Sec. 939.22(16) may define that term, the defendant's blood alcohol reading was .30 percent and the child's was .199 percent.<sup>84</sup>

Third, the effects of the alcohol remained strong when the baby was born.<sup>85</sup>

The defendant's attempt to take her baby's life was set into motion by her intentional consumption of huge amounts of alcoholic beverages and remained operative as long as the dangerous level of alcohol stayed in her system and that of her full-term fetus. While the effects of her conduct were still in motion, the baby was born.<sup>86</sup>

Thus, "[t]he convergence in time of the instrumentality of murder (alcohol) with the victim being born was not instantaneous such as when a bullet is fired from a gun toward a human target. Nevertheless, the convergence occurred and the elements of the crime have been established for probable cause purposes."<sup>87</sup>

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80. *Id.* at 5, n.1.

81. Decision, *supra* note 75, at 5-6.

82. *Id.* at 6; WIS. STAT. § 939.22(16) (1996).

83. See Decision, *supra* note 75, at 7.

84. *Id.*

85. See *id.*

86. *Id.* at 7-8.

87. *Id.* at 8.

Judge Barry then concluded that in the Zimmerman case "the facts are a natural extension of *State v. Cornelius*,"<sup>88</sup> despite the fact that the *Cornelius* court had no need to compare the fetus' rights with the mother's.<sup>89</sup> In *Cornelius*, the father was convicted of homicide for harm inflicted upon the fetus; in the Zimmerman case, the mother's actions, instead of the father's, caused the harm to the viable fetus.<sup>90</sup>

Judge Barry also noted that "providing protective status to a viable fetus has precedence in Wisconsin."<sup>91</sup> For example, in *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, a woman in her eighth month of pregnancy claimed injuries suffered during a car accident caused her child to be stillborn.<sup>92</sup> The *Kwaterski* court held that a viable fetus was a person within the meaning of Wisconsin's wrongful death statute and that the fetus was therefore entitled to the protection of tort law.<sup>93</sup> Thus, Judge Barry concluded that "there are circumstances in Wisconsin law when a viable fetus has rights in relation to certain conduct which is adverse to it, even as it relates to its mother."<sup>94</sup>

Judge Barry also distinguished *Vandervelden* and *Black*.<sup>95</sup> *Vandervelden* did not apply because it involved a nonviable fetus and the Zimmerman case had nothing to do with an abortion.<sup>96</sup> *Black* did not apply because it involved the prosecution of a defendant-father under a statute entitled "abortion."<sup>97</sup> Judge Barry concluded that "nothing in these or other Wisconsin cases which have been cited can be viewed as inconsistent or contrary to the conclusions reached in this decision."<sup>98</sup>

Responding to other defense arguments, Judge Barry rejected a due process claim for lack of notice,<sup>99</sup> because "people who kill or harm others because of excessive use of alcohol are well known in our society to suffer criminal consequences for their actions."<sup>100</sup> He also found that parents are not immune from criminal charges when the

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88. *Id.* at 9.

89. *Id.* at 9-10.

90. *Id.* at 10.

91. *Id.* at 12.

92. *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 148 N.W.2d 107 (Wis. 1967).

93. *See* Decision, *supra* note 75, at 12-13; *Kwaterski*, 148 N.W.2d at 110.

94. Decision, *supra* note 75, at 13.

95. *See id.* at 14-15.

96. *See id.*

97. *See id.* at 15.

98. *Id.*

99. *See id.* at 10-11.

100. *Id.* at 10.

persons harmed are their children and that the defendant "cannot be deemed ignorant" of either of these facts.<sup>101</sup>

Judge Barry concluded that Wisconsin law was sufficient to support the charges brought against Zimmerman.<sup>102</sup>

The State has persuasively argued that the defendant certainly would be prosecuted if she had caused her child to drink vodka from a baby bottle upon leaving the hospital. She would also be prosecuted if she killed her infant by running off the road while driving with a .30 percent blood alcohol reading. Why then should she not be held accountable for her acts in this case? Society holds people accountable for harm they cause others while intoxicated. Clearly the defendant knew this.<sup>103</sup>

Judge Barry emphasized that this ruling was only a denial of the defendant's motion to dismiss: guilt or innocence would be decided at trial.<sup>104</sup>

Judge Barry ended his opinion with a plea to the legislature to "clarify to what extent a viable fetus may be protected,"<sup>105</sup> by clearly defining the recognized state's interest in potential human life, something that has not been done in the twenty-three years since *Roe v. Wade*.<sup>106</sup>

[W]hat happens when a woman chooses to ignore the information and continue to consume substantial quantities of alcohol and drugs throughout her entire pregnancy? Should society be forced to sit back, shrug its shoulders and pay for all the long-term medical and social costs associated with that irresponsible behavior? Others who endanger life by acting under the influence of alcohol or drugs are held accountable for their behavior, including parents who jeopardize the safety of their children. Why should a woman carrying a viable fetus escape responsibility for intentional or reckless acts? It seems that the next logical step for the legislature following its [substantial changes in the Children's Code] is for it to create a clear statement as to what extent viable fetuses can be protected.<sup>107</sup>

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101. *Id.*

102. *See id.* at 11.

103. *Id.* at 10.

104. *See id.* at 11.

105. *Id.* at 15.

106. *See id.* at 16.

107. *Id.* at 17.

Since the Wisconsin court denied the defendant's motion, the defense has appealed.<sup>108</sup>

### III. THE CURRENT STATUS OF WASHINGTON LAW

Had Deborah Zimmerman lived in Washington state, she probably could not have been charged under existing Washington law. As it currently stands, no woman has been convicted in Washington for harm inflicted upon her own fetus.<sup>109</sup> In Washington, both statutory and case law allow for criminal prosecution and civil actions against third parties who cause the death of a viable fetus, but in all contexts exclude the mother from liability or prosecution.

Washington case law allows individuals to be held civilly liable for killing a viable fetus by harming the pregnant woman under the wrongful-death statute.<sup>110</sup> Washington criminal statutes allow a third party to be charged with first degree manslaughter for inflicting harm upon a pregnant woman which kills her viable fetus, but the language of the statutes excludes the mother from prosecution.<sup>111</sup> In the only case in Washington that involved prosecution of a pregnant woman for harming her viable fetus, the court held that a viable fetus was not within the criminal definition of a person unless specifically included.<sup>112</sup>

Washington law has three civil causes of action under which parents may sue for the tortious death of a child: wrongful death, the survival action, and the parental claim for death of a child. Under wrongful death, an individual who kills a viable fetus by harming the pregnant woman can be civilly liable.<sup>113</sup> Courts have construed the underlying statutes liberally because they are remedial in nature.<sup>114</sup> The only prerequisite to maintaining a survival action under any of

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108. See Order for Stay of Proceedings Pending Appeal, *State v. Zimmerman*, No. 96-CF-525 (Wis. Cir. Ct. filed June 10, 1996); Petition for Leave to Appeal a Non-Final Order Entered in Circuit Court, Racine County, Honorable Dennis J. Barry Presiding, Denying Motion to Dismiss Information for Failure of the State to Adduce Probable Cause at the Preliminary Hearing, *State v. Zimmerman*, No. 96-CF-525 (Wis. Cir. Ct. filed June 10, 1996).

109. See *Dunn*, 82 Wash. App. at 122, 916 P.2d at 952 (holding mother could not be charged with second-degree criminal mistreatment of a child for ingesting cocaine while pregnant).

110. See *Cavazos v. Franklin*, 73 Wash. App. 116, 867 P.2d 674 (1994); WASH. REV. CODE § 4.24.010 (1996).

111. See WASH. REV. CODE § 9A.32.060 (1996).

112. See *Dunn*, 82 Wash. App. at 128-129, 916 P.2d at 955.

113. See WASH. REV. CODE §§ 4.20.010, 4.20.046, 4.24.010 (1996).

114. See *Gray v. Goodson*, 61 Wash. 2d 319, 324, 378 P.2d 413, 415 (1963).

these statutes is that the decedent could have maintained the action had he or she lived.<sup>115</sup>

Courts have extended civil liability to include fetal death and injury. In *Seattle-First National Bank v. Rankin*, the court held that a fetus that is injured before birth by the negligence of another may recover damages for the injury if it lives after birth.<sup>116</sup> The court reasoned that allowing recovery for injuries suffered before birth is the "more just rule."<sup>117</sup> In *Moen v. Hanson*, the court concluded that the term "minor child" as used in the parental claim for the wrongful death of a minor child statute included a viable fetus *never born alive*.<sup>118</sup> The court viewed the use of the term "minor" as indicating when the rights of the parents ended (i.e., at majority), not when they began.<sup>119</sup> The court did recognize the inherent causation difficulties which would be created by allowing this cause of action, but determined that this reason was insufficient to deny recovery.<sup>120</sup> Thus, the civil law of Washington recognizes viable fetuses as human beings with value and deserving of legal protection.

Washington criminal law has also recognized that in certain circumstances the death of a viable fetus is a crime. First degree manslaughter is defined at title 9A, section 32.060 of the Washington Revised Code. The statute states:

(1) A person is guilty of manslaughter in the first degree when:

- (a) he recklessly causes the death of another person; or
- (b) he intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.

(2) Manslaughter in the first degree is a class B felony.<sup>121</sup>

Section (1)(b) of this statute states that a person can be charged with first degree manslaughter for harming a mother and therefore killing her viable fetus. However, the statute has not been extended to cover charging the mother for inflicting injury upon herself and her fetus.<sup>122</sup>

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115. See *Cavazos*, 73 Wash. App. at 119, 867 P.2d at 676.

116. 59 Wash. 2d 288, 291, 367 P.2d 835, 837-838 (1962).

117. *Id.*

118. 85 Wash. 2d 597, 599, 537 P.2d 266, 267 (1975); see WASH. REV. CODE 4.24.010 (1996).

119. *Moen*, 85 Wash. 2d at 599, 537 P.2d at 267.

120. See *id.* at 601, 537 P.2d at 267-268.

121. See WASH. REV. CODE § 9A.32.060 (1996) (emphasis added).

122. In fact, the statute has never been used to charge a pregnant woman for killing her viable fetus.

In 1994, when Timothy Blackwell shot and killed his wife (who was eight months pregnant), her fetus, and her friend, the King County prosecutor charged him under this statute.<sup>123</sup> In 1995, Blackwell was convicted of first degree manslaughter for killing his wife's viable fetus.<sup>124</sup> Before the *Blackwell* case, title 9A, § 32.060, had been most frequently used for prosecuting defendants for abortions when abortion was still illegal in this state.<sup>125</sup> The *Blackwell* decision indicated an emerging need for punishment of individuals for wrongfully harming a viable fetus outside of the context of abortions.

Since then, the State brought charges of second degree criminal mistreatment of a child against a mother for ingesting cocaine while pregnant. Immediately after the birth of her child, the mother and newborn child both tested positive for cocaine.<sup>126</sup> The mother admitted to using cocaine during her pregnancy.<sup>127</sup> During a prenatal consultation months before the birth, the doctor had warned that continuing to use cocaine could damage her child.<sup>128</sup> The doctor scheduled Dunn to begin a drug treatment program during her pregnancy, but Dunn never attended the program.<sup>129</sup> Due to the mother's continued cocaine use, the child was born with fetal intrauterine growth retardation and placenta abruptio, two life-threatening conditions.<sup>130</sup> The State then charged the mother with second degree criminal mistreatment of her viable unborn child.<sup>131</sup> Prosecutors alleged that the mother "did recklessly create an imminent and substantial risk of death or great bodily harm by taking cocaine during pregnancy after being warned by the doctor that it was harmful to the unborn child."<sup>132</sup> However, the trial court granted the mother's motion to dismiss for failure to establish a prima facie case of guilt.<sup>133</sup>

The Court of Appeals affirmed the dismissal.<sup>134</sup> The court held that the State failed to establish that a rational trier of fact could have

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123. See *State v. Blackwell*, No. 95-1-0376-3 (Wash. Super. Ct. 1995).

124. See *id.*

125. See, e.g., *State v. Unosawa*, 48 Wash. 2d 616, 296 P.2d 315 (1956); *State v. Hart*, 26 Wash. 2d 776, 175 P.2d 944 (1946).

126. See *Dunn*, 82 Wash. App. at 123, 916 P.2d at 953.

127. See *id.*

128. See *id.* at 122, 916 P.2d at 953.

129. See *id.* at 124, 916 P.2d at 953.

130. See *id.*

131. See *id.* at 123, 916 P.2d at 953; WASH. REV. CODE § 9A.42.030(1)(a) (1996).

132. *Dunn*, 82 Wash. App. at 125, 916 P.2d at 953.

133. See *id.*

134. See *id.* at 124, 916 P.2d at 953.

found beyond a reasonable doubt that all elements of the crime had been established.<sup>135</sup> Five elements must be proven to establish second degree criminal mistreatment: (1) the defendant must be a parent or guardian; (2) the victim must be a child or dependent; (3) the defendant must act recklessly; (4) the defendant's actions must create an imminent and substantial risk of death or great bodily harm; and (5) the risk of death or harm must be caused by withholding a basic necessity of life.<sup>136</sup> The court held that the State failed to definitively prove two essential elements: (1) that the victim was a child, and (2) that the mother withheld a basic necessity of life.<sup>137</sup>

The court first analyzed why an unborn child was not a "child" for the purpose of prosecution for criminal mistreatment of a child.<sup>138</sup> While noting that a fetus is considered a "minor child" under Washington law for the purposes of the wrongful death statute,<sup>139</sup> the court stated that "[n]o Washington criminal case has ever included 'unborn child' or fetus in its definition of person. When the Legislature intends to include the fetus in a class of criminal victims, it specifically writes that language into the statute."<sup>140</sup> Furthermore, the court stated that the Legislature's failure to specifically define "child" to include a fetus indicated its intention not to depart from typical definition of child in criminal statutes as person from birth to age 18.<sup>141</sup> The court also noted that the Legislature intended for the statute to apply only when the mother withheld a "basic necessity of life."<sup>142</sup> Rather, the Legislature intended basic necessities of life to include only food, shelter, clothing, and health care.<sup>143</sup>

No current Washington statute defines the State's interest in potential human life. *Dunn* shows that charges similar to those brought against Zimmerman would not stand in Washington because specific criminal statutory definitions include fetus only when the harm is inflicted upon the mother.<sup>144</sup> Therefore, the Legislature must

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135. See *id.* at 127, 916 P.2d at 955.

136. See WASH. REV. CODE § 9A.42.030(1)(a) (1996); see also *State v. Bartlett*, 74 Wash. App. 580, 593, 875 P.2d 651, 658 (1994).

137. See *Dunn*, 82 Wash. App. at 27, 916 P.2d at 955.

138. *Id.*

139. See *Moen v. Hanson*, 85 Wash. 2d 597, 599-600, 537 P.2d 266-67 (1975); WASH. REV. CODE § 4.24.010 (1996).

140. See *Dunn*, 82 Wash. App. at 128, 916 P.2d at 955 (citing WASH. REV. CODE § 9A.32.060(1)(b) (1996)).

141. See *Dunn*, 82 Wash. App. at 128-129, 916 P.2d at 955.

142. *Id.* at 129, 916 P.2d at 955-956.

143. See *id.* at 129, 916 P.2d at 955.

144. *Id.*



create a statute which would allow the State to charge pregnant women under the criminal law for intentionally harming a viable fetus.

#### IV. WHY WASHINGTON LEGISLATORS NEED TO AMEND STATE LAWS

##### A. *The Problem*

Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE) are birth defects with life-long consequences and secondary disabilities caused by prenatal alcohol exposure. When a pregnant woman drinks alcohol, the alcohol passes through the placenta to the fetus.<sup>145</sup> The alcohol then remains in the fetus longer than it does in the mother.<sup>146</sup> In 1973, researchers from the University of Washington introduced the term "Fetal Alcohol Syndrome" to describe a pattern of birth defects they observed in children born to alcoholic mothers.<sup>147</sup> Since then, more than 2,000 studies have confirmed that using alcohol while pregnant can cause permanent birth defects.<sup>148</sup>

FAS is diagnosed when three primary characteristics occur together: growth deficiency, a characteristic pattern of physical abnormalities, and some manifestation of central nervous system dysfunction.<sup>149</sup> First, "individuals with FAS may exhibit inadequate growth and development before and/or after birth."<sup>150</sup> Second, FAS is characterized by a unique cluster of minor facial abnormalities.<sup>151</sup> The most common facial features associated with FAS include: short palpebral fissures (small width of the eye opening); flat midface; smooth philtrum (the vertical ridges between the nose and upper lip tend to be flat); thin upper lip; low nasal bridge (the bridge of the nose

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145. See Janna C. Merrick, *Maternal Substance Abuse During Pregnancy: Policy Implications in the United States*, 14 J. LEGAL MED. 57, 58 (1993) [hereinafter Merrick, *Maternal Substance Abuse*].

146. See *id.*

147. See Fetal Alcohol and Drug Unit, University of Washington School of Medicine, UNDERSTANDING THE OCCURRENCE OF SECONDARY DISABILITIES IN CLIENTS WITH FETAL ALCOHOL SYNDROME (FAS) AND FETAL ALCOHOL EFFECTS (FAE) 9 (Final Report 1996) [hereinafter Understanding].

148. See Comprehensive Health Education Foundation, THE WASHINGTON STATE FETAL ALCOHOL RESOURCE GUIDE: TOOLS FOR PREVENTION AND INFORMATION iv (1996) [hereinafter Resource Guide].

149. See Understanding, *supra* note 147, at 11.

150. Resource Guide, *supra* note 148, at vii.

151. See *id.* The presence of one or two facial abnormalities is not sufficient to make the physical diagnosis.

between the eyes tend to be flat); epicanthal folds (folds of skin which occur at the inner corner of the eye); and a short nose.<sup>152</sup>

Third, "FAS is characterized by cognitive and behavioral dysfunction due to structural and chemical damage to the brain. Evidence of damage may be structural, neurological, and/or behavioral."<sup>153</sup> Structural damage includes microcephaly (small head size) and damage to specific structures in the brain.<sup>154</sup> Neurologic damage includes seizures, abnormalities of muscle tone, tremors or marked incoordination, hearing problems, and visual problems.<sup>155</sup> Behavioral damage includes attention deficit disorder (with or without hyperactivity), problems with reasoning and judgment (inability to predict consequences of behavior), speech and language delays, poor memory, and mild to severe mental retardation.<sup>156</sup>

There is no established "safe" amount for a pregnant woman to drink because alcohol affects everyone differently.<sup>157</sup> Two women may drink the same amount of alcohol during pregnancy and one may have an affected child and the other may have a "normal" child.<sup>158</sup> The degree of effects from prenatal alcohol exposure varies case to case due to a variety of factors such as timing of the exposure, dose, frequency, and genetic factors in the mother and/or fetus.<sup>159</sup> "In general, the more a woman drinks, the greater the risk[] to the fetus."<sup>160</sup>

Studies estimate the number of infants born each year with FAS are between one and three per 1,000 live births.<sup>161</sup> Each year over 40,000 children in the United States are born with defects due to prenatal alcohol exposure.<sup>162</sup> Preliminary data from a pilot study conducted in two Washington State counties found 1.9 cases of FAS per 1,000 first graders.<sup>163</sup> With approximately 79,000 births per year in Washington state, between 79 and 237 new cases of FAS occur each year.<sup>164</sup>

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152. *See id.*

153. *Id.*

154. *See id.* at vi.

155. *See id.*

156. *See id.*

157. *See id.* at vii.

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See* March of Dimes Birth Defects Foundation, PUBLIC HEALTH EDUCATION INFORMATION SHEET: DRINKING DURING PREGNANCY (1992).

163. *See* Resource Guide, *supra* note 148, at vi.

164. *See id.*

FAS is the leading known causes of mental retardation in the United States.<sup>165</sup> The effects of FAS are permanent. People with FAS have the disabilities they are born with throughout their lives.<sup>166</sup> Most important, unlike many other birth defects, FAS is preventable.<sup>167</sup> However, high rates of both alcohol use and unplanned pregnancies make prevention a difficult task.<sup>168</sup> To be effective, prevention should involve a multifaceted approach including public education, effective pregnancy planning, and adequate treatment services for chemically dependent women.<sup>169</sup> Unfortunately, these measures alone are not enough. While negligence is the usual state of mind under which such alcohol abuse occurs, steps must be taken which allow at least for the prosecution of pregnant women like Deborah Zimmerman who drink in an intentional attempt to kill their viable fetus.

### B. *The Solution*

By amending the law, Washington could ensure that pregnant women could not intentionally harm their viable fetuses with impunity. In order to allow for the prosecution of women like Deborah Zimmerman, Washington legislators should amend title 9A, section 32.060, the first degree manslaughter statute, to read:

- (1) A person is guilty of manslaughter in the first degree when:
  - (a) he recklessly causes the death of another person; or
  - (b) he intentionally and unlawfully kills an unborn viable fetus by inflicting any injury upon the mother of such child, or
  - (c) *a pregnant woman intentionally and unlawfully kills her unborn viable fetus through the use of drugs and/or alcohol.*
- (2) Manslaughter in the first degree is a class B felony.

By adding section (1)(c), the state could prosecute pregnant women for drinking in an intentional attempt to kill their viable fetuses. In addition, this amendment is narrow enough to avoid unnecessary and unadvised prosecutions.

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165. See Children's Trust Foundation, FETAL ALCOHOL FACT SHEET on file at the *Seattle University Law Review*.

166. See *id.*

167. See Resource Guide, *supra* note 148, at i.

168. See *id.*

169. See *id.*

### C. Why Arguments Against State Intervention are Insufficient

Opponents make three main arguments against prosecution of pregnant women for harming their fetuses. First, some argue that laws allowing for this prosecution create a fetal interest that previously did not exist.<sup>170</sup> Second, some argue that there are constitutional reasons for why such laws cannot be passed.<sup>171</sup> Finally, some argue that prosecuting pregnant women would deter them from seeking the prenatal care they need.<sup>172</sup> This section will demonstrate why none of these claims is sufficient to argue for a ban on the prosecution of pregnant women.

#### 1. Creation of Fetal Interest Argument

The first and most common argument against a statute allowing the prosecution of the mother is that it would create a fetal interest in opposition to that of the mother.<sup>173</sup> Prosecution of the mother would be a statement that a viable fetus has rights greater than those of the mother.<sup>174</sup>

This argument ignores the fact that by allowing the state to regulate abortions during the second and third trimesters, *Roe v. Wade* already recognized a state interest protecting potential human life.<sup>175</sup> This interest was clarified and reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>176</sup> The Court held that fostering or protecting the health of a viable fetus was a valid state purpose that allowed the state to regulate abortions so long as no undue burdens were imposed upon pregnant women.<sup>177</sup> Therefore, prosecuting pregnant women for harming their fetuses does not have to create a fetal interest that forsakes the rights of pregnant women, because *Casey*

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170. See, e.g., Molly McNulty, Comment, *Pregnancy Police: The Health, Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 280 (1987-1988) (hereinafter McNulty, *Pregnancy Police*).

171. See, e.g., *id.* at 310-18.

172. See Merrick, *Maternal Substance Abuse*, *supra* note 145, at 68.

173. See, e.g., McNulty, *Pregnancy Police*, *supra* note 170, at 280.

174. See *id.*

175. *Roe*, 410 U.S. at 113. It is unclear when the most harm is done to the fetus—when the mother drinks during pregnancy, during the first trimester, or after that. Because this author suggests a narrow statute, the problem of the first trimester is extinguished.

176. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 U.S. 2791, 2819 (1992).

177. See *id.*

has already recognized a protected state interest in preserving potential life.<sup>178</sup>

Also, prosecuting pregnant women for harming their fetuses is not a statement that a fetus has no rights when a woman decides to abort but has legal person rights when it serves the interest of the state. Prosecution under the proposed statute could only occur when there is a viable fetus, the point at which the state already has a recognizable interest in protecting the potential human life.

Abortion rights advocates also argue that the end goal of prosecuting pregnant women is to have the fetus achieve equal status with the woman because it has a constitutionally protected right to life before birth.<sup>179</sup> This again ignores the fact that the state's interest in protecting the fetus would *only take effect when the fetus becomes viable*, when the state already has the power to regulate abortions.<sup>180</sup> Allowing states to prosecute pregnant women for harm to fetuses does not recognize any new rights of a viable fetus, it merely protects previously recognized rights.

## 2. Constitutional Argument

A second argument of opponents is that the prosecution of pregnant women is unconstitutional because of the constitutional prohibitions on vagueness, illegal interference with a woman's right to liberty, and equal protection of the law.<sup>181</sup> The vagueness argument can be easily countered if the Legislature drafts a statute which is narrowly tailored towards the goal of deterring women from using alcohol and drugs while pregnant. The statute should provide that charges could only be brought against a pregnant woman who acted intentionally regarding the life of her viable fetus. Through careful drafting, this proposed statute can be narrowly tailored to avoid the problem of a "slippery slope." In addition, the legislative history will indicate that the intent is for the statute to be limited and not to allow the state to prosecute a pregnant woman for things such as her diet or lack of exercise.

The argument that a statute would constitute illegal interference with a woman's protected liberty interest is also ineffective. First, the United States Supreme Court has recognized that a woman does not

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178. See *id.*

179. See Scott Lehigh, *Common Sense, or a New Way To Ban Abortion?*, THE BOSTON GLOBE, September 15, 1996, at D1.

180. See *Casey*, 112 U.S. at 2819.

181. See, e.g., McNulty, *Pregnancy Police*, *supra* note 170, at 310-18.

have a fundamental right to an abortion.<sup>182</sup> Second, the Court has held that a state does have a permissible interest in protecting the life of a viable fetus and can do so through the regulation of abortions.<sup>183</sup> This establishes that a woman's right to liberty must be balanced against the state's right to protect potential life. This balancing may be accomplished through a carefully worded statute that would prosecute a woman only for recklessly or intentionally endangering the life of her viable fetus through the use of drugs or alcohol, which would not be placing an undue burden on the mother.<sup>184</sup>

Furthermore, arguing that a statute that criminalizes the behavior only of women would violate the equal protection clause of the Constitution is also ineffective. In *Michael M. v. Sonoma County Superior Court*, the Court has held that a law may discriminate on the basis of gender if the differences the law addresses are "real."<sup>185</sup> In upholding a statutory rape statute aimed at deterring underage pregnancy that only punished males having intercourse with underage females, the Supreme Court stated that the fact that only women could become pregnant was a "real" difference which allowed for disparate treatment by the law.<sup>186</sup> This reasoning also applies in prosecuting pregnant women; when and if men ever gain the ability to become pregnant, they would become subject to such a law.

Thus, if the Washington Legislature enacted a statute that was narrowly tailored towards the specific purpose of prohibiting women from endangering their fetuses by intentionally abusing drugs and alcohol during their pregnancies, it would probably withstand any level of constitutional scrutiny.

### 3. Deterrence from Prenatal Care Argument

The final argument against prosecuting pregnant women is that prosecution would not deter women from abusing drugs and alcohol but instead more women would go without the necessary prenatal care in order to avoid prosecution.<sup>187</sup> But enacting a law allowing for prosecution would not be the sole means used to deter women from abusing drugs and alcohol during pregnancy. The methods currently used to deter women from abusing drugs and alcohol during pregnancy, namely voluntary treatment programs and education, have been

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182. See *Casey*, 112 U.S. at 2819.

183. See *Casey*, 112 U.S. at 2819.

184. See *id.*

185. 450 U.S. 464 (1981).

186. See *Michael M.*, 450 U.S. at 464.

187. See McNulty, *Pregnancy Police*, *supra* note 170, at 310-18.

ineffective.<sup>188</sup> Advocating a law to prosecute women who intentionally put the life of a viable fetus at risk is not calling for the end of the education process. In order to be effective, the education process must be improved. The addition of the criminal statute would be an attempt to make women more painfully aware of the consequences of their drinking and drug use during pregnancy. In order to ensure that pregnant women would not avoid necessary prenatal care, the state needs to provide for a program in which women can seek help and guidance during the early stages of their pregnancy.<sup>189</sup> The goal of the statute is to stop pregnant women from abusing drugs and alcohol while pregnant, *not* to put pregnant women in jail.

Under the proposed Washington law, if a woman, much like Deborah Zimmerman, arrived at a hospital to give birth to an infant who tested positive for drugs or alcohol, the woman could be charged with a crime. On the other hand, if the woman sought early prenatal care that helped her stop abusing drugs and alcohol, she would certainly avoid any chance of prosecution. To be effective, this law needs to be accompanied by meaningful access to adequate prenatal care and drug treatment facilities.

#### D. Why Intervention Is the Solution

Currently, Washington state is only one step away from the prosecution of pregnant women for intentional or reckless disregard for the life of their unborn children. The Washington case of *State v. Blackwell* and the criminal statute under which Blackwell was convicted for the death of his viable fetus indicate that the state is willing to recognize the murder of a viable fetus as a crime.<sup>190</sup> However, in *State v. Dunn*, the court indicated that the plain language of the statute, when strictly construed, did not include a viable fetus.<sup>191</sup> After all, Washington already recognizes an affirmative duty toward a viable fetus through the civil liability for the wrongful death of a viable fetus.<sup>192</sup> Furthermore, the interest of the state in protecting potential life is also recognized in *Roe* and *Casey*.<sup>193</sup>

The most important point is the need to protect society, including both the mother and the child. When the mother chooses to use alcohol and drugs throughout her pregnancy, she not only endangers

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188. See Children's Trust Foundation, FETAL ALCOHOL FACT SHEET, *supra* note 165.

189. See Resource Guide, *supra* note 148, at i.

190. *Blackwell*, No. 95-1-0376-3.

191. *Dunn*, 82 Wash. App. at 122, 916 P.2d at 952.

192. See *Moen*, 85 Wash. 2d at 599, 537 P.2d at 266.

193. *Roe*, 410 U.S. at 113; *Casey*, 112 U.S. at 2819.

her own life, but the life of her innocent child. The state needs to deter mothers from harming their unborn children. Currently, education and encouraging treatment are the only ways to do this, but these means have been ineffective.

A critical issue for the judge's decision in the Zimmerman case was the fact that Deborah Zimmerman acted intentionally—she knew what she was doing and hoped that she would kill her child.<sup>194</sup> Zimmerman had sufficient knowledge of her actions, and the possible harm that could ensue.<sup>195</sup> Women who abuse drugs and alcohol consistently throughout their pregnancy need to be stopped. Since statistics show that education and encouraging treatment are ineffective, Washington state needs to amend its laws to begin prosecuting these women.<sup>196</sup>

While *Roe* and *Casey* hold that the constitutional right to privacy is broad enough to encompass a woman's autonomy over her body during pregnancy, the law maintains that the right is not absolute and that the state may properly assert important interests in safeguarding health and protecting potential life.<sup>197</sup> Ms. Zimmerman could have exercised her right to privacy and chosen abortion before her fetus was viable. But, by choosing to proceed with the pregnancy, she tacitly accepted the responsibility to act *reasonably* in regard to Meagan's health and thus subjected herself to state intervention.

The Washington Legislature as well must act reasonably in enacting a law to punish women like Zimmerman. The fear that women will be prosecuted for smoking, jogging, or sipping wine in their ninth month of pregnancy demonstrates the line that Washington Legislators should draw: the defendant's *intentional* disregard for the life of her unborn child deserves to be punished. In situations like that of Deborah Zimmerman, the state has a clear duty to proceed with the prosecution.

## V. CONCLUSION

This is not a battle of pro-choice vs. pro-life, or mother vs. fetus. This is a question of recognizing a viable fetus for what it is, potential human life. This is something the state has done since *Roe v. Wade*, and something that the state must continue to do by prosecuting women for intentionally trying to kill their viable fetuses.

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194. See Decision, *supra* note 75, at 10.

195. See *id.*

196. See Resource Guide, *supra* note 148, at i.

197. *Roe*, 410 U.S. at 113; *Casey*, 112 U.S. at 2819.



Regardless of the final outcome of *State v. Zimmerman*, state legislatures clearly must listen to the *Zimmerman* court's plea for action. It is time for state legislators to make decisions about the extent to which a state should recognize a state's interest in potential human life. Washington state needs to take the next logical step and pass a law making a mother's infliction of intentional harm upon her fetus a crime.