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How the Supreme Court of Alabama Usurped the Rights of Pregnant Women Who Use Substances and Ignored Non-Carceral Options to Address Prenatal Substance Use

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**NOTE — *STATE V. HICKS*: HOW THE
SUPREME COURT OF ALABAMA
USURPED THE RIGHTS OF
PREGNANT WOMEN WHO USE
SUBSTANCES AND IGNORED NON-
CARCERAL OPTIONS TO ADDRESS
PRENATAL SUBSTANCE USE**

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Abstract

In 2014, the Supreme Court of Alabama solidified that the State may criminally prosecute and potentially sentence women to jail time for using substances during pregnancy. Ultimately, the court determined that the term “child” includes unborn fetuses. Using State v. Hicks, this Note will provide an in-depth review of the criminal statute that allows state prosecutors to bring charges against these women, the damaging consequences from criminal prosecution or fear of prosecution under this statute, and nonpunitive alternatives that the state of Alabama can implement to further the State’s interest in protecting children from the earliest stages of development.

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I. INTRODUCTION

In *Hicks v. State*,¹ the Supreme Court of Alabama sought to determine whether Alabama's judicial precedent allowed for criminal prosecution of the respondent for violating Alabama's chemical-endangerment statute by exposing her unborn child to a controlled substance.² The court addressed the relevant inquiry: whether the use of the word "child" in the chemical-endangerment statute³ included all children, even those that are unborn.⁴ The court concluded that the word "child" in the chemical-endangerment statute does include both born and unborn children.⁵ The court further found that applying this statute to prosecute the use of controlled substances during pregnancy promotes Alabama's policy for protecting life from the earliest stages of development.⁶ Ultimately, the court's interpretation of the chemical-endangerment statute erroneously: (i) determined that the word "child" includes unborn fetuses, despite the judicial ambiguity surrounding the interpretation of the word;⁷ (ii) undermined the right to privacy and bodily autonomy of expectant mothers;⁸ and, (iii) prevented expectant mothers from obtaining adequate prenatal care due to the possibility that they will be prosecuted for their substance use.⁹

II. THE CASE

Prior to giving birth, Sarah Janie Hicks ingested cocaine while pregnant with her child, referred to as J.D.¹⁰ J.D. tested positive for the presence of cocaine in his body at the time of his birth.¹¹ Hicks filed a pretrial motion to dismiss the indictment in which she asserted that: (1) because the plain language of Section 26-15-3.2(a)(1)¹² of the Alabama Code reflected the legislature's intent that the

1. 153 So. 3d 53 (Ala. 2014).

2. *Id.* at 57.

3. *See* ALA. CODE § 26-15-3.2 (2023) (explaining that a person commits crime of chemical endangerment by exposing a child to an environment in which he or she knowingly, recklessly, or intentionally causes or permits a child to be exposed to, ingest or inhale, or have contact with a controlled substance, chemical substance, or drug paraphernalia).

4. *Hicks*, 153 So. 3d at 57.

5. *Id.* at 66.

6. *Id.*

7. *See infra* Section V.A.

8. *See infra* Section V.B.

9. *See infra* Section V.C.

10. *Hicks*, 153 So. 3d at 55.

11. *Id.*

12. *See* ALA. CODE § 26-15-3.2(a)(1) (2023) ("A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she . . . knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or to inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia.").

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statute only apply to a born child and not a fetus (an unborn child),¹³ Hicks's conduct in ingesting cocaine while pregnant did not constitute chemical endangerment of a child; (2) application of the statute to Hicks's denied her due process, because the statute as applied to her conduct is impermissibly vague, as it does not provide notice that the statute prohibits exposing a *fetus* to a controlled substance¹⁴; (3) the State violated the separation of powers doctrine,¹⁵ because it is the duty of the legislature, not a district attorney, to proscribe criminal offenses and the legislature declined to criminalize prenatal conduct that harms a fetus; and (4) application of the statute to Hicks's denied her equal protection because the state sought to punish women who abuse drugs while pregnant, whereas a man may father a child while abusing drugs without fear of prosecution under the statute.¹⁶

On November 19, 2009, the trial court conducted a hearing addressing the motion to dismiss.¹⁷ At the conclusion of the hearing, the trial court asked Hicks and the State to explain how the court can dismiss a valid indictment.¹⁸ The trial court found that the motion to dismiss appeared grounded in factual arguments and questioned whether the assertions in the motions are better suited for a judgment of acquittal. Hicks argued that it is a question of law, not a question of fact, as to whether the term "child" includes an unborn fetus and that no crime was committed based on the set of circumstances alleged in that indictment.¹⁹ The State responded that if the indictment is valid, then the court is asked a question of fact, which it cannot dismiss when the indictment is correct on its face and valid.²⁰ On November 30, 2009, the trial court denied the motion to dismiss in alignment with the State's argument.²¹ Shortly after, on December 7, 2009, Hicks filed a Motion to Declare the Statute Unconstitutional based on similar arguments as set out in her motion to dismiss.²² In January 2010, Hicks reserved the right to appeal the issues presented in her motion to dismiss before

13. See *Dictionary of Cancer Terms*, NAT'L CANCER INST., <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/fetus> (last visited Dec. 13, 2023) (defining "fetus" as "[a]n unborn offspring that develops and grows inside the uterus (womb) of humans," and "fetal period" as "begin[ning] at 9 weeks after fertilization of an egg by a sperm and end[ing] at the time of birth").

14. *Hicks*, 153 So. 3d at 55.

15. See ALA. CONST. of 1901, art. III, § 42 ("The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.").

16. *Hicks*, 153 So. 3d at 55.

17. *Id.*

18. *Id.*

19. *Id.* at 56.

20. *Id.* at 55.

21. *Id.* at 55–56.

22. *Id.* at 56.

entering a guilty plea.²³ Pursuant to a plea agreement, Hicks pled guilty to the chemical endangerment of a child, as charged in the indictment.²⁴ The court sentenced Hicks to three years imprisonment; ultimately, the sentence was suspended and the court placed her on supervised probation for one year.²⁵

Hicks appealed her conviction to Alabama's Court of Criminal Appeals, contending that the plain language of the statute was clear and unambiguous and that the statute does not mention unborn children or fetuses.²⁶ Specifically, Hicks argued that the court should not interpret the term "child" in Section 26-15-3.2 to include an unborn child or fetus.²⁷ She further asserted that the settled rules of statutory construction indicate that: (1) per the rule of lenity, the court should strictly construe criminal statutes in favor of the accused; (2) the legislative history of the statute and the Alabama legislature's failure to amend Section 26-15-3.2 to specifically state that the statute applies to a fetus shows that the legislature did not intend for the statute to apply to the prenatal exposure of unborn children to controlled substances; and (3) the majority of Alabama's sister states historically refuse to criminally prosecute women for conduct occurring during pregnancy.²⁸ Hicks's constitutional challenges to Section 26-15-3.2 included that as applied to her, the statute was void for vagueness and violative of due process.²⁹ The Court of Criminal Appeals relied on its recent opinion in *Ankrom v. State*³⁰ and held that the plain meaning of the term "child" in Section 26-15-3.2 includes a viable fetus.³¹ The court further asserted: (a) the rule of lenity was inapplicable; (b) the fact that subsequent attempts to amend the statute to include unborn fetuses within the definition did not pass was irrelevant; and (c) holdings from other courts were unpersuasive.³²

On February 24, 2012, Hicks petitioned the Supreme Court of Alabama for a writ of certiorari, which the court granted in April of 2012.³³ In *Ex parte Ankrom*,³⁴ the Supreme Court of Alabama held that the plain meaning of the word "child" within the chemical-endangerment statute includes an unborn child.³⁵ Given the similarity in the facts of both cases and the recent release of

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. 152 So. 3d 373, 385 (Ala. Crim. App. 2011) (holding that plain meaning of term "child" in Section 26-15-3.2 includes a viable fetus and that Ankrom therefore had adequate notice that her conduct was prohibited).

31. *Hicks*, 153 So. 3d at 56.

32. *Id.*

33. *Id.* at 57.

34. 152 So. 3d 397 (Ala. 2013).

35. *Id.* at 421.

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the opinion in *Ankrom*, the Supreme Court of Alabama sought to determine whether Alabama's chemical-endangerment statute applied to Hicks's conduct.³⁶ Similar to her previous argument's in the lower court, Hicks asserted that the legislature did not intend for the word "child" in the chemical-endangerment statute to apply to an unborn child; that applying the chemical-endangerment statute to protect unborn children is bad public policy; and, that the lower court's decision is a denial of due process of law for Hicks.³⁷

III. LEGAL BACKGROUND

Section 1 of the Fourteenth Amendment provides that "no State shall ... deprive any person of life, liberty, or property without due process of law."³⁸ Since the ratification of the Fourteenth Amendment, the Supreme Court has been tasked with determining what individual rights are encompassed by the word "liberty." These rights are integral to the human experience within this country and ascribe a legal obligation on all states, preventing them from trampling on these rights. The United States continually wrestles with which rights, if any, an unborn fetus should receive, while also giving weight to the rights of pregnant women to make decisions concerning their body and the privacy they are granted in making those decisions.³⁹

In 1973, the Supreme Court, faced with the task of balancing a woman's autonomy over her pregnancy and state interest in protecting the "potentiality of human life," held that the "compelling" point at which a state can regulate or prohibit abortion begins at the end of the first trimester.⁴⁰ The general theme of the Court's decision is that a woman's right to make decisions regarding her pregnancy is limited by the state's interest in protecting the unborn fetus.⁴¹ The Court upheld the State's interest in protecting an unborn fetus, but found that unborn fetuses are not people under the Fourteenth Amendment.⁴² Thus, the Supreme Court stopped short of assigning legal rights, as defined by the Fourteenth Amendment, to unborn fetuses. Yet, this did not stop state prosecutors from bringing charges against individuals whose actions against the

36. *Hicks*, 153 So. 3d at 58.

37. *Id.*

38. U.S. CONST. amend. XIV, § 1.

39. See, e.g., *Roe v. Wade*, 410 U.S. 113, 163 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs*, 597 U.S.; *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Dobbs*, 597 U.S.

40. See *Roe v. Wade*, 410 U.S. at 163 (concluding that states may regulate abortion in a manner that reasonably relates to preserving and protecting maternal health because, according to available medical knowledge, mortality rates of abortion in first trimester may be lower than mortality rates of normal childbirth).

41. *Id.* at 163–64 (explaining that states retain a legitimate interest in protecting potential life because fetus, after first trimester, has "the capability of meaningful life outside the mother's womb").

42. *Id.* at 158.

mother also caused harm to the unborn fetus. A number of states adopted and upheld this rule in judicial decisions. In *North Carolina v. Beale*, prosecutors indicted a man for the murder of his wife and unborn child.⁴³ However, the Supreme Court of North Carolina found that the statutory definitions of a victim under the first or second degree murder statute did not apply to killing a viable, unborn fetus.⁴⁴ In *Keeler v. Superior Court*,⁴⁵ the state charged a man with murder for beating his pregnant ex-wife, resulting in her fetus becoming stillborn.⁴⁶ The Supreme Court of California, relying on evidence of the legislature's intent, held that the legislature "did not intend the act of feticide—as distinguished from abortion—to qualify as a crime."⁴⁷

In 2006, the Alabama legislature passed the Chemical Endangerment of a Child statute (aka the "chemical-endangerment statute").⁴⁸ The statute provides that a

person commits the crime of chemical endangerment of exposing a child to an environment in which controlled substances are produced or distributed if he or she is a responsible person and knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia.⁴⁹

A responsible person is defined as a child's "natural parent, stepparent, adoptive parent, legal guardian, custodian, or any other person who has the permanent or temporary care or custody or responsibility for the supervision of a child."⁵⁰ Causing or permitting a child to receive exposure to, ingest, inhale, or contact with a controlled substance, chemical substance, or drug paraphernalia is a Class C felony with a penalty of up to ten years in prison and a fine of up to \$15,000.⁵¹ Further, if the exposure, ingestion, inhalation, or contact results in serious physical injury to the child, the offense is raised to a Class B felony, resulting in up to twenty years in prison and a fine of up to \$30,000.⁵² Finally, if the exposure, ingestion, inhalation, or contact results in the death of the child, the crime is a Class A felony, resulting in the possibility of life in prison and a fine of up to \$60,000.⁵³

43. 376 S.E.2d 1, 1 (1989).

44. *Id.* at 4.

45. 470 P.2d 617 (1970).

46. *Id.* at 619.

47. *Id.* at 622–30.

48. ALA. CODE § 26-15-3.2 (2023).

49. *Id.*

50. *Id.* § 26-15-2(4).

51. *Id.* §§ 26-15-3.2(a)(1), 13A-5-6(a)(3), 13A-5-11(a)(3).

52. *Id.* §§ 26-15-3.2(a)(2), 13A-5-6(a)(2), 13A-5-11(a)(2).

53. *Id.* §§ 26-15-3.2(a)(3), 13A-5-6(a)(1), 13A-5-11(a)(1).

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On January 31, 2009, Hope Ankrom gave birth to a son.⁵⁴ Medical records indicated that she tested positive for cocaine prior to giving birth and her son tested positive for cocaine after birth.⁵⁵ During an investigation by the Department of Human Resources, Ankrom admitted to a Human Resources worker that she used marijuana while pregnant, but she denied using cocaine.⁵⁶ Medical records from her physician showed a documented substance abuse problem several times during Ankrom's pregnancy and that she tested positive for cocaine and marijuana more than once during her pregnancy.⁵⁷ On February 18, 2009, police arrested Ankrom and charged her with chemical endangerment of a child.⁵⁸ Ankrom's indictment stated that she "knowingly, recklessly, or intentionally cause[d] or permit[ted] a child . . . to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia in violation of Section 26-15-3.2(a)(1)."⁵⁹ In her Motion to Dismiss Indictment, Ankrom set out a series of arguments.⁶⁰ On October 15, 2009, the trial court denied the motion.⁶¹ On April 1, 2010, Ankrom pled guilty to violating the chemical-endangerment statute and was sentenced to three years in prison. However, the court subsequently suspended her sentence and replaced it with one year of probation.⁶²

Amanda Kimbrough's case offers another example. On April 29, 2008, a Colbert County hospital admitted Kimbrough and her obstetrician diagnosed her with preterm labor and "occult cord prolapse."⁶³ Her physician also ordered a urine test, which came back as positive for methamphetamine.⁶⁴ Kimbrough denied any methamphetamine use while pregnant.⁶⁵ She underwent a cesarian section and delivered a newborn infant who required manual resuscitation

54. *Ex parte Ankrom*, 152 So. 3d 397, 401 (Ala. 2013).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.* (alterations in original) (citation omitted) (detailing Ankrom's argument, which asserted that "'the plain language of [the statute] shows that the legislature intended for the statute to apply only to a child, not a fetus,'; that 'courts in other states which have enacted the same or similar chemical endangerment statutes have determined that such statutes do not apply to prenatal conduct that harms a fetus'; that . . . 'the rule of lenity applies,'; that '[t]he legislature has previously considered amending the statute to include prenatal conduct that harms a fetus and declined to do so' . . . ; and that '[p]rosecution of pregnant, allegedly drug-addicted women is against public policy for numerous moral and ethical reasons.'").

61. *Id.*

62. *Id.* at 402.

63. *See id.* at 403 (citations omitted) (explaining that "occult cord prolapse" is "a condition in which the umbilical cord descends through the birth canal before the fetus, resulting in the blood flow through the umbilical cord being cut off").

64. *Id.*

65. *Id.*

because he could not breathe.⁶⁶ The child's condition momentarily improved, but his condition rapidly declined, and he died nineteen minutes after birth.⁶⁷ A toxicology screen administered on the deceased child's blood found methamphetamine and a metabolite of methamphetamine in his system.⁶⁸ The hospital notified the Department of Human Resources of Kimbrough's positive toxicology report and the Department removed her other two children from her care and instead, placed them with her mother.⁶⁹ While developing a childcare plan with a Human Resources worker, Kimbrough disclosed that she smoked methamphetamine three days before she entered the hospital.⁷⁰

In September of 2008, a grand jury indicted Amanda Kimbrough for the chemical endangerment of her child that resulted in the child's death.⁷¹ Kimbrough filed four motions to dismiss and alleged that:

(1) [the] term "child" in [Section] 26-15-3.2 did not include an unborn child, and therefore, her conduct in smoking methamphetamine while pregnant did not constitute the offense of the chemical endangerment of a child; (2) that prosecuting her for violating [the statute] for conduct during pregnancy . . . violated the doctrine of separation of powers; (3) that interpreting the term "child" in [the statute] to include an unborn child rendered the statute void for vagueness; and (4) that interpreting the term "child" in [the statute] to include an unborn child violated her right to equal protection under the law.⁷²

The trial court denied the motions, and the case proceeded to trial; however, Kimbrough reached a plea agreement with the State, and the jury was dismissed.⁷³

Ankrom and Kimbrough appealed their convictions to the Alabama Court of Criminal Appeals, which held that the word "child" in the chemical-endangerment statute included an unborn child.⁷⁴ The court relied on four

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 403–04.

71. *See id.* at 402 (citation omitted) ("The grand jury of said county charge that, before the finding of the indictment, Amanda Borden Kimbrough . . . did knowingly, recklessly, or intentionally cause or permit a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, to wit: methamphetamine, and the exposure, ingestion, inhalation, or contact resulted in the death of Timmy Wayne Kimbrough, in violation of § 26-15-3.2 of the Code of Alabama.").

72. *Id.*

73. *See id.* (explaining that under plea agreement, Kimbrough pleaded guilty to chemical endangerment of a child as charged in indictment, trial court sentenced her to ten years imprisonment, and she expressly reserved her right to appeal).

74. *Id.* at 404.

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methods of statutory interpretation to construe “child”:⁷⁵ (1) the rule of lenity;⁷⁶ (2) legislative intent and previous judicial precedent; (3) the dictionary definition of the word; and (4) interpretations of the word by other state courts.⁷⁷ Relying on the plain language of the statute, the court first explained that it will engage in judicial construction only if the language of the statute is ambiguous.⁷⁸ If ambiguous, the rule of lenity requires that the statute is construed in favor of the accused.⁷⁹

The court next looked at the legislative intent, which stated that “the public policy of the State of Alabama is to protect life, born, and unborn.”⁸⁰ The court found that this duty is especially important when dealing with unborn life that is biologically equipped to live outside the womb.⁸¹ The court also reviewed a previous Alabama Supreme Court case, *Eich v. Town of Gulf Shores*, which examined whether the parents of an eight-month-old stillborn fetus could maintain a wrongful death action for the death of their unborn child.⁸² In *Eich*, the court interpreted the Alabama wrongful death of a minor statute’s term “minor child” to include a “viable fetus that received prenatal injuries causing death before a live birth,” thus, expressly recognizing a viable fetus as a child.⁸³

The Court of Criminal Appeals next referenced the *Merriam–Webster’s Collegiate Dictionary* to further support their position, which defines a “child” as “an unborn or recently born person.”⁸⁴ Lastly, the court relied on *Whitner v. State*,⁸⁵ a South Carolina Supreme Court case. In *Whitner*, the South Carolina Supreme Court found a woman, who ingested crack cocaine during the third trimester of her pregnancy, guilty of endangering a viable fetus’s life and health under South Carolina’s criminal child abuse and endangerment statute.⁸⁶ South Carolina’s highest court cited its compelling interest in protecting the life of viable fetuses to hold that women may be found criminally liable for actions that

75. *See id.* (citation omitted) (“Principles of statutory construction instruct this Court to interpret the plain language of a statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous. The fundamental rule is that criminal statutes are construed strictly against the State.”).

76. *See id.* (explaining that rule of lenity requires that ambiguous statutes are construed in favor of accused).

77. *Id.* at 404–05.

78. *Id.* at 404.

79. *Id.*

80. *Id.* (quoting *Ankrom v. State*, 152 So. 3d 373, 379 (Ala. Crim. App. 2011)).

81. *Id.* (stating that legislature defined term “child” in Section 26-14-1(3) as a person under age of eighteen).

82. *Eich v. Town of Gulf Shores*, 300 So. 2d 354 (Ala. 1974).

83. *Ankrom*, 152 So. 3d at 404 (citing *Eich*, 300 So. 2d).

84. *Id.* at 405.

85. 492 S.E.2d 777 (S.C. 1997).

86. *Id.* at 782–84.

could harm a viable fetus during pregnancy.⁸⁷ The Court of Criminal Appeals further solidified its interpretation of the term “child” under the chemical-endangerment statute by relying on *Hall v. Murphy*⁸⁸ and *Fowler v. Woodward*.⁸⁹ When applying each of these interpretive factors, the court concluded that no rational basis exists for concluding that the plain and ordinary meaning of the term “child” does not include a viable fetus.⁹⁰

Both Ankrom and Kimbrough petitioned the Supreme Court of Alabama for a writ of certiorari to review the Court of Criminal Appeals’ decisions regarding their cases, because the decisions presented a material question of first impression for the court.⁹¹ The court granted both petitions and consolidated their cases to consider whether the term “child,” as used in the chemical-endangerment statute, includes an unborn child.⁹² The Supreme Court of Alabama sought to determine whether the statute in question permitted finding Ankrom and Kimbrough criminally liable under the chemical-endangerment statute for conduct that could potentially harm an unborn fetus.⁹³ Ankrom and Kimbrough raised three arguments: (1) the Court of Criminal Appeals incorrectly applied the chemical-endangerment statute in *Ankrom* to the use of a controlled substance during pregnancy; (2) the Court of Criminal Appeals’ decision in *Ankrom* is bad public policy; and (3) the decision violates the United States Constitution and the Alabama Constitution.⁹⁴

The Supreme Court of Alabama first addressed whether the Court of Criminal Appeals erred in *Ankrom* when it applied the chemical-endangerment statute to a pregnant woman’s use of controlled substances, which resulted in her unborn child ingesting the controlled substance.⁹⁵ Kimbrough and Ankrom both asserted that courts must strictly construe ambiguous criminal statutes “in favor of those persons sought to be subjected to their operation.”⁹⁶ Kimbrough further argued that “the ordinary meaning of the word ‘child’ in the chemical-endangerment statute is limited to children who have been born and therefore, exist in a world where they might come in contact with drug paraphernalia or

87. *Id.* at 785–86.

88. 113 S.E.2d 790 (S.C. 1960) (holding that a fetus that reaches period of prenatal maturity, which is when it is capable of independent life apart from its mother, is a person).

89. 138 S.E.2d 42 (S.C. 1964) (interpreting *Hall* to support finding that a viable fetus that sustained injuries while still in womb does not have to be born alive for another person to successfully maintain an action for wrongful death of fetus).

90. *Ex parte Ankrom*, 152 So. 3d 397, 407 (Ala. 2013) (citing *Whitner*, 492 S.E.2d at 779–81).

91. *Id.*

92. *Id.*

93. *Id.* at 407–08.

94. *Id.* at 408.

95. *Id.* at 408–20.

96. *Id.* at 409.

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places where drugs are made or sold.”⁹⁷ Yet, the court agreed with the State’s argument and asserted that, as the plain meaning of the word “child” indicates, the word is broad enough to encompass all children.⁹⁸ In response to Ankrom’s argument that other statutes in the Alabama Code interpret the word “child” to exclude unborn children,⁹⁹ the court held that nothing in the cited statutes contradicts the court’s plain meaning interpretation of the word “child” within the chemical-endangerment statute.¹⁰⁰

Similarly, the court also rejected the argument that the attempts to amend the chemical-endangerment statute in the legislative history indicate that the word “child,” as used in the statute, does not include unborn children.¹⁰¹ The court reasoned that while it is possible to surmise that the legislature intended the original chemical-endangerment statute to protect only born children, it is also possible that the legislature already understood the original statute to protect born and unborn children, rendering any proposals to amend the statute unnecessary.¹⁰² Lastly, the court rejected Kimbrough’s argument that it should follow the majority of states that refuse to extend their chemical-endangerment statutes to unborn children.¹⁰³

Despite acknowledging the potential public policy implications cited by the petitioners, the court stated that the legislature is more equipped to handle issues of public policy.¹⁰⁴ The court briefly addressed the petitioners’ constitutional arguments and in agreeing with the State, concluded that this particular argument fell outside the parameters of the writ granted by the court.¹⁰⁵ Specifically, the court explained that its consideration only covered whether the word “child” in the chemical-endangerment statute encompasses unborn children, an issue of first impression that prompted the court’s grant of certiorari.¹⁰⁶ In responding to this issue, the Alabama Supreme Court held that the plain meaning of the word

97. *Id.* at 410.

98. *Id.* (holding that term “child” is unambiguous and encompasses born and unborn—including Ankrom’s and Kimbrough’s unborn children).

99. *Id.* at 412 (identifying Section 26-14-1(3) of Alabama Code, which defines “child” as “a person under the age of 18 years,” and Section 26-16-91(2) of Alabama Code, which defines “child” as “a person who has not yet reached his or her eighteenth birthday”).

100. *Id.* at 414.

101. *See id.* at 416 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)) (“Subsequent legislative history is a ‘hazardous basis for inferring the intent of an earlier’ Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.”).

102. *Id.*

103. *Id.* at 418 (discounting other states that refused to apply chemical-endangerment statutes to protect unborn children).

104. *Id.* at 420 (explaining that court would be “remiss if [it] failed to recognize that the legislature may disagree with the result of [the] [c]ourt’s interpretation and application of the chemical-endangerment statute and is free to amend the statute to effect a different scope for the application of the statute”).

105. *Id.* at 421.

106. *Id.*

“child” in the chemical-endangerment statute includes unborn children or fetuses at any stage of development.¹⁰⁷

IV. THE COURT'S REASONING

Building upon the reasoning in *Ex parte Ankrom*, the Alabama Court of Criminal Appeals convicted Sarah Hicks of violating the chemical-endangerment statute.¹⁰⁸ Hicks brought forth three arguments before the Alabama Supreme Court: (1) the legislature did not intend for the word “child” in the chemical-endangerment statute to apply to an unborn child; (2) applying the chemical-endangerment statute to protect unborn children is bad public policy; and (3) the court denied her due process of law.¹⁰⁹ The court first addressed Hicks's legislative intent argument. Hicks contended that under the rules of statutory interpretation, the word “child” in the statute cannot include an unborn child because the legislature did not define “child” in the statute.¹¹⁰ She asserted that the lack of definition renders the statute unconstitutionally ambiguous, and thus, the court should render the statute void for vagueness.¹¹¹ In the alternative, Hicks argued that if the court does not find the statute unconstitutionally vague, the court should apply the rule of lenity and interpret the statute in the light most favorable to her.¹¹²

Relying heavily on its opinion in *Ankrom*, the court applied the rules of statutory construction to interpret the statute.¹¹³ The court reiterated that, when conducting statutory interpretation, “[w]ords used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used[,] a court is bound to interpret that language to mean exactly what it says.”¹¹⁴ Further, “[i]f the language of the statute is unambiguous, then there is no room for judicial construction”¹¹⁵ The court directly quoted the decision of the Court of Criminal Appeals in *Ankrom*, which stated that “[n]ot only have the courts of this State interpreted the term ‘child’ to include a viable fetus in other contexts, the dictionary definition of the term ‘child’ explicitly includes an unborn person or a fetus.”¹¹⁶ The court, finding the Court of Criminal

107. *Id.*

108. *See Hicks v. State*, 153 So. 3d 53, 57 (Ala. 2014) (detailing Court of Criminal Appeals' finding that Hicks violated statute by “causing her unborn child to be exposed to, to ingest or inhale, or to have contact with a controlled substance”).

109. *Id.* at 58–63.

110. *Id.* at 58.

111. *Id.*

112. *Id.*

113. *Id.* at 58–61.

114. *Id.* at 59.

115. *Id.*

116. *See id.* at 59–60 (citations omitted) (reasoning that if legislature wanted to prohibit conduct solely against viable fetuses, statute needed to use that specific term; if legislature intended to proscribe conduct

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Appeals' reasoning persuasive, concluded that the term "child" within the statute is unambiguous and the word's plain meaning includes unborn children.¹¹⁷ Because the court found the statute unambiguous, the court also ruled that the rule of lenity would not apply.¹¹⁸

The court next addressed Hicks' argument that the legislature's intended definition of the word "child" in the statute is definable using other chapters of the Alabama Code, which define "child" as "[a] person under the age of 18 and as [a] person who has not yet reached his or her eighteenth birthday."¹¹⁹ She further urged the court to refer to the Woman's Right to Know Act, which defines "unborn child" as "the offspring of any human person from conception until birth."¹²⁰ The court again deferred to its prior decision in *Ankrom* to craft its opinion, since the petitioners relied on similar arguments.¹²¹ The court found that using the word "child" in other chapters of the Code only sets a maximum age for when an individual is no longer regarded as a "child" for statutory purposes.¹²² Additionally, since the particular language in the partial-birth abortion statute and the Woman's Right to Know Act only addresses unborn children, it would be impractical to use the word "child."¹²³ Because "both born and unborn children can be exposed to controlled substances," the court concretely inferred that the legislature intended the chemical-endangerment statute to apply to "all" children, at any stage of "life."¹²⁴

Hicks contended that most other jurisdictions refuse to define the word "child" as including an unborn child and thus, the Court of Criminal Appeals erred by following the minority view in *Whitner v. State*.¹²⁵ In response, the court, citing the concurring opinion in *Hamilton v. Scott*,¹²⁶ espoused on the controlling interest of the state in protecting the fetus that may become a child.¹²⁷ In *Ankrom*, the court indicated that the State retains a "legitimate interest in protecting the life of children from the earliest stages of their development and has done so by enacting the chemical-endangerment statute."¹²⁸ Thus, the court concluded that the majority approach does not lead the justices to apply

against a viable fetus and all other persons under a certain age, "child" would be sufficient to convey that meaning).

117. *Id.* at 60.

118. *Id.*

119. *Id.* (citing ALA. CODE §§ 26-14-1(3), 26-16-91(2) (2023)).

120. *Id.* at 60–61 (citing ALA. CODE § 26-23A-3(10) (2023)).

121. *Id.* at 61.

122. *Id.*

123. *See id.* (explaining that these statutes specifically reference a "human fetus" or "unborn child" because it would be "nonsensical" in those contexts to include children that already are born).

124. *Id.*

125. *Id.* at 62 (citing *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997)).

126. 97 So. 3d 728, 740 (Ala. 2012).

127. *Hicks*, 153 So. 3d at 62.

128. *Id.*

additional meaning beyond the plain meaning of the word “child.”¹²⁹ Hicks lastly argued that the legislature’s decision not to pass any proposed amendments to the chemical-endangerment statute that would have incorporated unborn children into the word “child” is indicative of legislative intent.¹³⁰ The court found this approach unpersuasive.¹³¹ The court reasoned that there are a number of inferences that are implied by this inaction, including that the current legislation already encompasses the proposed changes.¹³² Because the court could not identify a concrete reason for the legislature’s failure to incorporate the proposed changes, it declined to adhere to Hicks’ interpretation of the legislature’s inaction.¹³³ The court briefly addressed Hicks’ public policy argument, which relied on a number of medical and public health organizations that believe prosecuting women for drug use during pregnancy does not protect human life.¹³⁴ Agreeing with the court’s reasoning for rejecting the same argument put forth in *Ankrom*, it declined to consider Hicks’ public policy arguments.¹³⁵

Hicks lastly put forth an as-applied challenge, arguing that due to the vagueness of the statute, she did not receive adequate notice of what constituted prohibited conduct.¹³⁶ This in turn violated her due process rights.¹³⁷ Applying the void for vagueness doctrine, the court cautioned that difficulty in ascertaining a meaning will not render a statute unenforceable, as too vague.¹³⁸ To survive scrutiny, the chemical-endangerment statute must provide fair notice as to what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement.¹³⁹ The court further noted that when a law is unambiguous, an individual is presumed to know the law and must conform their behavior to it.¹⁴⁰ Thus, that mistake of the law cannot count as a defense to a crime.¹⁴¹ Therefore, because the chemical-endangerment statute is unambiguous, it provides fair notice and is not unconstitutionally vague.¹⁴²

For the second time, the Supreme Court of Alabama set out to determine whether the chemical-endangerment statute applies to women who use substances during pregnancy. Aligning its opinion with its recent analysis in

129. *Id.* at 61–62.

130. *Id.* at 62.

131. *Id.*

132. *Id.* at 62.

133. *Id.*

134. *Id.* at 62–63.

135. *Id.*

136. *Id.* at 64.

137. *Id.*

138. *Id.* at 65 (citation omitted).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 65–66.

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Ankrom, the Supreme Court of Alabama again held that the plain meaning of the word “child” in the statute includes unborn children and in turn, that the statute furthers the State’s interest in protecting the life of children from the earliest stages of their development.¹⁴³

V. ANALYSIS

A. *The Court Incorrectly Applied the Canons of Interpretation to Erroneously Conclude That the Chemical-Endangerment Statute is Applicable to Women Who Use Substances During Pregnancy*

The court erroneously applied the canons of statutory interpretation when finding that the legislature intended for the word “child” in Alabama’s chemical-endangerment statute to include unborn fetuses. Despite judicial precedent outlining how to utilize the Plain Meaning Rule, legislative intent, and interpretations of the meaning of “child” in other jurisdictions, the court incorrectly found the statute unambiguous and inclusive of fetuses still in the womb.¹⁴⁴ Courts apply canons of statutory construction¹⁴⁵ to ensure their judgments do not harm an individual’s liberty.¹⁴⁶ The controlling principle that guides Alabama courts in analyzing statutes is the separation of powers principle.¹⁴⁷ This is not only evident from judicial opinions,¹⁴⁸ but is expressly outlined in the Alabama Constitution.¹⁴⁹

Strong adherence to this principle should have prevented the Supreme Court of Alabama justices from engaging in judicial activism or, as some call it, “legislating from the bench.”¹⁵⁰ To limit judicial decision making from imposing on the legislature, Alabama courts apply the Plain Meaning Rule as a primary canon of interpretation to decipher statutes that are rendered ambiguous.¹⁵¹ As the Alabama Supreme Court stated in *Ex parte State*,¹⁵² the purpose and intent of lawmakers “should not be defeated by [a] narrow construction based upon nice

143. *Id.* at 66.

144. *See id.*

145. *See* Christina Gomez, *Canons of Statutory Construction*, 46 COLO. LAW. 23, 23, 25 (2017) (defining canons of construction as methods of interpretation courts use to assign meaning to legislative statutes when said statutes are ambiguous or “plain meaning would lead to absurd results”).

146. *Id.*

147. *See supra* note 15.

148. *See* *Ex parte James*, 836 So. 2d 813, 815 (Ala. 2002) (observing that separation of powers is an “express command”).

149. *See supra* note 15.

150. Marc James Ayers, *Unpacking Alabama’s Plain-Meaning Rule of Statutory Construction*, 67 ALA. LAW. 31, 32–33 (2006).

151. *Id.*

152. 2 So. 2d 765 (Ala. 1941).

distinctions in the meaning of words.”¹⁵³ When the statute is still found ambiguous, despite applying the Plain Meaning Rule, the court will turn to secondary interpretation mechanisms, such as legislative intent.¹⁵⁴

With these overarching principles guiding the court’s decision, the proper interpretation would find that the plain meaning of the word “child” provided enough ambiguity to render the statute inapplicable. The Alabama legislature defined the term “child” in the chemical-endangerment statute as “a person who is less than eighteen years of age.”¹⁵⁵ In turn, the court applied the Plain Meaning Rule to interpret whether the statute applied to Hicks’s conduct.¹⁵⁶ The court merely looked to the dictionary definition of the word “child” and previous Alabama court interpretations of the word to inaccurately assign unborn fetuses to the definition of “child” in the statute.¹⁵⁷ The analysis ignored how this country’s highest court concluded that “the unborn have never been recognized in the law as persons in the whole sense.”¹⁵⁸

The separation of powers foundation also solidifies why legislative intent is vital to judicial statutory construction. The application of this statute to women who use substances during pregnancy offends notions of fundamental fairness and substantial justice present in the Due Process Clause.¹⁵⁹ Criminal law operates under the principle that “due process prohibits prosecutors and courts from interpreting or applying an existing law in an unforeseeable or unintended manner.”¹⁶⁰ Prosecutors historically attempted to use criminal statutes related to child abuse and neglect, delivery of controlled substances to minors, chemical-endangerment statutes, and involuntary manslaughter to impose criminal consequences onto women juggling motherhood and substance use.¹⁶¹ Despite these attempts, several state courts found that if state legislatures did not intend to apply similarly situated statutes to substance use by pregnant women, then criminal prosecution in this manner must fail.¹⁶²

153. *Id.* at 769.

154. Ayers, *supra* note 150, at 34 (stating that “wise advocate[s]” always begin to decipher an argument using plain meaning and only when statute at issue is rendered ambiguous should they utilize the secondary canons of interpretation to determine legislative intent).

155. ALA. CODE § 26-15-3.2 (2023).

156. Hicks v. State, 153 So. 3d 53, 58 (Ala. 2014).

157. *Id.* at 60.

158. Roe v. Wade, 410 U.S. 113, 162 (1973), *overruled by* Dobbs v. Jackson Women’s Health Org., 597 U.S. 215 (2022).

159. See Meghan Horn, *Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse*, 14 WM. & MARY J. WOMEN & L. 635, 643 (2008) (noting that Due Process Clause guarantees that every person under laws of this country receive a fair and just legal process using proper interpretation of legislative statutes).

160. *Id.*

161. Carol J. Sovinski, *The Criminalization of Maternal Substance Abuse: A Quick Fix to a Complex Problem*, 25 PEPP. L. REV. 107, 122 (1997).

162. See Horn, *supra* note 159, at 639.

For example, in 1992, the Florida Supreme Court rejected a prosecutorial challenge to a substance using mother charged under drug trafficking laws.¹⁶³ In *Johnson v. State*, Jennifer Johnson, a pregnant woman in labor, communicated to her obstetrician that she used cocaine the morning of her delivery.¹⁶⁴ Johnson did not experience any birth complications and approximately ninety seconds went by from the time the child came from the birth canal and the clamping of the umbilical cord.¹⁶⁵ The State argued that Ms. Johnson's ingestion of cocaine amounted to a delivery of a controlled substance to an infant during the one minute period following the birth, before cutting the umbilical cord.¹⁶⁶ Florida's highest court first found that even if the criminal statute applied, medical testimony did not support the trial court's conclusion "that a 'delivery' occurred during the birthing process."¹⁶⁷ More importantly, the court concluded, through a review of legislative enactments, that "the [l]egislature expressly chose to treat the problem of drug dependent mothers and newborns as a public health problem and that it considered but rejected imposing criminal sanctions."¹⁶⁸ Other state courts similarly rejected attempts to expand existing criminal statutes to prosecute pregnant substance users, concluding that the application of such statutes to the unborn fetus and pregnant woman went beyond the state legislature's intent.¹⁶⁹ As the Georgia Court of Appeals correctly stated, women prosecuted under these types of statutes "could not reasonably have known that [they] would be prosecuted for 'delivering' or 'distributing' cocaine to [their] unborn child[ren] if [they] ingested [drugs] while pregnant."¹⁷⁰

Hicks correctly argued that the legislature intended for the word "child" to exclude unborn fetuses because of how the word child is defined in other similarly situated Alabama statutes.¹⁷¹ The *in pari materia*¹⁷² rule is another secondary canon of statutory construction courts use to decipher legislative

163. See *Johnson v. State*, 602 So. 2d 1288, 1290 (1992).

164. *Id.* at 1291 (detailing how Johnson later admitted during a Department of Health and Rehabilitative Services investigation that she smoked marijuana and crack cocaine "three to four times every-other-day" during her entire pregnancy).

165. *Id.*

166. *Id.*

167. *Id.* at 1292.

168. See *id.* at 1294 (citation omitted) ("Criminal prosecution of mothers like Johnson will undermine Florida's express policy of 'keeping families intact' and could destroy the family by incarcerating the child's mother when alternative measures could protect the child and stabilize the family.").

169. See, e.g., Horn, *supra* note 159, at 124 (describing a case in which California Municipal Court of San Diego held that California's child support statute was only intended to compel parents to financially support their children, not prosecute women for conduct that caused injury to their fetuses).

170. *State v. Luster*, 419 S.E.2d 32, 36 (Ga. Ct. App. 1992) (holding that by enacting legislation treating addiction during pregnancy as a health problem, Georgia legislature signaled its position that substance use during pregnancy is a disease and indicated its preference for treatment over prosecution, which is in line with opinion of local and national medical experts).

171. *Hicks v. State*, 153 So. 3d 53, 61 (Ala. 2014).

172. Ayers, *supra* note 150, at 33.

intent.¹⁷³ The Alabama Supreme Court itself proclaimed that statutes are *in pari materia*¹⁷⁴ when dealing with the same subject.¹⁷⁵ Thus, it should follow that where statutes are *in pari materia*, courts will construe the statutes together to determine the meaning and intent of each. The Alabama Supreme Court further espoused that under available circumstances, the court should resolve these statutes in favor of each other to form one congruent plan and bring unity to the law.¹⁷⁶ With this precedential guidance, the court should have found that the chemical-endangerment statute *in pari materia* with Sections 26-14-1(3) and 26-16-91(2) of the Alabama Code. As Hicks argued, the “placement of the [c]hemical-[e]ndangerment statute in its specific title and chapter of the Alabama Code is meaningful because the legislature is presumed to know the definition of child in the preceding and subsequent chapters.”¹⁷⁷ Title 26 of the Alabama Code Infants and Incompetents defines “child” as a person under the age of eighteen years.¹⁷⁸ Section 26-16-91(2) under Title 26 defines “child” as a person who has not yet reached his or her eighteenth birthday.¹⁷⁹ The chemical-endangerment statute falls under Title 26 of the Alabama Code, too.¹⁸⁰ It naturally follows that construing these statutes together, the term “child” within the chemical-endangerment statute should only apply to people who are not yet eighteen years of age.

The court should have also looked to the purpose behind why the legislature passed the statute in 2006. Between 2002 and 2006, Alabama officials conducted approximately 1,432 methamphetamine lab seizures within the state.¹⁸¹ Increased apprehension that children are exposed to dangerous substances during the production of illegal drugs prompted the Alabama legislature to pass the Chemical Endangerment of a Child statute in 2006.¹⁸² This law began as a means to protect children from the dangers of methamphetamine and other drug labs; however, prosecutors quickly began applying it to women who tested positive

173. See *Locke v. Wheat*, 350 So. 2d 451, 453 (Ala. 1977) (“Sections of the Code dealing with the same subject matter are *in pari materia*. As a general rule, such statutes should be construed together to ascertain the meaning and intent of each.”).

174. *Kelly v. State*, 139 So. 2d 326, 329 (Ala. 1962).

175. *City of Birmingham v. Southern Express Co.*, 51 So. 159 (Ala. 1909).

176. *Waters v. City of Birmingham*, 209 So. 2d 388, 392 (Ala. 1968) (dictating that courts should harmonize statutes within same code, unless in irreconcilable conflict); *Walker County v. White*, 26 So. 2d 253, 255 (1946) (holding that courts must resolve statutes in favor of each other when possible, so as to “form one harmonious plan”).

177. *Hicks v. State*, 153 So. 3d 53, 61 (Ala. 2014) (citation omitted).

178. ALA. CODE § 26-14-1(3) (2006).

179. *Id.* § 26-16-91(2).

180. *Id.* § 26-15-3(2).

181. Rachel Suppé, *Pregnancy on Trial: The Alabama Supreme Court's Erroneous Application of Alabama Chemical Endangerment Law in Ex. parte Ankrom*, 7 HEALTH L. & POL'Y BRIEF 49, 50 (2014).

182. *Id.*

for controlled substances during pregnancy.¹⁸³ How did a statute meant to punish those who expose minor children to environments where illicit drugs are manufactured become a mechanism to prosecute hundreds of pregnant women and new mothers in Alabama?¹⁸⁴ The unforeseeable application of a state statute led to the unjust prosecution of women who use substances during pregnancy.¹⁸⁵ Tiffany Hitson, a twenty-two year old woman, became the first mother prosecuted under this law in 2006, after she gave birth to a healthy baby who tested positive for cocaine and marijuana.¹⁸⁶ Between 2006 and 2013, prosecutors across the state of Alabama utilized the statute to prosecute women who tested positive for substances during pregnancy or shortly after giving birth.¹⁸⁷

B. The Imposition of This Decision Limits A Pregnant Woman's Right to Privacy and Prevents Women From Making Autonomous Decisions Over Their Own Bodies

The prosecution of women who use controlled substances during pregnancy compromises their right to privacy.¹⁸⁸ The Supreme Court first articulated the right to privacy in *Griswold v. Connecticut*¹⁸⁹ and addressed this right again in *Eisenstadt v. Baird*.¹⁹⁰ In these cases, the Supreme Court created a right to privacy over certain intimate procreation decisions.¹⁹¹ The right to privacy extends to reproductive health and must align with a woman's right to personal autonomy.¹⁹² While pregnancy criminalization laws are not directly related to

183. *Id.*

184. *Id.* at 54–55; see also Maya Miller, *Alabama Advocates Urge Treatment Over Punishment for Pregnant Women Jailed for Substance Use*, WNO – NEW ORLEANS PUBLIC RADIO (Feb. 24, 2023, 2:07 PM), <https://www.wno.org/public-health/2023-02-24/alabama-advocates-urge-treatment-over-punishment-for-pregnant-women-jailed-for-substance-use> (citing research from Pregnancy Justice, a nonprofit legal advocacy group, which found at least 600 pregnancy criminalization cases in Alabama with more than 150 women imprisoned in Etowah County alone).

185. *Id.* at 50.

186. Phillip Rawls, *National Ire over Alabama Prosecuting Pregnant Moms*, LAW.COM, (Aug. 1, 2008), <https://www.law.com/dailyreportonline/almID/1202551672379/>.

187. Suppé, *supra* note 181, at 50, 54–55.

188. AMNESTY INT'L, *CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA* 54–55 (2017).

189. 381 U.S. 479, 483–86 (1965) (defining right to privacy as an implied right derived from personal protections explicitly granted from First, Third, Fourth, Fifth, and Ninth Amendments).

190. 405 U.S. 438, 453 (1972) (extending right to privacy to an individual to “be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”).

191. See *id.* at 443, 453; *Griswold*, 381 U.S. at 486.

192. See AMNESTY INT'L, *supra* note 188, at 52–55.

abortion, their common ground lies in legislative and judicial attempts to create legally separate rights for fetuses.¹⁹³

As the Alabama Supreme Court stated in *Hicks*, the application of the chemical-endangerment statute to pregnant substance use supports the state's duty to protect the rights of potential life.¹⁹⁴ Under the statute, a person commits a crime of chemical endangerment by exposing a child to an environment when the child comes into contact with a controlled substance.¹⁹⁵ This statute, therefore, grants the child legal rights to claim an injury against the individual who exposed him or her to an environment with controlled substances.¹⁹⁶ When the chemical-endangerment statute passed, the legislative history, the law's purpose, and statutory interpretation, made clear that the word "child" in the statute only referred to already born children.¹⁹⁷ Despite this overwhelming evidence, the court held that the term "child" in the statute included unborn fetuses and that the statute may justify imposing criminal liability against a mother who exposed her unborn child to substances during the pregnancy.¹⁹⁸ This, in turn, grants unborn fetuses legal rights that allow the state to bring charges against the mother or pregnant woman for using substances during her pregnancy.¹⁹⁹ Criminal prosecution in this manner places the decision making in the hands of the state and forces women to see their fetuses as an obstacle to the full exercise of their legal rights.²⁰⁰

The right to privacy should not disappear simply because a woman becomes pregnant. Conviction under Alabama's chemical-endangerment statute can trigger secondary consequences such as permanent denial of public assistance, food stamps, and public housing.²⁰¹ For women in low income communities, this could create a devastating effect on their ability to support their families.²⁰² Additionally, depending on the type of conviction under the chemical-

193. See Lynn M. Paltrow, *The War on Drugs and the War on Abortion: Some Initial Thoughts on the Connections, Intersections and the Effects*, 28 S.U. L. REV. 201, 232 (2001) (drawing a connection between claims that abortion and contraception are forms of child abuse and use of child abuse laws to prosecute pregnant women for engaging in substance use).

194. *Hicks v. State*, 153 So. 3d 53, 66 (Ala. 2014).

195. ALA. CODE § 26-15-3.2 (2023).

196. See *id.*

197. See Suppé, *supra* note 181, at 61 (explaining how law's original sponsors stated that they did not intend for law to be used against new mothers, how different Alabama statutes expressly differentiated between terms "child" and "fetus," and how all amendments that proposed expanding term "child" to include fetuses failed).

198. *Hicks*, 153 So. 3d at 65–66.

199. See generally AMNESTY INT'L, *supra* note 188, at 18.

200. See Melissa B. Alexander, *Denying the Dyad: How Criminalizing Pregnant Drug Use Harms the Baby, Taxpayers and Vulnerable Women*, 82 TENN. L. REV. 745, 761–62 (2015) (discussing obstacles faced by marginalized pregnant women who use drugs and are thus subject to prosecution and criminalization when seeking health care).

201. Suppé, *supra* note 181, at 72–73.

202. *Id.*

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endangerment statute, a woman in Alabama could lose her license to practice or the state may deny federal welfare or social security benefits.²⁰³ This limits the career options available to the woman and decreases the available funding options she can access.²⁰⁴

Even when alternatives to incarceration are used, such decisions severely limit a woman's choice in her approach to substance use treatment.²⁰⁵ Judges have a large degree of discretion in defining the terms of treatment within the court.²⁰⁶ This inevitably means that one judge oversees the treatment decisions of a large number of vulnerable women.²⁰⁷ This also indicates that women lack choice in how they approach treatment—they must either comply with the rehabilitation program or go to jail.²⁰⁸ Oftentimes, it takes months to enter treatment programs, and attempts to enroll into treatment programs outside of court mandates lead to high monetary costs²⁰⁹ and repressive environments.²¹⁰ Even more striking is the close relationship the programs keep with law enforcement.²¹¹ In several residential drug facilities in Alabama, if a woman fails to return to treatment after a visit to her family, the center contacts the county sheriff and the woman is promptly arrested.²¹²

Women filtered through the court system for prenatal substance use are frequently subjected to unpredictable drug tests and reporting.²¹³ In Alabama, medical providers are required to report positive drug tests to child welfare authorities due to their mandatory reporting authority.²¹⁴ Once this supervisory agency is involved, women fall under the direction of child protective services workers that implement a slew of testing requirements that, if not complied with, will inevitably increase the likelihood of criminal prosecution.²¹⁵ This again

203. *Id.* at 73.

204. *Id.*

205. See AMNESTY INT'L, *supra* note 188, at 33–34 (finding that women wait longer to seek care, feel discouraged from receiving drug treatment, and attempt to self-detox at home due to legal ramifications of a drug violation while pregnant).

206. ORISHA A. BOWERS ET AL., SISTERREACH, TENNESSEE'S FETAL ASSAULT LAW: UNDERSTANDING ITS IMPACT ON MARGINALIZED WOMEN 20 (2019), https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2020/12/SisterReachFinalFetalAssaultReport_SR-FINAL-1-1.pdf (explaining how final decision about whether a woman is admitted into drug court and treatment programs are made by drug court judge).

207. AMNESTY INT'L, *supra* note 188, at 26.

208. *Id.* at 30–31.

209. *Id.*

210. *Id.* at 44.

211. *Id.* at 10.

212. *Id.*

213. *Id.* at 52.

214. *Id.* at 38.

215. *Id.* at 39. As one child protective supervisor explained, child protective workers are required to collaborate with law enforcement, and in some Alabama counties, prenatal clinics give the patient history

impacts the woman's right to privacy because she is no longer in control of what her treatment looks like or her communication with her health care provider.²¹⁶

The fear of the woman's doctor reporting her positive drug test also undermines the doctor-patient relationship because it imposes a system that requires doctors to become agents of the criminal justice system, monitoring maternal behavior for wrongdoing and reporting "disobedient" patients, instead of focusing on prenatal care.²¹⁷ This further creates an adversarial arrangement that deters pregnant women from disclosing their substance use to their doctors, a consequence that prominent medical authorities condemn.²¹⁸ Faced with the threat of losing their autonomy and the fear of losing their children, the mother must make the impossible decision to forego prenatal care and other medical measures. Legal scholars hypothesize that for many women, their only feasible choice is to leave the state to deliver their child, which could decrease the availability of medical treatment, putting the mother and unborn child in danger.²¹⁹

Legal scholars further warn that fear of prosecution will actually increase instances of abortion in the state.²²⁰ A select group of critics of this argument believe that the overarching consequence a pregnant substance user faces is not the decision to get an abortion, but the burden to stop using illegal substances once she makes the decision not to receive abortion treatment.²²¹ These critics further note that once a mother decides to have a child, the consequences that come with pregnancy are hers to bear.²²² Such consequences include fulfilling the duties and obligations associated with keeping her child safe.²²³ Thus, when a woman fails to fulfill these obligations, the court must step in to ensure the child is not harmed, and thus, arguably, there is "no reason to treat a child in utero any differently from a child ex utero where the mother has decided not to destroy the fetus or where the time allowed for such destruction is passed."²²⁴

to the hospital who then call child protective services, who then share it with law enforcement. If the patients report contains "something really bad," a police report is filed. In addition to criminal punishment, women are also subjected to sanctions, punitive monitoring, repeated drug tests, and classes. *Id.*

216. *Id.* at 42, 54.

217. Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994, 1011 (1988).

218. Suppé, *supra* note 181, at 70 ("The American Medical Association and the American College of Obstetricians and Gynecologist[s], among others, have spoken out on this issue and . . . stat[ed] that women will avoid prenatal care when they believe doctors are gathering evidence for law enforcement.").

219. *Id.* at 71.

220. *Id.*

221. Nova D. Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741, 762 (2000).

222. *Id.*

223. *Id.*

224. *Id.* (citation omitted).

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Yet, the critics ignore the Supreme Court of Alabama's ruling that the State's interest in protecting the unborn child begins "at the earliest stages of development," which naturally includes pre viability when abortion is legal.²²⁵ This means that there is nothing to prevent a prosecutor from bringing charges against pregnant women for substance use at any stage of their pregnancy.²²⁶ Thus, the argument that there is ample time and freedom for a woman to decide whether to receive an abortion is moot, because the threat of prosecution is present as soon as a woman's pregnancy becomes known.²²⁷ The burden of obtaining an abortion emerges at the earliest stages of development because the woman's freedom over her pregnancy becomes severely limited due to the impending threat of prosecution at any stage of pregnancy.²²⁸ These potential results are in direct conflict with Alabama's goal of protecting the unborn²²⁹ by placing the mother in compromising positions as she attempts to protect herself, her child, and the security of her family from the imposition of the state.

C. The Court's Decision Undermines the Benefits of Comprehensive Treatment to Pregnant Substance Users and Ignores the Barriers That Pregnant Substance Users Historically Face When Accessing Treatment

The court's opinion creates a dangerous stigma surrounding women who use substances during pregnancy and ignores the lack of available treatment options for pregnant women. The opinion also fails to address available opportunities to create treatment options that are congruent with the needs of pregnant women. The health care system in Alabama is ranked in the bottom quartile in terms of access and affordability.²³⁰ In Alabama, there are several barriers to treatment for pregnant women, including stigma, lack of financial resources, lack of childcare, fear of losing custody, and fear of prosecution.²³¹ Many rehabilitation programs are hesitant or unwilling to provide pregnant women with treatment and prenatal care due to fear of program liability, lack of resources to care for infants, lack of services for other children while the mother is in treatment, and limited staff with the training and knowledge to treat pregnant substance users.²³² Substance users, and especially pregnant substance users, deserve adequate care.

225. *Hicks*, 153 So. 3d at 66.

226. Alexander, *supra* note 200, at 775–76.

227. *Id.* at 776 (explaining that urine screens, which are used to detect recent drug use, are usable at any stage of pregnancy and that drug testing on newborn hair can show evidence of illegal substances ingested months before delivery).

228. *Id.*

229. See *Hicks*, 153 So. 3d at 66.

230. AMNESTY INT'L, *supra* note 188, at 9.

231. Suppé, *supra* note 181, at 74.

232. *Id.*

1. MAT Programs

Despite overwhelming support from leading health care agencies and research indicating the effectiveness of medication-assisted treatment (“MAT”) as part of a comprehensive treatment plan, women may avoid MAT out of fear that a positive test for opioids during prenatal care may lead to legal intervention, loss of parental rights, and fear of being stigmatized by those involved in their care.²³³ MAT is a treatment modality used to address substance use that combines medications with counseling and behavioral health therapies.²³⁴ In fact, Alabama lawmakers did not amend the chemical-endangerment statute to exempt women who use medically prescribed drugs until 2016.²³⁵ Additionally, with parental substance use as the driving force behind one third of child removal cases in 2019, foregoing treatment may feel like a safer option.²³⁶

Since Alabama no longer discriminates against MAT, how can these programs become more accessible for pregnant substance users? The Alabama Department of Mental Health indicates that there are currently twenty-one certified opioid treatment programs in Alabama.²³⁷ For services specific to pregnant women and women with children, eligible patients must be pregnant, have custody of dependent children, or have lost custody of their children with the possibility of regaining custody.²³⁸ The Department notes that for women with dependent children, those children can attend treatment with their mothers.²³⁹ Lastly, all certified treatment providers in Alabama must prioritize admission for pregnant women and there are no admission fees for pregnant women and women with children in their care.²⁴⁰ In 2013, southern states had

233. Dennis J. Hand et al., *Substance Use, Treatment, and Demographic Characteristics of Pregnant Women Entering Treatment for Opioid Use Disorder Differ by United States Census Region*, 76 J. SUBSTANCE ABUSE TREATMENT 58, 62 (2017) (explaining how women who are at risk of losing custody over their children may avoid MAT in order to have a negative opioid test during prenatal care or at delivery); Zane Frazer et al., *Treatment For Substance Use Disorders in Pregnant Women: Motivators and Barriers*, 205 J. DRUG AND ALCOHOL DEPENDENCE 1, 5 (2019) (observing many obstacles that pregnant substance users face when accessing substance use treatment).

234. *Medication Assisted Treatment (MAT)*, NOT ONE MORE ALABAMA, <https://www.notonemorealabama.org/medication-assisted-treatment.html> (last visited Jan. 3, 2024).

235. Nina Martin, *Alabama Lawmakers Limit Drug Prosecutions in Pregnancy*, PROPUBLICA (May 4, 2016, 2:02 PM), <https://www.propublica.org/article/alabama-lawmakers-limit-drug-prosecutions-in-pregnancy>.

236. Miriam Boeri et al., *Barrier and Motivators to Opioid Treatment Among Suburban Women Who Are Pregnant and Mothers in Caregiver Roles*, 12 FRONT. PSYCHOL. 1, 2 (2021).

237. *Substance Use Treatment Services*, ALAB. DEP'T OF MENTAL HEALTH, <https://mh.alabama.gov/division-of-mental-health-substance-abuse-services/substance-abuse-treatment-services/> (last visited Jan. 3, 2024) (detailing that such services are available in only sixteen of Alabama's sixty-seven counties).

238. *Id.*

239. *Id.*

240. *Id.*

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3.1 MAT programs per 1,000,000 residents.²⁴¹ Yet, there are barriers to treatment that disproportionately impact rural southern areas, especially in a state like Alabama where fifty-five of the sixty-seven counties are considered rural.²⁴² For example, many of these programs are within the city limits and require daily, in person attendance for at least the first three months of treatment.²⁴³ Issues with meeting these treatment standards are further compounded when women are simultaneously employed or cannot meet the financial burden of daily travel.²⁴⁴

Proponents of criminalization over treatment point to these barriers in treatment as justification for the criminalization of substance use during pregnancy.²⁴⁵ They rationalize that even as more affordable in-patient treatment facilities become available, these facilities would still reject pregnant women.²⁴⁶ This belief stems from these assumed facts: pregnant women reportedly miss thirty-eight percent of their appointments; pregnant substance users are more likely to have HIV or AIDS, which creates more complex treatment and contact risks for other patients; and, treatment programs are not prepared for the complex needs of pregnant substance users.²⁴⁷

Yet, overwhelming data shows that criminalizing women for substance use while pregnant is a backward and ineffective method to decrease illicit substance use.²⁴⁸ Alabama must understand that its approach to prenatal substance use should empower the mother and provide an avenue that keeps the mother and child together whenever possible. To do this, Alabama must acknowledge the collateral consequences of criminalization, increase funding for wraparound substance use treatment services, and increase access to substance use treatment.²⁴⁹

241. Hand et al., *supra* note 233, at 63; *see also* Andrea Weber et al., *Substance Use in Pregnancy: Identifying Stigma and Improving Care*, 12 *SUBSTANCE ABUSE & REHAB.* 105, 108 (2021) (explaining how language, beliefs about gender roles, and attitudes regarding fitness of parenting are social factors that can express and perpetuate stigma while facilitating punitive, rather than therapeutic, approaches).

242. *Access to Healthcare Poses a Challenge in Rural Alabama*, ALA. PUB. HEALTH, <https://www.alabamapublichealth.gov/ruralhealth/at-a-glance.html#:~:text=55%20out%20of%2067%20of,population%20live%20in%20rural%20areas> (last visited Jan. 3, 2024).

243. Hand et al., *supra* note 233, at 62.

244. Tara M. Higgins et al., *Treating Perinatal Opioid Use Disorder in Rural Settings: Challenges and Opportunities*, 128 *PREVENTIVE MEDICINE* 105786, 105786 (2019).

245. Patricia R. Congdon, *Prenatal Prosecution: Taking a Stand for the State and the Well-Being of Its Soon-To-Be Citizens*, 5 *CHARLESTON L. REV.* 621, 637 (2011).

246. *Id.*

247. *Id.*

248. *See generally* AMNESTY INT'L, *supra* note 188, at 50, 60 (stating that criminalizing women for substance use defeats purpose of protecting maternal, child, and reproductive health; violates human rights; deters women from seeking medical care; and, erodes trust in medical profession).

249. Cortney E. Lollar, *Criminalizing Pregnancy*, 92 *IND. L.J.* 947, 952 (2017) (explaining that prosecution of a woman for her behavior during pregnancy results in greater harm and poorer outcomes when child, without any evidence of actual harm, is removed from his or her mother's care).

Instead of forcing pregnant substance users into carceral systems that are ill equipped to manage the needs of this population, the Alabama Supreme Court should have recognized and encouraged safe treatment alternatives. MAT programs are an example of such treatment.²⁵⁰ Medications used in MAT programs in the United States are methadone, buprenorphine, naloxone, and naltrexone, which are all full or partial opioid agonists.²⁵¹ Additionally, evidence shows that MAT limits complications from recreational substance use by minimizing risks and consequences related to relapse.²⁵² More specifically, buprenorphine is a favorable maintenance medication for pregnant women and may prove more effective for those in areas with limited transportation options when prescribed in an office setting, because it does not require daily supervision for users.²⁵³ Scholars note that MAT is most effective when combined with individual and group counseling, case management, psychosocial education, peer support, and coordination of prenatal care that is available in tandem within clinic based opioid treatment programs.²⁵⁴ Incorporating each of these components into an office based setting allows for the opportunity to incorporate innovative health care features, such as telemedicine and peer recovery support.²⁵⁵ Buprenorphine is also linked to positive birth outcomes. A system review indicated that buprenorphine is “associated with lower risk of preterm birth, greater birth weight, and larger head circumference with no greater harm of buprenorphine to parent or baby.”²⁵⁶

Another method that encourages consistent prenatal appointment attendance is through supportive prenatal substance use policies (“PSUPs”).²⁵⁷ Supportive PSUPs are aimed at rehabilitation and work to provide early intervention and substance use treatment services.²⁵⁸ This is a viable alternative to criminalization because it provides “on-site pregnancy, parenting, and child-related services, as they have been shown to improve child development

250. See text accompanying note 233.

251. See Boeri et al., *supra* note 236 (describing available medications used for MAT programs in United States); *Opioid Agonist Therapy*, CENTRE FOR ADDICTION & MENTAL HEALTH, <https://www.camh.ca/-/media/files/oat-info-for-clients.pdf> (last visited, Jan. 3, 2023) (explaining that opioid agonists are medications that work to prevent withdrawal and minimize dependence on opioid substances).

252. *Opioid Use and Opioid Use Disorder in Pregnancy*, AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/08/opioid-use-and-opioid-use-disorder-in-pregnancy> (last visited Jan 1, 2024).

253. Hand et al., *supra* note 233 at 62.

254. *Id.*

255. *Id.*

256. Congdon, *supra* note 245, at 630.

257. Nadia Tabatabaepour, *Impact of Prenatal Substance Use Policies on Commercially Insured Pregnant Females with Opioid Use Disorder*, 140 J. SUB. ABUSE TREATMENT 1, 2 (2022).

258. *Id.*

outcomes.”²⁵⁹ Previous research shows that treatment facilities that offer buprenorphine, methadone, childcare, housing, and other services result in higher rates of treatment retention, abstinence from illicit substance use, and better access to care.²⁶⁰ Alabama could facilitate this by increasing funding for treatment programs made specifically for pregnant women.²⁶¹ The State can also broaden Medicaid and other insurance coverage to include coverage for peer recovery coaches, transportation, and full coverage for transportation.²⁶² If Alabama is to protect the well-being of expectant mothers and the children they are carrying, they should follow other states that are increasing financing and reimbursement, training and technical assistance, and cross agency coalitions to support substance use treatment opportunities.²⁶³

2. *Public Health Approach*

To combat the lack of appointment attendance, prevalence of patient substance use, and treatment facility inabilities to care for the complex needs of pregnant substance users, the Supreme Court of Alabama should have advocated for a public health approach to address substance use during pregnancy, instead of criminalization.²⁶⁴ The public health approach aims to increase funding for drug treatment facilities that accept pregnant women, increase resource centers for prenatal care, and encourage simultaneous drug treatment options and prenatal care.²⁶⁵ Recognizing the benefits of public health treatment modalities, the University of Alabama at Birmingham’s Division of Maternal Fetal Medicine created the Comprehensive Addition in Pregnancy Program (“CAPP”).²⁶⁶ Seeking to serve as a resource for women who may be at risk of a felony offense under Alabama’s chemical-endangerment statute or government supervision, the CAPP offers intensive outpatient services for pregnant substance users who

259. Weber et al., *supra* note 241, at 114.

260. *Id.*

261. Congdon, *supra* note 245, at 646.

262. DANA FONEY & SHANNON MACE, NAT’L COUNCIL FOR BEHAV. HEALTH, FACTORS THAT INFLUENCE ACCESS TO MEDICATION-ASSISTED TREATMENT 19 (2019), https://www.behavioralhealthworkforce.org/wp-content/uploads/2019/10/Factors-that-Influence-MAT_Full-Report.pdf.

263. *See id.* (explaining that finance and reimbursement efforts include innovative state Medicaid plans and waivers, coverage expansion for OUD medications within Medicare and commercial insurance plans and prevention plans include treatment expansions, recovery support, harm reduction efforts, and twenty-four hour referral services for substance use patients).

264. Sarah E. Smith, *No Safe Harbors: Examining the Shift from Voluntary Treatment Options to Criminalization of Maternal Drug Use in Tennessee*, 46 U. MEM. L. REV. 203, 229 (2015).

265. *Id.* at 230.

266. Savannah Koplun, *Pregnant Women Battling Addiction Find Hope, Success in UAB Program*, UAB NEWS, (May 29, 2019), <https://www.uab.edu/news/health/item/10514-pregnant-women-battling-addiction-find-hope-success-in-uab-program>.

desire sobriety and pre and post natal care.²⁶⁷ These services include prenatal care in conjunction with obstetric substance use treatment, pediatric follow up, care coordination, social services, peer recovery support, and parenting education.²⁶⁸ As one voluntary CAPP participant, Kate, explained, “the unwavering support from the CAPP nurses, social workers, physicians . . . and her program peers gave her a sense of belonging and encouragement in a judgment-free zone.”²⁶⁹ As CAPP continues to expand and work with more women like Kate, it serves as a great example of a community program that empowers women to address their substance use while providing them with a variety of services to address life stressors that often lead to negative postpartum experiences.²⁷⁰

The public health approach also incorporates trauma-informed practices into the health care systems to decrease barriers to seeking care.²⁷¹ Trauma-informed practices understand that certain behaviors observed in people with substance use disorders that lead health care professionals to see them as “difficult, selfish, or bad patients” developed from past and present experiences.²⁷² To address trauma and neglect from past health care experiences, health care providers must stay cognizant of how their conscious and unconscious biases are revealed through interactions with their patients.²⁷³ Trauma-informed practices encourage health care professionals to provide choices throughout the care process and give participants autonomy in their disclosures.²⁷⁴ This gives patients more control over their treatment, puts their right to privacy at the center of their provider/patient relationship and encourages consistent prenatal appointment attendance.²⁷⁵

One of the most important aspects of the public health approach is to understand that opioid use disorder is a chronic condition and the potential for relapse can may increase due to the nature of the disorder along with the stressors of caring for a newborn child.²⁷⁶ Medical providers should ensure that patient education, counseling, and monitoring do not stop when the mother and child are discharged.²⁷⁷ It is not uncommon for women to serve in the caregiver roles of

267. *Id.*

268. *Id.*

269. *Id.*

270. See Miller, *supra* note 184.

271. Weber et al., *supra* note 241, at 116.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. Stephen W. Patrick, *Improving Public Health Systems for Substance-Affected Pregnancies*, 109 AM. J. PUB. HEALTH 22, 23 (2019).

277. *Id.*

their families.²⁷⁸ Caregiving is correlated with increased risks of depression, anxiety, and other mental health issues.²⁷⁹ Such behavioral health challenges can be caught early and addressed properly with continual MAT, input from mental health practitioners, and close monitoring of the mother and child, especially during the first postpartum year.²⁸⁰

Some hospitals take a holistic approach to maternal care with the use of an interprofessional team of nurses, nurse practitioners, physician assistants, physicians, midwives, social workers, pharmacists, and mental health and addiction medicine specialists.²⁸¹ Such professionals work collaboratively to enhance positive outcomes for the mother and their children.²⁸² Health care systems also utilize the Labor, Delivery, Recovery, and Postpartum model (“LDRP”), where the same team of nurses care for and monitor the mother during labor, delivery, recovery, and the postpartum period.²⁸³ Because of their ability to closely observe the mother and child, nurses are often the first to make note of any difficulties a new mother has in caring for her newborn, such as the side effects of MAT or early signs of distress in the child.²⁸⁴ Surrounding the mother and child with a multidisciplinary team can also address the social determinants of health.²⁸⁵ Social workers can assist the mother with accessing housing resources, food security, transportation, and provide support to the mother if child protective services becomes involved.²⁸⁶ Approaching the mother and child’s care as a team with the involvement of a multidisciplinary medical team, the family, and the community leads to healthier outcomes for mothers and their child.²⁸⁷

Lastly, the Supreme Court of Alabama should have listened to the populations impacted the most by these laws: pregnant women and new mothers. Women directly impacted by these laws recommend, based on their own experiences, that instead of criminalization, they need more resources to help: (1) maintain their sobriety through groups and motivational programs; (2) gain access to addiction recovery programs aimed at decreasing recidivism; (3)

278. *Opioid Use Disorder Toolkit: Supporting the Public Health Response in Maternal, Child and Adolescent Health*, ASS’N OF STATE & TERRITORIAL HEALTH OFFICIALS 1, 9–10 (2022), <https://www.astho.org/globalassets/pdf/mch-opioid-use-disorder-toolkit.pdf>.

279. *Id.*

280. Mary K. Prince et al., *Substance Use in Pregnancy*, NAT’L LIBR. OF MED. (July 21, 2023), <https://www.ncbi.nlm.nih.gov/books/NBK542330/>.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* (describing how interprofessional health care teams can improve care for pregnant women with substance use disorders and care for their children by overcoming barriers to treatment, addressing psychosocial needs, establishing an early diagnosis, and initiating MAT).

acquire life skills through parenting, financial management, and educational courses; and (4) regain custody of their children with the help of free legal assistance, job security, and fair housing options.²⁸⁸

VI. CONCLUSION

The criminalization of pregnant women goes against the treatment needs of the expectant mother, creates an adversarial relationship between the health care provider, pregnant woman, and child, and ignores nonpunitive treatment options that are more conducive to substance use while pregnant.²⁸⁹ The Supreme Court of Alabama's decision in *Hicks v. Alabama* erroneously interpreted the chemical-endangerment statute to include unborn fetuses, diminished the privacy rights of the pregnant woman, and failed to consider treatment options that do not involve judicial intervention.²⁹⁰ Recently, the Supreme Court of Alabama expanded upon its jurisprudence that erroneously defines "child;" the court held that frozen embryos created for in vitro fertilization ("IVF")²⁹¹ are "children" and are therefore granted the same legal rights as other "unborn children."²⁹² These are the same legal rights this court provided to unborn fetuses in cases like *Hicks*, *Kimbrough*, and for many other women.²⁹³ The court found that Alabama's Wrongful Death of a Minor Act²⁹⁴ gives expectant parents the ability to sue for wrongful death of a minor child if their frozen embryos are somehow destroyed.²⁹⁵ Keeping in line with the state's self-proclaimed policy "to recognize and support the sanctity of unborn life and the rights of unborn children," the court's misguided religious citations define "sanctity of life" using

288. Suppé, *supra* note 181, at 72–73.

289. *See supra* Part V.

290. *See supra* Section V.A.

291. The plaintiffs in this case were parents who utilized the Center for Reproductive Medicine, P.C. to assist them with the IVF process; their embryos were removed from the cryogenic nursery by an unauthorized patient and subsequently destroyed. *LePage v. Ctr. for Reprod. Med.*, SC-2022-0515, slip op. at 1–2, 4–7 (Ala. Feb. 16, 2024).

292. *LePage*, slip op. at 7 (holding that "Wrongful Death of a Minor Act applies on its face to all unborn children, without limitation"); *see also* Josh Moon, *Alabama Supreme Court Rules Frozen Embryos are Children, Cites the Bible in Opinion*, ALA. PUB. REP. (Feb. 19, 2024, 7:33 AM), <https://www.alreporter.com/2024/02/19/alabama-supreme-court-rules-frozen-embryos-are-children-cites-the-bible-in-opinion/>; Brendan Pierson, *Explainer: Alabama's Highest Court Ruled Frozen Embryos Are People. What is Next?*, REUTERS (Feb. 23, 2024, 6:43 PM), <https://www.reuters.com/business/healthcare-pharmaceuticals/alabamas-highest-court-ruled-frozen-embryos-are-people-what-is-next-2024-02-23/>.

293. *See supra* note 184 and accompanying text.

294. ALA. CODE § 6-5-391(a) (2022) ("When the death of a minor is caused by the "wrongful act, omission, or negligence of any person, persons, or corporation, or the servants or agents of either, the father, or the mother as specified in Section 6-5-390, or, if the father and mother are both dead or if they decline to commence the action, or fail to do so, within six months from the death of the minor, the personal representative of the minor may commence an action.").

295. *See* Pierson, *supra* note 292.

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the “Manhattan Declaration: The Call of Christian Conscience,” a manifesto that calls on Protestant, Evangelical, Roman Catholic, and Eastern Orthodox Christians to “stand for life, marriage, and religious liberty.”²⁹⁶ Further, the 8-1 majority believes that life begins at conception because “all human beings bear God’s image from the moment of conception.”²⁹⁷ With this decision, the court has only broadened the protections unborn beings receive while further limiting the safeguards available to women and the very health care agencies assigned to care for them.

In the ten years since the Supreme Court of Alabama upheld the criminal prosecution of women who use substances during pregnancy, the impact of this decision continues to create far reaching consequences for both the prosecuted women and those that fear prosecution. This is illustrated both by cases like the recently decided *LePage* and in scenarios akin to *Hicks*. Pregnant women who use substances are an incredibly vulnerable population that deserve appropriate and continuous care that addresses their substance use and medical needs throughout the prenatal and postpartum stages. In order to truly honor the State’s interest in protecting the life of children from the earliest stages of their development, the court must recognize that engaging the criminal justice system does not ameliorate the problem. Allowing this population to partake in services that will strengthen their livelihood and the safety of their unborn child without fear of criminal liability creates an open and trusting relationship between the mother and her health care provider and improves the treatment outcomes for mothers and their children.²⁹⁸ Instead of creating an adversarial relationship between the State and the mother, Alabama should work collaboratively with the community, mothers, and their families to increase accessibility to substance use resources and remove common barriers to treatment.²⁹⁹

296. John Stonestreet, *The Manhattan Declaration – Ten Years Later: A BreakPoint Symposium*, BREAKPOINT COLSON CTR. (May 2, 2019), <https://www.breakpoint.org/41709-2/>; see also *LePage*, slip op. at 31–32 (Parker, C.J., concurring) (referencing Manhattan Declaration and *Hicks* decision to support opinion).

297. See Moon, *supra* note 292.

298. See *supra* Section V.C.

299. See *supra* Section V.C.