Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy

Nora Christie Sandstad†

> "If the fetus is a person, there are no limits on the state's power to police and punish pregnant women. . . ."[1]

Introduction

While pregnant, a woman is no longer entitled to the full scope of rights she held before her pregnancy. Two years ago, Maryland forced a woman to give birth in her jail cell after an inconsistent sentence;[2] unlike the standard practice of release, she received a jail sentence *because* she was pregnant.[3] Some states commit pregnant women against their will for consuming alcohol while pregnant.[4] Upon suspicion of maternal substance abuse, the government often removes children from their mother's custody at birth.[5] As states and the federal government have expanded the

---

†. J.D. expected 2008, University of Minnesota Law School; B.A. 2001, University of Minnesota, Morris. This Article has benefited from the editorial abilities of Mary Patricia Byrn, Molly Given, Steve Barrows, and the staff of *Law and Inequality: A Journal of Theory and Practice*. Special thanks to my family and friends for their wisdom and support, especially Nathan LaCoursiere, Christie Sandstad, Douglas Sandstad, and Tundra Sandstad.

1. Lynn M. Paltrow, *Punishment and Prejudice: Judging Drug-Using Pregnant Women*, *in* MOTHER TROUBLES, RETHINKING CONTEMPORARY MATERNAL DILEMMAS 59, 76 (Julia E. Hanigsberg & Sara Ruddick eds., 1999), *available at* http://advocatesforpregnantwomen.org/file/punishment%20and%20prejudice-Final.pdf.

2. Julie B. Ehrlich & Lynn Paltrow, *Jailing Pregnant Women Raises Health Risks*, WOMEN'S ENEWS, Sept. 20, 2006, www.womensenews.org/article.cfm/dyn/aid/2894 (last visited Nov. 4, 2007) (describing Kari Parson's delivery at the Jennifer Road Detention Center).

3. *Id.* ("Though standard practice is to release people arrested for probation violations on their own recognizance until their later court dates, the judge in Parsons' case sent her to jail, citing his interest in protecting the fetus's health.").

4. David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN'S L.J. 243, 249 (2001) (noting that Minnesota, South Dakota, and Wisconsin permit this practice).

5. *Id.* at 250.

rights of fetuses, the number of pregnant women being held in jails and in hospitals because of their actions during pregnancy has also increased.[6] Women's constitutional rights are violated when the justice system treats women unequally due to their condition of being pregnant.[7]

The legal precedent in the United States regarding maternal rights and fetal rights creates a legal riddle, from *Roe v. Wade*'s grant of privacy rights to women in their health care decisions[8] and denial of Fourteenth Amendment personhood to fetuses,[9] to the 2004 Unborn Victims of Violence Act's ("UVVA") grant of federal personhood to fetuses.[10] If a fetus has rights, and its rights are violated, can the violator be prosecuted differently depending upon her relation to the fetus?[11] One thing is clear: the recent trend to increase fetal rights through both judicial and legislative actions is prompting a reduction in women's rights.[12]

---

6. *Id.* at 244 (noting the increase in prosecutions of pregnant women).

7. *See* Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 688–89 (2006) ("Legal recognition of fetuses as persons whose rights have been violated . . . reflects and reifies a particular conception of pregnant women and their relationship to the developing fetus. This, in turn, necessarily structures relations between pregnant women and the state. More precisely, recognition of fetal victimhood has dictated heightened governmental control over women's bodies and lives."); *see also* Paltrow, *supra* note 1, at 20 ("The possibilities for denying women's freedom are not the fantasies of lawyers engaged in slippery slope arguments, but rather current trends in the ever increasing effort to win legal recognition of the fetus and to undermine and ultimately abolish women's rights.").

8. Roe v. Wade, 410 U.S. 113, 152 (1973) ("[T]he court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

9. *Id.* at 158 ("All this . . . persuades us that the word 'person' as used in the Fourteenth Amendment, does not include the unborn.").

10. Unborn Victims of Violence Act (UVVA), 18 U.S.C. § 1841 (2004) ("[T]he term 'unborn child' means a child in utero, and the term 'child in utero' . . . means a member of the species homo sapiens, at any stage of development, who is carried in the womb.").

11. *See id.* (excepting the mother as a potential violator under the law).

12. *See* Brody & McMillin, *supra* note 4, at 243–44 ("Over the last decade, states have increasingly prosecuted women for using drugs or alcohol while pregnant and modified their civil child abuse and neglect statutes to foster the civil commitment of mothers and the removal of children in their care."); *see also* Elizabeth Spiezer, *Recent Developments in Reproductive Health Law and the Constitutional Rights of Women: The Role of the Judiciary in Regulating Maternal Health and Safety*, 41 CAL. W. L. REV. 507, 526 (2005) ("Defining a fetus at any stage of development as a 'human being' and declaring its termination as homicide or child abuse is not a truthful or effective means of curtailing violence against women or protecting children. Rather, such statutes create a false definition of a woman's pregnancy and place her in a role as secondarily important as compared with the importance of her pregnancy."); Tuerkheimer, *supra* note 7, at 696 (describing how the UVVA acts to "sever the interests of fetus and pregnant woman, ultimately furthering an agenda of control over women's bodies and lives").

Roe, growing ever distant in the rearview mirror, now appears as the peak of women's reproductive autonomy, not its commencement. Fetal rights advocates found the seeds of their arguments within *Roe*'s holding.[13] *Roe* established that, because the state's interest in potential life becomes compelling at twenty-four weeks,[14] the state's interest will overcome a woman's rights to privacy and bodily integrity with few exceptions from that point forward.[15] If the state becomes a watchdog for fetuses and restricts the behavior of pregnant women, then at some point, this state intervention challenges the constitutional rights of the pregnant woman. The question persists: where do we draw the line between a woman's autonomy and the state's interest in fetal rights?

This fetal rights trend has far-reaching constitutional and societal implications, and the legal lines that will be drawn may not parallel the moral lines that popular opinion prefers. Though moral issues are critical to this question, this Article's focus is limited to the constitutional concerns. Part I of this Article examines the basis for maternal and fetal rights in the United States. Part II documents the steady increase in according rights to fetuses and the resulting reduction of pregnant women's rights. Part III explores how this increase in fetal rights constitutes an infringement on pregnant women's equal protection rights. Finally, Part IV argues that a concurrent violation of pregnant women's right to privacy also occurs. The Article concludes that, in light of constitutional protections and the Pregnancy Discrimination Act of Title VII,[16] both the prosecution of and the involuntary commitment of pregnant women for substance use is a violation of their rights and must not be sustained.

---

13. *See* Lisa McLennan Brown, *Feminist Theory and the Erosion of Women's Reproductive Rights: The Implications of Fetal Personhood Laws and In Vitro Fertilization*, 13 AM. U. J. GENDER SOC. POL'Y & L. 87, 91 (2005) (referencing "*Roe*'s failure to clearly define what rights to personhood a fetus may hold" as the instigating factor for much of the increase in demand for fetal rights, which has "allowed states to undermine the Supreme Court's holding").

14. *Roe*, 410 U.S. at 164–65 ("For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion . . . .").

15. *Id.* at 165 (citing an exception to the exercise of the State's interest "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother").

16. Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)).

I. The State of Maternal and Fetal Rights Before 1984

Historically, pregnancy fell into the private sphere and went unregulated by the state.[17] Laws regulating abortion were the exception to this standard, and eventually became the flash point for the women's movement of the 1960s and 1970s.[18] The language of "choice," which developed to describe individual control over reproduction in the movement to legalize abortion, prompted a backlash centered on the fetus as an individual with rights.[19] The notion of fetal rights that originated in the right-to-life movement expanded beyond the issue of abortion to include wrongful death claims,[20] prosecutions for child abuse[21] and

---

17. *Roe* notes that abortion was not regulated by the common law until England restricted the practice in 1803. *Roe*, 410 U.S. at 136 ("England's first criminal abortion statute . . . came in 1803."). *See generally* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 99–102 (1987) (describing the segregation between public and private spheres and the level of state regulation that corresponded to each sphere).

18. *See, e.g.*, SARA EVANS, PERSONAL POLITICS 221–22 (1979) (describing the increased influence of the women's movement and its effect on legalizing abortion).

19. *See* ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 241–42 (rev. ed. 2000) (discussing the formation of "right-to-life" committees in the 1970s to work against the legalization of abortion). The discussion of choice in pregnancy prompts a diverse reaction from feminist commentators. *Compare* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 125 (1995) ("Single motherhood as a social phenomenon should be viewed by feminists as a practice resistive to patriarchal ideology, particularly because it represents a 'deliberate choice' in a world with birth control and abortion."), *and* Nancy D. Campbell, *The Construction of Pregnant Drug-Using Women as Criminal Perpetrators*, 33 FORDHAM URB. L.J. 463, 476 (2006) ("Once the mother has made the choice to have a child, she must accept the consequence of that choice. One of the consequences of having children is that it creates certain duties and obligations to that child. If a woman does not fulfill those obligations, then the state must step in to prevent harm to the child." (quoting Nova D. Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741, 762 (2000))), *with* Lisa Eckenwiler, *Why Not Retribution? The Particularized Imagination and Justice for Pregnant Addicts*, 32 J.L. MED. & ETHICS 89, 91 (2004) ("Freedom, or free agency, is a precondition for responsibility, and keen attention to the particulars of these women's lives reveals that freedom is not a fully realized ideal."), Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267 (1992) ("Social forces define the circumstances under which a woman conceives a child, including how voluntary her participation in intercourse may be. Social forces determine whether a woman has access to methods of preventing and terminating a pregnancy, and whether it is acceptable for her to use them."), *and* Tuerkheimer, *supra* note 7, at 702–03 (assessing "wanted" pregnancies). Note also that the term "choice" is not always the best term when referring to substance use either. For more on addiction, see Paltrow, *supra* note 1, at 9–10.

20. *See, e.g.*, M. Todd Parker, *A Changing of the Guard: The Propriety of Appointing Guardians for Fetuses*, 48 ST. LOUIS U. L.J. 1419, 1427 (2004) (discussing the inclusion of fetal wrongful death claims within a Missouri statute).

murder,[22] and the demand for the legislative establishment of independent fetal rights.[23] This regulation of pregnancy using fetal rights sprang from the decriminalization and ensuing regulation of pregnancy termination.[24]

In the criminal context, the legal idea of separating a fetus from the woman who carries it has only developed in the past quarter century.[25] Over one hundred years ago, Oliver Wendell Holmes declined to extend personhood to an unborn child, noting that "the unborn child [i]s a part of the mother . . . ."[26] Recently, however, a fetal rights advocate called for courts to "allow a fetus to recover for injuries resulting from the mother's abuse of drugs, or negligent use of drugs while pregnant."[27] Not only have fetal rights advocates separated the fetus from the woman, but some have also cast the woman and fetus as courtroom adversaries. This conceptualization of pregnancy, though new, is not an

---

21. *See* Brody & McMillin, *supra* note 4, at 250.

22. *See* Tuerkheimer, *supra* note 7, at 696 ("Thirty-one states currently have laws against fetal homicide . . . ."); *see also* Shannon M. McQueeney, *Recognizing Unborn Victims over Heightening Punishment for Crimes Against Pregnant Women*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 461 (2005) (describing California's fetal homicide statute).

23. *See, e.g.*, Michelle Haynes, *Inner Turmoil: Redefining the Individual and the Conflict of Rights Between Woman and Fetus Created by the Prenatal Protection Act*, 11 TEX. WESLEYAN L. REV. 131, 132–33 (2004) (describing the Texas Legislature's drafting of a fetal rights bill). Minnesota statutes also reflect this objective as well; fetal rights advocates have inserted definitions of a fetus (at all stages of development) as a human into legislation. *See, e.g.*, MINN. STAT. § 144.343 (2006) ("[F]etus means any individual human organism from fertilization until birth.").

24. *See* Parker, *supra* note 20, at 1446 ("It was not until efforts in the mid-twentieth century to reform and liberalize abortion laws that there was a widespread focus in America on the fetus as a distinct life as the justification for opposing abortion.").

25. *See* McLennan Brown, *supra* note 13, at 90–91 ("Historically, the fetus only acquired legal rights separate from those of the woman at birth."); *see also infra* Part II (discussing *State v. Horne*, the first criminal fetal rights case). Fetuses were given independent legal status in the context of wrongful death tort recovery in 1946. *See* Elizabeth A. Ackmann, *Prenatal Testing Gone Awry: The Birth of a Conflict of Ethics and Liability*, 2 IND. HEALTH L. REV. 199, 203 (2005) (noting that *Bonbrest v. Kotz* was "the first case to allow recovery for a fetal injury if the fetus attained viability").

26. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884); *see also* Parker, *supra* note 20, at 1426 (discussing Holmes' views on the unborn, including that the fetus lacked standing in courts).

27. Moses Cook, *From Conception Until Birth: Exploring the Maternal Duty to Protect Fetal Health*, 80 WASH. U. L.Q. 1307, 1339 (2002); *see* Tuerkheimer, *supra* note 7, at 688 (describing the "notion of fetal personhood" as "'not merely acceptable' but 'increasingly . . . unchallengeable'" (quoting Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 330 (1992))).

improvement for women because it restricts their rights based upon the condition of pregnancy.[28]

A. The Legal Separation of Woman and Fetus

Infringement on a pregnant woman's rights pits a pregnant woman against her fetus, the being to which she is most connected.[29] This gives rise to a painfully personal constitutional dilemma: if a legal separation of the fetus's interest from the woman's is forced, whose rights take priority?

Legislatures and courts have determined that the state's interest in potential life allows the state to declare a woman with drug addiction unfit to parent.[30] Some states, like Minnesota, have determined that evidence of drug or alcohol abuse during pregnancy can activate the state's interest and allow the state to civilly commit a pregnant woman in order to keep her from "abusing" her fetus.[31] However, policy makers have failed to consider or address the duty of the state to protect a fetus when a woman engages in legal activity that also harms a fetus. Such activities include tobacco use, participation in a dangerous sport, or ingestion of necessary prescription drugs that are potentially harmful to the fetus, such as Depakote or Haldol.[32] This selective and haphazard protection of fetuses weakens the pregnant woman's authority over her own body and further separates the pregnant woman from her fetus conceptually.

Feminist scholars struggle with this issue.[33] The equality feminist's vision for change—focused on women's rights—differs

---

28. *See* Tuerkheimer, *supra* note 7, at 688 ("Where before the pregnant woman was regulable, we will see that she now has become invisible.").

29. *See generally id.* at 704 ("Pregnancy, for many women, is experienced as a time of growing connection to the developing fetus.").

30. *See* Brody & McMillin, *supra* note 4, at 250.

31. *See id.* at 249; *see also* Michelle D. Mills, *Fetal Abuse Prosecutions: The Triumph of Reaction over Reason*, 47 DEPAUL L. REV. 989, 997 (1998) (describing MINN. STAT. § 626.5561 (2006) as applying to use of any controlled substance).

32. Interview with Christie Sandstad, Clinical Nurse Specialist, Psychiatry Associates (Dec. 16, 2006) (on file with author) (calling prescription medication such as Lithium Carbonate, Depakote, and Haldol "necessary but risky in pregnancy"); *see also* Mills, *supra* note 31, at 1001–02 (describing the toxic effects of lawful substances on fetal health, including alcohol, tobacco, and prescription and over-the-counter medications, as well as potentially harmful activities such as heavy exercise or high-stress employment); *id.* at 1027 (describing how the South Carolina statute in Whitner v. State, 492 S.E. 2d 777 (1997), "could be interpreted to require mothers to refrain from all activities that are even potentially harmful to their [fetuses]").

33. *See infra* Part IV.B (discussing feminist views).

from the woman-as-mother primacy of relational feminists.[34] The resulting patchwork of scholarship offers a viable alternative conceptualization of the maternal-fetal relationship that refuses to view the pregnant woman and the fetus as having independent interests.[35]

B. In the Beginning, There Was Roe

In the years between 1821 and 1973, every state devised laws to prohibit or restrict abortion.[36] When the Supreme Court handed down *Roe v. Wade*[37] in 1973, only a few states had begun eliminating some of the previously imposed impediments to the practice.[38] Thus, the recognition of a constitutional right to pre-viability abortion in *Roe* represented a dramatic departure from the existing widespread prohibitions. *Roe* solidified a right to personal privacy first identified in *Griswold v. Connecticut*.[39] In *Griswold*, the Court located the origin of the right to privacy in the "penumbras" of the Bill of Rights.[40] Though *Roe* appeared to be a pronouncement of substantial rights afforded to a woman in making her pregnancy-related decisions, it also created a framework for state intervention during the latter part of a woman's pregnancy.[41] The Court balanced a woman's right to personal privacy against the state's "important and legitimate interest[s]," which included "protecting the potentiality of human

34. *See* Tuerkheimer, *supra* note 7, at 669 (describing the incompleteness and incompatibility of "reproductive autonomy" feminism and "connection" feminism); *see also* McLennan Brown, *supra* note 13, at 89–90 (defining relational feminists as those who focus on interconnectedness and mutual responsibility, but noting that "relational feminists believe that women and men approach the world differently, which may result in a greater allocation of reproductive rights to the woman based on her unique experiences").

35. *See infra* Part IV.A.

36. *See generally* PETCHESKY, *supra* note 19, at 67–137 (discussing state criminalization of abortion in the nineteenth century and state legalization of abortion in the twentieth century, culminating with the "relegalization of abortion by the Supreme Court in 1973"). *Roe v. Wade*, 410 U.S. 113, 138 (1973), notes that Connecticut passed the first statute, and only prohibited late term (after "quickening") terminations.

37. 410 U.S. 113.

38. *See* PETCHESKY, *supra* note 19, at 124 (describing how, by 1969, ten states had lessened or abolished their abortion statutes).

39. 381 U.S. 479 (1965); *see Roe*, 410 U.S. at 152.

40. *Griswold*, 381 U.S. at 484.

41. *See* Parker, *supra* note 20, at 1448 ("*Roe* began the balancing act between the woman and the fetus."). For an alternative view of *Roe*, see MACKINNON, *supra* note 17, at 100 ("*Roe v. Wade* presumes that government nonintervention into the private sphere promotes a woman's freedom of choice. When the alternative is jail, there is much to be said for this argument.").

life."[42] *Roe* determined that a state's interest became compelling upon "viability," the point at which a fetus "presumably has the capability of meaningful life outside the mother's womb."[43] Therefore, a state could prevent a woman from terminating her pregnancy in the third trimester, provided it included a health exception.[44] Though *Roe* solely addressed the termination of pregnancy, its declaration of a compelling state interest in protecting potential life logically extends to other behaviors that affect fetal health. It was that compelling state interest that fueled the movement for fetal rights and established a mechanism by which states can intervene in a woman's pregnancy on behalf of the fetus.[45]

II. The Progressive Reduction in Pregnant Women's Rights

Opponents of *Roe* were initially successful at the state level in chipping away at pregnant women's rights. Based on the idea of protecting the unborn, the right-to-life movement has also experienced slow but steady success on a federal level, culminating in the Supreme Court's 2007 endorsement of an abortion restriction without a health exception.[46]

A. State-by-State Attempts to Prosecute Pregnant Women Became Progressively More Successful

In the aftermath of *Roe*, the South Carolina Supreme Court took the next step when it advanced fetal rights in the 1984 case of *State v. Horne*.[47] The court reversed a manslaughter conviction of

42. *Roe*, 410 U.S. at 162; *see also* Amy F. Cohen, *The Midwifery Stalemate and Childbirth Choice: Recognizing Mothers-to-Be as the Best Late Pregnancy Decisionmakers*, 80 IND. L.J. 849, 862 (2005) (noting how this balancing focused on "when the baby becomes an individual," which now creates legal issues for abortion rights and maternal rights generally).

43. *Roe*, 410 U.S. at 163; *see* Spiezer, *supra* note 12, at 510–11 (describing how the state's interest "at some point may outweigh the individual woman's privacy interest"). Note that the actual time of viability has changed from *Roe* to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and it may continue to occur earlier and earlier in the pregnancy as medicine advances. Ackmann, *supra* note 25, at 207. As a result, the amount of pregnancy over which a state has a compelling interest grows.

44. *See Roe*, 410 U.S. at 163–65.

45. *See* Cohen, *supra* note 42, at 862 ("The result [of *Roe*] is that today, the abortion struggle in our society is now waged almost exclusively with reference to this legalistic question of when the baby becomes an individual."); *see also* Mills, *supra* note 31, at 990–91 (noting that, between 1980 and 1998, "more than 200 women in over 30 jurisdictions [had] been prosecuted for ingesting drugs while pregnant").

46. Gonzales v. Carhart, 127 S. Ct. 1610 (2007).

47. 319 S.E.2d 703 (S.C. 1984).

a man accused of stabbing his pregnant wife because it found the relevant infanticide statute had never been applied to fetuses that had not been born alive.[48] Changing course, the court then reinterpreted the law and found an "unborn child" to be a "person" within the criminal code so that the next defendant would have sufficient legal notice and could be convicted under the statute.[49] The court reasoned that, because civil wrongful death actions included the unborn within the definition of "person," the state criminal statutes should logically follow the same definition to maintain consistency.[50] *Horne* began the trend of including an unborn fetus (sometimes only after viability) within the definition of a person and inspired other prosecutions around the country. Though appellate courts often reversed convictions,[51] some allowed the establishment and extension of fetal rights.[52]

In 1986, Louisiana extended rights to pre-embryos created in vitro.[53] The state statutorily recognizes a pre-implantation embryo as a "juridical person"[54] and "a biological human being."[55] Though the statute was limited to embryos produced for in vitro fertilization,[56] the Louisiana Legislature created a precedent for allocating legal rights to the unborn.

In other states, prosecutors in the late 1980s and early 1990s brought charges against pregnant women under the influence of drugs or alcohol in an effort to expand the definitions of "person" in criminal statutes. Illinois prosecutors charged Melanie Green with manslaughter in 1989 following the death of her newborn, accusing her of exposing the fetus to cocaine.[57] In 1990, Diane Pfannenstiel went to a Wisconsin hospital for treatment of injuries sustained as a victim of domestic violence; she was four months

48. *Id.* at 704 ("[A]t the time of the stabbing, no South Carolina decision had held that killing of a viable human being *in utero* could constitute a criminal homicide.").

49. *Id.*

50. *Id.*; *see also* Dana Page, *The Homicide by Child Abuse Conviction of Regina McKnight*, 46 HOW. L.J. 363, 382–83 (2003) (discussing the court's reasoning in *Horne*). Beyond wrongful death actions, some states have also granted rights to fetuses in a "mental anguish common-law cause of action." McLennan Brown, *supra* note 13, at 93.

51. *See, e.g.*, *infra* notes 60–69 and accompanying text.

52. *See* Campbell, *supra* note 19, at 469 (citing examples of courts upholding women's convictions).

53. LA. REV. STAT. ANN. § 9:121 (2006).

54. LA. REV. STAT. ANN. § 9:124.

55. LA. REV. STAT. ANN. § 9:126.

56. § 9:121.

57. Mills, *supra* note 31, at 1016. However, the grand jury did not support the charges. *Id.*

pregnant at the time.[58] The government prosecuted Ms. Pfannenstiel for felony child abuse because she had an elevated blood alcohol level.[59] That same year, Margaret Velasquez Reyes was charged with felony child endangerment because of her heroin use during pregnancy.[60] Though the California Court of Appeals vacated the conviction,[61] Ms. Velasquez Reyes's prosecution in a state known for progressive action in this area of the law[62] illustrates the breadth of these actions across the country.

Florida took a different tack in 1992: instead of trying to expand the definition of child, it focused on the moment of birth.[63] A state court convicted Jennifer Johnson of delivery of a controlled substance to her newborn child—through its umbilical cord immediately following delivery.[64] Though overturned by the Florida Supreme Court,[65] this decision illustrates the increasing creativity of prosecutors in pursuing pregnant women and the efforts to construe old laws in new ways without having to enact updated laws.[66] By 1992, over 150 women had been criminally prosecuted "because of their behavior during pregnancy."[67]

Arizona examined the status of the legal rights of an unborn fetus in the 1992 case *Vo v. Superior Court*.[68] Though the court declined to extend rights to fetuses in the criminal context, it encouraged the legislature to do just that.[69] At the same time,

---

58. *Id.* at 997.

59. *Id.* at 996; *see also* Associated Press, *Pregnant Woman Is Charged with Child Abuse for Drinking*, N.Y. TIMES, Jan. 22, 1990, at B8.

60. Reyes v. Superior Court, 141 Cal. Rptr. 912 (Ct. App. 1977). For more on the war on drugs, see Page, *supra* note 50, at 370–76 and Brody & McMillin, *supra* note 4, at 248.

61. *Reyes*, 141 Cal. Rptr. at 915 (finding that the statute had not and would not encompass a fetus within the definition of child).

62. *See, e.g.*, CAL. CONST. art. XXXV, § 5 (allowing stem cell research which destroys surplus embryos obtained from in vitro fertilization treatment centers).

63. Johnson v. State, 578 So. 2d 419, 420 (Fla. Dist. Ct. App. 1991) ("[A]n infant at birth is a person . . . ."), *rev'd*, 602 So. 2d 1288 (Fla. 1992).

64. *Id.* at 419.

65. Johnson v. State, 602 So. 2d 1288 (Fla. 1992).

66. *See* Campbell, *supra* note 19, at 466 (noting the use of "existing child abuse and neglect statutes" and other creative prosecutorial techniques).

67. Page, *supra* note 50, at 372 (quoting LYNN M. PALTROW, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW (1992), *available at* http://advocatesforpregnantwomen.org/articles/1992stat.htm).

68. 836 P.2d 408 (Ariz. Ct. App. 1992). For a discussion of *Vo*, see Kristi Kleiboeker, *Encouraging Responsibility During Pregnancy Through Amending the Unborn Victims of Violence Act*, 83 WASH. U. L.Q. 1621, 1626 (2005).

69. *Vo*, 836 P.2d at 415 ("[W]e agree with commentators that perhaps the time has come to reexamine the protections afforded unborn children under Arizona's criminal law . . . ."); *see also* Kleiboeker, *supra* note 68, at 1627 n.35 (quoting *Vo*).

Arizona was willing to prosecute those who harmed a fetus that was later born alive.[70] This "born alive" rule is a middle ground in fetal rights—a cause of action only arises if the fetus is subsequently born alive, as only a live person can enforce legal rights.[71]

Oklahoma bestowed "upon viable human fetuses the legal status of 'human being' under [state] law" in *Hughes v. State* in 1994.[72] The Oklahoma Court of Criminal Appeals determined that, because the legislature had enacted the homicide statute to protect human life, expanding this protection to viable fetuses was consistent with the legislative intent.[73] Thus, the court saw viable fetuses as human life.

The Wisconsin Court of Appeals held a fetus to be a person in a 1995 Child in Need of Protective Services ("CHIPS") action.[74] In *State ex rel. Angela M.W. v. Kruzicki*, the lower courts determined that Angela's fetus could be detained against her will, while in her womb, in order to protect it from Angela's drug use.[75]

By treating the unborn as fully human and punishing women for certain behavior while pregnant, these state-by-state prosecutions establish the basis for a more consistent and successful punishment of pregnant woman. Additionally, the rhetoric that developed out of concern for fetal life contributed to the legal view of these women as guardians of fetuses rather than simply persons who happen to be pregnant.

B. No More Notice: Whitner v. State *Sets the Stage for Successful Convictions and Legislative Action*

In 1997, South Carolina charged Cornelia Whitner with felony child endangerment.[76] Whitner used crack cocaine during pregnancy, and her child tested positive for cocaine at birth.[77] According to the court, "a viable fetus was within the 'plain

70. *See* Kleiboeker, *supra* note 68, at 1628 (discussing Arizona's adherence to the "born alive" rule).

71. *Id.* at 1623. The "born alive" rule has its own flaws; there is a logical disconnect between punishing women whose activities produce birth defects and not punishing those women whose conduct contributes to miscarriage or stillbirth.

72. 868 P.2d 730, 735 (Okla. Crim. App. 1994).

73. *Id.* at 732–33; *see also* McQueeney, *supra* note 22, at 468.

74. State *ex. rel.* Angela M.W. v. Kruzicki, 541 N.W.2d 482, 497 (Wis. Ct. App. 1995), *rev'd*, 561 N.W.2d 729 (Wis. 1997).

75. *Id.*

76. Whitner v. State, 492 S.E.2d 777 (S.C. 1997). See Page, *supra* note 50, at 387 for a discussion of *Whitner*.

77. *Whitner*, 492 S.E.2d at 778–79.

meaning' of the word 'person' in the statute . . . ."[78] As one commentator notes, *Whitner* was a departure from *Horne*[79] in that the court did not apply the statute prospectively after making an interpretation.[80] Rather, the *Whitner* court found that the relevant statute had applied to fetuses all along, meaning the court could convict Ms. Whitner.[81] In the thirteen years between *Horne* and *Whitner*, fetal personhood developed from a consideration that a fetus *might* be a person within the meaning of a statute to the presumption that a fetus *is* a person in some jurisdictions.[82]

The Missouri Court of Appeals made a similar decision in 1997, when it held "an unborn child [to be] a 'person' for the purposes of the first-degree murder statute."[83] The court based the decision in *State v. Holcomb*[84] on the Missouri Legislature's passage of an "unborn child statute."[85] The court interpreted the statute to have established that "an unborn child is a person to the full extent permitted by the Constitution of the United States."[86]

In 2001, the South Carolina Supreme Court prosecuted another woman for crimes during pregnancy. In *State v. McKnight*, the court reviewed and upheld Regina McKnight's conviction of homicide by child abuse when she delivered a stillborn child who subsequently tested positive for cocaine.[87] In addition to denying procedural defenses, the state supreme court rejected McKnight's constitutional arguments regarding notice and privacy.[88] Citing *Whitner*, the *McKnight* court stated: "As to her own right to privacy, this Court specifically rejected the claim

78. *Id.* at 780.

79. State v. Horne, 319 S.E.2d 703 (S.C. 1984); *see supra* text accompanying notes 47–50 (discussing *Horne*).

80. Page, *supra* note 50, at 388.

81. *Whitner*, 492 S.E.2d at 781 ("[T]he legislature intended to include viable fetuses within the scope of the Code's protection.").

82. The United States Supreme Court denied certiorari of *Whitner*. 523 U.S. 1145 (1998).

83. Kleiboeker, *supra* note 68, at 1632.

84. 956 S.W.2d 286 (Mo. Ct. App. 1997).

85. Kleiboeker, *supra* note 68, at 1632.

86. *Holcomb*, 956 S.W.2d at 291. *But see infra* note 174 and accompanying text (discussing Roe v. Wade, 410 U.S. 113 (1973)).

87. State v. McKnight, 576 S.E.2d. 168, 171, 179 (S.C. 2001); *see* Page, *supra* note 50, at 363 (detailing the prosecution of McKnight). Page quotes Dorothy E. Roberts's description of McKnight's prosecution as "part of an alarming trend towards greater intervention into the lives of pregnant women under the rationale of protecting the fetus from harm." *Id.* (quoting Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419, 1420 (1991)).

88. *McKnight*, 576 S.E.2d at 175–76.

that prosecution for abuse and neglect of a viable fetus due to the mother's ingestion of cocaine violates any fundamental right."[89] The court framed the privacy argument in terms of whether or not smoking crack while pregnant was a constitutional right.[90]

Texas joined the ranks of states granting rights to fetuses in 2003, when it established a definition of "person" that included the fetus.[91] The Arkansas Legislature enacted the Fetal Protection Act and determined that a fetus gestating for over twelve weeks is a person.[92] Missouri and Louisiana also define a fetus as a person—effective from the moment of conception.[93]

In 2004, the Kentucky Supreme Court followed the lead of South Carolina, Missouri, Texas, and others. Kentucky previously adhered to the "born alive" rule. The Court declared a fetus to be a "person" within the homicide statute and the penal code at large.[94]

Utah prosecuted Melissa Rowland in 2004 after she gave birth to twins, one of whom was stillborn and the other addicted to cocaine.[95] Utah's relevant homicide statute specifically includes fetuses and does not provide an exception for the conduct of the pregnant woman.[96] The prosecutor called the combination of Rowland's drug use and refusal to submit to medical procedures "depraved indifference to human life."[97] Though the charges were dropped "due to Rowland's mental state," Utah was intent on

89. *Id.* at 176 (citing Whitner v. State, 492 S.E.2d 777 (S.C. 1997)).

90. *Id.* The United States Supreme Court denied certiorari of *McKnight*. 540 U.S. 819 (2003).

91. *See* Haynes, *supra* note 23, at 132 (citing TEX. PENAL CODE ANN. § 1.07(a)(26), (38) (Vernon Supp. 2006)). Haynes argues that Texas's Prenatal Protection Act is insufficient because it does not provide a means to prosecute a woman whose fetus is harmed by the pregnant woman's commitment of "an assaultive or intoxicated crime." *Id.* at 133.

92. McQueeney, *supra* note 22, at 468 (citing ARK. CODE ANN. § 5-1-102(13)(B)(i)(b) (Supp. 2007)).

93. McLennan Brown, *supra* note 13, at 92 (citing LA. REV. STAT. ANN. § 14:2(7) (2007) and MO. ANN. STAT. § 1.205 (West 2000)).

94. Kleiboeker, *supra* note 68, at 1631 (citing Commonwealth v. Morris, 142 S.W.3d 654, 660 (Ky. 2004)).

95. *Id.* at 1642 (citing Katha Pollitt, *Pregnant and Dangerous*, THE NATION, Apr. 26, 2004, at 9).

96. *Id.* at 1643 n.155 (citing UTAH CODE ANN. § 76-5-201 (2003)). *But see infra* notes text accompanying notes 108–10 (discussing the Unborn Victims of Violence Act (UVVA) of 2004, 18 U.S.C. § 1841 (2006), which specifically excludes the conduct of the pregnant woman).

97. *Id.* at 1643 (quoting Alexandria Sage, *Mom Arrested After Utah Stillbirth*, CBS NEWS, Mar. 12, 2004, http://www.cbsnews.com/stories/2004/03/12/health/main606119.shtml (last visited Nov. 4, 2007)). The issue of forcing pregnant women to undergo medical procedures is another aspect of this movement for fetal rights. For more information, see Parker, *supra* note 20, at 1439–44.

defending the rights of Rowland's fetus.[98]

Notably, the Fifth District Court of Appeals for the State of Florida declined to join the movement of including fetuses within the definition of "people."[99] In a special concurrence, one judge stated: "If we recognize a fetus as a person, we must accept that the unborn would have the rights guaranteed persons under the Constitution[] of the United States . . . . [I]t would be dangerous to do so when the potential for state intrusion into the lives of women is so significant."[100]

A report of Kari Parsons's 2005 arrest in Maryland details the negative consequences of prosecuting pregnant women.[101] Not only was Parsons arrested because of drug use, but she was "imprisoned specifically to protect the health of her fetus."[102] This was not the standard practice for Parsons's offense, nor did it improve the health of the fetus.[103]

Following the experimental period of individual prosecutions, states began legislatively and judicially defining fetal personhood on a mass scale.[104] This entrenchment of fetal rights and maternal obligations provided the groundwork for a more comprehensive national action to "protect" fetal life.

C. *Federal Action: The Unborn Victims of Violence Act Bolsters Fetal Rights Movement*

The states were not alone in their fight for fetal rights; the federal government also contributed to the erosion of pregnant women's rights in the interest of promoting fetal rights. In 2001, a bill was introduced in Congress which, while prohibiting the execution of pregnant women in order to protect the fetus, defined

98. Kleiboeker, *supra* note 68, at 1643.

99. Wixtrom v. Dep't of Children and Families (*In re Guardianship of J.D.S.*), 864 So. 2d 534, 539 (Fla. Dist. Ct. App. 2004); *see also* Cohen, *supra* note 42, at 863.

100. *In re Guardianship of J.D.S.*, 864 So. 2d at 541 (Orfinger, J., concurring and concurring specially); *see also* Cohen, *supra* note 42, at 863.

101. *See* Ehrlich & Paltrow, *supra* note 2 ("Parsons gave birth to her son alone in a dirty Maryland jail cell furnished only with a toilet and a bed with no sheets. She had been in labor for several hours and had countless times pleaded for help and medical attention. The requests were denied.").

102. *Id.* (noting that "standard practice is to release people arrested for probation violations on their own recognizance until their later court dates").

103. *Id.* ("Parsons gave birth completely alone, without health care or support of any kind.").

104. NAT'L CONFERENCE OF STATE LEGISLATURES, FETAL HOMICIDE (2007) (noting that thirty-six states have fetal homicide laws defining a fetus as a person to some degree).

fetuses as "homo sapiens."[105] In 2002, the Executive Branch disseminated a new rule for the federal children's health insurance program that redefined "child" to include a fetus at all stages of development.[106] When the government cloaked the challenge to pregnant women's rights in the guise of extending health insurance to the unborn, few contested the semantics.[107]

As in the state model, after establishing fetal personhood, the federal government's next step was to extend protection to the unborn under criminal law. On April 1, 2004, President Bush signed the UVVA into law.[108] This law makes it a federal crime to harm a fetus—a crime distinct from that for harming pregnant women.[109] Though the UVVA specifically excludes pregnant women from possible prosecution,[110] its significance lies in its recognition of legal protection for fetuses.[111]

The potential effects of the UVVA include giving "the fetus formal status, which has the effect of placing the fetus in competition against its mother-to-be in the legal and medical arenas, thereby further forsaking the interests of pregnant women."[112] Some scholars believe the UVVA was "part of a strategy to undermine *Roe*."[113] Restrictions on abortion, however,

105. Innocent Child Protection Act of 2001, H.R. 1595, 107th Cong. (2001).

106. McLennan Brown, *supra* note 13, at 97 (citing 42 C.F.R. § 457.10(3) (2006)). McLennan Brown asserts that the combination of word choice in health insurance statutes, wrongful death claim revisions, and homicide statutes "do not reflect a state goal of protecting and preserving the life of a fetus but rather attempt to define and regulate the behavior of a woman who is experiencing a wanted pregnancy." *Id.*

107. *See, e.g.*, Janet L. Dolgin, *Embryonic Discourse: Abortion, Stem Cells, and Cloning*, 31 FLA. ST. U. L. REV. 101, 128–29 (2003) (stating that many anti-abortion publicists began making assertions about fetal status).

108. Unborn Victims of Violence Act (UVVA) of 2004, 18 U.S.C. § 1841 (2006).

109. *Id.*

110. *Id.*

111. The UVVA was subtitled "Laci and Conner's Law" in recognition of Laci Peterson, who was murdered in her eighth month of pregnancy. *See* McQueeney, *supra* note 22, at 461 (citing *Peterson Timeline*, KNTV (Jan. 10, 2003), http://www.nbc11.com/news/1883355/detail.html (last visited Nov. 4, 2007)). The media discussion of the incident illustrates the cultural perspective on late term pregnancy: the name to be given to Laci's fetus, had it been born, was "Conner"; however, the discourse on the fetus treated him very much as if he were a person. *See* Frank Swertlow, *Peterson Trial: Musical Chairs in Court*, PEOPLE, Sept. 14, 2004, *available at* http://www.people.com/people/article/0,,696496,00.html ("The 31-year-old Peterson is accused of murdering his wife, Laci, and their unborn son, Conner, on Christmas Eve 2002."). Congress's linguistic choice in so naming the law was significant. This selection of words affirmed the vision of both Laci and her fetus as individuals, each with his or her own sets of rights.

112. Brody & McMillin, *supra* note 4, at 271–72.

113. *See, e.g.*, Cohen, *supra* note 42, at 862 (referring to Roe v. Wade, 410 U.S. 113 (1973)).

are just *one* constraint on pregnant women's conduct that may result from the granting of rights to fetuses.[114] Attorney and legal commentator Amy F. Cohen describes how the definition of a fetus as a person "could also cast serious doubt on the resolution of other pregnancy issues such as the imposition of liability on pregnant women for neglecting their health during pregnancy, harming fetuses through the use of drugs, etc."[115]

Passage of the UVVA may also function as the turning point in the trend of prosecuting pregnant women. Back in 1998, one scholar stated that nearly all of these prosecutions had failed "because most courts have refused to include a fetus as a 'child' under the statutes."[116] However, with new federal guidance that specifically mandates fetuses be included in the definition of "child,"[117] these prosecutions may become more successful and more common.

D. Adding the "Partial Birth" Abortion Legal Analysis to the Debate

The Supreme Court held unconstitutional a state law prohibiting partial birth abortion in 2000.[118] *Stenberg v. Carhart* reiterated the requirement of a health exception in all abortion regulations.[119] That reasoning seemed to be more fragile following

---

114. Page ironically refers to the prosecution of pregnant women as "judicial activism." Page, *supra* note 50, at 364.

115. Cohen, *supra* note 42, at 862. Other problems with the UVVA are evident. According to Kleiboeker, Congress considered the fact that homicide is the leading cause of death for pregnant women as a factor in its enactment of the UVVA. Kleiboeker, *supra* note 68, at 1635. Though this is a compelling reason, the UVVA itself does nothing to protect pregnant women from being killed. *See* 18 U.S.C. § 1841. Kleiboeker claims that the UVVA increases the deterrence factor for harming a pregnant woman. Kleiboeker, *supra* note 68, at 1636. However, one might presume that the effectiveness of deterrence between one murder prosecution (for the woman) and two murder prosecutions is negligible to one contemplating murder in the first place. Another purpose attributed to these fetal rights statutes is "to dictate compliance with societal notions of acceptable maternal conduct." Tuerkheimer, *supra* note 7, at 692. Additionally, there is an exception to the UVVA and similar state statutes for abortion, a nod to the persistence of the *Roe* decision. *See, e.g.*, 18 U.S.C. § 1841; ARK. CODE ANN. § 5-2-201(13)(B)(ii)(a) (Supp. 2007). Though the discussion of fetal rights in the abortion debate is beyond the scope of this article, note that a number of commentators see this exception as only a stop along the way to granting and enforcing fetal rights at every stage of pregnancy. *See, e.g.*, *infra* note 138 and accompanying text.

116. Mills, *supra* note 31, at 991 (discussing People v. Morabito, 580 N.Y.S. 2d 843 (N.Y. Geneva City Ct. 1992).

117. *See supra* text accompanying note 106.

118. Stenberg v. Carhart, 530 U.S. 914, 945–46 (2000).

119. 530 U.S. at 934.

the adoption of the UVVA's definition of a fetus as a person.[120] Conspicuously, the *Stenberg* decision did not prevent Congress and President Bush from enacting a federal law that restricts the manner in which a woman may terminate her pregnancy.[121]

By November of 2006, when the Supreme Court heard the challenge to the federal Partial-Birth Abortion Ban Act ("PBABA") of 2003,[122] fetal rights had expanded exponentially.[123] The recent Supreme Court decision of *Gonzales v. Carhart* confirmed the Court's conservative[124] path within the reproductive liberties arena.[125] *Gonzales* upheld the constitutionality of the PBABA.[126] This restriction on procreative choice—here, a prohibition on a method to terminate a pregnancy[127]—was the first time the Court limited abortion without requiring a health exception.[128] Justice Ginsburg, in her dissent, emphasized the impact of this decision on the existing reproductive precedent. "Ultimately, the Court admits that 'moral concerns' are at work, concerns that could yield prohibitions on any abortion . . . . By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent."[129] Asserting her support for a fundamental right to make procreative choices, Justice Ginsburg stated, "[i]n candor, the [Partial-Birth Abortion Ban] Act, and the Court's defense of it, cannot be understood as anything other than

120. *See* 18 U.S.C. § 1841. Note that Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas opposed the health exception in *Stenberg v. Carhart*. 530 U.S. at 957–79 (Kennedy, J., dissenting); *id.* at 980–1020 (Thomas, J., dissenting); *see also* Planned Parenthood of Se. Pa. v. Casey, 50 U.S. 833, 898 (1992) (deciding that a wife smoking or drinking while pregnant cannot be regulated by her husband). If the husband cannot regulate his wife's behavior during pregnancy, how can the State? In contrast, see *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 327–28 (2006), for a unanimous demand for a health exception. Another definitive case regarding the ability of pregnant women to make decisions without the intervention of the state is *In re A.C.*, 573 A.2d 1235 (D.C. Cir. 1990) (en banc). There, the judge noted: "Surely, however, a fetus cannot have rights in this respect superior to those of a person who has already been born." *Id.* at 1244.

121. *See* Partial-Birth Abortion Ban Act (PBABA) of 2003, 18 U.S.C. § 1531 (2006).

122. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1610 (2007).

123. *See supra* text accompanying notes 105–12.

124. Lowercase "c" conservative, as in restricting, rather than enhancing, individual rights.

125. *See Gonzales*, 127 S. Ct. at 1652 (Ginsburg, J., dissenting) (stating that the Court was "differently composed" during the last abortion regulation decision).

126. *Id.* at 1639 (majority opinion).

127. *See id.* at 1627 ("[The PBABA] regulates and proscribes . . . performing the intact [Dilation and Evacuation] procedure.").

128. *See id.* at 1636.

129. *Id.* at 1647 (Ginsburg, J., dissenting).

an effort to chip away at a right declared again and again by this Court . . . ."[130] According to Justice Ginsburg, then, the previously existing fundamental right to make reproductive decisions without interference from the state is now being retracted.[131]

A final question emerges from *Gonzales*: what framework is the Court using to assess restrictions on procreation? Ironically, the *Gonzales* Court did not base its decision on the risk to a future child or even the harm to the fetus itself.[132] The majority drew a line—banning one particular procedure—which, according to Justice Ginsburg, "saves no fetus . . . ."[133] Ultimately, however, the ambiguous "moral concerns" framework for assessing procreational choices is an open invitation to federal legislation to protect the unborn. That legislation will indubitably infringe upon the rights of pregnant women.

Nationally, recognition of fetal rights continues to grow, as illustrated by the fact that at least twenty states have homicide laws that identify unborn children at any stage of gestation as victims, and at least twelve more recognize fetuses as living persons beyond a certain stage of development.[134] Additionally, the *scope* of rights being granted to fetuses is expanding.[135]

---

130. *Id.* at 1653.

131. *See id.* *Compare* Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006) (unanimously holding that a health exception was required in any restriction on the right to terminate a pregnancy), *with Gonzales*, 127 S. Ct. at 1636 (majority opinion) (holding, just one year later in a 5–4 decision, that a health exception was not necessary, contrary to medical opinion). Justice Ginsburg notes the change in the make-up of the Court as a contributing factor to the decision. *Id.* at 1652 (Ginsburg, J., dissenting) ("[T]he Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of 'the rule of law' and the 'principles of *stare decisis*.'").

132. *See id.* at 1639 (majority opinion) ("Respondents have not demonstrated that the [PBABA] . . . imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception.").

133. *Id.* at 1650 (Ginsburg, J., dissenting).

134. Kleiboeker, *supra* note 68, at 1645 (citing State Homicide Laws That Recognize Unborn Victims, National Right to Life Committee (Sept. 2, 1999) http://www.nrlc.org/whatsnew/sthomicidelaws.htm (last visited Nov. 4, 2007)); *see* Eckenwiler, *supra* note 19, at 89 (describing the current status of state and federal laws as a "patchwork quilt of laws governing pregnant addicts"). *But see* Ehrlich & Paltrow, *supra* note 2 (discussing the Maryland high court's decision to reverse lower court convictions of pregnant women, ruling that child endangerment laws do not apply to the unborn).

135. Eckenwiler, *supra* note 19, at 89 ("[T]he current political climate—characterized by numerous efforts at the federal and state level to grant personhood status to the fetus . . . may invite an increase in future prosecutions and other responses that are punitive in nature." (citing 18 U.S.C. § 1531 (2006))); *see also* Ehrlich & Paltrow, *supra* note 2 (describing how, recently, "pregnant women have been arrested and jailed" in at least nine states because "pregnant women can be considered child abusers even before they have given birth").

Further, state legislatures are passing laws to define fetuses as people to the fullest extent the Constitution will allow.[136] By adding abortion exceptions to these statutes, the states assume they are in compliance with *Roe*.[137] "The logical conclusion to this gradual erosion is that states, which continually declare a fetus a person, will reach a point when fetal personhood is a foregone conclusion, even in the abortion context."[138] This movement, though popular in Washington and statehouses across the country, ultimately violates the Constitution.[139]

III. The Equal Protection Clause of the Fourteenth Amendment Requires the Treatment of Pregnant Women Be the Same As Non-Pregnant Adults

"[A] State may not use its interest in the potential life of a pregnancy as justification for suspending a woman's constitutional rights."[140] The Equal Protection Clause protects all people from unequal treatment that is based upon gender, race, national identity, age or other immutable factors.[141] The Supreme Court has found that the Equal Protection Clause applies when an individual in one class has been treated differently than an individual in another class because of certain classifications.[142]

---

136. *See e.g.*, MO. ANN. STAT. § 1.205 (West 2000) ("[T]he laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to the persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court . . . .").

137. *See* McLennan Brown, *supra* note 13, at 91 (citing Roe v. Wade, 410 U.S. 113 (1973)).

138. *Id.*

139. *Id.* at 92 ("The movement to recognize a fetus as a person inherently conflicts with a woman's right to bodily integrity and procreational liberty."); *see* Paltrow, *supra* note 1, at 15 ("It is the firmly held belief of some that a woman should subordinate her right to control her life when she decides to become pregnant or does become pregnant. Anything which might possibly harm the developing fetus should be prohibited . . . . While such a view is consistent with the recognition of a fetus having rights which are superior to those of its mother, such is not and cannot be the law of this state." (quoting Stallman v. Youngquist, 531 N.E.2d 355, 359 (Ill. 1988))).

140. Spiezer, *supra* note 12, at 520; *see, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846–47 (1992); *Roe*, 410 U.S. at 164–65. Spiezer also states that, when the fetus's interest is held superior to the pregnant woman's, "women are not being fully recognized as 'persons' under the [C]onstitution, but rather are being relegated to a traditionally feminized role without the full rights of 'persons.'" Spiezer, *supra* note 12, at 526.

141. *See* U.S. CONST. amend. XIV, § 1.

142. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (holding that racial restrictions on the freedom to marry violates the central purpose of the Equal

The Court applies different levels of review to different classifications; gender classifications have earned an intermediate level of scrutiny.[143] Intermediate scrutiny requires the government show its actions are substantially related to an important governmental interest.[144] Because pregnancy is a gender classification, the state may not treat pregnant women differently than non-pregnant adults without showing a substantial government interest and proving the state action is substantially related to that interest.

A. Pregnancy as Status: An Equal Protection Challenge to Prosecution

The Court addressed unequal treatment of pregnant women in *General Electric Co. v. Gilbert*.[145] There, the Court determined that pregnancy was not a gender-based classification, and thus did not fit within the framework of the Equal Protection Clause.[146] In response, Congress amended Title VII by adding the Pregnancy Discrimination Act ("PDA").[147] This statute declares that discrimination based upon the status of pregnancy is sex-based discrimination.[148] Though the PDA was intended to function in the employment context,[149] the fundamental finding of pregnancy discrimination as a component of gender discrimination may be extended to other applications, such as the equal protection guarantee of the Fourteenth Amendment. Thus, courts should view pregnancy discrimination as analogous to gender discrimination in determining the level of scrutiny to apply in their analyses. Restrictions specifically directed toward pregnant women or disproportionately affecting pregnant women must then be viewed as suspect and meet the intermediate level of scrutiny

---

Protection Clause).

143. *See* Craig v. Boren, 429 U.S. 190 (1976).

144. BLACK'S LAW DICTIONARY 833 (8th ed. 2004).

145. 429 U.S. 125 (1976).

146. *Id.*; *see also* Mills, *supra* note 31, at 1028 (discussing the Court's decision that rational review should be applied to pregnancy discrimination, finding it was not discrimination on the basis of sex but rather a biological classification).

147. Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)); *see* H.R. Rep. No. 95-948, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750 (noting that the bill was introduced in response to the Court's *Gilbert* decision).

148. H.R. Rep. No. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751 (describing the PDA's purpose, to "unmistakably [reaffirm] that sex discrimination includes discrimination based on pregnancy").

149. *Id.* at 4749 (noting the purpose of the PDA to clarify sex discrimination including "discrimination in employment based on pregnancy").

applied to gender questions under the Equal Protection Clause.[150]

To survive this increased scrutiny, these statutes must serve an important government interest and be substantially related to that interest.[151] While the government presumably has an important interest in protecting a fetus, restrictions on pregnant women's actions and prosecutions of them are not necessarily substantially related to the protection of fetuses.[152] Prosecutions can be more harmful to the fetuses than alternative regulations or no regulations at all;[153] further, many superior methods exist with which to improve the health of fetuses.[154] As Mills notes, these "[p]rosecutions may in fact exacerbate the problem they intend to solve," in effect working against the state's interest, rather than substantially furthering that interest.[155]

B. Equal Protection and the Fundamental Right to Parent

In *Troxel v. Granville*,[156] the Supreme Court stated the state

150. Note that strict scrutiny may apply to questions that are posed under the Due Process Clause. *See* Campbell, *supra* note 19, at 474.

151. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). Note that the Court in *United States v. Virginia* demanded an "exceedingly persuasive justification" for gender-based government action. 518 U.S. 515, 531 (1996).

152. *See* Mills, *supra* note 31, at 1030 ("The health of newborn babies is indeed an important governmental objective. The means that the states are using to achieve that objective, however, are not substantially related to meeting the goal.").

153. *See id.* at 1037–38 ("[U]sing incarceration as a method of punishing drug-addicted mothers does not improve the fetus's health. . . . The conditions in prison are physically hazardous to both mother and baby.").

154. When government focuses so much attention and so many resources on prosecuting pregnant women's behavior, it neglects other, arguably more important, factors that cause damage to babies, such as poverty and domestic violence. *See* Spiezer, *supra* note 12, at 522 ("[E]xposure to drugs in utero is not the major cause of injury to fetuses; actually, poverty and malnutrition are the most damaging."); *see also* Eckenwiler, *supra* note 19, at 93, 95 (asserting that the focus on a pregnant woman's "inner life" risks diverting "attention from matters of social structure, including the policies and practices that make drug addiction more likely," as well as "divert[ing] attention from the men's participation in procreation"); Ehrlich & Paltrow, *supra* note 2 ("Health risks to . . . fetuses and children . . . can be mitigated through prenatal and continuing medical care and counseling."); Page, *supra* note 50, at 364 (noting that the prosecution of pregnant women "diverts public attention from social ills such as poverty, racism and a misguided national health policy"); Tuerkheimer, *supra* note 7, at 692 ("Regulating women in the name of vindicating the rights of fetuses, the law utterly fails to recognize, much less remedy, the full spectrum of violence that impacts their lives.").

155. Mills, *supra* note 31, at 1036.

156. Troxel v. Granville, 530 U.S. 57, 66 (2000) ("The Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *id.* at 68–69 ("Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further

may not infringe upon a parent's fundamental right to rear a child.[157] Courts thus implicate a fundamental right when viewing prosecutions of expectant women through the lens of the right to parent rather than the status of being pregnant, and must therefore apply a more intense scrutiny. Legal scholars David C. Brody and Heidee McMillin assert that "[b]eing dependent on drugs or alcohol does not necessarily make a woman an unfit parent."[158] They argue that abuse or neglect must be evident in order to legitimate the separation of mother from child.[159]

If one rejects substance dependency as a litmus test for unfit parenting, then parents with substance dependency cannot be denied their right to parent without more evidence of incompetence. Prosecuting and jailing women whose babies are born with drugs in their systems thus denies women their fundamental right to parent. This results in an unequal, unjust, and unconstitutional application of the law.

C. Drug Testing and Equal Protection

Adding consideration of the law surrounding drug testing into the mix supports the claim that the prosecution of pregnant women for child endangerment or abuse is unconstitutional. The apparent inconsistency in the way courts use drug testing bolsters the argument that such prosecution is barred under the Constitution. Courts recognize that states cannot administer drug tests to a woman without her consent;[160] however, the state *can*

---

question the ability of that parent to make the best decisions concerning the rearing of that parent's children." (citation omitted)). *But see id.* at 73 ("Because we rest our decision on the sweeping breadth of [the act] and the application of that broad unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context.").

157. *Id.*

158. Brody & McMillin, *supra* note 4, at 251–52.; *see also* Cohen, *supra* note 42, at 880 ("While the *Roe* framework is appropriate for early pregnancy, in late pregnancy the individual right of mother-to-be and developing child cannot, and should not, be artificially disengaged from each other and balanced by the state, because the state is not in the best position to accurately balance and assess the interests involved. Instead, absent a showing of incompetence, a mother-to-be should be authorized to make joint health decisions for herself and the developing child, as she would be moments after birth.").

159. Brody & McMillin, *supra* note 4, at 266.

160. *Id.* at 253 (noting that the Supreme Court found this practice to be in violation of the Fourth Amendment in Ferguson v. City of Charleston, 528 U.S. 1187 (2000)).

drug screen a newborn without the mother's consent and subsequently use the results to prosecute the mother.[161] Additionally, some states require mandatory reporting of a pregnant woman's drug use to social welfare agencies.[162] Mandatory reporting can trigger investigations into parenting and affect eligibility for economic aid and access to other resources, thus restricting a new parent's access to important government programs.[163] Finally, men are not administered drug tests when their children are born to determine whether or not the father may be an unfit parent.[164] The violation of equal protection guarantees occurs when women are treated differently under the law because they gave birth. This invasion of the child for evidence to use solely against the mother is inconsistent with the constitutional values of privacy, bodily integrity, and equal application of the laws.[165]

D. Application of Equal Protection

Consider a direct application of the equal protection guarantee: the notion that the treatment of pregnant substance users must be the same as non-pregnant substance users. If the typical non-pregnant individual accused of being intoxicated is given either a ride home, a night in the "drunk tank," or a fine, the state must apply that same consequence to a pregnant woman.[166] If a new father who is suspected of drug use is entitled to an investigation before removal of the child from his custody, the

161. Spiezer, *supra* note 12, at 514 (describing how, on remand, the Court of Appeals in Ferguson v. Charleston, 308 F.3d 380, 395 (5th Cir. 2002), limited the holding and found the testing of newborns to not be in violation of the mother's Fourth Amendment rights). Spiezer writes, "[b]y allowing the prosecution of women based on the testing of their babies immediately upon birth, the court allows an easy way around the prohibition of unreasonable searches and seizures of women during pregnancy." *Id.* at 521.

162. Brody & McMillin, *supra* note 4, at 254.

163. *Id.*

164. Mills notes that substance use by the father can have a harmful effect on the fetus. Mills, *supra* note 31, at 1005. "Before conception, the father's exposure to toxic chemicals, smoking, and drinking alcohol may lead to fetal defects." *Id.* Mills also notes that the father's actions during pregnancy—i.e., physical abuse of the mother—can affect the fetus as well. *Id.* The practice of prosecuting only women—though both parents' consumption of substances can cause harm to the fetus—is at odds with the idea of equal protection.

165. *See* Tuerkheimer, *supra* note 7, at 694 (describing how the "codification of fetal victimhood causes the virtual disappearance of *the pregnant woman*—her interests, perspective, and rights").

166. *See* Eckenwiler, *supra* note 19, at 91 ("Some evidence shows that judges have imposed longer sentences on pregnant as opposed to other drug users.").

mother is entitled to identical due process.[167] The status of a woman as pregnant does not make her less of a "person" under the Fourteenth Amendment. She is no less deserving of the equal protection and application of the law.[168]

A statement from the South Carolina Supreme Court in *Whitner* is in blatant disagreement with this principle, however. "If the State wishes to impose additional criminal penalties on pregnant women . . . it may do so."[169] Judges' statements such as this provide evidence of the need for a systemic change to protect the rights of pregnant women. "[T]he underlying condition that exposes women to criminal charges, drug addiction, is not itself criminal behavior but a disease"; it is not an act, but rather a status.[170] It is now a bedrock principle of American criminal law that status does not provide cause for prosecution.[171]

E. A Feminist Analysis of the Equal Protection Argument

Equality (or "liberal") feminist writers support such an application of equal protection, one that requires the state to treat pregnant women the same as other individuals.[172] This equal protection analysis eliminates the problem of setting the interests of the fetus against the woman, as this view does not neglect the fetus's interests because it acknowledges the *shared* interests of the pregnant woman and the fetus. Such an analysis also allows for more appropriate and effective solutions to the problem of substance abuse during pregnancy than prosecution permits.

Outside of a Planned Parenthood clinic recently, an anti-

---

167. *See* Paltrow, *supra* note 1, at 13 ("Prosecutors [have] argued that arrest [is] still justified because evidence of a woman's drug use during pregnancy is predictive of an inability to parent effectively. But fathers identified as drug users are not automatically presumed to be incapable of parenting.").

168. *See* Spiezer, *supra* note 12, at 507 ("[T]he Supreme Court must mandate that laws regulating women's reproductive health and safety clearly and unequivocally value women as autonomous persons rather than as functions of a socially defined maternal role."); *see also* Tuerkheimer, *supra* note 7, at 669, 698 (describing how, past and present, "the rhetoric of fetal personhood has been employed to undermine the legal rights of pregnant women," and that most societal undermining of women has been because women can become pregnant).

169. Whitner v. State, 492 S.E.2d 777, 786 (1997); *see* Campbell, *supra* note 19, at 481.

170. Mills, *supra* note 31, at 1022–23.

171. *See* Robinson v. California, 370 U.S. 660, 666–67 (1962) (holding that a statute that makes the status of being a drug addict illegal is unconstitutional under the Eighth Amendment).

172. *Cf.* McLennan Brown, *supra* note 13, at 89 ("Formal equality theorists posit that society should treat individuals according to their actual characteristics, regardless of gender . . . .").

abortion protestor shouted, "[w]hy do you discriminate against babies?"[173] The protestor, essentially reinterpreting the Equal Protection Clause of the Fourteenth Amendment as giving fetuses rights (to life, to proper care, to the potential for a healthy life) within the context of abortion, would likely extend her logic to the situation of substance use as well. That approach ignores, however, that *Roe* established that a fetus is not a person within the meaning of the Fourteenth Amendment.[174] The recognition of separate rights in the fetus necessarily diminishes the pregnant woman's rights, which are guaranteed by the Fourteenth Amendment. The idea of one individual's exercise of her or his rights being allowed to reduce another's guaranteed rights is anathema to the idea of equal protection.

IV. A Woman's Right to Privacy Is Not Altered by the Condition of Her Pregnancy

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court stated, "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[175] The *Casey* decision is one in the relatively short line of cases that exposed, established, and enshrined the right of privacy in the U.S. Constitution.[176] Beginning in 1967 with *Griswold*, the Supreme Court has consistently upheld an individual's right to privacy, though the source of the right has shifted from a penumbra of enumerated rights to, most recently, the Fourteenth Amendment.[177] Though the right to privacy began in the secluded setting of the marital bedroom,[178] it has been extended to private, sexual activities generally, between any two consenting adults,[179] regardless of marital status.[180] Though the Court has yet to address pregnancy itself under a framework of privacy, it has reviewed both sexual intercourse[181] and childrearing as such.[182] As pregnancy fits into

173. The author witnessed this incident on December 20, 2006, while volunteering as a clinic escort at the St. Paul Clinic on Ford Parkway.

174. Roe v. Wade, 410 U.S. 113, 158 (1973).

175. 505 U.S. 833, 847 (1992).

176. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); *Casey*, 505 U.S. 833 (1992); *Roe*, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

177. *Compare* Griswold v. Connecticut, 381 U.S. 479 (1965), *with Lawrence*, 539 U.S. 558.

178. *Griswold*, 381 U.S. 479 (considering married couples' rights to contraception).

179. *Lawrence*, 539 U.S. 558.

180. *Eisenstadt*, 405 U.S. at 438.

181. *See, e.g., id.*

the stage between those protected activities, it logically deserves the safeguard of privacy.[183]

A. Structuring a Privacy Argument Against Prosecution: Type of Review, Autonomy, and the Common Law

Commentators contest which standard of review should apply to this privacy issue. One analyst asserts that in all procreation cases, the Supreme Court has mandated an "undue burden" assessment.[184] In fact, the "undue burden" standard, which originated in *Casey*, has only been applied to the decision to terminate a pregnancy. Extension of this lower standard of review (when compared with strict scrutiny for other privacy matters) to all pregnancy-related decisions would create a class of women whose rights automatically diminish as they procreate. As the Constitution does not provide for different levels of personhood, such a situation cannot be permitted.[185]

Another commentator describes two aspects of the right to privacy: "one is freedom from interference with one's body . . . [t]he other is freedom to act with one's body, i.e., the right to exercise autonomous control . . . ."[186]

> Personal autonomy goes to the heart of what many Justices feel is at the root of the privacy right. It is perhaps the most abstract or philosophical strand of privacy doctrine, as it is less about the right to do a particular thing as about the right to be let alone.[187]

---

182. *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000).

183. Mills, *supra* note 31, at 1022 ("While it has never been explicitly stated by the Court, it logically follows that if a woman's reproductive privacy right extends to her decisions about contraception and abortion, that right should also encompass privacy surrounding her health during the pregnancy as well as the fact of the pregnancy itself.").

184. Carrie Ann Wozniak, *Difficult Problems Call for New Solutions: Are Guardians Proper for Viable Fetuses of Mentally Incompetent Mothers in State Custody?*, 34 STETSON L. REV. 193, 202–03 (2004).

185. *But see id.* at 205 ("The pregnant woman cannot be isolated in her privacy" (quoting Roe v. Wade, 410 U.S. 113, 159 (1973))). *Lawrence* stated it applied a rational basis analysis but appeared to apply heighted scrutiny when the right to privacy was assessed there. *Lawrence*, 539 U.S. at 558. However, the Court's resistance to extending fundamental rights to "non-traditional" lifestyles could not be applied to the clearly fundamental right to reproduce and carry a child to term.

186. Cohen, *supra* note 42, at 870 (quoting Barbara A. McCormick, *Childbearing and Nurse-Midwives: A Woman's Right to Choose*, 58 N.Y.U. L. REV. 661, 692 (1983)).

187. Cohen, *supra* note 42, at 869; *see* Tuerkheimer, *supra* note 7, at 701 (describing how the idea of bodily integrity "animate[s] an understanding of reproductive freedom that encompasses a far wider range of concerns than the legal right to abortion").

This notion undermines the *McKnight* court's rejection of the privacy defense—the court only examined the potential for McKnight's behavior of smoking crack to be covered by the privacy right, rather than reviewing the actions of the hospital and police in investigating her actions.[188]

The common law reinforces the importance of the privacy aspect of autonomous control in a declaration quite relevant to pregnancy: "The common law is quite clear that when the bodily integrity of one individual is pitted against the needs of another, there is no duty to sacrifice oneself, even if the harm were minimal and the benefit to the other great."[189] Ultimately, our legal system has decided that there shall be no duty to assist, as reinforced by Good Samaritan laws.[190] Even assuming the existence of fetal rights, there is no legal basis for requiring a pregnant woman to extend herself to protect the fetus. This juncture of bodily autonomy and privacy rights for a pregnant woman is summed up by Catherine MacKinnon, who declared that society must expose "the outrages of . . . forced motherhood."[191] Finally, threats to women's privacy rights are genuine: even those who support the purpose of the UVVA note that it fosters challenges to privacy, especially the privacy guaranteed to the pregnant woman.[192]

B. Feminist Perspectives on Privacy Rights and Prosecutions

Feminists have taken various stances on the right to privacy. Liberal feminists tend to find the right to privacy, especially in terms of bodily integrity and reproductive autonomy, as being essential to equality goals.[193] Others, especially those focused on

188. State v. McKnight, 576 S.E.2d. 168, 171–79 (S.C. 2001).

189. Cohen, *supra* note 42, at 871.

190. Yania v. Bigan, 155 A.2d 343 (Pa. 1959); *see* Paltrow, *supra* note 1, at 15 ("A legal duty to guarantee the mental and physical health of another has never before been recognized in law."). Amy F. Cohen spells out the potential application of such laws to pregnant women. Cohen, *supra* note 42, at 871 ("The alternative adopts a brutally coercive stance towards pregnant women, viewing them as vessels or means to an end which may be denied the bodily integrity and self-determination specific to human dignity."). However, one could attempt the analogy of the fetus as a tenant to the woman's (landlord's) womb. In that case, a general duty of care would attach. *See* Sargent v. Ross, 308 A.2d 528, 531 (N.H. 1973).

191. MACKINNON, *supra* note 17, at 26.

192. Kleiboeker, *supra* note 68, at 1647 ("[W]hile the UVVA does not directly inhibit a woman's privacy, the UVVA is a determinative step to approaching the line between murder and personal autonomy in an area of law that has long been gray.").

193. *See, e.g.*, MACKINNON, *supra* note 17, at 99 ("The liberal ideal of the private . . . holds that, so long as the public does not interfere, autonomous individuals

the private-public sphere division, see privacy as a luxury of the "haves" in society—more of a right earned by power and money than a right accessible to all.[194] Catherine MacKinnon noted that the assumption of privacy's inviolability, "framed as an individual right, presupposes that the private is not already an arm of the state."[195] This assertion is supported by the fact that many women, and pregnant women especially, live at the mercy of the welfare system—and thus the state—for food, shelter, and health care. Those resources come at a cost to women, and some of that cost is privacy.[196]

At first glance, relational feminists like Martha Fineman might be viewed as favoring the state's protection of the fetus, as their feminism strives for healthy interactions between all members in a society but especially between mother and child.[197] This is not the case. Fineman, in her book *The Neutered Mother, The Sexual Family, and Other Twentieth Century Tragedies*, clearly rages against the state's intervention into the mother-child relationship, even to protect the child. She states, "[r]ather than seeking to punish Mother, we should be devising ways to enable her to provide effective mothering."[198]

Regardless of the critiques of the practical access to privacy or the suspected negative aspects of privacy, feminists do agree that a woman *should* have autonomous control over her body. Whether or not feminists frame this autonomous control as a right to privacy, the right to maintain control of one's person throughout pregnancy is best situated (constitutionally) within the right to

---

interact freely and equally.").

194. MacKinnon argues that this luxury is primarily male. *Id.* at 100. "Feminism confronts the fact that women have no privacy to lose or to guarantee." *Id.*

195. *Id.*

196. MacKinnon suggests that paying this cost may *benefit* women. *See id.* at 102 ("When women are segregated in private, separated from each other, one at a time, a right to that privacy isolates us at once from each other and from public recourse. This right to privacy is a right of men 'to be let alone' to oppress women one at a time. It embodies and reflects the private sphere's existing definition of womanhood.").

197. McLennan Brown notes that "[r]elational feminism is dangerous because it provides arguments that could be used to support fetal personhood legislation through the ethic of care and mutual responsibility." McLennan Brown, *supra* note 13, at 104.

198. Fineman, *supra* note 19, at 216. Fineman points out that, once a child is born, a framework of privacy based on the individual is less favorable for the protection of the family unit. *Id.* at 185 ("[I]f the individual is the focus of constitutional concern, it is all too easy for the state to justify increased regulation and supervision of mothering by acting in its 'protective' capacity for the child against the mother.").

privacy.

Feminist scholars might balk at the framing of this argument, as it relies substantially on the established system of jurisprudence to argue against the prosecution of pregnant women. Legal scholar Lisa Eckenwiler dismisses defense attorneys' arguments against retribution and against prosecution for the sake of women and children's health; those arguments state that prosecution will lead to "slippery slope" regulation of all maternity behaviors.[199] Instead, Eckenwiler proposes that the focus be placed on the *individual woman*—not as a failed mother, but as a woman facing great challenges with few resources to assist her.[200] Though important on a case-by-case level, this method does little to prevent the overall transformation of our legal system into a place that values potential life over existing life.

C. *The Government's Mixed Messages on Pregnant Women's Rights*

Another significant consideration in the jurisprudence surrounding pregnancy and privacy has been the role of state influence on a woman's decision to terminate her pregnancy. The United States Supreme Court has held that states may encourage women *not* to seek abortion as part of the state's interest in the potential life.[201] Though this places pressure on a woman's right to privacy in her abortion decision, it has not been considered an undue burden.[202] When placed into this framework, fetal injury prosecutions cause the opposite result: the government, through its ability to charge substance-using women with crimes if they carry their pregnancy to term, subtly encourages addicted women to *terminate* their pregnancies.[203] Finally, viewing these prosecutions as an undue burden makes them an unconstitutional infringement on a woman's right to reproductive privacy.[204]

---

199. Eckenwiler, *supra* note 19, at 95.

200. *Id.*

201. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992) (holding that a state may enact "legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion").

202. *Id.*

203. *See* Mills, *supra* note 31, at 1025 (describing how fetal protection laws "may actually encourage women to obtain abortions").

204. *Id.* at 1026–27 ("[A] drug-addicted mother is faced with the following options: (1) to go to the doctor and risk criminal charges; (2) to shun the doctor and risk the fetus's health by not getting prenatal care; or (3) to terminate her pregnancy. Thus, fear of prosecution not only regulates, but unduly burdens, a

The movement for fetal rights has reduced a woman's right to privacy. Through drug testing of newborns, welfare resources dependent upon clean drug tests, and especially the physical restraint of pregnant women, this reduction in women's autonomy violates the right to privacy as guaranteed by the Fourteenth Amendment.

D. Additional Constitutional Issues in Laws Used to Prosecute Pregnant Women: Lack of Notice, Vagueness, Overbreadth, and Underinclusiveness

Both the laws extended to apply in fetal rights cases[205] and the laws designed with fetal protection in mind[206] suffer from additional constitutional defects. When a reasonable individual is unaware that a law would apply to her behavior, there is a lack of notice.[207] Courts that extended statutory breadth without warning, as was the case in *Hughes*[208] and *Whitner*,[209] do not give sufficient legal notice.[210] Commentator Michelle D. Mills notes that most courts examining fetal harm cases have "determined that a plain reading of the statutory language shows that they were not intended to apply to fetal abuse, so no reasonable woman would be aware that her behavior would subject her to criminal charges."[211]

A vagueness defense might also be employed in some of these prosecutions. While the UVVA specifically excludes actions of the pregnant woman, state laws are less specific. A lack of supportive legislative history, clear language, and previous use of these laws against pregnant women makes for a shaky conviction. Beyond the vagueness of to whom the law applies, there may also be vagueness as to which behaviors are prohibited. Many of these laws erode the right to abortion by bolstering the fetus's alleged personhood.[212] They might also be interpreted to prohibit numerous *legal* activities. When a statute gives such discretion in

---

woman's decision whether to keep her baby . . . .").

205. *See supra* notes 49, 73, 74 and 78 and accompanying text.

206. *See supra* notes 53, 91, 92, 93 and 108 and accompanying text.

207. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (standing for the proposition that prosecution is unconstitutional under the Due Process Clause of the Fourteenth Amendment when a statute "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden").

208. Hughes v. State, 868 P.2d 730 (Okla. Crim. App. 1994).

209. Whitner v. State, 492 S.E.2d 777 (S.C. 1997).

210. *See supra* notes 73 & 81.

211. Mills, *supra* note 31, at 1020.

212. *See supra* text accompanying note 138.

enforcement, it is void for vagueness.[213]

The statutes written to prosecute pregnant women for fetal abuse also suffer from overbreadth.[214] An overinclusive law affects those outside its intended application.[215] The lack of specification of prohibited behaviors leaves many activities prosecutable. When statutes are phrased to prohibit any action that may harm a fetus, they cannot be constitutionally enforced. The overbreadth argument is especially salient as the causal link between fetal drug exposure and fetal injury is very difficult to prove scientifically.[216] Therefore, women are not prosecuted purely because of harm they may have caused to their fetuses, but because of their drug use. Recall that status prosecution is unconstitutional under *Robinson*.[217] When prosecutions occur before delivery, they are based on the assumption that the fetus was injured, with no evidence to support that conclusion. In fact, there may be no injury at all.[218]

These overinclusive statutes are simultaneously underinclusive, by not applying to all behaviors which injure fetuses.[219] Not only do these laws restrict only certain people's behavior (sometimes excluding the pregnant woman, generally excluding physicians), they also frequently only restrict *some* types of behavior. Drug use early on in the pregnancy is not prosecuted,[220] and neither is smoking.[221] On a broad social scale,

---

213. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

214. Mills, *supra* note 31, at 1035.

215. *See id.* at 1033.

216. *Id.* at 1035 ("The degree of fetal injury, and whether any injury occurs at all, is the product of a number of factors and cannot be determined solely on the basis of the mother's ingestion of a controlled substance.").

217. *See supra* note 171 and accompanying text; *see also* Mills, *supra* note 31, at 1025 ("[T]hese statutes seem designed to punish women for drug use rather than for child abuse.").

218. *See* Mills, *supra* note 31, at 1035–36 ("Women who are held liable while they are pregnant are prosecuted well before any discernable harm is known. . . . Therefore, at least some women who are included in a law's definition of a fetal abuser have not, in fact, harmed their children.").

219. *Id.* at 1034.

220. *See id.* ("[O]nly late-term drug use is prosecuted, but early exposure creates the most serious risk of fetal injury."). Even if state fetal personhood statutes were used to prosecute a woman for drug use early in her pregnancy, proof of use would likely be difficult to obtain. *See id.* at 1034 n.383 ("If a woman uses drugs early in pregnancy, tests of the mother or baby at the time of delivery will definitely be negative.").

221. The South Carolina Attorney General's Office, the same office that prosecuted Cornelia Whitner, see supra Part II.B, stated that even following that case, a pregnant woman engaging in legal activities such as smoking cigarettes would not invite prosecution. Op. S.C. Att'y Gen. (1997), 1997 S.C. AG LEXIS 175, at *22 ("While obviously Whitner is capable of being read both broadly as well as

these prosecutions aimed at protecting fetuses do nothing to solve the most significant problems faced by pregnant women such as poverty, malnutrition, and lack of health care.[222]

Conclusion

The recent movement for supporting fetal rights began as a response to the allocation of rights to women—the choice to determine whether to continue their pregnancies. The current right of women to autonomy during the ongoing pregnancy is being threatened. At the judicial and legislative levels, and at the state and federal levels of government, fetal rights advocates are succeeding in winning rights for fetuses at the expense of women's rights. The UVVA, by defining a fetus as a person, was the first step nationally toward pursuing equal rights for these "people." Though *Roe* stands in the way of recognizing fetuses as people under the Fourteenth Amendment, legislators may devise a distinction between early pregnancy and a third-term fetus, using *Roe's* own compelling state interest. However, the enduring rights of privacy and equal protection demand that pregnant women, regardless of their reproductive status, have the same rights as other adults. Therefore, any grant of fetal rights that interferes with a woman's constitutional rights cannot be tolerated.

narrowly, the Court's insertion of the language regarding a woman having no privacy right to engage in illegal substance abuse following the motion for reconsideration leads us to recommend a cautious approach, thereby generally limiting application of Whitner to a mother's use of illegal substances such as crack cocaine.").

222. *See supra* notes 152–54 and accompanying text.