WOMEN'S RIGHTS AND FETAL PERSONHOOD IN CRIMINAL LAW

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ABSTRACT

In this research we examine the implications of *Roe v. Wade* and subsequent abortion rulings' balancing of women's rights against the state's "compelling interest" in potential human life. We examine the three major areas of criminal law that deal with the question fetal rights: abortion, substance abuse by pregnant women and prenatal battering/third party fetal killing. Because different parties are harming or potentially harming the fetus in each case, we can consider whether states demonstrate equal concern for fetal well-being regardless of the perpetrator's sex. In other words, is the fetal rights movement truly driven by a desire to protect society's most "vulnerable members," or, as many feminists charge, is it simply a smokescreen for hiding political attacks aimed at undermining women's exercise of full citizenship?

PART I: INTRODUCTION

The status of women in American society has been defined both legally[1]

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1. *See, e.g.*, Bradwell v. State, 83 U.S. 130, 141-142 (1873) (Bradley, J., concurring). Justice Bradley states in his concurring opinion:

> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator . . . . On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender.

and morally[2] by their capacity to reproduce and serve their husbands. As such, debates concerning the legal status of women reflect the moral understanding of their "natural" roles as wives and mothers. Although married women (and women generally) were legally powerless in the nineteenth century, they were "protected" by patriarchal beliefs that women were "vital instruments for building American society."[3] Until recently such protection was apparent in state laws restricting women's freedom of contract, regulating work hours,[4] and restricting women's participation in certain jobs.[5] Thus in both law and society, protections for women have actually excluded them from of fundamental liberties that were extended to men. While changes in contemporary law and society have made it possible for women to overcome some of this "protection,"[6] the focus of the legal and moral debate has shifted towards the value of the fetus and the need to protect the "unborn" from potential harms.[7] Thus the idea of protection is still invoked to circumscribe the rights of women based on their biological and social roles.

More than a century after its ratification, the Fourteenth Amendment's guarantee of equal protection of the law was finally extended to women. [8] Many hoped women's constitutional rights would soon be secured as state classifications based on sex were judicially scrutinized.[9] As the Supreme Court observed, ". . .our Nation has had a long and unfortunate history of sex discrimination rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[10] Although women's rights seemed on the verge of full constitutional recognition, the progress halted in the mid-

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Id.

2. *Genesis* 3:16 (King James) ("Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee.").

3. Bonnie Thornton Dill, *Our Mothers' Grief: Racial-Ethnic Women and the Maintenance of Families*, 13 J. FAM. HIST. 415, 415 (1988).

4. Although the Supreme Court struck down work restrictions for men during the late 1800s, *see, e.g.*, Lochner v. New York, 198 U.S. 45, 74 (1905), similar provisions for women were sustained in *Muller v. Oregon*, 208 U.S. 412 (1908). In *Muller*, the Court upheld a law establishing a maximum number of work hours per week for women. *See Muller*, 208 U.S. at 422. *Muller* did not overrule *Lochner* however, as the court found that women were a special class of workers because of their capacity to bear children. *See id.* at 421.

5. *See Bradwell*, 83 U.S. at 141 (upholding Illinois' refusal allow a woman to practice law, claiming: "God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws," and "divine ordinance" and the "nature of things" created the "domestic sphere as that which properly belong[ed] to the domain and functions of womanhood"); *see also* United Auto Workers v. Johnson Controls, 499 U.S. 187 (1991).

6. Obvious examples in law include the ratification of the Nineteenth Amendment (right to vote), *see* U.S. CONST. amend XIX, the Equal Pay Act of 1963, *see* 29 U.S.C. § 206(d)(1) (1999), and Title IX of the Education Amendments of 1972, *see* 20 U.S.C. § 1681 (1999); among many social indicators is the prominence of women in the work force and public office and the recent popularity of the American Women's World Cup soccer team.

7. *See infra* Part II.

8. For a discussion of Equal Protection, see 2 RALPH A. ROSSUM & G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW 431-32 (4th ed. 1995).

9. In *Reed v. Reed*, 404 U.S. 71 (1971), the Court finally held the Fourteenth Amendment prohibits states from imposing arbitrary classifications based on sex.

10. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

1970s.[11] Social, cultural and religious opposition,[12] coupled with political and legal concern for the fetus fostered by technological advances enabling fetal visualization,[13] have continued to keep women's claim to equal protection[14] subject to the balancing of state interests.

During the same period, the Court handed down its first major abortion rights case, *Roe v. Wade*.[15] While holding that a woman's privacy right under the Fourteenth Amendment's Due Process Clause applied to her decision about whether to have an abortion,[16] it also regarded fetal rights separate from those of the woman.[17] The Court's assertion that states may have a "compelling interest"

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11. In 1972, Congress passed the Equal Rights Amendment and by early 1973 twenty-four states had ratified it. Over the next four years, 35 of the necessary 38 states ratified the amendment, but there have been no additional adoptions. Four years later, the Supreme Court in *Craig v. Boren*, 429 U.S. 190 (1976), held that sex based classifications were subject to "intermediate scrutiny." While clearly an improvement over the "rational basis" test invoked in *Reed v. Reed*, the ruling showed that the Court was unwilling to subject sex based classifications to the "strict scrutiny" invoked in cases involving race based classifications. *See infra* note 14.

12. For a good account of the confluence of these factors, see JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986).

13. Probably the most important is the widespread use of "ultrasound," a now routine procedure that provides primitive (to the untrained eye) real-time motion picture of the fetus in the womb. *See* Carole Stabile, *Shooting the Mother: Fetal Photography and the Politics of Disappearance*, 28 CAMERA OBSCURA 179, 179-85 (1992). The fetoscope is a miniature camera mounted on a device that is surgically inserted into the uterus, where it photographs the fetus. *See id.* In the mass media, fetal images were first depicted in *Life* magazine in 1965 and 1972; fetoscopy was shown on television on the 1983 PBS program "The Miracles of Human Life." *See id.* Today, such images are widespread, visually and psychologically "humanizing" the fetus. *See id.*

14. To determine whether classifications are legitimate and permissible under the Equal Protection Clause, the Court gradually developed a "tiered" approach, representing the level of scrutiny the Court will give to the classification under review. *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 358 (1999). The "strict scrutiny test" is used for what the Court considers "suspect" classifications (race, ethnicity, national origin and perhaps alienage) and classifications that burden fundamental rights - rights that either are independently and explicitly (other than the Fourteenth Amendment or the Fifth Amendment's Due Process Clause) protected by the Constitution or are important and implied in the Constitution generally. *See* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 357 (1978) (Brennan, J., concurring). The validity standard under strict scrutiny is that the law must be the least restrictive means available to achieve a compelling state interest. *See* Bernal v. Fainter, 467 U.S. 216, 219 (1984). The strict scrutiny test is almost always fatal to any law or regulation. The rational basis test is used for most garden-variety classifications, such as economic and health and safety regulations, resulting in differential treatment of groups. To pass constitutional muster, such a law must simply be reasonably designed to achieve a legitimate governmental purpose. *See* Romer v. Evans, 517 U.S. 620, 635 (1996). Laws held to this standard are almost always upheld. The middle tier test or intermediate scrutiny is applied to classifications involving sex discrimination and illegitimacy (children). *See* United States v. Virginia, 518 U.S. 515, 567-68 (1996) (Scalia, J., dissenting). This validity standard requires that the law must be "substantially related to an important government objective." *Id.* at 570-71. (Scalia, J., dissenting). When the middle tier test is involved, the outcome is less predictable than with the rational basis or strict scrutiny tests. It is important to recognize, then, that sex is not accorded the same protection as race. Women are not, as a class, as constitutionally protected as racial minorities unless certain privacy issues are implicated. *See* DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1210-1220 (3d ed. 1997). For a discussion of equal protection in the context of abortion and women's rights see *infra* Part III.

15. 410 U.S. 113 (1973).

16. *See id.* at 152-53.

17. *See id.* at 158-64.

in the potentiality of human life allowed states to balance the interests of the pregnant woman and the fetus, often pitting the two against each other.[18] Further, the Court set up the possibility that in protecting this "compelling interest" states could violate a woman's fundamental liberties without contravening the "strict scrutiny test."[19]

In this article, we examine the implications of this inherent tension in *Roe*, in subsequent abortion rulings, and in other areas, paying particular attention to the relationship between fetal rights and women's civil liberties. The establishment of conditional rights for both the woman and the fetus has affected additional areas of criminal law: substance abuse by pregnant women and third party acts of violence against pregnant women that result in fetal deaths or injuries. In the first section of this article, we examine the legal framework used in the abortion disputes and its use in other areas of criminal law. In the second, we examine the legal arguments used by fetal rights proponents to justify state intervention to protect the fetus. We then discuss the women's rights arguments limiting state violation of the equal protection clause. Finally, in the last section, we juxtapose the arguments for fetal rights with the various areas of criminal law protecting the fetus. Because different parties are potentially harming the fetus in each case, we can consider whether states demonstrate equal concern for fetal well being regardless of the perpetrator's sex. In other words, is the fetal rights movement truly driven by a desire to protect society's most "vulnerable members," or, as many feminists charge, is it simply a smokescreen for hiding broader political attacks aimed at undermining women's exercise of full citizenship?

The Legacy of Conflict

In *Roe* the Court ruled that Texas' abortion ban violated the Due Process Clause of the Fourteenth Amendment,[20] which protects, inter alia, the right to privacy against state action.[21] Although the state cannot override that right, the Court also ruled that a state may have legitimate interests in protecting the pregnant woman's health[22] and the "potentiality of human life."[23] Thus, in a single ruling the Court simultaneously secured a woman's constitutional right to an abortion and made it conditional. *Roe*, by granting the state a "compelling

18. The Court stated, "[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision." *Id.* at 154.

19. Indeed, in the evolution of abortion cases decided by the Court since *Roe*, balance in this dichotomy of rights (maternal/women's vs. fetal) has tilted in favor of the fetus, leading to a new "test" for state regulation of women's fundamental right to abortion. *See* Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1982); Planned Parenthood v. Casey, 505 U.S. 833 (1992); *see also* discussion *infra* notes 107-112 and accompanying text.

20. 410 U.S. at 164.

21. *See id.* at 152-53. The Court noted that this implied constitutional right has also been grounded in the First, Fourth, Fifth and Ninth Amendments, as well as in "penumbras of the Bill of Rights," Griswold v. Connecticut, 381 U.S. 479, 484-85 (1964), and in "the concept of liberty guaranteed by the first section of the Fourteenth Amendment," Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

22. *See* 410 U.S. at 163.

23. *Id.* at 162.

interest" in regulating abortion to "preserve and protect" maternal health,[24] provided a justification for states to restrict women's access to abortion.[25]

Moreover, by arguing that a state's interest in the "unborn" may reach a "compelling" point during the third trimester,[26] the Court explicitly balanced a pregnant woman's rights against those of the fetus.[27] Although the Court asserted that it "need not resolve the difficult question of when life begins,"[28] the extension of rights to the fetus necessarily abridges those of the pregnant woman, and grants the fetus, at least, limited personhood status protected by the compelling state interest standard. The *Roe* Court held, "These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"[29] In acknowledging the state's "important and legitimate interest in potential life," the Court allowed that state regulation "protective of fetal life after viability thus has both logical and biological justifications."[30]

The notion that the fetus has legal rights separate from those of the pregnant woman is still a relatively new legal concept. The "born alive"[31] rule governed criminal law until the mid-nineteenth century, and not until *Roe's* trimester framework did the legal system clearly define a separate sphere of fetal rights.[32] Although *Roe* laid the groundwork for fetal legal independence, technological developments have reinforced the separation.[33] Until recently, the fetus was "hidden" within the womb.[34] Even after "quickening"—when fetal movement becomes detectable—-the fetus could not be visually represented; its recognizably human form was unobservable.[35] Technological developments in the 1960s that allowed physicians and their patients to "see" the fetus while in the womb altered public perceptions of the unborn.[36] Ultrasound imaging allows the human shape and human features of the fetus to be "seen" as early as twelve weeks into a pregnancy.[37] The convergence of these developments enhanced the

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24. *Id*. at 163. The state's "compelling interest" in maternal health arises at the end of the first trimester, because that is the point at which death from abortion, "in the light of [then] present medical knowledge" becomes more likely than death from childbirth. *Id.*

25. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992).

26. *Roe*, 410 U.S. at 162-64.

27. *See id*.

28. *Id.* at 159.

29. *Id.* at 163.

30. *Id*. at 164.

31. Cari L. Leventhal, Comment, *The Crimes Against the Unborn Child: Reorganizing Potential Human Life in Pennsylvania Criminal Law*, 103 DICK. L. REV. 173, 176 (1998). The common law "born alive" rule only gave legal standing to born human life, the killing of a fetus was not homicide because the fetus did not have an existence separate from its mother. *See id*. at 174.

32. The Court specifically described the state's interest in protecting the "potentiality of human life" (i.e., the fetus) as "separate and distinct" from both the woman's fundamental right to privacy and the state's interest in preserving and protecting maternal health. *See Roe*, 410 U.S. at 162.

33. *See* Robert H. Blank, *Reproductive Technology: Pregnant Woman, the Fetus, and the Courts*, 13 WOMEN & POL. 1, 2 (1993).

34. Blank, *supra* note 33, at 3.

35. *Id.*

36. *See id.*

37. *See id*.

notion of fetal autonomy.[38] With the visualization of the fetus and the Court's sanctioned interest in potential life, women's rights have been under fire in both the courts and the state legislatures under the rationale of fetal protection.[39]

The Legal Spill-Over Into Other Policy Domains

The legal repercussions from the abortion rulings on fetal personhood and fetal rights are most evident in the criminalization of "fetal abuse," a term which has been applied to prenatal drug exposure, but not to the myriad common and preventable threats to fetal well being.[40] Since 1985, women have been prosecuted in two thirds of the states for "fetal abuse," a crime that does not exist in any state's criminal statutes.[41] District attorneys have used a variety of existing criminal statutes (including but not limited to those dealing with child abuse,[42] child neglect,[43] child endangerment,[44] delivering drugs to a minor,[45] and homicide[46]) to prosecute pregnant addicts for exposing their fetuses to drugs in utero. Because none of these statutes were originally intended to apply to fetuses, prosecutors have argued that the unborn are essentially identical to born children (i.e., persons entitled to equal protection under the law).[47]

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38. *See id.*

39. *See id.* at 15. The discussion *infra* illustrates the use by some prosecutors of various child protection statutes to punish drug or alcohol abusing mothers. In one case, a woman was charged with child neglect after giving birth to a baby who experienced narcotics withdrawal within 24 hours. *See* In re Baby X, 293 N.W.2d 736 (Mich. Ct. App. 1980). Dissenting justices in cases that have overturned such convictions have expressed great moral despondence: "It is with great sadness and disappointment that I am forced to conclude that in Kentucky the majesty of the law is unable or unwilling to protect innocent *unborn children* from harm caused by the conduct of *another* human being." Kentucky v. Welch, 864 S.W.2d 280, 286 (1993) (Winersheimer, J., dissenting) (emphasis added).

40. For a discussion of how unconscious patriarchal biases limited the definition of "fetal abuse" to maternal behaviors, see Jean Reith Schroedel & Paul Peretz, *A Gender Analysis of Policy Formation: The Case of Fetal Abuse*, 19 J. HEALTH POL., POL'Y & L. 335 (1994).

41. *See* Philip H. Jos et al., *The Charleston Policy on Cocaine Use During Pregnancy: A Cautionary Tale* 23 J. L., MED., & ETHICS, 120, 120 (1995); *see also* Lynn M. Paltrow, *Punishing Women for Their Behavior During Pregnancy: An Approach that Undermines the Health of Women and Children*, DRUG ADDICTION RESEARCH & THE HEALTH OF WOMEN (NIDA) 1998, at 467, 468. Women have been prosecuted for prenatally exposing their children to illegal drugs in Alabama, Alaska, Arizona, California, Connecticut, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. *See generally* JEAN REITH SCHROEDEL, IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES (2000).

42. *See, e.g.*, Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992); Whitner v. South Carolina, 492 S.E.2d 777, 778 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998).

43. *See, e.g.*, Department of Soc. Serv. v. Nash, 419 N.W.2d 1, 2 (Mich. Ct. App. 1987); *In re* Theresa J., 551 N.Y.S.2d 219, 220 (N.Y. App. Div. 1990); State v. Kruzicki, 561 N.W.2d 729, 731 (Wis. 1997).

44. *See, e.g.*, State v. Gray, 584 N.E.2d 710, 710 (Ohio 1992).

45. *See, e.g.*, People v. Hardy, 469 N.W.2d 50, 51 (Mich. Ct. App. 1991); Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992).

46. *See, e.g.*, State v. Deborah J.Z., 596 N.W.2d 490, 491 (Wis. Ct. App. 1999).

47. Certainly one of the most aggressive prosecutors has been South Carolina Attorney General Charles Condon, who, as Solicitor (district attorney) for Charleston and Berkeley counties in the

The passage of statutes criminalizing third party's killing of a fetus represents a less notorious treatment of the fetus as a legally distinct entity. Although many criminal acts can result in the death of the fetus, the vast majority of third party fetal killings are caused, intentionally or not, by husbands or boyfriends who kick, beat, stab, or shoot their pregnant partners.[48] Approximately, half the states, by criminal statute or case law, define the killing of a fetus as "assault,"[49] "murder,"[50] "manslaughter,"[51] "feticide,"[52] or a similar offense.[53] By separating fetal killing from the crime against the pregnant woman, these states implicitly or explicitly accord the fetus at least limited personhood status. After all, no state punishes the killing of a dog or cat with an eleven year prison term, much less the death penalty.[54]

In the remainder of this paper, we analyze the legal arguments advanced by fetal rights activists and by women's rights proponents. Those who seek to strengthen fetal rights assert that the state has the duty to protect its most "vulnerable" citizens, even at the expense of the rights of pregnant women. Women's rights proponents, however, support the recognition of the constitutional rights of women, trying to re-shape (or return) the maternal-fetal relationship from adversarial to supportive, from dual to unitary.[55] The Supreme Court's support for "proportionality" makes this a tenuous argument.

1980s, initiated an ambitious "interagency" plan. Prenatal patients who fit a profile were tested for drugs. Those who tested positive were offered the choice of mandatory drug treatment or arrest. Women whose first visits were to deliver their babies were, for the first three months of the plan, arrested if they tested positive. The plan has been modified, but Condon is now in his second term as Attorney General; his website touts his "active role in cases involving crack cocaine addicts charged with abusing their unborn children." Jos et al., *supra* note 41, at 122; *see also* www.scattorneygeneral.com/accom.html.

48. *See* Hortensia Amaro, et al., *Violence Toward Pregnant Women and Associated Drug Use*, paper presented at the American Public Health Association Annual Meeting (1988); Paula J. Adams Hillard, *Physical Abuse in Pregnancy*, 66 OBSTETRICS & GYNECOLOGY 185, 188-89 (1985).

49. *See, e.g.* N.H. REV. STAT. ANN. § 631:1 (1996).

50. *See, e.g.* CA. PENAL CODE § 187 (West 1999).

51. *See, e.g.* MICH. COMP. LAWS § 750.14 (1999).

52. *See, e.g.* LA. REV. STAT. ANN. § 14:32:7 (West 1995).

53. Arizona, Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah and Washington have statutes criminalizing third party fetal killing. The courts in three additional states (Massachusetts, Missouri, and South Carolina) have modified the traditional common law "born alive" rule to make third party fetal killings a crime under some circumstances. In Massachusetts and South Carolina, fetal viability has been substituted for the "born alive" rule, while in Missouri an appeals court ruled that the state's murder statute applies unconditionally to a fetus. *See* Commonwealth v. Lawrence, 536 N.E.2d, 571, 575 (Mass. 1989); State v. Horne, 319 S.E.2d. 703, 704 (S.C. 1984); State v. Holcomb, 956 S.W. 2d 286, 292 (Mo. Ct. App. 1997).

54. Although states differ somewhat in the punishments meted out to individuals convicted of cruelty to animals, the range is relatively narrow for first offenses, varying from fines of up to $400 in Colorado, *see* COLO. REV. STAT. § 18-9-202, (1997) to a one year prison sentence in Kansas, *see* KAN. STAT. ANN. § 21-4310, (1997).

55. Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 57 (1987); Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After* Webster, 138 U. PA. L. REV. 179, 191 (1989).

The Parameters of the Legal Debate

Only within the past several decades has the question of fetal humanity been seriously debated within legal circles.[56] Prior to the 1970s, legal debates about fetal personhood were limited to the effect of fetal status on other parties (usually men), rather than the actual humanity of the fetus.[57] That is no longer true. Moral questions about the value of fetal life figure prominently in debates over fetal policies.[58] While the paucity of legal debate over third party fetal killing forces us to focus on the other two applicable areas of criminal law (abortion and prenatal drug exposure), we believe the absence of debate over the latter speaks volumes about the extent to which society views pregnant women as solely responsible for any and all fetal harms.

Fetal rights advocates usually begin the debate with a moral argument about the need to protect unborn life.[59] The humanity of the fetus is axiomatic, but some argue "scientifically" that the fetus is a "tiny person" with the requisite forty-six chromosomes for a unique genetic identity from conception.[60] A range of public policy and legal justifications for state intervention on behalf of the fetus follow. Implicit is the underlying policy goal: to prevent the widespread killing of fetuses (i.e., abortion).

The high social and financial cost of caring for drug affected infants and children is invoked as a reason for state intervention against pregnant drug abusers.[61] Fetal rights advocates typically argue that a "compelling interest" justifies state intervention to protect all human life (born and unborn).[62] Their underlying but not exclusive justification for state action is rooted in the tradi-

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56. Of course, *Roe*, initiated the controversy. Early articles included Gail Goichman & Harold L. Hirsch, *The Expanding Rights of the Fetus: An Evolution Not a Revolution*, 30 MED. TRIAL TECHNIQUE Q. 212 (1983); Christine Overall, *Pluck a Fetus from Its Womb: A Critique of Current Attitudes toward the Embryo/Fetus*, 24 U. W. ONT. L. REV. 1 (1986).

57. For example, within civil law fetal personhood was viewed as a means to assure that the interests of another party were treated fairly. Inheritance laws were the first to accord personhood albeit indirectly, to the fetus, by ensuring that the wishes of the testator were followed. *See* Lawrence Nelson et al., *Forced Medical Treatment of Pregnant Women: Compelling Each to Live as Seems Good to the Rest*, 37 HASTINGS L.J. 703, 730 (1986); *see also* Jeffrey A. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Life*, 22 HARV. J. ON LEGIS. 97, 151 (1985).

58. Two recently edited books contain a variety of perspectives. *See, e.g.* THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE (Brad Stetson, ed.) (1996); LYNN MARIE MORGAN & MEREDITH W. MICHAELS, FETAL SUBJECTS, FEMINIST POSITIONS (1999).

59. *See, e.g.*, Ralph Reed, *Democracy and Religion Are Not Incompatible*, USA TODAY MAG., July 8, 1997, at 26; Patrick T. Murphy, *Protect the Innocent*, N.Y TIMES, July 30, 1996 at A17; Charles W. Colson, *When Majority Rule Is Wrong*, CHRISTIANITY TODAY, April 5, 1993, at 100.

60. *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 117 (1990) (citing *Did You Know?*, a pro-life pamphlet).

61. For a discussion on the financial costs of providing for infants whose physical and mental development is impaired by in utero exposure to drugs see Marty Jessup & Robert Roth, *Clinical and Legal Perspectives on Prenatal Drug and Alcohol Use: Guidelines for Individual and Community Response*, 7 MED. & L. 377, 378 (1988) (discussing the fact that hospital bills for neonatal narcotics withdrawal treatment can reach $28,000 or more per infant).

62. Such arguments have been advanced by a growing number of Supreme Court justices. *Cf.* Roe v. Wade, 410 U.S. 113 (1973) *with* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

tional responsibilities accorded to the states under federalism.[63] Often ignored or dismissed are the civil rights of pregnant women, and a woman's decision not to have an abortion is viewed as a voluntarily abrogation of those rights for the duration of the pregnancy.[64]

In contrast, women's rights advocates focus almost entirely on the rights of the pregnant woman and ignore or downplay the fetus.[65] As pictures of the fetus-as-a-baby become more prominent, women's rights advocates have struggled to place this image in context—within the woman's uterine wall. They counter the moral arguments of fetal humanity by distinguishing fetal life, as clearly as possible, from born human life. Some depict the woman as the "vulnerable" member of society.[66] Others assert it is impossible in early pregnancy to distinguish between embryos that will become a single human being and those whose cells will sub-divide into twins, triplets or even more human beings.[67] Cell division continues throughout the gestational period, so it is patently false to assert that an embryo (or even a fetus) is essentially the same as a born human being. Moreover, they attempt to change the moral framework of the debate by maintaining that the current expansion in fetal rights is part of a broader attack on women's citizenship rights.[68]

The policy arguments against state intervention have attained only moderate success. With respect to abortion, women's rights advocates claim that laws restricting or criminalizing abortion do not achieve the desired policy goal of preserving fetal life because a woman needing to terminate a pregnancy will ul-

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63. Conservative legal scholars believe that the states have the authority to regulate abortion through their police power. They have attacked *Roe* on federalist grounds, arguing that abortion and reproductive rights should be addressed through democratic processes at the state level. *See* Bruce Fein, *Does Congress Know No Limits?*, TEX. LAW., March 19, 1992, at 19; Richard A. Erb & Alan W. Mortensen, *Wyoming Fetal Rights-Why the Abortion "Albatross" is a Bird of a Different Color: The Case for Fetal Federalism*, 28 LAND & WATER L. REV. 627, 654 (1993); Lino A. Graglia., *Does Constitutional Law Exist?*, 47 NAT'L REV., June 26, 1995, at 31.

64. Such as the right to privacy and equal protection under the law. For a discussion of voluntary abrogation, see *infra* notes 109-112.

65. Although advocates of women's rights have written on a range of fetal policies, most have dealt with the ways that recent Court abortion rulings have abrogated women's rights. *See, e.g.*, Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 481 (1990); Eileen McDonagh, *From Pro-Choice to Pro-Consent in the Abortion Debate: Reframing Women's Reproductive Rights*, 14 STUD. L., POL. & SOC'Y 245, 245 (1994). The range of writing on prenatal drug exposure is great. *See generally* Shona Glink, *The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 2 U. ILL. L. REV. 533 (1991); Lynn M. Paltrow, *Perspectives of a Reproductive Rights Attorney*, 1 FUTURE CHILDREN 85 (1991); Tiffany M. Romney, *Prosecuting Mothers of Drug-Exposed Babies: The State's Interest in Protecting the Rights of a Fetus Versus the Mother's Constitutional Rights to Due Process, Privacy and Equal Protection*, 17 J. CONTEMP. L. 325 (1991); Lorraine Schmall, *Addicted Pregnancy as a Sex Crime*, 13 N. ILL. U. L. REV. 263 (1993); Gallagher, *supra* note 55; Johnsen, *supra* note 55.

66. *See, e.g.*, McDonagh, *supra* note 65, at 254 (describing the fetus as a "trespasser" and calling the woman a "captive Samaritan" forced to donate her body to provide for the developing fetus); Koppelman, *supra* note 65, at 484 (arguing that if Roe were overturned, the nine months of a woman's pregnancy would constitute "forced labor" and "involuntary servitude" prohibited by the Thirteenth Amendment).

67. Mary Warnock, *Do Human Cells Have Rights?* Address at Ormond College, Melbourne (1987).

68. *See, e.g.*, CYNTHIA R. DANIELS, AT WOMAN'S EXPENSE 53 (1993).

timately do so.[69] Legal impediments will simply force pregnant women to seek untrained and criminal abortion providers, leading to widespread injury and death.[70] Women's rights proponents also have been unable to garner support for drug treatment policies instead of criminal sanctions to combat prenatal drug exposure,[71] at least in part because pregnant women who abuse drugs are not sympathetic policy targets.[72]

Unable to overcome the moral intensity and popular legitimacy of appeals to protect and save innocent fetal life, they have ultimately contended that state intervention is a bad idea, principally because it unduly infringes on the civil liberties of pregnant women, and secondarily because the state lacks a "compelling interest" in protecting fetal life. [73] Finally, some advocate a return to the pre-*Roe* conception of unitary maternal and fetal interests.[74]

While the aim of this article is to understand and critique the legal arguments of each side, we do not minimize the moral and policy questions involved. In fact, they are so complex and important that they deserve full and separate treatment. The arguments put forth by each side are summarized in Table 1.

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69. Although there is no way to accurately assess the number of illegal abortions performed in the pre-*Roe* era, many scholars estimate that the annual numbers of illegal and legal abortions (i.e., medically approved therapeutic abortions) are comparable to post-*Roe* legal abortion numbers. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE 353-55 (1990); MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION AND REPRODUCTIVE POLICIES 66 (1996).

70. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 278 (1993). The deaths and maimings caused by illegal abortion practices constituted a serious public health problem. Prior to *Roe*, 5,000 to 10,000 women may have died annually as a result of poorly performed abortions during those years. In addition, public health officials estimate that 350,000 women annually were injured by illegal abortionists. *See* GRABER, *supra* note 69, at 43.

71. In 1990, about 60% of crack addicts were women, *see* Gillian Walker et al., *A Descriptive Outline of a Program for Cocaine-Using Mothers and Their Babies*, 3 J. FEMINIST FAM. THERAPY 7, 7 (1991), but only 25% of addicts receiving treatment were women. *See* National Institute on Drug Abuse, *Drug Services Research Survey: Final Report Phases I and II* (1992). According to another study, there are approximately 280,000 pregnant addicts in the country but only about 11% of them are able to get drug treatment. *See Infant Victims of Drug Abuse: Hearing Before Senate Finance Committee*, 101st Cong. 36 (1991) (statement of Comptroller General, U.S. Government Accounting Office).

72. *See* LAURA E. GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 122 (1997).

73. *See, e.g.*, Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 617 (1986).

74. *See, e.g.*, Patricia A. King, *Helping Women Helping Children: Drug Policy and Future Generations*, 69(4) MILBANK Q. 595, 598 (1991) (pointing out that some argue that "maternal-fetal and mother-child relationships can only be understood in terms of interactions where the needs of one define the needs of both.")

TABLE 1: LEGAL DEBATES OVER FETAL PERSONHOOD

Arguments	Fetal Rights	Women's Rights
Moral	Humanity of Fetus Fetal Vulnerability	Distance from born persons Defense of women's citizenship
Policy	Ban abortions to preserve fetal life Social and economic cost of prenatal drug exposure	No reduction in number of abortions Negative consequences of illegal abortions Case is overstated Policy prescription would exacerbate the problem Lack of drug treatment
Legal	Compelling state interest State police power / federalism *Parens Patriae* power Fetal right to life takes precedence Pregnant woman has voluntarily abrogated some of her rights	No compelling state interest Fundamental national rights Minimal state involvement in family life Fetal rights erode women's fundamental rights to: due process privacy bodily integrity self sovereignty equal protection Fetus and pregnant women have unitary interests

PART II: THE LEGAL CASE FOR STATE INTERVENTION TO PROTECT THE FETUS

Fetal rights proponents assert that state intervention to protect the fetus is legally justifiable because it is: 1) an exercise of traditional state police powers;[75] 2) an application of *parens patriae* power;[76] 3) fetal precedence in a hierarchy of fundamental rights;[77] and 4) the logical consequence of a woman's voluntary ab-

75. Erb & Mortensen, *supra* note 63, at 654.

76. *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 413 (1983).

77. Julius Landwirth, *Fetal Abuse and Neglect: An Emerging Controversy*, 79 PEDIATRICS 508, 513 (1987) argues that the fetus' right to be born healthy overrides a woman's right to privacy. Others argue that the applicability of the Fourteenth Amendment's privacy guarantee should not be strictly applied because pregnant women are unique in that their actions may simultaneously adversely impact the health and well-being of another person-the fetus. *See* Parness, *supra* note 57, at 166; Joseph Losco, *Fetal Abuse: An Exploration of Emerging Philosophic, Legal and Policy Issues*, 42 W. POL. Q. 265, 266-67 (1988).

rogation of rights during pregnancy. The premise underlying each is the legal concept of "dual federalism," in which the national and state governments have separate sovereign spheres of responsibility.[78] Supporters of "dual federalism" believe that the courts should invoke the Tenth Amendment to overturn any national laws that intrude on traditional areas of state authority.[79] Building on federalist principles, fetal rights proponents use legal arguments about "compelling state interest," "police power," and *parens patriae* to assert a division of power that grants responsibility for policies dealing with the fetus to the states rather than the national government. As such, fetal personhood relies on principles of federalism and the police powers of the state to "regulate health, safety, welfare and morals,"[80] esoteric aspects of constitutional law and theory.

Proponents of fetal rights claim the state has a "compelling interest" in potential life, echoing the *Roe* Court.[81] While *Roe* held that the state's interest only became "compelling" at the point of fetal viability,[82] in the more recent *Webster v. Reproductive Health Services* a plurality of Justices maintained that the state's interest in the determination of fetal viability was itself compelling.[83] The plurality opinion spoke approvingly of the Missouri statute's preamble's assertions of full fetal citizenship, although its constitutionality remained uncertain.[84] Further-

78. In the strongest contemporary assertion of the principle of dual federalism, the Supreme Court, on the last day of the 1998-1999 Term, decided three cases that firmly established states' "residuary and inviolable sovereignty." *See* Alden v. Maine, 527 U.S. 706, 715 (1999); *see also* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 634 (1999).

79. *See, e.g.*, ERIC N. WALTENBURG AND BILL SWINFORD, LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT 15, 17, 19 (1999); Fein, *supra* note 63, at 19.

80. ROSSUM & TARR, *supra* note 8, at 472.

81. This argument may itself be a response to the *Roe* Court's refusal to include the fetus in the definition of "person" under the Fourteenth Amendment. States have shown a willingness to extend this status to the fetus, resulting in a conflict between federal and state principles. *See, e.g.*, Webster v. Reproductive Health Serv., 492 U.S. 490, 500-01 (1989) (discussing Mo. Rev. Stat. §§ 1.205.1(1), (2) (1986), the preamble of which includes the words, "the life of each human being begins at conception," and requiring that all state laws be interpreted to provide unborn children with the same rights enjoyed by other persons).

82. 410 U.S. 113, 163 (1973).

83. 492 U.S. 490, 519 (1989) (citing Thornburg v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 795 (1986)). Chief Justice Rehnquist, writing for a three member plurality, upheld a provision requiring physicians to determine the viability of fetuses of twenty weeks gestational age. *See id.* Because *Roe* set a gestational age of twenty-eight weeks as the point when state interest in the potential life of a fetus became compelling, *see* 410 U.S. at 160, *Webster* represents a clear break with the trimester framework of the earlier decision. In *Roe*, the Court defined viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." *Id*. It cited medical authorities for the assertion that viability is usually placed at about seven months (28 weeks), but that it may occur earlier, even at 24 weeks. *See id.* The *Webster* Court upheld Missouri's requirement that physicians perform pre-abortion tests to determine the viability of fetuses of 20 weeks or more, despite uncontradicted evidence of non-viability before 23 and a half weeks because "there may be a four week error in estimating gestational age." 492 U.S. at 515-16, 522. Most medical experts consider 24-26 weeks to be the earliest possible point of viability. At earlier gestational ages, critical organs, such as the lungs and kidneys, are unable to function even when the baby is attached to a respirator. *See id.* at 515-16.

84. *See Webster*, 492 U.S. at 506-07. The Court declined to rule explicitly on the preamble because it could be read merely to express a permissible value judgment and because it was not ripe for adjudication. *See id.*

more, because a plurality viewed favorably Missouri's contention that life begins at conception, *Webster* further invited state legislators to intervene in a woman's pregnancy.[85] Fetal rights advocates, such as Kenneth Jost, claim the decision gives a blank check to state legislatures to protect the fetus throughout the woman's pregnancy.[86] Moreover, the Court recognized that the increasing influence of technological developments on the law has rendered the "third trimester" viability standard less absolute.[87]

The most common legal rationale for state intervention on behalf of the fetus is derived from the state's traditional police power (i.e., power of the state to regulate conduct to protect public health, safety, welfare, morals and good order).[88] Some fetal rights advocates,[89] asserting that the Supreme Court has exceeded its jurisdiction by imposing any limits on state authority over the fetus, believe that only the states have the power to regulate maternal-fetal relations.[90] The Court has not explicitly ruled on whether the federal government or the states have authority in this area, and its confusing forays in the abortion context offer few clues as to its ultimate position.

Included in the states' police powers is the *parens patriae* power. *Parens patriae* provides an exception to the legal concept of "standing" by providing state governments with the legal authority to act to protect and control the property and custody of minors and incompetent persons. Juvenile protection laws, including laws prohibiting abuse and neglect of children, are based upon these powers, as well as the traditional police power. The Supreme Court in *Mormon Church v. United States*[91] supported an extremely broad interpretation of this power and held, "[P]*arens patriae* is inherent in the supreme power of every State. . .It is a most beneficent function, and often necessary to be exercised in

85. *Id*. at 557-58 (Blackmun, J., concurring in part and dissenting in part).

86. Kenneth Jost, *Do Pregnant Women Lose Legal Rights?*, 28 CONG. Q. 414 (1989); *see also* Kenneth Jost, *Mother Versus Child*, A.B.A. J. 84 (1989).

87. Both Chief Justice Rehnquist's plurality opinion and Justice O'Connor's concurring opinion stressed that viability, not adherence to *Roe*'s trimester formula triggers the state's compelling interest in fetal health. *See Webster*, 492 U.S. 490. In *City of Akron v. Akron Center for Reproductive Health*, 462 U.S.416 (1983), Justice O'Connor, in her dissenting opinion, discussed the conflict between improving medical technology and the rigidity of the trimester approach. 462 U.S. at 453-59 (O'Connor, J., dissenting). She asserted "[J]ust as improvements in medical technology will inevitably move *forward* the point at which the State may regulate for reasons of maternal health, different technological improvements will move *backward* the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother." *Id.* at 456-57.

88. Among the earliest sources of state authority, the "police power" has been defined by the Court as "the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community." Atlantic Coast Line R.R. Co. v. Goldsboro, 232 U.S. 548 (1914).

89. *See* Erb & Mortensen, *supra* note 63.

90. Although women's rights advocates have not chosen to counter the police powers argument as a rationale for state jurisdiction over matters of fetal health, Chief Justice Marshall writing for the majority in *Gibbons v. Ogden* reasoned that although health laws are within the police power of the states, the power was not absolute, and under some circumstances the power of the national government can override the police power of the state. 22 U.S. 1, 203 (1824). For a discussion of the reasoning used by the Court in *Gibbons* and subsequent developments, see Wendy E. Parmet, *Regulation and Federalism: Legal Impediments to State Health Care Reform*, 19 AM. J.L. & MED. 121, 122-23 (1993).

91. 136 U.S. 1 (1890).

the interests of humanity, and for the prevention of injury to those who cannot protect themselves."[92]

As one fetal rights advocate argued, "The child represents America's future. . .the state's *parens patriae* role extends to the fetus and its interest in protecting maternal health and potential life."[93] Fetal rights advocates reason that the absolutely defenseless fetus needs this type of state protection even more than (older and less defenseless) children. If the state has the authority to intervene on behalf of the comparatively autonomous, state action on behalf of the unborn is even more justifiable.[94]

Legal Strategies to Protect the Fetus

Justifiably outraged by the suffering of babies whose chances for a decent life may have been ruined by their mothers' prenatal use of illegal drugs or alcohol, the public strongly supports criminal sanctions against these women.[95] The 1987 Pamela Stewart case was the first high profile prosecution of a pregnant woman for engaging in personal conduct harmful to the fetus.[96] Although no states have passed laws making substance abuse during pregnancy a separate offense, at least 34 states have prosecuted women for "fetal abuse" since 1985 under a variety of criminal statutes including those pertaining to child abuse, child neglect, delivery of drugs to a minor, and child endangerment.[97] Most prosecutions have relied on statutes previously applied only to punish offenses committed against adults or children after birth.[98] For example, child abuse statutes have been extended to include fetal exposure to drugs or alcohol in utero by defining the fetus as a child (i.e., legally a person) and then holding the pregnant woman to a far stricter behavioral standard than is typical in child abuse cases.[99]

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92. Id. at 57.

93. Kathryn Schierl, *A Proposal to Illinois Legislators: Revise the Illinois Criminal Code to Include Criminal Sanctions Against Prenatal Substance Abusers*, 23 J. MARSHALL L. REV. 393, 418-419 (1990) (discussing the state's interest in protecting the fetus in the case of prenatal drug abuse).

94. *See, e.g.*, Schierl, *supra* note 93; Parness, *supra* note 77; *see also* Mary K. Kennedy, *Maternal Liability for Prenatal Injury Arising from Substance Abuse During Pregnancy: The Possibility of a Cause of Action in Pennsylvania*, 29 DUQ. L. REV. 553 (1991).

95. Public opinion polls report virtual universal condemnation of women who use illegal drugs while pregnant. *See* Jan Hoffman, *Pregnant, Addicted and Guilty*, N.Y. TIMES MAG., August 19, 1990, at 34; *Abuse of Fetus Ruled a Crime*, NAT'L L.J., July 29, 1996, at A8. Polls also indicate support for punishing women whose legal behaviors, such as drinking, have the potential to inflict harm on the fetus. *See* Barbara Kantowitz et al., *The Pregnancy Police*, NEWSWEEK, April 29, 1991, at 52, 53.

96. *See* Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 279 (1990). Pamela Rae Stewart gave birth to a brain damaged son after failing to follow her doctor's instructions. *See id*. Her son died at six weeks old, and Stewart was criminally charged under a California child support statute because she had used illegal drugs during her pregnancy. *See id*. The charges were later dismissed because "the statute did not cover the conduct alleged." *Id*. at 280.

97. *See supra* notes 40 to 46.

98. *See Ohio v. Gray*, 584 N.E.2d 710 (Ohio 1992) (holding that "child" refers to a "born" child.) However, the trend has been toward the criminalization of maternal conduct by accepting precisely what the Ohio court threw out; that is, a fetus is a person.

99. Conviction for criminal conduct requires *mens rea*, or criminal intent, which is often very difficult to establish in these cases. Typically, this entails either "objective" evidence of recklessness and/or negligence or "subjective" intent of purposeful and knowing action. For a discussion of the

Although prosecutors obtained convictions using existing child abuse and child neglect statutes, the legal maneuvering needed to apply them to prenatal substance abuse cases also made reversal likely. By the early 1990s most prosecutors had abandoned their application in favor of other legal strategies.[100] For example, under laws prohibiting the delivery of drugs to minors, the prosecution may contend that the infant remains attached to the mother via the umbilical cord for several minutes after birth and could still be receiving narcotics through that umbilical cord.[101] A positive toxicology screen is used to prove the charge. To be sustained, the usual standard of criminal culpability must be liberalized, but Bonnie Robin-Vergeer believes it is possible to develop criteria that meet the legal requirements.[102] Conviction for criminal conduct requires *mens rea*, or criminal intent, however, which is very difficult to establish in these cases. Typically, this entails either "objective" evidence of recklessness and/or negligence or "subjective" intent of purposeful and knowing action.[103]

The expansion of existing statutes may hold some promise for determined prosecutors. Most of the earlier "fetal abuse" convictions based on statutes applicable to born children were reversed for lack of legislative intent,[104] but the Supreme Court of South Carolina has other ideas. In *Whitner v. State*,[105] it ruled that a woman could be prosecuted for child abuse if she takes drugs while pregnant, holding that a viable fetus is a "child" or a "person" in South Carolina and is thereby entitled to legal protection.[106]

Legal Justifications for Restricting the Rights of Pregnant Women

Fetal rights advocates believe that certain restrictions on specific fundamental rights of pregnant women, as a group, are constitutional on two

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difficulties in establishing criminal intent in prenatal drug exposure cases, *see* Molly McNulty, *Pregnancy Police: Implications of Criminalizing Fetal Abuse*, 11 YOUTH L. NEWS 33 (1990).

100. In 1995 the Wisconsin Court of Appeals upheld an order placing a fetus in protective custody of the state in order to protect it from possible prenatal exposure to narcotics. *See* State v. Kruzicki, 561 N.W.2d 729, 732 (Wisc. 1997). The fetus (and the pregnant woman) then were placed in a drug treatment center. *See id.* Subsequently, the Wisconsin Supreme Court overturned this ruling on the grounds that the legislative branch of government is responsible for creating new law, not the judiciary. *See id.* at 740.

101. *See, e.g.*, Johnson v. State, 578 So. 2d 419, 419 (Fla. Dist. Ct. App. 1990).

102. Bonnie I. Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to the Principled Intervention*, 42 STAN. L. REV. 745, 796 (1990).

103. *See* McNulty, *supra* note 99, at 35 (stating that any serious attempt to assign criminal intent to these cases is likely to fail because of the social and economic conditions over which the pregnant woman has no control).

104. In the past, high courts in Florida, Kentucky, Ohio, and Nevada had ruled that the fetus was not a "child" or "person" absolving women of child abuse liability for in utero exposure to illegal narcotics. Most cases involving prenatal drug exposure are not appealed because the women typically accept pleas bargain or serve their sentence. *See generally*, Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons & the Threat to* Roe v. Wade, 62 ALB. L. REV. 999 (1999).

105. 492 S.E.2d 777 (S.C. 1996), *cert. denied*, 523 U.S. 1145 (1998).

106. *Id.* at 778. The South Carolina Supreme Court reinstated the eight year sentence given to Cornelia Whitner, whose son tested positive for cocaine immediately after his birth. Whitner's son is now eight years old and appears to have suffered no ill effects from her use of drugs while pregnant. *See* Times Wire Services, *Drug Pregnancy Case Prosecutions Ok'd in South Carolina*, L.A. TIMES, July 17, 1996 at 12.

grounds. First, the right of the fetus to be born healthy overrides a woman's rights to privacy.[107] Second, the applicability of the Fourteenth Amendment's equal protection guarantee should not be strictly applied because pregnant women's actions may simultaneously adversely affect the health and well-being of another person—-the fetus. Therefore, pregnant women comprise a class separate from non-pregnant persons, and constraints on their fundamental rights to engage in particular behavior should not be subjected to the same "strict scrutiny."[108]

Finally, as Robertson[109] argues, once a woman decides not to have an abortion, she has assumed an obligation to ensure the health and welfare of the fetus that, concomitantly, fundamentally limits her bodily freedom. The "voluntary abrogation of rights" argument has been advanced by many legal scholars.[110] According to Mathieu, "every pregnant woman has a moral obligation to accept certain burdens in order to avoid causing serious prenatal harm."[111] Kennedy finds support for the principle of voluntary abrogation in a Pennsylvania law where parents "have a duty to provide care, love and support for their children" and argues that by not terminating a pregnancy a woman has chosen to become a parent and has undertaken that obligation.[112] Kennedy further insists that if third parties can be held liable for damage to the unborn, the mother and father should be held similarly accountable.

PART III: A DEFENSE OF THE RIGHTS OF PREGNANT WOMEN

Although a few women's rights proponents have taken the moral position that the fetus is a "non-person,"[113] most argue that the expansion of fetal rights is a subterfuge for broader political attacks aimed at women's exercise of full citizenship.[114] While certainly important, a defense of women's citizenship is not

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107. *See, e.g.*, Landwirth, *supra* note 77.

108. Parness, *supra* note 57, at 166.

109. Robertson, *supra* note 76, at 405.

110. *See, e.g.*, Schierl, *supra* note 93, at 407; Kennedy, *supra* note 94, at 571; *see also* Beth Driscoll Osowski, *The Need For Logic and Consistency In Fetal Rights*, 68 N.D. L. REV. 171, 201 (1992); *see generally* Deborah Mathieu, *Mandating Treatment for Pregnant Substance Abusers: A Compromise*, 14 POL. & LIFE SCI. 199 (1995); Margery W. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEG. MED. 63 (1984).

111. Mathieu, *supra* note 110, at 199 (insisting that a woman, upon becoming pregnant, assumes the same duty of care toward the fetus as she would toward any stranger: a duty simply to refrain from causing harm. If the woman foregoes her right to abort, she voluntarily enters a special relationship with the fetus and is held accountable to a stricter duty of care; advocates civil sanctions). For a discussion of criminal prosecutions of pregnant women to advance a policy of fetal protection and parental responsibility, *see* Sam S. Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1210 (1987) (arguing that case law demonstrates that the state's interest in protecting the fetus may overcome a woman's right to autonomy.) Balisy cites *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 377 U.S. 985 (1964) where a woman, despite her religious objections, was forced to undergo a blood transfusion, and *Jefferson v. Spalding County Hospital Authority*, 274 S.E.2d. 457 (1981), where the court forced a woman to undergo a cesarean section delivery. *See id.* at 1229.

112. Kennedy, *supra* note 94, at 570.

113. *See, e.g.*, Warnock, *supra* note 67.

114. *See, e.g.*, SUZANNE UTTARO SAMUELS, FETAL RIGHTS, WOMEN'S RIGHTS: GENDER EQUALITY IN THE WORKPLACE 9 (1995); McDonagh, *supra* note 65, at 245; DANIELS, *supra* note 68, at 53.

nearly as morally compelling or publicly dramatic as a call to protect innocent fetal life. In the two areas of criminal law in which fetal status is discussed, the evidence and analyses are very different.

Women's rights proponents attack the targeting of pregnant substance abusers because they believe the adversarial framework is pragmatically flawed. Prosecutorial policies actually deter pregnant addicts from seeking the most effective assistance for themselves and their fetuses—-drug treatment and prenatal care.[115] Further, resources for pregnant women in the prison system are scarce, prenatal drug treatment is almost non-existent[116] and the incarceration of pregnant women often does more to harm the fetus than other policy alternatives.[117] None of these arguments have halted the targeting of pregnant addicts for punitive sanctions, perhaps because they appear to defend actions that, on the surface, appear indefensible.

Women's rights advocates have focused primarily on legal arguments defending women's civil liberties. The legal arguments fall into three broad categories: 1) lack of a compelling state interest to intervene on behalf of the fetus; 2) a civil liberties defense of the rights of pregnant women (and by extension all women); and 3) arguments that view the interests of the pregnant woman and fetus as unitary rather than adversarial.

Only a few women's rights advocates oppose the principle that the state has a "compelling interest" in fetal protection.[118] A handful of Supreme Court cases have established a fundamental right to privacy, particularly in areas involving marital relations and reproduction, which can be constitutionally overridden only by a "compelling state interest."[119] The most articulate argument against such an interest is put forth by Dellinger and Sperling,[120] who argue that

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115. Medical and drug treatment professionals who work closely with pregnant addicts believe that criminal sanctions actually deter them from the prenatal care and substance abuse treatment needed to ensure healthy births. *See, e.g.*, Janna C. Merrick, *Caring for the Fetus to Protect the Born Child? Ethical and Legal Dilemmas in Coerced Obstetrical Intervention*, 13 WOMEN & POL. 63, 73 (1993); Marilyn L Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 DRUG & ALCOHOL DEPENDENCE 199, 202 (1993).

116. *See* Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 955 (1997). Most research indicates incarceration is a very poor choice, if fetal health is the goal. *See id*. All of the relevant medical associations- the American College of Obstetricians and Gynecologists, the American Medical Association, the American Academy of Pediatrics, and the American Public Health Association- have issued statements opposing the incarceration of pregnant addicts. *See id*.

117. Most studies have found that pregnant addicts in prison have higher miscarriage and birth abnormalities rates than addicts on the street. *See, e.g.*, Barbara J. Shelton & Derek G. Gill, *Childbearing in Prison: A Behavioral Analysis*, 18 J. OBSTETRIC, GYNECOLOGIC, & NEONATAL NURSING 301, 301 (1989); Ellen M. Barry, *Quality of Prenatal Care for Incarcerated Women Challenged*, 6 YOUTH L. NEWS 1 (1985); Carolyn McCall et al., *Pregnancy in Prison: A Needs Assessment of Perinatal Outcome in Three California Penal Institutions*, Report to the state of California, Department of Health Services CRIME & JUV. DELINQ. 808 (1985).

118. *See* Johnsen, *supra* note 55, at 202.

119. The Supreme Court, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and in *Roe v. Wade*, 410 U.S. 113 (1973), found that fundamental privacy rights can only be overridden upon a showing of "compelling state interest." Even if a state shows such an interest, its interference must be "narrowly drawn to express only the legitimate state interests at stake." *Roe*, 410 U.S. at 155.

120. Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 106 (1989).

government's recent pervasive use of policies, statutes, and enforcement procedures, designed for other purposes, against pregnant women does not "display anything approaching a compelling interest in protecting all potential human life." They contend that because governmental practices with regard to the fetus have been neither absolute nor consistent over time, state interest in the fetus is anything but "compelling." Not only were pre-*Roe* statutes never enforced uniformly, states made no effort to prevent travel out of the country to secure abortions or to prevent the affluent from securing exemptions on mental health grounds.[121]

Dellinger and Sperling also note that current statutes restricting abortion often exempt pregnancies caused by rape or incest.[122] "Such exceptions are, of course, understandable, but by making this exception, the state acknowledges that there are some reasons that justify terminating a fertilized ova that have nothing to do with the moral or physical qualities of the fetus, but rather with the circumstances of the woman's pregnancy."[123] They suggest that "conscious or unconscious" notions about women's proper behavior may have influenced the creation of abortion laws, particularly in instances of rape, where a woman must prove not only that she was raped but that her pregnancy resulted from the rape and not from consensual intercourse.[124] According to Dellinger and Sperling, these inconsistencies in the enforcement, application, and range of abortion laws make the state's interest "less absolute," and therefore less compelling; what may be compelling in the abstract diminishes when weighed against competing fundamental rights.

Most women's rights advocates believe that the Court's balancing of women's and fetal rights has created a "slippery slope," resulting in the gradual diminution of women's rights as more behavior is deemed harmful to the fetus.[125] Although the prosecutions of pregnant women for "fetal endangerment" have thus far focused on pregnant women's use of illegal narcotics, the underlying rationale in these cases raises the possibility of criminalizing conduct (e.g., smoking and drinking) for one heretofore unrecognized class of people while

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121. *See* GRABER, *supra* note 69, at 39-64 (stating that there was a pre-Roe abortion "gray market" or "twilight zone" in which law enforcement officials chose to not to arrest and prosecute discrete physicians who provided safe abortions to upper and upper-middle class women. In contrast, unsafe "black market" abortionists, whose clientele was comprised of poor women and women of color, were subject to criminal sanctions—often after a patient died of medical complications from a botched abortion).

122. Seventeen states currently have comprehensive abortion bans, which would become enforceable if *Roe* were overturned. Alabama, Arizona, Arkansas, California, Colorado, Delaware, Massachusetts, Michigan, Mississippi, New Mexico, Oklahoma, Texas, Vermont, West Virginia and Wisconsin never repealed their pre-*Roe* abortion bans. Four of these states (California, Colorado, Delaware, and New Mexico) have exceptions for women whose pregnancies are the result of rape or incest. Mississippi only has a rape exception. Two states, Louisiana and Utah, have passed post-*Roe* comprehensive abortion bans. The 1991 Louisiana law, albeit with some conditions, provides exceptions for rape and incest victims. *See* LA. REV. STAT. § 14:87 (1998). The 1991 Utah law, also with some conditions, includes rape and incest exceptions for abortions performed prior to 20 weeks gestational age, but not after that point. UTAH CODE ANN. § 76-7-302(2) (1995).

123. Dellinger & Sperling, *supra* note 120, at 107.

124. *Id*.

125. Jost, *Mother Versus Child*, *supra* note 86; *see also* John Kleinig, *Criminal Liability for Fetal Endangerment*, 9 CRIM. JUST. ETHICS 11, 11-13 (1990).

exempting the remainder.[126] Recently enacted civil statutes in South Dakota and Wisconsin that permit the involuntary commitment of women who drink while pregnant clearly demonstrate that ice is indeed forming on the slope.[127] Scholars believe there is no logical end to this type of governmental intrusion into the lives of pregnant women.[128]

Women's rights advocates have identified three general areas in which the constitutional rights of pregnant women are violated by rulings and laws designed to protect the fetus. These are: procedural due process, privacy and equal protection. The least complex, procedural due process, holds that the extension of existing statutes to the fetus violates the due process guarantee that a criminal law must clearly and explicitly indicate the conduct to be prohibited.[129] In contrast, privacy implicates the right to self sovereignty and bodily integrity,[130] and equal protection deals with race and sex discrimination.[131]

Due process is guaranteed to all residents of the United States against both the federal government by the Fifth Amendment and state intrusion by the Fourteenth Amendment. The Fourteenth Amendment's due process clause, which prohibits states from depriving any person of life, liberty, or property, without due process of law, was enacted to ensure that state governments act in conformity with basic and standard principles of fairness.[132] The use of state child abuse statutes to prosecute pregnant women for fetal abuse violates women's right to due process because it grants honorary "personhood" to the fetus through "novel uses of criminal statutes originally targeted at rather different conduct," arguably implicating the constitutional prohibition against ex post fact laws.[133] The absence of evidence that fetuses were considered children under the child abuse statutes violates women's right to procedural due process

126. The most well known example involved two Seattle bar tenders who refused to serve a drink to a pregnant woman. While the woman's decision to have a drink may be questioned, the bar tenders did not have the right to refuse to serve a competent adult woman. In another case, a Massachusetts health club owner revoked the membership of a woman who was ten weeks pregnant, because he believed physical activity would harm the fetus. *See* Renee I. Solomon, *Future Fear: Prenatal Duties Imposed by Private Parties*, 17 AM. J.L. & MED. 411, 420 (1991).

127. *See* S.D. CODIFIED LAWS § 34-20A-70 (Michie 1997); WISC. STAT. §51.20 (1988).

128. *See* Kleinig, *supra* note 125.

129. *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939).

130. Daniel Ortiz, *Privacy, Autonomy, and Consent*, 12 HARV. J.L. & PUB. POL'Y 92 (1989) (arguing that the right to privacy gives individuals "dominion over oneself"). The Court upheld the right of individuals to refuse unwanted medical intrusions in *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990).

131. *See Brown v. Board of Educ.*, 347 U.S. 483 (1954), and *Reed v. Reed*, 404 U.S. 71 (1971), for examples of early Court decisions applying equal protection analysis to race and sex discrimination.

132. Due process has been invoked when governmental actions have been seen as violating fundamental standards of fairness, usually in areas not explicitly covered by the Bill of Rights. The Court, in *Rochin v. California*, 342 U.S. 165 (1952), articulated what came to be called the "shock the conscience" standard, for evaluating fundamental fairness, but did not articulate specific guidelines as to what is and is not fair. Subsequent legal decisions, such as *Gideon v. Wainwright*, 372 U.S. 335 (1963), where the Court held that fundamental fairness was violated when an indigent defendant was unable to employ legal counsel, have done so in a piece meal fashion.

133. Kleinig, *supra* note 125, at 11.

as established by the Fourteenth Amendment.[134] Although the retroactive application of fetal personhood status to these laws has not been adjudicated, precedent indicates that it would violate due process. The United States Supreme Court in *Lanzetta v. New Jersey* held that due process meant that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[135] In the more recent *Keeler v. Superior Court*, the California Supreme Court explained that a penal statute must clearly inform those who are subject to it that their conduct will be subject to criminal penalties.[136]

The substantive due process concerns raised by these cases are far more significant than the procedural ones. Substantive due process has historically limited government's substantive power to regulate various aspects of economic and non-economic life. In the modern (New Deal to the present) era, substantive due process has been important only with respect to certain non-economic actions of government.[137]

Although the word "privacy" is not mentioned in the Constitution, it is now held to be a constitutional right implied from some combination of the explicit guarantees in the First Amendment (right of association), Third Amendment (prohibition against quartering soldiers), Fourth Amendment (protection against unreasonable searches and seizures), Fifth Amendment (protection against self incrimination) and the Ninth Amendment (people's retention of rights is not affected by enumeration of specific rights) and the due process clause of the Fourteenth Amendment.[138] The Supreme Court in *Griswold v. Connecticut*[139] ruled that "specific guarantees in the Bill of Rights have penumbras,

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134. For further discussion, see Doretta Massardo McGinnis, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 508 (1990), and Paltrow, *supra* note 65, at 87.

135. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

136. *See* 470 P.2d 617 (Cal. 1970).

137. There are two standards of review in substantive due process cases. The "rational basis" test is used to determine the constitutionality of almost all regulations affecting economic interests and most other interests as well. *See* Hagit Elul, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 507 (1999). There must be a rational relation between the regulation and a legitimate governmental purpose. *See id*. This is an easy test to meet. The strict scrutiny test is used to determine the constitutionality of a few fundamental rights and infringements on liberty guaranteed by the Fourteenth Amendment. *See id*. To meet the test's requirements, there must be a necessary (not merely rational) relation between the regulation and a compelling (not merely legitimate) governmental purpose. *See id*. The fundamental rights subject to strict scrutiny involve personal privacy or autonomy, sex, marriage, and family matters, such as child bearing and child rearing. *See id*. Note that these rights are implied in the Constitution, unlike rights explicitly guaranteed (i.e., speech, religion, various rights of the criminally accused etc.) that are the subjects of different constitutional "tests." *See id*.

138. Anglo-American law had developed tort protections against invasions of privacy long before constitutional scholars considered the possibility of a right to privacy existing as a "penumbra" in the Constitution, especially the Bill of Rights. The notion of "privacy" as a constitutional right can be traced to a seminal article written in 1890 by Samuel D. Warren and Louis D. Brandeis where the authors claim, "That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. . ." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890).

139. 381 U.S. 479 (1965).

formed by emanations from (First, Third, Fourth, Fifth and Ninth Amendment) guarantees that help give them life and substance."[140]

Women's rights advocates consider the recent expansion of fetal rights to be a serious encroachment on women's right to privacy.[141] Because privacy is a fundamental right, state attempts to dictate a woman's behavior during pregnancy would have to withstand strict scrutiny by showing a compelling state interest that is the least intrusive on protected rights.[142] Mossalso points out that both federal and state courts have recognized a constitutional right of privacy in medical records and patient/physician relationships.[143]

In addition to a generalized right to privacy, women's rights advocates assert that privacy encompasses specific rights that protect bodily integrity and self sovereignty. The right to bodily integrity is arguably an individual's most significant privacy right, and is protected by a "significantly heightened privacy interest."[144] Although some recent Supreme Court decisions have upheld limitations on the right to bodily integrity of public employees for public health and safety,[145] pregnant women, however, as a class are not comparable to public employees, who typically waive some of their privacy rights by accepting employment. A more relevant precedent is *Winston v. Lee*,[146] in which the Supreme Court held that a criminal defendant's compelled surgery to remove a bullet to be used as evidence in his prosecution violated his constitutionally protected rights to bodily integrity.[147]

Subordinating a pregnant woman's rights to the unborn fetus is unique in our system. There are no comparable situations where a male's bodily integrity is forcibly violated to provide for another "person."[148] In this regard, the fetus has greater rights than a born person. A born child does not have the right to force his/her parents to undergo any form of bodily invasion, even a blood test, without the person's consent. Both common law and statutory law have long upheld the right of a person to refuse to allow others to invade his or her bodily

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140. *Id.* at 484. Although the right to privacy applies in many situations, "in today's legal and political context, the right to privacy has become more or less synonymous with reproductive freedom, particularly abortion." LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES AND JUSTICE 410 (3rd ed. 1998). The Court further delineated the boundaries of privacy in *Bowers v. Hardwick*, 478 U.S. 186 (1986), as pertaining to family, marriage and procreation, declaring, "the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Id.* at 190.

141. *See, e.g.*, McGinnis, *supra* note 134, at 517-51; Johnsen, *supra* note 55.

142. Johnsen, *supra* note 55, at 197.

143. Moss, *supra* note 96, at 295.

144. Winston v. Lee, 470 U.S. 753, 767 (1985).

145. In two 1989 rulings the Supreme Court upheld limitations on the right to bodily integrity. The Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989), upheld drug testing of employees whose work involved drug interdiction and in *Skinner v. Railway Labor Executive Association*, 489 U.S 602, 603 (1989), ruled that drug testing of railroad workers involved in major train accidents was constitutional.

146. 470 U.S. 753, 766 (1985).

147. *Id.* at 766.

148. EILEEN MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 103 (1996).

integrity.[149]

In addition to procedural due process and privacy, state intervention of behalf of the fetus has denied (particularly poor and minority) women's Fourteenth Amendment right to equal protection.[150] Pregnant poor women and non-white women are disproportionately subject to forced cesarean sections,[151] as well as punishment for substance abuse.[152] Partly because poor women are more often treated at public hospitals, they are more likely to be tested by physicians for drug use.[153] Both addicted and non-addicted African-American women also are less likely to receive adequate prenatal care, thereby increasing the risk of an injured baby.[154] Negative racial and class stereotypes make poor non-white pregnant women easy targets, facilitating prosecution instead of assistance.[155]

More generally, sex discrimination is a major reason for the subordination of women's rights to those of the fetus.[156] Women are reduced to "vessels" or "potential vessels" that carry the unborn.[157] Pregnant women, and by extension all women are thereby rendered invisible, reduced to nothing more than moveable uteruses. The Court's adoption of the metaphor, quoting the *Roe* decision

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149. For example, the Illinois Supreme Court in *Curran v. Bosze*, 566 N.E.2d 1319, 1345 (Ill. 1990), ruled that consent was required before two children could even have blood drawn to determine whether their bone marrow might help save their half brother, who was dying of leukemia.

150. For further discussion, see McGinnis, *supra* note 134, at 530-31; DANIELS, *supra* note 68, at 62; Schroedel & Peretz, *supra* note 40.

151. *See* Katherine A. Knopoff, *Can a Pregnant Woman Morally Refuse Fetal Surgery?*, 79 CAL. L. REV. 499, 531 (1991). A major study found that a large proportion of the women involved in forced caesarean section cases are poor, single, non-English speaking minorities. Eighty-one percent of the women involved were black, Asian or Hispanic. Forty-four percent were unmarried, twenty-four percent did not speak English as their primary languages and all were receiving public assistance or treatment free of charge at a teaching hospital. *See* Rachel Roth, *At Women's Expense: The Costs of Fetal Rights*, 13 WOMEN & POL. 117, 121 (1993).

152. *See* Solomon, *supra* note 126, at 418. Seventy percent of women arrested for drug-related fetal abuse have been African-American, even though white and African-American women ingest controlled substances at a nearly equal rate. *See id.* Pregnant African-American women are 9.58 times more likely than pregnant white women to be reported by health officials for substance abuse during pregnancy. *See id.*; *see also* Lisa C. Bower, Legal Legacies & Feminist Fantasies, Africanism, Fetal Harm & The Redefinition of Mothering, Paper presented at the Am. Pol. Sci. Assoc. Annual Mtg, Sept. 3-6, 1992.

153. *See* Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1205 (1990); Barry Siegel, *In the Name of the Children*, L.A. TIMES MAG., August 7, 1994 at 14; Jos et al., *supra* note 41, at 124.

154. *See* Solomon, *supra* note 126, at 418. The American Civil Liberties Union (ACLU) in 1990 reported that more than half of all arrests for prenatal exposure to harmful narcotics occurred in South Carolina, where all the women arrested were poor and a majority were African-American. According to the ACLU, South Carolina hospitals often decided to screen for narcotics use if the woman had not received early prenatal care. However, Medicaid did not pay for prenatal care prior to nineteen weeks of pregnancy, delaying poor women's prenatal care and resulting in their narcotics screening. *See* Merrick, *supra* note 115, at 69.

155. *See* Solomon, s*upra* note 126, at 418.

156. *See* McNulty, *supra* note 99, at 277 (quoting Margaret Atwood's novel, *The Handmaid's Tale*, which describes a future where woman are denied education and are valued solely for the reproductive capabilities. "We are two-legged wombs, that's all; sacred vessels, ambulatory chalices.")

157. *See* MCDONAGH, *supra* note 148, at 22-24.

itself: "When pregnant, a woman 'carries an embryo and later a fetus'. . .,"[158] shifts the focus from the woman to the fetus that she is merely carrying. This verbal displacement of the woman is reinforced visually in medical images which show the fetus floating in space and the mother transformed into a vessel for the fetus.[159]

Another argument contrasts the state's disinterest when male actions harm or potentially harm the fetus with its aggressive stance toward similarly situated women. Men's unintentional or intentional behavior can adversely affect the fetus in two ways. The first is caused by male exposure to environmental toxins, alcohol and narcotics abuse—any of which may cause genetic damage to the fetus.[160] The second involves acts of physical violence directed at the pregnant woman and/or the fetus itself. According to a report by the Surgeon General, violence is the leading cause of injury to women between fifteen and forty-four years of age, and some women are more likely to be battered while pregnant.[161] Nevertheless, the dangers to fetal health caused by third party acts of violence have only recently gotten any attention from pro-life groups.[162] In fact, assailants are rarely charged with fetal harm, endangerment or killing for acts of physical violence against pregnant women, while women are often the targets of determined prosecution under expanded drug and child abuse statutes.[163] The dis-

158. McDonagh, *supra* note 65, at 271.

159. *See* DANIELS, *supra* note 68, at 16-17.

160. Some of the fetal harms traceable to these sources result from damage to the germ cell, but at least one illegal drug, cocaine, is directly transported from the male sperm to the fertilized egg. *See* Ricardo A. Yazigi et al., *Demonstration of Specific Binding of Cocaine to Human Spermatozoa*, 266 JAMA 1956, 1956 (1991); Ruth E. Little & Charles F. Sing, *Father's Drinking and Infant Birth Weight: Report of an Association*, 36 TERATOLOGY 59, 63-64 (1987); *see also* Christine F. Colie, *Male Mediated Teratogenesis*, 7 REPROD. TOXICOLOGY 3 (1993); Andrew F. Olshan & Elaine M. Faustman, *Male-Mediated Developmental Toxicity*, 7 REPROD. TOXICOLOGY 191 (1993).

161. Antonia C. Novello et al., *From the Surgeon General, U.S. Public Health Service*, 267 JAMA 3132, 3132 (1992).

162. *See, e.g.* SCHROEDEL, *supra* note 41. (Only one of thirty-two national pro-life organizations contacted considered prenatal battering and third party fetal killings to be a problem that should be addressed through governmental action. The one group was Americans United for Life.) Subsequently, the National Right to Life Coalition began supporting efforts to make criminal homicide statutes applicable to human organisms from fertilization onwards. *See* http:www.nrlc.org./Whatsnew/sthomicidelaws.htm. However, pro-life legislators in Ohio and Pennsylvania were instrumental in getting those states to revise their murder laws in 1997. The new Ohio law makes anyone who kills any "unborn member of the species *homo sapiens*, who is or was carried in the womb of another" subject to the entire range of murder and manslaughter charges. *See* OHIO REV. CODE ANN. §§ 2903.01, 2903.09 (Anderson 1998). The Pennsylvania law eliminates the need for the human organism to have been carried in a woman's womb; it makes individuals who kill an "unborn child" at any stage of pre-natal development criminally liable for murder or manslaughter. *See* 18 PA. CONS. STAT. ANN. §§ 2601-2609 (West 1998). The sponsor of the Pennsylvania bill was asked in legislative debates if someone who entered a medical clinic and knocked over a petri dish containing fertilized eggs, could be charged with multiple homicide. The sponsor said, "If you knew, and it was your intent, then yes." *Killing Fetus Would be Crime*, LANCASTER NEW ERA, April 30, 1997, at A1.

163. *See* Paltrow, *supra* note 42, at 468 (citing an example of a pregnant Wyoming woman who was arrested for child abuse after filing a domestic violence complaint against her husband. The woman's "crime" was the legal consumption of alcohol. In another well known case, one of the woman's actions that allegedly constituted child abuse was to have sex with her husband; the sexual act involves two parties and the failure to charge the husband constitutes sex discrimination.)

crepancy suggests a double standard in the perception of harmful male and female conduct.[164]

The Court's Double Standard in Compelling State Interest Cases

The debate over whether there is a "compelling state interest" in protecting fetal life, while vigorous, curiously lacks substance. What is missing is an understanding of the legal concept itself. Rubenfeld notes that "scant jurisprudence exists" on what "compelling state interest" means.[165] Part of the difficulty is that the phrase has been invoked in both due process and equal protection cases. While courts have used the term "compelling state interest" for a long time, it did not become an integral part of constitutional analysis until the 1960s. It is important to consider the history of the concept, its legal evolution, and the lessons which might be learned from a study of rulings in which it has been used.

In one of the earliest cases, *Buck v. Bell*,[166] Justice Holmes wrote that Virginia had a "compelling state interest in preventing the procreation of children who will become a burden on the state" that justified its involuntary sterilization of an eighteen year old woman mistakenly characterized as "feeble minded."[167] In the late 1960s and early 1970s the Court used the test in a group of cases that combined equal protection and fundamental rights analyses.[168] The term became judicially significant when the Court began to apply "strict scrutiny" to government intrusions against "fundamental rights" or classifications based on "suspect" criteria.[169] *Shapiro* and *Dunn* applied the strict scrutiny test; not only

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164. *See* Schroedel & Peretz, *supra* note 40; *see generally* Paul Peretz & Jean Reith Schroedel, *The Road Not to Travel: A Comment on Deborah Mathieu's Proposal to Mandate Outpatient Treatment for Pregnant Substance Abusers*, 15 POL. & LIFE SCI. 67 (1996).

165. Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 603 (1991).

166. 274 U.S. 200 (1927). This case was not reversed until 1942, when an Oklahoma statute mandating sterilization for criminals convicted of three felony offenses was held to violate the Fourteenth Amendment's guarantee of equal protection because it allowed exceptions for embezzlement, liquor law violations, and political offenses. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942). In a unanimous decision, Justice Douglas argued that the law was unfairly applied to certain criminals, such as appellant Jack Skinner (who raided chicken coops) while those who committed financial crimes were not sterilized. *See id.* at 538-39. Skinner represented one of the first expansions of equal protection to implied fundamental rights (e.g., marriage and procreation). *See id.* at 541.

167. *See Buck*, 274 U.S. at 204. Carrie Buck was committed to the Virginia Colony for Epileptics and Feebleminded when she got pregnant at the age of seventeen. *See* Buck v. Bell, 130 S.E. 516, 517 (Va. 1925). Despite her normal intelligence, absence of criminality, and rape by a relative of her foster parents, she was unable to convince the Supreme Court that the Virginia sterilization statute violated her Fourteenth Amendment rights to due process and equal protection. *See Buck*, 274 U.S. at 207.

168. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); Shapiro v. Thompson, 394 U.S. 618 (1969); *see also* Dunn v. Blumstein, 405 U.S. 330 (1972), Kramer v. Union Free School District, 393 U.S 818 (1968).

169. *Cf. Skinner*, 316 U.S. 535 (stating that "strict scrutiny of the classification which a State makes in a [compulsory] sterilization law is essential" and nowhere mentioning "compelling interest") *with Shapiro*, 394 U.S. at 634 (explicitly rejecting the application of the "rational basis" test to the fundamental right to travel, employing the modern "strict scrutiny" test that requires a showing that the statue is "necessary to promote a compelling governmental interest" (emphasis omitted)). Justice Harlan's dissent in *Shapiro* was based primarily on his disagreement with the Court's extension of

did states have to show that their interest was "compelling," but they also had to show that they were using the "least restrictive alternative" or that it was "necessary" (i.e., that the compelling interest could not be met through other less discriminatory means).[170]

Finally, in 1973 the Court applied the strict scrutiny test, with its emphasis on "compelling state interest," in *Roe*[171] and *Doe*[172] to the protection of privacy rights in abortion cases. In these privacy cases the Court held that while the government lacked "compelling state interest" in fetal health throughout an entire pregnancy, there are "compelling points" in a pregnancy where state interest becomes compelling.[173] Later, in *Akron v. Akron Center for Reproductive Health, Inc.*,[174] the Court reiterated its position in *Roe* that a "compelling state interest" in fetal life exists from the point of viability,[175] and that a similarly compelling interest in maternal health arises "at approximately the end of the first trimester."[176] A few years later, in *Webster v. Reproductive Health Services*,[177] the Court upheld Missouri's highly restrictive abortion statute that declared in its preamble that "life. . .begins at conception"[178] and that unborn children have the same rights as other persons in the state,[179] but for reasons of ripeness and concreteness, the Court did not rule upon those issues.[180] A plurality of the justices were even prepared to overturn, or at least severely limit, the applicability of the *Roe*

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the modern strict scrutiny to fundamental rights cases, *see id.* at 658-63, and he would have upheld the statute under a rational basis analysis. *See id*. at 672-677.

170. *See Shapiro*, 394 U.S. at 634; *Dunn*, 405 U.S. at 340-41.

171. 410 U.S. 113 (1973).

172. 410 U.S. 179 (1973).

173. *See Roe*, 410 U.S. at 162-164; *Doe*, 410 U.S. at 187.

174. 462 U.S. 416 (1983).

175. *Id*. at 428.

176. *Id*. at 429. *Akron Center* struck down the City of Akron's requirement that all second trimester abortions had to be performed in hospitals because it was not reasonably related to the government's admittedly compelling interest in maternal health after the first trimester. *See id*. at 432-33. The Court moved away from *Roe*'s "bright line" trimester formula stating that "if it appears that during a substantial portion of the second trimester the State's regulation 'departs from accepted medical practice', the regulation may not be upheld simply because it may be reasonable for the remaining portion of the trimester." *Id.* at 434 (citation omitted). Thus, although *Akron Center* was a "pro-choice" decision, its rationale helped pave the way for subsequent "pro-life" decisions that also, albeit much more forcefully and disapprovingly, rejected absolute adherence to *Roe*'s trimester formula. *See* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); Planned Parenthood v. Casey, 505 U.S. 833 (1992). In fact, the basic principles advanced by the *Webster* and *Casey* majorities were initially articulated by Justice O'Connor in her dissent, with Justices White and Rehnquist joining, in *Akron Center*. *See id.* at 452-75 (O'Connor, J., dissenting). She noted that the majority's difficulty with the trimester formula "graphically illustrates why the trimester approach is a completely unworkable method of accommodating [abortion's] conflicting personal rights and compelling state interests." *Id*. at 454. In its place, she advanced the "undue burden" standard that has become the fulcrum between pro-choice and pro-life jurisprudence. *Id*. at 461 (stating that the "constitutional right to an abortion. . .protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.") (quotations and citation omitted).

177. 492 U.S. 490 (1989).

178. MO. REV. STAT. §1.205.1(*l*) (1986).

179. *See id*. at §1.205.2.

180. *See Webster*, 492 U.S. at 504-507. Only Justice Stevens' dissent addressed the preamble on the merits. *See id.* at 562-72 (Stevens, J., dissenting).

decision.[181] By pushing the point of potential fetal viability to twenty weeks, *Webster* effectively ended *Roe*'s trimester framework. The erosion of a pregnant woman's fundamental right to privacy continued in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[182] where the Court said, "Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed."[183] Further, the Court said that:

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or for any other medical procedure. The fact that a law serves a valid purpose, is not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty, protected by the Due Process Clause.[184]

In using the "undue burden" standard, the controlling plurality in *Casey* has weakened the "compelling state interest" requirement in abortion cases, implying that a pregnant woman's privacy is not as "fundamental," as, for example, the right to travel. Thus, the strict scrutiny dual criteria for "compelling state interest" have been replaced by different standards. While *Casey* reaffirmed" a woman's right to terminate her pregnancy before viability,[185] the Court concluded that states may enact laws that further their compelling interest in potential, even pre-viable, life so long as the laws are rationally related to that purpose and do not unduly burden a woman's right to terminate her pregnancy.[186] This is a troubling development that supports the claim that women's fundamental rights are being systematically devalued.

The history of what constitutes a compelling state interest in the abortion context provides the rationale for fetal rights advocates' arguments about state police power and *parens patriae* power and for women's rights advocates' contention that women's fundamental rights are under attack. The former seek to demonstrate that their interest in the fetus is legitimate (i.e., falls under the traditional purview of state regulation) and constitutes a "compelling state interest;" the latter attempt to show that the constitutionality of laws expanding fetal

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181. Justice Scalia explicitly urged that *Roe* should be overruled. *See id.* at 532-37 (Scalia, J., concurring). Chief Justice Rehnquist in the plurality opinion refused to go quite that far. *See id.* at 521. He upheld only the basic core of *Roe*—that states cannot criminalize all non-therapeutic abortions without violating a woman's due process right to privacy. *See id.* at 513-21. Apparently, Justice O'Connor's continual reliance on the "undue burden" standard that she had enunciated in *Akron Center* is all that preserved *Roe*. *See id.* at 525-31 (O'Connor, J., concurring).

182. 505 U.S. 833 (1992).

183. *Id.* at 872.

184. *Id*. at 874.

185. *Id.* at 871 (describing this as *Roe*'s "most central principle.")

186. *See id.* at 874-76. Not only did Justice O'Connor gain the support of Justices Kennedy and Souter for her "undue burden" standard, but the concept now controls the ideological center of the current Court on the abortion issue. Chief Justice Rehnquist and Justices Scalia and Thomas have argued that a women's right to abortion is protected by due process, but can be regulated by states that meet the rational basis test. *See id*. at 966. While Justices Ginsburg and Breyer have yet to rule a substantive abortion case, it is unlikely that either would advocate a retreat from *Roe*.

rights have rendered women's rights less than fundamental, because neither part of the "strict scrutiny" standard typically invoked in fundamental rights issues is used by the Court in contemporary abortion jurisprudence.[187] Both sides' failure substantively to debate the issues is appropriate in the zero-sum legal environment.

The Court's apparent willingness to create a different and far less stringent standard when the rights of pregnant women are pitted against the state's interest in preserving fetal life renders the legal battle unequal. Apparently, there are two constitutional standards for determining whether a state interest is compelling in privacy cases: one that applies to heterosexual men and a separate but unequal standard that applies to women and homosexuals).[188] The Court has also wrestled, inconsistently, with other aspects of women's rights. In its struggle to articulate a clear test for the constitutionality of sex based classifications in equal protection cases, the Court has altered judicial standards over time. For example, the Court in *Reed v. Reed*[189] applied a reasonableness (or rational basis) standard for judging whether sex based classifications violated the Constitution's guarantee of equal protection.[190] Two years later it nearly established sex as a suspect classification in *Frontiero v. Richardson*,[191] when Justice Brennan, in a plurality opinion, applied the strict scrutiny standard to an equal protection case involving sex based classifications.[192] But for one more vote in *Frontiero*, sex based classifications would have been considered, with race, as suspect. Instead, the Court in a series of subsequent cases has apparently settled on intermediate scrutiny in equal protection cases involving sex based classifications.[193] However, Justice Ginsburg seems again to be trying to move the Court closer to a "strict scrutiny" test in sex discrimination cases. Her majority opinion in

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187. *See generally* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

188. However, the Court in 1986 upheld the conviction of a man for violating Georgia's "anti-sodomy" law. *See* Bowers v. Hardwick, 478 U.S 186 (1986) (holding that consensual (in this case, male) homosexual conduct in one's own home is not protected by the constitutional right to privacy).

189. 404 U.S. 71 (1971).

190. *See id.* at 76 (holding that an Idaho law which gave a preference to men over similarly situated women as administrators of the estates of deceased relatives violated the equal protection clause). The opinion stated that a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *See id.* (quotations and citations omitted). *Reed* stands as one of the rare cases in which the Court struck down a governmental regulation using the "rational basis" test. *See id.*

191. 411 U.S. 677 (1973).

192. *See id.* at 682-91. Justices Douglas, White and Marshall joined with Brennan in the majority opinion. *See id.* Justice Stewart concurred, but invalidated the sex based classification under *Reed*'s rational basis test. *See id.* at 691 (Stewart, J., concurring). Justices Powell and Blackmun and Chief Justice Burger also concurred, based on *Reed*, deferring any re-examination of the level of scrutiny for sex based discrimination until ratification or rejection of the then-pending Equal Rights Amendment. *See id.* at 691-92 (Powell, J., Blackmun, J., and Burger, J., concurring). Justice Rehnquist dissented. *See id.* at 691 (Rehnquist, J., dissenting).

193. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976). The equal protection "test" for "intermediate scrutiny" holds that classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Id.* at 197. Ironically, *Craig*, struck down an Oklahoma law that discriminated against *males* by establishing higher minimum age requirements for the sale of "near beer" to males (age 21) than to females (age 18). *See id.*

United States v. Virginia, [194] while ostensibly applying intermediate scrutiny, said that states must have an "exceedingly persuasive justification" for discriminating between men and women.[195]

But, in its application of substantive due process and determining what state interest is compelling in abortion cases, the Court has moved in the opposite direction. It ostensibly has applied a well established judicial standard but, instead, has loosened the standards which must be met. Somewhat surprisingly, women's rights advocates have not forcefully pointed out the Court's use of a separate and unequal standard in the application of "compelling state interest" in cases that pit women's fundamental rights against the state's interest in protecting fetal life.

The Court's apparent willingness to ignore its own clearly established judicial standards and precedents is troubling. It indicates that the citizenship rights of women are less fundamental than those of other citizens (even those whose citizenship is in dispute, such as the "unborn"),[196] and makes it very difficult for women's rights advocates to succeed in the legal arena because the rules change whenever they seem likely to prevail. Even though the abortion cases are argued on privacy grounds,[197] it would be disingenuous to ignore the fact that all pregnant persons are women and that only women risk losing their fundamental rights.[198]

What makes the Court's development of a double standard in abortion cases even more disturbing is that it is not anomalous. It is consistent with a substantial body of legal research which has uncovered evidence of systematic and pervasive gender bias in all aspects of the current judicial system. More than twenty-five state task forces, commissioned and staffed by members of the states' own judiciaries, have uncovered a pattern of sex discrimination in state courts.[199] The final report of the New York state task force reported:

> [G]ender bias against women. . .is a pervasive problem with grave consequences. Cultural stereotypes of women's role in marriage and in society daily

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194. 518 U.S. 515 (1996).

195. *Id*. at 553. Justice Ginsburg's effort to enhance the scrutiny for sex discrimination cases is not surprising; in her capacity as general counsel for the American Civil Liberties Union in the 1970s, she headed the Women's Rights Project, arguing six sex discrimination cases, including *Craig v. Boren*, before the Court. As an advocate, she repeatedly urged the Court to adopt the strict scrutiny standard. ***See*** EPSTEIN & WALKER***, supra*** note 140. She has written that women's right to abortion should be an equal protection-not privacy issue (i.e., Do abortion regulations discriminate against women?). *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

196. For a historical summary of women's ambiguous citizenship status, see Rogers M. Smith, "*One United People": Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229 (1989) (arguing that despite a civic creed based on egalitarian principles, women are not the only group whose ascriptive characteristics historically have precluded them from attaining full citizenship status.)

197. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 120 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

198. This is consistent with Justice Ginsburg's equal protection analysis. *See generally* Ginsburg, *supra* note 195.

199. *See* United States Court of Appeals (9th Cir.) Gender Bias Task Force, *The Effects of Gender in the Federal Courts*, E2-E4 (1993) (hereinafter Ninth Circuit Task Force).

> distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility.[200]

At the federal level, only the Court of Appeals for the Ninth Circuit has completed a study of gender bias within the federal judicial system. Its Gender Bias Task Force found widespread evidence of gender bias against women in all aspects of the federal judiciary.[201] In *Ellison v. Brady*,[202] it stated that unconscious gender bias in society is so pervasive that a gender neutral perspective is virtually impossible. "A sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women." [203]

Perhaps the same male bias is responsible for fetal rights proponents' failure to campaign to criminalize third party fetal killings. Their passionate outcries over the purported harms from in utero exposure to narcotics and the loss of fetal life caused by liberal abortion laws render deafening their silence over injuries and loss of fetal life caused by men beating, stabbing, and shooting pregnant women. While motive may be impossible to determine, the effect is unmistakable: women's rights are consistently subservient to those of the fetus, while male behavior that produces similar results is treated benignly. The conclusion that gender bias (whether conscious or unconscious) is the cause is, at least, logical.

CONCLUDING THOUGHTS

As we have seen, the spill-over from *Roe* and other abortion cases has served to justify state intervention in a woman's reproductive decisions from conception. Every expansion in fetal rights has resulted in a commensurate decline in the fundamental rights of pregnant women. One possible escape from this conundrum is a return to the idea that the interests of the woman and fetus are unitary. Re-framing the legal dialogue from adversarial to complementary would relieve some of the legal gymnastics of the past thirty years and restore the focus to the very real threats to maternal and fetal health.

Unification of the interests of the pregnant woman and the fetus can be cast in moral, as well as legal terms. First, the pregnant woman is the most appropriate person to make decisions about the fetus. After all, who is in a better position to make decisions about the health and well-being of the fetus she "carries?" How many Americans would prefer that outsiders with no direct stake in the outcome (i.e., bureaucrats, politicians, health club owners etc.) make these decisions? The vast majority of women naturally care very deeply for their children (born and unborn) and willingly make innumerable sacrifices on their behalf. In two of the three relevant areas of criminal law (statutory and case law

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200. *Report of the New York Task Force on Women in the Courts*, 15 FORD. URB. L.J. 11, 17-18 (1986-1987).

201. The social consequences of gender discrimination within the court system was highlighted by the Ninth Circuit in a recent ruling. "[S]o too is gender discrimination in the judicial system a stimulant to community prejudice. . . which impedes equal justice for women." United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992). *See also* Ninth Circuit Task Force, *supra* note 199, at 191.

202. 924 F.2d 872 (9th Cir. 1991).

203. *Id.* at 879.

related to substance abuse during pregnancy and third party fetal killings), the interests of the woman and the fetus are congruent. Only in the area of abortion law do fetal and maternal interests potentially conflict. Unfortunately, the adversarial "spill over" from recent abortion cases blurs these distinctions.

The second component of the moral issue is that only the unitary framework protects the rights and interests of the woman, as well as the fetus. As Cushman succinctly summarizes, "For [pro-Roe activists], the moral imperative is the lives of women, which they argue our society has never fully valued and has all too often treated cheaply in the name of one moral imperative or another."[204] Far too often the moral claims advanced by fetal rights proponents require the abrogation of a woman's constitutional rights for the length of her pregnancy. Moreover, they casually dismiss concerns that re-criminalizing abortion may lead to a recurrence of the days when women hemorrhaged to death or contracted septis at the hands of black market abortionists.

However, both the adversarial and the unitary frameworks are flawed. The women's rights proponents correctly argue that the adversarial framework that evolved from *Roe* has been problematically applied to other fetal policy issues and has served to justify erosions of women's fundamental rights. Fetal rights proponents also accurately describe as potentially conflictual the maternal and fetal interests within the abortion context. With this in mind, we can forthrightly consider what party can most appropriately claim to speak on behalf of the fetus.

As many legal scholars from both camps have noted, the relationship of a woman to the fetus within her womb during pregnancy is unlike any other human relationship. During a normal pregnancy a woman undergoes massive physical and chemical changes that affect her entire body, in ways more profound than any other "normal" human function. No other human association is comparable. Support for women's full citizenship rights simply means that the pregnant woman, not the state, is the most appropriate person to make decisions about the fetus.

While the biological father's genetic connection to the fetus is the same as the pregnant woman's, it lacks the intensity of her physical and emotional bond. He experiences the pregnancy as an outsider, while for a woman it is an essential part of her very being. Young captures the difference when she writes that pregnancy for observers (including fathers) is "a time of waiting and watching, when nothing much happens," but "the pregnant woman experiences herself as a source and participant in the creative process. Though she does not plan and direct it, neither does it merely wash over her; rather, she is this process, this change."[205] For this reason alone, the woman's claim to being in the best position to make decisions about the fetus and to represent its interests is stronger than the claims of all other parties. Moreover, this special relationship between the woman and the fetus has long been recognized in other areas of the law, such as

204. ROBERT F. CUSHMAN, CASES IN CONSTITUTIONAL LAW 334 (8th ed., 1994).

205. IRIS YOUNG, THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY 167 (1990).

civil adoption law.[206]

Finally, a unitary framework would confront the real implications of third party battering. In the adversarial relationship, there are only two actors, the woman and the fetus, precluding involvement or consideration of a third party. By recognizing that harming the fetus also involves harm to the pregnant woman, the legal potential for truly "protecting the fetus" is strengthened. This framework provides one of those rare opportunities for both sides to find common ground. If fetal rights advocates are indeed motivated by a concern for fetal life, they should be at least as outraged by third party fetal injury/killing cases as they are by substance abuse during pregnancy. When pregnant women use illegal drugs, they are motivated by their addiction—-not by a desire to harm the fetus. Conversely, battering during pregnancy typically is directed against the fetus.[207] Although non-pregnant women tend to be beaten on the face or breasts, pregnant women usually are beaten or kicked in the abdominal region, implying a conscious or subconscious intent to harm the fetus.[208] Perhaps in their obsession with abortion, fetal rights proponents fail to consider situations where joint maternal and fetal interests are pitted against a third party. Gender bias may also cloud their judgment where the party harming the fetus is male rather than female.

We now have an opportunity to defuse the level of conflict over abortion. In the past decade and a half, scientists have developed non-surgical postcoital means of preventing conception and terminating an early pregnancy. The "morning after" pill, oral contraceptives, such as Ovral or Levlen, halt contraception if taken within twenty-four hours of intercourse.[209] Even though these drugs are not yet available in most parts of the country as "emergency contraception," the recent success of an eighteen month pilot project in Washington

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206. Adoption laws in all fifty states recognize that the relationship between a pregnant woman and her fetus is unique, and that the woman has a greater say than any other party in determining whether the child should be given to an adoptive family. *See* RANDALL B. HICKS, ADOPTING IN AMERICA 52 (1993). For example, in most states the consent of an unmarried birth mother, not the birth father, is required for an adoption. *See id*. Furthermore, the woman is not legally bound by any adoption agreement entered into prior to the birth of the child. *See* id. A few states allow the woman to sign adoption papers prior to the child's birth but allow her to retract that agreement within a specified period after the birth. *See id*. Most states require the birth mother to sign consent papers only after the birth and then allow her to withdraw that consent for a specified time. *See id*. For example, in Alaska the birth mother can consent to an adoption at any time after the birth of the child, but ten days subsequent, she retains an unqualified right to withdraw that consent. *See id*. at 165. For a summary of state adoption laws, *see id*. at 155-328.

207. Jacquelyn C. Campbell, et al. *Correlates of Battering During Pregnancy*, 15 RES. NURSING & HEALTH 219, 219 (1992).

208. *See* Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460, 462 (1977); Elaine Hilberman, *Overview: The 'Wife Beater's Wife' Reconsidered*, 137 AM J. PSYCHIATRY 1336, 1340 (1980); Abbey B. Berenson et al., *Drug Abuse and Other Risk Factors for Physical Abuse in Pregnancy among White Nonhispanic, Black, and Hispanic Women*, 164 AM. J. OBSTETRICS & GYN. 1491, 1493 (1991).

209. Depending upon the point in the menstrual cycle, the drugs halt or delay ovulation or alter the lining of the uterus to prevent the implantation of a fertilized egg. *See* Katharine A. White, *Crisis of Conscience: Reconciling Religious Health Care Providers' Belief and Patients' Rights*, 51 STAN. L. REV. 1703, 1715 (1999). Both the Food and Drug Administration and the American College of Obstetricians and Gynecologists have declared them safe, and the drugs are widely used as "emergency contraception" in Europe. *See id*.

state makes it likely that they will be within the next year.[210] Mifepristone (RU-486) is a means to terminate a first trimester pregnancy. Like postcoital oral contraceptives, if taken within a few days after coitus, mifepristone halts the implantation of a fertilized egg. If taken later, it induces a miscarriage. Clinical trials involving more than 2,000 women were successfully completed in the mid-1990s and mifepristone may reach the American market in the next year.[211] Anti-abortion activists in Congress are still trying to halt the final approval of mifepristone.[212]

Because neither the "emergency contraception" pills nor the oral abortifacients require visits to abortion clinics, it is difficult to aggressively mobilize against their use. Also, because society is far less emotionally and visually attached to an unimplanted egg, such methods should be less controversial than abortions, these technologies may naturally shift public and policymakers' attention away from the more polarizing debate and toward other threats to prenatal health and the general well being of all children.

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210. More than 900 Washington state pharmacists participated in the eighteen month project, directed by the Program for Appropriate Technology in Health (PATH). *See* Nancy Montgomery, *Morning After Project a Success*, SEATTLE TIMES, July 25, 1999, at B1. Participating pharmacists were able to prescribe the drugs to the women without their having to see physicians. *See id*. The program director, Jane Hutchings, estimates that nearly 12,000 prescriptions have been written. *See id*. If thirty percent of those women would have ended up pregnant, the program has prevented more than 3,000 unwanted pregnancies. *See id*. Even though the Washington State Pharmacy Association was initially concerned about a backlash from right to life groups, these fears turned out to be groundless. *See id*.

211. *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 65 (1994); Lisa M. Krieger, *RU-486 Abortion Pill Still Not Widely Available in the U.S.*, S.F. EXAMINER , Jan. 27, 1998, at A1.

212. *See* Chris Casteel, *Spending Cuts End Coburn-led Impasse in House*, DAILY OKLAHOMAN, June 9, 1999, at 16. For example, the House on June 8, 1999 approved by a margin of 217-214 an amendment to the Agriculture Department's budget. *See id*. The amendment would have severely restricted the FDA's ability to approve any drug that could cause an abortion. *See id.* Rather than allow the budget to be held up through a protracted battle with the White House, congressional leaders subsequently allowed the amended version of the budget to be superseded by the unamended underlying budget, which was then adopted. *See id*.