The Collision Between the Rights of Women, the Rights of the Fetus and the Rights of the State: A Critical Analysis of the Criminal Prosecution of Drug Addicted Pregnant Women

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INTRODUCTION

An estimated 375,000 infants are born each year affected by maternal drug abuse during pregnancy, requiring up to $100,000 of intensive medical care per child.1 A $37.5 million price tag has compelled courts and legislatures to take action, many imposing criminal sanctions against pregnant drug users.2

The use of criminal sanctions to deal with pregnant drug users has been controversial,3 raising constitutional questions, both

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1 See Patricia A. Sexton, Imposing Criminal Sanctions on Pregnant Drug Users: Throwing the Baby out with the Bath Water, 32 WASHBURN L.J. 410, 410 (1993) (citing Suzann Silverman, Scope, Specifics of Maternal Drug Use, Effects on Fetus Are Beginning to Emerge from Studies, 261 JAMA 1688 (1989). The most frequently cited national estimate of the number of drug-exposed newborns is 375,000. The estimated number is from a 1988 survey of 36 hospitals conducted by the National Association of Perinatal Addiction, Research and Education. The hospitals surveyed are located in "heavily populated areas." The statistics include newborns who have been exposed to "crack, heroin, methadone, cocaine, amphetamines, PCE and marijuana." Id. see also Douglas J. Besharov, Crack Children in Foster Care, 19 CHILDREN TODAY, 21, 22 (1990). The article stated that in 1988, 25 out of every 1,000 children in the United States died before their fifth birthday due to drug exposure while in the uterus citing MICHAEL KIDRON ET AL., THE NEW STATE OF THE WORLD 55 (1991) The United States infant mortality rate is equal to less affluent countries such as Costa Rica and Honduras.


3 See Sexton, supra note 1, at 411 (discussing “sharp” philosophical disagreements that exist with regards to how to treat drug abusive pregnant woman: Woman’s rights advocates assert the most effective approach is to enable women to receive prenatal care without the threat of criminal prosecution. The American Civil Liberties Union (ACLU) argues that prosecution of pregnant women will not only fail to
facial and consequential, and questions regarding autonomy in the fetal-maternal conflict. Part I of this analysis will discuss the constitutional issues and the issues of autonomy raised by the criminal prosecution of drug addicted pregnant women. The discussion is divided into three sub-sections: (1) the rights of women; (2) the rights of the fetus; and (3) the rights of the state. Part II discusses the collision between the rights of women, the fetus and the state. The analysis will discuss the subordination caused to women by the criminal prosecution of pregnant drug users, based solely on a woman’s biological ability to become pregnant. Part III discusses the theories upon which the criminal prosecution of drug addicted pregnant woman is based and offers a critical analysis of such criminal prosecutions. The analysis will show that the real effects from the criminal prosecution of drug addicted pregnant women include not only the subordination of women, but also more harm to the fetus.

I. THE CONSTITUTIONAL ISSUE AND THE ISSUE OF AUTONOMY

The constitutional question raised by the criminal prosecution of drug addicted pregnant women is whether criminal sanctions violate due process and equal protection. Specifically, the issue is whether criminal prosecution of drug addicted pregnant women deprives women of their fundamental right to privacy and personal autonomy.

deter drug use during pregnancy, but will also create a precedent for prosecuting a wide array of harmful prenatal conduct, [i.e. poor sleep habits and failing to follow a doctor's order]. Finally, opponents of criminal intervention assert that if the legal system punishes pregnant drug users, pregnant women will be deterred from seeking prenatal care from doctors out of fear of facing criminal charges;


4 See Christine M. Bulger, In the Best Interest of the Child? Race and Class Discrimination in Prenatal Drug Use Prosecution, 19 B.C. THIRD WORLD L.J. 709, 725 -26 (Spring 1999) (discussing three harmful effects of imposing criminal sanctions on pregnant drug users: (1) detrimental effects on a baby when taken away from his/her mother within first months of life; (2) potential expansion of state interference in pregnant woman’s conduct; and (3) opportunity for discrimination).

5 See U.S. Const. amend. XIV § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive an person of life, liberty, or property; without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").
When faced with a constitutional question, the Court must first define the fundamental right or rights at issue and then apply the proper standard of review to ensure the legislation passes constitutional muster. The United States Constitution guarantees that fundamental rights are not to be abridged by either federal or state legislation. The standards of review used by the Court to review legislation are strict scrutiny, intermediate scrutiny and rational basis, depending upon the


7 See U.S. CONST. art. III (discussing judicial power of Supreme Court shall extend to all Cases, in Law and Equity, arising under United States Constitution).

8 See U.S. CONST. amends. I, IV, V, XIV (discussing no law shall be passed regarding establishment of religion or prohibiting free exercise of religion, speech, press, assembly and petition government; that no person shall be subject to unreasonable search and seizures without probable cause; that no person shall be deprived of life, liberty or property without due process of law and that no person shall be denied equal protection under law).


11 See State v. Hutchins, 188 F.3d. 531, 541 (D.C.Cir. 1999) The three standards of review are rational basis, strict scrutiny and intermediate scrutiny: Under the rational basis standard, no fundamental right is at issue and the [court] would only need to show a rational relationship between [the legislation] and any legitimate government interest. Under strict scrutiny standard, a fundamental right is implicated and the [court] would have to show that the [legislation] is narrowly tailored to promote a compelling government interest. To be narrowly tailored, there must be a sufficient nexus between the compelling governmental interest and the provisions of the [legislation] [citation omitted] and the [legislation] must use the least restrictive reasonable means to achieve its goals. Id.

Under intermediate scrutiny, the court acknowledges that existence of a fundamental right but also recognizes an important government interest. It requires the [court] to show the [legislation] is substantially related to the government interest. Id.; see also
rights affected by the legislation.\textsuperscript{12} To define the fundamental right or rights at issue in a particular piece of legislation and apply the proper standard of review to determine its constitutionality is a difficult task because there are often, as is the case with the criminal prosecution of drug addicted pregnant woman, rights in conflict.\textsuperscript{13} The rights in question regarding the criminal prosecution of drug addicted pregnant women are a woman's fundamental right to privacy and the extent to which a pregnant woman has this right before becoming over ridden by the fetus' right to physical integrity.\textsuperscript{14} This creates a conflict between a woman's right to personal autonomy against the fetus' right to physical integrity and the State's interest in such integrity for the protection of potential human life.\textsuperscript{15}

Qutb v. Strauss, 11 F.3d. 488, 493 (5th Cir. 1993) (defining term "narrowly tailored" as legislation containing "nexus between the stated government interest and the classification created by the ordinance.").


\textsuperscript{15} See Paltrow, supra note 13, at 1014 ("[P]rosecutors across the country have relied on the claimed existence of fetal rights as a basis for justifying the arrest and imprisonment of pregnant women . . . cit[ing] . . . wrongful death cases and fetal homicide cases as a basis for treating fetuses as persons and treating . . . pregnant women . . . as criminals."). See generally Lai, supra note 14, at 201 (discussing existing protections for women's sexual autonomy); Northern, supra note 14, at 489 (arguing courts should do more to protect woman's right to procreative autonomy).
A. The Rights of Women

1. The Fundamental Right to Privacy and Liberty

The fundamental right asserted by women, pregnant or not, drug addicted or not, is the right to privacy with regards to choices about their bodies. Holding a drug addicted pregnant woman criminally liable for fetal damage has concerned many legal scholars with the effects such sanctions will have on the women's rights. Many legal scholars argue that if the state is allowed to criminally prosecute women for drug use during pregnancy, a flood gate will open allowing the state to criminally prosecute pregnant women for not eating or sleeping correctly or for the failure to follow a doctor's instructions. The endless possibilities cause severe detriment to a woman's right to privacy and her ability to choose what to do with her body, keeping the woman in a subordinate position.

16 See generally Naomi Cahn, Policing Women: Moral Arguments and the Dilemmas of Criminalization, 49 DEPAUL L. REV. 817, 821 (discussing subordination of women through legislation that criminalizes or decriminalizes certain aspects of woman's life, including woman's right to control her own body, woman's right to care for her children, and woman's right to live safely). See generally John L. Johns, Reproductive Rights of Women: Construction and Reality in International and United States Law, 5 CARDOZO WOMEN'S L.J. 1, 22-26 (1998) (looking to United States Constitution for development of women's reproductive rights, right to privacy with regards to their bodies).

17 See Sexton, supra note 1, at 411 (stating "[t]he American Civil Liberties Union (ACLU) argues that the prosecution of pregnant women will not only fail to deter drug use during pregnancy, but will also create a precedent for prosecuting a wide array of harmful prenatal conduct... there would be nowhere to draw the line in regulating women's behavior."); see also Bulger, supra note 4, at 724 (emphasizing possibilities for racial discrimination with use of criminal sanctions against drug addicted pregnant women); Lorraine Schmall, Addicted Pregnancy as a Sex Crime, 13 N. ILL. U. L. REV. 263, 273 (Spring 1993) (discussing effects of criminal sanctions against drug addicted pregnant women on woman's abortion rights); Rachel Roth, Woman News: What Future for Reproductive Rights?, CHI. TRIB., Feb. 23, 2000 (discussing women's "incredibly shrinking sphere of reproductive control.").

18 See Roth, supra note 17, at 1 (discussing increase in reproductive control); see also Schmall, supra note 17, at 273 (discussing criminal sanctions imposed upon drug addicted pregnant women). See generally Johns, supra note 16, at 26-30 (discussing reality of women's reproductive rights).

19 See Dawn E. Johnsen, The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 YALE L.J. 599,600 (January 1986) ("By creating an adversarial relationship between the woman and her fetus, the [S]tate provides itself with a powerful means for controlling women's behavior during pregnancy, thereby threatening women's fundamental rights.").

The subordinate status of women in American law was founded in both religious and secular sources, including Judeo-Christian traditions, English common law, the frontier conditions of colonial America, and the American plantation economy of the

Oxford Dictionary of Quotations, "[f]rom the first dawn of life unto the grave, Poor womankind's in every state a slave, We will our rights in learning's world maintain; Wilt's empire now shall know a female reign," and demanding treatment of women as equals).  

See Katharine T. Bartlett & Angela P. Harris, Gender and Law Theory, Doctrine, Commentary 1-16 (Aspen Law & Bus. 2d ed. 1988) (discussing foundations for women's subordinate status and ways in which they were reinforced in United States, i.e. assumption in United States that men represented norm of full human being and women represented deviation from norm, concept of women as property, and idea of male sphere that is "public" - concerned with government, trade, business, and law - and female sphere that is "private" - encompassing home, family, and child-rearing); see also Paula Abrams, The Tradition of Reproduction, 37 ARIZ. L. REV. 453, 475 (1995) (stating that in Judaic Tradition "women gained the approval of both God and husband through reproduction."); Marie A. Failinger, Gender, Justice and the Left Hand of God: A Lutheran Perspective, 9 S. CAL. REV. L. & WOMEN'S STUD. 45, 52 (1999) (stating that some Christian denominations see scripture as justification for subordination of women.); Angela L. Padilla & Jennifer J. Winrich, Christianity, Feminism, and the Law, 1 COLUM. J. GENDER & L. 67, 70 n.18 (1991) (giving definition of Judeo-Christian tradition).

See Bartlett & Harris, supra note 21, at 1–16; see also In Re Bradwell, 1869 WL 5503, at *3 (Ill.1869) (noting that "[i]t is to be also remembered that female attorneys at law were unknown in England, and a proposition that a woman should enter the courts of Westminster Hall in that capacity, or as a barrister, would have created hardly less astonishment than one that she should ascend the bench of Bishops, or be elected to a seat in the House of Commons."); aff'd sub nom, Bradwell v. People of State of Illinois, 83 U.S. 130; Laura Sack, Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases, 4 YALE J.L. & FEMINISM 291, 294 (1992) (stating that "[u]nder English common law, as under Roman law, children were the property of their fathers."); Derek W. St.Pierre, The Transition from Property to People: The Road to Recognition of Rights for Non-Human Animals, 9 HASTINGS WOMEN'S L.J. 255, 266 (1998) (stating that "[f]ollowing common law tradition, upon marriage women lost their ability to sue, to own property and in general to gain any recognition in the eyes of the law."). See generally Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 HARV. L. REV. 1261, 1296 (2000) (stating that prohibition of women from juries was derived from English common law.); Betsy Tsai, The Trend Towards Specialized Domestic Violence Courts: Improvements on an Effective Innovation, 68 FORDHAM L. REV. 1285, 1288 (2000) (stating that English Common Law "permitted a husband to beat his wife with a stick no wider than his thumb.").

See Bartlett & Harris, supra note 21, at 1–16; see also William N. Eskridge, Jr., Multivoce Prejudices and Homo Equity, 74 IND. L.J. 1085 (1999) (stating that rape was not considered crime in colonial times); R. Jason Richards, Disabilities in Notary Law and Practice, 32 J. MARSHALL L. REV. 1033, 1035 (1999) (stating that "[d]uring our colonial period, English common law and custom, which governed the American colonies, prohibited women from voting and from holding any public office."); David Schultz, Scalia On Democratic Decision Making and Long Standing Traditions: How Rights Always Lose, 31 SUFFOLK U. L. REV. 319, 343 (1997) (stating that sexism is deeply rooted in American history dating back to colonial times); Carl Tobias, Interspousal Tort Immunity in America, 23 GA. L. REV. 359, 388 (1989) (stating that legal values of Colonial America were rooted in patriarchal values of English common law); John Fabian Witt, From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family, 25 LAW & SOC. INQUIRY 717, 727 (2000) (stating that "[c]olonial governments resisted female land ownership, even for unmarried women, [so that] women who became too economically independent frequently found themselves the objects of community attack", such as disproportionate witchcraft accusations).
eighteenth- and nineteenth-century South.\textsuperscript{24} One of the most powerful tools of subordination was the defining of sexual norms,\textsuperscript{25} allowing for the sexual exploitation of slaves,\textsuperscript{26} the control of women's reproduction through bans on birth control and abortion,\textsuperscript{27} domestic violence and laws against


\textsuperscript{25} See Bartlett & Harris, supra note 21, at 39-49 (discussing societal perceptions as to what is sexually “normal” for males and females, including excerpts from Corroll Smith-Rosenberg’s book \textit{Disorderly Conduct: Visions of Gender in Victorian America}, Horatio Robinson Storer’s book \textit{Why Not? A Book for Every Woman}, a Plymouth Massachusetts case of 1649, in which two women were tried for act of sodomy and let off with minimal punishment of public humiliation as opposed death penalty imposed for male to male sodomy); see also Corroll Smith-Rosenberg, \textit{DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA} 208-16 (A. A. Knof 1985) (discussing how diagnosis of hysteria was used to define woman’s role and personality in nineteenth century); Katharine T. Bartlett, \textit{Feminism and Family Law}, 33 FAM. L.Q. 475, 488 (1999) (stating that in nineteenth century “women who did not conform to expected gender roles” were considered deviants); Jill Elaine Hasday, \textit{Federalism and the Family Reconstructed}, 45 UCLA L. REV. 1297, 1344–45 (1998) (discussing 1866 essay by Horatio Robinson Storer, leader of nineteenth-century campaign against abortion, “that compared the fertile female body to America’s Great Plains and warmed native-born white women that ‘the future destiny of the nation’ depended upon their relative birth rates.”).


\textsuperscript{27} See Bartlett & Harris, supra note 21, at 39-49; Bartlett, supra note 25, at 488 (stating “link between restrictions on the medical practice of abortion that were in place in the nineteenth century and the desire to maintain women in their “place” are particularly well documented.”); see also Roe v. Wade, 410 U.S. 113, 148 (1973) (stating that American anti-abortion laws were “product of a Victorian social concern to discourage illicit sexual conduct.”); Thomas L. Jipping, \textit{From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection}, 4 TEX. REV. L. & POL. 365, 395 (2000) (stating that “every state during the nineteenth century had banned abortions except to save the mother’s life.”). \textit{But see} Carol S. Weisman & Trude Bennett, \textit{Women’s Health Care: Activist Traditions and Institutional Change}, 25 J. HEALTH POLI. & L. 582, 584 (2000) (stating that abortions were not illegal in United States until mid-
miscegenation. Legal scholars argue that the criminal prosecution of drug addicted pregnant women is simply another way in which women are kept in a subordinate position. From Aristotle to contemporary song lyrics, women have been thought of as inferior to men, keeping women in a subordinate position in society. An illustration of the difference in treatment between men and women, keeping women in a subordinate position, involves child support obligations. A nineteenth century).

28 See Bartlett & Harris, supra note 21, at 39-49 (discussing 1883 case State v. Jackson, in which court held that State had right to regulate interracial marriages); see also Harris, supra note 26, at 600 (stating that “[s]outhern miscegenation laws were part of a patriarchal system through which white men maintained their control over the bodies of all black people.”); Trina Jones, Shades of Brown: The Law of Skin Color, 49 DUKE L.J. 1487, 1502 (2000) (stating that anti-miscegenation statutes began to appear as early as 1662); Dorothy E. Roberts, The Moral Exclusivity of the New Civil Society, 75 CHI.-KENT L. REV. 555, 564 (2000) (stating that central objective of early “American law and social convention was keeping the white bloodline free from Black contamination.”).

29 See Schmall, supra note 17, at 282-83 (emphasizing different standards of care to which fathers are held as opposed to mother); see also Deborah J. Krauss, Regulating Women’s Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decision and Women of Color, 26 HARV. C.R.-C.L. L. REV. 523, 539 (1991) (arguing that state imposed choice between abortion or criminal prosecution for drug use turns addicted pregnant woman into “a second-class citizen possessing constitutional rights inferior to those of men and nonpregnant women.”); Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, And the Right of Privacy, 104 HARV. L. REV. 1419, 1481 (1991) (arguing that “state’s decision to punish drug-addicted mothers rather than help them stems from [their] poverty and race of the defendants and society’s denial of their full dignity as human beings.”).

30 See Bartlett & Harris, supra note 21, at 3 (citing COMPLETE WORKS OF ARISTOTLE, vol. 2, at 2131) (Jonathan Barnes ed., ev. Oxford ed. 1984) (“[N]ature has made the one sex stronger, the other weaker, that the latter through fear may be the more cautious, while the former by its courage is better able to ward off attacks... and... acquire possessions outside the house, while the other preserve those within.”); see also Mark C. Modak-Truran, Corrective Justice and the Revival of Judicial Virtue, 12 YALE J. & HUMAN. 249, 267 n. 81 (2000) (stating that “Aristotle’s women were idiots in the Greek sense of the word.”); Deborah M. Thaw, The Feminisation of the Office of Notary Public: From Feme Covert to Noutaire Covert, 31 J. MARSHALL L. REV. 703, 708 (1998) (stating that Aristotle “maintained that men alone realize themselves as citizens, whereas women realize themselves only within the confines of the household.”).

31 See also NO DOUBT, I'M JUST A GIRL (Trauma Records 1997) (discussing “girl in the world” who is sick of being treated differently because of her gender and including lyrics such as, “Oh, I'm just a girl. So don't let me have any rights... don't let me out of your sight... don't let me drive late at night. I'm just a girl. I guess I'm some kind-a freak. The way they all sit and stare with those eyes.”).

32 See Cahn, supra note 13, at 822 (discussing the subordinate position of women in society). See generally Ann E. Freedman, Sex Equality, Sex Differences and the Supreme Court, 92 YALE L.J. 913, 915-17 (1983) (discussing effect of constitutional adjudication on sex roles in America); Earl M. Maltz, Sex Discrimination in the Supreme Court — A Comment on Sex Equality, Sex Differences, and the Supreme Court, 1985 DUKE L.J. 177, 177 (1986) (commenting on work by Freedman regarding effect of Supreme Court adjudications on efforts to redefine sex roles).

33 See Schmall, supra note 17, at 284-87. The author discusses the differences in treatment between men and women with regards to child support obligations. “The disparity between women and men exists even in judicial custody determinations.
father, delinquent in child support obligations, who is brought before a family court judge is rarely, if ever, incarcerated because of “a perception that putting men in jail will net no real support money for the children.”34 In contrast, courts seem all too ready too incarcerate a pregnant woman.35 Other examples include the fact that men are not arrested for child abuse or neglect “after having taken illegal drugs that are known to adversely affect sperm.”36 Nor are there reported cases of removing children from the custody of a father who is arrested for drunk driving, or possession and use of cocaine, or use of a dangerous weapon” while caring for his children.37 The incarceration of the female and not the male further reinforces the gender distinctions and disparate treatment.38

Judicial decisions removing a child from a mother or assuming a mother who tests positive for drugs is neglectful fail to make a substantive inquiry into the mother's actual fitness.” Id. See generally David H. Gans, Stereotyping and Differences: Planned Parenthood v. Casey and the Future of Sex Discrimination Law, 104 YALE L.J. 1875, 1877 (1995) The author argues that the “Supreme Court has consistently held that state laws and practices reflecting stereotypical assumptions about women’s proper roles are invalid under the Equal protection Clause.” Id.

34 See Schmall, supra note 17, at 284-87. "Its [the incarceration of fathers delinquent in child support payments]... depends upon its efficacy in specific and general deterrence... citing Robert Mnookin & D. Kelly Weisberg, Child, Family and State 234 (1989).” Id.

35 See Schmall, supra note 17, at 287 (discussing the one [emphasis added] case in which court found father had responsibility to his unborn child, although not punishable by incarceration if responsibility was not met). But see In re Adoption of Doe, 543 So. 2d 741, 749 (Fla. 1998) (holding that unmarried father did not have right to interfere with mother of his child's decision to place their illegitimate child for adoption because father did not support mother while she was pregnant, evidencing his intent to abandon child); Alison E. Grossman, Striking Down Fetal Protection Policies: A Feminist Victory?, 77 VA. L. REV. 1607, 1607-09 (1991) (discussing Supreme Court decision putting rights of woman ahead of fetus).


38 See Coe v. County of Cook, 1997 WL 797662, at *1 (N.D. Ill. 1997) (discussing rights of potential father as against mother's right to obtain abortion); see also In the matter of Alfredo S. 172 A.2d 528 (holding that although father had admitted to recreational cocaine use up to four months prior to birth of child, these were not "extraordinary circumstances" as to warrant denial of custody to natural parent). See generally Cass R. Sunstein, Feminism and Legal Theory. Feminism Unmodified, 101 HARV. L. REV. 826, 826-29 (1988) (discussing force of feminist movement and belief that movement is just beginning). But see Phyllis Schlafly, Gender Symposium: How the Feminists Want to Change Our Laws, 2 STAN. L. & POL'Y REV. 65, 65-66 (1994) (questioning motivations of feminists).
Women’s rights advocates argue the criminal prosecution of drug addicted pregnant women is a violation of a woman’s fundamental right to privacy created in Roe v. Wade. In Roe, the Court held that the right to privacy:

whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon [S]tate action, . . . or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.

If the right to privacy includes a woman’s choice to terminate her pregnancy, should it not include a woman’s actions while she is pregnant?

The right to privacy guaranteed by the Constitution extends to both women and men, regardless of their biological differences. It is nature that dictates only a woman is to possess the biological necessities to become pregnant. Therefore, this difference should not deprive her of the fundamental right to privacy. A

40 See Roe, 410 U.S. at 153 (discussing detriment State would impose on pregnant woman by denying her choice to terminate her pregnancy, including psychological, mental, and physical distress caused by additional offspring).
41 See Schmall, supra note 17, at 306 (emphasizing it is woman’s biological difference targeted by coercive actions against drug addicted pregnant women). See generally James Denison, The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse, 64 S. CAL. L. REV. 1104, 1131 (1991) (stating only gender distinguishes female offenders from their male counterparts in fetal abuse laws); Nancy K. Schiff, Legislation Punishing Drug Use during Pregnancy: Attack on Women’s Rights in the Name of Fetal Protection, 19 HASTINGS CONST. L.Q. 197, 218 (1991) (arguing it is discriminatory to hold only women responsible for fetal harm and pointing to studies demonstrating that male drug and alcohol abuse contribute to abnormal fetal development). But see Margaret P. Spencer, Prosecutorial Immunity: The Response to Prenatal Drug Use, 25 CONN. L. REV. 393, 413 (1993) (arguing gender-based classification cannot be established because state action against pregnant drug users does not single out all women for disparate treatment).
42 See Schmall, supra note 17, at 306 (discussing biological differences of women, allowing only women to become pregnant); see also Ruth Colker, The Female Body and the Law: On Truth and Lies, 99 YALE L.J. 1159, 1174 (1990) (pointing out that all women are affected by pregnancy based discrimination because all women have capacity to become pregnant); Elizabeth L. Thompson, The Criminalization of Maternal Conduct during Pregnancy: A Decision Making Model for Lawyers, 64 IND. L.J. 357, 362 (1989) (stating that attempts to justify criminal prosecution of women for prenatal fetal abuse are based on unique relationship between woman and unborn fetus); Note, Rethinking Motherhood: Feminist Theory and State Regulation of Pregnancy, 103 HARV. L. REV. 1325, 1339 (Apr. 1990) [hereinafter Rethinking Motherhood] (pointing to inseparability of maternal and fetal interests as determinative of women’s vulnerability to intrusive government action).
43 See Schmall, supra note 17, at 306–08 (discussing woman’s constitutional right to privacy and impediments placed upon this right by criminal prosecution of drug addicted
woman, pregnant or not, must be able to enjoy the "right to be let alone—the most comprehensive of rights and the right most valued by the civilized man." The United States Constitution guarantees that no state shall deprive any "person" of life, liberty, or property without due process of law and a guarantee that no state shall deny any "person" equal protection of the laws. Is a woman not a "person" simply because she has the capacity to bear a child? Quite to the contrary, a woman is a "person" protected by and entitled to the basic guarantees of the Constitution.

The criminal prosecution of a pregnant woman who may use drugs during her pregnancy denies all women their constitutional right to privacy. In Planned Parenthood v. Casey, the Supreme Court stated that "the Constitution places pregnant women); see also Dawn Johnson, From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives after Webster, 138 U. PA. L. REV. 179, 199-200 (1989) (arguing that any governmental intrusion that singles out pregnant women implicates women's fundamental right to privacy); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955, 1007 (1984) (arguing sex equality doctrine must distinguish between laws that differentiate along gender-based lines and laws governing reproductive biology). See generally Janet Golden, "A Tempest in a Cocktail Glass": Mothers, Alcohol, and Television, 25 J. HEALTH POL. POLY & L. 473, 473-80 (June 2000) (providing numerous examples of news broadcasts in which pregnant women who consumed alcohol during their pregnancy were depicted as danger to society).

44 See Schmall, supra note 17, at 306-08 (arguing that coercive actions deny women their constitutional rights to liberty and privacy) (citing Olmstead v. United States, 277 U.S. 438, 478 (1928)) (Brandeis, J., dissenting).
45 See U.S. CONST. amend. XIV.

47 See Schmall, supra note 17, at 306-08 (arguing that criminal prosecution of drug addicted pregnant women deprives women of their fundamental right to privacy). But see Nova D. Janssen, Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy, 48 DRAKE L. REV. 741, 765 (2000) (pointing out that even the Roe Court questioned whether previously articulated right to privacy is equivalent to unlimited right to do with one's body as one pleases); Julia Elizabeth Jones, State Intervention in Pregnancy, 52 LA. L. REV. 1159, 1168 (1992) (stating that statute punishing women for giving birth to drug-addicted babies is either gender-based or based on pregnancy, requiring in either case only intermediate level scrutiny and probably surviving equal protection challenge).
limits on a [S]tate’s right to interfere with a person’s most basic
decisions about family and parenthood.” If a woman, more
specifically a pregnant woman, is a “person” as defined and
protected under the Constitution, then the State’s right to
interfere in her familial decisions is limited. Therefore, a
State’s right to interfere in a woman’s decisions while she is
pregnant is also limited, if not unacceptable, as a violation of a
woman’s fundamental right to privacy.

In addition to her fundamental right to privacy, a woman, as a
“person” protected by the Constitution, also enjoys the
fundamental right of liberty. In Thornburgh v. National
College of Obstetricians and Gynecologists, the Court stated
that the “Constitution embodies a promise that [a] certain
private sphere of individual liberty will be kept largely beyond
the reach of government,” extending to both men and women.

One of the “private spheres of individual liberty” kept beyond the

49 See id. at 908; see also Schmall, supra note 17, at 307 (citing in fn. 159 United
States Supreme Court cases in which Court outlines some of rights possessed by people
with regards to family and parenthood); see also Eisenstadt v. Baird, 405 U.S. 438, 440
(1972) (holding statute that prohibited unmarried persons from obtaining contraceptives
invalid and rejecting distinction between married people and unmarried people as
irrational; Griswold v. Connecticut, 381 U.S. 479, 480-85 (1966) (holding State law which
prohibited use of contraceptives by married people unconstitutional and establishing
fundamental right to privacy in family matters); Pierce v. Society of Sisters, 268 U.S. 510,
534 - 35 (1925) (furthering parents right to make educational decisions for their children
by invalidating State prohibitions of private religious schools); Meyer v. Nebraska, 262
U.S. 390, 390-403 (1923) (holding parents have the right to make educational decisions for
their children).

50 See Schmall, supra note 17, at 307 (discussing number of United States Supreme
Court cases in which Court defines and protects "persons" right to make decisions
regarding his/her family). See generally Meera Worth, Note, Spousal Notification and the
state interference with individual’s right to privacy involving domestic relations is not
free from constitutional restraints); Juhi Mehta, Note, Prosecuting Parents under
Fornication Statutes: A Constitutionally Suspect Legal Solution to the Social Problem of
rights of women in childbearing exists and extends to minors, therefore state must show
compelling state interest in criminalizing consensual sex between minors).

51 See Schmall, supra note 17, at 307 (arguing that State's interference with woman's
decisions while she is pregnant is violation of woman's fundamental right to privacy); see
also Carol Jean Sovinski, The Criminalization of Maternal Substance Abuse: A Quick Fix
to a Complex Problem, 25 PEPP. L. REV. 107, 118-19 (stating prosecution of women for
their behavior during pregnancy implicates right to privacy); Worth, supra note 50, at
1131.

52 See Schmall, supra note 17, at 307 (discussing constitutional right of liberty).


54 See id. at 772; see also Schmall, supra note 17, at 307; James R. Schueller, Note,
The Use of Cocaine by Pregnant Women: Child Abuse or Choice?, 25 J. LEGIS. 163, 176
(1999) (referring to large areas of privacy outside sphere of government intrusion).
reach of the government is a woman's right to procreate. 55 This fundamental right of liberty should extend to a woman's actions while she is in the process of procreation — while she is pregnant. 56 The criminal prosecution of drug addicted pregnant women not only subordinates women, depriving them of their fundamental rights to privacy and liberty, but also destroys their right to personal autonomy. 57

2. The Woman's Right to Personal Autonomy

The right asserted by women, pregnant or not, drug addicted or not, is the right to personal autonomy. 58 Personal autonomy is the right to be free from interference by others and the ability to flourish among and in relation to others. 59 A woman's right to

55 See Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (discussing Oklahoma criminal statute that sterilizes "habitual criminal" as depriving persons of their basic liberty to marry and procreate); see also Loving v. Virginia, 388 U.S. 1, 2 (1967) (discussing person's fundamental right to marry extends to any person he or she chooses). See generally Reed v. Campagnolo, 810 F. Supp. 167, 169 (Md. Dist. Ct. 1993) (discussing wrongful birth cause of action, giving parents of child born with birth defects right to sue doctor for negligence which denied them opportunity to abort pregnancy).

56 See Schmall, supra note 17, at 308–09 (discussing fundamental right of liberty possessed by women during pregnancy). But see Schueller, supra note 54, at 176 (stating constitutional rights and liberty interests do not include right to use drugs during any state of pregnancy and laws prohibiting such do not burden fundamental rights).

57 See Schmall, supra note 17, at 309 ("Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed [S]tate incursions into the body repugnant to the interests protected by the Due Process Clause.") (citing Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 305 (1990)) (O'Connor, J., concurring); see also Chan, supra note 16, at 821 (discussing negative impact of criminalization on women's bodily integrity). But see Chan, supra, note 2, at 223 (arguing that criminalization of drug use during pregnancy would not unduly burden women's right to bodily autonomy but would serve state's interest in protecting potential life).


autonomy is her right to be her own sovereign. Women's advocates argue that the criminal prosecution of drug addicted pregnant women threatens the personal autonomy of women because it allows the state to interfere with a woman's body while she is pregnant, keeping her in a subordinate position.

In the 1970's, in an effort to end the subordination of and enhance the autonomy of women, academic scholars began to challenge the law's claim to neutrality, rationality, and objectivity. Laws that were enacted under the guise of protecting women, and thus claimed by the state to be rational, often resulted in threatening a woman's right to personal autonomy. In a 1981 case, Michael M. v Superior Court of

60 See Bartlett, supra note 21, at 804 (discussing meaning of personal autonomy to woman); see also Information Is Vital, CHI. DAILY HERALD, Aug. 13, 2000, at 13 (discussing reproductive choice as extension of woman's personal autonomy). See generally Deborah L. Rhode, Feminist Critical Theories, 42 STAN. L. REV. 617, 634 (1990) (discussing woman's right to autonomy in context of reproductive rights); Tara Rayne Shewchuk, Regulation of Pre-Conception Agreements: A Synthesis of Individual Rights and Community Values, 1 HEALTH L.J. 147, 166-77 (1993) (discussing that woman's right to autonomy includes reproductive choices).

61 See Bartlett, supra note 21, at 804; see also Page McGuire Linden, Drug Addiction during Pregnancy: A Call for Increased Social Responsibility, 4 AM. U. J. GENDER & LAW 105, 111 (1995) (discussing problems with criminal prosecution as it relates to individual rights). See generally Johnson, supra note 19, at 600 (discussing threats to women's fundamental rights). But cf. Wilkins, supra note 58, at 1426 (advocating that criminal prosecution statutes would survive strict scrutiny if narrowly drawn).

62 See Bartlett, supra note 21, at 804; see also Cahn, supra note 16, at 821 (discussing subordination of women); see also Caroline Morris, Technology and the Legal Discourse of Fetal Autonomy, 8 UCLA WOMEN'S L.J. 47, 51 (1997) (discussing subordination of women due to enhanced fetal rights); Barbara Hewson, A Women's Freedom under Attack, TIMES, July 8, 1997 (stating that fetal rights proponents argue that "pregnant women are a subordinate class"). See generally Bobbi C. Sternheim, Shaping Social Justice, Law Advances Women's Rights through Litigation, N.Y. L.J., May 1, 1992, at S-8 (stating that traditionally law has "perpetrated the subordinate status of women").

63 See Bartlett, supra note 21, at 804 (discussing effort by women and scholars to end subordination by challenging neutrality, rationality and objectivity of law). See generally Trinity Indus., Inc. v. Occupational Safety and Health Review Comm'n, 16 F.3d 1455, 1464 (6th Cir.) (1994) (discussing link between neutrality and objectivity); Berta Esperanza Hernandez-Truyol, Virtual Equality as Constitutional Reality: An Introduction, 11 ST. JOHN'S J. LEGAL COMMENT. 1, 4 (1995) (discussing neutrality and objectivity as myth in law); Marcela V. Rodriguez, Pedagogy and Law: Ideas for Integrating Gender into Legal Education, 7 AM. U.J. GENDER SOC. POLY & L. 267, 273 (1999) (discussing the law and preserving its "objectivity, rationality... and neutrality").

Sonoma County, the court held a statutory rape law that criminally prosecuted males only, as the aggressors in sex, for the act of sexual intercourse with a female not his wife under the age of eighteen, did not violate Equal Protection because the difference in treatment of males and females was necessary to "equalize" the physiological differences between men and women. In this pious attempt by the Court to "equalize" the differences between men and women, the Court severely inhibited a woman's right to personal autonomy. The Court stripped the power of consent from the female under the age of eighteen and in the process maintained control over the female body, eighteen or older.

The principle of equal treatment and formal equality brought and women).

450 U.S. 464 (1981) (holding that statutory rape statute that imposes criminal sanctions solely on males serves as equalizer of deterrents to engage in sexual intercourse between sexes); see also Bartlett, supra note 21, at 804-24.


See Bartlett, supra note 21, at 807 (discussing woman's right to personal autonomy); see also Alda Facio, The Law: An Art or a Science, 7 Am. U. J. Gender Soc. Pol'y & L. 355, 366 (1998) (explaining that when laws are promulgated to take women into account or grant them right, they may actually be do more harm to women); Jonathan Todres, Prosecuting Sex Tour Operators in U.S. Courts in an Effort Reduce the Sexual Exploitation of Children Globally, 9 B.U. Pub. Int. L. J. 1, 5 (Fall 1999) (noting that scholars believe Mann Act, which was designed to help women, actually inhibits their rights). See generally, David E. Bernstein, Sex Discrimination Laws Versus Civil Liberties, 1999 U. Chi. Legal F. 133, 133-35 (1999) (standing for general proposition that discrimination laws should not be passed if they impinge on fundamental rights).

See Bartlett, supra note 21, at 807 (discussing subordination of women); see also Mary Anne Case, Symposium, Discrimination and Inequality Emerging Issues "The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 Cornell L. Rev. 1447, 1460 (July 2000) (discussing while combat and draft exclusion for women can be viewed as benefit, it results in concrete deprivation of opportunity, citizenship value, inclusion and rights); Suzanne Sangree, Title IX and the Contact Sport Exemption: Gender Stereotypes in a Civil Rights Statute, 32 Conn. L. Rev. 381, 440 (Winter 2000) (stating that Title IX contact sports exemption reconfirms stereotype that women are inferior and restricts their rights to integrate with men in contact sports). See generally Cahn, supra note 16, at 818 ("Because women are so closely identified with their children, they are treated particularly harshly for alleged crimes against their children.").
about a change in the law.\textsuperscript{69} The theory of formal equality explains that, "individuals who are alike should be treated alike, according to their actual characteristics rather than stereotypical assumptions made about them."\textsuperscript{70} Under this theory, and after reevaluating the rationale used in the upholding of the statutory rape law in the \textit{Michael M}. case,\textsuperscript{71} many jurisdictions have either abolished or changed the law. Liability for consensual sex is imposed only if there is a large age difference between the parties and the "victim" is under the statutory age of consent.\textsuperscript{72} Statutory rape laws were not the only laws by which a woman was deprived of personal autonomy.\textsuperscript{73} Rape, abortion and

\textsuperscript{69} See Bartlett, \textit{supra} note 21, at 101 (discussing change in law brought about by equal treatment and theory of formal equality); see also Lucinda M. Finley, \textit{Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate}, 86 COLUM. L. REV. 1118, 1121 (Oct. 1986) (critiquing use of equality analysis as transformative device for challenging social and economic subordination of women). \textit{But see} Mary Becker, \textit{Patriarchy and Inequality: Towards a Substantive Feminism}, 1999 U. CHI. LEGAL F. 21, 21 (1999) (stating that formal equality cannot seriously challenge patriarchy); Kathleen Mahoney, \textit{Theoretical Perspectives of Women's Human Rights and Strategies for Their Implementation}, 21 BROOK J. INT'L L. 799, 800 (1996) (arguing fundamental equality theory cannot properly address issues because it is based on false assumption that basic institutions of society are fair).


\textsuperscript{72} See Bartlett, \textit{supra} note 21, at 819-20 (discussing "promiscuity defense" to crime of statutory rape as existing way in which modern courts continue to maintain control over female body, robbing her of personal autonomy by allowing "intrusive and value-laden inquiry into the victim's sexual past."); see also MISS. CODE. ANN. § 97-3-65 (2000) (removing from rape charges anyone within thirty-six months of minor if perpetrator is seventeen and over, or twenty-four months if perpetrator is under seventeen); ARK. STAT. ANN. § 5-14-103 (1999) (making affirmative defense to rape that perpetrator be within two years of victim who is fourteen or less); CAL. PENAL CODE § 261.5 (West. 1997) ("[A]n act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator is guilty of a misdemeanor, whereas any person over the age of 21 years who engages in unlawful sexual intercourse with a minor under 16 years of age may be guilty of either a misdemeanor or a felony."); Donald A. Dripps, \textit{Beyond Rape: An Essay on the Difference between Presence of Force and the Absence of Consent}, 92 COLUM. L. REV. 1780, passim (Nov. 1992) (re-evaluating rape).

\textsuperscript{73} See Bartlett, \textit{supra} note 21, at 819-20 (discussing impact of statutory rape laws on women); Margaret A. Baldwin, \textit{Public Women and the Feminist State}, 20 HARV. WOMEN'S L.J. 47, n. 283 (Spring 1997) (discussing Catherine Mackinnon's feminist critique of privacy as depriving women of identity, autonomy, control and self-definition). \textit{See generally} Lynn D. Wardle, \textit{The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists}, 62 ALB. L. REV. 853, 948 (1999) (discussing effect of \textit{Roe v. Wade} in making abortion exclusively women's decision as endorsing sexist notion that men have non interest in birth and that it should be woman's problem).
pregnancy laws, all laws created for the supposed protection of women, threatened a woman's right to personal autonomy.\textsuperscript{74} Although formal equality may seem to promote the protection of a woman's right to personal autonomy, it may actually result in the unequal treatment of women.\textsuperscript{75} The imposition of criminal sanctions against drug addicted pregnant women, solely because they are women who are pregnant and therefore should be treated alike, may result in a rationale that allows for the differential treatment of women because of their common capacity to become pregnant.\textsuperscript{76}

When a woman becomes pregnant, her rights to privacy, liberty and personal autonomy conflict with the rights of a fetus.\textsuperscript{77} Many jurisdictions disagree on the issue of rights possessed by a fetus.\textsuperscript{78} The disagreement begins with the

\textsuperscript{74} See Bartlett, supra note 21, at 819-20 (discussing woman's right to personal autonomy). See generally Bernstein, supra note 67, passim (standing for general proposition that discrimination laws should not be passed if they impinge on fundamental rights); Fazio, supra note 67, at 366 (explaining that when laws are promulgated to take women into account or grant them right, they may actually do more harm to women); Todres, supra note 67, at 5 (noting that scholars believe Mann Act, which was designed to help women, actually inhibits their rights).

\textsuperscript{75} See Bartlett, supra note 21, at 819-20 (discussing formal equality). But see Becker, supra note 69, at 21 (stating that formal equality cannot seriously challenge patriarchy); Mahoney, supra note 69, at 799 (arguing fundamental equality theory cannot properly address issues because it is based on false assumption that basic institutions of society are fair). See generally Finley, supra note 69, at 1121 (critiquing use of equality analysis as transformative device for challenging social and economic subordination of women).

\textsuperscript{76} See Bartlett, supra note 21, at 819-20 (discussing formal equality); see also Linden, supra note 51, at 110-118 (drawing upon tenets of cultural feminist theory to advocate solutions which not only recognize that interests of mother and fetus are compatible, rather than conflicting, but also recognize societal duty to aid substance-addicted pregnant women); Schmall supra, note 17, at 308-09 (arguing criminal prosecution of drug addicted pregnant women treats women differently due to their biological ability to become pregnant); Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, Women's Rights and Fetal Personhood in Criminal Law, 7 DUKE J. GENDER L. & POL'Y 89, 90 (2000) (noting that "idea of protection is still involved to circumscribe rights of women based on their biological and social roles.").

\textsuperscript{77} See also Kary Moss, Substantive Abuse during Pregnancy, 13 HARV. WOMEN'S L.J. 278, 286 (1990) (arguing that when society chooses to punish pregnant women for their drug use, it opens door to placement of additional restrictions on women's behavior during pregnancy); Paltrow, supra note 13, at 1004 ("The prosecutions of pregnant women represent a significant threat to reproductive freedom. . ."); Schmall, supra note 17, at 308-12 (discussing conflicts between woman's right to privacy, liberty and personal autonomy and rights of fetus). See generally Schroedel, supra note 76, at 96-99 (examining three major areas of criminal law that deal with question of fetal rights: abortion, substance abuse by pregnant women, and prenatal battering/third party fetal killing).

\textsuperscript{78} See Paltrow, supra note 13, at 1004-08 (discussing South Carolina's approach to protecting rights of fetus through use of State's criminal child endangerment statute, and discussing estimated two hundred women have been prosecuted around country on different jurisdictions theories of fetal abuse); see also Joseph R. Henry, Laura E. Gomez,
question of whether a jurisdiction should recognize that a fetus possesses any rights. If so, the issue becomes, at what point does a fetus develop this right? Thus, creating the battle over fetal rights.

**B. The Battle Over Fetal Rights**

The right in question with regards to the fetus is simply whether the fetus has the right to physical integrity. The answer, however, is difficult. Jurisdictions "battle" over the correct answer to the question regarding fetal rights, resulting in an answer that varies from jurisdiction to jurisdiction.

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*Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure, 3 J. HEALTH CARE L. & POLY 207, 208–16 (discussing California's approach to prosecution of drug addicted pregnant women); John A. Robertson, Procreative Liberty and the Control of Conception, Pregnancy and Childbirth, 69 VA. L. REV. 405, 406 (1983) (noting social and scientific developments currently drawing attention to meaning and scope of positive rights of both parties).*

*See Roe v. Wade 410 U.S. 113, 132 (1973) (discussing rights, if any, possessed by fetus); see also Stenberg v. Carhart, 120 S. Ct. 2597, 2597 (2000) (utilizing principle that subsequent to viability, states in promoting their interest in potentiality of human life may, if it chooses, regulate abortion except where it is necessary for preservation of mother's life or health); Johnsen, supra note 19, at 599 (offering that relevant legal question ought not to be whether fetus is 'alive' from the moment of conception, or moment of viability, etc., as if question were one of solely natural rather than social decision); Paltrow, supra note 13, at 1002-06 (discussing conflict between rights of fetuses and pregnant women, and examining action taken by states).*

*See Albert R. Jonsen, Transition from Fetus to Infant: A Problem for Law and Ethics, 37 HASTINGS L.J. 697, 697 (May 1986) (concluding that "issues in Procreational Autonomy, demands something unusual: the topic evokes profound personal emotions, excites bitter social debates, draws upon a long tradition of moral reflection, and raises deeply embedded principles of the common law."); see also Gina Kolata, Bias Seen against Pregnant Addicts, N.Y. TIMES, July 20, 1990, at A13 (citing expert statements indicating most women prosecuted for using illegal drugs while pregnant have been poor members of racial minorities, even though drug use in pregnancy is equally prevalent in white middle-class women). See generally Julia Epstein, Symposium, The Sacred Body in Law and Literature: the Pregnant Imagination, Fetal Rights, and Women's Bodies, 7 YALE J.L. & HuMAN. 139, 141 (analyzing historical underpinnings of modern view of pregnancy in attempt to understand recent trend toward criminalizing pregnant women's behavior or status in relation to their gestating fetus).*

*See Jonsen, supra note 80, at 697 (stating that "[t]he fetus in utero and the infant extra uterum are affected radically and ultimately, for law and policy can mean for them life and death."); see also Johnsen, supra note 19, at 600-601 (noting state creation of adversarial relationship between women and their fetuses as means of controlling women's behavior during pregnancy); Tamar Lewin, Abuse Laws Cover a Fetus, a High Court Rules, N.Y. TIMES, Oct. 30, 1997, at A22 (reporting South Carolina's high court ruling that upholds criminal prosecution of pregnant women who used drugs, noting that decision runs contrary to every other state supreme court that has addressed issue); Isabel Wilkerson, Woman Cleared after Dug Use in Pregnancy, N.Y. TIMES, Apr. 3, 1991, at A15 (noting Michigan appeals court ruling that women should not stand trial on charges of delivering cocaine to newborns through umbilical cord).*

*See Supreme Court Has Limited State Interest in Potential life, ST. LOUIS POST-DISPATCH, Mar. 3, 2000, at C15 (discussing public debate over fetal rights with reference
In 130-200 A.D., with the creation of the Hippocratic Oath, came the development of fetal rights, for it was the doctors who subscribed to the Hippocratic Oath that first rejected abortion.\(^8\) As the Oath gained popularity among doctors, it set the stage for the common law in England and eventually the common law in America.\(^8\) At first in common law, it was not considered a crime to perform or receive an abortion before the "quickening" of the fetus – quickening being defined as the "first recognizable movement of the fetus in utero... usually [between] the sixteenth to eighteenth week of pregnancy."\(^8\) As time passed the distinction between the "quickened" fetus and the "un-quickened" fetus began to fade, resulting in the enactment of the 1828 New York legislation that made all abortions illegal, "un-quickened" as well as "quickened."\(^8\) "By the end of the 1950's, a large

\(^8\) See Roe, 410 U.S. at 132 (characterizing origins of Hippocratic Oath in 130-200 A.C.E. as "nucleus of medical ethics" and discussing beginnings of modern resistance to suicide and abortion); see also TABER'S CYCLOPEDIC MEDICAL DICTIONARY 902 (18th ed. 1997); Matthew P. Previn, Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life, 84 GEO. L. J. 589, 594 (1996) (explaining when Hippocratic Oath was adopted by Pythagoreans it expressed their view on sanctity of life).

\(^8\) See Roe, 410 U.S. at 133-40; see also Washington v. Glucksberg, 117 S. Ct. 2258, 2273 (1997) (describing promise physician makes when taking Hippocratic Oath to "neither give a deadly drug to anyone if asked for it nor...make a suggestion to this effect."); Jeffrey L. Lenow, The Fetus as a Patient: Emerging Rights as a Person, 9 AM. J.L. AND MED. 1, 12 (1983) (discussing powerful ethical and moral combination of maternal instinct and Hippocratic Oath "not to abort fetus which is capable of independent ex-utero survival.").


\(^8\) See Roe, 410 U.S. at 138 (discussing gradual adoption by American States of legislation that banned and punished completed abortions as well as attempts to receive abortion, with exception of therapeutic abortions – those abortions necessary to preserve life of mother); see id. at 139, n. 31 (citing New York anti-abortion legislation); see also Kelley P. Swift, Hope v. Perales: Abortion Rights under the New York State Constitution, 61 BROOK. L. REV. 1473, 1512 (1995) (discussing history of New York legislation regarding abortion rights). See generally Kayhan Parsi, Metaphorical Imagination: The
majority of jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. From this historical context came the present day argument in support of a fetus’ right to physical integrity.

The argument in support of the fetus’ right to physical integrity was first presented to the Supreme Court in the 1973 case Roe v. Wade. The argument claimed that the fetus was a “person” within the meaning of the Fourteenth Amendment and is therefore entitled to constitutional protections. The Fourteenth Amendment reads as follows: (1) Amendment IX, “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people;” and (2) Amendment XIV, “[No State shall] deprive any person of


See Paltrow, supra note 13, at 1000 (discussing strategy of anti-choice activists, which is to reverse Roe and have fetuses recognized as full “persons” under law, affording fetuses full protection under Constitution). See generally Bruce Fein and William Bradford Reynolds, Let the State Legislatures Grapple with the Abortion Dilemma, MANHATTAN LAW., June 13, 1989, at 13 (noting legislative debates between pro-choice and pro-life forces). Cf. Edwin M. Yoder, Pro-Choice Marchers Forget How Court Works, ST. PETERSBURG TIMES, Apr. 12, 1989, at 17A (arguing function of court is not to secure majority rights); cf also Letitia Kowalski, Looking for a Solution: Determining Fetal Status for Prenatal Drug Abuse Prosecutions, 38 SANTA CLARA L. REV. 1255, 1285 (1998) (explaining States have been reluctant to intrude in body of individual for sake of another).


See Roe, 410 U.S. at 156 (arguing fetus is “person” within meaning of Fourteenth Amendment); see also Buelow, supra note 85, at 985 (discussing case law addressing issue whether fetus is “person” as stated in Fourteenth Amendment); The Fetus Lost in the Labyrinth Ways of the Law,"N.Y. TIMES, Aug. 10, 1983, at A22 (urging that Supreme Court’s approach is example of legal formalism). See generally Ralph Schaffer, Lawmakers Wrestle a Concept: Is a Fetus a Person?, SAN DIEGO UNION-TRIB., Feb. 18, 1990, at C3 (noting cases regarding right of fetus to protection as person).
life, liberty, or property without due process of law; nor . . . deny any person . . . equal protection of the laws."  

In a careful analysis to determine if a fetus was a "person" within the meaning of the Fourteenth Amendment, the *Roe* court discussed specific references to the term "person" within the Constitution, concluding that none of the references had any possible prenatal application. Even though the Court did not find the fetus to be a "person" within the meaning of the Constitution, it did recognize that the fetus had protectable interests beyond the Constitution. Thus, although not under the auspices of the Fourteenth Amendment, a state may define and protect rights of a fetus, opening the door for the imposition of criminal sanctions against drug addicted pregnant women.  


94 See *Roe*, 410 U.S. at 162 (concluding that in certain situations State may define and protect rights of fetus); see also Sam S. Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1235 (May 1987) (asserting that criminal penalties should be imposed onto women who abuse drugs and alcohol during pregnancy). See generally *Developments in the Law - Medical Technology*
In the war called the fetal-maternal conflict, the battle over the rights of the fetus is a battle that feminists argue women cannot afford to lose. The protection of the fetus through coercive actions against its pregnant mother does nothing but subordinate women, depriving them of their fundamental right to privacy, liberty and personal autonomy. Although there is a risk to the fundamental rights of women, states argue that the "interest in the preservation and protection of potential life outweighs the pregnant mother’s privacy."
C. The Rights of The State

The states regulation of pregnant women\(^9\) balances the woman's right to privacy, liberty and physical autonomy against the fetus' right to physical integrity and the states' interest in potential human life.\(^9\) The states' interest in protecting children dates back to 1925 in a United States Supreme Court case Pierce v. Society of Sisters.\(^10\) In Pierce v. Society of Sisters\(^11\) and its mother to decide whether to kill her child after it was born, court found that it was certainly unconstitutional because court has to protect right of fetus).

\(^{98}\) See Rethinking Motherhood, supra note 42, at 1326 (discussing State's efforts to regulate woman's conduct during pregnancy to include both direct intervention, either through forced medical treatment or preventive detention, and indirect sanctions, such as criminal prosecution and civil penalties) (citing In re Jamaica Hospital, 128 Misc. 2d 1006, 1007-8 (N.Y. Sup. Ct. 1985) in which New York court ordered blood transfusion on woman who was eighteen weeks pregnant because of State's interest in preservation of human life against woman's expressed wishes not to receive transfusion; see also Webster v. Reprod. Health Servs., 109 S. Ct. 3040 (1989) (expanding constitutional permissible scope of State regulation of reproduction); In re A.C., 573 A.2d 1235 (D.C. Ct. of Appeals 1990) (discussing District of Columbia case in which court ordered doctors to perform cesarean section on terminally ill pregnant woman without her consent, based on State's interest in fetus and interests of fetus itself); People v. Pamela Rae Stewart, 16 Ms. 92, 95 (San Diego Mun. Ct., Cal. Feb. 24, 1987) (charging Pamela Stewart with criminal liability for damage to her fetus due to Pamela's disregard of her physician's advice to discontinue use of amphetamine during her pregnancy and to abstain from sexual intercourse); Dep't of Soc. Servs. v. Felicia B., 144 Misc. 2d 169 (Fam. Ct. 1989); In re Danielle Smith, 128 Misc. 2d 976 (Fam. Ct. 1985) (discussing civil penalties imposed on women based on their conduct during pregnancy); Sovinski, supra note 51, at 123-24 (1997) (prosecuting Pamela Stewart for prenatal conduct that led to death of her child was found to be invalid because statute was not intended to create criminal liability for prenatal injury).

\(^{99}\) See Rethinking Motherhood, supra note 42, at 1326; see also Udo Werner, The Convergence of Abortion Regulation in Germany and the United States: A Critique of Glendon's Rights Talk Thesis, 18 LOY. L.A. INT'L & COMP. L.J. 571, 578 (June 1996) (reasoning that state could in second trimester of woman's pregnancy regulate abortion solely to protect woman's health and that during last trimester, state could "go so far as to prescribe abortion' to realize its interest in protecting fetal life". But see Alicia Ouellette, New Medical Technology: A Chance to Reexamine Court-Ordered Medical Procedures during Pregnancy, 57 ALB. L. REV. 937, 947-48 (Summer 1994) (recognizing that Supreme Court has rules that "fetal rights are always subordinate to woman's health and safety" and that regarding issue of forced fetal surgery, woman's right prevails because undergoing major surgery surely compromises her physical health); Paltrow, supra note 13, at 1010-11 (finding that even though state may prohibit abortion after viability, it may not prevent woman of her right "to liberty, privacy, and equality through state-sanctioned 'pregnancy police'")

progeny, the Court concluded that the state's interest in safeguarding children extends against their parents. These cases set the precedent for the states' interest in the protection of both pregnant women and their fetuses. The states' interest developed in a 1973 United States Supreme Court case, *Roe v. Wade*, where the court held that although a woman had a right to obtain an abortion, her right to terminate her pregnancy was not absolute.

Concluding in *Roe* that "the right of personal privacy includes the abortion decision, but that right is not unqualified and must be considered against important [S]tate interests in regulation" solidified the states' interest in the protection of potential human life. Though the states' interest in the protection of the fetus may limit a woman's fundamental right to privacy, the Court justified such limitations by claiming a "compelling [S]tate

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101 See Pierce, 268 U.S. at 516.
102 See Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (emphasizing State's interest in guarding welfare of child in public places and streets "even against the wishes of a parent."); *see also* Schleifer v. City of Charlottesville, 159 F.3d. 843, 853 (4th Cir. 1999); Bellotti v. Baird, 443 U.S. 622, 634 (1972) (setting out *Bellotti* analysis to determine standard of review for legislation regarding minors, which includes three factors: (1) peculiar vulnerability of children, (2) inability of children to make critical decisions in informed, mature manner and (3) importance of parental control in child rearing); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
104 See *Roe*, 410 U.S. 113, 133 1973); *see also* Siegel, *supra* note 103, at 277 (discussing *Roe's* account of history of abortion).
105 See *Roe*, 410 U.S. at 150 (discussing Blackmun's decision in which court held that "States have legitimate interests in seeing to it that abortions are performed under circumstances that insure maximum safety to the patient [and] a woman's right to terminate her pregnancy is not absolute, and may . . . be limited by the state's legitimate interests in safeguarding the woman's health, in maintaining proper medical standards and in protecting human life."); *see also* Siegel, *supra* note 103, at 275 (discussing *Roe's* account of state regulatory interests in abortion). See generally Christina L. Misner, *What If Mary Sue Wanted an Abortion Instead? The Effect of Davis v. Davis on Abortion Rights*, 3 AM. U. J. GENDER SOC. POLICY & LAW 265, 274-77 (1995) (discussing woman's right to obtain abortion).
interest” in the protection of potential human life.\textsuperscript{107} At some point in time it is “reasonable and appropriate” for states to decide that the health of a potential human life “becomes significantly involved [and the] woman's [right to] privacy is no longer sole . . . [and] must be measured accordingly.\textsuperscript{108} At this point, the woman's fundamental right to privacy becomes an issue of autonomy, questioning whose rights will reign supreme, the woman's right to personal autonomy or the fetus' right to physical integrity and the states' interest in the protection of that physical integrity.\textsuperscript{109}

The \textit{Roe} Court did not answer this question.\textsuperscript{110} Although the Court stated the “point in time” did not begin at conception, the Court did not say when this point in time did begin.\textsuperscript{111} Thus, while creating the interest in the protection of the fetus, the Court also created confusion as to when and in what form states should exercise this protection.\textsuperscript{112} It was left up to the individual jurisdictions to determine when a person's life really began in


\textsuperscript{108} See \textit{Roe}, 410 U.S. at 159; see also Dyke, \textit{supra} note 107, at 875-77 (discussing trimester framework developed in \textit{Roe} case to determine when fetus becomes viable and when state may regulate woman's choice to terminate her pregnancy); Reichman, \textit{supra} note 107, at 777 (stating that Court has qualified conclusion that "the right to abortion must be balanced against states' interest in protecting . . . the unborn child"); Joan R. Bullock, \textit{Abortion Rights in America}, 1994 BYU L. 63, 78-84 (1994) (discussing women's abortion rights as opposed to rights of fetus).

\textsuperscript{109} See Schmall, \textit{supra} note 17, at 300-08 (discussing woman's right to personal autonomy versus fetus' right to physical integrity); see also Bullock, \textit{supra} note 108, 77 (discussing women's rights); Reichman, \textit{supra} note 107, at 777 (discussing case law developments in determining at what point states interest in protecting fetus outweighs woman's right to privacy and physical integrity).

\textsuperscript{110} See \textit{Roe}, 410 U.S. at 132-60. The Court never really answers the question of when a fetus' right to physical integrity and the State's interest in the protection of that right overrides the woman's right to personal autonomy. \textit{Id.; see also Bullock, \textit{supra} note 108, at 79 (discussing point of viability of fetus).}

\textsuperscript{111} See \textit{Roe}, 410 U.S. at 160 (“When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer [of when life begins].”); see also Bullock, \textit{supra} note 108, at 79 (discussing the point of viability of fetus).

\textsuperscript{112} See \textit{id.} (reviewing various religious and philosophical beliefs articulating when human life begins). \textit{But see} Stenberg v. Carhart, 120 S. Ct. 2597, 2609 (2000) (stating, “[t]he State's interest in regulating abortion pre-viability is considerably weaker than post viability”); Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992) (holding valid \textit{Roe's} central holding, “viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions”).
order to be protected by the state.\textsuperscript{113}

There is a large discrepancy among doctors, lawyers, scholars, philosophers, and neighbors as to when a human life begins.\textsuperscript{114} Most people when asked the question, "When does a person's life really begin?" would answer at fertilization or conception.\textsuperscript{115} Biologically, human life begins before fertilization, "since the egg or oocyte is alive before sperm entry, as were innumerable antecedent cells, back through the origin of [the] species."\textsuperscript{116} Exactly which stage of human reproduction marks the beginning of a human life is a matter of opinion and may vary from person to person.\textsuperscript{117} It is important, however, from a legal standpoint, to

\textsuperscript{113} See generally Casey, 505 U.S. at 913 n.2 (Stevens, J. concurring in part and dissenting in part) (quoting Ronald Dworkin, \textit{Unremunerated Rights: Whether and How Roe Should Be Overruled}, 59 U. CHI. L. REV. 381, 400-01 (1992) (arguing if states were free to declare fetus personhood, states could overrule constitutional rights by creating new persons); Golden, \textit{supra} note 43, at 473 (discussing number of news broadcasts from various jurisdictions, displaying women who consume alcohol and drugs during their pregnancies and State's attempts to regulate these women); Linden, \textit{supra} note 61, at 117-20 (1995) (discussing state's changes use of criminal statutes allowing prosecution for fetal death); Paltrow \textit{supra} note 13, at 1010-11 (stating Supreme Court may allow states to determine start of life, but Court has last say about competing rights of state and privacy).


\textsuperscript{115} See Furrow, \textit{supra} note 114, at 891 ("Fertilization continues to be the cry of many religious bodies and indeed also of the [August World Medical Association, who, in 1949, adopted the Geneva Convention Code of Medical Ethics, which contains the clause: 'I will maintain the utmost respect for human life from the time of conception.'); see also Clarke D. Forsythe, \textit{Human Cloning and the Constitution}, 32 VAL. U. L. REV. 468, 504 n.161 (1998) (quoting John Robertson, RESOLVING DISPUTES OVER FROZEN EMBRYOS, Hasting Ctr. Rep., Nov.-Dec. 1989, at 11 “While the preimplantation embryo is clearly human and alive, it does not follow that it is also a 'human life' or 'human being' in the crucial sense of a person with rights or interests’’); Bartha M. Knoppers & Sonia LeBris, \textit{Recent Advances in Medically Conception: Legal, Ethical, & Social Issues}, 17 AM. J. L. & MED. 329, 329 (1991) (discussing ethical and legal questions of when life begins).

\textsuperscript{116} See Furrow, \textit{supra} note 114, at 891-93 (explaining human reproductive process from primordial germ cells, cells that make up tissue of early embryo, to time at which fetus can survive outside maternal body); see also Parsi, \textit{supra} note 86, at 753 (making distinction between embryos and pre-embryos and beginnings of human life). But see Stephen C. Hicks, \textit{The Right to Life in the Law: The Embryo and Fetus, the Body and Soul, the Family and Society}, 19 FLA. ST. U. L. REV. 805, 828 (1992) (discussing alternative question of when person receives her soul).

\textsuperscript{117} See Furrow, \textit{supra} note 114, at 891; see also Paltrow, \textit{supra} note 13, at 1009 (discussing concurring opinion by Justice Stevens in \textit{Planned Parenthood v. Casey} in which he writes that developing organism is not yet "person" and does not have "right to
develop a practical consensus regarding the beginning point of a human life because the decision directly affects the rights of the woman and, in turn, the rights of the fetus.118

While the Supreme Court has never formally determined when a fetus becomes a "person" for constitutional purposes,119 the Court has developed a state interest in the protection of potential human life, opening the door for the criminal prosecution of pregnant women on behalf of the fetus.120 Although there still remains a discrepancy among jurisdictions as to when a human life begins, the trend over the past fifteen years has been to expand the common law rights of the fetus and recognize that a fetus can be a victim for the purposes of civil and criminal litigation.121 For example, most states now permit an estate to file a tort cause of action on behalf of a stillborn child, when slightly over ten years ago a majority of states would have


119 See Roe v. Wade, 410 U.S. 113, 156 (1973) (holding term "person" as it appears in Fourteenth Amendment is not intended to include fetus); see also Planned Parenthood v. Casey, 505 U.S. 833, 913-14 (1992) (reaffirming Roe's holding that, "the unborn have never been recognized in law as persons in whole sense"). See generally Jed Rubenfeld, On the Legal Status of the Proposition that "Life Begins at Conception", 43 STAN. L. REV. 599, 599 (1991) (discussing problems developing because Court never decided whether fetus was independent person).

120 See Roe, 410 U.S. at 154 (concluding that State has interest in protection of potential human life); see also Reinstein v. Super. Ct. of Ariz., 894 P.2d 733, 734 (Ariz. 1995) (dismissing charges of child abuse brought against woman who used heroin while pregnant); State v. Luster, 419 S.E.2d 32, 37 (Ga. 1992) (dismissing drug distribution charges against pregnant woman who used cocaine while pregnant because court held legislature did not contemplate use of statute for "distribution" to fetus).

required the child to be born alive before the accrual of the tort action. In addition, over the past several years, some states have made penalties for feticide (the killing of a fetus) similar to those penalties imposed for homicide, and several states have created new homicide statutes to explicitly include fetuses as those whose death may give rise to homicide prosecutions. These trends in applying criminal sanctions to actions taken against the fetus have paved the way for the criminal prosecution of drug addicted pregnant woman.


In the criminal prosecution of drug addicted pregnant women the rights at issue, which are women's rights to privacy, liberty and personal autonomy, the rights of a fetus to physical integrity and the rights of the state in the protection of potential human life, collide. A past illustration of a collision between these rights is Roe. In Roe, the Court held that a state law

122 See Furrow, supra note 114, at 893; see also Valerie D. 233 Conn. 492 (1992) (petitioning to terminate parental rights because mother injected herself with cocaine several hours before labor); In re Jesus L. 1990 WL 279626 (Conn. 1990) Memorandum of Decision (petitioning to terminate parental custody based on prenatal substance abuse); Stallman v. Youngquist 125 Ill. 2d. 267 (1988) (bringing action to recover for prenatal injuries sustained in automobile accident); In re Monique T. 2 Cal. App. 4th 1372 (1992) (petitioning to remove child from mother's custody because child tested positive for cocaine immediately after birth); In the Matter of Stefanel Tyesha C. and In the Matter of Sebastian M. 157 A.D. 2d 322 (N.Y. App. Div. 2d. 1990) (petitioning for child neglect judgments against mothers who used cocaine while pregnant); M.S.S. v. Demaio, M.D. 503 So. 2d 1384 (Fla. Dist. Ct. App. 1987) (alleging medical malpractice for injuries cause prenatal and neonatal by physicians); In the Matter of Gloria C. 124 Misc. 2d. 313 (N.Y. Fam. Ct. 1984)(allowing for order of protection on behalf of unborn child).

123 See Furrow, supra note 114, at 896; see also CAL. PENAL CODE § 187(a) (stating "[m]urder is the unlawful killing of a human being, or a fetus, (emphasis added), with malice aforethought."); People v. Dennis, 17 Cal. 4th 468, 499 (1998) (affirming conviction of second degree murder for killing homicide victim's fetus); People v. Davis, 7 Cal. 4th 797, 814 (1994) (affirming "[t]he third party killing of fetus with malice aforethought is murder under section 187, subdivision (a), as long as the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks.").


125 410 U.S. at 147-64 (holding, inter alia, abortion within scope of personal liberty as guaranteed to plaintiff by Due Process Clause of 14th Amendment, though recognizing state has “compelling interest” in both safety of mother and welfare of fetus); see also
criminalizing abortion violates the Due Process Clause of the Fourteenth Amendment,\textsuperscript{126} which protects a persons right to privacy against state action,\textsuperscript{127} including a woman's right to terminate her pregnancy.\textsuperscript{128} Although the state cannot override the right to privacy, it has a legitimate interest in protecting both pregnant women's health and a potential human life, of which each interest grows and reaches a "compelling" point at various stages of the woman's pregnancy until she reaches term.\textsuperscript{129} Thus, creating a conflict between the rights of the pregnant woman, her fetus and the state\textsuperscript{130}—a conflict perpetuated by the imposition of criminal sanctions against pregnant women.\textsuperscript{131}


\textsuperscript{126} See U.S. CONST. amend. XIV § 1 (reading that no State shall deprive any person of "personal liberty"); Stenberg, 147 L. Ed. 2d at 753-54 (striking down partial birth abortion law as violation of United States Constitution); Glucksberg, 521 U.S. at 727 (citing Roe v. Wade in concurring opinion).


\textsuperscript{128} See Roe, 410 U.S. at 147-64 (legalizing abortion); see also Craig v. Boren, 429 U.S. 190, 195 (1976) (citing Eisenstadt); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding statutory ban on contraception per se violates rights of single persons under Equal Protection Clause of Fourteenth Amendment); Griswold, 381 U.S. at 479 (holding abortion within penumbras of rights).

\textsuperscript{129} See Roe, 410 U.S. at 157 (discussing that although woman has right to choose to terminate her pregnancy, "The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is preformed under circumstances that insure maximum safety for the patient [and at the same time, uphold its duty] in protecting prenatal life."); see also Planned Parenthood v. Casey, 505 U.S. 833, 844-46 (1992) (upholding Roe); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 751 (1986) (affirming Roe); Planned Parenthood v. Danforth, 428 U.S. 52, 55 (1976) (following Roe).

\textsuperscript{130} See Roe, 410 U.S. at 150; see also Schroeder, supra note 76, 92 (noting Roe Court established woman's right to privacy while simultaneously establishing that state may have legitimate interest protecting health of woman). See generally U.S. CONST. amend. XIV § 1 (reading no State shall deprive any person of "personal liberty").

\textsuperscript{131} See Schmall, supra note 17, at 313 (discussing conflict of rights created by criminal sanctions imposed upon pregnant drug users). But see Parks, supra note 117, at 250-61 (resolving conflict of rights issues created by criminal sanctions imposed upon pregnant drug users). See generally Paltrow, supra note 13, at 1007-15 (discussing attempts by legislatures to impose criminal sanctions upon pregnant drug users).
The first case of criminal sanctions against a pregnant woman arose in California in 1985, when Pamela Rae Stewart was criminally charged, under a California child support statute, for failing to follow her doctor's instructions while pregnant.132 Stewart was charged after having given birth to a severely brain damaged child who eventually died within six weeks after birth.133 The California Municipal Court dismissed the case, holding the statute was implemented to assure financial support for children and not to control a mother's behavior during pregnancy.134 Even though the charge against Stewart was dismissed, the Stewart case represents one of the first examples where the state attempted to prosecute a mother in order to protect potential human life.135

States provide little consistency regarding the standard of care

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132 See Whitner v. State, 328 S.C. 1 (1997) (the court held that a mother could be deemed criminally liable for prenatal drug use. Id.; People v. Pamela Rae Stewart, 16 Ms. 92, 95 (San Diego Mun. Ct. Feb. 24, 1987). The doctor's instructions to Stewart were to stay off her feet, refrain from sex, and go to the hospital if she started to bleed. At the time, Stewart had two children ages three and five, and claimed it was extremely difficult to remain in bed with two young children. She did admit to having sexual intercourse with her husband on the morning of November 23, 1985 (the day the alleged crime took place), although the bleeding did not begin until the evening. After which, Stewart and her husband, called the paramedics within an hour. Stewart was arrested and charged ten months after she gave birth. Note: Stewart's husband was never charged for committing a crime, although he too was aware of the doctor's instructions not to engage in sexual intercourse while his wife was pregnant. Id.; see also Stephanie L. Hainer Ojeda, Whitner v. State: Expanding Child Abuse and Endangerment Laws to Protect Viable Fetuses from Prenatal Substance Abuse, 99 W. VA. L. REV. 311, 311 (Winter 1996)

The author discusses the Whitner case that came before the Supreme Court of South Carolina, marking the first time the South Carolina Court would interpret the word "child," as found in a child abuse & endangerment statute, to include a viable fetus. Id.

133 See Stewart, 16 Ms. at 95; see also Paltrow, supra note 13, at 1007-15 (discussing numerous approaches by legislatures to impose criminal sanctions upon pregnant women). See generally Victoria J. Swenson and Cheryl Crabbe, Pregnant Substance Abusers: A Problem That Won't Go Away, 25 ST. MARY'S L.J. 623, 631-31 (1994) (stating that state courts have been leading force behind efforts to curb maternal substance abuse, by imposing both criminal and civil sanctions upon substance-abusing mothers).

134 See Stewart, 16 Ms. at 93 (stating California law under which Stewart was charged was enacted in 1925 to actually protect women and force men to financially provide for women they impregnated); see also Paltrow, supra note 13, at 1006-07 (discussing states expansion of civil child abuse laws to include use of drugs while pregnant); Swenson, supra note 133, at 632-42 (discussing both direct and indirect intervention by states to curb substance-abusing mothers).

135 See Chenault v. Huie, 989 S.W.2d 474, 475 (Tex. Ct. App. 1999) (discussing cause of action in tort for injuries to child caused by mother's negligent or grossly negligent conduct during pregnancy); see also Wisconsin v. Deborah J.Z. 596 N.W.2d 490, 493 (Wis. Ct. App. 1999) (charging pregnant woman with first-degree intentional homicide and first-degree reckless injury to her child when her blood alcohol concentration exceeded .3% prior to delivering child); Swenson, supra note 133, at 640-42 (discussing Stewart case).
a pregnant woman owes to her fetus. In Johnson v. State, Jennifer Johnson became the first woman in the United States to be criminally convicted for giving birth to an infant affected by maternal drug use. Johnson was convicted for delivery of a controlled substance from a mother to her child after birth, but before the umbilical cord was cut. Johnson was sentenced to one year of "community control" and fourteen years of probation. Also, Johnson was required to participate in a drug rehabilitation program; obtain a general education diploma (the equivalent to a high school diploma); abstain from the use of drugs and alcohol; refrain from socialization with anyone who used drugs or alcohol; receive permission from a probation officer before going to a bar; and participate in a "judicially approved prenatal care program" if she became pregnant. Although, once again, the conviction was reversed, the Johnson case illustrates a state's interest in the protection of potential human

136 See Sexton, supra note 1, at 419. See generally Mary J. Pizzo, Prenatal Substance Abuse: A Call for Legislative Action in Maryland, 22 U. BALTIMORE L. REV. 329, 342 (stating that woman intending to carry full term, assumes duty of reasonable care to fetus); Edward Sylvester, Chenault v. Huie: Denying the Existence of a Legal Duty between a Mother and her Unborn Child, 33 Akron L. REV. 107, 127 (arguing once woman is aware she is pregnant, she should conduct herself in reasonable manner, and noting this type of standard has been followed in several jurisdictions).

137 602 So. 2d. 1288 (Fla. 1992).

138 See id.; See generally Jones, supra note 47, at 1174-75 (arguing that criminalizing substance abuse by pregnant women will cause more harm than good; punishing woman will not stop her addiction and will deter her from being open with doctor); Swenson, supra note 133, at 650-54 (discussing constitutional concerns of punishment of pregnant drug users).

139 See Johnson, 602 So. 2d. at 1288; see also Sexton, supra note 1, at 413 (stating "[t]he prosecution successfully persuaded the jury that Johnson "delivered" an illegal substance to her child through her umbilical cord just seconds before the cord was cut."). See generally McGinnis, supra note 46, at 505-508 (discussing prosecutorial trend charging women who used drugs during pregnancy, including mention of Johnson); Swenson, supra note 133, at 650-54 (discussing constitutional concerns with punishment of pregnant drug users).

140 See Johnson, 602 So. 2d. at 1288.

141 See id.; see also Robinson v. California, 370 U.S. 660 (1962) (positing that drug addicts suffer disease and are proper subjects of medical treatment); State v. Ashley, 701 So. 2d 338, 342 (1997) (stating "Medical Science prescribes rehabilitation, not imprisonment, for the offender."); Honorable Peggy Fulton Hora, et al., Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America, 74 Notre Dame L. REV. 439, 448 (Jan. 1999) discuss development of Drug Treatment Courts (DTCs) "through the introduction of drug treatment principles to addicted criminal defendants, . . . in family court, . . . unknowingly . . . the concepts of therapeutic jurisprudence [and DTCs are applied] every day in hundreds of courtrooms across America."); McGinnis, supra note 46, at 520 (noting that drug addiction has been judicially designated as a status that should not be criminally penalized but that has been commonly accepted as disease).
The Johnson case opened a Pandora’s box, resulting in an increased number of women who have been criminally charged, although eventually not convicted, with drug use during pregnancy. For example, in a more recent case, Washoe County, Nevada v. Cathy Encoe, under a child endangerment statute, the State of Nevada filed a criminal complaint against Cathy Encoe for willfully endangering a child by using marijuana during pregnancy. Although Ms. Encoe was not convicted, the

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142 See Johnson, 602 So. 2d. at 1288; see also Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993); State v. Gray, 62 Ohio St. 3d 514 (1992); People v. Morabito, 151 Misc. 2d 259 (City Ct. 1992); Louise M. Chan, *S.O.S. from the Womb: A Call for New York Legislation Criminalizing Drug Use during Pregnancy*, 21 FORDHAM URB. L.J. 199, 199 (1993)(advocating use of criminal sanctions against drug addicted pregnant woman); Parks, *supra* note 117, at 246-52 (discussing criminalization of prenatal drug use); Sexton, *supra* note 1, at 413 (“Since July, 1989, approximately 160 women have been charged with crimes for giving birth to drug exposed infants.”).

143 See Roberts, *supra* note 29, at 29, 1421-36 (1991). The article discusses the effects of the increase in the number of women criminally charged with drug use during pregnancy on the “Black woman.” *Id.*; see also Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993). The district court’s tried and convicted Connie Welch, a thirty-three year old woman, with second degree criminal abuse, under the Kentucky criminal child abuse statute, after Connie had given birth to a baby boy suffering from neonatal abstinence syndrome. The court of appeals, however, dismissed the conviction, and the Kentucky Supreme Court affirmed, holding that the criminal abuse statute did not encompass the abuse of a fetus. *Id.; State v. Gray, 62 Ohio St. 3d 514 (1992). The State charged a mother with one count of child endangerment for giving birth to a child addicted to cocaine. *Id.; State v. Deborah J.Z., 596 N.W.2d 490 (Wis. Ct App. 1999) The State of Wisconsin charged a mother with attempted first-degree intentional homicide and first-degree reckless injury whose blood alcohol concentration exceeded. 3% prior to delivering the child. *Id.; State v. Gethers, 585 So. 2d 1140 (Fla. Dist. Ct App. 1991). The State charged a woman with aggravated child abuse based upon the use of cocaine during her pregnancy). *Id.; People v. Morabito, 151 Misc. 2d 259 (N.Y. City Ct. 1992). The State charged a pregnant woman with criminal possession of a controlled substance and endangering the welfare of a child. *Id.*

144 110 Nev. 1317 (1994).

145 NRS § 200.508, which reads in part:

> Any person who . . . willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect . . . is guilty of a gross misdemeanor unless a more severe penalty is prescribed by law for an act or omission which brings about abuse, neglect or danger. *Id.* ;


146 See NRS § 200.508.
state's reoccurring attempts to criminally prosecute women for drug use during pregnancy demonstrates a clear existence of a conflict between the rights of women, the fetus and the state.147

The criminal prosecution of pregnant women for the harm caused to their unborn children by using drugs is a recent phenomenon; one that raises the question what is the state's rationale for imposing criminal sanctions against drug addicted pregnant women. A discussion of the theories upon which the criminal sanctions are based may offer the answer.

III. CRITICAL ANALYSIS OF THE CRIMINAL PROSECUTION OF DRUG ADDICTED PREGNANT WOMEN

The theories upon which the criminal prosecution of drug addicted pregnant women are based vary among jurisdictions.148 Women who give birth to children affected by maternal drug use have been charged with crimes under statutes that punish the distribution of drugs to a minor, child abuse and neglect, assault with a deadly weapon, reckless injury and homicide.149 Deducing from these types of charges, a woman is being not being prosecuted because of her illegal drug use but because she is a

147 See NRS § 200.508; see also Schmall, supra note 17, at 286 (discussing conflict of rights created by criminal prosecution of drug addicted pregnant women). See generally McGinnis, supra note 46, at 505-11; Rethinking Motherhood, supra note 42, at 1336 (observing state regulation of pregnant drug addicts is model that narrows problem to conflict between mother's rights and child's welfare and should shift to broader construct accepting of interdependence of maternal-fetal relationship).

148 See Sexton, supra note 1, at 419 (noting "laws in each [S]tate vary, and provide little consistency concerning the standard of care a pregnant woman owes her fetus."); see also Don't Punish Addicts; Treat Them, ST. LOUIS POST-DISPATCH, June 5, 1990, at 2B (noting pregnant women who take drugs must receive treatment or undergo criminal prosecution); Tammerlin Drummond, Police Adopt Child-Abuse Policy // Mothers of Drug-Addicted Babies May Be Prosecuted, ST. PETERSBERG TIMES, Mar. 24, 1989, at 1 (noting in Tampa Bay, cases of infant drug addiction have not been prosecuted in the past); Marlene Sokol, Theories on Crack Babies off Base, Expert Says, ST. PETERSBERG TIMES, Mar. 20, 1993, at 3B (noting mothers are incarcerated rather than being treated in Tampa Bay, Fla.).

149 See Roberts, supra note 29, at 1431 (stating "[c]reative statutory interpretations that once seemed little more than outlandish concoctions of conservative scholars are now used to punish women [for drug use during pregnancy."]); Better Ways to Aid Pregnant Drug Addicts, ST. LOUIS POST-DISPATCH, Jan. 5, 1990, at 2C (noting New Jersey established abuse statutes with regards to unborn fetus); Joseph H. Brown, A Drug-Free Birth Is a Baby's Entitlement, TAMPA TRIB., Mar. 22, 1998, at 6 (explaining prosecutors charge mother with variety of charges including reckless homicide and abuse); see also Isabel Wilkerson, Jury in Illinois Refuses to Charge Mother in Drug Death of Newborn, N.Y. TIMES, May 27, 1989, at 10 (noting Ill. Prosecutor charged woman with involuntary manslaughter and delivery of controlled substance to infant).
woman who is pregnant.\textsuperscript{150} In addition, pregnant women receive harsher sentences than drug-addicted men or women who are not pregnant.\textsuperscript{151} The legal rationale behind the criminal prosecution of drug addicted pregnant women is the woman’s pregnancy, because a woman’s conduct while she is pregnant could cause harm to the fetus; the illegality is not drug use, but the pregnancy.\textsuperscript{152} Under the guise of public policy considerations and defended by the theory of formal equality, this rationale is just another form in which the state tries to exert control over a woman’s body.\textsuperscript{153}

Society is concerned with the health of the unborn child of a drug addicted mother because eventually the child will be brought into the world, brining with him/her tremendous expenses, i.e., the child’s medical bills and the child’s expenses if he/she becomes a ward of the state.\textsuperscript{154} Thus, in the name of

\textsuperscript{150} See Roberts, supra note 29, at 1445 (quoting “[p]rosecutors charge these defendants not with drug use, but with child abuse or drug distribution – crimes that relate to their pregnancy.”); Better Ways to Aid Pregnant Drug Addicts, supra note 149, at 2C (explaining New Jersey legislation charging mother with child abuse and not drug possession or drug use); Don’t Punish Addicts; Treat Them, supra note 148, at 2B (noting consequences of not getting treatment is criminal charges of child abuse); Drummond, supra note 148, at 1 (charges would be based on child abuse).

\textsuperscript{151} See Roberts, supra note 29, at 1445 (arguing only avenue available for drug-addicted woman who becomes pregnant to escape criminal charges is abortion); Get Ready for the Pregnancy Police, ST. LOUIS POST-DISPATCH, Jan. 20, 1989, at 2C (noting some legal experts agree pregnant women are more likely to be sent to prison if drugs are found no matter initial crime); Jailed Because She Is Pregnant; A Superior Court Judge Went Beyond His Duty, WASH. POST, Aug. 21, 1988, at C8 (noting pregnant woman jailed because judge wanted to protect unborn fetus from her drug use even though she was convicted for forgign checks). But see Stopping the Stones, COURIER-J. (Louisville, KY.), Oct 3, 1993, at 2D (noting reversal of seven-year prison sentence for prenatal abuse because court did not want to discriminate against pregnant women).

\textsuperscript{152} See Roberts, supra note 29, at 1445 (arguing criminal prosecution of drug addicted pregnant women punishes pregnancy).

\textsuperscript{153} See Schmall, supra note 17, at 311 (discussing criminal sanctions imposed upon pregnant women for drug use is another way in which State maintains control over woman’s body); see also Thompson to Sign Cocaine Mom Bill in Waukesha Milwaukee J. SENTINEL, June 11, 1998, at 4 (noting pregnant woman using alcohol or drugs may be detained to protect the fetus). See generally Better Ways to Aid Pregnant Drug Addicts, supra note 149, at 2C (showing New Jersey State making it illegal for pregnant mother to use drugs); Don’t Punish Addicts; Treat Them, supra note 148, at 2B (noting State either forces upon woman treatment or face criminal punishment).

\textsuperscript{154} See Sexton, supra note 1, at 410-11 (discussing societal concerns regarding care expenses for child born to drug addicted mother); see also Joan Beck, Pregnant Women Can Do Terrible Harm to Their Unborn Children, TAMPA TRIB., Apr. 19, 1995, at 11 (noting costs can exceed $100,000 in medical bills); Colleen K. Connell, Legal Battleground: The Womb, CHI. SUN-TIMES, Sept. 3, 1996, at 26 (noting potential tragic consequences and serious public health concerns). See generally Thompson to Sign Cocaine Mom Bill in Waukesha, supra note 153, at 4 (noting drug use by pregnant woman can cripple her child for life).
public policy, under a child abuse or neglect statute, states impose criminal sanctions against drug addicted pregnant women. 155 This differential treatment between women and men is based in the theory of formal equality. 156

The theory of formal equality realizes the differences in circumstances and characteristics between women and men. Formal equality theorists rationalize that because only women possess the characteristics that enable them to become pregnant, women should be treated alike and men treated differently. 157 Therefore justifying the differential treatment between men and women by claiming that although the rule of law is different for women as opposed to men the result is equal. 158 Historically, courts have approved of legislation that treated women less favorably then men because women were biologically different. 159 For example, in Bradwell v. Illinois, 160 the Court affirmed a state’s refusal to allow a woman to practice law, because “civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.” 161 States, rationalizing the imposition of criminal

155 See generally Cahn, supra note 16, (discussing use of criminal child abuse and neglect statutes to impose criminal sanctions upon drug addicted pregnant women); Henry, supra note 78, at 207 (discussing California’s approach to impose criminal sanctions against drug addicted pregnant women); Better Ways to Aid Pregnant Drug Addicts, supra note 149, at 2C (noting New Jersey Legislator passed abuse statutes to protect the fetus); Brown, supra note 149, at 6 (indicating charges of homicide and abuse).

156 See Schmall, supra note 17, at 313 (discussing the differential treatment between men and women).

157 See Bartlett, supra note 21, at 101 (discussing theory of formal equality); see also Schmall, supra note 17, at 313 (discussing differences in treatment between men and women); Andrew Bolger, Equality Body Urges Law Against Sex Discrimination, FIN. TIMES (London), June 16, 1998, at 11 (noting to achieve equal treatment, pregnant women would have to be compared to sick man). But see Susan Gluck Mezey, Elusive Search for Equality – Women, Public Policy, and the Federal Courts, SAN FRAN. CHRON., Mar. 29, 1992, at 8 (debating women can not ask for special favors and demand equality at same time).

158 See Bartlett, supra note 21, at 102, 261.

159 See Schmall, supra note 17, at 311. But See United Auto Workers v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (holding that employer’s “fetal protection program” to exclude all women from jobs involving exposure to lead was violation of Title VII gender discrimination provisions). See generally Frontiero v. Richardson, 411 U.S. 677, 679 (1973) (holding that military servicewoman is entitled to treat her husband as dependent for pension purposes).


sanctions against drug addicted pregnant mothers and not fathers, may argue that the difference in treatment is warranted due to the biological difference between women and men.\textsuperscript{162} The argument may be that because only women are biologically able to carry potential human life and the state has an interest in the protection of potential human life, only women can be punished for self-inflicted actions during pregnancy that may harm potential life.\textsuperscript{163} However, the state rationale is flawed, for the criminal prosecution of drug addicted pregnant women in no way protects potential human life.\textsuperscript{164} In fact, the criminal prosecution of drug addicted pregnant women increases the harm to the fetus.\textsuperscript{165}

The imposition of criminal sanctions against pregnant mothers may lead to a decrease in pre-natal care to the fetus.\textsuperscript{166} Criminal sanctions may deter the pregnant woman from seeking the pre-natal care necessary to deliver a healthy child, especially if the

(holding that stereotyping women as nurses in medical profession is inappropriate); Reed v. Reed, 404 U.S. 71 (1971) (holding that state statute can not prohibit woman from acting as estate administrator because of her gender).

\textsuperscript{162} See Schmall, supra note 17, at 313 (arguing State's rationalize differential treatment between men and women is warranted due to biological differences). See generally Salim Muwakkil, \textit{Don't Get Hooked on Sterilization}, RALEIGH NEWS-OBSERVER, Sept. 24, 1999 (describing program offering $200 to drug addicts to become sterilized); Cheryl Wetzstein, \textit{States Getting Tough With Moms Addicted to Cocaine}, WASH. TIMES, Dec. 29, 1998 (reporting cocaine-addicted women give birth to 124 babies each day.)


\textsuperscript{164} See Schmall, supra note 17, at 313:

[It is clear that the Court – and our society, has never given up on justifying different treatment because of that separate spheres notion. Instead of concentrating on equal access and avoiding unnecessary and non-critical incursions into female empowerment, the Court continues to make decisions on the basis of its earliest ruminations about what it, as guardian of our social fabric, considers sex-appropriate. Id. See generally Anthony Jewell, \textit{"Court Backs Mother in Fetal Alcohol Case"}, B. GLOBE, May 27, 1999; Judy Peres, \textit{Setback for Fetal Rights in Wisconsin Alcohol Case}, CHIC. TRIB., May 27, 1999 (reporting case where woman was not charged with attempted murder for drinking herself into stupor during ninth month of her pregnancy).


\textsuperscript{166} See Roberts, supra note 29, at 1449 (stating "pregnancy may be a time when women are most motivated to seek treatment for drug addiction... the government should capitalize on this opportunity by encouraging drug-addicted women to seek help... [and not punish them by the imposition of criminal sanctions]."); Lynn Paltrow, \textit{Methadone in Pregnancy}, N. Y. TIMES, Jan. 7, 1999 (pointing out that pregnant heroin addicts are routinely denied methadone treatment despite evidence that withdrawal from heroin increases risk of fetal death).
woman may use drugs. Studies have shown that infants exposed to cocaine are also subject to other risks such as the use of additional drugs, cigarettes, alcohol and malnutrition. If a woman fears visiting a physician to receive pre-natal care because she is addicted to drugs, the threat to the health of the unborn child is extremely heightened.

The states argue that the differential treatment of women, with the criminal prosecution of drug addicted pregnant women, is necessary to protect potential human life. When a drug-addicted woman becomes pregnant, however, the only avenue to escape criminal charges is to abort the fetus. The state's justification for the differential treatment is flawed, for an


168 See Roberts, supra note 29, at 1429-30 (discussing how studies are often clouded by other fetal risk factors); see also Balisy, supra note 94, at 1218 (stating that effects of cigarette smoking on fetus can result in reduced birth weight and increased risk of respiratory distress syndrome, hypoglycemia and jaundice); Claire E. Dineen, Fetal Alcohol Syndrome: The Legal and Social Responses to Its Impact on Native Americans, 70 NOTRE DAME L. REV. 1, 20 (1994) (discussing increased risk of fetal abnormalities due to alcohol consumption in mothers). See generally Thompson, supra note 42, at 363 (discussing risk factors that may affect pregnancy outcome).

169 See Roberts, supra note 29, at 1429 (stating that addicts often receive little or no prenatal care); see also Michnelle Oberman, Substance Use during Pregnancy: Legal and Social Responses: Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs, 43 HASTINGS L.J. 505, 511 (1992) (discussing avoidable harms suffered by fetus when mother does not obtain prenatal care); Bonnie I. Robin-Vergee, The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention, 42 STAN. L. REV. 174, 767 (1990) (discussing how children of female addicts receive neither appropriate prenatal care nor adequate parenting after birth). See generally Spencer, supra note 41, at 397-98 (discussing how health of fetus can be improved by creating incentives for drug addicted mothers to seek out prenatal care).

170 See Roberts, supra note 29, at 1449 (discussing State's argument that criminal prosecution drug addicted pregnant women is necessary for protection of potential human life) (discussing State's rationale of protecting fetus from harm); see also Margaret Diamond, Echoes from Darkness: The Case of Angela C., 51 U. PITZ. L. REV. 1061, 1066 (1990) (stating that protecting fetus as "innocent third party" from adult's decision to refuse medical treatment is one of State's interests); Sovinski, supra note 51, at 111 (stating that Supreme Court recognizes that State interest in potential life is to be weighed against woman's autonomy rights). See generally Michael A. Grizzi, Compelled Antiviral Treatment of HIV Positive Pregnant Women, 5 UCLA WOMEN'S L.J. 473, 488 (1995) (stating State's interest can override patient's refusal to be treated for several reasons, including protection of innocent third parties).

171 See Roberts, supra note 29, at 1445-46 (questioning government's justification for criminal prosecution of drug addicted pregnant woman); see also Schmall, supra note 17, at 307-08. See generally Andrew Freeman, Prenatal Substance Abuse: Texas, Texans and Future Texans Can't Afford It, 37 S. TEX. L. REV. 539, 583 (1996) (discussing Texas' only avenue for protecting fetus is to pass new criminal legislation). But see Janet W. Steverson, Stopping Fetal Abuse with No-Pregnancy and Drug Treatment Probation Conditions, 34 SANTA CLARA L. REV. 295, 298 (1994) (discussing possible probation option and monitoring as potential alternative).
 abortion does not protect potential human life.\textsuperscript{172} An abortion terminates potential human life.\textsuperscript{173} Ironically, the theory of formal equality was created to remedy the effects of past gender discrimination,\textsuperscript{174} and the only effect of the differential treatment, the criminal prosecution of drug addicted pregnant women, is the suppression of a woman's fundamental right to privacy, liberty and personal autonomy.\textsuperscript{175} The exact opposite for what the theory was intended.\textsuperscript{176}

CONCLUSION

The criminal prosecution of drug addicted pregnant women creates a conflict between the rights of the woman to privacy, liberty and personal autonomy; the right of the fetus to physical integrity; and the right of the state in the protection of potential human life. The states argue that their interest in protecting potential human life justifies imposing criminal sanctions against pregnant women in order to protect fetus' right to physical integrity. The results, however, are counter to the state's goal relating to the protection of potential human life. The only effect of such sanctions is the unjustifiable subordination of a woman, denying her the fundamental right to privacy, liberty and personal autonomy.

Such government coercion ignores the still developing

\textsuperscript{172} See Roberts, supra note 29, at 1449 (arguing that pregnant women who are addicted to drugs will more often seek abortions if they know their addiction will lead to criminal prosecution); see also Spencer, supra note 41, at 396 (stating that many medical and legal scholars consider prosecution ineffective and counter-productive). See generally Carol Gosain, Protective Custody for Fetuses: A Solution to the Problem of Maternal Drug Use? Case Note on Wisconsin Ex Rel. Angela v. Kruzicki, 5 GEO. MASON L. REV. 799, 800 (1997) (discussing how states should be cautioned from deterring women from seeking prenatal care). But see Chan, supra note 2, at 202 (stating advocates of criminal sanctions claim prosecution will direct women toward treatment).

\textsuperscript{173} See Roberts, supra note 29, at 1449.


\textsuperscript{175} See Cahn, supra note 16, at 817; Roberts, supra note 29, at 1449; Schmall, supra note 17, at 313. But see Parks, supra note 117, at 245.

\textsuperscript{176} See Roberts, supra note 29, at 1449; Schmall, supra note 17, at 313; see also Cahn, supra note 16, at 817. See generally Bartlett, supra note 21, at 101 (discussing theory of formal equality).
jurisprudence of the unborn. It rejects the predominance of the mother's interests... it excuses fathers... [accepting] antiquated notions of patriarchy which deny both genders and their children an opportunity for fair treatment. . . .^{177}

^{177} See Schmall, supra note 17, at 333–34.