Looking for a Solution: Determining Fetal Status for Prenatal Drug Abuse Prosecutions

Sarah Letitia Kowalski

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol38/iss4/6
LOOKING FOR A SOLUTION: DETERMINING FETAL STATUS FOR PRENATAL DRUG ABUSE PROSECUTIONS

I. INTRODUCTION

A study by the National Association for Prenatal Addiction Research and Education revealed that approximately 375,000 babies per year suffer potential health damage from in utero exposure to drugs. In reaction, several states have attempted to punish pregnant women for negligent or reckless conduct that harms or may harm their fetuses. Since 1985, at least 200 women in thirty states have been criminally prosecuted for the use of illicit drugs or alcohol during pregnancy through a variety of tactics. For example, prosecutions have granted a fetus the legal rights of a person by reading protection into criminal negligence statutes and then taking custody of children who have been exposed to drugs in utero for negligence. Until June 1996 in *Whitner v. South Carolina*, however, no state supreme court had upheld a


conviction for prenatal abuse based on a child abuse statute. Decisions such as *Whitner* create a growing problem because such prosecutions are readily gaining popular support without addressing the implications for women.

The outcome of prosecutions for prenatal drug abuse rests on the legal status accorded to the fetus and relative weight given to the mother's privacy interest relative to the fetus or state. For example, a pregnant woman can only be prosecuted for child abuse if her fetus is considered a *child*. Prosecutions of fetal abuse under the rubric of child abuse statutes raise important issues because, by granting a fetus the status of a born person, they necessarily pit a woman's constitutionally granted privacy rights against the state interest in protecting a fetus. Thus, the success or failure of prenatal drug abuse prosecutions rests on the legal status accorded to the fetus and the extent to which the balancing of the mother's interest relative to the fetus or state is permissible.

However, neither statutory law nor case law has clearly established the relationship between the mother and fetus. A direct result of the law's uncertainty regarding the legal status of fetuses, prosecutions for prenatal abuse have yielded disparate outcomes, many of which tread heavily on the rights of women. There are three possible conceptual models which characterize the rights of a pregnant woman in relation to her fetus: (1) the fetus and mother both possessing distinct and separate rights; (2) the mother and fetus as a union whose rights are simultaneously intertwined; and (3) the fetus having no rights. Prosecutions for fetal abuse follow the first model, whereby a woman is distinct from her fetus and, thus, has interests at odds with her fetus. However, this comment argues that such a view of fetal rights is inconsistent with legal precedent established in *Roe v. Wade*.

---

6. *Id.*
7. *See infra* Part II.C.
9. *See infra* Part II.
11. *See infra* Part II.C.
and Planned Parenthood v. Casey.\textsuperscript{13}

This comment begins by summarizing arguments for and against coercive fetal abuse prosecutions.\textsuperscript{14} After describing three potential models of the relationship between maternal and fetal rights,\textsuperscript{15} this comment illustrates that several fetal abuse prosecutions have been problematic because they accord a legal status to the fetus distinct from the mother which relegates the mother to the equivalent of a fetal container.\textsuperscript{16} In addition, this comment examines the extent to which prosecutions for prenatal abuse, which treat the mother and fetus as having competing rights, violate established precedent regarding the legal status of a fetus, as established in Roe v. Wade and Planned Parenthood v. Casey, and unjustifiably impinge on a woman’s protected liberty.\textsuperscript{17} Finally, this comment demonstrates that in order to prosecute for fetal abuse, the state must account for the union between mother and fetus, as recognized in Roe v. Wade and Planned Parenthood v. Casey.\textsuperscript{18} Therefore, prosecutions for prenatal abuse must not impinge unnecessarily on the woman’s right to privacy and bodily integrity.\textsuperscript{19} This comment concludes that coercive punitive measures should be avoided in the context of fetal abuse regulations and argues in favor of preventative measures that could ensure better access to drug treatment centers for pregnant women.\textsuperscript{20}

II. BACKGROUND

Prosecutions for prenatal substance abuse involve both prebirth seizures and postbirth sanctions.\textsuperscript{21} These are deemed coercive because they rely on the State’s power to sanction people to compel certain behavior. Opponents of coercive prosecutions favor a less intrusive approach which focuses on preventing the problem rather than punishing unwanted conduct. Therefore, those who oppose coercive fetal

\textsuperscript{13} 505 U.S. 833 (1992).
\textsuperscript{14} See infra Part II.A-B.
\textsuperscript{15} See infra Part II.C.
\textsuperscript{16} See infra Part II.A.
\textsuperscript{18} See Nelson, supra note 10, at 302-03.
\textsuperscript{19} See infra Part VI.
\textsuperscript{20} See infra Parts IV, VI; see also Steinbock, supra note 1.
\textsuperscript{21} See Nelson, supra note 10, 309-15.
abuse prosecutions advocate for improved prenatal education and drug or alcohol counseling.

A. Arguments for Coercive Fetal Abuse Prosecutions

Proponents of fetal abuse statutes argue that un aborted fetuses have a future interest in their well-being, such that maternal acts or omissions which endanger the fetus should be prosecuted. For example, John Robertson, a well-known advocate of this position, who favors some coercive measures to protect unborn children, argues that it is the future child, not the fetus, who is the intended beneficiary of protective legislation, making a distinction between freedom to procreate and freedom in procreation. Robertson argues that once a woman decides to carry a pregnancy to term she does not have a constitutional right to make her own decisions about how her pregnancy will be conducted. Thus, a woman has a legal duty not to put her fetus at risk and can be subject to homicide or child abuse charges for violating that duty.

Proponents of coercive fetal abuse prosecutions further argue that although parents have a great deal of discretion in deciding how to raise their children, they do not have absolute freedom because they are morally and legally obligated not to inflict harm on their children. Parents who injure their children or fail to provide adequate food, clothing or medical care can have their children taken away from them and may even face criminal sanctions. Thus, proponents argue that if the coercive power of the state can be used to protect children, then it should be permissible to use state coercion against a woman who injures her child before it is born by her prenatal conduct.

B. Arguments Against Coercive Fetal Abuse Prosecutions

Conversely, opponents of coercive state action for actions

---


24. Id.

25. Id. at 438-39.

26. Steinbock, supra note 1, at 275-76.

27. Id. at 276.

28. Id.
taken during pregnancy that cause harm to a fetus argue that many women have been singled out for special prosecutions and additional penalties solely because they were pregnant at the time of drug use. These opponents do not maintain that pregnant women are immunized from prosecution under generally applicable criminal statutes that would punish illegal drug use. They emphasize that prosecutions have relied upon criminal statutes for drug delivery and distribution which impose harsher penalties upon these women than would otherwise be imposed for drug possession.

Furthermore, these opponents contend that prosecutions for prenatal substance abuse have the effect of deterring women from seeking drug treatment which could end the drug abuse and prevent fetal harm. For instance, a report by the United States General Accounting Office ("USGAO") described fear of prosecution and loss of custody as a "barrier to treatment" for pregnant women dependent on drugs. Women are also deterred from seeking prenatal care or refraining from telling their physicians about their drug use, which could "help prevent or at least ameliorate many of the problems and costs" associated with drug-exposed births.

The American Medical Association ("AMA") has also expressed similar concerns about prosecutions for drug use during pregnancy by noting that, even if the health of a few children was promoted, the overall effect would be detrimen-

29. Dawn Johnsen, Substance Abuse During Pregnancy: Legal and Social Responses: Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty, 43 HASTINGS L.J. 569, 579 (1992) (discussing approaches to fetal abuse prosecutions which do not invade women's right to privacy); see, e.g., United States v. Vaughn, 117 Daily Wash. L. Rptr 441 (D.C. Super. Ct. 1989). In Vaughn, the defendant was a pregnant woman imprisoned for 180 days for check forgery because she tested positive for cocaine use and the judge wanted to prevent further cocaine use during pregnancy. Id.

30. See Johnsen, supra note 29.

31. See, e.g., Johnson v. State, 602 So. 2d 1288 (Fla. 1992). In Johnson v. State, 578 So. 2d 412 (Fla. 1991), prosecutors convicted Jennifer Clarise Johnson of cocaine distribution to a minor for cocaine ingested by the baby after birth but before the umbilical cord was cut. However, Johnson v. State, 602 So. 2d 1288 (Fla. 1992), held that the conviction should be overturned because the statute did not clearly apply to these facts.

32. Johnsen, supra note 29, at 575.

33. Id. at 603 (citing U.S. GEN. ACCOUNTING OFFICE, DRUG EXPOSED INFANTS: A GENERATION AT RISK (1990)).

34. Id. (quoting U.S. GEN. ACCOUNTING OFFICE, DRUG EXPOSED INFANTS: A GENERATION AT RISK (1990)).
Therefore, coercive sanctions may result in more medically disastrous births, "more premature deliveries due to the lack of prenatal care, more concealed pregnancies, unattended births, more infant abandonment, and perhaps a resurgence of infanticide, as women find themselves forced to destroy the evidence of their presumed wrongdoing."

Evidence from drug treatment centers support the findings of the AMA and USGAO. For example, a survey of treatment programs in New York City revealed that fifty-four percent deny treatment to all pregnant women, and eighty-seven percent said they would refuse to treat a pregnant woman on Medicaid that was addicted to cocaine. Therefore, opponents argue that unless adequate drug treatment centers are available for pregnant women, coercive actions against drug-addicted pregnant mothers are unjustified.

C. Three Models for Prenatal Abuse Prosecutions

1. Introduction

Prosecutions for prenatal substance abuse across the country have yielded extremely disparate results because case law has failed to define the legal status of a fetus in relation to a pregnant woman. However, successful prosecutions are based, in large part, upon one of three potential models for the fetus-mother relationship. The three models are described in detail below.

2. Mother and Fetus Possess Conflicting Rights

Under the first model, the fetus and mother are viewed as two distinct beings that hold competing and often hostile interests. Thus, the woman is viewed simply as a container

35. Id. at 572 (citing American Medical Ass'n, Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women, 264 JAMA 2663 (1990)).
37. Johnsen, supra note 29, at 605 (citing Born Hooked: Confronting the Impact of Prenatal Substance Abuse: Hearing Before the House Select Comm. on Children, Youth, and Families, 101st Cong. 110, 112 (1989)).
40. Johnsen, supra note 29, at 576.
used by the fetus until it comes to term.\textsuperscript{41} Because this framework creates a conflict between women’s liberty and the promotion of healthy babies, Dawn Johnsen, the Legal Director for the National Abortion Rights League, has labeled it the “adversarial model.”\textsuperscript{42} In describing this model, she states, “[a]dversarial policies approach the woman and the fetus she carries as distinct legal entities having adverse interests, and assume that the government’s role is to protect the fetus from the woman.”\textsuperscript{43}

Many theorists have argued that the notion of fetal rights is a misnomer.\textsuperscript{44} These advocates maintain that viewing the rights of the fetus and mother as completely distinct allows the state to vindicate the fetus’s rights without accounting for the mother’s simultaneous rights to privacy, liberty or bodily integrity.\textsuperscript{45} For example, Lynn Paltrow, Director of Special Litigation for the Center of Reproductive Law and Policy in New York argues, “[c]reating fetal personhood necessarily means the destruction of women’s personhood . . . . The problem is, there is no logical limit. This whole discussion absolutely makes the woman, her body, her flesh irrelevant.”\textsuperscript{46} Since pregnant women must make countless daily decisions that, to varying degrees, affect the likelihood of optimal fetal development,\textsuperscript{47} there must be a logical limit to governmental intrusion.\textsuperscript{48} Therefore, the adversarial

\begin{itemize}
  \item \textsuperscript{41} Id. at 570.
  \item \textsuperscript{42} Id. at 576.
  \item \textsuperscript{43} Id. at 571. Thus, the adversarial approach cautions restraint since it provides the state with a powerful means of controlling women’s behavior during pregnancy, thereby threatening women’s fundamental rights. Id.
  \item \textsuperscript{44} See, e.g., Dawn Johnsen, The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 YALE L. J. 599 (1986); Nelson, supra note 10, at 304; Lyle Denniston, Abortion, Fetus Rights on Legal Collision Course: Protections for Unborn Head Test in Florida, BALTIMORE SUN, Nov. 4, 1996, at A1 (quoting Lynn M. Paltrow, director of special litigation for the Center of Reproductive Law and Policy in New York).
  \item \textsuperscript{45} Nelson, supra note 10, at 304.
  \item \textsuperscript{46} Denniston, supra note 44.
  \item \textsuperscript{47} Maternal Rights and Fetal Wrongs, supra note 2, at 998. For example, a pregnant woman must decide whether to drink coffee, continue working, drink alcohol and exercise.
  \item \textsuperscript{48} Johnsen, supra note 29, at 607. Because policies premised on the adversarial model only burden the liberty of women, and not men, important sex equality concerns are raised. The Supreme Court ruled, in UAW v. Johnson Controls, 499 U.S. 187, 198-99 (1991), that sex discrimination exists when men and women are similarly situated, yet the government singles out only women
\end{itemize}
view remains problematic because the state may punish or sanction actions that cause minor or negligible harm to the fetus, regardless of the amount of impingement on the woman's interests. A woman's interest in her own bodily integrity can be easily trumped by the fetus's interests since the two beings are viewed as distinct rather than interrelated.

3. The Fetus Has No Rights Until Birth

The second model, at the other extreme, views the mother and child as completely indistinguishable from one another such that the fetus is considered only a part of the mother with no rights of its own. Under this framework, the fetus is given no rights independent of its mother's until its birth. Therefore, in theory a woman could do anything to her body without regard to her fetus. Although a woman should be accorded a degree of discretion in deciding how to conduct herself during pregnancy, she most likely will not completely ignore the potential for life represented by the fetus. Therefore, this model does not sufficiently depict reality and, thus, is not adhered to by either side of the debate.

4. Mother and Fetus Union

The third and final model, taking the middle ground approach, views the mother and fetus as a union. Lawrence Nelson, a noted bioethicist and lawyer, describes this union

---

for penalties and restrictions. In Johnson Controls, an employment policy excluded women from jobs involving exposure to lead because of possible harm to their fetuses, even though men's exposure to lead could also damage their sperm and lead to diminished birth outcomes. Id. at 192. Likewise, punitive actions aimed at women who use alcohol or drugs discriminate against women since evidence supports that men can also cause harm to their sperm and, thus, future children by using alcohol and drugs. Johnsen, supra note 29, at 607. Therefore, one must closely examine the disparate treatment of men and women in this context to determine to what extent prosecuting fetal abuse constitutes impermissible sex stereotypes about a woman's role in childbearing. Id.

49. Johnsen, supra note 29, at 606-07; see also supra notes 22-28 and accompanying text for arguments that a woman who decides to carry a fetus to term waives all maternal rights such that she cannot engage in any behavior which may potentially harm the fetus.

50. Johnsen, supra note 29, at 607.

51. Id. at 600-01.

52. Id. at 601.

53. Id. at 571.

by stating, "[a] pregnant woman and her fetus constitute a union in the sense that they are two genetically different human entities who are joined together for a period of time. They are a union, yet simultaneously distinguishable as two different entities who are intimately joined." He supports this paradigm from a biological perspective, which holds that a fetus does not exist in the abstract or on its own, rather, it exists only inside the womb of a woman. Dawn Johnsen, who labels this the "facilitative model," argues that this model "recognizes that women who bear children share the government's objective of promoting healthy births but that . . . [w]omen inevitably must make numerous decisions that require them to balance varying and uncertain risks to fetal development against competing demands and interests in their lives."  

D. Legal Treatment of Conflicting Maternal and Fetal Interests

The United States Supreme Court has yet to review any prosecutions of fetal abuse under child abuse statutes that have extended the meaning of "child" to include "fetus" for purposes of prosecuting prenatal drug abuse. However, abortion jurisprudence is instructive because both fetal abuse prosecutions and abortion concern the right of a woman to make autonomous decisions about her body during pregnancy. In addition, abortion jurisprudence and fetal abuse cases both involve a state interest in protecting the life and health of the fetus, which must be balanced against maternal privacy and decisional rights.  

55. Id. at 303.  
56. Id.  
57. Johnsen, supra note 29, at 571.  
58. See, e.g., In re Valerie D, 613 A.2d 748 (Conn. 1992) (holding that a child abuse statute does not apply to an unborn fetus and that the lack of a parent-child relationship cannot be used to terminate parental rights when the lack of a relationship was a direct result of the fact that the child was in foster care from birth). The Connecticut Supreme Court explicitly stated that the prosecution would not withstand constitutional scrutiny. Id. Cf. Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1997) (refusing to examine the constitutionality of its holding by citing procedural defects in the pleading that precluded it from having to make such considerations).  
60. 410 U.S. 113 (1973) (establishing a the right to chose an abortion).
Parenthood v. Casey, sub 61 embody the facilitative approach to fetal rights and thus provide a framework for balancing the state’s interest in protecting the potential life and health of the fetus against the maternal privacy rights. 62

1. The Right to Privacy in Reproductive Decision-Making

The Supreme Court first articulated the right to privacy in reproductive decision-making in Griswold v. Connecticut, 63 when the Court struck down a law that prohibited married couples from using contraception by recognizing that certain intimate decisions deserve constitutional protection. 64 Later cases elaborated on this right to privacy to include freedom of personal choice in matters of marriage, procreation, contraception, child rearing, education and family life. 65 More importantly, the Court has continually upheld the “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” 66 The Court further stated,

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the very heart of the liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. 67


62. See infra Part II.D.2-3.

63. 381 U.S. 479 (1965) (establishing the right of married couples to use contraception).

64. Id. at 485-86.

65. See Moore v. City of East Cleveland, 431 U.S. 494 (1977) (striking down an ordinance that restricted the ability of certain relatives to live together); Roe v. Wade, 410 U.S. 113 (1973) (right to choose whether to terminate a pregnancy); Loving v. Virginia, 388 U.S. 1 (1967) (right to choose one’s spouse); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to select the schooling of children under one’s control); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to determine the language taught to one’s children).


67. Casey, 505 U.S. at 851.

*Roe v. Wade*[^68] and its progeny have provided the framework for analyzing conflicts between maternal privacy rights and the state's interest in protecting the fetus and should constitute binding precedent regarding the legal status of a fetus in other contexts such as fetal abuse.[^69] *Roe*, the landmark case making abortions in the first two trimesters legal, further solidified the right to privacy in reproductive decision-making by recognizing the right to an abortion based on a right to privacy founded in the Fourteenth Amendment's concept of personal liberty.[^70] After specifically stating that “person as used in the Fourteenth Amendment does not include the unborn,”[^71] the Court nonetheless noted that the state does have an important and legitimate interest in preserving and protecting the health of a pregnant woman and another important interest in protecting the potentiality of human life.[^72] According to *Roe*, they are separate and distinct; each grows substantially as the woman approaches term.[^73] In order to determine what amount of state regulation is appropriate, the Court expressed that where funda-
mental rights are involved, regulations limiting these rights may only be justified by "compelling state interests," and that legislative enactments must be narrowly tailored to express only the legitimate state interest at stake.\textsuperscript{74} Thus, the Court in \textit{Roe} defined a trimester system to reflect the state's varying interest in the mother and fetus.\textsuperscript{75} The trimester system, as articulated in \textit{Roe}, is as follows:

(a) During the first trimester, the state may not regulate abortions, such that the decision whether to abort must be left to the woman and to the medical judgment of the woman's physician.

(b) From the end of the first trimester to the point of fetal viability, a state may regulate the procedure in ways that are reasonably related to the state's interest in preserving and protecting the health of the pregnant woman.

(c) Finally, from the point of fetal viability, defined as beginning in the third trimester, a state's interest in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.\textsuperscript{76}

Thus, the Court recognized both maternal privacy rights and the state interest in protecting potential life, but engaged in a balancing test to determine if and when the interest in protecting potential life becomes compelling.\textsuperscript{77} The Court decided that the right to terminate pregnancy was not absolute, and thus acknowledged some state regulation as appropriate.\textsuperscript{78}

In \textit{Planned Parenthood v. Casey},\textsuperscript{79} the most recent Su-

\textsuperscript{74} Id. at 155. The Court in \textit{Roe} explained that case law has established that where certain fundamental rights are involved, regulations curtailing these rights must be justified by a "compelling state interest." \textit{See} \textit{Kramer v. Union Free Sch. Dist.}, 395 U.S. 621, 627 (1969); \textit{Shapiro v. Thompson}, 394 U.S. 618, 634 (1969); \textit{Sherbert v. Verner}, 374 U.S. 398, 406 (1963). In addition, when dealing with these fundamental rights, legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. \textit{See} \textit{Griswold v. Connecticut}, 381 U.S., 479, 485 (1965); \textit{Aptheker v. Secretary of State}, 378 U.S. 500, 508 (1964); \textit{Cantwell v. Connecticut}, 310 U.S. 296, 307-08 (1940).

\textsuperscript{75} \textit{Roe}, 410 U.S. at 163-64.

\textsuperscript{76} \textit{Id.} at 164-65.

\textsuperscript{77} \textit{Id.} at 162-63.

\textsuperscript{78} \textit{Id.} at 154.

Supreme Court decision in the area of abortion and reproductive rights, the Court reaffirmed the central holding of *Roe* which the Court in *Casey* viewed as having three parts: (1) a recognition of a woman's right to an abortion without undue interference from the state before fetal viability; (2) a confirmation of the State's power to restrict post-viability abortions as long as there is an exception for pregnancies which endanger a woman's life or health; and (3) the principle that the State has a legitimate interest in the woman's health and potentiality of life from the outset of pregnancy.

However, since the trimester framework was not considered part of *Roe*’s central holding, the Court rejected it. In doing so, the Court in *Casey* reasoned that the trimester framework was enacted to ensure that a woman's right to choose an abortion did not become subordinate to the State's interest in protecting fetal life. However, the trimester framework had the practical effect of prohibiting all State regulation in the first two trimesters. The Court noted that the right to terminate a pregnancy does not necessarily prohibit the state from taking steps to ensure that the choice is thoughtful and informed. Thus, because the trimester framework had the effect of forbidding any regulations before viability, the Court rejected the trimester framework in favor of an undue burden standard which allows the state to impose only those regulations that do not cause undue interference with a woman's right to an abortion.

The Court in *Casey* described the undue burden standard as follows: "the very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue." In essence, an undue burden exists if the purpose or effect of a state regulation results in placing substantial obstacles in the path of a woman seeking to abort a non-

---

80. *Id.* at 846.
81. *Id.*
82. *Id.*
83. *Id.* at 873.
84. *See id.* at 873-76.
86. *Id.* at 877-78.
87. *Id.* at 876.
88. *Id.*
viable fetus.99 "Regulations which do no more than create a structural mechanism by which the State, or parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."90 Thus, as long as the proposed regulation fosters informed decision-making, it will be upheld.91

Although Roe and Casey embody the facilitative model, prosecutions for fetal abuse continue to employ the adversarial model of fetal rights. Because the Supreme Court has not yet decided any of these cases, it is not clear whether Roe and Casey should be binding. It is, therefore, important to examine fetal abuse prosecution cases to illustrate that they do in fact violate the union of rights established in Roe and Casey.

3. Cases Prosecuted Using the Adversarial Model

Criminal sanctions in the context of drug use or neglect during pregnancy have gained popular support.92 In 1994, twelve states expanded their definitions of child abuse to include fetal drug exposure.93 Many lower courts have read protection for fetuses into existing state civil child neglect statutes, thus allowing the state to take custody of newborn children who have been neglected in utero.94 In an extreme case, a woman who had been using cocaine was detained for three weeks during her pregnancy in a drug treatment center to protect the health of her fetus.95 The state appellate court held that her rights were not violated by the "protective custody" since only the fetus was ordered to be detained.96

Courts, prosecutors, and other government entities across the nation recently have policed a broad range of women's activities during pregnancy.97 Most of these prosecutions have attempted to define the fetus as a legal person

89. Id. at 877.
90. Id.
92. See infra notes 91-106 and accompanying text.
93. Steinbock, supra note 1, at 280.
96. Id.
97. See infra notes 82-103 and accompanying text.
with rights in conflict with the mother's.98 For example, an appellate court in Michigan held that a child born with discolored teeth, whose mother had negligently used tetracycline during pregnancy, could sue his mother for prenatal injuries, if it was determined that she had failed to act as a "reasonable" pregnant woman.99

Women have also been charged with child abuse by prosecutors interpreting child abuse statutes to include a fetus.100 As a result, women have been charged with child neglect or abuse for engaging in both legal and illegal activities which have caused harm to the fetus.101 For example, a woman in California was prosecuted for allegedly causing her son to suffer severe brain damage as a result of her own blood loss during delivery.102 She was prosecuted under a statute requiring parents to provide their children with clothing, food, shelter and medical attention.103 The prosecution alleged that the woman could have avoided the harm to her child if she had followed her doctor's advice and sought medical attention as soon as she had begun bleeding vaginally.104 Ultimately, the judge ruled that the statute could not be used to prosecute a woman for otherwise lawful activities during pregnancy.105 However, such cases have not prevented prosecutors around the country from prosecuting women under statutes that were most likely not intended to criminalize otherwise legal conduct during pregnancy.106

Even more prevalent are cases involving illegal substance abuse by pregnant women.107 As previously stated, a

98. Johnsen, supra note 29, at 576-77.
102. Maternal Rights and Fetal Wrongs, supra note 2, at 994.
103. Id. at 994 n.1 (citing CAL. PENAL CODE § 270 (West 1988)).
104. Id.
105. Id. at 994-95.
106. Johnsen, supra note 29, at 577.
107. Id.; see, e.g., Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1997); Johnson v. State, 602 So. 2d 1288 (Fla. 1992); In re Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986); In re Smith, 492 N.Y.S.2d 331 (N.Y. Fam. Ct. 1985); In re Baby X,
woman who engages in illegal substance abuse or other illegal conduct can be held accountable under applicable criminal statutes. However, commentators stress that women should not be singled out for special prosecutions and higher penalties solely because they are pregnant at the time of drug use.

For example, prosecutions for delivering drugs to a minor during the period of time the baby is born, but still connected by the umbilical cord, are a dramatic example of using a woman's pregnant status in order to convict her of a more serious crime. In July 1989, Jennifer Johnson became the first woman to be convicted of delivering cocaine to her child through the umbilical cord. She was sentenced to a one year rehabilitation program and fourteen years probation. The alternative was to charge Jennifer Johnson with possession of cocaine. However, by waiting for her baby to be born, Johnson was convicted of delivery to a minor which carries a much harsher sentence. In addition, the prosecutors bypassed the crucial issue of whether a fetus should be granted the status of a child by waiting until the baby was born and yet still connected to the mother. Therefore, this prosecution remains troubling since it avoids an issue that needs to be resolved by higher courts.

4. Whitner v. South Carolina: The Highest Court Holds That a Fetus Constitutes a Person for Purposes of Child Abuse Statutes

In July 1996, the South Carolina Supreme Court became

108. Johnsen, supra note 29, at 579.
109. Id.
111. Id.
112. Steinbock, supra note 1, at 279. However, these prosecutions remain dubious because the intent required for a criminal conviction under these statutes is usually absent, as it would be difficult to establish that a pregnant woman intends to deliver drugs to her fetus in the same sense that a drug pusher intends to deliver drugs. Id. If she is aware of the risks to her fetus but ignores the risks, she is most likely guilty of reckless endangerment. Id. Even so, most women are probably not even guilty of reckless endangerment since they are ignorant of the extent of the risk of drug use. Id. Thus, a woman ignorant of the risks does not intentionally or recklessly harm her baby, but, rather, negligently allows her not-yet-born child to be exposed to harm as a result of her drug use. Id.
the highest court to uphold a conviction of criminal child neglect for causing a baby to be born with cocaine metabolites by reason of the mother's ingestion of crack cocaine during the third trimester of her pregnancy. On April 20, 1992, Cornelia Whitner pled guilty to criminal child neglect under section 20-7-50 of the South Carolina Code for causing her baby to be born with cocaine metabolites in its system because of her use of crack cocaine during the third trimester of her pregnancy. The circuit court convicted Whitner and sentenced her to eight years in prison. Although Whitner did not initially appeal her conviction, she later filed a petition for Post Conviction Relief ("PCR") in which she plead lack of subject matter jurisdiction to accept her guilty plea and ineffective counsel for her lawyer's failure to advise her that the statute under which she was being convicted may not apply to prenatal drug use. The petition was granted and the State appealed. In July 1996, the South Carolina Supreme Court reversed the circuit court and upheld the conviction, thus becoming the first state court of last resort to uphold a conviction for prenatal substance abuse under a criminal child abuse statute by holding that a fetus is a "child" for the purpose of child abuse statutes. On rehearing, the court again affirmed Whitner's conviction.

114. Id. at 778. The court quoted the South Carolina Code, S.C. CODE ANN. § 20-7-50 (Law. Co-op. 1985):

Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

Whitner, 492 S.E.2d at 778.
115. Whitner, 492 S.E.2d 778-79.
116. Id. at 779.
117. Id.
118. Id.
119. Id.
120. Id. The Supreme Court of South Carolina originally decided the case on July 15, 1996. Whitner v. South Carolina, No. 24468, 1996 WL 393164 (S.C. July 15, 1996). However, the court granted a petition for rehearing on October 22, 1997 to hear Whitner's constitutional arguments, which had been improperly raised with the PCR. Whitner v. South Carolina, 492 S.E.2d 777, 779 (S.C. 1997). As such, the opinion filed in July 1996 was withdrawn and replaced with the opinions issued on October 22, 1997. Id. The two opinions are substantively the same; however, the latter opinion includes a disposition of constitu-
The South Carolina Supreme Court relied on its previous holdings in wrongful death actions and murder charges which recognized that viable fetuses are persons holding certain legal rights and privileges. For example, the court explained that it had recognized a wrongful death action in Hall v. Murphy for an infant who died as a result of injuries sustained prenatally after viability. In that case, the court held there was no "medical or other basis" to assume that a fetus has no separate being apart from the mother and, thus, a fetus capable of independent life apart from its mother is a person. In addition, the court pointed to cases in which it recognized the crime of feticide with respect to viable fetuses, and actions for injuries inflicted on a viable fetus which caused the fetus to be born dead, to conclude that viable fetuses are persons holding legal rights and privileges.

The Whitner court distinguished several cases in other states where the state refused to prosecute for fetal abuse by pointing out that many of the cases which declined to construe "person" to mean "viable fetus" for purposes of child abuse statutes, similarly did not construe the word person in a criminal statute to include fetus (viable or not). For example, in Reyes v. Superior Court, the court of appeals...
noted that California law does not recognize a fetus as a "human being" within the purview of the state murder and manslaughter statutes; thus, it was improper to find the fetus was a "child" for purposes of the felonious child endangerment statute. Likewise, the court in Whitner cited Commonwealth v. Welch\(^{130}\) in which the Kentucky Supreme Court refused to extend a child endangerment statute to prenatal conduct specifically because Kentucky law had not construed the word person in a criminal statute to include a fetus.\(^{131}\)

Even though the South Carolina Supreme Court could distinguish itself from states which do not recognize actions for fetal manslaughter or murder, it still had to distinguish itself from Massachusetts case law since Massachusetts recognizes actions for fetal murder, but did not allow a prosecution for fetal abuse under a child abuse statute.\(^{132}\) Massachusetts, like South Carolina, recognizes wrongful death actions on behalf of a viable fetus injured in utero and subsequently born dead,\(^{133}\) and permits homicide prosecutions of third parties who kill viable fetuses.\(^{134}\) However, in Commonwealth v. Pelligrini,\(^{135}\) the Massachusetts state court held that a mother pregnant with a viable fetus is not criminally liable for transmission of cocaine to the fetus because a viable fetus

---

\(^{130}\) 864 S.W.2d 280 (Ky. 1993).

\(^{131}\) Whitner, 492 S.E.2d 777, 782 (S.C. 1997) (citing Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993)).


\(^{134}\) See Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989) (holding that a viable fetus is a person for purposes of common law crime of murder); Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984) (holding that a fetus is a person for purposes of vehicular homicide statute).

is not a person within the meaning of the state's illegal substance distribution statute.\(^{136}\) The *Pelligrini* court reasoned that its state tort and criminal actions for fetal harm "accorded legal rights to the unborn only where the mothers' or parents' interest in the potentiality of life, not the state's interest, are sought to be vindicated."\(^{137}\) Under this rationale, the viable fetus lacks rights of its own that deserve vindication.\(^{138}\) The *Whitner* court refused to recognize this rationale and instead argued that South Carolina's tort and criminal actions for fetal harm rested on the state's interest—rather than the mother's interest—in vindicating the life of the viable fetus.\(^{139}\)

Finally, the Court to Whitner's constitutional arguments.\(^{140}\) Whitner argued that prosecuting her for using cocaine during pregnancy burdens her right to privacy or her right to carry her pregnancy to term.\(^{141}\) The Court held that her prosecution did not implicate any of Whitner's fundamental rights because cocaine use, whether or not during pregnancy, is not a right since it is always illegal.\(^{142}\) Therefore, the Court stated, "[i]f the State wishes to impose additional penalties on pregnancy women who engage in the already illegal conduct because of the effect the conduct has on the viable fetus, it may do so."\(^{143}\) Thus, Court argued that the imposition of an additional penalty does not burden a woman's right to carry her pregnancy to term; but rather simply recognizes that a third party is harmed.\(^{144}\)

5. *Cases Which Have Declined to Extend Child to Include Fetus*

On the other hand, several decisions have rejected the idea that a fetus is a child for purposes of child abuse statutes and, thus, have held that criminal conduct before the birth of the child does not give rise to criminal prosecution

---

136. *Id.*
137. *Id.*
139. *Id.*
140. *Id.* at 784.
141. *Id.* at 785.
142. *Id.* at 786.
143. *Id.*
under state child abuse/endangerment or drug distribution statutes.\textsuperscript{145} Most significantly, in 1992, the Connecticut Supreme Court reversed a judgment which terminated the parental rights of the mother and granted custody to the state based on the mother's prenatal conduct of injecting cocaine.\textsuperscript{146} The action was brought under section 45a-717 (f)(2) of the Connecticut General Statutes which provides, in pertinent part, that the court may approve a petition for termination of parental rights "if it finds, upon clear and convincing evidence that . . . the child has been denied, by reason of an act or acts of parental commission or omission, the care, guidance or control necessary for [the child's] physical, educational, moral or emotional well-being."\textsuperscript{147} The court had to address the issue of whether the legislature intended this statutory language to contemplate the termination of parental rights based on prenatal conduct.\textsuperscript{148} The court examined the legislative intent behind the statute and concluded that "until birth, Valerie was not a "child" within the meaning of § 45a-717 (f)(2) and, therefore, the "act . . . of parental commission" that took place before that moment cannot be considered to be parental conduct that "denied [her] . . . the care . . . necessary for [her] physical . . . well-being."\textsuperscript{149} Thus, the court concluded that the legislature did not contemplate that a petition for termination of parental rights could be based on prenatal drug use by the mother.\textsuperscript{150}


\textsuperscript{146} In re Valerie D, 613 A.2d 748, 759 (Conn. 1992) (holding that child abuse statute was not applicable to unborn child and that lack of parent-child relationship cannot be used to terminate parental rights when the lack of a relationship was a direct result of the fact that the child was in foster care from birth).

\textsuperscript{147} Id. at 759 (citing CONN. GEN. STAT. § 45a-717(f)(2) (1990)).

\textsuperscript{148} Id. at 765.

\textsuperscript{149} Id. at 760.

\textsuperscript{150} Id. at 765.
B. State Reluctance to Intrude into Lives of Others

Abortion jurisprudence has consistently established that maternal health outweighs concerns for fetal health throughout pregnancy. For example, in *Thornburgh v. American College of Obstetrics and Gynecology*, the Supreme Court struck down a statute that did not clearly make maternal health concerns a greater priority than fetal health. Furthermore, in *Roe v. Wade*, the Court prohibited states from proscribing post-viability abortions if they are “necessary to preserve the life of the mother.”

The State has repeatedly declined to intrude into the lives or bodies of one individual for the sake of another, even when the individual’s life is at stake. In fact, our legal system has typically refused to force one person to help another even when doing so would save the other from injury or death. For example, there have been two reported cases where individuals unsuccessfully sought court orders to compel one person to undergo a medical procedure for the benefit of another. In *McFall v. Shimp*, a terminally ill man sought a court order to compel his first cousin to undergo bone marrow testing and donation if compatible. Even though a bone marrow transplant was the plaintiff’s only hope for survival and the procedure would most likely not cause harm to the cousin, the court refused to order the intrusion since establishing a legally enforceable duty to undergo bodily invasion for another’s benefit “would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.”

Similarly, in *Curran v. Bosze*, a father sought a court order to compel his ex-girlfriend and mother of twin three

---

151. See *supra* Part II.D.3 and accompanying text.
159. *Id.* at 311-12 (citing McFall v. Shimp, 10 Pa. D & C.2d 90 (Allegheny County Ct. 1978)).
year old boys, to be tested as a potential bone marrow donor for the benefit of their thirteen year old son who was dying of leukemia.\textsuperscript{161} The court held that the father could not force her or the twin boys to undergo testing even though it may save the life of his son.\textsuperscript{162} These cases illustrate that imposing invasive and life-threatening medical interventions upon competent yet unconsenting adults is viewed as unconscionable even if done for the benefit of another individual.\textsuperscript{163}

III. STATEMENT OF THE PROBLEM

The outcome of prosecutions for prenatal drug abuse rests on the legal status accorded to the fetus and relative weight given to the mother’s privacy interest relative to the fetus or state. However, the law has not clearly established the relationship between the mother and fetus.\textsuperscript{164} As a direct result, prosecutions of prenatal drug abuse have been conducted on a case-by-case basis, yielding highly unpredictable decisions which rely on questionable rationales and tread heavily on an area that has traditionally been considered private—namely, the bodies and private lives of its citizens.\textsuperscript{165} For example, as Whitner currently stands, nothing in the reasoning of the case would prevent the state from prosecuting a woman for child neglect for lawful activities, such as smoking or drinking coffee, during pregnancy as long as it had the effect of endangering the life of the fetus. In essence, such reasoning reduces women to fetal containers for whom the state can regulate both lawful and unlawful activities during pregnancy. Therefore, many self-destructive or negligent actions taken by pregnant women could be the basis of charges for child abuse.

The prevalence of prosecutions based on purely legal activities should caution restraint in using any punitive framework based on granting the fetus its own legal status since it allows clearly inapplicable statutes to be used to regulate a

\begin{footnotes}
\begin{enumerate}
\item Id. at 312 (citing Court Blocks Forced Marrow Tests, S.F. CHRON., Sept. 29, 1990, at A8; Boy in Leukemia Case Dies - He Lost Supreme Court Ruling, S.F. CHRON., Nov. 20, 1990, at B6) [hereinafter Leukemia Case Dies].
\item Id. (citing Leukemia Case Dies, supra note 161, at B6.)
\item Johnsen, supra note 29, at 583; Nelson, supra note 10, at 312.
\item See, e.g., Planned Parenthood v. Casey 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113; see also supra Part II.D.3 for a discussion of disparities in criminal law which fail to address the legal status of fetuses.
\item Nelson, supra note 10, at 305.
\end{enumerate}
\end{footnotes}
woman's conduct merely because she is pregnant. Therefore, to prevent relegating women to fetal containers and develop a workable framework for prosecuting prenatal drug abuse, the status of the fetus in relation to its mother must be clarified.

IV. ANALYSIS

Drug use during pregnancy unquestionably causes several problems for the child and, later, for society. Women can be prosecuted under generally applicable criminal laws which prohibit any individual from engaging in illegal behavior. However, women should not be singled out and subjected to special prosecutions and additional penalties solely because they were pregnant at the time they engaged in illegal conduct such as drug use.

A. Whitner Violates Casey and Roe Which Represent the Facilitative Model

Prosecutions of fetal abuse have not followed the facilitative model because extending “child” to include a “fetus,” creates fetal rights which are in conflict with the mother’s. Therefore, prosecutions which have accorded the fetus its own legal rights equivalent to that of a child ignore the simultaneous interests of the mother in her own privacy and bodily integrity. Thus, such prosecutions violate the framework for balancing maternal and fetal interests as established in Roe and Casey.

Criminalizing conduct harmful to a woman’s own fetus in utero has two detrimental effects, both of which stem from viewing the fetus and mother as distinct. First, the adversarial model results in treating women as fetal containers, rather than thinking and feeling beings. Second, by recognizing fetal rights in opposition to the mother’s, fetal abuse legislation forces women to see their fetuses as things that

166. See supra Part II.C.
167. Stovall, supra note 1, at 1265.
168. Johnsen, supra note 29, at 579.
170. Johnsen, supra note 29, at 581-82.
171. See supra Part II.D.
172. Maternal Rights and Fetal Wrongs, supra note 2, at 1009.
173. Id. at 1010.
curtail their legal rights.\textsuperscript{174} Fetal abuse laws threaten pregnant women by making pregnancy a legally precarious situation, potentially fostering hostility between mother and child.\textsuperscript{175} Thus, by employing the adversarial model, courts have not only ignored established legal precedent regarding the status of the fetus,\textsuperscript{176} but also have most likely violated \textit{Roe} and \textit{Casey} in three respects. First, recognizing the fetus as a child contradicts \textit{Roe}'s statement that a fetus is not a child for purposes of the Fourteenth Amendment.\textsuperscript{177} Second, the prosecutions rely on a regulatory system that unduly burdens a woman's right to make decisions regarding her pregnancy.\textsuperscript{178} Finally, because it can be argued that the mother's interests in this context are the fundamental rights to privacy and bodily integrity, any regulations potentially impinging on these fundamental rights must survive strict scrutiny such that they are narrowly tailored to achieve a compelling state interest.\textsuperscript{179}

\textbf{B. Implications of Whitner and Other Cases Based on the Adversarial Model}

In addition, a broad statute which makes neglecting a fetus a crime without specifying what constitutes abuse would fail to define the forms of abuse which constitute crimes.\textsuperscript{180} Therefore, women would lack notice regarding the scope of their duties toward their fetuses. Furthermore, doctors and health care providers, who are required to report child abuse, would be in a difficult predicament, because they, too, would not know what conduct they were required to report.

In addition, such applications of child abuse statutes are not narrowly tailored to survive strict scrutiny since they could allow a degree of infringement on maternal rights not

\textsuperscript{174} \textit{Id.} at 1009.
\textsuperscript{175} \textit{Id.} at 1009-10.
\textsuperscript{176} Johnsen, \textit{supra} note 29, at 572.
\textsuperscript{179} Strict scrutiny is the degree of scrutiny the Supreme Court will apply to fundamental rights. \textit{Roe} v. \textit{Wade}, 410 U.S. 113 (1973). The Court has held that "where certain fundamental rights are involved" regulations limiting those rights must be narrowly drawn to protect only the legitimate state interest at stake. \textit{Id.; see supra} Part II.D.1 for judicial development of the right to privacy as a fundamental right.
\textsuperscript{180} Nelson, \textit{supra} note 10, at 313-14.
justified by the extent of fetal protection offered.\textsuperscript{181} For example, child abuse statutes could be interpreted to punish taking of drugs that are essential to the mother's health, but result in harm to the fetus.\textsuperscript{182} Such a result clearly violates the notion that concerns for maternal health outweigh concerns for fetal health throughout pregnancy. For example, in \textit{Thornburgh v. American College of Obstetrics and Gynecology},\textsuperscript{183} the Supreme Court struck down a statute that did not clearly make maternal health concerns a greater priority than fetal health.\textsuperscript{184} In \textit{Roe v. Wade}, the Court prohibited states from proscribing post-viability abortions if they are "necessary to preserve the life of the mother."\textsuperscript{185}

1. Whitner's Flawed Reliance on Roe

The \textit{Whitner} court cites \textit{Roe} for the proposition that the state's interest in a fetus is not only legitimate, but rather it is compelling.\textsuperscript{186} Further, the court found that Whitner has no fundamental rights in this situation.\textsuperscript{187} However, \textit{Whitner}’s reasoning is flawed because \textit{Roe} explicitly held that recognizing a state interest in the life of a viable fetus did not justify the conclusion that a fetus was a person under the Fourteenth Amendment.\textsuperscript{188} However, after citing \textit{Roe} and its progeny as establishing that the states have a compelling interest in the life of a viable fetus, \textit{Whitner} held a pregnant woman has no rights, fundamental or otherwise, in such a context.\textsuperscript{189} Thus, \textit{Whitner} cites a compelling interest in the potential life of the fetus, but ignores the rest of \textit{Roe}’s holding,\textsuperscript{190} which, as reaffirmed in \textit{Casey}, establishes that the state has the power to restrict an abortion after fetal viability as long as there are exceptions for pregnancies which endanger the mother's health.\textsuperscript{191} Under \textit{Roe}’s trimester framework,

\begin{itemize}
\item \textsuperscript{181} \textit{Id.} at 314-15.
\item \textsuperscript{182} \textit{Maternal Rights and Fetal Wrongs}, supra note 2, at 1006.
\item \textsuperscript{183} \textit{Thornburgh v. American College of Obstetrics and Gynecology}, 476 U.S. 747 (1986).
\item \textsuperscript{184} \textit{Id.} at 763.
\item \textsuperscript{185} \textit{Roe} v. \textit{Wade}, 410 U.S. 113, 163-64 (1973).
\item \textsuperscript{186} \textit{Whitner v. South Carolina}, 492 S.E.2d 777, 785 (S.C. 1995).
\item \textsuperscript{187} \textit{Id.} at 786.
\item \textsuperscript{188} \textit{Roe}, 410 U.S. at 156-59.
\item \textsuperscript{189} \textit{Whitner}, 492 S.E.2d at 786.
\item \textsuperscript{191} \textit{Casey}, 505 U.S. at 846.
\end{itemize}
and *Casey*'s undue burden standard, the state is limited in the amount it may impinge on a woman's right to terminate her pregnancy.\textsuperscript{192} In the third trimester, or post-viability, the state interest is considerably stronger, such that abortions can be proscribed except when the mother's health is at issue.\textsuperscript{193} This exception for post-viability abortion, when the state's interests are the strongest, suggests that even in the third trimester of pregnancy, the protection of a woman's life and health supersedes the state's interest in protecting potential human life. Thus, *Whitner* blatantly refused to recognize the mother's simultaneous interest in her own privacy, and as a result, *Whitner*'s reliance on *Roe* to establish the absence of any rights is a disregards *Roe*'s central holdings.\textsuperscript{194}

2. *Whitner* Ignores the Right to Privacy Implicated by Prosecutions Against Pregnant Women

Since *Roe* did not foreclose the possibility of according other legal rights to fetuses, the *Whitner* court rationally turned to other cases where fetuses have been accorded legal rights, such as in tort and criminal statutes, to justify extending the word child to mean fetus.\textsuperscript{195} *Whitner* reasoned that it could distinguish itself from cases in other states which declined to prosecute for prenatal drug abuse because those states did not recognize tort and criminal actions on behalf of fetuses.\textsuperscript{196} However, recognition of the fetus as a "legal person" in instances where it is the mother's interest being vindicated such that no maternal-fetal conflict is created, in no way creates fetal interests that are assertable by the government or others against women.\textsuperscript{197} For example, the *Pelligrini* court held that a viable fetus is not a person within the meaning of drug distribution statutes, even though the state law recognizes tort and criminal actions on behalf of fetuses injured in utero or born dead as a result of in utero injuries.\textsuperscript{198} The *Pelligrini* court reasoned that its state tort and

\textsuperscript{192} Id.; *Roe v. Wade*, 410 U.S. 113 (1973).

\textsuperscript{193} *Casey*, 505 U.S. at 846; *Roe*, 410 U.S. at 164.


\textsuperscript{195} See supra notes 175-177 and accompanying text; *Maternal Rights and Fetal Wrongs*, supra note 2, at 1009; Johnsen, supra note 29, at 572.

\textsuperscript{196} *Whitner*, 492 S.E.2d at 786.

\textsuperscript{197} Johnsen, supra note 29, at 579-80.

\textsuperscript{198} *Commonwealth v. Lawrence*, 536 N.E.2d 571 (Mass. 1989) (holding that a viable fetus is a person for purposes of common law crime of murder); Com-
criminal actions for fetal harm "accorded legal rights to the unborn only where the mothers' or parents' interest in the potentiality of life, not the state's interest, are sought to be vindicated." 99 Under this rationale, the viable fetus possesses no rights of its own that deserve vindication. 200 Therefore, even though some courts have construed non-explicit laws to include protection of fetuses, 201 these cases should be distinguished from fetal abuse prosecutions by the fact that criminalizing third party harm does not implicate a right to privacy. 202 In fact, it is difficult to conceive a situation where the state interest in fetal health could be outweighed by the rights of a third party. 203 However, the state's interest may be trumped by a privacy right when maternal conduct is in question. 204

The Whitner court argued, on the other hand, that South Carolina's tort and criminal actions for fetal harm rested on the state's interest—rather than the mother's interest—in vindicating the life of the viable fetus. 205 Yet, this argument fails to recognize that in order to view a prosecution as vindicating the state's rights rather than the mother's rights, the state must conclude that the fetus has a legal status separate from its mother. In addition, this rationale fails to recognize that when the woman is vindicating her own rights for fetal homicide, there are no implications for her right to privacy. Thus, Whitner's rationale again relies on creating fetal rights in conflict with the mother's, obscuring the inescapable reality that, physically, a fetus is part of a woman's body. 206

3. Lack of Consistency in Recognizing Actions on Behalf of Fetuses in Tort and Criminal Law

In addition, drawing analogies from the body of tort and

---


203. Id.

204. Id.

205. Whitner, 492 S.E.2d at 783.

206. Johnsen, supra note 29, at 579.
criminal case law is also highly suspect since treatment of these issues has been extremely disparate. For example, as of 1984, thirty-seven states had recognized a cause of action for prenatal injury. In most states, recovery is limited to cases in which the fetus was viable at the time of the tort. Similarly, even though criminal liability attaches in some jurisdictions for intentional acts leading to fetal death under either homicide or feticide statutes, it is usually limited to viable fetuses. Moreover, courts are split over whether to extend protection for fetuses into criminal statutes that do not specifically mention the unborn. Although the conclusions one should draw from this disparate treatment should be limited to some extent, live-birth and viability requirements and the non-enforcement of criminal statutes can be interpreted as evincing a lesser state interest in protecting fetuses from harm than in protecting the born. Thus, the treatment of fetal injuries in other areas supports the proposition that a state's interest in preventing fetal abuse is less compelling than its interest in protecting a child from post-natal harm.

C. Lack of Precedent for Fetal Abuse Statutes

Because Roe and Casey both adopt the facilitative model of fetal-maternal rights, no precedent exists for coercive fetal abuse statutes. As previously stated, proponents of coercive state action for fetal abuse statutes argue that fetuses which will not be aborted have a future interest in their well-being, such that maternal acts or omissions which endanger the fetus should be prosecuted. To support this contention, proponents of pre-birth seizures and post-birth sanctions cite the state's ability to prohibit abortions in the third trimester, ex-

207. Id.; Maternal Rights and Fetal Wrongs, supra note 2, at 1003-04 (citing Ron Beal, Note, Can I Sue Mommy? An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive, 21 SAN DIEGO L. REV. 325, 332 (1984)).


210. See, e.g., Reyes v. Superior Court, 141 Cal. Rptr. 912, 913 (Ct. App. 1977) (refusing to read fetal protection into California child abuse statute that did not mention fetuses).

211. Maternal Rights and Fetal Wrongs, supra note 2, at 1005.

212. Id.

213. Warren, supra note 22, at 287.
cept when necessary to save the life of the mother, as a recognition that a woman who decides not to terminate her pregnancy in the first two trimesters has voluntarily waived the right to engage in any harmful conduct towards the fetus.\textsuperscript{214} For example, John Robertson makes a distinction between freedom to procreate and freedom in procreation.\textsuperscript{215} He argues that once a woman decides to carry a pregnancy to term she impliedly waives the right to make her own decisions about how her pregnancy will be conducted.\textsuperscript{216} Thus, a woman has a legal duty not to put her fetus at risk and can be subject to homicide or child abuse charges for violating that duty.\textsuperscript{217}

This obligation, carried to its logical conclusion, requires that a pregnant woman could be forced to consent to fetal therapy or prohibited from smoking, drinking or otherwise failing to maintain her health. The notion of implied waiver, however, raises the question it is supposed to answer—whether an interest in protecting fetuses can outweigh maternal autonomy. Thus, one is left at the same point at which one began. A prosecution for otherwise legal behavior raises troubling questions in that it presupposes that a woman who elects to continue a pregnancy has forfeited legal rights enjoyed by all other competent adults who have been convicted of no crime.\textsuperscript{218}

Proponents of coercive fetal abuse prosecutions further argue that, although parents have a great deal of discretion in deciding how to raise their children, they do not have absolute freedom because they are morally and legally obligated not to inflict harm on their children.\textsuperscript{219} Parents who injure their children or fail to provide adequate food, clothing or medical care can have their children taken away from them and may even face criminal sanctions.\textsuperscript{220} Such arguments lack merit because they fail to recognize that pregnant women are not immunized from prosecution under generally applicable criminal statutes that would punish illegal drug

\textsuperscript{214} Robertson, supra note 23, at 405 n.3.
\textsuperscript{215} Id. at 410.
\textsuperscript{216} Id. at 463.
\textsuperscript{217} Id.
\textsuperscript{218} Warren, supra note 22, at 290.
\textsuperscript{219} Steinbock, supra note 1, at 275-76.
\textsuperscript{220} Id. at 276.
However, many women have been singled out for special prosecutions and additional penalties solely because they were pregnant at the time of drug use. Prosecutions have relied on criminal statutes for drug delivery and distribution that were never intended to be used in this manner and that impose harsher penalties than those for possession.

There is no precedent for a waiver of maternal rights because, if a woman could truly be seen as waiving maternal rights, any situation in which a mother declined medical treatment possibly beneficial to the fetus would be illegal. However, women have been able to decline surgery which their physicians regard as beneficial to the fetus and have been able to refuse cesarean sections even when doing so may cause the baby to die. Furthermore, the state has continually been reluctant to intrude into the lives or bodies of one individual for the sake of another, even when the individual's life is at stake. In fact, our legal system has typically refused to force one person to help another, even when doing so would save the other from injury or death. For example, individuals have unsuccessfully sought court orders to compel one person to undergo a medical procedure for the benefit of another, illustrating the court's reluctance to invade into the sanctity of one's body for the benefit of another individual. Precedent has firmly established that one person's medical needs cannot readily override another person's right to autonomy and physical integrity. Therefore, John Robertson's interpretation of Roe as a waiver of a pregnant woman's personal autonomy remains problematic and unsupported by case law.

D. Fetal Abuse Prosecutions Based on the Adversarial Model Threaten Constitutional Liberty

Prosecutions for fetal abuse necessarily raise profound concerns about privacy and bodily autonomy because the fetus (or future child) can be protected only through the body of

---

221. Johnsen, supra note 29, at 579.
222. Id.
225. Id.
226. Johnsen, supra note 29, at 583.
227. See supra notes 158-165 and accompanying text.
228. Warren, supra note 22, at 290.
the pregnant woman or through controlling the behavior of the pregnant woman during pregnancy. For example, allowing the government to impose special penalties and restrictions on pregnant women’s actions in order to promote asserted interests in the fetus could enable government to dictate a woman’s conduct at every stage of pregnancy. Thus, women could be regulated by the state for otherwise legal activities, such as drinking or smoking, since the decisions at issue in fetal abuse cases concern both procreative and non-procreative issues, including what to drink or eat, when to visit the doctor, whether to have sex, etc. Regulating such decisions for all people—for example, banning all alcohol consumption—has no procreative significance. If, however, states limit consumption only for pregnant women, they would be regulating the procreative aspects of the decision whether to drink. Laws seeking to control the incidents of procreation infringe on a woman’s power to make decisions about how she will live her life during her pregnancy. Thus, fetal abuse cases implicate the right to make decisions that affect the spheres of family, marriage and procreation, as well as the right to control one’s own body.

Since it seems well established from previous case law that the Court would have to recognize a right to make decisions concerning one’s body during pregnancy, regulations which affect this right must be subject to constitutional scrutiny. However, the issue remains which level of scrutiny to apply. Until Casey, it had been well established that if a

229. Steinbock, supra note 1, at 276.
231. Maternal Rights and Fetal Wrongs, supra note 2, at 1000.
232. Id.
233. Id.
234. Id. This is contrasted with Robertson’s view that once a woman makes the decision she no longer has a free right, but, rather, must make decisions not to “act in ways that would adversely affect the fetus.” See Robertson, supra note 23, at 437. Robertson’s theory stems from the idea that it is not fair to give a woman the benefit of a right that she has deliberately forgone in that by choosing not to abort, the woman has decided to live her life in a proscribed manner. Id.
235. Maternal Rights and Fetal Wrongs, supra note 2, at 998.
236. See infra Part II.D. for discussion about the right to make decisions concerning one’s body during pregnancy.
right deemed fundamental, such as the right to privacy implicated by abortion or choices during pregnancy, then as the Court stated in Roe, "[w]here certain 'fundamental rights' are involved, the Court has held that the regulation limiting these rights may be justified only by a 'compelling state interest', and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." Thus, Roe developed a trimester framework to reflect the growing state interest in the potentiality of life which becomes compelling in the last trimester. In Casey, however, the Court rejected the trimester framework and the notion that all pre-viability regulations must be struck down under strict scrutiny. Therefore, after Casey, it appears that the State's interest in the fetus pre-viability may warrant government intrusion. In addition, the state's interest in the potentiality of life from conception may warrant intrusions that do not create an undue burden on the exercise of reproductive rights.

The new standard adopted by Casey is the undue burden standard. However, the court did not make it clear whether this should be the new standard for a fundamental right or whether it decided that the right to an abortion is not fundamental and that the undue burden standard is the correct level of scrutiny for important, but not quite fundamental, rights. Regardless, it appears that the undue burden standard constitutes an intermediate level of scrutiny falling somewhere between a rational relationship and strict scrutiny, since regulations similar to ones which had been previously struck down by Roe, were upheld in Casey. Therefore, it seems obvious that if a regulation cannot withstand the undue burden analysis, it will definitely be struck down by a strict scrutiny analysis. Thus, the inquiry begins with

240. Id.
241. Id.
242. Id.
243. See, e.g., id.
244. See, e.g., id. For example, parental consent provisions and 24 hour waiting periods were previously struck down, but were held not to constitute an undue burden in Casey. Casey, 505 U.S. at 876.
an undue burden analysis as articulated in Casey. 245

E. *Punitive Measures in the Fetal Abuse Context Constitute an Undue Burden*

Criminal law punishes acts it deems morally culpable for one of two reasons. From a utilitarian perspective, punishment is justified only if it is likely to result in some net social benefit. 246 In contrast, from a retributivist perspective, the guilty should suffer, hence punishment need not be justified by other social benefits. 247 Thus, a law that attains either of these ends without unduly burdening the ultimate right to privacy should be upheld. However, in the context of prosecutions for prenatal drug abuse, neither of these ends are attained.

For example, the alleged state interest in fetal abuse prosecutions is protecting the health of the fetus. However, most threats of prosecution for prenatal drug abuse have the effect of deterring women from seeking drug treatment that could end the drug abuse and prevent fetal harm. 248 As previously discussed, the USGAO reports that fear of prosecution and loss of custody act as a “barrier to treatment” for pregnant women dependent on drugs. 249 Furthermore, the American Medical Association has also expressed similar concerns because women are deterred from seeking prenatal care or refraining from telling their physicians about their drug use, which could prevent many of the problems associated with drug abuse during pregnancy. 250

In addition, even if the prosecutions could be proven to further the state’s interest in the potential life’s well-being, they would not survive the “least restrictive alternative” standard that requires that “even though the governmental purpose be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal

245. See infra Part IV.E.
247. Id.
248. Johnsen, supra note 29, at 603.
249. Id. (citing U.S. GEN. ACCOUNTING OFFICE, DRUG EXPOSED INFANTS: A GENERATION AT RISK (1990)); see supra Part II.B.
250. Id. at 603 n.151 (citing American Medical Ass’n, Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women, 264 JAMA 2663, 2667 (1990)).
liberties when the end can be more narrowly achieved.\textsuperscript{251}
Providing adequate drug treatment and prenatal care for poor women are more narrowly tailored and effective means for the state to address the problem of drug-exposed babies.\textsuperscript{252} Therefore, punitive sanctions must be struck down.

Thus, if a state was really concerned about the health of the unborn child, it would ensure that women were not deterred from seeking prenatal care and would also ensure adequate drug treatment for not only non-pregnant, but also pregnant women.\textsuperscript{253} However, despite the great need for drug and alcohol treatment programs, many pregnant women cannot obtain access to one.\textsuperscript{254} This is because many treatment programs routinely refuse to admit pregnant women, and those that do admit pregnant women have long waiting lists.\textsuperscript{255}

Because prosecutions do not effectively further the state's interest in fetal health, and may actually exacerbate the problem by deterring women from seeking treatment, prosecutions for fetal abuse cannot pass constitutional muster. More specifically, just as the state can burden a woman's ability to get an abortion to the extent that the regulation helps the woman make an informed decision, the state can burden a woman's liberty during pregnancy to the extent that it achieves the state interest in a viable fetus as long as it does not unduly burden the woman's exercise of her privacy or liberty rights. Fetal abuse statutes do not achieve the state's interest in protecting potential life because they deter women from seeking prenatal care, and, thus, they are unduly burdensome.\textsuperscript{256} In addition, these forms of coercion severely violate women's rights to privacy, liberty, autonomy and physical integrity which would be unjustifiable even if

\textsuperscript{251} Roberts, supra note 237, at 1456 (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960)).
\textsuperscript{252} Id. at 1456.
\textsuperscript{253} Johnsen, supra note 29, at 613.
\textsuperscript{254} Id. at 605 (citing Born Hooked: Confronting the Impact of Prenatal Substance Abuse: Hearing Before the House Select Committee on Children, Youth and Families, 101st Cong., 110, 112 (1989) (Statement of Wendy Chavkin, M.D., M.P.H., Rockefeller Fellow, Sergievsky Center, Columbia School of Public Health)).
\textsuperscript{255} Johnsen, supra note 29, at 605 (citing Molly McNulty, Pregnancy Police: The Health, Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses, 16 N.Y.U. REV. L. & SOC. CHANGE 277 (1987-88)).
\textsuperscript{256} See, e. g., Johnsen, supra note 29, at 601, 613.
there were a net benefit to society. Further, these types of coercion presume that just because a woman is pregnant she has forfeited her fundamental rights of autonomy and bodily integrity. Therefore, before the state can impose regulations on a women's conduct during pregnancy that will be applied only to women by virtue of the fact that only women can bear children, the courts should strictly scrutinize the regulations to ensure that they actually further the government's interest and do not unnecessarily infringe on a woman's liberty.

V. PROPOSAL

Prenatal substance abuse presents a growing problem in the United States. However, child abuse prosecutions based on construing the word child to include a fetus have the effect of creating a conflict between the mother and fetus which fails to account for the interconnected relationship of mother and fetus. If the adversarial model is employed to prosecute prenatal conduct, there is no logical stopping point, thus allowing convictions for otherwise legal conduct. However, if the fetus is granted no rights at all, the mother can do whatever she likes during pregnancy with no regard to the fetus at all. Therefore, the facilitative model should govern fetal abuse because it recognizes that pregnant women have to make numerous decisions that require balancing uncertain risks to the fetus against competing demands in their lives. Through that recognition, the right to privacy in reproductive decision making is necessarily balanced by the fetus's interest in potential life. As stated by Dawn Johnsen, "this model recognizes that women who bear children share the government’s objective of promoting healthy babies, but that existing obstacles—and not bad intentions—impede the attainment of this common goal."

Laws seeking to control the incidents of procreation infringe on a woman's power to make decisions about how she

257. Warren, supra note 22, at 287.
259. Johnsen, supra note 29, at 574.
260. Id. at 571.
will live her life during her pregnancy. Therefore, the right to "control procreative liberty and familial decisions should also apply to the maternal decisions potentially infringed upon by fetal abuse legislation." Because fetal abuse cases implicate two aspects of the right to privacy: (1) the right to make decisions that affect the spheres of family, marriage, and procreation, and (2) the right to control one's own body, case law on point, such as Casey, should govern. Therefore, as in Roe and Casey, the fetus should not be granted the legal status of a person. In addition, any regulations should not unduly burden a woman's right to privacy. Because coercive state action often prevents women from obtaining adequate prenatal care, courts and the government should protect women's rights to privacy by preventing coercive state action after the harm has been done to the fetus. Therefore, this comment proposes that rather than deprive women of the right to make judgments or punish them after the fact for making "wrong" choices, states should seek to expand women's choices by improving access to prenatal care and substance abuse treatment.

VI. CONCLUSION

Although prenatal abuse constitutes a growing problem in the United States, the solution should not rely on granting the fetus its own legal status, which has far reaching implications for women since it "creates a false impression that an inherent conflict exists between promoting healthy births and protecting women's fundamental liberties." Prior to fetal abuse prosecutions, a fetus had been granted rights distinct from the mother only in the narrow areas of tort and criminal law where the rights of the mother, rather than the rights of a third party, are being vindicated. Therefore, holding that a fetus is a child for purposes of child abuse statutes is not only problematic but unprecedented because it relegates

261. Id.; see supra note 234.
262. Maternal Rights and Fetal Wrongs, supra note 2, at 1000.
263. Id. at 998.
265. Johnsen, supra note 29, at 613.
266. Id.
women to the position of fetal containers. Thus, any actions which potentially harm the fetus, whether legal or non-legal, could be used to prosecute women, thus infringing on women's liberty interest.\textsuperscript{268} Furthermore, this impingement is unjustified because it has the effect of deterring behaviors necessary to promote healthy and safe pregnancies.\textsuperscript{269} Therefore, any attempts to combat prenatal abuse must account for the intricately intertwined interests of both woman and fetus so that just policies that do not impinge arbitrarily on a woman's liberty are developed. Because state intervention into women's bodies and their other legally protected rights is highly intrusive, courts should not uphold such interventions using vague standards of their own creation which do not encompass procedural safeguards.

\textit{Sarah Letitia Kowalski}

\textsuperscript{268} Johnsen, \textit{supra} note 29, at 572.

\textsuperscript{269} \textit{Id.} at 613.