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Alexandria Weininger

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Alexandria Weininger

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Professor Riccio-Comparative Constitutional Law AWR

Fetal Rights and Prenatal Substance Abuse: A Comparative Law Perspective

“May be human beings have not evolved enough to hold the complex idea that many things can be true at the same time. We can feel a certain way. We can value the unborn as a matter of religion, ethics, or experience, but we can’t do that as a matter of law and still value pregnant women.” – Lynn Paltrow, Executive Director, National Advocates for Pregnant Women¹

Part I Introduction

Amanda Kimbrough, a 32-year old Alabama woman, admits she has a drug problem. Kimbrough, who was pregnant with her third child in 2008, said she used methamphetamine only once during the pregnancy.² “I don’t even know why I done it. I guess the Devil knocked on my shoulder that day,” Kimbrough said to a reporter with *The New York Times*.³ The child, named Timmy Jr., was born premature at 25 weeks in April of 2008. The boy weighed 2 pounds 1 ounce and lived only 19 minutes.⁴ Kimbrough tested positive for meth and as a result, her two older children were removed from her custody and she was allowed only supervised visits for 90 days.⁵ She was also ordered to drug treatment and parenting classes.⁶ However, law enforcement’s intervention did not end there. Six months after the baby’s death, she was charged with chemical endangerment of a child, a Class A felony, which carries a mandatory sentence of 10 years to life.⁷

Alabama’s chemical endangerment law in the state’s criminal code provides:

A responsible person commits the crime of chemical endangerment

¹ Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES, April 25, 2012, at A1

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ ALA. CODE § 26-14-3.2 (2006)

of exposing a child to an environment which he or she does any of the following:

1. Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, or drug paraphernalia as defined in § 13A-12-260.
2. Violates § 26-15-3.2(a)(1) and a child suffers physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia.
3. Violates subdivision § 26-15-3.2(a)(1) and the exposure, ingestion, inhalation, or contact results in the death of the child.⁸

The State of Alabama argued that the term “child” in the statute extends to an unborn child, and that the term “environment,” includes the uterus or womb. In its case against Kimbrough, the State relied on a decision by the Alabama Court of Criminal Appeals, which upheld this broad interpretation of the chemical-endangerment statute.⁹ In its defense of this interpretation, the Colbert County Assistant District Attorney Angela Hulseby, told *The New York Times*, that “[Kimbrough] caused the death of another person, a person that will never have the chance to go to school, go to the prom, get married, have children of their own. You’re dealing with the most innocent of victims.”¹⁰ At the end of State’s case, Kimbrough’s attorney advised her to plead guilty, but reserved the right to appeal the conviction on constitutional grounds.¹¹

There is no denying that substance abuse during pregnancy is a pervasive problem. According to a national survey on drug use and health, among pregnant women aged 15 to 44,

⁸ *Id.*

⁹ See *Ankrom v. State*, CR-09-1148, 2011 WL 3781258 (Ala. Crim. App. Aug. 26, 2011) (Court held that a viable fetus is a “child” within the meaning of the chemical-endangerment criminal statute).

¹⁰ Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES, April 25, 2012, at A1

¹¹ *Id.*

5.0 percent were using illegal drugs in 2010-2011.¹² In comparison, the rate among women in this age group who were not pregnant was 10.8 percent.¹³ In addition, a recent study by the Journal of the American Medical Association found that the number of pregnant women using opiate drugs and the number of babies born experiencing withdrawal symptoms rose sharply over the last decade.¹⁴ While medical experts disagree as to the extent of harm controlled dangerous substances can inflict upon a developing fetus, nearly all agree that drug use among pregnant women needs to be addressed and discouraged.¹⁵ While nearly all advocate for treating the drug- addicted woman through treatment programs, states have used a variety of methods, in combination with treatment, in an attempt to target prenatal substance abuse. Some states have expanded their civil child-welfare laws to include prenatal substance abuse as a factor in determining whether grounds exist to terminate parental rights due to abuse or neglect, while some have authorized civil commitment of pregnant drug-users.¹⁶ While all states have drug laws that make it a crime to be in possession, use or distribute drugs classified as controlled dangerous substances, as many as thirty-three states currently have criminal statutes that address the issue

¹² Substance Abuse and Mental Health Services Administration, *Results from the 2011 National Survey on Drug Use and Health: Summary of National Findings*, NSDUH Series H-44, HHS Publication No. (SMA) 12-4713. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2012.

¹³ *Id.*

¹⁴ Pam Belluck, *Abuse of Opiates Soars in Pregnant Women*, N.Y. Times (April 30, 2012), <http://www.nytimes.com/2012/05/01/health/research/prescription-drug-abuse-soars-among-pregnant-women.html> (Article states that approximately 13,500 babies a year are born with opiate-withdrawal symptoms).

¹⁵ American College of Obstetricians & Gynecologists, *Maternal Decision Making, Ethics, and the Law*, ACOG COMMITTEE OPINION, No. 321, Nov. 2005 at 9 (Opinion states, “Pregnant women should not be punished for adverse prenatal outcomes. The relationship between maternal behavior and prenatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.”).

¹⁶ Cynthia Dailard & Elizabeth Nash, *State Responses to Substance Abuse Among Pregnant Women*, 2000, THE GUTTMACHER REPORT ON PUBLIC POLICY 3(6):3-6 (Findings of this study used in the Institute’s state policies in brief, as of October 1, 2012).

of exposing children to illegal drug activity.¹⁷ Prosecutors in some states have tried to rely on “chemical-endangerment” laws to target prenatal substance abuse.¹⁸ Prosecutors in states such as South Carolina and Alabama, have been using certain criminal laws on the books and filing charges against women for their conduct during pregnancy.¹⁹ While most attempts to convict pregnant women for their prenatal conduct using state criminal statutes have been unsuccessful or have resulted in overturned convictions, many women are still spending time behind bars and using precious resources to defend themselves against the charges stemming from a woman’s drug use while pregnant.²⁰

This paper will examine the issue of fetal rights, through the perspective of criminal laws used to prosecute women for their conduct while pregnant. It will provide a comparative analysis of the constitutional protections (or lack thereof) bestowed upon the unborn in the United States and the Dominican Republic; two countries who take drastically different takes on the issue of fetal rights. It will also examine Canada’s interpretation of fetal rights. Part II will address the constitutions in these three countries, which explicitly balance the rights between privacy rights of women and the rights of the unborn. In the Dominican Republic for example, some would suggest the balance tilts in favor of fetal rights. Part III of this paper will discuss the fetus as a plaintiff and its ability to sue third parties and the success of suits against the mother for prenatal conduct in these countries. Part IV will examine the fetus as a victim of crime, and determine whether the law applied there should be applied to the unique mother-unborn child relationship.

¹⁷ Child Welfare Information Gateway, *Parental Drug Use as Child Abuse – State Statutes*, July 2012, available at http://www.childwelfare.gov/systemwide/laws_policies/.

¹⁸ *Id.*

¹⁹ Interview with Farah Diaz-Tello, Staff Attorney, National Advocates for Pregnant Women (Oct. 2012)(Tello adds that her office is also seeing prosecutors attempt to charge pregnant women for their conduct using state criminal law in Texas and Tennessee).

²⁰ Linda C. Fentiman, *Pursuing the Perfect Mother: Why America’s Criminalization of Maternal Substance Abuse Is Not the Answer – A Comparative Legal Analysis*, 15 MICH. J. GENDER & L. 389, 409 (2009).

This paper does not attempt to justify illegal conduct by pregnant women nor does it take the position that pregnant women who use drugs should be absolved of criminal liability, simply by virtue of being pregnant. It does however maintain that there are presently criminal laws designed to deal with drug use and possession and that a statute, targeting a woman because she is using drugs and happens to be pregnant, is problematic constitutionally and presents problems on the public policy front, because it discourages women from getting help out of fear of criminal sanctions. Through this analysis, the paper will discuss recommendations that include relying on drug laws currently on the books to prosecute women who use drugs while pregnant, rather than creating a whole new charge based on conduct alleged to have affected the fetus. Statutes that do attempt to target people who possess drugs around minors should include an exception for pregnant women, such as Missouri's chemical-endangerment statute. Furthermore, states should be relying on civil laws, taking prenatal substance abuse into account to make determinations as to parental rights once the child is born, and should focus on the treatment of drug-addicted women through drug-treatment programs rather than through jail time.

Part II The Constitution and the Balance Between Privacy Rights and the Rights of the Unborn

A. The United States

In its attempt to determine the rights afforded to a woman and her fetus, the Supreme Court of the United States turns to the Constitutional provisions dealing with privacy and liberty. Regarding the issue of privacy, while the U.S. Constitution does not explicitly enumerate a right to privacy, the Court has ruled that privacy is a fundamental right protected by substantive due process.²¹ While privacy is not explicitly provided, there are amendments in the Constitution

²¹ Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (Court held that that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

where the notions of privacy are apparent, and the privacy notion is also inherent in the Bill of Rights.²² In determining whether a privacy right exists in regard to the choice to procreate, the Court determined in Griswold v. Connecticut, 381 U.S. 479 (1965), that if a fundamental right was at issue, any legislative actions must be narrowly tailored to effectuate the legitimate state interests asserted.²³

In Roe v. Wade, 410 U.S. 113 (1973) the court applied the framework used in Griswold, and determined that the claim that a fetus is a person is not supported by the Constitution.²⁴ The Court determined that the “right of personal privacy includes the abortion decision,” but added that the right is not absolute and that important state interests must be considered when proposing regulations.²⁵ The Court also added that “that at some point the state interests as to the protection of health, medical standards, and prenatal life, become dominant.”²⁶ The Court added that in comparing this privacy interest with the privacy interests previously before the Court, this one is quite different as the woman’s privacy interest is not sole nor is it isolated.²⁷ This “point” that the Court mentions, and in the State has a legitimate interest, is at viability.²⁸ The Court referred to medical knowledge at the time, and deemed it to be the third trimester, somewhere between the 24th and 28th week of pregnancy.²⁹ The viability standard enunciated in Roe remains the standard today, despite the medical advances which have given babies born earlier than the stated viability estimate a chance at survival.

²² Roe v. Wade, 410 U.S. 113, 152 (1973) (Court stated that it recognized a right of personal privacy in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments).

²³ Griswold, 381 U.S. at 485.

²⁴ Roe, 410 U.S. 113, 158 (1973).

²⁵ Id.; See also Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 835 (1992).

²⁶ Roe, 410 U.S. at 154.

²⁷ Id. at 159.

²⁸ Id. at 163 (Court stated that it is a medically-established fact that a fetus is viable from the end of the first trimester on.).

²⁹ Id.

The additional constitutional basis implicated by the criminalization of a woman's conduct while pregnant is the concept of personal liberty. Justice Stewart's concurrence in Roe is particularly applicable and should be considered, as he opined that, "[i]n a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed."³⁰ This is essentially the core of the 14th Amendment Equal Protection, which provides that no state shall deprive "any person of life, liberty, or property without due process of law; nor deny to any person equal protection of the laws."³¹ In Roe, the Court determined that the word "person," included in the 14th Amendment, does not include the unborn, but naturally includes the mother.³² The Court in Casey followed this line of reasoning, recognizing the unique human condition of pregnancy and that these personal and intimate decisions in connection to that pregnancy are the core of liberty protected by the 14th Amendment.³³ It also added that a liberty violation is present in limited circumstances, when the state's regulation is so burdensome that it places an "undue burden" on the woman's ability to make the personal decision.³⁴ This concept illustrates the deference paid to a woman's liberty interest, and the Court's reluctance to allow States to interfere with a woman's ability to decide whether to carry a pregnancy to term. These cases, upholding a woman's right to choose based on liberty and its outweighing of the state's interest in potential human life, are important to the issue regarding the criminalization of a woman's conduct while pregnant, because the criminalization of this conduct could very well coerce a woman to end a pregnancy, out of fear of criminal sanctions should she give birth to a child affected in some way by her illicit drug use.

³⁰ Roe, 410 U.S. at 168 (Stewart, J., concurring)(Citing this proposition, cited in Board of Regents v. Roth, 408 U.S. 564, 572 (1972)).

³¹ U.S. Const. art. XIV, § 1

³² Roe, 410 U.S. at 157.

³³ Planned Parenthood of Se. Pennsylvania, 505 U.S. at 852-54.

³⁴ Planned Parenthood of Se. Pennsylvania, 505 U.S. at 874.

In addition, the United States Supreme Court has characterized the right to marry and procreate as “one of the most basic civil rights of man.”³⁵ The Court reiterated the protection of this right in subsequent cases, adding that “[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.”³⁶ It must be mentioned however, that not every state has embraced the notion that the right to procreate is absolute. In Wisconsin for example, the Wisconsin Supreme Court ruled that a judge’s probation condition on a man with nine children whom he consistently failed to support, could not have any more children until he proved he was able to support them, was constitutional.³⁷ The court added that while it recognizes the right to procreate as a fundamental right, the probation condition was exactly that: a condition, and was not an outright ban.³⁸ Also, the court stated it was reasonably related to the objective of rehabilitation and was not overbroad. Further, it reasoned that convicted individuals do not enjoy these rights to the same degree as those who have not been convicted of a crime.³⁹

In addition to a woman’s fundamental right to carry a pregnancy to term and right to an abortion, is the concept of dignity. Dignity is a word that can be found in a number of constitutions around the world⁴⁰ and in some transnational declarations, however it is not an enunciated concept in the United States Constitution, but a word occasionally invoked in United States court decisions.⁴¹ While this notion of dignity is not specifically mentioned in the

³⁵ Skinner v. State of Okl. ex rel. Williamson, 316 U.S. 535, 541 (1942).

³⁶ Carey v. Population Services, Int’l, 431 U.S. 678, 685 (1977).

³⁷ State v. Oakley, 2001 WI 103, 245 Wis. 2d 447, 477, 629 N.W.2d 200, 214 opinion clarified on denial of reconsideration, 2001 WI 123, 248 Wis. 2d 654, 635 N.W.2d 760

³⁸ Oakley, 2001 WI 103, 245 Wis. 2d at 468-69.

³⁹ Id. at 466.

⁴⁰ Constitution of the Republic of South Africa [Constitution] May 8, 1996, Chapter 2, Section 10 (S. Afr.); Grundgesetz [Constitution] May 23, 1949, Chapter 1, art. 1 (Ger.).

⁴¹ See Neomi Rao, Three Concepts of Dignity in Constitutional Law, 86 NOTRE DAME L. REV. 183, 185-86 (Author refers to the Universal Declaration of Human Rights, which provides, “All human beings are

American Constitution, it is still worthy of discussion, as it is a word utilized by the Personhood movement in the United States, which stands behind attempts and policies extending legal protection to the fetus, and is used by numerous advocates that oppose laws criminalizing the conduct of pregnant women by way of its affect on the fetus.⁴² The dignity term, although perhaps not expressly provided, has been invoked in prior United States Supreme Court decisions in the context of Equal Protection challenges involving gender or race.⁴³ Dignity is used as courts attempt to reconcile the conflict between a woman's fundamental right to privacy and the "fetus' right to physical integrity."⁴⁴ As this paper will show, states take different approaches in balancing the woman's privacy interest, the state's interest in the potential life, and in creating measures that are tailored to achieving the objective of deterring drug use among pregnant women. Interestingly, Justice Stevens foreshadowed the potential for conflict in Casey, by quoting Ronald Dworkin, a professor of law and philosophy, Stevens wrote:

"The suggestion that states are free to declare a fetus a person...assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population...If fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves by declaring that fetuses have rights competitive with the constitutional rights of women."⁴⁵

born free and equal in dignity and rights." G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. I (Dec. 10, 1948).

⁴² See Personhood Pro-Life & Pro-Human Policy for the 21st Century, <http://www.personhood.net/> (last visited Nov. 6, 2012) (Organization promotes the notion that the unborn should constitutionally be deemed "persons." States the sanctity of life is the bedrock of human dignity.); See also Katharine McCabe, *What About the Personhood of Women?*, National Advocates for Pregnant Women (Nov. 6, 2012, 2:38 PM), http://advocatesforpregnantwomen.org/blog/2012/07/what_about_the_personhood_of_w.php.

⁴³ Neomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsberg's Equality Jurisprudence*, 70 OHIO ST. L.J. 1053, 1059-62 (2009) (Article refers to United v. Virginia, 518 U.S. 515, 515 (1996), as although Justice Ginsberg did not use the word "dignity," her opinion reaffirms the value in a woman's choice to make decisions for herself, here, in the education context).

⁴⁴ Deanna Rae Reitman, *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*, 16 ST. JOHN'S J. LEGAL COMMENT. 267, 270 (2002).

⁴⁵ Lynn Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1010 (1999) (Citing Casey v. Planned Parenthood, 505 U.S. 833, 913 n.2 (Stevens, J. concurring)).

In the United States, the unique relationship between federal and state law, as well as the Constitutional protections afforded women in regard to abortion and the right of a state to have a compelling interest in potential life, creates a basis from which courts can analyze the phenomena of criminalizing prenatal conduct. States, through the 10th Amendment, their individual constitutions, and statutory codes also play a role in the decisions handed down by state courts regarding state interest in potential life.⁴⁶

B. Canada

The Canadian Constitution provides in Section 7 under the Legal Rights portion, that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁴⁷ Unlike the Dominican Republic, which is discussed *infra*, Canada has not decided as to whether this right extends to the unborn. Section 7 was interpreted in the context of abortion rights in the country’s Supreme Court decision addressing abortion.⁴⁸ In the 1960s, the Canadian government legalized abortions, however included restrictions such as needing committee approval prior to the abortion.⁴⁹ In the 1980s Dr. Morgentaler had been performing abortions with prior committee approval and in a clinic rather than an accredited hospital, as mandated by law.⁵⁰ Morgentaler was subsequently charged and claimed the law violated Section 7 and 12 of the Canadian Charter of Rights and Freedoms.⁵¹ The Supreme Court of Canada held that the applicable criminal section was

⁴⁶ U.S. Const. amend. X

⁴⁷ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c. 7 (U.K.).

⁴⁸ R. v. Morgentaler, [1988] 1 S.C.R. 30 (Can.).

⁴⁹ Morgentaler, [1988] 1 S.C.R. at para. 5.

⁵⁰ Id.

⁵¹ Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c. 2(a) (U.K.) (Article provides, “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.”); Canadian Charter of Rights and Freedoms, Part 1 of

unconstitutional.⁵² Chief Justice Dickson of the Supreme Court of Canada opined that the criminal code, imposing criminal sanctions on a woman and forcing her to carry a pregnancy to term, unless “she meets certain criteria unrelated to her own priorities and aspirations,” is a breach of the security of the person, as defined in Section 7.⁵³ The majority also added that the restrictions provided in the code, would create undue delay in obtaining an abortion and therefore, create more potential for harm and risk to the woman, which constitutes an assault on the bodily integrity guaranteed by Section 7.⁵⁴

Furthermore, the court added that the law fails under Section 1, which allows for restrictions by law, “as can be demonstrably justified in a free and democratic society.”⁵⁵ The court approached the issue using the proportionality test and found first, that the procedure and administrative requirements were arbitrary.⁵⁶ Second, the limitations were viewed as being out of proportion with the objectives, because the restrictions would have actually harmed women by forcing them to essentially jump through administrative hoops, creating dangerous delay as the pregnancy progresses, and therefore impeding the objective.⁵⁷ While the court did not say what kind of restrictions would be appropriate, it did add that protection of the fetus is a valid objective, however the means by which the Parliament went about it was not proportional and not in accord with Section 1.⁵⁸ It is important to note that the court did not address whether or not the fetus is a person or should be included in the “everyone” term used in Section 7. The court

the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 c. 12 (U.K.) (Article provides, “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”).

⁵² R. v. Morgentaler, [1988] 1 S.C.R. 30 (Can.).

⁵³ R. v. Morgentaler, [1988] 1 S.C.R. 30, para. 20 (Can.).

⁵⁴ *Id.* at para. 57.

⁵⁵ *Id.* at para. 55 (The Court states that, “[f]inally the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved.”).

⁵⁶ *Id.* at para. 55.

⁵⁷ *Id.* at para. 55.

⁵⁸ *Id.*

essentially punts on that question by stating that because the court determined that the criminal code section included restrictions that would have impeded on a woman's liberty interest, the issue as to whether a fetus has a right to "life, liberty, and security of the person," was not decided.⁵⁹ It also did not enumerate, like the United States decision in Roe, at what point and under what circumstances, the country's interest in unborn life would override a woman's interest in having an abortion.⁶⁰ Nor did it provide any type of guidance for Parliament as to what restrictions on abortion would be deemed proportional and therefore, constitutional.⁶¹ As a result of this holding, there is currently no law restricting abortion in Canada, however it is controlled through legislation that covers the safety of medical procedures.⁶²

In a 1989 a case before the Canadian Supreme Court, the court finally resolved the issue as to whether a fetus has rights, but only as provided by Quebec's Civil Code and the common law.⁶³ The case came before the court in the context of a father filing for an injunction in order to prevent a girlfriend from aborting his unborn child.⁶⁴ Interestingly, the court refused to address the issue as to whether a fetus has a right to life under Section 7 of the Canadian Charter of Rights and Freedoms, because the respondent did not assert Section 7 as a defense of his rights, nor on behalf of the fetus.⁶⁵ The court added that because the Charter can only be used when there is some kind of state action, it refused to consider whether "Section 7 could be used to

⁵⁹ Id. at para. 56.

⁶⁰ Id. at para. 54-56 (The Court states that protecting the potential life is a legitimate government interest, however states the restrictions provided in criminal code 251 are not proportional. It adds that a fetus may in fact "be deserving of constitutional recognition under Section 1 of the Canadian Charter of Rights and Freedoms" but that "there can be no escape from the fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of a woman in a in a fair and non-arbitrary fashion.").

⁶¹ National Abortion Federation, *Legal Abortion in Canada*, <http://www.prochoice.org/canada/legal.html> (last visited Dec. 2, 2012).

⁶² Id.

⁶³ Tremblay v. Daigle, [1989] 2 S.C.R. 530 (Can.).

⁶⁴ Id. at *9.

⁶⁵ Id. at *45.

ground an affirmative claim to protection by the state.”⁶⁶ The court held that a fetus has no legal rights under the common law or the civil code, but did not address any rights that might flow from Section 7.⁶⁷ Furthermore, the court addressed the argument by the respondent father that the civil code provides sections that implicitly give rights to the fetus. One of those codes includes inheritance provisions.⁶⁸ Essentially, the father in the case argued that if the civil code of the country protects a fetus’ economic interest, surely it must protect its interest in life.⁶⁹ In response to this argument, the court opined that the fetus in the civil law context is a “fiction of civil law,” and that the civil code’s statutory provisions addressing the fetus only maintain the purpose of protecting property until the fetus’ birth.⁷⁰ In addition, the court stated that in regard to respondent’s last argument, that there is no legal precedent allowing a man to prevent a woman from obtaining an abortion in order to protect his interest in the potential life he helped create.⁷¹ The court essentially provides that the fetus has no legal rights in this case under the Quebec Civil Code and the Canadian common law, and articulated its adherence to the country’s born-alive rule which grants legal rights upon the birth of the child.⁷² While the court does provide in Morgentaler, that the country does have a legitimate interest in the unborn, in Tremblay, the court seems to fall short of stating that a fetus could never have the right to life under Article 7 in certain contexts. This sets the stage for whether subsequent court cases implicating the use of drugs during a woman’s pregnancy.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id. at *31.

⁶⁹ Id.

⁷⁰ Id. at *37-38.

⁷¹ Id. at *46.

⁷² Id. at *3.

C. The Dominican Republic

The Dominican Republic takes a very different approach from that of the United States and Canada, and is a signatory to a number of international conventions which both affirm the country's constitutional position regarding fetal rights and in some cases, contradicts it. In 2009, the Dominican Republic's National Assembly voted to amend the Constitution originally drafted 1966, to address the issue of fetal rights,⁷³ and by extension, abortion.⁷⁴ Article 37 of the Carta Magna provides: "The right to life is inviolable from conception to death. The death penalty cannot be established, pronounced or applied in any case."⁷⁵ The amendment was introduced by President Leonel Fernandez, with the Catholic Church lobbying vigorously on its behalf.⁷⁶ Some who closely followed the country's amendment process add that the President acquiesced to the Christian conservative block with Article 37, in order to obtain the necessary support for other reforms.⁷⁷ The amendment, which bans abortion, even when the mother's life is at risk or when the pregnancy is a result of rape or incest, is among the most restrictive in Latin America and was vehemently opposed by women's groups within the Dominican Republic, as well as

⁷³ Sharon Camp and Dr. Fatima Juarez, *A Dangerous Trend: Dominican Republic Adopts Draconian Abortion Restriction*, HUFFINGTON POST WORLD, (Sept. 24, 2012), http://www.huffingtonpost.com/sharon-l-camp/a-dangerous-trend-dominic_b_203459.html.

⁷⁴ It is worth noting that media coverage of this amendment to the Dominican Republic's Constitution has characterized the amendment as an abortion ban, because that is the practical effect. However, the amendment makes no specific mention of abortion.

⁷⁵ CARTA MAGNA [CONSTITUTION] January 26, 2010, Ch. 1, art. 37 (Dom. Rep.)

⁷⁶ Dominican Today, *Groups Rail the Catholic Church for Abortion Ban*, (April 23, 2009), available at <http://www.dominicantoday.com/dr/local/2009/4/23/31774/Groups-rail-the-Dominican-Catholic-Church-for-abortion-ban>.

⁷⁷ Julio Rios-Figueroa, *A New Constitution in the Dominican Republic*, CONSTITUTIONMAKING.ORG, (Feb. 14, 2010), <http://www.comparativeconstitutions.org/2010/02/new-constitution-in-dominican-republic.html>; See also FREEDOM HOUSE, *Freedom in the World: Dominican Republic* (2011) <http://www.freedomhouse.org/report/freedom-world/2011/dominican-republic> (Additional amendments that passed include the addition of a tribunal that provides additional constitutional review, as well as a controversial amendment that prevents children born from Haitian immigrants from obtaining citizenship).

international human rights groups.⁷⁸ Aside from Article 37, the country's penal code also criminalizes abortion and targets anyone who provides an abortion, helps to provide it, or any woman who obtains one.⁷⁹ As will be discussed, *infra*, this amendment, combined with the criminal law making it a crime to obtain or assist in obtaining an abortion, creates a situation where the life of the unborn is often prioritized over the life of the woman. The practical effect of Article 37 is that fetal rights overcome those of the mother.

Unlike the United States, the Dominican Republic has a constitutional article specifically addressing privacy, however there is no indication that the Dominican Republic's Supreme Court has extended the concept of privacy to extend to a woman's reproductive choice and further, there is no indication that it has been fully applied in the context of marriage.⁸⁰ Along with Article 37, the Dominican Republic also includes an article that provides that a marriage is "constituted by natural or legal ties [vinculos], by the free decision of a man and a woman to contract matrimony or by the responsible will to conform it."⁸¹ The practical effect of Article 37 seems to indicate a conflict with other provisions provided in the constitution, namely articles pertaining to human dignity.⁸² While the constitution does not address privacy, it does specifically include human dignity and equality. In fact, the concept of human dignity and liberty

⁷⁸ Who Are Responsible for the Death of Esperanza?, COLECTIVA MUJER Y SALUD (Aug. 17, 2012), http://www.colectivamujerysalud.org/index.php?option=com_content&view=article&id=249:iquienes-son-responsables-de-la-muerte-de-esperancita&catid=31:general&Itemid=64 (Translation via Google Translate); See also Changes to Dominican Republic Constitution Will Put Women's Lives in Danger, AMNESTY INTERNATIONAL (Sept. 14, 2009), <http://www.amnesty.org/en/news-and-updates/news/changes-dominican-republic-constitution-women-danger-20090914>.

⁷⁹ CODE CRIMINAL [C. CRIM.] art. 317 (Dom. Rep.).

⁸⁰ CARTA MAGNA [CONSTITUTION] January 26, 2010, Ch. 2, art. 44 (Dom. Rep.) (The Article provides a Right to Intimacy and to Personal honor, and states that "The respect and non-interference in the private, family, and home life and to the correspondence of the individual is guaranteed.").

⁸¹ CARTA MAGNA [CONSTITUTION] January 26, 2010, Ch. 2, art. 55 (Dom. Rep.)

⁸² Mia So, *Resolving Conflicts of Constitution: Inside the Dominican Republic's Constitutional Ban on Abortion*, 86 IND. L.J. 713, 718 (2012) (The author cites Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT'L L.J. 1, 16 (1996)

is included in multiple sections of the constitution.⁸³ The article provisions including a right to personal integrity, a right to human dignity, a right to intimacy and personal honor, and a right to equality.⁸⁴ This is interesting and even perplexing, given that Article 37 seems to stand in direct contrast with a woman’s right to human dignity and her right to intimacy; especially in light of the fact that some legal scholars have discussed the comparison between privacy and dignity and have deemed a woman’s dignity and her right to reproductive choice as synonymous.⁸⁵ Article 37 also appears to stand in contrast to the article addressing equality, as the article determining life as “inviolable” from conception to death, would seem to pertain mostly, if not solely to a woman, based on the unique characteristic of potential pregnancy. One must question the Dominican Republic’s commitment to human dignity with such restrictions on a woman’s right to carry a pregnancy to term, and thus, the emphasis the country seems to place on protecting the life of the unborn.

The conflict as it relates to the country’s interpretation of dignity is not confined to the country’s constitution and its provisions, but is also apparent between its constitution and other international agreements of which the Dominican Republic is a signatory.⁸⁶ Article 26 of the Constitution provides that “the norms in force from ratified international covenants will govern in the internal environment.”⁸⁷ It also states that, “[t]he norms in force of ratified international agreements will govern within the domestic sphere [ambito interno], once [they have been

⁸³ CARTA MAGNA [CONSTITUTION] January 26, 2010, Ch. 1, art. 38, 39, 42 (Dom. Rep.)

⁸⁴ *Id.*

⁸⁵ Mia So, *Resolving Conflicts of Constitution: Inside the Dominican Republic’s Constitutional Ban on Abortion*, 86 IND. L.J. 713, 718 (2012) (The author cites Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT’L L.J. 1, 16 (1996) (The author states that “reproductive self-determination is synonymous with liberty.”)).

⁸⁶ *Id.*

⁸⁷ CARTA MAGNA [CONSTITUTION] January 26, 2010, Ch. 6, art. 26 (Dom. Rep.)

published] in official manner.”⁸⁸ One of the international human rights conventions to which the Dominican Republic is a member of the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”). The Dominican Republic is a signatory to the convention and ratified the international agreement.⁸⁹ The convention is described as an internal bill of human rights for women and is the only human rights treaty that affirms the reproductive choice of women.⁹⁰ The relevant portion of CEDAW provides, “[t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights[.]”⁹¹ By including Article 26 in its constitution, the Dominican Republic is required to honor CEDAW. However, by amending the constitution to add Article 37, it is clear the amendment contradicts the article included in the United Nations Convention to which the Dominican Republic is a party.⁹² Therefore, the Dominican Republic cannot both abide by both Article 26, adhering to the requirements the country has agreed to in international law and Article 37, which greatly hinders and restricts a woman’s reproductive choice.⁹³

In addition to the conflict discussed above, the country’s signing and ratifying of multiple international agreements has created a conflict, even between those agreements. For example, while CEDAW provides for a woman’s reproductive choice, the the Dominican Republic is also a signatory under the American Convention of Human Rights. The American Convention of Human Rights was ratified by the Dominican Republic in 1978, and was adopted by many

⁸⁸ *Id.*

⁸⁹ Convention on the Elimination of All Forms of Discrimination Against Women Preamble, July 17, 1980, <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#intro>

⁹⁰ *Id.*

⁹¹ Convention on the Elimination of All Forms of Discrimination Against Women art. 16(e), July 17, 1980, <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

⁹² Mia So, *Resolving Conflicts of Constitution: Inside the Dominican Republic’s Constitutional Ban on Abortion*, 86 IND. L.J. 713, 716-17 (2012).

⁹³ *Id.* at 717.

several other countries in the Americas.⁹⁴ Article 4 of the Convention specifically provides for a right to life, beginning at conception.⁹⁵ In addition to the American Convention on Human Rights, the Dominican Republic is also a signatory to the International Convention on the Rights of the Child, which outlines the basic rights that children everywhere deserve, including the right to survival and the right to be from abuse and undue influence.⁹⁶ The convention also includes Article 6, which provides that all children have the inherent right to life.⁹⁷ The agreement to this convention also provides potential conflict with Article 37, especially if the pregnant woman is young woman less than 18 years of age. In adhering to Article 37, one child's life may essentially be sacrificed for another. An unfortunate but stark reality of Article 37, which is demonstrative of a conflict with a convention that provides that all children have an inherent right to life. It is essentially a sacrificing of one child's life over another, under Article 37.

As indicated above, the Dominican Republic's amendment of its constitution has not only provided the legal right to life to a fetus, but has in some cases, has even been interpreted as eclipsing the pregnant woman's right to life. Article 37, as well as other articles in the constitution enumerating dignity, and Article 26, which addresses the country's intent to adhere

⁹⁴ Organization of American States, American Convention on Human Rights, "Pact of San Jose, Costa Rica," Nov. 22, 1969, O.A.S.T.S. No. 36.

⁹⁵ Organization of American States, American Convention on Human Rights, "Pact of San Jose, Costa Rica," Nov. 22, 1969, O.A.S.T.S. No. 36, art. 4(1) (States, "Right to Life: Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.").

⁹⁶ United Nations International Convention on the Rights of a Child, Nov. 20, 1989, U.N.T.S. 27531, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (Directed to those under 18 years of age).

⁹⁷ United Nations International Convention on the Rights of a Child, art. 6, Nov. 20, 1989, U.N.T.S 27531 ("States Parties shall recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child).

to international agreements to which it is a signatory, indicates an inherent conflict in the Dominican Republic's Constitution.⁹⁸

Part III The Fetus as Plaintiff

A. The United States

In the area of tort law, the United States has bestowed some degree of legal rights on a fetus for injuries it sustained in the womb that resulted in a miscarriage or stillbirth. Most states, for example, provide that a fetus is a "person" for purposes of wrongful death statutes.⁹⁹ When a wrongful death suit for the death of a fetus is before the court, courts tend to take one of two approaches. They either find that the fetus was viable at the time of sustaining injuries which resulted in the prenatal death, allowing for recovery or that it was not and therefore, no recovery can be made on the death of a fetus.¹⁰⁰ Still, a minority of courts still find that even if a fetus was viable at the time of injury, a surviving relative or administrator of the estate still may not recover.¹⁰¹ Courts that take the view that a fetus cannot recover, regardless of viability at the time of the accident, state that the wrongful death statute is to be strictly construed and that if the legislature had intended the unborn to be protected under these statutes, it would have addressed the unborn child.¹⁰² Courts also reason that the fetus is not a distinct, legal entity apart from the mother and therefore, cannot sustain a wrongful death cause of action.¹⁰³ For example, Florida is a state in the minority that does not allow for recovery for the wrongful death of a fetus and

⁹⁸ Mia So, *Resolving Conflicts of Constitution: Inside the Dominican Republic's Constitutional Ban on Abortion*, 86 IND. L.J. 713, 717 (2012).

⁹⁹ Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1013 (1999).

¹⁰⁰ Sheldon R. Shapiro, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

adheres to a “born-alive” type rule.¹⁰⁴ In a Florida Supreme Court case involving the issue, parents sued the hospital and the physicians for injuries sustained by the fetus during delivery that resulted in a stillbirth.¹⁰⁵ First, the court determined that there is no cause of action under Florida’s Wrongful Death Act because a “fetus” is not a person under the statute.¹⁰⁶ However, in an attempt to remain consistent with the state’s public policy and without circumventing the state’s wrongful death statute, the court did provide that the parents are entitled to sue for negligent stillbirth, which limits the damages to mental pain and anguish, and medical expenses.¹⁰⁷ It should be noted here that the court did not address viability, however given the point at which the mother was delivering (at 41 weeks), the fetus would have been deemed “viable.”

The issue of viability and its determination as to whether a wrongful death action on behalf of a fetus can be sustained seems to differ state to state. In Georgia for example, a wrongful death action may only be sustained against a third party if the fetus is viable, meaning that there must be “quickening” or movement inside the womb.¹⁰⁸ It is not necessary that the mother feel the movement, but evidence must be presented that the unborn child is capable of movement.¹⁰⁹

Other states allow wrongful death claims to be asserted and have cited reasons that include the weight of modern authority that allows for this type of cause of action on behalf of the unborn, that a fetus is more than just a part of the mother and deserves legal recognition as so, and that a born-alive rule is illogical and arbitrary, for example, in a case where twins are

¹⁰⁴ Erica Richards, *Loss of Potential Parenthood as a Statutory Solution to the Conflict Between Wrongful Death Remedies and Roe v. Wade*, 63 WASH. & LEE L. REV. 809, 811 (2006)

¹⁰⁵ Tanner v. Hogart, 696 So. 2d 705, 706 (Fla. 1997).

¹⁰⁶ Tanner, 696 So. 2d at 706.

¹⁰⁷ Id. at 708-09

¹⁰⁸ Citron v. Ghaffari, 246 Ga. App. 826, 542 S.E.2d 555, 556 (2000)

¹⁰⁹ Citron, 246 Ga. App. 826 at 557.

involved and one dies before birth, while the other dies immediately after.¹¹⁰ Courts also add that these types of statutes tend to be remedial in nature and therefore, should be construed liberally to include the unborn in the scope of those it meant to cover.¹¹¹ Virginia did not recognize a wrongful death cause of action on behalf of a fetus until recently. In April 2012, the Virginia Senate approved and the Governor signed into law a bill that allows expectant parents to sue over the wrongful death of a fetus.¹¹² One supporter of the legislation said the change was made to correspond with recent changes in the criminal law, allowing for the criminal prosecution for fetal homicide.¹¹³ Importantly, the bill explicitly includes that “no cause of action may be brought against the natural mother of the fetus.”¹¹⁴

The assertion made by the supporter regarding corresponding changes in the criminal law is demonstrative of the “slippery slope” problem with expanding legal rights for the fetus and in a sense, expanding the definition of “person” under these wrongful death statutes. The supporter is referring to the Unborn Victims of Violence Act, which will be discussed *infra* in Part IV and provides that a third party may be prosecuted when certain federal crimes are committed against the fetus that in its death.¹¹⁵ The issue here is that some courts do use one, limited expansion or exception regarding fetal rights in one area of law, and then deem it to apply to others. This therefore, creates legal rights for the fetus, independent of the woman carrying the unborn child and promotes the notion that the fetus is a separate entity from the

¹¹⁰ Sheldon R. Shapiro, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978).

¹¹¹ *Id.*

¹¹² Laura Vozzella, *Virginia Senate Approves Right to Sue for Wrongful Death of Fetus*, Washington Post, March 5, 2012, available at http://www.washingtonpost.com/blogs/virginia-politics/post/virginia-senate-approves-right-to-sue-for-wrongful-death-of-fetus/2012/03/05/gIQA718NtR_blog.html.

¹¹³ Peter Vieth, *Governor Signs Fetal Wrongful Death Bill*, Virginia Lawyers Weekly, April 12, 2012, available at <http://valawyersweekly.com/vlwblog/2012/04/12/governor-signs-fetal-wrongful-death-bill/>.

¹¹⁴ *Id.*

¹¹⁵ *See infra* Part IV.

mother. An example precisely on point is a case heard before the Alabama Criminal Court of Appeals, Ankrom v. State of Alabama, CR-09-1148, 2011 WL 3781258 (Ala. Crim. App. Aug. 26, 2011) which will be discussed at length in Part IV.¹¹⁶ In support of the court’s holding that an unborn child falls within the state’s chemical endangerment statute, and that a pregnant woman may be charged under the statute for drug use during her pregnancy, the court referred to the state’s interpretation of “child” in its wrongful death statute.¹¹⁷ Judge Burke wrote that, “the Alabama Supreme Court has interpreted the term “minor child” in Alabama’s wrongful-death-of-minor statute to include a viable fetus that received prenatal injuries causing death before a live birth.”¹¹⁸ The court goes on stating that, “...not only have the courts of this State interpreted the term “child” to include a viable fetus in other contexts, the dictionary definition of the term “child “ explicitly includes an unborn person or fetus.”¹¹⁹ In light of the fact that courts may and do interpret a move in one area of law to expand fetal rights or expand a statute, as representative of a state’s overall general public policy to do so, is a very valid concern and establishes a precedent for courts to broaden legal rights for the unborn.

Another issue, which was addressed by Virginia’s new statute, is ensuring that a wrongful death action cannot be asserted against the natural mother of the fetus. This scenario was present before the Supreme Court of Arkansas, when a father filed a wrongful death action against a mother’s estate when she drove her car into a bridge, killing herself and the fetus.¹²⁰ The court first found that the suit was barred because the doctrine of parental immunity applied, which provides that a minor that is not emancipated, does not have a cause of action against a

¹¹⁶ *See infra* Part IV.

¹¹⁷ Ankrom v. State, CR-09-1148, 2011 WL 3781258 *8 (Ala. Crim. App. Aug. 26, 2011)

¹¹⁸ Ankrom v. State, CR-09-1148, 2011 WL 3781258 *5 (Ala. Crim. App. Aug. 26, 2011)

¹¹⁹ Id.

¹²⁰ Carpenter v. Bishop, 290 Ark. 424, 425, 720 S.W.2d 299 (1986)

parent for an unintentional tort¹²¹ The court went on to state that because the fetus' injury was a result of negligence on behalf of the mother, the parental immunity doctrine applies.¹²² In another case before the Massachusetts Supreme Court, a child born alive filed a negligence suit against her mother for personal injuries she sustained in the womb, which she alleged were caused by her mother's negligent driving.¹²³ The plaintiff child was delivered emergency C-section and was hospitalized for 23 days after with breathing difficulties and asthma; problems the plaintiff alleged she still had to deal with at the time of suit.¹²⁴ The court first determined that due to the unique relationship between a mother and her fetus, a legal duty of care cannot be imposed on the mother.¹²⁵ The court added that by recognizing a pregnant woman's duty of care to her fetus would present numerous other circumstances that could give rise to litigation, and it would force courts to pinpoint the time in which such a duty would arise.¹²⁶ In conclusion, the court added that "there are inherent and important differences between a fetus, in utero, and a child already born, that permits a bright line to be drawn around the zone of potential tort liability of one who is still biologically joined to an injured plaintiff."¹²⁷ This case demonstrates the court's concern with making law that would provide a severing between the fetus and the mother, which would provide legal rights to the fetus that could be used against the natural mother.

The American Civil Liberties Union and other advocacy organizations have stated that while one should be compensated for the loss of a pregnancy and the pain that accompanies that loss, the prospective parent should be the one bringing the suit, not bringing it on behalf of the

¹²¹ Carpenter, 290 Ark. 424, 426, 720 S.W.2d 299

¹²² Id.

¹²³ Remy v. MacDonald, 440 Mass. 675, 801 N.E.2d 260, 262-63 (2004)

¹²⁴ Remy, 440 Mass. 675, 801 N.E.2d at 263

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Id. at 267

stillborn fetus.¹²⁸ Few would deny that the harm and anguish that can come as a result of a stillbirth should be compensated, but how it should be compensated is often the inquiry of which spurs the most debate. However, the loss could be compensated through the existing tort framework or through a cause of action such as negligent still birth. Also, in an effort to prevent mothers from having to defend against such causes of action, legislators should take notice of Virginia’s recent bill, which explicitly provides that the wrongful death cause of action cannot be asserted against the fetus’ natural mother. This not only prevents a court from deriving from the state’s civil code a general, legal interest in broadening a fetus’ legal rights, but it also maintains that the legal interest between a mother and her fetus is very unique and the two not be made out to be legal adversaries.

B. Canada

Legal precedent in Canada has adhered to the country’s “born-alive” rule which provides that private legal rights do not attach to a fetus, and only attach upon birth.¹²⁹ Canada operates on a common law system, while Quebec utilizes its own civil code.¹³⁰ As discussed in Tremblay, the fetus has no rights in private law, and the only exception to this is that the fetus is granted rights as a beneficiary of a will or donation.¹³¹ The court however reasons that this is provided in the common law system however, only to protect the interests for the child once it is born.¹³² Also, in regard to the Civil Code in Quebec, the court in Tremblay stated that the provisions that do refer to the fetus, do so in reference to inheritance.¹³³ The court however countered this argument adding that four out of the seven sections of the Civil Code cited by the respondent specifically

¹²⁸ Memorandum from the American Civil Liberties Union, What’s Wrong with Fetal Rights (July 31, 1996) (available at <http://www.aclu.org/reproductive-freedom/whats-wrong-fetal-rights>).

¹²⁹ Tremblay v. Daigle, [1989] 2 S.C.R. 530, *43 (Can.).

¹³⁰ Tremblay, [1989] 2 S.C.R. at *25.

¹³¹ Tremblay, [1989] 2 S.C.R. at *30-31.

¹³² Id. at *35.

¹³³ Id. at *31-32.

state that the legal rights provided in these sections are not granted unless the fetus is born alive and viable.¹³⁴ The court again, maintained that the civil justification for fetal rights rests on a “legal fiction in civil law,” and that the purpose of the rights is to preserve them so that they may attach at birth.¹³⁵

A Canadian Supreme Court case discussing the ability of a fetus to issue and prenatal conduct is Dobson v. Dobson, [1999] 2 S.C.R. 753 (Can). In that case before the court, a grandfather brought suit against the mother for negligent driving that resulted in the birth of a child with cerebral palsy.¹³⁶ The child was born by an emergency Caesarean after the accident.¹³⁷ The court narrowed the question to whether a mother should be held liable for the damages sustained by her born-alive child, and held that an action against the mother for prenatal injuries cannot be maintained.¹³⁸ In making its decision, the court considered whether a duty of care should be imposed on the mother and the privacy implications on a woman, if this type of suit is to be permitted.¹³⁹ First, the court referred to another Canadian Supreme Court case, where the court held that before “imposing a duty of care, the court must be satisfied: (1) that there is a sufficiently close relationship between the parties to give rise to the duty of care; and (2) that there are no public policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed, or the damages to which a breach of it may give rise.”¹⁴⁰ The court opined that while previous cases have deemed the mother-fetus entity as one, this case

¹³⁴ Id. at *32.

¹³⁵ Id. at *37.

¹³⁶ Dobson v. Dobson, [1999] 2 S.C.R. 753, para. 2-3 (Can).

¹³⁷ Dobson, [1999] 2 S.C.R. at para. 2.

¹³⁸ Id. at para. 66-67.

¹³⁹ Id. at para. 19.

¹⁴⁰ Id. (Citing City of Kamloops v. Nielsen, [1984] 2 S.C.R. 2, which provided that a duty of care may exist, subject to public policy considerations.).

permits the fetus and mother to be viewed as two distinct entities given the facts of the case.¹⁴¹

While the first prong is satisfied regarding the relationship between the parties, the court stated that the second prong regarding the public policy considerations indicate that a duty of care should not be imposed.¹⁴² It cited several reasons against imposing a duty of care, including that there are many circumstances, such as work environments, where a woman has no choice but to take certain risks and that allowing a child to sue in tort against its mother based on prenatal injuries has the potential for negative repercussion on the mother-child relationship.¹⁴³

Furthermore, a reasonable pregnant woman standard would be unworkable, as the various lifestyle of women, some a result of economic realities, would not lend itself to a fair application of the standard.¹⁴⁴

The court also examined the woman's personal autonomy and privacy right, and while it did not refer to the Canadian Charter of Rights and Freedoms, it focused on the public policy aspect and on the unique relationship between a mother and her unborn child.¹⁴⁵ The court determined that to hold a woman liable in tort to the prenatal injuries sustained by her child due to negligence, would be subjecting even her most mundane activities to judicial scrutiny.¹⁴⁶ In addition, the court highlighted the main difference between holding a third-party liable versus a mother liable for prenatal injuries, and that unlike third-parties, everything from strenuous activity to a fall, could render the mother liable.¹⁴⁷ The court believed the public policy and the

¹⁴¹ Id. at 20.

¹⁴² Id. at 21.

¹⁴³ Id. at 31. (The Court stated that, “[t]o impose a duty of care would require judicial scrutiny into every aspect of that woman’s behavior during pregnancy.”).

¹⁴⁴ Id. at 53.

¹⁴⁵ Id. at 47.

¹⁴⁶ Id. at 78.

¹⁴⁷ Id. at 45.

potential affects of an imposition of a duty of care would have on a woman's privacy rights as well as on the family unit as a whole, indicate that such a ruling would be unwise and unjust.¹⁴⁸

The decision set out in Tremblay, as well as Dobson, adopt the standard that legal rights do not adhere to a fetus until birth, and further, that the unique relationship between mother and fetus, in the civil sense, prohibit suit for prenatal injury. It is also important to note that in making its decision, especially in Dobson, the court relies heavily on public policy and the potential ramification of imposing a duty of care on a mother, on both her privacy interests as well as on family unit as a whole.

C. The Dominican Republic

The Dominican Republic's tort law as it relates to the unborn is limited. First, there is no wrongful death statute on point in the Dominican Republic. However, damages have been awarded to a decedent's close relatives, based on the country's civil code which has granted damages to a decedent's close relative.¹⁴⁹ In France, the courts have allowed negligence suits to go forward, to recover from the damage caused to the fetus in utero.¹⁵⁰

Aside from the limited recovery available in the Dominican Republic, in which one could recover by reference to French law, the fetus also has a right to inherit property. According to Article 725 of the Civil Code, the only legal heirs "excluded" from being able to receive property

¹⁴⁸ Id. at 78.

¹⁴⁹ Curtis Mallet-Prevost, Colt & Mosle LLP, *Dominican Republic Law Digest Reviser*, 2007 (Due in part to the country's history with France, the Dominican Republic still looks to French jurisprudence and accepts French law as a legitimate source of law).

¹⁵⁰ Linda C. Fentiman, *Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse is Not the Answer – A Comparative Legal Analysis*, 15 Mich. J. Gender & L. 389, 447 (Author cites to a French case where the parents of a child born with defects due to the mother's contracting rubella while pregnant, was able to recover against the doctor who did not accurately inform the mother that she contracted the disease. Couple was awarded approximately \$1.32 million dollars).

include a child not yet conceived and a child born “not violable.”¹⁵¹ In interpreting this statute, Dominican Republic Supreme Court Justice Victor J. Castellanos wrote in an article that Article 725, “establishes as a requirement to inherit, the existence of the heir at the time of opening of succession, a human being conceived is a member of a succession and cannot be excluded from it, so that our system gives Dominican civil human embryos and fetuses the category of human beings with the right to inherit.”¹⁵²

In addition to Article 725, Article 906 of the civil code also states in regard to inheritance that a child need only be conceived to inherit property by will.¹⁵³ These two articles provided by the country’s civil code indicate the extent to which, at least in the civil sense, that fetal rights are recognized in the Dominican Republic.

Part IV The Fetus as Victim

A. The United States

In March 2004, in response to the highly publicized Laci Peterson case¹⁵⁴, President George W. Bush signed into law the Unborn Victims of Violence Act (UVVA). The UVVA provides that under federal law, in the commission of specified federal crimes, any person who “causes the death of or bodily injury to a child, who is in utero at the time the conduct takes place,” shall be charged with a separate offense, in addition to any other charges relating to the

¹⁵¹ Code Civil [C. Civ.] art. 725 (Dom. Rep.) (“Consequently, they are unable to succeed: 1st which was not even conceived, 2nd the child was not born viable.”).

¹⁵² Email from Marisol Floren, Foreign & International Law Librarian, Florida International University (FIU) College of Law (Nov. 6, 2012, 04:53 EST) (on file with author) (author directed my attention and translated Victor J. Castellanos, *La Personalidad Juridica del no Nato, Posee el Mismo Alcance, En Derecho, Al de Los Nacidos*, Gaceta Judicial, vol. 8, issue 189, (2004).).

¹⁵³ Code Civil [C. Civ.] art. 906 (Dom. Rep.).

¹⁵⁴ Richard Winton, *Scott Peterson Appeals Death Sentence to California Supreme Court*, L.A. TIMES, July 6, 2012, <http://latimesblogs.latimes.com/lanow/2012/07/scott-peterson-appeal-death-row-supreme-court.html>. (California resident Scott Peterson was convicted in 2004 for murdering his wife, Laci, who was nearly 8 months pregnant at the time of her death. Peterson is currently on death row and in July, appealed his death sentence to the California Supreme Court.).

acts committed against the mother.¹⁵⁵ The law is broad in its definition of what constitutes an “unborn child” and while it states an “unborn child” includes a child in utero and who is carried in the womb, it does not address whether or not the fetus must be viable nor does it address any specific point in the pregnancy when the law would be applicable.¹⁵⁶ It also explicitly excludes prosecuting anyone for conduct relating to an abortion for which the pregnant woman consented, anyone medically treating the pregnant woman or unborn child, and any woman with respect to her unborn child.¹⁵⁷ While signing the bill, President Bush stated in at a press conference in the East Room, that “violent crimes against pregnant women often have two victims. And therefore, in those cases, there are two offenses to be punished.”¹⁵⁸

After the UVVA was signed into law, additional states that did not include the “unborn” in its homicide statutes started amending their homicide laws. Currently, 38 states have fetal homicide laws on the books and at least 23 of those states have fetal homicide laws that protect the fetus without specifying or addressing gestational age.¹⁵⁹ For example, Alabama’s homicide statute provides that the term “person” under the statute states, “when referring to the victim of a criminal homicide or assault, means a human being, including an unborn child in utero at any stage of development, regardless of viability.”¹⁶⁰ It also specifies that nothing in the act shall make it illegal to obtain an abortion.¹⁶¹ Other states specific that in order to be charged with a

¹⁵⁵ 18 U.S.C. § 1841(2004).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Press Release, The White House-Office of the Press Secretary, President Bush Signs Unborn Victims of Violence Act of 2004, (Apr. 1, 2004) (on file with author).

¹⁵⁹ National Conference of State Legislatures, *Fetal Homicide Laws*, as of April 2012, available at <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx>.

¹⁶⁰ Ala. Code § 13A-6-1 (Amended in 2011)

¹⁶¹ *Id.*

fetal homicide, the unborn child must be either viable or have achieved a certain gestational age.¹⁶²

With the addition of the “unborn child” as a victim in the statute, legal challenges were asserted in courts across the country, questioning the constitutionality of recognizing a fetus as a person, for purposes of criminal homicide. In Minnesota, the Supreme Court of that state heard a case involving a defendant convicted of murder of a woman and the woman’s fetus, which had the gestational age of approximately 27-28 days.¹⁶³ The defendant challenged the conviction as it related to the unborn child, arguing that the homicide statute violated the 14th Amendment as interpreted in Roe by including a non-viable fetus as a “person” and arguing that the statute was vague and therefore, should be void.¹⁶⁴ Regarding the 14th Amendment, the court stated that a woman electing to have an abortion versus a third party who destroys a fetus with a gunshot are not comparable in anyway, therefore, the argument by the defendant that persons who were essentially in the same situation were being treated differently by the law was unavailing.¹⁶⁵ In reference to the argument that a fetus was not considered a “person” according to the 14th Amendment as interpreted by Roe, the court reiterated a portion of the United States Supreme Court’s holding, that provides that states still maintain an important and legitimate interest in protecting the unborn.¹⁶⁶ The court went on to state that the interest in protecting the unborn extends to whether the fetus is viable or non-viable, and that the issue of viability is “immaterial” to an equal protection challenge.¹⁶⁷ In regard to the argument asserting vagueness, the court determined that the statute gives fair warning of the prohibited conduct and that the injury caused

¹⁶² National Conference of State Legislatures, *Fetal Homicide Laws*, as of April 2012, available at <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx>.

¹⁶³ State v. Merrill, 450 N.W.2d 318, 320 (Minn. 1990)

¹⁶⁴ State, 450 N.W. 2d at 320.

¹⁶⁵ Id. at 321-22.

¹⁶⁶ Id. at 322 (Referring to Roe v. Wade, 410 U.S. 113, 162 (1973)).

¹⁶⁷ Id.

to the fetus is comparable to a situation of transferred intent.¹⁶⁸ The court added that, “criminal liability here only requires that the genetically human embryo to be a living organism that is growing into a human being.”¹⁶⁹

These arguments are particularly important as we will see, in defending a mother against charges based on conduct that occurs during her pregnancy. First, it is important to note that fetal homicide laws play a role in charging women based on their alleged prenatal conduct because courts have and do look to portions of the criminal code in which to interpret the words “child” and “person.” Also, it should be noted that while some states do acknowledge criminal sanctions for the harm of a fetus, they do so through heightened penalties and not with additional charges that serve to further distinguish between mother and fetus.¹⁷⁰ Homicide statutes including the fetus, and that go further by ignoring the United States Supreme Court regarding viability as it relates to the state’s compelling interest in protecting the unborn, provide courts that have deemed a woman’s prenatal conduct “criminal” with an additional basis upon which to rest their reasoning.

Utilizing some of the reasoning and statutory interpretation enunciated by courts in upholding convictions based upon the murder of the unborn, prosecutors of some states have turned to prosecuting mothers based on criminal conduct occurring during a pregnancy that is believed to have affected the fetus. As discussed *supra* in Part I, prosecutors in Alabama have been charging women under a chemical-endangerment statute.¹⁷¹ Chemical endangerment is a law that has been on the books in Alabama since 2006, and it provides that, “chemical

¹⁶⁸ *Id.* at 323.

¹⁶⁹ *Id.* at 324.

¹⁷⁰ Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77, 90 (2009) (Author highlights Colorado fetal homicide statute which focuses on the harm done to the mother versus the unborn child. Language of the statute uses “pregnant woman” versus “unborn child.”).

¹⁷¹ See *supra* Part I.

endangerment is exposing a child to an environment in which controlled substances are produced.”¹⁷² While Amanda Kimbrough awaits oral argument before the Alabama Supreme Court on her case, another woman is also waiting and was the very first to be convicted under Alabama’s chemical endangerment statute for harm alleged to have done by to her fetus.

The other case that will go before the Alabama Supreme Court involves twenty-three year old Hope Ankrom. Ankrom has three children; the third was born in 2009 and weighed almost six pounds.¹⁷³ Although the baby was healthy, he tested positive for marijuana and cocaine.¹⁷⁴ In an interview with the *New York Times*, Ankrom admitted smoking pot, claiming that she only smoked it to help alleviate severe morning sickness.¹⁷⁵ She continued to smoke it despite her doctors warnings that he could be criminally charged if she didn’t stop.¹⁷⁶ She denied, however, the cocaine use.¹⁷⁷ She had intended to quit smoking marijuana a few weeks before her due date, but the baby came six weeks early.¹⁷⁸ After the child was born, the hospital called Alabama’s child protective service, which placed the children in the custody of her parents.¹⁷⁹ Two weeks later, police came to the door with an arrest warrant.¹⁸⁰ Ankrom plead guilty the chemical endangerment charge and she was given a suspended sentence with one year’s probation.¹⁸¹ Prosecutors were able to secure Ankrom’s conviction through an extremely broad statutory interpretation of the words “child” and “environment” in the state’s child

¹⁷² ALA. CODE § 26-14-3.2 (2012)

¹⁷³ Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES, April 25, 2012, at A1

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ Id.

¹⁸⁰ Id.

¹⁸¹ Id.

endangerment statute.¹⁸² The State argued that the word child extended to include unborn child, and that environment, extended to include the womb.¹⁸³ The Criminal Court of Appeals upheld that statutory interpretation, first, by citing the State’s code articulating its policy to protect life, born and unborn.¹⁸⁴ The court then went on to state that aside from the state’s public policy of protecting the unborn, the Alabama Supreme Court has interpreted the term “minor child” in the State of Alabama’s wrongful death statute to include a viable fetus.¹⁸⁵ Further, the court provided that, “[u]nless the legislatures specifically states otherwise, the term “child” is simply a more general term that encompasses the more specific term “viable fetus.”¹⁸⁶

Also key to the court’s analysis was a South Carolina Supreme Court case; the only case which has thus far sustained a conviction of a woman, based on an interpretation of a child endangerment statute and the word “persons” to include a viable fetus. In the case Whitner v. South Carolina, 328 S.C. 1 (1997), Cornelia Whitner pled guilty to criminal child neglect, after her baby was born and tested positive for cocaine. Whitner did not appeal her conviction to 8 years in prison, but later filed a petition for Post Conviction for Relief.¹⁸⁷ The court in Whitner considered South Carolina’s wrongful death statute, which applies to a viable fetus injured while in the womb as well as a fetus not born alive but sustaining prenatal injuries.¹⁸⁸ Further, the court made reference to the fact that the court had previously held that the word person in a homicide statute included viable fetuses.¹⁸⁹ It also considered the specific policy and goal of the child endangerment statute and added that when “coupled with the comprehensive remedial purpose of

¹⁸² Ankrom v. State, CR-09-1148, 2011 WL 3781258 *5 (Ala. Crim. App. Aug. 26, 2011)

¹⁸³ Ankrom, CR-09-1148, 2011 WL 3781258 *5.

¹⁸⁴ Id.

¹⁸⁵ Id.

¹⁸⁶ Id. at *8.

¹⁸⁷ Whitner v. State, 328 S.C. 1, 10, 492 S.E.2d 777, 779 (1997)

¹⁸⁸ Whitner, 328 S.C. 1, 6, 492 S.E.2d at 779-80.

¹⁸⁹ Id. at 780.

the Code, this language supports the inference that the legislature intended to include viable fetuses within the scope of the Code’s protection.”¹⁹⁰ In an attempt to reconcile why South Carolina is justified in upholding this interpretation, while most decisions in other state courts refuse to hold that maternal conduct may lead to criminal prosecution, the court simply that the other states had different case law, which explicitly refused to recognize a fetus as a human being.¹⁹¹ In justifying its decisions when compared to other courts around the country, the court stated that while other courts put more credence on “person” as defined by the medical community, the South Carolina Supreme Court rationale rests on the fact that the Supreme Court has repeatedly held that states have a compelling interest in potential life.¹⁹²

The arguments made on behalf of Whitner, Ankrom, and Kimbrough for the unconstitutionality of statutes applied to prenatal conduct mirror one another. First, there is the argument that imposing criminal sanctions on a woman for the alleged harm done to her fetus is violating her privacy in procreation, and thereby, her privacy rights.¹⁹³ The argument set forth in an *amicus brief* in support of Kimbrough’s position, is that including additional criminal sanctions stemming from the fetus’ exposure to illicit drugs, beyond that which will she be subject to due to the illegal drug use, will provide a woman in this situation with two choices: either carry the pregnancy to term and risk prosecution or abort the fetus.¹⁹⁴ This in essence, infringes on a woman’s fundamental right to procreate and carry a fetus to term. There is

¹⁹⁰ *Id.* at 781.

¹⁹¹ *Id.* at 782 (The court also looked at a Massachusetts case due to the state’s similarity in case law and because it held that a pregnant woman could not be criminally charged for delivering cocaine to her fetus. Court there found that a viable fetus is not under the age of 18, as proscribed by the statute).

¹⁹² *Id.* at 783.

¹⁹³ Brief for Amanda Kimbrough as Amici Curiae Supporting Appellant, *Kimbrough v. The State of Alabama*, No. CR-09-0485 (Ala. Crim. App. July 2010) (Brief refers to Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) where the United States Supreme Court held that a rule that burdens a woman’s freedom of choice at it relates to marriage and family is unconstitutional).

¹⁹⁴ *Id.*

certainly the valid argument that a woman's other option is to just stop taking drugs. While this is probably the best course of action, the argument fails to take into account the power of addiction. The treatment of the issue through imposing additional criminal charges, also stands in contrast to the position recognized in law that while charges may flow from acts stemming from drug addiction, one cannot be charged solely for "being" an addict.¹⁹⁵ Illegal drug use is not a protected right amongst the list of privacy interests articulated by the United States Supreme Court, however it can be argued that the right to procreate and carry a pregnancy term is a fundamental right and it is impeded upon by this regulation that, while may be "narrowly-tailored," is not the least restrictive means of accomplishing the goal of deterring illegal substance abuse by pregnant women.

Another argument against applying Alabama's chemical-endangerment statute in this way, includes the argument that it is unconstitutionally vague, and therefore violates Due Process by failing to provide a woman with notice as to what conduct constitutes criminal conduct under the statute.¹⁹⁶ The chemical endangerment statute, as it is written, does not put a pregnant woman on notice that her conduct, which is already subject to prosecution, may be subject to further charges because of her pregnancy. The language of the statute does not mention a fetus or unborn child, and the current construction that is allowing this prosecution to go forward is based mostly on the prosecutor's interpretation. Also, it is important to note that as a rule of statutory interpretation, ambiguous criminal statutes should be read in favor of the defendant, per the rule of lenity.¹⁹⁷ While the dissent in Whitner believed the majority ignored the rule of lenity in

¹⁹⁵ Robinson v. California, 370 U.S. 660, 666-67 (1962).

¹⁹⁶ Brief for Amanda Kimbrough as Amici Curiae Supporting Appellant, Kimbrough v. The State of Alabama, No. CR-09-0485 (Ala. Crim. App. July 2010)

¹⁹⁷ United States v. Santos, 553 U.S. 507, 514 (2008) (See also United States v. Bass, 404 U.S. 336, 347-349 (1971)).

coming to its decision, the majority believed that there was no ambiguity in the statute and that read in light of South Carolina's existing laws, that viable fetuses were intended to come within the scope of the statute.¹⁹⁸ In light of the United States Supreme Court's decision in Roe and its affirmation of that decision in Casey, holding a fetus is not a person for purposes of the 14th Amendment, coupled with federal and state law that do provide some degree of legal rights to the unborn, it is apparent that there is ambiguity in the context and in the actual chemical-endangerment statute and in the criminal neglect statute in Whitner.

In addition to Due Process under the 14th Amendment, Alabama's interpretation of the state's chemical endangerment statute also violates equal protection of the laws.¹⁹⁹ As provided in U.S. v. Virginia, 518 U.S. 515 (1996), in order to sustain differential treatment based on gender, the state has the burden to show that the classification, "serves important government objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."²⁰⁰ First, the State of Alabama's interpretation means that only pregnant women can be charged under this interpretation of the law. While not all women will decide to become pregnant or will become pregnant, the law interpreted in this way is only applicable to women. Secondly, The State of Alabama has stated its objective as caring for the well-being of the unborn and states its interest in potential life, however whether or not the discriminatory means of prosecuting pregnant women "relates to the achievement of those objectives," is highly unlikely. First, as indicated above, the degree to which drug use during pregnancy affects a fetus is still unclear. Also, doctors and other medical professionals who understand the implications of addiction, state consistently that criminalizing drug use among

¹⁹⁸ Whitner, 328 S.C. 1, 6, 492 S.E.2d at 784.

¹⁹⁹ Brief for Amanda Kimbrough as Amici Curiae Supporting Appellant, Kimbrough v. The State of Alabama, No. CR-09-0485 (Ala. Crim. App. July 2010)

²⁰⁰ United States v. Virginia, 518 U.S. 515, 533 (1996)

pregnant women deters women from getting the help they need, out of fear of criminal repercussions.²⁰¹ This is especially the case, when there are more effective, less discriminatory means to further the state's interest in the potential life of the unborn.²⁰²

Perhaps the strongest argument against the use of Alabama's chemical-endangerment statute include the public policy ramifications for charging women who have drug problems, above and beyond the charges they would already receive as a result of illegal drug use. First, imposing criminal liability on a woman's prenatal conduct would be a sort of implicit encouragement of abortion among drug user.²⁰³ The consequences of the state's chemical-endangerment statute, makes it a crime to have a child, who may or may not be suffering from the effects of drug exposure, but yet having an abortion to prevent any criminal repercussions is constitutionally permissible.²⁰⁴ This provides a pregnant drug user, who may fear criminal prosecution, with justification for terminating a pregnancy to avoid possible jail time.²⁰⁵ In addition, it also encourages women struggling with dependency, to travel across borders, in order to have their child, which neither deters women who use drugs while pregnant from using them,

²⁰¹ American College of Obstetrician and Gynecologists, *Maternal Decision Making, Ethics, and the Law*, AGOC Committee Opinion, No. 321 (November 2005) (Opinion states, "Pregnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.")

²⁰² American Psychiatric Association, *Care of Pregnant and Newly Delivered Women Addicts: Position Statement*, APA Document Reference No. 200101 (2001) ("American Psychiatric Association opposes the criminal prosecution and incarceration of pregnant and/or newly delivered women on child abuse charges based solely on the use of substances during pregnancy... The best way to prevent abuse and neglect in this situation is adequate treatment for the mother and family.").

²⁰³ Brief for Amanda Kimbrough as Amici Curiae Supporting Appellant, *Kimbrough v. The State of Alabama*, No. CR-09-0485 (Ala. Crim. App. July 2010).

²⁰⁴ *Id.*

²⁰⁵ Press Release, American Civil Liberties Union, *ACLU Asks Alabama Court to Protect the Rights of Pregnant Women* (July 6, 2010) (ACLU that Alabama's chemical endangerment "infringes on a woman's fundamental right to continue a pregnancy and singles out pregnant women for discrimination.").

nor does it do anything to assist women battling with addiction.²⁰⁶ Also, it should be addressed that criminalizing such conduct fails to address the underlying reasons for drug use, and treats the problem as a crime, rather than an illness. A number of medical organizations have firmly stated their opposition to these additional charges based on prenatal conduct, because it does little to help drug-addicted women and because the true effects of drug use on the fetus are still unknown.²⁰⁷ Furthermore, it opens the door for additional charges on woman for a whole spectrum of prenatal conduct. This particular statute address illicit drug use, however there may be other conduct that may be deemed to have detrimental effects on a fetus that may be innocent in and of itself, that could be subjected to judicial scrutiny in light of its alleged affects on the fetus.

It is also worth noting that the women who tend to be the target of such prosecutions, by and large, do not paint a sympathetic picture and are not unfamiliar with the criminal court system. For example, while Amanda Kimbrough was free on an appeal bond in connection with her chemical endangerment charge, her attorney Jake Watson said her bail bond was recently revoked because she was arrested for selling a controlled substance.²⁰⁸ Moreover, nowhere in the Whitner nor the Ankrom opinion by the Court of Criminal Appeals in Alabama, is there any discussion or mention by the court of the nature of addiction and drug dependency, which is a telling indicator regarding the court's approach to deciding this case.

²⁰⁶ Interview with Farah Diaz-Tello, Staff Attorney, National Advocates for Pregnant Women (Oct. 2012) (Diaz-Tello said anecdotally, she has heard that women have traveled as far as Georgia, out of fear that giving birth in Alabama will result in prosecution.).

²⁰⁷ See Pam Belluck, *Abuse of Opiates Soars in Pregnant Women*, New York Times, April 30, 2012 available at <http://www.nytimes.com/2012/05/01/health/research/prescription-drug-abuse-soars-among-pregnant-women.html> (The consequences of a pregnant woman's drug use are far from certain, "and much more likely if the child had to contend with economic hardship, family instability, poor education, and other factors.).

²⁰⁸ Interview with Jake Watson, Attorney for Amanda Kimbrough (Oct. 22, 2012).

While the cases of Kimbrough and Ankrom are still pending before the Supreme Court of Alabama, there are other jurisdictions where prosecutors are interpreting state criminal statutes broadly to prosecute pregnant women for prenatal conduct that affects the fetus. In Indiana, a case is currently pending involving a woman who attempted suicide while pregnant. In December of 2010, Bei Bei Shuai tried to kill herself while eight months pregnant, after learning the man whom she had an affair with, was returning to his wife.²⁰⁹ She ingested rat poison and in a note to the man, she wrote that she and the unborn child were a burden to him, and that she was “taking this baby, the one you named Crystal with me to Hades.”²¹⁰ Shuai eventually admitted to friends what she had done, and they rushed her to the hospital for treatment, where the unborn child she was carrying was born prematurely and died three days later.²¹¹ Shuai was charged with murder and attempted feticide, and the Court of Appeals of Indiana addressed only the murder charged, holding that Shuai is not immune from prosecution, because of her relationship with the child that was born after her suicide attempt.²¹² The main argument asserted by Shuai’s counsel was that the murder statute was ambiguous as applied to Shuai, since she was carrying the fetus and since prior case law in Indiana determined that a neglect statute does not “criminalize conduct that occurs prior to a child’s birth.”²¹³ It also argued that the statute as written was intended to apply to third parties, not to the women carrying the fetus.²¹⁴ The court rejected that argument, writing that the opinion regarding the neglect statute, had the word “dependent,” which lead to a different interpretation, and that the facts in this case, including a suicide note specifically mentioning the fetus, indicate that the plain language of the murder and feticide

²⁰⁹ *Shuai v. State*, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012) transfer denied, 967 N.E.2d 1035 (Ind. 2012).

²¹⁰ Katha Pollitt, *Protect Pregnant Women: Free Bei Bei Shuai*, THE NATION (March 7, 2012), <http://www.thenation.com/article/166664/protect-pregnant-women-free-bei-bei-shuai>

²¹¹ *Shuai*, 966 N.E.2d 619 at 622.

²¹² *Id.* at 628.

²¹³ *Id.* at 629.

²¹⁴ *Id.*

statute applies to her.²¹⁵ Like the court in Whitner, the court specifies that the fetus was “viable,” and that the statute specifically protects either a “viable fetus” or human being.²¹⁶ Unlike the South Carolina Supreme Court however, the court did address the mental health issue, however it sided with the state’s argument that the death of the child was more than an unintended consequence of her suicide attempt, referring to the note Shuai left.²¹⁷ This illustrates the conflict and the very issue that advocates for women in situations like Shuai say, is a double standard of sorts, as while suicide is not a criminal act, it all of the sudden becomes one if the person making the attempt is pregnant.²¹⁸ Shuai’s trial is set for April.

As some jurisdictions adjudicate cases such as these, where statutory interpretation can lead to a collision between a woman’s privacy right and the state’s interest in protecting potential life, some states have carefully crafted legislation to avoid this type of court battle all together. In Missouri for example, a portion of the state’s child endangerment statute prevented the state from pursuing charges against a woman who gave birth to a child that tested positive for marijuana and methamphetamine.²¹⁹ While the state’s child endangerment statute addresses children “under the age of 17,” the court interpreted that language by referring to another statute that explicitly excludes criminal sanctions against a woman for ingesting illegal drugs while pregnant or for failing to “properly” take care of herself during the pregnancy.²²⁰ In support of its position, the court wrote that the drug user is already subject to criminal charges and that

²¹⁵ Id. at 630.

²¹⁶ Id.

²¹⁷ Id.

²¹⁸ Katha Pollitt, *Protect Pregnant Women: Free Bei Bei Shuai*, THE NATION (March 7, 2012), <http://www.thenation.com/article/166664/protect-pregnant-women-free-bei-bei-shuai> (Pollitt spoke with Shuai’s attorney, who said, “[f]or everyone else suicide is a mental health issue. For pregnant women, it’s a crime. That’s a violation of women’s constitutional right to equal treatment under the law.”).

²¹⁹ State v. Wade, 232 S.W.3d 663 (Mo. Ct. App. 2007)

²²⁰ MO. REV. STAT. § 1.205 (West 2012) (Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.)

additional, pregnancy-related charges would be only to protect the fetus.²²¹ This however, would allow for unlimited prosecution and make it very difficult to draw the line as to what behavior is subject to criminal sanctions.²²² By explicitly stating this exception in the statute, the state has prevented these types of prosecutions from going forward, not because it lacks interest in the potential life, but because of the potential such prosecutions would have in infringing on a woman's liberty interest and in dissuading women with drug addictions from seeking treatment.

Other states are still trying to determine the role prenatal drug use should play in child abuse and neglect cases and whether such conduct is sole justification for the removal of a child from the home. In New Jersey for example, the New Jersey Supreme Court has recently considered whether a mother would lose custody of her child solely because the newborn had cocaine in its system.²²³ The woman's attorney argued that a showing of harm to the child is needed, and that maternal drug abuse is not sufficient, as in this case there is no indication that the child was harmed.²²⁴ New Jersey's Department of Youth and Family Services offered up an argument based on generalities, stating that there is evidence that woman who use drugs while pregnant present dangers to children once their born and called them, "ticking time bombs."²²⁵ A decision on the issue has not yet been rendered by the court.

While it appears a portion of the statute, specifically excluding the prenatal conduct by mothers is the best approach to avoiding this kind of prosecution and poor public policy, some legal scholars have argued for imposing a legal duty on woman at a certain point in their

²²¹ Wade, 232 S.W.3d 663 at 665-66.

²²² Id.

²²³ Michael Booth, *Court Mulls Whether Prenatal Use of Illicit Drugs is Per Se Unfit Parenting*, NEW JERSEY LAW JOURNAL, Sept. 10, 2012.

²²⁴ Id.

²²⁵ Id.

pregnancies.²²⁶ This approach however, is problematic, especially in regard to the issue of viability. The Supreme Court of the United States has not specifically identified the point at which a fetus is viable, however did hold that the stage approximately at the end trimester is the point at which the state may regulate abortion procedures if it is reasonably related to maternal health.²²⁷ The concept of viability remains fluid and inconsistent, not only as utilized in state legislation in regard to abortion restrictions²²⁸ but also scientifically, as doctors do not all agree on agree on the precise time in which a baby will be able to survive outside the womb.²²⁹ The issue of causation is also important in considering a duty of care, in that the medical effects of certain types of controlled substance on the fetus are still very much undetermined. Finally, creating a legal duty care does not address the main problem with criminalizing prenatal conduct; what kind of conduct should be banned and if banned and criminal liability results, it is quite likely to force pregnant drug-users further underground rather than encourage them to seek help.

B. Canada

In Canada, attempts to pass a Canadian version of the U.S.'s Unborn Victims of Violence Act have failed. In 2008, the bill passed the House of Commons, however it eventually failed in the Senate. This may be because some members of the liberal party viewed the bill as a

²²⁶ James Denison, Note, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1103, 1136 (1991) (Citing RESTATEMENT (SECOND) OF TORTS § 323 (1965)).

²²⁷ *Roe*, 410 U.S. 113 at 164.

²²⁸ Guttmacher Institute, *State Policies in Brief, An Overview of Abortion Laws (As of Nov. 1, 2012)* available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (Some state laws restrict abortion based on “viability” others base it on 22 weeks, and others 24 weeks).

²²⁹ Bonnie Rochman, *A 21 Week Old Baby Survives and Doctors Ask, How Young is Too Young to Save?*, TIME, May 27, 2011, available at <http://healthland.time.com/2011/05/27/baby-born-at-21-weeks-survives-how-young-is-too-young-to-save/>.

backdoor to criminalizing abortion, despite the provision advocates of the bill said would be included, which would have excluded women who obtain and those who provide abortions.²³⁰

Canadian prosecutors have tried in the past to charge third parties and mothers, for prenatal injuries, however the cases found in Canadian courts thus far, show that prosecutors have been unsuccessful as in the cases seen, the fetus was technically, not “born alive.” For example, in one Canadian Supreme Court case, two midwives were charged with criminal negligence for a botched delivery.²³¹ The woman who had hired the midwives went into labor at home, with the two women by her side, however the child died in the birth canal.²³² The court ruled that because the child was still in the birth canal when it died, the charges against the two women must be dismissed as the criminal code refers to a “person” and a fetus is not a “human being” for purposes of the code.²³³ This case indicates the strict adherence to the born-alive rule and the bright-line rule the court is forced to adhere to in enforcing it.

Regarding the criminal prosecution of a mother for harm to the fetus, an interesting case has recently gone before the Canadian Supreme Court, involving a woman charged with concealing the body of a child. Ivana Levkovic claims she fell and gave birth in her Ontario home, and a subsequent autopsy could not tell whether the baby died before, after, or during childbirth.²³⁴ The baby was found by the apartment superintendent, wrapped in blankets on the apartment balcony.²³⁵ Levkovic was charged with a criminal code section that prohibits concealing the death of a child, however child in the code is not articulated, and her counsel argued that the statute was vague and hence, violated her liberty rights provided in Section 7 of

²³⁰ Randall Palmer, *Canadian Abortion Debate Rekindled As Bill Passes*, Reuters, Mar. 6, 2008, available at <http://ca.reuters.com/article/domesticNews/idCAN0625185820080306>.

²³¹ *R. v. Sullivan*, [1991] 1 S.C.R. 489, *8-9 (Can.).

²³² *Id.*

²³³ *Id.* at *19.

²³⁴ *R. v. Levkovic*, [2010] ONCA 830, para. 7-9 (Can.).

²³⁵ *Id.*

the Canadian Charter of Rights and Freedoms.²³⁶ Levkovic was acquitted, as the court believed the evidence was insufficient that the child was born alive.²³⁷ However, an appeals court held that the lower court erred and ordered a new trial, believing that that portion of the code referring to “child...died before birth,” was not actually vague and gave the defendant notice that her conduct would result in criminal liability.²³⁸ The new trial is on hold until the Supreme Court’s ruling, which is expected to address the meaning of the word “child” in the statute.

While there are currently no cases in Canada, where a woman is criminally charged for prenatal abuse, one case involving prenatal substance abuse may shed some light of those types of charges. In the Canadian Supreme Court case of Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 SCR 925 (Can.), the court held that a pregnant woman abusing drugs may not be ordered into a treatment center for the protection of her child.²³⁹ The woman was five months pregnant with her child, and was addicted to sniffing glue.²⁴⁰ Two children she had prior to this pregnancy were permanently disabled and were being cared for by the state.²⁴¹ The court held in a 7-judge majority that under Canadian law, a fetus is not a legal person and that no rights attach until birth, and that drawing an opposite conclusion would impede on a woman’s liberty.²⁴² The court added in the majority opinion, that “[t]his is not a story of heroes and villains. It is the more prosaic and all too common story of people struggling to do their best in the face of inadequate facilities and the ravages of addiction.”²⁴³ While this

²³⁶ Id. at para. 82-85.

²³⁷ Id. at para. 14.

²³⁸ Id. at para. 117-23.

²³⁹ Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925, para. 4 (Can.).

²⁴⁰ Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925, para. 1 (Can.).

²⁴¹ Id.

²⁴² Id. at para. 39.

²⁴³ Id. at para. 35.

case involves prenatal substance abuse in the civil context, and the Canadian criminal code does not have a section similar to that of Alabama's chemical-endangerment statute, it is helpful in determining how a Canadian court might deal with the issue of criminal sanctions against a mother for injuries to a child caused by her prenatal conduct. On one hand, since the fetus has no legal rights, it would seem that criminal liability would not attach, as the statutes in the criminal code seem to specifically include the term "human being,"²⁴⁴ and that he "means to cause him bodily injury." The intent would be directed toward an entity that is viewed in the eyes of the law as having no rights. On the other hand however, the court has enunciated several times in various holdings involving the fetus that legal rights do attach, especially in the civil context, upon birth, and there has been no definitive answer from the court as to whether the fetus has a right to life under Section 7 or whether state protection of fetal interests may be sustained under Section 1 of the Canadian Charter of Rights and Freedoms.²⁴⁵ If the child is born, then it would seem these legal rights would attach to illegal conduct occurring during the pregnancy. It is possible that the criminal sanctions however, would not pass Canada's constitutional proportionality test under Section 1,²⁴⁶ as depending on what the Crown provides as its objective, the court could view prosecution as out of proportion to the objective.²⁴⁷ However, this does need to be viewed in

²⁴⁴ Criminal Code R.S.C., 1985, c. 229 (Can.). (For example, under murder, 229 subsection (b) where a person, meaning to cause death to a human being or meaning to cause *him* bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being).

²⁴⁵ See R. v. Morgentaler, [1988] 1 S.C.R. 30 (Can.); See also Tremblay v. Daigle, [1989] 2 S.C.R. 530 (Can.).

²⁴⁶ See R. v. Morgentaler, [1988] 1 S.C.R. 30, para. 52 (Can.) (Citing R. v. Oakes, [1986] 1 S.C.R. 30, which provides that if a certain statute infringes on one portion of the Charter, it may be saved under Section 1 if the government can prove it's a legitimate interest and is proportional to the objective.).

²⁴⁷ While the abortion restrictions are an entirely different restriction than criminal prosecution, the Court in Morgentaler, held that the restrictions were unconstitutional because they were out of proportion to the objective, and "may actually defeat that objective." Should the government offer as justification for criminal sanctions, that the objective is to provide for the health and safety of the woman, a court may

light of the fact that the Court in Morgentaler, refused to rule out or evaluate any claim to “fetal rights” as a constitutional issue in the case, which leaves room for future court decision to determine the issue.²⁴⁸ It is possible that the Canadian Supreme Court will come closer to addressing the issue, as it attempts to interpret the word “child” in one portion of the Canadian criminal code. A decision on this issue may come down in the coming weeks.²⁴⁹

C. The Dominican Republic

While there is no equivalent to the Unborn Victims Act in the United States, through the Constitution’s Article 37 and the country’s criminal code, there are criminal repercussions for those who end the life or attempt to end the life of a fetus in the Dominican Republic. First, as discussed previously, Article 37 proscribes that everyone has the right to life from the moment of conception.²⁵⁰ In addition, Article 317 of the criminal code states that those who induce an abortion, as well as those who abort a fetus such as a doctor or anyone who assists a medical professional in aborting a fetus are subject to penalties, including imprisonment.²⁵¹ Women who induce an abortion are subject to imprisonment ranging from two to five years, while doctors and other medical professionals that assist in an abortion may receive a penalty from five to twenty years.²⁵² It should be noted however, that there is currently a movement before the Dominican

view criminal sanctions and possible imprisonment as “defeating the objective,” in light of the realities of drug addiction.

²⁴⁸ An argument that the objective is the government’s interest in protecting the unborn may hold up to Canada’s proportionality test, in light of the Court’s concession in Morgentaler that “[s]tate protection of fetal interest may well be deserving of constitutional recognition under Section 1.”

²⁴⁹ See *supra* Pg. 43.

²⁵⁰ See *supra* Part II.

²⁵¹ CODE CRIMINAL [C. CRIM.] art. 317 (Dom. Rep.)

²⁵² *Id.*

legislature to increase the penalties, increasing the time of imprisonment to a maximum of 30 years.²⁵³

While there is no indication that the penal code has been used to prosecute pregnant women for drug use, like the Kimbrough case in the United States, it has been effectively used to prevent at least one young woman from receiving life-saving cancer treatment. In July, a 16-year old woman, which the media called “Esperanza” or “Hope” arrived at a hospital in the Dominican Republic to undergo potentially life-saving chemotherapy to treat her leukemia.²⁵⁴ The girl, who was about 10 weeks pregnant at the time she was to undergo the treatment, was unable to find a doctor or hospital to treat her.²⁵⁵ Doctors were aware that chemotherapy would likely deform the fetus or possibly kill it, which would be a crime under the law.²⁵⁶ Fearful of the criminal and constitutional repercussions, Esperanza did not receive treatment until 20 days after she was admitted into the hospital.²⁵⁷ Aside from the 20 day delay in treatment, Esperanza was also given a lower amount of chemotherapy, as an attempt to protect the fetus and to stay within the parameters of the law.²⁵⁸ Unfortunately however, days after the woman received the treatment, she suffered a miscarriage, then went into cardiac arrest where doctors were unable to revive her.²⁵⁹

²⁵³ Telephone Interview with Dr. Lilliam Fondeur, Gynecologist in private practice, in the Dominican Republic, (Nov. 10, 2012).

²⁵⁴ Anastasia Moloney, *Pregnant Teen with Cancer Stirs Abortion Debate in Dominican Republic*, July 25, 2012, available at <http://blogs.reuters.com/the-human-impact/2012/07/25/pregnant-teen-with-cancer-stirs-abortion-debate-in-dominican-republic/>.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Michelle Castillo, *Dominican Teen at Center of Abortion Debate Dies from Leukemia Complications*, CBS News, August 20, 2012., available at http://www.cbsnews.com/8301-504763_162-57496613-10391704/dominican-republic-teen-at-center-of-abortion-debate-dies-from-leukemia-complications/.

²⁵⁸ Telephone Interview with Dr. Lilliam Fondeur, Gynecologist in private practice, in the Dominican Republic, (Nov. 10, 2012).

²⁵⁹ Michelle Castillo, *Dominican Teen at Center of Abortion Debate Dies from Leukemia Complications*, CBS News, August 20, 2012., available at http://www.cbsnews.com/8301-504763_162-57496613-10391704/dominican-republic-teen-at-center-of-abortion-debate-dies-from-leukemia-complications/.

In Latin American countries where stringent anti-abortion measures outlaw abortion, even in the case of rape or incest, stories such as Esperanza's, are not unheard of. For example, in 2006, a 13-year old girl from Peru learned she was pregnant after being raped by a man in her neighborhood.²⁶⁰ She was so upset at this discovery, that she attempted suicide by jumping off a roof, but survived and injured her spine.²⁶¹ Despite the fact that the 13-year old girl's pregnancy was a result of rape, doctors refused to perform the surgery necessary to repair the damage to her back, out of fear of harming the fetus and breaking Peruvian law.²⁶² The girl eventually miscarried and is now a quadriplegic.²⁶³

Activists and medical professionals that support exceptions the Dominican Republic's anti-abortion measure claim Esperanza's death is an example of the state, sanctioning a situation where the rights of the fetus overcame the rights of the mother – a 16-year old girl in this case. Dr. Lilliam Fondeur, a gynecologist in the Dominican Republic who brought media attention to Esperanza's case by writing about it in an editorial in the country's national newspaper, *El Nacional*, said that this result is unfortunately not surprising. While she said this is the first case of its kind that she is aware of in the Dominican Republic, the penalties tied to treating pregnant women weigh on doctors and in turn, affect the treatment pregnant women receive. For example, Dr. Fondeur said just a few weeks ago, a young woman came into her office, 16 to 17 weeks pregnant carrying twins.²⁶⁴ The twins however, were conjoined; they had "two faces," but shared

²⁶⁰ Tim Padgett, *Uruguay Diverges from a Continent Where Abortion is Worse than Rape*, TIME, Oct. 19, 2012, available at <http://world.time.com/2012/10/19/uruguay-diverges-from-a-continent-where-abortion-is-a-crime-worse-than-rape/>.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Telephone Interview with Dr. Lilliam Fondeur, Gynecologist in private practice, in the Dominican Republic, (Nov. 10, 2012).

a heart.²⁶⁵ While the woman wanted to have an abortion, the doctor was unable to help her and had to turn her away, due to the illegality of providing an abortion.²⁶⁶

Dr. Fondeur is not alone, in her assessment that the law in the Dominican Republic has the effect in some situations, of placing the life of the unborn over the life of the mother.²⁶⁷ Many women organizations, international organizations such as Amnesty International, and medical organizations within the country believe that the law not only places fetal rights above the rights of those already born, but that it serves to deepen the chasm between the country's rich and poor. Dr. Fondeur says that for a fee, women interested in obtaining an abortion will speak to doctors to find out the drug needed to start the abortion process. This information however, costs money, and women who are poor often do not have the kind of access to the necessary information to have an abortion safely.²⁶⁸ While there does not appear to be any "chemical-endangerment" type law on the books in the Dominican Republic, if a woman arriving at the hospital after starting the abortion process, could possibly be charged under the applicable criminal code prohibiting abortions.

This indicates that while the law seeks to preserve the legal right of the unborn to life, in the process, it subjugates the right of the woman – a child herself in some instances- from the very same right to life secured by the Dominican Republic's Constitution. Certainly, while there are no cases at this point of a woman being prosecuted for prenatal conduct alleged to have harmed the fetus, the abortion ban as it has been applied and used today in the Dominican Republic, would provide for a woman's prosecution, should her conduct result in the death of her fetus.

²⁶⁵ Id.

²⁶⁶ Id.

²⁶⁷ Id.

²⁶⁸ Id.

Part V Conclusion

In conclusion, the view of fetal rights in the United States, Canada, and the Dominican Republic are different, and thus naturally shape the extent to which a woman may be prosecuted for prenatal conduct. While the Dominican Republic approach places too great an emphasis on the country's interest in the unborn, Canada's strict-adherence to its born-alive may be too harsh, and the Supreme Court of Canada has yet to delineate the point at which a government may have a compelling interest in the potential life under Section 1 of the Canadian Charter of Rights and Freedoms.

In light of the constitutional issues and the serious public policy implications, Alabama's chemical-endangerment statute should not be applied to punish prenatal conduct. Existing criminal laws already target women, pregnant women, and men who use or possess illegal drugs, and additional charges stemming from that conduct, simply because one is pregnant, opens the door to bestowing more legal rights upon the fetus. While prenatal conduct should play a role in determining custody and parental rights, criminalizing prenatal conduct discourages women who are battling addiction from seeking treatment and may create a further blurring of the line between a woman's privacy right and the compelling interest of the state in potential life.