

INSIDE THE WOMB: INTERPRETING THE *FERGUSON* CASE

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I. INTRODUCTION

The rapid and recent advancements in prenatal care, combined with an increase in knowledge of fetal development, have led to a higher scrutiny of women's activities during pregnancy.¹ When a pregnant woman's behavior endangers her fetus' life through active or passive conduct, "fetal abuse" is deemed to have occurred. The specific problem of fetal abuse involving mothers that abuse drugs is highly controversial, and courts are often called upon to provide guidance and resolution on these sensitive issues.

The government has a standard policy advocating the prevention of fetal abuse, but its recent intervention has raised serious and conflicting constitutional issues. In 2001, in *Ferguson v. City of Charleston*, the United States Supreme Court considered whether involuntary drug tests performed on pregnant women without their consent violated the Fourth Amendment of the Constitution.² This was the first case in which the Supreme Court explicitly recognized Fourth Amendment rights in the context of pregnant women who are addicted to drugs.

Part II of this commentary explores the history of maternal-fetal conflict in the context of drug addiction. Part III examines the landmark case of *Ferguson v. City of Charleston* as it relates to the Fourth Amendment, and its implications for treatment of pregnant women. Part IV discusses other complex constitutional issues, specifically those involving the Equal Protection Clause and the Due Process Clause. These issues are usually raised when a state actor attempts to enforce fetal rights while the fetus is still inside the womb.³

II. FETAL RIGHTS

It is a popular belief amongst physicians that the relationship between a mother and her unborn child is unique. While the medical profession holds this view, it has fueled the conflict between pregnant women and their fetuses by controlling medical procedures specifically targeted to benefit the fetus, and by

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1. See, e.g., Chau Lam, *Teen who hid her newborn in closet may get him back*, HOUS. CHRON., Oct. 15, 1997, at A12 (charges filed against a 17-year-old girl who failed to get prenatal or postnatal care after her baby was delivered prematurely in her bedroom).

2. 532 U.S. 67 (2001).

3. States may attempt to police the behaviors of the mothers-to-be before the fetus is born.

viewing the fetus as a separate patient.⁴ When the physician views the fetus as a separate patient, the physician elevates the fetus to a status above that of the mother, creating an inherent conflict.⁵ This conflict is further magnified when a woman and her fetus have different needs.⁶ A New England Journal of Medicine article suggests that many physicians think it is proper to dishonor a patient's choice to consent to, or refuse a medical procedure, when that choice could endanger the life of the fetus.⁷ In some cases, physicians have asked courts to override the informed decision of the pregnant woman, and courts have almost always ordered the medical procedure in question.⁸

The law of fetal rights is deeply rooted in the common law. Traditionally, a mother and her fetus were thought to constitute one person, even though the law had accounted for the fetus separately for centuries.⁹ The most famous case upholding the traditional view, and refusing to recognize fetal rights, was *Dietrich v. Inhabitants of Northampton* in 1884.¹⁰ In *Dietrich*, a woman sued the city of Northampton for damages to her unborn child resulting from the woman's fall on a defective sidewalk.¹¹ The child was born prematurely and subsequently died. The court dismissed the claim, holding that although common law recognized the causing of miscarriage or death of a "quickened" fetus as a crime, no civil cause of action was available.¹² *Dietrich* thus stood for the proposition that a fetus unable to live outside of its mother's womb had no standing to sue.

For six decades, the holding in *Dietrich* stood unchallenged. Courts declined to recognize fetal rights, but did act to protect third party interests, such as the interest of the fetus' father in obtaining compensation for his loss of property, and the interest of the mother in receiving compensation for the physical

4. Helene M. Cole, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2663 (1990). For example, a pregnant patient may refuse to submit to a cesarean section when her doctor strongly believes that the procedure would be in the best interests of her unborn child. *Id.* In addition, a pregnant woman may refuse a necessary blood transfusion for the sake of her fetus on the basis of religion. *Id.*

5. Deirdre Moira Condit, *Fetal Personhood: Political Identity Under Construction*, in EXPECTING TROUBLE 28 (Patricia Boling ed., 1995) (stressing that in modern times the fetus is often treated as a second patient, but not necessarily as a lesser one). Medical specialties such as "fetal health" can also contribute to the notion of the fetus being the primary patient. *Id.*

6. *Id.* The development of medical technology is likely to increase the exposure of the fetus and add to the conflicting needs of the expectant woman and her fetus.

7. Veronika E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1192 (1987); see also Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 10 (1987).

8. This has generally been with regard to cesarean sections. Kolder, *supra* note 7, at 1192; see Gallagher, *supra* note 7 (restraining woman with ankle and wrist cuffs); see also Raleigh Fitkin-Paul Morgan Hosp. v. Anderson, 201 A.2d 537, 537 (N.J. 1964) (ordering a blood transfusion to save the life of woman or unborn child over woman's religious objections).

9. Kristen Burgess, *Protective Custody: Will It Eradicate Fetal Abuse and Lead to the Perfect Womb?*, 35 HOUS. L. REV. 227, 240 (1998).

10. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 114, 114 (1884).

11. *Id.*

12. *Id.*

injuries she sustained during pregnancy.¹³ After *Bonbrest v. Kotz* in 1946, courts began to grant limited rights to the fetus.¹⁴

In *Bonbrest*, the fetus was injured by the physician during delivery.¹⁵ The court emphasized that the fetus was viable at the time of injury, and held that to deny recovery to a child for prenatal injuries would be to allow a wrong without a remedy.¹⁶ The court rejected the idea of a fetus as only “part” of the mother, at least for purposes of recovery against a third party.¹⁷ Curiously, the court ordered compensation for all three victims—the injured child and the two parents—without explicitly recognizing that the fetus possessed rights separate from, or potentially in conflict with, those of the mother.¹⁸ Nevertheless, by holding that the child was viable and had standing before the court, the *Bonbrest* court helped to support the idea that fetal rights may exist even earlier in a woman’s pregnancy as advances in medical science move the viability date closer to the date of conception.¹⁹

Finally, in 1960, the doctrine of fetal rights was revisited in *Smith v. Brennan*.²⁰ The court held that justice requires recognition of a child’s legal right to begin life with a sound mind and body.²¹ In *Brennan*, a fetus was allowed to recover against a third party for injuries it suffered in an automobile accident.²² In *Stallman v. Youngquist* in 1988, a different court declined to extend the notion of a child’s right to begin life with a sound mind and body into the womb itself.²³ The court rejected the notion of a fetus’s right to be protected against prenatal injury.²⁴ Decades later, in *Ferguson v. City of Charleston*, the Supreme Court was similarly asked to consider whether a fetus has a right to be protected against prenatal injury resulting from the mother’s conduct.

III. THE SUPREME COURT SPEAKS: *FERGUSON* V. CITY OF CHARLESTON

For decades, the nation’s primary response to the problem of illicit drug use has been an escalation of federal, state, and local law enforcement activities aimed at discouraging drug use through punishment of the users.²⁵ In recent

13. See generally Burgess, *supra* note 9, at 241-48 (describing in detail fetal rights under property, tort and criminal law).

14. 65 F. Supp. 138, 138 (D.C. 1946).

15. *Id.* at 139.

16. *Id.* at 141.

17. *Id.* at 140.

18. *Id.*

19. Kristen Barrett, *Prosecuting Pregnant Addicts for Dealing to the Unborn*, 33 ARIZ. L. REV. 221, 223 (1991).

20. *Smith v. Brennan*, 157 A.2d 497, 497 (N.J. 1960).

21. *Id.* at 503.

22. *Id.* at 504.

23. 531 N.E.2d 355, 355 (Ill. 1988).

24. *Id.* The court held that to recognize a legal right of a fetus to begin life with a sound mind and body assertable against a mother would make a pregnant woman the guarantor of the mind and body of her child at birth. *Id.* The court refused recovery, noting that this legal duty had never before been recognized. *Id.* at 359.

25. Patricia A. Sexton, *Imposing Criminal Sanctions on Pregnant Drug Users: Throwing the Baby Out With the Bath Water*, 32 WASHBURN L.J. 410, 424 (1993).

years, the public has increasingly favored holding women criminally responsible if they use drugs while pregnant.²⁶ Generally, there are three categories of judicial responses when dealing with perinatal²⁷ substance abuse in the courts: (1) rejecting the claim of jurisdiction on all grounds; (2) protecting the infant only after its birth; and (3) state intervention before the birth of the infant.²⁸ In *Ferguson v. City of Charleston*, a state hospital asked the Supreme Court to take the third route, to protect fetuses from harmful drugs—even at the cost of the mother's liberty.²⁹

In *Ferguson*, obstetrics patients at a public hospital, who resembled a suspected drug use profile, were subjected to urine tests for cocaine, without informing the women of the testing.³⁰ According to the hospital policy, a pregnant woman fit the profile for suspected cocaine use if she met one or more of the following criteria suggesting the use of drugs:

1. No prenatal care
2. Later prenatal care after 24 weeks gestation
3. Incomplete prenatal care
4. Abruptio placentae
5. Intrauterine fetal death
6. Preterm labor of no obvious cause
7. IUGR (intrauterine growth retardation)
8. Previously know drug use or alcohol abuse
9. Unexplained congenital anomalies³¹

The hospital policy also provided that the urine samples taken from pregnant women meeting the profile were to be collected in a way that would maintain the chain of custody, presumably to ensure that the results could be used in subsequent criminal proceedings against the woman.³² In the event that a woman's urine tested positive for cocaine, the hospital informed the police, who subsequently threatened to arrest the woman if she did not agree to participate in a drug treatment program.³³

The lower courts approved the hospital's testing policy, relying on Supreme Court precedents in which "suspicionless" drug tests, although qualifying as searches within the meaning of the Fourth Amendment, were justified by

26. *Id.* at 411. Across the nation, prosecutors have used creative applications of laws in existence to bring cases against pregnant drug addicts which include child abuse, neglect, vehicular homicide, encouraging the delinquency of a minor, involuntary manslaughter, drug trafficking, failure to provide child support and assault with a deadly weapon. *Id.* at 412-14.

27. "Perinatal" is defined as the period beginning after the twenty-eighth week of pregnancy through the twenty-eighth day following birth, and "prenatal" is broadly defined as the time after conception that precedes birth. Taber's Cyclopedic Medical Dictionary 1469, 1587 (Clayton L. Thomas, M.D., ed., 1993).

28. Sexton, *supra* note 25, at 414-15.

29. *City of Charleston v. Ferguson*, 532 U.S. 67, 67 (2001).

30. *Id.*

31. *Id.* at 71 n.4 (the policy involved testing patients meeting one or more of the hospital's nine criteria through use of a urine drug screen).

32. *Id.* at 73.

33. *Ferguson*, 532 U.S. at 71-73. Ten women who received obstetrical care were arrested after testing positive for cocaine. *Id.* at 73.

a “special need.”³⁴ The District Court stated that a “special need” justification is critical where warrantless searches are at issue.³⁵ However, in each of the Supreme Court cases relied upon by the lower court, the “special need” advanced as a justification for warrantless searches, or those based on individualized suspicion, went beyond the state’s general interest in law enforcement.”³⁶

The Supreme Court held that because the hospital was public, its staff members were government actors subject to the strictures of the Fourth Amendment.³⁷ The Supreme Court agreed with the District Court’s conclusion that testing urine samples from pregnant patients for cocaine and reporting positive results to the police constituted a “search” within the meaning of the Fourth Amendment, but rejected the view that the searches were justified by a “special need.”³⁸ Unless the mother consented, the test itself and the act of reporting of a positive test result to police were considered to be unreasonable searches, despite the policy’s law enforcement purpose.³⁹ The Supreme Court rejected the hospital’s assertion that the policy was designed to serve a “special need” to coerce pregnant women to participate in substance abuse treatment, declaring:

[W]hile the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal.⁴⁰

Ferguson v. City of Charleston is the first Supreme Court case involving a maternal-fetal conflict in an addiction context, articulating that pregnant women cannot be “searched” without probable cause under the Constitution. This may be the first of many cases in which the Supreme Court is asked the walk the fine line between what a woman does to her own body and what she does to her unborn child.

IV. OTHER CONSTITUTIONAL ISSUES—THE EQUAL PROTECTION CLAUSE AND THE DUE PROCESS CLAUSE

The constitutional problems associated with state efforts to identify and punish pregnant women who have ingested controlled substances are not limited to search and seizure within the Fourth Amendment. State action taken against women suspected of prenatal substance abuse also raises questions under both the Equal Protection Clause and Due Process Clause of the Fourteenth

34. *Id.* at 73 (citing various cases in which the Supreme Court has permitted warrantless searches because of special needs including *Vernonia Sch. Dist. 47J v. Action*, 515 U.S. 646 (1995) and *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 602 (1989)).

35. *City of Charleston v. Ferguson*, 532 U.S. 67, 75 (2001).

36. *Id.* at 73.

37. *Id.*

38. *Id.* at 76.

39. *Id.* at 72.

40. *Ferguson*, 532 U.S. at 82-83. Respondents argued that their ultimate purpose in protecting the health of both mother and child is a beneficent one. *Id.* at 81. However, the Court held that the policy plainly revealed that its purpose was not actually distinguishable from the state’s interest in crime control. *Id.* (citing *Indianapolis v. Edmond*, 121 S. Ct. 447 (2000)).

Amendment. When either clause has been raised in the context of pregnancy, courts have consistently followed the Supreme Court decision of *Roe v. Wade*⁴¹ and its progeny.⁴²

A. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁴³ According to some commentators, the Equal Protection Clause is considered to be the “single most important concept in the Constitution for the protection of individual rights,”⁴⁴ because it protects against unlimited governmental intrusion on those rights.⁴⁵ Equal protection principles recognize that most legislation classifies individuals differently in order to promote various legislative objectives. This classification system may infringe on the interests of an individual or a class of individuals.⁴⁶ Thus it has been argued that the Equal Protection Clause “measure[s] the validity” of state law classifications.⁴⁷

Kristen Burgess writes, “Courts must consider whether regulating pregnancy in a manner that deprives women of liberty in order to protect fetuses infringes on the mother’s autonomy during pregnancy to the degree that it violates the Equal Protection Clause.”⁴⁸ Burgess states that those opposed to criminalizing a pregnant woman’s behavior believe that the punishment “violates the equal protection clause, because only the rights of the female participant in the procreative process are infringed.”⁴⁹ Also, some suggest that state intervention in this context disproportionately burdens women.⁵⁰

In *Roe*, the Supreme Court held that a fetus is not a “person” within the meaning of the Fourteenth Amendment of the Constitution,⁵¹ even though the court recognized the state’s interest in protecting the fetus in the third trimester.⁵² Since *Roe*, a pregnant woman’s right of privacy has remained intact. In 1992, the Supreme Court in *Planned Parenthood v. Casey* altered the trimester framework under *Roe* and emphasized the state’s interest in the promotion of

41. *Roe v. Wade*, 410 U.S. 113, 113 (1973).

42. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 833 (1992); see also Cynthia L. Glaze, *Combating Prenatal Substance Abuse: The State’s Current Approach and the Novel Approach of Court-Ordered Protective Custody of the Fetus*, 80 MARQ. L. REV. 793, 795 (1997).

43. U.S. CONST. amend. XIV, § 1.

44. J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 524 (3d ed. 1986).

45. Burgess, *supra* note 9, at 239; see also Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121 (1989) (commenting that the equal protection clause protects racial minorities, women, resident aliens, and illegitimate children from discriminatory treatment).

46. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (commenting that equal protection must co-exist with the practical necessity of legislative classifications); Burgess, *supra* note 9, at 239.

47. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring).

48. Burgess, *supra* note 9, at 239.

49. Annotation, *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1565 (1990) [hereinafter *Developments*]; see Burgess, *supra* note 9, at 239-40 (drawing attention to the fact that fathers are not being penalized for smoking tobacco in the presence of pregnant women despite societal recognition that second-hand smoke is dangerous to non-smokers and to fetuses).

50. Burgess, *supra* note 9, at 240.

51. *Roe v. Wade*, 410 U.S. 113, 158-59 (1973).

52. *Id.* at 164-65.

potential life.⁵³ In *Casey*, the Court held in favor of “informed consent requirements,” a twenty-four hour waiting period, and parental consent for minors. The Court also adopted Justice O’Connor’s “undue burden test” as the measure of future restrictions.⁵⁴ Both *Roe* and *Casey* have been cited as a basis for recognition of fetal rights, but women’s rights advocates and fetal rights advocates disagree over whether the state interest recognized in these two cases extends beyond the abortion context.⁵⁵

Women’s rights advocates interpret *Roe* and its progeny narrowly, advancing the notion that those cases only reach the issue of abortion.⁵⁶ These groups believe that the Supreme Court identified the life and health of the mother as factors limiting the state’s interest in potential life.⁵⁷ It has been suggested that even if *Roe* can be read as recognizing fetal rights, these rights are always subordinate to the mother’s right to life and health.⁵⁸ These advocates hold the view that “any rights a fetus may have are simply not compelling enough to override the pregnant woman’s clear and uncontested rights in making decisions about her pregnant body.”⁵⁹

Fetal rights advocates, on the other hand, broadly interpret *Roe* and its progeny as implying that the state’s interest in potential life exists at conception and not at the point of viability.⁶⁰ Their belief that the fetus’ independent rights exist even before viability was affirmed by the Supreme Court in *Webster v. Reproductive Health Services*⁶¹ and *Casey*.⁶² These advocates also believe that the two cases justify the extension of the rights already afforded a fetus to other situations, such as those where the fetus’ mother is involved in substance abuse.⁶³ Some fetal rights advocates take the position that a woman’s right to abuse her body “stops at the border of her womb.”⁶⁴

A woman’s Fourteenth Amendment rights under maternal drug use statutes, both civil and criminal, are often compared to a woman’s right to an abortion.⁶⁵ In 1973, the Supreme Court in *Roe* held that women had the legal right to have an abortion. The right was held to be “fundamental” and emanated from

53. *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992). Justice O’Connor commented that it must be remembered that *Roe* clearly speaks about establishing a woman’s liberty but also about the State’s important and legitimate interest in potential life.” *Id.* at 871.

54. *Id.* at 876-77.

55. Glaze, *supra* note 42, at 796.

56. Alicia Ouellette, *New Medical Technology: A Chance to Reexamine Court-Ordered Medical Procedures During Pregnancy*, 57 ALB. L. REV. 927, 945-48 (1994).

57. *Id.* at 945-46.

58. *Id.* at 947.

59. *Id.* at 948.

60. Glaze, *supra* note 42, at 796.

61. *Webster v. Reproductive Health Services*, 492 U.S. 490, 490 (1989) (upholding a Missouri statute granting the fetus “all the rights, privileges, and immunities available to other persons, citizens, and residents”); see MO. REV. STAT. § 1.205.2 (2001).

62. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

63. Glaze, *supra* note 42, at 797.

64. *Id.*

65. Cheri Hass, *State v. Gray: De-Criminalization of Maternal Drug Abuse or a Momentary Reprieve?*, 25 U. TOL. L. REV. 1013, 1025 (1995).

the broader constitutional right to privacy.⁶⁶ Importantly, a woman's right to privacy and bodily autonomy was not considered absolute.⁶⁷ The Court found that the state has a compelling interest in the well-being of a fetus during the woman's third trimester of pregnancy.⁶⁸ Those favoring fetal rights also advance the position that there is no constitutional right to abuse controlled substances.⁶⁹ Thus, they argue that the state may intervene in a pregnancy to protect the possibility of future life without treading on the Fourteenth Amendment right of privacy.⁷⁰

The penumbral privacy recognized in *Roe v. Wade* also contains a right of bodily integrity.⁷¹ The doctrine of bodily integrity has been treated in a respectful way by the courts.⁷² The Supreme Court has stated, "No right is held more sacred, or is more carefully guarded by the common law than the right of the individual to the possession and control of his own person, free from all restraint and interference by others, unless by clear and unquestionable authority of law."⁷³ The right to be free from non-consensual bodily invasion forms the basis of the informed consent doctrine.⁷⁴ The privacy strand of the right to bodily integrity has emerged in cases permitting patients or their guardians to refuse medical treatment.⁷⁵ Furthermore, courts have recognized that the right against bodily interference extends to medical procedures intended to benefit another.⁷⁶

Erosion of the right to bodily integrity and autonomy has been permitted in the cases of certain compelling state interests such as preserving life, preventing suicide, maintaining the integrity of the medical profession, and protecting third parties.⁷⁷ These state interests do exist in the context of maternal drug abusers.⁷⁸ Pregnant women who abuse drugs are not forced to behave in ways which protect their fetuses; however, such women can be penalized for harming their fetuses.⁷⁹ Scholar Cheri Hass observed that "the state is not requiring physical in-

66. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

67. *Id.* at 154.

68. *Id.* at 163. The court chose the third trimester because it believed that to be the point at which the fetus became viable.

69. Hass, *supra* note 65, at 1025-26; see *State v. Gray*, 584 N.E.2d 710, 714 (Ohio 1992) (Wright, J., dissenting) (arguing that a child has the legal right to begin life without the burden of injuries inflicted before it is born).

70. Hass, *supra* note 65.

71. Derk B.K. VanRaalte, *Punitive Policies: Constitutional Hazards of Non-Consensual Testing of Women for Prenatal Drug Use*, 5 HEALTH MATRIX 443, 466 (1995).

72. *Id.* The right to be free from bodily invasion originated in the common law. *Id.*; see *Norwood Hosp. v. Munoz*, 564 N.E.2d 1017, 1021 (Mass. 1991).

73. *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

74. Bonnie I. Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 788-98 (1990); see, e.g., *In re Conroy*, 486 A.2d 1209 (1985).

75. See, e.g., *Rennie v. Klein*, 458 U.S. 1119 (1982); *Superintendent v. Saikewicz*, 370 N.E.2d 417 (1977); *In re Conroy*, 486 A.2d 1209 (1985); *In re Quinlan*, 355 A.2d 647 (1976).

76. *McFall v. Shimp*, 10 Pa.D. & C.3d 90 (1978) (holding that there was no legal basis to compel a man to undergo a bone marrow extraction to save a terminally ill cousin).

77. *Superintendent of Belchertown v. Saikewicz*, 370 N.E.2d 417, 425 (Mass. 1977).

78. Hass, *supra* note 65, at 1028.

79. *Id.*

trusion into a woman's body and the woman is not being forced to undergo an unwanted biological process, as the case would be with criminalizing abortions."⁸⁰ In addition, forcing a pregnant woman to quit using drugs is often viewed as socially acceptable because it potentially helps both the woman and her fetus.⁸¹

B. Due Process

In addition to a woman's right to equal protection under the law, her due process rights could be violated if the state's intervention unduly burdened her reproductive rights. Due Process involves a tension between the state and the individual, requiring that people have notice of the laws that they are alleged to have violated. In *Casey*, the "undue burden standard" was found to be the appropriate method by which to reconcile the state's interest with the woman's right of constitutionally protected liberty.⁸² The undue burden standard left the doors wide open for state regulation.⁸³

In *Roe*, the Supreme Court asserted that the state may restrict abortion after viability is established only if the mother's life or health is not affected. *Roe* does not entertain the option of enforced treatment to promote fetal health."⁸⁴ Some suggest that the effect of that silence operates as a "waiver" of her maternal due process rights.⁸⁵ James Nocon states, "In sum, once a woman elects to waive her right to abortion and to carry the fetus to term, she is no longer free to take action that would endanger her fetus."⁸⁶ This argument of a waiver of the due process rights by the pregnant woman can be disputed in three ways: (1) a woman may elect to terminate her pregnancy to preserve her health; (2) no actual waiver can occur until after the point of viability; and (3) even if the mother decides to carry the baby to term, she does not waive her right to conduct labor and delivery in the manner of her choosing.⁸⁷ Additionally, and more importantly, no cases have established a woman's legal duty to accept any risk to her health or body for the sake of her fetus.⁸⁸

In *Casey*, the Supreme Court recognized "that the State has a legitimate interest from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."⁸⁹ However, those against policing the behavior of pregnant women stress that the state's interest does not

80. *Id.*

81. *Id.*

82. *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992).

83. Hass, *supra* note 65, at 1025.

84. James J. Nocon, *Physicians and Maternal-Fetal Conflicts: Duties, Rights and Responsibilities*, 5 J. L. & HEALTH 1, 20 (1991).

85. *Id.*

86. *Id.*

87. *Id.* (stating that the "waiver" position is ineffective on three premises).

88. *Id.*; see *Thornburgh v. American College of Obstetrics & Gynecology*, 476 U.S. 747 (1986) (striking down a Pennsylvania law that required a woman to accept an increased medical risk to save her viable fetus); *Colautti v. Franklin*, 439 U.S. 379 (1979) (striking down a law requiring a mother, in her second trimester, to undergo a mini-cesarean section because it offered the best opportunity for the fetus to be born alive).

89. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

reach the level of overriding the mother's due process rights.⁹⁰ Commentators argue that even if the state's interest in fetuses was compelling enough to permit burdening women's rights, the regulation that the states are trying to impose on pregnant women are not tailored to survive strict scrutiny.⁹¹

V. CONCLUSION

The Supreme Court's ruling in *Ferguson* marks the first time the Supreme Court has attempted to mediate in the war between advocates for drug-addicted pregnant women and advocates for the fetuses they carry. This landmark decision stands for the proposition that even when a pregnant woman is addicted to illegal substances, her status as a constitutionally protected individual is not to be compromised through drug testing without probable cause or her consent. The government of this country should not be permitted to police its pregnant citizens through their umbilical cord.

Treatment of such women is also very difficult. Treatment programs for substance-addicted mothers are almost non-existent,⁹² so it is no surprise that the number of drug-addicted newborns continues to rise. Often, the more preferential treatment options for female drug addicts, such as residential treatments, are the most difficult to obtain.⁹³ Treatment options are even more limited for pregnant women. Public drug treatment programs are an option for female addicts, but it is not uncommon for the programs to deny or expel the women once they are found to be pregnant.⁹⁴ Sadly, in the case of pregnant women drug addicts, the laws of our country aim to uncover substance abuse not for the purpose of prevention through treatment, but for the purpose of penalizing the pregnant woman for her conduct.

The legal issues raised in *Ferguson* cannot be said to be fully resolved since advances in medical technology are to be expected, and their impact on maternal and fetal rights cannot be predicted at this time. However, we must be careful not to use these medical advances as a weapon against pregnant women, who bring our society's children into the world.

90. Developments, *supra* note 49, at 1561.

91. *Id.* at 1564.

92. Sexton, *supra* note 25, at 424.

93. *Id.* at 424.

94. *Id.*; see also Nora S. Gustavsson, *Drug Exposed Infants and Their Mothers: Facts, Myths, and Needs*, 16 *SOCIAL WORK IN HEALTH CARE* 87, 97 (1992).