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RECENT DEVELOPMENTS IN REPRODUCTIVE HEALTH LAW AND THE CONSTITUTIONAL RIGHTS OF WOMEN: THE ROLE OF THE JUDICIARY IN REGULATING MATERNAL HEALTH AND SAFETY

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."¹

I. INTRODUCTION

In order to ensure women full rights as "persons"² entitled to personal liberty under the Constitution, the Supreme Court must mandate that laws regulating women's reproductive health and safety clearly and unequivocally value women as autonomous persons rather than as functions of a socially defined maternal role.³ The history of repro-

1. *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992).

2. "Person" is defined in the Oxford English Dictionary as an "individual human being." THE OXFORD DICTIONARY OF CURRENT ENGLISH 665 (Della Thompson, ed., rev. 2d ed. 1996) [hereinafter OXFORD]. The word "person" is not defined in the Constitution. *Roe v. Wade*, 410 U.S. 113, 157 (1973) ("The Constitution does not define 'person' in so many words."). However, the word "person" appears in several amendments, including the Fifth, Twelfth, Fourteenth, and Twenty-Second Amendments. *Id.*

Therefore, in order for "person" as used in the Constitution to ensure rights to all "individual human beings," OXFORD, *supra*, rights must not be denied based on an individual's particular gender, race, class, or reproductive status. Thus, for women to be recognized as "persons," entitled to the constitutionally protected rights endowed to "persons" referred to in the various amendments, laws must not limit women's rights based on their reproductive statuses.

3. As used in this comment, the term "maternal" refers to the historically predetermined role of American women to fill a social function as mothers and wives. "Maternal" is defined as "of or like a mother; motherly." OXFORD, *supra* note 2, at 547. The word "maternal" thus connotes the traditional characteristics of motherhood, those that women are expected to possess: selflessness, docility, and domesticity. See generally Judith Walzer Leavitt, *Gendered Expectations: Women and Early Twentieth-Century Public Health*, in U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 147 (Linda K. Kerber et al. eds., 1995). "Feminine" characteristics are proscribed as the norm, and deviation is viewed as a danger, with differing treatment across socio-economic lines. *Id.* The maternal role encompasses the expectations of motherhood and femininity and also the expectation that a woman will have a particular role in, and a particular relationship to, her sexuality; of course, pregnancy is directly tied to sex, and thus the concept of a woman's control of her own pregnancy is intimately related to control over her own sexuality. "Sexual" is defined as "of sex, the sexes, or relations between them." OXFORD, *supra* note 2, at 835. The American legal tradition of separating a woman from control over both her pregnancy and her sexuality are thus

ductive health law reflects the absence of such a standard and the consequent treatment of women in the American legal⁴ and social⁵ systems as less than fully persons.⁶ Because “personhood” is not reconcilable with a predetermined maternal role,⁷ laws must consistently be shaped to recognize women as autonomous persons, regardless of their reproductive statuses, in order to allow women full rights under the Constitution.⁸

In Part II, this comment discusses recent developments in three areas of reproductive health law. Section A addresses the constitutional mandate of the maternal health exception in all abortion regulation and the resulting unconstitutionality of the 2004 Federal Partial Birth Abortion Ban⁹ due to its omission. Section B discusses the prosecution of women who use illegal drugs during pregnancy and a recent Supreme Court decision on a hospital policy targeting prenatal substance abuse.¹⁰ Section C discusses the development of fetal homicide laws and the ramifications of the 2004 Federal Fetal Homicide Statute entitled “Protection of Unborn Children”¹¹ due to its emphasis on the protection of a fetus at any stage of development rather than on protecting pregnant women from violence.

Finally, in Part III, the recent developments in reproductive health law are analyzed in terms of their significance to the constitutional rights of women across race and class lines. This analysis traces both the changing and enduring themes in the legal treatment of women in relation to these socially defined categories.

inextricably interrelated. The implication of defining a woman as secondary to her maternal function is a fundamental inequality between the sexes, and thus creates a necessary equation of human with male, with women occupying a lesser role. *See infra* Part III.

4. *See generally* SUSAN DELLER ROSS ET AL., *THE RIGHTS OF WOMEN: THE BASIC ACLU GUIDE TO WOMEN’S RIGHTS* (ACLU Handbook Series, 3d ed., rev. 1993) (outlining gender discrimination in the American legal system).

5. *See generally* ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES* (1974) (describing the developing role of women in American society).

6. *Id.* at 235 (“*The Laws were man’s laws, the government a man’s government, the country a man’s country.*”); *see also* ROSS ET AL., *supra* note 4, at xv (explaining that “legally sanctioned discrimination [against women] still persists” in the American legal system).

7. Inherent in the idea of a predetermined maternal role is the lack of personhood; when women are relegated to a maternal function, they are denied the agency of personhood.

8. This argument encompasses the treatment of women across sexual orientation, age, and other differing particular reproductive circumstances. *See infra* Part III.

9. 18 U.S.C.A. § 1531 (West 2004).

10. *Ferguson v. Charleston*, 532 U.S. 67 (2001).

11. 18 U.S.C.A. § 1841 (West 2004) (referred to in text as Federal Fetal Homicide Statute).

This comment argues that in order to protect the rights of all women, American laws must prioritize each woman’s autonomous interests above a historically determined maternal role. Until laws are restructured to value a woman as an autonomous individual above her maternal role, women will not be afforded full “personhood” under the Constitution.

II. RECENT DEVELOPMENTS IN REPRODUCTIVE HEALTH LAW

This Part discusses recent developments in reproductive health law within the context of the American legal system. First, Section A discusses the development of the maternal health exception in abortion regulation. This discussion includes the recently passed Federal Partial Birth Abortion Ban and its lack of the constitutionally mandated exception. Next, section B describes the development of criminal prosecutions of women for drug use during pregnancy and the current state of the law for drug-addicted pregnant women. Lastly, section C traces the development of fetal homicide laws including the Federal Fetal Homicide Statute, “Protection of Unborn Children.”

A. *The Maternal Health Exception*

The maternal health exception was established in *Roe v. Wade*¹² to protect women from state abortion legislation when an individual woman’s health is threatened by a pregnancy.¹³ This section first looks to the historical significance of the maternal health exception to all abortion legislation followed by a discussion of the 2004 Federal Partial Birth Abortion Ban and its lack of the mandated exception.

1. *Development of the Maternal Health Exception*

Abortion was legal at common law—indisputably before “quickening,”¹⁴ and likely after quickening as well.¹⁵ Although the nineteenth century saw a sweeping criminalization of abortion across the

12. 410 U.S. 113 (1973).

13. *Id.* at 162-65 (recognizing a woman’s valid interest in her own health throughout a pregnancy).

14. *See, e.g., id.* at 132 (defining “quickening” as “the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy”).

15. *Id.* at 132-36. “It is undisputed that at common law, abortion performed *before* “quickening” . . . was not an indictable offense.” *Id.* at 132. “[I]t now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.” *Id.* at 136.

states,¹⁶ in 1973 the United States Supreme Court found the abortion right rooted in the Fourteenth Amendment's liberty interest.¹⁷ Following its precedent in recognizing the Constitution's protection of a personal liberty interest in the right to privacy, the Court held in *Roe* that the liberty interest extends to pregnant women deciding whether or not to continue a pregnancy.¹⁸

The recognition of a woman's constitutional right to terminate a pregnancy was a landmark decision in its application of the right to privacy and personal liberty to women during pregnancy.¹⁹ At the same time, the Court recognized that "[t]he privacy right involved . . . cannot be said to be absolute," but rather "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."²⁰ In its analysis of the extent to which a State may regulate the abortion right, the Court established the requirement of a maternal health exception to all abortion regulation, regardless of the stage of pregnancy.²¹

The maternal health exception was developed in *Roe* and reaffirmed in *Planned Parenthood* to protect a woman's liberty interests even as it recognized a State's interest in potential life.²² The framework set forth by the Supreme Court regulating abortion legislation focuses in large part on the development of a fetus as a pregnancy progresses.²³ In the early stages of a pregnancy, a State's interests in maternal health and the potential life of the pregnancy are low, while a woman's privacy interest in determining whether to terminate the pregnancy is high.²⁴ As a fetus develops, the State's interest in both

16. See, e.g., JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 253-88 (1994) (explaining the political motivations in developing abortion laws at the turn of the century in a chapter entitled *Criminalizing Reproductive Control: The End-of-Century Campaigns to Disempower Women*).

17. *Roe*, 410 U.S. at 153.

18. *Id.* at 152-53. "[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas of privacy, does exist under the Constitution." *Id.* at 152. Further, "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

19. *Id.* (finding the liberty interest encompasses a woman's decision whether to continue a pregnancy).

20. *Id.* at 154.

21. *Id.* at 164-65 ("For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."); *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992) (quoting *Roe* and reaffirming the necessity of a maternal health exception subsequent to viability).

22. *Planned Parenthood*, 505 U.S. at 870-73; *Roe*, 410 U.S. at 162-65.

23. *Roe*, 410 U.S. at 162-65.

24. *Id.*

maternal health and in the potential life of the fetus increases, and at some point may outweigh the individual woman's privacy interest.²⁵ However, a woman's interest in her own health and safety is never entirely overcome, even as the pregnancy approaches full term.²⁶ Thus, even if an abortion regulation seeks solely to proscribe a late term abortion, it is still required to include a maternal health exception.²⁷

2. *The Federal Partial Birth Abortion Ban*

Since *Roe* and its progeny established a woman's right to choose and set forth the balancing act between a woman's interests and a State's interests in a pregnancy,²⁸ the states have developed a variety of laws proscribing late term abortion procedures.²⁹ In 2000, the Supreme Court struck down the Nebraska Partial Birth Abortion Ban as unconstitutional, in part because it lacked a maternal health exception.³⁰ The Nebraska Ban proscribed one procedure for terminating a late term pregnancy, commonly referred to as a D&X,³¹ and was also broad enough to cover a more common procedure for terminating both pre- and post-viability pregnancies, known as the D&E.³²

Subsequently, a ban nearly identical to the Nebraska statute, the Federal Partial Birth Abortion Ban, was passed by Congress and signed into law in 2004.³³ Like the Nebraska ban, the Federal Ban proscribes the D&X procedure, and lacks an exception for the health of the mother.³⁴ In accord with the Supreme Court's ruling on the re-

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. See, e.g., Melissa de Rosa, *Partial-Birth Abortion: Crime or Protected Right?*, 16 ST. JOHN'S J. LEGAL COMMENT. 199, 220-22 (2002).

30. *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) "First, the law lacks an exception 'for the preservation of the . . . health of the mother.'" *Id.* (citing *Casey*, 505 U.S. at 879).

31. *Id.* at 923-30. The D&X procedure consists of:

1. deliberate dilatation of the cervix, usually over a sequence of days;
2. instrumental conversion of the fetus to a footlong breech;
3. breech extraction of the body excepting the head; and

4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus. *Id.* at 928 (citation omitted).

32. *Id.* at 923-30. "D&E 'refers generically to transcervical procedures performed at 13 weeks gestation or later.'" *Id.* at 924 (citation omitted). Also, the Nebraska ban "applies both pre- and postviability." *Id.* at 930. "Viability" refers to the point at which a fetus is capable of surviving outside the womb. BLACK'S LAW DICTIONARY 749 (2d pocket ed. 2001).

33. 18 U.S.C. A. § 1531 (West 2004).

34. *Id.* (providing an exception to save the life, but not to preserve the health, of the mother).

quirement of an exception to preserve *both* the life and the health of the mother in any abortion legislation, United States District Courts have imposed injunctions on the Federal Ban and indicated that it is not likely to be upheld by the Supreme Court.³⁵

Another issue the courts have heard in recent years concerning the status of a fetus in relation to the rights of a pregnant woman is the criminal prosecution of women who use drugs during pregnancy. These prosecutions raise concern both for the potential life of a pregnancy and the rights of a woman simultaneously experiencing pregnancy and addiction.

B. Targeting Women Who Use Drugs During Pregnancy

This section first discusses the development of prosecutions against women for prenatal substance abuse. It then describes the current law regarding women who use drugs during pregnancy.

1. Development of the Prosecution of Women for Drug Use During Pregnancy

The push to criminalize prenatal substance abuse as a particular offense was spurred by “the problem of ‘crack babies’ . . . widely perceived in the late 1980s as a national epidemic, prompting considerable concern both in the medical community and among the general populace.”³⁶ In conjunction, the medical field released studies showing the risk to fetuses from *in utero* exposure to illegal drugs.³⁷ As advocates sought to mitigate the damage to infants due to drug use by their mothers, one option was criminal prosecution, including “both prebirth seizures and postbirth sanctions.”³⁸

35. See, e.g., *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 809 (2004) (finding the ban “unconstitutional because it does not allow, and instead prohibits, the [D&X] procedure when necessary to preserve the health of a woman”); see also *Nat’l Abortion Fed’n v. Ashcroft*, 287 F. Supp. 2d 525, 525-26 (S.D.N.Y. 2003) (finding plaintiffs showed “a likelihood of success on the merits” that the Ban “is unconstitutional because, among other things, it does not contain an exception to protect women’s health”); *Planned Parenthood Fed’n v. Ashcroft*, No. C03-4872PJH, 2003 U.S. Dist. LEXIS 20105, at *4 (N.D. Cal. Nov. 7, 2004) (imposing a temporary restraining order on the Federal Ban because plaintiffs “demonstrated a likelihood of success in showing that the [Ban’s] failure to provide for an exception to preserve women’s health renders the law unconstitutional”).

36. *Ferguson v. Charleston*, 532 U.S. 67, 70 n.1 (2001).

37. Sarah Letitia Kowalski, *Looking for a Solution: Determining Fetal Status for Prenatal Drug Abuse Prosecutions*, 38 SANTA CLARA L. REV. 1255, 1255 (1998) (“A study by the National Association for Prenatal Research and Education revealed that approximately 375,000 babies per year suffer potential health damage from in utero exposure to drugs.”).

38. *Id.* at 1257.

Consequently, numerous women have been subject to prosecution for drug use during pregnancy.³⁹ In the absence of specific legislation, criminal prosecutions of women for prenatal drug use are based on one of three theories:

(1) abuse of or endangerment to the child resulting from the mother's substance abuse while pregnant; (2) possession of controlled substances as a result of the presence of such substances in the body or bodily fluids of the infant; or (3) postpartum delivery or distribution of controlled substances to the child through the mother's umbilical cord for the period after birth and before the cord is clamped.⁴⁰

In response to challenges to the applicability of criminal statutes to prenatal substance abuse,⁴¹ some jurisdictions have sought legislation specifically targeting women who use drugs during pregnancy.⁴² However, such attempts have been largely unsuccessful.⁴³ The lower courts have addressed the criminal prosecution of women who use drugs during pregnancy in various ways; while some courts have allowed forced hospitalization and imprisonment for drug-addicted pregnant women, others have categorically disallowed child abuse laws to apply to prenatal substance abuse.⁴⁴

2. Current Law for Women Who Use Drugs During Pregnancy

In 2001, the United States Supreme Court analyzed the weight accorded to the interest of a State versus the interest of a woman in searching a woman's body for evidence of prenatal substance abuse in *Ferguson v. Charleston*.⁴⁵ In *Ferguson*, the court addressed a hospital policy of collecting evidence of drug use from pregnant women's bod-

39. *Id.* at 1255 ("Since 1985, at least 200 women in thirty states have been criminally prosecuted for the use of illicit drugs or alcohol during pregnancy through a variety of tactics.").

40. James J. Hodge, Jr., Annotation, *Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child*, 70 A.L.R. 5th 461, at *1a (2004).

41. Louise Marlane Chan, *S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 *FORDHAM URB. L.J.* 199, 209-10 (1993) (describing how prosecution under child abuse laws "contravenes legislative intent and arguably denies defendants the due process requirements of notice and fair warning").

42. See Lynn M. Paltrow et al., *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, Year 2000 Overview (describing attempts by states to criminalize drug use by pregnant women), at http://advocatesforpregnantwomen.org/articles/gov_response_review.pdf (last visited Mar. 26, 2005).

43. *Id.*

44. See, e.g., *State v. Ikerd*, 369 N.J. Super. 610, 614 (N.J. Super. Ct. App. Div. 2004); *Whitner v. State*, 328 S.C. 1, 4 (S.C. 1997); *State v. Gray*, 584 N.E.2d 710, 711 (Ohio 1992).

45. 532 U.S. 67 (2001).

ies for criminal prosecution purposes.⁴⁶ Because the policy in question was conducted at a public hospital, “the members of its staff [were] governmental actors, subject to the strictures of the Fourth Amendment.”⁴⁷ Thus, the case involved a question of whether “the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.”⁴⁸

Reversing the lower court’s finding that the circumstances of the case allowed the government “to conduct searches without warrants or probable cause”⁴⁹ under the “special needs doctrine,”⁵⁰ the Court held that “[t]he Fourth Amendment’s general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applie[d] to [the hospital] policy.”⁵¹ The policy of searching the urine of pregnant women for criminal evidence violated “[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital . . . that the results of those tests will not be shared with nonmedical personnel without her consent.”⁵² Although the legal limitations of allowing criminal prosecution of women for drug use during pregnancy are less than clear, the Court in *Ferguson* established some guidelines as to what is constitutional in the course of prosecuting women who use drugs during pregnancy: the testing of pregnant women’s urine for drugs is held to the general standard for searches under the Fourth Amendment.⁵³ However, on remand, the Court of Appeals limited the ruling to women who were tested before delivery; a woman whose newborn was tested for drugs was held to suffer “no violation of her Fourth Amendment rights.”⁵⁴

States seeking to protect the potential life of a pregnancy are concerned with a woman’s treatment of her own body as well as the actions of others towards the pregnant woman. Thus, to deter violence towards women, some states have passed criminal statutes defining

46. *Id.* at 69-70.

47. *Id.* at 76.

48. *Id.* at 70.

49. *Id.* at 69-70.

50. *Id.* at 76.

51. *Id.* at 86.

52. *Id.* at 78.

53. *Id.* at 67.

54. *Ferguson v. Charleston*, 308 F.3d 380, 395 (5th Cir. 2002).

violent attacks on pregnant women as feticide.⁵⁵ This issue has risen to the national level with the 2004 Federal Fetal Homicide Statute.⁵⁶

C. *The Federal Fetal Homicide Statute*

This section first discusses the history of prosecuting attacks on pregnant women as fetal homicide. It then discusses the passing of the Federal Fetal Homicide Statute in 2004.

1. *Historical Development of Fetal Homicide Laws*

Under the common law, homicide was not possible until after an infant was born alive.⁵⁷ The “born-alive” rule was premised on the belief that human consciousness began upon a live birth.⁵⁸ The common law thus recognized the violent causing of a miscarriage as a lesser offense and provided for various punishments depending on whether a fetus had quickened.⁵⁹

Advancements in the medical understanding of fetuses have allowed for determinations of whether attacks on pregnant women are the actual cause of fetal demise.⁶⁰ The argument ensued that if an attack on a pregnant woman could be proven as the cause of the termination of her pregnancy, the attacker should be held liable for murder.⁶¹ States have been successful with this argument in obtaining homicide convictions for defendants who have killed or attacked a pregnant woman, where it was proven the pregnancy was terminated due to the harm to its mother.⁶²

55. *States that Prohibit Crimes Against the Unborn Child*, AUL Model Legislation and Policy Guides (explaining that “[t]wenty-seven States treat the killing of an unborn child as a form of homicide,” and outlining various state statutes), at www.unitedforlife.org/guides/fh/fh_statutes.htm (last visited Mar 13, 2005).

56. 18 U.S.C.A. § 1841 (West 2004).

57. Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R. 5th 671, 671 (2004).

58. *Id.*

59. *Id.*

60. *Id.*

61. See *People v. Taylor*, 86 P.3d 881, 881 (Cal. 2004); *Utah v. MacGuire*, 84 P.3d 1171, 1172 (Utah 2004); *Commonwealth v. Morris*, 142 S.W.3d 654, 660 (Ky 2004); *People v. Dennis*, 950 P.2d 1035, 1055 (Cal. 1998); *People v. Davis*, 872 P.2d 591, 591 (Cal 1994).

62. See *supra* note 59.

2. *The Federal Fetal Homicide Statute*

Following the trend of states in recognizing the attack/killing of pregnant women resulting in the termination of pregnancy as homicide, Congress passed a federal statute in 2004 providing that the act of terminating a woman's pregnancy (expressly distinguishing a consensual abortion) is a separate offense, punishable as if the offense had been committed upon the mother.⁶³ The statute provides that the act of forcefully terminating a woman's pregnancy, regardless of the stage of pregnancy, falls within the scope of the statute.⁶⁴ Thus, significantly, the statute does not distinguish the crime according to the development of a fetus, but rather treats identically an attack whether it occurs instantly after conception or at full term.⁶⁵

The developments in reproductive health law in recent years share a common theme in their perpetuation of the treatment of women according to a maternal role. These developments have roots in the American social and legal systems and have implications for women across race and class lines.

III. ANALYSIS AND PROPOSED SOLUTIONS

The American legal system has a long history of granting women lesser rights than those accorded to men.⁶⁶ When the rights denied to women are those fundamental rights ensured by the Fourth and Fourteenth Amendments, women are not being recognized as "persons" under the Constitution. Laws eroding a woman's rights on the basis of her reproductive capacity perpetuate the definition of women as primarily maternal beings and secondarily autonomous individuals. Only through a consistent recognition of women as autonomous individuals entitled to control over their own bodies will women be fully recognized as "persons."

A. *Analysis of Current Laws*

The legal treatment of women according to a predetermined maternal role has led to a conflict between a woman's interest in her own body and the government's interest in her reproductive status.⁶⁷ The

63. 18 U.S.C.A. § 1841 (West 2004).

64. *Id.*

65. *Id.*

66. ROSS ET AL., *supra* note 4, at xiii.

67. *See, e.g.,* Kowalski, *supra* note 37, at 1256 (explaining "possible conceptual models

recent developments in reproductive health law reinforce the traditional role of women in American society as primarily wives and mothers, and secondarily as autonomous persons with the right to determine the course of their own lives. This section analyzes the developments in all three areas and their effect on women across race and class lines.

1. *The 2004 Federal Partial Birth Abortion Ban*

The maternal health exception established in *Roe* is indisputably necessary to ensure that medical procedures are available if believed by a woman and her doctor to be the best and safest method under the circumstances of a particular case.⁶⁸ Yet, the 2003 Partial Birth Abortion Ban omits a maternal health exception, allowing the procedure only if a woman's life is threatened.⁶⁹ Ultimately, because all abortion regulation must contain a health exception to pass constitutional muster,⁷⁰ the failure to include a health exception in the Federal Partial Birth Abortion Ban renders it necessarily unconstitutional. The significance of the passing of the Federal Ban despite its clear constitutional flaw is its indication of the willingness of Congress to disregard the interests of a woman in her own health and safety in favor of its interest in the continuation of a pregnancy. This readiness to disregard the interests of an individual woman is interwoven in the history of abortion regulation.⁷¹

Feminist analyses of the development of abortion laws have identified the use of abortion regulation to control women within and across race and class lines, with a blatant disregard for the interests of individual women.⁷² Early campaigns to criminalize abortion at-

which characterize the rights of a pregnant woman in relation to her fetus," including the model "whereby a woman is distinct from her fetus and, thus, has interests at odds with her fetus").

68. *Roe*, 410 U.S. 113, 163-64.

69. 18 U.S.C.A. § 1531 (West 2004).

70. See *Roe*, 410 U.S. at 162-64; *Planned Parenthood v. Casey*, 505 U.S. 833, 880 (1992); *Stenberg v. Carhart*, 530 U.S. at 938; *Carhart v. Ashcroft*, 331 F. Supp. 2d. 805, 808 (D. Neb. 2004). The constitutionality of the ban ultimately turns on whether the procedure is ever medically necessary to preserve the health of the woman, and whether Congress has a right to categorically ban the procedure if it is. *Id.* Accordingly, amidst arguments over the humanity of the procedure, the congressional and judicial debates over the constitutionality of the ban focus on the lack of the health exception, with support and opposition for the ban arguing over the safety and necessity of the procedure. *Id.*

71. See generally Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE REGULATION OF MOTHERHOOD* 43 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

72. *Id.*

tempted to define a woman's existence through her reproductive capacity.⁷³ The abortion option allowed a woman to choose when and whether to have children, a concept at odds with the developing American ideology of the nuclear family with women confined to the private sphere.⁷⁴ The medical community's anti-abortion campaign of the nineteenth century urged "that a woman who shirked her duty to bear children committed 'physiological sin' In this compound concept of physiological sin, the profession translated religious, legal, and customary norms of marital duty into therapeutic terms. As doctors repeatedly argued, abortion and contraception both threatened women's health."⁷⁵

Significantly, the anti-abortion campaign was couched in nationalistic and racist terms; the fear of white, middle class women's access to abortion inspired entreaties to women's race and class affiliations. As one leader of the anti-abortion campaign argued:

[T]he great territories of the far West, just opening to civilization, and the fertile savannas of the South, now disenthralled and first made habitable by freemen, offer homes for countless millions yet unborn. Shall they be filled by our own children or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation.⁷⁶

These racial overtones in the campaign to criminalize abortion remained a theme in American birth control politics; in fact, "[t]he first publicly funded birth control clinics were established in the South in the 1930s as a way of lowering the Black birthrate, and during the Depression, birth control was promoted as a means of lowering welfare costs."⁷⁷ Government encouragement or discouragement of women to bear children across race and class lines reflects its concerns over racial integration and changes in socio-economic roles.⁷⁸ Thus, the criminalization of abortion in the nineteenth century was both a reaction to the threat of increased women's rights during the suffrage movement⁷⁹ and to the threat of racial integration.⁸⁰

73. *Id.* at 48.

74. *Id.* at 51.

75. *Id.* at 48 (citations omitted).

76. *Id.* at 49 (citations omitted).

77. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood, in MOTHERS IN LAW: FEMINIST THEORY AND THE REGULATION OF MOTHERHOOD* 224, 242 (Martha Albertson Fineman & Isabel Karpin eds., 1995) (citations omitted).

78. Siegel, *supra* note 71, at 49.

79. *Id.* at 51-52 ("Restrictions on abortion and contraception were enacted at a time when state legislatures were liberalizing the marital status doctrines of the common law," allowing "a new way of regulating wives' conduct, one that deviated in method and preoccupa-

While government objectives evolve with shifts in the socio-economic climate, the classist and racist components of the anti-abortion campaign remain present in the current efforts by Congress to restrict abortion rights.⁸¹ Today, limits on reproductive freedom disproportionately affect poor women and women of color: "Because of racism, it is more likely that the government will interfere with their reproductive decisions; because of their poverty, they are more likely to need the government's assistance to facilitate those decisions."⁸² While the threat to the maternal health exception in abortion regulation implicates the constitutional rights of all women, as the mandate is a safeguard of the basic right of women experiencing pregnancy to determine the course of their own lives,⁸³ the erosion of the right will disproportionately affect poor women and women of color.

An abortion regulation which focuses solely on the interest in a potential life, compelling women to fulfill a maternal function, contravenes the core of the Supreme Court decisions which recognize a woman's fundamental right to privacy and liberty. If it is necessary to ban an abortion procedure that is unsafe due to its risk to women's health, a statute must be framed explicitly towards that end. Otherwise, a State is clearly prioritizing its interest in the woman's maternal role (through the potential life she carries) above the woman's interest in her own health.⁸⁴ Thus, the Federal Partial Birth Abortion Ban, in prioritizing an interest in potential life above the health and safety of a woman, violates the basic constitutional rights of a woman during pregnancy.⁸⁵

tion from traditional doctrines of marriage and family law.").

80. *Id.* at 59 "In the nineteenth century, the 'native' American middle class responded to the populationist 'threat' posed by immigrant and African-American families by regulating the reproductive conduct of its own women." *Id.* An analysis of current abortion regulations, therefore, should "attempt to ascertain the gender, race and class salience of such regulation, whether birth-compelling or birth-detering in form." *Id.*

81. *Id.* at 51-52.

82. Roberts, *supra* note 77, at 243.

83. Planned Parenthood v. Casey, 505 U.S. 833, 879 (1992) (reaffirming that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother") (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

84. See *Roe*, 410 U.S. at 163; *Planned Parenthood*, 505 U.S. at 843.

85. Further, although the legislative intent behind the ban is clearly not on maternal health, but rather on protecting children in the process of birth, the ban does not alter whether or not any children will be born; instead, it proscribes one of several procedures which may be used to terminate a pregnancy, as opposed to whether or not the pregnancy may be terminated. *Stenbert v. Carhart*, 530 U.S. 914, 930 (2000).

To ensure women's constitutional rights are upheld regardless of their reproductive statuses, the courts must maintain a standard of requiring legislation to uphold a woman's interest in her health above the state's interest in a woman's maternal function. This standard must apply within and outside of the abortion context. For example, as the courts address issues such as the criminal prosecution of women for drug use during pregnancy, a woman's individual rights must not be compromised.

2. Prosecution of Pregnant Women for Drug Use

As stated above, a State may not use its interest in the potential life of a pregnancy as justification for suspending a woman's constitutional rights.⁸⁶ A woman's individual interests do not disappear on the basis of her pregnancy. Prosecutions of women for drug use during pregnancy threaten to impede women's constitutional rights by illegally expanding state statutes⁸⁷ and justifying illegal intrusions into the body in the name of fetal health.⁸⁸

Prosecutions of drug-addicted pregnant women have sparked debate over the legality of state action seeking to protect unborn children from abuse.⁸⁹ While the Court in *Ferguson* held that hospitals may not use the supposed necessity of preventing drug use by pregnant women⁹⁰ to impose unreasonable searches and seizures upon a pregnant woman's body,⁹¹ on remand, the Fourth Circuit specifically allowed the search of an infant immediately upon birth for use in the criminal prosecution of its mother.⁹² Although the court recognized that, as a matter of law, none of the women tested pursuant to the policy "gave their informed consent to the taking and testing of their urine for evidence of criminal activity for law enforcement pur-

86. See *Roe*, 410 U.S. 164-65; *Planned Parenthood*, 505 U.S. at 846-47.

87. See Chan, *supra* note 41, at 209-10.

88. See *Ferguson v. Charleston*, 532 U.S. 67, 67 (2001).

89. See generally Lisa Eckenwiler, *Why Not Retribution? The Particularized Imagination and Justice for Pregnant Addicts*, 32 J.L. MED. & ETHICS 89 (2004) (arguing against criminal prosecutions of drug-addicted pregnant women).

90. Paltrow et al., *supra* note 42, at 1 ("Today, dozens of carefully constructed studies establish that the impact of cocaine on the developing fetus has been greatly exaggerated and that other factors are responsible for many of the ills previously attributed to pregnant women's use of cocaine.").

91. *Ferguson*, 532 U.S. at 84 (deciding the hospital policy of searching pregnant women's urine for drug use in the name of fetal health did not fall within the "closely guarded category of 'special needs'").

92. *Ferguson v. Charleston*, 308 F.3d 380, 395 (4th Cir. 2002).

poses,”⁹³ it then limited a woman’s right to privacy by excluding from the definition of the woman’s privacy interest the woman’s just-delivered baby’s body, even though they share bodily fluids.⁹⁴

By allowing the prosecution of women based on the testing of their babies immediately upon birth, the court allows an easy way around the prohibition of unreasonable searches and seizures of women during pregnancy. Rather than a routine application of the standing requirement that one must have a personal privacy interest in the area searched to raise a claim of a constitutional violation,⁹⁵ it allows the government direct access to a woman’s bodily fluids found in her baby’s body immediately after an umbilical cord is cut.⁹⁶ Hospitals are encouraged to work in conjunction with law enforcement to wait until a woman gives birth to test for drugs in a baby’s system, since that evidence will be allowed in the criminal prosecution of its mother. A pregnant woman’s Fourth Amendment rights are thus easily eradicated as searches of her bloodstream, through her just-delivered baby, are allowed without any showing of probable cause for a search.⁹⁷

Further problematizing prosecutions of drug-addicted pregnant women is that such prosecutions target those women most vulnerable to attack.⁹⁸ This is because “[c]ertain forms of fetal-protective regulation are overwhelmingly directed at pregnant women who are poor, of color, and on public assistance (for example, forced surgical treatment, or drug-related prosecutions and custody deprivations).”⁹⁹ Viewed in light of the nineteenth century anti-abortion campaign, prosecutions of women for drug use may claim to be “undertaken to protect the unborn,” but in fact “driven by antipathy to poor women of color and the children they might bear.”¹⁰⁰ To fully appreciate the racist and classist implications of these prosecutions, it is illuminating to

93. *Id.* at 386.

94. *Id.* at 395 (finding that a woman has no “reasonable expectation of privacy in her newborn child’s bodily fluids”).

95. *Id.* (“[The] term ‘standing’ refers, in Fourth Amendment context, to [the] question of whether [a] party’s own expectation of privacy has been infringed.”) (citing *Rakas v. Illinois*, 439 U.S. 128, 139-40 (1978)).

96. *Id.* (finding that the use of the fluids from the baby’s body may be used against the mother because it falls within “the general rule that an expectation of privacy does not arise from one’s relationship to the person searched”).

97. For an explanation of the constitutional requirement of probable cause for a search, see generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 9.01 (3d ed. 2002).

98. See Eckenwiler, *supra* note 89, at 91.

99. Siegel, *supra* note 72, at 56 (citations omitted).

100. *Id.* at 56-57.

consider whether society would “so readily contemplate criminal prosecution, ‘protective incarceration,’ or custody deprivation as responses to maternal addiction if the policies were to be applied to privileged women rather than to the poor[.]”¹⁰¹

Beyond their fallibility as disproportionately affecting poor women and women of color, prosecutions of women for drug use during pregnancy through implementation of policies by hospitals and prosecutors seeking to protect unborn children from abuse are widely regarded as misguided and ineffective.¹⁰² Contrary to the medical reports released in the 1980s and 1990s, exposure to drugs *in utero* is not the major cause of injury to fetuses; actually, poverty and malnutrition are the most damaging.¹⁰³ Thus, rather than serving the function of protecting children, prosecutions of drug-addicted pregnant women ultimately violate a woman’s right to privacy and discourage women from seeking prenatal care through threatening criminal prosecution and loss of parental rights.¹⁰⁴

To effectively promote prenatal health, it is critical that legislation recognizes that upholding a woman’s constitutional rights and promoting prenatal health are not mutually exclusive.¹⁰⁵ Because neither interest is served through imposing state objectives on a woman’s body without her consent,¹⁰⁶ legislation should be formulated with both interests in mind. The Court has already recognized the threat of violations of fundamental rights of women during pregnancy when the choice of medical procedures is allowed to be determined by courts rather than the woman.¹⁰⁷ Similarly, there should be a consistent recognition that all of a woman’s constitutional rights are protected during pregnancy. Indeed, “[n]o right is held more sacred, [n]or is more carefully guarded . . . than the right of every individual to the posses-

101. *Id.* at 57.

102. *See, e.g.*, *Ferguson v. Charleston*, 532 U.S. 67, 84 n.23 (recognizing “a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health”).

103. Paltrow et al., *supra* note 42, at 1 (“Indeed, a 1999 study found that poverty has a greater impact than cocaine on a child’s developing brain.”).

104. *Id.* (explaining the position of “leading medical and public health groups” that “prosecution of substance-using pregnant women . . . would deter women from obtaining necessary health care and would thus cause harm to both maternal and fetal health”).

105. *Id.*

106. *Id.*

107. ROSS ET AL., *supra* note 4, at 210-11 (describing the case of *In re A.C.*, 573 A.2d 1235 (D.C. App. 1990)).

sion and control of [her] own person, free from all restraint or interference of others,”¹⁰⁸ regardless of her reproductive status.

It is also a fundamental human right of every woman to be free from violence, both during and not during pregnancy. However, drafters of statutes seeking to criminalize attacks on pregnant women must remain cognizant of the right of each and every woman to determine the course of her own pregnancy.

3. *The 2004 Federal Fetal Homicide Statute: “Protection of Unborn Children”*

The intertwined goals of maternal and fetal health are best served through valuing and meeting the needs of all women. A government cannot try to combat violence against a woman’s pregnancy without addressing violence against women. Essential to eradicating gendered violence is treating women as “people” and not as objects fulfilling a maternal role. Since most violence against women is committed by an intimate partner,¹⁰⁹ the most crucial component of eliminating gendered violence is challenging the fundamental inequality of reducing women to a role of fulfilling a function of the needs of others. In fact, women are more likely to be victims of violence by an intimate partner when they are fulfilling a traditionally feminized role: women who are pregnant are twice as likely to be battered by a partner as women who are not pregnant.¹¹⁰

Focusing attention of violence against women during pregnancy as an issue of protecting children rather than focusing on violence against the woman compounds rather than solves the problem. Relegating a woman to a role lesser than the role of her pregnancy reinforces the view that the pregnancy is more important than the woman herself. Thus, the cycle of increased violence against women during pregnancy continues as women are undervalued as individuals.¹¹¹

108. *Id.* (quoting *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

109. National Domestic Violence Hotline, National Statistics (quoting a 1998 DOJ survey finding that “of women who reported being raped and/or physically assaulted since the age of 18, three quarters (76 percent) were victimized by a current or former husband, cohabitating partner, date or boyfriend”), at <http://www.ndvh.org/dvInfo.html> (last visited March 26, 2005).

110. Cybergrrl, Inc., Domestic Violence Statistics, Pregnancy and Domestic Violence (1992), at <http://home.cybergrrl.com/dv/stat/statpreg.html> (last visited March 26, 2005). Further, “40 percent of assaults on women by their male partners begin during the first pregnancy.” *Id.*

111. See MARI J. MATSUDA, *Feminism and the Crime Scare*, in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 37, 40-45 (1996) (describing a feminist opposition to the Violence Against Women Act).

Increased recognition and enforcement of women's human rights results in a decrease in domestic violence and other forms of violence against women, including during pregnancy. With the women's movement came awareness of the right of women to be free from violence from their partners and legal protection for battered women.¹¹² As the women's movement overall increased women's basic human rights,¹¹³ it challenged the traditional view that women are less than male "persons" under the constitution and thus not entitled to the same basic human rights. With rising recognition that women are "persons" entitled to rights comes the counterpart of protection of women from violence as autonomous human beings entitled to that protection, both during and not during pregnancy.

As awareness of domestic violence has increased and women have become recognized as autonomous individuals as well as maternal beings, the states have addressed the issue of violence against women during pregnancy in various ways.¹¹⁴ Significant in state laws criminalizing attacks on pregnant women are the variety of definitions given to a fetus at different stages of pregnancy, ranging from a part of the woman's body to a full human being.¹¹⁵ Trying to determine the constitutional rights of a woman who is pregnant in relation to laws designed to protect the woman and the fetus has engendered a debate over whether such laws impede on abortion rights.¹¹⁶ Clearly, defining the termination of a pregnancy as homicide challenges the concept underlying abortion that a fetus is not an independent human being.¹¹⁷

The Federal Fetal Homicide Statute of 2004 resulted from political motivations both to protect women from violence and to move towards defining the fetus as a human being.¹¹⁸ Its passing marked a victory both for some women's rights groups and for anti-abortion coalitions.¹¹⁹ The push for a recognition of an attack on a woman which terminated a pregnancy as a homicide was a result of a political

112. See generally Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 59 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

113. ROSS ET AL., *supra* note 4, at xiii-xvi.

114. See generally, e.g., Michael Holzapfel, *The Right to Live, the Right to Choose, and the Unborn Victims of Violence Act*, 18 J. CONTEMP. HEALTH L. & POL'Y 431 (2002).

115. *Id.* at 450-58 (providing an overview of differing treatments by states of a developing fetus).

116. See generally, e.g., Alison Tsao, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights?* 25 HASTINGS CONST. L.Q. 457 (1998).

117. *Id.*

118. See, e.g., Lori K. Mans, *Liability for the Death of a Fetus: Fetal Rights or Women's Rights?*, 15 U. FLA. J.L. & PUB. POL'Y 295, 296-98 (2004).

119. *Id.*

climate both angered over attacks on pregnant women and contentious on the topic of abortion rights.¹²⁰ Ultimately, however, there is an inherent conflict between increasing protection of a woman as a human being and defining a woman as secondary to her reproductive capacity. Thus, the Federal Fetal Homicide Statute is widely criticized for its treatment of the fetus as a human being even as it is celebrated for increasing penalties for attacks on a pregnant woman.¹²¹

Additionally, the new Fetal Homicide Statute is flawed in its false reliance on increased penalties as a means of protecting women from crimes.¹²² Rather than increased criminal penalties, “[i]t is the things [feminists] have asked for all along that will stop crime: quality child care and paid parental leave, guaranteed minimum income, universal literacy, affirmative action, and free health care, including mental health care and drug rehabilitation programs.”¹²³ Thus, as feminists, “[w]e have to say, loudly, that the politicians who gave us more punishment and no prevention are the cause of the inevitable next wave of crime that will hit our streets.”¹²⁴ This approach to increased criminal penalties for violence against women is fraught with conflict; certainly, “[t]he lessons of paradox are the lessons of survival under patriarchy.”¹²⁵

Further, a demand for increased criminal prosecutions as protection brings the resultant “disproportionate[] imprison[ment] [of] men of color . . . not because men of color commit more crimes against women; contrary to the popular lie, they do not. They do, however, stand in the places where the system chooses its favorites for punishment.”¹²⁶ Thus, the push for increased protection from violence must be tempered by recognition of the flaws inherent in the criminal justice system; it is difficult “[a]s a feminist . . . [to] celebrate crime leg-

120. *Id.* at 309 (describing arguments that the “fetal rights” legislation is “a misnomer for legislation which actually reinforces a woman’s autonomy . . . by deterring and punishing those who take away [the choice protected by *Roe v. Wade*] by killing a fetus” against the woman’s choice to have a baby, as well as arguments that fetal rights legislation impedes on abortion rights because it “establishes the fetus as a person”).

121. *See, e.g.,* Tara Kole & Laura Kadetsky, *The Unborn Victims of Violence Act*, 39 HARV. J. ON LEGIS. 215, 215 (2002) (“Although the law tends to increase penalties for assaulting a pregnant woman by punishing harm done to her fetus during the attack, opponents of the UVV fear that the Act will not, in fact, protect women,” but will instead “[b]y giving the fetus human status . . . infringe on a woman’s constitutional right to choose an abortion as established in *Roe v. Wade*.”).

122. MATSUDA, *supra* note 111, at 45 (describing a feminist opposition to increased criminal penalties for violence against women).

123. *Id.* at 42.

124. *Id.*

125. *Id.*

126. *Id.* at 40.

islation that advances the protection of women without providing for racial justice.”¹²⁷

In order to effectively increase protection for women from violence during pregnancy, laws should recognize women as fully autonomous persons. To do so, laws must be framed in terms of the woman, and not in terms of “unborn children.” To combat human rights violations against women, laws must first recognize all women as persons under the Constitution.

B. Proposed Solutions

When the State’s interest in potential life is weighed against the rights of a woman to make decisions regarding her own health and reproduction, the woman’s interests must be prioritized above her maternal function in order to ensure that her constitutional rights are not violated. If the interest in the fetus is weighed above the woman, women are not being fully recognized as “persons” under the constitution, but rather are being relegated to a traditionally feminized role without the full rights of “persons.” Thus, any legislation implemented must be scrutinized by the courts to ensure that laws in violation of women’s rights are not enforced. If the courts consistently demand that laws respect the rights of women, it will further the recognition of women as “persons.” Such an increased awareness would then result in a legislature which recognizes those rights in drafting laws and fewer laws placing women in a secondary position to a maternal role.

Laws which protect women and further prenatal health are important developments towards establishing women’s human rights. However, these laws must be framed in terms of women’s rights and not fetal rights. Defining a fetus at any stage of development as a “human being” and declaring its termination as homicide or child abuse is not a truthful or effective means of curtailing violence against women or protecting children. Rather, such statutes create a false definition of a woman’s pregnancy and place her in a role as secondarily important as compared with the importance of her pregnancy.¹²⁸ A statute which defines a woman’s pregnancy for her rather than allowing her to define it herself denies a woman her right to autonomy and disallows a valuing of the woman as an individual, entitled to protection from violence and invasions of privacy regardless of her reproductive status.

127. *Id.* at 39.

128. *See* Kowalski, *supra* note 37.

Preventing violence against women during pregnancy, allowing women reproductive freedom, and encouraging prenatal health are all vital issues and valid legal and political objectives. To reach each one individually without compromising the others requires a consistent treatment of women as entitled to full human rights independent of their reproductive statuses.

IV. CONCLUSION

The definition of women in the American social and legal systems as less than autonomous persons has resulted in a system of laws that treats an individual woman as secondary to a maternal role.¹²⁹ An analysis of federal and state laws around women and pregnancy that recognizes the ongoing treatment of women in the American legal and social systems as primarily wives and mothers and secondarily autonomous individuals demands a reshaping of laws to prioritize a woman above her maternal role. In order to set a standard for laws that will allow for a full recognition of woman as “persons” under the Constitution, entitled to full constitutional rights, the Supreme Court must disallow laws which relegate women to a maternal function.¹³⁰

When a woman is valued within the legal system as an autonomous individual, this necessarily includes valuing her during pregnancy. Thus, there is no conflict between valuing women as individuals rather than as maternal objects and valuing pregnancy and fetal health. In fact, the two are inseparable. Recognition of the unique experience of pregnancy and attention to the particular needs of each woman best serves both the interests of a woman and her pregnancy.¹³¹ To attest to value a pregnancy and to seek to protect the “unborn” from violence while at the same time perpetuating a legal system which seriously undervalues the woman carrying the pregnancy is, at best, oxymoronic. Violence against women in all forms, including during pregnancy, cannot seriously be challenged by increasing criminal penalties against those who attack women in the name of protecting the potential life that a woman may be carrying.¹³²

If the American legal system continues to prioritize a woman’s maternal function above her interests in her own health (be it through denying a woman the right to terminate a pregnancy to protect her

129. *See supra* Part III.

130. *See supra* Part III.

131. *See Kowalski, supra* note 37.

132. *See supra* Part III.

own body, suspending a woman's Fourth Amendment rights in the name of fetal health, or defining violence against pregnant women in terms of the effect on the "unborn" rather than the effect on the woman), women will continue to be valued less as individuals and more for a maternal function.¹³³ Only through challenging the approach to laws which value a woman less as an individual on the basis of her reproductive capacity, and demanding that all laws value and enforce every woman's full constitutional rights, will violence against women be eradicated and true maternal health and safety be realized.

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133. *See supra* Part III.

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