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Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability Among Fetal Pain and Fetal Homicide Laws

Bernice Bird*

INTRODUCTION

State fetal personhood laws¹ continuously diminish women's privacy rights to terminate or continue pregnancies. Currently, state governments pass both fetal pain and fetal homicide laws that legislate over any stage of pregnancy.² Each type of personhood law, however, unlawfully impacts pregnant women's privacy rights differently. Most fetal pain laws prohibit

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1. NAT'L CONFERENCE OF STATE LEGISLATION, *Fetal Homicide Laws*, <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx> (last visited Sept. 3, 2013) (hereinafter *Fetal Homicide Laws*). This paper is limited to the examination of recent prosecutions of pregnant women for feticide under state fetal personhood laws enacted as fetal homicide and fetal pain laws. For more analysis on federal fetal personhood laws and proposed bills, see Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841(d) (2004); Unborn Child Pain Awareness Act of 2011, S.314, 112th Cong. (2011), *available at* <http://www.govtrack.us/congress/bills/112/s314/text> (last visited Sept. 3, 2013) (failed the House vote as H.R. 6099 in the 109th Congress; introduced in the Senate in the 110th Congress as S. 356); Sanctity of Human Life Act, H.R. 23, 113th Cong. (2013), *available at* <http://www.govtrack.us/congress/bills/113/hr23/text> (last visited Sept. 3, 2013). For more on the prosecution of pregnant women for injury to fetuses under chemical endangerment statutes see James Denison, Note, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1103 (1991). Moreover, this paper does not analyze the impact of state partial birth abortion legislation in relation to the federal Partial Birth Abortion Ban Act and whether the federal law serves as an additional undue burden in the post-viable stage of pregnancy. For more on this analysis see Anne MacLean Massie, *So-Called "Partial Birth Abortion Bans:" Bad Medicine? Maybe. Bad Law? Definitely!*, 59 U. PITT. L. REV. 301 (1998); Alissa Schecter, Note, *Choosing Balance: Congressional Powers and the Partial Birth Abortion Ban Act of 2003*, 73 FORDHAM L. REV. 1987 (2005).

2. See *Fetal Homicide Laws*, *supra* note 1; GUTTMACHER INSTITUTE, *An Overview of Abortion Laws*, http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (hereinafter GUTTMACHER).

abortions that purportedly cause fetal pain at twenty weeks.³ As pre-viable pregnancy regulations, fetal pain laws unconstitutionally infringe on women's right to reproduce without state interference, as reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴

As post-viable pregnancy regulations, fetal homicide laws are undue burdens⁵ to women's right to reproduce because the laws lack maternal life and health exceptions precluding maternal prosecution. Fetal homicide laws, though initially created to protect both mothers and fetuses,⁶ serve to wholly protect fetal life and prosecute any perpetrator responsible for fetal death, including the mother.⁷ Maternal prosecutions associate pregnant behaviors with criminal sanctions and, therefore, "hinder"⁸ the "free choice"⁹ to reproduce. Accordingly, pregnant women suffer encroachment of their liberty interest to continue or terminate pregnancy at all stages of pregnancy.

This paper proposes that state fetal pain and homicide laws should only apply to regulating the post-viable stages of pregnancy, while affording policy considerations for maternal life, physical and mental health. Part I examines the Supreme Court's doctrinal shift in defining fetal personhood. Section A argues that *Roe v. Wade* and *Planned Parenthood v. Casey* limited the expansion of fetal personhood rights in protecting women's rights to terminate and continue pregnancies. Section B asserts that *Gonzalez v. Carhart* expanded the definition of fetal personhood in the context of partial birth abortions and thereafter influenced state policy.

Part II analyzes state fetal personhood laws as overriding maternal personhood in the interest of protecting fetal life. Section A provides an overview of fetal pain laws at the state level. Moreover, Section A argues that fetal pain laws are unconstitutional restrictions on the pre-viable stages of pregnancy because pregnant women retain their privacy interests prior to viability. Section B discusses fetal homicide laws as undue burdens in the post-viable stages of pregnancy because they lack maternal life and health exceptions to maternal prosecution. Part III examines policy change in both fetal pain and fetal homicide laws in proposing that fetal personhood laws limit their regulations to post-viable stages of pregnancy while retaining maternal life and health interests. Suggestions for policy changes include state funding and improvement of mental health facilities, drug

3. GUTTMACHER, *supra* note 2.

4. 505 U.S. 833, 846 (1992).

5. *Id.* at 877.

6. Fetal Homicide Laws, *supra* note 1.

7. *See* Bei Bei Shuai v. State, 966 N.E.2d 619, 626 (Ind. Ct. App. 2012); Jack Elliott, Jr., *Analysis: Mississippi's Fetal Homicide Law Gets Court Scrutiny*, COMMERCIAL APPEAL (Apr. 1, 2013, 7:07 PM), <http://www.commercialappeal.com/news/2013/apr/14/analysis-mississippi-fetal-homicide-law-gets/>.

8. *Casey*, 505 U.S. at 877.

9. *Id.*

rehabilitation centers, and policies that restrict imprisonment of pregnant women for chemical endangerment of fetuses.

I. U.S. SUPREME COURT ON ABORTION: CHANGING DEFINITIONS OF FETAL PERSONHOOD

The U.S. Supreme Court's line of abortion cases¹⁰ granting women a limited privacy right to abortion¹¹ has conceptualized reproductive freedom from a pro-choice¹² to a pro-life¹³ context. In doing so, the Court's doctrinal shift has restructured the definition of fetal personhood.

A. *ROE V. WADE & PLANNED PARENTHOOD V. CASEY*: LIMITING FETAL PERSONHOOD

In 1973, the U.S. Supreme Court held in *Roe v. Wade*¹⁴ that a Texas statute criminalizing abortions was unconstitutional and overbroad, except when medically necessary to save the life of the mother.¹⁵ The *Roe* Court declared that a woman's right to terminate or continue a pregnancy was a

10. See *Roe v. Wade*, 410 U.S. 113 (1973); *Casey*, 505 U.S. at 877; *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzalez v. Carhart*, 550 U.S. 124 (2007). This paper limits its discussion of Supreme Court rulings on abortion jurisprudence to the aforementioned cases, as they pertain to key discussions on fetal personhood set forth in *Roe v. Wade*. For more Supreme Court rulings on the right to terminate pregnancies, see *Harris v. McRae*, 448 U.S. 297, 326–27 (1980) (upholding Hyde Amendment as a federal restriction for those states participating in Medicaid to validly refuse women medically unnecessary abortions); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 490 (1989); *Hodgson v. Minnesota*, 497 U.S. 417, 423 (1990) (invalidating Minnesota law requiring notification of both parents and waiting period for minor to obtain abortion).

11. See *Roe*, 410 U.S. at 153; *Casey*, 505 U.S. at 877.

12. See *Roe*, 410 U.S. at 153; *Casey*, 505 U.S. at 877.

13. *Gonzalez*, 550 U.S. 124. The pro-choice and pro-life rhetoric of the *Roe* and *Casey* Courts is reflected in both the verbiage used to describe abortion procedures and the doctrine. The pro-life dialogue of the *Gonzalez* Court is reflected in its choice of words in describing partial birth abortions as a way of “killing” fetuses. See *Gonzalez*, 550 U.S. at 139. In a word search excluding headnotes, the *Gonzalez* Court referred to abortions as a method of “killing,” approximately twenty-eight times, while using the term “terminate” six times. *Gonzalez*, 550 U.S. 124. In contrast, the Court's majority opinions in both *Roe* and *Casey* each used the word “kill” to refer to abortions only one time. *Roe*, 410 U.S. at 137; *Casey*, 505 U.S. at 980. Instead, the *Roe* and *Casey* Courts utilized the term “terminate” to refer to a woman's choice to end her pregnancy. *Roe*, 410 U.S. 113 (using the term “terminate” approximately twelve times, excluding headnotes); *Casey*, 505 U.S. 833 (using the term “terminate” approximately thirty-six times, excluding headnotes).

14. 410 U.S. 113. On the same day as *Roe*, the U.S. Supreme Court reviewed a Georgia statute criminalizing abortions in the companion case *Doe v. Bolton*, 410 U.S. 179, 179 (1973). The *Doe* Court clarified the health exception to a woman's right to procure abortions. The Court held that the Georgia statute was unconstitutional in requiring women to seek abortions in hospitals, with confirmation of two independent doctors, after approval from hospital abortion committees. *Doe*, 410 U.S. at 194–201. In defining the health exception to abortions, the *Doe* Court reasoned “that [] medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health.” *Id.* at 192.

15. *Roe*, 410 U.S. at 164.

unique privacy right that existed within the Fourteenth Amendment; however, the right was not “absolute.”¹⁶ Unlike other judicially declared privacy rights,¹⁷ the state may curtail the privacy right in order to safeguard the important interests of promoting the potential life of the unborn child and safeguarding the mother’s health.¹⁸ That is, a woman maintains the privacy right to her bodily integrity and, therefore, a choice to terminate or continue a pregnancy, until the point of fetal viability.¹⁹

The *Roe* Court developed a trimester framework to balance the mother’s privacy rights with the state’s interests to protect the health of the mother and life of the fetus.²⁰ According to *Roe*, the mother’s privacy right to terminate a pregnancy is narrowly construed to exist between only the mother and her consulting physician during the first trimester.²¹ Therefore, the state may not legislate on matters of the womb during the first trimester. During the second trimester, the state may legislate over abortion in a manner that is reasonably related to promoting the interest of maternal health.²² Finally, the state may prohibit or regulate abortion “subsequent to viability,”²³ unless abortion is medically necessary to save the life and health of the mother.²⁴

As a result, fetal viability became the definitive line demarcating the division between proper state interference and individual privacy interests.²⁵ A fetus is viable when it may “potentially live outside the mother’s womb, albeit with artificial aid,”²⁶ which occurs between twenty-four and twenty-eight weeks into the pregnancy.²⁷ Therefore, fetal personhood is not legally possible under *Roe*, as the Court interpreted the Constitution to grant legal rights to persons already born.²⁸ Fetal

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

17. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 510 (1925) (extending the privacy right to education); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (reasoning the fundamental right to marry is within the personal right to privacy); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (reasoning the personal right to privacy affords a right to contraception within married couples). *See also Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (extending the privacy right to unmarried people).

18. *Roe*, 410 U.S. at 154.

19. *Id.* *See also Casey*, 505 U.S. 833, 989 (Scalia, J., concurring) (“[After viability] the State’s interest in unborn human life is stealthily downgraded to a merely ‘substantial’ or ‘profound’ interest (That had to be done, of course, since designating the interest as ‘compelling’ throughout pregnancy would have been, shall we say, a ‘substantial obstacle’ . . . to reaffirm . . . the ‘central holding’ of *Roe*.)”).

20. *Roe*, 410 U.S. at 164–65.

21. *Id.* at 164.

22. *Id.*

23. *Id.*

24. *Id.* at 164–65.

25. *Id.* at 164.

26. *Id.* at 160 (citing LOUIS M. HELLMAN & JACK A. PRITCHARD, *WILLIAMS OBSTETRICS* 493 (14th ed. 1971); *DORLAND’S ILLUSTRATED MEDICAL DICTIONARY* 1689 (24th ed. 1965)).

27. *Roe*, 410 U.S. at 160.

28. *Id.* at 157.

personhood could not logically and legally coexist with the right to terminate pregnancies.²⁹ “If this suggestion of personhood is established, the . . . case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”³⁰ In recognizing fetal personhood, the state could prosecute women who procure abortions on the grounds of feticide.

In 1992, the Court reaffirmed the “essential holding”³¹ of *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, while abolishing the trimester framework.³² The *Casey* Court held that the following provisions of a Pennsylvania statute were not an undue burden to the right to terminate a pregnancy: (1) the medical emergency definition;³³ (2) the requirement of informed consent within a twenty-four hour waiting period;³⁴ (3) the parental consent provision for unemancipated minors,³⁵ and (4) the medical recordkeeping provision.³⁶ However, the Court reasoned that the spousal notification provision was an undue burden to women seeking abortions because domestic violence influenced women’s reproductive choices.³⁷

According to *Casey*, women have the right to “choose to have an abortion before viability and to obtain it without undue interference from the State.”³⁸ An “undue burden” was defined as any “regulation . . . [that] plac[ed] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”³⁹ Moreover, the Court reasoned that “the means chosen by the state to further the interest in potential life must be calculated *to inform the woman’s free choice, not hinder it.*”⁴⁰ Therefore, an undue burden serves to hinder a woman’s free choice to terminate or, as its legal opposite, continue her pregnancy.

29. *Roe*, 410 U.S. at 157–58.

30. *Id.* at 156–57.

31. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

32. *Id.*

33. *Id.* at 880 (reasoning that the definition of medical emergency as posing a “serious risk” to the mother’s health was sufficiently broad enough and did not act as an undue burden).

34. *Id.* at 881 (reasoning that requiring informed consent within twenty four hours for physician to inform women of the nature of the procedure and gestational age of the unborn child is not a substantial undue burden of delay, cost or risk).

35. *Id.* at 899 (reasoning that, except in a medical emergency, the judicial bypass provision allowing minors to seek abortions without parental consent upon a finding of capacity and maturity, if the abortion is in the minor’s best interests, was not an undue burden).

36. *Id.* at 900–01 (reasoning that maintaining medical records on demographic data of abortion procedures was necessary for health interests and medical research).

37. *Id.* at 894.

38. *Id.* at 846.

39. *Id.* at 877.

40. *Id.* (emphasis added).

The Court enumerated that the holding contained three parts:

First[, there] is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second[, there] is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies[,] which endanger the woman's life or health. And third[, there] is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.⁴¹

In upholding the key premises of *Roe*, the *Casey* Court incorporated the *Roe* Court's rejection of fetal personhood, as it would abridge a woman's right to terminate and, likewise, continue her pregnancy. The right to terminate pregnancy is based on the fundamental liberty to use contraception,⁴² which includes the choice to terminate pregnancy, use contraception, or forego either and, instead, continue the pregnancy and raise the "human life that results."⁴³ The *Casey* Court, in its dicta, sought to protect these privacy rights as part of a woman's liberty interest to "control . . . her [own] destiny."⁴⁴ Moreover, the Court emphasized that fetuses cannot "override the rights of the woman"⁴⁵ until the point of viability thereby further addressing the need of privacy protection, at least during the pre-viable stages of pregnancy.

Therefore, the *Casey* Court restricted state regulation on all pregnant women in the pre-viable stages, rather than limiting its opinion to pregnant women choosing to terminate their pregnancies. Without directly addressing fetal personhood, *Casey* established that prior to viability, pregnant women are entitled to continue or terminate their pregnancy without state restriction.

B. *GONZALEZ V. CARHART*: EXPANDING FETAL PERSONHOOD

In 2007, however, the Court confused legal scholars⁴⁶ by "blur[ring] the lines, firmly drawn in *Casey*,"⁴⁷ on the application of the health

41. *Casey*, 505 U.S. at 846.

42. *Id.* at 852–53 (relying on *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 538 (1972)).

43. *Id.*

44. *Id.* at 869.

45. *Id.* at 870.

46. See Margo Kaplan, "A Special Class of Persons": *Pregnant Women's Right to Refuse Medical Treatment after Gonzalez v. Carhart*, 13 U. PA. J. CONST. L. 145, 147–53 (2010); Michael C. Dorf, *Abortion Rights*, 23 *TOURO. L. REV.* 815, 822–24 (2008).

exception to “partial birth abortions.”⁴⁸ The Court upheld the Partial Birth Abortion Ban Act of 2003 (“PBABA”) in *Gonzalez v. Carhart*,⁴⁹ reasoning that its absence of a health exception did not pose an undue burden as a federal restriction of “partial birth abortions”⁵⁰ upon fetal viability.⁵¹ The PBABA prohibited practitioners from “knowingly perform[ing] a partial-birth abortion . . . that is [not] necessary to save the life of a mother.”⁵²

The Court declared that federal restrictions to partial birth abortions could exist without a health exception for women, contrary to *Casey*, because there remained a significant medical uncertainty as to the health benefits of dilation and evacuation procedures in later term pregnancies.⁵³ Primarily, the medical uncertainty surrounding the benefits⁵⁴ of these abortion procedures served to justify the federal restriction as reasonable, rather than undue.⁵⁵ Moreover, the Court reasoned that it could not interpret *Casey*’s health exception as to allow medical professionals to perform any abortion procedures at their discretion.⁵⁶ Rather, the state had an interest to regulate the medical profession insofar as to protect the profession from suffering a negative public perception on the “appropriate role of a physician during the delivery process, [because partial birth

47. *Gonzalez v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting).

48. *Gonzalez*, 550 U.S. at 147. “Partial birth” abortions are commonly referred in the medical community as “intact dilation and evacuation” or “dilation and extraction” procedures. *Id.* at 170 n.1 (Ginsburg, J., dissenting). For an explanation on the “dilation and extraction” and “intact dilation and evacuation procedures,” see *Stenberg v. Carhart*, 530 U.S. 914, 915 (2000).

49. *Gonzalez*, 550 U.S. at 147. Seven years earlier in 2000, the Court heard *Stenberg v. Carhart*, in which the Court reviewed a Nebraska statute criminalizing “partial birth abortions” without an exception to safeguard the health of women. *Stenberg*, 530 U.S. at 921. The Court invalidated the statute because of the absence of the health exception, as the statute posed an undue burden to reproductive freedom. *Id.* As a result of the *Stenberg* decision, approximately thirty states declared their partial birth abortion bans unenforceable. PEW FORUM ON RELIGION & PUBLIC LIFE, *A History of Key Abortion Rulings of the U.S. Supreme Court* (Jan. 16, 2013), <http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/> (hereinafter “PEW FORUM ON RELIGION & PUBLIC LIFE”).

50. *Gonzalez*, 550 U.S. at 147. Approximately nineteen states prohibit partial birth abortions in the pre-viable and post-viable stages of pregnancy. See GUTTMACHER, *supra* note 2. Three of these states only implement post-viable restrictions to partial birth abortions. *Id.* Incidentally, the government of El Salvador prohibits abortions, even at the cost of saving the life of the mother. Jodi Jacobson, *Women’s Rights Groups Demand Immediate Action for El Salvadoran Woman in Need of Life-Saving Abortion* (Apr. 25, 2013, 4:05 PM), <http://rhrealitycheck.org/article/2013/04/25/womens-rights-groups-demand-immediate-action-for-el-salvadoran-woman-in-need-of-life-saving-abortion/>.

51. See *Gonzalez*, 550 U.S. at 147.

52. *Gonzalez*, 550 U.S. at 124. (citing 18 U.S.C. § 1531(a) (2006)).

53. *Id.* at 158.

54. *Id.* at 166–67 (stating that the statute was not invalid particularly when there were other methods of abortion available for women in the second trimester).

55. *Id.* at 158.

56. *Id.*

abortion procedures] pervert[] a process during which life is brought into the world.”⁵⁷

Unlike the past key decisions on abortion, the *Gonzalez* Court, in an opinion written by Justice Kennedy, emphasized the states' interest to safeguard and promote the “respect of human life.”⁵⁸ The Court reasoned that the PBABA was constitutional because it prohibited “a method of abortion in which a fetus is killed just inches before completion of the birth process.”⁵⁹ Furthermore, the Court deferred to legislative history that “implicitly approving such a[n] . . . inhumane procedure . . . will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.”⁶⁰ The Court expressed that “[dilation and evacuation] is a procedure itself laden with the power to devalue human life.”⁶¹

Moreover, the *Gonzalez* Court strengthened the argument for fetal personhood laws in writing that the PBABA “appl[ied] [to] both pre-viability and post-viability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, *whether or not it is viable outside the womb.*”⁶² In the reasoning, the Court constructively reversed the mandates of *Casey* in announcing personhood rights to pre-viable fetuses. Furthermore, *Gonzalez* interpreted the state's power to regulate reproductive freedom for the interest of “promot[ing] respect for human life *at all stages in the pregnancy,*”⁶³ contrary to *Roe* and *Casey*. Specifically, “the government has a legitimate and substantial interest in preserving and promoting fetal life.”⁶⁴ Finally, the *Gonzalez* holding resulted in the judicial approval of state legislatures to create abortion policy, without regard to medical findings.⁶⁵

II. FETAL PERSONHOOD ENCROACHING ON ALL STAGES OF PREGNANCY

After *Roe v. Wade*, many state legislatures enacted fetal personhood laws as a challenge to the reproductive right to terminate a pregnancy.⁶⁶ In

57. *Gonzalez*, 550 U.S. at 160.

58. *Id.* at 159.

59. *Id.* at 157.

60. *Id.* at 157 (citing to Congressional Findings ¶ (14)(N)).

61. *Id.* at 158. The Court cites at length the Congressional record in stating that the prohibited abortion methods under the Act had a “disturbing similarity to the killing of a newborn infant.” *Id.* (citing Congressional Findings ¶ (14)(L)).

62. *Id.* at 147. (emphasis added).

63. *Id.* at 163. (emphasis added).

64. *Gonzalez*, 550 U.S. at 145.

65. *Id.* at 129. (“Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.”)

66. James MacPherson, *North Dakota Fetal Pain Bill Passes House, Sent to Governor Jack Dalrymple*, HUFFINGTON POST (Apr. 12, 2013, 4:51 PM), <http://www.huffington>

particular, fetal pain laws became ubiquitous among the states after *Gonzalez v. Carhart*.⁶⁷ Most fetal pain laws prohibit abortions as early as twenty weeks.⁶⁸ These laws unconstitutionally regulate the pre-viable stages of pregnancy and infringe on women's privacy.

Various fetal homicide laws were also the states' response to *Roe v. Wade*.⁶⁹ State legislatures enacted fetal homicide laws, also known as "unborn victims of violence"⁷⁰ laws, with the legislative intent of protecting both the mother and unborn child.⁷¹ Most commonly, states prosecuted third party assailants for injury or death to the unborn child.⁷² However, chemical endangerment laws also served as means to prosecute mothers⁷³ for feticide. At post-viability, fetal homicide laws act as undue burdens on reproductive freedom because the laws prosecute pregnant women without affording maternal life or health exceptions for policy considerations.

Ultimately, state governments overreach their powers and restrict both a woman's right to terminate and continue her pregnancy at all stages of pregnancy. This section examines (1) fetal pain laws; and, (2) fetal homicide laws at the state level.

A. STATE FETAL PAIN LAWS

The fetal pain laws are unconstitutional pre-viable restrictions on women's rights to terminate and continue pregnancies. Moreover, the laws constructively serve as the states' effort to coerce female citizens to continue pregnancies.

1. Overview

Although the medical and legislative research is still in substantial disagreement on whether fetuses feel pain upon administration of stimuli at twenty weeks,⁷⁴ *Gonzalez v. Carhart* has "emboldened"⁷⁵ state legislatures

post.com/2013/04/12/north-dakota-fetal-pain_n_3071760.html (hereinafter North Dakota Fetal Pain Bill).

67. See PEW FORUM ON RELIGION & PUBLIC LIFE, *supra* note 49.

68. GUTTMACHER, *supra* note 2.

69. North Dakota Fetal Pain Bill, *supra* note 66.

70. Fetal Homicide Laws, *supra* note 1.

71. Fetal Homicide Laws, *supra* note 1.

72. Fetal Homicide Laws, *supra* note 1.

73. Marie Diamond, *Pregnant Women Who Lose Babies Face Criminal Charges in Mississippi, Alabama*, (July 1, 2011, 12:25 PM), <http://thinkprogress.org/justice/2011/07/01/256823/pregnant-women-criminal-charges/>. See also NAT'L ADVOCATES FOR PREGNANT WOMEN, *Truthout Covers NAPW and Our Cases*, June 2012 Archives, (June 15, 2012), <http://advocatesforpregnantwomen.org/blog/2012/06/> (hereinafter NAPW).

74. Denise Grady, *Study Finds 29-Week Fetuses Probably Feel No Pain and Need No Anesthesia*, N.Y. TIMES, Aug. 24, 2005, http://www.nytimes.com/2005/08/24/health/24fetus.html?_r=0; *Texas: Pro-Life Side Wins Debate Over Fetal-Pain Abortion Ban*, Mar. 18, 2013, <http://www.lifenews.com/2013/04/18/texas-pro-life-side-wins-debate-over-fetal-pain-abortion-ban/>.

75. PEW FORUM ON RELIGION & PUBLIC LIFE, *supra* note 49.

to pass restrictive reproductive laws. As of 2013, forty-one states prohibit abortion upon fetal viability, unless to save the life or health of the mother.⁷⁶ However, several states prohibit abortions during the pre-viability stage of pregnancy in contradiction to *Casey* and *Roe*. For instance, Alabama, Arizona, Idaho, Indiana, Kansas, Nebraska, Louisiana, and North Carolina prohibit abortions at twenty weeks into the pregnancy, except for the life or health of the mother.⁷⁷ These states prohibit abortions at twenty weeks on the theory that fetuses experience pain from abortions.⁷⁸

In March of 2013, North Dakota, the state with the “toughest restrictions on abortion in the country,”⁷⁹ signed into law a “fetal heartbeat bill” banning abortions six weeks into pregnancy upon detection of a fetal heartbeat.⁸⁰ Notably, North Dakota has also passed a “fetal pain” bill on all abortions twenty weeks into pregnancy on the premise that fetuses feel pain at twenty weeks.⁸¹ Additionally, if ratified by the voters in the November 2014 election, North Dakota could become the first state to pass a “fetal personhood amendment” to its State Constitution so that a fertilized egg has the same right to life as any living person.⁸²

2. Pre-Viable Fetal Pain Laws: Unconstitutional State Interference in Women's Privacy

The fetal pain bans on pre-viable abortions unlawfully infringe on the privacy interests of pregnant mothers. The state's interest to protect fetal pain has expanded the state's reach into the pre-viable stages of pregnancy against women's right to privacy set forth in both *Casey* and *Roe*. A careful reading of *Gonzalez*, and the states' reproductive policies that followed, would lead to the conclusion that states have the authority to legislate on reproductive rights in the absence of medical certainty.⁸³ Moreover, unlike *Casey* and *Roe*, the Court in *Gonzalez* explicitly stated that state governments have an interest to “promote respect for human life at all stages in the pregnancy[.]”⁸⁴ Thus, states have the legal basis to legislate during pre-viability in the absence of medical certainty in the interest of fetal life, despite its detrimental consequences to women's privacy rights.

76. GUTTMACHER, *supra* note 2.

77. GUTTMACHER, *supra* note 2.

78. PEW FORUM ON RELIGION & PUBLIC LIFE, *supra* note 49.

79. Mira Oberman, *North Dakota Now Has the Toughest Restrictions in the Country*, BUSINESS INSIDER (Mar. 27, 2013, 10:48 AM), <http://www.businessinsider.com/north-dakota-introduces-toughest-abortion-laws-in-the-country-2013-3>.

80. North Dakota Fetal Pain Bill, *supra* note 66.

81. North Dakota Fetal Pain Bill, *supra* note 66.

82. Oberman, *supra* note 79.

83. *Gonzalez v. Carhart*, 550 U.S. 124, 129 (2007). (“Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.”)

84. *Id.* at 163 (emphasis added).

The fetal pain laws dilute both the choices to terminate pregnancy and continue a pregnancy. Particularly, the pre-viable fetal pain laws serve as pieces of moral legislation for the state to deter abortions. If a pregnant woman cannot seek an abortion prior to twenty weeks, contrary to *Casey*, then the state has effectively removed her choice to continue her pregnancy. Rather, she must either carry to term or travel to a favorable jurisdiction. Travel, however, is expensive for many women and may prove burdensome, especially if in a state with only one abortion clinic.⁸⁵ Moreover, the fetal pain laws may have a discriminatory impact on women of lower socioeconomic status. Women of lower socioeconomic means may lack the education to understand that fetal pain is not empirically validated. As a result of constructive state coercion, many women will refuse an abortion and continue their pregnancies, even if their social circumstances are undesirable, because they empathize with their fetuses.

Furthermore, the states' estimated assumptions that a fetus can experience pain prior to viability is irrelevant, given that *Roe* clearly sets forth that unborn children have no legal rights under the Constitution.⁸⁶ As *Roe* reasoned, if fetuses had a legal right to life and personhood, then states and courts could proscribe their mothers' rights to abortions altogether.⁸⁷ Although *Casey's* dicta states that, subsequent to viability, an unborn child's interest could "override the rights of the woman,"⁸⁸ this does not further the state's interest to regulate pre-viable pregnancies. If anything, *Casey's* dicta may provide states a legal basis to create fetal protection laws in the post-viable stages of pregnancy, while remaining limited to the health and life needs of the mother. Thus, if broadly construed, a fetus's "personhood" is as limited as its mother's, while in the womb. However, current fetal personhood laws are so burdensome as to deter women's "free choice"⁸⁹ to reproduce in regulating both the pre-viable stages and post-viable stages of pregnancy without maternal life or health exceptions.

B. STATE FETAL HOMICIDE LAWS

Under fetal homicide laws, various states have prosecuted pregnant women for behavior resulting in the deaths of their unborn children.⁹⁰ Although fetal homicide laws enable states to regulate "any stage of

85. See Sarah Kliff, *North Dakota's Only Abortion Clinic Isn't Going Anywhere*, WASHINGTON POST, (Apr. 2, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/02/north-dakotas-only-abortion-clinic-isnt-going-anywhere/>; Campbell Robertson, *Judge Prevents Closing of Mississippi's Sole Abortion Clinic*, N.Y. TIMES, Apr. 15, 2013, http://www.nytimes.com/2013/04/16/us/ruling-prevents-closing-of-mississippi-only-abortion-clinic.html?_r=1&.

86. *Roe v. Wade*, 410 U.S. 113, 157–58 (1973).

87. *Id.*

88. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992).

89. *Id.* at 877.

90. See *Bei Bei Shuai v. State*, 966 N.E.2d 619 (Ind. App. 2012); Elliott, *supra* note 7.

pregnancy,”⁹¹ most legal challenges involve women who have lost pregnancies in the post-viable stages of pregnancy. At post-viability, fetal homicide laws pose as invalid, undue burdens on women's choices to continue pregnancies because the laws lack maternal life or health exceptions for state policy considerations precluding maternal prosecution. Rather, the fear of criminal sanctions related to pregnancy-based behaviors causing feticide influences women's reproductive freedom.

1. Overview

States have enacted fetal homicide laws for the legislative purpose of protecting both mothers and their unborn children from the acts of third parties.⁹² Since the 1970s, various courts have determined that viable fetuses were human beings and were entitled to legal protection.⁹³ In total, 38 states have enacted fetal homicide laws, while twenty-three of them regulate “any stage of gestation”⁹⁴ from “conception to live birth.”⁹⁵ Eleven states explicitly preclude prosecution of legal abortion under the fetal homicide laws.⁹⁶

Pro-choice advocates argue that fetal personhood laws grant unborn children fetal personhood rights that may criminalize pregnant mothers' behavior that results in miscarriages or stillbirths, such as substance abuse.⁹⁷ Rather, state legislatures should only protect pregnant mothers and punish their assailants.⁹⁸ Moreover, the fetal homicide laws serve to create

91. Fetal Homicide Laws, *supra* note 1.

92. Fetal Homicide Laws, *supra* note 1.

93. *See Keeler v. Superior Court*, 2 Cal. 3d 619, 628 (1970) (rejecting the “born alive” rule in order to accommodate fetuses as protected class under California's murder statute); *contra Reyes v. Superior Court*, 75 Cal. App. 3d 214, 219 (1977) (rejecting application of child endangerment statute to unborn fetus in prosecution of mother ingesting heroin while pregnant causing twins' heroin addiction); *Commonwealth v. Cass*, 467 N.E.2d 1324, 1326 (Mass. 1984) (applying viable fetuses to vehicular homicide statute); *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984); *Hughes v. State*, 868 P.2d 730, 735 (Okla. Crim. App. 1994); *State ex rel. Angela M. W. v. Kruzicki*, 541 N.W.2d 482, 484 (Wis. Ct. App. 1995). As early as the 1300s, the common law enabled prosecution for infanticide; however, the common law did not recognize fetal homicide *per se*. Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J. L. & SOC. PROBS. 77, 80. (2009). Rather, a plaintiff had to establish that the infant was “born alive” and subsequently died as a result of third-party injuries while *in utero*. *Id.* at 81.

94. Fetal Homicide Laws, *supra* note 1 (listing KAN. STAT. ANN. § 21-5419).

95. Fetal Homicide Laws, *supra* note 1 (listing MISS. CODE ANN. § 97-3-37). The list of states that regulate pregnancy in the pre-viable and post-viable stages are Alabama, Arizona, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin. *See supra*.

96. Fetal Homicide Laws, *supra* note 1. The following states explicitly preclude punishment of abortion under their fetal homicide laws: Alabama, Alaska, Arkansas, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Oklahoma, and South Carolina. *See supra*.

97. Fetal Homicide Laws, *supra* note 1.

98. Fetal Homicide Laws, *supra* note 1.

an adversarial relationship between the fetus and mother.⁹⁹ Pro-life advocates assert, however, that the state has an interest to safeguard both the fetus and mother from violent acts.¹⁰⁰

In general, states have used fetal homicide laws against women in the interest of promoting, and seeking retribution for, fetal life. States with chemical endangerment laws have recently prosecuted women under these laws as vehicles to prosecute for fetal homicide.¹⁰¹ The defendant-mothers' profiles paint a picture of mentally infirm or drug dependent women who are victims of the states' political agendas to eradicate drugs and abortion.

In 2006, the State of Mississippi charged its first defendant, fifteen-year-old Rennie Gibbs with depraved heart murder for the stillbirth of her thirty-six week-old fetus on the theory that her cocaine habit caused its death.¹⁰² As an adolescent, Gibbs faces a life sentence for the stillbirth.¹⁰³ In an amicus brief in support of Gibbs to the Mississippi Supreme Court in 2012, a myriad of public health professionals and the American Civil Liberties Union of Mississippi argued that “[s]uch prosecutions deter pregnant women from seeking prenatal care and drug and alcohol treatment.”¹⁰⁴ Moreover, amici argued that maternal prosecutions could potentially encourage termination of pregnancies among women struggling with drug dependency as an avenue to avoid criminal penalties.¹⁰⁵

Additionally, in 2010, the State of Mississippi prosecuted Nina Buckwalter for manslaughter when she delivered a stillborn.¹⁰⁶ The State alleged that her illicit drug use demonstrated “callous disregard for life”¹⁰⁷ thereby causing the stillbirth. The circuit judge dismissed the case reasoning that the state legislature did not intend to criminalize pregnant women's actions.¹⁰⁸ However, the case was appealed to the Mississippi Supreme Court.¹⁰⁹ Four similar cases are pending in the court system on whether women are criminally culpable for the deaths of their fetuses.¹¹⁰

99. Fetal Homicide Laws, *supra* note 1.

100. Fetal Homicide Laws, *supra* note 1.

101. Elliott, *supra* note 7.

102. Ed Pilkington, *Outcry in America as Pregnant Women Who Lose Babies Face Murder Charges*, THE GUARDIAN (Jun. 24, 2011, 1:30 PM), <http://m.guardiannews.com/world/2011/jun/24/america-pregnant-women-murder-charges>. For a list of Mississippi's fetal homicide laws, see Fetal Homicide Laws, *supra* note 1.

103. Pilkington, *supra* note 102.

104. Brief for Nat'l Ass'n Soc. Workers et al. as Amici Curiae Supporting Petitioner at 2, *Gibbs v. State*, No. 2010-M-819, available at <http://www.socialworkers.org/assets/secured/documents/ldf/briefDocuments/Gibbs%20v%20State%20MS%20Sup.Ct.Amicus%20Brief.pdf>.

105. *Id.*

106. Elliott, *supra* note 7.

107. Elliott, *supra* note 7.

108. Elliott, *supra* note 7.

109. Elliott, *supra* note 7.

110. Elliott, *supra* note 7.

Alabama also introduced the Chemical Endangerment Act of 2006 to protect children from exposure to their parents' use and manufacture of methamphetamines.¹¹¹ The State prosecuted Amanda Kimbrough for the stillbirth of her premature child, alleging that the baby's death was the result of her drug use during pregnancy.¹¹² Kimbrough struggled with drug dependency¹¹³ and chose to continue her pregnancy, nonetheless.¹¹⁴ Kimbrough reported that she was dependent on methamphetamine after her first marriage.¹¹⁵ During her pregnancy, Kimbrough had refused prescription medication for the health of the unborn child, primarily because the fetus had already developed various medical complications, such as a prolapsed cord.¹¹⁶ Kimbrough's physician had diagnosed her unborn child with Down Syndrome and had recommended an abortion, which she refused.¹¹⁷ She stated in an interview that, in a moment of weakness, she had used "meth only once" while pregnant with her now deceased child.¹¹⁸ Although the State charged her with murder relating to drug use, the prosecutor did not charge her with drug possession.¹¹⁹ She received a minimum sentence of ten years after reaching a plea bargain with the State.¹²⁰ As of 2006, sixty women have been prosecuted for drug dependency under this law.¹²¹

Finally, in 2011, the State of Indiana prosecuted Bei Bei Shuai for the death of her fetus resulting from her attempted suicide.¹²² Shuai ingested rat poison, while thirty-three weeks pregnant, after her fiancé had abandoned her.¹²³ A friend rushed her to the hospital where she was treated and hospitalized for a month, and the baby was delivered via Caesarean

111. Pilkington, *supra* note 102. See also NAPW, *supra* note 73.

112. Pilkington, *supra* note 102.

113. Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES, Apr. 25, 2012, http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-badmthers.html?Pagewanted=all&_r=0.

114. Alexa Kolbi-Molinas, *A Pregnant Woman Is Not a Meth Lab*, ACLU BLOG OF RIGHTS (July 6, 2010, 5:12 pm), <http://www.aclu.org/blog/reproductive-freedom/pregnant-woman-not-meth-lab>.

115. Calhoun, *supra* note 113.

116. Calhoun, *supra* note 113.

117. Calhoun, *supra* note 113.

118. Calhoun, *supra* note 113.

119. Kolbi-Molinas, *supra* note 114.

120. Calhoun, *supra* note 113.

121. Calhoun, *supra* note 113. See also Debra Cassens Weiss, *Drug Abusing Pregnant Women Under Endangerment Law, Ala. Supreme Court Says*, ABA JOURNAL (Jan. 14, 2013, 6:30 AM), http://www.abajournal.com/news/article/unborn_children_are_protected_by_chemical_endangerment_law_alabama_supreme/ (reporting that the Alabama Supreme Court upheld maternal prosecutions under the chemical endangerment law).

122. Laura Wilkerson, *Woman Charged With Murder After Suicide Attempt*, OPEN SALON (Mar. 17, 2011, 7:43 AM), http://open.salon.com/blog/laura_wilkerson/2011/03/17/woman_charged_with_murder_after_suicide_attempt.

123. *Id.*

section.¹²⁴ However, her baby died a week later.¹²⁵ The prosecutor's office in Indiana charged her under the murder and fetal homicide statutes for harm caused to the fetus *in utero* and its subsequent death upon delivery.¹²⁶

The case of *Bei Bei Shuai* was one of first impression for the Court of Appeals of Indiana, given that it had not ruled on whether the State could lawfully prosecute a mother under the fetal homicide statute.¹²⁷ The court relied on *Herron v. State* where the State had prosecuted a mother for her cocaine use while pregnant because of the physical effects on the child after delivery.¹²⁸ In *Herron*, the court declined to uphold the prosecution of the defendant-mother for her cocaine use while pregnant under the dependency statute because the statute did not recognize unborn children as a protected class.¹²⁹ In contrast, the *Bei Bei Shuai* court determined that the state legislature had explicitly classified unborn children as "persons" in its fetal homicide statute.¹³⁰ Therefore, the court reasoned that the State could justifiably prosecute on behalf of *Bei Bei Shuai*'s deceased child under both the murder and fetal homicide laws.¹³¹

As of 2013, *Bei Bei Shuai* served over a year in prison and she was released on bond following an appeal to the Indiana Court of Appeals.¹³² *Shuai*'s case was set for trial in September when the parties reached a plea agreement on August 2.¹³³ The prosecutor dropped the charges of feticide and murder, and *Shuai* pleaded guilty to criminal recklessness and was sentenced to time served of 178 days.¹³⁴

2. Unduly Burdensome Post-Viable Fetal Homicide Laws: No Health or Life Exceptions to Maternal Prosecution

The current fetal homicide laws run contrary to *Casey*'s guidelines for maternal health and life exceptions to state regulation of post-viable pregnancy. Maternal prosecutions are in the sole interest of the fetus and are not in the best health or life interests of the unborn child and mother. As a result, the presence of fetal homicide laws "hinder"¹³⁵ women's "free

124. Wilkerson, *supra* note 122.

125. Wilkerson, *supra* note 122.

126. *Bei Bei Shuai v. State*, 966 N.E.2d 619 (Ind. App. 2012).

127. *Bei Bei Shuai*, 966 N.E.2d at 628.

128. *Id.* (citing *Herron v. State*, 729 N.E.2d 1008, 1011 (Ind. App. 2000)).

129. *Id.*

130. *Id.* at 629.

131. *Id.* at 628.

132. "I was scared": Woman Accused of Killing Her Unborn Baby by Drinking Rat Poison Speaks out Ahead of Murder Trial as Her Lawyer Insists it was Suicide Attempt, MAIL ONLINE (Apr. 25, 2013, 8:32 PM), <http://www.dailymail.co.uk/news/article-2315028/Bei-Bei-Shuai-Woman-accused-killing-unborn-baby-drinking-rat-poison-speaks-ahead-murder-trial-lawyer-insists-suicide-attempt.html>.

133. *Bei Bei Shuai Pleads Guilty in Baby's Death*, HUFFINGTON POST (Aug. 2, 2013, 7:18 PM), http://www.huffingtonpost.com/2013/08/02/bei-bei-shuai-guilty_n_3698383.html.

134. *Id.*

135. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

choice¹³⁶ to terminate or continue pregnancies because of the threat of criminal sanctions.

Prosecuting mothers who suffer stillbirths or miscarriages as a result of drug dependency or mental health disorders is against public policy. Such status-based prosecutions trigger mental health distress, which exacerbates the risk of drug relapse or an underlying mental health condition, and leads to a likelihood of prosecution.¹³⁷ Ultimately, the threat of prosecution does not deter the behavior—it worsens the punishable offense. Moreover, the subsequent imprisonment will separate the mother from any other existing children, which injures the psychological bonds within existing family units.¹³⁸ If the states desire a decrease in drug dependency and increase in positive parenting, then the prosecution of at-risk mothers is likely to have the opposite effect.

In 2010, the National Institute on Healthcare Management published that ten percent to twenty percent of women suffer maternal depression during pregnancy or within the first twelve months after delivery.¹³⁹ Various peer-reviewed studies have confirmed these findings and have added that maternal anxiety and depression are most common among pregnant women with histories of mental health disorders.¹⁴⁰ Policy arguments are abound in showing that strengthening the mental health of at-risk pregnant women, rather than punishing them, will enhance the potential lives of unborn children, while respecting women's personhood.

At post-viability, the fetal homicide laws make pregnant women a "special class of persons"¹⁴¹ whose pregnancy status permits overreaching state scrutiny. For example, in Mississippi, possession of cocaine, or any derivative thereof, yields a prison sentence from a year¹⁴² up to a maximum of thirty years,¹⁴³ dependent on the weight of the substance in possession. However, as the prosecution of Rennie Gibbs¹⁴⁴ demonstrates, a pregnant

136. *Casey*, 505 U.S. at 877.

137. Lynn M. Paltrow, *Criminal Prosecutions Against Pregnant Women*, REPRODUCTIVE FREEDOM PROJECT (April 1992), <http://www.advocatesforpregnantwomen.org/articles/1992stat.htm>.

138. *Id.*

139. *Identifying and Treating Maternal Depression: Strategies & Considerations for Health Plans*, NAT'L INSTITUTE FOR HEALTHCARE MANAGEMENT FOUNDATION, http://nihcm.org/pdf/FINAL_MaternalDepression6-7.pdf (last visited Oct. 23, 2013).

140. *Pregnancy and Mental Health*, STANFORD SCHOOL OF MEDICINE: CENTER FOR NEUROSCIENCE & WOMEN'S HEALTH, http://womensneuroscience.stanford.edu/wellness_clinic/Pregnancy.html (last visited Sept. 2, 2013); *Psychiatric Disorders During Pregnancy*, MASS. GENERAL HOSPITAL: MGH CENTER FOR WOMEN'S MENTAL HEALTH, <http://www.womensmentalhealth.org/specialty-clinics/psychiatric-disorders-during-pregnancy/> (last visited Sept. 2, 2013).

141. *National Advocates for Pregnant Women in the New York Times Magazine*, THE OVERBROOK FOUNDATION (May 4, 2012), <http://www.overbrook.org/2012/05/04/national-advocates-for-pregnant-women-in-the-new-york-times-magazine/>.

142. MISS. CODE ANN. § 41-29-139(c)(1)(A) (2006) (less than one tenth of a gram).

143. *Id.* § 41-29-139(c)(1)(E) (thirty grams).

144. Pilkington, *supra* note 102.

woman in Mississippi can face life imprisonment when her crack cocaine possession causes the death of her fetus.

Finally, states could eventually restrict pregnant women's "drink[ing, obesity,] or fail[ure] to follow doctors' orders."¹⁴⁵ Therefore, pregnant women could potentially suffer deprivation of legal activities because legislatures assert an interest to protect fetal life. Notably, state governments have been silent on whether women should abstain from prescription medication, rigorous sports, and daily activities in the interest of the fetus.¹⁴⁶ However, many activities, such as exercise or prescription medicine, are in the best health interest of the mother, though states may prohibit the behaviors to save the life of the fetus. If the states proscribe all maternal acts to protect fetal life, then states will violate *Casey's* maternal life and health exceptions and will sacrifice women's personhood rights at the expense of their fetuses. Eventually, women may choose to abstain from motherhood to evade criminal sanctions, particularly women with addictions and mental health disorders.¹⁴⁷ Essentially, these overbroad fetal homicide laws enable state legislatures to prevent the destruction of life by any means necessary at the expense of women's reproductive agency.

III. REDEFINING FETAL PERSONHOOD LAWS: BALANCING FETAL AND WOMEN'S INTERESTS

If fetal pain and homicide laws continue in this manner, then the laws will continue to diminish women's privacy rights merely because women choose to become pregnant or terminate pregnancies. Therefore, if state legislatures determine to maintain fetal personhood measures, then they should amend them in order to respect women's legal rights afforded under the Constitution.

First, states should not regulate the pre-viable stages of pregnancy, as reaffirmed in *Casey*. However, states may pass fetal protection measures in the post-viable stages and strictly construe them, so long as there are maternal health and life limitations to the fetal "personhood." As the fetal personhood laws stand currently, personhood seems resoundingly absolute as soon as the fetus is viable, and therefore, the mother's privacy protection ceases to exist. If states amend their current fetal personhood legislation to honor the post-viable health and life limitations reaffirmed in *Casey*, then the laws should pass constitutional muster.

145. Elliott, *supra* note 7.

146. Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 LAW & INEQ. 171, 176 (2008).

147. *ACLU Asks Alabama Court to Protect the Rights of Pregnant Women*, ACLU (July 16, 2010), <http://www.aclu.org/reproductive-freedom/aclu-asks-alabama-court-protect-rights-pregnant-women>; NAPW, *supra* note 73.

Second, the states should limit the breadth of regulations during the post-viable stages of pregnancy in considering the life, physical and mental health interests of the mother, as well, as relevant interests of the fetus. In doing so, the narrowing of fetal "personhood" and subsequent maternal prosecutions will result. As a recommendation, state governments should enact preventive measures. States should fund local mental health programs and improve drug rehabilitation facilities.¹⁴⁸ In doing so, state governments will foster the mother's health interest, and in turn, the health of any future unborn children.

Finally, states should cease imprisoning pregnant women for chemical endangerment of unborn children,¹⁴⁹ unless the courts determine that the women are dangerous to the community under the respective states' sentencing guidelines for relevant reasons. As for women with existing children, states should refrain from separating mothers from their existing children as a mode of punishment for substance abuse during pregnancy.¹⁵⁰ Rather, separation should only occur if the pregnant mother is judicially determined as an unfit parent for her existing children.

CONCLUSION

Although states have an important interest in ensuring the health of their unborn citizens, the states also have a duty to respect the pre-existing rights of their born citizens. Laws to protect fetal and maternal life can coexist. Given that women have the right to terminate pregnancies prior to viability, narrowly tailoring existing legislation to refrain from the abridgement of reproductive privacy affords pregnant women their right to personhood. Moreover, states must reexamine their current health policies as a means to protect fetal life in the post-viable stages of pregnancy, rather than enacting laws that eliminate women's right to her personhood.

148. NAPW, *supra* note 73.

149. Debra Cassens Weiss, *Drug Abusing Pregnant Women Under Endangerment Law, Ala. Supreme Court Says*, ABA JOURNAL (Jan. 14, 2013, 6:30 am), http://www.abajournal.com/news/article/unborn_children_are_protected_by_chemical_endangerment_law_alabama_supreme/.

150. Adam Nossiter, *In Alabama, A Crackdown on Pregnant Drug Users*, N.Y. TIMES, Mar. 15, 2008, http://www.nytimes.com/2008/03/15/us/15mothers.html?_r=0.