After Farley v. Sartin: The Consequences of Declaring a Nonviable Fetus a Person for the Purpose of Wrongful Death

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I. INTRODUCTION

On December 13, 1995, the Supreme Court of Appeals of West Virginia broke new ground when it decided in *Farley v. Sartin*¹ that a nonviable fetus is a “person” within the meaning of West Virginia’s wrongful death statute.² In speaking for the unanimous court, Justice Cleckley reasoned that:

> [J]ustice is denied when a tortfeasor is permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability at the time of death . . . . Our concern reflects the fundamental value determination of our society that life—old, young, and prospective—should not be wrongfully taken away.³

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¹ 466 S.E.2d 522 (W. Va. 1995).
² *Id.* at 534 (citing W. VA. CODE § 55-7-5 (1994)).
³ *Id.* at 533.
In making this "fundamental value determination" that prospective, nonviable life should be protected under the wrongful death statute, the court greatly expanded the realm of fetal rights. Nevertheless, Justice Cleckley reasoned that this expansion "neither affects nor interferes with the constitutional protection afforded a woman who chooses to have an abortion." With little explanation, the court concluded that a woman's constitutional right to have an abortion was not a tortious act and, therefore, not relevant to actions for wrongful death.

However, the court failed to recognize the "inherent conflict" in granting a woman a constitutional right to terminate a nonviable fetus that has full personhood status under the wrongful death statute. Although the court in Farley attempted to limit its holding to the scope of wrongful death actions, its decision paves the way for new and expansive civil and criminal liability and intrusive state action against pregnant women. Even more alarming, the Farley court's recognition of nonviable fetal rights may lead to violations of a woman's rights to privacy, bodily integrity, and parental autonomy, and may even infringe on a woman's constitutional right to have an abortion. This article examines the

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4 Id.
5 Id. at 534.
6 Farley, 466 S.E.2d at 534-35. Justice Cleckley offered the following explanation of abortion rights, in light of the court's decision to recognize a nonviable fetus as a person in a wrongful death action:

To be clear, a wrongful death action will not lie against a woman who chooses to exercise her constitutional right to have an abortion. By definition, if a woman has a constitutional right to decide whether to carry an unborn child to term or abort it, then the act of aborting is not tortious. In such cases, the reasons for invoking the wrongful death statute do not apply; there is no tortious conduct to deter.

Id.
8 Farley, 466 S.E.2d at 534-35.
"slippery slope"\textsuperscript{10} of possible ramifications that follow from conferring separate legal rights to a nonviable fetus.

II. THE CONSTITUTIONAL RIGHTS INVOLVED

A. Pre-Roe v. Wade Decisions

The United States Supreme Court has long recognized that certain inherent liberties arise from the Fourteenth Amendment to the Constitution.\textsuperscript{11} These liberty interests encompass freedom from both physical and mental bodily restraint.\textsuperscript{12}

In \textit{Meyer v. Nebraska},\textsuperscript{13} the Court expanded the realm of implicit and protected liberty interests to include freedoms concerning marriage and child-rearing.\textsuperscript{14} The Court further defined and emphasized child-rearing as a liberty interest two years later in \textit{Pierce v. Society of Sisters}.\textsuperscript{15} In denying the state power to impose public education on its children, the Court in \textit{Pierce} construed the child-rearing liberty to include a parent's right "to direct the upbringing and education of children under their control."\textsuperscript{16}

From these early decisions protecting marriage and child-rearing emerged the idea of procreative autonomy as a protected liberty interest. For


\textsuperscript{11} U.S. CONST. amend. XIV.

\textsuperscript{12} See Allgeyer v. Louisiana, 165 U.S. 578 (1897). In explaining the Fourteenth Amendment liberty interest, the Court stated that "[t]he liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties." \textit{Id.} at 589.

\textsuperscript{13} 262 U.S. 390 (1923).

\textsuperscript{14} \textit{Id.} at 399. Justice McReynolds explained that liberty "denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children." \textit{Id.; see also} Loving v. Virginia, 388 U.S. 1 (1967). Loving noted that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." \textit{Id.} at 12 (quoting Skinner v. Oklahoma, 316 US 535, 541 (1942)).

\textsuperscript{15} 268 U.S. 510 (1925).

\textsuperscript{16} \textit{Id.} at 534-35.
example, in *Skinner v. Oklahoma*, the United States Supreme Court struck down a statute which ordered compulsory sterilization for certain felons. In doing so, the Court elevated the protected liberty status of marriage and procreation to that of fundamental rights under the Constitution.

Following its early decisions involving marriage, child-rearing, and procreation, the Court, in *Griswold v. Connecticut*, recognized a zone of privacy, inherent within the Constitution, which protects an individual's right to privacy concerning intimate family relations. In *Griswold*, the Court struck down a state statute which forbade the distribution and use of contraceptives. In doing so, the Court announced that the right to use such devices was a privacy interest protected by the “penumbra” of rights in the Third, Fourth, Fifth, and Ninth Amendments.

Subsequently, *Griswold* paved the way for many more decisions expanding the right to privacy. For example, a father's right to parenthood was expressly recognized in *Stanley v. Illinois*. In striking down a state statute under which children of unwed fathers automatically became wards of the state upon the death of their mothers, the Court specifically recognized the “interest of a parent in the companionship, care, custody, and management of his or her children.” Other post-*Griswold* privacy interests recognized by the Court include the right

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17 316 U.S. 535 (1942).
18 *Id.; see also* Wright, *supra* note 43, at 1298.
19 *Id.* at 541. The Court concluded that “[m]arriage and procreation are fundamental to the very existence and survival of the race.” *Id.*
20 381 U.S. 479 (1965).
21 *Id.* at 484.
22 *Id.* at 485.
23 *Id.* at 484; *see also* Einsenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to obtain and use contraceptives to non-married individuals).
25 *Id.* at 651.
to bodily integrity,26 the right to bear or beget a child,27 and the right to enter and maintain personal relationships.28

The recognition and subsequent expansion by the Court of the right to privacy, including the right to marry,29 procreate,30 and raise a child,31 ultimately paved the way for the Court to recognize the right of a woman to terminate her pregnancy in the landmark decision of Roe v. Wade.32

B. Roe v. Wade

In Roe, the United States Supreme Court declared that a woman’s right to abort her unborn fetus was a protected liberty interest within the Due Process Clause of the Fourteenth Amendment.33 Specifically, the Court characterized a woman’s right to terminate her pregnancy as a “fundamental” right under the Due Process Clause.34 Therefore, any infringement by the state upon this fundamental

26 See generally Cruzan v. Missouri Dep’t of Health, 497 U.S. 261 (1990) (recognizing that the right to bodily integrity requires informed consent for medical treatment).

27 See Eisenstadt, 405 U.S. at 453.

28 Roberts v. Jaycees, 468 U.S. 609 (1984). In acknowledging this right, the Court, in part, reasoned:

[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Id. at 617-18.

29 See supra note 14.

30 See supra note 17.

31 See supra notes 15 and 16.


33 Id. at 164.

34 Id. at 154-156.
right would be subject to strict scrutiny by the courts.\(^{35}\)

In deciding that a woman has a fundamental right to terminate her pregnancy, the Court recognized that a “person,” as used in the Fourteenth Amendment, does not include the unborn.\(^{36}\) However, the Court did not grant a woman the absolute right to have an abortion at any time during her pregnancy. On the contrary, the Court recognized that, at some point during a woman’s pregnancy, the state’s interests in protecting the unborn becomes compelling.\(^{37}\)

Therefore, the Court balanced the woman’s privacy rights against these state interests and established a trimester system.\(^{38}\) During the first trimester, the state may not interfere with a woman’s decision to have an abortion.\(^{39}\) However, from the beginning of the second trimester until the fetus becomes viable,\(^{40}\) the state may regulate only the abortion procedure, in order to preserve and protect maternal health.\(^{41}\) From the time of viability up until birth, the state may prohibit a woman’s right to have an abortion, except if it is necessary to preserve the health or life of the mother.\(^{42}\)

Although the Court in *Roe* recognized that a woman has a fundamental and absolute right to obtain an abortion during her first trimester of pregnancy, when the fetus can only be classified as nonviable, the decision itself has been criticized for planting seeds of doubt and room for departure in its own holding.\(^{43}\)

For example, although the Court purported to limit state regulation of the abortion

\(^{35}\) *Id.* Strict scrutiny requires the state to have a “compelling state interest” in the activity being regulated, and that the regulation be “closely tailored” to achieving that interest through the least restrictive means possible. *Id.*

\(^{36}\) *Roe*, 410 U.S. at 158.

\(^{37}\) *Id.* at 155.

\(^{38}\) *Id.* at 163-64.

\(^{39}\) *Id.*

\(^{40}\) The Court defined viability as the point at which the fetus is presumed to be capable of meaningful life outside the mother’s womb, or between twenty-four and twenty-eight weeks. *Id.* at 160.

\(^{41}\) *Roe*, 410 U.S. at 163-64.

\(^{42}\) *Id.* at 163-64.

procedure during the second trimester to interests involving maternal health, Justice Blackmun, speaking for the majority, wrote in dictum that "[i]n assessing the State's interest, recognition may be given to the less rigid claims that as long as at least potential life is involved, the state may assert interests beyond the protection of the pregnant woman alone." Therefore, the Roe decision itself supports the view that pregnancy involves not just a woman's interest alone, but that of the mother and her fetus, and that special deference may be given not just to viable life, but "potential" life as well.45

C. Post-Roe v. Wade Decisions

The first case to chip away at the Roe decision was Maher v. Roe,46 in which the Court upheld a state regulation providing Medicare coverage for childbirth expenses, but not for nontherapeutic abortion expenses.47 The Court distinguished Maher by stating that the regulation did not impose an additional burden beyond that already suffered by the woman due to her pre-existing economic position.48 Furthermore, the Court stressed the difference between direct state interference with a woman's right to an abortion, which was prohibited by Roe, and state encouragement of childbirth, which was "consonant with legislative policy," and did not have to withstand the "compelling interest" test.49

The erosion of Roe continued in Webster v. Reproductive Health Services.50 In Webster, the Court upheld a Missouri statute that prohibited the use of public facilities and the assistance of public employees for unnecessary abortions.51 Although the Court left the trimester system established in Roe intact, the Court declared that states have a "compelling interest" in protecting the life

44 Roe, 410 U.S. at 150.
45 Id.
47 Id. at 474.
48 Id.
49 Id. at 475, 477.
51 Id. at 511.
of the unborn child "throughout pregnancy." In fact, Chief Justice Rehnquist, writing for the majority, rejected Roe's "rigid" trimester scheme for establishing viability, and, instead, argued for the protection of the unborn child from the time of conception.

The strongest blow to the Roe decision came with the Court's decision in Planned Parenthood v. Casey. Although not overruling Roe, the Court in Casey expressly rejected the trimester framework developed in that opinion. Instead, the Court drew the line at viability "so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."

Furthermore, the Court in Casey lowered a woman's right to abortion from fundamental right status, subject to strict scrutiny review, to that of protected liberty interest. The Court adopted a new test, the undue burden test, which allows a state to regulate an activity as long as the statute's purpose or effect is not a substantial obstacle to engaging in that activity. For example, the Court upheld a mandatory twenty-four hour waiting period as facilitating "the wise exercise" of the right to abortion, but struck down the spousal notification provision as imposing a "substantial obstacle" to a woman's right to terminate her

52 Id. at 494. Furthermore, the Court moved the line of viability from twenty-eight weeks to twenty weeks, stating that a "presumption of viability" was created at the gestational age of twenty weeks. Id. at 515-16.

53 Id. at 519.

54 Webster, 492 U.S. at 519. Chief Justice Rehnquist wrote that "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing a state regulation after viability but prohibiting it before viability." Id.


56 Id. at 873.

57 Id. at 870.

58 Id. at 874-78.

59 Id at 876.

60 Casey, 505 U.S. at 887.
pregnancy.61

The Court in Casey clarified what had been emerged from the post-Roe cases: In pregnancy, a woman’s interest cannot be evaluated in isolation but must be balanced against the rights of her fetus. The Court’s recognition of fetal rights, coupled with the recognition by the Supreme Court of Appeals of West Virginia of the parent/nonviable fetus relationship interest in wrongful death, establishes the theoretical groundwork for an explosion of tort litigation involving fetal rights. As one keen observer cautioned, the recognizing of more and more fetal rights “would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation.”62

III. FORESEEABLE TORT LITIGATION

A. A Father’s Rights and Potential Tort Suits

Although the Supreme Court in Planned Parenthood v. Danforth63 and Planned Parenthood v. Casey64 rejected a father’s assertion of a protected liberty interest in the life of his unborn child, at least within the first two trimesters, the Court has never directly addressed a father’s appeal for his wife to carry his child to term, nor has it fully weighed the inherent rights of the father.65 After the Farley court’s recognition of a father’s interest in the life of his nonviable fetus in the context of wrongful death,66 West Virginia is ripe for a full exploration of

61 Id. at 894. The Court emphasized the plight of the battered woman and the reasons why she may not want to reveal to her husband a decision to obtain an abortion. Id. at 893. (“Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends.”); see also Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (rejecting the requirement of spousal consent before a woman can obtain an abortion).

62 Hudak v. Gregory, 634 A.2d 600, 605 (Pa. 1993) (Flaherty, J., dissenting) (holding that a nonviable fetus, born alive, is a person for which an action for wrongful death and survival may be maintained).

63 See supra note 61.

64 See supra note 61.


these paternal rights, especially the right of a father to bring a tort action for the tortious abortion of his child.

The paternal rights of procreation and association serve as the foundation for a paternal tort suit against a mother who has terminated a nonviable fetus. First, freedom of association, including the right to enter and maintain personal relationships has been recognized by the Court as a fundamental right. This fundamental right of association has been construed to include society, caring and commitment, intimacy, and self-identification. Likewise, the fundamental right to procreate, recognized by the Court in Skinner, can be construed to protect a father’s choice to enjoy the “society” of a child, to develop an intimate parent-child relationship, and to assume the role and responsibilities of parenthood. Along with these paternal rights of intimate association and procreation, a father has a well-recognized relational interest in the loss of a child, including a fetus and nonviable fetus under West Virginia law, for purposes of wrongful death.

On at least two occasions, the United States Supreme Court has recognized the significance of this relational interest between a father and a child. One of the strongest appraisals and affirmations of these paternal rights came in Justice White’s dissent in Planned Parenthood v. Danforth. In arguing for the protection of paternal rights in the abortion arena, Justice White explained:

[T]he husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife. It by no means follows, from the fact that the mother’s interest in deciding “whether or not to terminate her pregnancy” outweighs the State’s interest in the potential life of the fetus, that the husband’s interest is also outweighed and may not be

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68 See Black, supra note 65, at 1007.

69 Id. at 1009 (quoting Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L. J. 624, 640 (1980)).


71 See, e.g., Caban v. Mohammed, 441 U.S. 380 (1979) (holding that sex-based discrimination between unmarried mothers and unmarried fathers, which permits an unwed mother but not an unwed father to block the adoption of their child simply by withholding consent violated the Equal Protection Clause of the Fourteenth Amendment); Stanley v. Illinois, 405 U.S. 645 (1972) (holding a state statute under which children of unwed fathers become wards of the state upon the death of their mothers violated the Due Process Clause of the Fourteenth Amendment).
protected by the State. A father’s interest in having a child—perhaps his only child—may be unmatched by any other interest in his life.\textsuperscript{72}

Thus, Justice White recognized that a father not only has the right to procreate, but he also has the right to intimately associate with his children.\textsuperscript{73}

The judicial recognition a father’s fundamental right of procreation, intimate association, and right of redress for injury to his child, including a nonviable fetus in wrongful death, clearly gives a father a protected interest not only in the life of his existing children, but also in the potential life of his gestating child. These paternal rights may serve as the basis for a father’s suit for tortious abortion or tortious interference with a pregnancy. Such a recognition would involve the weighing of a woman’s right to abort, her right to bodily autonomy, and her right to reproductive freedom, against a man’s right to procreate, his right to reproductive freedom, and his right to recover for wrongful death.\textsuperscript{74} It is not inconceivable, especially in a state which recognizes a nonviable fetus as a “person,”\textsuperscript{75} that these paternal rights could outweigh the maternal rights.

For example, the Supreme Court of Appeals of West Virginia has inherently recognized the idea that life begins at conception, at least in the realm of wrongful death.\textsuperscript{76} If the West Virginia legislature codified the court’s view on when life begins,\textsuperscript{77} a father could argue that any injury to a nonviable fetus is an injury to a life. In this context, abortion is a wrongful act.\textsuperscript{78} Thus, a father may argue that an abortion not only injures, but also eliminates the valued life of a

\textsuperscript{72} Planned Parenthood v. Danforth, 428 U.S. 52, 93 (1976) (citation omitted) (White, J., concurring in part and dissenting in part).

\textsuperscript{73} Id.

\textsuperscript{74} Black, supra note 65, at 1027.

\textsuperscript{75} Farley v. Sartin, 466 S.E.2d 522, 534 (W. Va. 1995).

\textsuperscript{76} Id.

\textsuperscript{77} The United States Supreme Court has upheld this type of legislative declaration, as long as it “imposes no substantive restrictions on abortions.” Webster v. Reproductive Health Servs., 492 U.S. 490, 505-06 (1989).

\textsuperscript{78} Black, supra note 65, at 1019.
fetus\textsuperscript{79} and deprives him of his fundamental right of association and procreation, including his right to enjoy the society of a child and to develop an intimate parent-child relationship. Thus, a father could conceivably bring a tort suit for tortious abortion or tortious interference with a pregnancy against the woman who aborted his nonviable fetus because life, including that of a nonviable fetus, is protected by the law under the wrongful death statute.\textsuperscript{80}

Nevertheless, such a tort suit would still be subject to the undue burden test adopted by the United States Supreme Court in \textit{Planned Parenthood v. Casey}.\textsuperscript{81} However, because \textit{Casey} disavowed that abortion is a fundamental right,\textsuperscript{82} a mother’s rights can no longer be presumed to take precedence over a father’s rights.\textsuperscript{83} Moreover, if a court determines a father’s rights to association and procreation deserve strict scrutiny review, the balancing between paternal and maternal rights will be a much closer call.\textsuperscript{84}

Thus, a father could argue that allowing a suit for tortious abortion or tortious interference with a pregnancy does not place a “substantial obstacle”\textsuperscript{85} on a woman’s right to have an abortion, for she may still obtain an abortion without any direct state interference.\textsuperscript{86} Instead, such a tort reflects and promotes the West Virginia court’s policy (and hypothetically the legislature’s policy) that life begins at conception, and any injury to life, even potential, nonviable life, is protected under the wrongful death statute.

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} See \textit{Casey}, 505 U.S. at 887.

\textsuperscript{82} See \textit{id.} at 833.

\textsuperscript{83} Black, \textit{supra} note 65, at 1031.

\textsuperscript{84} \textit{Id.} at 1032.

\textsuperscript{85} \textit{Casey}, 505 U.S. at 887.

\textsuperscript{86} The United States Supreme Court has distinguished between direct state interference with abortion and legislative policy promotion. \textit{Maher v. Roe}, 432 U.S. 464 (1977). The Court distinguished between “direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy,” the former being unconstitutional and the latter constitutional. \textit{Id.} at 475.
B. Fetal Rights and Potential Tort Suits

As more courts begin to recognize and expand fetal rights, as the court did in *Farley*, the possibility of tort suits against mothers by their own children for injuries sustained prenatally become more probable. Historically, neither common law nor statute required a woman to regard the health of her fetus above that of her own health.\(^{87}\) Nevertheless, with the departure from the parental immunity doctrine in tort actions\(^{88}\) and legal recognition of fetal rights, the door for suits for prenatal injuries is wide open.

For example, the Michigan Supreme Court has held that a mother may be liable for the negligent infliction of prenatal injuries.\(^{89}\) In *Grodin v. Grodin*,\(^{90}\) a pregnant woman took medication for her own health, resulting in damage to her son's teeth.\(^{91}\) In overruling the doctrine of family tort immunity, the court concluded that the mother could be held liable for injurious neglect to her child for improper prenatal medical care.\(^{92}\) In deciding that a pregnant woman could be held liable under these circumstances, the court established a standard for predicting liability: A mother must act as a "reasonable pregnant woman."\(^{93}\) Other courts have also appeared to follow *Grodin's* holding that a pregnant woman has a duty to protect the health of her fetus.\(^{94}\)

\(^{87}\) Manson & Marolt, *supra* note 9, at 164; *see also* Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988) (noting that a legal duty to guarantee the mental and physical health of another has never before been recognized by law).

\(^{88}\) *See, e.g.*, Lee v. Comer, 224 S.E.2d 721 (W. Va. 1976) (rejecting the parental immunity doctrine as a bar from a suit brought by a child against a parent).


\(^{90}\) *Id.*

\(^{91}\) *Id.* at 869.

\(^{92}\) *Id.* at 870.

\(^{93}\) *Id.* at 871.

\(^{94}\) *See, e.g.*, Curlender v. Bio-science Laboratories, 165 Cal. Rptr. 477 (Ct. App. 1980) (suggesting that a woman may be held liable to her child for not preventing its birth if the mother anticipates the probability of a birth defect); Bonte v. Bonte, 616 A.2d 464 (N.H. 1992) (holding that an infant born brain damaged has a cause of action against his or her mother for the mother's negligence that caused injury to the child when in utero). Courts have also been willing to force a pregnant woman to submit to a Caesarean section in order to increase her chance of delivering a healthy...
However, *Grodin* and its progeny have been criticized for heralding a snowball effect, in which a pregnant woman could be sued for all sorts of activities, which have been deemed harmful to a fetus. For example, a woman may be liable for not only such known harms caused by alcohol consumption and smoking during pregnancy, but she theoretically could be liable for excessive exercise or not eating properly. Even more extreme, passing on unhealthy genes could be viewed as tortious behavior. In fact, it is foreseeable that any act or omission by a pregnant woman that could impact fetal development could be subject to litigation.

At least one court has sharply criticized the idea of a woman being held liable for negligent infliction of prenatal injuries. The Illinois Supreme Court in *Stallman v. Youngquist* rejected a cause of action by or on behalf of the fetus against its mother for the negligent infliction of prenatal injuries. The court reasoned that allowing such a cause of action would cause a mother and child to be "legal adversaries from the moment of conception until birth." The court also pointed out the difficulty in ascertaining a judicially defined standard of conduct pregnant women would have to meet to satisfy state scrutiny. Lastly, baby. See *In re A.C.*, 533 A.2d 611 (D.C. 1987).


96 Gallagher, *supra* note 10, at 44.


98 *Id.* at 355.

99 *Id.*

100 *Id.* at 361.

101 *Id.* at 359.

102 *Stallman*, 531 N.E.2d at 360. The court explained:

If a legally cognizable duty on the part of mothers were recognized, then a judicially defined standard of conduct would have to be met. It must be asked, By what judicially defined standard would a mother have her every act or omission while pregnant subjected to state scrutiny? By what objective standard could a jury be guided in determining whether a pregnant woman did all that was necessary in order not to breach a legal duty to not interfere with her fetus’ separate and independent right to be born whole? In what way would
the court pointed out that holding a woman liable for the negligent infliction of prenatal injuries subjects all of her decisions during pregnancy to state scrutiny and infringes on both her right to privacy and her right to bodily autonomy.\textsuperscript{103} Other commentators have also criticized the imposition of tort liability on a woman for negligent prenatal injuries for frightening ambivalent women toward abortion and deterring her from keeping the child once it is born.\textsuperscript{104}

So far, West Virginia has not specifically recognized a cause of action for the negligent infliction of prenatal injuries. Nevertheless, with the West Virginia Supreme Court of Appeals's abolishment of the parental immunity doctrine\textsuperscript{105} and subsequent recognition of a nonviable fetus as a person,\textsuperscript{106} the possibility of such tort actions becomes more real. According to Kathryn Kolbert, Vice President of the Center for Reproductive Law and Policy, "[w]hen you characterize the fetus as a person you run the risk of... holding the woman herself liable."\textsuperscript{107} Although holding a mother civilly liable has not received widespread acceptance in state courts, holding a mother criminally liable for injuries to her fetus appears to be the new wave in protecting fetal rights.\textsuperscript{108}

IV. CRIMINAL LIABILITY

Although courts have historically given deference to the right of parental autonomy,\textsuperscript{109} the doctrine of parens patriae allows the state to set minimum
standards of conduct for the health and safety of the community.\textsuperscript{110} With the increasing recognition of fetal rights, states are becoming increasingly compelled to protect those rights by criminalizing certain behaviors of pregnant women. For instance, over two hundred women in more than thirty states have been prosecuted for conduct during pregnancy that has endangered the lives of their fetuses.\textsuperscript{111} These prosecutions appear to be a direct reaction by the states to the alarming number of infants born each year with signs of drug-related illnesses. In fact, approximately two hundred fifty thousand infants are born annually with drug-related afflictions.\textsuperscript{112}

In response to the drug problem, states across the country have attempted to prosecute women who use drugs or alcohol during pregnancy on various theories, including child endangerment,\textsuperscript{113} child abuse and neglect,\textsuperscript{114} and even

\begin{enumerate}
\item Judith Kahn, \textit{Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus—Is This a Mother's Crime?}, 53 \textit{Brook. L. Rev.} 807, 814 (1987).
\item \textit{Id.}
\item \textit{See} Reyes v. Superior Court, 141 Cal. Rptr. 912 (Ct. App. 1977) (holding that child endangerment statute does not refer to an unborn child or encompass a woman’s alleged drug use during pregnancy); People v. Morabito, 580 N.Y.S.2d 843 (N.Y. Geneva City Ct. 1992) (dismissing child endangerment charges against pregnant woman who allegedly smoked cocaine because courts may not extend the statute to include fetuses within the definition of “child,” and because public policy and due process considerations militate against such prosecutions); State v. Gray, 584 N.E.2d 710 (Ohio 1992) (finding that a mother cannot be convicted of child endangerment based solely on prenatal substance abuse because the statute does not extend to fetuses or prenatal conduct); Commonwealth v. Kemp, 643 A.2d 705 (Pa. Super. Ct. 1994) (affirming dismissal of charges of recklessly endangering the welfare of a child against a pregnant woman who allegedly ingested cocaine and finding that neither the “child” nor “person” included an unborn “fetus”).
\item \textit{See In re} Valerie D., 613 A.2d 748 (Conn. 1992) (holding that legislative history does not support application of civil child abuse statute where child was born with positive drug toxicology when pregnant woman had injected cocaine several hours prior to giving birth); State v. Carter, 602 So. 2d 995 (Fla. Dist. Ct. App. 1992) (affirming the trial court’s decision to dismiss charges of child abuse against pregnant woman who allegedly used illegal drugs); Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction, finding that to construe the child abuse statute to apply to a woman’s prenatal conduct would make the statute impermissibly vague and violate legislative intent); State v. Osmus, 276 P.2d 469 (Wyo. 1954) (holding that criminal neglect statute cannot be applied to a woman’s prenatal conduct).
\end{enumerate}
delivering drugs to a minor.\textsuperscript{115} The majority of state courts have declined to prosecute pregnant women on these theories, often holding that the statutes do not apply to fetuses.\textsuperscript{116}

However, at least two states have recently been successful in their prosecutions of drug-addicted pregnant women. The Supreme Court of South Carolina in \textit{Whitner v. State}\textsuperscript{117} upheld a woman's guilty plea to criminal child neglect for causing her baby to be born with cocaine metabolites in its system because of her crack cocaine use during her third trimester of her pregnancy.\textsuperscript{118} In doing so, the court in \textit{Whitner} found that "it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse."\textsuperscript{119}

A Wisconsin court has gone further, becoming the first state to charge a woman with attempted murder for allegedly trying to kill her fetus with alcohol.\textsuperscript{120} A Wisconsin judge recently found that evidence that Deborah Zimmerman gave birth to a baby girl, said to be limp, without color, and having a blood-alcohol content of 0.199, supported charges of attempted first-degree intentional homicide and first-degree reckless conduct against Zimmerman.\textsuperscript{121} Although Zimmerman's defense attorney has maintained that the charges do not

\textsuperscript{115} See Johnson v. State, 602 So. 2d 1288 (Fla. 1992) (reversing pregnant woman's convictions for "delivering drugs to a minor" and declining the state's invitation to walk down a path that the law, public policy, reason, and common sense reject); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992) (finding that statute proscribing delivery and distribution of cocaine did not encompass prenatal transmission); People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991) (holding that statute prohibiting delivery of cocaine to children was not intended to apply to pregnant drug abusers).

\textsuperscript{116} See supra notes 113-115.

\textsuperscript{117} No. 24468, 1996 WL 393164 (S.C. July 15, 1996).

\textsuperscript{118} Id. at *4.

\textsuperscript{119} Id. at *3. The court also declared that there was "no question here that Whitner endangered the life, health, and comfort of her child," because she ingested crack cocaine during her third trimester of pregnancy. Id. at *4.

\textsuperscript{120} 'Deadly' Alcohol Charges Allowed, CHI. TRIB., Sept. 19, 1996, at 3.

\textsuperscript{121} Id. Zimmerman's own blood-alcohol level was 0.30%. Judge Dennis Barry concluded that "[t]he instrumentality . . . was not the shooting of a bullet or the plunging of a knife. Instead, it was the massive consumption of a potentially deadly quantity of alcohol." Id. (alteration in the original).
apply because a fetus is not legally recognized as a human being, it remains to be seen whether this argument will ultimately prevent Zimmerman from being convicted of the attempted murder of her unborn child.

Cases like Whitmer and Zimmerman invoke strong arguments both for and against the prosecution of women for using drugs and alcohol during pregnancy. Those who argue that women should be prosecuted for behavior during pregnancy that endangers their fetuses maintain that states have a compelling interest in protecting the potential life of a fetus. Furthermore, a state also has an interest in protecting a newborn's right to be born healthy and free from drug-induced abnormalities. In addition, the state has an interest in protecting the health of the mother and state intervention helps steer a drug-abusing woman toward needed drug treatment. Finally, prosecution of these crimes specifically and generally deters a woman from using drugs during their pregnancy.

John Robertson, a leading fetal rights advocate, has proposed his own theory of protecting fetal rights. Robertson contends that a fetus should be protected under a theory of "contingent legal personhood." Such a theory would subject women to criminal and civil liability for all damaging acts and omissions before the birth of a child. Furthermore, declaring a fetus a "contingent legal person" would license governmental imposition or restraints on a woman's medical decisions and lifestyle choices during pregnancy, even before her fetus was viable, if there were clear and convincing evidence of a woman's intent to carry a child to term. These arguments for prosecution clearly support

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122 Id.

123 Wright, supra note 43, at 1301.

124 Id.

125 Id. at 1302.

126 Romney, supra note 95, at 328.

127 Id.

128 Gallagher, supra note 10, at 11.

129 Id. (quoting John Robertson, The Right to Procreate and In Utero Fetal Therapy, 3 J. LEGAL MED. 333, 352 (1982)).

130 Id.

131 Id.
the idea that protecting the health of the potential life, the health of the mother, and general social welfare outweigh a pregnant woman’s right to engage in dangerous behavior during pregnancy.\textsuperscript{132}

On the other hand, many compelling arguments can be made against prosecuting women for behavior they engage in during pregnancy. Those against prosecution argue that criminalizing maternal behavior is one of the most intrusive means of protecting potential life and the means least likely to achieve its purported goals.\textsuperscript{133} For example, prosecuting mothers for conduct they engage in during their pregnancy flies in the face of a woman’s constitutionally protected right to privacy, bodily autonomy, and self-determination regarding decisions relating to her child and her own body.\textsuperscript{134} Furthermore, the state’s interest in preventing prenatal harm of the fetus is not compelling enough to overcome a woman’s privacy rights because the Fourteenth Amendment does not extend protection to unborn children under \textit{Roe v. Wade}.\textsuperscript{135}

Not only does criminal prosecution of pregnant woman violate her right to privacy, but also the expectant mother’s fear of criminal sanctions could deter her from seeking prenatal care or substance abuse treatment.\textsuperscript{136} Additionally, physicians and other health care providers could be required to report a woman to a state authority for acts that may endanger her fetus during pregnancy.\textsuperscript{137} Fear of being reported to the police by health care providers will discourage her from communicating honestly about her health and drug addiction to her health care provider.\textsuperscript{138} This could destroy a woman’s trust in her physician and cause

\textsuperscript{132} Wright, \textit{supra} note 43, at 1306.

\textsuperscript{133} Manson & Marolt, \textit{supra} note 9, at 176.

\textsuperscript{134} Wright, \textit{supra} note 43, at 1293. Lynn Paltrow, staff attorney for the ACLU’s Reproductive Freedom Project, also argues that any legal duty imposed on a pregnant woman who uses a harmful substance during her pregnancy is a violation of her constitutional right to privacy. \textit{Id.} at 1289.

\textsuperscript{135} \textit{Id.} at 1302.

\textsuperscript{136} Manson & Marolt, \textit{supra} note 9, at 172-73.

\textsuperscript{137} \textit{Id.} at 171. Although physicians and health care providers must report cases of suspected child abuse and neglect under most child abuse and neglect statutes, usually such statutes do not regard the fetus as a child and afford no protection to the unborn. \textit{See} Mary Beth Murphy, \textit{Protecting Fetus at What Cost?: Medical, Legal Issues Raised by Detention, Milwaukee J. Sentinel}, Sept. 18, 1995, at 1. However, if a state declared a fetus a child under its child abuse and neglect statute, then health care providers would be required to report on incidents of prenatal child abuse as well.

her to conceal vital facts about both her health and the health of her fetus and turn a doctor’s office into an “interrogation room.”

However, prosecutions of pregnant women may not stop at just drug or alcohol abuse. When society chooses to punish pregnant women for their drug use, it opens the door for additional restrictions on the women’s behavior. According to Lynn Paltrow of the Center for Reproductive Law and Policy, “[i]f you could detain women to protect the fetus then virtually every pregnant woman could be detained because so much of daily living poses a risk to the developing fetus.”

Women could be subject to prosecution for any behavior they engage in during pregnancy that may harm their fetuses, including failing to eat properly, using tobacco, taking prescription drugs, or exposing their fetuses to hazards in the workplace.

Furthermore, legal enforcement of fetal rights would require a system of state surveillance oppressive to all women of child bearing age. Ensuring that women do not engage in any harmful behavior during pregnancy would create a virtual pregnancy police in direct violation of a woman’s constitutional right to privacy. Theoretically, women who suffer miscarriages, stillbirths, or other complications during pregnancy could be subject to prosecution and required to defend their behavior during pregnancy.

West Virginia has, thus far, not criminalized the behavior of a woman during pregnancy that may adversely affect her fetus. However, after Farley, a nonviable fetus is defined as a person for the purpose of wrongful death. This expansion of fetal rights by the Supreme Court of Appeals of West Virginia could serve as a springboard for affording the nonviable and viable fetus protection under the West Virginia child abuse and neglect statutes and possibly even

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139 Manson & Marolt, supra note 9, at 172.

140 Wright, supra note 43, at 1318.

141 Murphy, supra note 137, at 1.

142 See Romney, supra note 95, at 343.


144 See Romney, supra note 95, at 344.

under the homicide statutes. As Justice Toal reasoned in Whitner v. State, “it would be absurd to recognize the viable fetus as a person for purposes of... wrongful death statutes but not for purposes of statutes proscribing child abuse." Thus, a strong argument can be made that under West Virginia law a nonviable fetus should also be recognized as a person under criminal statutes.

V. INFRINGEMENT ON A WOMAN’S RIGHT TO HAVE AN ABORTION

Currently, a woman still has the constitutional right to have an abortion, at least up until the point of viability. However, there is an “inherent conflict” in granting a cause of action on behalf of a nonviable fetus while giving a woman a constitutional right to abort that same nonviable fetus. As Kathryn Kolbert, Vice-President of the Center for Reproductive Law and Policy notes, “[r]ecognition of the [nonviable] fetus as an individual person is a back-door way to undermine the rights guaranteed by Roe v. Wade.”

At least some state courts agree with Ms. Kolbert’s analysis and have refused to extend nonviable fetuses person status under their wrongful death statutes. For example, the Michigan Court of Appeals in Toth v. Goree recognized the inconsistency in abortion rights and nonviable fetal rights and refused to afford a nonviable fetus protection under the Michigan wrongful death statute. Justice Danhof, speaking for the majority, reasoned:

If the mother can intentionally terminate the pregnancy at three months, without regard to the rights of the fetus, it becomes increasingly difficult to justify holding a third person liable to the fetus for unknowingly and unintentionally, but negligently,

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149 See Kandel v. White, 663 A.2d 1264, 1268 (Md. 1995).

150 McMorris, supra note 107, at B1 (alteration in original).


152 Id. at 303-04.
causing the pregnancy to end at that same stage. There would be an inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act.\(^{153}\)

The New Hampshire Supreme Court in *Wallace v. Wallace*\(^{154}\) also agreed with the court’s reasoning in *Toth*, and held that a wrongful death action could not be maintained on behalf of a nonviable fetus.\(^{155}\) The court, in passing, remarked that "it would be incongruous for a mother to have a federal constitutional right to deliberately destroy a nonviable fetus and at the same time for a third person to be subject to liability to the fetus for his unintended but merely negligent acts."\(^{156}\)

West Virginia has now done what the courts in *Toth* and *Wallace* refused to do. The Supreme Court of Appeals of West Virginia has declared that a nonviable fetus is a person under the wrongful death statute.\(^{157}\) In essence, the court in *Farley* has said that a nonviable fetus may be recognized as a person and be afforded a legal cause of action under West Virginia law, but that same nonviable fetus may be legally and constitutionally terminated at any time by the woman who carries it.\(^{158}\) Such a result is incongruous and undermines the viability concept in both *Roe* and *Casey*.

Furthermore, with the increased willingness of the United States Supreme Court to protect fetal rights,\(^{159}\) there may be more room for a state, such as West Virginia, that recognizes nonviable fetal right to argue that the state has a compelling interest in protecting the fetus at any stage of a woman’s pregnancy.\(^{160}\) Such a decision would virtually give full constitutional protections to the unborn,

\(^{153}\) *Id.* at 303-04.

\(^{154}\) 421 A.2d 134 (N.H. 1980).

\(^{155}\) *Id.* at 136.

\(^{156}\) *Id.* at 137 (citation omitted).


\(^{158}\) *Id.* at 534-35.

\(^{159}\) See *supra* part II.C.

\(^{160}\) See *Wright*, *supra* note 43, at 1303.
both viable and nonviable. In such a scenario, it would be very difficult, if not impossible, to justify granting a woman a right to terminate a life given full rights under the Constitution.

VI. CONCLUSION

The concept of viability is crucial to the delicate structure of Roe v. Wade and, consequently, in affording a woman a constitutional right to have an abortion. The line of viability has been consistently pushed back and undermined by the Supreme Court since Roe, and any further recognition of fetal rights could erode Roe even further.

West Virginia’s granting of “person” status to a nonviable fetus for the purpose of wrongful death gives rise to many consequences and ramifications that may serve to upset and undermine the Roe balance. There simply are no bright lines or stopping points once nonviable fetuses are granted rights under the law. The granting of these rights pave the way for limitless tort liability, including suits by fathers and by children themselves, against the pregnant woman. Furthermore, a woman could be subject to criminal prosecution for her behavior during pregnancy, which would entail intrusive and substantial state interference with her right to privacy. Ultimately, the recognition of nonviable fetal rights could lead to a state justifiably infringing on a woman’s constitutionally protected right to have an abortion. Even if a state could not legally ban abortion, the abundance of civil suits and criminal liability which will likely arise from the conferring of these rights would chill a woman’s freedom of choice and place an undue burden upon her decision to have an abortion. Therefore, granting nonviable fetuses rights of “personhood” is an overwhelming if not dangerous proposition: Once the floodgates are open, true reproductive freedom for women may become a thing of the past.

Stacie L. Lude

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161 Id.