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# Holistic Pregnancy: Rejecting the Theory of the Adversarial Mother

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# Holistic Pregnancy: Rejecting the Theory of the Adversarial Mother

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## INTRODUCTION

Like generations of mothers before her, Laura Pemberton planned to welcome her baby into the world in the comfort of her family home. She desired a natural, vaginal birth. The State disagreed. Police entered her home, strapped her legs together and forcibly transported her to the hospital. Authorized by court order, doctors cut her open and removed her baby from her womb, without her consent.[1]

Angela Carder had an inoperable, terminal, cancerous tumor in her lung. She was twenty-five weeks pregnant and eagerly awaiting the birth of her first child when the tumor was found. Wanting to deliver a healthy baby and live long enough to hold him in her arms, she consented to undergo a cesarean section once her pregnancy reached twenty-eight weeks. Angela's health rapidly deteriorated and at twenty-six weeks, without her consent, but armed with a court order, doctors cut her open and removed her baby from her womb, ending the lives of both baby and mother.[2]

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*Assistant Professor of Law, Duquesne University School of Law. This Article represents conversations I have been having in my head since I first experienced pregnancy in 2002. It also incorporates the thoughts and feedback I received from my supportive colleagues: Martha Jordan, Bruce Ledewitz, Jan Levine, Jane Moriarty, Wesley Oliver, Nancy Perkins, Laurie Serafino, and Ann Schiavone. I thank Dr. J. Lee Nelson and Professor Jeanne Flavin for their helpful critique. I am grateful for the opportunity to present earlier versions of this article at the Three School Colloquium at the University of Pittsburgh School of Law and the Feminist Law Conferences organized by Marina Angel at Temple University Beasley School of Law and the University of Pennsylvania School of Law. I thank the following students for their valuable research assistance: Alexandra Bott, Staci Fonner, Judy Hale Reed, and Cara Pinto. And, I thank the staff of the *Hastings Women's Law Journal*, especially Sonya Laddon Rahders, for their suggestions and edits. Finally, I am thankful beyond words to my grandmother, mother, sister, and children for helping me to understand the nature of pregnancy and the mother-child relationship.

1. Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247 (N.D. Fla. 1999); Lynne M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38(2) J. HEALTH POLITICS, POL'Y & L. 299, 306–07 (2013); Sarah D. Murphy, *Labor Pains in Feminist Jurisprudence: An Examination of Birthing Rights*, note, 8 AVE MARIA L. REV. 443, 443–44 (2010).

2. *In re* A.C., 573 A.2d 1235 (D.C. 1990).

Bei Bei Shuai attempted to commit suicide after her boyfriend, a married man who was the father of the child she was expecting, left her. She survived, but her baby did not. Thereafter, she was charged with murder.[3]

Rennie Gibbs, a pregnant fifteen-year-old girl ingested cocaine during her pregnancy. She delivered a premature stillborn with the umbilical cord wrapped around its neck. The teen was charged with "depraved heart murder."[4]

Hope Ankrom's healthy newborn tested positive for cocaine. Despite her denial of drug use and the lack of harm to her baby, Hope was arrested. Police separated her from all three of her children, including her breastfeeding newborn. She was convicted of child endangerment and sentenced to three years in prison.[5]

These stories exemplify the law's hostile relationship with pregnant women. Rather than presuming the pregnant woman will act in the best interests of her pregnancy and of fetal life, the law assumes that she is hostile to her unborn child and identifies the State as better suited to protect pregnancy and fetal life. The law responds to pregnant women as if they are threats to their babies, instead of respecting them as expectant mothers. As a result, pregnant women are increasingly targeted by the State for aggressive surveillance, regulation, separation, and incarceration. Outside of the abortion context, the assumption that a pregnant woman is hostile to her fetus is misplaced and leads to disastrous results for women, children, and families. Pregnant women eagerly anticipating the births of their children like Laura Pemberton and Angela Carder are brutally assaulted by the State in the name of fetal protection. Mothers like Hope Ankrom are taken from their children for the sake of punishing misconduct during pregnancy. Young women like Rennie Gibbs and Bei Bei Shuai are re-victimized by the State after suffering the devastating loss of their babies.

In addition to affecting those directly involved, this intervention also fosters an environment in which pregnant women fear the State. The State's interaction with pregnant women, outside of the abortion context, communicates that women's autonomy, bodily integrity, parental rights, and physical freedom are at risk during pregnancy. Birthing plans are subject to veto by the State. Prenatal indiscretions are subject to harsh judgment. Misconduct stemming from mental illness and drug addiction is more likely to lead to criminal charges and lengthy incarcerations. As Lynn Paltrow, Jeanne Flavin, and the National Advocates for Pregnant Women have documented, women, aware of the trend toward increased state involvement, consider that their rights will be constrained if they become pregnant.[6] Thus, the impact of the State's relationship with

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

4. Order 162566, Gibbs v. State, 2010-IA-00819-SCT, (Miss. Oct. 27, 2011).

5. *Ex parte* Ankrom v. State, 152 So. 3d 397 (Ala. 2013); *see* Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES, Apr. 15, 2012, http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?pagewanted=all&_r=0.

6. *See* Lynn M. Paltrow and Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public*

pregnancy is not limited to those women whose individual rights have been affected. State action against any pregnant woman serves as a warning to all women who are pregnant or who may become pregnant.[7]

This invasive state action is a consequence of extending the legal understanding of pregnancy as developed in the abortion cases, which has various flaws, to all pregnancies.[8] The law first conceptualized pregnancy as adversarial in response to women's attempts to terminate pregnancy. In the abortion context, understanding the relationship between mother and fetus as adversarial is arguably essential to protection of fetal life. By identifying the mother as a threat to the fetus, State intervention is justified. Therefore, within the abortion context, it is easy to understand why pregnancy was defined as inherently adversarial. The great tragedy is that this adversarial view is becoming the dominant legal paradigm for all pregnancies. Wanted and unwanted pregnancies alike are being treated as threatened pregnancies. Pregnant women intending to carry their pregnancies to term and love a new child are viewed with suspicion for the harm they *could* inflict, instead of with respect and appreciation for the care they *will* provide. This article critiques this perspective. It argues that the adversarial conceptualization of pregnancy is inapplicable outside of the abortion context. In other words, wanted pregnancies[9] should not be conceptualized as adversarial and State action should not be justified upon that basis.

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*Health*, 38(2) J. HEALTH POLITICS, POL'Y & L. 299, 330–31 (2013) (discussing examples of pregnant women who avoid prenatal care out of fear of arrest, or who would have avoided prenatal care or lied to their healthcare providers had they known there was a risk of arrest).

7. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 51 (1995) ("[R]egardless of the differences among us, all women must care about social and legal constructions of motherhood. Although we may make individual choices not to become mothers, social construction and its legal ramifications operate independent of individual choice. As is demonstrated in everyday existence, as well as in legal doctrines and political language, women *will* be treated as mothers (or potential mothers) because 'Woman' as a cultural and legal category inevitably encompasses and incorporates socially constructed notions of motherhood in its definition.").

8. In this article I do not critique the legal conceptualization of pregnancy in the abortion context because this article is not a critique of the adversarial conceptualization of pregnancy in the context of abortion. Rather, this article is about the law's application of the adversarial view of pregnancy to pregnancies that are not being terminated, that is, wanted pregnancies. Therefore, most of the discussions of pregnant women in this article refer to pregnant women who intend to carry their pregnancies to term.

9. In this article, my discussion of "wanted pregnancies" is meant to refer to all pregnancies wherein the pregnant woman intends to carry the pregnancy to term and give birth to a child. Calling all such pregnancies "wanted" may seem misleading because it does not distinguish between unintended and intended pregnancies. Also, it does not distinguish between pregnancies that are intended to birth a baby that the mother will keep as opposed to a baby the mother will give up for adoption or through a surrogacy arrangement. Nevertheless, I use the phrase "wanted pregnancies" to prefer to all pregnancies intended to be carried to term because there does not seem to be a better phrase to describe such pregnancies. Under this description, the only pregnancies that are not "wanted pregnancies" are those that that the pregnant woman plans to terminate.

A better baseline view of pregnancy will reflect the nature of pregnancy by incorporating the physiological, existential, and social aspects of pregnancy and recognizing its simultaneous duality and oneness. It will recognize that pregnancy is inherently nonadversarial and in all cases of wanted pregnancies, the woman should be presumed to act in the best interests of herself, her pregnancy, and her fetus.

The pregnancy paradigm that I propose is rooted in a holistic view of pregnancy. A holistic view reflects scientific knowledge and maternal experience to incorporate all aspects of pregnancy. It conceptualizes pregnancy by building upon scientific understandings of the fetal-maternal relationship and maternal accounts of the experience of pregnancy. At its core, it seeks to replace the law's patriarchal construction of pregnancy as inherently adversarial, with a view of pregnancy that is consistent with the true nature of the mother-child dyad. This article argues that the view of pregnancy as adversarial is generally inapplicable to wanted pregnancies. Moreover, this article asserts that the adoption of a conceptualization of pregnancy consistent with scientific knowledge and maternal experience will lead to greater protection of both maternal and fetal interests.

This article consists of four parts. In Part I, I discuss the legal evolution of the adversarial conceptualization of pregnancy. Tracking cases in tort and constitutional law, I demonstrate how the law's adversarial understanding of pregnancy developed. In Part II, I use interdisciplinary motherhood research to refute the adversarial conceptualization of pregnancy, and to establish that pregnancy is defined by physiological, existential, and social duality and oneness. I present my holistic view of pregnancy and situate it within the broader feminist legal discourse. In Part III, I demonstrate the danger of applying the adversarial conceptualization of pregnancy in the context of wanted pregnancies. I discuss cases that exemplify application of the adversarial view to pregnancies that are inherently *un*-adversarial, and the unjust consequences that result.

## I. EVOLUTION OF THE LEGAL CONCEPTUALIZATION OF PREGNANCY

Modern pregnancy jurisprudence can be traced back to early tort cases. The courts that first encountered questions concerning the nature of pregnancy conceptualized it as wholly situated within the woman.[10] I call

10. *See infra* section II.A., p. 229; Notably, the earliest cases addressing the rights of a fetus involved whether a child could inherit property if born after the death of a testator. *See* William J. Maledon, Note, *Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME L. REV. 349, 352 (1971) (citing Biggs v. McCarty, 86 Ind. 352 (Ind. 1882) (determining that a child in utero at the time of the testator's death had an equal right and title to property with his mother where the testator devised land to the mother "and her children"); Hall v. Hancock, 32 Mass. 255 (Mass. 1834) (finding that a grandchild could share in a bequest under his grandfather's will even though he was born nine months after his grandfather's death); Aubuchon v. Bender, 44 Mo. 560 (Mo. 1869)

this view of pregnancy the *connected* view because it focuses on the maternal-fetal connection and considers the fetus to be part of the mother. By the 1950s, courts were rejecting the connected view of pregnancy in favor of a conceptualization of pregnancy as the embodiment of a woman and an independently existing fetus.[11] I call this alternative view of pregnancy the *separate existence* view, because it is based on the idea that the fetus and the pregnant woman are separable and distinct. The separate existence view of pregnancy eventually inspired the judicial conceptualization of pregnancy in the abortion cases.[12] In *Roe v. Wade*, the separate existence understanding of pregnancy further evolved into an understanding of pregnancy as the embodiment of two separable, distinct beings with *adversarial* interests. I call this view the *adversarial view*. According to the adversarial view, state intervention is needed to protect fetal interests because the pregnant woman is in conflict with the fetus. This adversarial view of pregnancy is quickly becoming the dominant conceptualization of pregnancy in the law.[13]

Today, consistent with the adversarial view of pregnancy, pregnant women's healthcare decisions are often scrutinized and overruled by the State, in the name of protecting potential life. When pregnant women engage in undesirable conduct, criminal and dependency courts apply the adversarial view to deny them access to their children and, in some cases,

(concluding that a child could inherit all types of estates and remainders in real property from his father even though he was born after his father's death).

11. *See infra* section II.B., p. 231.

12. *See infra* section II.C., p. 232.

13. This article deals with the legal conceptualization of pregnancy in medical intervention, criminal, and dependency law. I argue that in these areas of law, the adversarial view of pregnancy is quickly becoming the dominant legal conceptualization. Other areas of law that consider pregnancy include family, surrogacy, immigration, and employment. Though aspects of the adversarial conceptualization of pregnancy are present among pregnancy conceptualizations in these other areas of law, they are not exclusively guided by an adversarial view. In other articles I will discuss how the adversarial conceptualization of pregnancy appears in family, surrogacy, immigration, and employment law. The recently decided Supreme Court case *Young v. UPS, Inc.* may significantly shift the conceptualization of pregnancy in employment law, with the court's holding that a pregnant employee may use non-pregnant employees as comparators to show improper denial of accommodations. 575 U.S. ___ (2015). In *Young*, the Court considered how the law should treat pregnant workers. It was argued that the accommodations provided under the Americans with Disabilities Act to workers with disabilities who are similar to pregnant workers in their ability or inability to perform certain tasks ought to serve as a baseline for treating pregnant workers under the Pregnancy Discrimination Act. Brief of Law for Professors and Women's Rights Organizations as Amici Curiae Supporting Petitioner at 28, Young v. United Parcel Serv., Inc., No. 12-1226, (U.S. Sept. 10, 2014), *available at* http://www.scribd.com/doc/239318619/Young-v-UPS-Supreme-Court-Brief. Additionally, legal scholars argued that the Americans with Disabilities Amendments Act of 2008 ("ADAAA")'s expansion of the types of disabilities that require reasonable accommodations, including those that limit a person's ability to stand, lift, walk or bend, should apply to pregnant workers under the PDA who have similar abilities or inabilities to work. *Id*. at 29–30.

to incarcerate them. In this section, I trace, analyze, and discuss the evolution of the legal conceptualization of pregnancy and explain how the courts came to adopt an adversarial understanding of pregnancy.

### A. THE CONNECTED VIEW

In the late 1800s, State courts first considered the nature of pregnancy in cases concerning *in utero*[14] injuries to the fetus. In *Dietrich v. Inhabitants of Northampton*, Justice Oliver Wendell Holmes, Jr., writing for the Supreme Judicial Court of Massachusetts, held a suit could not be maintained by the deceased child of a woman who was injured when she was four or five months pregnant and such injury "brought on a miscarriage, and the child, although not directly injured, . . . was too little advanced in [fetal] life to survive its premature birth."[15] Though the infant died ten to fifteen minutes later, there was testimony that the child did live following delivery.[16] The issue addressed by the court was "whether an infant dying before it was able to live separated from its mother could be said to have become a person recognized by the law as capable of having a *locus standi*[17] in court, or of being represented there by an administrator."[18] In determining that no civil suit could be brought by the child, Justice Holmes reasoned that "the unborn child was a *part of the mother* at the time of the injury," and therefore, was not a person within the meaning of the law such that suit could be brought on his behalf.[19] The court's conclusion on the nature of pregnancy and the mother-child relationship, that the child is part of the mother during pregnancy, was a controversial proposition that would eventually be abandoned.[20] However, for decades it remained the prevailing common law view of pregnancy and the maternal-fetal relationship.[21] Thus, in the early 1900s the legal conceptualization of pregnancy reflected a view of the mother and fetus as inherently and inseparably connected.

14. *In utero* is defined as "In the womb; during gestation or before birth." BLACK'S LAW DICTIONARY 951 (10th ed. 2014).

15. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 14–15 (Mass. 1884) (*abrogated by* Keyes v. Construction Service, Inc., 165 N.E.2d 912 (Mass. 1960)).

16. *Id*.

17. *Locus standi* is defined as "The right to bring an action or to be heard in a given forum; STANDING." BLACK'S LAW DICTIONARY 1084 (10th ed. 2014).

18. *Dietrich*, 138 Mass. at 16.

19. *Id*. at 17 (emphasis added).

20. *See infra* section I.B., p. 214.

21. Allaire v. St. Luke's Hosp., 56 N.E. 638 (Ill. 1900); Prescott v. Robinson, 74 N.H. 460 (1908) (allowing mother to recover damages related to her suffering as a result of negligent infliction of prenatal injuries, but disallowing mother to recover damages for child's injuries after birth); Nugent v. Brooklyn Heights R.R. Co., 139 N.Y.S. 367 (N.Y. App. Div. 1913); Gorman v. Budlong, 55 L.R.A. 118 (1901) (denying recovery for prenatal injuries); Lipps v. Milwaukee Electric Ry. & Light Co., 159 N.W. 916 (Wis. 1916).

In 1900, an Illinois case followed the connected view and barred recovery by the infant for injuries it sustained due to the hospital's negligence prior to the child's birth.[22] There, the pregnant mother sustained significant injuries when the elevator carrying her and her unborn child malfunctioned.[23] In reasoning that the infant could not maintain an action against the hospital for injuries sustained before his birth, the court noted that a contrary holding could allow an infant to "maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it," a seemingly absurd result.[24]

Though the court followed *Dietrich*'s reasoning, barring recovery by the infant, Justice Carroll Boggs's dissent "vigorously and persuasively challenged" the "proposition that an unborn child was part of his mother."[25] Boggs argued for recognition of the life of a fetus as "a life distinct from that of its mother when it reaches the prenatal state of viability at which it could survive if then separated from her."[26] Though Boggs's separate existence view would eventually prevail, for many years courts continued to apply the connected view that a child is not a person, but is a part of his mother, until birth.[27]

In 1928, an Alabama Court applying the connected view explained,

> [t]his court has established a general line of demarcation between the civil rights of the mother and child to be born. It is concurrent with separate existence of the mother and child by the birth; and parental injury before the birth is no basis for action in damages by the child or its personal representative. The mother of an unborn child may recover damages to her and it, in *ventre sa mere*, "if such injury and damage is not too remote."[28]

Thus, a fetus injured in the womb could not bring suit for damages. Recovery for injury was only available to the mother, so long as the injuries sustained by the fetus were not too remote to her. The separate existence of mother and child was only recognized after the child was born.

22. *Allaire*, 56 N.E. at 638.
23. *Id*.
24. *Id.* at 640.
25. Baldwin v. Butcher, 184 S.E.2d 428, 430 (W. Va. 1971) (internal citations omitted).
26. *Id.* (internal citations omitted).
27. *See* Israel Lerner, *Torts – Right of Parent to Recover for Prenatal Injuries Causing Death of Child – Verkennes v. Corniea, 38 N.W.2d 838 (Minn. 1949)*, 28 TEX. L. REV. 986, 987 (1950) (discussing the evolution of the law regarding whether a child could recover for prenatal injuries).
28. Birmingham Baptist Hosp. v. Branton, 118 So. 741, 743 (1928) (emphasis added). *En ventre sa mere* "refers to an unborn child, [usually] in the context of a discussion of that child's rights. If the child is *en ventre sa mere* at the time of a decedent's death and is subsequently born alive, the child is treated as having been in existence at the time of the decedent's death for purposes of inheritance." BLACK'S LAW DICTIONARY 651 (10th ed. 2014).

B. THE SEPARATE EXISTENCE VIEW

In 1940, the Supreme Court of Pennsylvania noted that some courts were departing from the connected view and considering the adoption of the separate existence view of pregnancy:

> [a]t early common law the mother and child until birth were considered as one, the child was not deemed to have an existence independent of the parent. As a result, an injury to an unborn child was looked upon as an injury to the mother. It is true that the unity of mother and child has been relaxed in modern times and that today for some beneficial purposes a child *en ventre sa mere* is considered as born.[29]

Importantly, in contrasting the connected and separate existence views the Pennsylvania court explicated that under the connected view, injury to the fetus was regarded as an injury to the pregnant woman. This perspective, that the proper locus of fetal injury is the injury to the pregnant woman, was lost when the courts adopted the separate existence view of pregnancy.[30]

By 1955, the connected view had lost considerable support.[31] That year, in a carefully considered opinion, the Oregon Supreme Court rejected the connected view.[32] In its place, it embraced the modern view that a child could recover for damages sustained post-viability.[33] Just two years earlier, a New York court had adopted a more extreme version of the separate existence view when it declared that the legal entity of the child began at conception and, therefore, a child born alive was entitled to recovery for injuries sustained anytime during pregnancy.[34] The trend to recognize the

29. Berlin v. J. C. Penney Co., 16 A.2d 28, 28 (Pa. 1940), *abrogated by* Sinkler v. Kneale, 164 A.2d 93 (Pa. 1960) (emphasis added).

30. *See* Gregory J. Roden, *Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence*, 16 ST. THOMAS L. REV. 207, 223 (2003) (noting that during the early twentieth century, state courts began granting a right of action to an unborn child individually as a separate legal entity distinct from its mother based upon the will of the people as expressed by their legislature).

31. Mallison v. Pomeroy, 291 P.2d 225 (Or. 1955). New York rejected Justice Holmes' view and adopted the separate existence view in 1951, in *Woods v. Lancet*, 102 N.E.2d 691 (N.Y. 1951). *See also* Vernennes v. Corniea, 38 N.W.2d 838 (Minn. 1949) (holding that father could bring suit against physician and hospital responsible for the death of his wife and unborn son during wife's labor because child was a person separate from his mother at the time of the prenatal injury); Lerner, *supra* note 27 (tracing civil actions at common law to recover for wrongful death).

32. *Mallison*, 291 P.2d at 225.

33. *Id.*

34. Kelly v. Gregory, 125 N.Y.S.2d 696 (N.Y. App. Div. 1953) (the first case to allow recovery by an infant for prenatal injuries incurred during the mother's ninth month of pregnancy wherein the child was born alive, but died soon after as a result of the injury). *See also* Cooper v. Blanck, 39 So.2d 352 (La. Ct. App. 1923); Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful*

separate existence view was characterized as "simply" bringing the law "into accord with the demand of natural justice which requires recognition of the legal right of every human being to begin life unimpaired by physical or mental defects resulting from the negligence of another."[35]

Thus, tort law developed two contrasting conceptualizations of pregnancy. According to the connected view, pregnancy was framed as a connected mother and fetus, inseparable at law until birth.[36] The fetus was not recognized as independently existing. As a result, the fetus could not recover for its prenatal injuries. The mother could recover damages for fetal injuries, to the limited extent that the law would recognize that she sustained damages.[37] By contrast, the separate existence view conceptualized post-viability pregnancy as the embodiment of two distinct, separable beings, each with an independent legal existence.[38] The fetus was entitled to recover damages for injuries sustained prenatally.[39] Importantly, the shift from the connected view to the separate existence view was driven, at least in part, by pragmatic concerns. Courts reasoned that adoption of the separate existence view was the only way to right the wrong caused by tortious injury to a fetus.[40] In other words, courts determined that the only way they could provide a remedy for prenatal injury was to recognize the fetus's separate existence while it was trapped

*Death, and Wrongful Birth: Time for a New Framework*, 22 J. FAM. L. 677, 680 (1983–84); Lerner, *supra* note 27, at 987 (noting the rule "that a surviving child should be granted a right of action for injuries sustained at any time during the gestation period regardless of viability has found little support among the authorities"). For a discussion of the history of abortion regulation *see* Tracy A. Thomas, *Misappropriating Women's History in the Law and the Politics of Abortion*, 36 SEATTLE U. L. REV. 1, 25–26 (2012) ("The public shift from acceptance to criminalization of early term abortion played out in . . . New York. Beginning in 1828, the revisers of the New York code expanded the offense of abortion to include abortions prior to quickening and elevated post-quickening abortion from a misdemeanor to a felony with an exception for therapeutic abortions necessary for the health of the mother. One legal scholar concluded, based on the revisers' notes, that the law was primarily concerned with protecting women from surgical malpractice and death from abortion procedures during a time before the invention of antiseptic. In 1845, the New York legislature enacted a comprehensive law to criminalize abortion through medicines or procedures and to punish the provider of abortions for manslaughter in the second degree. For the first time, this act brought the woman herself under the criminal sanctions of the statute rather than punishing only the doctor, midwife, or pharmacist."). *See also* JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 253–88 (1994) (for a history of the criminalization of contraception and abortion).

35. Endresz v. Friedberg, 248 N.E.2d 901, 903 (N.Y. 1969); *see also In re* Unborn Child, 683 N.Y.S.2d 366, 369 (N.Y. Fam. Ct. 1998); Gloria C. v. William C., 476 N.Y.S.2d 991 (N.Y. Fam. Ct. 1984).

36. *Dietrich*, 138 Mass. 17.

37. *Id.*; Birmingham Baptist Hosp. v. Branton, 118 So. 741, 743 (Ala. 1928); Berlin v. J. C. Penney Co., 16 A.2d 28, 28 (Pa. 1940), *abrogated by* Sinkler v. Kneale, 164 A.2d 93 (Pa. 1960).

38. Allaire v. St. Luke's Hosp., 56 N.E. 638 (Ill. 1900).

39. *Kelly*, 125 N.Y.S.2d at 696; Mallison v. Pomeroy, 291 P.2d 225 (Or. 1955).

40. *In re Unborn Child*, 683 N.Y.S.2d at 369.

in its mother's womb, and allow it to bring suit, post-birth, on its own behalf. Thus, the judicial embrace of the separate existence view of the fetus was pragmatically, not theoretically, driven.[41]

Adoption of the separate existence view was not based on determinations of the nature of pregnancy, the pregnant woman, the fetus, or the mother-child relationship. Though the law grappled with the issue of viability, its analysis failed to theorize the maternal-fetal relationship and the nature of pregnancy. Instead, jurists determined that justice required allowing a child to recover for prenatal injuries, and they reverse-analyzed that the only way to allow such a recovery was to hold—regardless of the truth of the matter[42]—that a fetus had a separate existence. The fact that no court recognized that justice could be served by allowing the mother,[43] as the literal embodiment and logical representative of the child, to bring suit to recover for the loss of the child or the injury sustained by the child is indicative of the law's failure to recognize pregnancy as a unique and unparalleled relational reality exhibiting unprecedented connectedness.[44]

### C. THE ADVERSARIAL VIEW

Though family privacy was constitutionally recognized in the early 1900s,[45] the United States Supreme Court did not analyze the nature of pregnancy until its 1973 *Roe v. Wade* decision.[46] Through *Roe*, pregnancy was conceptualized as the embodiment of two distinct, separable beings, with adversarial interests. To ensure protection of both maternal and fetal interests, the Court identified four relevant legal actors in each pregnancy: the woman, the fetus, the physician, and the State. Though the Court believed that pregnancy, physiologically, concerned two beings: a woman and a fetus; legally, it identified four actors: the woman, the fetus, the physician, and the State. *Roe* protected the woman's relationship with her pregnancy, in consultation with her physician, through the 14th Amendment right to privacy.[47] Meanwhile, it empowered the State to act

41. *Id.*; Endresz v. Friedberg, 248 N.E.2d 901, 903 (N.Y. 1969); Gloria C. v. William C., 476 N.Y.S.2d 991 (N.Y. Fam. Ct. 1984).

42. *See infra* Part II.

43. While some courts were willing to allow the mother to recover for injuries to the fetus that were not "too remote" to her; *see* Birmingham Baptist Hosp. v. Branton, 118 So. 741, 743 (Ala. 1928), there was no recognition that a mother could recover for the full extent of prenatal injury to the fetus.

44. *See generally* Sherwood v. Walker, 33 N.W. 919 (Mich. 1887).

45. *See generally* Pierce v. Soc'y of the Sisters, 268 U.S. 510, 534 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

46. Roe v. Wade, 410 U.S. 113 (1973). Prior to 1973 no U.S. Supreme Court case directly addressed pregnancy, though they came close in the series of cases addressing contraception. Poe v. Ullman, 367 U.S. 497 (1961); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); see *infra* note 50.

47. Initially, the woman's right to privacy was fully derivative of her doctor's right to provide her with medical care. In the contraception cases (*supra* note 46) and in *Roe v. Wade*, the court viewed reproduction as a *medical* issue, not a *women's* issue. *Roe*, 410 U.S.

to protect its interests in maternal health, the fetus, and potential life.[48] Pursuant to *Roe*, courts are authorized to balance the pregnant woman's rights and interests against those of the fetus and the State.[49] Like the tort cases, this constitutional conceptualization of pregnancy embraces the separate existence view that the woman and fetus are separable and distinct during pregnancy. However, unlike the tort cases, the constitutional conceptualization of pregnancy adds third parties, the physician and the State, to the adjudication of pregnancy matters. More importantly, unlike the tort separate existence view, the constitutional separate existence view of pregnancy identifies the mother and the fetus as legal adversaries. For this reason, I call the conceptualization of pregnancy in the abortion context the adversarial view.

Throughout the 1900s, the Supreme Court struggled to define the parameters of the fundamental rights that ultimately formed the constitutional basis for reproductive rights.[50] In 1923, in *Meyer v. Nebraska*,

at 166. It was not until *Planned Parenthood v. Casey* that the Court situated reproductive rights as being an issue of women's rights. 505 U.S. 833, 852 (1992) ("Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure. . . . Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. *That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.* The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. *The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society*.") (emphasis added).

48. *Roe*, 410 U.S. at 164–65 (establishing State's interest in maternal health and, in post-viability, the potentiality of human life).

49. *Id.*

50. *See* Gonzales v. Carhart, 550 U.S. 124 (2007) (holding that a ban on partial-birth abortions did not place an undue burden on a woman's right to abortion during her second trimester due to the availability of other late-term abortion methods); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (affirming its central holding in *Roe v. Wade*, the Court determined that a state statute that has the purpose or effect of placing substantial obstacles in the path of a woman seeking an abortion before viability is unconstitutional under the Fourteenth Amendment for placing an undue burden on her right to abortion); *Roe*, 410 U.S. at 113 (holding that a woman's fundamental right to privacy under the Fourteenth Amendment encompassed the decision whether or not to terminate her pregnancy, but determining that the state had a right to regulate abortions after the first trimester and prohibit them after the fetus attained viability); Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that a state's restrictions on an unmarried woman's right to obtain contraceptives violated the Equal Protection clause of the Constitution for unlawfully discriminating against women based on marital status); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a state statute prohibiting married couples from using contraceptives was unconstitutional for invading the right of privacy surrounding the marriage relationship); Skinner v. Oklahoma, 316 U.S. 535 (1942) (determining that a state

the Supreme Court first recognized that individuals have the fundamental right to "establish a home and bring up children" as part of their Constitutional liberty guarantee.[51] In 1925, the Court built upon this holding in *Pierce v. Society of Sisters*, and determined that parents' liberty interest included the right to direct the nature of their children's education.[52] The Court determined that a state statute requiring that children attend public schools "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[53] The Court reasoned that the "fundamental theory of liberty . . . excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[54] Importantly, the Court recognized the paramount interest that parents have in their children. It explained, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[55] Thus, by 1925, the Supreme Court had acknowledged that the parent-child relationship gave rise to fundamentally protected rights and that parents ought to be free from unreasonable interference with those rights.

Nevertheless, two years later, the Court refused to protect a woman's right to become a mother. In *Buck v. Bell*, the Court upheld the constitutionality of a Virginia state law authorizing the sterilization of "mental defectives" against a due process challenge.[56] In a decision penned by Justice Holmes, the Court declared that the sterilization of Carrie Buck pursuant to state law did not violate her due process or equal protection rights.[57] In this brief decision, Justice Holmes made no mention of the fundamental rights recognized in *Meyer* and *Pierce*.[58] His focus was exclusively on the State interest in sterilizing "imbeciles."[59] Holmes

statute providing for the sterilization of habitual criminals violated the Equal Protection clause of the Constitution); *Meyer*, 262 U.S. at 390 (holding that a state statute that attempted to control the type of education that parents could provide to their children unconstitutionally invaded the liberty right guaranteed under the Fourteenth Amendment).

51. *Meyer*, 262 U.S. at 399.

52. *Pierce*, 268 U.S. 510.

53. *Id.* at 534–35.

54. *Id.* at 535.

55. *Id.*

56. Buck v. Bell, 274 U.S. 200, 205–07 (1927) (wherein Justice Holmes famously reasoned that, "three generations of imbeciles are enough").

57. *Id.* at 207.

58. Holmes also made no mention of his view that during pregnancy the fetus is *part of the mother*. The implication is that Holmes' *connected* view was not an understanding of pregnancy from the perspective of a woman, but rather an understanding of pregnancy from the perspective of the outside observer. If Holmes had understood the significance of pregnancy to the lives of many women, he might not have so easily concluded that to deny a woman the ability to become pregnant and have a child was no violation of any right at all.

59. *Buck*, 274 U.S. at 206.

reasoned that it would be "better for all the world" if the State would sterilize those who are "manifestly unfit from continuing their kind."[60] Finding that Carrie Buck's rights were not violated by the State's forcible sterilization of her, he likened state mandated sterilization to state mandated vaccination.[61]

Notwithstanding a robust national eugenics policy during the early decades of the 1900s[62] and the Supreme Court's affirmation of that policy in its 1927 *Buck v. Bell* decision, in 1942, the Supreme Court acknowledged that the forced sterilization of individuals pursuant to state law "implicates a sensitive and important area of human rights."[63] In *Skinner v. Oklahoma*, the Court struck down an Oklahoma law calling for sterilization of those convicted two or more times of felonies involving moral turpitude.[64] Justice William Douglas explained the case's significance in language that clearly displayed revulsion toward the policies of America's then-enemy, Nazi Germany:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. *He is forever deprived of a basic liberty.*[65]

Therefore, in the 1940s there was an important shift in the Supreme Court's privacy jurisprudence. Through *Skinner*, the Court, for the first

60. *Buck*, 274 U.S. at 206.

61. *Id.* In likening the State's power to sterilize individuals to the State's power to vaccinate its citizens, Holmes cited to *Jacobson v. Massachusetts*, 197 U.S. 11 (1902). In *Jacobson*, the Court held that requiring residents to be vaccinated or revaccinated against smallpox was a valid act of the State pursuant to its police power and did not violate residents' constitutional rights. The Court noted: "'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.'" *Id.* at 26–27.

62. "29 States enacted compulsory eugenic sterilization laws between 1907 and 1931." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 463 (1985) (citing JACOB H. LANDMAN, HUMAN STERILIZATION 302–03 (1932)).

63. Skinner v. Oklahoma, 316 U.S. 535, 536 (1942). Certainly, the Court's decision was influenced by growing awareness concerning the eugenics policies administered in Nazi Germany.

64. *Id.* at 536, 543.

65. *Id.* at 541 (emphasis added).

time, recognized that the right to conceive a child was fundamental. Separate and distinct from the family rights that had been established in *Meyer* and *Pierce*, the Court clearly recognized that an individual has a constitutionally protected liberty interest in choosing to reproduce at some yet unidentified time in the future.[66]

Despite its holding in *Skinner*, in 1961, in *Poe v. Ullman*, the Supreme Court refused to rule on the constitutionality of a Connecticut statute that criminalized the use of contraceptives.[67] The majority claimed that the constitutionality of the law was not justiciable because there was no actual threat that the statute would be used to prosecute plaintiffs.[68] Therefore, the Court refused to analyze the constitutionality of a law criminalizing contraceptive use and did not provide any analysis of the rights that might be infringed upon by such a law. However, in his dissent, Justice John Marshall Harlan, having decided that the State law was justiciable, analyzed its constitutionality.[69] Justice Harlan concluded that the law was an unconstitutional violation of a marital couple's privacy interest.[70] He relied on the aforementioned privacy holdings in *Meyer*, *Pierce*, and *Skinner*, and on the constitutional protections of the Third and Fourth Amendments securing persons against the quartering of soldiers during times of peace and unreasonable searches and seizures, to reason that the marital couple has a privacy interest in the intimate aspects of their relations.[71] Importantly, unlike in *Skinner* where the Court was compelled to protect the *individual's* "basic civil right" and "liberty" to be free from "irreparable injury" through state-forced sterilization,[72] here, Justice Harlan dissented to protect the intimacy of the rights of the *marital couple*.[73] The distinction is significant. The right in *Skinner* could have provided the foundation for an *individual* right to procreate. By contrast, in his dissent, Harlan argued to extend the *marital couple*'s right to procreate to include access to contraception.[74]

66. Despite the fact that *Skinner* clearly established that forced sterilizations are unconstitutional, between 2006 and 2010 the State of California "coercively sterilized at least 148 women . . . incarcerated at the California Institute for Women in Corona and Valley State Prison for Women in Chowchilla." Rebecca Ryan, *California Female Inmate Sterilizations: Why We're Appalled, But Not Surprised*, WOMEN'S LAW PROJECT BLOG (July 12, 2013), https://womenslawproject.wordpress.com/2013/07/12/california-female-inmate-sterilizations-why-were-appalled-but-not-surprised/.

67. Poe v. Ullman, 367 U.S. 497, 504–05 (1961).

68. *Id.*

69. *Id.* at 522–56.

70. *Id.* at 539.

71. *Id.* at 543–44.

72. Skinner v. Oklahoma, 316 U.S. 497, 541 (1961).

73. *Poe*, 367 U.S. at 539.

74. Of course, this matter was put to rest in *Eisenstadt v. Baird*, when the Court explained that any rights belonging to the marital couple must be derived from the individuals who form the marital couple. 405 U.S. 438, 453 (1972).

The rights of the marital unit prevailed and in 1965, Harlan's *Poe* dissent formed the foundation for the Court's decision in *Griswold v. Connecticut*.[75] There, the Supreme Court reaffirmed the right to privacy established in *Meyer*, *Pierce*, and *Skinner*, and extended it to include the right of "married persons" to use contraceptives.[76] The Court reasoned that the Connecticut statute criminalizing contraceptive use unconstitutionally affected "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[77] The Court struck down the state law and noted that it was "repulsive to the notions of privacy surrounding the marriage relationship."[78]

Seven years later, in *Eisenstadt v. Baird*, the Supreme Court shifted its privacy analysis once again and determined that the fundamental right to use contraceptives was an individual privacy right, rather than a marital privacy right.[79] In *Eisenstadt*, the Court declared unconstitutional a Massachusetts law that restricted the distribution of contraceptive devices.[80] Specifically, the law limited the distribution of contraceptive devices for the purpose of preventing pregnancy to married persons only.[81] Notably, the law permitted the distribution of contraceptive devices to prevent the transmission of disease to both single and married persons.[82] Thus, while the law permitted single persons to acquire contraceptive devices to prevent disease, it barred them from acquiring such devices to prevent pregnancy.[83]

In determining whether the law could be sustained "simply as a prohibition on contraception," the Court quoted the appellate court's determination that a ban on contraceptives on the basis of immorality "conflicts with fundamental human rights."[84] It explained that, "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[85] The *Eisenstadt* Court thereby acknowledged an individual's right to prevent pregnancy.[86] Further, in arguing for the equal treatment of the married and the unmarried, the Court clarified that all marital privacy rights are inherently individual privacy rights. It famously explained that any rights held by the married couple would necessarily be derivative of rights held by the individual members of the couple:

75. Griswold v. Connecticut, 381 U.S. 479 (1965).
76. *Griswold*, 381 U.S. 480–81, 485. The Court also cited to the right to privacy as discussed in Harlan's *Poe* dissent. *Id.* at 484.
77. *Id*. at 485.
78. *Id*. at 486.
79. Eisenstadt v. Baird, 405 U.S. 438 (1972).
80. *Id*. at 453.
81. *Id*. at 441–42.
82. *Id*.
83. *Id*.
84. *Id*. at 452–53 (quoting 429 F.2d 1398, 1402 (1st Cir. 1970)).
85. *Eisenstadt*, 405 U.S. at 453.
86. *Id*.

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[87]

Thus, in *Eisenstadt*, for the first time, the Supreme Court held that the individual has a constitutionally protected privacy right to prevent becoming pregnant.

Although the Court's decision never discussed pregnancy as a woman's issue, its principal effect was to bestow upon women the right to use contraceptives to control their reproductive futures. Coupled with the Court's holding in *Skinner*, acknowledging the individual's fundamental right to procreate, as of 1972 women had the constitutional privacy right to make decisions regarding whether "to bear or beget a child" free from unwarranted governmental intrusion.[88] For the first time in women's history, the right to choose whether or not to become pregnant and have a child was constitutionally recognized.

Despite the significance of *Eisenstadt* as a reproductive rights case, it nevertheless did little to shed light on the legal conceptualization of pregnancy. In fact, in *Eisenstadt* there was no discussion at all concerning the relationship between a woman and her pregnancy. The Court's silence on the matter of pregnancy finally began to abate the following year. In *Roe v. Wade*, the Court announced that the fundamental right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[89] Though *Roe* has been criticized for failing to recognize abortion as a women's issue,[90] it was the first Supreme Court case that gave any meaningful attention to the significance of pregnancy

87. *Eisenstadt*, 405 U.S. at 453. (internal citations omitted).

88. *Id.*; Skinner v. Oklahoma, 316 U.S. 535, 541. (1942).

89. Roe v. Wade, 410 U.S. 113, 153 (1973).

90. Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 799 (1995) (criticizing the Supreme Court's view, beginning in *Roe v. Wade*, that pregnant women are merely patients by regarding the decision to have an abortion as purely a medical one where the doctor's judgment was paramount to the woman's concerns). "In *Roe v. Wade*, it was not entirely clear to whom the privacy belonged. The leading feminist criticism of *Roe* has long been that it reads like a manifesto for doctors' rights rather than women's rights, suggesting that whether to abort is the doctor's decision, even when the reasons are non-medical." Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 334 (2010). *See also* Jonathan Bullington, *Justice Ginsburg: Roe v. Wade Not 'Woman Centered'*, CHICAGO TRIBUNE, May 11, 2013, http://articles.chicagotribune.com/2013-05-11/news/chi-justice-ginsburg-roe-v-wade-not-womancentered-20130511_1_roe-v-abortion-related-cases-wade-case.

and motherhood in the lives of women.[91] In reasoning why the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," the Court explained:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[92]

Thus, the Court indicated some awareness of how motherhood can affect the life of a woman and the kinds of circumstances she might consider in making her decision.[93] However, the Court cautioned that this personal decision was one for the woman to make in consultation with "her responsible physician."[94] In other words, after explaining why a woman might choose to terminate her pregnancy, the Court stressed that she could not make that choice alone. Rather, a woman would consider "[a]ll these factors" with "her responsible physician."[95] After all, reasoned the Court, "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."[96] Therefore, while *Roe* was, from a practical perspective, a groundbreaking reproductive rights case that enabled women to exercise their self-determinative right to prevent motherhood even after they became pregnant, the legal position taken by the Court was that abortion is, primarily, a *medical* decision, not a *woman's* decision.[97] Therefore, like other Supreme Court cases affecting women before it, *Roe* only limitedly theorized the relationship between a woman, her pregnancy, and motherhood.[98]

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

92. *Id*.

93. The Court did not consider the physiological nature of pregnancy or the relationship between a woman and pregnancy. Its focus was exclusively on the social consequences of having a baby. While important, it reflected a very limited understanding of the nature and significance of pregnancy.

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

95. *Id*.

96. *Id*. at 166.

97. *Id*.; *See also* Donald D. Rotunda, *On Deep Background 41 Years Later: Roe v. Wade*, CHICAGO TRIBUNE, Jan. 22, 2014, http://articles.chicagotribune.com/2014-01-22/opinion/ct-perspec-blackmun-0122-20140122_1_blackmun-roe-v-chief-justice-burger.

98. Feminist legal theorists have considered other bases upon which women's right to abortion could have been founded. For example, *see* Rosalind Dixon & Martha Nussbaum, *Abortion, Dignity and a Capabilities Approach*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL

Ultimately, in *Roe*'s view, pregnancy is inherently a medical matter that impacts the pregnant woman, her doctor, the fetus, and the State.

The view of abortion as, primarily, a medical decision was subsequently clarified by the Court in *Planned Parenthood v. Casey*:

> Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy.[99]

Despite this theoretical shift, *Casey* affirmed *Roe*'s central holding.[100] Like other Supreme Court cases affecting women before it, *Roe* failed to theorize the relationship between a woman, her pregnancy, and motherhood. Further, it characterized the abortion decision as "inherently, and primarily" a *medical* decision.[101] In contrast, *Casey* characterized it as a *woman's* decision.[102] Ultimately, in *Roe*'s view, pregnancy consists of a woman, her doctor, a fetus, and its state. In Casey, the Court clarified that the right upon which abortion was founded was situated in the woman. Moreover, in both *Casey* and *Roe*, the Court acknowledged that in making her decision, a pregnant woman would consider the interests of the fetus within her.

In *Roe,* when discussing the reasons why a woman might choose to terminate her pregnancy, the court seemed cognizant that a pregnant woman would consider both her interests and the interests of her unborn child. The Court included medical reasons, ostensibly both those concerning the health of the mother and the fetus, in its list of relevant factors a woman would consider in determining whether to terminate the

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PERSPECTIVES 64 (Beverley Baines et al. eds., 2012) (discussing a human dignity approach to recognizing a woman's right to abortion); *see* Rebecca Rausch, *Reframing Roe: Property Over Privacy*, 27 BERKELEY J. GENDER L. & JUST. 28, 52 (2012) (considering reframing *Roe* in the language of property, specifically a woman's property interest in her uterus).

99. Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992); *see* Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77 (1995) (discussing that *Casey* was the first case to view abortion as a woman's decision as opposed to a medical decision).

100. *Casey*, 505 U.S. at 846 ("Roe's essential holding, the holding we reaffirm, has three parts. First 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 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 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.").

101. *Roe*, 410 U.S. at 156.

102. *See, e.g.*, *Casey*, 505 U.S. at 846.

pregnancy. In addition, the Court identified social reasons why a woman might seek to terminate the pregnancy. The social reasons identified by the Court included reasons that could be fairly characterized as serving the mother's interest, as well as those that would serve the interests of the mother's other children, her family, and even the child that the fetus might become. Specifically, the court recognized that the woman would consider the "distress, for *all* concerned, associated with the unwanted child,"[103] a reason that certainly implies that the Court believes that the woman is making her decision with regard to not just her own self-interest, but also with regard for the interests of "*all* concerned"—likely including her husband or partner, her children, and the fetus.[104] Thus, *Roe*'s consideration of why a mother would terminate her pregnancy was not framed in a necessarily adversarial context. In identifying reasons like "the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it[,]"[105] the Court seemed to acknowledge that the woman's termination decision might be based, as well, on the interests of her unborn child.

In *Casey*, the Court similarly determined that in deciding whether to continue her pregnancy, a woman will consider the interests of her fetus. For example, the Court recognized that some view abortion as a means of preventing "cruelty to the child" and "anguish to the parent" as a result of "the inability to provide for the nurture and care of the infant."[106] Moreover, the Court declared that, without a doubt, "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision" and that ensuring that the woman's decision is an informed one "reduc[es] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[107] Therefore, like in *Roe*, in *Casey*,

103. *Roe*, 410 U.S. at 153.
104. *Id*.
105. *Id.*
106. *Casey*, 505 U.S. at 853.
107. *Id*. at 882. The Court's decision in *Gonzales v. Carhart* further developed this view of pregnancy wherein the woman is concerned for the fetus. Gonzales v. Carhart, 550 U.S. 124, 159–60 (2007) ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."). In her dissent, Justice Ruth Bader Ginsburg criticized the majority's discussion of the woman's fragility as a justification for the abortion restriction at issue. She argued:

> Because of women's fragile emotional state and because of the 'bond of love the mother has for her child,' the Court worries, doctors may withhold

the Court expressed its view that the pregnant woman's decision regarding whether or not to continue her pregnancy is informed by her concerns for the interests of the fetal life developing in her womb.

This reading of *Roe* and *Casey* places the adversarial conceptualization of pregnancy adopted by the Court at odds with its dicta.[108] Despite recognizing the physiological and social reasons behind why a woman might choose to terminate her pregnancy, reasons that take into consideration the interests of the woman's family and her unborn child, the Court established a legal framework that considers the woman and the fetus as inherently adversarial, and appointed the State to act as proper protector of the fetus. Although the Court assumed the woman was interested in her fetus and concluded that the fetus was not a constitutionally recognized "person," the Court nevertheless, authorized the State to serve as representative of fetal interests.[109] As a result, the legal conceptualization

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> information about the nature of the intact D&E procedure. The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.

*Id.* at 183–84 (Ginsburg, R., dissenting). *See also* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of the Woman-Protective Anti-Abortion Argument*, 57 DUKE L.J. 1641 (2008); *see* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1771, 1792 (2008) (arguing that the Supreme Court's decision in *Gonzales v. Carhart* reinforced gender paternalism by perpetuating the idea that bans on certain types of abortion methods are needed to protect the pregnant woman, while ensuring that she fulfills her natural role as wife and mother).

108. *See* Stacy A. Scaldo, *Deadly Dicta: Roe's "Unwanted Motherhood," Carhart II's "Women's Regret," and the Shifting Narrative of Abortion Jurisprudence*, 6 DREXEL L. REV. 87 (2013) (examining the dicta concerning unwanted motherhood and women's regret in the abortion cases and considering how it affects the long-term societal opinions and understandings of reproductive rights).

109. *Id.* at 157–58; *see also id.* at 164–65 ("The Constitution does not define 'person' in so many words. Section 1 of the Fourteenth Amendment contains three references to 'person.' The first, in defining 'citizens,' speaks of 'persons born or naturalized in the United States.' The word also appears both in the Due Process Clause and in the Equal Protection Clause. 'Person' is used in other places in the Constitution . . . But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application. All this, together without observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."); *Id*. at 163–64 ("For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."); Amy Lotierzo (comment), *The Unborn Child, A Forgotten Interest: Reexamining Roe in Light of Increased Recognition of Fetal Rights*, 79 TEMP. L. REV. 279 (2006) (A pre-*Carhart* consideration of how recognitions of the rights of the unborn through adoption of legislation such as the Partial-Birth Abortion Act of 2003 and the Unborn Victims of Violence Act of 2004 may affect reproductive rights.).

of pregnancy embraced by *Roe* and *Casey* was grounded upon the assumption that the woman and the fetus are legal adversaries and that the State is needed to protect fetal interests. This view of the maternal-fetal relationship as adversarial contrasts with the Court's view of the parent-child relationship as conceptualized in *Pierce*, where it limited the State's ability to interfere with parental decisions.[110] Of course, the cases can be easily distinguished because *Pierce* concerned parental decisions regarding childrearing while *Roe* concerned the parental decision to terminate pregnancy.[111] Though it can be argued that the decision to terminate a pregnancy is not a parental decision,[112] the Justices' characterization of the woman's decision-making process in *Roe* and *Casey* suggests that, at least in part, they believe it is.

Thus, the adversarial view of pregnancy first articulated in *Roe* was the culmination of over a century of case law. Early cases holding that the fetus was part of the mother demonstrated that the law initially viewed pregnancy and the mother-fetus relationship as inherently connected. In the search for a remedy for prenatal injuries, this view gave way to a conceptualization of pregnancy as the embodiment of two distinct, separable entities. This separate existence view, while recognizing a separation between mother and fetus, refused to classify the mother and fetus as adversarial.[113] The refusal to allow a fetus to recover against its

110. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

111. *See* Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97 (2008) (discussing the *Carhart* court's reliance on maternal love to support its decision to uphold the ban on partial birth abortion and considering the extent to which women's abortion decisions are maternal decisions); Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 138 (1995) (noting that abortion decisions are unique to the mother and father of the child because pregnancy relates to profound and far-reaching aspects of their lives, as both may want to have children at a particular time in their lives, control their destinies, participate in public life, and live by their own spiritual imperative).

112. *See* Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85, 167, 170 (2005) (arguing that the Supreme Court's decisions on abortion have damaged women physically, psychologically, and relationally, and contend that state and local governments should be allowed to regulate and monitor abortions, as well as formulate policies for it).

113. Very few courts have permitted a child to recover against its mother for prenatal injuries sustained due to her negligence. *See* Bonte v. Bonte, 616 A.2d 464 (N.H. 1992) (finding that a child could bring suit against her mother for negligently crossing a street where she was struck by a vehicle when she was seven months pregnant, causing the child to be born with severe and permanent disabilities); Nat'l Casualty Co. v. N. Trust Bank of Fla., 807 So. 2d 86 (Fla. Dist. Ct. App. 2001) (holding that a child had a cause of action against her mother where the mother's negligent driving caused an automobile accident when she was seven months pregnant, resulting in injuries to the child); Grodin v. Grodin, 301 N.W.2d 869 (Mich. Ct. App. 1980) (deciding that if a mother was unreasonably negligent in taking the drug tetracycline while pregnant, then her son could maintain a cause of action against her for the injuries he sustained as a result of his mother's conduct).

mother, illustrated the legal position that the mother and the fetus had an inherently non-adversarial, connected relationship.[114] In *Roe v. Wade*, the Supreme Court modified the separate existence view of pregnancy to include a vision of the mother and fetus as legal adversaries and empowered the State to protect the fetus from the mother. This shift forever changed the way courts view pregnancy both inside and outside of the abortion context.

The adversarial view of pregnancy has had a significant impact on pregnant women in medical intervention, criminal, and dependency cases. The application of the adversarial view of pregnancy outside of the abortion context is misguided. As the presentation of the nature of pregnancy from both scientific and maternal perspectives in Part II will demonstrate, pregnancy is a unique relational existential experience that represents a simultaneous duality and oneness. The maternal-fetal relationship is generally symbiotic and rarely adverse. Therefore, the legal conceptualization of pregnancy as adversarial should not apply to wanted pregnancies. Moreover, the legal conceptualization of pregnancy should be reconceived to reflect the holistic nature of pregnancy supported by scientific knowledge and maternal experience.

## II. THE NATURE OF PREGNANCY[115]

Pregnancy is unlike any other aspect of human existence. Pregnancy is a unique relational existential experience.[116] No other human experience

114. Sallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. 1980) (while recognizing that a subsequently born child has assertable legal rights against third parties for prenatal injuries, the court states that "[i]t would be a legal fiction to treat the fetus as a separate legal person with rights hostile to and assertable against its mother"); Grodin v. Grodin, 301 N.W.2d 869 (Mich. Ct. App. 1980) (determining that the child's mother was immune from suit if her allegedly negligent act of taking the medication tetracycline while pregnant involved an exercise of reasonable parental discretion); Cullotta v. Cullotta, 678 N.E.2d 717 (Ill. App. Ct. 1997) (holding that a mother had no legal duty to her unborn child at the time she was in an automobile accident that resulted in the child being born prematurely and suffering other injuries); Remy v. MacDonald, 801 N.E.2d 260 (Mass. 2004) (finding that a child could not bring suit against its mother for the negligent infliction of prenatal injuries because recognizing a legal duty of care to her unborn child would have profound legal consequences); Chenault v. Huie, 989 S.W.2d 474 (Tex. App. 1999) (concluding that a child could not maintain an action against its mother for injuries caused by the mother's frequent drug use throughout the pregnancy because the court could not dictate a pregnant woman's conduct toward her unborn child).

115. Professors Owen D. Jones and Timothy H. Goldsmith argue that legal thinkers ought to consider interdisciplinary research, specifically research concerning human behavior, in reaching legal determinations. Owen D. Jones & Timonthy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405 (2005). They approve of recent legal scholarship that seeks to "deploy insights from behavioral biology to address existing problems in law." *Id*. at 409.

116. Clinical anatomist David Bainbridge describes pregnancy as a "uniquely intimate relationship between two people." DAVID BAINBRIDGE, MAKING BABIES: THE SCIENCE OF PREGNANCY 6 (2000). Though Bainbridge's definition describes pregnancy a relationship

reflects a relationship as necessarily intertwined as the one experienced during pregnancy.[117] As sociologist Barbara Katz Rothman eloquently articulated, "[m]otherhood is an experience of interpersonal connection. The isolated, atomistic individual is an absurdity when one is pregnant: one is two, two are one."[118] Father of modern medicine, William Harvey, pioneered the idea that pregnancy represents a duality: "just as much as a pregnancy needs a baby, pregnancy also needs a mother."[119] Thus, a pregnant woman is neither one nor two,[120] and yet, she is both. Pregnancy represents duality: it has two parts, maternal and fetal. Simultaneously, pregnancy represents oneness: The mother and fetus are inextricably united and a part of each other.

### A. THE PHYSIOLOGY OF PREGNANCY[121]

Pregnancy is a period of extraordinary transformation. Pregnancy turns a fertilized egg into a baby and a woman into a mother. Pregnancy's transformative process impacts both woman and fetus through distinct but interrelated mechanisms. The impact of pregnancy on the woman and the fetus are different yet complementary.[122] Initial aspects of this transformative process begin with conception.[123] Pregnancy commences

between two "people," his work stresses the uniqueness of this relationship in ways that imply that his description of "two people" is due to linguistic limitations. We have no words to describe the relationship between mother and fetus.

117. BAINBRIDGE, *supra* note 116, at 6. (stating "Never again outside pregnancy can we be so truly intertwined with someone else, no matter how hard we try."). I am working on a follow-up article considering the legal conceptualization of the mother-infant relationship. I argue that, similar to pregnancy, the mother-infant relationship is uniquely connected. *See, e.g.*, MEREDITH F. SMALL, OUR BABIES, OURSELVES: HOW BIOLOGY AND CULTURE SHAPE THE WAY WE PARENT 35 (1998) ("The word 'entrained' is often used to explain this relationship. Entrainment is a kind of biological feedback system across two organisms, in which the movement and patterns of one influence the other. Entrainment, in this context, means that the physiology of the two individuals is so entwined that, in a biological sense, where one goes, the other follows, and vice versa.").

118. BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 89 (1989).

119. BAINBRIDGE, *supra* note 116, at 55.

120. Author Susan Maushart describes pregnancy as "kind of no-woman's land, in which one is not quite mother, but no longer other." SUSAN MAUSHART, THE MASK OF MOTHERHOOD: HOW BECOMING A MOTHER CHANGES OUR LIVES AND WHY WE NEVER TALK ABOUT IT 37 (2000).

121. For a thorough explanation of the physiology of pregnancy, see PETER T. ELLISON, ON FERTILE GROUND: A NATURAL HISTORY OF HUMAN REPRODUCTION 1–80 (2001).

122. Pregnancy changes a woman's body and mind preparing her to be a mother. Pregnancy transforms an egg into a highly dependent baby. Though the woman and egg are changed in different ways, the changes are complementary because the end result is significant physiological changes in the mother that serve only to respond to a baby's needs; and the baby who needs such a mother. *See* SMALL, *supra* note 117, at 14–15.

123. LOUANN BRIZENDINE, THE FEMALE BRAIN 98 (2006) ("The mommy-brain transformation gets under way at conception, . . . changing the way she thinks, feels, and what she finds important"); *see also* ELLISON, *supra* note 121, at 19–32 (discussing the fertilization process).

with the embedding of an embryo in the mother's uterine lining.[124] Successful implantation requires a delicate interaction between the mother and the embryo in which each is an active participant.[125] The embryo aggressively digs itself into the mother's uterine wall.[126] This invasive implantation process results in the embryo being bathed in maternal blood and attaching to the mother's blood supply.[127] To signal its presence, the embryo releases large quantities of the hCG hormone.[128] Upon receiving the hCG signal, the mother's body responds by ceasing its normal menstrual cycle.[129] The attachment of the embryo to the mother's blood supply commences a process of hormonal and physiological changes in the pregnant woman, priming her to nurture her baby both in utero and postpartum.[130]

The pregnancy will last approximately forty weeks.[131] By the seventh week, the embryo takes on a recognizably human form.[132] By this time, most of its internal organs have been developed and its sex is determined.[133] By the end of the second trimester, all fetal organs are formed.[134] Around the fifth month of pregnancy, the mother starts to feel the movements of her fetus and begins to emotionally attach to her baby.[135]

124. ELLISON, *supra* note 121, at 22–23 (refuting the idea that fertilization is the beginning of pregnancy: "Successful implantation, not the mere fertilization of the egg, is the true initiation of a potentially viable pregnancy. Many would-be embryos may pass through a woman's uterus in her lifetime without succeeding at this task, either because the embryo itself is defective or because the endometrium is at an inappropriate stage of its own developmental cycle or is pathologically disabled.").

125. *Id.* at 23 (stating "Successful implantation depends on the active interaction of the embryo and the mother. It is not something that one does to the other. The mother's endometrium must be receptive to the embryo, and the embryo must be able to implant itself.").

126. BAINBRIDGE, *supra* note 116, at 93.

127. *Id.*

128. The pregnancy hormone referred to as "hCG" is the human chorionic gonadotrophin hormone. *Id.*

129. *Id.* at 114; *see id.* at 92–94.

130. BRIZENDINE, *supra* note 123, at 95–103; Ruth Feldman, et al., *Evidence for a Neuroendocrinological Foundation of Human Affiliation: Plasma Oxytocin Levels Across Pregnancy and the Postpartum Period Predict Mother-Infant Bonding*, 18 PSYCHOLOGICAL SCIENCE 965 (2007); Lane Strathearn, *Maternal Neglect: Oxytocin, Dopamine and the Neurobiology of Attachment*, 23 J. OF NEUROENDOCRINOLOGY 1054, 1054 (2011) ("[B]iological mothers may be primed, through the neuroendocrine changes associated with pregnancy, parturition and lactation, to provide optimal nurturance and protection to their offspring").

131. ELLISON, *supra* note 121, at 71.

132. BAINBRIDGE, *supra* note 116, at 115.

133. *Id.*

134. ELLISON, *supra* note 121, at 62.

135. BRIZENDINE, *supra* note 123, at 99; SMALL, *supra* note 117, at 27 (pregnant women begin to bond with their babies even when the mother has negative feelings about her pregnancy) (citing A.S. Fleming, *Hormonal and Experiential Correlates of Maternal Responsiveness in Human Mothers*, *in* MAMALIAN PARENTING 184–208 (N.A. Krasnegor & R.S. Bridges eds., 1990)).

The fetal skeleton is laid down in cartilage and ossification commences.[136] Fetal brain stem functions and sensory responses indicate that the fetus has functional cortical brain circuits.[137] During the third trimester, the fetus continues to grow and accumulate fat.[138] The brain grows significantly during this time.[139] In the last weeks of pregnancy, the lungs mature, preparing the fetus to live outside its mother.[140]

Just as the fertilized egg transforms into an embryo and the embryo transforms into a developing fetus, the pregnant woman experiences a complementary transition to motherhood. Her process includes physical as well as emotional changes. The mother's blood is flooded with hormones that change her body and brain.[141] She is protected against stress hormones produced by the fetus and the placenta.[142] Her blood volume doubles.[143] She experiences increased thirst, hunger, and fatigue.[144] Her brain shrinks in size in preparation for the production of new brain cells and new networks of maternal circuits.[145] The pregnant woman experiences increased neural plasticity for the purpose of adapting her brain function for motherhood.[146] Ultimately her brain will be changed "structurally, functionally, and in many ways, irreversibly," preparing her for the birthing process and to mother her new baby.[147]

### B. ADVERSARIAL INTERESTS IN PREGNANCY

Even though the maternal and fetal aspects of the pregnancy process are predominantly complementary, sometimes the genetic interests of the mother and her fetus collide. Because the mother and fetus have distinct genes, "things that are good for the spread of the offspring's genes are not necessarily good for the spread of the mother's genes."[148] There may be conflicts over the best use of maternal energy resources, such as whether the mother should retain them for herself or share them with her developing

136. ELLISON, *supra* note 121, at 62.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. BRIZENDINE, *supra* note 123, at 97–103 (progesterone levels climb from ten to one hundred times the normal levels during the first two to four months of pregnancy); *see also* Dave Grattan, *A Mother's Brain Knows*, 11 J. NEUROENDOCRINOLOGY 1188 (2011), *available at* https://www.researchgate.net/publication/51724765_A_mother%27s_brain knows.
142. BRIZENDINE, *supra* note 123, at 97–103.
143. *Id.*
144. *Id.*
145. By six months postpartum, the mother's brain returns to its original size. *Id.* at 100. Prolactin is involved in stimulating neurogenesis, the production of new cells, in the maternal brain. Grattan, *supra* note 141, at 1188.
146. Grattan, *supra* note 141, at 1188.
147. BRIZENDINE, *supra* note 123, at 95, 100–01.
148. ELLISON, *supra* note 121, at 42.

offspring.[149] Research in Gambia demonstrated that a mother's inadequate caloric intake during pregnancy prompts her to lower her basal metabolic rate, reduce her own energy consumption, and divert the energy to store fat needed for embryonic development.[150] Consequences of the lower metabolic rate included compromising cognitive functions and thermoregulatory abilities.[151] Another example of the potentially adversarial interests of the woman and fetus is preeclampsia.[152] In a normal pregnancy, the mother's blood pressure rises to adapt to fetal vascular demands.[153] Sometimes, however, the mother can experience extreme hypertension with fatal consequences.[154] Though maternal-fetal conflicts can be used to indicate that mother and fetus have an adversarial relationship, they also demonstrate that, physiologically, once the mother has committed to the pregnancy, she will continue to support it, even if doing so is harmful to her wellbeing.[155] Thus, research demonstrates that, physiologically, pregnancy is defined more by symbiosis than conflict.[156]

### C. BEYOND PREGNANCY

The postpartum period is of crucial importance to an infant's survival.[157] Thus, it is no surprise that many of the changes that a mother

149. ELLISON, *supra* note 121, at 78.
150. *Id*. at 72–73.
151. *Id*. at 73.
152. *Id*. at 76.
153. *Id*. at 74.
154. *Id*. at 76.
155. *Id*. at 43 ("[A]n appeal to metabolic conflict between mother and offspring may not be necessary. The fact of successful implantation alone may tip the scales of the cost/benefit equation significantly since it implies that the embryo has passed a significant 'viability' test. The probability that a given pregnancy will be successful increases by at least 33 percent after implantation, and the 'cost' necessary to tip the scales away from further investment become equivalently higher. . . . Once an embryo has [successfully implanted], maternal physiology seems to favor its continued survival even under adverse conditions.") Outside of the physiological context, woman and fetus may have adversarial interests. All unwanted pregnancies are examples of the conflict and tension that may accompany pregnancy. Though important, this aspect of adversity in pregnancy is outside the scope of this article.
156. Abortion, which is outside the scope of my limited discussion of the physiology of pregnancy, is a common and obvious example of maternal-fetal conflict. The abortion decision represents a social conflict between woman and fetus. A woman's desire for an abortion has been described as follows: "No one wants an abortion as she wants an ice-cream cone or a Porsche. She wants an abortion as an animal, caught in a trap, wants to gnaw off its own leg." Hendricks, *Body and Soul*, *supra* note 90, at 361. Though this analogy is insightful, it is not without problem, as it can be interpreted to suggest "that abortion permanently harms a woman by killing a part of her, even if it is necessary to escape a worse fate. That is true for some women, but other women are starfish, who will grow a new leg and go on as before." *Id.* at 361 n.149.
157. Feldman, *supra* note 130, at 965–70 ("The mother-infant bond, the primary bond across mammalian species, is expressed in a clearly defined set of maternal postpartum behaviors that emerge or intensify during the bonding stage. . . . Studies in humans [ ]

experiences during pregnancy are for the benefit of the post-partum mother-infant relationship.[158] For example, a woman's body prepares itself for lactation during pregnancy.[159] Some describe breastfeeding less as the end result of pregnancy, and more as a continuation of gestation.[160] This view of breastfeeding is consistent with the view of anatomist and paleontologist R.D. Martin that the human gestation period is actually twenty-one months, nine months of pregnancy followed by twelve months of postpartum care.[161]

New research indicates that hormonal surges during pregnancy that modify the mother's brain may also facilitate postpartum care.[162] This would help to explain why many mothers feel ready to bond with their infants during the immediate postpartum period.[163] Research findings suggest that, "biological mothers may be primed, through neuroendocrine changes associated with pregnancy, parturition and lactation, to provide optimal nurturance and protection to their offspring."[164] A study out of Bar-Ilan University found that initial pregnancy levels of neuropeptide oxytocin predict postpartum bonding behaviors.[165] Other research indicates that adaptation of the mother's oxytocin and dopamine systems, during pregnancy and outside of pregnancy, impact a mother's ability to provide adequate postpartum care to her infant.[166] Though there are indications that

indicate that maternal postpartum behavior has long-term effects on infants' cognitive, neurobehavioral, and social-emotional growth.").

158. *See* BRIZENDINE, *supra* note 123, at 95.

159. SMALL, *supra* note 117, at 186–92.

160. *Id.* at 198 ("[The breastfeeding system] continues from conception to weaning and thus is biologically designed to go on for months or years in a process called 'exogestation'—gestation outside the womb that is still intimately connected. We know this because of the profound effect that breast-feeding has on the female fertility system—continuous breast-feeding stops ovulation and prevents conception.").

161. SMALL, *supra* note 117, at 7 (1998) (citing MARTIN, R. D., PRIMATE ORIGINS AND EVOLUTION: A PHYLOGENETIC RECONSTRUCTION (1990)).

162. *See* BRIZENDINE, *supra* note 123, at 95; Feldman, *supra* note 130, at 965; Strathearn, *supra* note 130, at 1054–65 (identifying key biological systems that contributed to maternal caregiving behavior, with focus on oxytocinergic and dopaminergic reward systems); Lane Strathearn, et al., *Does Breastfeeding Protect Against Substantiated Child Abuse and Neglect? A 15-year Cohort Study*, 123 PEDIATRICS 483, 483–93 (2009) (supporting the claim that mothers may be biologically primed to provide the best care for their offspring through neuroendocrine changes during pregnancy, birth, and breastfeeding).

163. *See* Marshall Klaus, *Mother and Infant: Early Emotional Ties*, 102 PEDIATRICS 1244, 1244–46 (1998). Describing her own experience of becoming a mother, Brizendine explains: "Deeply buried in my genetic code were triggers for basic mothering behavior that were primed by the hormones of pregnancy, activated by childbirth, and reinforced by close, physical contact with my child." BRIZENDINE, *supra* note 123, at 95.

164. Strathearn, *supra* note 130, at 1054. *See also* BRIZENDINE, *supra* note 123, at 95; Feldman, *supra* note 130, at 965; Strathearn et al., *supra* note 162, at 483–93 (supporting the claim that mothers may be biologically primed to provide the best care for their offspring through neuroendocrine changes during pregnancy, birth, and breastfeeding).

165. Feldman, *supra* note 130, at 969.

166. Strathearn, *supra* note 130, at 1062 (finding that "the adaptation of the oxytocin and

the hormonal changes a mother experiences during pregnancy impact her postpartum mothering, this research is still in an early phase.[167]

### D. MICROCHIMERISM

Doctors once believed that the fetal and maternal vascular systems remained separate during pregnancy.[168] We now know this is not the case. During pregnancy, fetal cells travel into the mother's body and maternal cells travel into the fetal body.[169] This two-way traffic of cells through the placenta is called fetal and maternal microchimerism.[170]

The scientific meaning of "chimera" is an organism composed of cells (or DNA) that originated in two or more genetically distinct individuals.[171] Generally, each individual has a unique set of DNA markers that distinguish the cells of that person from every other.[172] It is the distinctness of each person's DNA that makes DNA testing such a useful law enforcement tool.[173] Where an individual is a chimera, however, she possesses not only her own cells marked with her unique genetic code, but also the cells of another.[174]

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dopamine systems (whether through a mother's own early childhood experience, stress during pregnancy or even as a result of breastfeeding experience) may lead to variation in infant and adult attachment, as well as maternal brain and endocrine responses.").

167. *Id*. ("Additional studies are needed to explore the role of oxytocin in promoting a secure mother-infant attachment.").

168. Charlotte Boyon, et al., *Fetal Microchimerism: Benevolence or Malevolence for the Mother?*, 158 EUROPEAN J. OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 148, 148 (2011).

169. *Id.* at 151; *see also* William F.N. Chan, et al., *Male Microchimerism in the Human Female Brain*, 7(9) PLOS ONE (2012) ("During pregnancy, genetic material and cells are bi-directionally exchanged between the fetus and mother, following which there can be persistence of the foreign cells and/or DNA in the recipient"); J. Lee Nelson, *The Otherness of Self: Microchimerism in Health and Disease*, 33(8) TRENDS IN IMMUNOLOGY 421, 421 (2012) ("It is now well recognized that some cells are exchanged between a woman and fetus during pregnancy.").

170. *See* Diana Bianchi, et al., *Male Fetal Progenitor Cells Persist in Maternal Blood for as Long as 27 Year Post Partum*, 93 PROC. NAT'L ACAD. SCI. USA 705 (1996); "Microchimerism" is derived from the term "chimera" in Greek mythology. Catherine Arcabascio, *Chimeras: Double DNA Double the Fun for Crime Scene Investigators, Prosecutors, and Defense Attorneys?*, 40 AKRON L. REV. 435, 436–38 (2007); The Chimera was the "offspring of Typohn and Echidna, and a sibling of the three-headed monster, Cerberus. With parts of a lion, a goat, and a dragon, [she was] a powerful and hideous beast." David H. Kaye, *Chimeric Criminals*, 14 MINN. J. L. SCI. & TECH. 1, 2–3 (2013); According to Greek mythology, the Chimera was a "fearful creature, great and swift of foot and strong, whose breath was flame unquenchable." Catherine Arcabascio, *Chimeras: Double DNA Double the Fun for Crime Scene Investigators, Prosecutors, and Defense Attorneys?* 40 AKRON L. REV. 435, 437 (2007) (quoting EDITH HAMILTON, MYTHOLOGY: TIMELESS TALES OF GOD AND HEROES 139–43 (Warner Books 1999) (1942).

171. Arcabascio, *supra* note 170, at 438 (citing CHURCHILL'S MEDICAL DICTIONARY (1989)).

172. Arcabascio, *supra* note 170, at 438.

173. *Id.* at 455–57.

174. *Id.* at 438.

Maternal and fetal cells have been found to persist in the other's body under disparate conditions. Maternal cells have been discovered in the second trimester in normal tissues of various fetal organs.[175] Maternal cells have also been found in the organs of newborns and infants with anomalies, chromosomal abnormalities, and infections.[176] Finally, maternal cells have been found in children with and without autoimmune disease.[177] Existence of a mother's cells in her offspring in many different circumstances, has led researchers to conclude that while maternal cells are "frequently observed in autoimmune diseases . . . it is evident that maternal cells can contribute to the overall body architecture even in healthy individuals."[178]

Similarly, fetal cells have been identified in mothers' bodies long after pregnancy ends. Fetal cells that travel into the mother's body during pregnancy persist inside of her, making her a chimera.[179] Initial research focused on the potential for persisting fetal microchimerism to sometimes have adverse consequences for a mother.[180] Specifically, researchers found that fetal microchimerism associated positively with the autoimmune disease scleroderma.[181] But even in the first study, fetal microchimerism was also found in healthy women. Over recent years multiple studies have pointed to potential health benefits of fetal microchimerism, for example in protection against some types of cancer, including breast cancer.[182] Overall, researchers have determined that fetal cells can be both beneficial and harmful to the mother:[183]

> In most studies of cancer, the proposed role of fetal [cells] has been beneficial, with a suggested role in tissue repair, repopulation and/or immune surveillance. However, a role in disease progression has also been considered as contributing to lymphangiogenesis or tumor growth, for example in melanoma.[184]

175. Nelson, *supra* note 170, at 421 (maternal cells were found in *fetal* thymus, lung, heart, pancreas, liver, spleen, kidney, adrenal gland, ovary, testis, and brain).

176. *Id*. (maternal cells were found in *newborn and infant* thymus, lung, pancreas, liver, spleen, thyroid, and skin).

177. *Id*.

178. *Id*.

179. Arcabascio, *supra* note 171, at 439; Chan, *supra* note 170, at 3 (describing that male fetal cells persisted in the brain of his ninety-four year old mother). Microchimerism can also be caused by miscarriage or induced abortion, it can be the result of cell transfer between twins, and it is probable that a mother can pass the cells of an older sibling or a previous pregnancy to a fetus during a subsequent pregnancy. Nelson, *supra* note 170, at 421.

180. Ralph P. Miech, *Short Communication: The Role of Fetal Microchimerism in Autoimmune Disease*, 3(2) INT. J. CLIN. EXP. MED. 164, 165 (2010).

181. *Id.*

182. Nelson, *supra* note 170, at 425.

183. *Id.*; Stephanie Pritchard & Diana W. Bianchi, *Fetal Cell Microchimerism in the Maternal Hearth: Baby Gives Back*, 110 CIRCULATION RESEARCH 3 (2012), *available at* http://circres.ahajournals.org/content/110/1/3.full.pdf+html.

184. Nelson, *supra* note 169, at 425.

Regarding microchimerism, there are still more questions than answers. Nevertheless, it is now clear that the maternal-fetal connection is more nuanced and longer lasting than previously thought.

Revelations concerning fetal and maternal microchimerism prompted leading chimerism researcher J. Lee Nelson to the make the following statement:

> I think that we . . . need to revise the paradigm that we have, which is mostly a paradigm of self-versus-other, because, biologically, it is very likely that we all have chimerism at some level, usually small levels. And the most common source of that is transfer of cells between a mother and child during pregnancy.[185]

Nelson's explanation of the biological basis for revising the self-versus-other paradigm has implications for the legal conceptualization of pregnancy. Currently, the law conceptualizes pregnancy as an adversarial relationship between two separate entities: mother and fetus. Nelson's research, and the research of others who study fetal-maternal microchimerism, demonstrates that the mother-fetus relationship is more than the relationship between two separate entities. The fact that mother and fetus, in addition to the many other intertwined aspects of pregnancy, also share each other's cells, refutes an understanding of the mother and fetus as, simply, separate.

### E. MATERNAL UNDERSTANDINGS OF PREGNANCY

Understanding and acknowledging the many varied experiences of pregnant women is critical to fairly characterizing pregnancy. As one scholar noted, "only women can directly experience reproduction including menstruation, pregnancy, birth, and lactation, so their voice and perspectives on these issues are of central feminist concern."[186] Nevertheless, women's voices have often been excluded from pregnancy discourse. Philosopher Iris Marion Young commented that, "[w]e should not be surprised to learn that discourse on pregnancy omits subjectivity, for the specific experience of women has been absent from most of our culture's discourse about human experience and history."[187] Today,

185. Interview with J. Lee Nelson, Professor of Medicine, University of Washington School of Medicine, Nelson Lab at the Fred Hutchinson Cancer Research Center, in Seattle, Wash. (Mar. 14, 2013) (on file with author).

186. Diana C. Parry, *Women's Lived Experiences With Pregnancy and Midwifery in a Medicalized and Fetocentric Context: Six Short Stories*, 12(3) QUALITATIVE INQUIRY 459 (2006) (citing L.R. WOLIVER, THE POLITICAL GEOGRAPHIES OF PREGNANCY (2002)).

187. IRIS MARION YOUNG, ON FEMALE BODY EXPERIENCE: "THROWING LIKE A GIRL" AND OTHER ESSAYS 46 (2005); *see also* ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 36 (1976) ("Nothing to be sure, has prepared me for the intensity of relationship already existing between me and a creature I had carried in my body and now held in my arms and fed from my breasts . . . . No one mentions the psychic crisis of bearing a first child . . . the sense of confused power and powerlessness, of being taken over on the one hand and of touching new physical and psychic potentialities on the

pregnant women's views are collected in memoirs, narratives, feminist writings, and maternal studies research. Attention is given to the intimate experiences of individual women and the social contexts which frame their experiences. As "mother of modern feminism"[188] Simone de Beauvior noted, "[p]regnancy . . . [is] experienced in very different ways depending on whether [it] takes place in revolt, resignation, satisfaction, or enthusiasm."[189] Consistent with the effort to present women's pregnancy experiences in perspective, Canadian sociologist Diana C. Parry uses pregnant women's narratives to reveal "the social and cultural contexts of women's lived experiences with pregnancy through a feminist lens."[190] Poet Adrienne Rich and author Naomi Wolf offer their own memoirs of pregnancy and motherhood in their books *Of Woman Born*[191] and *Misconceptions*, respectively.[192] Psychiatrist Louann Brizendine uses her clinical experience with pregnant women to provide maternal accounts of pregnancy.[193] Together, these portraits of pregnancy provide a helpful, yet still incomplete, maternal perspective of pregnancy.[194]

Descriptions of women's pregnancy experiences reveal pregnancy to be a nuanced, often existentially altering experience.[195] Women report

other, a heightened sensibility which can be exhilarating, bewildering, and exhausting. No one mentions the strangeness of attraction—which can be as single-minded and overwhelming as the early days of a love affair—to a being so tiny, so dependent, so folded-in to itself—who is, and yet is not, part of oneself.").

188. FINEMAN, *supra* note 7 (citing DEIDRE BAIR, SIMONE DE BEAUVOIR: A BIOGRAPHY (1990)).

189. SIMONE DE BEAUVOIR, THE SECOND SEX 533 (Constance Borde & Sheila Malovany-Chevallier, trans., Alfred A. Knopf 2010) (1949).

190. Parry, *supra* note 186, at 459.

191. RICH, *supra* note 187.

192. NAOMI WOLF, MISCONCEPTIONS: TRUTH, LIES, AND THE UNEXPECTED ON THE JOURNEY TO MOTHERHOOD (2001).

193. BRIZENDINE, *supra* note 123.

194. The pregnancy narratives I provide are vulnerable to essentialist critique. Certainly, they do not represent the experiences of all pregnant women. Nevertheless, they are reflective of real pregnancy experiences that, at present, remain largely unrepresented in the legal discourse surrounding pregnancy. Similarly, Adrienne Rich laments the incompleteness of her portrayal of motherhood: "I write with a painful consciousness of my own Western cultural perspective and that of most of the sources available to me: painful because it says so much about how female culture is fragmented by the male cultures, boundaries, groupings in which women live. However, at this point any broad study of female culture can be at best partial, and what any writer hopes-and knows-is that others like her, with different training, background, and tools, are putting together other parts of this immense half-buried mosaic in the shape of a woman's face." RICH, *supra* note 187, at 17; For additional discussions of women's pregnancy experiences see Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97 (2008) (providing women's testimonies concerning their decisions to abort); Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457 (2013) (discussing both positive and negative constructions of pregnancy and discussing women's experiences with unwanted pregnancies).

195. *See* DE BEAUVOIR, *supra* note 189, at 538 ("But pregnancy is above all a drama playing itself out in the woman between her and herself. She experiences it both as an enrichment and a mutilation; the fetus is part of her body, and it is a parasite exploiting her; she possesses it, and she is possessed by it; . . . A new existence is going to manifest and

experiences of welcoming and resenting their pregnancies, loving and fearing their unborn children, anticipating motherhood and longing for their fleeting individuality.[196] Though aspects of each woman's experience differ, ultimately the following accounts demonstrate that pregnancy is often regarded as a unique relational existential reality simultaneously representing duality and oneness.

The radical motherhood theories introduced by Adrienne Rich in *Of Woman Born* are grounded in her own experiences as a mother.[197] She presents pregnancy as a duality while simultaneously acknowledging that aspects of oneness and pre-pregnancy individuality persist:

> Nor, in pregnancy, did I experience the embryo as decisively internal in Freud's terms, but rather, as something inside and of me, yet becoming hourly and daily more separate, on its way to becoming separate from me and of-itself. In early pregnancy the stirring of the fetus felt like ghostly tremors of my own body, later like the movements of a being imprisoned in me; but both sensations were *my* sensations, contributing to my own sense of physical and psychic space.[198]

Rich's testimony that pregnancy represents both duality and oneness resonates with other women as well. Philosopher Iris Marion Young describes her experience:

> As my pregnancy begins, I experience it as a change in my body. . . . Then I feel a tickle, a little gurgle in my belly. It is my feeling, my insides, and it feels somewhat like a gas bubble, but it is not; it is different, in another place, belonging to another, another that is nevertheless my body. . . . Pregnancy challenges the integration of my body experience by rendering fluid the boundary between what is within, myself, and what is outside, separate. I experience my insides as the space of another, yet my own body[199]

In *The Second Sex*, pregnancy is described in similar terms:

> She experiences it both as an enrichment and a mutilation; the fetus is part of her body, and it is a parasite exploiting her; she possesses it, and she is possessed by it; it encapsulates the whole future, and in carrying it, she feels as vast as the world; but his very richness annihilates her, she has the impression of not being anything else.[200]

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justify her own existence. . . ."). *See also* WOLF, *supra* note 192, at 30 ("What was this new life—new life *form*? The weirdness was intense. . . . There was someone *in* me; nurturing itself *from* me; what was the difference between this inner inhabitation and a kind of benign possession, or gentle succubus?").

196. DE BEAUVOIR, *supra* note 189, at 538–39.

197. RICH, *supra* note 187, at 17.

198. *Id.* at 47.

199. IRIS MARION YOUNG, *Pregnant Embodiment: Subjectivity and Alienation*, in ON FEMALE BODY EXPERIENCE 46, 49 (2005).

200. DE BEAUVOIR, *supra* note 189, at 538.

The diary entry of a European woman similarly expresses feelings of simultaneous duality and oneness during pregnancy:

> I am a cold and logical thinker, but at that time, my reasoning blurred and dissolved, impotent, into tears, another helpless, childish creature's tears, not mine. I was one and the other at once. It stirred inside of me. Could I control its movements with my will? Sometimes I thought I could, at other times I realized it was beyond my control. I couldn't control anything. I was not myself. And not for a brief, passing moment of rapture, which men, too, experience, but for nine watchful quiet months. . . . Then it was born. I heard it scream with a voice that was no longer mine.[201]

While the writer shrinks from feelings of powerlessness and invasion, she continues to feel that she was "one and the other at once."[202] Narratives provided by Sociologist Diana C. Parry shed further light on how women view their pregnancies. In the context of pregnancy healthcare decisions, some women report feeling pressure to sacrifice their individual needs.[203] These accounts provide support for the dual nature of pregnancy, specifically, the extent to which these women crave recognition as individual pregnant women, not just as incubators.

For example, one woman expresses her frustration at the severe morning sickness she is experiencing. Her pregnancy is making her "feel sick all day and all night," causing her to miss two weeks of work, preventing her from doing any of the things she normally enjoys, making it difficult for her to "sleep, eat, and function," and is affecting her mood.[204] She feels helpless and hopeless. Against the advice of her family, she decides to take Diclectin[205] to help with her pregnancy. She speaks with her midwife, Joy, to weigh the costs and benefits of taking the medicine:

> This drug has been around for years and I have talked to a lot of other women about it. Everything suggests it is safe. Plus, Joy really thought it would help *me*. She put it to me like this: If you're not coping well with this pregnancy—for example, if you're sick all the time and you're worn out and you're stressed out—then you're not going to have a healthy pregnancy. Joy explained to me that not getting enough rest or being nauseated all the time will affect the baby. According to Joy, even your state of mind, your

201. RICH, *supra* note 187, at 167 (quoting ELIZABETH MANN BORGESE, THE ASCENT OF WOMAN 44 (1963)).
202. *Id.*
203. *See* Parry, *supra* note 186.
204. Parry, *supra* note 186, at 465.
205. Diclectin is prescription medication used to treat nausea and vomiting during pregnancy. *Diclectin*, DUCHESNAY, http://www.duchesnay.com/en/diclectin (last visited Feb. 18, 2015).

> mental state of mind, is important for a healthy pregnancy. I now understand that a healthy mom is important, too.[206]

In justifying her choice to her family, she provides a glimpse into her difficult pregnancy with the following plea:

> [R]ight now, I just feel like everything is overwhelming me and I just lie in bed in the dark. It's hard to explain, but I just feel so overwhelmed by the nausea, which leads to feelings of regret like, maybe this wasn't the best decision to get pregnant. . . . [T]his is a hard decision for me to make. I don't like the idea of taking medication while pregnant either, but you know what?! This is too much; I can't handle this any more. I need to do something to stop this nausea and help myself. I appreciate your concern for the baby, but this is also about me. *I* need to feel better.[207]

The following account further exemplifies the social conflict women encounter when seeking healthcare during pregnancy. They feel that doctors are treating their pregnancies, not their whole person. At times, pregnant women feel neglected. One woman explains that her decision to have a midwife attend her home birth, instead of using an obstetrician in a hospital, is based on her desire to be treated as an individual pregnant woman, not just as a pregnancy:

> [M]idwifery is woman-centered care. That is, midwives provide individualistic care that is catered to an individual woman and her unique situation. As a consequence, my midwives treated me as a whole person, not simply as a pregnancy. Part of the individualized care was the informed choice and shared decision making that midwifery allowed me. Midwives encourage women to take an active role in their own health and well-being, including the power to make decisions.[208]

Obstetric care is criticized for similar reasons. Young explains:

> [T]he pregnant subject's encounter with obstetrical medicine in the United States often alienates her from her pregnant and birthing experience. . . . I will argue that a woman's experience in pregnancy and birthing is often alienated because her condition tends to be defined as a disorder, because medical instruments objectify internal processes in such a way that they devalue a woman's experience of those processes, and because the social relations and instrumentation of the medical setting reduce her control over her experience.[209]

206. Parry, *supra* note 186, at 466.
207. *Id.*
208. *Id*. at 463.
209. IRIS MARION YOUNG, ON FEMALE BODY EXPERIENCE: "THROWING LIKE A GIRL" AND OTHER ESSAYS 55–56 (2005) (a discussion of pregnant women's experiences with medical care).

Overall, these perspectives portray pregnancy as an existence in which duality and oneness are experienced simultaneously. Even while she repels, she welcomes. Even while she resents, she celebrates. Even while she hates, she loves. Pregnancy is uniquely situated to encompass the one and the two.

It is important to clarify that the simultaneous duality and oneness of pregnancy applies to the physiological, existential, and social relationship between the mother and fetus. Physiologically, duality is represented by fetal viability and by health conflicts between mother and fetus. Simultaneously, physiological oneness is represented by the intertwined existence of the mother and fetus, their shared resources, and microchimerism. Existential duality is demonstrated where women feel that they are two. Simultaneously, existential oneness is represented by women's expressions of viewing the pregnancy as part of their selves. Finally, social duality is experienced by pregnant women's feelings of being invaded by an other or their resentment that concern for the fetus overshadows concern for their individual self. Simultaneously, social oneness is experienced when they welcome and absorb the otherness represented by the fetus.

The preceding narratives and memoirs serve to show that women are recorded as experiencing pregnancy as duality and oneness. They feel connected to their pregnancies and to the lives growing inside of them, yet they also feel invaded. Outside of pregnancy and the mother-infant relationship, there are few moments that prompt individuals to feel that they are, simultaneously, one and two. It is important that this more representative perspective, rather than the adversarial view of pregnancy that has evolved over time, be relied upon to guide the legal understanding of and interaction with pregnancy.

### F. A HOLISTIC VIEW AND FEMINIST LEGAL THEORY

The definition of pregnancy that I propose serve as the foundation for a legal conceptualization is that *pregnancy is a unique relational existential reality that simultaneously represents duality and oneness.* The law should treat the pregnant woman as a pregnant woman, not as an individual person like any other non-pregnant person, not as the embodiment of two separate individuals, but as a pregnant woman.[210] She is more than one but less than two. She embodies and represents an inseparable woman and fetus. The

210. The Supreme Court recently considered how to conceptualize pregnancy in the context of employment discrimination. *See supra*, note 13. Some argue in support of viewing pregnancy as disability. Brief of Law for Professors and Women's Rights Organizations as Amici Curiae Supporting Petitioner at 28, Young v. United Parcel Serv., Inc., No. 12-1226, (U.S. Sep. 10, 2014), *available at* http://www.scribd.com/doc/239318619/Young-v-UPS-Supreme-Court-Brief; *see also* Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 45–49 (1990/91) (arguing that conceptualizing pregnancy as disability is a mistake).

fact that medical science has enabled us to cut open the pregnant woman's belly and remove the child from within does not change the inherent nature of the pregnancy. It does not transform the pregnant woman into a separable mother and fetus. I propose the adoption of a view that incorporates all aspects of pregnancy, the harmonious as well as the conflicting, the duality as well as the oneness, the separate as well as the connected. A holistic view of pregnancy understands that pregnancy is a unique relational existential reality that simultaneously represents physiological, existential, and social duality and oneness. This view is consistent with both physiological and maternal understandings of pregnancy. It is reflective of both intended and unintended pregnancies. It is honest. And, it is woman-centered.[211]

This holistic view incorporates the caring and nurturing aspects of pregnancy consistent with perspectives of relational feminists who highlight the care aspects of women's relationships.[212] It is also aligned with the radical feminist rejection of patriarchal constructs, their focus on motherhood, and the argument that "androgeny is not liberating for women" and that feminist goals should include revaluing traits "associated with the feminine role, such as nurturing and gentleness."[213] A holistic view of pregnancy stands in stark contrast with patriarchal views of pregnancy: It characterizes pregnancy from the perspectives of women and an ethic of care, and it celebrates the unique perspective that women offer. Though a holistic view will likely find support among radical and relational feminists, it should not alarm liberal feminists. In this section, I situate my holistic theory of pregnancy within relational and radical feminism and I respond to the concerns I anticipate it will raise among liberal feminists.[214]

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211. *See* Mason, *supra* note 210, at 2 ("Maternity and motherhood are seen as treacherous topics by those seeking rights for women. They believe that to recognize the biological and social conditions of childbearing and childrearing as a feminine characteristic is to open the door to classifying women for separate, unequal treatment under the law."). *See also,* June Carbone & Naomi Cahn, *Behavioral Biology, the Rational Actor Model, and the New Feminist Agenda*, 24 RESEARCH IN LAW AND ECONOMICS: LAW AND ECONOMICS: TOWARD SOCIAL JUSTICE 189 (Dana L. Gold ed., 2009) ("It is impossible to discuss biology without considering gender . . . . While we believe that the new biology distinguishes between differences in observed preferences and differences in fundamental capacity, we also believe that the multiple risks that come from stereotyping are real. While we cannot let the threat of stereotyping affect our acquisition of knowledge, we must acknowledge and confront it.")

212. Hendricks, *Body and Soul*, *supra* note 90, at 365.

213. PATRICIA SMITH, ed., FEMINIST JURISPRUDENCE 5 (1993).

214. Liberal feminists espouse the general view that "the subordination of women is caused by the legal and social barriers that block or preclude their access to the public sphere of economic and political life." Patricia Smith, *Introduction: Feminist Jurisprudence and the Nature of Law*, *in* FEMINIST JURISPRUDENCE 3, 4 (Patricia Smith, ed., 1993). Liberal feminists argued for "equal rights and equal freedom" and felt that the law should be "gender blind, that there should be no special restrictions or special assistance on the basis of sex." *Id*. Radical feminists believe that we must "change the way we think about gender itself, [and] reexamine our assumptions about our nature and relations to others." *Id.* at 5. Many assert that "male

In her seminal 1989 article *Jurisprudence and Gender*, Robin West critiqued the jurisprudential embrace of the "separation thesis" consisting of the following cluster of claims or assumptions:

> [T]he claim that human beings are, definitionally, distinct from one another, the claim that the referent of "I" is singular and unambiguous, the claim that the word "individual" has an uncontested biological meaning, namely that we are each physically individuated from every other, the claim that we are individuals "first," and the claim that what separates us is epistemologically and morally prior to what connects us.[215]

West maintains that reliance on the separation thesis and its view of the individual as a fully separate being is a foundational flaw in legal thinking that disregards aspects of women's lives.[216] She argues that "[w]omen are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings. . . ."[217] Unlike men, West argues, women's lives are often defined by their connection to others. West identifies four "recurrent and critical material experiences" during which "women are in some sense 'connected' to life and to other human beings."[218] Chief among them, she identifies "the experience of pregnancy."[219]

West's critique followed the work of earlier feminists. In 1989, sociologist Barbara Katz Rothman lashed out against the "absurdity" of the atomistic individual:[220] "Motherhood is an experience of interpersonal connection. The isolated, atomistic individual is an absurdity when one is

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power or male dominance is the basis of the construction of gender and that this construction pervades all other institutions and ensures the perpetuation of patriarchy and thus the subordination of women." *Id.* In general, "the focus of radical feminism is on the domination of women by men through the social construction of gender within patriarchy. For them the solution to the oppression of women is to reverse institutional structures of domination and to reconstruct gender, thereby eliminating patriarchy." *Id.* Relational feminists posit that men and women are, in fact, fundamentally different because "men and women typically undergo a different moral development." *Id.* at 7. Many relational feminists argue that feminists today should not seek "to fit women into a man's world, not to assimilate women into patriarchy, and not to prove that women can function like men and meet male norms[.]" *Id.* Instead of assuming that women will change to meet existing institutions, "institutions should be changed to accommodate women." *Id.*

215. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988).

216. *Id.* at 1.

217. *Id.* at 2.

218. *Id.* at 2–3. West identified the following four connected experiences of women's lives: "the experience of pregnancy itself; the invasive and 'connecting' experience of heterosexual penetration, which may lead to pregnancy; the monthly experience of menstruation, which represents the potential for pregnancy; and the post-pregnancy experience of breast-feeding." *Id*. at 3.

219. *Id.*

220. *See generally* ROTHMAN, *supra* note 118, at 30–37.

pregnant: one is two, two are one."[221] Poet Adrienne Rich examined the disconnect between women's connected understandings of pregnancy and motherhood, and the normative views of pregnancy espoused by our social institutions.[222] She critiqued the patriarchal constructions of pregnancy and motherhood and revealed how motherhood norms were created by outside observers, gendered male.[223] Throughout her work, she refuted the ideology of motherhood by presenting thorough research as well as her own perspective.[224]

The perspectives of Rich, Rothman, and West, that pregnancy is a unique relational experience, and not simply the embodiment of two separate beings, is consistent with relational feminists' focus on the care aspects of pregnancy, that

> pregnancy and birth are occasions of heightened connection to another life. . . . [P]regnancy is an act of nurturance: the feeding and care of a developing life. That nurturing may be done willingly or unwillingly, with love, indifference or hate, but it is done. . . .[225]

Relational feminists highlight both the nurturing and connected aspects of pregnancy and mothering.[226] They value the connection between mother and fetus and view it as a uniquely feminine strength. Further, they use care to help define relationships and argue that it should be a basis for legal recognition of relational rights.[227] Meanwhile, relational feminists recognize that pregnancy can elicit seemingly contradictory responses. The above quote demonstrates the idea that a pregnant woman will care for her fetus physiologically, regardless of whether she consciously loves, hates, welcomes, or resents the life growing inside of her.

221. ROTHMAN, *supra* note 118, at 89.

222. RICH, *supra* note 187.

223. *Id.* at 11 ("In the division of labor according to gender, the makers and sayers of culture, the namers, have been the sons of the mothers."); *see also id.* at 39 ("The female body . . . has far more radical implications than we have yet come to appreciate. Patriarchal thought has limited female biology to its own narrow specifications. The feminist vision has recoiled from female biology for these reasons; it will, I believe, come to view our physicality as a resource, rather than a destiny.")

224. *See generally id.*

225. Hendricks, *Body and Soul*, *supra* note 90, at 365.

226. *Id.*; *See* Linda McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1184 (1992);

227. *See* Jennifer Hendricks, *Essentially a Mother,* 13 WM. & MARY J. WOMEN & L. 429, 442–43 (2007). For an argument that mothering should be "unsexed" *see* Daren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57, 68–69 (2012).

Not all feminist theorists embrace a connected view of pregnancy.[228] Martha Nussbaum, in a 2008 essay, responded to West's articulation of pregnancy as connected by defending the separation thesis:

> The physical separateness thesis is both true and important. . . . Pregnancy is, of course, a partial exception to the physical separateness thesis, since the mother's nutrition does nourish the fetus. Moreover, her emotional state may affect the well-being of the fetus, so pregnancy may be an exception to the mental separateness thesis as well. Notice, however, that the exception is a one-way exception: there is nothing the fetus is capable of doing that will improve the nutritional status or the emotional state of the mother. *The fetus is in that sense a parasite.* Moreover, there are many ways in which the thesis of bodily connection breaks down. . . . All sorts of grave medical choices often have to be made between the physical interests of the mother and those of her fetus, and in such cases nobody has much doubt that there are two separate beings in question, however close and intimate their physical connection.[229]

Nussbaum rejects West's overall separation thesis critique as well as its applicability to pregnancy. Her view is representative of the liberal feminist position. Liberal feminists avoid highlighting any differences between men and women and instead focus on attaining feminist goals through equal opportunity for all.[230] Recognizing differences is discouraged because it is believed that many differences are socially constructed and because there is concern that differences will be exploited to further oppress women.[231]

To refute West's pregnancy critique, Nussbaum focuses on aspects of pregnancy that highlight separations between the mother and fetus and argues that these examples of separation prove that, though connected,

228. *See* Martha C. Nussbaum, *Robin West, Jurisprudence and Gender: Defending a Radical Liberalism*, 75 U. CHI. L. REV. 985 (2008); *see also* Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 383–85 (1996). More recently, gender theorist Daren Rosenblum argued that biology plays an outsized role in the construction of "mothers" and "fathers" and claimed that ovulation, gestation/birth, and lactation are not necessarily connected to mothering. Rosenblum, *supra* note 227, at 68–69; *see also* Hendricks, *Body and Soul*, *supra* note 90, at 364–65 (Scholars "have warned of the dangers of relational and other feminist theories that emphasize women's connectedness to others. Feminist theory that portrays women as inherently more nurturing than men can easily be used against feminist political goals").

229. Nussbaum, *supra* note 228, at 988–89 (emphasis added).

230. *See* SMITH, *supra* note 213, at 4–5.

231. *Id.*; Hendricks, *Body and Soul*, *supra* note 90, at 364–65 (Scholars "have warned of the dangers of relational and other feminist theories that emphasize women's connectedness to others. Feminist theory that portrays women as inherently more nurturing than men can easily be used against feminist political goals").

mother and fetus are separate beings.[232] Her view correlates with liberal feminist ideology that views women's equality through the lens of individual human rights and necessarily rejects any view of women that conflicts with an individualistic pursuit of equality.[233] Nussbaum's defense of the separation thesis seeks to invalidate West's claim by proving two counter-assertions: (1) pregnancy, as a matter of biology, is consistent with the separation thesis because the maternal-fetal connection is a one-way relationship wherein the mother gives and the fetus takes and health conflicts may pit the interests of the mother against those of the fetus;[234] and (2) acceptance of the separation thesis is necessary to the achievement of women's equality.[235]

Despite their valid aspects, these arguments have weaknesses. First, as was previously discussed, from a physiological perspective, pregnancy is not simply a one-way relationship. Pregnancy research reveals that physiologically, pregnancy has an inherently interconnected nature.[236] Well-known findings concerning the delicate physical entanglement of mother and fetus support this view.[237] Moreover, medical conflicts that

232. *See* Sanger, *supra* note 228, at 383–85 (expressing concern that "uncritical celebration and extension" of the views of relational feminists like Gilligan and West will justify discrimination against women).

233. *See* SMITH, *supra* note 213, at 4. Justice Ruth Bader Ginsburg expressed her concern that focus on the mother-child relationship will lead to more discrimination against mothers: "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be." Coleman v. Court of Appeals of Maryland, 132 S.Ct. 1327, 1343 (2012) (Ginsburg, J., dissenting) (quoting 1989 House Hearing 248 (American Bar Association Background Report)). Concerns regarding how increased attention to the mother-child relationship will set women back persists outside of the legal academy as well. Child psychologist, Dr. Stella Chess warned of the dangers of giving too much attention to the mother-child relationship:

> We are back to the professional ideology of the 1950s and 1960s, by now fortunately outmoded, in which the causation of all psychopathology, from simple behavior problems to juvenile delinquency to schizophrenia itself, was blamed on the mother. Then the mother's fault lay in her noxious actions during her child's first few years of life and the attitudes, both conscious and unconscious, that determined them—emotional rejection, rigid childcare practices, 'double-din' messages, etc. Now the fault lies in what the mother fails to do, namely failure to establish skin-to-skin contact with her baby. Further, the time of danger has now been moved back to the first few hours, or enlarged to the first few weeks after birth.

Stella Chess, *Mothers Are Always the Problem – or Are They? Old Wine in New Bottles*, 71 PEDIATRICS 974 (1983).

234. Nussbaum, *supra* note 228, at 989.

235. *Id*., at 991 ("The separation thesis is true and important. All the types of connection that we seek with one another are mediated by our separateness, physical and mental. Forgetting this fact may actually harm our projects of connection.")

236. *See supra* section II.A., p. 229; section II.D., p. 233.

237. *Id.*

may accompany a pregnancy do not necessarily lead to classification of all pregnancies as consistent with the separation thesis.[238] In most pregnancies, there is no need to choose between the health of the mother and the fetus. Medical conflicts during pregnancy that prompt a woman to terminate or risk her pregnancy in the interest of the woman's health are extremely rare.[239] The occurrence of medical conflict in pregnancy, supporting the separate thesis, is the exception. A state of physiological harmony, supporting West's connected view, is the norm. It is therefore more reasonable to develop a conceptualization of pregnancy based primarily on the norm of physiological harmony, while also incorporating the exception of medical conflict. A holistic view of pregnancy accomplishes this goal.

Moreover, even where there is a medical conflict, some mothers deny the physiological conflict by making the social choice to continue the pregnancy. In doing so, they refuse to choose between their individual self and their pregnant self.[240] They instead choose both as components of their whole self, and their continued relationship with their fetus. In these scenarios, medical conflict does not fully prove the separateness of mother and fetus. While medical conflict demonstrates physiological conflict, a choice to continue the pregnancy, in spite of the threat to maternal health, demonstrates social connection. Where, in the face of physiological conflict, the mother continues her pregnancy, a holistic view of pregnancy is representative. A holistic view captures the physiological conflict, by recognizing pregnancy's inherent duality while also incorporating social connection by recognizing pregnancy's inherent oneness. Moreover, when the mother chooses to continue her pregnancy over a termination that would be, arguably, in her individual interest, the mother proves that the

238. *See supra* section II.B., p. 231.

239. It is difficult to find reliable statistics on the percentage of abortions that are chosen to protect maternal health. It seems that between less than one percent and 2.8 percent of all abortions are performed to save the life of the mother or for the health of the mother. Akinrinola Bankole, Susheela Singh, & Taylor Hasa, *Reasons Why Women Have Induced Abortions: Evidence from 27 Countries*, 24 INT'L FAMILY PLANNING PERSPECTIVES (1998), http://www.guttmacher.org/pubs/journals/2411798.html; *Reproductive Health, Maternal and Infant Health: Pregnancy-Related Deaths*, CDC (Dec. 17, 2014), http://www.cdc.gov/reproductivehealth/MaternalInfantHealth/Pregnancy-relatedMortality.htm. However, over 1000 women die each year for pregnancy-related reasons and it is believed that many more would die if abortion was not legal. *Id. See also* Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97, 103–25 (2008) (providing a thorough discussion of when and why women obtain abortions).

240. Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion*, 34 HARV. J.L & PUB. POL'Y 889 (2011). Bachiochi challenges "the assumptions underlying the idea that pregnancy and motherhood necessarily undermine equality for women [and argues] instead that abortion rights actually hinder the equality of women by taking the wombless male body as normative, thereby promoting cultural hostility toward pregnancy and motherhood." *Id.* at 893.

social relationship between herself and her fetus is characterized by connection, protection, and care.

In addition to defending the separation thesis from a theoretical perspective, Nussbaum also expresses a practical concern that the separation thesis is necessary to protect women's equality.[241] Recognition of the connected nature of pregnancy can be equally protective of women's equality. As this article's review of pregnancy law in Part III will show, courts have little difficulty interfering with women's autonomy and actions when applying an adversarial view of pregnancy. This is because the adversarial view compels courts to balance the rights of the woman against the potentially adversarial interests of the fetus.[242] This balancing of rights, which would not exist were the woman not pregnant, enables courts to intervene in women's pregnancies. Though some courts that adopt a connected view of pregnancy also impose state action upon pregnant women, a connected view is theoretically less consistent with an adversarial view of pregnancy.[243] Adopting a legal conceptualization of pregnancy that recognizes the connection between mother and fetus would require the formulation of a legal framework that appreciates the otherness of pregnancy. Neither the current adversarial model nor a purely individualistic approach to the pregnant woman recognizes the true nature of pregnancy. Despite Nussbaum's concerns, I believe that there is no reason to assume that this holistic conceptualization of pregnancy would be less protective of women's equality.[244] Similarly, activist and lawyer Erika Bachiochi argues that "the assumptions underlying the idea that pregnancy and motherhood necessarily undermine equality for women . . . actually hinder the equality of women by taking the wombless male body as

241. Nussbaum, *supra* note 228, at 989–90 (expressing her concern as follows: "It seems to me that West romanticizes the state of pregnancy when she fails to observe these manifest tensions and breakdowns in physical connection. Moreover, when we consider the case of pregnancy due to rape or incest, or pregnancy as the result of inadequate opportunity to use contraception, the separateness thesis looks stronger yet: this is my body, and here I find within it an unwanted parasite, jeopardizing my plans and possibly my health and even my life. If it this picture that underlies most arguments in favor of abortion rights for women, and any feminist ignores such considerations at her peril.").

242. Rebecca Rausch argues that there is validity to the adversarial conception of pregnancy: "It seems untenable that any abortion rights analysis can truly avoid this clash. The interests of a fetus and a woman who does not want to be pregnant necessarily conflict." Rebecca Rausch, *Reframing Roe: Property Over Privacy*, 27 BERKELEY J. GENDER L. & JUST. 28, 52 (2012).

243. *See* Raleigh Fitkin-Pal Morgan Mem'l Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964); *see infra* section III.A., p. 250.

244. In subsequent articles, I will provide greater detail as to how the law should interact with pregnancy in specific cases. This foundational article seeks to show that the current conceptualization is inconsistent with the true nature of pregnancy and that the legal conceptualization of pregnancy should be reconstructed to reflect maternal and scientific understandings.

normative, thereby promoting cultural hostility toward pregnancy and motherhood."[245]

I argue that feminist goals of social and economic equality would be better supported by a theorization of pregnancy that is honest and realistic. A few decades ago women were forced to minimize the impact that pregnancy, motherhood, and marriage had on their ability to be successful in the paid market.[246] To admit the severity of morning sickness and its impact on productivity at work, or the pain of sleepless nights and the effect on brain function, or the amount of time spent on housework and the consequential lack of energy for other pursuits, would have been the death knell of maternal employment.[247] With the formal barriers to women's equal participation in the public sphere eradicated, thanks to the work of liberal feminists, the new feminist equality frontier should be to create a society wherein all women are able to fully participate and succeed in the public sphere, without sacrificing motherhood.[248] Therefore, unless we are honest about the meaning and impact of pregnancy and motherhood on the lives of women, we will be unable to eradicate the mothering effect and

245. Bachiochi, *supra* note 240, at 893; *see also* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).

246. *See* Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1 (1990/91) (arguing that an equal protection analysis of maternity and childrearing is bad for women and children).

247. In her book, PREGNANT MEN, Professor Ruth Colker admits to her own difficulties working during pregnancy and notes that *pretending* that a pregnant woman is no different from anyone else, or from her pre-pregnant self, is problematic:

> My pregnancy made me so tired that I often found it difficult to continue with my practice of law. Despite my feminism, I felt guilty in putting my own physical needs above my professional practice. I confided in a colleague that I was frustrated that people had expected me to work so hard during my pregnancy. She said in response, "Did you ever try telling them that you are tired? You always walk around telling people how good you feel and then you are surprised when they don't empathize with your exhaustion!"

RUTH COLKER, PREGNANT MEN 5 (1994). In her memoir, Naomi Wolf shares a similar realization, "There is an impossible expectation placed on pregnant women in our society: that we're supposed to get on with everything and express only a blossoming sense of joy and anticipation, even as the person we have taught ourselves to be is transfigured and reborn." WOLF, *supra* note 192, at 63.

248. *See* FINEMAN, *supra* note 7, at 70–89; *see also id.* at 70–71 (discussing potential disadvantages to pushing for the de-gendering of motherhood: "To a great extent, the law and legal language incorporate the feminist notion that Mother is an institution that must be reformed–that is, contained and neutralized. In middle-class family law (the law of marriage and divorce), this has been accomplished by transfiguring the symbolically positive cultural and social components of parenting typically associated with the institution of motherhood into the de-gendered components of the neutered institution of 'parenthood.' Custody policy at divorce reflects the determination that parents are assumed equally entitled to custody regardless of the 'mothering' they did (or did not do) during the marriage."); Bachiochi, *supra* note 240.

achieve success as both mothers and workers.[249] Adopting a legal conceptualization of pregnancy that reflects a holistic view of pregnancy is an important step toward achieving these goals.

Finally, a holistic view of pregnancy will produce more just legal results. Strapping a pregnant woman down and forcing her to undergo a cesarean section against her wishes is not the type of state action expected from a liberal democracy,[250] terminating a mothers' parental rights based solely on her misconduct during pregnancy is not good for mothers, children, or families,[251] and charging a woman with murder because desperation led her to attempt suicide while she happened to be pregnant represents an utter failure to understand mental illness and vulnerability.[252] A holistic view of pregnancy would empower pregnant women to make choices that are best for themselves and their pregnancies. By adopting a holistic view of pregnancy and abandoning the farce of adversarial pregnancy, the law can move toward practices that will enhance the lives of mothers, children, and families.

Furthermore, it is important to acknowledge that the separation thesis remains of value to pregnancy theory. In other words, the separateness of woman and fetus is an accurate portrayal of some aspects of pregnancy under certain circumstances. Separation is represented by medical and social conflicts between the mother and the fetus that may arise. A holistic view of pregnancy, necessarily, must incorporate these aspects of pregnancy. It does so by recognizing that duality is a critical aspect of pregnancy. Thus, within the feminist legal discourse, my perspective is more aligned with West's view than with Nussbaum's, yet it incorporates both. I side with West and other relational feminists because I believe the connected view is more reflective of the nature of pregnancy than the liberal separationist view. Nevertheless, I do not discount the valid aspects of Nussbaum's separation thesis defense. Rather, I merge both the separate and connected aspects of pregnancy into one holistic conceptualization.

Accordingly, I propose the rejection of the adversarial view of pregnancy and the adoption of a holistic view of pregnancy in its place. The law should conceptualize pregnancy as a unique relational existential reality that simultaneously represents duality and oneness. Further, the law should adopt a presumption in favor of maternal decision making during pregnancy. The presumption in all wanted pregnancies should be that the pregnant woman acts in the best interests of herself, her pregnancy and her fetus.[253]

249. *See generally* Rona Kaufman Kitchen, *Eradicating the Mothering Effect: Women as Workers and Mothers, Successfully and Simultaneously*, 26 WIS. J.L. GENDER & SOC'Y 167 (2011) (defining the "mothering effect" as the comprehensive aspects of the professional and personal marginalization and financial penalization of mothers).

250. *See infra* section III.A., p. 250.

251. *See infra* section III.B., p. 259.

252. *See infra* section III.B., p. 259.

253. In a subsequent article, I will discuss how the presumption can be overcome.

## PART III. CONSEQUENCES OF AN ADVERSARIAL VIEW

The consequences of applying the adversarial view of pregnancy in the context of wanted pregnancies are troubling for women, children, and families. Courts hearing cases concerning medical intervention, criminal allegations, and parental rights have been using an adversarial view of pregnancy to guide their decisions. As a result, pregnant women have been physically violated, families have been ripped apart, mothers have been denied access to their children, and women have been incarcerated after the deaths of their babies. This section discusses specific cases that illustrate the unjust results of applying an adversarial conceptualization of pregnancy to wanted pregnancies. In addition, I describe how a holistic view of pregnancy and a presumption in favor of maternal decision making during pregnancy would lead to more just results.

### A. MEDICAL INTERVENTION

In *In re A.C.*, a court in Washington, D.C. was called upon to determine whether to authorize a hospital to deliver a twenty-six and a half week old fetus from her terminally ill mother, Angela Carder, by cesarean section without her consent.[254] Due to Angela's advanced illness and her inability to clearly communicate her will, the trial court found that "[t]here was some dispute about whether [Angela] would have chosen to have a cesarean section" at earlier than twenty-eight weeks.[255] Angela's husband and mother were opposed to the cesarean section.[256] Some hospital doctors testified that the procedure was necessary to protect the unborn child and that if performed, the child had a fifty percent to sixty percent chance of survival.[257] The District Court authorized the cesarean section.[258]

After Angela was informed of the trial court's decision but before the cesarean section was performed, Angela refused to consent to the surgery. In response to a physician's inquiry, she "mouthed the words, 'I don't want it done.'"[259] As a result, an appeal was filed.[260] The Court of Appeals denied a motion to stay the order of the trial court. The hospital performed the cesarean section and both the mother and infant died.[261]

After the procedure was performed, a three-judge motion division of the United States Court of Appeals for the District of Columbia prepared an opinion denying the stay.[262] In its decision the court applied the adversarial view of pregnancy adopted in *Roe*.[263] In reaching its conclusion, the court

254. *In re* A.C., 573 A.2d 1235, 1239 (D.C. 1990).
255. *In re* A.C., 533 A.2d 611, 612 (D.C. 1987).
256. *In re A.C.*, 573 A.2d. at 1240.
257. *Id*. at 1239.
258. *Id*. at 1241.
259. *Id*.
260. *In re A.C.*, 533 A.2d at 613.
261. *Id*.
262. *Id*. at 612, *vacated* 539 A.2d 203 (D.C. 1988).
263. *Id*. at 614–15 (citing Roe v. Wade, 410 U.S. 113, 153, 160, 162 (1973)).

considered the *Roe* framework for balancing maternal and fetal rights, the pregnant woman's right to bodily integrity, and a mother's right to withhold medical treatment from her child.[264] Based on *Roe*, the court explained that in a case such as this it was proper to balance a pregnant woman's right to liberty against the State's interest in potential life:

> [A]s a matter of law, the right of a woman to an abortion is different and distinct from her obligations to the fetus once she has decided not to timely terminate her pregnancy. With a viable fetus, a balancing of interests must replace the single interest of the mother. . . .[265]

In affirming the trial court's decision, the court also considered whether the pregnant woman's right to bodily integrity precluded it from authorizing the cesarean section without her consent. In analyzing the matter, the court noted that though the "right to bodily integrity precludes the State from intervening in the adult's decision to refuse medical treatment," the State's interests in "protecting innocent third parties," in this case the fetus, "may override" the adult's right.[266] Finally, the court considered whether a parent could refuse medical treatment on behalf of her child. While the law clearly supports the proposition that "parents may not withhold life-saving treatment from their children because of the parents' religious beliefs," the court recognized that this rule was not necessarily applicable to unborn children.[267] Thus, the court turned its attention to the question of whether a pregnant woman's right to bodily integrity outweighed the State's interest in potential life.[268] Based on decisions in other jurisdictions, the court determined that "the State may not infringe upon the mother's right to bodily integrity to protect the life or health of her unborn child unless to do so will not significantly affect the health of the mother and unless the child has a significant chance of being born alive."[269] Finally, the court held that where, as here, the pregnant woman had only a few days left to live, the cesarean section would not

264. *In re A.C.*, 533 A.2d at 614–15.

265. *Id*. The argument that a woman's legal rights and duties shift once she has decided against terminating the pregnancy was made earlier by fetal rights proponent John A. Robertson. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 437–38 (1983) (claiming that "[o]nce [the pregnant woman] decides to forgo abortion and the state chooses to protect the fetus, the woman loses the liberty to act in ways that would adversely affect the fetus. [¶]. Restrictions on pregnancy management may significantly limit a woman's freedom of action and even lead to forcible bodily intrusions to protect the unborn child . . . Although she is under no obligations to invite the fetus in or to allow it to remain, once she has done these things she assumes obligations to the fetus that limit her freedom over her body.").

266. *A.C.*, 533 A.2d. at 615–16.

267. *Id*. at 616.

268. *Id*. at 614.

269. *Id*. at 617.

significantly alter her prognosis, and her child had a chance of surviving, the trial court "did not err in subordinating [the pregnant woman's] right against bodily intrusion to the interests of the unborn child and the State."[270]

Through this decision, the appellate court wholly embraced the adversarial view of pregnancy in this non-abortion context. The court reasoned that state action was needed because the mother's refusal to consent to a cesarean section prior to twenty-eight weeks conflicted with the interest in potential life. Thus, the court applied the adversarial view of pregnancy to justify balancing the State's interest in protecting fetal life against the mother's interest in her bodily integrity. Importantly, the facts in this case were easily distinguishable from the facts in an abortion case. In an abortion case, a pregnant woman seeks to terminate her pregnancy. Angela Carder was not seeking to terminate her pregnancy. Angela's family was seeking, simply, to be left in peace. They sought for Angela to be permitted to live out her remaining days without state interference. She refused a surgery that would hasten her death and remove her possibly already brain dead, not yet fully developed child from her womb.[271] Though some would argue that her refusal to consent placed her interests at odds with the interests of her fetus, the claim is debatable. If Angela's child had survived, she would have had many serious health problems and no mother. Reasonable people could determine that, under the circumstances, it would have been best to allow nature to run its course and for Angela and her baby to pass on together. Despite the doctors' opinions that Angela's life was coming to an end, it is also possible that Angela would have continued to live long enough for her child to be delivered and placed into her arms. Though we do not know why exactly, Angela, her husband (the baby's father), and her mother were all opposed to the earlier cesarean section.[272] Nevertheless, the State determined that, based on *Roe*'s adversarial understanding and legal framework, it was proper to forcibly remove Angela's baby from her body.

A few months later, the Court of Appeals vacated its judgment denying the stay and reheard the case, despite its apparent mootness, in order to provide proper guidance if and when a similar case was to arise.[273] After fully considering the issues, the Court held that there was no legal basis for forcing Angela to undergo a cesarean section without her consent even if her refusal placed the fetus in harm's way.[274] The Court further determined that where it was unclear whether a woman would consent to undergoing a

270. *A.C.*, 533 A.2d. at 617.

271. Terry E. Thornton & Lynne Paltrow, *The Rights of Pregnant Patients Carder Case Brings Bold Policy Initiatives*, 8(5) HEALTHSPAN 10 (1991), *available at* http://advocatesforpregnantwomen.org/articles/angela.htm.

272. *Id*.

273. *In re A.C.*, 573 A.2d at 1237.

274. *Id*.

cesarean section, as the hospital argued was the case for Angela Carder, it was the court's duty to make a finding through substituted judgment.[275] Specifically, the Court held:

> [I]n virtually all cases the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus. If the patient is incompetent or otherwise unable to give an informed consent to a proposed course of medical treatment, then her decision must be ascertained through the procedure known as substituted judgment.[276]

Moreover, the court found that since Angela neither consented to the cesarean section, nor did the court make a finding of consent through substituted judgment, "it was error for the trial court to proceed to a balancing analysis, weighing the rights of [the mother] against the interests of the state."[277]

The appellate court rested its decision on the individual right to bodily integrity.[278] However, through its analysis of the case, the court rejected the adversarial view of pregnancy embraced in the district court and initial Court of Appeals decisions. The court did not consider Angela and her fetus to be two separate beings in need of individualized legal protection. The court did not view Angela as a threat to her pregnancy and an adversary to her fetus. Rather, the court viewed the fetus as connected to Angela and viewed Angela as the proper representative of her best interest, her pregnancy included. By stating that "in virtually all cases the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus" the court acknowledged that the pregnant woman is the best judge of what is in the interest of herself, her pregnancy, and her fetus.[279]

Thus, the trial court's decision and the two decisions of the D.C. Circuit in *A.C.* illustrate the disparate results of applying an adversarial or connected view of pregnancy. Moreover, the decisions demonstrate that courts are often confused about how to analyze state intervention with pregnant women. Where the court embraced the adversarial view of pregnancy, it authorized the State to interfere with the pregnant woman's decisions concerning her body, her life, and her unborn child. Where the court embraced a connected view of pregnancy, it refused the State's

275. *In re A.C.*, 573 A.2d at 1237.
276. *Id.*
277. *Id*. at 1248.
278. *Id*. at 1247 ("[T]he right of bodily integrity belongs equally to persons who are competent and persons who are not. . . . To protect that right against intrusion by others—family members, doctors, hospitals, or anyone else, however well-intentioned— . . . a court must determine the patient's wishes by any means available, and must abide by those wishes unless there are truly extraordinary or compelling reasons to override them.").
279. *In re A.C.*, 573 A.2d at 1237.

intrusion and concluded that the pregnant mother is the appropriate representative of both her own interests and the interests of her unborn child. Where the court analyzed the matter as an abortion case and as a bodily integrity third party exception case, intervention was authorized. Where the court analyzed the case as a bodily integrity patient consent case, intervention was prohibited. The recent increase in forced medical interventions of pregnant women demonstrates that, despite the corrective action taken by the court of appeals in Angela Carder's case, the adversarial view of pregnancy is gaining support.[280] Therefore, it is especially important that courts apply a proper legal framework to analyze cases of pregnant women.

Applying a holistic view of pregnancy and a presumption in favor of maternal judgment to Angela Carder's case, the court would have acknowledged that pregnancy is a unique relational existential reality that simultaneously represents duality and oneness and that, therefore, the State should presume that Angela Carder is best positioned to determine how best to handle her life and her pregnancy. Such a framework would support the Circuit's ultimate decision that the case should have been analyzed as a matter of substitute judgment.

An Illinois court considered a similar issue four years later in *In re Baby Boy Doe*.[281] It considered whether a "court can balance whatever rights a fetus may have against the rights of a competent woman to refuse medical advice to obtain a cesarean section for the supposed benefit of the fetus."[282] The court concluded that "no such balancing should be employed, and that a woman's competent choice to refuse medical treatment as invasive as a cesarean section during a pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus." In reaching its conclusion, the court relied on the 1988 Illinois Supreme Court tort case *Stallman v. Youngquist*.[283] In *Stallman*, the Illinois Supreme Court held that a child could not bring suit against his mother for damages sustained due to his mother's unintentional infliction of prenatal injuries.[284] The Court reviewed the history of prenatal tort claims to reach its conclusion. Without rejecting tort law that allows an infant to recover for prenatal injuries against a third party, the court expressed is disapproval of the adversarial view of pregnancy:

> It would be a legal fiction to treat the fetus as a separate legal person with rights hostile to and assertable against its mother. The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. No other

280. *See* Paltrow & Flavin, *supra* note 6.
281. *In re* Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994).
282. *Id*. at 326.
283. *Id*. (citing Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988)).
284. *Stallman*, 531 N.E.2d at 355.

> plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world. It is, after all, the whole life of the pregnant woman which impacts on the development of the fetus. As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault: it is a fact of life.[285]

In *Baby Boy Doe*, the court reached its ultimate conclusion based on multiple legal principles.[286] Most importantly, however, the court considered the holding in *Stallman* and that court's "recognition that the relationship between a pregnant woman and a fetus is unique."[287] Despite recognizing that the relationship between mother and fetus is "unlike the relationship between any other plaintiff and defendant,"[288] the court recognized that under Illinois law, "a fetus is not treated *only* as part of its mother."[289] However, it limited the fetal right to life to actions asserted against third parties only—"not assertable against its mother . . . for the unintentional infliction of prenatal injuries."[290]

The *A.C.*, *Stallman*, and *Baby Boy Doe* cases represent how a holistic view of pregnancy can lead courts to defer to the pregnant woman's judgment. They illustrate the contrast between the adversarial view, wherein fetal interests are assertable against the mother; the separate existence view, wherein the fetus is an independent being that can assert its interests against a third party not its mother; and the holistic view, wherein the fetal-maternal relationship is characterized by simultaneous duality and oneness. In embracing a holistic view, these cases focused on the "unique" relationship shared by mother and fetus.[291] They acknowledged that mother and fetus are "unlike" other legal parties.[292] Instead of trying to fit the mother-fetus relationship into understandings of human relations outside of the pregnancy and motherhood contexts, based on the separateness of the individual, these cases attempt to recognize the true nature of pregnancy and apply law to it in a reasonable and just manner.

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285. *Stallman*, 531 N.E.2d at 360.

286. In reaching its decision, the court identified the common law right to refuse medical treatment, the due process clause's conferral of a "significant liberty interest in avoiding unwanted medical procedures," the state of Illinois' acknowledgement that the state right of privacy protects reproductive autonomy, and the right to religious liberty. *In re Baby Boy Doe*, 632 N.E. 2d at 331.

287. *Id.* at 331.

288. *Id.* at 331–32.

289. *Id.* at 332 (emphasis added).

290. *Id.*

291. *Baby Boy Doe*, 632 N.E. 2d at 331.

292. *Id.* at 331–32.

In addition, these cases identify the practical problems with regulating the mother-fetus relationship as if it was a relationship between two legal strangers. They understand that it is a "fact of life" that the mother and child are intertwined in unparalleled ways and that every action taken by the pregnant mother "for better or worse, shapes the prenatal environment which forms the world for the developing fetus."[293] Unlike the common law courts' adoption of the connected and separate existence views in the earlier tort cases or the Supreme Court's adoption of the adversarial view and its rights balancing framework in the abortion cases, the *Stallman* court adopted a holistic view of pregnancy *after* considering the actual nature of pregnancy. The separate existence view was adopted primarily in an effort to ensure a mechanism by which to right the wrong of prenatal injuries caused by third parties. The adversarial view adopted by the Supreme Court followed years of common law court application of the separate existence view. It recognized that, regardless of the true nature of pregnancy, in the special circumstances of abortion the woman and the fetus have adversarial interests. A holistic view of pregnancy would incorporate the view of the courts in *A.C.*, *Stallman*, and *Baby Boy Doe*.

Interestingly, not all courts that have adopted a holistic view of pregnancy have refused to balance the rights of the fetus against the mother's rights.[294] In *Raleigh Fitkin-Pal Morgan Memorial Hosp. v. Anderson*, a New Jersey court expressed support for a holistic view of pregnancy, but, nevertheless, authorized violation of the mother's bodily integrity without her consent to save her life and the life of her child.[295] The court expressed an understanding of pregnancy similar to the one articulated by the *Stallman* Court: "the welfare of the child and mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them."[296] However, the court concluded that "the child's right to live, even before birth, was superior to the mother's right to bodily inviolability."[297] Thus, despite the fact that the court adhered to a connected view of pregnancy, it simultaneously recognized distinct rights in the fetus, rights adversarial and superior to the mother's rights.

The court's reasoning in *Raleigh Fitkin-Pal* is flawed. If the pregnancy represents inseparability and there is insufficient evidence to prove an adversarial relationship between the mother and fetus, the court should presume that the pregnant woman is best positioned to make decisions concerning herself, her pregnancy, and her fetus. The conclusions reached

293. Hendricks, *Essentially a Mother*, *supra* note 227, at 472.

294. *See* Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964).

295. *Id.*; Case Comment, *Transfusions Ordered for Dying Woman Over Religious Objections*, 113 U. PA. L. REV. 290, 293 (1964).

296. *Raleigh Fitkin-Paul Morgan Mem'l Hosp.*, 201 A.2d at 538.

297. *Transfusions Ordered for Dying Woman Over Religious Objections*, *supra* note 295, at 293 (citing *Raleigh Fitkin-Paul Morgan Mem'l Hosp.*, 201 A.2d at 537).

in *A.C*, *Stallman*, and *Baby Boy Doe* are a more reasonable application of a holistic view—that because of the "unique" relationship of the mother and fetus, whereby the fetus depends exclusively on the mother for everything necessary and where every act of the mother impacts "the environment which forms the world for the developing fetus," it is inappropriate to balance fetal rights against maternal rights.[298] Though *A.C.* and *Baby Boy Doe* were medical intervention cases that adopted a holistic view of pregnancy and deferred to the pregnant woman's judgment in making medical decisions concerning her pregnancy, the more recent trend has been to adopt an adversarial view of pregnancy and allow the State to violate the pregnant woman's bodily integrity in the interest of fetal life. The adoption of a holistic view of pregnancy coupled with a presumption in favor of maternal decision making would preclude the State from second guessing pregnant women's healthcare decisions.

Importantly, though both the *A.C.* and *Baby Boy Doe* courts refused to allow the state to intervene without the pregnant woman's consent, each court employed a distinct reasoning. Moreover, though *A.C.* ultimately reached the same conclusion as it would have pursuant to a holistic view of pregnancy, the court's application of a simple bodily integrity/patient consent framework failed to recognize that pregnancy is a unique reality that requires special legal consideration. In contrast, *Baby Boy Doe*, consistent with my proposed approach, did acknowledge the uniqueness of pregnancy in determining that the state could not interfere with the pregnant woman's refusal of a cesarean section. Though the court relied on the right to bodily integrity in prohibiting state interference, like the court in *A.C.*, *Baby Boy Doe*'s reasoning was based on the unique nature of pregnancy as discussed in *Stallman*.

A recent article authored by Lynn Paltrow and Jeanne Flavin critiquing state interventions in pregnancies tracked "forced interventions on pregnant women" from 1973–2005.[299] One example discussed in the article was the case of Laura Pemberton, a pregnant woman who was forcibly restrained while in active labor and compelled to undergo a cesarean section because doctors believed "she was posing a risk to the life of her unborn child by attempting to have a vaginal birth after having had a previous cesarean section (VBAC)."[300] Subsequently, she filed suit against the hospital as agents of the State for violation of her substantive and procedural due

298. *Baby Boy Doe*, 632 N.E. 2d at 331; Hendricks, *Essentially a Mother*, *supra* note 227, at 472.

299. Paltrow & Flavin, *supra* note 6.

300. *Id.* at 306–07; Sarah D. Murphy, note, *Labor Pains in Feminist Jurisprudence: An Examination of Birthing Rights*, 8 AVE MARIA L. REV. 443, 461–63 (2010) (discussing that though a VBAC poses a risk to both mother and fetus, the risk of posed by cesarean sections are similar and that the preference for cesarean sections among medical professionals is really based on medical interests in better hours and avoidance of malpractice lawsuits, not fetal protection).

process rights to, among other things, bodily integrity.[301] In granting the hospital's motion for summary judgment, the district court relied on *Roe*'s rights-balancing framework under which "by the point of viability . . . the state's interest in preserving the life of the fetus outweighs the mother's own constitutional interest in determining whether she will bear a child."[302] It determined that "Ms. Pemberton's personal constitutional rights . . . clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child."[303] The court held that the facts at issue were actually *more* supportive of state intervention than in *Roe* because:

> [T]he full-term baby's birth was imminent, and more importantly . . . the mother sought only to avoid a particular procedure for giving birth, not to avoid giving birth altogether. Bearing an unwanted child is surely a greater intrusion on the mother's constitutional interests than undergoing a caesarean section to deliver a child that the mother affirmatively desires to deliver. Thus the State's interest here was greater, and the mother's interest less, than during the third trimester situation addressed in Roe.[304]

The court did not recognize that the case was factually distinguishable from *Roe*.[305] Laura Pemberton, unlike a pregnant woman seeking to terminate her pregnancy, showed absolutely no evidence of an adversarial mother-fetus relationship.[306] Instead of applying the *Roe* framework, the court should have, based on the facts, adopted a holistic conceptualization of Laura's pregnancy and recognized, like the courts in *A.C.* and *Baby Boy Doe*, that the pregnant woman's interests were aligned with her unborn child's interest and that her bodily integrity was not subject to state intervention. This misapplication of the adversarial conceptualization of pregnancy is not isolated.[307] Criminal and dependency courts apply an

301. Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1251 (N.D. Fla. 1999).

302. *Pemberton*, 66 F. Supp. 2d at 1251.

303. *Id.*

304. *Id.* at 1251–52.

305. Murphy, *supra* note 300, at 465–67 (critiquing application of *Roe* to *Pemberton* by arguing that under *Roe* the state's power is prohibitive and in *Pemberton* the state took "assertive measure against a woman's decision by forcing her to undergo a cesarean section" against her will).

306. Laura Pemberton "left the state and went on to have four more children, including a set of twins, vaginally." *Writing Contest to Advance Feminist Legal Scholarship on the Subject of Pregnant Women's Civil and Human Rights*, Aug. 28, 2008, http://advocatesforpregnantwomen.org/main/events/writing_contest_to_advance_feminist_legal_scholarship_on_the_subject_of_pregnant_womens_civil_and_human_rights.php.

307. Lynn M. Paltrow & Jeanne Flavin, Op-Ed., *Pregnant, and No Civil Rights*, N.Y. TIMES, Nov. 7, 2014, at A21; For a discussion of how the Supreme Court's decision in *Carhart* impacts pregnant women's medical intervention cases *see* Margo Kaplan, *"A Special Class of Persons": Pregnant Women's Right to Refuse Medical Treatment After*

adversarial view of pregnancy to incarcerate pregnant women and mothers and to deny them their parental rights.

B. CRIMINAL AND DEPENDENCY LAW

Application of the adversarial conceptualization of pregnancy has led to especially devastating results for some mothers in the dependency and criminal contexts.[308] State child welfare laws establish that mothers who engage in certain conduct during their pregnancy may face the loss of their maternal rights.[309] A woman whose legal motherhood would otherwise be recognized at law may be barred from establishing legal motherhood exclusively on the basis of her actions during the pregnancy.[310] Even where the State does not terminate the mother's legal status, her access to her child may be limited or denied.[311] Additionally, a mother's conduct during her pregnancy may result in her criminal prosecution and incarceration.[312] Recent commentators have

*Gonzales v. Carhart*, 13 U. PA. J. CONST. L. 145, 145 (2010) ("Until *Carhart*, abortion jurisprudence provided very limited support for compelled medical treatment of pregnant women more generally. *Carhart* interprets the state interests in fetal life and maternal health so broadly that it essentially creates new, dubious state interests that, in the context of compelled treatment cases, expand state justifications for requiring medical treatment of pregnant women, even where such treatment would harm women's health.").

308. *See e.g.* Ex parte Ankrom, 1110176 & 1110219, 2013 WL 9828405 (Ala. Jan. 11, 2013) (affirming ten-year sentence for mother of two who was convicted under child endangerment statute based on her prenatal drug use, and affirming three year sentence for mother of three convicted of child endangerment based on prenatal drug use where her baby was born healthy); Bei Bei Shuai v. State, 966 N.E.2d 619 (Ind. Ct. App. 2012) (affirming indictment of woman charged with murder and attempted feticide based on attempted suicide while pregnant); State v. Buckhalter, 119 So. 3d 1015 (Miss. 2013) (mother charged with culpable-negligence manslaughter after she gave birth to a stillborn baby); Order 162566, Gibbs v. State, No. 2010-IA-00819-SCT (Miss. Oct. 27, 2011) (teenaged mother charged with depraved heart-murder after she gave birth to stillborn baby); *In re* Roni M.H., No. E2011–02691–COA–R3–PT, 2012 WL 1523948, at *9 (Tenn. Ct. App. April 30, 2012) (mother's parental rights terminated based on prenatal drug use).

309. Ian Vandewalker, Comment, *Taking the Baby Before It's Born: Termination of the Parental Rights of Women Who use Illegal Drugs While Pregnant*, 32 N.Y.U. REV. L. & SOC. CHANGE 423 (2008); *In re* Unborn Child, 683 N.Y.S.2d 366, 369 (N.Y. Fam. Ct. 1998) (determining that a mother was guilty of derivative neglect of her unborn child where she admitted to using illegal drugs during her pregnancy in violation of a court order that she refrain from drug use).

310. Vandewalker, *supra* note 309.

311. *See Ex parte Ankrom*, 2013 WL 9828405.

312. Paltrow & Flavin, *supra* note 6; Karen McVeigh, *Study Finds Widespread 'Criminalisation of Pregnancy' in U.S. Institutions*, THE GUARDIAN (Jan. 14, 2013), http://www.theguardian.com/world/2013/jan/15/criminalisation-pregnancy-women-study; State v. McKnight, 576 S.E.2d 168 (S.C. 2003) (convicting the defendant of homicide by child abuse where she gave birth to a full-term stillborn child as a result of using cocaine while pregnant); Ex parte Hicks, 153 So. 3d 53 (Ala. 2014) (holding that the defendant was properly convicted of chemical endangerment of a child for exposing her unborn child to cocaine while pregnant); Radley Balko, *And Now: The Criminalization of Parenthood*, WASH. POST, Jul. 14, 2014, http://www.washingtonpost.com/news/the-watch/wp/2014/07/14/and-now-the-criminalization-of-parenthood/ (noting that Tennessee native, Mallory

identified this trend of incarcerating pregnant women as the "criminalization of pregnancy."[313]

In 2012, in *In re Roni M.H.*, a Tennessee Appellate Court articulated its view of prenatal conduct that justifies terminating a mother's parental rights. The court explained:

> We have repeatedly held that probation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child.[314]

Pursuant to Tennessee statute, a finding that a mother has engaged in conduct that "exhibits a wanton disregard for the welfare of the child" is grounds for terminating her parental rights.[315] The Appellate Court sustained termination of the mother's parental rights on the basis of "wanton disregard for the welfare of the child," where the finding was based on "evidence of her drug abuse in the course of her pregnancy with

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Loyola, was charged with felony assault after her newborn infant tested positive for methamphetamine as a result of her prenatal drug use).

313. *See* McVeigh, *supra* note 312; Paltrow & Flavin, *supra* note 6. A review of the legal response to 'crack babies' in the 1980s reveals that this trend is not at all new. *See* Louise Marlane Chan, Note, *S.O.S. from the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199 (1993) (arguing in favor of criminal legislation proscribing drug use during pregnancy); Michael T. Flannery, *Court-Ordered Prenatal Intervention: A Final Means to the End of Gestational Substance Abuse*, 30 J. FAM. L. 519 (1991) (arguing for prenatal intervention to address the epidemic of prenatal drug use and its impact on newborns); Lynn Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999 (1999) (discussing prosecutions of pregnant women as a threat to reproductive freedom); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (adding the perspective of poor Black women to the debate over protecting fetal rights by prosecuting women for drug use during pregnancy and arguing that such prosecutions violate women's fundamental rights).

314. *In re* Roni M.H., No. E2011–02691–COA–R3–PT, 2012 WL 1523948, at *9 (Tenn. Ct. App. April 30, 2012) (citing *In re* Audrey S., 182 S.W.3d 838, 867–868 (Tenn. Ct. App. 2005)). However, the results of a recent twenty-five year study on the "crack baby" epidemic of the 1980s revealed that there are no statistically significant differences in the long-term health or brain development of children that were exposed to cocaine in utero compared to those who were not. Katie McDonough, *Long-term Study Debunks Myth of the "Crack Baby"*, SALON, Jul. 23, 2013, http://www.salon.com/2013/07/23/longterm_study_debunks_myth_of_the_crack_baby/. As Dr. Deborah A. Frank, a pediatrician, related, the "crack baby" epidemic was more of a moral issue rather than an actual health problem, as society's reaction to prenatal drug use was "'guided not by the toxicity, but by the social meaning' of the drug." Susan Okie, *The Epidemic that Wasn't*, N.Y. TIMES, Jan. 27, 2009, http://www.nytimes.com/2009/01/27/health/27coca.html?pagewanted=all&_r=0. Notably, researchers working on the study found that factors like poor parenting, poverty, and stress were more likely to damage a child's intellectual and emotional development than prenatal drug exposure. *Id.*

315. TENN. CODE ANN. § 36-1-102(1)(A)(iv) (West 2010).

the Child."[316] Thus, under Tennessee law, a mother's parental rights are subject to termination based solely on her conduct during pregnancy.[317]

This case is but one example of the common sentiment that regardless of a woman's intent, conduct that may harm the fetus during pregnancy is wrong and should be punished. Sometimes the punishment takes the form of forcibly separating the mother and child and denying the mother access or rights to her child, under the guise of child welfare. Other times, especially in cases where there was a miscarriage, stillborn baby, or death of the infant soon after delivery, the punishment takes the form of removing the mother's other children from her and/or prosecuting her under criminal law. Even worse, a mother may face prison time even where it is unclear whether the conduct caused the prenatal injury. The next two cases are illustrative of the trend to conceptualize all pregnancies as inherently adversarial and the consequences of such a conceptualization.

On April 29, 2008, Amanda Helaine Borden Kimbrough went into premature labor.[318] Amanda and her husband, Timmy Sr., were looking forward to welcoming their third child.[319] Doctors told the Kimbroughs at a prenatal visit in early April that Timmy Jr. would have Down syndrome and counseled them about the option to terminate the pregnancy, but they declined that option and remained eager to welcome their first son into their family.[320] The Kimbroughs refused to consider abortion because they were morally opposed to it.[321] Due to many factors, including prematurity and a prolapsed cord, Timmy Jr.'s birth was complicated and he died only nineteen minutes after he was born.[322] While at the hospital, Kimbrough's obstetrician ordered a urine drug screen, which came back positive for methamphetamine.[323] The pediatrician who treated Timmy Jr. determined that he died due to "respiratory arrest secondary to prematurity."[324] However, the medical examiner who performed Timmy Jr.'s autopsy found that he died from "acute methamphetamine intoxication."[325]

As a consequence, Kimbrough's other two children were removed from her custody.[326] For ninety days she was permitted only supervised visits with them.[327] In July, following a determination that the children would be

316. *In re* Roni M.H., 2012 WL 1523948 *1, *8 (Ct. App. Tenn. 2012).
317. *Id*.
318. *Ex parte Ankrom*, 2013 WL 9828405 at *3.
319. Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES, Apr. 15, 2012, http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?pagewanted=all&_r=0.
320. *Id*.
321. *Id*.
322. *Ex parte Ankrom*, 2013 WL 9838405 at *3.
323. *Id*.
324. *Id*.
325. *Id*.
326. *Id*. at *4.
327. Calhoun, *supra* note 5.

safe in her care, the State returned Kimbrough's children to her.[328] Six months after Timmy Jr.'s death, the County District Attorney's office charged Kimbrough with chemical endangerment of a child, resulting in death, which carried a mandatory sentence of 10 years to life.[329] After a two-day trial, Kimbrough pleaded guilty on the advice of counsel and was sentenced to 10 years in prison.[330]

On January 31, 2009, Hope Elisabeth Ankrom gave birth to a healthy son she named Bryson.[331] Bryson was Ankrom's third child; she already had two daughters, Aubree, aged 1, and Paige, aged 2. During her pregnancy, Ankrom tested positive for both marijuana and cocaine.[332] Though she denied ever using cocaine, Ankrom admitted that she used marijuana during her pregnancy because "her morning sickness was relentless."[333] At birth, Bryson tested positive for cocaine.[334] The hospital reported the drug test results to the State and Ankrom's children were taken from her care.[335] On February 18, 2009, the police arrested Ankrom from her home.[336] Because she was still breastfeeding, the officers permitted her to "pump a few times before they took [her] to jail."[337] On April 1, 2010, Ankrom was sentenced to three years in prison for violating Alabama's chemical endangerment of a child statute.[338]

Both Ankrom and Kimbrough appealed their convictions claiming that the term "child" in the Alabama statute did not include a fetus.[339] In 2011, in a case of first impression, the Alabama Court of Criminal Appeals upheld Ankrom's conviction for ingesting a controlled substance during her pregnancy and her child's positive test for the controlled substance at birth.[340]

In 2013, the Supreme Court of Alabama consolidated Ankrom's and Kimbrough's appeals to determine "[w]hether the term 'child' . . . includes an unborn child."[341] Ultimately, the court upheld both convictions.[342] The court relied on public policy, the plain meaning of the word "child," the persuasive reasoning of a South Carolina Supreme Court decision in a

328. *Ex parte Ankrom*, 2013 WL 9838405 at *4.
329. Calhoun, *supra* note 5.
330. *Id.*
331. *Ex parte Ankrom*, 2013 WL 9828405 at *1; Calhoun, *supra* note 5.
332. *Ex parte Ankrom*, 2013 WL 9828405 at *22.
333. *Id.* at *1; Calhoun, *supra* note 5.
334. *Ex parte Ankrom*, 2013 WL 9828405 at *1; Calhoun, *supra* note 5.
335. Calhoun, *supra* note 5; *see* Ferguson v. City of Charleston, 532 U.S. 67 (2001) (determining that South Carolina state hospital's reporting of pregnant women's medical results to law enforcement was an unreasonable search and seizure that violated pregnant women's constitutional rights).
336. *Ex parte Ankrom*, 2013 WL 9828405 at *1; Calhoun, *supra* note 5.
337. Calhoun, *supra* note 5.
338. *Ex parte Ankrom*, 2013 WL 9828405 at *2.
339. *Id.* at *1.
340. Ankrom v. State, 152 So.3d at 377 (Ala. Crim. App. Aug. 26, 2011).
341. *Ex parte Ankrom*, 2013 WL 9828405 at *1.
342. *Id.* at *7.

similar case, and the State's interest in protecting the life of the fetus.[343] The court held that Alabama's chemical endangerment statute applied to mothers who "caused their unborn child to ingest a controlled substance."[344] This decision placed Alabama in the minority position, since "a majority of jurisdictions have held that unborn children are not afforded protection from the use of a controlled substance by their mothers."[345]

Despite being the minority position, the decision of the Alabama Supreme Court in *Ankrom* is representative of a trend toward the criminalization of pregnancy. In Alabama alone, since 2006 approximately 60 new mothers have been prosecuted under the child-endangerment statute.[346] These cases represent an abrupt departure from the common law view that a mother should not be liable to her child for prenatal injuries. Today, women are facing imprisonment for prenatal injuries.

The cases of Ankrom and Kimbrough are representative of how application of an adversarial view of pregnancy can lead to devastating results for families. Both mothers were separated from their children and incarcerated as punishment for their misconduct during pregnancy. The fact that neither intended to harm their unborn children was not considered by the court. The lack of certainty with regard to whether Kimbrough's child died due to her alleged drug use was also left unconsidered. The reality that Ankrom birthed a healthy baby, a healthy baby in need of his mother, was also disregarded by the court when it affirmed the decision to remove Ankrom from her nursing infant and imprison her. These extreme results are the logical consequence of presuming the maternal-fetal relationship to be adversarial.

Application of a holistic view of pregnancy would require courts to acknowledge the connected and symbiotic nature of the maternal-fetal relationship and the many ways in which the pregnant woman cares, nurtures, and protects her fetus. Applying a holistic view of pregnancy to Kimbrough's and Ankrom's pregnancies would have prompted the court to consider their whole pregnancies. Application of a holistic view of pregnancy would necessitate consideration of the pregnant woman's social relationship with her fetus as often evinced by her intention. Where, as here, the parties' intent clearly indicates a nonadversarial maternal-fetal relationship, there would be no basis for viewing the pregnancy through an adversarial lens. Kimbrough and Ankrom would have been entitled to a presumption in favor of their maternal decision making during their pregnancies. The State would not have been able to criminalize their conduct absent overcoming the maternal presumption.[347]

343. *Ex parte Ankrom*, 2013 WL 9828405 at *18.
344. *Id*.
345. *Id*.
346. Calhoun, *supra* note 5.
347. In a subsequent paper I will discuss how the State can overcome the presumption in favor of maternal decision making during pregnancy.

The Indiana case of *Bei Bei Shuai* is an example of the criminal prosecution of a woman after her suicide attempt. Shuai was pregnant through an affair with Zhiliang Guan, a married man.[348] Upon being left by Guan she became distraught and suicidal.[349] Shuai purchased rat poison with the intention of committing suicide and taking her "baby" with her.[350] She was 33 weeks pregnant at the time.[351] Later that day, a friend brought Shuai to the hospital.[352] After she and the fetus were stabilized, Shuai was given a steroid to "improve post-birth lung functioning of children who are born prematurely."[353] Immediately thereafter, Shuai began having contractions.[354] She was given indomethacin "to stop the contractions."[355] One week later, a doctor observed "an unusual fetal heart rate."[356] With Shuai's consent, the doctors performed a cesarean section to deliver the baby immediately.[357] The infant was transferred to the neonatal intensive care unit.[358] Shuai's baby, Angel, had a "high International Normalized Ratio," indicating her blood would not clot and a "bilateral Grade III intraventricular hemorrhage" from which she was unable to recover.[359] Three days after her birth, Angel was removed from life support and died.[360] There was conflicting evidence as to whether Angel's death was the result of the rat poison ingested by Shuai, inherited hemophilia, disseminated intravascular coagulation, or some unknown cause.[361]

The appellate court denied Shuai's motion to dismiss that argued, in part, that the homicide and feticide statutes pursuant to which Shuai was charged did not apply to a pregnant woman and the fetus she carries.[362] Specifically, Shuai argued that "the relationship between a mother and the fetus she carries is unique and 'fundamentally and profoundly different from third-party attacks on pregnant women.'"[363] Shuai relied on a 2000

348. Bei Bei Shuai v. State, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).
349. *Id.*
350. *Id*. Shuai "wrote Guan, saying she felt she and the fetus were a burden on Guan, she had resolved to kill herself, and she was 'taking this baby, the one you named Crystal, with [her].' Shuai then ingested rat poison. Shuai called Guan and told him she had ingested rat poison and was going to die." *Id.* (alteration in original).
351. *Id.*
352. *Id.*; *see also* Diana Penner, *Woman Freed After Plea Agreement in Baby's Death*, INDIANAPOLIS STAR, Aug. 2, 2013, http://www.usatoday.com/story/news/nation/2013/08/02/woman-freed-after-plea-agreement-in-babys-death/2614301/.
353. *Bei Bei Shuai*, 966 N.E.2d at 622.
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Bei Bei Shuai*, 966 N.E.2d at 622.
360. *Id.* at 623.
361. *Id.* at 624.
362. *Id.* at 626.
363. *Id.* at 628.

Indiana Court of Appeals case holding that an unborn child was not a "dependent" under the State neglect statute and that, therefore, the mother could not be charged with neglect based on her ingestion of cocaine while pregnant.[364] However, the court refused to adopt Shuai's reasoning and instead distinguished the cases based on statutory interpretation.[365]

Judge Patricia Riley of the Indiana Court of Appeals wrote a separate opinion dissenting in part and concurring in part in the *Bei Bei Shuai* decision. Riley argued against the majority's interpretation of the feticide statute. She argued that the Court's reading would lead to "absurd" results.[366] Riley argued that if interpreted according to the State, Indiana's feticide statute could "create an indefinite number of new 'crimes.'"[367] She suggested that such a reading of the statute could criminalize pregnant women's use of "over-the-counter cold remedies," "sleep aids," cigarettes, and alcohol.[368] Riley warned that the majority's decision could have unintended consequences: "the State's interpretation might lead to a slippery slope whereby the feticide statute could be construed as covering a full range of a pregnant woman's behavior."[369]

Riley's dissent did not include any discussion of the legal conceptualization of pregnancy or the theoretical foundations for such conceptualizations. Rather, it focused on the practical impact of adjudicating pregnancy like any other relationship between two strangers. Her argument demonstrates how an adversarial view of the mother-fetus relationship can be the foundation for absurd results. By allowing criminal charges to be pursued against a pregnant woman for her attempted suicide, the court opens the door to criminal prosecutions anytime a pregnant woman's actions are harmful to her fetus. This view discounts the care that a pregnant woman provides to her fetus. It disregards the biological fact that, were it not for the pregnant woman, there would be no fetus. A narrow view of pregnancy that holds a pregnant woman accountable to the State for misconduct during pregnancy without taking into account the reality of the mother-fetus connection and the history of the woman's pro-pregnancy conduct does not reflect the overall nature of pregnancy.

Denying mothers their parental rights or incarcerating them on the basis of their conduct during pregnancy is inconsistent with a holistic view of pregnancy and a presumption in favor of the pregnant woman's

364. *Bei Bei Shuai*, 966 N.E.2d at 628 (citing Herron v. State, 729 N.E.2d 1008, 1011 (Ind. Ct. App. 2000)).

365. *Bei Bei Shuai*, 966 N.E.2d at 629. After the Court remanded the case, Shuai pled guilty and was sentenced to time served, which was a total of 178 days. *Bei Bei Shuai Pleads Guilty in Baby's Death*, HUFFINGTON POST (Aug. 2, 2013, 7:44 AM), http://www.huffingtonpost.com/2013/08/02/bei-bei-shuai-guilty_n_3698383.html.

366. *Bei Bei Shuai*, 966 N.E.2d at 636.

367. *Id.*

368. *Id.*

369. *Id.*

decisions. Under a holistic view of pregnancy, courts would be unable to dissect the maternal-fetal relationship so as to selectively penalize undesirable aspects of the relationship. Under a holistic view of the pregnancy, courts would need to recognize that, but for the pregnant woman, there would be no baby and that, therefore, it is inappropriate to punish the pregnant woman for her conduct, even where that conduct may compromise the health of the pregnant woman, the pregnancy, or the fetus. Where pregnant women make poor choices due to addiction or mental illness, it is inappropriate to disregard the holistic nature of the maternal-fetal relationship and characterize the pregnancy as adversarial. Theoretically, punishing pregnant women for misconduct is unreasonable. From a physiological perspective, punishing women for misconduct during pregnancy fails to account for the many acts of connection, protection, and care that the woman's body has provided to the fetus. From a social perspective, punishing women for misconduct during pregnancy fails to acknowledge and value the social choice they made to carry their pregnancies to term and welcome a child into the world. An unintended consequence of the State's punishment of pregnant women may be to actually encourage women to have abortions.[370] Thus, a holistic view of pregnancy and a presumption in favor of maternal decision making can have clear benefits for the pregnant woman and the fetus.

## IV. CONCLUSION

The legal conceptualization of pregnancy has been developing since the 1800s. Today, the law often views pregnancy as having an inherently adversarial nature. It regards pregnancy as the embodiment of two separate beings, a mother and a fetus, with adversarial interests. This adversarial view is the result of an over one hundred-year evolution of the law. In the late 1800s, the law saw the fetus, simply, as a part of the mother. This connected view of pregnancy understood the mother and fetus as one.

During the early 1900s, the legal construction of pregnancy shifted away from the connected view. The law adopted an understanding of pregnancy as the embodiment of two separately existing beings, a mother and a fetus. Pursuant to the separate existence view, a child could bring suit against a third party for actions which caused the child's prenatal injuries. Though the law regarded the fetus as separate from the mother, it

370. Marina Greywind, a North Dakota woman, obtained an abortion to avoid criminal prosecution after she was charged with child endangerment for inhaling paint fumes while pregnant. Gina Kolata, *Woman in Abortion Dispute Ends Her Pregnancy*, Feb. 26, 1992, N.Y. TIMES, http://www.nytimes.com/1992/02/26/us/woman-in-abortion-dispute-ends-her-pregnancy.html; NATIONAL WOMEN'S LAW CENTER, FACT SHEET: IF YOU REALLY CARE ABOUT CRIMINAL JUSTICE, YOU SHOULD CARE ABOUT REPRODUCTIVE JUSTICE! (Oct. 2014), *available at* http://www.nwlc.org/sites/default/files/pdfs/criminal_justice_reproductive_justice_ factsheet_10-3-14.pdf.

did not view the mother and fetus as adversaries. The law therefore refused to allow the child to bring suit against the mother for injuries sustained by the fetus during the pregnancy. This view of pregnancy remains prevalent in tort law today.

The Supreme Court's consideration of pregnancy during the abortion cases led to the modification of the separate existence view into an adversarial view of pregnancy that regards the mother and fetus as separate and adversarial beings. While this conceptualization of the maternal-fetal relationship is understandable in the abortion context, it is theoretically inconsistent with wanted pregnancies. Nevertheless, increasingly, courts are applying the adversarial view of pregnancy to analyze wanted pregnancies in cases concerning medical intervention, criminal prosecution, and dependency proceedings. As a result, pregnant women are being assaulted, incarcerated, and separated from their children by the State.

I propose reconceptualizing the legal view of pregnancy for all wanted pregnancies to reflect a holistic understanding of the maternal-fetal relationship. This holistic view of pregnancy would incorporate interdisciplinary maternal research recognizing that *pregnancy is a unique relational existential reality that simultaneously represents duality and oneness*. This view incorporates both the connected and separate aspects of pregnancy. Building upon this foundation, I propose the adoption of a legal presumption in favor of maternal decision making during pregnancy.

The consequence of adopting a holistic conceptualization of pregnancy and a presumption in favor of maternal decision making during pregnancy in the healthcare and misconduct contexts would be the preclusion of State interference with pregnant women's medical decisions. In the healthcare context, the pregnant woman's choice of a particular birthing plan or prenatal care would be protected from State veto. Understanding pregnancy from a holistic perspective necessitates recognizing that the pregnant woman, alone, provides the connection, protection, and care critical to fetal life. A holistic perspective recognizes that there would be no pregnancy but for the pregnant woman, that the pregnant woman alone sustains fetal life, and, therefore, it is inappropriate for the State to overrule her healthcare decisions. Pursuant to a holistic view, the State recognizes that the pregnant woman, the one person who is making significant individual sacrifice to welcome a new life into the world and who is most likely to be the person who will make the most significant sacrifices in raising her future child, is best situated to determine what is in the best interest of herself, her pregnancy, and her fetus. Therefore, a holistic view of pregnancy supports a presumption that the pregnant woman's medical decisions are in the best interest of the woman, her pregnancy, and her fetus.

In the context of maternal misconduct during pregnancy, the State would be generally precluded from taking action to punish the woman or deny her parental rights where, but for the pregnancy, there would be no basis for State action. In this case, the State's deference to maternal decision making would acknowledge that it is in the best interest of the pregnant woman, the pregnancy, and the fetus to abstain from incarcerating pregnant women or separating them from their children. By adopting a holistic view of pregnancy, the State recognizes that the pregnant woman's interests are aligned with the fetus and that pregnant women who intend to carry their pregnancies to term and birth a child should not be subjected to an increased likelihood of incarceration or familial separation. While the State would be free to offer support to a pregnant woman dealing with addiction or mental health issues, it would remain barred from prosecuting her or initiating dependency proceedings against her where such action would be otherwise unavailable were she not pregnant.[371]

In conclusion, the adversarial conceptualization of pregnancy that was developed in the abortion context has no place in the case of wanted pregnancies. Rather, a holistic conceptualization of pregnancy, pregnancy as a unique relational existential reality that simultaneously represents duality and oneness, should be adopted. This view of pregnancy, based on scientific knowledge and maternal experience, presumes that the pregnant woman acts in the best interest of herself, her pregnancy, and her fetus. Where pregnant women have chosen to carry a pregnancy to term, therefore, the State should defer to their choices and conduct during pregnancy. Pregnant women should not be subject to heightened scrutiny and the State should not use pregnancy to justify interfering with women's autonomy, bodily integrity, parental rights, and physical freedom.

371. In a subsequent paper I will discuss the circumstances under which the State can overcome a presumption in favor of maternal decision making during pregnancy. Additionally, I will consider whether State intervention in the form of social services is more likely to serve State interests in maternal health and potential life than criminal and dependency actions.

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