

Comment,  
**The Deviant Woman v. The Struggling  
Mother: Differences in the Legal  
Treatment of Similarly Situated  
Women Struggling with Addiction**

A woman drug addicted and parenting, and a woman drug addicted and pregnant—two similarly situated women in need of social services and support. But they are treated very differently under the current law. For almost fifty years *Roe v. Wade* protected a woman's constitutional right to seek an abortion and explicitly stated a fetus was not a person with rights and protection under the Fourteenth Amendment.<sup>1</sup> The recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* has now overturned *Roe*, resulting in powerful ramifications for women's health overall.<sup>2</sup>

The *Dobbs* decision has greatly impacted the way American laws now treat pregnancy, and has largely affected the lives of expectant mothers, specifically those who struggle with drug addiction.<sup>3</sup> Following the loss of her child at four months pregnant, a woman was sentenced to four years in prison for first-degree manslaughter.<sup>4</sup> Although the woman admitted to drug use during pregnancy, the examiner did not determine that drug use was the cause of death and an autopsy revealed that genetic anomaly, placenta abruption, maternal malnutrition, and use of methamphetamines all could have been contributing factors. Fetal personhood laws are at the forefront of criminalization in response to pregnant women abusing drugs, and these women are suffering harsh punitive repercussions such as lengthy criminal

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113, 154 (1973).

<sup>2</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Bertha Alvarez Manninen, *A Critical Analysis of Dobbs v. Jackson Women's Health Organization and the Consequences of Fetal Personhood*, 32(3) CAMBRIDGE Q. HEALTHCARE ETHICS 1 (2023).

<sup>3</sup> Manninen, *supra* note 2, at 8.

<sup>4</sup> *Id.*

sentences and incarceration.<sup>5</sup> Under *Dobbs* the Court now recognizes a state's interest in protecting fetal life, and with states allowed to give a fetus rights and protections, pregnant addicts are facing criminal implications.<sup>6</sup> In contrast, American laws treat already parenting mothers struggling with drug addiction very differently than pregnant woman. For an already parenting mother, the law recognizes a mother's fundamental right to the care, custody, and control of her child.<sup>7</sup> Therefore, drug addicted mothers are offered reintegrative and rehabilitative services through child advocacy and dependency courts to preserve the mother-child bond, serve the best interest of the child, as well as protect a parent's fundamental right to parent.<sup>8</sup> Most notably, the Adoption and Safe Families Act of 1997 as well as state statutes implementing child welfare laws have dramatically changed the operation of family courts.<sup>9</sup> Specifically, the legislation contemplates that courts will develop service plans for families and create court ordered programs "designed to address the problems that brought the child to the attention of state authorities."<sup>10</sup> Further, family and "dependency drug courts were established to assist courts and child welfare agencies in their efforts to help parents overcome their drug dependency so they can provide a healthy and safe environment for their children and avoid losing their right to parent."<sup>11</sup> For pregnant women struggling with addiction, their status as an addict is met with an adversarial and punitive legal approach.<sup>12</sup> The National Advocates of Pregnant Women, a pro-choice advocacy group, recorded 1,600 cases between 1973 and 2020 involving women who were arrested for the

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<sup>5</sup> Lynn Paltrow, Lisa Harris & Mary Marshall, *Beyond Abortion: The Consequences of Overturning Roe*, 8 AM. J. BIOETHICS, 3 (Aug. 2022).

<sup>6</sup> Nicole Dube, James Orlando & Jessica Schaeffer-Helmecki, *Abortion Laws Enacted Post-Dobbs Decision*, OFFICE OF LEGISLATIVE RESEARCH (2022).

<sup>7</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>8</sup> KAN. STAT. ANN. § 23-3201 (2022).

<sup>9</sup> Gayle Dakof, Jeri Cohen & Eliette Duarte, *Increasing Family Reunification for Substance-Abusing Mothers and Their Children: Comparing Two Drug Court Interventions in Miami*, 60(4) JUV. & FAM. CT. J. 11, 14 (2009).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Paltrow et al., *supra* note 5.

loss of their unborn child, and a vast majority of the cases involved woman who used drugs during their pregnancy.<sup>13</sup>

The *Dobbs* decision has further created a distinct difference in how the law responds to pregnant women addicted to drugs and how it responds to parenting mothers addicted to drugs. If the law under *Dobbs* is going to acknowledge a fetus as a child, then the law should also apply *Troxel* and uphold an expecting mother's fundamental right to parent. *Dobbs*' recognition of fetal life should inevitably be accompanied by recognition of the right to parent. Therefore, pregnant drug addicted women require the same treatment as similarly situated parenting mothers struggling with drug addiction. Under this interpretation pregnant drug addicts should be processed through child welfare and dependency courts instead of suffering at the hands of adversarial criminal prosecutions. These women are parents under the application of fetal personhood standards. They are as deserving as non-pregnant mothers in need of sufficient social services and case management to support them and uphold their constitutional right to parent.

Part I of this Comment looks at how the current law criminally prosecutes pregnant drug addicts and the arguments supporting these punitive implications. Part II will outline how the laws treat parenting mothers who struggle with addiction through rehabilitative and reintegrative services. Part III then highlights the distinct differences between the treatment of two similarly situated groups of individuals and argues the unfairness of that approach in light of the holding in *Dobbs* and the increased recognition of fetal personhood. The Comment concludes by posing some solutions that serve the welfare of both expecting mothers and children.

## **I. How the Law Treats Women Who Are Drug Addicted and Pregnant**

To understand how current laws treat women who are pregnant and addicted to drugs it is imperative to analyze the history that has led to these criminal prosecutions. In grappling with this

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<sup>13</sup> Robin Levinson-King, *US Women Are Being Jailed for Having Miscarriages*, BBC NEWS (Nov. 12, 2021), <https://www.bbc.com/news/world-us-canada-59214544>.

issue of pregnant persons and drug addiction, courts have turned to statutory interpretation to determine the intent of the legislatures when applying child abuse and neglect statutes to a fetus.<sup>14</sup> An early decision from South Carolina illustrates the point. The majority opinion in *Whitner v. State* found that under the plain language of the statute, the word “child” in its Children’s Code is defined as a “person under the age of eighteen,” and that a fetus having reached the point of viability is a person according to the statute.<sup>15</sup> Under this interpretation a fetus is considered a person and the child abuse and neglect statute could therefore be applied to pregnant women addicted to drugs.<sup>16</sup> The court in *Whitner* ruled that the Children’s Code is intended to be interpreted broadly, and that it applies to all children who need services, including unborn children.<sup>17</sup> This broad interpretation thus “supported the inference that the legislature intended to include viable fetuses within the scope of the Code’s protection.”<sup>18</sup>

Support for applying child abuse and neglect statutes to a viable fetus has been gaining traction. Similar to the holding in *Whitner*, in a New York case from 1998, a petition was filed on behalf of a fetus, alleging that the mother was neglectful in her continued use of drugs while pregnant.<sup>19</sup> The court held that a fetus was a person afforded protection under the Family Court Act and suffered neglect at the hands of its mother.<sup>20</sup> In response the court issued an order of protection on behalf of the fetus.<sup>21</sup> The court held that although the current legislation under the Family Court Act § 512 does not include the word “fetus,” protection for the fetus can be found in other areas of the law.<sup>22</sup> For instance, under the New York Penal Law § 125.05(1) “person” is defined as a “human being who has been born and is alive”; however, Penal Law § 125.000 “specifically includes as a victim, in the definition of homicide, an unborn child over 24 weeks.”<sup>23</sup>

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<sup>14</sup> *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

<sup>15</sup> *Id.* at 169.

<sup>16</sup> *Id.* at 170.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *In re Unborn Child*, 683 N.Y.S.2d 366 (N.Y. Fam. Ct. 1998).

<sup>20</sup> *Id.* at 370-72.

<sup>21</sup> *Id.* at 371.

<sup>22</sup> *Id.* at 368.

<sup>23</sup> *Id.*

Therefore, the court found consistent with the statute, the legislature, which sanctioned the criminal prosecution for the killing of a 24 week fetus, would therefore have an interest in the “issuance of an order of protection against a third party to prevent actions which could result in injury or death of a fetus” due to drug use by an expecting mother.<sup>24</sup> By expanding the legal definitions of “child” and “person” to reach a viable fetus, courts have found justification to support the prosecution of pregnant women for their drug use during pregnancy.<sup>25</sup> In some states women are being prosecuted for prenatal substance abuse, whether their fetus is viable or not.<sup>26</sup> In 2006 the state of Alabama passed a statute that permitted prosecution of women for prenatal substance use under its “chemical-endangerment statute.”<sup>27</sup> Under the Alabama statute a person can be charged with the crime of chemical endangerment if they “knowingly, recklessly, or intentionally cause or permit a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance.”<sup>28</sup> In 2013, the Alabama Supreme Court held that the chemical endangerment statute applied to a fetus regardless of viability.<sup>29</sup> Further, in 2014 the state of Tennessee added provisions to its assault statute to include prenatal substance abuse.<sup>30</sup> Specifically, section (c)(2) states that “nothing in this section shall preclude prosecution of a woman for assault for the illegal use of narcotic drug while pregnant.”<sup>31</sup>

Decisions to prosecute pregnant women have increasingly gained support politically in response to anti-abortion activism

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<sup>24</sup> *Id.* at 369.

<sup>25</sup> *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (citing multiple courts holding that a fetus was included in the legal definition of “child” and “person” under statutes regarding child abuse and neglect); *Gloria C. v. William C.*, 476 N.Y.S.2d 991 (N.Y. Fam. Ct. 1984); *Matter of Fathima Ashanti K.J.*, 558 N.Y.S.2d 447 (N.Y. Fam. Ct. 1990); *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003).

<sup>26</sup> Myrisha S. Lewis, *Criminalizing Substance Abuse and Undermining Roe v. Wade: The Tension Between Abortion Doctrine and the Criminalization of Prenatal Substance Abuse*, 23 WM. & MARY J. WOMEN & L. 185 (2017).

<sup>27</sup> ALA. CODE § 26-15-3.2(a)(1).

<sup>28</sup> *Id.*

<sup>29</sup> Lewis, *supra* note 26.

<sup>30</sup> TENN. CODE ANN. § 39-13-107 (c)(2).

<sup>31</sup> *Id.*

efforts and the “war on drugs.”<sup>32</sup> The nationwide political movement known as the “war on drugs” supported the use of increased penalties, enforcement, and incarceration for drug offenders to combat illegal drug use, and pregnant drug addicts have been no exception.<sup>33</sup> The “crack baby” epidemic further bolstered the war on drugs and criminalization of pregnant women addicted to drugs.<sup>34</sup>

The “crack baby” epidemic of the 1980’s resulted in a nationwide misconception that if drug addicted parents had children, they were almost inevitably born “retarded, unteachable, and aggressive” because of fetal exposure to crack cocaine.<sup>35</sup> In response to this nationwide crisis, drug-using and drug addicted women were being detained in hospitals or jailed due to concerns for their fetus and to prevent further drug use.<sup>36</sup> Consistent with this response, a New York court held that an “unborn child possesses a right to gestation undisturbed by wrongful injury and the right to be born with a sound mind and body free from abuse or neglect.”<sup>37</sup> After further investigation regarding birth outcomes following drug exposure in utero, physicians and researchers determined that maternal drug use did not inevitably lead to negative health consequences for infants.<sup>38</sup> A long term research study (covering outcomes from 1984-2000) concluded that “most infants exposed to prenatal crack cocaine are indistinguishable from nonexposed infants.”<sup>39</sup> The same study later concluded that in utero exposure to drugs is not the primary cause of adverse

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<sup>32</sup> Ian Vandewalker, *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).

<sup>33</sup> See generally *id.*

<sup>34</sup> *Id.* at 434.

<sup>35</sup> *Id.*

<sup>36</sup> April Cherry, *Maternal-Fetal Conflicts, the Social Construction of Maternal Deviance, and Some Thoughts About Love and Justice*, 8 TEX. J. WOMEN & L. 245 (1999).

<sup>37</sup> Matter of Fathima Ashanti K.J., 558 N.Y.S.2d 447, 555 (N.Y. Fam. Ct. 1990), citing John E. B. Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?* 23 DUQUESNE L. REV. 1, 60 (1984).

<sup>38</sup> Katherine Sikich, *Peeling Back the Layers of Substance Abuse During Pregnancy*, 8 DEPAUL J. HEALTH CARE L. 369 (2005).

<sup>39</sup> Tiffany Scott, *Repercussions of the “Crack Baby” Epidemic: Why a Message of Care Rather Than Punishment Is Needed for Pregnant Drug-Users*, 19 NAT’L BLACK L.J. 203, 212 (2007).

health consequences to fetuses, and that poverty and malnutrition are most damaging.<sup>40</sup> Society's response to the "crack baby" epidemic has only further perpetuated the problem without addressing the real social ills that are harming families.<sup>41</sup>

Commentators argue that although babies born to drug addicted mothers may suffer a host of medical problems it is unclear whether these medical problems, other than withdrawal, can be directly linked to maternal drug use or are caused by lack of prenatal care and maternal malnutrition.<sup>42</sup> They suggest that it is likely that poor birth outcomes of drug addicted mothers are not due to the drug use itself but instead are a direct result of poverty.<sup>43</sup> Access to proper nutrition, housing, prenatal care, and social support is crucial to a woman's health and the health of her unborn child.<sup>44</sup> Without access to basic human needs, the stress of poverty can greatly put a pregnant woman and her fetus at high risk of poor birth outcomes and other pregnancy related complications.<sup>45</sup>

The impact of the "crack baby" epidemic and the "war on drugs" increasing the criminalization of drug use have influenced a societal consensus that expecting mothers addicted to drugs are blanketly "deviant mothers."<sup>46</sup> "[W]hen women, particularly mothers who are poor, of color, non-English speaking, or illicit drug users, do not comply with physicians' expectations or suggestions [regarding prenatal care], they are understood as selfish, uncaring (or stupid), and just plain old bad mothers."<sup>47</sup> Deviant mothers are thus understood to be inappropriate decision makers for their fetus and thus people who should be "subject to physician and judicial control."<sup>48</sup> The legal system, at least historically has not distinguished "between poor parents and bad parents," and if poor parents are substance abusers, judges are likely to

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<sup>40</sup> *Id.* at 213.

<sup>41</sup> *See generally id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *See generally* KHIARA BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* 41 (2011).

<sup>45</sup> *See generally id.*

<sup>46</sup> Cherry, *supra* note 36, at 256.

<sup>47</sup> *Id.* at 257.

<sup>48</sup> *Id.*

view them negatively and stereotypically, which can lead to punitive repercussions.<sup>49</sup>

In 2004, a trial judge sentenced a pregnant woman struggling with drug abuse to prison for charges of theft in a direct attempt to protect her unborn child and stop further drug use.<sup>50</sup> On appeal, the superior court found that the incarceration sentence bore no relationship to the initial underlying offense and instead was imposed only because the defendant was pregnant, and drug addicted.<sup>51</sup> The court held that a defendant's status as a drug-addicted pregnant woman may not be considered in determining the appropriate sentence of an unrelated crime and was thus a direct violation of her constitutional rights that provide safeguards against cruel and unusual punishment.<sup>52</sup>

In furtherance of efforts to protect fetal life, courts have also used a pregnant woman's status as a drug addict for grounds to terminate parental rights.<sup>53</sup> The policy-based idea that drug users are bad parents and the state's strong interest in protecting fetal life have been used to support the imposition of state laws that permit for termination of parental rights of pregnant mothers who struggle with drug addiction.<sup>54</sup> Some commentators argue that courts are increasingly applying a best interest of the child standard in termination proceedings based on "preconceptions about the harm that prenatal drug use causes and their conceptions of how mothers ought to act."<sup>55</sup> These same commentators argue that by holding poor and drug addicted mothers to a middle class predisposed standard of what a mother should act like, courts are harming family relationships, specifically the maternal-infant bond that is crucial to a child's health and well-being.<sup>56</sup>

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<sup>49</sup> Janet L. Doglin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 BROOK. L. REV. 1213, 1228 (1991).

<sup>50</sup> *New Jersey v. Ikerd*, 850 A.2d 516 (N.J. Super Ct. App. Div. 2004).

<sup>51</sup> *Id.* at 613.

<sup>52</sup> *Id.* at 621.

<sup>53</sup> Vandewalker, *supra* note 32, at 428.

<sup>54</sup> *Id.* at 428.

<sup>55</sup> *Id.* at 429.

<sup>56</sup> *Id.* at 429.



## II. How the Law Treats Women Who Are Parenting and Drug Addicted

Under *Troxel v. Granville* the Supreme Court held that parents have the fundamental right to the care, custody, and control of their child.<sup>57</sup> However, the state holds a strong interest in protecting children; thus states are granted the authority to challenge a parent's constitutional rights.<sup>58</sup> In weighing these competing interests, courts will often apply a balancing test to determine if a parent is fit to retain custody of their child.<sup>59</sup> When a parent's right to parent is brought into question because of potential child abuse or neglect, the court must conduct proceedings through specialized child advocacy and dependency courts.<sup>60</sup> Child advocacy and dependency courts differ from adversarial criminal prosecutions in that these proceedings have the goals of reintegration and rehabilitation.<sup>61</sup> Accordingly, these specialized court systems will uphold a best interest of the child standard when making decisions for the family.<sup>62</sup> Child abuse and neglect statutes in many states require a showing of actual or imminent harm to a child to preclude court intervention.<sup>63</sup> When a parent is drug addicted and parenting, the state is required to make a showing of legitimate harm to the child which can be difficult to prove.<sup>64</sup> When a family enters child advocacy and dependency court, the court and social services work together to implement procedures that promote efforts to maintain family relationships through reintegrative and rehabilitative services.<sup>65</sup> Child advocacy agencies are required by the state to make reasonable efforts to aid in reunifying and rehabilitating families.<sup>66</sup> During the time that a child is in state custody, a court hearing is held once a year to determine if reasonable efforts have been

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<sup>57</sup> *Troxel*, 530 U.S. 57.

<sup>58</sup> *Alma S. v. Dep't of Child Safety*, 425 P.3d 1089 (Ariz. 2018).

<sup>59</sup> *Id.* at 1093.

<sup>60</sup> *Id.* at 1092.

<sup>61</sup> *Id.* at 1094.

<sup>62</sup> *Id.*

<sup>63</sup> Doglin, *supra* note 49.

<sup>64</sup> *See id.* at 1213.

<sup>65</sup> KVC Kansas, <https://kansas.kvc.org/about/mission-vision/> (last visited Mar. 22, 2023).

<sup>66</sup> KAN. STAT. ANN. § 38-2264(a) (2022).

made by the appropriate public or private agencies to rehabilitate the family and achieve reintegration.<sup>67</sup> Under these proceedings, social and legal systems work together to aid and support parents and their children.

For instance, under the Kansas Children's Code, the state must prove by clear and convincing evidence that state intervention is warranted and that a child is in fact a child in need of care who should be taken into state custody.<sup>68</sup> If the court finds that a child is a child in need of care by statute, the court is granted authority to make orders for the child and family. If a child is adjudicated as a child in need of care the court will then consider multiple factors when determining a disposition goal.<sup>69</sup> These factors include the physical, mental, and emotional condition of the child and their needs; the parent's participation in the abuse, neglect, or abandonment; and any other relevant information and evidence from the initial action.<sup>70</sup> A disposition goal can include a plan to maintain the child at home, remove the child from the home and order a reintegration plan for the family, or provide another form of permanency for the child such as adoption, permanent custodianship, or an independent living goal.<sup>71</sup> In determining disposition courts will often try to keep children at home with their parents and will only place a child outside of the home when necessary.<sup>72</sup> Placement outside of the home is only warranted in certain circumstances such as if "the child is likely to sustain harm if not immediately removed from the home"; or "allowing the child to remain in the home is contrary to the welfare of the child"; or "immediate placement of the child is in the best interest of the child."<sup>73</sup> Further, removal may be warranted "if reasonable efforts have been made to maintain the family unit" and have failed, or that "an emergency exists which threatens the direct safety of the child."<sup>74</sup> Following the removal of a child from a parent's home, courts will then order parents to

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<sup>67</sup> *Id.* § 38-2264 (c)(1).

<sup>68</sup> *Id.* § 38-2250.

<sup>69</sup> *Id.* § 38-2255(a).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* § 38-2255 (c).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

complete a court ordered permanency plan, also known as a reintegration plan.<sup>75</sup>

Under the Kansas Children's Code, a court order for a permanency plan involves an individually tailored task plan developed by social services systems which is intended to help support families in achieving the appropriate dispositional permanency goal.<sup>76</sup> Courts and social services operate under a common goal of reintegrating families. If a parent is struggling with addiction, a case manager will draft a parent's reintegration plan to include drug treatment, frequent drug testing, and therapy to help support parents struggling with addiction.<sup>77</sup> Further, case managers will help parents navigate other social and environmental factors that could be impeding their ability to achieve sobriety and support their child.<sup>78</sup> These resources include aid with housing, transportation, nutrition, employment, and mental health services.<sup>79</sup> Child advocacy and dependency courts are unique in their crossover between social and legal systems working together to reunify and heal struggling families.<sup>80</sup> When a parent is drug addicted and parenting, court intervention is used to provide social support services and address the social ills that lead to addiction. Under the children's code a parent's fundamental right to parent is preserved and child dependency courts prioritize maintaining family relationships and upholding the best interest of the child standard.

### **III. It Is Problematic to Treat Similarly Situated Women Differently**

Child advocacy and dependency proceedings are dramatically different than the punitive criminal prosecutions pregnant addicts are confronted with under fetal personhood laws. Women who are drug addicted and parenting are offered reintegrative and rehabilitative social services, while pregnant drug addicts

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<sup>75</sup> *Id.* § 38-2263(b).

<sup>76</sup> *Id.*

<sup>77</sup> KVC KANSAS, *supra* note 65.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692 (2006).

face lengthy incarceration and punitive repercussions that could cause both the mother and the unborn child to suffer.<sup>81</sup> Whether a woman is drug addicted and parenting or drug addicted and pregnant, these women require support from social services and state intervention through a rehabilitative approach. Currently the law recognizes a distinct difference between a pregnant women addicted to drugs and a woman who is parenting and struggling with addiction.

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court applied rational basis scrutiny to determine that the government's interest in protecting fetal life outweighed a woman's privacy and autonomy interests.<sup>82</sup> This decision is backed by the argument that the Constitution does not and has never protected a woman's right to abortion under the Due Process Clause, despite the longstanding application of *Roe v. Wade* finding otherwise.<sup>83</sup> The Court further stated, "abortion is distinct from other rights purportedly rooted in privacy and autonomy because of the moral questions raised by ending fetal life."<sup>84</sup> Under *Dobbs* the Supreme Court "downgraded abortion from a fundamental right to a 'health and welfare regulation' that can be regulated by the states."<sup>85</sup> The Court therefore granted states the power to regulate abortion as well as approved the creation of legislation that upholds a legitimate interest in preserving fetal life.<sup>86</sup> The decision in *Dobbs* is grounded in fetal personhood, which in application has led to serious implications for expecting mothers nationwide.<sup>87</sup> Under fetal personhood laws, the state recognizes "fetuses as 'persons' under the law, from the moment of fertilization," and provides them constitutional rights such that abortion is considered murder.<sup>88</sup> Fetal personhood laws are gaining traction under *Dobbs*, and will have an impact on the prosecution of pregnant women by blaming them for their poor

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<sup>81</sup> *Id.* at 692; *See generally*, Lewis, *supra* note 29.

<sup>82</sup> *Dobbs*, 142 S. Ct. 2228.

<sup>83</sup> *Id.* at 2245.

<sup>84</sup> *Id.* at 2283.

<sup>85</sup> Yvonne Lindgren, *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, 35 J. AM. ACAD. MATRIM. LAW. 252 (2022).

<sup>86</sup> *Dobbs*, 142 S. Ct. 2228.

<sup>87</sup> Manninen, *supra* note 2.

<sup>88</sup> Lindgren, *supra* note 85, at 253.

outcomes of their pregnancies.<sup>89</sup> Often it is women who are not in a position to be able to defend themselves that are suffering harsh criminal sanctions.<sup>90</sup> A research study done by a nonprofit criminal justice journal, The Marshall Project, identified that “most the women subject to criminal prosecution under fetal personhood laws are typically working low-paying jobs, are often victims of domestic abuse, have little access to healthcare or drug treatment, and rely on court-appointed lawyers.”<sup>91</sup> Paradoxically in serving an interest to protect the fetus, states are failing to provide accessible prenatal care, housing, nutrition, transportation, and drug treatment to support expecting mothers and the fetus.<sup>92</sup> While the ramifications of the decision in *Dobbs* are still unfolding, the opinion ostensibly gives states authority to expand the reach of their child abuse, endangerment, and homicide laws to impose criminal punishment on pregnant women for their behaviors without considering their pre- and post-natal healthcare needs.<sup>93</sup> The impact of *Dobbs* has pitted a woman and her unborn child against each other by upholding a right to fetal life over the privacy and autonomy interests of the mother, and as a result both are suffering.<sup>94</sup>

Instead of placing a woman and her child against each other, women who are pregnant and struggling with drug addiction should be tried through child dependency courts and their fundamental right to parent upheld and preserved. Under *Dobbs* the interest of a fetus outweighs the privacy and autonomy interest of a woman. Accordingly, courts recognize a pregnant woman’s fetus as a “child” according to statutory interpretation. However, the woman’s fundamental right to parent falls short at the hands of the state’s interest in protecting fetal life. Due to fetal personhood laws, one drug addicted mother of a “child” is thrust

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<sup>89</sup> *Id.* at 254.

<sup>90</sup> Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, THE MARSHALL PROJECT (2018), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever>.

<sup>91</sup> *Id.*

<sup>92</sup> *Dobbs*, 142 S. Ct. 2228.

<sup>93</sup> Cary Aspinwall, Brianna Bailey & Amy Yurkanin, *They Lost Pregnancies for Unclear Reasons, Then They Were Prosecuted*, WASH. POST (Sept. 1, 2022), <https://www.washingtonpost.com/national-security/2022/09/01/prosecutions-drugs-miscarriages-meth-stillbirths/>.

<sup>94</sup> *See id.*

into a very adversarial legal system, while another drug addicted mother of a “child” is managed through a specialized court system with a goal of rehabilitation and reintegration.<sup>95</sup> Current laws are drastically inconsistent despite their shared interest in protecting children, and expecting mothers and their unborn child are suffering as a result.<sup>96</sup> The level of scrutiny used to decide *Dobbs* is rational basis, adhering to a state’s legitimate interest in protecting fetal life.<sup>97</sup> In contrast, *Troxel* applied strict scrutiny in determining a parent’s right to parent.<sup>98</sup> As a result, women who are pregnant and drug addicted are suffering harsh repercussions due to the implication of state fetal personhood laws under *Dobbs*, and drug addicted parents are offered rehabilitative social services that preserve their fundamental right to parent under *Troxel*.<sup>99</sup>

States interpreting laws through a fetal personhood lens are failing to recognize a parent’s fundamental right to parent despite the state’s interest in protecting fetal life. As a result, pregnant women are suffering punitive criminal prosecutions, are not being offered reintegrative services, and are not receiving support for their addiction and life circumstances. Courts agree that there is a “child” suffering alleged abuse and neglect at the hands of their parent when a pregnant woman abuses drugs and a parent abuses drugs, but the legal response is vastly different depending on if a mother is pregnant or already parenting.

#### **IV. Fixing the Problem**

The diverse treatment of two similarly situated pools of individuals calls for reform within the legal and social systems. The criminal response to women who are pregnant and drug dependent fails to address the social ills that are leading to high rates of

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<sup>95</sup> Appell, *supra* note 80.

<sup>96</sup> Manninen, *supra* note 2.

<sup>97</sup> *Dobbs*, 142 S. Ct. 2228.

<sup>98</sup> *Troxel*, 530 U.S. 57.

<sup>99</sup> Joseph P. Ryan, Jeanne C. Marsh, Mark F. Testa & Richard Louderman, *Integrating Substance Abuse Treatment and Child Welfare Services: Findings from the Illinois Alcohol and Other Drug Abuse Waiver Demonstration*, 30(2) SOC. WORK RES. 95 (2006).

infant mortality and drug addiction.<sup>100</sup> Although babies born to women addicted to drugs may be born with a host of medical problems, it is unclear whether these medical problems, other than withdrawal symptoms, are directly related to drug use during pregnancy or are instead due to lack of prenatal care and maternal malnutrition.<sup>101</sup> Therefore, courts should change the way they view pregnant women struggling with drug addiction. If the law under *Dobbs* is going to recognize a fetus as a protected person, that view should be consistent throughout all areas of law, which means courts should also support a pregnant woman's right to parent, instead of imposing harsh criminal sanctions.

Women who are pregnant and struggling with addiction should be filtered through child advocacy and dependency courts where they will receive case management, social services, and treatment aimed at preserving the fundamental right of a parent and serve the best interest of the child. A pregnant woman who is drug addicted should be offered the opportunity to be rehabilitated and reintegrated with her child outside of criminal prosecution just the same as a mother who is drug addicted and already parenting. Further, due to the stigma and stereotyping associated with illicit drug use while pregnant or parenting, efforts should be made to raise awareness of the implicit biases legal professionals, social workers, and physicians may hold against drug addicts.<sup>102</sup> To eliminate or decrease bias in these industries there should be training programs implemented to aid in a better understanding of addiction and the social factors influencing addiction and impacting a person's life. A better understanding of addiction and the specific social factors that may be creating a barrier to sobriety could lead to individually tailored solutions and services so that an addict can be given the opportunity to be

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<sup>100</sup> Brad N. Greenwood, Rachel R. Hardeman, Laura Huang & Aaron Sojourner, *Physician—Patient Racial Concordance and Disparities in Birthing Mortality for Newborns*, 35 PROC. NAT'L ACAD. SCI. U.S.A. 117 (Aug. 17, 2020).

<sup>101</sup> Cherry, *supra* note 36, at 254.

<sup>102</sup> Dara Seybold, Byron Calhoun, Denise Burgess, Tammi Lewis, Kelly Gilbert & Angie Casto, *Evaluation of Training to Reduce Bias Toward Pregnant Patients with Substance Abuse*, 14(3) J. SOC. WORK PRACTICE IN THE ADDICTIONS 239 (2014).

successful in overcoming addiction and achieving stability.<sup>103</sup> Physicians and researchers have identified that “when nurses and healthcare workers have knowledge of addiction as a disease they will provide more effective nursing and healthcare to the women they encounter and are better prepared to make a difference in the lives of both women and their children.”<sup>104</sup> The goal for both women who are pregnant and drug addicted, and those who are parenting and drug addicted, should be reintegration and rehabilitation. Women struggling with drug dependency need proper assistance and support to overcome addiction and improve their quality of life so that they can support their child.

Following a change in the legal response to women who are struggling with drug addiction and pregnant, affirmative action must be taken. Social and legal systems must work to address the real needs of these women before, during, and after pregnancy. Often women who are poor, minorities, or addicted to drugs fail to obtain pre- and post-natal care out of fear of being met with skepticism and stereotyping by healthcare providers and worries they will be reported for drug use during pregnancy.<sup>105</sup> When women go to their medical providers for care, they are often held to white middle-class standard of how a woman should behave and care for herself during pregnancy despite maybe not having the resources or ability to achieve this standard.<sup>106</sup> This issue is a matter of public health, and therefore requires a public health solution. Instead of healthcare workers and physicians blaming women for their pregnancy related symptoms, addiction, or maternal malnutrition, healthcare providers need to be asking women what they need to help support their pregnancy. Often women cannot achieve the presumed standard of pregnancy and motherhood due to social ills such as the absence of proper housing, transportation, nutrition, and drug treatment. Instead of blaming women and labeling them a bad mother, hospitals need to be addressing the basic material needs of women and children. Pre- and post-natal service providers should be addressing a woman’s access to adequate food, housing, and education to sup-

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<sup>103</sup> See generally Denise Maguire, *Drug Addiction in Pregnancy: Disease Not Moral Failure*, 33 NEONATAL NETWORK 11 (Jan.-Feb. 2014).

<sup>104</sup> *Id.* at 12.

<sup>105</sup> Seybold et al., *supra* note 102, at 242.

<sup>106</sup> *Id.* at 12/



port a healthy pregnancy instead of meeting disadvantaged patients with skepticism and stereotyping. “Instead of viewing maternal behaviors that are harmful or fatal to fetuses as criminal, we should view them as a function of the myriad social and economic deprivations suffered by some women.”<sup>107</sup> When a woman is pregnant and drug addicted the focus should not be on the harm to fetal life but on the life and health of the pregnant woman.<sup>108</sup> Women struggling with addiction deserve a pregnancy experience that addresses their real needs, including access to sufficient medical care that is affordable, access to drug treatment facilities, and support that narrows in on the real problems that could be perpetuating drug use.

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<sup>107</sup> April Cherry, *Shifting Our Focus from Retribution to Social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses*, 28 J.L. & HEALTH 8 (2008).

<sup>108</sup> *Id.*

