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How Far Can a State Go To Protect a Fetus? The Rebecca Comeau Story and The Case For Requiring Massachusetts To Follow the U.S. Constitution

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COMMENT

HOW FAR CAN A STATE GO TO PROTECT A FETUS? THE REBECCA CORNEAU STORY AND THE CASE FOR REQUIRING MASSACHUSETTS TO FOLLOW THE U.S. CONSTITUTION

I. INTRODUCTION

The Fourteenth Amendment of the United States Constitution provides that a state shall not deprive any person of life, liberty or property without due process of law.[1] The Rebecca Corneau story illustrates the tremendous complexity attached to those seemingly uncomplicated words, as well as the necessity that states abide by them. The Attleboro-Robidoux Sect is a fundamentalist Christian group that rejects medical treatment.[2] Rebecca Corneau is a member of that sect, and in 1999 she gave birth to a child, Jeremiah, who died in disputed circumstances.[3] Jeremiah had not been born in a hospital. According to the Bristol County, Massachusetts District Attorney, Jeremiah died because Corneau failed to aspirate the contents of the birth canal[4] from his lungs.[5] Despite this alle-

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[1] *See* U.S. CONST. amend. XIV, § 1.

[2] *See* Frank J. Murray, *Pregnant Woman in Custody After Refusing Medical Exam,* THE WASHINGTON POST, Sept. 1, 2000, at A4.

[3] *See e.g. The Early Show: Paul Walsh Jr., District Attorney, and Lynne Paltrow, Reproductive Rights Attorney, Discuss the Case of Rebecca Corneau, Member of a Christian Sect that Rejects Medical Care* (CBS television broadcast, Sept. 1, 2000) (transcript on file with *Burrelle's Information Resources*) [hereinafter *Early Show*].

[4] Aspiration is a routine procedure generally performed by a doctor or midwife immediately following birth in which a clear airway is established. *See* VARNEY, VAR-

gation, Corneau insists that the child was stillborn.[6]

At around the same time, another child in the sect also died.[7] This child was a ten-month old boy who police believe starved to death.[8] The bodies of both of these children were found buried in Baxter State Park in Maine.[9] Massachusetts' prosecutors are currently investigating the circumstances surrounding the deaths of both infants.[10] Eight members of the sect, including Corneau's husband,[11] have been jailed in Massachusetts for failing to cooperate with the investigation.[12] Additionally, Corneau was pronounced an unfit mother and her three living children were removed from her by the state.[13] Although a principal focus of the investigation of the Attleboro Sect concerns the death of Jeremiah, Corneau has not been charged with any crime.[14]

In August of 2000, the state became aware that Corneau was pregnant with another child.[15] The court ordered that Corneau undergo a physical exam, which she refused to do.[16] Due to the circumstances surrounding the death of Jeremiah, the state of Massachusetts feared for the safety of Corneau's unborn fetus and ordered her to remain in a state-run medical facility in Boston for the remainder of her pregnancy.[17] While still in custody, Corneau gave birth to a healthy girl who the court ordered to remain in state-custody until her

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NEY'S MIDWIFERY, 455-56 (3d ed. 1997).

[5] *See* Early Show, *supra* note 3.

[6] *See* David Abel, *Pregnant Sect Member in State Custody,* THE BOSTON GLOBE, Sept. 1, 2000, at A1.

[7] *See id.*

[8] *See* Angie Cannon, *A Case of Fetal Rights*, U.S. NEWS & WORLD REPORT, Sept. 25, 2000.

[9] *See Sect Member Leads Police to Buried Bodies of 2 Infants,* SAN FRANCISCO CHRONICLE, Oct. 25, 2000, at A9.

[10] *See* Abel, *supra* note 6.

[11] David Corneau told the police where the two infants were buried on October 24, 2000, in exchange for immunity for himself and Rebecca Corneau. *See Sect Member Leads Police to Buried Bodies of 2 Infants, supra* note 9.

[12] *See* Cannon, *supra* note 8.

[13] *See CNN TALKBACK LIVE: How Far Can the State Go to Protect an Unborn Child?* (CNN television broadcast, Sept. 4, 2000) [hereinafter TALKBACK].

[14] *See id.*

[15] *See id.*

[16] *See* Abel, *supra* note 6.

[17] *See* Early Show, *supra* note 3.

fate is decided by the courts.[18]

This comment will explore the question of whether a state can take a pregnant woman into custody and subject her to prenatal care despite her religious beliefs that prohibit her from seeking medical care. Part II of this comment explains the historical development of a woman's fundamental right to privacy in making decisions concerning her pregnancy. Part II also discusses the limited contexts in which a fetus has rights, a person's right to free exercise of religion, and a person's freedom to refuse medical care. Part III addresses the legal procedures by which a state may confine a person against her will and how this implicates a person's right to due process. Part IV critiques the Massachusetts court's forced confinement of Corneau. Part V discusses what a state should do when confronted with a pregnant woman who refuses medical care due to her religious belief that to receive medical care is to "bow to a false God."[19]

II. BACKGROUND

A woman's fundamental right to privacy in making decisions concerning her pregnancy is relevant to Corneau's case because her case highlights the question of whether states have any right to intervene on behalf of an unborn fetus.[20] This section will also discuss the limited rights of a fetus.[21] These rights have been articulated when states have attempted to intervene in a woman's choices concerning her pregnancy.[22] Several states have used these fetal rights to protect the fetus from harm caused by the behavior of the mother during pregnancy.[23] Finally, the right to refuse medical care will be examined, as well as whether the right to free exercise of religion supports an individual in her refusal of medical care when this decision affects the life of her child.[24]

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[18] *See Sect Member Leads Police to Buried Bodies of 2 Infants, supra* note 9.

[19] *See* Abel, *supra* note 6.

[20] *See infra* notes 49 and 61-62 and accompanying text.

[21] *See infra* notes 96-99 and accompanying text.

[22] *See infra* notes 100-01 and 112-113 and accompanying text.

[23] *See infra* notes 102-05 and accompanying text.

[24] *See infra* notes 169-177 and accompanying text.

A. A WOMAN'S RIGHT TO PRIVACY IN MAKING CHOICES ABOUT HER PREGNANCY

An individual's right to privacy is not specifically enumerated in the Bill of Rights.[25] Although the framers of the Constitution did not include the right to privacy in the text of the Constitution, the United States Supreme Court has found that a right to privacy does exist and is protected by the Constitution.[26] Since its determination in 1965, courts have expanded this right to privacy and frequently invoke this right to protect myriad circumstances in our private lives.[27]

In 1965, the United States Supreme Court first articulated an individual's right to privacy.[28] In *Griswold v. Connecticut,*[29] the Court examined the right to privacy within the context of a Connecticut criminal statute that outlawed the purchase and prescription of contraceptives.[30] The appellants were medical professionals who had been convicted of giving married couples information regarding contraception.[31] The appellants had been found guilty as accessories under the Connecticut Statute and were fined pursuant to the statute's prohibition on using contraceptives or providing assistance in their use.[32] Appellants challenged the constitutionality of the Connecticut statute claiming it violated the Due Process Clause of the Fourteenth Amendment.[33]

The Court identified the issue to be whether the Connecticut statute violated a person's right to privacy in the context of the intimate relationship of marriage.[34] The Court deter-

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[25] *See infra* notes 35-36 and accompanying text.

[26] *See infra* notes 28 and 35-36 and accompanying text.

[27] *See infra* notes 44-50 and 56 and 171 and accompanying text.

[28] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[29] *See id.*

[30] *See id.* at 480 (providing that General Statutes of Connecticut § 53-32 states that "any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." Section 54-196 states that "any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.").

[31] *See id.*

[32] *See id.*

[33] *See* Griswold, 381 U.S. at 480.

[34] *Cf.* at *id.* at 482 (recognizing that the law forbidding the use of contraceptives

mined that although the right to privacy is not enumerated in the Bill of Rights, it is implicit in the First Amendment's guarantee of "freedom to associate and privacy in one's associations."[35] Furthermore, protection of privacy could be found in the Fourth and Fifth Amendments' "protection against all governmental invasions of the sanctity of a man's home and the privacies of life."[36] The Court found that decisions regarding contraceptives fell within this scope of protection.[37] From these protections, the Court concluded that a zone of privacy existed within the Constitution.[38] Furthermore, a married person's decision to use contraceptives fell squarely within that zone of privacy.[39]

Finding that the decision to use contraceptives was within the zone of privacy, the Court struck down the Connecticut statute and held that governmental intrusion into the marital bedroom to search for signs of contraceptive use is "repulsive to the notions of privacy surrounding the marital relationship."[40] *Griswold* was the Court's first clear articulation of an individual's fundamental right to privacy.[41] However, the right to privacy created therein was not unqualified. The *Griswold* Court limited the right of privacy to decisions and events that occur within the marital relationship.[42]

A few years later in *Eisenstadt v. Baird*,[43] the Court expanded the *Griswold* right of privacy to unmarried people.[44] Appellee Baird, a professor, was convicted under a Massachusetts statute[45] for giving contraceptive foam to an unmarried

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by married people "operates directly on an intimate relation").

[35] *See id.* at 183 (quoting NAACP v. Alabama, 357 U.S. 449, 462 (1958)).

[36] *See id.* at 484 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

[37] *See id.* at 485

[38] *See* Griswold, 381 U.S. at 485.

[39] *Cf.* at *id.* 485-86 (stating that allowing police to search the marital bedroom for signs of contraceptive use is repulsive to notions of privacy surrounding marriage).

[40] *See id.* at 486.

[41] *See supra* notes 27-28 and accompanying text.

[42] *See* Griswold, 381 U.S. at 486.

[43] 405 U.S. 438 (1972).

[44] *See id.* at 454.

[45] *See id.* at 440 (referring to Massachusetts General Laws Ann., c. 272 which mandates a maximum five-year term of imprisonment for any person who distributes contraceptives unless they are a registered medical professional prescribing contraceptives to a married person).

woman at the conclusion of a lecture on contraception.[46] In *Eisenstadt,* Justice Brennan, writing for the majority, explained that under *Griswold,* a state may not prohibit the distribution of contraceptives to married persons.[47] The Court stated that to ban the distribution of contraceptives to unmarried persons is equally impermissible, because to find otherwise would violate the equal protection right of unmarried individuals.[48] Brennan proclaimed that "[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."[49] Thus, the Court held that the Massachusetts statute was unconstitutional because it provided dissimilar treatment for married and unmarried persons.[50]

Eisenstadt was followed in 1973 by *Roe v. Wade*.[51] There, the United States Supreme Court determined whether the fundamental right to privacy, established in *Griswold* and expanded by *Eisenstadt*, extended to a woman's choice to terminate her pregnancy.[52] In *Roe,* a class action was brought challenging the constitutionality of the Texas criminal law that prohibited and criminalized abortion except in the event that it was needed to save the mother's life.[53] Jane Roe, the named plaintiff, was unmarried, pregnant, and could not afford to travel to another state to obtain a "legal" abortion.[54] Further, because her life was not in danger, Roe could not obtain an abortion in Texas and despite her desire to terminate her pregnancy, she was forced to carry the child to term.[55]

The Court determined that a woman's decision to terminate her pregnancy falls within the right of privacy.[56] If a

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[46] *See id.*

[47] *See id* at 453.

[48] *See* Eisenstadt, 405 U.S. at 453 (citing the Equal Protection Clause of the Fourteenth Amendment).

[49] *See id.* at 453-54.

[50] *See id.* at 454-55.

[51] 410 U.S. 113 (1973).

[52] *See generally* Roe, 410 U.S. at 113.

[53] *See id.* at 117-18 (discussing Texas Penal Code 1191-1194, and 1196).

[54] *See id.* at 120.

[55] *Cf.* at 124-25 (explaining that Roe was not pregnant at the time of the district court hearing).

[56] *See id.* at 153.

state denies a woman this choice altogether, a detriment would be imposed upon her.[57] However, the Court stated that a woman's right to obtain an abortion is not absolute.[58] In the context of abortion, the Court held that a state may properly exercise its important interests in safeguarding health, maintaining medical standards, and in protecting potential life.[59] However, these state interests must be weighed against a woman's right to privacy in making decisions concerning her pregnancy.[60]

In weighing these conflicting interests, the Court recognized that where "fundamental"[61] rights, such as the right to privacy, are involved, a state's intrusion into these rights must be justified by a "compelling" state interest.[62] The state's compelling interest in protecting potential life required the Court to determine whether the fetus, a potential life, is a "person" deserving of Constitutional protection.[63] The Court explained that because the Constitution does not specifically define what a "person" is,[64] for the purposes of receiving constitutional protection, a fetus is not considered a "person" under the Fourteenth Amendment.[65]

While the Constitution does not provide protection to the unborn, the Supreme Court recognized in *Roe* that the state does have a legitimate interest in protecting potential life.[66] Furthermore, the Court differentiated *Roe* from privacy cases that involve the marital relationship, because a pregnant woman is carrying a potential life in her uterus.[67] For this rea-

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[57] *See* Roe, 410 U.S. at 153 (stating, for example, that being forced by the state to mother an unwanted child could result in a distressful life, aggravated by the physical and psychological harm associated with overwork and the possible stigma of being an unwed mother).

[58] *See id.*

[59] *See id* at 154.

[60] *See id.*

[61] *See id.* at 152 (explaining that only personal rights that can be deemed fundamental are included in the idea of personal privacy).

[62] *See e.g.* Kramer v. Union Free School District, 395 U.S. 621, 627 (1969) *quoted in* Roe v. Wade, 410 U.S. at 155.

[63] *See* Roe, 410 U.S. at 158.

[64] *See id.* at 157 (explaining that although the word "person" is used in the Fourteenth Amendment, it is used only to apply to those people already born).

[65] *See id.* at 158.

[66] *See id.* at 162.

[67] *See id.* at 159.

son the Court held that a woman's right to an abortion must be measured against the fact that a potential life is at stake.[68] Furthermore, the Court agreed that the state also has an interest in preserving and protecting the health of pregnant women.[69] Therefore, in order to reconcile these three distinct interests, the Court determined that the state's interest in protecting potential life becomes compelling at the point of viability, that is when the fetus is "capable of sustaining life outside of the womb."[70] Therefore, according to *Roe*, until the fetus reaches the point of viability, the state may not interfere with the mother's choice to terminate her pregnancy.[71] Moreover, if the mother's health is at stake at any time during the pregnancy, saving her life overrides any interest the state may have in protecting the potential life of the fetus.[72]

In 1992, the Supreme Court narrowed *Roe's* holding in *Planned Parenthood v. Casey*.[73] The *Casey* Court recognized that the state has a compelling interest in potential life at the point of the fetus' viability.[74] However, Justice O'Connor, in her majority opinion, found that the trimester demarcation, articulated in *Roe*, was no longer a sufficient basis for determining viability.[75] Technological advancements in the years separating *Roe* and *Casey* rendered the *Roe* trimester system outdated.[76] The *Casey* Court established a new approach to determining the point at which a state's interest in potential life becomes compelling.[77] The test for this determination was whether the regulation in question creates an undue burden on a woman's right to privacy in making the decision whether to have an abortion.[78] If the regulation does create such a burden, then the regulation is unconstitutional.[79]

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[68] *See* Roe, 410 U.S. at 154.

[69] *See id.* at 162.

[70] *See id.* at 163.

[71] *See id.* at 164.

[72] *See id.*

[73] 505 U.S. 833 (1992).

[74] *See id.* at 870.

[75] *See id.* at 873.

[76] *See id.*

[77] *See id.* at 874.

[78] *See* Casey, 505 U.S. at 874.

[79] *See id.* at 877.

While *Roe* and *Casey* limit a woman's right to privacy in making decisions concerning her pregnancy, these restrictions are limited to the context of obtaining an abortion. Although *Casey* departed from *Roe* in establishing how a state determines a fetus' viability for the purposes of the validity of state intrusion, the rights of the state and the rights of the pregnant woman remained the same.[80] The state retains the right to prohibit a woman from having an abortion when the potentially aborted fetus is viable.[81] The state may also enact regulations concerning abortion, provided the state's interest is compelling and the regulations do not unduly burden the woman's right to privacy.[82] Nevertheless, women retain the right to privacy in making decisions concerning their pregnancy, including the decision to have an abortion.[83]

B. FETAL RIGHTS

Although *Roe* and *Casey* lay out the rights of the woman and the rights of the state in the context abortion, the Supreme Court has made no clear articulation of whether a fetus has any constitutionally protected rights. In fact, by concluding that a fetus is not a person under the Fourteenth Amendment, the Supreme Court suggests that a fetus has no rights under the Constitution.[84] Further, the Supreme Court has not specifically addressed the question of whether the rights of the state to protect a viable fetus extend into areas other than abortion.[85] Without guidance on this issue states have attempted, often without success, to protect the viable fetus in contexts other than abortion.[86]

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[80] *See id.* at 874.

[81] *See id.* at 870.

[82] *See id.* at 874.

[83] *See* Roe, 410 U.S. at 153.

[84] *See id.* at 158.

[85] *See* Cynthia L. Glaze, Comment, *Combating Prenatal Substance Abuse: The State's Current Approach and the Novel Approach of Court-Ordered Protective Custody of the Fetus,* 80 MARQ. L. REV. 793, 796 (1997).

[86] *See id.* at 802 (finding by Florida Supreme Court that prosecuting pregnant women for prenatal substance abuse is the least effective means for combating the problem of drug use during pregnancy. Michigan courts finding positive drug urinalysis in newborns not sufficient to constitute drug possession for the mothers).

The issue of fetal rights is particularly challenging when addressing whether the state has a compelling interest in protecting a viable fetus from a mother's conduct during her pregnancy.[87] The state's compelling interest in protecting potential life must be balanced against the mother's fundamental right to make decisions concerning her pregnancy.[88] However, women's rights advocates argue that any rights afforded to a fetus should be limited to the context of abortion.[89] As the fetus is not afforded any protection under the Fourteenth Amendment, and the mother has a fundamental right to make decisions concerning her pregnancy, states should be allowed to intervene in a woman's pregnancy only where abortion is concerned.[90]

However, fetal rights advocates read *Roe* more broadly.[91] They believe that *Roe* stands for the proposition that the fetus has rights independent of the mother or the state, even before it becomes viable.[92] Fetal rights advocates further urge that the existence of these rights were affirmed by the Court's decision in *Casey*[93] and are only limited by the balancing test.[94] They argue that these independent rights and the conditional rights already afforded to the fetus in other areas of the law justify a state's interest in the rights of the fetus in contexts other than abortion.[95] For example, a fetus is entitled to receive an inheritance provided it is born alive.[96] In tort law, every state provides a cause of action for prenatal injury, so long as the viable fetus is later born alive.[97] In addition to these qualified rights, most states allow a tort cause of action for prenatal injury to a viable fetus even when the fetus dies

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[87] *See* Nova D. Janssen, Note, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy,* 48 DRAKE L. REV. 741, 742 (2000).

[88] *See* Glaze, *supra* note 85, at 797.

[89] *See id.* at 796.

[90] *See id.*

[91] *See id.*

[92] *See id.* at 796.

[93] *But see* Casey, 505 U.S. at 876 (stating that the trimester demarcation is incompatible with *state interest* in potential life throughout pregnancy, as opposed to articulating that a fetus has rights throughout the pregnancy).

[94] *See* Glaze, *supra* note 85, at 796-97.

[95] *See id.* at 797.

[96] *See* Janssen, *supra* note 87, at 750.

[97] *See id.*

prior to birth.[98] Furthermore, in criminal law, some states allow a cause of action for fetal homicide if the fetus was viable at the time of the killing.[99]

Fetal rights advocates believe that these conditional rights, and the independent rights that they derive from the Court's decisions in *Roe* and *Casey*, justify a state's intervention into a woman's pregnancy in contexts other than abortion.[100] Fetal rights advocates further believe that the state has an even greater interest in protecting the future life of the fetus should a mother choose to carry her pregnancy to term.[101] Since *Casey* was the last articulation by the Supreme Court on the issue, whether the position expressed by women's rights advocates or that expressed by fetal rights advocates is the constitutionally supported position is still hotly contested.

C. State Intervention: Women Using Illegal Drugs During Pregnancy

Outside of the abortion debate, a major arena in which states have attempted to create and protect rights for the fetus, is that in which a pregnant woman uses illegal drugs during her pregnancy.[102] The use of illegal drugs by a mother can have a significant impact on the health of the fetus.[103] For example, some of the effects of cocaine and heroin on a fetus are addiction and withdrawal at birth, low birth weight, short body length, abnormally small head circumference, birth defects and learning disabilities.[104] Many states have attempted to protect the fetus from these potential dangers by charging a mother who uses illegal drugs while pregnant with child abuse.[105]

For example, in *In Re Ruiz*, the Ohio Court of Common Pleas addressed the question of whether a mother's prenatal

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[98] *See id.*

[99] *See* Tony Hartsoe, *Person or Thing: In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 Campbell L. Rev. 169, 211-12 (1995).

[100] *See* Glaze, *supra* note 85, at 796-97.

[101] *See id.* at 797.

[102] *See id.* at 793-94.

[103] *See id.* at 793.

[104] *See id.*

[105] *See* Glaze, *supra* note 85, at 799.

conduct constituted child abuse under Ohio's statute.[106] Luciano Ruiz was born mildly premature, underdeveloped, and with a host of health problems.[107] At birth, he tested positive for cocaine and opiates.[108] The source of these traces of drugs could only be linked to Luciano's mother.[109]

In order to determine whether Ruiz's mother could be charged with child abuse for her prenatal use of illegal drugs, the court first ascertained whether a fetus is a child for the purposes of finding child abuse.[110] In determining whether a fetus is a child under the Ohio statute, the court noted that the common law typically afforded legal protection beginning only at birth.[111] However, prior to *Ruiz*, Ohio courts had allowed causes of action to be brought for wrongful death of a viable fetus.[112] On this basis, the court concluded that an unborn child is entitled to at least some legal protection when his life has been endangered by another.[113]

Additionally, the Ruiz court looked to the United States Supreme Court's holding in *Roe*, which provides that a state has a compelling interest in human life at the time of viability.[114] The judge, reluctant to decide whether a fetus should be awarded a "person's" rights at the time of viability, reasoned that this question was better left to legal scholars.[115] However, for the purpose of determining if a viable fetus is a child under the child abuse statute, the court found that the protections created in *Roe* and the civil legal protection afforded to a fetus by Ohio common law led to the conclusion that the state has an interest in a child's welfare beginning at viabil-

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[106] *See* In Re Ruiz v. Court of Common Pleas of Wood County, 500 N.E.2d 935, 936 (1986).

[107] *See id.*

[108] *See id.*

[109] *See id.*

[110] *See id.*

[111] *See* In Re Ruiz, 500 N.E.2d at 936.

[112] *See id.* at 937 (quoting Jasinsky v. Potts, 92 N.E.2d 809 (1950) (allowing causes of action for viable fetus born alive, but dying shortly thereafter), Werling v. Sandy, 476 N.E.2d 1053 (1985) (allowing cause of action for viable fetus that is later stillborn)).

[113] *See id.* at 939.

[114] *See id.* at 938.

[115] *See id.* at 937-38.

ity.[116] Therefore, the court concluded that Ohio's definition of child abuse could include prenatal injury caused by drugs consumed by a pregnant woman past the point of her fetus' viability.[117]

However, in a later case, *Ohio v. Grey*, the Ohio Supreme Court took the opposite approach from the *Ruiz* decision.[118] The court stated that words and phrases in Ohio statutes are to be construed according to the rules of grammar and common usage.[119] Following this rule, one becomes a parent only when his or her child is born.[120] It follows logically that a child becomes a "child" only when he or she is born.[121] In looking at the same statute that was at issue in *Ruiz*, the court found that nowhere had the legislature indicated that it had intended to include pregnant women in the statutory definition of the word "parent."[122] The court further held that whether pregnant women have a legal duty to protect their fetuses is a question for the state legislature, not the courts.[123] Therefore, since the legislature had not included the protection of fetuses in the Ohio child abuse statute, the court refused to allow the state of Ohio to convict pregnant women of child abuse who had used drugs during their pregnancies.[124]

State courts seldom address the question of whether a state's interest in protecting the life of a fetus is compelling enough to outweigh the mother's constitutionally protected right to privacy.[125] When questions arise concerning state intervention during pregnancy, most states have adopted the Ohio Supreme Court's approach to look solely at the language of the child abuse statute to determine if a fetus is included within its scope of protection.[126] Because state child abuse statutes often lack language specific to fetuses, most states will not convict pregnant women under their child abuse

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[116] *See* In Re Ruiz, 500 N.E.2d at 938.

[117] *See id.* at 939.

[118] *See* Ohio v. Gray, 584 N.E. 2d 710 (1992).

[119] *See id.* at 711 (citing OHIO REV. CODE ANN. § 1.42).

[120] *See id.*

[121] *See id.*

[122] *See id.* at 712.

[123] *See* Gray, 584 N.E. 2d at 713.

[124] *See id.*

[125] *See* Glaze, *supra* note 85, at 799.

[126] *See id.* at 801.

codes for using drugs during pregnancy.[127]

Because states are unable to press charges against the mother under the child abuse statutes, some states have turned to other methods of protecting the fetus when the state is aware that the mother has been using illegal drugs throughout the pregnancy.[128] For example, the state of Wisconsin has attempted to protect drug-exposed fetuses by placing the pregnant woman in custody until she gives birth.[129] However, Wisconsin's approach was ultimately unsuccessful.

In *Wisconsin v. Kruzicki*[130] a pregnant mother tested positive for cocaine and other drugs numerous times during her pregnancy.[131] The County of Waukesha filed a Children in Need of Health and Protective Services (hereinafter "CHIPS") petition with the Juvenile Court.[132] The petition alleged that the fetus was in need of the state's protection because its "parent neglected, refused or was unable, for reasons other than poverty, to provide necessary care [. . .] so as to seriously endanger the physical health of the child."[133] A CHIPS petition is usually filed on behalf of a child who is already born and, if granted, the child is placed in foster care for its protection.[134] In order to use a CHIPS petition to protect a fetus, the mother must be placed in custody. The mother in *Kruzicki* argued that a fetus is not a child under the Children's Code.[135] The juvenile court ruled against the mother and placed her in custody for the protection of the "child."[136] On appeal, the Wisconsin Court of Appeals affirmed the decision, finding that a viable fetus is a "child" under Wisconsin's code.[137] Although the state was successful at holding the mother until term, the Wisconsin Supreme Court reversed the

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[127] *See id.* at 805.

[128] *See id.* at 806.

[129] *See id.*

[130] 561 N.W.2d 729 (1997).

[131] *See id.* at 732.

[132] *See id.*

[133] *See id.*

[134] *See* Glaze, *supra* note 85, at 806.

[135] *See id.* at 808.

[136] *See id.* at 806 (quoting State ex rel Angela M.W. v. Kruzicki, 197 Wis. 2d 532, 541 (1995)).

[137] *See id.* at 807 (quoting State ex rel Angela M.W. v. Kruzicki, 197 Wis. 2d 532, 560 (1995)).

lower court's decision, finding that the term "child" as it was used in the relevant child abuse statutes, was too ambiguous to include a fetus within its meaning.[138]

While some state legislatures have passed laws stating that drug addiction in a newborn is evidence of child abuse,[139] attempts to pass legislation that deters a woman's prenatal illegal drug use while pregnant have mainly failed.[140] In fact, by allowing a pregnant woman to be prosecuted, the state's goal of protecting the fetus from the consequences of its mother's drug use is circumvented because it deters pregnant mothers from seeking out prenatal care. For example, rather than face possible prosecution for drug use, many women using illegal drugs while pregnant will simply avoid seeking medical or prenatal care.[141] Furthermore, incarceration does not necessarily ensure health for the fetus since prisons often have inadequate health care.[142]

D. A Right to Practice One's Religion Versus the Right to Refuse Medical Care

Turning from the considerations of women's privacy rights in making choices concerning pregnancy, the right to freely exercise one's religion and to refuse medical care must also be explored. The First Amendment of the United States Constitution provides for free exercise of religion.[143] The right of the individual to refuse medical care as a form of free exercise of religion has been afforded some constitutional protection. The following section will discuss these issues.

1. Right to Religious Freedom

While the right to privacy is not specifically enumerated in the Bill of Rights, the First Amendment of the United States Constitution specifically provides for the freedom of religion.[144] This right, however, is not without some limita-

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[138] *See* Kruzicki, 561 N.W.2d at 736.

[139] *See* Glaze, *supra* note 85, at 803-04.

[140] *See id.* at 804.

[141] *See* Johnson v. Florida, 602 So.2d 1288, 1295-96 (1992).

[142] *See* Glaze, *supra* note 85, at 804-05.

[143] *See* U.S. Const. amend. I.

[144] *See,* Reynolds v. United States, 98 U.S. 145, 162 (1878).

tions.[145] *Reynolds v. United States*[146] is an early Supreme Court articulation of how far the right to free exercise of religion extends.

In *Reynolds,* the United States Supreme Court analyzed whether a Congressional statute forbidding polygamy violated the First Amendment.[147] The Court distinguished Congress' authority to legislate religious beliefs from its authority to legislate religious acts.[148] The Court held that although Congress may not legislate a person's religious beliefs, it may prohibit acts that endanger the public.[149] The plaintiffs in *Reynolds* were members of the Mormon faith, in which polygamy was an accepted and encouraged doctrine.[150] The Court found that the historical prohibition against polygamy is linked to marriage, a sacred institution in American society that is necessarily intertwined with the concept of monogamy.[151] Polygamy, the Court held, is in direct conflict with monogamy and, therefore, endangers the institution of marriage.[152] Thus, the Court held that the First Amendment guarantee of religious freedom did not include the right to practice polygamy. Despite the fact that polygamy was a religious act, it was banned because it endangered the best interests of the public.[153]

In contrast, over sixty years later, in *Cantwell v. Connecticut,*[154] the Court struck down a statute that prohibited solicitation without a license when a Jehovah's Witness was convicted under the statute.[155] Although the Court affirmed the *Reynolds* holding, finding that religious acts can be regulated, it held that the restrictions placed upon those acts could not "unduly infringe" on the individual's freedom of religion.[156] The "unduly infringe" standard provided more protection of

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[145] *See id.* at 166.

[146] 98 U.S. 145 (1878).

[147] *See id.*

[148] *See id.* at 166.

[149] *See id.*

[150] See *id.* at 145.

[151] See Reynolds, 98 U.S. at 165-66.

[152] *See id.*

[153] *See id.* at 167.

[154] 310 U.S. 296 (1940).

[155] *See id.* at 311.

[156] *See id.* at 304.

religious acts than the *Reynolds* decision, which articulated no standard of scrutiny.[157] In *Cantwell*, the licensing official was authorized to make determinations as to what is a religious cause when granting or denying licenses.[158] The Court held that a state may regulate the time, place and manner of solicitation only if it is for the purpose of protecting the best interests of the public.[159] To condition the granting of a license for solicitation on an official's determination of what constitutes a religious cause placed a burden on the free exercise of religion.[160] The Court held that this licensing scheme unduly infringed on Cantwell's free exercise of religion and was therefore unconstitutional.[161]

A few years later in *Prince v. Massachusetts*,[162] the Court upheld a Massachusetts child labor law which prohibited children from selling printed material on the street.[163] Prince, a Jehovah's Witness, permitted her nine-year old niece, also a Jehovah's Witness, to sell "The Watch Tower" on the street.[164] Prince argued that the statute violated the child's "God-given right and constitutional right to preach the gospel."[165] The Court held that although a parent has a right to give his children religious training and a child has a right to exercise his religion, these rights are not absolute when they threaten an important public interest.[166] The Court held that the important public interest in protecting children from the evils of child labor was more important than either a parent's right or a child's right to free exercise of religion.[167] Forbidding chil-

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[157] *See* Reynolds, 98 U.S. at 166.

[158] *See* Cantwell, 310 U.S. at 302.

[159] *See id.* at 306-07.

[160] *See id.* at 307.

[161] *See id.* at 306.

[162] 321 U.S. 158 (1944).

[163] *See id.* at 170.

[164] *See id.* at 162 (discussing the distribution of the "Watch Tower," an informational pamphlet published by the Jehovah's Witnesses).

[165] *See id.*

[166] *See id.* at 166. *Compare with* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (upholding a parent's authority to provide religious schooling, and a child's right to receive it, against the state's requirement that children attend public schools).

[167] *See* Prince, 321 U.S. at 166-67 (articulating some of the areas in which a state could properly legislate, in the interest of protecting children, that would supersede both the rights of religion and the rights of parenthood. Interestingly, the Court stated that a parent cannot claim freedom from compulsory vaccination for either

dren to sell "The Watch Tower" on the street did not unduly infringe on the rights of Prince or her niece to freely practice their religion.[168]

2. *Refusal of Medical Care*

Although not specifically enumerated in the Bill of Rights, a competent person may generally refuse to undergo medical treatment, even if such treatment may prove to be life-saving.[169] Courts at all levels have upheld this right without elaborating on the reasoning behind it.[170] Courts have also consistently upheld a competent adult's refusal of medical care on the grounds that refusal to consent to medical care is encompassed in the individual's fundamental right to privacy.[171] In fact, courts consistently impose civil liability on those who perform medical treatment without the consent of a competent adult.[172] As with other rights included under the purview of a right to privacy, such as the right to an abortion, a state must assert an important governmental interest when inflicting medical care on the person in question, for that individual's right to refuse medical care to be legally overridden.[173]

Courts have also upheld a patient's right to refuse medical care on the grounds that medical care violates his or her

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himself or his child on religious grounds).

[168] *See id.* at 170.

[169] *See* 93 A.L.R.3d 67 (3a)(2000). *See also* Palm Springs General Hospital v. Martinez, Dade Co CC, Fla (1971) (upholding elderly patient's refusal to undergo blood transfusions and surgery, despite inevitable death, because Florida's interest in compelling treatment was minimal).

[170] *See id.*

[171] *See id.* at (3c). *See also* Satz v. Perlmutter, 362 So. 2d 160 (1978) (holding that an elderly man had a right to have mechanical respiration discontinued based upon the constitutional right to privacy). *See also* Lane v. Candura, 376 N.E.2d 1232 (1978) (holding that a woman's constitutional right to privacy entitled her to refuse to consent to having her gangrenous leg amputated).

[172] *See id.* at (3b).

[173] *See id. See also* Wons v. Public Health Trust, 500 So. 2d 679 (1987) (holding that trial court erred in authorizing hospital to administer involuntary blood transfusions to a Jehovah's Witness where the State had no compelling interest sufficient to override the patient's constitutional right to practice her religion according to her conscience). For example, a state may assert an interest in preventing an adult from refusing medical care when the adult has dependent, minor children and receipt of medical care would prevent the children from becoming orphans.

religious beliefs.[174] However, as with the right to privacy, a compelling governmental interest may allow the state to limit the right to free exercise of religion because the right to refuse medical care is fundamental, but not absolute.[175] States have successfully asserted a compelling governmental interest in saving the life of a viable fetus, thereby requiring medical procedures even though the pregnant woman refuses the procedures on religious grounds.[176] Courts have also permitted states to assert this interest when forcing pregnant women into medical confinement when these women have previously refused medical treatment that would prevent the death of their fetuses.[177]

In *Jefferson v. Griffin Spalding Hospital Authority,*[178] the Georgia Supreme Court forced a pregnant woman to undergo a surgical procedure that could save the life of her child over her religion based objection to surgery.[179] Without the surgery, doctors predicted that the child had a one percent chance of surviving the birth, the mother a fifty percent chance.[180] With the surgery, both the mother and child had nearly a one-hundred percent chance of survival.[181] Despite the fact that the mother refused surgery on religious grounds, the court held that the state had an interest in the potential life of the viable fetus. The state further argued that its intrusion into the woman's right to privacy was outweighed by its duty to give the fetus an opportunity to live.[182] As a result, the state forced the mother to undergo the surgery.[183]

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[174] *See* 93 A.L.R.3d 67 (3d). *See also id.* at (3b). *See also* Wons v. Public Health Trust, 500 So. 2d 679 (1987) (holding that trial court erred in authorizing hospital to administer involuntary blood transfusions to a Jehovah's Witness over her religious objections).

[175] *See id.* at (3d). *See also* Wons v. Public Health Trust, 500 So. 2d 679 (1987) (holding that trial court erred in authorizing hospital to administer involuntary blood transfusions to a Jehovah's Witness where state had no compelling interest sufficient to override patient's constitutional right to practice her religion according to her conscience).

[176] *See* Glaze, *supra* note 85, at 812.

[177] *See id.* at 812-13.

[178] 274 S.E.2d 457 (1981).

[179] *See id.*

[180] *See id.* at 458.

[181] *See id.*

[182] *See id.* at 460.

[183] *See* Jefferson, 274 S.E.2d at 460.

In his concurring opinion, one Justice stated that although the First Amendment grants absolute freedom of religious belief, it does not grant absolute freedom of religious acts.[184] However, when restricting a religious act, the state must take the least burdensome path possible.[185] Even in taking the least burdensome path, a state still must demonstrate a compelling interest.[186] Protecting the life of a viable fetus and its mother are both compelling state interests.[187] In this case, there was no less burdensome path than forcing the mother to undergo surgery.[188] Under these extreme circumstances, forcing the mother to undergo surgery against her religious beliefs was not a violation of the First Amendment.[189]

The *Jefferson* court held that the state of Georgia demonstrated a compelling interest in requiring the mother to undergo surgery because both her life and that of her fetus were in serious danger.[190] However, when faced with a situation similar to that in *Jefferson*, other courts have ruled differently.[191] For example, the Illinois Appellate Court overruled the trial court's ruling that a pregnant woman be required to undergo blood transfusions for the benefit of her viable fetus, a procedure she refused to undergo on religious grounds.[192] The court held that the refusal of medical care in such an instance outweighed the state's interest in the welfare of the viable fetus, even though both the fetus and the mother were likely to die without the blood transfusions.[193]

Protecting a viable fetus from imminent death, even outside of the abortion context, has been held to be a compelling state interest.[194] However, the contention that this inter-

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[184] *See id.* at 461 (Smith, J., concurring).

[185] *See id.* (Smith, J., concurring).

[186] *See id.* (Smith, J., concurring).

[187] *See id.* (Smith, J., concurring).

[188] *See* Jefferson, 274 S.E.2d at 461 (Smith, J., concurring).

[189] *See id.* (Smith, J., concurring).

[190] *See id.* at 460.

[191] *See eg.* In Re Brown, 294 Ill. App. 3d 159, 172 (1997) (holding that a woman's right to refuse blood transfusions that would benefit her fetus outweighs State's interest in the welfare of the viable fetus).

[192] *See id.* at 171.

[193] *See generally id.* at 172.

[194] *See generally* Anderson, 42 NJ at 423 (stating that an unborn child is entitled to the law's protection and the mother should receive blood transfusions because

est is compelling has not been echoed by, nor has it been articulated by the United States Supreme Court. By contrast, when only the "welfare" of the fetus is at stake, such as when a mother is using drugs while pregnant, or where a fetus would be benefit from a medical procedure that is not necessarily life preserving, the state is less likely to have a compelling enough interest to override fundamental individual rights.[195]

III. DISCUSSION

A Massachusetts judge ordered Rebecca Corneau to undergo a prenatal exam because she was suspected of covering up the circumstances surrounding the death of her last baby, Jeremiah.[196] Because of Jeremiah's death, the state feared for the safety of Corneau's fetus.[197] Corneau refused to submit to a court-ordered physical exam giving as her reason that to receive medical care is to "bow down to a false god."[198] Upon her refusal, Corneau was taken into custody for failure to obey the court order.[199] Corneau was then confined in the Neil J. Houston House, a medical facility in Roxbury, Massachusetts, and forced to remain there for the duration of her pregnancy.[200] This decision may have been the first time a healthy woman had been forced into the state's custody to protect the health and welfare of an unborn child.[201]

The Fourteenth Amendment provides that a person shall not be deprived of his liberty without due process of law.[202] There are two major ways in which a state may deprive a person of his or her liberty, without a criminal conviction, and remain consistent with this constitutional mandate: preventive detention and civil commitment. Massachusetts' forced confinement of Corneau presents several constitutional ques-

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their lives are intertwined).

[195] *See supra* notes 125-27 and accompanying text.

[196] *See supra* notes 3-13 and accompanying text.

[197] *See* Jacob H. Fries, *Court Action Planned Against a Cult Member,* THE BOSTON GLOBE, Aug. 31, 2000, at B2.

[198] *See* Abel, *supra* note 6.

[199] *See id.*

[200] *See id.*

[201] *See id.*

[202] *See* U.S. CONST. amend. XIV, §1.

tions, each concern the right to liberty provided for in the Fourteenth Amendment Due Process Clause. First, Massachusetts exercised preventive detention over Corneau although she is not a criminal defendant.[203] Second, Massachusetts placed Corneau in civil commitment although she is not incompetent,[204] nor has she been proven to be a risk either to herself or another person.[205] This section will discuss these issues.

A. THE PREVENTIVE DETENTION DOCTRINE AND ITS APPLICABILITY TO REBECCA CORNEAU

A state may confine a criminal defendant, prior to trial and without bail, if it fears that the defendant is dangerous to the public at large, or to a certain segment of the public.[206] This practice is called the preventive detention doctrine.[207] The preventive detention doctrine raises the issue of whether pretrial freedom can be denied to a criminal defendant because of his suspected criminal tendencies.[208] The main objection to this doctrine is that the deprivation of a defendant's freedom prior to finding him or her guilty is a denial of the defendant's due process rights under the Fourteenth Amendment.[209] However, the Federal Bail Reform Act of 1984 allows preventive detention when there is evidence of past criminality.[210]

In *United States v. Salerno*[211] the United States Supreme Court upheld the constitutionality of the Federal Bail Reform Act of 1984.[212] The Court stated that to exercise preventive detention, the state must have a legitimate and compelling regulatory interest in protecting the public that outweighs an

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[203] *See infra* notes 216-18 and accompanying text.

[204] *See infra* notes 233-34 and accompanying text.

[205] *See infra* notes 235-36 and accompanying text.

[206] *See* 75 A.L.R. 3d 956 (2a) (1977).

[207] *See id.*

[208] *See id.* at (1).

[209] *See* Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 557 (1986).

[210] *See*, JOSHUA DRESSER, UNDERSTANDING CRIMINAL PROCEDURE, 549-52 (2d ed. 1996).

[211] 481 U.S. 739 (1987).

[212] *See id.* at 754.

individual's liberty interest.[213] In order to show that the interest is compelling, the government must prove by clear and convincing evidence that the arrestee "presents an identified and articulable threat to an individual or the community."[214] If this threat is demonstrated, then detention is consistent with the Due Process Clause.[215]

However, application of the preventive detention doctrine requires that the person confined is a criminal defendant.[216] Although eight members of Corneau's religious group, including Corneau's husband, have been placed in custody for refusing to answer questions about the two infants' deaths, Corneau was not one of them.[217] Corneau was, in fact, never arrested, nor was she charged with any crime prior to her forced medical confinement.[218] Therefore, whether Massachusetts has the authority to hold Corneau in preventive detention is an issue that requires resolution.

B. CIVIL COMMITMENT

Preventive detention is a criminal procedure, and as such can only be applied apropos criminal defendants.[219] However, outside of the criminal context, the state may institute civil confinement for persons who present a danger to themselves or others.[220] This procedure is called civil commitment and results in confinement in a state mental hospital for varying lengths of time.[221] Although the Massachusetts legislature provides for the civil commitment of mentally incompetent people, absent a finding of incompetence, the law requires that the person confined manifest a likelihood of serious harm to either himself or another person.[222] In order to demonstrate that a person is a danger to himself, the state must establish evidence of threats or attempts of suicide or other significant

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[213] *See id.* at 749-750.

[214] *See id.* at 751.

[215] *See id.*

[216] *See* 75 A.L.R. 3d 956 §2(a).

[217] *See* Abel, *supra* note 6.

[218] *See* TALKBACK, *supra* note 13.

[219] *See* 75 A.L.R. 3d 956 (1977) §2(a).

[220] *See infra* notes 232-35 and accompanying text.

[221] *See* Addington v. Texas, 441 U.S. 418, 419-20 (1979).

[222] *See* Mass. Ann. Laws, ch. 123, §12a (2000).

bodily harm.[223] Likewise, in order to show that the person is a danger to others, the state must establish evidence of homicidal or other violent behavior, or evidence that others are in reasonable fear of such behavior.[224]

Similar to the preventive detention doctrine, civil commitment raises the issue of whether the involuntary confinement of a person by the state violates his due process rights under the Fourteenth Amendment.[225] A person forced into confinement under civil commitment is necessarily deprived of his liberty. In most civil actions, where a person's liberty is not at stake, there must be a showing that what is being contended is more likely than not to have occurred.[226] This standard of proof is known as the "preponderance of the evidence."[227] However, in circumstances of civil commitment, the Constitution requires that the burden of proof be more rigorous because one's liberty is at stake.[228]

In *Addington v. Texas*[229] the United States Supreme Court addressed this problem. Although a state has a legitimate interest in protecting the public from physical harm, the Court found that the standard civil action burden of proof, preponderance of the evidence, is insufficient when it may result in the deprivation of a person's liberty.[230] The Court held that when a state deprives a person of liberty through civil commitment, the state must prove the necessity to do so by at least clear and convincing evidence.[231] As a result, this higher standard of proof places a more stringent burden upon states to show that a person presents a danger to himself or others, and should be confined.

As a preliminary matter, Massachusetts' civil commitment statutes mandate that a person be incompetent before

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[223] *See id.* at §1.

[224] *See id.* at §1.

[225] *See* Addington, 441 U.S. 418, 420 (1979).

[226] *See generally id.* at 423 (reasoning that as society has minimal concerns in the outcome of private monetary suits the preponderance of the evidence standard is all that is required).

[227] *See id.*

[228] *See id.* at 427.

[229] *See id.* at 418.

[230] *See* Addington, 441 U.S. at 427.

[231] *See id.* at 433.

he or she can be placed in state custody.[232] For one to be declared incompetent, he or she must lack sufficient physical, mental or legal qualifications.[233] The state has not declared Corneau to be incompetent, yet it has placed her in a state hospital.[234] Without a showing of incompetence, application of civil commitment requires a showing by clear and convincing evidence that the person is likely to harm himself or others.[235] As a result, Corneau should not be confined under this statute. Furthermore, since a fetus is not a person under the Fourteenth Amendment,[236] and the Massachusetts civil commitment law does not include a fetus in its definition of person,[237] whether Massachusetts has the authority to place Corneau in confinement under its civil commitment laws requires an answer.

IV. CRITIQUE

Rebecca Corneau was confined by the state of Massachusetts against her will because she was pregnant and refused to submit to medical care.[238] Corneau states that she refused this care because it was prohibited by her religion.[239] Massachusetts placed Corneau in custody due to some unsubstantiated future harm it feared she would impose on her fetus, yet failed to charge her with a crime, deem her incompetent, or demonstrate that her fetus was in ill health. This state's action and its reasoning is extremely questionable, in light of the fact that the Supreme Court has held that a fetus is not a person under the Fourteenth Amendment,[240] and that most states refuse to protect fetuses even from the grave effects of prenatal drug exposure.[241]

Most states remain reluctant to articulate fundamental rights for fetuses, even at the expense of protecting the fetus

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[232] *See* Mass. Ann. Laws, ch. 123, §4.

[233] *See* BLACK'S LAW DICTIONARY (6th ed.1991).

[234] *See* Abel, *supra* note 6.

[235] *See* Mass. Ann. Laws, ch. 123, §1. *See also* Addington, 441 U.S. at 427.

[236] *See* Roe, 410 U.S. at 158.

[237] *See* Mass. Ann. Laws, ch. 123, §1

[238] *See* Cannon, *supra* note 8.

[239] *See id.*

[240] *See* Roe, 410 U.S. at 158.

[241] *See* Glaze, *supra* note 85, at 799.

from the detrimental health effects of exposure of prenatal drug exposure.[242] States' reluctance to do so is consistent with the Supreme Court's holding in *Roe* that a fetus is not a person under the Fourteenth Amendment.[243] This conclusion is crucial to the Corneau situation because Massachusetts placed the supposed rights of a fetus, which is not a person deserving of constitutional protections,[244] above the rights of Corneau, a person who is entitled to constitutional protections.[245] As a result, Corneau's rights to due process, privacy, and free exercise of religion were blatantly violated for no compelling reason.[246]

A. CORNEAU'S RIGHT TO DUE PROCESS WAS VIOLATED

Holding Corneau in confinement for an entire month without charging her with a crime, violated her due process rights. Preventive detention is permissible only for criminal defendants.[247] Furthermore, civil commitment is appropriate only when a person is declared incompetent or the state shows by clear and convincing evidence that if the person is not put in confinement, a great likelihood exists that he will endanger himself or others. The state of Massachusetts lacked a basis to confine Corneau under either of these procedures therefore her medical confinement was unconstitutional.[248]

1. Preventive Detention Does Not Apply to Corneau

Implicit in the preventive detention doctrine is that the person confined is a criminal defendant.[249] Corneau was never arrested or charged with any crime on which to base a preventive detention.[250] Furthermore, in order for a state to hold a person in custody without bail and without making a finding of guilt, it must prove by clear and convincing evidence

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[242] *See supra* notes 126-27 and accompanying text.

[243] *See* Roe, 410 U.S. at 158.

[244] *See supra* notes 63-65 and accompanying text.

[245] *See infra* notes 255-58 and accompanying text.

[246] *See supra* notes 238-41 and accompanying text.

[247] *See* 75 A.L.R. 3d 956 §2(a).

[248] *See infra* notes 249-51 and 253-54 and accompanying text.

[249] *See* 75 A.L.R. 3d 956 §2(a).

[250] *See* TALKBACK, *supra* note 13.

that the person presents an "identifiable and articulable threat to an individual or the community."[251] The state of Massachusetts has not indicated that Corneau presents such a threat. It has not arrested or charged her with any crime. As a result, Corneau is not a criminal defendant and should not have been placed under preventive detention.

Had Corneau been arrested on contempt charges, the state may have had legal support for holding Corneau in custody. Her pregnancy and birth could have been easily monitored because she would be in jail.[252] However, by simply placing Corneau in "medical confinement," without charging her with a crime and without showing by clear and convincing evidence that she posed a threat to the public, Corneau's due process right to liberty, protected by the Fourteenth Amendement, was violated.

2. Civil Commitment Does Not Apply to Corneau

The state of Massachusetts further violated Corneau's right to due process because she did not fit the criteria to be civilly committed. A civil commitment requires that the state show by clear and convincing evidence that the person is incompetent or a serious threat to herself or others.[253] The state never declared Corneau to be incompetent. Further, because Corneau's fetus is not a person deserving of protection under the Fourteenth Amendment, and the Massachusetts civil commitment statute did not include fetus in those subject to the likelihood of harm, her refusal to submit to prenatal care does not pose a serious harm to another person.[254] Therefore, by placing Corneau in civil confinement, the state of Massachusetts deprived her of her right to liberty under the Due Process Clause of the Fourteenth Amendment.

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[251] *See* Salerno, 481 U.S. at 751.

[252] *See* TALKBACK, *supra* note 13.

[253] *See supra* notes 232-35 and accompanying text.

[254] *See* Mass. Ann. Laws, ch. 123, §1. *See also supra* notes 64-65 and accompanying text.

B. CORNEAU'S RIGHT TO PRIVACY IN MAKING DECISIONS CONCERNING HER PREGNANCY WAS VIOLATED

Massachusetts wrongfully forced Corneau into confinement for refusing to undergo a prenatal exam.[255] Individuals have a fundamental right to make decisions concerning their pregnancy in private.[256] In order for a state to infringe upon this fundamental right to privacy, it must show a compelling governmental reason for doing so.[257] Because the state had no evidence that Corneau or her fetus were anything but healthy when she was forced into medical custody, Massachusetts lacked a compelling reason to force her to have a prenatal exam.[258] As a result, Massachusetts violated Corneau's right to privacy.

The Supreme Court's decisions in *Roe* and *Casey* support the proposition that a state's compelling interest in protecting potential life applies only when a woman plans to terminate her pregnancy when her fetus is viable.[259] In *Casey*, the Supreme Court narrowed *Roe* by changing the trimester method of determining when a fetus is viable, thereby expanding a state's compelling interest in protecting potential life.[260] Under *Casey,* the test became whether a regulation unduly infringes on a woman's right to make decisions concerning her pregnancy.[261] This new test did not, however, change the interests at stake. The interests remained that a woman has a fundamental right to privacy in deciding whether to have an abortion, limited only by a state's compelling interest in protecting the potential life of a viable fetus.[262]

Furthermore, in addressing whether particular legislation would unduly infringe on a woman's fundamental right to privacy, the Court only addressed regulations specifically related to abortion.[263] The fact that the Court did not articulate the

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[255] *See* TALKBACK, *supra* note 13.

[256] *See* Eisenstadt, 405 U.S. at 453.

[257] *See supra* note 62 and accompanying text.

[258] *See* TALKBACK, *supra* note 13.

[259] *See* Casey, 505 U.S. at 878.

[260] *See id.* at 870.

[261] *See id.* at 874.

[262] *See id.* at 879.

[263] *See id.* at 879-901 (examining whether requiring a 24 hour waiting period before receiving an abortion, parental notification for pregnant minors seeking abor-

possibility that a state could have a compelling interest in protecting potential life outside of the abortion context, suggests that the Court did not intend for a state to assert that interest.

However, even if the reasoning in *Casey* is extended to contexts other than abortion, the state of Massachusetts still lacked a compelling interest to violate Corneau's right to privacy. In asserting an interest in potential life, a state must not unduly infringe on a woman's right to privacy in making these decisions.[264] By placing Corneau in confinement, the state rendered it impossible for her to make and carry out decisions concerning her pregnancy.

If allowed to assert fetal rights, a state could easily find that a woman who drank a beer, smoked a cigarette, or didn't wear a seat belt while pregnant should be locked up under the justification that her behavior put the fetus' life at risk.[265] Accordingly, if women were forced to submit to prenatal exams, a huge burden would be placed on those women who cannot afford prenatal care, do not have access to it, or do not believe in it.[266]

Furthermore, allowing states to confine pregnant women suspected of past crimes could extend to allowing states to confine pregnant women who have actually committed past crimes. The problem then arises as to what types of convictions would require the confinement of pregnant women. This type of control over a pregnant woman's life would grant the state unfettered permission to infringe on her privacy. To allow such intrusion is impermissible and arbitrary, and yet it is the precedent that is being set by allowing Massachusetts to confine Rebecca Corneau for her refusal to consent to prenatal care.

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tions, and spousal consent for woman seeking abortions unduly burdened a woman's right to choose).

[264] *See* Casey, 505 U.S. at 874.

[265] *See* TALKBACK, *supra* note 13.

[266] *See id.*

C. CORNEAU'S RIGHT TO FREE EXERCISE OF RELIGION WAS VIOLATED

The right to freely exercise one's religion is fundamental.[267] However, if a state has a compelling governmental interest in protecting the public, it may infringe or limit an individual's free exercise right.[268] Corneau asserts that refusing to submit to a prenatal exam is within her rights because to submit to medical care violates her religious beliefs.[269] Although a competent adult may generally refuse to submit to medical care without recriminations, the state imposed a different standard for pregnant women.[270] States have required pregnant women to undergo medical procedures. However, Massachusetts' action to confine Corneau when the fetus was in no danger of ill health is unprecedented.

The American Medical Association Board of Trustees stated that judicial intervention, to order medical care for pregnant women is appropriate only if an exceptional circumstance is found in which "treatment (1) poses an insignificant-or – no health risk to the woman, (2) entails minimal invasion of her bodily integrity, and (3) would clearly prevent *substantial and irreversible harm to her fetus . . .* "[271] Forcing Corneau to submit to prenatal care posed no significant health risk to her. However, whether it prevented substantial and irreversible harm to her fetus is unclear. Therefore the standard was not met. Furthermore, forcing Corneau into confinement until she comes to term substantially invades her bodily integrity. Such confinement constitutes a maximum invasion because it hinders both her movement and her decision-making abilities. It hinders her freedom. Furthermore, because there has been no showing that Corneau's fetus is in grave danger of death by her not receiving medical care, to force her to do so anyway infringes on her right to live according to her religious convictions.[272] Absent a compelling governmental reason, a state may not unduly infringe on a person's

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[267] *See* Prince, 321 U.S. at 165.

[268] *See id.* at 166.

[269] *See* Cannon, *supra* note 8.

[270] *See* 93 A.L.R.3d 67 §3a.

[271] *See* Glaze, *supra* note 85, at 814.

[272] *See* Wons, 500 So. 2d 679.

right to religious freedom. This interest has not been demonstrated by Massachusetts, and Corneau's rights have been violated.

V. PROPOSAL

Despite the fact that Massachusetts acted in violation of Corneau's constitutional rights in forcing her into custody, a state should be permitted to protect the health and welfare of the unborn. The dilemma is how to protect a future life without granting rights to a fetus to which it is not entitled, while respecting all of the rights of the mother. The state has an interest in Corneau's situation, because it is aware of two infants' deaths, one of whom was Corneau's son. Furthermore, Corneau's religious group refused to cooperate in the state's investigation into the infants' deaths, and Corneau was unlikely to have her next child in a hospital, or seek out any further medical care for that child. However, to allow the state to confine an individual on unsubstantiated suspicions results in a whittling away of the very concepts which the Constitution was written to protect: freedoms such as liberty, privacy, and the free exercise of religion.

A state in Massachusetts' position must simply comply with the Constitution. The state must show a compelling interest in order to infringe on a woman's right to privacy in making decisions concerning her pregnancy, and her right to freely exercise her religion by refusing medical care. If the interest is not compelling, state action infringes on these rights. Although to refrain from taking action in such a circumstance may result in harm to a fetus, violating the fundamental constitutional rights is disastrous in the long run. If the state may confine a pregnant woman merely suspected of potentially harming her fetus, the state has unbridled power to control almost every aspect of a woman's life during her pregnancy. The Constitution is meant to prevent such unbridled governmental power and should be followed.

VI. CONCLUSION

Rebecca Corneau should not have been placed in the custody of the state of Massachusetts. The state failed to demonstrate the requisite clear and convincing evidence needed to

confine her either under the preventive detention doctrine or under its civil commitment statute. Furthermore, because a fetus is not a person under the Fourteenth Amendment, the state may not remain consistent with the Constitution and infringe on Corneau's right to make decisions concerning her pregnancy, including the decision not to have prenatal care. Because Corneau and her fetus were not in ill health, the state did not have a compelling reason to force her to submit to medical care. Furthermore, forcing Corneau into confinement for refusing medical care on religious grounds is not the least burdensome method of protecting life and unduly infringed on her right to free exercise of religion. The forced confinement of Rebecca Corneau was a flagrant violation of many of her constitutionally protected rights and should not be permitted to happen again in Massachusetts or any other state in the United States.

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