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Symposium: Feminist Theory and the Erosion of Women's Reproductive Rights: The Implications of Fetal Personhood Laws and In Vitro Fertilization

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FEMINIST THEORY AND THE EROSION OF WOMEN'S REPRODUCTIVE RIGHTS:

THE IMPLICATIONS OF FETAL PERSONHOOD LAWS AND IN VITRO FERTILIZATION

LISA MCLENNAN BROWN*

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INTRODUCTION

The propagation of new rights for other parties in the reproductive process, namely the fetus and men, is curtailing women's reproductive autonomy. The ground-breaking decision of *Roe v. Wade*¹ established an allocation of rights between a woman and the state, and has since served as the cornerstone of women's reproductive

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1. 410 U.S. 113 (1973).

rights. Recently, however, new laws and medical technologies have implicated burgeoning conflicts beyond merely the interests of the state.² Fetal personhood laws have begun to reallocate rights between a woman and the fetus and to recognize a man's interests in the potential life.³ In addition, artificial reproductive technology has created a choice for the man to procreate or to avoid procreation following the act of reproduction.⁴

Left unchecked, these developments eventually will erode women's reproductive rights.⁵ The question arises whether this attrition in women's rights is a positive trend. Some analysts argue that new legislation like fetal personhood laws and advances in reproductive technologies balance the rights of all parties involved in the reproductive process, where traditionally women's rights automatically override those of the man and the fetus.⁶ Other gender experts question whether these changes in the law are just another instance of a male-dominated culture seeking to return to a time when the law privileged men and viewed women as largely lacking personal rights.⁷ Whether these changes are viewed as positive or negative, legislators and judges are encroaching upon women's rights.⁸ This article asserts that feminist theorists must concentrate on shaping these new areas to ensure that law-makers do not deprive women further of their contested reproductive liberties.

2. See, e.g., Unborn Victims of Violence Act of 2004, 18 U.S.C.A. § 1841 (2004) (recognizing the fetus at any stage of development as a potential independent victim of certain federal crimes).

3. See, e.g., Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995) (permitting bereaved father to bring a cause of action under West Virginia's wrongful death statute for the death of his wife and her nonviable fetus); Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 604-05 (citing several instances in which courts have punished women for their acts during pregnancy adversely affecting the fetus).

4. See, e.g., Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (holding in a dispute regarding the disposition of embryos that the party objecting to procreation generally has the greater interest and should prevail). In *Davis*, the court found in favor of the father because his preference was for destruction of the embryos while the mother sought to donate them to a childless couple. *Id.* at 592.

5. See Johnsen, *supra* note 3, at 611-12 (noting that the anti-abortion movement deliberately urges enhanced legal status for the fetus outside of the abortion context in order to foster an atmosphere hostile to abortion rights).

6. See Mary A. Totz, *What's Good for the Goose Is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141, 182-83.

7. Johnsen, *supra* note 3, at 624-25.

8. See *infra* Part II (writing that, in implicating rights for other parties in the reproductive equation beyond the woman, the courts and legislatures make critical mistakes; one example is ignoring the crucial difference between fetuses and living persons).

I. FEMINIST THEORIES

Feminist theorists present several diverse perspectives on how best to increase and protect women's rights. Formal equality theorists posit that society should treat individuals according to their actual characteristics, regardless of gender, rather than accentuating individual differences and reinforcing societal assumptions based on stereotypes.⁹ Thus, this theory professes that equalization with men best serves women's rights. Liberal feminists expand upon formal equality by adding traditional liberal ideas that promote individual autonomy and privacy.¹⁰ Liberal feminists struggle over whether men and women should be treated the same in an effort to establish equality or treated differently in a way that results in equality. Although modern legal authorities are skeptical of the argument that separate standards actually can result in equality, they nonetheless have embraced the importance of personal autonomy and privacy in the reproductive rights arena by upholding a woman's right to end her pregnancy.

Relational feminism grew out of a negative reaction to this focus on individual rights.¹¹ This theory advocates the ethic of care in order to create a system of interconnected people and to develop a sense of mutual responsibility.¹² It began with the research of Professor Carol Gilligan, who investigated the differences between boys and girls in their moral development and found two distinct moral analytic processes.¹³ Robin West carried forth this idea and differentiated between men and women, in part, by noting a woman's capacity to be materially connected to another human life, namely a fetus.¹⁴ These connections give women different rights and responsibilities vis-à-vis all of the other entities involved in the reproductive process, including men, the fetus, and the state.¹⁵ Thus, relational feminists

9. See Joyce E. McConnell, *Relational and Liberal Feminism: The "Ethic of Care," Fetal Personhood and Autonomy*, 99 W. VA. L. REV. 291, 300 (1996) (noting that the Equal Rights Amendment and women's civil rights laws are premised on this theory).

10. See *id.* at 301 (explaining that U. S. Supreme Court reproductive jurisprudence is based on an individual's right to autonomy and privacy).

11. See *id.* (noting that the relational feminists believed that the focus on individual rights would interfere with the development of interdependency).

12. *Id.* at 301-02.

13. See *id.* at 302 (reporting that Gilligan found that boys employ an individual rights approach in their analytic process towards justice, while girls framed their moral beliefs based on relational care).

14. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988) (maintaining that at least four material experiences all relating to pregnancy connect women to other human beings).

15. *Id.*

believe that women and men approach the world differently, which may result in a greater allocation of reproductive rights to the woman based on her unique experiences.¹⁶

Finally, dominance theory posits that men and women are different because of the historic societal fact that men hold a dominant position, while women occupy a subordinate one.¹⁷ Because of the often private nature of this dominance, proponents of this theory have argued for greater legal regulation of areas where the law traditionally has been absent.¹⁸ For example, leading advocate Catherine MacKinnon has successfully persuaded law-makers to acknowledge sexual harassment as an abuse of power in the workplace and to enact sex-discrimination employment laws to punish such behavior.¹⁹

Each theory approaches reproductive rights law from a different perspective. As a result, feminist theorists must be watchful and creative in developing strategies as legislatures and courts become increasingly bold in their attempts to deprive women of their fundamental rights and liberties.²⁰

II. THE PROLIFERATION OF FETAL PERSONHOOD LAWS

Fetal personhood refers to certain areas of the law that consider the fetus a separate unborn person, rather than a part of the woman carrying the fetus.²¹ Historically, the fetus only acquired legal rights

16. See McConnell, *supra* note 9, at 302-03; Karen H. Rothenberg, *New Perspectives for Teaching and Scholarship: The Role of Gender in Law and Health Care*, 54 MD. L. REV. 473, 481 (1995).

17. See Rothenberg, *supra* note 16, at 482 (noting that dominance theorists believe that men maintain the dominant position primarily through the threat of sexual violence).

18. See *id.* (explaining that dominance theorists also advocate aggressive legal intervention to combat family violence perpetuated by men in the private sphere).

19. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 58 (1986) (Catherine A. MacKinnon on brief for respondent); CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* at 1, 9-10 (1979); EEOC Guidelines, 29 CFR §1604.11 (1985); see also Rothenberg, *supra* note 16, at 482 (highlighting this theory's particular focus on sex and violence against women and the notion that the law should protect women against private actors, namely men, who engage in such conduct).

20. See Johnsen, *supra* note 3, at 603-04 (stating that legal recognition of the rights of the fetus could be used against women); McConnell, *supra* note 9, at 291-92 (recognizing that West Virginia went against U.S. Supreme Court precedent when declaring fetal personhood in wrongful death actions).

21. See McConnell, *supra* note 9; see also Aaron Wagner, *Texas Two-Step: Serving Up Fetal Rights By Side-Stepping Roe v. Wade Has Set the Table for Another Showdown on Fetal Personhood in Texas and Beyond*, 32 TEX. TECH. L. REV. 1085 (2001) (discussing the return of the "fetal person" that disappeared after *Roe* in the vocabulary of the U.S. Congress and state lawmakers).

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separate from those of the woman at birth.²² Statutes and common law precedent recognizing the fetus as a person while still *in utero* have eroded this live birth requirement.²³ More specifically, state and federal legislatures have enacted civil wrongful death statutes and courts have permitted lawsuits against a woman by her child or the state for actions taken during pregnancy.²⁴ It is an area that is growing substantially. In 2003, multiple state legislatures considered measures concerning criminal punishments for harm to a fetus or embryo independent of the harm to the pregnant woman.²⁵ These provisions only conflict with the holding of *Roe* to the extent that they give the fetus rights under the Fourteenth Amendment.²⁶ Because the Supreme Court failed to delineate what other fetal personhood rights a state may give a fetus outside of the abortion context, state legislators have skirted *Roe* by not awarding protections precluded by that holding.²⁷

Roe's failure to define clearly what rights to personhood a fetus may hold has allowed states to undermine the Supreme Court's holding.²⁸ The logical conclusion to this gradual erosion is that states, which continually declare a fetus a person, will reach a point when fetal personhood is a foregone conclusion, even in the abortion context.²⁹

22. See *Roe*, 410 U.S. at 161 (observing that U.S. law has not accorded legal rights to the unborn except in the case of inheritance and tort law, and then only when the pregnancy resulted in a live birth).

23. See Wagner, *supra* note 21, at 1100-01 (discussing the abandonment of the born alive rule in favor of the viability requirement for wrongful death actions).

24. See, e.g., *Grodin v. Grodin*, 301 N.W.2d 869, 870 (Mich. Ct. App. 1980) (allowing child to sue mother for taking tetracycline during pregnancy, which may have caused the child to have discolored teeth); *Curlender v. Bio-Science Labs.*, 165 Cal. Rptr. 477, 488 (1980) (suggesting that a child could sue his parents for proceeding with the pregnancy if the parents had prior knowledge of birth defects that would cause pain and suffering to the child).

25. See NARAL PRO-CHOICE AM., WHO DECIDES? A STATE-BY-STATE REPORT ON THE STATUS OF WOMEN'S REPROD. RIGHTS, NATIONWIDE TRENDS: 2003 ANTI-CHOICE AND PRO-CHOICE STATE LEGISLATIVE ACTIVITY 5 (13th ed. 2004) [hereinafter WHO DECIDES?] (noting that during 2003 twenty-one states considered forty-four separate bills that would criminalize harm to a fetus independent of the pregnant woman), available at <http://www.naral.org/yourstate/whodecides/trends/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=10163> (last visited Jan. 3, 2005).

26. See *Roe*, 410 U.S. at 158 (declaring "that the word 'person,' as used in the Fourteenth Amendment does not include the unborn").

27. See WHO DECIDES?, *supra* note 25, at 5 (warning that anti-choice legislators enact these laws under the pretext of concern for pregnant women but the legislators sympathetic to the anti-abortion movement really are trying to undermine a woman's right to choose to terminate her pregnancy).

28. Wagner, *supra* note 21, at 1102-03 (noting that while states generally accept the limits on fetal rights imposed by *Roe*, they have increasingly elevated the rights of the fetus under criminal laws in a direct assault on *Roe*).

29. See Wagner, *supra* note 21, at 1089-90 (arguing that the state of inconsistency in fetal personhood laws will eventually undercut *Roe* completely).

Currently, the most extreme examples of this erosion appear in Louisiana and Missouri, where state statutes declare that a fetus is a person from the time of conception or fertilization and implantation.³⁰ Few states have gone as far, but almost all have begun to incorporate the idea of a fetus as a person in areas of the law outside of the constitutional context.³¹ Feminist theorists must take notice of this trend, as there is no way to equalize the rights of the fetus and the woman without undermining the liberty interests *Roe* granted women. The movement to recognize a fetus as a person inherently conflicts with a woman's right to bodily integrity and procreational liberty.

A. Wrongful Death

All states have enacted wrongful death statutes to protect the relational interests of families and to provide compensation for loss following a homicide.³² Most civil wrongful death statutes name spouses and children as the beneficiaries and provide damages based on pecuniary loss rather than a subjective analysis of grief.³³ In 1946, the United States District Court for the District of Columbia permitted a wrongful death action claim, where a fetus was born alive, but subsequently died from injuries received *in utero*.³⁴ Every state adopted this "born-alive" rule by 1967.³⁵

In 1971, the West Virginia Supreme Court of Appeals upheld the constitutionality of that state's wrongful death statute, which included a viable unborn fetus in its definition of a person.³⁶ By 1995, at least thirty-six states and the District of Columbia recognized a wrongful death cause of action for the death of a viable fetus.³⁷ This trend

30. See MO. ANN. STAT. § 1.205(1) (West 2004) (stating that "the life of each human being begins at conception"); LA. REV. STAT. ANN. § 14:2(7) (West 2004) (defining the term "person" as a human being "from the moment of fertilization and implantation" for the purposes of Louisiana criminal law).

31. See *infra* II.A-II.C (noting that the trend of viewing a fetus as a person is manifested primarily in civil wrongful death statutes, homicide statutes, and children's health insurance coverage provisions).

32. See McConnell, *supra* note 9, at 295 (noting that wrongful death statutes deviated from the common law, which did not allow for recovery if the tortfeasor's conduct resulted in death).

33. See *id.* (pointing out that the law nevertheless places a value on the subjective criteria of the loss of comfort from the deceased).

34. See *Bonbrest v. Kotz*, 65 F. Supp. 138, 142-43 (D.D.C. 1946) (noting that medical malpractice may have caused the child's injury and denying the physician-defendant's motion for summary judgment).

35. McConnell, *supra* note 9, at 297.

36. *Baldwin v. Butcher*, 184 S.E.2d 428 (W. Va. 1971).

37. See *Krishnan v. Sepulveda*, 916 S.W.2d 478, 480-81 n.4 (Tex. 1995) (listing the thirty-seven entities that recognize such a claim).

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stemmed partially from a negative reaction by legislatures to the idea that a fetus that dies right after it is born is somehow different from one that dies immediately before being born.³⁸ Viability is a medical term of art that typically occurs around twenty-two to twenty-six weeks of pregnancy and predates the moment of birth.³⁹ For example, Texas defines viability as “the stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case, an unborn child possesses the capacity to live outside its mother’s womb after its premature birth from any cause.”⁴⁰ What constitutes the period of viability is a subjective standard that certainly will continue to change as medical technology improves.⁴¹

In addition, courts in Missouri and West Virginia have allowed wrongful death causes of action for the death of a fetus at any stage of development. In *Connor v. Monkem*,⁴² the Missouri Supreme Court allowed a cause of action for the death of a four-month-old fetus under the state’s statutory assignment of rights to the unborn at all stages of development.⁴³ West Virginia is the only state that has assigned these rights without express statutory authority. The West Virginia Supreme Court of Appeals recognized a wrongful death cause of action for a fetus killed at eighteen to twenty-two weeks, reasoning that viability is not a proper line of distinction, and the goals and purposes of wrongful death statutes are satisfied only by interpreting the word “person” to include a nonviable fetus.⁴⁴ In the alternative, several states and the District of Columbia have begun to reach outside of the wrongful death statutes and have allowed a mental anguish common-law cause of action to parents following the death of a fetus.⁴⁵

38. See, e.g., *Summerfield v. Superior Court*, 698 P.2d 712, 722 (Ariz. 1985) (explaining that viability is a more logical and less arbitrary line than birth because the timing of birth is often decided by doctors who induce labor, rather than by nature).

39. See *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 457-58 (1983) (noting that the concept of viability increasingly is blurred through advances in reproductive technologies).

40. TEX. HEALTH & SAFETY CODE ANN. § 170.001(3) (Vernon 2004).

41. See Christina L. Misner, *What If Mary Sue Wanted an Abortion Instead? The Effect of Davis v. Davis on Abortion Rights*, 3 AM. U. J. GENDER & L. 265, 290-91 (1995) (discussing the viability framework as a problem for the abortion debate as medical technology improves).

42. 898 S.W.2d 89 (Mo. 1995).

43. See *id.* at 89 (finding it “relatively clear” that the Missouri legislature recognizes a legally protectable interest in a child from the point of conception).

44. See *Farley*, 466 S.E.2d at 534 (explaining that the distinction between viability and non-viability would produce anomalous results because it focused more on the status of life than on the wrongful conduct of the tortfeasor).

45. Wagner, *supra* note 21, at 1108.

Those statutes and court decisions that recognize fetal personhood give rise to serious equal protection concerns. If the fetus is recognized as a person under the law, then the next logical step is to assume that this person has rights under the Fourteenth Amendment—rights that were denied expressly in *Roe*. Although fetal personhood laws have skirted this pronouncement by limiting the circumstances where a fetus is designated a separate person, laws such as wrongful death statutes erode the marker of viability and create a slippery slope to full fetal personhood recognition.

B. Criminal Statutes

Recent developments in criminal law further compound this constitutional conflict. Congress has recognized the fetus as an independent victim of a federal crime through the Unborn Victims of Violence Act, which renders a fetus an “unborn person” at all stages of development.⁴⁶ The federal law includes punishment for causing death or injury to the fetus.⁴⁷ Twenty-eight states already have some type of criminal punishment for injury to an “unborn child” under their statutory definition of that term.⁴⁸

The recent *Peterson* case in California has galvanized this area of the law, both at the federal and state levels. Congress renamed the federal act, “Laci and Connor’s Law” after the woman and her fetus in the *Peterson* matter, although this law would not even have applied in her situation.⁴⁹ Meanwhile, the state of California sentenced Scott Peterson to the death penalty based on the charge of murder of both Laci and their unborn child.⁵⁰ Although harm to a pregnant woman should be punished severely, these laws represent a broad expansion of rights outside of the right of a woman to be free from bodily harm.

The Partial-Birth Abortion Ban Act of 2003 is another example of the change in perspective regarding the fetus that demonstrates the inherent tension between the integrity of the woman’s body and the recognition and protection of the life of the fetus as a separate

46. 18 U.S.C.A. § 1841.

47. § 1841(a).

48. HEATHER BOONSTRA, THE GUTTMACHER REP. ON PUB. POL’Y, THE ANTIABORTION CAMPAIGN TO PERSONIFY THE FETUS: LOOKING BACK TO THE FUTURE 6 (1999).

49. Jeffrey Rosen, *A Viable Solution: Why It Makes Sense To Permit Abortions & Punish Those Who Kill Fetuses*, 2003-OCT LEGAL AFF. 20 (noting that Laci and Connor’s murderer could not be prosecuted under the new federal statute because it only applied to those who kill or injure a fetus during the commission of another federal offense regardless of knowledge of the pregnancy or intent to harm the fetus).

50. Stacy Finz & Diana Walsh, *Peterson Jury: Death; The Decision: Autopsy Photos a Reminder of Brutal Murders*, S. F. CHRON., Dec. 14, 2004, at A1.

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person.⁵¹ The law is written in broad, non-medical language, yet purports to explain and criminalize a certain medical procedure. In 2000, the Supreme Court struck down a nearly identical ban that a state legislature had enacted because it failed to provide an exception for decisions made to protect the health of the woman.⁵² The federal Partial-Birth Abortion Ban Act suffers from the same weaknesses the Supreme Court already addressed, as it broadly covers a variety of permitted medical procedures and does not contain a health exception.⁵³ The Act already has been challenged in federal courts, and three courts have held it unconstitutional.⁵⁴

Not only have the rights of a fetus been expanded to a level equal with the rights of a woman in several circumstances, but also a fetus's personhood rights have engulfed those of women in some criminal contexts. One instance of this phenomenon is the prosecution of pregnant women for substance abuse. In May 2001, a South Carolina jury after fourteen minutes of deliberation convicted Regina McKnight of homicide by child abuse, after she gave birth to a stillborn baby and admitted to crack-cocaine use while pregnant.⁵⁵ This type of prosecution fails to recognize the underlying tragedy of the number of crack-addicted women and punishes these women for the resulting harm to the fetus.

Other states have instituted alternative forms of punishment, such as "protective" incarceration of pregnant women for unrelated crimes, prosecution after the birth of the child for harmful actions taken while pregnant, and removal of the baby from her custody following birth.⁵⁶ These policies implicate broader social concerns, as they disproportionately affect minority and poor women.⁵⁷ By shifting the

51. See 18 U.S.C.A. § 1531 (2003) (imposing monetary and criminal penalties on physicians who knowingly perform partial birth abortion procedures).

52. See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (striking down a Nebraska statute banning partial-birth abortion procedures because the statute failed to include an exception for partial-birth abortions that were necessary to preserve the mother's health).

53. See Press Release, Center for Reproductive Rights, First-Ever Federal Abortion Ban Challenged in Court Today (Oct. 31, 2003) (noting that the Nebraska ban also prohibited the most commonly used procedure for termination of second trimester pregnancy), available at http://www.reproductiverights.org/pr_03_1031jointpba.html.

54. *E.g.*, *Planned Parenthood v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004); *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (Neb. 2004); *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004).

55. Dana Page, *The Homicide by Child Abuse Conviction of Regina McKnight*, 46 *How. L.J.* 363, 363 (2003).

56. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419 (1991).

57. *Id.*

focus from treating and rehabilitating drug-addicted women to protecting the fetus, the courts and legislatures are privileging the rights of the fetus over the rights of the woman.

Feminist theorists must be especially cognizant of their arguments in this area of the law. A model of values for law and society based on love, connection, interdependence and care may undermine reproductive rights by increasing the rights of the fetus to health and life, thereby challenging a woman's bodily integrity and personal autonomy.⁵⁸ The feminist ethic of care argument could be used to justify severe impositions on pregnant women by the state based on fetal personhood language and logic. This theory further may undermine the abortion arena by recognizing the fetus as an individual person and requiring all women to carry a fetus to term under the ethic of care for the potential life.⁵⁹

The perception of a societal increase in the attention of men to family and children could result in a proliferation of men suing women for actions taken during pregnancy under these new statutes.⁶⁰ Fetal personhood laws have embraced this idea, and in South Carolina, the courts have used such statutes effectively against women.⁶¹ Relational feminism supports a society that cares for its unborn children, but this way of framing the reproductive rights discussion is dangerous and could be fatal to women's rights in the reproductive sphere.

C. State Health Insurance

The State Children's Health Insurance Program ("SCHIP") is federal legislation that provides health insurance coverage to uninsured children in families with incomes above Medicaid eligibility, but at or below 200% of the federal poverty level.⁶² SCHIP is a broad mandate that allows states to control eligibility standards

58. See West, *supra* note 14 (analyzing the differences between the "connection thesis" that recognizes women's material relationship with the fetus and the traditional "separation thesis" that values the autonomy of each independent person); see also McConnell, *supra* note 9, at 307-08.

59. McConnell, *supra* note 9, at 307.

60. See Totz, *supra* note 6, 202-07 (arguing that a state could allow a cause of action, which, in effect, would accuse the mother of acting tortiously against the father's interest in the child).

61. See, e.g., Page, *supra* note 55, at 379-82 (noting the case where a woman was charged and convicted of homicide by child abuse for the death of her unborn child under a South Carolina statute that did not even criminalize conduct during pregnancy).

62. 42 U.S.C.A. § 1397aa (2004); see also CYNTHIA DAILARD, THE GUTTMACHER REP. ON PUB. POL'Y, NEW SCHIP PRENATAL CARE RULE ADVANCES FETAL RIGHTS AT LOW-INCOME WOMEN'S EXPENSE 3 (2002) (discussing Congress' enactment of SCHIP).

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and benefits for children younger than nineteen years of age.⁶³ Although SCHIP has important social policy implications, it has been used to further erode women's rights. In October 2002, the Bush Administration promulgated a rule expanding the definition of a "child" under SCHIP to include a fetus from conception to birth.⁶⁴ This rule expands health insurance coverage for the "child" but does not expand coverage for the pregnant woman for post-partum care, including ordinary post-delivery hospital care or care for post-delivery complications.⁶⁵ The regulation puts women in direct competition with the fetus for coverage because it is unclear whether healthcare that is not directly related to the fetus, or that may be detrimental to the fetus, would be covered.⁶⁶ This is just one more attempt on the part of the federal government to place the rights of the fetus at an equal level with the rights of born persons.

Wrongful death statutes, homicide statutes, and state health insurance policies are combining to reinforce a system of sex inequality by developing the rights of the fetus as an individual person. These laws do not reflect a state goal of protecting and preserving the life of a fetus but rather attempt to define and regulate the behavior of a woman who is experiencing a wanted pregnancy.⁶⁷

III. ARTIFICIAL REPRODUCTIVE TECHNOLOGY: *IN VITRO* FERTILIZATION

The encroachment by fetal rights on the rights of the woman further is exacerbated by the recent developments in artificial reproductive technology, which implicate a different set of rights: the rights of men. One in five couples is unable to conceive a child naturally.⁶⁸ As a result, scientific developments such as *in vitro*

63. DAILARD, *supra* note 62, at 5.

64. 42 C.F.R. § 457.10 (2002).

65. See CTR. FOR REPROD. RIGHTS, COMMENTS SUBMITTED TO U.S. DEP'T OF HEALTH & HUMAN SERVS. (May 2002) (stating that any treatment received by a woman would be incident to the treatment the fetus receives), available at http://www.reproductiverights.org/hill_ltr_0506schip.html.

66. See *id.* (arguing that treatments such as epidurals during delivery may not be considered necessary to promote the health of the baby and, therefore, may not receive insurance coverage).

67. See Johnsen, *supra* note 3, at 612 (arguing that in a wanted pregnancy, a mother fully intends to bring the child to term so, therefore, there is no need for the state to interfere to protect the life of the fetus); Page, *supra* note 55, at 402 (stating that prosecutors are waging war against black women through fetal rights); McConnell, *supra* note 9, at 307-08 (describing instances where pregnant women had to answer for harm done to the wanted fetus).

68. Diane K. Yang, *What's Mine Is Mine, But What's Yours Should Also Be Mine: An Analysis of State Statutes That Mandate the Implantation of Frozen Embryos*, 10 J.L. & POL'Y 587, 587-88 (2002).

fertilization (“IVF”)⁶⁹ have been widely used—over 45,000 conceptions resulted from this procedure in the United States since 1978.⁷⁰ Prior to the introduction of such technology, men’s reproductive rights were limited entirely to pre-fertilization actions and decisions, including access to over-the-counter contraceptives and an equal opportunity to refrain from sexual activity that could result in procreation.⁷¹ Once conception occurred men ceased to have decision-making power, and the judgment of women became absolute because of the implications of privacy and autonomy.⁷² IVF delays this bodily integrity veto power for an indeterminate period of time following the actual act of reproduction.⁷³ Although the courts have had little opportunity to address these issues, what they have decided is strikingly important for the future of women’s reproductive rights.⁷⁴

A. Case Law

The first major attempt of the legal system to address IVF arose in Tennessee in 1992.⁷⁵ *Davis v. Davis* involved a divorcing couple unable to agree on the disposition of their frozen embryos, created from eggs extracted from the woman and combined with sperm in a petri dish.⁷⁶ More than one egg was harvested and fertilized in this instance, and the unused embryos were cryopreserved for future use.⁷⁷ Mary Sue Davis originally favored implanting these embryos into her own uterus but later sought to donate them to a childless

69. See *id.* at 591 (defining IVF as the process by which a woman’s eggs are removed from her body, fertilized in a petri dish, and transferred to her uterus).

70. See *id.* (suggesting that conception by IVF is a growing tool to aid infertile couples and is enabled, in part, by growth of a technological industry).

71. See *id.* at 600 (noting that a man may choose whether to procreate, while the woman bears all the risks in deciding whether to continue a pregnancy).

72. See *id.* at 600-01 (writing that those who support the idea that women retain absolute control over the embryos bolster their contentions by extending the *Roe* logic regarding freedom to terminate a pregnancy to freedom to control the frozen embryos).

73. See Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model To Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 458 (describing pregnancy as the gatekeeper of reproductive rights).

74. See *infra* III.A-III.B (describing the case law and stating implications for women’s rights).

75. See *Davis*, 842 S.W.2d at 592 (noting that the disposition of embryos presents a question of first impression for the Tennessee courts).

76. See *id.* at 591 (noting that a couple pending finalization of a divorce had seven frozen embryos remaining after completing a series of IVF procedures and that the sole complication with the Davis’ divorce was the disposition of the frozen embryos).

77. See *id.* at 592 (noting that a pregnancy did not result from the fertilized egg implanted in Mary Sue Davis).

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couple, while Junior Davis preferred to have the embryos discarded.⁷⁸ The Supreme Court of Tennessee recognized the couple's right of procreational autonomy, which consisted of both the right to procreate and the right to avoid procreation.⁷⁹ To determine which right was superior, the court established a three-pronged test that looked first to the preferences of the two parties, second to the existence of a prior agreement concerning disposition of the embryos, and third to the future intentions of the parties in using the embryos.⁸⁰ The court determined that where the preferences of the parties' conflict, and a prior agreement does not exist, the right to avoid procreation ordinarily should prevail.⁸¹

The right to procreate or avoid procreation is established firmly in U.S. Supreme Court precedent. The Court held in *Skinner v. Oklahoma* in 1942 that "[m]arriage and procreation are fundamental to the very existence and survival of the race" and, consequently, struck down a law that forced sterilization in certain instances.⁸² The right not to procreate was expanded in *Griswold v. Connecticut*, where the Supreme Court upheld the right of married persons to receive information and medical advice in order to avoid procreation.⁸³ This right was clarified a few years later in *Eisenstadt v. Baird*, when the Court stated, "[i]f 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."⁸⁴ Just one year later, the Supreme Court in *Roe* privileged the rights of women to privacy and bodily integrity once the pregnancy process had begun, signifying that the equal rights of men and women to procreate or avoid procreation ended with the

78. *See id.* at 590 (stating that the Davis' did not have any formal agreement regarding how to handle the unused embryos).

79. *See id.* at 601 (basing the recognition of procreation rights on U.S. Supreme Court precedent regarding reproductive freedoms).

80. *See id.* at 603-04 (noting that the court weighed the burdens of procreation on each party and decided ultimately that procreation would cause a greater burden on the party who disfavored procreation); *see also* Daar, *supra* note 73, at 460-61 (noting the establishment of the *Davis* three-prong test to be used by courts in future instances where couples disagree over the disposition of frozen embryos).

81. *See Davis*, 842 S.W.2d at 604 (stating that the right to avoid procreation prevails if the other party has an alternative means of achieving parenthood).

82. 316 U.S. 535, 541 (1942) (noting that sterilization has long-term effects that deprive a person of basic liberty and that the act of sterilization is irreversible).

83. 381 U.S. 479, 485-86 (1965) (striking down a state law forbidding the use of contraceptives as overly broad and "repulsive" to the kind of privacy expected in a marriage).

84. 405 U.S. 438, 453 (1972) (emphasis added).

reproductive act.⁸⁵

The Court intended to treat procreative rights of men and women differently after the beginning of a pregnancy, as is clear from its decision in *Planned Parenthood v. Casey*,⁸⁶ which struck down a requirement that a woman notify her spouse prior to having an abortion.⁸⁷ The *Casey* Court deemed this requirement an “undue burden” on the married woman seeking an abortion and further justified this deprivation of men’s rights because “it is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s.”⁸⁸ Bodily integrity rights have given the woman an automatic veto over the man’s procreation decision once the act of reproduction has occurred.⁸⁹ The paradox of this veto power is that it protects the individual privacy of a woman and her decision whether to bear a child but “effectively intrude[s] into the man’s fundamental right to decide whether or not he will beget a child.”⁹⁰

The *Davis* court determined that because a frozen embryo exists outside of anyone’s body, it does not implicate the traditional bodily integrity protections, and so it serves to increase the reproductive rights of men for a time following fertilization of an egg.⁹¹ The *Davis* balancing test prescribes that the interests of the man and the woman should be weighed equally: “As they stand on the brink of potential parenthood, Mary Sue Davis and Junior Lewis Davis must be seen as entirely equivalent gamete-providers.”⁹² No longer does the woman have an absolute veto, resulting in a substantial boon to men’s rights.⁹³

A New York appellate court in 1997 reaffirmed the burgeoning idea that constitutional protection of a woman’s reproductive autonomy is

85. See *Roe*, 410 U.S. at 170 (noting that the privacy interests of women in pregnancy override the state’s interest in protecting the unborn fetus).

86. 505 U.S. 833 (1992).

87. See *id.* at 893-94 (noting that such a requirement would prevent even women in abusive marriages from obtaining legal abortions).

88. *Id.* at 896 (noting that because a woman physically bears the child, the pregnancy more “directly and immediately” affects her).

89. See Totz, *supra* note 6, at 148 (stating that once a woman makes a decision about a fetus the man is generally bound by her decision whether he disagrees or not).

90. *Id.* at 182-83.

91. See *Davis*, 842 S.W.2d at 601 (noting that despite the physical stress on a woman in extracting eggs, a man and woman are mutual parties to the potential “joys of parenthood”).

92. *Id.* at 604.

93. See *id.* (noting that although women undergo more hardships in IVF than men, both have equal rights).

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not implicated until implantation.⁹⁴ In *Kass v. Kass*, the court found an unequivocal statement of the intent of the parties in their informed consent document and never reached the question that the *Davis* court was forced to decide.⁹⁵ *Kass* stated that an indication of mutual intent regarding disposition must be “scrupulously honored, and the courts must refrain from any interference with the parties’ expressed wishes.”⁹⁶ This deference is essential because “the decision to attempt to have children through IVF procedures and the determination of the fate of cryopreserved pre-zygotes resulting therefrom are intensely personal and essentially private matters which are appropriately resolved by the prospective parents rather than the courts.”⁹⁷ The *Kass* dissent did note a possible exception to this rule for instances where honoring the statement would violate public policy.⁹⁸

A public policy concern was the cornerstone of the Massachusetts decision in 2000 in the case of *A.Z. v. B.Z.*⁹⁹ The court found the possibility of a valid contract in a consent form signed by the couple and the clinic, which provided that upon separation of the couple, the embryos would be given to the wife for implantation.¹⁰⁰ However, the lower court was not convinced that the parties intended this agreement to cover the situation at hand, where a dispute arose between them.¹⁰¹ Unable to validate the agreement, the court ruled against the wife’s objections because they would force the husband to procreate against his wishes.¹⁰² Such an outcome would violate public policy, as “forced procreation is not an area amenable to judicial enforcement.”¹⁰³ The court also noted that the legislature had determined that individuals should not be held to contractual agreements binding them to certain familial relationships.¹⁰⁴ As a

94. *Kass v. Kass*, 663 N.Y.S.2d 581 (N.Y. App. Div. 1997).

95. *See id.* at 587-88 (noting that the contract’s provision to dispose of all remaining pre-zygotes in the event the couple divorced).

96. *Id.* at 590.

97. *Id.*

98. *Id.* at 601 (Miller, J., dissenting); *see also* Yang, *supra* note 68, at 609 (discussing how the outcome of *Kass* may have differed if other public policy questions had been raised in the appeal).

99. 725 N.E.2d 1051 (Mass. 2000).

100. *See id.* at 1054 (noting that the couple could have altered the agreement before signing it).

101. *See id.* at 1055 (noting that the couple had given birth to twins, which the judge ruled as a change to the circumstances of the original agreement).

102. *Id.*

103. *Id.* at 1057-58.

104. *See id.* at 1058 (citing the elimination of breach of promise to marry as a cause of action).

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result, the court applied a straightforward comparison of the present intentions of the parties, privileging the right not to procreate.¹⁰⁵

A similar outcome followed in the 2001 New Jersey case of *J.B. v. M.B.*¹⁰⁶ In that case, a married couple signed a consent form for the IVF clinic providing that upon divorce the couple would relinquish the frozen embryos to the clinic unless they obtained a court order specifying control and direction.¹⁰⁷ The court found that the consent form's conditional language was not enough to establish a clear intent by the parties regarding disposition.¹⁰⁸ Therefore, the court turned to an analysis of the intentions of the parties and reaffirmed the finding that the right to avoid procreation is superior to the right to procreate.¹⁰⁹

B. Implications of Feminist Theory

These were all issues of first impression in the courts, and the rule that emerges from them is murky: a court must look at each individual case to evaluate the interests of both parties in the creation of embryos.¹¹⁰ Each case represents not only a split among the states but also within the states. For example, the lower court in New York, overruled on appeal by the highest state court, awarded custody of the embryos to the woman.¹¹¹ The New York lower court's decision was based on the theory that a man had no greater rights to frozen embryos than he did to an *in vivo* embryo.¹¹² The decision of the lower state court implicates a formal equality theory that fertile and infertile women should be treated alike: women undergoing IVF treatment should have the same right to control the use or termination of the frozen embryos as a woman would during a normal pregnancy, for any other result is discrimination against the woman who is unable to conceive through natural methods.¹¹³ "For decades, women have fought for the precious right to procreational autonomy.

105. See *id.* at 1059 (noting the state and the court's desire not to force individuals into unwanted relationships).

106. 783 A.2d 707 (N.J. 2001).

107. *Id.* at 710.

108. *Id.* at 713 (noting that the only clear reading of the agreement was that the clinic retained control over the embryos unless the parties had chosen otherwise in a writing or unless a court order specified otherwise upon divorce).

109. See *id.* at 717-18 (reasoning that a contract compelling parenthood against one's will is unenforceable on public policy grounds).

110. See Daar, *supra* note 73, at 459-61 (outlining the three-prong test the *Kass* court first articulated).

111. *Kass*, 663 N.Y.S.2d at 590-91.

112. *Id.* at 585.

113. See Daar, *supra* note 73, at 462

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The advent of reproductive technology, designed to equalize the reproductive opportunities for all women, should not stand as a detractor to the rights of infertile women.”¹¹⁴ The appeals court rejected this formal equality idea, focusing on the location of the embryo outside of the body rather than on protecting the reproductive liberties of women.¹¹⁵ The result of *Kass* produces greater gender equality, but it does so at the expense of procreational autonomy for infertile women.¹¹⁶

By including the ideas of bodily integrity and personal autonomy in a constitutional right to privacy, the courts have been able to distinguish reproductive rights law from other areas of the law that have been dominated by equal protection arguments. *Roe* and *Casey* pronounced that men had no equal protection argument in the decisions a woman made about the fetus when it was physically incorporated into her own body.¹¹⁷ These IVF cases not only represent a rejection of this privacy right, but also they further disregard the liberal feminist theory that men and women approach the procreative process from unique angles, which should be considered when allocating rights to achieve equality.¹¹⁸ The ruling of the *Davis* court that both progenitors had an equal interest in the disposition of their frozen embryos disregarded the importance of bodily integrity and created an equal protection claim for men, effectively eroding women’s rights by allocating them elsewhere.

IV. SOLUTIONS

Fetal personhood laws and court decisions involving IVF increasingly equalize the rights of all parties in the reproductive process. Instead of producing a greater sense of equality in reproductive choices for men and women, this approach to reproductive rights has served to curtail the rights of women in decisions involving procreation by diminishing the strength of the constitutional protections of bodily integrity and privacy. Feminist

114. *Id.* at 466.

115. *See Kass*, 663 N.Y.S.2d at 602 (ruling that although IVF can have a tremendous impact on a person emotionally, the original agreement between the parties should be upheld).

116. *See Daar*, *supra* note 73, at 466 (arguing that women should not lose their right to control their embryos because their partners have changed their mind regarding their disposition).

117. *See Roe*, 410 U.S. at 154 (noting that the right of a woman to terminate her pregnancy fell within the purview of the Fourteenth Amendment subject only to important state interests); *Casey*, 505 U.S. at 875 (mentioning only the state’s interest and declining to mention men’s role in decisions to terminate a pregnancy).

118. *See supra* Part I (discussing the different feminist theories and their approaches to reproductive rights).

theory should determine how best to protect women's reproductive rights in this new environment and guide the law to provide such protection. The law must continue to recognize that "[t]o deprive women of their right to control their actions during pregnancy is to deprive women of their legal personhood."¹¹⁹ The right to physical integrity is supreme, as it ensures the basic privacy freedom of women, which is still a constitutional right. Feminists should choose a theory to support carefully and use its structure to argue stringently against fetal personhood laws that erode the bodily integrity of women and seek to reinforce a historical system of inequality. There is no formal equality justification for attempting to equalize the rights of the woman and the fetus, which are directly contradictory.¹²⁰ Relational feminism is dangerous because it provides arguments that could be used to support fetal personhood legislation through the ethic of care and mutual responsibility.¹²¹ Material connections to the fetus increasingly have been used by the state to justify interference with women's decisions during pregnancy, and responsibility arguments may reward men for becoming more involved with their children and with domestic chores.¹²² These rewards take rights away from women in the reproductive choice arena, instead of increasing joint decision-making.

Dominance theory advocates more state involvement in changing the focus of society from male-domination.¹²³ This could become a powerful argument for legislation protecting women's rights from usurpation by the fetus. However, the legislation that has been enacted so far consistently has regulated the actions of women and reinforced the status quo instead of undermining it.¹²⁴ Thus far, liberal feminist difference theory is the only argument that has withstood scrutiny by the courts and various attacks by the legislatures.¹²⁵ Women's reproductive rights thrive under the

119. Johnsen, *supra* note 3, at 620.

120. See Misner, *supra* note 41, at 298 (discussing how the movement to endow a fetus with more rights infringes on women's rights in the abortion context).

121. See McConnell, *supra* note 9, at 303-05 (discussing the effect of the Farley decision on abortion).

122. See generally Johnsen, *supra* note 3 (citing various cases where women's rights clashed with fetal rights); see also Totz, *supra* note 6, at 198-202 (noting how changes in society have resulted in different expectations and different roles for men in the household).

123. See Rothenberg, *supra* note 16, at 482 (noting that the theory suggests that the major difference between men and women is that women are subordinate to men).

124. See, e.g., DAILARD, *supra* note 62, at 3 (discussing changes in SCHIP that evade pregnant women's rights).

125. See, e.g., *Roe*, 410 U.S. at 113; *Casey*, 505 U.S. at 875. Both cases are grounded in traditional reproductive privacy, autonomy, and bodily integrity

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encouragement of privacy, autonomy and a lack of interconnectedness.¹²⁶ Advocates should unite behind these concepts to prevent the state from increasingly defining and regulating the behavior of women merely because of their capacity to be pregnant.

Furthermore, the law must allocate rights regarding IVF treatment in a way that will not disadvantage women on the basis of infertility. IVF is a new area of the law, but it implicates rights at the very core of women's reproductive freedom.¹²⁷ Following the lead of the courts, some legislatures have begun to enact laws concerning IVF treatments and embryo disposition.¹²⁸ Florida requires an express written agreement by the couple concerning later disposition of the frozen embryos in the event of divorce, death, or other unforeseen circumstance prior to any procedure.¹²⁹ New Hampshire requires medical examinations and counseling prior to undergoing the IVF treatment.¹³⁰ New Mexico and Louisiana have enacted the most extreme laws, which could be interpreted to privilege the rights of the embryo over both the man and the woman through required implantation of all embryos, either by the couple or through adoptive implantation.¹³¹ Implantation, rather than disposition, is required in Louisiana because the embryo is not the property of the progenitors but a separate person or entity with a legal right to health and welfare.¹³²

These statutes and court decisions demonstrate the crucial need for feminist advocacy in this area, or the legal power of women's equality and personal autonomy will be severely diminished. IVF may be an area of the law best governed by dominance theory, which could change the societal norm by bringing private family issues out into the

concerns.

126. See Wagner, *supra* note 21 at 1094; McConnell, *supra* note 9, at 306-07.

127. See *supra* Part III.A (discussing the IVF case law and its effect on traditional reproductive rights laws).

128. See, e.g., FLA. STAT. ANN. § 742.17 (2004) (requiring couples to sign express contracts regarding disposition of embryos before engaging in IVF procedures).

129. *Id.*

130. N.H. REV. STAT. ANN. §§ 168-B:13, 168-B:18 (2003).

131. N.M. STAT. ANN. §24-9A-[1] (Michie 2003). Although this provision deals with clinical research and expressly excludes IVF treatments, it has been interpreted by some scholars to be overly vague in these distinctions. See Cynthia Reilly, *Constitutional Limits on New Mexico's In Vitro Fertilization Law*, 24 N.M.L. REV. 125 (1994) (stating that the IVF law, while purporting to cover only research treatments, is unconstitutionally vague and unclear in its scope); LA. REV. STAT. ANN. § 9:122 (2004) (noting that eggs fertilized *in vitro* are solely for complete development of humans through implantation); § 9:129 (stating that a viable IVF ovum is judicially regarded as a person and shall not be intentionally destroyed).

132. § 9:129.

public and encouraging individual contracts. Contracts ensure against further erosion of reproductive rights through the subjective analysis of each individual governing court or legislature. Such contracts govern an area of reproductive health that otherwise would be controlled by the liberty and bodily integrity interests that the courts seem willing to discard. They represent new interests of the entities in the reproductive process, as they give the state the right to be involved in some intimate family decisions, and they also increase the rights of a man to have input in the use or disposition of the embryos. However, they are a concrete way to clarify rights and equalize the progenitors without extensive subjective analysis and debate.

The *Davis* and *Kass* courts romanticized the idea of having a contract that would answer all of the hard questions about disposition of embryos,¹³³ but the *J.B.* and *A.Z.* courts reacted negatively to the enforcement of such contracts because enforcing such contracts would insert the state into private family issues.¹³⁴ Any solution, however, necessarily will involve some type of intrusive state action, whether it is through legislation, a court order determining disposition, or a court order enforcing a contract. Feminist theorists must advocate a type of intrusion that will protect the vital reproductive interests of women in this changing legal environment.

CONCLUSION

Feminist theorists must be vigilant in order to prevent the swell of rights opposed to the rights of women in the reproductive process. Vigilance is essential to ensure that the rights of the state, the fetus, and the man collectively do not overwhelm women's reproductive autonomy. Feminist theory has contributed to this possible erosion by promoting pure equality between men and women and developing liberal theories of interdependence. The state courts and legislatures have welcomed a change in focus from subjective decisions regarding autonomy to equality and have applied it to situations involving the disposition of frozen embryos. This has taken away the emphasis on women's rights, however, and has been detrimental to the reproductive rights discussion. At the core of any future legal

133. See, e.g., *Davis*, 842 S.W.2d at 597 (noting that a valid contract should be upheld, but also noting that conditions surrounding the contract change); *Kass*, 663 N.Y.S.2d at 590-91 (concluding that courts must refrain from interfering with the parties contractually expressed interests).

134. See, e.g., *A.Z.*, 725 N.E.2d at 162 (noting that people have freedom and privacy rights to shape their personal lives); *J.B.*, 783 A.2d at 719 (declaring their rule allowing parties to change contracts better suited to public policy).

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argument must lie the notion that the right to physical integrity is supreme, as it protects the basic privacy freedom of women from unwanted bodily invasions.

Feminists will play a paramount role in the future of legal developments regarding fetal personhood and IVF. Difference theory can restore the rights of women by acknowledging the unique nature of the reproductive process for each entity involved, while also encouraging respect for autonomy and bodily integrity. Dominance theory and contract enforcement can change the status quo and protect women's reproductive choices from scientific developments. Advocates must be assertive in fighting the erosion of women's reproductive rights through fetal personhood laws and IVF decisions.