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Addressing the Tension between Female Reproductive Autonomy and Foetal Interests during Pregnancy and Birth

by

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Abstract

This thesis considers different areas of tension developing in South Africa between female reproductive autonomy rights and foetal interests that arise when law reform is proposed which aims to ensure healthy pregnancy and birth outcomes. Four areas are highlighted: prenatal substance abuse; termination of pregnancy; violence that terminates a pregnancy without a woman's consent; and extending legal personhood to the unborn. Ultimately, this thesis explores whether it is possible to tackle these concerns without encouraging an adversarial pregnancy environment.

There are two leading approaches to pregnancy in law: Pregnant women are either viewed as single entities (the primary South African position) or two separate entities (the primary position in the United States). This thesis tests the validity of both to adequately tackle the identified areas of concern. Research indicates that these approaches undermine healthy pregnancies or birth outcomes and female reproductive autonomy. The approaches fail to reflect the embodied nature of pregnancy being one that is based on relationship and inseparable connection. The single-entity approach denies the existence of the unborn while the separate-entities approach encourages pregnancy adversarialism.

This thesis reveals that the concerns will never be adequately resolved unless the potential for tension between women and the unborn is removed. The author proposes a relational approach to pregnancy in order to address the potential for tension and applies the not-one-not-two approach to pregnancy which focuses on the embodied connection that pregnancy represents and the contextual realities in which pregnancies exist. The thesis applies this approach to the identified areas of concern.

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Key Words

Reproductive autonomy

Reproductive rights

Foetal interests

Single-entity approach

Separate-entities approach

Not-one-but-not-two approach

Relational theory

Pregnancy adversarialism

Pregnancy relationship

Legal subjectivity

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Chapter One

Introduction

1 1 Setting the Scene

This thesis considers the different areas of South African law where a tension is developing between female autonomy rights and foetal interests during pregnancy and birth. In the United States this tension has persisted for some time and consequently there are valuable experiences that can be considered. However, based on those experiences, this thesis develops a more creative and inclusive approach to addressing the tension rather than simply accepting or justifying any current legal attempts of tackling the issue where one "party's" interests are subordinated in favour of the other "party's" interests.

At the core of the tension between female autonomy rights and foetal interests is the issue of personhood or legal subjectivity and the consequence of being considered a legal subject in law. In South Africa legal subjectivity vests once a person is born alive.[1] Upon the occurrence of live birth, a person is vested with all constitutional rights and duties found in the Constitution of the Republic of South Africa, 1996.[2]

There are numerous constitutional rights that provide space for women to exist as autonomous, self-determining agents. In *Christian Lawyers Association v Minister of Health*[3] the court stated that the right to self-determination is a constitutional imperative and identified the following rights as those rights that vest women with the capacity for self-determination: Section 12(2)(a) and (b) provides that everyone has the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction and to security in and control over their body; section 27(1)(a) offers everyone the right to access reproductive health care; section 10 states that everyone has inherent dignity and the right to have their dignity

1 T Boezaart "Child Law, the Child and South African Private Law" in T Boezaart (ed) *Child Law in South Africa* (2009) 4-5; H Kruger & A Skelton (eds) *The Law of Persons in South Africa* (2010) 13.
2 Ibid.
3 2005 (1) SA 509 (T) 518 B-E. This decision is briefly discussed below.

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respected and protected; and in terms of section 14, everyone has the right to privacy.[4] A foetus has very limited legal recognition since legal subjectivity vests only once a person is born alive.[5] Until live birth, a foetus is not a holder of constitutional rights or duties.[6]

This position has been challenged in court to a limited degree and in each case the position of a pregnant woman and her foetus has merely been confirmed. For instance, the Eastern Cape Division in *S v Mshumpa*[7] found that one could not murder a foetus since the victim of murder must have be a living person and until birth a foetus is not a living person.[8] The court described the existence of a pregnancy as a "unique togetherness" and that the wonder of pregnancy is not in the separateness of the pregnant woman and the foetus but rather their closeness.[9]

There are further examples where the legal position of the unborn has been challenged in court. In *Christian Lawyers of SA v Minister of Health*[10] the court found that the a foetus does not have a right to life in terms of section 11 of the Constitution and recognised that if an unborn were granted that right there would be "far-reaching and anomalous consequences" for women.[11] Later, in *Christian Lawyers Association v Minister of Health*[12] the court found that the right to individual self-determination lies at the heart of the right to terminate a pregnancy.[13] However, this right is not absolute and may be limited once a foetus is viable, (which was found to occur more or less at the end of the second trimester) but the limitation on women's rights may not constitute an outright limitation to terminate pregnancies.[14]

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4 Also see generally M O'Sullivan "Reproductive Rights" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2005) ch 37.
5 Boezaart "Child Law, the Child and South African Private Law" 4-5.
6 Ibid.
7 2008 (1) SACR 126 (E).
8 149 E-F.
9 151 H.
10 1998 (4) SA 1113 (T).
11 1122 E; I.
12 2005 (1) SA 509 (T).
13 518 A.
14 522 F-I; 527 E.

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Furthermore, in *Christian League of Southern Africa v Rall*[15] the court found that the application of the *nasciturus* fiction did not vest a foetus with legal personality but rather held benefits in suspension until the foetus is born alive.[16] Consequently the application of the *nasciturus* fiction cannot protect a foetus against conduct that terminates prenatal life since there is no possibility of live birth in the context of termination of pregnancy.[17]

Recently,[18] South African academics have begun to question the validity of viewing a pregnant woman and foetus as a single entity, and recommendations are being made that foetal interests[19] should receive increased and more direct protection in law.

Pillay[20] argues that the born-alive rule has no purpose in law anymore since advancements in medical technology have developed to the point that we can now prove the presence of life at the point of foetal viability.[21] Based on this argument, Pillay asserts that personhood should be extended to a viable foetus.[22] Kruuse[23] and du Plessis[24] call for feticide laws to be enacted that will allow a foetus to be a victim of criminal conduct despite not being vested with constitutional rights. On the topic of maternal substance abuse, Ovens[25] calls for the extension of the crime of child abuse to include prenatal drug abuse, causing a pregnant woman to be held criminally liable.

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15 1981 (2) SA 821 (O).
16 822 H.
17 823 E.
18 Only current suggestions for reform are considered in this thesis. "Current" indicating South African scholarly publications dating back to no later than 2008 since it was in 2008 that a South African court heard its first criminal law case which confirmed that the unborn lack legal status and cannot be victims of criminal conduct, see *Mshumpa*. This case seems to have sparked academic debates concerning pregnant women, pregnancy more generally, and the unborn.
19 Reference to foetal interests, in the context of this thesis specifically refers to foetal interest in continued existence and allowing for uninterrupted development until live birth.
20 R Pillay "The Beginning of Human Personhood: Is South African Law Outdated?" (2010) 2 *Stell LR* 230.
21 Foetal viability indicates the point in foetal development where a foetus is capable of independent survival if born. At this point in development, all the vital organs are present and able to perform their functions sufficiently. See generally G Cohen & S Sayeed "Fetal Pain, Abortion, Viability and the Constitution" (2011) 39 *JLME* 235; C Pickles "Proving the Significance of the Born-Alive rule with Reference to Medical Knowledge of Foetal Viability" (2013) 24(1) *Stell LR* 146. More on the issue of foetal viability is discussed in ch 5.
22 Ibid.
23 H Kruuse "Fetal 'Rights'? The Need for a Unified Approach to the Fetus in the Context of Feticide" (2009) 72 *THRHR* 126.
24 G du Plessis "Feticide: Creating a Statutory Crime in South African Law" (2013) 1 *Stell LR* 73.
25 M Ovens "Maternal Substance Abuse in South Africa: An Area for Concern?" (2008) 1 *Acta Crim* 77; M Ovens "A Criminological Perspective on the Prenatal Abuse of Substances during Pregnancy and the Link to Child Abuse in South Africa" (2010) 11 *CARSA* 38.

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Myburgh[26] takes the position that when women electively terminate their pregnancies they are exercising their reproductive rights irresponsibly and criticises the point that women's interests are always considered when discussing foetal interests. De Freitas supports her view,[27] and both de Freitas and Myburgh have argued for better protection of the unborn from termination of pregnancy.[28]

In South Africa there is clearly a call for a shift from viewing the foetus and pregnant woman as one single entity to viewing a pregnant woman and her foetus as two separate entities.[29] The most alarming feature concerning these recommendations is that very little consideration is given in existing literature to the implications of adopting these recommendations, particularly with reference to the effects on the experience of pregnancy generally and pregnancy outcomes.

This thesis focuses on the connection that is shared between a pregnant woman and the foetus for the duration of the pregnancy, and considers the circumstances where female reproductive autonomy and foetal interests line up against each other. A tension is found to occur in many instances but only four instances will be identified here,[30] namely in the application of termination-of-pregnancy laws; through the extension of legal status to the unborn; violence against pregnant women and in the case of women imposing self-harm during pregnancy. Current attempts at addressing these areas of concern usually end in one "party's" interests being subordinated for the benefit of the other "party's" interests.

The conflict that arises during a termination-of-pregnancy procedure generally arises in cases of elective terminations[31] since therapeutic termination procedures (based on

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[26] G Myburgh *Humanity and the Protection of the Unborn: A Jurisprudential Rationale for the Furtherance of the Anthropological Paradigm in International Law* LLM Dissertation, University of the Free State (2008) 58-60.

[27] S de Freitas "The South African Constitutional Court and the Unborn" (2012) 5(2) *IJRF* 56.

[28] S de Freitas & G Myburgh "The Relevance of Science for the Protection of the Unborn" (2009) 45(1 & 2) *TCW* 61.

[29] *Mshumpa* (151 H) is the most recent decision that has confirmed that South Africa follows a single-entity approach; the court described this approach in terms of the 'unique togetherness' shared between a pregnant woman and her foetus.

[30] There are more areas where this tension occurs, the limitation of this thesis to the specified four areas of consideration is justified below, see para 1 5.

[31] Elective termination of pregnancy refers to those circumstance where a woman terminates her pregnancy for non-therapeutic reasons, namely on demand or for socio-economic reasons.

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sound clinical judgements) can be justified through necessity.[32] The defence of necessity is relevant because continued pregnancy poses a risk to the woman or is a result of unlawful conduct such as rape or incest.[33] The general argument is that legislation that permits terminations of pregnancies on demand or for socio-economic reasons are said to be arbitrary and contrary to foetal interests,[34] pitting female reproductive autonomy and foetal interests against each other.

In the case of criminal law, the tension arises where a third party or the pregnant woman herself acts contrary to the interests of the foetus thereby injuring the foetus or terminating the pregnancy outside of the bounds of the Choice on Termination of Pregnancy Act[35] (Choice Act). The tension usually arises in cases of violence against pregnant women[36] and prenatal substance abuse.[37] In these scenarios either the legislature or judiciary embark on a process of attempting to resolve the tension which usually results in female reproductive autonomy being diminished in favour of foetal interests.[38]

How each scenario is currently dealt with depends on the approach taken by a particular jurisdiction. On the one hand, a foetus and the pregnant woman can be regarded as a single entity and the foetus only acquires a protectable status once born alive. On the other hand, the foetus and the pregnant woman can be regarded as two separate entities, each with their own sphere of existence.[39]

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[32] According to Snyman, necessity covers the circumstances where a person acts out of necessity to protect his or her or somebody else's life, bodily integrity, property or other legally recognised interest, which is endangered by a threat of harm which has commenced or is imminent and which cannot be averted in another way. C Snyman *Criminal Law* 5 ed (2008) 115.

[33] C Ngwena "An Appraisal of Abortion Law in Southern Africa from a Reproductive Health Rights Perspective" (2004) 32 *JLME* 708 711.

[34] Myburgh, (*Humanity and the protection of the unborn* 48) considers the use of elective termination procedures as irresponsible and an abuse of female reproductive rights and an insult to our sense of humanity.

[35] Act 92 of 1996.

[36] For example, see C Pickles "The Introduction of a Statutory Crime to Address Third-Party Foetal Violence" (2011) 74 *THRHR* 546.

[37] For example, see E Ordolis "Maternal Substance Abuse and the Limits of the Law: A Relational Challenge" (2008) 46 *Alta L Rev* 119.

[38] S Meredith *Policing Pregnancy: The Law and Ethics of Obstetric Conflict* (2005) 187.

[39] See M Ford "Nothing and Not-Nothing: Law's Ambivalent Response to Transformation and Transgression at the Beginning of Life" in S Smith & R Deazley (eds) *The Legal, Medical and Cultural Regulation of the Body* (2009) 24-30. Ford states that the law's response to a foetus is to grant it special status which has been justified in numerous ways. Special status has been based on "potentiality" which suggests that by virtue of the fact that a foetus holds the potential to become something else is a reason to attribute value in foetal life. Special status has been granted out of

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In essence, the single-entity approach is based on the "oneness" of the pregnant woman and foetus since the foetus is wholly subsumed (embodied) in and dependent on the woman's body; the unborn are something akin to a bodily organ. While in the case of the separate-entities approach, the foetus is viewed as more than an organ; it is seen as a human being and therefore it is argued that they should be granted status as a person in law. Characteristically, the single-entity approach applies the born alive rule[40] while the separate-entities approach rejects this rule or supports the development of legal principles beyond the rule because medical technology is advanced enough to prove life prior to actual live birth.[41]

Supporters of termination-of-pregnancy laws tend to follow the single-entity approach, while those that advocate foetal rights or who are "pro-life" supporters are likely to follow the separate-entities approach. Supporters of the separate-entities approach also accept unauthorised intervention to ensure continued foetal development or live birth since a foetus is perceived to be a person in need of treatment or enhanced legal consideration.[42] The single-entity approach finds that unauthorised interventions are a violation of female autonomy rights and that being pregnant is not a justifiable limitation of women's rights.[43] In the case of criminal issues, the single-entity approach will not permit a foetus to be considered a victim of criminal conduct and pregnant women are not obligated to protect the foetus from harm. The separate-entities approach generally supports the possibility that a foetus can be the victim of criminal conduct[44] and if applied to extremes, women might also have duty to conduct

respect for interests which follows the position that a foetus has interests of some sort that should be respected. Interests here refer to the ability of a foetus to feel pain or pleasure, which would require us to refrain from causing a foetus any unnecessary pain. Special status has also been justified with reference to relationships. This ground of justification requires one to go beyond rights and interests arguments and look at the underlying relationships. Finally, special status is granted on the grounds of dignity. Here, Ford argues that the special status of the foetus is not founded on interests of the foetus but on the wider societal interest in preserving the dignity of human life generally. A more comprehensive discussion of the different theories will follow in ch 5 and a revised application of special status will be forwarded in ch 11.

40 This rule requires that a person must first be born alive in order to qualify as a legal subject, see Pillay (2010) *Stell LR* 230.

41 Ibid.

42 L Jordaan "The Legal Validity of an Advanced Refusal of Medical Treatment in South African law (Part 1)" (2011) 1 *De Jure* 32; L Jordaan "The Legal Validity of an Advanced Refusal of Medical Treatment in South African Law (Part 2)" (2011) 44(2) *De Jure* 259.

43 See generally Meredith *Policing pregnancy*.

44 Kruuse (2009) *THRHR* 126.

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themselves according to the best interests of the foetus, ensuring proper development and live birth.[45]

In each area of law a tension is clearly present and attempts have been made to resolve the issue by approaching courts or advancing arguments supporting the enactment of legislation. When recognising the unique relationship that develops through the biological fact of pregnancy, South African court decisions usually end with an individualised conception that interprets the single-entity approach in terms of the pregnant woman's autonomy rights.[46] These sorts of decisions do not reflect a capacity to address the shared needs of the pregnant woman and the foetus she carries.[47] By contrast those United States' decisions that embrace the separate-entities approach reject the values of connection and present the view that a woman is a foetal container whose autonomy and bodily integrity may be violated through state sanctioned intervention.[48] However, this approach also undermines the interests of both pregnant women and the unborn they carry.[49] In each case an adversarial environment is created. This approach is not conducive to the fact that women bear the constraints of pregnancy and that the unborn are innately reliant on women for live birth. There needs to be a sense of cooperation for the further good of both, namely healthy pregnancy and healthy pregnancy outcomes.

In a steadfast rejection of the single-entity and separate-entities approaches, this thesis recommends a relational approach. This recommendation draws on the work of Nedelsky[50] who rejects a liberal construction of autonomy which views individuals as being atomistic and calls for a definition of autonomy that recognises people as

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45 See Meredith *Policing Pregnancy* 130-162. As an overview, Meredith discusses the maternal duty to act in the best interests of the foetus with reference to circumstances where pregnant women have been incarcerated for the duration of their pregnancies in order to curb their drug dependent activities, where women have been charged or convicted with child neglect based on conduct prior to the birth of their children and in some instances women have faced charges of dealing drugs to a minor where their babies have tested positive for narcotics or alcohol at birth. Going even further, harmful conduct during pregnancy has at times been used as a ground to justify the removal of a child from the care of his or her mother. The author has linked the criminalisation of third-party foetal violence to maternal liability (139).

46 Ordolis (2008) *Alta L Rev* 134.

47 Ibid.

48 Ordolis (2008) *Alta L Rev* 134.

49 Ibid.

50 J Nedelsky "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 *Yale J Law Fem* 7; J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011).

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inherently social in nature. She argues that autonomy is made possible by constructive relationships; this includes intimate, cultural, institutional, national, global relations, all of which are in a constant state of interaction.[51] This approach recognises that human existence and the experience of autonomy is characterised by the presence of relationships and interaction with others.[52] Focusing on the centrality of relationships helps to distinguish between those relationships that foster autonomy and those that undermine it, this understanding will guide the transformation of destructive relationships into ones that foster autonomy.[53]

A relational approach to autonomy applied in the context of this thesis helps to develop a more contextual understanding of pregnant women, to the extent that they are not purely isolated individuals free from external influences. This approach offers the opportunity to create the space to recognise that there are numerous relationships that influence the experience of pregnancy and which inevitably determine whether healthy pregnancies and healthy pregnancy outcomes can be achieved. It is argued that when approaching a particular area of law relevant to pregnancy one needs to develop a contextual understanding of pregnant women in relational terms having regard to their social setting and the actual presence of a pregnancy and the unborn in order to meaningfully resolve the issue.

This relational approach requires one to consider the pregnant woman in relation to the foetus rather than in an adversarial confrontation with the foetus, both united with mutual needs. Contrary to the single-entity approach, the proposed relational approach recognises the presence of foetal life which is explicitly included as something necessary to consider since the pregnant woman shares a connection to the foetus. Contrary to the separate-entities approach, the proposed relational approach does not consider the foetus as entirely independent of the pregnant woman because of the relational link shared between the foetus and pregnant woman.

51 Nedelsky *Law's Relations* 118
52 Nedelsky *Law's Relations* 119.
53 Nedelsky *Law's Relations* 122.

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1 2 Significance and Purpose of the Study

The research task aims to illuminate concerns about female reproductive autonomy and the connection between pregnant women and the foetus. Central to this issue is the tension between pregnant women's autonomy rights and foetal interests. This tension prevents the law from developing in favour of taking foetal interests into account and questions whether it is possible to do so without undermining women as autonomous agents.

Female autonomy and foetal interests are currently seen as conflicting notions in most factual scenarios considered by the law, whether in terms of criminal law or private law. The approach assumed by the law prevents legal systems from recognising foetal interests without being confronted with the force of female autonomy or without undermining female autonomy. The moment an opportunity arises to advance foetal interests an impression is created that foetal interests have a heightened value and this too would establish a ground to justify the limitation of female autonomy beyond the current limitations imposed by laws.[54]

For instance, in South Africa, where intentional harm is inflicted against a pregnant woman which causes the termination of her wanted or intentionally continued pregnancy, the harm to the "extra-ness" that her pregnancy represents cannot be addressed by the courts since female autonomy prohibits the consideration of foetal interests as a foetus does not exist in law until live birth.[55] Ultimately, the notion of self-determination which provides women with autonomous freedom is the very notion that prevents the law from taking decisions in favour of foetal interests. This should not be the case because some women want to continue pregnancies and have that process of continuation protected.[56]

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[54] Limitations such as those found in the Choice Act which increasingly limit women's access to pregnancy termination as the pregnancy progresses closer to birth.

[55] These were the facts that the court had to decide on in *Mshumpa*.

[56] For instance see, B Manninen "The Value of Choice and the Choice to Value: Explaining the Discussion about Fetal Life within Prochoice Advocacy" (2013) 28(3) *Hypatia* 663; M Schulman *The Nasciturus Non-Fiction, The Libby Gonen Story: Contemporary Reflections on the Status of the Nascitural Personhood in South African Law* LLM Dissertation, University of the Witwatersrand (2014).

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It is not the purpose of the research task to redefine constitutional principles relevant to the right to life. It is also not the purpose of this thesis to discover new ways and means to develop opportunities to grant a foetus constitutional rights, since it is the author's position that female autonomy also needs to be advanced through the recognition of foetal interests, rather than be limited any further in favour of a foetus.

Recognising that a foetus is not a person in law and acknowledging that female reproductive autonomy is important to the integrity of society, the research aims to discover a third, relational approach to taking foetal interests into account without narrowing the boundaries of the law as it currently stands for women. This approach questions the validity of the single-entity and separate-entities approaches since one fails to acknowledge the unborn while the other is adversarial in nature and automatically places foetal interests and female autonomy at loggerheads with one another. In fact the research goes further and questions whether the legal system is the best mechanism to resolve this tension, since it is not practical for some of these issues to be converted into legal disputes at all.[57] Pregnant women need to be considered contextually having regard to their relational ties to the unborn they carry, to the society in which they live, and the availability of support structures to assist women during the course of their pregnancies.

1 3 Research Questions

Central research question

Can the value of connection be used in a way that the tension between female reproductive autonomy rights and foetal interests is addressed and an adversarial approach is wholly avoided, thus allowing for coexistence of legally recognised foetal interests and female autonomy?

[57] The exception here is harmful conduct of third parties towards pregnant women. However, it is asserted that if a less adversarial and a more supportive, contextually relevant approach can be adopted when dealing with pregnant women and their foetus generally, this too can positively influence criminal law and its capacity to effectively take foetal interests into account.

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Subsidiary research questions

1. Historically, what motivated the development and recognition of women as autonomous agents vested with autonomy rights and foetal interests respectively and how did these two notions become adversarial in nature?
2. What are the constitutional underpinnings of female reproductive autonomy and how are they protected in South Africa?
3. Under a constitutional dispensation, how does South Africa classify a foetus in law and what justifies this approach?
4. In what areas of law has the tension between female autonomy rights and foetal interests come to light and how have South African scholars responded thereto?
5. Does the United States offer a viable alternative to the current South African position of women and the unborn in law in respect of advancing healthy pregnancies and healthy pregnancy outcomes?
6. Is it possible to go beyond the adversarial nature of the courts and to what extent are the judiciary and legislature the correct forums to encourage and support the resolution of these issues?

1 4 Research Methodology

In order to adequately address the questions listed above, a desk top research process is conducted mainly examining primary and secondary sources.

A very broad, historical study considers the development of female reproductive autonomy and foetal interests. The study helps to highlight trends and changes that occurred over time to the present day. Originally the study is descriptive in nature but develops into an analytical endeavour in order to determine if a “competitive” relationship exists between pregnant women and the unborn.

A wide conceptual study is conducted relating to the various theories that underpin the drive for the recognition of female autonomy rights and foetal interests respectively. This study also takes a descriptive stance and mainly relies on secondary sources. Where legislation and case law is referred to, it primarily serves an illustrative purpose to demonstrate how these theories have influenced the various movements for

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reproductive freedom, the recognition of women as autonomous individuals and the foetal rights movement.

When approaching the task of constitutional analysis relating to women and foetal interests and when contemplating those areas identified as being in need of reform, a qualitative comparative study is conducted. A comparative study is required for this study because, although South Africa has a very progressive stance on female reproductive autonomy there have been very few circumstances where these rights have been tested, stretched or limited in favour of foetal interests. However, there is movement in this area among academics who are questioning the current position of South African law concerning foetal interests and female autonomy, and recommendations have been made to develop the law in favour of foetal interests (usually following the separate-entities approach).[58] The comparative study serves to show the potential consequences of heeding those recommendations or resisting the recommendations, especially in the current adversarial climate of the two approaches. Within this framework, the potential comparative jurisdiction must characteristically hold the following elements: There must be a stable and well established constitutional regime in place; women must be recognised as autonomous agents; there must be termination-of-pregnancy laws (whether derived from case law or legislation) and the born-alive rule must be recognised and applied or must have been recognised and applied in the past and abandoned, rejected or developed for reasons of advancing foetal interests.

Research indicates that the United States of America fits squarely into the criteria for the comparative study. The United States is an example of a country that has accommodated the call for protecting foetal interests; since legislation has moved beyond the born alive rule given that a foetus can be the victim[59] of criminal conduct. In certain instances there is also a duty on pregnant women to protect the foetus from

[58] Myburgh *Humanity and the Protection of the Unborn*; Kruuse (2009) *THRHR* 126; de Freitas & Myburgh (2009) *TCW* 74; Pillay (2010) *Stell LR* 230; Ovens (2010) *CARSA* 38; de Freitas (2012) *IJRF* 56; du Plessis (2013) *Stell LR* 73.

[59] Legislation is in place at both state level and federal level (Unborn Victims of Violence Act, 2004) that confronts third-party foetal violence that results in the termination of a pregnancy. At state level, 38 states have foetal homicide laws in place <http://www.ncsl.org/IssuesResearch/Health/FetalHomicideLaws/tabid/14386/Default.aspx> (accessed 1 December 2011). This approach leaves the applicability of the born-alive rule in a questionable position.

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harm. This is the case despite the fact that women have a right to terminate their pregnancies.[60] For these reasons the United States is an example of a country that has embraced the separate-entities approach.[61] However, since the United States follows a federal system, not all states are studied. The federal system (federal case law and legislation) and a small selection of states form the comparative study. Relevant states are identified with reference to whether the state applies the separate-entities approach to one of the identified areas of concern regarding pregnancy in law.

The comparative study stretches over two broad aspects in the thesis. First, an analytical and interpretive study is conducted to determine the legal status of pregnant women and the unborn. The aim is to determine the factual extent of female autonomy in relation to foetal interests and how the law has impacted on the advancements of female autonomy and furthering foetal interests. Second, a qualitative and analytical study is conducted of case law and legislation to determine the effectiveness of the United States' separatist laws in realising healthy pregnancies and healthy pregnancy outcomes in those areas identified by South African scholars as being in need of reform. This study aims to determine how the persistence of the tension between female autonomy rights and foetal interests hampers the opportunity for effective law reform. To conclude the study, secondary sources are considered to bring to light the various criticisms lobbied against the separate-entities approach which helps determine the likelihood of successfully adopting a third approach to dealing with the tension in South Africa.

The development of a third, non-adversarial approach to pregnancy requires theoretical considerations and mainly secondary sources are consulted.

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60 *Roe v Wade* SCt 705 (1975). It was found that the right to terminate a pregnancy lies in women's constitutional right to privacy, however as a pregnancy progresses to the point of viability (approximately the second trimester) the state has sufficient interest in foetal life to limit the right to terminate a pregnancy.

61 See generally B Burkstrand-Reid "The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence" (2010) 81 *U Colo L Rev* 97.

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1 5 Limitations

The study is limited to the period of pregnancy, focusing on the relationship that exists between a woman and her foetus for the duration of pregnancy and birth. The scope of the research is determined by those areas identified by South African scholars as being in need of reform, namely developing legal status for the unborn, introducing feticide laws where the foetus is a direct victim, criminalising prenatal substance abuse as a form of child abuse and reducing the liberal scope of the Choice Act.

A number of other areas have been identified where a tension between female autonomy rights and foetal interests persists, such as advocating forced medical interventions for the benefit of the unborn[62] and holding attending health care professionals criminally liable for negligently causing stillbirth.[63] These issues are certainly deserving of deeper consideration but neither will be considered in this

[62] See Jordaan (Part 1) (2011) *De Jure* 32; Jordaan (Part 2) (2011) *De Jure* 259. In the case of advance medical directives, Jordaan argues that the interests of a viable foetus should at least be considered and balanced against the interests of an incompetent pregnant woman who has made an advance medical directive refusing medical treatment. In the medical realm, the tension generally occurs in cases where medical intervention is deemed necessary in order to secure the live birth of a foetus and the pregnant woman refuses to consent to treatment or acts contrary to the instructions of her attending physician. Medical interventions range from hospitalised birth, Caesarean deliveries or blood transfusions. In these sorts of cases, the attending physician approaches the courts to obtain an order to compel compliance with his or her medical advice on the basis that non-compliance with the medical advice will result in irreversible harm to the foetus or stillbirth. Under these circumstances female autonomy is diminished in order to ensure medical treatment. (See generally Meredith, *Policing pregnancy*; P Harris "Compelled Medical treatment of Pregnant Women: The Balancing of Maternal and Foetal Rights" (2001) 49 *Clev St L Rev* 133.) The foetus is considered to be a second "patient" to whom the doctor owes a duty of care. This topic has received considerable attention in the United States. This thesis cautions against taking such an extreme approach and going so far as viewing the unborn as separate patients in the context of medical treatment during pregnancy. For more on this issue see, L Ikemoto "Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women (1992) 59 *Tenn L Rev* 487; E Nelson "Reconceiving Pregnancy: Expressing Choice and Legal Reasoning" (2004) 49 *McGill LJ* 593; M Miller "Refusal to Undergo a Cesarean Section: A Woman's Right or a Criminal Act" (2005) 15 *Health Matrix* 383; M Kaplan "'A Special Class of Persons' Pregnant Women's Right to Refuse Medical Treatment after Gonzales v. Carhart" (2010) 13(1) *J Const L* 145; B Dickens & R Cook "Legal Effects of Fetal Monitoring Guidelines" (2010) 108(2) *Intl J Gynecol & Obstet* 170; P Laufer-Ukeles "Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy" (2011) 37 *Am J Law Med* 567. There are many sources to consider here but those cited serve as mere examples of the debates surrounding forced medical interventions during pregnancy.

[63] For instance see, A le Roux-Kemp & J Wilkinson "A Novel Application of the Hydrostatic Test in Determining Live (Non)Birth" (2012) 2 *SACJ* 271 and Schulman *The Nasciturus Non-Fiction*. Schulman argues for the protection of foetal interests during birth. He presents the unborn as separate entities deserving of laws protective reach. The concerns with this approach are the same as discussed in the fn directly above.

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thesis.[64] This limitation is justified on the basis of research continuity[65] and due to institutionally-imposed limits on time and space. Consequently, not all areas of pregnancy-related concern can be considered in the research project.

1 6 Chapter Overview

This thesis is made up of four parts. Part one seeks to determine what factors give rise to an adversarial pregnancy environment. Chapter two provides an historical overview of the social position of women in relation to the unborn in order to determine the origins of pregnancy adversarialism. Chapter three studies feminism (as a leading social movement aimed at emancipating women) and contemplates the deployment and recognition of female reproductive autonomy. Chapter four considers the role of scientific advancements in prenatal care, the eventual individuation of the unborn and the development of theories concerning why the unborn are entities worthy of value and separate or individuated attention.

Part two studies the current position of South African law regarding pregnant women and the unborn. Chapter five deliberates on the legal status of pregnant women and determines the extent of their reproductive rights during pregnancy. Chapter six focuses on the unborn and establishes that South Africa currently ascribes to the single-entity approach and the not-one-but-not-two approach (not-one/not-two approach) to the unborn and explores the implication of these approaches. Chapter

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64 However, it is submitted that the approach this thesis develops towards pregnancy in law can be applied to this issue of forced or ineffective medical interventions during pregnancy. Further research is required here and the findings of this thesis can serve as a good foundation in developing more effective responses to pregnancy in the intersection between pregnancy, medicine and law.

65 The aim for research continuity is related to previous LLM research, (C Pickles *S v Mshumpa: A Time for Law Reform* LLM Dissertation, University of Pretoria (2010)). The dissertation sought to introduce a statutory crime to address third-party violence that terminates prenatal life and instead of granting the unborn rights or rendering them independent victims, the dissertation suggested introducing a crime against “motherhood”. (This is covered in more detail in ch 11 of this thesis.) Upon completion of the LLM research a number of further issues were revealed under the theme of pregnancy in law which required additional, more detailed research and consideration. These areas of concern included: How to tackle violence against pregnant women that cause termination of pregnancies. Further, how can law reform be effected without granting the unborn status in law and if status were to be extended how would that position take the notion of pregnancy in law further? The research raised the question of what should be done in cases where pregnant women cause grave self-harms. Additionally, how would the various responses in each area of law impact on the other areas of law. Of particular concern, was how all these necessary developments would impact on the provisions of the Choice Act and women’s rights more generally? These additional research themes could not be included in the LLM research and therefore served to justify doctoral studies.

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seven looks at the various arguments advanced by South African scholars for changes to South African law. It further contemplates the quality of their arguments against the backdrop of advancing foetal interests and reproductive autonomy. Furthermore, the chapter critically considers whether these suggestions for reform will secure healthy pregnancies and healthy pregnancy outcomes.

In chapter seven it is demonstrated that South African scholars advocate for a separate-entities approach to pregnancy in order to better protect the unborn and part three of this thesis tests the credibility of the claim. Part three focuses on the United States and current developments taking place in relation to pregnancy in the law. Chapter eight researches the legal status of pregnant women and the unborn and establishes that the unborn are vested with a form of legal status in the United States. It further demonstrates that granting legal status to the unborn does not necessarily result in better protection of the unborn and this finding is supported by research stemming from chapters nine and ten. Chapter nine and ten critically delve into the themes of third-party violence that terminates prenatal life and prenatal substance abuse as constituting child abuse. Part three aims to establish that if the aim of law reform is to secure healthy pregnancies and pregnancy outcomes, the separate-entities approach is a poor method to achieve that end.

Part four suggests a way forward and takes on a different tone in comparison to the rest of the thesis. Parts one, two and three are objective observations of the current milieu of pregnancy in law, whereas, part four applies more of a reflective tone. This shift in tone requires a purposeful change of writing style. Chapter eleven advances an alternative view of pregnancy based on relational feminism and the not-one/not-two approach, and it further advances a unique form of status for the unborn in law. The chapter thereafter applies this revised view of pregnancy to the identified areas in need of reform, namely, to termination-of-pregnancy laws, prenatal substance abuse, violence against pregnant women and personhood of the unborn. Chapter twelve concludes the thesis, providing a reflection on the overall findings of the thesis.

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1 7 Definitions, Terms and Phrases

There are a number of definitions, terms and phases particular to the context of this thesis. These will be considered here to allow for better understanding as the thesis progresses.

1 7 1 Abortion and termination of pregnancy

According to the *Oxford Advanced Learners Dictionary*[66] the terms "termination of pregnancy" and "abortion" are synonymous. However for purposes of this thesis, "termination of pregnancy" is preferred unless quoting from texts that specifically use the term "abortion". "Termination of pregnancy" is preferred for two reasons. First, this term falls in line with the definitions provided in the Choice Act. Second, the term "abortion" is reminiscent of the now repealed Abortion and Sterilization Act 2 of 1975 (Abortion Act) which has been described by Ngwena as indifferent to human rights, restrictive and inaccessible for poor women (mainly black women), paternalistic and authoritarian.[67] The inaccessible provisions of the Abortion Act resulted in high levels of maternal mortality and morbidity because women had no other choice but to access unsafe and illegal termination-of-pregnancy services when dealing with unwanted pregnancies.[68] The Choice Act, adopting the term "termination of pregnancy" is a clear break from the oppressive Abortion Act and more fitting to our constitutionally enriched "freedom of choice" dispensation. On that basis "termination of pregnancy" is preferred.

1 7 2 Nedelsky's relational feminism

Nedelsky argues: "Relationships are central to people's lives – to who we are, to the capacities we are able to develop, to what we value, what we suffer, and what we are able to enjoy".[69] She emphasises that the centrality of relationships in our inherently social existence indicates the constitutive nature of the various relationships one might

66 A Hornby *Oxford Advanced Learner's Dictionary of Current English* 8 ed (2010).
67 C Ngwena "Access to Legal Abortion: Developments in Africa from a Reproductive and Sexual Health Rights Perspective" (2004) 19 *SAPR/PL* 329 330; 342.
68 Ngwena (2004) *SAPR/PL* 330.
69 Nedelsky *Law's Relations* 3.

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share with others. This accentuates the reality that a person's experience of themselves and their core capacities[70] are influenced by the relationships he or she engages in at all levels of existence. Relationships range from the most intimate to wider impersonal social relationships we share with the state or other public institutions.[71]

A relational approach serves as both an investigative and transformative tool.[72] It helps to identify who the participants are to a particular relationship. Further, it assists in determining the quality of that relationship, that is, whether the structure of the relationship secures or undermines capacity building.[73] Nedelsky argues that when a destructive relationship arises it is because the law has structured the relationship in that way, and this indicates the necessity to reform laws to allow for an improved structured relationship.[74] With a contextualised perspective in place, such as one that focuses on relationships and those aspects that influence relationships, it makes it easier to identify how to restructure or transform relationships so as to allow for more constructive, capacity building connections between relating parties.[75]

It is through the process of centralising focus on relationships that more imaginative solutions come to the fore. This view ensures individuals' unique core capacities are secured and realisable even though they might be wound in webs of relationships characterised by varying degrees of dependency. This approach is important to the aims of this thesis given that this thesis aims to restructure pregnancy relationship in a way that tensions or adversarialism is extinguished. Nedelsky's writing provides a theoretical backing and demonstrates how to create the space to consider the unborn and achieve this end without compromising autonomy. More on this approach is provided in chapter eleven of this thesis and the discussion presented here merely serves to provide the basic premise of relational feminism that this thesis relies on.

70 Such as our dignity, equality or autonomy, to name a few.
71 Nedelsky *Law's Relations* 20.
72 Nedelsky *Law's Relations* 67.
73 Nedelsky *Law's Relations* 133.
74 Nedelsky *Law's Relations* 67.
75 Ibid.

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1 7 3 Foetus, foetal viability, and foetal interests

Except in the case of elective termination of pregnancies, this thesis is mainly concerned with the interests of a foetus, rather than that of a zygote,[76] blastocyst[77] or embryo.[78] "Foetus" refers to development that takes place from nine weeks gestation until birth.[79] At this stage all major body organs are present and the unborn begins to take human form.[80] Foetal viability refers to that point in foetal development that a foetus, if separated from the pregnant woman, is capable of independent life.[81] Generally, foetal viability occurs at the end of the second trimester (at roughly five month's gestation).[82]

These distinctions are necessary because in South Africa and the United States the law places legal significance in *foetal* life, and this legal significance is concretised even further once a foetus has reached viability since it is argued that the state has an interest in securing the live birth of a foetus.[83] For purposes of clarity, reference will be made to the "unborn" rather than zygote, blastocyst, embryo or foetus in the case where gestational age is not specifically relevant to the argument being advanced.

A number of foreign jurisdictions have adopted the method of spelling "foetus" as "fetus" however "foetus" is preferred for this thesis. "Fetus" will only be used in the case where the current author quotes from texts that use the term "fetus".

The concept of "foetal interests" is used purposefully to denote the fact that the unborn do not have rights and also should not have rights. Furthermore, the use of "interests" in this thesis does not signify that the unborn are viewed as having conscious

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76 A zygote is the single cell that develops from a male and female gamete. In prenatal development, this occurs within two weeks after conception. See <http://www.thefreedictionary.com/Zygote> (accessed 30 October 2012).

77 Once implantation has occurred, the zygote develops into a blastocyst, at this point prenatal life is cluster of cells from which an embryo will develop. Thereafter the embryo develops into a foetus. See <http://www.thefreedictionary.com/blastocyst> (accessed 30 October 2012).

78 Embryonic stage takes place three weeks after conception and at this stage cell differentiation takes place. This process continues until the eighth week of gestation. See <http://www.thefreedictionary.com/embryo> (accessed 30 October 2012).

79 See <http://www.thefreedictionary.com/fetus> (accessed 30 October 2012).

80 Ibid.

81 See, Cohen & Sayeed (2011) *JLME* 235; Pickles (2013) *Stell LR* 146.

82 Ibid.

83 More on the legal significance of foetal viability is discussed in ch 6.

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vestment[84] in and of themselves. Rather, "interests" indicates an unconscious involuntary experience that takes place naturally by way of nature's intention. It is submitted that once an environment allows for an entity to come into existence and begin to develop, that entity has a form of natural interest to continue development until full development is reached as nature intended.

1 7 4 Healthy pregnancy and healthy pregnancy outcomes

Generally third-party (being the state, attending physicians, law enforcement officials, or persons other than the pregnant woman concerned) intervention during a pregnancy is justified by the fact that these individuals or institutions have an interest in securing the live birth of the foetus. Intervention can result in forced medical treatment, criminal liability and/or incarceration of pregnant women. This is a very narrow construction of a "healthy pregnancy outcome", since it is clearly one dimensional in that it only focuses on the unborn individually and it fails to consider pregnant women beyond being mere foetal carriers.

For purposes of this thesis a "healthy pregnancy" is a pregnancy that progresses without unauthorised third-party intervention, where pregnant women progress though their pregnancies without having their rights violated in order to serve the interests that others may have in the unborn they carry. This construction recognises that in order to maintain a healthy pregnancy, pregnant women will inevitably come into contact with health care providers for prenatal care, indicating that there will be a certain degree of dependency on others for securing a healthy pregnancy. However, what determines a healthy pregnancy in these circumstances is that the compounded needs of both the pregnant woman and foetus are address in a relational fashion. Thus, violating the autonomy of a pregnant woman will not advance the interests of the foetus because of the unborn's intricate link to the pregnant woman.

"Healthy pregnancy outcome" moves beyond merely securing the live birth of a foetus but also looks to secure the autonomy and bodily and psychological integrity of the

[84] Steinbock uses "interests" to denote consciousness in late-term foetuses, see B Steinbock *Life before Birth: The Moral and Legal Status of Embryos and Fetuses* (2011). This thesis uses "interests" differently.

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pregnant woman concerned. Further, a "healthy pregnancy outcome" aims to protect the wellbeing of existing relations (and possibly her future relation to her new child if the woman has decided against adoption), namely, protecting her family unit and placing in the community. Securing the live birth of a foetus is an important aim but should not end with a woman being dismembered from who she is beyond her pregnancy.[85]

1 7 5 Prenatal life

The term "prenatal life" is used to describe the developmental life of an unborn which does not receive the same recognition as "life" in the legal sense.

1 7 6 "Tension between female autonomy rights and foetal interests" versus "maternal-foetal conflict"

Writing on the cost of foetal rights, Roth is very critical of the use of "maternal-foetal conflict" since it focuses attention on women's behaviour as the primary source of risk to foetal health or healthy pregnancy outcomes and away from other factors.[86] She argues that this phrase makes two assumptions: First, all pregnant women are already mothers; and second, these pregnant women are bad mothers because if they were good mothers, they would not be in conflict with the unborn they carry.[87]

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85 It is fitting to refer to an example. In the case where a pregnant woman is addicted to and abusing illegal substances, the threat of legal intervention or criminal sanctions may deter her from seeking treatment or even obtaining any prenatal care. This undermines the aim of achieving healthy progression through pregnancy and also impacts on the pregnancy outcome. In the case where a pregnant woman is incarcerated for substance abuse in order to control her self-harming conduct, she will generally receive substandard prenatal medical treatment within prison facilities and her underlying addiction may not be adequately addressed. This too may adversely impact on the prospects of securing a healthy pregnancy or healthy pregnancy outcome since the foetus may be born alive but the child's mother will not have had her addiction addressed, may very well remain incarcerated and not able to function as the child's mother. Clearly this approach of securing a healthy pregnancy or healthy pregnancy outcome is dysfunctional because it fails to address the pregnant woman's underlying issues of addiction and breaks up the natural system of unity with the child and existing relationships. This approach fails to develop a contextual understanding of the problem the pregnant women face and consequently fail to address to root cause of the problem. See generally Ordolis (2008) *Alta L Rev* 199.

86 R Roth *Making Women Pay: The Hidden Costs of Fetal Rights* (2000) 6.

87 Ibid.

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"Maternal-foetal conflict" fails to include other elements of a pregnant woman's identity and broader context.[88] Not all pregnant women are mothers, some only becoming mothers upon giving birth (unless the woman plans for her future child to be adopted).[89] Roth argues that referring to pregnant women as "mothers" before they have given birth creates an image of a mother which suggests that she should hold the qualities of being selfless and being prepared to perform those duties generally associated with motherhood.[90] With that in mind, this phrase implies that pregnant women have failed to demonstrate these important motherly qualities, and these women are perceived as engaging in a social wrong. Additionally, the phrase turns a foetus into a child.[91] Consequently, cultural expectations and legal standards of parental duty then apply to pregnant women and the foetus assumes the position of a separate entity and engages in conflict with the pregnant woman.[92] Here, all attention is focused the pregnant woman instead of focusing on her environment and the responsibilities of others (individuals or institutions).[93]

Since it is the purpose of this thesis to move beyond the adversarial approach, the phrase "maternal-foetal conflict" will be avoided. Using "tension between female reproductive autonomy rights and foetal interests" is less adversarial and more pragmatic to the fact that the foetus and pregnant woman are in constant connection until birth. "Tension" identifies the fact that there are differently structured needs or interests which causes a certain degree of difficulty and this requires a continuous process of giving and taking until a healthy outcome is reached. Focus on "female autonomy" opens the opportunity for a wider contextual understanding of women. "Foetal interests" indicates that this is not an issue of the unborn having rights nor does this term create the impression that one is dealing with a child. This places the issue in very clear terms.

This thesis will now go on to consider the first part, namely: What factors contribute towards developing a pregnancy environment characterised by a tension?

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88 Roth *Making Women Pay* 6.
89 Ibid.
90 Roth *Making Women Pay* 6. More on this is covered in ch 7 when South African scholars' work is considered and again in part 3 of this thesis when researching the position in the United States.
91 Ibid.
92 Roth *Making Women Pay* 6.
93 Ibid.

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PART ONE

The Development of, and Contributors to an Adversarial Pregnancy Environment Based

Part one aims to determine what factors contributed to some pregnancies taking on an adversarial nature.[1] In this thesis an adversarial pregnancy environment refers to an environment where the existence of a pregnancy, usually symbolising a physical and metaphysical "bond" between women and the unborn, is turned into a relationship characterised by tension between opposing "parties", where one "party's" interests or rights are advanced to the detriment of the other "party's" interests or rights. Here, the "parties" involved in this sort of environment include pregnant women, the unborn, and third parties. Third parties include persons (such as fathers-to-be, family members, or members of the community), or institutions (such as the medical profession and the state), who have an interest in developing foetal life and who wish to secure healthy foetal outcomes.

Pregnant women can be found in one corner. In this corner, using feminism as the umbrella example of women's aims, women seek the freedom to move beyond their historically rooted subordinate and reproductive role. Much is invested in following self-defined directions, achieving substantive equality and autonomy within their societies. These efforts include the realisation of female reproductive freedom which inevitably entails preventing procreation in cases of parenthood circumvention, ensuring bodily integrity and protecting autonomous existence during pregnancy and birth. In each instance women are advancing themselves, above that of third-parties interests.

While women are pushing forward as equal and autonomous agents, there is a simultaneous movement found in the opposite corner, this is constructed as including third parties and the unborn whom they have laid claim to. Here, these parties look to intervene in pregnancies based on the grounds that they have an interest in securing

[1] This statement is qualified to only some women because not all women will find themselves experiencing their pregnancies as adversarial. Ch 7 of this thesis will show the typical scenarios where this environment is experienced by pregnant women.

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healthy foetal outcomes. Their claim to the unborn is achieved by detaching or disembodying the unborn from pregnant women's and treating the unborn as separate entities in need of individualised consideration and, at times, protection from the vulnerability of being in an unborn state.[2] In this respect, third parties "speak" or act for the unborn they are not carrying in order to secure optimal foetal outcomes.

A tension arises between the two sides because in order for third parties to speak and act for the unborn they will have to pass through women and possibly derail women's sought-after inner direction (autonomy). This can end up with women being treated as a means to an end rather than being treated as means unto themselves. It is this very scenario that some women are pushing to avoid. A tension thus arises between the notions of female autonomy rights and foetal interests during the continuation of a pregnancy in this sort of environment. However, this construction of an adversarial pregnancy environment does not instil the positon that pregnant women view their unborn as adversaries, nor that they purposely act contrary to the demands linked to healthy pregnancy outcomes. Rather, it is the process of removing the unborn from the female body that informs the adversarial experience of pregnancy since it entails having non-pregnant third parties speak and act for the unborn and thereby directly render women as reproductive agents.

Part one consists of three chapters. To start, chapter two provides a snippet into the history of women and unborn and shows that this adversarial environment is more of a contemporary issue and then sources some possible contributors towards the development of a tension between pregnant women and foetal interests. The fact that women and the unborn generally existed on a level playing field, being under the head of a household, is a probable reason why there was not much room for a tension to arise between the two. However, two developments change the dynamics of this scenario: feminism (as a female-advancing social movement) and medical technology (as a foetus-individuating development). The discussion of feminism under chapter three shows that as women respond to their unfortunate history of unequal citizenship

[2] The vulnerability of being in an unborn state lies in the fact that the unborn can be seen to be held in a relationship of dominance because they are wholly reliant on another's body and therefore have no say about what happens to them or the environment in which they are developing. This vulnerability encourages others to intercept and act for them.

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the levelled playing field changes because women begin to assert their sense of autonomy foremost. They move towards being self-determined agents vested with reproductive freedom which means that they are no longer directed by externally defined domestic or reproductive roles. Chapter four shows that as women are achieving those ends scientific technology introduces objective evidence of life before birth leading to a move beyond maternal experiences of pregnancy towards public pregnancies. Technological developments in reproductive health assist in identifying the unborn as something more than as merely being part of the pregnant body (like an organ) and individualising the unborn as something separate from the pregnant body (foetal individuation). These developments offer the opportunity for third parties to indirectly experience pregnancy by eliciting a sense of connection between the unborn and the public to the exclusion of pregnant women. In essence it can be argued that we are left with a three-party pregnancy in one body which inevitably creates fertile ground for tensions to arise.

In the end part one shows that it is the intersection between women's response to their historical existence and the simultaneous development of individuated foetal life is what readies the notion pf a tension between female reproductive autonomy and foetal interests. Furthermore, part one also highlights what is at stake when trying to address the tension between female autonomy rights and foetal interests. Women's drive for equality as born members of humanity and the value vested in prenatal life is deeply rooted in the fabric of various societies in the West and it is therefore important to take these considerations into account when attempting to develop a sound response to addressing this tension during pregnancy.

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Chapter Two

A Snippet of the History of Women and the Unborn in Antiquity and the Middle Ages

2 1 Introduction

In a bid to determine whether there is an historical account of an adversarial pregnancy environment this chapter looks at the social status of women and the unborn in pre-modern times. Further, chapter two attempts to trace the evolution of the status of women and the unborn and examines how these evolved perceptions undermined or advanced the needs of either unborn or women.

Chapter two contrasts the roles of Christianity and the state, and looks at how each institution influenced the lives of women and the independent (but non-scientific) recognition of the unborn. What becomes apparent is that women's subsidiary position is maintained in both secular law and the later developed Christian teachings while the unborn receive increased consideration and protection as societies move towards Christian ethics. It is important to take notice of the role of Christian ethics because although the Church and state developed and functioned independently, secular law came to rely on the moral code of the Church in areas concerning marriage, sexual practices and morality, and property rights.[1] Further, the notion of crime contains the moral issue of sin for which punishment is required.[2] Here, the state was viewed as an agent of God and its purpose was to control sinful individuals on earth.[3]

While there is no obvious historical account of an adversarial pregnancy environment, the merger of the state and religion does show that process of developing an adversarial environment begins to take root. The undercurrents of this situation proves unfortunate for women since they are held in a position of subservience through

1 C Jeffery "The Development of Crime in Early English Society" (1957) 47 *J Crim Law Criminol Police Sci* 647 664. Also see O Robinson, T Fergus & W Gordon *An Introduction to European Legal History* (1985) 123.
2 Ibid. Jeffery (652) states that the concept of crime developed as it did as a result of the interaction between the state and the church.
3 Jeffery (1957) *J Crim Law Criminol Police Sci* 652.

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religion and law, both with socially wide-reaching scope, and the unborn are elevated in God's name which is later secured in law.

This historical study focuses on historical development in the West and this is due to the fact that the historical foundations of the South African and American legal systems can all be traced back to the western development of European law. To start, ancient Greek laws influenced Roman law which infiltrated Europe after the fall of the Western Roman Empire.[4] The spread of Roman law in Europe led to wide reaching reception of Roman law principles in Europe including the German Reich with Holland as one of its feudal dependencies.[5] The reception of Roman law in Holland gave rise to the union of Roman-Dutch law.[6] This legal system was brought to the shores of South Africa in 1652 when the Cape of Good Hope was occupied by Netherlands by Jan van Riebeeck from the Dutch East Indian Company.[7] England was somewhat exempt[8] from European reception of Roman law, but developed its own common law system.[9] This law was received into the United States,[10] and South Africa.[11] In line with these linkages, this historical study focuses on the western development and evolution of women and the unborn, spanning from Ancient Greece, through Rome and into western European societies.

This chapter takes on a descriptive tone of the lives of free women[12] and the unborn as derived from secondary sources.[13] What follows is not intended to be a complete

4 H Hahlo & E Khan *The South African Legal System and its Background* (1973) 484-485.
5 Hahlo & Khan *The South African Legal System and its Background* 484.
6 Hahlo & Khan *The South African Legal System and its Background* 514-517.
7 Hahlo & Khan *The South African Legal System and its Background* 525.
8 Hahlo & Khan *The South African Legal System and its Background* 504. Hahlo & Kahn point out that although England did not wholly receive Roman law, the Norman Conquest brought England closer to the rest of the continent which was influenced by Roman laws. For a more comprehensive account of the connection between the English and Roman law, see Hahlo & Khan *South African Legal System and its Background* 504-508. Also see, Robinson et al *European Legal History* 208.
9 Robinson et al *European Legal History* 205-256.
10 A Morrison (ed) *Fundamentals of American Law* (1996) 9-14; W Burnham *Introduction to the Law and Legal System of the United States* (1995) 1-2; 39; 42.
11 Hahlo & Khan *South African Legal System and its Background* 575-578. Hahlo & Khan state that the adoption of English laws took place by "a kind of osmosis" without the enacting any legislation to that effect (574), and changes to the Roman-Dutch system began to take place in 1795 (567).
12 A free person was one who did not have a master and did not have to live to serve a master, see D Schaps "What was Free about a Free Athenian Woman?" (1998) 128 *TAPhA* 161 163; 165; J Gardener *Women in Roman Law and Society* (1986) 205-231.
13 Before delving into this topic, a number of methodological weaknesses must be recognised when taking on an historical study of this nature. The author of this thesis is not an historian and is thus forced to rely on secondary sources that are characteristically interpretative. This poses a number

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historical account[14] but rather a general overview of the position of the unborn, the regulation of female sexuality, and women's economic, political, and cultural roles in antiquity and the Middle Ages.

2 2 Ancient Greek Women

The position that women enjoyed in the ancient Greek society is a matter of much debate.[15] However, research indicates that with the introduction of fifth century urban city states (oligarchies) women faced increased chastity and seclusion.[16] These states were characteristically governed by a small group of people (free men that were citizens) and were merely a federation of households (*oikoi*) under the power of individual patriarchs.[17] According to Foxhall, a household was considered a

of problems with respect to the content of the historical accounts discussed in this chapter and must be noted here. First, not all historical texts survived the ages. Those texts that did survive may not have survived intact. Consequently one may be left with an incomplete picture of a particular topic. Second, historical texts that did survive were drafted in a language not known to the present author (ancient Greek, Latin or Hebrew for instance) and the secondary sources considered in this chapter represent a translation of these historical texts. It is submitted that having to rely on translated works and interpretations creates the risk of losing a certain amount of contextual understanding of a topic, and the tone of the texts cannot be personally evaluated. Second, issues arise when evaluating the content of ancient or Medieval texts. A number of authors have alluded to the fact that existing texts are notoriously empty of the lived experiences of different social classes, particularly women and children within these classes. In this respect, see M Wiesner-Hanks "World History and the History of Women, Gender, and Sexuality" (2007) 18 *J World Hist* 53; R Karris "Invisible women" (2005) 39 *MMF* 15; J Loengard "Legal History and the Medieval Englishwoman: A Fragmented View" (1986) 4 *LHR* 161. For those texts that do mention the "invisible" portions of ancient populations, the texts mainly represent the views and experiences of wealthy, educated men. For instance see M Kaufman "Spare Ribs: The Conception of Women in the Middle Ages and the Renaissance" (1973) 56 *Soundings* 139 140-141, Kaufman, in the context of literary works, argues that our image of the Middle Ages is informed by literature which is subject to the artist's personal, unconscious prejudices and conscious distortions, all meshed together through the prism of the artist's imagination. He states further (141-140) that Medieval literature was mainly produced by aristocratic men that represent a very small portion of the total Medieval population, however contemporary scholars and authors rarely question the validity of the depiction of women presented by these historical personalities. Kaufman's (140) arguments can also be applied to non-literary texts and to those texts originating from ancient Greece and Rome since literacy (for purposes of record keeping and legislative drafting) was a skill reserved for privileged men. Consequently, for purposes of this chapter it is important to recognise that women's lives and experiences were not widely documented and where women's concerns were documented it was very rarely done by women themselves. We are left with a distorted and incomplete view of women, pregnancy and the unborn in antiquity and the Middle Ages which impacts on the quality of the information presented in this chapter. Also see generally Wiesner-Hanks (2007) *J World Hist* 53; Karris (2005) *MMF* 15; Loengard (1986) *LHR* 161 who also allude to these concerns.

14 A complete account would be impossible, see fn above.

15 A McLaren *History of Contraception: From Antiquity to the Present Day* (1990) 14. Also see M Katz "Ideology and 'the Status of Women' in Ancient Greece" (1992) 31 *H&T* 70 72-82 where the author gives an overview of the divergent interpretations of the status of ancient Greek women.

16 McLaren *History of Contraception* 15.

17 Ibid.

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fundamental building block of ancient Greek society since it was the primary space for expression of age and sex roles, affinity, socialisation and economic cooperation.[18] A household not only included a wife and children but also slaves and property.[19]

McLaren states that it was under this system of households that females became domesticated.[20] Without referring to any authority, he asserts that Greek laws held that women had no life outside the household.[21] However Arthur demystifies the position and states that the concept of "household" (*oikos*) itself was a legal principle that defined all aspects of a woman's position: "The state was conceived as a union of *oikoi*, each of which was an association of husband, wife, children and slaves, together with property which supported them and whose growth their association was designed to promote."[22]

Greek society is said to have had a very clear divide between public and private life. Women's lives were secluded from men and it seems their roles were played out in the private world of the household where they were responsible for its efficient operation.[23] Women fell under the head of the household,[24] (being her husband or father) and all decisions were made by him.[25] Only men could operate in the public world (beyond the boundaries of the household) and Foxhall asserts that the head of the household worked on behalf of his household or in consensus with it.[26]

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18 L Foxhall "Household, Gender and Property in Classical Athens" (1989) 39 *CQ* 22.
19 McLaren *History of Contraception* 15.
20 Ibid.
21 McLaren *History of Contraception* 15. Oddly, McLaren does not refer to any such laws.
22 McLaren *History of Contraception* 31-32.
23 Foxhall (1989) *CQ* 30.
24 Emphasising the effect of different classes, Schaps ((1998) *TAPhA* 164; 167-177) explains that belonging to the head of a household must be distinguished from being a master's slave. He states that free Athenian women were subordinated to free Athenian men and the relationship was one of affection. This was not the case for the relationship shared between a master and slaves. Generally free women had more independence than a slave since they could not merely be sold, detained or beaten, they were entitled to have and express an opinion, free women sometimes had their own slaves and could even divorce their husbands. However their dependence was always subject to the head of the household.
25 Foxhall (1989) *CQ* 30. M Arthur "Early Greece: The Origins of the Western Attitude toward Women" (1973) 6 *Arethusa* 33 states that upon marriage, a woman was technically only "loaned out" to another family for the purpose of producing a legitimate heir.
26 Foxhall (1989) *CQ* 31.

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A woman could not legally represent herself or her interests, every woman needed to be represented by the head of the household (being her *kyrios* meaning representative or guardian).[27] This impacted on women's ability to own or control property.[28] At most, women were vested with "informal" powers to transact or deal with property but only to the extent that her *kyrios* made provision for this to happen.[29] This construction left women dependent on men on two levels, intimately within the household and formally within the public sphere since women's relations with her *kyrios* was instrumental in advancing her interests.[30] Arthur argues that as long as women continued to be associated to the private spheres of life, they would appear to be "a sub-species of humanity", a mere aspect of men's existence.[31] She argues further that the social and legal structure of this ancient Greek state factually endorsed and prescribed the subservience of women and this took away an existence in their own right.[32]

McLaren asserts that marriage played a fundamental role in Greek society, the purpose for marriage was to produce heirs and only males were recognised heirs.[33] The ideal household was self-sufficient, with a fertile wife that produced children who could assist in maintaining the property.[34] Although the wife's fertility was honoured in a household, it was just as important to not produce too many heirs since that would cause the family's wealth to be divided up between too many claimants.[35] According to McLean, the ideal familial structure would consist of one son to maintain the family name and one daughter to fortify an alliance with another family through marriage.[36]

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27 S Johnstone "Women, Property, and Surveillance in Classical Athens" (2003) 22 *CA* 247.
28 Ibid.
29 Johnstone (2003) *CA* 248. Johnstone states that this "informal" power has been interpreted as "freedom" for women. For instance see, generally, Foxhall ((1989) *CQ* 22) who argues that a woman's dowry gave her leverage in her relationship with her husband, because if she was unhappy she could divorce her husband and take her dowry with her (39). However Johnstone ((2003) *CA* 269) points out that if her husband resists returning the dowry, the woman would have to get her father to litigate on her behalf. This demonstrates that a woman's attempt to gain control is ultimately dependant on a man.
30 Johnstone (2003) *CA* 269.
31 Arthur (1973) *Arethusa* 36.
32 Ibid.
33 McLaren *History of Contraception* 16.
34 McLaren *History of Contraception* 17. The wife was tasked with directing the domestic slaves and at times enjoyed temporary power when her husband was away.
35 Ibid.
36 McLaren *History of Contraception* 17.

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This notion of the ideal Greek household and city state could only be successfully achieved if reproduction was controlled.[37] Consequently, while it was important to have a family the ancient Greeks did not view the arrival of every child as a blessing.[38] The goal of population control was very clear and six fertility control methods were identified: divorce, remarriage and adoption for purposes of gaining an heir; and contraception, termination of pregnancy and exposure for purposes of decreasing potential heirs.[39] This thesis is concerned more with the methods adopted to decrease potential heirs since this practise goes against foetal interests.

It is noteworthy that fertility control was primarily a women's business based on "female knowledge".[40] The presence of this "knowledge" indicates that women saw themselves as actively having control over their fate and it indicates a serious intention to gain control over procreation.[41] Fertility control practices varied and included breastfeeding, herbal potions, obscure barrier methods and vaginal suppositories.[42] McLaren asserts that women had a very poor understanding of their menstrual cycle and therefore the rhythm method, if employed, would not have been very successful.[43] In the case where all attempts to curb fertility failed, women believed they could remedy the problem with magic in the form of protective amulets and talismans.[44]

In the case where conception occurred despite adopting the above mentioned methods of fertility control, women had access to termination-of-pregnancy procedures. In fact, there is evidence Greek philosophers advocated the use of termination of pregnancies as a method of population control.[45] For instance, Aristotle called for the employment of termination of pregnancies to regulate fertility and he described a termination of pregnancy as "to have a miscarriage induced before sense

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37 Ibid.
38 McLaren *History of Contraception* 17.
39 Ibid.
40 McLaren *History of Contraception* 26; 28.
41 McLaren *History of Contraception* 28.
42 McLaren *History of Contraception* 26; 27.
43 McLaren *History of Contraception* 27.
44 McLaren *History of Contraception* 28. For instance, McLaren (28) refers to the work of Pedanius Dioscorides (40-90 AD) who authored a five-volume encyclopaedia on herbal medicine and Dioscorides asserted that an asparagus root amulet will ensure infertility.
45 McLaren *History of Contraception* 18; R Feen "Abortion and Exposure in Ancient Greece: Assessing the Status of the Fetus and 'Newborn' from Classical Sources" in W Bondeson, H Engelhardt, S Spicker & D Winship (eds) *Abortion and the Status of the Fetus* (1983) 289.

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and life had begun in the embryo".[46] However, terminating a pregnancy was not the preferred method of fertility control because it placed women at risk since it usually required the use of violence and further required "outside" assistance or instruction especially in cases where complications were experienced.[47]

Although ancient medical texts described termination of pregnancy as being practiced in secret there is no evidence that there were any laws against terminating a pregnancy.[48] The absence of laws on the topic did not mean that women were free to terminate pregnancies as they wished; women had to obtain permission from their husbands (if married) or fathers (if unmarried).[49] In the case where an unmarried woman fell pregnant she was expected to terminate her pregnancy in order to save herself and her father great dishonour.[50] McLaren and Feen state that terminating a pregnancy was only ever considered wrong if it was done without the permission of a husband or father.[51] The heads of the households (father or husband) were the only people recognised as competent to adequately judge the issue on whether a pregnancy should be terminated or not.[52] Further, his permission was required because the termination of a pregnancy denied him of heirs; it cheated him of hopes and the continuity of his name.[53] McLaren states that if a woman who terminated her pregnancy without her husband's or father's permission she may be condemned to death.[54]

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46 McLaren *History of Contraception* 18. The issue of "sense of life" will be discussed in para 2 3.

47 28. Other contraceptive methods fell within the intimate sphere of a woman's life. In the case where termination of pregnancy is required she had to move beyond her intimate "female knowledge".

48 McLaren *History of Contraception* 29. Also see S Dickison "Abortion in Antiquity" (1973) 6 *Arethusa* 159. Reviewing the work of Professor Nardi (E Nardi *Procurato Abortio Nel Mondo Greco Romano* (1971)) she agrees with Nardi finding that there is no demonstrable evidence of the existence of any laws what so ever against abortion, all that is mentioned in the available sources is that women terminated their pregnancies even though it placed their health at great risk.

49 McLaren *History of Contraception* 32; Feen "Abortion and Exposure in Ancient Greece" 291. In the case of a divorced woman, she had the option of exposing the child if the father did not recognise the child, see McLaren *A History of Contraception* 33.

50 McLaren *History of Contraception* 32.

51 Ibid.

52 McLaren *History of Contraception* 32.

53 Ibid.

54 McLaren *History of Contraception* 32. He states that the fact that there were sanctions imposed against women who did not have their husband's permission presupposes that women did act on their own.

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Public tolerance of abortion is understandable when placed in the context of exposing children. According to Dickison, exposure was a relatively common practice.[55] Only the father of the child had the right of exposing the child since he had no duty to accept his children.[56]

During the period spanning 320-30 BC (the Hellenistic period) women's status changed. Although women were still excluded from political life and still subordinated, Cantarella asserts that this period saw a growing respect towards women since there were increased opportunities for women to participate in social life, and their legal capacities were extended.[57]

Despite the continued requirement of a guardian's consent, women were able to personally buy and sell goods and property; mortgage their property; give and obtain loans; draft wills; be heirs; and inherit legacies.[58] Widows or women who were not legally married were vested with fairly broad powers over their daughters since these women were entitled to expose their daughters, place them in apprenticeship or even arrange for their marriages.[59] Cantarella[60] also goes on to provide evidence of women exercising political power,[61] however she states that these women achieved this power as representatives of a dead sovereign or they would manage to assume those sorts of positions through the use of abuse and violence.

Further, literature from this era did not depict women as "misfortune", but as persons with both good and bad qualities.[62] Misogyny was still present but with different

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55 Dickison (1973) *Arethusa* 166; C Patterson "'Not Worth the Rearing': The Causes of Infant Exposure in Ancient Greece" (1985) 115 *TAPhA* 103. For more on exposure, see Feen "Abortion and Exposure" 115; 118.

56 McLaren *History of Contraception* 34-34; Feen "Abortion and Exposure in Ancient Greece" 285. McLaren (33) states that the extent to which exposure was adopted is not clear and he suggests that it was unlikely that the elite practised exposure.

57 E Cantarella *Pandora's Daughters: The Role and Status of Women in Greek and Roman Society* (1981) 90. She points out that it is not clear what caused this change but theorises that contributing factors may include the fact that the city-state was replaced by monarchs and the influences of these political systems or it may simply be the fact that classical values crumbled in the new system.

58 Cantarella *Pandora's Daughters* 91.

59 Ibid.

60 Cantarella *Pandora's Daughters* 92.

61 For instance Cantarella (92) refers to Olympias (mother of Alexander the Great) who played an influential role in the Macedonian court and exercised governmental power while Alexander the Great was away fighting the Persians.

62 Cantarella *Pandora's Daughters* 93-97.

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undertones. Previously misogyny was an expression of excluding women by denouncing their significance in society, theorising their inferiority and highlighting their "negative" powers.[63] Cantarella argues that misogyny in the Hellenistic era was "simple misogyny of those who see their own certainties wavering and defend themselves by translating the old prejudices into a sort of popular wisdom. They rely on a series of clichés and precepts of supposed common sense to reassert the now anachronistic commonplaces".[64] She argues that this sort of misogyny is a sign and a consequence of the fact that for the first time in history, Greeks had to acknowledge the presence of women.[65]

According to Cantarella, it is in this era that the dignity of the individual woman began to be recognised.[66] She argues that women rebelled against subordination to male power on the ground of autonomy.[67]

2 3 The Unborn in Greek Antiquity

If termination of pregnancy and exposure were restricted only by the head of a household, it leaves one questioning how the unborn were perceived in ancient Greek society. Feen states that in the concept of life revolved around the principle of "ensoulment" being a metaphysical speculation rather than a biological process.[68] Accordingly, a soul was the source or cause of life.[69] Greeks believed that there were a variety of souls: nutritive souls for plants; sensitive souls for animals and rational souls for humans.[70] Feen states that some Greeks believed that the unborn would go through an entire transformation of souls as it developed, from the nutritive soul of a plant, to a sensitive soul of an animal and then eventually a human rational soul.[71]

63 Cantarella *Pandora's Daughters* 97.
64 Cantarella *Pandora's Daughters* 98.
65 Ibid.
66 Cantarella *Pandora's Daughters* 97.
67 Cantarella *Pandora's Daughters* 91. Cantarella refers to a Hellenistic law that a father had the power to interrupt his daughter's marriage. This was challenged in the second century by a daughter arguing against her father's powers stating that a father cannot remove a daughter from a marriage without her "will".
68 Feen "Abortion and Exposure in Ancient Greece" 293.
69 Ibid.
70 McLaren *History of Contraception* 31; Feen "Abortion and Exposure in Ancient Greece" 293.
71 Feen "Abortion and Exposure in Ancient Greece" 293.

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According to Gunstan, it was believed that the soul is what gave a substance or organism its characteristic form.[72]

It is not clear when an unborn was vested with a rational soul but according to McLaren[73] and Feen,[74] it was believed that a male unborn was not endowed with a rational soul until 30 days (Hippocrates) or 40 days (Aristotle) after conception. A female unborn was only ensouled with rationality 80 days (Hippocrates) or 90 days (Aristotle) after conception.[75] Aristotle did believe that the unborn were alive from a very early stage but only in the same way as a vegetable was.[76]

It must be remembered that according to Aristotle, the termination of a pregnancy could only take place before "sense and life had begun in the embryo".[77] In this context "sense" is synonymous with movement and "life" with ensoulment. Feen states that "ensoulment" or "life" refers to the sensitive soul of an animal and he cautions that it would be a mistake to associate a rational soul of a human being to foetal movement.[78] A rational soul was required for thought processes.[79] Therefore Feen argues that Aristotle most likely viewed an embryo with "sense and life" as potential human life with a potential rational soul and a pregnancy should not be terminated at this point because of what the embryo might become, rather than what it had become.[80] Contrary to Feen's assertions, Gunstan has interpreted Aristotle's work as endowing a formed foetus (being one that is recognisably human) with a rational soul.[81] Feen states that it is not clear what the ancient Greeks held to be the most plausible approach to ensoulment but evidence seems to indicate that it was generally accepted that rationality occurred at birth with the newborn's first breath.[82]

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72 G Gunstan "The Moral Status of the Human Embryo: A Tradition Recalled" (1984) 1 *J Med Ethics* 38 39.
73 McLaren *History of Contraception* 31.
74 Feen "Abortion and Exposure in Ancient Greece" 294.
75 McLaren *History of Contraception* 31. It was believed that females took longer to be "ensouled" because females were "thinner" so it took some time for them to coagulate.
76 McLaren *History of Contraception* 31. For more on Aristotle's theory see, N Ford *When did I Begin? Conception of the Human Individual in History, Philosophy and Science* (1988) 19-36.
77 McLaren *History of Contraception* 18.
78 Feen "Abortion and Exposure in Ancient Greece" 294.
79 Ibid.
80 Feen "Abortion and Exposure in Ancient Greece" 294..
81 Gunstan (1984) *J Med Ethics* 39; Ford *When did I Begin?* 38.
82 Feen "Abortion and Exposure in Ancient Greece" 295.

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Aristotle's approach distinguishes between a "formed" and "unformed" unborn: An "unformed" foetus was one that did not hold "sense" and "life".[83] The sex of the foetus and foetal movement indicated the presence of life and sensation.[84] Sex of a foetus was determined with reference to the position of the foetus in the uterus.[85] Further, it was believed that female unborn began to move at four months after conception, while male unborn moved at three months after conception.[86] Dickison argues that it was Aristotle who was the first to ever make this distinction and attach significance to it.[87] In fact Aristotle's distinction regarding foetal development is historically significant. It is the sole contribution of Greek thought to later ecclesiastical legislation regarding termination of pregnancies and thus played a fundamental role in Roman law on termination of pregnancies.[88] According to Ford Aristotle's theory dominated the field of reproduction for two thousand years because no one was able to challenge his position with any popular support from the masses; his theory held its ground well into the eighteenth century.[89]

Despite the Greek's position on ensoulment, it seems the unborn was not more than a potential human being and was regarded as part of the pregnant woman's body until birth.[90]

With an understanding of beliefs on ensoulment, one would naturally think that birth would hold significant meaning since at that point the foetus is separated from the mother's body and can breathe and is thus worthy of protection. This was not the case. It was only once a new born infant had been named and accepted into the family by the head of the household (through a public naming ceremony) that it could be said that the infant entered a meaningful and recognised life.[91] Consequently, there was a distinction between the murder of a newly born child named and recognised as a

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83 Dickison (1973) *Arethusa* 165.
84 Ibid.
85 McLaren *History of Contraception* 21.
86 McLaren *History of Contraception* 31. For more on ancient theories of reproduction see J Landels "An Ancient Account of Reproduction" (1979) 44 *Biol Hum Aff* 94.
87 Dickison (1973) *Arethusa* 165.
88 R Huser *The Crime of Abortion in Canon Law: An Historical Synopsis and Commentary* DCL Dissertation, Catholic University of America (1942) 5.
89 Ford *When did I Begin?* 36.
90 McLaren *History of Contraception* 31.
91 Patterson (1985) *TAPhA* 106-107.

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member of a family and the exposure of an infant in the first few days of birth.[92] The difference does not lie in the nature of the action taken but rather in the status of the "victim".[93] Patterson stresses that exposure was a limited and a specific act affecting a newborn that has no place within the family unit, whereas murder could only be committed against a child that had been named and accepted into the household.[94] Patterson argues that only "child-murder" was legally prohibited but not exposure.[95]

The act of terminating a pregnancy or exposure seemed to impute some form of reprehensibility. Patterson refers to inscriptions found in Ptolemais (the ancient capital of Cyencaica) that prescribes periods of purification after performing certain acts.[96] Those who engaged in sexual intercourse, recently gave birth, terminated a pregnancy or exposed a newly born, were required to undergo a purification period.[97] In the case of termination of pregnancy and exposure, the purification period was relatively longer compared to that indicated for sexual intercourse or child birth.[98] However, Patterson states that prescribing periods of purification was not an indication of moral or legal reprehensibility but rather suggests that termination of pregnancy and exposure were "serious sources of pollution in the eyes of the frames of sacred law and perhaps in society in general".[99]

In the context of ancient Greek history, the literature considered portrays both women and unborn as agents employed to advance the needs of a male dominated society. At this point in history an adversarial pregnancy environment is not even on the horizon since there is no clear tension between the interests of women and the unborn, at least not to the extent that is being experienced in modern day where pregnant women and unborn are being pitted against one another.

92 Patterson (1985) *TAPhA* 105.
93 Ibid.
94 Patterson (1985) *TAPhA* 105. Also see Feen "Abortion and Exposure in Ancient Greece" 287.
95 Patterson (1985) *TAPhA* 106. Patterson justifies this statement with reference to Solon's laws which declared that selling one's children into slavery was unlawful, thus Patterson concludes that killing one's named and accepted child was also unlawful.
96 Patterson (1985) *TAPhA* 106.
97 Ibid.
98 Patterson (1985) *TAPhA* 106.
99 Ibid.

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2 4 Ancient Roman Women

From its earliest days,[100] Roman law reflected a deeply patriarchal society where male citizens qualified as heads of family (*paterfamilias*) and only men were vested with full rights.[101] A family (*familia*) included a *paterfamilias*, a wife, biological children, slaves, wet nurses, tutors and foster children.[102] All family members were subject to the *paterfamilias*.[103] The *paterfamilias* was declared to have complete power, until his death, over both married and unmarried children.[104] Some hold the view that in the early Republic a father's powers went so far as to vest him with the right to kill those belonging to his household.[105] However, other have asserted that this is merely a rhetorical assertion of the immense power men held within a household.[106]

According to McLaren the idea behind having a family was to maintain prestige and wealth and thus marriage was a method to achieve this.[107] Marriage ensured children since children conserved the household, maintained the estate, carried the family

[100] Ancient Roman history began with the rise of the Republic in 753 BC which existed until 30 BC. The Republic is subdivided by early Republic (510-270 BC); middle Republic (270-120 BC); and late Republic (120-30 BC). The Roman Empire emerged during 30 BC-410 AD. It was during the early Republic that the Romans became involved in the affairs of Greek provinces and eventually Greece became a Roman province in 146 BC. Consequently there was a lot of Greek influence in Roman culture and this will be evident from the discussion that follows since it covers the years before and after the Roman takeover of Greece. Time line obtained from Fleming "Timeline of Greek & Roman Antiquity".

[101] Cantarella *Pandora's Daughters* 113.

[102] McLaren *History of Contraception* 43.

[103] Ibid.

[104] McLaren *History of Contraception* 43. It was only once the *paterfamilias* died that his direct descendants were liberated, see Cantarella *Pandora's Daughters* 115.

[105] McLaren *History of Contraception* 43; Cantarella *Pandora's Daughters* 109.

[106] See B Shaw "Raising and Killing Children: Two Roman Myths" (2001) 54 *Mnemosyne* 31 56-76. Shaw argues that Roman fathers were never vested with such all-encompassing rights and references to this sort of power of life and death is merely a rhetorical assertion of the great powers of a father. Shaw covers this topic extensively but his various assertions will not be discussed, the point being made is that there is some doubt whether a *paterfamilias* truly held the power of life and death.

[107] McLaren *History of Contraception* 43. There were two laws that confirmed the importance of marriage and marriage ethics in Rome: *Lex Lulia de Maritandis Ordinibus* (18 BC) and *Lex Papia Poppaea Nuptialis* (9 BC). These two laws were later merged into the *Lex Lulia et Papaia*. Essentially these laws stipulated that one could only marry another from an appropriate age group and that a marriage had to be fertile. In the case were couple procreated they were granted certain rewards and sanctions were imposed on those who had no children. In this regard, see Cantarella *Pandora's Daughters* 122.

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name and forged important family alliances.[108] Heirs were considered to be integral a household and there are reports that wives were sometimes shared.[109]

Roman women[110] were believed to be "freer" than Greek women because they were not segregated from men; they dined with their husbands and were not forbidden to venture out in the streets.[111] However, according to Shaw married Roman women were guarded to see that they did not stray from the realm their husband's authority and neighbours and friends were regularly called on to maintain surveillance over absent husband's wives.[112]

Generally women played a domestic role and Cantarella asserts their lives were meticulously planned for the primary purpose of reproduction.[113] Women did not possess individual names; generally a woman was named after her origin in relation to a group of families to which her family belonged and her individual family name or

[108] McLaren *History of Contraception* 46. Also see B Shaw "The Family in Late Antiquity: The Experience of Augustine" (1987) *Past Present* 3 12. However, there are contrary views concerning this construction of marriage. For instance see B Dennis "Love: Another Aspect of Roman Marriage" (2006) <http://www.brandonmdennis.com/pdfs/Non%20Fiction%20-%20Love%20-%20Another%20Aspect%20of%20Roman%20Marriage.pdf> (accessed 15 March 2013). Although Dennis' work is academically questionable to the extent that his self-published paper lacks authority, he never the less raises compelling arguments concerning love in Roman marriages. Dennis states most historical accounts concerning marriage are in the form of legal documents of the elite pertaining to divorce, dowries, property ownership and money. He moves away from these sorts of documents and considers inscriptions on tombstones and it is here that he found expressions of love and affection towards deceased wives. On this basis, Dennis concludes that there must have been love in marriages, in addition to the legal formalities. Searching for love in marriages, one is also induced to be influenced by the theme love found in Roman poetry (for instance see O Kiefer *Sexual Life in Ancient Rome* (1934) 178), however Kaufman ((1973) *Soundings* 140) warns that literary texts are never a precise record of reality and states that literary texts are "feigned history"; far from a "slice of reality". On women in Roman life, Kiefer (*Sexual Life in Ancient Rome* 25) accepts that Romans married to have children and that if love developed between husband and wife it was a fortunate accident rather than a rule. This position is confirmed in C Reid "Marriage in its Procreative Dimension: The Meaning of the Institution of Marriage through the Ages" (2008-2009) 6 *U St Thomas LJ* 454. Reid states (454) that modern shifts in legal norms and public philosophies detach themselves from the fact that marriage was a procreative tool, and it is submitted that the shift in searching for love in Roman marriages is an example of this philosophical shift. This is not to say that there was no love in marriages but the underlying primary reason for marriage may not have been for love.

[109] McLaren *History of Contraception* 47.

[110] According to Cantarella (*Pandora's Daughters* 114) female slaves were mere objects rather than subjects of law. Female slaves were responsible for household chores and they had to make themselves available to males members of the family for sexual gratification. Female slaves could not marry but merely engage in relationships which could be interrupted at any time and she also held no right over her children. For a general overview of female slaves, see, J Gardener *Women in Roman Law and Society* 205-231.

[111] McLaren *History of Contraception* 45; Cantarella *Pandora's Daughters* 134.

[112] Shaw (1987) *Past Present* 30-31.

[113] Cantarella *Pandora's Daughters* 109.

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the feminine form of her father's name.[114] Cantarella interprets this practice as indicating how women were perceived: They were a fraction of a family, anonymous and passive.[115] Further, Shaw describes married Roman women as "a species of domestic property".[116]

A woman did not enjoy any political rights, and civil rights could only be exercised with the consent of her formally appointed male guardian.[117] In the fifth century BC, Roman women could inherit, own and bequeath property but only to the extent that they were formally represented by their guardian.[118] Women were placed under guardianship for life since it was believed that they were unable to take care of themselves as a result of the "frivolity of their spirit".[119] Cantarella views guardianship as a means to nullify women's legal capacities.[120]

Despite the implementation of a guardianship system there were mechanisms available to women to escape this imposition through the *ius Liberorum*. Roman authorities actively sought to encourage population growth.[121] Roman culture praised and rewarded fertility; and motherhood was a means to enhancing a woman's social status.[122] On this basis, the *ius Liberorum* established that once a free woman had three children she would be freed from guardianship.[123] The *ius Liberorum* includes a rather cynical undertone: Women were held under guardianship in order to gain advantage of their reproductive capacities to achieve the Roman goal of population growth. This suggests a measure of coercion to perform the "public duty" of procreation and it seems to imply that without the guidance of a guardian they could not be trusted to perform this duty voluntarily. Despite the potential "advantage" the

[114] Cantarella *Pandora's Daughters* 124.
[115] Cantarella *Pandora's Daughters* 126.
[116] Shaw (1987) *Past Present* 30.
[117] Cantarella *Pandora's Daughters* 113.
[118] McLaren *History of Contraception* 45.
[119] Cantarella *Pandora's Daughters* 122. Concerning the issue of guardianship, only males were considered capable of managing themselves and remained under guardianship until they reached fourteen years of age.
[120] Cantarella *Pandora's Daughters* 122. For a general overview and a descriptive account of the lives of Roman women, see G Clark "Roman Women" (1981) 28 *G&R* 193.
[121] McLaren *History of Contraception* 42.
[122] McLaren *History of Contraception* 47. Fertility was very important; the groom's family were known to send midwives to examine the prospective wife's uterus in order to determine whether she was deemed fertile or not (49).
[123] Cantarella *Pandora's Daughters* 123.

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ius Liberorum offered, there was a compelling need to limit the amount of children per household.[124] Romans understood that having too many children could potentially threaten the household; and McLaren explains that even one child was thought to be a strain and to have three or more children was considered to be the exception rather than a norm.[125]

Fertility control was a very important aspect for the household, even though it was viewed as a "female problem".[126] Numerous methods were adopted to curb fertility and unwanted newly-born infants. Women (incorrectly) employed the rhythm method, drank herbal teas and used cedar gum as a barrier method.[127] Evidence suggests that women used pessaries, suppositories, plugs and douches made of olive oil and white lead or alum.[128] Women also wore amulets and talismans.[129]

Where contraceptive methods failed, women could attempt to terminate their pregnancies provided it was with the consent of the *paterfamilias*.[130] During the Republican period there were no laws against the termination of pregnancies.[131] However, McLaren asserts that it was considered insubordination if a woman terminated a pregnancy for her own purposes as she was perceived to be motivated by self-centeredness.[132] Midwives performed termination of pregnancies and doctors were only ever involved with the procedure if it was believed that a pregnant woman's life was in danger.[133]

McLaren argues that generally, fertility control was limited to the "practical solution" of killing, sale or exposure of excess children.[134] According to Harris exposure was

[124] McLaren *History of Contraception* 50.
[125] McLaren *History of Contraception* 51.
[126] McLaren *History of Contraception* 47.
[127] Roman women believed that it was necessary to avoid sex during the days that immediately followed menstruation, see McLaren *A History of Contraception* 57; K Hopkins "Contraception in the Roman Empire" (1965) 8 *CSSH* 124 140.
[128] McLaren *History of Contraception* 58; Hopkins (1965) *CSSH* 134.
[129] McLaren *History of Contraception* 59; Hopkins (1965) *CSSH* 124. McLaren (54) states that upper-class Roman women had good reason to employ contraceptive methods because they were married off earlier, they did not breastfeed and by restricting their fertility these women were able to secure substantial inheritances for already existing children.
[130] McLaren *History of Contraception* 61.
[131] McLaren *History of Contraception* 62.
[132] McLaren *History of Contraception* 61.
[133] McLaren *History of Contraception* 62.
[134] McLaren *History of Contraception* 52.

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commonly relied on because unlike contraception and termination pregnancies, it permitted the *paterfamilias* to choose the sex of his children.[135] The family's interests, as interpreted by the *paterfamilias*, dictated whether or not a new born would be accepted or not.[136] A *paterfamilias* held the right to sell any child, grandchild and any other descendent if it was considered necessary.[137] Exposure was also used to avoid extreme social embarrassment in cases where an infant was born to an unmarried woman.[138] It was practiced in times of despair, some slave women were known to expose their children because they were not prepared to bring them up into slavery and some divorced pregnant women were also known to make use of exposure.[139] This indicates that without security and support of a household a woman's reproductive capacity could be the source of great hardship and this encouraged the abandonment of wanted children.

As a result of the Roman's adherence to the concept that the *paterfamilias* held far-reaching power over his family effectively limited the state's ability to interfere in aspects pertaining to marriage, exposure, contraception and abortion.[140] However, during the Roman Empire (30 BC-410 AD), under Augustine (30 BC- 14 AD), the powers of a *paterfamilias* were curbed to the extent that he could no longer sell his children into slavery or send them to their death.[141] Justinian (527-565 AD) later declared that killing a child was the same as homicide.[142]

Cantarella argues that Roman women were freer and more aware of themselves during the early stages of the Empire.[143] Marriage was no longer a means of "transferring" a woman into another's family but progressively became an equal relationship based on the will of both parties involved.[144] Both men and women had

[135] W Harris "Child-Exposure in the Roman Empire" (1994) 84 *JRS* 1 11.
[136] McLaren *History of Contraception* 52.
[137] Cantarella *Pandora's Daughters* 116.
[138] Cantarella *Pandora's Daughters* 12-13.
[139] Cantarella *Pandora's Daughters* 14. Harris (18-19) states that there is evidence that exposed infants fed the demand for slaves and slave prostitutes since the person who rescued the infant was free to do what he pleased with the child.
[140] McLaren *History of Contraception* 42.
[141] Cantarella *Pandora's Daughters* 136.
[142] Ibid.
[143] Cantarella *Pandora's Daughters* 135.
[144] Cantarella *Pandora's Daughters* 136-137.

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the same right to divorce.[145] In the last centuries of the Republic, lifetime guardianship laws changed and a woman was able to replace their chosen guardian with one of her choice, one that she trusted.[146] Later under Claudius (14-68 AD) guardianship of free born women was abolished and under Constantine (274-337 AD) guardianship disappeared altogether.[147] Widows were granted the right to be guardians of their children and that later extended to natural mothers.[148] Women could also gain custody over their children where their husbands acted shamefully and women could inherit from their children and vice versa.[149]

In the first centuries of the Empire, women experienced wide-ranging emancipation to the extent that they enjoyed sexual freedom, developed intellectual interests, freely married and divorced, openly used contraceptives and terminated pregnancies, educated themselves and began to live outside the context of matrimony.[150] However, it seems emancipation was only enjoyed by the aristocracy, very little is known about other women who did not fall within that social class.[151]

Cantarella asserts that men thought very poorly of emancipated women because they were acting contrary to the old rule of subordination and family morality.[152] She refers to a number of Roman texts where men complain that wives have left their husbands for younger men; wives using their slaves to place their husbands under surveillance but refusing to be placed under surveillance themselves; wives wanting to "make love and not babies"; wives asking for consent to have lovers or engaging in affairs with doctors.[153] Some of the liberties enjoyed by women were viewed as a sign of a lack of self-control, selfishness and luxury.[154] The presence of these sorts of complaints indicates that women were not mere passive recipients of assigned reproductive

[145] Cantarella *Pandora's Daughters* 137. Where the intention to marry no longer existed, the parties were automatically divorced.
[146] Cantarella *Pandora's Daughters* 139.
[147] Ibid.
[148] Cantarella *Pandora's Daughters* 140.
[149] Ibid.
[150] Cantarella *Pandora's Daughters* 140-141.
[151] Cantarella *Pandora's Daughters* 142.
[152] Cantarella *Pandora's Daughters* 144.
[153] Ibid.
[154] Cantarella *Pandora's Daughters* 150.

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expectations but they were actively asserting and engaging their sense of autonomy in various ways.

In the first and second century AD, termination of pregnancies were vehemently opposed in cases where a woman terminates a pregnancy against her husband's wishes since it interfered with a husband's interests.[155] Initially, where a woman acted contrary to her husband's wishes it was considered a "matrimonial offence" and not illegal per se.[156] However, under the reign of Servus and Caracella (198-211 AD) termination of pregnancies without a husband's consent was criminalised for the first time in Roman history and it became a public concern.[157] The termination of a pregnancy was believed to have such catastrophic consequences for the family and since family morality was increasingly a public issue, termination of pregnancies could no longer constitute a private affair.[158] The first public sanction for termination of pregnancy without a husband's consent was exile.[159] Under these circumstances, it is not the termination of a pregnancy that is being punished but rather a woman's defiance.

Further, according to Cantarella the second century AD saw, for the first time, judicial "custody of the womb" for the benefit of a husband.[160] During the reign of Marcus Aurelius and Lucius Verus (138-192 AD), Rutilius Severus asked the emperors to resolve a problem he faced with his ex-wife.[161] He claimed she was pregnant (presumably with his child) and she denied the existence of a pregnancy.[162] The emperors decided that the woman should be examined by three midwives, and if she was found to be pregnant, she should be guarded to ensure that she did not terminate

[155] McLaren *History of Contraception* 62.
[156] Cantarella *Pandora's Daughters* 148-150.
[157] Cantarella *Pandora's Daughters* 165.
[158] Ibid.
[159] Cantarella *Pandora's Daughters* 165; Feen "Abortion and Exposure in Ancient Greece" 291.
[160] Cantarella *Pandora's Daughters* 149.
[161] Cantarella *Pandora's Daughters* 148
[162] Cantarella *Pandora's Daughters* 149

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the pregnancy.[163] Cantarella understands this to mean that emancipated women were women that could not be trusted.[164]

Under Constantine's reign (313 AD) Christians were granted religious freedom[165] and under Theodosius (379-385 AD) Christianity was declared the state's religion.[166] The introduction of Christianity saw further changes to relationships between men and women.[167] Marriage became monogamous[168] and permanent and it was preached that men and women had equal standing in a marriage.[169] Despite their equal setting in marriage, Christian teachings contradict this notion by explicitly referring to male superiority within the household and so the theme of comprehensive subordination of women returns to Rome again.[170] Eventually, Christianity became male dominated and hierarchical, calling for women to be increasingly conservative and return to their "natural" role.[171]

Chastity was also robustly enforced, since chastity was nearer to God than marriage. Chastity was a superior state of holy living that Romans were encouraged to aspire towards (even in marriage).[172] Sexual intercourse was only for those who were married and could only be used for purposes of procreation.[173] McLaren explains that if one engaged in sexual relations for pleasure and not procreation, it was regarded as

[163] Ibid. Cantarella does not mention the reason why Rutilius sought to protect the pregnancy from being terminated; it may be that he did not have any heirs or wanted a son. However the point remains that, regardless of his reasons, his actions can be perceived as indicating that only men could legitimately decide whether a pregnancy should be terminated and Cantarella argues that this implies that women who do terminate pregnancies did so for immoral reasons or to hide immoral reasons or to hide the "fruits of illicit relations".
[164] Cantarella *Pandora's Daughters* 149.
[165] Cantarella *Pandora's Daughters* 157.
[166] McLaren *History of Contraception* 76.
[167] Cantarella *Pandora's Daughters* 157.
[168] Under Constantine and Constans, in 339 AD, it was established that adulterers should be condemned to death by being burnt at that stake and in 506 AD a husband was granted the power to kill his wife. Under Justinian (526-565 AD) adulterers would face the penalty of detention. This is the first time in Roman history that punishment involved a complete limitation of a person's liberty and adultery was the first crime to ever be punished by the sanction of detention. See Cantarella *Pandora's Daughters* 163-164.
[169] Cantarella *Pandora's Daughters* 157.
[170] Cantarella *Pandora's Daughters* 158. Cantarella refers to numerous Christian works to substantiate her claim, for instance "man is the image of God, and the mirror of his glory, whereas women the glory of man"; "woman's head is man".
[171] McLaren *History of Contraception* 94.
[172] Cantarella *Pandora's Daughters* 167.
[173] McLaren *History of Contraception* 78.

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unnatural and perverse.[174] It was the drive towards chastity that led to the "demonizing" of women (except Virgin Mary) by church fathers since women represented "flesh and passions".[175] Under Augustine (354-430 AD), one of the great fathers of the early Christian Church, Christianity reached its peak of misogyny and women were regarded as temptation and "instruments of evil and sin" and according to Cantarella women's purpose was to bear children.[176]

Another significant development under the influence of Christianity was the shift in reasoning for criminalising termination of pregnancies and contraceptive practices.[177] Christians were concerned with the interests of the unborn and viewed the foetus as a living human being and on these grounds the criminalisation of termination of pregnancies was justified.[178] The basis of humanity also justified the position that exposure and infanticide constitute murder. [179]

Though the Church acknowledged that marriage and childbearing were burdensome to women, it nevertheless insisted on holding women accountable for engaging in the "sinful undertakings" of fertility control.[180] This attitude was maintained despite the fact that controlling reproductive capacity was for the benefit and wellbeing of the entire household.[181] In the case were economic considerations were advanced for justifying the use of fertility control, Christian fathers stressed that abstinence from sexual intercourse was the only permissible tactic.[182] In fact, McLaren states that church

[174] McLaren *History of Contraception* 79-80.
[175] Cantarella *Pandora's Daughters* 169. Cantarella (169) considers some Christian writings of the time and refers to texts that describe women rather poorly. According to Turtullian (an early Christian theologian from 160-240 AD) women were the "gate of the devil." John Chrysostom (a church father) described women as having "infantile" minds. Clement of Alexandria (a Christian theologian from 150-215 AD) wrote that "women must seek wisdom, like men, even if men are superior and have first place in every field, at least if they are not too effeminate."
[176] Cantarella *Pandora's Daughters* 170. McLaren (*History of Contraception* 79) states that Augustine asserted that a marriage could be defended if it produced children, fidelity and continence. Love was considered to be a destructive passion and dangerous if involved in a marriage. Further, sex was symbolised as the fall from grace and the source of disorder; impotency, frigidity and erections were all uncontrolled and demonstrated a man's enslavement to lust.
[177] McLaren *History of Contraception* 73. The author states: "If stop signs imply the existence of traffic, the clergy's ongoing condemnations of abortion and contraception can at the very least be taken as evidence of the continued employment of such practices."
[178] McLaren *History of Contraception* 73; Cantarella *Pandora's Daughters* 148. More on the Christian position concerning the life of the unborn will be discussed below.
[179] McLaren *History of Contraception* 81.
[180] McLaren *History of Contraception* 90.
[181] Ibid.
[182] McLaren *History of Contraception* 90.

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fathers played down the "economic" argument because it implicated men in the issue.[183] Thus, Christianity placed the spotlight on women, being those to blame for the need for fertility control because they were portrayed as being driven by lust.[184]

In spite of the Church's position women were still attracted to Christianity because it offered them a "legitimate alternative" to the extent that Christians teaching stressed celibacy and thus offered women the option of avoiding marriage and childbearing.[185] Further, McLaren states that there was a genuine desire to overcome and redefine sex roles.[186] Traditionally, marriage and childbearing were policed by men in order to serve their own interests whereas Christianity brought with it an alternative way of life away from marriage altogether since virginity was holier than marriage.[187]

2 5 The Unborn in Rome

During the Republic era and early centuries of the Roman Empire a foetus did not have an independent existence until birth.[188] Feen states that this approach was drawn from the work of the Stoics (an ancient Greek philosophical school that held much influence during the period of the Roman Empire) who believed that a soul existed in the body of the unborn in a "potential" form and that once a newborn breathed after birth, the air actualised the potential through a cooling process.[189] At most the unborn held a *spes animantis*, being a hope of living or being ensouled.[190] Until birth, the unborn were considered to form part of pregnant women's bodies, similar to that of fruit from a tree.[191] Consequently, McLaren points out that if a *paterfamilias* opposed a pregnancy termination it was probably because it was contrary to his own interests and not because he was defending the life of the unborn as a valued entity.[192]

[183] Ibid.
[184] McLaren *History of Contraception* 90.
[185] McLaren *History of Contraception* 88.
[186] Ibid.
[187] McLaren *History of Contraception* 88.
[188] McLaren *History of Contraception* 61.
[189] Feen "Abortion and Exposure in Ancient Greece" 295.
[190] McLaren *History of Contraception* 82.
[191] Feen "Abortion and Exposure in Ancient Greece" 295.
[192] McLaren *History of Contraception* 61.

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As with the Greeks, live birth was not a significant occurrence for Romans. Roman infants were worse off than Greek infants since all Roman children were subject to the power of life and death that the *paterfamilias* held in his household.[193] This power endowed a father the right to put his child to death, even after he recognised the child as part of the *familia*.[194] However, this power was eventually removed as Christian morals began to take hold in the Roman Empire.[195]

With the introduction of Christianity, the approach to the life of the unborn changed. Christian concern for the life of the unborn can be traced back to the third century BC when the Old Testament was first translated into Greek.[196] According to the Greek version of the Exodus text (21: 22-23), if an unformed foetus is dislodged from a woman's uterus as a result of a blow, that person is liable to pay compensation.[197] In the case where the foetus was formed, the party had to "give life for life" and thus sentenced to death.[198] Huser points out that Greek and Latin translations of the Exodus text differs.[199] According to the Latin translation compensation[200] had to be paid by the person who accidentally caused the termination of pregnancy and if the pregnant woman died as a result of the accidental conduct, that person would be sentenced to death.[201]

McLaren points out that, in the Greek translation, there is a clear shift of focus from the life of a woman to the "life" of the foetus.[202] According to Huser, the Greek translation elevated the status of a formed unborn to that of a human being.[203] Of further significance, Huser states that it is the Greek translation that was broadcast

[193] K Brennan "Evidence of Infanticide and Exposure in Antiquity: Tolerated Social Practice, Uncontrolled Phenomenon or Regulated Custom" (2002) 2 *U C Dublin L Rev* 92 104.
[194] Ibid. According to Brennan (105), this power could not be exercised arbitrarily and the *paterfamilias* was required to consult with kinsmen of the child before he was permitted to make a decision concerning the fate of the child.
[195] Brennan (2002) *U C Dublin L Rev* 107.
[196] McLaren *History of Contraception* 82.
[197] Huser *The Crime of Abortion in Canon Law* 6.
[198] Ibid.
[199] Huser *The Crime of Abortion in Canon Law* 6.
[200] According to McLaren (*History of Contraception* 82), compensation was determined with reference to the stage of foetal development.
[201] Huser *The Crime of Abortion in Canon Law* 6. It is noteworthy that there is no mention of intentionally terminating a pregnancy by a third party or by the pregnant woman herself. Huser argues that use of "accidental" indicates that voluntary termination of pregnancies was not a prevalent practice among the Jews and their immediate neighbours.
[202] McLaren *History of Contraception* 82.
[203] Huser *The Crime of Abortion in Canon Law* 6.

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throughout the Roman world and it proved to be a great influence on Roman laws and moral doctrines.[204] In Rome, Christianity introduced the moral view that termination of pregnancy was a serious sin and a heinous crime since it caused the death of a human person even though unborn.[205] The Church condemned termination of pregnancy as a violation against the unborn itself.[206]

Religious teachings each had their own contributions to make concerning these translations. Philo of Alexandria (a Jewish biblical philosopher during the period 20 BC-50 AD) followed Aristotle's assertion that a foetus gains "sense and life" after 40 days, but he also adopted the Stoic's position that the foetus was part of a woman's body until birth, however he condemned exposure and the termination of a pregnancy in the case of a formed foetus.[207] Augustine did not believe that a foetus was fully formed at the moment of conception and he held the view only once a foetus became fully formed and "endowed with sensation" could one speak of a "soul living in the body".[208] Thus, Augustine asserted that a woman who terminated a pregnancy of an unformed foetus was guilty of "perversion", but if the foetus was formed, she would be guilty of homicide.[209]

While on the other hand, conciliar legislation stemming from various Christian councils ignored the distinction between formed or unformed foetuses and simply lumped termination of pregnancies with infanticide.[210] According to Huser, the Council of Elvira (305 AD) was the first council to enact legislation to punish termination of pregnancies by being refused communion for life (even on her death bed).[211] Huser states the council's position was incredibly influential in the centuries to follow, to the extent that

[204] Huser *The Crime of Abortion in Canon Law* 8.
[205] Huser *The Crime of Abortion in Canon Law* 12.
[206] Ibid.
[207] McLaren *History of Contraception* 82.
[208] McLaren *History of Contraception* 83.
[209] Ibid.
[210] McLaren *History of Contraception* 83-84. This chapter serves to develop an overview of foetuses and women in antiquity therefore it is not possible to indulge all the historical arguments available. It is noted that are diverging positions and reference is made to a number of these views in order to provide an example of those arguments.
[211] This is in terms of canon 63 of their conciliar legislation, see, Huser *The Crime of Abortion in Canon Law* 17

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it served the basis for the majority of ecclesiastical enactments against termination of pregnancies up into the Middle Ages.[212]

On the topic of Christian opposition to contraception, in antiquity, the distinction between fertility control and termination of pregnancies was rarely made, in fact the same medicines were prescribed as contraceptives and abortifacients.[213] For instance McLaren[214] and Hopkins[215] refer to the work of Soranus, a Greek physician practicing in Rome during the first or second century AD who stressed that contraception prevented conception, while termination of pregnancies destroyed what has been conceived. At that time, these assertions were rare and considered insignificant.[216] Hopkins states that there was a general lack of clarity about the concept of "contraception" even amongst the most educated and he argues that this may stem from the fact that ancient doctors were unable to tell when a pregnancy began nor were they able to agree about the length of gestation.[217] It was for this reason that Christians did not distinguish between termination of pregnancies and contraceptive methods.[218]

It needs to be mentioned that although the Church always held that it is a serious sin to terminate a pregnancy at any stage of development, the Church at various times accepted a distinction between formed for purposes of determining appropriate penalities.[219] In other words, generally the termination of pregnancies at any stage was offensive but the penalties for such conduct were graded according to the distinction of whether the foetus was formed or not.[220] In effect, canon law followed Augustine's position.[221] McLaren argues that condemnations of termination of pregnancies were based on the fact that the termination of a pregnancy was a "non-procreative act" rather than basing their condemnations on the argument that life was

[212] Huser *The Crime of Abortion in Canon Law* 21, for more on later conciliar legislation see 22-29.
[213] McLaren *History of Contraception* 84; Hopkins (1965) *CSSH* 136.
[214] McLaren *History of Contraception* 61.
[215] Hopkins (1965) *CSSH* 136-137.
[216] McLaren *History of Contraception* 61.
[217] Hopkins (1965) *CSSH* 138.
[218] McLaren *History of Contraception* 84.
[219] Huser *The Crime of Abortion in Canon Law* 1.
[220] Gunstan (1984) *J Med Ethics* 39.
[221] McLaren *History of Contraception* 84; Gunstan (1984) *J Med Ethics* 40; and see generally D Dombrowski "St. Augustine, Abortion, and Libido Crudelis" (1988) 49 *JHI* 151.

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present at conception.[222] In line with McLaren's assertion, McCartney points out that it is not the official teaching of the Church that a new human being exists from the moment of conception, Roman Church leadership sought to maintain a link between sexual activity and procreation.[223] Thus it follows that even if foetuses are not human beings, termination of pregnancies would still be "illegal".[224]

At the end of the Roman Empire there is a clear change in dynamics concerning women's lives in relation to unborn life, women's subordination was confirmed in Christianity but the life of the unborn was elevated in worth and seen to be deserving of protection. This indicates that the foetus receives individualised consideration and something separate from the body of the pregnant women. Although there is no obvious direct tension between women and foetuses at this point, this heralds the beginnings of a change in thinking processes where the needs of the unborn are being elevated above the needs of women.

2 6 Women in the Middle Ages

During the early Middle Ages[225] western barbarian states emerged; civilization was characterised by small clusters of rural societies which were violent, pagan or Arian Christian.[226] The sophisticated development of reproductive knowledge of the Greeks and Romans was lost mainly due to mass illiteracy and the Church was left to take on the role as keeper of Western culture where Romans and Franks were the major role players.[227]

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[222] McLaren *History of Contraception* 84.
[223] J McCartney "Some Roman Catholic Concepts of Persons and Their Implications for the Ontological Status of the Unborn" in W Bondeson, H Engelhardt, S Spicker & D Winship (eds) *Abortion and the Status of the Fetus* (1983) 313. In fact Gunstan ((1984) *J Med Ethics* 38) asserts it was only in the late nineteenth century that protection was granted from the moment of conception.
[224] McCartney "Some Roman Catholic Concepts of Persons" 313.
[225] Generally the Middle Ages (also referred to as Medieval times or Dark Ages) spans from the fall of the western Roman Empire in 476 until the end of the 15th century This timeframe can be subdivided into the early Middle Ages (476-999); the high Middle Ages (1000-1299); and the late Middle Ages (1300-1499). See S Newman "Timeline of the Middle Ages" *The Finer Times* <http://www.thefinertimes.com/Middle-Ages/timeline-of-the-middle-ages.html> (accessed 8 February 2013).
[226] McLaren *History of Contraception* 101.
[227] McLaren *History of Contraception* 102. Since this thesis focuses on the Western position of women and foetal interests, the focus of this section will be on the general position of Western societies of the Middle Ages.

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The older Roman style families disappeared and were replaced by a new system of balanced households.[228] In this context, women fell under men (husband, father or brother) and a number of scholars assert that they basically formed part of his property.[229] Paterson describes a medieval woman as a "transparent object of exchange between men: often virtually invisible, she functions as a trophy or reward for valorous service, as a status symbol, a channel of noble blood and property, or a means by which a man may avenge himself on another man (by seducing or raping that man's wife)".[230]

Hayden states that women had very little say about who they married and polygamy and abduction was common practice.[231] Marriage was viewed a means to an end and was generally driven by the need for property.[232] A marriage was sealed by the exchange of property and sexual intercourse; once those actions took place the wife "belonged" to her new husband.[233] Kaufman states that courtly love was a "fanciful rebelliousness" since women were generally denied the satisfaction of romantic fulfilment.[234] Noonan claims that during the high Middle Ages the Church required both man and woman to willingly consent to a marriage.[235] Nevertheless even he concedes

[228] Ibid.
[229] For instance see, V Bullough "Medieval Concepts of Adultery" (1997) 7 *Arthuriana* 5; F Buckstaff "Married Women's Property in Anglo-Saxon and Anglo-Norman Law and the Origin of the Common-Law Dower" (1893) 4 *Ann Am Acad Pol Soc Sci* 33 34; 41.
[230] L Paterson "Gender Negotiations in France during the Central Middle Ages: The Literary Evidence" in P Linehan & J Nelson (eds) *The Medieval World* (2003) 246 255. Paterson (259) points out that rape falls under *raptus* (meaning abduction), which comprised of the violation of another man's right over a woman's sexuality. Worse of all, a woman's interest in pursuing her attacker would be put aside if her husband or father felt that enforcing his rights would be an inconvenience to existing relations between himself and the attacker. This gives a good indication of position women held in medieval society. However Kaufman ((1973) *Soundings* 139) argues that the popular conclusion that mediaeval women were subjugated is partially as a result of what he calls "masculine historical rationalization". This assumes that modern women are much better off when compared to medieval women and its corollary, the "male argument from progress" which concludes that men are much more enlightened in modern days compared with the barbaric positions they held in medieval times. Kaufman (140) asserts that the "more we get ourselves to believe the sexual injustices of the 'Dark Ages,' the more we are able to persuade ourselves of our own evolutionary progress." Consequently, it is submitted that we must recognise "female subordination" statements cautiously.
[231] M Hayden "Women in the Middle Ages" (1913) 3 *Irish R* 282 285. On polygamy see McLaren *History of Contraception* 103.
[232] McLaren *History of Contraception* 103; Kaufman (1973) *Soundings* 145
[233] McLaren *History of Contraception* 103.
[234] Kaufman (1973) *Soundings* 145.
[235] See generally J Noonan "Marriage in the Middle Ages: Power to Choose" (1973) 4 *Viator* 419. He states that the Church has a vested interest in introducing consent as a requirement since the institution wanted to prevent compulsion being used as a ground for divorce.

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that the tension between the moral ideal and actual practise and between legal norm and social practise inevitably caused different approaches in different societies.[236]

Husbands held great authority over their wives and women rarely questioned this.[237] Divorce was readily available to men, even for the most frivolous of reasons.[238] According to Hayden, a husband could sell or punish his wife or even bequeath her to a friend upon his death. [239]

Kaufman argues that the above described position of women should be accepted as the position of wealthier upper class medieval society.[240] Accordingly, he argues that when one looks at lower social classes, where prestige and power are not real possibilities, one finds a structure of close knit extended kinship based on communal relations which were supported and allowed for sustenance.[241] The socio-economic conditions of the poor demanded that women be regarded as companions and spouses lived on equal footing.[242] Kaufman asserts that it was in this class division that women experienced autonomy in free labour because they played a real social and economic part in their society. On the hand, aristocratic society forges extensive land-holding economy and developed a system that maximised and profited from sexual division of labour.[243]

Generally Western European working class women enjoyed limited economic independence and were publically active.[244] Women's work was characteristically unskilled work (or at least considered such) and included domestic services, petty

[236] Noonan (1973) *Viator* 431.
[237] Hayden (1913) *Irish R* 285.
[238] Ibid.
[239] Hayden (1913) *Irish R* 285. Hayden (286) points out that there are many reports of women being brutally punished by their husbands but just as many reports of wives being treated with respect and confidence. Also see S Butler "Abortion by Assault: Violence against Pregnant Women in the Thirteenth-and-Fourteenth-Century England" (2005) 17 *JWH* 9 22.
[240] Kaufman (1973) *Soundings* 147.
[241] Ibid.
[242] Kaufman (1973) *Soundings* 147.
[243] Ibid.
[244] McLaren *History of Contraception* 106-107.

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retailers, midwifery and prostitution.[245] Some women were members of various gilds[246] but were never considered full members and were generally excluded from any benefits associated with membership to a particular gild.[247] In fact most gilds operated out of household workshops and women were incorporated as members of the household rather than workers in the gild.[248] The exclusion of women from full participation in gilds severely restricted their ability to peruse autonomous economic benefit especially since by the fourteenth century most urban trades were organised and regulated by gilds.[249]

Despite the subordinate role women faced at home they are found to have enjoyed more freedom than Roman women.[250] Women mingled freely in public among men and openly shared in their husbands' sorrows and triumphs.[251]

Loengard states that thirteenth century records demonstrate that a small minority unmarried adult women enjoyed property rights similar to that of men but for purposes of inheritance women were disadvantaged since property usually only passed to male heirs.[252] She argues that the real distinction concerning property rights lies in the distinction between men and single women on the one hand and men and married women on the other.[253] In this regard Buckstaff states that, according to Germanic tribes and later English tradition, only once a woman was married she would acquire a legal right to certain property in her own name which Buckstaff indicates as a clear break from the experiences of women from antiquity.[254] Nevertheless, when it came to management and control of a woman's income, her rights were generally

[245] M Kowaleski & J Bennett "Crafts, Gilds, and Women in the Middle Ages: Fifty Years After Marian K. Dale" (1989) 14 *Signs* 474 475.
[246] According to Kowalski & Bennett ((1989) *Signs* 474; 476) gilds were formed in order to bring people together who specialise in the same trade or craft for mutual social, religious and economic benefit and were notoriously male dominated.
[247] Kowalski & Bennett (1989) *Signs* 477-478.
[248] Kowalski & Bennett (1989) *Signs* 479.
[249] Ibid.
[250] McLaren *History of Contraception* 104.
[251] Hayden (1913) *Irish R* 286.
[252] Loengard (1986) 4 *LHR* 167.
[253] Ibid.
[254] Buckstaff (1893) *Ann Am Acad Pol Soc Sci* 39.

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suspended during her husband's life.[255] Hayden points out that as "free" as women were, in the background, husbands retained control.[256]

At this point in history there are records of increased alternatives available to women. Christianity brought in a different dimension to lives of women that went beyond marriage. These alternatives either offered women a substitute to married life or it offered them other principles to live by while married.[257] Women could turn to the Church in order to legitimately protect their interests. The attraction to religion was fuelled by the Church's preaching of monogamy and hostility towards divorce.[258] For those women who did not want to marry, the Church offered them the opportunity to live a life of celibacy in a nunnery.[259] However, not all women accepted the Church; Kaufman states that women were also attracted to mystical movements like the Beguines.[260] Beguines were groups of celibate laywomen who prayed and worshiped together but who took no permanent vows and followed no prescribed rules.[261] Stoner accepts the Beguines as one of the first feminist movements since these women rejected the Church's defined roles for women as either nuns or wives, and developed a unique freedom of movement, feminist religious expression, and economic independence.[262] Kaufman[263] describes the Beguines as threatening to the developed masculine ecclesiastic hierarchies and Stoner[264] points out that this was cause of their downfall.[265]

Medieval communities were interested in large families which led to an "obsession" with procreation.[266] Thus, McLaren asserts that a good wife was a fertile wife and

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[255] Ibid.
[256] Hayden (1913) *Irish R* 284.
[257] Hayden (1913) *Irish R* 289; McLaren *History of Contraception* 104.
[258] McLaren *History of Contraception* 104.
[259] Hayden (1913) *Irish R* 288.
[260] Kaufman (1973) *Soundings* 143.
[261] A Stoner "Sisters between Gender and the Medieval Beguines" (1995) 4 *Ex Post Facto* 29.
[262] Stoner 1995) 4 *Ex Post Facto* 29.
[263] Kaufman (1973) *Soundings* 143.
[264] Stoner 1995) 4 *Ex Post Facto* 29; 34-36.
[265] Also see generally C Neel "The Origins of the Beguines" (1989) 14 *Signs* 321.
[266] McLaren *History of Contraception* 109. In this regard, see F Harris-Stoertz "Pregnancy and Childbirth in the Twelfth- and Thirteenth-Century French and English Law" (2012) 21 *JHSex* 263 267. The author discusses the payment of *wergeld* which was a system of compensation where a money payment had to made to a family group if a member of that family were killed or injured. In this respect substantial sums of money had to be paid over if a person cause the death of a fertile or pregnant woman, or injured a pregnant woman causing the termination of her pregnancy. Harris-Stoertz argues that prescribed amounts payable is an indication of the seriousness of the crimes

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wives who bore many children were honouring their husbands.[267] Doctors asserted that sexual intercourse was essential for women's good health and the public actively approved of vigorous marital sexuality.[268]

The drive for large families also encouraged community surveillance of women of reproductive age.[269] Men's concern for and fear of women's reproductive power fed misogyny during the Middle Ages.[270] The Church presented female sexuality as dangerous and it was asserted that sex, if not deadly, could drive a man to early retirement or cause him to contract leprosy.[271] Sadly the Church did not recognise pregnancy as a potential threat to women's health; rather, the Church found that women were a risk to men's health.[272] McLaren argues that ultimately, the Church aimed to protect men from female domination (though their sexuality) and the Church called for women to be trained in submissiveness.[273]

Most fertility control mechanisms were aimed at increasing conception rather than preventing pregnancies or live births.[274] However, even with the drive for large families, in reality, family sizes were modest as a result of late marriages, high infant mortality rate and economic strain.[275] However, a number of scholars understand that smaller family sizes also indicate that women were limiting pregnancies.[276] Procreative control was deemed a woman's concern.[277] Besides facing economic pressures, women had a vested interest in limiting pregnancies in order to protect their health.[278] Pregnancies were limited by periodic sexual self-restraint (as advocated by the

committed against a family. For a general discussion of *wergelt* see, C Jeffery "The Development of Crime in Early English Society" (1957) 47 *J Crim Law Criminol Police Sci* 647 655.

267 McLaren *History of Contraception* 109.
268 McLaren *History of Contraception* 110.
269 Ibid.
270 McLaren *History of Contraception* 111. For some examples, see generally R Bloch "Medieval Misogyny: Woman as Riot" (1987) *Representations* 1.
271 McLaren *History of Contraception* 112.
272 McLaren *History of Contraception* 111.
273 McLaren *History of Contraception* 112.
274 McLaren *History of Contraception* 110.
275 C McCann "Fertility Control and Society in Medieval Europe" (2009) 40 *J Mediev Renaiss Stud* 45 47; McLaren *A History of Contraception* 113.
276 McCann (2009) *J Mediev Renaiss Stud* 47; McLaren *A History of Contraception* 113; B Miller "She Who Hath Drunk Any Potion..." (1962) 31 *Medium Aevum* 188 190-193. Also see generally, P Biller "Birth-Control in the West in the Thirteenth and Early Fourteenth Centuries" (1982) 94 *Past Present* 3.
277 McLaren *History of Contraception* 115.
278 McCann (2009) *J Mediev Renaiss Stud* 47; McLaren *History of Contraception* 115.

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Church)[279] and through the use of contraceptive mechanisms.[280] Contraceptive methods included herbal and magical potions, pessaries, amulets, suppositories, anal intercourse and *coitus interuptus*.[281]

Where contraceptive efforts failed, women could terminate pregnancies through the use of potions, pessaries or violent movements or blows to the uterus area.[282] Early termination of pregnancies (prior to ensoulment) held an ambiguous moral standing, on the one hand some doctors prescribed therapeutic terminations while others saw the termination of a pregnancy as a crime committed against the husband.[283] In the case where termination of pregnancy was a crime against the husband, he was entitled to divorce his wife on the grounds that she terminated her pregnancy.[284] The Church on the other hand, through its task of policing morality, condemned termination of pregnancies since it was an act against procreation and thus sinful.[285] The extent of the prescribed punishment depended on whether the unborn was formed or not.[286]

Exposure was also practiced and according to Boswell there were no secular laws preventing exposure of newly born infants.[287] It was mainly women who exposed infants but according to McLaren, this was usually done in accordance with their husbands' direction.[288] Roman, German and Scandinavian fathers continued to have the right to expose their children, this occurred in cases where the father refused

[279] McLaren *History of Contraception* 116. However, the church was more concerned with the immorality associated to non-procreative sex than with fertility control. To that extent the church also condemned women from "mounting" men, oral and anal sex since all these practises frustrated procreation (121).
[280] McLaren *History of Contraception* 116.
[281] McCann (2009) *J Mediev Renaiss Stud* 51-52; McLaren *History of Contraception* 119.
[282] McLaren *History of Contraception* 124. On the use of violence to terminate a pregnancy see S Butler "Abortion Medieval Style? Assaults on Pregnant Women in Later Medieval England" (2011) 40 *WS* 778. For more on potions that women took in order to terminate pregnancies see Miller (1962) *Medium Aevum* 190-193.
[283] McLaren *History of Contraception* 125.
[284] Ibid.
[285] McLaren *History of Contraception* 125.
[286] Gunstan (1984) *J Med Ethics* 39.
[287] J Boswell "*Expositio* and *Oblatio*: The Abandonment of Children and the Ancient and Medieval Family" (1984) 89 *AHR* 10 24. In fact, Boswell (28) argues that the only perceived problem with exposure was the fact parents might unknowingly have sexual intercourse with one of their abandoned children (in the case where the child is found and made to work as a prostitute) and Christians were concerned by the fact that the abandoned child is an indication that a couple engaged in sexual relations for pleasure rather than for procreative purposes.
[288] McLaren *History of Contraception* 127.

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accept the child into the family.[289] In fact it is widely supported that exposure was commonly practiced.[290]

Even though women faced certain risks during pregnancy and childbirth and there was a need to limit heirs within a family, there was still a very strong drive to ensure at least one legitimate heir to continue the family line (for nobility) and maintain access to land (for the less wealthy).[291] As a result of this increased interest in obtaining a legitimate heir, pregnant women were treated with great suspicion and according to Harris-Stoertz this is reflected in secular English law of the High Middle Ages.[292] For instance men had an interest in goings on of the "women only" birthing chamber because English law prescribed that the birth of an heir did not count if it was born dead, never heard crying or born a "monster".[293] This law proved problematic because women were not considered acceptable witnesses (they could not have direct access to court) and men were not allowed in the birthing room to witness the birth.[294] The man had to stand outside and wait to hear a wailing child since not even the women present for assisting during labour were trusted to conveying this critical information concerning an heir.[295] Harris-Stoertz sees the above example (along with others)[296] as an indication that men began to assert control over other issues that were primarily "womanly concerns".[297]

[289] Hayden (1913) *Irish R* 284; McLaren *History of Contraception* 127. Hayden asserts that it was only newly born females that were subject to this practice and not males; however McLaren does not make a distinction.
[290] McLaren *History of Contraception* 127. For more on exposure see S Butler "A Case of Indifference? Child Murder in Later Medieval England" (2007) 19 *JWH* 59 69-70; Boswell (1984) *AHR* 23; Also see generally E Coleman "Infanticide in the Early Middle Ages" in S Stuard (ed) *Women in Medieval Society* (1976) 47.
[291] F Harris-Stoertz "Pregnancy and Childbirth in the Twelfth- and Thirteenth-Century French and English Law" (2012) 21 *JHSex* 263 275.
[292] Ibid. This is particularly interesting because marriage and sexuality usually fell within the jurisdiction of the church.
[293] Harris-Stoertz (2012) *JHSex* 276. Being born a "monster" indicates that the neonate is born deformed.
[294] Ibid.
[295] Harris-Stoertz (2012) *JHSex* 276.
[296] For further examples see Harris-Stoertz (2012) *JHSex* 277-280.
[297] Harris-Stoertz (2012) *JHSex* 264.

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2 7 The Unborn in the Middle Ages

With Christianity guarding morality in the context of marriage and sexuality, the life of the unborn certainly fell within the Church's domain. However, the Middle Ages also saw the emergence of secular laws aimed at protecting the life of the unborn.

The issue of ensoulment came to the forefront once again and it was believed that an unborn became human once it had received its soul from God.[298] A prominent Dominican priest and philosopher, Thomas Aquinas (1225-1274) relied on Aristotle's work and asserted that the unborn progresses through various souls (first vegetative and then sensitive) until the unborn takes the form of a recognisably human body which occurs at 40 days for males and 90 days for females.[299] At this point the unborn is ensouled with a rational soul.[300] According to Haldane and Lee, Aquinas posited, that at the very least, the unborn must have the beginnings of organs (not necessarily fully developed organs that are immediately functional) in order for ensoulment to occur,[301] thus it must hold the potential for human life. However there were other positions as well, McLaren[302] refers to a text that explores foetal development titled *Anatomia Ricardi Anglici* where an author argues that, based on his observations of terminated pregnancies at various points of development, the unborn takes on a complete human form after 30 days after intercourse. According to this text, "vitality" could only be detected at 60-70 days.[303]

This understanding of ensoulment informed the Middle Ages Church in its position against termination of pregnancies but this distinction was only used for purposes of classifying and distinguishing penalties.[304] To cause the termination of a pregnancy

[298] See generally J Haldane & L Patrick "Aquinas on Human Ensoulment, Abortion and the Value of Life" (2003) 78 *Philosophy* 255.
[299] Harris-Stoertz (2012) *JHSex* 266.
[300] Ibid.
[301] Harris-Stoertz (2012) *JHSex* 266.
[302] McLaren *History of Contraception* 126. However, Aquinas' position held its place in Christian history against termination of pregnancies. According to Haldane & Lee ((2003) *Philosophy* 261) the Catholic Church itself has made reference to his views and referred to his position as the position informing the Church's stance on termination of pregnancy in the past.
[303] McLaren *History of Contraception* 126.
[304] D DeMarco "The Roman Catholic Church *and* Abortion: An Historical Perspective Part 1" *CatholicCulture.Org* <http://www.catholicculture.org/culture/library/view.cfm?id=336> (accessed 4 February 2013) 4. Also see D De Marco "The Roman Catholic Church *and* Abortion: An Historical Perspective Part 2" *CatholicCulture.Org*

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prior to ensoulment was still considered a sin in the eyes of the Church but it would be equal to a lesser sin such as that of contraceptive use.[305] However, if a termination of pregnancy occurred after ensoulment, it would be considered homicide.[306] Noonan points out that the act of terminating a pregnancy was a crime against God since it destroyed what He created and an offence against love of one's neighbour because it was a *type* of killing.[307] This is a continuation of the Roman position where the woman's husband is removed as the victim of the act of terminating a pregnancy. As a result of the poor understanding of foetal development, the concept of ensoulment was vague to say the least, but accepting a delay in ensoulment helped justify leniency towards early termination of pregnancies.[308]

On the issue of therapeutic termination of pregnancies, Haldane and Lee refer to the work of the Archbishop of Florence, Antoninus (1389-1453) who held that a pregnancy may not be terminated after ensoulment even in the case where a pregnant woman's life may be at stake.[309] Further, Antoninus asserted that a pregnant woman may not bring on her own death in order to save the "life" of an ensouled unborn.[310] It seems that in this sort of scenario it was left to God (as the Creator) to determine the outcome of a pregnancy since it was argued by both Aquinas and Antoninus that one cannot commit homicide in order to avoid another evil.[311]

This is not to say that there were no practices or policies in place to save the lives of the unborn in case where pregnant women passed away during labour. In the case

<http://www.catholicculture.org/culture/library/view.cfm?recnum=3362> (accessed 4 February 2013).

[305] Haldane & Patrick (2003) *Philosophy* 261.

[306] Haldane & Patrick (2003) *Philosophy* 262. It must be noted that the church's condemnations were merely based on morality and it was only in 1917 that the termination of a pregnancy prior to ensoulment was considered homicide, see McLaren *History of Contraception* 126.

[307] J Noonan "Christian Tradition and the Control of Human Reproduction" (1984) 4 *J Christ Juris* 1 8-9.

[308] Butler (2005) *JWH* 9; Haldane & Patrick (2003) *Philosophy* 261; McLaren *History of Contraception* 126.

[309] Haldane & Patrick (2003) *Philosophy* 262. Antoninus took his lead from Aquinas.

[310] Ibid. Research indicates that post-mortem caesarean deliveries were being practiced from as early as 600 BC. One of the earliest Kings of Rome enacted the *Lex Regia* which required the removal of the unborn before the burial of its mother. The purpose of this law is not clear since it cannot be ascertained whether this was done in an attempt to save the life of the unborn or whether it represented a burial practice, see J Boley "The History of Caesarean Section" (1991) 145 *Can Med Assoc J* 319.

[311] Haldane & Patrick (2003) *Philosophy* 262; S Lurie "The Changing Motives of Cesarean Section: From the Ancient World to the Twenty-First Century" (2005) 271 *Arch Gynecol Obstet* 281.

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where a pregnant woman did die during labour, the Church imposed obligatory post-mortem caesarean-section delivery in a bid to save the soul of the unborn by removing it from the woman's body in order to save its life and baptise the child once successfully delivered.[312] In the Middle Ages caesarean deliveries were never performed on living women since it was not considered to be a medical procedure that could save her life, but rather something that would hasten her death.[313] Thus, according to Lurie, caesarean-section delivery was more of a cultural event that was guarded by the Church since newly born lives were very rarely saved in this way but it was still preferred that the mother and foetus were buried separately.[314]

As a further example where the needs of the unborn are recognised Harris-Stoertz[315] refers to a Medieval English and French custom of suspending death sentences or physical punishment (mutilation and torture) in the case where the convicted person was a pregnant woman.[316] Once the woman gave birth or it was proven that she was not pregnant, her punishment would commence.[317] Here the object of concern is prenatal life alone since the pregnant woman's punishment is merely postponed.[318]

On the secular front, third party assaults on pregnant women and self-induced pregnancy terminations also received some attention in the Middle Ages and it was considered homicide if the unborn "died" as a result of this conduct.[319] All the focus was placed on the loss of prenatal life and not on the harm caused to a pregnant woman in the case of assault.[320] However the confusing theoretical basis concerning ensoulment tainted any legal efforts in this regard. McLaren refers to the early thirteenth century treatise, the Fleta which was the first English legal commentator's writings on termination of pregnancy.[321] McLaren quotes the Fleta as stating the following:[322]

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312 Lurie (2005) *Arch Gynecol Obstet* 282-283.
313 Ibid.
314 Lurie (2005) *Arch Gynecol Obstet*. According to Lurie (283) it was only during the Renaissance era that caesarean-section deliveries became medical procedures.
315 Harris-Stoertz (2012) *JHSex* 271.
316 She refers to French Laws of William, the Fleta and Britton.
317 Harris-Stoertz (2012) *JHSex* 271.
318 Ibid.
319 Harris-Stoertz (2012) *JHSex* 269.
320 Ibid.
321 McLaren *History of Contraception* 126.
322 McLaren *History of Contraception* 125.

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> He, too, in strictness is a homicide who has pressed upon a pregnant woman or has given her poison or has struck her in order to procure an abortion or to prevent contraception, if the foetus was already formed and quickened, and similarly he who has given or accepted poison with the intention of preventing procreation or conception. A woman also commits homicide if, by potion or the like, she destroys a quickened child in the womb.

According to this text, it was argued that the termination of a pregnancy after ensoulment was as serious a crime as the use of contraception.[323] The effectiveness of this legal treatise to address concerns for the wellbeing of the unborn is questionable. McLaren suggests that this law remained in place because it was so rarely relied upon.[324] One can draw from this that the intention to protect prenatal life was clearly present but since there was a lack of knowledge of foetal development this intention could not be realised effectively.

The secular position moved towards a more practical approach at the end of the Middle Ages and required live birth for the crime of homicide. The most influential statement depicting this shift is that of Sir Edward Coke (1552-1634), who stated:[325]

> If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered a dead childe, it is a great misprision and no murder, but if the childe be born alive and dyeth of the Potion, Battery, or other cause, this is murder, for in law it is accounted as a reasonable creature, in rerum natura, when it is born alive.

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[323] McLaren *History of Contraception* 126.

[324] Butler (2005) *JWH* 12; McLaren *History of Contraception* 126. This legal treatise is distinguishable from the church's position. As mentioned earlier the church considered the termination of a pregnancy after ensoulment to amount to murder while engaging in contraceptive practices was considered a lesser sin, see Harris-Stoertz (2012) *JHSex* 270.

[325] As quoted in G Casey *Born Alive: The Legal Status of the Unborn Child in England and the U.S.A* (2005) <www.ucd.ie/philosophy/staff/gerardcasey/casey/BornAlive.pdf> (accessed 8 February 2013) 16.

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Casey[326] and Forsyth[327] argue that legal authorities are concerned with the evidentiary difficulties associated with proving the cause of a termination of pregnancy in the case where violence is inflicted on pregnant women or in cases where women terminated their pregnancies.[328] The live birth of a "quick childe" was required for purposes of murder,[329] thus quickening (or formation, according to Aristotle's approach) became an important point since it indicated proof of prenatal life in law and not only in religion anymore.[330] Also, according to Forsythe, this rule informs the law on termination of pregnancies, namely that a pregnancy should not be terminated after quickening.[331] This is the position that informed the law as it developed from the Middle Ages to present day and takes the form of what we understand today as being the born-alive rule.[332]

2 8 Concluding Remarks

The purpose of this historical study was to determine whether there is any historical record of a tension that existed between the interests of women and the unborn. Prior to the introduction of Christianity, both women and the unborn existed on a level playing field, under the authority of the head of a household. However, as Christianity is accepted and incorporated into the society's moral order, the life of the unborn gains an independent value protected by the Church in the name of God. Consequently the platform for tension between the needs of women and foetus begins to take form.

Starting with the position of women, a dominant and reoccurring theme of subordination becomes apparent. However, the true extent of subordination is questionable since authors vary in their account of female subordination. On the extreme end of the scale, women are presented as being wholly subordinated under man and they are portrayed as lacking the capacity to live a life beyond the domestic sphere. Authors describe woman's status as something that is intrinsically linked to a

[326] Casey *Born Alive* 17.
[327] C Forsythe "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms" (1987) 21 *Val UL Rev* 563.
[328] It must be noted that there are conflicting views as to whether this quotes serves as an evidentiary rule or a substantive rule of law.
[329] Casey *Born Alive* 16.
[330] Forsythe (1987) *Val UL Rev* 568. Forsythe (573) refers to this as the "quickening doctrine".
[331] Forsythe (1987) *Val UL Rev* 574.
[332] See generally Casey *Born Alive*; Forsythe (1987) 21 *Val UL Rev* 563.

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household to the extent that everything that describes her as an individual is traced back to the household of her husband or father. It is also argued that the stronghold over women in that time was so excessive that they could not control their reproductive capacities, a natural consequence of the female body, without their husband's consent. This representation of women is one sided and it must be remembered that this construction of extreme regulation over women is based on incomplete texts which are likely to have been authored by elite men and thus cannot be unquestioningly accepted as a true reflection of reality.

It would be incorrect to perceive women as absolutely passive recipients of this designated and overly regulated role. There are a number of subtle indications that some women actively exercised autonomy. For instance, the existence of regulations may be a signal of activity in a particular area therefore calling for the regulation of certain conduct. Consequently, the constant calls for training women in submissiveness, private seclusion, condemnations of fertility control and terminations of pregnancies all possibly indicate that women were not "adequately" submissive and did exist in the public sphere. It may also indicate that they continued to exert control over their bodies on a wide scale. Further, McLaren's[333] reference to "female knowledge" about fertility control and termination of pregnancy procedures indicate that despite the fact that women lacked skills like men, they still functioned in their space as human beings, and developed their own means of conveying important knowledge amongst themselves in order to care for and advance themselves free from the constraints of male regulation.[334] Further, Cantarella's description of Roman women engaging in sexual relations outside of marriage for non-procreative purposes also hints towards a deduction that women did not quietly accept nominated husbands and existed on a purely procreative level, they were also driven by desire and intimate relations. Another indication of women engaging their inner direction is the public participation in mystical cults described by Kaufman,[335] Stoner[336] and Neel.[337] In this

[333] McLaren *History of Contraception* 26; 28.
[334] Reference to "women's knowledge" also demonstrates that this knowledge is passed on from one woman to the next which can be interpreted as the existence of unwritten women's history. Thus, it would be logically unsound to except the available written texts as the only historical account of women.
[335] Kaufman (1973) *Soundings* 143.
[336] Stoner (1995) *Ex Post Facto* 29.
[337] Neel (1989) *Signs* 321.

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respect, women did not accept the male dominated Church or marriage as their only options; instead they actively united and followed a spiritual course on their own terms.

Various authors considered in this chapter recognise that as history progresses through the ages, women became “freer” since they are able to participate in gilds and public life generally. However, subordination (regardless of its scope) remains a constant theme. One can theorise that the fact that these freedoms did not liberate women from their household link may be the reason why women were granted those trivial freedoms since they would still be able to fulfil their designated role of wife, mother and caretaker. The Roman *ius Liberorum* and women’s limited participation in medieval gilds are some examples that support this theory.

When considering the position of the unborn, it becomes apparent that the regulation of women, particularly their reproductive capacity, is not done in order to advance the interests of the unborn but rather to advance the interests of the head of a household. Although Aristotle advocates a limitation on when a pregnancy can be terminated, the fact that there were no identified laws imposing some form of sanction for non-compliance indicates that a late termination of pregnancy may not have been an issue of great social concern. Further, in Greece, when a husband withheld permission to terminate a pregnancy it was because the birth held the potential benefit of advancing man’s patrimonial goals and not necessarily because the unborn had some form of intrinsic value. Accordingly, in ancient Greek history there does not seem to be any areas where a potential tension could arise. This may stem from the fact that neither women nor the unborn actually had any legally recognised interests to advance. Reproductive autonomy seems to be a concept that was not recognised nor were foetal interests, what can be seen is that women and the unborn seem to be positioned on the same level as one another.

However this position begins to change when Roman history is considered. As one moves into Roman history, towards the rise of Christianity, there is a shift in ideologies. The Church introduced a new moral and social philosophy: Humans were weak and immoral, born with original sin as a result of their fall from Eden and the purpose of life

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on earth was salvation which could be found in the Church.[338] Women were offered refuge from a life of marriage and the Church claimed sexual equality but according to Church teachings, women's sexuality needed to be controlled. Cantarella states that even though the political, social, and economic conditions changed from that of Greece, the essential issues surrounding women were the same.[339] Misogyny, although founded on new assumptions, was merely reconfirmed in Christian ideologies[340] and the fact that these ideologies come from a higher spiritual source solidifies women's perceived inferior position. McLaren states that as religion spreads the status of women declines.[341]

Christianity not only maintains the notion of female subordination but it also introduces an additional restriction on women. The Church held that all pregnancies, including unwanted ones, hold some form of value and this is achieved on a distorted understanding of foetal development as espoused by Aristotle. In this regard, it was believed that the life of the unborn had a value that originated from beyond the household and power of the *paterfamilias*. This position results in women's needs being held in abeyance not only for the benefit of her household and the *paterfamilias* but now also for the unborn. Here are the first indications where the interests of the unborn begin to be elevated above the needs of women. The Church's position of subordinating women and valuing the unborn continues into the Middle Ages.

While the advancement of women's interests remains somewhat static, there is an emergence of a new paradigm that an unborn holds a value independent to that of a pregnant woman. In Roman history we find vague examples of women being placed under various forms of surveillance in order to ensure the wellbeing of the unborn and later the mediaeval Church actively repudiates the notion therapeutic termination of "ensouled" pregnancies. Adding to the undercurrents of the situation, however "rebellious" women's individual actions were, women of these times did not consciously come together and bring about wide-spread social change, thus weakening their ability to change their position in reproduction thus adding to the

[338] Jeffery (1957) 47 *J Crim Law Criminol Police Sci* 652.
[339] Cantarella *Pandora's Daughters* 170.
[340] Ibid.
[341] McLaren *History of Contraception* 63.

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power of Church teachings and law's approach towards the value of prenatal life. Here one finds the beginnings of an environment that has the potential to foster a relationship where tensions may arise.

The remaining two chapters of part one go on to consider how female consciousness and medical technology contribute towards creating an adversarial pregnancy environment. The chapters explore how the phrase "reproductive autonomy rights" comes to life and how "foetal interests" get scientific backing. It will further be demonstrated that these concepts are developed in a way that each is left pitted against one another.

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Chapter Three

Responding to History: Female Consciousness, Feminism and Calls for Equality

3 1 Introduction

Broadly, part one of this thesis considers the development of an adversarial pregnancy environment which takes shape when women take a stand and speak for themselves on the one hand, and when the development of individualised foetal identity takes root on the other hand. This chapter, being the second portion of part one, focuses on the rise of collective female action in the form of feminism and refers to some of the wide reaching implications of feminist action.

As a break from a history of subordination and domestication, early modern history represents a hive of activity concerning, amongst other issues, the creation of an adversarial pregnancy environment. This chapter shows that with the influence of the renaissance, women begin to self-construct a platform for open, collective expression of will, female perspective and rejection of male-driven and defined practices. Women begin to question the 'norm' and assert their interests which culminates into the emergence of feminist views. Through collective power, women introduce alternative perspectives based on female insights and experiences. Consequently, they begin, and continue with, the process of changing the face of their traditional position to the extent that it does not suit their inner direction and experience of equality. These efforts are reflected in the feminisation of the law aimed at addressing issues particular to women and removing the masculine as the "norm" or yardstick. Feminists contribute towards opening the door for equality with respect decisions concerning marriage, reproduction, education and professionalism. Specifically for this thesis, it is their call for reproductive freedom that contributes towards the development of pregnancy adversarialism since this sort of freedom is primarily concerned with women's interests as a foremost concern rather than focusing purely on prenatal value and advancement.

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The purpose of this chapter is threefold. First, it contributes towards understanding women's position within the development of an adversarial pregnancy environment, not as ill-intentioned instigators but as activists calling for freedom and equality in order to determine their own direction and for control over that. It must be noted that it is not women's feminist activities that are considered to be the cause of an adversarial pregnancy environment but rather an additional factor, that when squared up against the development of individualised foetal identity and third parties acting on foetal individuation, an adversarial pregnancy environment comes to the fore.[1] Second, this chapter provides context in that as women begin to self-construct their platform for freedom and equality, this allows for specific issues to be addressed with respect to reproduction (or non-reproduction), pregnancy, childbearing and childrearing. Consequently this chapter sets the scene for the later consideration of contemporary concerns where a tension arises in law and this is discussed in part two of this thesis. Third, chapter three adds to an understanding of the relational tone of this thesis within the wider feminist discourse. Subsequently, while this chapter is not a critique of feminism and feminist theory, it does draw on relational feminism in part four of this thesis and in that respect it is necessary to engage with feminism in order to progress through the thesis with an informed background.

Chapter three goes on to discuss a possible definition of feminism and looks at the three feminist waves.[2] In this respect, central feminist themes will be considered in each wave, and their main successes and shortfalls will be considered.[3] Thereafter,

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1 Ch 4 explores the rise of foetal identity and the theories advanced concerning why we value prenatal life.

2 There is discussion that a fourth wave of feminism is emerging but information concerning this development and its attributes are scarce which makes it difficult to consider fourth-wave feminism in this chapter. Donovan, in the Preface to her 2012 publication, briefly refers to "fourth-wave feminism" but states that it is too early to assign any wave-like social movement or events to this notion. In fact, she refers to this fourth-wave feminism as "putative" which indicates that there is not enough evidence of a social movement at present. In this respect, see J Donovan *Feminist Theory: The Intellectual Traditions* (2012) xiii-xiv. More recently, Munro considers whether we are facing a new wave of feminism and she opines that there is certainly something on the horizon. She locates this movement in contemporary internet and social networking usage and states that these forms of media have introduced a "call-out culture" whereby women call out and challenge sexism and misogyny. However, due to the closed nature of social networking these feminist discussions do not reach those who are not "sufficiently networked". Consequently, it is questionable whether this form of contemporary feminist activity points to any social or political reform. See, E Munro "Feminism: A Fourth Wave" (2013) 4 *Political Insight* 22.

3 In this chapter, relational feminism is not considered in detail since a detailed discussion will follow in ch 11 where the challenge to address the tension between female autonomy rights and foetal interests is brought to the fore.

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this chapter looks at how women's collective call for equality and reproductive freedom (as a means to achieve equality) meets and then clashes with foetal interests and third parties seeking to act for the interests of the unborn. This chapter proceeds on the premise that it is the feminist drive for equality that feeds into an adversarial pregnancy environment, particularly regarding reproduction because third parties have a vested interest in reproduction and prenatal life.[4] Third-parties interests in the unborn can be linked to development of foetal identity[5] and related theories of the value of foetal life which is the leverage required for justifying intervention in female choices concerning reproduction. This will become apparent through reading chapter four and merely serves to provide direction and context concerning the course of discussion to follow.

3 2 The Rise of Female Consciousness and Feminism

Lougee states that despite the fact that the Renaissance is well known for its advances in culture and material conditions of life, this period also brought with it increasing inequalities in social powers between men and women.[6] However, Becker-Cantarino argues that women, in their own capacity, enter history in the early modern period since there is a marked rise in feminist consciousness during this time.[7] At this point women became aware of the fact that they belonged to a subordinated group and as a result of being classified as part of this group, they had suffered wrongs.[8] Further, women progressively became aware that their suffering was not imposed on them through nature but was a result of societal structures.[9] This awareness developed into a sense of connectedness, and women began to develop an autonomous definition of goals and strategies to change their "unnatural" position.[10] Essentially, women developed alternative ideas or visions for their future.[11] These ideas took different,

4 A father-to-be will have an interest in the unborn as will medical professional in relation to their aims to promote healthy pregnancies, optimal foetal development and safe birth, and the state on the basis that it bears responsibility for the welfare of all citizens.
5 It is argued that women have always known the unborn they personally carry which knowledge develops through the process of gestation, however this cannot be said for third parties such as the medical profession, fathers-to-be or the state.
6 C Lougee "Modern European History" (1977) 2 *Signs* 628 633.
7 B Becker-Cantarino "'Feminist Consciousness' and 'Wicked Witches': Recent Studies on Women in Early Modern Europe" (1994) 20 *Signs* 152 154; 156.
8 Ibid.
9 Becker-Cantarino (1994) *Signs* 156.
10 Ibid.
11 Becker-Cantarino (1994) *Signs* 156.

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although not mutually exclusive, paths in order address the wrongs suffered. Stansell refers to these as "cracks" in social order and states that where cracks begin to appear, it inevitably comes to the attention of individuals who examine that particular area and widen the distance between what is supposed to be and what is.[12] Before looking at what actions women embarked on to agitate the cracks that appeared in the social order of the time, it is necessary to first contemplate the term "feminism".

"Feminism" was first devised by the French in the 1880s as "*féminisme*", "*femme*" meaning "woman", and "*isme*" which refers to a social movement or political ideology.[13] However, Offen argues that the exact origins of the term are unknown but it was widely used during the early 1890s, and by 1894-1895, the term had found its way into publications in England, Belgian France, Spain, Italy, Germany, Greece and Russia.[14]

Offen[15] describes feminism as being pro-women, and as encompassing both an ideology and movement for socio-political change which is founded on the critical analysis of male privilege and female subordination. Historically, feminism was founded on, and was in tension with, male domination of both the political and

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12 C Stansell *The Feminist Promise: 1792 to the Present* (2010) 6. Although Stansell is referring to women's activities in the 1700s, her comment is equally applicable to women's activities that date back as far as the 1400s. In this respect, see, J Kelly "Early Feminist Theory and the *Querelle des Femmes*, 1400-1789" (1982) 8 *Signs* 4. Kelly's assertions will be considered below.

13 E Freedman *No Turning Back: The History of Feminism and the Future of Women* (2002) 3. Freedman asserts that during that time there were many "isms" coming into life, for instance, socialism and communism. Thus feminism implied that women's issues belonged to a group of individuals leading the way for change.

14 K Offen "Defining Feminism: A Comparative Historical Approach" (1988) 14 *Signs* 119 126; K Offen "On the French Origin of the Words Feminism and Feminist" (1988) 8 *Fem Issues* 45. According to Taylor the term "feminism" first featured in the context of the international suffrage campaigns which were advanced by female suffragists. Nevertheless, she points out that what has become clear is that most of the ideas that fell under the term "feminism" had already existed for well over a century under other descriptions. Taylor argues further that it was the absorption of these ideas under one term that indicates a level of political self-awareness that was not present in earlier periods. Thus, prior to the emergence of the suffrage movement, there already existed a body of views on women who identified themselves as taking a particular position, and on this premise Taylor asserts that is necessary and justifiable to consider these views as feminist views. See B Taylor "Feminism and the Enlightenment 1650-1850" (1999) 47 *Hist Workshop J* 261 264. However, Offen ((1988) *Signs* 131) points out that some authors describe these earlier views, and activities associated with those views as "precursors" or "forerunners" of feminism, or of "proto-feminists". Offen (131) is critical of this practice because it fails to first describe what "feminism" is, and one is left with many different and sometimes conflicting ideas of feminism. On that note, both Taylor ((1999) *Hist Workshop J* 264) and Offen ((1988) *Signs* 132) state that when considering these early feminist views, the subject must be approached in their own terms and must be considered within the cultures in which early feminist views were written because the concept of feminism is not static.

15 (1988) *Signs* 150-152.

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intellectual spheres of societies.[16] However, Offen states that more recent feminist developments have now surpassed this original manifestation of feminism.[17] She asserts that feminism has a wide historical range which varies between cultural traditions and female experiences.[18] Nevertheless, a common value underlies all diverse feminist perspectives: Feminism uses gender (ie, the different social constructions of the behaviour of the sexes) as the basis for analysis.[19] In this context feminism critically engages topics such as personal autonomy of women, social organisation of the family and state, the unequal distribution of political, social, and economic power between sexes, patriarchal thought, and various institutional and social control mechanisms.[20] Offen states that feminism seeks to terminate masculine hierarchy but not necessarily "sexual dualism".[21] Thus, according to Offen, feminists seek to create a balance between men and women on the basis of their shared humanity and respect for difference.[22]

What also becomes apparent, and what makes defining feminism difficult, is that the term "feminism" on its own does not identify with all the possible different perspectives of women with different female experiences linked to their existence in different cultures, races, classes, and societies.[23] Freedman[24] states that feminism askes two questions: First, what about women? (Meaning what difference does gender make?) Second, which women? (Which essentially asks, what difference do ideas about race, class, or nationality make?)[25] Consequently, it is necessary to qualify the term feminism with additional descriptive terms such as socialist feminism, black feminism,

16 Ibid.
17 Offen (1988) *Signs* 150-152.
18 In this respect, Freedman (*No Turning Back* 8) states that feminism must recognise the overlapping identities of women as members of classes, races, and nations. This requires the acknowledgement there is no universal woman that can be projected onto all women in various societies, cultures and traditions since gender has developed differently through time and place.
19 Offen (1988) *Signs* 150-152.
20 Ibid.
21 Offen (1988) *Signs* 150-152.
22 Also see Freedman's (*No Turning Back* 7-8) working definition of feminism where she identifies equal worth, privilege, social movements, and social hierarchies as four critical components in the definition of feminism.
23 Freedman *No Turning Back* 6.
24 Freedman *No Turning Back* 8.
25 For instance, Offen ((1988) *Signs* 123) points out that at the start of the suffragette movement some women in England and the United States linked the notion of feminism with the idea of equality with men (liberal feminism), while other women in Europe focused on sexual difference (cultural or relational feminism) rather than on sameness of men and women. Liberal feminism and cultural or relational feminism will be discussed in more detail below.

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or ecofeminism (to name a few).[26] Van Marle and Bonthuys[27] stress that there is not one single correct feminist approach and that feminism has evolved as a result of internal feminist debates about feminism itself. At times different feminist perspectives can be contradictory, overlap or intersect one another, depending on the area of focus.[28] However, Freedman states they should all explicitly address justice for women as their primary concern.[29]

The following discussion of feminist theories will position the theories historically according to the 'three waves of feminism'. However, van Marle and Bonthuys warn that the various forms of feminism as discussed in the context of a particular wave, are not purely historical terms since there are a number of contemporary feminists currently adopting first or second wave approaches.[30]

3 3 First-Wave Feminism: Liberal Feminists

First-wave feminism aimed to achieve the same treatment between men and women and called for the development of neutral standards.[31] These feminists wanted to vote and gain access to the public domain which was typically reserved for men. They argued against the fact that women's difference in biology, psychology and intelligence were disqualifying factors for entry into the public world.[32]

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26 Freedman *No Turning Back* 6. Van Marle & Bonthuys point out that these differences in theories relate to what different feminists identify as evidence of subordination, how each define and frame subordination and the remedies they suggest to overcome subordination and secure liberation, see K van Marle & E Bonthuys "Feminist Theories and Concepts" in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 16.

27 "Feminist Theories and Concepts" 15.

28 Ibid.

29 Freedman *No Turning Back* 8.

30 Van Marle & Bonthuys "Feminist Theories and Concepts" 17. This thesis is testament to that since the author is adopting relational feminism (being of second-wave origin) in a possible fourth-wave era. Van Marle and Bonthuys further suggest locating feminist waves within their philosophical eras, namely modernists (first- and second-wave feminism) and postmodernists (third-wave feminism). Modernism is linked to the Enlightenment period where it was believed that man was rational and capable of controlling nature. Modernists rejected linkages with emotion, community, religion or spirituality and moved towards the notions of universal objectivity, control and rationality (37). Modernist feminists believed that the law was able to transform women's lives (17). While postmodernists feminists challenged objectivity and rationality, and question whether law was able to properly address subordination (17). More on postmodern feminism will be discussed under third-wave feminism below.

31 Van Marle & Bonthuys "Feminist Theories and Concepts" 17.

32 Ibid.

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According van Marle and Bonthuys[33] liberal feminists argue that women's emancipation lies in the assertion that men and women are equal, have equal claim to rights, and are equally free to participate in the public spheres of various professions and politics. Under liberal feminism, women are viewed as rational individuals,[34] and thus have the capacity to make autonomous choices which are as worthy as men's.[35] Donovan[36] states that liberal feminists introduced a view of women as responsible agents, who are able to care for themselves and advance their own interests, thus women exist as individual independent beings. Donovan states further that liberal feminists called for training in critical thinking since it was argued that this would provide the means to bring about a change in women's social standing.[37]

An early example of liberal feminist work was Mary Wollstonecraft's *The Vindication of the Rights of Women* (1792) where she took on the task of highlighting and cataloguing the substance of what she viewed as women's incapacity that she believed would be eradicated through education.[38] According to Stansell, Wollstonecraft believed that education would assist girls to develop reason, moral strength and virtue, and this was their right.[39] In 1838, Sarah Grimké published *Letters on the Equality of the Sexes* through which she particularised women's absolute moral equality and she claimed that men and women were created equally, both being moral

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33 "Feminist Theories and Concepts" 17; 31. Also see M Freidman et al "What is Feminism? And What Kind of Feminist am I?" (1987) 1 *Agenda* 3 5-6

34 According to Freedman (*No Turning Back* 46) only (white) men were believed to be endowed with rationality, thus they were vested with natural rights which the state could not intrude upon, and they could therefore exist independently. While all persons that were non-white, and white women were considered irrational and independent, and they were considered to be something less than what men were. For a feminist critique of modern theories of rationality see M Gatens "Modern Rationality" in A Jagger & I Young (eds) *A Companion to Feminist Philosophy* (2000) 21-29.

35 Friedman et al (1987) *Agenda* 6.

36 *Feminist Theory* 31.

37 Ibid. Kelly ((1982) *Signs* 5) persuasively argues that at the dawn of modern history, the beginnings of liberal feminist consciousness (being a continuous body of feminist thought) took root in France amongst literate women. Christine de Pisan (1363-1430) sparked the "*Querelle des Femmes*" (quarrel of women) which Kelly accepts as the first feminist debate on the decline of women's position in society. Although the *Querelle* lacked a vision of social movement, individually, women offered intellectual resistance to masculine perspectives through written works. Women took a stand against the masculine construction of women as irrational and their resultant confinement to subordinate roles (since women were perceived to lack the ability to govern and learn). The *Querelle* sought to break through the limits of subordination associated with that image through educating women. The content of early feminist arguments are critically reactive, mainly responding to what misogynists said about women. The "battle of pens" continued into the 1700s and according to Freedman (*No Turning Back* 50) this call for education later transformed into a heated political call for women's rights.

38 In this respect, see Stansell *The Feminist Promise* 17.

39 Stansell *The Feminist Promise* 19.

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and accountable.[40] According to Stansell, Grimké located the damage women suffered, not in women's failure to be rational, but in men's power since men held women back through physical coercion and forced bodily submission.[41]

However, it was Elizabeth Stanton from the United States, who played a leading role in forming the first women's rights convention in Seneca Falls in 1848, which issued a Declaration of Sentiments of Independence (Seneca Falls Declaration).[42] The Seneca Falls Declaration declared that men and women were created equal, and identified an extensive list of grievances which included issues relating to taxation without representation, poor pay, and systematic exclusion from politics, law and medicine.[43] Most importantly, it was the first to call for women's suffrage in the United States.[44] Stanton argued that women needed civil rights in order to achieve independence, and that it is the state's responsibility to protect women's sovereignty.[45] According to Stansell, from this point on, women's suffrage became an issue worthy of public debate, and suffrage was a standard demand at women's rights conventions.[46] However, what emerged from these liberal feminist activities was a mainly, white, middle-class group of women calling for suffrage.[47]

Although women's suffrage was not achieved until the twentieth century,[48] liberal feminists' initial fight for equality secured this later victory for women. Earlier victories

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40 Stansell *The Feminist Promise* 45.
41 *The Feminist Promise* 46. Donovan (*Feminist Theory* 14) states that Grimké was the first to ever apply American natural rights principles to women.
42 Stansell *The Feminist Promise* 70.
43 Stansell *The Feminist Promise* 69.
44 Ibid. Donovan (*Feminist Theory* 23) also refers to English liberal theory philosophers, Harriet Taylor and John Mills, who borrow from the American women's rights doctrine (for more on their work see, Donavon *Feminist Theory* 23-25.) Also see Freedman *No Turning Back* 54-57, she describes how the liberal feminism movement made its way through Russia, Germany, Scandinavia, Norway, New Zealand, Finland, Brazil, Chile, and even Japan.
45 Donovan *Feminist Theory* 17.
46 *The Feminist Promise* 69.
47 Stansell *The Feminist Promise* 74; Van Marle & Bonthuys "Feminist Theories and Concepts" 32. Donovan (*Feminist Theory* 22-23) points out that this does not mean that black women did not express their own feminist views. However, their concerns extended beyond voting rights, they also had to face issues linked to racism and deepened subordination through racism.
48 See Freedman *No Turning Back* 372, she tabulates the year when women were granted the rights to vote. During 1890-1910, the first three countries to grant women voting rights were New Zealand, Australia, and Finland. During 1910-1940, women in the United Kingdom, Canada, United States, Russia, and Netherlands (to name a few) were granted voting rights. Majority of the countries extended voting rights during 1940-1960, with South Africa being among the last to extend voting rights to women of all races in 1994.

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include the liberalisation of divorce laws through newly enacted legislation married women could protect their property which meant that they could establish themselves economically, thus giving divorced women better leverage in child custody cases.[49] Women also got increased access to higher education and a number of professions.[50] Nevertheless, liberal feminism also left many "women issues" untouched. Van Marle and Bonthuys point out that these beneficial advances did not extend to the working class and black women.[51]

Liberal feminists failed to consider the impact of the public/private divide.[52] To a limited extent, these feminists were critical of the domestic sphere in that they saw a need to eradicate inequality within marriages and they understood that this could be achieved through law reform.[53] However, liberal feminists failed to tackle the assumptions that women maintain the domestic sphere (for example child bearing and rearing) and that these responsibilities placed women at a disadvantaged starting point when entering the race for equality.[54] They failed to understand these duties as being inhibitors to the ability to enjoy equality, even if it was granted to women.[55] In other words, liberal feminists achieved formal equality which placed them in a particularly vulnerable position because formal equality prevents the law from allowing special measures to be taken to accommodate differences based on gender (for instance pregnancy), and men could very well argue that 'special measures' on the basis of gender constitutes discrimination.[56] On that basis, liberals failed to consider whether there were, and the extent of, differences between men and women; they held the position that men and women were equal, and if difference did exist, these were minor differences that resulted from conditioning.[57]

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49 Donovan *Feminist Theory* 26; Freedman *No Turning Back* 55.
50 Ibid.
51 Van Marle & Bonthuys "Feminist Theories and Concepts" 32.
52 Donovan *Feminist Theory* 26; Van Marle & Bonthuys "Feminist Theories and Concepts" 32.
53 Donovan *Feminist Theory* 26. For instance, liberal feminists believed that legislation aimed at protecting married women's property would bring about equality within a marriage.
54 Donovan *Feminist Theory* 26; Van Marle & Bonthuys "Feminist Theories and Concepts" 32.
55 Donovan *Feminist Theory* 26.
56 Van Marle & Bonthuys "Feminist Theories and Concepts" 32.
57 Donovan *Feminist Theory* 26.

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3 4 Second-Wave Feminism: Cultural or Relational, Radical and Socialist Feminism

During the 1960s to 1980s, second-wave feminists emerged in the West.[58] After first-wave feminists secured women's access to the public world, van Marle and Bonthuys[59] state that second-wave feminists faced a number of practical difficulties in the context of formal equality. Formal equality proved particularly problematic in respect to pregnancy, childcare, housework and sexual harassment, all of which are essentially women's issues that are not experienced by men.[60] According to Gambaudo, second-wave feminists rejected the "equal to man" argument because being equal to man meant being the same as man, and this approach denied women's visibility and recognition.[61] In this context second-wave feminists drew on the differences between men and women, and highlighted the consequences of these differences.[62] True to the "difference" thread of second-wave feminism, different feminist theories emerged to secure female liberation, and a discussion thus follows of the three feminisms that took root during the second wave.

3 4 1 Radical feminism

Radical feminists sought to establish the original cause of female oppression and went further and established that female oppression was the cause of all other forms of oppression and domination.[63] These feminists argued that patriarchal control (as a social system of male-defined values) oppressed women, and was thus also the cause of all other forms of oppression (for instance racism and economic exploitation).[64] Radical feminists focused on relations between men and women, especially the fact

58 B Epstein "The Successes and Failures of Feminism" (2002) 14 *JWH* 118.
59 "Feminist Theories and Concepts" 17.
60 Ibid.
61 S Gambaudo "French Feminism vs Anglo-American Feminism: A Reconstruction" (2007) 14(2) *EJWS* 93 95. In this respect, Gambaudo (95) argues that second-wave feminists faced up to patriarchy and defined themselves as different to man, "with different needs, different sensitivity, different modes of expression, etc. than those man had defined for her." Also see Epstein (2002) *JWH* 121.
62 Van Marle & Bonthuys "Feminist Theories and Concepts" 17.
63 Freidman et al (1987) *Agenda* 8.
64 Van Marle & Bonthuys "Feminist Theories and Concepts" 34; Freidman et al (1987) *Agenda* 8.

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that men dominated women in their personal relationships.[65] They argued that the experience of oppression that occurred in the private area of personal relationships (family, marriage, and the bedroom) should not be conceived and limited to being a woman's individual (private) problem, but should be widened and understood as a broader social and political issue.[66] Fineman[67] states that radical feminists sought to deconstruct the traditional public/private divide by arguing that "the personal is political".[68] Since all women experience domination on the basis of their sex and gender, the concept of "sisterhood"[69] gave rise to a perceived mechanism to transcend barriers of race and class.[70]

Donovan[71] and van Marle and Bonthuys[72] consider a number of radical feminists who contributed to the development of various radical themes aimed at liberating women. For instance, some called for a differentiation between women's liberation and sexual liberation.[73] Women's liberation housed the notions of spiritual and intellectual freedom and freedom from invasion of privacy, while sexual freedom was a strategy used to maintain subordination, because "love" (as something linked to sex) was presented as an enchanting experience, and in this form, it was used to justify boring and tedious lives.[74] Further, love was rejected because dependency and possessiveness developed through a 'love relationship' which prevented women from developing their full human potential.[75] Marriage was also rejected since it was believed to be the means adopted to oppress women, in fact, some radical feminists

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65 M Fineman "Feminist Legal Theory" (2005) 13 *Am U J Gender & Soc Pol'y & L* 13 20; Freidman et al (1987) *Agenda* 8.
66 Freidman et al (1987) *Agenda* 8.
67 (2005) *Am U J Gender & Soc Pol'y & L* 20
68 Also see Stansell *Feminist Promise* 232; Donovan *Feminist Theory* 140; Van Marle & Bonthuys "Feminist Theories and Concepts" 34; Freidman et al (1987) *Agenda* 8-9. According to Fineman ((2005) *Am U J Gender & Soc Pol'y & L* 21), the breaking down of public/private divide goes against historical developments since private was always associate to the female and public related men. Thus, by making personal (private) openly public and political women can enter and womanise traditional male spheres of society.
69 According to Hooks, sisterhood stood to represent a bond between all women based on shared victimhood found in the common experience of oppression. See B Hooks "Sisterhood: Political Solidarity between Women" (1986) 23 *Feminist Rev* 125. However, critics raised concerns with this concept, this is discussed below.
70 Van Marle & Bonthuys "Feminist Theories and Concepts" 35.
71 *Feminist Theory* 138-166.
72 "Feminist Theories and Concepts" 34, fn 114.
73 Donovan *Feminist Theory* 140; 141.
74 Ibid.
75 Donovan *Feminist Theory* 141.

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called for the elimination of marriage and family.[76] They pressed for the development of extra-uterine or parthenogenetic[77] means of reproduction because these artificial methods would remove gender role divisions attached to childbearing and rearing.[78] Other radical feminists followed that women's oppression was rooted in psychological factors and argued that men established their "manhood" through a process of asserting their ego over women, and men derive their strength and self-esteem through this process.[79] Generally these feminists were characteristically 'separationists' in the sense that they focused on separating themselves from men and sought liberation through unity with other women.[80]

Van Marle and Bonthuys[81] emphasise that radical feminists recognised that legal rules were used to justify and maintain male dominance and that it was necessary to effect changes in the law. However, the aim of these feminists was to go beyond changing law and achieve complete change of patriarchal social systems which structured women's lives.[82] In this respect, radical feminists successfully brought public and legal attention to issues of domestic violence and pushed for recognising sexual

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76 Ibid. Radical lesbians also came to the fore in this regard, see Donovan *Feminist Theory* 158-164. Some of these women called for 'female-separatism' (meaning, only women can give each other a new sense of self) and refuse to be 'male-identified' (being the acceptance of identification in terms of male's power and status). They argued against heterosexuality, because heterosexuality is a leading factor in the oppression of women since it places men first and every women's definition in determined in relation to men. Living a separate lesbian life allows for the existence of relationships that are not defined by gender roles and everything is open for new interpretation.

77 Meaning the process of producing offspring from ovum that has not been fertilised, see Oxford Advanced Learners Dictionary (8 ed).

78 Donovan *Feminist Theory* 141; 145.

79 Donovan *Feminist Theory* 142; 143-144. In this respect, these feminists focused on the role of rape on pornography in driving the oppression of women.

80 However, Donovan (*Feminist Theory* 153-155) points out that Black radical feminist took a different approach to the white "separationist" approach. Recognising that white feminist organisations were blatantly ignorant to other women's divergent experiences of womanhood, and black women were steadfast in their pursuit to not be made invisible against the backdrop of white middle-class women's dominating feminist organisations. Black feminists sought liberation through acknowledging the roles of race and class in the context of oppression and pushed to define their own image as black women, not merely as a group of women or as a group of Africans. However, they perused these aims in a community setting (as opposed to the separationist approach described above), provided that 'community' did not require forsaking their differentness. On this basis, black women united with black men, particularly when it came to issues of race. They also sought to remain true to their racial and ethnic roots, and this came in the form of preserving the history and culture of their mothers. These radical feminists saw that by keeping their mothers' culture alive, they would be reclaiming their female-identified cultural tradition. In essence these women saw liberation in acknowledging the difference in themselves, their feminist roots and their cultures.

81 "Feminist Theories and Concepts" 35.

82 Ibid.

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harassment as a "gendered legal harm".[83] Further, Epstein credits radical feminists for the accomplishment of affirmative action in the United States.[84]

Radical feminism also comes with a number of problems. The concept of sisterhood was rejected by black and third-world feminists, they argued that radical feminists were essentialists since they have constructed an "unrepresented grand theory".[85] Further, black feminists argued that this construction of feminism is not reflective of their experiences with men.[86] Also, the fact that radical feminists rejected motherhood led to many women feeling alienated and in need of an alternative, more inclusive perspective.[87] Epstein explains that radical feminism stalled as a result of "fractionalism", ideological conflicts and internal struggles, which lead to the development of relational feminism.[88]

3 4 2 Cultural or relational feminism

Relational feminism[89] moved beyond the liberal's rational and legal approach for liberation, and sought to introduce broader cultural transformation by accentuating human faculties of intuition and connection.[90] In this respect, relational feminists emphasise that there is a difference between men and women, that women can be

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83 Van Marle & Bonthuys "Feminist Theories and Concepts" 34-35.

84 (2002) *JWH* 121-122.

85 Van Marle & Bonthuys "Feminist Theories and Concepts" 35. For more against the radicalist construction of the sisterhood ideal, see Hood (1986) *Feminist Rev* 125; O Oyewùmí "Feminism, Sisterhood, and Other Foreign Relations" in O Oyewùmí (ed) *African Women & Feminism: Reflecting on the Politics of Sisterhood* (2003) 3-4. Both sources stress that sisterhood is a white woman's articulation of shared oppression and solidarity, and that they have failed to take into account the fact that white women themselves have exercised their class privileges against black women. In fact, Oyewùmí (10-19) goes on to explain the difference between "sisterhood" in the context of white feminism (as a gender specific term) and "sister" and "brother" in the context of black communities (as traditionally non-gender specific or terms that transcend Western conceptions of gender), and points out that although Western feminist movements adopted the sisterhood ideal from black communities, their racial tendencies prevented Western feminists from fully grasping to true nature of an African sisterhood.

86 Van Marle & Bonthuys "Feminist Theories and Concepts" 35. Also see Oyewùmí "Feminism, Sisterhood, and Other Foreign Relations" 10-19.

87 Van Marle & Bonthuys "Feminist Theories and Concepts" 35.

88 (2002) *JWH* 122.

89 "Relational feminism" is preferred over "cultural feminism" since the term "relational" unequivocally speaks to the underlying importance of relationships within this feminist approach.

90 Offen (1988) *Signs* 143; Donovan *Feminist Theory* 31. In fact, according to Offen ((1988) *Signs* 135), relational feminism (which she defines as relational arguments) was more of a European movement, whereas the movement for female equality and rights was mainly an Anglo-American approach to advancing women. Further, Offen (144) points out that relational feminists were critical of liberal feminists' adoption of the "male model" as the norm for human existence.

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defined according to their relationships with others, and that feminine qualities[91] are actually a source of strength and pride which can positively contribute towards public regeneration.[92] These feminists saw value in being a woman, and they celebrated the perceived differences that women had from men.[93] Offen states that relational feminists sought "equality in difference".[94] Van Marle and Bonthuys explain that relational feminists accept that women are more emotional than men and that rationality is not any greater in value than emotion, consequently they reject the imposed hierarchical status of oppositional pairs applicable to men and women.[95] Donovan[96] asserts that non-Western and indigenous feminists seemed to be drawn towards relational feminism (based on traditional women's values) than liberal feminism (based on individualism, rights and personal achievement). Generally, relational feminists were concerned with "protective legislation" aimed at protecting and advancing their differentness.[97]

According to Donovan the tradition of relational feminism was instigated long before second-wave feminism.[98] In this respect she refers to Margaret Fuller's *Woman in the Nineteenth Century* (1895) in which she called for women to develop self-reliance and the ability to stand on their own but from within a female-community setting that is characterised by loving relationships and connection.[99] Donovan states that Fuller asserted that this process showed women that they have unique characteristics, and

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91 These feminine qualities include pacifism, cooperation, peaceful dispute resolution, and harmonious regulation of public life, see Donovan *Feminist Theory* 32.
92 Donovan *Feminist Theory* 31; Van Marle & Bonthuys "Feminist Theories and Concepts" 35.
93 Donovan *Feminist Theory* 31.
94 (1988) *Signs* 139.
95 "Feminist Theories and Concepts" 35.
96 *Feminist Theory* 167.
97 Donovan *Feminist Theory* 60.
98 Donovan *Feminist Theory* 31-62. She dedicates an entire chapter to first-wave relational feminism titled "Nineteenth-Century Cultural Feminism". However, Donovan (217 fn 2) stresses that not all early modern feminists can be categorically labelled "liberal" or "cultural" feminists, since some women drew from each approach at different times. She states that these categories assist with organising first-wave feminist theories. Offen ((1988) *Signs* 136) also shares this view, she recognises that both feminist theories are intertwined. In a later chapter titled "Twentieth-Century Cultural Feminism", Donovan (167) states second-wave relational feminists differed from their first-wave feminists that they had a history to remind them that getting women in power did not automatically secure a "purified" political playing field and a new theoretical approach is required. For purposes of clarity the current author will continue to use Van Marle and Bonthuys ("Feminist Theories and Concepts" 17) definitional approaches to the three waves of feminism. This footnote merely serves the purpose of demonstrating that feminist theories should be viewed as interrelated and connectedly existing on a continuum.
99 Donovan *Feminist Theory* 33. A number of other authors are considered but will not be considered here especially because a full historical account falls beyond the purpose of this thesis.

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that they were essentially different from men. In this respect, Fuller argued that women had a unique intuitive intellectual faculty and the ability to develop a holistic view (resulting from their subtle connections with people and all life forms), and allowing "feminine" expression will bring about social change, something along the lines of a feminisation of culture.[100]

Van Marle and Bonthuys[101] state that in order to understand modern relational feminism one must consider the work of Carol Gilligan.[102] Gilligan (a psychologist) determined that moral reasoning and women's structure of "knowing" differed from men's.[103] Through conducting a number of studies, Gilligan found that women were driven by an ethic of care (centred in connection, context and response to need) while men were driven by an ethic of justice (founded and directed by abstract rules and inflexible rights discourse). In this respect, women were found to place importance on relationships and context and develop a sense of responsibility to act positivity to address perceived need. Men, on the other hand, were found to function (or specifically compete) in the arena of intangible rules and principles and their thinking processes tended to take on more violent characteristics. Consequently women are seen to have a different voice to men. Van Marle and Bonthuys[104] state that what we find is that the ethic of justice stands superior to the ethic of care in the context of moral reasoning and this has led to the development of a social and legal system that fails to take women's perspectives into account. The authors assert that the ethic of justice and the ethic of care should not be seen as being in conflict with one another but rather as complimenting one another.[105]

Some earlier relational feminists fostered a vision that was typically matriarchal in character,[106] and they believed that women were different in that they were vested with separate cultural and ethical heritages, being maternal, cooperative, altruistic, and

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100 Donovan *Feminist Theory* 34-35.
101 "Feminist Theories and Concepts" 35. Also see Donovan *Feminist Theory* 173.
102 C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982).
103 Donovan *Feminist Theory* 173.
104 "Feminist Theories and Concepts" 36.
105 Ibid.
106 Freedman (*No Turning Back* 65) refers to this approach as maternalism, where the call for emancipation is rooted in motherhood. See Donovan (*Feminist Theory* 58) who describes this theoretical approach viewing the state in maternalistic terms in that the state should care for and protect a person's liberties, and provide for his or her basic needs.

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life-affirming.[107] Other relational feminists were separationists, in the sense that they believed that by living in separate female institutions they will free themselves from male domination.[108] In this respect they fought for a welfare state that would regulate food and drug industries, labour conditions, and aid in access to education and health care.[109] They also called for "voluntary motherhood"[110] and subsidies for childrearing.[111] Fineman states that relational feminist activities led to the deconstruction of the traditional male perspective in law (ie that it was man-made) and feminised the law to the extent that our stance on sexual assault, domestic violence, family laws, sexual harassment and battered women's syndrome was transformed.[112] Donovan also merits relational feminists with the realisation of protected maternity leave.[113]

What relational feminists did not care for was formal equality rights because, according to Fineman neutral rules can very easily lead to further inequalities especially when functioning in a climate where women's social and biological circumstances were fundamentally different to the construct of masculinised laws.[114] Consequently, these differences demand different treatment (or special consideration and response) so as to address existing structural and socio-political inequalities.[115] Van Marle and Bonthuys[116] point out that relational feminists have been criticised for holding an "essentialist" account of femininity. They assert that relational feminism excludes those

[107] Donovan *Feminist Theory* 53; Van Marle & Bonthuys "Feminist Theories and Concepts" 36 (fn 122).
[108] Van Marle & Bonthuys "Feminist Theories and Concepts" 36 (fn 122).
[109] Donovan *Feminist Theory* 59.
[110] "Voluntary motherhood" in the context of earlier feminist movement refers to a wife right to refuse to have marital sex in order to avoid a pregnancy. This later turned to a call for contraception. See Freedman *No Turning Back* 232.
[111] Donovan *Feminist Theory* 56.
[112] Fineman (2005) *Am U J Gender & Soc Pol'y & L* 17.
[113] *Feminist Theory* 62
[114] Fineman (2005) *Am U J Gender & Soc Pol'y & L* 16-17.
[115] Ibid. With difference at the core of relational feminist theory, the most pressing issue is, what constitutes "difference" between men and women? Donovan (*Feminist Theory* 60-61) points out that some relational feminists' posited difference in genetic (biological) makeup, while others found difference in the social construction of women, but the answer remains an issue of debate. Biological difference renders this theory vulnerable to issues surrounding biological determinism which can be used to develop and legitimise a philosophy of female inferiority. While social or environmental constructions of female differentness also highlights a theoretical fault since a change in social circumstances (for instance receiving an education) will change the identity of gender or create no difference in identities, thus taking on a liberalist tone. Donovan argues that early relational feminists saw their inner nature as something inborn and naturally assigned to them, and that this perspective would follow them from the private to the public spheres.
[116] "Feminist Theories and Concepts" 36.

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women who do not ascribe to an ethic of care and end up internalising the very stereotypes and gender divisions that women's oppression is based upon.[117] Further, relational feminists fail to consider the way in which some women's morality is actually a product of their oppression, thus accepting patriarchal assignment of their subordination.[118]

3 4 3 Socialist feminism

Socialist feminism is a response to the inadequacy of Marxism[119] and Marxist feminism, Donovan refers to socialist feminism as "Marxism (primarily) modified by radical feminism".[120] According to van Marle and Bonthuys Marxist feminists argue that women's subordination is a result of a class system which relies on the notion of private property.[121] They called for the demise of capitalism in order to break through classism, and that process would ultimately result in eradication of gender prejudices.[122] Accordingly, they argued that the legal system nurtured capitalism and the interests of the upper class by restricting women to domestic life and assigning their labour for familial use.[123] In that respect, Friedman et al state that Marxist feminists only analysed women to the extent that they experienced life under capitalism (public life of waged labour), and removed themselves from "male

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[117] Ibid.
[118] Van Marle & Bonthuys "Feminist Theories and Concepts" 36.
[119] H Hartmann "The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union" (1972) 3(2) *Capital & Class* 165. Friedman et al ((1987) *Agenda* 11-12) and Donovan (*Feminist Theory* 63-70) describe Marxism as a theory concerned with capitalism and its consequences in society. Karl Marx saw capitalist societies as societies that were divided and conflicted with the capitalist ruling party on the one side and the working class on the other, and the relationship between the two was one of exploitation and struggle. Capitalism was considered particularly problematic because under the auspices of freedom, workers were forced to work for a capitalist or starve since he or she had nothing to sell but his or her labour. Since the accumulation of wealth was the driving force behind capitalism, workers were pushed to work harder and for longer hours in order to increase production and profits. This process ultimately led to worker alienation and he or she merely became part of the machinery of production and workers lacked any meaningful links to the actual product produced. Marx himself was not concerned with gender issues but with the eradication of classism linked to capitalism. Further, Marx saw freedom as a social achievement rather than an individual one and called for a communist world.
[120] *Feminist Theory* 63.
[121] "Feminist Theories and Concepts" 33.
[122] Ibid.
[123] Van Marle & Bonthuys "Feminist Theories and Concepts" 33; Friedman et al (1987) *Agenda* 13.

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domination" discourse since it was their premise that struggling against men would detract from the broader goal of class struggle and socialism.[124]

Marxist feminism later lost its footing when female oppression was found to precede capitalism,[125] and that history demonstrated that the demise of capitalism in socialist states did not alleviate gender issues.[126] Radical feminists were critical of Marxist feminism to the extent that it supressed gender struggles in the name of class struggle and as such Marxist feminism lacked a "theory of women as women".[127] Further, Marxist feminists failed to understand the experience of oppression beyond class, and their focus on public life failed to recognise women's experiences in the home.[128] In response to these critiques, socialist feminism emerged.[129]

Socialist feminism, in its wide ranging formulations, generally sought to address gender and class oppression in order to liberate women.[130] In essence, they created a "dual system theory" recognising that: Patriarchy creates gender oppression and that class systems create class oppression and work alienation for most women.[131] Van Marle and Bonthuys[132] point out that although patriarchy and class systems are two distinct elements they are mutually reinforcing, particularly with reference to female oppression. Socialist feminists called for day care facilities, paid maternity leave, sick leave, affirmative action, waged housework, guaranteed annual income, contraception and termination-of-pregnancy rights, equal participation in the labour force and fair pay, and encouraged the development of and participation in trade unions.[133]

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[124] Friedman et al (1987) *Agenda* 14-15. Hartman ((1972) *Capital & Class* 166) explains that the "woman question" in socialism must be distinguished from the "feminist question" in feminism. The "woman question" is linked to women's relation to the economic system, while "feminist question" is linked to determining the causes of sexual inequality between men and women.

[125] Donovan *Feminist Theory* 78; Friedman et al (1987) *Agenda* 15. In this respect Donovan (78) refers to a number of critical feminist works who highlight that chastity belts and foot-binding were all in place well before the rise of capitalism.

[126] Van Marle & Bonthuys "Feminist Theories and Concepts" 33; Friedman et al (1987) *Agenda* 14-15

[127] Van Marle & Bonthuys "Feminist Theories and Concepts" 33.

[128] Ibid.

[129] Van Marle & Bonthuys "Feminist Theories and Concepts" 33; Friedman et al (1987) *Agenda* 15.

[130] Ibid. Van Marle and Bonthuys (33) state that this was their attempt to deal with the "gender-blindness" of Marxism and "class-blindness" of radical feminism.

[131] Van Marle & Bonthuys "Feminist Theories and Concepts" 33-34; Hartmann (1972) *Capital & Class* 165.

[132] "Feminist Theories and Concepts" 33.

[133] Donovan Feminist Theory 79; Friedman et al (1987) *Agenda* 16-19.

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Friedman et al[134] point to a number of criticisms raised against socialist feminism. Criticism has been lobbied by black feminists who have asserted that socialist feminism is ethnocentric and racist because in promoting the sisterhood ideal, socialist feminists have failed to recognise the power they exercise over black women (particularly in Britain).[135] Further, black feminists also raised concerns over the fact that socialist feminists did not push to adopt an international position, had they done so, socialist feminists would have to acknowledge the rights they won for themselves (ie access to cheaply produced products from developing countries) at the expense of women in developing worlds.[136] Additionally, socialist feminists have been criticised for their utopianism and separatism (in the context of their trade unions).[137]

Riding on first-wave feminist action,[138] second-wave feminist theories faced two contrasting positions, namely "sameness v difference" and this divide continues to this day.[139] However different each strand of Western feminism may be, each contributed towards the drive for change.[140] Each strand adopted a particular strategy, used their strategies in different settings, and consequently enjoyed different successes.[141]

Despite their successes, a glaring issue with this construction of feminism lies in the fact that it was mainly limited to middle-class and upper-middle class Western white women.[142] This leads to the fact that Western feminism housed racial characteristics,

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134 (1987) *Agenda* 19.
135 Friedman et al (1987) *Agenda* 20.
136 Ibid.
137 Friedman et al (1987) *Agenda* 19.
138 According to Donovan (*Feminist Theory* 58), it is generally accepted that first-wave feminism ended once women were granted voting rights. In the context of the United States, she argues to the contrary, and asserts that even though there was no real further development of the feminist theory in the years that followed 1920, women were actively putting earlier theories into practice. To support this argument she refers to areas of social-welfare reform policies that took place in the United States with respect to President Roosevelt's New Deal. Also see Stansell *The Feminist Promise* 180, she also points out that between the 1920s and 1980s, ideas about feminism thinned out, there was the rise of the "modern girl" or flappers who were "convention-spurning, cigarette-smoking, lipsticked (sic) and rouged, jazz-dancing, birth-control-using" women all through France, Germany, India, Japan, and South Africa.
139 Freedman *No Turning Back* 71-72.
140 Ibid.
141 Epstein (2002) *JWH* 118.
142 Ibid. Epstein (119) points out that working-class women did participate in first-wave feminist movements but by the end of the 1800s they constitute a fairly small portion of the movement. Further Donovan (*Feminist Theory* 22-23) states that Western black woman also found expression during these times but not in unity with the wider white women's movement. For more on African-American activities, see, Freedman *No Turning Back* 73-83. The notion that second-wave feminist was a mainly white movement is being questioned and sternly critiqued, see, B Roth "Second Wave

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for instance, Freedman[143] points out that the British[144] suffragette movement incorporated a language of white racial superiority. They saw themselves as the "mothers of the race" and their aim was to "civilise" the colonised: The more women's lives resembled the lives of women from the West, the more civilised their culture would be.[145] European feminists contributed to colonist dialogue and asserted that white women should be granted the vote in order to support the work of colonialism.[146]

Looking at this portrayal of earlier feminist movement, one is left questioning whether African women had developed a feminist movement or theory in Africa at the same time as the rise of Western feminism, and the answer seems to be no. Oluwele points out that there is no centuries-long African history of feminist theory as one finds in the Western.[147] She states further this is because "authentic" African views on African women, and the relationships between African men and women were blurred by Western conceptions and assumptions of human nature, and Western constructions of gender and patriarchy.[148] However, this does not mean that non-Western women did not develop their own internal sense of identity when faced with Western ideologies. Under the title "The Challenge of Local Feminists", Freedman states that the poor and working class women of Africa and Asia did not find gender as the exclusive determinant of their political will or feminist priority, they went further and called for economic justice and cultural and national sovereignty.[149] Consequently

Black Feminism in the African Diaspora: News from New Scholarship" (2003) 17 (58*) Agenda* 46; B Thompson "Multiracial Feminism: Recasting the Chronology of Second Wave Feminism" (2002) 28(2) *Feminist Studies* 336.

143 *No Turning Back* 97. Freedman states that European superiority justified denying non-Europeans individual rights and self-governance.

144 According to Freedman (*No Turning Back* 81) racist sentiments were also present in the United States particularly in Southern states.

145 Freedman *No Turning Back* 98. Freedman (97-98) points out that African and Indian women were seen as helpless victims of men and in need of rescue and protection by Christianity and European civilisation. Yet, African and Indian women were not consulted in order to determine the extent of their "needed" protection.

146 Ibid.

147 S Oluwele "Africa" in A Jaggar & I Young (eds) *A Companion to Feminist Philosophy* (2000) 96 104.

148 Ibid. Oluwele states that there is a dearth of texts written by African people in which the views of African women are expressed.

149 Freedman *No Turning Back* 115. According to Freedman (*No Turning Back* 117) non-Western feminist movements generally took approaches that resembled relational feminism and rejected the idea that women and men were formally equal. In this respect, see Friedman et al (1987) *Agenda* 20-23, the authors' state that anticolonial struggles have been defined in terms linked to Marxist socialism and held that the "women question" would be addressed once there had been successful transformation into a socialist state. Further the authors state that women participated in broader struggles for liberation and at times rejected the concept of feminism altogether (because of the term's association with the West). Despite this, those women that participated in nationalist

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critical reflection highlighted that there is no "universal woman" since concerns and interests of women vary from regions, classes, nationalities, and ethnic backgrounds, and as such feminism must be sufficiently diverse to address different needs of different women.[150] This brings the rise of third-wave feminism into perspective.

3 5 Third-Wave Feminism

Third-wave feminism came to the fore in response to what Donovan[151] calls the "tyranny of monolithic concepts that became the central concern in feminist theory at the end of the twentieth century". It is a movement that critiques and rejects many aspects of second-wave feminism.[152] In this respect third-wave feminism focuses on differences between women (as opposed to only focusing on differences between man and the construction of "universal woman"), and aims to deconstruct and decentre the essentialist approach perceived in second-wave feminism.[153] Second-wave feminism is considered to be "essentialist" to the extent that a single feminist narrative or truth was being presented as the narrative for all women during the course of second-wave feminism, and consequently marginalised those women that did not fall in line with that narrative or truth.[154] They called for an understanding of women's context (in terms of race, sexual orientation, colonisation, religion, culture and class) in addition to, and in combination with gender and sex considerations,[155] thus acknowledging individuality. The focus on context characterises third-wave feminism (or, as Snyder refers to them: "third-wavers") as all-inclusive and more diverse since it embraces "a multiplicity of identities, accept[s] the messiness of lived contradiction, and eschew[s] a unifying agenda".[156]

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movements are referred to as anticolonial feminists. For more on women's organisations and movements in the context of nationalism, see, S Hassim Voices, Hierarchies and Spaces: Reconfiguring the Women's Movement in South Africa" (2005) 32(2) *Politikon* 175. Hassim (74) states that women did not mobilise as women merely because they were women. They mobilised is terms of more transcending identities, for instance, as students, workers or as Africans.

[150] Freedman *No Turning Back* 117.

[151] *Feminist Theory* 183.

[152] J Coleman "An Introduction to Feminism in a Postfeminist Age" (2009) 23(2) *Women's Studies Journal* 3 10.

[153] S Mann & D Huffman "The Decentering of Second Wave Feminism and the Rise of the Third Wave" (2005) 69(1) *Sci Soc* 56 57.

[154] See Van Marle & Bonthuys "Feminist Theories and Concepts" 38. Mann & Huffman ((2005) *Sci Soc* 59) states that essentialism ignores or down plays differences found amongst women.

[155] Van Marle & Bonthuys "Feminist Theories and Concepts" 17.

[156] C Snyder "What is Third-Wave Feminism? A New Directions Essay" (2008) 34(1) *Signs* 174 177.

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Van Marle and Bonthuys identify three major third-wave feminist views: Postmodern feminism, postcolonial feminism and critical race feminism.[157] However, Snyder[158] (writing in 2008) points out that third-wave feminism is still fairly new to the scene of feminism, consequently, more views are probably emerging as this piece is being written and therefore cannot be included here. Further, since these feminist perspectives lack deep-rooted historical content,[159] each will be briefly considered.

3 5 1 Postmodern feminism

Donovan[160] considers postmodern feminism as the most important theoretical development of the twenty-first century which focuses on the local and contextual realities of subjects. According to van Marle and Bonthuys,[161] postmodern feminism looks at difference between men and women and differences between women. The authors explain that postmodern feminists stress that individuals are not vested with a fixed inherent identity,[162] thus identity is always liable to alter depending on context and discourse.[163] Postmodern feminists aim to deconstruct dominant principles by considering counter marginal principles and bringing multiple meanings and context to the fore.[164] Donovan[165] explains that this strand of feminism strongly resists any

[157] "Feminist Theories and Concepts" 17.
[158] (2008) *Signs* 183. The "newness" of third-wave feminism is apparent when one attempts to define it since developing a definition seems problematic for feminist authors. This may be an indication of the fact that an adequate definition is still in the making, see generally Coleman (2009) *Women's Studies Journal* 3; Snyder (2008) *Signs* 174; Mann & Huffman (2005) *Sci Soc* 56; S Gillis, G Howie & R Munford "Introduction" in S Gillis et al (eds) *Third Wave Feminism: A Critical Exploration* (2004) 1; A Braithwaite "The Personal, the Political, Third-Wave and Postfeminists" (2002) 3(3) *Feminist Theory* 335.
[159] At least when compared to first- and second-wave feminism.
[160] *Feminist Theory* 184; 197.
[161] "Feminist Theories and Concepts" 37.
[162] In fact, on the topic of identity, Mann & Huffman ((2005) *Sci Soc* 63) state that these feminists saw the action of affirming identity as disciplinary, restrictive and regulatory and argues that liberation will come only once we reject the politics of identity or categorisation.
[163] Van Marle & Bonthuys "Feminist Theories and Concepts" 38.
[164] Van Marle & Bonthuys "Feminist Theories and Concepts" 38. Van Marle and Bonthuys (38) and Donovan (*Feminist Theory* 190) explains that by deconstructing the privileged position of a dominant ideology or principle, postmodernism displaces the privileged position of the dominant theme thus providing space for other principles or ideologies to be recognised, considered and applied. For instance it is postmodern feminists who question the use of masculine pronouns as the accepted language in legal discourse since it privileges a masculine worldview and marginalises the voice of the female perspective in law. This also opens the space for understanding equality in substantive terms.
[165] *Feminist Theory* 189.

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form of generalisation, coherence and universality and by avoiding generalisations they are able to deconstruct the essential conditions required for authority (or dominant principle). Van Marle and Bonthuys[166] find the significance of postmodern feminist work lies in its scepticism of prevailing conceptions of justice.

3 5 2 Postcolonial feminism

Postcolonial feminism (also known as global feminism)[167] focuses on non-Western women,[168] and links the history of colonialism to the current position of women, and looks at how former colonial powers continue to dominate in ways other than through the traditional construction of colonisation.[169] Postcolonial feminists examine and address issues of race, class and sexuality, and by focusing on the marginalised, look to displace dominant discourses of unity such as "third world woman"; "black woman"; "white woman".[170] In this respect, all those who were "othered" (by exclusion from the dominant discourse of the West and colonial encounters) will find inclusion.[171] According to Mann and Huffman,[172] postcolonial feminism looks to highlight and recognise that women from the "third world" are heterogeneous which is derived from their multiple and diverse social locations. The process of "de-othering" third-world women is necessary in order to highlight the fact that these women are not "singular" or lesser (in the sense that they are perceived by the West to be ignorant, tradition-bound, and victimised).[173]

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166 "Feminist Theories and Concepts" 38.
167 Mann & Huffman (2005) *Sci Soc* 56.
168 Donovan *Feminist Theory* 184.
169 Van Marle & Bonthuys "Feminist Theories and Concepts" 38. In this respect Donovan (*Feminist Theories* 204) refers to the migration of women to the wealthier West as nannies, sex workers or care takers. In this respect we begin to see a picture of Western women exploiting "their sisters" which again takes on an "imperialist" form.
170 Van Marle & Bonthuys "Feminist Theories and Concepts" 39-40.
171 Donovan *Feminist Theory* 166.
172 (2005) *Sci Soc* 67.
173 Mann & Huffman (2005) *Sci Soc* 58. This view of African woman was discussed earlier upon concluding the second-wave feminism discussion. For further reading on this topic, see O Oyewùmí "The White Woman's Burden: African Women in Western Feminist Discourse" in O Oyewùmí (ed) *African Women & Feminism: Reflecting on the Politics of Sisterhood* (2003) 25-43.

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3 5 3 Critical race feminism

According to Mann and Huffman, critical race feminism (also known as intersectionality theory in the context of feminism) was the first to develop extensive critique of second-wavers from within the feminist movement, particularly with respect to their essentialist stance.[174] In line with postmodern feminists critical race feminists share their focus on difference, but contrary to postmodern feminists, who shunned the idea of categorised identity, critical race feminists embraced identity as key to liberation.[175]

Their focus is placed on working-class black women and calls for increased attention on the gendered subordination of black women and their racialized experiences.[176] Van Marle and Bonthuys[177] explain that as a result of colonisation and capitalism, African women experience harms that are not always adequately considered by first-world feminist scholarship. For instance, critical race feminists found that conventional feminism excluded experiences of black women by developing a feminism based on white middle class academic experience and the issues addressed by these feminists have very little benefit for black women.[178] Further, conventional feminism fails to recognise that as a result of race and class some women experience further oppression and that oppression also stems from complicit women.[179] Black women also feel alienated to the extent that conventional feminists oppose men while black women consider themselves in solidarity with them, especially for purposes of survival in a capitalist and racist society.[180] On this basis critical race feminists call for issues of race, class and gender to be address simultaneously.[181]

Concluding on third-wave feminism, Donovan[182] points out that using postmodernism as a theoretical foundation for third-wave feminism poses a number of problems.[183]

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[174] Mann & Huffman (2005) *Sci Soc* 59. The authors point out that this stems from second wavers use of sisterhood as a term seeped in ethnocentrism.
[175] Coleman (2009) *Women's Studies Journal* 6.
[176] Van Marle & Bonthuys "Feminist Theories and Concepts" 40.
[177] "Feminist Theories and Concepts" 41.
[178] Ibid.
[179] Van Marle & Bonthuys "Feminist Theories and Concepts" 41.
[180] Ibid.
[181] Van Marle & Bonthuys "Feminist Theories and Concepts" 41.
[182] *Feminist Theory* 197.
[183] Postmodernism is the focus of critique because in their article Mann and Huffman ((2005) *Sci Soc* 56) explicitly linked all major variations of third-wave feminisms to postmodern theory.

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She states that the most important concern is the fact that postmodernists (with emphasis on deconstruction) have criticised feminism itself since it subscribes to an all defining theory which itself is essentialist and monocausal (or pushing for a single cause) since only particular individuals have legitimacy.[184] In this respect postmodernists view feminism (as representing a cohesive group of a female identity) as ascribing to a universal statement and this very action marginalises others.[185] This approach is deeply problematic because by its very nature, postmodernism does not accept the option of choosing among different theories because all theories are essentialist and monocausal and thus all theories are treated with suspicion. This in turn threatens any cohesive feminist agenda or mass action which negates the possibility of change.[186] Donovan alludes to the fact that postmodernism is seen by some feminists as serving the ruling-groups' interests since it prevents any formulation of conscious opposition by the subordinated.[187] Van Marle and Bonthuys[188] caution that postmodernist's methodology of committing to context and difference, if taken to the extreme could mean that the category of gender becomes meaningless. The authors suggest using postmodernism as an analytical tool that can be used to expand feminist projects for liberation particularly when understanding gender and its links to different races, classes and sexual orientations.[189]

3 6 Feminist Calls for Equality and the Adversarial Pregnancy Environment

Thus far this chapter shows that collaborated female consciousness led to the rise of feminism which is still active today in various forms. Characteristically, feminism houses numerous female perspectives, assertions and critiques all stemming from the individuality of women's lived experiences which are located in their varying social, cultural and racial constructs. However, a unifying thread can be identified amongst these diverse perspectives which is women's call for equality in both private and public spheres.[190]

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[184] Donovan *Feminist Theory* 197.
[185] Ibid.
[186] Donovan *Feminist Theory* 197.
[187] Ibid.
[188] "Feminist Theories and Concepts" 23.
[189] Ibid.
[190] C Albertyn "Equality" in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 82. Albertyn (83-90) explains that feminist demands for equality have evolved through the years from demands for formal equality (equal treatment with men) to demands for substantive equality (recognising

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The content of equality needs some consideration.[191] MacKinnon finds that the claim to equality is based on being human.[192] However, Mackinnon states that currently, what it means to be "human" is constructed according to men's standards and she understands this to mean that women (who cannot reach that standard) are seen as something below being human (second-class citizens).[193] As a result of "second-class status" women are denied respect, dignity, resources, protection and power.[194] She then goes on to question whether the existing standard of "human" should be feminised thus enabling women to be understood as human and therefore equal.[195]

MacKinnon's work is focused on achieving equality between men and women by comparing women's "humanness" with that of men, however, Ackermann is sceptical of this approach.[196] He argues that stating that "person A 'is equal' to person B is on its own meaningless". He requires one to ask, in respect of what are people equal? While MacKinnon uses being human as the standard, she does not elaborate on what it is about being human that makes people claims for equality legitimate or what kind of "human" would be feminised enough to make the concept sufficient to include women. Ackermann answers this by stating that people are, or should be, equal in respect of their human dignity.[197]

Ackermann understands human dignity to be synonymous with "inestimable" human worth and he argues that a number of inherent human traits vest in all persons based

differences between the sexes, context and disadvantage). Further, Albertyn (94-95) explains that substantive equality should be both backward- and forward-looking in that it should remove past disadvantages and put mechanisms in place to secure future equality. This approach to equality can be seen as transformative equality. Substantive equality is the form of equality currently in place in South Africa. Whereas, the United States and Canada have adopted a formal approach to equality, for more on equality see C Albertyn & B Goldblatt "Equality" in S Woolman et al (eds) *Constitutional Law of South Africa* (second edition original service 3 2007, volume 3) 35-5-35-7.

[191] See Albertyn "Equality" 82; C Beasley *What is Feminism? An Introduction to Feminist Theory* (1999) 28-30.

[192] C MacKinnon *Sex Equality* (2007) 3.

[193] Ibid.

[194] MacKinnon *Sex Equality* 2.

[195] MacKinnon *Sex Equality* 3.

[196] L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 23.

[197] Ibid. However, see Albertyn and Goldblatt "Equality" 35-5. The authors also ask the same question but come to a different answer. They answer the questing by stating that at the very least there should be equality in respect of outcomes and opportunities. The authors contend that understanding equality in these terms assists in addressing areas of material disadvantage.

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on the fact that they form part of the human race.[198] Ackermann requires human worth to be understood as:[199]

> [T]he capacity for and the right to respect as a human being. This arises from all those aspects of the human personality that flow from human intellectual and moral capacity; which in turn separate humans from the impersonality of nature, enables them to exercise their own judgment, to have *self-awareness* and a sense of *self-worth*, to exercise *self-determination*, to *shape themselves* and nature, to develop their personalities and to *strive for self-fulfilment in their lives*. It also arises from the capacity of human beings to enter into meaningful relationships with others and thereby achieve self-fulfilment at least in part. (Emphasis added.)

Placing Ackermann's work in the context of contemporary feminist aims for equality, it can be understood that women seek equality in human worth regardless of sex or gender,[200] to secure the space for self-awareness, develop their sense of self-worth, freely exercise self-determination and shape themselves in terms of their inner direction in order to secure self-fulfilment. Further, in cases where women do enter into relationships in order to achieve self-fulfilment, such relationships should result in legitimising and reinforcing their "sense and experience" of human worth.[201] In a

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[198] Ackermann *Human Dignity* 4; 52. He does not qualify the attribution of human worth by requiring a minimum level of mental capacity. Further it is implicit that sex or gender will not qualify a person's human worth either. Woolman offers a different construction of dignity. See S Woolman "Dignity" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 12 2005) 36-6-36-19. Working off of the Constitutional Court of South Africa's jurisprudence, Woolman identifies five definitions of dignity. First, every individual is an end in themselves. This means that an individual cannot be treated as a mere instrument towards achieving other's aims or desires. Second, dignity can be defined as "equal concern and equal respect". This definition houses a negative obligation to not treat a person merely as a means but to also see them as able autonomous agents. Third, dignity can be defined as self-actualisation. This definition follows on the notion that due to the fact that people the capacity to create inner meaning they are also entitled to respect for the meaning that they pursue. Fourth, dignity can be defined as self-governance. Woolman explains that since we house the capacity to formulate our own ends that give our lives meaning, we should also be entitled to collective decision making that determines the ends of our community (that is, democratic existence). Finally, Woolman identifies "collective responsibility for the material conditions for agency" as the fifth definition of dignity. This definition of dignity recognises collective dignity as being that which brings the community together and he states that collective dignity can only occur under conditions of mutual recognition of each other's ends as a community unit.

[199] Ackermann *Human Dignity* 86.

[200] They are not merely after equality with men in respect of what men may find suitable parameters of what it might mean to be human. If one were to accept that women only seek equality with men, then we will be left with having to redefine what it means to be human or at least look to see which sex offers the most inclusive definition of human. This forms a side-show and detracts from the issues at hand.

[201] Ackermann *Human Dignity* 25. Ackermann refers to this requirement of human dignity as the "'relationality' aspect of human dignity." This portion of dignity recognises that certain rights cannot

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situation where a person, institution or the state unjustifiably interferes with or refrains from positive enforcement of these aims they will be infringing on women's human worth and therefore negatively impacting on their experience of equality among others.[202]

Since this thesis is concerned with tensions between female autonomy rights and foetal interests during pregnancy, it is necessary to narrow down the focus of equality in the context of reproduction and understand how the notion of female reproductive freedom (seen as an expression of autonomous existence) informs women's sense and experience of equality of human worth. Thereafter it is necessary to see how reproductive freedom traverses foetal interests and thereby informs one aspect of the adversarial pregnancy environment.

O'Sullivan states that reproductive freedom is a "precondition" for the sexual and social equality of women.[203] In terms of this thesis reproductive freedom is the freedom for women to decide with whom they would like to procreate and whether or not they would like to become parents, bear children, how many to bear and the preferred spacing between children. It is further viewed as including decisions on how to progress through pregnancy and birth. In reaching these sorts of decisions, reproductive freedom also includes autonomous decision making in respect of desired methods of contraception, conception and birthing techniques. This construction of reproductive freedom engages the notion that despite the fact that it is only women who hold the capacity to gestate the unborn and give birth, there is no obligation on them to become parents and therefore reproductive freedom is also the freedom not to reproduce.[204]

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be achieved in isolation and therefore people are required to enter into relationships in order to gain access to these rights and enjoy them. These sorts of rights are called "associational individual rights".

[202] Under a constitutional regime this type of interference would then require the consideration of whether one is dealing with sex and gender discrimination.

[203] O'Sullivan "Reproductive Rights" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2005) 37-13.

[204] See generally L Shanner "Procreation" in A Jaggar & I Young (eds) *A Companion to Feminist Philosophy* (2000) 429-435. Shanner explains various feminist positions on reproductive freedom. For instance liberalists require as little intervention in women's reproductive decisions and therefore they argue that termination of pregnancies, genetic diagnosis and selection, gestational services and high-tech fertilisation technologies should be freely available to women on demand. Socialist feminists, however focus more on restructuring social and cultural institutions to suit women's reproductive lives thereby allowing women to gain economic independence while still engaging in

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Women's biological capacity to procreate functions beyond their intentions concerning whether they would like to be parents or not, and if this capacity is left to run its natural course, sexually involved[205] women of reproductive age could very easily be held in a cyclic state of pregnancy and childrearing.[206] Therefore, it is key to secure a safe environment in which to make reproductive decisions concerning sex, contraception, conception, pregnancy continuation and birth in order to remove this vulnerability. The importance of this becomes apparent when one considers the cultural, social and physical implications of bearing and rearing children because these are disproportionately burdensome for women.[207]

While some women may find parenthood as positively life-defining and rewarding, other women may experience parenthood as perpetuating existing inequalities to varying degrees.[208] O'Sullivan[209] and Mackinnon[210] explain that the consequences of pregnancy and parenthood can include job loss, oversight for promotion, low-paid or unpaid maternity leave, lack of affordable or adequate health care and later childcare, interrupted and sometimes abandoned careers and education.[211] Further, pregnancy,

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family life if they so choose. They see gestational contracts and marketing of in vitro fertilization as a means of exploiting women, particularly the young and impoverished. Shanner points out that radical feminists understand reproductive freedom as a means to remove women as "procreative objects" and generally reject any form of outsider intervention. Also it must be noted that although this portion of the thesis is concerned with demonstrating the development of the adversarial pregnancy environment without reference to laws in place, it is necessary to recognise that reproductive freedom can be and has been translated into a number of rights. For instance, see, C Albertyn et al "Women's Freedom and Security of the Person" in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 364; O'Sullivan "Reproductive Rights" ch 37; G Douglas *Law, Fertility and Reproduction* (1991) 17-25. Specifically, reproductive freedom is based on the rights to self-determination and bodily integrity. However, O'Sullivan dedicates an entire chapter to explaining how the rights in the South African Bill of Rights give meaning to women's reproductive freedom. This issue will be considered in part 2 of this thesis.

[205] "Sexually involved" should be seen to include consensual acts of sexual engagement and also non-consensual acts such as rape and coercive sex practices and relations such as forced marriages and sexual slavery.

[206] This obviously depends on the circumstances of the women concerned and whether they are in a position to refuse sexual advances. Albertyn et al ("Women's Freedom and Security of the Person" 364) point to this concern, namely that women are "not equal in choosing to fall pregnant".

[207] See O'Sullivan "Reproductive Rights" 37-13; MacKinnon *Sex Equality* 1074; C Albertyn et al "Women's Freedom and Security of the Person" 364.

[208] MacKinnon *Sex Equality* 1074-1075.

[209] "Reproductive Rights" 37-13.

[210] *Sex Equality* 1074-1075.

[211] Also see, E Bonthuys "Gender and Work" in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 170-175; C McDonough "Motherhood and Feminism: Lessons from the Titanic" (2006) 8 *J Assoc Res Mothering* 123; J Williams & S Shames "Mothers' Dreams: Abortion and the High Price of Motherhood" (2004) 6 *U Pa J Const L* 818.

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childbirth and rearing children can be physically taxing on women and at times life-threatening.[212] Adding to the encumbrances described here, not all pregnancies are intended or wanted[213] and if women's reproductive freedom is lacking, those not wanting to continue with a pregnancy would face forced pregnancy and birthing experiences and parenthood in cases where adoption is not opted for or is not an option.[214] These issues are increasingly problematic for young girls[215] and women[216] living in poverty whose social support structures are inadequate or non-existent in terms of health care services, education and childcare facilities.

O'Sullivan understands that pregnancy has the potential to seriously curb women's ability to participate as citizens.[217] In line with that, Mackinnon argues, "social structures, economic organization, and cultural attitudes do not tend to support most women in being, or being seen as 'good mothers' and full citizens too".[218] Evidently, it is important that women are free to make reproductive decisions because the cultural, social and physical implications of procreation and associated experiences are far-reaching and long-lasting.

From the above description of women's unique reproductive experiences, it is clear that reproductive freedom is not an already possessed freedom found in all women and girls, but rather a goal that must be achieved.[219] Jackson states that reproductive

[212] MacKinnon *Sex Equality* 1076; R Cook & B Dickens "The Injustice of Unsafe Motherhood" (2002) 2 *Dev World Bioeth* 64.

[213] Cook & Dickens ((2002) 2 *Dev World Bioeth* 75; 79) provide a number of examples that would explain the phenomenon of unwanted pregnancies. The authors associate unwanted pregnancies to laws and practices that prevent access to reproductive health mechanisms such as contraceptives, elective sterilization procedures and family planning services. In some instances oppressive laws make women economically dependent on men which can expose the vulnerabilities of sexual and other forms of violence. Also, women are susceptible to being involved in unsafe sex relationships where they are not in the position to deny sexual advances, demand the use of condoms or access to contraception. Also, inadequate sex and family planning education can lead to increased experiences of unwanted pregnancies.

[214] See generally Cook & Dickens (2002) 2 *Dev World Bioeth* 64.

[215] While the focus on this discussion has mainly been on women's experiences, young girls cannot be excluded because most females come into reproductive age before reaching adulthood. Therefore the reach of reproductive freedom must extend to girls too. Regarding girl's biological vulnerabilities, reproductive health and social support structures in South Africa for young married girls and mothers, see A Skelton "Girl's Social and Economic Rights in South Africa" in B Goldblatt & K McLean (eds) *Women's Social and Economic Rights* (2011) 67-75

[216] Williams & Shames (2004) 6 *U Pa J Const L* 827-829; Cook & Dickens (2002) 2 *Dev World Bioeth* 64.

[217] "Reproductive Rights" 37-14.

[218] *Sex Equality* 1075.

[219] E Jackson *Regulating Reproduction: Law Technology and Autonomy* (2001) 318.

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freedom is not synonymous with unregulated reproduction nor absence of external constraints.[220] In order for women to be able to gain the benefits of reproductive freedom external constraints must be addressed and regulations need to be in place to ensure safe sexual freedom and equitable access to satisfactory reproductive health care services.[221] A number of institutions bear this responsibility, and include the state and state action in respect of acceptable population control policies, laws pertaining to the realisation or curbing of reproductive freedom, rights and health, the health care industry in the administration of health care services and family members, friends or wider society in their position to offer personal support to women undergoing reproductive decisions.[222]

With the above in mind, reproductive freedom should be understood as relational in that women cannot act on a reproductive decision without relying on external sources of support.[223] Some examples of the relational underpinnings of reproductive freedom are worthy of consideration. Where a woman decides not to conceive a child she will need external assistance in order to gain access to birth control mechanisms or for undergoing a sterilization procedure. The relational nature of reproductive freedom even stands true for those women who decide to avoid parenthood through abstinence. Here, it can be argued that a woman relies on others to respect her decision and not force themselves or their desires onto her. Respecting women to make and live by that decision contributes towards their enjoyment of reproductive freedom. Another example is the case where a woman seeks to legally terminate an unwanted pregnancy, this end result cannot be achieved with her acting on her own and she needs the assistance of a regulated system that secures safe access to termination-of-pregnancy services and health care professionals to perform the

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[220] Ibid.

[221] This issue will be discussed more detail in part two of this thesis, focusing on the position in South Africa and the United States.

[222] See O'Sullivan "Reproductive Rights" 37-12-37-13; 37-23-37-24. Also see Jackson (*Regulating Reproduction* 11-160) who in her 3 chapters on birth control, termination of pregnancy and pregnancy and childbirth goes into pronounced detail on how the various identified institutions playing off one another in the context of either assisting women to realise their reproductive aims or act as inhibitors to realising their decided reproductive path. As mentioned in the footnote above, selected contemporary areas of tension with be considered regarding the position in nominated countries of study. The primary aim of this discussion is to demonstrate the various factors at play when understanding the complexity and inter-connectedness of realising the goal of female reproductive freedom.

[223] Jackson *Regulating Reproduction* 115.

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procedure. Further, the relational underpinnings of reproductive freedom is also present in cases where women plan to continue with their pregnancies, they will need prenatal and postnatal care, assistance during birth and social support during maternity leave.

It is the relational nature of reproductive freedom that contributes towards the development of an adversarial pregnancy environment which fosters the potential for tensions to arise during pregnancy. This is especially so when women rely on third-parties who are drawn towards realising foetal interests to continued existence rather than securing pregnant women's equality. Relationships relevant to the aims of this thesis include those where third parties (being the state, medical profession and the judiciary) engage with pregnant women and attempt to derail their self-defined direction for purely positive foetal-related outcomes and not for purposes of advancing women's sense and experience of equality in human worth. Examples applicable to this thesis include restrictive termination-of-pregnancy laws and the use of coercive legal interventions to secure "proper" management of pregnancies that ensures optimal foetal development and positive foetal outcomes.[224] These sorts of interventions impede on women's equality both during and after a pregnancy. It impacts on their equality during pregnancy because third-party intervention may go against how some women plan to experience their pregnancies and possible birth and directly removes pregnant women as cable autonomous decision makers. Further, women's experience of equality will also be impeded after birth in cases where there are restrictive termination-of-pregnancy laws because pregnancy will be forced thus resulting in unwanted parenthood and all the above described social and cultural consequences. Ultimately, women are treated as a means to an end, which is to secure desired foetal outcomes in spite of women's chosen ends, thus devaluing them as human beings and impeding on their sense and experience of dignity or human worth which results in unequal human existence.

This discussion demonstrates that female reproductive freedom, as a fundamental precursor for sexual and social equality, is not primarily concerned with foetal interests

[224] Although this is not covered here, a more detailed discussion on these areas of concern can be found in part 2 of this thesis.

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as an individual concern.[225] Rather, reproductive freedom concerns women's interests and assists in achieving desired ends that characteristically move beyond a purely procreation position. However, the relational foundation of reproductive freedom may place some women in a vulnerable position whereby they rely on third-party support systems whose intentions are not aligned with women's but rather with foetal interests to positive foetal outcomes.[226] Therefore, women's drive for reproductive freedom backed by feminism's calls for equality can be seen to contribute towards developing pregnancy adversarialism, but only in so far as a woman's ends in not aligned with third-parties ends.

3 7 Concluding Remarks

This chapter demonstrates how far women have come and how much has changed in terms of women working towards actively living self-defined direction in respect of education, career paths and parenthood. Feminist collective action has a very clear link to the attainment of these ends. Characteristically, feminism houses numerous perspectives, assertions, points of emphasis and critiques,[227] all stemming from the individuality of women's lived experiences located in their varying social, cultural and racial constructs. Importantly, each perspective aims to achieve freedom and equality through placing women at the core.

First-wave liberal feminists pushed for equality based on sameness, emphasising an individualised construction of autonomous rational agents. However this atomistic existence did not fit well and second wavers drew attention to differences between men and women and thus introduced additional perspectives and arguments for

[225] Manninen explains that at the start, feminism was primarily concerned with detaching women from the unborn since reproduction was one of the primary sources of women's subordination. However, feminism is slowly adjusting its position on the unborn but this is more of a contemporary occurrence and still not a very popular position to find in feminism. See B Manninen "The Value of Choice and the Choice to Value: Explaining the Discussion about Fetal Life within Prochoice Advocacy" (2013) 28(3) *Hypatia* 663. This is discussed in more detail in ch 11 para 11 3.

[226] Ch 3 deals with this factor that contributes towards pregnancy adversarialism, namely, foetal identification and eventual detachment (disembodiment) from pregnant women carrying them and thereafter being spoken for by third parties who argue to have an interest in positive foetal outcomes.

[227] Not all areas concerning feminism could have been explored in this chapter since doing so moves beyond the scope and aim of this thesis. However an overview is important because it shows where women have come from, how they plan to move forward and what is at stake if they are prevent from living in terms of their own foreseeable ends.

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liberation. Socialist feminists brought gendered economic injustice into their quest for liberation, and pursued a goal to restructure educational and business establishments in order to facilitate the reproductive element of women's lives. They created space for women to achieve economic security while having families when it is safest and more convenient.[228] Radical feminists, in their quest to stamp out the root cause of oppression, viewed pregnancy, reproduction and heterosexual union as forms of oppression. Rejecting conventional understandings of love and marriage, radical feminists publicised the private domain and opened the private sphere for public (legal and political) attention and wide redress. Relational feminists, drawing from connection, responsibility and ethic of care, offered a complete turnaround compared to liberalist atomist stance. It was their aim to introduce legislation giving recognition and protection to the different voices vested in women and their uniquely female experience. Nevertheless, all this feminist activity developed an essentialist characteristic, and third wavers have come to the fore and start to offer a feminist critique of feminism. Third wavers, in their postmodern deconstructionist, locally and contextually informed perspective, insistently relocate the marginalised women excluded from first and second-wave feminist, right into the centre of contemporary feminist discourse. In this respect women of colour and non-Western women are developing a feminism that speaks to their locally lived experiences of capitalism, colonialism and racism, amongst others.

Even though schools of feminism can be conflicting, self-critical and grounded on diverging standpoints the discussion of feminism also indirectly highlights what may be at stake if women were denied their sought after ends, especially when the ends they seek are not predominantly procreative in character. Namely, we run the risk of repeating history because without sufficient freedom to make reproductive decisions women's agency would be negated and they would face the possibility of forced domestication and reproduction in terms of externally defined roles. In this respect reproductive freedom is pivotal in the achievement of feminist aims for equality.

Female reproductive freedom brings feminist objectives into the sphere of pregnancy adversarialism for a number of inter-related reasons. Reproductive freedom is a

[228] Shanner "Procreation" 430.

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relational experience and therefore women rely on others to realise their interests. Second, reproductive freedom concerns itself with a specific freedom to be enjoyed by women and its primary area of concerned does not lie with foetal interests or third parties' interests in individuated prenatal life. Therefore when women rely on third parties whose interests are not in line with their own reproductive decisions, the situation arises where tensions may occur because it is unlikely that women will simply accept third-party intervention in such a personal realm of their life. Thus, some women are left experiencing their pregnancies in an adversarial environment.

The chapter to follow considers other parties involved in the creation of pregnancy adversarialism and focuses on foetal identification and eventual detachment from pregnant women's bodies (disembodiment). It also examines the theories advanced as to why foetal life is something to value and the implications of valuing the unborn as an independent entities.

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Chapter Four

Foetal Identification, Individuation and "Special Status": Theories on the Value of the Unborn

4 1 Introduction

Lupton, writing on the social worlds of the unborn, points out that as the women's movement came to the fore, so did the "foetal citizen" through foetal identity and individuation.[1] Through the use of technology, pregnant women's bodies have been "opened up" enabling one to gain visual access to the unborn, track its growth and development, and even offer direct therapeutic services. These developments are seen as indisputable evidence of biological life, albeit unborn non-legal life. Visual aids such as ultrasonography and foetal medicine identify prenatal life and individuate it from the living condition of pregnant women's bodies and lives.

These technological advancements have fuelled the development of theories on prenatal life and where the value of such life lies. Theories that have been developed on the foundation of medical science are presented as objectively legitimate since they stem from scientific technological advancements and observations that provide universally applicable evidence of "life" before birth and proof of the humanness of the unborn. This is opposed to the theories found in early history based on somewhat flawed observations, divine principles, or myths, none of which could be tested or disproved without adequate access to technology and advanced knowledge systems.[2] For instance Casper[3] states: "Science, technology, and medicine are important authoritative worlds in which definitions of life are propagated and subsequently represented in other worlds … the 'meaning of life' in these other worlds is vested with

1 D Lupton *The Social Worlds of the Unborn* (2013) 105.

2 See, J Palmer "Seeing and Knowing: Ultrasound Images in the Contemporary Abortion Debate" (2009) 10(2) *Feminist Theory* 173 177; Lupton *Social Worlds of the Unborn* 2. Palmer explains how "scientific photography" played a leading role in the medicalization of pregnancy terminations, since there was a shift from religious based objections to objections based on technical grounds. In this context, scientific knowledge is portrayed as legitimate and depoliticised making decisions based on that form of knowledge seem objective and neutral, and therefore more easily justified.

3 M Casper "Operation to the Rescue: Feminist Encounters with Fetal Surgery" in in L Morgan & M Michaels (eds) *Fetal Subjects, Feminist Positions* (1999) 105.

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greater claims to truth and universality." Consequently, the foetus has come a long way from the "biblical seed" or mystic humanoid creature.[4]

Accordingly, this chapter looks at various scientific and technical medical advances and demonstrates how these developments have led to the identification of the unborn and their eventual individuation from the existence of pregnant women carrying them, in both clinical and social settings. As a result of biologically and socially "knowing" the unborn, a number of theories have sprouted aimed at explaining why prenatal life is of any value. The most prevalent of these will be discussed in this chapter. In explaining the value of foetal life, the term "special status" is adopted and denotes the situation that the unborn are not vested with full status but since they are also not mere things, they have some status.

Although this thesis is mainly concerned with *foetal* development during pregnancy (the development that takes place after embryonic stage), at times it is necessary to consider all stages of prenatal life including embryonic life. This is due to the fact that some of the theories discussed take this approach and removing embryonic life from the argument will detract from the contribution of the theory under consideration.

4 2 Technological Advancements and the Unveiling of Prenatal Life

Duden explains that the unborn "we live with today were first conceived not in the womb but in visualizing technologies".[5] Prior to technological contributions in medicine, during the three hundred years prior to the first depiction of "fetuses without mothers" in 1799, the unborn were represented as fully-gown miniature persons dancing in pregnant women's uteruses, presenting the "child *hoped* for" (emphasis

[4] Casper "Operation to the Rescue" 105. A fitting example of how knowledge in medicine infuses and informs claims to life beyond the functioning realms of medical science: Casper (108) explains how Dr Liley of Auckland (the first doctor to perform foetal surgery in the 1960s) claimed that the unborn were vested with personhood and he explicitly used his scientific and clinical knowledge as "objective stabilizers" to justify his claim. In this instance he took the position of a "pro-lifer" arguing against termination of pregnancies.

[5] B Duden "The Fetus on the 'Farther Shore': Toward a History of the Unborn" in L Morgan & M Michaels (eds) *Fetal Subjects, Feminist Positions* (1999) 16.

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added).[6] Pregnancy was understood as a female-based bodily experience.[7] Thus, getting to "know" the unborn was based on fairly rudimentary processes when compared to the amenities of today's medical practices.[8] Most information obtained on the unborn was collected from experiments on miscarried or aborted foetuses.[9] However, when it came to understanding how the unborn existed and "lived" within women's bodies the medical profession had very little to go by and had to rely on the descriptions provided by pregnant women. Physicians' knowledge could only go as far as pregnant women were able to describe and articulate their experiences and essentially physicians could only observe from the outside.[10]

Oakley states that the first foetal heartbeat was accidentally heard in 1818 when a physician was attempting to listen for foetal movements though a woman's corset, and later in 1821 another report emerged of hearing foetal heartbeat.[11] Further, in the 1800s and early 1900s abdominal palpitation was the only method available that could assist in determining the position of the foetus for purposes of labour.[12] Internal examinations and examination of vaginal discharge also assisted in determining the onset of early pregnancy.[13] In 1928, after discovering pregnancy hormones, the first urine pregnancy test was performed and by 1940 the tests were highly successful.[14]

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6 Duden "The Fetus on the 'Farther Shore'" 18-19. A Frankfurt physician, Dr Soemmerring, was the first to present the representations of the unborn as entities progressing through gradual development. However, Duden (23) explains that his method of representing the unborn was such that the images were not real representations but rather a blueprint for the "evolution of general fetal development". Thus, the representations do not have an umbilical cord, or any biological connections to the pregnant woman and appear out of context. According to Duden, this representation casts the unborn in a space that makes them untouchable, a form of "disconnected visibility" yet their lifelike representations suggest a very real closeness. Duden (23-24) argues that it is Soemmerring's depictions of the unborn that starts the notion that the foetus we know today is the product of mechanically produced records (biomedical measurements) rather than the bodily experience of pregnancy. A "disembodied" or a-contextual foetus come to the fore again in the late 1900s, this is discussed below.

7 Duden "The Fetus on the 'Farther Shore'" 20. A pregnancy was only ever "confirmed" by a woman's experience of quickening, being the time when a woman first feels the unborn stir in her uterus. Even in this case, the unborn were not considered "children" but rather a "child-to-be". If there was premature delivery, the product of conception was not considered a child but rather a "mole", "Mooncalf", or a "misshapen thing", see, Duden "The Fetus on the 'Farther Shore'" 20.

8 A Oakley *The Captured Womb: A History of Medical Care of Pregnant Women* (1986) 25.

9 E Jackson *Regulating Reproduction: Law, Technology and Autonomy* (2001) 126; Lupton *Social Worlds of the Unborn* 4. Further, Lupton points out that the vast majority did not have access to newly discovered information.

10 Oakley *The Captured Womb* 155.

11 Oakley *The Captured Womb* 25.

12 Oakley *The Captured Womb* 26-27.

13 Oakley *The Captured Womb* 25.

14 Oakley *The Captured Womb* 96; 155.

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While these elementary practices (some more than others) had various advantages, neither provided information about the condition of developmental life within the uterus.

Getting actual visuals of the unborn inside the uterus originally took place in 1896 through the use of x-rays, in this instance an x-ray was performed on a pregnant woman, who at the time had miscarried but had not yet expelled the foetus.[15] In 1899 the first living foetus was x-rayed and thereafter x-raying pregnant women was enthusiastically encouraged and actively engaged.[16] By 1910 x-rays were considered a medical norm in antenatal care in certain areas of the United Kingdom.[17] At first x-rays were useful in mapping the stages in the growth of the foetal skeleton, then x-rays were seen to provide an accurate means of assessing gestational age, sex of the foetus, and aided in detecting skeletal abnormalities in the unborn.[18] Further, foetal presentation and position could be correctly determined which proved a great help when it came to controlling labour.[19] Later, x-raying also assisted in diagnosing a low-lying placenta (placenta praevia) which if not detected can cause fatal complications during an attempted vaginal delivery.[20]

However, in 1957 the medical profession came to officially recognise increased health complications linked to radiation exposure and x-ray referrals dropped significantly.[21] The initial suspected hazards of radium exposure incentivised the development of alternative ways of viewing the unborn and in the late 1940s ultrasonography made its way into antenatal care by Douglas Howry.[22] After a series of mechanical refinements and developing two-dimensional foetal images (as opposed to early one dimensional

15 Oakley *The Captured Womb* 28.
16 Ibid.
17 Oakley *The Captured Womb* 98.
18 Oakley *The Captured Womb* 98; 100.
19 Oakley *The Captured Womb* 100-101.
20 Oakley *The Captured Womb* 103.
21 Oakley *The Captured Womb* 102; 105. Oakley (102; 105) explains exposure to radiation left people infertile or infected with severe forms of cancers, and in some cases leukaemia and other forms of malignant diseases were found in those children that were x-rayed prior to birth.
22 Oakley *The Captured Womb* 157. Interestingly, Oakley (157) states that the same technology (sonar) was used to detect submarines during the First World War and it was never thought of to use it in obstetrics until the 1940s.

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images) having an ultrasound was routine practice at some clinics in the United Kingdom.[23]

Oakley states that ultrasonography gave third parties "real-time" scans which showed "life" in the uterus, the real goings-on behind female's abdominal walls.[24] New information came to light which included the observation of foetal breathing motions, eye movements, and foetal hiccups, and physicians also discovered that the unborn empty their bladders a certain number of times per day.[25] Further, ultrasonography enabled physicians to determine what could be considered normal growth patterns thus enabling the detection of any abnormal growth patterns.[26] Oakley points out that a "mounting list" of characteristics came to light and ultrasonography could detect 80 different congenital abnormalities.[27]

Oakley asserts that ultrasonography enabled the medical profession to "dispense with mothers as intermediaries, as necessary informants on fetal status and life-style".[28] Consequently, ultrasonography made it possible for third parties to have direct access to the unborn and opened up the opportunity to gather detailed information about the unborn prior to birth.[29] These gradual obstetric developments created authoritative space of obstetricians to claim a knowledge superior to that of pregnant women themselves in terms of their bodily experiences of pregnancy.[30] Consequently terms such as "fetal patienthood" and foetal "personality" begin to permeate the discussion of pregnancy.[31] This presents the steady move from identifying the unborn, towards individuating them as having separate living needs from the women carrying them.

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23 Oakley *The Captured Womb* 146.
24 Oakley *The Captured Womb* 156.
25 Oakley *The Captured Womb* 167.
26 Ibid.
27 Oakley *The Captured Womb* 168. Oakley (171-174) points out that other methods of foetal visualisation were developed, such as fetoscopy and amnioscopy whereby an endoscope (optical instrument) is inserted directly into the amniotic cavity in order to view the unborn directly. More recently, embryoscopy has made its way into clinical practice and this enables one to view a 4 week embryo, see, Jackson *Regulating Reproduction* 127.
28 Oakley *The Captured Womb* 155.
29 Ibid.
30 Oakley *The Captured Womb* 98.
31 Oakley *The Captured Womb* 155; 189; Lupton *Social Worlds of the Unborn* 3. Jackson (*Regulating Reproduction* 129) rightly points out that the terms "fetal patienthood" and the more contemporary term, "fetal medicine" pose a problem since they are not morally neutral descriptions of clinical practice. She explains that these terms draw attention away from pregnant women and their rights as patients themselves. The terms tends to side-line women's right to refuse treatment as patients, thus preventing the physician from treating the unborn as a patient or practicing foetal medicine.

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In respect of individuation, Roth argues that the first sign of "separating"[32] the foetus from the pregnant woman was found in 1941 (during the hype of x-raying and scanning pregnant women) when a doctor justified preventing natural birth on the grounds of "fetal distress" rather than referring to the conditions that originated in the pregnant woman herself.[33] However, Shorter goes earlier than that and suggests that since 1901 "fetal indications" were beginning to be accepted for purposes of obstetric intervention during birth.[34] After examining a number of medical texts, he notes that from around 1930s pubic-hair shaving, birthing positions, routine episiotomies, the use of forceps and caesarean deliveries were all increasingly justified for purposes of securing positive foetal outcomes.[35] Shorter argues that this means that obstetricians were prepared to intervene in birthing process despite the fact that the pregnant woman concerned was not in a compromised position.[36]

Further, stemming from the initial visuals of the unborn, increasingly refined technological developments in medicine also enabled foetal monitoring and surgery, which tends to emphasise the foetus as a patient in need of individualised medical attention.[37] Casper states that once ultrasonography was integrated into obstetric

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[32] It is submitted that the process of separation should be interpreted as an indication that people are acting on the new found identity of the unborn.

[33] R Roth *Making Women Pay: The Hidden Costs of Fetal Rights* (2000) 33. In this respect Roth refers to the work of W Arney *Power and the Profession of Obstetrics* (1982).

[34] E Shorter *A History of Women's Bodies* (1984) 166. Jackson (*Regulating Reproduction* 128) confirms that this trend continues to persist, stating that the yardstick for successful obstetric practice is foetal health and wellbeing, consequently medical textbooks are increasingly devoted to treating the unborn, and less dedicated to the care of pregnant women.

[35] Shorter *A History of Women's Bodies* 164-176. In this respect women were expected to be clean shaven in order to secure a sanitised birthing area (167) and women were expected to deliver on their backs in order for the attending physician to have sufficient access to the uterus to accurately monitor foetal heart rates (169). Episiotomies were routinely performed in order to "spare the child a prolonged expulsive stage of labour" (172). Assisted deliveries in terms of forceps and caesarean-section deliveries also increased for purposes of ensuring healthy foetal outcomes (174-175). On the topic of forceps delivery Shorter (174) quotes the proceedings at a White House Conference in 1933: "Until comparatively recently forceps were used infrequently and then only when the mother was unable to deliver herself, fetal indications were not recognized."

[36] Shorter *A History of Women's Bodies* 166; 176. Rather dramatically, Shorter interprets this as meaning that medicine has "stanched from women's hands whatever hopes of autonomy and control" they wished for.

[37] Jackson (*Regulating Reproduction* 127) explains that if any anomalies are detected in a foetus, it can now receive treatment while still in a woman's uterus. She states that blood transfusions can be performed via the umbilical cord. In some cases the foetus can be removed from the uterus, operated on, and then returned to the uterus for later birth (127, fn 66). Also see B Dickens & R Cook "Legal and Ethical Issues in Fetal Surgery" (2011) 115 *IJGO* 80.

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care, clinical attention turned to foetal surgery.[38] This is because ultrasonography revealed a range of structural problems, thus creating the need for surgical solution to remedy identified foetal-related complications.[39]

Also, in earlier writings[40] it was argued that advancements in medical technology is continually improving its ability to ensure the survivability of a premature foetus earlier in gestation thus giving the impression that the limit of foetal viability is being pushed back to earlier points in gestation.[41] However it has come to light the viability line is not pushed back but rather there is an increased incidence of survival for those neonates born at the point of viability.[42] No matter how far medicine develops, the benefits of technology are limited in cases where the unborn is too underdeveloped to sustain life.[43] However, the position of increased survival rates of premature neonates also feeds the view of "foetal patienthood" since doctors are cited as arguing that if a 23-week-gestated neonate can be successfully treated after birth, then a foetus of the same gestational age deserves care too.[44] Jackson states: "[G]iven the increasing range of technological innovations that allow the fetus to be seen, monitored, diagnosed and treated while still *in utero*, it is probably unsurprising that some doctors consider birth to be an arbitrary point at which to recognise the fetus as a patient in its own right."[45]

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38 Casper "Operation to the Rescue" 106.

39 Ibid.

40 For instance see, S McLean "Women, Rights and Reproduction" in S McLean (ed) *Legal Issues in Human Reproduction* (1989) 219.

41 Foetal viability refers to the point in foetal development where a foetus will be capable of independent survival if it were to be delivered. In this respect gestational age, organ development, sex and attending health care facilities all contribute towards the survivability of the foetus. For a detailed definition of clinical foetal viability see, C Pickles "Proving the Significance of the Born-Alive Rule with Reference to Medical Knowledge of Foetal Viability" (2013) 24(1) *Stell LR* 146 155-160.

42 J Sarkin-Hughes "A Perspective on Abortion Legislation in South Africa's Bill of Rights Era" (1993) 56 *THRHR* 83 89.

43 See E Lee "The Abortion Debate Today" in K Horsey & H Biggs (eds) *Human Fertilisation and Embryology: Reproduction Regulation* (2007) 288; Sarkin-Hughes (1993) *THRHR* 89. These authors explain that without sufficient development (representing an "anatomical threshold") extremely premature neonates will not be able to survive because their bodies will be too underdeveloped to sustain basic life. For more on the limiting role of viability in a clinical setting see, Pickles (2013) *Stell LR* 146; T Powell, L Parker, C Dedrick, C Marrera, D Salva, F Erdman, S Huff & M Saunders "Decisions and Dilemmas Related to Resuscitation of Infants born on the Verge of Viability" (2012) *NAINR* 27; B Arzuaga & B Lee "Limits of Human Viability in the United States: A Medicolegal Review (2011) 28(6) *Pediatrics* 1047; I Seri & J Evans "Limits of Viability: Definition of the Grey Zone" (2008) 28 *Am J Perinatol* 4.

44 Jackson *Regulating Reproduction* 128.

45 Jackson *Regulating Reproduction* 127. This proves particularly problematic for pregnant women because, as Lupton (*Social Worlds of the Unborn* 22) points out: "Once a foetus becomes designated as a 'patient', the maternal body in which it is developing tends to be viewed as an 'environment' or

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Thus, as technology improves, it moves from foetal identification towards fortifying individuation by third parties in the medical field. However, the process of identifying and individuating the unborn is not only found in the context of medical treatment of pregnant women, as scientific advancements improve, it's findings become more accessible to the public and thus attract wider public attention. In this respect, access to the unborn is no longer limited to attending physicians but expands to include other members of public. Michaels and Morgan state that as the unborn move into the public arena the notion of "foetal personhood" enters the scene.[46] Lupton argues that this process has led to "infantilising of the unborn".[47]

According to Palmer the introduction of three- and four-dimensional ultrasonography scans is the cause of increased third-party foetal visibility beyond the clinical setting.[48] This is due to the fact that three- and four-dimensional ultrasound scans are far clearer, and one no longer needs a medically-trained eye to interpret the image as is required with two-dimensional images.[49] These images present a clear picture, in real time, of the unborn engaging in human behaviour and thus elicit a sense of familiarity from the viewer.[50] To the untrained eye, these multi-dimensional scans are also perceived to portray foetal consciousness with respect to reactions to stimuli and detailed facial

even an 'incubator' for the nourishment and protection of the unborn." This may very well lead the side-lining of women's wellbeing and health since the unborn will be the primary focus of the medical attention.

46 M Michaels & L Morgan "Introduction: The Fetal Imperative" in L Morgan & M Michaels (eds) *Fetal Subjects, Feminist Positions* (1999) 2-3.

47 Lupton *Social Worlds of the Unborn* 3.

48 Palmer (2009) *Feminist Theory* 177. Palmer (175) explains that three-dimensional scans are a series of two-dimensional scans recorded and reconstructed into three-dimensional data based on geometric information gathered through the two-dimensional scan process. Four-dimensional scan are really just updating these scans at short intervals to create the impression of movement. Interestingly, Palmer (175) points out that three- and four-dimensional scans are not frequently used for clinical purposes because the technology used to obtain two-dimensional scans are of a superior quality for purposes of obtaining clinical data. Lee explains that these scans do not offer any additional information about foetal development and thus have limited value in a clinical context, see Lee "The Abortion Debate Today" 238. Lupton (*Social Worlds of the Unborn* 4) describes the scans as being used for purposes of prenatal bonding.

49 Palmer *Feminist Theory* 175.

50 Ibid.

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expressions.[51] That is, the scans are used to argue that the unborn feel pain and since they have been recorded "smiling", they must also be experiencing happiness too.[52]

As a result of removing the need for clinical interpretation of the image, these images have moved into the public domain via newspapers, television broadcasts and advertisements, pregnancy books and magazines, and documentaries, and have begun to play a role in the wider debates concerning reproductive rights.[53] More often than not, these images are presented a-contextually and detached from the social and political contexts of pregnancy.[54] The unborn are presented as floating in space, which suggests "disembodied subjectivity" of the unborn, or a form of "foetal autonomy".[55] Lupton also explains that the maternal "nine-month long work" and the "interembodied" nature of gestation has disappeared and the extent of maternal erasure has even gone so far as to exclude them from representations of the birthing process.[56] Additionally, increased media coverage of foetal surgery, presented as "rescue operations" embeds in the public's mind the notion that the unborn are separate patients in need of individualised medical attention.[57]

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51 Palmer *Feminist Theory* 184-185. Palmer (185) points out that, in medicine, reactions to stimuli and facial movements are reflexes rather than conscious movements or expressions of emotions. Also see Lee "The Abortion Debate Today" 238-239, Lee places the same argument forward. This shows that ultrasound images tend to undergo cultural interpretations that are at odds with medical practice and knowledge. More about the ability to feel pain or express emotion will be discussed below when considering the interest approach to valuing foetal life.

52 Palmer *Feminist Theory* 184-185.

53 Palmer *Feminist Theory* 175. For instance, Lupton (Social Worlds of the Unborn 47-48) shows how these technologies informed the pro-life stance against termination of pregnancies and how they used this technology to advocate for law reform.

54 Lupton *Social Worlds of the Unborn* 40; Palmer *Feminist Theory* 176-177.

55 Palmer *Feminist Theory* 176-177; Roth *Making Women Pay* 33. Palmer (177) notes that some feminists have questioned the presentation of these images as "reality" since the images do not include the pregnant woman's body. They have called on viewers to be critical of the "reality" these images are perceived to represent and argue that more attention should be given to who produces the images and who sees the images. This is an important task because "ways of seeing are recognised as socially embedded." Also see, Lee "The Abortion Debate Today" 288, who share the same view. More on this topic is discussed below.

56 Lupton *Social Worlds of the Unborn* 40.

57 Casper "Operation to the Rescue" 107. Casper explains that while pregnant women generally, out of the need to secure healthy birth outcomes, accept undergoing foetal surgery, maternal health is side-lined for the benefit of the unborn. This is also clear when one considers the history of the development of foetal surgery, where fatality risks were so high but physicians pushed through because the positive foetal outcomes urged them on. In this respect, see, Casper "Operation to the Rescue" 106-107.

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Lupton understands the development the foetal citizen as a contributor towards an environment characterised by adversarialism.[58] While technology gives third parties access to pregnancies, Roth argues that it is not technology itself that creates an adversarial pregnancy environment but rather the social and political relations of technology.[59] She stresses that scans do not speak for themselves, they have to be interpreted by the viewer: "technology alone does not tell a story".[60] Roth's cautionary note rings true when one considers Palmer's discussion of how foetal reflexes in response to stimuli have numerous interpretations depending on who the interpreter is, their context and underlying motives. For instance, non-medical individuals understand those reflexes to be an indication of experiencing of pain and emotions, while medically-trained individuals understand those reflexes to be part of a complex neurological system but still involuntary and without any conscious appreciation.[61] One interpretation is driven by the underlying social construction of "child" and emotional reactions to what it is seen (developing moving foetus), while the other is influenced by a "scientific approach" in the context of the uncertain.[62] Regardless, both views tend to focus on the individuality of the foetus.

Michaels and Morgan state that currently foetal representations "converge with prevailing norms about the nature of subjectivity and personhood … fetuses are sexed, named, 'photographed,' surgically altered, spoken to and about, and even speak themselves, Hollywood style".[63] Roth argues that as interpretations continue to provide the unborn independent status, women begin to be erased as important social beings.[64] An adversarial pregnancy environment will certainly come to the forefront

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58 Lupton *Social Worlds of the Unborn* 105.

59 Roth *Making Women Pay* 32. For instance, in the United States politics revolving around women and reproduction has led to foetal-rights sympathisers using advances in medical technology to justify their calls to extend full legal status to the unborn. In this respect see the discussion in part 3 of this thesis.

60 Roth *Making Women Pay* 33.

61 Palmer *Feminist Theory* 184-185.

62 Ibid. Here Palmer (182) is considering a debate that took place on parliamentary level, about whether four-dimensional ultrasound scans should be used as evidence of foetal consciousness in the context of termination of pregnancies. It was found by the committee that the scans are not helpful with respect to understanding the scientific neurobiological development of the unborn. In one of the public comments (183), a participant called on the panel to view the unborn as a developing child from as early as 18 weeks' gestation, and he based this call on the evidence on what was seen via four-dimensional scans. The panel (183-184) agrees that what is viewed is memorable and elicits emotions but goes on to separate scientific knowledge about pregnancy and emotion, and make their decision from a scientific position.

63 Michaels & Morgan "Introduction: The Fetal Imperative" 6.

64 Roth *Making Women Pay* 34.

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where the process of assigning independent subjecthood to the unborn takes place in an active female-rights arena as depicted in chapter three of this thesis.

4 3 Legal Personhood and Theories on the Value of Prenatal Life as Justifications for "Special Status" in Law Generally

Tooley points out that, beyond law, the term "personhood" can be interpreted in a number of ways.[65] Personhood can either denote a purely biological connection to the human species, or personhood can indicate a type of "mental life"[66] found in normal functioning adult human beings. He emphasises that it is important from an ethical perspective to determine what a person[67] is because the designation of "personhood" demands moral status, making it morally and possibly legally wrong to destroy it or interfere with its proper development.[68] The position in respect of law (particularly

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65 M Tooley "Personhood" in H Kuhse & P Singer (eds) *A Companion to Bioethics* (2001) 117.

66 See J Harris *The Value of Life: An Introduction to Medical Ethics* (1985) 14-19 for an example of defining personhood in relation to mental capacities. "Mental life" can be a wide range of characteristics and can include, self-awareness, self-consciousness, the ability to communicate with language, rationality. The essential characteristics of what makes a person a person is an ongoing debate. The account of personhood that only requires mental capacity equal to that of an adult is rejected from the outset in this thesis and will not be considered any further unless in passing for two reasons: First, this approach is adopted because the definition of personhood, namely requiring rationality and self-consciousness, has far reaching and demeaning consequences since it denies any significance to those already born, such as, neonates, young children, the mentally ill (at varying degrees) and those in a permanent vegetative state. Second, this construction of personhood does not assist in realising the aim of this chapter, namely, to determine why special status would be afforded to the unborn, it completely denies any moral standing in terms of unborn life. For a recent example of the implications of this line of thought, see, A Giubilini & F Minerva "After-birth Abortion: Why Should the Baby Live?" (2013) 39 *J Med Ethics* 261. Here that authors argue that the unborn do not have the same moral status of actual people (since they lack the metal capacity to ascribe value to their lives) and as a result of this their interests can be overridden by people with full personhood. Thus, they argue, that abortion should be available after birth, even in the absence of severe neonatal malformations. Essentially, the authors were arguing for legal infanticide. This article faced fierce criticism, see generally, http://jme.bjm.com/content/39/5/261.short (accessed 19 August 2013). However, working with a concept of personhood that is representative of mental capacity, Tooley (121) alludes to the fact that some philosophers have called for personhood to be understood in terms of degrees. Thus, the value accorded to the unborn will be relative to the degree of personhood is holds. In this respect, see C Perring "Degrees of Personhood" (1997) 22 *J Med Philos* 173. Perring rejects the idea that personhood is a "categorical concept" and he advances that personhood (being a representation of developed psychological properties) is a "graded concept". Thus, as personhood develops and moves up in degree towards more complete personhood, so the value of that person's life increases. Accordingly, he (190) advocates for a "graded right to life" and the lower the degree of personhood, the lower the claim to life will be, meaning that it can more easily be trumped at certain stages in development or degradation. Conversely, Perring (191) states that the higher the degree of personhood the more demanding circumstances must be in order for his or her right to life to be trumped. Also see, T Kushner "Having a Life versus Being Alive" (1984) 1 *J Med Ethics* 5, the author offers a similar approach to degrees of personhood.

67 As opposed to non-humans such as animals, machines or a simple group of cells, see, Harris *The Value of Life* 14.

68 Tooley "Personhood" 117.

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South African law) is that prior to birth the unborn lacks personhood even though it is part of the human species. Once born, the new born is a person and is vested with legal subjectivity and rights as a person regardless of its ability to act rationally, be self-aware or display any other form of "mental life".[69]

The above legal description of personhood does not clarify why it can be ethically wrong to terminate late pregnancies or experiment with biological products linked to human reproduction. Science has visibly demonstrated unborn life and their medical and social individuality, but now one is left to determine what should be done with prenatal life. In this respect, a number of theories come into play when dealing with prenatal life that seek to determine why we should value prenatal life in some instances but also shy away from valuing it in other situations. According to Ford, this process of valuing[70] and/or devaluing[71] prenatal life is really a process of designating "special status" to the unborn.[72] Here "special status" refers to the fact that although the unborn are not ascribed the legal status of personhood, they still represent something that holds distinctive and intrinsic value and is something worthy of our consideration or even protection.[73]

It must be noted that some of the theories considered in this chapter and the manner in which they are used to justify special status are not the only ways these theories can be, or have been adopted. For instance, Boonin discusses some of the same theories as they have been applied by "abortion critics" to extend the right to life to the unborn at varying stages of development.[74] Therefore, Boonin's work demonstrates that numerous theories can be stretched in an attempt to extend the right to life to the unborn. While Boonin goes into great detail to convincingly discredit these theories as

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69 Davel & Jordaan *Law of Persons* (2000) 2.

70 Here, "value" indicates a demand for a certain measure of respect close or equal to that demanded by personhood.

71 Being something "less" than personhood.

72 M Ford "Nothing and Not-Nothing: Law's Ambivalent Response to Transformation and Transgression at the Beginning of Life" in S Smith & R Deazley (eds) *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression* (2009) 22.

73 Ibid. Here, the moral status of the unborn can be seen to inform law's granting of special status to the unborn. Steinbock explains the difference between "moral standing" and "moral status", see B Steinbock *Life before Birth: The Moral and Legal Status of Embryos and Fetuses* 2 ed (2011) 1. "Moral standing" indicates to us whether a particular entity's interests or existence counts, and "moral status" tells us *how much* its interests or existence counts.

74 D Boonin *A Defense of Abortion* (2003) 19-132.

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an “abortion defender”, he does not consider these theories in a more nuanced fashion and his conclusions all seem to end with demonstrating how the right to life cannot be justifiably extended to the unborn. His approach does not extract any further uses for these theories.[75] A particular theory seems to “live or fall” by its ability to extend the right to life to the unborn. Conversely, for purposes of this chapter, these theories are used in a more balanced fashion, namely, to show that although the unborn are not vested with full status they are still accorded special status. Understanding these theories as conferring special status to the unborn, specific attention is given to the grounds used to limit the value of prenatal life so as to avoid a situation of merely extending legal subjectivity to the unborn.

4 3 1 Potentiality

Potentiality is grounded on the premise that due to the fact that an entity has the potential to become something more complete and meaningful, it is worthy of respect or assigned special status.[76] Applying this approach, the unborn is valued as a developing human since it holds the potential (complete genetic make-up) to become a unique individual human being with full moral status, or a complete and independent person.[77]

Ford raises a number of criticisms against this method of conferring special status to the unborn. First, she states that not all unborn actually hold the potential to become persons since some face severe deformities and may not survive until birth.[78] Second, she cautions that not only the unborn hold the potential to become fully fledged

[75] The portion of Boonin’s work that discredits these theories project a sense of an “all or nothing” situation and this fails the aims of this chapter to develop an understanding of why unborn life is sometimes protected, while other times it is not.
[76] Ford “Nothing and Not-Nothing” 24.
[77] Ford “Nothing and Not-Nothing” 24; C Megone “Potentiality and Persons: An Aristotelian Perspective” in M Kuczewski & R Polansky (eds) *Bioethics: Ancient Themes in Contemporary Issues* (2002) 155 157; M Warren “Abortion” in H Kuhse & P Singer (eds) *A Companion to Bioethics* (2001) 127 131; R Hursthouse *Beginning Lives* (1987) 72; Harris *The Value of Life* 11.
[78] Ford “Nothing and Not-Nothing” 24-25.

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persons since the potential can also be found in sex gametes thus requiring special status to be conferred on to those entities too.[79] Third, Ford succinctly states:[80]

> In our dealings with entities in the here-and-now, it could be argued, we should accord them the status appropriate to what they currently *are*, rather than to what they may one day be. We should focus, for example, on the appropriate way to value the embryo/ foetus as an *actual embryo*/*foetus*, rather than a potential something else. (Emphasis in the original.)

In this respect, Ford points out that we are merely valuing a human characteristic that the unborn does not actually have, and the author finds this a little perplexing.[81] Dworkin can be cited as a critic too, he rejects the notion of "future possibilities" and offers a "frustration thesis" instead.[82] Dworkin views unborn life as a continuing process which is of worth because there is a certain degree of "natural investment" in that developmental process, meaning that as unborn life continues to develop there is increased investment in its natural progression through "life".[83] Consequently, as foetal development continues it makes any loss of life increasingly significant due to

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79 Ibid. Ford relies on Harris's work, see Harris *The Value of Life* 11-12. However, Ford does acknowledge that there have been some qualifying restraints applied to potentiality arguments. For instance, the argument that potential is limited to those entities that can, in their natural state, develop into humans. This qualification will exclude individual ovum and sperm from being afforded special status since in their natural state (without fusion) they cannot develop into a human being.

80 Ford "Nothing and Not-Nothing" 25.

81 Ibid. Additionally, Ford (25;27), relying on Hursthouse, points out that this approach holds very little value in terms of practical application especially since Hursthouse (*Beginning Life* 73) emphasises that the potentiality argument can either be applied very conservatively or liberally. In this respect Hursthouse (73) explains that the potential seen in unborn life can be ranked very low (moving away from humanness) by liberalists or it can be ranked very high (moving closer towards humanness) by conservatives. Consequently, Ford (25; 27) argues that this approach is weakened since its application depends on whatever normative context the holder's forgoing ethical outlooks are. Warren ("Abortion" 131) refers to a fitting example: "It is true that potential human beings are often highly valued, particularly by persons who wish to have children. If a pregnancy is wanted, then the fetus will be valued for its human potential. But if the pregnancy is unwanted or medically dangerous, or the fetus is found to be severely abnormal, then its value as a potential human being may be outweighed by the needs of actual human beings." Lupton's work in *Social Worlds of the Unborn* also alludes to the same issues.

82 R Dworkin *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (1993) 87; 89. In the context of loss of life, he states that the loss is not sad because of what can or may happen in the future, but rather what has already happened: It "frustrates" the redemption or realisation of natural and human investments made in terms of that life.

83 Dworkin *Life's Dominion* 87-89.

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increased natural investment.[84] That is, through premature loss of prenatal life we have frustrated certain investments in a particular life's journey.[85]

Megone (based on Aristotle's work) offers a more complex construction of the potentiality argument and asserts that the above descriptions and critiques of potentiality may be misconceived.[86] He draws on a concept of potentiality which is constituted of three forms, namely, essential potentiality, material potentiality and state potentiality. Essential potentiality signifies the following:[87] A member of a particular species has an internal nature, being its essence. The essential properties of that species are seen to be a set of potentialities that explain the purpose of the species' behaviour and indicates what must be realised by that member as part of that species. Accordingly, a member of a particular species is seen to be part of that species because that member represents the essential potentialities from within, as part of its nature.[88] On this basis, Megone argues that the unborn are not merely potential human beings but are in fact human beings by virtue of the essential potentialities the unborn represent, which are also equally found in children and adults respectively.[89] Consequently, Megone argument calls for special status, not because the unborn has the potential to be a human being but because it is an actual human being.

Adding further clarity to Aristotle's notion of potentialities, Megone emphasises that state potentialities must be distinguished from essential potentialities. State potentiality is part of a particular condition that a subject is in which gives it the potential to behave a certain way.[90] While essential potentiality refers to the identifying

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84 Dworkin *Life's Dominion* 87-89. Dworkin (88) explains the that depth of feelings of loss (or frustration) is determined by the stage of life when that life is lost because "frustration is greater if it takes place after rather than before the person has made a significant personal investment in his (sic) own life, and less if it occurs after any investment has been substantially fulfilled."

85 It is suggested that this approach also finds application under "interest theory", namely that prenatal life is valued because the unborn has an interest (investment) in its own natural progression towards a journey through life. This denotes a process of natural investment within its own biological development.

86 Megone "Potentiality and Persons: An Aristotelian Perspective" 163. Megone (157) relies on Aristotle because he was the first to examine the concepts of potentiality.

87 Megone "Potentiality and Persons: An Aristotelian Perspective" 157-162.

88 For instance, Megone (162) uses the acorn as an example. He states that an acorn and an oak tree both represent that same essential potentialities in the sense that they both have the same set of potentialities that must be realised or actualised from within (by their nature). Further, the acorn will remain part of that species regardless of whether it successfully realises the essential potentialities or not because the potentialities are still found within its very nature.

89 Megone "Potentiality and Persons: An Aristotelian Perspective" 163.

90 Megone "Potentiality and Persons: An Aristotelian Perspective" 170.

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characteristics of a species that are in place by virtue of it belonging to that species, these will always be in place regardless of the conditions that may or may not arise.[91] Megone states that essential potential represents "identity conditions" of a species while state potentialities represent the potential for development in a particular setting.[92] Turning to human beings, state potential is when a human being is in a state that gives him or her the potential to exercise his or her identity characteristics of reason, self-consciousness, and knowledge of language (for instance).[93] This position is used to reject those arguments that persons (signifying human beings with rationality and self-awareness) are morally more significant than the unborn (without personhood requirements of self-awareness and rationality).[94] Thus, Megone uses this argument to suggest that the unborn are not merely part of the broader human species (and thus morally less significant) since the potential for reason and self-awareness is always present.

As for the argument that a potentiality approach leads to the situation where even gametes are potential human beings, Megone turns to Aristotle's construction of material potentiality, which continues as follows:[95] A substance has potential when it is regarded only as another object. Once the substance has realised that potential to be another object, it ceases to exist in its original substantial form.[96] Therefore, at conception, the unfertilised egg develops into an integrated system of 46 chromosome cells and is unique from the individual female egg and male sperm cells.[97]

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91 Megone "Potentiality and Persons: An Aristotelian Perspective" 171. For instance, Megone (170-171) refers to a plant's essential potential to photosynthesise, and once developed properly it will be in a position (or in a state) to actualise the potential to photosynthesise when exposed to sunlight. Contrasting essential potential and state potential, Megone explains that the potential to photosynthesise is an essential characterise of all plants by virtue of belong to that species. However, the state where the plant *can* photosynthesise indicates state potentialities.

92 Megone "Potentiality and Persons: An Aristotelian Perspective" 172.

93 Megone "Potentiality and Persons: An Aristotelian Perspective" 173.

94 Megone "Potentiality and Persons: An Aristotelian Perspective" 171-174. For more on this argument that being a "person" indicates something more than just being part of the human species, see Harris *The Value of Life* 7-27; Tooley "Personhood" 117-119.

95 Megone "Potentiality and Persons: An Aristotelian Perspective" 163-165.

96 For example, Megone (164) refers to a tree and states that a tree can be thought of as wood, therefore a tree has the potential to be a table. Once the tree has been converted into a table, the tree ceases to exist in its natural form.

97 Megone "Potentiality and Persons: An Aristotelian Perspective" 164. See Tooley "Personhood" 122 who takes a different approach. He suggests distinguishing between passive potential found in sex gametes and active potential found in fertilized ovum. He argues that spermatozoa and unfertilized ovum hold less value because they require some form of outside intervention before they can begin to develop into a member of the human species. However, Tooley (123) rightly points out that even

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Consequently, this form of potential does not detract from the value of essential potential and thus leaves the special status of the unborn intact.

4 3 2 Human dignity and species membership

Tooley states that some authors have rejected the notions that potentiality or personhood are grounds to value the unborn, rather, some have suggested that since the unborn belongs to the human species it arguably deserves special status.[98] Here, speciesism and human dignity (denoting human worth) will be considered together. This discussion concerns the underlying meaning of dignity, rather than how the constitutional right to dignity functions, however expressed in various Constitutions around the world.

Retired Constitutional Court Justice, Ackermann understands dignity as expressing inherent human worth, in fact human dignity is presented as being synonymous with human worth.[99] Ackermann stresses that it is by the mere fact that we are part and parcel of humanity that our worth is demanded, and states:[100]

> The dignity accruing to any person does not depend on the fact that this person is able to exercise a particular degree of reason or *any reason at all*. All that is required is membership of the human species. In order to protect the dignity of all members of the species, it is necessary that protection be given (not necessarily absolute protection) in certain circumstances to a member even before birth and even after death. (Emphasis in the original.)

Ackermann, acknowledging that he is advancing a "species argument", goes on to explain that absolute worth extends to the individual within the species and to the entire species of that individual.[101] In this respect, he asserts that, the act of conception

fertilized ovum require outside intervention in terms of a woman's body because without that, there will be no opportunity for development.

98 Tooley "Personhood" 123.

99 L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 4. Ackermann points out that "worth" connotes infinity and is something that cannot be qualified with a price tag or replaced by something else. Further, he (52) asserts the "human worth" is the secular flipside to the religious position that individuals are created in the image of God.

100 Ackermann *Human Dignity* 51. Also see Ford "Nothing and Not-Nothing" 29.

101 Ackermann *Human Dignity* 52.

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(despite the intention of individuals participating in sexual relations) can inevitably lead to the production of a member of a species and through that process, the products of conception joins in on the worth of the species.[102] This value accrues to the unborn regardless of whether it develops as a perfect specimen of our species, thus his construction of human worth also includes those with the "barest minimum of intellect and emotion".[103] Despite emphasising the inherent value of unborn members of our species, Ackermann qualifies this value by stating that, "I would also argue that *certain aspects* of human dignity pre-date birth and survive death".[104] (Emphasis added.)

Considering Ackermann's quoted work mentioned above (former and latter), one can extract two (albeit, vague) limiting factors to the inherent worth in the context of the unborn. First, *certain circumstances* will determine whether protection of dignity will extend to the unborn. Second, only *certain aspects* of human dignity exist prior to birth. Ackermann does not indicate what the "certain circumstances" may be, nor does he clarify what those "certain aspects" are.[105] Rather, he places this issue in the hands of the "interpreter of the Constitution", who, with access to developments in science, will be better positioned to determine when various aspects of dignity begin or end.[106]

Searching for some indicators that could be used to clarify Ackermann's "certain circumstances" or "certain aspects" leads to Harris and Dworkin respectively. Harris

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[102] Ibid.

[103] Ackermann *Human Dignity* 52. Also see Dworkin *Life's Dominion* 70, whose position falls in line with Ackermann's approach.

[104] Ibid. Ackermann's assertions fall in line with Dworkin's earlier work on the intrinsic worth of the unborn. Dworkin (*Life's Dominion* 71-74) states that something's intrinsic value exists independently, beyond what others enjoy, want, or need. In respect of that value, we find the need to protect it because it is important within itself and not merely because others find value through their enjoyment of it. In the context of human life, Dworkin states that human life is inviolable (or sacred) and the hallmark feature of this characteristic is the fact that it is intrinsically inviolable because it exists. In its existence, it represents human life and once human life has begun it should flourish rather than be destroyed. Here, destruction can be seen as an act of dishonour, since human life demands honour.

[105] However, something that may indicate "certain aspects" can be ascertainable from Ackermann's (23-24) suggested meaning of human worth, "*the human worth (dignity) of each and every person is the capacity for and the right to respect as a human being. This arises from all those aspects of the human personality that flow from human intellectual and moral capacity; which in turn separate humans from the impersonality of nature, enables them to exercise their own judgment, to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their personalities and to strive for self-fulfilment in their lives. It also derives from the capacity of human beings to enter into meaningful relationships with others and thereby achieve self-fulfilment at least in part.*" (Emphasise in original.) Clearly, certain elements of this construction of human worth cannot be enjoyed by the unborn.

[106] Ackermann *Human Dignity* 52.

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suggests that the unborn are part and parcel of humanity, however, they are not "persons" since they lack certain characteristics such as, capacity for pain and pleasure, a sense of self and time, and rationality.[107] Thus, while we value the unborn for being part of our species, the fact that they are not persons justifies us treating them differently from persons such as already born individuals.[108] However, Dworkin, in the context of termination of pregnancies, states that human life should not be irresponsibly wasted and one should have sufficient "justification of appropriate importance" in order to tamper with human life.[109] Here, "appropriate importance" refers to, among other circumstances, the contextual setting women find themselves in when confronting whether to continue with a pregnancy or not, and can include life threatening pregnancies, foetal abnormalities, detrimental social and economic circumstances, age and issues linked familial responsibilities.[110] These decisions are seen to go beyond arbitrary waste of human life.

While Ackermann himself does not provide complete clarity about the extent of dignity in respect of or in the unborn,[111] he does articulate the grounds for justifying valuing unborn life, namely that it forms part of humanity and as such it deserves consideration and value, or special status. Further, leaving the interpretation of the value open to the "interpreter of the Constitution" salvages the value of dignity to the extent that it is not cast in stone but enables the inclusion of future and unpredicted developments into

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[107] Harris *The Value of Life* 7-27. Also see Jackson *Regulating Reproduction* 228-229, who approvingly raised the same argument.

[108] Ibid. However it must be noted that the characters or essential traits that constitute a "person" is the topic of endless debate. For instance see Tooley "Personhood" 117-126. Also see Megone "Potentiality and Persons" 155; J Bermúdez "The Moral Significance of Birth" (1996) 106(2) *Ethics* 378 381-382 for a critique of Harris.

[109] Dworkin *Life's Dominion* 58.

[110] Dworkin *Life's Dominion* 50-60. Worthy of notice is the fact that it has been advanced that since the unborn are recognised as human beings and science shows life in even the simplest form of human life, then the unborn must be seen to also having the same rights as those already born, particularly the right to life. See Warren "Abortion" 129-131. However, this claim must be recognised as being far too extreme and Warren notes this position to be highly ambiguous and empirically unsound for a number of reasons, for these reasons see 130-131. Also see Jackson *Regulating Reproduction: Law* 226-227 for biological justifications for denouncing this position. Since this approach extends full legal status and therefore implicitly denies special status of the unborn, it will not be considered any further in this chapter because the aim of the chapter is to recognise that the unborn is not a legal subject but still valued on other "special" grounds.

[111] A further example of Ackermann's elusive reference to the unborn is found he (52) goes on to state that "I am not for one moment suggesting that the mother of the *conceptus* does not have rights which are to be weighed up against the dignity rights of the *conceptus*, and which in particular circumstances, would prevail." It needs to be mentioned that, here again is another issue that leaves one perplexed because Ackermann uses "dignity *rights*" (emphasis added) of the unborn.

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our understanding of the value. This approach makes the value of dignity more amenable to changing circumstances, and ensures it is socially and contextually informed.

Critical of human dignity as a ground for valuing foetal life, Ford considers this approach to be flawed since it simply assumes that the human species is something special without justifying what is special about being human in comparison to other species.[112] In this respect, Dworkin offers a plausible explanation. He states that we value our species more because we see ourselves as the highest ranking species in terms of evolution and that without humanity, all knowledge, art and culture will disappear.[113] Ford further advances that speciesism can lead to extreme results, namely, justifying race preference on the grounds that those that form part of a particular race share in their distinct human relationships.[114] However, it is asserted that racism, as opposed to inclusion of the basis of humanity cannot be practically justified in a constitutionally-informed legal system.

4 3 3 Respect for interests

Steinbock,[115] an avid proponent of the interests approach, explains that this approach recognises that those entities that have the ability to care for their own welfare have "interests",[116] and thus have moral status and require things to be done for their own sake. The interest approach requires one to consider the entity itself, meaning, what may be important to it rather than considering what makes the entity significant to others.[117] In this context, "interests" denotes a claim the entity has against others to act or refrain from acting in certain ways, and it also encompasses a claim for attention or concern.[118] Having the "ability to care" for one's own welfare requires a certain level

[112] Ford "Nothing and Not-Nothing" 29.
[113] Dworkin *Life's Dominion* 77; 82. Dworkin (82-83) links humanity's value to value in natural creation (as mentioned in the text) and in the form of deliberative human creation. Deliberative human creation emphasises that every individual, in their unique spheres, develop certain interests, ambitions, personality traits, and that in itself is an expression of "human creative intelligence" which also finds links to genetics and culture.
[114] Ford "Nothing and Not-Nothing" 29.
[115] Steinbock *Life before Birth* XIV.
[116] For instance they have a "stake" in their comfort, being the need to avoid pain and discomfort, and experience pleasure or happiness.
[117] Steinbock *Life before Birth* 2.
[118] Ibid.

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of consciousness, because without awareness the entity will be unable to care about anything that happens to it, or even whether it is wholly destroyed.[119] That is not to say that those living entities without consciousness (and thus no interests of their own) do not matter, since there may be reasons to preserve them but this will derive from the value others attach to the entity rather than the value the entity has in itself.[120]

Steinbock's approach on interests does not adopt an "all or nothing" position since she asserts that even the most rudimentary of interests (for instance, pain, discomfort, pleasure) count as being relevant interests, and this standpoint opens up the interests approach for the inclusion of "marginal cases".[121] Marginal cases represent those entities that are not "persons" (being legal subjects) but also those that do not merely constitute "things", such as, rocks or sand.[122] The unborn can be classed as "marginal cases" since they are neither persons nor mere things.

In the context of special status of the unborn, respect for interests falls on the notion that the unborn have interests of some sort and those ought to be respected.[123] Steinbock argues that once a foetus becomes sentient it gains interests and therefore acquires special status.[124] She points out that it is not the ability to experience pain that is significant, what is significant is the fact that the ability to feel pain is an

[119] Steinbock *Life before Birth* 5. Steinbock states that "interested beings" can be made happy or sad, they can feel pleasure or pain but they do not always have to know what will make them happy or sad. Further, she (7-15) points out that the requirement for consciousness is an issue in dispute with some authors arguing against the necessity of consciousness and others arguing that consciousness on its own is not enough for purposes of interests.

[120] Steinbock *Life before Birth* 6. Steinbock explains that these organic entities do not have a stake in their own preservation, but we may still have an obligation to preserve them. She (7) states: "We can have obligations *regarding* mere things, but these obligations are not *to them*." (Emphasis in the original.) With respect to embryos, as non-sentient, and thus non-interested beings, Steinbock (270-278) admits that her interest approach does not extend to embryos but she goes on to call for the development of a third category for moral consideration to be developed based on respect. Here she emphasises that respect does not have to be an "all or nothing" scenario but can be granted in degrees relative to the entity in question. Due to the fact that the embryo is a potential person and a symbol of human existence it will demand more respect than an animal or plant. She states, this respect accorded does not remove the ability to experiment with embryos provided that the sorts of experiments embarked upon advance the greater good of humanity. Her approach is significant here because it indicates that different theories can be used for explaining special status at different points in gestation.

[121] Steinbock *Life before Birth* 2.

[122] Ibid.

[123] Ford "Nothing and Not-Nothing" 27.

[124] Steinbock *Life before Birth* 40. She (1; 40) states that an embryo and "pre-sentient" foetus do not have moral standing, meaning that their existence do not have a claim to our moral attention.

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indication of conscious experience in its most primitive form.[125] Relying on scientific evidence of foetal development, Steinbock states that the foetal nervous system is in place between 20-24 weeks of gestation and she concludes that the foetus may be capable of feeling pain at that point.[126] However, it must be noted that no one is able to provide any definitive answers as to when or even if a foetus can feel pain because the foetus cannot be asked, however, Steinbock stresses that scientific evidence places a duty on us to err on the side of caution.[127]

Despite the fact that a foetus may be sentient, that ability on its own will not be sufficient for purposes of extending legal status to the unborn. Steinbock turns to "time-relative interests" to justify only extending special status to a sentient foetus instead of legal status (or the right to life).[128] Time-relative interests refers to the fact that:[129]

> [O]ne's interest in staying alive is not simply determined by the amount of good in one's future but also by the degree of psychological connectedness between oneself now and oneself in the future. Psychological connectedness is a matter of both the richness of the subject's mental life and the number of internal connections within a subject's narrative, including memories of past experiences, anticipation of future experiences, plans, intentions, and goals.

Steinbock explains that time-related interests require some form of psychological unity, being a psychological investment in a possible future in order for there to be a stake in one's continued life.[130] Accordingly, she asserts that sentience alone cannot afford a foetus the right to life, it can however extend special status since it has

[125] Steinbock *Life before Birth* 46.
[126] Steinbock *Life before Birth* 46-47. For more on the ability to feel pain see, G Cohen & S Sayeed "Fetal Pain, Abortion, Viability, and the Constitution" (2011) 39(2) *J Law Med Ethics* 235; S Lee, H Ralston, E Drey, J Partridge & M Rosen "Fetal Pain: A Systematic Multidisciplinary Review of the Evidence" (2005) 295(8) *JAMA* 947. More on the topic of the ability of a foetus to feel pain is discussed below.
[127] Steinbock *Life before Birth* 47-48.
[128] Steinbock *Life before Birth* 77.
[129] Steinbock *Life before Birth* 73.
[130] Steinbock *Life before Birth* 77. Steinbock refers to an example where a few people and a dog are stranded on a boat at sea and someone must be sacrificed to prevent the boat from sinking. In these sorts of circumstances there is general agreement that the dog should be sacrificed and that it would be wrong to sacrifice human life. Steinbock states that it the time-relative interest that explains this response: "The difference between the human being and the dog is that the human being is much more psychologically invested in and connected to her possible future than the dog is to hers. A human being has a well-developed, nuanced sense of herself as a protagonist in a life story - a narrative – that dogs do not have."

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interests (albeit rudimentary).[131] In this form, the sentient foetus' claim to life is "weak" and the termination of a pregnancy is still a harm to it.[132] As psychological connectedness increases, the greater the harm of the pregnancy termination will be because the foetus will have stronger time-relative interests to continued life.[133] Steinbock argues that a late-term foetus will have both consciousness and psychological connectedness but the right to life cannot be extended to it because of the fact that the foetus exists within a woman's body and it may be impossible to give effect to that right without violating the rights of the pregnant woman.[134]

While Steinbock's approach offers a very attractive explanation on why prenatal life holds value, it is argued that there are a number of draw backs to her line of argument. For Steinbock, sentience is understood to signify a definitive line in foetal development that makes a foetus more like a neonate.[135] This critique aims to show that basing the initiation of special status of a foetus on a disputable fact such as foetal sentience is seen to leave her theory vulnerable. Further, the fact that Steinbock rejects foetal viability as morally significant is viewed as further weakening her argument.[136] Both issues will be discussed here.

To start, at most, sentience can only be understood as a "possible" attribute of prenatal life. Steinbock herself cites authority for the fact that it cannot be said with any certainty when sentience sets in during prenatal development,[137] but that "it seems unlikely that fetuses have experiences of any kind before mid-gestation".[138] Later, Steinbock states that a "late-gestation" foetus *is* conscious and sentient.[139] It is not very clear when a foetus is a late-gestation foetus. This approach seems a little unreliable because her protested definitive line in foetal development becomes somewhat blurred.

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131 Steinbock *Life before Birth* 81.
132 Ibid.
133 Steinbock *Life before Birth* 81.
134 Steinbock *Life before Birth* 81. However, earlier in her work (55-59), Steinbock seems to suggest that conceptually a late-gestation foetus is the same as a neonate and that there is no conceptual bar (as opposed to a physiological bar) that prevents extending the right to life to the a later-term foetus. This issue receives further attention below, see para 4 4.
135 Steinbock *Life before Birth* 101.
136 *Life before Birth* 99-101.
137 Steinbock *Life before Birth* 46-50.
138 Steinbock *Life before Birth* 34.
139 Steinbock *Life before Birth* 58.

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Cohen and Sayeed[140] and Lee et al[141] also deal with the quandary of foetal pain, a summary of their assertions follows. The authors explain that there are two elements involved with the ability to feel pain: There is a psychological and a physiological element to pain. Physiologically speaking, nociception is the physical response to noxious stimuli which involves reflexively moving limbs away from stimulation. Generally, nociceptors develop prior to those structures required for conscious awareness or perception of pain (that is, thalamocortical pathways). The authors state that nociception must be distinguished from the personal experience of pain. Nociceptors merely allow for a physical response to pain, but not a conscious response to it. Psychologically, pain is recognised as a subjective and an emotional experience, it requires the presence of consciousness which allows one to recognise that a particular stimulus is unpleasant. Since pain is linked to the emotional psyche, arguably, it is something that needs to be learnt through life experience. Pain can only be consciously experienced with the aid of thalamocortical pathways which are believed to develop in the third trimester at 29-30 weeks' gestation.

Conversely, there is authority that pain is something that cannot be experienced until *after* birth. Lee[142] cites a number of clinically-related sources which indicate that the "true pain experience" can only be developed after birth since the complex emotional experience of pain can only develop once the neonate is exposed to the world beyond a uterus, it has to learn to recognise pain. The feeling of pain is seen to be something that develops after birth along with memory, anxiety and other cognitive brain functionalities.

The anomaly of foetal pain does seem to leave Steinbock's approach in murky waters. If foetal sentience is questionable and one's approach is premised on that notion, it will lead to questionably extending special status to the unborn. This anomaly could be partially remedied with the inclusion of foetal viability into the equation of according special status because research indicates that foetal viability is an inevitable development and it sets in prior to the possible experience of sentience. It is argued that while the possibility of conscious experience calls for special status of the unborn,

[140] Cohen & Sayeed (2011) *J Law Med Ethics* 235.
[141] Lee et al (2005) *JAMA* 947.
[142] Lee "The Abortion Debate Today" 238-239.

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viable foetuses should be included in the equation of when the benefits of special status vest, even if the inclusion of viability would lead to a weaker claim to protection compared to the claim for protection demanded by the presence of sentience.[143] However, Steinbock does not agree.

Steinbock[144] is critical of the moral significance of foetal viability and while most of the critiques relate to the judicial construction of foetal viability,[145] one critique is linked to the technical interpretation of the term of viability which will be considered here.[146] According to Steinbock, it is argued: If the moral significance of independent survivability of a foetus is attached to the clinical point of viability, and clinical viability is influenced by technological advances, developments such as "external womb technology" will effectively pull the threshold of viability to the point of conception.[147] It is argued that this is because the unborn, through improved technology, can "survive" *ex utero* at early points in gestation.[148] Consequently, more weighty special status will

[143] This argument is developed further in ch 11 of this thesis where the author proposes a layered approach to foetal status in law.

[144] *Life before Birth* 99-101.

[145] Most of the sources Steinbock relied on in her critique of foetal viability refer to the judicial construction of foetal viability rather than the clinical construction of viability. The author of this thesis is also critical of the judicial construction of foetal viability, see Pickles (2013) *Stell LR* 146. In this article a comparative study was conducted between the United States and South Africa and it was determined that, according to the legal construction of foetal viability, a foetus may be viable at any time from nineteen weeks gestation to 28 weeks gestation. Rhoden, in her critique of how *Roe v Wade* 93 S Ct 705 (1973) has been interpreted by the legislature and later judicial decisions, offers an explanation as to why different accepted stages of viability may be found. Decisions rely on medical technology as it stands at the time of a particular decision, thus what was the point of survivability when *Roe* was decided in 1978 is no longer the point of survivability in 2013 because medical technology is constantly improved upon. See generally, N Rhoden "Trimesters and Technology: Revamping Roe v. Wade" (1986) 95(4) *Yale LJ* 639. Therefore the judicial construction of viability is incomplete and ambiguous and should not be used for purposes of extending special status. It is submitted that the clinical definition of foetal viability is preferred for purposes of extending special status. Clinical foetal viability is understood in terms of being a grey-zone for survivability, and does not indicate an "on-off switch" as generally depicted in law. Gestational age, weight, antenatal exposure to corticosteroids, foetal sex, presence or absence of deformities, whether the pregnancy involves single or multiple gestations, resource availability, and socio-cultural factors all play a role in determining foetal survivability. Though foetal survivability is a medically informed estimation that can only be confirmed upon physical examination after birth, it still represents an inevitable point in foetal development that will occur, unless of course the pregnancy is terminated or miscarried. In this regard see generally, Pickles (2013) *Stell LR* 146.

[146] The criticisms based on judicial construction of foetal viability will not be considered here because that construction of viability is inherently flawed, see fn directly above.

[147] Steinbock *Life before Birth* 99-101; Rhoden (1986) *Yale LJ* 655-673.

[148] Ibid. Rhoden (671) formulates two constructions of viability when discussing the implications of *Roe*'s reliance of viability. "Viability$_1$ refers to the technical construction of viability, that is, the purely clinical notion of independent survival. While Viability$_2$ refers to the normative concept of survivability which encompasses the notion that a viable foetus is so "substantially developed that it has a claim to societal protection". She states that when *Roe* was decided, viability was estimated to occur at 28 weeks' gestation. Rhoden then argues that the court has been misinterpreted as applying a purely

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have to vest extremely early in gestation, and one implication would be that access to termination-of-pregnancy services could be severely impeded.

Admittedly, this argument has some merit *if* clinical viability is understood to denote mere "external survival". However, it is asserted that it would be inappropriate to interpret "clinical viability" as so widely construed that it supposes that any possible form of *ex utero* existence at any point in gestation is "foetal viability". It is offered that the correct interpretation of clinical foetal viability is one that is narrowly construed. In this respect, Christoffersen-Deb refers to medical texts and explains that viability is described as the "lower limit of fetal maturation compatible with extrauterine (sic) survival" which aids in determining whether the a foetus is "sufficiently mature such that not initiating resuscitation is unacceptable".[149] First, this highlights that foetal viability is centred on a certain degree of foetal development, that is, the most basic necessities for life must be in place before one can begin to discuss the notion of "viability". Second, only when that degree of development is in place, technological support can assist in sustaining life after birth. Accordingly it is argued that the foetus must have developed all essential bodily functions that places it in the position to sustain life with the assistance of technology. Here, technology is not creating human life as the wide construction of viability presupposes, but rather aids in supporting already existing viable life.[150] The term "viable" in this instance is not linked to technologies ability to create life but to the foetus' physical ability to be alive.

With this understanding in mind, the significance of viability becomes more apparent. The significance of viability lies in the fact that from the point of viability the foetus is no longer undergoing the process of rudimentary development of a body that can sustain its life.[151] Rather, at this point, all necessary functionalities are in place and as

technical construction of viability ($Viability_1$), Instead, since viability was understood to occur in tandem with "substantial" foetal development the court was actually referring to the "value laden" $Viability_2$. This discussion focusses on Rhoden's notion of "$Viability_1$".

[149] A Christoffersen-Deb "Viability: a Cultural Calculus of Personhood at the Beginning of Life" (2012) 26(4) *Med Anthropol Q* 576.

[150] In fact, it is argued that even prenatal life created through technological advancements, like "external womb technology", will not make an embryo or very under-developed foetus viable until the essential degree of physical development is in place which originates from the unborn's body itself.

[151] However, see, Rhoden (1986) *Yale LJ* 655-673. She approvingly cites a number of pro-choice authors who argue against the biological significance of foetal viability. Their argument is that viability lacks significance because to them, consciousness is understood to be significant and not merely the ability for independent survival.

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the foetus progresses through later gestation, it goes through a perfecting and strengthening process of bodily organs and functionalities.[152] The fact is that everything is in place for purposes of sustaining life, but for the foetus' location within a woman's body that it cannot sustain independent life. It offers the first point in foetal development that the foetus has a "fighting chance" for independent life if born at that point. Thus a viable foetus is developing stronger connections to its eventual birth and it is argued that this then moves from a biologically significant development to also being a socially significant event.[153] Foetal viability thus can be seen as bolstering the foetus' worth in respect of securing special status.

On more general grounds, Dworkin rejects the notion that the unborn may have interests of their own.[154] Earlier in his chapter on "What is Sacred?", Dworkin discards the notion of valuing prenatal life on the basis that the unborn may possibly be sentient at some point during gestation.[155] He states that individuals still object to pregnancy termination despite the absence of sentience, thus indicating that there are far more significant reasons to object to terminating prenatal life.[156] Ford also objects to a "respect for interests" approach because it is not clear how to determine these interests and she stresses that on a practical level these sorts of indeterminable interests cannot be wholly respected, especially when considering pregnant women's interests.[157] Harris points out the issue of sentience is flawed since pain can easily be curbed with anaesthesia, thus the reason for special status (or non-interference) runs deeper than the concern that the unborn may feel pain.[158] However, Harris' position fails to grasp that sentience is an indication of foetal consciousness, and it is not sentience itself that is significant.

[152] In this respect, see Christoffersen-Deb (2012) *Med Anthropol Q* 575. Christoffersen-Deb (584-585) explains that in the case of imminent pre-term delivery, foetal viability is the dividing line between terminating the pregnancy or getting ready for a caesarean-section delivery and facilitating neonatal intensive care. He (585) indicates that increased gestation after viability will increase the chances for positive foetal outcomes.
[153] See generally, D Meyerson "Abortion: The Constitutional Issues" (1999) 116 *SALJ* 50.
[154] Dworkin *Life's Dominion* 98.
[155] Dworkin *Life's Dominion* 89.
[156] Ibid.
[157] Ford "Nothing and Not-Nothing" 28.
[158] Harris *The Value of Life* 118.

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4 3 4 Special status based on relationality

Morgan states that "fetal relationality" is a feminist response to foetal individuation which attempts to construct a form of status that is consistent with pro-choice narratives.[159] In this approach, the existence in relationships is an essential characteristic of personhood or status.[160] Ford explains that using relationships as the foundation for special status requires a move beyond rights and interests discourse and brings focus on the relationships that exist in terms of a pregnancy.[161] This approach calls for a contextual understanding in which rights and interests exist.[162] Morgan, having considered a number of relational feminist works on this topic, summarises that a relational approach views the unborn as "moving through" pregnant women, and thus the unborn cannot form relationships with others independently and others cannot form relationships with them either.[163] However, a unique and intimate relationship exists with pregnant women, and any relationships with others are indirect and facilitated through pregnant women.[164] On this ground, since the unborn cannot relate independently and exists in a relationship of dependence in respect of pregnant women, they cannot be granted full status.[165]

Morgan states that a relational approach is founded on biological and psychological relations.[166] The fact that the unborn are physically found within and wholly dependent on women's bodies emphasises an understanding of biological unity during a pregnancy.[167] It is argued that the unique physical position of the unborn calls for special social status, and this approach empowers a pregnant woman to determine the status and value of the foetus she carries.[168] Morgan accepts biological

[159] L Morgan "Fetal Relationality in Feminist Philosophy: An Anthropological Critique" (1996) 11(2) *Hypatia* 47 48. She (48) explains that this is deemed necessary because feminism could no longer continue to deny increasing moral and social status of the unborn since it would result in "anti-mothers" or "child-killers" type of feminism and this would lead to denying the significance of many women's experiences linked to pregnancy and child bearing.
[160] See generally, P Groarke "The Legal Concept of the Person: A Relational Account" (2010) 51(2) *Hey Jl* 298; N Levy "The Moral Significance of being Born" (2013) 39(5) *J Med Ethics* 326.
[161] Ford "Nothing and Not-Nothing" 28.
[162] Ibid.
[163] Morgan (1996) *Hypatia* 52.
[164] Ibid.
[165] Morgan (1996) *Hypatia* 52.
[166] Morgan (1996) *Hypatia* 52-53.
[167] Morgan (1996) *Hypatia* 52.
[168] Ibid.

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connections as a ground that informs foetal relationality but warns that a biological approach is insufficient on its own because relationships need to be reciprocally experienced.[169]

Concerning the psychological grounds, Morgan emphasises that the very nature of a relationship is reciprocity between individuals connoting a bond, and asks the question: On who does the onus for the experience of relations rest? Morgan identifies two schools of thought, some feminists place the onus on the unborn, and since the unborn lacks certain mental and physical characteristics equal to that of full legal subjects, the unborn lacks full legal status. This approach then provides a justification for the right to terminate pregnancies because the unborn are "ineffectual relational agents".[170] Another school of feminist thought places the onus on pregnant women, and state relationships are characterised by interdependence and an awareness of the existence of interdependence.[171] These feminists assert that even if the awareness of interconnectedness turns out to be one-sided, that is the pregnant woman is aware of the interdependence of the unborn, a relationship can still exist.[172] Pregnant women's awareness of their relationship with the unborn is seen as a process of forming a person, thereby not extending full status to the unborn.[173]

Although Ford accepts the importance of relationships in the context of important human bonds, she is critical of this approach because the unborn cannot experience relationships in any direct or meaningful way.[174] The relationships experienced during pregnancy (in terms of the unborn and woman) is one-sided, with the unborn being the objects of relations or "passive recipients of the ethical behaviour of others".[175] This brings into question whether this approach has any value as a universal application for purposes of special status.

Morgan is also critical of the above relational construction to the extent that Western feminists fail to adequately encompass one of the true aspects of relationality: the

[169] Morgan (1996) *Hypatia* 52.
[170] Morgan (1996) *Hypatia* 53.
[171] Ibid.
[172] Morgan (1996) *Hypatia* 53.
[173] Ibid.
[174] Ford "Nothing and Not-Nothing" 29.
[175] Ibid.

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attribute of social existence.[176] Turning to non-Western traditions, she calls for a "culture-bound" understanding of relationality which recognises that the body is socially constructed both in a physical and psychological sense.[177] Consequently, a body or a person is valued because it is seen as the product of specific social interactions.[178] Since the person is socially constructed, communities engage in "psychological nurturance" to create persons, communities are seen to hold collective responsibility to bring persons into existence.[179] In this respect the unborn is seen as a mixture of a number of different kinds of social influences that facilitate its condition.[180] Thus, the unborn should be viewed as socially constituted. Relevant social influences can include failed contraception, promotion into a better paying job, personality traits of those involved with the unborn's constitution, exposure to substances like prenatal vitamins or daily intake of various foods.[181]

Although Morgan does not expressly state as much, it is submitted that this approach places value in the unborn because of the fact that it represents a portion of a culture, a society and social influence which all contribute towards its creation and continued development. Morgan explains that the decision to terminate a pregnancy is framed as a decision to interrupt the social process of making a person.[182] However this approach comes at a price, Morgan admits that in cases where non-Western societies formulate prenatal life in this fashion, it is very rare that termination of pregnancies will be performed under "free choice" of the pregnant woman concerned, and it usually involves social decision making.[183]

[176] Morgan (1996) *Hypatia* 56. She argues that these feminists prefer to understand relationality in respect of inherent properties of the unborn and the pregnancy, or in the pregnant women themselves, or both. Morgan explains that "they are reluctant to let relationality 'leak out' into a pregnant woman's social world (e.g., father, parents, friends, or government agencies) because shared relationality might provide justification for undercutting her sovereign control over the fate of her pregnancy."
[177] Morgan (1996) *Hypatia* 56.
[178] Ibid.
[179] Morgan (1996) *Hypatia* 56-57. Morgan points out that non-Western "nurturing" is not associated to the Western construction of nurturing, in that is does not demand female selflessness but rather it is a quality found within communities equality distributed between men and women.
[180] Morgan (1996) *Hypatia* 57.
[181] Ibid.
[182] Morgan (1996) *Hypatia* 57.
[183] Morgan (1996) *Hypatia* 57-58.

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4 3 5 Karnein's theory of unborn life: "Personhood Dependent Principle"

Karnein construes personhood as being founded on primary and secondary considerations.[184] First, she argues that those that are capable of moral agency[185] are accorded personhood. However, she understands that in many instances, human beings may lack moral agency (such and neonates, young children, the infirm or those with mental disabilities) but still demand protection generally afforded to moral agents. On this basis, she argues that there are secondary considerations that inform whether personhood attaches to an entity or not, in this case these entities should form part of the human species and form "intimate parts of our social universe".[186] She understand that being endowed with personhood demands respect and a commitment towards protection.[187]

Karnein excludes the unborn from personhood since she argues that personhood only attaches at birth.[188] Despite the fact that a human embryo or foetus is of human decent and can be subject to the social universe of other human beings,[189] to her, foetal-dependency ("symbiotic attachment") is a qualifying factor to extending personhood to a foetus.[190] She argues that in order to be a person the "entity in question must not inevitably rely for its continued existence on life support of a kind that can always be denied".[191] She understands and respects the notion that pregnant women have the right to terminate their pregnancies and this then counts as a detriment to the status of the unborn.[192] Thus, it is the unborn's special kind of structural reliance on one specific and irreplaceable person that serves as the ground to deny the unborn

[184] A Karnein *A Theory of Unborn Life: From Abortion to Genetic Manipulation* (2012) 4; 19.
[185] She (19) defines moral agents as subjects of morality who are receptive to morality's demands and who are capable of acting accordingly.
[186] Karnein *A Theory of Unborn Life* 4; 22.
[187] Karnein *A Theory of Unborn Life* 17-18.
[188] Karnein *A Theory of Unborn Life* 22.
[189] The start of this chapter demonstrates that the unborn certainly do form part of other's social worlds, Lupton's work clearly demonstrates this. See Lupton *Social Worlds of the Unborn*, generally.
[190] Ibid.
[191] Karnein *A Theory of Unborn Life* 23. Karnein notes that while new-borns are dependent beings, they are not "structurally" in a position to be denied life support. That is, other third parties can care for their needs in cases where its mother refuses to do so. Whereas, in the case of a pregnancy, if a woman denies her support, the unborn's life will be extinguished.
[192] Ibid. Karnein founds her position on the work of Thomson. See J Thomson "A Defense of Abortion" (1971) 1(1) *Philos Public Aff* 47. Thomson justifies termination of pregnancies on the grounds that pregnant women do not have a moral responsibility towards the unborn, they cannot be forced to give up the use of their bodies for the benefit of others, whether born or unborn. Thomson's arguments are discussed in more detail in ch 7 para 7 3 1.

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personhood and its related protection.[193] Thus while Karnein does not explicitly acknowledge this, her construction of personhood is effectively made up of four elements: capacity for moral agency, being of human decent, partaking in the social universe of moral agents, and being capable of independent survival (meaning that the entity cannot rely on only one specific person for maintenance of independent life).

While the above described criteria deny the unborn full status, she suggests that there are reasons why we should value some of them. Her reason lies in the fact that we all derive from embryos, consequently already born persons have "backward-orientated interests" in the wellbeing of the embryo from which they developed.[194] Since we owe certain obligations to persons, such as to refrain from harming them, then we have a reason to treat the unborn that develop into persons in anticipation of the persons they end up developing into.[195] The special status that we extend to these embryos requires us to refrain from altering or removing features of the embryos that may have a harmful consequence for the later developed persons.[196]

Essentially Karnein is arguing that those embryos that have a chance of developing into persons should be attributed moral value, this is her "Personhood Dependent Principle".[197] Having a "chance" indicates that there is a viable embryo and that there is a woman willing to carry the pregnancy to term.[198] Karnein's theory therefore does not extend value to all human embryos; embryos' status is contingent upon their prospects of development into living persons.

Determining which embryos have that prospect leads to Karnein's "Principle of Precaution".[199] This principle requires us to err on the side of caution meaning that all

[193] Karnein *A Theory of Unborn Life* 25.
[194] Karnein *A Theory of Unborn Life* 18.
[195] Karnein *A Theory of Unborn Life* 28.
[196] Karnein *A Theory of Unborn Life* 34. In this respect, Karnein views living persons as respectful "safe-keepers" of later persons' biological possessions, being their physical, mental, genetic attributes inherent in their biological makeup.
[197] Karnein *A Theory of Unborn Life* 28.
[198] Karnein *A Theory of Unborn Life* 34. The author's (39) reliance on "willingness" makes sense because "embryos inside women's bodies have as little potential to become persons if women do not want to continue their assistance as do embryos by themselves without women wanting to carry them to term in the first place."
[199] Karnein *A Theory of Unborn Life* 28. See T Murphy "Adoption First? The Disposition of Human Embryos" published online 11 June 2013 *J Med Ethics* doi: 10.1136/medethics-2013-101525 1. To date, Murphy is the only known author to cite Karnein's work discussed here. He refers to her

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embryos should be treated as if they will become persons.[200] The author explains that this position should stand for as long as we can irrevocably say that there is no possibility that the unborn can develop into persons.[201] This will be the case in respect of termination of pregnancies or biologically rendering stem cells unable to develop into viable embryos.[202]

Karnein's attribution of special status does not find experimentation with human embryos problematic, provided that a particular embryo does not go on to develop into a person.[203] Furthermore, where experimentation does occur and that embryo goes on to progress through development, the process of experimentation is not seen to violate the intrinsic worth of the embryo but rather violates or "affects the past-directed interests" of the person it develops into.[204] Karnein's theory is more concerned with the controversy surrounding the disposition of viable human embryos. She argues that we find value in the creation of persons and this requires that we allow development to occur, especially where there is no important reason to stop it.[205] Consequently she argues that where there are viable embryos, they should not be readily disposed of.[206] Rather, they should be made available to willing women regardless of the biological origins of the embryos.[207]

Karnein's work is very new to the pool of theories dedicated to valuing the unborn, and as a result there is little by way of published criticisms against her work. Murphy does offer some criticism, but his contribution relates to the practical application of Karnein's

"Principle of Precaution" as "presumption of expected personhood" in that we should respect embryos as if they are presumptive persons.

200 Karnein *A Theory of Unborn Life* 29.

201 Ibid.

202 Karnein *A Theory of Unborn Life* 29. Karnein understands that women are entitled to terminate their pregnancies she views us as being under no obligation to treat embryos as if they are already persons. She argues (29) that our obligation arise retrospectively: "They are applied in a forward-looking manner only via speculation (as to an embryos future) and as a matter of caution so that we avoid violating our (retrospective) obligations." Further, she states that we are also under no obligation to realise our speculations.

203 Karnein *A Theory of Unborn Life* 33.

204 Ibid.

205 Karnein *A Theory of Unborn Life* 37.

206 Ibid.

207 Karnein *A Theory of Unborn Life* 37. In this respect Karnein encourages us to take an affirmative approach towards the creation of persons and this approach demands that we allow women to become pregnant with embryos left over from other persons' fertility procedures.

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theory in respect of allowing women to "adopt" non-biologically related embryos.[208] Given his contribution does not advance any suggestions on how to improve on Karnein's theory, his contribution will not be considered here because it moves beyond the aims of this chapter.

4 4 Special Status, the Significance of Birth, and Re-Embodying the Foetus

Special status is seen to be constructed of two elements. First, it captures a negative element in that there is something in or of the unborn that prevents them from having full status. Second, special status also has a positive element, namely that there is something in or of the unborn that demands something from us, or to be considered of value in one form or another. While all the above considered theories offer legitimate grounds to justify the special status of the unborn to some extent, it is suggested that individually, each theory holds limited effect. This is particularly evident when one considers Morgan's following statement:[209]

> Social and biological birth have become uncoupled in the United States over the last two decades. As a result of reproductive imaging technologies, the commodification of babies, the attribution of personhood (what I call 'social birth') can now precede biological birth. The result is a new unprecedented category of fetal persons … It is my contention that those who set off to prove the 'natural' importance of birth forgot to keep an eye on the weather. Their rhetoric of birth as the moral dividing line between persons and nonpersons is simply unconvincing in an era when ever greater social value is being attached to fetuses.

One is left questioning, how have the theories considered in this chapter detracted from the significance of birth, and thus possibly made law's approach to the unborn meaningless or out of sync with prevailing theories. The answer stems from the fact that, generally, the theories and scientific based arguments have failed (some more so than others) to emphasise the embodied nature of pregnancy: "Pregnancy" includes an intrinsically unique connection between a woman and the unborn, whereby prenatal

[208] T Murphy "Adoption First? The Disposition of Human Embryos" *J Med Ethics* doi: 10.1136/medethics-2013-101525 1.
[209] Morgan (1996) *Hypatia* 59-60.

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life is wholly dependent on the body of women.[210] It is for this reason that the special status of the unborn should be viewed through the lens of re-embodied prenatal life, and this construction should be used as an informative tool for purposes of extending special status.

To prevent extension of full status to the unborn one must bring pregnancy back into context. To start, re-embodiment is necessary because a woman's body is a *sine qua non* for pregnancy (gestation and prenatal development). Biologically, pregnancy takes place in a woman's body thus requiring that the unborn be understood as part and parcel of the body of a pregnant woman. The "part and parcel" does not mean that the unborn are mere organs of a woman's body, but indicates that it is a woman's body that ensures continued gestation and development. Consequently, any discussion about status prior to birth requires the recognition that the unborn be considered in relation to the contextual setting of pregnancy.[211]

With prenatal development placed back into its "bodily context", it is necessary to turn to the theories considered in this chapter. A common feature gleaned from the discussed theories is the fact that each tends to emphasise that the process of human development negates full status of the unborn. For instance, as a result of its partial development, the unborn cannot directly relate, they have under-developed or undeveloped mental capacity, self-awareness and rationality or they lack consciousness for purposes of having their own interests.[212]

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[210] For more on the nature of pregnancy see Lupton *Social Worlds of the Unborn* 52-69.

[211] This is where the value of foetal viability comes in and the even further valuable occasion of biological birth. These issues will be address on detail below.

[212] The only exception is that of Karnein *A Theory of Unborn Life* 22-26, she terms this limiting factor a "symbiotic connection to the body of a woman". It must be noted that Steinbock (*Life before Birth* 81) does attempt to follow an embodied approach to pregnancy because after arguing that foetal sentience is sufficient for moral standing and similar to neonates in respect of development, they are entitled to less "protection" because "they are located inside the pregnant woman's body." While this does fall in line with the concept of an embodied foetus, Steinbock (58), seems to have forgotten the embodied nature of pregnancy when under the discussion of "The Right to Life" she states that there is no "conceptual bar to ascribing a right to life to the nearly born fetus. A late-gestation fetus is conscious and sentient. It is very likely that it can experience pain, and presumably, it has pleasurable experiences, an interest that can be protected by a right to life". It is submitted that understanding the foetus as being "embodied" offers a conceptual bar to extending the right to life to the unborn.

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While all these theoretical assertions bear an obvious element of truth (varying in degree), it is submitted that they are somewhat incomplete. This is so because even extremely premature neonates, full-term babies, toddlers, and school children go through the processes of human development on a daily basis but we do not attach less value to them in law on the grounds of continued development.[213] Instead, it is advanced that we limit the status of the unborn because of the fact that they are going through a process of development which does not take place in an independent space, but rather within and dependant on another's body.[214] So while prenatal development signifies a process of the most basic form of human development, it is the additional fact that this development takes place in women's bodies that concretises that grounds of limiting the status of the unborn. As long as the limiting element of embodiment persists the foetus will lack full status.

It is this embodied understanding of pregnancy and prenatal development that makes the significance of biological birth more apparent. Concerning Morgan's argument that "social birth" (linked to foetal imagery and assisted reproductive technologies) has replaced the significance of "biological birth", Roth responds directly to Morgan and convincingly argues that:

> Most pregnant women probably do desire and create personhood by imagining the person their fetus will become, whom it will resemble, and so on, whether or not they consume such services as genetic testing and ultrasound. Women's personal actions and attempts to make meaning, and broader social efforts are not the same as political decisions to award personhood to the fetus through [full] legal status. These efforts can create pressure to recognise a fetus as an autonomous person, but they tell us little about *whether we ought to*. (Emphasis added.)

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[213] Admittedly, prenatal development is the most basic form of human development for purposes of sustaining life and this can be distinguished from non-life sustaining forms of development that takes place after foetal viability and birth.

[214] "Independent space for development" needs some expansion and qualification here. "Independent space" does not denote isolated existence but rather refers to the occupation of a space that does not include another person's body for purposes of advancement of one's life. Concerning development of a child, it is accepted that children cannot develop independently, children are dependent on caregivers for survival but that survival does not include continued access to the use of another's bodily functions. It is necessary to point out that breastfeeding does not fall within this category because it is not comparable to the bodily resources needed to gestate a foetus. External means of nourishment can be differentiated from internally sustaining all functionalities of life for purposes of an individual's advancement.

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Roth's "whether we ought to" is tied to the significance of biological birth. Warren succinctly argues that it is "impossible to treat fetuses *in utero* as if they were persons without treating women as if they were something less than persons".[215] It is argued that the key to full status is not linked to our social and clinical knowledge of the foetus and their processes of development. Rather, the key to full status lies in the physical biological detachment of a foetus from a woman's body at any point after clinical foetal viability.[216] This approach explains why extremely premature neonates, despite being in an underdeveloped state, or the fact that one was not given nine months to socially or clinically get to "know" them, will still receive all of law's protective reach and medical attention where resources permit.

The significance of birth has also been argued on more abstract grounds and deserves some consideration here. One way to explain the significance of birth is to demonstrate that there is a difference in moral worth between a foetus and a neonate, thus justifying why a neonate deserves full status and a foetus does not.[217] Warren defends the significance of birth in relational terms based on the inherent social nature of human beings.[218] She considers social interaction as one of the fundamental parts of personhood and argues that the difference between a late-term foetus and a neonate is the ability of a neonate to socially interact. While accepting that sentience offers a good criterion for extending some moral value to the foetus, she argues that sentience is insufficient for full moral worth because it does not bring with it social interaction.[219] Warren explains that at birth, the neonate enters the human social world, where it lives

[215] Warren (1989) *Hypatia* 46 59.
[216] Justifying the significance of foetal viability will be considered below when discussing the positive elements of special status.
[217] Currently, there is an ethical debate about the significance of birth with respect to the permissibility of infanticide on the one hand or the impermissibility of termination of pregnancies. It is argued that since a late-term foetus and a neonate are intrinsically the same in terms of human development and personhood capacities or attributes they should be treated the same way. This rests on the fact that birth is merely a change in location and not a change in intrinsic properties. Whether one argues for permissible infanticide (Giubilini & Minerva (2013) *J Med Ethics* 261) or extending full status to the unborn (Morgan (1996) *Hypatia* 47) depends on how personhood is constructed. Also see Levy (2013) *J Med Ethics* 326. Clearly, with emphasis on the significance of biological birth this thesis is positioned against the practice of infanticide.
[218] Warren (1989) *Hypatia* 55.
[219] Ibid. Warren (55) states that "it is doubtful that a child reared in total isolation from other sentient (or apparently sentient) beings could develop the capacities for self-awareness and social interaction that are essential to personhood".

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and becomes enmeshed in social relationships which brings about social responsiveness from the child itself.[220]

Writing more recently on the significance of birth, Levy relies on Warren's argument and takes it further.[221] Levy's relational account holds that the neonate's worth depends on its actual capacities (present at birth) but that the full realisation of these capacities are partly dependent on the neonate's relationship with others and its environment.[222] Thus, he advocates a combined relational account to justify increased moral value of neonates based on relational facts about them, which includes a "relational account of worth" and a "relational account of capacities".[223]

Concerning Levy's account of relational worth, he argues that birth is a neonate's entrance into "full sociality", as opposed to his or her limited entry prior to birth via imagery technologies.[224] Existence in "full sociality" denotes the fact that there is the opportunity to interact (socially, clinically and legally) with the neonate independently and the neonate can engage in a wide range of interactions with a number of people who see or identify the neonate as an individual.[225] Ultimately, Levy asserts, that we do not *bestow* value on the neonate, the neonate's value *accrues* through the process of birth and identification via his or her social relations thus obligating society to recognise his or her value.[226]

On the notion that neonates lack certain capacities for full moral worth, Levy turns to a relational account of capacities which is tied to the notion of "scaffolding actions".[227] Scaffolding actions are those actions that that are made possible only because some form of external support is available to complete the action.[228] Levy suggests that neonates should be seen as having "scaffolding capacities", in that their independent capacity is there but in order to realise it to its fullest, the neonate relies on support structures (his or her relations to others and the environment) to actualise the

[220] Warren (1989) *Hypatia* 56.
[221] Levy (2013) *J Med Ethics* 326.
[222] Levy (2013) *J Med Ethics* 328.
[223] Levy (2013) *J Med Ethics* 327-328.
[224] Levy (2013) *J Med Ethics* 328.
[225] Ibid.
[226] Levy (2013) *J Med Ethics* 328.
[227] Ibid.
[228] Levy (2013) *J Med Ethics* 328.

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capacity.[229] While neonates form part of a "carer-child dyad" their lack of independence will not detract from their moral worth because their moral worth also stems in part from their availability (after birth) to form part of the dyad that supports his or her capacities.[230]

Arguments that call for anything more than special status prior to birth and postulate the significance of biological birth as merely signifying a change of location, are founded on a disembodied approach to pregnancy. Disembodying the unborn leaves such arguments with "missing links" because for as long as pregnancy takes place within a woman's body no foetus can exist without the presence of another's body. All arguments that involve continued unborn life must be steered by the existence of female bodies. So while prenatal development justifies something more than no status at all (special status), whether it be on the grounds of dignity, interests, relationality or potentiality, prenatal life must first and foremost be understood as a process that takes place in women's bodies and that very fact reinforces grounds for limiting the status of the unborn.[231]

4 5 Concluding Remarks

This chapter shows that prior to the emergence of technologically informed prenatal care, pregnancy fell in women's domain and it was they who would convey internal developments to outsider third parties. This is not to say that the unborn were not known of, obviously they were, but only through the existence of female experiences. The progression from quickening to birth was considered significant because it demonstrated the transformation from a "hope" for a child (quickening) into actually having a child (birth). However, technology blurred these lines with its constant

[229] Ibid. For instance, Levy explains that support is needed to help develop certain "onboard capacity" and once that capacity has developed, the support (scaffold) can be dispensed of. An example would be the training-wheels on a bicycle. The training wheels are only there for as long as the child needs them to develop his or her riding capacity. Once that capacity is fully realised, the training wheels can be dispensed with.

[230] Levy (2013) *J Med Ethics* 329.

[231] That is until medical technology advances to the stage of introducing external means of gestating the unborn, through external uterine technologies, for instance. The issues linked to these sorts of medical advancements fall beyond the scope of this thesis and will not be considered here. Especially since the aim of the thesis is to address tensions that arise as a result of *pregnancy*.

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development allowing for greater knowledge about the unborn and its eventual social acceptance and integration prior to quickening or birth.

With the need to know more about prenatal development in medicine and science, the maternal body was side-lined and female bodily experience began to be replaced with expert knowledge. Through the use of visualising technologies, the unborn were located and identified within the maternal body. Resultantly, they became independent objects of study and experimentation. These studies aided in identifying norms in terms of prenatal growth patterns, genetic disorders and prenatal abnormalities. Ultimately, medical professionals were concerned with securing healthy or positive foetal outcomes during fertilization, prenatal development and birth. Merely identifying unborn life and potential risk was not enough to secure healthy outcomes and physicians moved towards treating any treatable prenatal anomalies though foetal medical practices. Consequently the foetus moved from identification towards individuation followed with a trail of individuating terms such as foetal patient, foetal personality, foetal distress and foetal indications, to name a few.

However the concept of “foetal personhood” or considering the unborn as children came with society’s introduction to three- and four-dimensional scans of the unborn. Consequently, pregnancy and prenatal development moved into the public domain. The non-clinical interpretation of the life-like presentations of the unborn fed into politics advocating foetal rights arguments concerning the right to life and the extension of full legal status (personhood) to the unborn. These developments proved problematic since third parties lay claim to women’s pregnant bodies which hold the unborn and in which broader society has an interest.

Working off and expanding on Ford’s concept of special status, this chapter alluded to a limited number of theories that offered sufficiently nuanced explanations as to why prenatal life is valued but not valued to the extent that personhood would be justified. Theories of potentiality, human dignity, speciesism, foetal interests, relationality and the “Personhood Dependent Principle” looked at why prenatal life is something to value. Each attempted to explain and justify the phenomenon of increased third party-interest, being medical, social and legal interests, in the unborn (and inadvertently in pregnant women’s bodies as embodying the unborn). While each theory offered a

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certain degree of valuable insight pertaining to the use of technology to theorise on the value of the unborn, they too fell into the contemporary trap of side-lining the women who carry the unborn. This is because most of the theories failed to fully appreciate the embodied nature of pregnancy in their deliberations, with the exception of the relational approach and personhood dependency principle. The proper functioning of special status as a means to accord justifiable consideration of the unborn cannot adequately be applied in the context of a disembodied approach to pregnancy. Without considering the unborn in the real context of their existence, any argument concerning status would be flawed.

It is finally submitted that it is the flawed disembodied identification, individuation and theorising of the value of the unborn that has contributed to readying the ground for an adversarial pregnancy environment. This is due to the fact that the experience of pregnancy no longer includes only women and the unborn, but includes other third parties such as medical professionals, state officials, fathers-to-be and other members of society. Technology offers these parties the opportunity to experience the unborn, in terms of monitoring their movements, watching facial expressions and tracking their growth, all prior to birth. These very real experiences prompt a sense of relativity, responsibility and interest in the unborn that occurs to the exclusion of pregnant women. With third parties experiencing this sense of connection to the unborn, there will inevitably be occasions where others view certain circumstances as necessitating actions for the benefit of the unborn (for its own good), beyond pregnant women's health indications, wellbeing and rights generally. With women concerned about advancing their rights to substantive equality and autonomy on the one hand and third parties advancing their interests in the unborn as if slicing through an invisible female body on the other hand, an adversarial pregnancy environment is inevitable.

Concluding on part one of this thesis, chapters two and three demonstrate that while feminism and related activities took hold and the realisation of equality developed, there was increased development in technologies and medical knowledge of pregnancy and foetal development. These developments led to the medicalization of pregnancies and the eventual detachment (disembodiment) of the unborn from pregnant women. The perceived individuation of the unborn led to the emergence of a number of theories concerning foetal "life" which were necessary for interested third

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parties to develop since those theories would justify intervention in women's exercise of reproductive choice. These two concurrent events of women engaging reproductive freedom and the unborn being detached and spoken for by third parties, create an environment where some women's bodies became the playground for third parties. Part two of this thesis will now turn to look at the South African position of pregnant women and the unborn in law and identifies contemporary areas where the tension plays out as a result of disembodying the unborn as a separate entity worthy of individuated concern.

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PART TWO

Pregnancy under South African Law, Select Areas in need of Law Reform, and Potential for Pregnancy Adversarialism

Part one of this thesis worked on the concept of adversarialism in pregnancy. It identified that there is fertile ground for a tension to arise during pregnancy as a result of the potential for three-party pregnancies with some parties asserting what they consider important in respect of suitable pregnancy outcomes. The three-party pregnancy includes women who are seeking autonomous agency despite their reproductive capacity, the foetus which is identified, individuated and allocated interests, and third-parties interested in the unborn. Essentially, part one highlights that third parties are developing an increased interest in the unborn and their wellbeing and they seek ways to intervene in some pregnancies in order to "protect" the unborn and secure optimal foetal development and healthy birth outcomes. However, the process of achieving these ends tends to render women invisible and also may not be in line with women's envisaged experience of reproduction, pregnancy or birth, thus giving rise to possible adversarialism.

Generally, oppositional environments will give rise to disputes concerning the best way forward and the courts or legislature will be approached in order to resolve the issue or called on to enact suitable legislation. In this light, part two of this thesis looks at whether the adversarial pregnancy environment manifests itself in the context of South African law. Part two starts off with chapter five which looks at pregnant women and their respective rights that give effect to their autonomy during pregnancy. Chapter six goes on to consider the legal status of the unborn and discusses which approaches to pregnancy are applicable in South African law. The discussion that spans these two chapters serves the purpose of setting out the current legal framework which shapes the legal existence of the two entities that constitute a pregnancy, and with this context in place, chapter seven serves to consider recent calls for law reform concerning pregnant women, the unborn or pregnancy in general.

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Part two of this thesis highlights that pregnancy adversarialism has not yet found any articulation in South African law. The reason for this stems from the fact the current South African approaches to pregnancy, being the popular single-entity and the newly established not-one-but-not-two approaches, do not create an environment conducive to tension during pregnancy. Consequently, legally sanctioned intervention during a pregnancy by third parties is unheard of. However, some South African academics question whether this approach secures healthy pregnancy outcomes and are critical of the legal validity of this position as a whole. In this respect, each argument expresses a common aim of introducing a separate-entities approach to pregnancy in South Africa and chapter seven goes on to look at all these assertions in detail. Generally, it is asserted that viewing the pregnant woman and the foetus as two separate entities creates the necessary space to secure healthy foetal outcomes since legal intervention can be justified in cases where pregnant women's conduct is seen as detrimental to foetal health, development and eventual live birth. These arguments will all be considered and will inform what areas will be considered in part three when the United States is considered.

Since there is no case law or legislation addressing or testing these calls for reform, one cannot analyse whether such interventions based on the separate-entities approach will in fact result in positive pregnancy outcomes in a legal technical sense. On this basis, part two will inform the content and scope of part three where South African authors' assertions are tested against the experiences in United States where such proposals have already been tested and put to use and/or criticised as being legally unsound.

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Chapter Five

Pregnancy in South Africa: The Legal Status of Pregnant Women

5 1 Introduction

The purpose of part two of this thesis is to look at pregnancy under South African law, and this chapter pursues this aim by considering the legal status of pregnant women. This discussion is important to the aims of this thesis of addressing the tension between female autonomy rights and foetal interests in that it identifies one of the entities involved in the tension, namely pregnant women, and it demonstrates the scope of pregnant women's legal existence. Without this broad understanding of pregnant women under the law, all considered calls for law reform will lack context and there will be an insufficient understanding concerning the legal parameters which the calls for reform attempt to influence.

Chapter five explores the concepts of legal subjectivity and autonomy as they are elucidated in case law and particularises these concepts to pregnant women. Thus, the chapter demonstrates that pregnant women are legal subjects and as such they are entitled to regulate the course of their lives despite the presence of a pregnancy. These concepts of legal subjectivity and autonomy are used in the very specific context of reproductive decision-making processes that some pregnant women may face when confronted with a pregnancy. In this respect, the notion of reproductive autonomy, as a constitutive part of the general construct of autonomy, is drawn on and the chapter identifies and discusses a number of constitutional rights that are present to ensure that pregnant women can safely realise their reproductive autonomy while pregnant.

In the context of this chapter, reproductive decisions and actions (as manifestations of reproductive autonomy) are broadly construed as including decisions that will take place once a pregnancy has already commenced. Reproductive decisions include decisions to continue with a pregnancy or to lawfully terminate a pregnancy, life style

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choices during pregnancy, and preferences pertaining to antenatal care and birth.[1] Thus, this chapter is not concerned the topics of contraception, fertility treatments and related pre-implantation issues, and it also does not consider matters that could possibly arise after birth.

Accordingly, this chapter examines pregnant women's rights, case law and legislation that are relevant to the realisation of pregnant women's reproductive autonomy.[2] It also considers to what extent pregnant women's rights are realised and identifies some critical weaknesses for pregnant women's meaningful enjoyment of autonomy.

5 2 Pregnant Women as Unqualified Legal Subjects and Their Autonomous Character

Pregnancy is seen to involve the process of women gestating the unborn. However, while the term pregnancy hints towards an image of connection or unity between a woman and foetus, there is a core distinguishing feature between pregnant women and the unborn under South African law, this lies in the issue of legal subjectivity. In law, a person is one who is born alive and legal subjectivity only vests at this moment.[3] Boezaart defines a legal subject as "any entity that can have rights, duties and competencies".[4] It is this distinguishing feature of legal subjectivity that sets very different legal paths for pregnant women and the unborn during continued pregnancy under South African law, even though they may share the common connection of pregnancy.

All pregnant women, like other competent individuals, have rights, and like those of any other person, their rights can be limited under justifiable circumstances in terms

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1 This thesis takes the position that increased attention should be given to birthing women's rights and that this should fall under reproductive rights more broadly. For a discussion of bringing birthing rights back into focus see, R Spence "Abandoning Women to their Rights: What Happens when Feminist Jurisprudence Ignores Birthing Rights" (2012) 19 *Cardozo JL & Gender* 75.

2 This is done with the knowledge that pregnancy is a very unique experience for each woman and for each pregnancy respectively, with experiences of autonomy varying according to a woman's social standing. In this respect see, E Lazarus "What do Women Want? Issues of Choice, and Class in American Pregnancy and Childbirth" in R Davis-Floyd & C Sargent *Childbirth and Authoritative Knowledge: Cross Cultural Perspectives* (1997) 132.

3 T Boezaart "Child Law, the Child and South African Private Law" in T Boezaart (ed) *Child Law in South Africa* (2009) 4.

4 Ibid.

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of section 36 of the Constitution. Equal access to and enjoyment of all rights is secured under section 9 of the Bill of Rights in the Constitution of the Republic of South, 1996 which states that everyone is equal before the law and that individuals also have the right to equal protection of the law. Further, equality includes the right to full and equal enjoyment of all rights and freedoms. The equality clause then prohibits unfair discrimination on a number of grounds and specifically includes pregnancy.[5] Therefore the benefit of all rights, laws and freedoms vest in pregnant women despite the fact that they are pregnant. This establishes the principle that pregnant women are unqualified legal subjects.

5 2 1 Human autonomy as per South African constitutional case law

Pregnant women's full and equal enjoyment of all the rights and freedoms secured in the Constitution requires that they are equipped to engage their sense of autonomy especially when determining how they plan to live their lives as procreative subjects. However, the Constitution does not specifically grant anyone the *right* to autonomy and finding a working legal definition of autonomy has proved fruitless. The *Advanced Learners Dictionary*[6] defines autonomy as the ability to act and make decisions without being controlled by anyone else and this term is presented as being synonymous with independence.[7] While a dictionary definition assists to a certain degree, it is void of any legal impetus. This situation proves problematic because it is not clear how a person will know that their autonomy has been denied or limited from a legal perspective and how with this be litigated on as a means of protecting autonomy.

Sifting through constitutional case law aids in determining the role and function of autonomy under South African law but rather than providing a once-off defined principle, a number of separate decisions have to be drawn on in order to come up with a workable concept. The Constitutional Court has made reference to the autonomy of individuals but has not necessarily looked at the content of the term in

5 S 9(3) of the Constitution.
6 A Hornby *Oxford Advanced Learner's Dictionary of Current English* 8 ed (2010).
7 Oddly, the *Oxford Dictionary of Law* does not define autonomy, see J Law & E Martin (eds) *Oxford Dictionary of Law* 7 ed (2009). The acceptability of this definition is in question though, ch 11 provides substantive reasons why.

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any substantive way.[8] This is in spite of the fact that autonomy (along with dignity) is understood to be a constitutionally prized value.[9] Nonetheless, there are a number of decisions that contribute towards developing a clear picture of autonomy.

To start, the Constitutional Court seems to have accepted an umbrella concept of autonomy which is similar to that of the Oxford definition provided above. In *Barkhuizen*,[10] Ngcobo J referred to autonomy as the "ability to regulate one's own affairs, even to one's detriment" and this was seen as the very "essence of freedom and a vital part of dignity". It is asserted that self-regulation can be seen as the core of human autonomy. In *Volks v Robinson*,[11] Sachs J in his minority judgment asserted that respect for human autonomy implies that the law must honour the choices that people make and it must give weight to those decisions, even if their decisions are seen as unconventional.

In order to experience this construction of human autonomy, Ackermann J, in *Bernstein*, recognised that "rights, like the rights to privacy, are not based on notions of the unencumbered self, but on the notion of what is necessary to have one's own

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8 For instance, in *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC) (concerning the constitutionality of the common law definition of rape in that it excludes anal penetration and is gender specific) Nkabinde J (para 37) giving majority judgment, found that rape violates a woman's sexual autonomy. Also, Langa J (para 80), in his dissent in the same decision, found that the crime of rape violates the constitutional value of freedom since it negates a person's bodily autonomy and this is negation transcends the parameters of gender specificity. In *Bernstein v Bester* 1996 (2) SA 751 (CC) (dealing with constitutionality of sections 417 and 418 of the now repealed Companies Act 61 of 1973) O'Regan J (para 150) held that the right to freedom should include within it the understanding that society is characteristically interdependent but that this understanding should not deny the value of autonomy. Going further, O'Regan (para 150) recognised that the state plays an important role in enhancing autonomy amongst other rights in the Constitution. In *MM v MN* 2013 (4) SA 415 (CC) (dealing with the validity of a customary marriage where the first wife's consent is lacking), Froneman J, Khampape J and Skweyiya J (para 73) found that "autonomy and control over one's personal circumstances are a fundamental aspect of human dignity". These are some of many references without any substantive consideration as to what autonomy stands to mean in law and what one should do with it in a legal setting.

9 *Barkhuizen v Napier* 2007 (5) SA 250 (CC) para 150. (In this case the Court had to decide on the constitutionality of a time-limitation clause in a short-term insurance policy in that such a clause violates a person's right to approach a court for redress.) While Sachs J was providing his minority decision in the context of contract law, it is asserted that if one accepts that people enjoy autonomy while engaging contractual relations, autonomy must be constitutionally prized even more so in the context of pursuing one's life course.

10 Para 57.

11 2005 (5) BCLR 446 (CC) paras 154; 156. This case concerned the constitutionality of s 2(1) of Maintenance of Surviving Spouses Act 27 of 1990 to the extent that the Act does not make provision for a permanent life partner's claim for maintenance from their partner's deceased estate.

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autonomous identity".[12] While this quote draws on the relational nature of rights and the scope of the right to privacy, it also shows that though autonomy is not explicitly recognised in the Constitution as a human right, a number of rights give credence to a person's sense of autonomous existence. For instance, one cannot fully enjoy autonomy where one's rights to freedom or privacy do not prevail.[13] Further, a person's experience of autonomy can also be justifiably limited through a rights approach since not all rights are absolute. This can be achieved through applying the limitation clause housed in section 36 of the Constitution, therefore serving as a regulatory mechanism regarding the extent of one's autonomy.

Adding to a more informed picture of autonomy, in *National Coalition for Gay and Lesbian Equality*, in the context of the right to privacy, Sachs J referred to Ackermann J's decision in *Bernstein* and advanced the notion that autonomy does not mean the right to occupy a specific space in which a "socially detached individual can act freely from interference by the state".[14] Sachs J understands that individuals are in a lived state of social connectedness and explains that what is important for autonomy is the nature of the activity and not where the activity takes place.[15] Therefore, autonomy takes on a relational tone[16] and in this context, the more an activity relates to a person's inner sanctum the more pressing the need for advancement and protection from conflicting rights of the community or the state.

Interestingly, in *S v Jordan*,[17] the appellants attempted to cluster the rights to dignity, privacy and freedom of the person under the concept of autonomy and base their

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12 Para 65. Ackermann J approvingly relied on R Forst "How (Not) to Speak about Identity: The Concept of the Person in a Theory of Justice" 1992 18 *Philos Soc Crit* 293.

13 For instance in *Ferreira v Levin*; *Vryenhoek v Powell* 1996 (1) SA 984 (CC) which concerns the validity of s 417(2)(b) of Companies Act 61 of 1973 and an accused's right to a fair trial. Sachs J (para 251) stated that one needs to protect human autonomy in order to achieve freedom and personal security. Also, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (dealing with the constitutionality of the common law crime of sodomy) at para 32 Ackermann J stated that privacy recognises that we have a right to a sphere of intimacy and autonomy.

14 Para 117.

15 Ibid.

16 Sachs J seems firmly committed to understanding autonomy in relational terms. In fact, in two of his judgments Sachs J refers to Nedelsky who is well known for her relational stance on autonomy. See *Ferreira* fn 11 and *S v Baloyi* 2000 (2) SA 425 (CC) (dealing with aspects of the Prevention of Family Violence Act 133 of 1993) para 16, fn 40. Nedelsky's work on relational autonomy will receive detailed attention in ch 11 of this thesis.

17 2002 (2) SACR 499 (CC) para 52. This case dealt with the constitutionality of criminalising brothel keeping and sex for reward in terms of the Sexual Offences Act 23 of 1957.

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litigation on that concept, but Sachs J and O'Regan J rejected this approach and found that since autonomy is not explicitly included in the Constitution they would have to work with constitutionally recognised human rights that were argued to have been infringed. This demonstrates that in order to advance a person's autonomy in law or litigation, one must be aware of the rights that give weight to autonomy. However, determining which rights are relevant to the specific task of advancing a person's autonomy can be complicated since any right in the Bill of Rights will inevitably advance a person's autonomous character.

In the context of the umbrella concept of human autonomy, case law originating from the Constitutional Court indicates that the rights to freedom, privacy and dignity all give credence to this wide understanding of autonomy.[18] Yet, in a number of decisions one finds references such as, sexual autonomy,[19] bodily autonomy,[20] personal autonomy[21] and patient autonomy,[22] to name a few. It is submitted that these references give an indication of which branch of the umbrella concept of autonomy is at play. Linked to that, when these branches of autonomy are relied on, it requires a focused application of rights in a very specific way, and these rights are applied in addition to the rights relevant to the umbrella concept of human autonomy. Further, since each branch of autonomy stems from the umbrella concept, it can be accepted that asserting a particular branch inevitably assists in realising the umbrella concept of human autonomy,[23] namely to pursue one's own envisaged ends without interference. However, neither of the branches should be conceived as an isolated capsule of a particular form of autonomy. Rather, each branch of autonomy should be seen as being formed by permeable boundaries allowing for principles to transcend the wide

[18] For instance, see the following cases generally*: S v Jordan*; *MM v MN*; *Barkhuizen v Napier*; *Bernstein v Bester*; *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC); *MEC for Education v Pillay* 2008 (1) SA 474 (CC)

[19] *Masiya* para 37.

[20] *Masiya* para 80.

[21] *Baloyi* para 16.

[22] *Castell v De Greef* 1994 (4) SA 408 (C). This case concerned medical negligence of an attending physician in that the physician failed to obtain his patients informed consent. While *Castell* is not a Constitutional Court decision, it does enforced what is recognised today as constitutional right to self-determination as housed in section 12 of the Constitution. This case was decided by Ackermann J who later became a Constitutional Court Judge. It can therefore be argued that he took this perspective with him when moving to the Constitutional Court.

[23] For instance, if one's bodily autonomy were to be infringed through rape, one's wider experience of autonomy will also be negatively impacted upon.

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array of autonomy branches and allow for each branch to compliment and support one another.[24]

It is understood that each branch of autonomy is relative to specific areas of human interaction and existence, and therefore assist in identifying what rights are involved when it comes to protecting or advancing a person's autonomy in that area of interaction or existence. In the case where the same rights are relied on in respect of advancing different branches of autonomy, it is the particular branch of autonomy that will determine *how* the rights will be relied on. This construction frames autonomy as a fluid concept which is influenced by relationships and the context of those relationships.[25]

5 2 2 Pregnant women's reproductive autonomy as a branch of human autonomy

Linking these findings on autonomy to the theme of female[26] autonomy during pregnancy requires one to determine which branch of autonomy becomes relevant during a pregnancy. This approach will assist in identifying those constitutional rights that support pregnant women's experience of autonomy as legal subjects. Reproductive autonomy seems to fit this task well since pregnancy and decision making during pregnancy can be grouped as reproductive decisions leading to reproductive actions.[27] Reproductive actions will include those actions that lead to both having and not having children, and all the decision-making processes that are taken in order to realise those outcomes. It must be noted that reproductive actions are therefore not limited to decisions on terminating a pregnancy, but also include those

[24] For example, in an act of embracing autonomy, a women decides to bear a child. The process of bearing a child engages her reproductive autonomy as well has her autonomy as a medical patient. Both these branches of autonomy feed off of and bolster one another in the ultimate goal of realising and experiencing her human autonomy.

[25] It is submitted that if autonomy was a concept that could be considered in isolation, our courts surely would have provided a concrete definition to work with by now. For more on context-related autonomy, see, T Glennon "Regulation of Reproductive Decision-making" in S Sclater, F Ebtehaj, E Jackson & M Richards (eds) *Regulating Autonomy: Sex, Reproduction and Family* (2009) 149-168.

[26] Female autonomy includes girls and women. Further, female autonomy is not distinguished from human autonomy in an arbitrary sense but rather to highlight that female experiences of autonomy will invariably differ to that of men, particularly during pregnancy because pregnancy and being able to fall pregnant is unique to women.

[27] While bodily, sexual and patient autonomy also have a role to play here, these concepts can be included under the broader label of reproductive autonomy in that bodily, sexual and patient autonomy all impact on pregnant women's overall experience of reproductive autonomy.

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decisions where women decide to continue with a pregnancy. Therefore, reproductive actions include those issues relating to how pregnant women decide to progress through pregnancies in respect of health care treatment and lifestyle choices.[28]

Still, the term "reproductive autonomy" seems problematic because research indicates that this term does not appear in any South African case law[29] or legislation. This makes it difficult to determine the position of female reproductive autonomy generally and more specifically during pregnancy. Terms such as "reproductive health care",[30] "reproductive health",[31] "reproductive choice"[32] and "reproductive self-determination"[33] do make their appearances but as seen earlier, rights such as these are not the experience of autonomy in themselves but represent what is necessary for autonomy to be experienced and assist in offering protection in law.[34] The use of "reproduction" as a qualifying word to each right is understood to be an indication of the context in which the right is being applied.

If human autonomy is broadly understood as the process of self-regulation then reproductive autonomy will be the process of self-regulation in the context of reproduction. This methodology falls in line with Mojapelo J's statement in *Christian Lawyers Association v Minister of Health*[35] (*Christian Lawyers* (2005)) where the Judge confirmed that a woman's autonomy to determine the fate of her pregnancy can be protected through the application of a number of constitutional rights.[36] Identifying

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28 The Preamble of Choice on Termination of Pregnancy Act 92 of 1996 lists a number of reproductive health care services which includes access to contraception, sexual education, family planning, counselling programmes and termination-of-pregnancy services. This list gives an indication of what actions can be recognised as reproductive actions.

29 In this respect Juta Law Online was utilised and the following data bases were used: South African Criminal Law Reports (1990 to date); South African Law Reports (1947 to date); and Juta's Unreported Judgments.

30 S 27(1)(a) of the Constitution provides that everyone has the right to have access to health care services, including reproductive health care.

31 Preamble to the Choice on Termination of Pregnancy Act 92 of 1996.

32 *Stewart v Botha* 2007 (6) SA 247 (C) 247 H. This case dealt with liability for wrongful birth and wrongful life claims and will receive further attention later in the chapter. Also see *Christian Lawyers* (2005) 529 E.

33 *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (T) 524 I. In this case the Transvaal Provincial Division had to decide whether minors were able to consent to the termination of their pregnancies in terms of the provisions of the Choice Act, without the involvement of parents or guardians.

34 *Bernstein* para 65.

35 527 F.

36 This case will be discussed in more detail below, with specific reference to the rights relied on.

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the relevant rights to achieve the aim of reproductive autonomy is much less complicated from this perspective, and for purposes of this thesis emphasis will be narrowly placed on reproductive autonomy during pregnancy.

5 3 Female Reproductive Rights Giving Effect to Reproductive Autonomy

While a legal construction of reproductive autonomy is not available, a number of rights have been identified as "reproductive rights". The Preamble to the Choice on Termination of Pregnancy Act[37] (Choice Act) makes specific reference to promoting "reproductive rights". While not explicitly defining the term, the Act does recognise a number of rights as important for women's freedom of choice in reproduction which include the rights to dignity, freedom, equality, security of the person, reproductive health and health care. These rights pooled together can be understood as reproductive rights.

In *Constitutional Law of South Africa*, O'Sullivan's chapter deals extensively with reproductive rights but primarily in the context of termination of pregnancy.[38] She also goes on to identify a number of rights such as those recognised in the Choice Act and defines reproductive rights as follows:[39]

> Even under the narrowest of constructions, reproductive rights demand respect for women's bodily integrity and an environment for decision making free from fear of abuse, violence and intimidation. Viewed more broadly, reproductive rights require the provision of information about access to voluntary and adequate reproductive and sexual services and may even command the provision of such basic necessities as food, shelter, childcare and education.

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37 Act 92 of 1996.

38 M O'Sullivan "Reproductive Rights" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2005) ch 37. Also see, C Albertyn, L Artz, H Combrinck, S Mills & L Wolhuter "Women's Freedom and Security of the Person" in *Gender, Law and Justice* (2007) 363-374. The authors (368) also indicate that reproductive autonomy includes a wide range of rights, such as dignity, privacy, opinion and belief, bodily integrity and person security and freedom. Later in the chapter (374), Albertyn et al recognise these rights and the rights to life and health care as reproductive rights. However, Albertyn et al tend to use reproductive freedom and reproductive autonomy interchangeably as if to mean the same thing. However it must be emphasised that the author of this thesis takes the position that the right to freedom is something distinct from autonomy in that rights are what is necessary for autonomy or an autonomous identity.

39 O'Sullivan "Reproductive Rights" 37-1.

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It is noticeable that in a South African context, searches relating to female reproductive decision making in law all tend to result in information on termination of pregnancy. Yet, as indicated in paragraph 5 2 2, deciding not to bear a child is only one element of reproductive decision-making and action.[40] The discussion of reproductive rights therefore must also go beyond termination of pregnancy otherwise only one element of reproductive autonomy would be covered here and will not take the wider issue of tensions during pregnancy any further. Therefore, while most of the discussion on rights to follow stems from case law and literature relevant to termination of pregnancy, an effort will be made to extend that discourse to include the situation where women plan to continue with their pregnancies and how identified reproductive rights ensure healthy pregnancies and healthy pregnancy outcomes.

As mentioned, O'Sullivan identifies a number of constitutional rights as being relevant to reproductive decision making, she does so by applying the identified rights in a reproductive context.[41] Her approach is therefore approvingly adopted in terms of structure. Further, the discussion that follows also stems from previously published work linked to the right to termination of pregnancy under the South African Constitution.[42] Unfortunately, there is very little case law dealing with the rights of pregnant women as a specific group of rights-holders, however, general principles pertaining to human rights will be adapted for particular application to pregnant women.

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40 Also see, C Pickles *S v Mshumpa: A Time for Law Reform* LLM Dissertation, University of Pretoria (2008) 116. This was the first time that this author came to understand reproductive rights as more than the right to terminate a pregnancy and the discussion to follow in this thesis aims to build on this premise.

41 O'Sullivan identifies many rights as being reproductive in nature, however not all of those rights will be considered in this chapter due to constraints on word count. Thus, only those rights understood to constitute fundamental building blocks to fostering an environment of respect towards reproductive autonomy will be considered. See O'Sullivan "Reproductive Rights" 37-18; 37-21; 37-24; 37-25 for her discussion of the children's rights and the rights to religion, information and freedom of expression respectively, as other examples of reproductive rights.

42 C Pickles "Termination of Pregnancy Rights and Foetal Interests in Continued Existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996" (2012) 15 *PER* 403.

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5 3 1 Equality

Section 9 of the Constitution provides that everyone is equal before the law and has equal protection of the law. This right includes full and equal enjoyment of all rights and freedoms. Further, neither the state, nor any person, may unfairly discriminate directly or indirectly against any person on a number of grounds, including, amongst other grounds, gender, sex, and pregnancy. Discrimination on any one of these listed grounds is unfair unless a party can establish otherwise.

In *Fourie*, Sachs J described equality as the right to be different and explains that equality demands equal concern and respect across differences.[43] At the very least, equality insists that difference should not be the basis for exclusion, marginalisation or stigma.[44] In view of our differences, the Bill of Rights is committed to a substantive understanding of equality.[45] Birenbaum explains that formal equality involves treating individuals with similar characteristics equally, but this proves problematic because it can still lead to further inequality.[46] According to Albertyn, substantive equality essentially draws on the notion that people should be able to fully realise their human potential by participating in society and developing necessary relationships, despite the presence of difference.[47] In order for people to meaningfully engage their potential, arbitrary and systemic barriers to social participation must be removed, and conditions should be created where human potential can be realised and healthy relationships developed.[48] Fredman explains that a substantive approach to equality requires reconceptualising the right on the basis of gender.[49] She goes further and states that substantive equality highlights power struggles and gender roles in those struggles, it necessitates differential treatment in order to achieve equal outcome, it requires transformation of social institutions as opposed to expecting individuals to conform, and lastly, it advances individuals rather than the notion of consistency.[50]

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43 Para 60.
44 Ibid.
45 J Birenbaum "Contextualising Choice: Abortion, Equality and the Right to Make Decisions Concerning Reproduction" (1996) 12 *SAJHR* 485 488.
46 Ibid.
47 C Albertyn "Equality" in E Bonthuys & C Albertyn (eds) *Gender, Law, and Justice* (2007) 95.
48 Ibid.
49 S Fredman "Engendering Social and Economic Rights" in B Goldblatt & K McLean (eds) *Women's Social and Economic Rights: Developments in South Africa* (2011) 4-33.
50 Fredman "Engendering Social and Economic Rights" 12-13.

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Narrowing the application of equality to the context of pregnancy, O'Sullivan[51] states that the explicit inclusion of pregnancy, sex and gender in section 9(2) is a constitutional acknowledgment that pregnant women form part of a systemically disadvantaged group and therefore are in need of greater judicial attentiveness. Birenbaum argues that a substantive approach "addresses the forces of systemic discrimination which, in the case of gender discrimination, often result in 'neutral' or 'equally applied' rules having an adverse impact on women".[52] This is problematic because the biological fact of pregnancy and its consequences are not considered when a formal approach to equality is adopted.[53] Substantive equality in the context of reproductive rights makes the connection between systemic discrimination against women and women's reproductive role.[54] O'Sullivan states that, from a substantive perspective, the right to equality requires the state to intervene positively and to provide the minimum resources necessary for the enjoyment of certain rights.[55]

In respect of termination of pregnancies, both the Choice Act and the National Health Act[56] aid in realising the aims of substantive equality. The Preamble to the Choice Act recognises that, in order to achieve equality, women must be able to decide whether to terminate a pregnancy or not, since they are best placed to make decisions of that nature. Their better placement stems from the fact that child bearing is physically, psychologically, and economically[57] owned by women and child rearing is disproportionally shouldered by them in both an economic and social sense.[58] These

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51 "Reproductive Rights" 37-14. Interestingly, pregnancy was not included in the Interim Constitution's equality clause.
52 Birenbaum (1996) *SAJHR* 488.
53 Ibid.
54 O'Sullivan "Reproductive Rights" 37-14.
55 O'Sullivan "Reproductive Rights" 37-12. Equality provides women with the freedom to choose whether to have intercourse or how many children to have and when, and permissive termination legislation is an issue of social justice and sexual equality.
56 Act 61 of 2003.
57 In the sense that pregnant women bear the burden of uncertainty with respect to paid maternity leave or related benefits. The unfortunate fact is that physicality of pregnancy limits women's earning capacity and this is despite the fact that run-of-the-mill household expenses continue to accrue throughout the existence of a pregnancy.
58 O'Sullivan "Reproductive Rights" 37-13. Also see *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). In this case the Constitutional Court was called on to decide whether granting special remission of sentence to mothers of children below the age of 12 years was unfair discrimination in respect of fathers with children of the same age. Goldstone J (para 37) recognised that generally women bear more responsibilities for child rearing than fathers do. Further, Goldstone J explicitly recognised women's unequal social footing when the Judge stated as follows (para 38):

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consequences are increasingly detrimental when poverty and race intersect the issue.[59] Drawing on context shows that these circumstances all impact on women's ability to meaningfully develop their envisaged human potential, particularly in cases where their inner direction does not include bearing children, having too many children, or having children too closely spaced to one another. In recognising this, the Choice Act allows for the termination of a pregnancy on demand during the first twelve weeks of gestation,[60] and from thirteen to twenty weeks, for socio-economic reasons.[61] Most importantly, the only required consent[62] is that of the woman or girl[63] who is seeking the service, and interference with access to termination-of-pregnancy services will render the interferer criminally liable.[64]

On its own, the Choice Act will not realise equality for women, more is necessary.[65] For there to be substantive equality, even the poorest of women of any race or background should be able to have access to the Act's benefits of procreative

"there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources, are immense. The failure of fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and it is one of the causes of deep inequalities experienced by women in employment." (Footnotes excluded.) The majority's position on women's roles does not come without debate, see the decisions of Kriegler J (paras 82-83); Mokgoro J (paras 92-93); O'Regan J (para 113). Also see ch 3 para 3 6 of this thesis and authority cited therein, where the cost of motherhood is discussed in more detail.

59 Ibid.

60 S 2(1)(a).

61 S 2(1)(b). Once a pregnancy has progressed passed 20 weeks gestation, s 2(1)(c) provides that such pregnancy may only be terminated on therapeutic grounds. Therapeutic grounds are listed as follows, maternal life endangerment, severe foetal malformation, or there is risk of injury to the foetus.

62 S 5 of the Choice Act.

63 See *Christian Lawyers* (2005) where the Court held that the Choice Act, for purposes of consent in respect of a minor, requires the minor concerned to have the necessary maturity to provide informed consent. Also see s 129(2) and (3) of the Children's Act 38 of 2005, which provisions also refer to the requirement of sufficient maturity to provide informed consent. For a comprehensive description of the doctrine of informed consent see P Carstens & D Pearmain *Foundational Principles of South African Medical Law* (2007) 875-893. The topic of informed consent will receive further attention later.

64 S 10(1)(c) of the Choice Act provides that "[a]ny person who prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy shall be guilty of an offense and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years".

65 C Ngwena "Accessing Abortion Services under the Choice on Termination of Pregnancy Act: Realising Substantive Equality" (2000) 25 *JJS* 19 29. Ngwena points out that for substantive equality to be realised, merely legalising termination of pregnancies is not enough, and the state must make access available for those who cannot afford the service.

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control.[66] The state has realised this and in terms of section 4(3)(c) of the National Health Act, health care centres funded by the state must provide women with free termination-of-pregnancy services. While section 4(3)(c) assists in ensuring that the benefit of the Choice Act infiltrates differences, the fact remains that public provision of termination-of-pregnancy services has not met its full potential even after nearly two decades of implementation.[67] However, at the very least it must be acknowledged that South Africa is on the right path towards realising substantive equality in the context of parenthood avoidance.[68]

If equality means that all people should be able to fulfil their inner potential by moving beyond barriers linked to pregnancy, sex, gender, race, class and so on, then its reach must include the scenario where women plan to continue with their pregnancies too. Here, the right to equality requires that while women are gestating they still have the same access to rights and freedoms contained in the Constitution and the law generally. The existence of continued pregnancy should not nullify their opportunities for self-fulfilment. On a substantive level, the right to equality requires that pregnancy is recognised as a biological process which has the effect of increasing women's needs[69] for more specialised attention regarding health care, education, and economic assistance, to name a few examples. If these context-related measures are not in place, women are at risk of being denied the opportunity to safely progress through pregnancy and to later resume their non-reproductive activities.

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66 Ibid.

67 For instance see C Pickles "Lived Experiences of the Choice on Termination of Pregnancy Act 92 of 1996: Bridging the Gap for Women in Need" (2013) 3 *SAJHR* 515. Also see J Harries, N Lince, D Constant, A Hargey & D Grossman "The Challenges of Offering Public Second Trimester Abortion Services in South Africa" (2012) 44 *J Biosoc Sci* 197; J Harries, K Stinson & P Orner "Health care Providers' Attitudes towards Termination of Pregnancy: A Qualitative Study in South Africa" (2009) 9 *BMC Public Health* 296. Each article demonstrates that, although South Africa has this policy in place, the demand for termination-of-pregnancy services is rarely adequately met as a result of poor infrastructure, and a lack of physical space and personnel. The lack of personnel is linked to provider opposition to termination of pregnancies and unwilling care providers. The shortage of termination-of-pregnancy providers undermines the availability of termination services. These are the same issues raised by Ngwena over ten years ago, see Ngwena (2000) *JJS* 19.

68 So while we are on the right path, more needs to be done to "fortify" the path with proper policy implementation and adequate state accountability. See generally Pickles (2013) *SAJHR* 515.

69 Here, "increasing women's need" is used to indicate that pregnancy brings with it very specific issues, for instance, general basic health care will not be sufficient for pregnant women. The existence of a gestating foetus places women's bodies under very unique demands that requires increased resources such as prenatal vitamins, folic acid, proper general nutrition, access to specialise medical practitioners who can monitor pregnant women and foetal development. Most importantly, birth is understood to have the potential to be one of the most life threatening instances in women's lives.

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There are a number of examples where special provision has been made for pregnant women which have the effect of securing space for them to experience reproductive autonomy on the basis of substantive equality. One such example is section 4(3)(a) of the National Health Act which states that the Minister, state clinics and community health care centres funded by the state must provide pregnant women, amongst other listed recipients, free health services if they are not beneficiaries of medical aid schemes.[70] The Act's definition of health care services specifically includes reproductive health care. This provision has the potential[71] to ensure that pregnant women can safely progress through pregnancy despite differences in race, class, gender, and so on. Further, having this sort of provision in place indicates that the state is engaging the notion that regardless of a woman's social standing, reproduction will not be a ground to deny women their chances of healthy existence during the process of reproduction and beyond reproduction. In this sense, section 4(3)(a) aids in overcoming maternal morbidity and mortality.[72] By preventing negative consequences associated with pregnancy and child birth, in principle, women should be able to continue to work towards the path they envisaged for themselves and not be physically hampered by the reproductive process.

Another example of reinforcing reproductive autonomy through the prism of reproductive rights stems from a recent Constitutional Court decision. In *Head of Department, Department of Education, Free State Province v Welkom High School*[73] the Court dealt with pregnant learner policies which automatically exclude female

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70 Another examples of legislative support mechanisms relevant to economic security of pregnant women can briefly identified. In terms of s 25(1) of the Basic Conditions of Employment Act 75 of 1997 women are entitled to four consecutive month's maternity leave. However, the Act does not mandate paid maternity leave. In the case where the woman concerned contributed to the Unemployment Insurance Fund, s 24(1) of the Unemployment Insurance Act 63 of 2001 provides that she will be entitled to maternity leave benefits. Also, in terms of s 5 of the Employment Equity Act 55 of 1998 every employer is mandated to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination as specified in terms of the equality clause. Additionally, s 187(1)(e) of the Labour Relations Act 66 of 1995 provides that dismissal on the grounds of pregnancy, intended pregnancy, or for any reasons related to pregnancy is automatically an unfair dismissal.

71 Since this is a socio-economic right, the state's obligation to realise this right only goes so far as resources permit. See s 27(1)(b) and (2) of the Constitution. More on this right will be discussed below.

72 See generally, Human Rights Watch "Stop Making Excuses" *Human Rights Watch* (2011) <http://www.hrw.org/reports/2011/08/08/stop-making-excuses-0> (accessed 2 February 2014).

73 2013 (9) BCLR 989 (CC).

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learners from school in cases where they fall pregnant.[74] The Court found that excluding pregnant learners from school on the grounds of their being pregnant was a *prima facia* violation of their right to equality.[75] For substantive equality to be realised, a school's learner pregnancy policy should include aspects that advance these learner's equal benefit of the right to education by accommodating the unique position that pregnancy creates for girl learners. Therefore, the policies should rather include aspects such as the following: exemptions from mandatory sporting activities, procedures regarding maternity leave, adequate availability of medical and counselling services at the school, and special accommodation of babies within the school environment.[76]

For purposes of this thesis, *Welkom* is ground breaking for two reasons. First, this case serves as an example of equality as a reproductive right beyond the realm of termination of pregnancy. It demonstrates how our rights system can be relied on to foster a healthy environment for women or girls to realise their reproductive autonomy where the realisation of autonomy includes continuation of pregnancy. Second, the *Welkom* case emphasises that the decision to continue with a pregnancy should not come at such a high price that it could cost girls their educational advancement and thereby place them at a disadvantaged starting point when entering the economy or attempting to gain access to tertiary education. Expanding on that, this case explicitly recognises that girls do not have to be torn between advancing ambitions beyond motherhood and motherhood itself. Society and the state have to accommodate female reproductive capacity as a norm rather than as an exception to the norm. This decision is a progressive move towards substantive equality. If having to make a choice between education and pregnancy continuation were to be imposed, and the

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[74] It should be noted that this was not the primary issue before the Court. The primary issue to be decided related to the question of which body, being the provincial authorities or the school's governing bodies, had the authority to develop learner pregnancy policies, and what processes should be followed where the policy is seen as unconstitutional. However, a serious issue became apparent because regardless of who is vested with the authority in terms of legislation, the fact remained that the schools concerned were implementing a *prima facie* unconstitutional policy and the Court took it upon itself to delve into that issue.

[75] Paras 111-114. While the reader is referred to paragraphs of the majority decision provided by Khampepe J, the decisions of both Froneman J and Zondo J are also aligned to this position. Further, the Court recognised that such exclusionary policies also violates a female learner's rights to privacy, dignity, bodily and psychological integrity and education. These rights, in the context of their application to pregnancy, will be considered below.

[76] Para 64.

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girl concerned chose to have an education instead, thereby requiring her to terminate her pregnancy, it can hardly be accepted that the termination decision is a voluntary act based on autonomy.

5 3 2 Dignity

The Constitution expressly protects a person's dignity, in this respect section 10 states that everyone has inherent dignity and the right to have their dignity respected and protected. According to *National Coalition for Gay and Lesbian Equality*,[77] dignity, at the very least, requires us to acknowledge the value and worth of all individuals as members of society.[78] Building on that, in *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*,[79] Khampepe J reiterated[80] that dignity recognises the value of the choices individuals make, and this right also includes "the deeply personal understanding we have of ourselves, our worth as individuals and our worth in our material and social context". Later on Khampepe J,[81] expands on this and explains that one's dignity embraces how a person values him or herself and how others value the person concerned. Further, according to *S v Makwanyane*, dignity and the right to life are the most important of all human rights.[82] Therefore, as one of the most important rights, dignity is a constitutional acknowledgment that human beings are entitled to be treated as worthy of respect and concern.[83]

Applying this right in a reproductive context leads to O'Sullivan's work on termination of pregnancy. She asserts that "[d]enying a woman the freedom to make and to act upon a decision concerning reproduction treats her as a means to an end and strips her of her dignity".[84] In terms of being an individual as an end in herself, a woman

77 Para 28.
78 This falls in line with Ackermann's approach to dignity, in that he understands dignity to mean human worth and this inestimable worth vests in all human beings by the very fact that they form part of the human race. See L Ackermann *Human Dignity: Lodestar for Equality* (2012) 86-114.
79 2014 (1) SA 168 (CC) para 52.
80 The Judge relied on *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 27.
81 Para 56.
82 1995 (3) SA 391 (CC) para 144. In this case the Constitutional Court had to decide on the constitutionality of the death sentence.
83 Para 328.
84 See "Reproductive Rights" 37-23.

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should not be treated as a mere instrument needed to achieve the will of others, and approaching dignity in this way sets the standards below which ethical and legal behaviour may not fall.[85]

Not only has dignity secured the space for reproductive decision making in terms of termination of pregnancy, according to Woolman, this right has revolutionised the body of law that deals with state regulation of termination of pregnancies.[86] He states that the courts[87] have expressly recognised that the right to dignity encapsulates two definitions specifically relevant to women in relation to reproductive rights: "equal concern and equal respect" and "self-actualization".[88] "Equal concern and equal respect" is a negative obligation in the sense that one cannot treat another merely as a means, but, rather, should recognise in the other person the ability to act as an autonomous moral agent and self-actualise.[89] This approach formulates dignity as a formal entitlement to equal concern and equal respect.[90] Viewing dignity as securing the space for self-actualisation, women's dignity is entitled to respect, since they hold the capacity to create meaning for themselves and pursue their own set of ends.[91]

While Woolman and O'Sullivan explain the role of dignity in the context of termination of pregnancy, it is asserted that those principles will also find application where women plan to continue with their pregnancies. If dignity is seen as a formal entitlement for respect and concern regarding the space for self-actualisation, continuation of pregnancy has to be included in that since continuing with a pregnancy forms part of the process of self-actualisation. If not, one would be diminishing a pregnant woman's human worth. Consequently, the decision to continue with a pregnancy demands respect, and decisions made on how to progress through pregnancy regarding health care and lifestyle also demand respect since women have the capacity to make decisions, create meaning for themselves and pursue their own ends.

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85 S Woolman "Dignity" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 3 2011) 36-9.
86 Ibid 36-31.
87 *Christian Lawyers* (2005); *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T).
88 Woolman "Dignity" 36-34.
89 Woolman "Dignity" 36-10.
90 Ibid.
91 Woolman "Dignity" 36-11.

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The only known case dealing with the application of dignity in respect of pregnancy continuation is the *Welkom* case. In this instance, Khampepe J found that requiring girls to "report" their pregnancies to school authorities, and further requiring other learners to report suspected pregnant girls to school authorities amounts to a violation of their dignity.[92] These reporting requirements may end up stigmatising learner pregnancy and thereby may create an environment where pregnant learners hide the existence of a pregnancy.[93] This is a fairly clear lack of respect for self-actualisation, and a violation of the space required for self-actualisation. Girls should not be punished for following through with the decision to continue with a pregnancy. Punishment for engaging one of the body's biological processes will not foster a person's dignity, nor will it result in healthy progression through pregnancy because it may compromise healthy pregnancy outcomes because the existence of a pregnancy may be hidden.

5 3 3 Life

Section 11 of the Bill of Rights provides that everyone has the right to life. In *Makwanyane* the Constitutional Court found that the right to life is an unqualified right.[94] O'Regan J stated that the right to life goes beyond mere existence; it includes the right to live as a human being with human dignity, to be part of a broader community, and to share in the experience of humanity.[95]

According to O'Sullivan,[96] section 11 of the Constitution is supported by the Choice Act in that its less restrictive provisions provide women with access to reproductive health care services that will or should prevent or reduce deaths associated with the illegal and unsafe termination of pregnancies. During the first twelve weeks of pregnancy, only the pregnant woman's consent is required, and a properly trained midwife may perform the procedure.[97] From thirteen weeks, only a medical practitioner may carry out a termination, and, after twenty weeks' gestation, two medical

92 Para 115. According to the Judge, these requirements also violates pregnant girls' rights to privacy and bodily and psychological integrity.
93 Ibid.
94 Para 47.
95 Para 326.
96 "Reproductive Rights" 37-7.
97 Para 327.

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practitioners, or one medical practitioner together with a registered midwife, may perform the termination-of-pregnancy procedure.[98]

Ngwena demonstrates how the Choice Act is moving in the right direction concerning securing women's right to life.[99] He states that, during the implementation of the Abortion and Sterilization Act, it was estimated that 40 000 women accessed unsafe and illegal termination-of-pregnancy services, and that only an average of 1200 women qualified for legal terminations.[100] However, in the first year of the Choice Act's implementation, 26 000 women had access to safe and legal termination-of-pregnancy services.[101] These figures demonstrate a gradual realisation of the value of women's lives in South Africa.[102] Unfortunately, the World Health Organization estimated that forty-two million pregnancies were terminated world-wide in 2008, and, of these, twenty million were terminated by unskilled service providers using dangerous techniques, under unsanitary conditions, or were self-induced terminations.[103]

Drawing from the above discussion on the right to life, it is submitted that this right also demands that the decision to continue with a pregnancy should not equate to a decision to risk one's life in order to realise that reproductive decision. Going further, if the right to life is more than organic life and refers to a certain quality of life directed by dignity, then the right to life demands that as women progress through pregnancy and birth generally, they are treated in a way that enhances their lives in a dignified manner. A demand such as this one, extends to the community, the medical

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98 S 2(b) and (c) respectively. This is in contrast to the now-repealed Abortion and Sterilization Act 2 of 1975, where, in terms of section 3(1)(a)-(d), a pregnancy could be terminated only in cases of rape, incest, or if the pregnancy constituted a serious threat to the woman's life, or physical or mental health. Two medical practitioners were required to certify that abortion was necessary in the circumstances indicated. Section 3(1) was further qualified by section 3(2), which required that the medical practitioner who certified the necessity of the termination could not be the practitioner to perform the termination procedure, or even fall under the same partnership or employer.

99 C Ngwena "An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective" (2004) 32 *JL Med & Ethics* 708 715

100 Ngwena refers to E Sidiropoulos "South Africa Survey 1996/1997*"* (1996) *South African Institute of Race Relations* <http://www.nelsonmandela.org/omalley/cis/omalley/OMalleyWeb/dat/SAIRR%20Survey%201996-97.pdf> (accessed 5 February 2014).

101 Ngwena (2004) *JL Med & Ethics* 708 715.

102 Pickles (2012) *PER* 403.

103 World Health Organization "Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008" (2011) *World Health Organization* <http://whqlibdoc.who.int/publications/2011/9789241501118_eng.pdf?ua=1> (accessed 5 February 2014) 2.

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profession, and the state in respect of reproductive decisions made by pregnant women. This approach is justified when one considers O'Regan J's finding in *Makwanyane*:[104] "The right to life … incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence - it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity."

5 3 4 Freedom and security of the person

The Bill of Rights ensures freedom and security of the person. Section 12(2)(a) and (b) provides that everyone has the right to bodily and psychological integrity and this right includes the right to make reproductive decisions and the right to security and control of their body.

O'Sullivan,[105] reflecting on Ackermann J's minority decision in *Ferreira*, explains that "freedom" (as found in the title to the right) should not be construed too narrowly. A narrow construction views freedom as housing the right to not have obstacles to choices and activities placed on one's path by the state.[106] According to O'Sullivan,[107] this approach will effectively prevent positive claims against the state for the realisation of section 12(2) rights. Again, the author approvingly refers to Ackermann J, and emphasises that the experience of freedom and security is so closely linked to the conditions in which it is exercised, therefore any meaningful experience of section 12 is dependent on the presence of other rights.[108] In a reproductive context, this means that freedom and security cannot be effectively developed or sustained where women do not have access to reproductive health care services.[109]

[104] Para 327.
[105] "Reproductive Freedom" 37-16.
[106] Para 54, as cited by O'Sullivan ibid.
[107] "Reproductive Freedom" 37-16.
[108] O'Sullivan "Reproductive Rights" 37-18.
[109] Ibid. It should be remembered, O'Sullivan is specifically focusing on termination-of-pregnancy rights. However, the core principles of her argument can transcend the parameters of termination of pregnancies and be applied widely to include instances of pregnancy continuation.

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Bishop and Woolman explain that section 12(2) recognises that "each *physical body* is of equal worth and is entitled to equal respect".[110] (Emphasis in original.) Further, this right demands tolerance of diverse bodies and the authors construe section 12(2) as obliging the state to ensure that every "body" can equally participate in society despite the presence of diversity.[111] Considering the meaning of "psychological integrity", Bishop and Woolman suggest that this means protection from undue stress or shock, and as such it offers protection from insults and privacy violations.[112] According to Bishop and Woolman,[113] "security in" in terms of section 12(2)(b) refers to those bodily invasions that are more than "trivial". The invasion would move beyond trivial where it was not preceded by a hearing, where established procedures are not followed, and there was an infliction of unnecessary pain and anxiety, or the invasion runs the risk of disfigurement or is detrimental to one's health.[114] The Constitution's recognition of the right to enjoy control over one's body, is ultimately an acknowledgment that individuals are cable of making decisions for themselves and acting accordingly.[115] Bishop and Woolman argue that any action that impedes on this form of control is a *prima facia* violation of section 12(2)(b).[116]

Section 12(2) plays a vital role in the context of voluntary parenthood avoidance. Albertyn et al view section 12(2) as essential to bodily autonomy and the source of reproductive freedom.[117] Bishop and Woolman[118] also understand section 12(2)(a) as protecting reproductive freedom,[119] and argue that the recognition of reproductive freedom was likely intended to prevent courts from prohibiting the termination of pregnancies. This argument stands firm especially when one considers that *Christian Lawyers* (2005) is the last known case that challenged the Choice Act and the unsuccessful challenge was never taken on appeal to the Constitutional Court.[120] The

[110] M Bishop & S Woolman "Freedom and Security of the Person" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 6 2008) 40-77.
[111] Ibid.
[112] 40-78-40-79.
[113] "Freedom and Security of the Person" 40-86. The authors refer to the following as trivial invasions: finger printing or breathalyser testing.
[114] Ibid 40-87.
[115] Bishop & Woolman "Freedom and Security of the Person" 40-88.
[116] Ibid. This right can be limited in terms of the principle mutual concern and mutual respect for others.
[117] Albertyn et al "Women's Freedom and Security of the Person" 297; 364.
[118] Bishop & Woolman "Freedom and Security of the Person" 40-80.
[119] Interestingly, the authors do not define what they consider to be reproductive freedom.
[120] On an even more meaningful level, *Christian Lawyers* (2005) did not challenge the entire Act but only those portions that allowed for minors to consent to their own pregnancy terminations. That

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authors go on and assert that this section gives recognition to the fact that socially entrenched forms of physical oppression and exploitation related to women's reproduction and sexuality.[121] According to O'Sullivan, section 12(2) directly confronts the fact that women do not enjoy security in, and control over, their own bodies, taking into account the high rates of sexual violence against women and that circumstances in which women become pregnant are often beyond their control.[122] Further, O'Sullivan[123] states that the Choice Act promotes a woman's right to freedom and security of her body by affording her the right to choose to terminate her pregnancy safely, and that only the women concerned are in the best position to make that decision; hence only their consent is needed.

The first case to deal with section 12(2) of the Constitution in a reproductive context[124] was *Christian Lawyers Association of SA v Minister of Health* (*Christian Lawyers* (1998)). In this case the plaintiffs sought an order to declare the Choice Act to be unconstitutional and to strike it down in its entirety. The plaintiffs argued that the Act infringed on the unborn's right to life and is therefore unconstitutional. McCreath J rejected the argument that the Constitution applied to the unborn and went on to focus on the role of section 12(2) the Constitution.[125] McCreath J recognised that in order to overcome broad and deep-rooted forms of domination and disadvantage based on numerous grounds of discrimination, proper consideration must be given to women's rights, which includes their right to make decisions concerning reproduction and control over their bodies, among other rights recognised by the Court.[126] Also, very important to the aims of this thesis in respect of reproductive autonomy or autonomy as a whole, the Court confirmed that section 12(2) of the Constitution is not explicitly qualified for the benefit of the unborn.[127] Where a limitation of rights is sought, one

may be related to the fact that in 1998 an unsuccessful application was made to declare the Act unconstitutional in its entirety, see *Christian Lawyers Association of SA v Minister of Health*.

[121] Bishop & Woolman "Freedom and Security of the Person" 40-80.

[122] O'Sullivan "Reproductive Rights" 37-17. Also see Albertyn et al "Women's Freedom and Security of the Person" 295.

[123] "Reproductive Rights" 37-18.

[124] According to O'Sullivan ("Reproductive Rights" 37-16), *Ferreira* was the first Constitutional Court case to deal with s 12's equivalent in the Interim Constitution, and this was done so in the context of unlawful detention and the prohibition on cruel, inhumane and degrading punishment. A search using Juta Law Online Publications show that it is mainly s 12(1) that makes its way through the judicial system, whereas the application of s 12(2)(a) and (b) rarely comes before the courts.

[125] More about the Court's approach to the unborn will be considered in ch 6.

[126] 1123 D-F.

[127] 1121 I.

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must turn to the limitation clause found in section 36 of the Constitution, and on this basis, the Court accepted that the state may regulate termination of pregnancies.[128]

Christian Lawyers (1998) did not really go to the core of what section 12(2)(a) and (b) of the Constitution means for women, however *Christian Lawyers* (2005)[129] did. Also in the context of termination of pregnancy, *Christian Lawyers* (2005) brought the concept of "reproductive self-determination" to the fore. The Court[130] found that the "fundamental right to self-determination" is founded on a number of rights such as the rights to dignity,[131] privacy[132], access to reproductive health care,[133] and bodily and psychological integrity including the right to make decisions concerning reproduction and security of one's own body.[134] These rights were found to provide the foundation for the right to terminate a pregnancy in South Africa.[135] Interestingly, Mojapelo J did not include the right to equality while building a rights-based foundation, this is strange because without equal benefit of the listed rights, the effective reach of each right is substantially diminished. In any case, further in the judgment the Judge finds that, comparatively,[136] South Africa has the most explicit right concerning termination of pregnancy and that this right is reinforced by the rights to life,[137] equality,[138] dignity, privacy, and reproductive health care. Most importantly, the Court emphasised that section 12(2)(a) and (b) were clearly designed to protect women's right to reproductive self-determination.[139]

Accepting that section 12 of the Constitution sets down the ambit for freedom and self-determination generally, and subsections (2)(a) and (b) read together recognise

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[128] 1121 J-1122 A.
[129] Briefly, this case concerned the right of a minor to consent to the termination of her pregnancy without the consent of her parents or guardian.
[130] 518 A-D.
[131] S 10 of the Constitution.
[132] S 14 of the Constitution. This right will be considered directly after the discussion on the right to freedom and security of the person.
[133] S 27(1)(a) of the Constitution. This right will also be discussed in detail below.
[134] S 12(2)(a) and (b) of the Constitution.
[135] 518 D.
[136] The Court compared the right to terminate a pregnancy in respect of the United States, Canada and Germany.
[137] S 11 of the Constitution. This right will receive detailed attention below.
[138] It should be noted that the Court did not consider equality to form part of the foundation to the right to terminate a pregnancy but it is seen as a right that strengthens a woman's right to terminate her pregnancy. This does not fall in line with Preamble of the Choice Act.
[139] 524 I.

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reproductive self-determination, then there is certainly more to this section than right to terminate a pregnancy. It is submitted that "decisions concerning reproduction" as used in section 12(2)(a) must be construed wider than that, and should include the decisions to continue with a pregnancy,[140] on how one proposes to live through a pregnancy, and concerning appropriate and person-specific birthing techniques. Reproductive decisions should be seen as encompassing those decisions that result in reproductive outcomes in one form or another. Furthermore, while progressing through gestation, birth and related decision making processes, women's control over their bodies should not be diminished but ensured. Therefore, if Woolman and Bishop, and Albertyn et al understand section 12(2)(a) as protecting reproductive freedom then their contributions should have also included issues related to pregnancy continuation.[141]

In respect of pregnancy continuation, it is necessary to determine how section 12(2)(a) and (b) read together aids in realising female reproductive autonomy when that autonomous action involves pregnancy continuation. No South African case law has dealt with the application of section 12(2)(a) and (b) in this context. This is a discomforting judicial silence, especially because pregnancy is a common occurrence in women's lives and it would be naïve to accept that every woman's decision concerning pregnancy continuation and related health and lifestyle decisions have been unquestionably respected.

A fitting example of a violation of female reproductive self-determination can be found in *S v Mshumpa*.[142] In this case a pregnant women was shot in the stomach with the aim of terminating her pregnancy without her consent. The victim's boyfriend and father-to-be of the unborn did not wish to have a child with the victim and chose this

[140] Obviously, reproductive decisions come into play before the existence of a pregnancy, and can include who to procreate with and when, contraceptive decisions and possibly infertility treatments. However, these considerations fall beyond the scope of this thesis, since the topic is narrowly focused female autonomy during pregnancy.

[141] In the beginning of their section on reproductive freedom, Albertyn et al ("Women's Freedom and Security of the Person" 363) define reproductive freedom as including "claims to decision-making and control over their fertility, the freedom to decide when and whether to have children, and the information and the means to act on these decisions". Most of the discussion that follows, in the context of pregnancy, relates to termination of pregnancy. Bishop and Woolman do not go on to develop a definition of reproductive freedom at all.

[142] 2008 (1) SACR 126 (E). A more detailed analysis of this case will follow when discussion the position of the unborn under South African law.

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method to avoid parenthood.[143] The shots to the victim's abdomen successfully terminated a pregnancy that the victim wanted.[144] The case came before the Eastern Cape Division as a criminal case of murder of the foetus,[145] rather than a violation of the victim's right to reproductive freedom and self-determination per section 12(2).[146] In all the hype about prenatal life in law,[147] the woman, who lost the opportunity to fulfil her expectation of being a parent and having a child, was side-lined. The Court refused to extend the definition of murder to include a foetus for a number of reasons,[148] one being that, developing the law in such a way will violate women's right to terminate their pregnancies, ironically being a self-determination right itself.[149] It must be noted that the author of this thesis is not critical of the outcome of this case. Rather, the author is critical of how the case was formulated and brought before the Eastern Cape Division.[150]

Contrary to the *Mshumpa* outcome, *Minister of Health v Treatment Action Campaign*[151] serves as an example of a decision where the Constitutional Court supportively embraced pregnant women's reproductive decision to continue with a pregnancy and indirectly reinforced their section 12(2) rights to self-determination through applying their socio-economic rights to health care services.[152]

In *Treatment Action Campaign*, the applicants sought to enforce HIV positive pregnant women's section 27 socio-economic rights to health care services in the public sector and claim access to antiretroviral treatment, being Nevirapine. The relevant treatment was made available to the state for free and would assist in preventing or materially

[143] Para 6.
[144] Paras 1; 3.
[145] Para 5.
[146] Froneman J (para 64) did recognise that the assault on the victim was a violation of section 12(2)(a) and (b) but not in respect of the right to freely and securely continue a pregnancy. Rather, the Judge's focus was on the impact an assault has on a pregnant woman, and since the pregnant woman and foetus share a unique connection, an assault on the foetus is effectively an assault on the pregnant women. In that respect, her section 12 bodily security rights were violated.
[147] Paras 49-50
[148] Paras 55-62
[149] Para 59.
[150] In effect, this case results in a situation that since the law recognises the right to terminate a pregnancy, it therefore cannot recognise the right to continue with a pregnancy because any value attached to a gestating foetus will nullify women's claims to freely terminate early pregnancies.
[151] (No 2) 2002 (5) SA 721 (CC).
[152] In fact, this case serves as a perfect example of O'Sullivan's ("Reproductive Rights" 37-18) assertion that freedom is bound up to the context in which it is experienced.

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reducing mother-to-child transmission of HIV which is known to take place during pregnancy or at birth. While the treatment was made available at a select few research and training centres through the country,[153] the applicants successfully argued that this restrictive access was unreasonable on a number of grounds and a breach of the state's duties in terms section 27(2).[154] In effect, the Court not only supported these women's decisions to continue with their pregnancies by forcing the state to provide necessary antiretroviral treatment, but by doing so the Court also supported the notion that when reproductive decisions are made, there is an obligation to ensure meaningful realisation of those decisions.[155] In this instance, women wanted to gestate healthy foetuses and give birth to healthy children, this included the need to reduce the risk of transmitting HIV during pregnancy or at birth. Without the obligation on the state to provide the necessary treatment, reproductive freedom and self-determination in the context of pregnancy continuation would be left meaningless, a mere paper-right.[156]

For purposes of this thesis, it is also necessary to contemplate reproductive self-determination in the context of right to make a decision to refuse medical treatment during the existence of a pregnancy. In *Treatment Action Campaign* women were enforcing their rights to treatment, but there is also a converse claim to not submit to treatment. The motivation for whichever decision is taken lies at the heart of what "healthy pregnancy" and "healthy pregnancy outcomes" mean for the particular woman concerned. For instance, a healthy pregnancy may not only mean that one gives birth to a healthy child at *any* cost. Instead, some women may place increased value on how they perceive their bodies' physical integrity or healthy psychological progression

[153] These centres only catered for 10% of all births in the public sector, see para 62.
[154] Socio-economic right to reproductive health care is discussed in more detail below. However it should be noted that *Treatment Action Campaign* was not brought before the Constitutional Court as an issue of access to reproductive health care but was based on the more general right to health care services.
[155] The *Treatment Action Campaign* case is identified as the only case where the constitutional Court ordered the state into action, see H Melber "South Africa's Battle for Human Dignity: The Constitution Debated and Tested" (13 October 2014) *The Nordic Africa Institute* <http://naiforum.org/2014/10/south-africas-battle-for-human-dignity/> (accessed 14 October 2014). See M Pieterse *Can Rights Cure? The Impact of Human Rights Litigation on South Africa's Health System* (2014) 68-70; Amnesty International "Struggle for Maternal Health: Barriers to Antenatal Care in South Africa" (2014) *Amnesty International* <http://www.amnesty.org/en/library/asset/AFR53/006/2014/en/37182be0-efcd-4740-82b9-759a8ff8e3cd/afr530062014en.pdf> (accessed 14 October 2014) 10.
[156] Also, from an equality perspective, the realisation of a woman's reproductive freedom cannot be denied on the grounds of ill-health.

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through pregnancy and birth. Therefore, some women may wish to refrain from excessive ultrasound scans, physical examinations, or prefer to avoid foetal surgery, vaginal deliveries[157] or assisted deliveries in the form of caesarean section deliveries or episiotomy incisions. In these instances, pregnant women may wish to continue with a pregnancy and birth but on their own terms as personally defined.

There is no known South African case law where pregnant women have been forced to submit themselves for treatment by health care providers to ensure healthy pregnancies or healthy pregnancy outcomes. This position may stem from the fact that South African law specifically recognises a competent person's right to refuse treatment.[158] Given that section 9 of the Constitution makes provision for equal benefit

[157] In this instance, women may elect to undergo a caesarean section delivery. This is known as elective caesarean delivery. According to Lurie, vaginal delivery is recognised as being potentially traumatic to the pelvic floor and the cause of anal and urinary incontinence. He also explains that there is an increased rate of post-traumatic psychological stress associated with vaginal and emergency caesarean section deliveries. Lurie then goes on to question whether vaginal delivery can be classified as medical treatment and suggests that if it so defined, then women have the right to make a choice between vaginal or caesarean deliveries. Also, if vaginal deliveries were to be considered medical treatment, then refusing to provide women with caesarean section services would amount to a scenario of "forced vaginal deliveries". See, S Lurie "The Changing Motives of Cesarean Section: From the Ancient World to the Twenty-first Century" (2005) 271 *Arch Gynecol Obstet* 281 284. Section 12(2)(a) and (b) support this approach. It is submitted that as long as delivery takes place in a medical facility and medical personnel are attending to the pregnant women, vaginal delivery could be construed as a medical procedure in that context. As such, section 12(2) secures the freedom to refuse vaginal delivery. This would obviously be qualified in circumstances where the attending facilities do not have the necessary equipment or skilled physicians to provide the alternative treatment of caesarean section delivery. It is due to the fact that caesarean section deliveries place high demands on resources and increase health risks during birth that vaginal deliveries are preferred at public facilities in South Africa. Caesarean section deliveries are only performed when medically indicated. Technically, that should be the case in private facilities. However, it is a well-known that private patients can get access to their preferred method of delivery. In this respect see, S Basu, J Andrews, S Kishore, R Panjabi & D Stuckler "Comparative Performance of Private and public Healthcare Systems in Low- and Middle-Income Countries: A Systemic Review" (2012) 9(6) *PLoS Med* e10001244 5;9.

[158] Although, once again, it might be rather naïve to accept that women's rights are so readily respected. Medical paternalism still remains a conscientious issue, Carstens & Pearmain (*Foundational Principles of South African Medical Law* 877) point out that health care professionals do not always align themselves to the principle of patient autonomy. Also, Glennon ("Regulation of Reproductive Decision-making" 152-155) explains that a patient's decision making process can be manipulated so as to give the impression that patient autonomy is being realised rather than the health care providers preferences. For instance she explains that people, while making decisions, are influenced by context which is never truly neutral. She refers to a number of different contexts, one being "decisional context". Decisional context includes the application of default rules which patients very rarely contest. As discussed in the footnote directly above, vaginal delivery is a default rule and as such, women accessing public services may simply accept that method because it is presented as a rule. Also linked to context is the use of "starting points" as influencing what the patient will construe as reasonable. For instance, Glennon explains that artificial reproduction clinics concerned with high success rates will be enticed to encourage patients to implant more embryos than what may be necessary. Consequently, the clinic when presenting information to a patient, would say that most other patients implant three or four embryos. These numbers then become the patient's analytic

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and protection of the law, these principles are to the equal benefit of pregnant women too. In the context of informed refusal to submit for medical procedures, *Castell* held the following:[159]

> It is clearly for the patient, in the exercise of his or her fundamental right to self-determination, to decide whether he or she wishes to undergo an operation, and it is in principle wholly irrelevant that the patient's attitude is grossly unreasonable in the eyes of the medical profession: the patient's right to bodily integrity and autonomous moral agency entitles him or her to refuse medical treatment.

Furthermore, according to *Castell* the right to refuse remains in place even if respect for one's refusal will result in that person's death.[160] However, section 6(1)(d) of the National Health Act prescribes that the decision to refuse should be informed.[161] In this respect the Act stipulates that the decision will be informed if, when exercising the right to refuse, the patient is informed of the implications, risks and obligations of such refusal.

Taking informed refusal further, Carstens and Pearmain[162] advise that a person's preferences concerning refusal to submit for medical treatment, particularly life-sustaining treatment, should also be duly recorded in the form of an advance medical directive like a living will. This directive becomes relevant in cases where a person loses the ability to speak and act for themselves, and involves the case where he or she is not clinically dead[163] but left in a persistent vegetative state.[164] An advance directive, drafted by a competent individual, which explicitly refuses life-sustaining

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starting point and they will rarely stray from that. Glennon offers further examples and explanations on how patient autonomy can be subtly curbed, but what has been mention here helps demonstrate why there may be no case law on this issue: Women may very well be labouring under the impression that informed consent is provided concerning their treatment while pregnant.

159 409 A-B.

160 421 A.

161 All decisions concerning whether to undergo or to refrain from medical treatment must be informed. See Carstens & Pearmain *Foundational Principles of South African Medical Law* 875-879 for a discussion of the role of consent in medical treatment. At the core of the requirement for consent that it must be informed which indicates that the patient knows and appreciates what he or she is consenting to.

162 *Foundational Principles of South African Medical Law* 203-210.

163 S 1 of the National Health Act defines death as brain death.

164 Carstens and Pearmain (*Foundational Principles of South African Medical Law* 205) define a person as being in a permanent vegetative state when he or she lacks cognition and conation. In a social sense, the person in dead despite being alive biologically. Also see *Clarke v Hurst* 1992 (4) SA 630 (D) 640 D-G.

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treatment is understood to be legally binding, since South African law recognises voluntary passive euthanasia.[165] The South African Law Reform Commission recognises that advance directives give effect to a person's right to bodily and psychological integrity.[166]

Since pregnancy itself does not render a woman mentally incompetent, any decision making processes undertaken in respect of medical treatment must be honoured and respected, as should pregnant women's advance directives. Failure to do so would result in a violation of her sense of autonomy, implicating her rights to make reproductive decisions, security in and control over her body and dignity.[167]

The topic of pregnant women's rights to make decisions concerning reproduction, to enjoy bodily and psychological integrity, and maintain control over their pregnant bodies can go on and on. The principles discussed in this section serve to show that section 12(2)(a) and (b) covers the right, not to continue with a pregnancy, as well as the right to continue with a pregnancy and in exercising both avenues of reproduction, the process has to be on terms suitable to the particular woman concerned since it is her body that bears the consequences of her decisions.

5 3 5 Privacy

Section 14 of the Bill of Rights affords everyone the right to privacy. Ackermann J explains that the right to privacy is closely related to a person's identity in that it is what is necessary for a person to have an autonomous identity.[168] The right to privacy recognises that all persons have a right to a sphere of private intimacy which relates to our inner sanctum.[169] Inner sanctum includes aspects such as family life, sexual

[165] Voluntary euthanasia is described by Carstens and Pearmain (203, fn 428) as causing the death of a patient with their consent as provided for in an advanced directive. Reference to passive form of euthanasia (203, fn 426) refers to causing the voluntary death of a patient by removing life-sustaining treatment, or refraining from providing such treatment, and allowing "nature to take its course". Concerning the legal validity of advanced directives, see generally, *Clarke*.
[166] Carstens & Pearmain *Foundational Principles of South African Medical Law* 208-209.
[167] Dignity is implicated because by overriding women's decision making capacity concerning their bodies, in order for an attending physician to provide what he or she thinks is best in terms of health care, reduces women to being a means to another's end.
[168] *Bernstein* para 65.
[169] *National Coalition for Gay and Lesbian Equality* para 32, per Ackermann J.

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preferences and home environment,[170] and all those issues that can be considered closely linked to the development of one's personal identity. Concerning the scope of the right to privacy, the right is not location specific (ie in the private sphere of the home), but rather the right to privacy is protected so long as the activity or decision being made is linked to a core area of a person's inner sanctum. Thus, a person's privacy will be protected even in cases where he or she has left the sanctum of their home and is in engaging with the state or the community.

Sachs J[171] states that the right to privacy has been interpreted as the right to be left alone and exist free from state interference,[172] but he explains there is more to this right. First, it encompasses the right to "get on with your life", express your personality and make intimate decisions about relationships.[173] Second, the right to privacy also places some responsibility on the state to promote conditions in which personal self-actualisation can take place.[174]

McQuoid-Mason understands the right to privacy as protecting personal autonomy, and when it is used in this way one refers to this as personal-autonomy privacy rights.[175] These are substantive privacy rights which permit individuals to make decisions about their lives without state interference, ultimately empowering them to exercise control over issues such as marriage, procreation, contraception and child-rearing.[176]

The right to privacy has direct application to reproductive decisions in that these sorts of decisions can be identified as being one of the core areas of a person's identity and links to their family and home environment. It is therefore clear that those decisions to either terminate or continue with a pregnancy should be protected by the right to

[170] *Bernstein* para 67.
[171] *National Coalition for Gay and Lesbian Equality* para 116.
[172] O'Sullivan "Reproductive Rights" 37-8. Also see D McQuoid-Mason "Privacy" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 12 2003) 38-1. He states the following "at the very least, the right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life".
[173] Ibid.
[174] *National Coalition for Gay and Lesbian Equality* para 116.
[175] "Privacy" 38-22-38-23.
[176] Ibid.

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privacy, in that the state or the wider community cannot dictate to women how to go about engaging reproductive decisions.

In the context of termination of pregnancy, O'Sullivan[177] cautions that the right to privacy should be used in conjunction with equality rights, since relying on privacy rights in isolation introduces a number of drawbacks. In this respect, she argues that it is easier to justify limiting women's access to termination-of-pregnancy services, because the termination of a pregnancy is considered to fall within a woman's private sphere, thus ultimately removing a duty on the state to provide public funding or to intervene and protect women.[178] Her argument can also be equally applied to cases of pregnancy continuation, in that maternity services should be made readily available as a state duty to all pregnant women for the safe realisation of the decision to bear children.

It needs to be noted that O'Sullivan's concern about the drawbacks to relying on the right to privacy as a ground for reproductive autonomy stems from her study of the Unites States position concerning the basis of their termination of pregnancy laws. In the United States, a woman's right to terminate her pregnancy is founded on her right to privacy and states have used this approach as a ground to deny the allocation of state funding for the realisation and protection of the "private issue" of abortion.[179] However, this is not the situation in South Africa. Sachs J, in the context of the right to privacy, explicitly states that rights cannot be viewed in isolation or compartmentalised.[180] He states: "Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly."[181] Also, as mentioned earlier in this discussion, the state is recognised as having an obligation to promote the conditions necessary for the actualisation of one's identity. Thus, while having or not having children is considered a private issue, the state must promote conditions supportive to that end.

[177] "Reproductive Rights" 37-12.
[178] Ibid.
[179] O'Sullivan "Reproductive Rights" 37-11.
[180] *National Coalition for Gay and Lesbian Equality* para 112.
[181] Ibid.

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Privacy, as a reproductive right, therefore has an important role to play in the realisation of reproductive autonomy since it not only creates the space to make decisions concerning reproduction but also places an obligation for the development of means to achieve meaningful reproductive outcomes.

5 3 6 Reproductive health care[182]

Section 27(1)(a) of the Constitution provides that everyone has the right to have access to health care services including reproductive health care. However, these rights do not embrace an individual entitlement to the immediate provision of any service or resource.[183] Section 27(2) obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. This places a positive obligation on the state to devise a comprehensive and workable plan to meet its obligations to progressively realise socio-economic rights within available resources.[184]

In *Soobramoney v Minister of Health*[185] the Constitutional Court held that the obligations imposed on the state to progressively realise socio-economic rights are dependent upon the resources available for such purposes and socio-economic rights are limited by reason of the lack of resources. In *Grootboom* the same Court held that this limitation means that both the content of the obligation in relation to the rate at which realisation of rights is achieved, as well as the reasonableness of the measures employed to achieve the result are governed by availability of resources.[186]

Bilchitz explains that socio-economic rights require the state to develop a systematic and comprehensive programme that is designed to realise these rights

[182] Portions of this discussion stem from previously published work, see Pickles (2012) *PER* 403; Pickles (2013) *SAJHR* 515.
[183] D Bilchitz "Health" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 4 2012) 56A-i.
[184] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 39. This case concerns the constitutional right to housing.
[185] 1998 1 SA 765 (CC) para 11. Here the Court had to consider the constitutional right to have access to emergency medical treatment.
[186] Para 46.

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progressively.[187] *Grootboom* found that progressive realisation means that "accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time".[188]

Whether the state has discharged its duty to progressively realise any particular socio-economic right will be evaluated by the courts in terms of the "reasonableness" of the programme concerned.[189] This requires a contextual evaluation of the circumstances.[190] In respect of understanding the nature of the obligations imposed by socio-economic rights, *Treatment Action Campaign* (No 2) is identified as having gone further than any of the other socio-economic cases in pushing the state to realise pregnant women's right to health care.[191] However, while the decision's reach was extensive, the Court did not create the right to receive treatment on demand, instead, it focussed on the reasonableness of the challenged policy.[192]

In *Mazibuko v City of Johannesburg*[193] the Constitutional Court held that the positive obligations imposed on government will be enforced by courts in at least two of the following instances: If government takes no steps to realise rights at all or in the case where government adopts measures that are unreasonable, the court will require that the measure be revised.[194] The Court identified three instances of unreasonableness: The adopted measures make no provision for those in desperate need; the government adopts a policy with unreasonable exclusions or limitations; or where government fails to continually review its policies to ensure that the achievement of socio-economic rights are progressively realised.[195]

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[187] Bilchitz "Health" 56A-i.
[188] Para 45.
[189] *Grootboom* para 42.
[190] Bilchitz "Health" 56A-i. Bilchitz identified criteria previously used by the Constitutional Court when evaluating a state programme: The programme must ensure that appropriate financial and human resources are available, it must be capable of facilitating the realisation of the right concerned, the programme must be flexible and attend to a 'crises', it must not exclude a significant segment of the affected population and the programme must balance short, medium and long-term needs.
[191] See the discussion of this case above, para 5 3 4. See Pieterse *Can Rights Cure?* 67.
[192] Pieterse *Can Rights Cure?* 68.
[193] 2010 (4) SA 1 (CC) para 67. This case involved the constitutional right to have access to sufficient water.
[194] Ibid.
[195] *Mazibuko* para 67.

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Concerning the third example of unreasonableness, the Court in *Grootboom* found that legislative measures on their own are not enough to constitute constitutional compliance with section 27 obligations.[196] The state is obliged to act to achieve the intended result; legislative measures must be supported by appropriate, well directed policies and programmes.[197] These policies and programmes must also be reasonably implemented.[198] Further, the state must be aware that conditions do not remain static, thus requiring continuous review of devised programmes and policies.[199]

Having set the scene of the basic premise of socio-economic rights,[200] it is necessary to determine what the concept of "reproductive health" denotes and its role for women in South Africa.[201] Carstens and Pearmain explain the role of reproductive health rights in the context of the South African constitutional setting. The authors argue that this right is specifically relevant to women of reproductive age since their research indicates that it is these women who disproportionately suffer with reproductive health problems and that these problems are found to account for 60% of the burden of disease for women in Africa.[202] They conclude, "the reference to reproductive health care is an acknowledgment of the prejudice suffered by women in this area and constitutes an express undertaking to remedy the situation."[203]

Ngwena[204] states that reproductive health is a state of complete mental, physical and social wellbeing in all matters linked to the reproductive system. Further, reproductive

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196 *Grootboom* para 42.
197 Ibid.
198 *Grootboom* para 42
199 Ibid para 43; *Mazibuko* para 40. For a critical review of the Constitutional Court's approach to adjudicating socio-economic rights disputes see, D Brand "Judicial Deference and Democracy in Socio-Economic Rights in South Africa" (2011) 3 *Stell LR* 614; G Quinot & S Liebenberg "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (2011) 3 *Stell LR* 639; S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 3 *Stell LR* 664; M Pieterse "Legislative and Executive Translation of the Right to Have Access to Health Care Services" (2010) 14 *LDD* 1.
200 Bilchitz identifies *Grootboom* as providing the most extensive discussion of reasonableness, and views *Treatment Action Campaign* (No 2) as fleshing out a better understanding of this criterion, see Bilchitz "Health" 56A-12.
201 Neither the Constitution nor the National Health Act define reproductive health.
202 Carstens & Pearmain *Foundational Principles of South African Medical Law* 176-177.
203 Ibid.
204 Ngwena (2004) *JL Med & Ethics* 708. Ngwena relies on the proceedings of a conference by the United Nations "Population and Development, Programme of Action Adopted at the International Conference on Population and Development" (Cairo, 1994).

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health encompasses the right to a satisfying and safe sex life, the ability to reproduce and the freedom to make decisions on procreation.[205] O'Sullivan[206] states that reproductive health therefore implies that people have the ability to engage in safe sexual relationships and that women can safely progress through their pregnancies.

Carstens and Pearmain understand the reach of the right to reproductive health as moving beyond a termination-of-pregnancy issue to include a wide range of other services.[207] These services include those relating to conception, contraception, fertility, infertility, prenatal, perinatal and postnatal care, gynaecological services, and advice and treatment regarding sexually transmitted diseases.[208]

For purposes of understanding how reproductive health care contributes towards advancing female autonomy during pregnancy and birth it is necessary to consider what mechanisms are in place to achieve the aim of autonomy in this sphere. In this respect, both access to termination-of-pregnancy services and maternity care has received legislative attention. The Choice Act and the National Health Act address these concerns. However, as indicated above, in the discussion on state obligations to progressively realise socio-economic rights, enacting legislation is not enough. The state must constantly review its policies and make necessary adjustments in order to gradually reach all women in need.

O'Sullivan understands that access to safe termination services contributes to reproductive health through the reduction of maternal morbidity and mortality.[209] The same can be said for those women who are pregnant and in need of health care while pregnant, during labour and after delivery. However, both these areas of reproductive health service face a number of issues and maternal mortality rates are still worrisome.

Human Rights Watch recently finalised a report that focused on the public provision of maternal health care services in South Africa, specifically focusing on the Eastern

[205] Ibid.
[206] "Reproductive Rights" 37-24.
[207] Carstens & Pearmain *Foundational Principles of South African Medical Law* 176-177.
[208] Ibid.
[209] Ibid.

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Cape.[210] Human Rights Watch emphasised that since the end of apartheid, South Africa has passed important sexual and reproductive health-related laws that, if implemented successfully, have the potential to improve maternal health care greatly.[211] They found that South Africa has the highest per capita spending on health in sub-Saharan Africa, and is recognised as having a strong legal and policy framework, which includes a constitutional guarantee of the right to health. Maternity care is free (per the National Health Act), and, as a result, 92% of women attend antenatal care and 87% give birth in health facilities.[212]

Despite these positive projections, pregnant South African women will only benefit from these laws *if* the reproductive health laws are implemented properly. At the release of its report, Human Rights Watch reported that South Africa was one of six sub-Saharan African countries that made no progress in reducing maternal mortality rates and actually reported an increase in deaths.[213] This increase amounted to an estimated 80% increase in maternal deaths. The reason for this increase is linked to appalling conditions that pregnant women are sometimes left to endure, especially when turning to public health care facilities while in labour. The report describes circumstances where women have endured verbal or physical abuse by attending hospital staff, general neglect, refusal of urgent medical treatment, or have been turned away when presenting themselves at a hospital for delivery.[214] The report recognises that, even with the states progressive framework in place, women's reproductive health rights are still being undermined, and the tragic fact is that many women who eventually die from pregnancy or birth-related causes have been in contact with the health care system, meaning that some of the deaths could have been prevented.[215] What is important to recognise is that the problem is not the South

[210] Human Rights Watch “Stop Making Excuses”. According to the report, statistically, the Eastern Cape has the highest maternal mortality rate in South Africa.
[211] Human Rights Watch “Stop Making Excuses” 15.
[212] Ibid.
[213] Human Rights Watch “Stop Making Excuses” 15. These reporting requirements are linked developing countries’ efforts to reach a number of Millennium Development Goals. These goals are described as “anti-poverty goals” and improving maternal health is one such goal.
[214] See, generally, ch 2 of the report, "Maternity Care Failures and Patient Abuse".
[215] Ibid.

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African legal framework failing women, but rather a lack of government accountability in the health care system.[216]

Similar conditions have been found when pregnant women make use of public termination-of-pregnancy services in South Africa.[217] In 2008, the World Health Organization reported that an estimated 120 000 women in Southern Africa had accessed unsafe termination-of-pregnancy services, resulting in 500 maternal deaths.[218] Alarmingly, the report cautioned that these figures should be considered the "tip of the iceberg", since the incidence of accessing unsafe services, as well as associated mortality rates, tended to be underreported in surveys, and unreported or underreported in hospital records.[219]

The World Health Organization figures therefore serve to indicate that the relevant provisions of the Choice Act are not being fully implemented.[220] To substantiate this claim, the author of this thesis, in a previous study, looked at a number of recently published studies stemming from the medical profession in the context of the public provision of termination-of-pregnancy services. Despite the fact that the Choice Act holds very liberal ideals, the study found that women face extensive access barriers linked systematic failures within the public health care system such as ill equipped facilities and over-burdened, uncompromising, and hostile staff.[221] These failures become access barriers that place numerous women at increased risk, either because they have to terminate their pregnancies later on in the gestation period or are obliged to turn to illegal and unsafe termination-of-pregnancy providers.[222] Perpetuating the issue is the fact that, despite the same complaints arising through the years of the

[216] Human Rights Watch "Stop Making Excuses" 3. One possible example of the state being held accountable in the context of health care is the *Treatment Action Campaign* case. However, as mentioned earlier this case was not heard in the context of access to reproductive health care, but in terms of the broader right to access to health care generally.
[217] Pickles (2013) *SAJHR* 515.
[218] World Health Organization "Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008" 19; 28. The report (2) defines an "unsafe" termination of pregnancy as a termination performed by a provider who lacks the necessary skills and qualifications to perform an induced termination of pregnancy. This definition also includes a self-induced termination of pregnancy. These practices fail to meet officially prescribed circumstances and safeguards.
[219] World Health Organization "Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008" 15.
[220] Pickles (2013) *SAJHR* 515.
[221] Pickles (2013) *SAJHR* 518-522.
[222] Ibid.

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Choice Act's implementation, the state is found to be inactive in terms of its section 27 obligations.[223] Namely, the research indicates that state has failed to regularly review its current policy concerning the free provision of termination-of-pregnancy services as required in terms of section 27 of the Constitution.[224] Consequently, the state cannot progressively lower access barriers to termination-of-pregnancy services since it lacks an adequate understanding of the lived experiences of women.[225] The state is thus ill equipped to implement any meaningful reforms.

Both these reports and related studies linked to the socio-economic right to reproductive health care for pregnant women indicate that the mechanisms are there for pregnant women to realise their reproductive autonomy, however, ineffective implementation at times renders these rights as mere paper rights. Interestingly, neither of these issues have been the subject of litigation despite the obvious state violation of these rights.

5 4 Concluding Remarks

This chapter demonstrates that women and girls of reproductive age enjoy extensive protection under the law. This stems from the fact that they are legal subjects with vested constitutional rights. Being such, women's protection is unqualified, meaning that being pregnant does not serve as a ground to diminish their worth as legal subjects and the protective reach of all rights remain intact for the duration of a pregnancy.

Securing a safe space for self-realisation is one aspect that this chapter identifies as intrinsic to legal subjectivity. Chapter five highlights that autonomy is broadly understood to encompass the ability and the freedom to self-regulate, and that this concept gains its weight from the rights embodied in the Bill of Rights. Also, autonomy can be seen to be made up of a number of subdivisions, such as bodily autonomy or reproductive autonomy, to name two examples, all of which contribute towards the greater experiences of the ability to self-regulate. In order for autonomy to be

[223] Pickles (2013) *SAJHR* 525-529.
[224] Ibid.
[225] Pickles (2013) *SAJHR* 525-529.

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advanced, one is required to look at the context in which protection or advancement is needed. Context refers to particular areas of human interaction and relations, and this will identify the relevant subdivision of autonomy that is at play and aid in determining how to best apply the relevant constitutional rights. Construing autonomy in this way renders it a relational concept in the sense that it cannot be understood in isolation, namely, without the context in which relations exist.

This thesis depicts reproductive autonomy (being a subdivision of autonomy generally) as being relevant to the context of pregnant women determining how to progress through pregnancy. The process of reproductive self-regulation requires a certain amount of reliance on external aid for its facilitation and realisation. External aid includes aspects such as increased need for state funding, increased medical attention and general communal respect towards decisions reached pertaining to the pregnancy at hand. Reliance on others indicates relations specific to pregnant women's experiences of their respective pregnancies. The chapter went on to identify a number of constitutional rights that enable pregnant women to entrench their claims to these external aids and protect and advance their reproductive autonomy against third parties like the state and the community while engaging in relations with them in order to get access to needed aid.

Reproductive rights, being the rights identified as giving weight to a woman's claim to reproductive autonomy, include the rights to life, equality, dignity, privacy, bodily and psychological integrity and access to reproductive health care. The reproductive context in which these rights are engaged and applied allow for them to be understood as reproductive rights. Having considered all these rights, chapter five shows that currently these reproductive rights place extensive protective barriers around pregnant women. It is expressly noted that a woman's reproductive rights are not qualified in the Constitution for the benefit of a foetus. This is not to say that their reproductive rights cannot be limited in terms of section 36 of the Constitution, but that that the law does not qualify the value of women's legal existence based on the presence of a pregnancy. More on the limiting effects of foetal life on pregnant women's rights will be considered in chapter six. For now however, it is sufficient to recognise that legal subjectivity of women and its benefits remain in place throughout a pregnancy.

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It is further noted that there are a number of areas where enforcement of reproductive rights is lacking. Such cases include failure on part of the state to address the loss of wanted pregnancies through violence against pregnant women and medical negligence causing stillbirths, and the poor provision of public termination-of-pregnancy services and general maternity care. As a result of these areas of inactivity, pregnant women's reproductive autonomy is compromised and they are left vulnerable to human rights infringements. Interestingly, while these areas deserve increased academic debates and state attention, chapter seven will demonstrate that they do not form part of the calls for reform on issues related to pregnancy under the law.

Overall, chapter five demonstrates that pregnant women, who constitute one part of a pregnancy, hold a solid position in law. The protective legal framework described here acts as a defence against changes to the law and to challenges to existing rights via the courts. This contextual setting should be kept in mind when considering suggestions for law reform in chapter seven.

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Chapter Six

Pregnancy in South Africa: The Legal Status of the Unborn

6 1 Introduction

The contentious issue of the legal position of the foetus in South African law is explored in this chapter. The legal status of the foetus is important because it is one of the entities involved in the tension between female autonomy rights and foetal interests and this discussion goes on to demonstrate the scope of their legal existence in the context of that tension. Without this foundational chapter, the calls for law reform considered in chapter seven will lack context and there will be an insufficient understanding regarding the legal framework which these calls for reform seek to amend.

As the position stands today, the Constitutional Court is yet to hear a case dealing with the legal status of the unborn, thus all the principles relied on stem from the common law, legislation and decisions reached in the lower courts. Chapter six takes a look at how South African law views the unborn and generally considers the implications of not being recognised in law as a legal subject during pregnancy. In this respect, this chapter looks at the born-alive rule as a pre-constitutional principle and its current role as a legal principle under the umbrella of the Constitution of the Republic of South Africa, 1996. The born-alive rule effectively informs the notion that pregnant women are viewed as embodying a single entity in law, and case law validating this claim is considered. However, chapter six also identifies an emerging approach to pregnancy as taking hold in South Africa since the introduction of the Constitution, namely, the not-one-but-not-two approach (not-one/not-two). This concept is explored and principles stemming from case law and legislation relevant to termination of pregnancy and constitutional values are found to support its recent rooting in South Africa.

Since the foetus lacks legal status and thus is not vested with constitutional rights, the structure of chapter six will be substantially different from chapter five's rights based approach. A foetus holds a curious position in South African law currently. Despite not

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having legal subjectivity their existence is sometimes recognised through the application of certain legal principles or legislation, while at other times they are denied any recognised existence. Accordingly, both instances will be considered and compared here with reference to case law, legislation and relevant legal principles.

6 2 What a Foetus is Not: The Born-Alive Rule and Pregnancy as Embodying a Single-entity Approach

There is no legislation that explicitly recognises the unborn as an independent entity in South African law.[1] In most instances a child is defined as a person below the age of majority without specifying when age begins. A fitting example of this approach is section 28(3) of the Constitution which states that a "child" for purposes of section 28 means a person under the age of 18 years.[2] Neither "age" nor "person" has a definition, particularly in respect of when either begins or comes into being.

This somewhat open-ended approach may be a subtle indication that the common law position is approvingly adopted by the legislature for the time being.[3] While legislation does not expressly deny independent status, the common law does. Presently, the common law born-alive rule denies the unborn legal status and the title of person.[4] Unless legislation specifically trumps the common law position or it is developed through judicial precedent, any law applicable to persons excludes those not yet born.[5] This position has far reaching implications in the context of the legal status of a foetus.

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1 C Pickles "Approaches to Pregnancy under the Law: A Relational Response to the Current South African Position and Recent Academic Trends" (2014) 47(1) *De Jure* 20.

2 The Children's Act 38 of 2005 takes the same approach, see s 1(1) definitions.

3 Although, it is noted that where a term is not defined in a piece of legislation, its ordinary grammatical meaning should be applied. But it is noteworthy that in cases where the literal meaning would lead to an ambiguous outcome and secondary interpretative aids, such as its long title, headings and other sections prove ineffective, the interpreter can have recourse to other interpretative aids such as common law presumptions. See C Botha *Statutory Interpretation: An introduction for Students* 5 ed (2012) 91. Botha does give examples of other methods of statutory interpretation, but this falls beyond the purpose of the topic.

4 Here "person" is being referred to in terms of its legal construction, rather than its social construction. The distinction between the two constructions can be found in D Lupton *The Social Worlds of the Unborn* (2013). Also see the general discussion in ch 3.

5 Botha explains that it is presumed that legislation does not alter the common law more than is necessary, where it does, legislation will trump the common law. However, where there is no legislation dealing with the issue specifically, the common law position stands. See Botha *Statutory Interpretation* 43.

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6 2 1 The application of the born-alive rule in South Africa

The requirement of live birth in South Africa and what follows originates from previous research.[6] This requirement features in criminal law for purposes of proving murder[7] and in the law of persons as the moment when legal subjectivity originates.[8] The common law born-alive rule was developed as a result of a lack of advanced medical technology and because of a primitive understanding of the female body during pregnancy.[9] During these less technologically advanced eras, pregnancies could not be monitored with any certainty.[10]

Prior to the 20th century and the discovery of foetal viability,[11] quickening[12] was considered the most important point in pregnancy in both law and medicine.[13] In medicine, it was assumed that the foetus became alive at quickening.[14] At common law, quickening was legally significant because it was the only reliable proof that a woman was pregnant in an era where medical knowledge about pregnancy was very underdeveloped.[15] On the other hand, live birth offered the opportunity of providing an objective, clinical observation that the foetus, once born, was alive.[16] Further, the health of the foetus could not be established until born.[17] Consequently, until birth, proving the cause of termination of a pregnancy or injury to a foetus was impossible.[18]

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6 See C Pickles "Personhood: proving the Significance of the Born-Alive Rule with Reference to Medical Knowledge of Foetal Viability" (2013) 24(1) *Stell LR* 146.
7 C Snyman *Criminal Law* 5 ed (2008) 448; J Burchell *Principles of Criminal Law* 3 ed (2005) 671.
8 T Boezaart *Law of Persons* (2010) 11.
9 R Pillay "The Beginning of Human Personhood: Is South African Law Outdated?" (2010) 2 *Stell LR* 230 231.
10 Pillay (2010) *Stell LR* 231. Also see A Oakley *The Captured Womb: A History of the Medical Care of Women* (1986) 11-12. According to Oakley, in the 18th and 19th centuries, antenatal care did not exist. Pregnant women and health care providers did not consider routine medical supervision necessary. There were no clinics or hospital departments available to pregnant women. The general rule was that pregnancy did not constitute a medical phenomenon; in fact, there was no professional body claiming expert knowledge on the treatment of pregnant women.
11 In his discussion of the development of the born-alive rule, Forsythe points out that foetal viability, as emphasised in American law today, did not actually play a role in the development of common law concerning foetal life, see C Forsythe "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms" (1987) 21 *Val UL Rev* 563 569.
12 Quickening is defined as the first time a pregnant woman feels foetal movement within her uterus, usually in the second trimester of her pregnancy, see Forsythe (1987) *Val UL Rev* 567.
13 Forsythe (1987) *Val UL Rev* 568.
14 Ibid.
15 Forsythe (1987) *Val UL Rev* 568.
16 Ibid.
17 Forsythe (1987) *Val UL Rev* 575.
18 Ibid.

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The born-alive rule was later extended to the law of persons, and it is now the only criterion used to determine whether there is an entitlement to personhood.[19]

Accordingly, the common law crime of murder is only applicable where the victims has been born alive.[20] Section 239(1) of the Criminal Procedure Act 51 of 1977 assists in determining when one is born alive for purposes of murder and provides that if it is proved that a child breathed after separation it will be deemed to have been born alive. For purposes of legal subjectivity, the common law requires that the foetus must be separate from the mother's body and must have lived independently.[21] Boezaart states that any sign of life is evidence that the foetus survived after separation.[22] Foetal viability is not recognised as a qualifying element in either of these constructions of live birth.[23]

6 2 2 Conceptualising the single-entity approach to pregnancy

The extent of the non-existent status of a foetus is significantly obvious when one considers the recent criminal law decision of *S v Makhakha*.[24] In this case, a woman who was approximately seven months pregnant was one of the victims of a brutal rape

19 Pillay (2010) *Stell LR* 232.
20 Snyman *Criminal Law* 448; Burchell & Milton *Principles of Criminal Law* 671.
21 Boezaart *Law of Persons* 12.
22 Ibid.
23 However, see Boezaart *Law of Persons* 12, where she points out that some authors specify an additional requirement of foetal viability for purposes of legal subjectivity. Originally, the author of this thesis followed Boezaart's position concerning the issue of viability, see Pickles (2013) *Stell LR* 148 where Boezaart was approvingly cited in that regard. However, as part of further research and since that 2013 publication, additional research was conducted into whether women were gaining effective benefit of the Choice on Termination of Pregnancy Act 92 of 1996. This research found that the process of terminating second-trimester pregnancies may sometimes result in *live* delivery of non-viable children (these are considered children because they are essentially now born persons). These deliveries are understood by nurses to have resulted in live births because the child that is delivered moves about after delivery, see J Harries, K Stinson & P Orner "Health Care Providers' Attitudes towards Termination of Pregnancy: A Qualitative Study in South Africa" (2009) 9 *BMC Public Health* 296 301. For more on this see C Pickles "Lived Experiences of the Choice on Termination of Pregnancy Act 92 of 1996: Bridging the Gap for Women in Need" (2013) 3 *SAJHR* 515. These findings lead one to question the denial of viability as a requirement for legal status. Affording legal status to a born but pre-viable neonate seems a fruitless endeavour because of the very fact that it is non-viable which means that the child is unable to sustain its life as a result of being under-developed. Essentially, this means that nothing can be done for the child despite the fact that it is considered a legal subject. Therefore, it is now submitted that viability should play a role in a practical setting when considering the vestment of legal subjectivity. From a practical perspective, birth before viability means that nothing can be done to allow for the entity to effectively gain the benefit of what it essentially means to be a legal subject being a meaningful life protected by rights.
24 2013 JDR 1934 (WCC).

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and murder. While the accused was found guilty of the pregnant victim's rape and murder, the fact that a viable foetus was lost during the commission of the crime was not regarded as an issue before the Western Cape High Court. The judgment does not include the sentence imposed and it is therefore not clear if the loss of foetal life even contributed towards an increased sentence as a possible aggravating factor.

Makhakha is noteworthy because it demonstrates how deep-rooted South African law's perception is of pregnancy. That is, the law views pregnancy as a representation of a pregnant woman being a single entity. Seymour,[25] explains that this is the "body-part model" of pregnancy under law. The single-entity approach means that "the fetus is simply part of the woman's body", and denies the foetus its "distinctiveness".[26] The foetus is seen to be part of a woman's body in the same way a room is part of a house, or it can be interpreted as suggesting that the foetus is merely something like an organ which belongs to the body of a pregnant woman.[27] Consequently, the single-entity approach withholds any vested and protectable interests or rights for as long as the foetus remains unborn. Further, where a pregnancy comes to an end, it must result in live birth before the law's protective reach can take hold.

The single-entity approach can be contrasted to the separate-entities approach. Seymour explains that the separate-entities approach views a woman and her foetus as though they are separate individuals and with distinctive needs.[28] In their separate existence, each is seen to hold a range of enforceable rights,[29] ultimately leading to an understanding that the foetus is a legal subject engaging in legal relations for its own account. Seymour argues that this is typically the modern medical profession's take of pregnancy because of their constant individualised interaction with the unborn as a result of medical technology.[30] Clearly, the born-alive rule does not encompass this approach.[31]

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25 J Seymour *Childbirth and the Law* (2000) 189.
26 Seymour *Childbirth and the Law* 190.
27 Ibid.
28 Seymour *Childbirth and the Law* 190; 194.
29 Seymour *Childbirth and the Law* 194. Seymour's assertion falls in line with the findings of part 1 of this thesis.
30 Ibid.
31 More on the separate-entities approach will be discussed in ch 7 and its resulting implications will be considered when United States is discussed in part 3.

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6 2 3 Single-entity approach in the pre-constitutional era

There are a number of private law cases that speak to the unborn's general lack of legal distinction. Usually, these cases come before courts as attempts to challenge the appropriateness of the single-entity approach in that it fails to acknowledge foetal life, and generally seek to bring about reform in respect of the born-alive rule. Prior to the Interim Constitution, 1993[32] and Final Constitution, 1996,[33] the influence of the born-alive rule as a legal principle enforcing the single-entity approach was consistently accepted in the context of civil law.

In the ambit of status and succession, the *nasciturus* fiction allowed for interests accruing to the unborn to be held in abeyance until its live birth.[34] There are a number of conditions attached to this fiction, namely: There should be some advantage or benefit for the unborn; the benefit must accrue after the unborn's conception; and the unborn must later be born alive in the legal sense of the word.[35] Consequently, this fiction does not in itself overcome the non-existence of the unborn, it remains a non-entity for as long as the final condition of live birth is not realised.[36] It could be argued that if anything, the *nasciturus* fiction portrays a foetus as a conditional entity of sorts,

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32 The Interim Constitution came into operation 27 April 1994.

33 The Final Constitution came into operation 4 February 1997.

34 According to Boezaart (*Child Law in South Africa* 5-6), this fiction stems from Roman and Roman-Dutch law principle: "*nasciturus pro iam nato habetur quotiens de commodo eius agitur*". Boezaart explains that, translated, this means that the unborn can be regarded as already having been born when it is in their interests. This fiction has been statutorily incorporated in s 2D(1)(c) of the Wills Act 7 of 1953. In terms of this provision, if the testator or testatrix does not provide otherwise, those already conceived will be included in the devolution of a benefit, provided they are later born alive.

35 Boezaart *Child Law in South Africa* 6.

36 There is a dispute as to whether this doctrine houses a fiction or a legal rule, however, it is submitted that this doctrine encompasses a fiction. It is a fiction in so far as the doctrine is viewed as not extending legal subjectivity, whereas if it were conceived as a rule, legal subjectivity would vest prior to birth. In this respect, see C Pickles *S v Mshumpa: A Time for Law Reform* LLM Dissertation, University of Pretoria (2010) 51-52; Seymour *Childbirth and the Law* 136-137. Also, see case law as discussed below which indicates that the *nasciturus* doctrine is applied as a fiction in South Africa. It should also be noted that du Plessis views the *nasciturus* doctrine as an example of *direct* protection of foetal interests, see G du Plessis "Feticide: Creating a Statutory Crime in South African Law" (2013) 1 *Stell LR* 73 78. However, Seymour (*Childbirth and the Law* 135) suggests otherwise. Seymour explains that while the law recognises the unborn's claim to property in a deceased estate, the right to the property only vested after birth, he argues: "The law on the inheritance rights of the unborn did not, however, necessarily reflect a desire to protect the welfare of the fetus: '[I]t was the testator's intent, not the personhood of the fetus, that was the common law's primary concern.'" The fact that birth is required in order for there to be a valid ground to transfer property indicates that there is no direct protection of the unborn, protection only realised after birth thus providing direct protection of a born person. Further, this doctrine is aimed at protecting the testator's wishes rather than the unborn's interests.

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which still does not afford it an individualised protected space because the condition of live birth must still be realised.

In *Pinchin v Santam Insurance*[37] the Court took the application of the *nasciturus* fiction beyond property law and found it had a role to play in respect of delict. Hiemstra J found that if causation could be proved, the fiction can be applied for purposes of recovering damages for injuries sustained while *in utero*, provided the unborn was later born alive. This decision was later rejected by the Supreme Court of Appeal in 2005,[38] however, the point to be taken is that for as long as there is no live birth, the reach of the fiction has limited effect.

This limited effect of the *nasciturus* fiction on the legal status of the unborn was confirmed in *Christian League of Southern Africa v Rall*.[39] In this case the respondents attempted to use the *nasciturus* fiction as a mechanism to prevent the lawful termination of a pregnancy in terms of the now repealed Abortion and Sterilization Act 2 of 1975. Steyn J confirmed the *nasciturus* fiction "does not clothe the unborn child with any legal personality". Going further, the Judge held that where a stillbirth occurred, all rights or interests being held in abeyance died with unborn. The *nasciturus* fiction therefore cannot be applied as a means of protection from conduct that may cause a termination of pregnancy because that very act prevents live birth.

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37 1963 (2) SA 254 (W). In this case, a pregnant woman was injured in a vehicle collision, and after her child's birth it became apparent that the child suffered from cerebral paralysis and brain damage.

38 See *Road accident Fund v Mtati* 2005 (6) SA 215 (SCA). This case also concerned prenatal injuries that the plaintiff suffered as a result of a vehicle collision. The Supreme Court of Appeal rejected the *Pinchin* position and found that the application of the *nasciturus* fiction was not necessary in prenatal injury cases since the ordinary principles relevant to the law of delict. In this instance it was held, "[t]he damage is suffered by the plaintiff at the moment that, in law, the plaintiff achieves personality and inherits the damaged body for which the defendants are responsible for. The events prior to birth are mere links in the chain of causation between the defendants' assumed lack of skill and care and the consequential damage to the plaintiff".

39 1981 (2) SA 821 (O).

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Van Heerden v Joubert[40] and *Friedman v Glicksman* [41] will be discussed under pre-constitutional cases even though both cases were heard within months of the Interim Constitution coming into operation on 27 April 1994.[42]

In *van Heerden* the Court had to determine whether, in terms of the Inquest Act 58 of 1959, an inquest could be conducted into the cause of a stillbirth, particularly when it is alleged that the stillbirth is a result of medical negligence, rather than an unfortunate natural occurrence. In this case, it was alleged that prenatal life was terminated during the course of birth as a result of the attending medical staff failing to apply adequate care. The would-be parents sought recourse by requiring an investigation into the cause of the stillbirth through the application of the Inquest Act.[43] However, the attending medical staff challenged the soundness of this approach and successfully argued that the Inquest Act only applied to persons and since the foetus was stillborn, no person came into existence in respect of the law. In this respect, Grosskopf JA, applying the literal meaning of "person", found that this term does not include stillborn child, unborn child, viable unborn child, unborn human being, or living foetus.

McCreath J, in *Christian Lawyers of SA v Minister of Health* (*Christian Lawyers* (1998)) interprets the *van Heerden* decision as leaving the common law status of the unborn

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40 1994 (4) SA 739 (A). While this case was heard after the Interim Constitution came into operation, since neither the Interim, nor the Final Constitutions operate retroactively, the case must have been heard in terms of the law that was in place at the time this issue came to life.

41 1996 (1) SA 1134 (W).

42 This approach is adopted for a number of reasons. There is a common law presumption that legislation is prospective unless the contrary is explicitly provided for. See Botha *Statutory Interpretation* 55-62 where the author explains the presumption that legislation is prospective. In respect of the principle against retrospectivity and the Constitution, see B Bekink *Principles of South African Constitutional Law* (2012) 408-409. Nothing is mentioned in the Interim Constitution with regard to its retrospective application. Therefore, since the facts in *Friedman* came about prior to the Interim Constitution, it is taken that its constitutional provisions and values did not come into play. The defendant did bring up the s 9 of the Interim Constitution (right to life), but the Court rejected their argument and did not refer to the Interim Constitution thereafter, 1138 D. The *van Heerden* case was an appeal from proceedings that took place in 1992. In terms of section 241(8) of the Interim Constitution, any pending proceedings in place when the Interim Constitution commences shall be dealt with as if the Constitution had not been passed, except where, in terms of those proceedings an appeal is noted after the commencement of the Interim Constitution, then its provisions are applicable. Since the decision appealed against was heard in 1992 it is assumed that the appeal was noted during the course of 1992 and not after the Interim Constitution came into operation. It is further asserted that both cases were decided so soon after the commencement of the Interim Constitution that it is questionable whether its provisions and values could have been meaningfully engaged and applied in any case.

43 According to Grosskopf JA, the main purpose of the Act is to determine the cause of death, circumstances surrounding the death, whether any person is responsible for death, and whether death can be attributed to the commission of any offence.

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open, since the Court was only concerned with the term "person" in the narrow context of the Inquest Act and not so much with external legal developments.[44] It is submitted that the common law status of the unborn was never really "open" to begin with, the undeveloped existence of the common law born-alive rule speaks to this fact. It is submitted further that *van Heerden* feeds into the body of law that views the unborn as non-entities, meaning that pregnant women and the unborn are considered to be a single-entity. As such, this case removes any means in law to investigate damaging pregnancy outcomes which may have a substantive contribution to causing a stillbirth, be it medical negligence or even violence against pregnant women.

In *Friedman* the Court was confronted with a wrongful life claim.[45] A wrongful life claim is defined as an action brought on behalf of a child on the basis that a physician negligently failed to inform his or her parents of the risk of being born a disabled child.[46] The argument goes that had the physician not acted negligently, the child's prenatal life would have been terminated and he or she would not be left to live a disabled life which is one of pain and suffering.[47] The Court was left with the question of whether a physician held a duty (in terms of the laws of contract or delict) towards a potentially disabled foetus to inform its would-be-parents, that there is a risk of disability thereby allowing its would-be-parents to secure the termination of its prenatal life.

The claim was rejected for a number of reasons,[48] but relevant to the legal status of a foetus the Court found that would-be-parents cannot contract or make elections on

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44 1998 (4) SA 1113 (T) 1120 D-E.

45 The Court also had to decide on a wrongful birth claim, which is a claim brought by parents who assert that they would have terminated their pregnancy had they been properly informed of the risk of birth defects in the foetus. Where the claim is successful, the attending physician would face liability for damages suffered as a result of having to support a child with special needs, 1138 A.

46 1138 C.

47 Ibid.

48 1124 I-1123 C. First, it is contrary to public morals to find that a person would be better off not living than having to live a marred life. Second, allowing the action may open the doors for parents to be held liable for allowing a potentially disabled foetus to be born into a disabled life despite being aware of the risk of pain and suffering. Third, the Court found that one cannot hold a physician liable for a child being born with disabilities that he or she is not responsible for causing. Also, The Court (1143 A-B) conceded that if a wrongful birth action were to be allowed, the principles of delict require that the person be put in the position he or she would have been had the negligent conduct not occurred. In essence this would require the Court to determine the extent of damage as being the difference between disabled life and no life at all, because if the physician was not negligent, the pregnancy would have been terminated and no such person would have come to life. In this respect, there is no criteria in law that assists in establishing this difference.

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behalf of their foetus.[49] This is based on the legal premise that an agent cannot act on behalf of a "non-existent principal", and in this case the foetus is considered non-existent because it is not yet born.[50] Consequently, it is taken from this decision that generally, no contractual obligation can be brought about in respect of those not yet born.

Goldblatt J, after having approvingly cited English and American case law, found that in delict, a physician does not owe a foetus the duty to ensure its termination in the case of a less-than-desirable disabled life after its birth, only the pregnant women can lay claim to the duty to be informed.[51] The Court rejected this duty towards to the unborn on the grounds of sanctity of life, since it would mean viewing disabled life as less valuable than non-disabled life.[52] No child is seen to have the right to be born a whole, functional human being, and it is not for the law to determine whether it is preferable to have no life instead of a disabled one.[53] Instead, the Court must be governed by sanctity of life, and that approach calls for the preservation of all life.[54]

The *Friedman* case can be interpreted as ambiguous. At first glance, this case can be interpreted as the Court attaching value to prenatal life generally, because all life in any form is something to value and to allow a wrongful life claim would strike through the core of that value. Additionally, it could be seen that this value remains intact despite there being no legal basis for one to owe a duty towards the unborn. Originally, the author of this thesis adopted this view.[55]

On further reflection however, it must be pointed out that the essence of the sanctity of life argument is hollow if the Court still accepts that a physician owes a pregnant woman a duty to inform her of any potential disabilities, thereby providing the foundation to terminate her pregnancy that gestates a potentially disabled foetus. It is not clear how providing the duty towards women and not the unborn infringes less on

49 1140 F-H.
50 Ibid.
51 1142 A-F.
52 Ibid.
53 1141 E.
54 1142 E.
55 In previous work (Pickles *S v Mshumpa: A Time for Law Reform* 54-56) the author of this thesis understood *Friedman* as an illustration of an exception to the non-existent position of a foetus under law.

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the sanctity of life.[56] Termination of pregnancy on the grounds of foetal abnormalities (or disabilities) is statutorily provided for, it was available under section 3(c) of the repealed Abortion and Sterilization Act, and is presently available under section 2 of the Choice on Termination of Pregnancy Act 92 of 1996 (Choice Act). However, the Court never took on the task to address this anomaly in its application of the sanctity of life approach. A more nuanced reading of *Friedman* could indicate that the Court is leaning towards, or *wanting* to value the unborn in their own right but the uncertain legal terrain of such a move leads towards an ambiguous outcome. Either way, the Court's sanctity of life approach is seen to have failed.

The same point was critically highlighted in *Stewart v Botha*.[57] In *Stewart*, the Court also found that wrongful life actions do not disclose a cause of action in law but on different grounds to that of *Friedman*.[58] Rejecting the sanctity of life argument, Louw J emphasised that the question under wrongful life actions is whether the disabled child concerned suffered any damage, and concluded that the child had not because the only life possible is the disabled one to which the child was born.[59] Consequently there is no delict and the negligent conduct of the attending physician, being the failure to inform the child's mother of potential disabilities, is legally irrelevant.[60] The Court asserted that if medicine had advanced to the point where genetic disabilities could be treated prenatally, and the physician failed to act under those circumstances, then one may have a claim.[61]

The *Friedman* case also takes the position that the unborn are non-entities since one does not have any legal obligation towards them and the prenatal life is sanctified only in so far as pregnant women are prepared to continue gestating potentially disabled

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56 The fact that the Court affirmed women's right to terminate a pregnancy on the grounds of foetal abnormality leaves the Court's concept of sanctity of life in a questionable position. Whether it is in the interest of the foetus to be terminated on the grounds of potential disability or whether a woman feels it is necessary to terminate foetal life on the grounds of potential disability, the fact remains that there is a termination of prenatal life specially justified by the potential of disability.

57 2007 (6) SA 247 (C) paras 20-21. In fact, Louw J is critical of the *Friedman* decision in a number of respects, see paras 22-28. These additional critiques fall beyond the scope of this discussion.

58 The author of this thesis must concede that *Stewart* was misinterpreted in previous work, see Pickles *S v Mshumpa: A Time for Law Reform* 56-57. Further, *Stewart* and *Freidman* were mistakenly interpreted as complimentary cases which offered exceptions to the fact that the law did not value or recognise prenatal life.

59 Para 29.

60 Para 30.

61 Ibid.

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foetuses. This case, along with *Pinchin*, *Rall* and *van Heerden* all provide a clear presentation that the single-entity approach is well-rooted in South African law. It is now necessary to consider whether the introduction of the Interim Constitution and later the Final Constitution impacted on this approach in any meaningful way.

6 2 4 Single-entity approach under the constitutional dispensation

All pre-constitutional cases are unequivocally aligned to the born-alive rule and by implication pregnant women are simply viewed as embodying not more than themselves during the existence of a pregnancy. Those cases attempted to bring about a change in this perception, but as demonstrated the cases deepened and refined the single-entity perception even further. With the introduction of the Interim Constitution and later the Final Constitution, the curious position of the unborn comes to the fore because some cases go on to reaffirm the non-existence of foetal life while another case linked to the interpretation of the Choice Act gives a glimmer of legal recognition. What is noticeable, is that in those instances where the unborn are ever so slightly recognised, it occurs in the context of constitutionally informed values. Only those cases that provide constitutional affirmation of the single-entity approach will be considered here whereas those instances where prenatal life is recognised under the law will be discussed under paragraph 6 3 below.

Although it is not the first foetal-related decision heard under our constitutionally informed judicial system, *Christian Lawyers* (1998) sets the scene of how prenatal life fits in with the Constitution and the provisions of the Bill of Rights. In this case, the plaintiffs argued that the right to life, in terms of section 11 of the Bill of Rights, also applied to the unborn, and on this basis the Choice Act was unconstitutional. They contended that life starts at conception, therefore the right to life vests then.[62] In response to this, the defendants raised an exception arguing that the plaintiffs' summons did not disclose a cause of action since a foetus does not bear any rights.[63]

62 1116 B-I.
63 1117 A.

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The Court found that the use of the terms "everyone" and "every person" are synonymously applied throughout the Constitution, and went on to question whether the unborn fell within the ambit of those terms.[64] This question was seen to relate to principles of legal interpretation, and the Court found it unnecessary to have regard to medical or scientific evidence concerning the beginnings of human biological life, or religious and philosophical arguments since these aspects are not part of the process of interpreting the law.[65] The question is whether, despite medical knowledge or religious positions at the time of its drafting, the Constitution accorded the unborn the benefit of its provisions.

To clarify on the Court's approach to this issue, McCreath J[66] approvingly quoted the writing of Williams[67] in that the question before the Court is not one of whether the foetus is human, but whether it should be given the same legal protection as those already born. In that respect the Court found that there is no express provision in the Constitution that affords the unborn either legal personality or protection.[68] Also, the Court found that the wording of section 28(1) is such that it cannot be applied to the unborn, for example, those rights pertaining to work,[69] detention[70] and armed conflict,[71] and the Court therefore decided all the other subsections of 28(1) exist to the exclusion of the unborn.[72] Section 28 of the Constitution, pertaining to children's rights is specifically applicable to those persons under 18 years of age, and the Court found that age only begins at birth, therefore excluding the unborn.[73]

Since the specialist children's rights provision of section 28 of the Bill of Rights does not apply to the unborn, being the section where one would expect express protection to stem from, the Court found that none of the other provisions of the Constitution have application either.[74] In this respect, the Court found that the term "everyone" as used

64 1117 H-1118 B.
65 1118 B-I.
66 1120 H.
67 As quoted, G Williams "The Foetus and the Right to Life" (1994) 33 *CLJ* 71 78.
68 1121 G.
69 S 28(1)(e) and (f).
70 S 28(1)(g).
71 S 28(1)(i).
72 1122 A-D.
73 1122 C. McCreath J does not cite authority for understanding age to begin at birth.
74 1122 E-H.

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in a number of constitutional rights cannot logically be applied to the unborn. The Court listed a number of rights which includes the rights to privacy; freedom and control over one's body; freedom of conscience, religion, thought, opinion, expression, assembly, association and movement; and specifically the right to life.[75] "To include the foetus in the meaning of that term in s 11 would ascribe to it a meaning different from that which it bears everywhere else in the bill of rights… that is clearly untenable."[76] The Judge found that as far as the Constitution is concerned, the foetus is not a legal person.[77]

Looking at the relationship between pregnant women and the unborn, the Court recognised that women's reproductive rights as per section 12(2) of the Constitution are not limited for the benefit of the unborn.[78] While, the Court did recognise that women's reproductive choices can be limited in terms of s 36 of the Constitution, it did not did not expressly recognise the grounds to limit their rights within a foetal-interests framework, but rather according to state interests.[79] Unfortunately, the Court did not explain what was meant by "state interest". One can speculate that the state has an interest in the preservation of prenatal life, but given the direction of this decision as leaning against the recognition of independently-valued prenatal life, it can also be argued that the state has an interest in reducing high levels of maternal mortality rates associated with illegal or unsafe pregnancy terminations and therefore sees the need to regulate the industry accordingly.[80]

This decision sets the tone concerning foetal life under the Constitution. Not only does the single-entity approach get constitutional "endorsement" from the Provincial Division but the Court goes further and rejects the separate-entities approach. Rejection of the separate-entities approach is apparent when one considers McCreath J's hypothetical application of section 11 to the unborn. According to McCreath J, if section 11 were to be interpreted as applying to the unborn, they would have separate claims to life and lawful termination of pregnancies would ultimately constitute murder,

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75 Ibid.
76 1122 I.
77 1123 B.
78 1121 I.
79 1122 A.
80 Concerning high maternal morbidity and mortality rates associated to illegal and unsafe termination-of-pregnancy procedures see generally, World Health Organization "Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008" (2008).

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even if the termination of pregnancies were medically indicated.[81] The Judge finds this to be an invalid approach and states, "the drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms".[82] As a side note, the Court's conclusion in respect of the outcome of the separate-entities approach is perceived as legally unsound, since if the unborn were granted the right to life, private defence would allow pregnant women to terminate their pregnancies in cases where their own lives are at risk.[83] Further, McCreath is labouring under the impression that the foetus, if accepted to be a separate person, would have an enforceable claim to the use of a woman's body,[84] which would be stronger than a woman's claim to her own body: There is no such right in law.[85]

Looking at the criminal law perspective of the legal position of the unborn, section 239(1) of the Criminal Procedure Act is still in force which requires the proof of live birth before a case of killing a newly born child can be put forward. Further, while *Makhakha* did not delve into foetal existence under South African criminal law in the context of murder, *Mshumpa* did.[86] As far as research indicates, *Mshumpa* was the first, and to date, is the last known case that deals with violence which results in the termination of a pregnancy. As briefly mentioned in chapter five, this case concerned the non-consensual termination of a woman's pregnancy (Shelver) by shooting her in the abdomen twice. The harm was inflicted on her with the intention to terminate her pregnancy. As a result of the gun-shot wounds, the victim gave birth to stillborn girl that had reached 38 weeks gestation.[87] The state tried Mshumpa and Best (his co-

81 1122 I.
82 1123 B.
83 In respect of private defence, see Snyman *Criminal Law* 103-115. Private defence is defined as "the use of force to repel an unlawful attack which has commenced, or is imminently threating upon her or someone else's life, bodily integrity, property or other interest, which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to the attack".
84 This issue was specifically addressed and proven wrong in Pickles (2014) *De Jure* 20. More on issues linked to perceived implications of the separate-entities approach will be considered in ch 7.
85 It is necessary to point out that McCreath's position can be viewed as somewhat patriarchal in that it almost insists that women should be self-sacrificing and are under an obligation to give up their lives in order to save the unborn. Whereas this sort of self-sacrificing obligation is not imposed on anyone, it is not clear why the Judge would find that to be the case during pregnancy.
86 See *S v Mshumpa* 2008 (1) SACR 126 (E). It is submitted that *Mshumpa*'s outcome may be the reason why the prosecuting authority in *Makhakha* did not pursue the loss of prenatal life under criminal law.
87 Paras 1-3.

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accused) for the murder of the foetus and attempted murder of Shelver, the pregnant victim.

In an attempt to succeed with a murder conviction of the foetus, the state used medical evidence to show that a 38-week foetus, verging on birth, is no different from a born child, in that their level of development and experience of and reaction to pain are the same.[88] Further, the medical expert attested to the fact that the foetus had attempted to breathe while still *in utero* and this is a comparable reaction to any born person in the case of severe loss of blood.[89] After their endeavour to blur the differential lines between a late-term (or viable) foetus and a born person, the state argued that the Court should declare that "killing of an unborn child in circumstances such as the present constituted the crime of murder".[90] The state urged that a declaration of this sort would allow for law to properly reflect medical advancements and community convictions.[91] Ultimately, the state argued for the common law crime of murder, being the unlawful and intentional killing of another person, to be extended to include the unborn.[92] This extension is necessary, because "person" means those who are already born and this definition therefore excludes the unborn from the ambit of the crime of murder.[93]

When considering whether to develop the common law to include the unborn within the ambit of murder the Court looked at the status of the unborn generally and reiterated that constitutional rights do not extend to them.[94] Froneman J stated that as far as he is aware "no South African court has ever held that an unborn child that was not born alive holds any right in its unborn state".[95] Further, Froneman J found in other countries, where feticide laws are in place, it is not a result of the born-alive rule being done away with but rather because statutory provisions were enacted to work around the rule.[96] Recognising the difficulties associated with formulating a reasonably

88 Para 48.
89 Ibid.
90 Para 50.
91 Ibid.
92 Para 53.
93 Ibid. Snyman (*Criminal Law* 448) confirms this and explains that to "kill" a foetus and separate it from a pregnant woman's body is "abortion" and not murder.
94 Paras 56; 64.
95 Ibid.
96 Para 57. This is confirmed in part 3 of this thesis when the United States is considered.

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precise extended definition of murder, the Court found that the legislature was best positioned to bring about this sort of reform.[97]

Ultimately, the Court refused to extend the common law crime of murder and found that the act be punished as part of the offence committed against Shelver and that the aggravation of the act, in the form of harm to the foetus, can be taken into consideration at the sentencing stage.[98] The Court found it acceptable to treat the harm caused to the foetus as a crime against the pregnant woman for two reasons. First, women are vested with constitutional rights. In particular, section 12(2)(a) and (b) provide that they have the right to bodily and psychological integrity which includes the right to make reproductive decisions, thus terminating her pregnancy through assault is a violation of her rights.[99] Second, assaulting a pregnant woman with the intention of harming the foetus is construed as an assault on both the pregnant woman and the foetus due to their "unique togetherness".[100] Froneman J explains, "[a]n assault by an outsider on one is at the same time an assault on both, in their togetherness".[101]

Given the boundaries within which the Court had to work regarding current legal principles such as the limited scope of the Constitution in respect of the unborn, the born-alive rule, the principle of legality, and requirement to incrementally develop the common law, the outcome of the case is unfortunate[102] but is perceived as legally sound. For purposes of this thesis it is noted that the Court confirmed that the born-alive rule is still a functioning principle of our legal system and that the Constitution does not extend to the unborn for as long as there is no live birth. Thus, this portion of *Mshumpa* confirms the single-entity approach.

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97 Paras 59; 65. Issues such as whether the crime should include maternal conduct during pregnancy, the role of foetal viability, and how the extended crime will fit in with illegal termination of pregnancies in respect of the Choice Act.

98 Para 58.

99 Para 64. Although, as the law stands, there is no specifically developed statutory crime to label this wrong as criminal, see C Pickles "The Introduction of a Statutory Crime to Address Third Party Foetal Violence" (2011) 74(4) *THRHR* 546.

100 Ibid.

101 Para 64.

102 The outcome is viewed as unfortunate because Shelver's loss went unrecognised in law, she understood her loss as more than a mere bodily experience and there is no legally labelled crime validating and recognising her sense of loss.

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Nevertheless, the use of "unique togetherness" introduces a very subtle indication that the Court recognises more in pregnant women than women as the only entity involved in a pregnancy. This is because a woman cannot be uniquely together with herself, there must be something more in order for there to be a "together" element.[103] However, the Court applied the "unique togetherness" as a means to deny the unborn a recognised position in law thus affirming a single-entity approach to pregnancy. This is so because the harm was punished as essentially only being a physical harm to the pregnant woman, the other entity with which the woman was understood as being together with was merely subsumed into one. What happened in *Mshumpa*, was more than just harm to the body of a pregnant woman, it was termination of late term prenatal life which is obviously something more than an assault on Shelver. This case demonstrates that recognising the "extra-ness" in pregnancy is not necessarily the end of the single-entity approach, because the very fact that the foetus is seen as intrinsically connect to the woman can serve as a ground to deny it meaningful recognition in law.

Both *Christian Lawyers* (1998) and *Mshumpa* offer a view of how the single-entity approach is applied in both private and criminal law, and in both instances, it is established that the Constitution denies the unborn separate existence until live birth. Moving for a wider view, the discussion of case law here shows that despite confirming the born-alive rule and the resulting single-entity approach, there are elusive indications of attempts to recognise pregnancy as something more than embodying a single entity. This is seen in *Friedman*'s unsuccessful application of sanctity of life; *Christian Lawyers* (1998)'s vague state interest in regulating women's reproductive decisions; and *Mshumpa*'s "unique togetherness". *Christian Lawyers Association v Minister of Health*[104] (*Christian Lawyers* (2005)) and the Choice Act, under the direction of the Constitution's founding value of dignity, expand on these curious references and will be discussed next.

[103] This is especially the case if "together" is understood as companionship or close association. It implies there is something to be in close association with.
[104] 2005 (1) SA 509 (T).

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6 3 A Foetus as More than Nothing: Pregnancy as Representing Not-One-But-Not-Two

Accepting that the born-alive rule and the resulting single-entity approach is an entrenched principle in South African law, one nevertheless finds instances where foetal life is acknowledged and their interests are accounted for despite not having been born. This section looks at the intersection of constitutional values (as opposed to rights), the limiting provisions of the Choice Act and the decision of *Christian Lawyers* (2005) where the Court clarified the state's interest as being an interest in prenatal life. This intersection changes the dynamics of prenatal life under law in that the born-alive rule remains intact but a different perspective is introduced. This perspective ultimately goes beyond the single-entity approach. While functioning within the legal framework of the born-alive rule, the intersection of these three spheres of law introduce the notion that pregnancy can be seen as embodying more than one, but also not completely two either.

6 3 1 Conceptualising the not-one-but-not-two approach

This approach to pregnancy is seen to rest between the two extremes of the single-entity and the separate-entities approaches to pregnancy,[105] offering a middle ground.[106] The not-one/not-two approach is defined as a female view of pregnancy.[107]

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[105] While the concerns relating to the separate-entities approach will be considered in more detail in part 3 and ch 11 of this thesis, it is necessary to mention that the not-one/not-two approach originally came about as a response to the ineffective outcomes of the separate-entities approach. In this respect, see I Karpin "Legislating the Female Body: Reproductive Technology and the Reconstructed Woman" (1993) 3 *Colum J Gender & L* 329. Research indicates that she is the first to have adopted this term and advanced it as an approach to pregnancy. Karpin (329) is critical of the separate-entities approach which she sees as being a means to gain political control over women through legal interventions during pregnancy. She asks why not view a pregnant woman and foetus as not-one-but-not-two. She argues that the separate-entities approach already does this in that legal action is taken on behalf of the unborn (as a separate entity) in cases where maternal conduct is seen as dangerous. However, that very action must acknowledge, for purposes of a successful claim against a woman, that there is a shared connection between a pregnant woman and foetus, it must acknowledge their inseparability. It is their inseparability that makes maternal conduct problematic for the unborn which separate-entities advocates wish it to address.

[106] Seymour *Childbirth and the Law* 190; 202.

[107] Seymour *Childbirth and the Law* 199; C MacKinnon "Reflections of Sex Equality under Law" (1991) 100(5) *Yale LJ* 1281 1309; 1313-1314. MacKinnon explains that the legal system has failed to adequately conceptualise pregnancy and the maternal/foetal relationship because the interests, perceptions and experiences that have shaped the law on this topic are those of men and development has occurred to the exclusion of women. This is problematic because pregnancy is

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MacKinnon provides a description of the unborn from a female perspective which validates this approach:[108]

> More than a body part but less than a person, where it is, is largely what it is. [Footnotes omitted.] From the standpoint of pregnant women, it is both me and not me. It 'is' the pregnant woman, in the sense that it is in her and of her and is hers more than anyone's. It is 'not her' in the sense that she is not all that is there. In a legal system that views the individual as a unitary self, and that self as a bundle of rights, it is no wonder that the pregnant woman has eluded legal grasp, and her fetus with her.[109]

Focus on relationship allows for the recognition of the following elements as stemming from the existence of a pregnancy: united needs; interconnectedness; mutuality; and reciprocity.[110] Essentially, it advocates a view and embeds an understanding that a pregnant woman and foetus cannot be viewed in isolation. The not-one/not-two approach allows a foetus to be recognised as a distinct entity but it also expresses an unequivocal reminder of the relationship shared between a pregnant woman and her foetus.[111] Therefore, this approach acknowledges that a foetus has interests but that these interests must be promoted in a way that a woman's rights are acknowledged.[112]

In order to achieve the aim of advancing foetal interests in a way that women's rights are promoted, the not-one/not-two approach to pregnancy is context driven, meaning

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female experience, thus resulting in the development of principles from a disadvantaged outsider perspective.

[108] MacKinnon (1991) *Yale LJ* 1316.

[109] Lupton's studies support MacKinnon's position, see Lupton *Social World of the Unborn* 53-56. Lupton recognises that some women do understand their pregnancies as embodying a separate individual. However, even within the perception of foetal individuation, all the women understood the foetus to be in and somewhat part of their bodies, thus not completely apart from them.

[110] Seymour *Childbirth and the Law* 190.

[111] Seymour *Childbirth and the Law* 200. This approach echoes the very principles of relational feminism thus supporting MacKinnon's premise that the not-one/not-two approach is a female perspective on pregnancy. See ch 3 para 3 4 2 and authority cited therein for a discussion of relational feminism. This topic will be discussed further in part 4. For examples of the practical application of relational feminism, see, J McConnell "Relational and Liberal Feminism: The 'Ethic of Care,' Fetal Personhood and Autonomy" (1996) 99 *W Va L Rev* 291; E Ordolis "Maternal Substance Abuse and the Limits of the Law: A Relational Challenge" (2008) 14 *Alta L Rev* 119; P Laufer-Ukeles "Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy" (2011) 37 *Am JL & Med* 567. Also see Pickles *S v Mshumpa: A Time for Law Reform* 124-126; 133-134. It must be noted that while the author of this thesis does not use the term "relational feminism" in her LLM dissertation, the adopted approach certainly ties in with the concept of relational feminism in the context of understanding the unborn. A detailed discussion of these issues will take place in ch 11.

[112] Seymour *Childbirth and the Law* 200.

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that the maternal/foetal relationship must be understood in respect of the context in which that relationship exists. It is only through the process of including context that one can determine if intervention in pregnancy is necessary, and if such intervention should be a legal intervention or not. Where legal intervention is found to be necessary, context would assist in determining whether such an intervention would amount to an acknowledgment or infringement of women's rights.[113]

Seymour understands this approach as being flexible.[114] First it acknowledges value in the unborn but denies them their separateness.[115] Secondly, it enables women's rights to be included and considered.[116] Third, it sets the scene for the protection of the unborn when their interests are threatened by a third party, but may produce different results when the unborn's interests are threatened by the pregnant women carrying them.[117]

On the issue of harm caused by pregnant women, Seymour argues that this approach does not provide absolute legal immunity for pregnant women.[118] While he goes on to assert that female autonomy plays a crucial role in determining their immunity,[119] it is suggested that absolute freedom during pregnancy may never be in place because this approach demands that the value of the unborn will always play a part (not the central part, but certainly an important contributory one) in determining a way forward.[120]

Seymour recognised that there are very few cases that give any attention to this approach, but *Christian Lawyers* (2005) does, together with the Choice Act.

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[113] Ibid.
[114] Seymour *Childbirth and the Law* 201-202.
[115] Ibid.
[116] Seymour *Childbirth and the Law* 201-202.
[117] Ibid.
[118] Seymour *Childbirth and the Law* 202.
[119] His discussion of autonomy (in the context of Canada and the United States of America) goes beyond the scope of this chapter. Briefly he suggests that women will benefit from immunity where harm caused to the unborn is a result of women exercising their right to withhold consent to invasive bodily infringements. However, he refrains from answering the question of whether a woman can be held legally accountable where harm is caused to the unborn in the case where the woman engages in harmful conduct such as drug abuse or alcoholism.
[120] This was argued elsewhere, see, Pickles (2014) *De Jure* 20.

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6 3 2 Choice on Termination of Pregnancy Act and *Christian Lawyers* (2005)

This author has argued elsewhere that the Choice Act can be seen as a mechanism that advances foetal interests despite it providing the means to lawfully terminated pregnancies.[121] The discussion to follow builds on this notion and links it to the not-one/not-two approach to pregnancy.

As discussed earlier, in 1998, the Choice Act came under constitutional scrutiny in *Christian Lawyers Association* (1998), and it was clearly demonstrated that a foetus is not a bearer of constitutional rights. Also, the Judge vaguely mentioned that the state has an interest in regulating women's reproductive decisions. Years later, in *Christian Lawyers* (2005), also in the context of the Choice Act, the Court found that the right to terminate a pregnancy is not absolute and went on to clarify the state's interest in respect of reproductive decision-making processes.

6 3 2 1 *Christian Lawyers* (2005) expansion of "state interest"

While recognising the importance of women having a right to terminate their pregnancies,[122] the Court found that the right to terminate a pregnancy, like all constitutional rights, is subject to the limitation clause.[123] Focusing on state interest, Mojapelo J explicitly recognised "[t]he state has a legitimate role, in the protection of pre-natal life as an important value in our society, to regulate and limit the woman's right to choose in that regard".[124] Since the right to terminate a pregnancy is a fundamental constitutional right, state regulation cannot amount to a denial of the freedom to exercise the right.[125] Thus, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required in terms of section 36 of the Constitution.[126]

[121] See C Pickles "Termination-of-Pregnancy Rights and Foetal Interests in Continued Existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996" (2012) 15(5) *PER* 404; Pickles *S v Mshumpa: A Time for Law Reform* 58 and see all authority cited therein.
[122] For a discussion of this portion of the *Christian Lawyers* (2005) decision, see ch 5 para 5 2 3 3.
[123] 527 D.
[124] Ibid.
[125] 527 E.
[126] Ibid.

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This case fits squarely in line with the not-one/not-two approach to pregnancy because the value in prenatal life is acknowledged in its own light, indicating that pregnancy embodies more than one entity.[127] However, the acknowledgement does not go so far as to confer on the unborn an entire separate status and enforceable rights.[128] Rather, this judicial acknowledgment views the foetus in relation to the pregnant woman and her existing rights.[129] *Christian Lawyers* (2005) can also be distinguished from the cases discussed under the single-entity approach in that the Court not only acknowledges the existence of prenatal life but also attaches value thereto, which value is understood to demand state action for the benefit of prenatal life in a qualified way that is respectful of women's rights.[130] Finally, it is submitted that *Christian Lawyers* (2005) demonstrates that the not-one/not-two approach has a strong chance of surviving constitutional muster.[131]

6 3 2 2 Limitations in the Choice Act

The state and society's interest in prenatal life and the value attached thereto has found legislative translation. The Choice Act sets out the circumstances and the conditions that allow for the termination of a pregnancy, in terms of section 2(1)(a) which states that a pregnancy may be terminated upon the request of a woman during the first twelve weeks of gestation. Section (2)(1)(b) provides that from the thirteenth week up to and including the 20th week of gestation, a pregnancy may only be terminated once a woman has consulted with a medical practitioner and that medical practitioner is of the opinion that: continued pregnancy would pose a risk to the mother's physical or mental health; there is a substantial risk that the foetus will suffer from severe physical or mental abnormality; the pregnancy is a result of rape or incest; or the continued pregnancy will severely affect the woman's social or economic circumstances. Section 2(1)(c) provides that a pregnancy that has reached the 21st week of gestation may only be terminated if a medical practitioner, after consulting with another medical practitioner, is of the opinion that the continued pregnancy will endanger the woman's life, will result in severe malformation of the foetus, or would pose a risk of injury to a foetus.

[127] Pickles (2014) *De Jure* 20.
[128] Ibid.
[129] Pickles (2014) *De Jure* 20.
[130] Ibid.
[131] Pickles (2014) *De Jure* 20.

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These provisions clearly demonstrate that, as the pregnancy progresses, women's freedom of choice is curtailed and the decision is shared with a medical practitioner and must fall within one of the stipulated grounds. Although *Christian Lawyers* (1998) sets the scene of a rather grim legal framework concerning the advancement of foetal interests in that the Constitution does not extend to the unborn, *Christian Lawyers* (2005), read together with the Choice Act, introduces a different dimension concerning their protection. The restrictions contained in the Choice Act reveal a legislative commitment to balance the increasingly compelling interests of the foetus (at and after viability) with reproductive rights of women,[132] and this position feeds into the not-one/ not-two approach since a foetus is recognised but in the context of the pregnant woman carrying it.

6 3 2 3 Constitutional values

A number of academics have contributed towards creating an understanding of where this interest in foetal life is derived from. While it is accepted that a foetus is not a bearer of constitutional rights, Meyerson convincingly points out that this does not finalise the matter concerning foetal interests.[133] She argues that if that were the case, the state would pass laws permitting late terminations of pregnancies for any reason whatsoever.[134]

There is an obstacle to treating a foetus in such an arbitrary fashion. O'Sullivan[135] relies on Ronald Dworkin's[136] view that arguments about termination of pregnancies should not revolve round whether a foetus is the bearer of constitutional rights, this would be a flawed approach because any argument that affords a foetus constitutional

[132] M O'Sullivan "Reproductive Rights" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2005) 37-27. The issue of foetal viability is discussed below.
[133] D Meyerson "Abortion: The Constitutional Issues" (1999) 116 *SALJ* 50 55.
[134] Ibid.
[135] See O'Sullivan "Reproductive Rights" 37-6. Further authors relying on Dworkin are Meyerson (1999) *SALJ* 53 and H Kruuse "'Fetal Rights?' The Need for a Unified Approach to the Fetus in the Context of Feticide" (2009) 2 *THRHR* 126 134.
[136] As provided for in R Dworkin *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual* (1993).

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rights merely grants the state a derivative interest in prohibiting or regulating the termination of pregnancies.[137]

It is Dworkin's assertion that the argument is not whether we object to the termination of pregnancies because we believe that a foetus is a bearer of constitutional rights, but whether we attach some intrinsic value to life and the potential for human life.[138] Accordingly, the interest of the state in potential life derives from the state's interest in protecting the sanctity of human life in all its forms, therefore justifying the regulation of termination laws on grounds that are independent of the rights-bearing capacity of the foetus itself.[139] Dworkin argues that the state has a detached interest in regulating termination of pregnancies.[140] This argument falls in line with *Christian Lawyers* (2005) where the Court describes prenatal life as an important value in our society.[141] This value is so important that it justifies limiting women's rights to terminate their pregnancies.[142]

The value of prenatal life, being a ground justifying the limitation of women's rights, is informed by our constitutional values.[143] The Constitution includes a number of provisions that make specific reference to values, such as, sections 1, 7(2), 36(1), and 39(1) and (2). First, the Constitution recognises that human dignity, the achievement of equality, and the advancements of rights and freedoms are some of the specified values that the Republic of South Africa is founded on.[144] Further, the Bill of Rights affirms the democratic values of human dignity, equality and freedom,[145] and thus any limitations of rights contained in the Bill of Rights must be reasonable and justifiable in light of the founding values.[146] These founding values also play a central role when

[137] A derivative interest is an interest based on the presumption that the entity involved is a person with rights and interests, and the state's interest in protecting it stems from the fact that it is a bearer of rights. See Dworkin *Life's Dominion* 11.
[138] *Life's Dominion* 11.
[139] Ibid.
[140] A detached interest is an interest based on the fact that human life is itself intrinsically valuable, regardless of the status of the person. See *Dworkin Life's Dominion* 11; Kruuse (2009) *THRHR* 135.
[141] 527 D. Also see C Albertyn et al "Women's Freedom and Security of the Person" in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 370, the authors recognise that the Choice Act reflects Dworkin's approach concerning the state's interest in later gestation foetuses.
[142] Ibid.
[143] Meyerson (1999) *SALJ* 55.
[144] S 1(a) of the Constitution.
[145] S 7(2) of the Constitution.
[146] S 36(1) of the Constitution.

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interpreting the Bill of Rights and legislation, or when developing the common and customary law.[147] Meyerson states that there is more to the Constitution than granting and protecting the rights, since it explicitly distinguishes between rights and freedoms on the one hand, and the values of human dignity, equality and freedom on the other.[148] Agreeably, Meyerson argues that, even if there are no human rights protected prior to birth, it is necessary to consider whether the value of human dignity might operate as a constitutional constraint on legislation governing the termination of pregnancies.[149]

Meyerson states that it is the value of human dignity that is under threat, because it is hard to deny that the destruction of foetal life, although it violates no constitutionally protected subject's right to life, undermines human dignity.[150] A foetus is not mere maternal tissue; she considers it to be a living organism, whose destruction is not a morally trivial matter but something to be regretted.[151] Meyerson published her work in 1999, her position still stands today. Ackermann, expressly took on this approach to dignity in his recent publication, *Human Dignity: Lodestar for Equality in South Africa*.[152] Ackermann understands dignity (being synonymous with human worth) to vest in all who form part of the human species and asserts that in order to protect the dignity of all, it may be required that dignity be protected even before birth.[153] Therefore, value in prenatal life, as something forming part of the human species, is ever present. It is now necessary to determine when one can act towards the preservation of that value.

[147] S 39(1)(a) of the Constitution.
[148] Meyerson (1999) *SALJ* 55. Also see *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) 962 A-C.
[149] Meyerson (1999) *SALJ* 56. Also see S Woolman "Dignity" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 3 2011) 36-19; 36-22–36-25. He states that the value of dignity can be invoked in three types of cases: where the value of dignity guides the interpretation of the right and, by doing so, shapes the ambit of the right; where the value of dignity can be used to justify the limitation of a right; and where the value of dignity can be used in those cases where the Bill of Rights does not directly apply to the circumstances, and, in this case, the value of dignity will inform the development of the common law or the interpretation of the statute (36-24).
[150] Meyerson (1999) *SALJ* 59.
[151] Ibid.
[152] L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012).
[153] Ibid 51.

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6 3 2 4 Vesting of state interest

Since an interest in foetal life has been established on the basis of the value of dignity, it is now necessary to determine at what point in development can it be accepted that that interest in the unborn is conferred. Ackermann argues that since the very act of conception brings about a member of the human race, what conception produces joins in on the worth (dignity) of the species.[154] Accepting that the value of dignity serves as the ground for the state to limit female reproductive rights in terms of the Choice Act and Ackermann understands it to vest at the moment of conception, a vexing question is raised: How can the Choice Act legitimately permit elective terminations of first- and second-trimester pregnancies, since it can be claimed that these terminations also offend the value of human dignity?[155]

In respect of the above question, Meyerson asserts that, early non-therapeutic pregnancy terminations are too controversial for the state to regulate since the unborn are usually very underdeveloped when such terminations are permitted.[156] Further, the limitation clause prevents the state from limiting rights for intractably disputed reasons, since a person's own moral judgments do not justify legal interference by the state when a woman decides to exercise her choice to terminate her pregnancy.[157] Sarkin-Hughes states that:[158]

> [D]espite the fact that not every woman's decision will be in accordance with another's individual sense of morality, society's interest must only be an advisory one. Otherwise we will be left with the dangerous and oppressive situation of the state imposing a preconceived moral stance, which has been created in part from stereotypes of women's intellectual and physiological capabilities.

However, beyond early prenatal life, and once the foetus becomes more developed and approaches viability,[159] its destruction becomes less tied to intractably disputed views and the weight to be afforded to human dignity in relation to female reproductive

[154] Ackermann *Human Dignity* 52.
[155] Pickles (2012) *PER* 420.
[156] (1999) *SALJ* 57.
[157] Meyerson (1999) *SALJ* 57-58.
[158] (1993) *THRHR* 89.
[159] Foetal viability is said to occur at around twenty-two weeks of gestation, see J Sarkin-Hughes "A Perspective on Abortion Legislation in South Africa's Bill of Rights Era" (1993) 53 *THRHR* 83 89; Pickles (2013) *Stell LR* 146.

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rights becomes less controversial.[160] This is because, theoretically, it is at the point of viability that a foetus should be capable of living independently of the pregnant woman if it is born alive, since all its vital organs are developed and are able to perform their functions sufficiently.[161]

Accepting the above arguments as constitutionally valid, a concern remains regarding termination of pregnancies for socio-economic reasons in the second trimester.[162] The authors mentioned above,[163] describe "early pregnancy" as including first- and second-trimester pregnancies. However, it is difficult to accept that a pregnancy that has developed into the second trimester can still be described as an "early pregnancy".[164] At this point, as a pregnancy develops through the weeks of the second trimester, the foetus begins to take the form of an infant and moves indisputably closer to viability. According to Myburgh, provisions that allow termination of pregnancies for socio-economic reasons are an "irrational and arbitrary exclusion of the unborn and [create] an imbalance in liberal abortion jurisprudence", because only the rights of women are advanced.[165] By contrast, Ngwena has praised South African termination-of-pregnancy laws as radically liberal in comparison with those of our African

[160] Meyerson (1999) *SALJ* 58.

[161] See, generally, C Cohen & S Sayeed "Fetal Pain, Abortion, Viability and the Constitution" (2011) 39(2) *JL Med and Ethics* 235. Cohen & Sayeed point out that there are normative societal tendencies, as expressed by the courts, to assign a particular point in development for foetal viability based on the estimation of gestational age. However, there are other factors that affect the probabilities of long-term neonatal survival, such as sex, birth weight, maternal exposure to steroids, and resource allocations. It must be noted that understanding viability as significant enough to justify increased protection under the law is seen as arbitrary by some, since it is argued that regardless of the point in development the unborn may be, the fact remains that it represents human life. This issue will be addressed in more detail in ch 7.

[162] In terms of s 2(1)(b)(iv) of the Choice Act, a woman can terminate a pregnancy from 13-20 weeks' gestation if the continued pregnancy will significantly affect the social or economic circumstances of the woman.

[163] Meyerson (1999) *SALJ* 58; Sarkin-Hughes (1993) *THRHR* 89.

[164] Pickles (2012) *PER* 421.

[165] G Myburgh *Humanity and the Protection of the Unborn: A Jurisprudential Rationale for the Furtherance of the Anthropological Paradigm of International Law* LLM Dissertation, University of the Free State (2008) 60. Also see F van Oosten "The Choice on Termination of Pregnancy Act: Some Comments" (1999) 116 *SALJ* 60 64. He argues that the Choice Act merely grants a woman the freedom to terminate a pregnancy for whatever reason she considers fit since the Act simply views the foetus as a "member of the pregnant woman's body, which includes the right to have her embryo killed". Van Oosten (76) is very critical of the Choice Act and describes it as being plagued with "lacunae, contradictions, inconsistencies and incomprehensibilities, and demonstrates a stunning ignorance of basic principles of criminal law and an inexplicable ambivalence on the issue of abortion, and a surprising insensitivity to the meaning of words on the legislatures part".

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neighbours, since South Africa is one of the very few African countries that permits termination of pregnancies for socio-economic reasons.[166]

Through the lens of foetal interests, and at first glance, the socio-economic reason provision is arbitrary.[167] However, taking a closer contextual look into second-trimester terminations in South Africa, as the not-one/not-two approach calls for, it is argued that this provision fills a very important role for South African women. Of the total number of pregnancies that were terminated in 2009, 13% took place in the second trimester (after twelve weeks' gestation).[168] These statistics lead one to question why second-trimester terminations are taking place (if not for therapeutic reasons) at a time when South African legislation permits first-trimester termination of pregnancies on demand.[169] Going further into the inquiry, are these decisions infused with a sense of arbitrariness and tactless conduct on the part of women seeking second-trimester termination-of-pregnancy services?

A number of studies have provided an answer to this. Research stemming from the medical field where the provisions of the Choice Act are implemented, demonstrate that accessing the service later in pregnancy is not necessarily an indication of arbitrary decision making but rather an indication of a system failing pregnant women, in that it is unable to effectively meet their reproductive demands.[170] Having regard to the contextual reality that women find themselves in when seeking to terminate their

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166 C Ngwena "An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective" (2004) 32(4) *JL Med and Ethics* 708 715.

167 Pickles (2012) *PER* 422.

168 Health Systems Trust "TOPs by Gestational Age" *Health Systems Trust* <http://indicators.hst.org.za/healthstats/88/data/gedo> (accessed 16 December 2013). Unfortunately the only statistics available to date, are those for 2009. Health System's Trust is yet to update their termination-of-pregnancy statistics. Also, these statistics do not differentiate between elective or therapeutic termination-of-pregnancy procedures.

169 Especially since first-trimester terminations are free at public health care facilities; see s 4(3)(c) of National Health Act 61 of 2003.

170 C Morroni & J Moodley "Characteristics of Women Booking for First and Second Trimester Abortions at Public Sector Clinics in Cape Town" (2006) 12(2) *SAJOG* 81; J Harries, P Orner, M Gabriel & E Mitchell "Delays in Seeking an Abortion until the Second Trimester: A Qualitative Study in South Africa" (2007) 4(7) *Reprod Health* 13; D Grossman, D Constant, N Lice, M Alblas, K Blanchard & J Harries "Surgical and Medical Second Trimester Abortion in South Africa: A Cross Sectional Study" (2011) 11(1) *BMC Health Serv Res* 224; J Harries, N Lince, D Constant, A Hargey & D Grossman "The Challenges of Offering Public Second Trimester Abortion Services in South Africa: Health Care Providers' Perspectives" (2012) 44(2) *J Biosoc Sci* 197; Pickles (2013) *SAJHR* 515.

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pregnancies,[171] elective, second-trimester termination of pregnancy fulfils a very crucial role in South Africa.[172] It is not only the rights of pregnant women that are being advanced, but also the rights of those with whom these women already share a relationship and have a responsibility of care towards (children and dependent family members).[173] These women would find themselves in dire circumstances if termination-of-pregnancy legislation prohibited second-trimester terminations, especially where delays in terminations are the result of external factors linked to financial resources, staff attitudes, and poor referral systems.[174] Although the studies referred to in this thesis were limited to termination-of-pregnancy services in the public sector, they do give an indication of the hardship that the majority of South African women may face in general. It can hardly be concluded that second-trimester termination of pregnancies is generally arbitrarily and irresponsibly sought after or relied on by women.[175]

O'Sullivan states that there are good reasons for the state to progressively limit the termination of a pregnancy after viability. First, foetal brain development is sufficient for the foetus to feel pain,[176] which indicates that the foetus has protectable interests

[171] Morroni & Moodley ((2006) *SAJOG* 81) explain that the women forming part of their study who were seeking second-trimester termination of pregnancy were all faced with unplanned pregnancies: twenty of the eighty-two women were teenagers, just over one-quarter were self-supportive, while thirty-eight were still in school. It is submitted that women are not terminating pregnancies for reckless reasons. At times the termination of a pregnancy is a response to social evils. Social evils includes poor access to reproductive control measures, coercive sexual practices, a change in circumstances which leaves them vulnerable to the burden of rearing a child alone, sexual violence or simply experiencing an unplanned pregnancy. If the aim is to better serve the interests of the foetus, in line with the value society vests in them, then these social evils need to be adequately addressed. In fact, not doing so can be labelled irrational, irresponsible and arbitrary on the side of the state and wider community. More on this is discussed in ch 7 para 7 3 4.

[172] Pickles (2012) *PER* 424.

[173] Ibid.

[174] Pickles (2012) *PER* 424.

[175] Ibid.

[176] The ability to feel pain is a contested issue. See M Ford "Nothing and Not Nothing: Laws Ambivalent Response to Transformation and Transgression at the Beginning of Life" in S Smith & D Deazley (eds) *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression* (2009) 27. Ford argues that scientists disagree about the gestational age at which a foetus becomes sentient. Some have argued that sentience is present in the first trimester, and there are those who doubt that a foetus is sentient at all. Ford states that there is a majority view that sentience emerges late in the third trimester. This argument is based on the fact that no sentience is possible without any cortical structures in place, which only fully develops between 30-35 weeks gestation. Also see, generally, S Lee et al "Fetal Pain: A Systematic Multidisciplinary Review of the Evidence" (2005) 294(8) *JAMA* 947; Cohen and Sayeed (2011) *JL Med and Ethics* 235.

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of its own.[177] Secondly, by the time the pregnancy has reached that stage of development, the woman concerned has had ample time to decide whether termination is the best option for her.[178] Further, she argues that, at the stage of viability, the termination of a pregnancy becomes more problematic, because, as the foetus has developed towards being an infant, the difference between being a foetus and a child has become only a matter of location of the unborn in the womb rather than its development.[179] These arguments fall squarely in line with the provisions of the Choice Act. Section 2(1)(c) requires the life of the pregnant woman or foetus to be at risk before a termination may be granted where the pregnancy has advanced past the 20th week of gestation.[180]

Examination of the *Christian Lawyers* (2005) decision regarding state interest and the provisions of the Choice Act indicate that female reproductive rights are the state's first and foremost concern.[181] However, having given women the opportunity to exercise their rights during "early pregnancy", the state's interest in female reproductive rights wanes in favour of acting on the value in prenatal life.[182] Subsequently, the state's detached interest, based on the value of human dignity, serves as a reasonable and justifiable ground to limit female reproductive rights without diminishing the legal significance of birth or bringing constitutional rights into play regarding the unborn.[183] All of this takes place despite the fact the born-alive rule is still a functioning principle under South African law. The intersection of constitutional values, the Choice Act and state interest all give credence to the not-one/not-two approach to pregnancy in South

[177] See Steinbock's arguments concerning foetal interests based on sentience in B Steinbock *Life before Birth: The Moral and Legal Status of Embryos and Fetuses* 2 ed (2011). Her position was discussed ch 4 para 4 3 3.

[178] "Reproductive Rights" 37-9. However, this statement must be accepted cautiously since ch 5 demonstrated that women in need tend to have a difficult time accessing termination-of-pregnancy services. This difficulty is known to cause delays in getting the termination-of-pregnancy procedure performed and these delays may even cause women to miss out on the opportunity to lawfully terminate a pregnancy because the pregnancy progressed into the third trimester. The third trimester being the point in pregnancy when women's rights to terminate a pregnancy are severely limited to serious health risks.

[179] O'Sullivan "Reproductive Rights" 37-10.

[180] Sarkin-Hughes ((1993)*THRHR* 89) states that it is preferred to set the cut-off line at 20 weeks rather than 22 weeks, because estimates of gestational age have an approximate 2 week margin of error. Even though Sarkin-Hughes's work was published in 1993, to date, there still remains gestation estimation difficulties, see Pickles (2013) *Stell LR* 156-157.

[181] Pickles (2012) *PER* 425.

[182] Ibid.

[183] Pickles (2012) *PER* 425.

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Africa since neither entity is entirely forsaken for the other, but both entities are nevertheless recognised as existing in law.

6 4 No Indications of Contemporary Tensions between Female Autonomy Rights and Foetal Interests during Pregnancy

Having now completed the discussion of both pregnant women and the unborn under South African law it is necessary to consider how these two spheres intersect and whether this intersection gives rise to any tensions during pregnancy.

From a single-entity perspective, only women exist and the presence of a pregnancy does not count for much in law from the perspective of the foetus.[184] Under this construction, pregnant women's autonomy rights cannot be viewed as being in tension with its own realisation. The single-entity approach, as is currently applied in South Africa, effectively prevents third parties from using the law to act for the benefit of the unborn.[185] Therefore, no third party has any legal foundation to interfere with a woman's pregnancy for the benefit of a foetus or its interests. This is pertinently clear, since as indicated in chapter five in the context of women's rights, there is no case law indicating that pregnant women can be forced to progress through pregnancy in accordance with others pursuing their own conceptions of healthy pregnancies or pregnancy outcomes. In this chapter it was also demonstrated that all litigation initiated with the aim of protecting the foetus or its interests has failed.

Even from the not-one/not-two approach there is no room for an adversarial pregnancy environment. This stems from the fact that in cases where the value of foetal life is recognised, it is done in a qualified manner: A foetus is only recognised in relation to

[184] From the perspective of pregnant women, the presence of a pregnancy allows for women to lay increased claims against the state for the realisation of their reproductive autonomy.

[185] From a more traditional perspective in respect of the Abortion and Sterilization Act, research indicates that foetal interests were not the driving concern behind the commencement of the Act. In this respect see R Rebouché "The Limits of Reproductive Rights in Improving Women's Health" (2012) 63(1) *Ala L Rev* 1 4-8. Rebouché explains that the regulation of termination of pregnancies during Apartheid the state was more concerned about preventing white women from terminating pregnancies in order to increase the white population. A further indication that the Act was not in place to serve the interests of the unborn rests on the fact that a woman could have her pregnancy terminated in the case of rape or incest. If the state was being driven by the desire to protect the unborn, the conditions leading to conception would be irrelevant.

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the pregnant woman who carries it and its value is advanced so far as this sort of advancement is respectful of the woman and her rights. This expresses a scenario of "meeting in the middle": A little recognition is given to the existence of a foetus while taking a little from female autonomy and there is not space for absolute or extensive claims against either entity constituting a pregnancy. A more detailed discussion of this approach will be covered in chapter eleven. It is suffice to say, that with its currently limited application in South Africa, the not-one/not-two approach offers a compromise in a situation that could have easily resulted in the rise of an environment for tensions during pregnancy.

Drawing from chapter five's discussion of pregnant women and their rights and what was demonstrated thus far in this chapter, there is sufficient authority indicating that as South African law stands, there are no tensions between pregnant women's rights and foetal interests, thus there is no adversarial pregnancy environment.[186] However, the issue does not stop here because chapters five and six clearly demonstrate the need for law reform in certain areas of pregnancy so as to enhance women's reproductive autonomy and create a safe space to offer improved consideration of the unborn. Chapter seven demonstrates that when law reform proposals are advanced, the risk of a tension comes to the fore.

6 5 Concluding Remarks

This chapter shows that the born-alive rule is deep rooted in South Africa and has far reaching implications. The rule gives rise to the single-entity approach, and this is currently the most prominent approach in South Africa. The more traditional and pre-constitutional implications of the born-alive rule is the fact that the unborn are essentially non-existent under the law and no one can, in legal technical terms, act for their benefit, no one owes them a legal duty of any sort, and they cannot be considered victims of crime. Despite law's very denialist approach towards prenatal life, there are examples where the courts have inched towards recognising the value of prenatal life. These attempts have been based on principles such as sanctity of life and tentatively

[186] This finding is contrary to Pillay's assertion that without affording the unborn full legal subjectivity, our courts are not equipped to address "maternal-foetal conflicts", see Pillay (2010) *Stell LR* 236.

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recognising pregnancy as resembling a “unique togetherness”. However, neither of these attempts transformed into any concrete principles leading to the legal recognition of prenatal life. This result may stem from the fact that there was no obvious legal basis to authorise or justify these attempts, however this changed after the introduction of the Constitution which brought the value of dignity within the parameters of the law.

After the introduction of the Constitution there is a shift in the way the unborn are perceived and this takes place in the context of the Choice Act. Chapter six highlights that despite the fact the born-alive rule is still in force, the value of dignity, as one of the founding values in the Constitution, prescribes that all life is of value. This value informs how legislation should be interpreted and applied in respect of certain rights, thus it encourages an interpretation of the Choice Act that accords value to the unborn which ultimately serves to legitimately limit female reproductive autonomy from viability onwards. The approach adopted in this context fits the description of the not-one/not-two approach in that it recognises the existence of prenatal life, not as something wholly distinct from women but as something intrinsically related to them. Consequently, this approach does not extend legal subjectivity; it opens a window for limited legal recognition of the unborn but only in the contextual setting of women and their rights.

The discussion of the Choice Act teaches us that prenatal life will always be valued, but whether we can act on that value, and how we go about protecting that value must be determined in the context in which the unborn exist, being through women and their rights. Despite the single-entity approach being the more well-known approach, we are seeing the emergence of a new approach taking root in South Africa and it will be interesting to see if the courts attempt to apply it to other aspects beyond termination-of pregnancy laws.[187] However, it is questionable whether the wider legal community is even aware such an approach exists.

Pooling the findings of chapter five and six together establishes that neither of the two approaches applied in South Africa encourage tensions between female autonomy

[187] Ch 11 demonstrates how this might occur should the approach be accepted.

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rights and foetal interests. However, this is not to say that there are no concerns with the application of these approaches. All of the scholarly opinions raised against the South African approach to prenatal life concerns the single-entity approach. Generally, these concerns relate to the fact that this approach is irreconcilable with the scientific fact that the unborn are biologically and genetically distinct from pregnant women.[188] Chapter seven will go on to consider this matter and related calls for reform of South African law relevant to pregnancy.

[188] Pickles (2014) *De Jure* 20.

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Chapter Seven

Calls for Reform of South African Law Pertaining to Pregnancy and the Preferential Advancement of the Separate-Entities Approach

7 1 Introduction

Chapters five and six set the foundation for this chapter. Both chapters developed an overall legal perspective of pregnancy under South African law from the viewpoint of pregnant women and then the unborn. The main features to be taken from both chapters collectively is the fact that South Africa primarily adopts a single-entity approach towards pregnancy in that only pregnant women are recognised in law and thus have wide reaching constitutionally-informed legal protection, while the unborn as virtual non-entities do not benefit from law's protective provisions.[1]

In this context, chapter seven looks at South African[2] academic responses to the scenario presented in chapters five and six. These authors question whether the single-entity approach can effectively secure healthy pregnancies and healthy pregnancy outcomes, and have come to question the legal validity of this position as a whole. The single-entity approach is seen to pose a number of problems in securing healthy progression through pregnancy and birth because one "entity" who contributes towards the makeup of a pregnancy, being the unborn, is not fully recognised in law.

A study of these scholarly contributions identifies a common thread, namely that the law is viewed as being ill-equipped to tackle harmful impediments to healthy pregnancies or healthy pregnancy outcomes, either caused by third parties or pregnant women themselves. While delving into different areas of law, each of the authors' arguments go on to express the common aim of introducing a separate-

[1] Ch 6 also demonstrates that South Africa also adopts a not-one-not-two approach to pregnancy, but this is a new assertion made in this thesis. Those who advance suggestions for law reform in South Africa are seemingly unaware that such an approach can be gleaned from South African termination-of-pregnancy law.

[2] South African authors of particular interest include, Kruuse, Pillay, de Freitas, du Plessis (previously Myburgh), and Ovens. It is necessary to indicate who will be considered because other authors from foreign jurisdictions will also be included in this chapter but serve the purpose to provide clarity on certain concepts and support for some arguments.

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entities approach to pregnancy in South African law and chapter seven goes on to look at all these assertions in detail. The responses considered in this chapter all advocate for reform of specific aspects pertaining to pregnancy, such as third party violence that terminates prenatal life, substance abuse during pregnancy, women's right to have access to termination-of-pregnancy services, and the extension of personhood to the unborn. In each of these areas of law, it is generally asserted by the South African scholars that viewing pregnant women and the unborn as two separate entities creates the necessary space to secure healthy foetal outcomes since legal intervention can be justified in cases where pregnant women's or third parties' conduct is seen as being detrimental to ideal foetal health, development and eventual live birth. Thus, while many more areas were identified as being in need of reform in chapters five and six, this chapter only focuses on select issues as highlighted by current[3] academic debates.

While chapter seven serves the purpose of highlighting a shift in focus concerning pregnancy, from a single-entity approach to a separate-entities approach, it also contains a secondary purpose of setting the scope for the comparative study which follows in part three of this thesis.

Chapter seven starts with determining what informs the authors' positions regarding their perception that pregnancy under South African law requires reform and then looks at how these motivations for reform commonly translate into legal arguments that support a separate-entities approach to pregnancy. After setting this foundation, the chapter contemplates each author's suggested area of reform by first looking at the crux of their response to an identified issue in pregnancy and then by critically considering the quality of their contribution towards the end goal of effective law reform. Engaging in a critique of each of the authors' suggestions at this point in the thesis has the added benefit of clarifying a number of South African legal principles that will aid the overall purpose of the thesis to develop an effective way forward

[3] Only current suggestions for reform are considered in this chapter, "current" indicating South African scholarly publications dating back to no later than 2008 since it was in 2008 that a South African court heard its first criminal law case which confirmed that the unborn lack legal status and cannot be victims of criminal conduct, see *S v Mshumpa* 2008 (1) SACR 126 (E). This case seems to have sparked academic debates concerning pregnant women, pregnancy more generally, and the unborn.

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regarding the tension that can arise between female autonomy and foetal interests during pregnancy.

7 2 Underlying Motivations for Law Reform

Before looking at the various areas that are allegedly in need of reform, it is necessary to first consider the underlying reasons why reform is seen to be necessary and what mechanism serves as the best mechanism to bring about reform.

There is general consensus among all the South African authors' calls for reform considered in this chapter in that they all aim to extend direct legal protection to the unborn, as legal subjects or quasi-legal subjects,[4] but in different spheres of the law. Since South African law primarily adopts a single-entity approach to pregnant women, thereby making the unborn non-entities, there is a perception that little room is left to allow for the law to be used as a mechanism to ensure healthy foetal-related outcomes during gestation and birth. Thus, if the law does not recognise the existence of a foetus it cannot be called on for their protection.

7 2 1 Medical science as an informative instrument

All the South African authors advocating reform rightly emphasise that there is more to a pregnant woman than just the woman alone and essentially argue that the unborn be recognised as more than nothing. In this respect, the law is seen to be out of sync with medicine, in that medical science has proven life before birth and despite this evidence, the law is still labouring under the construct of viewing a pregnant woman as embodying only one life, her own.[5] It is on this basis that the law is viewed as being

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4 "Quasi-legal subject" is used here because, even though some authors denounce a rights approach to protecting the unborn, they still argue for direct application of legal principles to the unborn. If one considers the meaning of legal subjectivity as including an element of legal interaction with a subject, these authors have essentially gone on to argue for a subcategory of legal subjectivity. Boezaart defines a legal subject as "any entity that can have rights, duties and competencies". Further, "legal subjectivity" is defined as "the characteristic of being a legal subject in legal interaction". See T Boezaart "Child law, the Child and South African Private Law" in T Boezaart (ed) *Child Law in South Africa* (2009) 4 and H Kruger & A Skelton (eds) *The Law of Persons in South Africa* (2010) 13 respectively.

5 For instance, Pillay explicitly takes this route. See, R Pillay "The Beginning of Human Personhood: Is South African Law Outdated?" (2010) 2 *Stell LR* 230 232.

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flawed and all the authors rely on and make reference to knowledge developed from science and medical technology which demonstrates that a foetus is more than mere maternal tissue.[6] The actual scientific and medical advancements relied on will not be considered here because this was sufficiently covered in chapter four of this thesis.[7] Generally, these sorts of arguments focus on medical knowledge pertaining to biological aspects of foetal development, how the foetus looks at varying stages of development and the medical understanding of foetal-genetic makeup, all of which point to the individuality of a foetus as a human being.[8] It is at this stage that we see those facets which contribute towards creating an adversarial pregnancy environment (as covered in chapter four) seep into legal arguments, thus readying the ground for possible pregnancy adversarialism.

An example of how these arguments play out are worthy of notice. Kruuse, discussing the notion of feticide in South Africa, makes reference to the fact that our "knowledge" of prenatal development is more developed than that of the Stoic notions of the unborn and we now understand and accept that foetal body parts belong to the foetus alone.[9] This means that we have come to agree that foetal body parts are not that of pregnant women's bodies, since that would mean that pregnant women have eight or more limbs, with two or more hearts, and some may even have penises, depending on the sex and number of foetuses being gestated at one time.[10] This knowledge is therefore not only interpreted as highlighting that a foetus is a distinct entity, but also demonstrates the extent of its distinctness, namely, that a foetus is a biologically whole individual. Kruuse argues that any legal policy that does not accord with medical

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6 G du Plessis "Feticide: Creating a Statutory Crime in South African Law" (2013) 1 *Stell LR* 73 77-78; S de Freitas "The South African Constitutional Court and the Unborn" (2012) 5(2) *IJRF* 56 51; Pillay (2010) *Stell LR* 232; S de Freitas & G Myburgh "The Relevance of Science for the Protection of the Unborn" (2009) 45(1 & 2) *TCW* 61 70-74; 76; H Kruuse "Fetal 'Rights'? The Need for a Unified Approach to the Fetus in the Context of Feticide" (2009) 2 *THRHR* 126 132. This trend is also found in case law. In *Mshumpa* the state used the expert evidence of a neonatal surgeon to prove that later in gestation the unborn are very much the same as children, the only difference being that they are located in women's bodies. On this basis, the state argued for the extension of the crime of murder to the unborn.

7 See ch 4 para 4 2 in this regard.

8 Some do so more explicitly than others.

9 Kruuse (2009) *THRHR* 126 131. See ch 2 concerning the topic how the unborn were perceived during antiquity and the Middle Ages.

10 Ibid. While Kruuse does not make specific reference to science and medical technologies, her position must be founded on medical technology because these are the areas that lead to the development of technologies that opened up living pregnant women's bodies for public scrutiny.

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knowledge of foetal individuality is founded on "one fiction too far",[11] the fiction being that the foetus has no independent existence because it is part of the woman who carries it.

Also, de Freitas and Myburgh state that science, driven by principles of objectivity, provides evidence of life before birth and that this life starts at conception, thus justifying extending protection of the unborn from abortion from the moment of conception.[12] The authors then go one to "clarify" the unborn through scientific evidence by looking at what science tells us about fertilization, implantation and foetal development from implantation in the uterus and onwards.[13] The authors conclude their scientific analysis of the unborn with the following:[14]

> When all the above [scientific] information is considered it is clear that according to science there is enough data available to make a firm case for the protection of the human being from the zygote stage and given what is presently known in embryology, we can do no less [references omitted].

In fact, de Freitas is so convinced of the role of scientific knowledge in identifying the unborn as distinct live entities that he asserts that when issues related to termination of pregnancy reach the Constitutional Court the Court will have no choice but to consider what science has to say when making a finding on the legal status of the unborn.[15] It is his position that if the Court considers science, it will be impossible to not extend legal protection to the unborn.[16]

There are many more examples but not all will be mentioned here since each author adopts the same method to justify recognising more in pregnant women, namely using science to identify and distinguish the unborn from the pregnant women carrying them. Thus far, what all the arguments rightly present to us is that South African law is not in line with scientific knowledge of prenatal life, in that there is certainly more to a

11 Kruuse (2009) *THRHR* 132.
12 De Freitas & Myburgh (2009) *TCW* 69.
13 De Freitas & Myburgh (2009) *TCW* 70-74. In fact, the authors go on to refer to the unborn as "children" and the women who carry them, as "mothers".
14 De Freitas & Myburgh (2009) *TCW* 74.
15 De Freitas (2012) *IJRF* 56.
16 Ibid.

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pregnant woman than a pregnant woman only. A foetus is understood to be biologically alive before birth, and even though in the process of development, it is genetically unique.[17] There is consequently an obvious need for reform. Accordingly, it is now necessary to go on and look at how South African scholars all propose law's inclusion of these findings when dealing with pregnancy and pregnancy-related issues under the law.

7 2 2 Manifestations of scientific knowledge in legal arguments pertaining to pregnancy: The separate-entities approach

With this changed, scientifically informed, image of pregnant women, the current South African trend is to favour the separate-entities approach to pregnancy over the currently applied single-entity approach.[18] To recap on the definition of the separate-entities approach as provided in chapter six: The separate-entities approach to pregnancy views a woman and her foetus as though they are separate individuals of distinctive value with separable needs.[19] In their separate existence, the pregnant woman and foetus are seen to hold a range of enforceable rights or interests,[20] ultimately leading to an understanding that the foetus is able to directly engage in legal relations for its own account or benefit, obviously not in its personal capacity but through others.[21]

There are a number of key pointers indicating that the authors are adopting the separate-entities approach despite none of them explicitly acknowledging this or without using this exact term. Commonly these indicators relate to the use of terminology or phrases which instil an image in the reader's mind of foetal separateness and independence.

17 C Pickles "Approaches to Pregnancy under the Law: A Relational Response to the Current South African Position and Recent Academic Trends" (2014) 47(1) *De Jure* 20.
18 Ibid.
19 J Seymour *Childbirth and the Law* (2000) 190; 194.
20 Ibid.
21 Pickles (2014) *De Jure* 20.

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Jordan[22] contemplates the appropriateness of respecting a woman's advance medical directive that prohibits treatment in the case where she is rendered unconscious and pregnant at the time that treatment is needed in order to sustain her life. Jordaan argues that the interests of a late-term foetus "should at least be considered and balanced against the interests of the incompetent [unconscious] mother who made the advanced directive refusing medical treatment".[23] The process of balancing of interests signifies two competing entities and this understanding is strengthened by the use of the term "mother".

"Mother" indicates that one of those entities is already a parent. Kruuse also makes reference to "mother" and uses the terms "unborn child" and "child" when describing the relationship between a pregnant woman and her foetus.[24] In fact, in *Mshumpa*, Froneman J makes several references to "mother" and at times "mother and baby" in respect of a pregnant woman.[25]

Understanding pregnant women as mothers goes to the core of the separate-entities approach. Generally, one is only understood to become a parent once birth has occurred. Thus, the use of the term "mother" in relation to a foetus (where birth has not yet occurred) encourages an image of a relationship of parent and child which image is representative of two separate persons. Roth, writing on the position in the United States, suggests that describing pregnant women as "mothers" before they

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22 L Jordaan "The Legal Validity of an Advanced Refusal of Medical Treatment in South African Law (Part 1)" (2011) 44(1) *De Jure* 32 45. While Jordaan's proposal for law reform is not being considered for purposes of this thesis, her use of specific terminology is a fitting example of the trend currently taking root in South Africa.

23 Jordaan (Part one) (2011) *De Jure* 44. Most of the South African authors considered in this chapter use the term "mother" to refer to pregnant women, including, du Plessis (2013) *Stell LR* 73; de Freitas & Myburgh (2009) *TCW* 73; M Ovens "A Criminological Perspective of Prenatal Abuse of Substances during Pregnancy and the Link to Child Abuse in South Africa" (2010) 11(2) *CARSA* 38.

24 Kruuse (2009) *THRHR* 131.

25 See paras 1-5; 10; 41; 48; 49; 57; 58; 64; 67. This is strange because as already discussed in chapter six, the *Mshumpa* decision actually represents the single-entity approach in that the "unique togetherness" of a pregnant woman and foetus was interpreted as not being sufficient enough, in a legal sense, to recognise the unborn in law (at least in the way that Froneman J interpreted the relationship that exists during a pregnancy). Froneman J did however suggest even though the law, as it currently stands, cannot accommodate the unborn, the legislature is better equipped to deal with the issue of violence against pregnant women which terminates their pregnancies (para 65). One can speculate that the terminology preferred by Froneman J can be interpreted as the Judge being personally swayed to viewing the unborn as something separate from pregnant women but the legal atmosphere prohibits such an approach. Since Froneman J is currently sitting as a Constitutional Court Judge his position is important to note, especially given that no case law has yet reached the Constitutional Court pertaining to the status of the unborn in South Africa.

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have even given birth turns the unborn into children and cultural expectations and legal standards pertaining to parental duty begin to influence the image of pregnant women.[26] Roth argues that viewing a pregnant woman as a mother ends with identifying the foetus as independent from her thus enabling the foetus to engage in "conflict" with the pregnant woman.[27] This stands true when we consider Jordaan's suggestion of balancing foetal interests against that of pregnant women refusing medical treatment.

Aside from using terminology that characterises the relationship between a pregnant woman and her foetus as one of separateness, there are further terminological references which are distinctive to the separate-entities approach. For instance Kruuse states: [28]

> [T]the fetus is a *distinct organism* from the mother and cannot be treated as a bit of human tissue comparable to her kidney, one of her appendages or her appendix. It is a *separate living organism*, whose destruction is something to be regretted in itself regardless of what happened to the mother carrying it. (Emphasis added.)

Further, de Freitas approvingly cites foreign sources to indicate that a foetus represents "another person".[29] Pillay states that allowing for the introduction of foetal rights "would give expression to the legal convictions of the community which demand *separate* protection of the foetus through laws proscribing murder and assault of the foetus".[30] (Emphasis in the original.) Du Plessis calls for the protection of the unborn "irrespective and independent of its location or relationship to the mother".[31] Pillay and du Plessis' suggestions imply that violent conduct directed towards the unborn is something distinct from that directed towards pregnant women, while in reality any conduct against the foetus will be experienced by a pregnant woman and conduct against a pregnant woman will impact on the foetus she carries.

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26 See R Roth *Making Women Pay: The Hidden Cost of Fetal Rights* (2000) 6.
27 Ibid.
28 Kruuse (2009) *THRHR* 131.
29 (2012) *IJRF* 56
30 Pillay (2010) *Stell LR* 237.
31 Du Plessis (2013) *Stell LR* 77.

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All the authors' positions considered thus far adopt an approach to pregnancy that clearly follows to the separate-entities approach, thereby highlighting a trend towards preferring this approach to the single-entity approach.[32] The unborn are identified and individuated from pregnant women based on scientific understanding of the prenatal development and this understanding transforms into language infused with legal undertones that feed into the notion that the unborn are entirely separate in their prenatal existence. References to notions such as "balanced against", "separate protection", "irrespective of relationship", "irrespective of location", "another person" all disconnect the unborn from pregnant women and the only time women are understood in the context of the unborn is when they are seen to be mothers.

It is generally contended that the separate-entities approach is necessary in order to achieve the ends of legal protection of the unborn and to follow is a discussion of the various areas where protection should be extended.

7 3 Areas Identified as in Need of Reform: Separate-Entities Approach in Action

Four themes have been identified as in need of reform, namely, status law pertaining to personhood, third-party violence that terminates a pregnancy (commonly referred to as feticide by South African scholars), substance abuse during pregnancy and liberal access to termination-of-pregnancy services. Each South African author considered in this chapter will be categorised according to one of these themes of reform, their suggestions are considered and then a critique follows.

7 3 1 Extending personhood to a viable foetus

Pillay's argument for reform is considered first because it is seen to be the most extreme and far reaching of all calls for reform. This is also the only argument that explicitly adopts an approach to the unborn that is rights based.

Pillay states that the born-alive rule's purpose was evidentiary in nature, she explains that at the time of the rule's development knowledge about prenatal life was

[32] This was discussed in Pickles (2014) *De Jure* 20.

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rudimentary and thus live birth was considered the only objective proof of the existence of life.[33] This rule then became the established criterion for personhood in law.[34] However since advancements in medical science, Pillay argues that we now have sufficient proof of life before birth which have removed the evidentiary difficulties the born-alive rule sought to remedy.[35] She argues that our current knowledge of foetal development also assists in determining the extent of any harm caused to the unborn in the case of violence against pregnant women.[36] It is on this basis that Pillay is critical of the common law and its approach to legal subjectivity, and also the fact that our courts have never questioned the continued relevance of the born-alive rule despite there being opportunities to do so.[37]

Pillay goes on to argue that we should consider non-legal factors, such as medical science, when assigning status to the unborn and calls for the legal concept of personhood to be extended to include at the very least, a viable foetus.[38] Consequently, she argues for the creation of foetal rights and she understands the attribution of rights as the appropriate mode to address those areas where foetal interests remain invisible to the law. She states:[39]

> In the abortion context, the attribution of foetal rights would constitute a radical departure from the prevailing legal position which focuses solely on the rights of pregnant women. [Footnotes omitted.] As this unequal power relationship is challenged, both the judiciary and the medical profession will have the opportunity to adopt a more transparent, principled and balanced approach in resolving maternal-foetal conflicts. In the non-abortion context relating to third party criminal acts directed against pregnant women, the attribution of foetal rights would give expression to the legal convictions of the community which demand *separate* protection for the foetus through laws proscribing murder and assault of the foetus. [Footnotes omitted.] In delict, attributing foetal rights would facilitate wrongful death claims based on a stillbirth caused by the negligent conduct of another … In each of these contexts, the attribution of foetal rights would

33 Pillay (2010) *Stell LR* 231.
34 Ibid.
35 Pillay (2010) *Stell LR* 232.
36 Ibid.
37 Pillay (2010) *Stell LR* 232-236.
38 Pillay (2010) *Stell LR* 236.
39 Pillay (2010) *Stell LR* 236-237.

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> facilitate judicial decision-making by enabling fiction and expediency to be replaced by fact, justice and reason. (Emphasis in original.)

Pillay's adoption of the separate-entities approach leads to the notion that a foetus is a separate legal subject with vested constitutional rights. She understands this application as being necessary to adequately protect a foetus from the pregnant woman who carries it and third parties such as perpetrators of assault or murder and negligent medical professionals. However, there are a number of flaws to Pillay's argument for the extension of rights to the unborn.

As demonstrated in chapter six,[40] there are no "maternal-foetal conflicts" at present in South Africa since we are yet to accept pregnant women as representing two separate entities.[41] Furthermore, it is only when the separate-entities approach is applied in a way that extends rights to a foetus that the true extent of "conflict" is observable. The discussion to follow demonstrates this point.[42]

To start, Pillay's depiction of the relationship between a pregnant woman and her foetus as one being characteristically unequal in the context of termination of pregnancies, cannot be supported. Academic commentary on the Choice on Termination of Pregnancy Act[43] (Choice Act) and the decision of *Christian Lawyers Association v Minister of Health*[44] (*Christian Lawyers* 2005) demonstrates that this is certainly not the case.[45] We would only find an unequal power relationship if the Choice Act was not in place and termination of pregnancies were severely restricted[46] or if there was no law limiting the right to terminate a pregnancy thus permitting women to terminate right up the moment of birth. In these instances the unequal power relationship would exist because those preventing terminations for the benefit of the unborn would have greater say over women and their bodies than the women would

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40 Para 6 4.

41 At most it can be argued that a conflict exists in the mind of a person personally observing a pregnant woman engage in conduct that the viewer finds offensive towards prenatal life. The pregnant woman's conduct might be viewed as offensive based on the viewer's subjective perceptions of what is or is not appropriate behaviour during pregnancy, but this subjective view has not been translated into legal conflict.

42 These arguments are taken from Pickles (2014) *De Jure* 20.

43 Act 92 of 1996.

44 2005 (1) SA 509 (T).

45 This was discussed extensively in ch 6 para 6 3 2.

46 As was the case under the Abortion and Sterilization Act 2 of 1975.

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have for themselves or, alternatively, women would have greater say over their bodies to the detriment of foetal life.

Concerning the notion of foetal rights providing legal leverage for the protection of the unborn, both Kruuse and McCreath J take the stance that granting rights to a foetus can certainly offer protection, particularly against unfavourable conduct during pregnancy.[47] In *Christian Lawyers of SA v Minister of Health*[48] (*Christian Lawyers* 1998) per McCreath J, it was found that *if* the right to life in section 11 of the Constitution were to be interpreted as applying to a foetus, a foetus would have a separate claim to life and the lawful termination of a pregnancy would ultimately constitute murder, even if the termination of a pregnancy were medically indicated to preserve the life of the pregnant woman concerned.[49] Kruuse takes a more nuanced approach and asserts that if a foetus is vested with legal subjectivity and thus the right to life, it would mean that the right to terminate a pregnancy would be impossible to justify except where the pregnant woman's life is in danger.[50] Later on, Kruuse explains that the unborn's right to life is a right that is not capable of being outweighed by a woman's rights generally, meaning that the unborn's right to life will always take preference over women's rights (aside from her right to life).[51]

The separate-entities approach, applied in this way, seems to create a situation where Pillay's "maternal-foetal conflicts" are done away with because the right to life will always hold more weight than rights vested in others, including that of pregnant women (as emphasised by Kruuse and McCreath J).[52] All three of these positions therefore complement the premise that a rights-based approach could possibly serve as a workable method for the protection of a viable foetus.[53] However, further reflection

47 Although, it must be noted that both suggest not taking a rights-based approach.
48 1998 4 SA 1113 (T).
49 1122 I. Here, the court understands that where a foetus is granted rights it could use those rights as a means to protect itself from termination of pregnancy for any reason whatsoever. However, it must be recognised that this position is unfounded, since principles of private defence (if a fatal pregnancy is construed as an attack on a woman's body) or necessity justify the termination of a pregnancy in cases where continued pregnancy poses a threat to a woman's life. See C Snyman *Criminal Law* 5 ed (2009) 103-123 for a detailed discussion of private defence and necessity as grounds of justification.
50 Kruuse (2009) *THRHR* 133.
51 Kruuse (2009) *THRHR* 135.
52 Pickles (2014) *De Jure* 20.
53 Ibid.

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on this issue brings a different perspective to the fore, especially in the context of Thomson's article, "A Defense of Abortion". [54]

Writing from United States, Thomson offers a thought provoking, if extreme, counter argument to the above described position, and her work is so well known[55] that it is not clear why her publication was not considered by those contemplating the consequences of foetal rights.[56] Thomson uses the example of waking up to find that a violinist has been attached to your body in order to gain the benefit of the function of your kidneys, and this attachment was necessary for purposes of keeping the violinist alive.[57] The crux of the issue is that the violinist was attached to your body without your consent.[58] Her entire article revolves around this hypothetical anecdote and she raises challenging questions as to whether anything can be done to remove the attachment even though removal will result in the violinist's death.[59]

In this context, Thomson goes on to suggest that we imagine the unborn as legal persons with the right to life (like the violinist) and further suggests that, generally, the right to life includes the right to be given at least the bare minimum one needs for continued life.[60] Thomson then poses the following challenge: What would the case be where the bare minimum one needs to sustain life turns out to be something that that one does not have a right to?[61]

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54 J Thomson "A Defense of Abortion" (1971) 1(1) *Philos Public Aff* 47. While this chapter is not focused on justifying termination of pregnancies, Thomson's argument transcends the abortion debate and has application in any argument that attempts to accord rights to the unborn.

55 According to Google Scholar, and as at 20 December 2013, Thomson's article has been cited 1119 times. See <http://scholar.google.co.za/scholar?hl=en&q=Thomson+%22&bntG=&as_sdtp=> (accessed 20 December 2013). Also see C Kaczor *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice* (2010) 145 who cites Thomson's article as "the most famous article ever written about the subject of abortion." This is not to say that her work is unquestionably accepted, for instance see D Boonin *A Defense of Abortion* (2003) 133-276. Boonin, while defending Thomson's position, cites and discusses 16 different objections to Thomson's argument.

56 The only authors cited in the chapter that refer to Thomson is de Freitas and Myburgh (2009) *TCW* 69-70 and du Plessis (2013) *Stell LR* 88. Although, these authors only cite authority that takes a stand against Thomson's position. The authors are in opposition to Thomson because they are attempting to justify protection of the unborn without adopting a rights approach. Their approach could have possibly been motivated by Thomson's convincing argument in that a rights approach may be legally problematic and overly complex for anyone seeking to protect the unborn on that basis.

57 Thomson (1971) *Philos Public Aff* 48-49.

58 Ibid.

59 Thomson (1971) *Philos Public Aff* 47-50.

60 Thomson (1971) *Philos Public Aff* 55.

61 Ibid.

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This question becomes relevant when, for purposes of sustaining life, one needs continued use of another's body: The problem is, the mere presence of need does not create an enforceable right against another. Thomson contends that:[62]

> [N]obody has the right to use your kidneys unless you give him such a right; and nobody has the right against you that you shall give him this right - if you do allow him to go on using your kidneys, this is a kindness on your part, and not something he can claim from you as his due. Nor has he any right against anybody else that *they* should give him continued use of your kidneys. (Emphasis in Original.)

Ultimately, Thomson's argument is that having the right to life does not guarantee the use of that right.[63] Where right of use is provided, it is done because one is a "Good Samaritan".[64] Thomson views continued pregnancy as women acting as Good Samaritans in that there is no legal obligation on them to make the sacrifices that are necessary in order for the unborn to sustain prenatal life.[65] In this respect, Thomson questions whether engaging in voluntary sexual intercourse is an indication of consent to a resulting pregnancy thus giving rise to an obligation, and she answers this in the negative.[66] Thomson states:[67]

> If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say, 'Ah, now he can stay, she's given him a right to the use of her house – for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle.

Similarly, Karnein argues that although women may be partly responsible for conception, given that contraception is arguably readily available in this day and age, there is a limit to the amount of responsibility that can accrue for something that women

62 Thomson (1971) *Philos Public Aff* 55.
63 Thomson (1971) *Philos Public Aff* 56.
64 Generally Thomson's argument is cited as the "Good Samaritan Argument", see Boonin *A Defense of Abortion* 133.
65 Thomson (1971) *Philos Public Aff* 63.
66 Thomson (1971) *Philos Public Aff* 57-58.
67 Thomson (1971) *Philos Public Aff* 58-59.

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would have to go out of their way to prevent especially if what is being prevented is a natural process of reproduction.[68] She explains:[69]

> [W]hile persons can be asked to make significant sacrifices to save those they have deliberately pushed into the water, women cannot be asked to provide a substantial amount of assistance to someone who came into existence because they did not prevent a 'natural' process from occurring.

Thomson's argument holds true in South Africa *if* legal personhood were to be extended to include a viable foetus. There is no known South African case law or legislation that compels another to forsake their bodies, or portions thereof, in order for another to sustain his or her life. Pickles and Labuschagne,[70] drawing from laws regulating medical donation,[71] argue that, generally, no one has a claim to another's body without that person's informed consent, and they demonstrate this to be a well-established principle under South African law. On that note, Pickles and Labuschagne warn that this principle acts to the detriment of any aims to protect the unborn as legal persons.[72]

Since the unborn live off the body of pregnant women and gain the benefit of pregnant women's bodily functions, a pregnancy can be understood as representing a relationship of donation because one person is using another person's body to sustain

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68 A Karnein *A Theory of Unborn Life: From Abortion to Genetic Manipulation* (2012) 24.

69 Ibid.

70 C Pickles & D Labuschagne *Pregnancy, Foetal Individuation, and Claims to Another's Body: Some Relational Issues in a South African Context* (2014) unpublished paper presented at a conference of the Society of Law Teachers of Southern Africa hosted by the Oliver Schreiner Law School at the University of Witwatersrand 15 January 2014 (copy on file with the author). The argument presented here stems from research conducted by Labuschagne. She was commissioned to research the topics of donation and use of another's body, and assisted in linking these concepts to continued pregnancy.

71 Specifically, the National Health Act 61 of 2003, and case law and common law principles relevant to informed consent.

72 Pickles & Labuschagne *Pregnancy, Foetal Individuation, and Claims to Another's Body*. One of the most concerning consequences of this approach is that creates the space to voluntarily terminate viable but pre-term pregnancies, and this cannot be seen as serving important developmental needs of foetuses. Pre-term deliveries pose a number of health issues, and long-term medical and social risks. See M Pignotti & G Donzelli "Perinatal Care at the Threshold of Viability: An International Comparison of Practical Guidelines for the Treatment of Extremely Preterm Births" (2008) 121 *Pediatrics* 193; D Moster, R Terje Lie, T Markestad "Long-term Medical and Social Consequences of Preterm Birth" (2008) 359 (3) *New Eng J Med* 262. This can hardly be seen as a positive outcome associated with foetal rights.

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life.[73] Accordingly, if the unborn were persons, they would need pregnant women's informed consent to continue gestating.[74] The principle of informed consent requires that in order for the consent to be informed, the person must have knowledge and appreciation for what is being consented to prior to the donation.[75] Given that pregnancy is fairly unpredictable in terms of what resulting procedures may be necessitated by deciding to be pregnant, it is their contention that no true informed consent can ever be actually be obtained.[76] This leads to the very extreme position that where informed consent is lacking,[77] as would be the case for all pregnancies (even planned ones), the person whose body is being used is essentially being assaulted.[78]

It must be emphasised that the author of this thesis does not adopt this extreme approach. This discussion serves to demonstrate how far reaching Pillay's proposal extends the potential for conflict between the unborn and pregnant women, if it were to be adopted and current South African principles were to be applied as if the unborn were legal persons. Thompson's work clarifies the extreme implications of Pillay's proposal. These far-reaching implications serve as the very reason why the author rejects Pillay's argument since the aim of this thesis is to advance both pregnant women and the interests of the unborn; this scenario is recognised as doing neither.

This discussion shows that Pillay's rights-based argument is problematic when it comes to offering protection to a viable foetus since vesting of rights does not always

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73 Pickles & Labuschagne *Pregnancy, Foetal Individuation, and Claims to Another's Body*. See s 56 of the National Health Act which makes provision for the donation and use of living persons' tissue, being blood, blood products and gametes.

74 As required in terms of s 6 and s 7, read together with s 55 and s 66 of the National Health Act.

75 Pickles & Labuschagne *Pregnancy, Foetal Individuation, and Claims to Another's Body*.

76 Ibid.

77 For consequences of having not obtained informed consent, see P Carstens & D Pearmain *Foundational Principles of South African Medical Law* (2007) 890-891.

78 Here, Pickles & Labuschagne refer to *Palmer v Palmer* 1955 3 SA 56 (O); *S v Goliath* 1972 3 All SA 69 (A); *Castell v de Greef* 1994 4 SA 408 (C).Viewing pregnancy as an assault is typical of older-generation pro-choice feminists, see B Manninen "The Value of Choice and the Choice to Value: Expanding the Discussion about Fetal Life with in Prochoice Advocacy" (2013) 28(3) *Hypatia* 663. Manninen identifies Thomson as one of these sorts of feminists (664) and she explains that older-generation pro-choice feminists have equated the unborn to an "aggressive intruder" (664) and cites one pro-choice feminist as arguing that "all cases of compelled pregnancy are morally akin to rape and kidnaping, since the fetus intrudes upon the body of the woman without her consent". However, Manninen points out there is now a move away from such extreme oppositional standpoints and this thesis serves as such an example.

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offer any tangible guarantees for the realisation of those rights.[79] A separate-entities approach applied in this way manifestly introduces conflict and creates an environment for head-on adversarialism between a pregnant woman and her foetus.[80] What becomes obviously clear is that an adversarial pregnancy environment encouraging tensions during pregnancy is in sight when approaching pregnancy through the lens of the separate-entities approach as the basis to extend rights to the unborn.

7 3 2 Feticide or foetal-protection from third-party violence that terminates prenatal life

The calls for reform considered under feticide are all in reaction to the *Mshumpa* decision and the perceived injustice stemming from the outcome of that case in that the law failed to recognise the loss of prenatal life as a result of unlawful violent conduct inflicted on a pregnant woman. Basically, this case highlights that as the law stands in South Africa there is no crime to address the termination of a pregnancy without the pregnant woman's consent. Kruuse and du Plessis both adopt the separate-entities approach in their contribution to the discourse of reform in this area of law but each offer different possible avenues to address the *Mshumpa* outcome.

7 3 2 1 Du Plessis' suggested statutory crime of feticide

Du Plessis interprets *Mshumpa* as offering indirect protection to the unborn and rejects that approach as being insufficient.[81] Indirect protection is seen to be insufficient because the crimes of assault and attempted murder[82] only recognise that such violent conduct constitutes a violation of the woman's rights to bodily integrity and life.[83] Merely considering the termination of prenatal life as an aggravating factor during the sentencing phase obscures the loss of prenatal life. Du Plessis argues that given that the purpose of criminalising certain conduct is to protect and maintain public order, approaching circumstances similar to that of *Mshumpa* as merely being assault or attempted murder of the pregnant woman is not sufficient where "the mother and the unborn are [both] injured or killed".[84]

79 Pickles (2014) *De Jure* 20.
80 Ibid.
81 Du Plessis (2013) *Stell LR* 74-75.
82 Attempted murder being one of the crimes that Mshumpa and Best were convicted of, see *Mshumpa* para 67.
83 Du Plessis (2013) *Stell LR* 75.
84 Ibid.

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For purposes of protection, du Plessis understands the requirement of live birth to constitute a mere "technicality" since "birth is only a change of place and relationship to the mother and surrounding world".[85] She understands birth to be a technicality because if a 38-week foetus dies prior to birth as a result of the infliction of grave harm, there is no wrong-doing,[86] whereas, if the same foetus is seriously harmed, delivered alive and later dies of the same injuries, the crime of murder comes into play.[87] In both instances we are dealing with the same entities in respect of their developmental attributes but one is protected and the other is not, and this difference is linked to birth. Du Plessis also disagrees that foetal viability is relevant for protection, she states: "There is no rational reason why the fact that the unborn is able to survive outside the mother's womb, should be a determining factor for protection of the unborn".[88] She argues that protection from feticide from fertilisation onwards offers more sensitivity to the position of the unborn as human beings; birth and viability are rejected by du Plessis as being irrational indicators of the humanness of the unborn.[89]

Contrary to Pillay's approach to protecting the unborn, du Plessis argues that we should move beyond using the concept of personhood as a means to understand the unborn as human beings in law, but she qualifies this and states that this sort of move should not be understood as advocating the extension of the right to life to the unborn generally.[90] She understands that the avoidance of a rights approach aids in overcoming any possible confrontation with women's termination-of-pregnancy rights granted under the Choice Act.[91] However, du Plessis leaves her argument there. While

85 Du Plessis (2013) *Stell LR* 76.
86 Ibid.
87 Du Plessis (2013) *Stell LR* 76.
88 Du Plessis (2013) *Stell LR* 78.
89 Ibid.
90 Du Plessis (2013) *Stell LR* 76. As with Pillay, she also discredits the application of born-alive rule in respect of its rule in determining personhood.
91 Du Plessis (2013) *Stell LR* 76. This is very surprising coming from du Plessis because in 2009 du Plessis co-authored an article with de Freitas under her maiden name Myburgh (de Freitas & G Myburgh (2009) *TCW* 61) where she and de Freitas argue for the protection of the unborn from termination of pregnancy. (They both argue for protection from the moment of conception. Their arguments on termination-of-pregnancy law reform are discussed below.) This may indicate that du Plessis has developed her position to take a more nuanced approach towards pregnancy-related concerns. If that is not the case, her arguments can be interpreted as being ambiguous. This means that in one area of law she argues that there is a need to protect the unborn from third-party violence in a way that keeps pregnant women's termination-of-pregnancy rights intact, while in another area of law she argues for the protection of the unborn from termination of pregnancy the moment of their conception. While this ambiguity might seem strange at first, this is also a well-known tactical

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she encourages one to adopt an approach to the unborn beyond the bounds of our Constitution and its rights, she does not suggest what legal mechanisms one should use to justify the protection of the unborn or how to implement this.[92] She suggests that "to be inclusive and rational regarding feticide arguments, it is necessary to expand the argument to more than human rights" and include considerations such as science, public interests, protection of pregnant women from violence and the protection of "sentient beings", amongst other possible considerations.[93]

Du Plessis argues, "[i]t will be best to provide protection to the unborn irrespective and independent of its location and relationship to the mother".[94] She argues this can be achieved through the creation of a statutory crime of feticide allowing for the direct protection of the unborn, thus calling for the recognition of the unborn (from conception onwards) as separate victims of violent crime in their own right.[95] Du Plessis goes on to define feticide as the "unlawful and intentional or negligent causing of the death of an unborn by a third party and without the consent of the pregnant woman bearing the unborn".[96] (Footnotes omitted.) This construction of feticide focuses on lack of consent on part of the pregnant woman concerned and emphasises third-party conduct, thereby exempting pregnant women as possible perpetrators.

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approach adopted by pro-life advocates in the United States. This means that while working on rendering termination of pregnancy illegal, they advocate for reform in all other areas of law in order to extend the status of the unborn in every possible avenue, this is discussed in more detail in ch 8 para 8 4. In personal communication with du Plessis via electronic mail (5 July 2014) du Plessis clarifies her position in this regard. She emphasises that her argument for the introduction of a crime of feticide is not being used as a means to protect the unborn in this area of law for later protection against liberal termination-of-pregnancy laws in South Africa. She explains that in the context of feticide, a pregnant women's interests and that of the unborn are aligned, "the rights and interests of both are not placed in tension with each other and an emphasis on the one-sided protection of the mother to the exclusion of the unborn is not needed". Concerning issues with "alignment of interests" argument, see ch 9 para 9 3 2. She explains that her primary position is focused on securing the right to life for the unborn but that she adopted the argument that she did for her feticide position in order to "stay away from the personhood argument since it creates such a deadlock position that one will struggle to have any rights for the unborn. Also, attempting to move away from the right to life argument is actually an attempt to provide the unborn and mother some protection because the right to life argument has not been helping thus far. Therefore, I am looking at alternative arguments to the right to life issue – however, this does not mean that I do not believe that the unborn should have the right to life." There is a sense of uncertainty in her position and it seems to relate to the difficulty one faces when discussing the unborn in a women's rights arena. The difficulty links to the fact that the unborn have been individuated from the women carrying them which is a poor representation of the reality of pregnancy.

92 Du Plessis (2013) *Stell LR* 87-90.
93 Du Plessis (2013) *Stell LR* 90.
94 Du Plessis (2013) *Stell LR* 76-77.
95 Du Plessis (2013) *Stell LR* 74-75.
96 Ibid.

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There are a number of issues with du Plessis' call for reform. Du Plessis' discontent with the Constitution and constitutional rights in the context of the unborn, leaves her position vulnerable because the Constitution is the supreme law,[97] it provides the framework in which our entire legal system functions. Therefore, from a practical perspective it is uncertain how one would effectively provide for the legal protection of the unborn but do so beyond the reach of the Constitution.

Furthermore, du Plessis understands it to be important to avoid a rights-based approach to protecting the unborn so as to prevent pregnant women and the unborn being placed in conflict with one another.[98] At first glance, this seems to be the right step towards avoiding an adversarial pregnancy environment, however, the very fact that she adopts the separate-entities approach to pregnancy could lead to the demise of her argument. This is because the separate-entities approach opens the door for women to be perpetrators towards the unborn since the unborn and pregnant women are regarded as separate entities in relation to one another, each with individualised legal protection. This is especially true because du Plessis argues for the protection of the unborn *irrespective* of their relationship to pregnant women and *independent* of women as well.[99] Thus if the biological relationship or embodied connectedness is not considered relevant when understanding harm caused to the unborn, there is nothing preventing a woman from being a perpetrator in relation to her own foetus.

There is some ambiguity in du Plessis' approach. It seems that the basis for du Plessis' exclusion of women from the ambit of the crime of feticide lies in the fact that the unborn are located within their bodies which then allows them to terminate pregnancies, she thus relies on the relationship between pregnant women and the unborn as the mode of exclusion of women. This exclusion contradicts du Plessis' original arguments concerning viewing the unborn as a distinct entity worthy of separate legal consideration. Thus, in order to prevent "creating a dichotomy with regards to South African laws concerning voluntary abortion",[100] du Plessis would not

[97] S 2 of the Constitution states: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".
[98] Du Plessis (2013) *Stell LR* 76.
[99] Du Plessis (2013) *Stell LR* 77.
[100] Du Plessis (2013) *Stell LR* 76.

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only have to avoid extending rights to the unborn but also would have to understand the unborn as being something intrinsically linked to the essence of pregnant bodies belonging to women. Essentially, she would have to deny the unborn separate status. It is necessary to take this stance because if the unborn are still, to some degree, seen to be part of pregnant women's bodies, only then would women still be entitled to terminate their pregnancies because that action would be a form of women's exercise of bodily autonomy.

Taking this further, it is not clear how and on what justifiable ground only third parties can held liable for harm caused to the unborn and not pregnant women when they terminate a pregnancy, especially when the same outcomes are experienced by the unborn, namely an infringement of their safe progressive development or termination of prenatal life. If harm towards the unborn serves as the foundation for reform, then the fact remains that it is not essential *who* commits the act that harms an entity but rather it is the fact that harm is inflected when certain conduct takes place. It is understood that protecting and maintaining public order refers to conduct that is perceived to be harmful, and not specifically who conducts themselves in a harmful manner. Also, it is not clear what du Plessis proposes the case would be where women consent to the termination of their pregnancies by a third party but outside the bounds of the Choice Act. The same ends are achieved, namely harm to the unborn, but the crime of feticide would not be applicable because the woman concerned consented.

Du Plessis offers an intriguing and thought-provoking perspective on violence that terminates prenatal life but her suggestions leave the reader with a sense of uncertainty. While advocating protection of the unborn she has inadvertently offered a contradictory response. If the reason for protecting the unborn lies in the fact that they are separate human beings (but not legal persons with rights) and should not be harmed on that basis then it should not matter who harms the unborn, it is the mere fact of harming them that is of grave concern. Aside from this concern, her publication assists in highlighting how complex this issue can be and how many facets come into play when attempting to go forward.

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7 3 2 2 Kruuse's suggested statutory crime of feticide

Kruuse, writing in 2009, suggests that before we look at how to best protect the unborn, it is first necessary to develop a "unified approach" towards how we view the unborn in law.[101] She was not referring to du Plessis' arguments, but to the state's actions after the *Mshumpa* decision had been reached.[102] However her suggestion does impact on du Plessis who seems to have her roots in the separate-entities approach but is at odds with its possible far reaching implications, thus falling short in translating her suggestion into a workable solution.

Kruuse, also dissatisfied with the indirect foetal protection stemming from *Mshumpa*, rejects the single-entity approach and calls for the introduction of the crime of feticide, being a crime that can be perpetrated against the unborn only.[103] She justifies this approach on the grounds that the unborn is something distinct from the pregnant women who carry them. Kruuse is critical of Froneman J's use of the unique relationship shared between a pregnant woman and the foetus she carries since this "unique togetherness" is used as a ground to deny the opportunity for direct legal protection of the unborn.[104] She argues that this approach is "inadequate" since "if we recognise, as most of us do, that the fetus is a potential life: a separate organism which will, all things being equal, in due course become a life, and that we value life" then we are obligated to provide direct protection.[105]

Kruuse rejects constitutional rights as being necessary for the protection of the unborn and turns to the value of human dignity (symbolising inherent human worth) as warranting her call for direct separate protection.[106] As with du Plessis, Kruuse avoids a rights-based approach for the protection of the unborn because she understands it

[101] Kruuse (2009) *THRHR* 128.
[102] Ibid. Kruuse explains that, after Froneman J found that the crime of murder was not applicable to the unborn, the state planned to challenge the correctness of Froneman J's findings implying that they understood a viable foetus to be a legal subject. However, the state then approached the South African Law Reform Commission instead, seeking to develop a statutory crime to address circumstances similar to that of *Mshumpa* implying that a viable foetus is not a legal subject but still represent something in need of protection.
[103] Kruuse (2009) *THRHR* 126.
[104] Kruuse (2009) *THRHR* 132. It was Froneman J's finding that harm caused to a foetus can be adequately addressed as crime inflicted on the pregnant woman carrying the foetus since the foetus will also suffer the harm as a result of their "uniquely togetherness".
[105] Ibid.
[106] Kruuse (2009) *THRHR* 134-136.

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to create an environment where women's rights to terminate their pregnancies would be in competition with that of the unborn's right to life.[107]

Approvingly relying on Meyerson's comments on the Choice Act,[108] Kruuse argues that human life is intrinsically valuable and this value remains intact despite an entity, such as the unborn, lacking legal subjectivity or rights.[109] Kruuse identifies the constitutional value of dignity as accommodating this principle in a legal context.[110] Thus when one terminates a pregnancy it is a violation of the value of human dignity. Kruuse contends that valuing the unborn because they are representatives of human life avoids the "inevitable clash between the rights of the mother and fetus" because "[w]hen it is not the fetus's right to life which is at stake, but the value of human dignity, this value (unlike the right to life) is capable of being weighed against – and outweighed by – the pregnant woman's rights".[111] Kruuse is satisfied with this approach since it does not deny women their rights and at the same time it still allows us to recognise and protect the unborn.[112]

Having identified the value of human dignity as the reason why the law should directly protect the unborn (as opposed to Froneman J's indirect approach), Kruuse stops there. She leaves the "practicality" of formulating a definition of the crime of feticide to legislature.

Kruuse does not go so far as to suggest possible wording for a statutory crime which makes it difficult to critique her contribution. Nevertheless, some reservations to her argument can be noted. These reservations relate to her adoption of principles arising from the Choice Act and the use of the value of dignity generally.

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[107] Kruuse (2009) *THRHR* 133.
[108] See generally, D Meyerson "Abortion: The Constitutional Issues" (1999) 116 *SALJ* 50.
[109] Kruuse (2009) *THRHR* 135.
[110] Kruuse relied on D Meyerson "Abortion: The Constitutional Issues" (1999) 116 *SALJ* 50 and cites s 39(1) of the Constitution which provides that when interpreting the Bill of Rights one must do so in a way that promotes the value of dignity, amongst other values. Meyerson was discussed in detail in ch 6 para 6 3 2 3.
[111] Kruuse (2009) *THRHR* 135.
[112] Ibid.

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Kruuse[113] relies on Meyerson's commentary of the Choice Act and her construction of the role of the value of dignity in the context of the Act,[114] to develop what Kruuse understands to be the necessary structure which will ensure that when we approach the topic of the unborn in South Africa, we do so in a manner that is consistent across the board, whether it be lawful terminations of pregnancies or feticide. However, this aim for consistency is frustrated at the start as a result of her interpretation of the Choice Act.

As already argued in chapter six of this thesis, the Choice Act views pregnant women as embodying not only one entity but not two completely separate entities either.[115] With this in mind, with Kruuse moving away from connectedness as a source of protection of the unborn, she interrupts consistency when she advocates for understanding the unborn as something separate from pregnant women, and in that separateness she advocates for direct protection of the unborn on the basis of the value of dignity. The Choice Act does not take that approach: The unborn are recognised but the influence of this recognition is limited by the unborn's relationship to pregnant women and their rights to terminate their pregnancies. Kruuse, therefore, cannot rely on Meyerson's arguments regarding termination-of-pregnancies laws in South Africa because her approach is in direct opposition to that understanding of how the Choice Act functions.

Furthermore, Kruuse's application of the value of dignity as the primary source for direct protection of a separate, non-constitutional entity, is questionable. Using the value of dignity as the only basis for the enactment of legislation, leads to the understanding that Kruuse is adopting the value of dignity as a means to create enforceable claims in law. According to Kruuse's adopted position, if the value of dignity can be used to protect the interests of the unborn in the context of lawful termination of pregnancies then it can also be used in the context of a statutory crime of feticide. While the value of dignity is viewed as being relevant, the author of this thesis is critical of the use of the value of dignity in the way that Kruuse uses it.

[113] Kruuse (2009) *THRHR* 134.
[114] See Meyerson (1999) *SALJ* 50.
[115] Para 6 3 2 1.

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First, it is questionable whether constitutional values on their own lead to enforceable claims and on this basis it is also doubtful that the value of dignity as applied in the Choice Act is being applied in the same way that Kruuse is attempting to use it in feticide. However, this position is not arguing that the value of dignity does have a role to play in the protection of pregnancies from violence but it is the *method of application* that is in question here. In order to distinguish between the use of the value of dignity in the context of termination of pregnancies and its use in the context of feticide, it is necessary to briefly go back to the basics concerning dignity as a constitutional value.

As a value, human dignity is described as one of the founding values of the Republic of South Africa,[116] the rights contained in the Bill of Rights affirms dignity as a democratic value,[117] dignity serves part of the process of justifying the limitation of rights in the Bill of Rights,[118] and it also aids in interpreting of these rights.[119] When looking at the role that the constitutional value of dignity plays, Woolman[120] directs us to Chaskalson CJ's finding in *Minister of Home Affairs v National Institute for Crime Prevention and Reintegration of Offenders*.[121] Chaskalson CJ, responding to the applicants' argument that the values mentioned in founding clause of the Constitution are absolute and not subject to limitation, stated:[122]

> The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. *They do not, however, give rise to discrete and enforceable rights in themselves.* This is clear not only from the language of s 1 itself, but also from the way the Constitution is structured and in particular the provisions of section 2 which contains the Bill of Rights. (Emphasis added.)

[116] S 1(a) of the Constitution.
[117] S 7(1) of the Constitution.
[118] S 36 of the Constitution.
[119] S 39 of the Constitution.
[120] S Woolman "Dignity" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 12 2005) 36-23
[121] 2005 (3) SA 280 (CC). This case concerns the right to vote and the application of this right to those who are imprisoned and serving a sentence of imprisonment without the option of a fine. The Electoral Act 73 of 1998 was amended in such a way that it excluded prisoners from voting and the court had to address the constitutionality of such exclusion.
[122] Para 21.

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Woolman interprets this quote as meaning: Values are one thing, rights are another. The difference between the two lies in what each provides.[123] Woolman explains that while values shape the rules expressed in the Constitution, and those very rules will also shape our understanding of constitutional values, the difference between the two is that rights give rise to rules and enforceable claims, while values do not.[124]

From the above cited authority the following is submitted regarding the value of dignity as per the South African Constitution: Dignity as a right will give rise to enforceable claims but dignity as a value cannot. As a constitutional value,[125] dignity comes into play when constitutional rights are involved, usually when they are being interpreted or limited. Thus, in order for the constitutional value of dignity to have a part to play in shaping the law, the presence of constitutional rights (a rights element) is necessary. A rights element is necessary because without a right to interpret or limit, the value of dignity has no footing.

Bringing these findings into the context of the unborn in law, the value of dignity offers us a device to recognise the value of the unborn in law generally, since the concept of dignity is synonymous with human worth which attaches to all human life.[126] However, the Constitutional Court's application of the value does not allow for the value we vest in prenatal life generally[127] to be translated into enforceable legal claims. More specifically, on its own, the value of dignity does not provide the unborn with an individuated claim to protection from another's conduct.

Consequently, Kruuse's argument that the value of dignity is an adequate ground for the introduction of a statutory crime to allow for the independent protection of the unborn is difficult to accept. Even though dignity does inform the way forward, it will only have the desired impact in law if we engage with women as rights bearers. By

[123] Woolman "Dignity" 36-23.
[124] Ibid.
[125] As opposed to a general theory of human dignity.
[126] L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012).
[127] Another way of explaining this is to distinguish the constitutional value of dignity from the general philosophy of dignity. From a philosophical perspective, we value the unborn because they are part of humanity. The constitutional value of dignity then serves as a mechanism to translate that philosophy into a means of articulating that value in law which has legal weight. Kruuse seems to be relying purely on the philosophy of dignity and not so much the legal principle of the value of dignity as set out in the Constitution.

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focusing on the separateness of the unborn, Kruuse removed the only relevant rights-bearing agents in relation to the unborn, being pregnant women. She effectively removed the rights element required by the Constitutional Court. It is only once we have established that there are rights involved in a particular scenario, that the value of dignity can become relevant and have any legal influence. Consequently, there is a strong argument that feticide based on the value of dignity alone, as applied in the separate-entities approach, may not stand.

The Choice Act can be seen as being in contrast to Kruuse's feticide approach in that the Choice Act is based on women's rights, it thus has a rights element embedded. The Act is seen to adopt a not-one/not-two approach because there is recognition of the unborn meaning that pregnant women are more than one entity but not completely two separate entities. This stance is supported by the fact that recognising the unborn does not lead to absolute prohibition against termination of pregnancies for the benefit of the unborn. In determining the scope of women's rights to terminate their pregnancies, the value of dignity comes in as an interpretative tool, thus providing the opportunity to give legal credence to the value vested in the unborn through the application of the constitutional value of dignity. Therefore the value of dignity will only find application in a relational context, where at least one agent to the relationship is vested with constitutional rights.

This discussion demonstrates that violence against pregnant women that causes the termination of their pregnancies is more complex than merely arguing that the unborn are separate-entities because they are recognisable human beings and we can therefore protect them individually. As demonstrated when considering du Plessis' position, limiting the scope of the crime to third parties only is flawed especially if the motivation for reform lies in the prevention of harm to the unborn. Women who terminate their pregnancies and third parties who assault women both cause the same results, thus this limited application of the crime to third parties is hard to justify as legitimate. Also, Kruuse's position is problematic because the value of dignity needs constitutional rights in order for it to be an active, functional and influential legal

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principle, particularly in the context of the unborn.[128] Despite this, Kruuse does raise an import factor to consider, namely that when this issue is addressed it should be addressed in a unified manner. However, in both instances, the authors' refusals to recognise pregnant women's fundamental role in securing the legitimacy of the unborn's protection impedes the development of workable solutions.

7 3 3 Substance abuse during pregnancy as constituting child abuse

Ovens in the only known South African author to suggest law reform concerning protecting the unborn from the possible harms associated to substance abuse during pregnancy.[129] In the context of this discussion, substance abuse concerns the excessive use of legal and illegal substances which have the effect of changing the user's moods, feelings and perceptions, such as alcohol, prescription medication and other illegal psychoactive substances.[130] Further, Ovens explains that there are two different approaches to addressing substance abuse during pregnancy; the harm reduction approach (treatment approach) and the punitive approach.[131] The harm-reduction or treatment approach views substance abuse during pregnancy as a social welfare issue and the punitive approach views substance abuse during pregnancy as a crime.[132] The crime element of the punitive approach appears to lie in the fact that harm is caused to another and it is therefore submitted that the punitive approach follows the separate-entities approach, particularly when applied in the context of pregnancy.

Ovens points out that this area of pregnancy is problematic in that there is no information available concerning the incidence of substance abuse by pregnant

[128] The unborn are distinguished here from other legal subjects with vested constitutional rights because it is submitted that where a legal person finds that the value of their human worth (dignity) as being diminished by certain conduct, their constitutional rights will aid in determining whether there was in fact any infringement of primary rights (dignity, equality, and so on) and these rights will also justify the development of the common law or the enactment of certain legislation aimed at preventing further conduct that has the effect on diminishing their human worth. The same cannot be said for the unborn, because despite the fact that the constitutional value of dignity informs how we view the unborn in law, they are not vested with constitutional rights and therefore cannot, on their own, enforce or protect their human worth through the application of other primary rights.
[129] M Ovens "Maternal Substance Abuse in South Africa: An Area for Concern?" (2008) 1 *Acta Crim* 77; Ovens (2010) *CARSA* 38.
[130] Ovens (2008) *Acta Crim* 78.
[131] Ovens (2008) *Acta Crim* 77.
[132] Ibid.

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women in South Africa.[133] However, relying on statistical data on substance abuse generally, she indicates that there is a noticeable increase in demand for substance-abuse treatment and goes on to assume that this increase could probably also be an indication of an increase in substance abuse during pregnancy.[134] Furthermore, while research is available indicating the harmful effects of alcohol abuse on the unborn, there is no conclusive evidence signifying that drug abuse during pregnancy has harmful effects on those children born from drug-dependent women.[135] It seems that harms are present but the nature and extent of the harms are still the subject of further research.

Concerning known harms caused to the unborn as a result of substance abuse, Ovens highlights that those children who were excessively exposed to substances prenatally are smaller in body size, have low birth weight, are at increased risk of Sudden Infant Death Syndrome and suffer painful withdrawal symptoms.[136] However, there are also indications of longer lasting harms linked to behavioural problems such as learning disabilities, school failure, juvenile delinquency and homelessness.[137] In line with Ovens' findings, Häefele also notes the prenatal exposure to methamphetamine can result in abnormal infant behaviour, birth defects, noticeable change in brain structure, poor social adjustment and language defects.[138]

Unfortunately, many women are found to be unaware of the possible dangers or health-implications associated with substance abuse on the unborn.[139] Additionally, despite there being indications of possible harmful consequences associated to substance abuse during pregnancy, very little research exists on this topic in South Africa. Ovens states that currently, no treatment exists for addicted pregnant women

[133] Ovens (2008) *Acta Crim* 80.
[134] Ibid.
[135] Ovens (2008) *Acta Crim* 77-78. Research on the position in the United States also indicates that there is insufficient evidence proving that abusing certain substances is factually the cause of adverse pregnancy outcomes. Despite this dearth in evidence, and as counter-intuitive as this might seem to be for purposes of assigning criminal liability, women still face criminal prosecution in the United States for "harms" caused to their born babies who were exposed to illegal substances prenatally. This is discussed in detail in ch 10.
[136] Ovens (2008) *Acta Crim* 88.
[137] Ibid.
[138] B Häefele "An Explorative Study on the Impact of Prenatal Methamphetamine (TIK) Abuse on Early Child and School Behaviour" (2012) 1 *Acta Crim* 56 60.
[139] Ovens (2008) *Acta Crim* 80.

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and that many in-patient centres do not accept pregnant women.[140] She explains that most treatment programmes are unable to provide specialised medical services or support required by pregnant women necessitated by the presence of a pregnancy.[141] She also explains that some women may not seek help because of lack of access to transport, inadequate financial resources or there being no alternative care services for dependent children.[142] Further, some women may be concerned about the repercussions of seeking help, namely they fear domestic violence, criminal prosecution or losing their children to the foster-care system.[143] Ovens' research shows that some pregnant women are found to take responsibility for themselves and attempt to stop or reduce their substance abuse for the sake of the unborn.[144]

This stance towards substance abuse by pregnant women is very unnerving because drug dependency is understood to involve a biochemical process.[145] This means that drug dependency impedes an addict's efforts to successfully stop abusing substances thus necessitating the inclusion of medical assistance and proper rehabilitation programmes in order to effectively overcome dependency.[146] Aside from the issue relating to access to supportive drug-addiction treatment, self-reliance to overcome addiction is problematic because substance-abusing pregnant women are seen have extensive treatment needs in that they require training on effective parenting, they need to learn how to deal with pregnancy and come to understand the impact that substance abuse has on themselves and the unborn, and they need training on how to develop the necessary skills to provide for themselves and their children.[147]

Ovens' contribution indicates that substance abuse during pregnancy runs the risk of raising serious health concerns for pregnant women and the unborn and this issue therefore needs increased attention. It seems that the state is aware of the need to address concerns associated to addiction more generally and at the time of Ovens' contribution, the Prevention of and Treatment for Substance Abuse Bill was before

[140] Ovens (2008) *Acta Crim* 90.
[141] Ovens (2008) *Acta Crim* 91.
[142] Ovens (2008) *Acta Crim* 82.
[143] Ibid.
[144] Ovens (2008) *Acta Crim* 91.
[145] Ovens (2008) *Acta Crim* 82.
[146] Ibid.
[147] Ovens (2008) *Acta Crim* 91.

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Parliament to tackle this concern. The Bill has now been assented to and commenced in March 2013 under the title of Prevention of and Treatment for Substance Abuse Act (Substance Abuse Act).[148] Unfortunately, the Act does not address substance abuse during pregnancy.

The Substance Abuse Act takes on a harm-reduction or treatment approach towards substance abuse,[149] and sets out a number of guiding principles pertaining to the provision of treatment services. Section 4 of the Act requires that treatment services serve the best interests of substance abusers and those persons affected by substance abuse and the Act provides a number of measures to ensure this. Included in the listed measures is the obligation to respect the rights of human dignity and privacy, and substance-addicted persons must be understood as human beings in need, and all being vested with the potential to change.[150] Ovens interprets section 4 as meaning that any intervention must be approached in a way that is conducive to conciliation and problem-solving, and confrontational approaches should be avoided.[151] This interpretation is supported by section 9 of the Substance Abuse Act which states that prevention programmes must preserve the family structure, develop appropriate parenting skills and create awareness about the dangers associated with substance abuse, amongst other listed purposes.

Ovens is critical of the Act's ability to protect the unborn from exposure to harmful substances.[152] She interprets the Act as being too broad since it does not specifically deal with the consequences of substance abuse by pregnant women.[153] Ovens understands this Act as only serving the rights of women generally and views its provisions as failing in the protection of the unborn since they are not considered

[148] Act 70 of 2008.
[149] S1 of the Substance Abuse Act defines treatment as the "provision of specialised social, psychological and medical services to service users and to persons affected by substance abuse with the view to addressing the social and health consequences associated therewith". "Service users" refers to those persons abusing or dependent on substances and "persons affected by substance abuse" refers to any family or community member not abusing substances but requires services related to substance abuse.
[150] S 4(d) and (i)
[151] Ovens (2008) *Acta Crim* 85.
[152] Ovens (2008) *Acta Crim* 85.
[153] Ovens (2008) *Acta Crim* 85. The Act's silence on substance abuse by pregnant women may very well stem from the fact that this specific area of substance abuse has not been the subject of sufficient research.

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persons in law until birth.[154] This lack of recognition of the unborn therefore impedes one's ability to take their best interests into account despite the fact that according to Ovens the unborn can technically be classified as being affected by substance abuse since they are being gestated in bodies exposed to the substances.[155] Furthermore, she understands the requirement to avoid confrontation as being an impediment to the protection of the unborn.[156]

Ovens expresses concern over the fact that there is no legislation providing a legal basis to intervene in pregnancies in order to prevent harm to the unborn by substance-abusing pregnant women.[157] She argues that while child abuse attracts criminal prosecution, the Children's Act[158] does not consider the abuse of drugs by pregnant women as a crime and therefore, no protection is offered to the unborn.[159] Looking to offer better protection to unborn, Ovens advocates for a punitive approach to substance abuse during pregnancy by calling for the definition of child abuse to be extended to include harms caused to the unborn by pregnant women's substance abuse.[160]

Before applying Ovens' suggested inclusion of the unborn in the definition of child abuse it is necessary to contemplate how she defines child abuse to start with. She defines child abuse as "the deliberate or unintended physical and/or emotional abuse and/or neglect of a child by a parent".[161] This is contrary to the definition provided in the Children's Act, section 1 of the Act defines abuse as "any form of harm or ill-treatment deliberately inflicted on a child". The provision then goes on to list certain conduct included in this definition, such as assault, sexual abuse, exploitative labour practices and exposing the child to conduct that may harm a child psychologically or emotionally.

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[154] Ovens (2008) *Acta Crim* 85. In a later publication on the same topic, Ovens ((2010) *CARSA* 45), she states that in this scenario "the rights of the drug-using mother are upheld by legislation and the rights of the fetus [are] not taken into account".
[155] Ibid.
[156] Ovens (2008) *Acta Crim* 85.
[157] Ovens (2008) *Acta Crim* 92.
[158] Act 38 of 2005.
[159] Ovens (2010) *CARSA* 38.
[160] Ovens (2008) *Acta Crim* 92.
[161] Ovens (2008) *Acta Crim* 78.

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It must be noted that Ovens' work derives from a criminological perspective and she therefore does not engage with the legal meaning of rights. She only briefly mentions applicable legal principles and it is therefore not clear whether her intention is to extend personhood and advocate for foetal rights generally. While Ovens does use the term "rights" in respect of the unborn, it is not obviously clear whether she is using that term in a technical legal sense. However, her arguments can be interpreted as bestowing on the unborn an enforceable right against the pregnant women carrying them to be born in a healthy (specifically, non-drug exposed) condition. Where this right is not respected, Ovens proposes that the women concerned be held criminally liable, since their conduct would amount to child abuse.

While there is an unquestionable need to address substance abuse during pregnancy in South Africa, a number of reservations can be made against Ovens' proposal for law reform in this area.

To start, it is noticeable that Ovens understands child abuse as constituting unintentional conduct as well as intentional conduct, however, as mentioned above, Section 1 of the Children's Act defines "abuse" in relation to children as any form of harm or ill treatment deliberately inflicted on a child. Furthermore, in common law, child abuse in itself is not a crime but a generic term for the possible offences that a perpetrator may be charged with,[162] it is pertinent to note the intention requirements linked to those underlying offences. Carstens and du Plessis[163] identify a number of common law and statutory crimes as being relevant to the general realms of child abuse, all of which require the element of intent.[164]

[162] However, aside from the common law position, s 305(3) of the Children's Act provides for a statutory crime of child abuse. The section provides that any person (parent, guardian, care-giver, or otherwise) will be guilty of an offence if that person abuses or deliberately neglects a child in his or her care. Since the Act defines abuse as intentional conduct, the same issue concerning intention is relevant with the statutory crime of child abuse as with the common law position.

[163] P Carstens & R du Plessis "Medico-Legal Aspects Pertaining to Children" in T Boezaart (ed) *Child Law in South Africa* (2009) 601-613.

[164] In terms of the common law, the following crimes were identified: Assault, assault with intent to grievous bodily harm, indecent assault, rape, sodomy, incest, murder and culpable homicide. The only crime listed here that does not require intention is that of culpable homicide, which requires negligence on part of the perpetrator. The statutory crimes identified by Carstens and du Plessis stem from s 14 of the Sexual Offences Act 23 of 1957 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

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Focusing on the subject matter at hand, substance abuse during pregnancy as a possible form of child abuse would amount to physical abuse since Carstens and du Plessis identify "chemical substance abuse" as a form of physical abuse against a child.[165] Chemical substance abuse is defined as "poisoning resulting from the deliberate, concealed administration of a toxin to a child".[166] The relevant common law crime is the crime of administering poison or another noxious substance.[167] Snyman explains that the perpetrator must have unlawfully and intentionally administered a poison or noxious substance to another person.[168] Intention here, refers to the fact that the perpetrator "must have been aware of the fact that the substance he [or she] was dealing with was or contained poison or some other noxious substance, and he must have foreseen the possibility that someone might consume it".[169]

This discussion highlights a number of concerns pertaining to Ovens' approach. First, the perusal of South African criminal law principles pertaining to child abuse emphasise intention as being an essential element for criminal liability. Ovens' very research indicates a lack of intention on the part of substance-abusing pregnant women. Second, all of the crimes relevant to child abuse are only applicable to legal persons, thus extending the scope of the general term of child abuse to include the unborn would require a complete overhaul of entrenched legal principles applicable to criminal law which goes far beyond merely rephrasing the term of child abuse.

Ovens' proposal links to women's conduct during pregnancy and poses a particularly difficult position in respect of criminal liability: From a technical perspective there can never really be a crime of child abuse against a foetus, there must be a born child for purposes of identifying harm and proving that the woman's conduct was the factual and legal cause of that particular harm. Until birth, harm is merely "theoretical".

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[165] Carstens & du Plessis "Medico-Legal Aspects Pertaining to Children" 594.
[166] Carstens & du Plessis "Medico-Legal Aspects Pertaining to Children" 599.
[167] Snyman *Criminal Law* 453.
[168] Ibid. While this crime is still in place, Burchell & Milton (in J Burchell & J Milton *Principles of Criminal Law* (2010) 691) explain that there may no longer be a need for a separate crime of poisoning because the common law crimes of assault, assault with intent to do grievous bodily harm, murder, attempted murder overlap with this crime and the crime of poisoning therefore does not offer any greater protection to society. In the case where the crime of poisoning does not come into play concerning substance abuse during pregnancy then the other mentioned common law crimes become applicable and each requires intention on part of the perpetrator.
[169] Snyman *Criminal Law* 453.

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Going back to the foundational principles of criminal law, Snyman explains that the first requirement for criminal liability is that there must be conduct in the form of an act or omission that falls within the definitional elements of a particular crime.[170] Thus, if child abuse were defined to include prenatal substance abuse which causes adverse foetal health implications, a women abusing substances while pregnant would amount to "conduct" within the definitional scope[171] of that crime. However, aside from conduct there is a requirement that the conduct must have been the cause of the outcome proscribed by the crime.[172] Causation involves factual causation and legal causation and factual causation must be established first, thereafter if factual causation is established, then one is required to determine legal causation.[173] A pregnant woman would have factually caused the adverse foetal-health implication if her conduct cannot be thought away without the adverse outcome disappearing at the same time.[174] Here is where Ovens' suggestion falls short, adverse health implications cannot be assessed while the foetus remains in utero. It is submitted that birth is required in order to assess if damages occurred while in utero and then factually link substance abuse to the child's adverse health. As soon as birth occurs, the issue is no longer abuse of the foetus.

However if Ovens argues that the unborn are children, then it is possible to still consider it child abuse but the crime can only be detected after birth. This still poses a problem because Ovens' aim is to prevent harm to the unborn, yet criminal law will not act unless there is evidence of factual and legal cause of harm. This can only be established after birth thus frustrating her aim of preventing harm during gestation.

It is odd that Ovens takes a punitive approach to substance abuse during pregnancy, especially given the fact that she recognises serious inadequacies currently plaguing the treatment of drug-dependent pregnant women, their general inability to gain access to effective treatment, and the fact that she explicitly recognises that drug-

[170] Snyman *Criminal Law* 51.
[171] See Snyman *Criminal Law* 71, for a discussion of the legal requirements pertaining to definitional elements. Since this discussion is working off a hypothetic application of the crime child abuse against a foetus, this element for criminal liability will not be discussed.
[172] Snyman *Criminal Law* 79.
[173] Ibid.
[174] Snyman *Criminal Law* 79. This test is *conditio sine qua non* formula.

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dependency involves a biochemical process which requires medical attention. It is also concerning that criminalisation is her preferred method of reform even though the extent of substance abuse among pregnant women and resulting harms are not conclusively established yet,[175] in South Africa and abroad.[176] It appears as though her position against the treatment approach lies in the fact that this approach will be less effective in South Africa due to the limited availability of treatment resources.[177] In this respect *S v Williams*[178] must be noted, in this case the state argued that juvenile whipping was an appropriate sentence to impose on children given that South Africa suffers shortages of resources and infrastructure thus impeding the implementation of any alternative sentencing options.[179] Langa J rejected this argument as "untenable" and found that "state unreadiness" should not be the price for children to pay.[180] He further emphasises that "resources should be made available and that they should be utilises properly, so that the values in the Constitution may be upheld and maintained".[181] Thus recognising that overcoming addiction includes aspects of medical treatment clearly points to the inappropriateness of criminal sanctions, and a lack of resources will not come to the aid of Ovens' approach.

Furthermore, Ovens fails to demonstrate how convicting pregnant women of crimes associated to child abuse prevents reoccurrence of substance-abuse related issues

[175] Something that stands out to the author of this thesis is the unanswered issue of harm caused to the unborn as a result of excessive exposure to harmful substances, and whether it can be said with any certainty that the harm is only caused by pregnant women after fertilisation. It may be worthwhile to research the impact of substance abuse on the gametes of both men and women (prior to any fertilisation), and to further research the potential consequences on the biological quality of resulting foetuses. It is a critical question in respect of criminalising harm caused to the unborn because it may be found that men are also causing harm to the unborn and their prospective children, and applying Ovens' approach would require that they be held criminally liable too in cases where they father children from their drug-exposed gametes. This point may very well impact on the prosecution's ability to prove causation beyond a reasonable doubt.

[176] The extent of the dearth of available scientific data indicating harm becomes obviously clear when discussing the position in the United States, see part 3 of this thesis.

[177] Ovens (2008) *Acta Crim* 79. Ovens (87) also considers the adequacy of treatment resources a viable and influential research question when approaching the issue of how to address the substance abuse during pregnancy in a South African context. She states: "A further area of interest is to ascertain whether a treatment or harm reduction approach used in other developed countries to deal with the pregnant drug dependent, will be less effective in South Africa due to limited treatment resources available to drug dependent mother".

[178] 1995 (3) SA 632 (CC) paras 61; 63. In this case the Constitutional Court found whipping, as a sentencing option, to constitute a violation of children's rights to dignity and that their right to be protected from cruel, inhumane and degrading and treatment or punishment prohibits this course of sentencing.

[179] Paras 61; 63.

[180] Para 63.

[181] Para 64.

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when further pregnancies are encountered by the same women. Ovens' resulting recommendation of criminalising substance abuse stands out as incongruous because in the abstract to her contribution she states: "This article explores areas which need to be researched in order to develop a policy that would be beneficial to pregnant substances (sic) abusers and also protect the unborn foetuses".[182]

7 3 4 Reform of termination-of-pregnancy laws

The call for reform under the context of the Choice Act is for the repeal of the Act for the benefit of the unborn from the moment of fertilization. In "The Relevance of Science for the Protection of the Unborn", de Freitas and Myburgh attempt to demonstrate the value of science when striving to clarify the status of the unborn which clarification will serve to better protect the unborn from termination of pregnancies.[183] They explain that science is traditionally used as the basis for when protection should set in, and this currently stands at the point of viability, since science shows that it is at this point that the unborn may be able to survive independently and may also be able to feel pain.[184] De Freitas and Myburgh then turn to the "science of the unborn" to clarify "just what sort of being the unborn is during the course of coming into being" because if the purpose of the law is to protect "people", it can only do so on accurate scientific data.[185] In fact, it is their contention that new medical technologies will "solve the abortion problem".[186]

De Freitas and Myburgh advocate a non-rights approach since they argue that it is not purely the attribution of rights that makes it wrong to kill another, and on that notion they conclude that a right-to-life argument is not necessary when seeking to develop grounds to justify legal protection of the unborn from the women who carry them.[187] They contend that other measures can be used for protection and turn to science to work towards the determination of "life" and whether the unborn require legal protection or not.[188] In this respect the authors unequivocally draw on the separate-

[182] Ovens (2008) *Acta Crim* 79.
[183] De Freitas & Myburgh (2009) *TCW* 63.
[184] Ibid.
[185] De Freitas & Myburgh (2009) *TCW* 64.
[186] De Freitas & Myburgh (2009) *TCW* 66.
[187] De Freitas & Myburgh (2009) *TCW* 65-70.
[188] De Freitas & Myburgh (2009) *TCW* 70.

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entities approach by using science to demonstrate that the unborn are more than mere maternal "tissue" and embody a distinct human life which has independent value, characteristics that are present from the moment of conception.[189] De Freitas and Myburgh go on to conclude that since human life begins at conception, law is under an obligation to protect it and limiting women's rights to terminate their pregnancies only once the foetus is viable is "logically and biologically flawed and unworkable".[190]

Most of de Freitas and Myburgh's[191] critique is lobbied against the Unites States concerning its adoption of the foetal viability criterion to limit women's rights to terminate a pregnancy in *Roe v Wade*.[192] They are critical of *Roe* in respect of the courts explicit refusal to consider science to determine the status of unborn life as "human life" but then it contradictorily relied on viability, which is a scientifically-informed concept, to be the identified point in development to confer protection.[193] The crux of their contribution ties into the use of viability as a determinative marker for protection of the unborn because if one understands there to be human life from conception, it is not clear why survivability should be accepted as the only point requiring protection.

While the authors' critique is focused on *Roe*, the implications of their arguments also extend to a South African context. First, these are both South African based academics and in South Africa it is accepted that the Choice Act limits access to termination-of-pregnancy services once foetal viability sets in.[194] Second, in a later 2012 publication pertaining to the status of the unborn in a South Africa context,[195] de Freitas relies on the very same scientific-based arguments as presented in his co-authored 2009 publication. In his 2012 publication he argues that when the issue of the legal status of the unborn eventually has its day in the Constitutional Court, the

[189] De Freitas & Myburgh (2009) *TCW* 70-81.
[190] De Freitas & Myburgh (2009) *TCW* 80. These flaws lie in the fact that viability is a relative term, where despite the advanced development of a foetus, external non-biological factors can negatively impact on survivability levels. The authors argue that viability does not "measure the universal human characteristics shared by the foetus and the larger community and species, rather it focuses on the potential ability of the foetus to breathe air [reference omitted]. Therefore clearly, the viability standard makes little sense from a human development perspective."
[191] De Freitas & Myburgh (2009) *TCW* 81.
[192] 93 S Ct 705 (1973).
[193] De Freitas & Myburgh (2009) *TCW* 78.
[194] See ch 6 para 6 3 2 and authority cited therein.
[195] De Freitas (2012) *IJRF* 51.

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Court will have to consider science in developing an understanding of the unborn.[196] It is his contention that this understanding "should assist in supporting the South African Constitutional Court in coming to a finding that recognises the protection of the unborn to some or other degree".[197]

In the context of presenting discussions in "preparation" for the Constitutional Court's deliberations on imminent issue of the legal status of the unborn, de Freitas states:[198]

> This article calls for having the Constitutional Court assist in gaining more clarity on the legal status of the unborn against the background of a more improved degree of legal recognition. In this regard, support is given to the role of the South African Constitutional Court in approaching the legal status of the unborn from a more nuanced and sensitive point of view, bearing in mind that the woman's right to have an abortion should be qualified against the background of the interests of the unborn as well.

There are a number of issues that can be highlighted against the two contributions considered herein.

It is in the very context of the Choice Act that we have come see that the unborn *are* valued. Chapter six shows that this is the only piece of legislation that does this. As already established, in South Africa the value we vest in the unborn in law stems from the constitutional value of dignity.[199] Ackermann finds that this value vests in all of those who are representatives of humanity: the unborn, the born and the dead.[200] Theoretically, that which is just conceived is vested with the value of human dignity because even in its unborn state it is recognised as being part of the essence of what it means to be human. It can be argued further that dignity is present even before conception, especially if one understands reproductive gametes as constituting foundational representatives of the human race. What is important to note is that it can therefore be argued that we value the unborn regardless of their viability. Concerning the status of the unborn in law: They are unborn human beings and as such the value

[196] Ibid.
[197] De Freitas (2012) *IJRF* 59.
[198] De Freitas (2012) *IJRF* 52.
[199] Ch 6 para 6 3.
[200] Ackermann *Human Dignity* 51-52.

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of dignity vests in them. Contrary to the picture presented by de Freitas and Myburgh, the mechanism to value the unborn in a legal framework is already in place in South African law. Science can tell us whether what is developing is human enough to accrue some form of value, but it cannot direct us on how to respond in law.

The issue remaining links to when it is acceptable to act on this value with legal force. It is submitted the question of the acceptability of any action that seeks to protect the unborn demands the consideration of context, and the context of the unborn directly links to the pregnant women carrying them. This essential and inseparable link serves as an impediment when looking to directly protect the unborn, thus if one seeks to protect the unborn it must be done through its very life-support, being pregnant women. It is strongly emphasised that one cannot identify termination of pregnancies as the "problem" that needs to be addressed in order to protect the unborn. Context of pregnancies tells us that one must understand that the action of turning to termination-of-pregnancy services is a response to underlying social issues, and in this respect Albertyn et al state that:[201]

> [F]ew feminists argue for abortion on demand in the third trimester, no feminists support sex selection as a reason for abortion and all desire a world in which women do not have to resort to terminations, because they have real control over their fertility and because they do not have to worry about the social and economic factors that make it difficult to carry the pregnancy to term and raise a child.

Of further concern is the fact that, at times women do not have control over the circumstances of conception due to coercive sexual pressures and sexual violence against women.[202]

Consequently, if de Freitas and Myburgh's concern is for the protection of the unborn, it is argued that they will be better placed to tackle the issue by moving beyond science as the answer to protecting the unborn and focusing more on eradicating those factors that feed the demand for termination-of-pregnancy services. In order to do so, they

[201] C Albertyn, L Artz, H Combrinck, S Mills & L Wolhunter "Women's Freedom and Security of the Person" in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 295 365.
[202] Albertyn et al "Women's Freedom and Security of the Person" 364; R Cook & B Dickens "The Injustice of Unsafe Motherhood" (2002) 2 *Dev World Bioeth* 64.

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would have to look at the context of pregnancies generally. Merely removing permissible termination-of-pregnancy laws will not resolve the issue of harming the unborn, because if their position were to be adopted we will more than likely find an increase in unsafe illegal terminations[203] and possibly an increase in concealed births and neonatal abandonment simply because the underlying social issues that feed the need to curb having too many children will still be present. Neither of these scenarios can be seen as protecting anyone.

Manninen asserts a similar argument.[204] She emphasises that financial difficulty or poverty is one of the leading reasons for women to terminate their pregnancies, and where pregnancies are terminated on these grounds, these decisions are not based on choice but "coercion" since free choice is removed.[205] She argues further that implementation and access to socio-economic rights will alleviate the demand for termination of pregnancies, since supportive services such as access to housing, health care and reproductive services are found to reduce the termination-of-pregnancy rate.[206] In fact, Manninen cites a pro-life advocate from a Catholic organisation as making this connection between poor socio-economic status with termination of pregnancy.[207] Manninen highlights that even in though this particular Catholic organisation argued for restrictive termination-of-pregnancy laws, it nevertheless recognised that criminalising termination of pregnancies will be ineffective if social support is not offered simultaneously.[208]

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[203] See Centre for Reproductive Rights "Whose Right to Life? Women's Rights and Prenatal Protections under Human Rights Comparative Law" (20 March 2012) *Centre for Reproductive Rights* <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf> (accessed 3 July 2014) 12. The organisation indicates that the legal status of termination of pregnancy does not impact on the incidence of termination of pregnancies but does impact on incidence of maternal mortality and morbidity rates.

[204] Manninen (2013) *Hypatia* 663.

[205] Manninen (2013) *Hypatia* 676.

[206] Manninen (2013) *Hypatia* 677.

[207] Ibid.

[208] Manninen (2013) *Hypatia* 677. However, Fredman emphasises that socio-economic rights will do little unless those rights reflect "the specificities of gender". This means that women's experience of poverty is a different experience to that of men and merely making these rights available on the basis of formal equality (as opposed to substantive equality) will not address the unique position of women faced with poverty. See S Fredman "Engendering Social and Economic Rights" in B Goldblatt & K McLean (eds) *Women's Social and Economic Rights: Developments in South Africa* (2011) 4-33.

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It is obviously a utopian stance to think that the demands for termination-of-pregnancy services can be completely removed since there will always be instances where women feel that they may have to turn to those services, especially regarding therapeutic terminations and in cases of unexpected turns of events. However, as already indicated in chapters five and six, the Choice Act effectively reaches a middle ground between women's autonomy and the value we vest in foetal life as a society. The middle ground is reached in so far as the Act recognises the value of the unborn but in a qualified manner which is informed by context of the unborn's existence.[209] Namely, the Act's provisions indicate that protection must be afforded prior to birth but that protection cannot be in place from the moment of conception because that would absolutely tip the scales in favour of the unborn and may result in serious violations of women's rights and ultimately dehumanise them to primarily reproductive tools.

The meeting in the middle is in place through the application of foetal viability, this being the point where protection can be legitimately enforced. Therefore, capability for independent life is not the reason why we value the unborn, it is however the reason why we act on the value we vest in the unborn. Even though de Freitas and Myburgh are critical of viability as a justifiable point for protection, the author of this thesis cautions that this point in foetal development cannot be dismissed too easily as insignificant.

There are well established concerns regarding the translation of the clinical construction of foetal viability into a legally applicable principle.[210] Generally, foetal viability is not a fixed term since the determination of a foetus as viable includes the consideration of a number of clinical and biological factors.[211] All of these factors are found to vary in relation to socio-economic elements associated with the pregnant woman concerned, and thus requires that the viability of any given foetus be considered on a case by case basis.[212] This uncertainty poses a problem in law

[209] In this respect, see s 2 of the Choice Act generally where the subsections recognise a number of circumstances as impacting on women's experiences of pregnancy, namely their socio-economic circumstances, mental and physical health, and whether the pregnancy was a result of rape or incest, to name a few circumstances.
[210] C Pickles "Personhood: Proving the Significance of the Born-Alive Rule with Reference to Medical Knowledge of Foetal Viability" (2013) 24(1) *Stell LR* 146.
[211] Ibid.
[212] Pickles (2013) *Stell LR* 146. The implication of this is that those extremely premature neonates born in private facilities have a better chance of survival than those born in public facilities.

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because law, by its nature, requires certainty. However, as argued in chapter four,[213] the concept of foetal viability is first and foremost centred on there being a certain degree of foetal development, and this degree of development indicates that the most basic necessities for independent life are in place. This point in development is absolutely significant as this is the first time that third parties can begin to consider how they can best act for the benefit of the unborn should birth be necessary at this point. Only once this development is present can one then go on to determine if adequate external factors are available to provide any necessary support to the viable foetus if born.

Understanding there to be a biological developmental element to the concept of foetal viability (indicating a core minimum in foetal development), it is argued that the Choice Act specifically attaches to the biological aspect of the concept instead of external factors such as those relative to a woman's economic standing. It is further argued that this is done for purposes of extending the "benefit of the doubt" to the unborn, meaning that regardless of unequal access to qualitative external factors such as attending health care facilities, the interests of all those unborn that have reached 20 weeks gestation will receive the Act's protective reach and women will no longer be able to terminate pregnancies on demand or for socio-economic reasons.[214] Foetal viability in the context of the Choice Act is crucial to our respect towards human life because any termination of a pregnancy from that point on *may* end with the live birth of a child who is capable of independent life, thus obligating us to act for its independent benefit.[215]

Reading the 2009[216] and 2012[217] contributions together the two authors considered here can be interpreted as demanding that women's rights be qualified against the backdrop of the interests of the unborn and this qualification should stand from the moment of conception.[218] The Choice Act has already achieved the process of

[213] See para 4 3 3 and authority cited therein.
[214] See s 2(1)(c) of the Choice Act.
[215] Should a termination procedure result in the live delivery on a non-viable child nothing can be done to secure any kind of life for it, but the same cannot be said for the live delivery of a viable child during a termination procedure.
[216] De Freitas & G Myburgh (2012) *IJRF* 56.
[217] De Freitas (2009) *TCW* 61.
[218] Concerning the extent of the qualification of women's rights, du Plessis explains, in personal communication via electronic mail (5 July 2014), that the authors "do not argue that women's rights

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legitimately limiting women's rights for the benefit of the unborn. However, the separatist approach calling for direct protection from the moment of conception introduces the scenario where the carefully balanced provisions become unjustifiably uneven. It is not clear how de Freitas and Myburgh can legitimately justify valuing one entity more than the other when both are accepted as representatives of the human race and each are vested with intrinsic worth. Thus, the very same ground for demanding uncompromised respect for the unborn, serves the very basis to nullify women's legal status.

While all the other areas considered concerning proposals for law reform will be included in the United States comparative study, this aspect of chapter seven will not form part of the comparative study for a number of reasons. This decision primarily rests on the author's argument that no law reform in respect of the Choice Act is necessary to better protect the unborn. Improving women's control over the conditions in which they fall pregnant through reform of social policies and better provision of reproductive health measures better serves women of reproductive age, pregnant women and the unborn.[219] Further reasons for not conducting a comparative study on the United States position regarding termination of pregnancy rests on the fact that Rebouché highlights that the South African approach was adopted in the wake of the United States experience, thus what South Africa currently applies is already a product of comparative considerations.[220] Furthermore, there seems to be general consensus

to her body should not be considered – in fact – this is very important. What is argued [is] that the over-emphasis on women's rights to the exclusion of considering other factors is arbitrary and contrary to a reasonable approach where all relevant factors are considered. Therefore, the argument is for a balanced approach concerning the unborn". She explains further that as the position stands concerning the "abortion debate" is that women's rights are being over-emphasised to the point that their rights are considered the sole criterion in the debate.

[219] The Centre for Reproductive Rights supports this view, see Centre for Reproductive Rights "Whose Right to Life? Women's Rights and Prenatal Protections under Human Rights Comparative Law" (20 March 2012) *Centre for Reproductive Rights* <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf> (accessed 3 July 2014).

[220] R Rebouché "The Limits of Reproductive Rights in Improving Women's Health" (2011) 63(1) *Ala L Rev* 1. She points out that the United States served as an "anti-model" on how to effectively deal with termination of pregnancies in law (22). She points out that the issue facing the effectiveness of the Act relates to implementation of its provisions rather that the provisions itself. This conclusion was also reached in C Pickles "Lived Experiences of the Choice on Termination of Pregnancy Act 92 of 1996: Bridging the Gap for Women in Need" (2013) 3 *SAJHR* 515, this article calls for improved state action rather than reform of the provisions of the Choice Act.

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that the United States has little to offer when contemplating the topic of termination of pregnancy.[221]

7 4 Readying the Ground for Tension between Female Autonomy Rights and Foetal Interests during Pregnancy

All these calls for reform can be characterised as third-party interventions during pregnancy and such intervention is arguably necessitated by the need to secure healthy foetal outcomes. The grounds advanced for justification for intervention relates to third-parties interests in prenatal life, as an important value in society, which is informed by our advanced knowledge of the development of prenatal life generally. The primary focus of these authors' submissions relate to the a-contextual consideration of the unborn as separate entities from that of pregnant women carrying them.

It is hypothesised that if each of these suggested reform measures are acceded to, pregnant women will suffer broad limitations in respect of their autonomy linked to legal subjectivity, face forced third-party interventions and possible criminal liability for conduct that is described as being harmful to the unborn, thus placing them under strict state surveillance for the duration of the pregnancy.[222] These sorts of reforms would change the dynamics of the doctor-patient relationship since attending health physicians that assist with prenatal care and birth will likely be the first persons to notice or suspect that intervention is necessary based on their intimate observations of pregnant women. While chapters five and six highlight the need for reform concerning pregnancy and related issues, it is submitted that reform on these grounds promote adversarialism in pregnancy which might negatively impact our ability to secure healthy outcomes for pregnant women and the unborn jointly.

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[221] De Freitas and Myburgh argue this from a pro-life perspective, see De Freitas & Myburgh (2009) *TCW* 81. Rebouché, who takes a pro-choice position also expresses dissatisfaction with the position of termination-of-pregnancy laws in the United States, see generally Rebouché (2011) *Ala L Rev* 1.

[222] This position stands for both du Plessis' and Kruuse's construction of feticide because as already indicated above, it is not clear how the authors can justifiably limit criminal liability to third parties only when the focus of the issue is on harm caused the unborn. It cannot be denied that pregnant women through termination of pregnancy or other "harmful" conduct harm the foetus, which is exactly what third parties do when assaulting or attempting to murder pregnant women.

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Going back to the findings in part one, it was highlighted that pregnancy adversarialism comes about when the existence of a pregnancy, which usually symbolises physical and metaphysical bond, is turned into a relationship characterised by tension between two opposing "parties" with diverging interests. In this instance one party's rights or interests are being advanced to the detriment of the other party's interests or rights. The parties involved in this sort of adversarialist environment include pregnant women, the unborn and third parties who all have an interest in the pregnancy concerned. These third parties include other persons such as the father-to-be, family members and members of wider society, and also established institutions such as the medical profession and the state.

The South African authors' separatist approach to pregnancy sets the foundation for adversarialism. On the one hand, we have women with their vested rights which generally secures the autonomy to do as they please with their own bodies, such as refuse medical treatment, prevent conception, terminate pregnancies and engage in what can be perceived by others as dangerous conduct. While on the other hand, we have the unborn portrayed as distinct and individuated entities, as well as third parties who attempt to "speak for" the interests of the unborn as valued entities in society. What is noticeable in respect of the authors' contributions, is the fact that the pregnancy environment they create tends to nullify women's claims to their rights as human beings and overlook the fact that pregnant women also have an interest in their unborn and the goal of progressing through pregnancy and birth healthily.[223] Instead, all emphasise the humanness of the unborn and primarily focused on society's interest in the unborn.

A tension is seen to arise because in order for third parties to act for the benefit of the unborn's interests they will have to overcome female autonomy, especially when society's perceived method of foetal protection goes against what a woman envisages as acceptable actions upon her body. However, autonomy is not something anyone will be prepared to give up too readily: Hence, a tension arises between female autonomy rights and foetal interests.

[223] That is, aside from Kruuse because she specifically referred to a pregnant woman's need to see justice be done for the non-consensual and violent termination of a wanted pregnancy.

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It can therefore be concluded that the authors considered in the chapter are effectively readying the ground for pregnancy adversarialism in South Africa which can very well be realised if their contributions are taken seriously. However, it is questionable whether this approach to pregnancy will in fact secure healthy foetal outcomes. Part three of this thesis will go on to investigate whether approaching these areas of pregnancy with a separatist view will in fact bring about the results envisaged by the authors considered in this chapter.

7 5 Concluding Remarks

This chapter highlights that pregnant women certainly do embody more than merely themselves. While this has been demonstrated in science for quite some time now, South African law has failed to articulate this extra-ness in its legal principles pertaining to pregnancy. Science and advancements in technology have rendered the single-entity approach redundant and it now serves as a legal obstruction when attempting to secure healthy pregnancies and healthy pregnancy outcomes through the application of legal principles.

The South African authors considered in this chapter have used science as the basis to not only identify more in pregnant women but to also individualise the unborn as separate entities to that of pregnant women. Further, they commonly hold that since the unborn are distinct in their existence and representative of humanity, there is a legal obligation to act for their direct benefit and offer protection from harmful consequences stemming from the conduct of pregnant women and third-parties. This foundation then serves the basis for arguments to either extend personhood to the unborn, to protect them from violence, substance abuse during pregnancy or termination-of-pregnancy intentions.

It is clear that the law's approach to particular areas in pregnancy must be reformed in South Africa, however, each of the recommended proposals for reform considered in this chapter are questionable. A number of flaws were highlighted in respect of each contribution. Pillay's application of principles pertaining to human rights is unsound generally. Du Plessis' adopted an ambiguous construction of the unborn by portraying

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them as separate entities worthy of direct protection while still subjecting them to the limitations of their biological links to pregnant women and their rights. Kruuse questionably compared and linked a separate-entities based feticide law to the principles of the Choice Act and the constitutional value of dignity which mutually draw on connection between the unborn and pregnant women. Ovens unrealistically and somewhat excessively extended the scope of criminal law principles to include unintended conduct of substance-abusing pregnant women and justified this approach on the basis of a lack of resources to provide the more acceptable option of treatment. De Freitas and Myburgh misplaced their emphasis on termination of pregnancies as the primary cause of harm to the unborn and effectively use the humanity argument regarding the unborn as a ground dehumanise pregnant women.

Aside from these ambiguously formulated responses to the inadequacies of the single-entity approach, collectively, the authors are essentially laying the foundation for tensions to arise between pregnant women's autonomy rights and foetal interests. The opportunity for tension or adversarialism arises because the unborn are "disembodied" from pregnant women and presented as separate entities with interests in need of individualised protection, and there are attempts to protect these interests to the detriment of pregnant women's autonomous existence. It is strenuously doubted that legal tensions during pregnancy will lead to healthy pregnancy or foetal outcomes generally.

This is where the value of a comparative study comes to the aid of the current dilemma currently being encountered. To elucidate: There seems to be general consensus that the single-entity approach is irreconcilable with scientific fact since it denies the "extra-ness" that the foetus embodies during a continued pregnancy. Therefore, the law is unable to respond to areas of concern where pregnancies are placed at risk. South African authors are actively advocating a preference to adopt a separate-entities approach rectifying the identified areas of concern yet no one is able to test the strength of these claims in a South African context. One can only really theorise on the consequences of giving heed to the recommendations for reform covered in this chapter. Thus, a comparative study of the United States, where the separate-entities approach is applied to the same areas of pregnancy discussed in this chapter will clarify whether these recommended calls for reform are legally sound. It will further

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establish whether each offer the protection of the unborn as envisaged by South African academics, and whether female autonomy rights and foetal interests are both advanced in each scenario.

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PART THREE

Pregnancy under United States Law: Applied Separatism and its Consequences

Part two demonstrates that while South Africa has a progressive stance towards women's reproductive autonomy, there is a noticeable silence concerning the unborn in law. Further, part two also demonstrates that this silence should no longer be maintained since our legal approach to pregnancy is evidently unjustified. It is not only unjustified from a scientific perspective but also from the perspective of effectively advancing women's reproductive autonomy in the case where women plan to continue with their pregnancies. Accordingly, a number of recommendations have been advanced by South African scholars aimed at developing the law to offer increased recognition and protection of the unborn, all of which emphasise adopting the separate-entities approach to pregnancy. However, these recommendations are still fairly new in South Africa and they are yet to reach the approving attention of our judiciary or legislature. This is a fortunate because the consequences of adopting each proposal for reform may not yield the intended results which is clear from the fact that a number of flaws were identified in each authors' contribution to the discourse of pregnancy under South African law. The ultimate concern is that those suggested categories of reform will not improve healthy pregnancy outcomes or secure optimal foetal development as envisaged by the South African contributors.

These issues therefore emphasise the need to conduct a comparative study. The country selected for comparison must have a well-established constitutional regime, women must be recognised as legal subjects and the country must adopt a separate-entities approach to pregnancy and apply it (either via case law or legislative enactments) to the specific areas identified by South African authors as being in need of reform. Furthermore, these measures must have been in place for a sufficient amount of time in order to effectively evaluate the implications of these measures. The presence of these identified elements aid in determining whether taking a separatist approach to pregnancy results in securing healthy pregnancy outcomes or optimal foetal development. Lengthy application of these measures also offers the benefit of

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there being a long line of commentary and debate concerning the appropriateness of adopting a separate-entities approach to pregnancy which helps identify the implications of taking such a stance.

That said, part three focuses on the United States regarding pregnant women and unborn. The United States is identified as a suitable comparator since it meets all the above requirements. However, this study is limited in scope, the content of the comparative study is determined in relation to those areas identified by South African academics as being in need of reform. Consequently, part three will determine the legal status of pregnant women and the unborn and consider how their status impacts on the United States' approach to the following specific areas: substance abuse during pregnancy, violent conduct that terminates prenatal life, and the extension of full legal status to the unborn. A further limiting factor is the fact that not all states in the Unites States will be studied. The federal legal system (case law and legislation) and only a selected number of states will be considered. However, where federal law is not relevant because it does not deal with one of the pregnancy-related issues identified above, then only states will be considered. The primary factors informing which state will be included in the study links to whether a particular state adopts a separate-entities approach to address a listed pregnancy-related concern.

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Chapter Eight

The Legal Status of Pregnant Women and the Unborn in the United States

8 1 Introduction

In this chapter the discussion pertaining to the legal status of pregnant women and the unborn will be conducted with reference to the concept of "personhood" and its application in United States law, particularly in the contextual setting of pregnancy. The legal construction of personhood is the preferred point of departure because the term provides an indication of an entity's legal status under federal and state laws. Writing on the concept of personhood in the United States, Fagundes[1] states that broadly, personhood "raises the fundamental question of who counts for purposes of law".

Approaching the discussion of legal subjectivity of pregnant women and the unborn from a personhood perspective is different to the approach adopted when discussing the South African position of pregnant women and the unborn in part two of the thesis. However, this is necessitated by the fact that it is not possible to cover the maze[2] of both state and federal laws (legislation and case law) pertaining to the legal status of both pregnant women and the unborn and their accruing rights.

In determining who counts or who should count for purposes of United States law chapter eight looks at the born-alive rule and the concepts of "constitutional personhood" and "foetal personhood" are explored. Also, the chapter identifies that pregnancy is construed as embodying two separate entities and looks at what serves as the basis for that view. With this contextual setting in place, the chapter goes on to consider attempts at furthering the foetal recognition in law which is currently being advanced via personhood measures. These measures aim to render the unborn full

1 D Fagundes "What we Talk About When We Talk About Persons: The Language of a Legal Fiction" (2001) 114 *Harv L Rev* 1745 1746.

2 The maze referred to here comprises of the Constitution of the United States, state constitutions, federal and state legislation and federal and state case law.

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legal subjects on the basis that they are human beings, thus removing the relevance of the born-alive rule altogether.

8 2 The Born-Alive Rule and "Personhood" in the United States

As with South Africa, in the United States the common law born-alive rule determines that only those who are born alive constitute legal subjects or persons, the rule thus determines whether an entity is a legal person and whether an entity has vested rights protectable under law.[3] In this respect, a pregnant woman is a legal subject and a foetus is not. However there has been considerable development away from the common law position and this has taken place through the enactment of legislation at both federal and state level. As will be discussed below, "personhood" or "person" can be defined in legislation or case law in a way that expands its definitional reach to the unborn.

Generally, where there is no legislation in place, or the interpretation of legislation does not justify a move away from the common law position, the born-alive rule remains in force.[4] However, this principle is not followed universally. For instance, Fagundes explains that in a number of cases where the term "person" was not defined in state homicide legislation the state courts have excluded the unborn out of "deference" to the common law born-alive rule.[5] Whereas some courts have assumed that all the unborn are human for purposes of the law.[6] As an example of this approach, Fagundes cites a decision reached by the Massachusetts Supreme Judicial Court as stating that if all human beings are legal persons and the unborn are human, then the unborn are also legal subjects thus granting them legal personhood.[7] Furthermore, there is also

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3 J Seymour *Childbirth and the Law* (2000) 137; *Roe v Wade* 93 S Ct 705 (1973) 716-721; Z Ives "Feticide and Criminal Law: Is there an Acceptable Approach?" (1998) <https://dspace.unm.edu/handle/1928/2402> (accessed 21 September 2014) 4-5; A Tsao "Fetal Homicide Laws: A Shield against Domestic Violence or Sword to Pierce Abortion Rights?" (1998) 25 *Hastings Const L Q* 457 460-461.

4 Ibid. Also see Fagundes (2001) *Harv L Rev* 1757. In the context of the unborn and criminal law principles, Seymour (*Childbirth and the Law* 140) explains that these scenarios where the common law prevails is generally not concerned with legal nature of the unborn, but rather concerns the proper function of the judiciary. Namely, it is not the function of the courts to create new crimes for the protection of the unborn.

5 Fagundes (2001) *Harv L Rev* 1757.

6 Ibid.

7 Fagundes (2001) 114 *Harv L Rev* 1757-1758. Aljalian also refers to a number of examples, see N Aljalian "Fourteenth Amendment Personhood: Fact or Fiction" (1999) 73(2) *St John's L Rev* 495 533.

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no trans-substantive application of the legal concept of "personhood" in that what establishes the unborn as persons in one area of law does not necessary render the unborn persons in other areas of law.[8]

Consequently, these approaches indicate that there is personhood in the traditional common law sense, this concept is narrowly construed and applies to those human beings who are born alive. Traditional personhood is the form of personhood that attaches to pregnant women. While on the other hand, there is a broad construction of personhood that extends to the unborn by virtue of the fact that they are of human origin. This construction of personhood can be understood as a wide construction of personhood and generally comes about through legislative enactments or via judicial precedents which develop the law beyond the born-alive rule. The scope of these two concepts of personhood varies according to federal and state jurisdictions.

8 2 1 Personhood of pregnant women and the unborn at federal level

The United States Constitution is one of the three identified supreme laws in the United States, and it governs both federal and state laws.[9] In doing so it guarantees certain benefits and protection for all persons in the Unites States, amongst other national governmental aims.[10] The term "person" features frequently in the Constitution but it is not defined.[11] The provisions most relevant to the protection of a person are the Fifth and Fourteenth Amendments, known as the Due Process Clauses and Equal Protection Clause respectively. Specifically, the Fifth Amendment states: "No person … shall be compelled in any criminal case to be a witness against himself; nor be

8 Fagundes (2001) *Harv L Rev* 1758. Also see T Jost "Rights of Embryo and Foetus in Private Law" (2002) 50 *Am J Comp L* 633.

9 Art 6, cl 2 provides that the Constitution, federal statutes and United States treaties are the supreme laws of the Unites States.

10 The preamble to the Constitution states a number of purposes, such as the aim to create a "more perfect union", secure freedom and achieve justice. For ease of reference see D Kommers, J Finn & G Jacobsohn *American Constitutional Law: Essays, Cases, and Comparative Notes* 3 ed (2009) 1093-1102 (Appendix B "The United States Constitution") and the authors' summary of the content of the Constitution, 31-33.

11 This was noted in *Roe*, 729. The term "person" appears in the listing of requisite qualifications for Representatives and Senators (art 1, s 2, cl 2), in the Apportionment clause (art 1, s 2, cl 3), in the immigration and importation provision (art 1, s 9, cl 1), in the Emolument clause (art 1, s 9, cl 8), the election provisions (art 2, s 1, cl 2), in the provision specifying qualification for the office of President (art 2, s 1, cl 5), and in the extradition provisions (art 4, s 2, cl 2). "Person" also appears in the Fifth, Twelfth, and Twenty-second Amendments, and in s 2 and 3 of the Fourteenth Amendment.

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deprived of life, liberty, or property without due process of the law". Section 1 of the Fourteenth Amendment stipulates that no "state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor to deny any person within its jurisdiction the equal protection of the laws". Consequently, for purposes of constitutional law at federal level, the concept of "person" plays an integral role when determining who gains the benefit of the Constitution's protective reach, particularly when it comes to the protection of one's life.

Roe v Wade offers some clarity concerning what entities do not constitute persons regarding the United States Constitution. In this case the United States Supreme Court decriminalised termination of pregnancies and found that women have a right to choose whether to terminate a pregnancy or not, and that this right is founded on their right to privacy.[12] However, the Court found that right to privacy is not absolute and that states can justifiably limit a woman's right to terminate a pregnancy once the foetus has reached viability.[13] The Court found that once a foetus is viable the state has a "compelling interest" in protecting potential life.[14] Thus, states can proscribe the termination of pregnancies from viability onwards, but not in cases where pregnant women's health or lives are at risk.[15]

In *Roe*, Wade and some *amici* argued that termination of pregnancies should be proscribed from the moment of conception because the unborn are persons for purposes of the Fourteenth Amendment.[16] The argument goes: If an entity constitutes a "person", then the Fourteenth Amendment guarantees that the unborn's right to life will be protected and they will receive equal protection of the law generally.[17] The Supreme Court found that in the majority of the constitutional provisions where

12 728.
13 The Court stated (727), "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation". Viability is understood to be significant because it is at this point that the unborn can survive independently if born, thus justifying state regulation.
14 732.
15 Ibid.
16 728.
17 Ibid.

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"person" appears, it appears as a "postnatal" concept.[18] The Court found that the unborn are therefore not included in the constitutional concept of "person".[19] Later the Court states: "In short, the unborn have never been recognised in the law as persons in the whole sense".[20] Reference to "postnatal" persons indicates that the Court requires live birth for purposes of constitutional protection at federal level. Kommers et al state that as a result of *Roe* a "fetus is not a 'person' in a *constitutional sense*".[21] (Emphasis added.) Accordingly, the Supreme Court's finding in *Roe* adopts a narrow construction of personhood, and in relation to pregnancy this means that a pregnant woman will receive constitutional protection while a foetus will not and this difference relates to the fact that one entity is born and the other is not.

Another example of a narrow construction of personhood can be found in the United States Code Annotated (1 USCA),[22] section 8(a) stipulates that any references to "child", "person", "human being" and "individual" in Acts of Congress, rulings or regulations of various administrative bureaus and agencies of the United States means "a member of the species homo sapiens who is born alive at any stage of development". Section 8(b) defines live birth as the complete expulsion or extraction of a foetus at any stage in development and after delivery the child breathes, has a heartbeat, the umbilical cord pulsates, or there is definite voluntary muscular movement. This definition of live birth does not require that the umbilical cord be cut and it is irrelevant that expulsion or extraction is a result of natural or induced labour, caesarean section or "induced abortion".[23] However, section 8(c) states that section 8 must not be interpreted as affirming, denying, expanding or contracting any legal status or right applicable to any member of the homo sapiens at any point prior to live birth.

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18 729.

19 Ibid. For a critique of the Supreme Court's interpretation of the Fourteenth Amendment, see, M Paulsen "The Plausibility of Personhood" (2012) 74(14) *Ohio St LJ* 13; Aljalian (1999) *St John's L Rev* 495. There is many more criticisms raised against the Court's construction of "person" but these 2 articles are sufficient for purposes of demonstrating that the *Roe* decision is not unanimously accepted.

20 731.

21 *American Constitutional Law* 624.

22 This section came into effect August 2002 and serves to guide the interpretation federal legislation, rulings and regulations.

23 The inclusion of "induced abortion" more than likely indicates that those viable foetuses delivered alive as a result of a failed termination-of-pregnancy procedure will be considered "born alive" and thus constitute persons and are entitled to all of law's protective reach.

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Section 8(c) of 1 USCA seems to ensure that despite the unborn not being identified as persons in a constitutional sense, protection can still accrue to "homo sapiens" prior to live birth. This ties in with the *Roe* decision. *Roe* went on to afford some protection for the unborn from viability onwards since the unborn represent potential human life.[24] In this respect, women's rights to terminate their pregnancies can be justifiably limited in order to protect the unborn.[25] Thus, not being recognised as a constitutional person does not bring the issue to an end regarding the status of the unborn in the United States at federal level. The Supreme Court's reference to a viable foetus not being recognised as a person in the "whole sense" indicates that despite the requirement of live birth for vestment of legal subjectivity, there is a lesser degree of recognition taking place.[26] Together, section 8(c) of 1 USCA and *Roe* indicate that the unborn are not persons for purposes of the Unites States Constitution, however, they receive protection or beneficial consideration as human beings generally or as persons widely construed.

It is at this stage that another form of legal subjectivity comes to light at federal level. Section 8(c) of 1 USCA acknowledges the unborn as somewhat separate subjects of law since they are considered in the section without reference to the fact that they are embodied in other persons' bodies. In fact, by preventing section 8(c) from being interpreted as neither expanding nor contracting any "legal status" or "legal rights" vested in the unborn, this section constitutes a legislative acknowledgment that the unborn themselves may have a particular status under certain laws and possibly individuated rights as well. If the unborn are not persons in the narrow sense, then it can be argued that this section creates independent subjects of the unborn in law in a wider sense.[27] That is, they are granted "foetal personhood".

For purposes of this thesis the concept of "foetal personhood" is a form of personhood that is distinct from the Supreme Court's construction of constitutional personhood in

[24] 732.
[25] 728. This is because the state has a "compelling interest" in viable prenatal life.
[26] 731.
[27] This must be distinguished from the position in *Roe*, in that *Roe* is interpreted as considering the value of the unborn in relation to pregnant women carrying them whereas this section considers the unborn as individuated entities worthy of legislative attention.

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Roe. It denotes a wider construction of personhood status which demands legal recognition and protection of the unborn on the basis that they are members of the human species. This legal acknowledgment of the unborn allows for them to be considered separately from pregnant women and demands that certain laws attach for the benefit of the unborn individually. Foetal personhood is present in two instances: Where an enactment goes as far as defining the unborn as persons for purposes of that particular Act or, where such definition is not extended but the implication of an Act is that the unborn directly benefits from its provisions as separate subjects of its law. Essentially, foetal personhood creates a different class of legal subjects which allows the unborn to exist as independent subjects of law.[28]

The federal Unborn Victims of Violence Act of 2004[29] (Unborn Victims Act) demonstrates that foetal personhood is in place at federal level. Also, the Act serves as an example of how section 8(c) of 1 USCA finds practical application to the unborn regarding the notion of foetal personhood. The Unborn Victims Act specifically aims to address those circumstances where a third party,[30] while committing a federal crime,[31] also causes or attempts to cause harm to or the death of an unborn. In such an instance that person faces an additional criminal charge of murder or attempted murder.[32] Essentially, the Unborn Victims Acts renders the foetus concerned a separate victim of criminal conduct.

The Act does not define the unborn as persons, instead, it defines the unborn as a "child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb".[33] Thus, the Unborn Victims Act does not extend constitutional or narrow personhood,[34] it does nevertheless extend extra-constitutional protection to the

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28 This is what the South African authors were aiming to achieve while arguing for law reform, see ch 7.
29 18 USCA s 1841.
30 The Act specifically excludes women and their conduct from the ambit of the Act, see s 1841(c).
31 The Act lists 68 relevant federal crimes, see s 1841(a).
32 S 1841(a)(2)(C).
33 S 1841(d).
34 This was recently confirmed in *US v Montgomery* 635 F 3d 1074 (8th Cir 2011) 1086. In this case the United States Court of Appeals had to decide whether kidnapping that results in the death of a person constitutes felony murder. In this case Montgomery attacked a pregnant woman in order to forcefully remove the foetus from the pregnant woman's uterus and then kidnap the child once born. The process of removing the foetus led to the pregnant woman's death.

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unborn on the basis that they are members of the human species. This Act applies directly to the unborn as separate subjects of federal law,[35] and the unborn have subsequently been viewed as "unique legal victim[s]".[36] In *Montgomery*, the Court held that the Unborn Victims Act recognises the unborn as a "special class of victims not previously recognised under federal law".[37]

It is obvious that two concepts of personhood exist at federal level: Constitutional personhood (narrow personhood) and foetal personhood (wide personhood). Section 8(a) and (b) of 1 USCA and the *Roe* decision indicate that the born-alive rule still plays an active role in the United States, at least as far as the United States Constitution and some federal legislation are concerned.[38] However, despite those legislative provisions and judicial holdings, there are examples where the unborn receive legal recognition at federal level in spite not being born.

8 2 2 Personhood of pregnant women and the unborn at state level

The federal position concerning constitutional personhood implicates every state in the United States. According to the supremacy clause of the United States Constitution, the Constitution and federal laws are supreme.[39] Consequently, state laws pertaining to the unborn and their recognition cannot interfere with women's termination-of-pregnancy rights as developed through *Roe* and states cannot grant the unborn any enforceable right to life. However, Linton explains that notwithstanding the *Roe* decision, states are free to extend legal status to the unborn, albeit limitedly.[40] He argues "neither *Roe* nor *Casey* purported to address the State's authority to define the legal status of the unborn child outside the context of abortion or to confer legal

35 See W Malcolm "The Unborn Victims of Violence Act: Addressing Moral Intuition and the Right to Choose" (2004) 1(2) *Tenn JL & Policy* 277 282.
36 See E Falk *Privacy, Due Process, and Morality: A Legal Analysis of Federal Fetal Personhood* Honours Capstone, American University (2013) 46.
37 1086.
38 This position is currently being challenged. In 2013 a Bill was introduced to Congress titled Sanctity of Human Life Act. The Bill aims to guarantee the right to life of all human beings and that life begins at "fertilization, cloning, or its equivalent. This Bill has been given a 4% chance of being enacted, see https://www.govtrack.us/congress/bills/113/hr23 (accessed 2 April 2014).
39 Art 6 cl 2 of the United States Constitution. This means that states cannot enact laws that contradict federal laws. Thus the supremacy clause creates a hierarchy with state law falling under federal law.
40 P Linton "The Legal Status of the Unborn Child under State Law" (2011) 6(1) *U St Thomas JL & Pub Pol'y* 141 143; 155.

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rights upon the unborn child that do not interfere with the exercise of the 'abortion liberty'".[41]

While the federal legal system imposes some limitation on states, states can and do extend protection to the unborn in other areas, such as in respect of foetal homicide and foetal pain laws.[42] Bird understands these laws as legislative enactments of foetal personhood.[43] Regarding foetal homicide laws at state level, the National Conference of State Legislation reports that 38 states in the United States have enacted foetal homicide laws.[44] Linton points out that while some states require foetal viability or quickening, the majority of states criminalise violent third-party pregnancy terminations from the moment of conception.[45] The Guttmacher Institute reports that as of April 2014 twelve states implement foetal pain laws.[46] In fact, Linton's research highlights that foetal interests are recognised as interests separable from the women carrying them in numerous areas of law at state level, these areas include the law of delict, health care laws, property law and "guardianship laws".[47]

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41 Ibid.

42 Foetal pain laws are laws generally linked to the regulation of termination of pregnancies. These laws aim to limit women's access to termination-of-pregnancy services on the basis that the unborn can feel pain. An example of a "foetal pain law" is the Alabama Pain-Capable Child Protection Act. This Act declares that the state has a compelling state interest in the unborn from the moment that they can experience pain (s 12) and the legislature has established (s 13) that this compelling interest is separate and independent from the state's compelling interest regarding foetal viability and the Act declares that neither of the these compelling interests are intended to replace the other.

43 See B Bird "Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability among Fetal Pain and Fetal Homicide Laws" (2014) 25(1) *Hastings Women's LJ* 39.

44 National Conference of State Legislation "Fetal Homicide Laws" (February 2013) *National Conference of State Legislation* <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> (accessed 2 April 2014). The 38 states concerned include, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin. In Massachusetts foetal homicide came about through case law and not legislative enactments.

45 Linton (2011) *U St Thomas JL & Pub Pol'y* 141 144.

46 Guttmacher Institute "State Policies in Brief: An Overview of Abortion Laws" *Guttmacher Institute* (2014) <https://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf> (accessed 2 April 2014). These states include, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Minnesota, Montana, Oklahoma, South Dakota, Texas and Utah.

47 See generally Linton "The Legal Status of the Unborn Child under State Law" (2011) 6(1) *U St Thomas JL & Pub Pol'y* 141. Also see Jost (2002) *Am J Comp L* 646. Some of these areas will be considered later in the chapter.

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There are more explicit examples of foetal personhood emerging at state level, these take the form of legislatively defining the unborn as persons under state law or through enacted statements of intent regarding a particular state's policy on the unborn. Concerning the extension of the definition of person to include the unborn, section 43.1 of the California Civil Code states that the unborn are deemed to be existing persons in so far as it is necessary to give effect to their interests after birth.[48] A legislated statement of intent can be found in section 2 of Amendment 68 to the Arkansas Constitution. Amendment 68 concerns the state's "abortion policy" and section 2 states: "The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution".

The United States, through various state actions, has a long history of encouraging a view of the unborn as a "person" in law.[49] This historical perspective has now culminated towards attempted state constitutional amendments where the unborn are defined as persons from the moment of conception. Scott discusses this topic as "personhood amendments" and points out that to date, those attempts to extend full legal personhood to the unborn have failed.[50] The main premise behind the notion of "personhood amendments" is for states to demonstrate what they perceive to be "persons" on a factual and scientific basis, and from there force the federal government via the Supreme Court to re-examine *Roe*.[51] Taking note that personhood amendments may be futile, Scott argues that even though the unborn are not constitutionally protected persons at federal level, state constitutional amendments

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48 Also see s 1.07 of the Texas Penal Code. For purposes of the penal code, s 1.07 defines an individual as a "human being who is alive, including an unborn child at every stage of gestation from fertilization until birth".

49 See generally, R Roth *Making Women Pay: The Hidden Costs of Fetal Rights* (2000) 37-183. Roth describes numerous attempts to place foetal interests above women's rights. Also see Bird "Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability among Fetal Pain and Fetal Homicide Laws" (2014) 25(1) *Hastings Women's LJ* 50, fn 93. Bird indicates that the United States has viewed the unborn as persons from as early as the 1970s. As authority she cites *Keeler v Superior Court* 2 Cal 3d 619 (1970), in this Californian case, the born-alive rule was rejected in order for the crime of murder to be extended to protect the unborn.

50 T Scott "Why State Personhood Amendments Should be Part of the Profile Agenda" (2011) 6(1) *U St Thomas JL & Pub Pol'y* 222. Also see L Collins & S Crockin "Fighting 'Personhood' Initiatives in the United States" (2012) 24 *Reprod Biomed* 689 690.

51 Scott (2011) *U St Thomas JL & Pub Pol'y* 224. Scott explains (230) that this is linked to the "Blackmun Hole". The "Blackmun Hole" refers to Justice Blackmun's decision in *Roe* where he stated (728) that if the unborn are established as persons within in the meaning assigned to personhood as per the Fourteenth Amendment then the unborn's right to life would be guaranteed.

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could secure the unborn's "rights" to the extent permissible under current federal law.[52] Further, he argues that a state "would recognize its right and duty to protect the unborn, a subset of persons, under the rights and privileges available in its constitution".[53]

As with the federal system, there are certainly two forms of personhood at state level. Aside from federal sanctioned constitutional personhood there is also a form of quasi-legal subjectivity at play. This limited form of legal subjectivity which vests in the unborn is being stretched to the absolute limits of what federal law permits, thus extending foetal protection wherever possible even at state constitutional level. In fact, Jost indicates that a number of states still have termination-of-pregnancy laws which are in contravention of the Constitution as per *Roe*.[54] He explains that while these laws are not being enforced they are being kept in place in the hope that the Supreme Court will at some point reconsider its position in *Roe* and extend constitutional personhood to the unborn.[55]

8 2 3 Foetal Personhood Creates a Multi-Party Pregnancy

The extension of a lesser degree of legal personhood to the unborn has implications on how pregnancy is perceived in the United States. Fagundes considers a number of state codes that criminalise the termination of pregnancies through third-party violence and he argues that whether legal status is bestowed on the unborn via judicial interpretations of the common law or statutory enactments, "these laws can still send a strong message about the personhood status of fetuses … the act of criminalizing feticide, regardless of method, sends a message about the state's regard for fetal life and thereby implicitly grants fetuses limited personhood status".[56] Also, Scott identifies

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52 Scott (2011) *U St Thomas JL & Pub Pol'y* 233.

53 Ibid. However, see P Linton "A Fool's Errand: State 'Personhood' Proposals" (2009) 35(4) *Hum Life Rev* 61. Linton is very critical of "personhood amendments" generally.

54 Jost (2002) *Am J Comp L* 633 635.

55 Ibid.

56 Fagundes (2001) *Harv L Rev* 1756. Regarding the Unborn Victims Act, Fagundes' argument concerning the limited character of foetal personhood stands true. Malcolm ((2004) *Tenn JL & Policy* 295), a supporter of the Act, points out that the unborn are not extended full status since women who terminate their pregnancies are excluded from the ambit of the Act and the Act is limited to 68 federal crimes. If full status were afforded to the unborn, women would not be excluded and the Act would inevitably not be limited to only 68 federal crimes.

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"personhood amendments" as an explicit expression of a state's theoretical belief in the personhood of the unborn.[57] Along similar lines, Karnein states that:[58]

> If all states are allowed to create a set of cases that make the treatment of embryos as persons into precedents, a new reality may be created. This may be a reality in which people have grown used to thinking of embryos as persons and thus change their attitudes about abortion.

These strong messages and theoretical beliefs embedded in federal and state laws pertaining to foetal personhood without a doubt shape perceptions on how pregnancy is viewed in the United States. The United States is identified as primarily adopting the separate-entities approach to pregnancy in that the unborn are viewed as entities distinct from the pregnant women carrying them. Further, since the unborn are part of the human species they are seen to be entitled to certain rights and legal protections.

Karnein points out that the first official recognition of the unborn as separate entities came about in 1946.[59] In *Bonbrest v Kotz*[60] the Court had to determine whether a delictual claim for injuries sustained prenatally should stand. In previous cases these claims were rejected because the unborn were understood to form part of the pregnant women carrying them.[61] In *Bonbrest*, McGuire J rejected the historical notion that the unborn are part of pregnant women's bodies and stated:[62]

> As to a viable child being 'part' of its mother — this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extra-uterine life — and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a 'part' of the mother in the sense of a constituent element — as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable fetus is not a part of its mother.

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57 Scott (2011) *U St Thomas JL & Pub Pol'y* 235.
58 A Karnein *A Theory of Unborn Life: From Abortion to Genetic Manipulation* (2012) 72. In the context of foetal homicide laws Karnein (73) understands treating the unborn as separate victims may "habituate" people into thinking that the termination of prenatal life is the same at killing a person.
59 A Karnein *A Theory of Unborn Life* 69.
60 65 F sup 138 (1946).
61 Karnein *A Theory of Unborn Life* 68.
62 141.

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The Justice went on and asserted that, if viable, the unborn has "its own bodily form and members, manifests all of the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems and is capable *now* of being ushered into the visible world".[63] (Emphasis in original.) Karnein notes that a number of cases followed the separate-entities position found in *Bonbrest* and a new theory of the unborn came to the fore in the United States.[64] While *Bonbrest* concerns the law of delict, the discussion above indicates that the separate-entities theory is clearly present in other contemporary areas of law which concern protection of the unborn as distinctive entities.

8 4 The Origin of Theorising the Foetus as Separate from a Pregnant Woman in Law

Seymour explains that a separatist view of pregnancy exists as a result of the United States adopting a "definitional approach" to determining the legal nature of a foetus.[65] A definitional approach considers how the law should classify the unborn by considering its essential characteristics.[66] The underlying issue is to determine whether the unborn's characteristics inform us as to whether they are human beings, persons or body parts.[67] This approach is founded on the assumption that the unborn cannot possess rights or be owed any duty of care unless their nature is identified as being distinctive (one complete entity on their own) but also in that distinctive existence they share similar characteristics to that of the human race.[68] Seymour states that once the nature of the unborn has been determined, certain conclusions follow concerning the legal recognition to which the unborn are entitled.[69] He explains:[70]

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63 142.
64 Karnein *A Theory of Unborn Life* 69-70.
65 Seymour *Childbirth and the Law* 185.
66 Ibid.
67 Seymour *Childbirth and the Law* 185. Seymour identifies this approach as problematic, because what it means to be a person differs from context to context, and this is very true if one considers that different forms of personhood have developed in American law, each with different consequences attaching.
68 Seymour *Childbirth and the Law* 159; 170; 185.
69 Seymour *Childbirth and the Law* 185.
70 Ibid.

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> A particularly clear example of the operation of this process is seen in the United States cases dealing with claims under wrongful death statutes in respect of stillbirths. These have frequently been decided on the basis that, since the relevant statutes refer to 'persons', they must be applied in the case of a still-birth if the fetus can be categorized as a 'person'.[71]

Consequently, how the nature of the foetus is defined impacts on whether or not a pregnancy will be viewed as embodying a single entity or two separate entities.

In determining whether to define the foetus as a separate human being or merely part of the body of the pregnant woman carrying it, reference is generally made to medical knowledge of prenatal development. This is evident in *Bonbrest*, the first case to individuate the foetus, and this knowledge is still being advanced as a ground to justify separate recognition of the unborn.[72] However, it must be noted that the development of foetal personhood in the United States did not come about simply as a result of considering what science has demonstrated. If that were true, one uniform concept of foetal personhood would attach to the unborn regardless of which area of law is relevant and one would expect there be uniformity across the United States, yet this is not the case.

Roth points out that there are other forces at play, and explains that in the United States it is the context in which medical technology is being used that gives rise to foetal personhood, or foetal "rights" as she puts it.[73] She urges that one should understand the social context and political setting of technology rather than technology itself and argues:[74]

> Though technological capabilities are not all together irrelevant, if the United States was not at a place where struggles over gender equality and abortion in particular were so

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71 Seymour's contribution was published in 2000 and there have been substantial developments in American law pertaining to the unborn since then. The discussion to follow in this part will demonstrate that the definitional approach is being applied beyond wrongful death claims in the case of stillbirth thus also indicating wide acceptance of the separate-entities approach to pregnancy.

72 See the general discussion of ch 3. Also, as the discussion develops in part 3 the reader should note how often medical technology crops up in the debates concerning the foetus and pregnancy-related issues.

73 Roth *Making Women Pay* 30-33.

74 Roth *Making Women Pay* 32.

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> intense, longstanding, and seemingly intractable, then new medical technologies might not have been put to use in a campaign to achieve fetal rights.

She argues that technology gave the highly politicised anti-abortion lobby in the United States leverage to support their claims that the unborn are separate human beings who are in need of protection and this then translated into legal arguments for rights or personhood.[75] Roth explains that foetal personhood claims are layered on older moral claims pertaining to women's duty to fulfil their "feminine destiny by bearing children" thus increasing cultural demands and this all takes place in a context where pregnancy is highly medicalised which ultimately leads to increased professional and state authority over women.[76]

To prove the validity of her argument that foetal personhood is not purely a result of advances in technology but of political climate instead, Roth compares the United States to other countries where prenatal technology is also present.[77] She argues that Australia, Britain, and Canada all have the same access to prenatal technology as found in the United States, but none of these jurisdictions recognise foetal rights which allow for women to be held criminally liable in respect of adverse pregnancy outcomes and forced medical interventions during pregnancies are few and far between.[78] This position stands despite the first "test-tube baby" being born in England in 1978, or the fact that Scotland was the first country to use ultrasonography, or that Australia was a pioneer in the research and development of reproductive technologies.[79] Roth's[80] arguments demonstrate that foetal personhood is uniquely American and her discussion convincingly shows that "something besides the simple availability of technology must account for the degree of fetal rights activity in the United States: the heightened intensity of reproductive politics".[81]

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75 Roth *Making Women Pay* 33.

76 Roth *Making Women Pay* 32; 34. It is here that one can see the tension during pregnancy, where women are fighting to advance beyond their historical disadvantage while others are using their pregnancies as means to keep women in their subordinate and reproductive positions. This is achieved by using technology to speak for the unborn. It is in this context that we find forced medical interventions and the criminalisation of certain conduct during pregnancy.

77 Roth *Making Women Pay* 34.

78 Ibid.

79 Roth *Making Women Pay* 34.

80 Roth *Making Women Pay* 34-35.

81 According to Solinger "reproductive politics" is a term that developed during second-wave feminism (see ch 2 para 3 4) in the United States and concerns issues related to contraception, termination

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Roth[82] identifies the foetal-rights movement (or the extension of foetal personhood) as directly stemming from the *Roe* decision, in the form of a "backlash"[83] to the reproductive autonomy that the decision created for all women. According to Solinger,[84] the backlash was based on a "values crisis" meaning that women were seen to be given "an excess of equality" in that by enjoying the reproductive autonomy established through *Roe* "women were grabbing social power from men and challenging social stability in part by claiming reproductive rights". Those concerned with the implications of *Roe* on social stability turned to religion for answers and these organisations became the foundation to organise resistance against liberal access to termination of pregnancies. Roth[85] explains that *Roe* provided a framework to think of the unborn from a legal perspective. Within *Roe*'s framework women focused on advancing their rights to reproductive autonomy while third parties sought to advance their interest in preserving social order based on gender roles and this was achieved by "protecting" the lives of the unborn (as entities that the state has a compelling interest in) and advances in medical technology assisted in legitimising anti-abortion arguments.[86]

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of pregnancy, sterilisation, adoption and sexuality among other reproductive-related topics. Solinger states that this term demonstrates how politics is at the centre of reproductive-related issues and uses the following questions to illustrate this: "[W]ho has the power to make decisions about keeping or ending a pregnancy: the pregnant woman, a physician, or a member of Congress? Who has the power to define a *legitimate* mother, that is, a woman who has the right to raise her own child: a city welfare official, an adoption agency and its client, a judge, or the mother herself?" (Emphasis in the original.) Going further, Solinger explains that all reproductive decisions are influenced by law and policy and this untimely creates a power struggle between the public and the private spheres. Solinger, in very basic terms, explains that many follow the notion that the decision on whether to have a child or not is a private matter which should be governed by a woman's choice. While, on the other hand, there are many who believe that reproductive issues are public concerns that should be governed by legislation and these laws generally reflect underlying values that society attaches to childbearing women and the unborn. See R Solinger *Reproductive Politics: What Everyone Needs to Know* (2013) 1-2.

82 *Making Women Pay* 17.

83 Although she identifies that foetal personhood did not come to life in a vacuum, she argues that it is the historical political climate of subordinating women through controlling their reproduction that enabled the foetal personhood movement to take hold. Part 1 of this thesis sufficiently covers the historical position of women and this topic will not be discussed here.

84 *Reproductive Politics* 15.

85 *Making Women Pay* 17.

86 Ibid.

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Resistance towards the freedom to terminate a pregnancy unfolds in the political arena.[87] Meredith explains that anti-abortion lobby groups work together to enact federal and state laws, they garner political support and promote anti-abortion candidates, seek out test cases and tie their campaigns to intercept with the decisions.[88] The fundamental aim of these organisations is to render termination of pregnancies illegal in the United States.[89] First and foremost they focus on extending full constitutional personhood to the unborn.[90] While constitutional amendments are being advocated, anti-abortion groups employ backdoor tactics to slowly chip away at the right to terminate a pregnancy.[91] This is done through advocating law reform in other areas of law that would result in enhancing the legal status of the unborn more generally.[92] Most alarmingly, while *Roe* concerned advancing women's autonomy rights concerning reproduction, it is *Roe*'s compelling state interest in protecting prenatal life that serves the foundation to justify wider reforms for the legal status of the unborn.[93] Ultimately, *Roe*'s use of compelling interest in prenatal life serves as the basis for its demise.

Discussing the intersection of the anti-abortion movement and the drive to develop legal status of the unborn, Meredith states: "Pressures for more fetal rights legislation are unlikely to subside in the US, and the anti-abortion agenda views any attempt to

87 Hence the notion of "reproductive politics": public regulation via "anti-abortion politics" of private spheres of women's lives being the "politics of choice".

88 S Meredith *Policing Pregnancy: The Law and Ethics of Obstetric Conflict* (2005) 182. While Meredith was specifically focusing on the issue of forced medical interventions, she equated forced medicinal intervention tactics to that adopted by the anti-abortion lobbyists. Also see Solinger *Reproductive Politics* 16. Roth (*Making Women Pay* 21) gives a brief exposé of how even the various Unites States presidents were involved in either the pro-life or pro-choice movement. Their affiliation to any side either resulting in diminished access to termination of pregnancy or increased access to termination of pregnancy.

89 Roth *Making Women Pay* 20.

90 Ibid.

91 Meredith *Policing Pregnancy* 182.

92 Ibid.

93 See B Burkstrand-Reid "From Sex for Pleasure to Sex for Parenthood: How the Law Manufactures Mothers" (2013) 65 *Hastings LJ* 211 221. In addition to the states interest in prenatal life, Burkstrand-Reid explains that grounds justifying the regulation of all women of reproductive capacity is also linked to the state's interest in maternal health. She argues that using the term "maternal health" instead of "women's health" renders women "mothers" in law and thereby justifies state regulation over woman in order to secure the realisation of "good mothers". Applying references such as "maternal health" to women who are not pregnant or women who are pregnant but do not wish to continue with their pregnancies opens the door to increased regulation. The use of *Roe* and subsequent termination-of-pregnancy case law in this way becomes more apparent in the chapters to follow concerning the United States position on the identified areas of concern regarding pregnancy in law.

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give the fetus 'personhood', even through legislation with entirely different aims, as positive progress towards its own goals".[94] Consequently, where measures to extend full legal subjectivity fail, lobby groups adopt substitutive efforts such as promoting foetal homicide laws and "drug mother" laws and keeping "uncooperative 'mothers'" in check for purposes of protecting the unborn.[95]

The theorised separateness of the unborn sets the scene for pregnancy, pregnant women, and the unborn in United States. This setting is what part one of this thesis identifies as creating an environment for adversarialism during pregnancy and fosters tensions. It is the intersection of diverging approaches tied together by pregnancy, meaning women, responding to their historical subordination by advocating an autonomous and substantively equal existence on one side while third parties on the other side are using technology to secure healthy pregnancy outcomes and advance control over women. This three-party approach sets fertile ground for an adversarial pregnancy environment. It is argued that this tension comes at a price of preventing the law from adequately addressing issues that implicate the realisation of women's reproductive autonomy and advancing foetal interests at the same time. Under adversarialism, instead of advancing both entity's needs only one "party's" interests are being advanced to the detriment of the other "party" and the law is used to sanction this.

8 5 Attempts to Extend Full Legal Subjectivity to the Unborn Via Personhood Measures

The discussion to follow serves to evaluate the strength of Pillay's suggestion that reforming South African status law by extending full legal subjectivity to the unborn from viability onwards will serve to adequately protect them.[96] In short, it is Pillay's contention that if the unborn were vested with rights the legal system would be better placed to protect them from termination of pregnancies and third-party violence that

94 Meredith *Policing Pregnancy* 182.
95 Ibid. Also see J Schroedel, P Fiber & B Snyder "Women's Rights and Fetal Personhood in Criminal Law" (2000) 7(89) *Duke J Gender L & Pol'y* 89 who support the position set out by Roth and Meredith.
96 R Pillay "The Beginning of Human Personhood: Is South African Law Outdated?" (2010) 2 *Stell LR* 230. For an extensive discussion of Pillay's position, see ch 7 para 7 3 1.

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terminates prenatal life.[97] Pillay asserts further that law reform of this nature would make wrongful death claims permissible in the case of negligently causing stillbirth.[98] Aside from responding to Pillay's proposal, this discussion also inadvertently responds to de Freitas and Myburgh's proposals for repealing termination-of-pregnancy laws in South Africa.[99] Even though de Freitas and Myburgh advocate an approach that is not founded on the notion of rights or personhood, they none-the-less call for the repeal of termination of pregnancy in South Africa on the basis that the unborn are human beings and are in need of protection, which is the same premise being used by personhood advocates in the United States.[100]

Moving back to the United States, the fact that the unborn are vested with only foetal personhood is not accepted by some and the issue of extending full legal status to the unborn has received extensive attention through the process of attempted legislative enactments or constitutional amendments. These enactments or amendments were briefly introduced above[101] as "personhood amendments"[102] or "personhood initiatives".[103] The collective activity driving these initiatives is referred to as the "personhood movement" and this movement has been defined as a branch of the pro-life movement in the United States.[104]

As already mentioned above,[105] the provisions of United States Constitution do not apply to the unborn since they are not considered persons n a constitutional sense. This was established by *Roe* in 1973 and the position remains today.[106] Collins and

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97 Pillay (2010) *Stell LR* 236.
98 Pillay (2010) *Stell LR* 237.
99 S de Freitas & G Myburgh "The Relevance of Science for the Protection of the Unborn" (2009) 45(1 & 2) *TCW* 61; S de Freitas "The South African Constitutional Court and the Unborn" (2012) 5(2) *IJRF* 56; see the discussion in ch 7 para 7 3 4 2.
100 As will become evident from the discussion below, these personhood measures are advanced on the basis that the unborn are human beings from the moment of conception thus justifying the call that federal and state constitutions should protect them as they do any other person.
101 See para 8 2 1.
102 Scott (2011) *U St Thomas JL & Pub Pol'y* 222.
103 Collins & Crockin (2012) *Reprod Biomed* 689.
104 A Armstrong & D Hsieh "The 'Personhood' Movement Is Anti-Life: Why it Matters that Rights Begin at Birth, Not at Conception" *Coalition for Secular Government* (31 August 2010) <http://www.seculargovernment.us/docs/a62.pdf> (accessed 22 April 2014) 2.
105 Para 8 2.
106 Kommers et al *American Constitutional Law* 624. However it must be noted that it is only really the crux of *Roe* that remains today, being that the Constitution does not apply to the unborn. The anti-abortion lobbyists and sympathising state officials have successfully chipped away at what *Roe* originally stood for. For a brief summary see Kommers et al *American Constitutional Law* 626-630

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Cockin confirm that personhood measures are pro-lifers' response to the *Roe* decision.[107] The authors explain that most of the bills or personhood initiatives stem from an organisation called Personhood USA.[108] The organisation is focused on developing a concept of personhood that includes the unborn thereby rendering termination of pregnancy unlawful as it would constitute the crime of murder.[109] Personhood USA's position of viewing the unborn as persons stems from the premise that science has revealed that the unborn are human beings and should thus be understood as persons in law and culture.[110] The ultimate aim of these measures is to extend constitutional rights to the unborn which enables the law to fully protect them at federal level thereby allowing states to do so too.[111]

Personhood measures have been taking place in the United States for a number of years since 1995 at federal level and since 2008 at state level.[112] In 2013 a federal Bill (HR 23) was introduced during the 113th Congress titled the Sanctity of Human Life Act. Section 2(1)(A) of the Bill confirms that the constitutional right to life is the "most

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who summarise United States Supreme Court litigation that took place after the *Roe* decision, all these cases are indications that there are regular disputes linked to a woman's right to terminate her pregnancy and there is a constant move towards limiting this right in one respect or another. See *Planned Parenthood of Central Missouri v Danforth* 96 S Ct 1976 (1976); *Bellotti v Baird* 99 S Ct 3035 (1979); *Planned Parenthood v Ashcroft* 103 S Ct 2517 (1983); *Akron v Akron Centre for Reproductive Health* 103 S Ct 2481 (1983); *Webster v Reproductive Health Services* 109 S Ct 3040 (1989); *Planned Parenthood of Southeastern Pennsylvania v Casey* 112 S Ct 2719 (1992); *Stenberg v Carhart* 120 S Ct 2597 (2000); *Gonzales v Carhart* 127 S Ct 1610 (2007); For the position at state level see, Guttmacher Institute "State Policies in Brief: An Overview of Abortion Laws" *Guttmacher Institute* (1 April 2014) <http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf> (accessed 2 June 2014). The Institute tabulates extensive restrictive measures which include mandated (pro-life) counselling, extensive physician and hospital resource requirements, limited public funding, mandated waiting period of 24 hours, and mandated parental involvement in cases of teenage related pregnancy termination. There is a plethora of criticism on the United States position concerning the legal protection of a woman's right to decide to terminate of pregnancy, too much to consider here. However this discussion demonstrates that *Roe*'s position is being diluted and anti-abortion efforts are unlikely to subside. For more on this issue see generally, B Burkstrand-Reid "The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence" (2010) 81 *U Colo L Rev* 97.

[107] Kommers et al *American Constitutional Law* 624.

[108] Collins & Crockin (2012) *Reprod Biomed* 689. Falk's research supports Collins and Crockin's assertion in this regard, see Falk *Privacy, Due Process, and Morality: A Legal Analysis of Federal Fetal Personhood* 10-11.

[109] See Personhood USA "What is Personhood?" <http://www.personhoodusa.com/about-us/what-is-personhood/> (accessed 22 April 2014).

[110] Ibid.

[111] Personhood USA "What is Personhood?". As discussed above (para 8 2 2), Scott ((2011) *U St Thomas JL & Pub Pol'y* 224) explains that if states, through legislative expression, define the unborn as humans, the Supreme Court may be forced to revisit *Roe* and reconsider its position on excluding the unborn from constitutional personhood.

[112] Collins & Crockin (2012) *Reprod Biomed* 689; Falk *Privacy, Due Process, and Morality: A Legal Analysis of Federal Fetal Personhood* 9.

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fundamental right of a person" and subsection (B) states: "the life of each human being begins with fertilization, cloning, or its functional equivalent, irrespective of sex, health, function or disability, defect, stage of biological development, or condition of dependency, at which time every human being shall have all the legal and constitutional attributes and privileges of personhood". Section 3(3) of the Bill defines the concepts "human" and "human being" as including "every member of the species homo sapiens at all stages of life, beginning with the earliest stage of development".

Currently the Bill is still sitting with the House Committee on the Judiciary and Subcommittee on the Constitutional and Civil Justice,[113] but commentators suggests that the Bill only has a 4% chance of being enacted.[114] This is unsurprising given that there is a long history of attempts to render *Roe* unconstitutional through various federal bills, these date as far back as 1995 and none have garnered sufficient support to make it passed the House Committee.[115]

These failed attempts are also apparent at state level where similar personhood endeavours have taken place. Collins and Cockin[116] state that while various states' initiatives have adopted different language and forms[117] the essential and common characteristic found in every initiative is to redefine "person" so to include the unborn from the moment of fertilisation and thereby extending full legal status and rights to them.[118] To date all personhood measures have failed and Collins and Cockin provide a snippet into these failures: In 2008 Calorado citizens voted down a personhood initiatives; in 2009 a Virginia personhood bill failed; during 2010-2011 personhood

[113] Falk *Privacy, Due Process, and Morality: A Legal Analysis of Federal Fetal Personhood* 9.
[114] See generally Govtrack.US <https://www.govtrack.us/congress/bills/113/hr23/> *Govetrack.US* (accessed 22 April 2014). Scott is also critical of the Bill's suitability for passage into legislation, see Scott (2011) *U St Thomas JL & Pub Pol'y* 240. Scott's pessimistic view says a lot about the quality of the Bill because he himself is supporter of personhood measures and he goes on to recommend what he considers to be a more appropriate personhood amendment, see 240-242.
[115] Falk *Privacy, Due Process, and Morality: A Legal Analysis of Federal Fetal Personhood* 9.
[116] M Manian "Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health" (2013) 74 *Ohio St LJ* 75 77; J Will "Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice" (2013) 39(4) *Am JL & Med* 573 576; Collins & Crockin (2012) *Reprod Biomed* 690.
[117] Manian ((2013) *Ohio St LJ* 79-82) explains that personhood proposals can take the form of ballot initiatives or legislative proposals. Ballot initiatives must generally gather sufficient support by way of signatories. Once enough signatures have been obtained, a relevant personhood measure can be placed on a particular year's state ballot where state citizens can vote on whether they approve or not. Majority approval would allow for the adoption of the personhood initiative.
[118] Collins & Crockin (2012) *Reprod Biomed* 689.

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measures were defeated in Alabama, Arizona, Kansas, Oklahoma, Mississippi, North Dakota and South Carolina.[119] However, these defeats seemed to have fuelled efforts and in 2012 eleven states introduced personhood bills and nine have started ballot initiatives whereby citizens of a particular state vote on personhood measures by popular vote.[120] Despite this flurry of personhood activity, Manian points out that all failed.[121]

After perusing commentary on various positions in a number of states, it seems that personhood initiatives are unsuccessful because they fail to attract sufficient support at grass roots level.[122] There is very little research available indicating what it is about personhood measures that shuns public support generally. In fact at first glance, this wholesale resistance is viewed as a peculiar response, Manian explains that given that the United States has a strong anti-termination-of-pregnancy climate one would expect personhood measures to succeed especially since the collective purpose of the movement is focused on outlawing termination of pregnancies.[123]

Manian[124] theorises[125] that the concern over personhood initiatives lies in the fact that these initiatives have wide reaching implications that go far beyond the issue of termination of pregnancies. She concedes that any enacted personhood measures will likely result in non-therapeutic pregnancy termination being rendered criminal[126] but she argues that "the likely reason for the failure of personhood proposals even in states extremely hostile to abortion rights lies in this link between personhood

[119] Collins & Crockin (2012) *Reprod Biomed* 690.
[120] Ibid.
[121] Manian (2013) *Ohio St LJ* 82. However, see Personhood USA "North Dakota Measure 1" *Personhood USA* <http://www.personhoodusa.com/campaigns/north-dakota-measure-1-2014/> (accessed 22 April 2014) where the organisation claims victory in North Dakota because the state legislature was the first of all states to pass a personhood amendment allowing for the unborn to be considered persons in that state. However, this is not a complete victory just yet because North Dakota's citizens will have to vote on this amendment in November 2014.
[122] Collins & Crockin (2012) *Reprod Biomed* 690; Armstrong & Hsieh "The 'Personhood' Movement Is Anti-Life: Why it Matters that Rights Begin at Birth, Not at Conception" 5-7.
[123] Manian (2013) *Ohio St LJ* 77. Manian (83) points out that in 2011 1100 reproductive health-related provisions were introduced to state legislatures, of that 68% related to restricting access to termination-of-pregnancy services. The "anti-abortion" sentiment lead to a record-breaking 92 termination-of-pregnancy restrictions being enacted.
[124] Manian (2013) *Ohio St LJ* 86.
[125] The term "theorises" is used because even Manian ((2013) *Ohio St LJ* 99) admits that one cannot conclusively list the reasons why personhood measures have failed to the extent that they have.
[126] Manian (2013) *Ohio St LJ* 87-89

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legislation and healthcare".[127] If enacted, personhood laws can implicate women's wider reproductive health concerns by negating their lawful access to contraception[128] and infertility treatments, especially in respect of *in vitro* fertilization.[129] Manian[130] points out that women's decision making powers while pregnant in respect of life style choices and medical treatment options may be substantially curbed by consideration of what is best for prenatal persons. Also, all miscarriages would have to be investigated[131] and pregnant women may face increased forced detention as a means to curtail unfavourable behaviour during pregnancy.[132] Manian argues that personhood laws can also implicate family law principles to the extent that partners will be entitled to legitimately exert significant control over their pregnant partners and women's bodies may very likely become material to parental rights disputes in cases of divorce proceedings.[133] She goes so far as implicating employers in the aftermath of personhood laws: "Given the risk of substantial tort liability under a legal regime granting personhood to embryos, employers may argue the embryo-protection policies

[127] Manian (2013) *Ohio St LJ* 86.

[128] Manian (2013) *Ohio St LJ* 89. Contraceptive methods such as intrauterine devices, the conventional pill and "morning after" pill all prevent fertilized eggs from attaching to the uterus wall. Thus, where personhood is defined from the moment of fertilisation these contraceptive methods will be viewed as being the cause of death of a person. In this respect also see Will (2013) *Am JL & Med* 592-593, whose contribution supports this contention. Will goes into more detail about the impracticality of these laws. He explains (596-597) that it will be impossible to implement these sorts of laws in respect of contraceptive intake because hormonal contraceptives use multiple methods to prevent conception. These methods include preventing ovulation, altering cervical mucus or uterine environments to prevent sperm penetration or travel or altering the uterus in such a way that it makes implantation of a fertilized egg impossible. Will (597) concludes that a women making use of contraceptives will never be able to conclusively determine which one of these methods prevented conception.

[129] Will (2013) *Am JL & Med* 592-593, 610-614; Manian (2013) *Ohio St LJ* 89-92. Manian (91) explains that its very nature the various processes involved in *in vitro* fertilisation could lead to a number of criminal charges such as murder, abandonment and neglect. Criminal liability of this kind is highly probable because Manian explains (91) that *in vitro* fertilisation centres perform a number of process such as implant, donate, or discard freshly retrieved and fertilised eggs, at times eggs are frozen for later use, donated to other patients or to research or the eggs are eventually discarded. The concern over the impact of personhood measures on access to assisted reproduction is a deeply entrenched concern, Collins & Cockin ((2012) *Reprod Biomed* 690-691) attribute Virginia's 2011 personhood initiative's failure to the fact that assisted reproduction patients and doctors fought the initiative on the basis that such provisions are harmful to patients receiving reproductive care. This "health care approach" proved successful because the personhood initiative failed.

[130] Manian (2013) *Ohio St LJ* 93-99.

[131] Will (2013) *Am JL & Med* 590-591. Will explains that since personhood laws render fertilised eggs persons then all miscarriages would have to be investigated since it involves the death of a person.

[132] Manian (2013) *Ohio St LJ* 95-96. Manian suggests that these concerns cannot be overstated, she argues that the United States already has a history of detaining pregnant women for unfavourable conduct during pregnancy and personhood laws would exacerbate the issue even further.

[133] Manian (2013) *Ohio St LJ* 98.

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are justified to ensure that female workers do not cause injury to their future children while performing the functions of their jobs".[134]

From the above considerations it can be accepted that the reason for these personhood initiatives' widespread failures lies in the fact that these measures attract far reaching implications. Personhood measures directly and adversely impact on women and their families, health care providers and employers in cases where women are employed. Going further, the above discussed implications cannot be viewed as a closed list. Only if or once personhood laws take root can one begin to determine the full extent of the measures' reach into the lives of a community and the personal spheres of women and girls of reproductive age. Suffice to say, the potential foreseeable consequences seem to provide a sufficiently frightening view to result in the extension of personhood's defeat.

8 6 Implications of the United States Experience of Personhood Measures for Attempts to Extend Personhood in South Africa

Relating findings on the United States experience to Pillay's suggestion of extending personhood to the unborn, it is noticeable that even in a jurisdiction where foetal personhood exists, there is still a very persistent avoidance of extending full legal subjectivity to the unborn at any point prior to birth. Drawing on De Freitas and Myburgh's arguments, even with the presence of scientific evidence that the unborn are human beings, the complete removal of permissive termination-of-pregnancy laws is unlikely in the foreseeable future.

What this chapter demonstrates is that extending full legal status to the unborn on the grounds that they are human cannot be legitimately limited to rendering termination of pregnancy illegal or protecting the unborn from termination-of-pregnancy decisions, it will inevitably render the unborn "super persons" with more rights than born persons and no existing obligations towards others. The unborn are rendered super persons because the duties towards the unborn are not like any other person's duties in that

[134] Ibid. It can also be argued that where "embryo-protection policies" are not put in place, employers could face criminal liability should the work environment be hazardous enough to cause a miscarriage.

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the unborn can lay claim to another's body for necessary development. This arguably permits third-party access to ensure optimal foetal development and law would sanction this. Also, in all the hype of the personhood measures, there is no discourse of holding the unborn liable for threating the life or health of the women who carry them, or rendering the unborn liable for their contribution towards necessitating caesarean section deliveries or emergency invasive treatments, thus demonstrating the one-sidedness of these measures.[135] These are absurd potential outcomes which ignite adversarialism and correspond with Pillay, de Freitas and Myburgh's extension of protection of the unborn as persons or as human beings.

To date, the personhood movement has failed in its endeavour to be considered an effective means to protect the unborn because the cost of such protection comes at an invasively high price. This failure may be an indication that there is consensus that there are less extreme means to achieve the ends of prenatal protection or healthy pregnancies. The question whether personhood initiatives will secure healthy pregnancies or healthy pregnancy outcomes cannot be answered here because none of the initiatives have taken root, however the wholesale rejection of the moment may be an indication that personhood measures will not effectively achieve that end.

Linking personhood initiative findings to the broader project of this thesis, namely to address the tension between pregnant women's reproductive autonomy and foetal interests to continued development, Manian recognises that "personhood laws seem likely to instigate increased investigation, prosecution, and control over pregnant women's autonomy for the sake of protecting her fetus".[136] Manian considers these measures as increasing adversarialism because as the situation in the United States currently stands, women are facing these issues without the application of personhood measures,[137] this is discussed in chapters that follow. This specifically supports the argument that a separate-entities approach to pregnancy introduces pregnancy

[135] Interestingly, none of the authors considered in this discussion engage with Thomson's notion that granting rights to the unborn will not necessarily guarantee the use of those rights, see generally J Thomson "A Defense of Abortion" (1971) 1(1) *Philos Public Aff* 47; para 7 3 1 of this thesis for an extensive discussion of Thomson's position.

[136] Manian (2013) *Ohio St LJ* 97-96. Also see generally, V Beetly "Mississippi Initiative 26: Personhood and the Criminalization of Intentional and Unintentional Acts by Pregnant Women" (2011) 81 *Supra* 55.

[137] See L Paltrow & J Flavin "Arrests and Forced Interventions on pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health" (2013) 38(2) *JHPPL* 299.

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adversarialism or intensifies already existing tensions rather than addressing pregnancy-related issues in a way that supports the notion of pregnancy being a shared experience between two inseparable entities both with interests that need advancing. This contradicts Pillay's notion that extending legal subjectivity assists in resolving conflicts.[138]

8 7 Concluding Remarks

Using *Roe* and the common law born-alive rule as the starting point, full legal subjectivity in the United States vests in those who are born alive and these persons are constitutionally protected. This is a fairly clear cut position, but when pregnancy is brought into the equation a number of issues arise. Chapter eight demonstrates that status law during pregnancy is a contested issue in the United States. This position is linked to the influential role of reproductive politics and its characteristically polarised constituency made up of anti-abortion lobby groups arguing for full legal subjectivity for the unborn on the one hand and women-centred organisations pushing forward to preserve the right to terminate pregnancies on the other hand.

Anti-abortion efforts focus on reversing *Roe* while at the same time use *Roe* to advance their aims of extending legal subjectivity to the unborn. There is substantial effort invested in bringing the unborn to law's attention via personhood measures and other legal developments that contribute towards extending the status of the unborn. While personhood measures have failed due to their wide-reaching implications, the anti-abortion lobbyists' efforts have paid off to a certain extent when one considers the diminished role of the born alive-rule. The born-alive rule was the sole criterion in determining who counted for purposes of law, particularly in respect of protection of life. However, the intersection of advances in science and medical technology and reproductive politics diluted birth as being relevant and turned to the "human being" criterion as a driving factor for extending status to the unborn.

As a result of this development the concept of foetal personhood comes into the picture, as a form of personhood which is not constitutionally informed but still attracts

[138] Pillay (2010) *Stell LR* 236.

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independent legal consideration. The fact that different forms of personhood are at play in one pregnant body indicates that the separate-entities approach to pregnancy is applied, this is evident at both federal and state level.

It is concluded that legal status can be described as stratified in the United States. Those who are already born are vested with constitutional personhood and these individuals receive constitutional rights and protection while those yet to be born but already conceived are vested with foetal personhood which only attracts extra-constitutional protection. Also, the extent of the personhood strata varies due to the fact that the unborn's status is fluid[139] in that its status depends on the state and the statute involved. However, the chapters to follow will show that it is not only the unborn's status that is fluid but also pregnant women's as a result of the fact that they are pregnant and that pregnancy is viewed as holding two separate entities both with independent interests attempting to be protected.

Also, concluding on Pillay, De Freitas and Myburgh's proposals for extending the fullest possible protection to the unborn as a separate entity, this chapter demonstrates there may be a preference to adopting less extreme means to achieve the ends of foetal protection than defining the unborn as human beings whether from the moment of conception or viability. Understanding the unborn as human beings or persons in law implicates more than mere termination-of-pregnancy issues, and even in a highly charged foetal rights arena, these sorts of measures are consistently avoided. This notion of less extreme means will be built on in the final part of this thesis where the author of this thesis suggests looking at pregnancy as a whole in its contextual setting. This requires one to take note of the embodied relationship between women and the unborn and that this approach shows that by advancing women's rights the unborn's interests will be advanced too, thus according full legal status to the unborn is not necessary.

Despite avoiding the extension of full status to the unborn, chapter eight shows that an environment for pregnancy adversarialism is already established in the United

[139] See Meredith *Policing Pregnancy* 181, who specifically uses this term to describe the status of the unborn in the United States.

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States. This is evidenced by the fact that the unborn are granted foetal personhood and third parties are using this form of personhood to navigate women's rights and autonomy ambitions, the chapters that follow look at how this construction of status works out in the identified areas of concern of violence against pregnant women or the unborn and substance abuse during pregnancy constituting child abuse.

The position in the United States can be juxtaposed with that in South Africa. Part two of this thesis demonstrates that South Africa currently adopts a single-entity approach to pregnancy and some South African based academics have developed a theory of pregnancy separatism in response to the short comings of following a single-entity approach. The United States on the other hand is identified as primarily applying the separate-entities approach to a number of areas of law relevant to pregnancy, specifically those areas identified by South African authors as being in need of reform in South Africa. Consequently, the aim of the discussions to follow is to determine how the United States (at federal and state level) has attempted to address these contentious issues and whether the adopted method has effectively secured healthy pregnancy or foetal outcomes. Ultimately, the purpose of what follows is to test the legal validity of South African authors' assertions that the separate entities approach is the most effective means to secure optimal pregnancy and foetal outcomes.

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Chapter Nine

Feticide or Foetal Homicide

9 1 Introduction

Du Plessis[1] and Kruuse[2] both suggest enacting South African legislation that will criminalise violence that terminates prenatal life. While each author proposes different strategies to achieve that end, each purposefully encourage that the unborn be considered separate victims of crime under feticide and thereby advancing the separate-entities approach.[3] This discussion evaluates whether du Plessis and Kruuse offer sound legal responses to violence that terminates prenatal life by looking at the position in the United States where measures are already in place to address this area of concern. Not all measures in the Unites States adopt a separate-entities approach to address violence that terminates prenatal life.[4] However in order to test the effectiveness of Kruuse and du Plessis's feticide proposals only those states that adopt the separate-entities approach will be considered here since they themselves base their proposals on this approach.

First, this chapter will look at how the Unites States has approached the issue of violence that terminates prenatal life, the theoretical soundness of the adopted approaches and whether these approaches achieve the ends of healthy pregnancies and healthy pregnancy outcomes. Violence that terminates prenatal life has received attention at both federal and state levels, however neither legislatures have adopted a unified approach to the issue. Perusal of various codes across the United States

1 G du Plessis "Feticide: Creating a Statutory Crime in South African Law" (2013) 1 *Stell LR* 73.
2 H Kruuse "Fetal 'Rights'? The Need for a Unified Approach to the Fetus in the Context of Feticide" (2009) 2 *THRHR* 126.
3 See ch 7 para 7 3 2 for a detailed discussion.
4 See A Murphy "A Survey of State Fetal Homicide Laws and their Potential Applicability to Pregnant Women who Harm their own Fetuses" (2014) 89 *Ind LJ* 848 896, Murphy explains that both the states of Colorado and Connecticut do not recognise the unborn as separate victims of violent crimes. However see J Flavin *Our Bodies, Our Crimes: The Policing of Women's Reproduction in America* (2009) 100, who states that "dozens" of states adopt this approach which generally imposes harsher penalties rather than create 2 separate victims. The fact that a separate-entities approach is not unanimously adopted might be an indication that it does not adequately respond to violence against pregnant women. More on this is discussed below in para 9 5.

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reveals that individuated prenatal protection from violence varies according to jurisdiction.[5]

9 2 Approaches to Violence that Terminates Prenatal Life

To start, there is no uniform title allocated to the crime of terminating prenatal life through violent conduct. Some refer to the termination of prenatal life as murder, feticide or fetal homicide. For instance section 187(a) of the Californian Penal Code defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought". Indiana uses the term "feticide", according to section 35-42-1-6 of the Indiana Code, if a person knowingly or intentionally terminates a human pregnancy other than to produce a live birth or to remove a dead fetus, that person commits feticide. The Kentucky Penal Code uses the term "fetal homicide" and makes provision for fetal homicide in the first, second, third and fourth degrees.[6] At federal level, the Unborn Victims Act does not designate any title to the crime of terminating prenatal life through violence, the Act merely states that where a person, while committing a federal crime, causes the death of or injury to an unborn, that person is "guilty of a separate offence under this section", in addition to the offence applicable to the original federal crime.[7]

Aside from the issue of allocating different titles, there is no uniform approach concerning when protection of the unborn vests. Some states offer protection from the moment of conception,[8] while others refer to protection from moment of quickening[9]

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5 This is in line with the fact that, as pointed out in ch 8 para 8 6, the unborn's status is fluid depending on the state involved.

6 See ss 507A.020, 507A.030, 507A.040, and 507A.050 of the Kentucky Statutes respectively.

7 S (a)(1). Another method of extending penal provisions to include the unborn is to include them in the definition of person for purposes of criminal law provisions thus making it possible to commit a number of criminal offenses against the unborn. An example of this can be found in "Alexa's Law" of the state of Kansas (see s 21-5419 of the Kansas Criminal Code). Alexa's Law amends the statutory definition of "person" or "human being" to include the unborn for purposes of capital murder, murder, murder in the second degree, vehicular homicide, culpable homicide and battery in its various forms (see s 21-5419(c) of the Kansas Criminal Code).

8 S 16-5-80(a) of the Code of Georgia Annotated provides that for purposes of this section pertaining to feticide, "the term 'unborn child' means a member of the species homo sapiens at any stage of development who is carried in the womb".

9 S 782.09(1) of Florida Statutes Annotated provides that the unborn must be "quick" in order for a charge of murder to stand against an accused. However, there is no consensus amongst states concerning the definition of "quick child". For instance, in Florida "quick child" is deemed synonymous with "viable child", see s 782.071(2) of Florida Statutes Annotated which provides that "a fetus is viable when it becomes capable of meaningful life outside the womb through standard

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or viability.[10] It is noteworthy that protection tends to correlate with the point in gestation that the unborn is considered to be a human being or person for purposes of that particular criminal provision. Despite diverging positions, the most popular approach is to offer protection from the moment of conception and 23 states currently do so.[11]

Also, most states have explicitly excluded lawful termination of pregnancies from the ambit of crimes against the unborn.[12] It should be noted that state legislation does not have to explicitly exempt lawful termination of pregnancies since the right to terminate a pregnancy is constitutionally protected in terms of *Roe v Wade*.[13] Any legislation

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medical measures". Generally, quickening occurs before viability. Quickening refers to the point in foetal development when a pregnant woman can feel the unborn stir, this can occur as early as 16 weeks gestation, see Begin before Birth "Fetal Development" *Begin Before Birth* <http://www.beginbeforebirth.org/in-the-womb/fetal-development> (accessed 5 May 2014). Yet, a foetus reaches viability from roughly 20 to 24 weeks gestation (depending on social and economic circumstances of the pregnant woman concerned), see C Pickles "Personhood: Proving the Significance of the Born-Alive Rule with Reference to Medical Knowledge of Foetal Viability" (2013) 24(1) *Stell LR* 146 for a discussion of the difficulties faced when attempting to pinpoint foetal viability. Contrary to Florida, Michigan follows the traditional understanding of quickening, according to s 750.322 the "wilful killing of an unborn quick child" is prohibited. The section does not provide a definition for "quick child" but the Court of Appeals of Michigan in *People v Nixon* 42 Mich App 332 (1972) 335 fn 3, van Valkenburg J, following the common law position, found that a quick child is one that "indicates signs of life by way of fetal movements which can be felt by the mother" during the 4th or possibly as late at the 5th month of pregnancy. Rhode Island also uses the "quick child" criteria but attached a different definition to that term. S 11-23-3(a) of the General Laws of Rhode Island Annotated prohibits the wilful killing of an unborn quick child and ss (c) states that "[f]or the purposes of this section, 'quick child' means an unborn child whose heart is beating, who is experiencing electronically-measurable brain waves, who is discernibly moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of usual medical care and facilities available in this state". This definition seems to have meshed quickening with viability by requiring movement and survivability.

10 For instance, s 2-103(b) of the Maryland Code, Criminal Law provides that "a prosecution may be instituted for murder or manslaughter of a viable fetus". S 20-209 of the Maryland Code, Health – General defines viability as that stage when, "in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus's sustained survival outside the womb". It should be noted though, that the term "viability" differs from state to state, see Pickles (2013) *Stell LR* 146 for a discussion of these diverging approaches.

11 See National Conference of State Legislatures "Fetal Homicide Laws" (February 2013) *National Conference of State Legislatures* <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> (accessed 5 May 2014). These states are: Alabama, Arizona, Georgia, Idaho, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

12 Working off a study by the National Conference of State Legislatures, the following states can be identified as explicitly excluding lawful termination of pregnancies: Alabama, Alaska, Arkansas, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Michigan, Mississippi, North Carolina, Oklahoma, and South Carolina. See National Conference of State Legislatures "Fetal Homicide Laws". The federal Unborn Victims Act also excludes lawful termination of pregnancies from the ambit of the Act, see s 919a(c)(1).

13 93 S Ct 705 (1973)

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infringing that right cannot be enforced since the constitutional position as set out in *Roe* stands supreme in this instance.[14]

There are also diverging legislative approaches pertaining to whether pregnant women can be held liable for conduct that causes the termination of a prenatal life, aside from those instances of lawful termination of pregnancies. The federal Unborn Victims Act excludes a woman as a possible perpetrator of violence against her own foetus, subsection (c)(1) of the Act simply states that the Act will not be "construed to permit the prosecution … of any woman with respect to her unborn child". The Unborn Victims Act can be interpreted as providing comprehensive exemption of pregnant women for any harmful conduct towards their pregnancies. Murphy terms these exemptions "maternal exceptions".[15] However, not all states have followed the federal example of including an explicit all-encompassing "maternal exception" and Murphy[16] explains that state legislative silence on the issue allows for the inclusion of a woman as a perpetrator against her own foetus via broad interpretation of relevant statutes.[17]

Two such examples are the States of Utah and Oklahoma. Utah only exempts certain conduct of pregnant women with regard to specific aspects relevant to pregnancy. According to section 76-5-20(3) of the Utah Criminal Code, a person will not be held criminally responsible for causing the death of an unborn child in cases where the death is a result of a refusal to consent to medical treatment, caesarean section delivery or the death is a result of failing to follow medical advice. Subsection (4)(a) also exempts women in cases where death of the unborn is a result of a "criminally

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14 See ch 8 para 8 2 above for a discussion on the hierarchy of laws in the United States.
15 Murphy (2014) *Ind LJ* 850.
16 See generally Murphy (2014) *Ind LJ* 847.
17 In fact, Paltrow and Flavin from National Advocates for Pregnant Women studied the incidence of women facing criminal charges and prosecution in respect of their own pregnancies and report that 413 cases of pregnant women being criminally charged for certain conduct during pregnancy and the authors found that in most of these cases women were facing this treatment despite the fact that there was no legislative authority for it. Further, their study highlights 200 more reported cases since 2005. See L Paltrow & J Flavin "Arrests and Forced Medical Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health" (2013) 38(2) *JHPPL* 299 320; 335. The 413 cases are not limited to instances where women have been charged for homicide in relation to their foetuses but include various charges linked to child abuse, dealing in drugs and so on. The authors state (321), "our study documents hundreds of arrests or equivalent deprivations of liberty, with the majority relying on interpretations and applications of criminal laws that were never intended to be used to punish women in relationship to their own pregnancies." Though most of these cases relate to child abuse or endangerment (Paltrow & Flavin (2013) *JHPPL* 321) it proves Murphy's point that explicit exceptions need to be made where the unborn are considered separate entities in law.

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negligent or reckless act of the woman". However, subsection (4)(b) read together with subsection (1)(b) provides that a woman can be found guilty of criminal homicide "of her own unborn child" in cases where she intentionally terminates the pregnancy beyond the realms of lawful termination-of-pregnancy laws in Utah.[18] In Oklahoma a different approach is adopted, for purposes of homicide, section 691.D of the Oklahoma Statutes provides: "Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child". Thus, aside from intentional conduct against prenatal life, in Oklahoma a woman can be held criminally liable in cases of where her conduct is viewed to be criminally negligent.[19]

9 3 Reviewing the Theoretical Soundness of the Various Approaches to Violence that Terminates Prenatal Life

On the face of it, the notion of criminal liability for terminating prenatal life through violence can be understood as a legislative commitment to valuing and preserving the intrinsic worth of the unborn in as far as they are understood to be human beings. Also, leaving the right to terminate a pregnancy intact and available to women despite foetal protection measures being in place gives the *impression* that there is a commitment to securing the advancement of reproductive autonomy not to bear children.[20] Further, it gives the *impression* that women's rights to continue through pregnancy without interference is also being protected. This is what Kruuse and du Plessis argue will be the case.[21] However, looking at how these commitments translate into lived experiences of pregnant women and looking at these two commitments in relation to one another highlights inherent flaws, and these flaws emerge as a direct result of disembodying the unborn from pregnant women.

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18 This provision is identified as a legislative development of the common law position regarding a woman's criminal liability in instances where she unlawfully terminates her pregnancy, see generally S Visser "Prosecuting Women for Participating in Illegal Abortions: Undermining Gender Equality and the Effectiveness of State Police Power" (2011) 13(1) *JLFS* 171.

19 Also see Murphy (2014) *Ind LJ* 862, Murphy reaches the same conclusion.

20 Although it must be noted that these protection measures are being encouraged by groups which seek to eventually render termination of pregnancy illegal, thus the underlying motives make the realisation of reproductive autonomy unachievable. This being the case, it is submitted that the impression is purposefully created to reduce resistance to these sorts of protective laws.

21 See the discussion in ch 7 para 7 3 2.

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9 3 1 Contradictions in relation to termination-of-pregnancy provisions

Contradictions are apparent in relation to termination-of-pregnancy laws. The most obvious flaw relates to those legislative provisions that protect the unborn from fatal violence from the moment of conception while *Roe*, which also regulates the termination of a pregnancy, only allows states to act on their compelling interests in the unborn from the moment of viability.[22] If each area of law is being driven by the same underlying motive (being the value that the unborn represent) it is not clear how protection can vest at different times in gestation when both acts can be viewed as factually violating that value.[23] Ultimately, there is no cohesive theoretical basis for adopting this approach. This very issue was highlighted when discussing du Plessis[24] and it seems to remain an unaddressed issue in the United States.

The only theoretical basis that comes to mind that permits protection from the moment of conception is to understand that pregnant women have the right to determine the fate of their own pregnancies while third-parties do not, thus rendering the issue of gestation irrelevant. The issue of gestation would be considered irrelevant because the harm inflicted would be viewed as a violation against the pregnant woman's choice in relation to her pregnancy and not in relation to the unborn's individuated interests. It is submitted that adopting this approach requires that the relevant statutory crime move away from viewing the unborn as separate from pregnant women. This would result in denying the unborn the status of separate victims and require them to be re-embodied into the concept of pregnancy. However, this is not the case under these foetal protection measures.

The flaw of extending protection at any point in a pregnancy becomes particularly contradictory in cases where women can be held criminally liable in relation to their own pre-viable pregnancies. Liability persists despite the fact that the right to terminate

22 732.

23 For instance in *State v Merrill* 450 NW 2d 318 (Minn 1990) Merrill murdered a woman who was 1 month pregnant and he was charged for committing foetal homicide since the crime was defined in a way that included non-viable pregnancies. The court (322) went on to recognise that *Roe* identified a compelling state interest in the potentiality of human life that the unborn represent and use this interest to justify providing statutory protection to the unborn from the moment of conception in the form of foetal homicide statutes. The court found that as long as these provisions do not negatively implicate women's privacy rights then the legitimacy of the foetal protection measures stand.

24 See ch 7 para 7 3 2 1.

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a pregnancy still stands and the United States Constitution demands the availability of pregnancy terminations at the request of a woman provided that the termination is in relation to a pre-viable foetus or embryo.[25] Under these instances, the perceived commitment to advancing female reproductive autonomy is no longer present and foetal interests take centre stage, even at the cost of women's rights. *Roe* held that the regulation of termination of pregnancy in the United States is premised on the state's interest in preserving and protecting women's health (in addition to that of protecting prenatal life),[26] thus termination-of-pregnancy regulations are not aimed to punish those women who function outside accepted regulations.[27] This is in line with the fact that there is no common law precedent that women can be held criminally liable for adverse pregnancy outcomes as a result of prenatal conduct.[28] However, despite this the State of Utah has passed what Visser terms the "self-abortion homicide provision".[29]

According to section 76-5-201(1)(a) of the Utah Criminal Code, a person commits criminal homicide if he or she causes the death of another human being, including an "unborn child at any stage of development". Subsection (1)(b) provides that this crime will not stand in the case of lawful termination of pregnancies and subsection 4(b) attributes criminal liability to women who intentionally terminate their pregnancies outside the bounds of lawful termination-of-pregnancy provisions. Consequently, these provisions effectively render unlawful pregnancy terminations performed by women on themselves as the crime of homicide from the moment of conception. Oddly, the lawful termination of a pregnancy is not termed justifiable homicide or considered a defence against a homicide charge. This scenario creates the impression that women's punishment relates more to the fact that they fail to conform with law's

25 732.
26 Ibid.
27 See J Seymour *Childbirth and the Law* (2000) 147-148 who argues that from an historical perspective, self-induced termination of pregnancies were not crimes and women were never held criminally liable for making use of illegal termination-of-pregnancy services. In this respect Seymour explains that the legal regulation of termination of pregnancies was aimed at illegal service providers whose dangerous methods were likely to place vulnerable women at increased risks. Also see Visser (2011) *JLFS* 175-176 whose study confirms this position.
28 See G Brown "Bei Bei Shuai: Pregnancy, Murder, and Mayhem in Indiana" (2014) 17(2) *J Gender Race & Just* 221 240-245.
29 See generally, Visser (2011) *JLFS* 171.

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regulation over them rather than by their failure to respect prenatal life, this impression is created because termination-of-pregnancy laws remain in place.

Visser understands this provision to be an attack on women living in Utah and views it as one of many attempts to outlaw termination of pregnancies.[30] Visser argues further that provisions such as these overlook "the Supreme Court's decisions in *Roe v Wade* and *Planned Parenthood v Casey*, which deal expressly with women's autonomy and place a high value on protecting this autonomy, at least prior to fetal viability".[31] In fact, Visser argues that these sorts of provisions manipulate the judiciary into placing prenatal life at any stage of development before that of women.[32] Women's criminal liability in relation to their own pregnancies will be discussed further below, the point here is to highlight the flaws inherent in offering protection from the moment of conception in relation to termination-of-pregnancy rights generally.

It is submitted that flaws remain even in those cases where legislation extends protection to the unborn from the moment of viability onwards. On the face of it these foetal protection measures are in line with the state's compelling interest in viable parental life as identified in *Roe*.[33] However, it will be demonstrated that a contradiction exists in relation to the diverging approaches each adopts: Foetal protection measures render the unborn separate victims of crime thus employing the separate-entities

30 Visser (2011) *JLFS* 185.
31 Ibid.
32 Visser (2011) *JLFS* 184.
33 According to *Roe*, the state has a compelling interest that can only be acted on once the unborn is viable, 727.

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approach to pregnancy,[34] while *Roe* can be interpreted as representing the not-one-but-not-two approach[35] (not-one/not-two approach) to pregnancy.[36]

The root of the issue lies in the misinterpretation of *Roe* as creating separate entities of the unborn during gestation.[37] Paltrow and Flavin argue that the underlying legal theory being advanced for justifying the protection of the unborn stems from the fact that the unborn are viewed as separate entities from viability onwards and the purported authority for this lies in a misinterpretation of *Roe*.[38] After examining a number of cases,[39] Paltrow and Flavin argue that prosecutors, hospital attorneys and even judges hold or present understandings that *Roe* "established that viable fetuses must be treated as legal persons fully separate from the pregnant woman".[40] (Footnotes omitted.)

The principles stemming from *Roe* cannot be relied on for protection from fatal criminal conduct from the moment of viability if the basis for that position is founded on the separate-entities approach. To start, the Court explicitly found that the unborn are not persons under the United States Constitution,[41] thus plainly rejecting the notion that a pregnant woman represents two separate legal entities for the duration of a pregnancy. However, the Court went on to recognise value in the potential that prenatal life represents at the point of viability onwards and on that basis limited women's rights to terminate their pregnancies.[42] This limitation does not serve as an

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34 Seymour (*Childbirth in Law* 198) disagrees with this assertion, however the basis for him taking that position has changed since his 2000 publication. It is Seymour's contention that the judiciary reluctantly viewed pregnant women as separate entities in the context of prenatal homicide laws but since 2000, however, as described above, legislation specifically regards the unborn separate victims of crime thus explicitly following the notion that the unborn are separate entities from the pregnant women carrying them.

35 See ch 6 para 6 3 1 for an extensive discussion of the concept of the not-one/not-two approach to pregnancy. Briefly this approach recognises the unborn as distinctive entities but maintains the embodied nature of pregnancy by recognising the relationship the unborn share with pregnant women carrying them. This approach views a pregnancy as embodying 2 entities but the special relationship also renders a foetus and pregnant woman 1 entity. Also see Seymour *Childbirth and the Law* 199-202.

36 The same conundrum presents itself in Kruuse's proposal for the crime of feticide in South Africa where the author used principles stemming from termination of pregnancy to justify separate victimhood for the unborn. See ch 7 para 7 3 2 2.

37 Paltrow & Flavin (2013) *JHPPL* 322.

38 Paltrow & Flavin (2013) *JHPPL* 325.

39 The authors cite roughly 10 cases to illustrate their point, see Paltrow & Flavin (2013) *JHPPL* 325.

40 Paltrow & Flavin (2013) *JHPPL* 325.

41 729.

42 732.

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absolute limitation on women's rights since the court found that a woman cannot be prevented from terminating a viable pregnancy in the case where her life or health is at risk.[43] This serves as recognising the need to protect the potential that a viable foetus represents but in relation to the pregnant woman carrying it, thus adopting the not-one/not-two approach.[44] This is comparable to the South African position regarding the Choice on Termination of Pregnancy Act[45] (Choice Act).

9 3 2 Contradictions in relation to women's criminal liability regarding their own pregnancies

Another flaw identified in legislative provisions that seek to protect pregnancies from violence relates to the comprehensive exemption of pregnant women from the ambit of criminal liability despite identifying the unborn as entities separate from women carrying them. If the purpose of feticide, foetal homicide or homicide is to protect prenatal life as an important state interest (whether from the moment of conception, quickening or viability) then it is unclear how pregnant women's intentional or negligent conduct can be justifiably excluded in the context of the separate-entities approach.[46]

Comprehensive exemption of women can be viewed as violating the value vested in the unborn as the separate entities created by these criminal provisions. Most of these provisions define the unborn as persons or human beings, and it is on this basis that they are protected under the particular homicide, feticide or foetal homicide statute.[47] However, by exempting a woman in relation to her own foetus leads to the position that the foetus is not valued solely because it is a person or human being but rather the value of the foetus is determine by considering which party is asserting some form of relationship with the foetus. For instance, if the scenario involves a woman's violent conduct in relation to her own foetus, despite the fact that the unborn is a human being

43 Ibid.
44 For a contrary view see J Schroedel, P Fiber & B Snyder "Women's Rights and Fetal Personhood in Criminal Law" (2000) 7(89) *Duke J Gender L & Pol'y* 89 91-92 who identify *Roe* as treating pregnant women and the unborn as separate entities. Whereas, Paltrow and Flavin (2013) *JHPPL* 325 and Seymour Childbirth and the Law 177 support the notion that *Roe* does not create separate entities of pregnant women.
45 Act 92 of 1996. Also see the discussion in ch 6 para 6 3 2 1.
46 This too was identified as an issue when considering du Plessis' proposal for feticide laws in South Africa. See ch 7 para 7 3 2 1.
47 See discussion in para 9 2.

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or person, no criminal liability will vest. This suggests that the unborn in relation to the woman carrying it is vested with very little if any value at all, creating a category of human being that is valueless. This is not viewed as an application of the not-one/not-two approach because the value of the unborn is wholly overlooked when considered in relation to pregnant women and the not-one/not-two approach sees more in a pregnant woman than just the woman concerned. If the scenario involves a third-party's violent conduct in relation to the unborn, criminal liability will vest. This suggests that the foetus in relation to a third party is comprehensively valued as a human being or person in the context of homicide laws.

A consequence of this anomaly is that the value of the foetus as a person or human being is only being determined by the fact that a woman intends to continue with a pregnancy.[48] Thus, only where continuation of pregnancy is intended, then the fact that the foetus represents a person or human becomes an influential or defining factor in determining another's criminal liability. A further consequence leads to the position that despite foetal homicide laws expressing a separate-entities approach to pregnancy, in reality the separate-entities approach is only applicable to third parties while the single-entity approach[49] is applied to pregnant women. This is very contradictory to the premise of valuing the unborn on the basis of their humanity.

The stance described above is problematic. It is submitted that the unborn are not valued because they represent a wanted pregnancy, they are valued because they represent humanity or as per *Roe*[50] "potential human life".[51] This statement is supported by the fact that women cannot simply elect to terminate late pregnancies because they no longer intend to be pregnant, there are restrictions placed on women's freedom in this regard and these restrictions are identified as relating to the

48 For instance, if a woman decides not continue with a pregnancy, she can terminate her pregnancy legally or inflict trauma upon herself to terminate her pregnancy, and this does not receive the attention of foetal protection measures. However, where she continues a pregnancy (by not having her pregnancy legally terminated or causing a self-induced termination) then the foetus is valued and others cannot interfere with the pregnancy continuation without attracting attention of foetal protection measures.

49 The single-entity approach can be defined as viewing a foetus as a non-existent entity thus taking the view that pregnancy represents a single entity being the woman only. For a detailed discussion, see ch 6 para 6 2 2 and Seymour *Childbirth in Law* 182.

50 731.

51 For a detailed discussion of the argument that unborn life represents a worth of its own see ch 4 para 4 3 2.

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value the unborn represent.[52] Thus, termination-of-pregnancy laws still extend protection to the unborn regardless of women's intentions during late pregnancy. This suggests that the unborn are valued in and of themselves once they have reached a certain point in gestation. Nevertheless as a result of applying the separate-entities approach in the context of violence that terminates pregnancies there has been a failure to adequately articulate this value into a legal principle that can be soundly applied.

Seymour discusses the issue of excluding women from feticide or foetal homicide provisions at length and considers a number of cases decided across the United States which justify this stance.[53] He takes the position that as long as women's interests are aligned with the state's interest in preserving prenatal life, there is no reason why third-party violence that terminates pregnancies should not be criminalised, regardless of when protection is extended in gestation.[54] Under this position it is argued that liberal termination-of-pregnancy laws should not be used as a ground for third parties to evade prosecution for harm inflicted against pregnant women which causes the termination of their pregnancies.[55] Seymour[56] explains that this approach allows for flexibility according to context, in the case of a termination of pregnancy the woman concerned is asserting her right not to bear children and the

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52 In the context of the United States, *Roe* (732) placed this limitation on women from the moment of foetal viability since it is at this point that the unborn can survive independently.

53 Seymour *Childbirth and the Law* 178-186. One such example is *Merrill*. In this case Merrill murdered a woman who was roughly a month into her pregnancy and was charged for the murder of both the pregnant woman and her embryo. It should be noted that at the time of this decision the State of Minnesota criminalised third party violence that terminates a pregnancy at any point in gestation, such conduct was defined as murder. Merrill argued that limiting criminal liability to third parties and pregnant women or their attending physicians when performing termination of pregnancies. In essence he argued that similarly situated persons are treated dissimilarly. In response, the court held (321-322): "The situations are not similar. The defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as a woman who elects to have her pregnancy terminated by a person who is legally authorized to perform the act. In the case of abortion, the woman's choice and the doctor's actions are based on the woman's constitutionally protected right to privacy. This right encompasses the woman's decision whether to terminate or continue the pregnancy without interference from the state, at least until such time as the state's important interest in protecting the potentiality of human life predominates over the right to privacy, which is usually at viability. [Reference omitted.] *Roe v. Wade* protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus. The court found (322) that the relevant statutory provisions are aimed at protecting the potentiality of human life without impinging directly or indirectly on a woman's right to privacy.

54 Seymour *Childbirth and the Law* 182.

55 Ibid.

56 Seymour *Childbirth and the Law* 180.

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state has an interest in securing the healthy and unburdened realisation of that right. Whereas in the context of protection from third-party violence she is asserting her right to bear children and the state vests value in the unborn she carries.[57]

While the "alignment of interests" argument offers a compelling view, it does not resolve the issue of the devalued position of the unborn when they are considered in relation to pregnant women. Also, if the focus is on alignment of interests between women and the state then the definition of the crime should regard women as victims since their interests are infringed and not those of the unborn.

Murphy views "maternal exceptions" as the source of legitimacy for any legislation seeking to prohibit violent termination of prenatal life,[58] however this discussion shows otherwise. Under the construction of the separate-entities approach which expresses independent value in the unborn, the source of illegitimacy stems from "maternal exceptions" since it should not matter who causes harm to the unborn in order to secure protection of them as separate valued entities. The root cause of all the inconsistencies discussed here stem from the compulsion to provide *independent legal recognition* of the unborn via the notion of foetal personhood while at the same time arguing that these efforts advance the protection of women's *autonomous* existence during pregnancy.[59] Splitting a pregnancy in this way inevitably leads to irreconcilable contradictions.

9 3 3 Contradictions in relation to advancing the notion of foetal protection

The above described inconsistency pertaining to the translation of the value of the unborn into a workable legal principle can be seen to be addressed in cases where states hold women criminally liable either explicitly in terms of legislative provisions[60]

57 Ibid.
58 Murphy (2014) *Ind LJ* 850.
59 Foetal personhood is understood to be at play here because the unborn are granted legal leverage over others in their individuated capacities.
60 Such as that found in the State of Oklahoma. According to s 691 D of the Oklahoma Statutes Annotated a woman can be held criminally liable for conduct that causes the termination of her pregnancy in cases where the conduct concerned constitutes a crime in Oklahoma.

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or through wide interpretation of foetal protection measures.[61] Paltrow and Flavin[62] point out that it is the result of adopting a separate-entities approach that there is now a trend in the United States of holding or attempting to hold women criminally liable in relation to their own demised pregnancies.

Proehl[63] discusses three very well documented incidences of holding or attempting to hold women criminally liable in terms of homicide laws for stillbirths or adverse pregnancy outcomes resulting in death of a born child,[64] namely, that of Regina McKnight,[65] Melissa Rowland[66] and Bei Bei Shuai.[67] However, while only three incidents will be discussed here, Paltrow and Flavin point out that during the time spanning 1973-2005 there were 68 cases of women being charged and involved in criminal proceedings because they experienced miscarriages, stillbirths, or infant deaths.[68] In 48 of these cases women were charged under variations of state homicide laws in the form of feticide, manslaughter, reckless homicide, homicide by child abuse and first degree murder.[69] They further point out that in four cases where women's conduct constituted "self-abortion" they were charged under murder or manslaughter statutes.[70] Paltrow and Flavin argue that the number of cases their study identified represent a "substantial undercount", many cases may be unaccounted for due to the

61 Concerning the issue of wide statutory interpretation of prenatal homicide laws, see Murphy (2014) *Ind LJ* 863.

62 (2013) *JHPPL* 322-326.

63 K Proehl "Pregnancy Crimes: New Worries to Expect when Your Expecting" (2013) 52(2) *Santa Clara L Rev* 661 664-672. In fact many authors have covered numerous cases including these, there are so many contributions that not all can be included here as a result of word count constraints.

64 These cases cover criminal liability for conduct not generally considered criminal but for the fact that these women were pregnant and Proehl ((2013) *Santa Clara L Rev* 663) identifies these instances as involving a new form of status crime. By this Proehl means that these sorts of crimes against the foetus only apply to a very particular subset of the population being pregnant women.

65 *State v McKnight* 576 SE 2d 168 (SC 2003) (*McKnight* 2003) and the appeal decision *McKnight v State* 661 SE 2d 354 (SC 2008) (*McKnight* 2008).

66 The record of the Court's decision cannot be sourced in the form of a reported cases and most of what is discussed in this thesis stems from academic publications and some information from Rowland's case file as obtained from Flavin, a Professor of Sociology and President of the Board of Directors of National Advocates for Pregnant Women via electronic mail on 27 May 2014.

67 *Shuai v State* 966 NE 2d 619 (Ind App 2012).

68 Paltrow & Flavin (2013) *JHPPL* 321. It must be noted that their study only covers traceable cases spanning this time period. Since some time has passed there may be more cases on the books. In fact, in their conclusion the authors state that they have "identified more than 200 cases initiated against pregnant women since 2005 that also overwhelmingly rest on the claim of separate rights for fertilized eggs, embryos and fetuses". (References omitted.) However, the authors do not indicate whether these cases are related to homicide charges or not.

69 Ibid.

70 Paltrow & Flavin (2013) *JHPPL* 322.

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fact that not all charges are properly documented or result in published court opinions.[71]

While the true extent of women's criminal exposure is somewhat uncertain Paltrow and Flavin's comprehensive study does identify that a substantial number of women face criminal charges for adverse pregnancy outcomes. The authors argue that despite the fact that these laws were passed in the wake of extreme violence against pregnant women they are now being used to as grounds to arrest pregnant women themselves.[72] However, as with Murphy's cautionary note urging explicit "maternal exceptions"[73] Paltrow and Flavin[74] explain that:

> Even when women are not charged under feticide laws, such laws are used to support the argument that generally worded murder statutes, child endangerment laws, drug delivery laws, and other laws should be interpreted to permit the arrest and prosecution of pregnant women in relationship to the embryos or fetuses they carry.

Going back to the three identified cases specifically, in the State of South Carolina, McKnight[75] was the first woman to be charged and successfully convicted for homicide by way of child abuse[76] for experiencing a stillbirth of her viable foetus.[77] In May 1999 McKnight experienced a stillbirth and the autopsy revealed that prenatal life terminated an estimated three days before delivery and that the foetus had been exposed to cocaine.[78] On this basis McKnight was charged and convicted of homicide by child

71 Paltrow & Flavin (2013) *JHPPL* 303-304.
72 Paltrow & Flavin (2013) *JHPPL* 323.
73 Murphy (2014) *Ind LJ* 849-850.
74 Paltrow & Flavin (2013) *JHPPL* 323.
75 *McKnight* 2003.
76 This crime is identified as being unique to South Carolina and is understood to be crime developed in line with the State's tough on drugs approach, see Proehl (2013) *Santa Clara L Rev* 665-666.
77 While this case involves child abuse it is discussed here because of the fact that McKnight faced a homicide charge in relation to her own foetus, other cases regarding child abuse that did not result in terminated prenatal life will be discussed in ch 10.
78 171. McKnight admitted to using cocaine and consented to drug testing (*McKnight* 2003 178-179). However, Page offers compelling argument that her consent was uninformed since the nurse who obtained McKnight's consent for urine testing did not understand the legal implications of obtaining such tests so she was not in the position to relay the legal implications of those tests to McKnight, see D Page "The Homicide by Child Abuse Conviction of Regina McKnight" (2003) 46 *How LJ* 363 366.

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abuse,[79] and sentenced to 20 years imprisonment in the Circuit Court.[80] This was later confirmed by the majority in the Supreme Court of South Carolina.[81] The Supreme Court found that the crime of homicide by child abuse was applicable to a pregnant woman in relation to her viable foetus[82] and since "it is public knowledge that usage of cocaine is potentially fatal, we find the fact that McKnight took cocaine knowing she was pregnant was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child's life".[83]

In 2008, McKnight's conviction was overturned as a result of post-conviction relief proceedings where the Supreme Court of South Carolina found that McKnight received ineffective assistance from her counsel at trial.[84] The Court found that the prosecution's research concerning the effects of cocaine on prenatal development was outdated.[85] In fact the Court accepted that recent studies show that the harm suffered as a result of prenatal exposure to cocaine is comparable to harms associated with exposure to nicotine, poor nutrition and inadequate prenatal care, meaning that a causal link had not been established beyond a reasonable doubt.[86] McKnight went on to plead guilty to manslaughter and was released from prison.[87] She allegedly plead guilty in order to avoid being retried and possibly sentenced to a longer term.[88] Murphy explains that while McKnight got some relief, the court did not address the constitutionality of holding women criminally liable for adverse pregnancy outcomes

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79 The crime of homicide by child abuse is governed by s 16-3-85(A) of the South Carolina Code Annotated, which provides that a person is guilty of homicide by child abuse if that person causes the death of a child under the age of seven while committing child abuse or neglect and death occurs as a result of the person's "extreme indifference to human life".

80 179.

81 Ibid.

82 173. However, dissenting with the majority, Moore J found that at most McKnight's conduct constituted a violation of the State's termination-of-pregnancy statute which imposed less severe punishment being a fine of 1000 USD or 2 years imprisonment for "feticide by its mother". Moore J explained that this provision took due account of the special relationship between the unborn and women carrying them and was thus unconvinced that homicide statutes are applicable against pregnant women, 179-189.

83 173.

84 *McKnight* 2008.

85 *McKnight* 2008 360-361.

86 *McKnight* 2008 358 fn 2.

87 Paltrow & Flavin (2013) *JHPPL* 306; B Steinbock *Life before Birth: The Moral and Legal Status of Embryos and Fetuses* 2 ed (2011) 173.

88 Ibid.

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despite the fact that substance abuse during pregnancy is now understood to be a lot less harmful than previously believed.[89]

Page[90] gives some background information on McKnight that demonstrates the tragedy of this case. McKnight was an African-American woman who was homeless, unemployed, "educably mentally handicapped" and a mother of three, who at the time of the 2003 case had been using drugs for three years.[91] While she repeatedly sought treatment for her addition, she was turned away.[92] In fact, she was only admitted for treatment to overcome her addition after her first trial ended in a mistrial and while receiving treatment she fell pregnant once again as a result of a relationship with her treatment counsellor.[93] Page points out that holding McKnight criminally responsible diverts attention from the state failing to take responsibility for wider social evils such as poverty, racism[94] and misguided national health policy.[95] This is a compelling argument because if McKnight had received treatment when she originally attempted to obtain it, her addiction would have been addressed and her entire ordeal in the criminal justice system could possibly have been averted.[96] Page concludes that it is unfair to punish people who are sick because they cannot get well while at the same time refusing to provide the means to get better.[97] More on the effectiveness of these criminal policies will be discussed below, the discussion here is to point out the theoretical inconsistencies pertaining to holding women liable in order to protect the wellbeing of the unborn.

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89 Murphy (2014) *Ind LJ* 862.
90 Page (2003) *How LJ* 368-369.
91 Ibid.
92 Page (2003) *How LJ* 368-369.
93 Ibid.
94 Racism is relevant here because non-white women, being those who represent the minority in the Unites States are over represented in cases dealing with holding women criminally responsible for adverse pregnancy outcomes, see Paltrow & Flavin (2013) *JHPPL* 311. Their study highlights that aside from race, the indigent are overly represented and so too are African American women, particularly in the South. This is where McKnight was tried, in South Carolina. Page argues that it is the intersectionality of McKnight's circumstances that left her vulnerable to limited protection by the United States Constitution, this intersectionality includes the meeting points of disadvantages associated with race, class and gender. For a detailed discussion see Page (2003) *How LJ* 397-399.
95 Page (2003) *How LJ* 364.
96 One might be inclined to argue that McKnight might not have experienced an adverse pregnancy outcome had she received treatment. However, as demonstrated in para 9 4 that follows, there are many factors that influence the increased risk of adverse pregnancy outcomes, and substance abuse increases it. Merely removing substance abuse as a risk factor therefore may not have saved McKnight's pregnancy.
97 Page (2003) *How LJ* 403. More on adequate state response will be discussed below.

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In December 2010 in Indiana, Bei Bei Shuai was in her third trimester when her partner broke off their relationship. [98] Feeling distraught she attempted suicide by ingesting rat poison.[99] She informed the father-to-be of her actions telephonically.[100] In addition to verbally communicating her intentions she wrote a suicide note indicating that she intended to end her life and that of the foetus as well.[101] Soon after talking to her partner the police arrived to check on her, however she sent them away.[102] Shuai then went to a friend who suspected that something was amiss and after a while she informed her friend what she had done, and they went to the hospital.[103] Shuai received treatment to stabilise her condition, however a few days later complications occurred which necessitated an emergency caesarean section delivery.[104] After delivery Shuai's child's condition worsened requiring that the child be placed on life support and unfortunately, when life support was removed the child passed away.[105] An autopsy revealed that the child died of intra-cerebral haemorrhage which was purportedly a result of the toxins in rat poison that was ingested by Shuai during her prenatal suicide attempt.[106]

Shuai[107] was charged with murder[108] and attempted feticide[109] and jailed. At trial, Shuai's motion to dismiss the charges and her petition for bail were both denied, on appeal a number of issues were raised regarding her right to bail and the applicability of the charges to Shuai in relation to her own foetus. Despite the fact that women's liability in respect of their own pregnancies is not explicitly provided for in either of charges against Shuai, the Court of Appeals of Indiana found these crimes to be

98 *Shuai* 622.
99 Ibid.
100 *Shuai* 622.
101 Ibid.
102 *Shuai* 622.
103 Ibid.
104 623.
105 Ibid.
106 623.
107 Ibid.
108 According to s 35-42-1-1(4) of the Indiana Code murder is defined as knowingly and intentionally killing a viable foetus. Despite the fact that the child was born alive, the Court (627) held that this charge stands because the harm inflicted occurred while the baby was a foetus. The Court (627) found that removing the charge simply because medical staff effected birth in an attempt to save the child's life should not be used as a ground for Shuai to avoid liability.
109 S 35-42-1-6 of the Indiana Code defines feticide as the termination of a human pregnancy with the intent to procure a non-live birth.

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applicable nonetheless.[110] "Shuai is a 'person,' the State alleged she intended to kill A.S. [the foetus] by virtue of Shuai's mention of the fetus in the suicide note, and the victim was an entity protected under the murder statute, be it a 'viable fetus' or 'human being,' [that] died".[111] Feticide was found to be applicable on the basis of Shuai's suicide note, because it undisputedly demonstrated that Shuai intended to end her pregnancy and the fact that she did so with rat poison indicated the intention to ensure a live birth did not ensue.[112] Furthermore, even though the Appeals Court found suicide did not constitute a crime in the United States, the Court accepted the state's argument that the charges Shuai faced were not in relation to the harm she caused to herself but linked to her conduct towards the unborn and once again Shuai's suicide note served the basis for this since she expressly indicated that she intended to kill herself and the foetus.[113]

The significance of this case relates to the fact that pregnant women can now be held criminally liable for "self-harm" in Indiana, which if it were not for the existence of a pregnancy, no crime would have been committed. Pollitt cites Linda Pence (Shuai's attorney) as stating that "[t]hese laws say there's one law for pregnant women and another for everyone else … For everyone else suicide is a mental health issue. For a pregnant woman, it's a crime".[114] Ultimately, this sort of scenario leads to the puzzling position that pregnant women are legally required to "stay sane" until they give birth.[115] This case is another unfortunate example of taking the easy route away from state responsibility especially because suicide is a response to wider social issues such as health concerns being an illness of depression.[116] Pillott rightly points out that pregnant women in crisis need compassion and treatment.[117]

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[110] 629.
[111] Ibid.
[112] 629.
[113] 630
[114] K Pollitt "Protect Pregnant Women: Free Bei Bei Shuai" (28 March 2012) *The Nation* <http://www.thenation.com/article/166664/protect-pregnant-women-free-bei-bei-shuai> (accessed 20 May 2014).
[115] Ibid.
[116] See the *amici curiae* brief of American Association of Suicideology et al in the matter of *Shuai v State* 966 NE 2d 619 (Ind App 2012) 19. The *amici* argue that charging women for attempted suicide is in effect punishing them for their health status.
[117] Pollitt "Protect Pregnant Women: Free Bei Bei Shuai" *The Nation*.

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Through a study conducted on homicide and suicide during pregnancy, Palladino et al demonstrate that in the Unites States the maternal mortality rate from suicide is greater than many other obstetric complications which are understood to be traditional causes of maternal mortality.[118] While the authors identify a number of limitations, they confidently assert that the study's findings "suggest that effective methods aimed at perinatal psychological health are imperative".[119] However, suggesting help implies that women would be able to ask for it in cases where they are experiencing suicidal ideation. Shuai's criminal charges and impending trial could impede the opportunity for seeking help in Indiana because a cry for help can very well be interpreted as an indication of the intention to commit murder or feticide. Foetal interests are being placed before the needs of pregnant women carrying them and if pregnant women's needs are not properly addressed a successful suicide will come at the high price of two valued lives.[120]

Melissa Rowland from Utah is another example of homicide charges being brought against a pregnant women, in this case one of Rowland's twins was stillborn while the

[118] C Palladino, V Singh, J Campell, H Flynn & K Gold "Homicide and Suicide During Prenatal Period: Findings from the National Violent Death Reporting System" (2011) 118(5) *Obstet Gynecol* 1056 1059; 1061. Traditional causes of mortality are identifies as including eclampsia, preeclampsia, haemorrhage, placenta previa or amniotic fluid embolism.

[119] Palladino et al (2011) *Obstet Gynecol* 1062. This suggestion is problematic because according to J Perlow & H Lesmes "Homicide and Suicide during the Perinatal Period: Findings from the National Violent Death Reporting System: Letter to the Editor" (2012) 119(6) *Obstet Gynecol* 1275 1276, the authors highlight that the American College of Obstetricians and Gynecologists decided against universal depression screening being made available to pregnant women in the health care system. The authors argue that this would assist with identifying cases in need of intervention and thus aid in reducing suicide rates during pregnancy.

[120] A chilling report emphasises this point. D Dell & B O'Brien "Suicide in Pregnancy" (2003) 102(6) *Obstet Gynecol* 1306 report on a case where a young woman suffered with bipolar disorder which she was receiving treatment for. She unexpectedly fell pregnant and the relationship with her partner ended. However, terminating the pregnancy was not an option for her and she opted to place the child up for adoption once born. Her caregivers discontinued her psychiatric medication out of fear that the medication she was taking could cause foetal anomalies and complicate labour and delivery. As a result of suddenly stopping her medication the pregnant woman experienced a relapse, sought help a number of times at a psychiatric crisis centre and eventually she was admitted as an in-patient at a psychiatric unit. She was stabilised and released, within 2 days after being discharged she shot and killed herself. This case is an example of treatment being in reach but the separately construed interests of the foetus were placed above that of the pregnant woman carrying it, and this approach led to the demise of both the pregnant woman and the foetus. This is a tragic example of the extreme results that the separate-entities approach invokes. In fact, had the foetus been understood in relation to the pregnant woman one would undoubtedly see some benefit in allowing adequate treatment of the pregnant woman concerned or demanding state action and investment to find treatment appropriate for pregnant women suffering with mental instabilities. The unity that pregnancy represents means foetal interests will be advanced where the interests of the pregnant woman are advanced too and this is particularly obvious in this case.

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other was born alive.[121] The live-born twin tested positive for exposure to alcohol and cocaine,[122] and it was estimated that the stillborn twin died two days prior to delivery.[123] Rowland faced one charge of child endangerment in relation to her born-alive twin and charged with criminal homicide in respect of her stillborn twin.[124]

Rowland's murder charge was based on the fact that she refused follow medical recommendations to undergo a caesarean-section delivery at earlier point during her pregnancy.[125] According to National Advocates for Pregnant Women this case faced an "unexpected storm of controversy" but instead of the state dropping all charges against Rowland she pleaded guilty to two counts of third-degree felony child endangerment.[126] As a result of the charges being brought against Rowland, she spent 105 days in jail before reaching a plea agreement and being released.[127] According to Miller, this case represents the first reported case of a woman being prosecuted for refusing to deliver a foetus via caesarean-section surgery.[128] The ground for dropping the murder charge did not relate to the fact that Utah's homicide laws did not explicitly exclude pregnant women but because of Rowland's history of mental illness.[129] This leaves the door open to the possibility that other women may face homicide charges under similar circumstances, however no such cases can be sourced.

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[121] National Advocates for Pregnant Women "Lessons from the U.S. Experience with Unborn Victims of Violence Laws" (13 January 2004) *National Advocates for Pregnant Women* <http://www.arcc-cdac.ca/action/LessonsfromUS.pdf> (accessed 21 May 2014) 6. As a result of the case note being reported, the author of this thesis relies on anecdotal accounts of Rowland's legal ordeal. Consequently, no case law can be cited here.

[122] Ibid.

[123] See M Miller "Refusal to Undergo a Cesarean Section: A Woman's Right or a Criminal Act?" (2005) 15 *Health Matrix* 383.

[124] National Advocates for Pregnant Women "Lessons from the U.S. Experience with Unborn Victims of Violence Laws" *National Advocates for Pregnant Women* 6.

[125] Ibid. Miller ((2005) *Health Matrix* 383) explains that Rowland sought medical attention several times during the third trimester and each time she was advised to undergo an emergency caesarean-section delivery because the unborn were understood to be in danger that may either result in stillbirth serious injury. Further, on 2 January 2004 Rowland singed a document acknowledging that her refusal to submit to treatment might cause adverse pregnancy outcomes including stillbirth.

[126] National Advocates for Pregnant Women "Lessons from the U.S. Experience with Unborn Victims of Violence Laws" *National Advocates for Pregnant Women* 6.

[127] Ibid.

[128] Miller (2005) *Health Matrix* 384.

[129] National Advocates for Pregnant Women "Lessons from the U.S. Experience with Unborn Victims of Violence Laws" *National Advocates for Pregnant Women* 6. With mental illness being a concern, it is not clear how Rowland's child endangerment conviction stands.

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While actual homicide convictions seem to be rare in the United States that does not mean that women do not face these charges when they experience stillbirths, miscarriages[130] or death of a child soon after delivery. Charging women for these adverse pregnancy outcomes are wide spread across the United States.[131] Generally women are charged with murder, homicide or feticide in relation to their own pregnancies but end up pleading to lesser offences through plea agreements with the prosecution.[132] Alternatively, courts at times reject that women can be held liable in respect of their own pregnancies and dismiss the case, however, in these instances women have still had to spend time in prison awaiting trial and secure representation which are both unfortunately high prices to pay.[133]

From a theoretical perspective, holding women criminally liable in respect of their own adverse pregnancy outcome seems more in line with the direction of the separate-entities approach in respect of consistency. It is more in line because the unborn and pregnant women are rendered two separate entities and the unborn are valued as human beings or persons in law, then exemption cannot logically be extended to women because the issue at hand is the harm caused to the unborn and not who causes the harm.

However, this approach is also flawed to a certain degree. Substance abuse, attempted suicide and refusal to undergo a caesarean section all rely on the embodied connectedness of pregnancy for purposes of harm, without there being a pregnancy

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[130] In this chapter focus is placed on stillbirth and perinatal death since the cases considered herein revolve around the occurrence of these two forms of pregnancy outcomes. However, the discussion to concerning stillbirths is equally applicable to the experience of a miscarriage. Flavin *Our Bodies, Our Crimes* 106 defines miscarriage as the loss of a pre-viable pregnancy while stillbirth constitutes the loss of a viable pregnancy. She indicates the miscarriage is more common than stillbirth and the uncertainty plaguing the causes of stillbirth are also applicable to the causes of miscarriages. These uncertainties are discussed below in para 9 4.

[131] See generally L Paltrow "*Roe v Wade* and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration" (2013) 103(1) *Am J Public Health* 17; Paltrow & Flavin (2013) *JHPPL* 299.

[132] For instance see B Bird "Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability among Fetal Pain and Fetal Homicide Laws" (2014) *Hastings Women's LJ* 39 51. This stems from the fact that women are represented by inadequate council or do not have council at all, Paltrow (2013) 25(1) *Am J Public Health* 17.

[133] For instance see Paltrow (2013) *Am J Public Health* 18. Also see Centre for Reproductive Rights "Punishing Women for their Behavior during Pregnancy: An Approach that Undermines Women's Health and Children's Interests" (September 2000) *Centre for Reproductive Health* <http://reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf> (accessed 23 May 2014) 11-15.

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neither of these scenarios are crimes in themselves. Thus it is the combination of the physical biological relationship between pregnant women and women's self-harm that creates a "fatal environment" for prenatal life. Yet, the separate-entities approach is applied in a way that renders the relational aspect of pregnancy irrelevant despite the fact that if it were not for the relational aspect, no adverse outcome would have ensued, essentially nullifying the causal connection giving rise to the "offence".

Going further, criminal sanctions for these women's experiences of stillbirth or perinatal death can be viewed as responsive actions rather than preventative. It can be argued that responsive actions can never lead to healthy pregnancies or pregnancy outcomes if applied in a particular case because these actions only become applicable once prenatal life is lost. Thus, applying homicide laws will never really address those actions that are argued to cause stillbirths or perinatal deaths as adverse pregnancy outcomes. One can argue that if prenatal life was truly valued emphasis should be on preventative rather than responsive actions. Ultimately, these provisions do give weight to the value that the unborn represent and demonstrate that the loss of prenatal life is something that should not go unnoticed in law, but they fail to prevent the loss.

Also discrediting the notion that these measures are being employed to protect the unborn is the fact that it is mainly poor women of colour (representing the minority in the United States) who bear the brunt of criminal charges for experiencing stillbirths or perinatal deaths. In Paltrow and Flavin's study that identified 416 cases of women's facing charges that threaten their freedom on the grounds of pregnancy related issues, the authors found that, regardless of race, the majority of women in the system were "economically disadvantaged", indicating that poor women bear the brunt of these foetal protection measures.[134] Of the women identified in the study, in 368 cases the women's race could be identified and of these, 59% of the women involved were women of colour, of that, 52% were black.[135] The authors found that black women are overrepresented in their study despite the fact that these women constitute a minority group. The majority of these liberty violations take place in the South.[136] While the

[134] Paltrow & Flavin (2013) *JHPPL* 311.
[135] Ibid. However, the authors (332-333) emphasise that while these statistics demonstrate some women are more susceptible to state intervention, pregnant women as a whole group and across the United States all suffer from these sorts of state actions.
[136] Paltrow & Flavin (2013) *JHPPL* 311.

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authors are presenting data on all forms of state intervention during pregnancy based on numerous grounds (not only in respect of criminal charges for stillbirth or perinatal death), their study does demonstrate that the intersection of poverty and race intensifies state action and women who fall in this category are particularly vulnerable.[137] The authors cite a number of studies supporting their findings, and submit that racial disparity is not a result of "'colour-blind' decisions" but linked to a "history of devaluing African-American mothers".[138]

Page explains this history of devaluing black women in the context of her discussion of the *McKnight* case, and argues that "criminalization of poor black women's conduct during pregnancy is a part of a larger continuum of the devaluation of black women as mothers that began during slavery and continues in numerous forms today".[139] By criminalising their conduct the state attributes the cause of stillbirth or perinatal deaths squarely on their shoulders thus rendering their actions during pregnancy, as "bad acts of individual mothers".[140] However, these "bad acts", (such as addiction to controlled substances) are linked to, and exacerbated by poverty and associated social issues and by attributing personal responsibility, the state has removed itself from the obligation to address these concerns.[141] This issue raises a unique situation for black women: Black women experience significantly more stillbirths each year than white women which renders them vulnerable to increased prosecutions, and this position will persist if the state fails to address the underlying issues giving rise to stillbirth as a pregnancy outcome. Page argues: "The comments made by those involved [in the prosecution of women] indicate that these prosecutions are solely about punishing these women for their 'bad' mothering and have little to do with actually protecting the health of children".[142] The fact that these measures do not secure healthy "children" will become even more obvious when this chapter considers the fact that criminalising stillbirths is founded on flawed assumptions of who factually causes harm to pregnancies.[143]

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[137] Paltrow & Flavin (2013) *JHPPL* 333.
[138] Paltrow & Flavin (2013) *JHPPL* 333-334.
[139] Page (2003) *How LJ* 364.
[140] Ibid.
[141] Page (2003) *How LJ* 364.
[142] Page (2003) *How LJ* 401.
[143] See para 9 4 below.

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From a theoretical perspective, the separate-entities approach to pregnancy in the context of feticide or foetal homicide is rendered unsound and leads to ambiguous outcomes. Understanding that these protective measures are infused with anti-abortion sentiments in the United States, a clash must be expected between the right to terminate a pregnancy and the protection from violence that terminates prenatal life.[144]

9 4 The Flawed Foundations for Holding Women Criminally Liable for Experiencing Stillbirths or Perinatal Deaths

Despite the theoretical inconsistencies described above, there are practical concerns that implicate the adequacy of these measures which are generally linked to proving factual causation in cases that involve pre-viable pregnancies, whether it is a woman or third party being charged. Also, proving intention is problematic in cases of pre-viability since it can be convincingly argued that the perpetrator was unaware of the existence of a pregnancy at the time he inflicted violence against a particular woman therefore making intention difficult to prove. These issues have been covered elsewhere and have generally been criticised and debated at length and will not be the focus of this discussion.[145] This aspect of criminal law will not be comprehensively

[144] In fact, it is submitted that du Plessis' earlier work takes a very specific stand against termination of pregnancy in South Africa thus leading one to speculate that similar motives are possibly being advanced in South Africa, especially given that an established pro-life scholar is advancing broader foetal protection measures under the separate-entities umbrella. Generally du Plessis (previously Myburgh) co-authors with de Freitas who also strongly opposes elective termination of pregnancy. Concerning du Plessis anti-termination-of-pregnancy position, see S de Freitas & G Myburgh "Seeking Deliberation on the Unborn in International Law" (2011) 14(5) *PER* 9; S de Freitas & G Myburgh "The Relevance of Science for the Protection of the Unborn" (2009) 45(1 & 2) *Journal for Christian Scholarship* 61; G Myburgh *Humanity and the Protection of the Unborn: A Jurisprudential Rationale for the Furtherance of the Anthropological Paradigm of International Law* LLM dissertation University of the Free State (2008). Despite this interpretation, du Plessis has indicated via electronic mail, that this in not her intention in the least. Her aim concerning feticide is to offer protection to the unborn and she argues for the exemption of termination-of-pregnancy provisions in order to avoid a deadlock between women's rights and the interests of the unborn. She however does insist that arguing for termination-of-pregnancy exemption is not an indication that she no longer advocates for the unborn's right to life generally. Personal communication with du Plessis via electronic mail (5 July 2014).

[145] See the discussions in C Pickles *S v Mshumpa: A Time for Law Reform* LLM dissertation University of Pretoria (2010) 103-108; C Pickles "The Introduction of a Statutory Crime to Address Third-Party Foetal Violence" (2011) 74(4) *THRHR* 546 559-561. These sources argue that proving causation and intention is problematic in cases that involve pre-viable pregnancies. However, for a contrary view, see Du Plessis (2013) *Stell LR* 87, who argues that medical technology has developed enough to be able to prove the cause of very early pregnancy terminations. It is submitted this this argument should to treated with caution because as this portion of the chapter demonstrates, many adverse pregnancy outcomes cannot be explained despite advances in medical technology.

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discussed because the primary focus of this portion is to determine whether adopting a separate-entities approach to addressing violence that terminates pregnancies is an appropriate means to address tensions in a way that secures optimal pregnancy related outcomes.

Instead, the discussion will focus on the fact that these criminal actions are based on flawed assumptions concerning causation, namely, by holding women criminally liable in respect of adverse pregnancy outcomes these women are being designated as the sole cause of harm. This implies that these women alone could have prevented stillbirth or death soon after delivery. It must be conceded that women's conduct (self-agency) during pregnancy will sometimes have a role to play pertaining to a pregnancy outcome. However, the fact remains these women exist in wider social settings that also contribute towards the experience of adverse pregnancy outcomes and this issue is so complex that the designation of responsibility becomes rather problematic. Daniels contemplates the issue of attributing individual responsibility to women who experience adverse pregnancy outcomes and argues that "it is clear the responsibility for fetal harm is so deeply shared with men, with public institutions, and with social structures, that it makes little sense to try tease out individual from collective responsibility for fetal harm".[146]

Concerning men's contribution to foetal harms, Daniels argues that men's physical distance from pregnancy and gestation tends to create the illusion that men have less of a connection to foetal harm, and she convincingly demonstrates otherwise.[147] Daniels explains that contemporary studies have linked paternal use of alcohol and drugs and toxic exposures to viruses and chemicals to adverse pregnancy outcomes such as miscarriage, low birth weight, congenital abnormalities, cancers, neurological disorders and other health problems.[148] While there are biological links to poor pregnancy outcomes, Daniels also highlights men's social contribution towards adverse pregnancy outcomes and explains that men who abuse substances may not

[146] C Daniels "Fathers, Mothers, and Fetal Harm: Rethinking Gender Difference and Reproductive Responsibility" in L Morgan & M Michaels (eds) *Fetal Subjects, Feminist Positions* (1999) 83 -84.
[147] Ibid.
[148] Daniels "Fathers, Mothers, and Fetal Harm" 85; 87-88. Daniels acknowledges that some of the studies she relies on to demonstrate paternal responsibility for foetal harms have certain limitations. She nevertheless persuasively argues that science has demonstrated that men certainly have a role to play when considering a particular pregnancy outcome.

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only produce damaged sperm but may also create a social environment that implicates the health of pregnant women.[149] For instance, they may encourage substance abuse by pregnant partners or physically abuse women and studies demonstrate that pregnant women are susceptible to increased partner violence in respect of severity and frequency.[150] She urges that if there is a serious drive to address foetal harm, we are required to recognise the role of men in a biological and social sense.[151]

Looking at "collective responsibility" for foetal harm, Daniels argues that "risky" behaviour by a woman during pregnancy on its own may not necessarily result in an adverse pregnancy outcome.[152] Referring to the issue of alcohol abuse and foetal-alcohol syndrome, Daniels looks at a study that indicates that women of low socio-economic status experience higher rates of foetal-alcohol syndrome compared to those women of higher socio-economic status, despite the fact that all the women in the study drank the same amount of alcohol per day during their pregnancies.[153] The diverging results were found to be linked to poor socio-economic status.[154] The study concluded that poverty in addition to risky behaviour work together to produce increased adverse pregnancy outcomes.[155] She argues: "When we widen the lens to include social structures we can clearly see the ways in which we share collective responsibility for fetal harm" and further states that women's responsibility must therefore be shared.[156]

Linking this thought process to the issue of criminal liability for stillbirth or perinatal death, leads one to question whether women can shoulder sole responsibility on the basis that they themselves are responsible for that harm. Paltrow and Flavin point out that in their study of cases brought against women for adverse outcomes, including charges related to experiencing stillbirth, they found a number of instances where "cases proceeded without any evidence, much less scientific evidence, establishing a

[149] Ibid.
[150] Daniels "Fathers, Mothers, and Fetal Harm" 89.
[151] Ibid.
[152] Daniels "Fathers, Mothers, and Fetal Harm" 91.
[153] Ibid.
[154] Particularly, poorer women had poor eating habits which was linked to their socio-economic status.
[155] Daniels "Fathers, Mothers, and Fetal Harm" 91.
[156] Daniels "Fathers, Mothers, and Fetal Harm" 92.

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causal link between the harm and the pregnant woman's alleged action or inaction".[157] This might be the case because, despite the presence of self-destructive behaviour or the infliction of self-harm, the cause of a stillbirth remains the subject of uncertainty and it is really a medical game of speculation based on probabilities and possibilities.[158] This is not to suggest that women do not make a contribution towards that specific outcome, but it is argued that their conduct is not the sole factor leading to that outcome, meaning that responsibility must be shared and not carried by women alone.[159]

Turning back to the *Shuai* case, the *amici* brief of Legal Voice and Perinatal Loss Support Organizations and Experts deals with this topic extensively.[160] The *amici* indicate that each year an estimated 26000 pregnancies end in stillbirths and 19000 neonates die very soon after delivery as well, with the loss being unexplained in the majority of instances.[161] The *amici* assert that some factors associated with pregnant women's conduct (such as smoking) have links to stillbirth and infant death as pregnancy outcomes, however "an association, and even a *likelihood* of causation, does not prove *actual* causation in any particular case".[162] (Emphasis in original.)

There are a number of factors that contribute to pregnancy loss which include genetic disposition, poor nutrition, environmental hazards, intimate partner violence, paternal factors and lack of access to adequate health care.[163] However, despite identifying

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[157] Paltrow & Flavin *JHPPL* (2013) 318. This issue of proving causation was obviously clear in the cases discusses above, see para 9 3 3.

[158] For instance, see The Stillbirth Collaborative Research Network Writing Group "Association between Stillbirth and Risk Factors Known at Pregnancy Confirmation" (2011) 306(22) *JAMA* 2469; The Stillbirth Collaborative Research Network Writing Group "Causes of Death among Stillbirths" (2011) 306(22) *JAMA* 2459.

[159] Flavin urges that risk factors should be distinguished from causes, and explains that while risk factors for stillbirth may be present, they are not necessarily the actual cause of stillbirth in and of themselves, see *Flavin Our Bodies, Our Crimes* 106.

[160] *Amici* brief of Legal Voice and Perinatal Loss Support Organizations and Experts in the matter of *Shuai v State* NE 2d 619 (Ind App 2012). Interestingly, Daniels who argues for shared responsibility in respect of foetal harm is one of the listed *amici curiae* in the *Shuai* case which indicates that her arguments are relevant to sharing the responsibility of the experience of a stillbirth as well as general adverse pregnancy outcomes.

[161] *Amici* brief of Legal Voice and Perinatal Loss Support Organizations and Experts in *Shuai* 8.

[162] *Amici* brief of Legal Voice and Perinatal Loss Support Organizations and Experts in *Shuai* 9.

[163] Ibid. Regarding access to adequate health care, the *Amici* brief of Legal Voice and Perinatal Loss Support Organizations and Experts in *Shuai* 12 refers to a number of contemporary studies indicating that income and race have the potential to adversely impact a woman health and pregnancy. Drawing on Daniels ("Fathers, Mothers, and Fetal Harm: Rethinking Gender Difference and Reproductive Responsibility" 83) notion of shared responsibility, it is submitted that if poor

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certain risk factors that contribute to stillbirth, the Stillbirth Collaborative Research Network Writing Group indicates that black women experience substantially higher rates of stillbirth and this racial disparity with white women's pregnancy outcomes cannot be explained even with today's access to advances in medical science.[164] Where contributory risk factors have been identified, Dudley et al indicate that assigning one particular factor as the cause of death can only be done in a relatively small portion of the cases, one of these cases is "catastrophic fetal trauma".[165] Concerning the allocation of causation, they go on to explain:[166]

> Given the degree of uncertainty in majority of cases regarding the event or condition that led directly to fetal death, we adopted a hierarchical system wherein a condition that was a potential cause of fetal death was graded as being a present condition, a possible cause of death, or a probable cause of death.

On account of the difficulty of allocating one particular issue as the cause of foetal death, the *amici* persuasively argue that prosecuting women for experiencing a stillbirth is factually and socially wrong.[167] The *amici* argue from a social perspective, mental health concerns need adequate attention and constant treatment,[168] this is especially true given the high incidence of suicide during pregnancy and it is submitted that failure to provide care must be viewed as contributing to foetal harm.[169] The *amici* go on to also implicate men's contribution to the experience of stillbirth, particularly those men who procreate at advanced age, who have smoked, drank alcohol, used drugs, consumed caffeine, have genetic disorders or been exposed to workplace or wartime exposures, all of which can adversely impact the potential for live birth.[170] While the *amici* are not advocating for men to be prosecuted for contributing towards

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pregnancy outcomes are associated to social issues linked to race and poverty, inaction on part of the state to alleviate this influences renders the sate partly liable for the incidence of stillbirth as well.

164 See generally The Stillbirth Collaborative Research Network Writing Group (2011) *JAMA* 2469; The Stillbirth Collaborative Research Network Writing Group (2011) *JAMA* 2459.

165 D Dudley, R Goldenberg, S Conway, R Silver, R Saade, M Varner, H Pinar, D Coustan, R Bukowski, B Stoll, M Koch, C Parker & U Reddy "A New System for Determining the Causes of Stillbirth" (2011) 116(2) *Obstet Gynecol* 254 255.

166 Ibid.

167 *Amici* brief of Legal Voice and Perinatal Loss Support Organizations and Experts in *Shuai* 9.

168 *Amici* brief of Legal Voice and Perinatal Loss Support Organizations and Experts in *Shuai* 10.

169 For instance see, C Palladino, V Singh, J Campbell, H Flynn & K Gold "Homicide and Suicide during the Perinatal Period" (2011) 118(5) *Obstet Gynecol* 1056 1059. The authors highlight that homicide and suicide are 2 of the leading causing of death of pregnant women, higher than mortality rates associated to placenta previa, eclampsia, preeclampsia and amniotic fluid embolism.

170 *Amici* brief of Legal Voice and Perinatal Loss Support Organizations and Experts in *Shuai* 11.

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a stillbirth, they are arguing that "prosecuting women in these circumstances ignores the contribution of sperm and paternal acts, and assumes that all aspects of fetal development rest entirely with the pregnant woman and her behaviour during pregnancy".[171]

Ultimately, prosecuting a woman for delivering a stillborn child, or live born child that dies soon after delivery renders her a criminal for experiencing outcomes that fall beyond her control.[172] In fact, the attribution of criminal liability for the experience of a stillbirth is widely opposed in the medical community. In supporting McKnight's Petition for writ of certiorari,[173] 26 separate institutions joined together to argue against adopting this approach to stillbirth and argued that medical science does not claim the use of cocaine was the cause of McKnight's stillbirth and that "it is exceedingly difficult to reliably isolate, beyond a reasonable doubt, any one factor (or group of factors) as having caused the stillbirth".[174] Compounding the injustice of prosecution is the fact that generally, addiction, suicide and refusal to undergo medical treatment are themselves not crimes in the United States and the United States approach demonstrates that the experience of a stillbirth for any possible conduct opens the doors for criminal liability.[175]

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171 Ibid.

172 *Amici* brief of Legal Voice and Perinatal Loss Support Organizations and Experts in *Shuai* 11.

173 *McKnight v South Carolina* 540 US 819 (2003). According to E Farnsworth *An Introduction to the Legal System of the United States* 4 ed (2010) 49-50, a writ of certiorari is the primary method of review by the United States Supreme Court, and it is essentially a command issued by the Supreme Court to the lower federal or state court of last resort requiring it to certify and return the record of proceedings. The command may be granted on the petition of either party to the case but a certiorari will only be granted for "special and important reasons" and the fact that the decision concerned is "erroneous" is not reason enough.

174 *Amici* brief of American Public Health Association et al in the matter of *McKnight v South Carolina* 540 US 819 (2003) 3. Even though this *amici* brief was drafted in 2003 and relied on sources relevant to the state of medical technology at the time, the fact that the *amici* brief for *Shuai* echo the same issues demonstrates the inherent difficulty of providing an effective explanation of the cause of stillbirths.

175 In fact, Burkstrand-Reid indicates that women were charged for involuntary manslaughter when their preferred birth method (home births) resulted in stillbirths, see Burkstrand-Reid (2013) *Hastings Law Journal* 249. See *Commonwealth v Pugh* 969 NE 2d 672 (Mass 2012) (the Supreme Judicial Court of Massachusetts reversed Pugh's conviction of involuntary manslaughter based on the fact that she decided to have a home birth); *United States v Jumper* 3 Fed Appx (4th Cir 2001) (in this case, Jumper decided against a hospital birth and after delivery of her child at her father's house, the neonate stopped breathing. Jumper did not call for assistance and concealed the child's corpse. On her admission of guilt, she was convicted of involuntary manslaughter).

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9 5 The Implications of Adopting a Separate-Entities Approach to Address Violence that Terminates Prenatal Life

The separate-entities approach is perceived as being necessary to "protect" the unborn on that basis of them being human beings despite the fact that they are still in the process of gestation. This notion requires that if the separate-entities approach is going to be advocated for and adopted as the means to protect the unborn as victims of violent crimes, then a woman cannot be excluded in relation to her own pregnancy since it is the harm inflicted against the foetus which is of concern. The fact that the crimes of feticide, foetal homicide and murder of a foetus are being applied to women (whether expressly in legislation or via imaginative interpretations) indicates that parties involved in or advocating for prosecutions have identified the theoretical flaw of exempting women.[176] This discussion will show that while exempting women does not protect the unborn as human beings, including women within the ambit of "perpetrator" renders some pregnancies at increased risk, and this leads to tensions which prevent healthy pregnancy outcomes.

By following a separate-entities approach to pregnancy the parties involved in prosecuting women for stillbirths have lost sight of the very obvious fact that ensuring a healthy woman is expected to increase the likelihood of a healthy birth outcome, genetics permitting. Bringing this perspective back into the context, demonstrates that the threat of criminal prosecution for self-destructive or risky conduct during pregnancy will not encourage women to turn to the state and health care system to get help but will rather cause them to avoid those institutions altogether, ultimately avoiding seeking prenatal care, drug and alcohol related treatment and assistance for suicidal ideation. This has received widespread recognition by the health care community who regularly cooperate and draft *amici* briefs or release statements opposing the prosecution of women in respect of stillbirths or perinatal deaths.[177] Paltrow and Flavin identify 250 different organisations and experts opposed to the approach of criminalising adverse pregnancy outcomes.[178]

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[176] See Flavin *Our Crimes, Our Bodies* 100-103 for a neat summary of how this has taken place.
[177] For instance, see, Bird (2014) *Hastings Women's LJ* 51; Paltrow & Flavin (2013) *JHPPL* 331; Proehl (2013) *Santa Clara L Rev* 687-689; *Amici* brief of American Public Health Association et al in *McKnight* (2003) 16; *Amici* brief of American Association of Suicideology et al in *Shuai*.
[178] Paltrow & Flavin (2013) *JHPPL* 331.

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This approach negatively impacts on women's reproductive autonomy, in that these women are pregnant and in need of help and advancing punitive tactics towards them deter them from seeking care or even communicating openly with care providers.[179] This places women at risk and consequently also fails to serve the aim of securing optimal foetal development and healthy birth outcomes.

Proehl explains that criminal liability "creates perverse incentives" such as opting to terminate pregnancies instead of face the possibility of prosecution.[180] Proehl asserts that there has already been one recorded incidence of this taking place, where a pregnant woman terminated her pregnancy to avoid being charged with child endangerment.[181] She argues that the threat of criminal sanction "creates a strong incentive against carrying a pregnancy to term. A state's goal of raising healthy babies is seriously undermined by resorting to the criminal system to regulate pregnancy".[182] However, this approach not only negatively impacts on the aim of securing healthy live births but also undermines women's reproductive autonomy because the threat of prosecution could drive women to terminate wanted pregnancies.[183]

It is submitted that the application of criminal provisions against women in relation to their failed pregnancies is a poor response. If the aim is to protect pregnancies from harm then pregnant women must be understood contextually in order for there to be responsible and effective practical translation of the state's goal of advancing prenatal life and women's health during pregnancy. Context requires that underlying risk factors of stillbirth are addressed,[184] those broadly associated with poverty, addiction, mental

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[179] Paltrow & Flavin (2013) *JHPPL* 332. The *Amici* brief of American Public Health Association et al in *McKnight* (2003) 16-18 explains the importance of developing a safe place within medical-setting for women to openly relay information. This allows for attending health care providers to assist in developing the most effective treatment for that particular women. However, criminalising this area turns health care into evidence collection activity for purposes of prosecution, ultimately violating the "sanctity of health care provider-patient relationship".

[180] Proehl (2013) *Santa Clara L Rev* 689.

[181] Ibid. She cites the case as *State v Greywind*, however, no reference is provided and this case cannot be sourced.

[182] Proehl (2013) *Santa Clara L Rev* 690. American Public Health Association et al argue the same: "The criminal investigation and possible prosecution of women like Ms McKnight sends a perilous message to pregnant addicts not to seek prenatal care or drug treatment, not to confide their addiction to health care professions, and not to give birth in hospitals – or not to carry the fetus to term." See *Amici* brief of American Public Health Association et al in *McKnight* (2003) 20.

[183] *Amici* brief of American Association of Suicideology et al in *Shuai* 22.

[184] *Amici* brief of American Association of Suicideology et al in *Shuai* 19

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illness, adequate access to respectful prenatal care, education, domestic violence, and so on. In this respect, it is advanced that by removing women from their contextual setting and assigning sole criminal responsibility effectively draws attention away from the collective and multifaceted causes of stillbirth. In fact, it may even cause the identification of these contributors impossible. Ultimately, this renders addressing the issue of stillbirth an absolute failure towards women and their pregnancies. Going further, failure to address the wider social issues essentially ensures repeated adverse pregnancy outcomes, meaning that the same women in the same unaddressed toxic environment can continue to procreate and since the underlying risk factors to foetal demise is never addressed the cycle might just continue.

Also, failing to understand pregnant women's context means that even those feticide measures that are limited to third parties may possibly be failing to protect women and thus the unborn as well. The original incentive[185] for advancing feticide or foetal homicide laws was to tackle domestic violence against pregnant women by their partners which resulted in adverse pregnancy outcomes.[186] However, interest in men's contribution towards poor pregnancy outcomes seems to be a "none-issue".[187] Schroedel et al advanced this argument in 2000.[188] A 2011 study of the causes of maternal mortality indicates that, aside from suicide, homicide is a leading cause of maternal mortality and Palladino et al demonstrate that homicide rates have increased compared to the homicide rates indicated in 1999 studies.[189] This can be interpreted as indicating that the threat of criminal prosecution and the development of the foetus as a separate victim has done little to protect women and the foetus due to the fact that the context of a pregnancy is removed. In fact, the context of pregnancy is so far removed that these feticide measures which render the unborn separate victims of violence have essentially removed women as victims as well.[190] Interestingly, Palladino et al do not suggest increasing criminal prosecutions but rather suggest that underlying social concerns which foster abusive conduct receive attention.[191] Failing

[185] Bird (2014) *Hastings Women's LJ* 50; Paltrow & Flavin (2013) *JHPPL* 323.
[186] Obviously the fact that women can be prosecuted under these laws indicates that protecting women may not be of concern any longer.
[187] Schroedel et al (2000) *Duke J Gender L & Pol'y* 111-112.
[188] Ibid.
[189] Palladino et al (2011) *Obstet Gynecol* 1056-1057; 1061.
[190] See Flavin *Our Bodies, Our Crimes* 101.
[191] Palladino et al (2011) *Obstet Gynecol* 1062. Their summarised conclusion provides (1056): "Our results indicate that pregnancy-associated homicide and suicide are important contributors to

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to do so flies in the face of woman's reproductive autonomy since her decision to bear a child is interfered with, and this not only costs her her life, but also takes prenatal life with it. These are extreme cases of poor pregnancy outcomes.

The separate-entities approach fails to produce positive pregnancy outcomes because it encourages pregnancy adversarialism since rendering the unborn separate victims of violent conduct makes pregnant women potential wrongdoers and third parties intercept and speak for the unborn. Adversarialism in the United States is generally referred to as "maternal-foetal conflicts" which instils the impression that women's interests are in conflict with the interests of the unborn. This creates the situation where one party is pitted against the other, and as in all adversarial conflicts, only one party can succeed.[192] The "conflict" is deemed to arise in cases where a pregnant woman engages in risky behaviour as an autonomous agent (as her personal interests generally permit)[193] and this behaviour is judged by others to be in contravention to the unborn's interest to optimal development and eventual live birth. In reality, the "conflict" is not between women and the unborn but between others and the pregnant women, since others perceive her conduct as infringing on the unborn as a separate entitiy and attempt to act to prevent it, as "foetal guardians" through policing and regulating women.[194]

Roth[195] provides a fitting example of the above "foetal guardian" construction: In a Californian case concerning the attempted prosecution of a woman for experiencing a stillbirth which was allegedly a result of her substance abuse during pregnancy, the deputy district attorney is quoted as arguing that under *Roe*:[196]

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maternal mortality and confirm the need to evaluate the relationships between sociodemographic disparities and intimate-partner violence with pregnancy-associated violent death."

192 Steinbock *Life before Birth* 155.156.

193 However, it is noted that conduct associated to addiction and mental illness impact negatively on women's ability to act autonomously since these conditions have the effect of removing or substantially reducing the experience of freedom in for the "decision" making processes.

194 R Roth *Making Women Pay: The Hidden Cost of Fetal Rights* (2000) 6-7. See S Meredith *Policing Pregnancy: The Law and Ethics of Obstetric Conflict* (2005) 170-175 who, aside from discussing the conflict between pregnant women and health care providers seeking to secure healthy pregnancies and live births, also discusses other areas where conflict arises between third parties and pregnant women. She effectively demonstrates that efforts to act on foetal interests diminish women's autonomy during pregnancy, thus highlighting the notion that viewing the unborn as separate entities opens the door for one "party" to lose something for the benefit of the other party.

195 Roth *Making Women Pay* 135.

196 Roth (ibid) is citing from *People v Jaurigue*, however this case cannot be sourced and a full citation cannot be provided.

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> [T]hat baby that isn't born that happens to be over the age of twenty-four to twenty-eight weeks gestation has Constitutional rights, and somebody has to listen to that voice. Even though no one else can hear it, we hear it, and we intend to protect that child's Constitutional rights.

Essentially, the situation of speaking for the unborn against the women who gestated them aids in removing context (being those wider social issues that have a role to play in creating adverse pregnancy outcomes) and thus renders women exclusively liable to ensure foetal health without providing them the means to do so. The implications of adopting a separate-entities approach to addressing violence that terminates pregnancies encourages pregnancy adversarialism and fails to ensure healthy pregnancies or outcomes where both female reproductive autonomy and foetal interests are advanced.

9 6 Implications of the United States Experience of Feticide or Foetal Homicide for Reform Proposals in South Africa

Both Kruuse[197] and du Plessis[198] refer to the United States as an example of a possible avenue for South Africa to consider regarding law reform. In this respect, the lack of conformity in the United States concerning how to best address the issue of violent termination of pregnancies offers valuable insight on the range of possibilities available to dealing with this concern in the parameters of the separate-entities approach. Du Plessis' position is not too far off from the general position in the United States in that she proposes protection from the moment of conception while still advocating that lawful termination of pregnancies remain in place.[199] Most importantly for feticide proposals in South Africa as advanced by du Plessis[200] and Kruuse,[201] both federal and state codes have extended prenatal protection outside the realms of constitutional

[197] Kruuse (2009) *THRHR* 134-135. While Kruuse does not specifically rely on particular statutes in place in the United States, she does rely on Dworkin's position which is commentary of the United States approach to this specific topic.
[198] Du Plessis (2013) *Stell LR* 80-84.
[199] Du Plessis (2013) *Stell LR* 91.
[200] Du Plessis (2013) *Stell LR* 76-78; 87-90. Generally, du Plessis argues against that advancing the right to life to the unborn or designating the attribution of "personhood" is not necessary for protecting the unborn from third-party violence that terminates prenatal life.
[201] Kruuse (2009) *THRHR* 133.

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provisions. This is important because it is both Kruuse[202] and du Plessis'[203] contention that working outside the parameters of constitutionally informed foetal rights prevents a clash with women's rights or prevents the scenario where women will be denied access to termination-of-pregnancy services.

After reviewing the theoretical soundness of the various approaches, a number of flaws emerged and these flaws are found to negate the value of Kruuse and du Plessis' proposals for South Africa.

This chapter demonstrates that du Plessis and Kruuse's positions that avoiding foetal rights or personhood will allow for termination-of-pregnancy laws and feticide to co-exist is theoretically unsound purely on the basis that the unborn are individuated as separate entities. In cases where pregnant women are excluded, those proposed exclusionary provisions attribute contradictory values to the unborn, and if one is dealing with the same entity across all spheres of law and relationships it is not clear what basis is being relied on for the attribution of different values. Further, where one asserts a uniform value in the unborn for purposes of law, feticide or foetal homicide measures are used against pregnant women in respect of their adverse pregnancy outcomes via imaginative statutory interpretations. This proves problematic because theoretically these measures do not ensure healthy births but merely respond to the adverse outcome, doing nothing to actually protect prenatal life while it exists.

Also, a deeper consideration of how the United States employs and applies these provisions indicates its primary concern is to oust lawful termination of pregnancy and impose "good mother" laws on those who are socially constructed as being "bad mothers".[204]

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[202] Ibid.
[203] (2013) *Stell LR* 91.
[204] Concerning this "good mother" versus "bad mother" rhetoric in the United States see Flavin *Our Bodies, Our Crimes* 102-103. Flavin argues that the practise of prosecuting women for pregnancy continuation is based on society's belief on who is fit to procreate and who is not. In this respect, society expresses what they view as constituting a good mother. A good mother is one who provides and secures healthy foetal development. Flavin explains that for those women who cannot secure these requirements, they are regarded as bad mothers. The allocation of this title remove attention from the real cause of poor pregnancy outcomes, such as lack of access to health care and policies that that support parenting and pregnant women. Flavin views the prosecution of women for issues related to their pregnancies or pregnancy outcomes as mechanisms to normalise and standardise the notion of good mother.

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9 7 Concluding Remarks

The value of du Plessis and Kruuse's position of arguing for direct protection of the unborn as separate victims of violence that terminates prenatal life can be critically reviewed in the wake of the United States experience. The United States demonstrates that there are various definitional methods that can be adopted to extend direct protection to the unborn under the separate-entities umbrella. Similar to the arguments promoted by Kruuse and du Plessis, the basis for direct protection stems from the foundation that the unborn are part of humanity and thus require consideration in law and the Unites States was able to do this under *Roe* which prevents the allocation of constitutional rights to the unborn. On the surface, this creates a welcoming impression that the same methods pertaining to protection from violence can be adopted in South Africa and this will protect women who plan to continue with their pregnancies and also protect the unborn even though they lack constitutional recognition. However further consideration highlights contradictory outcomes and the root cause of this lies in the application of the separate-entities approach to pregnancy.

Both Kruuse and du Plessis argue that protection can be advanced to the unborn without implicating women's liability in respect of their own pregnancies. The United States experience has shown that limiting potential perpetrators to only third parties violates the founding notion that the unborn are human beings and are in need of protection on that basis. This consequently leads to questionable outcomes concerning the actual protection of the unborn because women who terminate their pregnancies, whether via legal or illegal means, cause harm to the unborn as human beings. Further, laws directed at protecting the unborn as separate victims seem to have made little impact on violence against pregnant women and thus failed to prevent harm to both subjects that constitute a pregnancy.

While this leaves Kruuse and du Plessis' proposals in a questionable position, one could argue for the extension of protection measures to include pregnant women. The chapter tested the credibility of this approach and highlighted further concerns. It can be argued that including women as potential perpetrators is more in line with the premise that the unborn are being protected because they are human beings.

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However, this chapter shows that it also fails to extend any meaningful protection from stillbirth.

The wholesale failure of feticide or foetal homicide measures is linked to the fact that the separate-entities approach is being employed. The unborn are viewed as separate from the women who gestate them and vested with individuated and distinguished needs. This has led to women's needs to not only be ignored but they are also identified as the sole cause of foetal demise. This fails to understand that an unhealthy woman leads to unhealthy pregnancies and unhealthy birth outcomes. With this realisation, context can be considered and wider social-related risk factors can be included when considering how to develop an effective way forward to address issue associated to violence against pregnant women. Instead of addressing pregnancy related concerns, the separate-entities approach is the epitome of pregnancy adversarialism and as a result, it fails to advance women's reproductive autonomy and foetal interests.

Further, the fact that *Roe* remains in place despite these foetal protections being enacted, should not be interpreted as rendering foetal protection measures valid in respect of women's rights generally. Pregnancy and all pregnancy-related issues in United States are plagued with the undercurrents of hostile reproductive politics, and foetal protection measures such as feticide or foetal homicide laws are used to weaken *Roe* and its legitimacy.[205] This means that if the unborn are extended legal status in all areas of law excluding termination of pregnancy, there will no longer be a basis on which *Roe* can be saved. What is evident is that *Roe* is being relied on to advance protection, that decision is interpreted as providing a judicially sanctioned discourse of the unborn in law, and it is being used in a way which leads to its own demise.[206] In fact, Flavin argues that "champions of fetus-centred laws have co-opted the language

[205] See ch 8 para 8 4.

[206] Interestingly, Kruuse (2009) *THRHR* 126 is interpreted as adopting the same approach, however, maybe without the intended consequence of rendering termination of pregnancies illegal in South Africa. Kruuse turns to the Choice Act as an indication that in South Africa there is a vested interest in the unborn since we limit women's access to termination procedures as the pregnancy progresses. She then goes on use this to justify protecting the unborn from third party violence. This highlights the relevance of studying the United States, it demonstrates that consequences of developing the law in this way. Should Kruuse's approach be adopted, anti-termination of pregnancy lobby groups may find this the perfect opportunity to deny women the right to terminate a pregnancy, similar to what is happening in the United States.

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of the women's movement to garner support for their position and arguably mask their intent".[207]

Even if all of what has been argued here concerning the application of feticide to pregnant women can be removed by imaginative legislative provisions in South Africa, chapter 10 will demonstrate how feticide measures which are only applicable to third parties are now being relied on to justify charging women for child abuse as a result of their use and addiction to substances during pregnancies. This indicates that a separate-entities approach generally fosters adversarialism.

[207] Flavin *Our Bodies, Our Crimes* 101.

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Chapter Ten

Prenatal Substance Abuse as Child Abuse

10 1 Introduction

This chapter is a response to the argument that substance abuse during pregnancy should constitute child abuse against the unborn. This view is promoted by Ovens in South Africa.[1] Briefly, Ovens[2] advocates for the extension of child abuse to include the unborn in order to protect them from the perceived harmful consequences of prenatal substance abuse.[3]

When discussing Ovens' position in chapter seven it was argued that from a practical perspective, there can never be a crime of foetal abuse since birth is necessary to witness harm and then prove causation.[4] Until birth, harm is purely theoretical and this is evident when considering the United States position because child abuse or endangerment charges are only brought against women after they have given birth. While the United States has grappled with the issue of substance abuse during pregnancy for a number of years now,[5] to date, no pregnant woman has been charged with the crime of child abuse of a foetus,[6] meaning that no woman has been charged or convicted of child abuse while still pregnant. Rather, child abuse charges have been brought against women after giving birth and the children test positive for exposure to certain substances.

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1 M Ovens "Maternal Substance Abuse in South Africa: An Area for Concern?" (2008) 1 *Acta Crim* 77; M Ovens "A Criminological Perspective on the Prenatal Abuse of Substances during Pregnancy and the Link to Child Abuse in South Africa" (2010) 11(2) *CARSA* 38. See the discussion in ch 7 para 7 3 3.

2 Ovens (2010) *CARSA* 38. She titles this "prenatal substance abuse".

3 Substance abuse is taken to include addiction and use, and concerns the abuse or use of illegal substances.

4 See ch 7 para 7 3 3 for a full discussion of Ovens' proposal for reform.

5 Guttmacher Institute "State Policies in Brief: Substance Abuse during Pregnancy" (1 May 2014) *Guttmacher Institute* <http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf> (accessed 26 May 2014). According to the Guttmacher Institute policymakers have been debating the best way forward since the 1980s.

6 Ibid.

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Consequently, Ovens' recommendation is different to the United States approach. She calls for substance abuse during pregnancy to constitute child abuse in respect of a foetus while the United States renders prenatal substance abuse as child abuse in respect of a neonate born alive and testing positive to exposure to certain substances prenatally. Despite these differences, the common ground between the two is that there is a move towards criminalising prenatal substance abuse and each adopt a separate-entities approach to pregnancy in order to do so.[7] Since Ovens demonstrates a legitimate concern surrounding the issue of substance abuse during pregnancy and the need to address its occurrence, a discussion of how the United States has approached the issue will prove beneficial to the overall purpose of advancing women's reproductive autonomy and foetal interests in South Africa.

This chapter discusses how the United States has opted to address issues related to substance abuse or use during pregnancies that results in live birth of a neonate who tests positive to dug exposure as a result of prenatal substance abuse or use. Thereafter the discussion turns to identify a number of inconsistencies related to those approaches and the chapter demonstrates that adopting a separate-entities approach as advocated by Ovens may fail to achieve healthy pregnancies and pregnancy outcomes.

Chapter ten draws on similar arguments presented in chapter nine in relation to the notion of holding women criminally liable in respect of adverse pregnancy outcomes. However, this chapter is different from chapter nine in that chapter ten covers those instances where there is live birth and considers possible child abuse charges as a result of prenatal exposure to certain substances. Chapter nine on the other hand, looked at cases of stillbirth and consequential murder charges against women as a result of a wide range of conduct during pregnancy.

[7] L Paltrow & J Flavin "Arrests and Forced Medical Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health" (2013) 38(2) *JHPPL* 299 identify all criminal actions against pregnant women in relation to their own pregnancies as being based on the separate-entities approach to pregnancy.

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10 2 The United States Approach to Substance Abuse during Pregnancy

Until fairly recently no state had explicitly criminalised the conduct of substance abuse during pregnancy as any particular crime.[8] According to Harris et al, avoiding criminalisation is in line with two United States Supreme Court decisions which establish that addiction is not a crime but rather an illness that requires treatment and not punishment.[9] Instead of using criminal law, seventeen states have expanded civil child-welfare requirements to include substance abuse during pregnancy, thus detecting drug-exposure in neonates serves as a ground to terminate parental rights on the basis of child abuse or neglect.[10] Only a few states consider prenatal substance abuse to be criminal child abuse of born neonates.[11] Despite this focus on civil regulation,[12] the Guttmacher Institute points out that prosecutors have nevertheless attempted to attack prenatal substance abuse by relying on other criminal laws not

8 Guttmacher Institute "State Policies in Brief: Substance Abuse during Pregnancy"; L Harris, A Arbor & L Paltrow "The Status of Pregnant Women and Fetuses in US Criminal Law" (2003) 289(13) *JAMA* 1697.

9 Harris et al (2003) *JAMA* 1697. In this respect, see *Linder v United States* 268 US 5 (1925); *Robinson v California* 370 US 660 (1962).

10 See Guttmacher Institute "State Policies in Brief: Substance Abuse during Pregnancy". The Institute lists the following states as including substance abuse in civil child abuse provisions: Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Minnesota, Nevada, Oklahoma Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia and Wisconsin. Harries et al explain that in some states civil child abuse laws involve establishing women's parenting abilities while in other states substance abuse serves as a basis of "presumptive neglect". The authors emphasise that these laws are aimed at protecting children and not punishing women on the grounds of foetal rights. See Harries et al (2003) *JAMA* 1698.

11 These states will be discussed in more detail below.

12 For instance, some states make provision for civil commitment of pregnant women who use drugs and these commitments can later be used in child-welfare proceedings after birth. These states include Minnesota, South Dakota and Wisconsin. Also, a number of states have taken a different route and made treating drug-addicted pregnant women a priority and allowing for treatment to be more readily accessible. States adopting this approach include Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Missouri, Oklahoma, Tennessee, Texas, Utah and Wisconsin. See Guttmacher Institute "State Policies in Brief: Substance Abuse during Pregnancy". However, these sorts of provisions render questionable outcomes, see Paltrow & Flavin (2013) *JHPPL* 307. The authors discuss Rachael Louw's case. Louw voluntarily sought treatment for her addiction while pregnant, she was reported under Wisconsin's "cocaine mom" statute which allows for a pregnant woman to be kept in custody if she is known to "habitually lack self-control" in respect of alcohol or controlled substances. Paltrow & Flavin report that while Louw was involuntarily detained in a psychiatric ward she did not receive prenatal care, she was prescribed numerous medications including Xanax, and while her foetus was assigned a guardian ad litem, Louw did not receive any counsel until after 12 days of being detained. Even after a doctor testified that Louw's substance usage posed no material risk to her pregnancy and the Court ordered her release, she remained in detention for several days after the Court order and remained under state surveillance until she gave birth.

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related to the specific issue of substance abuse.[13] In this context Harris et al[14] indicate that women are generally charged with one of three types of crimes in relation to their pregnancies: child abuse or endangerment, foetal murder or manslaughter,[15] or illegal delivery of drugs[16] to a minor. Paltrow and Flavin report that feticide laws are commonly used to support the argument that generally-worded legislation regulating child endangerment or drug delivery to a minor should be interpreted to allow for the arrest and prosecution of pregnant women in relation to their own pregnancy outcomes.[17]

Aside from criminal charges there are also documented incidences of "preventative detention". This involves incidences where pregnant women are charged with a particular crime which is unrelated to pregnancy or substance use but because they tested positive and were pregnant at the time of being brought before the court, they were sentenced to detention instead of probation which would be the usual course of action.[18]

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13 Guttmacher Institute "State Policies in Brief: Substance Abuse during Pregnancy".

14 Harris et al (2003) *JAMA* 1697. Also see J Flavin & L Paltrow "Punishing Pregnant Drug-Using Women: Defying Law, Medicine and common Sense" (2010) 29(2) *J Addict Dis* 231 233 for more recent figures. The authors state that their study identifies hundreds of cases across 40 states where pregnant women are identified as drug-users and arrested and during the period spanning 2005 and 2006 dozens of cases came to the attention of National Advocates for Pregnant Women.

15 See discussion in ch 9 para 9 3 3 concerning Regina Knight.

16 Under these charges women are accused of delivering drugs to the unborn via the umbilical cord. In this respect Harris et al ((2003) *JAMA* 1697) state that at times prosecutors have accepted that the unborn is not a person but continue with the charges on the basis that a woman arguably delivers drugs through the umbilical cord just after birth before the cord is clamped and cut. For instance, see *Johnson v State* 578 So 2d 419 (Fla App 5 Dist 1991). The District Court of Appeal of Florida confirmed 2 counts of delivering a controlled substance to neonates through the umbilical cord after birth. In this case Johnson used cocaine while pregnant and very soon before the delivery of each of her 2 children. The Court held (420): "Appellant voluntarily took cocaine into her body, knowing it would pass to her fetus and knowing (or should have known) that birth was imminent. She is deemed to know that an infant at birth is a person, and a minor, and that delivery of cocaine to the infant is illegal. We can reach no other conclusion logically." Sharp J dissenting with the majority (421-425), raised a number of issues. Relevant to this discussion, the Judge dissented on the basis that the legislation criminalising the delivery of a controlled substance by an adult to a minor is not meant be applied to a woman in relation to her just-born child since there was no legislative indication of this intent. Further Sharp J found that there was insufficient evidence before the Court to prove that delivery of the controlled substance even took place after birth being the only time relevant for the crime. However, in *Johnson v State* 602 So 2d 1288 (Fla 1992) the Supreme Court of Florida quashed the District Court's finding. The Supreme Court (1290) followed Sharp J's position concerning lack of legislative intent to allow for the crime to be applicable to a woman and her just-delivered child, and that "delivery" does not include the method of delivery of a controlled substance via the umbilical cord. This closed down the avenues of charging women for dealing in a controlled substance to their babies just after birth but before the umbilical cord is cut.

17 Paltrow & Flavin (2013) *JHPPL* 323.

18 For instance see Flavin & Paltrow (2010) *J Addict Dis* 235. The authors refer to a case concerning Brenda Vaughan who pleaded guilty to forgery charges and the prosecution recommended

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Given that this portion of the thesis is concerned with testing the validity of Oven's calls for changes to the law, only those instances where women have been held criminally liable in terms of criminal child abuse charges will be considered here.[19] Before looking at the various state activities it is noteworthy that there is no federal legislation or case law that renders prenatal substance abuse as criminal child abuse. However, at state level there is a hive of activity.

Schroedel et al point out that earlier attempts at protecting the unborn from substance exposure took the form of applying existing child abuse legislation which, technically, was only relevant to those children who were already born.[20] Harries et al explain that in these instances prosecutors attempted to equate a viable foetus with a child and argued that by using drugs or suffering from addiction, a pregnant woman was committing child abuse.[21] However, in all the cases examined in the study conducted by Harries et al, the courts refused to extend the child abuse provisions to include the unborn on the basis that no such legislative intent was apparent from the legislation as drafted.[22] Otherwise, the courts found that extension of these laws would render the statute unconstitutionally vague.[23] These statutes would be vague in the sense that women could be held criminally liable for an endless array of scenarios such as

probation instead of being sentence to a term of imprisonment. After the judge found out that Vaughan was pregnant and tested positive for cocaine, the Judge sentenced her to 30 days imprisonment pending a decision as to whether she can be admitted to a special intensive probation programme. It turned out that she was not a resident of the state and therefore did not qualify for the intensive probation programme and the Judge sentenced her to a further 6 months imprisonment. The authors quote the judge as saying: "I'm going to keep her locked up until the baby is born because she'd tested positive for cocaine when she came before me … She's apparently an addictive personality and I'll be darned if I am going to have a baby born that way." Flavin and Paltrow point out that there was no trial or conviction of any charge relating to possession or use of illegal substances. It is not clear how this sort of judicial discretion has any legal force as if offends the principle of legality.

19 However, given the fact that there is a strong civil law presence concerning substance abuse or use during pregnancy, it may be an indication that there is a majority view that criminal law responses are inappropriate.

20 J Schroedel, P Fiber & B Snyder "Women's Rights and Fetal Personhood in Criminal Law" (2000) 7(89) *Duke J Gender L & Pol'y* 89 103.

21 Harris et al (2003) *JAMA* 1697.

22 Harris et al (2003) *JAMA* 1698. Further Schroedel et al (2000) *Duke J Gender L & Pol'y* 103 explain that where prosecutors did obtain convictions in lower courts, their manipulation of legal terms adopted in legislation made reversal more likely in higher courts. For some examples, see: *State v Gethers* 585 So 2d 1140 (Fla App 4 Dist 1991); *Reinesto v Superior Court* 894 P 2d 733 (Ariz App Div 1 1995); *Herron v State* 729 NE 2d 1008 (Ind App 2000). While only 3 cases are cited here, there are many more but it is not possible to reference every case dealing with the dismissal of charges or convictions of child abuse against the unborn.

23 Harris et al (2003) *JAMA* 1697.

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smoking or taking up employment in a hazardous working environment thus making is difficult to determine beforehand whether any particular conduct was criminal or not.[24] Thus, in the context of child abuse, generally the courts have refused to extend the definition of a child to include a foetus, or the definition of a parent to include a pregnant woman in relation to her foetus or that the term "delivery" includes the transfer of drug-contaminated blood via the umbilical cord.[25]

10 3 Cases of Child Abuse Convictions on the Basis on Prenatal Substance Abuse

Writing more recently on substance abuse during pregnancy in the context of criminal law, Flavin and Paltrow[26] state when women challenge the imposition of criminal sanctions brought against them for substance abuse during pregnancy, the Appellate Courts have almost consistently dismissed or overturned charges or convictions. However, some exceptions stand.

10 3 1 South Carolina: Cornelia Whitner

In 1992 in the State of South Carolina, Cornelia Whitner pleaded guilty[27] to criminal child neglect[28] due to her using cocaine during her third trimester thus causing her child to be born with traces of cocaine in his system. She was sentenced to eight years imprisonment by the Circuit Court, she did not appeal her conviction.[29] Whitner later filed a petition for post-conviction relief[30] on the basis that that the court *a quo* lacked jurisdiction to accept her guilty plea since she pleaded guilty to a non-existent crime.[31] Additionally, she argued that she was represented by ineffective counsel in that her

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24 Ibid.
25 Harris et al (2003) *JAMA* 1697.
26 Flavin & Paltrow (2010) *J Addict Dis* 235.
27 *Whitner v State* 492 SE 2d 777 (SC 1997) 778. The history of previous proceedings was obtained from the Supreme Court's decision as it recounted how the case ended up before it.
28 The Supreme Court of South Carolina (779) provides the following definition for criminal child neglect (as per South Carolina Code Annotated s 20-7-50): Any person having the legal custody of any *child* or helpless person, who shall, without lawful excuse, refuse or neglect to provide … the proper care and attention for such *child* or helpless person, so that the life, health or comfort of such *child* or helpless person is endangered or likely to be endangered, shall be guilt of a misdemeanour and shall be punished within the discretion of the circuit court." (Emphasis in the original.)
29 779.
30 Ibid.
31 779.

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attorney failed to advise her that the crime she was being prosecuted for might not apply to prenatal drug use.[32] Her petition was granted but the state appealed and the case went before the South Carolina Supreme Court, with the same questions to be addressed.[33]

Concerning whether Whitner pleaded guilty to a non-existent crime, the state argued that the criminal child endangerment statute encompasses acts of a pregnant woman that endanger the life, health or comfort of her viable foetus.[34] The Supreme Court[35] then went on to state that the question before the Court was therefore whether a viable foetus is a "person" as per the definition of child being "a person under the age of eighteen".[36] To answer this question the Court emphasised that it must determine the intention of the legislature, which can be ascertained with reference to the language adopted and the context of that language within the entire construct of the statute and policy of the law generally.[37] After referring to the fact that a viable foetus is a person in respect of wrongful death actions and feticide, the Court stated:[38]

> [W]e do not see any rational basis for finding a viable fetus is not a 'person' in the present context. Indeed it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for the purpose of statutes proscribing child abuse. Our holding in *Hall* that a viable fetus is a person rested primarily on the plain meaning of the word 'person' in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word 'person' has changed in any way that would deny viable fetuses status as persons.

Whitner argued against the inclusion of a viable foetus within the ambit of "person" on a number of grounds but what stands out here is the fact that including a viable foetus in child endangerment statute would lead to the incongruous result that "every action

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32 The Court dismissed this notion (784) because, as will be evident for the discussion that follows, the Court found that the crime of child endangerment is applicable to a viable foetus.
33 777.
34 779.
35 Ibid.
36 This is the definition provided in the South Carolina Children's Code, s 20-7-30(1) (1985).
37 779.
38 780. The Court found the South Carolina Children's Code supported their position of including a viable foetus within the ambit of the term "child".

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by a pregnant woman that endangers or is likely to endanger a fetus, whether otherwise legal or illegal, would constitute unlawful neglect".[39] Even smoking or drinking during pregnancy might lead to women being prosecuted under the statute.[40] The Court rejected this argument and asserted that alcoholic parents of born children can be found guilty of child neglect or endangerment even though the act of drinking alcohol is legal itself.[41]

The Court went on to express its disinterest of the implications of extending criminal child endangerment provisions to a viable foetus when it stated that it did not need to address "this potential parade of horribles (sic) advanced by Whitner".[42] The Court emphasised that it was only concerned with the particular case before it being that Whitner admitted to using drugs in the third trimester which caused her child to be born with traces of the drug in its system.[43] The Court found Whitner's conduct to have endangered the life, health and comfort of her child despite the fact that "the precise effects of maternal crack use during pregnancy *are somewhat unclear*, [however] it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child".[44] (Emphasis added.)

The Supreme Court also rejected Whitner's argument that she was not provided with sufficient notice that her conduct constituted a crime[45] since the plain meaning of "child" includes a viable foetus and that it is "common knowledge" that drug use can cause harm to the unborn.[46] Whitener also advanced the argument that prosecuting her violated her right to carry her pregnancy to term, which right is founded on the right to privacy.[47] Whitner asserted that the United States Constitution "protects women from measures penalizing them for choosing to carry their pregnancies to term".[48] The

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39 781.
40 Ibid.
41 781.
42 782.
43 Ibid.
44 782.
45 This being a question of legality in South African terms.
46 785.
47 Ibid.
48 This argument is based on the premise that women who engage in conduct perceived to be harmful must either terminate their pregnancies or face criminal prosecution and imprisonment which places them in a position to have to choose. This imposition of choice violates their right to continue with a pregnancy. The threat of imprisonment is a great burden on women's freedom to carry a pregnancy

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Court accepted that it is true that women have a constitutional right to continue with a pregnancy, however the Court was critical of this argument in the context of Whitner's case finding that none of Whitner's rights are implicated (privacy or otherwise) because no one has the right to use cocaine.[49] The Court found that the state has a compelling interest (as provided for in *Roe v Wade*)[50] in protecting the life and health of a viable foetus and that the:

> State's imposition of an additional penalty when a pregnant woman with a viable fetus engages in the already proscribed behavior does not burden a woman's right to carry her pregnancy to term; rather, the additional penalty recognizes that a third party (the viable fetus or newborn child) is harmed by the behaviour.

The South Carolina Supreme Court reversed the decision of the Circuit Court concerning Whitner's post-conviction relief motion and the United States Supreme Court denied her petition for a writ of certiorari.[51] Accordingly, in South Carolina, the position stands that a pregnant woman can commit the crime of child endangerment and abuse against her own foetus via substance abuse or even by using a substance on a once-off basis, and this also may involve legal or illegal substances.

A number of issues need to be raised concerning *Whitner*. It is not obviously clear how the Court can impose criminal liability without sufficient evidence pertaining to the fact that there was even any harm caused to the viable foetus as a result of exposure to cocaine. There must be actual harm, and substance abuse must be the factual and legal cause of that harm. The Court's reference to "public knowledge" of harm is insufficient here. Thus it is questionable that any endangerment to life, health or comfort was proved at all. Public knowledge must be founded on objective evidence,

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to term. In this respect, the defence referred to a number of United States Supreme Court decisions relating to pregnant women's procreative rights, 785.

49 786.

50 *Roe v Wade* 93 S Ct 705 (1973) 732.

51 *Whitner v South Carolina* 523 US 1145 (1998). According to E Farnsworth *An Introduction to the Legal System of the United States* 4 ed (2010) 49-50, a writ of certiorari is the primary method of review by the United States Supreme Court, and it is essentially a command issued by the Supreme Court to the lower federal or state court of last resort requiring it to certify and return the record of proceedings. The command may be granted on the petition of either party to the case but a certiorari will only be granted for "special and important reasons" and the fact that the decision concerned is "erroneous" is not reason enough. Thus, it should be kept in mind that just because the United States Supreme Court denied a writ of certiorari does confirm or deny to the correctness of the South Carolina Supreme Court findings in the least.

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possibly from the medical profession of any harm, public knowledge itself does not prove harm beyond a reasonable doubt.

Going further, it is noteworthy that this stance towards pregnant substance-abusing women not only equates a pregnant women with parents of born children, but possibly extends far more onerous parental obligations and legal duties regarding the prenatal relationship. This is the case because the prenatal relationship implicates women's bodies and require that their bodies are kept in an optimal condition for purposes of gestation. While on the other hand, a female parent's body of a born child is irrelevant to the well-being of the child concerned. Thus this case creates a heavier obligation on pregnant women as "parents" of the unborn while parents of born children are allocated a lesser degree of responsibility regarding the healthy up-keep of their bodies. Also, it is only pregnant women who carry this responsibility because it is only conduct during gestation that is viewed as relevant and not harmful conduct by men who contribute towards conception, consequently, paternal contributors bear no responsibility towards ensuring healthy foetal development. Taking this argument to extremes, focusing on women's obligations towards their bodies during pregnancy could render living in poverty a crime because poor nutrition and lack of financial resources to secure qualitative health care implicate the condition of pregnant women's bodies. Focus on female responsibility removes the state from focus.

However, the resulting implications do not stop there. *Whitner* presumptively allocates the title of "parent" to a woman who may not intend to be a parent at all. It presumes that pregnancy continuation is an indication of the assumption of parental responsibilities, and this is flawed. It is submitted that not all pregnant women who continue with their pregnancies plan to be parents after birth. This may be particularly true regarding unplanned pregnancies or those pregnancies that exist as a result of rape, incest or coercive sexual relationships. It might be due to personal moral direction that a woman chooses to avoid the option of terminating her pregnancy and rather place the child up for adoption once born. However the existence of addiction at the time of falling pregnant inhibits their ability to secure an environment optimal for foetal development and prenatal health, and punishment ensues on this basis.

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From a purely technical perspective, pregnancies might be unplanned but the burden for ensuring that the unborn's "life, health or comfort" is not endangered, rests with pregnant woman alone, yet this obligation does not rest with the paternal contributor to the pregnancy or even the state at large. This creates an unsettling scenario particularly where the pregnancy is a result of rape. Not only is the woman pregnant but she bears the sole implication of child abuse provisions concerning her conduct for nine months. Although it is the state's obligation to protect the unborn via its compelling interest, women are left with the bill.

10 3 2 Alabama: Hope Ankrom

Another example of extending criminal child abuse laws to pregnant women who use or abuse substances during pregnancy relates to child abuse provisions in Alabama. The child abuse provision pertains to "chemical endangerment of exposing a child to an environment in which controlled substances are produced or disturbed" in terms of section 26-15-3.2 of the Code of Alabama (Chemical Endangerment Statute). According to this provision, a person commits the crime of chemical endangerment when that person knowingly, recklessly, or intentionally causes a child to be exposed to, ingest, inhale, or have contact with a controlled substance, chemical substance or drug paraphernalia.[52]

"Child" is not defined in Chapter 15 of the Code of Alabama, which is the chapter that deals with child abuse generally. Nevertheless, in 2009 when Hope Ankrom gave birth to a child that tested positive for exposure to cocaine, she was arrested and charged with chemical endangerment of a child a month later.[53] Later that year, Ankrom was formally indicted by a grand jury, where after she filed a motion to dismiss the charges on the grounds that the Chemical Endangerment Statute was not intended to be applied to the unborn. Her motion was denied and in 2010 Ankrom pleaded guilty to chemical endangerment charges but stipulated that she reserved an issue, namely that the facts of her case do not assert an offence under the law which she is charged.

[52] The seriousness of the offence increases in relation to the harm caused to the child, that is, either causing serious physical injury or death.
[53] *Akron v State* 2011 WL 3781258 (Ala Crim App). At the time of writing, this decision is unreported thus page numbers cannot be referenced.

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This was the issue that the Court of Criminal Appeals of Alabama had to determine after the trial court noted her reservation.

The Court found that the ordinary meaning of child includes the unborn, and to justify its position the Court referred to the fact that the Alabama wrongful death statute includes a viable foetus within its provisions, and the Court also went on to cite a number of dictionaries which all include the unborn with their definitions of child. Going further, the Court approvingly cited *Whitner*'s definition of person as including a foetus. The Court went on to find that a viable foetus is included in the definition of the "child" and went so far as to state that referring to the unborn as children is so common that:

> Unless the legislature specifically states otherwise, the term 'child' is simply a more general term that encompasses the more specific term 'viable fetus'. If the legislature desires to proscribe conduct against only a 'viable fetus' it is necessary to use that specific term. However, if the legislature desires to proscribe conduct against a viable fetus and all other persons under a certain age, the term child is sufficient to convey that meaning.

Also, Ankrom argued that allowing these charges and consequent conviction would encourage an endless string of possible criminal charges against women for day-to-day conduct during pregnancy. However, the Court found that since this statutory provision is limited to chemical endangerment and not general endangerment the issue of "endless extensions" is removed.[54]

On appeal to the Supreme Court of Alabama, the Court confirmed the Criminal Appeal Court's finding that the Chemical Endangerment Statute is intended to include a pregnant woman's conduct in relation to her foetus.[55] The Court also went further and

[54] The Court pointed out that cigarettes and alcohol do not fall within the ambit of "controlled substances", although it must be noted that the definition of this term is not provided for in the statute.

[55] *Ex parte Ankrom; Ex parte Kimbrough* 2013 WL 135748 (Ala). This decision is also unreported and consequently page numbers cannot be cited while discussing the decision. Amanda Kimbrough was also charged and convicted to imprisonment for chemically exposing her foetus to a controlled substance. In this case Kimbrough went into premature labour (at 25 weeks gestation) 3 days after smoking methamphetamines and the child died very soon after delivery. The Court recited the evidence as indicating that Kimbrough presented at hospital with "occult cord prolapse" which is a condition where the umbilical cord descends down the birth canal before the foetus and causes a cut in the blood supply to the foetus. However, a medical examiner provided testimony that the child's autopsy results indicates that he died from "acute methamphetamine intoxication" while the

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expanded the reach of the statute to protect all foetuses and not just viable ones.[56] Consequently, abuse of a controlled substance at any point during pregnancy is a criminal offence in Alabama via the Chemical Endangerment Statute.

Alabama Supreme Court decision was written by Parker J who, while concurring with the majority expressed the necessity to draft a separate decision where the Judge concurs "specially" with the majority. Parker J found that "*Roe* has sometimes been misread as holding that that those unborn children are not persons and do not have the same fundamental rights as does every other person, which rights must be protected by the law … nothing could be further from the truth".[57] To demonstrate how far from the truth such a statement is, Parker J cited five other areas of law (property law, criminal law, law of delict, guardianship law and health care law) as recognising the unborn as persons with "legally enforceable rights". The Judge concluded by reiterating that the decision reached by the Court is in line with widespread legal recognition of the unborn as persons and went on to point out that the only area in law where the unborn lack protection is in respect of termination of pregnancy and this is purely on the basis of the *Roe* decision. It is submitted that should this be the ultimate guiding light for the Court taking this approach, it is intrinsically flawed because *Roe* is not legal authority for viewing the unborn as a separate entity in law let alone victims of pregnancy-related conduct.[58]

The Judge's position concerning the status of the unborn in the United States can be interpreted as demonstrating the practical successes of the anti-abortion lobby groups in the United States. To briefly recap, chapter eight[59] demonstrated that, while working towards securing full personhood for the unborn, the anti-abortion lobby groups adopt alternative "backdoor" tactics to attacking the validity of *Roe*'s standing. In this respect the lobby groups work towards extending status to the unborn in all other areas of law. This approach is adopted with the aim of rendering *Roe* at odds with other developed

paediatrician who treated the child after birth indicated that the cause of death was a result of "respiratory arrest secondary to prematurity". In fact, after delivery the child was not breathing at all, and only after intervention he recovered to a point but his condition rapidly declined to his ultimate death. He only lived for an estimated 19 minutes.

56 Ibid.

57 *Ex parte Ankrom; Ex parte Kimbrough*.

58 This was argued in ch 9 para 9 2 2 1, see authority cited therein.

59 Ch 8 para 8 4.

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areas of law which provide the unborn with increased status thus rendering the *Roe* illogical since it would be the only area of law denying the unborn proper status.[60]

Suppé states that Alabama experienced a drastic increase in methamphetamine production during 2002 and 2006 and the Chemical Endangerment Statute was intended to protect children from exposure to harmful production processes.[61] However, 60 women have been prosecuted under this law for giving birth to babies testing positive to drug exposure during gestation.[62] Steele cites state authorities involved in prosecuting these women as viewing this law an effective means to protect women and their babies since the threat of punishment will deter use of drugs while pregnant and arresting the women offers them "rehabilitation opportunities".[63]

10 3 3 Tennessee: Senate Bill 1392

Another example where substance addiction or use constitutes child abuse brings the discussion to the State of Tennessee. Aside from the above exceptions, most of the cases against pregnant substance-abusing women were dismissed on the grounds of there being a lack of legislative intent to include pregnant women within the ambit of a particular child abuse statute. Focus on legislative intent leaves open the possibility of merely enacting legislation with the explicit intent of defining criminal child abuse as including the unborn in relation to the pregnant women carrying them. In 2003 Harries et al suggested that there is no support for holding women criminally liable in relation to their adverse pregnancy outcomes, but conceded that statutory proposals might be made to address issues the courts avoided.[64] In line with that prediction, on 16 May 2014 the Tennessee Senate passed a Senate Bill (SB) 1391 which renders the use of

60 See ch 8 para 8 4 where the aims of the anti-abortion lobby were discussed.
61 R Suppé "Pregnancy on Trial: The Alabama Supreme Court's Erroneous Application of Alabama's Chemical Endangerment Law in Ex Parte Ankrom" (2014) 7(2) *HLP* 49 50.
62 Ibid. This is according to National Advocates for Pregnant Women, as reported by C Steele "DA to Begin Prosecution of Mothers Who Use Drugs" (1 October 2012) *NorthJersey.com* <http://www.northjersey.com/news/crime-and-courts/da-to-begin-prosecution-of-mothers-who-use-drugs-1.338718?page=all> (accessed 19 June 2014).
63 Ibid.
64 Harris et al (2003) *JAMA* 1698.

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illegal substances during a pregnancy an assault if the child is born addicted to or harmed by the illegal substance used prenatally.[65]

The Bill amends the Tennessee Code regulating offences against the person regarding "assaultive offenses". Section 39-13-107 (a) provides that for purposes of assault, "another", "individuals" and "another person" include the unborn at any point in gestation when those terms refer to the victim of any act made criminal by this provision. Subsection (c) originally stated that nothing in subsection (a) "shall apply to any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant, or to any lawful medical or surgical procedure to which a pregnant woman consents, performed by a health care professional". The Bill adds a new sentence to the end of this provision stating:

> However, nothing in this section shall preclude prosecution of a woman for an assaultive offense for the illegal use of a narcotic drug while pregnant, if her child is born addicted to or harmed by the narcotic drug or for criminal homicide if her child dies as a result of her illegal use of a narcotic drug taken while pregnant.

According to Cohen,[66] these measures were introduced after collecting data to determine the extent of neonates being born with "neonatal abstinence syndrome"[67] and the data was interpreted as indicating that there is a sudden increase in neonates being born with this syndrome. However, personal communication with Flavin,[68] Professor of Sociology and President of the Board of Directors for National Advocates for Pregnant Women, explains that no substantive studies were conducted on the issue of neonatal abstinence syndrome before the collection of data as mentioned by Cohen. Consequently, the interpretation of there being a sudden increase is arguably

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65 See Legi Scan "Tennessee Senate Bill 1391" *Legi Scan* <http://legiscan.com/TN/bill/SB1391/2013> (accessed 27 May 2014).

66 R Cohen "Will Tennessee Legalize the New Jane Crow?" *Socialistworker.Org* (23 April 2014) <http://socialistowrker.org/2014/04/23/will-tennessee-leglaize-new-jane-crow> (accessed 5 June 2014).

67 Cohen explains that this condition is a medical condition found in neonates who were exposed to addictive substance prenatally, however the condition is treatable provided that attending health care providers know there is a need to provide treatment, see Cohen "Will Tennessee Legalize the New Jane Crow?".

68 22 May 2014, Cape Town.

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based on flawed methodology rendering the conclusion that there is an increase in neonates born with the syndrome questionable.

The implications of this legislation are yet to be determined since it is fairly new to the scene of substance use during pregnancy, however there is some speculation in the United States. There is wide spread concern that those women who decide to continue with their pregnancies despite suffering with addiction will face criminal charges, these might even ensue in cases where these women are in active treatment.[69] In fact this legislation has been dubbed the "Pregnancy Criminalization Law".[70] Flavin and Paltrow explain how these laws are seen to criminalise pregnancy:[71]

> If a woman who is already addicted to drugs becomes pregnant and is not able to completely abstain from using drugs, the only way she can be assured of avoiding criminal charges for such crimes as child abuse, drug delivery to minors, and homicide is to get an abortion. Even though proponents of arrests and prosecutions articulate the problem as one of a woman who uses drugs while she is pregnant, their perspective is more accurately characterized as an objection to a woman becoming and remaining pregnant.

Cohen views SB 1391 as another attack on termination-of-pregnancy rights in the United States since it treats the unborn as a separate entity because charging a woman for assaulting her own foetus implies that the foetus is independent with separate interests.[72] This notion will then infuse the hotly contested debates concerning termination-of-pregnancy laws.[73] How this law plays out is yet to be seen, however, National Advocates for Pregnant Woman are reportedly prepared to challenge its constitutionality.[74]

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69 American Civil Liberties Union "Tenn. Governor Singles out Pregnant Women for Discrimination" (29 April 2014) *American Civil Liberties Union* <https://www.aclu.org/reproductive-freedom-womens-rights/tenn-governor-singles-out-pregnant-women-discrimination> (accessed 5 June 2014).

70 Angry Black Women Watch "Tennessee's Pregnancy Criminalization Law will Hit Black Women the Hardest" (18 April 2014) *Angry Black Women Watch* <https://abww.wordpress.com/tag/sb-1391/> (accessed 5 June 2014).

71 Flavin & Paltrow (2010) *J Addict Dis* 234.

72 Cohen "Will Tennessee Legalize the New Jane Crow?".

73 Ibid.

74 Cohen "Will Tennessee Legalize the New Jane Crow?".

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These instances of child abuse laws in South Carolina, Alabama and Tennessee clearly demonstrate that a separate-entities approach is at play in the context of the issue of addressing prenatal substance abuse or use. On the surface, this method seems to highlight a commitment to aims of protecting the unborn as human beings thus advancing their interests, and the fact that this is being done under *Roe*'s umbrella gives the impression that women's right to terminate a pregnancy remains intact thus also serving her autonomy rights (being narrowly construed). However there are a number of theoretical flaws inherent in adopting the separate-entities approach to address the issue of prenatal exposure to drugs.

10 4 Reviewing the Theoretical Soundness of Child Abuse Convictions for Prenatal Substance Abuse or Usage

From a theoretical perspective, criminal child abuse or endangerment provisions that hold women liable in respect of their own prenatal conduct are more in line with the underlying premise of the separate-entities approach. That is, the unborn, identified as human beings, are separate subjects under the law and on that basis deserve protection from whoever may cause harm, including women and their prenatal substance abuse.[75]

Despite this congruency, a number of flaws can be identified. However, since some of these flaws are also present in the discussion concerning feticide, foetal homicide or murder of a foetus,[76] this discussion will be brief in comparison to that in chapter nine. One aspect that will not be repeated here is the contradiction that these criminal child abuse provisions have with *Roe*, this was discussed as length in chapter nine and the same flaws are viewed as being applicable here.[77] Further, criminal charges for child

[75] This can be juxtaposed to contradictory application of the separate-entities approach under feticide or foetal homicide as identified in ch 9 para 9 3 2, where women were exempted from criminal liability via "maternal exemptions".

[76] See ch 9 para 9 3.

[77] See ch 9 para 9 3 1 and all authority cited therein. Only that portion of the discussion that relates to holding a woman criminally liable for experiencing a stillbirth is relevant here. Very briefly, offering protection at any point in gestation (as Tennessee and Alabama have done) contradicts the notion that *Roe* only offers protection from the moment of viability and it can hardly be argued that these provisions protect pre-viable unborn for exposure to drugs since women can simply terminate a pregnancy to avoid the possibility of criminal liability. Also, extending protection to viable foetuses (as South Carolina has done) is erroneously founded on the argument that *Roe* creates separate legal subjects of the unborn, the discussion in para 9 3 1 demonstrates that this is not the case.

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abuse in relation to prenatal substance abuse relies on the embodied connectedness of pregnancy, yet the crime separates a pregnancy, making the foetus a victim and the woman a perpetrator. This approach in criminal law renders the connection that pregnancy represents as irrelevant thus nullifying the causal connection that gives rise to the offence, meaning without the existence of a pregnancy the conduct would not be criminally harmful.[78]

Aside from contradicting *Roe*, another aspect threatening sound translation of the aim of the separate-entities approach is the fact that protection from prenatal exposure to drugs through the imposition of criminal sanctions after birth has occurred is reactionary rather than preventative. Flavin argues that this approach will have no effect on improving pregnancy outcomes since "arresting a pregnant woman after she gives birth will not have a retroactive impact on her pregnancy".[79] She understands this line of action as missing out on a "valuable opportunity" to provide women with access to supportive health care and drug treatment while pregnant and engaging in risky behaviour.[80] As argued in chapter nine,[81] if prenatal life was valued and in need of protection from harm, emphasis should be on preventative actions rather than responsive ones. Ultimately, these provisions do give weight to the value that the unborn represent as human beings and demonstrate the potential for adverse birth outcomes as something that should not go unnoticed in law, but these measures for foetal protection fail to prevent the possibility of an adverse outcome.

Flavin[82] and Goodwin[83] report that substance abuse is comparable across race and class. With that in mind, one would expect states to apply child abuse measures

78 This was also covered in ch 9 para 9 3 3.
79 Flavin *Our Bodies, Our Crimes* 113.
80 Ibid. In this respect, offering support during pregnancy to overcome addiction or instil grounded knowledge of the health risks linked to substance usage is viewed as preventative actions rather than mere reactionary. Flavin (*Our Bodies, Our Crimes* 113) warns that incarceration during pregnancy should not be viewed as an adequate prevention strategy, because prisons or jails are known for their poor living conditions generally, never mind considering the special needs of pregnant women. These environments are not seen as ideal for protecting the unborn from harm since these environments fail to offer quality prenatal care, nutritional diets and effective reproductive health care. Also see Suppé (2014) *HLP* 69-70, who cited authority that Alabama received an "F" rating for the delivery of services to pregnant inmates, being an incredibly bad rating in the United States
81 Para 9 3 3.
82 *Our Bodies, Our Crime* 109
83 M Goodwin "Prosecuting the Womb" (2008) 76(5) *Geo Wash L Rev* 1657 respectively. Goodwin (1679-1681) points out though all races abuse substances, poor women and particularly poor black

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consistently across the board regardless of race and class. However, and as already indicated in chapter nine,[84] poverty and race tend to indicate which women will face criminal attention regarding adverse pregnancy outcomes.[85]

Suppé points out that in Alabama there is increased focus on "hard" drugs being cocaine and methamphetamine, which are the drugs that tend to be used more by poor communities thus rendering them more vulnerable to prosecutions.[86] Also, Schroedel et al[87] attribute increased attention on poor women because of their reliance on the public health care system, being the institutions at the forefront of testing and reporting women to authorities for their prenatal drug use.[88] Explaining the over-representation of poor women in the criminal system, Suppé suggests that not all women can afford termination-of-pregnancy services in order to avoid criminal charges, thus poor women are more susceptible to facing criminal charges and convictions.[89] All of this shows how poor women, and particularly poor women of colour are valued rather than to how much the unborn are valued as separate entities and protected as such.[90]

The argument that there is lack of prevention of harm is especially obvious when one considers the fact that the a woman still has the right to terminate a pregnancy, in the

women abuse illegal substance while more affluent white women tend to abuse legal substances. She argues that this approach is more about criminalising choice substance rather than abuse of substance.

84 Ibid.

85 See Suppé (2014) *HLP* 71; Paltrow & Flavin (2013) *JHPPL* 332-333; Schroedel et al (2000) *Duke J Gender L & Pol'y* 110; Roth *Making Women Pay* 146-149.

86 Suppé (2014) *HLP* 71. However, Roth's (147) work points to the fact that this is not a new approach, crack cocaine has always been a drug that authorities have focused on. She argues that the fact that other substances which are used by white women or more affluent women (such as alcohol, powder cocaine or heroin) do not reach the attention of authorities is an indication of the social value of black women in American society. All substances have the potential to cause harm, yet neither get equal attention from authorities. Also see D Page "The Homicide by Child Abuse Conviction of Regina McKnight" (2003) 46 *How LJ* 363 370-372.

87 Schroedel et al (2000) *Duke J Gender L & Pol'y* 110.

88 Also see Roth *Making Women Pay* 143. However, Roth (147), drawing from a number of studies, highlights of all the women using public care facilities, black women are more likely to be tested and reported than white women. Page asserts a similar argument, Page (2003) 46 *How LJ* 372.

89 Suppé (2014) *HLP* 72. Also see Flavin *Our Bodies, Our Crimes* 112, who explains that termination of pregnancy is "frequently considered among pregnant women who use illicit drugs, but less frequently obtained". She list a number of reasons why pregnancy terminations were not obtained, being, that women realised they were pregnant too late in gestation, they lacked financial means to secure the service or decided against terminating their pregnancies on moral or religious grounds.

90 Many authors come to this conclusion, for an example see Goodwin (2008) *Geo Wash L Rev* 1657 generally.

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context of the separate-entities approach, a termination of pregnancy allows for the ultimate “harm” being the complete termination of prenatal life. This means that only those women who do not terminate their pregnancies face criminal sanctions, leading to the likely conclusion that these laws are directed at punishing women for becoming mothers since they are poor, or poor and black, and addicted, thus they should not be creating or mothering children. This draws on chapter nine’s “bad mother” rhetoric which is equally applicable to the context of prosecuting women for prenatal substance abuse or use.[91]

From a theoretical viewpoint, criminal child abuse laws do not offer the protection intended. Having these laws apply after birth fails to prevent exposure and the fact that *Roe* remains in force, renders the unborn and born children unprotected from the potential harms and implications of substance abuse.

10 5 Flawed Foundations for Holding Women Criminally Liable for Substance Abuse during Pregnancy

Before moving on, it is necessary to point out that the use of drugs or other harmful substances during pregnancy, whether legal or illegal, is viewed in a disapproving light and the fact remains that this is a social concern that requires serious attention. Ovens and all those involved in the search to adequately address this concern make this very clear. However, if criminal law is going to be the method to address these concerns certain principles must be adhered to for purposes of sound and legitimate application of the law.

Aside from the theoretical issues, there are also practical concerns relating to causation of harm and the underlying assumption that women are the sole contributors of harm in cases of adverse pregnancy outcomes. It is submitted that if harm from prenatal exposure cannot be established, or a link between the harm and prenatal substance abuse cannot be established, then the attribution of criminal liability cannot

[91] See para 9 3 3.

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be ascribed.[92] Further, criminal liability can only attach in the case of there being the intention to cause a particular harm, and substance abuse if fuelled by addiction, removes intention to cause harm to the unborn since addiction is not an intentional criminal act against others but an illness that requires adequate treatment.[93]

The first issue is to determine whether substance abuse during pregnancy renders the unborn harmed as a result of exposure. In *Whitner*, the South Carolina Supreme Court asserted that it is "well documented and within public knowledge" that the use of cocaine can seriously harm the unborn when ingested by women during pregnancy.[94] Also, that it is "common knowledge" that drug use causes harm to the unborn.[95] To support this position, the Court relied on two medical journal articles, one published in 1992 and another published in 1985.[96] However, after perusing both articles, a different conclusion is reached to that of the Supreme Court. At most these articles illustrate that there is a risk of harm in the case of intrauterine cocaine exposure but neither indicate this highly technical, scientific-based knowledge is readily available to the general public and that the articles' findings are easily understood by those outside of medicine.[97] In fact, Volpe introduces his findings with something akin to a cautionary note, mentioning that "[d]elineating the effects of intrauterine exposure to cocaine on fetuses and newborn infants is difficult" and one such difficulty rests with the fact that the use of other drugs, smoking cigarettes or marijuana, poor nutrition or lack of prenatal care confounds the process of identifying whether cocaine is the actual cause

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92 See generally C Snyman *Criminal Law* 5 ed (2008) 79-94. Causation constitutes factual and legal causation. Even where the factual causation of harm can be established or is eventually established in the future, legal causation must also be established.

93 Regarding intention, see Snyman *Criminal Law* 181-208. Regarding the nature of addiction as a disease and its consequential effect of removing "choice" to use a particular drug, see, American Society of Addiction Medicine "Public Policy Statement: Definition of Addiction" (19 April 2011) *American Society of Addiction* <http://www.asam.org/research-treatment/definition-of-addiction> (accessed 24 June 2014). This will be discussed in further detail below.

94 782.

95 785.

96 782. The Court cites the following articles as authority of public knowledge of harm: J Volpe "Effect of Cocaine Use on the Fetus" (1992) 327(6) *N Engl J Med* 399; I Chasnoff, W Burns, S Schnoll & K Burns "Cocaine Use in Pregnancy" (1985) 313 (11) *N Engl J Med* 666. Roth *Making Women Pay* 142, identifies Chasnoff's publication as being the source of the "crack baby" myth.

97 In fact, access to these articles are limited by the fact that paid subscription is needed. This removes a large portion of the general population from gaining knowledge of the potential risks associated with prenatal substance abuse. Further, it is questionable that articles published in medical journals amount to common knowledge.

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of adverse prenatal development or pregnancy outcome.[98] Referring to two articles does not seem sufficient to prove harm and knowledge of such harm.

Some years later in 2003, the same court relied on the basis of public knowledge again and cited its decision in *Whitner* as authority: Regina McKnight was convicted of murder for experiencing a stillbirth on the basis that it is "public knowledge the usage of cocaine is potentially fatal".[99] Concerning the impact of cocaine, the Court held:[100]

> The drug 'cocaine' has torn at the very fabric of our nation. Families have been ripped apart, minds have been ruined, and lives have been lost. It is common knowledge that the drug is highly addictive and potentially fatal. The addictive nature of the drug, combined with its expense, has caused our prisons to swell with those who have been motivated to support their drug habit through criminal acts. In some areas of the world, entire governments have been undermined by the cocaine industry.

In neither instance is any standard authority cited that supports the Court's conclusion that foetal harm does occur directly as a result of prenatal substance abuse nor that foetal harm was widely known to occur as a result of substance exposure. Paltrow and Flavin offer a compelling argument to explain the Court's position and the general hype around criminal actions against women who used substances during pregnancy.[101] They explain[102] that during the 1980s and 1990s (when *Whitner* was charged and pleaded guilty)[103] a "war on drugs" (particularly against the use of cocaine) took hold in the United States and using women were found at the centre of it: they were "crack mothers"[104] creating "crack babies". According Roth,[105] "crack babies" are those who, as a result of prenatal exposure to crack cocaine, were portrayed as being destined to

98 Volpe (1992) *N Engl J Med* 399.
99 *State v McKnight* 576 SE 2d 168 (SC 2003) 173. (*McKnight* 2003.) See ch 9 para 9 3 3 for a full discussion of the case.
100 Ibid.
101 Flavin & Paltrow (2010) *J Addict Dis* 231. Although, it must be noted that these authors are not the only ones to offer this explanation, see Roth *Making Women Pay* 136.
102 Flavin & Paltrow (2010) *J Addict Dis* 232.
103 Being, 1992.
104 According to Paltrow and Flavin (232), "crack mothers" were women portrayed as drug-using women and "hypersexual, out-of-control women who would 'do anything' for drugs. They were characterized as being completely indifferent to any harm they might cause to themselves or others, especially the children they would give birth to".
105 *Making Women Pay* 136.

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"fail in school and grow up to be less than human, wreaking havoc on society". She[106] explains that these babies were characterized as the "biological underclass" and expected to suffer with developmental defects. These character traits stemmed from "drug war propaganda" in the media with "grossly exaggerated claims about the risks posed by prenatal exposure to certain substances".[107]

Paltrow and Flavin explain that this public moral panic concerning drug use during pregnancy not only implicated respectable media[108] houses but also universities. They cite Columbia University's Centre on Addiction and Substance Abuse as stating in their 1994 Annual Report that prenatal exposure results in "a slaughter of innocents of biblical proportions".[109] Academic publishing houses were also involved, Roth explains that those academic pieces which emphasised prenatal harm were more likely to be published than those that did not.[110] She argues: "This skewed selection distorts the public's understanding of the problem and contributes to a climate of panic in which coercive intervention into pregnant women's lives seems acceptable."[111]

The media successfully, via sensationalism, created a picture of United States being in the grips of an "epidemic which was destroying a generation of young people".[112] This media coverage of "medical misinformation" was uncritically and widely accepted, thus permeating the minds of all in society.[113] Aside from facing criminal prosecution,[114] Roth reports that some politicians went so far as to push for the implementation of very harsh policies such as suggesting that addicted women should

[106] Roth *Making Women Pay* 142.
[107] Flavin & Paltrow (2010) *J Addict Dis* 231.
[108] Ibid. Flavin and Paltrow cite Time Magazine and the New York Times as reporting on and exasperating the panic of "crack mothers" and "crack babies". However, for more on the media's hype concerning the "crack crisis", see L Paltrow & K Jack "Pregnant Women, Junk Science and Zealous Defense" (2010) *The Champion* <http://parentattorney.org/wp-content/uploads/2011/08/pregnant-women-junk-science-zealous-defense.pdf> (accessed 22 June 2014) 3.
[109] Flavin & Paltrow (2010) *J Addict Dis* 232.
[110] Roth *Making Women Pay* 144.
[111] Ibid.
[112] Flavin & Paltrow (2010) *J Addict Dis* 232.
[113] Flavin & Paltrow (2010) *J Addict Dis* 233.
[114] Roth (*Making Women Pay* 146) gives a brief exposé of when prosecution against women started in relation to their substance use, she cites 1992 as holding the record for the number of women facing criminal charges.

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be sterilised, or face forced imposition of contraception for the duration of their reproductive age.[115]

With judicial precedents in place concerning the prosecution of women for prenatal substance use in *Whitner*,[116] the panic eventually abated during the 1990s.[117] Nevertheless, it has resurfaced more recently, but not in relation to cocaine, now the public moral panic is in relation to methamphetamine.[118] Paltrow and Flavin report that, in the United States, "the public is still fed a regular diet of accounts that distort and misrepresent the effects of illicit drug use … rely on non-experts, and demonize the people who use illicit drugs".[119] (Footnotes omitted.)

Despite a change in focus regarding the drug of concern, the more recent panic surrounding drug use during pregnancy is taking place within a more informed context.[120] Hence McKnight being granted post-conviction relief in 2008.[121] Briefly, the 2008 Court found that the evidence the state originally relied on during the 2003 trial to prove that McKnight's prenatal substance use was the cause of her stillbirth, was outdated.[122] The Supreme Court accepted that prenatal use of cocaine was no more harmful than smoking, poor nutrition and lack of prenatal care,[123] all of which have strong links to poverty.[124] This more informed position stems from the fact that health care professionals are more assertively open about what their findings reveal concerning studies pertaining to prenatal substance abuse. In this respect, Flavin and Paltrow[125] report that health care experts and researchers publically denounce

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115 Roth *Making Women Pay* 142.
116 Hence the *McKnight* (2003) decision relying in *Whitner*.
117 Flavin & Paltrow (2010) *J Addict Dis* 233.
118 Ibid. Suppé's work supports this argument, she explains that Alabama's Chemical Endangerment Law was enacted in response to the rise in methamphetamine use, see Suppé (2013) HLP 51-58.
119 Flavin & Paltrow (2010) *J Addict Dis* 234. For an example see B Lester "Another 'Drug Baby' Media Scare" (12 March 2005) *Common Sense for Drug Policy* <http://www.csdp.org/publicservice/dejavumeth.htm> (accessed 20 June 2014).
120 Paltrow & Jack (2010) *The Champion* 2.
121 *McKnight v State* 661 SE 2d 354 (SC 2008) (*McKnight* 2008). See ch 9 para 9 3 2 for a discussion of this case.
122 360-361. As reported, the *McKnight* 2003 decision does not cite what evidence was advanced but the fact that the *Whitner* case was cited as authority in indicates that the underlying reasons for the states position concerning prenatal substance abuse is outdated since the *Whitner* case relied on 2 articles, from the 1980s and the early 1990s respectively.
123 358 fn 2.
124 Paltrow & Jack (2010) *The Champion* 2.
125 Flavin & Paltrow (2010) *J Addict Dis* 234

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misinformed media coverage and urge that publications be founded on science as derived from field specialists rather than the local sheriffs or paediatricians.[126]

National Advocates for Pregnant Women compiled a "fact sheet" concerning experts' positions of consequences of prenatal substance abuse and looked at crack cocaine, methamphetamine, opiates, marijuana and alcohol.[127] Regarding crack cocaine, researchers are cited as finding that the effect of prenatal exposure to cocaine is less severe than prenatal exposure to alcohol, and effects of cocaine exposure are similar to prenatal nicotine exposure.[128] Also, there is no convincing evidence that prenatal cocaine exposure is associated with developmental concerns, and that if attending health care providers were not informed of women's cocaine use during pregnancy, those babies who were exposed could not be distinguished from the non-exposed neonates.[129] The organisation indicates that in an open letter to the media during 2004 30 leading researchers and doctors unanimously rejected the notion of there being a "crack baby" syndrome, disorder or condition, and further went on to argue that neonates cannot be born addicted to substances.[130]

On the topic of prenatal exposure to methamphetamine, the organisation indicates that further research is required for purposes of determining the effects of prenatal

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[126] See further the following examples as posted on National Advocates for Pregnant Women's website, R Newman "Experts Urge Media to End Inaccurate Reporting on Prescription Opiate Use by Pregnant Women" (13 March 2013) *Institute of Beth Israel Medical Centre* <http://advocatesforpregnantwomen.org/issues/pregnancy_and_drug_use_the_facts/experts_urge_media_to_end_inaccurate_reporting_on_prescription_opiate_use_by_pregnant_women.php> (accessed 20 June 2014); L Paltrow "Response to: 'Drug Policies Must be Rooted in Science'" (21 December 2012) *National Advocates for Pregnant Women* <http://advocatesforpregnantwomen.org/Response%20to%20%2522Drug%20Policies%20Must%20Be%20Rooted%20in%20Science%2522.pdf> (accessed 20 June 2014); National Advocates for Pregnant Women "Top Medical Doctors and Scientists Urge Major Media Outlets to Stop Perpetuating 'Crack Baby' Myth" *National Advocates for Pregnant Women* (25 February 2004) <http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/top_medical_doctors_and_scientists_urge_major_media_outlets_to_stop_perpetuating_crack_baby_myth.php> (accessed 20 June 2014).

[127] National Advocates for Pregnant Women "Prenatal Exposure to Illegal Drugs and Alcohol: Media Hype and Enduring Myths Are Not Supported by Science" (24 March 2010) *National Advocates for Pregnant Women* <http://advocatesforpregnantwomen.org/2010%20drugmyth%20factsheet%20v3.pdf> (accessed 22 June 2014).

[128] National Advocates for Pregnant Women "Prenatal Exposure to Illegal Drugs and Alcohol" 1.

[129] Ibid.

[130] National Advocates for Pregnant Women "Prenatal Exposure to Illegal Drugs and Alcohol" 1. Also see K Sunderlin & L Huss "The Mythology of 'Addicted Babies': Challenging Media Distortions, Laws, and Policies that Fracture Communities" (2014) 86 *Different Takes* 1.

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exposure to methamphetamine in respect of developmental issues.[131] Further research is required because currently there is insufficient evidence to draw any substantive conclusions on the topic.[132] In 2005, more than 90 medical doctors, scientists, psychological researchers and treatment specialists released an open letter denouncing the use of the term "meth babies" since it lacked scientific basis and any such syndrome, disorder or condition could not be validated.[133] This issue rests on the fact that the effects of prenatal methamphetamine use cannot be separated from other factors.[134] Other factors include poor nutrition, lack of prenatal care, and the concurrent use of other legal and illegal substances such as nicotine, alcohol, cocaine and marijuana.[135]

Prenatal exposure to opiates (such as heroine and oxycodone) leads to some neonates being born with foetal abstinence syndrome,[136] but exposure is not associated with compromised birth defects or growth and development.[137] Also the use of marijuana has resulted in concerns such as affecting birth weight or birth length in high-risk pregnancies, however after a few months those effects subside.[138] It was also pointed out that prenatal exposure to alcohol and nicotine had a more pronounced effect on birth weight or growth compared to marijuana.[139] The National Institute on Drug Abuse indicates that exposure to nicotine increases the risk of stillbirth, infant mortality, Sudden Infant Death Syndrome, preterm birth, respiratory problems, slowed

131 Ibid.
132 National Advocates for Pregnant Women "Prenatal Exposure to Illegal Drugs and Alcohol" 1.
133 National Advocates for Pregnant Women "Prenatal Exposure to Illegal Drugs and Alcohol" 2.
134 Ibid.
135 J Mohoney "Information about Methamphetamine Use in Pregnancy" *American College of Obstetricians & Gynecologists* (2006) <http://vanilla47.com/Methamphetamine%20Pharmacology/Information%20about%20Methamphetamine%20Use%20in%20Pregnancy.pdf> (accessed 27 June 2014).
136 This syndrome can be successfully treated. If the withdrawal symptoms are not too severe no medication is needed. However, in cases of severer withdrawal symptoms medication can be prescribed to alleviate the issue. See Substance Abuse and Mental Health Services Administration "Methadone Treatment for Pregnant Women" (March 2009). The brochure is available on National Advocates for Pregnant Women's website <http://advocatesforpregnantwomen.org/SAMHSA%20Brochure%20%2522Methadone%20Treatment%20for%20Pregnant%20Women%2522.pdf> (accessed 22 June 2014).
137 National Advocates for Pregnant Women "Prenatal Exposure to Illegal Drugs and Alcohol" 2.
138 National Advocates for Pregnant Women "Prenatal Exposure to Illegal Drugs and Alcohol" 3.
139 Ibid.

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foetal growth and low birth weight.[140] Also important to note is the fact that second-hand exposure can increase the risk of harm of the above described conditions.[141]

The National Institute on Drug Abuse identifies alcohol as one of the widely abused substances during pregnancy in America,[142] and frequent or excessive exposure to alcohol during gestation is known to cause Foetal Alcohol Syndrome which is a recognised disorder.[143] However, there are a number of issues associated with predicting an outcome with any certainty: "there is no medical certainty regarding the level of alcohol consumption during a particular pregnancy that will result in negative fetal outcomes. Even the exact mechanism that establishes a causal link between alcohol ingestion and manifestation of harmful fetal symptoms has yet to be definitively established".[144] Nevertheless, there are a number of identified risk factors that indicate that some women are more susceptible to giving birth to children with the syndrome which include age, socio-economic status, ethnicity, genetic factors, and maternal alcohol metabolism.[145] Even with this knowledge, experts are calling for further research.[146]

It is widely acknowledged in the medical field that proving factual causation in respect of adverse pregnancy outcomes is scientifically problematic.[147] In each of the cases

[140] National Institute on Drug Abuse "Topics in Brief: Prenatal Exposure to Drugs of Abuse" (May 2011) *National Institute on Drug Abuse* <http://www.drugabuse.gov/sites/default/files/prenatal.pdf> (accessed 23 June 2014).However the Institute highlights the low birth weight is "dose-dependent" which means that the more a woman smokes during pregnancy, the more the infant's birth weight is reduced.

[141] Ibid.

[142] National Institute on Drug Abuse "Topics in Brief: Prenatal Exposure to Drugs of Abuse".

[143] National Advocates for Pregnant Women "Prenatal Exposure to Illegal Drugs and Alcohol" 3.

[144] Ibid.

[145] National Advocates for Pregnant Women "Prenatal Exposure to Illegal Drugs and Alcohol" 3.

[146] Ibid.

[147] See the following *amici curiae* briefs: *Amici curiae* brief of the National Association of Alcoholism and Drug Abuse Counselors et al in the matter of *Whitner v State* 492 SE 2d 777 (SC 1997), (listing 21 *amici curiae*); *Amici curiae* brief of American Public Health Association et al in the matter of *State v McKnight* 576 SE 2d 168 (SC 2003) (listing 26 *amici curiae*); *Amici curiae* brief of South Carolina Medical Association et al in the matter of *McKnight v State* 661 SE 2d 354 (SC 2008) (listing at least 6 *amici curiae*, however the exact number cannot be ascertained from the brief since the appendix listing the *amici* is not available); *Amici curiae* brief of American Public Health Association et al in the matter of *Kimbrough v State of Alabama* in the Court of Criminal Appeals of Alabama, criminal appeals number CR-09-0485 (2010) (listing 23 *amici curiae*); *Amici curiae* brief of the Alabama Women's Resource Network et al in the matter of *Akron v State* 2011 WL 3781258 (Ala Crim App) (listing 24 *amici curiae*); *Amici curiae* brief of American Academy of Addiction Psychiatry et al in the matter of *Ex parte Kimbrough* 2013 WL 135748 (Ala) (listing 44 *amici curiae*); *Amici curiae* brief of American Academy of Addiction Psychiatry et al in the matter of *Ex parte Ankrom* 2013 WL 135748 (Ala) (listing 46 *amici curiae*). The *amici* are generally made up of individuals or organisations linked

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mentioned in this chapter, the *amici* have collectively asserted this point.[148] For instance, the *amici* in the *Whitner* matter collectively support the notion that as scientific knowledge stood in 1997, the consequences of prenatal exposure is inconclusive and that "there remains a genuine scientific dispute as to whether a causal link exists between cocaine and serious fetal harm".[149] This was reiterated in 2003 where the *amici* in *McKnight* (2003) emphasised that more research is needed concerning the potential causes of harm in respect to prenatal exposure to cocaine.[150] The *amici* argue: "While current studies are unable to link cocaine use to adverse fetal developments, neither do they exclude cocaine as a potential fetotoxin. Without a doubt, more research is needed. It is precisely this fact that exposes the injustice and irrationality of the *McKnight* decision" to hold her criminally liable for experiencing a stillbirth.[151] The same has been argued by *amici* in respect of methamphetamine in 2010[152] and 2013.[153] While these arguments failed in these cases, they have succeeded in all others where the courts have assessed and recognised the value of scientific research pertaining to medical knowledge of prenatal exposure of certain substances.[154]

Evidence indicates that science has failed to prove prenatal exposure to illegal drugs causes "unique harms distinguishable from those caused by other uncontrollable

to the provision of health care and social or legal services, either as practitioners, researchers, academics or theorists and have expert knowledge in their field. These listings represent vast opposition to criminalising prenatal substance abuse on the basis of there being a lack of established causation, amongst other areas of concern.

[148] Ibid.

[149] *Amici* brief of the National Association of Alcoholism and Drug Abuse Counselors et al in *Whitner* 6-8. This remains an issue today, see National Institute on Drug Abuse "Topics in Brief: Prenatal Exposure to Drugs of Abuse" whose work was updated in 2011.

[150] *Amici* brief of American Public Health Association et al in *McKnight* (2003) 16.

[151] Ibid. Also see the later brief filed when the case went on appeal, *Amici* brief of South Carolina Medical Association et al in *McKnight* (2008) 14-16.

[152] *Amici* brief of American Public Health Association et al in *Kimbrough* (2010) 22-25.

[153] *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013) 27-29.

[154] Ibid, the *amici* is specifically referring to the *McKnight* (2008) decision where the Court accepted that medical research showing that cocaine use during pregnancy does not cause as much harm as smoking, poor nutrition or lack of prenatal care. Also see, *Amici* brief of the Alabama Women's Resource Network et al in *Akron* (2011) 19-20, fns 53-57. In this brief, the *amici* cite a number of cases, some refer to the fact that the courts refused to extend child endangerment laws to pregnant women because the unborn do not constitute "children", however there a handful of examples where the courts have refused to convict women on the grounds that there was insufficient evidence that any harm was caused as a result of prenatal exposure to cocaine or other illegal substances.

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factors".[155] It also brings the legitimacy of these approaches into question because alcohol and nicotine, while legal, also negatively implicate pregnancy outcomes.

The National Institute on Drug Abuse warns that prenatal drug exposure is associated with potential risk of harmful and possibly long-term effects on children who were exposed to substances prenatally.[156] However, ascertaining the full extent of the consequences of prenatal drug exposure is problematic because of the negative impact that many other factors have on pregnancy as well, such as: "Multiple individual, family and environmental factors – such as, nutritional status, extent of prenatal care, neglect or abuse, socioeconomic conditions, and many other variables".[157] Other variables can include sexually transmitted diseases, genetic disease, chromosomal abnormalities, structural birth defects, health problems (such as high blood pressure), uterine and cervical problems, maternal obesity, low maternal weight gain, multiple gestations.[158] Further, Daniels highlights men's roles in contributing to poor pregnancy outcomes, in respect of their own addictive behaviours, genetic defects, environmental exposures and their role in domestic violence.[159] The *amici* in *Kimbrough* (2013) assert that adverse pregnancy outcomes occur despite best intentions of pregnant women or their attending physicians,[160] and identified risks associated with adverse outcomes are not necessarily the direct cause of an outcome and thus can never be completely removed.

Aside from the issue of causation, the National Institute on Drug Abuse calls for a supportive home environment and promotion of quality parenting, since these factors are associated with reducing negative outcomes in exposed children.[161] The fact that

[155] *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013) 33.
[156] National Institute on Drug Abuse "Topics in Brief: Prenatal Exposure to Drugs of Abuse".
[157] Ibid.
[158] E Jackson *Regulating Reproduction: Law, Technology and Autonomy* (2001) 148; *Amici* brief of American Public Health Association et al in *Kimbrough* (2010) 21; *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013); *Amici* brief of the National Association of Alcoholism and Drug Abuse Counselors et al in *Whitner* 11.
[159] C Daniels "Fathers, Mothers, and Fetal Harm: Rethinking Gender Difference and Reproductive Responsibility" in L Morgan & M Michaels (eds) *Fetal Subjects, Feminist Positions* (1999) 85-88. In fact, Daniels (87) highlights that birth defects appear in respect of abuse of legal substances such as alcohol and nicotine. She (87) also points to studies highlighting that cocaine use by men is associated with increased abnormal sperm and sperm mortality. Further, cocaine is found (88) to bind to sperm making to transmittable to ova during fertilization, however, it is uncertain whether this has led to birth defects.
[160] *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013) 25.
[161] National Institute on Drug Abuse "Topics in Brief: Prenatal Exposure to Drugs of Abuse".

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wider issues contribute toward adverse pregnancy outcomes brings Daniels' position on shared responsibility for foetal harm back into perspective.[162] It is her position that since there is a wide range of contributors that impact on pregnancies in a negative way, which sometimes even fall beyond the control of pregnant women concerned (such as poverty and genetic inclinations), it is unfair to hold them solely responsible for adverse pregnancy outcomes.[163] While this does not completely remove women's responsibility for self-destructive behaviours, it does call for the attribution of diminished responsibility in the context of criminal law.

Roth explains that a "war on drugs" stance focuses on law enforcement rather than prevention of drug use or treating drug users.[164] This position therefore removes attention from the state as role players in contributing to the cause of foetal harm and detracts from the social need of treatment. Flavin demonstrates that the nature of addiction is such that it can remove the "choice" or the "intention" to continue use, and is defined as "a chronic relapsing brain disease that is characterized by compulsive drug seeking and use, despite harmful consequences".[165] In 2011, the American Society of Addiction Medicine released a policy statement defining addiction as a chronic brain disorder.[166] The Society warns that "without treatment or engagement in recovery activities, addiction is progressive and can result in disability or even premature death".[167] As such, the threat of criminal sanction will likely do very little to curb use of illegal substances.[168] Yet despite the gripping effects of substance abuse, Flavin reports that pregnant women are motivated to cease using substances during pregnancy, however, complete cessation is incredibly difficult and women are not likely to succeed without proper trained assistance.[169] Also, complete cessation places pregnancies at risk if done outside of a treatment facility because withdrawal symptoms (particularly in respect of opiate and alcohol) can cause harm to the unborn

[162] Daniels "Fathers, Mothers, and Fetal Harm" 83-98. See the discussion in ch 9 para 9 4.
[163] Ibid.
[164] *Making Women Pay* 139.
[165] Flavin *Our Bodies, Our Crimes* 111. She cites the definition of addiction as provided by the National Institute on Drug Abuse.
[166] American Society of Addiction Medicine "Public Policy Statement: Definition of Addiction" According to Flavin *Our Bodies, Our Crimes* 111, this characteristic of addiction removes the notion of criminal intent.
[167] Ibid.
[168] This was pointed out in *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013) 36.
[169] Ibid.

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or even terminate a pregnancy.[170] Nevertheless, with proper treatment these risks can be substantially reduced.[171]

This indicates that adequate treatment for addiction needs to be available in order to address addiction and maintain healthy pregnancies. If the aim is to secure healthy birth outcomes, one would expect treatment to be readily available allowing for as many healthy births as possible but as the position stands, pregnant women's access to drug treatment facilities is lacking in the United States.[172] Also, lack of access to treatment facilities impacts more on poor and rural women, placing them and their pregnancies at further risk.[173] Jackson builds on this issue and asserts that having treatment available is only one aspect of substance abuse, and argues that there should be increased focus on alleviating the triggers of addiction.[174] She highlights that addicts are "often poor, undernourished, homeless, victims of violence and abuse" and unless these issues are addressed the benefits of treatment are likely to be minimal or lasting only temporarily.[175] Jackson states "concentrating on the harm caused by individual women both punitive and therapeutic strategies may obscure society's responsibility for the health and wellbeing of the next generation".[176] Essentially, women are burdened with the responsibility for securing optimal foetal outcomes without being provided the support or the means to achieve that aim.[177]

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[170] Roth *Making Women Pay* 139; Jackson *Regulating Reproduction* 149; Paltrow & Jack (2010) *The Champion* 4.

[171] Paltrow & Jack (2010) *The Champion* 4.

[172] The lack of treatment facilities for pregnant women is widely documented, see Daniels "Fathers, Mothers, and Fetal Harm" 96-95; Centre for Reproductive Rights "Punishing Women for their Behavior during Pregnancy" 7; Roth *Making Women Pay* 138-141; B Steinbock *Life Before Birth: The Moral and Legal status of Embryos and Fetuses* 2 ed (2011) 169; *Amici* brief of American Public Health Association et al in *Kimbrough* (2010); *Amici curiae* brief of South Carolina Medical Association et al in *McKnight* (2008) 24-25; *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013) 37. Flavin *Our Bodies, Our Crimes* 111-110 explains that women do not enter treatment either because they cannot afford to, there is not enough space to absorb them or the treatment centre does not offer childcare facilities to children already born and in their care. Also Flavin (112) points out that of those facilities that do accommodate children or make provision for child care typically limit the number and ages of the children accepted.

[173] *Amici curiae* brief of South Carolina Medical Association et al in *McKnight* (2008) 26.

[174] Jackson *Regulating Reproduction* 151.

[175] Ibid; fn 199. This argument is support by a study that demonstrates women resume substance abuse after giving birth, see American Society of Addiction Medicine "Survey Finds Lower Rates of Substance Use by Pregnant Women, but Rapid Resumption of use After Pregnancy" (2009) 24(4) *ASAM News* 16.

[176] Jackson *Regulating Reproduction* 151.

[177] Roth *Making Women Pay* 177. In fact she (163) argues that when the state regulates women's behaviour during pregnancy, it is effectively declaring that its goal is to increase healthy birth outcomes as cheaply as possible.

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This implicates the state and wider society (in respect of violence and abuse) and highlights the shared responsibility towards poor pregnancy outcomes that stem from the failure not only to adequately tackle issues associated with poverty but also health care generally and drug treatment specifically. This is not to argue that women do not have a role to play to ensure that their own pregnancies result in healthy outcomes, but there should be wider recognition of all facets implicating the experience of pregnancy, possible outcomes and everyone's obligations regarding human reproduction.

From this perspective the grounds advanced to hold women liable are inherently flawed in respect of women's drug abuse during pregnancy, proof of harm beyond a reasonable doubt is lacking thus rendering causation questionable.[178] From a public policy perspective, addiction is not a crime but a health concern that generally attracts treatment, yet this standard is not applicable in the case of pregnant or birthing women. Despite the fact that some attending health care staff are at the forefront of reporting positive testing neonates to state officials in order to charge their mothers, the wider medical community stand in strong opposition to the criminalisation of substance abuse during pregnancy and argue that using the legal system "to address perinatal alcohol and substance abuse is inappropriate" [179] since it results in increasing the adverse consequences of prenatal substance abuse. Further the state, men and wider communities remain invisible concerning their contributions towards creating unhealthy pregnancy environments and poor pregnancy outcomes.

10 6 The Implications of Adopting a Separate-Entities Approach to Address substance Abuse During Pregnancy

Adopting a separate-entities approach to pregnancy in the context of substance abuse is being advanced in order to protect the unborn from the pregnant women who carry

[178] For instance see the arguments present in the *Amici* brief of American Academy of Addiction Psychiatry et al in *Ankrom* (2013) 29-30 where it is argued that charges will be brought against women who are known to have previously used an illegal substance and at birth her neonate tests positive. "Drug tests, however, can only confirm that someone took the drug or was exposed to it. Drug tests do not establish that a particular drug caused particular harms. Nor does the fact that a drug is an illegal controlled substance establish such a causal connection."

[179] *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013) 7.

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them. In this instance protection from women's self-destructive prenatal behaviour is needed in order to secure optimal foetal development and healthy birth outcomes. From this perspective pregnant women are constructed as perpetrators against the unborn they gestate and implicitly are perpetrators against their own bodies. This view of pregnancy fails to promote the aims of healthy pregnancies and pregnancy outcomes since it fosters adversarialism by focusing on foetal interests as a primary concern for advancement, thus diluting female reproductive autonomy.[180]

It is the position of all *amici* considered in this chapter that criminalising substance abuse and threatening criminal prosecution will serve as a barrier to realise healthy pregnancies and birth. This includes scores of interested organisations and relevant experts who have at certain times come together to denounce punitive state action. This has the impact of sending a very stern, well supported message against adopting a punitive law in such an arbitrary fashion.[181]

To start, adopting a punitive approach fails to achieve healthy pregnancies and jeopardises pregnancy outcomes. It is argued that those women addicted to or occasionally making use of substances will refrain from accessing prenatal care,[182] or avoid hospital births altogether.[183] Further, if or when care is obtained these women will be less likely to be honest regarding their addiction issues or reliably divulge information critical for adequate treatment.[184] Criminalising prenatal substance abuse also implicates effective drug treatment during pregnancy,[185] since women who

[180] Some of what is relevant to this discussion has already been covered in ch 9, however, it is considered necessary to revisit these issue in the specific context of prenatal substance abuse allegedly causing harm to neonates.

[181] Concerning this chapter alone, 180 *amici* have been listed, however, there are many more cases with *amici* filing briefs in opposition to criminal sanctions against women for prenatal substance abuse.

[182] K Proehl "Pregnancy Crimes: New Worries to Expect when Expecting" (2013) 53(2) *Santa Clara L Rev* 661 687; S Roberts & C Pies "Complex Calculations: How Drug Use during Pregnancy Becomes a Barrier to Prenatal Care" (2011) 15 *Matern Child Health J* 333; *Amici* brief of the National Association of Alcoholism and Drug Abuse Counselors et al in *Whitner* 12-14; *Amici* brief of American Public Health Association et al in *McKnight* (2003) 19; *Amici* brief of South Carolina Medical Association et al in *McKnight* (2008) 27;

[183] *Amici* brief of American Public Health Association et al in *McKnight* (2003) 20.

[184] Proehl (2013) *Santa Clara L Rev* 687; *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013) 12-13; *Amici* brief of the National Association of Alcoholism and Drug Abuse Counselors et al in *Whitner* 12-14; *Amici* brief of American Public Health Association et al in *McKnight* (2003) 20;

[185] *Amici* brief of the National Association of Alcoholism and Drug Abuse Counselors et al in *Whitner* 18.

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actively seek treatment might face prosecution despite wanting to overcome their addiction.[186]

This scenario presents a number of problems because prenatal care is identified as improving pregnancy outcomes,[187] even amongst those women who are unable to completely stop drug use.[188] Also those who decide to overcome addiction without treatment may face increased complications as a result of potentially fatal withdrawal symptoms.[189] Little et al report that treatment for substance abuse while pregnant assists in increasing foetal growth, improving foetal wellbeing and reducing the risk of poor pregnancy outcomes, they suggest these results possibly ensued as a result of attending health care professionals being aware of pregnant women's status regarding exposure to substances.[190] From this perspective, criminal sanctions compromise the health of pregnant women and the unborn and thus fail to offer any meaningful protection.

Fear of prosecution can be taken to absolute extremes and serve as motivation to terminate pregnancies.[191] Concerning the threat of terminating pregnancies, National Advocates for Pregnant women report of an incident in North Dakota where Martina

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[186] *Amici* brief of South Carolina Medical Association et al in *McKnight* (2008) 28. This is a likely situation because it is reported that pregnancy and motherhood serve as strong motivators to get treatment and overcome addiction for women, see Flavin *Our Bodies, Our Crimes* 111; American Society of Addiction Medicine (2009) *ASAM News* 16.

[187] *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013) 8-9; *Amici* brief of the National Association of Alcoholism and Drug Abuse Counselors et al in *Whitner* 16;

[188] *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013) 6. However for a contrary view, see G Richardson, S Hamel, L Goldschmidt & N Day "Growth of Infants Prenatally Exposed to Cocaine/Crack: Comparison of a Prenatal Care and a No Prenatal Care Sample" (1999) 104(2) *Pediatrics* 18. Regardless, Roberts & Pies indicate that lack of prenatal care places clear limits opportunities for offering health-related interventions that assist in promoting healthier outcomes, see Roberts & Pies (2011) *Matern Child Health J* 333.

[189] Roth *Making Women Pay* 139; Jackson *Regulating Reproduction* 149; Paltrow & Jack (2010) *The Champion* 4.

[190] B Little, L Snell, T van Beveren, B Crowell, S Trayler & W Johnston "Treatment of Substance Abuse During Pregnancy and Infant Outcome" (2003) 20(5) *American Journal of Perinatology* 255 260. In fact, the authors' findings indicate that the longer pregnant women remain in treatment the more likely they will give birth to neonates who are comparable to those neonates born from women that did not abuse substances prenatally. Also see, *Amici* brief of American Public Health Association et al in *McKnight* (2003) 18. Also see, Centre for Reproductive Rights "Punishing Women for their Behavior during Pregnancy: An Approach that Undermines Women's Health and Children's Interests" (September 2000) *Centre for Reproductive Health* <http://reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf> (accessed 23 May 2014) 7.

[191] Proehl (2013) *Santa Clara L Rev* 687; *Amici* brief of American Academy of Addiction Psychiatry et al in *Kimbrough* (2013) 10-11. This was specifically recognised by the District Court of Appeal of Florida in *Johnson* (discussed above under para 10 2).

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Greywind, who was approximately twelve weeks pregnant, was charged with reckless endangerment of the unborn for allegedly inhaling paint fumes.[192] Greywind spent some time in prison and managed to arrange release for a medical appointment where she had her pregnancy terminated. She thereafter filed for a motion to dismiss the charges on endangerment.[193] The prosecutor reportedly stated that the case of child endangerment was no longer worth the time or effort because Greywind terminated her pregnancy.[194] The Greywind incident is at loggerheads with the notion that foetal protection measures are effective mechanisms to protect the unborn.

Further, prosecuting and sentencing women for prenatal substance abuse as an a-contextual approach to addressing the harm concerns related to substance abuse. As a result of removing pregnant and mothering women's context, criminal child abuse laws fail to adequately translate into any meaningful protection and merely ensure the continuous cycle of destruction. Imprisonment will not serve the interests of the women concerned nor that of existing and future children. Concerning serving women's interests, sentencing women to imprisonment will not address underlying issues associated with addiction, let alone provide the specialist care needed to overcome drug addiction or parental training to assist in coping with parental responsibilities.[195] Further, illegal substances are known to be readily available in prisons.[196] This scenario proves problematic because women might remain addicts, they will still be able to bear more children in the future and will remain ill equipped to face the issues that are present at the intersection of addiction, pregnancy and parenting.

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[192] National Advocates for Pregnant Women "NAPW Documentation State v. Greywind" (14 April 2012) *National Advocates for Pregnant Women* <http://advocatesforpregnantwomen.org/issues/criminal_cases_and_issues/napw_documentation_state_v_greywind.php> (accessed 25 June 2014); Paltrow & Flavin (2013) *JHPPL* 308. This case cannot be source, consequently secondary sources are being relied on.

[193] Ibid.

[194] National Advocates for Pregnant Women "NAPW Documentation State v. Greywind".

[195] These are some of issues were identified by Daniels ("Fathers, Mothers, and Fetal Harm" 94-96) as being important to address in order for women to overcome addiction but given the poor condition of the prison system, it in very unlikely that these issues will receive any meaningful attention. Concerning the poor conditions of prisons see Flavin *Our Bodies, Our Crimes* 134. Also see, *Amici curiae* brief of Pegasus Legal Services for Children et al in the matter of *State v Martinez* 141 NM 763 (NM 2007) 16-17. In this case the Supreme Court of New Mexico struck down the state's attempt to convict *Martinez* for abusing substances prenatally. The state petitioned to the Supreme Court of New Mexico after the Court of Appeals ruled against its move to prosecute Martinez, see *State v Martinez* 137 P 3d 1195 (NM App 2006). Something to note further, if there is already a short supply of adequate drug treatment facilities outside of the prison system, it is not clear how treatment would be readily available in prisons.

[196] Jackson *Regulating Reproduction* 149.

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Concerning the interests of existing children, the *amici* in *Martinez* argue that separating a mother and child "carries with it profound and well-documented dangers".[197] These dangers include negative effects on emotional, behavioural and psychological development, some children develop problems with aggression and withdrawal, criminal involvement, depression and thus may negatively impact their ability to concentrate.[198] They argue further that arresting and incarcerating women who have recently given birth removes the chance to bond, this poses unique concerns because the days following birth are argued to be one of the most crucial times of a newborn's life.[199] Bearing in mind that prenatal substance abuse is a non-violent "crime" it is unsettling that this form of separation should occur. If the concerns of substance abuse are addressed, the family unit can remain intact and future children can be better received in this family unit.

Viewing the unborn as entities separate from pregnant women with distinguished and diverging interests and health needs is the core reason why the aim for foetal protection fails. This approach, in a foetal personhood environment fosters adversarialism, Flavin asserts:[200]

> Singling out pregnant women and mothers for prosecution, court orders through family courts and drug treatment courts, and civil commitments contributes to a climate in which pregnant women are increasingly seen as adversaries of the fetuses they carry rather than people who have a stake in a healthy pregnancy and a positive outcome.

Those third parties who participate in the pregnancy relationship between women and the unborn and fuel that adversarialist environment must be recognised. It must be emphasised that it is others' perception that women are in an adversarial position with the unborn they carry, and not that women hold this perception themselves. Roth points out that adversarialism does not exist between pregnant women and the unborn but rather pregnant women are in an adversarial relationship with medical or state

[197] *Amici* brief of Pegasus Legal Services for Children et al in *Martinez* 15.
[198] *Amici* brief of Pegasus Legal Services for Children et al in *Martinez* 15-16.
[199] *Amici* brief of Pegasus Legal Services for Children et al in *Martinez* 16.
[200] Flavin *Our Bodies, Our Crimes* 116.

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authority.[201] Roth's example of the prosecutor "listening" to the voices of the unborn is relevant here.[202] Aside from state prosecutors, there is a wide range of other individuals speaking for the unborn through the actions of reporting women who are known to have abused substances prenatally, these include nurses, doctors, midwives, hospital social workers, hospital administrators, drug treatment counsellors, partners and other family members.[203] Paltrow and Flavin quote a doctor as saying that the health profession's goal, from a medical perspective, is to secure the best outcome for the infant and where substance abuse is detected, they have to report it to the Department of Human Services.[204]

This process of reporting women to protect the individuated foetus invites the prosecutorial process, which by its very nature, is adversarial[205] and inevitably ends with one "party's" interests being advanced over the other "party's" interests. Instead of help from, these women face prosecution.

With broader health concerns brought into perspective, a policy favouring criminalisation clearly fails to secure the best possible outcomes for the unborn, but also fails pregnant women and all women who have the potential to fall pregnant. This approach brings pregnancy adversarialism to the fore thus imposing tensions between female reproductive autonomy and foetal interests. In each of the cases discussed in this chapter, these women represent those who have decided to continue with a pregnancy, this is a reproductive decision and is an expression of reproductive autonomy. In order to effectively and meaningfully realise this decision, women need access to health care, being general health care, prenatal care and drug treatment.

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[201] Roth *Making Women Pay* 90. However, Steinbock (*Life Before Birth* 156) does refer to instances where she views pregnant women as being in an adversarial position with the unborn since there are times when pregnant women's interests contradict with foetal interests. For instance she refers to the example where a pregnant woman has cancer and the only treatment available to secure the woman's survival may likely terminate the pregnancy. She states (156): "It is wishful thinking to pretend that what is best for the pregnant woman is necessarily best for the fetus or future child, or what is best for the fetus always promotes the pregnant woman's interests. Moreover, it is possible that some pregnant women choose to engage in behaviors that are risky both for themselves and their future children."

[202] Roth *Making Women Pay* 133-134. This is discussed in ch 9 para 9 5.

[203] Paltrow & Flavin (2013) *JHPPL* 326-327.

[204] Paltrow & Flavin (2013) *JHPPL* 328.

[205] Schroedel et al (2000) *Duke J Gender L & Pol'y* 105.

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Criminalising prenatal substance abuse makes it difficult for these women to realise their reproductive decision to bear a child and therefore violates their reproductive autonomy, it impedes the realisation of a healthy outcome. This occurs in one of two ways, either women are forced into the decision to terminate a wanted pregnancy or forced to progress through pregnancy without any adequate care proportionate to their health risks; if neither of these two options are chosen, these women face prosecution.

When reproductive autonomy is threatened in this way, so are foetal interests. A healthy pregnant woman aids in securing the realisation of a healthy child, this emphasis on inseparable link and the impact of that link between the unborn and pregnant women requires that women's environments be addressed. Understanding reproductive autonomy as including the right to have a child and safe progression through pregnancy with access to drug treatment and prenatal care opens the door to remove tensions and secure optimal pregnancy outcomes thus serving both female reproductive autonomy and foetal interests.

10 7 Reflecting on Ovens' Proposal in Light of the United States Experience

The study of the United States assists in substantiating the concerns raised in chapter seven when discussing Ovens' proposal of extending child abuse laws to include prenatal substance abuse. The experiences in the United States demonstrates that criminalising prenatal substance abuse should not be considered an option for South Africa. Not only do the foundational principles of criminal laws prohibit the expansion of criminal law in this area of pregnancy but also such a move fails to protect both women and the unborn.

Ovens[206] herself acknowledges that, not only is the extent of prenatal substance abuse in South African unknown[207] but she also concedes that there is no conclusive evidence demonstrating a specific harm is inflicted through prenatal exposure to abused substances. She does recognise the potential for a number of harms possibly resulting from prenatal substance abuse (such as low birth weight or increased risk of

[206] Ovens (2008) *Acta Crim* 80; 88.
[207] This leads one to question to what extent intervention is even needed.

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Sudden Infant Death Syndrome),[208] but fails to locate those harms within the context of other factors associated with increasing the risks of adverse pregnancy outcomes. She does very briefly mention that socio-economic factors affect pregnancy outcomes,[209] but Ovens does not seem to link the significance of those factors in respect of attributing criminal responsibility solely for women to carry. Additionally, Ovens recognises addiction as a medical or health-related concern that requires treatment[210] but nevertheless advocates a punitive approach[211] in an atmosphere where there is no known prenatal drug treatment facilities.[212] If prenatal substance abuse is to be taken seriously, it is required that the complexity of the issue be considered in the context in which it exists, without that knowledge, no adequate policy can be developed and this issue will remain stagnant.

Ovens refers to the United States as having criminal measures in place to tackle prenatal substance abuse and views these measures as necessary since without them the unborn are left unprotected.[213] However, as demonstrated here, since these measures have only been applied after birth, harm is not prevented because the "harmful" conduct was present during gestation. Further, Ovens argues that the Choice on Termination of Pregnancy Act[214] (Choice Act) offers the unborn more protection than is currently afforded to the unborn being exposed to substances prenatally,[215] this discussion shows that this assumption is unfounded when applied to this issue because the Choice Act will serve as an opportunity to avoid prosecution by terminating pregnancies.[216] Consequently, separating the unborn as separate victims from pregnant women, as separate victims suffering unique harms apart from women, renders efforts for protection unsound from a theoretical and practical perspective.

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[208] Ovens (2008) *Acta Crim* 88.
[209] Ibid.
[210] Ovens (2008) *Acta Crim* 91.
[211] Ovens (2008) *Acta Crim* 92.
[212] Ovens (2008) *Acta Crim* 90.
[213] Ovens (2008) *Acta Crim* 85; Ovens (2010) *CARSA* 40; 45.
[214] Act 92 of 1996.
[215] Ovens (2010) *CARSA* 45.
[216] The Choice Act is correctly being interpreted as offering protection to the unborn, but as already demonstrated, this protection takes place in a not-one-but-not-two approach to pregnancy as opposed to Ovens' separate-entities approach. See the discussion in ch 6.

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In her the abstract to her publication Ovens specially mentioned that she was seeking to develop a policy that is beneficial to pregnant addicts and their unborn.[217] The United States experience demonstrates that her suggestion of turning to criminal law fails this aim. In fact, South Africa, is on the right path given that treatment based legislation has been enacted. The Prevention of and Treatment for Substance Abuse Act[218] should remain in place but possibly be amended to make specific provision for the treatment of pregnant women with the aim of securing healthy pregnancies and secure training aimed at keeping the family unit together after birth. This approach recognises the value in pregnancy and acts on such value in a way that tensions are avoided and all interests are advanced.

10 8 Revisiting Legal Status in the United States

The implication of foetal personhood (as denoting a separate subject in law but not a constitutional person) is far reaching: It allows for increased limitation of termination-of-pregnancy rights, it inspires calls for the extension of constitutional personhood, secures the development and implementation of feticide laws, foetal homicide or murder provisions, and serves as grounds to justify the criminalisation of prenatal substance abuse. These measures are not only being applied against third parties but also against pregnant women who gestate the unborn.

Leeway for this sort of extensive protection is a result of the separate-entities approach being applied in one area of law and then the notion of separatism gains momentum. It gains a life of its own in that the application of the separate-entities approach in one aspect of one area of law leads to establishing authority for the application of that approach more broadly in one particular area of law and in other areas of law. For instance, feticide provisions originally aimed at affording protection from third-party violence against pregnant women. However, logic demands that if the unborn are separate victims of crime, then these provisions can be equally applicable to women who experience stillbirths or perinatal deaths as a result of self-harm or self-destructive behaviour. From there, feticide provisions are cited as justification for criminalising

[217] Ovens (2008) *Acta Crim* 79.
[218] Act 70 of 2008.

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other conduct that does not necessarily result in pregnancy terminations, such as prenatal substance abuse.[219]

These are extensive protections in spite of the fact that the unborn lack constitutional personhood. Foetal personhood as a form of legal personhood vests the unborn with greater rights than born persons,[220] "super-rights".[221] This expansive legal recognition of the unborn is gearing towards rendering the vestment of constitutional personhood irrelevant.[222] Lupton emphasises that the unborn are very unique in that they are granted a range of rights but no obligations, and that their rights span the legitimate expectation that pregnant women must submit all of themselves for their gestational benefit and prospects of a healthy birth outcome.[223]

Looking at the United States experience in the context of separatism forces a reconsideration of the status of pregnant women in the United States. Flavin asserts that "foetal protectionism" results in women being bystanders to their own bodies.[224] Foetal personhood predominates pregnant women's personhood diminishing their status to what has been described as a "special class of persons",[225] "second class citizen",[226] "second class status",[227] and "unique category of persons",[228] whose existence can be bypassed in the name of foetal personhood. Women's diluted status

[219] *Whitener* is a fitting example of this taking place.
[220] Schroedel et al (2000) *Duke J Gender L & Pol'y* 109
[221] Roth *Making Women Pay* 134.
[222] Lupton argues that cadavers (in respect of the use of their organs) have more rights than pregnant women in the United States. See D Lupton *Social Worlds of the Unborn* (2012) 107-108. This argument is linked to the incidence of forced medical interventions in the United States and the trend of rendering women's advanced directives null and void if they are unconscious while pregnant and in need of life sustaining treatment. In this instance, if these women, in their advanced directives, indicated the desire to not be resuscitated or kept alive artificially, this directive will not be respected if resuscitation is needed when they are pregnant. Lupton refers to a study that highlights a number of incidences where pregnant women, who were brain dead, where artificially kept alive in order for their pregnancies to mature to the point when the unborn could be safely delivered alive. Bringing this back to cadavers, Lupton (108) argues that the state may not harvest any organ of a deceases person without that persons consent, which must have been given while still alive, yet pregnant women's wishes concerning what happens to their bodies after death are rendered irrelevant. Roth also asserts a similar argument, see Roth *Making Women Pay* 134.
[223] Lupton *Social Worlds of the Unborn* 108.
[224] Flavin *Our Bodies, Our Crimes* 118.
[225] B Bird "Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability among Fetal Pain and Fetal Homicide Laws" (2014) 25(1) *Hastings Women's LJ* 39 54.
[226] Proehl (2013) *Santa Clara L Rev* 690.
[227] L Paltrow "*Roe v Wade* and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration" (2013) 103(1) *Am J Public Health* 17.
[228] Paltrow (2013) *Am J Public Health* 19.

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during pregnancy makes them vulnerable to wide-reaching state intrusions and "effectively strip[s] them of their status as constitutional persons".[229] Paltrow and Flavin's study highlights that there is one law for non-pregnant individuals, where addiction, attempted suicide, or refusal to undergo medical treatment is not criminal and then there is another law for pregnant women, where these issues are criminal.[230] Criminal responsibility rests with women purely because the value vested in the unborn has been translated into foetal personhood which is now a value that has more legal clout than the value vested in women who carry them.

Turning to du Plessis and Kruuse's arguments that avoiding constitutional protection or rights avoids the implication of women's rights and freedoms: This discussion shows that developing the view that the unborn are separate entities in law will encroach on women's rights because of the very fact that they are the ones who gestate the unborn. The more protection afforded to the unborn as individuated subjects, the more women fade out of law's protective reach regardless of the constitutional status of the unborn. This demonstrates the fluidity of women's status as legal subjects: Prior to pregnancy their bodies are their own and autonomy vests, suicide, addiction and refusal to undergo medical intervention is not criminal and women are viewed as competent enough to progress through their lives as they deem fit. However, once conception has occurred, depending on the state and body of law at play, pregnancy removes women's autonomy and the state and others in authority take over, almost rendering women incompetent and untrustworthy to see pregnancies through without broader surveillance and intervention on behalf of the unborn. These invasions on autonomy do not take place in respect of any other person, being men and non-pregnant women, and this speaks volumes about pregnant women's status in the United States.

10 9 Concluding Remarks

The conclusion in this chapter serves two purposes, to conclude on prenatal substance abuse as child abuse and to also conclude on part three in its entirety.

[229] Paltrow (2013) *Am J Public Health* 17. Paltrow discusses extensive violations of pregnant women's rights as protected under the United States Constitution.
[230] See generally Paltrow & Flavin *JHPPL* 299.

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Generally, substance abuse, in the form of addiction, is an import social concern that requires serious attention and the study of the United States experiences concerning prenatal substance abuse as constituting child abuse has proved invaluable for purposes of determining the way forward for South Africa. Ovens argues that the unborn are in need of protection from pregnant women's substance abuse, and she recommends that prenatal substance abuse should constitute child abuse. This chapter demonstrates the need for a more informed and multi-disciplinary approach to the issue of substance abuse and requires innovative thinking when looking to tackle this issue.

In the United States, only three states have adopted an approach similar to Ovens' proposal and this is despite the fact that foetal personhood is well established in a large number of states. All three states seek to protect the unborn from prenatal expose, either from the moment of conception or from viability onwards. The fact that only three states implement such child abuse or endangerment provisions indicates that this approach is not viewed in a favourable light and less extreme, more appropriate methods can be adopted to tackle prenatal substance abuse.

A number of concerns were raised with adopting a punitive approach to address addiction during pregnancy. The first relates to causing harm to children born after being prenatally exposed to illegal substances. Expert arguments advanced by numerous *amici* demonstrate that merely testing positive for drugs does not indicate the infliction of harm. Further, if an adverse pregnancy outcome is experienced, the adverse outcome cannot always be linked directly to prenatal substance abuse as the cause. Furthermore, addiction is considered a disease which implicates the requirement of intent. It therefore cannot be accepted that an addict intentionally sets out to harm her foetus by abusing substances. Flavin points out that in most cases women in the system were addicts who fell pregnant and not women who fall pregnant and then become addicts with the intention to harm the healthy progression of their pregnancies.[231] This all speaks to the fact that foundational principles for intentional criminal responsibility is lacking, that is causation and intention.

[231] Flavin *Our Bodies, Our Crimes* 95-118.

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Imposing criminal liability on women alone implies that women have control over their pregnancy outcomes, and therefore have the means prevent adverse outcomes. However, where no unique harm can be identified as being caused by the abuse of a particular illegal substance indicates that other factors increase the risk of adverse outcomes. These factors are wide ranging and include role players such as the state and wider community. Factors identified include violence, low socio-economic standing, poor health care, poor nutrition, genetic disorders, lack of health care, and so on. More alarming is the fact that while these factors are indicated risk factors for poor pregnancy outcomes, they are also identified as driving addictive behaviour. Consequently, responsibility for adverse pregnancy outcomes extend beyond pregnant women who abuse substances.

Amici opposing the criminalisation of prenatal substance abuse argue against the use of law in the realm of social undoing and insist that such an approach fails to protect anyone. It places women and the unborn at increased risk because women avoid drug treatment, prenatal care, or hospital births. Some women have been identified as preferring to terminate pregnancies instead of continue with pregnancies while suffering with addiction despite the fact that pregnancy and motherhood serve as strong motivation to overcome addiction. Further, placing women in prison fails to address addiction, the underlying motivations for addiction and also fails to adequately develop coping mechanisms or prepare women for parenthood, this approach fails existing children and any future child the same women may go on to have. It almost ensures that those trapped in the cycle of self-destructive behaviour remain there. Also, these crimes are such that no harm is prevented since charges are only brought after birth and if the neonate tests positive. Addiction, if left untreated could cost women their lives, and if women are pregnant at the time, it could cost more.

Separating the unborn from pregnant women for purposes of better protection essentially leads to increased risk of adverse outcomes. Criminalising prenatal substance abuse turns pregnancy into an adversarial zone which perpetuates tensions because third parties attempt to act for the best interests of the unborn and women are portrayed as perpetrators against their own pregnancies. This fails to advance women's reproductive autonomy and ultimately fails to advance the interests of the

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unborn. An unhealthy woman cannot guarantee a healthy birth outcome, to expect otherwise it to expect the impossible.

The United States expereince, in respect of the three states that criminalise prenatal substance abuse, demonstrates that this approach should not be adopted. In doing so, it has also demonstrated what should be done in order to address prenatal substance abuse. That is, focus on substance abuse as a health concern requiring treatment rather than a criminal act against others. From this perspective South Africa has already made progress towards this in respect of the Prevention of and Treatment for Substance Abuse Act and now if any law reform should follow, it should be focused on including pregnancy-specific provisions concerning adequate treatment.

Concluding part three in its entirety, this study demonstrates that adopting a separate-entities approach to addressing pregnancy-related concerns fails to secure optimal foetal outcomes, healthy pregnancies for women and almost guarantees poor pregnancy outcomes. This is largely due to the fact that separatism fosters tensions between pregnant women's autonomy and foetal interests as advanced by third parties. In this respect the United States serves as an anti-model for addressing the tension between female autonomy rights and foetal interests during pregnancy and birth. As things stand it seems as though the United States is moving backwards, leaning towards placing women in their historical context of reproductive vessels.[232]

Extending full legal subjectivity to the unborn, criminalising maternal conduct suspected of causing stillbirth or perinatal death, and criminalising prenatal substance abuse does not contribute towards creating a supportive pregnancy environment. All those scenarios invite the inclusion of third parties into a very personal realm of reproductive experience and they tend take over women's bodies in order to advance the interests of the unborn as separate entities in need of outside protection. This study has effectively shown that this approach fails to protect the unborn from harm, in that

[232] Women's historical position was discussed in part 1 of this thesis, see ch 2. It could even be argued that women are being placed in a further disadvantaged position. Historically women and the unborn were viewed as being equal under the head of the household, while in modern day, the unborn seem to be valued more than women.

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it renders women invisible despite the fact that it is their bodies that gestate the unborn, secure prenatal life and provide nourishment.

The separate-entities approach does provide a medium in which to speak about pregnancy-related concerns, but the discourse is one of adversarialism and offends the embodied connection that pregnancy represents. Less extreme measures can be adopted that will reap increased protection. It fails to grasp the notion that healthy women and healthy pregnancy environments offer better prospects for women to safely advance though pregnancies and secure healthy pregnancy outcomes. Understanding the context in which individual pregnant women exist highlights this. Thus far this thesis now rejects both the single-entity approach and separate-entities approach to pregnancy since both fail to adequately articulate a respectful discourse of pregnancy, female reproductive autonomy (as including the right to terminate or continue with pregnancies) and foetal interests based on unity of interests. The chapter to follow will discuss an alternative narrative of pregnancy in law based on relational theory in the form of the not-one-but-not-two approach to pregnancy.

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PART FOUR

Going Forward: Addressing Pregnancy Adversarialism and Concluding Reflections

Collectively part two and three demonstrate that the current leading views of pregnancy are not well equipped to advance female reproductive autonomy in the wide sense, advance foetal interests nor articulate the intrinsic value of the unborn in legal terms. After considering selectively identified issues in pregnancy, the two parts demonstrate a need for reform and the question to be answered here is how to develop an approach to pregnancy that is conducive to reform that advances female reproductive autonomy and foetal interests in a non-adversarial way.

Additionally, part three also indicates that when aiming to develop South African law in relation to pregnancy and pregnancy related concerns, a strategy should be developed that fits the uniqueness of the South African legal system. Considering the United States and arguing that similar laws be applied in South Africa, without due regard to the historical and political influences that give rise to those laws, would prove ineffective.

The project of part four is to return to pregnancy as an embodied event and to do so through a relational lens. Chapter eleven advances that pregnancy should be viewed as being not-one-but-not-two entities and builds on existing debates taking place in relational theory. This approach is applied to the selected areas of pregnancy in South African and tests the credibility of the approach. Chapter twelve concludes the thesis with a reflective overview.

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Chapter Eleven

A Relational View of Pregnancy and Addressing the Tension between Reproductive Autonomy and Foetal Interests

11 1 Introduction

This thesis has highlighted a number of areas of concern with regards to pregnancy, namely, the legal personhood of the unborn, violence against pregnant women that terminates prenatal life, termination of pregnancy and prenatal substance abuse. It has also looked at what South African academics have suggested for a way forward regarding these issues and then tested their suggestions against the United States experience in these particular areas. Up to this point, the research shows that while there are areas in need of law's attention, current proposals are not yielding the intended outcomes of healthy pregnancies or healthy pregnancy outcomes because the method of addressing these issues ends in an adversarial pregnancy environment.

In the process of working through South African academics' suggestions for changes to the law and testing the appropriateness of these suggestions, a number of broader concerns have come to light. These concerns move beyond merely identifying what areas of pregnancy are in need of development in law, but include foundational aspects such as how to properly view pregnancy in law more generally and how to value the unborn in law and give effect to that value. It has come to light that as things stand, the South African legal system is lacking an informed foundation to work from which includes essential aspects of pregnancy, being the constitutive parts of a pregnancy (women *and* the unborn) and the context in which pregnancies exist. Without a proper foundation to work from, any attempt to address issues arising from pregnancy cannot effectively be addressed, hence the questionable responses to pregnancy-related issues considered up to this point.

This chapter develops a framework in which to view pregnancy in law which provides space to consider the contexts in which pregnancy exists. This task draws on relational

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theory and is inspired by and adopts facets of Nedelsky's work in *Law's Relations*.[1] From there, a project is developed under the guidance of a number of identified relational principles and feminist aims. This project develops a view of pregnancy in law that is sensitive to both women's rights and foetal interests and a number of aspects are clarified and explained. Thereafter identified areas of concern are considered through a relational lens to demonstrate that it is possible to advance both female reproductive autonomy and foetal interests in a non-adversarial way. This chapter shows that a relational approach to pregnancy removes tensions thus allowing for an adequate legal response to pregnancy related concerns.[2] Is also indicates how the law can be used productively to improve pregnancy experiences and outcomes can be expected.

While Nedelsky does not specifically tackle the issues raised in this thesis regarding pregnancy, her work does serve as a guide to pregnancy in law generally. A number of other authors do rely on relational theory in respect of pregnancy-related matters and their work will be considered later when the chapter applies relational principles to the identified areas of concern.

11 2 Relational Theory and Feminism: A Theoretical Backing

At the onset, "relational theory" was not part of the original conceptualisation of this research task. Instead the focus was on "context". Context highlighted how certain laws or calls for changes to the law failed to have a contextual understanding of pregnant women's lives and how, as a result of their unique contexts, these women experienced very individual experiences in relation to pregnancy. Without context one will be left with flawed notions of pregnancy, pregnant women, and the unborn and without proper consideration of context in law the scene is set for disastrous or less than meaningful outcomes. Ultimately, contextualising pregnancy served as the

1 See J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011). Also see J Nedelsky "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1987) 1(7) *Yale JL & Feminism* 7.

2 Herring identifies relational theory as primarily functioning on an "abstract level" with little attempt being made to apply the theory to lived settings, see J Herring "Relational Autonomy and Rape" in S Sclater, F Ebtehaj, E Jackson & M Richards (eds) *Regulating Autonomy: Sex, Reproduction and Family* (2008) 53. This chapter aims to not only theorise pregnancy as relational but also apply that view to concrete examples.

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leading facet in framing how to offer better prospects of meaningful law reform as opposed to what was being suggested. Focus on context was instinctive rather than being steeped in theory.

While this thesis was still in the planning phase it became apparent that focusing on context has links to relational feminism.[3] Even though this thesis clearly lined up with feminist aims in a broad sense, it was only at that point that the aim of contextualising pregnancy came to have a more specific theoretical backing in the form of relational theory. Relational feminism now forms part of the solution to addressing the tension between reproductive autonomy and foetal interests. Despite the fact that this theory has not specifically made its debut as guiding the answer to the research task until now,[4] there are very specific arguments that have been presented throughout this thesis which all tie into relational theory.[5] Further, since these arguments are advanced in the context of women and women's rights, they also tie into broader feminist aims of advancing and securing women's rights. How these arguments tie into relational feminism will become apparent as the discussion develops.

My understanding of relational feminism was founded on Nedelsky's work,[6] where she reconceptualised autonomy in relational terms.[7] Her work influenced my thinking

3 More specifically, it was Professor van Marle who highlighted this point during a research focus group discussion on law and poverty early in 2012. Unfortunately, the exact date cannot be recalled. Professor van Marle referred to Nedelsky *Law's Relations* and Nedelsky (1987) *Yale JL & Feminism* 7 as examples of relational feminism.

4 Relational feminism was briefly discussed in ch 3 para 3 4 2. However, the discussion differs here, ch 3 served the purpose to identify what feminism as a social movement achieved for women. However, in this chapter relational feminism is engaged as a guiding theory in developing a framework for a revised view of pregnancy in law.

5 For instance throughout this thesis there have been concerns raised about how the context of the unborn is ignored, how their inseparable connection falls away when adopting a separate-entities approach to pregnancy and how third-party interventions impact poorly on pregnancies and pregnancy outcomes when an adversarialist stance is adopted. Even the title of the thesis suggests a calling to reunite connections rather than breaking them down since the aim is to "address" tensions.

6 Nedelsky *Law's Relations*; Nedelsky (1987) *Yale JL & Feminism* 7.

7 This is not to say that relational feminism goes uncriticised, for instance see J Christman "Relational Autonomy, Liberal Individualism and the Social Constitution of Selves" (2004) 117 *Philosophical Studies* 143. Nor is Nedelsky's work the only work to rely on relational theory in respect of autonomy, for instance see E Nelson *Law, Policy and Reproductive Autonomy* (2013); J Downie & J Llewellyn "Relational Theory & Health Law Policy" (2008) (Special Edition) *Health LJ* 194. Downie & Llewellyn have subsequently published an edited collection in 2012 of leading relational theorist positions regarding health law and policy titled *Being Relational: Reflections on Relational Theory and Health Law*. Unfortunately, due to difficulty in sourcing the book expeditiously and time constraints, that publication will not be considered in this chapter.

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processes throughout the research process and has come to serve as the theoretical framework of this thesis. Nedelsky's work is valuable in three respects: Her work provides a synopsis of relational feminism; she applies this theory to autonomy, which is a value that is central to this thesis in respect of women engaging their reproductive autonomy; and Nedelsky also explains the role of interconnection in respect of persons and other life forms.

11 2 1 The basic premise of relational feminism

As briefly mentioned in chapter three[8] relational feminism moves away from a liberalist construction of individuals as isolated beings with rights and the law being the employed mechanisms to protect such isolation.[9] Relational feminism focuses on the importance of relationships and context. Nedelsky identifies relationships as being central to people's lives, "to who we are, to the capacities we are able to develop, to what we value, what we suffer, and what we are able to enjoy".[10]

Focusing on this aspect of human existence recognises that human beings are inherently social which means that we are constantly engaged in relationships and are fundamentally interconnected.[11] Nedelsky explains that every individual is engaged in relationships at various levels, from intimately personal relationships shared between parent and child, to wider relationships with teachers, employers, and state institutions.[12] Further, the context in which these relationships play out impact on the relationships themselves.[13] For instance, Nedelsky demonstrates that wider societal and cultural practices can intersect the parent/child relationship and shape how parents care for their children.[14] This indicates that wider facets of life such as laws

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8 Para 3 4 2.

9 See Nedelsky (1987) *Yale JL & Feminism* 12. She explains that according to a liberalist notion of autonomy, the most isolated person is the most autonomous. Her work primarily focuses on revising the liberalist view of autonomy in relational terms. Her argument is based on the notion that autonomy cannot be experienced in isolation with others. Rather, she asserts that autonomy is experienced in relationships with others who provide support and guidance necessary for the development and experience of autonomy.

10 Nedelsky *Law's Relations* 3.

11 Nedelsky *Law's Relations* 19.

12 Nedelsky *Law's Relations* 20.

13 Ibid.

14 Nedelsky *Law's Relations* 21. Nedelsky explains that while she views individuals as relational, she emphasises that relationships do not determine who an individual is, rather relationships are viewed as playing a constitutive role in an individual's life. Nedelsky (32) explains "constitutive" by quoting

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and long-standing social norms impact on relationships and how those relationships are experienced.[15] Nedelsky states: "In short, every level is both shaped by and shapes those it intersects with. All human beings are both constituted by, and contribute to, changing or reinforcing the intersecting relationships of which they are part".[16]

Understanding people as being relational rather than atomistic[17] shows that people are interdependent and dependent instead of purely independent[18] by nature.[19] According to Nedelsky, interdependency and dependency runs to the core of our existence in that we all rely on our social world to enable us to realise "core capacities" such as love, reason, creativity and autonomy, to name a few capacities.[20] Therefore, part of the point of adopting a relational approach is centralise relationships in our views on human existence and to then identify the relationships that foster or undermine core values, and determine how various laws and norms help structure these relationships in the way that they do.[21]

In respect of the role of law and rights, Nedelsky argues that law and rights structure relationships and play a role in determining the quality of those relationships by either enhancing or undermining core values.[22] She advances that when problems do arise this is because law has structured relationships in ways that undermine certain core values.[23] The issue is therefore not that law permeates people's lives to the extent that

from Steven Winter as stating: "We are constituted because the situated quality of human existence means that both the physical and social environment with which we interact is already formed by the actions of those who have preceded us". Also, we are not determined by our relationships because all human beings have an internal "significant ability to make themselves who they are" through what Nedelsky terms "creative capacity" in place of "self-determination". See Nedelsky *Law's Relations* 31; 167.

15 Nedelsky *Law's Relations* 21.
16 Nedelsky *Law's Relations* 22.
17 Indicating the liberalist stance of a person, isolated from others and protected in their isolation.
18 Nedelsky *Law's Relations* 3.
19 Nedelsky *Law's Relations* 28.
20 Ibid.
21 Nedelsky *Law's Relations* 32.
22 Nedelsky *Law's Relations* 66.
23 Nedelsky *Law's Relations* 67. Nedelsky (39-41) refers to a number of examples of how structured relationships can either undermine or foster autonomy. Ultimately it comes down to the issue of hierarchy and the way a power relation is allowed to be exercised over others in a position of dependency. Dependency can be viewed as graded and the more a person is dependent the more likely it is that the person's core value will be left vulnerable to the other's position of power.

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it does, but rather *how* it does so.[24] This requires one to investigate whether the influence of the law advances a person's core values or undermines it. Consequently, reform of the law is not necessarily advocated in order to increase the role of the state but rather to adjust the role of the state. This perspective is paramount given that everyone engages with the law, the state and collective power in their everyday relations and interconnectedness.[25]

Nedelsky understands a relational approach to take an "evaluative" stance which is primarily aimed at transforming relationships in order to better secure certain core values.[26] Consequently, one needs to be aware of the central role of relationships and evaluate which relationships are destructive in order to free one's self from that relationship but also to transform the structures that shaped the destructive relationships to start with.

11 2 2 A relational approach to autonomy

Nedelsky highlights a number of core values important to individuals and asserts that her relational model can be applied to any value,[27] however her focus is on the value of autonomy. She views feminism as an "emancipatory project" and identifies autonomy as being central to women's drive to self-define their lives and make their lives their own.[28] However, she asserts that the current and prevailing view of autonomy, as derived from liberalism, is flawed because of it over emphasises independence as the primary indication of autonomous existence.[29] She therefore argues that since autonomy is important to feminist aims, it is necessary to keep the value but reconceptualise it as a relational value.[30] She argues for "relational autonomy", a concept that allows for the recognition that people are social in nature indicating that people are not "self-made" but rather come about through social relations that constitute us.[31]

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24 Nedelsky *Law's Relations* 67
25 See general discussion, Nedelsky *Law's Relations* 65-69.
26 Nedelsky *Law's Relations* 67.
27 Nedelsky *Law's Relations* 41.
28 Nedelsky *Law's Relations* 43-44.
29 Nedelsky (1987) *Yale JL & Feminism* 8.
30 Nedelsky (1987) *Yale JL & Feminism* 7.
31 Nedelsky (1987) *Yale JL & Feminism* 8.

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Autonomy is presented by Nedelsky as a capacity, she views it as an ongoing process to find "one's own law" in the quest towards "becoming" autonomous.[32] "One's own law" denotes internally derived values, orders, limits and commands and she asserts that how these values come about is through social interaction and spiritual consciousness.[33] According to Nedelsky "becoming" autonomous indicates that people are not born into autonomy but rather it is something that must be developed and this is done in relation to others.[34]

Nedelsky argues: "If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships – with parents, teachers, friends, loved ones – that provide support and guidance necessary for the development and experience of autonomy".[35] Consequently, she views interdependence, as opposed to independence, as a constant component of autonomy.[36] With relationships drawn back into perspective, she establishes that it is easier to identify the role of relationships in realising autonomy, in that same relationships undermine autonomy while others foster it.[37]

Being understood as interconnected and dependent does not render people powerless to collective power.[38] Nedelsky encourages a move away from the traditional view of pitting individuals against the state since this is a destructive outlook and ignores how much people actually rely on the state.[39] Taking this approach closes the door on finding ways to secure autonomy in spite of being part of the collective. Most people encounter the collective power of the state when having to rely on state

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32 Nedelsky (1987) *Yale JL & Feminism* 10.
33 Ibid.
34 Nedelsky (1987) *Yale JL & Feminism* 10.
35 Nedelsky (1987) *Yale JL & Feminism* 12.
36 Ibid.
37 Nedelsky *Law's Relations* 36. She (36) states: "my claim is that autonomy requires constructive relationship[s] throughout a person's life. Autonomy can thrive or whither in adults depending on the structures of relationships they are imbedded in".
38 Nedelsky (1987) *Yale JL & Feminism* 13.
39 Nedelsky (1987) *Yale JL & Feminism* 14-15. The traditional approach to an encounter to collective power is for individuals to shield themselves from the collective by setting up legal barriers from which the collective may not cross. If the state cross that boundary, autonomy is compromised but if the state is prevented from crossing, autonomy is secured. This means that if one were to rely on the state, he or she would have to accept diminished autonomy. Nedelsky highlights that this view beaks down any prospects of developing alternative options for securing autonomy.

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services (such as public education, health care services or for social welfare in general) and when they find themselves subject to state regulations (for instance mandatory licensing or health and safety regulations).[40] Therefore, there will always be some form of interdependence on the state at various levels.[41]

An individual's encounter with the state is an interaction between individual autonomy, interdependence (because of the need for state services) and collective power. In this context Nedelsky argues that whenever a state takes on the responsibility for social welfare, it must do so in ways that foster an individual's own sense of competence, control and integrity.[42] Since autonomy can only be experienced in relation to others, the problem is not a question of how to keep the state away but how to ensure the autonomy of individuals when they are in a legitimate sphere of state power.[43] This requires a construction of autonomy that is compatible with the notions of interdependence and a relational approach to autonomy does this since it opens the space for more creative thinking on how to foster autonomy.

Nedelsky states that the force behind her desire to reconceive autonomy as relational was driven by the need to protect those who are already in a position of dependency on the state.[44] In fact, Nedelsky's position inspires a perspective that anyone in any form of hierarchical relationship requires protection from the imposition of power. Looking at ways to foster people's autonomy in these relationships, Nedelsky turns her attention to the role participants play within that relationship or the participants' subjective experiences of those relationships.[45] For instance, if participants in a relationship feel helpless or degraded, something is amiss,[46] especially if autonomy instils a sense of power to shape and direct one's life.[47]

According to Nedelsky, even in extreme cases of dependency, the law can structure relations in a way that fosters autonomy of participants to a relationship, and this can

40 Nedelsky (1987) *Yale JL & Feminism* 13.
41 Ibid.
42 Nedelsky (1987) *Yale JL & Feminism* 13.
43 Ibid.
44 Nedelsky *Law's Relations* 84.
45 Nedelsky *Law's Relations* 133.
46 Nedelsky *Law's Relations* 136.
47 Nedelsky *Law's Relations* 135.

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be achieved through providing and maintaining channels for participation and inclusion.[48] Ultimately, inclusion is necessary because if something has an impact on a person's life it is important that they actively participate in the decision-making process.[49] This position obligates the design of a process that encourages participation in order to address power imbalances and participation must take place at all levels.[50]

11 2 3 A relational approach to interconnection between people and "other-life forms"

Up to this point, relationships between human beings (born individuals) have been considered and how the law has a role to play in that aspect, next it is necessary to consider how Nedelsky's relational approach applies to other life forms (animals or otherwise). On the topic of equality of moral worth and the ordering rank of different life forms' claims to moral consideration,[51] Nedelsky explains that a relational mode of thinking must be inclusive.[52] To be inclusive means that as human beings we are obligated to hold "respectful and responsible relations" with "other-life forms" because all life holds intrinsic worth.[53] This requires that we reduce any harmful impact thereon and structure our relations with other entities on the premise of reducing our negating impact on them.[54] She states that in this respect, the relational project "would be to discern how human action could have as positive (or minimal) an impact as possible while fostering wise relations between humans (both individuals and in the aggregate) and other entities broadly conceived".[55]

48 Nedelsky *Law's Relations* 139. Her focus is on administrative law, however, the argument she advances transcends administrative law and can aid any form of hierarchical relationship, between teachers and learners, parent and child, or even doctor and patient. Later in her book (153) Nedelsky recognises this.
49 Ibid.
50 Nedelsky *Law's Relations* 139. Nedelsky recognises that this may easier said than done. She notes (155) that sometimes power imbalances are combined with established notions of fault, poverty, about who is deserving and who is not, and in these instances in it not only the relationship than needs transformation but the entire institution. This sort of reform cannot not take place over night, it will be an incremental process of reform.
51 See generally Nedelsky *Law's Relations* 194-199.
52 Nedelsky *Law's Relations* 195.
53 Ibid.
54 Nedelsky *Law's Relations* 196.
55 Ibid.

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Even though Nedelsky does not specifically address the position of the unborn, it is submitted that the unborn are included here and this is justified by interpreting "other-living forms" widely. Her discussion emphasises that the relational project requires us to be considerate of other life forms and this indicates the broad inclusionary scope of the relational theory.

In an earlier article, Nedelsky discusses how to structure relationships with the unborn and gives a glimpse into the possible factors that need to be considered within the context of this thesis. In this article she contemplates "potential life" in the context of artificial reproductive technologies and presents a convincing argument against viewing potential life as property.[56] This article considers the assertion that the law of property can be used as a suitable means to protect people's stake in their products of reproduction while making use of reproductive technologies.

Basically, Nedelsky argues against the use of property law because the structure of this law will foster relationships in a way that leaves women's equality and autonomy vulnerable and might result in disrespect for and depreciation of children generally.[57] She explains that this might possibly result because, as property law currently stands, it governs ownership, commodification, exploitation and alienation, all of which if used in the context of reproduction offends women and the respect for and appreciation of children.[58] She encourages that attention be given to context, meaning what sort of relationships are being fostered by adopting a property law approach: A relationship of commodity or a relationship that advances autonomy in women to reproduce and respect for the children that originate therefrom?[59] From this perspective it can be seen that law of property fails to foster desirable relationships in relation to reproduction.

In the process of proving her point that it is unnecessary and preferable to avoid the use of property law in respect of reproduction-relation issues, Nedelsky contemplates

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56 J Nedelsky "Property in Potential Life? A Relational Approach to Choosing Legal Categories" (1993) 6(2) *Can JL & Jurisprudence* 343.

57 Nedelsky (1993) *Can JL & Jurisprudence* 343-353. Her arguments are more detailed than what is presented here.

58 Children are involved here because Nedelsky argues that if we understand the biological products of reproductive technologies to be products of ownership we would be violating the respect and appreciation we have towards the children they are born to become.

59 Nedelsky (1993) *Can JL & Jurisprudence* 364.

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other concerns beyond artificial reproductive technologies. Her discussion helps identify the role of relationships when considering the unborn and indicates the importance of context in determining how to interpret those relationships.

She explains that focusing on relationships helps to highlight a more constructive path. For instance, Nedelsky considers termination of pregnancy and explains that because a woman has a choice in pregnancy continuation (as a form of bodily freedom) she will not necessarily also have a choice in selling her reproductive capacities (as another form of bodily freedom).[60] The difference lies in the quality of the relationship each "choice" fosters, Nedelsky argues:[61]

> [T]hese two forms of 'choice' will have completely different implications for the relationships between mothers and their children, and between people and children more generally. The effects on these relationships are likely to be undesirable in the case of selling and desirable in the case of ensuring that pregnancy is always a consensual relation for the mother. Similarly, if we look closely at how each form of 'choice' would affect relations of equality and conditions for autonomy, or would contribute to the relations that foster exploitation, commodification, and alienation, the difference in impact on patterns of relationships renders the overlap of the term 'choice' trivial.

On the topic of unwanted pregnancy and the freedom of choice to terminate those pregnancies, Nedelsky identifies pregnancy as a relationship and in the case of it being unwanted, she argues than no woman should be compelled into a "nine month relationship of pregnancy".[62] However, she concedes that as the pregnancy progresses through the months, the relationship changes and in the final months

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60 Nedelsky (1993) *Can JL & Jurisprudence* 364-365. Nedelsky explains that when pro-choice arguments are frame in property rights arguments (meaning that women's bodies are owned by women alone) this confusion arises.

61 Nedelsky (1993) *Can JL & Jurisprudence* 365.

62 Nedelsky (1993) *Can JL & Jurisprudence* 364. In fact, in the context of artificial reproductive technologies Nedelsky discusses feelings of "attachment" and "responsibility" towards the unborn, and when a couples' preserved embryo is destroyed without their consent, it is viewed as a violation of those feelings. While this is accepted, this thesis goes much further and expresses an intrinsic value in products of human conception in addition to feelings of attachment. Thus destroying a couple's preserved embryo without their involvement also constitutes a violation against the intrinsic worth of the embryo over and above the couple's violation.

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"respect and appreciation for children" may require that the pregnant woman who wishes to end her relationship, wait until birth to do so.[63]

This article together with Nedelsky's instance on inclusivity in *Law's Relations*[64] gives some insight on how a relational approach might play out in respect of the unborn and women who carry them. The following is drawn from her work here: The unborn are entities that must be included in our considerations and by requiring this there is a recognition that pregnant women share a relationship with the unborn. Further, how this relationship is experienced can be influenced by the particular laws being adopted or applied in certain ways. This indicates that the law structures relationships in a way that either fosters desirable or undesirable relationships during pregnancy. Desirable relationships are those relationships that nurture women's autonomy (allowing for them to be driven by their own laws) and respect of other life forms, while undesirable relationships remove women as autonomous equal agents and disrespect other life forms.[65]

11 2 4 Tying relational feminism with the current South African legal climate

Relational theory and Nedelsky's view thereof is in not foreign to South Africa. There may be many examples of how a relational approach ties in with the current South African legal milieu, however, only those aspects relevant to and discussed in this thesis will be considered here. Chapter five and six of this thesis highlight examples of relational theory taking root and even finding application in legislation.

In respect of chapter five, the discussion of autonomy as per South African Constitutional Court decisions demonstrates established relational undertones.[66]

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63 Ibid.

64 Nedelsky *Law's Relations* 196.

65 Ultimately, according to Nedelsky, the law should foster relationships that secure respect and equality for women and respect and appreciation for children, see Nedelsky (1993) *Can JL & Jurisprudence* 364. The position of viewing of the unborn as future children is a topic that will not be considered here. A revised view of the unborn is offered in this chapter which does not take the stance that we act a certain way towards the unborn because they might become children later, but rather for other reasons. Despite this difference in opinion or approach, it is viewed as important to recognise that pregnancy represents a relationship between a woman and the unborn she carries and law plays a role in determining the quality of that relationship.

66 See the discussion in para 5 2 1.

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While the decisions considered in that chapter do not employ an exact replica of Nedelsky's approach they do demonstrate that relational elements are currently present in judicial thinking. Furthermore, the presence of relational discourse hints to the notion that the current legal atmosphere might be more open to further development directed by relational perspectives. In respect of chapter six, the Choice on Termination of Pregnancy Act[67] (Choice Act) was identified as adopting a relational approach to pregnancy in that it adopts a not-one-but-not-two (not-one/not-two) approach.[68]

These two instances discussed here confirm that not only is the South African legal system open to relational thinking processes[69] but that the relational approach is already legislatively established in an area of reproduction. The task is now to build on this and develop the notion of pregnancy in law as relational beyond termination of pregnancy to the broader project of pregnancy in law more generally.

11 3 The Project: A View of Pregnancy in Law that Advances Female Autonomy *and* Articulates a Value in the Unborn

The way pregnancy is articulated in law has far reaching implications for women and girls. Chapter two of this thesis shows that historically, reproduction has played a defining role regarding women's status. It is in this context that there is stern opposition from the women's movement when it comes to arguing for a view of pregnancy that allows the unborn to be recognised and their value articulated in law. This is justified given that whenever the unborn have been recognised it has mostly been done to the detriment of the women who carry them,[70] creating a sense of history repeating itself.

Manninen finds it understandable that women were driven to dissociate themselves from the unborn.[71] A manifestation of this dissociation is found amongst a prominent

67 Act 92 of 1996.
68 Para 6 3. This aspect was covered extensively, it is therefore unnecessary to repeat the arguments and findings in para 6 3.
69 Further, the fact that these relational aspects originate from the Constitutional Court speaks volumes to the acceptability of such an approach in South Africa.
70 This is what ch 2 and part 3 in its entirety demonstrate collectively.
71 B Manninen "The Value of Choice and the Choice to Value: Explaining the Discussion about Fetal Life within Prochoice Advocacy" (2013) 28(3) *Hypatia* 663 665.

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branch of pro-choice feminists who advocate a view of the unborn as nothing more than a "clump of cells" or mere "tissue".[72] That is, it could be argued that they adopt a single-entity view of pregnant women.[73] Michaels and Morgan indicate that talking of the unborn was viewed as surrendering to the pro-life movement and thereby obstructing the movement's quest for reproductive freedom and equality.[74]

While feminist support for a single-entity approach can be appreciated, Manninen points out that there have been some developments away from this position while still remaining within a feminist framework.[75] A more contemporary, but not so popular, feminist view of pregnancy which is not one of a single entity but one where there is a desire to find an expression of the unborn as being more than "tissue" or a "clump of cells".[76] This younger generation of feminists characterise themselves as being "pro-choice" but find it necessary to articulate a value in the unborn in the modern pro-choice arena.[77] Manninen relates this shift in mind set to changes in social dynamics, in that the younger generation feminists are "far removed from the concerns and oppression suffered by the generations of women before them".[78] She argues that women now feel more at ease about expressing value in the unborn because the unborn no longer symbolise women's predetermined roles as mothers or homemakers.[79]

Manninen's arguments are accepted with caution. It is argued that the process of moving beyond the home is ongoing. For some women the battle to develop economic value in care work or gain meaningful access to paid employment outside the home is still a very real struggle, and this process yields different results depending on socio-

72 Manninen (2013) *Hypatia* 665.
73 This conclusion makes sense if one considers the separate-entities approach as deriving from a male-centred perspective of pregnancy, see I Karpin "Legislating the Female Body: Reproductive Technology and the Reconstructed Woman" (1993) 3 *Colum J Gender & L* 329.
74 M Michaels & L Morgan "Introduction: The Fetal Imperative" in L Morgan & M Michaels (eds) *Fetal Subjects, Feminist Positions* (1999) 2.
75 Manninen (2013) *Hypatia* 665.
76 Ibid.
77 Manninen (2013) *Hypatia* 667.
78 Manninen (2013) *Hypatia* 665. While younger generation feminists are emphasised here, there are some seasoned feminists that have called for an acknowledgement of the unborn as being "respect worthy", Manninen cites a number of them, 665 fn 1. Morgan & Michaels, publishing an edited piece in 1999, dedicated an entire collection of essays related to feminist positions of the subjectivity of the unborn. Therefore, this call for an inclusive feminist agenda is not new but Manninen's article demonstrates that it seems to be gaining increased momentum more recently.
79 Ibid.

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economic status, race, class and gender.[80] However it is submitted that women today, at least in South Africa, have better prospects than prior to the feminist movement,[81] and this has the potential to provide security when engaging discourses about prenatal life.

Manninen explains that by denying value in the unborn, the feminist movement is isolates those women who find it difficult to undergo a termination-of-pregnancy procedure as a result of their opinions of the unborn as something to value.[82] They view their general experiences of pregnancies, whether planned or unplanned, as being side-lined or ignored if that experience attaches value to the unborn.[83] Lupton's[84] work expands on Manninen's findings regarding the new generation of feminist scholars and provides a further account of women's experiences of pregnancy.

Generally, Lupton shows that the unborn are certainly understood to be more than cells but the process of giving expression of the value the unborn represent tends to be ambiguous.[85] An ambiguous articulation transpires because not every foetus is equally valued. For instance Lupton explains that some women who are pregnant as a result of rape may express the unborn as "monstrous, less than human, even as a kind of cancerous growth, and certainly not as an 'innocent baby'".[86] However, even when pregnancies are planned, Lupton convincingly points out that foetal value is relative to their biological quality. She explains that those unborn who have been diagnosed with genetic deformities are at times considered "less worthy of life in the medical arena" and it is medical practise to encourage terminations over pregnancy

80 Ch 3 demonstrates this.
81 Initially, the agenda was to secure rights akin to that of men, now we have rights in terms of the Constitution (as covered in ch 5) and the agenda is to secure meaningful realisation and enjoyment of our rights.
82 Manninen (2013) *Hypatia* 667. Manninen (664-665) explains that some women found that while they understood they had a right to terminate their pregnancies, actually going through the entire procedure was found to be a difficult experience because they felt that what was being terminated was something more than detached "tissue" or "cells". She goes on to explain that these feelings are associated with the realisation, understanding and appreciation of the fact that "gestation will not just yield *a* baby, rather it will yield their baby; gestation and birthing *turns one into a mother*". (Emphasis in original.) This not only explains that there is more to the unborn but also illustrates that women are not terminating pregnancies because they do not value the unborn but might also represent that realisation that the continuation of a pregnancy has profound impact on one's life in respect of motherhood and responsibility.
83 Ibid.
84 D Lupton *The Social Worlds of the Unborn* (2013).
85 Ibid.
86 Lupton *Social Worlds of the Unborn* 58.

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continuation.[87] Furthermore, the value vested in one particular foetus varies according to a pregnant woman's different experiences during the course of her pregnancy.[88] These varying views generally relate to how women perceive themselves as pregnancy progresses and whether they attribute the responsibility for these perceptions to the existence of gestating life.[89] For instance, negative perceptions might render the unborn temporarily less valued, while positive perceptions increases a woman's sense of value in the unborn.

Support for the single-entity approach served women well, however, it serves a questionable role today. In order for feminism to legitimately claim the role of advancing women's concerns, it needs to adopt a stance towards pregnancy that is inclusive of the above positions of the younger generation of feminists who want to engage in discussions of the unborn and consider how to value them. It is this point that serves the reason for wanting to develop a revised view of pregnancy so as to allow for the space to include, discuss and recognise the unborn.

It must be mentioned that what this thesis proposes is not a new feminist agenda in terms of its broader social movement. In 1999 Morgan and Michaels called for "born again feminism" and advocated "feminist recuperation" of the unborn.[90] A feminist "recuperation" of the unborn is arguably a fundamental task for the movement especially because pregnancy is a woman's lived concern. To expand on the notion of "recuperation" of the unborn: Morgan and Michaels[91] explain that despite developments in science in respect of prenatal care and fertility treatment, feminist positions worked around the issue of the unborn rather than directly with them, and thus failed to develop a feminist discourse of the unborn. In contrast, third parties[92] worked with advances in science and went on to directly grapple with the issues of how to talk about the unborn generally, how to best express a value in them and how

87 Ibid.
88 Lupton *Social Worlds of the Unborn* 56-59.
89 Ibid.
90 Michaels & Morgan "Introduction: The Fetal Imperative" 3; 6. However, the two authors are not the first to do so, they cite other works published as early as the 1980s which call attention to the need for feminist consideration of the unborn.
91 Michaels & Morgan "Introduction: The Fetal Imperative" 6.
92 These third parties include the medical profession and people generally associated to the pro-life movement.

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to apply that value in specific contexts.[93] This allowed for third-party appropriation of the unborn to the exclusion of women in terms of their views and experiences.[94] Consequently, feminism is somewhat starved of a position regarding the unborn. Thus, there is clearly a need to develop a language of the unborn and recuperate the foetus in a way that is sensitive to the women's movement.

This discussion emphasises three guiding and delineating considerations for the project of developing a revised view of pregnancy that advances women *and* allows for the consideration of the unborn. First, the revised view must be developed on the basis that women's history plays a significant role in women's lived experiences today and still impacts on their ability to secure and protect self-determination and reproductive freedom. Second, there are women in the pro-choice arena who are aiming to give weight to the existence of the unborn as entities "worthy" of better consideration and this needs to be built on. Third, in looking to add a perspective on the unborn better attention should be given to women's varying attribution of value to the unborn instead of side-lining their perspectives.

It is noteworthy that a significant amount of time has lapsed between Morgan and Michael's publication in 1999 and Manninen's recent article published in 2013, yet both contributions are essentially advocating the same things. This might suggest that the call for developing a discourse of pregnancy that is inclusive of valuing the unborn is not well supported or not worthy of being acted on, and this raises some concerns for the project being developed for this thesis. These authors are all from the United States, therefore their calls and those that they cite might be ignored because of the fact that the Unites States is still incredibly polarised in the context of termination of pregnancy. Part three of this thesis clearly demonstrated this, specifically in relation to reproductive politics and increasing invasive interventions taking place regarding pregnant women's bodies and lives. However, this is not the climate in South Africa,

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93 Ibid.

94 Michaels & Morgan "Introduction: The Fetal Imperative" 6. This topic was covered extensively in ch 4 of this thesis. Manninen points out that the primary face of feminism is the one that denies the value in the unborn, and this remains a problem to date. In fact, the point of her publication is to open feminism up to include those women who do find value in the unborn and she advocates feminist respect for those positions. See generally, Manninen (2013) *Hypatia* 663.

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and thus it is argued that the time is ripe for developing and advancing a project of this sort in respect of pregnancy under South African law.

11 4 Clarifying Particulars Relevant to Advancing the Project

A number of issues require specific clarification so as to distinguish the relational approach from other approaches considered in this thesis, being the single-entity and separate-entities approaches. Clarification will demonstrate how a relational approach addresses the criticisms raised when considering the single-entity and separate-entities approaches. First I will explain why the single-entity and separate-entities approaches are rejected. Second, with arguing for the need to include a consideration of the unborn, this portion of the chapter will revisit and refine the notion that the unborn are vested with special status and thereafter see how this revised notion of special status can be absorbed into the South African legal system when dealing with pregnancy. Finally, after having established that our legal system can accord special status to the unborn, this portion of the chapter will go on to clarify how to view pregnancy as a relationship between pregnant women and the unborn and advance a view of pregnancy the voids the notion of tension between reproductive autonomy and foetal interests.

11 4 1 Outright rejection of the single-entity and separate-entities approaches

All the South African authors[95] considered in this thesis who call for changes to South African law regarding the unborn correctly reject the single-entity approach as irreconcilable with scientific fact.[96] The single-entity approach denies the distinctive existence, the "extra-ness" that the foetus embodies during a continued pregnancy. The unborn are biologically and genetically distinct from the pregnant women who

[95] M Ovens "Maternal Substance Abuse in South Africa: An Area for Concern?" (2008) 1 *Acta Crim* 77; S de Freitas & G Myburgh "The Relevance of Science for the Protection of the Unborn" (2009) 45(1 & 2) *TCW* 61; H Kruuse "Fetal 'Rights'? The Need for a Unified Approach to the Fetus in the Context of Feticide" (2009) 2 126; M Ovens "A Criminological Perspective of Prenatal Abuse of Substances during Pregnancy and the Link to Child Abuse in South Africa" (2010) 11(2) *CARSA* 38; S de Freitas "The South African Constitutional Court and the Unborn" (2012) 5(2) *IJRF* 56; G Du Plessis "Feticide: Creating a Statutory Crime in South African Law" (2013) 1 *Stel LR* 73; R Pillay "The Beginning of Human Personhood: Is South African Law Outdated?" (2010) 2 *Stel LR* 230.

[96] See ch 7 of this thesis.

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carry them, and women are "whole" with or without the presence of prenatal life.[97] MacKinnon, a feminist herself, also rejects the single-entity approach to pregnancy and describes the foetus as a separate organism comparable to a "parasite".[98] However she argues that the unborn's dependence does not go so far as to make it a body-part belonging to the pregnant woman.[99] In this respect, the current South African approach to pregnancy is flawed, and the existence of the foetus cannot continue to be overlooked for much longer.[100]

More importantly, flaws inherent in the single-entity approach must be understood beyond what science tells us. Seymour explains that some argue for the retention of this approach because it secures female autonomy during pregnancy, that is, if the foetus is considered as merely constituting part of a body, women will still enjoy the space for freedom of choice – in other words, whether or not to terminate the pregnancy.[101] However, this is a very superficial and one-sided understanding of female autonomy during pregnancy and chapter five of this thesis demonstrated this. Reproductive autonomy involves more than the issue of parenthood avoidance.

Female autonomy must also recognise women's vested interests in their unborn, or at the very least their experiences of valuing the unborn, however varied this might be. Therefore, female autonomy must be understood as including the decision to continue with a pregnancy, as well as decisions on *how* to progress through pregnancy and birth.[102] This manifestation of autonomy must be protected in law in order for it to have any meaningful effect for women who want children. Consequently, the single-entity approach only speaks to one side of female autonomy and fails to assist those women who plan to continue with their pregnancies and to adequately protect such decisions. For instance, Seymour refers to an example where a pregnant woman is unlawfully

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97 Seymour advances this argument, see J Seymour *Childbirth and the Law* (2000) 191. Seymour refers to, and quotes from, MacKinnon's work: See C MacKinnon "Reflections on sex equality under law" (1991) 100 *Yale LJ* 1281, 1313-1316.

98 MacKinnon (1991) *Yale LJ* 1314.

99 Ibid.

100 The arguments presented here have been argued elsewhere by the author of this thesis, see generally C Pickles "Approaches to Pregnancy under the Law: A Relational Response to the Current South African Position and Recent Academic Trends" (2014) 47(1) *De Jure* 20.

101 Seymour *Childbirth and the Law* 193.

102 See ch 5; Pickles (2014) *De Jure* 20.

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attacked and, as a result miscarries,[103] a situation similar to that in *S v Mshumpa*.[104] Here, the single-entity approach prevents the law from responding to her loss of a pregnancy that she had an interest in, because the "extra-ness" the foetus represents is not recognised in law as worthy of consideration.[105] Going further, it also fails to encourage an inclusive stance to women who do value the unborn but nevertheless terminate their pregnancies for reasons that outweigh the value they accord to the unborn.[106]

Ultimately, the single-entity approach must be rejected because it fails not only to speak to scientific fact, but also to comprehensively engage female experiences and expectations of pregnancy, feminine issues related to pregnancy continuation, and the resulting consequences of pregnancy for parenthood. It is a-contextual and void of an understanding of the connection women might share with the unborn when pregnant.

That said, South African authors' support for a separate-entities approach to pregnancy to allow the law to be true to scientific revelations about prenatal life is just as problematic.[107] Seymour explains that, while the single-entity approach forecloses the possibility for intervention on behalf of the unborn, the separate-entities approach invites intervention and conflict.[108] Part three of this thesis demonstrated this when considering the United States experience regarding the unborn in law.

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[103] *Childbirth and the Law* 193-194.

[104] 2008 1 SACR 126 (E).

[105] Through the infliction of violence, a woman's decision to have a child was interfered with, but no one can be held accountable for that interference because, prior to birth, the foetus does not exist. The same issue arises in the case where, as a result of medical negligence, a woman who continues with a pregnancy and intends to give birth to a live child, delivers a stillborn child. The single-entity approach precludes any recourse, because the foetus, as a non-entity, never acquired legal personality owing to medical negligence preventing live birth. Also, if the existence of the unborn is denied in law, it is not clear how pregnant women can lay justifiable claims to extra, more specialised medical attention or increase their claims for state support that is needed in order to progress safely through continued pregnancies.

[106] This does not mean that the value is something that has very little weight, but when considered contextually in relation to individual women's lives, affording too much weight to the value might come at an excessively high price. In this respect see J Williams & S Shames "Mother' Dreams: Abortion and the High Price of Motherhood" (2004) 6 *U Pa J Const L* 818.

[107] Ovens (2008) *Acta Crim* 77; de Freitas & Myburgh (2009) *TWC* 61; Kruuse (2009) *THRHR* 126; Ovens (2010) *CARSA* 38; de Freitas (2012) *IJRF* 56; du Plessis (2013) *Stel LR* 73; Pillay (2010) *Stel LR* 230.

[108] Seymour *Childbirth and the Law* 200. However, it should be remembered that the discussion of Thomson's "good Samaritan" argument demonstrated that the extent of conflict will obviously depend on whether the separate-entities approach is adopted to justify personhood before birth or whether it is used to develop a quasi-legal subject for the unborn. See J Thomson "A Defense of Abortion" (1971) 1(1) *Philos Public Aff* 47; for a discussion of Thomson see ch 7 para 7 3 1.

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Part three established that the separate-entities approach, which accords rights or attributes quasi-legal subjectivity[109] to the unborn, in fact fails to protect the unborn. The separate-entities approach strikes at the core of the embodied reality of pregnancy. By directly engaging with the unborn through the application of legal principles it denies pregnancy's very nature, being one of relationship and factual connectedness. The central issue as regards the separate-entities approach is that it almost completely negates the significance of the existence of women and also denies women their full legal status.[110] Women and their bodies cannot be bypassed, ignored or made invisible: They are essentially a *sine qua non* for the existence of prenatal life. Seymour points out that the more the separate-entities approach individuates the unborn, the less the individuality of women is recognised.[111]

Thus, while science does demonstrate the unique genetic character of the unborn, Karpin convincingly argues as follows:[112]

> There is no scientifically verifiable 'fact' that designates woman and fetus as separate. There are only scientific descriptions that hypothesize the notions of separateness, and certain descriptions are being privileged over others. For example, the scientific 'fact' that the fetus and mother are genetically different does not answer the question of whether the description of them as separate is appropriate.[113]

Accordingly, it is submitted that the separate-entities approach to pregnancy can only ever be justified in the abstract and in the context of hypothetical anecdotes. This is especially true where foetal separateness leads to direct engagement with the unborn in the context of law, being direct application of rights and legal doctrines or principles.

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[109] For a discussion of how calls for changes to South African law in respect of legally recognising the unborn amount to attribution of quasi-legal subjectivity see ch 7 para 7 2.

[110] I Karpin "Legislating the Female Body: Reproductive Technology and the Reconstructed Woman" (1992) 3 *Colum J Gender & L* 325-327; part 3 of this thesis also came to this conclusion.

[111] Seymour *Childbirth and the Law* 195.

[112] Karpin (1992) *Colum J Gender & L* 326.

[113] To emphasise this point, it is worthwhile referring to J Herring & P Chau "My Body, your Body, our Bodies" (2007) 15(1) *Medical LR* 34, 45-47. The authors, in debating whether one owns one's body, turn to medical science to *prove* the interconnection of bodies. In fact, they start off with pregnancy and define it as a relationship of shared space and fluids. They justify their position by referring to scientific studies pertaining to the development of the placenta and its role in ensuring optimal foetal development through its connection to the body of a pregnant woman.

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Even Thomson, who goes to extremes to demonstrate the flaws inherent in the separate-entities approach, suggests that we focus on the unique dependency of the unborn on pregnant women, and views this dependency as a source of a "special kind of responsibility" a pregnant woman will have towards the unborn she carries.[114] She views this responsibility as special because it is not something that can be claimed by other independent persons.[115] This approach is founded on the relationship shared between the unborn and pregnant women.

Both the single-entity and separate-entities approaches fail the relational tone of the project: The single-entity approach denies intrinsic worth in the existence of prenatal life during pregnancy and also fails to realise fundamental aspects of women's reproductive autonomy. The separate-entities approach structures the pregnancy relationship very poorly in that women's autonomy is compromised and as a result of the connection between women and the unborn, when women's autonomy is compromised the unborn are not meaningfully protected either.

Accordingly, this chapter approvingly adopts the not-one/not-two approach to pregnancy as found in terms of the Choice Act. The not-one/not-two approach is understood as relational in that it recognises the value of both participants to a pregnancy but understands their connection as inseparable. Before going on to discuss this approach in a little more detail it is first required that a view of the unborn be developed in a way that allows for their value to be better considered but also in a way that does not compromise women's position in society and law and fits in with the feminist agenda of advancing women.

11 4 2 A suggested view of the unborn in law: Returning to and refining "special status"

With the rejection of both the single-entity and separate-entities approaches, and the not-one/not-two approach being advanced, it is necessary to clarify the suggested position of the unborn since they are being recognised but not in the same way the separate-entities approach recognises them. This is especially necessary if the aim of

[114] Thomson (1971) *Philos Public Aff* 58.
[115] Ibid.

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the project is to include an understanding of pregnancy that allows for the consideration of foetal interests. Accordingly, the discussion advances a theory of what it is about the unborn that denies them their complete separateness but simultaneously acknowledges their existences as more than body parts of women.

Chapter four discussed the notion of the unborn being afforded "special status" and at this point it is necessary to provide the gist of chapter four's findings in order the present arguments to make sense. In chapter four of this thesis the phrase "special status"[116] was advanced as the phrase to relay the idea that while the unborn are not ascribed legal status as persons, they still represent something that holds intrinsic value and therefore are worthy of our consideration or protection. This thesis presented the position that "special status" therefore encompasses two elements, a "negative element" denoting the denial of full status in law and a "positive element" being the attribution of value despite lack of personhood. In chapter four a number of theories were considered,[117] and some reservations were raised generally, but more particularly this thesis identified the theories as failing (some more than others) to understand the embodied nature of the unborn as the reason to deny legal personhood.[118]

It was argued that, it is not the fact that the unborn cannot relate or are in the process of development that denies them full status, but because they are "embodied" and factually live off of another's body. The discussion in chapter four stopped there and the purpose here is to expand on that position and consider what it is about the unborn that demands some status. Recognising the unborn as "embodied" represents a process of re-contextualising the unborn as being held within the body of pregnant women and this identifies a special relationship between women and the unborn.[119]

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[116] As used by Ford, see M Ford "Nothing and Not-Nothing: Law's Ambivalent Response to Transformation and Transgression at the Beginning of Life" in S Smith & R Deazley (eds) *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression* (2009) 22.

[117] See para 4 3, those theories discussed include potentiality; dignity and speciesism; foetal interests bases on consciousness; relationality and the personhood dependent principle.

[118] See para 4 4. The author of this thesis sought to provide an explanation why biological birth was still relevant despite the fact that we have come to know the unborn socially.

[119] This move is viewed as necessary because, as ch 4 demonstrated, technology had the effect of "removing" the unborn from women's bodies allowing for others to not only identify the unborn but also individuate them from women too.

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While a foetus lacks personhood status, I argue that it nevertheless does have special status. Granting *some* status despite the lack of personhood is the "positive element" to special status which is that element which identifies something in and of the unborn that demands consideration by society. I align the positive element of special status with Ackermann's[120] construction of human worth. His writing on human worth in respect of the unborn is not very detailed and I therefore go on to contextualise human dignity of the unborn through the consideration of Dworkin.[121] Ackerman highlights that the unborn are afforded dignity and Dworkin helps identify what factors limit the unborn's dignity. Further Steinbock's[122] interests approach and the medical construction of foetal viability are also employed to advance the argument that there is something in and of the unborn that supports the call for special status.

In chapter four some criticisms were raised against the various approaches used in the argument being advanced in this chapter,[123] however, I assert that working with these theories in combination with one another strengthens their position in justifying valuing the unborn. Working with a combination of theories requires that a layered approached is adopted: Human dignity forms the foundation to the claim for special status, and foetal viability and interests feed into, support, and are bolstered by the notions of human dignity, thus building from dignity upwards. It is proposed that as one layer builds on the other so the stake in special status is strengthened as the unborn nears birth.

11 4 2 1 Human dignity

Since Ackermann and Dworkin's position on the value of the unborn was thoroughly covered in chapter four, it will be briefly said that Ackermann advances the argument that dignity is an expression of inherent human worth.[124] The mere fact of being part of humanity accords an individual worth and this accrues regardless of whether an

[120] See L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012).
[121] R Dworkin *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (1993).
[122] B Steinbock *Life before Birth: The Moral and Legal Status of Embryos and Fetuses* 2 ed (2011).
[123] See ch 4 paras 4 3 2 and 4 3 4 respectively.
[124] Ackermann *Human Dignity* 4.

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individual is a perfect example of humanity or not.[125] He continues and extends human worth to those who are also just conceived.[126]

In line with Ackermann, this chapter's embodied approach to prenatal life accepts that any form of human life, at the very least, is deserving of our attention and consideration. Furthermore it is advanced that there are times that "consideration" takes the form of protection. However, the dynamics of a particular situation may not allow for *absolute* protection since it is argued that absolute protection will only ever extend after biological birth.

Here, human dignity is seen as the foundational informative principle that sets down the parameters and directs how we should conduct ourselves when dealing with prenatal life. It is argued the while dignity demands that the unborn always receive attention, how much attention they receive depends on the point of prenatal development and the context in which pregnant women find themselves.[127] For instance, experimenting with products of human reproduction *ex utero* or stem cells[128] may be permissible, but the fact that they form part and parcel of humanity demands that such products receive our consideration, to which extent legislative regulation may be justified. Moving beyond embryos, foetuses, as further developed entities, demand more intensified consideration and the grounds justifying this turns to whether they are viable and have interests as depicted by Steinbock.

11 4 2 2 Clinical foetal viability

While the process of development in another's body denies full status to the unborn, and dignity demands something more than "nothing", it is suggested that foetal viability offers a worthwhile explanation as to how much more than "nothing" the foetus will be. Essentially, the limiting effect of the embodied approach decreases as the foetus develops towards the "clinical construction" of foetal viability. This view does not come

[125] Ackermann *Human Dignity* 52. Also see Dworkin *Life's Dominion* 70, whose position falls in line with Ackermann's approach.
[126] Ackermann *Human Dignity* 52. However, Ackermann provides that only certain aspects of the value will be present before birth, he however, does not indicate what those aspects are.
[127] Relating this position to the context in which pregnant women find themselves is in line with Dworkin, see Dworkin *Life's Dominion* 50-60. This was discussed in ch 4, see para 4 3 2 for a more detailed discussion.
[128] Concerning stem cell research practices, see, Steinbock *Life before Birth* 255-270.

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without any criticisms, and the discussion to follow will first explain the concept of "clinical viability" and thereafter an attempt will be made to explain how this concept adds to the second layer that justifies affording an increased special status to the foetus.

The clinical construction of viability is preferred because when one considers the legal construction of viability one is left with an incomplete and ambiguous definition of foetal viability.[129] The legal construction of viability as found in case law and legislation is somewhat flawed because each tends to merely refer to gestational age as an indicator of foetal survivability.[130] Also, research shows that the specified gestational age for viability varies between different judgments, and between case law and legislation.[131] Contrary to the legal construction of viability, the clinical definition of foetal viability is understood as a grey-zone for survivability, and does not indicate an "on-off switch" as generally depicted in law.[132] Determining foetal survivability involves the consideration of a wide range of medical and social factors,[133] and gestational age is only one relevant factor. While foetal survivability is a medically informed estimation that can only be confirmed upon physical examination after birth, it nevertheless represents an inevitable point in foetal development that will occur, unless the pregnancy is terminated or miscarried.

The biological significance of viability lies in the fact that from the point of viability the foetus is no longer undergoing the process of rudimentary development of a body that can sustain its life.[134] Rather, at the point of viability, all necessary functionalities are in place and as the foetus progresses through gestation closer to birth, it goes through

[129] See generally C Pickles "Personhood: Proving the Significance of the Born-Alive Rule with Reference to Medical Knowledge of Foetal Viability" (2013) 24(1) *Stell LR* 146.
[130] Pickles (2013) *Stel LR* 148-155. A comparative study was conducted between the United States and South Africa and it was determined that, according to the legal construction of foetal viability, a foetus may be viable at any time from 19-28 weeks' gestation.
[131] Ibid.
[132] Pickles (2013) *Stel LR* 156.
[133] These factors include gestational age, weight, antenatal exposure to corticosteroids, foetal sex, presence or absence of deformities, whether the pregnancy involves single or multiple gestations, resource availability, and socio-cultural factors, for a more detailed discussion of role of these factors see Pickles (2013) *Stel LR* 155-160 and authority cited therein.
[134] However, see, N Rhoden "Trimesters and Technology: Revamping Roe v. Wade" (1986) 95(4) *Yale LJ* 639 655-673. She approvingly cites a number of pro-choice authors who argue against the biological significance of foetal viability. Their argument is that viability lacks significance because to them, consciousness is understood to be significant and not merely the ability for independent survival.

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a perfecting and strengthening process of bodily organs and functionalities.[135] The fact is that everything is developed for purposes of sustaining life, it is but for the foetus' location that it cannot sustain independent life. The author of this thesis attaches significance to this developmental milestone in prenatal life because its stake in independent life gradually strengthens.

At this point it is necessary to attach significance of clinical viability to the layered approach of justifying special status. Viewing viability through the informative lens of dignity (human worth), it is proposed that this somewhat more advanced stage of prenatal development justifies increased consideration or protection than that of embryos. This is so because viable foetuses are developing stronger connections to their eventual birth and it is argued that the developmental process moves from being a biologically significant event to also being a socially significant event.[136] Foetal viability thus bolsters the foetus' stake in respect of securing special status. However, the limiting effect of embodied status is not done away with altogether once a foetus is viable, but the consequences of embodiment become ameliorated.[137]

To sum up, as a foetus reaches and passes the grey-zone of viability, its special status is strengthened. This strengthened status prevents arbitrary interferences with prenatal life.[138] A fitting practical example of this notion can be found in the South African Choice Act. In terms of section 2(1)(a) pregnancy terminations are available on demand in South Africa up to twelve weeks' gestation. Reasons for a pregnancy termination need not be justified or approved of by society or the State however the procedure must be regulated for health concerns. After twelve weeks' gestation,

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[135] In this respect, see A Christoffersen-Deb "Viability: a Cultural Calculus of Personhood at the Beginning of Life" (2012) 26(4) *Medical Anthropology Quarterly* 575. Christoffersen-Deb (584-585) explains that in the case of imminent pre-term delivery, foetal viability is the dividing line between terminating the pregnancy or getting ready for a caesarean-section delivery and facilitating neonatal intensive care. He (585) indicates that increased gestation after viability will increase the chances for positive foetal outcomes.

[136] See generally, D Meyerson "Abortion: The Constitutional Issues" (1999) 116 *SALJ* 50.

[137] It should be noted that Steinbock cites a number critiques against the significance of viability (in the context of termination-of-pregnancy debates) as a ground to justify special status of foetuses. See Steinbock *Life before Birth* 99-101. Most criticisms seem to originate from the legal construction of viability and as indicted above, the embodied approach to pregnancy works off the clinical construction and therefore there critiques are not relevant here.

[138] See Meyerson (1999) *SALJ* 57. This approach diverges somewhat from Meyerson to the extent that she argues that foetal viability and sentience tend to occur in tandem, however more recent clinical determinants suggest otherwise.

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section 2(1)(b) sets more stringent grounds for allowing a pregnancy termination. For instance, grounds that indicate that the pregnancy poses mental or physical maternal risk, foetal abnormalities, the pregnancy is a result of rape or incest, or continued pregnancy will significantly affect maternal social or economic circumstances will have to be demonstrated. After the stage of what is considered to be viability, from 20 weeks on, section 2(1)(c) completely narrows down the option of terminating a pregnancy to fatal pregnancy circumstances (maternal or foetal related) or severe foetal malformations.[139]

11 4 2 3 Sentience as an indication of primitive consciousness

The final sheet of the layered approach to special status is the adoption of Steinbock's foetal interests approach. Steinbock's basic premise is accepted, namely that a late-term foetus, through its ability to feel pain, has interests that are worthy of protection for its own sake.[140] She uses the foetus' ability to feel pain, as an indicator of rudimentary consciousness, to justify preferring the sentience criterion over foetal viability criterion for purposes of special status.[141] For Steinbock, sentience is understood to signify a definitive line in foetal development that makes a foetus more like a neonate despite the fact that it cannot be said with any certainty whether a later-term foetus is factually conscious.[142]

The issue of foetal ability to feel pain needs to be considered. In chapter four[143] it was argued that Steinbock's position of the unborn being able to feel pain was somewhat unfounded since to actually determine this factual aspect of foetal development is not possible.[144] However, it is submitted that the worth of the approach is not wholly

[139] One might be inclined to argue that the mere presence of regulation does not necessarily indicate a respect for prenatal life but rather respect for the life and health risks involved in terminating pregnancies in a haphazard fashion. However, the fact is, very specific grounds are set down for pregnancy terminations. If there was no drive to protect prenatal life it would be possible to terminate a very late term foetus for any reason with the only proviso being that it can be performed safely on the women concerned. This is clearly not the case in South Africa.

[140] Steinbock *Life before Birth* 81.

[141] Steinbock *Life before Birth* 99.

[142] Steinbock *Life before Birth* 46-50; 101.

[143] See para 4 3 3.

[144] Ibid, In fact, it was pointed out that some argue that pain is something a person learns only after birth. See G Cohen & S Sayeed "Fetal Pain, Abortion, Viability, and the Constitution" (2011) 39(2) *J Law Med Ethics* 235; S Lee, H Ralston, E Drey, J Partridge & M Rosen "Fetal Pain: A Systematic Multidisciplinary Review of the Evidence" (2005) 295(8) *JAMA* 947; E Lee "The Abortion Debate Today" in K Horsey & H Biggs (eds) *Human Fertilisation and Embryology: Reproduction Regulation* (2007) 238-239.

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removed especially if one were to adopt a layered approach to special status which builds on the foundation of human dignity. The notions of human dignity enforce the need to err on the side of caution when it comes to the very likely possibility of foetal sentience being present.[145] Further, research indicates that foetal viability sets in prior to the possible experience of sentience, and it is argued that while the possibility of conscious experience increases special status, a viable foetus should be included in the equation of when the benefits of special status vest, even if a viable foetus' stake to special status is weaker than that of a "sentient" foetus.

11 4 2 4 Differentiating "special status" from legal or quasi-legal subjectivity

The vestment of "special status" in the unborn that is being advanced in this chapter needs to be distinguished from the process of extending legal or quasi-legal legal subjectivity to the unborn.

In chapter seven, a number of South African authors were considered and it was demonstrated that each called for changes to certain aspects of the law in order to offer better protection of prenatal life.[146] The authors were all identified as advocating a separate-entities view of pregnancy and argued for the direct application of the law to the unborn as if the unborn are separate legal subjects of law.[147] It was consequently argued in this thesis that the various authors were essentially extending legal or quasi-legal subjectivity to the unborn.[148] The relational approach being adopted in this chapter moves away from the position that the unborn can be directly engaged through the law and therefore cannot have legal or quasi-legal subjectivity as purported by the South African authors considered in this thesis.

The position of denying the unborn legal subjectivity originates from the insistence that the unborn are embodied in pregnant women.[149] A consequence of embodiment is that one cannot ever, regardless of the designation of foetal-separateness, directly engage with the unborn in any tangible way, since the unborn exist in a factually non-

[145] This might be implied by Steinbock in her approach, but it is argued that without her explicitly alluding to that fact renders her approach problematic.
[146] See the various arguments considered in para 7 3.
[147] Ibid.
[148] See ch 7 para 7 2. Fn 3 of ch 7 explains how this conclusion is reached.
[149] In ch 4 para 4 4 this position was argued in detail.

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permeable[150] environment, that is, within the body of a woman. It is this embodied connection that must be acknowledged, since this connection absolutely prevents direct contact or interaction between the unborn and others.[151] Also, it is asserted that an embodied view or understanding of pregnancy should always inform the thinking processes whenever the unborn are considered regardless of how much science identifies the unborn as genetically unique and individuates them from the women who carry them.

While it is conceded that "special status" is a form of status in law, the status it accords to the unborn is not comparable to the status accorded to individuals who are already born, therefore there is no situation of foetal personhood or full personhood being extended. It is asserted that status is afforded to the unborn as participants of humanity and it is special because it does not go so far as to vest legal subjectivity yet it nevertheless demands acknowledgment. This acknowledgment is made possible via the engagement with pregnant women, being the *sin qua non* for foetal existence. Consequently, all foetal-related concerns must be addressed through women: It is asserted that these concerns must be addressed because they involve humanity and the further a pregnancy progresses the more can be demanded from law's protective reach.

This concludes the discussion of the unborn and the attribution of special status, the next step is to establish how to incorporate this view into the diverging social discourses and experiences of the unborn.[152]

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[150] Karpin (1992) *Colum J Gender & L* 333 states that technology, for instance ultrasonography, has led to the impression that the female body is permeable and flexible to outside curiosities, and argues that pregnant women are viewed as passive foetal containers in the sense that they are denied the capacity to carry the unborn and determine their boundaries. She understands this to be a technocultural phenomenon based on ultrasonography, with viewers of prenatal ultrasound scans coming to (mistakenly) understand the uterus as permeable as a result of being able to view the unborn prior to birth.

[151] Here, "others" must be understood to include third parties, such as the outside community and the medical profession, the state and the law with its legal principles.

[152] As discussed above, see para 11 3.

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11 4 3 Reconciling “special status” with non-uniform attribution of value in the unborn

In the process of developing a discourse of pregnancy that includes women, embodies the unborn and articulates a specific value in the unborn, one is left with a glaring issue. This revised view of pregnancy can be seen as proposing a view that all foetuses are of equal value to everyone. However, earlier it was highlighted that each foetus is valued differently depending on the woman concerned, the circumstances that led to conception, stage of foetal development, the public health policy or merely because personal preferences vary from one person to the next.[153] The task therefore is to reconcile a “stable” principle of “special status” of the unborn with the ambiguous and almost fluid position of the unborn in respect of women’s ever-changing and diverse subjective perspectives during pregnancy, as well as diverging social policies and society responses to the unborn.

11 4 3 1 The conundrum

Valuing the unborn on the foundational principle that they form part of humanity demands that the value attached to the unborn attaches because the unborn themselves are entities worthy of value, even though they may be embodied. This value should therefore attach irrespective of the value any one individual might attach to them. This approach therefore requires that special status of the unborn (as representing a particular value in the unborn) must traverse differing values attributed to the unborn.

When a uniform value is being advanced in respect of the unborn a problem arises, because there will be cases where people value the same foetus differently. Consequently, there is a concern that if each foetus is provided with special status in law in spite of subjective feelings of the pregnant woman concerned, there may be a situation of women having a value externally imposed on them as a result of adopting a relational approach. The external imposition of special status of the unborn onto pregnant women can ultimately result in the same experiences highlighted in the United States, where third parties intervene in pregnancies for the sake of “foetal-

[153] See para 11 2.

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wellbeing" but do so to the detriment of the women, thereby violating their autonomy, constitutional rights and bodily integrity more generally.[154]

On the other hand, if the special status of the unborn is not universally accorded to all foetuses regardless of a subjective sense of valuation or intentions pertaining to the unborn, the unborn might end up being valued merely on the basis of the particular relationship at play. This is what occurred in the United States regarding the application of feticide legislation that excludes pregnant women in respect of their own pregnancies while at the same time legally sanctioning termination of pregnancies.[155]

Briefly, in chapter nine it was demonstrated that in the United States, some feticide provisions are aimed at protecting the unborn as victims of third-party violent conduct and that this protection is justified on the grounds that the unborn are defined as persons or human beings. However, it was argued that by holding only third parties criminally liable for the violent termination of prenatal life and not pregnant women in respect of their own pregnancies, the provisions are articulating a contradictory value in the unborn. A contradictory value is being attached because both acts essentially terminate a "person" but different consequences result depending on the actor. Thus, the foetus is valued as a person in relation to third parties but not in relation to the pregnant woman carrying it. This leads to the conclusion that unborn are not valued because they are "persons" or "human beings" but rather because they represented a wanted pregnancy.[156] Therefore the unborn's value is determined by the relationships different people share with them rather than on the basis of their humanity.

These contradictory positions can be attributed to the inconsistent adoption of the separate-entities approach to pregnancy. Recognising these challenges provides insight into possible issues that need to be considered when aiming to develop a revised view of pregnancy in law that includes a uniform value in the unborn. Consequently, it needs to be determined how to value the unborn in a uniform way, but such that it does not contradict our sense of humanity that the unborn are viewed as representing nor to serve as the basis to undermine women, and therefore must fit

[154] See part 3 generally.
[155] See ch 9 para 9 3 2.
[156] Ibid.

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in with the broader aims of feminism. It is asserted that both these issues can be overcome if the unborn are re-embodied in the concept of pregnancy and their value is understood as intrinsically linked to the context of women and their rights. This will become more apparent later in the chapter when special status is applied to the identified areas of concern.

Even in the case where this conundrum can be addressed through a revised view of pregnancy, further issues arise in the form of resistance to adopting a uniform value of the unborn in law.

11 4 3 2 Resistance to adopting a uniform value of the unborn in law

Advocating a universal value for the unborn in the form of special status (as is being developed in this chapter) is not readily supported.[157] Support is lacking for the very reason that such an approach might compromise a flexibility in law. Flexibility is understood to be necessary when dealing with the unborn in law because of the fact that not every foetus is equally valued by women, society and the state, or that a foetus does not have one particular value all through a pregnancy. Ultimately, the concern is that different contexts demand different responses, and if one uniform value is advanced, law's flexibility will be sacrificed.

Seymour is one such author who argues against assigning a uniform value to the unborn in law. While Seymour specifically argues against the separate-entities call for the vestment of personhood in the unborn, his arguments are also viewed as a broader argument against any set form of status for the unborn in law. This interpretation advanced because Seymour does not advance any other form of uniform value in the place of personhood or legal subjectivity of the unborn. Therefore, his position is worthy of consideration here because it assists in understanding why securing a uniform status for the unborn is advanced as something to avoid in law.

Before considering his argument, it is necessary to understand the context of Seymour's preferred position regarding pregnancy in law. Seymour suggests that he

[157] For instance see, Seymour *Childbirth and the Law* 186.

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supports a relational account of pregnancy, being the not-one/not-two approach.[158] He adopts this approach because he argues that it is necessary to have consideration of the unborn but only so far as women's rights allow.[159] It is his position that because the unborn are not wholly one entity and pregnancy does not represent two completely separate entities, women's rights play a central role in determining the extent to which the unborn can be recognised in law. It is clear that he is pro-choice and a general women's rights advocate who nonetheless finds value in the unborn.

Seymour asserts that conferring a uniform status to the unborn is not possible primarily because there will never be consensus about the nature of the foetus.[160] He further asserts that the process of ascribing status is a normative task, and normative processes make certainty in law unattainable.[161] He emphasises that it is better to avoid pursuing any uniform status for the unborn because such avoidance assists in allowing for flexible responses to pregnancy-related concerns in law in a way that advances women.[162] His argument means that there will always be a measure of uncertainty when considering the status or position of the unborn in law more generally, and this approach provides leeway for lawmakers to respond differently to the various claims made for the unborn and the difference in response lies in the context in which the unborn are being considered.[163] Here, Seymour is stating that the law does not protect the unborn in a termination-of-pregnancy context in the way it would in the context of third party violence, and that it is the context that determines whether the state will intervene or not. He views this approach as necessary in order to secure women's rights but does so in a way that does not overlook the unborn in any absolutist way.

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158 Seymour *Childbirth in Law* 191-202. Although it must be noted that the author of this thesis also prefers a relational account to pregnancy, but applies the not-one/not-two theory differently to Seymour. This is discussed below and explanations are provided as to why the relational approach is applied differently.

159 Ibid.

160 Seymour *Childbirth and the Law* 186.

161 Ibid.

162 Seymour *Childbirth and the Law* 186.

163 Seymour *Childbirth and the Law* 186. Essentially he asserts that context aids in determining whether it is appropriate for the state to act on its interest in prenatal life in one situation, while not do so in another situation. He argues that having a flexible approach to the unborn in law allows for women to terminate their pregnancies while at the same time allows for the protection of the unborn from third-party violence.

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Since Seymour advocates that the law should adopt the not-one/not-two approach, one can see that he recognises the unborn as having intrinsic worth, however he seems to lose sight of that when advocating flexibility in law. His focus on context, being the relevant relationships at play, gives the impression that it is relationships determining whether or not the law will value the unborn, rather than the unborn having inherent worth in and of themselves as he argues the not-one/not-two approach does. This can be gleaned from the following excerpt of his understanding of a relational approach to pregnancy and the role of different relationships in respect of law's approach to the unborn:[164]

> While this approach accepts that a fetus is a distinctive entity with intrinsic worth, it recognises that in some contexts it is appropriate for the law to intervene to protect fetal interests, but not in others. Crucial to making this distinction is an examination of the relationships between the parties to proceedings involving fetal harm. For example, a doctor or midwife caring for a pregnant woman is in a particular relationship to that woman and her fetus. The practitioner can be seen as owing a duty of care to both and it is in the interests of both for there to be a possibility of damages claim if the duty is breached. Similarly, when an assailant attacks a pregnant woman and causes a stillbirth, there is (as some courts and legislatures have recognized) no reason why the assailant should not be found guilty of an offence in respect of the destruction of fetal life. In each of these illustrations, there is a particular relationship between the woman, her fetus, and a third party. From this perspective, it is a consideration of the nature of the *relationship*, rather than of the nature and characteristics of the fetus, which determines whether it is appropriate for the law to acknowledge the existence of the fetus and the harm done to it. (Emphasis in the original and footnotes omitted.)

Seymour emphasises the appropriateness of the relational approach (not-one/not-two approach to pregnancy) because it creates space to include the consideration of the unborn as having intrinsic worth but then goes on to use the approach's reliance on context to deny intrinsic value. This leads to an ambiguous outcome, because worth that is "intrinsic" is something understood to be inherent, derived from within, as opposed to being determined by external factors such as the contextual influences of relationships. In Seymour's quest for securing flexibility in law he not only ensures a

[164] Seymour *Childbirth and the Law* 185.

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fluid position of the unborn in law but also renders the unborn's value as something less than intrinsic.[165] From this, it seems that flexibility in law compromises value in the unborn, and if one wants to establish a value in the unborn such value will compromise flexibility, and trying to overcome this issue results in ambiguous outcomes.

Considering the outcomes of Seymour's relational position and the outcomes of the separate-entities approach in the United States,[166] it is evident that ambiguous and inconsistent outcomes persist despite both adopting different approaches to pregnancy. The common feature between Seymour and the United States position is the fact that there is no foundational uniform view of the unborn. In both these contexts the entire scenario of pregnancy in law becomes a complicated maze: Assigning fluid value of the unborn in law makes it unclear whether one can express any value in the unborn, if so, how should one go about valuing them or what it is about the unborn that is being valued, and even leaves open the question on how one would determine when it is appropriate to value the unborn. The entire task of working with pregnancy in law becomes one lined with indeterminable or blurred boundaries. This leads to consequences that inadvertently prepares the ground for increased women's right's violations.

11 4 3 3 Consequences of avoiding a uniform value in the unborn

It is argued that contradictory,[167] ambiguous and inconsistent[168] outcomes must be expected if the law is required to be flexible to ever-changing context in relation to a fluid concept such as the unborn. It is argued that when the drive for flexibility leads to such inherent ambiguous or contradictory outcomes, something is amiss and injustices will ensue. Injustices are certainly possible when one recalls the United States experience as recorded in part three of this thesis and how the law was manipulated to advance one group's position over the rights of another group.

[165] With this in mind, it is not very clear why it would be necessary for Seymour to adopt an approach that provides the space to consider the intrinsic value of the unborn to start with.
[166] See para above.
[167] Referring the United States position described in para 11 3 3 1 above.
[168] Referring to Seymour's position described in para 11 3 3 2 above.

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In part three it was demonstrated that the articulation of the value of the unborn in the United States (while under the umbrella of the separate-entities theory) was far from uniform: Some states enforce a value in the unborn through the application of certain laws, but the value accorded varies across different branches of law thus impacting the effect of the value generally. For instance the expression of the value in the unborn in respect of termination-of-pregnancy laws differed to that expressed in respect of feticide or foetal homicide laws. This position allows for easy manipulation of principles by "pro-life" groups to the detriment of women's rights.[169] While the vulnerability for manipulation is very much a product of the Unites States' history of reproductive politics, the patchy method of dealing with the unborn in law opens the legal system to abuse and can result in illegitimate outcomes. It is argued that avoiding a uniform value readies the ground for those with ulterior motives to make their way through law and set unfavourable precedents for women's rights because there is no uniform value guiding the various issues.

It is asserted that all the uncertainty and ambiguous outcomes originate from the fact that a crucial piece of the pregnancy puzzle is missing, namely an objective foundational principle (or starting point) on how to deal with the unborn in law. This foundational principle indicates what it is about the unborn that needs to be considered or even what is it about the unborn that needs to be overlooked when one attempts to deal with pregnancy-related concerns in law.

11 4 3 4 Special status in the realms of flexibility

It is suggested that vesting special status in the unborn (as a uniform value) will assist in drawing determinable lines indicating where the unborn stand in the general body of law. This merely indicates a starting point and does not serve the purposes of providing a final say on the issue of the unborn in law. Special status as a starting point can guide and direct debates concerning pregnancy and can assist in maintaining consistency in respect of outcomes. Adopting this view is necessary because it removes the opportunities to manipulate existing legal principles relevant

[169] This manipulation of the law was sufficiently recorded throughout part three and will not be discussed here.

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to pregnancy and curbs the use of backdoor tactics and substitutive methods to extend full status to the unborn.

While South Africa is not plagued with polarised reproductive politics comparable to that in the United States,[170] it is necessary to establish a "South African" uniform value for the unborn because the patch-work approach to dealing with the value of the unborn in law is already taking root in academic writing. For instance du Plessis'[171] call for the introduction of the crime of feticide to be applicable from the moment of conception yet her recommendation contains a termination-of-pregnancy exemption, this is almost a perfect reflection of what is transpiring in the United States.[172] If her call for changes to the law are accepted, the value of the unborn would differ according the different spheres of law, despite the fact that each law is dealing with the same entity across the board.[173] Furthermore, while du Plessis has explained that her primary aim is to protect the unborn from third-party violence rather than employ backdoor tactics to advance personhood status for the unborn,[174] her position raises some concerns. The study of the United States position indicates that there are certainly people or organisations with the intention to use backdoor personhood tactics and du Plessis' position provides the perfect opportunity to advance certain alternative agendas. Aside from du Plessis, Kruuse's publication on feticide expresses the need to adopt a unified approach to the unborn in law more generally,[175] and while I disagree with the method Kruuse adopts, I understand the call for a unified approach as legitimate and necessary.

Having demonstrated the risks inherent in allowing for a fluid concept of the unborn and having substantiated the need for establishing a uniform view of the unborn, the

[170] R Roth *Making Women Pay: The Hidden Cost of Fetal Rights* (2000); R Solinger *Reproductive Politics: What Everyone Needs to Know* (2013).
[171] Du Plessis (2013) *Stel LR* 73.
[172] Most importantly, those foetal homicide or feticide provisions that apply from the moment of conception are being used to justify the extension of child abuse laws to prenatal conduct, see the discussion in para 10 2; L Paltrow & J Flavin "Arrests and Forced Medical Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health" (2013) 38(2) *JHPPL* 299 323. Although the ultimate aim is render termination of pregnancies unlawful, see ch 8 para 8 4.
[173] A similar argument can be advanced in respect of Kruuse's call for feticide, although she makes more of an attempt to reconcile termination-of-pregnancy laws with her proposed feticide laws in a more theoretical basis, see generally Kruuse (2009) *THRHR* 126.
[174] Personal communication with G du Plessis via electronic mail (5 July 2014).
[175] Kruuse (2009) *THRHR* 126.

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following question now arises: Will adopting a uniform value in the unborn compromise the ability of the law to respond flexibly to the plethora of contexts in which pregnancy exists and is experienced by pregnant women personally or by others via observations?

Seymour asserts that flexibility towards the value the law vests in the unborn is necessary to ensure that women's rights are respected, however, the above discussion demonstrates that when a flexible stance is adopted on the value of the unborn in law, rights of women are more easily violated, or violations are more likely. It is asserted that Seymour's emphasis on flexibility might be misplaced, this thesis proposes that the law need not be flexible in its view of the value of the unborn but rather offer flexibility in respect to *how* the law responds to the uniform value of the unborn in the various contexts and relationships in which it appears. It is argued that flexibility of the law should focus on allowing respectful space for different responses to a set value. This perspective of flexibility in law allows for special status to transcend all the different possible perspectives of the unborn. This argument will be explained further.

The approach of having a set value or principle in law but allowing for different responses to that particular value or principle is not foreign to South Africa, and what follows is rather obvious. For instance, section 31 of the Constitution of South Africa, 1996 provides that everyone has the right to participate in religion or culture. This section is expressing a value in religion and culture but does not obligate any one person to be religious or follow one particular religion or accord themselves to one culture. In respect of reproduction, the Choice Act expresses a value in women's reproductive freedom, it does not make termination of pregnancy compulsory by its mere enactment into law.

While these principles or laws recognise a particular value, neither obligate one precise result to realise from the values they advance. Each seems to provide a "respectful space" for different responses to life's circumstances within the realms of the particular value at hand. The value serves as the starting point (as a core minimum) and assists in determining the parameters one is functioning in. It also demands that respect be afforded when working in the parameters of the value. This respect links to

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the broader acknowledgment that everyone is unique in and of themselves and also that their individual responses to a value will differ according to person, community, race, sex, culture, country, and so on. This is an example of how expressing a uniform value on one particular aspect can be achieved even though there is a plethora of perspectives on the aspect at hand. How this plays out will be demonstrated below when applying the not-one/not-two approach to *capita selecta* areas of reform.

This discussion illustrates that establishing a uniform value in the unborn in law can be achieved through the application of this chapter's "special status" because this status is founded on the fact that the unborn are embodied. Recognising the unborn as embodied brings women back into focus and allows for an informed contextual understanding of pregnancy as experienced by women. Further, adopting a uniform value in the unborn assists in overcoming contradictions, inconsistencies and ambiguities currently plaguing debates about the unborn. In the process of securing special status, women's rights violations should be significantly reduced because the status proposed not only acknowledges the unique interconnection during pregnancy but also removes the opportunities to manipulate the law to advance laws contrary to women's rights.

11 4 4 Removing the notion of tension: Pregnancy as a relationship and third parties relating to pregnant women

Having rejected the current prevailing approaches to pregnancy and demonstrating how to advance a value of the unborn in law, it is now necessary to contemplate how to articulate pregnancy as involving relationships and how to construct those relationships in a way that removes the perception that pregnancy embodies a tension. Thereafter, these views will be reconciled with the not-one/not-two approach as found in the Choice Act.

In chapter seven it was established that currently, there is no tension espoused in South African law between female autonomy rights and foetal interests and this position rests on the fact that South Africa mainly adopts a single-entity approach to

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pregnancy.[176] However, it was also shown that as a result the application of this approach the law is ill-equipped to tackle pregnancy-related concerns, particularly those associated with pregnancy continuation.[177] While a number of South African scholarly authors have advanced suggestions on how to rectify the current position each adopted a separate-entities approach to pregnancy that renders pregnancy riddled with adversarialist positions. Further, the study of the United States experience showed that as long as adversarialism remains any possible changes to the law will be laced with tensions and be rendered fruitless.[178]

It is submitted that without developing a view of pregnancy in law in a way that it is not premised on tension, the law will be poorly developed and those issues highlighted as being in need of reform will not be meaningfully addressed. The task therefore is to address the underlying notion that there is a tension between autonomy rights of pregnant women and foetal interests before going on to suggest how to address any identified areas of concern. Essentially this task requires a consideration of the relationships at play, an evaluation of how the law is structuring those relationships and then determine how to reform that structure so as to remove tension and secure healthy pregnancy outcomes.

Looking at the relationships at play, pregnancy represents a relationship which is a unique one shared between a woman (with associated autonomy rights) and the unborn (with associated interests) she carries. It is unique in that the connection cannot be removed without terminating the pregnancy (and possibly prenatal life) and no one else can relate to the unborn directly in the way that a pregnant woman does during the existence of a pregnancy because the unborn is wholly embodied in her. This point is in conflict to the South African authors' position since they postulate that the existence of a pregnancy gives rise to two separate entities, whereas here, the pregnancy relationship is postulated as including two entities which are inseparable thus also constituting one. In essence this is the not-one/not-two approach.

[176] Para 7 4.
[177] These concerns were raised in chs 5 and 6.
[178] See ch 7 generally.

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How the pregnancy relationship is interpreted impacts on how third party's relationships (the state, intimate partners, medical staff, family) are construed in respect of a particular pregnancy. According to a relational construction of a pregnancy relationship others cannot directly relate to the unborn without implicating the women who carry them, they are in effect relating to the pregnancy unit or relationship as constituted both a woman and an unborn. Under this construction, focus should be on "optimal pregnancy progression" and "optimal pregnancy outcomes" and how third parties can secure this in their interaction with pregnancies. This demonstrates that when the pregnancy relationship, as a unit, is cared for, more meaningful outcomes can be expected because both participants in the relationship are considered.

Construing the pregnancy as including two separate entities opens up the means to *theoretically* engage with the unborn to the exclusion of the woman concerned or vice versa. Since pregnancy embodies an entrenched connection, this view ignores that fact that what happens to one will inevitably happen to the other, thus diminishing the quality of the pregnancy relationship.[179] The quality of the relationship will be diminished because one participant's interests or rights are being over-ridden for the benefit of the other participant's rights and this means one participant is being treated poorly, yet the connection implies poor treatment will negatively impact on both. Here one will typically find references to securing "optimal foetal development" or "optimal foetal outcomes", all of which are void of women who experience pregnancy progression and birth.

It is clear that one view of pregnancy encourages a tension while the other does not. It is argued that the tension being expressed here is not a tension between a woman and the unborn she carries, but a tension between two concepts as developed and structured in law. This structure results in arbitrary relationship outcomes and invasive interventions.

With this view, it becomes apparent that the concepts of pregnant woman and unborn, as currently being used in law, do not adequately reflect the lived existence of

[179] Violence against a pregnant woman is violence against a woman and the unborn she carries, substance abuse and treatment thereof during pregnancy implicates a woman and her foetus, even termination of pregnancy involves both participants of a pregnancy relationship.

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pregnancy – being one of factual connection[180] and the connection is biologically entrenched in that where autonomy is advanced so are the interests of the unborn.[181] Focus should be squarely on the pregnancy relationship as expressing an inseparable unit between a woman and the unborn and this structure requires that when the law is applied to this relationship it should advance a healthy relationship which fosters female autonomy and foetal interests (special status).[182]

This view of pregnancy falls in line with the not-one/not-two approach of the Choice Act as discussed in chapter six of this thesis.[183] That entire discussion will not be repeated here. However for purposes of guiding what follows below, a brief[184] overview of the not-one/not-two approach will be provided and it will also be shown how the Choice Act is a legislative incarnation of that approach. Basically the not-one/not-two approach centralises the pregnancy relationship and characterises it as recognising the interests but instils the notion that these interests cannot be viewed in isolation, thus foetal interests can only be advanced in a way that promotes women's rights.[185] In order to achieve this aim, the not-one/not-two approach is context driven which requires that the pregnancy relationship be considered in the context in which it exists. Focus on context helps detect what is required from others and even the pregnant woman concerned in order to secure a healthy pregnancy relationship or healthy relations with others generally.

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[180] The notion of connection and its role in women's lives is a contested issue see, R West "Jurisprudence and Gender" (1988) 55(1) *U Chi L Rev* 1; S Karin & R Oritz "In a different Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda" (1993) 87 *Nw U L Rev* 858; S Noonan "Theorizing Connection" (1992) 30(3) *Alta L Rev* 719. This thesis will not delve into these issues. The point of "connection" here is that pregnancy is a biological connection between a woman and the unborn she carries.

[181] Harris presents a similar argument in the context of medical treatment of pregnant women who through their own conduct are perceived as placing their pregnancies at risk. She states: "Common sense tells us that if a fetus inhabits the body of a pregnant woman, they share a physiology, and so have many common needs. One could argue that the most important aspect of fetal-wellbeing is maternal wellbeing". See L Harris "Rethinking Maternal-Fetal Conflict: Gender and Equality in Perinatal Ethics" (2000) 96(5) *Obstetrics & Gynecology* 786 788.

[182] In cases where special status is compromised, law should prevent such compromises on frivolous grounds because the unborn from part and parcel of humanity and that is the very least that is required. For instance by gradually limiting women's right to terminate their pregnancy as the pregnancy progresses, it is the special status of the unborn is being advanced.

[183] See para 6 3 2.

[184] A brief explanation is preferred because ch 6 para 6 3 1 provides a detailed conceptualisation of this approach as developed from considering MacKinnon (1991) *Yale LJ* 1316; Karpin (1993) *Colum J Gender & L* 329; Seymour *Childbirth and the Law* 190. This was further developed in Pickles (2014) *De Jure* 20, however the discussion to follow goes further than the article and applies the approach to other areas of law relating to pregnancy.

[185] This means that the context of the unborn in informed by the women who carry them.

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This approach is applied in respect of the Choice Act in that women do not have the absolute right to terminate their pregnancies and the limitation of this right is argued to originate from the value vested in the unborn by society.[186] This indicates that value in prenatal life is acknowledged which means that a pregnant woman embodies more than one entity. However, this acknowledgment does not go on to accord separate status to the unborn, rather, the unborn are understood in relation to pregnant women and their existing rights thus meeting in the middle between women's rights and foetal interests.[187]

11 5 Application of the not-one/not-two approach: A relational approach to the identified areas in need of reform

This discussion is guided by the theoretical positions developed above. In this respect the not-one/not-two approach (as an incarnation of the relational approach) to pregnancy will be applied to the different areas of law identified as being in need of reform. The aim is to secure meaningful pregnancy outcomes and optimal pregnancy progression. This discussion will demonstrate that these areas can be addressed in a way that is void of tensions between female reproductive autonomy rights and foetal interests thus allowing for more effective proposals.

11 5 1 Reform of the Choice on Termination of Pregnancy Act

The idea behind advocating law reform in respect of termination of pregnancy in South Africa is to afford better consideration of the unborn in law, since they are viewed as human beings and therefore deserving of better protection from elective pregnancy terminations.[188] After considering du Plessis and de Freitas' work in chapter seven, it was highlighted that the Choice Act is not in need of reform because it is the only piece of legislation that gives expression to the value in prenatal life and does so in a

[186] See *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (T) 527 D.
[187] A meeting in the middle is viewed as being in place because neither entity receives absolute protection in law.
[188] De Freitas & Myburgh (2009) *TCW* 63; De Freitas (2012) *IJRF* 51.

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balanced fashion, which accords respect to female reproductive autonomy.[189] However, other aspects are relevant to this area and need some consideration.

When termination of pregnancy is discussed in a relational sense, some authors focus on how the services should be provided in order to better realise pregnant women's autonomy while functioning within the relationship between service provider and pregnant woman. For instance Riley and Furedi explain that a woman's autonomy is diminished unless the service is offered in an environment that respects women's self-determination by offering support for informed decision-making, secured confidentiality, and ensuring availability in choice of treatment methods and access to treatment.[190] These concerns were highlighted in a South African context too, in that the current public provision of termination-of-pregnancy services do not line up with the liberating aims of the Choice Act and one of the identified reasons for this lies in service providers' attitudes towards women attempting to gain access to the services.[191]

While these issues highlight legitimate concerns regarding the quality of the relationship pregnant women share with service providers and that better policies need to be in place at grassroots level, it does not suggest how the area of parenthood avoidance can be better structured so as to ensure the realisation of healthy pregnancy relationships. Something more can be said on the issue, especially if the aim is to foster healthy pregnancies. In the critique raised against calls for more restrictive termination-of-pregnancies laws it was demonstrated that restricting access

[189] Para 7 3 4. In fact, it is the Choice Act that applied the not-one/not-two approach that serves as an example on how advance other areas of pregnancy in law towards more improved outcomes.

[190] L Riley & A Furendi "Autonomy and the UK's Law on Abortion" in S Sclater, F Ebtehaj, E Jackson & M Richards (eds) *Regulating Autonomy: Sex, Reproduction and Family* (2008) 241. Also see C Kaposy "Improving Abortion Access in Canada" (2010) 18 *Health Care Anal* 17; Nelson *Law, Policy and Reproductive Autonomy* 133-150. Kaposy (22) specifically states: "A woman's exercise of autonomy is seeking abortion has to operate in relationship to, and in relation to, the burdens and forms of influence set before her by the other actors and institutions in the context in which she finds herself. The choice to have an abortion cannot be a meaningful option without the means for accessing abortion, and access can be impeded by systemic and structural realities created by policy decisions within the health care environment." There are many contributions focusing on how access to termination of pregnancy advances women's autonomy, not all can be considered here. These references merely serve as an example of some facets need to be present in a patient-provider relationship in order for pregnant women's autonomy to be advanced. The discussion can go much deeper than this, but these examples are sufficient to serve the purpose of this discussion.

[191] C Pickles "Lived Experiences of the Choice on Termination of Pregnancy Act 92 of 1996: Bridging the Gap for Women in Need" (2013) 29(3) *SAJHR* 515 522-525.

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to elective termination of pregnancy will not offer better protection for the unborn, rather focus should be placed on addressing those wider social factors that feed the demand for termination-of-pregnancy services.[192] This argument can be phrased in relational terms which helps clarify what needs to be done in order to secure improved pregnancy outcomes.

Emphasis on securing a healthy pregnancy means that the existence of a pregnancy should be welcomed and this means the pregnancy should be a result of a woman exercising her reproductive autonomy. Turning to termination of pregnancy is understood to be a responsive action which is deemed to be required because the woman concerned is trying to avoid parenthood. While the Choice Act serves a vital role in women's lives more can be done in the area of parenthood avoidance. This requires expanding the contextual view to include existing relationships which were in place before the need to terminate a pregnancy becomes relevant. This means that one should be considerate of those conditions and relationships that were present at the time of and leading up to conception.

A broader contextual view seeks to answer why women are relying on termination of pregnancy to start with. Turning to termination-of-pregnancy services can be an indication that their reproductive autonomy might have been compromised in one form or another through other relationships, such as through poor provision of reproductive health or coercive sexual relationships. This means that where women's autonomy is respected concerning their reproductive decisions[193] the need for termination of pregnancies should be diminished thus securing more wanted pregnancies than unwanted ones.

This demonstrates that more needs to be done to foster better relationships between women and their partners, between women and the state in cases where women rely on the state for reproductive health services, and between women and society. Merely changing termination-of-pregnancy laws will not secure better outcomes in terms of those relationships. Instead, more effective and constructive social policies need to be

[192] Ch 7 para 7 3 4.
[193] Such as decisions regarding who to engage in sexual relationships with and when, contraception, reproductive health, and marriage, to name a few.

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developed. This is particularly true in respect of health care services, addressing the vulnerable position women and girls hold in society generally and specifically in sexual relationships, ensuring improved sex and reproductive health education, and working towards alleviating poverty and its impact on women. Taking these foundational steps helps ensure that more pregnancies are wanted than unwanted and this helps secure the realisation of healthy pregnancies in that the relationship between pregnant women and unborn is welcomed.

11 5 2 Addressing violence during pregnancy that terminates prenatal life

Violence against pregnant women is a complex occurrence that is recognised as a health and human rights issue, and this topic needs serious attention.[194] However not all aspects of this form of violence can be covered here when considering a way forward. Instead, focus will be narrowed to Kruuse and du Plessis' suggestions of feticide in response to violence against pregnant women that terminates prenatal life and then focus will shift to offering of an alternative view to feticide.

Both Kruuse[195] and du Plessis[196] argue for the introduction of the crime of feticide in order to offer better and more direct protection of the unborn from violence that terminates prenatal life. It is suggested that an alternative approach to the issue be adopted which recognises that harm against the foetus is harm against a woman. Further, since this is violence against a pregnancy the form of harm inflicted can be viewed as unique because it can only be inflicted at a time when a woman is pregnant.[197]

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[194] For instance see S Shamu, N Abrahams, M Temerman, A Musekiwa & C Zarowsky "A Systematic Review of African Studies on Intimate Partner Violence against Pregnant Women: Prevalence and Risk Factors" (2011) 6(3) *PLoS ONE* e17591; A van Parys, A Verhamme, M Temmerman & H Verstraelen "Intimate Partner Violence and Pregnancy: A Systematic Review of Interventions" (2014) 8(1) *PLoS ONE* e85084. However, not all violence against pregnant women constitutes intimate partner violence, a shocking example of the recent forced caesarean section on a woman by another women with the aim of kidnapping the new born, see South African Press Association "Foetus Theft May Have Been to Keep Boyfriend, Court Hears" (26 August 2014) *news24* <http://www.news24.com/SouthAfrica/News/Alleged-foetus-thief-says-murder-was-to-keep-boyfriend-20140826> (accessed 28 August 2014).

[195] Kruuse (2009) *THRHR* 126. For a full discussion of Kruuse's position and raised criticisms see ch 7 para 7 3 2 2.

[196] Plessis (2013) 1 *Stel LR* 73. For a full discussion of du Plessis' position and raised criticisms see ch 7 para 7 3 2 1.

[197] Violence against women who are not pregnant might render similar harms upon their bodies but violence during pregnancy involved the added element of the unborn and health complications

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While the essence of Kruuse and du Plessis' arguments are rejected on the basis that the authors adopt a separate-entities approach to pregnancy, each raised important issues that require consideration here. First, both emphasise that when aiming to address the concern of violence against prenatal life, women's rights must remain intact. However, the study of the United States experience unquestionably demonstrated that for as long as pregnancy is construed as including two separate entities this aim will be frustrated.[198] Second, Kruuse suggests that a unified approach to the value of the unborn be adopted, meaning that when introducing the crime of feticide it should be reflective of the provisions of the Choice Act.[199] However, is was not only revealed that the Choice Act does not adopt a separate-entities approach,[200] but that, as demonstrated when considering the United States,[201] employing a separate-entities approach in the context of feticide might serve as the demise for the Choice Act specifically and women's right more generally.[202]

Suggestions for the introduction of feticide impose a number of problems on the pregnancy relationship because women are removed from consideration and efforts are placed on advancing foetal interests in isolation. This can culminate towards violating female reproductive autonomy rights because it opens the doors for maternal liability towards the unborn women carry.[203] This is widely viewed as a poor reflection of the pregnancy relationship.[204] Nevertheless, value can be drawn from these two

specifically associated with pregnancy. Violence during pregnancy is a serious concern that requires proper reflection of the factual issues at hand. The uniqueness of the harm goes beyond foetal-related concerns and implicated the entire pregnancy as a unit. The World Health Organisation reports that murder and suicide are the most extreme health consequences of violence against pregnant women. The less extreme, but still concerning, consequences include poor foetal growth, preterm labour, increased risk of miscarriage (which occurs before viability) or abortion (which occurs after viability), poor bonding after birth, depression, and certain maternal physical impairments such as broken maternal bones, cuts and bruises. See World Health Organization "Information Fact Sheet: Intimate Partner Violence during Pregnancy" (2011) *World Health Organization* <http://apps.who.int/iris/bitstream/10665/70764/1/WHO_RHR_11.35_eng.pdf?ua=1> (accessed 28 August 2014) 2-3.

198 See ch 9 generally.

199 See generally Kruuse (2009) *THRHR* 126.

200 See the arguments presented in ch 6 para 6 3 2 where an alternative interpretation was advanced.

201 See ch 9 generally.

202 See ch 10 generally which highlights how feticide measures implicate women's health rights while pregnancy and addicted, also see quoted comments of Parker J as per *Akron v State* 2011 WL 3781258 (Ala Crim App) in para 10 2 3.

203 These arguments were presented in detail in both chs 9 and 10.

204 For instance see generally Roth *Making Women Pay* 135-183; E Jackson *Regulating Reproduction: Law, Technology and Autonomy* (2001) 140-151; J Flavin *Our Bodies, Our Crimes: The Policing of*

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aspects and both can be meaningfully realised if the view of pregnancy is revised and amended to a not-one/not-two view.

To start, the not-one/not-two approach requires that pregnant women are viewed as more than one but do not constitute two as a result of the interconnection between the pregnant woman and the unborn. Consequently, the issue of violence that terminates prenatal life is not only an issue of violence against the unborn but also violence against pregnant women.[205] This means that a third party is interacting with the pregnancy relationship in a way that compromises the health of the pregnancy as a unit and if that conduct results in stillbirth, it also compromises healthy pregnancy outcome.

It is necessary to understand the motivation behind the calls for feticide legislation. The crime of feticide in seen as necessary because women have the crimes of assault or murder attached to the harms inflicted on them, but is no crime attached for the harm inflicted on the unborn.[206] Of further issue, is the view that the loss of a pregnancy is merely considered an aggravating factor for purposes of sentencing.[207] It is agreeable that something more is happening when one attacks a pregnant woman, something more than mere assault, attempted murder or murder of a woman. The fact is these are women who are pregnant and pregnancy indicates something more, this being the presence of the unborn with their vested special status. The unborn's special status obligates society to recognise the unborn when crimes are perpetrated against women during a pregnancy, and further the obligation requires the development of a specialised crime that acknowledges harms caused to pregnancies. As long as pregnancy is acknowledged as embodying women and the unborn in their unique interconnection, both participants to a pregnancy will receive law's protective reach in respect of a crime against pregnancy.[208]

Women's Reproduction in America (2009) 95-118; B Steinbock *Life before Birth: The Moral and Legal Status of Embryos and Fetuses* 2 ed (2011) 154-198; D Lupton *Social World of the Unborn* (2012) 104-109; Nelson *Law, Policy and Reproductive Autonomy* 194-204.

[205] Even in the case where the sole intention for inflicting violence is to terminate a pregnancy, the intrinsic connection between a pregnant woman and the unborn means that a woman will be implicated.

[206] Kruuse (2009) *THRHR* 132; du Plessis (2013) *Stell LR* 75.

[207] This was the court's approach in *S v Mshumpa* 2008 1 SACR 126 (E).

[208] This allows for harm inflicted on the unborn to remain in focus and therefore moves beyond the position in *Mshumpa* where harm to the unborn was merely an aggravating factor.

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Concerning how violent crimes against pregnancy should be phrased, I have previously suggested introducing a statutory crime to something akin the unsuccessful United States Bill[209] titled the Motherhood Protection Act of 2004.[210] Nevertheless, arguing for provisions similar to the Motherhood Protection Act was motivated by the need to realign focus on pregnant women who are the recipients of violent conduct and use their reproductive rights to justify state intervention in cases where a pregnancy is terminated through violence of another.[211] I viewed pregnant women's reproductive rights as being relevant because I recognised that a continued pregnancy constitutes a decision to bear a child and interference with the realisation of that decision is an infringement of a woman's reproductive rights. [212] In addition to women's reproductive rights, I viewed the state's interest in prenatal life as taking on a supportive role (rather than a leading one) in justifying the state's interest in protecting pregnant women from violence.[213] Also, I recommended that the crime can only be applied in cases of viable pregnancies,[214] this was necessitated by the principle of causation[215] and to remain in line with the Choice Act.[216] I further suggested that this separate crime should be an additional crime to that of murder, attempted murder or assault.[217]

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[209] Instead of enacting the Motherhood Protection Act, the federal government enacted Unborn Victims of Violence Act 2004. This bill focused on harm caused to women and rendered women the sole victims of violence. However, the Unborn Victims of Violence Act created two victims of violence, the woman and the unborn. For a further discussion on this topic see C Pickles *S v Mshumpa: A Time for Law Reform* LLM Dissertation, University of Pretoria (2010) 108-111.

[210] C Pickles "The Introduction of a Statutory Crime to Address Third Party Foetal Violence" (2011) 74(4) *THRHR* 546 565.

[211] Ibid.

[212] Pickles (2011) *THRHR* 565. For more on this bill see, M Fitzpratick "Fetal Personhood after the Unborn Victims of Violence Act" (2006) 58 *Rugters LR* 553; M Hixkcox-Howard "Case for Pro-Choice Participation in Drafting Fetal Homicide Laws" (2007) 17 *Tex J Women & L* 317.

[213] Pickles (2011) *THRHR* 565.

[214] Pickles (2011) *THRHR* 566. Here viability was not presented in terms of gestational weeks but should rather focus on the issue of survivability where gestational weeks can be one of many factors to consider when determining viability. This approach falls in line with the special status approach adopted in this chapter.

[215] Regarding concerns associated with causation, see Pickles (2011) *THRHR* 559-560. It was highlighted that pre-viable pregnancies are incredibly fragile and spontaneously abort without apparent reasons coming to the fore. This makes proving causation beyond a reasonable doubt almost impossible.

[216] Remaining in line with the Choice Act requires that protection on the basis of special status only vest upon foetal viability because that is the point in the Choice Act that the unborn receive increased protection from termination of pregnancy, see s 2(1)(c) of the Act.

[217] Pickles (2011) *THRHR* 566.

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I stand by the premise of the above arguments but offer some adjustments which should be viewed as the by-product of deeper analysis of this issue at hand. Since my refined aim is to protect pregnancy in a way that both advances women's reproductive autonomy and foetal interests, a more fitting title might be "Pregnancy Protection Act". Requirements of foetal viability should remain intact but be open to amendment in cases where causation can eventually be proved through improved sciences especially if human dignity serves as the foundation for protection. This should be cautiously approached though because such an amendment should not render crimes against pregnancies in contradiction to the Choice Act.[218] However, viewing pregnancy as embodying not-one/not-two might allow for such contradictions to be avoided, because women and their rights remain part of the primary focus.

Necessity for further development of the above suggested statutory crime lies in the role of foetal interests. Above, foetal interests are understood to hold a supportive role in the suggested crime in advancing women's rights. However, this approach detracts from the intrinsic worth of the unborn, therefore their role in justifying a statutory crime against pregnancy must be central rather than supportive. Recognising the centrality of their interests does not necessarily make foetal interests a primary concern but certainly an important one. Due to the fact that the unborn are embodied, their important role must always be recognised in relation to the women who carry them.

Using the Choice Act's adoption of the not one-not two approach to pregnancy as a guide for criminalising third-party violence during pregnancy offers more reliable benefits for pregnancies. It creates the space to address harms of third-party violence in law in uniformity with the Choice Act. As a result thereof women's termination-of-pregnancy rights are left intact while also securing special status of the unborn, effectively advancing healthy pregnancy relationships for those pregnancies that are continued.[219]

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[218] This means that South Africa should not be left with the same position as that in the United States where their feticide and foetal homicide laws are in direct contradiction with the Roe v Wade decision. Since one branch of law offers foetal protection from the moment of conception while another branch of law only offers protection from viability onwards.

[219] A response to violence that terminates pregnancies must be developed in law, as recently as 23 June a pregnant woman was murdered but the additional loss of the seven month pregnancy is not formulated in law in a way that allows the perpetrator to be charged. See South African Press Association "Man in Court for Murderous Rage" (28 August 2014) *iol news* <http://www.iol.co.za/news/crime-courts/man-in-court-for-murderous-rage-

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This discussion has merely provided a safe criminal law *response* to violence already inflicted. If the aim is to realise female reproductive autonomy and respect for special status of the unborn, then *preventative* measures must also be in place or improved in order to secure healthy pregnancies and pregnancy outcomes. However, identifying appropriate preventative measures falls beyond the scope of this thesis since the main purpose here is to consider an alternative approach to that adopted by Kruuse and du Plessis. It is noted though that developing preventative measures will require a broader contextual lens which moves beyond mere consideration of the unborn, and this implies the adoption of a relational analysis.[220]

Having clarified the position in respect of third parties relating to a pregnancy relationship, it is now necessary to contemplate the position where women harm themselves during pregnancy.

11 5 3 Addressing prenatal substance abuse

Ovens' publication demonstrated that prenatal substance abuse is a cause for concern in South Africa and needs addressing and she went on to recommend a punitive approach via application of child abuse laws instead of treatment.[221] However the United States experiences on prenatal substance abuse demonstrates that a punitive approach is not readily accepted and is too narrowly focused on women as wrongdoers.[222] Those states identified as adopting a punitive approach to prenatal substance abuse face concerted opposition from the medical community and human rights organisations.[223] The position is that addiction is a health concern and should

1.1742716#.U__OB8WIBXs> (accessed 29 August 2014). It is reported that after argument the accused allegedly stabbed his pregnant girlfriend to death and attempts to save the unborn failed. He is consequently being charged for murder in respect of his girlfriend's death.

220 It seems a relational analysis is already taking place, see generally World Health Organization "Information Fact Sheet: Intimate Partner Violence during Pregnancy"; For instance see Shamu et al (2011) *PLoS ONE* e17591; World Health Organization "Understanding and Addressing Violence Against Women: Intimate Partner Violence" (2012) *World Health Organization* <http://apps.who.int/iris/bitstream/10665/77432/1/WHO_RHR_12.36_eng.pdf?ua=1> (accessed 28 August 2014).

221 See her arguments generally, Ovens (2008) *Acta Crim* 77; Ovens (2010) *CARSA* 38 and para 7 3 3 of this thesis.

222 See part 3 of this thesis generally.

223 This is particularly evident from the list of *amici* briefs: *Amici curiae* brief of the National Association of Alcoholism and Drug Abuse Counselors et al in the matter of *Whitner v State* 492 SE 2d 777 (SC

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be treated as such,[224] this argument regards punitive intervention as an ineffective means to tackle a health concern such as addiction. In essence, the position is that criminal law has no role to play in this pregnancy-related concern.[225]

Drawing from the findings on the United States position, this chapter approvingly adopts the treatment approach to prenatal drug abuse. Punitive third-party interventions fail to secure healthy pregnancy relationships between pregnant women and the unborn in that the states' actions are primarily focused on the advancement of the unborn's interests without consideration of the pregnant women who carry them.[226] Furthermore, this approach compromises optimal pregnancy outcomes because the condition of addiction persists, at times pregnancies are terminated (not because the pregnancy is unwanted but because of fear of prosecution), women are incarcerated and families are broken up.[227] The interconnection between women and the unborn means that punishment of pregnant women renders the unborn punished too.[228] Overall, this approach is viewed as an inadequate response. A treatment based approach on the other hand focuses on the pregnancy as a unit and seeks to advance the interests of both women and the unborn during pregnancy and maintain the family

1997); *Amici curiae* brief of American Public Health Association et al in the matter of *McKnight v South Carolina* 540 US 819 (2003); *Amici curiae* brief of American Public Health Association et al in the matter of *State v McKnight* 576 SE 2d 168 (SC 2003); *Amici curiae* brief of Pegasus Legal Services for Children et al in the matter of *State v Martinez* 141 NM 763 (NM 2007); *Amici curiae* brief of South Carolina Medical Association et al in the matter of *McKnight v State* 661 SE 2d 354 (SC 2008); *Amici curiae* brief of American Public Health Association et al in the matter of *Kimbrough v State of Alabama* in the Court of Criminal Appeals of Alabama, criminal appeals number CR-09-0485 (2010); *Amici curiae* brief of the Alabama Women's Resource Network et al in the matter of *Akron v State* 2011 WL 3781258 (Ala Crim App); *Amici curiae* brief of American Academy of Addiction Psychiatry et al in the matter of *Ex parte Kimbrough* 2013 WL 135748 (Ala); *Amici curiae* brief of American Academy of Addiction Psychiatry et al in the matter of *Ex parte Ankrom* 2013 WL 135748 (Ala). See further examples as posted on National Advocates for Pregnant Women's website, www.advocatesforpregnantwomen.org.

[224] Flavin *Our Bodies, Our Crimes* 111; American Society of Addiction Medicine "Public Policy Statement: Definition of Addiction" (19 April 2011) *American Society of Addiction* <http://www.asam.org/research-treatment/definition-of-addiction> (accessed 24 June 2014).

[225] This can be gleaned from the content of ch 10, but also see M Horn "Mothers versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse" (2008) 14(2) *Wm & Mary J Women & L* 635; S Smith "Criminalising Prenatal Substance Abuse: Hurting Women and their Unborn Children" (2012) 6(1) *Health Law Outlook* 14; S Mohapatra "Unshackling Addiction: A Public Health Approach to Drug Use during Pregnancy" (2011) 26(2) *Wis JL Gender & Soc'y* 241.

[226] These were the general findings originating from the study of the United States position in respect of prenatal substance abuse, see ch 10.

[227] Ibid.

[228] K Kellet "Miscarriage of Justice: Prenatal Substance Abusers Need Treatment, Not Confinement under Chemical Endangerment Laws" (2014) 40 New *Eng J on Crim & Civ Confinement* 455 467.

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unit after birth.[229] This approach therefore secures and maintains relationships rather than undermining them.[230]

11 5 3 1 Moving away from a discourse of "child abuse" and realigning interests

The discussion to follow will provide an alternative view of prenatal substance abuse and through that view demonstrate that while harmful conduct is taking place interests can be constructively realigned. This realignment holds the potential to positively link pregnant women to their unborn thus promoting a healthy pregnancy relationship and healthy pregnancy outcomes. It further assists in bringing a more positive tone to the relationship shared between pregnant women and the state and medical profession based on the fact all three parties are essentially aiming for the same results.

This chapter characterises prenatal substance abuse as a form[231] of "self-harm"[232] instead of foetal abuse. The term "self-harm" serves the tactical purpose of avoiding the argument that women are abusing drugs with the view to abuse the unborn. Further, the use of "self-harm" in the context of prenatal substance abuse has the effect of stressing that while the consequences of prenatal substance abuse on the unborn is somewhat unknown, it is nevertheless accepted that substance abuse is known to be harmful to the substance abuser. Since the substance abusers considered here are pregnant the interconnection between women and the unborn

[229] Ibid.
[230] Smith (2012) *Health Law Outlook* 14.
[231] Although, as a concept it can range from prenatal substance abuse (addictions) to instances of intentional and drastic infliction of harm, such as suicide ideation, attempted suicide or personal infliction of violence in order to terminate a pregnancy outside of the provisions of termination-of-pregnancy laws. Since this chapter is concerned with those suggestions for changes to the law as advanced by South African authors, the primary focus of this discussion will consider an alternative route to Ovens' proposal that prenatal substance abuse should constitute the crime of child abuse. It is pertinent to address this issue in a productive way because if women can be held liable for substance abuse during pregnancy then a precedent is set for liability in other respects of self-harm, whether this involves smoking, participation in sports, suicide ideation, unlawful termination of pregnancy and any other actions viewed as compromising a healthy pregnancy relationship and healthy pregnancy progression. This would be a concerning development because as already shown with reference to research on the United States position, healthy pregnancies are compromised to the extent that health care was avoided or pregnancies were terminated. (See ch 10 generally.) However, it is also recognised that knowing how to respond to the notion of self-harm via prenatal substance abuse generally will assist in understanding how to use the law to address other areas of self-harm without opening the "floodgates" for criminal sanctions against pregnant women.
[232] It must be noted that "self-harm" does not indicate that the process of harming oneself through addiction is void of the contextual understanding that addiction is a social issue that intersects with poverty, race, violence against women, gender discrimination, and poor nutrition and education. These influencing factors were generally highlighted in ch 10, also see generally C MacIntosh "Conceiving Fetal Abuse" (1998) 14 *Can J Fam L* 178.

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during pregnancy must be noted. Therefore, self-harm in this context must also be understood as harming the pregnancy relationship and compromising healthy pregnancy progression in that one participant to the pregnancy relationship is in an unhealthy state of addiction. It also allows for one to accept that if the pregnant women, being the leading participant to the pregnancy relationship,[233] is in an unhealthy state, foetal wellbeing must surely be susceptible to compromise too.[234]

However, focus on the issue of prenatal substance abuse as a form of self-harm does not mean that it is only pregnant women who are involved in imposing harm upon themselves. As mentioned above, a relational approach requires that the context in which decisions are made or actions are taken be considered too. Moving away from the narrow perspective of child abuse[235] allows for a more informed contextual view of pregnant addicts because it keeps women and their lived experiences in clear view.

Johnson points out that pregnant women are usually addicts before falling pregnant and prenatal addictive behaviours are not intentional acts to compromise the pregnancy or healthy outcomes.[236] Johnson explains that at times women will go to great lengths to secure healthy pregnancies and babies and that it is not bad intentions but existing obstacles that prevent overcoming addiction.[237] This encourages one to consider the context in which women become addicts and contemplate why their addictions remain despite being motivated to stop using.

A number of factors have been identified as facilitating an environment conducive to self-harm,[238] such as sexual abuse and violence,[239] diminished economic standing,

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[233] Women are identified as the leading participants in the pregnancy relationship because they are essentially a *sine qua non* for foetal existence. Identifying them as taking a leading position should not be seen to detract for the special status of the unborn, it is a result of the special status of the unborn that requires this issue to be addressed because if addiction was purely an issue of self-harm that is not illegal in South Africa then there would be no real need to tackle the concern.

[234] See E Ordolis "Maternal Substance Abuse and the Limits of the Law: A Relational Challenge" (2008) 46(1) *Alta L Rev* 119 121.

[235] It is viewed as narrow because it only focuses on harms to the unborn, whereas substance abuse harms the substance abusing women too.

[236] D Johnson "Shared Interests: Promoting Healthy Births without Sacrificing Women's Liberty" (1992) 43 *Hastings LJ* 569 571.

[237] Johnson (1992) *Hastings LJ* 573; 575-576.

[238] Answering this question falls beyond the scope of this chapter but it must be recognised that if the underlying aim of addressing prenatal substance abuse is to protect the unborn and the unborn are inherently linked to the women who carry them, then focus should be on preventative measures.

[239] MacIntosh (1998) *Can J Fam L* 193-194.

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racial discrimination, poor education, and women's vulnerable position in society to name a few relevant factors.[240] Once addiction is settled, the most glaring factors that act as obstacles to overcome addiction include poverty and as a result of poverty there is a lack of access to health care in the form of drug addiction treatment and also a lack of choice in respect of treatments available.[241]

Viewing substance abuse as an act a women commits against herself helps clarify the context involved. Further, since pregnancy embodies not-one/not-two, the harm against oneself naturally implicates the unborn being carried. Relying on interconnection from the start helps to emphasise and centralise the shared health interests between pregnant women and the unborn they carry and understanding the context of addiction helps highlight what can be done to foster healthier pregnancies.

Having established the pregnancy relationship in the context of self-harm and highlighted the alignment of interests in the pregnancy relationship, it must be pointed out that there is also a shared interest between pregnant women and those third parties who want prenatal substance abuse to be addressed. Johnson explains that the underlying motivation for state or collective action against drug abuse during pregnancy relates to the health risks associated with such behaviour and the possible wide reaching implications on children born from women who abuse substances.[242] Advancing the view that pregnant women and the unborn are inseparable means that both women and third parties, (the state and medical profession) share in the objective to realise healthy pregnancy outcomes and the interests are therefore aligned.

With interests aligned it becomes clearer that adversarial tactics are not necessary in order to achieve the aims of addressing addiction during pregnancy. This takes the issue to another level allowing for creative consideration of how to realise these aligned interests in a way conducive to the pregnancy relationship and the relationship between pregnant women and third parties.

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[240] See Ordolis (2008) *Alta L Rev* 138.
[241] Johnson (1992) *Hastings LJ* 157; Ordolis (2008) *Alta L Rev* 137.
[242] Johnson (1992) *Hastings LJ* 601. Horn identifies these interests as originating from the resulting responsibilities that state will have to shoulder when more and more child are born exposed, see Horn (2008) *Wm & Mary J Women & L* 652.

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11 5 3 2 Public health care as a facilitative model to address shared interests

Having revealed the shared interests between pregnant women and the unborn and between pregnant women and third parties, the task now is to determine how to realise these shared aims in a way that promotes both women's autonomy rights and foetal interests thus fostering not only healthy pregnancy progression but also healthy pregnancy relationships between women and the unborn. At this point one is required to contemplate the nature of the relationships at play and their existing structures. The pregnancy relationship between the unborn and pregnant women is already well established and will not be repeated here, however, it is necessary to consider how third parties would relate to addicted pregnant women under Ovens' punitive approach and then to contemplate how they should relate to pregnancy relationships in the future.

Characterising prenatal substance abuse as a health concern indicates that assistance is required, not only to overcome addiction but also sustain a drug-free life thus securing healthy pregnancies and eventual healthy family units.[243] In essence this emphasises the requirement of third-party intervention into a pregnancy relationship. Taking this standpoint provides a very clear view of how others are inherently intertwined in the issue of substance abuse and that these relationships each play an integral role: There are pregnant women in need of assistance, there is the state which passes laws regarding the issues of illegal drugs and prenatal health care and also adopts certain policies regarding the provision of health care, and the health care profession which provides the know-how and relevant care ultimately acting as the go-between regarding state resources and healthy outcomes. Also, women are viewed as being in a hierarchical relationship since they are in a position of need but the know-how and resources to meet that need rests in the hands of the medical profession and the state.

The state is viewed as the link between pregnant women and health care providers in that its response to addiction via policies and laws will determine the quality of third-party interventions and the care provided to pregnant women. Laws and policies would indicate what would be permissible interventions and what types of care could be

[243] Mohapatra (2011) *Wis JL Gender & Soc'y* 253.

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provided, if any at all. How these measures are developed and imposed will inevitably impact on the quality of the role players' relationships and the resulting outcomes stemming from those interactions. For instance, in the United States which is essentially a replica of Ovens' approach, there is third-party intervention but relationships are structured through criminal law provisions which renders relationships adversarial in nature and this adversarial stance infuses the pregnancy relationship and the relationship between third parties and the pregnancy relationship. This therefore also compromises women's autonomy and foetal interests. In this instance the relationships are so poorly constructed that the shared aims and interests described above are left unrealised or severely compromised.

Johnson explains:[244]

> Policymakers who truly wish to foster healthy childbearing must understand that government, women, and their future children all have shared interests in taking the steps necessary to promote healthy births. They also must recognize that imposing special penalties that restrict the capacity of women to control their lives will not further these shared interests. Rather, the government must take positive steps to remove obstacles that prevent women from receiving the health services, treatment, and prenatal care they need.

With that in mind, it is argued that characteristically, the assistance advanced by the state and health providers should be of such a nature that it provides the means to foster a better pregnancy relationship since a healthy foundational relationship between pregnant women and the unborn ensures better prospects of healthy pregnancy outcomes. Given that South Africa is already well-prepared for a relational approach it is further argued that a more fitting approach for the current South African climate is to turn to a relations-fostering approach to prenatal substance abuse.[245]

A treatment based approach is understood as relational in that, according to Smith, "it aims to balance the interests of women's autonomy and the state's interest in potential life resulting in policies that are more functional and just for women and their

[244] Johnson (1992) *Hastings LJ* 613.
[245] See para 11 2 4 above.

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families".[246] This emphasises a recognition of relationships and the need to maintain or foster them. Further, according to Mohapatra the public health approach to drug addiction focuses on the broader context of a particular issue rather than isolating focus on individual actions or behaviour, it considers how social determinants impact health of particular individuals.[247] She explains that it is useful to understand the social makeup of a particular concern because such knowledge allows for public policies to be developed in a way that prevents and reduces harms rather than merely punishing harms.[248] This approach more readily realises all parties' interests in a way that does not render them adversaries.

This discussion demonstrates something more must be done in South Africa and these efforts should take place outside of criminal law. In South Africa women have justiciable socio-economic rights, such rights being the right to health care and the right to reproductive health care.[249] Further, in terms of section 4 of the National Health Act[250] women in need should receive free prenatal care at state funded facilities. If they are suffering with substance-related concerns, treatment for this should be included within the ambit of prenatal care because it assists in securing healthy pregnancy progression and outcomes. Additionally, even though the Prevention of and Treatment for Substance Abuse Act[251] does not make specific mention of pregnant women's access to treatment, the equality clause (s 9 of the Constitution) explicitly prevents discrimination on the basis of pregnancy thus obligating the treatment of pregnant women who suffer from addiction. Collectively these provisions should have more impetus on the issue of prenatal substance abuse, yet the issue seems to remain unaddressed.[252] The upside to this is that there are laws in South Africa that can be used to encourage values-fostering relationships. Additionally, these laws can simultaneously serve as a means to protect women when relationships become

[246] Smith (2012) *Health Law Outlook* 14.
[247] Mohapatra (2011) *Wis JL Gender & Soc'y* 260.
[248] Ibid.
[249] S 27(1)(a) of the Constitution, 1996.
[250] Act 61 of 2003.
[251] Act 70 of 2008.
[252] According to Ovens there are no treatment facilities for pregnant women suffering with addiction, Ovens (2008) *Acta Crim* 90.

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structured in a way that compromise values of female reproductive autonomy or foetal interests.[253]

11 5 3 3 Differentiating between self-harm and third-party harms

The final issue that needs to be considered is why this thesis advances criminal sanctions against third parties who impose violence on pregnant women but not on pregnant women who impose self-harms during pregnancy. The distinction lies in the application of the not-one/not-two approach to pregnancy.

It is submitted that applying principles of criminal law to third parties who relate violently to pregnancy assists in fostering healthy pregnancies and pregnant relationships between the unborn and women. This is because both women's rights and special status of the unborn are being advanced by the application of criminal law against others. However doing the same in respect of pregnant women's conduct will compromise the pregnancy relationship and hamper efforts to secure healthy pregnancy outcomes altogether. This was clearly demonstrated in chapters nine and ten of this thesis regarding the United States experiences.

Adopting this approach does not mean that pregnant women's self-harm must not go unaddressed. If it were to be left unaddressed it would mean that the single-entities approach would be at play since the unborn's special status would be rendered unrecognised and meaningless in law. However, the not-one/not-two approach demonstrates that while women are harming themselves the presence of the unborn intensifies the extent of harm and therefore justifies increased or improved state action. The adoption of the not-one/not-two approach further means that different legal

[253] Protection will certainly be required in cases where pregnant women exist in a hierarchical relationships such as the doctor-patient or state-welfare recipient relationships, because as the United States experience demonstrates in ch 10, there are third parties who are not aligned with the treatment approach. In fact Ovens is the South African example of that position. This view is necessitated by the realisation that while the medical profession in the United States argue against the use of criminal law to address addiction, it must be noted that they are the ones at the forefront of reporting women which serves to initiate criminal proceedings. Concerning health care providers reporting women who have used drugs prenatally, see Roth *Making Women Pay* 143; 147; J Schroedel, P Fiber & B Snyder "Women's Rights and Fetal Personhood in Criminal Law" (2000) 7(89) *Duke J Gender L & Pol'y* 89 110; D Page "The Homicide by Child Abuse Conviction of Regina McKnight" (2003) 46 *How LJ* 363 372.

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measures must be applied in place of criminal law principles that will promote a healthy relationship thus improve the prospects of healthy pregnancy outcomes.

To conclude, it is noted that this discussion has been focused on responding to substance abuse during pregnancy and this is based on the fact that it attempts to suggest more constructive alternatives to Ovens' suggestions. However it should be mentioned, from a relational perspective, if the underlying concerns are to foster healthy pregnancy relationships and optimal pregnancy outcomes more effort should be placed on prevention[254] of substance abuse rather than criminalisation or responding treatment regimes. Further, attention should be drawn to the role of the state and effort should be turned towards forcing the state into action to address those social concerns that facilitate drug use. Focusing on substance abuse as a crime against the unborn is far too narrowly focused to render any meaningful outcomes in both a responsive and preventative approach.

11 5 4 Extending personhood to the unborn

Briefly, Pillay argues for the extension of personhood and foetal rights to viable foetuses in order to better protect them from a wide range of possible harms such as third-party violence, termination of pregnancy, and civil wrongs such as wrongful death issues.[255] In chapter seven,[256] this thesis demonstrated how adopting such an approach would fail to realise the intended outcomes and it was demonstrated that even in a country such as the United States which is characterised by foetal protection measures, such sweeping protections are not in place.[257] The study on the United States personhood measures aimed at extending full legal subjectivity to the unborn highlighted a hesitance to go so far as to extend personhood to the unborn because less extreme means are available to achieve protection of the unborn.[258]

[254] This falls beyond the scope of this discussion, however Mohapatra advances some compelling suggestions, see Mohapatra (2011) *Wis JL Gender & Soc'y* 264-266.
[255] Pillay (2010) *Stell LR* 236-237. Also see the detailed discussion in ch 7 para 7 3 1.
[256] Para 7 3 1.
[257] See ch 8 para 8 5.
[258] Ibid and see generally M Manian "Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health" (2013) 74 *Ohio St LJ* 75.

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This topic was strategically left for last. While I do not support Pillay's suggestion for law reform, her work does indicate a need for increased consideration of the unborn in law, particularly in respect of status. It is argued that a relational approach has achieved this without necessitating full legal subjectivity or foetal rights.

The development of special status of the unborn via a relational approach shows that full legal subjectivity is not necessary in order to create the space to consider the unborn in law. That development together with the application of the not-one/not-two approach demonstrates that the extension of full legal subjectivity to the unborn is unnecessary to protect the unborn. Up to this point, this chapter has suggested alternative ways to effectively protect the unborn without advancing any legal subjectivity akin to born persons. The relational stance adopted in part four of this thesis clearly shows that advancing the unborn's interests in a way that removes the women who carry them, creates an environment that compromises the unborn's wellbeing rather than fosters it.

11 6 Concluding Remarks

Throughout this thesis criticisms were raised against the adoption of the law in a way that either advances women's reproductive autonomy or foetal interests, as if neither of the two interests can coexist. Yet in reality pregnant women and the unborn coexist and have done so for as long as human procreation has taken place. This lived reality clearly shows how the law is failing to articulate pregnancy correctly. This incorrect view originates from our emphasis on individuality and separateness and possibly removing women from participation in the development of law regarding pregnancy related concerns.

Parts two and three of this thesis show the flaws inherent in both the single-entity and separate-entities approaches to pregnancy in law. I argue that these flaws exist because each approach ignores the connection (the living coexistence) between pregnant women and the unborn. This a-contextual view of pregnancy places these approaches in a poor position to address pregnancy related concerns: Both approaches either ignore the existence of the unborn altogether or, where the unborn are acknowledged, they are acknowledged in a way that renders pregnancy steeped

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in tensions where female reproductive autonomy hinders advancement of the unborn or where foetal interests hinders advancement of women's reproductive autonomy. For as long as one is adopting an adversarial approach it will be difficult to reach effective changes to the law. Revising the view of pregnancy in law is clearly necessary, this thesis argues that there must be another way to view pregnancy in law that is reconcilable with the lived realities of pregnant women.

Arguing for a better consideration of context of pregnant women and the unborn and emphasising the need to return focus to the unique connection between women and the unborn directed this thesis towards Nedelsky's work on relational theory in law. Her work provides a framework to simultaneously consider the unborn and women in relation to one another and also demonstrates that it is the way relationships are structured that tends to either foster or undermine certain values. Further, she demonstrates how to reflect on the law and its structuring mechanisms so as to highlight what needs changing in order to achieve desirable outcomes. In the context of pregnancy, desirable outcomes would be ones that advance female reproductive autonomy and foetal interests thus securing a respectful pregnant relationships and optimal pregnancy outcomes because both participants to pregnancy are cared for.

Having created the theoretical space to consider the unborn in relation to pregnant women ties into the Choice Act's not-one/not-two approach to pregnancy and suggests that the unborn be accorded special status. Since this special status is built on the unborn as embodied it keeps women central to any considerations concerning pregnancy in law. Focus on pregnancy as a relationship even though the pregnant woman and the unborn are not on an equal footing in law offers a number of benefits. It articulates a more fitting view of pregnancy based on female experiences of pregnancy. It allows for an expression of value of the unborn in law while simultaneously serving as a constant reminder that the unborn can never be engaged in isolation from women. Leading on from that, understanding pregnancy as an inseparable connection provides guidance how others may or may not relate to pregnant women when their primary focus relates to concerns about the unborn. Most importantly, understanding pregnancy as a connection recognises that what happens to one entity will involve the other, advancing one advances the other, and violating one violates the other.

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Adopting this view allows for an alternative view of pregnancy and those relating to pregnancy to develop in a non-adversarial way. Further, where adversarial positions begin to develop, this approach provides the evaluative mechanisms in order to address and reform those structures allowing for tensions to develop. While theoretically this makes sense, this chapter went on to test this theory and apply it to the various pregnancy-related concerns pointed out by South African scholars.

The identified areas of law in need of reform were all characteristically identified as being steeped in tension since each sought to protect the unborn while effectively side-lining women and their reproductive autonomy. A relational approach transformed those relationships, meaning that instead of the relationships being based on separatism they are now all based on entrenched connection. When using connection as the starting point it naturally guides the parameters of what would constitute constructive or destructive interventions and helps identify which mechanisms would achieve constructive interventions. It also shows that when relationships and shared interests are the elements of primary focus the right role players can be called on to effect the necessary change. Finally it reveals that while responsive actions are necessary, if our concerns are truly about realising healthy pregnancy relationships and healthy outcomes better preventative measures need to be established.

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Chapter Twelve

Concluding Reflections: Developing a Transcending Model of Pregnancy in Law via the Notion of Pregnancy Interconnectedness

12 1 Introduction

This thesis began with a central research question: Can the value of connection serve as the basis to address the tension between foetal interests and female reproductive autonomy, ultimately allowing for both interests and rights to co-exist? The thesis demonstrates that this can be done through the not-one-but-not-two approach to pregnancy (not-one/not-two approach). Further, it shows that for as long as laws develop views of pregnancy which are void of the connection between the unborn and pregnant women, a tension between female autonomy and foetal interests will persist. Without the value of connection all efforts to address pertinent issues of pregnancy in law will be unmanageable and stagnant in law.

It has become clear to me through the writing of this thesis that the process of addressing the tension between female reproductive autonomy and foetal interests during pregnancy and birth is in fact a search for a suitable model for pregnancy in law. I began the task with the assumption that there were various tensions at play depending on the particular aspect of law being applied to an issue in pregnancy. For instance, the tension that takes place in criminal law regarding third party violence involves a separate tension in pregnancy from that which transpires in private law regarding the regulation of pregnancy terminations. However, as I progressed through research and writing it has been revealed that one tension exists and it plagues all branches of law when one attempts to apply the law to a particular issue in pregnancy. The search for a solution to the tension between female autonomy rights and foetal interests during pregnancy and birth is in fact a search for a model of pregnancy in law which views pregnancy in a way that extinguishes the tension.

The drive to address the tension in pregnancy was always present but as the research progressed it became apparent that if one model of pregnancy is developed which

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indicates what pregnancy is in law and how the law can be applied to it (as a form of framework), then this new model can transcend all branches of law. This will remove the opportunity to pit the unborn against the pregnant women who carry them and allow for consistent and effective law reform.

The following is an overview of the substantive facets that motivated this thesis and contributed towards establishing the contextual importance of this topic for the advancement of women and the unborn in law. Further, the overview reveals how a revised approach to pregnancy can find suitable application to a broad spectrum of pregnancy related concerns spanning termination of pregnancy, status of the unborn, criminal harms and self-imposed harms by pregnant women.

12 2 Contemplating Motivations for this Research

Before going on to look at the overall findings of this research task, it is necessary to reconnect this thesis to the context in which the motivation for researching the topic came about. This doctorate was inspired by the many unanswered questions highlighted during my master's (LLM) research[1] but left unanswered due to the very specific and narrow research focus (being law reform to address violence against pregnant women that terminates prenatal life) and institutionally-imposed time and space constraints. It was during LLM research that I came to identify my research activities as broadly aligned to feminism, in that the outcomes sought were aimed at advancing women's rights. However, when tackling this issue in the context of pregnancy, I discovered that advancing women's rights in the current legal milieu meant that valuing the unborn and acting on that value brought with it troubling human rights concerns for women. Despite this, I held the view that there must be alternative ways to deal with this issue regarding the unborn.

It was during research undertaken for the LLM that I came to find that as female reproductive autonomy and foetal interests are currently understood or constructed in law they are oppositional which gives the sense that reconciliation between the two notions is almost impossible. Having foetal interests and female reproductive

[1] C Pickles *S v Mshumpa: A Time for Law Reform* LLM Dissertation, University of Pretoria (2010).

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autonomy pitted as polarised positions has far reaching implications regarding how law is equipped to tackle pregnancy related concerns. Within this oppositional framework the law cannot act to protect those pregnancies that are continued without somehow reducing women's autonomy rights. Alternatively, reproductive autonomy rights are so narrowly construed that protecting these rights mean that the value of the unborn will be diminished.

The LLM research demonstrated very clear areas of concern. These areas of concern included how to deal with violence against pregnant women in cases where a pregnancy is terminated as a result thereof. Additionally, what would the situation be where the unborn are granted the status of victims and therefore some form of legal subjectivity and how would that position take the notion of pregnancy in law further? The research raised the question of what should be done in cases where pregnant women engage in risky behaviours. Additionally, how would the various responses in each area of law impact on the other areas of law. Of more particular concern, was how would all these necessary developments impact South Africa's prized termination-of-pregnancy laws? However, since the LLM research was limited to law reform concerning violence against pregnant women, focus on how law reform in this area would ripple out and impact on other areas was limited and for purposes of research continuity, a doctoral study emerged.

12 3 Taking the Research Theme Further

From the experience gathered via LLM research activities this doctoral study began on the very broad premise that currently there is a tension between female autonomy rights and foetal interests during pregnancy and birth. Further research indicated that a number of areas were identified in law where the tension is present and therefore hampers progression in law because neither of the two interests or rights can simultaneously be advanced. This position hampers women's progression in law and if pregnant women are not being advanced, neither are the unborn. The aim therefore is to develop a view of pregnancy that allows for the law to address pregnancy-related concerns in a way that a tension between female autonomy rights and foetal interests does not arise.

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A number of areas were identified where there is a need for reform and also where this tension between female autonomy rights and foetal interests plays out. However, this thesis narrowed its focus to those areas that would allow for very specific research continuity following from my LLM. Therefore the areas included in this study focused on the argument for granting legal personhood to the unborn[2] and making the unborn victims when others commit violence against pregnant women.[3] It also considered the argument to regard prenatal substance abuse as child abuse against the unborn[4] and whether the Choice on Termination of Pregnancy Act[5] (Choice Act) is in need of repealing.[6] While all these themes are associated with different pregnancy-related areas, they are all linked in their aim to offer better protection to the unborn in law. Ultimately, these identified areas serve two roles, each assisted in identifying what areas are in need of increased legal attention and each demonstrated how the tension between female autonomy rights plays out thus demonstrating what the resulting implications are of this ever-present tension.

Up to this point the tension between female autonomy rights and foetal interests was identified and known to be present in a number of areas which are currently in need of reform. However, more was needed: If the aim of the thesis is to address the tension then it is necessary to know where the tension possibly originated from.

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2 R Pillay "The Beginning of Human Personhood: Is South African Law Outdated?" (2010) 2 *Stell LR* 230. This call for reform highlights that the law needs to be developed so as to allow for a discourse of the unborn in law which advances better protection generally.

3 H Kruuse "Fetal 'Rights'? The Need for a Unified Approach to the Fetus in the Context of Feticide" (2009) 2 *THRHR* 126; G du Plessis "Feticide: Creating a Statutory Crime in South African Law" (2013) 1 *Stellenbosch Law Review* 73. Calling for a view of the unborn as victims of crime indicates that the law might need to be reform in so far at it fails to acknowledge that when a pregnant woman is attached, more than bodily injury occurs in that a pregnancy might be lost too. This needs recognition in law.

4 M Ovens "Maternal Substance Abuse in South Africa: An Area for Concern?" (2008) 1 *Acta Crim* 77; M Ovens "A Criminological Perspective of Prenatal Abuse of Substances during Pregnancy and the Link to Child Abuse in South Africa" (2010) 11(2) *CARSA* 38. Introducing criminal sanctions for prenatal substance abuse is an indication that too little s being done regarding drug use and abuse and the resulting implication for children born from women who abused drugs prenatally and are born into families who continue to use drugs.

5 Act 92 of 1996.

6 S de Freitas "The South African Constitutional Court and the Unborn" (2012) 5(2) *IJRF* 56; S de Freitas & G Myburgh "The Relevance of Science for the Protection of the Unborn" (2009) 45(1 & 2) *TCW* 61. Looking to repeal termination-of-pregnancy laws is viewed as an indication that more can be done regarding the prevention of termination of pregnancy and the question is how to do so without removing the right of women to choose what is best for them without the imposition of undue external restraints.

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12 4 Foundational Aspects: Understanding the Context of Pregnancy Adversarialism

Acknowledging that there is a tension during pregnancy, the next step was to consider what factors encouraged the rise of the notion of adversarialism in pregnancy. The identified tension did not come about in a vacuum and it was this search for context that part one of this thesis considered.

It is well known that women's history is characterised by roles associated with subordination, domestication and reproduction, but very little was known of the basic historical position of unborn. Further, less is known about the significance of pregnancy and how the position of the unborn and pregnant women intersected in history (how they were positioned in relation to one another). A number of aspects stand out from the research findings.

Foremost, it seems that from the period spanning ancient Greece through to the Middle Ages pregnant women and the unborn were one and in that oneness, they usually resided under the head of the household in which the woman lived. As a result of this shared subordinate position, the unborn and women were not structured relationally to be in tension with one another but maybe only in tension with the head of the household. There are clear indications that women acted contrary to the head of the household because scholars have referred to "women's knowledge" and the use of magic potions and amulets to curb unwanted pregnancies and so forth. These actions did not seem to be labelled in legal terms equivalent to reproductive autonomy as known today but looking retrospectively, they could certainly constitute underground attempts at securing bodily autonomy. Also, the unborn did receive attention but articulating that consideration into any workable theory or policy was difficult given the lack of knowledge regarding the embodied and therefore invisible development of the unborn. In respect of the unborn, it seems there was no apparent legal term (such as foetal interests) designated to what the unborn might mean and how that meaning could be imposed in law or otherwise, except in so far as the unborn represented heirs and connection to a particular household.

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Eventually Christianity came into the picture and women's subordination under the household head was confirmed and inculcated further while the unborn were slowly recognised as entities of inherent worth. Nevertheless, these developments do not in themselves give an indication of a specific tension between women advancing an inner direction and the unborn as vested with distinct interests in law. The makings were there, however, because these teachings permeated the later development of laws.

With this historical perspective in place, what is gleaned from the two chapters on feminism and the scientifically-justified individuation of the unborn is that the terms "female autonomy rights" and "foetal interests" are contemporary terms. I argue that these terms are incarnations of the developments that took place during the rise of feminism and foetal individuation, and the environment in which the terms came to be developed seems to have played a significant role in positioning these terms as polarised.

The historical study brought home how negative women's history was in comparison to the freedoms presently being enjoyed.[7] Women's history must have been something inherently demeaning in many respects and ultimately it was not accepted by women because an entire social movement was born in response to it, which still remains strong today. The fact that it took an entire social movement to bring about change over a vast span of time indicates an environment of entrenched opposition to women's emancipation. Furthermore, the fact that the movement is still active today can also be interpreted as indicating that opposition to further emancipation is ever-present in varying degrees.[8] Opposition to emancipation already sets an adversarial tone.

Furthermore when one considers that women were aiming for emancipation from the constraints of reproduction, it is clear that the drive for freedom would clash with the newly discovered foetus with treatable defects. This is seen to result in numerous

[7] This is not to say that the task is complete because the extent of freedoms enjoyed directly correlates with race, socio-economic status, gender, culture and so on.

[8] The study of the United States in part 3 of this thesis demonstrates this is certainly true, however the fact that South Africa does not share the same intensity of opposition comparable to the United States shows that opposition is common but the degrees of severity differs from one jurisdiction to the next.

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efforts to curb women's conduct during pregnancy for the benefit or treatment of the unborn.

In spite of feminism taking several and at times opposing positions, the uniting factor is that, as a movement, feminism must advance women. Since reproduction was one of the primary sources of subordination and women's position in domestic life, focus was on securing the freedom to choose in respect of reproductive matters. Given the very central role that reproduction plays in women's lives, it makes sense that feminism generally viewed securing reproductive freedom for women as a precondition for equality. These efforts must surely have been frustrated by the simultaneous opposition against emancipation and the increased discoveries regarding foetal development. These developments in reproductive health were supposedly meant to secure safe progression through pregnancies but the environment in which these developments took place allowed for the appropriation of science by some to individuate the unborn as separate entities and present them as being worthy of separate consideration and protection beyond the field of medicine.

Also, a central idea of feminism is to bring woman back into the centre so as to deconstruct what is considered a "norm". This is achieved by increasing women's participation and rendering their experiences relevant to the development of better informed norms. One of the reasons why a comprehensive history of women in relation to the unborn could not be provided is because women as a group were not recorded, their first-hand experiences on how they lived and functioned within the various classes is missing. They were somewhat invisible from the records of history, however the extent of invisibility varied according to classes. This indicates a lack of participation which means that many laws and policies were developed without female perspective and input. Thus as science develops and brings new issues to the fore regarding pregnancy, such as the unborn as separate entities, the law is poorly equipped to articulate workable solutions because of women's past exclusion. Consequently, principles are applied and enforced to pregnancy-related issues that do not really resonate with the lived realities of pregnancy and this can entrench tensions.

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The simultaneous individuation of the unborn and the development of theories regarding the unborn with the use of science to justify those theories, proves particularly problematic to a movement seeking to define women beyond procreation and child bearing and rearing. On the one hand these developments are meant to secure safe progression through pregnancy and offer increased choices concerning procreation but on the other hand women are being side-line once again because the focus is on the unborn as separate entities even though women's bodies serve as the means for prenatal existence. This indicates that feminist aims are being frustrated in two respects: First, women are possibly being rendered invisible again and this indicates that there is the potential for history to repeat itself. Second, the significance of women and their experiences are being devalued thus denying them participation.

As a whole, gaining an understanding of this context was incredibly valuable in that it showed where women came from, where they are going and it provides indications of how they plan to reach their desired ends. It also showed how the presence of a pregnancy has the potential to derail women's efforts for freedom and reproductive autonomy especially in an environment infused with wider social tensions which frustrate women's general efforts for advancement. It also demonstrates that there is a lot at stake when developing an understanding of pregnancy in law because women's history serves as a constant reminder of where the result of our reform efforts are not permitted to go. Women must remain central, their participation must be secured and maintained and their interests and rights should not be sacrificed for externally defined motivations (being those developed by third parties and not pregnant women themselves). Part one also shows that there are flourishing debates about the unborn and some of these debates are being developed in ways that remove women as significant role players in pregnancies and any move forward must rectify this. This position is premised on the fact that pregnancy is a woman's concern, more so than anyone else's because it is something that occurs within them.

Finally, understanding the context demonstrates that pregnancy is complex and not simply a matter of theoretical definition of the unborn. Pregnancy is a manifestation of "reproduction" which can either be a source of liberation when it is wanted or a struggle for women when it is unwanted. Pregnancy is also a symbol of existing prenatal life which is highly prized by different people who are situated differently across various

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contexts. Further, it is an embodied experience for women. These multidimensional perspectives in themselves increase opportunities for tensions between the concepts of reproductive autonomy and foetal interests. Regardless, foundational pointers bring home the importance of women's rights and the fact that the unborn do exist even if in an embodied form, and the remaining question is how to manoeuvre these complexities in a constructive way.

12 5 Pregnancy in South Africa

Having developed an understanding of what factors contribute towards the development of tensions it was necessary to narrow down the focus to the current developments in South Africa regarding pregnancy in law. Part two of this thesis covered this aspect and considerable attention was given to the legal positions of pregnant women and the unborn respectively. Ultimately part two developed an understanding of the current context of pregnancy, its participants and how they are positioned in law in relation to one another. It further considered how these positions can be improved on by looking at various calls for reform of South African laws.

The study of the position of pregnant women in law revealed that reproductive autonomy as a concept receives substantial support via constitutionally infused principles and rights but its scope is very narrow in South Africa. This narrow construction results in poor realisation of autonomy for women while continuing with pregnancy and blurs the boundaries when considering how to develop laws relevant to instances of pregnancy continuation.

When researching reproductive autonomy and the rights that support autonomous experience, most of the literature relevant to pregnancy focuses primarily on the right to terminate a pregnancy, it therefore focuses on the right of a woman to not be a parent. This is clearly an underdeveloped concept. I view reproduction as not only avoiding parenthood but also securing it. The South African picture of reproductive autonomy is very constricted and obstructs the consideration of autonomy in the

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context of pregnancy continuation. I viewed this as an area in need of nurturing,[9] which allows for reproductive autonomy to be extended to include the consideration of pregnancy continuation and any action taken during pregnancy in relation to the pregnancy implicates women's autonomy in reproduction.[10]

Having argued for a more inclusive understanding of reproductive autonomy, another issue was discovered. On the one hand there are many supportive mechanisms in relation to parenthood avoidance in the form of constitutionally informed legislation[11] and case law[12] enhancing the reach of legislative and constitutional provisions. On the other hand, in the context of pregnancy continuation, there is clearly a lack of supportive mechanisms specifically relevant to the protection and advancement of women's rights during pregnancy continuation and birth.[13] For instance the Choice Act does not have a correlating act, something akin to Choice on Continuation of Pregnancy Act[14] which would regulate private or public relations between third parties and pregnant women for the duration of a pregnancy. Without recognising the extra-ness that pregnancy represents for women and the unborn, the law will be unable to address the very unique concerns relevant to pregnancy such as distinctive health care or treatment needs or the unique vulnerability pregnant women face in the context of criminal conduct.

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9 Nurturing is used because the research on constitutional rights showed that these rights are equally applicable to all issues relevant to pregnancy generally and not just termination of pregnancy.

10 Looking at parts 1 and 2 together, the possible reason why this is in place is because feminists were first and foremost seeking freedom in choice concerning reproduction which would mean that where conception is unwanted or forced, mechanisms must be in place for women to rectify this, so it would make sense to first secure the right not to be a parent and then move on to secure rights while pursuing the goal of parenthood.

11 For instance the Choice Act.

12 For instance see, *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (T); *Christian Lawyers of SA v Minister of Health* 1998 (4) SA 1113 (T); *S v Mshumpa* 2008 (1) SACR 126 (E).

13 This is not to say that nothing exists at all, but when comparing provisions relevant to terminate a pregnancy in law and pregnancy continuation, there is a dearth of protective mechanisms for those women choosing to continue with pregnancy. The reason for this might relate to the fact that reproductive autonomy is not properly developed in South African law and therefore litigation on the topic will not take place nor will legislation be introduced.

14 Schulman argues for similar legislation in the context of holding negligent medical professionals criminally accountable in cases where they cause a stillbirth, see generally M Schulman *The Nasciturus Non-Fiction, The Libby Gonen Story: Contemporary Reflections on the Status of the Nascitural Personhood in South African Law* LLM Dissertation, University of the Witwatersrand (2014). Although he adopts a separate entities approach nonetheless.

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The study of the position of pregnant women in law helped to identify how expansive their autonomy rights really are. It also provided a point of reference which specifies very clear parameters in which law reform efforts relevant to pregnancy must be cognisant of in order to secure rather than undermine their autonomy. It also demonstrates that something is missing in South African law. If women are continuing with pregnancies, there is some form of investment taking place in the unborn but the lack of legislation or case law on the matter points to the fact that this topic is not reaching law's full attention. On that note my attention shifted to the unborn and their position in South African law.

The study of the unborn brought "approaches" to pregnancy to the fore in that how the law approaches pregnancy is an indication of the position of the unborn. Three approaches to pregnancy were identified, the single-entity, the separate-entities, and the not-one/not-two approaches. South Africa is recognised as adopting two of these approaches simultaneously, the single-entity approach is applied to all areas of the law except in the context of termination of pregnancy where the not-one/not two approach is relevant. Under the single-entity approach, the unborn's interests are not recognised in law and pregnant women are viewed as the only relevant entities, this approach is a result of South Africa's adherence to the common law born-alive rule. Whereas, the not-one/not-two approach recognises the existence and intrinsic worth of the unborn but does so contextually, meaning that they are understood to be part and parcel of women and therefore their interests can only be advanced in relation to women and their rights.

The adoption of the single-entities approach is problematic in a number of respects. It denies the unborn's existence as entities with interests and it denies the lived reality of pregnancy as experienced by women who progress through pregnancy with the unborn gestating within them. Furthermore, it is removed from scientific fact and it fails to resonate with contemporary knowledge and experiences of the unborn. Therefore the application of the single-entity approach in law is no longer appropriate.

Further issues which stand out as peculiar but which echo with what was highlighted regarding women's autonomy rights: The unborn's interests are not recognised in broader areas of law such as those regulating health care, criminal law, status and so

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on and these are the laws relevant to the situation when a pregnancy is continued. Foetal interests are recognised when termination of pregnancy is at issue in that women's rights to terminate a pregnancy is increasingly curbed as pregnancy progresses and this is viewed as being linked to the unborn's interests.[15] By adopting two different approaches to pregnancy, South African law is assuming contradictory positions regarding foetal interests because it only recognises foetal interests when it comes to terminating prenatal life by pregnant women but not when it comes to ensuring and maintaining quality progression through gestation towards live birth. This is a very contradictory position and it does not make sense for this to be maintained, thus law reform is necessary in this regard.

This thesis is the first research output to recognise South Africa as adopting two different approaches to foetal interests. While a number of academics have recognised the Choice Act as advancing and limiting women's rights for the benefit of the unborn none have understood this process as the product of relational thinking processes nor has a descriptor ever been assigned in South Africa such as the not-one/not-two approach. Instead, in South Africa, the majority of scholars have laboured under the erroneous view that the Choice Act applies the single-entity approach. My interpretation shows otherwise. Arguing for an alternative view of the Choice Act created the opportunity for the relationships between the unborn and pregnant women to be taken beyond mere termination of pregnancy and infused in other debates involving pregnancy. This relational interpretation of the Choice Act is supported not only by case law[16] regarding the Choice Act but by the entire relational setting found in South African constitutional law.[17]

What I drew from the two chapters is that in both the approaches being applied in South African law, there is no room for a tension to develop between female reproductive autonomy and foetal interests. This rests on the fact that under the single-entity approach the interests of the unborn are not recognised and under the not-

[15] This resonates with the fact that pregnancy continuation in respect of women's rights has not been properly developed, and probably explains why foetal interests would not be recognised in those either because the extra-ness that pregnancy embodies is being overlooked. If pregnancy continuation is not receiving increased attention the unborn would not either.
[16] *Christian Lawyers* (2005).
[17] As demonstrated in ch 5 para 5 2 1.

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one/not-two approach both foetal interests and reproductive autonomy are advanced in relation to one another in a balanced way. However there is clearly a need for reform of the law away from the single-entity approach and when considering how South African scholars suggested reform a tension loomed. Furthermore, the study of the United States position demonstrated that as a result of this tension their proposals for law reform will fail to advance pregnancy in law.

12 6 Law Reform and the Appropriate Approach to give Effect to Reform

Regarding the identified areas in need of reform, I took the position that these are legitimate areas in need of increased consideration in the context of pregnancy.[18] I further align my position with the other South African scholars in so far as they all reject the single-entity approach to pregnancy. However, that is as far as agreement goes, and my position completely diverges from the commonly found positions among South African scholars in a number of respects. First, the reasons advanced for substantiating reform differs in that I propose protecting pregnancy as a representation of a unit between pregnant women and the unborn, thus allowing for a balanced consideration of female reproductive autonomy and foetal interests. On the other hand, South African academics argue for direct protection of the unborn to the exclusion of women. Second, their method of effecting reform takes place via the application of the separate-entities approach, whereas I advance a relational approach via the application of the not-one/not-two approach to pregnancy which is already found to be in place in South Africa and its legitimacy is therefore already established.

The diverging approach employed in this thesis takes its cue from the concerning developments in the United States regarding pregnant women's rights in the context of the separate-entities approach. What the study of United States laws revealed was the fact that too many complications and contradictory outcomes arise as a result of adopting a separate-entities approach to pregnancy. This study showed was that when the relationship between women and the unborn they carry are structured in a way that fosters tensions, poor pregnancy outcomes must be expected. In part three of this

[18] Except in so far as it has been argued that the Choice Act should be repealed or access to termination of pregnancy should be increasingly curbed further than it currently stands.

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thesis, I argue that these poor outcomes are a direct result of the fact that the separate-entities approach is a poor representation of the unborn in relation to pregnancy and when the pregnancy unit is not properly represented, foetal interests and women's rights cannot be adequately advanced. Further, where women's rights are violated in order to secure foetal interests, the condition of pregnancy is compromised and this inevitability negatively impacts on the unborn, albeit indirectly. Given the expansive constitutional protections in place for women this approach will not pass constitutional muster in South Africa. Women's rights are entrenched and if one is aiming to address pregnancy-related concerns in South African law it must be done in relation to those rights.

In search for a more effective and accurate articulation of pregnancy in law, I was drawn to feminist views on pregnancy. I viewed feminism as appropriate because it serves as an established voice for women (in spite of diverging approaches in it), and it made sense to turn in that direction because pregnancy is a woman's concern in that only women experience the unique physicality of pregnancy. Further, when laws are developed around pregnancy it will have a direct impact on women, either as part of a pregnancy unit or individually and their participation is necessary so as to ensure their views and experiences are included in broader considerations when developing the law.

It was Nedelsky's relational feminism that categorically shaped the development of the way forward.[19] First, she highlighted that everyone is involved in relationships and these relationships are central to who we are and the quality of life's experiences. Second, that relationships exist not only between persons but between persons and other entities such as the unborn and that a responsibility to lessen harm originates from that relationship. Third, the quality of the various relationships is shaped by those forces that structure relationships such as the law and wider contextual issues being social and cultural norms. She explains that when relationships are not of a good quality in that capacities are not being developed or rights are being undermined, then

[19] J Nedelsky "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1987) 1(7) *Yale JL & Feminism* 7; J Nedelsky "Property in Potential Life? A Relational Approach to Choosing Legal Categories" (1993) 6(2) *Can JL & Jurisprudence* 343; J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011).

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one is required to restructure the law to allow for proper realisation of rights, interests or capacities.

Her emphasis on constructing relationships in a way that builds and fosters capacities and rights revealed to me that if the aim of this thesis is to address the tension between women's rights and foetal interests, then it is necessary to restructure the law, polices and general arguments in a way that removes the opportunity for tension between women and the unborn. What stood out after studying Nedelsky's work was the fact that in the context of the United States study, all the commentaries against the separate-entities approach were adopting a relational approach in that they were all seeking to secure a healthy pregnancy unit for both pregnant women and the unborn. Collectively, their arguments demonstrated that when a healthy relationship or unit is secured between pregnant women and the unborn, better pregnancy outcomes can be expected. This view supports the notion that women are not naturally in an adversarialist position with the unborn,[20] but, rather, it is the way that pregnancy is being structured in law or by other third parties that creates the notion of there being a tension.

Building from Nedelsky, I argued that pregnant women are in a relationship with the unborn they carry and this constitutes a pregnancy relationship. Characteristically, this relationship is unlike any other in that it takes place in one body and the entities cannot be separated unless via birth, miscarriage or termination of pregnancy. The uniqueness of this relationship therefore means that women and the unborn are two but their inseparability makes them one. Further, since the unborn are embodied within women, others cannot relate to them directly but only to the unit of pregnancy being the pregnancy relationship. This position demonstrates that when something needs to be done to protect the unborn, it must be done via the women who carry them and must therefore be respectful of their rights as human beings. This forces a broadening of context, instead of merely asking how can the foetus be protected in law, the

[20] The term naturally is being used to point out that pregnancy is a relationship of interconnection and a source of life under the right circumstances. It can also be characterised by reciprocity in that the unborn have the nurture of women's bodies to gestate and continue development until birth and women get to become parents in cases where pregnancy is planned or wanted and the child is not put up for adoption after birth. In the end, the two entities "live" together and if pregnancy was inherently adversarialist, I cannot imagine many pregnancies being carried to term, there must be alignments of interests between the two entities in their unique connection.

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question grows into how can the law secure an environment that protects healthy pregnancy progression and outcomes as a “unitary need” (being made up of foetal interests and women’s autonomy rights).

The uniqueness of this relationship demands the development or use of a pregnancy-specific approach rather than the mere application of existing legal positions of either the single-entity or separate-entities approaches generally applicable to individual born persons. The not-one/not-two approach neatly falls in line with this requirement. It meets the relational demands of acknowledging the unborn and by identifying pregnancy as not constituting two separate entities it positions the recognition of the unborn in direct relation to the pregnant women carrying them and their rights. Furthermore, this approach is already applied in a pregnancy-specific context, being the South African Choice Act.

Identifying that the unborn are recognised in law begs the question, what is it about the unborn that is being recognised in law? I proposed that the unborn be recognised as forming part of humanity which is in line with what science tells us. However, they are also embodied (thus also falling in line with the lived reality of pregnancy) and as a result of their embodied nature, they are not legal subjects either. Instead the unborn are vested with special status which is a unique status in law devised specifically for the distinctive position of the unborn. This status demands that protective measures are increasingly made available as pregnancy progresses closer to birth to secure healthy pregnancies and pregnancy outcomes for both women and the unborn. Developing and working with this status and securing this status’ connection to pregnant women’s (by emphasising the embodied nature of the unborn) women’s rights and foetal interests must mutually form part of securing a way forward.

In this respect there is space created in law to recognise the unborn in an appropriate way while also acknowledging women’s rights and their wider social and cultural experiences. This nullifies the necessity to go so far as to extend personhood to the unborn in order to acknowledge and protect their interests. Furthermore, chapter eleven demonstrated how this approach can be applied to other areas of pregnancy in law thus allowing for reform without compromising either foetal interests or female autonomy rights. Most importantly, this approach allows for third parties to be held

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criminally liable when the pregnancy relationship is arbitrarily harmed but encourages more constructive approaches to be adopted when addressing issues of self-harm during pregnancy. This proves the transcendental character of this approach which therefore reflects its appropriateness for its application to pregnancy in law.

12 7 A Closing Note

This thesis has shown that neither the single-entity nor the separate-entities approach adequately recognise or engage the connected nature of pregnancy as reflected throughout this thesis. The single-entity approach makes non-entities of the unborn and fails to give effective legal recognition to broader constructs of female reproductive autonomy. Application of the separate-entities approach to pregnancy goes on to make almost obscure non-entities of pregnant women and, where they are recognised, it is on a limited basis and focuses mainly on them as adversarial participants in a pregnancy. Furthermore, neither approach gives effective legal recognition to the values and interests of the unborn. It is therefore concluded that both approaches to pregnancy fail as a result of the very fact that each does not unsuccessfully grasp the lived experiences of pregnancy and therefore do not provide an adequate foundation for a tension-free model of pregnancy in law.

On that note, I advance that when considering pregnancy under the law, the value of the unborn must be recognised, but understood in relation to pregnant women. Understanding the togetherness that pregnancy represents allows the law to recognise both entities that constitute the pregnancy. Any calls for law reform regarding pregnancy, pregnant women or the unborn may essentially fail because their foundational approaches tend to exclude one of the constituent “parties” that forms a pregnancy. Without women, no pregnancies would exist – and the same can be said of the unborn.

The not-one/not-two approach employs the embodied connectedness of pregnancy as a point of departure, and seeks to advance an inclusive approach to issues stemming from pregnancy. It uses the pregnancy relationship and its context as an interpretative tool in determining a way forward. While this approach may not always place the unborn’s interests above those of the pregnant women carrying them, it does

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require that their interests be considered with reference to the dictates of context. The very fact that South Africa already has the makings of this approach in the judicial interpretation of the Choice Act in *Christian Lawyers* (2005) speaks volumes regarding its appropriateness and constitutional soundness. It is recommended that the not-one/not-two approach should therefore receive proper consideration henceforth and, where reform is recommended, those recommendations should be tested against the demands of this model of pregnancy. This will ensure that tensions are avoided and the interests of both participants to the pregnancy are advanced.

This thesis shows that focusing on the value of connection between pregnant women and the unborn serves the foundation to securing a tension-free way forward for law relating to pregnancy. It also indicates that the law plays an integral role in structuring relationships and can thus protect both women and the unborn from possible infringements through adversarialist interventions.

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Bibliography

Books, Chapters in Books, Journal Articles and Related Publications

L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (Juta, Claremont 2012)

C Albertyn, L Artz, H Combrinck, S Mills & L Wolhunter "Women's Freedom and Security of the Person" in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (Juta, Cape Town 2007) 295

C Albertyn "Equality" in E Bonthuys & C Albertyn (eds) *Gender, Law, and Justice* (Juta, Cape Town 2007) 82

N Aljalian "Fourteenth Amendment Personhood: Fact or Fiction" (1999) 73(2) *St John's Law Review* 495

American Society of Addiction Medicine "Survey Finds Lower Rates of Substance Use by Pregnant Women, but Rapid Resumption of use After Pregnancy" (2009) 24(4) *American Society of Addiction Medication News* 16

M Arthur "Early Greece: The Origins of the Western Attitude toward Women" (1973) 6 *Arethusa* 7

B Arzuaga & B Lee "Limits of Human Viability in the United States: A Medicolegal Review (2011) 28(6) *Pediatrics* 1047

S Basu, J Andrews, S Kishore, R Panjabi & D Stuckler "Comparative Performance of Private and public Healthcare Systems in Low- and Middle-Income Countries: A Systemic Review" (2012) 9(6) *Public Library of Science Medicine* e10001

C Beasley *What is Feminism? An Introduction to Feminist Theory* (Sage Publications, London 1999)

© University of Pretoria

B Becker-Cantarino "'Feminist Consciousness' and 'Wicked Witches': Recent Studies on Women in Early Modern Europe" (1994) 20 *Signs* 152

B Bekink *Principles of South African Constitutional Law* (LexisNexis, Durban 2012)

V Beetly "Mississippi Initiative 26: Personhood and the Criminalization of Intentional and Unintentional Acts by Pregnant Women" (2011) 81 *Supra* 55

J Bermúdez "The Moral Significance of Birth" (1996) 106(2) *Ethics* 378

D Bilchitz "Health" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 4 2012) 56-1

P Biller "Birth-Control in the West in the Thirteenth and Early Fourteenth Centuries" (1982) 94 *Past and Present* 3

B Bird "Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability among Fetal Pain and Fetal Homicide Laws" (2014) 25(1) *Hastings Women's Law Journal* 39

J Birenbaum "Contextualising Choice: Abortion, Equality and the Right to Make Decisions Concerning Reproduction" (1996) 12 *South African Journal on Human Rights* 485

M Bishop & S Woolman "Freedom and Security of the Person" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 6 2008) 40-1

R Bloch "Medieval Misogyny: Women as Riot" (1987) *Representations* 1

T Boezaart "Child law, the Child and South African Private Law" in T Boezaart (ed) *Child Law in South Africa* (Juta, Claremont 2009) 3

T Boezaart *Law of Persons* (Juta, Claremont 2010)

© University of Pretoria

J Boley “The History of Caesarean Section” (1991) 145 *Canadian Medical Association Journal* 319

E Bonthuys “Gender and Work” in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (Juta, Cape Town 2007) 244

D Boonin *A Defense of Abortion* (Cambridge University Press, Cambridge 2003)

J Boswell “*Expositio* and *Oblatio*: The Abandonment of Children and the Ancient and Medieval Family” (1984) 89 *American Historical Review* 10

C Botha *Statutory Interpretation: An introduction for Students* 5 ed (Juta, Cape Town 2012)

A Braithwaite “The Personal, the Political, Third-Wave and Postfeminists” (2002) 3(3) *Feminist Theory* 335

D Brand “Judicial Deference and Democracy in Socio-Economic Rights in South Africa” (2011) 3 *Stellenbosch Law Review* 614

K Brennan “Evidence of Infanticide and Exposure in Antiquity: Tolerated Social Practice, Uncontrolled Phenomenon or Regulated Custom” (2002) 2 *University College Dublin Law Review* 92

G Brown “Bei Bei Shuai: Pregnancy, Murder, and Mayhem in Indiana” (2014) 17(2) *Journal of Gender, Race & Justice* 221

F Buckstaff “Married Women’s Property in Anglo-Saxon and Anglo-Norman Law and the Origin of the Common-Law Dower” (1893) 4 *Annals of the American Academy of Political and Social Science* 33

V Bullough “Medieval Concepts of Adultery” (1997) 7 *Arthuriana* 5

J Burchell *Principles of Criminal Law* 3 ed (Juta, Lansdowne 2005)

© University of Pretoria

J Burchell and J Milton *Principles of Criminal Law* (Juta, Claremont 2010)

B Burkstrand-Reid "The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence" (2010) 81 *University of Colorado Law Review* 97

B Burkstrand-Reid "From Sex for Pleasure to Sex for Parenthood: How the Law Manufactures Mothers" (2013) 65 *Hastings Law Journal* 211

W Burnham *Introduction to the Law and Legal System of the United States* (West Group, Minnesota 1995)

S Butler "Abortion by Assault: Violence against Pregnant Women in the Thirteenth-and-Fourteenth-Century England" (2005) 17 *Journal of Women's History* 9

S Butler "A Case of Indifference? Child Murder in Later Medieval England" (2007) 19 *Journal of Women's History* 59

S Butler "Abortion Medieval Style? Assaults on Pregnant Women in Later Medieval England" (2011) 40 *Women's Studies: An Inter-Disciplinary Journal* 778

A Cameron "The Exposure of Children and Greek Ethics" (1932) 46 *Classical Review* 105

E Cantarella *Pandora's Daughters: The Role and Status of Women in Greek and Roman Society* (John Hopkins University Press, Baltimore 1981)

E Cantarella "Dangling Virgins: Myth, Ritual and the Place of Women in Ancient Greece" (1985) 6 *Poetics Today* 91

P Carstens & D Pearmain *Foundational Principles of South African Medical Law* (LexisNexis, Durban 2007)

© University of Pretoria

P Carstens & R du Plessis "Medico-Legal Aspects Pertaining to Children" in T Boezaart (ed) *Child Law in South Africa* (Juta, Claremont 2009) 587

M Casper "Operation to the Rescue: Feminist Encounters with Fetal Surgery" in L Morgan & M Michaels (eds) *Fetal Subjects, Feminist Positions* (University of Pennsylvania Press, Pennsylvania 1999) 101

I Chasnoff, W Burns, S Schnoll & K Burns "Cocaine Use in Pregnancy" (1985) 313 (11) *New England Journal of Medicine* 666

J Christman "Relational Autonomy, Liberal Individualism and the Social Constitution of Selves" (2004) 117 *Philosophical Studies* 143

A Christoffersen-Deb "Viability: a Cultural Calculus of Personhood at the Beginning of Life" (2012) 26(4) *Medical Anthropology Quarterly* 575

G Clark "Roman Women" (1981) 28 *Greece & Rome* 193

G Cohen & S Sayeed "Fetal Pain, Abortion, Viability, and the Constitution" (2011) 39(2) *Journal of Law, Medicine & Ethics* 235

E Coleman "Infanticide in the Early Middle Ages" in S Stuard (ed) *Women in Medieval Society* (University of Pennsylvania Press, Philadelphia 1976) 47

J Coleman "An Introduction to Feminism in a Postfeminist Age" (2009) 23(2) *Women's Studies Journal* 3

L Collins & S Crockin "Fighting 'Personhood' Initiatives in the United States" (2012) 24 *Reproductive BioMedicine* 689

R Cook & B Dickens "The Injustice of Unsafe Motherhood" (2002) 2 *Developing World Bioethics* 64

© University of Pretoria

C Daniels “Fathers, Mothers, and Fetal Harm: Rethinking Gender Difference and Reproductive Responsibility” in L Morgan & M Michaels (eds) *Fetal Subjects, Feminist Positions* (University of Pennsylvania Press, Philadelphia 1999) 83

S de Freitas & G Myburgh “The Relevance of Science for the Protection of the Unborn” (2009) 45(1 & 2) *Journal for Christian Scholarship* 61

S de Freitas & G Myburgh “Seeking Deliberation on the Unborn in International Law” (2011) 14(5) *Potchefstroom Electronic Law Journal* 9

S de Freitas “The South African Constitutional Court and the Unborn” (2012) 5(2) *International Journal for Religious Freedom* 56

D Dell & B O’Brien “Suicide in Pregnancy” (2003) 102(6) *Obstetrics & Gynecology* 1306

B Dickens & R Cook “Legal Effects of Fetal Monitoring Guidelines” (2010) 108(2) *International Journal of Gynecology & Obstetrics* 170

B Dickens & R Cook “Legal and Ethical Issues in Fetal Surgery” (2011) 115 *International Journal of Gynecology and Obstetrics* 80

S Dickison “Abortion in Antiquity” (1973) 6 *Arethusa* 159

J Donovan *Feminist Theory: The Intellectual Traditions* (Continuum International Publishing, New York 2012)

D Dombrowski “St. Augustine, Abortion, and Libido Crudelis” (1988) 49 *Journal of the History of Ideas* 151

G Douglas *Law, Fertility and Reproduction* (Sweet and Maxwell, London 1991)

J Downie & J Llewellyn “Relational Theory & Health Law Policy” (2008) (Special Edition) *Health Law Journal* 194

© University of Pretoria

G du Plessis “Feticide: Creating a Statutory Crime in South African Law” (2013) 1 *Stellenbosch Law Review* 73

B Duden “The Fetus on the ‘Farther Shore’: Toward a History of the Unborn” in L Morgan & M Michaels (eds) *Fetal Subjects, Feminist Positions* (University of Pennsylvania Press, Pennsylvania 1999) 13-25

D Dudley, R Goldenberg, S Conway, R Silver, R Saade, M Varner, H Pinar, D Coustan, R Bukowski, B Stoll, M Koch, C Parker & U Reddy “A New System for Determining the Causes of Stillbirth” (2011) 116(2) *Obstetrics & Gynecology* 254

R Dworkin *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Alfred A Knopf, New York 1993)

F Easton “Gender’s Two Bodies: Women Warriors, Female Husbands and Plebeian Life” (2003) 180 *Past & Present* 132

B Epstein “The Successes and Failures of Feminism” (2002) 14 *Journal of Women’s History* 118

E Eyben “Family Planning in Graeco-Roman Antiquity” (1980) 11 *Ancient Society* 5
Eyben (1980) *Ancient Society* 5

D Fagundes “What we Talk About When We Talk About Persons: The Language of a Legal Fiction” (2001) 114 *Harvard Law Review* 1745

E Falk *Privacy, Due Process, and Morality: A Legal Analysis of Federal Fetal Personhood* Honours Capstone, American University (2013)

E Farnsworth *An Introduction to the Legal System of the United States* 4 ed (Oxford University Press, Oxford 2010)

© University of Pretoria

R Feen “Abortion and Exposure in Ancient Greece: Assessing the Status of the Fetus and ‘Newborn’ from Classical Sources” in W Bondeson, H Engelhardt, S Spicker & D Winship (eds) *Abortion and the Status of the Fetus* (D. Reidel Publishing Company, Dordrecht 1983) 283

M Fineman “Feminist Legal Theory” (2005) 13 *Journal of Gender, Social Policy & the Law* 13

M Fitzpratick “Fetal Personhood after the Unborn Victims of Violence Act” (2006) 58 *Rugters Law Review* 553

J Flavin *Our Bodies, Our Crimes: The Policing of Women’s Reproduction in America* (New York University Press, New York 2009)

J Flavin & L Paltrow “Punishing Pregnant Drug-Using Women: Defying Law, Medicine and Common Sense” (2010) 29(2) *Journal of Addictive Diseases* 231

N Ford *When did I Begin? Conception of the Human Individual in History, Philosophy and Science* (Cambridge University Press, Cambridge 1988)

M Ford “Nothing and Not-Nothing: Law’s Ambivalent Response to Transformation and Transgression at the Beginning of Life” in S Smith & R Deazley (eds) *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression* (Ashgate, Surrey 2009) 21

R Forst “How (Not) to Speak about Identity: The Concept of the Person in a Theory of Justice” 1992 18 *Philosophy Social Criticism* 293

C Forsythe “Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms” (1987) 21 *Valparaiso University Law Review* 563

L Foxhall “Household, Gender and Property in Classical Athens” (1989) 39 *Classical Quarterly* 22

© University of Pretoria

S Fredman "Engendering Social and Economic Rights" in B Goldblatt & K McLean (eds) *Women's Social and Economic Rights: Developments in South Africa* (Juta, Claremont 2011) 4

E Freedman *No Turning Back: The History of Feminism and the Future of Women* (Ballantine Books, New York 2002)

M Freidman, J Metelerkamp & R Posel "What is Feminism? And What Kind of Feminist am I?" (1987) 1 *Agenda* 3

S Gambaudo "French Feminism vs Anglo-American Feminism: A Reconstruction" (2007) 14(2) *European Journal of Women's Studies* 93

J Gardener *Women in Roman Law and Society* (Croom Helm, London 1986)

M Gatens "Modern Rationality" in A Jagger & I Young (eds) *A Companion to Feminist Philosophy* (Blackwell Publishers, Oxford 2000) 21

C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, Cambridge 1982)

S Gillis, G Howie & R Munford "Introduction" in S Gillis, G Howie & R Munford (eds) *Third Wave Feminism: A Critical Exploration* (Palgrave Macmilan, New York 2004) 1

A Giubilini & F Minerva "After-birth Abortion: Why Should the Baby Live?" (2013) 39 *Journal of Medical Ethics* 261

T Glennon "Regulation of Reproductive Decision-making" in S Sclater, F Ebtehaj, E Jackson & M Richards (eds) *Regulating Autonomy: Sex, Reproduction and Family* (Hart Publishing, Oxford 2009) 149

M Goodwin "Prosecuting the Womb" (2008) 76(5) *Georgia Washington Law Review* 1657

© University of Pretoria

P Groarke "The Legal Concept of the Person: A Relational Account" (2010) 51(2) *Heythrop Journal* 298

D Grossman, D Constant, N Lice, M Alblas, K Blanchard & J Harries "Surgical and Medical Second Trimester Abortion in South Africa: A Cross Sectional Study" (2011) 11(1) *BioMed Central Health Services Research* 224

G Gunstan "The Moral Status of the Human Embryo: A Tradition Recalled" (1984) 1 *Journal of Medical Ethics* 38

B Häefele "An Explorative Study on the Impact of Prenatal Methamphetamine (TIK) Abuse on Early Child and School Behaviour" (2012) 1 *Acta Criminologica* 56

H Hahlo & E Khan *The South African Legal System and its Background* (Juta, Cape Town 1973)

J Haldane & L Patrick "Aquinas on Human Ensoulment, Abortion and the Value of Life" (2003) 78 *Philosophy* 255

J Harries, P Orner, M Gabriel & E Mitchell "Delays in Seeking an Abortion until the Second Trimester: A Qualitative Study in South Africa" (2007) 4(7) *Reproductive Health* 13

J Harries, K Stinson & P Orner "Health Care Providers' Attitudes towards Termination of Pregnancy: A Qualitative Study in South Africa" (2009) 9 *BioMed Central Public Health* 296

J Harries, N Lince, D Constant, A Hargey & D Grossman "The Challenges of Offering Public Second Trimester Abortion Services in South Africa: Health Care Providers' Perspectives" (2012) 44(2) *Journal of Biosocial Science* 197

J Harris *The Value of Life: An Introduction to Medical Ethics* (Routledge, London 1985)

© University of Pretoria

W Harris “Child-Exposure in the Roman Empire” (1994) 84 *Journal of Roman Studies* 1

L Harris “Rethinking Maternal-Fetal Conflict: Gender and Equality in Perinatal Ethics” (2000) 96(5) *Obstetrics & Gynecology* 786

L Harris, A Arbor & L Paltrow “The Status of Pregnant Women and Fetuses in US Criminal Law” (2003) 289(13) *Journal of the American Medical Association* 1697

F Harris-Stoertz “Pregnancy and Childbirth in the Twelfth- and Thirteenth-Century French and English Law” (2012) 21 *Journal of Sexual History* 263

H Hartmann “The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union” (1972) 3(2) *Capital & Class* 165

H Hartmann “Capitalism, Patriarchy, and Job Segregation” (1976) 1 *Signs* 137

S Hassim Voices, Hierarchies and Spaces: Reconfiguring the Women’s Movement in South Africa” (2005) 32(2) *Politikon* 175

M Hayden “Women in the Middle Ages” (1913) 3 *Irish Review* 282

J Herring “Relational Autonomy and Rape” in S Sclater, F Ebtehaj, E Jackson & M Richards (eds) *Regulating Autonomy: Sex, Reproduction and Family* (Hart Publishing, Oxford 2008) 53

J Herring & P Chau “My Body, your Body, our Bodies” (2007) 15(1) *Medical Law Review* 34

M Hixkcox-Howard “Case for Pro-Choice Participation in Drafting Fetal Homicide Laws” (2007) 17 *Texas Journal of Women & the Law* 317

B Hooks “Sisterhood: Political Solidarity between Women” (1986) 23 *Feminist Review* 125

© University of Pretoria

K Hopkins “Contraception in the Roman Empire” (1965) 8 *Comparative Studies in Society and History* 124

M Horn “Mothers versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse” (2008) 14(2) *William & Mary Journal of Women & the Law* 635

A Hornby *Oxford Advanced Learner’s Dictionary of Current English* 8 ed (Oxford University Press, Oxford 2010)

G Howie & A Tauchert “Feminist Dissonance: The Logic of Late Feminism” in S Gillis, G Howie & R Munford (eds) *Third Wave Feminism: A Critical Exploration* (Palgrave Macmilan, New York 2004) 37

R Hursthouse *Beginning Lives* (Basil Blackwell, New York 1987)

R Huser *The Crime of Abortion in Canon Law: An Historical Synopsis and Commentary* DCL Dissertation, Catholic University of America (1942)

L Ikemoto “Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women (1992) 59 *Tennessee Law Review* 487

E Jackson *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, Oxford 2001)

C Jeffery “The Development of Crime in Early English Society” (1957) 47 *Journal of Criminal Law, Criminology, and Police Science* 647

D Johnson “Shared Interests: Promoting Healthy Births without Sacrificing Women’s Liberty” (1992) 43 *Hastings Law Journal* 569

S Johnstone “Women, Property, and Surveillance in Classical Athens” (2003) 22 *Classical Antiquity* 247

© University of Pretoria

L Jordaan "The Legal Validity of an Advanced Refusal of Medical Treatment in South African Law (Part 1)" (2011) 44(1) *De Jure* 32

L Jordaan "The Legal Validity of an Advanced Refusal of Medical Treatment in South African Law (Part 2)" (2011) 44(2) *De Jure* 259

T Jost "Rights of Embryo and Foetus in Private Law" (2002) 50 *American Journal of Comparative Law* 633

C Kaczor *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice* (Routledge, New York 2010)

M Kaplan "'A Special Class of Persons' Pregnant Women's Right to Refuse Medical Treatment after Gonzales v. Carhart" (2010) 13(1) *Journal of Constitutional Law* 145

C Kaposy "Improving Abortion Access in Canada" (2010) 18 *Health Care Analysis* 17

C Kaposy & J Downie "Judicial Reasoning about Pregnancy and Choice" (2008) 16 *Health Law Journal* 281

A Karnein *A Theory of Unborn Life: From Abortion to Genetic Manipulation* (Oxford University Press, Oxford 2012)

S Karin & R Oritz "In a different Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda" (1993) 87 *Northwestern University Law Review* 858.

I Karpin "Legislating the Female Body: Reproductive Technology and the Reconstructed Woman" (1993) 3 *Columbia Journal of Gender and Law* 329

R Karras "Invisible women" (2005) 39 *Medieval Feminist Forum* 15

M Katz "Ideology and 'the Status of Women' in Ancient Greece" (1992) 31 *History and Theory* 70

© University of Pretoria

M Kaufman “Spare Ribs: The Conception of Woman in the Middle Ages and the Renaissance” (1973) 56 *Soundings* 139

K Kellet “Miscarriage of Justice: Prenatal Substance Abusers Need Treatment, Not Confinement under Chemical Endangerment Laws” (2014) 40 New *England Journal on Crime & Civil Confinement* 455

J Kelly “Early Feminist Thought and the *Querelle des Femmes*, 1400-1789” (1982) 8 *Signs* 4

O Kiefer *Sexual Life in Ancient Rome* (Abbey Library, London 1934)

D Kommers, J Finn & G Jacobsohn *American Constitutional Law: Essays, Cases, and Comparative Notes* 3 ed (Rowman & Littlefield Publishers, Lanham 2009)

M Kowaleski & J Bennett “Crafts, Gilds, and Women in the Middle Ages: Fifty Years After Marian K. Dale” (1989) 14 *Signs* 474

H Kruger & A Skelton (eds) *The Law of Persons in South Africa* (Oxford University Press, Cape Town 2010)

H Kruuse “‘Fetal Rights?’ The Need for a Unified Approach to the Fetus in the Context of Feticide” (2009) 2 *Tydskrif vir Hedensdaagse Romeins-Hollandse Reg* 126

T Kushner “Having a Life versus Being Alive” (1984) 1 *Journal of Medical Ethics* 5

J Landels “An Ancient Account of Reproduction” (1979) 44 *Biology and Human Affairs* 94

P Laufer-Ukeles “Reproductive Choices and Informed Consent: Fetal Interests, Women’s Identity, and Relational Autonomy” (2011) 37 *American Journal of Law & Medicine* 567

© University of Pretoria

J Law & E Martin (eds) *Oxford Dictionary of Law* 7 ed (Oxford University Press, Oxford 2009)

E Lazarus "What do Women Want? Issues of Choice, and Class in American Pregnancy and Childbirth" in R Davis-Floyd & C Sargent *Childbirth and Authoritative Knowledge: Cross Cultural Perspectives* (University of California Press, Berkeley 1997) 132

A le Roux-Kemp & J Wilkinson 2 "A Novel Application of the Hydrostatic Test in Determining Live (Non)Birth" (2012) 2 *South African Journal of Criminal Justice* 271

E Lee "The Abortion Debate Today" in K Horsey & H Biggs (eds) *Human Fertilisation and Embryology: Reproduction Regulation* (Cavendish Publishing, Oxon 2007) 231

S Lee, H Ralston, E Drey, J Partridge & M Rosen "Fetal Pain: A Systematic Multidisciplinary Review of the Evidence" (2005) 295(8) *Journal of the American Medical Association* 947

N Levy "The Moral Significance of being Born" (2013) 39(5) *Journal of Medical Ethics* 326

P Linton "A Fool's Errand: State 'Personhood' Proposals" (2009) 35(4) *Human Life Review* 61

P Linton "The Legal Status of the Unborn Child under State Law" (2011) 6(1) *University of St Thomas Journal of Law & Public Policy* 141

B Little, L Snell, T van Beveren, B Crowell, S Trayler & W Johnston "Treatment of Substance Abuse During Pregnancy and Infant Outcome" (2003) 20(5) *American Journal of Perinatology* 255

J Loengard "Legal History and the Medieval Englishwoman: A Fragmented View" (1986) 4 *Law & History Review* 161

© University of Pretoria

C Lougee “Modern European History” (1977) 2 *Signs* 628

D Lupton *The Social Worlds of the Unborn* (Palgrave Macmillan, Hampshire 2013)

S Lurie “The Changing Motives of Cesarean Section: From the Ancient World to the Twenty-First Century” (2005) 271 *Archives of Gynecology and Obstetrics* 281

C MacIntosh “Conceiving Fetal Abuse” (1998) 14 *Canadian Journal of Family Law* 178

C MacKinnon “Reflections of Sex Equality under Law” (1991) 100(5) *Yale Law Journal* 1281

C MacKinnon *Sex Equality* (New Foundation Press, New York 2007)

W Malcolm “The Unborn Victims of Violence Act: Addressing Moral Intuition and the Right to Choose” (2004) 1(2) *Tennessee Journal of Law & Policy* 277

M Manian “Lessons from Personhood’s Defeat: Abortion Restrictions and Side Effects on Women’s Health” (2013) 74 *Ohio State Law Journa*l 75

S Mann & D Huffman “The Decentering of Second Wave Feminism and the Rise of the Third Wave” (2005) 69(1) *Science & Society* 56

B Manninen “The Value of Choice and the Choice to Value: Expanding the Discussion about Fetal Life with in Prochoice Advocacy” (2013) 28(3) *Hypatia* 663

C McCann “Fertility Control and Society in Medieval Europe” (2009) 40 *Journal of Medieval & Renaissance Studies* 45

J McCartney “Some Roman Catholic Concepts of Persons and Their Implications for the Ontological Status of the Unborn” in W Bondeson, H Engelhardt, S Spicker & D Winship (eds) *Abortion and the Status of the Fetus* (D. Reidel Publishing Company, Dordrecht 1983) 313

© University of Pretoria

J McConnell “Relational and Liberal Feminism: The ‘Ethic of Care,’ Fetal Personhood and Autonomy” (1996) 99 *West Virginia Law Review* 291

C McDonough “Motherhood and Feminism: Lessons from the Titanic” (2006) 8 *Journal of the Association for Research on Mothering* 123

A McLaren *A History of Contraception: From Antiquity to the Present Day* (Blackwell Publishers, Oxford 1990)

S McLean “Women, Rights and Reproduction” in S McLean (ed) *Legal Issues in Human Reproduction* (Gower Publishing, Aldershot 1989) 213

D McQuoid-Mason “Privacy” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 12 2003) 38-1

C Megone “Potentiality and Persons: An Aristotelian Perspective” in M Kuczewski & R Polansky (eds) *Bioethics: Ancient Themes in Contemporary Issues* (MIT Press, London 2002) 155

S Meredith *Policing Pregnancy: The Law and Ethics of Obstetric Conflict* (Ashgate, Aldershot 2005)

D Meyerson “Abortion: The Constitutional Issues” (1999) 116 *South African Law Journal* 50

M Michaels & L Morgan “Introduction: The Fetal Imperative” in L Morgan & M Michaels (eds) *Fetal Subjects, Feminist Positions* (University of Pennsylvania Press, Pennsylvania 1999) 1

B Miller “She Who Hath Drunk Any Potion...” (1962) 31 *Medium Aevum* 188

M Miller “Refusal to Undergo a Cesarean Section: A Woman’s Right or a Criminal Act?” (2005) 15 *Health Matrix* 383

© University of Pretoria

S Mohapatra “Unshackling Addiction: A Public Health Approach to Drug Use during Pregnancy” (2011) 26(2) *Wisconsin Journal of Law Gender & Society* 241

L Morgan “Fetal Relationality in Feminist Philosophy: An Anthropological Critique” (1996) 11(2) *Hypatia* 47

A Morrison (ed) *Fundamentals of American Law* (Oxford University Press, Oxford 1996)

C Morroni & J Moodley “Characteristics of Women Booking for First and Second Trimester Abortions at Public Sector Clinics in Cape Town” (2006) 12(2) *South African Journal of Obstetrics and Gynaecology* 81

D Moster, R Terje Lie, T Markestad “Long-term Medical and Social Consequences of Preterm Birth” (2008) 359 (3) *New England Journal of Medicine* 262

E Munro “Feminism: A Fourth Wave” (2013) 4 *Political Insight* 22

T Murphy “Adoption First? The Disposition of Human Embryos” published online 11 June 2013 *Journal of Medical Ethics* doi: 10.1136/medethics-2013-101525 1

A Murphy “A Survey of State Fetal Homicide Laws and their Potential Applicability to Pregnant Women who Harm their own Fetuses” (2014) 89 *Indiana Law Journal* 848

G Myburgh *Humanity and the Protection of the Unborn: A Jurisprudential Rationale for the Furtherance of the Anthropological Paradigm of International Law* LLM Dissertation, University of the Free State (2008)

R Mykitiuk & D Scott “Risky Pregnancy: Liability, Blame and Insurance in the Governance of Prenatal Harm” (2011) 43 *University of British Columbia Law Review* 311

J Nedelsky “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 *Yale Journal of Law and Feminism* 7

© University of Pretoria

J Nedelsky "Property in Potential Life? A Relational Approach to Choosing Legal Categories" (1993) 6(2) *Canadian Journal of Law & Jurisprudence* 343

J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (2011)

C Neel "The Origins of the Beguines" (1989) 14 *Signs* 321

E Nelson "Reconceiving Pregnancy: Expressing Choice and Legal Reasoning" (2004) 49 *McGill Law Journal* 593

E Nelson *Law, Policy and Reproductive Autonomy* (Hart Publishing, Oxford 2013)

C Ngwena "Accessing Abortion Services under the Choice on Termination of Pregnancy Act: Realising Substantive Equality" (2000) 25 *Journal for Juridical Science* 19

C Ngwena "An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective" (2004) 32(4) *Journal of Law, Medicine & Ethics* 708

C Ngwena "Access to Legal Abortion: Developments in Africa from a Reproductive and Sexual Health Rights Perspective" (2004) 19 *SA Public Law* 329

J Noonan "Marriage in the Middle Ages: Power to Choose" (1973) 4 *Viator* 419

J Noonan "Christian Tradition and the Control of Human Reproduction" (1984) 4 *Journal of Christian Jurisprudence* 1

S Noonan "Theorizing Connection" (1992) 30(3) *Alberta Law Review* 719

M O'Sullivan "Reproductive Rights" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2 2005) 37-1

© University of Pretoria

A Oakley *The Captured Womb: A History of Medical Care of Pregnant Women* (Basil Blackwell Publishing, Oxford 1986)

K Offen "On the French Origin of the Words Feminism and Feminist" (1988) 8 *Feminist Issues* 45.

K Offen "Defining Feminism: A Comparative Historical Approach" (1988) 14 *Signs* 119

S Oluwele "Africa" in A Jaggar & I Young (eds) *A Companion to Feminist Philosophy* (Blackwell Publishers, Oxford 2000) 96

E Ordolis "Maternal Substance abuse and the Limits of the Law: A Relational Challenge" (2008) 14 *Alberta Law Review* 119

M Ovens "Maternal Substance Abuse in South Africa: An Area for Concern?" (2008) 1 *Acta Criminologica* 77

M Ovens "A Criminological Perspective on the Prenatal Abuse of Substances during Pregnancy and the Link to child Abuse in South Africa" (2010) 11(2) *Child Abuse Research: A South African Journal* 38

O Oyewùmí "The White Woman's Burden: African Women in Western Feminist Discourse" in O Oyewùmí (ed) *African Women & Feminism: Reflecting on the Politics of Sisterhood* (Africa World Press, Trenton 2003) 25

O Oyewùmí "Feminism, Sisterhood, and Other Foreign Relations" in O Oyewùmí (ed) *African Women & Feminism: Reflecting on the Politics of Sisterhood* (Africa World Press, Trenton 2003) 1

D Page "The Homicide by Child Abuse Conviction of Regina McKnight" (2003) 46 *Howard Law Journal* 363

C Palladino, V Singh, J Campbell, H Flynn & K Gold "Homicide and Suicide during the Perinatal Period" (2011) 118(5) *Obstetrics & Gynecology* 1056

© University of Pretoria

J Palmer "Seeing and Knowing: Ultrasound Images in the Contemporary Abortion Debate" (2009) 10(2) *Feminist Theory* 173

L Paltrow "*Roe v Wade* and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration" (2013) 103(1) *American Journal of Public Health* 17

L Paltrow & J Flavin "Arrests and Forced Medical Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health" (2013) 38(2) *Journal of Health Politics, Policy & Law* 299

L Paterson "Gender Negotiations in France during the Central Middle Ages: The Literary Evidence" in P Linehan & J Nelson (eds) *The Medieval World* (Routledge, Oxon 2003)

C Patterson "'Not Worth the Rearing': The Causes of Infant Exposure in Ancient Greece" (1985) 115 *Transactions of the American Philological Association* 103

M Paulsen "The Plausibility of Personhood" (2012) 74(14) *Ohio St Law Journal* 13

J Perlow & H Lesmes "Homicide and Suicide during the Perinatal Period: Findings from the National Violent Death Reporting System: Letter to the Editor" (2012) 119(6) *Obstetrics & Gynecology* 1275

C Perring "Degrees of Personhood" (1997) 22 *Journal of Medicine and Philosophy* 173

C Peters "Single Women in Early Modern England: Attitudes and Expectations" (1997) 12 *Continuity and Change* 325

C Pickles *S v Mshumpa: A Time for Law Reform* LLM Dissertation, University of Pretoria (2010)

© University of Pretoria

C Pickles "The Introduction of a Statutory Crime to Address Third Party Foetal Violence" (2011) 74(4) *Tydskrif vir Hedensdaagse Romeins-Hollandse Reg* 546

C Pickles "Termination-of-Pregnancy Rights and Foetal Interests in Continued Existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996" (2012) 15(5) *Potchefstroom Elektronies Regsblad* 403

C Pickles "Lived Experiences of the Choice on Termination of Pregnancy Act 92 of 1996: Bridging the Gap for Women in Need" (2013) 3 *South African Journal on Human Rights* 515

C Pickles "Personhood: Proving the Significance of the Born-Alive Rule with Reference to Medical Knowledge of Foetal Viability" (2013) 24(1) *Stellenbosch Law Review* 146

C Pickles & D Labuschagne *Pregnancy, Foetal Individuation, and Claims to Another's Body: Some Relational Issues in a South African Context* (2014) unpublished paper presented at a conference of the Society of Law Teachers of Southern Africa hosted by the Oliver Schriener Law School at the University of Witwatersrand 15 January 2014

C Pickles "Approaches to Pregnancy under the Law: A Relational Response to the Current South African Position and Recent Academic Trends" (2014) 47(1) *De Jure* 20

M Pieterse "Legislative and Executive Translation of the Right to Have Access to Health Care Services" (2010) 14 *Law, Democracy & Development* 1

M Pieterse *Can Rights Cure? The Impact of Human Rights Litigation on South Africa's Health System* (Pulp, Pretoria 2014)

M Pignotti & G Donzelli "Perinatal Care at the Threshold of Viability: An International Comparison of Practical Guidelines for the Treatment of Extremely Preterm Births" (2008) 121 *Pediatrics* 193

© University of Pretoria

R Pillay "The Beginning of Human Personhood: Is South African Law Outdated?" (2010) 2 *Stellenbosch Law Review* 230

T Powell, L Parker, C Dedrick, C Marrera, D Salva, F Erdman, S Huff & M Saunders "Decisions and Dilemmas Related to Resuscitation of Infants Born on the Verge of Viability" (2012) 12 *Newborn & Infant Nursing Reviews* 27

K Proehl "Pregnancy Crimes: New Worries to Expect when Expecting" (2013) 53(2) *Santa Clara Law Review* 661

G Quinot & S Liebenberg "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa" (2011) 3 *Stellenbosch Law Review* 639

R Rebouché "The Limits of Reproductive Rights in Improving Women's Health" (2011) 63(1) *Alabama Law Review* 1

C Reid "Marriage in its Procreative Dimension: The Meaning of the Institution of Marriage through the Ages" (2008-2009) 6 *University of St Thomas Journal of Law & Policy* 454

N Rhoden "Trimesters and Technology: Revamping Roe v. Wade" (1986) 95(4) *Yale Law Journal* 639

G Richardson, S Hamel, L Goldschmidt & N Day "Growth of Infants Prenatally Exposed to Cocaine/Crack: Comparison of a Prenatal Care and a No Prenatal Care Sample" (1999) 104(2) *Pediatrics* 18

L Riley & A Furendi "Autonomy and the UK's Law on Abortion" in S Sclater, F Ebtehaj, E Jackson & M Richards (eds) *Regulating Autonomy: Sex, Reproduction and Family* (Hart Publishing, Oxford 2008) 239

© University of Pretoria

S Roberts & C Pies "Complex Calculations: How Drug Use during Pregnancy Becomes a Barrier to Prenatal Care" (2011) 15 *Maternal & Child Health Journal* 333

O Robinson, T Fergus & W Gordon *An Introduction to European Legal History* (Professional Books, Adingdon 1985)

R Roth *Making Women Pay: The Hidden Costs of Fetal Rights* (Cornell University Press, Ithaca 2000)

B Roth "Second Wave Black Feminism in the African Diaspora: News from New Scholarship" (2003) 17 (58*) Agenda* 46

J Sarkin-Hughes "A Perspective on Abortion Legislation in South Africa's Bill of Rights Era" (1993) 56 *Tydskrif vir Hedensdaagse Romeins-Hollandse Reg* 83

D Schaps "What was Free about a Free Athenian Woman?" (1998) 128 *Transactions of the American Philological Association* 161

J Schroedel, P Fiber & B Snyder "Women's Rights and Fetal Personhood in Criminal Law" (2000) 7(89) *Duke Journal of Gender Law & Policy* 89

M Schulman *The Nasciturus Non-Fiction, The Libby Gonen Story: Contemporary Reflections on the Status of the Nascitural Personhood in South African Law* LLM Dissertation, University of the Witwatersrand (2014)

S Sclater, F Ebtehaj, E Jackson & M Richards (eds) *Regulating Autonomy: Sex, Reproduction and Family* (Hart Publishing, Oxford 2009)

J Scott & L Tilly "Women's Work and the Family in Nineteenth-Century Europe" (1975) 17 *Comparative Studies in Society and History* 36

T Scott "Why State Personhood Amendments Should be Part of the Profile Agenda" (2011) 6(1) *St Thomas Journal of Law & Public Policy* 222

© University of Pretoria

I Seri & J Evans "Limits of Viability: Definition of the Grey Zone" (2008) 28 *Journal of Perinatology* 4

J Seymour *Childbirth and the Law* (Oxford University Press, Oxford 2000)

S Shamu, N Abrahams, M Temerman, A Musekiwa & C Zarowsky "A Systematic Review of African Studies on Intimate Partner Violence against Pregnant Women: Prevalence and Risk Factors" (2011) 6(3*) Public Library of Science ONE* e17591

L Shanner "Procreation" in A Jaggar & I Young (eds) *A Companion to Feminist Philosophy* (Blackwell Publishers, Oxford 2000)

B Shaw "The Family in Late Antiquity: The Experience of Augustine" (1987) *Past & Present* 3

B Shaw "Raising and Killing Children: Two Roman Myths" (2001) 54 *Mnemosyne* 31

E Shorter *A History of Women's Bodies* (Penguin Books, Middlesex 1984)

A Skelton "Girl's Social and Economic Rights in South Africa" in B Goldblatt & K McLean (eds) *Women's Social and Economic Rights* (Juta, Cape Town 2011) 58

S Smith "Criminalising Prenatal Substance Abuse: Hurting Women and their Unborn Children" (2012) 6(1) *Health Law Outlook* 14

C Snyder "What is Third-Wave Feminism? A New Directions Essay" (2008) 34(1) *Signs* 174

C Snyman *Criminal Law* 5 ed (LexisNexis, Durban 2008)

R Spence "Abandoning Women to their Rights: What Happens when Feminist Jurisprudence Ignores Birthing Rights" (2012) 19 *Cardozo Journal of Law & Gender* 75

© University of Pretoria

R Solinger *Reproductive Politics: What Everyone Needs to Know* (Oxford University Press, Oxford 2013)

C Stansell *The Feminist Promise: 1792 to the Present* (The Modern Library, New York 2010)

B Steinbock *Life before Birth: The Moral and Legal Status of Embryos and Fetuses* 2 ed (Oxford University Press, New York 2011)

A Stoner "Sisters between Gender and the Medieval Beguines" (1995) 4 *Ex Post Facto* 29

K Sunderlin & L Huss "The Mythology of 'Addicted Babies': Challenging Media Distortions, Laws, and Policies that Fracture Communities" (2014) 86 *Different Takes* 1

R Suppé "Pregnancy on Trial: The Alabama Supreme Court's Erroneous Application of Alabama's Chemical Endangerment Law in Ex Parte Ankrom" (2014) 7(2) *Health Law & Policy Brief* 49

B Taylor "Feminism and the Enlightenment 1650-1850" (1999) 47 *History Workshop Journal* 261

The Stillbirth Collaborative Research Network Writing Group "Association between Stillbirth and Risk Factors Known at Pregnancy Confirmation" (2011) 306(22) *Journal of the American Medical Association* 2469

The Stillbirth Collaborative Research Network Writing Group "Causes of Death among Stillbirths" (2011) 306(22) *Journal of the American Medical Association* 2459

B Thompson "Multiracial Feminism: Recasting the Chronology of Second Wave Feminism" (2002) 28(2) *Feminist Studies* 336

J Thomson "A Defense of Abortion" (1971) 1(1) *Philosophy and Public Affairs* 47

© University of Pretoria

M Tooley “Personhood” in H Kuhse & P Singer (eds) *A Companion to Bioethics* (Blackwell, Oxford 2001) 117

A Tsao “Fetal Homicide Laws: A Shield against Domestic Violence or Sword to Pierce Abortion Rights?” (1998) 25 *Hastings Constitutional Law Quarterly* 457

K van Marle & E Bonthuys “Feminist Theories and Concepts” in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (Juta, Cape Town 2007) 15

F van Oosten “The Choice on Termination of Pregnancy Act: Some Comments” (1999) 116 *South African Law Journal* 60

A van Parys, A Verhamme, M Temmerman & H Verstraelen “Intimate Partner Violence and Pregnancy: A Systematic Review of Interventions” (2014) 8(1) *Public Library of Science ONE* e85084

S Visser “Prosecuting Women for Participating in Illegal Abortions: Undermining Gender Equality and the Effectiveness of State Police Power” (2011) 13(1) *Journal of Law & Family Studies* 171

J Volpe “Effect of Cocaine Use on the Fetus” (1992) 327(6) *New England Journal of Medicine* 399

P Walcot “Greek Attitudes towards Women: The Mythological Evidence” (1984) 31 *Greece & Rome* 37

M Warren “Abortion” in H Kuhse & P Singer (eds) *A Companion to Bioethics* (Blackwell, Oxford 2001) 127

R West “Jurisprudence and Gender” (1988) 55(1) *University of Chicago Law Review* 1

© University of Pretoria

M Wiesner-Hanks “World History and the History of Women, Gender, and Sexuality” (2007) 18 *Journal of World History* 53

J Will “Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice” (2013) 39(4) *American Journal of Law & Medicine* 573

G Williams “The Foetus and the Right to Life” (1994) 33 *Cambridge Law Journal* 71

J Williams & S Shames “Mothers’ Dreams: Abortion and the High Price of Motherhood” (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 818

S Wilson & J Dugard “Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights” (2011) 3 *Stellenbosch Law Review* 664

S Woolman “Dignity” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 12 2005) 36-1

Electronic Sources

American Civil Liberties Union “Tenn. Governor Singles out Pregnant Women for Discrimination” (29 April 2014) *American Civil Liberties Union* <https://www.aclu.org/reproductive-freedom-womens-rights/tenn-governor-singles-out-pregnant-women-discrimination> (accessed 5 June 2014)

American Society of Addiction Medicine “Public Policy Statement: Definition of Addiction” (19 April 2011) *American Society of Addiction* <http://www.asam.org/research-treatment/definition-of-addiction> (accessed 24 June 2014)

Amnesty International “Struggle for Maternal Health: Barriers to Antenatal Care in South Africa” (2014) *Amnesty International* <http://www.amnesty.org/en/library/asset/AFR53/006/2014/en/37182be0-efcd-4740-82b9-759a8ff8e3cd/afr530062014en.pdf> (accessed 14 October 2014)

© University of Pretoria

Angry Black Women Watch "Tennessee's Pregnancy Criminalization Law will Hit Black Women the Hardest" (18 April 2014) *Angry Black Women Watch* <https://abww.wordpress.com/tag/sb-1391/> (accessed 5 June 2014)

Anonymous *Definitions.Net* <http://www.definitions.net/definition/prometheus> (accessed 6 November 2012)

A Armstrong & D Hsieh "The 'Personhood' Movement Is Anti-Life: Why it Matters that Rights Begin at Birth, Not at Conception" (31 August 2010) *Coalition for Secular Government* <http://www.seculargovernment.us/docs/a62.pdf> (accessed 22 April 2014)

Begin before Birth "Fetal Development" *Begin before Birth* <http://www.beginbeforebirth.org/in-the-womb/fetal-development> (accessed 5 May 2014)

G Casey *Born Alive: The Legal Status of the Unborn Child in England and the U.S.A* (2005) <www.ucd.ie/philosophy/staff/gerardcasey/casey/BornAlive.pdf> (accessed 8 February 2013)

Centre for Reproductive Rights "Punishing Women for their Behavior during Pregnancy: An Approach that Undermines Women's Health and Children's Interests" (September 2000) *Centre for Reproductive Health* <http://reproductiverights.org/sites/default/files/documents/pub_bp_punishingwomen.pdf> (accessed 23 May 2014)

Centre for Reproductive Rights "Whose Right to Life? Women's Rights and Prenatal Protections under Human Rights Comparative Law" (20 March 2012) *Centre for Reproductive Rights* <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf> (accessed 3 July 2014)

R Cohen "Will Tennessee Legalize the New Jane Crow?" *SocialistWorler.Org* (23 April 2014) <http://socialistowrker.org/2014/04/23/will-tennessee-leglaize-new-jane-crow> (accessed 5 June 2014)

© University of Pretoria

B Dennis "Love: Another Aspect of Roman Marriage" (2006) <http://www.brandonmdennis.com/pdfs/Non%20Fiction%20-%20Love%20-%20Another%20Aspect%20of%20Roman%20Marriage.pdf> (accessed 15 March 2013)

D DeMarco "The Roman Catholic Church *and* Abortion: An Historical Perspective Part 1" *CatholicCulture.Org* <http://www.catholicculture.org/culture/library/view.cfm?id=3361> (accessed 4 February 2013)

D DeMarco "The Roman Catholic Church *and* Abortion: An Historical Perspective Part 2" *CatholicCulture.Org* <http://www.catholicculture.org/culture/library/view.cfm?recnum=3362> (accessed 4 February 2013)

D Fleming "Timeline of Greek & Roman Antiquity" <http://people.umass.edu/dfleming/english704-timeline.html> (accessed 7 February 2013)

Govtrack.US <https://www.govtrack.us/congress/bills/113/hr23/> *Govetrack.US* (accessed 22 April 2014)

Guttmacher Institute "State Policies in Brief: An Overview of Abortion Laws" *Guttmacher Institute* (1 April 2014) <http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf> (accessed 2 June 2014)

Guttmacher Institute "State Policies in Brief: Substance Abuse during Pregnancy" (1 May 2014) *Guttmacher Institute* <http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf> (accessed 26 May 2014)

© University of Pretoria

Health Systems Trust "TOPs by Gestational Age" *Health Systems Trust* <http://indicators.hst.org.za/healthstats/88/data/gedo> (accessed 16 December 2013)

Human Rights Watch "Stop Making Excuses" *Human Rights Watch* (2011) <http://www.hrw.org/reports/2011/08/08/stop-making-excuses-0> (accessed 2 February 2014)

Z Ives "Feticide and Criminal Law: Is there an Acceptable Approach?" (1998) <https://dspace.unm.edu/handle/1928/2402> (accessed 21 September 2014)

Legi Scan "Tennessee Senate Bill 1391" *Legi Scan* <http://legiscan.com/TN/bill/SB1391/2013 (accessed 27 May 2014)

B Lester "Another 'Drug Baby' Media Scare" (12 March 2005) *Common Sense for Drug Policy* <http://www.csdp.org/publicservice/dejavumeth.htm> (accessed 20 June 2014)

H Melber "South Africa's Battle for Human Dignity: The Constitution Debated and Tested" (13 October 2014) *The Nordic Africa Institute* <http://naiforum.org/2014/10/south-africas-battle-for-human-dignity/> (accessed 14 October 2014)

J Mohoney "Information about Methamphetamine Use in Pregnancy" *American College of Obstetricians & Gynecologists* (2006) <http://vanilla47.com/Methamphetamine%20Pharmacology/Information%20about%20Methamphetamine%20Use%20in%20Pregnancy.pdf> (accessed 27 June 2014)

National Advocates for Pregnant Women "Top Medical Doctors and Scientists Urge Major Media Outlets to Stop Perpetuating 'Crack Baby' Myth" *National Advocates for Pregnant Women* (25 February 2004) <http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/top_medical_doctors_and_scientists_urge_major_media_outlets_to_stop_perpetuating_crack_baby_myth.php> (accessed 20 June 2014)

© University of Pretoria

National Advocates for Pregnant Women "Prenatal Exposure to Illegal Drugs and Alcohol: Media Hype and Enduring Myths Are Not Supported by Science" (24 March 2010) *National Advocates for Pregnant Women* <http://advocatesforpregnantwomen.org/2010%20drugmyth%20factsheet%20v3.pdf > (accessed 22 June 2014)

National Advocates for Pregnant Women "NAPW Documentation State v. Greywind" (14 April 2012) *National Advocates for Pregnant Women* <http://advocatesforpregnantwomen.org/issues/criminal_cases_and_issues/napw_documentation_state_v_greywind.php> (accessed 25 June 2014)

National Conference of State Legislation "Fetal Homicide Laws" (February 2013) *National Conference of State Legislation* <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> (accessed 2 April 2014)

National Institute on Drug Abuse "Topics in Brief: Prenatal Exposure to Drugs of Abuse" (May 2011) *National Institute on Drug Abuse* <http://www.drugabuse.gov/sites/default/files/prenatal.pdf> (accessed 23 June 2014)

R Newman "Experts Urge Media to End Inaccurate Reporting on Prescription Opiate Use by Pregnant Women" (13 March 2013) *Institute of Beth Israel Medical Centre* <http://advocatesforpregnantwomen.org/issues/pregnancy_and_drug_use_the_facts/experts_urge_media_to_end_inaccurate_reporting_on_prescription_opiate_use_by_pregnant_women.php> (accessed 20 June 2014)

S Newman "Timeline of the Middle Ages" *The Finer Times* <http://www.thefinertimes.com/Middle-Ages/timeline-of-the-middle-ages.html> (accessed 8 February 2013)

L Paltrow "Response to: 'Drug Policies Must be Rooted in Science'" (21 December 2012) *National Advocates for Pregnant Women* <http://advocatesforpregnantwomen.org/Response%20to%20%2522Drug%20Policies%20Must%20Be%20Rooted%20in%20Science%2522.pdf> (accessed 20 June 2014)

© University of Pretoria

L Paltrow & K Jack "Pregnant Women, Junk Science and Zealous Defense" (2010) *The Champion* <http://parentattorney.org/wp-content/uploads/2011/08/pregnant-women-junk-science-zealous-defense.pdf> (accessed 22 June 2014)

Personhood USA "North Dakota Measure 1" *Personhood USA* <http://www.personhoodusa.com/campaigns/north-dakota-measure-1-2014/> (accessed 22 April 2014)

Personhood USA "What is Personhood?" *Personhood USA* <http://www.personhoodusa.com/about-us/what-is-personhood/> (accessed 22 April 2014).

K Pollitt "Protect Pregnant Women: Free Bei Bei Shuai" (28 March 2012) *The Nation* <http://www.thenation.com/article/166664/protect-pregnant-women-free-bei-bei-shuai> (accessed 20 May 2014)

E Sidiropoulos "South Africa Survey 1996/1997*"* (1996) *South African Institute of Race Relations* <http://www.nelsonmandela.org/omalley/cis/omalley/OMalleyWeb/dat/SAIRR%20Survey%201996-97.pdf> (accessed 5 February 2014)

South African Press Association "Foetus Theft May Have Been to Keep Boyfriend, Court Hears" (26 August 2014) *news24* <http://www.news24.com/SouthAfrica/News/Alleged-foetus-thief-says-murder-was-to-keep-boyfriend-20140826> (accessed 28 August 2014)

South African Press Association "Man in Court for Murderous Rage" (28 August 2014) *iol news* <http://www.iol.co.za/news/crime-courts/man-in-court-for-murderous-rage-1.1742716#.U__OB8WIBXs> (accessed 29 August 2014)

C Steele "DA to Begin Prosecution of Mothers Who Use Drugs" (1 October 2012) *NorthJersey.com* <http://www.northjersey.com/news/crime-and-courts/da-to-begin-

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prosecution-of-mothers-who-use-drugs-1.338718?page=all> (accessed 19 June 2014)

World Health Organization "Information Fact Sheet: Intimate Partner Violence during Pregnancy" (2011) *World Health Organization* <http://apps.who.int/iris/bitstream/10665/70764/1/WHO_RHR_11.35_eng.pdf?ua=1> (accessed 28 August 2014)

World Health Organization "Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008" (2011) *World Health Organization* <http://whqlibdoc.who.int/publications/2011/9789241501118_eng.pdf?ua=1> (accessed 5 February 2014)

World Health Organization "Understanding and Addressing Violence against Women: Intimate Partner Violence" (2012) *World Health Organization* <http://apps.who.int/iris/bitstream/10665/77432/1/WHO_RHR_12.36_eng.pdf?ua=1> (accessed 28 August 2014)

Table of Cases and Related Documentation

South Africa

Barkhuizen v Napier 2007 (5) SA 250 (CC)

Bernstein v Bester 1996 (2) SA 751 (CC)

Castell v De Greef 1994 (4) SA 408 (C)

Christian Lawyers Association v Minister of Health 2005 (1) SA 509 (T)

Christian Lawyers of SA v Minister of Health 1998 (4) SA 1113 (T)

Christian League of Southern Africa v Rall 1981 (2) SA 821 (O)

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Clarke v Hurst 1992 (4) SA 630 (D)

Dawood v Minister of Home Affairs; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC)

Ferreira v Levin; *Vryenhoek v Powell* 1996 (1) SA 984 (CC)

Friedman v Glicksman 1996 (1) SA 1134 (W)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)

Head of Department, Department of Education, Free State Province v Welkom High School 2013 (9) BCLR 989 (CC)

Heerden v Joubert 1994 (4) 739 (A)

Khumalo v Holomisa 2002 (5) SA 401 (CC)

Masiya v DDP 2007 (5) SA 30 (CC)

Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC)

MEC for Education v Pillay 2008 (1) SA 474 (CC)

Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC)

Minister of Home Affairs v National Institute for Crime Prevention and Reintegration of Offenders 2005 (3) SA 280 (CC)

Minister of Home Affairs v Fourie 2006 (1) SA 524 (CC)

MM v MN 2013 (4) SA 415 (CC)

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National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)

Palmer v Palmer 1955 3 SA 56 (O)

Pinchin v Santam Insurance 1963 (2) SA 254 (W)

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

Road accident Fund v Mtati 2005 (6) SA 215 (SCA)

S v Baloyi 2000 (2) SA 425 (CC)

S v Goliath 1972 3 All SA 69 (A)

S v Jordan 2002 (2) SACR 499 (CC)

S v Makhakha 2013 JDR 1934 (WCC)

S v Makwanyane 1995 (3) SA 391 (CC)

S v Mshumpa 2008 (1) SACR 126 (E)

S v Williams 1995 (3) SA 632 (CC)

Soobramoney v Minister of Health 1998 1 SA 765 (CC)

Stewart v Botha 2007 (6) SA 247 (C)

Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development 2014 (1) SA 168 (CC)

Van Heerden v Joubert 1994 (4) SA 739 (A)

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Volks v Robinson 2005 (5) BCLR 446 (CC)

United States

Akron v Akron Centre for Reproductive Health 103 S Ct 2481 (1983)

Akron v State 2011 WL 3781258 (Ala Crim App)

Bellotti v Baird 99 S Ct 3035 (1979)

Bonbrest v Kotz 65 F Sup 138 (State? 1946)

Commonwealth v Cass 467 NE 2d 1324 (Mass 1984)

Commonwealth v Pugh 969 NE 2d 672 (Mass 2012)

Ex parte Ankrom; Ex parte Kimbrough 2013 WL 135748 (Ala)

Gonzales v Carhart 127 S Ct 1610 (2007)

Herron v State 729 NE 2d 1008 (Ind App 2000)

Johnson v State 578 So 2d 419 (Fla App 5 Dist 1991)

Johnson v State 602 So 2d 1288 (Fla 1992)

Keeler v Superior Court 2 Cal 3d 619 (1970)

Linder v United States 268 US 5 (1925)

McKnight v South Carolina 540 US 819 (2003)

McKnight v State 661 SE 2d 354 (SC 2008)

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Pemberton v Tallahassee Memorial Regional Medical Center 66 F Supp 2d 1247 (N D Fla 1999)

People v Nixon 42 Mich App 332 (Mich 1972)

Planned Parenthood v Ashcroft 103 S Ct 2517 (1983)

Planned Parenthood of Central Missouri v Danforth 96 S Ct 1976 (1976)

Planned Parenthood of Southeastern Pennsylvania v Casey 112 S Ct 2719 (1992)

Reinesto v Superior Court 894 P 2d 733 (Ariz App Div 1 1995)

Roe v Wade 93 S Ct 705 (1973)

Robinson v California 370 US 660 (1962)

Shuai v State 966 NE 2d 619 (Ind App 2012)

State v Gethers 585 So 2d 1140 (Fla App 4 Dist 1991)

State v Martinez 137 P 3d 1195 (NM App 2006)

State v McKnight 576 SE 2d 168 (SC 2003)

State v Merrill 450 NW 2d 318 (Minn 1990)

Stenberg v Carhart 120 S Ct 2597 (2000)

United States v Jumper 3 Fed Appx (4th Cir 2001)

US v Montgomery 635 F 3d 1074 (8th Cir 2011)

Whitner v South Carolina 523 US 1145 (1998)

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Whitner v State 492 SE 2d 777 (SC 1997)

Webster v Reproductive Health Services 109 S Ct 3040 (1989)

Amici Curiae Briefs

Amici curiae brief of the Alabama Women's Resource Network et al in the matter of *Akron v State* 2011 WL 3781258 (Ala Crim App)

Amici curiae brief of American Academy of Addiction Psychiatry et al in the matter of *Ex parte Ankrom* 2013 WL 135748 (Ala)

Amici curiae brief of American Academy of Addiction Psychiatry et al in the matter of *Ex parte Kimbrough* 2013 WL 135748 (Ala)

Amici curiae brief of American Association of Suicidology et al in the matter of *Shuai v State* 966 NE 2d 619 (Ind App 2012)

Amici curiae brief of American Public Health Association et al in the matter of *Kimbrough v State of Alabama* in the Court of Criminal Appeals of Alabama, criminal appeals number CR-09-0485 (2010)

Amici curiae brief of American Public Health Association et al in the matter of *McKnight v South Carolina* 540 US 819 (2003)

Amici curiae brief of American Public Health Association et al in the matter of *State v McKnight* 576 SE 2d 168 (SC 2003)

Amici curiae brief of Legal Voice and Perinatal Loss Support Organizations and Experts in the matter of *Shuai v State* NE 2d 619 (Ind App 2012)

Amici curiae brief of the National Association of Alcoholism and Drug Abuse Counselors et al in the matter of *Whitner v State* 492 SE 2d 777 (SC 1997)

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Amici curiae brief of Pegasus Legal Services for Children et al in the matter of *State v Martinez* 141 NM 763 (NM 2007)

Amici curiae brief of South Carolina Medical Association et al in the matter of *McKnight v State* 661 SE 2d 354 (SC 2008)

Statutes and Bills

South Africa

Abortion and Sterilization Act 2 of 1975

Basic Conditions of Employment Act 75 of 1997

Children's Act 38 of 2005

Choice on Termination of Pregnancy Act 92 of 1996

Constitution of the Republic of South Africa, 1996

Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

Electoral Act 73 of 1998

Employment Equity Act 55 of 1998

Inquest Act 58 of 1959

Interim Constitution of the Republic of South Africa, 1994

Labour Relations Act 66 of 1995

National Health Act 61 of 2003

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Prevention of and Treatment for Substance Abuse Act 70 of 2008

Prevention of and Treatment for Substance Abuse Bill

Sexual Offences Act 23 of 1957

Unemployment Insurance Act 63 of 2001

Wills Act 7 of 1953

United States

Alabama Pain-Capable Child Protection Act

Arkansas Constitution

California Civil Code

California Penal Code

Code of Alabama

Code of Georgia Annotated

Florida Statutes Annotated

General Laws of Rhode Island Annotated

Indiana Code

Kansas Criminal Code

Kentucky Penal Code

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Maryland Code

Oklahoma Statutes

Partial-Birth Abortion Ban Act of 2003

Sanctity of Human Life Act (HR 23 2013)

South Carolina Code

Tennessee Code

Tennessee Senate Bill 1392

Texas Penal Code

Unborn Victims of Violence Act of 2004

United States Code Annotated

United States Constitution

Utah Criminal Code

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