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Addicted Pregnancy as a Sex Crime

LORRAINE SCHMALL*

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PROLOGUE

Probably the most incredible, exhausting and marvelous thing that ever happened to me was bearing young. I wanted children. I

* Associate professor, Northern Illinois University. I want to thank Professors Leona Green, Paula Johnson, Suzanne Reynolds and Joan Steinman for their critique and support; Pat Costello, Bob Drum and Shawn Miller for their research assistance; and Professor/Lawyer Sarah Weddington, whose argument for the Plaintiff in Roe v. Wade began the modern colloquy on female and fetal rights.

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was happy, married, and working at a job that paid better than about ninety percent of all the jobs held by women in the country. But pregnancy was also one of the worst times in my life. I was sick every minute, from conception until birth. I was tired, I was worried all too much about the fetus growing inside me, and I wondered the whole time if I would be able to really be a mother when the fetus left my body and my care was no longer autonomic. I practiced yoga and learned to talk to my fetus as a way of easing my pain, anxiety, and sickness. Every physical condition I had before the pregnancy was worsened by the presence of that fetus in my womb. Despite the costs, I exercised my personal constitutional right to continue my pregnancy to term.

I read everything I could about pregnancy. One of the most remarkable things I found out was that if I failed to properly nourish myself, and even if I died, my fetus would draw nourishment from the marrow in my bones. My fetus was part of me. I was, except for my socio-economic class, a typical mother. I was not arrested, committed, or harassed. My wealth, my race, and my access to private medical care made me inconspicuous — and safe.

There was a time, however, in my middle class, empowered life, when I had big troubles — when somebody in my family was dying ... slowly, noisily, and with long bouts of madness and chaos. This deviance from the rest of "normal" society made me vulnerable. With the best of intentions, the helping professions were there — to imprison me and my family. They, the doctors, the social workers, the lawyers, the bill collectors (or the "account representatives"), the therapists, even the police, identified me and my family as in need of their attention. They made me sign papers and attend meetings and go to court and seek counseling and have my children probed and examined. It did not feel like help to me. And it did not make my life better, in part because there were no resources available to help me, or to cure the person who was dying. Even though the helpers could not help me, I had no way to get them out of my life. I resented their intrusion, and felt, at a time when my whole world was falling apart, that I had no privacy, no autonomy, no control.

I thought often about how much worse it would be if I had been poor, having to juggle the helpers with the prosecutors and the welfare department, dealing with the lines at public health and the rest of life in this country that accompanies being poor. My problems would multiply if I were a woman of color, or from a foreign land with a language or dialect nobody could understand — and hooked on drugs.

Two of my childhood friends are doctors. Would they call the state if I abused my fetus? If I delivered too much valium through
my umbilical cord? Would they turn me in when I delivered a baby with serious fetal alcohol syndrome? Would they call the police if my husband were a drunk, who beat me and threatened my children, or my fetus? I think not.

One of my friends is a pediatrician. She has testified in abuse hearings where the primary physician has refused to turn in a lifelong patient. I asked her about whether doctors comply with reporting statutes. She said maybe, sometimes, perhaps. And the doctors she knows would probably never report their friends, or peers, or nearby neighbors, or patients whose families they've treated for years, or their wives' friends, or their husbands' students, or their sisters' clients. Which leaves those people who have no close relationships with doctors—the needy.

My other friend is a gynecologist. She resents being "drafted into the FBI." She doesn't relish the idea of losing touch with a patient because the woman can't even trust her own doctor. She once tested the blood of one of her patients that she suspected of using cocaine. Armed with positive test results, she called her patient, advised her of her "rights" and her responsibilities. And never saw her again. That is, until after her baby died from complications unrelated to cocaine, which could have been avoided by decent prenatal care. My doctor told me, a lawyer, that she had learned her lesson.

My own children were delivered by nurse-midwives, whose patients were about evenly divided between older, professional, "hipper" mothers and women on public aid, for whose care the state had contracted. The midwives gave each pregnant mother a questionnaire about, *inter alia*, street drug use. They begged us to be honest, and joked about how they would never reveal our answers to the press when we ran for public office. They certainly did not anticipate the answers being used against mothers in criminal prosecutions. Some of them—not among my half—probably were.

**INTRODUCTION**

At the same time former President Ronald Reagan was running for office, emphasizing a return to traditional family values, we started to keep track of the numbers of children born addicted to crack cocaine. By the end of his presidency, estimates were that nearly

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1. See Nancy Kathleen Sugg & Thomas Inui, *Primary Care Physicians' Response to Domestic Violence: Opening Pandora's Box*, 267 JAMA 3157, 3158 (1992) (noting that doctors coming from white, middle-class backgrounds were unlikely to ask their patients if their injuries were due to domestic violence, unless the patients were of a lower socio-economic status).
eleven percent of all women in America used drugs during their pregnancies. The result of this drug use is that 375,000 newborns were adversely affected by in utero drug exposure.\(^2\)

During the recent presidential campaign, the candidates seemed even more motivated than their predecessor to emphasize “family” values.\(^3\) More than a decade of coercive acts taken by the government, ostensibly for the protection of the unborn, have done little to improve the lives of families with drug problems or to deter the use of drugs by pregnant women.

In a well-intentioned, desperate, yet flawed effort, states have begun to intervene into the lives of pregnant women. Through criminal prosecution, civil reporting statutes and agency initiated child abuse and neglect proceedings, the state has subjected women to court order and supervision.\(^4\) These governmental approaches to the problem of addicted pregnancy result in the arrest of some poor woman whose labor has just ended, and whose child, though short for this world, will live just long enough to give the state grounds to prosecute its mother. Dedicated and caring doctors must face the choice of turning in their patients or violating a reporting law. While well-meaning social workers must testify that drug abuse is child abuse, and rend a family, even when no good alternative to that family exists.\(^5\)

This article examines how controls on addictive pregnancy present a new and dangerous threat to the treatment of women under the law. Although there are separate legal and social concerns with each of these governmental approaches to the serious problem of prenatal drug and alcohol abuse, in this article I collapse all three into what I


\(^3\) See Eleanor Clift, *The Murphy Brown Policy*, NEWSWEEK, June 1, 1992, at 46 (“Bush said the word ‘family’ nineteen times in a recent speech...”).


\(^5\) See ROSEMARIE TONG, WOMEN, SEX AND THE LAW 39, 53 (1984). This paper is not about why these women use drugs, and it is not about why women with problems that range from drug addiction to abject poverty have children, although the latter inquiry is relevant to why they lack a criminal *mens rea* to harm their fetuses, and why we cannot simply assume without proof that they are negligent or unfit parents. Sociologists may be able to shed light on some of the reasons:

Bluntly stated, prostitutes [and women who do not or cannot demand regular commercial payment for sex] are not born. They are made by a society that teaches girls that, if all else fails, a woman can always gain attention or money by offering her body to men who both want and need it.

*Id.* at 53.
call coercive actions. I do so, because in each case, there has been an adjudication of the woman’s “guilt” — as a negligent or unfit parent, as a criminal who is additionally guilty of being pregnant at the time, or as a criminal because of her pregnancy, capable of within-body delivery of a drug to a minor. In each case, for all intents and purposes, the woman is visited with the same sanction — denial of the custody of the to-be-born child.

Part I of this article examines the relationship between mother and fetus. I conclude that no coherent status attaches to the unborn vis-a-vis its own mother which could justify depriving her of her privacy, autonomy, and right to make personal family decisions. In Part II, I present some historical information on the disparate legal treatment of women throughout history. Part II(A) focuses on those legal acts undertaken to force women to comply with the feminine roles. I conclude that coercive acts comport with these anachronistic and unfair views of what women ought to do and be. Part II(B) continues the discussion of the disparate treatment based upon gender, but focuses on the unjustifiable disequilibrium between men and

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6. The following list compiles criminal and civil coercive actions brought against pregnant women. Because it is not always apparent on the face of a decision whether a woman is being subjected to a coercive action, the following is not an exhaustive list.


women with regard to the responsibilities of children. In particular, I state that a pro-child stance is inappropriate in the case of pregnant addicts because it is unfair to distinguish between mothers and fathers. Part III addresses the discriminatory effect of state intervention into cases of addicted pregnancy on poor people and people of color. Lastly, Part V analyzes the constitutionality of coercive government actions to control addicted pregnant women. This section determines that the constitutionality of coercive acts against pregnant drug users does not fit neatly into any one area of analysis. Consequently, I treat each potentially conflicting constitutional provision separately. Taken together, the arguments that these coercive acts violate the constitution are compelling.

I. THE CHAOTIC LEGAL STATUS OF THE UNBORN

The legal status of an unborn under established jurisprudence does not justify coercive actions on behalf of fetuses. In no other case, except the abortion of a viable fetus, has the state taken an unequivocal position in favor of the unborn. There is no consistent legal conception of when or under what circumstances a fetus becomes a person. In addition, there is additional lack of consensus on what is best for the parties involved and there is no bright-line test for whose interests should predominate. What women choose to do to their bodies, however, has become one of the most litigated and legislated issues in this country.8

7. See, e.g., Albert R. Jonsen, Transition from Fetus to Infant: A Problem for Law and Ethics, 37 Hastings L.J. 697 (1986). This is a thought-provoking introduction to a symposium issue: “Procreational Autonomy.” Although Jonsen makes many excellent points, I am disturbed by his conclusion that the debate about what rights a fetus has should be a debate between lawyers and ethicists. Mothers are strangely missing as a necessary voice in the colloquy.

8. See Fay Rozovsky, Consent to Treatment (2d ed. 1990). The author notes about abortion: “It is fair to say that no other medical procedure has been singled out for such attention.” Id. § 3.5, at 159. On the contrary, what other people do to women’s bodies is often ignored. See, e.g., Model Penal Code § 213.1 (1962) (recommending against the crime of marital rape except in cases of serious aggravation, because of the “generalized consent” to intercourse implied by marriage); cf. James T.R. Jones, Battered Spouses’ Section 1983 Damage Actions Against the Unresponsive Police After DeShaney, 93 W. Va. L. Rev. 251 (1991) (discussing police failure to adequately respond to domestic abuse and rape calls in the context of § 1983 litigation); Robin West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 Fla. L. Rev. 45 (1990); Matthew Litsky, Note, Explaining the Legal System’s Inadequate Response to the Abuse of Women: A Lack of Coordination, 8 N.Y.L. Sch. J. Hum. Rts. 149 (1990) (calling on the legislature, courts and police to provide a clear policy of protecting battered women); Symposium on Domestic Violence, 83 J. Crim. L. & Criminology 1 (1992).
The Supreme Court stated in *Roe v. Wade* that "the unborn have never been recognized in the law as persons in the whole sense." The ultimate question surrounding legal actions against pregnant women who use illegal drugs — ostensibly for the benefit of the fetuses these women carry — is how do we decide what or who to restrict? We are neither compelled to coercive actions by their indisputable moral correctness, nor are such actions a logical outgrowth of our Constitution or common laws. Fetuses are not so clearly deserving of protection, and if we choose to protect them, we do so as a consequence of having made a social decision that their rights are superior to their mothers. There is no coherent body of law to support that conclusion.

Courts often, but not universally, recognize an interest, regardless of fetal age, against a third-party tortfeasor or criminal. The

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10. *Id.* at 162.
11. In making her point that such a decision is a social, not a biological determination, Dawn Johnsen quotes Arthur Leff:

> [T]he relevant legal question ought not to be whether a fetus is 'alive' or 'a person' from the moment of conception, or the moment of viability, etc., as if the question were one of natural rather than social decision. A legal decision will still have to be made to whom the law ought to give protection, and at what cost, paid by who[m]... Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 n.1 (1986).

No one argues that anyone has a right to use and abuse illegal drugs, but the state of addiction is a medical, not a legal problem, and coercive actions against women for any reason violate their rights to bodily integrity.


13. *See State v. Merrill, 450 N.W.2d 318 (Minn. 1990); see also People v. Ford, 581 N.E.2d 1189 (Ill. App. Ct. 1991) (denying the defendant's claim that the feticide statute was unconstitutional as a violation of the Equal Protection Clause; the *Ford* defendant argued that the statute convicting him of feticide, for stomping the stomach of his pregnant seventeen-year-old stepdaughter, was unconstitutional
interest of the fetus vis-a-vis one or both of its progenitors is less clearly recognized. Under Roe, non-viable fetuses have no rights superior to the women who carry them. Somewhere in the middle of a pregnancy, the Supreme Court has recognized the state’s interest in the preservation of potential human life. But there is a radical difference between extinguishing that life, which is prohibited by Roe after viability, and improving the fetal environment to obviate potential dangers upon birth.

For example, in the typical coercive action against pregnant women, the state takes action at the time of delivery. The state may allege either a criminal “delivery” of an illegal drug to a person/infant or the state may attempt to take custody of a newborn alleging the mother’s civil or criminal neglect. In the most capricious of cases, the state has exercised jurisdiction over the mother for reasons unrelated to her pregnancy — for example, her commission of a

since it allowed a woman to abort the nonviable fetus in the first trimester without fear of prosecution); State v. Bauer, 471 N.W.2d 363 (Minn. Ct. App. 1991) (affirming trial court’s decision holding the defendant guilty in part for felony fetal homicide and for aiding the fetus’ mother in suicide). Contra Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970) (court cannot create a feticide statute out of a statute prohibiting the killing of a human being, even though defendant intentionally thrust his knee into the stomach of his 34-week-pregnant estranged wife); People v. Vercelletto, 514 N.Y.S.2d 177 (Ulster County Ct. 1987) (defendant could not be guilty of manslaughter when a fetus was injured during an automobile accident in which the defendant was driving intoxicated; the court’s holding was premised on the common law notion that a fetus was not a person for purpose of the homicide statute).


15. See, e.g., Johnson v. State, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991) (affirming a trial court’s decision that the defendant was guilty of delivering cocaine to her newborn infants by way of her umbilical cord immediately upon their birth, by using cocaine while in labor), quashed and remanded, Johnson v. State, 602 So. 2d 1288 (Fla. 1992).

16. See, e.g., In re Kristopher M., 1992 WL 26783 (Conn. Super. Ct. Feb. 10, 1992) (affirming a trial court which terminated a mother’s parental rights for neglect after she tested positive for cocaine and the child had seizure upon birth). The mother had a history of drug and alcohol abuse, along with physical abuse she suffered as a child. “The fact that the cocaine was introduced into the child’s veins a matter of hours before, rather than after birth does not preclude a finding of neglect.” Id. at *20; In re Stefani Tyesha C., 556 N.Y.S.2d 280 (App. Div. 1990) (finding of neglect against three mothers who tested positive for cocaine upon the birth of their three children); Department of Social Servs. v. Felicia B., 543 N.Y.S.2d 637 (Fam. Ct. 1989) (holding that a finding of neglect against a mother for ingesting cocaine during pregnancy required the child to test positive for toxicology test upon birth).
crime. The state coerces her not because of the crime but because of her pregnant condition.\textsuperscript{17} If a pregnant drug addict manages to avoid the legal system during her pregnancy, the state will not act. Of course, for many obvious reasons, racial minorities and the impoverished are less likely to be able to avoid contact with the state than their financially secure, majoritarian counterparts.

No state has attempted to create a logical and predictable theory for when its interest in the potentiality of human life takes precedence over the interest in the privacy of the pregnant woman. This inquiry is difficult because no lasting jurisprudence exists concerning when a fetus has rights, outside of the \textit{Roe v. Wade} scenario. Coercive actions against pregnant, drug addicted women — or girls — create fetal-maternal conflict. The coercive actions separate the inseparable,\textsuperscript{18} and focus upon the wrong thing — an organism about whose legal status mothers, philosophers, moralists, jurists, and society in general cannot agree.\textsuperscript{19} Such coercive actions victimize a mother who is already a victim, and whose child has, among other things, to look forward to being raised by an ex-convict.

The impossibility of distinguishing mother from fetus has led to an anomalous treatment by different jurisdictions in different areas of the law. In Australia, abortion is murder, plain and simple.\textsuperscript{20}

\begin{itemize}
\item \textsuperscript{17} See Jailed Because She is Pregnant; A Superior Court Judge Went Beyond His Duty, \textit{Wash. Post}, Aug. 21, 1988, at C8. In one case, a pregnant woman went to the police for help and protection from an abusive partner; she was thereupon arrested for abusing her fetus. The plight of Pamela Rae Stewart provides another example. She began to hemorrhage after she was forced to have sex with her husband. She was arrested after seeking medical help. People v. Stewart, No. M. 50819, slip op. (San Diego Mun. Ct., Cal. Feb. 26, 1987); see Tamar Lewin, \textit{Drug Use in Pregnancy: New Issues for the Courts}, \textit{N.Y. Times}, Feb. 5, 1990, at A14.
\item \textsuperscript{18} I am not alone in this confusion about how a state can focus on a part of a woman and call it, literally, a plaintiff. See Patricia Williams, \textit{Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts}, 42 \textit{Fla. L. Rev.} 81 (1990). "I do not believe that a fetus is a separate person from the moment of conception. How could it be? It is so interconnected, so flesh-and-blood-bonded, so completely part of a woman’s body. Why try to carve one from the other?" \textit{Id.} at 92.
\item \textsuperscript{19} It is analogous to the treatment pregnant women get from their doctors. "[The] psychosocial aspects of pregnancy and childbirth are given too little weight in the care process, to the detriment of women and their families, because of a focus on biotechnical aspects of care." \textit{Charlotte Muller, Health Care and Gender} 171 (1991). Muller also argues that service and care providers decide which patients "deserve" care, (e.g., often not including lesbians who want fertility treatment) and cites doctors' willingness to be more paternalistic toward poorer patients.
\item \textsuperscript{20} \textit{Colin Howard, Criminal Law} (4th ed. 1982). "There are three indictable
the United States, it is not so clear. For example, the People of the State of Minnesota convicted a man of double homicide when he killed a woman who was, unknown to him, twenty-seven days pregnant.21 The defendant was charged under a state law denominated “Murder of an Unborn Child in the First Degree.”22 The name itself could be drawn from a Eugene Ionesco play. But somehow, it is not absurd to hold a murderer accountable for the life he took and the potential life he prevented. This man was not, according to the court, denied his Fourteenth Amendment rights by a statute that failed to distinguish between viable and non-viable fetuses.23

A New York judge refused, however, to convict for a vehicular homicide a drunk driver who struck the car of a seven-month pregnant woman whose child was stillborn. “The heart of the issue herein is not whether this seven-month fetus . . . was a person in any philosophical, religious or even medical sense; but whether she was a person in a legal sense [under the statute].”24 The legislature defined a person protected by the criminal vehicular homicide law as “a human being who has been born and is alive.”25 Ironically, the state also defined who qualified as a person in some other contexts. “Person” for the purposes of murder, manslaughter, negligent homicide or abortion is defined as a fetus more than twenty-four weeks old. Could the unborn person in Vercelletto have been murdered, as long as an automobile was not the instrument of her death?

Even more absurd is the Missouri statute, upheld by the Supreme Court in Webster v. Reproductive Health Services,26 which proclaims “the life of each human being begins at conception” and that “unborn children have protectable interests in life, health, and well-being.”27 The logical interface of Webster and Roe, as applied in Missouri, means that a pregnant woman can exercise her constitutional rights and can terminate “the life of [a] human being,” this life having, by statute, begun at conception. In another case in that same state, a woman urged that her fetus was unlawfully jailed and suffered cruel
and unusual punishment without due process of law, simply because she was serving time. 28 The fetus lost. But what miserable irony if it had not, and if coercive actions that resulted in imprisonment or commitment of pregnant drug addicts, while protecting fetuses from the debilitating effects of demon drugs, denied them their constitutional rights as "unborn persons?"

The Illinois Supreme Court has also struggled with the concept of how to treat a fetus outside the framework of the Roe abortion context. In Stallman v. Youngquist, 29 the Illinois Supreme Court rejected the notion of tort liability of mothers for negligently inflicted prenatal injuries. The Court dismissed the stereotypical view of a mother’s role as "guarantor of the mind and body of her child at birth." 30 The court found no fetal rights superior to those of its own mother when it stated:

It is clear that the recognition of a legal right to begin life with a sound mind and body on the part of a fetus which is assertable after birth against its mother would have serious ramifications for all women and their families, and for the way society views women and women's reproductive abilities. 31 It strains our concepts of personal integrity to consider a woman as of no greater importance than as a fetal environment.

Even the pro-life movement offers no consistent constitutional or moral theory that supports coercive actions against pregnant women to protect the health of their unborn. Their adherents oppose most abortions as murder. They maintain, however, that abortion must be

29. 531 N.E.2d 355 (Ill. 1988).
30. Id. at 359.
31. Id. The Stallman court likely would agree with some feminist criticism. Many of the proponents of taking these pregnant women by force, however, are men who have not had to be sterilized to save their jobs and who have not experienced pregnancy or tried to avoid it, or had to deal with the consequences in exactly the same way as a woman. Williams, supra note 18, at 88 (commenting on the appellate court’s refusal to find less restrictive alternatives to fetal protections in UAW v. Johnson Controls Inc., 886 F.2d 871, 891 (7th Cir. 1989), rev’d, 111 S. Ct. 1196 (1991), and stating "why not confine all women to the home, keep the liquor under lock and key, and feed them a constant diet of whole grains and antibiotics, like brood hens?"). "[E]very woman should consider herself pregnant on the first day her period is due and avoid exposure to anything that has been implicated in birth defects." Margery W. Shaw, Conditional Prospective Rights of the Fetus, 5 J. LEG. MED. 63, 73 (1984) (citing Fran Pollner, The Revolution in Fetal Health Care, MED. WORLD NEWS, Sept. 12, 1983, at 65, 77 (1983)).
available to rape and incest victims. Consequently, abortion is moral, and should be legal, only when the woman did not deserve to become pregnant, that is, when the pregnancy did not result from her voluntary act. This inconsistency is apparent as well in the application of coercion to the pregnant drug user. The coercion by society is motivated, at least in part, by a desire to make the drug user accept responsibility for her acts, even if she is mentally and physically unable.

In the abortion context such coercion is virtually foreclosed. Husbands, boyfriends, and even parents of minors cannot prevent a woman from having an abortion. A father cannot force a woman to abort, even if he agrees to pay for an abortion, in order to avoid an eventual order to pay child support. One court reasoned, however, that a man, who, together with his ex-wife, arranged to freeze her ova fertilized by his sperm, can prevent that ex-wife from donating those preembryos to a childless couple. The lower court gave the mother "custody" of the ova, and awarded both "parents" joint control over the fertilized ova with equal voice over their disposition.

32. Four years ago, I sat in amazement outside the auditorium of the university where I worked, and listened to a presidential debate in which George Bush condemned abortion as murder, and, without skipping a beat, asserted the right of rape victims to commit that kind of murder. Nobody asked the Vice-President if it made sense to allow the "murder" of an unborn child whose life resulted from a sexual assault by a stranger — a rapist — but to illegalize the abortion of a fetus that resulted from an unwanted sexual assault by a husband, where there is no such thing as marital rape? Is a rape victim less of a mother, is her fetus less of a person, than a woman who is financially, physically or spiritually unable to care for a child and whose fetus can, nevertheless, be legally disposed of — much to the dismay of the Right-to-Life movement?

33. Some scholars maintain that most pregnancies among poor, especially black drug users are not voluntary, but do indeed result from rape, incest, or the nonavailability of abortion. See Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419, 1445 n.139 (1991).


36. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (limiting its final holding to the donation context because of the equal right of the husband to avoid procreation), cert. denied, Stowe v. Davis, 113 S. Ct. 1259 (1993).

37. Davis v. Davis, 59 U.S.L.W. 2205 (Tenn. Ct. App. Sept. 13, 1990) (unpublished decision), aff'd, 842 S.W.2d 588 (Tenn. 1992). In affirming the appellate court, the Supreme Court of Tennessee clarified the interest at issue in the lower
The court reasoned that it is "repugnant and offensive to constitutional principles" to require the ex-husband "to bear the psychological, if not the legal, consequences of paternity against his will."

The Tennessee Supreme Court had no greater ideas of what to do with these ova. Employing a balancing test in its final determination, the court essentially commanded the progenitors to agree to their disposition. The court recognized, however, that the father’s interest in avoiding parenthood, and his inability to establish a relationship with a child born from the implantation of these ova, was more significant and deserved greater protection than his ex-wife’s interest in giving her ova to a woman who wanted a child. The court recognized the mother’s "not insubstantial emotional burden" of having undergone painful, lengthy, and expensive in vitro fertilization procedures, but could offer her no solace. The court found a man has a fundamental right "to procreational autonomy." No one can tell him he must father a child. The court’s support of the man’s right not to procreate seems inconsistent with the decisions under Roe which do not allow a father to force an abortion on an unwilling mother.

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39. Davis, 842 S.W.2d at 604.
40. Id. at 601. The right to procreational autonomy, including the equivalent rights “to procreate and . . . to avoid procreation,” arises from the concept of liberty embodied in both the federal and Tennessee constitutions and expressed as an individual right to privacy. Id. at 598-601.
41. The Davis court distinguished the equal interest held by both gamete providers from the exclusive right held by a woman to make an abortion decision during the first three months of pregnancy following implantation of the preembryos when presumably a court could not enforce a contract against a woman because her autonomy is absolute in relation to her spouse during this time period. Id. at 597.
Some argue that fetal rights advocates who support coercive actions against pregnant drug users are simply trying to undercut a woman's abortion options. The argument is that by increasing fetal rights, there is a greater ability to protect fetuses from the action of its mother. An example of an attempt to limit the abortion rights of women through the use of fetal rights took place in Illinois. The state passed a law that required physicians to advise women who wanted an abortion of the "possibility of fetal pain." Although the statute was declared unconstitutional, it did not stop its proponents from trying to burden and compound the pain of the living, viable, pregnant woman, for the good of a fetus that everyone agreed was not medically viable.

An alternative argument can be made that coercive acts against pregnant women may encourage them to abort their fetuses, rather than be subject to criminal or civil prosecution for neglect or delivery of drugs. This may be a straw man, since abortion is likely not an affordable option. But it does present a conundrum. Advocates for the unborn cannot hope to encourage their destruction to obviate their neglect. However remote the possibility, it adds to the lack of coherent philosophy or legal precedent to justify coercive acts.

The most famous attempt to delineate the legal rights of women and fetuses is under attack. Roe v. Wade is undergoing either refinement or outright reversal. This leaves only the inchoate, unarticulated and untested legislation by the states as a guide. A fetus can sue in tort, or be murdered by a third person — sometimes. Not every court agrees about when a fetus becomes a legal person, and some become persons for one purpose but not another.

This inconsistency prevents us from analyzing the system. At the least it requires us to acknowledge that there is no consistency, which suggests a failure of the system. After that paradigmatic failure, we might next look at a type of sociological jurisprudence: how does law affect the parties and the society in which we all live? Whether fetuses


44. In the overwhelming majority of jurisdictions who have considered the issue, the fetus must be born alive to bring suit. See State v. Soto, 378 N.W.2d 625, 628-29 (Minn. 1985) (discussing the majority rule).

45. See supra note 25.
have rights can be looked at in terms of how the rest of society is affected by our resolution of these issues. To put it simply, is the world a better place — is the common weal improved — by coercive actions against pregnant women?

The current approach toward control of drug problems and protection of the unborn has historical precedent. In England and America, social change was demanded by members of the Eugenics Movement, which by and large functioned to encourage strengthening and preservation of the race through compulsory sterilization of women who were likely to produce defective offspring. Part of the Movement in Victorian England was a fifteen-year experiment in which alcoholic women were sent to reformatories in “a propitious rural environment” where they were subjected to “a variety of positive moral influences.” This endeavor was undertaken because imprisonment of these women for their alcoholism, which accounted for the greatest number of women in prison, had failed miserably.

As in the case of addicted pregnancy, the social and practical costs were high for female drunks who gave birth to, and often neglected, their sickly children. Victorians were burdened, not unlike contemporary Americans, with “heightened anxiety about the eugenic implications of female crime.” The worst element of female crimi-

46. See, e.g., William T. Vukowich, The Dawning of the Brave New World — Legal, Ethical, and Social Issues of Eugenics, 1971 U. ILL. L. REV. 189. Despite the horror inspired by hindsight, the movement was motivated by a sincere desire to improve society, and protect the unborn, by literally preventing their conception.


48. Id. at 5. In describing the case of a woman prosecuted for inebriety, the secretary of a large prison-reform group in England at the turn of the century, wrote:

She had been a good wife and mother till late in life. Then her children had all dispersed, and great loneliness had come upon her. It was the old, old story of drink, neglect, waste, and dirt—no food provided, no house made tidy, no beds made, no washing of clothes.

49. T.H. HOLMES, KNOWN TO THE POLICE 60-3 (1908), cited in ZEDNER, supra note 50, at 28. Or consider this cavalier determination of a woman’s criminality — or her unfitness for the care and custody of her child. “When a woman gets to be utterly careless of her personal appearance — personal cleanliness — you may be sure that she is careful for nothing else that is good.” M.E. Owen, Criminal Women, CORNHILL MAG., 14, 155 (1866), cited in ZEDNER, supra note 51, at 28. Compare Hopkins v. Price-Waterhouse, 490 U.S. 228 (1989), where a woman was denied partnership at a large accounting firm because she was not feminine enough. Justice Marshall asked the attorney for the company whether male partners also had to have their hair done to be promoted there. Cf. Ellen Goodman, A Warning on Warnings, BOSTON GLOBE, April 4, 1991, at 11 (discussing a situation in which waiters in a restaurant questioned a pregnant woman who ordered a drink as to whether she knew the dangers of drinking, demonstrating that everyone polices the pregnant).
nality was the woman’s failure, especially as a mother, to live up to the feminine ideal: chaste, moral, generous, religious. As one well-known preacher of the time remarked, “Woe to that country in which men are not able to consider women as living lives on the whole more sober, righteous, and godly than their own.”49

A century later, one may argue, zealots who champion the rights of fetuses are no less sexist, and infinitely less humane than their predecessors. Unlike the Eugenics advocates, I hear of no efforts to remove these poor addicts to idyllic environs with quality medical care and nurturing drug counselors. In addition, unlike their forebears, these modern protectors perpetrate invidious racial discrimination, an evil spared the homogeneous British a century ago. Even more reprehensibly, we do not appear as willing to abandon the historically worthless and dangerous idea.

Thus, the legal status of fetuses seems to elude lawmakers, except in two circumstances: when it is nonviable and subject to being aborted by an adult woman who can afford to terminate her pregnancy, and when its mother uses drugs.

II. COERCIVE ACTIONS ARE NEITHER FAIR NOR JUST

Government actors have three choices in dealing with pregnant drug addicts. They can leave them alone; they can affirmatively assist them; they can punish them. It is impossible to be sanguine about our societal motives when the government has rejected the first two approaches, and when the brunt of its punitive acts are borne by the least powerful, women in general, and specifically women of color, with no concomitant help for them in the herculean task of overcoming the poverty, addiction and second-class citizenship caused by our own racism and class structures. Women are measured against a male-created eurocentric standard of gender propriety. Demands and legal obligations are made upon mothers which fathers can evade. And when fetuses and women are victimized by tortious and criminal actions, they are given scant protections or redress.

A. SOCIETY DEMANDS SEXUAL PROPRIETY FROM WOMEN

From King Solomon to Spike Lee, we have been constrained to do the right thing. Although coke babies suffer more than their non-addicted infant peers, rending what families they have satisfies no theory of fairness. We have tried to justify coercive acts by stamping

49. ZEDNER, supra note 47, at 14 (citing J.W. HORSLEY, JOTTINGS FROM JAIL 62 (1887)).
them with the imprimatur of rightness. But, as with our lack of a coherent and consistent legal system of stare decisis in this area, there is no universally right and just way of handling the problem of substance-abusing mothers.

Philosophers refer to "legal moralism" as the principle which justifies limitations upon individual liberties in order to enforce conventional moral beliefs. One noted English scholar argues: "If the reasonable man believes that a practice is immoral and believes also — no matter whether the belief is right or wrong . . . that no right-minded member of his society could think otherwise, then for the purposes of the law it is immoral." This could be a neat way of justifying coercive acts against women, despite the absence of a legal system, and regardless of its efficacy or practical impossibility; all our notions of legal order rest upon this guarantee of the morally correct.

The biggest problem with this moral schema is that "it is highly unlikely that a melting-pot society could produce a consensus on what is moral or immoral . . . ." The public's disagreement after Roe v. Wade is a perfect example of our collective inability to define what is moral, and therefore legally enforceable. If we are honest, and attempt to consider the opinions of the less politically powerful — women and people of color or ethnic minorities — the opinions would be even more diverse. Therefore, no articulable, logical and cogent legal basis for the present paternalism toward the fetus exists, and no practical justification for coercive acts against pregnant drug addicts as a benefit to society follows.

At least some of the state's activity is likely motivated by the belief that pregnancy is what a sexually active woman "deserves." Such a view is analogous to views of date or acquaintance rape that consider the male's determination to have sex with a woman against her will just "punishment for her boldness, carelessness, or fantasies." The least a pregnant addict can do for the poor misbegotten

50. Tong, supra note 5, at 39.
52. Tong, supra note 5, at 40.
53. Id. at 103; see also Tamar Lewin, Woman has Abortion, Violating Court's Order on Paternal Rights, N.Y. Times, Apr. 14, 1988, at A26. An Indiana trial court, apparently ignoring Planned Parenthood v. Danforth, 428 U.S. 52 (1976), recognized "parental rights" of petitioner, and enjoined his girlfriend from having an abortion. The trial judge, obviously never having been pregnant himself, noted that "the only distress associated with the continuing pregnancy was [the woman's] wish to look nice in a bathing suit this summer." Id. The Supreme Court of Indiana reversed in Doe v. Smith, 527 N.E.2d 177 (Ind. 1988) (per curiam).
product of her promiscuity is care for it the way the majority sees fit. As one writer made this point fifteen years ago, in a “modern” analysis of sex crime:

The social and legal control of sexual behavior is based, on the one hand, on the need felt in many societies for the channeling of sex drives into forms of conduct leading to procreation, stable family units, and care and socialization of the child (with unquestioned knowledge of paternity in order to ensure proper passing on of property). . . .54

Ironically, none of these goals is satisfied by coercive acts; the addict has already procreated.

The stability a family unit may have is bound to be shaken by the altruism of the police, the social workers, and the judge of heightened social consciousness. The newborn or the young child whose pregnant mother got all the attention from the state is uncared for and forgotten. While her father, also blessed by the beneficence of the state, has no property to pass on to his crack heir. Coercive acts seem, anachronistically, to be fueled by the assumption “that the libido, or sexual drive, is a force that has antisocial potential.”55

Many philosophers have identified the basically misogynistic views of the early theologians as having an unmitigated effect on legal theory and practice centuries later.56 To wit:

A good christian is found toward one and the same woman, to love the creature of god whom he desires to be transformed and renewed, but to hate in her the corruptible and mortal conjugal connection, sexual intercourse and all that pertains to her as a wife.57

Righteous Professor Wigmore noted the female propensity “of contriving false charges of sexual offenses by men.”58 Comparing coercive acts against pregnant addicts to socio-legal treatment of sex crimes against women, and sexual harassment of women, shows misogyny pervades our legal redress systems. The misogynous character of our

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55. Id.
56. See generally ROSEMARY RUETHER, LIBERATION THEOLOGY (1972); GEORGE H. TAVARD, WOMEN IN CHRISTIAN TRADITION (1973).
57. RUETHER, supra note 56, at 103 (quoting the writings of St. Augustine).
58. TONG, supra note 5, at 101 (citing JOHN H. WIGMORE, EVIDENCE 379 (1934)).
legal system makes it difficult, if not impossible, to prove that a man did something to a woman that she did not deserve.\textsuperscript{59} It is as if modern jurists believe the anachronistic and degrading view of women held by a Georgia Supreme Court judge 150 years ago:

[No] evil habitude of humanity so depraves the nature, so deadens the moral sense, and obliterates the distinctions between right and wrong, as common, licentious indulgence. Particularly is this true of women, the citadel whose character is virtue; when that is lost, all is gone; her love of justice, sense of character, and regard for truth.\textsuperscript{60}

A woman without virtue cannot properly raise a child. No wonder we need not concern ourselves with best-interest hearings before taking custody of the offspring of a female alcoholic or an addict. The old worry — "Was she asking for it?" — plagues so much of our jurisprudence, and accounts for at least part of our collective demand for protection of the unborn at the expense of the woman who gave it life.

Our societal and legal views of rape cast light on how society justifies punitive actions against the pregnant drug user. Look, for example, at this frighteningly recent and candid view of what some powerful and respected men think of rape:

Many experts in the field of legal medicine believe 'that rape cannot be perpetrated by one man alone on an adult woman of good health and vigor.' Medico-legal experts therefore tend to regard all accusations of rape made under such circumstances as false. For example, Beck [1863] states in his treatise on medical jurisprudence . . . 'I have intimated that doubts exist whether a rape can be consummated on a grown female

\textsuperscript{59} Fear of the false complainant is generally not borne out in rape statistics. \textit{See generally} Susan Brownmiller, \textit{Against Our Will: Men, Women and Rape} (1975). For more information about this subject, contact Dr. Pauline Bart, Dept of Psychiatry: University of Illinois at Chicago, who has written extensively on this topic.

One district court judge found that a woman who had posed semi-nude for a motorcycle magazine could not legally experience sexual harassment when her male coworkers made obscene sexual requests. The appellate court in Burns v. McGregor Electronic Industries Inc., 955 F.2d 559 (8th Cir. 1992), reversed the district court and instructed it to determine whether the plaintiff, despite her nude modeling, was "at least as affected as that hypothetical reasonable person." \textit{Id.} at 566. The Court made clear that it did not demand that the district court, on remand, find in plaintiff's favor. \textit{Id.}

\textsuperscript{60} Camp v. State, 3 Ga. 417, 422 (1847).
Pregnant drug addicts have visible signs of their sins upon their very bodies: needle tracks and bellies. As in the case of the unchaste women and rape, these signs of sin prevent women from securing protection under the law.\(^62\)

It seems that a plausible explanation for coercive actions against pregnant women can be found in the historic legal stereotypes held about them. It has been difficult for women to convince male lawmakers and judges that discrimination, harassment, and even rape should be illegal and severely punished. In part, it has been difficult because women are viewed as paragons, whose descent into vice merit their victimization. The most modern example of this misogyny is demonstrated by coercive acts against pregnant women.

**B. FATHERS ARE NOT HELD TO THE SAME STANDARD OF CARE AS MOTHERS**

Except for what society considers the grossest improprieties — incest, pedophilia, and perhaps sexual orientation,\(^63\) a man’s sexuality

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\(^{62}\) State v. Snow, 252 S.W. 629 (Mo. 1923) The court cleared “otherwise blameless” young men from the statutory rape of an under-age prostitute stating that “[a] lecherous woman is a social menace; she is more dangerous than T.N.T.; more deadly than the ‘pestilence that walketh in darkness or the destruction that wasteth at noonday.’” *Id.* at 632. The statute involved imposed strict criminal liability upon any male who had intercourse with an underage girl, regardless of her consent or character. *Id.* at 631. The defendant was convicted of a statutory rape against a fifteen-year-old girl, who testified that she had engaged in intercourse with the defendant and with several other men. *Id.* at 630. In overturning the defendant’s conviction, the court noted that the girl was a prostitute. *Id.* at 632. Consequently, the men involved were “more sinned against than sinning” because of their immaturity and the girl’s influence. *Id.* at 632.

Eventually, the court overturned the defendant’s conviction based on the prosecutor’s prejudicial statement that “[the defendant] gives no more for that girl tonight [sic], gentlemen, think of it, not a spark of love has ever trickled in his heart for that girl, but all he cares for is to satisfy his lustful desires and his fiendish disposition towards women.” *Id.* at 632.

\(^{63}\) See, e.g., Bowers v. Hardwick, 478 U.S. 186, *reh’g denied*, 478 U.S. 1039 (1986). It is ironic that our football hero, Justice “Whizzer” White, found that the fundamental right to privacy that gave unmarried heterosexuals the right to practice birth control bore no “resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy.” *Id.* at 191. Just as drug addiction is too sinful to be an illness, sexual preference is too non-majoritarian to be a normal subset of personal
is his own private affair. Even when he transgresses some law, for example, by forcibly raping a woman, he is often forgiven or only minimally punished. The double standard has been addressed for generations, with no particular change in attitude.

Attempts at equalizing treatment of both genders for sex-related improprieties has fallen flat because of the gender-specific physical differences which highlight such “crimes” as premarital coitus. Cases involving unmarried parenting have a greater impact on the women who show their status, than on men, who do not. For example, in Chambers v. Omaha Girls Club, Inc., the court found that a private non-profit organization that served primarily poor African-American girls could fire a poor young African-American woman who was single and pregnant. The club claimed its mission was to help its clients overcome poverty and eschew single motherhood, among other evils, and to provide them “with exposure to the greatest number of available positive options in life.” Consequently, firing Crystal Chambers was a legitimate business necessity. According to the club, Crystal Chambers failed to be a proper role model for the girls with whom she worked. Her choice was to pursue her career, but not to abort her child. That a child would be raised by a hardworking, professionally-employed mother was not a “positive option” valued by the Omaha Girls Club. There was no discussion of whether the father of Crystal’s fetus worked there. That surely is a different case, because the result of his promiscuity was not physically evident like Ms. Chamber’s distended stomach.

Another example of the different standard men and women are held to involves child support obligations. There is a failure and refusal of family law courts to make fathers support living children,
much less the unborn. Courts are loathe to enforce delinquent child supporters by incarceration because of a perception that putting men in jail will net no real support money for the children. Although one could argue that most of the critics of coercive actions to enforce child support obligations are men, it is fair, considering the serious impact of these state actions, to question their efficacy. As one scholar noted:

[I]mprisonment for nonsupport has obvious disadvantages: it is expensive for the state and no income for the children is going to be generated while the fathers are in jail. Its justification, despite these drawbacks, therefore, depends upon its efficacy in specific and general deterrence: do men who are actually jailed learn their lesson and pay in the future, and does the threat of jail deter disobedience to support orders by fathers who otherwise shirk their obligations? The fact is, data shows that jail is a very effective way to make fathers pay.

The justification for punishment in child support cases is empirically proven; jail deters both specifically and generally, and it rehabilitates the chronic nonsupporter. Jail is a drastic measure that could have serious effects upon the families of those incarcerated. But if we refuse to solve the problem of delinquent child support with coercive acts, why do we approve their use against poor, sick, addicted pregnant women? Fairness dictates that the same considerations be taken on their behalf as those taken for delinquent child supporters.

Similar suggestions that coercive acts for the benefit of the unborn be directed at fathers as well as mothers, although laudable for their recognition of sexual discrimination, are as implausible as changing the results in Chambers and having that embryo’s father fired from his job. Physiology makes a difference. Female defendants deliver drugs through the umbilical cord. In few, if any, cases could a state

68. ROBERT MNookIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE 234 (1989).
70. See DAVID L. CHAMBERS, MAKING FATHERS PAY (1979); see also OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SUMMARIES OF REPORTS BY STATE COMMISSIONS ON CHILD SUPPORT ENFORCEMENT xii (1986).
prove the father's "delivery" of a drug to an unborn child. Furthermore, suggesting that fathers "make" women who are carrying their unborn children take drugs harkens back to the antiquated and erroneous notion that women have no autonomy. Granted, drug addicts have little free will if the notion of addiction is accepted for both what it denotes and what it connotes, but such attempts at equalizing treatment of expectant mothers and fathers merely reinforces gender distinctions and disparate treatment.

Child abuse and neglect actions against fathers are not practical either. Only one court in the country has reported a case where a father was found to have parental responsibilities to his unborn child, and even in that case it was by inference and not by coercion or command. Fathers, married or not, are not prosecuted for failing to support a pregnant woman and provide a fetus with necessaries. One Florida judge did prevent a father from interfering with his girlfriend's decision to place their illegitimate child for adoption, because as the court noted, the father did not support his girlfriend while she was pregnant and such behavior evinced his intent to abandon his child.\footnote{In re Adoption of Doe, 543 So. 2d 741, 749 (Fla.), cert. denied, 493 U.S. 964 (1989).}

Consequently, state law deprived him of his right to interfere with the mother's choice. This was a radical notion — and a good effort on the part of a judge attempting to deal fairly and even-handedly, but the judge imposed no direct responsibilities on the man. Instead, as in many cases, the court reinforced traditional notions of ownership and obligation.

Men are not arrested for child abuse or prosecuted for neglect after having used illegal drugs which are known to adversely affect sperm.\footnote{See Mary E. Becker, Can Employers Exclude Women to Protect Children?, 264 JAMA 2113, 2114 (1990) (stating that "[i]ronically, rational concern . . . would more likely result in policies limiting . . . fertile men, since there have been more documented claims of harm to children of male workers than to children of female workers.")); Kary Moss, Substance Abuse During Pregnancy, 13 Harv. Women's L.J. 278, 286 (1990) (citing Felissa Cohen, Paternal Contributions to Birth Defects, Nursing Clinics N. Am., Mar. 1986, at 49); Ricardo A. Yazigi et al., Demonstration of Specific Binding of Cocaine to Human Spermatozoa, 266 JAMA 1956 (1991) (noting that exposure of males to cocaine has been linked to abnormal development of their offspring).} Nor are there reported cases of removing children from the custody of a father who is arrested for drunk driving, or possession and use of cocaine, or use of a dangerous weapon while minding his children. Would we not take those coercive actions if we were really
interested in the welfare of the child, and not merely hell-bent on perpetuating sex discrimination?

Fathers rarely assume the same type or degree of responsibility for children as mothers. Data reveals that fathers are less involved in family planning. Pregnancy normally results, except in the case of forcible rape, from intentional acts on the part of both partners. But

[v]irtually all Medicaid-financed family planning services, however, are provided to women . . . and almost all sterilizations are performed on women. In 1978, the last year for which a breakdown was available, 88.1 percent of sterilizations were tubal ligations, 2.0 percent were hysterectomies, 5.6 percent were other female procedures, and 4.2 percent were vasectomies.

Women have been victims of introgenesis in medical control of birth. Imposing sanctions against a woman for harming herself, and her child, by failing to do what she has neither the emotional, social nor financial ability to do, legitimizes the theory that only the woman is the primary caretaker, and she must bear the burden of doing her pregnancy right.

This disparate obligation exists as well in the post-birth responsibilities that tend to fall more heavily upon women than men. Accompanying those childcare responsibilities are the psychic duties that society imposes only upon the mother. Modern psychoanalytic theory reinforced age-old notions that mothers are to be censured — and too rarely praised — for the way their children’s psyches develop. In the writings of Sigmund Freud, women are considered masochistic,

74. NEIL KALTER, GROWING UP WITH DIVORCE 10 (1990); Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 HARV. L. REV. 1749, 1810 n.231 (1990).

75. MULLER, supra note 19, at 158 (citing UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH CARE FINANCING ADMINISTRATION, MEDICARE AND MEDICAID DATA BOOK tbl. 2.20 (1983)).


77. See Regina v. Conde, 10 Cox Crim. Cas. 547 (1867) (convicting a mother of manslaughter when she negligently withheld food, causing her child’s death by starvation, but acquitting the father in the same case); accord Regina v. Nichols, 13 Cox Crim. Cas. 75, 76 (1874) (where the finding suggests that the woman was more responsible than the man and therefore more culpable and likely to be punished where a child dies due to willful neglect or intentional starvation).
narcissistic, and passive. “In this model was found the rationale for assigning to mothers responsibility for such diverse conditions as schizophrenia, homosexuality, and eating disorders. Maternity was interpreted as compensation for psychic inadequacy, rather than as positive creation . . . .”  

In addition, it embraces the traditional view that women who fail, or become addicted to drugs or alcohol, or become criminals, are more culpable than men who do the same thing.

Criminality is also seen as more serious when the actor is female than when the actor is male. Addressing the Social Science Association in England in 1883, one scholar argued that female criminality (most of it prostitution and alcoholism), though quantitatively insignificant, was a serious problem:

> for female crime has a much worse effect on the morals of the young, and is therefore of a far more powerfully depraving character, than the crimes of men . . . . [T]he influence and the example of the mother are all powerful: and corruption, if it be there, exists in the source and must taint the stream.  

Self studies of gender bias called for by the Conference of Chief Justices have uncovered serious discrimination in almost every area of the law, ranging from open hostility to sheer inability to empathize. “Judges may not understand or may ignore the life experiences of those whose lives are so different from their own.”  

Courts that cannot accommodate pregnant lawyers — women with education, experience and social class nearly the same as the judges, may feel even less disposed toward pregnant junkies, with a few other children.

The disparity between women and men exists even in judicial custody determinations. Judicial decisions removing a child from a mother or assuming a mother who tests positive for drugs is neglectful fail to make a substantive inquiry into the mother’s actual fitness. In
every case but those involving coercive actions against pregnant women, courts generally engage in complex fact-finding and look to several key factors when considering the best interest of the child. When courts seek to determine which parent will get custody, the court chooses that custodian who is most likely to act in the “best interest” of the child.

This best interest standard is not a strict test but a fluid determination. Some considerations include ability of a parent to care for child, the parent’s efforts to obtain custody, and evidence showing a desire to raise the child. The court may also consider a child’s preference. In addition, questions concerning the child’s age, maturity, and any special needs of the child are considered. Courts try to determine which parent will further establish relationships the child possesses, including a relationship with the other parent. A further consideration is whether the child has siblings living with the parent who may be denied custody. The thought is that keeping siblings together is usually in the child’s best interest. Never has a court conclusively determined custody based upon a single factor. Coercive actions against pregnant drug addicts has the practical effect of focusing custody determinations on one narrow factor. The mother incarcerated for drug abuse, for unrelated crimes, or who is the object of a state negligence and abuse proceeding to deny her custody because of her pregnant addicted state, ends up without custody of her child. This is clearly a different determination than what is in the best interest of the child.

Courts have dramatically democratized their approaches to child custody determinations, with the result that women have lost whatever preference they may have had. Modern case law demonstrates an ever-heightening standard for custody determination involving fathers’ interests. Within the past two decades, a more or less consistent rule of giving both parents equal right to a hearing as to their fitness as parents has evolved. An example of the shift in custody and fitness determinations can be seen in the law's treatment of custody in cases involving illegitimate children.

For example, traditionally, the mother of an illegitimate child had the primary, presumptive right to custody of the child. The

82. See, e.g., In re Marriage of Carney, 598 P.2d 36 (Cal. 1979) (noting that a father’s physical handicap limited his ability to participate in physical activities, yet holding that a physical handicap is not a final conclusion for denial); Goldstein v. Goldstein, 341 A.2d 51 (R.I. 1975) (acknowledging that preference is a factor, yet not conclusory to decision). See generally Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 11.5 (1968).

83. See Thomas J. Goger, Annotation, Right of Putative Father to Custody of
Supreme Court, however, has implied that such presumptions violate equal protection. In *Stanley v. Illinois*, upon the petition of an unmarried father, the Court struck down an Illinois statute that made children wards of the state upon the death of their unmarried mother, without allowing the unwed father to prove his fitness. The Court stated: "Indeed, if [the parent] is . . . fit . . . the State spits its own articulated goals [of protecting the welfare of the child] when it needlessly separates him from his family." Following such a lead, many if not most state courts have begun to use the same standards for custody determinations for both legitimate and illegitimate children, eschewing any presumptions in favor of the mother.

When a pregnant drug user finds herself in the hands of the state, her after-born child is summarily removed from her in two ways. First, a child may be removed through a negligence hearing that offers much less protection of the mother's rights and interests than a typical custody hearing affords even a putative father. Second, the mother may be separated from her child because of her incarceration. In both cases, it is her pregnancy, not her addiction or her commission of a crime, that affords her less process.

This lack of process is contrary to the expansion of due process being afforded men in custody cases involving illegitimate children. In a recent California Supreme Court decision, *In re Kelsey S.*, a mother sought to place her child with adoptive parents. Subsequently, the father brought an action to establish his parental relationship. The court held that if an unmarried father promptly comes forward and shows full commitment to his parental responsibilities, then due process protections forbid the termination of his parental relationship absent a showing of parental unfitness. The court found that the mother interfered with the father's right to bond with the child by

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*Illegitimate Child*, 45 A.L.R.3d 216 (1972). In some cases, the mother had the exclusive right to custody of the child.

84. 405 U.S. 645 (1972).
85. Id. at 652-53.
87. See, e.g., *In re Ruiz*, 500 N.E.2d 935 (Ohio C.P. 1986).
89. Id. at 1236.
attempting to allow the adoption without his consent.\textsuperscript{90} The father was granted this right to intervene in the adoption proceedings, even though there was no finding that the father ever assumed a parental role by buying food or necessaries for the mother during her pregnancy.\textsuperscript{91} Obviously, courts are sympathetic to putative fathers who do not meet their obligations to their children, while punishing women who are less than ideal mothers.

Automatically concluding that a woman addicted to drugs or alcohol is an unfit parent seems at odds with the judiciary's protection of children in other circumstances. Examples include sex offenders being granted unsupervised, partial custody of their own children, some of whom were victimized by these same fathers.\textsuperscript{92} This supports the conclusions of earlier social observers and policy-makers that women's crimes were not so much measured by their actual significance or content, but by their proof of a woman's deviation from the male-described norms of decency. This paternalism and imposition of values not held by the mother herself can hardly be said to improve the care of children, nor do they demonstrate the mercy and solicitude their mothers need.

Unmarried or financially "irresponsible" pregnancy, compounded by drug use during that pregnancy, would not sit well with judges whose own wives had very different experiences. \"[N]otwithstanding contemporary changes in sexual mores sexual morality still generates strong emotions in the minds of judges which are reflected in their judgments either expressly or under the surface.\"\textsuperscript{93} Women, much more often than men, are injured by courts views of morality.

Courts impose male dominated morality through custody determinations. Courts consistently disregard the suggestion, implied by the Uniform Marriage and Divorce Act, that the personal and sexual

\textsuperscript{90} \textit{Id.} at 1233-37.
\textsuperscript{91} \textit{Id.} at 1237-38.
\textsuperscript{92} Although parental rights can be terminated, it does not appear that there are any irrebuttable presumptions which terminate parental rights. See, e.g., \textit{In re Cassandra M.}, 488 N.Y.S.2d 96 (App. Div. 1985) (holding that father's imprisonment did not create an irrebuttable presumption that he was an unfit parent); \textit{Conkel v. Conkel}, 509 N.E.2d 983 (Ohio Ct. App. 1987) (father's homosexuality cannot be the per se basis to determine whether he is able to have visitation rights); \textit{In re Marriage of Woffinden}, 654 P.2d 1219 (Wash. Ct. App. 1982) (trial court erred in awarding custody of children to grandparents solely because father engaged in sexual intercourse with his daughter from the time she was six until she was twelve years old). See generally \textit{Clark}, \textit{supra} note 82, at § 20.6.
\textsuperscript{93} \textit{Clark}, \textit{supra} note 82, at 804.
conduct of a parent is irrelevant in a custody determination unless it affects the parent-child relationship. For example, in Jarrett v. Jarrett, a court denied custody to a mother who engaged in "open and notorious" cohabitation, in violation of Illinois law. The woman, according to the court, demonstrated improper moral values which would injure her child's mental and physical health.

One obvious reason more women than men are adversely affected by a judge's sense of what is right and moral for a child is that more women than men seek custody. But women are consistently held to a higher moral standard than men. The only glaring exceptions involve homosexuals, who like sexually active, aggressive, or drug-addicted women, do not adopt the gender roles society deems appropriate. Women bear the children, but that does not mean they ought to bear the burdens unfairly. They are disparaged, abused, unsupported and now, punished for being biologically different. We must not continue this historic discrimination.

Professor Regina Austin admonishes us to remember "that condemnation and economic hardships" of the type suffered by pregnant women who are discharged for being bad role models, or imprisoned for giving birth to an addicted child, or continuing to bear young even while on the public dole "are politically and socially contin-

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95. 400 N.E.2d 421 (Ill. 1979); see also McKim v. McKim, 440 So. 2d 562, 563 (Ala. Civ. App. 1983) (taking custody from the mother because she allowed a man other than her husband to stay regularly overnight in her home); Nix v. Nix, 706 S.W.2d 403 (Ark. Ct. App. 1986) (taking custody because of the mother's immoral relationship with a man); Shioji v. Shioji, 712 P.2d 197 (Utah 1985) (transferring custody because mother permitted boyfriend to sleep at her home frequently, which had an adverse impact on her children). See generally Annotation, Custodial Parents' Sexual Relations with Third Person as Justifying Modification of Child Custody Order, 100 A.L.R.3d 625 (1980) (annotating cases that discuss sexual relationships of a parent as cause for a custody modification).
96. See, e.g., Tong, supra note 5, at 193-95.
gent . . . [T]hey are not the product of a consensus that holds across race, sex, and class boundaries."98

C. OTHERS WHO INJURE FETUSES ARE NOT TREATED AS HARSHLY AS PREGNANT WOMEN

The strongest argument in support of coercive actions against pregnant mothers is that they are motivated by a desire to protect their children. But this rationale loses its strength when one compares how other sources of fetal injury are treated under the law. The women who carry these fetuses are dealt with more punitively than almost any other third parties. Evidence of this disparate treatment includes mass tort litigation involving injury to fetuses by doctors and drug companies that prescribed these dangers for women,99 and cigarette and liquor manufacturers who protested violently against even printing warnings for pregnant women on their products.100 Even husbands and boyfriends who injure the women who carry their children are no more harshly dealt with.101

Some of the cases where pregnant women were arrested for child neglect involved their efforts to get away from their abusive boyfriends or husbands, and in doing so, became the target of prosecution for endangering their fetuses. There is evidence that the medical profession is aware of the battering that clearly endangers a fetus as much as or more than its mother’s addictions. "Obstetrician/gynecologists are now being informed that battering is the major cause of injury to

99. See Summerfield v. Superior Court, 698 P.2d 712 (Ariz. 1985) (allowing parents to recover for wrongful death of stillborn, viable fetus when doctors failed to observe the absence of fetal movement); Jarvis v. Providence Hosp., 444 N.W.2d 236 (Mich. Ct. App. 1989) (allowing a wrongful death action on behalf of fetus whose mother was informed that a gamma globulin injection was not needed after being exposed to hepatitis); see also Steinman, supra note 76.
100. See Paul Jacobs, Winemakers Stung by Suit Agree to Get the Lead Out, L.A. Times, Nov. 20, 1991, at B1 (discussing a suit brought by the California Attorney General against wine-makers compelling them to post signs warning of the dangers of lead in wine, especially to pregnant women). The Wine-makers urged the attorney general to intervene in an effort to prevent the growing numbers of civil actions. One wine-maker explained, "[t]he idea of tying us up . . . with all this frivolous litigation, led us to conclude that it is really in the best interest of industry and consumers alike to settle." Id.; see also Elizabeth Ross, Tougher Warning Labels on Beer Ads, Christian Science Monitor, May 14, 1991, at 7.
101. See, e.g., Amy Eppler, Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won’t?, 95 Yale L.J. 788 (1986) (discussing the denial of equal protection to women when police, who believe it is a man’s right to beat a woman, will not protect them).
women, is never excusable, and may continue during pregnancy."  

These injuries to fetuses rarely make front page news. But the calls to punish the unfit, addicted mother are legion, and passionate.

There is and always has been a dismal failure by the state to intervene in cases of domestic violence. One could assume that either that is because a woman’s safety is of little interest to the state, or because domestic family matters are not proper preserves for the police. If the former explains the disregard for wife-battering, coercive actions against pregnant drug users is even more suspect because it demonstrates that women merit government intervention only when they are considered the offenders, and not when they are the victims. If the latter justifies the failure of the state to intervene in violent home situations, what excuse for state involvement in the behavior of pregnant women is there?

From an historical perspective, the state appeared loathe to interfere in family affairs because women were the ‘femme coverts,’ that is, the property of their husbands. Thus husbands had legal right to do pretty much as they pleased with their chattel. Husbands were the literal and legal heads of the family. Sir William Blackstone commented that a woman who murdered her husband had committed a crime analogous to treason, because she had murdered her ‘king.’ Traditional Anglo-American law treated wife-battering as an ‘acceptable practice.’

103. See Charles P. Ewing, Battered Women Who Kill: Psychological Self-Defense as Legal Justification 8-9 (1987). The author cited three studies dealing with battered women. In the first, among 420 women, half relayed that their mates physically beat them once a week. The second study showed that out of 350 women, 75 had been beaten with weapons. The third study revealed that out of 50 battered women, 24 were beaten while visibly pregnant. Id.
104. See, e.g., Christi Parsons, When drug-addicted babies die, is it murder?, Chi. Trib., Jan 24, 1993, § 1, at 1.

Historically, domestic violence has been viewed as an essentially private, family matter not suitable for aggressive governmental intervention. In fact,
Even in the second half of the twentieth century, when wife-beating became grounds for divorce from the batterer, many courts refused to dissolve a marriage where the battering was not sufficiently brutal to outweigh the society’s interest in preserving the holy order of marriage. For example, in 1958 a woman whose husband was taken to slapping her was denied a divorce:

What we have here is bickering, shortness of temper, and vexatious conduct. Aggravation there has been, but not cruelty. The bonds of matrimony are not to be thus lightly cast aside. There is at stake, for our society as a whole, too much of the public welfare, too much of the public morals, in the preservation of family ties, to permit the spouses to come and go as tempers wax and wane... [T]he cruelty we demand... must [be in] the realm of the evil and the wicked, of brutality, of malignancy, of indignities endangering mental or physical health.108

In another example, the Supreme Court of North Carolina reflected in a case where a husband was charged with assault and battery of his wife: "[H]owever great are the evils of ill-temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils that would result from raising the curtain and exposing to public curiosity and criticism the nursery and the bedchamber."109

It seems that where the right of a woman to save herself from abuse is involved, the home is a sanctuary that cannot be invaded.110 Coercive acts against pregnant women show this sanctity is not so great when the family ties we want to sever are between a woman and her fetus, and the nursery we wish to expose is the womb itself.

This disparate treatment of men and women under the law shows that society does not view women as credible. From this perspective society looks at allegations about domestic abuse skeptically. Perhaps

American law once recognized husbands as titular heads of their households with a right to dispense corporal punishment to disobedient wives. Although most laws of that sort disappeared during the early nineteenth century, their residual effects continued to manifest themselves in the social norms and assumptions of modern society.

Id. at 241.

110. Frederic B. Rodgers, Develop an Accelerated Docket for Domestic Violence Cases, 31 Judge’s J. 2 (1992) (reporting that every eighteen seconds a woman is battered and that 1,500 women are killed annually by spouses or boyfriends).
the decisionmakers should have pondered why a woman would falsely accuse her husband, or partner, or a stranger. Do legal decisionmakers believe that women are naturally dishonest, and lie even when they do not have to? Apparently, it is thought that, beyond being disingenuous, women clearly have neither the right nor the ability to make choices for themselves about their pregnancies.

Men have no established legal obligation to care for their fetuses. Although the primary participation of the male of the species is in providing the fodder to fertilize the egg, women must physically carry the fetus for nine months. Coercive actions suggests that society knows better than the mother herself. Mothers are forced to submit to state coercion for the good of the future children for whom only these mothers will be held responsible.

Once born, these children lose the interest and protection of a society that wishes to intervene in their uterine development. Perhaps if societal policing of their lives extended to their lives after birth, and to the women who will bear them, we could justify this intervention. After the trauma of their birth, our society offers scant help to children and virtually no protection. Our real concern for them ends when their autonomous lives begin.

III. STATE INTERVENTION DISCRIMINATES AGAINST POOR PEOPLE, AND PEOPLE OF COLOR

Who suffers the most from these coercive intrusions into the pregnancy of women? The literature and the popular press likes to highlight the few middle-class, majoritarian mothers who get caught. But coercive acts are directed at those who are closest emotionally, socio-economically, and spiritually, to the bottom. Poor, Black, Hispanic, Asian and very young women are traditionally stigmatized and observed by those in either the prosecutorial or the helping professions as demanding attention.

About the same percentage of white women as women of color use drugs.¹¹¹ White women, however, largely avoid prosecution. One study shows that a pregnant black woman was ten times more likely than her white sister to be reported for drug use to DCFS.¹¹² The

¹¹² Kary Moss, Substance Abuse During Pregnancy, 13 HARV. WOMEN’S L.J. 278, 294 (1990) (citing National Ass’n for Perinatal Addiction Research and Education, Press Release (Sept. 18, 1989)).
undisputed and shocking fact is that more than ninety percent of all the defendants prosecuted for drug addiction during pregnancy are women of color.113

People of color are always identified by the majority as problematic.114 As with women in general, some of the discrimination against African-American women and their babies is due to the paternal desire to offer remedial or compensatory aid. Society perceives that only poor women of color have children out-of-wedlock, while on drugs, and that stemming this flow of problems will make everyone in the white majoritarian society happier. The special attention women of color get is coercive, destructive and discriminatory.115

The sheer expense of drug treatment renders it beyond the reach of most minorities. The fact that Blacks are almost twice as likely as whites not to have private health insurance adds to the problem.116 These facts coupled with the death of programs for drug-addicted mothers shows that coercive acts will fall disproportionately on the poor.117 Moreover, the choice of crack mothers as the targets of

113. Roberts, supra note 33, at 1434.
115. DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW xxiii (2d ed. 1980). The treatment of Professor Derrick Bell is another example of our custom of inequality. Professor Derrick Bell, Jr., has long identified this paternalism as a form of “American racism initiated by whites against blacks.” In the 1980s, Dean Bell was hired to teach law at one of the nation’s most prestigious law schools, Harvard. In 1990, Professor Bell took leave from the school to protest its racially discriminatory hiring policies. In 1992, Harvard tenured four white men; Professor Bell brought suit, alleging discrimination in hiring against women in general and against men of color. He took a leave of absence, which Harvard has deemed a resignation.

Harvard has been called sexist for other reasons. In 1991, law professor Mary Jo Frug was murdered on her way home from work in Boston. She often wrote about racism and sexism under law. In the spring of 1992, the Harvard Law Review presented a humorous parody of Professor Frug’s work. Her murder was not mentioned. Stephanie B. Goldberg, Who’s Afraid of Derrick Bell?, 78 A.B.A. J. 56 (1992).


coercive acts, where crack is identified as a drug used predominantly by African-Americans, bolsters that conclusion. 118

There is very little medical care available for poor pregnant women. 119 It may be more significant to focus on what these children do not get — food and doctor’s care for their mothers — than to focus on what contraband they do get. In a study of who gets Medicaid, females account for between 59.9 percent and seventy percent in all fifty-two jurisdictions; 64.1 percent overall. 120 Among women of reproductive age in this country, in the early ‘80’s, forty-three percent of those with incomes under $5000 and thirty-one percent of those with incomes between $5,000 and $9,999 had Medicaid coverage; only twenty percent of the women in these brackets had health insurance. 121 Often, lack of access to abortion increases the problems for this group of mothers, and reduces the amount of money available for their own and their children’s medical care. “Absence of [Medicaid] abortion coverage, a significant limitation for those with unwanted pregnancies, is very likely to affect use of other services, including care of high-risk pregnancies and, ultimately, care of infants with severe problems.” 122

Congress was not able to mobilize enough support to overcome former President George Bush’s gag rule, preventing abortion counseling. 123 Until the government’s children live below the poverty level, as compared with 15% of caucasian children); Judy Scales-Trent, Black Women and the Constitution: Finding Our Place, Asserting Our Rights, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

118. Roberts, supra note 33, at 1435.

119. See, e.g., Mike Crase, Infant Mortality Rate is Dropping in DeKalb County, DEKALB DAILY CHRON., Mar. 26, 1992, § 1, at 1. Public health administrator Karen Grush told reporters: “In many, many areas throughout the state, public aid women simply cannot get in to see a physician until very late in their pregnancy, if at all.” Id. She also explained that funding for the WIC program (Woman and Infant Care, which in DeKalb County provided supplemental food to 1200 women and their young children) “has proven to be a major weapon in the fight to lower the infant death rate.” Id.

120. See MULLER, supra note 19, at 151 (citing U.S. DEPT. OF HHS, MEDICARE AND MEDICAID DATA BOOK (1988) and Health Care Financing Program Statistics, HCFA Pub. no. 03270 (1989) (tbl. 4.6)).

121. MULLER, supra note 19, at 155-56 (citing Susan Blank & Thomas Brock, Health, Health Care and Economic Self-Sufficiency, NAT’L HEALTH POL’Y F., (Oct. 9, 1985)).

122. MULLER, supra note 19, at 158.

position was recently reversed, even if an addicted mother wanted to terminate her pregnancy, she could not find out how to go about it.

Although the "early initiation of prenatal care is the most cost-effective means of reducing neonatal mortality for [B]lacks and for [W]hites, and it is far more cost-effective than neonatal intensive care . . . .", only eighty percent of white mothers and sixty-two percent of black mothers get first-trimester care. A 1984-86 study demonstrated that for thirty percent of the Hispanic, twenty percent of the African-American, and thirteen percent of the white women, either there was no prenatal care until the fifth month or later, or the mothers had fewer than half of the recommended visits to a doctor. Fetal rights advocates stop short of demanding medical care for the fetus, and for the children after their birth. Thus, minority women suffer more coercive actions and benefit less from prenatal care than their white counterparts.

If we accept that women in general are poorly protected against sex and gender-specific victimization, we need also to recognize that African-Americans are more likely victims of, arrested, prosecuted, and more severely punished for sex crimes. Haywood Burns, the former director of the National Conference of Black Lawyers reported: "Blacks raping [B]lacks is apparently less serious than [W]hites raping [W]hites, and certainly less serious than [W]hites raping [B]lacks." Burns reports these statistics: In Florida between 1960-64, five percent of the 125 whites who raping whites were sentenced

125. See NATIONAL CENTER FOR HEALTH STATISTICS, NCHS MONTHLY VITAL STATISTICS REPORT, vol. 35 no. 4, supp. 7/18/86, cited in MULLER, supra note 29, at 189.
127. The principle of fetal rights is being used as a basis for denying women the right to an abortion [and the obligation to stop using addictive drugs or alcohol] and insisting they undergo various procedures during pregnancy. Yet, at the same time, society has not conferred on childbearing an entitlement to the resources that may be required to assure a successful outcome. Entitlement is dependent on either status of self or spouse in an insured job or meeting a restrictive low income standard which covers only 40% of reproductive age. Protection of the primacy of the labor market and wage system in dispensing health care is given priority over universally adequate reproductive care.
to death; four percent of the sixty-eight Blacks who raped Blacks were so sentenced; fifty-four percent of the eighty-four Blacks who raped Whites got the death penalty; none of the Whites who raped Blacks were sentenced to death. In one famous study of rape in Philadelphia, black women were found to be twelve times more likely than their white sisters to be raped.

It is hard to imagine the same intense direction of coercive state intervention into the lives of white woman that women of color routinely experience. The fetal protection imposed through arrest and coercion is motivated by paternalism and racism as much as any real desire to help. Literally no other options are offered; no other parent-child relationship is so keenly monitored as the pregnant drug user; and, none of this group are so disproportionately victimized by state action than women of color.

Practically, no other result could take place, since the coercion has its origin in personal involvement with the state and poor women become involved with the state more easily. Poor women, most of them nonmajoritarian, have little access to private doctors, who can treat them and keep their secrets. They are more often victims of crime and need to expose themselves to police. They are impoverished and may need to undergo the scrutiny we attach to our so-called entitlement systems. They use poor-peoples' drugs, which are illegal and associated with street crimes, rather than the opiates of the middle class, such as prescription drugs and alcohol which may be legal drugs — or at least purchased more discretely. In addition, their pregnancies are seen as costly to white society. If women are to be madonnas, perhaps women of color need to be virgins to satisfy social notions of propriety. Coercive actions against pregnant women, most of which are directed against African-American mothers, address the symptoms, not the causes, of their problems. This additional aspect of disparate treatment on the basis of race and gender cannot be tolerated.

VI. COERCIVE ACTS VIOLATE BASIC COMMON LAW AND CONSTITUTIONAL RIGHTS

A. COERCIVE ACTS AGAINST PREGNANT WOMEN VIOLATE RECOGNIZED COMMON LAW PRINCIPLES OF BODILY INTEGRITY

There are those who believe that all law exists to protect property — even personal property, even our own bodies. Despite society's
interest in limiting and directing their activities, even pregnant women have a common law right of autonomy and ownership of their own bodies. Under common law, interference with this right was illegal, and eventually developed as a tort.

The right to bodily integrity is an ancient notion. "At the dawn of social organization, perhaps before men and women developed concepts of property or agreement, we speculate that primitive persons must have taken offense at violations of their physical integrity." 131 As early as the twelfth century there were records of actions for trespass to the person. The plaintiffs were considered to be private attorneys general for the king, whose civil claims helped maintain the peace without the sheriff's intervention, and punish the transgressor. The typical assault and battery charge, that someone caused the complainant physical injury, was rooted in the concept of ownership of one's physical person. 132 This property concept continues uninterrupted. "Physical injury to the person stands at the center of social concern with tort law." 133

Women, like men, have an "entitlement" in their own bodies, and they should not have nutrition, rehabilitation, or methadone imposed upon them against their wills. However, a pregnant woman may have her personal integrity challenged by an outsider, with the slightest standing, who deems such coercion fit and proper. When women become pregnant, drug users or otherwise, they become subjected to unwanted legal interference with their personal bodily rights.

On the other hand, a man's right of bodily integrity is treated more sacred. For instance, if we turned the world on its head and made men face the same harsh realities as women do, I am sure we would receive powerful opposition. If men who were exposed to dangerous chemicals, addicted to alcohol or cocaine, or had dangerous propensities, were then forced to be sterilized, abstain from sex or to use a newly developed contraceptive that only slightly increased their chances of prostate cancer or stroke, I have no doubt the courts and lawmakers would resist. Courts and lawmakers would find that men


132. See C.H.S. Fifoot, History and Sources of the Common Law 44-65 (1949).

133. Id. at 2-3. It serves as the basis for the modern allegation of battery brought against doctors for unconsented touching. See, e.g., Burton v. Leftwich, 123 So. 2d 766 (La. Ct. App. 1960); Arnold J. Rosoff, Informed Consent 3-4 (1981).
own their bodies and a man's integrity would be afforded protection based upon an "a priori ethical judgment which it is assumed that most citizens would share." 134 Why are pregnant women different? Why do women enjoy less of an entitlement? Women's interests or rights should not be lessened simply because they bear young, whose rights have as yet to be ultimately determined by statute or judicial decision.

Rejection of the unity of woman and fetus denies pregnant women their common law right to autonomy. Stated simply, bodily autonomy should guarantee a woman the right to decide what is done to her body. The fact that a fetus lies within a woman's body should not alter or negate that right. 135 Justice O'Connor, in Planned Parenthood v. Casey, 136 eloquently spoke for women as persons, with bodies and feelings, and not nameless entities upon which the state acts:

[T]hough the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise . . . . That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society. 137

Although bodily autonomy has never been formally recognized by the Supreme Court as a fundamental right, in Cruzan v. Director,

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134. SPECIAL COMM. ON TORT LIAB. SYS., supra note 131, at 4-27.
135. This is not to condone or encourage abuse of drugs that may injure a fetus. But when rights conflict, someone has to predominate. In nearly all pre-born litigation, the Supreme Court has recognized the superior claim of a woman.
136. 112 S. Ct. at 2807.
137. Id.
Missouri Department of Health,\textsuperscript{138} several Justices suggested that bodily autonomy is within that zone of fundamental interests protected by the Constitution. Lower courts have had more opportunity to wrestle with this issue. Perhaps countering the norm, one federal appellate court identified the right of a mother to control her body as inviable, despite the fact that she was pregnant. In a case denominated In re A.C.,\textsuperscript{139} the reviewing court found that a trial judge could not order a caesarean to be performed on a gravely ill cancer patient in order to improve the chances of survival for her eight-month-old fetus without attempting to determine the mother’s choice. The dying mother had “the right, under the common law and the Constitution, to accept or refuse medical treatment.”\textsuperscript{140} The court rejected the argument that a “woman who has chosen to lend her body to bring [a] child into the world has an enhanced duty to assure the welfare of the fetus, sufficient even to require her to undergo caesarean surgery (citation omitted)” because “[s]urely . . . a fetus cannot have rights superior to those of a person who has already been born.”\textsuperscript{141}

Unfortunately, the majority of courts that have considered the issue of forced caesareans in the tort context have not concluded that a mother’s bodily autonomy rights can be subjugated for the good of her unborn child.\textsuperscript{142} This judicial coercion, like the acts against pregnant drug users, is seriously racially imbalanced. In a study of twenty-one cases of court-ordered obstetrical procedures, most patients were Black, Asian, or Hispanic women. In eighty-eight percent of the cases, the court acted within a few hours, suggesting a less than adequate balancing of the mother’s rights, risks, and the alleged benefits to the fetus.\textsuperscript{143}

Not only do these cases suggest an unrecognized agenda of sex and race discrimination, but they are largely scientifically and legally unfounded. A doctor’s value judgment should not be substituted for the woman’s own wishes. “Medical knowledge is not certain enough

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\item \textsuperscript{138} 497 U.S. 261 (1990) (involving a formerly competent adult’s right to die).
\item \textsuperscript{139} 573 A.2d 1235 (D.C. 1990).
\item \textsuperscript{140} \textit{Id.} at 1247.
\item \textsuperscript{141} \textit{Id.} at 1244.
\item \textsuperscript{142} See Elizabeth Eggleston Drigotas, Comment, \textit{Forced Caesarean Sections}, 70 N.C. L. REV. 297 (1991).
\item \textsuperscript{143} See Veronika Kolder, et al., \textit{Court-Ordered Obstetrical Intervention}, 316 \textit{NEW ENG. J. MED.} 1192, 1193 (1987); see also Lawrence Nelson and Nancy Milliken, \textit{Compelled Medical Treatment of Pregnant: Life Liberty and Law in Conflict}, 259 JAMA 1060 (1988) (arguing that the doctor’s duty to promote fetal health is based upon her ethical and care obligation to the pregnant woman; it is wrong to consider the fetus a “second patient”).
\end{itemize}
to deny women 'the right to be wrong' while allowing physicians that right. Women are rarely unwilling to do anything within reason for the best interests of the fetus.\textsuperscript{144} The relationship between patient and doctor is normally considered contractual in nature. Since there can be no contract with a minor,\textsuperscript{145} the doctor would not have a relationship with a fetus that would necessitate him or her to breach the duty/relationship to the pregnant mother/patient.\textsuperscript{146} The common law should not grant a fetus rights superior to its mother when their interests collide, but states do not act consistently when having to choose between the unborn and the women who gave them life.

Not only are women subjected to externally-imposed decisions about their own health, but they are likewise not afforded credibility in making their own decisions. For example, in \textit{Carman v. Dippold},\textsuperscript{147} a doctor was found not to be negligent for failing to advise a woman in labor that her baby was in the breech position, even though the baby died during an attempted vaginal delivery. The court found that "it might have been imprudent" to try to obtain informed consent to the vaginal delivery method from the mother because "she was tense and her blood pressure had gone up."\textsuperscript{148} Although an isolated case,
it is the ultimate in paternalism, gratuitously passed back and forth between the men who are posturing to protect this poor woman — the doctor and the judge. It demonstrates how little autonomy women are given from those who have authority over them. It should sound as an alarm against the coercive actions, and other patent or subtle kinds of sex discrimination in which male decision-makers engage, while ostensibly acting on behalf of those poor unborn in need of protection against their own unwise, inept, and wicked mothers. Despite the antiquity of the protection, how women fare under tort law is as reflective of societal notions of power and propriety as any other challenged discrimination.\textsuperscript{149} An American Bar Association study described "tort law as an epicenter of jurisprudence, not simply as a set of guides and standards for the decision of many thousands of private lawsuits, but as a reflection of how American society feels about justice . . . .\textsuperscript{150}"

Court-ordered caesareans, the deprivation of a woman’s right to demand information about her care, lack of access to health care, restrictions on the right of women to make childbearing choices, including being the subject of discriminatory coercion by the government during their pregnancies, all represent the collective legal response that women deserve and receive less than men under the law. Health care is just one further example. Such results arguably emanate, at least in part, from a universal devaluation of a woman’s autonomy.

Coercive actions against pregnant women comport with, and are as equally discriminatory as, cases where parents have not been allowed to refuse their own medical treatment because they have dependent children. In a majority of these cases, it is the mother, and not the father, whose rights are deemed secondary to the needs of their children for a healthy parent.\textsuperscript{151} "In many of these cases, the

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  \item \textsuperscript{149} Leslie Bender, Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities, 1990 DUKE L.J. 848, 885-98.
  \item \textsuperscript{150} Special Comm. on Tort Liab. Sys., supra note 131, at 2-2.
  \item \textsuperscript{151} See, e.g., In re President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008-10 (D.C. Cir.), reh'g denied, 331 F.2d 1010, cert. denied, 377 U.S. 978 (1964) (court ordered blood transfusion despite mother's religious objections because the state had a responsibility not to allow the patient to abandon her infant child by allowing herself to die); accord In re Melideo, 390 N.Y.S.2d 523 (1976) (woman with serious uterine hemorrhage post-D&C was spared a blood transfusion
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patient was childless — a key consideration in view of the state’s interest in preventing the abandonment of minors in need of support.”

Judicial intervention in a patient’s personal health care choices, directed more often at women than men, disregards common law and constitutional rights, including privacy, autonomy, and personal religious beliefs.

In contrast, when a man whose life experience included a financially successful career, chose to eschew medical treatment, his wishes were acceded to. In In re Osborne, the court found that both “material and spiritual provision” had been made for his children, and the court was therefore relieved of protecting them against abandonment by their father. The Osborne court recognized the rights to bodily integrity and autonomy only after applying criteria more likely to be satisfied by men than by historically dependent, under or unpaid women. This “pro-child” judicial attitude adversely and unfairly affected women and deprived them of their rights.

State intervention in a person’s medical or lifestyle choices should be justified by a compelling reason. It is not apocalyptic and hysterical to suggest that coercive acts against pregnant drug-users imply that women must ultimately guarantee the well-being of the children they are to bear. The consequences of such a position are fantastic. As many have pointed out, there is no rational distinction between engaging in illegal acts and legal acts, if either can seriously harm a fetus, and if healthy children is our goal. How do we draw the line

because she had no dependents); In re Winthrop Univ. Hosp., 490 N.Y.S.2d 996, 997 (Sup. Ct. 1985) (court ordered authorization for blood transfusion where mother of two refused on religious grounds, the court reasoned that the state will not allow this “most ultimate of voluntary abandonments”); cf. Wons v. Public Health, 500 So. 2d 679 (Fla. Dist. Ct. App. 1987) (Dissent argued the “quality” of the dependent children’s life without their parent’s loving support; majority stated that the only issue is abandonment). Contra, In re Osborne, 294 A.2d 372 (D.C. 1972) (allowing refusal of medical treatment on religious grounds where both material and spiritual provision was available for the children, so they would not be abandoned). Interestingly, I could find no cases where a man was ordered to receive medical treatment for the good of his children.

152. Rozovsky, supra note 8, at § 7.1.2.

153. Rozovsky, supra note 8, at § 7.1.1 (“What is particularly interesting here is that not only did the parents’ religious interest give way to the state’s interest in the child’s life, but the mother’s interests in bodily integrity and freedom from undesired intrusion were overridden by the same state interest.”); Crouse Irving Memorial Hosp. v. Paddock, 485 N.Y.S.2d 443 (1985); Cf., Jacobson v. Massachusetts, 197 U.S. 11 (1905) (parents’ right to refuse to have their children immunized can be based both on religious beliefs and privacy).

between acting against a mother who is taking drugs, and thereby endangering her fetus, and the pregnant woman who fails to follow her doctor's advice during pregnancy? Or the mother who abuses drugs or alcohol or speeds only once, and injures or kills her fetus in a wreck? Or the mother who told my friend Rose, who teaches physically and mentally handicapped preschool children, that she and her husband believe in God and will keep trying to have one perfect little girl, despite their birthing several genetically damaged children. Or the AIDS victim who wants to conceive? The situations are endless. And all inquiries lead to the inexorable conclusion that even if state coercion were not patently racist, sexist, and impractical, it would still collide with our notions of ownership, autonomy and the right to be left alone.

B. COERCIVE ACTIONS DENY WOMEN THEIR CONSTITUTIONAL RIGHTS TO LIBERTY AND PRIVACY

Despite the potential conflict between the pregnant drug abuser and her fetus, a mother must be allowed to enjoy what the Supreme Court identified as the "right to be let alone — the most comprehensive of rights and the right most valued by civilized man." Her potential for birthing a child must not interfere with that plethora of constitutional protections she has already been afforded by the courts. As the Supreme Court reiterated in Planned Parenthood v. Casey, "the Constitution places limits on a state's right to interfere with a person's most basic decisions about family and parenthood." She

155. See Martha Field, Controlling the Woman to Protect the Fetus, 17 L. MED. & HEALTH CARE 114, 118 (1989).
159. Id. at 2806. She has a fundamental right to marry whomever she chooses. Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia's anti-miscegenation laws). She has this right to marry, even if she has not and will not support her dependent children from a previous marriage. In Zablocki v. Redhail, 434 U.S. 374 (1978), the Court invalidated a Wisconsin law that forbade a noncustodial parent from applying for a marriage license unless he submitted proof of his compliance with a court order for child support. The party before the Court happened to be a man, who had failed to support his children, had lived with his ex-wife, and had impregnated his current girlfriend, whom he wanted to marry. It could be argued that the Court's invalidation of the Wisconsin law, which had as its salutary goal the protection and support of children with living and competent parents, was drawn from the Court's, and society's stereotypes about proper behavior under the circum-
ADDICTED PREGNANCY AS A SEX CRIME

has privacy and autonomy rights. *Roe v. Wade*\textsuperscript{160} is still good law, and so a mother has greater rights than a nonviable fetus. In *Thornburgh v. National College of Obstetricians and Gynecologists*, the Court reiterated:

Our cases have long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government (citations omitted). That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision — with the guidance of her physician and within the limits specified by *Roe* — whether to end her pregnancy. A woman’s right to make that choice freely is fundamental.\textsuperscript{161}

The Supreme Court recently reaffirmed that basic right in *Planned Parenthood v. Casey*,\textsuperscript{162} when it approved of some, but invalidated other state laws restricting the right of any woman seeking an abortion before fetal viability. Some argue that the right to abort a fetus does not necessarily give a woman the right to abuse it. However, a fetus cannot be protected through coercive actions against its pregnant mother because it subordinates or destroys her autonomy. The alter-

\textsuperscript{160}. 410 U.S. 113 (1973).
\textsuperscript{161}. 476 U.S. 747, 772 (1986).
\textsuperscript{162}. 112 S. Ct. 2791 (1992).
natives to carrying a fetus to term are likely not available to most pregnant addicts. The population against which virtually all reported coercive actions have been taken to date cannot obtain free abortions. In addition, these women are likely not to have health insurance, and may be further restricted in their free choice to abort because of state laws restricting the access of minors to information about choices. Also, studies show that many places, regardless of the legality or the pro-choice philosophies of gynecologists, have no doctors to perform abortions.

Beyond privacy and liberty interests associated with a woman's right to make family choices, she may also have a constitutional right in her personal, bodily autonomy. Support for a constitutional right to bodily autonomy can be seen in the reasoning of Cruzan v. Director, Missouri Department of Health. The Court majority "assume[s] that the United States Constitution would grant a com-

163. See Webster v. Reproductive Health Servs., 492 U.S. 490, 510 (1989) ("[I]t is difficult to see how any procreational choice is burdened by the State's ban on the use of its facilities or employees for performing abortion."); Harris v. McRae, 448 U.S. 297, 317 (1980) ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to financial resources to avail herself of the full range of protected choices . . . [The] Hyde Amendment leaves an indigent woman with at least the same range of choice . . . ."); Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding a state statute which withheld Medicaid benefits for nontherapeutic abortions, explaining that "[t]he indigency that may make it difficult — and in some cases, perhaps impossible — for some women to have abortions is neither created nor in any way affected by the Connecticut regulation."); see also Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979).

164. Rust v. Sullivan, 111 S. Ct. 1759 (1991) (upholding § 1008 of the Public Health Service Act which, in part, prohibited those receiving federal family planning funds from counselling, advocating or providing referrals for abortions). In Rust, the Court stated that "[i]t would undoubtedly be easier for a woman seeking an abortion if she could receive information . . . but the constitution does not require that the Government . . . provide that information." Id. at 1777. See also Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 508 (1990) (upholding an Ohio statute which prohibited performing abortions on unmarried, unemancipated minors without notifying one of her parents or receiving a court order, while "leav[ing] the question open" as to whether the judicial bypass procedure in the statute was necessary); Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (Court upheld parental notification, 24-hour writing period, and content of medical advice about fetal experience; invalidated spousal notification). But see Presidential Memorandum, supra note 123 (suggesting reversal of the restrictions on access to abortion).


petent person a constitutionally protected right to refuse lifesaving hydration and nutrition." In a concurrence, Justice O'Connor recognized a constitutional right to bodily integrity. She concluded that the:

liberty interest in refusing medical treatment flows from decisions involving the state's invasions into the body. Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.168

Dissenting Justices Brennan, Marshall and Blackmun clearly recognized the fundamental, constitutional right of bodily integrity. "The right to be free from medical attention without consent, to determine what shall be done with one's own body, is deeply rooted in this Nation's traditions ..."169 The practical effect of state coercive acts against pregnant women, in whatever form they take, is that women whose bodies contain fetuses cannot choose to do with their bodies what they wish. Their liberty interests are infringed upon because the state has determined that the rights of the unborn predominate over their own.

Let's us assume for a moment that pregnant women do have a fundamental right — or a bundle of fundamental rights — associated with their own bodies and their own pregnancies. If that is so, then the Court ought to look at any legislation or state coercive action against these women with the strictest scrutiny, assuming that there is a category of Supreme Court review calling for such scrutiny.170 "New" fundamental rights, that is, those beyond protection from invidious race discrimination specifically envisioned by the framers of the Bill of Rights, are what Professor Gerald Gunther describes as "particularly dynamic, open-ended, and amorphous."171

167. Id. at 279.
168. Id. at 287.
169. Id. at 305.
170. Of course, constitutional law and decision does not lend itself to such neatness. Before his retirement, Justice Marshall often attacked the misnomer of the Court's "two-tiered approach." The Court apparently seeks to establish ... [that] equal protection cases fall into one of two neat categories which dictate the appropriate standard of review — strict scrutiny or mere rationality. But this Court's ... decisions defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause." San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).
Arguably, then, pregnant addicts may have one of these "new" fundamental rights with which state action interferes. Consequently, the Court ought to demand that the means adopted be narrowly tailored, necessary, and justified by compelling state interests. State coercive acts against pregnant women fail to satisfy these constitutional minima on all counts. They are hardly narrowly tailored, for the practical effects of such coercion limit her autonomy, mandate medical and legal attention, and deprive a woman of the right to be left alone. Furthermore, these actions cannot be justified because they do not result in any practical benefit to the fetus. They have never been shown to decrease the number of women who give birth to drug affected or addicted children. These coercive acts are and have been taken against women whose children have not yet shown and may not ever demonstrate the deleterious effects of their mothers’ drug use. No other methods of control have been tried, or even suggested, such as adequate prenatal care and counseling. The states have yet to prove that their interests in pre-viable fetuses are so compelling that the rights of their mothers must be subordinated, while they serve as guarantors of fetal health.

C. WOMEN, ESPECIALLY WOMEN OF COLOR, ARE DENIED EQUAL PROTECTION UNDER THE LAW.

The earliest amendments to the United States Constitution attempted to guarantee to every citizen equal protection under the law. When rights conflict, as they do between a fetus and its mother, the weighing of the relative merits of each claim is necessary to determine whose rights are more important. Women who are pregnant, particularly poor women of color, have been singled out for punitive treatment because of their pregnancy. Such classification mandates an examination of the fairness of such treatment. It appears to unequivocally deny the members of this group equal protection. The Court has struggled with the application of equal protection to gender. Its decisions are inconsistent and often reflect what the Court thinks society expects of or for, women. Current Supreme Court jurisprudence may not be sufficient to guarantee the consistency and fairness needed to protect women from being sanctioned for the sins of their bodies.

It makes sense that pregnant drug users can claim that extra protection from arbitrary and unfair treatment from the government because of their womanhood. 172 Sex-based classifications, according

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172. Being pregnant apparently means very little to the Supreme Court, because
to the Supreme Court, deserve "intermediate scrutiny." Sexual classifications are not automatically suspect, but they deserve special attention from the Court because of their higher likelihood of being unfair and discriminatory.

This is relatively new jurisprudence. Historically, the Court approved of legislative enactments that treated women less favorably because women were biologically different. For example, in *Bradwell v. Illinois*, a late nineteenth century Court affirmed a state's refusal to allow a woman to practice law, because "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman," and apparently, women were fortunate to enjoy the "paramount destiny and mission" of fulfilling "the noble and benign offices of wife and mother."

The Court clung to the ideal roles of femininity as justifying less than equal, but purposely separate laws for nearly a century. In 1962, the Court approved a state law that exempted women from jury duty unless, she "as the center of home and family life . . . determines that such service is consistent with her own special responsibilities." In 1970, in *Reed v. Reed*, the Supreme Court struck down an Idaho statute which provided that when several people sought the position of administrator of an intestate estate, males must be preferred over females. The Court found the classification completely unrelated to the state objective of efficient probate proceedings.

In *Frontiero v. Richardson*, the Court examined the gender classification differently, notwithstanding the fact, or perhaps because of the fact, that the white male plaintiff was not a member of any

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it has never eschewed its position in *Geldulig v. Aiello*, 417 U.S. 484 (1974) that women expecting children deserve any special constitutional treatment. The Court upheld the California law that excluded from its of disability insurance coverage any disability accompanying normal pregnancy and childbirth, because the law did not discriminate against women, especially pregnant women, but distinguished between "pregnant and non-pregnant person." *Id.* at 497. I much prefer being non-pregnant to pregnant, for all kinds of emotional, health and comfort reasons, but for the only situations in which it will actually make a legal difference . . . in the workplace . . . . Congress has remedied the Court's error by enacting the Pregnancy Discrimination Act, Pub. L. No. 95-555, 1978 U.S.C.C.A.N. 4749, 4750-52.

173. 83 U.S. 130, 141 (1872).
175. 404 U.S. 71 (1971).
class subjected to historic discrimination. The Court refused to endorse the United States Navy regulation, which provided that military women could not receive dependent benefits for their husbands without actual proof that their husbands were economically dependent on them. There was no corollary requirement of proof for servicemen whose wives claimed dependent benefits. Justice Brennan opined that classifications based on sex are inherently suspect.\(^{177}\)

This level of scrutiny, normally reserved for race and alienage cases, did not survive after \textit{Frontiero}. However, the Court continued to apply some heightened standards for evaluating a state statute that distinguished between the sexes. In \textit{Craig v. Boren},\(^{178}\) the Court concluded that an Oklahoma statute, which prohibited the sale of 3.2% beer to males under 21 and females under 18, violated the Equal Protection Clause because the statute's gender-based classification did not "serve important governmental objectives" nor was it "substantially related to the achievement of those objectives."\(^{179}\)

The results of challenges to classifications based on gender as violative of the equal protection rule have been inconsistent. Sometimes women receive paternalistic and preferential treatment,\(^{180}\) and sometimes they are denied access to the opportunities they need to earn a living and compete with men as market equals.\(^{181}\) A skeptic could observe that some of the inconsistency in the Supreme Court's decisions regarding gender and equal protection depends on who stands to benefit, and who brought the case. Professor Mary Becker argues that when men are the beneficiaries, when they are dependents of their wives, when they are denied access to jobs, when more responsibility rests upon them than they care to assume, the Court looks carefully, to determine why the balance of historical power has been so badly disturbed.\(^{182}\) Professor Judy Scales-Trent maintains that:

\begin{quote}
[t]he way in which a group is defined for purposes of the Equal Protection Clause both describes how that group is defined by the larger society, and defines how that group
\end{quote}

\(^{177}\) 411 U.S. at 688.
\(^{178}\) 429 U.S. 190 (1976).
\(^{179}\) \textit{Id.} at 197.
\(^{180}\) Califano v. Westcott, 443 U.S. 76 (1979) (preferential gender-based classification for allocating federal Aid to Families with Dependent Children).
should be viewed. The Court must see how the group has been
treated historically by the larger society before it decides what
level of protection it will provide the group.¹⁸³

After Craig v. Boren and its progeny, it was thought that "what
the Court did was strike down sex-based classifications that were
premised on the old breadwinner-homemaker, master-dependent di-
chotomy inherent in the separate spheres ideology."¹⁸⁴ However, it is
clear that the Court — and our society, has never given up on
justifying different treatment because of that separate spheres notion.
Instead of concentrating on equal access and avoiding unnecessary
and non-critical incursions into female empowerment, the Court
continues to make decisions on the basis of its earliest ruminations
about what it, as guardian of our social fabric, considers sex-approp-
riate roles.¹⁸⁵ This conclusion is supported by several cases decided
after the Court declared its preference for heightened scrutiny.

The Court has upheld distinctions based upon gender without
demanding any clear proof of the need for them. In Rostker v.
Goldberg,¹⁸⁶ decided in 1981, the Court approved of the male-only
draft registration requirement. The Court accepted the position of
Congress that women should not serve in combat, without really
asking why Congress reached that decision. According to the Senate
Armed Services Committee Report, "[t]he principle that women should
not intentionally and routinely engage in combat is fundamental, and
enjoys wide support among our people."¹⁸⁷ Apparently, the Supreme

¹⁸⁴. Wendy W. Williams, Reflections on Culture, Courts, and Feminism, 7 WOMEN'S RTS. L. REP. 175, 178 (1982).
allowed only mothers, and not fathers, a veto over adoption of illegitimate children);
Parham v. Hughes, 441 U.S. 347 (1979) (allowing an illegitimate child to sue for
wrongful death of its mother, but not of its father, if the father had not acknowledged
the child during its lifetime). It seems the Court relied on its own view of what is
best for illegitimate children, rather than on a consistent view of the proper degree
of scrutiny for gender classifications. See generally JOHN E. NOWAK AND RONALD E.
Court, 450 U.S. 464 (1981), that "perhaps the outcome of these two cases — in
which sex-based statutes were upheld — were foregone conclusions and that the only
question, before they were decided, was how the court would rationalize the out-
come." Williams, supra note 183, at 182.
Court is among the number of "our people" who support that principle. However, it harkens back to the separate spheres philosophy, ostensibly eschewed by the new equal protection jurisprudence. Professor Wendy Williams suggests that the decision affirms the social concept of "men's culture: aggressor in war."\textsuperscript{188}

Arguably, \textit{Michael M. v. Superior Court},\textsuperscript{189} decided the same year, also reflects the view of the Supreme Court that there are sex-appropriate roles, which are as much a justification for disparate treatment on the basis of gender than satisfaction of the standards evolved for intermediate scrutiny. In \textit{Michael M.}, the Court upheld a California law that concluded only men, and not women, were capable of committing the crime of statutory rape. The Court accepted the state's important interest in preventing teen-aged pregnancies. This goal, just as the one which motivates coercion against pregnant women who use drugs, is honorable. Nonetheless, it is difficult to comprehend how permitting women to have sex, voluntarily or forcibly, with under-age males, but illegalizing the same acts when the sex roles are reversed, avoids illegitimate births or unwanted abortions. The impracticality and unfairness of the state's position was apparently overlooked in favor of maintaining society's stereotypes about men and women. Such cases seem to adopt the view that women are inherently nonaggressive, and in need of protection, at least those women who satisfy the societal notions of proper feminine behavior. Such stereotypes likewise animate state coercive acts directed at pregnant women, especially those women least deserving of the privilege of pregnancy: poor women of color.

It may be hopeless to argue that these coercive actions violate the Constitution's promise of equal protection under the law. Hopeless, because even if the Supreme Court attempts to consistently apply the rules of law developed since the adoption of the Fourteenth Amendment, which it never has been able or willing to do, there are reasons why women are different. A gender claim is distinct from a race claim, or one based on national origin, simply because biology and society have made women's lives, and the demands thereon, so different. Arguably, at least from the perspective of someone who has never been blessed or burdened with this biology, there is room for legal differential treatment. Professor Sylvia Law observed: "There is no reason to believe that Black and White people are inherently different in any way that should ever be allowed to matter in the law.

\textsuperscript{188} Williams, \textit{supra} note 183, at 179.
\textsuperscript{189} 450 U.S. 464 (1981).
Men and women, by contrast, are different in significant sex-specific physical ways."\(^{190}\)

Women do not need a law professor to tell them that their bodies are different, or, most wondrously, capable of bearing children. However, these physical differences have bestowed upon the state a right to distinguish women from men,\(^{191}\) and to exert some control over women’s bodies. Women can claim to be a discrete and insular group, with immutable characteristics, which has suffered historical discrimination.\(^{192}\) However, the Court can, and has, decided that the state can rationally and lawfully treat women who are pregnant,\(^{193}\) fertile,\(^{194}\) delicate,\(^{195}\) deterred from having sex by the fear of becoming pregnant,\(^{196}\) busy with homemaking,\(^{197}\) victimized by years of past discrimination,\(^{198}\) or too nurturing and non-aggressive to be con-


\(^{193}\) General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). Gilbert was a Title VII case in which the Court upheld the employer’s exclusion of maternity benefits as not gender-based discrimination, but rather a simple distinction between pregnant and non-pregnant persons. Congress amended Title VII to specifically reverse the holding in Gilbert, by making discrimination on account of pregnancy includable in sex discrimination under § 701(k) of the statute. Gilbert was predicated, in part, upon a still existent Supreme Court decision, Geduldig v. Aiello, 417 U.S 484 (1974), which accepted California’s exclusion of pregnancy disabilities from its state disability insurance program as lawful despite equal protection claims.

\(^{194}\) In Autoworkers v. Johnson Controls, 111 S. Ct. 1196 (1991), had the employer done its homework and proved that the airborne lead was more dangerous to fertile women than to fertile men, its actions might have been upheld. That case arose under Title VII, but a public employer, e.g., some utilities, could theoretically try to exclude fertile women for their own and their potential children’s protection.

\(^{195}\) Muller v. Oregon, 208 U.S. 412 (1908).

\(^{196}\) Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding the conviction of a seventeen-year-old man who had consensual sex with a sixteen-year-old woman under a California statute that provided only men, and not women, could be convicted of statutory rape).


The [w]oman is still regarded as the center of home and family life. We cannot say it is constitutionally impermissible for a State ... to conclude that a woman should be relieved from the civil duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.

\(^{198}\) Kahn v. Shevin, 416 U.S. 351 (1974) (Florida may allow widows and not widowers to take a property tax exemption). Professor Wendy Williams argues that this case is unlike the compensation and remediation cases decided under Title VII,
scripted into military combat service, differently than men. Classification by sex, in other words, has often satisfied the Court as permissible.

The coercive actions discussed in this paper classify not only by gender, but likewise by race. The Supreme Court has concluded that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect."201

The group against whom most coercive actions are directed represents the intersection of race and gender, for which there is no specific heightened protection.202 African-American men are not subject to this type of classification and discriminatory treatment. They are not the wombs; they are the progenitors. As a class, men of color fare no better and sometimes worse than their sisters of color. However, in this case, biology protects them. It would be unfortunate, and contrary to any notion of fairness, if the fact that the coercive actions are sexist as well as racist may insulate them from the type of constitutional scrutiny that would lead to their invalidation.

There is no jurisprudence that would allow African-American women special constitutional protection. That is shameful and ridiculous because historic discrimination, proved in a myriad of ways, is directed toward African-American women, who are at the bottom

where the Court has approved affirmative action or set-asides. Rather than attempting to engage in a "finely tailored fact-based process for identifying and remedying past discrimination," as the Court has done in Fullilove v. Klutznick, 448 U.S. 448 (1980) and Johnson v. Santa Clara Dept. of Transp., 480 U.S. 616 (1987), Kahn and other cases affording women preferential treatment were decided on the bases of "old stereotypes about women's role and status." Williams, supra note 183, at 179-180 n.35.


200. PALTROW, ET AL., ACLU FOUNDATION, OVERVIEW OF ACLU NATIONAL SURVEY OF CRIMINAL PROSECUTIONS BROUGHT AGAINST PREGNANT WOMEN: 80% BROUGHT AGAINST WOMEN OF COLOR (October 3, 1990), cited in George Bundy Smith and Gloria Dabiri, Prenatal Drug Exposure: The Constitutional Implications of Three Government Approaches, 2 CONST. L.J. 53 (1991). The authors also criticize coercive acts because they violate constitutional protections afforded criminals, including notice, mens rea, and cruel and unusual punishment.


202. Judy Scales-Trent argues either that black women are a subset of Blacks, and therefore any laws affecting them as a class should be regarded with the strictest scrutiny, or that as victims of the "dual oppression" endemic to women and Blacks, they should be regraded as an even smaller and more discreet group, for whom the Court should advance scrutiny even greater than the old strict scrutiny, by lessening plaintiffs' burden of proving intent. Scales-Trent, supra note 182, at 9.

203. Clark, supra note 82, at 487 n.137.
of every socio-economic scale. Coercive acts are undeniably gender-specific, and I argue, sexually discriminatory. Women of color, as a subset of the objects of government oppression, are overwhelmingly victimized. As Judy Scales-Trent argues so convincingly, "since black women carry the burden of membership in the black group, which is already entitled to strict scrutiny protection, and in the disfavored female group, they should be entitled to more than strict scrutiny protection."  

Black women are both stigmatized and subordinated in every actual measure. If the constitutional guarantee of equal protection means anything, it must include protection against disparate and discriminatory coercion and punishment for crimes or omissions that any class could and does perpetrate. However, there is nothing in Supreme Court precedent that would afford these women the protection they deserve, both by reference to the presumed historical purpose of the constitutional promise and by the actual fact of their status.  

Although there is case law that suggests that government must intend to discriminate against a class, the Court has long been wary of application of facially neutral laws that fall more heavily upon a protected class. Toward the end of the nineteenth century, in *Yick Wo v. Hopkins*, the Supreme Court invalidated a local ordinance that banned the operation of hand laundries in wooden buildings. Its practical significance was that virtually all Asian hand-laundry operators were prevented from plying their trade. The Court found intentional discrimination against Asians based on the fact that exemptions from the ordinance were routinely granted to non-Asians. Therefore, the Court inferred that disparate impact could be unlawful.  

There have been other cases where the effects, rather than the intent or purpose of a law, formed a basis for finding a constitutional

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204. Scales-Trent, *supra* note 182, at 23.

205. African-American women have fared just as poorly under the Civil Rights Act of 1964, since any proved discrimination against black females can be rebutted by proof that the employer does not discriminate against white women, and is, therefore, operating free of prohibited gender bias, and proof that African-American men suffer no discrimination, thereby establishing a lack of discrimination on the basis of race.

206. Washington v. Davis, 426 U.S. 229 (1976) (even though a disproportionate number of African-Americans fail to pass a written test for employment at the police department, and the test had not been validated to establish its reliability for measuring subsequent job performance, statistical proof alone did not prove that the Department purposefully discriminated against African-Americans).

207. 118 U.S. 356 (1886).
These cases suggest that, at the very least, a dramatically disparate impact can and should shift the burden to the state to justify its seemingly neutral, pro-child policy which has the effect of threatening the rights of women, especially women of color. In a recent case, the Court issued its strongest suggestion that disparate impact could lead to a violation of the Equal Protection Clause. In *DeShaney v. Winnebago County Department of Social Services*, the Court held that although the state had assigned a social worker to work with a father who was suspected of child abuse, the Due Process Clause did not require the government to protect a child from its abusive father.

The importance of *DeShaney* in determining the legitimacy of current government coercion of pregnant drug users is the Court's statement that the promises of equal protection would be meaningless if the government were to "selectively deny its protective services to certain disfavored minorities." If denial of services on the basis of race offends the Constitution, so ought the imposition of sanctions on the same basis. Ironically, the factual determination in *DeShaney* seems to reject the position that the government must act to protect children, at whatever cost, contrary to the presumed motivation for government actions against pregnant women.

We cannot always expect the Supreme Court to raise the consciousness of a nation full of God-fearing people with a right to their judgments. The Court "reflect[s], by and large, mainstream views . . . and only very occasionally . . . moves temporarily out ahead of public opinion." We live in an era of strict constructionism — where no justice would be willing to bear the mantle of his or her

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208. See, e.g., Vasquez v. Hillary, 474 U.S. 254 (1986) (statistical evidence of systematic exclusion of racial minorities from a grand jury may shift the burden to the state to disprove its discriminatory intent); Rogers v. Lodge, 458 U.S. 613 (1982). In this case, African-Americans were a majority of the electorate, but a change to at-large elections resulted in the election of an all-white board of commissioners. This led to Court invalidation of the election procedures, *even though the Court articulated a demand for proof of intentional and purposeful discrimination* and the proof consisted of facts showing that elected officials had been insensitive to the African-American community and wanted to dilute their political strength. *Id.*


211. *Id.* at 197 n.3.

212. Williams, *supra* note 183.
substantive due process forebears, who, early in the century, were said by their critics to be excessively pro-active, who made personal choices about what was good for society. We look more and more to the "Founding Fathers" to make sure we are not giving people more rights than the framers of the Constitution meant them to have. As Justice Thurgood Marshall reminded us, the Constitution was never intended by its framers to protect African-Americans or women. Nonetheless, these groups certainly ought to get some measure of protection through contemporary Supreme Court review, however imperfect that protection is.

It is hardly original to conjecture that major changes are needed.

"Achieving sex-based equality requires social movement for transformation of the family, child-rearing arrangements, the economy, the wage labor market, and human consciousness." There are laws that promise equal treatment, but they are limited in scope to public education, employment, and housing. These laws do not afford

213. GUNThER, supra note 171, at 445. "Rejection of the Lochner heritage is a common starting point for modern Justices: Reaction against the excessive intervention of the 'Old Men' of the pre-1937 Court strongly influenced the judicial philosophies of their successors." Id. Clearly, the last two nominees to the Supreme Court, Justices Souter and Thomas, were reticent about having an opinion about anything vaguely controversial, much less touting a political and social agenda.


For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. "We the People" included, in the words of the framers, "the whole Number of free Persons. On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes — at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.

Id.

216. Law, supra note 189, at 956.

217. That is not to suggest that litigation under those civil rights statutes have perfected women's rights, or have been free of the cultural biases that keep women in their place. See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (women lawfully excluded from working as guards at a maximum security prison where rapists were not segregated from the rest of the inmates). "A woman's relative ability to maintain order in a male, maximum security unclassified penitentiary of the type Alabama now runs would be directly reduced by her womanhood." Id. at 335. I am reminded of the comments of a former beauty pageant winner, and a law student of mine,
protection to addicted mothers against state interference, coercion, and sanction. Therefore, the route of constitutional challenge must be pursued.218

about her experience as a counselor in a maximum security prison in Virginia. She said she felt less worried about rape in a prison full of guards than in the law school parking lot. She was struck by how Dothard denied women the opportunity to work. In her town, she said, women had three employment options: a fast food restaurant, the prison, or prostitution. And, of course, only the prison offered dependent health care benefits.

218. Cleburne v. Cleburne Living Ctr., 470 U.S. 432, 441, 448 (1985); see, e.g., School Bd. v. Arline, 480 U.S. 273, 287 (1987) ("Section 504 [may] achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear. . ."). Congress, however, has stated clearly, in response to the Court's nonsensical refusal to find discrimination without reason in the pregnancy cases that treating pregnant women different from any other worker without a legitimate business justification is per se discrimination. See Civil Rights Act of 1964 — Pregnancy Discrimination, Pub. L. No. 95-555, 1978 U.S.C.C.A.N. 4749, 4750-52. Congress found this provision of Title VII to be a necessity, because the Supreme Court refused to disallow such distinctions. The Supreme Court in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), had held that discrimination based on pregnancy was not per se sex discrimination, and in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), the Court held only that policies based on gender may violate Title VII; see also Teamsters v. United States, 431 U.S. 324 (1977) (use of statistics to prove a disparate impact upon African-Americans in employment); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (when using statistics to show discrimination in a school district the comparison should be the number of black teachers in the district with the number of black teachers in the labor market, not with the number of black students in the district); W. Bell, AID TO DEPENDENT CHILDREN 81 (1965), cited in Scales-Trent, supra note 182, at 23. In Washington v. Davis, 426 U.S. 229 (1976), the Supreme Court rejected a claim that a municipal requirement of a certain level of reading proficiency to be eligible for employment with the police department denied black citizens equal protection. Although the test score disqualifed a disproportionate number of African-American applicants, the Court accepted the city's rationale for the requirement, and said that without proof of discriminatory intent, the law was constitutional. Later, the Court refined its meaning in Hunter v. Underwood, 471 U.S. 222 (1985). In that case, a provision of the Alabama Constitution which disenfranchised persons convicted of crimes of moral turpitude, was declared unconstitutional. The Court did so for two reasons: a statistically significant disparate impact upon black voters, and proof of historic intent to discriminate against them. Interestingly enough, Alabama's miserable efforts to save their constitutional provision by arguing that the historic intent was to disenfranchise both poor Whites and Blacks, i.e., class rather than race discrimination, failed to disabuse the Court of its conclusion that the intent to discriminate against Blacks was "beyond peradventure." Id. at 232. In evaluating a state's compliance with the Fourteenth Amendment, the Court has instructed the generations that what motivates it to designate a level of protection is whether society's views of the group reflect "prejudice and antipathy" or "an outmoded notion" of the group's capabil-
Even if pregnant drug users have no fundamental rights with which state coercion interferes, the direction of that coercion against a specific class, such as women, requires that any laws affecting them must be evaluated against a standard that demands that all persons be guaranteed equal protection under the law.

Any distinct group whose membership is limited by accident of birth and whose political power is patently weak, ought not be classified for purposes of government benefit or burden unless the government has an overriding or compelling interest in some goal that can only be reached by group classification. When the government draws lines by race or national origin, the Court is automatically suspicious, and such criteria call for the greatest attention from the Supreme Court. Coercive action against pregnant drug-users classifies persons because of their immutable characteristics. The practical effect of coercive actions against pregnant drug abusers is that women of color, implicating both race and national origin, are overwhelmingly the objects of state action. Any government classification for differential treatment as a result of that class similarly mandates strict scrutiny for means and end.

Simply on the basis of race, these women should be guaranteed strict scrutiny of any local or state law that restricts them in any way, not only in the exercise of any of their fundamental rights: privacy, family decision-making, and autonomy. The Court has concluded that “legal restrictions which curtail the civil rights of a single racial group are immediately suspect.” They will be sustained only if the

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219. PALTROW, supra note 199, at 53.
221. Id. at 216.
interests of the state are compelling, as when a fetus becomes viable, and the state’s interest in the preservation and protection of potential life outweighs the pregnant mother’s privacy and family interest in terminating her pregnancy.\textsuperscript{222} Coercive actions are either directed against mothers whose fetuses are not viable, or directed against mothers whose fetuses have already been damaged by their mother’s drug use, which would obviate any compelling reason for the state to act.

I may conjecture that historically, men have been treated well, and it is this status quo the Court seeks to maintain, rather than attributing to the Court the welcome goal of equalizing power, access, and ending subordination. The Supreme Court continues to deny the role gender plays in our social structure. Sex and race can and ought to be analogized for purposes of guaranteeing equal protection under — and from — the law. Twenty years before the passage of the Civil Rights Act of 1964, a legislative effort to prohibit discrimination on the basis of race and sex, sociologist Gunnar Myrdal wrote of the universality of discrimination against non-majority persons of color and women:

The similarities in women’s and Negroes’ problems are not accidental. They were, as we have pointed out, originally determined in a paternalistic order of society. The problems remain, even though paternalism is gradually declining as an ideal and is losing its economic basis. In the final analysis, women are still hindered in their competition by the function of their procreation; Negroes are laboring under the yoke of the doctrine of unassimilability which has remained although slavery is abolished. The second barrier is actually much stronger than the first in America today. But the first is more eternally inexorable.\textsuperscript{223}

Physiological differences between the sexes provide an intuitively appealing argument for their different, and disparate treatment. That is not to say, however, that this is fair. The Court has struggled with the application of equal protection to gender. Its decisions are inconsistent, and often reflects what the Court thinks society expects of, or for women. There is the danger of futility in making the argument that coercive actions against pregnant women deny those women equal

\textsuperscript{223} Gunnar Myrdal, An American Dilemma 1078 (20th Anniversary ed. 1962).
protection. Current Supreme Court jurisprudence may not be sufficient to guarantee the consistency and fairness needed to protect women from being sanctioned for the sins of their bodies.

Our society strives toward the goals and guarantees of the Founding Fathers in many ways. Statutes, case law, and constitutional interpretation by the Supreme Court are reticulated parts of a whole evolution toward fairness. For that reason, the purpose of civil rights legislation should inform judicial constitutional interpretation, since the goals are the same. Only women, and virtually only women of color, suffer sanction for being both pregnant and addicted. How much more proof that such actions are unfair do we need?

D. COERCIVE ACTS INTERFERE WITH BASIC SUBSTANTIVE DUE PROCESS RIGHTS

Even if the category — pregnant, poor, African-American, Hispanic, Asian, or pregnant regardless of racial membership — merits no special level of scrutiny by a court, at a minimum, all state action must be rational to satisfy constitutional requirements. Long before the Court adopted its concept of semi-suspect classes, it demanded a rational means to a lawful end. In this undertaking, commentators urged the Court to engage in pragmatic analysis.

Twenty years ago, Gerald Gunther asked the Court to "assess the means in terms of legislative purposes that have actual bases in reality . . . [and to] gauge the reasonableness of questionable means on the basis of materials that are offered to the Court . . . ."224 A policy and program of coercive action against pregnant women that contravenes the legitimate end of healthy births, cannot satisfy that standard. Even were one to concede that the distinction — pregnant women are different and subject to stricter control for the good of their fetuses — is rational, the method of control is not. Coercive acts are impracticable because they do not achieve the goals of protecting the fetus from the ravages of drugs or alcohol, help the mothers who carry these fetuses, or avoid the proliferation of drug addiction.

Coercive acts serve no social purpose. Although the government’s ends, articulated or inferred, are legitimate and even noble, the means are irremediably flawed. Everyone agrees that infants born of addicted mothers are victims in need of help, but penalizing addicts is neither

the least restrictive nor most effective method.225 Most of the judges who have heard these cases end up rejecting the states’ theories justifying intervention. Prosecutors in the earliest coercive acts against women relied upon child abuse and neglect laws. Often “child” was not defined as including a fetus, and consequently judges rejected the theory.226

Some legislative changes have been made or proposed.227 Most legislators who have considered the problem generally agree that it may be worth trying to exercise jurisdiction over these women if it can help them and their babies. On the other hand, it may not. There is no evidence that it will. Furthermore, states must justify this glaring intrusion into women’s private lives, even if these women do not suffer the loss of any fundamental rights, and their gender serves as an appropriate basis for singling them out. Making the state prove that its acts are not only rational, but have some basis in fact, has been called the new substantive due process. Put most simply, each of us can legitimately demand that the laws our government enacts satisfy a basic test of rationality. In this context, that means the right to satisfy the old end-means test, without a court sitting as a super-legislature to determine the social efficacy of the law.228 No one has


226. For a discussion of this approach, see Kary Moss, Substance Abuse During Pregnancy, 13 HARV. WOMEN’S LAW J. 287 (1990).


228. Even after the demise of the now abandoned substantive due process review by the Court, which has been described as a time when the “justices upheld laws which they personally agreed would be necessary to protect important social goals even though the legislation involved some restraint on commerce,” JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 11.4, at 352 (1986), the Court still engaged in practical, “does it work?” analysis. In United States v. Carolene Prod. Co., 304 U.S. 144 (1938), a Due Process challenge of a federal statute which prohibited interstate shipment of milk with non-milk fat added was rejected. The Court stated that, “legislation . . . should not be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis.” Id. at 152. The Court concluded that the inquiry “must be restricted to the issue whether any state of facts either known or which could reasonably be assumed, affords support” for the law. Id. at 154. Such fact-based inquiry is not uncommon, and is appropriate in most cases.
ever proved the positive effects of coercive actions against pregnant drug-abusers. The best that can and has been offered is that something has to be done. That should not satisfy this test of rationality.

This due process concept is extracted from the dormant commerce clause, which gives the states power to regulate those areas left alone by Congress. When the Supreme Court considers the propriety and constitutionality of state actions affecting interstate commerce, it must also decide whether the state laws illegally discriminate against "persons" who are guaranteed equal protection by the Fourteenth Amendment.229 States have extremely broad power to regulate for safety, even when their actions affect the free flow of goods in commerce — both a constitutional and federal statutory goal230 — because of the Court's historic deference to state police power.231 However, even in this capacity, the states are subject to a fairly strict test of reasonableness.232

Southern Pacific Co. v. Arizona233 is a good example of this principle. When the state of Arizona tried to limit the length of trains in order to make intrastate transportation safer, the Court balked. Almost every train passing from East to West had to pass through Arizona. The Court asked "whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as to not outweigh the national interest in keeping interstate commerce free from interferences . . . ."234 The test is not so much a balancing test, as an inquiry into whether the restriction that denies equal protection, that treats some persons differently because of their citizenship or burdens interstate commerce, or leads to the practical but undesirable result of inviting retaliatory legislation of one state against her sisters, makes sense. The Court found that it did not, and invalidated the law.

The Court ought to reach the same conclusion in evaluating coercive actions against pregnant women.235 These steps, taken against

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229. See, e.g., Metropolitan Life Ins. v. Ward, 470 U.S. 869, reh'g denied, 471 U.S. 1120 (1985) (invalidating a state law imposing higher taxes on nonresident corporations because there was no rational justification for treating them differently).


233. 325 U.S. 761 (1945).

234. Id. at 775-76.

235. State courts have long engaged in practical fact-finding to justify or
a discreet group, women, many of whom are part of an even more discreet and arguably protected group, women of color, have a myriad of practical and undesirable effects with few or no positive results. The fetuses are not protected from early harm, and the mothers have no available rehabilitative services. Women who have been monitored have intentionally eschewed medical care during the remainder of their pregnancies. Consequently, the children born to the subjects of the coercion are left uncared for, and the pitiful pregnant abusers have lost their privacy, autonomy, and right to do their best with their own children.

Nothing practical has emerged from state coercive actions — both because they are not empirically justified and because nothing is done for any of the victims beyond coercion. Much injury occurs prior to the time a woman knows she is pregnant.\(^{236}\) In cases like *UAW v. Johnson Controls,\(^{237}\)* the employer argued that it had to disqualify all fecund females for precisely that reason.\(^{238}\) Consequently, coercive actions against visibly pregnant mothers, or worse yet — mothers who have already given birth — are useless in preventing the harm to the fetus.\(^{239}\) Of course, there are few options for children born of these mothers, except perhaps that they may be taken away from their drug-abusing mothers. Being drug-free for a period of institutionalization after state intervention does not do much toward raising a child in a drug-free environment. There are few places where these

invalidate state laws that rested upon gender classifications. See, e.g., Pennsylvania *v. Daniel*, 243 A.2d 400 (Pa. 1968) (refusing to find that all gender classifications offend the Equal Protection Clause, but invalidating a law that allowed men to be eligible for parole earlier than women for the commission of the same crime, unless the facts of each case justified it); *Mollere v. Southeastern Louisiana College*, 304 F. Supp. 826 (E.D. La. 1969) (invalidating a law that required women under age 21, attending state college, to live in dorms, where no such rule applied to men, even though the state said its own finances demanded the arrangement, since facts could not prove the reasonableness of the gender distinction). *See generally Barbara Allen Babcock et al., Sex Discrimination and the Law*, 120-23 (1975).


\(^{238}\) *See, e.g., Oil, Chem., and Atomic Workers Int'l Union v. American Cynamid Co.*, 741 F.2d 444 (D.C. Cir. 1984); *Zuniga v. Kleberg County Hosp.*, 692 F.2d 986 (5th Cir. 1982).

crack babies can be cared for, and even fewer places where their mothers can go, either during or after their pregnancies. The actual numbers of treatment centers especially for pregnant women, or those that welcome the children of those seeking help, are abysmally small. In cases where states sought to coerce or sanction mothers for their drug use, there are no facts to show the state offered any help to a mother whose life was — and maybe still is — so out of control that she became drug or alcohol dependant.

Let us assume that most addicted mothers understand their dilemma; they realize they must have help. There is already proof that help is difficult if not impossible to find. There is a clear bias in health care generally. Researchers report that medical policy-makers either do not consider women, by failing to research their health needs, or undervalue them. In allocating resources, women are considered to be worth less than men based on the measurement of


241. Drug and alcohol programs for women are far fewer than for men. A review by the National Institute on Alcohol Abuse and Alcoholism notes limitations of past research done on women and alcohol. There has been less research on the effects of alcohol on adult women than on fetuses, and studies of the effects of alcohol on human sexuality have focused on the male ability to perform sexually. In treatment programs, practical services that would have enabled women with family responsibilities to enter treatment were omitted from planning, and traditional sex role values were reported to influence attitudes of personnel in treatment agencies.

NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, SEX-RELATED ALCOHOL EFFECTS, ALCOHOL RESOURCES UPDATE (June 1985).

242. See Laurie Rubenstein, Prosecuting Maternal Substance Abusers: An Unjustified and Ineffective Policy, 9 YALE L. & POL’Y REV. 130, 146 (1991), citing Born Hooked: Confronting the Impact of Prenatal Substance Abuse: Hearing Before House Select Committee on Children, Youth and Families, 101st Cong., 1st Sess. 112 (Apr. 27, 1989) (noting that 87% of New York City treatment programs refused to treat pregnant crack addicts on Medicaid, and even fewer welcome the children of those seeking help); Michele Morris, Cries in the Dark Often Go Unanswered: For Drug-Addicted Mothers, Treatment is Hard to Find, Even Harder to Stick With, WASH. POST, July 2, 1991, at A1 ("Less than 20% of drug treatment programs in Washington even admit pregnant women . . . less than 5% help, or allow mothers to keep their children with them during treatment."); cf. LUCIA ZEDNER, WOMEN, CRIME, AND CUSTODY 6 (1991). The Eugenics Movement was unsuccessful and abandoned a program of relocating alcoholic women to rural areas to prevent their neglect of their born and unborn children because of "serious questions about the usefulness of any penal and reformatory endeavor."
socioeconomic costs of illnesses, including lost "man-hours" on-the-job, that emphasize and value men's activities — wage earning and a lifetime of participation in work for wages outside the home. Women often receive less, or later care than men for the same illness. Women's illnesses, like bulimia and PMS, have been often discounted or ignored.

Very little is known about drug addiction and mental illness among women. Men define what is sanity, and what kinds of dependency, for example, like that of a man upon a woman to maintain a home and raise children so he can devote his life to his career, are normal. Women are often undertreated for depression, for which they are the most common sufferers, and most often over-tranquilized. Women of color in this country tend to get little mental health care.

In addition to all of the other reasons why coercive actions are wrong, one may argue that sanctions based upon a woman's addiction violate other constitutional guarantees. Medical organizations consistently hold that substance abuse is a disease. The objects of state intervention are addicts, and prosecutors' arguments that they need some incentive to quit drugs are naive and wrong. The American Medical Association acknowledges that women do not take drugs to

243. See supra note 28, at 33.
250. See Paul A. Logli, Substance Abuse During Pregnancy: Legal and Social Response: The Prosecutor's Role in Solving the Problem of Prenatal Drug Use and Substance Abused Children, 43 HASTINGS L.J. 559, 566 (1992) ("Some critics of the prosecutor's role argue that coercing a woman into drug treatment by any means is bad public policy . . . . If such women are not forced into treatment after birth of their first drug addicted child, other damaged children are likely to follow.")
harm the fetus, but to satisfy an acute psychological and physical need for the drug. Twice, the United States Supreme Court has found that drug addiction is an illness. In Robinson v. California, the defendant was arrested and convicted under a California statute for being addicted to the use of narcotics. The Supreme Court found that “[t]o be addicted to the use of narcotics is said to be a status or condition and not an act.” The Court held that a statute which convicted one based on the status of being addicted to the use of narcotics was “cruel and unusual punishment” under the Fourteenth Amendment. The Court analogized this statute to one punishing a person for being “mentally ill, or a leper, or to be afflicted with a venereal disease.” In Powell v. Texas, the Court upheld a Texas statute which made public drunkenness illegal, holding that the statute did not amount to “cruel and unusual punishment” under the Eighth Amendment. In doing so, however, the Court noted that “there is widespread agreement today that ‘alcoholism’ is a ‘disease’...” Either coercive acts punish women for drug addiction, rather than an actual crime, or they punish women for their status — pregnancy — rather than their drug addiction. Neither course is rational.

Not only are the coercive actions impractical, but they do not satisfy any goals society may have regarding the role or purpose of sanction and punishment. Assuming that the actual results of any type of coercive actions are the same — separation of mother and child — all coercive actions can be viewed as sanctions. But most of the theories for punishment: deterrence, incapacitation, or rehabilitation, fail to justify the actions the states have taken against these women. Retribution, the theory of justly deserved punishment, is the

251. See Joan Beck, In Maternal-Fetal Conflicts, Guess Who Has No Rights, CHI. TRIB., Nov. 27, 1989, at 11. ("[The AMA’s recommendation is that] [s]eeking a court order to compel a pregnant woman to accept treatment intended to help her unborn infants is inappropriate...."). The AMA House of Delegates favors rehabilitative services instead of prosecution, and noted “glaring” lack of such services.
253. Id. at 662.
254. Id. at 667.
255. Id. at 666.
256. 392 U.S. 514 (1967).
257. Id. at 531-37.
258. Id. at 522. Nevertheless, the Court distinguished the Texas statute from the California statute in Robinson, explaining that Powell was not convicted for being an alcoholic, but for being drunk in public. Id. at 532-34.
likeliest rationale. However, it is improper in this case. It is arguable that pregnant drug users are held most culpable only in the view of a male-dominated society that disapproves of their failure to act like proper women.

The famous and distinguished Victorian judge, Sir James Fitzjames Stephen, argued that "the punishment of criminals was simply a desirable expression of the hatred and fear aroused in the community by criminal acts." He finds that criminal law stands in the same relation to the passion for revenge as marriage does to the sexual passion. Interestingly, the coercive acts against pregnant drug-abusers may involve both society's desire to punish illegality and its disapproval of a woman's failure to control her sexual appetite. Legal punishment controls and directs an otherwise rampant and base instinct, just as marriage keeps our animal urges under control. The poor, pregnant coke addict has not conformed to our societal need, unchanged since the age of Victoria, despite the sexual revolution, to check those dark sexual urges, which in the case of the addict, end in a pregnancy that risks the safety of some misbegotten infant.

Retribution makes sense when the wrongdoer understands the immorality or impropriety of her act. That may not be possible for an addicted mother, and it is also possible that the normative value of a drug-free pregnancy is not universal. Even if there were consensus that drug use is bad, there surely is less than complete acceptance of the notion that losing custody of one's baby — or incarceration — is the right form of censure which validates the use of retributive goals for sanction. "In this view, the emphasis is shifted from our demands upon the criminal and becomes a question of demands that the criminal does or should make upon himself to reconcile himself to the social order." The pregnant addict must understand that the majority of powerbrokers and lawmakers in this country, who have never known or experienced the demands pregnancy places upon the mother, expect a pregnant woman to make whatever sacrifices necessary to provide health and safety to her fetus. It is believed that an addict who volitionally (we assume, despite the denotation of 'addiction') continues to abuse drugs for her own gratification, with apparent disregard and neglect of her fetus, deserves to be punished. However, even acknowledging that a reasonable cross-section of

260. *Id.* at 37.


262. PACKER, *supra* note 258, at 38.
society deems the acts of these women immoral, the discriminatory application of such punishment, its interference with fundamental rights, and its simple impracticality, removes any possible justification for its use.

Another justification for punishment is that its imposition will deter future bad behavior. This justification is based upon the theories of the philosopher Jeremy Bentham, who, much like the law and economics analysts, “assumes a perfectly hedonistic, perfectly rational actor whose object is to maximize pleasure and minimize pain.” Ideally, punishment provides an impetus for utilitarian deterrence. In general, it is difficult to quantify what effect, if any, punishment has on deterring people from engaging in criminal acts.

Critics argue that the punishment of a specific wrongdoer after the fact, has no value in deterring the person specifically punished from doing the same thing again. However, we can never guess what general deterrent effect punishment may have, since no one knows how many women successfully avoided pregnancy while on drugs, aborted their fetuses, or broke their habits before pregnancy. Psychological critics reject the special deterrence notion because of their belief that criminals are not rational, but driven. Similarly, in the case of a drug-addicted woman, it is even more likely that addiction may negate the rational functioning of her mind. Thus, a presumption of rational behavior is contradicted by what we know about physical and psychological dependency.

On the other hand, if we presume a useful and workable Benthamite model applied to the pregnant addict, we may end up with a result opposite from the social goals relating to protection of the baby, reducing drug use, and so on. If the pregnant drug user is capable of rational decision-making, she will avoid contact and prenatal care if she knows that she will be the subject of state coercive actions if she seeks care or legal help during her pregnancy. She may even attempt to deliver her own child, rather than be arrested or have her baby taken by social workers when she delivers in a hospital. These results are counter to the goals of the society as a whole,

263. We must ask ourselves the same question that Lord Patrick Devlin asked thirty-three years ago in his Maccabean Lecture in Jurisprudence at the British Academy: “What is the connection between crime and sin and to what extent, if at all, should the criminal law of England concern itself with the enforcement of morals and punish sin or immorality as such?” PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 2 (1965).

264. PACKER, supra note 258, at 40.

265. See, e.g., WALTER BROMBERG, CRIME AND THE MIND (1965).
despite any value of deterrence under the Benthamite model. In addition, as with other crimes, the case studies of recidivist drug-addicted mothers are numerous.

The deterrence rationale simply does not function well in the case of addicted pregnancy. First, we must assume that an addicted mother has already been immune to the deterrent effect of illegalizing certain dangerous drugs because she continues to use them. Second, she often gets her cocaine money through illegal acts, such as prostitution or larceny. Third, the punishment of imprisonment already results in the removal of her children before and after birth. Is it any more likely that illegalizing, as a separate offense, the use of drugs while pregnant will deter her from using those drugs to which she is addicted or committing the crimes necessarily related to her addiction?

The last espoused theory for punishment is rehabilitation. At first blush, this appears to be the most humane reason for punishment. We must remember that "[h]owever benevolent the purpose of reform, however better off we expect its object to be, there is no blinking the fact that what we do to the offender in the name of reform is being done to him by compulsion for our sake, not for his." 266 We punish pregnant drug addicts to avoid the economic and social consequences of her addicted pregnancy — the possibly injured baby. We have a societal prerogative to do that, and it would seem an efficient solution. However, the documented failure of our society to have real rehabilitation programs for drug users, especially those with children, makes this justification for coercive actions more ephemeral than real. Simply incarcerating the addict may break her habit, and removing the child born of that addicted pregnancy will protect it from its mother’s bad influence. On the other hand, the dearth of resources to deal humanely with these coke babies reduces the possibility of actually improving society and protecting the victim of this alleged crime. Dare we punish women for their gender, their race, their addiction, and their poverty, when we have no way to rehabilitate them? Professor Herbert Packer rightfully designates punishment in the name of rehabilitation "gratuitous cruelty." 267

Finally, sanctions directed at pregnant women may also have the negative effect of seeming to minimalize their wrongdoing because the loss of their children is so out of proportion to the harm they have done. 268

266. Packer, supra note 258, at 53-54.
267. Packer, supra note 258, at 56.
268. There is another bad effect of disproportionate punishments so far as they
CONCLUSION

No one claims that a woman who endangers her fetus, even though she may have no real affirmative choice because of her addiction, is a hero. Any examination of her straits, however, should evoke pity, rather than the loathing accompanying such crimes as murder. We must do more than throw up our hands and say that no one can change all of society. We are lawyers, committed to some sense of social order under a set of rules. However, we should not spin our wheels and waste our time pursuing means that are unfair, discriminatory, ineffective and arguably illegal, in the guise of doing something.

The women whose particular plight I describe in this paper are relatively few in number. In terms of absolute quantity of harm, these government actions rank fairly low. The study of such an issue would not merit so much attention, if it were an isolated example of an organized, law-abiding, individual rights oriented society gone briefly awry.

Unfortunately coercive actions against pregnant addicts represent more than mere benign failures to control a serious social problem. Such government coercion ignores the still developing jurisprudence of the unborn. It rejects the predominance of the mother's interests, which was first recognized in Roe v. Wade, and, except for occasional blips, remains unchanged. It excuses fathers, and by doing so, accepts the antiquated notions of patriarchy which deny both genders and their children an opportunity for fair treatment and access. It reflects a negative and patronizing view of these women who become addicted and pregnant, and seems to punish them because they are women who have sinned. Coercive acts are just another in a series of substitutes for the decent health care that women are generally denied. Finally, state coercion of pregnant women denies these women equal protection and substantive due process under the law. These state actions are neither justified nor practical, and intentionally, or by involve excessive severity. It is this: if a man is very severely punished for a comparatively slight offence, people will be liable to forget about his crime and think only of his sufferings, so that he appears a victim of cruel laws, and the whole process, instead of reaffirming the law and intensifying men's consciousness that the kind of act punished is wrong, will have the opposite effect of casting discredit on the law and making the action of the lawbreaker appear excusable and almost heroic.

egregious historic accident, classify and discriminate on the bases of gender and race.

Sadly, coercive actions against unhappy, unhealthy, addicted and impoverished pregnant women are part of the larger whole of discrimination on the basis of gender, and, in this case, especially on the basis of the color of the mother's skin. It is incredible to observe that people would risk infringing upon a woman's constitutional rights; dispense sanctions so disproportionately upon women, especially minority women; refuse to make fathers care or provide for their children, while penalizing women who fail to guarantee fetal health; and take ineffective, if not counterproductive steps to halt the proliferation of drug dependency, rather than make it possible to have healthy babies. The sex crimes in the lives of these women are done to them, not by them. Deterring their behavior makes us feel as though we are addressing the problem of drugs. It also makes sure, in one more small but integral way, that power does not change.