

BREAKING THE LAW BY GIVING BIRTH: THE WAR ON DRUGS, THE WAR ON REPRODUCTIVE RIGHTS, AND THE WAR ON WOMEN

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“The distinction between benefits and burdens is more than one of semantics.”¹

I.

INTRODUCTION

In the United States, women’s reproductive capabilities have been used both to exalt and to oppress women. Women’s unique role in reproduction has been used to refuse women the power to secure employment,² to bar women from practicing in their chosen profession,³ and to deny women equal employment benefits.⁴ Over the last thirty or so years, the ability to bear and birth a child has been used as a reason to civilly confine⁵ or criminally prosecute hundreds of

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1. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977) (holding that employer’s practice of denying accumulated seniority benefits to women returning from maternity leave violates Title VII of the Civil Rights Act of 1964).

2. *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (“[A woman’s] physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.”).

3. *Bradwell v. Illinois*, 83 U.S. 130, 132 (1872) (“That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.”).

4. *See, e.g., Geduldig v. Aiello*, 417 U.S. 484 (1974) (challenging California insurance system’s exclusion of pregnancy for temporary disability benefits); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (challenging private disability benefits plan that excluded pregnancy). In 1978, Congress passed the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k) (1978), overturning *Gilbert*. The PDA states, in pertinent part:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

Id. The PDA applies only to sex-discrimination challenges under 42 U.S.C. § 2000e (“Title VII”), and so did not overturn *Geduldig*, which included a challenge under the Equal Protection Clause. *See infra* notes 153–162 and accompanying text.

5. Several states have enacted civil commitment laws specifically aimed at pregnant women.

women, predominantly women from poor communities and communities of color.⁶ Often, the proffered justification for the punitive action against pregnant women is the protection of fetal health or fetal rights, and the need to protect fetuses from harm based on the mother's drug use.⁷ But, as this article will show, prosecuting as child abusers or even murderers the thousands of American women who carry pregnancies to term despite their drug addictions not only fails to further the states' goal of protecting fetal health, but also violates the constitutional rights of pregnant women.

Prosecuting pregnant women who give birth while in the throes of drug addiction violates the Equal Protection Clause. Though the Supreme Court has historically declined to treat pregnancy discrimination as sex discrimination, eroding support for these Supreme Court precedents indicates that it is high time for a reevaluation. Additionally, the Court's drug-addiction jurisprudence, which has long held that drug addiction is not a crime, requires that women not be prosecuted for their addictions and creates an Equal Protection problem when they are.

Prosecuting women who give birth despite suffering from drug addiction is also bad public policy. Such prosecutions threaten to roll back reproductive freedom and to dehumanize women. As Lynn Paltrow, founder and executive director of National Advocates for Pregnant Women, notes, "according constitutional rights to fetuses would not only jeopardize women's lives and health by denying them access to legal abortion, but would also undermine substantially their status as constitutional persons including their ability to participate as full and equal citizens in our society."⁸ The more rights accorded to a fetus, the

See Minnesota Commitment and Treatment Act, MINN. STAT. ANN. §§ 253B.02, 253B.05, 253B.065 (West 2007) and MINN. STAT. ANN. § 626.5561 (West 2003); Oklahoma Prenatal Addiction Act, OKLA. STAT. ANN. tit. 63, § 1-546.5 (West 2004); S.D. CODIFIED LAWS § 34-20A-70 (2007); WIS. STAT. § 48.193 (2003). These statutes have resulted in the mandatory confinement in hospitals or jails of pregnant women after a positive drug test. See, e.g., Richard Cohen, *When a Fetus Has More Rights than the Mother*, WASH. POST, July 28, 1988, at A21; Amy Rabideau Silvers, *DA Moves to Protect Drunken Driver's Fetus*, MILWAUKEE J. SENTINEL, Feb. 9, 1999. For an overview of the use of civil commitment laws against pregnant women, see Erin N. Linder, *Punishing Prenatal Alcohol Abuse: The Problems Inherent in Utilizing Civil Commitment to Address Addiction*, 2005 U. ILL. L. REV. 873, 885-96 (explaining the history of civil commitment laws in Wisconsin and outlining potential constitutional problems with these laws).

6. See LYNN M. PALTROW, ACLU REPROD. FREEDOM PROJECT, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW 3-4 (1992) (reporting that by 1992, almost 170 women had been prosecuted for crimes including child abuse, reckless endangerment, and homicide, due to the women's decision to carry a child to term despite a drug problem); Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioners, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936) [hereinafter Brief for ACLU] at 17-22. Other sources estimate that, as of 1993, between 200 and 400 women were charged with criminal offenses based on the women's conduct during pregnancy. Sally Sheldon, *ReConceiving Masculinity: Imagining Men's Reproductive Bodies in Law*, 26 J.L. & SOC'Y 129, 135 (1999).

7. Julie B. Ehrlich & Lynn M. Paltrow, *Jailing Pregnant Women Raises Health Risks*, WOMEN'S ENEWS, Sept. 20, 2006, available at <http://www.womensenews.org/article.cfm/dyn/aid/2894>.

8. Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62

fewer remain for the woman who carries that fetus.⁹ Just as troublingly, these prosecutions divert attention from efforts to support pregnant and parenting women who struggle with addiction or to enable them to best their addictions. Women on Medicaid are frequently denied access to drug treatment before, during, and after pregnancy. In at least two states, women have been driven to file class-action lawsuits in attempts to gain access to the limited inpatient treatment beds in their areas.¹⁰ In New York City, for example, eighty-seven percent of drug treatment programs reject pregnant Medicaid patients addicted to crack cocaine.¹¹ Yet it is exactly these women who are most likely to be targeted for prosecution.¹² Many of the women prosecuted, criticized, and blamed for not finding rare or nonexistent treatment programs¹³ to meet their needs are among the forty-five million Americans without any health insurance that could cover drug-abuse treatment.¹⁴

These increasingly common¹⁵ prosecutions of women who are unable to overcome their addictions during pregnancy also violate both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.¹⁶ Other

ALB. L. REV. 999, 1009 (1999). Some advocates, including Paltrow, believe that the desires to overturn *Roe v. Wade*, 410 U.S. 113 (1973), which recognized the right to abortion as constitutionally protected, and to outlaw abortion are central motivations for these prosecutions. See *infra* note 89 and accompanying text.

9. See CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 28–29 (1993). The anti-abortion rights movement has focused on the uterus (as opposed to the whole woman) and creates the image of the uterus—and therefore the woman—as the fetus's sanctuary. The woman is cast as the “mother ship,” but the fetus is otherwise imaged and imagined as totally divorced from the woman in which it grows. In anti-abortion rights literature, the woman disappears. *Id.* at 21. The woman becomes just “empty space” in which the fetus “floats” unless, of course, she is perceived as a threat to the fetus's health. *Id.*

10. The two states are New York and Pennsylvania. RACHEL ROTH, *MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS* 139 (2000). See *Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 613 N.E.2d 523 (N.Y. 1993).

11. ROTH, *supra* note 10, at 140.

12. *Id.*

13. See DRUG POLICY ALLIANCE, *AFFECTED COMMUNITIES: TREATMENT AVAILABILITY FOR PREGNANT WOMEN AND MOTHERS*, <http://www.drugpolicy.org/communities/women/treatment/> (“Many in-patient treatment centers do not accept pregnant women and may drop women from treatment if they become pregnant.”).

14. Milt Freudenheim, *Health Plans Cover Fewer While Costs Keep Rising*, N.Y. TIMES, Aug. 27, 2004, at C1.

15. As of 2001, women had been prosecuted under, *inter alia*, child abuse, reckless endangerment, and homicide statutes, in thirty-four states: Alabama, Alaska, Arizona, California, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. Jean Reith Schroedel & Pamela Fiber, *Punitive Versus Public Health Oriented Responses to Drug Use by Pregnant Women*, 1 YALE J. HEALTH POL'Y L. & ETHICS 217, 218, 230 n.10 (2001). Since 2001, prosecutions have expanded into New Mexico, *State v. Martinez*, 137 P.3d 1195 (N.M. Ct. App. 2006), and Hawaii, *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005).

16. U.S. CONST. amend. XIV, § 1.

commentators have already written at length about the due process issues raised by prosecutions of pregnant women for their actions during pregnancy.¹⁷ This article will argue that, in addition to violating women's substantive due process rights, these prosecutions violate women's right to equal protection. This article also argues that either intermediate or strict scrutiny—not the rational basis scrutiny the Supreme Court has often applied to distinctions based on pregnancy outside the employment context¹⁸—is the proper lens through which to measure the equal protection violations at issue in the prosecutions of pregnant women for drug use. In Part II, I explain the social and historical context in which women are punished for exercising their right to carry a pregnancy to term. Part III presents the legal framework for analyzing the equal protection violation at issue. In Part IV, I apply the legal methodology to the cases of women who have been prosecuted for becoming mothers in spite of drug addiction and show that such prosecutions deny women equal protection of the law. I intend for this article to be a resource and tool for advocates. Precisely for this reason, my legal arguments push the current legal doctrine, rather than relying upon it. Because the Supreme Court's approach to pregnancy discrimination has been stagnant since the 1970s, advocates—myself included—must seek support from theoretical and academic sources. The arguments herein aim to provide a glimpse into what a progressive jurisprudence of pregnancy in the criminal justice context could look like.

II.

A. MAKING MOTHERS CRIMINALS

The Disproportionate Impact of the "War on Drugs" on Women

1. A Brief History of the Drug War

The War on Drugs has roots reaching back to the country's first opium commission in 1908.¹⁹ With the first group tasked with evaluating the extent of drug addiction in the United States came the first inflation—and fabrication—of statistics,²⁰ both to render the commission necessary and out of racism.²¹ Early

17. See, e.g., Jean Reith Schroedel, Pamela Fiber & Bruce D. Snyder, *Women's Rights and Fetal Personhood in Criminal Law*, 7 DUKE J. GENDER L. & POL'Y 89 (2000); Doretta Massardo McGinnis, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505 (1990).

18. E.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974) ("Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.").

19. See MIKE GRAY, *DRUG CRAZY: HOW WE GOT INTO THIS MESS AND HOW WE CAN GET OUT 41* (1998).

20. *Id.* at 43.

21. *Id.* at 46–47. Dr. Wright, the man at the helm of the first opium commission, blamed addiction to opiates on the Chinese and told Congress "[c]ocaine is often the direct incentive to the

in the twentieth century, American anti-drug sentiment peaked with Prohibition.²² After Prohibition's demise, with the arrival of the Depression and American involvement in World War II, the drug war cooled.

It was not until Richard Nixon became president that the modern War on Drugs began in earnest. Though the country was in the throes of social liberation in the late 1960s, rates of drug use and addiction had not ballooned when Nixon took office.²³ But Nixon, who had skated into office on promises that he would be tough on crime, saw that there was little crime the federal government could constitutionally regulate, since the Tenth Amendment delegates all unenumerated powers—including the police power—to the states.²⁴ Congress, however, could pass laws regulating the sale and possession of illegal drugs; Nixon cleared the way for such regulation by using inflated numbers to scare Americans into believing that “a plague of unimaginable proportions was about to engulf the nation.”²⁵ When Reagan, whose presidency is now synonymous with the War on Drugs, took office in 1980, he and his wife built on Nixon's foundations (slightly shaky after President Carter's tenure) and instituted a full-on federal assault on the drug trade.²⁶

Congress advanced Reagan's agenda with the passage of the Comprehensive Crime Control Act in 1984,²⁷ which increased federal drug sentences, and the Anti-Drug Abuse Act of 1986,²⁸ which “further increased federal drug penalties and instituted mandatory minimum sentences for simple possession of drugs.”²⁹ The 1986 Anti-Drug Abuse Act also included a new sentencing scheme for cocaine and crack cocaine (“crack”). Under the new provisions, the possession of crack—a drug predominantly found in communities of color—was punished up to 100 times more harshly than powder cocaine, which is more expensive and use of which is concentrated in white communities.³⁰ Under the Anti-Drug Abuse Act, “a crack dealer (usually black) who [was] arrested for the first time with five grams of crack must serve a five-year mandatory minimum sentence, whereas a first-time seller of powder cocaine (more often white) would not receive this mandatory sentence unless he had at least five *hundred* grams.”³¹ The crack/cocaine disparity, widely acknowledged as racist and one

crime of rape by the Negroes”

22. *See id.* at 56.

23. *Id.* at 97.

24. *Id.* at 93–94.

25. *Id.* at 94–95.

26. *Id.* at 100.

27. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473.

28. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of U.S.C.).

29. JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT* 27 (2001).

30. Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*, BOSTON GLOBE, July 5, 2006, at A7.

31. GRAY, *DRUG CRAZY*, *supra* note 19, at 138.

of the causes of today's overflowing prison populations, remained in place³² until November 2007, when the U.S. Sentencing Commission's amendment to the crack sentencing scheme went into effect.³³ The new guidelines reduce the sentences for crack and reduce—but do not do away with—the disparity between crack and cocaine sentences. The new sentencing scheme was made retroactive beginning in March 2008; people currently incarcerated for crimes related to crack are now able to go before a judge to request a reduced sentence.³⁴

2. *The Drug War and the Womb*

Spurred by the War on Drugs, and in response to the media's panicked and racist³⁵ coverage of the supposed "crack baby" scourge, states in the late 1980s began to implement new statutes and prosecutorial strategies to address the perceived problem of drug use by pregnant women.³⁶ Of the thirty-four states that considered legislative responses to this public-health problem, however, not a single state approved punitive legislation that would have "made it a crime to be addicted and to give birth."³⁷ Since then, only one state, South Carolina, has explicitly authorized the prosecution of pregnant and birthing women based on a positive drug test. In *Whitner v. State*,³⁸ the South Carolina Supreme Court held that a viable fetus is a "person" for the purposes of the state's child endangerment statute. The court upheld Cornelia Whitner's child-abuse conviction and eight-year prison sentence because her son, Tevin, though born in good health, tested positive for cocaine at the time of his birth.³⁹ In so ruling, the court ignored the intent of the South Carolina legislature that the child-abuse law protect living children and not fetuses, viable or not.⁴⁰ South Carolina thus became the only state in the country to allow the prosecution of women for becoming mothers. Though women have been and continue to be prosecuted in local courts across the country under theories of child abuse,⁴¹ reckless endangerment,⁴²

32. See Mauer, *supra* note 30.

33. Solomon Moore, *Rules Lower Prison Terms in Sentences for Crack*, N.Y. TIMES, Nov. 2, 2007.

34. *Id.*

35. Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 461–62 nn.1–2 (2005) (citing studies that charted major media outlet coverage of the "crack crisis" in 1986). See also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 154–62 (discussing race in the context of press coverage of the War on Drugs).

36. See Paltrow, *supra* note 8, at 1006 (highlighting the flurry of state activity in the late 1980s around the issue of pregnant women who use drugs or alcohol).

37. *Id.*

38. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

39. *Id.* at 779. See also Paltrow, *Pregnant Drug Users*, *supra* note 8, at 1029–35 (providing a detailed history of the *Whitner* case, including facts about Ms. Whitner's background, her request for drug treatment, and the court opinions).

40. See S.C. CODE ANN. § 20-7-490(A) (1985) (defining a "child" as "a person under the age of eighteen").

41. See, e.g., *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. 1995) (dismissing indictment

drug trafficking,⁴³ and homicide,⁴⁴ no other state appellate court has sanctioned such prosecutions or their attendant twisting of legislative intent.

Despite this lack of statutory authority, “the War on Drugs became a ‘war on women.’”⁴⁵ Policymakers claimed that drugs had brought about the “decline of the maternal instinct” and that something had to be done to save the nation’s children.⁴⁶ One in three women currently incarcerated in the United States was convicted of a drug offense,⁴⁷ and fully a third of those women were convicted of the offense of possession.⁴⁸ The number of women in prison on drug-related charges rose 888 percent between 1986 and 1995—the apparent high-water mark of the War on Drugs.⁴⁹ By 2005, the population of women incarcerated nationwide had increased 740 percent since 1980.⁵⁰ In New York State, the number of women in prison more than tripled between 1981 and 2005, with the great majority of those women incarcerated for drug-related crimes.⁵¹ Nearly seventy-five percent of the women incarcerated in New York State facilities are mothers,⁵² leaving almost four million children with mothers under the supervision of the criminal-justice system as of 1998.⁵³ More specifically, the War on Drugs became a war on women of color, with prosecutions of pregnant women focusing on those women who used crack cocaine, a drug predominantly found in low-income communities of color.⁵⁴ As Dorothy Roberts posits, “Because indi-

against petitioner on charge of child abuse based on prenatal consumption of heroin by mother).

42. See, e.g., *Cruz v. State*, 905 A.2d 306 (Md. 2006) (holding that “defendant’s ingestion of cocaine while pregnant could not form the basis for reckless endangerment conviction as to child later born alive”).

43. See *Ward v. State*, 188 S.W.3d 874 (Tex. App. 2006) (holding that woman’s ingestion of cocaine that enters her fetus’s bloodstream is not an “actual transfer of a controlled substance”); *Johnson v. State*, 602 So.2d 1288 (Fla. 1992) (finding that cocaine passing from mother to child through the umbilical cord after birth but before the cord is cut does not constitute delivery of controlled substance to minor).

44. See *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005). But see *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003) (affirming McKnight’s conviction for homicide because she gave birth to a still-born child whose blood showed traces of illicit drugs).

45. Nancy D. Campbell, *The Construction of Pregnant Drug-Using Women as Criminal Perpetrators*, 33 FORDHAM URB. L.J. 463, 474 (2006) (arguing that women who use illicit drugs during pregnancy are demonized because they fail to live up to society’s ideals).

46. See *id.* at 483–84.

47. AMNESTY INT’L USA, WOMEN IN PRISON: A FACT SHEET (2005), available at <http://www.amnestyusa.org/women/pdf/womeninprison.pdf>.

48. ROTH, *supra* note 10, at 153.

49. Andrew Stephen, *A Lifetime for a Spliff*, NEW STATESMEN, Mar. 27, 2006, available at <http://www.newstatesman.com/200603270019>.

50. JODY RAPHAEL, FREEING TAMMY 37 (2007).

51. WOMEN IN PRISON PROJECT, CORR. ASS’N OF N.Y., WHEN “FREE” MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE 3 (2006).

52. *Id.* at ix.

53. RAPHAEL, *supra* note 50, at 37.

54. See generally Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (positing that the prose-

gent Black women are generally under greater government supervision—through their associations with public hospitals, welfare agencies, and probation officers—their drug use is more likely to be detected and reported.”⁵⁵ Additionally, the failure to receive prenatal care, which is closely correlated with race and income,⁵⁶ is often a triggering factor for the administration of infant drug tests by the state.⁵⁷ Of the thirty women arrested in the 1990s at the Medical University of South Carolina because they returned a positive drug test while pregnant or giving birth, “all but one or two” were black.⁵⁸ This is not because black women are more likely to use illicit drugs—they are not. According to one study, there is no difference in rates of drug use by pregnant women “along either racial or economic lines.”⁵⁹ Yet black women are more than ten times more likely than white women to be reported for using drugs while pregnant.⁶⁰

If the true goal of these prosecutions is to protect fetal health, as prosecutors claim,⁶¹ current penal tactics fail to achieve the desired outcome. Though no one would argue that drug use or addiction by any person, pregnant or not, male or female, is a healthful practice, several studies have shown that the connection between maternal drug use and unique or extraordinary fetal harm has been greatly exaggerated.⁶² Instead, researchers have discovered that many of the symptoms drug-exposed newborns experience, previously linked to the mother’s cocaine use, actually result from poverty, improper nutrition, and lack of prenatal care.⁶³ According to one study, “The inner-city child who has had no drug exposure at all is doing no better than the child labeled a ‘crack-baby.’”⁶⁴ What should be striking “is not just how similar cocaine-exposed children are to their non-exposed peers, but how much worse these poor children . . . fare than their counterparts in better-off communities.”⁶⁵ Dr. Ira Chasnoff, whose 1987 study

cution of drug-addicted mothers most directly punishes poor black women). See also Drug Policy Alliance, *Race and the Drug War*, <http://www.drugpolicy.org/communities/race/>.

55. ROBERTS, *KILLING THE BLACK BODY*, *supra* note 35, at 173.

56. Roberts, *Punishing Drug Addicts*, *supra* note 54, at 1433.

57. *Id.*

58. Brief for ACLU, *supra* note 6, at 2. The nurse’s notes for the thirtieth woman arrested read: “Patient lives with her boyfriend, who is a Negro.” Interview with Lynn Paltrow, TRIAL, Aug. 2003, at 48, 50.

59. Roberts, *Punishing Drug Addicts*, *supra* note 54, at 1433–34.

60. *Id.* at 1434. Roberts suggests that this higher rate of reporting is based not only on black women’s more frequent interaction with social services, but also on the racist attitudes of health-care providers, which have been shaped by the media’s demonization of black women. *Id.*

61. See Ehrlich & Paltrow, *supra* note 7.

62. See Paltrow, *supra* note 35, at 461–62 (summarizing recent peer-reviewed studies undercutting the “crack baby” myth).

63. *Id.* at 462 n.7 (citing Alan Mozes, *Poverty Has Greater Impact than Cocaine on Young Brain*, REUTERS HEALTH, Dec. 6, 1999). See also GRAY, *DRUG CRAZY*, *supra* note 19, at 109–10.

64. Paltrow, *supra* note 35, at 462. See also Richard Barth, Charlotte McCullough, Lynn Paltrow & Barry Zuckerman, *Drug-Exposed Infants*, 3 FUTURE OF CHILD. 208, 210 (1993) (cocaine-exposed infants show “no mean differences on scores of the child’s development at two years of age when . . . compared with social-class-matched controls”).

65. ROTH, *supra* note 10, at 144. In one study, forty-seven children who had been exposed to

on crack use among women helped create the crack baby myth,⁶⁶ has since made clear that he does not believe there is such a thing as a crack baby. According to Chasnoff, children born to women who used crack during their pregnancies “are no different from other children growing up. . . . [T]he placenta does a better job of protecting the child than we do as a society.”⁶⁷ This is not to say that a pregnant woman’s addiction does not pose any danger to her fetus. Rather, drug use may carry a relatively minor impact, when compared with the myriad factors affecting fetal and child health, notably poverty and lack of proper nutrition, as well as environmental conditions and toxins. Yet policymakers have misguidedly and misleadingly focused on pregnant women and their inability to beat their addictions as the *only* determinant.⁶⁸

It is not just women’s bodies and activities that can pose risks to a fetus, “but also those of men—the straightforward male ejaculation can carry its own dangers.”⁶⁹ Male exposure to mutagens or other toxins in the workplace is widely accepted to be potentially damaging to fetal development.⁷⁰ Yet employers have not “protected” men’s fertility in the same way they have sought to protect women’s.⁷¹ Less widely acknowledged, but posing similar potential harm, is the link between paternal drug use and fetal health.⁷² Research demonstrates a connection between paternal alcoholism on one hand and low birth weight and an increased risk of birth defects on the other.⁷³ Studies have also found a link

drugs in utero and who were adopted as infants into wealthier communities in Toronto showed scores almost thirty points higher on IQ tests than their peers who were raised in low-income communities. *Id.*

66. See GRAY, *DRUG CRAZY*, *supra* note 19, at 108–09.

67. *Id.* at 110.

68. See CYNTHIA R. DANIELS, *EXPOSING MEN: THE SCIENCE AND POLITICS OF MALE REPRODUCTION* 110–11 (2006) (noting the societal expectation that, after conception, a pregnancy and any complications thereof become the responsibility of the woman alone). See also Cynthia R. Daniels, *Between Fathers and Fetuses: The Social Construction of Male Reproduction and the Politics of Fetal Harm*, 22 *SIGNS* 579 (1997); Laury Oaks, *Smoke-Filled Wombs and Fragile Fetuses: The Social Politics of Fetal Representation*, 26 *SIGNS* 63 (2000); Lynn M. Paltrow, *Blaming Pregnant Women*, TOMPAINE.COM, July 12, 2006, available at http://www.tompaine.com/articles/2006/07/17/blaming_pregnant_women.php.

69. Sheldon, *supra* note 6, at 131.

70. E.g., *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991) (citing evidence admitted into the case record about the “debilitating effect of lead exposure” on male reproduction).

71. DANIELS, *AT WOMEN’S EXPENSE*, *supra* note 9, at 81.

72. Sheldon, *supra* note 6, at 135.

73. DANIELS, *EXPOSING MEN*, *supra* note 68, at 142 (citing reports finding a connection between paternal drinking and malformations and cognitive deficiencies in children of alcoholic men). See also Robert E. Chapin, Wendie A. Robbins, Laura A. Schieve, Anne M. Sweeney, Sonia A. Tabacova & Kay M. Tomashek, *Off to a Good Start: The Influence of Pre- and Periconceptional Exposures, Parental Fertility, and Nutrition on Children’s Health*, 112 *ENVTL. HEALTH PERSP.* 69, 70 (2004) (noting that environmental contaminants, drugs, and other substances can be transmitted to a woman’s egg and absorbed by that egg during fertilization, which can affect the health of the fetus or child).

between paternal smoking and an increased risk of multiple birth defects.⁷⁴ In animal studies, morphine administered to fathers but not to mothers produced birth defects and behavioral abnormalities.⁷⁵ Beyond the effects that drug or alcohol use may have on a man's sperm,⁷⁶ a man's drug use in the presence of a pregnant partner could potentially further impact fetal health outcomes.⁷⁷

The media have paid little attention to the potentially damaging effects of men's drug and alcohol use on fetal development and infant health. Between 1985 and 2000, major U.S. newspapers featured 197 stories about pregnant women and cocaine addiction, but fewer than a dozen stories on the associations between fetal health problems and men's illicit drug, alcohol, or tobacco use.⁷⁸ It is no wonder, then, that though women's drug use poses fewer risks to fetal health than the public perceives and men's drug use is much more dangerous than commonly perceived, pregnant women who use drugs are vilified and jailed in vain attempts to protect fetal health, while their male partners face few or no repercussions.

Additionally, there is ample evidence that jailing women who are addicted to cocaine and other substances in order to protect their fetuses can put fetal health at even greater risk. Pregnant women have been incarcerated or civilly committed for minor infractions that would otherwise result in only a fine, because of judges' concern that their fetuses be protected.⁷⁹ When Kari Parsons, a Maryland woman, was seven months pregnant, she returned a positive drug screen, in violation of her probation, a sentence she received for a \$500 shoplifting charge.⁸⁰ The judge refused to release Parsons and instead ordered her confined in the local jail for the duration of her pregnancy, noting that his interest in a fair adjudication of Ms. Parsons' case was trumped by his concern for her fetus.⁸¹ Three weeks later, Ms. Parsons went into labor in her jail cell. In response to her calls for help and wails of pain, guards moved her from a shared cell where other women were timing her contractions to a solitary cell. Ms. Parsons' cries for medical attention went unheeded. She gave birth alone in a dirty jail cell.⁸² Though her son was born healthy, he later developed an infection due to the unsanitary conditions of his birth.⁸³ Forcing women to give birth under

74. DANIELS, *EXPOSING Men*, *supra* note 68, at 142–43.

75. *Id.* at 143.

76. *See id.* (citing studies indicating that cocaine can bind to spermatozoa and that paternal cigarette smoking can increase the risk of birth defects, including spina bifida and anencephalus).

77. *See id.* One of the studies Sheldon, *supra* note 6, cites indicates that children of non-smoking mothers and smoking fathers have higher rates of childhood cancer than children of two non-smoking parents.

78. *Id.*

79. *See* Ehrlich & Paltrow, *supra* note 7. *See also* Penny Riordan & Scott Daugherty, *Woman Recounts Giving Birth Alone in Jail*, *THE CAP.*, Dec. 2, 2005, at A1.

80. Riordan & Daugherty, *supra* note 79, at A1.

81. *Id.*

82. *Id.* *See also* Ehrlich & Paltrow, *supra* note 7.

83. Ehrlich & Paltrow, *supra* note 7.

such conditions belies any claim that prosecutors and judges are confining women to protect fetal, infant, or maternal health.

Even when women incarcerated in American jails and prisons do receive medical attention, the level of care is often in contravention of international treaties for the treatment of prisoners. Incarcerated women receiving medical care—including pregnant women—are sometimes shackled at the ankles and handcuffed, in violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (“Minimum Rules”),⁸⁴ among other treaties to which the United States is a signatory.⁸⁵ After she gave birth in her jail cell, Kari Parsons was taken to the hospital, where she was only allowed to see her newborn with her hands cuffed around her waist and her ankles shackled.⁸⁶ Incarcerated women who give birth in hospitals are often forced to endure labor and delivery while handcuffed or shackled to the bed, a practice that is not only dehumanizing but also can endanger fetal and maternal health.⁸⁷ According to Dr. Patricia Garcia, the use of restraints during labor can “compromise the ability to manipulate [the pregnant woman’s] legs into the proper position for the necessary treatment.”⁸⁸ The inhumane treatment of pregnant women in prisons, combined with the rising number of pregnant and female inmates, has created an environment in which too many women are giving birth in situations that are dangerous and de-

84. Standard Minimum Rules for the Treatment of Prisoners, Aug. 30, 1955, available at http://www.unhchr.ch/html/menu3/b/h_comp34.htm. See generally Amnesty Int’l USA, *Women in Custody: Sexual Misconduct and Shackling of Pregnant Women* (2001), available at <http://www.amnestyusa.org/women/custody/custodyissues.pdf> (exploring the human rights violations women face in American jails and prisons and comparing American standards to those of the international community). The Minimum Rules state that “[c]hains or irons shall not be used as restraints” and other restraints shall not be used except in explicitly delineated circumstances. See *id.* at 31. Only five states have prohibited the practices of shackling incarcerated women during labor, and twenty-three states expressly allow the use of restraints during labor. See Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, at A1. Maryland, where Kari Parsons was incarcerated and gave birth, has neither prohibited nor expressly allowed the use of shackles and other restraints on pregnant women and women in labor. See Amnesty Int’l USA, *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women – Key Findings* (2006), available at http://www.amnestyusa.org/women/custody/keyfindings_restraints.html.

85. Absent extenuating circumstances, the use of shackles and other restraints on pregnant prisoners also violates the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, as well as the International Covenant on Civil and Political Rights (ICCPR). See Amnesty Int’l USA, *Excessive Use of Restraints on Women in U.S. Prisons: Shackling of Pregnant Prisoners*, available at <http://www.amnestyusa.org/women/custody/shackling.html>. The United States has ratified both of these treaties. *Id.*

86. Riordan & Daugherty, *supra* note 79, at A1.

87. See generally Amnesty Int’l USA, *Not Part of My Sentence: Violations of the Human Rights of Women in Custody* (1999), available at <http://www.amnesty.org/en/report/info/AMR51/001/1999> (detailing human rights abuses, including sexual assault and the use of restraints, that women face in U.S. prisons and jails).

88. *Id.* at 33. The use of shackles throughout pregnancy also increases the risk that a pregnant woman will trip and fall, potentially harming herself and the fetus. See Amnesty Int’l USA, *Excessive Use of Restraints*, *supra* note 85. See also Editorial, *Giving Birth in Chains*, N.Y. TIMES, Mar. 5, 2006, at D13.

grading. Courts and legislators should not exacerbate this already significant problem by sending pregnant women to jail to keep them away from drugs.

Medical experts further agree that sending pregnant women to prison because of their addictions is counterproductive and bad for public health.⁸⁹ Groups as diverse as the American Medical Association and the March of Dimes oppose prosecuting pregnant women for carrying their fetuses to term despite drug use or addiction.⁹⁰ The American College of Obstetricians and Gynecologists (ACOG) asserts that “punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.”⁹¹ Because prenatal care is vital to fetal and maternal health, one would expect those who are concerned about fetal health to support policies encouraging women to seek prenatal care. Instead, many policy makers, prosecutors, and judges facilitate policies that drive drug-using women away from prenatal care and cause those who still seek out prenatal care to distrust their doctors. Finally, the claim that these prosecutions protect fetal health and encourage healthy births is betrayed by the fact that such prosecutions incentivize abortion by pressuring women to face a sort of Sophie’s choice that weighs an unwanted abortion against a severe prison sentence and the relegation of a child to foster care.⁹²

89. See generally Brief for The National Association of Alcoholism and Drug Abuse Counselors et al. as Amici Curiae Supporting the Petition for Writ of Certiorari, *Whitner v. South Carolina*, 523 U.S. 1145 (1997) (Mem.) (No. 97-1562) (as published in 9 HASTINGS WOMEN’S L.J. 139, 147–48 (1998)) (arguing that the U.S. Supreme Court should review the South Carolina Supreme Court’s holding in *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), because South Carolina’s holding “cast[s] treatment providers as law enforcement agents, mak[ing] doctors, nurses, substance abuse counselors and other treatment providers accessories to a public health tragedy that is both predictable and preventable”).

90. Nat’l Advocates for Pregnant Women, *Medical Group Opinions About Prosecution and Punishment of Pregnant Women* (2006) [hereinafter *Medical Group Opinions*] (on file with author). Organizations voicing their disapproval of prosecutions of pregnant women struggling with addiction include the American Medical Association; American Academy of Pediatrics; American College of Obstetricians and Gynecologists; American Public Health Association; American Nurses Association; American Society of Addiction Medicine; National Association for Perinatal Addiction, Research and Education; National Council on Alcoholism and Drug Dependence; Association of Maternal and Child Health Programs; Coalition on Alcohol and Drug Dependent Women and their Children; Center for the Future of Children; Southern Legislative Summit on Healthy Infants and Families; National Association of Public Child Welfare Administrators; and the American Psychiatric Association. *Id.*

91. *Id.* (quoting AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION, NO. 321, at 9 (Nov. 2005), available at http://www.acog.com/from_home/publications/ethics/co321.pdf).

92. See Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women’s Liberty*, 43 HASTINGS L.J. 569, 604 (1992) (highlighting reasons that adversarial approaches to drug use during pregnancy fail their stated goal of promoting healthy births). See also Campbell, *supra* note 45, at 476. Dorothy Roberts argues that this is exactly the purpose of such prosecutions—to discourage women “whom society views as undeserving” from having children. See Roberts, *Punishing Drug Addicts*, *supra* note 54, at 1435. In New York State, an authorized government agency caring for a child may file to terminate parental rights if a child has been in foster care for fifteen of twenty-two months. See N.Y. SOC. SERV. LAW § 384-b(3)(l)(i) (2003).

B. The War on Drugs' Impact on the Fight for Reproductive Justice

As the research summarized above indicates, there is little or no evidence that prosecutions support fetal and infant health. Yet policymakers and prosecutors continue to claim that their goal in prosecuting pregnant women is solely to protect fetal health. This claim hides other possible motivations for these prosecutions and is betrayed by the fact that the prosecutions of women who decide to carry a child to term in spite of a drug problem have had the predictable effect of undercutting women's autonomy generally, and the right to abortion specifically.⁹³ If a fetus has full legal and constitutional rights, then a woman cannot do *anything* that poses even the slightest chance of negatively affecting the fetus, including everything from being in a room with a person who is smoking, to eating spicy foods, to, of course, procuring an abortion or choosing a vaginal birth over a recommended cesarean section. Maryland's highest court recognized the risks of this slippery slope in its decision in *Kilmon v. State*,⁹⁴ noting that if "the statute is read to apply to the effect of a pregnant woman's conduct on the child she is carrying, it could well be construed to include . . . a whole host of . . . activity that could not possibly have been within the contemplation of the Legislature"⁹⁵ The court recognized that such potentially punishable activities could include:

[E]verything from becoming (or remaining) pregnant with knowledge that the child likely will have a genetic disorder that may cause serious disability or death, to the continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary

This means that if a mother in New York prosecuted for a drug crime (or for child abuse based on drug addiction) receives a sentence of longer than fifteen months, she could permanently lose custody of her child.

93. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that women have a constitutional right to abortion, though that right can be limited as the fetus approaches birth); Paltrow, *Pregnant Drug Users*, *supra* note 8, at 1009–12 (explaining that granting fetuses personhood for the purposes of child abuse law undermines women's autonomy and constitutional rights by requiring that they always be balanced against those of the fetus). See generally Schroedel & Fiber, *supra* note 15 (comparing the moral, legal, and policy reasons justifying women's rights and fetal rights).

94. *Kilmon v. State*, 905 A.2d 306 (Md. 2006). See also 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, 606 (1986).

95. *Kilmon*, 905 A.2d at 311.

things as skiing or horseback riding could produce criminal liability.⁹⁶

Though so slippery a slope may sound far-fetched, it is already becoming reality.⁹⁷ In June 2006, Arkansas State Representative Bob Mathis proposed a law that would criminalize cigarette smoking by pregnant women.⁹⁸ Arkansas Governor Mike Huckabee, who supported Mathis's bill, said that "such a prohibition, if enacted, would probably have to cover other unhealthy activities such as drinking."⁹⁹ While the ideal environment for fetal development remains one devoid of legal or illegal drugs, alcohol, or other toxins and hazards, laws like Arkansas' that ignore the fact that women can never guarantee perfect birth outcomes reduce women to vessels and subjugate the rights of women to those of the fetuses they carry.¹⁰⁰

This tactic is not new. Since the 1980s, anti-reproductive rights advocates have consistently depicted "a deeply fundamental conflict between [a woman and her fetus] that must be mediated and regulated by outside forces for the fetus to survive."¹⁰¹ Today the fetus is viewed as "belong[ing] to someone other than the pregnant woman, who simply acts as the 'host' for the man's unborn child."¹⁰² Because of this dehumanization of pregnant women, women have been forced to undergo cesarean sections and other medical treatment without their consent.¹⁰³

Take, for example, the case of Angela Carder. Carder was a married twenty-seven-year-old woman who was admitted to a Washington, D.C., hospital when she was twenty-five weeks pregnant with a wanted child, because cancer she had battled as a teenager had returned in the form of a large lung tumor. Knowing that her prognosis was poor and that she would likely die before her child could be born naturally, Carder had decided with her doctor (from whom she had received consistent prenatal care) that she would have a cesarean after only twenty-eight weeks. Carder and her doctor wanted to wait as long as possible to do any kind of operation on her, as, at that late stage of her cancer, major surgery might cause her own death. When Carder was admitted to the hospital in her twenty-fifth week, she decided, in conversation with her doctor, not to have a cesarean section since it might bring about her own death and it was too early to have any realistic hopes that the fetus would survive. Hospital staff

96. *Id.*

97. See, e.g., Adam Nossiter, *In Alabama, a Crackdown on Pregnant Drug Users*, N.Y. TIMES, Mar. 15, 2008.

98. Paltrow, *Blaming Pregnant Women*, *supra* note 68. The state legislature has already banned smoking tobacco in a car with a child under the age of six. See ARK. CODE ANN. § 20-27-1903 (West 2007).

99. *Id.* For a more realistic approach to alcohol consumption during pregnancy, see Julia Moskin, *The Weighty Responsibility of Drinking for Two*, N.Y. TIMES, Nov. 29, 2006.

100. See Paltrow, *Blaming Pregnant Women*, *supra* note 68.

101. DANIELS, AT WOMEN'S EXPENSE, *supra* note 9, at 22.

102. *Id.*

103. *Id.* at 31-55.

overheard Carder's discussions with her family and her doctor, and went to the hospital administration, who secured a court order to force Carder to undergo a cesarean immediately. Though Carder resisted, whispering her opposition to the cesarean when she heard of the court order during her few moments of consciousness, the cesarean was performed. Her twenty-six-week-old fetus died within two hours, and Carder died two days later, "having regained consciousness long enough to learn of the death of her child."¹⁰⁴

Under analogous circumstances,¹⁰⁵ however, men cannot be forced to submit to medical treatment or other bodily invasions for the sake of another.¹⁰⁶ As sociologist Cynthia Daniels points out:

Suspected rapists cannot be forced to undergo involuntary blood tests for AIDS. Parents cannot be forced to donate organs to their children, even if the child's life is at stake and the parent is the only appropriate donor. One may not be forced to donate bone marrow to a cousin who is dying of bone cancer.¹⁰⁷

The right to bodily integrity is unshakeable in the American tradition, with the one clear exception of pregnant women, who have been forced to undergo medical treatment for the sake of their fetuses in at least thirty-six different cases.¹⁰⁸ The granting of fetal rights comes therefore at the expense of women's

104. *Id.* at 31–32. See also *In re A.C.*, 573 A.2d 1235, 1247–48 (D.C. 1990) (en banc) (holding that hospital had erred in subordinating Carder's interest in her own bodily integrity to the potential life of the fetus she carried). The District of Columbia Court of Appeals' en banc decision, which recounts the exchange between Carder and the nurses and physicians at the hospital where she was being treated, overturned the prior holding of a panel of the same court. See *In re A.C.*, 533 A.2d 611, 617 (D.C. 1987) (holding that the "trial judge did not err in subordinating [Carder's] right against bodily intrusion to the interests of the unborn child and the state"). See generally Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951 (1986) (arguing that courts should not order compelled cesareans). Under the same logic used to force an unwanted cesarean on Angela Carder, at least one woman has been charged with murder for refusing to undergo a cesarean and subsequently giving birth to a stillborn child. See Marguerite A. Driessen, *Avoiding the Melissa Rowland Dilemma: Why Disobeying a Doctor Should Not Be a Crime*, 10 MICH. ST. U. J. MED. & L. 1 (2006) (discussing the case of Melissa Rowland, a Utah woman charged with first-degree murder after being told she should have a cesarean because her fetuses were in distress, and then giving birth vaginally to twins, one healthy and one stillborn).

105. Of course, no perfect analogy exists because biological men cannot become pregnant. However, circumstances such as those at issue in *McFall v. Shimp* are instructive. See *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (Pa. Ct. Com. Pl. 1978) (holding that a person could not be forced to donate bone marrow to save another).

106. *Id.* at 33. See also *Winston v. Lee*, 470 U.S. 753, 759 (1985) (holding that a criminal suspect could not be forced to undergo an unwanted surgery to remove a bullet from his body because "[a] compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be unreasonable even if likely to produce evidence of a crime"); Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 11 (1987) (arguing that the forced medical treatment virtually unique to pregnant women violates women's constitutional rights).

107. DANIELS, AT WOMEN'S EXPENSE, *supra* note 9, at 33.

108. Daniels identified thirty-six cases prior to 1993. *Id.*

self-sovereignty; women's self-determination is threatened in a way that men's will never be.¹⁰⁹

Fetal protectionism also undermines women's right to self-determination by putting the right to obtain an abortion at risk. As Lynn M. Paltrow, founder and executive director of National Advocates for Pregnant Women, has highlighted, "The anti-choice movement has persistently promoted the image and idea of the fetus as a fully developed child as a centerpiece of its efforts to overturn *Roe*."¹¹⁰ These efforts include sponsoring legislation to recognize the rights of the unborn; writing legislation, including the so-called partial birth abortion ban, which makes the terms "infant" and "fetus" interchangeable;¹¹¹ and arguing that clinic blockades are justified as efforts to save "human life."¹¹²

The Unborn Victims of Violence Act (UVVA)¹¹³ is another step toward the recognition of fetal rights. The UVVA makes conduct causing the death or injury of a fetus a separate offense, punishable by the same sentence as if the "person" killed had been the fetus's mother, regardless of the actor's intent and whether or not the actor knew the woman was pregnant.¹¹⁴ The UVVA does not apply, however, to the prosecutions of pregnant women and mothers for giving birth despite a drug problem. The language of the federal UVVA specifically exempts legal abortion and any act a woman undertakes with respect to her fetus.¹¹⁵ Despite the express language of the UVVA, state versions of the law are often cited when courts and prosecutors seek to interpret child-abuse laws expansively. The UVVA's explicit congressional mandate that women should not be punished for actions that may or do cause harm to their fetuses has done nothing to chill states' punitive responses to pregnant women who carry their pregnancies to term while battling drug addiction.

109. *Id.* at 55. Gallagher, *supra* note 106, at 26, argues that forced medical treatment violates the Thirteenth Amendment rights of pregnant women. Though the argument has significant implications for the issues addressed in this article, Gallagher's claim is outside the scope of the issues addressed herein.

110. Paltrow, *Pregnant Drug Users*, *supra* note 8, at 1012.

111. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105 (codified at 18 U.S.C. § 1531). The Supreme Court in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), upheld the federal abortion ban, despite its lack of an exception to protect the health of the woman. Since *Carhart*, states have begun to draft and pass their own state-level abortion bans, often mirroring the language in the federal ban. See, e.g., LA. STAT. ANN. tit. 14 § 32.11; UTAH CODE ANN. § 76-7-326. See also ALAN GUTTMACHER INST., STATE POLICIES IN BRIEF: BANS ON "PARTIAL-BIRTH" ABORTION (2008), available at http://www.guttmacher.org/statecenter/spibs/spib_BPBA.pdf.

112. See, e.g., *United States v. Lynch*, 952 F. Supp. 167, 169 (S.D.N.Y. 1997).

113. Unborn Victims of Violence Act, 18 U.S.C. § 1841 (2004). The law is also known as "Laci and Conner's Law."

114. *Id.* § 1841(a)(1)-(2)(B).

115. *Id.* § 1841(c).

III.

THE LEGAL LANDSCAPE

Prosecuting pregnant women and mothers for bearing children in spite of a drug problem violates the Fourteenth Amendment of the Constitution. While some commentators have focused on a substantive due process claim,¹¹⁶ this article will discuss arguments that rely on the Equal Protection Clause of the Fourteenth Amendment¹¹⁷ and will offer strategy suggestions for when and how to utilize equal protection claims. When deciding cases alleging pregnancy discrimination, the Supreme Court has historically been loath to apply principles of equal protection.¹¹⁸ This section introduces the equal protection standards the Court has applied to claims of sex discrimination and argues that these standards are insufficient to deal with questions related to pregnancy.

A. *Equal Protection Analytical Framework*

The Equal Protection Clause originated as a guarantee of equality for newly freed slaves in the aftermath of the Civil War and was read in its early days to protect only African Americans.¹¹⁹ Since the late nineteenth century, though, the Supreme Court has consistently expanded the protections guaranteed¹²⁰ and the groups safeguarded¹²¹ against discrimination. Today, analysis of the Equal Protection Clause proceeds under one of two strands: it either safeguards fundamental rights or guards against discrimination based on suspect classifications.¹²² For much of the history of equal protection jurisprudence, the question of whether a group was suspect or whether a right was fundamental was easily answered. Minority racial groups received the greatest protection, and laws

116. *E.g.*, Gallagher, *supra* note 106, at 28–31. An individual raising a substantive due process claim would argue that these prosecutions violate women's right to privacy, as articulated in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973).

117. U.S. CONST. amend. XIV, § 1.

118. *See infra* Part III.B.

119. *The Slaughter-House Cases*, 83 U.S. 36, 81 (1872) (reading the Equal Protection Clause narrowly and applying it only to distinctions on the basis of race).

120. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (affirming that U.S. citizens have a fundamental right to interstate travel); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing a fundamental right to marriage that encompasses the right to marry a person of a different race); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (finding Virginia poll tax to violate the Equal Protection Clause).

121. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that an employment benefits policy covering only the spouses of male members of the armed forces discriminates on the basis of gender, in violation of the Equal Protection Clause); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (overturning the discriminatory application of a state law targeting Chinese laundromat owners).

122. *See* James E. Fleming, "There Is Only One Equal Protection Clause": *An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 *FORDHAM L. REV.* 2301, 2306 (2006) (outlining the two strands and three major tiers of Equal Protection Clause analysis and their interstices). Suspect classes include groups that have been discriminated against historically, including women and racial minorities.

drawing distinctions on the basis of race were subject to strict scrutiny, whereas all other laws were subject only to rational-basis analysis. Strict scrutiny requires that the law at issue be narrowly tailored to the accomplishment of some compelling governmental interest.¹²³ Though the application of strict scrutiny almost always results in the invalidation of the statute being challenged, "strict scrutiny is not 'strict in theory, but fatal in fact.'"¹²⁴ Strict scrutiny should not, therefore, automatically result in the invalidation of the law or policy in question. Rational-basis scrutiny, on the other hand, provides the least searching evaluation and requires only that the challenged statute be rationally related to some legitimate state purpose.¹²⁵ Rational basis usually results in upholding the law at issue, though there have been some notable exceptions.¹²⁶

Beginning in the 1970s, the Supreme Court began to develop a middle level of scrutiny, known informally as intermediate scrutiny. The test was first articulated in *Reed v. Reed*,¹²⁷ when the Court applied heightened scrutiny to invalidate a statute codifying a preference for men over women whenever a court was required to choose an administrator for an estate of a person who died intestate.¹²⁸ It became clear that the Court was entertaining some sort of heightened scrutiny for classifications based on gender in its decision in *Frontiero v. Richardson*.¹²⁹ The Court found unconstitutional a federal statute allowing men in the armed services to automatically claim a spouse as a dependent for medical benefits and housing while denying that right to uniformed women unless they could demonstrate that their spouses were, in fact, dependents.¹³⁰ Writing for a plurality of the Court,¹³¹ Justice Brennan recognized the country's "long and

123. See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (articulating the Court's strict-scrutiny test for classifications based on race in a decision on affirmative action in public higher education).

124. *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

125. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488–91 (1955) (holding that economic classifications do not trigger heightened scrutiny, because they implicate neither a suspect class nor a fundamental right).

126. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (invalidating, under rational-basis scrutiny, a Texas zoning ordinance regulating the location of homes for the mentally disabled).

127. *Reed v. Reed*, 404 U.S. 71 (1971).

128. *Id.* Though the Court in *Reed* claimed to be using the well-established rational basis test, the language of the decision resembles something like "rational basis plus." See Fleming, *supra* note 122, at 2304–05.

129. *Frontiero v. Richardson*, 411 U.S. 677 (1973). *Frontiero* also exposed that the Court had not yet settled on a level of scrutiny for claims of gender discrimination. In *Frontiero*, a plurality of the Court agreed to apply strict scrutiny, but Justice Brennan, the author of the plurality, was unable to draw a majority of the Court. *Id.* at 688.

130. *Id.* at 690–91.

131. Though eight justices agreed that the law was unconstitutional, only Justices Douglas, White, and Marshall joined Justice Brennan's opinion. *Id.* at 678. Justice Rehnquist, who at the beginning of his career was reticent to apply any form of heightened scrutiny to claims of gender discrimination, dissented. *Id.* at 691. For an analysis of Justice Rehnquist's gender-discrimination jurisprudence, see Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination* in Hibbs, 58 STAN. L. REV. 1871 (2006).

unfortunate history of sex discrimination,"¹³² and therefore, to remedy this past discrimination, applied strict scrutiny to the facially discriminatory statute.¹³³ Only a few years later, in 1976, Justice Brennan ceded some ground in order to gain majority support, and held in *Craig v. Boren*¹³⁴ that intermediate scrutiny should apply to gender classifications. Today, the Court seems to have settled into an "intermediate scrutiny plus"¹³⁵ standard for gender-based classifications, as enunciated in *United States v. Virginia*.¹³⁶ The Court now appears to require that a state provide an "exceedingly persuasive justification" that the challenged law is substantially related to some important governmental objective.¹³⁷

In cases where gender discrimination arises because a law or policy, though neutral on its face, disproportionately impacts a protected group, the party challenging such a policy bears a higher burden of proof than one would when challenging a facially discriminatory law. Under *Personnel Administrator v. Feeney*,¹³⁸ if a state policy is neutral on its face but has a disparate impact on one gender, the party challenging the policy must prove that the state's action was motivated at least in part by discriminatory intent.¹³⁹ Such intent "implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."¹⁴⁰ However, the Court did concede that "there are cases in which impact alone can unmask an invidious discrimination."¹⁴¹ Thus, if a state action patently evinces covert gender discrimination, no proof of the state's motivation is necessary, because the discrimination is apparent.

Moreover, the State's justification for any classification that distinguishes between men and women "must not rely on overbroad generalizations about the

132. *Frontiero*, 411 U.S. at 684. Justice Brennan cited, *inter alia*, that for many years women could not serve on juries, did not have standing to sue, could not vote, and could not own property. He also noted that "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Id.* at 686 (internal citation omitted).

133. The four justices who did not join Justice Brennan's opinion relied on *Reed* to support their belief that the statute was unconstitutional even under a lower level of scrutiny. *See id.* at 691-92.

134. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (striking down an Oklahoma statute setting a legal drinking age of twenty-one for men and eighteen for women as a violation of the Equal Protection Clause).

135. *See Fleming*, *supra* note 122, at 2304-05.

136. *United States v. Virginia*, 518 U.S. 515 (1996) [hereinafter *VMI*] (requiring co-education at the Virginia Military Institute).

137. *Id.* at 533-34.

138. *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979) (holding that a Massachusetts veterans-preference statute did not constitute unconstitutional sex discrimination despite its disparate impact on women).

139. *Id.* at 275-79.

140. *Id.* at 279.

141. *Id.* at 275.

different talents, capacities, or preferences of males and females.”¹⁴² The justification, then, cannot rely on assumptions about how women or mothers should act, in relation to their children and families and to their public lives more generally.¹⁴³ This is particularly true in reference to pregnant women, who are “subject to a highly demanding set of expectations regarding the perceived belief that their every action impacts the fetus,”¹⁴⁴ and who are erroneously believed to be solely responsible for fetal health outcomes.¹⁴⁵

As reproductive- and criminal-justice reform advocates have noted, advances in healthcare technologies have created the misconception that if a pregnant woman behaves “properly,” she is guaranteed a healthy birth and child.¹⁴⁶ Prosecutions of pregnant women reinforce this misperception and support the erroneous idea that pregnant women are solely responsible for the health of their fetuses both before birth and at birth itself. Because there is a “physical distance” between men and pregnancy, the myth that women are the sole bearers of responsibility for reproductive and fetal health is perpetuated.¹⁴⁷ However, studies demonstrate that other factors, such as a man’s age at the time of insemination,¹⁴⁸ can affect fetal health outcomes. The dominant view has been to blame the mother, but “women must be free, as are men, to make decisions about their

142. *VMI*, 518 U.S. at 533.

143. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (holding that a woman’s sacrifice and suffering while pregnant and as a mother is “too intimate and personal for the State to insist . . . upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture”); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (“Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination”). See also Brief for South Carolina National Organization for Women et al. as Amici Curiae Supporting Respondent, *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003) [hereinafter McKnight Brief] (on file with author) (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 131 (1994), in arguing that prosecuting pregnant women for child abuse based solely on the woman’s drug use during her pregnancy violates the Equal Protection Clause because it “serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes” about how women should act while pregnant and as mothers); Ellen Bigge, *The Fetal Rights Controversy: A Resurfacing of Sex Discrimination in the Guise of Fetal Protection*, 57 UMKC L. REV. 261, 278 (1989) (“Another attitude observed [in the prosecution of women for child abuse and other crimes because of their decision to carry a child to term despite drug use] is the stereotypical view of women as the primary care-givers, based on the biological fact of female reproduction.”).

144. McKnight Brief, *supra* note 143. The *New York Times* recently published an article about the tendency of society to judge pregnant women unfairly. Moskin, *supra* note 99.

145. McKnight Brief, *supra* note 143. See also *supra* notes 61–77 and accompanying text. Beyond failing to consider the effects of men’s pre-conception behavior on fetal health, these prosecutions fail to take into account the effects of poverty and its attendant lack of proper nutrition and access to adequate sexual health care and prenatal care on fetal health outcomes. This fact suggests that these prosecutions are based at least in part on a discriminatory misconception about women’s reproductive health. See McKnight Brief, *supra* note 143.

146. See McKnight Brief, *supra* note 143.

147. See Brief for National Women’s Law Center et al. as Amici Curiae Supporting Appellant at 12, *Cruz v. State*, 905 A.2d 306 (Md. 2006) (No. 2005-105) [hereinafter Cruz Brief].

148. See Roni Rabin, *It Seems the Fertility Clock Ticks for Men, Too*, N.Y. TIMES, Feb. 27, 2007, at F1.

livelihood and reproductive health after being informed of the risks.”¹⁴⁹ Punishing women for failing to provide “the best prenatal environment possible . . . would have serious ramifications for all women and their families, and for the way in which society views women and women’s reproductive abilities.”¹⁵⁰ Such a result would constitute an unconstitutional denial of equal protection.

B. *Pregnancy Discrimination as Sex Discrimination?*

1. *The Basics: Geduldig and Gilbert*

Although the Supreme Court now applies heightened scrutiny to distinctions based on gender, the Court has been reticent to apply the same searching scrutiny to distinctions resting on biological differences between men and women.¹⁵¹ This is at least in part because the Equal Protection Clause “guarantees equal laws, not equal results.”¹⁵² The Court’s hesitation has nowhere been clearer—or more problematic for women’s rights advocates—than in the area of discrimination based on pregnancy.

In *Geduldig v. Aiello*,¹⁵³ the Supreme Court upheld an employment benefits package that excluded pregnancy as a covered “disability.” The Court reasoned that this was not sex discrimination in violation of the Equal Protection Clause because “[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”¹⁵⁴ By framing the issue in this way, the Court indicated its belief that there is no comparator group for pregnant women—i.e., that no one else can be “similarly situated.”¹⁵⁵ Since comparator

149. Cruz Brief, *supra* note 147, at 12 (summarizing the holding of *UAW v. Johnson Controls*, 499 U.S. 187 (1991)).

150. *Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988).

151. See *United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996) (“Physical differences between men and women, however, are enduring: ‘The two sexes are not fungible . . .’”) (citation omitted). In employing this overly formalistic rationale, the Court appears to be sanctioning distinctions based on biology as real and not stereotype-linked. Such formalistic logic opens the door to abuses. See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding law that made it more difficult for children born out of wedlock to American-citizen men and non-citizen women to obtain U.S. citizenship than for out-of-wedlock children of American-citizen women and non-citizen men). See also Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1, 6 (1985) (noting the Court’s applications of this “formalism”). Furthermore, there is an irony that in other contexts, such as race, it is exactly these kinds of “real” distinctions (e.g., skin color) that the Court has stated *cannot* be the basis for different or unequal treatment. Dawn Johnsen has noted the analogy: “The ability to bear children is to sex discrimination what dark skin is to race discrimination. It is the immutable characteristic that distinguishes the disadvantaged from the advantaged and which historically has been used to justify the subordination of the disadvantaged.” Johnsen, *Creation of Fetal Rights*, *supra* note 94, at 622.

152. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 273 (1979).

153. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

154. *Id.* at 497 n.20.

155. Herma Hill Kay has suggested a framework for addressing pregnancy discrimination

groups are usually required for equal protection claims based on suspect classifications,¹⁵⁶ this seemed to indicate that different treatment based on pregnancy was not a constitutionally suspect classification based on sex.¹⁵⁷ However, the Court left open the possibility that pregnancy discrimination could rise to the level of sex discrimination by noting that “[w]hile it is true that only women can become pregnant, it does not follow that *every* legislative classification concerning pregnancy is a sex-based classification.”¹⁵⁸

A few years later, in *General Electric Co. v. Gilbert*,¹⁵⁹ the Court extended this analysis to sex discrimination cases under the Civil Rights Act of 1964 (“Title VII”),¹⁶⁰ holding that because pregnancy is unique to women, in the context of medical benefits, “there is no risk from which men are protected and women are not.”¹⁶¹ Only one year later, Congress overruled *Gilbert* with the passage of the Pregnancy Discrimination Act (“PDA”), legislating that for the purposes of Title VII, pregnancy discrimination is sex discrimination.¹⁶² However, the PDA left undisturbed the holding in *Geduldig*, which was based on constitutional as opposed to statutory grounds.

2. Sex Discrimination Law Refined

Given the Court’s usual approach to pregnancy discrimination cases, it is challenging to present a successful pregnancy discrimination case. But it is not impossible. Some cases have suggested that the stringency of the applied judicial standard may be elevated in situations in which one sex bears a burden that the other sex does not or is punished for an act for which the other sex is not, as

that does not require a comparator group and that takes into account the biological differences between men and women. *Kay*, *supra* note 151. *Kay* suggests an approach that she labels “equality of opportunity,” which would allow courts to take account of biological reproductive sex differences and treat them as legally significant *only* when they are being utilized for reproductive purposes. *Id.* at 21–23.

156. See generally KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 220 (4th ed. 2006).

157. See Reva Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 (2007).

158. *Geduldig*, 417 U.S. at 496 (emphasis added). The Court concluded: “Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.” *Id.*

159. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

160. 42 U.S.C. § 2000e (2003). Title VII of the Act prohibits employment discrimination based on race, color, religion, sex, or national origin.

161. *Gilbert*, 429 U.S. at 138 (quoting *Geduldig*, 417 U.S. at 496–97).

162. 42 U.S.C. § 2000e(k) (1978). See *Newport News Shipping & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 (1983) (“In short, Congress’s rejection of the premises of *General Electric v. Gilbert* forecloses any claim that an insurance program excluding pregnancy coverage for female beneficiaries and providing complete coverage to similarly situated male beneficiaries does not discriminate on the basis of sex.”); *supra* note 4.

opposed to one sex receiving a benefit that the other does not.¹⁶³ In *Nashville Gas Company v. Satty*,¹⁶⁴ which was decided after *Gilbert* but before Congress passed the PDA, the Court acknowledged this difference, distinguishing this case from *Gilbert*, which held that pregnancy discrimination was not sex discrimination.

In *Satty*, an employee challenged company policy that required pregnant employees to take unpaid leaves of absence. Due to this policy, a woman could lose all of her job seniority, even though such seniority was retained during other occupational disabilities. The Court stated, "Here, by comparison [to *Gilbert*], petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics."¹⁶⁵ This language is important for two reasons: First, the *Satty* decision was penned by Justice Rehnquist, who had been—and continued to be after this decision—among the most skeptical of the justices regarding sex discrimination claims.¹⁶⁶ Second, prosecution of pregnant women who give birth despite a drug problem clearly places a burden on women that men cannot and "need not suffer."¹⁶⁷ This differentiation has been accepted in other cases related to pregnancy as a legitimate basis for a claim of discrimination. For example, "[t]he Court has expressly distinguished . . . the government's refusal to subsidize the exercise of the abortion right from the infliction of criminal penalties in the exercise of that right."¹⁶⁸ Title VII has been interpreted to "draw a distinction between discrimination *against* members of the protected class and special preference *in favor* of members of that class."¹⁶⁹

Given the Court's reticence to recognize pregnancy discrimination as sex discrimination under the Equal Protection Clause, feminist thinkers have presented alternative approaches to categorizing pregnancy discrimination as sex discrimination. In a 1985 article, Herma Hill Kay proposed a framework for addressing pregnancy discrimination that does not require a comparator group and that takes into account the biological differences between men and women.¹⁷⁰

163. I do not address in this article the inequities that can result when the law refuses to sanction giving one sex a benefit that the other sex does not and cannot receive. For example, women are disadvantaged by health insurance plans that refuse to cover oral contraception on the ground that men do not receive such coverage.

164. *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

165. *Id.* at 142.

166. See generally Siegel, *supra* note 131.

167. *Satty*, 434 U.S. at 142. See *infra* Part IV.A and accompanying notes for a further application of the Equal Protection Clause and its attendant jurisprudence.

168. Roberts, *Punishing Drug Addicts*, *supra* note 54, at 1468.

169. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 294 (1987) (Stevens, J., concurring).

170. See Kay, *supra* note 151, at 22–28. Professor Sylvia Law has also offered an alternative framework for evaluating equal protection claims when a law makes distinctions related to reproduction. See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

Kay suggested an approach that she labels "equality of opportunity," which would allow courts to "take account of biological reproductive sex differences and treat them as legally significant only when they are being utilized for reproductive purposes."¹⁷¹ Under Kay's theory, men and women engage in the same activity—sexual intercourse—and it violates the Equal Protection Clause to focus all of the "consequential disadvantages of reproductive conduct only upon women."¹⁷² Equality of opportunity demands that women and men be treated equally for the results of their shared activity.¹⁷³ As applied to *Geduldig*,¹⁷⁴ in which the Supreme Court evaluated whether an employer's decision not to provide coverage for health costs related to pregnancy was sex discrimination, the equality-of-opportunity approach would find that if men are not disabled as a result of their reproductive conduct, women should not be penalized for disability arising from the same conduct.¹⁷⁵ Thus, argues Kay, for constitutional as well as Title VII analyses, discrimination against a woman based on pregnancy is a facial discrimination based on sex, and intermediate scrutiny must apply.¹⁷⁶ Under equality of opportunity, no comparator group is necessary because the analysis focuses on the result of a behavior common to men and women.¹⁷⁷ Since it would be unequal to place the burdens of the shared reproductive behavior solely on women, equal protection analysis should bar any disadvantage or discriminatory treatment arising from the consequences of sexual intercourse.¹⁷⁸ Kay's analysis is vulnerable to the criticism that the Equal Protection Clause "guarantees equal laws, not equal results."¹⁷⁹ However, Kay accounts for this by emphasizing the shared act of sexual reproduction.

Further, as will be further discussed below, prosecutions related to pregnancy are unconstitutional because they violate the fundamental right to bear a child, as enunciated by the Supreme Court in *Skinner v. Oklahoma*.¹⁸⁰ This right is safeguarded by the fundamental rights and interests strand of the Fourteenth Amendment's Equal Protection Clause and raises an alternative approach to

Law proposes that "laws governing reproductive biology should be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state purpose." *Id.* at 1008–09. Law would thus require strict scrutiny whenever a law that draws distinctions based on reproductive biology is found to substantially reinforce the oppression of women.

171. Kay, *supra* note 151, at 22, 26.

172. *Id.* at 26.

173. *Id.* at 31.

174. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

175. Kay, *supra* note 151, at 30–31.

176. *Id.*

177. *Id.* at 31.

178. *Id.*

179. *See Pers. Adm'r v. Feeney*, 442 U.S. 256, 273 (1979).

180. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) ("Oklahoma [by the statute at issue in the case] deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.").

equal protection analysis of the prosecutions of women who exercise this right despite a drug problem. *Skinner* held that the right to procreate is “one of the basic civil rights of man,”¹⁸¹ and a state’s denial of that right can be the basis for a successful equal protection claim. The Court further stated, “When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”¹⁸² Other cases have reaffirmed the existence of this fundamental right.¹⁸³

C. *Drug Use in American Law*

According to the Supreme Court, addiction is not a crime but an illness for which one cannot be prosecuted. In *Robinson v. California*,¹⁸⁴ the Court held that “appellant’s ‘status’ or ‘chronic condition’ was that of being ‘addicted to the use of narcotics’” and could not be the basis for a criminal conviction.¹⁸⁵ Though the state may criminalize the use, purchase, sale, or possession of illicit drugs, as well as “antisocial or disorderly behavior resulting from [the drugs’] administration,” it may not punish the “status” of addiction.¹⁸⁶ By prosecuting a pregnant woman simply because of her drug addiction, a state violates the Fourteenth Amendment.¹⁸⁷ Addiction, according to the *Robinson* Court, is a mental illness; to punish one for addiction would be akin to imprisoning someone for having a common cold.¹⁸⁸ The Court, through Justice Stewart, was careful to point out that, like the common cold, drug addiction “may be contracted innocently or involuntarily.”¹⁸⁹

The Court later affirmed the central holding of *Robinson*—that drug addiction is not a crime—even as it held that an alcoholic found drunk in public could be arrested and incarcerated in *Powell v. Texas*.¹⁹⁰ The Court in *Powell* differentiated the facts of that case, in which an alcoholic was arrested based on public drunkenness, from *Robinson* and upheld Powell’s conviction. The dissent, penned by Justice Fortas and joined by Justices Douglas, Brennan, and Stewart, agreed that *Robinson* was still good law, but disagreed that it did not protect

181. *Id.* at 541.

182. *Id.*

183. *See, e.g., Carey v. Population Servs. Int’l*, 431 U.S. 678, 687–88 (1977) (holding that states may not prohibit the sale of condoms without a compelling state interest, as this would frustrate an individual’s fundamental right to decide whether to bear children); *Eisenstadt v. Baird*, 405 U.S. 438, 452–53 (1972) (holding that a statute prohibiting contraceptive distribution to single people but allowing it to married couples violated the Equal Protection Clause).

184. *Robinson v. California*, 370 U.S. 660 (1962) (invalidating a California statute that made it a crime to use or be addicted to illicit substances).

185. *Id.* at 665.

186. *Id.* at 666.

187. *See id.* at 667.

188. *Id.*

189. *Id.*

190. *Powell v. Texas*, 392 U.S. 514 (1968).

Powell from prosecution. As the dissent framed it, the question in the case, “whether a criminal penalty may be imposed upon a person suffering the disease of chronic alcoholism,”¹⁹¹ was easily answered in the negative by the Court’s holding in *Robinson*. The case involved, said the dissent, an action that was “not a consequence of [Powell’s] volition” but rather a symptom of his disease.¹⁹²

The Supreme Court has not again addressed the question of addiction and its consequences, and both *Robinson* and *Powell* remain good law.

IV.

APPLICATIONS AND ANALYSES

States violate the Equal Protection Clause when they prosecute women for child abuse and other related crimes when they carry a child to term despite a drug problem. Applying the frameworks set out above, it is apparent that such prosecutions discriminate on the basis of gender¹⁹³ and rob a class of women of their constitutionally protected right to bear children.¹⁹⁴ While the current conservative Supreme Court¹⁹⁵ is unlikely to accept an equal protection argument based on reproductive difference, it is a powerful argument for advocates to keep in their arsenal. The equality argument would be indispensable, for example, if a state were to pass a law explicitly criminalizing drug use during pregnancy. The passage of such a law would make it impossible for state courts to rely on a frequent rationale, on which I will elaborate below: that the prosecution of women who give birth despite a drug problem is a subversion of the legislative intent underlying that state’s child-abuse, drug-trafficking, or homicide laws.

A. *Criminalizing Women Who Carry a Child to Term Despite Their Drug Use Is Sex Discrimination*

Despite the Supreme Court’s inconsistency regarding pregnancy and sex discrimination, the application of child abuse laws to pregnant women based solely on their drug use violates the Equal Protection Clause. The prosecutions at issue in this article constitute sex discrimination under either of two theories. First, because these prosecutions involve a burden based on pregnancy as opposed to a benefit, pregnancy discrimination is sex discrimination. Second, because the relevant comparison is not pregnant women and non-pregnant per-

191. *Id.* at 558 (Fortas, J., dissenting).

192. *Id.*

193. These prosecutions are also racially discriminatory, and, as Dorothy Roberts argues, they fail under the strict scrutiny equal protection analysis required in cases of racial discrimination. See Roberts, *Punishing Drug Addicts*, *supra* note 54. The issues that Professor Roberts raises and the interplay between race and criminalization are vital to understanding the issues discussed in this article.

194. See *infra* note 261 and accompanying text.

195. The Roberts Court has already proven itself hostile to women’s reproductive autonomy. See *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007) (upholding, in an opinion fraught with paternalistic language, the first-ever federal abortion ban).

sons,¹⁹⁶ but rather men who use drugs and women who use drugs, the prosecutions of only women amount to sex discrimination.

1. *Pregnancy Discrimination as Sex Discrimination*

In its pregnancy-discrimination jurisprudence, the Supreme Court has consistently drawn a distinction between a state requiring a benefit for pregnant women and a state imposing a burden on pregnant women.¹⁹⁷ *Geduldig*, which fails to recognize this distinction, is therefore inapposite to the situation in which too many pregnant women find themselves: criminalized for having a child. In holding that the Constitution does not require a state to allot extra employment benefits to pregnant women, *Geduldig* “did not address duties, restrictions or burdens imposed only upon one sex.”¹⁹⁸ The passage of the PDA¹⁹⁹ indicated Congress’s intent that, at least under Title VII, pregnant women should not bear burdens that other people do not have to bear, and that Congress considered pregnancy discrimination to be sex discrimination.²⁰⁰ The Supreme Court indicated a similar constitutional concern that pregnant women not be unequally burdened in *Nashville Gas Co. v. Satty*.²⁰¹ *Satty* made clear what *Geduldig* had only hinted: “The distinction between benefits and burdens is more than one of semantics.”²⁰² This statement in a case only three years after *Geduldig*, narrowly limited *Geduldig*’s holding. *Geduldig*, the Court indicated in *Satty*, should only apply when a state’s conferral of benefits is at issue; when alleged pregnancy discrimination is based on a burden borne by only one sex, *Geduldig* does not apply and pregnancy discrimination may be sex discrimination.

Geduldig has been further limited by three more recent cases: *Nevada Department of Human Resources v. Hibbs*²⁰³ and *California Federal Savings & Loan Association v. Guerra* (“*Cal Fed*”)²⁰⁴ in the Supreme Court, and *Tucson Woman’s Clinic v. Eden*²⁰⁵ in the Ninth Circuit Court of Appeals. In *Cal Fed*,

196. See *supra* notes 153–158 and accompanying text.

197. See Bigge, *supra* note 143, at 279 (discussing the Supreme Court’s pregnancy-discrimination jurisprudence).

198. *Id.*

199. See *supra* note 162 and accompanying text.

200. Reva Siegel has argued that the PDA, combined with Congress’s power derived from Section Five of the Fourteenth Amendment to pass “appropriate legislation” to enforce the Equal Protection Clause, makes the PDA a “congruent and proportional means of enforcing the Equal Protection Clause as interpreted in *Geduldig*.” Siegel, *supra* note 131, at 1893–94. In this way, argues Siegel, the PDA can be understood to have overturned or severely limited *Geduldig*.

201. *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

202. *Id.* at 142.

203. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that under the Family and Medical Leave Act (“FMLA”) state employers are required to provide equal leave time to male and female caregivers).

204. *Cal. Fed. Sav. & Loan Ass’n v. Guerra (Cal Fed)*, 479 U.S. 272 (1987).

205. *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 548 (9th Cir. 2004) (holding that laws restricting access to abortion clinics do not violate the Equal Protection Clause).

the Supreme Court seemed to endorse an approach to considering pregnancy at odds with that in *Geduldig*. The Court held that a California state law requiring employers covered by Title VII to offer unpaid maternity leave was not preempted by Title VII's less onerous requirements.²⁰⁶ In so holding, the Court treated the "female worker, susceptible to pregnancy," as "the norm under state law by which other non-pregnant workers' treatment can be measured."²⁰⁷

Cal Fed represents the Supreme Court's measured acceptance of an anti-subordination principle of equal protection,²⁰⁸ which relies on the Equal Protection Clause to ensure that the government does "not use its power to relegate any identifiable group to an inferior position in society."²⁰⁹ The anti-subordination approach provides an alternative framework that takes pregnancy into account instead of reasoning it away through twisted formal logic that is inapplicable to people's lived experiences.²¹⁰ By burdening only pregnant women, the state creates a caste system that subjugates women and violates the Equal Protection Clause.²¹¹

Hibbs and *Tucson Woman's Clinic* took a more traditional, but similar, approach to pregnancy. In *Hibbs*, which concerned the application of the Family and Medical Leave Act (FMLA) to a state employer, the Supreme Court held that a state's "[f]ailure to treat pregnant employees 'the same as other persons not so affected but similar in their ability or inability to work' reflects . . . unconstitutional sex-role stereotype[s]."²¹² Although the Ninth Circuit in *Tucson Woman's Clinic* found that a statute regulating abortion providers created no equal protection violation,²¹³ it interpreted *Hibbs* as severely limiting the reach of *Geduldig*. The court wrote:

[I]mposing a disability on pregnant women might . . . amount to sex discrimination under the equal protection clause. Indeed, the Supreme Court [in *Hibbs*] implied that laws which facially discriminate on the

206. *Cal Fed*, 479 U.S. at 292.

207. Bigge, *supra* note 143, at 285.

208. *Id.*

209. Johnsen, *supra* note 92, at 610.

210. A prime example of such contrived reasoning is evident in *Geduldig's* infamous footnote 20. See *supra* text accompanying note 154.

211. Ruth Colker proposes a two-step framework for applying the anti-subordination principle. First, the party challenging the law must prove a disparate impact on one group, caused by a state policy or statute. No proof of discriminatory intent is required. Second, once the party has proven the disparate impact, the state must show that the policy at issue does not contribute to the subordination. Colker would apply strict scrutiny to this review, including alleged gender discrimination. See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986). For a discussion of how an anti-subordination analysis could help alleviate the problems presented by *Feeney*, see Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 357-63 (1991).

212. Siegel, *supra* note 131, at 1894 (quoting *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731 n.5 (2003)).

213. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 538 (9th Cir. 2004).

basis of pregnancy . . . can still be unconstitutional if the medical or biological facts that distinguish pregnancy do not reasonably explain the discrimination at hand.²¹⁴

Since the biological facts indicate that the actions of pregnant woman are not the only forces potentially influencing fetal health outcomes,²¹⁵ the medical or biological facts do not sufficiently explain why only women are prosecuted for drug use, particularly when such drug use has not been proven to cause specific harms.

Instead, these prosecutions are “rooted in discriminatory beliefs regarding the singular role of women as mothers,”²¹⁶ in violation of the Equal Protection Clause. Despite the United States’ “long and unfortunate history”²¹⁷ of paternalism and protectionism,²¹⁸ assumptions about women’s abilities or biology and the propriety of women to engage in certain activities cannot be the basis for legal differentiation based on sex.²¹⁹ “Subjecting all women who are pregnant or will become pregnant to state regulation or judicial intervention in their personal choices and conduct is a policy as discriminatory as the protectionist legislation so long used to prevent women from fully participating in the economic area of employment.”²²⁰ Prosecutions that assume all women will meet the “highly demanding set of [social] expectations” placed upon pregnant women,²²¹ or that women will immediately be able to overcome addictions that have plagued them for years, place an unequal and unnecessary burden on women alone²²² and should be considered unconstitutionally discriminatory.

214. *Id.* at 548.

215. See *supra* notes 61–77 and accompanying text.

216. Cruz Brief, *supra* note 147, at 9.

217. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

218. See *supra* notes 2–3 and accompanying text. See also *United States v. Virginia (VMI)*, 518 U.S. 515, 531–38 (1996) (charting discrimination against women throughout U.S. history).

219. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (striking down a mandatory preference for men over equally qualified women in appointment of estate administrators as a violation of the Equal Protection Clause); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (holding that a state law granting husband unilateral right to dispose of jointly owned community property without wife’s consent violates the Equal Protection Clause). Anti-reproductive rights activists are attempting to resurrect the validity of protectionist and paternalistic laws, particularly in the battle over South Dakota’s abortion ban. See Reva Siegel & Sarah Blustein, *Mommy Dearest?*, AM. PROSPECT, Oct. 2006, at 22.

220. Bigge, *supra* note 143, at 283.

221. Cruz Brief, *supra* note 147, at 10 (citing *ROTH*, *supra* note 10, at 17).

222. The assumption that all women can simply stop using drugs upon becoming pregnant is proven false by the difficulty that many people—men and women alike—have in overcoming addiction. Even people with unlimited resources and supportive communities struggle. See Paltrow, *Blaming Pregnant Women*, *supra* note 68 (noting Rush Limbaugh’s struggle to overcome an addiction to prescription painkillers). See also, e.g., Allison Hope Weiner, *Mel Gibson Apologizes for Tirade After Arrest*, N.Y. TIMES, Jul. 30, 2006, at A15. The law is sex discriminatory, reinforcing a belief that, although these wealthy white men cannot overcome their addictions, poor women will be able to simply by virtue of their pregnancies. See Paltrow, *Governmental Responses*, *supra* note 35, at 475–80 (highlighting the effectiveness of treatment but the lack of available treatment programs for pregnant women and Medicaid recipients).

Proponents of these prosecutions may argue that because the child-abuse, child-neglect, homicide, and reckless-endangerment statutes under which women have been prosecuted are facially gender neutral²²³ and because discriminatory intent is exceedingly difficult to prove, only rational basis scrutiny should apply. However, this argument misapplies the Supreme Court's holding in *Personnel Administrator v. Feeney* that a claimed victim of discrimination must prove the state's discriminatory intent, and it also misconstrues the mechanics of its continued application for several reasons.²²⁴ First, it is not the child abuse statutes themselves that are questioned as discriminatory, but rather local policies that implement them in an invidiously discriminatory fashion. These local policies are not neutral, because they specifically target pregnant women, usually at those moments where women have interaction with the state specifically *because of* their pregnancies—for example, when seeking prenatal care at a publicly funded clinic or when giving birth at a public hospital. These local programs encouraging prosecutions are sex discriminatory for the reasons detailed above: they rely on outdated and invidious stereotypes; they misunderstand the science of reproduction; and they place a burden on women that is not shared by men, creating a slippery slope of criminalization for all women—not just currently pregnant women²²⁵ or drug-using women. Second, as Ruth Colker and other commentators have argued, *Feeney*'s disparate-impact analysis is inapplicable to pregnancy because it ignores “questions that are likely to go to the core of women's equal protection problems.”²²⁶ *Feeney* requires that discrimination be part of legislatures' intent in enacting statutes for heightened scrutiny to apply, but this disregards the fact that legislatures often “ignore all women's interests altogether and thereby act to preserve the status quo of unequal opportunity between men and women. An *unthinking* attitude can be as harmful to women as direct animus, because it serves to keep women's interests in society invisible.”²²⁷ Finally, *Feeney* cannot apply to an action challenging the prosecution of women who continue their pregnancies to term despite their drug use, precisely because in pursuing these prosecutions local prosecutors *violate* legislative intent.²²⁸ In every state in which appellate courts have evaluated these prosecutions, with the exception of South Carolina, courts have held that the legislature did not intend

223. See, e.g., S.C. CODE ANN. § 16-3-85 (2006) (defining offense of homicide by child abuse); N.M. STAT. § 30-6-1 (2003) (defining offense of abandonment or abuse of a child).

224. See *Pers. Adm'r v. Feeney*, 442 U.S. 256, 276–80 (1979).

225. E.g., *Kilmon v. State*, 905 A.2d 306, 311 (Md. 2006).

226. Colker, *An Equal Protection Analysis*, *supra* note 211, at 360.

227. *Id.* at 360–61.

228. Prosecutors' twisting of child abuse statutes to allow for the prosecution of women based on their drug use during their pregnancies also violates the rule of lenity, which requires courts to construe criminal statutes most favorably to the defendant when multiple interpretations are possible. See *Johnson v. State*, 602 So.2d 1288, 1290 (1992). Although I do not believe that there are multiple reasonable interpretations of who is a “child” for the purposes of child abuse statutes, the rule of lenity indicates that even if there were, women like Jennifer Clarise Johnson, *see infra* note 265, could not be prosecuted for carrying a child to term despite a drug problem.

for child-abuse or drug-trafficking statutes to be discriminatorily applied to the actions of pregnant women vis-à-vis their fetuses.²²⁹ It is therefore impossible to show that in enacting a child-abuse, reckless-endangerment, or drug-trafficking statute, a legislature intended to discriminate against women.²³⁰ But this does not mean there is no invidious discrimination at work.

2. Applying Intermediate Scrutiny

Since it is established that these prosecutions are gender discriminatory,²³¹ intermediate scrutiny as interpreted under *VMI*—the standard applied to sex-discrimination claims—should apply. The Supreme Court’s equal protection jurisprudence shows that “a gender classification, unless ‘benign’ and enacted for a compensatory purpose, must be narrowly drawn, and the state has the burden of justifying the statutory classification.”²³² Because prosecutions are undoubtedly not compensatory, the state bears the burden of providing an “exceedingly persuasive” justification that these prosecutions are narrowly drawn and are “substantially related to . . . the achievement of important governmental objectives.”²³³ When subjected to this heightened level of scrutiny, it becomes apparent that prosecuting pregnant women for deciding to carry a child to term despite a drug problem is not only irrational in that it deters them from seeking prenatal care, but also violates the Equal Protection Clause.

The “burden of justification [of a discriminatory policy] is demanding and it rests entirely on the State.”²³⁴ In the prosecutions of pregnant women for child abuse, among other offenses, based solely on the woman’s decision to carry a child to term despite a drug problem, the state will usually offer its interest in protecting fetal health as its important governmental objective.²³⁵ *Roe v. Wade*²³⁶ stated, and most would agree, that this is a compelling state interest—but it is not well-served by prosecuting pregnant women. This is because “[a]dversarial policies fail to address and often exacerbate root causes of poor

229. See, e.g., *Kilmon v. State*, 905 A.2d 306 (Md. 2006); *State v. Martinez*, 137 P.3d 1195 (N.M. Ct. App. 2006); *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991). For a more exhaustive list, see <http://www.advocatesforpregnantwomen.org>.

230. The fact that many state appellate courts have already invalidated these prosecutions does not make the arguments advanced herein moot. Prosecutions continue—and continue to increase in frequency—and there may come a time when advocates decide to challenge them on constitutional grounds and, should they lose, appeal to the Supreme Court.

231. See *supra* Part IV.A.1.

232. Leslie G. Landau, *Gender-Based Statutory Rape Law Does Not Violate the Equal Protection Clause*: Michael M. v. Superior Court of Sonoma County, 67 CORNELL L. REV. 1109, 1122 (1982).

233. *United States v. Virginia (VMI)*, 518 U.S. 515, 533–34 (1996).

234. *Id.*

235. This is the justification that has usually been asserted. See, e.g., *Shared Interests*, *supra* note 92, at 588.

236. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

birth outcomes, because the government's threat of interference and punishment frightens away women most in need of health care."²³⁷ Even if it were possible to assume that confining a pregnant woman could potentially result in a better birth outcome for that one individual, "[i]f a governmental action may improve the chances of a healthy birth in one particular case, but only at the cost of causing many other less healthy births, then the action cannot be said to further the asserted governmental interest."²³⁸ Although there are numerous other ways in which the state could meet its objective of encouraging healthy births, policy makers have chosen not to implement them. In fact, the United States has one of the highest rates of infant mortality among the more-developed countries.²³⁹ In order to encourage fetal, infant, and maternal health, the United States could provide universal gynecological, obstetrical, and prenatal care. The government could take steps to provide the same resources and respect to pregnant and parenting women as does Sweden, the country with the lowest infant mortality rate in the world.²⁴⁰ Though these alternatives are unlikely to be implemented in the United States because of current political conditions, they demonstrate that there are numerous non-discriminatory alternatives available, and that many of these alternatives would do far more to ensure that the government meet its goal of protecting fetal health and potential life.

3. *Drug-Use Distinctions as Sex Discrimination*

The prosecution of women for becoming mothers in spite of drug addiction also violates the Equal Protection Clause in a second way: the prosecutions punish pregnancy and drug addiction, both of which are protected statuses that cannot be criminalized. Though there is no constitutionally protected right to use certain drugs,²⁴¹ one does have a constitutionally protected right not to be punished simply for being addicted.²⁴²

The Supreme Court held in 1962 that drug addiction is an illness that cannot be criminally punished.²⁴³ Yet prosecutors continue to punish women for nothing more than being addicted to illicit drugs and being pregnant. These prosecutions misapprehend both the nature of drug addiction and the definition of the punishable act.²⁴⁴ The defendants are women whose actions are better analo-

237. Johnsen, *supra* note 92, at 589. See also *supra* notes 89–92 and accompanying text. Medical experts agree that prosecuting pregnant women deters others from seeking prenatal care.

238. Johnsen, *supra* note 92, at 589.

239. SAVE THE CHILDREN, STATE OF THE WORLD'S MOTHERS 2006, at 43 (2006), available at http://www.savethechildren.org/publications/mothers/2006/SOWM_2006_final.pdf.

240. *Id.*

241. See Roberts, *Punishing Drug Addicts*, *supra* note 54, at 1462.

242. See *supra* Part III.C.

243. *Robinson v. California*, 370 U.S. 660 (1962).

244. I am referring to "act" in the criminal law sense. The question raised is: what is the *actus reus* that the state seeks to punish by pursuing these prosecutions?

gized to the defendant in *Robinson*²⁴⁵ than to the defendant in *Powell*.²⁴⁶ Like the defendant in *Robinson*, the women prosecuted for giving birth in spite of their drug addictions suffer from a dependence on illicit drugs that is “a biological, social, and psychological response to a drug, most usefully compared to a chronic illness in which relapse can be anticipated.”²⁴⁷ Women who are addicted to drugs have impaired control and continue to use drugs despite their knowledge of potential adverse consequences.²⁴⁸ And, like Robinson, the women prosecuted for child abuse and other related crimes because they have been unable to overcome drug addiction during pregnancy have not engaged in any punishable act. Under *Powell*, a person “may be punished constitutionally for an ‘act’ stemming from a person’s addiction.”²⁴⁹ However, the women targeted for prosecution based on addiction do not engage in any act other than giving birth. Unlike the defendant in *Powell* and others who have been punished for acts related to their addictions such as driving while intoxicated or public intoxication, women have been prosecuted based solely on the coexistence of addiction and pregnancy. They have not engaged in any act that can be separated from addiction itself, or from pregnancy. As even the conservative Kentucky Supreme Court has noted, there is nothing per se criminal about such defendants’ conduct, status, or condition.²⁵⁰ Addiction is not criminal. Neither is pregnancy. For as we have seen, the decision to bear a child is a constitutionally protected fundamental right.²⁵¹

These prosecutions, then, engage in sex discrimination by punishing women for a status (i.e., drug addiction) for which men cannot be punished. Supporters of the prosecutions of these women may point to the 1977 case of *Michael M. v. Superior Court*²⁵² as an indication that the Supreme Court will allow states to prosecute only men or only women for certain offenses. *Michael M.* upheld California’s statutory rape law, under which only a male could be convicted of the crime. The Court’s justification was that because only women can become pregnant, they needed to be protected at a young age from pregnancy and the

245. *Robinson v. California*, 370 U.S. 660 (1962). In *Robinson*, the defendant’s “act” was nothing more than being addicted to drugs while in a certain jurisdiction. The Supreme Court overturned his conviction, noting that addiction is an illness and as such cannot be punished through the criminal justice system. See *supra* Part III.C and accompanying notes.

246. *Powell v. Texas*, 392 U.S. 514 (1968). In *Powell*, the Supreme Court upheld a conviction for public intoxication, holding that this crime punishes an act stemming from addiction rather than addiction itself. See *supra* Part III.C and accompanying notes.

247. ROTH, *supra* note 10, at 139 (quoting a study by Wendy Chavkin). Relapses are a normal part of addiction recovery.

248. *Id.*

249. Paltrow, *Pregnant Drug Users*, *supra* note 8, at 1022.

250. See *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993). See also Paltrow, *Pregnant Drug Users*, *supra* note 8, at 1022–23.

251. See *supra* III.B.2. For analysis of this fundamental right, see *infra* Part IV.B.1.

252. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

other consequences of sex.²⁵³ However, the *Michael M.* holding has been roundly criticized for making little sense logically²⁵⁴ and for relying on what Ruth Colker calls "exaggerated notions about the sex differences between men and women."²⁵⁵ Professor Sylvia Law has noted that the *Michael M.* Court "mistakes stereotype for biology."²⁵⁶ Beyond this reliance on stereotype, the case holds little precedential value for two reasons. First, it discriminates against both men and women. It discriminates against men by putting the full burden of what is potentially a shared consensual act on one gender, though responsibility can and should be shared by both.²⁵⁷ *Michael M.* also discriminates against women. Believing that young men and women are not similarly situated because only women can get pregnant does not justify this unequal burden, because it assumes—wrongly—that young women have no agency. Young men and women *are* similarly situated in that they both have the ability and the right to say yes or no to sexual intercourse and to demand that contraception be used.²⁵⁸ Second, according to Ruth Colker, the holding not only relies on stereotypes but also perpetuates outdated notions of women and women's autonomy by entrenching socially created consequences of pregnancy.²⁵⁹ Colker writes:

The reason, for example, that the consequences are "particularly severe" for underage females is social rather than physical. For females between fifteen and eighteen, pregnancy is no more dangerous than for older women. Poverty, poor education opportunities, lack of prenatal care, lack of publicly-funded day care, and for the most part, lack of male involvement in child-rearing make the pregnancies of underage females particularly problematic. These conditions are socially created

253. *Id.* at 471.

254. See Landau, *supra* note 232, at 1109–10.

255. Ruth Colker, *Pregnant Men*, 3 COLUM. J. GENDER & L. 449, 488 (1993).

256. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 999 (1984).

Law continues:

[I]t is not entirely nature that imposes upon women the devastating burdens of teenage pregnancy; the social and legal ethos that makes women solely responsible for nurturing the children they bear also plays a part Of course, men are not deterred [from having sex as teenagers] because fatherhood is now only an 'opportunity' not a responsibility; men are not morally accountable to their children.

Id. at 999–1000.

257. Though it may be true that prosecutions for statutory rape rarely occur in cases in which the intercourse was consensual, this cannot account for the imbalance in California's law. See Colker, *supra* note 255, at 489–90. Regardless of whether the sex is indeed consensual, the law should treat male and female perpetrators the same. That women are infrequently convicted of rape (other than statutory rape) does not mean that the law can endorse the idea that only men are *able* to rape. This is particularly true in an age where the media has hyped story after story of older women having sexual relationships with younger men. Claiming that only men can be rapists enshrines men's sexual dominance over women and further perpetuates stereotypical gender roles.

258. This, of course, assumes consensual intercourse. But the logic is applicable to nonconsensual sex as well.

259. See Colker, *supra* note 255, at 488–89.

rather than physical.²⁶⁰

Thus, *Michael M.* is a misstep in the Court's jurisprudence that would not likely be upheld today. The case is itself an acceptance of a law that discriminates on the basis of gender and cannot be relied upon to overcome the indications of sex discrimination apparent here.

B. Charging Pregnant Women with Child Abuse Because of Their Drug Use Violates the Equal Protection Clause by Robbing Some Women of a Fundamental Right

There are certain rights that the Supreme Court recognizes as beyond the reach of government interference. The right to bear children is among these. The Court held in *Skinner v. Oklahoma* that the right to procreate is "one of the basic civil rights of [humankind]."²⁶¹ Thus pregnancy and childbirth are among "the decisions that an individual may make without unjustified government interference."²⁶² This right has been extended to include the right of women to decide not only to bear a child, but also to decline to bear a child.²⁶³ For, to use Kay's phrase, "if a woman cannot choose whether to utilize her reproductive capacity, she is not a free moral agent, let alone the equal of man."²⁶⁴

1. These Prosecutions Bar Some Women from Having Children

The prosecutions at issue in this article not only implicate the suspect class of gender, but they also rob a class of women of the fundamental right to bear children. Prosecutors have attempted to frame the constitutional right at issue as the right to use cocaine or other illicit drugs.²⁶⁵ By framing the question in this way, prosecutors divert attention from the proper inquiry: what constitutionally protected freedom does a woman engage in by giving birth?²⁶⁶ The right in question is protected by the *Skinner* line of cases: the right to decide whether and how to become a mother. *Skinner* made clear that the right to beget a child is fundamental and cannot be abridged barring circumstances satisfying strict scrutiny.²⁶⁷ Here, that requirement is not met; the promotion of fetal health can be

260. *Id.*

261. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The right to "marry, establish a home, and bring up children" has also been recognized as fundamental. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). See also *supra* Part III.B.2.

262. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977).

263. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

264. Kay, *supra* note 151, at 23 n.125.

265. According to Dorothy Roberts, the prosecutor in the 1989 case against Jennifer Clarise Johnson posed the constitutional issue this way: "What constitutionally protected freedom did Jennifer engage in when she smoked cocaine?" Roberts, *Punishing Drug Addicts*, *supra* note 54, at 1462.

266. *Id.* at 1462–63.

267. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

better achieved through numerous other avenues. And just as the state may not prevent a woman from deciding to bear a child, "the government may not unduly burden that choice."²⁶⁸ In *Cleveland Board of Education v. LaFleur*,²⁶⁹ the Supreme Court invalidated a mandatory maternity-leave program, holding that a state may not unduly burden a woman's decision to become a mother.²⁷⁰ "Just as the state may not force a woman to bear a child against her will, it may not act to penalize her for deciding to bear a child."²⁷¹ But "[b]y creating fetal rights that can be used against the woman bearing the fetus to restrict her conduct, the state appropriates a woman's right to control her actions and imposes a burden at least as great as that imposed [and found unconstitutional] in *LaFleur*."²⁷² As Dorothy Roberts notes, "[c]riminal prosecutions of drug-addicted mothers do more than discourage a choice; they exact a severe penalty on the drug user for choosing to complete her pregnancy."²⁷³

Yet prosecutors in many states continue to attempt to stop some women from becoming mothers by criminalizing the decision to give birth. The significance of these cases lies in the fact that the state seeks to prevent women who use drugs from giving birth, which is unconstitutional both because it infringes the fundamental right to bear a child and because it punishes addiction.²⁷⁴ More precisely, however, these prosecutions can be understood as an attempt to prevent poor women of color from having children. Women have been prosecuted due to their use of a range of drugs, but most used crack cocaine, which is often "associated with inner-city Blacks."²⁷⁵ Study after study has shown that despite similar levels of drug use across racial lines, black women are reported and prosecuted much more frequently.²⁷⁶ An Illinois study found that eighty-seven percent of women reported for using drugs during pregnancy were black, though pregnant black and white women showed similar rates of drug use.²⁷⁷ While the focus on crack may be attributed in part to the national panic about "crack babies" in the 1980s and '90s,²⁷⁸ there is no rational reason for such concern.

268. Roberts, *Punishing Drug Addicts*, *supra* note 54, at 1467.

269. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

270. *Id.*

271. Johnsen, *supra* note 94, at 618.

272. *Id.*

273. Roberts, *Punishing Drug Addicts*, *supra* note 54, at 1468.

274. *See supra* Part IV.A.3.

275. ROTH, *supra* note 10, at 147. *See also* Roberts, *Punishing Drug Addicts*, *supra* note 54, at 1433-35.

276. ROTH, *supra* note 10, at 147 (discussing a Florida study that found black women were ten times more likely to be reported to local authorities than white women). *See* Brief for ACLU, *supra* note 6, at 2 (stating that all but one or two of the thirty women arrested as part of a Charleston, South Carolina, program to identify pregnant women who use drugs were black). *See also* *Ferguson v. Charleston*, 532 U.S. 67 (2001) (holding that a program of turning over urine tests that returned positive drug results to the police to use as evidence in criminal prosecutions violated the Fourth Amendment's prohibition against unreasonable searches and seizures).

277. *See* ROTH, *supra* note 10, at 148.

278. *See supra* Part II.A.

Crack cocaine is no more likely to harm a fetus than powder cocaine or opiates, and unlike alcohol, it has not been proven to be connected to a specific set of fetal harms.²⁷⁹ Thus, as Dorothy Roberts argues, the targeting of women who use crack is by proxy a political decision to focus on poor black women.²⁸⁰

Whether it is black women or white women, Latino women or Asian women caught in the crosshairs of a prosecution simply because they chose to give birth, “government intrusion as extreme as criminal prosecution . . . unduly infringe[s] on protected autonomy.”²⁸¹

2. Prosecutions Attempt to Criminalize a Dually Protected Class and Restrict a Fundamental Right

Although the violation of the right to bear a child is alone enough to trigger the strictest possible scrutiny, there would nonetheless be an equal protection violation based on the fact that these prosecutions not only punish one protected fundamental right (childbearing), but they also punish a protected status (addiction). Drug addiction or use alone is not a crime. If “drug use by pregnant women is [a crime], then pregnancy constitutes ‘a necessary element of a remarkable new status-based criminal offense: pregnancy by a drug-dependent person, or drug use by a pregnant woman.’”²⁸² It is the “coexistence of two unpunishable statuses—drug addiction and pregnancy”—that results in the creation of “a new status crime”²⁸³ that both restricts a fundamental right, the right to give birth, and affects two status-based classes, drug addicts and pregnant women.

The Supreme Court has held that the strictest scrutiny is required in cases addressing classifications reaching both fundamental rights and suspect classes. In *Zablocki v. Redhail*,²⁸⁴ the Supreme Court applied a hybrid due process and equal protection analysis to hold that a law affecting the ability of specific people to marry violated a fundamental right and created an invidious classification based on wealth.²⁸⁵ Justice Stewart’s *Zablocki* concurrence accused the majority of simply using the substantive due process doctrine but labeling it equal protection.²⁸⁶ However, the Supreme Court has relied on the Equal Protection Clause

279. ROTH, *supra* note 10, at 147.

280. Roberts, *Punishing Drug Addicts*, *supra* note 54, at 1432–36.

281. *Id.* at 1468.

282. McGinnis, *supra* note 17, at 520.

283. *Id.*

284. *Zablocki v. Redhail*, 434 U.S. 374, 383, 388–90 (1978).

285. In other cases, the Court has held that differential treatment based on the wealth (or poverty) of a group of people is not necessarily indicative of suspect classification. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). However, in *Zablocki*, the Court acknowledges poverty as factor. The difference, I argue, can be attributed to the Court’s acknowledgment that it needed to protect the fundamental right to marry, also at issue in *Zablocki*.

286. See *Zablocki*, 434 U.S. at 395 (Stewart, J., concurring).

to protect fundamental rights in a manner similar to substantive due process.²⁸⁷ Given these precedents, it is apparent that, should a court erroneously decide that the right to bear a child is not in and of itself sufficient to show that a prosecution has violated the Equal Protection Clause, the court would still be compelled to hold that the infringement of a fundamental right combined with the attempted criminalization of a protected status fails Equal Protection scrutiny.

3. *Strict Scrutiny Applied*

Courts apply the least forgiving form of Equal Protection analysis to government interference with a fundamental right. Alternately labeled “critical examination”²⁸⁸ and “strict scrutiny,” it requires that the state’s action be narrowly tailored to meet some compelling governmental interest.²⁸⁹ The use of prosecution to curb the fundamental right of all women—even those addicted to illicit substances—to bear a child cannot survive strict scrutiny review. The state will probably argue, as it did in the context of intermediate scrutiny, that it has a compelling interest in protecting fetal health.²⁹⁰

However, under strict scrutiny, “the restriction sought by the government must *actually* serve or promote the compelling interest.”²⁹¹ Prosecuting women who become mothers while simultaneously experiencing a drug addiction or engaging in drug use is not necessary to further the government’s interest in promoting healthy fetuses and children. Nor does it actually serve that interest. Prosecutions deter women from seeking prenatal care and place maternal and fetal health at risk by forcing women to give birth in unsanitary jails and prisons.²⁹² The government’s interest further fails to satisfy the strict scrutiny standard because strict scrutiny requires that the government’s chosen method for reaching its compelling goal be “narrowly tailored” to meet that interest.²⁹³

The existence of feasible, less-restrictive alternatives vitiates a finding that the government’s chosen method is justified under strict scrutiny.²⁹⁴ Criminal sanctions are perhaps the *most* restrictive path the government could choose. The less restrictive—and likely more effective—alternatives that the government could employ to protect fetal and infant health include: federally or state-funded day care that would allow pregnant women who use drugs and who are already

287. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (protecting the fundamental right to travel).

288. *Zablocki*, 434 U.S. at 383.

289. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

290. See *Johnsen*, *supra* note 92, at 588 (predicting that the government will try to justify this restriction on women’s liberty by claiming it is a necessary step to promote healthy births). See also *supra* Part IV.A.2.

291. *Johnsen*, *supra* note 92, at 588 (emphasis added).

292. See *Medical Group Opinions*, *supra* note 90.

293. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (upholding affirmative action program under strict scrutiny).

294. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

parents to seek out-patient treatment,²⁹⁵ the provision of sufficient treatment beds for full families and for pregnant and parenting women who require in-patient treatment programs, and the provision of adequate pre- and post-natal medical care for women.²⁹⁶ Given the myriad alternatives available to the government, its decision to prosecute rather than preempt must fail under strict scrutiny.

V.

MAKING PROSECUTIONS OBSOLETE: FROM PUNISHMENT TO PREVENTION

Given that punitive approaches to the problem of drug addiction in pregnant and birthing women are unconstitutional and ineffective, public officials who are sincere in their concern for fetal and maternal health must seek out alternative approaches. The most effective will combine drug-abuse prevention and drug-addiction treatment. Such programs could include community-based psychotherapy, increased funding for Title X initiatives,²⁹⁷ and a required number or percentage of reserved places in drug-treatment programs for pregnant and parenting women. Though expensive, such programs cost less than incarceration²⁹⁸ and better promote family unification. Analysis of the cost of drug treatment that addresses the special issues of women, particularly pregnant and parenting women, also should take into account its preventative value. An early 1990s New York treatment program for drug-addicted, pregnant women and mothers “averted foster care placement in 75 percent of cases, saving \$22.7 million in foster care alone. Cumulative four-year savings were projected at more than \$250 million.”²⁹⁹

Treatment and prevention alone, however, will still not be sufficient to reach lofty fetal health goals. Public funding for abortion and for health care for all women, whether pregnant or not, will also contribute to the protection of maternal and fetal health in ways that prosecution cannot. Health care for women

295. Rachel Roth reports that lack of day care is a significant barrier to treatment for pregnant women seeking drug treatment services, many of whom already have children. See ROTH, *supra* note 10, at 140–41.

296. In 2002 the Bush Administration supported regulations that provide for prenatal care through the State Child Health Insurance Program (SCHIP). However, these programs treat the fetus as the patient and extend health care to the fetuses of pregnant women who are not themselves eligible for health care. See Press Release, ACLU Reprod. Freedom Project, ACLU Criticizes Bush Administration for Providing Prenatal Care Through Anti-Choice Measure in New Health Insurance Regulation (Sept. 27, 2002) (on file with author).

297. Title X is the federal government’s program funding reproductive-health and family-planning services for low-income women. President George W. Bush appointed Dr. Eric Keroack, a vocal proponent of abstinence-only programs and an anti-abortion advocate, to supervise Title X. See Christopher Lee, *Bush Choice for Family-Planning Post Criticized*, WASH. POST, Nov. 17, 2006, at A01. This appointment makes any immediate increase in Title X funding highly unlikely.

298. ROTH, *supra* note 10, at 179 (stating that women-centered drug treatment is less expensive than incarceration, neonatal care, or foster care).

299. *Id.*

must be viewed not through the lens of pregnancy or potential pregnancy,³⁰⁰ but through the importance of women's health in itself. Even so, such programs will reduce the impact of poverty on fetal and child health by ensuring proper nutrition and attention to illness when women do decide to become mothers. Combined with a dismantling of punitive approaches, access to health care will increase the likelihood that whenever a drug-dependent woman does become pregnant and decides to carry the pregnancy to term, a doctor can do whatever is possible to minimize the risk of injury to the fetus.

A more realistic understanding of addiction as an illness is required if new approaches to drug dependency and treatment are to become commonplace. Like so many other chronic illnesses, recovery from drug addiction often includes episodes of relapse. Just as we do not tell a person whose cancer has returned or a diabetic who slips up and has a cookie³⁰¹ that her recovery is doomed, neither should we give up on people who, in working to best drug addictions, lapse into exactly the old, bad behaviors they are trying to overcome. We must also advocate for a conception of pregnancy that counteracts the sense of entitlement that many people believe they have to make decisions to protect another woman's fetus. We must abandon the construction of fetuses as third parties to pregnancy,³⁰² which underlies so much recent federal and state legislation relating to women's health and reproductive rights³⁰³ and which disembodies and devalues women. This requires, among other things, a shift in rhetoric such that women are seen not just as incubators for "future Americans," but as people whose daily lives are complicated by the difficult—though often welcome—changes pregnancy brings. Contrary to fetal-rights advocate John Robertson's assertion that once a woman decides to forego an abortion, she loses her liberty to act in ways that may adversely affect the fetus,³⁰⁴ a woman's constitutional rights continue undiminished from conception to childbirth.

Finally, we must relinquish the culture of blame that legitimated the prosecutions of women who are drug-dependent for carrying pregnancies to term. It cannot any longer be politically expedient for local district attorneys seeking a launching pad for more-prominent elected office³⁰⁵ to target pregnant and parenting women who are drug-dependent. Pregnant women cannot be what Cynthia Daniels calls the "'dumping ground' for collective anxieties about social

300. See January W. Payne, *Forever Pregnant*, WASH. POST, May 16, 2006, at HE01.

301. Conversation with Lynn M. Paltrow, July 2006 (creating the hypothetical examples).

302. See ROTH, *supra* note 10, at 185–186.

303. See, e.g., Unborn Victims of Violence Act, 18 U.S.C. § 1841 (2004); Unborn Child Pain Awareness Bill, H.R. 6099, 109th Cong. (2d Sess. 2006); Colorado Proposed Initiative 2007–2008 #36, Definition of Person, available at http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/2007-2008%20Filings/Results/results_36.pdf. The language has been approved by the Colorado Supreme Court, and supporters are now gathering signatures. See Science Progress, <http://www.scienceprogress.org/2007/11/the-human-life-amendment-redux/>.

304. See Gallagher, *supra* note 106, at 11.

305. See ROTH, *supra* note 10, at 182.

transformation.”³⁰⁶ We cannot permit society to achieve catharsis³⁰⁷ for these fears by demonizing any one subset of women, which in turn threatens the reproductive autonomy of all women, regardless of race or socioeconomic status.

Doubtless, change will be slow. The implementation of programs like universal health care that includes comprehensive maternity care and relies upon government expenditure of tax dollars would require both a complete cultural shift in American views of welfare and the relinquishment of a bootstraps-type capitalism that believes every person can succeed if only she works hard enough. So major a societal transformation will not be swift in coming. But it can be brought about incrementally through the courts, the media, and the political process on a state and federal level. Lawsuits in state courts and under state constitutions, which sometimes have more-generous equal protection clauses than the Federal Constitution and may include equal rights amendments, will allow advocates to advance the cause in the state courts and to use those wins as a stepping stone to federal recognition.

VI. CONCLUSION

The distinction between benefits and burdens is indeed more than just semantics. When the state seeks to provide some sort of benefit based on pregnancy or other expressions of gender difference, it may sometimes do so.³⁰⁸ However, as I have sought to demonstrate, when the state seeks to burden women by allowing violations of liberty that men do not and cannot face, it violates the Equal Protection Clause.³⁰⁹

After over twenty-five years of destructive policies, the War on Drugs is finally being dismantled, one policy at a time.³¹⁰ Women’s rights advocates can take advantage of this momentum by challenging the prosecutions of women who become mothers in spite of their drug dependencies and by highlighting the devastating impact of the War on Drugs on women, families, and reproductive rights. Too many women are incarcerated simply because they chose to exercise their fundamental rights and were unable, in the exercise of that right, to overcome the chronic illness of addiction. These women were all wrongly imprisoned. No woman breaks the law by giving birth.

306. DANIELS, AT WOMEN’S EXPENSE, *supra* note 9, at 145.

307. *See id.*

308. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003). *See also* Siegel, *supra* note 131.

309. *See supra* Part IV.A–B.

310. *See, e.g.,* Eric E. Sterling, *Take Another Crack at that Cocaine Law*, L.A. TIMES, Nov. 13, 2006, at A17; Solomon Moore, *Rules Lower Prison Terms in Sentences for Crack*, N.Y. TIMES, Nov. 2, 2007.

