

# EXPANDING THE FEMINIST IMAGINATION: AN ANALYSIS OF REPRODUCTIVE RIGHTS

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## I. INTRODUCTION

*Imagination alone offers me some intimation of what can be.*

-Andre Breton<sup>1</sup>

In contemporary Western society, women's unique ability to become pregnant has been used as a justification for numerous and diverse discriminatory practices against women. As a result, women have been excluded from public life,<sup>2</sup> penalized by the criminal justice system,<sup>3</sup> and even physically controlled and invaded<sup>4</sup> because of their biological difference from men. The pervasiveness of this denigrating cultural and legal approach to pregnancy persists despite positive changes in other areas of the law regarding women's sexual autonomy and equality.<sup>5</sup> This article asks feminists to imagine how the law might be different, and true gender equality be obtained, if both men and women were considered equal contributors to fetal health and the law no longer subordinated the goal of gender equality to the goal of fetal health.

To a large extent, the feminist approach to the pregnancy problem has focused on securing and preserving the abortion right as a means of promoting women's reproductive autonomy and equality. This article argues that feminists should be skeptical about the efficacy of making abortion the rallying point it has become because the abortion right, as it exists today, has limited potential to enhance women's substantive equality. Making abortion the central issue may impede women's chances for equality because it detracts from other

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1. MANIFESTOS OF SURREALISM (1969).

2. See *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961) (holding that exclusion of women from jury duty is reasonable because women are the "center of home and family life"); *Rostker v. Goldberg*, 453 U.S. 57, 58 (1981) (holding that men and women are not similarly situated for purposes of the draft because of combat restrictions imposed on women by Congress); Katherine M. Skiba, *Women Take the Reins in Madison and Dane County Governments*, MILWAUKEE J. SENTINEL, Apr. 16, 1997, at 5 (reporting that women are holding leadership positions in the county for the first time).

3. See Heather Sprintz, *The Criminalization of Perinatal AIDS Transmission*, 3 HEALTH MATRIX 495, 496 (1993) (observing that criminal penalties for transmitting the HIV virus do not exclude transmission to a fetus from the mother).

4. See Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 162 (1993) (discussing society's attempt to control mentally disabled women's reproduction).

5. See, e.g., *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (holding state-mandated pregnancy leave is not discriminatory); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-69 (1986) (finding that "hostile environment" sexual harassment is a form of sex discrimination under Title VII of the Civil Rights Act of 1964); *FED. R. EVID.* 412 (limiting admissibility of a rape victim's sexual history, as well as reputation and opinion evidence concerning the victim).

important issues facing women, namely, the pregnancy problem—discriminatory treatment of pregnant women by society and the criminal justice system. Additionally, and perhaps most importantly, feminist rhetoric about abortion has largely failed to acknowledge the moral issues surrounding abortion.<sup>6</sup> This failure has ultimately damaged the feminist cause by oversimplifying this complex issue and alienating many supporters in the process. Because the abortion right is only one component of women's equality, this article urges feminist legal scholars to change the scope of their analysis from securing and preserving the abortion right to the broader issue of exposing the underlying fallacies supporting state power to disproportionately regulate female reproduction.

This article suggests an alternate approach to the current feminist analysis of reproductive rights. The ideas presented in this article are intended to initiate an intra-feminist dialogue about the pregnancy problem in order to move the issue beyond the traditional privacy and equal protection analyses commonly applied.

First, this article analyzes the paradoxical abortion right and its limited usefulness to women's struggle for equal treatment under the law. Next, the article provides examples of ways society arbitrarily burdens women, but not men, in relation to their respective biological reproductive capacities and discusses how such differential treatment negatively impacts women's chances of achieving equal power. Finally, this article proposes an alternate approach to the pregnancy problem. Specifically, the article argues that both men and women are reproductive beings that should be treated equally regarding their reproductive abilities. Therefore, under this approach, prior to the conception of a fetus, the state may not regulate male and female reproductive capacities disparately because, in fact, their reproductive contributions are equal. After conception, any state regulation of pregnancy must be based solely on the well-being of the mother, instead of fetal health, because placing a pregnant woman's rights in conflict with those of her fetus undermines women's autonomy and equality. Rather than focusing on abortion, this approach attempts to reconceptualize the issue as one involving the state's right to regulate both male and female reproductive abilities, regardless of the form of that ability.

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6. See generally Naomi Wolf, *Our Bodies, Our Souls: Rethinking Pro-Choice Rhetoric*, THE NEW REPUBLIC, Oct. 16, 1995, at 26 (encouraging recognition of the moral issues involved in the choice of whether to abort).

Because it is likely that women will continue to become pregnant unintentionally or require abortions for other reasons, abortion rights must be safeguarded and enforced in a meaningful way.<sup>7</sup> Therefore, this article also considers the nature of fetal life and what justifications, if any, feminists can legitimately provide for state involvement in a woman's pregnancy.

## II. THE ABORTION CONUNDRUM

### A. *The Singular Abortion Right*

To say that feminists should not continue to focus primarily on women's right to abortion is not to say that abortion is inconsequential to women's struggle for equal status under the law. The right to obtain an abortion is a critical component of women's equality because it enables women to exercise their free will regarding the direction of their lives.<sup>8</sup> For some women, abortion is "a window of relief in an unequal situation from which there is no exit."<sup>9</sup> But abortion, as the right is currently defined, has negative consequences for women as a group. The impact of abortion on women's lives is probably more subtle and far reaching than contemporary feminist rhetoric has recognized. For this reason, feminists should consider adopting a more comprehensive approach to reproductive autonomy.

Approximately forty-three percent of American women will have at least one abortion by the time they turn forty-five.<sup>10</sup> Many of these women will lie about their choice or simply not discuss it with the

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7. According to one article, at least 60% of pregnancies in the United States are unintended. See Sarah S. Brown & Leon Eisenberg, *Unintended Pregnancy and the Well-Being of Children and Families*, 274 JAMA 1332 (1995). Couples who use no contraception and those whose contraception fails contribute equally to the number of unintended pregnancies. See *id.* Women who become pregnant unintentionally are less likely to obtain prenatal care and are more likely to use harmful substances than those who became pregnant intentionally. See *id.* Children who are the result of an unintended pregnancy are more likely to have low birth weight, die in their first year, be abused, and have poor development. See *id.* The authors suggest that, based on this evidence, medical practitioners and researchers should focus more heavily on discovering ways to avoid unintended pregnancies, including developing contraceptive methods for men. See *id.*

8. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (arguing that the Court has recognized a right of personal privacy in the U.S. Constitution).

9. See Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L.J. 1281, 1315 (1991) (detailing ways in which society penalizes pregnant women and mothers).

10. See Mary Leonard, *Abortion: 25 Years After Roe v. Wade, Middle Ground Is Battlefield*, B. GLOBE, Dec. 14, 1997, at F1, available in 1997 WL 6285653; Terry Nicole Steinberg, *Abortion Counseling: To Benefit Maternal Health*, 15 AM. J.L. & MED. 483, 483 (1989).

people closest to them.<sup>11</sup> After having an abortion, women's emotional responses range from grief for the fetus to suicidal tendencies.<sup>12</sup> Some women may experience this trauma immediately after the abortion, while others might not experience trauma until ten years later.<sup>13</sup> Women who undergo second trimester abortions experience more physical pain than women who abort in the first trimester.<sup>14</sup> Perhaps most significantly, women who obtain second trimester abortions are more likely to perceive the fetus as a baby that can and does feel pain.<sup>15</sup> Obviously then, the choice to have an abortion is more than a simple medical decision between a woman and her doctor, as many "pro-choice" advocates have argued. Thus, the abortion choice has serious implications for women's mental health, especially considering the large number of women who choose abortion.<sup>16</sup>

Notwithstanding the fact that many women experience grief, guilt, and a sense of loss after an abortion,<sup>17</sup> the Supreme Court of the United States has concluded that a fetus is not a person for Fourteenth Amendment purposes.<sup>18</sup> Nonetheless, the Court reasoned, the fetus is a "potential life" and thus worthy of protection.<sup>19</sup> For this reason, states may infringe upon a woman's fundamental right to receive an abortion as long as the regulation does not pose an "undue burden" on that right.<sup>20</sup>

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11. See *id.* at 484 n.7.

12. See *id.* at 489-90 (using the word "grief" to include sadness, loss, and regret, as well as anger, fear, and anxiety).

13. See *id.* at 490.

14. See *id.* at 492.

15. See *id.*

16. But see Alice A. Frye, et al., *Induced Abortion in the United States: A 1994 Update*, 49 J. AM. MED. WOMEN'S ASS'N 131, 135 (1994) (summarizing Surgeon General C. Everett Koop's conclusion in 1989 that research does not support the idea that abortion is dangerous to women's mental health).

17. See *supra* text accompanying note 12.

18. See *Roe v. Wade*, 410 U.S. 113, 157 (1973) (stating a fetus is not a person within the meaning of the Fourteenth Amendment); see also Ronald M. Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 398-402 (1992) (discussing the constitutional status of fetal life). Professor Dworkin asserts that based on *Roe*, we can assume that a fetus is not a constitutional person whose rights are in conflict with the pregnant woman. See *id.* at 399. The *Roe* Court's analysis did not end there, however. The Court held that even though the fetus is not a person with constitutionally protected rights, the state still has an interest in protecting human life, and that the closer a woman comes to giving birth, the more compelling this interest becomes. See *Roe*, 410 U.S. at 163 (articulating the original test for permissible state involvement in abortion decisions).

19. See *Roe*, 410 U.S. at 150 (discussing potentiality of life); *Planned Parenthood v. Casey*, 505 U.S. 833, 872 (1992) (characterizing a fetus as potential life).

20. See *Casey*, 505 U.S. at 878 (enunciating the undue burden standard for abortion regula-

Under this prevailing legal formulation of the abortion right, it would seem that women who receive abortions must either convince themselves that a fetus is not a life, or alternatively convince themselves that their own interests outweigh whatever interests the fetus may have. On the other hand, if women successfully convince themselves of either of these ideas, or any other rationale, they may deny themselves the right to grieve for their aborted fetus, compounding the trauma experienced by the abortion itself. This denial leads to a great deal of ambivalence among women about abortion rights, and in turn, alienates some women from adopting the "pro-choice" viewpoint.<sup>21</sup>

Considered in this light, obtaining the "right" to receive an abortion seems like a mixed blessing. Few other rights have such profound moral and emotional impacts. Twenty-four years after women won this right, feminists must consider whether they should continue to focus on the abortion right in its current form or shift the focus from protecting abortion rights to more fundamental means of securing equal reproductive autonomy.

### *B. The Pregnancy Problem Illustrated*

Women are subjugated based on their ability to become pregnant, whether they actually can or do become pregnant, and whether they carry a fetus to term.<sup>22</sup> The legal inequalities illustrated below disadvantage women as a group, regardless of any individual woman's desire or ability to become pregnant. There are no concomitant social or legal disadvantages to men as a group or to individual men who impregnate women. If a woman becomes pregnant, she will bear the burden of her decision to either terminate the pregnancy or give birth. Assuming she does carry her pregnancy to term, her pregnancy will expose her to legalized discrimination in the form of

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tions). The Court's singular "undue burden" standard is reminiscent of the Court's "intermediate scrutiny" standard created to differentiate between racial classifications and gender classifications. Compare *Casey*, 505 U.S. at 988 (Scalia, J., concurring in part and dissenting in part) (recognizing the undue burden standard as a constitutional anomaly), with *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that the state must only show that the gender classification serves important government objectives and is rationally related to those objectives).

21. In fact, Norma McCorvey, who was "Jane Roe" in *Roe v. Wade*, recently denounced her pro-choice stance due to her own conflicted feelings regarding abortion. See David Van Biema, *An Icon in Search Mode*, TIME, Aug. 21, 1995, at 36; see generally Wolf, *supra* note 6, at 26 (advocating recognition of the moral issues surrounding the abortion choice).

22. See MacKinnon, *supra* note 9, at 1315-16 (arguing that women lose jobs or have a more difficult time gaining employment because of the possibility that they might become pregnant).

fetal protection laws,<sup>23</sup> unavailability of workplace benefits such as maternity leave,<sup>24</sup> and possibly even a forced cesarean section should she become ill.<sup>25</sup> As a mother, she will bear primary or exclusive responsibility for raising the child,<sup>26</sup> be excluded from higher paying jobs,<sup>27</sup> and may be forced to choose between a devalued role as mother and pursuing other goals.<sup>28</sup> If she is a drug user, she could face criminal prosecution under a panoply of statutes enacted to protect fetal life from maternal drug use.<sup>29</sup> If she is convicted of child abuse, the court may order "compulsory contraception" as a condition of her probation.<sup>30</sup>

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23. See discussion *infra* Part III.

24. The Family and Medical Leave Act of 1993 requires private employers who engage in interstate commerce and employ fifty or more employees each work day for at least twenty calendar work-weeks in the preceding year to provide pregnant employees who give birth up to twelve weeks of unpaid leave. See Family and Medical Leave Act, 29 U.S.C. § 2601 (Supp. V 1993). Companies with fewer than fifty employees account for 40% of the workforce. See Sabra Craig, Note, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51, 73-75 (1995) (discussing limitations of the Family and Medical Leave Act). The Act has received much criticism for its limited applicability and efficacy in meeting the goal of allowing mothers to bond with their newborn children. See *id.*

25. See *In re A.C.*, 573 A.2d 1235, 1238 (D.C. 1990) (allowing a hospital to order a cesarean section for a terminally ill pregnant woman); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981) (authorizing the hospital to administer all medical procedures deemed necessary to preserve the life of an unborn fetus); see also Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951 (1986) (giving a history of court-ordered cesarean section deliveries).

26. See Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL'Y 61 (1995) (arguing that mothers have an "expectation" that they will be responsible for raising their children); ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 220-26 (1978).

27. See *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (pointing out that even the U.S. Constitution does not demand equal employment opportunities for women).

28. One study reported that 90% of male business executives had children by age 40, while only 35% of women executives did. See Ellen Debenport, *Combining Careers, Children; Business, Society Are Slow To Unhitch 'Mommy Track'*, ST. LOUIS POST-DISPATCH, Mar. 17, 1993, at 1C (discussing disparate statistics between male and female workers); see also D. Kelly Weisberg, *Professional Women and the Professionalization of Motherhood: Marcia Clark's Double Bind*, 6 HASTINGS WOMEN'S L.J. 295, 322 (1995) (explaining that many women are forced to choose between work and family life if they are unable to be both perfect mothers and good workers).

29. See Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 280 (1990) (describing California prosecutors' use of a statute designed to protect children to prosecute a mother for her drug use during pregnancy).

30. See Janet F. Ginzberg, *Compulsory Contraception As a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979 (1992) (providing a history of courts' use of contraception as means of controlling reproductive rights). States, as well as courts, have developed plans for using Norplant to control reproduction, especially that of poor women. One state Governor proposed offering free Norplant to women who receive welfare, and has distributed Norplant to inner-city high school students. Other states have offered money to women on welfare to implant Norplant. See *id.*; see also Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (discussing specific threats of prosecution to women of color).

On the other hand, if she terminates the pregnancy, she faces extreme social stigmatization for her decision. Additionally, because the state has an interest in fetal life that becomes compelling when the fetus becomes viable, the state may significantly intrude on her decision to abort.<sup>31</sup> For instance, not only may the state attempt to persuade her not to abort her fetus, but it may also implicitly question the soundness of her decision by forcing her to wait twenty-four hours before undergoing the procedure.<sup>32</sup> The state may essentially strip women of their once fundamental right to receive an abortion by refusing to appropriate funds for abortions.<sup>33</sup> If she is a teenager, she may be required to acquire parental or judicial consent to obtain an abortion.<sup>34</sup> Many women intuitively understand the threat these restrictions pose to women's reproductive freedom, yet the legal system has determined that they pose no "undue burden" and may therefore be enforced by the state.<sup>35</sup>

Each of these restrictions imposes another entity's judgment over the woman's regarding her supposedly private decision to obtain an abortion. A judge, a physician, or a parent is considered to have better insight into a woman's decision to have an abortion than the woman herself. It is hard to imagine a situation in which a man's reproductive autonomy is compromised to a similar degree. Men are simply left out of the equation—their role in conception has no legal significance in the abortion context. In fact, the invisibility of the father is exemplified by the fact that even the state has more power than he to control the mother's decision to obtain an abortion.<sup>36</sup>

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31. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); see also Kathryn Kolbert & Andrea Miller, *Government in the Examining Room: Restrictions on the Provision of Abortion*, 49 J. AM. MED. WOMEN'S ASS'N 153, 153 (1994) (describing the nature and degree of state involvement in abortion decisions after *Casey*).

32. See *Casey*, 505 U.S. at 881 (describing a Pennsylvania abortion statute that requires women to wait 24 hours before receiving an abortion and requires doctors to provide information about abortion alternatives). The waiting period was held not to be an undue burden. See *id.* at 882.

33. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 490 (1989) (allowing a public hospital to ban abortions even when women offered to pay with private funds); *Harris v. McRae*, 448 U.S. 297, 329 (1980) (holding that states receiving Medicaid funds need not provide medically necessary abortions although they fund childbirth).

34. See *Casey*, 505 U.S. at 899 (upholding states' parental notification requirement); see, e.g., ARK. CODE ANN. §§ 20-16-801, 20-16-803 (Michie 1989) (requiring a minor to provide her parents with written notice of her intent to obtain an abortion); MO. REV. STAT. § 188.028 (1996) (requiring written consent from a parent, legal guardian, or through a court order before a doctor may perform an abortion on a woman under 18 years old).

35. See *Casey*, 505 U.S. at 875-77 (applying the undue burden standard to abortion regulations).

36. See *id.* at 895-96 (stating that fathers do not have the same cognizable and substantial interest in their unborn children as they do in their living children); see also Kevin M. Apollo,



## III. DISCRIMINATION AGAINST PREGNANT AND FERTILE WOMEN

A. *Fetal Protection*

States have advocated and carried out prosecutions of pregnant women for ingesting illegal drugs and have denied pregnant or fertile women access to certain types of employment based on a commitment to protecting fetal life.<sup>37</sup> These two types of laws illustrate the inherent inequality of focusing societal resources and coercion solely on pregnant women in the interest of fetal protection. In both areas of the law, women are conceptualized as either actual or potential vessels for fetal life to justify states' proscription of certain female conduct and states' involvement in the woman's pregnancy.<sup>38</sup> It is true, of course, that women as a group *are* actual or potential vessels for life. In this way, men and women are different. Men do, however, have an indispensable role in human reproduction—men ejaculate sperm, contributing half of the fetus' genetic material. Thus, in the same way that the state conceptualizes women as actual or potential mothers, the state could also conceptualize men as actual or potential fathers.<sup>39</sup> This revelation could dramatically alter the current positions of men and women relative to their reproductive capacity.

1. *Criminal Prosecution of Pregnant Women*

If a woman uses drugs during her pregnancy, states may attempt to prosecute her for child neglect or abuse.<sup>40</sup> In one well-publicized

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*The Biological Father's Right to Require a Pregnant Woman to Undergo Medical Treatment Necessary to Sustain Fetal Life*, 94 DICK. L. REV. 199, 217-22 (1989) (setting forth limitations on a father's interest in his fetus).

37. See *infra* notes 41, 76, 79-83 and accompanying text. Cf. Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 329-30 & n.282 (1992) (noting that until 1991, many employers sought to exclude fertile women from work which was thought to threaten the welfare of future generations); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (prohibiting fetal-protective regulation of women's employment under the Pregnancy Discrimination Amendment to Title VII of the Civil Rights Act of 1964).

38. For an excellent discussion of the law's conceptualization of women as vessels for life, see Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U.J. GENDER & L. 147 (1996).

39. While technically the state could conceptualize a man as a potential father, very rarely, if at all, has it done so for the purpose of punishing a man for fetal-harming behavior. See *infra* note 66 and accompanying text.

40. See Wendy Chavkin, Nancy Walker, & Denise Paone, *Drug Using Families and Child Protection: Results of a Study and Implications for Change*, 54 U. PITT. L. REV. 295, 300-12 (1992) (discussing the prosecution of pregnant women under various types of criminal statutes); Kristen Barrett, *Prosecuting Pregnant Addicts for Dealing to the Unborn*, 33 ARIZ. L. REV. 221, 237 (1991) (providing a general history of states' attempts to criminalize certain prenatal maternal acts).

case, the state prosecuted Jennifer Johnson under a felony statute prohibiting the delivery of a controlled substance to a minor.<sup>41</sup> The minor was Jennifer's fetus and the method of delivery was her umbilical cord.<sup>42</sup>

The Supreme Court of Florida found the lower court's interpretation of the statute contrary to rules of statutory construction and reversed Jennifer Johnson's conviction.<sup>43</sup> The court also reasoned that prosecuting pregnant drug users would dissuade these women from seeking drug treatment and might even increase the incidence of abortion.<sup>44</sup> Inexplicably, though, the court noted in dictum that the state's contention that the drugs were delivered through the umbilical cord was physiologically impossible because the placenta was "not part of the mother's body."<sup>45</sup> The court did not expand upon this proposition, but it apparently reasoned that for a mother to be convicted of delivering drugs to a fetus she must have some sort of physical control over the means of delivery.<sup>46</sup> If the placenta is not part of the mother's body, presumably then, neither is the fetus.

As circular as this reasoning is, it does illustrate the legal fiction courts must construct to prosecute women under such statutes. For the prosecution to stand, the woman and the fetus must, by definition, constitute two separate entities with competing interests. Otherwise, the only criminal sanctions a pregnant drug user faces are the typical "victimless crime" statutes.<sup>47</sup> Once the state establishes

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States may also attempt to initiate civil probate proceedings against drug-addicted mothers. In one case, the Michigan Court of Appeals held that courts can consider prenatal drug use by the mother as probative evidence of neglect to establish probate court jurisdiction in a termination of parental rights proceeding. See *In re Baby X*, 293 N.W.2d 736, 739 (Mich. Ct. App. 1980). The court opined that "a child has a legal right to begin life with a sound mind and body." *Id.* at 739 (citing *Womack v. Buchhorn*, 187 N.W.2d 218, 222 (Mich. 1971)). Courts that use this type of sweeping language in regard to fetal rights often do not consider the consequences of such pronouncements. For instance, if a child has a right to be born with a "sound mind and body," what type of remedy does a child have who is born brain damaged or physically handicapped through no "fault" of the mother or anyone else? The *Baby X* court also weighed a mother's right to confidentiality regarding drug treatment against the best interests of the child and held that the child won. See *id.* at 739-41.

41. See *Johnson v. State*, 602 So.2d 1288 (Fla. 1992). The statute referred to is FLA. STAT. ch. 893.13(1)(c)(1) (1989).

42. See *Johnson*, 602 So.2d at 1290.

43. See *id.* at 1290, 1296-97.

44. See *id.* at 1296.

45. *Id.* at 1292 (emphasis added).

46. See *id.* (noting that the only way Johnson could have prevented the "delivery" of drugs would have been to sever the umbilical cord before the child was born, which "of course, would probably have killed both herself and her child").

47. A "victimless crime" is a crime that generally involves only the criminal and has no direct victim, such as the crime of illegal possession of drugs. BLACK'S LAW DICTIONARY 1085 (6th

that a fetus is a separate legal entity from the woman, the state may then appoint itself as the fetal advocate because a fetus cannot speak for itself. Thus, the fetus has the power of the state to protect its state-defined interests, skewing the balance of power in its favor.

Although most attempts to prosecute pregnant women under similar statutes have proven unsuccessful,<sup>48</sup> one important point must be considered. These prosecutions have generally failed based on judicial reasoning that, as a matter of "common sense," the threat of prosecution discourages women from obtaining prenatal care and drug treatment and may even encourage abortion.<sup>49</sup> Therefore, abandonment of prosecutions of pregnant drug users would be based not on judicial concern for the equality of women but rather on protection of fetal life. While both may be worthwhile concerns, this philosophical distinction has importance for the feminist agenda because public opinion regarding pregnant women's conduct toward their fetuses could just as easily have swayed the court to uphold the conviction.<sup>50</sup> That is, the court's decision was based on politics rather than the law. A decision based on a commitment to women's equal

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ed. 1991).

48. For a discussion of the history of prosecutions for harming a fetus, see Judith Kahn, *Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus — Is This a Mother's Crime?*, 53 BROOK. L. REV. 807, 833-43 (1987).

49. See Jeffery A. Parness, *Pregnant Dads: The Crimes and Other Misconduct of Expectant Fathers*, 72 OR. L. REV. 901, 909 (1993) (discussing the societal trend away from prosecution in favor of rehabilitation and deterrence). Although the *Johnson* court considered itself to be applying common sense, it missed one obvious problem with its holding: Jennifer Johnson and many other women sought treatment during their pregnancies and discovered either that the waiting lists were too long or that the programs expressly excluded pregnant women. See Janet R. Fink, *Effects of Crack and Cocaine on Infants: A Brief Review of the Literature*, 24 CLEARINGHOUSE REV. 460, 463-64 (1990) (explaining that two-thirds of hospitals surveyed in 1989 had no drug treatment programs to which pregnant patients could be referred, that one of the only residential mother/child drug treatment programs in New York City has a several months-long waiting list, and that of the few New York City programs accepting addicted women, less than half simultaneously provide prenatal care); Jean Reith Schroedel & Paul Peretz, *A Gender Analysis of Policy Formation: The Case of Fetal Abuse*, 19 J. HEALTH POL., POL'Y & L. 335, 338 (1994) (noting that less than half of the newspaper articles published in the New York Times between 1989 and 1991 dealing with fetal abuse mentioned mitigating circumstances, such as lack of drug treatment programs for pregnant women, that would support an argument against punishing the mothers). Thus, it is not solely the threat of prosecution that prevents pregnant drug users from seeking treatment, but also a simple lack of programs that are willing and able to accept them. Accord Susan Dieneshouse, *Drug Treatment Is Scariest Than Ever for Women*, N.Y. TIMES, Jan. 7, 1990, at E26.

50. See Schroedel & Peretz, *supra* note 49, at 340 (discussing feminist response to the vilification of pregnant drug abusers). The authors contend that because of the emotional response to the plight of crack babies, feminists have accepted rather than criticized the views of mainstream media, health care professionals, and politicians, that mothers, and not fathers, are to blame. See *id.* at 341-42. The authors suggest that the feminist response to the problem of crack babies is directly contradictory to their response to other "fetal protection" laws, such as workplace exclusions of pregnant women. See *id.* at 342.

treatment under the law rather than fetal protection would have more significance for women because it would not devalue autonomous, adult women as human beings by subordinating their rights to those of the unborn while men are not similarly subordinated.

Currently, legislatures are free to draft precisely worded criminal laws aimed at prosecuting pregnant women, thus leaving no room for a court to interpret such laws other than in a way which subordinates women's rights. For instance, several states have recently enacted laws requiring physicians who suspect that a woman used drugs during pregnancy to perform toxicology tests and report the results to the local welfare agency.<sup>51</sup> Other states have altered their child abuse laws to include prenatal drug exposure in their definition of harm to a child.<sup>52</sup> Many states prosecute mothers or remove newborns from the home based solely on a positive drug test.<sup>53</sup> Such laws are not immune from constitutional attack;<sup>54</sup> however, a woman should not falsely believe that the threat of prosecution no longer exists simply because the prosecutions discussed above failed.

*a. A Common Sense Analysis of the Wisdom of Prosecuting Pregnant Women*

Feminist concerns regarding fetal protection laws are first, that a pregnant woman's interests are deemed subordinate to the interests of the fetus; and second, that men are not similarly subordinated, although the rationale for subordinating women is equally applicable

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51. See Chavkin, Walker, & Paone, *supra* note 40, at 306 & n.57 (citing ABA CENTER ON CHILDREN AND THE LAW, DRUG EXPOSED INFANTS AND THEIR FAMILIES: COORDINATED RESPONSES OF THE LEGAL, MEDICAL, AND CHILD PROTECTION SYSTEM 73, 73-80 (1990)). The ABA report cited in Chavkin, Walker, & Paone lists states with mandatory reporting statutes and excerpts relevant provisions. The provision types include reporting laws, civil prosecution laws, criminal prosecution laws, and welfare laws. See *id.* Listed are: Florida, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Nevada, New York, Oklahoma, Rhode Island, Utah, and the District of Columbia. See *id.*; see also *In re Baby X*, 293 N.W.2d 736, 741 (Mich. Ct. App. 1980) (holding that the best interests of the child outweighed the mother's interest in confidentiality regarding drug treatment).

52. Chavkin, Walker, & Paone list the states that target pregnant women for prosecution. Included are: Florida, Hawaii, Illinois, Indiana, Massachusetts, Nevada, New York, Oklahoma, and the District of Columbia. See Chavkin, Walker, & Paone, *supra* note 40, at 308.

53. See Chavkin, Walker, & Paone, *supra* note 40, at 305-06 (discussing state theories of prosecution). One theory of prosecution justifies intervention based on harm caused to the newborn because of the mother's drug use during pregnancy. See *id.* Another theory views prenatal drug use as an indicator of possible future harm to the child, such as abuse and neglect by the mother, thus justifying state intervention. See *id.*

54. See Chavkin, Walker, & Paone, *supra* note 40, at 307 (noting the constitutional issues raised by these statutes). One constitutional issue is equal protection, because of the discriminatory impact of these laws on poor, black women. See *id.* A second issue is due process, in cases where women are not informed of the tests being performed on them. See *id.*

to men because men's drug use may also harm the fetus.<sup>55</sup> The subordination of women, then, is two-tiered. On the first level, women's interests must give way to state-defined fetal interests. On the second level, women discover that society does not expect men to subjugate themselves in the same way it expects women to subjugate themselves. Both social hierarchy and fetal protection laws place men at the top, fetuses in the middle, and women at the bottom. This structure indicates that fetal protection goals are not the true basis for these laws. If they were, fetuses, not men, would be at the top of the hierarchy and, conceivably, men and women would share the subordinate position.<sup>56</sup>

A careful and reasoned consideration of the state's asserted interest in protecting fetal life and preventing birth defects reveals some inconsistencies which suggest that the state may be less committed to fetal protection than it purports to be.<sup>57</sup> First, incarcerated pregnant women are far more likely to experience miscarriages than the general population of pregnant women.<sup>58</sup> Additionally, pregnant women in prison are unlikely to receive adequate medical or prenatal care.<sup>59</sup> Therefore, attempting to protect fetal life by incarcerating pregnant women is misguided at best.

Second, and more important for purposes of comparison, one recent study found that cocaine can bind to sperm, possibly carrying the cocaine to the ovum and damaging the embryo before implantation.<sup>60</sup> Other research shows that alcohol, tobacco, and illegal drugs

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55. See *infra* notes 60-63; *Children of Fathers Who Smoke More Likely to Get Cancer*, ASSOCIATED PRESS, Dec. 16, 1996, available in 1996 WL 4454134 (reporting on a study showing that fathers' smoking damages their sperm and therefore increases their children's risk for developing childhood cancer); see generally Jacqueline Berrien, *Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures*, 2 YALE J.L. & FEMINISM 239, 246 (1990) (noting that men have not been prosecuted for their drug use which may harm a fetus, for abusing pregnant women, or for engaging in harmful sexual intercourse with pregnant women; also, men, unlike women, have not been required by employers to avoid exposure to chemicals known to damage sperm).

56. See generally Siegel, *supra* note 37, at 335-58 (discussing gender bias in fetal-protective regulation); Mary Jo Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992) (discussing the many ways the law has created or is based upon the hierarchies between men and women).

57. For a psychologically-based account of society's characterization of this issue, see Sherry F. Colb, *Words That Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101 (1992).

58. See Schroedel & Peretz, *supra* note 49, at 350-51 (discussing research on miscarriage rates among female inmates).

59. See Schroedel & Peretz, *supra* note 49, at 350-51 (discussing the quality of prison prenatal care).

60. See *Paternal-Fetal Conflict*, HASTINGS CTR. REP., Mar.-Apr. 1992, at 3 (discussing recent research on the effect of drug use on sperm).

have adverse effects on sperm.<sup>61</sup> This research on male contributions to fetal health is both limited and rarely publicized although men comprise a large majority of drug addicted individuals,<sup>62</sup> are more likely to use a variety of drugs, and abuse alcohol more frequently.<sup>63</sup> The effects of a mother's drug ingestion *after* conception, however, is a ripe field for research and publicity.<sup>64</sup> Despite the general societal concern for the plight of crack addicted babies, society has not considered the effects of male exposure to drugs a topic important enough to warrant large scale medical research.<sup>65</sup> Thus, although a father's drug use may have seriously impaired the quality of his sperm and may in turn cause birth defects, he suffers no threat of criminal sanction based exclusively on his reproductive conduct.<sup>66</sup> This is not to suggest that based on available research one could argue that men and women are similarly situated with regard to contributions to fetal health. Rather, feminists should explore and analyze the disparities in the research and in the regulation of male and female reproductive capacities to begin development of a more equitable approach to the pregnancy problem.

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61. See Schroedel & Peretz, *supra* note 49, at 343 (summarizing research on harm to sperm); *Children of Fathers Who Smoke More Likely to Get Cancer*, *supra* note 55 (reporting on a study showing that fathers' smoking damages their sperm and therefore increases their children's risk for developing childhood cancer).

62. See Schroedel & Peretz, *supra* note 49, at 343 (asserting that the comparative lack of research on "male fetal abuse" is the result of gender bias); Devra Lee Davis, Gladys Friedler, Donald Mattison, and Robert Morris, *Male Mediated Teratogenesis and Other Reproductive Effects: Biologic and Epidemiologic Findings and a Plea for Clinical Research*, 6 REPROD. TOXICOLOGY 289, 289 (1992) (explaining that the absence of research on male-mediated birth defects from exposure to toxins is the result of exclusive focus on maternal exposure); Stephen R. Kandall and Wendy Chavkin, *Illicit Drugs in America: History, Impact on Women and Infants, and Treatment Strategies for Women*, 43 HASTINGS L.J. 615, 629-30 (1992) (summarizing results of medical research on drug use during pregnancy).

63. See Schroedel & Peretz, *supra* note 49, at 343.

64. See, e.g., Schroedel & Peretz, *supra* note 49, at 338-39 (discussing the extensive coverage the New York Times has given to fetal abuse). The authors report that during 1989, 1990, and 1991, the New York Times printed 34 articles dealing with fetal abuse. All of the articles addressed the problem as one concerning women's "lifestyle choices." During the same period, the New York Times did not print any articles regarding how men's "lifestyle choices" affected fetal health. See *id.* at 338-39; see, e.g., Sharon Begley, *Hope for "Snow Babies,"* NEWSWEEK, Sept. 29, 1997, at 62 (reporting that presumptions about babies born to women who used cocaine during pregnancy may be incorrect and that those babies may grow up with fewer disadvantages than previously assumed).

65. See Schroedel & Peretz, *supra* note 49, at 338-39, 343 (commenting that no media exposure is given to male behavioral effects on sperm and asserting that the few medical studies that reveal such effects are "dismissed as 'nonsense'").

66. See, e.g., *Paternal-Fetal Conflict*, *supra* note 60, at 3 (discussing recent research on the effects of drug use on sperm). The idea that men could be prosecuted for their drug use as it affects reproductive conduct is dismissed outright. See *id.*

Third, if a man impregnates a woman he knows to be addicted to drugs, society does not impose any obligation on him whatsoever regarding the health of the fetus, although he has knowingly risked creating a drug-affected fetus. A father's legal obligation to the fetus begins, if at all, only after the fetus is born alive.<sup>67</sup> This lack of state involvement before conception could be justified because of the impracticality of identifying and regulating potential fathers. Nonetheless, if the state were truly interested in fetal health, it could regulate male sexuality through mandatory contraception until the male finds a suitable sexual partner with whom he would father a healthy child. In our society, this is an unlikely scenario. Interestingly, however, society does pass judgment on women's reproductive choices and regulates them to a much greater extent than it does men's choices.

Finally, consider the government-required warnings in bars and on cigarette and alcohol packaging advising women of the risks these products pose to fetal life.<sup>68</sup> These regulations presuppose that only women should be concerned with fetal life and that pregnant women, not fathers or society at large, bear the responsibility for producing healthy offspring. Imagine a cigarette warning advising men that cigarette smoke may damage sperm, causing stillbirths and learning disabilities.<sup>69</sup> This warning would carry the implicit message that men should alter their conduct because of their reproductive capacity. Applied to women, this message is accepted as practical; applied to men, it is a source of humor. As one commentator wrote, "Could a man be arrested in Florida for delivering drugs to a minor via — ? Oh, never mind."<sup>70</sup>

The socially ingrained notion that the mother is more responsible than the father for the health of a fetus because she carries it inside

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67. At least three states impose a legal obligation upon the father, along with the mother, to support the minor child. See, e.g., MD. CODE ANN., FAM. LAW § 12-204 (1984 and Supp. 1996); VA. CODE ANN. § 20-108.1-2 (Michie 1996); W. VA. CODE § 48A-1B-1 (1996). None of these states impose a legal obligation on the father before birth.

68. See 15 U.S.C. § 1333(a) (Supp. 1997). The federal government requires all cigarette packages to have one of four warnings, two of which directly address pregnant women: "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy" and "SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birthweight." *Id.* Alcohol labels also warn women that drinking alcohol while pregnant may cause low birthweights. Part of the warning on a bottle of Corona Extra Beer reads, "GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects."

69. Research does in fact indicate that this is true. See *Paternal-Fetal Conflict*, *supra* note 60, at 3.

70. *Paternal-Fetal Conflict*, *supra* note 60, at 3.

her body is, at least partially, refuted by statistics which show that men are more likely to batter a pregnant woman than a non-pregnant woman, and that the battery is often aimed at the fetus.<sup>71</sup> Accordingly, a social policy of true fetal protection would require criminalization of certain male conduct in relation to a fetus.<sup>72</sup> Specifically, a man who intentionally causes the death of or injury to a fetus could be prosecuted under special criminal laws aimed at fetal protection.<sup>73</sup>

Clearly then, a societal commitment to fetal protection certainly cannot explain these obviously gender-based distinctions. If society were actually committed to the protection of fetal life, it would seem logically and morally acceptable to impose some sort of regulation on both pre-conception and post-conception male behavior that damages fetuses. Taken to its full extent, a true fetal protection policy would allow the state to regulate both female and male reproduction

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71. See Schroedel & Peretz, *supra* note 49, at 343-46 (providing a summary of research).

72. At least one commentator has advocated the adoption of such measures. See Parness, *supra* note 49, at 912-18 (proposing methods for holding "expectant fathers" accountable for their actions regarding the welfare of the fetus). The author urges that "a few well-considered prosecutions" of pregnant fathers would serve the goal of fetal protection. *Id.* at 915. Many of the author's proposals are straightforward applications of neutral principals; however, his primary concern is protection of fetal life, not equality of the sexes. These two principles are not necessarily at odds. For instance, providing educational materials to both the mother and the father about their sex-specific conduct towards the fetus during pregnancy does not appear to impede women's equal status. The author's suggestion that states should develop special criminal laws for prosecuting expectant fathers, however, implicitly supports prosecution of pregnant women for harming their fetuses. This approach is clearly detrimental to women's equality as it conceptualizes the woman and the fetus as two distinct entities with conflicting interests, a position that this paper rejects.

73. See *People v. Smith*, 129 Cal. Rptr. 498 (Cal. Ct. App. 1976) (holding that the relevant statute only applied to viable fetuses). *Smith* choked, kicked, and hit his pregnant wife while yelling, "Bleed, baby, bleed." His wife later miscarried. See *id.* at 500; *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983) (holding that, for prosecution, the murder victim must be born alive). *Hollis* caused his wife to miscarry by forcing his hand up her vagina after telling her he did not want the baby she was carrying. See *id.* at 61. But see MINN. STAT. § 609.2661 (1987) (stating that whoever intentionally causes the death of a fetus is guilty of murder of an unborn child in the first degree and subject to life imprisonment. This statute does not include the pregnant woman or her doctor, thereby protecting her right to have an abortion, but does subject others to prosecution for harming her fetus.). In North Dakota, a person is guilty of a Class A misdemeanor if the person willfully assaults a pregnant woman and inflicts bodily injury upon the fetus. N.D. CENT. CODE § 12.1-17.1-06 (1995). Virginia prosecutes, as a Class Four felony, third parties, along with the pregnant woman, who administer drugs or other substances with the intent to destroy the fetus. VA. CODE ANN. § 18.2-71 (Michie 1996). Licensed doctors are exempted from this law. VA. CODE ANN. §§ 18.2-72, 18.2-73; cf. *People v. Davis*, 19 Cal. Rptr. 2d 96, 100 (Cal. Ct. App. 1993) (rejecting *Smith* and holding that viability is not an element in fetacide). *Davis'* convictions of murder of a fetus during the course of a robbery, assault with a firearm, and robbery were reversed because of prejudicial error in the jury instructions. See *id.* at 98; *State v. Knapp*, 843 S.W.2d. 345 (Mo. 1992) (holding that causing the death of a fetus is causing the death of a "person" within the meaning of the involuntary manslaughter statute). While driving drunk, *Knapp* caused an automobile collision with a pregnant woman, killing the fetus. See *id.* at 346.



prior to conception. The state might also require men and women who prove to be unfit parents to take mandatory birth control, a seemingly alarming possibility. As previously discussed, states have promulgated each of these types of laws with one alteration—they are directed exclusively at women.<sup>74</sup> Notably, when directed at men, these laws sound like preposterous invasions of privacy and abuses of state power. The absence of proposals to apply such laws to men, or even serious societal debate about their efficacy, works to maintain the status quo of male control over female reproduction. For this reason, feminists must start exploring the assumptions that support these inequalities.

## 2. Workplace Regulations

Like the legislatures and courts that argue for criminal prosecution of pregnant women, companies that expose their workers to health risks often cite fetal protection goals as a basis for discriminating against women in the workplace.<sup>75</sup> In 1978, the management of American Cyanamid Company adopted a fetal protection policy and informed certain affected women workers that women who did not undergo surgical sterilization would be fired or transferred to lower paying jobs.<sup>76</sup> In response to this policy, Betty Riggs, a twenty-six year old mother of one who intended to have more children, submitted to surgical sterilization in order to save her job.<sup>77</sup> Betty's union sued American Cyanamid, arguing that the policy constituted a hazard within the meaning of the Occupational Safety and Health Act.<sup>78</sup> The United States Court of Appeals for the District of Columbia Circuit held that the policy was not a hazard because women were able to choose whether to undergo sterilization and therefore were not exposed to the risk in the performance of their jobs.<sup>79</sup>

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74. See Chavkin, Walker, & Paone, *supra* note 40, at 306, 308.

75. See *Oil, Chem. & Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444, 446 (D.C. Cir. 1984) (explaining the purpose of the company's policy).

76. See *id.* at 446. The management extended the deadline for sterilization but never significantly altered its policy. See *id.* (providing a history of the company policy). Approximately thirty women were employed at the plant; after implementation of the new policy, only seven jobs were available to fertile women. See *id.* at 446.

77. Four other women also chose sterilization; two who did not were transferred to lower paying positions. See *id.* After Betty underwent sterilization, her job was eliminated. See David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 105-06 (1992) (recounting worker testimony).

78. See *American Cyanamid*, 741 F.2d at 444.

79. See *id.* at 449.

In 1982, after Congress passed the Pregnancy Discrimination Act,<sup>80</sup> Johnson Controls, a battery manufacturer, initiated a policy excluding pregnant women and "all women except those whose infertility was medically documented,"<sup>81</sup> from jobs which exposed them to raw lead.<sup>82</sup> As a justification for its policy, the company cited the risk of lead poisoning to fetuses.<sup>83</sup> The data the company relied on in formulating this policy also showed that lead poisoning might be passed to fetuses through lead-exposed sperm.<sup>84</sup> However, men were not excluded from any jobs based on this data.<sup>85</sup> As with drug use, the link between unhealthy fetuses and lead-exposed sperm is more tenuous because less research has been devoted to it than to maternal exposure to lead.<sup>86</sup> Additionally, most industries avoid the uncertainty of the data on sperm by resorting to perceptions of sex roles, for instance by assuming that harm to fetuses naturally occurs during pregnancy, not prior to conception.<sup>87</sup>

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80. Congress passed the Pregnancy Discrimination Act to amend Title VII of the Civil Rights Act of 1964 so it would include pregnancy. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988). The passage of the Act was the culmination of a long series of cases dealing with workplace benefits, but was passed as a direct response to *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977), in which the Supreme Court held that an employer's disability plan that provided non-occupational sickness and accident benefit coverage but not pregnancy-related coverage was not a sex-based classification because not all women become pregnant. *General Electric* followed an earlier Supreme Court case in which the Court reasoned that a California disability insurance program that did not pay benefits for pregnancy and childbirth was not invidiously discriminatory because the program differentiated between pregnant people and non-pregnant people, not between men and women. See *Geduldig v. Aiello*, 417 U.S. 484 (1974). Thus, the Court concluded, the Equal Protection Clause was not violated because non-pregnant persons of both sexes received benefits under the plan. See *id.* at 496-97. *Geduldig* illustrates one shortcoming of the current equal protection approach to gender equality. Not only did the Court's reasoning overlook the reality that *only women* become pregnant, but it also overlooked the reality that *only women* were denied benefits based on their unique ability to become pregnant. Thus, while the Court correctly concluded that both pregnant and non-pregnant people receive benefits, it apparently did not find it relevant that *only* pregnant people are denied a benefit.

81. *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 192 (1991).

82. See *id.* at 191.

83. See *id.*

84. See *id.* at 198 (holding that the policy violated Title VII because the gender-based classification was discriminatory).

85. See *id.* at 188 (describing how the policy was not neutrally applied).

86. See Davis, Friedler, Mattison, and Morris, *supra* note 62, at 291 (analyzing research on the effects of exposure to toxins on sperm); Irene Figa-Talamanca, Valene Dell'Orco, Alessandra Pupì, Franco Dondero, Loredana Gandini, Andrea Lenzi, Francesco Lombardo, Patrizia Scavalli, and Giancarlo Mancini, *Fertility and Semen Quality of Workers Exposed to High Temperatures in the Ceramics Industry*, 6 REPROD. TOXICOLOGY 517, 517 (1992) (discussing the results of a study which found some impairment of sperm quality after exposure to high temperatures).

87. See Kirp, *supra* note 77, at 113 (commenting on employers' tendency to assume women's physiology is more relevant to fetal health). As one physician testified: "If you don't look for a problem, you don't find it." *Id.* at 118. This sentiment is echoed by Chavkin, Walker, & Paone, *supra* note 40, at 289, who state: "The absence of extensive human evidence should be

One male Johnson Controls employee asked for a three month unpaid leave of absence in order to father a healthy child.<sup>88</sup> The company denied the request and told him he could quit if he was anxious about passing lead poisoning to his fetus.<sup>89</sup> Considering that Johnson Controls was aware of the risk posed to future fetuses through contaminated sperm,<sup>90</sup> it is hard to see how the female-only exclusion policy might rationally be considered a fetal protection policy. Nonetheless, both the District Court and the Court of Appeals denied the Union's claim that the policy violated the Pregnancy Discrimination Amendment to Title VII.<sup>91</sup> The Supreme Court of the United States reversed the Court of Appeals and held that Johnson Controls' policy did violate Title VII because the company could not prove that the policy was a bona fide occupational qualification related to the central mission of the employer's business.<sup>92</sup>

*a. A Common Sense Analysis of Fetal Protection Laws*

In reaching its conclusion, the Supreme Court pointed out that Johnson Controls was aware that lead exposure might pose a health threat to both female and male workers and their unborn children.<sup>93</sup> Therefore, because women were similarly situated to men with regard to their reproductive health, the Court found no reason why women, and not men, should be excluded from certain jobs.<sup>94</sup> In this regard, the decision seems to support the position that the state, or an employer, may not legitimately override women's decisions about the health of her fetus or potential fetus. By extension, the decision might also stand for the proposition that the woman's interests do not conflict with those of the fetus.

Additionally, the decision avoided one potential pitfall. It did not consider the company's purportedly benevolent motive in implementing the policy. Instead, the Court found that it was a facially

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interpreted as a deficiency in research rather than an absence of male-mediated adverse reproductive outcomes." *Id.* at 289.

88. See *International Union v. Johnson Controls*, 499 U.S. 187, 192 (1991); Kirp, *supra* note 77, at 116 (explaining that Johnson Controls dismissed its own research showing that men exposed to high levels of lead posed a risk to any fetus they fathered).

89. See Kirp, *supra* note 77, at 116-17 (describing the testimony of male plaintiffs).

90. See *Johnson Controls*, 499 U.S. at 198.

91. See *id.* at 187.

92. See *id.* at 203-04; see also Kirp, *supra* note 77, at 127 (discussing the Court's bona fide occupational qualification analysis).

93. See *Johnson Controls*, 499 U.S. at 188.

94. See *id.* at 187.

discriminatory policy that did not "withhold a benefit from men,"<sup>95</sup> but rather imposed a burden on women.<sup>96</sup> Although subtle, this point is important because of the paternalistic tendency of courts to characterize discriminatory practices against women as benefits.<sup>97</sup> Justice Blackmun clearly rejected this line of reasoning when he wrote, "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities."<sup>98</sup> In these ways, the decision does advance the feminist quest for reproductive autonomy.

Although the Court's decision has far-reaching implications for women's equal employment opportunities, closer scrutiny reveals that the decision has serious limitations. First, the decision essentially seeks to equalize the situation by applying traditional notions of formal equality.<sup>99</sup> Once again, women are faced with male-defined choices, neither of which look very attractive to working women.<sup>100</sup> Women workers, just like male workers, may now either continue to work and expose themselves to toxins, or quit their jobs. One might argue that these choices are more desirable than the choice Johnson Controls originally gave their female workers—quit or become sterilized.<sup>101</sup>

From a substantive equality perspective, however, the decision fails because it does not recognize valid differences between men and women. The Court assumed that it could either provide women with the same low level of protection afforded to men, or provide them with no protection at all.<sup>102</sup> From the substantive equality standpoint advocated here, courts *should* consider gender differences when in-

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95. *Id.* at 187-88.

96. *See id.* at 188 (discussing the absence of a malevolent motive).

97. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 636-38 (1975) (deciding a case in which a benefit was automatically granted to women but denied to men because women were assumed to be dependent and therefore to need the benefit but men were assumed not to be dependent and therefore not to need the benefit); Frontiero v. Richardson, 411 U.S. 677, 680 (1975) (requiring a showing that a male spouse was dependent upon his working wife before providing the male job-related benefits automatically granted to female spouses of working men, regardless of whether the female spouse was considered dependent upon the male, on the assumption that the woman needed the extra benefits but the man did not).

98. *Johnson Controls*, 499 U.S. at 211.

99. *See id.*

100. *See* Gary Minda, *Title VII At the Crossroads of Employment Discrimination Law and Postmodern Feminist Theory*, United Auto Workers v. Johnson Controls, Inc. and Its Implications for the Women's Rights Movement, 11 ST. LOUIS U. PUB. L. REV. 89, 133 (1992) (critiquing the *Johnson Controls* rationale from a postmodern feminist perspective).

101. Commenting on Betty Riggs' and others' decision to become sterilized, Judge Bork stated, "I suppose that they were glad to have the choice." Kirp, *supra* note 77, at 129.

102. *See Johnson Controls*, 499 U.S. at 187.

interpreting discriminatory statutes. They should not, however, assign social values to those differences or force women to be more like men in order to have legally cognizable interests.

Because of this judicial myopia, the *Johnson Controls* Court did not consider the underlying issue of occupational health and safety, which affects both men and women.<sup>103</sup> For instance, the Court could have required Johnson Controls to equalize the treatment of men and women by not exposing either to harmful levels of lead. Johnson Controls would then have had the choice to either develop safer ways of working with lead or shut down that part or all of its operation. Johnson Controls would have made this decision based on its best commercial judgment. Ironically, because Johnson Controls discriminated only against its female workers, the nature of the lawsuit itself provided the basis for allowing it to continue its unsafe practices.

Although protecting potential life is a worthwhile goal by many people's standards, states have sought to achieve this goal in invidiously discriminatory ways, leading to the subordination of women.<sup>104</sup> Because of the under-inclusiveness of state attempts at fetal protection, these policies have arguably produced only marginal effects on the well-being of fetuses.<sup>105</sup> Thus, women's equality has been sacrificed for an ill-defined social goal and misguided methods of achieving that goal.

#### IV. A PROPOSAL FOR AN ALTERNATIVE APPROACH TO REPRODUCTIVE RIGHTS

The current feminist focus on abortion poses two crucial obstacles to women's equality. First, it diverts feminists from questioning the basic assumption that men contribute less meaningfully to reproduction and fetal health, allowing these important issues to go unaddressed. Second, focusing on abortion introduces another entity — the fetus — into the analysis. The existence of the fetus not only makes the issue emotionally and morally charged, but also gives the state an "interest" which ostensibly justifies its involvement in the woman's pregnancy.<sup>106</sup> No comparable situation exists in which a fa-

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103. *See id.*

104. *See* Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981) (discussing employment policies that protect the fetus but discriminate against women).

105. *See id.* at 657 (asserting that a pregnant woman can be exposed to toxic substances through contact with an exposed male worker).

106. *See* *Roe v. Wade*, 410 U.S. 113, 148 (1973) (discussing the state's interest in safeguard-

ther's rights and interests are balanced against that of his fetus even though he has contributed equally to its creation.

To achieve the feminist goal of substantive equality, analysis of reproductive rights must begin before a fetus is created, at the point when men and women are truly equal reproductive beings. This approach attempts to reduce the analysis to a straightforward comparison of male and female reproductive rights, before a fetus exists. The central thesis of this approach is that prior to the conception of a fetus, the state may not regulate male and female reproductive behavior to differing degrees. In short, because the state does not regulate male contributions to reproduction, it cannot legitimately regulate the female analog.

*A. Recognizing the Male Contribution to Reproduction and Fetal Health*

Much of the regulation of female reproductivity is carried out under the guise of fetal protection.<sup>107</sup> Whether or not this objective is legitimate, it has subordinated women by denying them equal protection under the law, relegating them to the less powerful private sphere, and subjecting them to undue state involvement in decision-making.<sup>108</sup> Fetal protection rationales are based on the largely unexplored premise that women contribute more significantly to fetal health than men. Contrary to this assumption, however, research indicates that male exposure to controlled substances and toxins is harmful to fetuses.<sup>109</sup> Additionally, men can and do intentionally harm fetuses by physically abusing the mother.<sup>110</sup> The state does nothing to prevent these types of fetal harms *specifically* as fetal harms. In a system devoted to achieving substantive equality between the sexes, this under-inclusiveness would be impermissible. Feminists

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ing a woman's health and in protecting potential life); *Planned Parenthood v. Casey*, 505 U.S. 833, 833 (1992) (explaining that the state has an interest in potential human life which allows the state to regulate or proscribe abortion).

107. See *Casey*, 505 U.S. at 833 (1992) (granting the state the right to restrict abortion because of its interest in protecting potential life).

108. See *id.* (recognizing a state interest in fetal life earlier in the pregnancy and thus further limiting a woman's right to obtain an abortion).

109. See *International Union v. Johnson Controls*, 680 F. Supp. 309, 310 (E.D. Wis. 1988) (stating that there is dispute as to whether there is a significant risk of harm to the fetus from lead exposure and whether that risk, if it exists, is substantially confined to females as opposed to males); Schroedel & Peretz, *supra* note 49, at 343 (summarizing research showing that alcohol, tobacco, and illegal drugs harm sperm). Compare *Johnson Controls*, 680 F. Supp. at 311 (setting forth Professor Legator's statements that lead poses a threat to both men and women and that lead probably causes a genetic lesion during spermatogenesis), with *id.* at 310 (relating that expert witness Dr. Scialli is aware of no studies indicating that male blood lead levels of up to 50 micrograms result in any abnormalities in offspring).

110. See *supra* note 73.

must critically examine these assumptions which underlie much of the social control over women's reproductive autonomy.

In order to achieve equality for women, feminists must exercise their imaginations to expand the reproductive rights analysis to recognize the male contribution to reproduction. One danger of this recognition is that one could use it to justify a correlating expansion of father's rights. The approach advocated here avoids this danger, because it only requires the law to recognize that males *do* in fact possess reproductive functions that are not regulated by the state, which, in turn, should lead not to an increase in fathers' rights, but to a decrease in state regulation of women's reproduction. That is, because the rationale behind this approach focuses on achieving equal power for women, it does not support the notion of an increase in male involvement in women's reproductive lives.

Fathers' rights must not be broadened because to do so would justify the imposition of fathers' judgment on women's pregnancy-related decisions, thereby threatening women's reproductive autonomy. By contrast, merely exposing the equal contributions of men to reproduction and fetal health destroys the myth of women's greater contribution to fetal health prior to conception. This exposure destroys the basis for the current rationale for treating women differently based solely on their ability to become pregnant. In short, the state has no legitimate basis for regulating only half of the potentially reproductive beings.

It bears repeating that this approach is offered only as a starting point for limiting state involvement in reproduction. After conception, however, any defensible theory must address the existence of that third entity — the fetus. Given the advocacy of state neutrality argued for up to this point, what rationale exists for *any* regulation of abortion? The next section suggests some principles which may begin to answer this question in a way more meaningful than privacy and equal protection solutions have offered.

### *B. The Limits of State Involvement in Pregnancy Related Decisions*

Under this proposal, medical regulations of pregnancy would not be immediately suspect, but the state must offer an articulable reason for any such law. The state has a legitimate interest in promoting public health and therefore may regulate medical procedures.<sup>111</sup>

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111. See, e.g., ARIZ. REV. STAT. § 12-561 (1996) (allowing a suit for medical malpractice if the doctor did not obtain the patient's consent before rendering health care); ME. REV. STAT. ANN. tit. 24, § 2905 (West 1996) (outlining the circumstances under which consent to medical treat-

Health regulations should consider the uniqueness of pregnant women. To do otherwise is to deny reality. However, the state must place limitations on the parameters of this power. Accordingly, this proposal suggests that the state may not assert the protection of fetal life as a basis for regulations, as it does under the current regime.

This proposed restriction against state-enforced fetal protection measures prevents the state from diminishing pregnant women's rights by balancing them against the purported interests of her fetus. A pregnant woman, of course, is free to consider the health of her fetus paramount to her own health or personal concerns. In the interests of women's equality, this must be a personal decision, made only by the mother and whomever she chooses to involve.<sup>112</sup> Fetal health must no longer be achieved through state-enforced prioritization of rights, but rather through a recognition that maternal and fetal health are inextricably intertwined, because in most cases, a mother's health is not at odds with fetal health.

### 1. Abortion Regulations

In order to promote women's equality, abortion regulations must consider only the health of the mother, not the fetus. Because of the emotional impact of abortion, the definition of maternal health must include mental health.<sup>113</sup> For instance, based on the evidence of the harm some women suffer from undergoing abortions, physicians may exercise their independent medical judgment and choose to advise patients about these potential emotional harms.<sup>114</sup> Likewise, physi-

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ment is not necessary); OR. REV. STAT. § 677.097 (1996) (setting forth the procedures to be used to obtain informed consent from patients).

112. In this respect, at least, this proposal is similar to the common law of abortion, which deferred to the mother's judgment by criminalizing abortion only after "quickening," the point when the mother perceived fetal movement. See Siegel, *supra* note 37, at 281-82. Prior to quickening, the law considered the fetus to be part of the mother. See generally *Roe v. Wade*, 410 U.S. 113, 135 (1973). By all indications, prior to the Civil War, abortion was never considered a homicide, nor was it firmly established as a crime. See Siegel, *supra* note 37, at 281-82.

113. Early judicial decisions concerning abortion included psychological well-being in their definitions of maternal health. See *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973) (approving a statute which requires the physician to consider physical and psychological factors). The *Roe* Court explicitly considered the psychological harms of unwanted pregnancies. See *Roe*, 410 U.S. at 153 (discussing the harms of forced maternity). The *Casey* decision significantly curtailed these protections, allowing the state to go so far as to show the woman literature describing the fetus and encouraging the woman not to have an abortion, in spite of the documented harms of both unwanted pregnancies and the woman's perception of the fetus as a "baby." See *Planned Parenthood v. Casey*, 505 U.S. 833, 883-84 (1992); see also Kolbert & Miller, *supra* note 31, at 153 (describing the great degree of state involvement in abortion decisions after the *Casey* decision).

114. See Steinberg, *supra* note 10, at 490-92 (listing factors placing women at risk for post-abortion trauma).



cians may advise women about the likelihood of emotional harm from experiencing an unwanted pregnancy.<sup>115</sup> A woman, however, must make the final decision about whether to undergo the procedure, just as she would be required to do for any other medical decision.

This proposal alters the current state of the law which allows states to make blanket abortion regulations, practically rendering the abortion right nonexistent and limiting physicians' ability to exercise their medical judgment.<sup>116</sup> This approach respects women's judgment and allows every woman's internal moral standards to govern her decisions of whether and when to terminate her pregnancy. It does not assume that every woman would agree that late term abortions are repugnant or immoral, while it still allows the inherent ambiguities in defining when a fetus becomes a person. In short, it treats women as autonomous, responsible individuals while recognizing the distinctiveness of the abortion right.

## 2. *Regulating Pregnancy*

Similarly, if the mother intends to carry the fetus to term, the state may not impose its judgment on the mother's pregnancy-related decisions. Additionally, the state may not implement laws that consider the fetus a separate entity from the mother whose interests contradict her own. These restrictions would largely preclude fetal protection as a basis for criminal sanctions against pregnant women who use drugs, as well as precluding state endorsement of workplace regulations designed to protect fetal life.

Feminists should encourage a societal recognition that what is good for the mother is most often good for the fetus. Accordingly, resources should not focus on punishing pregnant women or limiting their employment-related options, but rather on providing resources which enable pregnant women to understand the effects their actions have on their fetuses. In practical terms, this would mean a shift from condemning and prosecuting pregnant drug users to providing meaningful drug use prevention programs and birth control options. Additionally, government and industry should focus on providing safe workplaces, rather than expecting women alone to

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115. Women who experience unwanted pregnancies are at greater risk for depression and being physically abused. See Brown & Eisenberg, *supra* note 7, at 1332 (summarizing research on the harms of unintended pregnancy). Also, both women and men risk economic hardship, the dissolution of relationships, and failure to attain personal goals. See *id.* at 1332.

116. See *Casey*, 505 U.S. at 833.

bear the economic burden of being forced out of employment because of potential risks to fetuses.

### V. CONCLUSION

This paper attempts to initiate a broader strategy to the pregnancy problem than the current focus on the abortion right allows. Focusing on the abortion right has limited the efficacy of the feminist project in two important ways. It has helped perpetuate the myth that male contributions to reproduction are legally, medically, and socially insignificant. This myth constitutes the fundamental basis of the current social system of reproductive regulation. Additionally, it has required women to suppress their emotional discomfort with the abortion right because to acknowledge it would provide ammunition to those who wish to abrogate the right altogether. This denial has negatively impacted women as a group and has contributed to making abortion the divisive issue it is today. Therefore, feminist theorists must exercise their powers of imagination to broaden the scope of analysis, rather than continuing to work within the confines of the traditional privacy and equal protection doctrines.

Feminist legal theorists have been extremely successful in translating theories of equality into practical methods of expanding women's rights under the law. Feminism has improved the quality of life and increased the range of opportunities available to women, yet the pregnancy problem remains one of the final obstacles to true equality. Feminist legal theory is equipped to meet this challenge through its unique ability to imagine.