

# Prosecuting the Womb

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*At the core of the modern Western political tradition lies the notion that there are certain things government should not do, certain places it should not go—except in the most extreme circumstances. In referring to these figurative “things” and “places,” people often use the language of “fundamental rights.”*

—Guido Calabresi<sup>1</sup>

*[T]he prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.*

—Justice William O. Douglas<sup>2</sup>

In May 2008, shortly before the publication of this Article, the South Carolina Supreme Court, in a unanimous decision, reversed the conviction of Regina McKnight, five years after upholding her convic-

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This Article engages difficult questions that relate to fetal disability, maternal responsibility, drug use, assisted reproduction technology (“ART”), and state response. The relationship between these issues may not be wholly obvious, particularly as the attempt here is to make a philosophical point as much as a legal observation as to how the State expends its policing resources to protect fetal health. Thus, the Article should not be read as indifferent to the ills caused by maternal drug abuse, nor as a rallying cry against ART. Rather, this project unpacks the normative implications of selective fetal harm initiatives and disparately policing reproduction.

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<sup>1</sup> Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 81 (1991).

<sup>2</sup> *Robinson v. California*, 370 U.S. 660, 678 (1962) (Douglas, J., concurring).

tion on a controversial drug conviction.<sup>3</sup> Ms. McKnight, an indigent Black woman, was sentenced for “homicide by child abuse,” in 2003, and became the first woman to be prosecuted and convicted in the United States for giving birth to a stillborn baby.<sup>4</sup> McKnight had no prior convictions, but her drug use during pregnancy violated a recently enacted South Carolina law.<sup>5</sup> The statute was enforced almost as a strict liability rule; prosecutors never proved that McKnight’s drug use actually caused the miscarriage. The State simply showed that there was one dead baby. If the state’s interest was to protect babies from being born dead, surely there were many more babies to rescue and mothers to convict. But the state’s zeal to incarcerate Ms. McKnight evinces other motives. For example, the State continued to pursue the prosecution despite the fact that miscarriages and stillbirths are caused by any number of factors ranging from assisted reproduction and alcohol abuse to obesity and secondhand smoke. Recent studies demonstrate that even a father’s age influences whether a baby might be born alive or dead.<sup>6</sup> According to a study published in the Archives of General Psychiatry, increased paternal age is also linked to autism and other disabilities.<sup>7</sup>

Recent high tech, high-publicity births, including that of Brianna Morrison’s sextuplets, raise an interesting point of comparison to the womb policing taking place in states across the country. In June of 2007, Ms. Morrison gave birth to six babies after using fertility drugs, including Follistim.<sup>8</sup> These drugs help to stimulate the ovaries and

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<sup>3</sup> McKnight v. State, 661 S.E.2d 354, 356–57 (S.C. 2008).

<sup>4</sup> State v. McKnight, 576 S.E.2d 168, 171 (S.C. 2003), *cert. denied*, 540 U.S. 819 (2003); see also Shalini Bhargava, *Challenging Punishment and Privatization: A Response to the Conviction of Regina McKnight*, 39 HARV. C.R.-C.L. L. REV. 513, 517 (2004).

<sup>5</sup> McKnight was convicted under S.C. CODE ANN. § 16-3-85(A)(1) (2007), pursuant to which “[a] person is guilty of homicide by child abuse” if he or she “causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life . . . .”

<sup>6</sup> See, e.g., Andrew J. Wyrobek et al., *Advancing Age Has Differential Effects on DNA Damage, Chromatin Integrity, Gene Mutations, and Aneuploidies in Sperm*, 103 PROCEEDINGS OF NAT’L ACAD. SCI. U.S. AM. 9601 (2006), available at <http://www.pnas.org/content/103/25/9601.full.pdfhtml>; Karl Kleinhaus et al., *Paternal Age and Spontaneous Abortion*, 108 OBSTETRICS & GYNECOLOGY 369 (2006).

<sup>7</sup> Abraham Reichenberg et al., *Advancing Paternal Age and Autism*, 63 ARCHIVES OF GEN. PSYCHIATRY 1026, 1032 (2006); see also Richard M. Goodman, *Problems in Medical Genetic Services as Viewed from Israel*, 99 PUB. HEALTH REP. 460, 460 (1984); *Older Dads Six Times More Likely to Have Autistic Children*, THIS IS LONDON, Apr. 9, 2006, <http://www.thisislondon.co.uk/news/article-23365716-details/Older+dads+six+times+more+likely+to+have+autistic+children/article.do>.

<sup>8</sup> See *Third Minnesota Sextuplet Dies*, FOXNEWS.COM, June 18, 2007, <http://www.foxnews.com/story/0,2933,282732,00.html>. Follistim is produced using genetic recombinant technology

have been linked to risky multiple births. When it became clear during the gestation that the fetuses were at serious risk, Morrison's doctors encouraged her to selectively reduce.<sup>9</sup> By selective reduction her doctors expected that most of the fetuses would survive to viability, but without the procedure, it was clear that some if not all would die.<sup>10</sup> Morrison and her husband refused to follow her doctor's advice, saying that their situation was a miracle, and in God's hands. "For us," Ryan Morrison said, "there's no difference between a fetus that's undeveloped and a baby."<sup>11</sup> Each was in critical condition after birth, subject to a battery of medical tests, treatments, and living with the aid of respirators and feeding tubes.<sup>12</sup> Six weeks after their births, all but one had died.<sup>13</sup>

For Ms. Morrison, there were prayers, interviews, blogs devoted to every update about her children's health status, Web sites, many donations, and sympathy. For Ms. McKnight, there was only a twenty-year prison sentence.<sup>14</sup> Are the women so different? Didn't they both take risks, knowing that their fetuses might be affected by their behaviors, specifically the drugs they consumed?

Playing in the backdrop of McKnight's prosecution was another danger to the unborn that seemingly slipped under the state's reproduction radar: Assisted Reproduction Technology ("ART").<sup>15</sup> In a re-

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and administered subcutaneously. Follistim Home Page, <http://www.follistim.com/consumer/index.asp> (last visited Sept. 5, 2008).

<sup>9</sup> Peter J. Smith, *Couple Chooses Life and Sextuplets*, LIFE SITE NEWS.COM, June 12, 2007, <http://www.lifesitenews.com/ldn/2007/jun/07061207.html>.

<sup>10</sup> *Special Delivery: Morrison Sextuplets Born Early*, WCCO.COM, June 12, 2007, <http://wcco.com/topstories/Brianna.Morrison.sextuplets.2.368106.html> [hereinafter *Special Delivery*].

<sup>11</sup> *Id.*

<sup>12</sup> Chris Kahn, *Sextuplets in Arizona and Minnesota*, FOX NEWS.COM, June 11, 2007, <http://www.foxnews.com/wires/2007Jun11/0,4670,SextupletBoom,00.html>.

<sup>13</sup> *Fifth Minn. Sextuplet Dies*, MSNBC.COM, July 23, 2007, <http://www.msnbc.msn.com/id/19919224>.

<sup>14</sup> McKnight's sentence was later reduced to twelve years. See *Petition Filed Today Seeking U.S. Supreme Court Review of Unprecedented South Carolina Decision Treating a Woman Who Suffered a Stillbirth as a Murderer*, NAT'L ADVOCS. FOR PREGNANT WOMEN, May 27, 2003, [http://advocatesforpregnantwomen.org/main/publications/articles\\_and\\_reports/petition\\_filed\\_today\\_seeking\\_us\\_supreme\\_court\\_review\\_of\\_unprecedented\\_south\\_carolina\\_decision\\_treating\\_a\\_woman\\_who\\_suffered\\_a\\_stillbirth\\_as\\_a\\_murderer.php](http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/petition_filed_today_seeking_us_supreme_court_review_of_unprecedented_south_carolina_decision_treating_a_woman_who_suffered_a_stillbirth_as_a_murderer.php).

<sup>15</sup> "ART includes all fertility treatments in which both eggs and sperm are handled. In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory and returning them to the woman's body or donating them to another woman. [ART does] not include treatments in which only sperm are handled (i.e., intrauterine—or artificial—insemination) or procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved." CDC, Assisted Reproductive Technology: Home, <http://www.cdc.gov/art> (last visited Sept. 5, 2008).

port issued by the Centers for Disease Control (“CDC”) in 2002, South Carolina was reported as one of the few states where over seventy percent of the births to women over thirty-five resulted in multiples.<sup>16</sup> The report emphasized that “ART-related multiple births are an increasingly important public health problem nationally and in many states.”<sup>17</sup> For the years covered in the study, the multiple-infant birth rate for all live-birth deliveries was three percent; however, live-birth deliveries resulting from ART procedures in South Carolina produced multiples fifty-six percent of the time.<sup>18</sup> Triplet and higher-order births were 100 times more likely than the national average of 0.16%.<sup>19</sup> These numbers are troubling because multiple births often produce low birthweight babies and carry greater risks for spontaneous abortions, cerebral palsy, hearing and sight impairment, mental retardation, chronic lung disease and higher rates of post-birth morbidity.<sup>20</sup>

What these statistics do not reveal is the high “failure” rates associated with ART.<sup>21</sup> Thus, while most of the ART-enabled gestations

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<sup>16</sup> L.A. Schieve et al., *Use of Assisted Reproductive Technology—United States, 1996 and 1998*, 51 MORBIDITY & MORTALITY WKLY. REP. 97 (2002), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5105a2.htm>. Multiple births increase the risk of low birthweight babies. *Id.* In South Carolina, approximately ten percent of annual births are to low birthweight babies. Low Weight Live Births in South Carolina (2002–2004), [http://www.ors2.state.sc.us/abstract/chapter17/vitalstat2\\_07.php](http://www.ors2.state.sc.us/abstract/chapter17/vitalstat2_07.php) (last visited Sept. 5, 2008).

<sup>17</sup> Schieve, *supra* note 16, at 97.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> David BenEzra, *In-Vitro Fertilisation and Retinoblastoma*, 361 LANCET 273, 273 (2003) (positing that “a high frequency of cytogenetic abnormalities and errors in cell-cycle regulation are detected in oocytes generated from IVF or intracytoplasmic sperm injection”); *see also* Fiona Bruinsma et al., *Incidence of Cancer in Children Born After In-Vitro Fertilization*, 15 HUM. REPROD. 604, 604 (2000); Ruwan Wimalasundera & Nicholas M. Fisk, *In Vitro Fertilisation and Risk of Multiple Pregnancy*, 359 LANCET 414, 414 (2002) (reporting the increased risk of multiple pregnancies among women who use IVF); Bo Stromberg et al., *Neurological Sequelae in Children Born After In-Vitro Fertilisation: A Population-Based Study*, 359 LANCET 461, 461 (2002). Dr. Stromberg and his colleagues found:

Children born after IVF are more likely to need habilitation services than controls (odds ratio 1.7, 95% CI 1.3–2.2). For singletons, the risk was 1.4 (1.0–2.1). The most common neurological diagnosis was cerebral palsy, for which children born after IVF had an increased risk of 3.7 (2.0–6.6), and IVF singletons of 2.8 (1.3–5.8). Suspected developmental delay was increased four-fold (1.9–8.3) in children born after IVF. Twins born after IVF did not differ from control twins with respect to risk of neurological sequelae. Low-birthweight and premature infants were more likely to need habilitation than fullterm babies.

*Id.*

<sup>21</sup> Of the 97,442 fresh nondonor ART cycles started in 2005, thirty-four percent resulted in pregnancy, and only twenty-seven percent resulted in live births. CDC, ASSISTED REPRODUCTION TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 25

that resulted in actual births in South Carolina resulted in multiples, the failure rate associated with ART is sixty-six percent, meaning well over half of the embryo/fetuses will never be born. Failed pregnancies are deeply traumatizing for the families involved and ART-related failures are no exception, especially when they result in miscarriages and still births.

The difference between McKnight's traumatic story and that of other couples, such as the Morrisons that utilized ART, might seem obvious at a glance: one woman was arrested and incarcerated because she violated a criminal statute, while the other woman was simply desperate to become a mother, so desperate that the measures she took resulted in the deaths of her five children. But on deeper inspection, there is a persistent question that arises from the juxtaposition of these stories, a question that relates to power, privilege, and the rational relationship between the state's legislation and its enforcement practices. If what states care about is ensuring the health of fetuses and promoting their development to birth, then why focus only on pregnant drug addicts like McKnight? Multiple birth ART babies are eight times more likely (in South Carolina) to be born low birthweight,<sup>22</sup> and low birthweight babies are forty times more likely to die during the first few months of life.<sup>23</sup> If the health and birthweight of babies is what underlies state motivations to prosecute mothers who consume drugs during gestation, why are women like Morrison allowed to pursue these risky therapies with virtually no state interference?

The difference in treatment might be explained by examining the political ideology that seems to underpin fetal drug laws ("FDLs"). Simply put, communitarianism holds that the needs and interests of society should prevail over those of an individual. Birthing "the right way" becomes more relevant according to a communitarian approach to lawmaking.<sup>24</sup> Under that approach, assumptions about an individual's possession and ownership of her body are subordinated to the state's interest in the "common good" and its desire to save certain

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(2005), available at <http://www.cdc.gov/art/ART2005/download.htm> [hereinafter CDC 2005 ART SUCCESS RATES].

<sup>22</sup> See MedCost SmartStarts Maternity Education Program, <http://www.medcost.com/prenatal/statistics.htm> (last visited Sept. 5, 2008); see also March of Dimes, Low Birthweight Among Multiple Deliveries: South Carolina, 1995–2005, <http://www.marchofdimes.com/peristats/level1.aspx?dv=ls&reg=45&top=4&stop=182&lev=1&slev=4&obj=1> (last visited Sept. 5, 2008).

<sup>23</sup> See MedCost SmartStarts Maternity Education Program, <http://www.medcost.com/prenatal/statistics.htm> (last visited Sept. 5, 2008).

<sup>24</sup> See *infra* Part I.

fetuses while promoting programs to reduce or eliminate the likelihood that others will be born.<sup>25</sup> A state's communitarian approach to reproduction is laid bare by who it "polices" and why. For pregnant women like McKnight, the state's ex post intervention in her pregnancy might seem justified if wombs are subject to conscription or under the "ownership" of the state. But wombs are not community property.

State ownership of wombs does not comport with our common law and constitutional traditions, which staunchly protect a person's right to individual autonomy and bodily integrity. Even in the most tragic circumstances, the state cannot force an innocent bystander to render aid to a person in distress; nor can the state force a relative to surrender an organ to a family member in need.<sup>26</sup> In the reproductive context, thousands of infertile couples yearn for children, but states cannot legally compel women with more than two children to surrender one or two to the state to help infertile couples achieve their dream (even if a child might be better off with the new family). Nor does the state possess the constitutional authority to force very fertile men and women to reproduce even when a larger population might inure to the benefit of the state.

If anything, Americans have come to understand and rely on the existence of a bright line that constrains and prevents the state from peeping into the intimate spheres of their lives, especially their bedrooms. The last hurdle to this type of liberation from state interference happened to be with homosexual sex in *Lawrence v. Texas*,<sup>27</sup> but privacy in the bedroom for the individual was well established before then.<sup>28</sup> Pregnant women expect no less privacy protection than other women, or their husbands and boyfriends.

If this is correct, then it is time to reconsider the normative and public policy implications of FDLs. This Article urges reconsidering the value of FDLs and explains why states should be more wary about

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<sup>25</sup> See *Buck v. Bell*, 130 S.E. 516, 520 (Va. 1925) (upholding a Virginia statute providing for the sterilization of inmates found to be "insane, idiotic, imbecile, feeble-minded, or epileptic, and . . . is the probable potential parent of socially inadequate offspring likewise afflicted.").

<sup>26</sup> See *Yania v. Bigan*, 155 A.2d 343, 346 (Pa. 1959) (refusing to impose liability on defendant for failure to render aid in a drowning death); *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (Pa. Com. Pl. 1978) (refusing to require the defendant to undergo a bone marrow transplant for the benefit of plaintiff, defendant's close relative).

<sup>27</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>28</sup> See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (recognizing as fundamental the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy); *Loving v. Virginia* 388 U.S. 1 (1967).

prosecuting such cases especially in the absence of a more consistent approach, which treats harm caused to babies by parental conduct more uniformly. The Article argues that the communitarian approach to regulating reproduction leads to inconsistent outcomes, unintended consequences, distributional unevenness, decreased utility, and economic inefficiencies. Even if the primary goal of FDLs were simply to incarcerate poor women of reproductive age, the transactional costs are too steep with very little social welfare achieved. After all, FDLs are *ex post* measures triggered by pregnancies, but such rules do not prevent pregnancies.

In fact, FDLs do little to tell us about harms to fetuses as these laws exempt from prosecution a host of behaviors that negatively impact pregnancies and cause miscarriages, such as smoking, second-hand smoke, diabetes, obesity, depression, and hypertension. Indeed, a good number of FDLs have exemptions for legal abortions so that they may remain consistent with *Roe v. Wade*.<sup>29</sup> Thus, the distributional consequences (incarceration, humiliation, and separation from family), map unevenly across the spectrum of parents who behave in ways that expose developing fetuses to harm. Other potentially high-risk types of reproduction and pregnancy, including in vitro fertilization and pre-implantation diagnosis, are exempt from this type of government intervention.

From a social justice perspective, the distributional consequences of FDLs impair fundamental rights of some women more than others. Indeed, that such rules target women at all warrants serious scrutiny, and indicates the imbalanced distributional consequences. A 2006 peer-reviewed study published in the *Journal of Obstetrics and Gynecology* points out that pregnancies from men older than forty are sixty percent more likely to terminate in a miscarriage than men between the ages of twenty-five and twenty-nine.<sup>30</sup>

Policing wombs brings private, intimate spaces into the public theatre, creating spectacles of poor, pregnant women and their children; and this public humiliation functions to visually inscribe these women's place in the social hierarchy.<sup>31</sup> This Article contemplates how we might reconsider these negative externalities relative to the

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<sup>29</sup> See 18 U.S.C. § 1841 (2006); see also Carolyn B. Ramsey, *Restructuring the Debate over Fetal Homicide Laws*, 67 OHIO ST. L.J. 721, 734 n.55 (suggesting that seventy percent of FDLs have exemptions).

<sup>30</sup> Kleinhaus, *supra* note 6, at 374.

<sup>31</sup> See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 30–31 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (suggesting public punishment serves multiple purposes, including the creation of spectacle, shaming, and the assertion and demonstration of power); Joel F. Handler,

public policy interests that FDLs support. One approach to address the gaps caused by FDLs might be to equalize punishment. Under this approach the state might criminalize all parental behaviors that result in youth/child/fetus exposure to harmful substances and behaviors whether or not an actual injury or harm materializes. In this way, regulating the risky behavior of parents sheds its gendered focus on women and implicates fathers and boyfriends. Or the state might engage in education and rehabilitation programs rather than incarceration, helping families to recover, while not burdening the state with the expenses of incarceration, indefinite foster care, and the collateral and social costs of children growing up with mothers in prison.

This Article argues that the reproductive policing efforts of the past twenty years are consistent with a communitarian approach to reproduction. The Article sheds light on the inconsistencies of this approach to behavior policing, which tends to disfavor (or treat in a more punitive manner) the less sophisticated, less powerful members of society—in this case, drug-addicted, poor women of color—and yet ignores the risks posed to fetuses by wealthier would-be parents who use sophisticated, expensive reproductive technologies in their attempts to reproduce.

This Article makes several claims. First, policing reproduction by way of FDLs will likely have a chilling effect on drug dependent women seeking prenatal care.<sup>32</sup> By reducing the expectation of privacy in the intimate spheres of reproductive care, women who most need prenatal assistance will likely avoid hospital dragnets. Women who associate prenatal treatment with police searches and criminal prosecution will likely be deterred from seeking the care necessary for fetal development. Opportunities for intervention and treatment will likely be significantly diminished as a consequence of tethering prenatal services to fetal inspections.

Second, FDLs are an arbitrary means of regulating risks to fetuses. Such laws are underinclusive as they target poor women and ignore the risky high income-bracket pregnancies where prescribed medications are abused as well as pregnancies that rely on assisted

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*“Constructing the Political Spectacle”*: *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 *BROOK. L. REV.* 899, 929–31 (1990).

<sup>32</sup> According to researcher Carolyn Carter, “[u]ncomfortable relationships with health care providers and fear of reprisal on the part of pregnant women who are addicted make women four times less likely to receive adequate care thereby creating health risks for women who are addicted, their unborn fetuses, and their other children.” Carolyn Carter, *Prenatal Care for Women Who Are Addicted: Implications for Empowerment*, 27 *HEALTH & SOC. WORK* 166, 167 (2002).

reproductive technologies.<sup>33</sup> But more, what about boyfriends and husbands? In a recent study conducted by Dr. Stephen G. Grant, he and his fellow researchers concluded that exposure to secondhand smoke during pregnancy can be just as detrimental to a developing fetus as primary exposure through maternal smoking.<sup>34</sup> The types of harms resulting from secondhand smoke can then be confused with risks that might be associated with primary smoking, including, “birth weight and susceptibility to . . . diseases, such as cancer”<sup>35</sup> and miscarriage.

Third, FDLs establish and perpetuate disturbing medico-legal trends by normalizing and possibly incentivizing breaches in fiduciary obligations.<sup>36</sup> Physicians in these hospitals are reduced to the role of drug informants or snitches and the physician-patient relationship is reduced to nothing higher than candy-shop owner-consumer relationship.

Fourth, FDLs pose economic and efficiency problems. FDL incarcerations penalize children and burden the state with childcare costs. States also assume the financial burden of incarcerating (feeding, clothing, and housing) and providing medical care for women who are otherwise fit to work. But perhaps more importantly, FDLs do not restore or support the family unit to which the child belongs. Studies demonstrate the seemingly irreversible negative effects on children with incarcerated parents.<sup>37</sup>

At the heart of the critique this Article offers is the observation that the right and access to parenting may be deeply unsettled and over a sustained period was deeply contested. The writing of this Article happens to coincide with the hundredth anniversary of the first eugenics legislation in the United States and recent legislative apologies for eugenics.<sup>38</sup> Part I provides a brief critique of communitarian

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<sup>33</sup> For example, in 1999, Lynn Paltrow expressed concern that prosecutors were disproportionately targeting low-income women of color for cocaine use during pregnancy, although minority women are not the only drug users and prenatal cocaine exposure arguably poses lower risks to the fetus than maternal alcohol and nicotine use. Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1002–05 (1999).

<sup>34</sup> Stephen G. Grant, *Qualitatively and Quantitatively Similar Effects of Active and Passive Maternal Tobacco Smoke Exposure on In Utero Mutagenesis at the HPRT Locus*, 5 BMC PEDIATRICS 20 (2005), available at <http://www.biomedcentral.com/1471-2431/5/20>.

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451, 451–55 (2000).

<sup>37</sup> See, e.g., Travis A. Fritsch & John D. Burkhead, *Behavioral Reactions of Children to Parental Absence Due to Imprisonment*, 30 FAM. REL. 83, 87 (1981).

<sup>38</sup> Gayle White, *Plan for Master Race Was Dead End*, ATLANTA J.-CONST., July 8, 2007, at

rulemaking. This Part argues that the draw of communitarianism is equally its undoing. Part I also argues that, as appealing as aspects of communitarian philosophy might be, there are dangers, including a fundamental flaw in how people are perceived as well as the notion that democracy can better be served by group proxies.<sup>39</sup>

In Part II, I suggest that a communitarian approach to fetal health protection, which focuses exclusively on drug choice, seems erratic and arbitrary. That type of pregnancy policing ignores the many ways in which fetuses are harmed by behavior other than drug usage, whether legal or illegal. This Part explores the racialized impact of FDLs, and draws from earlier examples of communitarian policing to demonstrate that vertical hierarchies are reified rather than destabilized by communitarian rulemaking. Part III unpacks the historical roots of treating women's reproductive capacity as communal property. It illumines the darker side of reproductive policing advanced during slavery and the eugenics laws of the twentieth century.

By way of contrast, Part IV scrutinizes what these dynamics mean in the realm of assisted reproduction. In this Part, I examine how race, wealth, and religion influence our normative understandings of mothering, and shape our notions of who qualifies as an appropriate mother. Section B of this Part examines the risks to fetuses resulting from assisted reproduction technologies. Part V analyzes the normative implications that emanate from selectively monitoring, policing, and prosecuting women based on gestational conduct. Part VI concludes with some brief reflections.<sup>40</sup>

### I. *The Communitarian Approach*

*We should not treat violence, drug abuse, illegitimacy, promiscuity, abusive attitudes toward people of different backgrounds, alcoholism, poor academic performance, and other social maladies as isolated phenomena. They reflect several*

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D1 (discussing Georgia's sterilization laws and the state's recent apologies for those laws); *A Shameful Legacy*, INDIANAPOLIS STAR, Apr. 8, 2007, at 1 (discussing Indiana's passage of the world's first sterilization law).

<sup>39</sup> See, e.g., Derek E. Brown, "A Land of Strangers": *Communitarianism and the Rejuvenation of Intermediate Associations*, 28 PEPP. L. REV. 941 (2001) (describing some of the foundational tenets of communitarianism and the role of the group in relation to democratic principles).

<sup>40</sup> It is important to disclose the questions this Article does not seek to answer. For example, the Article does not address the empirical question of whether poor women have access to sophisticated reproductive medicines and technologies like ART. Sure some do and most do not. Nor does the Article conceptualize parenting as a responsibility or right that all must share and, therefore, as one that the state is obligated to provide. My thoughts on that very provocative subject are reserved for a future paper.

*social factors, but key among them is weakness of character—the inability to resist temptation and adhere to prosocial values.*

—Amitai Etzioni<sup>41</sup>

#### A. *Communitarianism Applied*

A communitarian approach to lawmaking has made a resurgence in the delivery ward.<sup>42</sup> At the heart of communitarianism is the notion that a successful, cohesive community is bound by a shared moral order and a cohesive set of cultural values.<sup>43</sup> Both aspects, moral order and shared values, are expressed in communitarian philosophy and its counterpart communitarian political ideology.

Communitarianism is characterized by a focus on the wider political society, cooperation, socially constructed reason, mutual interdependence, intracommunity trust, values of tradition, settlement, shared beliefs, and an assumed comprehension and agreement on fundamental values.<sup>44</sup> Most importantly, a communitarian approach to rulemaking promotes community (government) as serving a central role in negotiating a set of ethics and developing policies that legislate predetermined values. At a glance, it might seem that there is little to resist in a constructive model of communitarian rulemaking. Its adherents point to a breakdown in social values and mores, and suggest a remedy that emphasizes the power of social institutions like families, churches, schools, and fraternal organizations to bring about change.<sup>45</sup>

Specifically, as explained by Etzioni, one of the leading proponents of a revived communitarian movement, “[c]ommunitarians

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<sup>41</sup> Amitai Etzioni, *A Communitarian Position on Character Education*, in BRINGING IN A NEW ERA IN CHARACTER EDUCATION 113 (William Damon ed. 2002).

<sup>42</sup> See generally MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 147–72 (1982); Simon Caney, *Liberalism and Communitarianism: A Misconceived Debate*, 40 POL. STUD. 273 (2006). Communitarianism dictates that the needs and interests of society should prevail over those of the individual. Its origins, or at least the name, can be traced back to John Goodwyn Barmby’s socioreligious efforts in the nineteenth century. Barmby’s personal objections to Victorian era politics were answered by his burning interest in communism and socialism. Barmby and his followers formed the Universal Communitarian Association, which later morphed into a religious movement and church. Some communitarian philosophers date its fundamental tenets back to biblical times, while others emphasize the current movement as solidifying a coherent set of ideas and principles. See BARBARA TAYLOR, EVE AND THE NEW JERUSALEM: SOCIALISM AND FEMINISM IN THE NINETEENTH CENTURY 172–82 (1983).

<sup>43</sup> See AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: THE REINVENTION OF AMERICAN SOCIETY 25 (1993).

<sup>44</sup> See ELIZABETH FRAZER, THE PROBLEMS OF COMMUNITARIAN POLITICS: UNITY AND CONFLICT 1–2 (1999).

<sup>45</sup> See Etzioni, *supra* note 41, at 114.

maintain that values do not fly on their own wings” and “[t]o shore up our moral foundations attention must be paid to social institutions that undergird our values,” including “family, schools, the community (including voluntary associations and places of worship) and society (as a community of communities).”<sup>46</sup> Intuitively, a collectivist ethic organized around a shared set of values that responds to uplifting communities, respect for neighbors, and pays attention to social mechanisms that undermine the welfare of the collective seems sensible. I find considerable legitimacy in Etzioni’s observation that America’s moral and social fabric is weakening: “Too often we demand rights without assuming responsibilities, pursue entitlements while shying away from obligations.”<sup>47</sup>

Communitarians critique libertarianism for not depicting the “real world,” and valuing formal equality, rationality, and autonomy and its inattention to the social mechanisms of disadvantage and dominance.<sup>48</sup> Unpacked further, libertarianism is criticized for a failure to pay attention to how “social processes construct” classes and groups “at the outset as unequally endowed.”<sup>49</sup> Frazer’s critique is that “unless these processes of initial endowment are understood by liberal theorists and brought within their theories, their models will fail to predict or identify the kinds of inequality that characterize modern societies.”<sup>50</sup>

However, Frazer’s critical analysis of libertarianism must necessarily extend to communitarianism because such failings are not inherent (or exclusive) to libertarianism, but can be mapped on to other political philosophies, particularly communitarianism. Frazer acknowledges the dynamics inherent in communitarianism that undermine individual freedoms and that “overlook . . . community,”<sup>51</sup> particularly if one’s subcommunity is marked by disabling characteris-

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 113.

<sup>48</sup> *See generally* FRAZER, *supra* note 44.

<sup>49</sup> *Id.* at 1.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1–2. Frazer notes that:

Communitarian theorists tend to emphasize the communal construction of social individuals and social formations. A problem is that these constructive processes themselves need to be analysed in terms of power—power which can account for when individuals manage to reconstruct their circumstances, when they move from context to context, when they get trapped, when they rest content. Communitarians, that is, overlook precisely the politics of “community”—to such an extent . . . that communitarianism barely looks like a political theory at all.

*Id.*

tics and disadvantages. The difficulty with embracing communitarianism has as much to do with how it fails to do what it purports to do.<sup>52</sup> Communities are corruptible and coercive, and prone to political process malfunctions. This is especially true when democratic principles are neglected, or become conflated with conflict, enmity, or notions of self-serving, anticommunity, insularity, and wholesale disavowal of communities. Democracy in such contexts becomes more illusory than real in proportion to the gravity of the features (ability, race, ethnicity, gender, education) that attach to nonelites. Guilt, shame, and retribution seem the natural (and fully anticipated) consequences of any attempts to seek identity.

The draw of communitarianism is equally its undoing. Whose ethics should prevail? As appealing as aspects of communitarian philosophy might be, there are dangers, including a fundamental flaw in how people are perceived and the notion that democracy can better be served by group proxies. William Sites offers an insightful example of the “self-limiting aspects” of communitarianism.<sup>53</sup> His observations are born from research involving a community development initiative in Chicago’s Humboldt Park area and illumine what he describes as a troubling reluctance to consider political action as a strategy in response to pressures to gentrify the neighborhood.<sup>54</sup> In cases such as these, he suggests that communitarian conceptions of community building or strengthening will fail and provide a weak theoretic foundation for community development to the extent that they limit or rule out political articulation of rights based demands.<sup>55</sup>

Yet this failure, which Sites refers to, of communitarian ethics’ inability to articulate rights-based demands in community development contexts, may in fact emanate from using groups as proxies for democracy. Concessions are necessarily to be made when groups operate by consensus; individualism naturally suffers, and so too possibly leadership. The unitary tradition of communitarianism has been criticized for its leanings towards essentialism and majoritarian politics. After all, the essentialist underpinnings of communitarianism might lead one to believe that all women, all Blacks, all white men, all gays, or all of any particular community would understand, embrace, and

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<sup>52</sup> See, e.g., SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS* 68–89 (1992).

<sup>53</sup> William Sites, *Communitarian Theory and Community Development in the United States*, 33 *COMMUNITY DEV. J.* 57, 63 (1998).

<sup>54</sup> *Id.* at 59–63.

<sup>55</sup> *Id.* at 63.

vote on “their” issues in a monolithic way, or that women and men see their interests as fully aligned and without distinction. The assumption here is that groups marked by a history of discrimination would overcome that legacy and not suffer additional, new forms of invidious discrimination in a communitarian model that will tend to replicate power dynamics and vertical hierarchies.

Adeno Addis articulates this concern differently.<sup>56</sup> He suggests that the unitary tradition of communitarianism necessarily implicates problematic institutional norms in the way of assimilation.<sup>57</sup> His concern is for ethnic minorities, and while he argues that “the only plausible way to understand the notion of ethnic rights is to conceive of it as being a right of a group,” he recognizes that the “notion of a cultural right becomes necessary because of the existence of cultural domination.”<sup>58</sup> The question then is whether cultural domination vanishes under a communitarian model, or persists such that ethnic minorities or other minority groups are forced to assimilate or succumb.

The point at which I disagree with Addis, however, is on the question of internal group dynamics. Communitarianism even at the micro level (within ethnic minority communities), will demand the same loyalty to intragroup hierarchies, consensus, and assimilation of thought as its broader counterpart within the larger community.

Despite a rather distinguished cadre of proponents, including Etzioni, Robert Putnam, Mary Ann Glendon, Jean Bethke Elshtain, and friends of the movement like Michael Sandel and Charles Taylor, communitarianism’s inherent weaknesses are revealed by a tendency toward authoritarianism and power sharing dominated by powerful elites. To be sure, Etzioni and others attempt to distinguish their brand of communitarianism as more progressive, and thus standing in

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<sup>56</sup> Addis takes a critical view of “[t]he political responses of dominant groups (regimes) to ethnic minorities” in general. Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 619 (1991). He argues that the responses within both the individual and communitarian models take one of three forms: assimilation, negation, and pluralism. *Id.* Within the framework of negation, majorities, he argues, will want to “totally annihilate [minorities],” and as an example points to Hitler. Within the framework of assimilation, Addis argues that majorities will demand acquiescence to majority beliefs and behaviors. This is most expediently achieved by “requiring the minority to learn the language of the majority, to follow the cultural practices of the majority, and generally to adjust its social practices and rituals to conform to those of the majority.” *Id.* at 619–20. The third response, which he refers to as pluralism, “protects the culture of minorities as the Other,” never fully opening the political process to minorities, but rather “preserving” minorities and their cultural practices “from the majority’s own actions which threaten to annihilate the minority.” *Id.* at 620.

<sup>57</sup> See *id.* at 619.

<sup>58</sup> *Id.*

contrast to its traditional roots, arguing for a responsive approach that embraces diversity.

Nevertheless, communitarianism assumes one set of values and inevitably forces one group's preferences on another, usually less-powerful group. Communitarians venerate the collectivist approach without ever really identifying the dangers that follow from organizing social principles and behaviors around a narrow set of values emanating from the elite. So, despite being presumed as a more left-leaning, emerging philosophy, communitarianism's challenge lies in overcoming the darker side of communities, which can be coercive, threatening to minorities, and indifferent to the suffering of those held in less esteem within the community. Indeed, historically, communitarianism has not worked so well for ethnic minorities or other "outcast" groups.

Communitarianism's collectivist origins are naturally at odds with classical libertarian values in at least two ways. First, libertarianism emphasizes the rights of individuals in a democracy over the will of the collective.<sup>59</sup> Second, central to libertarian philosophy is the notion that government interventions in private spheres undermine rather than promote the success and well-being of the individual. Most importantly, a libertarian ethic does not divorce itself from the community as might be assumed given its focus on the individual, but rather recognizes that the individual and community are deeply linked; a harm to the community is the collective consequence when individual rights become subordinated to unnecessary government interference and intervention.

The questions for contemporary proponents of communitarianism are who benefits from and who is harmed by this approach to rulemaking. My preference is to avoid a reductivist assessment of communitarianism, as the goal of this Article is not to provide an exposition or complete critique of the philosophy. Linda McClain,<sup>60</sup> Will Kymlicka,<sup>61</sup> and Derek L. Phillips<sup>62</sup> and others<sup>63</sup> unpack the less

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<sup>59</sup> See generally DAVID BOAZ, *LIBERTARIANISM: A PRIMER* 1–27 (1993).

<sup>60</sup> See generally Linda McClain, *Rights and Irresponsibility*, 43 *DUKE L.J.* 989 (1994).

<sup>61</sup> See generally WILL KYMLICKA, *MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY* (2007).

<sup>62</sup> See generally DEREK L. PHILLIPS, *LOOKING BACKWARD: A CRITICAL APPRAISAL OF COMMUNITARIAN THOUGHT* (1995).

<sup>63</sup> See generally *THE SOCIETY OF COMMUNITY: A SELECTION OF READINGS* (Colin Bell & Howard Newby eds., 1974).

appealing features of the philosophy, while Robert Putnam,<sup>64</sup> Alan Ehrenhalt,<sup>65</sup> and a growing set of academics and politicians point in considerable detail to its strengths.

Rather, the goal here is to confront a problematic feature of rulemaking that finds its support in a communitarian ethic or approach to lawmaking. Specifically, this Article is concerned with a relatively overlooked space in communitarian discourse that seemingly legitimizes holding reproduction and intimacy hostage to community values. In this space, women's reproduction resembles a property owned and surveilled by the larger community.<sup>66</sup>

Scholars have argued that this womb policing originated in the "Reagan-Bush war on drugs and the unprecedented media coverage of the 'crack crisis,'" which coincided with resurgence in the antiabortion movement.<sup>67</sup> Lynn Paltrow argues that "[p]regnant women became an appealing target for law enforcement officials who were losing the war on drugs and for the anti-choice forces whose goal has been to develop 'fetal rights' superior to and in conflict with the rights of women."<sup>68</sup> In fleshing out this idea further, Paltrow observes, "[p]regnant, drug-using women, portrayed as depraved, inner-city African American women who voluntarily ingested crack to poison their children, were not likely" to engender public sympathy.<sup>69</sup> In fact, a six-month study of five public health clinics and twelve private obstetrical offices in Pinellas County, Florida found that 14.1% of Black pregnant women tested positive for drug and alcohol use, compared to 15.4% of white women.<sup>70</sup> The most revealing aspect of the study was that only 1.1% of the pregnant white women testing positive for drug

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<sup>64</sup> See generally ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

<sup>65</sup> See generally ALAN EHRENHALT, *THE LOST CITY: THE FORGOTTEN VIRTUES OF COMMUNITY IN AMERICA* (1995).

<sup>66</sup> See, e.g., Calabresi, *supra* note 1, at 85 ("State laws against abortion can be seen as examples of a communitarian approach under which women's bodies—and, significantly, *only* women's bodies—are 'taken' for a common 'good,' for the sake of the lives of fetuses. The same can also be said of state rules requiring pregnant women to behave in certain ways to 'protect' an unborn child.").

<sup>67</sup> Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1019 (1999); see also, e.g., Calabresi, *supra* note 1, at 85 n.13; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Kathleen R. Sandy, *The Discrimination Inherent in America's Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack*, 54 ALA. L. REV. 665 (2003).

<sup>68</sup> Paltrow, *supra* note 67, at 1019–20.

<sup>69</sup> *Id.* at 1020.

<sup>70</sup> Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy*

use were reported to health authorities as compared to 10.7% of Black women.<sup>71</sup> In this way, pregnant Black women were a convenient scapegoat for two fervent movements, the war on drugs and the antiabortion campaign.

Yet, I am concerned about the analysis that antidrug and antiabortion campaigns were the sole cause of womb policing. Those coinciding movements may have combined to bring about a particular attention to Black women's reproduction, but the realities are that womb policing existed prior to the Reagan-Bush Administration of the 1980s as evidenced by the eugenic movements at the turn of the century and subsequent sterilization laws enacted during the period of 1950–1970. The persistence of womb policing has outlasted the Reagan and two separate Bush Administrations. In short, it is more expedient to dismiss womb policing as a phenomenon that grows out of and is maintained by conservative movements, and therefore unrelated to reproduction hierarchies within progressive movements. But, as I will argue in the next Section, progressive communitarianism and social conservative communitarianism have much in common.

#### B. *Social Conservative Communitarianism*

Why should communitarianism appeal only to progressives? Indeed, it does not. The rise in social conservatism cannot be attributed to a classical libertarian approach to social policy and law, but rather a communitarian model that is relational to the country, state, and local community. The Republican-led *Contract with America*—in image, expression, and vernacular—precisely appealed to social conservatives because it embraced collective values rather than liberal individualism.<sup>72</sup> Social conservatives find much appeal in the commitment to virtue, emphasis on community, an individual's reciprocal relationship to (and dependence on) her church, school, social clubs, and other institutions that define their communities. In both (progressive and social conservative) communitarian models, individualism runs counter to the expectation of a strong unified community and potentially destabilizes cooperative ordering.

The commonalities between social conservative and progressive brands of communitarianism may not be so intense as to render their

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and *Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 *NEW ENG. J. MED.* 1202, 1202 (1990).

<sup>71</sup> *Id.* at 1204.

<sup>72</sup> See Linda C. McClain, "Irresponsible" *Reproduction*, 47 *HASTINGS L.J.* 339, 375–79 (1996).

differences insignificant. However, recognizing the similarities between these approaches and what those ties signify for those who presume that the two movements are distinct (with different sets of values, beliefs, and operations), helps to illuminate the way(s) in which both approaches may bleed into and influence the other. This is a particularly important observation for the “critical” movements that often align by affinities based on race, gender, sex (and sexuality), and ability, but define themselves against social conservatism and claim to reject conservative principles.

Operationally, however, conservative and progressive communitarian approaches to evaluating a commitment to “the movement,” are demonstrably similar in the same way as enforced tenets, expectations of loyalty, and punishment of outliers (by means of ridicule, disparagement, and repudiation). If this is true, the commitment to cohesions on which the communitarian approach thrives cannot survive diversity (within either approach). For example, within the critical feminist approach, breakdowns result from the desire to define and embrace the cult of true womanhood.<sup>73</sup> In this way, feminist communitarianism suffers from the effort to identify and replicate itself according to one image, model, and message. The suffragette movement in the United States is revealing on this point. Susan B. Anthony and Elizabeth Cady Stanton stridently opposed the inclusion of Black women in the movement. In the broader framework of their woman-focused struggle, Black women were tolerated participants, but only to the extent that those from a slave legacy recognized and accepted a second-class status among the community of their “more enlightened” feminist peers.<sup>74</sup>

Critical communitarian approaches of all types fall captive to this perversity. In the context of race, one can quickly be introduced, scrutinized, and dismissed from the “community” for a failure to meet a sufficient threshold of authenticity,<sup>75</sup> demonstrating that communitar-

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<sup>73</sup> BARBARA WELTER, *DIMITY CONVICTIONS: THE AMERICAN WOMAN IN THE NINETEENTH CENTURY* 21–42 (1976).

<sup>74</sup> See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 177 (2001); Elizabeth Cady Stanton, *Gerrit Smith on Petitions*, *REVOLUTION*, Jan. 14, 1869, at 24–25 (1869), reprinted in *THE ELIZABETH CADY STANTON-SUSAN B. ANTHONY READER: CORRESPONDENCE, WRITINGS AND SPEECHES* 120 (Ellen Carol DuBois ed., 1992) (noting that enfranchising blacks without enfranchising women would allow that “every type and shade of degraded, ignorant manhood should be enfranchised, before even the higher classes of womanhood should be admitted to the polls”); see also Ellen Carol DuBois, *Introduction, Part Two: 1861–1873*, in *THE ELIZABETH CADY STANTON-SUSAN B. ANTHONY READER: CORRESPONDENCE, WRITINGS AND SPEECHES* 88, 92 (Ellen Carol DuBois ed., 1992).

<sup>75</sup> See generally Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice*

ian politics can play out in perverse and divisive ways even at the very local level. In an excellent article reviewing Justice Thomas's jurisprudence, Professor Angela Onuawichi-Willig reveals the tensions and stereotypes that conservative Blacks experience within Black communities, but also pushback and stereotyping among their conservative colleagues. On this point she argues, there is no basis for the claim that Justice Thomas is a "Scalia clone" or "Scalia puppet" and supports the proposition that Justice Thomas has been unfairly subjected to the stereotype of Black incompetence.<sup>76</sup>

Recent political contests highlight the ways in which authenticity politics create factions among racial groups and destabilize the notion and appearance of a cohesive racial identity.<sup>77</sup> The "is he Black enough" politics arising from Black communities and ironically from some white commentators regarding Barack Obama's presidential bid capture this phenomenon.<sup>78</sup> If all of this is true, what it exposes are the ways in which vertical hierarchies function and dominate in conservative as well as progressive communitarian models. The irony is that vertical hierarchies may be more pronounced and less anticipated in contemporary progressive, "critical" movements. To the extent that feminist communitarians, for example, perceive their movement as grounded in egalitarian assumptions about the equal status of all women, it might be difficult to become fully conscious of the ways in which the model breaks down, be it in relation to work status, economic status, sexuality status, religious orientation, or race status.<sup>79</sup>

Angela Harris, in her often-cited article on race and essentialism in feminist legal theory, discusses the metaphor of voice and how

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*Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005); Spencer Overton, *The Threat Diversity Poses to African Americans: A Black Nationalist Critique of Outsider Ideology*, 37 HOW. L.J. 465, 478-85 (1994); Clarence Thomas, *No Room at the Inn: The Loneliness of the Black Conservative*, in BLACK AND RIGHT: THE BOLD NEW VOICE OF BLACK CONSERVATIVES IN AMERICA 8 (Stan Faryna et al. eds., 1997).

<sup>76</sup> Onwuachi-Willig, *supra* note 75, at 938.

<sup>77</sup> Three recent political contests for U.S. Democratic primaries are examples of this phenomenon. In 2002, Cynthia McKinney ran a racialized campaign against Denise Majette for a seat in Georgia. The campaign was animated by the question of which candidate was more authentically aligned with Blacks although both women are Black. A few years later, a similar phenomenon occurred in the Illinois contest for the U.S. Senate between Barack Obama and Alan Keyes.

<sup>78</sup> Hillary Clinton's campaign bears this out as well. Both media and social pressure to appeal to a notion of the vulnerable woman demonstrate the ways in which gender essentialism matters within the larger political structure. Ironically, an emotional moment for Senator Clinton while in New Hampshire is credited with giving a bounce to her campaign.

<sup>79</sup> See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

“post-essentialist feminism can benefit . . . from the abandonment of the quest for a unitary self.”<sup>80</sup> The critiques, then, that emanate from critical communities about social conservatism undermining race, gender, or sexual orientation interests, victimizing its members, and oppressing its subgroups, deserves introspection within the progressive communitarian model, which defines itself against oppression, but often functions to subjugate the undesirable among the people it purports to include in an egalitarian community. Let us now examine what this means in the context of fetal harm laws.

## II. Arbitrary Communitarianism: Scapegoats and Others

*All of us—all who knew her—felt so wholesome after we cleaned ourselves on her. We were so beautiful when we stood astride her ugliness. Her simplicity decorated us, her guilt sanctified us, her pain made us glow with health, her awkwardness made us think we had sense of humor. Her inarticulateness made us believe we were eloquent. Her poverty kept us generous . . . . We honed our egos on her, padded our characters with her frailty, and yawned in fantasy of our strength.*

—Toni Morrison<sup>81</sup>

*The irony is that anyone who knows anything about maternal care in prisons would never send a pregnant woman there to protect the fetus.*

—Jean Reith Schroedel & Paul Peretz<sup>82</sup>

### A. *Quid Pro Quo Reproductive Ethics*

In recent years, subsidized prenatal care has been tethered to invasive medical information sharing.<sup>83</sup> Women’s relationships with their healthcare providers take on a *quid pro quo* character: the poor pregnant women agree to conform their behavior to a communitarian expectation, and as a result should anticipate less, or perhaps no, privacy when using government funded prenatal care. Specifically, in exchange for prenatal treatment at government-funded hospitals, pregnant women should assume that blood tests, urine samples, and other medical information will be divulged to police and prosecutors at the whim of doctors and nurses expressly for the purpose of punish-

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<sup>80</sup> *Id.* at 610.

<sup>81</sup> TONI MORRISON, *THE BLUEST EYE* 205 (1970).

<sup>82</sup> Jean Reith Schroedel & Paul Peretz, *A Gender Analysis of Policy Formation: The Case of Fetal Abuse*, 19 J. HEALTH POL. POL’Y & L. 335, 350 (1994).

<sup>83</sup> *See, e.g., State v. McKnight*, 576 S.E.2d 168, 176, 178 (S.C. 2003).

ing pregnant women for the ways in which they behave.<sup>84</sup> South Carolina became the first state to prosecute mothers pursuant to a fetal drug use policy, and thus serves as the focal point for the discussion below.<sup>85</sup>

Like Regina McKnight, Paula Hale was a rape victim and a drug addict.<sup>86</sup> Neither she nor McKnight had ever received rape counseling for the trauma, and like other women and girls with sexual violence histories, they turned to illegal drugs.<sup>87</sup> Hale's pregnancy was the result of that rape, and when she sought treatment at the only hospital she knew to serve poor Black women like her—the Medical University of South Carolina—“no one bothered to link her with an appropriate drug treatment program or a trauma institute,” but instead the nurses and doctors collected evidence of her drug use to turn over to police and prosecutors.<sup>88</sup> As with the twenty-eight other Black women snagged by the MUSC, Hale was “dragged out of the hospital in chains and shackles.”<sup>89</sup> To Lynn Paltrow, Executive Director of National Advocates for Pregnant Women, these haunting episodes conjured images of slavery.<sup>90</sup> Indeed, race seemed to dominate every aspect of pregnant patients' treatment at MUSC. All the women who were turned over to police for using illegal drugs during pregnancy were Black, with the exception of one white patient.<sup>91</sup> However, hospital officials made sure to note on her chart that the white patient “lives with her boyfriend who is a Negro.”<sup>92</sup>

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<sup>84</sup> A developing body of scholarship suggests that greater transparency and information sharing can actually be beneficial to the poor and to minorities in particular. The thrust of this recent scholarship is that greater transparency and information sharing might change institutional behavior and ultimately discourage discriminatory behavior by exposing those who engage in bad or criminal behavior—and therefore distinguishing them from the larger, more harmless, members of their subgroup. See Lior Strahilevitz, “How's My Driving?” *For Everyone (and Everything?)*, 81 N.Y.U. L. REV. 1699, 1759–65 (2006).

<sup>85</sup> See *McKnight*, 576 S.E.2d at 168.

<sup>86</sup> NAT'L ADVOC. FOR PREGNANT WOMEN, SOUTH CAROLINA: FIRST IN THE NATION FOR ARRESTING AFRICAN-AMERICAN PREGNANT WOMEN—LAST IN THE NATION FOR FUNDING DRUG AND ALCOHOL TREATMENT (2003), <http://advocatesforpregnantwomen.org/issues/briefingpaper.htm> [hereinafter *FIRST IN THE NATION*].

<sup>87</sup> *Id.*; Renae D. Duncan et al., *Childhood Physical Assault as a Risk Factor for PTSD, Depression, and Substance Abuse: Findings from a National Survey*, 66 AM. J. ORTHOPSYCHIATRY 437, 443 (1996); Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment: Toward an Integrated Approach*, 19 J. LEGAL MED. 471, 475–76 (1998).

<sup>88</sup> *FIRST IN THE NATION*, *supra* note 86.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

Drug abuse is a quotidian phenomenon. As states codify measures to prosecute women for drug use during pregnancy, what becomes clear is that such rules are not intended to be universalized and applied to all women.<sup>93</sup> States appear less interested in an empirically relevant approach to protecting all fetuses even in the context of drug use. FDLs disregard drug *abuse* during pregnancy, which would increase the pool of women under community/state inspection, but instead focus only on illegal drug *use*. As a result, FDLs can be said to focus more on policing drug choice than paying attention to fetal health. Any logic in such an approach quickly disappears under close inspection. If the community's focus is truly about the health of fetuses, then drug *choice* among mothers should be irrelevant. If this is true, policing drug choice is an approach that ensnares pregnant women according to which drugs they use, rather than the fact that they use drugs. You could call it a form of pruning out the weeds from the flowers.

A communitarian approach to fetal health protection which focuses exclusively on drug choice seems as erratic and arbitrary as focusing on race. And to the extent that such policies focus primarily on populations for whom there is less social sympathy, they are easily ignored. But FDL pregnancy policing also ignores the many ways in which fetuses are harmed by behaviors and exposures other than drug usage, whether legal or illegal, and the higher incidence of fetal and maternal mortality in poor, racial minority communities where there has been no drug use.<sup>94</sup> According to John M. Wallace, Jr., "although the emphasis of pediatricians' and many other helping professionals' work focuses on individuals and individual-level behaviors, these behaviors can only be properly examined, diagnosed, and treated when they are understood in light of the community and societal contexts in which they occur."<sup>95</sup>

But here is a problem, drug abuse and usage patterns and the contexts in which they occur can best be understood only when they are studied and treated, rather than simply policed. Incarcerating poor women because of illegal drug use is not an inquiry as to the breadth of a drug abuse problem among all pregnant women, nor does

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<sup>93</sup> See Drug Policy Alliance, Race and the Drug War, <http://www.drugpolicy.org/communities/race> (last visited Sept. 5, 2008).

<sup>94</sup> In other words, the correlation between fetal death among racial minorities where drug use has been present versus when it has not is understudied.

<sup>95</sup> John M. Wallace, Jr., *The Social Ecology of Addiction: Race, Risk, and Resilience*, 103 PEDIATRICS 1122, 1122 (1990).

the policing address the abuse of *legal* drugs that can harm fetuses. For example, at the turn of the century, opiate and cocaine use was widespread among white women.<sup>96</sup> According to Fernandez, between 1885–1887, middle- and upper-income white women accounted for 56–71% of those addicted to opiates in the United States.<sup>97</sup> The Harrison Narcotics Act of 1914, which later prohibited the use of those drugs, drove much of this conduct underground.<sup>98</sup> In an appeal to distinguished members of the medical profession, Dr. John Witherspoon warned of the medical community's obligation to "save our people from the clutches of this hydra-headed monster which stalks abroad throughout the civilized world, wrecking lives and happy homes."<sup>99</sup>

Half a century later, use of tranquilizers, amphetamines, alcohol, and prescription medications followed a similar racial and gender pattern, which one could argue legalized the ability for wealthier white women to use and in some cases abuse drugs. Despite drug dependency and abuse of prescribed medications among wealthier women, drug policies in the 1960s were not focused on this type of drug problem.<sup>100</sup> Nor have more recent efforts to police maternal drug abuse taken into account the abuse of legal drugs as a public health matter. The disparate state involvement among the classes of drug abusers results in a distorted racial gap, and undermines the *intent* of FDL policies—which are fetus-focused.

Fetuses are harmed by any number of substances and behaviors that predictably are not policed in communities that most passionately seek to "save the fetus." But much can be learned by the choices that

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<sup>96</sup> HUMBERTO FERNANDEZ, HEROIN 16 (1998); *see also* JULIAN DURLACHER, HEROIN: ITS HISTORY AND LORE 8 (2000).

<sup>97</sup> *Id.* at 20. Interestingly, sixty percent of the heroin related arrests in Portland, Oregon, were Chinese.

<sup>98</sup> FERNANDEZ, *supra* note 96, at 16.

<sup>99</sup> John Witherspoon, *Oration on Medicine: A Protest Against Some of the Evils in the Profession of Medicine*, 34 JAMA 1591, 1592 (1900); *see also* REPORT ON THE INTERNATIONAL OPIUM COMMISSION AND ON THE OPIUM PROBLEM AS SEEN WITHIN THE UNITED STATES AND ITS POSSESSIONS, S. DOC. NO. 61-377, at 45 (1910) (report of Hamilton Wright). For Wright, the opium drug czar of the 1910s, "[o]ne of the most unfortunate phases of the habit of opium smoking in this country [was] the large number of women who have become involved and were living as common-law wives of or cohabiting with Chinese in the Chinatowns of our various cities." *Id.* As antimiscegenation laws and social customs focused on preventing whites from cavorting with Blacks and other persons of color were strictly enforced in the United States until *Loving v. Virginia*, we can assume that Wright was not concerned about the common law relationships between Black women and Chinese men, but instead was referring to white women. Comments like Wright's were often used to incite racial animus, in this case, against the Chinese.

<sup>100</sup> Drug policies at that time did not penalize wealthier mothers for abusing drugs, nor were these women depicted as neglectful, uncaring, or irresponsible toward their children.

pregnant women make, including their drug use. For example, poor women, especially those who lack medical insurance, may tend to self-medicate to treat depression and anxiety.<sup>101</sup> The drugs that they consume will logically be those most affordable and easily accessible.<sup>102</sup> For some of those women, that will mean buying easily available illegal drugs that are sold illegally. In an Alabama study, for example, Black women were four times more likely to have cocaine/crack in their systems, however, white women were nearly twice as likely to have any drug in their systems, including marijuana and opiates.<sup>103</sup>

On the other hand, recent studies indicate that net worth influences health outcomes and sheds light on drug and alcohol abuse among whites.<sup>104</sup> These studies could dispel the notion that poor Blacks comprise the more significant users of drugs in the United States.<sup>105</sup> For example, among adults, studies indicate that “annual and current alcohol prevalences generally are highest among whites, at an intermediate level among Hispanics, and lowest among Blacks.”<sup>106</sup> Another study conducted in Baltimore indicates that among women with twelve or more years of education, white women are more likely than their Black counterparts to be heavy alcohol users.<sup>107</sup> That data, combined with studies from the National Institute

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<sup>101</sup> Beth Glover Reed, *Developing Women-Sensitive Drug Dependent Treatment Services: Why So Difficult?*, 19 J. PSYCHOACTIVE DRUGS 151, 153 (1987).

<sup>102</sup> See Lise Anglin, *Self-Identified Correlates of Problem Alcohol and Drug Use with Comparisons Between Substances*, 29 INT'L J. ADDICTIONS 285, 287 (1994); Ruth E. Davis et al., *Trauma and Addiction Experiences of African American Women*, 19 W. J. NURSING RES. 442 (1997) (explicating the overlooked causes of drug dependency among poor Black women).

<sup>103</sup> David A. Pegues et al., *Prevalence of Illicit Drugs Detected in the Urine of Women of Childbearing Age in Alabama Public Health Clinics*, 109 PUB. HEALTH REP. 530, 534 (1994).

<sup>104</sup> Craig Evan Pollack et al., *Should Health Studies Measure Wealth?: A Systematic Review*, 33 AM. J. PREVENTIVE MED. 250, 250 (2007).

<sup>105</sup> See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., RESULTS FROM THE 2001 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: VOLUME I. SUMMARY OF NATIONAL FINDINGS (2002), available at <http://www.oas.samhsa.gov/nhsda/2k1nhsda/PDF/cover.pdf>.

<sup>106</sup> John M. Wallace, Jr., *The Social Ecology of Addiction: Race, Risk, and Resilience*, 103 PEDIATRICS 1122, 1123 (1999); see also NAT'L INST. ON DRUG ABUSE, DRUG USE AMONG RACIAL/ETHNIC MINORITIES 34 (1995), available at <http://www.nida.nih.gov/pdf/minorities03.pdf>; Denise Kandel et al., *Prevalence and Demographic Correlates of Symptoms of Last Year Dependence on Alcohol, Nicotine, Marijuana and Cocaine in the U.S. Population*, 44 DRUG & ALCOHOL DEPENDENCE 11, 24 (1997) (stating that “[a]mong those who smoked [cigarettes] in the last year, blacks and Hispanics are significantly less likely than whites to be dependent, [while] among those who used cocaine/crack within the last year, blacks are more likely than any other group to be dependent”); Stephanie J. Ventura et al., *Trends and Variations in Smoking During Pregnancy and Low Birth Weight: Evidence from the Birth Certificate*, 111 PEDIATRICS 1176, 1176 (2003).

<sup>107</sup> M. Lillie-Blanton et al., *Black-White Differences in Alcohol Use by Women: Baltimore Survey Findings*, 106 PUB. HEALTH REP. 124, 124–33 (1991).

on Drug Abuse (“NIDA”), reveals that white women are more likely to smoke and abuse alcohol during pregnancies.<sup>108</sup> The NIDA study also shed some preliminary light on drug use among racial groups. For the year of the study, the NIDA survey found that an estimated 113,000 white women compared to 75,000 African American women had used illicit drugs during pregnancy.<sup>109</sup> Yet, as one study found, Black women are ten times more likely to be reported to a child welfare agency for drug use than white women.<sup>110</sup>

What does this data tell us about the ways in which state resources are utilized to respond to drug dependency among women and social policy commitments to helping fetuses? There are a few possibilities. On one hand, we could read racialized womb policing as an effort to save Black babies and ignore wealthier white babies. In this scenario we could imagine that womb policing is an *ex ante* screening device designed to predict the potential for later child neglect or abuse. Or womb policing could be seen as an economic alternative to rehabilitation. Essentially, the state has made a calculated decision that despite less efficiency, it is better to incarcerate rather than rehabilitate Black, drug addicted women. Another possibility is that despite medical studies warning against incarcerating drug addicted women, states have concluded that incarcerating drug addicted pregnant women produces a deterrent effect. Unpacked further, it is possible that states believe better prenatal resources are available to Black women in prison than through state-funded hospitals.

On the other hand, it is possible to conclude that such policies are not effective, in that arrests occur primarily among poor African Americans, while states fail to punish large swaths of the populations that are breaking the law. A revised approach, one that polices a broader spectrum of behaviors that relate to harming fetuses, would likely result in the punishment of more pregnant women, particularly white women. Yet, that approach would be rationally related to the state’s purported goals. Rather than shielding political elites within a community from the rules that ensnare poor women, such an approach might better equalize or promote democracy within the context of communitarian policing.

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<sup>108</sup> Robert Mathias, *NIDA Survey Provides First National Data on Drug Use During Pregnancy*, NIDA NOTES, Jan./Feb. 1995, [http://www.nida.nih.gov/NIDA\\_Notes/NNVol10N1/NIDA\\_Survey.html](http://www.nida.nih.gov/NIDA_Notes/NNVol10N1/NIDA_Survey.html).

<sup>109</sup> *Id.*

<sup>110</sup> Chasnoff, *supra* note 70, at 1202.

But there is something else revealed in South Carolina's version of womb policing. FDLs reveal hostility toward the privacy interests of poor, usually minority, drug addicted women. Historically, communitarian approaches to regulating reproduction have been problematic. Slave reproduction and eugenics are examples of the communitarian approaches. FDLs are no exception. They are an imperfect proxy for achieving social welfare.

FDLs are examples of a communitarian approach to rulemaking analogous to antiabortion laws in that under both types of laws "women's bodies—and significantly *only* women's bodies—are 'taken' for a common 'good' for the sake of the lives of fetuses."<sup>111</sup> There are many reasons to rethink the assumption that FDLs protect children and ultimately reduce costs to the state.

How much better off is a baby that is born in prison, or a toddler that grows up with a mother in prison? Has the state reduced the potential for long-term harm to the child or given greater value to the child's life by imprisoning its mother? The unintended consequences of this type of reproductive regulation may exacerbate far more than reduce harms to children.<sup>112</sup> Children with parents in prison are six times more likely to "go to prison."<sup>113</sup>

A clear distinction must be made. FDLs do not promote life. Nor do FDLs guarantee children a better life just as other criminal deterrents, such as capital punishment, do not promise restoration to victims' families or an improvement of their circumstances. Thus, the clarification of the state's goal is an important step in realizing what the law is designed to do as well as what it cannot (ever) accomplish.

One part of the problem here could be described as malleable boundaries or conflicting cultural perceptions of space;<sup>114</sup> another is

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<sup>111</sup> See Calabresi, *supra* note 1, at 85 n.13.

<sup>112</sup> The organization "Mentoring Children with Parents in Prison" reports that children with parents in prison are more likely to have behavioral problems. The children are more likely to experience depression, drop out of school, and engage in the type of behavior that leads to juvenile incarceration. See *Big Brothers Big Sisters/Amachi Texas and the Library of Congress Partner to Add Literacy Component to Mentoring Program for Children of Incarcerated Parents*, AMACHI TEXAS, Sept. 18, 2007, [http://www.amachi-texas.org/index.php?option=com\\_content&task=view&id=55&Itemid](http://www.amachi-texas.org/index.php?option=com_content&task=view&id=55&Itemid); Julia Crouse, *Initiative Seeking to Keep Inmates, Children Together*, HERALD-SUN (Durham, N.C.), Jan. 16, 2008, at 1; Tim Pratt, *Mentors Give Children Some Extra Attention*, EVENING SUN, June 10, 2007.

<sup>113</sup> *Id.*

<sup>114</sup> See EDWARD T. HALL, *THE HIDDEN DIMENSION* 113–25 (1969). Hall analyzes the subjective spatial dimensions that surround and define our comfort zones according to social cues. He confirms that individuals have an expectation of a certain physical distance measured from themselves to others.

emotion, even repugnance at women who engage in unhealthy activities during pregnancies. By malleable boundaries, it is important to acknowledge subtle cultural understandings about preserving and even promoting individual space. We understand that our bodies are generally safe from the intrusion of others. We can safely assume that it would be untoward and inappropriate (even a tort) to touch and rub a stranger's head, neck, or stomach. That type of bodily interference could easily fall in the category of offensive behavior. Why then does it appear that the female body when pregnant operates in a less autonomous and protected space? In pregnancy, does a woman lose her expectation of a physical border or safety zone? Surely not.

Narrative and anecdotal accounts of unwanted touching during pregnancy are well represented in blogs,<sup>115</sup> on Web sites,<sup>116</sup> and in newspaper articles.<sup>117</sup> These narratives provide insight about the embarrassment and humiliation experienced by pregnant women when their personal space or boundaries at work and in social settings are violated. As one commentator ponders it,

[s]o what is it about a pregnant belly that makes people feel comfortable with touching, grabbing, patting, and yes, groping it? It is after all, part of your body, and one of the more intimate parts—not like a shoulder, a hand or an elbow. What is it about a pregnant belly that makes people—complete strangers—feel a strange sense of ownership over it, and throw all culturally accepted notions of personal space out the window?<sup>118</sup>

Yet the sense of “ownership” that strangers may express over pregnant women or their fetuses as described by Olivia Wallace extends beyond the physical. In describing one aspect of FDLs as a physical boundary problem, I mean to suggest that spatial intrusions experienced by pregnant women are a metaphor for other types of intrusions against pregnant women that are bound in emotions.

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<sup>115</sup> See Posting of The Original Mama Bear to Baby Gaga, <http://forum.baby-gaga.com/about261070.html> (July 2) (According to one blogger discussing belly touching, “When I was pregnant I rarely let anyone touch my belly. My husband was about the only person I let touch me. It had nothing to do with old wives tales, but I didn’t feel comfortable with it. I wouldn’t let someone fondle my tummy without a baby in there so why would I with a baby in there? I guess that was my feelings.”).

<sup>116</sup> See Melissa Leonard, *Don't Touch My Belly!*, PREGNANCYANDBABY.COM, <http://pregnancyandbaby.com/pregnancy/baby/Dont-touch-my-belly-5761.htm>; Touching the Pregnant Belly, <http://www.pregnancyetc.com/touching-the-pregnant-belly.htm> (last visited Sept. 5, 2008).

<sup>117</sup> See, e.g., Candace Murphy, *A Belly Full of Insults*, COURIER MAIL (Austl.), Oct. 31, 2007, at 47.

<sup>118</sup> See Touching the Pregnant Belly, *supra* note 116.

Recent reports published in the *American Journal of Obstetrics and Gynecology* and the *Journal of Nurse and Midwifery* explain that people, including doctors and nurses, are far more critical of women's behaviors during pregnancy.<sup>119</sup> In part, the heightened awareness and attention to behavior during pregnancy has to do with a disdain for pregnant mothers who seemingly break the rules and harm the innocent. The moral authority against drug addicted women is heightened in these scenarios as the "victim" is an "innocent" fetus. In these scenarios the legal status of the fetus is not only elevated to that of the mother, it enjoys greater respect, generosity, and consideration. One author recently suggested that "[t]here can be no 'rule of law' if the Constitution continues to be interpreted to perpetuate a discriminatory legal system of separate and unequal for unborn human beings."<sup>120</sup> That women and their fetuses are bound should not be understood to make the lines concerning their behavior brighter and clearer. Rather, the boundedness of women and their fetuses demonstrates legal complications of exacting fetal rights from the women who carry them. Taken to its logical conclusion, a woman could be subject to criminal penalties for failure to provide adequate water, nourishment, or a healthy environment to a developing fetus or for attempting to save her life at a risk to the fetus.

### *B. Contested Boundaries and Distributional Effects*

Let us first consider boundaries. Imagine a pregnant woman's every sip of a caffeinated beverage, like iced tea; her bite into a chocolate chip cookie; or even a taste of a lemon-lime soda<sup>121</sup> being a crime against the state. Any reasonable lawmaker should want to flesh this out further; picture women doctors, partners at law firms, commodity traders, and those working in high-stress professions being treated as criminals—if they miscarried—because the death of a fetus is treated

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<sup>119</sup> See William A. Ramirez-Cacho et al., *Medical Students' Attitudes Toward Pregnant Women with Substance Use Disorders*, 196 AM. J. OBSTETRICS & GYNECOLOGY 86, 86–87 (2007); Theresa M. Stephany, *The Pregnant Addict: Treat or Prosecute?*, 44 J. NURSE-MIDWIFERY 154, 154 (1999) (commenting that "it is not uncommon to hear dismay or disgust expressed toward women who use drugs or alcohol while pregnant").

<sup>120</sup> Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 120 (2007).

<sup>121</sup> See Nutrition Data, 211 Foods Highest in Caffeine, <http://www.nutritiondata.com/foods-000131000000000000000000.html> (last visited Sept. 5, 2008) (listing lemon-lime soda as the thirty-seventh most caffeinated food).

as proof of either intent to harm or evidence of negligent endangerment to the fetus.

Here, then, for purposes of distributional equity, all pregnant women who expose fetuses to harmful substances would be or *should be* (according to this logic) subject to prosecution. If the twin purposes of FDLs are to reduce preventable risks to fetuses or even to lessen the incidence of low birthweight in babies, then states will exceed the boundaries of their constitutional authority, because the class will be overly broad and prosecution excessive. If justly applied, the effect of fetal harm laws would be to *discriminate* against between eighty-five and ninety percent of women (the percentage of women who are fertile). The only women exempt from prosecution for potentially harming a fetus would be infertile women, who comprise only fifteen percent of the population. The strict liability enforcement mechanism—at least as applied to McKnight—is unyielding, giving no room to consider personal or even medical externalities.

Medically and socially, the difficulty (and stress) of maintaining a pregnancy that avoids miscarriage or low birthweight delivery might be virtually impossible or too costly. This is not an argument that women are victims of their environments; rather, it is an acknowledgment that neither men nor women maintain absolute dominance over their environments. (Of course, historically women have maintained less control than men.) Here, then, a woman could be prosecuted for a miscarriage or stillbirth, but the effect (stillbirth) could be linked to any number of causes, including secondhand smoke,<sup>122</sup> domestic violence,<sup>123</sup> living in or near a toxic environment,<sup>124</sup> or the causes can be compounded and produce a negative effect.<sup>125</sup> Put another way, the

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<sup>122</sup> See L. George et al., *Environmental Tobacco Smoke and Risk of Spontaneous Abortion*, 17 EPIDEMIOLOGY 500 (2006); see also Outi Hovatta et al., *Causes of Stillbirth: A Clinicopathological Study of 243 Patients*, 90 BJOG: AN INT'L J. OF OBSTETRICS AND GYNAECOLOGY 691 (1983); Zosia Kmiotowicz, *Smoking Is Causing Impotence, Miscarriages, and Infertility*, 328 BRIT. MED. J. 7436 (2004); David Derbyshire, *Smoking Kills up to 5,000 Foetuses a Year*, TELEGRAPH.CO.UK, Dec. 2, 2004, <http://www.telegraph.co.uk/connected/main.jhtml?xml=/connected/2004/02/13/ecnsmok12.xml>.

<sup>123</sup> Leslie A. Morland, *Intimate Partner Violence and Miscarriage*, 23 J. INTERPERSONAL VIOLENCE 652 (2008).

<sup>124</sup> N.Y. STATE OFFICE OF PUBLIC HEALTH, LOVE CANAL, PUBLIC HEALTH TIME BOMB: A SPECIAL REPORT TO THE GOVERNOR AND LEGISLATURE 14 (1978); see also V.H. Borja-Aburto et al., *Blood Lead Levels Measured Prospectively and Risk of Spontaneous Abortion*, 150 AM. J. EPIDEMIOLOGY 590 (1999); Ingrid Gerhard et al., *Chlorinated Hydrocarbons in Women with Repeated Miscarriages*, 106 ENVTL. HEALTH PERSP. 675 (1998); Kathleen S. Hruska et al., *Environmental Factors in Infertility*, 43 CLINICAL OBSTETRICS & GYNECOLOGY 821 (2000); *History of Love Canal Waste Controversy*, N.Y. TIMES, May 21, 1980, at B6.

<sup>125</sup> The exact causes of stillbirth are not known, however. See Jess F. Kraus et al., *Risk*

criminal penalties associated with pregnancy would be enough to incentivize avoiding pregnancy altogether. In effect, the fear will be carrying any baby to term because it would be very difficult to opt out or control the circumstances in which harms arise during a typical pregnancy. If the risk of pregnancy means incarceration, then a likely effect of such rulemaking would be to discourage pregnancy and promote abortions, both of which are unintended and unanticipated consequences.

The constitutional burden here might best be captured and compared to poll taxes and literacy tests, which obstructed African Americans' constitutional right to vote.<sup>126</sup> Local election officials urged that such laws were facially neutral and colorblind, treating all classes as equal, and fulfilling an important state goal: having an informed electorate.<sup>127</sup> Yet, the impact was decidedly racialized, both in subtle and more obvious ways after the Civil War.<sup>128</sup> In 1877, Reconstruction in the South ended when Rutherford B. Hayes withdrew troops, expos-

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*Factors for Sudden Infant Death Syndrome in the U.S. Collaborative Perinatal Project*, 18 INT. J. EPIDEMIOLOGY 113 (1989). The compounding effect is not specifically discussed but has been alluded to in many of the smoking studies. De-Kun Li & Janet R. Daling, *Maternal Smoking, Low Birth Weight and Ethnicity in Relation to Sudden Infant Death Syndrome*, 134 AM. J. EPIDEMIOLOGY 958 (1991).

<sup>126</sup> See U.S. Dep't of Justice, Civil Rights Div., Voting Sec., Introduction to Federal Voting Rights Laws, [http://www.usdoj.gov/crt/voting/intro/intro\\_a.htm](http://www.usdoj.gov/crt/voting/intro/intro_a.htm) (last visited Sept. 5, 2008) [hereinafter Introduction to Federal Voting Rights Laws].

<sup>127</sup> See *id.* In fact, early poll taxes were considered liberal, and affected only white men—as they were the only class of persons entitled to vote in the United States prior to the Fifteenth and Nineteenth Amendments. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 684–85 (1966) (Harlan, J., dissenting). Justice Harlan recognized poll taxes as serving a rational purpose:

Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one . . . . Most of the early Colonies had [poll taxes]; many of the States have had them during much of their histories; and, whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay \$1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

*Id.*

<sup>128</sup> See *Revolution from Above*, TIME, Sept. 14, 1942, available at <http://www.time.com/time/magazine/article/0,9171,802472,00.html?iid=chix-sphere>. In this case, the law cannot be understood by divorcing it from its operation in the world, “from the law-in-action, from the living law—whether in terms of formalism or in terms of pure theory.” See Gregory Shaffer, *The “Rule of Law” in the World Trade Organization: Do the “Haves” Come out Ahead?* (Aug. 19,

ing African Americans who sought to exercise their right to vote to the intimidation and threats of white supremacist groups.<sup>129</sup> Meanwhile, southern legislatures implemented the policy of “redemption,” a process of gerrymandering districts to suppress Black voting and dilute its strength in largely Black districts.<sup>130</sup> Philip Perlmutter observes that the chilling effect on the Black vote, between 1876 and 1884, resulted in African American voter decline by one-quarter in Mississippi, one-third in Louisiana, and one-half in South Carolina.<sup>131</sup> According to the Department of Justice, by 1910, African Americans were basically excluded from the franchise.<sup>132</sup>

In 1942, *Time* magazine ran an editorial, capturing the effect of poll taxes, and noting that “after the Civil War, the Solid South turned [poll taxes] to a new purpose: keeping Negroes and white trash away from the polls.”<sup>133</sup> The Fifteenth Amendment gave ex-slaves the right to vote,<sup>134</sup> but that constitutional right became illusory and virtually meaningless at the local level, in light of extralegal externalities, including violence, intimidation, harassment and threats against families at voter registries. Southern states were resilient, quickly passing and revising legislation to disenfranchise the African American vote. Some southern states instituted “White Primaries” as a more transparent means to dictate the racial politics of voting.<sup>135</sup>

Literacy tests were a more permanent and successful means of diluting African American voting. Literacy tests accomplished the same goal as poll taxes, which was to suppress the voting of nonwhite elites, as these laws were selectively enforced and the distributional consequences mapped unevenly on Blacks as a class. Whites were selectively exempt, particularly in the South and West when literacy tests effectively replaced poll taxes.<sup>136</sup> Like fetal harm laws, literacy

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2008) (unpublished manuscript, on file with the author); see also David Nelken, *Law in Action or Living Law? Back to the Beginning Sociology of Law*, 4 *LEGAL STUD.* 157 (1984).

<sup>129</sup> See PHILIP PERLMUTTER, *LEGACY OF HATE* 101–02 (1999).

<sup>130</sup> See Introduction to Federal Voting Rights Laws, *supra* note 126.

<sup>131</sup> PERLMUTTER, *supra* note 129, at 102.

<sup>132</sup> Introduction to Federal Voting Rights Laws, *supra* note 126.

<sup>133</sup> See *Revolution from Above*, *TIME*, Sept. 14, 1942, available at <http://www.time.com/time/magazine/article/0,9171,802472,00.html?iid=chix-sphere>.

<sup>134</sup> U.S. CONST. amend. XV. Because of slavery, African Americans were not paid for their labor, and thus unable to accumulate the type of wealth that would satisfy a poll tax and translate into a voting right.

<sup>135</sup> Introduction to Federal Voting Rights Laws, *supra* note 126. The Supreme Court in *Smith v. Allwright* held that the Texas White Primary violated the Fifteenth Amendment. *Smith v. Allwright*, 321 U.S. 649, 665–66 (1944).

<sup>136</sup> See Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 *VAND. L. REV.* 881, 882 (1998) (noting that “grandfather clauses . . . had protected illiterate whites from disen-

tests were erratically enforced. Local governments were largely interested in intimidating and suppressing African American voting, particularly in southern districts that were heavily populated by Blacks. In essence, the right to vote became conditioned on an African American voter's tenacity, perseverance, and wit, on his ability to deflect violence and to maintain steadfastness so intense as to endure racial animus and the strictures of the voting process and prevail.

For instance, Alabama voting laws were notoriously restrictive and the *extralegal* violence that accompanied the voting process (in the shadow of the law) effectively disenfranchised the right to vote. The Alabama voting application was four pages long, and required that applicants swear that their answers were true under penalty of perjury.<sup>137</sup> Literacy tests bore no relationship to whether voters were actually literate or informed about the candidates seeking office, with typical questions interrogating the purpose of patents to how many witnesses must testify against a person charged with treason to support a conviction.<sup>138</sup> The political incentive to deny the Black vote led to ridiculous practices, including filtering the vote by requiring registered individuals to "vouch" for applicants.<sup>139</sup> The farce of voter policing is revealed in civil rights reports from the 1940s and 1950s that document illiterate whites conducting and scoring the testing.<sup>140</sup>

In similar fashion, if the effect of communitarian reproductive rules is to disparately target women, or at least all women who have the potential to become pregnant, which is ninety percent of the female population in the United States,<sup>141</sup> then these are regulations

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franchisement by exempting from literacy tests those persons who were enfranchised in the mid-1860s [before southern blacks received the right to vote] or who were descended from such persons").

<sup>137</sup> Veterans of the Civil Rights Movement, Alabama Literacy Test, <http://www.crmvet.org/info/lithome.htm> (last visited Sept. 5, 2008).

<sup>138</sup> *Id.* (application Parts B and C).

<sup>139</sup> *Id.* Voters were also met with the spectacle of violence. Voting became a performance, where African Americans became prepared for the violence and police brutality associated with attempting to vote. Like the birthing suite becoming an anteroom for the police, so did the voting booth.

<sup>140</sup> See DAVID MICHAEL HUDSON, *ALONG RACIAL LINES: CONSEQUENCES OF THE 1965 VOTING RIGHTS ACT* 22 (1999). Literacy tests were effectively abandoned after passage of the 1970 renewal of the Voting Rights Act. Pub. L. No. 91-285, § 2, 84 Stat. 314 (codified as amended at 42 U.S.C. §§ 1973-1973c (2000)). Subsequent Supreme Court opinions solidified the demise of literacy tests by upholding the federal legislation. See *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (holding that Congress through its power to enforce the Fourteenth and Fifteenth Amendments may "prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections").

<sup>141</sup> According to the CDC, ten percent (or about 6.2 million) of American women of repro-

about which we should be concerned. But if we are to be concerned because communitarian reproductive laws unfairly target all women, we should equally be concerned when the objective of those policies is to specifically target and disenfranchise specific racial groups. If the objective of such rules is to only pursue women like Regina Mc-Knight, then selective applications of the community's goals will more than likely result in arbitrary enforcement, attenuated adjudication, and inconsistent punishment. As with literacy tests and voter suppression tactics, FDLs are capriciously applied and enforcement is selective.<sup>142</sup> But whether applied to specific racial groups or extended to ensnare all women, the communitarian approach to reproductive rulemaking is not concerned with achieving welfare, but rather is explicitly focused on policing.

Accordingly, communitarian reproductive laws undervalue the reproductive freedoms of some women and overvalue the reproductive choices of others. In Charleston, South Carolina, for example, collaboration between local police and prosecutors with medical staff at the Medical University of South Carolina ("MUSC") resulted in the planning and implementation of a clandestine "Search and Arrest" policy that targeted some women and not others.<sup>143</sup> This policy was a model of communitarian rulemaking and monitoring. The secretive plan called for the furtive searching of pregnant women for evidence cocaine or crack use.<sup>144</sup> Using public service announcements and advertisements, MUSC staff and local law enforcement lured drug addicted women into the hospital, urging that pregnant women

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ductive age had had either an infertility-related medical appointment or service at some point in their lives. Researchers calculate infertility based on medical services sought, which also has socioeconomic implications that are not accounted for. Poorer women, who lack health coverage, are likely to be disproportionately underrepresented or unaccounted for with infertility statistics. The CDC describes infertility services to include "medical tests to diagnose infertility, medical advice and treatments to help a woman become pregnant, and services other than routine prenatal care to prevent miscarriage." This figure, however, does not accurately illustrate infertility in the United States, as seven percent of married couples (or two million couples) in which the woman is of reproductive age "reported that they had not used contraception" for nearly a year and the woman had not become pregnant. *See* CDC 2005 ART SUCCESS RATES, *supra* note 21, at 3.

<sup>142</sup> Journalistic accounts of FDL application suggest the same. *See, e.g., 2 Held Under Fetal Drug Law*, N.Y. TIMES, Oct. 12, 1989, at A26; Vince Beiser, *Fetal Abuse*, MOTHER JONES, June 14, 2000, <http://www.motherjones.com/news/feature/2000/06/fetal.html>; Brian Maffly, 'Fetal Abuse' Charges Give Rise to Debate; Mothers-to-Be Need Help, Not Fear, Critics Say, SALT LAKE TRIB., Dec. 1, 1997, at D1. *But see* State v. Deborah J.Z., 596 N.W.2d 490 (Wis. Ct. App. 1999).

<sup>143</sup> *See* Ferguson v. City of Charleston, 532 U.S. 67, 70–73 (2001) (describing MUSC's drug-screening program for pregnant women suspected of using cocaine).

<sup>144</sup> *See id.*

help their developing fetuses by receiving free prenatal services. Subsequently, when hospital staff identified those with “dirty” urine tests they expeditiously provided that information to local police and prosecutors,<sup>145</sup> and in turn they trampled on an undiminished expectation of privacy, undermined the physician-patient relationship, and disregarded the search and seizure requirements of the Fourth Amendment. That the policy was only implemented at MUSC, the single hospital in Charleston with a predominantly African American and low-income population gives some indication that the locus was purposeful and those caught in the dragnet were the intended population.<sup>146</sup>

The “Search and Arrest” policy did, however, accomplish one goal: it allowed the state without warrants or probable cause to conduct nonconsensual searches of pregnant women who sought prenatal care. But the policy did not improve pregnancy outcomes, reduce cocaine use, or increase the number of women successfully completing drug treatment programs as none were offered.<sup>147</sup> In 2001, the Supreme Court determined that the searches, which were conducted without probable cause or warrants, violated the Fourth Amendment in the absence of consent.<sup>148</sup> This brought some relief to Ms. Hale, but not Regina McKnight at the time.

### C. *Emotion and Spectacle*

*Although the villagers had forgotten the ritual and lost the original black box, they still remembered to use stones. The pile of stones the boys had made earlier was ready; there were stones on the ground with the blowing scraps of paper that had come out of the box. Mrs. Delacroix selected a stone so large she had to pick it up with both hands and turned to Mrs. Dunbar. “Come on,” she said. “Hurry up.”*

—Shirley Jackson, *The Lottery*<sup>149</sup>

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<sup>145</sup> *Id.* at 84–85.

<sup>146</sup> This is exemplified by “Project Export,” a joint research endeavor between MUSC and SCSU documenting the racial and economic disparities within South Carolina in general and within the I-95 corridor in particular. See Project Export, Health Disparities I-95 Corridor, [http://export.musc.edu/health\\_disparities/health\\_disparities.html](http://export.musc.edu/health_disparities/health_disparities.html) (last visited Sept. 5, 2008).

<sup>147</sup> See Center for Reproductive Rights, The Center’s Cases, [http://www.reproductiverights.org/crt\\_preg\\_ferguson.html](http://www.reproductiverights.org/crt_preg_ferguson.html) (last visited Sept. 5, 2008).

<sup>148</sup> *Ferguson*, 532 U.S. at 85–86.

<sup>149</sup> SHIRLEY JACKSON, *THE LOTTERY AND OTHER STORIES* 301 (Farrar, Straus & Giroux 2005) (1949).

*[T]he execution of a madman “should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others.”*<sup>150</sup>

Communitarian rulemaking not only relies on public display as a means of unifying communities, but also spectacle to facilitate expression and enforcement. Intuitively, one might disregard spectacles as embarrassing, unanticipated, (desired to be forgotten) public interactions. However, “*the spectacle*” serves an important promotion and policing function in communities, particularly those spectacles caused by interactions with ruling elites or with those enforcing the rules.<sup>151</sup> If this is true, then we can better understand the promotion of eugenics fairs in the South, and the pushback and violence associated with Jim Crow literacy tests and attempts to integrate schools, buses, and diners in the South.

During the U.S. eugenics era, county fairs were held throughout the South and Midwest to determine the “*fittest families*,” and the fairest babies.<sup>152</sup> Yet, if my hypothesis is correct, the fairs and fitter families contests actually served a more sophisticated and nefarious purpose; they rallied support around a set of troubling rules by establishing vertical hierarchies with fitter families on top, and social “misfits” on the bottom. Those considered less fit became the targets of sterility campaigns and incarceration.

Shirley Jackson’s classic short story *The Lottery* captures the public spectacle, violence, and emotion of communitarian rulemaking. Each year persons from the imagined New England village draw folded pieces of paper from a weathered black box to determine “the chosen one”: the person to be stoned. The rule was not vague; there seems to be a clear order: male heads of households blindly draw papers to determine if someone in their family will be stoned. A nod is given to individual autonomy as each family member pulls his or her own lot after the father/husband’s fateful draw.

We are never quite clear about the rule’s original intent. Population control, maybe? Surely, the less violent means of reducing/con-

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<sup>150</sup> *Robinson v. California*, 370 U.S. 660, 676 (1962) (quotation omitted).

<sup>151</sup> See, e.g., Bruce A. Arrigo, *Punishment, Freedom, and the Culture of Control: The Case of Brain Imaging and the Law*, 33 AM. J.L. & MED. 457 (2007); David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913 (2008) (describing this effect in trademark law).

<sup>152</sup> Paul A. Lombardo, *Taking Eugenics Seriously: Three Generations of ??? Are Enough?*, 30 FLA. ST. U. L. REV. 191, 210 (2003); see also DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 100 (1985); Lori B. Andrews, *Past as Prologue: Sobering Thoughts on Genetic Enthusiasm*, 27 SETON HALL L. REV. 893, 895 (1997).

trolling population growth operate as effectively as stoning (if not more so)—and without the unintended distributional consequences and the erratic force of the law. Nor is it clear that whatever the intended goal happens to be, that the means (stoning) happen to be the most efficient means of accomplishing it. In Jackson's story, the rule does not target thieves, pedophiles, murderers, cattle hustlers, or even adulterers. Rather, the lottery ticket falls arbitrarily into someone's hand each year.

As with the spectacles created in the Jim Crow voting process—the police presence, elaborate exams, and contestation over voting rights—each party (voter and registrar) is aware of the Fifteenth Amendment's promise that African Americans can vote—but a dance must be performed nonetheless.

So too with FDLs are spectacles created of pregnant poor women. In South Carolina, this performance was played out in the theatre of birthing rooms. In *Ferguson v. City of Charleston*, each case was a significant performance, a demonstration of how the Fourth Amendment could be trampled, constitutional rights ignored, and under what light shame and nakedness could be illuminated. The dances were thus: MUSC staff would release pregnant patients' medical information to police; local law enforcement responded by arresting women within hours and sometimes days after delivery; and the spectacle: rousing women from hospital beds, sometimes while bleeding from giving birth, completed the drama. One woman gave birth while handcuffed to her bed throughout the entire delivery, and those less fortunate gave birth in prison.<sup>153</sup>

Shaming serves an important function in the criminal law, and depending on the contexts may be a minimally invasive means to achieve important state goals.<sup>154</sup> However, the extreme measures taken to shackle pregnant drug addicted women, or restrain them by handcuffing their wrists to bed-irons are extralegal responses to their crimes. Shaming pregnant drug abusers is an attempt to increase the costs and thus reducing the incidence of drug abuse. But shaming in these contexts is intended to impose indirect costs on pregnant women. After all, what is the likelihood that pregnant women will over-

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<sup>153</sup> See Center for Reproductive Rights, *supra* note 147.

<sup>154</sup> Recently, business owners have opted to publicly shame thieves caught on surveillance rather than pressing charges. Such stipulations involve would-be defendants agreeing to wear placards for a week or two announcing their misdeeds. See Pallavi Gogoi, *Shame and Shoplifting at Wal-Mart*, BUSINESSWEEK, July 24, 2007, available at [http://www.businessweek.com/bwdaily/dnflash/content/jul2007/db20070723\\_644443.htm](http://www.businessweek.com/bwdaily/dnflash/content/jul2007/db20070723_644443.htm).

whelm law enforcement and speed away by foot in hospital gowns and slippers down hospital corridors? According to Toni Massaro, effective shaming in the criminal law context requires “audience awareness and participation, a cohesive body of would-be offenders who perceive and are sensitive to the same shame, judicial personnel and procedures that can tailor sanctions to the target audience sensitivities, and a formal means of reintegrating shamed offenders . . . .”<sup>155</sup> In the contexts of drug addicted pregnant women, shaming is made public in the birthing wards of public hospitals, and provides reward for the doctors and nurses complicit in the drug reporting programs. It identifies the “bad” addicted pregnant women, allowing others to self-define against their images as “good.” However, while there is exit, i.e., arrest and shackles, there appears to be disorganization and limited thought regarding reentry and rehabilitation.<sup>156</sup> Even worse for these women, shaming has an on, but no off switch.

#### D. Assisted Reproduction

*It is always an interesting situation when people rely on modern medicine and talk about God's will—because if it were simply God's will, then you'd say, 'If you're not becoming pregnant, that must be God's will'*

—Alexander Morgan Capron<sup>157</sup>

What does a communitarian approach to rulemaking in reproductive cases get right? Some might point to the hands-off approach to ART. Here, the minimally regulated industry thrives with minimal state interference or attention to fetal health outcomes or risks to mothers or fetuses. All of this may be particularly startling given the high incidence of cerebral palsy, hearing and visual impairment, low birthweight, premature births, and multiple gestations in ART pregnancies.<sup>158</sup> Despite numerous scientific studies documenting the fetal side-effects of assisted reproductive technologies,<sup>159</sup> the public re-

<sup>155</sup> Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1917 (1991).

<sup>156</sup> James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1088 (1998) (warning that “[o]nce the state stirs up public opprobrium against an offender, it cannot really control the way the public treats that offender”).

<sup>157</sup> See Alexander Morgan Capron, *Punishing Mothers*, HASTINGS CENTER REP., Jan.–Feb. 1998, at 31–33; Alexander Morgan Capron, *Biomedical Technology and Health Care: Transforming Our World*, 65 S. CAL. L. REV. 1, 75 (1991).

<sup>158</sup> M.A. Roberts, *Supernumerary Pregnancy, Collective Harm, and Two Forms of the Non-identity Problem*, 34 J.L. MED & ETHICS 776, 776 n.3 (2006).

<sup>159</sup> See *supra* note 20 and accompanying text; see also N.Y. TASK FORCE ON LIFE & THE LAW, QUESTIONS AND ANSWERS ABOUT INFERTILITY AND ITS TREATMENT 53–54 (1998), availa-

sponse to assisting infertile couples seems quite positive.<sup>160</sup> To the extent that harms—including stillbirths and deaths—occur, the public seems satisfied (or pacified) with biblical and spiritual references about the afterlife and heavenly interventions.

The obviously ripe cases for prosecution under an equitable application of the communitarian approach to policing reproduction will be the assisted reproduction pregnancies, because of the high incidence of low birthweight births, developmental delay, and mild to severe disabilities.<sup>161</sup> Legislators and prosecutors, most of whom are not medically trained, predict that the most obvious class of women who harm fetuses are drug addicts, especially, it seems, if they are Black women. Of drug addicts, they narrow the class further to those consuming illegal drugs—and only horizontally, thus treating crack and heroin as offending substances, but ignoring women whose use of prescription medication can cause chemical dependency in fetuses, interfere with healthy development, and result in low birthweight. Yet, the less-than-positive reports about children born through ART with cognitive delays, low birthweight, hearing impairment, blindness, cerebral palsy, and other disabilities<sup>162</sup> should cause alarm to legislators and

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ble at <http://www.health.state.ny.us/nysdoh/infertility/1128.htm#risks> (noting that certain ARTs “greatly increase the chances of multiple births” and that “children from multiple births have a much higher chance of prematurity and low birthweight”); P.O.D. Pharoah & T. Cooke, *Cerebral Palsy and Multiple Births*, 75 ARCHIVES OF DISEASE IN CHILDHOOD F174, F174–77 (1996) (finding that multiple birth babies are at increased risk of cerebral palsy); Jennita Reefhuis et al., *Fertility Treatments and Craniosynostosis: California, Georgia, and Iowa, 1993–1997*, 111 PEDIATRICS 1163, 1164–65 (2003) (finding correlation between fertility treatments and craniosynostosis); Meredith A. Reynolds et al., *Trends in Multiple Births Conceived Using Assisted Reproductive Technology, United States, 1997–2000*, 111 PEDIATRICS 1159, 1159 (2003) (finding that, for the period studied, proportion of multiple births in U.S. attributable to ART increased, while proportion attributable to natural conception decreased); Robert M.L. Winston & Kate Hardy, *Are We Ignoring Potential Dangers of In Vitro Fertilization and Related Treatments?*, 4 NATURE CELL BIOLOGY & NATURE MED. 14 (2002).

<sup>160</sup> Sonya Charles & Tricha Shivas, *Mothers in the Media: Blamed and Celebrated—An Examination of Drug Abuse and Multiple Births*; *Pediatrics, Ethics, Issues, & Commentary*, 28 PEDIATRIC NURSING 142 (2002).

<sup>161</sup> See Stromberg et al., *supra* note 20, at 461–65. Dr. Stromberg and his colleagues found: Children born after IVF are more likely to need habilitation services than controls (odds ratio 1.7, 95% CI 1.3–2.2). For singletons, the risk was 1.4 (1.0–2.1). The most common neurological diagnosis was cerebral palsy, for which children born after IVF had an increased risk of 3.7 (2.0–6.6), and IVF singletons of 2.8 (1.3–5.8). Suspected developmental delay was increased four-fold (1.9–8.3) in children born after IVF. Twins born after IVF did not differ from control twins with respect to risk of neurological sequelae. Low-birthweight and premature infants were more likely to need habilitation than fullterm babies.

*Id.*

<sup>162</sup> See *supra* note 159 and accompanying text.

prosecutors if the desire to protect fetuses means *all fetuses*, and if the prosecution of those who pose harm extends beyond poor Black women being treated at state hospitals. The data is compelling; we know far more about the risks associated with birthing through ART procedures,<sup>163</sup> than by the use of crack during pregnancy.<sup>164</sup> In fact, in a review of thirty-six studies, published in the *Journal of the American Medical Association*, Deborah Frank and her colleagues concluded that “after controlling for confounders, there was no consistent negative association between prenatal cocaine exposure and physical growth, developmental test scores, or receptive or expressive language.” However in the case of ART, health risks are known to extend beyond the fetus to the gestational carriers.<sup>165</sup> In the case of ART, pregnant women are at higher risk for diabetes, high blood pressure, and pre-eclampsia.<sup>166</sup> Thus, examining the unique similarities as well as the gaps between women like Regina McKnight and ART prospective moms is quite appropriate, although maybe not obvious.

To conclude, one consequence of selectively policing reproduction will be the underinclusive prosecution of pregnant women who engage in risky behaviors that may harm their fetuses. By example, abuse of prescription medications, tobacco use, alcohol consumption, and assisted reproduction will fall outside of criminal state responses.

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<sup>163</sup> Winston & Hardy, *supra* note 159, at 14.

<sup>164</sup> As early as 1998 a study sponsored by the National Institute of Health suggested that the effects of cocaine use during pregnancy was not as severe as depicted in media accounts. Recently, Deborah Frank and her colleagues reviewed thirty-six studies and determined that the risks of exposure to crack during gestation are not as severe as researchers and media pundits predicted twenty years ago. The authors suggest that other factors, ranging from poverty to other drugs, may play as much if not a greater role in determining the health outcomes in children. Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 J. AM. MED. ASS'N 1613, 1613 (2001).

<sup>165</sup> See Victor Clay Wright et al., *Assisted Reproductive Technology Surveillance—United States, 2000*, 52 MORBIDITY & MORTALITY WKLY. REP. 942 (2003); see also BenEzra, *supra* note 20, at 273 (positing that “a high frequency of cytogenetic abnormalities and errors in cell-cycle regulation are detected in oocytes generated from IVF or intracytoplasmic sperm injection”); Bruinsma et al., *supra* note 20, at 414; Nancy S. Green, *Risks of Birth Defects and Other Adverse Outcomes Associated with Assisted Reproductive Technology*, 114 PEDIATRICS 256, 256 (2004); Wimalasundera & Fisk, *supra* note 20, at 414 (reporting the increased risk of multiple pregnancies among women who use IVF); Jane Glen Haas, *Late or Never, Motherhood Remains a Matter of Choice*, HERALD NEWS, NOV. 28, 2004, at D13 (scrutinizing the decision of a fifty-six year-old Florida resident to undergo in vitro fertilization).

<sup>166</sup> Anne Lynch et al., *Preeclampsia in Multiple Gestation: The Role of Assisted Reproductive Technologies*, 99 OBSTETRICS & GYNECOLOGY 445, 445–51 (2002); *Infertility in Women*, N.Y. TIMES HEALTH GUIDE, Aug. 10, 2008, <http://health.nytimes.com/health/guides/disease/infertility-in-women/assisted-reproductive-technologies.html>.

Another concern is expressed by Lynn Paltrow that stereotype and myth will play a significant (and bias causing) role in how and if pregnant women who engage in risky behaviors become the targets of law enforcement.<sup>167</sup> Indeed, in a study published in 1999, Dr. Hallam Hurt, the chairman of the division of neonatology at the Albert Einstein Medical Center in Philadelphia, cautioned that poverty had a more significant impact on a child's brain than in utero exposure to crack.<sup>168</sup> He explained to Reuters, “[a] decade ago, the cocaine-exposed child was stereotyped as being neurologically crippled—trembling in a corner and irreparably damaged. But this is unequivocally not the case. And furthermore, the inner-city child who has had no drug exposure at all is doing no better than the child labeled a ‘crack-baby.’”<sup>169</sup>

In framing my objections to community regulation of reproduction, Part III unpacks the historical roots of treating women's reproduction as communal property. It illumines the darker side of reproductive policing advanced by slavery and the eugenics laws of the twentieth century. By contrast, Part IV scrutinizes what these dynamics mean in the realm of assisted reproduction.

To be clear, this Article does not presume that all regulations suppress individual freedom and subvert autonomy, even in reproductive spheres. However, the Article does maintain that hierarchies and patterns of dominance are replicated in communitarianism, and that those hierarchies and patterns of subordination and dominance carry forward in contemporary reproductive legislation (or at times the lack thereof), leading to distributive inequality, inconsistent application of policies, and unintended consequences.

### *III. The Problem with Reproduction as a Community Ethic*

*Enslaved women were considered fair game for any white man's sexual desires, and in the process lost control of their bodies and their reproductive rights.*<sup>170</sup>

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<sup>167</sup> See Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 462 (2005) (according to Paltrow, “spurred on by the media barrage concerning pregnant women and drugs, legislators in the mid 1980s began introducing numerous legislative proposals addressing [cocaine use during pregnancy]”).

<sup>168</sup> Hallam Hurt et al., *A Prospective Comparison of Developmental Outcome of Children with In Utero Cocaine Exposure and Controls Using the Battelle Developmental Inventory*, 22 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 21 (2001).

<sup>169</sup> Alan Mozes, *Poverty Has Greater Impact Than Cocaine on Young Brain*, REUTERS HEALTH, Dec 6, 1999.

<sup>170</sup> See JOHNNETTA BETSCH COLE & BEVERLY GUY-SHEFTALL, *GENDER TALK: THE STRUGGLE FOR WOMEN'S EQUALITY IN AFRICAN AMERICAN COMMUNITIES* 107 (2003).

Reproduction follows social and economic constructions of citizenship, privilege, and caste. These patterns are not overcome by the introduction of postmodern communitarianism to reproduction, as can be seen in the case of Regina McKnight or poor white women, including Melissa Rowland,<sup>171</sup> who birthed the *wrong way*. Rather, communitarianism can be the site at which these norms are reproduced and legitimized. Herein are some of the problems with subjecting reproduction to a communitarian approach to lawmaking. Its legitimacy rests on the premise that it is justifiable—indeed preferable—for particular segments of a community, usually ruling elites, to legislate the intimacy and reproduction of others. Yet, intuitively it would seem that the power to legislate in this way can only be justified if we were to imagine women’s reproduction as being property belonging to the state or community. To some, this premise might be intuitive, and to others an outrageous set of assumptions that map inconsistently with the values of communitarianism or how we perceive reproduction (fetuses, babies, children and families) in the United States.

This Section analyzes early efforts to prosecute and police women’s reproductive possibilities and addresses the problematic features of those efforts. The origins of treating women’s reproduction as part of a community ethic predate the enactment of FDLs, and some scholars might contend that the birth of politics involving the womb is grounded in antiquity. For purposes of this Article, human slavery in the United States provides a stark example of communitarian policing of women’s reproductive possibilities. Antebellum slavery was marked by regulatory coercion, distributive injustice, and the domination of powerful elites over the politically disenfranchised. This Section briefly scrutinizes the reproductive practices in U.S. slavery and eugenics to illumine and consider the dangers of aligning community norms and expectations with reproduction.

#### A. *Communitarianism and the Case of Slavery*

*Profit had to be wrung out of an erotic wilderness that could make a man forget why he was there in the first place.*<sup>172</sup>

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<sup>171</sup> Melissa Ann Rowland, a poor white woman, was prosecuted for criminal homicide in Utah for delaying a Caesarian section. Prosecutors alleged that this delay resulted in one of Rowland’s twins being born stillborn and accused her of a “depraved indifference to human life” for delaying the Caesarian section. See *Plea Agreement for Mother in Baby’s Death*, N.Y. TIMES, Apr. 8, 2004, at A25.

<sup>172</sup> PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 35 (1984) (commenting on the legal and social status of black wo-

Part III.A does not attempt to provide a substantive treatment of the institution of human slavery in the United States, as that is not its purpose. Brilliant scholars, among them John Hope Franklin,<sup>173</sup> John W. Blassingame,<sup>174</sup> and Paula Giddings,<sup>175</sup> by way of example, provide a developed and nuanced analysis of that institution. Rather, this section briefly describes and considers the discreet issue of a communitarian approach to reproduction, maternity, and paternity in the slave context.

The founding of American citizenship implicitly relied upon the denial of citizenship to African slaves and their progeny.<sup>176</sup> Crucial to the expedient packaging of citizenship for whites and the entrenched categories of second-class status for Blacks, and particularly Black women, was the enactment of anti-miscegenation legislation and the denial of inheritance through the paternal bloodlines, as had been an essential part of English common law tradition.<sup>177</sup> Paul Finkelman's observation that because relatively few white women settled early slave states, reproduction was more expediently achieved through sexual narratives between white men and Black women slaves<sup>178</sup> can be unpacked further to reveal persistent communal complicity in the sexual exploitation of Black women and girls.

Sexual encounters with enslaved Black women were by no means legally uncomplicated; they involved nonconsensual, forced sex; resulted in biracial children; and created social paradoxes, given the chattel status of Black women and the free, often wealthy status of the

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men, observing their victimization, rape, and other forms of dehumanizing abuse common during the American antebellum years).

<sup>173</sup> See generally JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* (1980).

<sup>174</sup> See generally JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (1972).

<sup>175</sup> GIDDINGS, *supra* note 172.

<sup>176</sup> See Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 *YALE L.J.* 1563, 1574 (1996).

<sup>177</sup> See, e.g., Negro Women's Children to Serve According to the Condition of the Mother, Act XII, 2 Hening 170 (Va. 1662) [hereinafter Negro Women's Children Act]. See also J.M. Balkin, *The Constitution of Status*, 106 *YALE L.J.* 2313, 2324 (1997) (discussing how biological or immutable traits like complexion or skin color can open passage for black children's exit from non-citizenship or racism through miscegenation); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 257 (1999) (examining the persistence of second-class status even as African Americans were granted new rights such as the right to marry).

<sup>178</sup> See Paul Finkelman, *Crimes of Love, Misdemeanors of Passion: The Regulation of Race and Sex in the Colonial South*, in *THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH* 124-25 (Catherine Clinton & Michele Gillespie eds., 1997).

fathers.<sup>179</sup> The social norms that emerged from this sexual violence operated in an odd way. Namely, reproduction was a principal site of regulation during slavery.

It would be a mistake to interpret slavery in the United States as an experiment among mavericks rather than as part of a sophisticated regime, emerging from and implemented, regulated, and policed by communities. The entrenched, persistent presence/practice of human slavery could not have been sustained without the embrace and complicity of communitarian ideals.<sup>180</sup> The economy born of Black women's labor in fields and households helped to turn neighborhoods to towns and towns into cities, but more valuable in some contexts was Black women's reproduction. Slaves gave status to their masters and mistresses, children were put to work as soon as possible, and in times of economic hardship, children could be sold for profit. Thus, early reproductive monitoring and policing of Black women's reproduction had much to do with economic as well as social purposes. However, absent from these sexual encounters were reproductive choice, autonomy, and recourse. Instead, women were subjects to be acted upon. Black women's reproduction was controlled by community norms and, quite specifically, their biological progeny became the "property" of others.

Consider, for example, that when Margaret Garner, the subject of Toni Morrison's novel *Beloved*,<sup>181</sup> "absconded" with her children to Cincinnati in 1856, she was charged with "stealing" the property of Archibald Gaines, her owner.<sup>182</sup> Rather than releasing her daughter to the approaching bounty hunters who were ordered to return the

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<sup>179</sup> *Id.* at 128–29. Black women lacked legal standing and were further disenfranchised by their inability to appeal to ruling elites, the legislature, or courts, as they were banned from the political process and therefore could not vote, seek justice through courts or intervention through traditional means, i.e., police and magistrates. *Id.* at 129.

<sup>180</sup> Communities relied on a set of social and economic values to define and buttress the institution of slavery, while ensuring its longevity. These collective values came to depict the inhumanity of human bondage, but during the antebellum period helped to establish the moral center of slavery. For example, salvation of slaves was the responsibility of owners. *See, e.g., State v. Williams*, 26 N.C. (4 Ired.) 400 (1844). Preachers and ministers were often paid to visit plantations to proselytize the slaves. *See* BLASSINGAME, *supra* note 174, at 60–61 (describing slave masters' efforts to impose religion on their slaves); *see also* THORTON STRINGFELLOW, *A BRIEF EXAMINATION OF SCRIPTURE TESTIMONY ON THE INSTITUTION OF SLAVERY* (1841), *reprinted in* THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830–1860, at 136 (Drew Gilpin Faust ed., 1981) (asserting that slavery was a blessing for the master and the slave).

<sup>181</sup> TONI MORRISON, *BELLOVED* (1987). *See generally* STEVEN WEISENBURGER, *MODERN MEDEA: A FAMILY STORY OF SLAVERY AND CHILD-MURDER FROM THE OLD SOUTH* (1998).

<sup>182</sup> *See* WEISENBURGER, *supra* note 181, at 6.

family to Gaines' plantation, Garner slashed her throat.<sup>183</sup> Reports indicate that Garner was attempting to kill the second child before she was subdued.<sup>184</sup> News of this tragic murder spread rapidly throughout the country; it fueled the ire of abolitionists who saw this as a mother's tragic choice and planters who regarded such villainy as treasonous to what was by their accounts a moral institution, based on shared values, principles, goals, obligations and practices. Black children were not presumed to have emotional value; they were, according to the law, property.

At trial, Garner was prosecuted not for murder, but for violating the Fugitive Slave Act. Her story is complicated by the fact that her children were very fair complected, leaving some historians, including Stephen Weisenburger to conclude that the children were the products of rape by her slave owner.<sup>185</sup> Interestingly, a murder conviction would have kept Garner in prison, while punishment as a fugitive slave returned her to Mr. Gaines' plantation and involuntary servitude. Shortly after her trial, Garner was sent to various other plantations and eventually sold to DeWitt Clinton Bonham, a Mississippi plantation owner.<sup>186</sup> Profit was to be extracted from the births of Black babies and there was a financial incentive involved in breeding Black women as one would chattel of any kind.<sup>187</sup> Interracial sexual encounters may have been motivated as much by economic profit as by the sexual gratification of slave owners and overseers bedding enslaved Black women. These ironies are no less difficult to understand now. Most disturbing, however, were the disquieting social and legal norms that emerged from the reproductive politics of slavery. For example, Black women's reproduction became an economic vehicle for slave owners. As a result, slave women's bodies were the sites at which unyielding, horrid sexual and physical violence occurred. Children born from these encounters were cast as illegitimate, fatherless, and inherited their mothers' slave status, becoming the chattel of their mother's owners.<sup>188</sup> For their part, slave owners sold their Black children with deliberate indifference.

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<sup>183</sup> *Id.* at 73–75.

<sup>184</sup> LEVI COFFIN, *REMINISCENCES OF LEVI COFFIN, THE REPUTED PRESIDENT OF THE UNDERGROUND RAILROAD* 560 (2d ed. 1880).

<sup>185</sup> *See* WEISENBURGER, *supra* note 181, at 76.

<sup>186</sup> *See id.* at 244–45.

<sup>187</sup> *See* Franke, *supra* note 177, at 264.

<sup>188</sup> *Id.*; *see also* Finkelman, *supra* note 178, at 129 (describing the “perverse result” of such encounters “that masters who fathered children with their female slaves would end up enslaving their own mixed-race children”); Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender and*

In 1662, Virginia led the slave states in differentiating the citizenship of future sons and daughters of the United States. The Act provided:

Whereas some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly*, that all children borne in this country shall be held bond or free only according to the condition of the mother, *And* that if any christian shall committ fornication with a negro man or woman, hee or shee soe offending shall pay double the ffines imposed by the former act.<sup>189</sup>

The 1662 law offers a view of the communitarian approach to reproductive regulation and a glimpse at mothering, fathering, and preference in the United States. If the status of the slave was “at the bottom of the well” as Derrick Bell might offer,<sup>190</sup> then certainly any laws that reinforced that unfortunate status on children was explicit in its message. Cheryl Harris explains that the Negro Women’s Children Act and similar others were designed to “guarantee that the property in whiteness remained pure and inviolate,” but more importantly that the slaveholders would not suffer economic loss through their sexual misadventures with Black slave women.<sup>191</sup> That is, Black children fathered by white men were far more valuable as property than offspring. Without citizenship, even the Black children of white fathers were permanently exiled in the world of slavery.

Johnnetta Betsch Cole and Beverly Guy-Sheftall posit that the most expedient means of regulating Black women’s sexuality and reproduction was to “generate images and stereotypes of Black women that removed them from the standard definitions and descriptions of womanhood.”<sup>192</sup> This image casting was purposeful, according to Giddings, and its persistence is evidenced by contemporary reproduction

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*the Institution of Property*, 18 CARDOZO L. REV. 309, 330 (1996) (describing the inheritance system that ensured the continual supply of slaves); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1719 (1993) (same); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1175 (1997) (same); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1503 (2000) (same).

<sup>189</sup> Negro Women’s Children Act, *supra* note 177 (legislating that child is slave or free according to condition of mother).

<sup>190</sup> See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

<sup>191</sup> See Harris, *supra* note 188, at 329–33 (describing slavery as system of property configured by social and legal boundaries of race and gender).

<sup>192</sup> See COLE & GUY-SHEFTALL, *supra* note 170, at 107.

policing, particularly in the context of fetal harm laws and the crack baby imagery.<sup>193</sup> Black women's image as irresponsible and promiscuous was juxtaposed to that of "white women as pure [and] fragile."<sup>194</sup>

The image of hyper-sexualized Black women's reproduction was gendered reproduction, as slave status itself was equated with an intensely degraded sense of Black humanity. In this uniquely contoured race- and gender-conscious construction, even the Black children of slaveholders were subjects of tiered citizenship that resulted in them being cast as slaves and therefore not free to or entitled to the privileges and rights of their fathers.<sup>195</sup> Naturally, tensions would arise as the status of motherhood between Black women and white women were differently conceptualized, leaving the children of Black mothers and white fathers differently recognized by the law than those of white mothers.<sup>196</sup> Some scholars continue to believe that this unacknowledged legal and social distinction and its powerful remnants haunt the political and social relationships between Black and white women today.<sup>197</sup>

Finally, the legal distinctions and vertical relationship between white and Black women illumine the awkward, but nevertheless privileged, position of white women within a communitarian structure both during slavery<sup>198</sup> and now.<sup>199</sup> As to slavery, consider here, Harriet Jacobs's account of her white mistress' position on slave marriage and family:

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<sup>193</sup> See GIDDINGS, *supra* note 172, at 35 (commenting that while black women were purposefully degraded to establish the unshakeable stereotype found in what I refer to as hyper-sexualized image, "white women would be 'elevated'—sometimes tyrannically so").

<sup>194</sup> COLE & GUY-SHEFTALL, *supra* note 170, at 107.

<sup>195</sup> See Finkelman, *supra* note 178, at 129.

<sup>196</sup> See *id.*

<sup>197</sup> See Roberts, *supra* note 176, at 1575–76.

<sup>198</sup> See HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 38 (1861); NELL IRVIN PAINTER, SOJOURNER TRUTH: A LIFE, A SYMBOL 220–33 (1996). Painter provides a moving portrait of Sojourner Truth's fascinating life and discloses an aspect of slave life traditionally overlooked. Prior biographers mistakenly read Sojourner's narration to imply that her male owner was the perpetrator of sexual violence upon her. To the contrary, reports Painter. "Less easily acknowledged," argues Painter, "then and now, is the fact that there are women who violate children." PAINTER, *supra*, at 16. The sexual abuse experienced by Sojourner came from her mistress, Sally Dumont, as Truth tells in scattered pages in her narrative. Sojourner was concerned about her credibility and thus was more reluctant to be outspoken about acts she described as "so unaccountable, so unreasonable, and what is usually called so unnatural." *Id.* Sojourner wrote that unless the listener/reader was "initiated" in such acts, her abuse might seem beyond the imagination. *Id.*

<sup>199</sup> See Roberts, *supra* note 176, at 1576.

[M]y mistress, like many others, seemed to think that slaves had no right to any family ties of their own; that they were created merely to wait upon the family of the mistress. I once heard her abuse a young slave girl, who told here that a colored man wanted to make her his wife. "I will have you peeled and pickled, my lady," said she, "if I ever hear you mention that subject again. Do you suppose that I will have you tending *my* children with the children of that nigger?" The girl to whom she said this had a mulatto child, of course not acknowledged by its father.<sup>200</sup>

Jacobs's powerful account demonstrates the vertical nature of social rights among women during the antebellum period. According to Dorothy Roberts, the vestiges of a hierarchical relationship within the community of women remains. In describing post-antebellum social policy, Roberts observes, "maternalist legislation was intended to assimilate women who had the potential of becoming citizens."<sup>201</sup> Naturally, Blacks lacked this potential, and therefore "stood entirely outside the elite white women's paternalistic concept of the national community."<sup>202</sup>

Part III.B briefly considers the pitfalls of policing women's reproduction and points directly to communitarian ethics of the twentieth century that declared some wombs more politically and socially viable than others, while advancing the notion that other wombs—those of ethnic minorities and poor white women—were hostile fertile grounds.

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<sup>200</sup> JACOBS, *supra* note 198, at 59.

<sup>201</sup> See Roberts, *supra* note 176, at 1576.

<sup>202</sup> *Id.* For a discussion of sexual stereotypes and violence against Black women, see Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). For a critical analysis of feminist legal theory and the marginalization of Black women, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). For a discussion of Black women and sexuality, see Madeline Squire, *Discovering Our Connections: Reflections on Race, Gender and the Other Tales of Difference*, 23 GOLDEN GATE U. L. REV. 795 (1993). For an investigation of gender in the context of race and class, see ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988). Consider the work of Bell Hooks for a contemporary analysis of Black women within the context of the larger debate on the definition of "woman." See BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981). For a literature review of Black women and sexual stereotypes and expectations during slavery, see Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 U.C.L.A. WOMEN'S L.J. 1 (1993); Erlene Stetson, *Studying Slavery: Some Literary and Pedagogical Considerations on the Black Female Slave*, in *BUT SOME OF US ARE BRAVE* 61 (Gloria T. Hull, Patricia Bell Scott & Barbara Smith eds., 1982).

B. *Eugenics and Reproduction Policing*

*The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.*

—*Oliver Wendell Holmes*<sup>203</sup>

Reproduction policing became animated in the twentieth century by the introduction of eugenics in medical, legislative, and social policy. Eugenics is a form of genetic determinism, the idea being that genes influence not only visible hereditary traits, but also trigger social behaviors, cognition, intellectual aptitude, and criminality.<sup>204</sup> Unpacked further, eugenics theorists assumed that social conditions, including poverty, and race, were directly associated with genes and intellectual acumen.<sup>205</sup>

Eugenics came to be positively associated with social responsibility, community values, religious virtue, social responsibility, economic efficiency, moral leadership, and a paternalist sense of duty toward the “socially unfit.”<sup>206</sup> The emergence of eugenic social policy coincided with the rise in nationalist organizations that reinforced not only racial supremacy, but also framed that concern in the context of community values.<sup>207</sup> Concurrently, class divisions became far more entrenched, so much so that poor white women also became the victims of reproductive hierarchy.<sup>208</sup>

The American Breeders Association (“ABA”) was chartered in 1903 by the Association of American Agricultural Colleges and Experimental Stations to investigate the pragmatic aspects of planned

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<sup>203</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>204</sup> *See Smith v. Bd. of Examiners of Feeble-Minded*, 88 A. 963, 966 (N.J. 1913).

<sup>205</sup> KEVLES, *supra* note 152, at 46–47.

<sup>206</sup> *See Smith*, 88 A. at 966.

<sup>207</sup> By example, the Pioneer Fund, founded in 1937, was established with the mission to promote the propagation of those “descended predominantly from white persons who settled in the original thirteen states prior to the adoption of the Constitution . . . and/or from related stocks.” WILLIAM H. TUCKER, *THE FUNDING OF SCIENTIFIC RACISM: WICKLIFFE DRAPER AND THE PIONEER FUND* 6 (2002). Among the organization’s five founding members was Wickliffe Preston Draper, who publicly (and financially) supported campaigns to deport Blacks to Africa and oppose school integration and civil rights efforts. *Id.* at 2, 128–29. Harry Laughlin, another founder and president of the organization, was a Nazi sympathizer, and the director of the Eugenics Record Office at Cold Harbor Springs. *Id.* at 3, 15–16. Laughlin lobbied for the passage of sterilization laws to minimize the reproductive capabilities of “socially unfit” men and women. John Marshall Harlan, who would later become a Justice of the United States Supreme Court, was also a member. *See id.* at 51–58; *see also* Paul A. Lombardo, “*The American Breed*”: *Nazi Eugenics and the Origins of the Pioneer Fund*, 65 ALB. L. REV. 743 (2002).

<sup>208</sup> *See* RICKIE SOLINGER, *PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA* (2005).

reproduction.<sup>209</sup> The ABA was a tireless promoter of eugenics rhetoric and propaganda.<sup>210</sup> The Eugenics Section urged the sterilization of men and women considered socially unfit and feebleminded. Among the targets of their program were the insane, alcoholics, prostitutes, drug users, and those who committed petty crimes.<sup>211</sup>

Eugenicists' efforts were also racially animated as miscegenation and diluting white racial purity were among their chief concerns.<sup>212</sup> As the *Smith* court reflected, "[t]here are other things besides physical or mental diseases that may render persons undesirable citizens or might do so in the opinion of a majority of a prevailing legislature."<sup>213</sup> "Racial differences," the court enunciated, "might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue."<sup>214</sup>

The abolition of slavery brought about the Fourteenth Amendment and changed the dynamics of reproduction policing. Wealth could no longer be wrung by forcibly breeding Black women, and thus their wombs no longer served a reproductive purpose from a communitarian point of view. Instead, Black reproduction became a *threat* to white communities, and more broadly to the stability of the democratic process. At least in name, and although deeply burdened (because of discrimination in the electoral process), Black men possessed the right to vote and a growing Black population no longer benefited southern communities, and threatened to destabilize the political process. As a result, Black women's reproduction became the site of hostility. Thus, rather than immutable characteristics or social conditions prescribing a right to equal protection and due process, in this period, those conditions served as a pretext for paternalistic state intervention.

Eugenic screening occurred on two contested fronts; one was marriage and the other was reproduction. In 1907, Indiana legislators passed the first eugenics legislation in the United States.<sup>215</sup> Legislators were particularly receptive to eugenic ideology as it appealed to community values and promised to maximize state welfare by eliminating

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<sup>209</sup> Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1431 (1981).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> See KEVLES, *supra* note 152, at 46–47.

<sup>213</sup> *Smith v. Bd. of Examiners of Feeble-Minded*, 88 A. 963, 966 (N.J. 1913).

<sup>214</sup> *Id.*

<sup>215</sup> See James B. O'Hara & T. Howland Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 22 (1956).

the reproductive possibilities of women and men regarded as socially unfit.<sup>216</sup> Legislators and judges assumed that state resources could be maximized by eliminating the possibility of reproduction among certain classes of people.<sup>217</sup> The speed at which other states pushed forward with versions of the Indiana law could be attributed to cloudy assumptions that connected most “social problems” to the poor, epileptic,<sup>218</sup> and racial minorities, among which were the notions that sterilizations would reduce incarceration rates, move the insane into categories of extinction, eliminate mental retardation, lessen the likelihood of biracial births, and rid their communities of alcoholism, promiscuity, prostitution, and homelessness.<sup>219</sup> The scope of state eugenics laws varied; however, some form of compulsory sterilization was codified in thirty-two American states.<sup>220</sup>

What should be understood from this period is the deeply-entrenched nature of communitarian reproduction policing. Reproduction was conveniently framed within a pseudo-scientific paradigm that mapped poverty, homelessness, and unpopular behaviors into a medical pathology. Tethering social behavior to medical illness provided a proxy for state intervention and substantiated a rhetoric of urgency. Fitter family contests throughout the Midwest, Southeast, and other parts of the country gave communities an active means to participate in an ideological agenda that celebrated the reproduction of favored groups, while conscripting the reproductive possibilities of others.<sup>221</sup>

The critical question underlying eugenic efforts was to what extent the government could be constitutionally justified in its efforts to better society through surgical sterilization of undesirable members of society.<sup>222</sup> New Jersey,<sup>223</sup> Iowa,<sup>224</sup> and Indiana<sup>225</sup> courts struck down eugenics legislation on Fourteenth Amendment grounds without

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<sup>216</sup> See *id.* at 21.

<sup>217</sup> See *id.*

<sup>218</sup> See *Smith*, 88 A. at 966–67 (striking down a New Jersey eugenics law that distinguished poorer classes of epileptics from wealthier epileptics on an Equal Protection grounds).

<sup>219</sup> See ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* (1981); SOLINGER, *supra* note 208, at 1.

<sup>220</sup> See, e.g., ALA. CODE ANN. tit. 45, § 243 (1940); ARIZ. CODE ANN. § 8-401 (1939); GA. CODE ANN. § 99-1301 (1955); MISS. CODE ANN. § 6957 (1942); NORTH CAROLINA N.C. GEN. STAT. §§ 35–36 (1950); OKLA. STAT. ANN. tit. 43A, §§ 341–46 (1951); S.C. CODE §§ 32-671–680 (1952); VT. REV. STAT. §§ 10,027–10,030 (1947); W. VA. CODE ANN. § 1394 (1955).

<sup>221</sup> See Fitter Family Contests, [http://www.eugenicsarchive.org/eugenics/topics\\_fs.pl?theme=8&search=&matches=](http://www.eugenicsarchive.org/eugenics/topics_fs.pl?theme=8&search=&matches=) (last visited Sept. 5, 2008) (explaining that fitter family contests held at state fairs naturally emerged from a strong agricultural tradition that judged animals by their physical characteristics, speed, weight, and other criteria).

<sup>222</sup> See O’Hara & Sanks, *supra* note 215, at 23.

<sup>223</sup> *Smith*, 88 A. at 966–67.

reaching the question about state power to regulate the reproduction of its citizens.

The most famous eugenics case involved a plaintiff named Carrie Buck, a young white woman from Virginia who survived a teenage rape and subsequent pregnancy only to have her daughter taken away by the family of the rapist.<sup>226</sup> In January 1924, the state of Virginia committed Carrie to the Virginia State Colony for Epileptics and Feeble-minded where she joined her mother, Emma Buck, who was alleged to have been an alcoholic and prostitute at some point in her life.<sup>227</sup>

Carrie's incarceration became the test case for Virginia's then-recently enacted sterilization plan,<sup>228</sup> which is worth outlining here for its contours and striking breadth:

Whereas, both the health of the individual patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives under careful safeguard and by competent and conscientious authority; and

Whereas, such sterilization may be effected in males by the operation of vasectomy and in females by the operation of salpingectomy, both of which said operations may be performed without serious pain or substantial danger to the life of the patient; and

Whereas, the Commonwealth has in custodial care and supporting in various State institutions many defective person who if now discharged or paroled would likely become by the propagation of their kind a menace to society, but who if incapable of procreating might properly and safely be discharged or paroled and become self-supporting with benefit both to themselves and to society; and

Whereas, human experience has demonstrated that heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy and crime; now, therefore,

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<sup>224</sup> *Davis v. Berry*, 216 F. 413, 417–19 (S.D. Iowa 1914) (striking down an Iowa statute that authorized the sterilization of male prisoners twice convicted of a felony).

<sup>225</sup> *Williams v. Smith*, 131 N.E. 2, 2 (Ind. 1921) (striking down Indiana statute that authorized the sterilization of prisoners, imbeciles, and epileptics on due process grounds).

<sup>226</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927); *see also* *THE LYNCHBURG STORY* (Worldview Pictures 1993) (a documentary featuring interviews with inmates from the Virginia Penal Colony where Carrie was sterilized and institutionalized).

<sup>227</sup> *Buck*, 274 U.S. at 205–07.

<sup>228</sup> Virginia Sterilization Act, 1924 Va. Acts 569, *quoted in* *Buck v. Bell*, 130 S.E. 516, 517 n.1 (1925).

Be it enacted by the general assembly of Virginia, That whenever the superintendent of the Western State Hospital, or of the Eastern State Hospital, or of the Southwestern State Hospital, or of the Central State Hospital, or of the State Colony for Epileptics and Feeble-Minded, shall be of opinion that it is for the best interests of the patients and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent is hereby authorized to perform, or cause to be performed . . . the operation of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy . . .<sup>229</sup>

The Virginia Supreme Court's opinion illumines the contours that shape, restrict, and police reproduction. The court found that the statute did not violate the provisions of the Eighth Amendment's cruel and unusual punishment provisions as the Virginia Sterilization Act was not by the court's review a "penal statute."<sup>230</sup> Neither did the court find any contravention of equal protection under the Fourteenth Amendment because the law was rooted in the state's police power, which encompassed the passage of regulations to promote public health and safety, nor any inequality as the law had a reasonable basis and was not arbitrary.<sup>231</sup>

Carrie's sterilization could be viewed as a *quid pro quo*. The court found Carrie and her daughter (who was only a year old at the time) to be "socially inadequate offspring."<sup>232</sup> The court declared that unless Carrie allowed herself to be sterilized, "she must be kept in the custodial care of the colony for thirty years, until she is sterilized by nature," but "[i]f sterilized under the law, she could be given her liberty . . ."<sup>233</sup> The economic expedience of sterilizing Carrie prevailed upon the court, and in a well-tempered, paternalistic turn, the court concluded that Carrie's welfare "and that of society" would be promoted by her sterilization.<sup>234</sup>

The 1924 case was a local victory for eugenicists, but the most important challenge came in 1927, when the United States Supreme Court considered whether the sterilization procedures authorized by

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<sup>229</sup> *Id.*

<sup>230</sup> *Buck v. Bell*, 130 S.E. 516, 519 (1925), *aff'd*, 274 U.S. 200 (1927).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 517.

<sup>233</sup> *Id.* at 517-18.

<sup>234</sup> *Id.* at 518.

state legislation were permissible under the Fourteenth Amendment.<sup>235</sup> Specifically, the Court considered whether the Equal Protection Clause was violated by the Virginia Sterilization Act as applied to socially undesirable institutionalized persons and not those in the general public.<sup>236</sup> But the Court extended its analysis to address the pressing question left open by lower courts, namely, whether the use of state police power to compel the sterilization of undesirable persons was allowed by the Constitution.<sup>237</sup>

It was Justice Oliver Wendell Holmes who emphatically quieted the storm about autonomy, liberty and reproduction. In a terse, eight-to-one opinion, Holmes elucidated the Court's view that "three generations of imbeciles are enough."<sup>238</sup> According to Holmes, "[i]t would be strange if [the public welfare] could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence."<sup>239</sup> Holmes urged that it is better not only for the state, but the "world," that rather than waiting to execute the children of women like Carrie, "or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."<sup>240</sup>

Sterilization laws became symbolic with eugenics. In turn, eugenics was symbolic with fitter families. Fitter families were associated with and dependent upon stronger communities. Stronger communities relied upon a shared sense of values, agreed upon social behaviors, and defining themselves against those marked by inferiority, real or imagined. In all of this, welfare for children became a justification and platform for the selective policing of poor women's reproduction.<sup>241</sup>

#### *IV. What Communitarian Policing Tells Us in the ART Context*

The argument advanced in this Article is that communitarian approaches to regulating reproduction lead to inconsistent outcomes,

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<sup>235</sup> *Buck v. Bell*, 274 U.S. 200, 205 (1927).

<sup>236</sup> *Id.* at 208.

<sup>237</sup> *Id.* at 208.

<sup>238</sup> *Id.* at 207.

<sup>239</sup> *Id.* at 207.

<sup>240</sup> *Id.* at 207.

<sup>241</sup> *See, e.g.*, PHILIP R. REILLY, *THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES* (1991); *see also* Act of April 28, 1923, 1932 Del. Laws ch. 62; Act of March 13, 1925, 1925 Idaho Sess. Laws ch. 194; Act of April 11, 1925, 1925 Me. Acts ch. 208; Act of April 8, 1925, 1925 Minn. Laws ch. 154; Act of March 15, 1923, 1923 Mont. Laws ch. 164; Act of April 18, 1917 N.H. Laws ch. 181; Act of March 16, 1925, 1925 Utah Laws ch. 82; Act of March 20, 1924, 1924 Va. Acts ch. 394.

unintended consequences, distributive unevenness, lessened utility and social welfare, and tend to be over-applied to poor and racial minority women and under-applied to wealthier white women. FDLs tell us little about harms to fetuses because the laws exempt from prosecution a breadth of behaviors that negatively impact pregnancies and cause miscarriages. These behaviors include the use of ART. The distributional consequences (incarceration, humiliation, and separation from family) map unevenly across the spectrum of parents who might behave in ways that expose developing fetuses to harm. Yet, other potentially high-risk types of reproduction and pregnancy, including in vitro fertilization and preimplantation diagnosis are exempt from this type of government intervention. If this assumption is correct, then it is appropriate to consider which communitarian regulatory approach (FDL or ART) better serves mothers, children, and families.

Recent selective prosecutions of certain classes of women, among them drug addicts and women with mental health histories,<sup>242</sup> for posing risk of harm to fetuses during pregnancies seem not only to contradict the “hands off” social policy with regard to ART, which emphasizes privacy and parental autonomy, but also selectively criminalizes fetal health harms. Low birthweight births are a common occurrence among ART pregnancies and fetal drug pregnancies. Among both groups, the possibilities of miscarriage and stillbirth exist.<sup>243</sup> In fetal drug cases as well as ART births, the mother’s behavior might impact fetal health and development. However, social, racial, and economic differences dominate state responses to these two classes of gestating women. These differences form a pattern that evidences disparities in how the law regulates risky maternal behavior. These disparities, in turn, lead to inconsistent health and social outcomes.

The week the McCaugheys were celebrated on the cover of *Newsweek Magazine*<sup>244</sup> for the remarkable birth of their seven children,<sup>245</sup> another narrative was developing in South Carolina. The happy glow of the McCaugheys, and the seeming “miracle” (of birthing seven children) as it was called, overshadowed the dramatic neo-

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<sup>242</sup> See *supra* Part II.A.

<sup>243</sup> Green, *supra* note 165, at 256.

<sup>244</sup> See NEWSWEEK, Dec. 1, 1997 (cover depicts Bobbi and Kenny McCaughey under the headline “‘We’re Trusting in God’: The Amazing McCaughey Septuplets”).

<sup>245</sup> See John McCormick et al., *The Magnificent Seven*, NEWSWEEK, Dec. 1, 1997, at 58.

natal rescue of the septuplets.<sup>246</sup> Ms. McCaughey had, like many ART patients, ingested drugs to hyperstimulate her ovaries, and a succession of other drugs to maintain her pregnancy. Of her children, all were born low birthweight, premature, and with a range of birth defects.<sup>247</sup> This was part of the McCaughey narrative that the public missed, in part because it was not reported, but, then again, it may not have been a story that the public was willing to hear.<sup>248</sup> In fact, the story would not have (and did not) change the way the political, social, and religious narrative was developed and *maintained* around the children as being “angels,” “miracles,” and “special.”<sup>249</sup> By extension, their mother was also special because only special people can give birth to “miracles.”

Nikitta Foston argues that a two-tiered society exists even among multiple birth moms and their children.<sup>250</sup> She contrasts the treatment

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<sup>246</sup> See *id.*

<sup>247</sup> See, e.g., Amanda Pierre, *Surgery Set for McCaughey Child; “More Normal” Walking Is the Goals Set for Nathan, the Sixth of the Iowa Septuplets*, DES MOINES REG., Nov. 8, 2004, at 1B.

<sup>248</sup> Recent searches on the LexisNexis database are quite revealing; although over 3,000 hits were found for “McCaughey and septuplets,” only 35 hits were found for “McCaughey and septuplets and birth defects,” in 2005. In 2008, when the research was repeated, using the same search criteria, only 43 hits contained the term birth defects (research conducted July 5, 2008).

<sup>249</sup> Thousands of articles have been written about the McCaughey septuplets. They have appeared on the covers of America’s most beloved magazines and seem to have semi-annual standing on the *Today Show*. For a sampling of the headlines, see, e.g., Joanne Boeckman, *The 7 Are Turning 5; They Grow Up So Fast! The Famous Septuplets Celebrate a Birthday and Prepare for New Challenges*, DES MOINES REG., Nov. 17, 2002, at 1E; Becky Bohrer, *U.S. Septuplets Enter “Terrible Two”: Charity, Faith Have Gotten Parents Through*, COMMERCIAL APPEAL (Memphis, TN), Nov. 23, 1999, at A6; Graham Brink, *Five Babies, Two Twins and One Happy Family*, ST. PETERSBURG TIMES (Fla.), Apr. 29, 2000, at 1A (quoting the father as saying God is watching over his children); Brian M. Christopher, *“Seven from Heaven:” Septuplets’ Father Tells Tales of Trial and Triumph*, INTELLIGENCER J. (Lancaster, Pa.), Feb. 25, 2000, at A-1; James Fussell, *Birthday for 7 Little Miracles*, DAILY TELEGRAPH (Sydney, Austl.), Nov 21, 1998, at 23; Elizabeth Kastor, *Bringing Up Lots & Lots of Babies*, GOOD HOUSEKEEPING, Mar. 1, 2001, at 106; Serge F. Kovaleski & Avram Goldstein, *Septuplets Make History and Headway*, WASH. POST, July 15, 2001, at A01; Susan Reinhardt, *Oh, Baby!(and Baby, and Baby!): Four WNC Families Blessed with Triplets in Recent Months*, ASHEVILLE CITIZEN-TIMES (N.C.), July 7, 2002, at 1C; Tamie Ross, *McCaughey Septuplets Inspirational*, DAILY OKLAHOMAN (Oklahoma City, Okla.), Dec. 2, 2000; Karen S. Schneider & Lisa Kay Greissing, *Baby Steps; One Year and Several Thousand Diapers Later, the McCaughey Septuplets Call It a (Birth)day*, PEOPLE, Nov. 30, 1998, at 210; *Dateline: Look Who’s Talking: The McCaughey Septuplets are Now Three Years Old* (NBC television broadcast Nov. 14, 2000); *Dateline: Seven Turn Seven; McCaughey Septuplets Turn Seven* (NBC television broadcast Nov. 21, 2004) (noting that they were “famous from the moment they were born”); *Dateline: The Septuplets at Five; McCaughey Septuplets Turn Five and Begin School* (NBC television broadcast Nov. 19, 2002); *Today: Kenny and Bobbi McCaughey Discuss Their Septuplets and Their CD Called “Sweet Dreams” in Honor of Children’s Second Birthday* (NBC television broadcast Nov. 19, 1999).

<sup>250</sup> Nikitta A. Foston, *The Harris Sextuplets: One Year Later*, EBONY, Oct. 2003, at 164.

of the McCaughey parents and their septuplets to the Harris family, whose sextuplets were born without the use of ART.<sup>251</sup> The article raised the question whether race matters in reproduction, and why the American community rallied around the McCaugheys, but not their Black counterpart, the Harris family. Foston reports that in addition to a phone call from then-president William Clinton, the McCaugheys received an invitation to the White House, an offer by Iowa's Governor to build them a home, a new twelve-seat van, free advertisements in major newspapers for their family assistance fund, college scholarships, and numerous other perks that the Harris family did not receive.<sup>252</sup> By stark contrast, the Harris family was barely mentioned in the press until a reporter with a publication whose audience is largely African American wrote about the disparate community treatment.<sup>253</sup>

It may be difficult to accept or understand that race matters in reproduction when the vestiges of some of the most pernicious forms of racial intolerance have, overtime, dissipated.<sup>254</sup> We desire to live in

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Ebony magazine's most significant readership is Black. The magazine was founded in 1942 by John H. Johnson, a Black businessman, who after World War II was disillusioned by the treatment of Black soldiers returning from war. According to the magazine's Web site, it reaches 12 million readers each month. See generally Johnson Publishing Company, <http://www.johnsonpublishing.com> (last visited Sept. 5, 2008).

<sup>251</sup> Foston, *supra* note 250, at 164.

<sup>252</sup> See *id.*

<sup>253</sup> See *id.*

<sup>254</sup> Photographs and documentaries are perhaps the most powerful historical and contemporary medium to illustrate the persistent violence that accompanied racial attitudes in the United States. Emotional and physical violence demarcated the bounded spaces of race in education, entertainment, housing, employment, and to some extent daily life, while Black Codes, Jim Crow social policies, eugenics, and Dixiecrat politics shaped the legal and political space. However, one might point to recent prosecutions of white men who murdered Black women and girls nearly fifty years ago as a sign of racial progress. Bobby Frank was seventy-one years old when prosecutors finally launched a trial for his murdering of four Black girls at a Birmingham church in 1963; Kenneth Clay Richmond's daughter came forward to share her eyewitness account of her father stabbing to death a Black woman selling encyclopedias in 1968 (although he died before ever being convicted); and a former mayor in New York, Charlie Robertson, who participated in the 1969 murder of a stranded motorist trying to change her tire was recently tried and acquitted. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 170 (Richard Delgado & Jean Stefancic eds., 1997) (arguing that stereotypes about Black sexuality and "brutishness" led to the lynching of more than 2500 Blacks during Reconstruction); Leon F. Litwack, *Hellhounds*, in WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (James Allen ed., 2000) (detailing through photography the community violence against Blacks and pointing out how Black women were not immune from racial violence and lynching even while pregnant); Rick Bragg, *Survivor of '63 Bomb Recalls Glass Shards and a Sister Lost*, N.Y. TIMES, May 18, 2002, at A1; Bruce C. Smith, *Murder Suspect Dies of Cancer*, INDIANAPOLIS STAR, Sept. 1, 2002, at 01A (informing readers that Kenneth Clay Richmond would never stand trial for murdering a Black woman).

a post-race and post-class society, but that road may be longer than Americans believe or desire it to be. Federal and state laws that require infants to “snitch” on their poorer mothers, erect bright lines that reinforce the idea that mothering is a community institution, one in which the boundaries of race, class, and sexuality matter.<sup>255</sup> The Keeping Children and Families Safe Act of 2003<sup>256</sup> gives some indication of this. In states receiving federal funds for child abuse and neglect services, health care providers involved in the delivery or care of infants identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure *must* notify the child protective services system of the exposure.<sup>257</sup>

As discussed in Part II, in recent years, women who fail to comply with physician recommendations, or to seek public medical assistance, have been “ratted out” to law enforcement and prosecutors; some to give birth in prison, others to witness the removal of their newborns, while prisons and jails become their post-operative recovery rooms.<sup>258</sup> Their maternal stories speak to a different reality—one where the womb is proactively regulated and policed for the health and safety of the fetuses, but which also involves conflicts of interest, violations of privacy, and disparate obligations on the part of physicians and nurses to act as law enforcement. Such was the case of Melissa Rowland of

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<sup>255</sup> In commenting on this Article, Paul Butler framed the issue of drug testing for gathering evidence to prosecute new mothers as requiring their fetuses and babies to “snitch” on their new parent. There is a provocative literature developing on the concept of snitching, which illumines an internecine divide among law enforcement, community organizations, and Blacks in the United States. In particular, some Blacks believe there is a “code” where to “snitch” even after the most horrible crimes is a vow of disloyalty to one’s family, community, gang, or group. In an odd way, the law reinforces this notion at the very local level with family immunity provisions in the common law, which allow spouses to refuse to testify against their partners in legal cases. An exception, however, is in the realm of crack laws, where recently prosecutors have harnessed tools from Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2000), to prosecute the girlfriends and wives of crack dealers under conspiracy laws. According to Phyllis Goldfarb, “[b]ecause the drug war has been fought on many fronts, these penalties include not just conviction but eviction, forfeiture of jointly held property, loss of student financial aid, and a lifetime ban on welfare benefits.” Phyllis Goldfarb, *Counting the Drug War’s Female Casualties*, 6 J. GENDER RACE & JUST. 277, 278, 280 (2002). Goldfarb has posited that:

[A] major way that women have been caught in the crossfire of the drug war has been through heterosexual relationships with men engaged in drug activity. Such relationships put women at considerable risk of severe penalties, including conviction of a drug offense, often as a constructive possessor, an aider and abettor, or a co-conspirator, typically with stiff, mandatory penalties.

*Id.*

<sup>256</sup> 42 U.S.C. § 5106a (2000).

<sup>257</sup> 42 U.S.C. § 5106a(b)(2)(A)(ii)(2000).

<sup>258</sup> See *supra* notes 83–93, 143–48, 153–56.

Utah,<sup>259</sup> Regina McKnight of South Carolina,<sup>260</sup> and many other women.<sup>261</sup> In what one commentator describes as a prosecutorial crusade, rural prosecutors are pursuing poor women with vigor.<sup>262</sup>

Unlike the laws targeting poor Black women for crack use, prosecutors in Alabama and elsewhere use laws “intended to protect youngsters from exposure to methamphetamine laboratories” to prosecute women who used the drug during pregnancy.<sup>263</sup> In one rural Alabama town, in a period over eighteen months, eight women were prosecuted for using drugs during their pregnancy, although the Alabama law under which they were convicted “makes no reference to unborn children.”<sup>264</sup> The prosecutor at the “forefront” of these convictions, Greg L. Gambril, urges that drug use during pregnancy is “a continuing crime,” and that the purpose of the law is to guarantee that a child has “a safe environment, a drug free environment” even in the womb.<sup>265</sup> Under this logic, the boundaries of maternal prosecutions are seemingly limitless; this could justify prosecuting pregnant women who contract diseases through sex, who use prescription medications, use ART, and any other activities or behaviors that could contaminate the womb or lead to a negative outcome for fetuses. Gambril argues that “no one is to say whether that environment is inside or outside of the womb.”<sup>266</sup> But such platitudes fall short in a state where child poverty, illiteracy, and unemployment are high.<sup>267</sup> Any discussion about child protection without addressing those children already in existence is truncated and an incomplete agenda at best. According to

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<sup>259</sup> See Kirk Johnson, *Probation in Caesarean Death*, N.Y. TIMES, Apr. 30, 2004, at A19.

<sup>260</sup> See Neil A. Lewis, *Justices Let Stand Ruling That Allows Forcibly Drugging an Inmate Before Execution*, N.Y. TIMES, Oct. 7, 2003, at A16 (reporting the United States Supreme Court’s refusal to overturn the conviction of Regina McKnight for consuming drugs during her pregnancy resulting in a miscarriage).

<sup>261</sup> See *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); see also Adam Nossiter, *In Alabama, Crackdown on Pregnant Drug Users*, N.Y. TIMES, Mar. 15, 2008, at A10.

<sup>262</sup> Nossiter, *supra* note 261 (noting that “unlike in other jurisdictions, women are not appealing their convictions, and lawyers and doctors talk about these cases reluctantly, if at all”).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* (quoting Alabama prosecutor Greg Gambril).

<sup>266</sup> *Id.*

<sup>267</sup> See, e.g., U.S. Dep’t of Agriculture, State Fact Sheets: Alabama, July 2, 2008, <http://www.ers.usda.gov/statefacts/al.htm> (last visited Sept. 5, 2008) (reporting that nearly thirty-one percent of rural Alabamans do not graduate from high school, and just over twelve percent finish college); *Alabama Still One of Ten Poorest States*, TUSCALOOSA NEWS (Ala.), Aug. 29, 2007, available at <http://www.tuscaloosanews.com/article/20070829/NEWS/708290340/1007> (describing Alabama’s “climb to No. 10 instead of near the bottom came largely on the misfortunes of other states. Alabama’s poverty rate remains at roughly 16 percent . . . and its median income is the fifth lowest in the nation”).

a study published in the *Journal of Developmental and Behavioral Pediatrics*, poverty is more detrimental to a child's cognitive development than in utero exposure to drugs like crack.<sup>268</sup>

Among these women is the class of persons the early eugenics laws were implemented to protect communities against: poor, uneducated women with lower IQs and prior mental health or criminal histories. They represent the less sympathetic among the population, and, unlike infertile women who used ART, many seek medical attention at public hospitals rather than at private, expensive clinics. These hospitals often serve as the conduit to law enforcement by disclosing medical data.<sup>269</sup>

The rationale for policies which lead not only to parental termination, but selective prosecution, is to protect children from potential health harms. According to the Fourth Circuit, the potential health harms to fetuses exposed to harmful substances, specifically crack, made the seizure of women's urine at public hospitals "a special need."<sup>270</sup> The health harms such laws seek to prevent include low birthweight, prematurity, and developmental delay. However, preoccupation with poor women misidentifies the scope of reproductive activities that lead to fetal harm.

This Article does not attempt to make the case for broader prosecution against women whose predictable and unpredictable behaviors during pregnancy might lead to fetal harm. Developing social policy to help women in making healthy choices during pregnancy is a laudable goal. Prosecuting pregnant women of any socio-economic background for drug use (legal or illegal) during pregnancy, however, with the specific aim to win convictions more severe than drug distributors and to shame and spectacle, will not achieve economic efficiency, rehabilitate mothers, promote healthy families, restore economic viability of households, or enhance the educational, economic, and social development of children. Indeed, children with mothers in prison fare worse than their counterparts.

Rather, in highlighting the vigorous prosecution of poor women, this Article documents that class and race continue to matter in reproduction, and that criminal prosecutions to protect fetal health lead to uneven outcomes, reify vertical hierarchies, and create distributional

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<sup>268</sup> Hallam Hurt et al., *Cocaine-Exposed Children: Follow-up Through 30 Months*, 16 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 29 (1999).

<sup>269</sup> See *supra* Part II.A.

<sup>270</sup> See *Ferguson v. City of Charleston*, 186 F.3d 469, 476–79 (4th Cir. 1999), *vacated*, 532 U.S. 67, *remanded to* 308 F.3d 380 (4th Cir. 2002).

imbalance in the criminal law. Further, this Article urges that such criminal prosecutions are under- and overinclusive. By overinclusive, it seems that prosecutors and courts are unwilling to consider mitigating circumstances that on a more rational review of each case might lead one to conclude that some circumstances were so extenuating that prosecution would be excessive, unwarranted, and less justifiable. By underinclusive, such policies ignore other risky behaviors that make the womb a hostile or vulnerable environment, including ART, contracting sexually transmitted diseases through unprotected sex, abusing prescription medications during gestation, working in highly stressful or toxic environments, or drinking and smoking. That crack and methamphetamine use are illegal does not explain away selective prosecution, especially because the potential risks to fetuses are the same or worse with ART. How do we reconcile such policies and the disparate outcomes?

#### A. Infertility

According to the CDC, nearly ten percent (or about nine million) of American women of reproductive age have had an infertility-related medical appointment or service at some point in their lives.<sup>271</sup> Researchers calculate infertility based on medical services sought, which also has socioeconomic implications that are not accounted for.<sup>272</sup> Poorer women who lack health coverage are likely to be disproportionately underrepresented or unaccounted for with infertility statistics. The CDC describes infertility services to include “medical tests to diagnose infertility, medical advice and treatments to help a woman become pregnant, and services other than routine prenatal care to prevent miscarriage.”<sup>273</sup> These figures, however, do not accu-

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<sup>271</sup> See CDC 2005 ART SUCCESS RATES, *supra* note 21, at 3. Unfortunately, the data relied upon by the CDC is somewhat aged; it was gathered as part of a study conducted over ten years ago from the 1995 National Survey of Family Growth. See also STEPHEN L. CORSON, CONQUERING INFERTILITY 1 (revised ed. 1990) (“In the United States, approximately 14 to 16 percent of all couples attempting to get pregnant have difficulty conceiving, and are defined by fertility therapists as being infertile.”); Val Davajan & Robert Israel, *Diagnosis and Medical Treatment of Infertility*, in INFERTILITY: PERSPECTIVES FROM STRESS AND COPING RESEARCH 17 (Annette L. Stanton & Christine Dunkel-Schetter eds., 1991) (stating “it has been estimated that between 10% and 15% of married couples in the United States are infertile”).

<sup>272</sup> CDC, U.S. DEP’T OF HEALTH & HUMAN SERVS., 2004 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2006) [hereinafter 2004 ART SUCCESS REPORT], available at <http://ftp.cdc.gov/pub/Publications/art/2004ART508.pdf>; see also Jessica L. Lambert, Note, *Developing a Legal Framework for Resolving Disputes Between “Adoptive Parents” of Frozen Embryos: A Comparison to Resolutions of Divorce Disputes Between Progenitors*, 49 B.C. L. REV. 529 (2008).

<sup>273</sup> CDC 2005 ART SUCCESS RATES, *supra* note 21, at 3.

rately illustrate infertility in the United States, as seven percent of married couples (approximately two million couples) in which the woman is of reproductive age “reported that they had not used contraception” for nearly a year and “the woman had not become pregnant.”<sup>274</sup>

Researchers estimate that infertility rates may increase as more women delay childbearing until the years when reproductive fertility declines.<sup>275</sup> Researchers confirm that female fertility peaks in the twenties.<sup>276</sup> Conversely, their slightly older counterparts, women right out of graduate school or barely in their thirties, are, according to scientists, reproductively old.<sup>277</sup> Scientists report that fertility decline begins for women in their thirties, with a dramatic decrease in fertility at and over the age of thirty-five.<sup>278</sup> Thus, for many infertile women, ART is perceived as more than a rational choice; it is a blessing.<sup>279</sup> Accordingly, a growing number of women diagnosed as infertile are turning to ART in order to conceive.<sup>280</sup> Dr. Harvey Stern refers to “[e]volution” as the “nasty, politically incorrect son of a bitch that says, ‘I want young lionesses guarding the cubs’—it doesn’t know about careers and delayed childbearing . . . .”<sup>281</sup> Along with the decrease in fertility, there is a heightened probability for birth defects in children conceived by “reproductively” older women—even without using in vitro fertilization and other forms of ART.<sup>282</sup> Chromosomal abnormalities, for example, occur in forty to fifty percent of pregnancies in women ages thirty to thirty-five.<sup>283</sup> As one commentator observes, “the share of embryos that women produce that are

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<sup>274</sup> *Id.* These figures may not account for infertility in gay couples or families that lack access to medical treatment and insurance. It is quite possible that women who lack health insurance are undercounted as “infertile” as they would have limited access to the medical appointments that would diagnose infertility. Indeed, there may be women completely unaware that they are infertile.

<sup>275</sup> See, e.g., Johannes L. H. Evers, *Female Subfertility*, 360 *LANCET* 151, 151 (2002).

<sup>276</sup> Anna Mulrine, *Making Babies*, *U.S. NEWS & WORLD REP.*, Sept. 27, 2004, at 60.

<sup>277</sup> See *id.*

<sup>278</sup> See *id.*

<sup>279</sup> See, e.g., Nuala O’Connor, *Open Letter to the Archbishop*, *IRISH TIMES*, Mar. 6, 1999, at P10.

<sup>280</sup> See Mulrine, *supra* note 276, at 60.

<sup>281</sup> Patricia Edmonds, *Making Babies*, *WASHINGTONIAN*, Dec. 2004, at 175 (quoting Dr. Harvey Stern).

<sup>282</sup> See, e.g., S. London, *Risk of Pregnancy-Related Death Is Sharply Elevated for Women 35 and Older*, 36 *PERSPECTIVES ON SEXUAL & REPROD. HEALTH* 89, 89–90 (2004) (noting that women forty or older have five times as high a risk of dying from pregnancy-related causes as women twenty to twenty-five years old).

<sup>283</sup> Edmonds, *supra* note 281, at 175.

chromosomally abnormal rises . . . to about 70% in women 40 and over.”<sup>284</sup> Consequently, the likelihood of pregnancy is incredibly low even with the use of in vitro technologies, and health risks are present.<sup>285</sup>

Professor Judith Daar, a leading author and researcher on ART is right—“[t]he world of [ART] has forced our society to confront scenarios that were unimaginable a mere quarter century ago.”<sup>286</sup> Technology now affords infertile families the ability to conceive, and provides reproductive options to those who have a diminished capacity to conceive due to delay in childbearing.<sup>287</sup> Also, infertility is no longer a “woman’s issue.”<sup>288</sup> In recent years, researchers report that “sperm counts have dropped by almost a third in a decade.”<sup>289</sup> A study of over 7000 men who visited the Aberdeen Fertility Centre at the University of Aberdeen in Scotland between 1989 and 2002 found that “average sperm concentrations fell by nearly 30 percent.”<sup>290</sup>

For women, reproductive technologies vary as broadly as the causes for infertility, of which older maternal age,<sup>291</sup> environment,<sup>292</sup> a

<sup>284</sup> *Id.*

<sup>285</sup> *See id.* (noting that “women in their late thirties and early forties may have only a 10 to 20 percent chance of having a baby” even with the use of in vitro technology and other “interventions”).

<sup>286</sup> Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J.L. & MED. 455, 455 (1999).

<sup>287</sup> *See, e.g.*, Schieve et al., *supra* note 16, at 97.

<sup>288</sup> *See* Sam Lister, *Careful, Lads, That Laptop Might Burn Your Genes*, TIMES (London), Dec. 9, 2004, at News 3.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* Commentators identify a number of factors that contribute to male infertility, including obesity, drug use, alcohol, and smoking. *Id.* Other factors include exposure to laptops “[p]esticides, chemicals and radioactive material.” *Id.*

<sup>291</sup> *See, e.g.*, Reefhuis et al., *supra* note 159, at 1163; Reynolds et al., *supra* note 159, at 1159 (suggesting that as “more women delay childbearing into their late 30s and 40s,” greater complications arise and infertility increases. The authors note that among the problems arising with increased maternal age are “the risk for multiple birth among naturally conceived pregnancies.”); Suzanne C. Tough et al., *Delayed Childbearing and Its Impact on Population Rate Changes in Lower Birth Weight, Multiple Birth, and Preterm Delivery*, 109 PEDIATRICS 399, 401 (2002); *see also* Dawn P. Misra & Cande V. Ananth, *Infant Mortality Among Singletons and Twins in the United States During 2 Decades: Effects of Maternal Age*, 110 PEDIATRICS 1163, 1163–64 (2002).

<sup>292</sup> Harmful environmental agents have been linked to sterility, infertility, cancer, and many other chronic illnesses. *See, e.g.*, Robert L. Brent et al., *A Pediatric Perspective on the Unique Vulnerability and Resilience of the Embryo and the Child to Environmental Toxicants: The Importance of Rigorous Research Concerning Age and Agent*, 113 PEDIATRICS 935, 935 (2004); Robert L. Brent, *Environmental Causes of Human Congenital Malformations: The Pediatrician’s Role in Dealing with These Complex Clinical Problems Caused by a Multiplicity of Environmental and Genetic Factors*, 113 PEDIATRICS 957, 960 (2004); Robert W. Miller, *How*

history of sexually transmitted diseases,<sup>293</sup> and poor health are documented as contributing factors. These studies indicate that individually, these factors can cause sterility, infertility, higher incidences for still birth, miscarriage, congenital delays in fetuses, congenital malformations, and multiple births. The by-products of these factors lead to secondary problems, which include increased rates of caesarean surgical deliveries, greater rates of hysterectomies, and increased use of reproductive services to address infertility.

With FDLs, maternal behavior, the law, and medicine intersect in an effort to protect fetuses and punish mothers for failing to do better in protecting their unborn children. The same is not true with ART. Instead, within the sphere of ART a double bind forms and parental autonomy nudges against legislative protection of fetuses. But, as there is limited if any governmental involvement in ART, the tension between parental choice (or the choice to parent by any means necessary) and protection of fetuses, may be perceived as only a false dichotomy. Few legal scholars explore this intersection in ART literature. Moreover, compelling scientific studies and medical evidence confirming ART's detrimental effects on fetuses and the children born from the technology generate little if any legislative action. Legislative inaction could indicate policymakers' indifference to the harms that result from ART, unease about addressing the harms caused to fetuses through ART, that a political minefield is avoided by ignoring the murkier, darker side of ART, or that so long as ART is not illegal, whatever harms that may result, no matter the severity, are justifiable. Or at least legislative inaction is justifiable, if not required.

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*Environmental Hazards in Childhood Have Been Discovered: Carcinogens, Teratogens, Neurotoxicants, and Others*, 113 *PEDIATRICS* 945, 945 (2004).

<sup>293</sup> Sexually transmitted diseases result in infertility, increased risk of hysterectomy, subfertility, ectopic pregnancies, and chronic pelvic pain. See, e.g., Evers, *supra* note 275, at 151 (noting that women are delaying childbirth, which in turn increases the probability of sexually transmitted diseases, sperm decline in their partners, and a reduction in the quality and quantity of viable eggs); Nadereh Pourat et al., *Medicaid Managed Care and STDs: Missed Opportunities to Control the Epidemic*, 21 *HEALTH AFFAIRS* 228, 229 (2002) (finding “[t]he burden of illness from [sexually transmitted diseases] is exacerbated by infertility, pregnancy complications, cancer, and a greater susceptibility to HIV infection”); Robert L. Brent & Michael Weitzman, *The Pediatrician's Role and Responsibility in Educating Parents About Environmental Risks*, 113 *PEDIATRICS* 1167, 1171 (2004) (noting “[s]exually transmitted disease can be life-threatening, cause infertility or sterility, and increase the risk of cervical cancer”); Brian M. Willis & Barry S. Levy, *Child Prostitution: Global Health Burden, Research Needs, and Interventions*, 359 *LANCET* 1417, 1419 (2002).

### B. *Reproduction, Pressure and Technology*

Over the past two decades, scientists have perfected techniques that help couples and individuals to conceive. The technique most commonly used transfers fertilized human eggs into a woman's uterus.<sup>294</sup> A woman may decide to use her own eggs or those of a third party.<sup>295</sup> Increasingly, eggs are acquired from third parties, including donors or women who are compensated for the use of their eggs.<sup>296</sup> The procedures are time consuming and expensive, making the technology cost-prohibitive for families with limited economic resources.<sup>297</sup> Notwithstanding technological advancements and that some pregnancies will result, ART's failure rate is estimated to be between sixty-five and eighty percent,<sup>298</sup> although in some cases the failure rate may be as high as ninety-nine percent with women over forty-four years old.<sup>299</sup> More telling is that this figure also indicates the high percentage of ART pregnancies that will terminate by miscarriage and other means.

Nevertheless, the enthusiastic demand for ART seems to justify its continued use. In other words, because women and men want the technology, some might argue that it should necessarily be available. Proponents of the technology could make an easy case for justifying its continued use, even in light of adverse health risks to fetuses. After all, legislators would not dare to proscribe pregnant women's access to fatty and innutritious foods during pregnancy regardless of potential health risks to the mother and fetus. Equally, and despite the known side effects of both smoking and drinking alcohol during

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<sup>294</sup> AM. SOC'Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 11 (2007), available at <http://www.asrm.org/Patients/patientbooklets/ART.pdf> [hereinafter ASRM BULLETIN] (explaining that women undergoing ART may use their own eggs or those of an egg donor. Distinctions are also made as to whether the eggs transferred were newly fertilized, fresh, or previously fertilized, frozen, and then thawed.).

<sup>295</sup> *Id.* at 11.

<sup>296</sup> See generally JULIA DEREK, CONFESSIONS OF A SERIAL EGG DONOR (2004) (writing about her emotional and financial experience as an egg donor); Tessa Mayes, *Students Sell Their "Anglo-look" Eggs for Thousands on Internet*, SUNDAY TIMES (London), Aug. 10, 2003, at Home News 21.

<sup>297</sup> See, e.g., Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 286-87 (1997).

<sup>298</sup> See CDC 2005 ART SUCCESS RATES, *supra* note 21, at 20.

<sup>299</sup> See *id.* at 27. According to the CDC, in 2005 (the last available data-reporting year available), "of the 134,260 ART cycles performed at these reporting clinics in 2005 resulted in 38,910 live births (deliveries of one or more living infants) and 52,041 infants." *Id.* at 11. See also Mulrine, *supra* note 276, at 64.

pregnancy, and the negative impact on fetal development, prosecutors have yet to engage their artillery with fighting those battles.

Respecting autonomy often means tacitly tolerating objectionable social behaviors. If men and women willingly engage in risky reproductive procedures on what basis can the government legitimately intervene? Despite high failure rates and health risks associated with ART, such realities seem less significant in light of demand, the ways in which we associate patriotism with childbirth, and respect for parental autonomy.

In recent decades, the satellite of assisted reproductive procedures that help families to conceive children has radically transformed public opinion.<sup>300</sup> Because between ten and fifteen percent of Americans of childbearing age are infertile (and have sought medical help),<sup>301</sup> fertility clinics practicing ART have found an eager audience. But current public opinion reflects a pendulum swing from attitudes in the 1980s. Consider that ART was once characterized by scholars as “separat[ing] the physical dimensions of sexual intercourse from the emotional and spiritual ones.”<sup>302</sup> IVF is now a popular, revenue-generating procedure, with individual clinics grossing as much as \$20 million annually.<sup>303</sup> ART’s popularity and use has grown significantly over the past ten years.<sup>304</sup> During this period, the number of children born through ART techniques more than quadrupled.<sup>305</sup> In 2001, 384 fertility clinics were reported to the CDC.<sup>306</sup> Those clinics reported performing 107,587 ART cycles, resulting in 29,344 live births and 40,687 babies.<sup>307</sup> One year later, more ART clinics were in business

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<sup>300</sup> See, e.g., Lisa Sweetingham, *DNAbbling Parents: Genetics Technology Brings Both Hope and Excruciating Personal Decisions to Patients Who Use It*, 22 HEALTH AFFAIRS 172, 176 (2003); Emily Messner, *Couple’s Joy Multiplied by Four*, WASH. POST, Jan. 6, 2005, at T3.

<sup>301</sup> See *supra* notes 272–73 and accompanying text. But see Marlene Cimon, *American Infertility Rate Not Growing Study Finds*, L.A. TIMES, Dec. 7, 1990, at A4 (reporting that “[t]he mistaken perception that the United States is experiencing an ‘epidemic of infertility’ could reflect demographic and social changes affecting some groups of women more than others . . .”).

<sup>302</sup> J. KERBY ANDERSON, GENETIC ENGINEERING 72 (1982).

<sup>303</sup> Justin Martin, *A Baby or Your Money Back*, FORTUNE SMALL BUSINESS, Nov. 10, 2003, at 62, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/2003/11/10/352829/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2003/11/10/352829/index.htm).

<sup>304</sup> See CDC 2005 ART SUCCESS RATES, *supra* note 21, at 62; see also Mulrine, *supra* note 276, at 61 (reporting that a clinic in Las Vegas services infertile couples that have “traveled from out of state to try again”).

<sup>305</sup> See Mulrine, *supra* note 276, at 61 (attributing increased use to the high failure rate).

<sup>306</sup> See CDC, 2001 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 11, available at <http://www.cdc.gov/ART/ART01/PDF/ART2001part1.pdf> [hereinafter CDC 2001 ART SUCCESS RATES].

<sup>307</sup> *Id.*

and the number of cycles performed had increased. In 2002, 391 fertility clinics were reported to be in operation.<sup>308</sup> Those clinics reported performing 115,392 ART cycles, resulting in 33,141 live births and 45,751 babies.<sup>309</sup> In 2005 (the last year for which data is available from the CDC), 422 fertility clinics reported to the CDC.<sup>310</sup> They performed 134,260 ART cycles, which resulted in 38,910 live births and 52,041 infants.<sup>311</sup> The distinguishing factor between live births and the number of infants born can be explained by the number of multiple births that occur with ART procedures. Those figures tend to be much higher than the national average.<sup>312</sup>

Despite its popularity, ART is a gamble; there are no guarantees of pregnancy (although some doctors make exaggerated claims that they can help 95% of patients conceive).<sup>313</sup> Such aggressive fertility claims misinform patients and warrant clarification and disclosure. For example, Dr. Keith Blauer's claim, that "if they're willing to use the technologies" his clinic can accomplish a pregnancy for almost every couple, is illusory.<sup>314</sup> Blauer's clinic might give a client the opportunity to carry another woman's embryos, but that is not the same as an infertile woman becoming pregnant. Rather, his clinic provides the opportunity in extreme cases for women with significant financial resources to become "carriers."<sup>315</sup> Other clinics striving for high "success" rates tend to refuse to take complicated fertility cases, thereby decreasing the risks of a "low" success rate or, conversely, increasing their statistical pregnancy "success" rates.

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308 See CDC, 2002 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 11, available at <http://www.cdc.gov/ART/ART02/PDF/ART2002.pdf> [hereinafter CDC 2002 ART SUCCESS RATES].

309 *Id.*

310 See, e.g., CDC 2005 ART SUCCESS RATES, *supra* note 21, at 11.

311 *Id.*

312 See, e.g., National Center for Health Statistics: Fast Stats A to Z: Multiple Births, <http://www.cdc.gov/nchs/fastats/multiple.htm> (last visited Sept. 5, 2008) (summarizing data for multiple births in the U.S.); see also Salynn Boyles, *Multiple Births from In Vitro Down: Pregnancy, Live Birth Rates Still Going Up Despite Guideline Limitations*, WEB MD, Apr. 14, 2004, <http://www.webmd.com/infertility-and-reproduction/news/20040414/multiple-births>.

313 See Edmonds, *supra* note 281, at 174.

314 *Id.*

315 Judy Siegel-Itzkovich, *Surrogacy: Bearing the Greatest Gift of All*, JERUSALEM POST, May 27, 2001, at 17 (noting the plethora of American for-profit companies that serve to match surrogates with baby-seeking couples). Siegel-Itzkovich further states that on average U.S. surrogates receive about \$12,000 in addition to the \$20,000 that the surrogacy centers receive. *Id.* Overall, couples pay an average of \$70,000 for all expenses. *Id.* Presumptively, couples seeking gestational surrogate services such as these must be "wealthy." *Id.*

IVF bypasses the natural process, allowing fertilization outside of the womb or, according to its Latin translation, “in glass.”<sup>316</sup> IVF facilitates egg fertilization in a controlled, clinical environment by mixing sperm and egg in a vessel outside the gestational carrier’s body.<sup>317</sup> The fertilized eggs culture for several days until implanted into the woman’s uterus.<sup>318</sup> The process presumes healthy sperm from the male;<sup>319</sup> however, not all male sperm are healthy.<sup>320</sup> Marginal or defected sperm contributes to couples’ infertility, and is addressed through ART procedures such as intra-cytoplasmic sperm injection (“ICSI”),<sup>321</sup> which has been linked to birth defects in children.<sup>322</sup> IVF along with several other techniques comprise the family of reproductive fertilization therapies used to clinically treat infertility.<sup>323</sup> The other technologies include gamete intra-fallopian transfer (“GIFT”),<sup>324</sup> ICSI,<sup>325</sup> zygote intrafallopian transfer (“ZIFT”),<sup>326</sup> and zona pellucida<sup>327</sup> manipulation.

Assisted conception technologies are medically complicated, painful for women, and expensive.<sup>328</sup> Reproductive technology may

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<sup>316</sup> See AMERICAN HERITAGE COLLEGE DICTIONARY 921 (4th ed. 2002).

<sup>317</sup> See Kimberly A. Horvath, *Infertility Treatment: An Argument for Mandated Coverage*, 32 J. HEALTH L. 445, 450 (1999).

<sup>318</sup> See *id.*

<sup>319</sup> See GRACE CENTOLA & KENNETH GINSBURG, EVALUATION AND TREATMENT OF THE INFERTILE MALE 133–35 (1996).

<sup>320</sup> *Id.*

<sup>321</sup> ICSI, which involves the use of sperm extraction from deep within the testicles of patients, is facilitated by injecting one spermatozoon directly into a woman’s oocyte or egg. See, e.g., AM. SOC’Y FOR REPROD. MED., PATIENT’S FACT SHEET: INTRACYTOPLASMIC SPERM (2008), [www.asrm.org/Patients/FactSheets/ICSI-Fact.pdf](http://www.asrm.org/Patients/FactSheets/ICSI-Fact.pdf).

<sup>322</sup> See *id.* But see A. G. Sutcliffe et al., *Outcome in the Second Year of Life After In-Vitro Fertilisation by Intracytoplasmic Sperm Injection: A UK Case-Control Study*, 357 LANCET 2080, 2080 (2001) (finding no major birth defect differences in a study of 208 singletons conceived by ICSI. The study, however, did not test for chromosomal defects in offspring, which limits its reliability.).

<sup>323</sup> See, e.g., CDC 2005 ART SUCCESS RATES, *supra* note 21, at 3–4.

<sup>324</sup> *Id.* GIFT is a process involving the use of a fiber-optic instrument to guide the transfer of gametes (unfertilized eggs and sperm) into a woman’s fallopian tubes through small incisions in the abdomen. *Id.*

<sup>325</sup> *Id.* ICSI involves a single sperm being injected directly into a woman’s egg.

<sup>326</sup> *Id.* Unlike GIFT procedures, ZIFT involves clinical fertilization of a woman’s eggs and “using a laparoscope to guide the transfer of fertilized eggs (zygotes) into her fallopian tubes.”

<sup>327</sup> Zona pellucida is the thick cellular covering that surrounds the ova. *Id.* See also M-I. Hsu et al., *Is the Timing of Implantation Affected by Zona Pellucida Micromanipulation?*, 17 J. ASSISTED REPROD. & GENETICS 34 (2000) (concluding that zona pellucida manipulation does not affect the timing of implantation or early embryo development).

<sup>328</sup> See, e.g., Jane Bradbury, *Could Chromosome Analysis Improve IVF Success Rate?*, 356 LANCET 1497, 1497 (2000).

offer “choice,” but not all choices are equal, and some are more illusory than real. With incredibly low success rates, each attempt at these medical procedures is a financial gamble,<sup>329</sup> yet the potential loss extends beyond the financial to the health of the mother, the surrogate (if one is used), and the potential fetus(es).<sup>330</sup> Several surgeries with general anesthesia may be required with each fertility attempt or “cycle” that a woman undergoes.<sup>331</sup> Thus, the complications associated with IVF are often distanced from the more glowing accounts about reproductive conception. Consider, for example:

A survey of in-vitro fertilisation clinics seeking recalled instances of serious morbidity and known fatalities revealed a wide variety of complications, including two deaths because of the accidental failure to deliver oxygen during general *anesthesia*, visceral injuries during egg retrievals, pelvic abscesses, serious infections, five serious vascular complications (one with residual hemiplegia), torsion of the ovary, and cancers discovered during or after treatment.<sup>332</sup>

Commentator Liz Tilberis, who died from an aggressive ovarian cancer that she attributed to ART, referred to the procedure as ovary “blasting.”<sup>333</sup> Researchers prodigiously document how ovaries may be stressed by undergoing cycles to release numerous eggs, many times more than that produced in a normal, one-month ovulation cycle.<sup>334</sup> According to one commentator, some researchers are concerned

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<sup>329</sup> CDC 2005 ART SUCCESS RATES, *supra* note 21, at 85 (reporting that for women forty-one and older, only 10.6% of cycles resulted in live births).

<sup>330</sup> *See infra* notes 329–36 and accompanying text; *see also* Stromberg, *supra* note 20, at 462 (finding that IVF babies suffer three times the rate of cerebral palsy as those in the general population); Reefhuis, *supra* note 159, at 1166 (finding “associations between fertility treatments and craniosynostosis”).

<sup>331</sup> *See, e.g.*, Sandra Coney, *Long Term Effects of Assisted Conception*, 345 LANCET 976, 976 (1995) (including data from a survey that revealed complications and deaths from IVF procedures).

<sup>332</sup> *Id.*

<sup>333</sup> LIZ TILBERIS, NO TIME TO DIE 45 (1998). Liz Tilberis died from ovarian cancer. Her oncologist, however, pointed out that proof of cancer connected with ART has not been scientifically proven. *See id.*

<sup>334</sup> Robert E. Bristow & Beth Y. Karlan, *Ovulation Induction, Infertility, and Ovarian Cancer Risk*, 66 FERTILITY & STERILITY 499, 499 (1996); J.J. Nieto et al., *Ovarian Cancer and Infertility: A Genetic Link?*, 354 LANCET 649, 649 (1999); Harvey A. Risch et al. *Parity, Contraception, Infertility, and the Risk of Epithelial Ovarian Cancer*, 140 AM. J. EPIDEMIOLOGY 585, 586 (1994); Carmen Rodriguez et al., *Infertility and Risk of Fatal Ovarian Cancer in a Prospective Cohort of U.S. Women*, 9 CANCER CAUSES & CONTROL 645, 646 (1998); Mary Anne Rossing et al., *Ovarian Tumors in a Cohort of Infertile Women*, 331 NEW ENG. J. MED. 771, 771 (1994); Alice S. Whittemore et al., *Characteristics Relating to Ovarian Cancer Risk: Collaborative Analysis of 12 U.S. Case-Control Studies*, 136 AM. J. EPIDEMIOLOGY 1184, 1185 (1992).

about the stress ovaries endure through aggressive hyper-stimulation procedures to produce more eggs, warning that “stimulating them, with drugs like Clomid or Pergonal, to produce more eggs could cause more stress, perhaps damaging ovaries.”<sup>335</sup>

A study conducted by researchers in the Divisions of Gynecologic Oncology and Maternal-Fetal Medicine, at the University of California’s Irvine Medical Center, suggested a link between fertility drugs and cancer in patients undergoing fertility drug therapy.<sup>336</sup> The researchers’ findings may also demonstrate a link to cancer in fetuses.<sup>337</sup> More research is necessary to determine the efficacy of fertility drugs and the risks associated with their use;<sup>338</sup> recent findings linking fertility treatments and drugs to cancer, however, are cause for alarm and raise questions about the ramifications of non-therapeutic surgeries and fertility treatments. Although some cycles result in pregnancy, most do not.<sup>339</sup> If one or more of the embryos implant successfully, the process then progresses to “clinical pregnancy.”<sup>340</sup> Because there is a low rate of successful implantation, most women undergo several cycles before pregnancy occurs or until they suspend the treatments.<sup>341</sup>

Clinical pregnancies, however, do not indicate that fetuses will successfully carry to term, or that children will be born “healthy,” or that miscarriages will not result. *There are no guarantees in assisted reproduction and “success” is an elusive term in the reproductive industry.* This point cannot be overemphasized given the vulnerable and uninformed status of patients seeking fertility treatments. Instead, a “clinical pregnancy” simply indicates that a woman *achieved* or was pregnant at a certain time.<sup>342</sup> To *diagnose* or monitor whether a fetus

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<sup>335</sup> Polly Summar, *The Cost of Infertility*, ALBUQUERQUE J. (N.M.), Oct. 3, 2004, at 10.

<sup>336</sup> See, e.g., Krishnansu Tewari et al., *Fertility Drugs and Malignant Germ-Cell Tumour of Ovary in Pregnancy*, 351 LANCET 957, 957–58 (1998) (providing the first case study linking germ cell cancer to fertility drug therapy. The authors suggest that “[s]ince fertility drugs recruit follicles containing oocytes derived from germ cells, the germ cell may also be susceptible to any possible carcinogenic influence of fertility drugs.”).

<sup>337</sup> *Id.*

<sup>338</sup> Tom Reynolds, *Fertility Drugs May Raise Ovarian Cancer Risk*, 85 J. NAT’L CANCER INST. 84, 85 (1993).

<sup>339</sup> See Evers, *supra* note 275; Mulrine, *supra* note 276, at 61.

<sup>340</sup> See CDC 2005 ART SUCCESS RATES, *supra* note 21, at 17.

<sup>341</sup> See Mulrine, *supra* note 276, at 61.

<sup>342</sup> Often the remaining non-implanted embryos are preserved with the aid of a warming incubator or a sophisticated freezing technique known as cryopreservation. Cryopreserved embryos result in lower incidence of live birth. See Family Beginnings: Egg Freezing: Risks and Benefits, <http://www.ivf-indiana.com/education/egg-freezing-risks-benefits.html> (last visited Sept. 5, 2008). For some women, using cryopreservation is less advantageous because frozen embryos have a low survival rate in the “thawing” process. The major benefit of this technique,

is actually healthy requires involvement with a separate group of physicians and necessitates more expensive, invasive procedures.<sup>343</sup> To be sure, genetic diagnosis techniques are very helpful for women and couples seeking information about the health of their fetuses.<sup>344</sup> Indeed, some of these fetal screening techniques are not new, including amniocentesis and fetal blood sampling, but the procedures have always posed health risks.<sup>345</sup>

Nonetheless, while screening procedures provide diagnostic information about certain birth defects, they do not provide cures for the diagnosed defects.<sup>346</sup> Understandably then, procedures to eliminate or reduce the risks of *birthing* ART children with congenital abnormalities are no less daunting, complicated, or expensive than the reproductive techniques to become pregnant.<sup>347</sup> Yet, because ART pregnancies expose fetuses to greater health risks, parents are naturally motivated to screen for the very birth defects that result from or have a higher incidence of manifesting through reproductive technology. Herein a tragic medical and economic double bind unfolds.<sup>348</sup>

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however, is that it affords women whose uterus lining is not ready for implantation the opportunity to preserve the embryo until she desires implantation, and it is less expensive than undergoing repeated IVF procedures. *See id.*

<sup>343</sup> ART and preimplantation genetic diagnosis (“PGD”), a screening technology, are vastly different. ART involves assistance to become pregnant and PGD entails scrutinizing the health of and diagnosing embryos. *See, e.g.,* Christopher Cunniff, *Clinical Report: Guidance for the Clinician in Rendering Pediatric Care: Prenatal Screening and Diagnosis for Pediatricians*, 114 PEDIATRICS 889, 889 (2004). For many of these techniques, the accuracy, reliability, and safety of the procedures are positively correlated with operator experience. Procedures such as amniocentesis, chorionic villus sampling, fetal blood sampling, and PGD allow analysis of embryonic or fetal cells or tissues for chromosomal, genetic, and biochemical abnormalities. Fetal imaging studies such as ultrasonography, magnetic resonance imaging, and fetal echocardiography identify structural abnormalities and provide definitive diagnostic information or suggest additional evaluation. In addition to these techniques, maternal serum screening is used to identify pregnancies that are at increased risk of adverse outcomes, such as neural tube defects, chromosomal abnormalities, and fetal abdominal wall defects. *Id.*

<sup>344</sup> *Id.* For some parents who would wish to terminate a pregnancy of unhealthy fetuses, obtaining genetic diagnosis information early in the gestation expands their options. *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* *See also* Shari Roan, *Multiple Births, Multiple Risks*, L.A. TIMES, June 25, 2007, at F1 (reporting that “couples who risk a multiple gestation pregnancy may also have to face the difficult prospect of selective reduction, in which the doctor aborts one or more of the fetuses to improve the likelihood that the remaining ones will be born healthy”).

<sup>348</sup> Moreover, newer screening technologies, such as PGD, may not be covered through insurance plans and thus will be an additional financial burden to women and couples utilizing IVF.

Given the strong correlation between ART and multiple births,<sup>349</sup> certain health problems are inevitable, such as low birthweight<sup>350</sup> and cerebral palsy.<sup>351</sup> With irrefutable evidence of high risks of unhealthy outcomes for children born through this technology, why have legislators focused only on fetal health risks associated with women who consume illegal drugs? If what states hope to achieve is a reduced risk of children being born with physical disabilities, what can we learn from state and federal inaction in policing assisted reproduction?<sup>352</sup> Is the legislative inaction here a signal? And if so, how should it be read?

### C. Success and Risks

*Sylas was left as the lone surviving sextuplet when his sister, Lucia Rae, died July 22. She was one of two girls and four boys born on June 10, four and a half months prematurely, to Brianna and Ryan Morrison of St. Louis Park . . . Three of the boys (Bennet Ryan, Tryg Brenton and Lincoln Sean) died within a week of birth, and a girl (Cadence Alana) died June 23, [2007].*<sup>353</sup>

Defining success among the myriad of reproductive services available is a daunting task, not undertaken by Congress for over fifteen years.<sup>354</sup> Reproductive societies may differ in how they define success. The CDC uses a very low threshold for determining ART success, and some medical societies refuse to consider multiple births a success.<sup>355</sup> Congress spoke to the issue in 1992, but did so by pro-

<sup>349</sup> See, e.g., Green, *supra* note 159, at 257.

<sup>350</sup> See Timothy Littlefield et al., *Multiple-Birth Infants at Higher Risk for Development of Deformational Plagiocephaly: II. Is One Twin at Greater Risk?*, 109 *PEDIATRICS* 19, 20 (2002).

<sup>351</sup> See Stromberg, *supra* note 20, at 462.

<sup>352</sup> My question here is not an absolute indictment against ART. Indeed, the technology affords opportunities that would otherwise not be available to some couples. Rather the question returns us to the very heart of this Article, which examines the disparate impact of policing different wombs through criminal sanctions. There is also a second question, which I address in other research, which is that there exists a double bind in mothering in general that forces some women to delay pregnancy—for employment and other reasons—until the “options” pose serious risks of harm to them and their fetuses. Given the risks described herein, would a woman make an educated free choice to delay pregnancy until infertility set in and then address her subfertility by undergoing highly invasive and risky assisted conception?

<sup>353</sup> *Final Surviving Sextuplet May Go Home with Family Soon*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Oct. 10, 2007, at B3.

<sup>354</sup> See 42 U.S.C. § 263a-1(b)(1) (2000) (delegating responsibility for defining “pregnancy success rates” to the Secretary of Health and Human Services).

<sup>355</sup> See Shari Roan, *supra* note 347, at F1. Although various definitions have been used for ART, the definition used by CDC is based on the 1992 Fertility Clinic Success Rate and Certification Act that requires CDC to publish the annual *ART Success Rates Report*. According to

moting the technology rather than regulating the industry. In 1992, Congress passed the Fertility Clinic Success Rate and Certification Act (“FCSCA”), requiring the CDC to collect data on the *success* of reproductive technologies in the United States.<sup>356</sup> A progressive legislation at the time, the goal behind the law was to help couples make informed decisions about the newly developing reproductive technologies.<sup>357</sup> Despite this congressional foresight the measure was substantively deficient. Congress failed to give substantive meaning to the term “success,” a term that is used as an abstraction by some in the reproductive industry and by government to mean only that a pregnancy was accomplished.

“Success” evokes different meanings and connotations depending upon at what stage and how one engages with reproductive technology. Consumers may expect more from the term “success” than Congress presumed sixteen years ago. Arguably, the data collected under the banner of “success” does not convey *all* that it should. Indeed, terming all ART pregnancies a “success” undermines sound decision-making for lay consumers, in particular for vulnerable women whose decisions to delay pregnancies or go forward with the procedures may be directly influenced by artificial data and reports as in the case of Jayne and Kenneth Karlin, who sued a New York fertility clinic for fraud and false advertising after undergoing seven cycles with no pregnancy resulting.<sup>358</sup> Another woman, Deena Ryan, whose fertility after ART was a success by government standards, laments “with the results that we’ve had, I truly wouldn’t wish this on my worst enemy. It’s very hard and it’s a lot of work and it’s very stressful.”<sup>359</sup> Such comments are raw and emotive, but understandable: Ms. Ryan had quadruplets at the age of twenty-four.<sup>360</sup>

Ms. Ryan’s constant efforts to provide care for her children can be followed through various posts on the Internet. To follow her story is to peek inside the life of a family trying desperately to cope with the

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this definition, ART includes all fertility treatments in which both eggs and sperm are handled.  
*Id.*

<sup>356</sup> See 42 U.S.C. § 263a-1(a) (2000). FCSCA serves as the primary legislative response to assisted reproductive technology; Congress has been otherwise virtually silent on the issue.

<sup>357</sup> See CDC, Assisted Reproductive Technology: Home, <http://www.cdc.gov/ART/index.htm> (last visited Sept. 5, 2008).

<sup>358</sup> See *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282 (1999) (discussed *infra* notes 387–96).

<sup>359</sup> Cindy DiBiasi, Health Week News, PBS, <http://www.pbs.org/healthweek/featurepl306.htm>.

<sup>360</sup> *Id.*

darker side of ART, where the disabilities overwhelm the parent and children. In a post about medical services, she wrote:

Hi, I am new to this group. I am a mother of quadruplets, two of whom have [cerebral palsy]. The kids are now 5.5 yrs. old. We have been to Ability Camp in Canada 4 times, and just can't logistically do the trip anymore. My daughter, Katherine, is a spastic quad and has done the most treatments (132) and we have only seen improvement in her oral motor control. Colin, spastic hemiplegia, has done 69 treatments and has been seizure-free since the last. We are looking into buying a [hyperbolic oxygen] chamber and I was told by a friend to look to this group for information and advice. I have sent for more information on the "inflatable" chambers from oxyhealth.com and wondered if any of you have experience with these or with similar ones. What are the pros and cons of these "portable" chambers? Are they as effective as the standard kind? Any info would be greatly appreciated. Deena Ryan, Revere, MA<sup>361</sup>

The CDC has served as the federal government's primary arm for data collection on ART, clinics, and birthrates since 1992.<sup>362</sup> The CDC collaborates with the Society for Assisted Reproductive Technology and annually measures the "success" of ART procedures.<sup>363</sup> According to their 2005 National Summary and Fertility Clinic Reports, *success is primarily measured by pregnancy and the birth of live-born infants*.<sup>364</sup> The data collected by the CDC, therefore, does not correlate this narrow definition of success or adjust the data to account for clinical mistakes and birth defects. Studies that do report evidence of clinical mistakes or unforeseeable outcomes, such as fetal birth defects, which also result in births of live-born infants, indicate an indirect bias or gap in the data.<sup>365</sup>

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<sup>361</sup> Posting of Deena Ohrt Ryan to MUMS National Parent Network: Parent Stories About HBO Treatments, <http://www.netnet.net/mums/hbostories.htm> (Oct. 29, 2002, 19:18:45).

<sup>362</sup> The CDC collects this information to comply with the FCSCA. See CDC, Assisted Reproductive Technology: Home, <http://www.cdc.gov/ART/index.htm> (last visited Aug. 29, 2008).

<sup>363</sup> See, e.g., CDC 2005 ART SUCCESS RATES, *supra* note 21.

<sup>364</sup> See *id.* at 6. The data collected for the 2005 report is the most conclusive national data. Although published in the autumn of 2007, the figures are the most recent data available. Success is also measured by the expertise of a particular clinic's staff and the quality of its laboratory.

<sup>365</sup> See, e.g., Khalid S. Khan et al., *Empirical Evidence of Bias in Infertility Research: Overestimation of Treatment Effect in Crossover Trials Using Pregnancy as the Outcome Measure*, 65 FERTILITY & STERILITY 939, 939 (1996).

Vague definitions of “success” related to ART procedures may be a boon for the ART industry, but it is problematic for lay consumers for several reasons. First, the “success rates” which are reported each year by clinics (as required by the FCSCA),<sup>366</sup> do not translate, as some women might expect, to “healthy fetuses” or “healthy babies.” Second, the CDC does not require follow-up data from the clinics about the health of the newborns. Third, the federal government does not inquire about birth defects, congenital abnormalities, or other problematic aspects of the pregnancies to include in “success.” Fourth, in order to achieve “high success” rates, clinics might be compelled to implant more than one fertilized egg, which in turn leads to multiple pregnancies. Although the federal guidelines suggest that no more than three fertilized eggs be implanted at once, clinics are not threatened with a federal fine or criminal penalty for noncompliance. Finally, as to access and public health, the CDC does not collect data on race or income, leaving researchers to guess or inquire at the clinical level about who uses the technology and user outcomes.

In light of the serious health risks associated with ART, it seems illogical at best to refer to all pregnancies as successful. Such a low threshold would seemingly implicate the government in providing unclear if not misleading information to vulnerable women, eager to become pregnant. Increasingly, CDC fertility reports feature multiple gestations as *successes*.<sup>367</sup> However, multiple gestations result in life-threatening low birthweight conditions among the fetuses and cause complications for the pregnant women.<sup>368</sup> Clearly, to the lay consumer, such data might be misleading. Should birthing five children at once be documented as a success given the health risks associated with those pregnancies?

ART is all the more complicated by the pecuniary interests of endocrinologists involved in the procedures.<sup>369</sup> At the Web site of In-tegraMed, a company offering loans for fertility-related expenses, for

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<sup>366</sup> See 42 U.S.C. § 263a-1(a)(1) (2000).

<sup>367</sup> See, e.g., CDC 2005 ART SUCCESS RATES, *supra* note 21, at 20.

<sup>368</sup> See, e.g., Norbert Gleicher et al., *Reducing the Risk of High Order Multiple Pregnancy After Ovarian Stimulation with Gonadotropins*, 343 NEW ENG. J. MED. 2, 6 (2000); Suzanne C. Tough et al., *Effects of In Vitro Fertilization on Low Birth Weight, Preterm Delivery, and Multiple Birth*, 136 J. PEDIATRICS 618, 620–21 (2000). There are many problems associated with multiple fetus pregnancies. Among these problems are the severe low birth weights of the babies, the possibility of multifetal reduction, greater likelihood of Caesarean deliveries, and the potential for greater complications in the pregnancies.

<sup>369</sup> *Fertility Centers of Illinois Addresses Dangerous Trend Surfacing Within Chicago Fertility Community*, BUSINESS WIRE, May 18, 2004 (urging that more extensive types of therapies for complex fertility cases be referred to highly trained reproductive endocrinologists).

example, women are encouraged to apply for loans: “You deserve to have it all, and with us on your side, you can.”<sup>370</sup> In fact, in recent years, an online financing industry has emerged to help couples with sound credit finance their reproductive dreams.<sup>371</sup> Doctors interviewed at one clinic (now a franchise) are proud of the clinic’s financial growth and expansion: “a handful of employees in 1984” and now boasts 400 employees at facilities in California, Texas, Minnesota, Virginia, and even at one facility in China.<sup>372</sup> Revenue generated from ART services will surpass two billion dollars this year.<sup>373</sup> With physician financial interests competing against women’s social and personal interests to procreate, ethical and moral conflicts can be anticipated. Moreover, entrepreneurial clinics and their management stand to profit for each ART attempt whether or not pregnancy is achieved.<sup>374</sup> Thus, the measure of “success” should involve a more in-depth, patient-focused analysis.

For example, in the United States in 2001, the live-birth success rate for each IVF cycle for women under the age of thirty-five was about thirty-five percent with rates significantly decreasing with older maternal age.<sup>375</sup> That figure held constant for 2002 and is about the same for 2005 data.<sup>376</sup> This significant failure rate could perhaps be anticipated; ultimately technology can only do so much. If embryos are transferred from non-donor eggs, the very conditions that cause infertility through natural procreation are not necessarily eliminated through ART.<sup>377</sup> ART simply provides a more direct process in clinical fertilization by bringing the egg and sperm directly together. Eggs that might be compromised due to maternal age or environmen-

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<sup>370</sup> See IntegraMed: Infertility and IVF Financing—Get a Loan, <http://www.integrated.com/inmdweb/content/cons/financing.jsp> (last visited Sept. 5, 2008) [hereinafter IntegraMed] (offering free infertility seminars and loans to pay for the procedures: “Worried about the cost of infertility treatments? Get a loan to finance your IVF and infertility treatment—including drugs”).

<sup>371</sup> The Web site of First Again, one such loan company, offers individuals with good credit the “anything loan,” and specifically targets individuals wanting to finance ART. See First Again: Fertility Financing, <http://www.firstagain.com/LandingPage.aspx?type=Fertility> (last visited Sept. 5, 2008). Capital One also offers loans for fertility treatments. See Capital One: Healthcare Finance, <http://www.capitalonehealthcarefinance.com/fertility> (last visited Sept. 5, 2008).

<sup>372</sup> See, e.g., Edmonds, *supra* note 281.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> See CDC 2001 ART SUCCESS RATES, *supra* note 306, at 25.

<sup>376</sup> See CDC 2002 ART SUCCESS RATES, *supra* note 308, at 21; CDC 2005 ART SUCCESS RATES, *supra* note 21, at 30.

<sup>377</sup> See Evers, *supra* note 275.

tal conditions will not become “healthy” through ART. Perhaps for this reason, only about ten percent of cycles result in birth for women over forty years old.<sup>378</sup>

Yet, the percentage of cycles resulting in live births is incredibly low despite the significant financial investment made by couples, their adherence to the aggressive hormone and drug therapies, and promises from clinicians and their staff.<sup>379</sup> CDC data reveals that women under thirty-five have the best odds of becoming pregnant with ART techniques.<sup>380</sup> However, only thirty-seven percent of women under thirty-five using ART will produce a live birth.<sup>381</sup> Of course, this data also translates to a sixty-three percent failure rate. For women over the age of thirty-five, the success rate for live births using ART dramatically declines. Only 19.7% of ART cycles for women between the ages of thirty-eight and forty will result in a live birth.<sup>382</sup>

The CDC’s findings reveal the stark limits of ART technology for younger women who wish to become pregnant. The statistics are far graver, however, for women over forty. According to the CDC, “[s]uccess rates decline each year of age and are particularly low for women 40 or older.”<sup>383</sup> Although twenty-three percent of women age forty became pregnant when using nondonor eggs or embryos, only sixteen percent sustained the pregnancies and gave birth.<sup>384</sup> The results were more disappointing for women over forty. In the 2005 annual report on ART success rates, the CDC reports, “[a]ll percentages dropped steadily with each 1-year increase in age.”<sup>385</sup> Indeed, women older than forty-four years old have less than a one percent chance of “live births” after using ART.<sup>386</sup>

The high failure rates associated with ART procedures are reason for concern. ART involves costly, intrusive medical services, with very limited probability of success. Indeed, it is more likely that the

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<sup>378</sup> See CDC 2005 ART SUCCESS REPORT, *supra* note 21, at 26.

<sup>379</sup> ASRM ETHICS COMMITTEE, RISK-SHARING OR REFUND PROGRAMS IN ASSISTED REPRODUCTION (1998), available at <http://www.asrm.org/Media/Ethics/sharedrisk.pdf> [hereinafter ASRM ETHICS COMMITTEE] (warning prospective patients to self-educate about physician/patient conflicts of interest and procedural risks involved with ART); see also IntegriMed, *supra* note 370.

<sup>380</sup> ASRM ETHICS COMMITTEE, *supra* note 379.

<sup>381</sup> See CDC 2005 ART SUCCESS REPORT, *supra* note 21, at 26.

<sup>382</sup> *Id.* This figure represents a decrease in the number of live births to women between the ages of thirty-eight and forty since the 2002 CDC ART SUCCESS REPORT.

<sup>383</sup> CDC 2005 ART SUCCESS RATES, *supra* note 21, at 27.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

procedure will fail than result in a pregnancy. In any other sphere where failure is likely to occur in sixty-three to ninety-nine percent of cases, consumer protection would surely become a public policy issue, and perhaps backed by legislative initiatives. But there has been little state or federal involvement addressing consumer protection in the broader context of ART procedures. Of particular concern should be the false advertisements, patient manipulation, and clinical misinformation guaranteeing pregnancy.<sup>387</sup>

Very few cases provide insight as to how patients cope with these issues *ex post*. However, one case on point, *Karlin v. IVF America, Inc.*, speaks directly to the issue of patient deception, manipulation, and false advertising.<sup>388</sup> In *Karlin*, the plaintiffs sued their fertility clinic for unfair and deceptive trade practices and false advertising.<sup>389</sup> At the heart of the case was the fact that the plaintiffs felt they were lied to and that the clinic, even after an investigation and adverse finding by the Federal Trade Commission, continued to mislead infertile women.<sup>390</sup> According to the court, the defendants assured infertile women that they had a fifty percent chance of achieving a pregnancy if they completed four IVF cycles.<sup>391</sup> The clinic also implied that some of those births would result in twins or higher order births.<sup>392</sup> The Karlins, however, underwent seven IVF cycles over two and a half years, and never achieved a pregnancy.<sup>393</sup> They sued, and among the issues alleged in their lawsuit against IVF America, were that the fertility clinic concealed information, including the high miscarriage rates, the “excessive” neonatal deaths, health risks, and abnormalities in babies born from ART procedures.<sup>394</sup>

The New York Court of Appeals permitted the plaintiffs’ lawsuit to move forward, emphasizing that consumer-directed conduct was at issue and thus the defendant’s deception implicated the public inter-

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<sup>387</sup> See *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 294 (1999) (holding that when an IVF practice “choose[s] to reach out to the consuming public at large in order to promote business—like clothing retailers, automobile dealers and wedding singers who engage in such conduct—they subject themselves to the standards of an honest marketplace secured by [New York law]”).

<sup>388</sup> *Id.*

<sup>389</sup> *Id.* at 289.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 288.

<sup>392</sup> *Id.* According to the court, the defendants claimed that every thirteen women would give birth to about eighteen babies. For some patients, the promise of twins or other higher-order births may be an inducement to continue in the process, particularly for those women who may have wanted more than one child.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 289.

est.<sup>395</sup> Writing for the majority, Chief Judge Judith S. Kay opined that when IVF America chose to reach out to infertile women to promote their clinic, “like clothing retailers, automobile dealers and wedding singers . . . they subject themselves to the standards of an honest marketplace.”<sup>396</sup> As one commentator observed, the case highlighted “a fact apparent to anyone who opens the Yellow Pages or rides a subway: doctors and managed-care companies, in heated competition, advertise much more—and more boldly—than even a few years ago. And so, as with other businesses, the chances of deceptive ads have increased.”<sup>397</sup>

What becomes clear from a critical review of the data collected by the CDC is that success cannot be guaranteed with ART procedures. In fact, success is difficult to qualify and measure with ART procedures when medical risks ranging from the mild to severe occur more frequently with those procedures than traditional pregnancies.<sup>398</sup> A Scandinavian study recently reported that the “perinatal death rate is doubled after ART.”<sup>399</sup> The study’s author attributes that high rate of death associated with ART to the “increased frequency of multiple births.”<sup>400</sup> That study’s other findings also merit consideration. For example, the author reports a “fourfold increase in the number of children cared for in rehabilitation centres in Sweden and a fourfold increase in the number of children with cerebral palsy born as a result of IVF in comparison with controls.”<sup>401</sup> As the CDC *2005 Success Rates Report* acknowledges, their data “indicate[s] that the risk for low birth weight is higher for infants conceived through ART than for infants in the general population.”<sup>402</sup> The CDC attributes the disparity to the high rate of multiple births resulting from ART procedures.<sup>403</sup>

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<sup>395</sup> *Id.* at 294.

<sup>396</sup> *Id.*

<sup>397</sup> Randy Kennedy, *Court Says Consumer Laws Apply to Medical Assistance Advertising*, N.Y. TIMES, May 5, 1999, at B4.

<sup>398</sup> A recent Scandinavian study offers a startling comparison of health risks associated with traditional pregnancies versus conception by ART. See Liv Bente Romundstad et al., *Increased Risk of Placenta Previa in Pregnancies Following IVF/ICSI; A Comparison of ART and Non-ART Pregnancies in the Same Mother*, 21 HUM. REPROD. 2353, 2353–58 (2006).

<sup>399</sup> Orvar Finnstroem, *Outcome of Multiple Pregnancy Following ART: The Effect on the Child*, in CURRENT PRACTICES AND CONTROVERSIES IN ASSISTED REPRODUCTION 240 (Effy Vayena, Patrick J. Rowe & P. David Griffin eds., 2002), available at <http://www.who.int/reproductive-health/infertility/report.pdf>.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

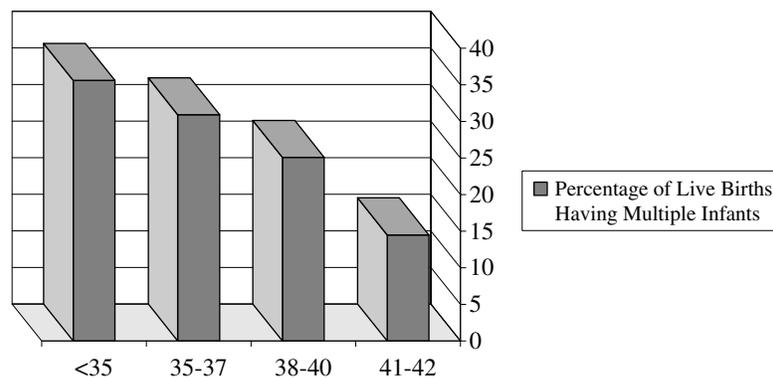
<sup>402</sup> See CDC 2005 ART SUCCESS RATES, *supra* note 21, at 24.

<sup>403</sup> *Id.*

It is quite surprising then, that relatively little attention is paid to the risks, complications, failures, and births with disabilities associated with ART at the state level. Prosecutors who seem eager to tackle the problems of fetal and childhood disabilities could retool their quest for fetal justice by vigorously pursuing fertility clinics that fraudulently advertise and induce vulnerable, infertile couples to undergo numerous cycles at their clinics with little possibility of achieving a pregnancy. Even in the cases where pregnancies are achieved, fetal outcomes may be severely compromised, especially with aggressive fertility treatment and multiple embryo implants, which can result in multiple births.<sup>404</sup>

Thus, the health consequences are far more severe for infants than the consequences portrayed in ART advertisements or the stories of couples like the McCaugheys. Of the live pregnancies resulting from ART cycles, one third are multiple births.<sup>405</sup> Consider the following: nearly forty percent of ART live births to women under age thirty-five will produce multiple infants.<sup>406</sup> The CDC reports that for women under thirty-five, 35.6% of live births produced multiples.<sup>407</sup> By slight contrast, for women ages thirty-five to thirty-seven, 30.9% of live births resulted in multiple births; and for women thirty-eight to forty, 25.1% of births were multiple gestations.<sup>408</sup> For women over forty-one, the rate of multiple births decreases, with 14.5% resulting in multiple births.

**Multiple Birth Rate Chart**



<sup>404</sup> See, e.g., Green, *supra* note 165, at 256.

<sup>405</sup> CDC 2005 ART SUCCESS RATES, *supra* note 21, at 22.

<sup>406</sup> *Id.* at 71.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

Clearly, not all reproductive technology health outcomes are “bad” or are the result of “bad choices.” However, the unexpected outcomes are worth acknowledging and addressing given the potential maternal and fetal health risks, and rising neonatal costs, which are not exclusively born on families. A rich sampling of reproductive technology literature reveals the uncalculated costs of biotechnology.<sup>409</sup> In the period between 1989 and 1998, the number of births of “five or more babies in the United States . . . almost doubled.”<sup>410</sup> Vital statistics data for 2005 (the most recent data available) record the highest numbers of live multiple births ever documented: there were 139,816 live multiple births; 133,122 twin births; 6208 triplet births; 418 quadruplet births; and 68 quintuplets and other higher order births.<sup>411</sup> Between 1989 and 1998 quintuplet births nearly doubled.<sup>412</sup> Viewed in isolation, the figures would seem to indicate ART’s success; more infertile couples have been able to conceive due to technological assistance. Internationally, this is a growing trend. In England, for example, the multiple birth rates increased from 22.4% in 1995–96 to 32.2% in 1997–98.<sup>413</sup> However, the CDC data does not capture other conditions that the public might want to know, for example, the number of fetal birth defects, physical and emotional development over time, clinical follow-up.

Overlooked in the ART success stories are those journeys families endure without the aid of their local communities and with deep regret at the physical setbacks their children experience. Deena Ryan is surely not alone as she expressed to a reporter the stresses brought on by the unexpected health problems her ART children developed. Among the poor ART health outcomes reported by researchers, low birthweight factors significantly.<sup>414</sup> Mild low birthweight might impair fetal health.<sup>415</sup> On the other hand, severe low birthweight, most com-

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<sup>409</sup> See, e.g., BenEzra, *supra* note 20, at 273; Green, *supra* note 165, at 256; Ozkan Ozturk & Allan Templeton, *In-vitro Fertilisation and Risk of Multiple Pregnancy*, 359 LANCET 232 (2002); Stromberg, *supra* note 20, at 461; E.R. te Velde et al., *Concerns About Assisted Reproduction*, 351 LANCET 1524 (1998); Tina Hesman, *Doctor Pushes Biological, Ethical Limits of Fertility Treatments*, CHI. TRIB., Apr. 21, 2004, at K4493.

<sup>410</sup> *Premature Septuplets Make Medical History*, SEATTLE TIMES, July 14, 2001, at A2.

<sup>411</sup> National Center for Health Statistics: Fast Stats A to Z: Multiple Births, <http://www.cdc.gov/nchs/fastats/multiple.htm> (last visited Sept. 5, 2008).

<sup>412</sup> *Premature Septuplets Make Medical History*, *supra* note 410.

<sup>413</sup> Press Release, Human Fertilisation & Embryology Authority, *Huge Rise in ICSI but Half of All Babies Still Come from Multiple Births* (Dec. 15, 1998), available at <http://www.hfea.gov.uk/en/954.html>.

<sup>414</sup> See Green, *supra* note 165, at 256.

<sup>415</sup> See *id.*

mon in multiple fetal pregnancies, can lead to higher incidence of long term health impairment.<sup>416</sup> Among women of color, these issues resonate in a fashion far different from the accounts depicting strong local community support and financial assistance to care for multiple birth babies.<sup>417</sup>

What does reproductive liberty mean in the context of ART choice and disquieting outcomes? It is clear that women spend thousands of dollars on reproductive procedures with minimal possibility for success.<sup>418</sup> Their engagement with the reproductive industry stimulates the growth and economic success of fertility clinics but may not advance maternal goals at least not in ways in which women anticipate or bargain for. For these reasons, we might question whether women's goals are not the only objectives valued in this process. In the battle for vigorous, innovative technology, perhaps a blind eye is turned to the pitfalls along the way.

Whether there is an affirmative governmental duty to intervene given the potential for patient exploitation is a timely question, particularly when framed against FDLs and reproduction policing of poor and drug addicted women. Yet, this question may not be answered by Congress or state governments as the federal legislature has deferred any substantive decision making in this area.<sup>419</sup> Very clear state guidelines regulate the actions of other professionals, such as attorneys and their engagement with clients, and now certified public accountants attract similar scrutiny.<sup>420</sup> In fact, the United States Supreme Court

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<sup>416</sup> In addition, multiple pregnancies result in a higher frequency of premature births, fetal cognitive delays, cesarean surgeries, cerebral palsy, blindness, and deafness. Howard W. Kilbride et al., *Preschool Outcome of Less Than 801-Gram Preterm Infants Compared with Full-Term Siblings*, 113 *PEDIATRICS* 742, 742 (2004).

<sup>417</sup> See, e.g., Katherine Q. Seelye, *Media Darlings: Initially Ignored, First Black Sextuplets Bask in Glow of Public Attention*, CHI. TRIB., Feb. 1, 1998.

<sup>418</sup> See CDC 2005 ART SUCCESS RATES, *supra* note 21, at 13. The CDC annual report does not provide a cost/success analysis. However, one can glean certain inferences through combined sources. The empirical data from the CDC indicates a marginal success rate at best for individual ART cycles resulting in pregnancies. Of course that data does not indicate the level to which the pregnancies are fully viable, meaning it does not indicate the health of the resultant children. If we compare that data with interviews and studies of fertility clinics in the United States, we might discover what, in other contexts, might be considered a consumer protection issue.

<sup>419</sup> See Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 *FLA. L. REV.* 603, 614–16 (2003).

<sup>420</sup> See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 639–49 (1985) (establishing guidelines for lawyer solicitation of business in mass newspaper advertisements); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (prohibiting lawyers from in-person solicitation); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 353, 363, 383 (1977) (scrutinizing state law prohibiting lawyer advertising in newspapers).

has weighed in on the commercial aspect of professional interactions with clients, making it quite clear that professional actors must first uphold a fiduciary duty to clients and suppress the fiduciary's own pecuniary interest.<sup>421</sup> Any conflicts with these principles can result in disbarment for attorneys.<sup>422</sup> Ironically, the very issues of in-person solicitation, advertising, client vulnerability, and pressure tactics alive in *Ohralik*, the case in which the Court prohibited lawyers from using those practices, mirror much of the issues raised by aggressive marketing of ART.

### V. Normative Implications and a Few Observations

The normative implications of reproductive policing do not map consistently across sets of would-be moms. For example, enforcement resources will be overrepresented in the policing and prosecuting of women who use illicit drugs like crack and methamphetamine. By contrast, minimal if any enforcement resources will be directed at the deterrence or regulation of prescription medication abuse, chain smoking, or alcohol dependency. In each category, pregnancies are placed at risk, but even the risks do not map evenly. Ironically, where the law seems most focused—crack use during pregnancy—data is inconclusive as to the long term impact on fetal and child development. On the other hand, far more conclusive data connects smoking (even secondhand smoking)<sup>423</sup> and alcohol consumption<sup>424</sup> to cognitive and physical disabilities in newborns and children. The longitudinal data on this point seem most persuasive.<sup>425</sup> In the case of high-tech

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<sup>421</sup> See *Ohralik*, 436 U.S. at 449.

<sup>422</sup> *Id.*

<sup>423</sup> See, e.g., Stephen G. Grant, *Qualitatively and Quantitatively Similar Effects of Active and Passive Maternal Tobacco Smoke Exposure on In Utero Mutagenesis at the HPRT Locus*, 5 BMC PEDIATRICS 20 (2005), available at <http://www.biomedcentral.com/1471-2431/5/20> (finding that both active maternal smoking and secondary maternal exposure increased rates of fetal HPRT mutation).

<sup>424</sup> See, e.g., Edward A Jacobs et al., *Fetal Alcohol Syndrome and Alcohol-Related Neurodevelopmental Disorders*, 106 PEDIATRICS 358, 358–61 (2000) (finding that “[p]renatal exposure to alcohol is one of the leading preventable causes of birth defects, mental retardation, and neurodevelopmental disorders”) (citation omitted).

<sup>425</sup> See, e.g., *id.* This study found that:

[I]n addition to the classic dysmorphic facial features, prenatal and postnatal growth abnormalities, and mental retardation that define the condition, approximately 80% of children with FAS have microcephaly and behavioral abnormalities. As many as 50% of affected children also exhibit poor coordination, hypotonia, attention-deficit hyperactivity disorder, decreased adipose tissue, and identifiable facial anomalies, such as maxillary hypoplasia, cleft palate, and micrognathia. Cardiac defects, hemangiomas, and eye or ear abnormalities are also common.

pregnancies, although severe health risks are documented, for the legislature, risky reproductive behavior is treated as a private matter between the women and their clinicians.

A. *Consistency*

What conclusions can we draw from the disparate resource distribution where the lion's share is directed to track crack use among pregnant women, rather than a broader focus, which would include monitoring other forms of substance abuse during pregnancy? Some conclusions are made evident by the nature of what policing and prosecuting entail, and others are more speculative. If resources are finite, then financial resources directed at policing and prosecuting pregnant women will divert funds from rehabilitation programs. In the *Ferguson* era for example, South Carolina invested in policing, but not rehabilitating drug addicted women.

Even within the context of policing, focusing primarily on crack use may result in the *undermonitoring* of other illicit drug use that poses risks of harm to fetuses and children. Again, if resources are finite, directing public funds at policing, prosecuting, and incarcerating crack addicts diverts funds from monitoring actual child abuse cases, and creates a gap in the monitoring of smoking, alcohol misuse, methamphetamine abuse, and overuse of prescription medications during pregnancies. If this is true, nurses and doctors might be overly attentive to crack addicted pregnant women, but for the wrong reasons. First, rather than focusing on the treatment, education, and support for pregnant crack addicts, medical personnel might be more concerned about competently carrying out their functions as police informants. Second, focusing almost exclusively on the use of crack in pregnancy draws a false bright line of fetal harm. The tacit assumption will be that crack use deserves more serious monitoring than overuse of prescription medications during pregnancy or alcohol and smoking. Of course, it could be the case that women engaging in other types of risky behaviors that will negatively affect fetal development receive effective rehabilitative care.

Overfunding crack-tracking and underfunding the monitoring of illicit drug use among pregnant women will likely disserve the state's ultimate goal—or at least expose a sinkhole in the policies on which the laws are predicated. In other words, if one is to believe that the best approach to protecting fetal health is to monitor and police drug

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*Id.* (citations omitted).

use, then overfunding the investigation of crack use undermines the state's goals. Incarcerating pregnant crack addicted women does not "help" their fetuses. More importantly, it seems, jailing crack addicts does not "help" nor address the broader basinet of fetuses exposed to a host of other risky behaviors while in utero. Jailing crack addicts will not help the state to deter women from smoking, drinking alcohol, or abusing prescription medications during pregnancy.

We can also expect that the stick approach employed to deterring risky behaviors during pregnancy will lead to inconsistent outcomes, unforeseen or possibly worse externalities, race disparities, and exaggerate class differences because the stick is narrowly applied to a narrow category of women. More specifically, legislators might actually miss the mark. If their enforcement efforts are animated by an interest in promoting good fetal health and development, then *ex post* measures, such as incarcerating pregnant crack addicts *after* drug consumption, are likely to be poor plans of action. The best measures are likely to be preventative and rehabilitative. To the extent that stick measures are viewed as *super* preventative—as in they are more likely to be stronger deterrents—research in criminal cases does not bear that out. Thus, *ex post* policing of drug use will not help fetuses that happen to already be drug exposed. This is not a suggestion of "do nothing," but it is a critique that if given consideration might lead to monitoring and rehabilitating rather than policing.

Nor does focusing attention on crack users fully address good fetal health and development. Instead, it is more arbitrary than focused, and less grounded towards legislative goals; it cloaks the concern about fetal health, giving the appearance that the state has the issue under control, when it does not. If we were to imagine a boat of individuals whose behaviors threaten the health and well-being fetuses, it would seem that the state should want to change the behavior of or impose costs on all passengers, not simply those in the hull or bow of the ship. We might think about it in the following way—focusing only on passengers wearing red, will not help the fetuses developing in persons wearing blue, green, white, black, brown, turquoise, and yellow. Thus, with this approach, the goal of reducing the number fetal health risks will always be weakened by the enforcement mechanisms being directed at narrow groups, and therefore missing the bigger picture or "wrongdoers." A better approach would be to decouple fetal protections from the narrow prosecution driven attention to pregnant crack addicts.

By decoupling our concern for the health of fetuses from crack prosecutions, states might better address the broader issue of maternal and fetal health, including developing frameworks to respond to assisted reproduction pregnancies. Such frameworks might involve investigating physician conduct for aggressive, in-person advertising of fertility services that suggest implausible “success” rates. Or, states could pay greater attention to transition or hybrid-like services that involve an element of state enforcement, such as mandated rehabilitation. Such rehabilitation could take place in group home-type environments, that permit babies to be onsite, rather than in foster care. The point here is that current practices obviate the need for more humane, efficient, and consistent practices across groups of women who engage in more risky behavior during pregnancies.

### *B. Race*

Other normative implications are raised by the way in which reproduction policing occurs in the United States. Chief among these implications are certain unintended consequences and distributional unevenness in prosecutions among racial groups. In short, Black women are more likely to be overrepresented in the prosecution of fetal abusers. This will cause a racial dynamic that we might wish to avoid in society for a few reasons. Chief among the reasons to avoid overrepresentation of Black women in prosecuting fetal abusers is that Black women are more likely to be reported for illicit drug use but according to the CDC, Blacks are actually less likely than white women to use illicit drugs like alcohol and cigarettes during pregnancies.<sup>426</sup> Overpolicing Black women’s reproduction will likely have other unintended social consequences, including leading to the false perception that Black women are less caring mothers and are more likely to abuse drugs than white women, which might have an impact beyond the criminal justice system and impact employment.

Prosecutors make an emotional claim with FDLs, suggesting that the line of distribution is far more direct, unencumbered, and the fetus is held hostage to its mother’s drug usage. The emotional component of such laws is persuasive. Child abuse is repugnant. But the analysis on FDLs is incomplete at best. For example, Black women experience higher rates of stillbirths absent any drug use. Indeed, a 2003 study conducted by the CDC found that between 1990 and 2003 fetal mor-

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<sup>426</sup> Robert Mathias, *NIDA Survey Provides First National Data on Drug Use During Pregnancy*, NAT’L INST. ON DRUG ABUSE, Jan./Feb. 1995, [http://www.nida.nih.gov/NIDA\\_Notes/NNVol10N1/NIDASurvey.html](http://www.nida.nih.gov/NIDA_Notes/NNVol10N1/NIDASurvey.html).

tality was on the decline, however, the fetal mortality rate for Black women persisted as it was double that of white women.<sup>427</sup> Thus, a miscarriage experienced by a Black female drug addict could be a false positive for fetal death as a drug related cause. Dr. Marian MacDorman, the study's lead author, reminds us that science is inconclusive about what causes fetal mortality.<sup>428</sup> However, contributing factors can be smoking, maternal obesity, high blood pressure, hypertension, and diabetes.<sup>429</sup> But are we to police these behaviors and health conditions too?

More importantly, the racial disparities resulting from fetal harm policing will result in a new social class: Black children being raised in foster care with mothers in prison. The problem with fostering this type of social condition extends beyond the immediate families involved. This issue implicates state resources, as the consequences are not limited to social stigma, but rather, data suggests that children of incarcerated mothers are more likely to drop out of school and enter the criminal justice system.<sup>430</sup> In a report produced by the California Research Bureau, Dr. Charlene Simmons warns that "the impact of a mother's arrest and incarceration on a family is often more disruptive than that of a father's arrest and incarceration . . . because approximately two-thirds of incarcerated mothers were the primary caregivers for at least one child before they were arrested."<sup>431</sup> An estimated 856,000 children in California have at least one parent in jail.<sup>432</sup> About eighty percent of women in prison in California have at least two children.<sup>433</sup>

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<sup>427</sup> Press Release, CDC, New Study Shows Decline in Stillbirths; Racial Disparities Persist (Feb. 21, 2007), available at <http://www.cdc.gov/media/pressrel/2007/r070221.htm>.

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> Charlene Wear Simmons, *Children of Incarcerated Parents*, 7 CAL. RESEARCH BUREAU 1 (2000), available at <http://www.library.ca.gov/crb/00/notes/V7N2.pdf>. According to Dr. Wear Simmons:

Children whose parents have been arrested and incarcerated face unique difficulties. Many have experienced the trauma of sudden separation from their sole caregiver, and most are vulnerable to feelings of fear, anxiety, anger, sadness, depression and guilt. They may be moved from caretaker to caretaker. The behavioral consequences can be severe, absent positive intervention—emotional withdrawal, failure in school, delinquency and risk of intergenerational incarceration.

*Id.*

<sup>431</sup> *Id.* at 4.

<sup>432</sup> *Id.* at 2 (stating that approximately 195,000 children currently have a parent in state prison).

<sup>433</sup> *Id.*

The data is compelling. Police records, legal cases, and studies consistently show that pregnant women reported to child welfare agencies and law enforcement are more likely to be Black and poor. Some scholars might suggest that the reproductive policing is a matter of profiling, and not an issue of fetal protection. That critique suggests that poor, pregnant Black women are policed exactly because they are poor Black women. These observations animate a broader discourse about racial disparities in many spheres of American life: health care, incarceration (in general), quality schools, and many other areas. Such externalities cannot be contained within families, but spill to the broader public.

Yet, critiquing reproduction policing as a platform motivated by racial animus, and thus a form of racial profiling ignores the illegal conduct of pregnant women using crack. Prosecuting women for crack use, where there is no evidence of that conduct would likely prove fatal to a prosecutor's case. The problem here is not one of false arrests or framed evidence, or harassing Black pregnant women in general, and should not be confused as such.

However, the racial profiling critique should not be dismissed without examination. Studies conducted by the CDC, and reports published in the *Journal of the American Medical Association* as discussed earlier,<sup>434</sup> provide compelling evidence that Black women are more likely to be reported to child welfare agencies for illicit drug use, even in communities where their drug consumption is less than their white counterparts. So, there is a racial impact, and it may very well be the case that at the micro-level, racial identity, not only of the pregnant patient, but also the care provider, may influence outcomes—be they health or criminal.

### VI. Concluding Thoughts

Forty years after *Robinson v. California*,<sup>435</sup> where the United States Supreme Court struck down a California statute, holding that prosecution for a drug addiction has no relationship to curing the illness, and can only be construed as an unconstitutional attempt to penalize the illness, it refused to consider a drug addicted pregnant woman's criminal conviction appeal for giving birth to a dead baby.<sup>436</sup> What are legislators and lower courts to make of this?

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<sup>434</sup> See *supra* note 110 and accompanying text.

<sup>435</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>436</sup> *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003), *cert. denied*, 540 U.S. 819 (2003).

This Article makes the case that laws enacted to impose a duty to disclose illegal prenatal drug use serve to police the wombs of undesirable women. By contrast, the Article contends that legislators seem less willing to use legal institutions to police, regulate or patrol the reproduction of more desirable citizens, thereby creating two distinct reproductive classes. The Article critiques such rulemaking as being over- and underinclusive, disturbing constitutional and criminal law principles<sup>437</sup> and reifying if not resurrecting problematic social norms.<sup>438</sup> By way of example, I suggest that FDLs, which have been packaged under a spectrum of titles, ranging from distribution of drugs to a minor to recklessness and child abuse, draw arbitrary distinctions in several spheres.

First, the womb is an artificial line or barrier, thereby rendering such laws underinclusive. If the essential functions of FDLs are to deter the use of harmful chemicals that can reach the fetus or reduce or eliminate the exposure of drugs to children, why draw the line at pregnancy?<sup>439</sup> It would seem to disserve the interest and intent of the legislation's aim to protect children for its only trigger to be pregnancy. Yet, it would be easy to see how such laws can be excessively cruel and pervert normative expectations of privacy, autonomy, fairness, and notice if applied neutrally. For example, if such laws were intended to protect *all* children from the harms associated with illegal substances, why not prosecute all mothers and *fathers* of underage children who sneak into the wine cabinet under a theory of illegal distribution of harmful substances to minors? Or consider how some legislative rules within states might seem at cross purposes: Wisconsin permits parents to take children of any age to bars and serve them alcohol, but has recently enacted legislation which deems illegal drug use during pregnancy to be child abuse.<sup>440</sup>

In the South Carolina cases involving the FDL, it was applied almost as a strict liability measure, as the data was never conclusive as to whether McKnight's drug use actually caused the miscarriage. If the true motivations behind FDLs are to protect *all children* and discourage *all mothers* from exposing their children to potentially dangerous substances, then bright lines and defaults that trigger the

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<sup>437</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding unconstitutional a state law requiring "habitual" criminals to be sterilized).

<sup>438</sup> See *Buck v. Bell*, 130 S.E. 516 (1925).

<sup>439</sup> See *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

<sup>440</sup> See WIS. STAT. §§ 48.02-9985; see also WIS. STAT. § 48.133 (a court may order a pregnant woman into custody who habitually lacks self-control in the use of controlled substances when there is a substantial risk to the physical health of her unborn child).

prosecution of only a narrow class of drug users, such as Black women who use crack during pregnancy, would seem to disserve the interests of states that have taken such pains to enact the legislation.<sup>441</sup> Surely, McKnight was not the only woman in South Carolina that year whose behavior affected her fetus. In South Carolina, fifteen percent of women smoke during their pregnancies, the majority of whom are white women.<sup>442</sup>

But such laws are underinclusive for a second reason. FDLs sketch an arbitrary line at medical harm to only certain classes of fetuses. For example, recent medical studies report the significant fetal health risks associated with ART.<sup>443</sup> This Article offers this not as a challenge to assisted reproduction, which certainly helps classes of parents who would otherwise be incapable of biologically or genetically parenting.<sup>444</sup> Rather, its point is to critically examine where the law resides and to test assumptions about what FDLs accomplish and against whom. Those harms, which are directly tied to ART procedures and pharmaceutical regimens injected and consumed orally by prospective mothers to maintain the pregnancies, expose those children to a higher risk of cerebral palsy, risks of hearing and visual impairment, lead to higher incidences of low birthweight, and overall may threaten the health of the fetus and gestational carrier (mother or surrogate).<sup>445</sup>

Finally, physician authority and judgment is often deferred to by hospital administrators, but increasingly judges, district attorneys, and police play an active role in expanding “physician power,” while leaving open the question about duties and obligations to the first patient (the pregnant woman).<sup>446</sup> Criminal convictions in South Carolina,<sup>447</sup>

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<sup>441</sup> See *McKnight v. South Carolina*, 540 U.S. 819 (2003); *Ferguson*, 532 U.S. at 67.

<sup>442</sup> CDC, *Prenatal Smoking Book: State Highlights* (1999), [http://www.cdc.gov/reproductivehealth/PrenatalSmkbk/states/sc\\_figures.htm#fig1](http://www.cdc.gov/reproductivehealth/PrenatalSmkbk/states/sc_figures.htm#fig1) (last visited Sept. 5, 2008). Scientific literature is far more conclusive about the risks associated with smoking during pregnancy.

<sup>443</sup> See *supra* notes 159–63 and accompanying text.

<sup>444</sup> My earlier work offers some thinking specifically on the social, medical, and legal challenges associated with assisted reproductive technologies and proposes *ex-ante* solutions. See Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1 (2005).

<sup>445</sup> BenEzra, *supra* note 20, at 273 (reporting that “a high frequency of cytogenetic abnormalities and errors in cell-cycle regulation are detected in oocytes generated from IVF or intracytoplasmic sperm injection”).

<sup>446</sup> Michelle Oberman writes about the bedside manner of this practice. She describes the uncomfortable police and judicial intervention processes in hospitals, where time is a fleeting resource, and legal interventions occur in “makeshift” adjudicative proceedings at women’s bedsides. She brings into context the transformation of the fiduciary role of the physician, from one of care giver to adversary. See Oberman, *supra* note 36, at 452 n.6.

Alabama,<sup>448</sup> and Utah<sup>449</sup> of poor pregnant women demonstrate this point quite well. Their convictions, spirited by active fiduciary breaches by their physicians, provide some indication of a troubling trend. The duty of confidentiality or operating in the best interest of the pregnant patient is now an open question. The physician-pregnant patient trust relationship in reproductive matters may be more illusory than real. In recent years, zealous efforts on the part of physicians to disavow and breach fiduciary norms to pregnant women by neglecting informed consent, performing unauthorized blood and urine tests or using such tests for unauthorized purposes have resulted in a renaissance of “womb policing.”<sup>450</sup>

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<sup>447</sup> See *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003) (affirming trial court conviction of Regina McKnight for the deliberate indifference to her fetus); *Whitner v. State*, 492 S.E.2d 777, 784 (S.C. 1997) (upholding the criminal conviction of a woman for delivering drugs to her fetus).

<sup>448</sup> See *supra* notes 261–67.

<sup>449</sup> See Suzanne Godenberg, *Caesarean Refusal Mother in Jail*, *GUARDIAN* (London), Mar. 13, 2004, at Home Pages 2; Linda Thomson, *Rowland Case Is Called “Political,”* *DESERET MORNING NEWS* (Salt Lake City, Utah), Mar. 13, 2004.

<sup>450</sup> The most notorious artifact of “womb policing” in our recent past is the case of *Buck v. Bell*. In that case, Carrie Buck, guilty of “inadequacy,” meaning that she was poor (and was argued to be “slow,” although this was not proven) was forcibly sterilized by the state of Virginia. She was one of thousands of women to suffer such widespread social retribution facilitated by a physician. *Buck v. Bell*, 274 U.S. 200, 205–07 (1927) (holding that it is “better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind”). Justice Holmes concluded his impassioned rhetoric by declaring that one more generation like Carrie would strangle the health and resources of the United States, thus declaring “three generations of imbeciles are enough.” *Id.*