Commentary

The Control of Pregnancy and the Criminalization of Femaleness

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> "It was as Mother that woman was fearsome; it is in maternity that she must be transfigured and enslaved."[1]
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> "One of the most characteristic and ubiquitous features of the world as experienced by oppressed people is the double-bind—situations in which options are reduced to a very few and all of them expose one to penalty, censure or deprivation."[2]

Criminal charges relating specifically to pregnancy have become almost commonplace. It seems that every week we read about some criminal offense that prosecutors have invented or exhumed in order to punish a woman for a perceived failing in her reproductive decision-making. The nature of the crimes in these cases is both deceptive and mercurial. In this strange new genre of criminal offenses, you must examine the punishment in order to discern the true nature of the crime.

In this essay, I will illustrate three instances of the application of criminal sanctions to women's reproductive behavior. In all of these cases, an examination of the penalties sought against the women accused of violating the law reveals a remarkable gap between the crimes and the punishments. In fact, the "punishments" assigned to these women are remotely related to the crimes with which they are charged. This indicates that, while the criminal justice system is invoking existing laws,

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1 Simone de Beauvoir, *The Second Sex* 171 (H.M. Parshley, trans) (Knopf, 1952).

2 Marilyn Frye, *The Politics of Reality: Essays in Feminist Theory* 2 (Crossing Press, 1983) ("*The Politics of Reality*").

their application essentially attempts to criminalize sex, conception, and gestation.

The cases are cloaked in a rhetoric of concern about the health status of fetuses, children, and women. Yet, connecting the rhetorical dots reveals a picture that belies that concern. Instead, we see a government that sits in judgment on the reproductive decisions made by certain women—poor women, younger women, and women of color. The criminal justice system's responses reflect a belief that some of these women should not be having sexual intercourse, others should not be bearing children, still others should not be permitted to parent their children, and still others should not be permitted to terminate their pregnancies.[3]

But there is even more afoot here than the regulation of who gets to have children. The deeper restriction at work in these cases goes to the heart of biological femaleness.[4] The penalties meted out punish women for being women—for being human beings who are capable of conceiving and reproducing. The law constrains women's biological capacity so severely that the only available options bring severe penalty. Especially for women of color and poor women, who are particularly vulnerable to social control through criminal sanctions, the only safe options offered by the criminal justice system become celibacy or sterilization.

I. THE CRIMINALIZATION OF SEX

In January, 1991, a fourteen year old girl gave birth to a baby in a toilet in a blue-collar, mixed-ethnicity suburban community outside of Chicago, Illinois.[5] Although she acknowledges having had sexual intercourse, she claims to have been unaware that she was pregnant. Likewise, neither her father, with whom she lives, nor her basketball coach were aware of the pregnancy. Throughout the day that she delivered the baby, she experienced what she thought were severe menstrual cramps. Suspecting that she might be getting her period, she went to the bathroom, and sent her father to a drug store to buy her some pain relief medicine. As soon as he left the house, she experienced a tremendously painful cramp, and screamed for help. Her screams persisted over the next fifteen minutes, during which time she realized that she was having

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[3] For an excellent discussion of these issues, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv L Rev 1419 (1991).

[4] I do not mean to endorse the notion that women are governed by their biology. Rather, this essay identifies the legal system's attack on that particular capacity of women that differentiates us biologically from men, and that men most fear and hate.

[5] The following story was related to me by the attorney who handled the case. I was given permission to write about it on the condition that no facts which might link the story with the subject's identity be disclosed. Thus, the attorney's name, and even the county in which the crime was prosecuted must remain confidential. Any person seeking further information about the case should contact me directly.

a baby. She stayed seated on the toilet following the delivery, uncertain whether moving might "pull her insides out."[6] She later told the police that she thought the baby "would be safe in the water because it had been in liquid inside of her."[7]

Her father returned home and found her in the bathroom. He looked in the toilet, and, seeing only the afterbirth, assumed that she had miscarried. The local paramedics responding to his call found the girl in shock, and the baby in the toilet, dead. They took both the girl and the dead baby to the nearest hospital, where the girl told doctors that she thought that she had heard the baby gurgling while she awaited help. An attending nurse testified that the girl said the baby cried for fifteen minutes before it died.

These remarks were noted in the medical record, which was later subpoenaed by the state's attorney. The autopsy showed the baby's lungs to be flat, indicating that it had never drawn a breath, and thus not only could not have cried for fifteen minutes, but probably was not born alive. In spite of this fact, the state's attorney chose to file criminal charges against the girl. The state charged the girl with involuntary manslaughter, which is an unintentional killing by acts likely to cause great bodily harm which are done recklessly.[8] Recklessness is constituted by a conscious disregard of substantial risk—a gross deviation from the standard of care that a reasonable person would follow.[9]

The state refused repeated attempts by the girl's attorneys to dismiss the charges, insisted on proceeding to trial, and requested jail time. While the law's wording is rather plain, it is difficult to know how to apply it to these facts. Which part of this girl's behavior was an "act likely to cause great bodily harm, . . . done recklessly"? The most obvious act would be having the baby in a toilet, rather than in a hospital. Yet, it is hard to discern what a reasonable standard of care should be for delivering babies when one is fourteen, lacking education about human reproduction, and totally unaware that she is pregnant.

One would expect the state to attempt to show either that the girl should have known that she was pregnant, or that, once she realized that a baby had emerged from her body, it was unreasonable for her not to have taken it from the water, cut the umbilical cord, and telephoned for medical assistance.[10] The state could have possibly submitted evidence to demonstrate that other women who deliver babies by surprise manage

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[6] Telephone interview with the 14 year old's attorney, Mar 11, 1992.

[7] Id.

[8] Ill Ann Stat ch 38, § 9-3 (Smith-Hurd, 1989). The statute reads in pertinent part: "Involuntary Manslaughter and Reckless Homicide. A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly."

[9] Ill Ann Stat ch 38, § 4-6 (Smith-Hurd, 1989).

[10] See Annotation, *Homicide: Sufficiency of Evidence of Mother's Neglect of Infant Born Alive, in*

to have babies that survive.[11]

Interestingly, the state's preparation for trial involved neither of these lines of evidence. Instead, subpoenas were issued to a large number of the girl's male eighth grade classmates, who were prepared to testify to the girl's promiscuity. Regardless of the testimony's admissibility, this line of inquiry reveals much about the state's attorney's perception of societal values regarding sexuality. The boys could testify to having had sex with her without fear of retribution (even if their stories incriminated them for statutory rape and were reminiscent of a gang rape).[12] Yet the same testimony, applied to the girl, might help to convince the judge that she should be incarcerated.

This forces us to reconsider the nature of this girl's crime. In the state's attorney's mind and, to the extent that his strategy reflects public mores, in the public's eye as well, the girl was no longer just a naive fourteen year old. Having had sex, she violated norms of appropriate behavior, and therefore was a whore. Essentially, charging her with involuntary manslaughter was incidental to the real crime she had committed.[13]

Yet, the decision to prosecute her characterizes the double-bind situation described so aptly by Marilyn Frye as "the experience of being caged in: all avenues, in every direction, are blocked or booby

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Minutes or Hours Immediately Following Unattended Birth, to Establish Culpable Homicide, 40 ALR 4th 724 (1985).

[11] For example, a popular talk show aired a program where the entire panel was composed of women who did not know they were pregnant, and indeed, did not know they were in labor, but nonetheless delivered babies without complications. *The Oprah Winfrey Show: I Was Pregnant and Didn't Know It* (ABC television broadcast, May 8, 1990).

[12] Apparently, several boys were willing to recount instances when they had lined up in her living room, waiting their turn to have sex with her.

[13] Once it became clear that the state intended to subpoena all of the girl's acquaintances, the defense attorney felt forced into a strategic decision to plead guilty in order to save the girl the pain of facing such a trial. Upon entering her plea, the girl was sentenced to several years of probation, including mandatory counseling and a curfew. My most recent conversation with her attorney (Mar 11, 1992) revealed that the girl had violated her curfew and, as this essay goes to press, is awaiting a hearing regarding her incarceration.

It is important to note that this 14 year old's case is not unique. Ms. Colleen Connell, Director of the Reproductive Rights Project, Roger Baldwin Foundation of the American Civil Liberties Union in Chicago, reports several similar cases proceeding to trial in recent years. Telephone interview with Colleen Connell, Illinois ACLU (Mar 11, 1992). One currently pending is against a 17 year old woman. In this Chicago case, the woman knew she was pregnant, but chose to hide it from her parents. After she delivered the baby on the toilet, she removed it from the water, cut the umbilical cord, and returned to her bedroom. The baby had died from drowning. She called a girlfriend and told her what had happened, and the girlfriend's father notified the police. The girl has been charged with murder, and all attempts by her attorney to have the charges reduced have been rejected. (Once again, the Chicago area attorney discussed the case with me on the condition of full anonymity.)

Ms. Connell notes that, while the girls generally are not found negligent for having their babies at home, they are liable for hostile or neglectful action toward the newborn. As she sees it, "the underlying social pathology giving rise to this problem is that of teen pregnancies in a culture repressed about teen sexuality." Id. It is not clear which underlying social pathology is more pernicious in these cases: that of teen pregnancies or that of the tremendous and unchecked misogyny that would permit a prosecutor to move forward with a case in this manner.

trapped."[14] Consider the situation of a fourteen year old girl, saddled with all of the inconsistent messages given by a society in which neither sexual activity nor sexual inactivity is condoned.[15] She grows up in a community which has no subsidized family planning clinic (Title X or Planned Parenthood) and a sparse and inconsistent sex education curriculum in the public school system.[16] She lives in a state that does not provide public funding for abortions, and where the average cost of a first trimester abortion is $250.00 (and is available only in the city, which is at least one and a half hours away by public transportation).[17]

In a system like this, an unplanned pregnancy is no oddity of nature. A fourteen year old's failure to recognize the onset of labor and to know how to deliver her own baby is not a sign of a mental deficiency or criminality. The loss of the baby's life is a tragedy—one to which the system responds by further punishing its mother.

II. THE CRIMINALIZATION OF CONCEPTION: *PEOPLE v DARLENE JOHNSON*[18]

On December 10, 1990, the USFDA approved a new form of contraception for use in the United States. That method, commonly known as "Norplant," is a surgically-implanted hormonal contraceptive, and is the most effective reversible method of contraception presently available.[19] On January 2, 1991, a California Superior Court judge conditioned probation for a woman who pled guilty to three counts of corporal injury to a child on her use of this contraceptive.

At the time of sentencing, Darlene Johnson was a twenty-seven year old mother of four, and was seven months pregnant. She had a prior criminal record which included petty theft and credit card forgery. At the time of her conviction, Ms. Johnson and her three youngest children were living with a fifty-one year old blind man, Johnny Washington. She earned $260/month by providing "in-home services" to two elderly blind people in her city. According to her statement, two weeks before her arrest, she whipped her six and four year old children with a belt after finding them smoking cigarettes in a closet and attempting to stick a piece of wire into an electrical outlet. Ms. Johnson was reported to the

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[14] Frye, *The Politics of Reality* at 4 (cited in note 2).

[15] See id at 3, discussing the "whore" v "frigid, cocktease, lesbian" dilemma faced especially by younger women.

[16] Thus, even if she had acknowledged her sexual activity and sought contraception (in spite of the fact that being prepared for sex would have labeled her a whore), she would have had difficulty obtaining it.

[17] Telephone interview with Susan Jona, Clinic Manager, Chicago Area Planned Parenthood, Feb 24, 1992.

[18] *People v Johnson*, No 29390 (Cal Sup Ct, Tulare County, 1991).

[19] Wayne C. Bardin, *Norplant Contraceptive Implants*, 2 Obstetrics and Gynecology Rptr 96, 101 (1990).

Police Department by the children's grandfather, who claimed she was abusing them. The police located the girls and reported finding numerous scars on their bodies. Both girls testified that Ms. Johnson and Mr. Washington occasionally beat them.[20]

During the judgment proceedings, the judge expressed his belief that the children were permanently scarred from the beatings, despite the fact that the state presented no evidence to support that belief. He noted that, because she had a prior record, Ms. Johnson could have been sent to state prison for the crime.[21] However, the judge indicated that he would have her serve her time in the county jail, and would grant her petition for probation, since her prior record did not relate to child abuse or neglect.[22]

Immediately after he made this determination, however, he engaged Ms. Johnson in a dialogue in which he indicated his impression that she was on welfare, and expressed his concern about her bearing more children.[23] He conditioned probation on her agreeing to use Norplant, and stated that she must demonstrate to him her preparedness to have children (including evidence of taking a parenting class, for which she was expected to pay), prior to removing the contraceptive.[24]

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[20] *Johnson*, Report and Recommendation of the Probation Officer 2 (Jan 2, 1990).

[21] *Johnson*, Judgment Proceedings, Reporter's Transcript 2 (Jan 2, 1991).

[22] Id at 8.

[23] The transcript reads as follows:
THE COURT: Are you on welfare?
THE DEFENDANT: I was.
THE COURT: Okay. And you will be again, right?
THE DEFENDANT: Yeah.
THE COURT: Do you want to get pregnant again? [Recall that Ms. Johnson was eight months pregnant at the time of this hearing.]
THE DEFENDANT: No.
THE COURT: Okay. As a condition of your probation, you know, this new thing that's going to be available next month, you probably haven't heard about it. It's called Norplant. . . . It's a thing that you put into your arm and it lasts for five years. You can't get—it's like birth control pills, except you don't have to take them everyday. . . .
THE DEFENDANT: Is it harmful to the body?
THE COURT: Well, it's like a birth control pill. It's FDA approved. It's not experimental. What do you think about that?
THE DEFENDANT: Okay.
THE COURT: Okay. It's not permanent. If you want to get pregnant, you can come back in and say—because I'm a little concerned about this. We've got two children who are beaten badly, and we've got one in utero. And I'm a little concerned about it. And I'd like you to complete some program of being a good mom before you get pregnant again. . . . And if you successfully complete your probation or want to modify your probation, you can do that and come back and say, "Look, I did all my parenting classes," whatever, and we'll move on from there. But at least at this juncture. . . I'm going to impose that as a condition of probation. Id at 6-7.

[24] Eight days later, Ms. Johnson returned to court on a Motion to Modify Sentence. *Johnson*, Reporter's Transcript, Hearing on Motion to Modify Sentence (Jan 10, 1991). Her lawyer presented legal precedent supporting his position that a fundamental right was being infringed, and that the state could, and therefore must, accomplish its duty to protect children by alternative, less restrictive means. Moreover, he documented several medical factors which might preclude Ms. Johnson from using Norplant. Id at 1-7. The judge denied the motion, claiming that "there was a willing, knowing, voluntary, acceptance of the probationary terms." Id at 17. He added that, "it is in the defendant's best interest and certainly in any unconceived

Judge Broadman was so determined not to lift this condition of probation that he refused to heed compelling legal and medical testimony against it.[25] This was a child abuse case, yet the penalty assigned did nothing to protect her children, all of whom had been removed from her custody. There was no evidence indicating that Ms. Johnson had engaged in any illicit behavior which might threaten the fetus she was carrying, let alone the well-being of any child she had yet to conceive.

In light of this, the judge's remarks about Ms. Johnson's being on welfare and about the use of Norplant being in her "best interests" are more than superfluous justifications for the probationary condition. Instead, they are indicative of two important factors at play in the case. First, they reveal a revised conceptualization of Ms. Johnson's crime. Regardless of any evidence of harm, future pregnancy will violate her probation, and she may be sent to the state penitentiary. In short, the state has criminalized conception.[26] Second, they demonstrate the double-bind situation at work for Darlene Johnson. She dropped out of the Los Angeles public school system when she had her first child. With no vocational training and no access to day care, her options were limited to begin with. Rather than empowering her to take control over her circumstances, including the timing of her pregnancies, the court takes away her power to conceive altogether.

III. Criminalizing Gestation: The Legal System's Response to Pregnant Addicts

A series of recent legislative and judicial actions have had the ironic effect of encouraging abortion by, in effect, penalizing a woman's decision to continue her pregnancy to term. These actions include state welfare reforms which deny additional benefits to women who have additional children, the criminalization of HIV transmission in several states,[27] and the widely publicized criminal proceedings that have been

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child's interest that she not have any more children until she is mentally and emotionally prepared to do so." Id at 20.

The judge asserted that his behavior was not "sexism or anti-feminist." He stated, "[t]here is no way in which to prove one is not a misogynist or a sexist, and I am outraged at any such suggestion. This Court in a proper case with appropriate technology would make a similar order against a man. The mere fact that technology has not arrived to implant a man does not mean that it should not be used in a woman." Id at 22-23.

25 See *Johnson*, Affidavit of Philip D. Darney, M.D., M.S., in Support of Motion to Reconsider/Modify Sentence at 2-3 (Jan 10, 1991). Sheldon J. Segal, Letter to the Editor, *Norplant Developed for All Women, Not Just the Well-to-Do*, NY Times at § 4, p 18 (Jan 6, 1991).

26 As this essay goes to press, Ms. Johnson's case is on appeal to the California Court of Appeals. Attorney Judith Ganz, of California Advocates for Pregnant Women, reports that Judge Broadman has attempted to impose Norplant on other women in recent cases. Telephone interview with Judith Ganz, attorney, California Advocates for Pregnant Women, Sept 25, 1991. Fortunately, lawyers have been prepared, and have rejected these attempts.

27 See, for example, Michael L. Closen and Scott H. Isaacman, *Are AIDS-Transmission Laws Encouraging Abortion?*, ABA J 77, 78 (Dec 1990) (discussing Illinois, Arkansas, and Oklahoma statutes which allow the criminal prosecution of HIV-positive women who have

brought against pregnant women who use drugs. I will use the latter cases to illustrate this legal phenomenon.

In August, 1988, in the District of Columbia, Brenda Vaughn pled guilty to a charge of second degree theft.[28] While the usual sentence for this crime is probation, when the judge in this case learned that Ms. Vaughn was pregnant, he ordered her to take a drug test. The judge was distressed when the results revealed evidence of cocaine, and felt that it justified sentencing her to "a long enough term in jail to be sure she would not be released until her pregnancy was concluded."[29] No charges were filed, nor was a trial held regarding her use of an illegal drug.

On May 6, 1991, the Florida Court of Appeals, Fifth District, upheld the conviction of Jennifer Johnson[30] for the crime of delivering a controlled substance to a minor.[31] The circumstances of "delivery" occurred in the moments after birth and prior to cutting the umbilical cord, during which time cocaine was said to have passed from the mother's body to that of her newborn child. The court was "singularly unimpressed" by arguments that the statute was not intended to encompass cases such as this, and by pleas that pregnant mothers might avoid contact with health care providers for fear of being charged with a crime.

Dianne P., a twenty-nine year old Wyoming woman, was arrested on January 4, 1990, while she was awaiting treatment at a hospital emergency room. She was pregnant, and had been severely beaten by her abusive husband. She feared that the beatings, which had left bruises on her neck, arms, and back, might have harmed her fetus. A blood test disclosed that she had consumed alcohol; police were summoned, and she was jailed on charges of criminal child abuse for endangering her fetus.[32]

In all of these cases, women were treated as criminals not because of the nature of their actions, but because they happened to be pregnant when they took those actions. Yet, all three women exhibited evidence of addiction. Women who are pregnant and addicted to controlled substances do not act with the intent of harming the fetus, but rather, as the AMA Board of Trustees notes in its Report on the subject, "to satisfy an acute psychological and physical need for that particular substance."[33]

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babies); Ill Rev Stat ch 38 §§ 12-16.2 (1989); Ark Stat Ann § 5-14-123 (1989); Okla Stat § 1192/1(a)(1988).

28 See *Case Update* ii, (ACLU/Reprod Freedom Project, Feb 7, 1990).

29 Id.

30 *Johnson v State*, 578 So 2d 419 (Fla App 1991).

31 Fla Stat § 893.13(1)(c)(1989).

32 See *Pregnancy Police Active in Wyoming, Michigan and Massachusetts*, 2 Reprod Rts Update 1, 3 (ACLU/Reprod Freedom Project, Feb 1, 1990). The trial court judge dismissed the charges at the Feb 2 hearing, finding that the state lacked probable cause that the fetus had been injured. *Wyoming Case Against Pregnant Woman is Dismissed*, 2 Reprod Rts Update 6 (ACLU/Reprod Freedom Project, Feb 16, 1990).

33 AMA Board of Trustees, *Legal Interventions During Pregnancy*, 264 J Am Med Ass'n 2663, 2667 (1990).

Punishing women for non-volitional acts is legally problematic. More importantly, such punishment is empirically counter-productive, encouraging women to avoid prenatal or medical care, and ultimately rendering abortion the only safe option. These women are caught in the ubiquitous double-bind. The problems experienced by all women in terms of controlling the circumstances of sex, the use of contraception, and access to abortion are exacerbated for pregnant women.[34] For the addict, sexuality is often linked to her drug supply, exposing her to risks of unplanned pregnancy, as well as sexually transmitted diseases.

Addiction treatment for pregnant addicts, however, is exceedingly limited.[35] Prenatal care is also difficult for this population to access.[36] More than one-quarter of "women of reproductive age . . . have no insurance to cover maternity care, and two-thirds of these . . . have no health insurance at all."[37]

Finally, laws treating drug-exposed newborns as neglected have encouraged physicians to screen infants born to women whom they suspect of using drugs[38] (that is, poor women of color). Babies testing positive are removed from maternal custody and the mother is investigated by state officials to determine her fitness to parent.[39] Criminal charges may be brought against her.

Read together, these factors mean that, if you are a poor, pregnant addict, the best way to avoid legal trouble is to have an abortion. The

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[34] For a more thorough discussion of sex, contraception, and abortion problems for pregnant addicts, see Michelle Oberman, *Sex, Drugs, Pregnancy and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 Hastings L J 505 (1992).

[35] Testimony Presented to House Select Committee on Children, Youth and Families, 101st Congress, 1st Session (Apr 27, 1989) (statement of Wendy Chavkin). Chavkin, a physician and professor at Columbia University School of Public Health, conducted a survey which revealed that out of 78 drug treatment programs (95% of the total treatment centers in the city), 54% refused to treat pregnant women. In addition, 67% would not treat women on Medicaid, and 87% of the programs did not have any services available to pregnant women on Medicaid who were addicted to crack. Only 44% of programs that accepted pregnant addicts provided or arranged for prenatal care. Moreover, only two programs made arrangements for childcare.

[36] Poor women and women of color who do seek care find themselves disproportionately reported to authorities for drug use. See, for example, Ira J. Chasnoff et al., *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 New Eng J Med 1202 (1990). The Pinellas County study screened 715 pregnant women who obtained prenatal care from public health clinics as well as private obstetrical offices. The study found that about 15% of the women, both black and white, used drugs during their pregnancies. Id at 1204. A discrepancy arises, however, when one looks at the number of cases that are reported to the authorities. Despite relatively equal rates of drug use, black women are nearly ten times more likely than white women to be reported to state agencies for substance abuse during pregnancy. Id. In addition, poor women are more likely to be reported than middle-class women. In the Pinellas County study, 60% of the 133 women reported to health authorities had incomes of less than $12,000 a year. Only 8% had incomes of more than $25,000 a year. Id at 1205.

[37] Committee to Study Outreach for Prenatal Care, *Prenatal Care: Reaching Mothers, Reaching Infants*, 4, 5 (Institute of Medicine, 1988).

[38] See, for example, Minn Stat Ann §§ 626.5561-626.5562 (West 1992); Ill Ann Stat ch 23, para 2055; ch 37, para 802-10 (Smith-Hurd 1991).

[39] See Oberman, 43 Hastings LJ at 521 (cited in note 34).

law has criminalized gestation, and in so doing, has encouraged abortion for the most vulnerable of women: poor women of color. This response cannot but raise the specter of eugenics.[40] Yet, access to abortion, already severely limited by financial constraints, soon may be altogether foreclosed by the demise of legalized abortion. Gradually, yet undeniably, the options available to the most economically and legally vulnerable women are being reduced.

IV. BARRING THE BACK DOOR: THE CRIMINALIZATION OF ABORTION

As society witnesses the slow death of legalized abortion, it is essential to remember that a woman who is pregnant and does not wish to be already faces several significant obstacles if she is to exercise her right to terminate the pregnancy. Almost immediately following the U.S. Supreme Court decision legalizing abortion,[41] the judiciary and state legislatures began limiting access to abortion by permitting the states to "encourage" women to choose childbirth over abortion.

The first limitations on abortion were financial: two U.S. Supreme Court decisions allowed states to fund health costs associated with pregnancy and delivery, but not those related to abortion.[42] As others have observed, this essentially revoked the right to abortion for poor women.[43] Later cases approved restrictions on the decisional autonomy of minors, permitting states to require parental notification and/or consent.[44] Then, in July 1989, the Court decided *Webster v Reproductive Health Services*,[45] upholding a Missouri statute banning the performance of abortions in public facilities, and requiring costly viability tests to be performed. The most recent limitations were on the information given to women seeking health care guidance at publicly-funded facilities. Setting aside free speech concerns, the Court in *Rust v Sullivan*[46] held that feder-

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[40] See Roberts, 104 Harv L Rev at 1419 (cited in note 3).

[41] *Roe v Wade*, 410 US 113 (1973).

[42] *Maher v Roe*, 432 US 464 (1976); *Harris v McRae*, 448 US 297 (1980).

[43] Catharine MacKinnon, *Toward a Feminist Theory of the State* 184-94 (Harv U Press, 1989). "[T]he McRae result sustains the meaning of privacy in Roe: women are guaranteed by the public no more than what they can get in private—what they can extract through their intimate associations with men. Women with privileges, including class privileges, get rights." Id at 191.

[44] *Hodgson v Minnesota*, 110 S Ct 2926 (1990); *Ohio v Akron Center for Reproductive Health*, 110 S Ct 2972 (1990).

[45] 492 US 490 (1989).

[46] 111 S Ct 1759 (1991). A portion of the regulations reads:

> A pregnant woman requests information of abortion and asks the Title X project to refer her to an abortion provider. The project counselor tells her that the project does not consider abortion to be an appropriate method of family planning and therefore does not counsel or refer for abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services, and provides her with a list of such providers from which the client may choose.

42 CFR § 59.1-59.10 (1989).

ally-funded facilities may be prohibited from informing women of their legal right to terminate an unwanted pregnancy.

The Court is currently considering *Planned Parenthood of Southeastern Pennsylvania v Casey*, involving a Pennsylvania statute which requires mandatory delays, husband notification, viability testing and prescribes anti-abortion physician lectures prior to obtaining an abortion.[47] Whether or not this case is used to explicitly overturn *Roe*, the recriminalization of abortion seems to be only a matter of time. Already, the state has used its power to circumscribe access to abortion. Soon, states will regain the power to criminally sanction women who terminate their pregnancies.

History suggests the manner in which states may enforce laws criminalizing abortion. Leslie Reagan has compiled a thorough and informative study of state enforcement of criminal abortion laws in the United States by investigating methods of enforcement in Chicago from 1867, when abortion was first criminalized, to 1940.[48] She utilizes county, city, and state legal records, including coroners' inquests, to demonstrate a pattern of prosecuting abortionists by relying on the dying declarations of women who had illegal abortions. Among other sources, Reagan reviews forty-four Cook County coroners' inquests. She finds that all of them investigated the abortions and deaths of white, working-class women, the majority of whom were immigrants or first generation Americans. The reason for this, she suggests, is that

> [w]orking-class women's poverty—in both wealth and health care—made it more likely that they, rather than middle-class women, would reach official attention for having abortions. . . . [P]oor women, lacking funds, often used inexpensive, and often dangerous self-induced measures and delayed in calling in doctors if they had complications. By the time poor women sought medical attention, they had often reached a critical stage and, as a result, had come to the attention of officials. Affluent women avoided official investigations into their abortions because they had personal relations with private physicians, many of whom never collected dying statements, destroyed such statements, or falsified death certificates.[49]

Reagan concludes that "[t]oday, as in the past, enforcement of any criminal abortion law will target the most powerless groups—poor and working-class women, women of color, and teen women—and their health care will be harmed the most."[50] Already we can see how this will be true. Women with money will be able to travel to states where abortion is legal; they will be more likely to have health care providers as

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[47] *Planned Parenthood of Southeastern Pennsylvania v Casey*, 744 F Supp 1323 (ED Pa 1990), 947 F2d 682 (3d Cir, 1991).

[48] Leslie J. Reagan, *"About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867 - 1940*, 77 J Am History 1240 (1991).

[49] Id at 1246.

[50] Id at 1264.

friends, and thus may more easily locate someone who will be willing to perform a relatively safe illegal abortion; they will have easier access to the health care system in the event of a complication. They will die in fewer numbers.

V. CONCLUSION

Ultimately, state power to criminalize women's reproductive decisions will affect all women. This is a society in which all women, old and young, lesbian and straight, of all colors, may have sexual contact with men either voluntarily or involuntarily. In a rape culture—one in which women's lives are restricted by the fear of ubiquitous sexual violence, which is not only socially tolerated but culturally glorified—all women live with the risk of male sexual intrusion. Such contact always carries with it the risk of pregnancy. Even those who choose not to conceive, and successfully avoid conception, will be subject to restriction.[51] Therefore the only true means of avoiding state intrusion into a woman's life will lie in sterilization.

All of the restrictions discussed in this essay are aimed directly at female sexuality and reproductive functioning. The women first restricted will continue to be those with the least power: women of color, poor women, and younger women. The logical extension of the double-bind dilemma as it applies to these women—and, ultimately, to all women—is not simply to prohibit them from exercising reproductive options, but at the most profound level, to stop them from being women. All escape routes will thus have been sealed, all options foreclosed: women simply cannot exist.

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[51] Note, for example, that fetal protection policies commonly exclude all women of reproductive age from potentially hazardous workplaces, regardless of actual pregnancy or even fertility. Although the constitutionality of such regulation has been successfully challenged (see *UAW v Johnson Controls*, 111 S Ct 1196 (1991)), the widespread emergence of fetal protection policies illustrates the extension of the control of pregnancy to the categorical regulation of women as women.