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Shared Interests: Promoting Healthy Births Without Sacrificing Women’s Liberty

by

DAWN JOHNSEN*

I. Introduction

While the national debate on reproductive rights has focused on a woman’s fundamental right to decide whether to have an abortion, a new strand of legal and public policy issues recently has emerged that also threatens American women’s reproductive freedom and other fundamental liberties. During the last decade, courts, legislatures, and state prosecutors increasingly have sought to impose special restrictions on women who decide to bear children. The government has attempted to use the force of law to compel women to behave in ways deemed likely to promote the birth of healthier babies. Pregnancy-related restrictions and penalties have been aimed at a wide variety of women’s conduct, ranging from driving an automobile1 and taking prescription drugs such as antibiotics and valium,2 to drinking alcohol3 and using illegal drugs.4

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1. Stallman v. Youngquist, 152 Ill. App. 3d 683, 504 N.E.2d 920 (1987) (child had a cause of action for prenatal injuries allegedly received when her mother drove negligently while pregnant), rev’d, 125 Ill. 2d 267, 531 N.E.2d 355 (1988); Christopher B. Daly, Woman Charged in Death of Own Fetus in Accident, WASH. POST, Nov. 25, 1989, at A4 (woman charged with vehicular homicide when she suffered a miscarriage after an automobile collision allegedly resulting from her driving while intoxicated); Renee Loth, DA Sees No Politics in Fetal Death Case, BOSTON GLOBE, Sept. 16, 1989, at 25 (same).


There can be no serious dispute that once a woman has chosen to bear a child, the government has a legitimate interest in pursuing policies that will improve the likelihood her baby will be healthy. Broad support exists for responsible governmental initiatives aimed at reducing the United States' tragically high infant mortality and morbidity rates. What is at issue are the specific means employed to improve the health of children and pregnant women: how should the government pursue this important goal?

Assessing the merits of possible governmental responses requires close attention to the profound policy and constitutional implications of these responses. Framing the discussion in terms of protecting the rights and interests of the fetus, for example, tends to obscure the inescapable reality that, physically, a fetus is part of a woman's body. Once a woman is pregnant, the government can affect fetal development, and thus the health of the infant at birth, only through the woman's body and actions. This critical fact raises opportunities for the development of effective public policies, but it also creates the potential for conflict. If not formulated with care, governmental policies adopted to promote healthy births can lead to significant and unnecessary intrusions on women's fundamental liberties and their ability to decide how to live their own lives.

During the last decade, this potential for conflict has been realized. Legislatures, prosecutors, and courts have used many forms of coercive governmental power to force women to act in ways deemed optimal for fetal development. Courts have imposed civil penalties and allowed children to sue their mothers for prenatal injuries that were attributed to the woman's behavior while pregnant. Prosecutors have brought criminal charges ranging from prenatal child neglect to homicide. Women have been imprisoned and civilly committed for the duration of their pregnancies. Women have lost custody of their children because of their


5. See, e.g., Stallman, 152 Ill. App. 3d at 694, 504 N.E.2d at 927; Grodin, 102 Mich. App. at 399, 301 N.W.2d at 870.


conduct during pregnancy. And courts in eleven states have ordered pregnant women to submit to cesarean sections against their will. In at least one such case, the compelled surgery required physically tying the woman to the operating table. In another, it contributed to the woman’s death.

Coercive and punitive governmental policies that create conflict between women’s liberty and the promotion of healthy births are unnecessary. Indeed, the most effective policies for improving the health of newborns are those that facilitate women’s choices, not those that infringe on their liberty. An analysis of the two dramatically different approaches taken by the government to this issue strongly supports this conclusion. One approach, characterized by the attempts made during the last decade to impose special restrictions and duties on women solely because they are or may become pregnant, can be described as the “adversarial model.” Adversarial policies approach the woman and the fetus she carries as distinct legal entities having adverse interests, and assume that the government’s role is to protect the fetus from the woman.

The second approach, which historically has been and today remains far more common, can be described as the “facilitative model.” This model recognizes that women who bear children share the government’s objective of promoting healthy births, but that existing obstacles—and not bad intentions—impede the attainment of this common goal. Women inevitably must make numerous decisions that require them to balance varying and uncertain risks to fetal development against competing demands and interests in their lives. Rather than depriving women of the right to make these judgments or punishing women after the fact for making “wrong” choices, facilitative policies seek to expand women’s choices by, for example, improving access to prenatal care, food, shelter, and treatment for drug and alcohol dependency.

This Article explores the relative merits of the facilitative and adversarial models of governmental action. It concludes that the approach

8. Levendosky, Turning Women, supra note 3, at A8; Levendosky, Using the Law, supra note 3, at A8.
11. See In re A.C., 573 A.2d at 1235.
that best preserves women’s liberty interests is also the most effective at promoting healthy pregnancies. The facilitative approach—building on shared goals—offers opportunities for positive, effective, and cost-efficient governmental policies. By contrast, the adversarial approach—creating maternal-fetal conflicts—is not only ineffective, but often disserves the governmental objective of promoting healthy births.

Part II of the Article describes the facilitative and adversarial models in more detail, focusing on how their underlying rationales and general effects differ. Part III then briefly reviews the history of the legal status of the fetus, revealing that use of the adversarial model is not supported by legal precedent. Part IV explores the ways in which governmental action premised on the adversarial model threatens women’s fundamental liberties, including their rights to privacy and bodily integrity, as protected by the United States Constitution and state constitutions. This exploration shows that absent constitutional limitations on the government’s use of criminal and civil sanctions to force women to act in the perceived best interests of fetal development, the government would have a justification for exerting unprecedented, sweeping control over women’s lives. Part IV then examines in detail the four major types of coercive action employed under the adversarial model, showing that each fails strict judicial scrutiny because the resulting infringements on women’s fundamental liberties are not justified by the government’s countervailing concerns. Adversarial policies do not further their asserted purpose and often affect women’s behavior in ways actually harmful to fetal development and to the women themselves. Even if rare instances exist in which an adversarial approach might improve the likelihood of a healthy birth in a specific case, many more women will be deterred from obtaining health care and drug and alcohol treatment by fear of prosecution, incarceration, civil liability, and court-ordered surgery. Citing these negative effects, and often noting the possibility of facilitative alternatives, a wide range of organizations have opposed governmental attempts to impose special restrictions on pregnant or fertile women.12

Finally, Part V briefly discusses how the use of adversarial policies runs counter to the value of equality embodied in federal and state constitutional protections against discrimination on the basis of sex or race. Adversarial policies employed to date have focused exclusively on restricting women’s behavior, even though ample evidence exists that men can adversely affect fetal development through behavior that results in damage to sperm, including smoking, drinking alcohol, drug use, and working in jobs that involve exposure to certain substances, such as lead. Serious concerns of racial injustice also are raised by the government’s use of adversarial policies. Recent studies show that African American women and other women of color have, in vastly disproportionate numbers, been the targets of pregnancy-related criminal prosecutions and court-ordered surgeries. In addition to providing the basis for possible legal challenges, these equality concerns provide strong support for the powerful policy arguments against governmental action that follows the adversarial model.

II. Two Models of Governmental Action to Promote Maternal and Infant Health

A. The Facilitative Model

The core assumption underlying policies that follow the facilitative model is that the critical goal of improving maternal and infant health can best be achieved by building on the shared interests of women and the government. The facilitative model is premised on the view that women who decide to bear children wish to have healthy pregnancies and healthy babies and typically will go to great lengths to make this possible. In a statement opposing legal interference with women’s decisions during pregnancy, the American Medical Association’s Board of Trustees noted:

Ordinarly, the pregnant woman, in consultation with her physician, acts in all reasonable ways to enhance the health of her fetus. Indeed, clinicians are frequently impressed with the amount of personal health

risk undertaken and voluntary self-restraint exhibited by the pregnant
woman for the sake of her fetus and to help ensure that her child will
be as healthy as possible.13

Rather than creating conflicts by transforming the sacrifices and choices
some women voluntarily make for the sake of the fetus into legally re-
quired standards of conduct for all women in all circumstances, facilita-
tive policies support women's ability to make individual decisions that
promote healthy births.

Basic to the facilitative model is an understanding that women do
not—indeed, could not—focus their every decision and action toward the
sole goal of reducing any risk to fetal development in a current or future
pregnancy. The unavoidable fact is that women must make countless
decisions that to varying degrees affect the likelihood of optimal fetal
development. Women must daily weigh these risks against competing
demands and desires: to care for their children and other family mem-
ers, to continue working in their jobs. How a particular woman's vari-
ous decisions will combine to affect fetal development is far from certain.
The facilitative model assumes that each woman—and not the govern-
ment—is best situated ultimately to decide how to balance these compet-
ing risks and moral considerations.

The facilitative model acknowledges that many women face obsta-
cles to having the healthy pregnancies they desire. Such obstacles may
include illness, addiction, poor information, lack of health insurance, and
poverty. For example, one third of pregnant women in the United
States, or about three million pregnant women each year, currently do
not receive adequate prenatal care, a circumstance closely linked to in-
fant mortality and poor infant health.14 Government policies that pro-
vide a woman with the tools necessary to have the healthy pregnancy she
desires facilitate achievement of this common goal.

Facilitative policies need not be costly and, indeed, can save the gov-
ernment money, given the high costs associated with poor infant health.
An example of an existing cost effective program that takes a facilitative
approach is the Special Supplemental Food Program for Women, In-
fants, and Children (WIC), which provides food supplementation, nutri-
tion education, and health care and social services referrals to low
income women, infants, and children. In operation since 1974, the WIC
program is universally recognized as highly successful in reducing the

13. AMA, Legal Interventions During Pregnancy, supra note 12, at 2663; see also ACOG
Committee Opinion, supra note 12, at 2 ("The vast majority of pregnant women are willing to
assume significant risk for the welfare of the fetus.").

(citing study of National Commission to Prevent Infant Mortality).
incidence of low birthweight, infant mortality and other infant health problems. Yet the program is currently funded to allow only about half, or 4.5 million of the income-eligible women and children to participate.\(^\text{15}\) The WIC program is so successful in improving infant health that expanding funding for it would actually save the government a substantial amount of money in health assistance to low income women and children. A recent study by the United States Department of Agriculture found that in just the first sixty days after birth, each dollar spent on the WIC program results in reduced Medicaid costs of between $1.77 and $3.13.\(^\text{16}\) An analysis published by the National Bureau of Economic Research found that expenditures to improve prenatal care would be even more cost effective than WIC.\(^\text{17}\)

The facilitative model accommodates the reality that some women engage in behavior that both presents a relatively high risk of harm to fetal development and also is viewed by society as having little or no redeeming value. A woman who, for example, ingests large amounts of alcohol or cocaine throughout pregnancy clearly is in no sense making a "good" decision. Even in these instances, however, a facilitative approach is most effective. The overwhelming majority of women who use substances such as cocaine, alcohol, and tobacco during pregnancy do so because they suffer from strong physical and psychological dependencies developed prior to pregnancy, not because they desire to give birth to an unhealthy baby. In fact, providers of health care and drug and alcohol treatment find that women are highly motivated during pregnancy to seek help in overcoming their dependencies precisely because they want to minimize risks to fetal development and deliver healthy babies.\(^\text{18}\) The

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\(^{18}\) See, e.g., NGA, In Brief, supra note 17, at 2 ("Pregnancy is a motivating factor for
use of punitive adversarial approaches, by contrast, merely deters women from seeking necessary treatment and prenatal care by instilling fear of prosecution and thus runs counter to efforts to promote healthy births.\textsuperscript{19}

Despite the great need and demand for treatment for pregnant drug and alcohol dependent women, the vast majority of pregnant women seeking treatment find it impossible to obtain. Drug treatment programs routinely deny admission to pregnant women, and the few that will treat women during pregnancy typically have long waiting lists.\textsuperscript{20} Facilitative approaches focus on filling this clear need for treatment, and also seek to prevent people from forming dangerous dependencies in the first place, through, for example, public education about the harmful effects of drug and alcohol use by women during pregnancy. Prevention programs are also valuable in that they make it possible to target men for education about the risk of damage to sperm from alcohol and drug use, which can result in fetal harm.\textsuperscript{21}

B. The Adversarial Model

Though most governmental responses to problems of poor infant health are still premised on the facilitative model, during the last decade governmental entities have increasingly employed approaches premised on the adversarial model. Under this model, a pregnant woman is viewed as two distinct entities—woman and fetus—each with separate and conflicting interests. Each of the countless decisions a woman makes that could affect fetal development is viewed with suspicion. The government's role is to protect the fetus from the pregnant woman by using the law to compel her to act in ways that a court, legislature, physician, or other appointed third party deems optimal for fetal health. Specifically, the government seeks to control women's behavior by second guessing their decisions and subjecting them to special restrictions and obligations based solely on the fact that they currently are or may become pregnant.

In recent years, courts, legislatures, prosecutors, and other governmental entities have used adversarial approaches to police women's behavior with respect to a broad range of activities. Most sweeping have been attempts to define the fetus as a distinct legal "person" and then force women to comply with legally required standards of behavior that

\textsuperscript{19} See infra notes 145-153 and accompanying text.
\textsuperscript{20} See infra notes 158-162 and accompanying text.
\textsuperscript{21} See infra notes 171-173 and accompanying text.
are broadly and vaguely defined. In one of the first instances of an adversarial approach, a Michigan appellate court ruled in 1980 that a child could sue his mother for prenatal injuries if she had failed to act, in the eyes of a court, as a “reasonable” pregnant woman. In that case, the child alleged his mother’s negligent use during pregnancy of the antibiotic tetracycline caused him to be born with discolored teeth. In 1987, an Illinois appellate court—ultimately reversed by the Illinois Supreme Court—similarly allowed a girl to sue her mother for intestinal injuries allegedly caused prenatally by her mother’s involvement in an automobile accident while pregnant.

Women have also been criminally prosecuted under general child abuse statutes for “prenatal abuse” of their fetuses on the basis of their behavior during pregnancy. A California woman was criminally prosecuted in the 1986 case, People v. Stewart, for allegedly causing her infant son’s severe brain damage and ultimate death, which resulted from her own loss of blood during delivery. The woman was prosecuted under a statute requiring parents to provide their children with clothing, food, shelter, and medical attendance, the prosecution claiming that the woman could have avoided this tragedy by following her doctor’s advice and seeking medical care as soon as she began bleeding vaginally, rather than waiting several hours. Ultimately, the judge ruled that the statute could not be used to prosecute a woman for her otherwise lawful behavior during pregnancy. Since the Stewart case, prosecutors across the country have attempted to prosecute women under statutes that clearly never were intended to criminalize women’s conduct during pregnancy. A pregnant woman in Wyoming who went to a police station to report that her husband had physically assaulted her was herself arrested and charged with child abuse for drinking alcohol during pregnancy. A woman in Massachusetts who suffered serious injuries in a car accident,
including the loss of her pregnancy, was prosecuted for involuntary man-
slaughter because she allegedly caused the accident by driving while
intoxicated.29

In another application of the adversarial model, judges have overrid-
den women's decisions regarding medical treatment and at least eleven
states and the District of Columbia have ordered women to give birth by
cesarean section, rather than vaginal delivery, despite the increased med-
cal risks and severe bodily intrusion involved.30 The District of Colum-
bia Court of Appeals, sitting en banc, recently became the first appellate
court to fully address the constitutional implications of this unprece-
dented interference with an individual's bodily integrity and ruled in
1990 that a court order forcing a woman to submit to a cesarean section
violates her constitutional rights.31

In addition to civil and criminal prosecutions and court-ordered
medical interventions, states have attempted to deprive women of cus-
tody of their children based solely on their actions during pregnancy,
rather than making the customary determination based on the current
ability of the woman and other family members to care for the child. A
Michigan woman was charged in 1987 with child abuse and temporarily
lost custody of her infant because she had taken valium while pregnant to
relieve pain from injuries suffered in a car accident.32 A woman in Iowa
similarly lost custody of her son after being charged with prenatal child
abuse based solely on her conduct during pregnancy.33 Although the
Iowa prosecution was based in part on allegations the woman used illegal
drugs, the frightening breadth of conduct for which women could be
prosecuted is suggested by the fact that the testimony against her in-
cluded allegations that she "paid no attention to the nutritional value of
the food she ate during her pregnancy—she simply picked the foods that
tasted good to her without considering whether they were good for her
unborn child."34

Thus far, the adversarial model has been used most frequently in
cases involving the use of illegal substances by pregnant women. Obvi-

29. See Daly, supra note 1, at A4; Loth, supra note 1, at 25.
30. Kolder et al., supra note 9, at 1194; In re A.C., 573 A.2d 1235 (D.C. 1990) (en banc);
curiam).
31. In re A.C., 573 A.2d at 1247.
DOCKET, supra note 2, at 140.
33. Baby Placed in Foster Home: Doctor Claims Prenatal Abuse, DES MOINES REG.,
34. Id. at 11A.
ously, a woman's pregnant status does not immunize her from prosecution under a generally applicable criminal statute that would otherwise prohibit her behavior. In the dozens of cases that have followed the adversarial model, however, women have been singled out for special prosecutions and additional penalties solely because they were pregnant at the time of the drug use. Prosecutors bringing such actions have relied upon statutes that were never intended to be used in this manner and that impose harsher penalties than those for simple possession. In a related context, a Washington, D.C. court ordered a woman imprisoned for the duration of her pregnancy following her arrest for forging checks. Although the prosecutor recommended probation, the judge sentenced the woman to imprisonment for 180 days—sufficient time to ensure she would give birth in jail—because she had tested positive for cocaine use, and the judge wanted to prevent her from using cocaine again while pregnant.

III. The Lack of Precedent for the Adversarial Model

The adversarial approach has been defended as following a general trend in the law toward recognition of the fetus as a legal entity or "person" distinct from the pregnant woman. This description of the law is simplistic and misleading. In fact, prior to the very recent trend toward the adversarial approach, the law viewed the pregnant woman as a single legal entity and did not treat the fetus as her legal adversary. As the United States Supreme Court stated in Roe v. Wade, "the unborn have never been recognized in the law as persons in the whole sense" and have not been recognized at all "except in narrowly defined situations and except when the rights are contingent upon live birth."

Over the years, the law has developed to take the existence of the fetus into account under certain circumstances, but this has occurred only for specific narrow purposes that promote the interests of born people, including women who bear children. Recognition of the fetus as a

37. Id.
38. For a more extensive discussion of the legal status of the fetus, see Dawn E. Johnsen, Note, The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 YALE L.J. 599, 600-13 (1986).
40. Id. at 162.
41. Id. at 161.
legal “person” in these instances in no way supports the notion that there are fetal interests assertable by the government or others against women.

The first context in which the definition of a legal “person” was expanded to include a fetus occurred in property law during the late nineteenth century. The law presumed that a man would desire to include among his heirs a child of his who was conceived yet not born at the time of his death. Legal status was conferred to protect not fetal interests, but the interests of a deceased parent, and was contingent upon the child’s subsequent live birth.

Tort law also developed to recognize the existence of the fetus. In 1946, a court first held that a child may maintain a cause of action against a third party, such as a physician, whose tortious conduct toward a pregnant woman results in the subsequently born child suffering harm. Allowing recovery for such prenatal injuries furthers the interests of women who bear children without creating maternal-fetal conflicts. It serves to compensate children for injuries suffered and helps pay the costs associated with their care. It also serves to deter wrongful acts toward pregnant women that cause such injuries.

Some states have subsequently extended the law’s recognition of the fetus as a legal entity for certain purposes under criminal and civil law without the traditional requirement of a subsequent live birth. This development did not create maternal-fetal conflicts but actually

42. See, e.g., Cowles v. Cowles, 56 Conn. 240, 13 A. 414 (1887); Medlock v. Brown, 163 Ga. 520, 136 S.E. 551 (1927); McLain v. Howald, 120 Mich. 274, 79 N.W. 182 (1899); see also Christian v. Carter, 193 N.C. 537, 538, 137 S.E. 596, 597 (1927) (stating that the civil law rule as to the recognition of fetuses “apparently was based upon the presumed oversight or inadvertence of the parent in providing for an existing or a contingent situation”). Even within property law, recognition of the fetus is the exception rather than the rule. See, e.g., In re Peabody, 5 N.Y.2d 541, 158 N.E.2d 841, 186 N.Y.S.2d 265 (1959) (holding that a fetus is not a person “beneficially interested” for purposes of § 23 of New York’s Personal Property Law and distinguishing the limited purposes served by the “fiction” of considering a fetus subsequently born alive a person for certain other matters of property law).

43. See Roe, 410 U.S. at 161-62; sources cited supra note 42.

44. See Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946) (first case to recognize standing of a child to maintain a cause of action for injuries received in utero after viability).

45. In some cases, state courts have stated explicitly that the purpose behind recognizing this cause of action is to compensate parents. See Volk v. Baldazo, 103 Idaho 570, 574, 651 P.2d 11, 15 (1982) (wrongful death statute “confers upon parents a cause of action for the wrongful death of a ‘child’ and thus protects the rights and interests of the parents, and not those of the decedent child”); Dunn v. Rose Way, Inc., 333 N.W. 2d 830, 832-33 (Iowa 1983) (distinguishing between claim by estate of fetus under state’s survival statute in which “the wrong is done to the injured person and to that person’s estate,” and a claim by parents for loss of a fetus under a wrongful death statute in which “the wrong is done to a child’sparents,” and concluding that the wrongful death statute, “involved . . . a right of recovery given to a parent. The parent’s loss does not depend on the legal status of the child . . . .”)}. Other state courts, however, have relied on a general state interest in protecting life. See Danos v. St.
served to further women's interests. As courts have explicitly noted, when a woman is caused to suffer a miscarriage or a stillbirth, allowing a civil cause of action for wrongful death or a criminal prosecution for homicide serves to protect pregnant women from severe bodily intrusion, physical harm, and the involuntary termination of pregnancies. For example, the United States Supreme Court has described wrongful death actions for the destruction of a fetus as providing compensation for the loss of a future wanted child:

\[\text{Some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life.}^{46}\]

Thus, legal precedent does not support the adversarial approach to promoting maternal and fetal health. Traditionally, the law did not treat the fetus as a separate entity in contexts that would create an adversarial relationship between a pregnant woman and the fetus within her. Rather, the law recognized the fetus as a legal entity only for carefully defined purposes, with a view toward protecting and promoting the interests of women as well as their children.

IV. Constitutional Limitations on the Adversarial Model

A. Women's Fundamental Rights

Governmental action based on the adversarial model is not only a sharp deviation from precedent, it also is at odds with the United States Constitution. Subjecting women to special restrictions because of their childbearing capability interferes with rights the Constitution recognizes as so fundamental to individual liberty that they may be restricted by the government only under the most compelling circumstances. Adversarial policies must therefore satisfy the demanding strict scrutiny standard of judicial review.

Because the government's use of the adversarial approach is relatively new and still atypical, no federal court has had occasion to consider its implications for women’s constitutional rights. As discussed below, several state courts have examined the constitutionality of specific

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Pierre, 402 So. 2d 633, 638 (La. 1981) (citing legislative pronouncement that “a human being exists from the moment of fertilization and implantation”).

Although most states that have used the criminal law in this manner have done so by amending the state homicide law to extend to fetuses, at least one state explicitly focused the law's protection on the pregnant woman rather than the fetus. See N.M. STAT. ANN. § 30-3-7 (Supp. 1989).

46. Roe, 410 U.S. at 162 (citation omitted).
adversarial actions—including court-ordered cesarean sections and criminal prosecutions of women for being pregnant while using illegal drugs—and have found that they interfere with women’s fundamental rights, as protected by the guarantee of liberty contained in the Fourteenth Amendment. \(^47\) Opinions of the United States Supreme Court recognizing and protecting fundamental liberties support these state court rulings.

Among the aspects of liberty that the Supreme Court has found to be fundamental, and thus deserving of heightened judicial protection, is the individual’s right to “independence in making certain kinds of important decisions,” \(^48\) particularly in matters central to determining the course of his or her own life. The Court has used various terms to describe rights related to decision-making autonomy, most often referring to them as part of the “right to privacy.” The Court has identified decisions related to procreation and pregnancy as being “at the very heart” of the right to privacy. \(^49\) Also fundamental is the individual’s right to privacy in certain matters that concern his or her physical body, which has been described as the right to bodily integrity. \(^50\) As the Court recently noted, this principle of bodily integrity is deeply embedded in our common law:

Before the turn of the century, this Court observed that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” \(^51\)

47. See infra section IV.B.
49. “The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.” Carey v. Population Servs. Int’l, 431 U.S. 678, 685 (1977). This cluster includes the right of the individual: to choose to prevent pregnancy through contraception, Griswold v. Connecticut, 381 U.S. 479 (1965); to terminate a pregnancy through abortion, Roe v. Wade, 410 U.S. 113 (1973); to continue working throughout pregnancy, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); and to remain fertile, Skinner v. Oklahoma, 316 U.S. 535 (1942). The Court has described the fundamental right to privacy as including “the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
50. For example, citing a Fourth Amendment right to “personal privacy and bodily integrity,” the Supreme Court ruled that a state could not compel a criminal defendant to submit to the surgical removal of a bullet needed as evidence in the state’s prosecution. Winston v. Lee, 470 U.S. 753, 761 (1985). In an earlier decision, the Court overturned as violative of the Fourteenth Amendment a conviction based on evidence obtained from what the Court described as a bodily invasion that “shocks the conscience,” consisting of the forced stomach pumping of a criminal suspect. Rochin v. California, 342 U.S. 165, 172 (1952).
Policies based on the adversarial model infringe on these fundamental liberties to a greater extent than analogous governmental interferences that courts have found unconstitutional. This is most graphically illustrated by the cases in which women have been forced against their will to submit to cesarean sections. The bodily intrusion entailed in such a case—with the attendant risks of major surgery (such as the risk of infection from the incision and a higher mortality rate)—surpasses those the Court has found unconstitutional in cases involving criminal defendants, over whom the government generally may exercise unusually far-reaching control.\(^5\) In one reported case, carrying out the court-ordered cesarean section required physically tying the woman to the hospital bed and forcibly removing her husband from the room.\(^5\) The bodily intrusion inflicted by ordering women to undergo cesarean sections for the advancement of perceived fetal interests stands in sharp contrast to our legal system's typical refusal to force one person to help another, even when doing so would save the other from grave injury or certain death with little or no personal sacrifice or risk.\(^5\)

Although recent appointments to the United States Supreme Court threaten to alter the Court's fundamental rights jurisprudence, and in particular to remove constitutional protection from the fundamental right of a woman to decide whether to have an abortion,\(^5\) the Court

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52. See supra note 50.

53. Confronted with the doctor's intentions, the woman and her husband became irate. The husband was asked to leave, refused, and was forcibly removed from the hospital by seven security officers. The woman became combative and was placed in full leathers, a term that refers to leather wrist and ankle cuffs that are attached to the four corners of a bed to prevent the patient from moving. Despite her restraints, the woman continued to scream for help and bit through her intravenous tubing in an attempt to get free. Gallagher, supra note 10, at 10.

54. Attempts by the government to force an individual to assist another are rare. Courts have held that people have no obligation to assist. Particularly instructive is McFall v. Shimp, 10 Pa. D. & C.3d 90, 91 (Allegheny Cty. 1978) (per curiam) (reprinted in 127 Pittsburgh Legal J. 14 (1979)), in which a court ruled that a man could not be compelled to donate bone marrow necessary to save the life of his cousin. The court wrote:

The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue. . . . For our law to compel defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, . . . and one could not imagine where the line would be drawn.

Id. at 91 (emphasis in original); see also In re Pescinski, 67 Wis. 2d 4, 8-9, 226 N.W.2d 180, 182 (1975) (court found it had no authority to order kidney transplant from incompetent mentally ill individual to his sister in dire need of transplant "[i]n the absence of real consent on his part, and in a situation where no benefit to him has been established").

55. See Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (state ban on use of
nonetheless might find that adversarial policies directed at women who choose to bear children interfere impermissibly with women’s fundamental constitutional rights. Even staunch opponents of *Roe v. Wade* have stated that the Fourteenth Amendment’s guarantee of liberty protects individuals from physical intrusions such as being forced to undergo unwanted medical procedures. For example, arguing on behalf of the Bush Administration that the Supreme Court should overrule *Roe v. Wade* and hold that women do not possess a fundamental right to make their own decisions regarding abortion, Solicitor General Kenneth Starr sought to distinguish forced abortions as nonetheless unconstitutional: “A state law mandating abortions would present a starkly different question. Our Nation’s history and traditions establish that a competent adult may generally refuse unwanted medical intrusion. This right would, we believe, extend to an unwanted abortion.” This view seemingly would protect a woman from a court-ordered cesarean section or other “unwanted medical intrusion.”

In addition to the protection afforded by the Fourteenth Amendment’s guarantee of liberty, state constitutional guarantees of liberty and privacy may provide women with protection from the intrusions of ad-

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public employees and facilities for performance or assistance of nontherapeutic abortions was not unconstitutional); Planned Parenthood v. Casey, 60 U.S.L.W. 3388 (1992) (U.S. Supreme Court granted certiorari to determine the constitutionality of the Pennsylvania Abortion Control Act). Constitutional provisions that protect women from sex discrimination may also constrain the use of adversarial policies. See infra section V.A.

56. Brief for the United States as Amicus Curiae at 14 n.7, Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (Nos. 88-1309, 88-1125). During oral argument in *Webster v. Reproductive Health Services*, then-Solicitor General Charles Fried similarly conceded that a forced abortion would be unconstitutional:

*Justice O’Connor:* Do you think the state has the right to, if in a future century we had a serious overpopulation problem, has a right to require women to have abortions after so many children?

*Mr. Fried:* I surely do not. That would be a different matter.

*Justice O’Connor:* What do you rest that on?

*Mr. Fried:* Because unlike abortion, which involves the purposeful termination of future life, that would involve not preventing an operation but violently taking hands on, laying hands on a woman and submitting her to an operation and a whole constellation—

*Justice O’Connor:* And you would rest that on substantive due process protection?

*Mr. Fried:* Absolutely.

Transcript of Arguments Before Court on Abortion Case, N.Y. TIMES, Apr. 27, 1989, at B12, B13.

Both Fried and Starr failed to recognize that compelled pregnancy and childbirth also involve the government “violently taking hands on, laying hands on a woman,” inconsistent with “[o]ur Nation’s history and traditions.” Nonetheless, their recognition that a woman’s fundamental rights would be implicated by “laying hands on a woman and submitting her to an operation” or an “unwanted medical intrusion” applies directly to forcing a woman to submit to a cesarean section.
versarial policies. State courts are free to interpret state constitutional provisions as more protective of individual liberties than similar provisions of the federal constitution. State courts have, for example, interpreted privacy provisions in their state constitutions as more protective than the federal constitution of women's right to make their own decisions regarding abortion, and on that basis have invalidated restrictions on minors' ability to obtain abortions without parental consent.  

If courts fail to apply strict scrutiny to adversarial policies, the government will be free to override or penalize any decision by a woman upon a simple showing that the regulation is rationally related to a legitimate interest in reducing a risk to fetal development.  


60. See Reyes v. Superior Court, 75 Cal. App. 3d 214, 217, 141 Cal. Rptr. 912, 913 (1977); Baby Placed in Foster Home, supra note 33, at 11A.


62. Baby Placed in Foster Home, supra note 33, at 11A.

63. Id.


65. Stewart, slip. op. at 4.
drinking alcohol,\textsuperscript{66} being injured in an automobile accident while driving negligently\textsuperscript{67} or under the influence of alcohol,\textsuperscript{68} taking prescription drugs,\textsuperscript{69} and taking illegal drugs.\textsuperscript{70}

Indeed, absent the protection of strict scrutiny, there is no logical stopping point to the kinds of personal decisions by women that could be second guessed by zealous prosecutors, estranged husbands and former lovers, or judges scrutinizing an isolated decision with the benefit of hindsight. A legal framework that does not require strict scrutiny of adversarial policies could create a separate legal regime in which, with the most minimal of justifications, women—but not men—could be deprived of the right to make countless important judgments critical to personal autonomy. The burdens placed on women who choose to become pregnant, or simply to remain fertile, could be sufficiently onerous to pressure some to avoid or even terminate otherwise wanted pregnancies. Women might also be pushed into submitting to unwanted sterilizations, as has resulted from policies of private employers that exclude fertile women from certain jobs involving exposure to substances that pose risks to fetal development.\textsuperscript{71}

Thus, any governmental action that follows the adversarial model by placing special restrictions on women based solely on their role in childbearing must be strictly scrutinized, even though the Constitution does not protect as fundamental the right to engage in many activities potentially affected. For example, the government certainly can impose criminal sanctions to prevent the use of cocaine. The fact that a woman is pregnant does not immunize her from prosecution under a criminal law of general application. Yet when the government prosecutes a woman for a crime not applicable to male users or imposes harsher penalties solely because the woman was pregnant when she used cocaine, the level of constitutional protection and judicial scrutiny increases because the

\begin{itemize}
\item \textsuperscript{66} Levendosky, \textit{Turning Women}, supra note 3, at A8; Levendosky, \textit{Using the Law}, supra note 3, at A8.
\item \textsuperscript{68} Loth, supra note 1, at 25; Daly, supra note 1, at A4.
\item \textsuperscript{71} See, e.g., UAW v. Johnson Controls, 111 S. Ct. 1196, 1199-2000 (1991) (plaintiffs included woman who had been sterilized in order to retain her job).
\end{itemize}
woman's pregnant status is an essential element of the charge. Similarly, although the Constitution does not guarantee a fundamental right to drive fifty-five miles per hour, and pregnancy does not create such a fundamental right, a law that required only pregnant women to drive forty-five miles per hour where others could drive fifty-five would be constitutionally suspect. It is the woman's pregnancy—or her ability to become pregnant—that is the impetus for governmental action under the adversarial model, whether it be a court-ordered medical procedure or a criminal prosecution for delivering drugs to a "minor" through the umbilical cord or for "prenatal child abuse." And it is this imposition of additional, special burdens aimed specifically at the procreative aspect of women's behavior that is deeply threatening to women's liberty and therefore deserving of strict scrutiny.

B. The Application of Strict Scrutiny to Adversarial Policies

As is true for any governmental interference with a fundamental individual right, a legislature, court, or other governmental actor may place special restrictions and additional penalties on women's actions as they relate to childbearing only if it can justify the constitutional infringement under the strict scrutiny standard of judicial review. The United States Supreme Court has repeatedly ruled that this standard requires the government to show that the challenged action is both "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end."

Although the Court has never articulated precise guidelines as to what these requirements entail—for example, how exactly an interest qualifies as "compelling"—it has provided some guidance. A court may not simply accept the government's assertion that the interest it is pursuing is "compelling." Rather, the court must carefully scrutinize even interests that appear compelling in the abstract to ensure that they justify the specific deprivation of the right at issue and are compelling in the

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72. For another discussion of the strict scrutiny standard as it applies to certain special restrictions on women's behavior that follow the adversarial model, see Dawn Johnsen, From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster, 138 U. PA. L. REV. 179, 204-15 (1989).


particular context and manner in which they are being asserted. For a restriction to be considered “narrowly drawn” to achieve the compelling interest, it must be the least “restrictive alternative”—that is, the means of achieving the governmental goal that is least intrusive on the fundamental right at stake.

Critical to the strict scrutiny standard, the restriction sought by the government must actually serve or promote the compelling interest. An adversarial policy that is harmful to the governmental interest being pursued obviously cannot be said to serve that interest. Thus, such a policy will not survive strict scrutiny.

Because significant use of the adversarial model has emerged only in the last decade, no federal court and only a few state courts have considered the application of strict scrutiny to an adversarial policy. When confronted with a legal challenge, the government is likely to assert that the restriction on women’s liberty is necessary to serve its interest in promoting healthy births. This interest is undoubtedly an important one for the government to pursue, and, as discussed above, most means of achieving this goal actually further women’s interests and raise no constitutional problems. But in those instances in which the government chooses a response that infringes upon women’s fundamental liberty, the role of the courts is to strictly scrutinize that action and determine whether it is justified.

Although the precise analysis varies depending on the context, governmental actions that follow the adversarial model are likely to fail strict scrutiny for three general reasons. First, in order to justify overriding a woman’s decision, the government must demonstrate that it is better able than the woman to make the “right” decision. Yet, in the contexts in which the government has sought to dictate women’s behav-

75. Boos, 485 U.S. at 323, 324 (though “[a]s a general proposition” the government “has a vital national interest” in protecting foreign diplomats in accordance with international law, that interest is not “automatically render[ed] . . . ‘compelling’” when its assertion infringes upon First Amendment rights); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497-98 (1989) (governmental interest in redressing generalized societal discrimination deemed to be not sufficiently compelling to justify race conscious remedies); Coy v. Iowa, 487 U.S. 1012, 1020 (1988) (criminal defendant's Sixth Amendment rights “outweighed” state’s interest in “protecting victims of sexual abuse”); Korematsu v. United States, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting) (arguing that courts may not “distort” the Constitution in order to approve all that the state may deem to be expedient and in the national interest when fundamental rights are at stake).

76. Boos, 485 U.S. at 329; Cohen v. California, 403 U.S. 15, 25 (1971) (governmental interest in preserving public order not sufficiently weighty to justify restrictions on free expression because it is “inherently boundless”).

77. See supra section II.A.
ior through adversarial policies, there rarely has existed a clear "right" decision; rather, they have involved inherently complex judgments balancing competing interests and have been fraught with uncertainty as to the likely effects on fetal development. A court or legislature is unlikely to be able to make the requisite showing that it is better situated than the woman whose life and liberty are at issue to make the complicated judgments—where to work, when to take medication necessary for her own health, whether to spend limited resources on prenatal care or food for her children—that necessarily vary from case to case according to each woman's circumstances.

Second, adversarial policies typically will fail that aspect of the strict scrutiny standard that requires the challenged action to be effective in furthering the asserted compelling interest. Their overall effect typically is not to advance the government's asserted interest in promoting healthy births, but to encourage behavior by women that is counter to that goal. In determining whether an adversarial policy actually serves the governmental interest, the court must examine not only the case at hand, but also the more general effects of the policy at issue. If a governmental action may improve the chances of a healthy birth in one particular case, but only at the cost of causing many other less healthy births, then the action cannot be said to further the asserted governmental interest. The overwhelming consensus within the medical and public health community is that taking an adversarial approach is ineffective and even counterproductive. Adversarial policies fail to address and often exacerbate the root causes of poor birth outcomes, because the government's threat of interference and punishment frightens away the women most in need of health care.

Finally, even if they could be shown to further the government's asserted goal, adversarial policies do not satisfy the requirement that they be "narrowly drawn" to achieve that goal, because effective "less restrictive alternatives" typically exist. The government can better pursue its goals through actions that follow the facilitative model of improving maternal and infant health by helping rather than punishing women. Because facilitative approaches both are more effective and do not interfere with women's fundamental rights, the government may not constitutionally pursue adversarial policies.

The remainder of this section will consider the application of the strict scrutiny standard to each of the four principal ways in which the adversarial model has thus far been used: (1) employment policies ex-

78. See sources cited supra note 12 and infra notes 138-144.
cluding women from certain jobs in the name of “fetal protection”; (2) the creation of special, broadly defined, government imposed standards of behavior for women, such as a crime of “prenatal abuse” or civil liability for failing to act as a “reasonable” pregnant woman; (3) court orders compelling women to undergo cesarean sections against their will; and (4) the imposition of special penalties on women for the use of illegal drugs based solely on the fact that the women were pregnant at the time of use. Applying the requirements of strict scrutiny as outlined by the Supreme Court reveals that each of these types of adversarial actions would likely fail strict scrutiny.

(1) Exclusionary Employment Policies

Although no federal court has considered the constitutional limitations on the adversarial model, the United States Supreme Court held in March 1991 that an employer’s implementation of an adversarial policy violated Title VII, the federal statute prohibiting sex discrimination in employment. In UAW v. Johnson Controls, the Supreme Court struck down Johnson Controls’ policy excluding all women who had not proven that they were infertile from working in positions where they would be exposed to lead—positions that were among the highest paid at the company. The Court ruled that by enacting the Pregnancy Discrimination Act to amend Title VII, Congress prohibited employers from adopting policies excluding fertile women from jobs based on potential harm to fetuses.

The most complete judicial description to date of the dangers posed by using women’s role in childbearing as the justification for special restrictions on their behavior is that given by Judge Frank Easterbrook of the Seventh Circuit in a dissent that reached the same conclusion ultimately adopted by the Supreme Court. Judge Easterbrook explained that to uphold the company’s policy would be to set a sweeping precedent that could not easily be confined, and noted that twenty million jobs could ultimately be closed to women under the proffered rationale.

Judge Easterbrook observed:

The hazards created by occupational chemicals span many orders of magnitude: some are safer than the sweeteners we wolf down, some are dangerous indeed. Where does lead fit on that spectrum? I cannot believe that Johnson would be entitled to fire female employees who

80. Id.
81. Id. at 1204.
smoke or drink during pregnancy—let alone fire all female employees because some might smoke or drink—which makes it hard to exclude women to curtail risk from other substances.

How does the risk attributable to lead compare, say, to the risk to the next generation created by driving a taxi? A female bus or taxi driver is exposed to noxious fumes and the risk of accidents, all hazardous to a child she carries. Would it follow that taxi and bus companies can decline to hire women? That an employer could forbid pregnant employees to drive cars, because of the risk accidents pose to fetuses?83

In addition to setting a dangerous precedent, an exclusionary policy such as Johnson Controls’ requires that even women who are not sexually active or who do not plan to bear children subordinate all other pursuits to the elimination of risks to a potential future fetus they have no intention of conceiving. A forty year-old divorced woman struggling to raise three children on her own is denied the job along with a woman who is pregnant or attempting to conceive. Indeed, the plaintiffs in Johnson Controls included a fifty year-old divorced woman who had been transferred to a lower paying job and a woman who had been sterilized in order to keep her job.84 In another dissent from the Seventh Circuit’s Johnson Controls decision, Judge Cudahy recognized it is far from clear that denying the job to even a pregnant woman is in the best interests of her future child:

What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well fed, housed and doctored? Whose fetus is at greater risk? Whose decision is this to make?85

The Supreme Court agreed with Judge Cudahy that in enacting Title VII Congress had determined that it is the woman’s decision to make: “Employment late in pregnancy often imposes risks on the unborn child, . . . but Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself.”86 Although the ruling rested on an interpretation of the federal statute, the Court implied that it made sense for Congress to leave such decisions to the woman because she was most directly affected and it would be inappropriate for a court or employer to override her judgment about how to balance competing factors in her life:

83. Id. at 916-17.
84. Johnson Controls, 111 S. Ct. at 1200.
85. Johnson Controls, 886 F.2d at 902 (Cudahy, J., dissenting).
86. Johnson Controls, 111 S. Ct. at 1207.
Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.

It is no more appropriate for the courts than it is for individual employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.87

The Supreme Court also noted that the justification offered for the exclusionary policy echoed the rationale used less than a century ago to restrict women’s participation in paid employment and political and civic affairs:88 “Concern for a woman’s existing or potential offspring historically has been the excuse for denying women equal employment opportunities.”89

(2) Broadly Defined Required Standards of Behavior

The adversarial policies that most clearly cannot survive strict judicial scrutiny are those that require women to comply with broadly defined standards of behavior during and even prior to pregnancy. For example, in recent years, women have been criminally prosecuted for behavior during pregnancy under child abuse and neglect statutes, and in one case under a statute requiring a parent “to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child.”90 In the civil context, a Michigan court ruled in 1980 that a boy could sue his mother for injuries caused by her actions during pregnancy that did not meet the “reasonable” pregnant woman standard.91 Some legal commentators have advocated creating a “duty to bring the child into the world as healthy as is reasonably possible,”92 “a fetal right to begin life with a sound body and mind,”93 or a crime of “fetal abuse.”94

87. Id. at 1207-10.
88. See infra section V.A.
89. Johnson Controls, 111 S. Ct. at 1210.
94. Margery W. Shaw, Conditional Prospective Rights of the Fetus, 5 J. LEGAL MED. 63, 98-100 (1984). One advocate of policies that follow the adversarial model, Dr. Margery Shaw,
The legal imposition of such required standards of behavior would allow the government broad discretion to intrude upon countless aspects of women’s lives. As the Supreme Court of Illinois noted in holding that a girl could not sue her mother for allegedly causing her to suffer prenatal injuries, if women could be sued by their children for their actions during pregnancy “[m]other and child would be legal adversaries from the moment of conception until birth.”95 The government cannot justify such sweeping, vaguely defined standards of mandatory behavior as “necessary to serve a compelling state interest.”96 Moreover, subjecting women to a standard of legally required behavior that targets not only undesirable activities but also constitutionally protected behavior which is socially and personally desirable cannot be said to be “narrowly tailored.”97 By fully implementing facilitative policies, the government could more effectively advance its interest in promoting desirable behavior without unnecessarily restricting women’s fundamental rights.

The criminal prosecution in 1985 of a California woman named Pamela Rae Stewart—one of the first premised on the adversarial model—helps illustrate the government’s lack of justification for taking away a woman’s right to make these judgments.98 Ms. Stewart was pros-
executed for allegedly causing the death of her son through her actions while pregnant, under a statute that requires a parent "to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child." Although the court ultimately ruled that the statute did not apply to the conduct at issue, the circumstances of Ms. Stewart's life and pregnancy reveal the types of complex judgments women must make that could become the basis for criminal or civil liability under broad standards of governmentally mandated behavior.

Ms. Stewart gave birth in 1985 to her third child. Tragically, her son was born with severe brain damage and died six weeks later. Ms. Stewart was arrested—and jailed for six days before she could make bail—for allegedly causing his death through her failure to follow her doctor's advice and obtain prompt medical care while pregnant, which the prosecutor claimed constituted failure to provide the "medical attendance" to her fetus required by the statute. Ms. Stewart had a difficult pregnancy and suffered from a dangerous condition known as placenta previa. This ultimately caused her to experience substantial blood loss as the result of vaginal hemorrhaging—threatening to her own life—that the prosecution claimed led to her son being born brain damaged. The prosecutor argued that Ms. Stewart should be held criminally liable because she might have delivered a healthy baby if she had sought medical care as soon as she began bleeding vaginally, rather than allegedly waiting a number of hours.

Ms. Stewart, like all women, made decisions about health care against the backdrop of her resources and competing responsibilities. Like many women, she faced significant obstacles to obtaining adequate medical care. She was very poor and had two small daughters to care for; while she was pregnant, the entire family lived first in a single hotel room and then in a mobile home they shared with her mother-in-law. Ms. Stewart apparently was also the victim of physical abuse by her husband. The police were called between ten and fifteen times over the course of a year to intervene when Mr. Stewart was abusive. Despite these difficult circumstances, Ms. Stewart did obtain some prenatal care. Although the prosecutor had her imprisoned for allegedly waiting a number of hours after she began bleeding before seeking medical assist-


100. The prosecutor also cited other activities in which Ms. Stewart allegedly engaged against her doctor's advice, including having sexual intercourse with her husband and taking marijuana and amphetamines, but it was her loss of blood that the prosecutor alleged caused the injury.
ance, Ms. Stewart had gone to the hospital on two prior occasions specifically because she was experiencing vaginal bleeding.\textsuperscript{101}

Even if the loss of Ms. Stewart's son could have been avoided by her obtaining better medical care, the government does not have a compelling interest that justifies prosecuting her for the judgment she made about when to call her doctor. If this type of prosecution were constitutionally permissible, any woman who gave birth to a less than completely healthy baby would be vulnerable to criminal investigation, prosecution, and incarceration. Prosecutions based on this sort of statutory provision also fail to pass strict scrutiny because the overall effect is counter to the asserted compelling interest of promoting healthy births. In a case in which the birth has already occurred, as with Ms. Stewart's prosecution, there is no possibility of helping the child directly at issue. Only by encouraging other women to obtain better medical care could the prosecution possibly promote future healthy births. Health care providers overwhelmingly agree, however, that the effect of prosecutions like Ms. Stewart's is just the opposite.\textsuperscript{102} They deter—not encourage—women from seeking prenatal care and even proper medical care during the actual delivery. Women are led to fear subjecting their actions during pregnancy to official scrutiny and inviting accusations by prosecutors that they failed to follow their doctors' advice. The women most likely to fear prosecution and therefore avoid health care are those most in need of it: Women at greater risk of having poor birth outcomes due to illness, poverty, or drug or alcohol addiction. As a result of this single failed prosecution of Ms. Stewart, health care and drug treatment providers in the San Diego area reported that women were deterred from seeking care by fear of arrest and prosecution.\textsuperscript{103} Governmental policies that take a facilitative approach and provide pregnant women with services such as prenatal medical care provide an obvious, less intrusive, and more effective alternative to this adversarial approach.

(3) Court-Ordered Cesarean Sections

The issuance of court orders forcing women to give birth by cesarean section provides another context in which the government cannot establish a compelling interest to justify overriding women's decisions. A survey published in the \textit{New England Journal of Medicine} reported cases in eleven states in which courts issued orders directing

\textsuperscript{101} Bonavoglia, \textit{supra} note 98, at 95.

\textsuperscript{102} See \textit{supra} notes 138-153 and accompanying text.

\textsuperscript{103} Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss, \textit{supra} note 98, at 21-23.
women to undergo such surgical procedures against their will. The purported justification for this extraordinary interference with women's liberty and bodily integrity has been the well being of the fetus.

In 1990, the District of Columbia Court of Appeals sitting en banc became the first appellate court to consider the full constitutional implications of forcing a woman to undergo a cesarean section. The court held in *In re A.C.* that a lower court's issuance of a court order was unconstitutional because the government did not possess an interest sufficiently compelling to override the woman's right to make her own judgment. The court's opinion, however, was not issued until long after the cesarean section had been performed. The facts of *In re A.C.* provide tragic and compelling evidence that such decisions must be left to the woman.

Twenty-seven year-old Angela Carder (identified in the opinion by her initials "A.C.") was twenty-six weeks pregnant and ill with cancer, which she had successfully battled since age thirteen, when she was ordered by a court to give birth by cesarean section. The order was issued at the hospital's request over the unanimous objections of Ms. Carder, her husband, her parents, and her physicians, and despite evidence that the fetus might not be viable and that the surgery might cause Ms. Carder's death, given her poor health. A three judge panel of the District of Columbia Court of Appeals refused to stay the order and the surgery was performed. In fact, the fetus did not survive, and Ms. Carder died two days after the surgery. The cesarean section was referred to on her death certificate as a contributing factor.

As is inevitably true in these cases, the court proceedings were held under tremendous time pressure, with little opportunity for the woman to present her case. The entire process took only six hours, from the time the hospital first went to court to the time the surgery was performed. The judge never spoke to Ms. Carder; the attorney appointed to represent her had no opportunity to meet with her, review her medical records, or prepare or call witnesses; and the physician who had the longest history of treating her was not notified of the hearing. A lawyer was appointed to represent the fetus, and she argued: "I think the poten-

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104. Kolder et al., *supra* note 9, at 1193.
106. *Id.* at 1237.
107. *Id.* at 1238.
108. *Id.* at 1238-40.
tiality of this fetus outweighs the imminent death of the patient.”

In ordering the surgery, the trial court judge stated: “It’s not an easy decision to make, but given the choices, the Court is of the view the fetus should be given an opportunity to live.”

The three judge appellate panel’s opinion, issued after Ms. Carper’s death, provides a disturbing example of the dangers of allowing a court to substitute its own judgment for that of the woman affected. In explaining the way in which it balanced the interests involved, the court acknowledged “we well know that we may have shortened A.C.’s life span,” but discounted the value of Ms. Carper’s life because she was likely to die soon in any event: “The Caesarean section would not significantly affect A.C.’s condition because she had, at best, two days left of sedated life; the complications arising from the surgery would not significantly alter that prognosis.” In fact, this finding was disputed in an affidavit subsequently submitted by Ms. Carper’s treating physician who stated that, had he been notified of the hearing, he would have testified that the surgery interfered with Ms. Carper’s ability to receive potentially beneficial chemotherapy that could have allowed her to live longer.

Nevertheless, the court found that the value of Ms. Carper’s life was outweighed by the admittedly “slim” chance that the fetus might survive: “The court based its decision to deny a stay on the medical judgment that A.C. would not survive for a significant time after the surgery and that the fetus had a better, though slim, chance if taken before A.C.’s imminent death.”

The willingness of both the trial court and the three judge panel to discount the value of Ms. Carper’s rights and her very life is chilling. Such disregard on the part of a tribunal powerfully illustrates why the government must not be allowed to take from the woman whose body will be subjected to surgery the ability to balance these competing factors for herself. Indeed, in this case the only conflict of interests was the conflict created by the hospital in seeking the order and the court in issuing it.

In an opinion issued almost three years after Ms. Carper’s death, the District of Columbia Court of Appeals, sitting en banc, ruled that “every

110. Transcript at 79, *In re A.C.*
111. *Id.* at 84.
113. *Id.* at 613-14.
114. *Id.* at 617.
115. Affidavit of Jeffrey A. Moscow, M.D., *In re A.C.*
116. *In re A.C.*, 533 A.2d at 613.
person has the right, under the common law and the Constitution, to accept or refuse medical treatment” and that directing a woman to submit to a cesarean section against her will interferes with this fundamental right.\textsuperscript{117} In a particularly graphic passage, the court focused on the violent bodily intrusion necessary to enforce an order against a woman who refused to comply:

What if A.C. had refused to comply with a court order that she submit to a cesarean? . . . Enforcement could be accomplished only through physical force or its equivalent. A.C. would have to be fastened with restraints to the operating table, or perhaps involuntarily rendered unconscious by forcibly injecting her with an anesthetic, and then subjected to unwanted major surgery. Such actions would surely give one pause in a civilized society, especially when A.C. had done no wrong.\textsuperscript{118}

The court found no governmental interest sufficiently compelling to override the woman’s decision and ruled that her right to choose must be protected: “[I]n virtually all cases the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus.”\textsuperscript{119}

The AMA has issued a comprehensive policy statement which concludes, as did the D.C. Court of Appeals, that physicians should not seek and courts should not issue orders overriding a pregnant woman’s decision whether to have a cesarean section. Noting that “[p]erforming medical procedures against the pregnant woman’s will violates her right to informed consent and her constitutional right to bodily integrity,”\textsuperscript{120} the AMA statement stresses the inappropriateness of any party other than the woman herself performing the necessary balancing of interests:

[Decisions that would result in health risks are properly made only by the individual who must bear the risk. Considerable uncertainty can surround medical evaluations of the risks and benefits of obstetrical interventions. Through a court-ordered intervention, a physician deprives a pregnant woman of her right to reject personal risk and replaces it with the physician’s evaluation of the amount of risk that is properly acceptable. This undermines the very concept of informed consent.]\textsuperscript{121}

\footnotesize{\textsuperscript{117} In re A.C., 573 A.2d 1235, 1247 (D.C. 1990) (en banc).}
\footnotesize{\textsuperscript{118} Id. at 1244 n.8.}
\footnotesize{\textsuperscript{119} Id. at 1237.}
\footnotesize{\textsuperscript{120} AMA, Legal Interventions During Pregnancy, supra note 12, at 2663.}
\footnotesize{\textsuperscript{121} Id. at 2665. Although the AMA declined to adopt an absolute rule that no situation exists in which a physician should seek judicial intervention, it noted: [A] woman conceivably could refuse oral administration of a drug that would cause no ill effects in her own body but would almost certainly prevent a substantial and irreversible injury to her fetus. Given the current state of medical technology, it is}
Even the medical judgment about the risk to the fetus is fraught with uncertainties that weaken the government's asserted interest in overriding a woman's decision. Not only was the court wrong about the viability of the fetus in In re A.C., the New England Journal of Medicine survey found anecdotal evidence of six cases in which the prediction of fetal harm proved to be inaccurate.\textsuperscript{122} In one of these cases, a Georgia court based its decision on medical testimony that without the cesarean section, there was a "99 percent certainty" that the fetus would not survive, as well as at least a "50 percent chance" that the woman herself would die.\textsuperscript{123} In fact, the cesarean section was never performed and the woman had a safe vaginal delivery, without any harm to her or the baby.\textsuperscript{124}

Allowing court-ordered cesarean sections not only fails to serve, but is harmful to, the government's asserted interest in promoting healthy births. The AMA report discusses the adverse consequences of the practice, which include engendering distrust of physicians by pregnant women: "[W]omen may withhold information from the physician that they feel might lead the physician to seek judicial intervention. Or they may reject medical or prenatal care altogether, seriously impairing a physician's ability to treat both the pregnant woman and her fetus."\textsuperscript{125}

The AMA concludes that "while the health of a few infants may be preserved by overriding a pregnant woman's decision,"\textsuperscript{126} the overall effect—which is the relevant issue for constitutional analysis—is that "the health of a great many more may be sacrificed."\textsuperscript{127} Thus, the government's objective is not served. In fact, the issuance of the order may directly endanger the health of the future child directly involved. In at least one case, the woman against whom such an order was directed left the hospital to avoid the procedure.\textsuperscript{128} In the case of Angela Carder, neither she nor her child survived.

\textsuperscript{122} Kolder et al., supra note 9, at 1195.
\textsuperscript{124} AMA, Legal Interventions During Pregnancy, supra note 12, at 2664.
\textsuperscript{125} Id. at 2666.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 2665; see also Gallagher, supra note 10, at 47.
(4) Special Penalties for Drug Use During Pregnancy

Courts, legislatures, and other governmental actors have most often taken an adversarial approach when addressing the use by pregnant women of harmful substances, such as cocaine and heroin, that already have been criminalized for the general public. Dozens of women have been criminally prosecuted, incarcerated, and deprived of custody of their children because they were pregnant when they used drugs. Few courts have considered the constitutionality of such special prosecutions because in most cases charges ultimately have been dismissed on the ground that the statute under which charges were brought was being misused. For example, women have been prosecuted for prenatal child abuse and distribution of cocaine to a minor, offenses much more serious than possession, because they were pregnant at the time of use.

Courts in at least two states, Michigan and Massachusetts, have ruled not only that the statutes were inapplicable, but also that the prosecutions interfered with women's fundamental liberties and failed strict scrutiny. In the Massachusetts case, Commonwealth v. Pellegrini, the court described the level of governmental intrusion into a woman's life entailed by such a prosecution: "In order to prosecute Ms. Pellegrini, the commonwealth must intrude into her most private areas, her inner body." It also noted that "the level of state intervention and control over a woman's body required by the prosecution" would set a dangerous precedent for numerous other pregnancy related restrictions on women. To date, the only appellate court to uphold a criminal prosecu-

131. Prosecutors have argued that the definition of “minor” under the statute was satisfied because cocaine may have been passed from the woman's body to her child's body after birth in the seconds before the umbilical cord was cut.
134. Id. at 6.
135. Id. at 9. A New York court described the dangerous potential for sweeping intrusions on women's liberty, ruling that a woman's fundamental right to privacy would be violated by finding her guilty of child neglect based solely on her use of drugs while pregnant and without considering her potential fitness as a parent:

To carry the . . . argument to its logical extension, the State would be able to supersede [sic] a mother's custody right to her child if she smoked cigarettes during
tion of this type did so with only a cursory discussion of the constitutional issues. The conviction currently is being appealed to the Florida Supreme Court.

Women who use illegal drugs during pregnancy obviously can be prosecuted under laws of general application. As with any adversarial policy, the factor that triggers the need for strict judicial scrutiny is the imposition of special restrictions (such as increased criminal penalties or charges) only on pregnant women engaging in the forbidden activity. The government may not single out women who are pregnant for harsher treatment unless the additional restriction is necessary and narrowly tailored to further a compelling interest.

It is in the context of drug use by pregnant women that the use of the adversarial model initially may seem to be the most justified and likely to survive strict scrutiny. The government clearly has a strong interest in reducing pregnant women's use of illegal drugs and other potentially harmful substances such as alcohol. The risks posed to fetal development by a woman's use of substances such as cocaine have been widely publicized. What is at issue, however, is not the legitimacy of the governmental interest, but whether the means chosen to effectuate that interest are appropriate and constitutionally permissible.

Evidence and opinion are overwhelming that penalties directed only at women who use illegal drugs during pregnancy are counterproductive to the government's objective of promoting healthy births and therefore do not serve a compelling state interest. Recognizing their adverse consequences, a wide variety of professional and public interest organizations concerned with infant and maternal health have vigorously opposed governmental responses that take an adversarial approach. Among the organizations taking a stance against special penalties directed at drug

her pregnancy, or ate junk food, or did too much physical labor or did not exercise enough. The list of potential intrusions is long and constitute entirely unacceptable violations of the bodily integrity of women.

In re Fletcher, No. N-3968/88, slip op. at 6 (N.Y. Fam. Ct., Oct. 7, 1988). The court noted that "by becoming pregnant, women do not waive the constitutional protection afforded to other citizens." Id.


137. Recent articles have suggested that initial reports of the adverse effects to fetal development of illegal maternal drug use may have been exaggerated and premature. See Linda C. Mayes et al., The Problem of Prenatal Cocaine Exposure: A Rush to Judgment, 267 JAMA 406 (1992); Kathy Fackelman, The Crack-Baby Myth, WASH. CITY PAPER, Dec. 13, 1991, at 25; Ellen Goodman, Beyond the "Crack Baby" Horror Lies the Pain of Troubled Kids, MIAMI HERALD, Jan. 16, 1992, at 23A.
use by pregnant women are: the American Academy of Pediatrics,138 the American Medical Association,139 the American Public Health Association,140 the American Society on Addiction Medicine,141 the March of Dimes,142 the National Association of Public Child Welfare Administrators,143 and the Southern Regional Project on Infant Mortality (an initiative of the Southern Governors’ Association and the Southern Legislative Conference).144 The reason most commonly cited for opposition by these organizations is that adversarial policies deter women who use drugs from seeking drug treatment and prenatal care by causing them to fear consequent arrest and prosecution for a crime such as prenatal child abuse or distribution to a minor. Both the Massachusetts and Michigan courts cited this deterrent effect in ruling that these types of prosecution fail strict scrutiny.145

138. “The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance abusing pregnant woman and her infant.” AMERICAN ACADEMY OF PEDIATRICS, POLICY STATEMENT, DRUG EXPOSED INFANTS 10. “The AAP is concerned that such involuntary measures may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment.” Id.

139. AMA, Legal Interventions During Pregnancy, supra note 12, at 2670 (“Criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate.”); AMA, Treatment Versus Criminalization, supra note 12. (“[T]herefore be it . . . resolved that the AMA oppose legislation which criminalizes maternal drug addiction.”).

140. The American Public Health Association “recommends that no punitive measures be taken against pregnant women who are users of illicit drugs when no other illegal acts, including drug related offenses, have been committed.” American Public Health Ass'n, Policy Statements, 81 AM. J. PUB. HEALTH 253, 253 (1991) (Policy Statement 9020: Illicit Drug Use by Pregnant Women).

141. “State and local governments should avoid any measures defining alcohol or other drug use during pregnancy as 'prenatal child abuse,' and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health services for these women.” ASAM Policy Statement on Chemically Dependent Women and Pregnancy, (Am. Soc'y on Addiction Medicine, Washington, D.C.), ASAM NEWS, Sept.-Oct. 1989, at 6.

142. “Punitive approaches to drug addiction may be harmful to pregnant women because they interfere with access to appropriate health care. Fear of punishment may cause women most in need of prenatal services to avoid health care professionals.” MARCH OF DIMES, STATEMENT ON MATERNAL DRUG ABUSE 1.

143. “Laws, regulations, or policies that respond to addiction in a primarily punitive nature, requiring human service workers and physicians to function as law enforcement agents are inappropriate.” Nat'l Ass'n of Pub. Child Welfare Adm'rs, supra note 12, at 3.

144. “[S]tates should adopt, as preferred methods, prevention, intervention, and treatment alternatives rather than punitive actions to ameliorate the problems related to perinatal exposure to drugs and alcohol.” Southern Legislative Summit on Healthy Infants and Families: Policy Statement, SOUTHERN REGIONAL PROJECT ON INFANT MORTALITY (Southern Governors' Association Southern Legislative Conference, Washington, D.C.) Oct. 4-7, 1990 at 8 [hereinafter Southern Legislative Summit].

A 1990 report by the United States General Accounting Office (GAO), which included the results of a survey of health care providers and others, also described fear of prosecution and loss of custody of their children as a "barrier to treatment" for pregnant women dependent on drugs:

Drug treatment and prenatal care providers told us that the increasing fear of incarceration and losing children to foster care is discouraging pregnant women from seeking care. Women are reluctant to seek treatment if there is a possibility of punishment. They also fear that if their children are placed in foster care, they will never get the children back.147

The report noted as particularly troubling that criminal sanctions would deter women from seeking not only drug treatment, but also prenatal care—care that could "help prevent or at least ameliorate many of the problems and costs associated with the births of drug-exposed infants."148 When prenatal care is provided, "the chances of an unhealthy infant are greatly reduced."149 In addition to avoiding drug treatment and prenatal care, women were also found to be giving birth at home, without medical care, because they feared detection.150

The AMA expressed similar concerns about special prosecutions for drug use during pregnancy, and noted in particular that even if the health of a few children would be promoted, the overall effect would be to sacrifice the well being of many more children:

Pregnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment. This fear is not unfounded . . . . [T]he number of women who are convicted and incarcerated for potentially harmful behavior is likely to be relatively small in comparison with the number of women who would be prompted to avoid medical care altogether. As a result, the potential well being of many infants may be sacrificed in order to preserve the health of a few.151

Adversarial policies may also cause women who do seek prenatal care to withhold from their doctors and other health care providers in-

147. Id.
148. Id.
149. Id. at 9-10.
150. Id.
151. AMA, Legal Interventions During Pregnancy, supra note 12, at 2667; see also Am. Soc'y on Addiction Medicine, supra note 141, at 6 ("Criminal prosecution of chemically dependent women will have the overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing, rather than preventing, harm to children and to society as a whole.").
formation concerning their use of drugs and other potentially harmful substances such as alcohol—information that is critical to obtaining appropriate care. Particularly counterproductive in this respect are statutes that require a health care provider to report a patient suspected of using illegal drugs or other potentially harmful substances during pregnancy to state authorities.\textsuperscript{152} Forcing doctors to betray their patients' confidences drives a wedge between pregnant women and their doctors and deters those women who most need health care from obtaining it.\textsuperscript{153}

In addition to discouraging pregnant women from seeking vital health care, adversarial approaches to the use of illegal drugs during pregnancy fail to promote healthy births for at least five other reasons. First, incarcerating women while they are pregnant is often detrimental to fetal development because of the unhealthy conditions that exist in prisons.\textsuperscript{154} Second, imposing additional penalties for already illegal activity is unlikely to be effective, because any deterrent effect of criminalization on the activity should already exist. Third, imposing harsh criminal penalties on pregnant women may pressure some women to have unwanted abortions.\textsuperscript{155} Fourth, as the \textit{Pellegrini} court observed, such prosecutions might well have a harmful effect on women's attitudes

\begin{itemize}
  \item \textsuperscript{152} See, e.g., \textsc{Minn. Stat. Ann.} § 626.5561–5562 (West Supp. 1992).
  \item \textsuperscript{153} Several medical organizations not only oppose the creation of special crimes directed at drug use during pregnancy, but also specifically oppose requiring doctors to report pregnant patients they suspect of using drugs or alcohol. For example, the AMA has adopted a resolution stating that it opposes "legislation which criminalizes maternal drug addiction or requires physicians to function as agents of law enforcement—gathering evidence for prosecution." \textsc{AMA, Treatment Versus Criminalization, supra note 12}, at 6. The American Society on Addiction Medicine adopted the following policy: "No law or regulation should require physicians to violate confidentiality by reporting their pregnant patients to state or local authorities for 'prenatal child abuse.'" \textsc{Am. Soc'y on Addiction Medicine, supra note 141}, at 6. In addition, the Southern Regional Project on Infant Mortality takes the position that states should "[b]ar[] pregnancy related tests and care that reveal substance abuse from being used as evidence in criminal prosecutions." \textsc{Southern Legislative Summit, supra note 144}, at 9.
  \item \textsuperscript{154} Litigation on behalf of pregnant female prisoners has documented shockingly dangerous conditions, including grossly deficient prenatal medical care and nutrition, exposure of pregnant women to contagious diseases, filthy and overcrowded living conditions, and easy access to illegal drugs, which have resulted in high rates of miscarriage and infant mortality and morbidity. \textsc{See generally} Ellen M. Barry, Recent Developments: Pregnant Prisoners, 12 \textsc{Harv. Women's L.J.} 189 (1989); Jacqueline Berrien, Pregnancy & Drug Use: Incarceration is Not the Answer, \textsc{Religious Coalition for Abortion Rights NewsL. (Women of Color Partnership)}, Aug. 1989 at 7; \textsc{AMA, Legal Interventions During Pregnancy, supra note 12}, at 2667.
  \item \textsuperscript{155} As the court stated in \textit{Pellegrini}, dismissing a special prosecution: "The state's interest would be further undermined when women seek to terminate their pregnancies for fear of criminal sanctions." \textsc{Commonwealth v. Pellegrini}, No. 87970, slip op. at 9 (Mass. Super. Ct. Oct. 15, 1990). \textsc{See also} To Stop Abortion by Addict, Her Brother Steps In, \textsc{supra note 7} at 24 (anti choice group seeking to block abortion by woman incarcerated for "reckless endangerment" of her fetus through her paint sniffing).
\end{itemize}
toward their pregnancies: "There is no familiar bond more intimate or more fundamental than that between the mother and the fetus she carries in her womb. This court will not permit the destruction of this relationship by the prosecution . . . ." 156 Finally, adversarial governmental actions are ineffective in reducing women's drug use during pregnancy because they fail to address the root problem: the strong physical and psychological dependencies from which the women suffer.

The same medical, children's welfare, women's rights, and public policy groups that are unified in their opposition to the adversarial approach also agree the effective policies are, those that follow a facilitative model and help women to overcome harmful dependencies. 157 Yet, the vast majority of pregnant women seeking assistance to overcome drug dependency cannot obtain the help they need. 158 Treatment programs routinely refuse to admit pregnant women, and those that will typically have long waiting lists, often longer than the duration of the woman's pregnancy. 159 A survey of treatment programs in New York City found that 54% denied treatment to all pregnant women, and 87% said that they would not treat pregnant women on Medicaid who were dependent on cocaine. 160 The GAO's 1990 report also found a severe shortage of treatment programs in key cities throughout the nation. 161 Those few programs that do have space available rarely provide services, such as prenatal care and child care, to meet the needs of pregnant women. To be effective and accessible for pregnant women, treatment programs must provide comprehensive community-based medical, educational, psychological, and social services. 162 Educational programs designed to discourage the initial use of harmful substances are particularly important. They serve both to prevent women from developing drug dependencies that would be difficult to overcome and to avoid harm to fetal development that might otherwise occur as a result of a woman's drug use before

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156. Pellegrini, slip op. at 16.
157. See supra notes 138-144.
159. McNulty, supra note 129, at 301-02.
160. Hearing, supra note 158, at 112.
161. GEN. ACCOUNTING OFFICE, supra note 146, at 36.
she even knows she is pregnant. Such programs are also useful in avoiding unsuccessful birth outcomes attributable to the alteration of sperm due to drug use by men.

Although the cost of these needed services clearly is substantial, the cost of failing to provide them is even greater. As the GAO's report concluded, financial (and other) costs to society of drug exposed infants come in many forms: extended and expensive hospital stays at birth for the infant; subsequent need for special medical care; higher rates of foster care placement; special educational needs; and limitations on employment possibilities later in life. If the government declines to provide funding for voluntary treatment programs and as a result women seeking help are turned away, it is profoundly unjust for the government then to prosecute, incarcerate, or place in involuntary treatment programs those same women under legal theories that are deeply threatening to women's fundamental liberties. As the AMA recognizes, "it would be an injustice to punish a pregnant woman for not receiving treatment for her substance abuse when treatment is not an available option to her."

Using adversarial approaches to the problem of drug use during pregnancy when alternative facilitative approaches exist is not only bad policy, but is also a basis for finding such policies unconstitutional. The government must seek to serve its interest in the manner least restrictive of the fundamental rights at stake. As the court concluded in dismissing the prosecution in Pellegrini, "[t]he commonwealth may effectuate its stated interest in protecting viable fetuses through less restrictive means, such as education and making available medical care and drug treatment centers for pregnant women."

V. Sex and Race Equality Concerns

A. Sex Equality

This article has focused on the threat to women's fundamental right to liberty posed by governmental policies premised on the adversarial model. Because such policies burden the liberty only of women, and not men, adversarial policies also raise important sex equality concerns. The implications for women's equality recently were touched upon by the United States Supreme Court when it ruled in Johnson Controls that polic-

163. Am. Soc'y on Addiction Medicine, supra note 141, at 6.
164. See infra notes 171-173 and accompanying text.
165. GEN. ACCOUNTING OFFICE, supra note 146, at 10.
166. AMA, Legal Interventions During Pregnancy, supra note 12, at 2669.
cies that exclude women from jobs presenting risks to fetal development violate Title VII's prohibition against sex discrimination in employment.168

The U.S. Constitution's guarantee of equal protection of the laws, which protects women from state action that discriminates on the basis of sex, may provide women with additional protection from adversarial governmental policies, as may similar provisions of state constitutions. Under current doctrine, the Equal Protection Clause of the Fourteenth Amendment prohibits government policies that discriminate on the basis of sex unless the distinction is "substantially related" to serving "an important governmental interest."169 Although this test is not as rigorous as the strict scrutiny reserved for race discrimination and policies burdening fundamental rights, it nonetheless provides women with a heightened level of judicial protection. Several state courts have interpreted their state constitutions as providing an even higher level of protection from sex discrimination than under the federal Constitution.170 Although it is beyond the scope of this Article to develop fully an analysis of the constitutional limitations on adversarial policies presented by the federal guarantee of equal protection, this section will briefly consider the principal arguments.

Adversarial policies that target only women even though the same behavior by men also increases the risk of unsuccessful birth outcomes constitute clear sex discrimination under current equal protection analysis. In such cases, men and women are similarly situated, yet government action singles out only women for penalties and restrictions. The discriminatory employment policy at issue in *Johnson Controls* is an example of such a policy in the private employment context. The policy at issue excluded only women from jobs involving exposure to lead despite evidence, as the Supreme Court noted, that men's exposure to lead can damage their sperm and thus lead to unsuccessful birth outcomes.171 In fact, one of the plaintiffs in *Johnson Controls* was a male employee who had requested—but been denied—a leave of absence because he hoped to

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169. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see also* Mississippi Univ. for Women *v. Hogan* 458 U.S. 718, 724 n.9 (1982) (invalidating sex based classification under intermediate scrutiny, but stating "we need not decide whether classifications based upon gender are inherently suspect," which would render them subject to strict scrutiny).


171. *Johnson Controls*, 111 S. Ct. at 1200; *see also* UAW *v. Johnson Controls*, 886 F.2d 871, 918-19 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting).
become a father but wanted first to lower the level of lead in his blood.\(^{172}\) Adversarial governmental actions directed at women who use drugs and alcohol during pregnancy represent another context in which only women have been penalized, despite evidence that alcohol and drug use—as well as smoking—by men can cause harm to their future children through the negative effect on sperm.\(^{173}\) Indeed, the relative lack of attention paid to the effects of men's behavior in determining the health of newborns may itself be a result of impermissible sex stereotypes about women's role in childbearing.

Establishing a successful equal protection claim will be more complex when the governmental actions restrict behaviors by women that do not present the same risks to fetal development when engaged in by men. The application of heightened judicial scrutiny in such cases will depend on courts recognizing that distinctions based on pregnancy or the potential to become pregnant are sex based. A controversial 1974 Supreme Court case, *Geduldig v. Aiello*,\(^ {174}\) touched on this issue. The Court in *Geduldig* upheld California's disability insurance program despite its exclusion of health care related to pregnancy and childbirth from the program's coverage. The Court stated that not all pregnancy-related distinctions necessarily constituted discrimination based on sex and found that the disability program at issue distinguished not between men and women but between "pregnant women" and "nonpregnant persons."\(^ {175}\) Soon thereafter, in *General Electric v. Gilbert*,\(^ {176}\) the Court applied the same strained reasoning in defining the scope of Title VII's prohibition on sex discrimination in employment.\(^ {177}\)

The Court's decisions in *Geduldig* and *Gilbert* have been subjected to harsh criticism and even ridicule\(^ {178}\) for their assertion that a distinction directly targeting a biological characteristic that only women possess and thus disadvantaging only women does not constitute a sex based dis-

\(^{172}\) Johnson Controls, 111 S. Ct. at 1200. In addition to lead, other workplace toxins that may damage sperm, and thus increase the risk of cancer and other harm to future children, include paints, pesticides, chemical solvents, and radiation. Father's Exposure to Toxins Can Hurt Fetus, Too, INDIANAPOLIS STAR, Mar. 9, 1991, at A5.


\(^{175}\) Id. at 496 n.20.

\(^{176}\) 429 U.S. 125 (1976).

\(^{177}\) See id. at 136.

\(^{178}\) See Tribe, supra note 59, at 1578 (describing the analysis in *Geduldig* as "so superficial as to approach farcical"); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955, 983-84 nn.107-09 (1984) (citing numerous articles critical of *Geduldig*).
tinction. The Court's strained reasoning was immediately rejected by Congress which overturned *Gilbert* by amending Title VII to make clear that, for purposes of employment, discrimination on the basis of pregnancy is to be treated as discrimination on the basis of sex. Regardless of the merits of those decisions, there is good reason to believe that the Court may not extend its *Geduldig* reasoning to cover the adversarial policies discussed in this Article.

When the Court decided *Geduldig* in 1974, its constitutional jurisprudence concerning sex discrimination was relatively undeveloped and unsophisticated. Only one year before, the Court had, for the first time, ruled that women are a protected class under the Equal Protection clause. The Court's discussion in *Geduldig* of distinctions based on pregnancy was brief, confined to a single footnote. Even if *Geduldig* remains good law, the Court's distinction between "pregnant women" and "nonpregnant persons" is not applicable or appropriate in the context of adversarial policies that impose special restrictions on women related to both current and future childbearing. These adversarial policies threaten the liberty not only of pregnant women, but of all women. *Johnson Controls* illustrates the point. There, a private employer excluded not just pregnant women, but all potentially fertile women from working in high paying jobs that entailed exposure to lead.

Moreover, the Court is likely only to apply *Geduldig* in the context of governmental action extending benefits and not to the type of affirmative penalties, burdens, and obstacles created by adversarial policies. When evaluating constitutional challenges to policies infringing on women's reproductive freedom, the Court has distinguished between laws it views as placing obstacles and burdens on the exercise of fundamental rights (which are subjected to strict scrutiny), and those that merely fail to extend benefits (which are reviewed under the deferential rational basis standard). Indeed, despite the strong criticism leveled at this distinction, the Court has relied on it as recently as May 1991 to uphold regulations that were challenged as interfering with the right to privacy and the right to freedom of expression.

The Court's refusal to find unconstitutional sex discrimination in *Geduldig* can be seen as reflecting this benefit-burden distinction. Indeed, in *Geduldig*, the Court stated that the benefit at issue (health care related to pregnancy and childcare) involved "a risk that was outside the

program's protection" and that women in the disability benefit program already in practice received a higher rate of benefit than men. The Court explicitly relied on this benefit-burden distinction in the Title VII context and limited the reach of Gilbert with its decision in Nashville Gas Co. v. Satty. The Court in Satty distinguished between a disability policy's failure "to extend to women a benefit that men cannot and do not receive" and the imposition on women of "a substantial burden that men need not suffer." While Title VII "did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in "the scheme of human existence" " an employer could not "burden female employees in such a way as to deprive them of employment opportunities because of their different role." Geduldig thus is unlikely to be applied to adversarial policies that involve not the extension of benefits, but the imposition of affirmative burdens and special penalties on women.

Finally, adversarial policies that impose restrictions on women's behavior only because of their childbearing capacity should be subjected to heightened scrutiny because they constitute a government policy to create a separate regime of onerous legal restrictions and obligations only for women. As many have argued, the core value behind the Equal Protection Clause that necessitates heightened scrutiny of governmental distinctions on the basis of race or sex is a concern that the government not use its power to relegate any identifiable group to an inferior position in society. Historically, the "justification" offered for the laws and policies that have functioned most insidiously in relegating women to an inferior status has been that the limitations placed on women's actions and freedom served women's unique role in childbearing. The Supreme Court noted this in Johnson Controls: "Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities." On this basis, women were re-

182. Geduldig, 417 U.S. at 497 & n.21. The Court similarly based its ruling on the lack of evidence "that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." Id. at 496.
184. Id. at 142. But see Tribe, supra note 59, at 1579 (agreeing with Justice Stevens' assertion that the distinction is "at best problematic").
185. Satty, 434 U.S. at 142.
stricted in the hours they could work in paid employment, excluded from political and civic affairs, and barred from certain professions, such as the practice of the law.

Although the current use of adversarial policies, such as those that exclude fertile women from high-paying jobs because of potential harm to potential fetuses, may be more subtle than the exclusionary policies of a century ago, the core justification is the same: Women's job opportunities and other liberties are restricted because someone other than the woman herself has decided that her childbearing role should be paramount. Indeed, it is difficult to distinguish between the rationale offered by proponents of adversarial policies today and the now-discredited 1908 opinion in which the Supreme Court upheld restrictions on women's ability to work in paid employment as necessary to promote the birth of healthy babies: "as healthy mothers are essential to vigorous offspring, the physical well being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."

History thus counsels that it is precisely when the government targets women for disadvantageous treatment because of their childbearing capacity that courts should be most suspicious and therefore apply heightened scrutiny to the governmental action. Unless required to provide a compelling justification for pregnancy-related restrictions on women, not all legislatures, prosecutors, and judges will adequately value the range of women's interests and needs, and most important, their right to make those value judgments themselves.

B. Racial Equality

The manner in which the government has pursued adversarial policies also raises serious concerns regarding racial justice, from both a policy and a constitutional perspective. The data that exist as to the race of the women against whom the government has taken adversarial action reveal that the vast majority have been African American women and other women of color. Although, as mentioned above, this Article does not seek to provide a thorough equal protection analysis of adversarial policies, the compelling evidence outlined below that such policies have been administered in a racially discriminatory manner hopefully will

serve as an invitation to others to develop fully the constitutional and public policy analysis this critical issue deserves.192

In 1987, the New England Journal of Medicine published the results of a national survey of obstetricians concerning the scope and circumstances of court-ordered obstetrical interventions during the preceding five years.193 The study uncovered twenty-one instances in which court orders were sought for cesarean sections, hospital detentions, or intrauterine transfusions. Among the information requested was the race of the woman against whom the court order was sought. Seventeen of the twenty-one women involved, or 81%, were women of color. Court orders for cesarean sections were sought in fifteen instances; thirteen were obtained. Eighty percent (twelve) of the women were African American or Asian, and only 20% (three) were white. Two of the three cases in which hospital detentions were sought involved African American women. Of the three women against whom court orders for intrauterine transfusions were sought, two were African American and one was Hispanic.194

Equally skewed on racial lines are the findings in studies of women who have been the targets of special criminal prosecutions carrying harsher penalties because they used illegal drugs during pregnancy. An article published in 1990, also in the New England Journal of Medicine, reports the results of a six month study of women seeking prenatal care at five public health clinics and twelve private obstetrical offices in Pinellas County, Florida.195 Florida is one of several states that require the reporting by health officials of the birth of infants to women suspected of using drugs or alcohol during pregnancy. The study found that 14.8% of women tested positive for drugs or alcohol and 13.3% of women tested positive for illicit drugs.196

The rate of positive toxicologies for drug and alcohol use among white women was slightly higher, 15.4%, than it was for African American women, 14.1%, with African American women more likely to test positive for cocaine and white women more likely to test positive for ma-

193. Kolder et al., supra note 9.
194. Id. at 1192-93.
196. Id. at 1204.
rijuana. Despite the slightly higher rate for white women and the legal requirement that suspected drug and alcohol use be reported, the study found that the rate at which African American women were reported to the health authorities was approximately ten times the rate for white women. The proportion of white women reported was 1.1%, while the proportion of African American women reported was 10.7%.197

A 1990 national survey by the American Civil Liberties Union of women who have been criminally prosecuted for behavior during pregnancy found similar results.198 The survey documented fifty criminal prosecutions, all but two of which occurred in the preceding two years and the vast majority of which involved the use of illicit drugs during pregnancy. Of the forty-seven cases in which the race of the women could be identified, 80% of the prosecutions had been brought against women of color.199

VI. Conclusion

One of the most harmful consequences of the use of adversarial policies is that it creates a false impression that an inherent conflict exists between promoting healthy births and protecting women’s fundamental liberties. This may mislead policymakers and courts into believing that they must make tradeoffs between the important governmental objectives of protecting women’s rights and improving maternal and infant health. Yet this apparent conflict in fact is no conflict at all. Although governmental use of adversarial policies may create the impression that action is being taken to deter behavior by women that causes unhealthy births, in reality such policies have the effect not only of infringing on women’s liberty but also of deterring the types of behavior necessary for healthy and safe pregnancies.

Policymakers who truly wish to foster healthy childbearing must understand that government, women, and their future children all have shared interests in taking the steps necessary to promote healthy births. They also must recognize that imposing special penalties that restrict the capacity of women to control their lives will not further these shared interests. Rather, the government must take positive steps to remove obstacles that prevent women from receiving the health services, treatment, and prenatal care they need. This is the core concept behind the facilitative model. Only by embracing it can earnest policymakers work effec-

197. Id. at 1204-05.
198. See ACLU Memorandum, supra note 4, at 1-2.
199. Id. at 2.
tively to ensure that every child has the best possible chance of being born healthy.