Order in the Court: Challenging Judges Who Incarcerate Pregnant, Substance-Dependent Defendants to Protect Fetal Health

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Introduction

Many commentators have analyzed prosecutors' use of child abuse, drug trafficking, and other statutes to criminalize drug use during pregnancy.[1] Likewise, studies have noted a growing trend among legislators to pass laws explicitly criminalizing drug use during pregnancy.[2] These authors have addressed complex constitutional and policy issues regarding such state action. None of the commentators, however, has significantly addressed another form of state action: the growing trend among judges to use the sentencing phase of criminal trials to incarcerate pregnant substance-dependent women, in an attempt to protect fetal health, absent statutes explicitly creating a "fetal abuse" crime.

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* Member, Third Year Class; B.A., Yale University, 1987. I dedicate this Note to Ellen Barry, Margaret Crosby, and Minnie Thomas; their inspiring accomplishments have helped women and their families stay healthy and together. I would also like to thank my family for their unwavering support.

1. The term "drug use" as used in this Note refers to both illegal substances, such as cocaine, marijuana, and heroin, and legal substances, such as alcohol, tobacco, and prescription drugs. Both categories of drugs can harm fetal health and both have been cited by judges incarcerating pregnant women. *See infra* notes 4-12 (regarding jailing pregnant women for illegal drug use) and notes 14-15 (regarding jailing pregnant women for alcohol use) and accompanying text. Since women "who use cocaine while pregnant are also more likely to smoke cigarettes and marijuana, consume alcohol, and have poor nutrition, it is difficult to ascertain how much of the effect is due to cocaine and how much to the other factors, which are also associated with low birth weight, prematurity, and small head circumference." Barry Zuckerman, *Drug-Exposed Infants: Understanding the Medical Risk*, 1 THE FUTURE OF CHILDREN 26, 27 (1991).

2. For discussions of prosecutorial and statutory attempts to criminalize both legal and illegal behavior during pregnancy, see Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster*, 138 U. PA. L. REV. 179 (1989); Molly McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277 (1989); Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990); Memorandum from the ACLU Women's Rights Project (September 16, 1991) (on file with the *Hastings Constitutional Law Quarterly*).

This Note focuses on the emerging trend of sentencing women to jail or prison because they use drugs while pregnant, without any statute defining such behavior as criminal. The Note addresses the question: Does a judge abuse sentencing discretion and violate constitutional rights by incarcerating a woman, who would normally face mere fines or probation for the charge against her, when that judge bases the incarceration decision on his or her belief that the woman's fetus will be protected from potentially harmful drug exposure while the woman is in prison?

Part I of the Note outlines the scope of the problem, focusing on the Washington, D.C., *United States v. Vaughn*[3] case. Part II explores the public policy questions that arise when a judge attempts to protect a fetus by incarcerating the woman carrying it. Part IIIA examines the availability of appellate review of sentences. Part IIIB first presents constitutional arguments which justify review of the sentencing of pregnant drug users, and then specifically analyzes due process, privacy, equal protection, and cruel and unusual punishment challenges to incarceration of pregnant, drug-dependent women. Part IV reviews different states' alternative approaches to sentencing the drug-addicted offender. This Note concludes that there are effective means to combat the tragic problem of in utero drug exposure without sacrificing the constitutional rights of women.

I. Discriminatory Sentencing of Pregnant Substance-Dependent Women

The *U.S. v. Vaughn* case[4] was a widely publicized example of a judge using the sentencing phase of a criminal trial to criminalize a defendant's substance dependence during pregnancy. Vaughn was arrested in 1988 in Washington, D.C., for forging $721.98 in checks belonging to her employer. Vaughn, a first-time offender, pled guilty to second degree theft, an offense punishable by up to $1000 fine and/or one year in jail. Before sentencing, Judge Wolf determined that Vaughn tested positive for cocaine. Although she denied drug use, Vaughn informed the court that she was six months pregnant. Judge Wolf sentenced Vaughn to six months in prison, stating that he was doing so "to be sure she would not be released until her pregnancy was concluded . . . because of . . . concern for the unborn child . . . ."[5]

In sentencing Vaughn for the duration of her pregnancy, Judge Wolf stated that protection of the public was an acknowledged purpose of criminal law enforcement. He stated his belief that the " 'public' included an unborn child and the taxpaying public who would undoubt-

3. DAILY WASH. LAW. REP., March 7, 1989, at 441 (D.C. Super. Ct. Aug. 23, 1988).

4. *Id.*

5. *Id.*

edly have to pay for . . . a child who could have severe and expensive problems at birth . . . ."[6] In addition, Judge Wolf stated that many of his colleagues on the bench reported similarly sentencing pregnant drug abusers, sometimes stating their reasons on the record.[7] He then admitted that Vaughn had been treated differently than if she were a man in this case, but argued that "a convicted rapist is treated differently from a woman."[8] Although "most judges of this court would probably impose a sentence of probation for most defendants with a first-time misdemeanor conviction," Judge Wolf argued that this was "not an invariable rule."[9] He noted that his authority to sentence her as he did came from the illegal nature of the drug which caused Vaughn to commit "her crimes," and from his authority to consider "*all* relevant factors . . . in imposing sentence."[10] Judge Wolf concluded that there was no other answer besides jail because Vaughn herself had denied her drug problem to the court.[11]

There is evidence that judges in other jurisdictions also use the sentencing phase of a trial to punish drug use during pregnancy. In Oakland, California, Superior Court Judge Stanley Golde reports: "If a woman is on a narcotics charge and is using narcotics, I send her to jail and, if the child is born, then I release them."[12] This occurs despite the fact that, like Washington, D.C., California has no statute criminalizing prenatal drug use. Despite much criticism of his practice, Judge Golde defends jail sentences, as opposed to drug treatment, for pregnant women because he believes space in drug treatment facilities "is limited at best, and they're basically total failures" because there is still access to drugs.[13]

Tribal judges reportedly use preventive incarceration to keep pregnant Native American women who live on reservations from drinking alcohol.[14] As one Native American health care administrator commented: "If a pregnant woman is brought in for a misdemeanor, she'll get the maximum amount of jail time. . . . You're supposed to be sen-

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6. *Id.*

7. *Id.*

8. *Id.* at 447.

9. *Id.*

10. *Id.*

11. *Id.*

12. Boni Brewer, *Incarceration of Pregnant Women Doubles at Jail*, VALLEY TIMES, June 17, 1990, at A1.

13. Judge Golde's belief that jail is drug-free is refuted by evidence suggesting that drugs are often easily accessible from a jail cell. *See* Catherine Foster, *Fetal Endangerment Cases Increase*, CHRISTIAN SCI. MONITOR, Oct. 10, 1989, at 8 (quoting Walter Connolly, Jr., attorney for the National Association for Perinatal Addiction Research and Education, who contended that "jail [is] no place to get away from drugs"); *see also* Andrew H. Malcolm, *Explosive Drug Use Creating New Underworld in Prisons*, N.Y. TIMES, Dec. 30, 1989, at 1.

14. Michele Magar, *The Sins of the Mothers*, STUDENT LAW., Sept. 1991, at 30, 33.

tenced for being drunk and disorderly, not for being drunk, disorderly, and pregnant."[15]

A nationwide study supports the theory that judges sometimes base sentences on their own perceptions of gender roles; for many crimes, women receive more lenient sentences than men, but for certain crimes, such as child abandonment, women receive harsher sentences than their male counterparts.[16] This difference implies an attitude that women are worthy of special protection until they violate their expected maternal role, at which time judges may be particularly punitive.[17]

Race also factors into the sentencing equation in the area of prosecuting and sentencing for drug use during pregnancy. The vast majority of women prosecuted or sentenced for behavior while pregnant are women of color.[18] A recent study of mandatory reports to law enforcement officials by Pinellas County, Florida, health providers regarding prenatal drug use showed that, despite similar rates of drug use among black and white women, health providers reported black women to authorities at ten times the rate of white women.[19] Similarly, experience shows that law enforcement officials tend to police publicly-funded hospitals and clinics, which serve a higher proportion of women of color than private hospitals.[20] Therefore, it seems reasonable to suspect that these same biases may lead judges to inquire more actively into the suspected drug use of pregnant women of color than that of pregnant white women who come before the court.[21]

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15. *Id.*

16. Matthew Zingraff & Randall Thomson, *Differential Sentencing of Women and Men in the U.S.A.*, 12 INT'L J. SOC. L. 401, 410 (1984).

17. There are no reported cases, to date, in which courts ordered men not to impregnate drug-using women, or to refrain from reproducing if their own sperm is defective due to drug use or other exposures. For the impact of male behavior on fetuses, see *infra* note 140 and accompanying text.

18. Eighty percent of pregnancy-behavior based prosecutions affect women of color, according to Kary Moss of the ACLU Women's Rights Project. Magar, *supra* note 14, at 33. This percentage also applies to sentencing practices; Brenda Vaughn, women on reservations, and most of the women at Santa Rita jail are women of color; *see* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1421-22 (1991) (Noting that the majority of women criminally punished for drug use during pregnancy are poor, black, and addicted to crack cocaine. Roberts argues that poor women of color are the most vulnerable to government monitoring and punishment because they are the least able to conform to white, middle-class standards of motherhood.).

19. Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 332 NEW ENG. J. MED. 1202 (1990).

20. *See* Lynn M. Paltrow, *When Becoming Pregnant is a Crime*, 9 CRIM. JUST. ETHICS 1, 41 (1990) (describing South Carolina's prosecution program where police have arrested women attending public hospitals for their deliveries).

21. *See infra* notes 141-44 and accompanying text (discussing a racial equal protection analysis in the context of disparate sentences for substance-dependent women of color).

II. Policy Implications of Incarcerating Pregnant Women

Brenda Vaughn was fortunate because she had access to regular prenatal medical visits during her incarceration.[22] But many women, whose cases are not publicized, suffer from a dangerous lack of prenatal care during incarceration.[23] This can be particularly disastrous for pregnant addicts, who require special, individualized treatment by experienced counselors.[24]

In addition to neglecting pregnant women's prenatal and drug treatment needs, prison officials have been known to deny pregnant prisoners necessary dietary supplements and rest.[25] There is also startling evidence that some prison staff members, apparently resentful of the "special treatment" that pregnant women need, assign the women work that requires a great deal of exertion and heavy lifting, even when the women have a history of miscarriage.[26] Such occurrences implicate Eighth Amendment protections against cruel and unusual punishment.[27]

In many cases, judges falsely believe that jails and prisons provide better health care for the woman and the fetus than the care an addicted woman would obtain on her own. Judge Wolf[28] may have assumed that Vaughn would get adequate care during her imprisonment, but he did not take the opportunity to monitor or order such care, which would have been a difficult task and perhaps an unconstitutional separation of powers violation.[29] Because of this lack of knowledge and follow-through by judges, a woman has no guarantee that she will receive adequate care, and she is not free to seek it on her own.

Significant evidence suggests that the primary reason women do not receive the care they need is not a lack of incentive on their part; rather,

22. Telephone Interview with Jeffrey Lewis, Attorney for Brenda Vaughn (Oct. 17, 1990).

23. *County Jail Miscarriage Rate 50 Times State Average*, YOUTH L. NEWS, Nov.-Dec. 1985, at 4 (In one California county jail, the miscarriage rate after the 20th week of pregnancy was 73%. Only one in five pregnant inmates delivered a live baby.); *see also* Brewer, *supra* note 12, at A2 (quoting Attorney Ellen Barry reporting that inadequate health care for pregnant women at Santa Rita Jail in recent years has resulted in miscarriages and a lawsuit which effected gradual improvements); Magar, *supra* note 14, at 34 (noting the lack of prenatal care, diet, and other services for jailed Native American women).

24. Many imprisoned women who are pregnant and addicted to heroin are forced to withdraw "cold turkey" (rather than gradually or with a methadone substitute), which can be extremely dangerous to the fetus, sometimes resulting in miscarriage; *see* Gerald A. McHugh, *Protection of the Rights of Pregnant Women in Prisons and Detention Facilities*, 6 NEW ENG. J. PRISON L. 231, 241-43 (1980).

25. Susan Stefan, *Whose Egg Is It Anyway?: Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L. REV. 405, 442 (1989).

26. *Id.*

27. *See infra* notes 145-66 and accompanying text.

28. *See supra* notes 3-11 and accompanying text (regarding the *Vaughn* case).

29. *See* Smith v. Goguen, 415 U.S. 566, 575 (1974) (forbidding the delegation of legislative, judicial, and enforcement powers to a single decision-maker).

there is a severe shortage of drug treatment programs which will accept pregnant women and provide prenatal and drug treatment services which address their unique needs, such as child-care for young children and a safe, supportive environment not often found in programs designed for men.[30]

The few specialized drug treatment programs available to pregnant women are more effective, more humane, and less expensive than incarceration.[31] The Central California Women's Facility in Chowchilla costs, on average, $19,000 annually ($52 daily) per female prisoner.[32] This figure does not reflect studies showing that most prisoners in the nation are recidivists who will incur costs for subsequent incarcerations, and many are profit-seeking drug users[33] who could probably be dealt with more humanely and economically by the substitution of effective drug treatment in place of (or in addition to) criminal penalties. This is especially true for pregnant addicts, many of whom enter the penal system because they commit petty offenses rather than violent crimes.[34]

At least one state has implemented a program to keep prisoners' families together. The Mother-Infant Care Program, a California alternative to prison for low-risk female prisoners, houses women and their young children at halfway houses which cost approximately $51 (for the Oakland facility) to $81 (for the San Francisco facility) daily.[35] The value of letting young children stay with their mothers seems immeasurable.

A punitive approach to pregnant prisoners is irrational when compared to the high success rates claimed by drug treatment centers which are efficiently designed to respond to the women's individualized needs. Minnie Thomas, Director of Mandela House residential drug treatment

30. *See* Karol L. Kumpfer, *Treatment Programs for Drug-Abusing Women*, 1 THE FUTURE OF CHILDREN 50, 53-55 (1991) (describing extensive research showing the lack of drug treatment for pregnant women nationwide and the barriers, such as lack of child care, to entering existing programs); *see also* Anastasia Toufexis, *Innocent Victims*, TIME, May 13, 1991, at 56, 59 (citing the lack of appropriate treatment programs as one of the reasons why only 11% of pregnant drug addicts receive treatment).

31. *See supra* notes 23-26 and accompanying text (describing unhealthy incarceration conditions).

32. Telephone Interview with Teena Farmon, Warden, Central California Women's Facility (Sept. 3, 1991). This figure includes health care services needed by pregnant women, but not the cost of foster care for children whose mothers are in prison. Farmon reports that most babies born to prisoners are cared for by relatives, while others go to church groups or foster care.

33. A research publication of the National District Attorneys Association reports that approximately seventy percent of males arrested for profit motivated crimes in 1989 tested positive for drugs. THE MAINLINE, Feb.-Mar. 1991, at 1.

34. Stefan, *supra* note 25, at 451.

35. Telephone Interview with Sue Olmsted, Executive Director, Volunteers of America (Sept. 3, 1991) (Volunteers of America administers the Alameda and San Francisco County Mother Infant Care programs).

center for pregnant women in Oakland, California, claims that her program helps 80% of the residents have drug-free pregnancies and teaches parenting (older children typically stay with relatives during the woman's treatment) and job skills.[36] The typical residential treatment period per client, usually six months, costs $10,916.66 ($30 daily), not including AFDC and other independent benefits clients may receive.[37] The San Francisco County Sheriff's Department estimates daily costs per prisoner (male or female) at $59 per day.[38] Department medical personnel report that services such as methadone treatment and parenting classes are available to jailed pregnant women.[39] Many health care costs are absorbed by county hospitals (inmates are ineligible for state Medi-Cal payments) and are therefore difficult to quantify.[40]

Evidence shows that once women learn that drug use during pregnancy is treated as a crime rather than a disease, many of them are driven away from much-needed health care.[41] For example, a highly publicized California prosecution of a pregnant drug-using woman resulted in an increase of women in that area who received late or no prenatal care.[42] Those women who did come in for care expressed fears to health care workers that they would be turned over to the authorities.[43] Similar patterns have appeared throughout the country wherever drug use during pregnancy is criminally punished rather than treated as a curable disease.[44] Because of this, the American College of Obstetricians and Gynecologists, representing 30,000 obstetricians and gynecologists throughout the United States, opposes legal actions against women who

36. Telephone Interview with Minnie Thomas, Director, Mandela House (Sept. 20, 1990).

37. *Id.*

38. Telephone Interview with Richard Dyer, Public Information Director, San Francisco County Sheriff's Dept. (Aug. 30, 1991).

39. Telephone Interview with Dr. Elizabeth Kantor, Medical Director, San Francisco County Jails (Sept. 5, 1991).

40. *Id.*

41. *See* Lynn M. Paltrow, *Perspective of a Reproductive Rights Attorney*, 1 THE FUTURE OF CHILDREN 85, 87 (1991) (outlining evidence showing that the threats of prosecution and loss of child custody deter women from seeking drug treatment and prenatal care). *Contra* Sonya Steven & Ann S. Ahlstrom, *Perspective from a Minnesota County Attorney's Office*, 1 THE FUTURE OF CHILDREN 93, 98 (1991) (questioning Paltrow's claim).

42. Declaration of Lydia Roper, State v. Stewart, (San Diego Mun. Ct. 1987) (No. M508197).

43. Declaration of Cathy Hauer, State v. Stewart, (San Diego Mun. Ct. 1987) (No. M508197); *see also* Mary Ann Curry, *Nonfinancial Barriers to Prenatal Care*, 15 WOMEN & HEALTH 85, 93 (1989) (identifying physician failure to maintain patient confidentiality as one of the barriers to pregnant women seeking prenatal care).

44. *Drug Treatment Issues: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 101st Cong., 2d Sess. 18-21 (1990) (Statement of Lynn M. Paltrow, ACLU Staff Attorney).

are pregnant and engage in behavior possibly detrimental to the fetus.[45]

III. Challenging Abuse of Sentencing Discretion

In the *Vaughn* case,[46] the sentencing judge argued that consideration of the defendant's drug use during pregnancy was within the limits of his discretionary authority. He described the purposes of sentencing as retribution, deterrence, rehabilitation, and "protection of the public from dangerous or aberrant people."[47] He explained that in this case the public included the fetus and the taxpayers who would be forced to pay for the problem of drug-exposed infants.[48] While the goals of incarceration are the same in most jurisdictions' statutory schemes,[49] Wolf used his own "fetal rights" theory, which had not been set forth by the legislature, to incarcerate Vaughn.[50] In so doing, Wolf arguably created a new crime via sentencing, without statutory authority, thus abusing his sentencing discretion and violating Vaughn's constitutional rights.[51]

A. Statutory Provisions for Review of Sentences

"Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives."[52] Yet this important phase of a criminal trial carries few restrictions on judicial discretion.

In reaching the final sentencing decision, a judge typically weighs many factors within the framework of the five objectives of sentencing: first, a retributive theory, to fit the punishment to the crime; second, a general deterrence theory, to deter potential offenders from committing the same offense; third, a specific deterrence theory, to deter the particular offender from further criminal activity; fourth, a preventive theory, to prevent the offender from injuring society again; and finally, a rehabilitative theory, to enable the offender to become a responsible and law-abiding member of society.[53]

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45. A.C.O.G. Committee on Ethics, *Committee Opinion: Patient Choice: Maternal Fetal Conflict*, Number 55 (Oct. 1987) (on file with the ACLU Women's Rights Project, 132 West 43 Street, New York, NY 10036).

46. *See supra* notes 4-11 and accompanying text.

47. United States v. Vaughn, DAILY WASH. L. REP., Mar. 7, 1989, at 447 (D.C. Super. Ct. Aug. 23, 1988).

48. *Id.*

49. *See, e.g.*, CAL. R. C. § 410, § 421 (West 1990) (outlining goals of sentencing and allowable aggravating factors).

50. *See supra* notes 4-11 and accompanying text.

51. *See infra* section IIIB (discussing constitutional restraints on sentencing).

52. Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958).

53. *See generally* D. A. Thomas, *Theories of Punishment in the Court of Criminal Appeal*, 27 MOD. L. REV. 546 (1964). For a more detailed analysis, see D. A. Thomas, *Sentencing — The Basic Principles (pts. 1&2)*, 1967 CRIM. L. REV. (Eng.) 455, 503.

Understandably, judges' biases enter into their sentencing decisions, but when a judge's personal bias leads to an unjust outcome, appellate review of a sentence may be available. On the federal level, 28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[54]

Some federal appellate courts have found sentencing judges to have abused discretion by highlighting certain factors while refusing to consider others.[55] Moreover, some federal district courts have experimented with sentencing councils which consider proposals by the sentencing judge and offer nonmandatory recommendations.[56]

Although the Constitution does not guarantee appellate review of criminal convictions and sentences,[57] every state allows some form of appeal from a criminal conviction.[58] Only some states, however, permit review of sentences which are challenged on grounds other than denial of a constitutional right.[59]

B. Constitutional Bases for Review of Sentences

Notwithstanding the broad discretion granted to judges, sentencing discretion ends where the Constitution begins. Judicial decisions, including sentencing decisions, are considered government actions;[60] therefore, such decisions must not violate the rights protected by the United States

54. 28 U.S.C. § 2106 (1991).

55. *See, e.g.*, United States v. Thompson, 483 F.2d 527 (3d Cir. 1973) (allegation of personal bias required judge's disqualification, under 28 U.S.C.A. § 144, from presiding over a selective service violation case after the judge announced that he sentenced all selective service violators to 30 months in prison); *see also* United States v. Daniels, 446 F.2d 967 (9th Cir. 1971) (quoting Williams v. New York, 337 U.S. 241, 248 (1949)) ("A trial court which fashions an inflexible practice in sentencing contradicts the judicially approved policy in favor of 'individualizing sentences.' ").

56. *See* Brian D. Cochran & Eileen C. Cochran, Comment, *Appellate Review of Sentences: A Survey*, 17 St. Louis U. L.J. 221, at 249 (1972).

57. Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.").

58. *Id.*

59. For a thorough but slightly outdated review of each state's position on appellate review, *see* Cochran & Cochran, *supra* note 56, at 249-62.

60. Shelley v. Kraemer, 334 U.S. 1, 14 (1948) ("That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."). The incorporation doctrine makes the Bill of Rights applicable to actions by the states, through the Fourteenth Amendment. John E. Nowak & Ronald D. Rotunda, Constitutional Law, § 10.3, at 332 (4th ed. 1991).

Constitution.[61]

1. Due Process

Under the Fifth and Fourteenth Amendments, neither the state nor the federal government can deprive any person of life, liberty or property without due process of law.[62] The Fifth Amendment Due Process Clause guarantees a fair procedure to determine the basis for, and legality of, such action.[63]

The Supreme Court has interpreted due process in the sentencing context to mean that a sentencing judge must exercise "informed discretion."[64] A judge may not act on "assumptions" that are "materially untrue."[65] Procedural due process clearly prohibits judge-made crimes[66] and vague laws.[67] The Supreme Court has also ruled that penal statutes should be strictly construed.[68] These restrictions on judicial activity mean that, under a due process analysis, a woman who comes before the court on a specific charge has the right to receive a sentence for that particular codified crime; not for being pregnant and engaging in behavior which may harm her fetus. A statute must fairly notify the public that certain conduct is proscribed; such notice meets due process requirements and enhances the deterrent effect of sanctions.[69] A statute is void for vagueness if the conduct it forbids is defined so vaguely that persons

61. *See e.g.*, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (Vacating, on equal protection grounds, a judge's racially-motivated decision to remove child custody from a white mother who had married a black man subsequent to her divorce from the child's father; "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

62. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

63. *See* NOWAK & ROTUNDA, *supra* note 60, at 487.

64. United States v. Tucker, 404 U.S. 443, 447 (1972) (vacating a sentence based on unconstitutional prior convictions).

65. Townsend v. Burke, 334 U.S. 736, 741 (1948) (Vacating a sentence based on misinformation in a defendant's criminal record; "Such a result, whether caused by carelessness or design, is inconsistent with due process of the law, and such a conviction cannot stand.").

66. Viereck v. United States, 318 U.S. 236, 243 (1942) ("The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."). Many states have codified a prohibition against judicial creation of offenses. *See, e.g.*, DEL. CODE ANN. tit. 11, § 202 (a) (1979); HAW. REV. STAT. § 701-102(1) (1985); N.J. STAT. ANN. § 2C:1-5(a) (West 1982).

67. United States v. Harriss, 347 U.S. 612, 617 (1954) (holding that due process requires fair notice that criminal law forbids contemplated conduct); Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972) (holding that a criminal statute which is so indefinite that "it encourages arbitrary and erratic arrests and convictions" is void for vagueness).

68. Busic v. United States, 446 U.S. 398, 406-07 (1980).

69. *See* Palmer v. City of Euclid, 402 U.S. 544, 546 (1971) (per curiam) (Quoting United States v. Harriss, 347 U.S. 612, 617 (1954), which stated that the "underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.").

"of common intelligence must necessarily guess at its meaning and differ as to its application . . . ."[70] If a vague statute is void, then surely punishment under no statute at all is even more violative of the fair notice that due process requires.

A judge may try to avoid a due process challenge by claiming, as did the judge in the *Vaughn* case,[71] that the sentence punishes a drug-related offense, which allows him or her to consider the circumstances surrounding drug use.[72] A sentencing judge can generally consider all of the aggravating and mitigating circumstances of a crime,[73] but if fetal danger due to a high-risk pregnancy (rather than drug use itself, or drug-related theft) is the basis for the incarceration, then pregnancy is much more than an aggravating factor. When a judge admittedly grants probation to similarly charged non-pregnant defendants,[74] pregnancy becomes the entire reason for incarceration. Without the benefit of extensive legislative hearings, including medical testimony, the judge has created a new crime which she or he has determined merits a jail term. Due process requires that this new crime be enacted by a legislature and codified, and that the prosecution prove the defendant's guilt beyond a reasonable doubt, with all of the procedural safeguards traditionally granted to criminal defendants.[75] A judge who incarcerates pregnant women because she or he believes their behavior may harm fetal health has not

70. Connally v. General Construction Co., 269 U.S. 385, 391 (1926). The prohibition against vagueness is particularly strong when the "uncertainty induced by the statute [or lack thereof] threatens to inhibit the exercise of constitutionally protected rights." Colautti v. Franklin, 439 U.S. 379, 391 (1979) (invalidating vague statutory provisions which criminalize certain abortion procedures).

71. *See supra* notes 4-11 and accompanying text.

72. A judge would act inconsistently if she or he applied a fetal harm theory only to the use of illegal drugs, because many types of legal behavior can harm fetal health, including alcohol and tobacco use, the use of medications to treat epilepsy or cancer, failure to follow a healthy diet, and exposure to toxic substances in the environment. These exposures often combine to produce an unhealthy fetal environment, making the cause of harm difficult to determine. *See* Diana Kronstadt, *Complex Developmental Issues of Prenatal Drug Exposure*, 1 THE FUTURE OF CHILDREN 38 (1991) (factors affecting fetal health are difficult to separate); *Drug Treatment Issues*, *supra* note 44, at 31-32 (some legal medications and practices help a woman but may harm her fetus).

73. Aggravating factors are circumstances surrounding a crime which add to the defendant's guilt and increase the defendant's length of incarceration. BLACK'S LAW DICTIONARY 60 (5th ed. 1979). In contrast, mitigating factors are extenuating circumstances which lessen the defendant's guilt and reduce the defendant's length of punishment. *Id.* at 903-04. *See also* Williams v. Oklahoma, 358 U.S. 576, 585-86 (1959) (holding that sentencing judge properly considered factors surrounding a kidnapping in determining the appropriate sentence).

74. *See supra* notes 4-13 and accompanying text. Judges Wolf and Golde admittedly base their sentences on a defendant's pregnancy status.

75. *See In re* Winship, 397 U.S. 358, 362 (1970) (holding due process requires at least a "beyond a resonable doubt" standard for criminal convictions); *see generally* NOWACK & ROTUNDA, *supra* note 60, at 497-98.

proved any codified crime "beyond a reasonable doubt," and therefore violates due process.

Even if the Supreme Court holds that incarceration based on drug use during pregnancy falls within a judge's sentencing discretion, a judge would still have to refrain from relying on untested assumptions in making his or her decision. The Court has used a due process rationale to invalidate the use of irrebuttable presumptions about people who seek legal protection of important rights. For example, in *Cleveland Board of Education v. LaFleur*, the Court struck down mandatory maternity leave regulations because they were based on the irrebuttable presumption that pregnant women could not teach effectively: "while the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause . . . because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child."[76] The Court's decision required the school to seek an individualized determination by a doctor regarding each pregnant teacher's continuing fitness to teach.[77]

The same argument should apply to pregnant drug dependent women: it is impermissible to presume that they need to be incarcerated in order to save their fetuses without at least a full inquiry into each woman's circumstances and the health benefits or detriments of the particular incarceration environment she faces. As in *Cleveland*,[78] the judge must show some rational basis to justify the presumption that incarceration is beneficial to a particular woman's health and pregnancy. In most, if not all, incarceration situations, the converse is true.[79] The judge would also have to support the presumption that the woman's drug use, and not one of many other possible factors, posed harm to the fetus.[80]

Due process protections also apply when judges remove custody of newborn or older children from an incarcerated woman solely because the woman presently suffers from drug addiction.[81] Since the right to raise one's own children is fundamental, due process requires a full, individualized inquiry into a person's parenting ability before termination of parental custody.[82] Federal law requires child welfare agencies to provide services designed to keep families together before terminating paren-

76. 414 U.S. 632, 648 (1974).

77. *Id.* at 644.

78. *Id.* at 643.

79. *See supra* notes 23-27 and accompanying text.

80. *See supra* note 1 (regarding the difficulty of distinguishing between the many causes of fetal harm, including a lack of prenatal care) and *infra* note 140 (regarding adverse effects of paternal behavior); *see also* Gideon Koren et. al., *Bias Against the Null Hypothesis: The Reproductive Hazards of Cocaine*, 2 LANCET 1440 (1989) (reporting on the difficulty of publishing studies which show negligible effects of cocaine use on pregnancy outcomes, as compared to studies which show a strong adverse affects, which are more likely to be published).

81. *See In re* Troy D., 263 Cal. Rptr. 869 (Ct. App. 1989).

82. *See* Stanley v. Illinois, 405 U.S. 645, 652 (1972).

tal custody.[83] This is the kind of narrow intervention, based on a particularized inquiry into family needs, which due process would allow. Judge Wolf permitted Brenda Vaughn to keep her child,[84] but many incarcerated women find custody severed on the basis of drug use during pregnancy.[85] Moreover, some incarcerated women "are encouraged to give up for adoption children that are born in prison" whether or not they will be fit to raise a child after incarceration.[86] In addition to raising due process concerns, this situation unnecessarily contributes to the problems of an overburdened foster care system and the children it tries to serve.[87]

To a lesser degree than incarceration, civil confinement of a person to mandatory medical treatment facilities requires stringent due process protections. The Supreme Court, recognizing "that civil commitment for *any* purpose constitutes a significant depriviation [sic] of liberty and stigmatizes the individual,"[88] has required that commitment criteria be established by "clear and convincing" evidence.[89] In *Vitek v. Jones*,[90] the Court held that when a prison seeks to confine a prisoner to a mental hospital involuntarily, the following civil commitment procedures must be provided: written notice; a hearing; an opportunity to present testimony of witnesses and to confront and cross-examine adversarial witnesses; an independent decisionmaker; a written statement by the factfinder of the evidence and reasons for the decision; free legal counsel for indigent persons; and effective and timely notice of these rights.[91] These safeguards restrict the power of a sentencing judge to arbitrarily confine a pregnant defendant to a hospital or drug treatment facility.

Substantive due process requires an analysis of whether incarceration imposed for behavior during pregnacy burdens the "fundamental"

83. *See* Charlotte B. McCullough, *The Child Welfare Response*, 1 THE FUTURE OF CHILDREN, 61, 62 (1991) (Explaining the effects of Pub. L. No. 96-272, which requires child welfare agencies "to make reasonable efforts to prevent a child's placement in foster care and, if foster care is necessary, to reunite the family.").

84. Telephone Interview with Jeffrey Lewis, Attorney for Brenda Vaughn (Oct. 17, 1990).

85. *See In re* Troy D., 263 Cal. Rptr. 869 (Ct. App. 1989); *see also* Paltrow, *supra* note 41, at 90 (reporting that even inaccurate drug tests have caused authorities to remove custody of children from their mothers).

86. *See* Kathleen Haley, Note, *Mothers Behind Bars: A Look at the Parental Rights of Incarcerated Women*, 4 NEW ENG. J. PRISON L. 141, 152 (1977); *see also* McHugh, *supra* note 24, at 237.

87. *See* McCullough, *supra* note 83, at 63 (describing an overburdened foster care system).

88. Grant H. Morris, *The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment*, 60 TUL. L. REV. 927, 939 (1986) (citing Addington v. Texas, 441 U.S. 418, 425-26 (1979)).

89. Addington v. Texas, 441 U.S. 418, 433 (1979).

90. 445 U.S. 480 (1980).

91. *Id.* at 494-95.

right to choose "whether to bear or beget a child."[92] Under modern substantive due process theory, courts must apply strict scrutiny to governmental deprivations of rights which the Supreme Court has deemed fundamental.[93] A woman's decision "whether to bear or beget a child" is a fundamental right protected, by the Due Process Clause of the Fourteenth Amendment, from government interference which does not meet the strict scrutiny test.[94] Under a strict scrutiny analysis, if a woman decides to carry a pregnancy to term, even though she engages in behavior which may harm the fetus, the government still may not burden that choice absent a compelling interest served by the least burdensome means.[95] While a judge may have a compelling interest in fetal health, particularly after viability,[96] it seems clear that less burdensome ways exist than to incarcerate pregnant women.[97] Voluntary drug treatment and pre-natal care are the most obvious examples.[98]

2. *Fundamental Rights: A Closer Look at the Privacy Decisions*

When a judge incarcerates female defendants for the uncodified crime of drug use during pregnancy, but gives much lighter sentences to similarly charged non-pregnant drug users, that judge burdens the right to carry a pregnancy to term by forcing a woman to choose between abortion and pregnancy in jail or prison.[99] The protection against undue burdens on one's choice whether or not to bear a child stems from a

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92. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

93. *See* NOWACK & ROTUNDA, *supra* note 60, at 393.

94. Roe v. Wade, 410 U.S. 113, 155 (1973).

95. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating a statute providing for compulsory sterilization of persons convicted three times of certain felonies, noting the need for strict scrutiny when fundamental rights such as procreation are at stake).

96. Webster v. Reproductive Health Services, 492 U.S. 490, 519-20 (1989) (plurality opinion) (compelling interest in fetal health begins at viability).

97. Minnesota law requires mandatory civil commitment for pregnant women who refuse treatment services. *See* Steven & Ahlstrom, *supra* note 41, at 95-96. However, many respected medical and social service experts advise against these coercive measures which they believe will deter pregnant women from initially seeking any treatment at all for fear of losing their liberty and their children. *See Recommendations*, 1 THE FUTURE OF CHILDREN, 8, 15 (1991). Moreover, such statutes would have to be very narrowly drafted and enforced to protect against all of the constitutional challenges outlined in this Note.

98. *See supra* note 30 and accompanying text (citing evidence showing the lack of appropriate drug treatment programs for pregnant women). A judge may also order drug treatment programs to admit pregnant women, if applicable statutes require equal access to public accomodations, including private facilities which offer their services to the public. *See Drug Treatment Issues*, *supra* note 44, at 15 (describing a lawsuit brought by the ACLU against four private alcohol and drug treatment programs in New York City which allegedly discriminate against pregnant women, in violation of New York's statute proscribing discrimination by facilities serving the general public).

99. *See generally* Roberts, *supra* note 18, at 1458 (arguing that incarcerating pregnant women for behavior which may harm the fetus punishes them for having babies; this punishment is almost exclusively reserved for women of color).

substantive due process "fundamental rights" theory[100] which is generally called the right to privacy.[101]

The argument that a judge can rightfully sentence a woman to prison for drug use during pregnancy is based on a theory that the fetus has rights apart from, and sometimes more important than, the pregnant woman's rights.[102] For example, Judge Wolf of the *Vaughn* case[103] viewed the fetus as a member of the "public" when he argued that his sentence was within statutory sentencing limits. This is a difficult argument to make while *Roe v. Wade*[104] remains valid law.

In *Roe*, the Court explicitly rejected the argument that the state had a compelling interest, even after viability, in protecting the fetus as a "person" as that term is used in the Fourteenth Amendment.[105] *Roe* held that the state could regulate the abortion right during the second trimester only if necessary to protect the health of the woman, and during the third trimester to protect the viability of the fetus only if the life or health of the woman would not be impaired by such restrictions.[106] Furthermore, in *Doe v. Bolton*[107] the Court explicitly noted that, in deciding whether to perform an abortion, doctors must be allowed to take into account the "emotional, psychological, [and] familial" factors of the woman's situation.[108] *Roe* and *Doe* still have important precedential value, although the recent case of *Webster v. Reproductive Health Services*[109] displays ominous signs about the future of abortion rights.[110]

The holdings in *Roe, Doe, Eisenstadt* and *Skinner* support a woman's right to procreate without a judge punishing her for that choice on

100. Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right to decide whether or not to terminate a pregnancy is primarily based on the Fourteenth Amendment).

101. *Id.* (explaining that the right to privacy protects the abortion decision from undue governmental burdens); *see also* Skinner v. Oklahoma 316 U.S. 535 (1942) (holding that the involuntary sterilization of criminals violates the Equal Protection Clause of the Fourteenth Amendment).

102. *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 447 n.129 (1983) (arguing that pregnant women should have a legal "duty to avoid . . . harmful activities in case she decides not to abort"); *see also* Barbara Shelley, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 DICK. L. REV. 691 (1988) (advocating criminal liability for maternal behavior which injures the fetus).

103. *See supra* notes 4-11 and accompanying text.

104. 410 U.S. 113 (1973).

105. *Id.* at 157.

106. *Id.* at 164-65.

107. 410 U.S. 179 (1973).

108. *Id.* at 192.

109. 492 U.S. 490 (1989).

110. *Id.* The Court in Webster allowed states to limit the use of public facilities for abortions. Chief Justice Rehnquist's concurring opinion supported the requirement of expensive tests on women seeking abortions in order to protect possibly viable fetuses. *Id.* at 519-20 (Rehnquist, C.J., concurring).

the basis of potential harm to the fetus. Judicial punishment of certain behavior during pregnancy, unsupported by conclusive facts or statutory authority, would not stand up to the strict scrutiny analysis applied to fundamental rights violations.[111] Judicial attempts at prescribing medical treatment via sentencing severely burden women's reproductive choices because incarcerated women are in the unique situation of having all their reproductive functions controlled by the state. They are not generally free to leave prison to seek their own nutrition, medical treatment and other services. When prison personnel fail to meet prisoners' medical needs, resulting deprivations of basic health services are unconstitutional because women retain their fundamental rights as long as those rights are not inconsistent with prison security.[112]

Judges who jail women for drug use during pregnancy essentially view a woman as a vessel for the fetus. By depriving pregnant women of freedom, economic opportunities or other "emotional, psychological, [and] familial" factors[113] because of fetal rights, judges replace women's autonomy rights with their own concern for the fetus. *Roe* held that this type of substitution is prohibited during the first and second trimesters of pregnancy, and limited in the third trimester to situations evidencing a compelling state interest (for example, if the fetus can be carried to term without harm to the woman's health).[114] A plurality in the *Webster* case found a compelling state interest at viability.[115] At most, therefore, there may be a legal argument for restricting a woman's post-viability activity if it damages fetal health, but even such an argument might fail upon consideration of the woman's "emotional, psychological, [and] familial" factors, since incarceration severely implicates all three.[116] Furthermore, such intervention is unlikely to improve fetal health because most drug-exposure damage is done in the first trimester[117] (often before a woman is aware of her pregnancy[118]), and because incarceration is often bad for the fetus as well as the woman.[119]

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

112. *See infra* note 164 and accompanying text.

113. Doe v. Bolton, 410 U.S. 179, 192 (1973).

114. Roe v. Wade, 410 U.S. 113, 164-65 (1973). Although fetal rights advocates may argue that once a woman decides to carry a fetus to term, *Roe* should not apply because she *chooses to lend her body* to protect the fetus from all possible harm (including abortion), the constitutional support for this argument is highly speculative. *See* Robertson, *supra* note 102 and accompanying text (arguing for a legal duty of care); *see also* Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987) (arguing against a legal duty of care).

115. *Webster*, 492 U.S. at 519-20 (plurality opinion).

116. *Bolton*, 410 U.S. at 192; *see supra* notes 23-26 and accompanying text.

117. McNulty, *supra* note 2, at 318-19.

118. *See Combinations of Drugs Taken by Pregnant Women Add to Problems in Determining Fetal Damage*, 261 JAMA 1694 (1989) (noting that pregnancy may not be diagnosed for several months, by which time damage to the fetus may have actually occurred).

119. *See supra* notes 23-26 and accompanying text.

Incarceration for the sake of the fetus is analogous to forcing medical treatment on a pregnant woman for the sake of the fetus. The Supreme Court has recognized the right of competent persons to be free from unwanted medical treatment.[120] The Court has not specifically addressed the issue of forced medical treatment of pregnant women to enhance fetal health. A recent Washington, D.C. Court of Appeals decision, however, held that, except for "truly extraordinary or compelling reasons," it would be unconstitutional for a court to order a ceasarean section on women who refused such treatment.[121]

Under the privacy rubric, it seems clear that protecting the taxpaying public[122] is not a sufficiently compelling state goal to justify invading Fourteenth Amendment rights, particularly because there are less costly, more effective, and more narrowly tailored means to achieve the goal of having fewer drug-exposed infants relying on the public welfare system.[123]

3. *Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment[124] guarantees all individuals equal governmental treatment in the exercise of their rights.[125] Governmental classifications based on race, national origin and alienage require strict scrutiny, which means that the government must have a compelling interest, and use the least restrictive means of achieving it, to justify treating such classes of people differently.[126] Classifications based on gender require intermediate scrutiny, which means they must bear a substantial relationship to "important governmental objectives."[127]

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120. *See* Rochin v. California, 342 U.S. 165 (1952) (declaring the right to refuse invasive procedures on one's body).

121. *In re* A.C., 573 A.2d 1235, 1247 (D.C. Ct. App. 1990). In this case, a woman dying of cancer allegedly refused a ceasarean section, as did her family. The trial court hurriedly approved a court-order sought by the hospital to perform a ceasarean section. Both the woman and the fetus died within a matter of days. The appellate court issued a post-mortem opinion that the order was invalid without evidence that either the woman consented to the procedure, or that her inability to give informed consent resulted in a careful substituted judgment procedure granting consent. *Id.* at 1252.

122. *See supra* note 6 and accompanying text (quoting Judge Wolf's argument that the "taxpaying public" needs protection from women whose drug use creates costly infant-care problems).

123. *See supra* notes 32-38 and accompanying text (regarding comparative costs of incarceration and treatment).

124. U.S. CONST. amend. XIV.

125. The source of equal protection against federal governmental action is the Due Process Clause of the Fifth Amendment. The analysis applied is identical to that applied under the Fourteenth Amendment. *See* NOWACK & ROTUNDA, *supra* note 60, at 569.

126. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971); Oyama v. California, 332 U.S. 633, 644-46 (1948).

127. Craig v. Boren, 429 U.S. 190, 197 (1976).

In *Mississippi University for Women v. Hogan,*[128] Justice O'Connor, writing for the majority, stated that a party seeking to uphold a statute that classifies by gender carries "the burden of showing an 'exceedingly persuasive justification' for the classification."[129] This burden, she continued, is met "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' "[130] Since the Court scrutinizes the application of a policy and not merely the state's articulated goals, if the means chosen do not serve the intended ends, the classification may have resulted from "the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."[131]

As a practical matter, discrimination on the basis of pregnancy is gender discrimination, because only women get pregnant. Under the law, however, the argument that pregnancy-based discrimination is gender discrimination rests on uncertain constitutional ground. In the 1974 case of *Geduldig v. Aiello,*[132] the Supreme Court held that pregnant employees seeking disability benefits for pregnancy could not do so under the equal protection clause.[133] In *Geduldig*, the Court viewed pregnancy as a health "risk," affecting some but not all women, for which the state was not required to provide protection;[134] according to the Court, since women could collect benefits for the same "risks" as men, the challenged policy did not discriminate on the basis of gender.[135]

In 1982, Congress added the Pregnancy Discrimination Act to Title VII to include discrimination on the basis of pregnancy within the statutory prohibition against employment-based gender discrimination.[136] It is important to note, however, that the Supreme Court, prior to enactment of the Pregnancy Discrimination Act, had already held that Title VII proscribed employment practices which clearly burdened pregnant women.[137]

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128. 458 U.S. 718 (1982).

129. *Id.* at 724 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

130. *Id.* at 724 (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

131. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982).

132. 417 U.S. 484 (1974).

133. *Id.* at 494-95.

134. *Id.* at 496-97.

135. *Id.* at 496-97 n.20.

136. Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1981)); for a comprehensive discussion of the newest workplace pregnancy discrimination issue, see Ellen Bigge, Comment, *The Fetal Rights Controversy: A Resurfacing of Sex Discrimination in the Guise of Fetal Protection*, 57 UMKC L. REV. 261, 271 (1989).

137. *See* Nashville Gas Co. v. Satty, 434 U.S. 136, 138-43 (1977) (striking down, on Title VII grounds, a policy which deprived women of their earned seniority benefits if they took maternity leave and subsequently returned to work).

Although it is unclear whether the Supreme Court would apply this pregnancy discrimination analysis to cases beyond the Title VII (employment) context, the *Nashville Gas Co. v. Satty*[138] case raises the possibility that a clearly burdensome type of pregnancy discrimination, such as incarceration, might violate the Equal Protection Clause. Moreover, in a footnote to his majority *Geduldig* opinion, Justice Stewart noted:

> While it is true that only women can become pregnant, it does not follow that *every* legislative classification concerning pregnancy is a sex-based classification . . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation *such as this* on any *reasonable* basis, just as with respect to any other physical condition.[139]

This language could be interpreted to narrow *Geduldig* to fact situations in which women are perceived as asking for extra *benefits*, as opposed to being unequally and unreasonably *burdened* by the duty to create a risk-free fetal environment. Evidence that men are not penalized or detained through incarceration for the duration of a partner's pregnancy, although paternal drug use, battering, and other behavior can adversely affect fetal health, would support an equal protection challenge.[140]

The Supreme Court would probably reject a race-based equal protection challenge to the incarceration of pregnant drug-users. The Court has required a showing of discriminatory intent, and not just discriminatory impact, by the government before it will strike down state action on equal protection grounds.[141]

Women of color may, nevertheless, be able to prove a prima facie case of discriminatory purpose by showing that broad sentencing discretion has produced unexplained racial disparities, following the reasoning of *Castaneda v. Partida*.[142] In that case, the Court held that a defendant successfully demonstrated a prima facie case of intentional discrimination in grand jury selections by showing a sufficiently large statistical dis-

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138. 434 U.S. 136 (1977).

139. *Geduldig*, 417 U.S. at 496 n.20 (emphasis added).

140. Men can harm fetuses by providing drugs to pregnant partners or by otherwise exposing the fetus to harmful or toxic substances, and by beating a woman during her pregnancy, which happens to one out of twelve women, according to one source. Katha Pollit, *Fetal Rights: A New Assault on Feminism*, THE NATION, Mar. 26, 1990, at 409, 416. A father's behavior prior to conception also influences fetal health. *See Fetuses Weigh Less if Father Smokes*, 111 NEW SCIENTIST, Aug. 28, 1986, at 19 (smoking damages fetal health); *see also* Ruth E. Little, *Association of Father's Drinking and Infant's Birth Weight*, 314 NEW ENG. J. MED. 1644 (1986); Andrew Purvis, *The Sins of the Fathers*, TIME, Nov. 26, 1990, at 90 (effects of drinking on fetal health); *Cocaine Binds to Sperm in Lab Study*, S.F. CHRON., Oct. 9, 1991, at A2 (raising concerns about fathers' contributions to fetal damage).

141. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 239-45 (1976).

142. 430 U.S. 482 (1977).

parity between the percentage of Mexican-Americans in the population and the percentage summoned, combined with a highly discretionary selection procedure.[143]

Black or Native American women would be able to demonstrate statistics showing that women in their racial groups are much more likely to be incarcerated for drug use during pregnancy than white women, despite studies showing similar patterns of drug use.[144] A challenge based on racial disparity would probably have to include a comparison between the percentage of female defendants of a particular race that is sentenced by a particular judge, and the percentage that is tested and incarcerated for drug use during pregnancy.

4. *Cruel and Unusual Punishment*

The most common basis for review of sentences is the allegation that a sentence is so disproportionate to a crime that it constitutes cruel and unusual punishment under the Eighth Amendment.[145] The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.[146] The argument that drug addiction is a disease[147] supports a theory that drug use combined with pregnancy should serve as a mitigating factor in sentencing, because punishing someone for the status of being addicted has been recognized by the Supreme Court as cruel and unusual punishment within the Eighth Amendment.[148] Under *Robinson v. California*, the status of addiction cannot be punished absent some criminal act.[149] The Court noted, however, that states have the power to compel treatment for addicts, with incarceration as a penalty for non-compliance.[150] In 1968, the Supreme Court narrowed *Robinson* by holding that a state could criminally punish a person for being drunk in public.[151] Today, addicted persons fill our jails[152] because they are

143. *Id.* at 494-97.

144. *See supra* note 19 and accompanying text.

145. *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983) (holding that a life imprisonment sentence under a South Dakota recidivist statute, in which defendant wrote a bad check for $100.00, constituted cruel and unusual punishment).

146. *See* Robinson v. California, 370 U.S. 660, 666 (1962).

147. *See* Linder v. United States, 268 U.S. 5, 18 (1925) (recognizing drug addiction as a disease).

148. Robinson v. California, 370 U.S. 660, 666-67 (1962).

149. The Court analogized: "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease." *Id.* at 666.

150. *Id.* at 665.

151. Powell v. Texas, 392 U.S. 514, 535 (1968) (plurality opinion questioning the defendant's inability to avoid drinking and appearing drunk in public, and expressing concern about limiting the state's power to handle social problems). *See* Dawn M. Korver, Note, *The Constitutionality of Punishing Pregnant Substance Abusers Under Drug Trafficking Laws: The Criminalization of a Bodily Function*, 32 B.C. L. REV. 629, 652-54 (1991).

convicted on specific charges (e.g. possession of drugs or drug trafficking) rather than on their status per se.

The Model Penal Code provides guidance as to what constitutes an "act" within the reach of criminal liability.[153] The Model Penal Code states that involuntary bodily movements, meaning those which do not result from a person's effort or determination, are excluded from the definition of "voluntary act" and thus cannot be punished as criminal acts.[154] Liability, however, may be imposed for the volitional act of driving, or otherwise acting, with knowledge of the likelihood that harm of criminal dimension may result (such as reckless endangerment).[155] Although one could argue that becoming pregnant is often a "voluntary act," the medical changes which accompany becoming pregnant are, to a large extent, beyond a woman's control.

The Federal Sentencing Guidelines do not specifically refer to drug use during pregnancy. The guidelines state that, although mental, emotional or physical conditions are not "ordinarily relevant" in determining whether a sentence should deviate from the guideline, "an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment."[156] The guidelines also recommend that sentences for drug users include mandatory participation in an appropriate treatment program.[157] These two recommendations could support an argument that judges should sentence pregnant women to supervised release or probation contingent upon participation in an appropriate treatment program, because pregnancy is an "extraordinary physical impairment" unsuited to incarceration. One could interpret further support for this argument from the Commission's comment that "family ties and responsibilities" may be relevant in sentencing when probation is an option.[158]

The prohibition against punishing the status of being ill arguably applies to the dual status of being pregnant and addicted to drugs, since both of these conditions can be viewed as "involuntary" bodily functions.[159] Punishing pregnancy is doubly problematic because of its "fun-

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152. *See generally* Michael B. Getty, *Alternative Sentencing for the Alcohol/Drug Defendant*, 14 S. ILL. U. L.J. 1 (1989) (analyzing attempts to get addicted prisoners out of prison and into treatment).

153. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 3.2 (2d ed. 1986) (discussing the MODEL PENAL CODE, § 2.01(1), and the definition of an "act" for criminal law purposes).

154. MODEL PENAL CODE, § 2.01(2)(d) (Proposed Official Draft 1962).

155. LAFAVE & SCOTT, *supra* note 153, at 199.

156. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL 275-76, § 5H1.3-.4 (West 1991).

157. *Id.* at 276, § 5H1.4.

158. *Id.* at 276-77, § 5H1.6.

159. Since deciding *Robinson* and *Powell*, the Court has denied certiorari to cases raising the issues of status defenses. *See* Korver, *supra* note 151, at 654 nn. 207-08 and accompanying text.

damental right" protection against undue governmental burdens, under a substantive due process rubric.[160] However, if one believes that a woman's pregnancy and drug use are completely voluntary acts, the Eighth Amendment challenge fails. Certainly, on a policy level, one can forcefully argue that addiction, especially during pregnancy, should be a *mitigating* factor in sentencing.[161]

To ensure against cruel and unusual punishment during incarceration, the Supreme Court in *Turner v. Safley* established for incarcerated persons the right to certain minimal conditions of health and safety.[162] At the same time, the Court has underscored that when balancing constitutional rights and security concerns, "the choice made by corrections officials — which is, after all, a judgment 'peculiarly within [their] province and professional expertise,' . . . should not be lightly set aside by the courts."[163] Yet when security is not an issue, it is clear that there is a constitutional right of prisoners to adequate medical care, under *Estelle v. Gamble.*[164]

The Supreme Court would probably interpret a pattern of depriving women prisoners of adequate prenatal care, including drug treatment or other essential services, as cruel and unusual punishment.[165] In California, Legal Services for Prisoners with Children challenged inadequate health care for women prisoners; the settlement of these suits, which relied on the Eighth Amendment, has effected more medical services in prisons and jails.[166]

IV. Alternative Sentencing for Drug Addicts

Commentators familiar with the shortcomings of incarceration in addressing the needs of drug addicted defendants sometimes suggest "alternative sentencing."[167] Alternative sentence advocates perceive drug addiction as a medical problem which must be treated in a therapeutic

160. *See supra* notes 60-123 and accompanying text (for due process and privacy analyses).

161. *See supra* notes 23-26 and accompanying text (regarding the adverse effects of punishment on maternal and fetal health).

162. 42 U.S. 78 (1987).

163. *Id.* at 92-93 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

164. 429 U.S. 97, 103-05 (1976).

165. *See* Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 349 (3d Cir. 1987) (holding that denial of elective abortions constituted "deliberate indifference to serious medical needs" in violation of the Eighth Amendment), *cert. denied*, 486 U.S. 1006 (1988).

166. Yeager v. Smith (No. CV-F-87-493-REC, Fed. Dist. Ct., California) (settlement approved October 3, 1989); Jones v. Dyer (No. H-114544-0, Alameda County Superior Court, California) (settlement approved November 3, 1989); Harris v. McCarthy (NO. 85-6002-JGD). For more detailed information about these cases and subsequent developments contact Ellen Barry, Director, Legal Services for Prisoners with Children, 1535 Mission Street, San Francisco, CA 94103, (415) 255-7036.

167. *See generally* Getty, *supra* note 152.

environment not often found in jails or prisons. Some state legislatures have granted prosecutors the statutory power to recommend treatment alternatives for drug-using defendants.[168] For example, the California alternative sentencing statute[169] gives prosecuting attorneys the power to determine defendants' eligibility for education, treatment or rehabilitation programs instead of incarceration. In determining eligibility, prosecutors must follow certain guidelines: the defendant must be charged with violating one of the enumerated offenses involving possession of drugs for personal use, the defendant must not have been convicted of a previous drug charge, the present charge cannot involve drug-related violence, the defendant must not have prior felony convictions or prior unsuccessful diversion program experience within five years, and the defendant must not have had prior revocation of parole or probation.[170]

Under the California system, the sentencing court makes the final decision whether to divert the defendant into treatment based on the presentence investigation and "any other information considered by the court to be relevant to its decision."[171] Once diversion is granted, it can be revoked on motion of the probation department, after which the court has a hearing to decide whether to resume criminal proceedings.[172] Conversely, if the defendant successfully completes a diversion program, the court dismisses all criminal charges.[173] Another advantage for the defendant is that no statement made during the diversion investigation process can be used against him or her in any subsequent proceedings.[174]

The most effective diversion program would train judges and lawyers involved in the area of criminal law to look for signs of drug addiction among all defendants who come before them.[175] The purpose of this inquiry would not be to aggravate a sentence, as in the *Vaughn* case, but to determine whether an addict, pregnant or not, is eligible for voluntary drug treatment. Voluntary treatment would ensure that limited resources would be spent on drug users who are ready to recover from addiction. Only when society has the resources to enroll all needy defendants in suitable programs should legislators begin to discuss how to help unwilling addicts (without violating their constitutional rights to liberty and autonomy). An offender who poses a present physical threat to

168. *Id.*

169. CAL. PENAL CODE §§ 1000-1000.5 (West 1985 & Supp. 1991); *see* Getty, *supra* note 152, at 6-9 nn.29-44 and accompanying text (discussing the statute).

170. CAL. PENAL CODE § 1000(a)(1)-(a)(6).

171. *Id.* § 1000.2.

172. *Id.* § 1000.3.

173. *Id.*

174. *Id.* § 1000.1(c).

175. The National Association for Perinatal Addiction Research and Education (NAPARE), based in Chicago, has a seminar project to educate judges about perinatal addiction and custody matters. Contact Ira Chasnoff, M.D., President, at (312) 329-2512 for more information.

other people should be locked up while undergoing treatment, but a convicted, non-violent person like Brenda Vaughn should be allowed to attend a program suited to her needs as a pregnant addict. Because many drug addicted women live in dangerous, unhealthy environments, residential treatment often offers the most hope for recovery.[176] California's Mother-Infant Care Program for low-risk prisoners allows certain pregnant women and women with young children to serve their sentences at halfway houses, where they can live with their children while they serve their sentences.[177] An ideal program might provide a combination of drug-treatment, job skills, and parenting training with an on-site child care component for a woman's dependent older children.

If a defendant, convicted of a specified crime, chooses drug treatment, a drug probation system could be set up to ensure that she makes significant progress toward recovery for the duration of her treatment, the length and scope of which could be determined by a panel of several judges, defense and prosecution attorneys, and treatment providers, including prenatal care providers. The treatment should not exceed the duration of the applicable criminal sentence, unless the defendant desires treatment to continue. If the same multi-disciplinary panel decides, through proper hearing procedures, that the defendant has not benefitted, and will not benefit, from the treatment, a judge may restore the original sentence (as long as it meets basic health care needs), minus time served during treatment. Given the choice between prison and a suitable, supportive treatment program, it is very likely that Vaughn would have chosen a treatment program.

Conclusion

A woman should not be brought into the criminal justice system simply because she is pregnant and addicted, without having been charged with a specific, codified crime. A woman's status as a pregnant addict is a serious problem which the government should treat with more appropriate action such as medical and drug treatment outreach programs.

When a pregnant woman commits a crime, she is subject to court jurisdiction. Like other defendants, however, she has constitutional protections which limit the factors upon which her sentence can be based. Public policy dictates that a judge should consider pregnancy (and any other medical condition), when sentencing an addicted woman; that

176. *See Drug Treatment Issues, supra* note 44, at 36-38 (describing the violence and other problems which impair women's recoveries, and the necessity of treatment programs specifically designed for women).

177. *See* Sandra Bodovitz, *Settlement Will Assist Jailed Moms with Kids*, THE RECORDER, May 30, 1990, at 1 (describing a settlement between Legal Services for Prisoners with Children and the California Department of Corrections aimed at fully implementing the program).

judge, however, may not use the pregnancy to mete out a harsher sentence to that woman than she would expect to receive for her charged crime. Instead, a judge should fashion a sentence which promotes the woman's health and fetal health without sacrificing the woman's constitutional rights.