New Attack on Reproductive Justice: Tennessee’s Criminalization of Pregnancy Conduct

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Part I.

Introduction

Last year, the state of Tennessee took a radical measure in the ongoing “war” on female reproductive choice by enacting a statute making drug use by pregnant women a crime of aggravated fetal assault.¹ Never before has a criminal statute so explicitly made fetuses legal victims of a mother’s conduct. Nor has any state’s criminal code ever established an independent drug use crime for this special class of “perpetrators.” Worse yet, the statute’s enforcement in Tennessee, as well as the emerging interpretation of fetal personhood in other states, disparately impacts minority women - the subset of American society already most vulnerable to socio-economic marginalization.²

Academic treatment has mostly utilized reproductive rights advocacy as its tool for constructing legal arguments against this nefarious expansion of state intrusion. This paper examines the threat to female sexual autonomy through the Reproductive Justice (RJ) framework,³ but also contends that expanded criminalization of pregnancy conduct has emerged within a greater complex of state action that systematically subordinates targeted segments of the population to serve capitalist and political self-interest.

After demonstrating the pathological nature of the issue at hand, this paper will propose solutions that circle back to the familiar: federal judiciaries should defeat the criminalization of

² American Civil Liberties Union, New Bill Would Criminalize Drug Use by Pregnant Women, at http://pulse.ncpolicywatch.org/2015/03/18/new-bill-will-criminalize-drug-use-by-pregnant-women/
³ Reproductive Justice is a social movement concerned with the impact that reproductive jurisprudence and legislation bears on poor women and women of color and views policies adverse to the interests of this subset of women as a human rights issue to be addressed accordingly. See SisterSong Women of Color Collective at http://www.sistersong.net/index.php?option=com_content&view=article&id=25&Itemid=66 (last visited on April 27, 2015)
pregnant women on constitutional grounds, and Congress should enact laws that prohibit the expansion of drug interdiction towards pregnant women. Finally, social justice movements like RJ should find expand their activism to include broader critiques towards broader systemic issues that promote class inequality and, as a result, race and gender subordination.

Part I of this paper first narrates the inconsistent development of reproductive rights in the U.S. with reproductive choice as its core issue. Part I then introduces Reproductive Justice, a progressive movement that challenges mainstream feminism in part by outing abortion fetish as narrow and exclusionary.\(^4\) The RJ framework, which incorporates intersectionality\(^5\) and social justice analysis, will also be used in subsequent sections to support links made between social exclusion, the State’s use of targeted criminalization, and justifications for solutions that I propose.

Part II begins by outlining socio-economic data reflecting the “double jeopardy” of gender and race subordination confronting women of color as well as class oppression in a social order that yields its greatest benefits to men and the middle class.

Part II then transitions into an analysis of governmental drug interdiction and prosecution during the so called “Drug War” instituted by Ronald Reagan in the 1980s and the devastating impact suffered by large minority communities as a result.\(^6\) A crucial nexus will be formed linking the Government’s political interests and overtly racist policies that erased large swaths of minority men from urban areas and similar legal strategies that are now threatening pregnant women of color, and by extension, families and communities of color.


\(^5\) Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs' Was A "War on Blacks",* 6 J. GENDER RACE & JUST. 381, 445 (2002) (discussing the impact the "War on Drugs" had on minority communities).

\(^6\) Id.
Part III surveys the amalgam of new laws and practices that ensnares low income women of color into the artificial “War on Drugs with special attention to the recent Tennessee legislation that, for the first time, explicitly makes pregnancy drug use an independently recognized crime.

Finally, Part IV will suggest modes of redressing state legislation and the enforcement of these toxic criminalization projects. Strategies will include Constitutional arguments leveraging Cruel and Unusual Punishment Doctrine, Equal Protection, and Search and Seizure jurisprudence. Each will be taken in turn. The Conclusion will crystalize this paper’s thesis and the main tenets of the analysis herein.

Part I.

Cycles of Female Sexual Autonomy: From Reproductive Rights to Reproductive Justice

The national and even academic discourse on reproductive rights has long trained its focus on abortion, myopically framing the issue in terms of women’s choice to terminate pregnancy. Some contemporary advocates of female autonomy in sexual and reproductive health, however, are properly expanding the movement to include freedom within reproduction – the rights of women during pregnancy and childbirth – as part of a broader Reproductive Justice (RJ) concept aimed at disassembling dominant social structures that continue to impact the most vulnerable members of society: poor women and women of color.

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8 Id.
A. Historical Development of Reproductive Rights in the U.S.

The development of reproductive rights in the U.S. has its roots in the lenient British common law regulating abortion. Historically in England, women could choose to abort their fetuses with little sanction before “quickening,” the moment at which the fetus begins to exhibit independent movement - believed to occur at some point towards the end of the first trimester.

This cautiously deferential view towards female reproductive autonomy appears to have been adopted by this nation in its infancy. Over time, however, states began to enact more stringent prohibitions on early term abortions. Perhaps leveraging puritanical sentiment and fear of interracial mixing, these states seized control of female reproductive organs as statutes, case law, and the mainstream medical profession together propelled the swift eradication of female reproductive and sexual autonomy.

Social values liberalized, however, during the prosperous post WWII period as the Civil Rights movement and Feminist advocacy gained momentum. In its 1973 decision Roe v. Wade, the Supreme Court followed the reversal of anti-abortion sentiment among the general public and the medical community. The landmark decision established a right of female choice in

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11 Roe v. Wade, 410 U.S. 113, 140, L. Ed. 2d 147 (1973); (Justice Blackmun wrote for the majority: “It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect.”).
12 Id. (“The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.”)
controlling their bodies and their pregnancies up until some ambiguous point of fetal viability.\textsuperscript{13} Justice Blackmun, writing the majority opinion of the Court, postulated:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.\textsuperscript{14}

Despite trending national sentiment in favor of women's choice in pregnancy, the \textit{Roe} decision polarized constituencies across the country as opposition activists accused an unelected Court of exceeding its authority.\textsuperscript{15} Even advocates of women's reproductive choice like future Justice Ruth Ginsberg, who wrote an amicus brief in \textit{Roe}, contemporaneously warned that the movement would have been better served by the Court merely striking down the disputed Texas statute as unconstitutional rather than establishing a national precedent that effectively legalized abortion under a tenuous trimester framework.\textsuperscript{16} She argued that by invalidating the statute, other state legislatures would have continued to legalize reproductive choice without animating the opposition’s base.

In subsequent decades, many states applied restrictive schemes in an effort to pacify the swell of political unrest caused by \textit{Roe}, including required informed consent requirements, parental notification, and restrictions on late-term abortions.\textsuperscript{17} In \textit{Planned Parenthood v. Casey}, the Court re-empowered states to regulate abortion so long as the restriction does not place an "undue burden" on women’s elective privilege, elaborating that the “burden” should not “place a

\begin{enumerate}
\item Id. (The Court established a precarious trimester framework which has since been used to justify abortion limitations and fetal personhood ideals. These consequences will be considered in Part III of this paper.).
\item Id.
\item Ruth Ginsberg, \textit{Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade}, 63 N.C. LAW Rev. 375 (1985) ("The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.").
\item Id.
\end{enumerate}
substantial obstacle in the path of a woman seeking an abortion.” 18 Another blow to reproductive rights came in Carhart II (2003), where the Supreme Court upheld the federal Partial Birth Abortion Ban Act of 2003. The Court held that Congress was within its authority to regulate certain types of abortions where medical science was divided as to the efficacy of the particular procedure in question.19 Casey and Carhart II have since formed the jurisprudential basis for a greater regulatory movement in restricting abortions after the first trimester.20 At least thirty-nine states now impose significant restrictions beyond fetal gestation at 24 weeks.21

The Supreme Court is not alone in corroding reproductive choice. The Hyde Amendment, originally passed in 1976, but subsequently altered to its most restrictive form in the early 1980s, prohibits the use of federal funding in the completion of abortions.22 In Harris v. McRae, the Supreme Court sustained the Act, holding that it does not facially eliminate a women’s fundamental right to an abortion, but simply requires all women to self-finance the “elective” procedure.23 Not surprisingly, Medicaid participants of which women of color rely upon more than men or non-Hispanic white women, and other low income women are most severely affected.24

B. Towards Reproductive Justice: Intersectionality and Reproductive Autonomy

In the throes of the above chronicled fight for abortive choice, philosopher and feminist Marlene Fried issued the following attack on the entrenched reproductive rights movement: “the

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21 Id.
23 Harris v McRae, 448 U.S. 297 (1980).
decision to fight for choice rather than justice is itself a decision to appeal to those who already have choices.” Fried’s conclusion reflects a central tenet of Reproductive Justice (RJ) advocacy: that mainstream feminism’s almost exclusive concern with abortion skews reproductive politics towards both the self-serving interests of middle class women and the maternalistic imposition of the same group’s social concerns on poor women and women of color.

During approximately the same time, critical race theorist and legal scholar Kimberlé Crenshaw, credited with introducing the concept of intersectionality to academic scholarship, argued that women of color in general, and black women in particular, occupied an ultra-subordinated space with respect to legal contexts and social movements. The marginalization and exclusion of this subset of women inevitably produced “an actual experience of domestic violence, rape, and remedial reform qualitatively different than that of white women.” Crenshaw concluded that legal solutions to both gender and racial oppression simultaneously suffered by a single group should address the matrix of pressures at the intersection of these forces.

Applying the critical theory scholarship of the late 1980s and early 1990s discussed above, the Reproductive Justice movement took prominence through the formation of the SisterSong Collective in 1997. It’s articulation of the movement is as follows:

Reproductive Justice … provides an intersectional framework that allows us to include all the social justice and human rights issues that affect our lives. This can be done without segmenting, isolating, and pitting one priority against another. The reproductive justice framework – the right to have children, not have children, and to parent the children we have in safe and healthy environments -- is based on the human right to make personal decisions about one’s life, and the

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27 Id.
obligation of government and society to ensure that the conditions are suitable for implementing one’s decisions.\textsuperscript{28}

Accordingly, \textit{SisterSong} and Reproductive Justice avoids focusing on the narrow issue of abortion and incorporates an “analysis of racial, economic, and structural constraints” on power.\textsuperscript{29} Recognizing that gender status operates within a complex of further subordinated identities, which prominently include race and class, RJ addresses a broader scope of reproductive challenges that impact the most vulnerable and comprehensively marginalized members of society: poor women of color.

Reproductive Justice scholars are concerned with include sterilization practices within the U.S. and abroad, access to reproductive healthcare, and finally the disproportionate and oppressive criminalization of pregnant women by statute and practice that works spectacular hardships on poor women of color significantly more than those suffered by white, middle class women.\textsuperscript{30}

While RJ raises \textit{intersectional} issues largely ignored within fight for female reproductive autonomy, many jurisdictions continue to regulate pregnancy through prosecutorial tactics and enactment of legislation.\textsuperscript{31} These will be discussed in the sections that follow.

\textbf{Part II.}

\textbf{Social Status of Women of Color and State Attacks on Minority Existence}

This section will first establish women of color as a particularly unique subset of the body politic, excluded and subjugated in ways not explained by gender subordination alone.

\begin{flushright}
\begin{footnotesize}
\textsuperscript{28} The SisterSong Women of Color Reproductive Justice Collective at http://www.sistersong.net (last visited on April 27, 2015).
\textsuperscript{29} \textit{Id}.
\textsuperscript{30} \textit{Id}.
\textsuperscript{31} \textit{See Infra Parts II and III}
\end{footnotesize}
\end{flushright}
Criminalization of low income and minority life by means of “Drug War” policies and practices will then be examined in subsection B.

A. Social Marginalization of Women of Color

Women of color notoriously suffer wage, education, and health access gaps as well as exclusion from the political process at much higher rates than their white female counterparts. Systemic bias (targeted prosecutions, and sentencing disparities for drug violations), structural impediments (involuntary prenatal screening at public, low-income hospitals) and outright racism produces socio-political disenfranchisement, and makes women of color more susceptible to sexual regulation and reproductive control from the state.

Women in the workforce make 77 cents for every dollar the average male worker makes. Black women and Latina women make 70 and 61 cents to that same male dollar respectively. While the wage disparity may be closer under an equal pay for equal work calculus, the actual gap illustrated by the data above reflects stratified economic conditions likely triggered by opportunity inequities for different “classes” of women in our society.

Black and Latina women also experience greater unemployment than white women. In 2012, Black and Latina women were unemployed at rates of 13.3 and 11.4 percent respectively, compared to the 7.2 percent rate of unemployment for white women.

Worse yet, women of color overwhelmingly populate the ranks of Americans living in poverty. According to U.S. Census Bureau, the poverty rate for non-Hispanic whites in 2010 was 9.9 percent, while Blacks and Hispanics rated at 27.4 and 26.6 percent respectively.

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33 Id.
34 Id.
35 Id.
36 Id.
Households led by single mothers – a population segment dominated by women of color – suffered a 31.6 percent poverty rate, over three times the national average for white households.\textsuperscript{37}

This poverty disparity underscores the *intersectional* character of gender and race oppression. Poverty does not occur in a vacuum. Moreover, it is a root cause for education gaps that produce the employment and wage disparities outlined above. Poverty also results in limited access to health care and exposure to exploitive state practices like underfunding of abortion and limited reproductive health support, and invasive screening at public health institutions that often serve as proxies for state law enforcement.\textsuperscript{38}

While the above data suggests approximately one in three women of color live in poverty, it is not a stretch to conclude that many more live just above the poverty line. Social Welfare Reform in the mid-90s excluded over 3 million families from cash assistance programs and overall welfare caseloads have dropped 60 percent since 1996, when the “Welfare Reform” Act was passed.\textsuperscript{39} As social welfare for the neediest fell, advocacy groups reported that poor women and women of color became increasingly trapped in violent relationships and otherwise exploitive settings such as immigrant women trafficking and forced sex work.\textsuperscript{40} Indeed the American Bar Association contends that African American women suffer a 35 percent greater risk of domestic violence than their white female counterparts, and that black women risk death as a result of intimate partner violence more than any other racial group.\textsuperscript{41} The Southwest Center

\textsuperscript{37} Id.
\textsuperscript{38} See Stevens, supra note 22.
for Law and Policy reports that Native American women are victims of rape or sexual assault at more than the double the rate of any other group.\footnote{Id.} Finally, the Georgetown Journal for Poverty Law and Policy recently published that 48 percent of Latina women reported an increase in domestic violence abuse \textit{after} emigrating to the U.S. from their much poorer home countries,\footnote{Mary Dutton, Characteristics of Help-Seeking Behaviors, Resources and Services Needs of Battered Immigrant Latinas: Legal and Policy Implications, Georgetown Journal of Poverty and Law Policy, at http://www.doj.state.or.us/victims/pdf/women_of_color_network_facts_domestic_violence_2006.pdf.} a striking indictment on social conditions for low-income immigrant women in the U.S.

But socio-economic data alone does not convey the depth of injustice suffered by women in minority communities. The under-policing of major crimes in poor urban neighborhoods\footnote{JILL LOEZY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA, (2014).} makes black and Latina women both more vulnerable to violent crimes and “invisible” as victims seeking remedy and protection. In her 2015 book \textit{Ghettoside: A True Story of Murder in America}, award winning L.A. Times investigative journalist Jill Leovy chronicles the story of the “Grim Sleeper,” a serial killer who terrorized black women in Los Angeles’s South side over a 19 year period starting in 1988. DNA evidence conclusively links the killer to eleven murders and one attempted murder, but the prevalence of substantially similar modus operandi (M.O.), and other evidence strongly suggest his involvement in dozens of other unsolved killings during the same period. Leovy surveys similar patterns of police neglect in black communities over the past century while demonstrating a startling contrast to the types of aggressive law enforcement otherwise affecting the very same neighborhoods. Her analysis shows that while police are willing and “successful” at “randomly” stopping petty drug possessors and parole violators in their aggressive “sweeps” of poor areas, they have been much less interested in investigating
major crimes that victimize members of the same. Mistrust builds and “street justice” produces a cycle of increased crime.45

Loevy also details outrage from the Black Coalition Fighting Black Serial Murders, who in 1989 demanded that the killings be given higher priority.46 The police declined to respond and made no public announcement regarding the killings, and the perpetrator went into apparent hiding.47 When similar murders targeting black female prostitutes on L.A.’s south side, involving the same M.O. surfaced in 2002, renewed demands were made on the LAPD.48 Even after DNA evidence concluded that the same serial murderer had committed the crimes, L.A.’s mayor and chief of law enforcement waited four months to alert the community their findings.49 While a suspect was finally arrested in 2014,50 the case remains open, an outrage to a community seeking justice for over 27 years.

Structural and systemic pathologies can, and should, be examined to explain and resolve the severe social conditions that many women of color experience—including depressed employment opportunity, restricted access to health and education, and greater exposure to poverty, violence and exploitation as demonstrated in the data above. It is sufficient for the purposes of this paper, however, to establish that women of color have been relegated to the deepest socio-economic margins and are therefore more vulnerable to state discipline fueled by class based obsession over certain types of drug use and users. This group is also susceptible to alienation from their children in paternalistic regimes that aim to dictate the terms of motherhood and personal conduct.

45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
B. The Drug War: Social Inequality and Related Pathologies

In a radio address during October of 1982, acting U.S. president Ronald Reagan declared the government’s official “War on Drugs.” \(^{51}\) Reagan spoke in military rhetoric, promising a “planned, concerted, campaign,” using terms like “battle,” “war,” and “surrender.” \(^{52}\) Former president Eisenhower’s warning of a rising “Military Industrial Complex” instantly took on eerily foreboding dimension. What ensued was a highly organized, painstakingly marketed, military styled attack on common drug use and petty trafficking even as national consumption had been trending downwards since the late 1970s. \(^{53}\) In the following decades, mass incarceration and historically long sentences brought millions of so called offenders to “justice” as subsequent presidents George H. W. Bush and Bill Clinton enhanced resources and aggression to the juggernaut movement. \(^{54}\) The victims were predictable: young, urban, black men. \(^{55}\)

Numerous studies have tracked the explosion of black male incarceration during the two decades since the inception of Reagan’s “Drug War.” One such study reported that “between 1976 and 1989 the total number of drug arrests of Caucasians grew by seventy percent, compared to a four hundred and fifty percent increase among African Americans, and that the number of Caucasians incarcerated for drug offenses increased by fifty percent from 1986 to 1991, while the number of African Americans incarcerated increased by three hundred and fifty

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\(^{52}\) Id.

\(^{53}\) Kenneth B. Nunn, RACE, CRIME AND THE POOL OF SURPLUS CRIMINALITY: OR WHY THE "WAR ON DRUGS" WAS A "WAR ON BLACKS", 6 J. Gender Race & Just. 381, 445 (2002) (The article notes that drug use was more pervasive by large segments of the white community in the 1960s and 70s, but had begun to subside by the late 70s. Not coincidentally, Reagan’s “War on Drugs” to root when crack cocaine became prevalent in black communities. The conclusion is that the government’s interest in large-scale drug prosecution only emerged as use had subsided in the white community but increased in the black community, making it both politically feasible and a convenient tool of race subordination.).

\(^{54}\) Id.

\(^{55}\) Id.
percent.” Even more alarming was the population of black males at diametrically opposite institutions during approximately the same period. By 1997, the number of black males incarcerated in prisons and jails for drug possession over the previous decade (791,280) exceeded those attending colleges or universities (579,800).

“Drug War” advocates argued that African American males break drug laws at higher rates and therefore faced incarceration at correspondingly greater per capita rates. The data does not support this contention, however. The U.S Health Service and Substance Abuse Administration, a government agency, reported in 1992 that 76 percent of drug users in the United States were white, while 14 percent were African American and eight percent Latino.

Since possession is an element of most drug crimes, patterns of arrest and incarceration disparities required more rigorous analysis of the policies and enforcement strategies that manifested those disparities.

University of Florida Law professor Kenneth Nunn posits a theory of “disproportionate enforcement” as an explanation of the racial disparities that exist in drug incarcerations. In his now famous law review article Why the ‘War on Drugs’ was a War on Blacks, Nunn argues that in urban areas where law enforcement routinely utilize racial profiling tactics, they also have easier access to street level offenders in “socially disorganized neighborhoods” because “drug dealing is more likely to occur on the streets” while transient drug buyers, both black and white, are “less likely to draw attention to themselves.” Professor Nunn also links social

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60. Supra, Nunn, Note 53.
disorganization and street level crime to chronic unemployment in a modern capitalist system that has increasingly produced income and wealth inequality along class as well as racial lines.  

Former law professor, criminologist, and legal scholar Michael Tonry more pointedly blames the architects of “Drug War” policies in what he calls a campaign of “malignant neglect.” According to Tonry, presidential committees, legislatures, and the federal sentencing commission all knew or should have known the effects of an overly supply-oriented approach to drug interdiction. As Nunn describes, supply reduction strategies seek to reduce the availability of drugs by limiting access to drugs sources and “increasing the risk of drug possession and distribution.” An externality of this strategy is the increased incentives for young, low-status men in these communities to compete for accelerated profit margins in the high risk, high reward market that is a bi-product of the over-policing of drug supply.

In his book, *Malign Neglect: Race Crime and Punishment in America*, Tonry outlines the declining drug use within the general white population that corresponded with rates of sustained drug use in black urban communities in the early 1980s. Consequently the conditions for political approval for a renewed drug purge provided a convenient “enemy,” a requirement of any “war” whether real or contrived. Tonry’s own words are compelling:

The white-shirted-and-suspended officials of the Office of National Drug Control Policy understood the arcane intricacies of NIDA surveys, Drug Use Forecasting and the Drug Abuse Warning Network better than anyone else in the United States. They knew that drug abuse was falling among the vast majority of the population. They knew that drug use was not declining among disadvantaged members of the urban underclass. They knew that the War on Drugs would be fought mainly in the minority areas of American cities and that those arrested and imprisoned would disproportionately be young blacks and Hispanics.

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61 *Id.*
63 *Id.*
While resources and policy focus has shifted from drug law creation and enforcement to the “War on Terror” since September Eleventh, drug prosecution and mass incarceration have sustained as prominent features of the U.S. criminal justice system.

Civil Rights litigator and legal scholar Michelle Alexander updates the racial disparities in drug prosecution and incarceration rates in her recent book, *The New Jim Crow*. Alexander reports that the U.S. prison population grew from 300,000 in the early 1980s to nearly 3,000,000 in 2012. As a result, the U.S. has the fastest growing incarceration rate in the world, and we imprison our population at a rate more than eight times our industrialized peers.

Why the obsession? Alexander argues that it is the entrenched, mostly white and capitalist policy makers who fashioned a response to the promise of class equality and racial opportunity after both WWII and the Civil Rights movement. She also notes corresponding jurisprudence that has seen an increase in political involvement of corporations while minority communities have become increasingly removed from the political process. Criminalization projects powered mainly by drug related law enforcement contribute to this condition.

In her historical analysis, Alexander chronicles The Reagan Administration’s knowledge of the Nicaraguan Contra’s cocaine distribution in the United States as a means of funding the U.S. backed opposition of Nicaragua’s socialist uprising. The corresponding flooding of poor urban markets with cheap cocaine is now seen as a contributing factor in the emergence of

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65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
“crack,” the low-income cocaine form of choice, contemporaneously featured in Reagan’s “Drug War.”

Finally, Alexander surveys contemporary data that shows sustained mass incarceration trends even as the government’s investment in the “War on Drugs” has shifted to the also fictitious “War on Terror.” She reports that black and Latino men are 25 times more likely to be arrested for drug possession than white male drug possessors and that 75 percent of drug prosecutions involve defendants of color. This is true despite continued evidence of greater drug use among white Americans. Alexander prognosticates that, given current rates of prosecution, incarceration, and sentence length, the U.S. Criminal Justice System will incarcerate one-third of the entire African American population at some point within the next two decades.

Commentators can certainly dispute the factors that contributed to our current crisis of mass incarceration. Indeed, the role of the state apparatus in knowingly and willingly producing the world’s largest per capita population of the imprisoned can also be debated. Perhaps concentrations of capital and wealth require such conditions as surplus labor and social control effectively alienate the “losers” of our economic system.

It is predictable that the same strategies of drug prosecution, which low-income men of color are susceptible to, will be used to force and maintain women, particularly of low socio-economic means, to the social margins. As a result, the dual purposes of race and gender subordination are served, as will be further discussed in the sections that follow.

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70 Id.
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72 Id.
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Part III.

Tennessee’s “Fetal Assault” Statute and Similar State Actions

The ramifications of Tennessee’s recent fetal assault statute are dramatic. While the National Advocates for Pregnant Women (NAPW) reports that thirty-eight states had previously utilized child endangerment statutes to prosecute similar conduct, most appellate courts properly rejected the use of laws which never contemplated fetuses as victims.\textsuperscript{74} Tennessee’s statute avoids this fate by bringing pregnant women and fetuses directly within its scope as separate, and more importantly, \textit{adversarial} parties suitable for regulation.

A. Background

Justice Ginsberg’s warning of political backlash after Roe manifested most creatively in the use of child endangerment statutes to prosecute expecting mothers for drug use and other conduct deemed to promote poor birth outcomes.\textsuperscript{75} Fetuses suddenly became the uncontemplated victims of laws that were intended to protect independently living children from parental misconduct.

California was the first state to attempt this kind of statutory manipulation in 1977 when it charged Margaret Reyes, a poor Latina women, with felony child endangerment for personal drug use during her pregnancy.\textsuperscript{76} Ms. Reyes was convicted at trial but the California Court of Appeals overturned the disposition, holding that fetuses did not meet the intended statutory definition of “child.”\textsuperscript{77} This result did not dissuade prosecutors in jurisdictions more politically

\textsuperscript{74} Supra, National Advocates for Pregnant Women (NAPW) at http://www.advocatesforpregnantwomen.org/.

\textsuperscript{75} Child endangerment statutes have been used in 38 states, at varying degrees of success, to prosecute pregnant women for potential drug exposure to their fetuses during pregnancy.


\textsuperscript{77} Id.
eager to stem abortion and female sexual autonomy. Many states, especially in the South, began prosecuting drug use under similar statutes, but met with similar fates at appellate review.\footnote{See NAPW, supra note 72}

Two decades later, South Carolina became the first state to successfully prosecute and sustain a criminal conviction of pregnancy drug use in \textit{Whitner v. State}.\footnote{Whitner v. State, 328 S.C. at 4.} Winter, a poor African American women, was referred to state law enforcement by a public hospital after her newborn tested positive for cocaine.\footnote{Whitner v. State, 328 S.C. 1 (1997).} The baby was delivered at full-term and showed no outward signs of poor health.\footnote{Id.} After conviction and appellate reversal, South Carolina’s Supreme Court did the extraordinary: it became the first state to expand its definition of “child” under its endangerment and abuse statute to include “viable fetus.”\footnote{See Tenn. Code, supra note 1.}

The impact of South Carolina’s unprecedented judicial activism was immediate. The invention of legal personhood for fetuses represented a success for conservative pro-life movements insistent on eradicating female choice in pregnancy altogether. Recognizing legal status for fetuses as separate from the pregnant women’s body is a significant step towards that end. Whitner’s conviction is also instructive in that a poor black woman, subjected to the care of a public health institution acting as an agent for law enforcement, was the most convenient target of South Carolina’s conservative political orientation regarding female reproductive choice.

\textit{Whitner} follows the formula at issue in this paper: i) a woman of color, ii) at or near poverty, iii) treated by an impersonal, public institution in a conservative jurisdiction, iv) willing to screen and share private medical records with law enforcement, v) is prosecuted her for child

\footnote{See NAPW, supra note 72.}
\footnote{Whitner v. State, 328 S.C. at 4.}
\footnote{Whitner v. State, 328 S.C. 1 (1997).}
\footnote{Id.}
\footnote{See Tenn. Code, supra note 1.}
abuse, vi) by using an endangerment statute that never contemplated unborn children as victims under the law.

Since Whitner, some states continue to successfully sustain similar convictions, although appellate courts in most jurisdictions still recognize these prosecutions as abusive misinterpretations of child endangerment statutes.\(^8^3\)

Fetal homicide laws and prosecutions have also shaped the national discourse on female reproductive autonomy. Historically, fetal protection in this context has focused on harm inflicted by third parties.\(^8^4\) For example, In 1984 Massachusetts became the first state to successfully impose criminal sanction for ending fetal viability while in utero under its vehicular homicide statute.\(^8^5\) In the past two decades, thirty-eight states have enacted some form of fetal homicide laws, according to the National Conference of State Legislator’s database.\(^8^6\) While specific provisions vary, the constitutional personhood of fetuses is recognized in some aspect by all of these statutes.

Strikingly, twenty-three of the thirty-eight jurisdictions have expanded protection to include a fetus at any stage of viability. In Alabama, for instance, the statute defines "person," for the purpose of criminal homicide or assaults, to include “an unborn child in utero at any stage of development, regardless of viability,” but conveniently provides that “nothing in the act shall make it a crime to perform or obtain an abortion that is otherwise legal.”\(^8^7\) Although this statute consciously avoids conflict with Roe’s remaining principle, that no law shall altogether prohibit a women’s choice to terminate pregnancy, it is no accident that Alabama blatantly affords full

\(^{8^3}\) See National Advocates for Pregnant Women, supra note 72
\(^{8^4}\) See the Unborn Victims of Violence Act
\(^{8^6}\) See National Conference of State Legislators at http://www.ncsl.org/
\(^{8^7}\) Id.
legal status to fetuses upon inception. Alabama is one of a handful of jurisdictions, mostly in the pro-life, politically conservative South, that is on the cutting edge of fetal rights activism. These states seem part of a concerted effort to establish full constitutional personhood for fetuses so that future abortion jurisprudence may more easily bend towards outright prohibition on the basis of these new “persons.” Indeed, Alabama recently established the right of independent legal counsel in family court proceedings for fetuses, an unheard of expansion of fetal recognition and outright attack on the women carrying those fetuses.88

Advocates of statutory feticide provisions argue that harsher penalties should deter and provide retribution for third party perpetrators of heinous crimes against pregnant women and their fetuses.89 The creation of fetal personhood, however, seems to be a pre-textual means of effectuating this otherwise reasonable objective as the same result could be achieved by honoring female bodily autonomy and designating pregnant women as a special class of particularly vulnerable victim. Crimes against these victims would then be enhanced as “aggravated,” and penalties could correspond accordingly.

Irrespective of policy debates, by using existing child endangerment laws and expanded fetal recognition, the anti-abortion movement has won important ground in its quest to eradicate female reproductive choice. As analyzed above, appellate scrutiny has stalled some of these efforts, however, and conservative jurisdictions search for a more solid foundation upon which to bifurcate the pregnant woman’s body against itself. The following subsection analyzes the anti-abortion movement’s radical next step towards achieving that goal.

88 Id.
89 Id.
B. Tennessee’s Response: Targeted and Direct Criminalization of Pregnant Women

Last year, Tennessee’s criminal code received a radical edition.\(^\text{90}\) As a result, pregnant women who suffer from substance abuse addiction now face additional and separate charges for drug use: criminal assault on their own bodies.\(^\text{91}\) No longer are child endangerment statutes or third party perpetrators needed in Tennessee.

According to the law, a woman may be “prosecuted for assault for the illegal use of a narcotic drug while pregnant, if her child is born addicted to or harmed by the narcotic drug.”\(^\text{92}\) Tennessee also expanded its statutory definition of “victim” in criminal assaults to include “viable fetus.”\(^\text{93}\) One practical effect of these changes to Tennessee’s criminal code is that women may now face criminal investigation for not only positive test results, \textit{but also} poor birth outcomes since low birth weight and size happen to be, among other genetic causes, possible indicators of drug exposure.\(^\text{94}\)

Less than two weeks after enactment, Tennessee arrested twenty-six year old Mallory Loyola under the statute when her newborn tested positive for meth-amphetamines even though Meth is not a narcotic. In addition, no other evidence of physical harm to the baby was observed at the time of Ms. Loyola’s charging. Tennessee’s first case under the new law was therefore foreboding of the potential of prosecutorial abuse as neither of the elements required under the crime, a) use of narcotics, nor b) harm to the fetus, was proven by the state. Nonetheless, Loyola pled to a lesser misdemeanor to avoid felony prosecution and agreed to enter a drug rehabilitation program.

\(^{90}\) Supra, Tenn. Code, note 1
\(^{91}\) This paper argues that the statute itself leverages the prosecutorial manipulations and fetal victimhood movements enumerated above as it makes a fetus the direct victim of a pregnant women’s conduct.
\(^{92}\) See Tenn. Code, supra note 1.
\(^{93}\) \textit{Id.}
\(^{94}\) See Think Progress at thinkprogress.org.
Loyola’s case is informative, because even though she is white, she has low socio-economic status and therefore could not afford the protection of a private doctor nor private hospital, which likely would never involuntarily screen her newborn for drug exposure and almost certainly would not alert law enforcement if it conducted such screening. As previously discussed, defendants with limited resources like Loyola are also more likely to ultimately receive criminal sanction even in cases where the state lacks substantial evidence and other procedural defects exist. While Loyola is white, the economic and criminal justice realities analyzed in above suggest that poverty and race are close proxies in today’s America, and her case therefore bolsters the racial dimension of gender subordination at issue in this paper.

Prosecutors and law enforcement in this blatantly pro-life jurisdiction have pushed for this law on dual concerns. First, they argue that the law may help stem the supposed resurgence of drug use and abuse in the state, a familiar refrain for governmental institutions eager to entrench themselves and their political values. Secondly, proponents of the measure claim that criminal sanction serves the best interest of fetuses, a precarious class of “legal persons” yet to be recognized by legislation or jurisprudence on the federal level.

The medical community and RJ advocates like NAPW have responded on health and constitutional grounds. Tennessee Medical Association Director Gary Zelizer contends that “any kind of punitive approach, from a health care perspective, drives women underground. It doesn’t encourage them to get treatment.” If true, wouldn’t the exceedingly vulnerable fetus be at risk of greater harm in the context of maternal drug use? If driven “underground,” then pregnant women

95 See NAPW, supra note 72.
96 See Alexander, supra note 64.
97 See National Conference of State Legislatures, supra note 66.
98 Id.
of already limited means and their fetuses would likely make even less contact with health
providers during the most important times of their respective lives.

Beyond health ramifications, NAPW legal spokeswoman Farah Diaz-Tello argues that
the statute’s scope is overly broad and brings women within the prospect of criminal
investigations on the basis of poor birth outcomes alone. “The law itself, even though it permits
women to be charged with misdemeanor assault, in no way limits the prosecution to
misdemeanor assault, nor does it limit the prosecution to women who are illegally taking
narcotics,” says Diaz-Tello. The law potentially subjects any woman whose newborn presents
with medical complications or whose pregnancy is lost to law enforcement scrutiny so long as a
medical provider also suspects drug use “because criminal investigation is the only way to rule
out an unlawful act.”99 In this context, absent positive toxicology, doctors and nurses must
determine reasonable suspicion or probable cause as quasi-agents of state law enforcement, a
constitutionally precarious dynamic.100

Finally, while there is no organized data yet, most RJ observers predict the trend in
jurisdictions using child endangerment statutes to prosecute pregnant women will follow course
in Tennessee: poor women and women of color will suffer the brunt of prosecutions under the
new statute.101 Worse yet, Tennessee’s appellate courts will be hard-pressed to find a basis to
reverse such prosecutions. The State’s high court, or indeed the Supreme Court of the United
States will likely have to strike the law down on constitutional grounds since the Tennessee
legislature has firmly rooted direct sanctions against pregnant women in its criminal code in
unprecedented fashion.

99 Id.
100 See generally Fourth Amendment Search and Seizure Doctrine.
101 See NAPW, supra note 57.
Part IV.

Proposed Solutions: Constitution Based Legal Strategies and Social Activism

The preservation of female reproductive autonomy and the constitutional personhood of pregnant women must be won by both targeted legal strategy and relentless social activism. Legal Challenges to Tennessee’s statute should leverage the Constitutional protections found in the Fourth, Eighth, and Fourteenth Amendments. Social activism should raise media awareness in times of renewed racial unrest as extreme violence against black victims at the hands of civilians and law enforcement make daily headlines. The following subsections analyze these strategies in detail.

A. Constitutional Attacks to Tennessee’s Statute

While the Supreme Court has yet to grant certiorari on challenges to use of child endangerment statutes in pregnancy drug use prosecutions, Tennessee’s explicit criminalization of the same offers a direct target for ultimate judicial review. Whereas appellate benches in most jurisdiction disposed of abusive prosecutions under endangerment law, rendering Supreme Court scrutiny mostly redundant, Tennessee brazenly creates a new class of “perpetrators” and “victims” for the “crime” of drug use, which is already covered in its criminal code. In the process, Tennessee has dissimulated the pregnant woman’s body from itself. Constitutional rights to Due Process, Equal Protection, and Fundamental Privacy are therefore implicated and this new class of defendant has standing to make claims against these prosecutions like never before.

102 See generally New York City’s recent Stop and Frisk controversy as outlined by the Center for Constitutional Rights at http://ccrjustice.org/stop-and-frisk (last visited on April 27, 2015).
103 “Grant Cert” means to approve an application to review the validity of a law or lower court decision. See Black’s Law Dictionary.
104 See generally Due Process, Equal Protection, and Privacy doctrine.
B. Social Activism

Social justice advocacy yields results. The Civil rights movement ended formal segregation and ushered the enactment of the Civil Rights Act. Legal and social activism resulted in the *Roe* decision, and subsequent advocacy yielded the Pregnancy Discrimination Act. The ACLU and NAACP continue to pressure the criminal justice and penal systems for reform in police tactics, prosecutorial discretion, sentencing disparities, and the crisis of mass incarceration. Achievements are fragmented however, and “interested parties” continue to force large segments of the population into subordinate roles based on race, gender and class.

This paper argues that individual movements have too long isolated themselves from the root causes of social inequity. It is time for single-issue activism to recognize that the modern Capitalist mode of production, supported by imperialistic military engagement internationally, will always yield race and gender hierarchies as proxies for class subordination. The history of America is a history of ruling class dominance with Native Americans, African-Americans, women, and later immigrant groups occupying the ranks of the lower class and the disenfranchised. Even today, income inequality continues to rise, state discipline continues to segregate and remove people of color from the political process, and female Reproductive Justice continues to suffer major setbacks as state action threatens to obfuscate the constitutionality of pregnant women as persons, and relegate them to the status of reproductive hosts.

But these are mere manifestations of a greater pathology. Corporations and high wealth individuals continue to garner economic and political power and these entities shape social policies according to their interests. In this context, partisan politics over gay marriage, transgender identity, or even reproductive rights provide convenient distractions in “staged” media conflicts for a largely impotent body politic to consume.
So while targeted legal attacks on Tennessee’s statute are necessary responses to the symptoms of pathological inequality, social activism should and must confront the broader ideological crisis of the politico-economic regime: severe income inequality for the masses and extreme wealth accumulation for the few. Systematic rule making and power generation that engender inequality domestically and resource exploitation in post-colonial and conflict regions internationally, will perpetuate hierarchical economic arrangements and increase poverty. These conditions will in turn cause radicalism and social uprising both within and without. The “State” will then utilize violence in the form of criminalization, increasingly militaristic police action, and military force abroad. The cycle will continue until overconsumption and extreme opposition render the system unsustainable. Class equality will necessarily be valued in the system that follows. Race and gender status will therefore be less coveted targets for subordination.

Social justice activism should recognize this dialectic and incorporate systematic issues of class and status into their analysis. Seemingly singular issues manifest in broader socio-economic contexts, and responses to those issues should be crafted accordingly.

Part V.

Conclusion

The ongoing “War” on Reproductive Justice hones its weaponry in Tennessee’s recent legislation. Ironically, this bold new law is also a boon to the Reproductive Justice movement itself. Previous endangerment prosecutions could only be practically challenged on the misinterpretation of definitions within those statutes. Similarly, fetal personhood recognition in homicide statutes were unpopular sources for RJ opposition as they were mostly aimed at protecting “fetal interests” against third party offenders.
Tennessee’s law gives RJ a tangible object for legal challenge in its explicit targeting of pregnant women and resultant constitutional dismembering of their bodies. Legal activism should confront the law as a prohibited invasion of female reproductive autonomy and fundamental privacy. The mechanism of enforcement should also be attacked on Due Process grounds as doctors and medical institutions are increasingly used as quasi-agents of law enforcement, medical privilege is involuntarily usurped.

Finally, the RJ movement should fulfill the promise of its “human rights” approach to reproductive autonomy and join the opposition to the perpetual and sustained attack on race and class in an ideologically broken political regime.