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Competing historical and cultural understandings of the human body make clear that medicine and the law construe bodily truths from differing knowledge bases. Jurists rely virtually entirely on medical testimony to analyze biological data, and medical professionals are not usually conversant with the legal ramifications of their diagnoses. In early modern Europe, both physicians and jurists recognized that their respective professions were governed by different epistemological standards, a view articulated by Félix Vicq d'Azyr (1748-1794), anatomist and secretary to the Royal Society of Medicine in France from 1776. Vicq d'Azyr noted that while lawyers were required to make unyielding decisions based on conflicting laws, customs, and decrees, physicians were permitted more latitude for uncertainty.[1] In the late twentieth century, Western medicine and law have become inextricably entwined as technologies have produced new ethical dilemmas facing medicolegal jurisprudence.

The authority of women to voice and explain their experiences of pregnancy and childbirth before and during the eighteenth century contrasts powerfully with the twentieth century's reliance on medicolegal decisions to define these experiences. In early modern Europe, women controlled information, experience, and beliefs concerning reproduction, and women held authority over it. A woman only became officially and publicly pregnant when she felt her

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1. See Lindsay Wilson, *Women and Medicine in the French Enlightenment: The Debate over "maladies des femmes"* (Baltimore: Johns Hopkins University Press, 1993), 65. Vicq d'Azyr became the first Secretary to the Société Royale, which he helped to found in 1776.

fetus *quicken*, or move inside her, and she alone could ascertain and report the occurrence of quickening. In 1765, William Blackstone's *Commentaries on the Laws of England* stated that life "begins in the contemplation of law as soon as an infant is able to *stir* in the mother's womb" (emphasis added).[2]

A pregnancy did not exist until there was quickening, as announced by the pregnant woman, and a child did not exist until it was born alive. Pregnancy in the West today, in contrast, usually entails certification by a medical professional, and is verifiable through a number of tactile, laboratory, and visual interventions into a woman's body, from palpation to chemical analysis to ultrasonography. Focus on the fetus as an entity that is available to medical and legal professionals for pronouncement and intervention, and that can be discussed separately from the womb that contains it, is very much a modern phenomenon.[3] In a sense, female *interiority* has been made public, while women's bodily *exterior* has attained juridical and moral privacy rights.[4]

It is useful to examine these sharp contrasts between eighteenth- and twentieth-century ideas about pregnancy in order to understand better the current quagmire which has trapped attitudes toward pregnant women. During the eighteenth century in Europe, heated controversy surrounded the issue of whether the mental activity of a pregnant woman could cause her fetus to become misshapen, and thus

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2. William Blackstone, *Commentaries on the Laws of England* (London: n.p., 1765), I:129. Thomas Cobham wrote in his manual for confessors (c. 1216) that striking a pregnant woman in such a way that she miscarried was punishable by death if the fetus was "formed," but required only monetary restitution if the fetus was "unformed." Cited in G.R. Dunstan, "Introduction: Text and Context," in *The Human Embryo: Aristotle and the Arabic and European Traditions*, ed. G.R. Dunstan (Exeter: University of Exeter Press, 1990), 5. Angus McLaren comments on the demise of quickening as a juridical definition in *Reproductive Rituals: The Perception of Fertility in England from the Sixteenth to the Nineteenth Century* (London: Methuen, 1984), 138. Barbara Duden also remarks on this phenomenon in *Disembodying Women: Perspectives on Pregnancy and the Unborn* (Cambridge, Mass.: Harvard University Press, 1993), 82.

3. See Lisa Cody, "The Doctor's in Labour; or a New Whim Wham from Guildford," *Gender & History* 4 (Summer 1992): 175-96. Cody argues that "[i]n the eighteenth century, doctors were forced to listen to women to gain knowledge about reproduction" and, like Duden, dates the silencing of the female body to the nineteenth century, when medicine gained a kind of authority that no longer needed to be authenticated by women's voices. Indeed, a 1959 article in a medical journal not only questions the authority of women's accounts of their own experiences of pregnancy, but actively terms such accounts a factor in misdiagnosing causes of birth malformations: "Maternal memory bias is a source of error most difficult to control. The mother of a malformed child is likely to try hard to find a 'reason' for the child's defect in the events of the pregnancy. Thus the mother of an abnormal child will be more likely to remember unusual events during the pregnancy than will the mother of a normal child." F.C. Fraser, "Causes of Congenital Malformations in Human Beings," *Journal of Chronic Diseases* 10 (August 1959): 97-110.

4. Duden argues that this change occurred in the nineteenth century, when the woman yielded to the fetus as the focus of pregnancy, in a chapter entitled "The Uterine Police," in *Disembodying Women*, 94-95.

to be born malformed at birth. Analyzing the way this controversy was articulated in Europe during the Enlightenment, I will argue, helps us to understand the recent trend toward criminalizing the behavior or status of pregnant women in relation to their gestating fetuses. In this Article, I suggest that knowing the history of the thorny decisions we face concerning women and reproduction can help us to appreciate the importance of the controversies in which we are currently embroiled.

I

In 1991, a Florida appellate court upheld Jennifer Clarice Johnson's 1989 conviction under a Florida statute that criminalizes delivery of controlled substances to minors. Her newborn infant had tested positive for cocaine. Johnson was convicted for "gestational substance abuse" and sentenced to drug rehabilitation and fifteen years probation. The court found that Johnson had passed crack cocaine to her fetus via the umbilical cord; its opinion signalled the first successful prosecution of a pregnant woman in the United States for prenatal damage to a fetus.[5] The following year, the Florida Supreme Court unanimously overturned the conviction, declining "the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread."[6] By mid-1992, more than 160 women had been prosecuted in the United States for drug use during pregnancy through a variety of charges (e.g., criminal child abuse, assault with a deadly weapon, drug trafficking), although at this writing no state or federal laws specifically criminalize prenatal maternal behavior. Most of the women who were prosecuted were women of color living in poverty. Many pleaded guilty or accepted plea bargains, but all twenty-three women who have challenged their prosecutions to date have won their cases on grounds that their prosecutions were unconstitutional or without legal basis.[7]

Jennifer Johnson, twenty-three years old, poor, and African-American, became the first woman in the United States to be

5. Johnson v. State, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991). For discussions of this case, see Christina von Cannon Burdette, "Fetal Protection—An Overview of Recent State Legislative Response to Crack Cocaine Abuse by Pregnant Women," *Memphis State University Law Review* 22 (fall 1991): 119-35; Wendy Chavkin, "Jennifer Johnson's Sentence," *Journal of Clinical Ethics* 1 (1991): 140-41; Dorothy E. Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," *Harvard Law Review* 104 (7): 1419-82 (1991); and Ruth Colker, *Abortion & Dialogue: Pro-Choice, Pro-Life, & American Law* (Bloomington: Indiana University Press, 1992).

6. Johnson v. State, 602 So. 2d 1288 (Fla. 1992).

7. Center for Reproductive Law and Policy, *Punishing Women for Their Behavior During Pregnancy: A Public Health Disaster*, February 2, 1993. This pamphlet published by the Center lists the cases to date, and is available from the Center, 120 Wall St., New York, NY 10005. My thanks to Kathryn Kolbert, Vice President of the Center, for this information.

convicted of delivering drugs to her fetus *in utero*.[8] Crucial to her prosecution was the fact that Johnson was not convicted of *using* drugs, only of exposing her fetus to drugs. Had Johnson terminated her pregnancy, the prosecution would never have taken place. The charges brought against Johnson concerned drug *exposure* rather than *harm*. The government introduced no evidence to prove that Johnson's drug use adversely affected her children; on the contrary, there was testimony that Johnson's children were healthy and normal. Dorothy E. Roberts has argued that race and class figured prominently in the Johnson prosecution, and also generally influence the state's choice to punish, rather than to provide services for, pregnant drug addicts, who are primarily poor African-Americans. "These women are not punished simply because they may harm their unborn children," Roberts asserts. "They are punished because the combination of their poverty, race, and drug addiction is seen to make them unworthy of procreating."[9]

Criminal cases such as the one brought against Jennifer Johnson have profound repercussions for ideas about women's bodies, pregnancy, and fetuses. Such prosecutions necessarily vest fetuses with the status of persons whose rights can be asserted against the rights of their mothers, thereby creating an adversarial relation between pregnant women and their fetuses. The legal notion of fetal personhood is relatively new in our legal discourse and, ironically, results in part from the 1973 United States Supreme Court decision on abortion in *Roe v. Wade*. The majority in *Roe* held that "the unborn have never been recognized in the law as persons in the whole sense," and that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[10] However, the

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8. State v. Johnson, No. E89-890-CFA (Fla. Cir. Ct. July 13, 1989), *aff'd*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991), *rev'd*, 602 So. 2d 1288 (Fla. 1992).

9. Roberts, "Punishing Drug Addicts Who Have Babies," 1472. Roberts points out that crack cocaine addiction—overwhelmingly a phenomenon of African-Americans—has been singled out for these prosecutions, even though there is compelling evidence that prenatal use of other kinds of drugs, such as alcohol or marijuana, causes fetal harm. Other drugs tend to find niches in middle-class white populations. Johnson's crack addiction came to light because she confided her drug use to her obstetrician at a public hospital. The state organized its prosecution on the theory that Johnson's efforts to get help for her addiction showed that she knew her drug use harmed her fetus. Ibid., 1449. In People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991), the court held that use of cocaine by a pregnant woman cannot be subject to criminal prosecution under a statute that prohibits delivery of cocaine.

10. Roe v. Wade, 410 U.S. 113, 162 (1973). An interesting contrast to *Roe*, and historical precursor of abortion debates, can be found in the mid-eighteenth-century *Petition of the Unborn Babes to the Censors of the Royal College of Physicians of London*, 2nd ed. (London: M. Cooper, 1751). This document represents a response to two physicians of the Royal College, referred to as Drs. Pocus and Maulus, who argued against an inquiry into the deaths of six children delivered by a man-midwife. The *Petition* tried to convince the physicians that "these Children . . . were distinct Beings, . . . and were equally entitled to Preservation with their Mothers." Ibid., 4-5.

trimester division that defined "viability" in *Roe* paradoxically relied upon the determination of a certain moment at which a fetus becomes an entity separate and separable in law from its mother. Fetal *viability* as a concept inherits much of the power of *quickening*, but with the crucial difference that it is decided by physicians and jurists rather than by pregnant women.[11]

In early modern Europe, the pregnant woman was responsible for prenatal care, because pregnancy was not the medicalized condition it is today. The period's advice literature tended to be written by and for women (although only a small percentage of aristocratic women could read), and included counsel on nutrition, exercise, and travel as well as recipes for abortifacients, often described as mixtures to induce menstruation or to remove false pregnancies.[12] The literature

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11. Mary Poovey argues that the trimester scheme for viability used in *Roe* produces a tripartite division in authority over a pregnancy: pregnant women have choices in the first trimester, physicians make decisions about the second trimester, and courts regulate the third trimester. Poovey points out that both pregnant women and fetuses challenge the notion of the humanist subject; pregnant women because they are not unitary, and fetuses because they are not self-determining. Poovey, "Feminism and Postmodernism—Another View," *boundary* 19 (2): 34-52 (1992). See Dawn E. Johnsen, "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection," *Yale Law Journal* 95 (3): 599-625 (1986), and "Maternal Rights and Fetal Wrongs: The Case against the Criminalization of 'Fetal Abuse,'" *Harvard Law Review* 101 (5): 994-1012 (1988), for arguments against the idea of fetal rights. Johnsen points out that criminalizing substance use by pregnant women only hinders them from seeking drug treatment and from getting prenatal care, for fear of being prosecuted. For the most cogent argument on the other side, see John A. Robertson, "Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth," *Virginia Law Review* 69 (April 1983): 405-64. Robertson assumes that all pregnancies carried to term include the free choice both to be pregnant and not to abort. For discussion of the personhood status of the fetus from medical, legal, theological, and philosophical points of view, see several articles in William B. Bondeson et al., eds., *Abortion and the Status of the Fetus* (Dordrecht: D. Reidel Publishing Co., 1983): Leonard Glantz, "Is the Fetus a Person? A Lawyer's View," 107-17; Patricia D. White, "The Concept of Person, the Law, and the Use of the Fetus in Biomedicine," 119-57; Gerald D. Perkoff, "Toward a Normative Definition of Personhood," 159-66; H. Tristram Engelhardt, Jr., "Viability and the Use of the Fetus," 183-208; and Caroline Whitbeck, "The Moral Implications of Regarding Women as People: New Perspectives on Pregnancy and Personhood," 242-72. Whitbeck's essay is the only one in the collection that focuses on the experiences and situations of pregnant women. She argues that the maternal-fetal relation has been "inadequately conceptualized." Ibid., 253-54.

A broad discussion of the issues implicated by prenatal technologies and knowledge is in Ruth Hubbard, *The Politics of Women's Biology* (New Brunswick, N.J.: Rutgers University Press, 1990), 141-98. Physicians, too, define the maternal-fetal relation as adversarial, in one textbook referring to the possibility that "the intrauterine environment is hostile." Leo R. Boler, Jr. and Norbert Gleicher refer to "a precarious medicolegal situation" and conclude that "it remains to be determined whether fetal indications allow infringement on maternal rights," in "Maternal versus Fetal Rights," chapter 14 of *Principles of Medical Therapy in Pregnancy*, ed. Norbert Gleicher (New York: Plenum Press, 1985), 141. See also W.A. Bowes, Jr., and D. Selgestad, "Fetal versus Maternal Rights: Medical and Legal Perspectives," *Obstetrics and Gynecology* 58 (1981): 209-14.

12. For discussions about writings and attitudes concerning women's reproductive health in medieval medicine, see Beryl Rowland, ed., *Medieval Woman's Guide to Health: The First English Gynecological Handbook* (Kent, Ohio: Kent State University Press, 1981), and John F. Benton, "Trotula, Women's Problems, and the Professionalization of Medicine in the Middle Ages," *Bulletin of the History of Medicine* 59 (spring 1985): 30-53. An excellent account of early modern beliefs about menstruation is in Patricia Crawford, "Attitudes to Menstruation in

advised pregnant women not to travel in carriages or ride horseback, and not to consume strong liquor or spicy foods. Some advice, and its underlying rationale, differed from today's advice for pregnant women. Wine, for example, was often recommended during pregnancy, but strong drink while pregnant or lactating was thought to cause childhood rickets. The traditional diet in England during the seventeenth century was highly salted and included a high consumption of alcohol, estimated by Robert Fogel at the stunning amount of between 3 and 9 ounces of absolute alcohol daily.[13] However, nothing existed that bore any resemblance to our current ideas about the etiology of fetal-alcohol syndrome.[14]

A long history predates recent challenges to maternal autonomy in decision making about pregnancy and in blame for its outcome. In *Dietrich v. Northampton* (1884), Justice Oliver Wendell Holmes denied cause for wrongful death in the case of a premature stillborn fetus born after its mother had fallen. Holmes argued that the fetus is part of the mother and is not owed a separate duty of care.[15]

Seventeenth-Century England," *Past and Present* 91 (1981): 47-73.

13. Robert W. Fogel, "Nutrition and the Decline in Mortality Since 1700: Some Additional Preliminary Findings," (National Bureau of Economic Research, 1986), Working Paper No. 1802, 68-69. It is clear from this figure, and from much of the imaginative literature of the seventeenth and eighteenth centuries, as well as from evidence concerning popular entertainments, that drunkenness was relatively routine. By the mid-eighteenth century, concern had mounted about the effects on infants of their mothers' excessive drinking during pregnancy. See Alvin E. Rodin, "Infants and Gin Mania in Eighteenth-Century London," *Journal of the American Medical Association* 245 (March 27, 1981): 1237-39. For another discussion of nutrition during pregnancy, see Michael K. Eshleman, "Diet During Pregnancy in the Sixteenth and Seventeenth Centuries," *Journal of the History of Medicine* 30 (1975): 23-39. I am indebted here to Linda A. Pollock's excellent overview of pregnancy among the landed elite in England in "Embarking on a Rough Passage: The Experience of Pregnancy in Early-Modern Society," in *Women as Mothers in Pre-Industrial England*, ed. Valerie Fildes (London: Routledge and Kegan Paul, 1990), 39-67. Advice and practice concerning diet differs markedly among cultures, and also varies significantly by classes, nations, and ethnic groups.

14. Prosecutions of pregnant women in early modern Europe were confined to those who conceived out of wedlock. See Patricia Crawford, "The Construction and Experience of Maternity," in *Women as Mothers in Pre-Industrial England*, especially 9-10. The rate of prosecutions for prenuptial pregnancy varied. In addition, laws concerning bastards made unwed motherhood extremely difficult. An illegitimate child could not inherit property, and poor women had few means to force the fathers to marry them. Adultery and fornication were also prosecutable offenses. Ellen Fitzpatrick discusses one case of attitudes toward, and treatment of, unwed mothers in North America during this period in "Childbirth and an Unwed Mother in Seventeenth-Century New England," *Signs* 8 (summer 1983): 744-49. For other historical discussions of prosecuting pregnant women, see June K. Burton, "Human Rights Issues Affecting Women in Napoleonic Legal Medicine Textbooks," *History of European Ideas* 8 (4): 427-34 (1987), and Adrienne Rogers, "Women and the Law," in *French Women and the Age of Enlightenment*, ed. Samia Spencer (Bloomington: Indiana University Press, 1984), 33-48. It is important to note that throughout the eighteenth century, Western Europeans believed that female orgasm was required for conception. If she became pregnant, a woman was in no position to claim rape because pleasure was seen as implying consent. Changes in these views, and changes in views of female sexual pleasure more generally, are traced for North America in Carl N. Degler, "What Ought to Be and What Was: Women's Sexuality in the Nineteenth Century," *American Historical Review* 79 (1974): 1467-90.

15. Dietrich v. Northampton, 138 Mass. 14, 52 (1884).

Courts followed Holmes's analysis concerning prenatal injuries until 1946, when a District of Columbia court recognized a fetus as a "distinct individual."[16] Thus, the concept of fetal personhood in United States law is a post-World War II phenomenon.

"At all stages of pregnancy," writes Lynn M. Paltrow, "the fetus is completely dependent on the woman—everything she does could affect it. . . . Recognizing 'fetal abuse' moves us toward criminalizing pregnancy itself because no woman can provide the perfect womb."[17] Paltrow argues that we face a slippery slope: the prohibition against cocaine could similarly promote bias against alcohol and tobacco, strenuous exercise, poor nutrition, driving a car, riding in an airplane, or owning a gun. The imperfect womb, while not the object of legal sanctions until after 1946, has been targeted for centuries as the source and foundation of birth disabilities and malformations. Although the move toward criminalizing the conduct of pregnant women is radically new in United States jurisprudence, it harks back to an ancient tradition of searching for explanations for birth mishaps in the minds and bodies of pregnant women, a tradition that reached its peak during the eighteenth century.

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16. Bonbrest v. Katz, 65 F. Supp. 138, 140 (D.D.C. 1946). See Tracy Dobson and Kimberly K. Eby, "Criminal Liability for Substance Abuse During Pregnancy: The Controversy of Maternal v. Fetal Rights," *Saint Louis University Law Journal* 36 (spring 1992): 655-94. Leonard Glantz writes that "although the law rarely lends itself to blanket statements, it can be clearly stated that a fetus is not a person under the law. . . . [F]etuses are not required to be protected," in "Is the Fetus a Person? A Lawyer's View," in Bondeson et al., eds., *Abortion*, 116.

17. Lynn M. Paltrow, "No: 'Fetal Abuse': Should We Recognize It as a Crime?" *ABA Journal* 39 (August 1989): 39. See also Lynn M. Paltrow, "When Becoming Pregnant Is a Crime," *Criminal Justice Ethics* 9 (1): 41-47 (1990). This issue is a symposium on "Criminal Liability for Fetal Endangerment." It is important to mention that there remains controversy over the precise effects of maternal cocaine use on a gestating fetus. It is difficult to single out intrauterine cocaine exposure as a factor in fetal development, because often prenatal cocaine exposure is only one of a number of factors—poor nutrition, lead poisoning, cigarettes, other drugs, as well as multiple short-term foster placements, homelessness, abuse, and the like—determining outcomes such as low birth weight or early cognitive deficits. See Linda C. Mayes et al., "The Problem of Prenatal Cocaine Exposure: A Rush to Judgment," *Journal of the American Medical Association* 267 (January 15, 1992): 406-08. The authors argue that factors such as methodological problems in determining the developmental effects of cocaine use during pregnancy, and bias in clinical decisions about reporting low-income and black women for drug use, make it difficult to assess the problem and label a large group of children as "irremediably damaged." Ibid., 408. Such factors also "work toward exempting society from having to face other possible explanations of the children's plight—explanations such as poverty, community violence, inadequate education, and diminishing employment opportunities that require deeper understanding of wider social values." Ibid., 406. Physicians have remarked on external factors affecting fetal growth such as socioeconomic conditions and tobacco smoking. See Donald B. Cheek, Joan E. Graystone, and Margaret Niall, "Factors Controlling Fetal Growth," *Clinical Obstetrics and Gynecology* 20 (December 1977): 925-42.

II

During the eighteenth century, physiologists, philosophers, and medical commentators engaged in a heated debate about whether or not imaginative activity in the minds of pregnant women could explain birthmarks and birth malformations. Seventeenth- and eighteenth-century developments in embryology and in neurophysiology were crucial for the development of this quarrel about pregnancy and the power of the mind. The adversarial and internally conflicting discourses that constituted this debate grew out of diverse cultural beliefs about the human body and about women and mothering, and were embedded in eighteenth-century medical writings.

Demarcation of bodily borders was complicated in the eighteenth century.[18] While the physical body was known to have a skin, that surface material represented not only a boundary, but also a fluid surface where interior life revealed itself.[19] Inside and outside, body/self and the external world operated in a process of continual exchange. Early in the century, women did not "reproduce" when they bore children; rather, they participated in *generatio*, or "fruitfulness." The reproductive apparatus of a woman's body that today is classified and studied under the medical rubrics of obstetrics and gynecology did not exist as a unit of medical knowledge in the early eighteenth century. Fetuses were nourished and developed by women, whose anatomical structures were far better understood than their functions.

During the Enlightenment, Europeans insisted on the relation of bodies as classificatory systems. Categories of the body delimited both sensory experience and human notions of autonomy and aesthetics. The female body contained a particular potential to invoke the monstrous because of the female's capacity to create monstrosity through her capacity for generation.[20] By the mid-nineteenth century, representations of women's bodies were subsumed into an etherealized domestic ideal, but early-eighteenth-century

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18. See Barbara Duden, *The Woman Beneath the Skin: A Doctor's Patients in Eighteenth-Century Germany*, trans. Thomas Dunlap (Cambridge, Mass.: Harvard University Press, 1991), and Ludmilla Jordanova, "Guarding the Body Politic: Volney's Catechism of 1793," in *1789: Reading, Writing, Revolution, Proceedings of the Essex Conference on the Sociology of Literature*, ed. Francis Barker et al. (Essex: University of Essex Press, 1982), 12-21.

19. For one view of how mechanistic ideas of physiology operated in eighteenth-century literature, see Juliet McMaster, "The Body Inside the Skin: The Medical Model of Character in the Eighteenth-Century Novel," *Eighteenth-Century Fiction* 4 (July 1992): 277-300.

20. On Jonathan Swift's deployment of this idea, see Susan Bruce, "The Flying Island and Female Anatomy: Gynaecology and Power in *Gulliver's Travels*," *Genders* 2 (Summer 1988): 60-76.

images of women reflected the perceived threat of an unsocialized, willful, and appetitive female sexuality.[21] In the Enlightenment, Europeans believed that ideas physically manifested themselves across the bodies of pregnant women. The eighteenth-century maternal imagination debates were therefore crucial not only for their cultural representation and medical analysis of women's bodies, but also for the ability of women to control their own lives.

In London in 1714, English surgeon Daniel Turner published a medical treatise called *De Morbis Cutaneis: A Treatise of Diseases Incident to the Skin.* Turner's brief treatise was important as the first English dermatology text in the history of medicine, but its fame rests on the vehement debate it provoked. In *De Morbis Cutaneis*, Turner defined what he called "that Faculty of the sensitive Soul called Phansy or Imagination" as a physiological power that resided in the brain. It operated, he argued, by irradiating nervous fluid inward in response to impressions received by the external organs, admittedly a vague definition from a modern perspective. Turner needed to define the imagination in his treatise because he made a controversial claim in his chapter about the causes of birthmarks. That chapter carried a typically long-winded eighteenth-century title: "Of Spots and Marks of a diverse Resemblance, imprest upon the Skin of the *Foetus*, by the Force of the Mother's Fancy; with some Things premis'd, of the strange and almost incredible Power of Imagination, more especially in pregnant Women." Turner could not explain his claim. In fact, he wrote: "how these strange Alterations should be wrought, or the *Foetus* cut, wounded and maimed, as if the same were really done with a Weapon, whilst the Mother is unhurt, and merely by the Force of her Imagination, is, I must confess ingenuously, . . . *Supra Captum, i.e.* above my Understanding."[22] James Augustus Blondel, a Parisian educated at the University of Leiden and a noted member of the College of Physicians of London, responded virulently to Turner's assertion. Blondel asked: "[W]hat can be more scandalous, and provoking, than to suppose, that those whom God Almighty has endow'd, not only with so many charms, but also with an extraordinary Love and Tenderness for their Children, instead of answering the End they are made for, do bread [*sic*] *Monsters* by the Wantonness of their Imagination?"[23]

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21. See Mary Poovey, *Uneven Developments: The Ideological Work of Gender in Mid-Victorian England* (Chicago: University of Chicago Press, 1988), 9-10.

22. Daniel Turner, *De Morbis Cutaneis* (London: R. Bonwicke et al., 1714), 102-28.

23. James Augustus Blondel, preface to *The Strength of Imagination in Pregnant Women* (London: J. Peele, 1727). Both Barbara Maria Stafford, in *Body Criticism: Imaging the Unseen in Enlightenment Art and Medicine* (Cambridge, Mass.: MIT Press, 1991), 314-15, and Marie-Hélène Huet, in *Monstrous Imagination* (Cambridge, Mass.: Harvard University Press, 1993),

The theory of the maternal imagination, or maternal impressions, embraced two quite separate ideas. First, a pregnant woman's longings, if ungratified, were understood to *mark* her fetus. Hence, if a woman's overwhelming desire for strawberries could not be satisfied, her infant would be born with a strawberry mark.[24] Cravings (or aversions) of this sort did not always involve food. They could also pertain to religious or sexual activities, or to obsessive acts or thoughts. Yet it is telling that the vast majority of examples of the first type of maternal impression involved a pregnant woman's uncontrollable appetite for fruit. The French physician-theologian Nicholas Malebranche, a major influence on Turner, had written in his 1674 *De la recherche de la vérité* [*In Search of Truth*] that a mother's desire for fruit caused her fetus to imagine and desire the fruit as well, so that "these unfortunate infants thus become like the things they desire too ardently."[25] It is not hard to find here a theological analogy between monstrous offspring and forbidden fruit.[26]

Second, the pregnant woman needed to avoid disturbing experiences at all costs, on the theory that negative experiences would be mirrored in a related physical deformity in her child. For example, if the sight of a street beggar missing the fingers of one hand startled her, her infant would be born lacking the fingers of the corresponding hand. The anonymous early eighteenth-century midwifery handbook, *Aristotle's Compleat and Experienc'd Midwife*, contained this advice: "Let none present any strange and unwholesome Thing to her, nor so much as name it, lest she should desire it, and not be able to get it, and so either cause her to Miscarry, or the Child to have some Deformity on that Account."[27] John Maubray went further in his

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64-67, take up this debate. See also Philip K. Wilson, "Out of Sight, Out of Mind? The Daniel Turner-James Blondel Debate over Maternal Impressions" (master's thesis, The Johns Hopkins University, 1987).

24. Curiously, a 1908 obstetrics textbook discussed cravings in a very different way. They were taken seriously, and although this text granted that cravings were a common feature of many pregnancies, it also suggested that such cravings are "deleterious" and that pregnant women must exercise self-control in order to overcome their desires. The author later asserted that "[r]eproduction is the test of a nervous woman, and should she be in any way mentally or physically weak, her brain may give way under the trial." Ernest Hastings Tweedy, *Tweedy's Practical Obstetrics*, ed. Bethel Solomons, 6th ed. (London: Oxford University Press, 1929), 218, 496.

25. Nicholas Malebranche, *The Search After Truth*, trans. Thomas M. Lennon and Paul J. Olscamp (Columbus: Ohio State University Press, 1980), 117.

26. See Huet, *Monstrous Imagination*, 48-49. Stafford also connects epidermal stains with Original Sin in *Body Criticism*, 318.

27. *Aristotle's Compleat and Experienc'd Midwife*, 4th ed. (London: by the booksellers, 1721), 30. This work was an anonymous and popular version of Aristotle's *De generatione et corruptione* and was continuously in print into the 1930s in Great Britain. See Paul-Gabriel Boucé, "Imagination, Pregnant Women, and Monsters in Eighteenth-Century England and France," in *Sexual Underworlds of the Enlightenment*, ed. G.S. Rousseau and Roy Porter (Chapel Hill: University of North Carolina Press, 1988), 86-100.

popular *The Female Physician* (1724). Maubray placed responsibility for these misadventures on the pregnant woman herself: "She ought discreetly to suppress all *Anger*, *Passion*, and other *Perturbations* of Mind, and avoid entertaining too *serious* or *melancholick Thoughts*; since all *such* tend to impress a *Depravity* of Nature upon the Infant's *Mind*, and *Deformity* on its *Body*." In addition, Maubray suggested that pregnant women must maintain domestic harmony in their households and marriages. According to Maubray, "there never ought so much as a *Cloud* to appear in [her] *Conjugal Society*; since all such unhappy *Accidents* strongly affect the growing *Infant*."[28]

Families took seriously the desires of pregnant women and the need to satisfy them. A striking early example of this truth: When his pregnant wife told the German botanist Joachim Camerarius (1534-1598) that she felt overwhelmed by the need to smash a dozen eggs in his face, he obliged her by submitting to her desire.[29] Actually, the best-known maternal imagination case in England was a fraud: in 1726, Mary Tofts of Godalming in Surrey, commonly known as the "rabbet woman," contrived a lucrative hoax by claiming that she gave birth to seventeen rabbits after being frightened in the fields.[30] In 1746, the *Gentleman's Magazine*, a politically moderate English monthly that covered a wide range of medical topics, published a typical report of a malformed birth ascribed to the maternal imagination:

> The wife of one Rich. Haynes of Chelsea, aged 35 and mother of 16 fine children, was deliver'd of a monster, with nose and eyes like a lyon, no palate to the mouth, hair on the shoulders, claws like a lion instead of fingers, no breast-bone, something surprising out of the navel as big as an egg, and one foot longer

28. John Maubray, *The Female Physician* (London: James Holland, 1724), 75-77. Maubray was considered a mystic and not taken seriously by medical practitioners; cited in Dolores Peters, "The Pregnant Pamela: Characterization and Popular Medical Attitudes in the Eighteenth Century," *Eighteenth-Century Studies* 14 (Summer 1981): 437.

29. This example is cited in McLaren, *Reproductive Rituals*, 40. See also Jacques Gélis, *History of Childbirth: Fertility, Pregnancy and Birth in Early Modern Europe*, trans. Rosemary Morris (Boston: Northeastern University Press, 1991), 53-58, originally published as *L'Arbre et le fruit* (Paris: Fayard, 1984), which gives an overview of ideas about cravings and imaginings.

30. This event became a major popular scandal in England, particularly for John Howard, the physician who claimed to have delivered the rabbits, and for Nathaniel St. André and Samuel Molyneux, who travelled to Guildford to ascertain the veracity of the reports. St. André was Anatomist-Royal (the royal physician), and when the hoax was exposed, he lost his job. For a discussion of the Mary Tofts story, see S.A. Seligman, "Mary Tofts: the Rabbit Breeder," *Medical History* 5 (1961): 349-60, and Glennda Leslie, "Cheat and Imposter: Debate Following the Case of the Rabbit Breeder," *The Eighteenth Century: Theory and Interpretation* 27 (Fall 1986): 269-86.

> than the other.—She had been to see the lions in the Tower, where she was much terrify'd with the old lion's noise.[31]

According to the theory of maternal impressions, the birth of a defective infant unveiled the secret passions of its mother. In some ways, one could argue that the birth of an addicted baby today also suggests a secret failure of its mother. The very term "crack baby" implies a fissure or breakage in a mother's ability to reproduce. It is not surprising, then, that the birth of what was invariably termed a "monster" called into question, above all, the legitimacy of its parentage. Malformed births represented a major social problem in early modern Europe. A monstrous birth lacked legitimacy in a fundamental way. Such an infant failed to resemble its (or any) father; hence, in a social order ruled by the laws of primogeniture and patrilineage, a malformed birth was a basic social disruption. Before the sixteenth century, a monstrous birth signified the opposite of its father's stamp. It was a portent, a sign of the wrath of God.[32] Conflicts arose between the ecclesiastical interest in the immortal soul of the infant and the secular authority's concern for determining property rights, inheritance, and legitimacy. Both interests pressured midwives, who were responsible for determining whether a live birth had taken place (hence affecting primogeniture) and for baptizing moribund newborns.

The notion of fetal personhood necessary to cases such as *State v. Johnson* in 1989 was unthinkable in the eighteenth century when newborns did not legally exist unless born alive. The familiar conflict between saving the mother's life and preserving the product of her labor was not at issue in early modern Europe. The mother's health and survival unequivocally came first, as it was the pregnant woman who was being delivered, not the fetus. This clear priority of concern underlay the midwifery practice of manual version, using hands to turn the fetus in the womb, and the typically male surgical practices of craniotomy and embryotomy, as means of removing a dead fetus from a living woman.[33] This view was not limited to early modern Europe. The *Mishnah*, for example, stipulates that an embryo can be

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31. *Gentleman's Magazine* 16 (1746): 270; cited in Roy Porter, "Lay Medical Knowledge in the Eighteenth Century: The Evidence of the *Gentleman's Magazine*," *Medical History* 29 (1985): 148. The best places to seek examples of birth malformations ascribed to the maternal imagination are in the casebooks of practicing midwives and obstetricians. Two studies that use these sources are Amalie M. Kass, "The Obstetrical Casebook of Walter Channing, 1811-1822," *Bulletin of the History of Medicine* 67 (Fall 1993): 494-523, and Duden, *The Woman Beneath the Skin*, although neither Kass nor Duden focuses on the maternal imagination.

32. For useful background, see Keith Thomas, *Religion and the Decline of Magic* (New York: Charles Scribner's Sons, 1971).

33. See Lynne Tatlock, "Speculum Feminarum: Gendered Perspectives on Obstetrics and Gynecology in Early Modern Germany," *Signs* 17 (Summer 1992): 725-60.

dismembered to save the life of a woman, "for her life takes precedence over its life" as long as its head has not yet emerged. Once its head is visible, "it may not be touched, since we do not set aside one life for another."[34]

III

The subject of maternal impressions did not by any means originate either in the eighteenth century or in Europe. The belief that the maternal mental state influences fetal development is ancient and can be found in Hindu medical treatises that predate Western Hippocratic medicine by many centuries.[35] Ayurvedic texts argue that prenatal beings are sentient and environmentally responsive. The *Garbha Upanishad* and the *Susruta-samhita*, for example, claim that the fetus expresses its desires through the mother's longings, and that such longings must be gratified. The *Caraka-samhita* provides a guide for pregnant women that equates certain eating habits (excessive sweets or fish) or behaviors (sleepwalking or sexual promiscuity) with character traits in the unborn child.[36] The Judeo-Christian tradition also offers a notable example of the theory that maternal sense impressions mark offspring: the story of Jacob placing rods before his flock so that they would bear speckled and spotted cattle.[37]

The two separate ideas that together form the concept of the maternal imagination are quite different. Although both types are involuntary on the part of the pregnant woman, cravings or obsessions are active, whereas observing unsettling persons, or events, or representations amounts to a passive experience that is externally imposed. Both types of maternal impression ultimately raise questions about the formulation of theories concerning female desire and its location in the generative female body. Interestingly, the idea of cravings is the one that persists both as folklore and in obstetrics textbooks today—the pickles-and-ice-cream (or, in the 1959 Disney animated classic "Lady and the Tramp," watermelon-and-chop-suey)

34. Ohaloth 7:6. Cited by L.E. Goodman, "The Fetus as a Natural Miracle: The Maimonidean View," in *The Human Embryo*, 88.

35. The Ayurvedic views on embryology also include the notion that children's deformities can be the result of parental sin in this or a previous life. See Vaidya Bhagwan Dash, *Embryology and Maternity in Ayurveda* (New Delhi: Delhi Diary, 1975). See also Lakshmi Kapani, trans., "Upanishad of the Embryo," and Kapani, "Note on the Garbha-Upanishad," in *Fragments for a History of the Human Body*, vol. 3, ed. Michael Feher (Cambridge, Mass.: MIT Press, 1989), 175-96.

36. See L.D. Hankoff and Ultamchandra L. Munver, "Prenatal Experience in Hindu Mythology," *New York State Journal of Medicine* 80 (December 1988): 2006-14.

37. Gen. 30:31-43, Revised Standard Version.

takeover of the pregnant woman's appetite.[38] But in their early modern formulation, the maternal imagination debates proposed a continuum between the passive reception of sensory experience, and the active production of desire. The maternal imagination debaters derived from the Lockean concept of the primacy of sensory experience the closest approximation we get in the seventeenth and eighteenth centuries to a notion of what women wanted.

In addition to the array of thinkers on generation from Heliodorus and Empedocles to Etienne and Isidore Geoffry Saint-Hilaire (the father-and-son founders of teratology, the scientific study of monsters), dozens of writers participated in the maternal impressions debate during the Enlightenment. Responding to the ideas of Daniel Turner, Blondel published *The Strength of Imagination in Pregnant Women Examin'd; and the Opinion that Marks and Deformities in Children arise from thence, Demonstrated to be a Vulgar Error* (1727). Turner counter-responded in 1730 with *The Force of the Mother's Imagination upon her Foetus in Utero.* Henry Bracken's *The Midwife's Companion* (1737) sided with Turner. Bracken cited the example of the fingerless beggar and suggested the sociopolitical implications of these ideas: "Indeed, such Objects as these [the beggar] should be driven out of every Town, by express Order of the Magistrate: For it is not hardly credible the Number of Children who are born monstrous on such Accounts."[39]

A French argument in support of Blondel appeared in 1745 when Bordeaux physician Isaac Bellet published his *Lettres sur le pouvoir de l'imagination des femmes enceintes.* Bellet argued against maternal impressions, and he also reported that this mistaken prejudice destroyed the repose and health of pregnant women. The smallest events made them anxious or alarmed, and they lived in fear of experiencing or thinking something that would hurt their infants. This situation was so dreadful, according to Bellet, that he asserted that imaginary maladies became real ones and affected the infant in the womb.[40] Later in the century, in *The Pupil of Nature; or Candid Advice to the Fair Sex* (1797), Martha Mears presented the same circular argument about maternal passions. Mears wrote that there was no nervous communication between mother and fetus, but that

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38. See Sheldon H. Cherry et al., eds., *Rovinsky and Guttmacher's Medical, Surgical, and Gynecologic Complications of Pregnancy*, 3rd ed. (Baltimore: Williams & Wilkins, 1985), 623, which alleges that pregnant women act out their conflicts through food: "Examples of cravings are ice cream, and the situation where a woman wakes her husband up in the middle of the night in winter asking for strawberries."

39. Henry Bracken, *The Midwife's Companion; or, A Treatise of Midwifery* (London: J. Clarke, 1737), 40-41.

40. Isaac Bellet, *Lettres sur le pouvoir de l'imagination des femmes enceintes* (Paris: Frères Guérin, 1745), 3.

"[i]t is of the utmost moment to root out of the mind those fatal apprehensions; or they will often produce the very evils to which they are so tremblingly alive." Disease during pregnancy may result, or difficulty in delivery, and even "a puny, or distorted infant is sometimes brought forth—the victim of its mother's terrors."[41] In 1747, John Henry Mauclerc published a refutation of Blondel's 1727 treatise: *Dr. Blondel Confuted: or, the Ladies Vindicated.* Mauclerc's subtitle, *the Ladies Vindicated*, reveals the underlying problem in these quarrels: the status of pregnant women as rational beings. The debate made clear both that the locus of responsibility for pregnancy remained with women and that female interiority represented a potential excess that must be policed.

The maternal imagination debate gradually died out, its ideas subsumed in some measure into the science of teratology by the early nineteenth century. Importantly, no definitive conclusion ever resolved the quarrel, and belief in the power of the maternal imagination remains in various cultures' folk beliefs. It is clear from the language of the medical treatises that contributed to the maternal impressions debate that the subject encompassed more than just the maternal imagination's influence on fetal development. This debate was about passion and power with respect to the early modern understanding of the body as an envelope, a coating for the soul, a receptacle whose corporeality was allegorical as well as physical.

Embryology did not emerge as a separate medical discipline until the second half of the sixteenth century. The Turner-Blondel contribution to ideas of generation appeared at the height of beliefs in embryological *preformation*, the view that the whole human structure exists in miniature prior to conception. Preformationist views came in a variety of flavors and were not an eighteenth-century invention, although they had been presented with greater reserve in earlier periods.[42] But around the end of the seventeenth century, preformationist arguments began to appear frequently in medical literature. The usual version of preformation was called *animalculism* or *spermaticism*. It held that a preformed human being inhabited the male seed. There was an interesting controversy concerning why, if animalculism was valid, children often looked like their mothers. One explanation involved the maternal imagination: vain pregnant women looked at themselves in the glass, and their images then imprinted onto the fetuses they carried. There was also a strain of prefor-

41. Martha Mears, *The Pupil of Nature; or Candid Advice to the Fair Sex* (London: for the author, 1797), 27-28.

42. See Jean Rostand, *La Formation de l'être: Histoire des idées sur la génération* (Paris: Librairie Hachette, 1930).

mationism called *ovism* that saw the female egg as the repository for the homunculus, a view that seemed to be shored up by Regnier de Graaf's discovery of the ovarian follicle in 1672. The most extreme version of preformationist belief was the notion of *emboîtement*, or encasement, which could be accommodated in either spermaticist or ovist formulations. The Swiss anatomist Albrecht von Haller offered an ovist explanation of this all-inclusive view: "It follows that the ovary of an ancestress will contain not only her daughter but also her granddaughter, her great-granddaughter and her great-great-granddaughter, and if it is once proved that an ovary can contain many generations, there is no absurdity in saying that it contains them all."[43] In other words, all potential human beings existed from the moment of divine creation.

Blondel espoused animalculism, whereas Turner proposed a continuity between fetal and maternal blood vessels, and followed an epigenetic view—the view that the embryo develops structurally and sequentially *in utero* through the growth and differentiation of specialized cells.[44] This debate embraced a central paradox in early modern thinking about fetal development: Turner was relatively accurate about maternal-fetal relations *in utero* but superstitious about the mental stability of pregnant women, whereas Blondel was inaccurate in his knowledge of gestational physiology but rejected the prevailing folk beliefs about female irrationality and uncontrollability during pregnancy. What is most striking is that both Turner's imaginationist view, which attributed monstrous births to maternal impressions, and Blondel's preformationist view, which argued that the maternal role was merely to house the developing fetus, similarly negated the agency of pregnant women. For preformationists, the mother remained entirely passive and useless except as a vessel; for imaginationists, the maternal imagination operated wholly beyond the will of the mother, who could not shape it or impose meaning upon it.[45]

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43. Cited in Joseph Needham, *A History of Embryology* (New York: Abelard-Schuman, 1959), 200, and in Andrea Henderson, "Doll-Machines and Butcher-Shop Meat: Models of Childbirth in the Early Stages of Industrial Capitalism," *Genders* 12 (winter 1991): 100-19. Marie-Hélène Huet points out that the encasement theory "should have excluded the possibility that the maternal imagination could modify the shape of a progeny that had already been formed since the beginning of time" in *Monstrous Imagination*, 42.

44. See Needham, *A History of Embryology*, 215-16. See also Shirley A. Roe, *Matter, Life, and Generation: 18th-Century Embryology and the Haller-Woolf Debate* (Cambridge: Cambridge University Press, 1981); Josef Warkany, "Congenital Malformations in the Past," *Journal of Chronic Diseases* 10 (1959): 84-96; Fraser, "Causes of Congenital Malformations in Human Beings," 97-110; and F.C. Frigoletto, Jr. and Suzanne B. Rothchild, "Altered Fetal Growth: An Overview," *Clinical Obstetrics and Gynecology* 20 (December 1977): 915-23.

45. See Marie-Hélène Huet, "Monstrous Imagination: Progeny as Art in French Classicism," *Critical Inquiry* 17 (summer 1991): 718-37. Jean-Baptiste Bérard argued that fetal development

So we are right back in a dilemma. The imaginationists believed women's stories and gave them an active role in the development of their fetuses, but at a price—they held women accountable for any birth not entirely normal. The preformationists (including the ovists) denied women any role in gestation except as pack animals but absolved them of blame for the ensuing birth. The eighteenth-century maternal imagination debates make clear that the ideological stakes of assigning responsibility for birth outcomes are especially high. In early modern Europe, assigning blame for the horror of defective or malformed births affected inheritance, social organization, and political power. In a social system dependent upon male lineage, it was more than just politically and economically convenient to displace this responsibility onto women's bodies and minds.

IV

The conflicting Enlightenment narratives that explain the etiology of, and thus fix the blame for, "imperfect" infants bear striking similarities to current ethical discussions stemming from the legal battles that pit pregnant women against their fetuses. The underlying significance of these narratives involves the legacy of blaming the mother for her children's appearance and behavior. Blaming mothers serves to justify a wide range of strategies for containing women's minds by containing women's bodies.[46]

Regulatory discourses concerning the physiology and reproductive roles of women have a long social history. In the eighteenth century, physicians and philosophers debated the power of a pregnant woman's mind to influence fetal development. In the nineteenth century, medical practitioners in the United States led an anti-abortion campaign intended to establish medicine as a scientific profession and to regulate reproduction. In the nineteenth century, as in the eighteenth, assumptions about maternal duty dictated attitudes concerning the behavior of pregnant women. In a passage that makes these assumptions clear, nineteenth-century Philadelphia physician Hugh Lenox Hodge attacked pregnant women for disobeying medical advice: "They eat and drink, they walk and ride, they will practice no

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took place entirely "à l'insu" of the mother's will and therefore could not be affected by the imagination or the living conditions of a pregnant woman. For proof, he recorded these statistics for 1821: 9,178 of 21,158 infants born in Paris were illegitimate, but none of them were monsters, despite the terrible conditions their mothers had endured during their pregnancies. Jean-Baptiste Bérard, *Causes de la monstruosité et autres anomalies de l'organisation humaine* (Paris: Didot le Jeune, 1835), 7.

46. Katha Pollitt writes interestingly about the legacy of blaming women for a host of ills in "Subject to Debate," *The Nation,* 30 May 1994, 740, in a column that discusses welfare, poverty, and motherhood.

self restrainment, but will indulge every caprice, every passion, utterly regardless of the unseen and unloved embryo."[47] The specter of unbridled appetites haunts this passage. The nineteenth-century campaign to criminalize abortion sought to replace a pregnant woman's testimony about her pregnancy with an externally imposed medical authority. Reva Siegel has shown that this campaign had the effect of claiming for physicians "a special competence to mediate between a woman and the state," an effect that continues to be important.[48]

The prevailing views in the nineteenth century permitted physicians to step in and "restrain" women who were unwilling or unable to restrain themselves. Both eighteenth-century discourses that attributed fetal malformations to maternal mental activity, and nineteenth-century regulations concerning pregnant women, medical authority, and abortion, served to make women's role in reproduction conform to prevailing ideas about women's social place. As Siegel notes, "[r]egulations governing the conditions in which women conceive, gestate, and nurture children express social attitudes about sexuality and motherhood and, in turn, shape women's experience of sexuality and motherhood."[49]

Katha Pollitt analyzes these social attitudes in a provocative article entitled "'Fetal Rights': A New Assault on Feminism." Pollitt asks, "[h]ow have we come to see women as the major threat to the health of their newborns, and the womb as the most dangerous place a child will ever inhabit?"[50] As I have shown, this is not a new question. Currently, women in the United States who use drugs, especially cocaine, during pregnancy may face criminal prosecution for a variety of offenses, from drug trafficking to criminal child abuse to assault with a deadly weapon. Yet, Carol E. Tracy noted in 1990 that only 11 percent of the pregnant women who need substance-abuse treatment get it. Tracy wrote, "we live in a society that romanticizes motherhood but provides virtually no structural supports for moth-

47. Cited in Reva Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," *Stanford Law Review* 44 (2): 301 (1992).

48. Ibid., 296. This comprehensive analysis of the nineteenth-century campaign against abortion and its importance for the history and current state of reproductive law fills in many of the gaps in my inquiry between eighteenth-century understandings of pregnancy and the move in the late twentieth century to criminalize the behavior of pregnant women. I am grateful to Professor Siegel for bringing her work to my attention. For a historical look at reproductive circumstances in the nineteenth century, see Janet Farrell Brodie, *Contraception and Abortion in Nineteenth-Century America* (Ithaca, NY: Cornell University Press, 1994).

49. Siegel, "Reasoning from the Body," 72.

50. Katha Pollitt, "'Fetal Rights': A New Assault on Feminism," *The Nation*, 26 March 1990, 410.

ers."[51] The situation is improving—ten years ago virtually no drug treatment programs would accept pregnant users, whereas now about 75 percent do. At the time of the initial trial of Jennifer Johnson in 1990, however, there were approximately 4,500 drug-addicted pregnant women in Florida, 2,000 of whom were on waiting lists for the 135 drug treatment beds available statewide for pregnant women.[52] Many drug treatment centers routinely turn away pregnant addicts, few have obstetricians on their staffs, and pregnant drug users avoid even basic prenatal care for fear of being reported. Thirty-seven thousand babies are born in the United States each year to drug-addicted women; fetal-alcohol syndrome affects one of every one thousand U.S. births; and 1.5 percent of newborns in New York City are HIV-seropositive.[53] The Supreme Court, in *General Electric Co. v. Gilbert* (1976), struck down EEOC guidelines requiring employers to provide maternity benefits under their disability programs. In his dissent, Justice William Brennan remarked that the United States is one of the few Western nations in the world with no universal legal and social provisions for maternity.[54]

Motherhood cannot be separated from the social conditions that surround it. The United States confronts the tragedies of teenage pregnancy, women and young children with AIDS, single-mother households living below the poverty line, inner-city crime, drive-by shootings, and homelessness. The overwhelming response has been

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51. Carol E. Tracy, "Help the Women Drug Users," *Philadelphia Inquirer*, 14 September 1990, sec. A, p. 21. In ironic contrast to the situation Tracy describes, a hospital program at the Medical University of South Carolina in Charleston allegedly used threats of public exposure and of jail to force pregnant women into drug treatment. In February 1994, the Office of Civil Rights of the U.S. Department of Health and Human Services initiated an investigation into whether or not the South Carolina program is discriminatory, because most of the women tested for drugs or jailed are African-American. See Philip J. Hilts, "Hospital Is Object of Rights Inquiry: Blacks Make Up Majority of Pregnant Women Tested for Drugs and Coerced," *New York Times*, 6 February 1994, sec. A, p. 29. In January 1993, the Philadelphia Commission on Human Relations and the Women's Law Project held a public hearing to investigate drug treatment programs in Philadelphia that were denying their services to pregnant women. Many drug treatment programs consider pregnant women too high-risk to treat because the programs do not have obstetricians on staff or because they believe they cannot handle miscarriages or other emergencies. See Fawn Vrazo, "Some Drug Programs Wary of Pregnant Women," *Philadelphia Inquirer*, 11 January 1994, sec. B, pp. 1-2.

52. Brian McCormick, "Drug Trafficking Conviction Overturned in Cocaine-Baby Case," *American Medical News*, 10 August 1992, p. 11.

53. James F. Drane, "Medical Ethics and Maternal-Fetal Conflicts," *Pennsylvania Medicine* 95 (July 1992): 12-16. The Committee on Bioethics of the American Academy of Pediatrics advises physicians to honor a woman's refusal of fetal procedures, unless the fetus will suffer irrevocable harm without them, the treatment is clearly indicated and likely to be effective, and the risk to the pregnant woman is low. If the woman refuses despite these conditions, the Committee recommends consultation with a hospital ethics committee and advises turning to courts only as a last resort. See American Academy of Pediatrics Committee on Bioethics, "Fetal Therapy: Ethical Considerations," *Pediatrics* 81 (6): 898-99 (1988).

54. General Electric Co. v. Gilbert, 429 U.S. 125, 160 (1976). Paraphrased in Whitbeck, "Moral Implications," in Bondeson et al., eds., *Abortion*, 263.

to criminalize acts of desperation such as drug use rather than to provide prevention or treatment services, to create jobs programs for inner-city youth, to improve the public education system, or to devise a system for regulating firearms. The assertion that a person represents a "danger to self and others" constitutes the legal justification for curtailing the individual's civil rights. This justification fuels the discussion of mandatory drug treatment for pregnant women but it has not led the courts, for example, to impose drug treatment upon all drug users, or to mandate medical treatment for other untreated diseases.[55] The medicolegal system in the United States, defined as it is by adversarial relations and contests, cannot adequately grapple with the problem of establishing a reasonable standard of care for pregnant women.[56] For example, increasing "fetal rights" will inevitably allow children to bring lawsuits against their mothers for prenatal injuries. *Roe v. Wade* does not prevent tort actions for pre-viable fetuses. At the same time, a maternal duty to utilize prenatal technologies has been emerging.

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55. Wendy Chavkin, "Mandatory Treatment for Drug Use During Pregnancy," *Journal of the American Medical Association* 266 (18 September 1991): 1556-61. Chavkin argues that mandating treatment furthers discrimination against poor minority women, and cites Veronika Kolder, Janet Gallagher, and Michael Parsons, "Court Ordered Obstetrical Interventions," *New England Journal of Medicine* 316 (7 May 1987): 1192-96. In this 1986 study of court-ordered Cesarean sections: 81 percent involved minority women, 24 percent involved women who were non-English speaking, and 100 percent involved clinic patients. The survey represented women from 45 states and the District of Columbia who had refused therapy deemed necessary for their fetuses. The data spanned statistics for 1981 to 1986, and the sample included white, Asian, and African-American women.

The study revealed that in Florida, the rate of drug-use reporting among pregnant women was ten times higher for African-American women than for white women. Instead of reporting and prosecuting pregnant women who use drugs, Chavkin argues, we need to enhance drug treatment programs so that they are welcoming for pregnant women, are set up to serve their needs, and are readily available. As long as such programs are scarce and of poor quality, debates about mandating them remain merely symbolic. Chavkin points out that the American Medical Association and the American College of Obstetricians and Gynecologists oppose court-ordered treatment or penalties for the behaviors of pregnant women. See AMA Board of Trustees Report, "Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women," *Journal of the American Medical Association* 264 (28 November 1990): 2663-70, and American College of Obstetricians and Gynecologists Statement, "Patient Choice: Maternal-Fetal Conflict," *Women's Health Issues* 1 (fall 1990): 13-15. See also Wendy Chavkin, "Drug Addiction and Pregnancy: Policy Crossroads," *American Journal of Public Health* 80 (1990): 483-87; Lynn Paltrow, *Case Overview of Arguments Against Permitting Forced Surgery, Prosecution of Pregnant Women or Civil Sanctions Against Them for Conduct During Pregnancy* (New York: ACLU Reproductive Freedom Project, 1989); M. McNulty, "Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses," *Review of Law and Social Change* 16 (1987/88): 277-319; and W.K. Mariner, L.H. Glantz, and G.J. Arnes, "Pregnancy, Drugs, and the Perils of Prosecution," *Criminal Justice Ethics* 9 (1): 30-41 (1990).

56. See Robert H. Blank, "Emerging Notions of Women's Rights and Responsibilities During Gestation," *Journal of Legal Medicine* 7 (4): 441-69 (1986), and Margery W. Shaw, "Genetically Defective Children: Emerging Legal Considerations," *American Journal of Law and Medicine* 3 (3): 333-40 (1977). See also Iris Marion Young, "Punishment, Treatment, Empowerment: Three Approaches to Policy for Pregnant Addicts," *Feminist Studies* 20 (Spring 1994): 33-57, an article that applies psychoanalytic ideas to formulate "a feminist ethic of care."

It is deceptively easy to conclude that eighteenth-century embryology was not sufficiently advanced to produce more scientific explanations for "monsters." The more pressing question is whether we can learn anything from these early medical debates that might illuminate the complicated social, ethical, medical, and legal issues we currently face.[57] For example, in prosecuting women for drug use during pregnancy, is the state again displacing the systemic socioeconomic problems of unemployment, poverty, and despair onto the bodies of women, and taking over control of these bodies because women allegedly lack "self-control"? Jurists try to translate the moral expectation that the pregnant woman will make every attempt to ensure the healthy development of her fetus into an idea of enforceable legal duty. In this attempt, they unavoidably subordinate a woman's rights to privacy and autonomy to a codification of the state's interest in protecting her fetus from harm.[58] In a 1988 Illinois case, a mother sued for prenatal injuries that occurred during an automobile accident when she was five months pregnant. The court summarized the situation created by the notion that fetuses have a cognizable "legal right to begin life with a sound mind and body" by stating:

> It is the firmly held belief of some that a woman should subordinate her right to control her life when she decides to become pregnant or does become pregnant: anything which might possibly harm the developing fetus should be prohibited and all things which might positively affect the developing fetus should be mandated under the penalty of law be it criminal or civil.[59]

The court found for the mother in this case.

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57. My focus is on only one aspect of the complicated politics of reproductive change in the late twentieth century: the criminalization of the social conduct of pregnant women. Cases in which courts have mandated that a pregnant woman have a Cesarean section against her will raise some of the same issues of criminalization and adversarial definitions of mother and fetus (as they also did in the eighteenth century). See Mary Sue Henifin, Ruth Hubbard, and Judy Norsigian, "Prenatal Screening," and Janet Gallagher, "Fetus as Patient," both in *Reproductive Laws for the 1990s*, ed. Sherrill Cohen and Nadine Taub (Clifton, NJ: Humana Press, 1989), 155-83, 185-235. For treatment of employers' "fetal protection policies" that exclude fertile women from certain workplaces, see note 60 below. For an overview of the legal and ethical issues surrounding new reproductive technologies, see Robert H. Blank, *Regulating Reproduction* (New York: Columbia University Press, 1990).

58. In this treatment, the pregnant woman is a medium or vehicle rather than an owner of property. See Judith Roof, "The Ideology of Fair Use: Xeroxing and Reproductive Rights," *Hypatia* 7 (spring 1992): 63-73, and Dawn Johnsen, "From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives and *Webster*," *University of Pennsylvania Law Review* 138 (1989): 179-215.

59. Stallman v. Youngquist, 531 N.E.2d 355 (1988); cited and discussed in Robin M. Trindel, "Fetal Interests vs. Maternal Rights: Is the State Going Too Far?" *Akron Law Review* 24 (spring 1991): 743-62.

A number of feminist legal scholars have criticized the idea of fetal rights and, consequently, the notion of fetal personhood itself that such rights presuppose. Conceiving and bearing children has never been risk-free, and women have always made, and been expected to make, sacrifices during pregnancy. However, a pregnant woman must have a different status with respect to her fetus than do others, including the state. Otherwise, women's ownership of their own bodies is challenged, and pregnant women are punished for social ills such as poverty, unemployment, malnutrition, and unequal access to education and health care. In juridical terms, there is no "bright line" which may confine this responsibility. "Until the child is brought forth from the woman's body," Janet Gallagher writes, "our relationship with it must be mediated by her. The alternative adopts a brutally coercive stance toward pregnant women, viewing them as means to an end and denying them the bodily integrity and self-determination specific to human dignity."[60]

The crux of this dilemma can be located in the language of rights itself. A focus on rights grounds the discussion in privacy law, which becomes meaningless if the contents of a pregnant woman's womb can be severed from her person and granted separate interests. The constitutional right of decisional privacy detailed in *Griswold v. Connecticut* has begun to yield its place to the rights of fetuses, pitting pregnant women not just against the products of their bodies, but

60. Janet Gallagher, "Prenatal Invasions and Interventions: What's Wrong with Fetal Rights," *Harvard Women's Law Journal* 10 (spring 1987): 57-58. The view Gallagher critiques has been extended to include all women of child-bearing age as potentially pregnant, a view that underlies employer-enforced "fetal protection" policies that exclude women from certain jobs. The best known of these recent cases was heard by the United States Supreme Court. See *United Auto Workers v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991). The Court ruled for the women, but in an earlier hearing by the Seventh Circuit, Judge Coffey remarked, "This is the case about the women who want to hurt their fetuses." This remark is cited in David L. Kirp, "The Pitfalls of 'Fetal Protection,'" *Society* 28 (March/April 1991): 70. For a full discussion of exclusionary employment policies, see Sally J. Kenney, *For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain* (Ann Arbor: University of Michigan Press, 1992). Susan Faludi remarks that no one has tried to prevent women from working at video display terminals or in daycare centers where they are at risk for cytomegalovirus, in "Your Womb or Your Job," *Mother Jones* 16 (November/December 1991): 59-66, 71. See also Elaine Draper, "Fetal Exclusion Policies and Gendered Constructions of Suitable Work," *Social Problems* 40 (1): 90-107 (1993), and Lucinda M. Finley, "Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate," *Columbia Law Review* 86 (1986): 1118-82. Also note that little attention has been paid to the effect of workplace toxins on fathers, despite evidence that men exposed to toxic chemicals can pass birth malformations on to their children. See Ricardo A. Yazigi, Randall R. Odem, and Kenneth Polakoski, "Demonstration of Specific Binding of Cocaine to Human Spermatozoa," *Journal of the American Medical Association* 266 (9 October 1991): 1956-59. In addition, sperm production in the average male has declined dramatically over the last fifty years, and the reasons appear to be environmental rather than genetic. See Michael Zimmerman, "Working With Chemicals Is a Threat to Fathers," *Philadelphia Inquirer*, 2 May 1993, sec. D, p. 5.

against their very bodies.[61] In *Eisenstadt v. Baird*, like *Griswold* a case involving contraceptive practice, the court held, "If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted intrusion."[62] Privacy rights in law are not monolithic: they include the rights to be left alone, to refuse medical treatment, and to have possession of and power over one's own person.[63] Christyne L. Neff persuasively argues that, for this reason, the doctrine of bodily integrity serves the arguments of reproductive freedom better than does privacy law. Bodily integrity doctrine underpins legal notions of assault and battery, search and seizure, informed consent, and the right to refuse medical treatment. Separating the fetus from a pregnant woman pursues what Neff calls "an analysis that views the pregnant woman as a duality [and] is itself a violation of woman's bodily integrity."[64] Privacy rights in their multiple forms cannot be distinguished so easily from the legal notion of bodily integrity, since the concept of privacy includes ideas about the body as a refuge, a space protected from state intrusion.[65] Indeed, a version of the idea of bodily integrity seems to have existed for early modern European thinkers, a complex irony given the ar-

61. Griswold v. Connecticut, 381 U.S. 479 (1965), invalidated statutes banning contraception. The idea of holding rights to "property in one's own person" and to bodily self-determination in relation to women's bodies as the media for pregnancies is asserted by Rosalind Pollack Petchesky in "Reproductive Freedom: Beyond 'A Woman's Right to Choose,'" *Signs* 5 (summer 1980): 661-85. A recent discussion of privacy law in relation to abortion rights can be found in David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade (New York: Macmillan, 1994). See also Iris Marion Young, "Pregnant Embodiment: Subjectivity and Alienation," *Journal of Medicine and Philosophy* 9 (February 1984): 45-62.

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

63. It is important to maintain distinctions between the constitutional right to privacy, decisional privacy, and tort privacy. For example, Justice Blackmun has been criticized for his failure "to distinguish carefully the physical privacy of seclusion from the decisional privacy of liberty or autonomous choice," when he famously stated in Roe that "a pregnant woman cannot be isolated in her privacy." Roe v. Wade, 410 U.S. 113, 159 (1973). See Anita L. Allen, "Tribe's Judicious Feminism," *Stanford Law Review* 44 (1): 187 (1991). The political elasticity of the word "right" became clear at the September 1994 United Nations conference on population held in Cairo, during which time United States and European officials made efforts to appease Vatican and Islamic concerns over the language discussing abortion. In a masterly effort at noncommittal speech, Timothy E. Wirth, the United States Undersecretary of State for Global Affairs, remarked, "The question of quote right unquote has been a controversial issue. Some people had interpreted the use of the word 'right' in the document as establishing an understood right as is the U.N. Declaration of Human Rights, and there is a language that is being proposed by the European Union to define what is meant by right." See Alan Cowell, "A Try at a Truce Over Population," *New York Times*, 15 September 1994, sec. A, p. 1. The concept remains ideologically, if not legally, slippery.

64. Christyne L. Neff, "Woman, Womb, and Bodily Integrity," *Yale Journal of Law and Feminism* 3 (spring 1991): 351. See also Petchesky, "Reproductive Freedom," and Katherine De Gama, "A Brave New World? Rights Discourse and the Politics of Reproductive Anatomy," *Journal of Law and Society* 20 (spring 1993): 114-30.

65. Linda C. McClain argues that privacy rights are tied to an imagery of sanctuary and refuge in "Inviolability and Privacy: The Castle, the Temple, and the Body," *Yale Journal of Law & the Humanities* 7 (winter 1995): 195. I am grateful to Professor McClain for sharing her work with me.

guments I have been making. At the same time, the embeddedness of pregnancy within a network of social practices and individual interests may have been more clearly delineated in earlier historical periods in Europe than it is in the United States today.

CONCLUSION

The eighteenth-century maternal imagination debates were intricate from both biological and philosophical perspectives. To contend that the maternal imagination was impotent, physicians subscribed to preformationism and used the physiologically inaccurate argument that the fully independent fetus shared no circulatory or nervous communication with its mother and, thus, could not respond to her mental or sensory experiences. In contrast, writers who affirmed the power of the maternal imagination chastised those who impugned women's honesty concerning their experiences of pregnancy. This eighteenth-century controversy, then, radically questioned the ontologic relation between pregnant women and fetuses, and did so in unexpected ways. That ontologic relation continues to be vexed. In 1668, François Mauriceau described pregnancy as "a rough Sea" and urged pregnant women "to be careful to overcome and moderate her Passions, as not to be excessive angry; and above all, that she be not afrighted; nor that any melancholy news be suddenly told her" because she might miscarry or harm her fetus. He wrote of the pregnant woman's "so great loathings, and so many different longings, and strong passions for strange things."[66] Three hundred years later, David L. Kirp proposes that in light of the problem of environmental and workplace hazards, "the more that is learned about these insidious dangers, the more remarkable it becomes that any fetus navigates the perilous voyage from conception to birth healthy and intact."[67] It is, finally, the socioeconomic infrastructure that needs sanction and repair, not the bodies of women.

66. François Mauriceau, *The Diseases of Women with Child and in Child-bed*, trans. Hugh Chamberlen (London: John Darby, 1683), 58, 65.

67. Kirp, "The Pitfalls of 'Fetal Protection,'" 76.