

Creeping Criminalization of Pregnancy across the United States

By the term “fetal protection laws,” I refer to an array of legislation that purports to promote the protection of fetuses. Such legislation includes feticide laws,¹ drug policies,² statutes criminalizing maternal conduct,³ and statutes authorizing the confinement of pregnant women to protect the health of fetuses.⁴ In some instances, existing laws intending to protect children from physical abuse have been interpreted to apply to fetuses – and thus fall within the category of fetal protection laws.⁵ Fetal protection laws are intended to promote the health and safety of fetuses by criminalizing actual or intended harm to the unborn.⁶ These laws create bright-line rules that are intended to place pregnant women (who know about them) on notice.

Today, the full scope of liberty-infringing pregnancy interventions, including threats of arrest and other coercive conduct that does not necessarily lead to criminal punishment, is unknown. There is no national database, and any state-level record-keeping related to mothers prosecuted under the guise of fetal protection can be difficult to access. Reporters like Nina Martin file “multiple information requests to identify” those arrested under child endangerment laws and child abuse statutes, which now apply to fetuses in a number of states. Vigilant investigation in Alabama revealed dramatic undercounting by “more than three times the number previously identified.”⁷

Evidence of arrests and prosecutions gathered by Martin, as well as national and international advocacy organizations such as National Advocates for Pregnant Women and Amnesty International, indicate that the numbers of women vulnerable to pregnancy policing are on the rise.⁸ New prosecutions of pregnant women for acts of feticide and attempted feticide illustrate this shift; such prosecutions simply did not occur before.

3.1 THE HISTORIC APPROACH

Historically, the common law predicated manslaughter and murder of an infant on two elements: first, an actual birth; second, the child must have been alive at the

time the criminal act occurred. Unless these factors were met, an individual could not be convicted under state law for causing injury, whether to a fetus or a child.⁹ Treatises dating back to Sir Matthew Hale (echoing Sir William Stanford and Sir Edward Coke) articulate this principle, which rooted in fourteenth-century common law. Hale articulated this principle in the following manner:

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is kild, it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be a great crime, and by the judicial law of *Moses* (g) was punishable with death, nor can it legally be known, whether it were kild or not, 22 *E. 3. Coron.* 263. so it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide. 1 *E. 3. 23. b. Coron.* 146.

But if a man procure a woman with child to destroy her infant, when born, and the child is born, and the woman in pursuance of that procurement kill the infant, this is murder in the mother, and the procurer is accessory to murder, if absent, and this whether the child were baptized or not. 7 *Co. Rep.* 9. *Dyer* 186.¹⁰

As related to childbirth and criminal law, the theory of *in rerum natura* translates as “in the nature of things” or “in existence” in English law.¹¹ In *Regina v. Knight* (one of the earliest reported cases involving the manslaughter prosecution of a woman for failing to protect her fetus), upon hearing compelling evidence leading to the “conclusion that the child had been born alive, and had died by the hands of the mother,” the English court reasoned that even under those circumstances the mother could not be guilty of manslaughter as there was no basis in law or doctrine for such a prosecution.¹²

In utero harms generally did not serve as a basis for child abuse, manslaughter, or murder convictions, particularly because proximate causation was considered too remote and indirect. In the 1904 case *Rex v. Izod*, an English court again reasoned that, although a woman may be guilty of neglect for failing to care for her fetus, the neglect “is not enough to justify a verdict of manslaughter” if the neglect is confined to the time the child is in utero, because the legal presumption of life is rooted at birth not conception.¹³ In that case, a widow’s failure to provide care to her fetus during labor and postbirth was evidence of negligence and serious neglect but not manslaughter, because there was no finding of “neglect of the child itself treated as a separate being.”¹⁴ The court held that “a child must be completely born before it can be the subject of an indictment for either murder or manslaughter.”¹⁵ This suggests that until a child is “completely born,” it is not considered a legal entity for purposes of murder or manslaughter.

Cases like *Regina v. Knight* and *Rex v. Izod* present troubling facts: poor women who at delivery passively allow their infants to expire. In at least one case it appears that the woman may have taken affirmative steps to end the life of the infant. Yet, in each instance, the courts take great strides to clarify that criminal punishment in the

form of manslaughter does not apply to a woman's failure to provide appropriate prenatal, labor, and postnatal care even when it contributes to fetal harm or infant death.

When similar cases reached courts in the United States, they followed the English approach. *Dietrich v. Northampton* is instructive on this point. In 1884, Oliver Wendell Holmes – then an associate justice of the Massachusetts Supreme Court – wrote that it would be far too remote if an action could be maintained on behalf of a fetus still dependent on the pregnant woman bearing it. Justice Holmes reasoned that any argument which suggested that a fetus “stands on the same footing as . . . an existing person” is hindered and not helped by the fact that a fetus does not have even a “quasi independent life.”¹⁶ In dicta, the court maintained that if a pregnant woman could not recover for the injury sustained by the fetus, neither would it be legally sound for the fetus to recover.

Years later, in *State v. Osmus*, the Wyoming Supreme Court established that, to convict a defendant of infanticide, it must be shown “first, that the infant was born alive, and second, if the infant was born alive that death was caused by the criminal agency of the accused.”¹⁷ In that case, the Wyoming Supreme Court overturned the manslaughter conviction of Darlene Osmus for her newborn's death.¹⁸ Darlene Osmus was a twenty-year-old unmarried woman who claimed ignorance of her pregnancy. At some point she went into labor and gave birth in the bathroom late one night. She testified that the infant was stillborn and that three days later she left the infant's body on the side of the highway. She was accused of murder, found guilty of manslaughter, and sentenced to two-to-four years in prison until the verdict was overturned.

In rejecting the state's two central claims that (1) Osmus was guilty of nonfeasance under Wyoming's child abuse and neglect statute and (2) guilty of manslaughter for failure to obtain prenatal and delivery care, Justice Blume emphasized that the law “relates to a really living child.” Justice Blume explained that “such nonfeasance must, of course, have occurred prior to the birth of the child and hence has no possible connection with [the law] so that an instruction setting out that section was error again in the light of that theory.”¹⁹ The court framed the matter as follows: “one of the questions is as to whether or not the child was born alive.”²⁰ According to the court, the law did “not directly provide or even intimate that it applies to a child such as involved in this case.”²¹

3.1.1 *Taxonomies of Legal Innovation*

By contrast, contemporary fetal protection efforts mark a troubling legal innovation and a dramatic departure from prior criminal law jurisprudence. The legal innovations may be categorized into four primary techniques: (1) old laws are applied and interpreted in new ways; (2) old laws are slightly amended to expand existing

prescriptions and sanctions; (3) new laws are applied in unintended ways against pregnant women; and (4) new laws are introduced that expressly create new prescriptions and sanctions.

In each case, a salient aspect of these legal innovations is the shifting definition of personhood, because legislative advocates of fetal protection adopt the standard that fetuses are persons. Under this framework, a fetus is a child for purposes of criminal prosecution. Viability and the capacity to live outside the womb are neither deemed necessary nor relevant. This shift in the law is significant as it normalizes treating the unborn as if they were born and alive at the time of injury, but for the most part only against pregnant women. This implicates abortion policy, criminal law, and women's constitutional rights.

Since 1973, authorities in at least forty-five states have sought to prosecute women for exposing their unborn children to drugs. Those efforts continue under a wide variety of laws even in states where high courts have previously rejected the criminalization approach. A 2019 report published by the Guttmacher Institute shows that state policies on substance use during pregnancy are wide-reaching.²² Think about this:

- Twenty-three states plus the District of Columbia have enacted laws establishing that drug use during pregnancy is child abuse.
- Twenty-five states plus the District of Columbia actually mandate that medical providers snitch on their pregnant patients if they suspect drug use.
- Eight states strong-arm medical providers to perform toxicology screens on pregnant patients if drug use is suspected. If providers fail to comply, they could be punished.

Three states – Minnesota, South Dakota, and Wisconsin – have enacted laws pursuant to which women who ingest drugs during pregnancy can be involuntarily committed to a treatment program. The Wisconsin law, recently challenged following the solitary confinement of a woman who protested her incarceration, is particularly draconian. The Wisconsin Unborn Child Protection Act permits the detention of a woman against her will for the duration of her pregnancy.²³ The law entitles a fetus to its own court-appointed lawyer – even though the pregnant woman could lose custody of her baby after birth. These proceedings are purposefully secret, “because they are part of Wisconsin’s children’s code.”²⁴

However, legal innovation in the reproductive rights realm is not limited to states’ interests in surveilling pregnancy and drug abuse for criminal and civil punishment. So far, thirty-eight states have implemented feticide statutes – a particularly worrying species of fetal protection laws.²⁵ Nearly three dozen states prohibit removing life support from brain-dead pregnant woman.²⁶

The few selected cases described below could be substituted by other examples in Alabama,²⁷ Indiana,²⁸ Maryland,²⁹ Mississippi,³⁰ South Carolina,³¹ or Tennessee,³² among others. Sometimes, criminal cases in this domain are overturned on appeal,

but not always. Lynn Paltrow and Professor Jeanne Flavin estimate the figure of 413 criminal interventions that they recently documented between 1973 and 2005 “is a substantial undercount.”³³ Importantly, in each of the cases they found “a woman’s pregnancy was a necessary factor leading to attempted and actual deprivations of a woman’s physical liberty.”³⁴

3.1.2 *Old Law Applied in New Ways: First-Degree Murder*

On a chilly April morning in 2013, I stood on a small square in downtown Indianapolis with a group of people bundled in their coats, blowing puffs of moist, hot air into their hands. Many had adorned their coats and jackets with pins that read: “Free Bei Bei.” Organizers had hoped for a larger crowd and that maybe the local mainstream women’s rights organizations would lend their voices and support to this small crowd assembled for a rally. So far, no such luck.

Instead, with the exception of a modest showing of undergraduate students from a nearby university and a handful of women law students, the crowd consisted mostly of middle-aged, middle-class white women from a local church group that had taken an interest in Bei Bei Shuai’s case. Some of these women made sure to explain to me that they were not “political” and did not “get caught up” in feminism, but this was different.

Shuai’s supporters believed that the failed attempt to end her life two days before Christmas, on December 23, 2010, by eating multiple packs of rat poison pellets was a sign of her distress and depression and not premeditation to murder her fetus. They told me her case was a tragedy; a romance gone bad, compounded by stigmatization and shame. To these women, Shuai’s bungled suicide effort – botched by a friend who rushed her to the hospital where doctors undertook aggressive and heroic efforts to save her life – was not a cause for criminal punishment.³⁵ For a few days, her baby even lived before dying.

The women I spoke to were alarmed that the local Marion County prosecutor, Terry Curry, a self-professed Democrat, brought first-degree murder and attempted feticide charges against Shuai in the wake of her failed suicide attempt while pregnant. To their point, suicide is not a crime in Indiana. Indeed, this was the first prosecution in Indiana’s nearly two-hundred-year history in which the state sought to criminally punish a woman after attempting a suicide.³⁶

Instead, weeks after Shuai’s release from the hospital and subsequent care at a mental health facility where she was treated for severe depression, police arrested her. Denied bail, Shuai was confined to Marion County Jail, a facility described in news reports and court documents as beset by sexual coercion (where male guards demand sexual favors from female inmates), physical abuse, corruption, and medical neglect.³⁷ For fourteen months, while Shuai was incarcerated and awaiting trial, the women who attended the rally wrote to her. At the rally, Shuai would later say that those notes were her lifeline, as was the modest financial support the women provided.

Shuai, a soft-spoken Chinese accountant from Shanghai, legally migrated to the United States with her now estranged husband, hoping to partake in the American dream. She told a reporter, “I knew America as the best country in the world”³⁸ – and at the time it looked as though many dreams would be within her grasp: Shuai’s husband was offered a prestigious job as a mechanical engineer and she planned to continue her education.

However, little by little the dream fragmented, splintering and unraveling in adultery, embarrassment, and shame. The first fracture in her plan involved university enrollment – Shuai could not afford to obtain the education she sought. University admission is less competitive in the United States, but obtaining a degree in this country is far more expensive than in China. Although she likely would have qualified to attend a very good Indiana university, Shuai could not afford to pay the bills. Then, the marriage “collapsed.”³⁹

Instead of pursuing a career in accounting, Shuai found herself working at a low-end Chinese restaurant, pregnant with a married man’s child.⁴⁰ On a cold December night in 2010, that man, Zhiliang Guan, threw a wad of money at her. That represented his part in the pregnancy. Zhiliang confessed that he was still married and committed to his other children, warning Shuai to keep away.

Court records⁴¹ document the events that rapidly unfolded, which ultimately led to Shuai’s suicide attempt, the death of her baby, and charges of first-degree murder by a new district attorney who wanted to prove he was tough on crime. Rather than keeping away, Shuai ran after Zhiliang Guan, pregnant and crying in the parking lot outside the Chinese restaurant. She dropped to her knees, begging for his help and imploring him to stay.⁴² Instead, he drove away, leaving behind only a plume of smoke in the frigid air and Shuai on the cold pavement.

Within days of Zhiliang’s abandonment, Shuai began plotting to kill herself; the options were seemingly endless in Indiana. In the United States, women kill themselves with pills, by suffocating themselves with gas, hanging, crashing their cars, and jumping off bridges. Alcohol, prescription painkillers, antidepressants, and opiates frequently combine with suicide efforts in the United States.⁴³ Shuai researched the various methods to kill herself, deciding on rat poison.⁴⁴

Rat poison and pesticides are common, low-cost ways in which women in China choose to end their lives. According to one researcher, 62 percent of deaths by suicide in that country can be attributed to the ingestion of rat poisons and pesticides.⁴⁵ A peer-reviewed article published in the *British Journal of Psychology* surmises that “easy access to pesticide and rat poison” in China “may account for the high fatality rate” among women who kill themselves by this method.⁴⁶ A number of studies offer some insights as to why women choose rat poison, but they do little to explain why the majority of female suicides worldwide are in China.⁴⁷ The former head of the World Health Organization’s Division of Mental Health, Norman Sartorius, has argued that in China it is believed that “Americans have depression. The English have depression. It’s their disease.”⁴⁸ To place that perspective in

context, a decade ago there was one psychiatrist in China for every 100,000 people, whereas “in Europe, the average ratio ranges from 1 in 3,000 to 1 in 5,000.”⁴⁹ In the United States the ratio is roughly 1 to 8,600.⁵⁰

Shuai’s prosecution made her supporters worry about their daughters. If convicted, Prosecutor Curry made clear he would seek the maximum sentence – forty-five years – and would only accept a plea deal of twenty years. In fact, Curry told a reporter that even if he had to throw out the first-degree murder charge for lack of evidence, he would nevertheless continue to pursue the attempted feticide charge.⁵¹ Some people saw this as a means for a liberal prosecutor to burnish conservative credentials at the expense of women.

Shuai described to me a cascade of embarrassments and humiliations compounding her life at the time: she was pregnant, unmarried, and essentially destitute.⁵² She was ashamed and afraid. Shuai told me, “In China, women like [her] – adulterous and pregnant – “are an embarrassment to their parents.”⁵³ She was fearful about being an embarrassment in the United States too. An unfavorable mood regarding immigration and single motherhood was taking root across the United States. Former congressman Eugene Clay Shaw, the key architect of federal welfare reform, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), put it this way, “The inscription at the base of the Statue of Liberty was written before welfare ... Now the question becomes, are these handouts a magnet that is bringing people into this country?”⁵⁴

Ultimately, Shuai’s case boiled down to this: prosecutors’ insistence that her real motive was to kill the fetus, and thereby humiliate and shame her married boyfriend – hence the charge of first-degree murder. They informed me that this was why she mentioned a baby in the suicide note. For the lawyers who prosecuted Shuai, the case was open and shut – all of the depression, anxiety, rat poison, and drama boiled down to a woman conspiring to harm or abort her fetus.⁵⁵

3.1.3 *Old Law Applied in New Ways: Manslaughter and Depraved Heart Murder*

Rennie Gibbs’s criminal prosecution in Mississippi for the “depraved heart murder” of her stillborn further illustrates the extent to which existing laws may be interpreted and applied in new ways. Rennie Gibbs was only fifteen years old when she became pregnant and, although a teenager, she struggled with drug dependence.⁵⁶ In December of 2006, one month after turning sixteen, Gibbs suffered a stillbirth⁵⁷ in the thirty-sixth week of her pregnancy.⁵⁸ Prosecutors concluded that her baby suffered from in utero exposure to cocaine, which caused its death.⁵⁹ As a result, the stillbirth was prosecuted as murder. Despite a rigorous defense, the Circuit Court of Lowndes County denied Gibbs’s Motion to Dismiss.⁶⁰

As in Bei Bei Shuai’s case, the potential criminal sanctions were quite severe. Under state statute, Gibbs’s pregnancy was by default the product of statutory

rape, given her age. Prosecutors ignored that, instead charging her with a crime that has an automatic life sentence in Mississippi.⁶¹ Gibbs's prosecution was one of first impression in Mississippi, as no previous second-degree murder charges had been instigated against a woman or girl for a case of stillbirth. According to Gibbs's legal counsel, "there ha[ve] been no reported cases and no media reports showing that the State of Mississippi ha[s] ever applied the depraved-heart homicide statute to a pregnant woman who suffered a stillbirth or miscarriage."⁶² That no prior cases are reported of a pregnant woman charged with this offense is unsurprising, because the explicit language of the statute does not "encompass the death of an unborn child."⁶³ Nor does the legislation on its face include pregnant women within the scope of the class of persons who can be prosecuted for violating this statute.⁶⁴

In 2014, charges related to her 2006 stillbirth were finally dismissed. Even so, Mississippi prosecutors vowed to reindict her for manslaughter.⁶⁵ Gibbs's attorneys continue to argue that the Mississippi legislature never intended the statute to apply to the unborn. They specifically cite the statutory language, highlighting that the statute underpinning Rennie Gibbs's prosecution, Mississippi Code § 97-3-37, "specifically provides that an 'unborn child' can be the victim of assault, capital murder, and certain types of manslaughter, but not depraved heart murder."⁶⁶ Moreover, they assert that, because there is "no reference to 'unborn child[ren]'" in the depraved heart section of that statute, 97-3-19(1)(b)." A reasonable interpretation of the law is that the legislature never intended the law to apply against pregnant women and therefore the statute is misapplied against Miss Gibbs.⁶⁷ Yet, the risks and trauma of prosecution and incarceration remain. And legislatures amend existing laws and enact new ones to criminalize fetal endangerment.

3.1.4 *Amending Old Law to Cover the Unborn*

Legal innovation in reproductive health also includes expanding existing legislation to cover the unborn. For example, in Florida, the "killing of unborn quick child by injury to mother" law expanded criminal laws to include the unlawful killing of a fetus or an "unborn quick child" as murder in the same degree "as that which would have been committed against the mother."⁶⁸ Other provisions of the law created new crimes to include the killing of a fetus as manslaughter, and extended punishment to vehicular homicide⁶⁹ and driving under the influence (DUI) manslaughter.⁷⁰ It is worth noting that at the time of this Florida enactment the law carved out an exception for abortion and prosecuting pregnant women.

Recently, however, Florida and other state legislatures have turned to personhood legislation to expand fetal protection, even against pregnant women. For example, in Arizona, SB 1052 (enacted on April 25, 2005) amended several state statutes⁷¹ to grant viable and nonviable fetuses the status of minors less than twelve years of age for purposes of determining criminal sentencing in murder and manslaughter cases.⁷²

Such statutes and ensuing court rulings provide models that conservative activist groups mobilize legislatures to adopt and prosecutors to prosecute.⁷³

3.1.5 *New Laws and Expansive Interpretations of Them*

States sometimes pass general statutes, such as drug laws, which state courts then expansively interpret to cover the endangerment of fetuses, even nonviable ones. For example, in 2006, Alabama legislators enacted § 26-15-3.2, Alabama Code 197, commonly referred to as the chemical endangerment statute. The statute provides that “a responsible person commits the crime of chemical endangerment [by] exposing a child to an *environment* in which he or she . . . knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a control substance, chemical substance, or drug paraphernalia.”⁷⁴

State courts, however, expansively interpret these statutes to cover fetuses. In 2013, the Alabama Supreme Court did so, further expanding fetal rights in that state by interpreting the term “child” as used in this statute to include both viable and nonviable fetuses.⁷⁵ The Alabama Supreme Court upheld this ruling in *Ex parte Hope Elisabeth Ankrom* – ruling it not only illegal for a pregnant woman to ingest illicit substances, but also to enter dwellings and other locations where such substances are manufactured or sold. In that case, the court reasoned that the word “environment” includes where a person lives and can refer to “an unborn child’s existence within its mother’s womb.”⁷⁶ Because the court held that the term “child” included unborn fetuses, now exposing a fetus to an environment where controlled substances are present could be considered child endangerment.

3.1.6 *A New Legislative Movement: Personhood for Preembryos, Embryos, and Fetuses*

Proponents of fetal personhood argue that no differences in status or rights exist between children and fetuses. They claim that no differences exist between children and fetuses whether the former are viable or not. To them, the line between child and fetus is spurious at best.⁷⁷ Representative Dick Jones (R-Topeka, Kansas) has explained the theory behind the new personhood movement this way: “The moment of conception when the finger of life is touched to that fetus, to that egg, it becomes a human being with all the inherent rights.”⁷⁸ Staunch interpreters of personhood propose granting constitutional rights to preembryos and even claim those rights are on a par with pregnant women’s rights.

In Georgia, embryos are now deemed to have “rights and responsibilities” under state law.⁷⁹ The bill granting embryo rights in that state, HB 388, is the nation’s first embryo adoption law.⁸⁰ The legislation’s sponsor, former Representative James Mills, has also sought to amend Georgia’s constitution to include the “Human Life Amendment,” which he described as “a peaceful and positive movement to

restore respect for life, liberty and the pursuit of happiness for Americans of all ages.”⁸¹ Representative Mills issued statements comparing embryos that have not developed to fetal stage to “children” for purposes of law.⁸² Relatedly, in Wisconsin, lawmakers proposed a bill that “would grant human embryos the same civil rights as people.”⁸³

Personhood referenda mark a significant phenomenon in legal innovation and the advancement of fetal protection efforts. Personhood legislation grants the status and rights of being born to fetuses and sometimes embryos, including in nonviable pregnancies, contradicting the framework of prevailing constitutional law. For example, the North Dakota Senate and House passed the “inalienable right to life of every human being at every stage of development” law in 2013, granting embryos and conceivably preembryos “inalienable” rights.⁸⁴

The North Dakota law failed a popular ballot vote in 2014. Nonetheless, the legislation – the first of its kind in the United States to pass both the Senate and House – mandated that “the inalienable right to life of every human being at any stage of development must be recognized and protected.” In an interview with a news magazine, Senator Margaret Sitte, sponsor of North Dakota’s personhood law, admitted that undermining *Roe v. Wade* was the purpose of her legislation. She explained, “We are intending that it be a direct challenge to *Roe v. Wade*, since [Justice] Scalia said that the Supreme Court is waiting for states to raise a case.”⁸⁵

States and their lawmakers invoke a range of chilling arguments to support the establishment of fetal rights and impose limits on women’s reproductive rights. Texas representative Michael Burgess argued in favor of fetal rights because he believes male fetuses feel sexual pleasure. According to the congressman, “male bab[b]ies . . . may have their hand between their legs,” because “they feel pleasure.”⁸⁶ He asked colleagues, “If [male fetuses] can feel pleasure, why is it so hard to think that they could feel pain?”⁸⁷

Representative Trent Franks (R-Arizona), a proponent of fetal rights and advocate for the position that fetuses experience pain, sponsored the Pain-Capable Unborn Child Protection Act, which aimed to preclude all women from having abortions, except in the case of impending death. When amendments were proposed permitting exceptions in cases of rape and incest, “Republicans on the [House Judiciary Committee] unanimously voted against the amendments, arguing that rape and incest exceptions were unacceptable.”⁸⁸ The lawmakers believed that fetal rights superseded those of pregnant women, even pregnant victims of rape.

That these measures are gaining momentum is evidenced by the broad number of states taking up personhood legislation – even when such measures ultimately fail at the ballot. Referenda in Colorado and Mississippi and petitions in Alabama, California, Florida, Georgia, Kansas, Montana, Nevada, Ohio, Virginia, and other states to redefine “personhood” mark only the most recent manifestations of legislative fetal protection efforts. Despite the fact these personhood amendments (except in Alabama) have so far failed, arrests, prosecutions, and involuntary “maternity rest”

restraining orders obtained against pregnant women under other extant state laws evidence that such fetal protection efforts are more than an isolated, fringe legislative movement.⁸⁹

3.1.7 *Other State Interventions: Civil Incarceration*

Civil incarceration is another means by which women's pregnancies may be subject to surveillance and hostile state intervention. Civil incarcerations in Wisconsin pursuant to that state's Unborn Child Protection Act⁹⁰ demonstrate how states may prioritize the legal interests of fetuses above those of pregnant women. In 1997, when Governor Thomas Thompson signed the legislation into law, lawmakers and others euphemistically referred to it as the "crack mama law". At the time, crack was stereotyped as a drug primarily or exclusively used among Blacks, and because of this some civil rights activists perceived the law as unfairly targeting Black women.

However, many recent civil confinements have not concerned Black women alone. According to National Advocates for Pregnant Women, while the exact number of women in Wisconsin civilly confined under its laws is unknown, "through their litigation they discovered more than 3,300 cases alleging what is called unborn child abuse in Wisconsin," resulting in actions taken against nearly 500 women since 2006.⁹¹ Nor is the Wisconsin law benign, because the statute delegates proceedings to juvenile courts where there are no public records of the proceedings and adult women have no right to counsel, although the state accords their fetuses this right.

In July 2013, Alicia Beltran, a twenty-eight-year-old white woman, was arrested, shackled, and confined by court order to a drug treatment center for seventy-eight days after she refused a doctor's order to take a potentially dangerous opiate blocker that she had decided was unnecessary.⁹² She was fourteen weeks pregnant and at the time no medical threat to her fetus existed.⁹³ In that case, Beltran had confided to medical staff at a prenatal checkup that she battled addiction to opiates in the past but had overcome drug dependency and had recently taken only a single Vicodin tablet for pain before becoming aware of her pregnancy.⁹⁴ The state denied Beltran's request for an attorney at each of her hearings, although legal counsel was provided for her fetus. Because Beltran was incarcerated, and thus unable to return to work, she lost her job and housing. When finally released from the state's custody, Beltran lacked the means to support herself or the baby she was soon to deliver.

Within a year of Beltran's incarceration, Tamara Loertscher, a twenty-nine-year-old white woman, was forced into solitary confinement by the state of Wisconsin, also for the purpose of protecting her fetus, after she refused to submit to a pregnancy test and inpatient treatment.⁹⁵ Loertscher claimed that, in addition to subjecting her to solitary confinement, correction officials threatened "to use a taser on her."⁹⁶ Loertscher was subjected to confinement until she signed a consent decree requiring her to submit to drug treatment and monitoring by authorities.

In her case, Loertscher filed a lawsuit under 42 U.S.C. § 1983, claiming that the law violated her constitutional rights. In 2017, District Judge James Peterson agreed and blocked enforcement of Wisconsin's civil confinement law, finding the statute unconstitutionally vague. He explained that "the expert evidence here makes one thing abundantly clear: current medical science cannot tell us what level of drug or alcohol use will pose a substantial risk of serious damage to an unborn child."⁹⁷ The state appealed to the Court of Appeals for the Seventh Circuit and ultimately to the United States Supreme Court. Wisconsin argued that the injunction threatened the health and safety of unborn children. The Supreme Court lifted the injunction.⁹⁸

3.2 EXTRALEGAL CONSEQUENCES

Who are the victims in these prosecutions? Despite the stories conveyed here, the women described in this Chapter are for the most part invisible. Concerns related to reproductive rights generally focus on abortion and not punishments for continuing pregnancies. These women are also unaccounted for in the broader discussions about criminal justice.

Women's invisibility to lawmakers, activists, and scholars studying the drug war may account for their misreading of the drug war as a problem in society generally about men and especially Black men. This misreading of the drug war and its gendered impacts neglects the unique ways in which women and children become invisible, collateral damage, and endure mass incarceration. Lawmakers overlooked or ignored the potentially harmful impacts of these policies.

3.2.1 *The Perspective of Prosecutors*

I interviewed Angela Hulsey and Kyle Brown, both Alabama prosecutors.⁹⁹ They are two of the five prosecutors I spoke to about the striking trend in Alabama of doctors surrendering patient information and medical records to law enforcement, the arrests, and plea deals. Many of the cases simply end in plea deals. A ten- or twenty-year plea deal is a bitter pill, but not unusual in these cases. Prosecutor Hulsey told me that, in her experience, "these cases settle 95 percent of the time because of the nature of the evidence that has already been presented to us against the person who has been accused."

I wondered about the quality of lawyers and they told me that for the relative few that can afford a private lawyer, they have "noticed a difference." However, "it is pretty clear to most of the attorneys with clients charged . . . it is clear the law is on the side of the state."¹⁰⁰ Carrie Buck, the poor white girl whom the state of Virginia compulsorily sterilized, quickly flashed to my mind. I wondered about her case. Her attorney also knew the law was on the side of the state and therefore did very little to defend her against the reach of the state's law.

They let me know that one key reason their cases settle before trial is because the women are afraid. They tell me that it is obvious when the women know prosecutors will bring the case “to a jury it is going to be inflammatory particularly before a conservative Colbert County jury.” This is “something that would factor into the attorney’s counsel to a client – a heavy consideration.”

We talk about the case of Amanda Kimbrough. I spent weeks in Alabama but never had the opportunity to meet Ms. Kimbrough, then an inmate at the “notoriously tough” Tutwiler women’s prison in Wetumpka, Alabama.¹⁰¹ Her mugshot is among the many my research assistants and I spent months gathering. I think about this image and the word stoic comes to mind.

In September 2008, Kimbrough was charged under the Alabama chemical endangerment statute. Her bond was set at half a million dollars. According to the indictment, she “did knowingly, recklessly, or intentionally cause or permit a child, Timmy Wayne Kimbrough, to be exposed to, to ingest or inhale, or to have contact with a controlled substance, to wit: methamphetamine.”¹⁰²

Kimbrough’s mugshot (and those of other similarly situated women in Alabama) interrupts the old narrative commonly associated with drug prosecutions of pregnant women (or women who were pregnant). She is white, tall, blond, and with penetrating blue eyes. She is married and a mother to two daughters. However, through her prosecution and plea deal, she became Alabama prisoner 287089, convicted for the death of her premature baby, Timmy Wayne Kimbrough, who survived nineteen minutes after birth.

As she told others at the time, “I am against abortion, I was going to keep my baby no matter what . . . It’s my baby. I’d do any and everything I could for my kids.”¹⁰³ For this reason, even when she discovered at twenty weeks that the baby might be at risk of Down syndrome, she rejected a doctor’s recommendation that she travel to Birmingham, Alabama for an abortion. However, these are not the concerns of prosecutors.

Kimbrough’s case was unique, because she took her case to trial. Prosecutor Hulsey confidently told me, “We had put all our evidence in and she pled guilty.” She did not seem surprised by Kimbrough’s guilty plea. Instead, she mentioned that Kimbrough “raised an issue about how these types of cases should not be prosecuted.”¹⁰⁴ I remain silent, as I believe the same.

She intimated that Kimbrough’s case fell apart when “it was her turn to show their case before the jury.” Maybe Hulsey was right: the fear of a tougher sentence motivates these women to settle. She told me, “Her last hope was maybe the judge would grant a motion for a judgment of acquittal. The only option was to go to the jury and take her chances or plead.” The bottom line was this, according to the prosecutor, “had she taken it to the jury, the judge could have sentenced her to the maximum.”¹⁰⁵ Instead, she took a ten-year plea deal. This was the first case of its kind tried through their office. She paused. Since Kimbrough, her office has prosecuted about fifteen other pregnant women or new mothers.

Prosecutor Hulsey informed me that a lot of times these cases hinge on informants – and many times the informants come from within the hospital. She told me there are motions that can be made “to protect the identity of informers.” She explained, “We want to protect the identity of the reporter.” Before we end the call, she informed me that “when a case is presented . . . our goal is to represent the state of Alabama in the best of our ability; our goal is to represent the victims; the victims are the most vulnerable, relying on their mothers’ womb[s]; they have no means to protect themselves.”¹⁰⁶ Who, I wondered to myself, protects the pregnant women? Kyle Brown, who had not said much in this interview, closed our call by noting that the Alabama Supreme Court has now given “widespread legal recognition that unborn children have rights by law, and the only place where they do not have rights is with abortion.” His final words to me were: “unborn children have rights.”¹⁰⁷

The prosecutors were courteous and generous with their time. When our interview ended, I still had more questions, but I was not sure if they have answers. Is Alabama’s use of its chemical endangerment law to prosecute pregnant women in line with legislative intent? Did legislators really intend to use that law as a dragnet against pregnant women in its state or rather enact it to deter exposing children to noxious fumes and even fires resulting from makeshift methamphetamine laboratories and dispensaries cropping up in trailer homes? The legislation’s author never intended its application against pregnant women.¹⁰⁸ However, at this stage, that seems not to matter to the Alabama prosecutors whom I interviewed, or to judges for that matter.

3.2.2 *Learning from McKnight’s Case*

Even when prosecutors believe they vindicate the rights of fetuses and newborns, they do so at enormous costs. Significant costs are associated with surveilling pregnancy for purposes of criminal law enforcement. The rise in the incarceration of pregnant women and mothers; the chilling prenatal visits and honest disclosures to medical providers, forging distrust in the physician-patient relationship; the increasing fiscal responsibility of the state; the long-term socioeconomic consequences to women; and the psychological harms to pregnant women and their children are all significant costs. The monetary costs alone can be quite high. The range is vast: in New York nearly \$70,000 per inmate per year, versus \$20,000 per year in South Carolina. Even at the lower end, when multiplied by decades and number of convictions, the costs add up.¹⁰⁹

Consider once more the case of Regina McKnight, sentenced to twenty years in prison for her stillbirth. Remember she was an example of why prosecutors needed to brandish a “stick” approach to monitoring pregnancy. After serving nearly a decade in prison, McKnight was released, her sentence unanimously overturned by the South Carolina Supreme Court. On the one hand, her case exemplified the

criminal justice system working after all – eventually, McKnight secured her freedom.

On the other hand, by the time of her release, McKnight had suffered the shaming, stigma, and indignity of multiple trials, accusations that she was cold-hearted and indecent, and a lengthy confinement in prison. Moreover, because most states do not automatically expunge criminal records after acquittals and pardons, women like Regina McKnight often suffer lingering consequences of incarceration, including difficulty in finding employment, housing, and even volunteer work. In many states, women with criminal records are unable to qualify for seemingly innocuous jobs such as cutting or braiding hair. The economic burdens related to incarceration, especially for drug-related offenses, are long-lasting and particularly harsh for single mothers.

McKnight's prosecution should be viewed as a cautionary tale. The case highlights the increasingly dangerous zone that pregnancy occupies in American law. Criminalizing conduct during pregnancy can ultimately undermine fetal health by chilling voluntary participation in prenatal medical visits. If women stand the risk of harassment and arrest while seeking medical care, the most vulnerable amongst them may choose to go without, particularly as incarceration impacts not only their own lives but also those of their children and families.

McKnight's case set a dangerous precedent, soon followed by other courts in other jurisdictions even while her prosecution and conviction went largely unnoticed in popular media and public discourse. The case marked a watershed moment in U.S. law for several reasons. First, the case sanctioned the criminalization of pregnancy. It established the troubling precedent that a woman's pregnancy could give rise to criminal investigation, prosecution, and punishment for murder against *her*. For centuries, courts resisted this type of jurisprudence in both tort and criminal law.¹¹⁰ But no longer.

Second, McKnight's prosecution established conduct during pregnancy as a site for criminal law intervention. It contributed to the normalization of police and prosecutorial involvement in women's reproductive health. In McKnight's case, the result was a prosecution for murder. In subsequent South Carolina cases, law enforcement targeted poor women of color in the wake of healthy births, premature births, and for miscarriages.¹¹¹

Third, McKnight's prosecution advanced a seriously distressing proposition related to perfection in pregnancy. Under this ruling, women's pregnancies could be held to a standard of faultlessness in South Carolina. Prosecutors erroneously assumed (and the court did too) that, absent depraved conduct on the part of pregnant women, stillbirths do not occur and that all pregnancies produce healthy babies except if the mother's conduct threatens fetal health. To the contrary, "stillbirth is one of the most common adverse outcomes of pregnancy."¹¹²

Stillbirths result from any number of factors.¹¹³ Upwards of 30 percent of pregnancies will terminate in miscarriage or stillbirth.¹¹⁴ Notwithstanding rigorous efforts

to identify what causes perinatal fetal mortality, researchers report that “a substantial portion of fetal deaths are still classified as unexplained intrauterine fetal demise,”¹¹⁵ because stillbirths are linked to environment,¹¹⁶ diabetes,¹¹⁷ hypertension,¹¹⁸ poverty,¹¹⁹ sexually transmitted diseases,¹²⁰ and stress.¹²¹

Implicit in McKnight’s conviction and subsequent cases involving pregnant women arrested and jailed for refusing cesarean sections, falling down steps, attempting suicide, and more, are assumptions and expectations about women’s conduct during pregnancy. The message of McKnight’s case was that failure to comply with the state’s perceptions of healthy conduct could result in arrest and punishment. This overbroad and vague standard could logically produce extreme anxiety in any pregnant woman, because even drinking tap water in some U.S. cities and towns could produce negative impacts in fetuses and children.¹²² The McKnight case demonstrated that if stillbirths could be prosecuted, then in all probability so could other pregnancy outcomes.

Finally, McKnight’s conviction served to politicize pregnancies, linking gestation with federal efforts to demonstrate toughness on drug crimes. McKnight’s conviction ensnared pregnancy as part of the “tough on crime” and “tough on drugs” policies of the drug war. Her prosecution opened a new avenue for police and prosecutors to advance an unsuccessful campaign to reduce the incidence of illicit drug use by arresting women at prenatal visits, dragging them into police cars shackled and handcuffed after delivery, and calling on doctors to disclose confidential medical records in the process.

3.2.3 *Children and Collateral Damage*

What happens to the children when their mothers agree to lengthy plea deals or suffer civil confinement? This questions are relevant to the concerns addressed in this Chapter and the policy solutions that follow. Emerging empirical research answers important questions regarding whether the children of incarcerated mothers are better or worse off, thus challenging some of the intuitions undergirding contemporary criminal punishment generally, and maternal policy specifically. The data illumines the myriad traumas experienced by children of incarcerated parents.

That is, the collateral consequences of policing pregnancy extend beyond pregnant women, reaching children in devastating, unintended, and frequently overlooked ways. More than two-thirds of women in prison are mothers.¹²³ Often, these mothers are the primary caregivers to their children (and other relatives) prior to entering the criminal justice system – by a wide margin. Incarcerated women are three times more likely than fathers to be the sole source of income and provider of basic needs for their children.

According to the Bureau of Justice Statistics:

Mothers were more likely than fathers to report living with at least one child. More than half of mothers held in state prison reported living with at least one of their children in the month before arrest, compared to 36% of fathers. More than 6 in 10 mothers reported living with their children just prior to incarceration or at either time, compared to less than half of fathers.¹²⁴

When their mothers are removed from home to serve time in states' jails and prisons, instability and insecurity enter children's lives.¹²⁵ Sometimes their mothers are relocated to other states, making it difficult to maintain contact and facilitate visits. Research led by Professor Kristin Turney, a sociologist studying the effects of parental incarceration in the lives of children, offers disquieting insights. Her research identifies the deleterious impacts of parental incarceration on children.

Children who experience parental incarceration suffer greater harms related to attention deficit, behavior or conduct problems, language and articulation challenges, and developmental delays than children who experience parental divorce or parental death.¹²⁶ Parental incarceration is so deleterious to children that those who have a household member with a "drug or alcohol problem" are yet better off according to physical and psychological indicators than children with a parent in jail or prison.¹²⁷

In essence, parental incarceration harms children in ways previously unreported and states' actions are implicated in the harms to children of incarcerated parents. According to Turney, these harms include both physical and psychological impacts on the children, which can be long-lasting. These are matters about which law-makers and other stakeholders should be concerned.

Additionally, the escalation of mothers behind bars now results in babies born behind bars and children incarcerated alongside their mothers as a policy solution. This highlights another area of concern and inquiry, because mass incarceration's deeply contentious and fraught realities have direct impacts on babies and children who essentially serve time with their mothers. These incarcerations are not necessarily due to fetal protection laws; most are for drug-related offenses of some sort.¹²⁸

In its report *Mothers, Infants and Imprisonment*, the Women's Prison Association's Institute on Women and Criminal Justice, states that because "the number of women in prison has skyrocketed over the past 30 years, states have had to consider what it means to lock up women, many of whom are pregnant or parenting."¹²⁹ In most cases, children of incarcerated mothers, whether their births occur behind bars or not, move into various forms of "other" care, which may include relatives, foster homes, shelters, group homes, and other arrangements.

For the babies and children who have the benefit of residing with their mothers in prison nursery programs, the outcomes for both mothers and their babies show significant promise: recidivism rates are lower and, so far, "children show no adverse effects" from their lives behind bars.¹³⁰ Research shows that "by keeping mothers and infants together, these programs prevent foster care placement and allow for the formation of maternal/child bonds during a critical period of infant

development.”¹³¹ However, these options are complicated too. Overcrowding, medical neglect, and unsanitary conditions describe only some of the difficulties incarcerated people experience. These are also tough places, where violence is common. One reporter described the conditions of American prisons where nurseries are found: “you walk through a metal detector and a locked steel door to a courtyard surrounded by razor wire and two 20-foot fences.”¹³² This is what the children of the nursery cast their gaze upon when they look outside. Research has yet to address the long-term consequences of children accompanying their mothers to prison.

3.3 CONCLUSION

As this Chapter explains, choosing birth has become a political landmine and trigger for state surveillance and criminalization of poor pregnant women, with severe extralegal consequences. These penalties now include criminal and civil incarceration for miscarriage and stillbirth, as well as punishments for behaviors perceived to threaten fetal health. This political shift in reproductive politics now redefines women’s responsibilities and obligations during pregnancy, the status of preembryos, embryos, and fetuses, and the power of the state vis-à-vis pregnant women.

This Chapter articulates three important themes about this shift in contemporary reproductive politics in the United States. First, it tells a story about legal innovation through the propagation of fetal protection laws. It explains how the frontlines of fetal protection strategically shifted to pregnancy. As such, existing laws were applied in new ways, such as extending child abuse statutes to fetuses and embryos, thereby redefining the terms of engagement with reproductive rights. New laws also emerged making explicit states’ agendas in both surveilling pregnancy and criminalizing conduct perceived as threatening fetal health. Through this agenda, fetal rights have now emerged.

Second, the Chapter underscores the importance of ethnography in reproductive rights. That is, it emphasizes the value of hearing the stories of women targeted by these new legal innovations as a way of perceiving what is at stake in their lives. By doing so, we come to understand legal innovations that disrupt and undermine reproductive rights – frequently at the expense of the most vulnerable.

Third, the Chapter articulates a blind spot within reproductive rights discourse and advocacy. It argues that a reproductive rights framework, which perceives abortion rights as its only or primary objective, woefully misreads reproductive health and the social contexts in which women live their lives. Framing reproductive rights as abortion rights both undermines the security of an abortion right and problematically ignores the broader interests contained within reproductive privacy. Simply put, limiting reproductive rights to abortion rights undermines the importance of women’s reproductive health. This framing disserves women who choose to parent even under arduous circumstances and ultimately impairs the abortion right itself.