

Conclusion

Still shackled, I climb up on the table, where nurses begin the very painful search for my small veins. As I begin to go under, the shackles are finally removed from my ankles. The guards will stay in the corner to watch as my breast comes off.

S.E. Allen

Understanding and addressing the enigmatic policing of pregnant women requires grappling with broader, troubling social and political issues, including mass incarceration, the U.S. drug war, welfare reform, and even our nation's notorious, but largely hidden, history of eugenics. Any of these topics would rightly deserve its own book and brilliant scholars and others have taken to writing them. These policy landmines set the stage for regarding pregnant women as objects of the state, deploying criminal punishment as a viable means of regulating their behavior, and, in essence and substance, criminalizing pregnancy. This book makes a close study of those issues and reveals that fetal protection efforts, which are often purported to justify states' persistent intrusions in poor women's lives, serve to mask other politically expedient interests: controlling women and demanding their obedience, gerrymandering, pandering to tough-on-crime strategies, achieving electoral victories, and heightening moral panic. Rarely are the well-being and dignity of babies and children a persistent concern of those politicians who most favor punitive interventions in the lives of their mothers.

In the process of writing this book, I have come to conclude that criminal threats and prosecution are measuring pregnant women's obedience, and far more than fetal risk. After all, how are shackling, birthing in prison toilets, and rearing children behind bars demonstrative of the state's respect or care for fetal or child life? Does shackling pregnant women during childbirth, which is legalized in dozens of states, amount to treating human life with dignity? Does it recognize the dignity of pregnant women?

11.1 POLICING THE WOMB: DIGNITY AND MOTHERHOOD

As this book explains, the broader turn to mass incarceration ensnares women too, creating invisible casualties, exacting unaccounted-for collateral damage in their children's lives, and instantiating troubling social norms. The costs of mass incarceration extend far beyond strained economic considerations, perversely incentivized contracts with private prisons, and states' budget shortfalls because they cannot afford to incarcerate so many Americans. The cost of relentless policing produces horrific externalities for children and the broader society, which becomes accustomed to legislative policy being shaped by politically motivated moral panic. That is, when politicians deploy the rhetoric of welfare queens bleeding the nation's economy by fraud, of needing to save babies, or claiming, as they did in the 1980s, that crack babies would overwhelm hospitals, schools, and even prisons, they trigger national hysteria, which gives way to aggressive civil and criminal interventions in the mothers' pregnancies.

However, amid the coercive incitement of moral panic by politicians and law enforcement, who demand that civil and criminal punishments be exacted upon low-income and working-class mothers, the well-being of children is often an afterthought. As Chapter 2 describes, crack baby hysteria and prosecutions were born of a myth now discredited by medical organizations.

It is a matter of great concern when a society abrogates or abandons its moral compass, loses sight of the dignity of others, and renders half of its population invisible. For example, if sentenced while pregnant, women may give birth in prison toilets or on rat-infested floors – like Tara Keil in Iowa¹ or Ambrett Spencer in Arizona.² Birthing in a toilet or on a rodent-infested floor demonstrates cruelty – not dignity, care, and fetal or child interest. Birthing under such conditions is an affront to the dignity of the U.S. criminal justice system – or should be. As one judge told me, prison is no resort. And while that is true, one reporter's description of Arizona's women prisons evokes nothing less than the imagery of cruel and unusual punishment: the local environmental agency found mice's fecal matter in the women's drinking water in one of Sheriff Joseph Arpaio's Maricopa County jails. Even the most hardened, ardent criminal deserves sanitary drinking water, let alone the two-thirds who are non-violent offenders.

Children suffer too from the United States' insatiable appetite for criminal punishment. The repercussion of states' policing and incarcerating pregnant women is that they give birth under arduous conditions. For the babies, this may mean coming into the world while their mothers' legs and wrists are shackled to metal gurneys through leg cuffs and chains, tethered to purportedly "prevent the women from running away" or to keep the armed guards "safe" (if the mothers are afforded hospital delivery). Callously, years ago, a male professor chuckled to me that there was no need to shackle women during delivery, because "police could just shoot the bitch if she ran." I was horrified and told him so. He apologized, but his

comment was all too revealing. Poor pregnant women are perceived as expendable and deserving of punishment.

Mass incarceration exacts an enormous toll on children. Professor Kristin Turney empirically details the profound emotional and psychological health harms experienced by children of incarcerated parents. Her research reveals that the impacts of incarceration on children are far worse than previously realized. Indeed, the health harms exceed experiencing a parent's death or suffering through divorce.³ In other words, the emotional and physical health of children of incarcerated parents deteriorates to such a degree that it becomes credibly and quantifiably measurable by researchers. The problem of mass incarceration is so extreme that even *Sesame Street*, the children's television program, introduced a puppet, Alex, to help the children in their viewing audience cope with the anxiety of parental incarceration. Alex is the muppet child of an incarcerated parent.

What is the solution? For some lawmakers, prison nurseries – allowing children to live alongside their incarcerated mothers – promote family unity and reduce the anxieties of estrangement and displacement. In fact, for the babies and children who reside with their mothers in prison nursery programs, the outcomes for both mothers and their offspring show significant promise: recidivism rates are lower and, so far, some say “children show no adverse effects” from their lives behind bars.⁴ However, these radically fraught options expose the disturbing consequences of a problematic criminal justice system that ignores the dignity of women and their children. The prison conditions are sometimes horrific. The nurseries leave no doubt that the women and their children are still in prison; the razor-sharp barbed wire and twenty-foot-high metal fences give that away.

In most cases, children of incarcerated mothers – whether their births occur behind bars or not – transition into various forms of other care, which may include relatives, foster homes, shelters, group homes, and other arrangements. Currently, about 500,000 children live in the limbo of U.S. foster care, and hundreds now live behind bars with their mothers. For children who remain in foster care throughout their adolescence, they can expect to endure homelessness, juvenile detention, teen pregnancy, and violence.⁵ Fewer than 6 percent will graduate from college.

11.2 TELLING THE STORY

Over the past decade, I have spoken to activists, prosecutors, judges, law professors, sociologists, women's groups, thought leaders, politicians, chief executive officers, theologians, former convicts, and others about the turn to policing women's reproduction and its deeply disturbing consequences, including the challenges women subsequently face in obtaining housing and education loans, voting, and maintaining the custody of their children. Sue Ellen Allen, the cofounder and former Executive Director of Gina's Team, and I placed these issues front and center at President Clinton's 2015 Clinton Global Initiative (CGI), held in Denver, Colorado. Had these various powerful groups and individuals, including mayors, governors,

and various power brokers at CGI, including President Clinton, noticed the dramatic rise in female incarceration? For Sue Ellen, this was a deeply personal question: she had served seven years behind bars, during which she suffered breast cancer, endured a mastectomy, and near solitary confinement in retaliation for demanding medical care for her twenty-five-year-old cellmate, Gina. My introduction to Sue Ellen was through her powerful autobiographical opinion editorial, describing having her breast “cut off”⁶ while in prison. It dawned on me that most news media ignore women in prison as a general matter, and therefore overlook their healthcare behind bars. As Sue Ellen recalled:

Imagine the feeling of shackles on your ankles, restricting your movements to baby steps. Even when you are very careful, you wind up with blisters from the weight of the hard, cold steel dragging you down. Now imagine handcuffs. They, too, are designed to restrict. They can chafe and cut, especially if the guard who cuffs you is having a bad day. He can clamp them on too tightly, and his bad day becomes yours.⁷

Sue Ellen wanted President Clinton and the CGI attendees to know about Gina, a mother of four, who died behind bars after prison officials neglected to provide timely medical care, despite numerous complaints, fevers, headaches, nausea, and inability to eat. Gina lapsed into a coma on the day she finally received medical attention, and died three days later. She had undiagnosed leukemia. A year after we spoke about these issues in Denver, Gina’s eldest daughter committed suicide.

In preparing this book and the articles and opinion editorials preceding it, I learned more than I previously thought imaginable about the troubling overuse of criminal punishment and the mass incarceration of women that results. Michelle Alexander’s powerful book, *The New Jim Crow*, astonished readers about Black males and incarceration, describing how the old Jim Crow gave way to an even more pernicious pattern of contemporary institutionalization, discrimination, and disenfranchisement. In essence, she warns that in many contexts life is worse for Black men now than after the abolition of slavery, because more are incarcerated now than then. A surprising percentage are disenfranchised from voting, denied the possibility of receiving federal loans and grants for post-secondary education – essentially cutting off another lifeline – and the felony record further disenfranchises them from housing, where they can volunteer, and even working.

However, there was and continues to be a void in thinking about women behind bars. Through this research, I have come to know that the turn to mass incarceration spares not even teen mothers from what at times can only be described as undignified, cruel, and inhumane treatment. Beyond mass incarceration, had the individuals I have spoken to over the past decade considered that women who desire to become mothers may be subjected to the most inhumane and undignified treatment by the state? This includes shackling, court-ordered bed rest, involuntary civil confinement, solitary confinement, and threats of criminal punishment if they fail

to meet the prosecutorial and legislative expectations of healthy pregnancy as inscribed in fetal protection laws. Why are these women the subjects of such intensified state scrutiny? Why have doctors taken up the mantle of deputized law enforcement when treating pregnant women? Ultimately, why are these women, even those who suffer from drug addiction, in prison?

Chapters in this book were the subject of talks across the country at law schools, medical schools, and with various civil society organizations. Many of the people with whom I spoke were very thoughtful on the subject, offering fascinating insights honed from their personal and professional experiences. However, most of the incredibly talented individuals with whom I had the pleasure to speak about this research – especially law professors – were unaware, startled by the cases, narratives, and costs (social and financial) associated with incarcerating women.

To gain an even sharper understanding for my research, I interviewed some of the men and women on the front line – from prosecutors in Alabama to activists in New York. I wanted to learn from them and to understand their perspectives on this alarming turn to policing women's pregnancies – namely, what accounts for this assiduous, but impalpable movement.

Steve Marshall, now Attorney General of Alabama, generously offered his time, speaking to me by phone and in person in Tuscaloosa and Birmingham when he was District Attorney in Marshall County, Alabama. Steve met with me to shed light on Alabama's prosecutions and help me understand these matters from a law enforcement perspective. He spoke about his personal and professional commitments and frustrations with combatting drug use and dependence among pregnant women. He explained that he wanted to "save the babies," and "stop abortions."⁸ Steve seemed sincere; he struggled with finding the right balance and approach to address illegal methamphetamine use in his county and, more broadly, the state. Like prosecutors in other states, he strategically uses child abuse or endangerment statutes to prosecute cases involving fetuses. And while some courts strike down such prosecutions, the Alabama Supreme Court handed Steve and other Alabama prosecutors a victory: that court recognizes no difference between a fetus (even nonviable) and a child.

Sadly, contemporary fetal protection efforts often reveal hostility to the concerns of low-income pregnant women, because they counterproductively emphasize prosecution, incarceration, shaming, and stigmatization over healthy physician-patient relationships, medical treatment, and patient autonomy. Even in Alabama, very arbitrary lines are drawn between pregnant women who depend on prescription medications prescribed by their doctors to ease anxieties and pains during pregnancies and their counterparts who use methamphetamines, belying claims that states want to stamp out *all* drug use during pregnancy. I raised this with Steve Marshall. It was not something he had considered.

Rather, despite the purported aims of fetal protection prosecutions, targeted action against poor women's illicit drug use seems to be a priority – not *all* harmful drug use. Not surprisingly, significant problems and consequences flow from this

approach, because it not only singles out one class of pregnant women for using drugs to treat their anxieties and pains, but also fails to recognize that prison is the worst place to promote fetal health.

This book takes up the largely ignored legislative and law enforcement turn to criminally policing pregnancy in the United States, providing a historical account of state intervention and control of women's pregnancy, while also offering theories to explain these legal and social shifts. The rising tide of criminal law enforcement in women's pregnancies coincides with deep shifts in the United States' cultural climate.

For example, the shifting cultural and political norms framing women's reproduction in the United States are marked by a troubling departure from civil, constitutional, and medical rights across a set of spheres that include rape, abortion, and pregnancy generally. As retired Republican senator Olympia Snowe informed me and a rapt audience at a summer 2013 luncheon in Minneapolis, Minnesota, when she was recruited to run for national office in the 1970s, the Republican Party leadership did not care that she was "pro-choice." Perhaps it did not matter, because George H.W. Bush shepherded Title X, which provides reproductive healthcare for the poorest women, through Congress. That legislation was signed into law by Richard Nixon. For her, it was a justice issue and at the time many within her party felt similarly, or at least believed these issues, such as abortion, rape, and pregnancy, were personal matters better left to women and their healthcare providers.

However, times have changed. Beginning in the 1980s and 1990s, special interest groups and strategic electoral campaigns used crime and unwed motherhood as the targets of animus, literally bringing pregnant women under attack. These attacks bring into question the very personhood of pregnant women. In fact, antiabortion legislators across the United States now claim that embryos and fetuses share the same constitutional status and rights as the pregnant women who gestate them. Antiabortion legislators are also shifting their tone and sympathies about rape and incest. Where, previously, even conservative lawmakers made clear that abortions should be permitted to save the life of the pregnant person as well as in cases of rape and incest, now that too is shifting. During the summer of 2019, Representative Steve King of Iowa told a crowd gathered at the Westside Conservative Club in Urbandale, Iowa, "I know that I can't certify that I'm not a part of a product of that." He pondered whether there would be "any population of the world left" if abortion exceptions existed for rape and incest. Of course, the very essence of rape and incest is an abuse of power and disregard for the humanity of the person sexually subjugated.

According to Lynn Paltrow, executive director of the National Advocates for Pregnant Women, "laws that seek to treat fertilized eggs, embryos, and fetuses as entirely separate legal persons provides the basis for creating a system of separate and unequal law for women."⁹ In other words, claims to protect and promote fetal health

and rights are sophisticated proxies for preserving patriarchy and the subordination of women.

In this new and seemingly neglected era of pregnancy policing, the roles of nurses and doctors are compromised as legislatures increasingly instantiate them as detectives and informants for the state, compromising well-established fiduciary roles, responsibilities, and obligations. For example, unbeknownst to pregnant patients, nurses and doctors increasingly don the roles of police informant during prenatal visits, disclosing confidential information to law enforcement, including medical tests and confidential communications, all without patient consent.¹⁰ That law enforcement now plays a key role in American reproduction may come as a surprise, given strides gained and legal victories secured by women in employment, politics, education, and even reproduction. Yet, well over five hundred cases in recent years – in Alabama alone – bear out the aggressive turn to criminal policing of women's pregnancies. That most of these cases suffer the fates of obscurity and disregard may have to do with indifference and antipathy toward the poor.

The new reproductive politics are shaped by significant shifts to criminal law interventions in women's pregnancies and the establishment of legal rights in the fetuses. Such shifts raise important social questions and cast shadows on well-established constitutional, contract, property, and tort law norms, creating both concerns and tensions between federal and state law. For example, fetal protection laws, which now exist in thirty-eight states, impose criminal law interventions and sanctions on women's pregnancies. These laws were largely intended to protect women from domestic violence, but now serve as powerful tools used by legislatures and law enforcement officials to punish pregnant women. Child abuse statutes originally intended to protect against the neglect and abuse of children provide enforcement leverage as revamped tools in the arsenals of legislators and prosecutors seeking to criminalize behavior that potentially harms fetuses.

States such as Utah have taken up the call to use a "very strong stick" in policing women's pregnancies by enacting aggressive fetal endangerment legislation, which applies to pregnant women who harm their pregnancies. Texas representative Doug Miller authored a bill aimed at criminalizing the ingestion of any controlled substances during pregnancy, making violation of the proposed law a felony. Other legislative efforts include establishing personhood in embryos and fetuses, which broadly criminalizes any conduct that interferes with perfecting the health of a fetus. Some scholars see these attacks as being abortion-related and they build a persuasive case, pointing to legislative attempts to bar the procedure after the first sound of a fetal heartbeat (approximately six weeks) rather than viability and, in Wisconsin, Alabama, Mississippi, and North Carolina, attempting to restrict abortions based on doctors' admitting privileges at nearby hospitals.¹¹

Nevertheless, these legislative turns reflect not only the reflexive and often ineffective use of criminal law to address tough social issues, such as endemic poverty, lack of employment, drug addiction, depression, homelessness, and

hopelessness; they also serve political purposes and expediency that may offer limited benefit to society. On close inspection, the passage and criminal enforcement of fetal protection laws may evince motives and implicit biases beyond abortion and even fetal health protection. For example, the new reproductive politics reveal pernicious practices connected to race and class bias, moral panic, selective prosecutions, and the extralegal desire to punish and shame vulnerable women. This book takes a critical look at those issues.

11.2.1 *The Gender Box*

Several clear problems emerge in the rush to police women's pregnancies. For example, the new reproductive policing focuses exclusively on women – their lifestyles, dependencies, associations, conduct, mistakes, and behaviors during pregnancy. By taking this approach, legislators invite false scientific assumptions, stereotypes, and misconceptions into how the public comes to understand reproduction. Legislators frame pregnancy as being controlled and conditioned by women. However, women alone do not create pregnancies, nor can they account for all the conditions that might benefit or harm a gestation, including environment, paternal health and age, and access (or lack of access) to medical services.

By focusing primarily on pregnant women in enacting new fetal protection laws, legislators send a very strong signal implying that pregnant women alone determine fetal health outcomes. Empirical studies expose the inaccuracy and deceptiveness in such claims.¹² Nevertheless, like recent controversial political accounts of “legitimate rape” as a type of sexual violence that cannot lead to pregnancy,¹³ erroneous reproductive claims can carry significant traction, particularly when afforded political spotlight in electoral campaigns. Framing fetal harms as exclusively and directly linked to women is scientifically invalid and only serves to exacerbate stereotypes and unconstitutionally burden the interests of pregnant women.

11.2.2 *“A Very Strong Stick”*

In recent years, the revision of child abuse statutes to include harms to fetuses, feticide laws, and the enactment of new personhood legislation represent unbridled and unchecked intrusions into women's pregnancies. Texas defines personhood as beginning at conception. In 2018, Alabama voters approved “Amendment 2,” which makes it state policy to amend the Alabama Constitution and to “declare and otherwise affirm that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, most importantly the right to life in all manners and measures appropriate and lawful; and to provide that the constitution of this state does not protect the right to abortion or require the funding of abortion.”

Within months of the ballot initiative, Ryan Magers, an Alabama resident, filed a wrongful death lawsuit against an abortion provider, the Alabama Women's Center for Reproductive Alternatives, its employees, and a pharmaceutical company, claiming that an abortion received by his girlfriend in 2017 was effectively murder of his future offspring, giving rise to a civil claim. His lawsuit claimed that "under Alabama law, an unborn child is a legal person" and relied on the new Amendment 2 provision in the Alabama Constitution. Madison County probate judge Frank Barger allowed the case to advance, deciding that Baby Roe was a person with legal rights. Magers represented Baby Roe's estate. Eventually, Madison County Circuit judge Chris Comer dismissed the claim.

Fetal protection laws, including new personhood measures, broadly sweep all potential reproductive harms into the gaze of criminal law enforcement and render them liable to punishment. As a result, newly enacted fetal protection laws (and amended child protection statutes) across the United States ensnare pregnant women for a broad range of activities, including falling down steps, suffering drug addiction, refusing cesarean sections, or attempting suicide. And prosecutors now speak openly about needing to punish pregnant women – for their own good. Some, like Charles Condon, claim that a strong "stick" is needed to keep pregnant women in line.

The passionate urging that "a very strong stick" be applied against pregnant women evokes troubling symbolism and imagery. The imagery casts metaphors of violence like whippings. This symbolism is consistent with the use of metal shackles on pregnant women during pregnancy and harsh punishments meted out by prosecutors.¹⁴ Importantly, the desire to inflict "very strong sticks" against pregnant women exposes extralegal interests beyond promoting fetal health, such as shaming, stigmatization, and retribution. Michel Foucault refers to this as the "spectacle" process.¹⁵

Well, does it work? Will inflicting "strong sticks" against pregnant patients reduce the incidences of low birth weight, premature births, and the other mental and physical conditions legislators seek to prevent? This is unlikely, because the conditions that contribute to the fetal outcomes legislators and prosecutors target may be caused by various factors, including domestic violence, poverty, living within close proximity to a toxic environment, poor nutrition, stress, depression, and the father (his biology, including his age). For example, as many as one-third of autism cases – a disease in which legislators have taken significant interest – result from the father's older age. Additionally, schizophrenia and numerous other mental health diseases are linked directly to paternity. Therefore, focusing criminal law interventions on pregnant women will at best achieve false security – a political placebo effect.

11.2.3 *Pregnancy Hierarchies: Implicit Class Bias*

Like the old reproductive policing during America's notorious, but significantly overlooked, eugenics' period, the new era of reproductive policing creates

reproductive hierarchies that distinguish between women's pregnancies based on socioeconomic or class status. Overwhelmingly, those targeted, arrested, and incarcerated in the United States for attempting to injure their fetuses are poor pregnant women. The gross disparities in arrests might be explained by the profoundly inaccurate assumption that poor women behave in riskier ways during their pregnancies than their middle-class or wealthy counterparts.

Clearly, most doctors respect their legal and ethical duties to their patients, and they desire to treat them with dignity and respect. However, class bias likely interferes, to some degree, with medical care. Ultimately, doctors more often extend greater deference to middle-class patients, and are more inclined to preserve and protect their confidentiality. Some doctors may share class status, similar educational attainment, and comparable professional status with their middle-class and more affluent patients. Moreover, the behaviors engaged in more frequently by middle-class women (that may expose fetuses to health risks) may be perceived as morally neutral and legally permissible. Take, for example, the use of highly addictive prescription medications to treat depression and anxiety,¹⁶ or the use of assisted reproductive technologies that increase the incidences of cerebral palsy, hearing impairment, multiple births, premature births, and cognitive delays in offspring.

Reproductive hierarchies illumine double standards in the rule and enforcement of law, whereby interest in the "socially fit" or the social fitness of a pregnancy is contingent on the pregnant patient's socioeconomic status. In other words, as in the eugenics era, those most vulnerable to contemporary reproductive policing are the poor and destitute. For example, a century ago the nation's first eugenics laws declared who could reproduce in the United States and who could not. The laws forbade women and men considered socially, morally, and intellectually unfit to reproduce. Forced sterilizations rendered girls from poor families – those as young as ten and eleven – forever unable to bear children. Legislatures found safe havens and constitutional legitimacy for these laws in American courts. In one of its most alarming decisions of the twentieth century, *Buck v. Bell*, the United States Supreme Court affirmed that forced sterilizations, carried out ubiquitously against the poor, did not violate their constitutional rights.

11.2.4 *Racial Discrimination and Selective Application of Feticide Measures*

Racial biases contribute to the significant disparities in who comes under the force of police scrutiny and control during pregnancy. Frequently, the cases brought to police and judicial attention may involve thorny legal and social issues, such as the patient who desires chemotherapy but also happens to be pregnant, or the patient who ingests illicit substances during pregnancy but nonetheless desires a healthy child. Law enforcement officials view these cases as cut-and-dry fetal

abuses that they are authorized to pursue. Nevertheless, profoundly apparent hierarchies frame when, how, and whether state intervention takes place at all.

For example, a slightly higher proportion of white women ingest illicit substances during pregnancy compared to Black women – 15.4 percent and 14.1 percent, respectively.¹⁷ Yet, according to a peer-reviewed study published in the *New England Journal of Medicine*, medical professionals are ten times more likely to report African American pregnant women to state disciplinary authorities if they test positive for illicit substances.¹⁸ These disparities offer disquieting points of reference and highlight deeply embedded implicit biases. Researchers found that only 1.1 percent of pregnant white women testing positive for illicit drug ingestion are reported, compared to 10.7 percent of Black women.¹⁹ To explain the disparity, some commentators claim that women of color serve as the convenient political scapegoats in legislative battles on drugs, welfare, and abortion. Lynn Paltrow surmises that “pregnant women became an appealing target for law enforcement officials who were losing the war on drugs and for the anti-choice forces whose goal has been to develop ‘fetal rights’ superior to and in conflict with the rights of women.”²⁰

Legislators, prosecutors, and doctors claim their interventions are about saving babies and preventing disabilities. Yet, pregnant women caught in the criminal grips and gaze of the state are almost exclusively poor and of color, like Bei Bei Shuai, Paula Hale, Regina McKnight, Parvi Patel, and many others. Frequently, women of color are the selectively targeted victims of intense state scrutiny. For example, in an infamous South Carolina criminal dragnet involving the collaboration of Medical University of South Carolina hospital staff, prosecutors, and local police, the self-described “task force” targeted only Black women for special drug testing, shackling, and arrest during and after prenatal visits, with the exception of one white pregnant patient.²¹ And in her case, the attending nurse who spearheaded the collaboration wrote on the patient’s chart: “lives with her boyfriend who is a Negro.”²² Such racial biases have negative social consequences and are constitutionally unjustifiable.

11.2.5 *Deputizing Doctors as Law Enforcement and Informants for the State*

Two major shifts in the roles and functions of nurses and doctors mark this era of policing women’s reproduction. The new reproductive policing involves the instantiation of medical personnel as interpreters of fetal drug laws and their assuming the function of informants for the state. Both of these shifts pervert the delivery of medicine and the roles of medical personnel. Indeed, these shifts create legal problems that unconstitutionally burden the interests of pregnant patients. The former demands legal capacities that medical staff do not possess, which exposes their judgments to discretion, fallibility, bias, and wrong calls. The latter imposes significant costs on the provider-patient relationship, as doctors and nurses risk violating fiduciary duties in order to aid law enforcement. Furthermore, patients

might withhold relevant information needed to treat their conditions or entirely forego medical care during pregnancy.

Importantly, these institutional shifts that embed doctors as criminal law gatekeepers cannot be described as rare or minimal invasions of patient privacy. These shifts represent the institutionalization of realigning ideologies and the reprioritization of legal values, particularly fiduciary duties. By demanding that doctors and nurses don the hats of law enforcement and informants, fissures in the provider-patient relationship emerge and mistakes surface. For example, some medical providers might consider their fiduciary obligation to their patient as secondary to their duty to disclose their patient's medical information, including interviews, medical tests, and other records, to the state. They may mistakenly believe that law enforcement interests trump patient interests and their medical obligations to privacy, informed consent, and confidentiality.

In Christine Taylor's case, it was a nurse who interpreted her patient's fall down steps as meeting the legal standards of attempted feticide. Taylor's subsequent arrest and incarceration serve as a potent example of not only the risks associated with instantiating medical providers as interpreters of feticide laws but also the fallibility of their legal interpretations and judgments. Taylor was later released from jail as prosecutors could not substantiate an attempted fetal murder case against her. Nevertheless, the harm and stigma that resulted from that "mistake" persists, as evidenced by one national news outlet continuing to post an online article entitled *Did Christine Taylor Take Abortion into Her Own Hands?*²³

11.2.6 *Benefiting and Harming Children*

Prosecutors claim that strict criminal punishments against pregnant women achieve justice and serve the interests of harmed fetuses and society. Such claims are seductive, but are they credible? Are they correct? In other words, are children of incarcerated mothers better off? Is there a social benefit from mass incarceration of poor, pregnant women? It turns out that children of mothers in prison are actually worse off. In a thought-provoking study published in the peer-reviewed *Journal of Child and Family Studies*, researchers discovered a high prevalence of posttraumatic stress disorder in children of incarcerated parents.²⁴ Other studies confirm significant incidences of anxiety, depression, and fear in children of incarcerated parents.²⁵

Shay Bilchik, author of a study focusing on the children of incarcerated parents, offers important insights into the status of children affected by "the call for more punitive and accountability-based approaches to stem the rising tide of crime."²⁶ She emphasizes that "there seems to be little controversy over the fact that this trend has caused . . . collateral damage."²⁷ She explains that the damage is not to the community, but rather "to the children of those offenders, negatively impacted by the incarceration of their parents."²⁸ Indeed, the National Council on Crime and Delinquency reports that children of incarcerated mothers are one of the most at-risk

groups in American society²⁹ and that a mother's incarceration may be particularly "destructive" for her children.³⁰

Thus, while legislators express the intention "to save the babies," incarcerating mothers may lead to their children being worse off and more likely to eventually enter the criminal justice system. A mother's incarceration neither reduces the potential long-term harms to the child nor does it enrich a child's life. This type of reproductive regulation may exacerbate rather than reduce harms to children³¹ and society – children with parents in prison are six times more likely to "go to prison."³²

11.2.7 *Turning Domestic Violence Laws Against Women*

In the shadow of the relentless, high-profile abortion wars during the last three decades, state legislatures adopted feticide statutes that at the time of their enactment promised to protect pregnant women against battery and domestic violence, which tend to increase during pregnancy. The Centers for Disease Control and Prevention (CDC), the lead United States agency devoted to monitoring public health and disease, reports that domestic violence is one of the leading threats to fetal health and development in developed as well as developing nations. The United States is no exception. The CDC defines domestic violence as "physical, sexual, or psychological/emotional violence or threats of physical or sexual violence that are inflicted on a pregnant woman."

The data is startling and horrific. According to the World Health Organization, pregnant women are "60% more likely to be beaten than women who are not pregnant."³³ Intimate partner abuse during pregnancy injures not only the mother's health but also that of the fetus, causing "threats to health and risk of death" from trauma.³⁴ Jacquelyn Campbell's extensive research on domestic violence during pregnancy confirms that intimate partner abuse at the time of pregnancy causes physical trauma and psychological distress that can result in severe depression and anxiety.³⁵ The mental and physical health consequences of domestic violence include physical injury, gastrointestinal harms, sexually transmitted diseases, depression, chronic pain, and post-traumatic stress disorder.³⁶ And the frequency of domestic violence during pregnancy is as high as 20 percent.³⁷ However, women who are domestically abused may be less likely to report the abuse for fear of reprisals from their partners and the threat of child welfare services removing children from the home and/or the baby after its birth.

Professor Deborah Epstein, in her invaluable research, documents the tireless efforts of feminists to bring about legal reform in the sphere of domestic violence, which until the 1980s and early 1990s drew a tepid response from law enforcement and legislatures, who viewed physical violence against women as "private" family matters.³⁸ Extreme brutality, including strangulations, kicking women down steps, marital rape, sexual assaults, breaking noses, and even kidnappings, fell within the categories of "private" and "family matters." Feticide laws were intended to fill this

gap and provide protections for pregnant women, whose lives were more likely to be threatened than those of nonpregnant women.

It is ironic, then, that such laws, intended to protect pregnant women against domestic violence, have gained momentum as tools for legislatures and prosecutors to perfect pregnancies and treat women's reproduction as matters of the state. Suzanne Goldberg, the director of the Center for Gender and Sexuality Law at Columbia Law School, explained it thusly: "Pregnant women are winding up victims of these laws instead of being protected by them."³⁹ She is right.

Consider once more the case of Bei Bei Shuai. Prosecutorial efforts to convict Shuai revealed significant disparities in the application of feticide laws in Indiana. Prosecutors desired an all-or-nothing verdict against Shuai; if their prosecution was successful, she could have served forty-five years in prison. Prosecutors claimed that their interests were the interests of the fetus and society. They argued that the state had convicted others under this law and that it must apply the law neutrally. Indeed, a prosecutor proudly informed me that she had prosecuted a man for violating the law and that he had received a forty-five-year sentence.

However, prior to Shuai's prosecution, the most recent feticide case on record was *Kendrick v. State*, where a bank robber shot the teller in the stomach, killing her twins. The defendant received a sentence of four years for each fetus. Similarly, in *Shane v. State* the defendant received eight years for the charge of killing a fetus. Finally, in *Perigo v. State* the defendant was convicted of a Class C felony feticide charge at trial and was sentenced to five years for killing a fetus. The backdrop of these cases involved torture, stabbing, shooting, and unparalleled violence against pregnant women. Most revealing are the minimal sentences sought for killing the fetuses.

11.2.8 Extralegal Punishment: Shaming

In prior works, I have suggested that stigma, shame, and contrition are the intended byproducts of criminal law punishment.⁴⁰ These emotion-driven aspects of criminal law seek to promote public welfare and achieve utility when applied to universally condemned crimes or when guilt is not enough. For example, the public nature of the court appearance, the subordination that attaches to incarceration, the psychological trauma resulting from institutionalization, limited access to the outside world, and being confronted with those injured by the defendant's conduct are all part of the criminal law punishment process.

In relation to pregnant women, however, criminal condemnation takes on powerful, extralegal force. It extends retribution to spheres where some scholars suggest the law should not tread.⁴¹ These extralegal punishments bear on an ex-offender's ability to fully rehabilitate, including restoration of voting rights, the ability to become gainfully employed, and whether one can reintegrate into society. Nearly a decade ago, Martha Nussbaum provided a powerful counternarrative to the utility of

shaming in the criminal law context.⁴² As Nussbaum pointed out, extralegal shaming manifests negative externalities that extend beyond the reach of the type of punishment administered by the criminal justice system. In other words, shaming is enduring and applied in unanticipated ways by unanticipated actors and institutions separate from the criminal justice system. These issues are particularly relevant in the reproductive context.

11.2.9 *Curing Addiction Through Criminal Law Intervention*

Legislators turn to the criminal law to cure social and now medical ills. However, for all the efforts to rein in women's conduct during pregnancy or to promote the health and welfare of future fetuses and babies, turning to the criminal law may undermine those policy and health goals. Precisely for this reason, the American Medical Association,⁴³ the American Public Health Association,⁴⁴ and dozens of other medical organizations⁴⁵ emphatically oppose criminal prosecutions of pregnant women in response to their drug and alcohol addiction. Among their reasons for opposing fetal drug law policy is a concern that "the threat of criminal prosecution prevents many women from seeking prenatal care and early intervention for their drug dependence."⁴⁶

The fear of arrest and prosecution may serve as powerful deterrents to seeking prenatal care. Studies indicate that, at least in cases involving drug addiction and illicit substance abuse, the "stick" approach is ineffective as it does not deter drug use and may exacerbate addictions and lead to the unnecessary fragmentation of the family.⁴⁷ Moreover, studies conducted by the Oregon Office of Alcohol and Drug Abuse Programs and Maryland's Alcohol and Drug Abuse Administration provide compelling, but not surprising, evidence that drug treatment programs are far more health- and cost-effective than incarceration due to their strong correlations with gainful employment, increased wages, reduced welfare use, and substantially less recidivism.⁴⁸ Given this, can incarceration of pregnant women be justified as fulfilling the state's interest in protecting children?

11.2.10 *Assisted Reproduction, Crack Babies, and Misjudging Harms*

Legislators likely understand that neonatology costs are rising; medical insurance lobbyists emphasize this phenomenon as a cause of rising healthcare costs.⁴⁹ However, politicians assume that those costs, particularly when they exceed insurance coverage and individual payment, result from the preventable or punishable choices made by indigent drug addicts.⁵⁰ Consider Representative Doug Miller's urgent warning once more: "The Texas Legislature can no longer sit idly by while its next generation is born . . . with physical and mental abnormalities . . . destined to be on Social Security benefits."⁵¹ Miller is right: the potential to care for extremely low birth weight and premature babies has expanded. Medical technology now ensures the

survival of fetuses and infants previously considered unviable, including “those with severe congenital malformations, those born as early as 22 weeks’ gestation and those with profound asphyxia.”⁵² However, these babies are not so-called crack babies.

Representative Miller’s fear of Texas becoming “swamped” with drug-addicted babies siphoning off state resources misjudges why neonatal medical costs are rising and what is contributing to childhood disabilities. Rigorously conducted scientific research published in the *Journal of the American Medical Association* and the *New England Journal of Medicine* reveals that medical providers and scientists rushed to judgment in the 1980s, purporting that major cities would become “swamped” by children born addicted to crack, exposed in utero by addicted mothers. This mythology spread, carried by the force of antidrug campaigns. However, a decade ago doctors courageously disavowed their earlier predictions.⁵³ Leading medical publications will no longer publish articles that use the term “crack baby,” because researchers now find that such a baby or child does not exist. Instead, poverty is a better indicator of child health and well-being. If crack babies are not driving up healthcare costs, what is?

Recent legislative interest in fetal health has often involved more than a call to aid the development and future well-being of fetuses. As this book shows, government actors selectively deploy this interest, calling attention to some pregnancies where the state demands perfection and not others. Increasingly, those who rely on the sophisticated medical technologies found in American neonatology wards are older, educated parents who, through aggressive hormone therapies and in vitro fertilization, give birth to premature, underweight twins, triplets, quadruplets, and even higher order births.⁵⁴

For example, assisted reproductive technologies (ART) – very expensive technologies used almost exclusively by upper-income couples – have a 65 percent failure rate, resulting in miscarriages and other traumas. According to researchers, children born via ART have an increased risk of cerebral palsy, cognitive delays, hearing and visual impairment, and premature births, among other conditions. To date, however, there are no federal laws that regulate the practice or industry despite more than two decades of robust empirical literature pointing to ART risks. Therefore, there are no ART-related prosecutions for fetal harms.

A report issued by the CDC framed the matter in this way: “ART-related multiple births are an increasingly important public health problem nationally and in many states.”⁵⁵ Dr. Michael Kornhauser and Dr. Roy Schneiderman warn that “increases in maternal age and greater use of in vitro fertilization, combined with remarkable medical advances, are leading not only to increases in preterm births, but also to medical complications and associated costs.”⁵⁶ The average medical costs associated with those births are one thousand percent more than for a full-term infant.

11.2.11 Abortion

Forceful state oversight increasingly dominates women’s reproduction. Legislators, who adamantly argue for smaller, less involved government, nonetheless seek to

deploy the government's mighty arsenal against pregnant women. This landscape is dominated by legislative appeals to grant fetuses the rights of living persons. It looks like this: rules requiring doctors to report any behaviors exhibited by their pregnant patients that might pose a threat of harm to fetuses; unscientific assessments about rape and pregnancy; the removal of children from women deemed to be unfit based on prenatal conduct; and intensified, selective arrests and prosecutions. But what accounts for this legislative trend? Some scholars claim that all of this – the war on women or at least the war on women's reproduction – is really about abortion.

This book recognizes the need to bring the use of child abuse statutes, feticide laws, and other fetal protection laws into view and out of the shadows of abortion and the discourses that dominate how scholars, activists, and politicians think about reproduction. So much has already been said about *Roe v. Wade* and abortion more generally: mandatory waiting periods; required distribution of information prior to pregnancy termination; limiting the period in which an abortion can be sought; parental and judicial approval.

Yet, there is an important gap to fill in the reproductive policing story that specifically relates to criminalizing abortion, race, and class. Indeed, legislation promulgated as this book goes to press makes clear that the criminal policing of women's pregnancies now extends to abortion in cleverly strategized and disguised ways that bear directly on access to and the affordability of the medical procedures. A slew of so-called heartbeat bills make it a crime to obtain an abortion after detection of a fetal heartbeat. Other states, such as Alabama, Iowa, Kentucky, Mississippi, Ohio, Georgia, and North Dakota have enacted similar laws. All have been challenged. Some struck down. Others have been enjoined from going into effect.

Politicians have erected legislative barriers that effectively close most clinics in some states, such as Mississippi, Arkansas, Wisconsin and North Dakota. Such laws mean that women must travel long, burdensome distances or to other states to obtain this legal medical procedure. Some of the legislation provides no exceptions for cases of rape or incest. For wealthier women, these obstacles may be burdensome, but not proscriptive.

However, there is more to be said about abortion, particularly the deployment of criminal law to undermine constitutional access to abortion. In the spring of 2019, Mississippi, a state with one abortion clinic, enacted a law banning abortions before some women would know they are pregnant – at about six weeks. For some legislators, despite U.S. Supreme Court precedent, a previability abortion is not only an act of moral turpitude but also a crime. For example, New Mexico representative Cathrynn Brown proposed legislation in 2013 that would criminally punish rape and incest victims who terminated their pregnancies. Brown's bill permitted the prosecution of pregnant women for "tampering with evidence." As Brown explained, an abortion after rape is a criminal act, because it tampers with evidence. A woman's punishment for violating Brown's law? A felony conviction,

mandating up to three years' incarceration. It is no surprise, then, that reproductive rights activists claim that the antiabortion movement epitomizes a war on women.

11.3 THE WAR ON WOMEN'S REPRODUCTION

In the twenty-first century, public criminal regulation trumps expectations of privacy. This book analyzes who benefits from and who is harmed by the contemporary legislative turn to policing women's reproduction. Recent criminal prosecutions targeting destitute pregnant women illuminate another reproductive space, where the threat of state intervention through punishment and extralegal retribution over-arch pregnancies and compromise the physician-patient relationship.

This book explains that poor pregnant women's reproductive options are deeply constrained and contested in the United States. A woman's poverty and drug consumption during pregnancy might result in heightened legal consequences, including threat of life imprisonment, giving birth while in jail, and even being shackled during labor, depending on the state in which the pregnant woman resides. In the United States, a woman determined to carry a pregnancy to term often unwittingly exposes herself to nefarious interagency collaborations between police and physicians, possibly leading to criminal prosecution, incarceration, and giving birth in highly unsanitary prison conditions, sometimes without the appropriate aid of hospital physicians and staff.

Policing the Womb argues that what legislators seek to reduce – the incidence of low-birth-weight babies – is tangled in racial and class profiling, which detracts from an evidence-based approach to reduce fetal health harm. On inspection, prescription drug use, domestic violence, and ART all play a role in fetal health outcomes and the rise in neonatology treatments and costs. This book deliberates on one of the most urgent social policy issues of our time – the rationality of the turn to criminally policing women's conduct during pregnancy.