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The Criminalization of Pregnancy and its Effects on Maternal Health: Understanding State Interventions

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THE CRIMINALIZATION OF PREGNANCY AND ITS EFFECTS ON MATERNAL HEALTH: UNDERSTANDING STATE INTERVENTIONS

*Vanessa Vecchiarello**

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INTRODUCTION

Marshaë Jones of Birmingham, Alabama was five-months pregnant when an argument broke out between her and another woman in a parking lot outside of a Dollar General in Pleasant Grove, Alabama.¹ The fight escalated and resulted in the other woman, Ebony Jemison, shooting Ms. Jones in the stomach.² Ms. Jones survived, but the injuries she suffered caused her to miscarry.³ The Jefferson County District Attorney charged Ms. Jemison with manslaughter, but the grand jury failed to indict her.⁴ By contrast, the grand jury indicted Ms. Jones on a manslaughter charge — for the death of her own fetus.⁵

Alabama, which has some of the strictest anti-abortion laws in the country,⁶ defines a fetus as a “person” at any stage of development regardless of viability.⁷ Alabama is 1 of 38 states that classify a fetus as a victim of homicide or assault under certain circumstances.⁸ Ms. Jones’s case is a stark example of the consequences of treating a fetus as a “person” under the law.

In response to national public outcry and a campaign led by activists, the Jefferson County District Attorney eventually dropped the charges against Ms. Jones.⁹ However, the fetal homicide law used

1. Michael Brice-Saddler & Alex Horton, *A Pregnant Woman Was Shot in the Stomach. She Was Charged with the Death of the Fetus*, WASH. POST (June 28, 2019), <https://www.washingtonpost.com/nation/2019/06/27/pregnant-woman-was-shot-stomach-she-was-indicted-her-babys-death/> [https://perma.cc/9EV3-T966].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Farah Stockman, *Alabamians Defend Arrest of Woman Whose Fetus Died in Shooting*, N.Y. TIMES (June 30, 2019), <https://www.nytimes.com/2019/06/30/us/alabama-woman-marshae-jones.html> [https://perma.cc/69DM-K6R7].

7. *State Laws on Fetal Homicide and Penalty Enhancement for Crimes against Pregnant Women*, NAT’L CONFERENCE ST. LEGISLATURES (May 1, 2018), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> [https://perma.cc/92RZ-BFYA].

8. *Id.*

9. Farah Stockman, *Manslaughter Charge Dropped against Alabama Woman Who Was Shot While Pregnant*, N.Y. TIMES (July 3, 2019),

to charge Ms. Jones remains in effect in Alabama.¹⁰ In contrast to the activists' and national media's outrage over the prosecution of Ms. Jones, the local sentiment in the City of Pleasant Grove, a city of 10,000 residents on the outskirts of Birmingham, was that charges were warranted.¹¹ When asked whether the indictment was fair in the case of Marsha Jones, one resident replied, "[y]ou have to go by the law."¹²

Since fetal protection laws were first introduced in the 1980s, the prosecution and criminalization of pregnant women like Marsha Jones have been on the rise.¹³ As of 2009, estimates based on news stories, court documents, and attorney reportings, indicated that at least 200 women were arrested for using drugs during their pregnancies.¹⁴ However, this estimate is likely under-inclusive: in just a year and a half between 2006 and 2008, at least eight women were prosecuted for drug use during pregnancy in a rural part of Alabama with only 37,000 residents.¹⁵ A study by Lynne Paltrow and Jeanne Flavin found that between 1973 and 2005, there were 413 cases where a woman's pregnancy was a necessary factor in the attempted or actual deprivation of her liberty.¹⁶ Paltrow and Flavin estimated this was a substantial undercount based on the barriers to identification and documentation of cases and sources indicating the existence of additional cases.¹⁷ Additionally, women of color are more likely to be

<https://www.nytimes.com/2019/07/03/us/charges-dropped-alabama-woman-pregnant.html> [<https://perma.cc/Q855-WF7Y>].

10. *Id.*

11. Stockman, *supra* note 6.

12. *Id.*

13. Carolyn Coffey, Note, *Whitner v. State: Aberrational Judicial Response or Wave of the Future for Maternal Substance Abuse Cases?*, 14 J. CONTEMP. HEALTH L. & POL'Y 211, 211 (1997) (prosecutors brought criminal charges for "drug use or other actions" during pregnancy against 200 women in 30 states); Erin D. Kampschmidt, Note, *Prosecuting Women for Drug Use during Pregnancy: The Criminal Justice System Should Step out and the Affordable Care Act Should Step Up*, 25 HEALTH MATRIX 487, 491 (2015).

14. Kampschmidt, *supra* note 13, at 496 (citing CTR. FOR REPROD. RIGHTS, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN'S HEALTH AND CHILDREN'S INTERESTS 2 (2000)).

15. *Id.* (citing Adam Nossiter, *In Alabama, a Crackdown on Pregnant Drug Users*, N.Y. TIMES (Mar. 15, 2008), <https://www.nytimes.com/2008/03/15/us/15mothers.html> [<https://perma.cc/YYD7-YL24>]).

16. Lynne M. Paltrow & Jeanne Flavin, *The Policy and Politics of Reproductive Health: Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L., 299, 304 (2013).

17. *Id.*

prosecuted than white women. One study from the early 1990s that documented 160 prosecutions in 24 states found that approximately 75% of charges were brought against women of color.¹⁸

Fetal protection laws refer to a range of statutes allegedly designed to promote fetal health and wellbeing.¹⁹ These laws may criminalize underlying health issues of pregnant women, such as substance use, as well as certain circumstances arising during pregnancy, like miscarriages or stillbirths. Fetal protection laws also include fetal personhood measures, fetal homicide or assault laws, criminal and civil child abuse or endangerment laws, and civil commitment statutes.²⁰ Fetal personhood measures attempt to establish fertilized eggs, embryos and fetuses as “legal persons” with equal rights, including the right to life from the moment of conception.²¹ Seven states — Alabama,²² Arkansas,²³ Georgia,²⁴ Kansas,²⁵ Kentucky,²⁶ Missouri,²⁷ and Tennessee²⁸ — have adopted abortion bans with personhood language. By February 2020, state legislatures in six states proposed legislation to establish fetal personhood.²⁹ None of these measures have passed yet.³⁰

The historical context of these laws illuminates the underlying causes of their disproportionate impact on women of color. Additionally, it is necessary to critically examine the accuracy and effectiveness of these laws’ stated purpose: to promote maternal and fetal health. The collateral consequences of criminalization on the lives of pregnant women and their families tell an important story

18. Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 938 (1997).

19. See Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781, 795 (2014) [hereinafter Goodwin, *Fetal Protection Laws*].

20. See generally Paltrow & Flavin, *supra* note 16.

21. *Personhood*, REWIRE NEWS (Nov. 7, 2018), <https://rewire.news/legislative-tracker/law-topic/personhood/> [<https://perma.cc/YSQ4-CT4M>].

22. H.B. 314, 2019 Leg., Reg. Sess. (Ala. 2019).

23. S.B. 149, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019).

24. H.B. 481 2019–2020 Leg., Reg. Sess. (Ga. 2019).

25. H.B. 2253 2019–2020 Leg., Reg. Sess. (Kan. 2019).

26. H.B. 148 2020 Leg., Reg. Sess. (Ky. 2019).

27. H.B. 126 2019 Leg., Reg. Sess. (Mo. 2019).

28. S.B. 1257 111th Gen. Assemb. (Tenn. 2019).

29. These states are Iowa, Idaho, Missouri, Oklahoma, Washington and West Virginia. *State Policy Updates: Major Developments in Sexual & Reproductive Health*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy> [<https://perma.cc/S8KM-S7JS>] (last visited Apr. 2, 2020).

30. *Id.*

about how fetal protection laws impose penalties that often have the effect of undermining maternal and fetal health. Additionally, these laws are discriminatory, imposing a unique form of liability on pregnant women and disproportionately impacting women of color.

Pregnant women incarcerated in states with fetal protection laws face a unique set of challenges during their incarceration and re-entry. Pregnant women possess unique and distinct health needs, and prisons often lack adequate prenatal health care. Additionally, women are disproportionately more likely to be the primary caregivers, so their incarceration disrupts both their lives and the lives of their dependents, such as their children or elderly and vulnerable relatives. Finally, incarceration fails to address underlying conduct, such as drug use, because of the dearth of services or programs specifically tailored to address the needs of pregnant women in prison.

Part I of this Note explores the background on fetal protection laws, including the various kinds of laws that exist, and the impact they have on the lives of pregnant women. Part II discusses the debate around these laws from a criminal law theory perspective and a constitutional perspective. Part III explores the ways in which fetal protection laws and the criminalization of pregnant women represent poor public policy, and proposes alternative methods of promoting maternal and fetal health.

I. THE CONSEQUENCES OF FETAL PROTECTION LAWS AND THE CRIMINALIZATION OF MOTHERHOOD

The potential impact of measures criminalizing behavior or drug use during pregnancy is significant. In the United States, approximately one million women have miscarriages or stillbirths every year.³¹ Additionally, the number of women using drugs during pregnancy has been on the rise: according to a biannual report on drug use released by the Department of Health and Human Services, during 1994 and 1995, 2.3% of pregnant women used illicit drugs, but during 2011 and 2012, 5.9% of pregnant women used illicit drugs.³²

31. *U.S. Pregnancy Rate Lowest in Two Decades*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 15, 1999), <https://www.cdc.gov/nchs/pressroom/99facts/pregrate.htm> [<https://perma.cc/UH9B-5HN8>].

32. Kampschmidt, *supra* note 13, at 491 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2012 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 23 (2013)).

Part I provides background on fetal protection laws and a brief history of the involvement of the criminal justice system in motherhood. Section I.A explores criminal liability under fetal homicide and assault laws. Section I.B discusses criminal and civil liability for substance use during pregnancy. Section I.C explores the deprivations of liberty under civil commitment statutes. Section I.D examines the history of the incarceration of mothers to better contextualize the discussion about whether criminalization and prosecution of pregnant women promote fetal and maternal health.

A. Criminal Liability under Fetal Homicide or Assault Laws

Fetal homicide and assault laws criminalize acts that cause the end of pregnancy by defining the fetus as a separate person and victim.³³ Alabama is 1 of the 37 states with these laws.³⁴ The Alabama Criminal Code defines a “person” who is a victim of a criminal homicide or assault, as “a human being, including an unborn child in utero or at any stage of development, regardless of viability.”³⁵ The law includes an exception for abortion care or treatment provided to a pregnant woman by a licensed healthcare provider. Twenty-nine of these states have fetal homicide laws that apply at the earliest stages of pregnancy, which is at any stage of gestation or development, conception, fertilization, or post-fertilization.³⁶ The proliferation of fetal homicide laws creates the risk of criminal consequences for a woman whose actions end her pregnancy prematurely. In Mississippi, the District Attorney prosecuted Rennie Gibbs for depraved-heart murder³⁷ after she gave birth to a stillborn daughter when she was 36-weeks pregnant.³⁸ Based on a trace of cocaine byproduct found in the infant’s system, the medical examiner ruled the infant’s death a homicide. Experts who later examined the autopsy reports disputed the finding that cocaine toxicity caused the infant’s death, and a judge

33. See generally *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT’L CONF. ST. LEGISLATURES (May 1, 2018), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> [<https://perma.cc/4WAD-4F3B>] [hereinafter *State Laws on Fetal Homicide*].

34. *Id.*

35. ALA. CODE § 13A-6-1 (2006).

36. *State Laws on Fetal Homicide*, *supra* note 33.

37. MISS. CODE ANN. § 97-3-19(1)(b) (2013) (“[A]n act eminently dangerous to others . . . regardless of human life.”).

38. See generally Nina Martin, *A Stillborn Child, A Charge of Murder and the Disputed Case Law on Fetal Harm*, PROPUBLICA (Mar. 18, 2014, 12:00 PM), <https://www.propublica.org/article/stillborn-child-charge-of-murder-and-disputed-case-law-on-fetal-harm> [<https://perma.cc/6XDY-MEYF>].

ultimately dismissed the charges without prejudice, finding the law was “unclear” on how to treat manslaughter charges against pregnant women.³⁹

Fetal assault laws also encourage state actors to treat eggs, embryos, and fetuses as though they are legally separate from a pregnant woman.⁴⁰ These laws establish a unique form of criminal liability for pregnant women,⁴¹ criminalizing actions that would be permissible but for the individual’s pregnancy, including falling down the stairs.⁴² In Iowa, Christine Taylor was 22 years old when she tripped and fell down the stairs during the second trimester of her pregnancy.⁴³ After confiding in hospital staff that she had been ambivalent about the pregnancy in its early stages, hospital staff suspected Taylor had attempted to kill her fetus.⁴⁴ They called the police, and Ms. Taylor was incarcerated for two days while prosecutors investigated her for feticide.⁴⁵ Under Iowa code Section 707.7, it is a crime to intentionally terminate a pregnancy during the third trimester, unless it is done by a licensed physician to protect the life or health of the mother.⁴⁶ Ms. Taylor was ultimately released from police custody, and prosecutors dropped the charges because she was in her second trimester of pregnancy when she fell.⁴⁷

At the federal level, the Unborn Victims of Violence Act (UVVA) is the first federal law to recognize a zygote, embryo, or fetus as an independent victim of crime, distinct from the pregnant individual.⁴⁸ The law stipulates that it is a separate offense to cause death or bodily injury to a child “who is in utero at the time the conduct takes place.”⁴⁹ Knowledge that the individual was pregnant is not required for the act to constitute a separate offense.⁵⁰ The UVVA explicitly excludes pregnant women from prosecution; however, the

39. Jessica Mason Pieklo, *Murder Charges Dismissed in Mississippi Stillbirth Case*, REWIRE.NEWS (Apr. 4, 2014, 2:43 PM), <https://rewire.news/article/2014/04/04/murder-charges-dismissed-mississippi-stillbirth-case/> [https://perma.cc/Q7ZW-MX7N].

40. *See generally* Paltrow & Flavin, *supra* note 16.

41. *See* Goodwin, *Fetal Protection Laws*, *supra* note 19, at 802.

42. *Id.*

43. *Id.* at 792.

44. *Id.* at 807.

45. *Id.*

46. IOWA CODE § 707.7 (4) (2009).

47. Goodwin, *Fetal Protection Laws*, *supra* note 19, at 807.

48. 18 U.S.C. § 1841 (2004); 10 U.S.C. § 919a (2004).

49. 18 U.S.C. § 1841.

50. *Id.* §1841(a)(2)(b); 10 U.S.C. § 919a(a)(2)(i).

significance of the law is the federal recognition of legal protection and personhood for fetuses.⁵¹ It embraces the maternal conflict framing discussed *infra* Section II.B. It also raises questions about the liability of a pregnant woman who neglects her health or uses drugs during pregnancy.⁵²

Eight states — Colorado, Connecticut, Delaware, Iowa, Maine, New Mexico, Oregon, and Wyoming — have laws that impose harsher criminal penalties on individuals for crimes against pregnant women.⁵³ Colorado's statute specifies that a court must sentence a defendant to "at least the midpoint, but not more than twice the maximum of the presumptive range [of] punishment" if the defendant "knew or reasonably should have known that the victim was pregnant."⁵⁴ Additionally, Colorado statutory law includes the knowing and intentional killing of a pregnant woman as an aggravating factor in sentencing.⁵⁵ These penalty-enhancement laws do not consider the loss of a pregnancy or harm to the fetus in relation to the pregnant person.⁵⁶

B. Criminal and Civil Liability for Substance Use during Pregnancy

Depending on the state, pregnant women may face prosecution under criminal or civil laws for substance use during pregnancy. State laws on drug testing during pregnancy or at birth vary.⁵⁷ According to the Guttmacher Institute, 25 states and the District of Columbia require healthcare professionals to report suspected drug use, and eight states require them to test for prenatal drug exposure if they suspect drug use.⁵⁸ State reporting requirements vary based upon whether a positive drug test is sufficient to trigger a reporting requirement and whether reporting is voluntary or mandatory for the

51. Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights during Pregnancy*, 26 L. & INEQ. 171, 185 (2008).

52. *Id.*

53. COLO. REV. STAT. §§ 18-1.3-401(13), -501(6), -1201(5)(q) (2016); CONN. GEN. STAT. §§ 53a-59c, -61a (1969); DEL. CODE ANN. tit. II, §§ 605, 606 (1999); IOWA CODE § 707.8 (1996); ME. STAT. tit. 17-a, § 208-C (2019); N.M. STAT. ANN. § 30-3-7 (1978); OR. REV. STAT. §§ 163.155, 163.160, 163.185 (2010); WYO. STAT. ANN. § 6-2-502 (1982).

54. COLO. REV. STAT § 18-1.3-401(13).

55. *Id.* § 18-1.3-1201 (5)(q).

56. *Id.*

57. See generally *Substance Use during Pregnancy*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy> [<https://perma.cc/477B-8Z8L>] (last visited Apr. 3, 2020).

58. *Id.*

healthcare provider.⁵⁹ To be eligible for federal funding for state child abuse or neglect prevention and treatment programs, the Federal Child Abuse Prevention and Treatment Act requires that states have policies and procedures to notify Child Protective Services of “substance-exposed newborns.”⁶⁰ These policies and procedures must include suitable referrals to Child Protective Services and other treatment programs and services.⁶¹ Individual states vary on definitions of “substance-exposed newborn,” when providers should report, and requirements for a plan of safe care for the newborn.⁶² In 2014, Tennessee became the first state to pass a law specifically allowing prosecution of pregnant women who use drugs, imposing penalties of up to 15 years in prison.⁶³

Numerous appellate courts have reversed convictions of pregnant women under criminal child abuse or endangerment statutes, so long as state statutes on child abuse or endangerment do not explicitly include fetuses.⁶⁴ However, courts in two states — Alabama and South Carolina — interpret criminal child abuse laws to apply to fetuses. In *Whitner v. South Carolina*, the Supreme Court of South Carolina held that a viable fetus was a “child” under the state’s criminal child endangerment statute.⁶⁵ Since the ruling in *Whitner*, activists in South Carolina have documented 108 arrests where law enforcement and local prosecutors charged women with criminal child abuse for actions during their pregnancies.⁶⁶ In 2013, the

59. Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 *YALE J.L. & FEMINISM* 317, 350–51 (2014).

60. CHILDREN’S BUREAU, PARENTAL DRUG USE AS CHILD ABUSE 2 (2015), <https://www.childwelfare.gov/pubPDFs/drugexposed.pdf> [<https://perma.cc/F79M-9CUM>]; see also 42 U.S.C. § 5106a(b) (1974).

61. 42 U.S.C. § 5106a(b)(2)(B)(ii).

62. Tricia E. Wright et al., *The Role of Screening, Brief Intervention, and Referral to Treatment in the Perinatal Period*, *AM. J. OBSTETRICS & GYNECOLOGY* 539, 544 (2016).

63. The law included a sunset provision and is no longer in effect as of July 1, 2016. However, the Tennessee legislature is considering an updated version of the legislation this term. The updated version would allow a woman to be prosecuted for drug use during pregnancy if the child is harmed by the drug use, unless the woman enrolls in and completes an addiction recovery program. See Aris Folley, *Tennessee Bill Would Charge Pregnant Women Who Use Illegal Drugs*, *HILL* (Feb. 12, 2019), <https://thehill.com/homenews/state-watch/429637-tennessee-bill-would-charge-pregnant-women-using-illegal-drugs-with> [<https://perma.cc/N998-GP2D>].

64. Kyle Kennedy, *How to Combat Prenatal Substance Abuse While Also Protecting Pregnant Women: A Legislative Proposal to Create an Appropriate Balance*, 70 *ARK. L. REV.* 167, 174–75 (2017).

65. 492 S.E.2d 777 (1997), cert. denied, 523 U.S. 1145 (1998).

66. AMNESTY INT’L, *CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA* 19 (2017),

Alabama Supreme Court interpreted “child” under Alabama’s chemical endangerment statute to include viable and nonviable fetuses.⁶⁷ The Alabama chemical endangerment law criminalizes exposing a child to a controlled substance or to an environment where a controlled substance is manufactured.⁶⁸ The court held that the plain meaning of “child” under the statute included a fetus.⁶⁹

Twenty-three states and the District of Columbia apply civil child welfare laws to fetuses, using these statutes to target substance use during pregnancy.⁷⁰ If a pregnant woman is subjected to drug testing during pregnancy and her case is referred to child welfare, this puts her at risk of losing custody of her unborn child. Additionally, the risk of child welfare involvement acts as a significant deterrent towards seeking prenatal care or drug treatment services.⁷¹

C. Liability and Deprivation of Liberty under Civil Commitment Statutes

Three states — Minnesota, South Dakota, and Wisconsin — have statutes allowing for the involuntary civil commitment of pregnant drug-using women.⁷² These statutes allow court-ordered institutionalization to a psychiatric hospital or other custodial institution if an individual is a danger to others.⁷³ The Minnesota statute provides that a court may order intervention if it finds by “clear and convincing evidence” that a pregnant woman has “engaged in excessive use, for a nonmedical purpose, of controlled substances . . . alcohol, or inhalants.”⁷⁴ The South Dakota statute does not specify a standard of proof for civil commitment by a spouse, guardian,

<https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf>
[<https://perma.cc/T5MC-T8U3>].

67. *Ex parte Ankrom*, 152 So.3d 397, 421 (Ala. 2013).

68. ALA. CODE § 26-15-3.2 (2006).

69. *Ex parte Ankrom*, 152 So.3d at 421.

70. *Substance Use during Pregnancy*, *supra* note 57.

71. Bach, *supra* note 59, at 348.

72. MINN. STAT. § 253b.065(c) (2007); S.D. CODIFIED LAWS § 34-20a-70 (1998); WIS. STAT. § 48.135 (2020). A court ruled that Wisconsin’s statute could not be applied to pregnant women because the word “child” under Wis. Stat. § 48.02 did not include viable fetuses. State *ex rel.* Angela M.W. v. Kruzicki, 561 N.W.2d 729 (Wis. 1997); *see also Substance Use during Pregnancy*, *supra* note 57.

73. Mina Dixon Davis, Note, “Bad Moms” and Powerful Prosecutors: Why a Public Health Approach to Maternal Drug Use Is Necessary to Lessen the Hardship Borne by Women in the South, 25 GEO. J. ON POVERTY L. & POL’Y 305, 312 (2018).

74. MINN. STAT. § 253b.065(c).

relative, physician, administrator of approved treatment facility, or other responsible person.⁷⁵

In the context of drug-using pregnant women, these statutes justify civil commitment on the basis that it is necessary to protect the pregnant person's fetus from potential harm.⁷⁶ For civil commitment statutes to be constitutional, there must be clear and convincing evidence that an individual is mentally ill and dangerous to herself or others.⁷⁷ The government, therefore, would be justified in taking pregnant drug or alcohol users into protective custody if it can prove a pregnant woman satisfies these conditions.⁷⁸ In 2016, a United Nations Working Group on Arbitrary Detention found that civil proceedings committing these pregnant women are often kept confidential, lack meaningful standards and procedural protections, and take place without the legal representation of the mother.⁷⁹ In Tallahassee, Florida, a physician ordered Samantha Burton to remain on bed rest when she was 25-weeks pregnant. Due to the high-risk nature of Ms. Burton's pregnancy, and the fact that Ms. Burton failed to comply with her healthcare provider's instructions and recommendations, the physician sought and obtained a court order. The order allowed the hospital to confine Ms. Burton against her will to preserve the life and health of the unborn child.⁸⁰ Ms. Burton was not provided any legal representation at the civil commitment hearing, despite the fact that her personal liberty was at stake. The court held "that the state of Florida ha[d] *parens patriae* authority to ensure that children receive medical treatment which is necessary for the preservation of life and health; [and] that as between parent and child, the ultimate welfare of the child is the controlling factor."⁸¹ In contrast to the approach taken in Florida, courts in California and

75. S.D. CODIFIED LAWS § 34-20a-70.

76. Davis, *supra* note 73, at 312.

77. Addington v. Texas, 441 U.S. 418, 431–33 (1979).

78. *Working Group on Arbitrary Detention: Preliminary Findings from Its Visit to the United States of America (11–24 October 2016)*, OFF. HIGH COMMISSIONER FOR HUM. RTS. (Oct. 24, 2016), www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E [<https://perma.cc/UQ9U-MKYF>].

79. *Id.*

80. *In re Unborn Child of Samantha Burton*, No. 2009 CA 1167, 2009 WL 8628562 (Fla. Cir. Ct. Mar. 27, 2009). A majority of states also allow fetuses to be considered as persons in civil wrongful death actions. Michael P. Penick, *Wrongful Death of a Fetus*, 19 AM. JUR. PROOF FACTS 3d 107, 116 (1993) (noting that "the majority jurisdictions . . . hold that a viable unborn child is a 'person' or 'individual' within the meaning of their wrongful death statutes").

81. *In re Unborn Child of Samantha Burton*, 2009 WL 8628562 *1.

New York have rejected the application of civil commitment statutes to pregnant women.⁸²

In 1998, one study found that 34 states reported prosecutions of drug-addicted women.⁸³ Another study conducted with data from 1973 to 2005, chronicled hundreds of arrests or deprivations of liberty under the criminal laws described above.⁸⁴ In 86% of the cases, they found that law enforcement made these arrests or detentions under existing criminal statutes intended for other purposes.⁸⁵ The most frequently filed charges in the cases in this particular study were child abuse or child endangerment charges.⁸⁶

D. The Historical Context of State Incarceration and Reproductive Control

To understand whether prosecution and incarceration promote fetal health and safety, it is important to consider how incarceration has played out in the lives of mothers. The intention behind incarceration — whether punitive or rehabilitative — impacts the prison conditions and the treatment of incarcerated individuals. American prisons have always treated women differently than men.⁸⁷ These differences also break down along racial lines as historically, a woman's race dictated where she served her sentence.⁸⁸ Penal institutions for white women were centered on the idea of reform.⁸⁹ Female reformatories housed only white women and were designed to reinforce their roles as mothers.⁹⁰ These reformatories offered white women opportunities to keep their families intact and gain new domestic skills, such as sewing, cooking, and serving at dinner tables.⁹¹ The majority of these facilities — applying a maternal rehabilitative model — had a matron system, meaning a woman oversaw it, and a woman's babies or children were permitted to stay

82. See *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wisc. 1997); *In re Steven S.*, 126 Cal. App. 3d 23 (Cal. Ct. App. 1981).

83. Wendy Chavkin, *National Survey of the States: Policies and Practices Regarding Drug-Using Pregnant Women*, 88 AM. J. PUB. HEALTH 117, 117 (1998).

84. Paltrow & Flavin, *supra* note 16, at 321; see also *supra* Section I.A.

85. Paltrow & Flavin, *supra* note 16, at 321.

86. *Id.*

87. Jenni Vainik, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 FAM. CT. REV. 670, 672 (2008).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

with them.⁹² By contrast, Black women were incarcerated with men or in female prison facilities, which were not oriented towards instilling domestic virtues.⁹³ Penal institutions for Black women did not have the same kinds of programming designed to improve women's skills as homemakers or child care providers.⁹⁴ These facilities were centered on retribution, not rehabilitation: they were dilapidated, lacking resources, and staffed by white male guards.⁹⁵

Additionally, the United States has a history of imposing forced sterilizations on Black women.⁹⁶ In the early twentieth century, during the height of the eugenics movement, many doctors performed involuntary hysterectomies on incarcerated Black women.⁹⁷ In *Buck v. Bell*, the Supreme Court held that if a potential parent exhibited characteristics that could result in "socially inadequate offspring," the state could mandate sterilization for that individual.⁹⁸ While such extreme measures have since been abandoned, judges can still require a woman to undertake various forms of birth control as a condition of probation or jail time.⁹⁹ As recently as 2010, a report by the Center for Investigative Reporting found that doctors under contract with the California Department of Corrections sterilized as many as 150 incarcerated women without state approval from 2006 to 2010.¹⁰⁰ While the Court subsequently overruled *Buck v. Bell*, scholars have remarked on the similarities between the Court's reasoning in *Buck v. Bell* and the justification for the prosecution of drug-addicted women.¹⁰¹ A Florida prosecutor who prosecuted a pregnant woman for drug use during pregnancy explained his decision: prosecution was

92. *Id.* at 672–73.

93. *Id.* at 672.

94. *Id.* at 673.

95. *Id.*

96. DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 89–98 (1997).

97. *Id.* at 68.

98. 274 U.S. 200, 207 (1927).

99. Rebecca L. Miles, Note, *Criminal Consequences for Making Babies: Probation Conditions That Restrict Procreation*, 59 WASH. & LEE L. REV. 1545, 1581 (2002).

100. Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2227 (2018). An independent investigation conducted by the California State Auditor later confirmed these findings. See CAL. STATE AUDITOR, *STERILIZATION OF FEMALE INMATES: SOME INMATES WERE STERILIZED UNLAWFULLY, AND SAFEGUARDS DESIGNED TO LIMIT OCCURRENCES OF THE PROCEDURE FAILED 1* (2014), <https://www.auditor.ca.gov/pdfs/reports/2013-120.pdf> [<https://perma.cc/G3W6-TMUK>].

101. Carla-Michelle Adams, *Criminalization in Shades of Color: Prosecuting Pregnant Drug-Addicted Women*, 20 CARDOZO J.L. & GENDER 89, 92 (2013).

necessary “to make sure this woman d[id] not give birth to another cocaine baby. The message is that this community cannot afford to have two or three cocaine babies from the same person.”¹⁰² The state has a history of using its powers of surveillance, prosecution, and even sterilization, to exert control over the reproductive lives of certain women. How the state circumscribes the reproductive freedoms of low-income women of color, in particular, is the focus of the next section.

II. THE DEBATE SURROUNDING FETAL PROTECTION LAWS

Part II discusses the debate around fetal protection laws, focusing on some of the laws’ most contentious aspects. Section II.A uses a critical race lens to examine the assumptions and motivations which guide fetal protection laws. Section II.B critically examines the theoretical framing of fetal protection laws: the notion of the maternal-fetal conflict. Section II.C examines the equal protection issues that arise from fetal protection laws. Understanding the nuances of this debate can allow legislators, law enforcement, and prosecutors to make safer and more effective policy choices.

A. Critical Race Analysis of Fetal Protection Laws

Fetal protection laws apply exclusively to women.¹⁰³ These laws target poor women because of their focus on banning the use of specific affordable illicit substances, which tend to be the only types of drugs accessible to low-income women.¹⁰⁴ One Alabama study found that “Black women were four times more likely to have crack/cocaine in their systems, however [W]hite women were nearly twice as likely to have any drug in their systems, including marijuana and opiates.”¹⁰⁵ The National Institute on Drug Abuse found that in one year, 113,000 white women and 75,000 Black women used illicit drugs during pregnancy.¹⁰⁶ The statistics surrounding the enforcement of fetal protection laws is even starker: in one study, 14.1% of Black women tested positive for drug and alcohol use during pregnancy, and 15.4% of white women tested positive for the same drug and alcohol use during pregnancy, but healthcare providers only

102. *Id.*

103. Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1680 (2008) [hereinafter Goodwin, *Prosecuting the Womb*].

104. *Id.*

105. *Id.*

106. *Id.* at 1681.

reported only 1.1% of white women compared to 10.7% of Black women.¹⁰⁷ Another study found that Black women are ten times more likely to be reported by their doctors to child welfare agencies for drug use as compared to white women.¹⁰⁸

Doctors and advocacy groups assert that negative health consequences of illicit drug use during pregnancy are not well established.¹⁰⁹ The participants in fetal impact studies are overwhelmingly poor people of color and are more likely to have had inadequate nutrition and medical care throughout their pregnancies.¹¹⁰ Additionally, the incidence of neonatal abstinence syndrome (NAS), a condition created by opiate withdrawal that results from pregnant women taking painkillers and other opiate derivative drugs, has risen “fairly dramatically.”¹¹¹ Prescription drugs are the second most commonly-abused type of drugs after marijuana.¹¹² However, fetal protection laws are focused on banning illicit drugs, not the abuse of prescription drugs legally obtained from a pharmacist, even though opium-derived prescription drugs may also be harmful to fetal health.¹¹³

Regulating Black women’s reproductive decisions has been a central aspect of racial oppression in America. Black women’s reproduction is treated as a form of “degeneracy” and used to explain or justify the status quo.¹¹⁴ The “damaging behavior” of Black mothers, rather than race discrimination and structural inequality, has been consistently used to explain the persistence of Black poverty and marginality.¹¹⁵ This framework is then used as justification for strict measures to control Black women’s childbearing, rather than working to improve their socioeconomic conditions, which has been decried by critics as “wasting resources on useless social programs.”¹¹⁶ Dorothy Roberts, University of Pennsylvania law professor, author, and expert on family law, compared fetal protection laws, which target drug use during pregnancy, to racial eugenics, asserting the laws punish

107. *Id.* at 1672.

108. *Id.* at 1680–81 (citing Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use during Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 *NEW ENG. J. MED.* 1202, 1202 (1990)).

109. Kampschmidt, *supra* note 13, at 494.

110. *Id.* at 495.

111. *Id.* at 493.

112. *Id.* at 494–96.

113. *Id.*

114. ROBERTS, *supra* note 96, at 24.

115. *Id.*

116. *Id.*

primarily poor Black women for their reproductive decisions because “the combination of their poverty, race, and drug addiction is presumed to make them unworthy of procreating.”¹¹⁷

In addition to failing to account for the risks posed by prescription medication abuse by middle- and upper-income women, fetal protection laws overlook the risks associated with assisted reproductive technology.¹¹⁸ Assisted reproductive technologies — including the use of fertility drugs and in vitro fertilization (IVF) — are a significant contributor to premature deaths of fetuses.¹¹⁹ A comparison between the legal and social responses to these risky pregnancies reveals stark differences. In her work on the criminalization of pregnancy, Michelle Goodwin compared the case of an indigent, pregnant Black woman prosecuted for drug use with the case of a religiously-conservative, pregnant, white woman who used fertility drugs.¹²⁰ The white woman was carrying what doctors deemed an unsafe number of fetuses, so the doctors recommended that she selectively abort some of the fetuses.¹²¹ The white woman declined to follow the doctors’ advice because of her religious beliefs, and all but one of her children died after birth.¹²² She received an outpouring of societal support and sympathy when the media publicized her story, and she suffered no legal consequences for her actions.¹²³ This story contrasts sharply with the indigent Black woman who was prosecuted and jailed for her drug use. There is a lack of large-scale regulation of the assisted reproductive technologies industry.¹²⁴ The disparity in the kinds of activities that are regulated, as well as the disparate reporting of women of color for their conduct during pregnancy, demonstrate that women of color, and Black women in particular, are the focus of fetal protection laws. In addition to the critical race theory perspective on fetal protection laws, other criminal law theories inform an understanding of these laws as well.

117. Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 TUL. L. REV. 1945, 1974 (1993).

118. Linda C. Fentiman, *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (And Other Countries Don't)*, 18 COLUM. J. GENDER & L. 647, 656 (2009).

119. Goodwin, *Prosecuting the Womb*, *supra* note 103, at 1659.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1693.

B. The Maternal-Fetal Conflict Framing of Fetal Protection Laws

The framing of these laws as a conflict between the mother, especially mothers of color, and pits the fetus's interest against the mother's. This framing represents a "paternalistic rejection of women's ability to know their own bodies and make medical decisions for themselves and their pregnancies."¹²⁵ Most laws adopt an adversarial view surrounding pregnancy and do not presume that the pregnant woman will act in the best interest of her fetus. The assumption, instead, is that the state must be able to intervene to protect fetal life.¹²⁶ Modern-day scrutinizing and overruling of a pregnant woman's healthcare decisions is consistent with that view.¹²⁷ This modern perspective on maternal-fetal conflict relies on assumptions and legal frameworks developed in the early twentieth century.

In the early twentieth century, the legal framework for conceptualizing pregnancy recognized that the mother and the fetus were inherently connected.¹²⁸ For instance, a fetus injured in the womb was not permitted to bring suits for damages. Yet, by the 1950s, this legal framework had begun to change, with courts determining the only way to provide a remedy for prenatal injury was to recognize the fetus as a separate existence.¹²⁹ In *Kelly v. Gregory*, the New York State Supreme Court allowed an infant to recover for prenatal injuries incurred during the mother's ninth month of pregnancy.¹³⁰ This reasoning was derived from tort law, where courts determined the only way to provide a remedy for prenatal injury was to recognize the separate existence of the fetus.¹³¹

After the abortion decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, courts began to shift again, no longer simply recognizing the fetus's existence as separate from the mother but as having an adversarial interest.¹³² This view authorizes the state to interfere with a pregnant woman's ability to make autonomous healthcare decisions. If courts returned

125. Goodwin, *Fetal Protection Laws*, supra note 19, at 817.

126. Rona Kaufman Kitchen, *Holistic Pregnancy: Rejecting the Theory of the Adversarial Mother*, 26 HASTINGS WOMEN'S L.J. 207, 208 (2015).

127. *Id.* at 211.

128. *Id.* at 212.

129. *Id.* at 211.

130. 282 A.D. 542 (N.Y. Sup. Ct., App Div. 1953).

131. Kitchen, supra note 126, at 215–16.

132. *Id.* at 213. See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

to the connected view of pregnancy, by contrast, the pregnant woman could be seen as the appropriate arbiter of not only her own interests but also those of her unborn child.¹³³ Under current laws, which are based on the adversarial conception between a pregnant woman and her fetus, courts and healthcare professionals force women to undergo cesarean sections, blood transfusions, and other medical interventions for the sake of the fetus.¹³⁴ Fetal protection laws, therefore, target women's behavior exclusively and fail to protect women's rights during pregnancy under the Equal Protection Clause.

C. The Equal Protection Problem with Fetal Protection Laws

Imposing a unique form of liability on pregnant women for their conduct during pregnancy is discrimination on the basis of sex and violates the Equal Protection Clause. Fetal protection laws can discriminate by (1) imposing criminal liability on a pregnant woman for actions, which would not be criminal but for her pregnancy,¹³⁵ (2) increasing the punishment for a particular offense based on how far along she is in her pregnancy,¹³⁶ or (3) treating the fetus as a person, and charging the woman with feticide or child endangerment.¹³⁷ In *Geduldig v. Aiello*, the Supreme Court held that state regulations affecting pregnancy are not always suspect of sex discrimination, and if they are not, the regulation or legislation receives rational basis scrutiny.¹³⁸ However, some scholars have asserted that even though the Court did not subject the regulation to heightened scrutiny in *Geduldig v. Aiello*, it “unambiguous[ly]” found that selective actions by a state involving pregnancy that is based on the *pretext* for other causes or concerns can be invidious discrimination.¹³⁹ In 1978, Congress passed the Pregnancy Discrimination Act (PDA), clearly

133. Kitchen, *supra* note 126, at 254–55.

134. Paltrow & Flavin, *supra* note 16, at 317.

135. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1445 (1991) (discussing the case of Pamela Rae Stewart, a pregnant woman charged with criminal neglect for failing to follow her doctor's orders, which included staying off her feet and refraining from sexual intercourse while pregnant).

136. Derk B.K. VanRaalte IV, *Punitive Policies: Constitutional Hazards of Non-Consensual Testing of Women for Prenatal Drug Use*, 5 HEALTH MATRIX 443, 460 (1995).

137. All courts who have considered the issue have held that child abuse statutes should not apply to fetuses, with the exception of the South Carolina Supreme Court in *Whitner v. South Carolina*. *Id.* at 463.

138. 417 U.S. 484, 496 (1974).

139. Goodwin, *Fetal Protection Laws*, *supra* note 19, at 862.

stating that discrimination on the basis of pregnancy was a violation of the Civil Rights Act.¹⁴⁰ While the PDA is specifically oriented to employment discrimination, it heightens the level of scrutiny for cases regarding classifications on the basis of pregnancy.¹⁴¹

This heightened scrutiny can be seen in part in *International Union v. Johnson Controls, Inc.*,¹⁴² where the Court held that a company policy which imposed special rules on fertile women and not men constituted discrimination on the basis of sex.¹⁴³ The defendant company prohibited fertile women from laboring in certain jobs out of a concern for fetal health because the company perceived conditions to be hazardous conditions for women who might become pregnant; however, fertile men were not subject to the same burdensome employment restrictions.¹⁴⁴ The Court's ruling made clear that classifications based on the potential for pregnancy constitute sex discrimination and that fetal protection policies that do not apply to the reproductive capacities and potentials of men are not neutral.¹⁴⁵ Fetal protection laws apply only to women, not to men. When the state exclusively regulates female behavior and not male behavior to advance fetal health, it erroneously acts as if women are solely responsible for a fetus's health.¹⁴⁶

Another equal protection issue with fetal protection laws arises because of these laws' disproportionate enforcement against low-income women of color.¹⁴⁷ The majority of women prosecuted for actions, particularly drug use during pregnancy, are low-income women of color.¹⁴⁸ Hospitals located in poor communities are more likely to test patients for drug use.¹⁴⁹ Tests conducted at the discretion of hospital staff may be impacted by implicit or explicit bias on the individual level.¹⁵⁰ Race discrimination and laws with the intent to discriminate receive strict scrutiny.¹⁵¹ An argument could be made that the application of fetal protection laws to low-income

140. 42 U.S.C. § 2000e(k) (1964); Kira Proehl, *Pregnancy Crimes: New Worries to Expect When You're Expecting*, 53 SANTA CLARA L. REV. 661, 679 (2013).

141. See Proehl, *supra* note 140, at 679.

142. 499 U.S. 187, 188 (1991).

143. *Id.* at 199.

144. *Id.* at 187–88.

145. Goodwin, *Fetal Protection Laws*, *supra* note 19, at 867.

146. *Id.* at 859.

147. Proehl, *supra* note 140, at 679.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

women of color at substantially higher rates than their white counterparts illustrates the “core discriminatory intent of the laws,” and therefore are unconstitutional.¹⁵²

III. WHY CRIMINALIZATION AND INCARCERATION IS NOT THE ANSWER

Part III examines the public policy reasons behind why prosecuting and incarcerating pregnant women for drug use during pregnancy is destructive and explores alternate approaches with treating the issue as a public health issue. Section III.A discusses the importance of framing drug use by pregnant women as a public health crisis. Section III.B offers recommendations for how doctors, hospitals, and policymakers could more effectively address substance use during pregnancy. Section III.C examines the collateral consequences of the criminalization of substance use for pregnant women and their families during incarceration and reentry. Section III.D addresses how the notion of fetal personhood and fetal protection laws undermine the rights of pregnant women, and connects these laws to the anti-choice movement.

A. Reframing Substance Use during Pregnancy as a Public Health Crisis

According to National survey data, 5% of women use an illicit substance during pregnancy.¹⁵³ Substance use during pregnancy is a serious public health issue associated with “preterm birth, low birthweight, birth defects, development delays, and miscarriage.”¹⁵⁴ However, criminalizing and incarcerating women with substance use problems during their pregnancies is not an effective means of addressing the issue.

As discussed, *supra* Section I.A, states have a variety of reporting regimes for addressing suspected drug use during pregnancy. These reporting requirements vary in terms of whether a positive drug test alone requires healthcare providers to report and whether reporting is voluntary or mandatory.¹⁵⁵ The reporting regime produced by states enacting fetal protection laws is a form of over-policing pregnant

152. *Id.*

153. Wright et al., *supra* note 62, at 539.

154. *Id.*

155. *Supra* Section I.A.

women, disproportionately affecting low-income women of color.¹⁵⁶ At the Medical University of South Carolina in Ferguson, there was a concerted effort to pressure pregnant patients into getting drug treatment, facilitated by coordination between local hospitals and the Charleston police. The prosecutor's office threatened women with drug charges if they did not enter treatment. In *Ferguson v. City of Charleston*, the Supreme Court held that this involuntary testing and surveillance of pregnant women by the Medical University of South Carolina violated the women's Fourth Amendment rights.¹⁵⁷ However, the Supreme Court's ruling was very narrow, and the practice of drug testing pregnant women continues in modern hospital systems.¹⁵⁸ By allowing doctors to drug test pregnant women, doctors act as "criminal law gatekeepers," and the integrity of the doctor-patient relationship is compromised.¹⁵⁹

Fetal protection laws can result in doctors violating confidentiality obligations they owe to their patients, failing to obtain voluntary consent, or subjecting patients to unnecessary suffering or surgeries.¹⁶⁰ The institutional shifts imposed by these laws have, in some circumstances, encouraged doctors to abdicate the fiduciary duties they owe to their pregnant patients.¹⁶¹ When patients fear that their doctors may refer them to the authorities for criminal prosecution, there is an erosion of patient trust — patients are less likely to trust their doctors with sensitive information needed to diagnose and treat them properly.¹⁶² Researchers associate the

156. DOROTHY E. ROBERTS, *CRITICAL RACE FEMINISM, RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE* 118–19 (2019). Scholars have noted that women of color are generally "over-policed and under protected by a web of legal institutions, systems and structures." *Id.* at 118.

157. 532 U.S. 67, 86 (2001).

158. *The Personhood Movement: Where It Came from & Where It Stands Today.*, PROPUBLICA, <https://www.propublica.org/article/the-personhood-movement-timeline> [<https://perma.cc/3QPY-8Q32>] (last visited Apr. 6, 2020) [hereinafter *The Personhood Movement*].

159. Goodwin, *Fetal Protection Laws*, *supra* note 19, at 794.

160. *Id.* at 818–33.

161. *Id.* at 819–20. Goodwin identifies that:

[V]oluntary consent is an essential component of any medical treatment; confidentiality is paramount to the physician-patient relationship and should not be trespassed by health care providers; medical treatments should avoid subjecting patients to unnecessary suffering, including, but not limited to unnecessary reproductive surgeries; and patients must be at liberty to withdraw from medical treatment, even if rejecting medical assistances might result in their deaths.

Id.

162. *Id.* at 831–32.

decline in patient trust with decreased satisfaction among patients and providers, patient disenrollment from care, worse patient adherence to treatment plans, and indirectly, unfavorable health outcomes.¹⁶³ This erosion of patient trust endangers pregnant women's lives and threatens prenatal health outcomes.

The erosion of doctor-patient confidentiality is particularly concerning in low-income communities where rates of maternal-fetal morbidity are higher than those in some developing countries.¹⁶⁴ The rate of maternal mortality has more than doubled since 1987,¹⁶⁵ and there are substantial racial disparities in maternal-fetal health outcomes. Black women die in childbirth at three to four times the rate of white women,¹⁶⁶ and Black infants are more than twice as likely as white infants to die in the first year.¹⁶⁷ Fetal protection laws are not an effective means of addressing this crisis in maternal and fetal health. Many medical organizations have concluded that fetal protection laws, in fact, deter women from seeking prenatal care, potentially worsening pregnancy outcomes for drug-addicted women.

The American College of Obstetricians & Gynecologists (ACOG) issued a report stating that incarceration and the threat of incarceration have proved ineffective in reducing rates of drug or alcohol abuse.¹⁶⁸ ACOG found these policies “deter women from seeking prenatal care and are contrary to the welfare of the mother and fetus.”¹⁶⁹ The American Medical Association (AMA) also opposes the prosecution of drug-addicted pregnant women and notes

163. *Id.* at 833.

164. *Id.*

165. *Pregnancy Mortality Surveillance System*, CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 4, 2020), <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> [<https://perma.cc/DV24-J83B>].

166. CTR. FOR REPROD. RIGHTS, *REPRODUCTIVE INJUSTICE: RACIAL AND GENDER DISCRIMINATION IN U.S. HEALTH CARE* 6 (2014), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CERD_Shadow_US_6.30.14_Web.pdf [<https://perma.cc/V3P2-L7AA>].

167. *Maternal, Infant, and Child Health: National Snapshot*, OFF. DISEASE PREVENTION & HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/maternal-infant-and-child-health/national-snapshot> [<https://perma.cc/Z8LR-SZHH>] (last visited Apr. 6, 2020).

168. *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, AM. C. OBSTETRICIANS & GYNECOLOGISTS (Jan. 2011), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Substance-Abuse-Reporting-and-Pregnancy-The-Role-of-the-Obstetrician-Gynecologist?IsMobileSet=false> [<https://perma.cc/LM9Q-Z3U2>].

169. *Id.*

that threatening women with prosecution will dissuade them from seeking important prenatal and medical care.¹⁷⁰ Additionally, the AMA recognized the importance of social support in calling for specialized treatment programs for drug-addicted pregnant women.¹⁷¹ The American Public Health Association also characterized the use of illicit drugs by pregnant women as a public health issue and recommended that the government decline to implement punitive measures.¹⁷² The National Perinatal Association asserted that testing pregnant patients' blood, saliva, or urine for "evidence of criminal conduct, child abuse, child endangerment, or criminal neglect undermines trust between patients and providers and is contrary to professional ethics."¹⁷³ They have also noted that non-white perinatal patients are disproportionately likely to suffer negative consequences for their substance use despite similar rates of substance use with white patients. The American Psychiatric Association (APA)¹⁷⁴ and the American Academy of Addiction Psychiatry (AAAP) have also come out against drug testing pregnant women.¹⁷⁵ These organizations have all concluded that criminalizing pregnant women's

170. Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 496 n.14 (2005).

171. American Medical Association, Policy Statement H-420.962, Perinatal Addiction — Issues in Care and Prevention (last modified 2017), <https://policysearch.ama-assn.org/policyfinder/detail/alcohol%20treatment?uri=%2FAMADoc%2FHOD.xml-0-3705.xml> [<https://perma.cc/6NK9-DT4A>].

172. *Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women*, NAT'L ADVOC. FOR PREGNANT WOMEN 5 (Oct. 2017), <http://advocatesforpregnantwomen.org/Medical%20and%20Public%20Health%20Group%20Statements%20revised%20Oct%202017.pdf> [<https://perma.cc/2D72-TJKV>] [hereinafter *Medical and Public Health Group Statements*].

173. *NPA Position Statement 2017: Perinatal Substance Use*, NAT'L PERINATAL ASS'N (2017), http://www.nationalperinatal.org/resources/Documents/Position%20Papers/2017_Perinatal%20Substance%20Use_NPA%20Position%20Statement.pdf [<https://perma.cc/8BAF-RP6N>] [hereinafter *NPA Position Statement*] ("Ongoing research over the last twenty-five years has demonstrated that incarceration or the threat of incarceration does not decrease substance use disorder in pregnancy.").

174. Samuel J. House et al., *Perinatal Substance Abuse: At the Clinical Crossroads of Policy and Practice*, 173 AM. J. PSYCHOL. 1077, 1079 (Nov. 2016) (stating the APA supports "adequate prenatal care" for pregnant addicts "without fear of punitive consequences").

175. *Use of Illegal and Harmful Substances by Pregnant Women*, AM. ACAD. ADDICTION PSYCHIATRY (May 2015), <http://www.aaap.org/wp-content/uploads/2015/06/AAAP-FINAL-Policy-Statement-Edits-Use-of-Illegal-Substances-by-Pregnant-Women-for-merge.pdf> [<https://perma.cc/PU8L-39VW>] (the AAAP opposes mandatory reporting of substance use during pregnancy and supports access to services and treatment).

drug use fails to deter drug use and inhibits women's access to prenatal care by disincentivizing seeking medical help.¹⁷⁶

B. Recommendations for Addressing Substance Use during Pregnancy

Doctors should be patient-centered in their care of pregnant drug users. One public health approach to the delivery of early intervention services by doctors is screening, brief intervention, and referral to treatment (SBIRT).¹⁷⁷ Studies have shown that SBIRT programs can improve pregnancy outcomes. Initial screening should be done universally and not selectively, as recommended by ACOG, the AMA, and the Center for Disease Control (CDC).¹⁷⁸ Toxicology testing should only be done with the woman's express consent, given the risk of child welfare or legal involvement.¹⁷⁹ Reporting requirements for physicians in the event of a positive drug test vary from state to state.¹⁸⁰ The screening process is primarily to divide women into groups based on the risk of substance use during pregnancy — high, medium, and low.¹⁸¹ Different interventions are recommended depending on the level of risk assessed in the initial screening.¹⁸² ACOG recommends affirming the positive choices of pregnant women in the low-risk group by using statements such as “[t]hat’s great you do not use drugs or alcohol, as drug use has been shown to cause many complications in pregnancy and problems with your baby, and there is no safe amount of alcohol [or drug] use in pregnancy.”¹⁸³ For women in the medium-risk group, ACOG recommends brief intervention, motivational interviewing, and follow-up appointments.¹⁸⁴ The objective of interviewing is to “(1) provide feedback on personal responsibility . . . (2) listen and understand a patient’s motivation for using . . . substances . . . and (3) explore other options to address patient’s motivation for substance

176. Many other organizations have also documented this trend, including the Center for Reproductive Rights, National Partnership for Women & Families, and National Women’s Law Center. See Goodwin, *Fetal Protection Laws*, *supra* note 19, at 872.

177. *NPA Position Statement*, *supra* note 173.

178. Wright et al., *supra* note 62, at 540.

179. *Id.* at 541.

180. *Id.*

181. *Id.* at 539.

182. *Id.*

183. *Id.* at 542 (internal quotations omitted).

184. *Id.*

use”¹⁸⁵ High-risk patients should be referred to specialized treatment centers or doctors.¹⁸⁶

Comprehensive treatment programs with gender-specific and trauma-informed care can be an effective means of addressing substance use issues by patients.¹⁸⁷ The National Perinatal Association recommends treatment programs employ the harm reduction model: promoting “any positive change” by the patient, continuing to work with the patient in the event of relapse, and supporting patient-driven plans from abstinence, decreased use, or even safer use.¹⁸⁸ Treatment options may include Medication-Assisted Treatment (MAT), crisis intervention, drug overdose training, and mental health assessment and treatment.¹⁸⁹ Research consistently demonstrates that community-based drug treatment is effective at reducing drug use.¹⁹⁰ Consistent access to drug treatment programs is important: individuals who participated in drug treatment programs while they were incarcerated, and community-based treatment after their release were seven times more likely to be drug-free than those who did not receive treatment.¹⁹¹ Many rural areas of the country do not have treatment centers, particularly for women or pregnant women.¹⁹² Transporting women to urban areas for drug treatment would require a pregnant woman to separate from her family and potentially her other children or dependents, making it not as effective as opening more rural treatment centers.¹⁹³ Alternatively, expanding primary care providers

185. *Id.* at 543.

186. *Id.* at 544.

187. *NPA Position Statement, supra* note 173.

188. *Id.*

189. *Id.* According to the Substance Abuse and Mental Health Services Administration (SAMHSA), medication-assisted treatment (MAT) is the use of FDA-approved medication, along with counseling and behavioral therapies, to address substance abuse issues in a manner which addresses the needs of the “whole patient.” See *Medication-Assisted Treatment (MAT)*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Sept. 9, 2019), <https://www.samhsa.gov/medication-assisted-treatment> [<https://perma.cc/J2RM-QDMU>].

190. Redonna K. Chandler, et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 J. AM. MEDICAL ASS’N 183, 190 (2009).

191. *Id.*

192. Wright et al., *supra* note 62, at 545.

193. *Id.*

certified to provide MAT, as well as telemedicine and telepsychiatry, could also address access issues for rural populations.¹⁹⁴

Finally, there are many factors beyond maternal substance use that influence maternal and fetal health, including exposure to secondhand smoke, carcinogens like pesticides and lead, domestic violence, and poverty.¹⁹⁵ The focus of states should be on providing resources to pregnant women so that they can reduce exposure to environmental toxins during their pregnancies. Providing access to more social supports, including food stamps, safe and affordable housing, and quality health care would improve maternal and fetal health outcomes and promote the stability of families. In addition to providing drug treatment and intervention programs to pregnant women with substance abuse issues, the National Perinatal Association recommends providing “parenting classes and support, and social services such as housing, employment, assistance and WIC.”¹⁹⁶ States should focus on non-punitive approaches to handling the issue of substance use during pregnancy. Non-punitive measures undertaken by states so far have included creating task forces to study the problem of substance use and pregnancy, starting or expanding treatment programs and organizing services specifically for pregnant women, encouraging medical professionals to screen and refer drug-using, pregnant women to treatment instead of to the police, and expanding public education programs regarding substance use during pregnancy for the public and medical professionals.¹⁹⁷

C. Collateral Consequences for Families of Incarcerated Pregnant Women

Incarceration has a disproportionately negative effect on mothers and their children. Indeed, 80% of incarcerated women have a child at the time they enter prison, and 70% of incarcerated women are single parents.¹⁹⁸ Women are more likely than men to be primary caregivers,¹⁹⁹ and 65% of incarcerated women are primary caregivers of minor children.²⁰⁰ Despite this stark disparity in caregiving responsibilities, judges are usually unable to consider women’s caregiving responsibilities or roles as primary caregivers in their

194. *Id.*

195. Goodwin, *Fetal Protection Laws*, *supra* note 19, at 843.

196. *NPA Position Statement*, *supra* note 173.

197. Paltrow, *supra* note 170, at 469–70.

198. Vainik, *supra* note 87, at 676.

199. *Id.* at 671.

200. Ocen, *supra* note 100, at 2214.

sentences.²⁰¹ The Sentencing Reform Act requires that guidelines and policies of the Sentencing Commission be gender-neutral, and the Commission has interpreted this to assume that consideration of women's typical familial obligation is barred under the sentencing guidelines.²⁰²

The number of children with a parent in prison increased by 80% between 1990 and 2007.²⁰³ This issue disproportionately impacts communities of color, as one 2007 study found that 1.7 million children had a parent in prison, three-quarters of whom were children of color.²⁰⁴ Policies and practices make it difficult for incarcerated women to remain in contact with their children, despite evidence that visitation has tangible benefits for mothers and their children.²⁰⁵ Following childbirth, incarcerated women are generally separated from their children within 24 hours of delivery.²⁰⁶ Few prison facilities for women exist in the United States, meaning women are often incarcerated at a great distance away from home, families, and lawyers.²⁰⁷ The Federal Bureau of Prisons has 29 facilities that house women,²⁰⁸ and almost two-thirds of women in custody are located more than 500 miles from their homes.²⁰⁹ In 1978, a study reported that only 2% of incarcerated women reported no visits with their children.²¹⁰ By contrast, in 2002, a study found that 54% of incarcerated mothers had no visits with their children.²¹¹ This

201. Candace Kruttschnitt & Rosemary Gartner, *Women's Imprisonment*, 30 CRIME & JUST. 1, 9 (2003).

202. Nicole S. Mauskopf, *Reaching beyond the Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 116 (1998).

203. *Fact Sheet: Parents in Prison*, SENT'G PROJECT 1 (2012), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Parents-in-Prison.pdf> [<https://perma.cc/EKC4-D7SK>].

204. Ocen, *supra* note 100, at 2221.

205. *Id.* at 2223.

206. *Id.*

207. *Id.* at 2222.

208. *Custody and Care: Female Offenders*, FED. BUREAU PRISONS, https://www.bop.gov/inmates/custody_and_care/female_offenders.jsp [<https://perma.cc/ZB4A-3REL>] (last visited Apr. 6, 2020).

209. SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM: BRIEFING SHEETS (May 2007), <https://www.sentencingproject.org/publications/women-in-the-criminal-justice-system-briefing-sheets/> [<https://perma.cc/5WZ7-VTUB>].

210. Vainik, *supra* note 87, at 679.

211. *Id.* The drastic increase in the number of incarcerated mothers who reported no visits from their children may also be because between 1980 and 2017, the number of incarcerated women has increased by more than 750%. THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS 1 (2019),

extended separation heightens the risk of physical or psychological injury to the mothers and children, and deteriorates the mother-child relationship.²¹²

Additionally, the separation can have serious, long-term ramifications for an incarcerated mother's parental rights. Incarceration and physical separation from children are grounds for termination of parental rights in 25 states.²¹³ Courts across the United States have terminated mothers' parental rights on the basis that they would be incarcerated for more than 18 months.²¹⁴ Incarcerated mothers have also lost parental rights because they were unable to attend parenting classes or substance abuse treatment programs or visit their children regularly.²¹⁵ Termination of parental rights has serious long-term consequences for both the mother and child.

Incarceration is less effective than drug treatment programs at dealing with drug addiction.²¹⁶ In-residence treatment programs that provide childcare would also be a means of keeping mothers and their children together. Alternatively, community-based treatment programs would allow pregnant women to continue to have access to support from their friends and families. Research by the American Public Health Association reports that only 11% of incarcerated individuals receive treatment for their addictions.²¹⁷ For those who do have access to prison addiction programs, the risk of recidivism is lower.²¹⁸

While mothers are incarcerated, halfway houses and prison nurseries can implement certain policies to accommodate mothers and their children. Halfway houses are community-based facilities where a mother and her children can live with similarly-situated families while under a corrections officer's supervision.²¹⁹ Prison

<https://www.sentencingproject.org/publications/incarcerated-women-and-girls/a>
[<https://perma.cc/G7HS-RMJL>].

212. *Id.* at 680.

213. *Id.*

214. Ocen, *supra* note 100, at 2227.

215. *Id.*

216. Kathleen Adams, *Chemical Endangerment of a Fetus: Societal Protection of the Defenseless or Unconstitutional Invasion of Women's Rights?*, 65 ALA. L. REV. 1353, 1365 (2014).

217. *Rehab vs. Prison: What Research Shows Is More Effective*, OXFORD TREATMENT Ctr. (Jan. 17, 2019), <https://www.oxfordtreatment.com/rehab-vs-prison/>
[<https://perma.cc/QAP2-EZKR>].

218. *Id.*

219. Vainik, *supra* note 87, at 684.

nurseries are special facilities within existing prisons where a woman may live with her newborn baby. An incarcerated woman must meet certain qualifications to participate in such a program, similar to a halfway house. To improve re-entry prospects for women and their dependents, prisons across the United States should create halfway houses and prison nurseries where women can live with their children.²²⁰ This change would be critically important because contact between incarcerated parents and their children has been found to be vitally important for both parties.²²¹

D. How Fetal Personhood Undermines the Rights of Pregnant Women

Fetal homicide and assault laws did not exist before *Roe*. The first fetal homicide law was passed in Minnesota in 1986, 13 years after *Roe*.²²² By 2014, fetal homicide laws could be found in 38 states. In 2004, the UVVA made it a federal crime to injure or kill a fetus during an act of violence against the mother. Liberal opponents at the time the bill was passed and scholars have since asserted that the UVVA was part of a strategy to undermine *Roe* because of the use of “unborn child” instead of the medically appropriate term “fetus.”²²³ The ramifications of fetal homicide and assault laws extend beyond undermining the right to abortion though.²²⁴ As discussed *supra* Sections I.A, I.B, and I.C, fetal homicide or assault laws can be used to prosecute women for noncriminal actions, such as falling down the stairs in the case of Christine Taylor. Legal recognition of fetal personhood as separate from that of the mother embraces and codifies a problematic maternal-fetal conflict framing of pregnancy, which results in a unique form of liability for pregnant women.

State reporting requirements for suspected prenatal drug use also did not exist before *Roe*. Fetal protection laws treat a public health issue, substance use during pregnancy, as a criminal offense. The Child Abuse Prevention and Treatment Act was passed in 1988, 15 years after *Roe*, and state reporting requirements for suspected

220. *Id.* at 670.

221. Megan McMillen, *I Need to Feel Your Touch: Allowing Newborns and Infants Contact Visitation with Jailed Parents*, U. ILL. L. REV. 1811, 1825–28 (2012).

222. *Roe v. Wade*, 410 U.S. 113 (1973); *The Personhood Movement*, *supra* note 158.

223. Amy F. Cohen, *The Midwifery Stalemate and Childbirth Choice: Recognizing Mothers-To-Be as the Best Late Pregnancy Decisionmakers*, 80 IND. L.J. 849, 862 (2005).

224. Sandstad, *supra* note 51, at 185–86.

prenatal drug use arose so that states could secure federal funding under the Act. Fetal protection laws do not promote maternal and fetal health. Numerous medical organizations, including the AMA, ACOG, and the National Perinatal Association, note that drug testing and reporting of pregnant women decreases the likelihood that these women will seek prenatal care. Additionally, imposing reporting requirements on physicians undermines the doctor-patient relationship. When state actors become a “watchdog” for fetuses,²²⁵ restricting behaviors of pregnant women and subjecting women, particularly low-income women of color, to heightened surveillance and police intervention, the state infringes on the constitutional rights of these pregnant women.

CONCLUSION

Fetal protection laws target pregnant women and impose harsh penalties and regulations that do not apply to any other class of individuals. Additionally, these laws fail to achieve better health outcomes for mothers or fetuses, a fact noted by professional medical associations. Incarcerated women in general and pregnant women face unique struggles while they are incarcerated and when it comes to reentry. There are serious collateral family law consequences for incarcerated pregnant women, including the termination of their parental rights.

Given that women are often the primary caregivers of their children and the separation that occurs when a mother is incarcerated without her children, specific programs and policies need to be designed and implemented to address these concerns. Drug treatment programs that accept and address the struggles of pregnant women are vital to successful re-entry or diversion. These programs also have a far greater likelihood of improving maternal and fetal health than fetal protection laws, which criminalize and incarcerate pregnant women.

225. *Id.* at 173.