Birthing Injustice: Pregnancy as a Status Offense

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Abstract

Over the last thirty years, pregnant women, particularly pregnant women of color, have increasingly come under the supervision and control of the criminal justice system. In July 2014, Tennessee became the first state in the country to pass a law criminalizing illegal drug use during pregnancy. Within weeks of its enactment, several women were arrested and subjected to prosecution under the statute. In Alabama, the State Supreme Court upheld convictions of several women after finding that the state's chemical endangerment statute applied to fetal life. The women convicted of these crimes joined hundreds of other pregnant women arrested for or convicted of similar offenses. Indeed, according to recent studies, over 1000 women have been convicted of crimes ranging from child endangerment to second-degree murder as a result of conduct during pregnancy. In almost all of these cases, the conduct of the women prosecuted would have been lawful or subject to a lesser penalty had it been committed by a nonpregnant person.

This Article makes two central claims about the increasing number of criminal prosecutions of pregnant women. First, this Article contends that pregnant women are subject to a form of status offense. Status offenses, which criminalize the behavior of individuals within a select group of people that would be noncriminal if committed by persons outside of the group, have been utilized to regulate disfavored classes. Pregnant women, especially those who are poor and of color, are similarly constructed as a disfavored class and are therefore subject to unique forms of criminal regulation. Through the imposition of criminal liability, the state is enforcing gendered norms and policing the line between "good" and "bad" motherhood. As such, criminalization and incarceration play a significant role in the regulation of the reproductive autonomy of women. Second, the Article asserts that the prosecution of pregnancy-based status offenses violates the Eighth Amendment's ban on cruel and unusual punishment.

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The reality is we live in a culture that not only leaves no room for pregnant people and their children, it devalues us.[1]

Introduction

An African-American woman named Cornelia Whitner gave birth to a son in a South Carolina county hospital.[2] Whitner's son was born "in good health" but tested positive for cocaine exposure.[3] Whitner had long struggled with addiction, yet was not offered drug treatment; in fact, no drug treatment program in the State of South Carolina accepted pregnant women with drug problems.[4] Instead, she was arrested and prosecuted for criminal child neglect.[5] During her sentencing hearing, Whitner admitted her problem and asked for treatment, saying, "I need some help, Your Honor."[6] The judge was unmoved, stating, "I think I'll just let her go to jail."[7] Whitner was sentenced to eight years of imprisonment[8] and in a groundbreaking 1997 decision, the South Carolina Supreme Court affirmed the conviction, finding that the term "child" as used in the state's child neglect statute extended to viable fetal life.[9]

While Whitner was one of the first women to be successfully prosecuted for a negative pregnancy outcome, she was not the last. Rather, the South Carolina decision affirming her conviction birthed a wave of criminal prosecutions of women for pregnancy outcomes. Over the last forty years, more than one thousand women, most of whom, like Whitner, are poor Black women, have been prosecuted for pregnancy-related offenses.[10]

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1 Patrisse Cullors, *The Future of Black Life*, Patrisse Cullors (Dec. 31, 2015), http://patrissecullors.com/2015/12/31/the-future-of-black-life/ (co-founder of Black Lives Matter linking the treatment of pregnant Black women and racial justice).

2 Jeanne Flavin & Lynn M. Paltrow, *Punishing Pregnant Drug-Using Women: Defying Law, Medicine, and Common Sense*, 29 J. Addictive Diseases 231, 232 (2010).

3 *Id.* at 232–33.

4 *Id.* at 233.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *See* Whitner v. State, 492 S.E.2d 777, 778 (S.C. 1997).

10 *See* Lynn M. Paltrow & Jeanne Flavin, *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, 299, 309–10 (2013) (finding that over 400 women have been arrested or prosecuted for endangering fetal health); Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, ProPublica (Sept. 23, 2015), https://www.propublica.org/article/when-the-womb-is-a-crime-scene (finding that nearly 500 women were charged with chemical endangerment as a result of drug use during pregnancy in Alabama alone); *infra* Part I.

Indeed, women have been prosecuted for unexplained pregnancy loss, self-induced abortions, fetal loss after having sex, fetal loss following a suicide attempt, and alcohol consumption while pregnant.[11] In these cases, prosecutors often use criminal statutes unintended to reach fetal life or pregnant women to pursue charges ranging from child neglect to second-degree murder.[12] In one of the starkest examples of the expansion of existing law to reach pregnant women, the Supreme Court of Alabama found that the word "child" as used in the state's child chemical endangerment law, which criminalizes individuals who expose children to controlled substances, extended to fetal life at any point after conception.[13] In July of 2014, Tennessee became the first jurisdiction in the country to enact a statute that explicitly criminalizes illegal drug use during pregnancy, although that statute has now expired.[14] Federal judges have used sentencing guidelines to enhance the sentences of pregnant women alleged to have harmed fetal life when imposing a sentence for a non-pregnancy-related offense.[15] In these cases, pregnancy as a status was critical to the arrest, prosecution, and incarceration of women across the country.[16]

This Article asserts that pregnancy itself has come to function as a form of status offense.[17] Status offenses—crimes that define an indi-

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11 Paltrow & Flavin, *supra* note 10, at 299–304, 314–17; Elizabeth L. Thompson, Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawyers*, 64 IND. L.J. 357, 357–58 (1989).

12 *See* Paltrow & Flavin, *supra* note 10, at 305–08.

13 ALA. CODE § 26-15-3.2 (Westlaw through 2016 Reg. Sess. and Act 2016-485 of 2016 First Spec. Sess.); *Ex parte* Ankrom, 152 So. 3d 397, 401 (Ala. 2013); *see also If You Really Care About Criminal Justice, You Should Care About Reproductive Justice!*, NAT'L WOMEN'S L. CTR. (Oct. 3, 2014), http://www.nwlc.org/resource/if-you-really-care-about-criminal-justice-you-should-care-about-reproductive-justice; Martin, *supra* note 10 (approximately 500 women have been arrested for taking drugs during pregnancy in the state of Alabama pursuant to this expansive reading of Alabama's chemical endangerment statute).

14 *See* TENN. CODE ANN. § 39-13-107 (Westlaw through 2017 First Reg. Sess.); Tony Gonzalez, *Tennessee Will Criminalize Moms Who Use Drugs While Pregnant*, TENNESSEAN (Apr. 30, 2014, 11:34 AM), http://www.tennessean.com/story/news/politics/2014/04/29/tn-will-criminalize-moms-using-drugs-pregnant/8473333/; *see also* Joel Ebert, *Tennessee Law That Punishes Mothers of Drug-Dependent Babies to End*, TENNESSEAN (Mar. 23, 2016, 12:40 PM), http://www.tennessean.com/story/news/politics/2016/03/22/tennessee-law-punishes-mothers-drug-dependent-babies-end/82141832/. The statute has since expired. *See* Associated Press, *Tennessee Ends Controversial Law that Put Drug-Addicted Pregnant Women in Jail Instead of Helping Them Seek Treatment*, DAILY MAIL (Apr. 2, 2016, 7:20 AM), http://www.dailymail.co.uk/news/article-3520098/Tennessee-ends-controversial-law-drug-addicted-pregnant-women-jail.html.

15 *See infra* Section I.C.

16 *See* Paltrow & Flavin, *supra* note 10, at 299–301.

17 While other articles have discussed the regulation of addiction, this Article is one of the few to rigorously engage the role of status in the criminal regulation of women's bodies. *See, e.g.*, Dawn Marie Korver, Note, *The Constitutionality of Punishing Pregnant Substance Abusers*

vidual's status or an aspect of personal identity as an essential element of the crime—are typically viewed with skepticism because they punish what is beyond an individual's ability to control, enable inappropriate intrusions by the state, and heighten the danger of the disproportionate criminalization of unpopular groups.[18] The perils presented by status offenses are more than mere speculation; rather, they are rooted in histories of discriminatory application of criminal law against the poor, people with disabilities, and racial minorities.[19]

Similarly, by treating pregnancy as an essential element for criminal prosecution, the state has constructed a status through which a unique set of criminal penalties applies to pregnant women and to no one else. While women are ostensibly engaging in conduct that triggers criminal intervention, such as drug use or other behaviors, it is their status as pregnant persons that brings them into contact with the criminal law. For example, if individuals who were not pregnant used drugs, they might not be guilty of any crime, as states typically do not criminalize drug use alone.[20] Indeed, the fact that pregnancy, not drug use, is the subject of the state's regulation is made clear by instances in which a woman's abortion has resulted in the dismissal of charges.[21] Moreover, these prosecutions overlook men who use drugs and put their future offspring at risk of fetal abnormalities; thus, men escape criminal liability altogether.[22] In these cases, pregnancy, rather than a woman's conduct, is the essential fact that determines whether a crime

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Under Drug Trafficking Laws: The Criminalization of a Bodily Function, 32 B.C. L. REV. 629, 633 (1991); Tiffany Lyttle, Note, *Stop the Injustice: A Protest Against the Unconstitutional Punishment of Pregnant Drug-Addicted Women*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 781, 782 (2006). These articles do not, however, engage the ways in which race, gender, and class intersect to render poor women and women of color vulnerable to criminalization. *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991). Nor does this scholarship interrogate the role of mass criminalization and incarceration in shaping such prosecutions. Additionally, these articles focus almost exclusively on the status of addiction rather than the status of pregnancy itself.

18 *See infra* Part II.

19 *See* Anthony A. Cuomo, Mens Rea *and Status Criminality*, 40 S. CAL. L. REV. 463, 466 (1967) (noting that status offenses "have been used as a vehicle of discrimination against minority groups and have been selectively applied").

20 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11357 (Westlaw through Ch. 9 of 2017 Reg. Sess.) (criminalizing possession of marijuana); CAL. PENAL CODE § 647(f) (Westlaw through Ch. 9 of 2017 Reg. Sess.) (punishing public intoxication).

21 *See, e.g.*, Paltrow & Flavin, *supra* note 10, at 308. Indeed, such prosecutions incentivize women to have abortions, in violation of their fundamental right to procreate. *See* Myrisha S. Lewis, *Criminalizing Substance Abuse and Undermining* Roe v. Wade*: The Tension Between Abortion Doctrine and the Criminalization of Prenatal Substance Abuse*, 23 WM. & MARY J. WOMEN & L. 185, 201 (2017).

22 *See* Lia A. Mandaglio, *The Punitive Pregnancy Matrix: Thinking Critically About the*

has been committed and therefore serves as the basis for criminal prosecution.[23]

The Supreme Court has ruled that the criminalization of status violates the Eighth Amendment's ban on cruel and unusual punishments. In *Robinson v. California*,[24] the Court struck down a law that criminalized the status of addiction.[25] The Court in *Robinson*, however, did not explicitly define what constituted a status nor did it signal how far the constitutional bar on the criminalization of status extended.[26] The lack of clarity inherent in the *Robinson* decision was laid bare in *Powell v. Texas*,[27] where a plurality of the Court found that the state may punish an alcoholic for the act of being drunk in public.[28] The Court reached this conclusion by separating the status of alcoholism from the permissible criminalization of conduct such as drinking and appearing in public.[29] The distinction drawn between status and conduct has severely limited the scope of the Eighth Amendment and its ability to protect vulnerable classes such as poor pregnant women.

As a result, when examining the constitutional concerns that arise when the state prosecutes pregnant women for negative fetal outcomes, scholars and advocates often frame the problem as one of competing interests: does a woman's right to reproductive autonomy and privacy trump the state's interest in fetal life? This is certainly an important question to ask and there is extensive literature interrogating the contours of that question.[30] Indeed, much of the literature on

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Patriarchal Motivations Behind Child Abuse Prosecutions for Prenatal Drug Use Among American Mothers, 19 NAT'L ITALIAN AM. B. ASS'N L.J. 27, 28 (2011).

23 Despite the centrality of pregnancy in these cases, the link has been underexplored by legal scholars. Indeed, the search term "pregnancy /p 'mass incarceration'" returned only twenty-one articles on Westlaw databases as of January 2017. Some scholars, however, have called for greater engagement between reproductive rights advocates and opponents of mass incarceration. *See, e.g.*, Lynn M. Paltrow, Roe v Wade *and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. PUB. HEALTH 17, 17 (2013). Other scholars have theorized the relationship between criminal law and the enforcement of normative standards of motherhood more generally. *See, e.g.*, Melissa Murray, *Panopti-Moms*, 4 CALIF. L. REV. CIR. 165, 168 (2013); Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 101 (1993).

24 370 U.S. 660 (1962).

25 *Id.* at 666–68.

26 *See id.*

27 392 U.S. 514 (1968).

28 *Id.* at 535–37.

29 *Id.* at 532–37.

30 Some articles examine policy implications of pregnancy prosecutions. *See, e.g.*, Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 508 (1990). A number of articles focus on the

the prosecution of pregnant women, such as Whitner, explores the ways in which such prosecutions violate women's fundamental rights to reproductive autonomy or breach the privacy that should be inherent in the doctor-patient relationship.[31]

The focus on fundamental rights and privacy, while tremendously important, often obscures how such prosecutions are part of a broader pattern of criminalization that is both status based and increasingly gendered.[32] As I have argued elsewhere, criminalization and incarceration have long been used as a means to police gender norms.[33] In recent decades this has intensified, and the criminalization of pregnancy as a status has been a primary mechanism of policing gender boundaries and controlling women's bodies. The failure to address

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equal protection implications of such prosecutions. *See, e.g.*, Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1450–56 (1991). Others explore due process claims. *See* Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 856–59 (2014).

31 In her seminal article *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, legal scholar Dorothy Roberts highlighted the ways in which Black women are particularly subject to criminalization due to the historic devaluation of their identities as mothers as well as the specific burdens criminal prosecutions place on their reproductive choices. *See* Roberts, *supra* note 30. Many others have traced the policy justifications animating the criminalization of pregnant women, *see generally, e.g.*, LAURA E. GÓMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997), and have argued that prosecutions of pregnant women should be centered in reproductive rights discourse and understood as a violation of the constitutional right to equal protection and bodily integrity, *see, e.g.*, Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 828–29 (2000); Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 600 (1986). Additionally, legal scholars, including Professor Michele Goodwin, have noted the ways in which such prosecutions raise troubling questions regarding medical privacy and pregnant women's access to health care. *See, e.g.*, Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1676–77 (2008); *see also* April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 150–52 (2007); Seema Mohapatra, *Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy*, 26 WIS. J.L. GENDER & SOC'Y 241, 244–45 (2011); Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451, 454 (2000).

32 *See, e.g.*, Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1428–29 (2012).

33 *See, e.g.*, Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586 (2015); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012) [hereinafter Ocen, *Punishing Pregnancy*]; Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. Rev. 1540 (2012) [hereinafter Ocen, *The New Racially Restrictive Covenant*].

this dynamic undermines our ability to understand the devastating impact of the criminal law on the reproductive autonomy of disenfranchised women.[34]

Indeed, when the state prosecutes pregnant women, the criminal law operates as a form of social control, punishing women who fail to adhere to normative standards of motherhood.[35] Women who are unable to obtain prenatal care, either because they suffer from addiction, do not have homes, have mental illnesses, or are poor, are deemed to be maternal failures and subject to censure by the criminal justice system.[36] Moreover, pregnant women, particularly those who use drugs, are blamed for negative fetal outcomes despite recent medical studies that have found drug use is less harmful to long-term development than once believed and that poverty is more of a predictor of negative fetal outcomes than drug usage.[37]

The criminalization of pregnancy as a means of social control is deeply informed by racial stereotypes and class bias regarding motherhood. Indeed, Black women are often cast as paradigmatic deviant mothers who are uncaring and whose childbearing is responsible for broader social ills, including violence and poverty.[38] It is unsurprising,

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34 In addition, the need to develop alternative legal theories to protect vulnerable pregnant women is necessary given that states are moving toward statutorily authorizing punishment for fetal harm, most often after the point of viability. Thus, existing approaches rooted in statutory interpretation or constitutional frameworks that are most protective pre-viability may be insufficient to protect pregnant women. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992) (establishing that states have an enhanced interest in fetal life at viability and may therefore restrict access to abortion post-viability).

35 Although only a fraction of women who give birth or experience a stillbirth have been directly affected by these prosecutions, all pregnant women are indirectly affected. Because of these prosecutions, pregnant women are placed at increased risk of surveillance when interacting with health care providers. Indeed, through pregnancy's criminalized status, states have expanded their regulation of intimate spaces and entrenched themselves within new institutional settings such as hospitals, child welfare agencies, and other treatment centers. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 177–79 (2007).

36 *See infra* Part I.

37 Paltrow & Flavin, *supra* note 10, at 333–34; *Decades Later, Drugs Didn't Hold 'Crack Babies' Back*, NPR (July 31, 2013, 12:00 PM), http://www.npr.org/templates/story/story.php?storyId=207292639.

38 *See, e.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 3 (1997) ("Poor Black mothers are blamed for perpetuating social problems by transmitting defective genes, irreparable crack damage, and a deviant lifestyle to their children."); Lisa C. Ikemoto, Commentary, *Destabilizing Thoughts on Surrogacy Legislation*, 28 U.S.F. L. REV. 633, 643 (1994) ("The Black matriarch image is used to blame Black women for the failure of Black children to escape poverty and crime."). *See generally* DANIEL P. MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) (arguing that the prevalence of Black families led by single mothers is a primary source of racial inequality).

then, that Black women have been the disproportionate targets of pregnancy prosecutions as the state attempts to regulate their reproductive capacities through the criminal law. One study found that Black women constituted over fifty percent of the women prosecuted for exposing fetuses to drugs in utero,[39] despite the fact that African-Americans and whites use drugs during pregnancy at similar rates.[40]

As the policies that have primarily affected Black women shape broader approaches to negative fetal outcomes, poor pregnant white women have increasingly been subject to criminalization, especially in the wake of the opioid crisis and the rise in methamphetamine use.[41] The expansive use of criminal law to regulate pregnant women, however, has extended beyond drug use to legal conduct that is believed to be harmful to fetal life. These prosecutions place all pregnant women at risk for criminalization if they engage in behavior that does not assure optimal fetal health, including failing to exercise, eating badly, taking prescribed medication, and failing to follow doctor's orders. In sum, the use of the criminal law in this manner reifies gender roles, solidifies racial stereotypes, individualizes macro-social problems rather than addressing the social context that created such social ills, and expands the scope of the criminal law.

Given these and other harms, this Article argues that the prosecution of pregnancy-based status offenses should be understood as cruel and unusual punishment in violation of the Eighth Amendment. In so doing, I challenge the distinction between status and conduct that was drawn by the court in *Powell v. Texas* and argue for an expanded notion of status that is more reflective of the historical operation of status offenses as a means of social control over pregnant women. In particular, *Robinson*'s prohibition on the criminalization of

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39 Paltrow & Flavin, *supra* note 10, at 310–11 (noting that of the 368 cases where racial information was available, 191 were African-American, 152 were white, and 24 were other women of color; African-American women accounted for 52% of these cases).

40 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, 1205 (1990).

41 *See* Veeral N. Tolia et al., *Increasing Incidence of the Neonatal Abstinence Syndrome in U.S. Neonatal ICUs*, 372 NEW ENG. J. MED. 2118, 2121 (2015) (noting the increased proportion of white mothers of infants born with neonatal abstinence syndrome); Martin, *supra* note 10. Given that white women are increasingly the face of maternal drug use, there may be a shift away from the use of the criminal law to address the social problems of inadequate health care and drug addiction. *See, e.g.*, Camille Phillips, *New Clinic at St. Mary's Hospital Offers Specialized Care for Pregnant Women Addicted to Heroin*, ST. LOUIS PUB. RADIO (Oct. 12, 2016), http://news.stlpublicradio.org/post/new-clinic-st-marys-hospital-offers-specialized-care-pregnant-women-addicted-heroin#stream/0.

status should extend beyond passive identity to reach performative acts or conduct that is inherent in, or closely related to, status. While the plurality in *Powell* rejected this view, more recent cases have applied the Eighth Amendment to strike down laws that criminalized performative actions associated with homelessness.[42] Moreover, the Supreme Court has rejected the distinction between status and conduct in other doctrinal arenas, such as the Fourteenth Amendment, to strike down criminal laws regulating vulnerable populations. For example, in *Lawrence v. Texas*,[43] the Court adopted a performative view of status, finding that the state may not criminally regulate conduct that is inherently bound up in the status of being gay, lesbian, or bisexual.[44] For pregnant women, the adoption of a performative definition of status would prohibit the punishment of conduct that is inherent in, or an unavoidable consequence of, pregnancy absent a compelling state interest in punishment. As such, this Article pushes for an expansion of the Eighth Amendment, rescuing it from its largely moribund state in the arena of reproductive rights, and extends my prior work on the progressive power of the Eighth Amendment to contest the subordination of vulnerable women.[45]

In critiquing the criminalization of pregnant women, I do not mean to suggest that the state has no interest in protecting fetal life or promoting fetal health. Nor am I denying the health consequences of drug use for both mothers and their children. Rather, I argue that the use of the criminal law to advance this interest is irrational and counterproductive. Instead, this Article argues that the state should use civil and therapeutic means of advancing its interest in fetal health. Moreover, this Article raises questions about how concerns regarding fetal harm are being leveraged to expand the criminal justice system instead of access to necessary health care and the ways in which the disaggregation of this pattern of policing pregnant women from the broader discourse on criminalization misses significant aspects of state surveillance of vulnerable people and populations.

Part I describes the scope of criminal regulation confronted by pregnant women. In particular, it highlights the various ways that pregnant women have been subject to unique forms of punishment

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42 *See infra* Section IV.A.

43 539 U.S. 558 (2003).

44 *Id.* at 577–79.

45 *See, e.g.*, Ocen, *Punishing Pregnancy*, *supra* note 33 (arguing for a race- and gender-conscious reinterpretation of the Eighth Amendment that is more protective of incarcerated women generally and Black women in particular).

because of drug use or other behaviors allegedly resulting in fetal harm. In Part II, I introduce the concept of the status offense and describe the various ways that status offenses have been conceptualized over time. I note the ways in which the Supreme Court has narrowed the definition of status by drawing a distinction between what I term status and conduct. Part III argues that the narrow definition of status and the distinction between status and conduct drawn by the plurality opinion in *Powell v. Texas* is inconsistent with the history of status offenses, which most often regulated some form of behavior or conduct by targeted groups. In Part IV, this Article argues that pregnancy-based status offenses operate as a racialized and gendered form of social control in ways that are analogous to historical status offenses. In particular, the Article argues that the criminal law was deployed to distinguish those pregnant women who complied with "good" standards of normative motherhood from those who were deemed deviant from the norm and therefore "bad." In Part V, this Article argues that the punishment of pregnancy-based status offenses violates the Eighth Amendment's prohibition on cruel and unusual punishments.

I. Regulating Pregnancy Through the Criminal Law

Legal theorist William Stuntz once remarked, "we are likely to come ever closer to a world in which the law on the books makes everyone a felon."[46] While Stuntz was speaking generally about the way in which criminal law has spread into more and more areas of social life, it has particular salience for women as criminal laws across the country have been used to prosecute women for fetal harm during pregnancy.[47] This Part highlights how criminal law has been used to regulate poor pregnant women and the ways in which all pregnant women are vulnerable to being made felons as a result of these trends.

Approximately four million women carry their pregnancies to term and another one million experience miscarriage or stillbirth each year.[48] Of these five million pregnancies, a fraction of pregnant women engage in illegal drug use or other allegedly harmful behaviors during pregnancy.[49] Despite this, over the last thirty years, states have

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46 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 511 (2001).

47 *See id.*; Paltrow & Flavin, *supra* note 10, at 321.

48 Lynn Paltrow & Jeanne Flavin, *Are Pregnant Women Persons After 20 Weeks' Gestation?*, Rewire (Nov. 15, 2013, 10:01 AM), https://rewire.news/article/2013/11/15/are-pregnant-women-persons-after-20-weeks-gestation/.

49 *See* Paltrow & Flavin, *supra* note 10, at 310; Lisa M. Noller, Comment, *Taking Care of*

increasingly used the criminal justice system to prosecute pregnant women for delivering drugs in utero and to punish pregnant women for broader behaviors that are alleged to have been harmful to fetal health and life.[50] Although comprehensive figures are not available, a study conducted by the National Advocates for Pregnant Women found that there have been at least 413 reported cases of prosecutions, arrests, or detentions of pregnant women between 1973 and 2005.[51] The organization has since documented an additional 380 cases since 2005.[52] A recent *ProPublica* report found that 479 pregnant women have been prosecuted in the State of Alabama alone since 2006.[53] Taken together, more than 1000 women have been impacted by such policies, with more than half of the cases arising in the last ten years. The most common charge pursued in these cases is child endangerment, and the most serious is first-degree murder.[54]

In the same study, of the pregnant women for whom race information was available, almost sixty percent were women of color.[55] Black women represented roughly fifty percent of the overall number of pregnant women prosecuted for pregnancy-based offenses.[56] These profound racial disparities exist despite African-American, white, and Hispanic women having fairly comparable rates of drug use during pregnancy, and pregnant white women using more harmful legal substances, such as tobacco, at higher rates than their nonwhite counterparts.[57] Recent studies, however, have documented the ways in which poor white women struggling with addiction to opioids or methamphetamine are increasingly subject to criminal prosecution.[58]

Two: Criminalizing the Ingestion of Controlled Substances During Pregnancy, 2 U. CHI. L. SCH. ROUNDTABLE 367, 370 (1995) (noting that approximately "eleven percent of women have used illegal drugs during pregnancy").

50 *See, e.g.*, Paltrow & Flavin, *supra* note 10, at 299–301.

51 *Id.* at 304, 309.

52 Lynn M. Paltrow & Jeanne Flavin, *Pregnant, and No Civil Rights*, N.Y. TIMES (Nov. 7, 2014), https://www.nytimes.com/2014/11/08/opinion/pregnant-and-no-civil-rights.html.

53 Martin, *supra* note 10.

54 Paltrow & Flavin, *supra* note 10, at 311 tbl.1, 321–22. The study's authors note, however, that this figure may underrepresent the number of women subject to prosecution as many more cases have gone unreported. *Id.* at 304–05 (noting the potential for hundreds of additional cases reported indicated by various news outlets around the country and suggested by the existence of barriers to reporting these types of cases).

55 *Id.* at 311.

56 *Id.*

57 *See* Kristen W. Springer, *The Race and Class Privilege of Motherhood: The* New York Times *Presentations of Pregnant Drug-Using Women*, 25 SOC. F. 476, 479–80 (2010).

58 *See, e.g.*, Tolia et al., *supra* note 41, at 2121 (finding, through analysis of data from 299 neonatal intensive care units, that "[t]here were changes in the distribution of race and ethnic-group categories, with an increasing proportion of mothers of white race (from 64% in

Among all women prosecuted for fetal harm, the vast majority were low income.[59] These racial and class disparities are likely a product of what Michelle Goodwin calls "pregnancy profiling," whereby stereotypes about drug use and maternal deviance among Black women and poor women prompt health care workers to subject them to testing at higher rates than their white and wealthy counterparts.[60]

As I note below, prosecutions of pregnant women largely break down into three categories. First, prosecutions of pregnant women are often based on drug use during pregnancy.[61] Such prosecutions are often driven by increased scrutiny of pregnant women by hospitals and medical professionals.[62] Such prosecutions often occur notwithstanding the fact that women give birth to healthy children. In these cases, the risk of harm to fetal life is criminalized. Second, pregnant women are arrested and prosecuted for behavior other than drug use, such as refusal to follow doctor's orders.[63] This includes prosecutions of pregnant women who refused treatment for sexually transmitted diseases or gave birth outside of a hospital setting against doctor's orders.[64] In these cases, pregnant women were prosecuted despite the women's otherwise lawful conduct and the problems inherent in determining the cause of negative fetal outcomes. The criminal justice system is invoked in many cases notwithstanding the fact that affected women often have documented histories of mental health problems or physical abuse by intimate partners.[65] Third, in many cases, judges use their discretion to enhance the sentences of women who were deemed

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2004–2005 to 76% in 2012–2013) and a corresponding decrease during the study period in the proportions of mothers of black race and Hispanic ethnic group"); Martin, *supra* note 10.

59 *See* Paltrow & Flavin, *supra* note 10, at 311.

60 *See* Michele Bratcher Goodwin, *Precarious Moorings: Tying Fetal Drug Law Policy to Social Profiling*, 42 RUTGERS L.J. 659, 673–74 (2011) ("Pregnancy profiling is the association of poor women's economic and physical characteristics (socioeconomic status and race) with a set of behaviors the State seeks to prohibit."); *see also* Ferguson v. City of Charleston, 532 U.S. 67, 84–86 (2001) (finding that a class of pregnant women arrested for drug use after their blood was tested for the presence of drugs during prenatal visits at a public hospital without their consent was an unreasonable search and thus a violation of the Fourth Amendment); Roberts, *supra* note 30, at 1432, 1440–42 (noting that poor women of color are more likely to interact with social welfare institutions and therefore have their pregnancies supervised by state entities and reported to law enforcement for prosecution).

61 *See, e.g.*, Flavin & Paltrow, *supra* note 2, at 231–34.

62 *See infra* Section I.A.

63 Paltrow & Flavin, *supra* note 10, at 316.

64 *See infra* Section I.C.

65 *See* Paltrow & Flavin, *supra* note 10, at 312–14 (finding that "[i]n several cases a woman's efforts to seek help after having been physically abused resulted in her arrest, although factors such as drinking alcohol or using an illegal drug while pregnant were cited as grounds for those arrests").

to put fetal life at risk despite being prosecuted for separate and unrelated offenses.[66]

A. Prosecution of Women Who Are Pregnant and Use Drugs or Alcohol

Prosecutions of pregnant women often result from drug or alcohol use.[67] One study estimated that approximately "two hundred [pregnant] women have been charged under . . . laws with 'drug use or other actions'—such as drinking alcohol, smoking cigarettes, or consuming illegal narcotics."[68] Other studies put the figure at twice that amount (during varied time frames and locations).[69] Women have been prosecuted for cocaine use despite giving birth to otherwise healthy children.[70] When miscarriages or stillbirths occur, first-degree murder and manslaughter have also been used as theories of criminal liability.[71]

Such prosecutions are often driven by increased scrutiny of pregnant women by hospitals and medical professionals. Indeed, health care providers and social service agencies have instituted elaborate drug testing protocols and prosecutors have aggressively pursued cases despite the fact that "fewer than 1 in 10 women and only approximately 4 in 100 pregnant women use illicit drugs and even fewer are dependent on them."[72] State investments in detection and prosecution have been made despite the recent evidence that suggests that drug exposure is not as harmful to fetal health as once thought.[73] As one scholar noted, "some researchers have found that after control-

66 *See infra* Section I.C.

67 *See* Paltrow & Flavin, *supra* note 10, at 315–16 (finding that eighty-four percent (or 348) of the 413 documented cases of state intervention involved drugs or alcohol, with cocaine most often identified).

68 Joanne E. Brosh & Monica K. Miller, *Regulating Pregnancy Behaviors: How the Constitutional Rights of Minority Women Are Disproportionately Compromised*, 16 AM. U. J. GENDER SOC. POL'Y & L. 437, 442 (2008).

69 *See, e.g.*, Paltrow & Flavin, *supra* note 10, at 304; Martin, *supra* note 10.

70 *See, e.g.*, Susan Okie, *The Epidemic that Wasn't*, N.Y. TIMES (Jan. 26, 2009), http://www.nytimes.com/2009/01/27/health/27coca.html.

71 Paltrow & Flavin, *supra* note 10, at 321–22.

72 Flavin & Paltrow, *supra* note 2, at 232.

73 *See* Laura M. Betancourt et al., *Adolescents with and Without Gestational Cocaine Exposure: Longitudinal Analysis of Inhibitory Control, Memory and Receptive Language*, 33 NEUROTOXICOLOGY & TERATOLOGY 36, 36 (2011); Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 J. AM. MED. ASS'N 1613, 1614 (2001); Katie McDonough, *Long-Term Study Debunks Myth of the "Crack Baby,"* SALON (July 23, 2013, 5:16 PM), www.salon.com/2013/07/23/longterm_study_debunks_myth_of_the_crack_baby/.

ling for a range of potential confounding factors, prenatal cocaine exposure does not affect infant growth or long-term development of the child."[74] Moreover, the effects typically associated with maternal cocaine use often "cannot be separated from the medical effects of poverty and malnutrition."[75] With regard to methamphetamine, studies have yet to find a connection between the drug and stillbirth.[76] Given the lack of evidence of concrete harm of fetal life, the prosecutions of pregnant women who use drugs rest largely on the *risk* posed by the drug use rather than *actual* harm.

Pregnant women have been prosecuted for crimes ranging from homicide to child abuse to "chemical endangerment of a child."[77] In Alabama, for example, the state Supreme Court upheld the criminal conviction of several women charged with chemical endangerment of a child after they consumed illegal substances during pregnancy.[78] The court held that a fetus is a "child" and that the womb is an "environment" that may be subject to regulation.[79] Most strikingly, the Alabama court held that a fetus is a child at conception, opening the door to criminalization at the earliest stage of a pregnancy, before a woman is even aware of a pregnancy.[80] The statute was not, however, read to require evidence of actual fetal harm.[81] Since the announcement of the court's decision, women have been prosecuted under Alabama's chemical endangerment statute.[82] More women are at risk of prosecution given that doctors, nurses, and other medical providers must report detected drugs in mothers or their children.[83]

Similar charges were brought against a Latina in Tennessee. The charge was filed after Maria Guerra was involved in a car accident and disclosed to the police that she had consumed alcohol.[84] Her blood alcohol level was later found to be half of the legal limit.[85] Although

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74 Springer, *supra* note 57, at 480 (citation omitted).

75 *Id.* at 482.

76 Flavin & Paltrow, *supra* note 2, at 233.

77 *See Ex parte* Ankrom, 152 So. 3d 397, 401 (Ala. 2013); Paltrow & Flavin, *supra* note 10, at 321–22.

78 *Ankrom*, 152 So. 3d at 401.

79 *Id.* at 412, 416.

80 *See id.* at 421.

81 *See generally id.*

82 Martin, *supra* note 10.

83 *See* ALA. CODE § 26-14-3 (Westlaw through 2016 Reg. Sess. and Act 2016-485 of 2016 First Spec. Sess.); Martin, *supra* note 10; *see also Ankrom*, 152 So. 3d at 401–02.

84 Kontji Anthony, *Police: Woman Earns DUI for Endangering Fetus*, WMC ACTION NEWS 5 (Jan. 7, 2013, 9:07 PM), http://www.wmcactionnews5.com/story/20525700/police-pregnant-woman-earns-dui-for-endangering-fetus.

85 *Id.*

Guerra did not have a child in the car during the accident, she was approximately four months pregnant.[86] Because of her status as a pregnant woman, Guerra was charged with "DUI-child endangerment with a child under 18."[87] Had Guerra not been pregnant, she likely would not have been charged with any crime, given that she was not over the legal limit of intoxication at the time of the accident. In this case, like so many others, there was no evidence of harm to fetal life; rather, mere risk of harm was sufficient to justify Guerra's arrest and prosecution.

The prosecutions of women like Guerra and those in Alabama are part of a broader trend of state intervention, regulation, and criminalization of pregnant women.[88] In addition to Tennessee's law criminalizing drug use, other states have proposed legislation to criminalize pregnancy by requiring doctors to report miscarriages and stillbirths, despite the fact that miscarriages are common and often not reducible to a single causal factor.[89] Given their wide scope, these efforts to criminalize pregnancy will have the ultimate effect of limiting the reproductive rights of women while expanding the criminal dragnet to noncriminal settings like hospitals.[90]

B. Prosecution of Pregnant Women for "Behavioral Deviance"

Women have also been subject to a range of criminal penalties for engaging in legal behaviors while pregnant. In such cases, pregnancy is the sole factor authorizing state intervention in the form of criminalization. In many cases, prosecutions of pregnant women were based on behaviors such as refusal to follow doctor's orders, which appeared in approximately one in five cases.[91] Prosecutions were also instituted after pregnant women refused treatment for sexually transmitted diseases or gave birth outside of a hospital setting against doctor's or-

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86 *Id.*

87 *Id.*

88 *See, e.g.*, State v. Greywind, No. CR-92-447 (N.D. Cass County Ct. Apr. 10, 1992) (pregnant Native American woman arrested for child endangerment after law enforcement alleged that her habit of inhaling paint created a substantial risk of serious bodily injury or death to the fetus).

89 *See, e.g.*, Tara Culp-Ressler, *Kansas May Force Doctors to Report Women's Miscarriages to the State Health Department*, THINKPROGRESS (Mar. 24, 2014), http://thinkprogress.org/health/2014/03/24/3418085/kansas-miscarriage-reporting/.

90 *See, e.g.*, WIS. STAT. ANN. § 48.193 (West, Westlaw through 2015 Act 392) (authorizing the civil detention of a pregnant woman in light of the "expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs").

91 Paltrow & Flavin, *supra* note 10, at 316. Prosecutions for the failure to follow doctor's orders were often coextensive with a finding of drug use. *Id.*

ders. In one California case, for example, a woman was diagnosed with a pregnancy complication and was instructed to stay on bed rest and to avoid sexual intercourse.[92] Against medical advice, the woman had sex with her husband and began to bleed.[93] The woman went to the hospital where she delivered her child, who later died.[94] The woman was charged with criminal neglect and the prosecution asserted that her disobeyance of doctor's orders caused the child to be born with severe brain damage.[95]

In another case, a woman was prosecuted for felony child neglect "for failing to take action to prevent HIV transmission to her second child, who was born HIV-positive."[96] There, the defendant's failure to obtain sufficient prenatal care was the basis of the criminal proceeding.[97] In a case out of Iowa, a pregnant woman who fell down a flight of stairs and sought medical treatment was arrested after she disclosed to medical staff that she initially "felt ambivalence" about her pregnancy.[98] The woman was reported to police on suspicion of attempting to terminate her pregnancy.[99]

Additionally, the criminal justice system is invoked in many cases notwithstanding the fact that affected women often have documented histories of mental health problems or physical abuse by intimate partners.[100] Consider the case of Bei Bei Shuai.[101] Shuai was a Chinese citizen who immigrated to the United States.[102] In the throes of depression, she unsuccessfully attempted to take her life by consuming rat poison.[103] Instead of being provided much-needed mental health treatment and support, Shuai was charged with murder by the State of

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92 Thompson, *supra* note 11, at 357–58.

93 *See id.*

94 *See id.*

95 *Id.*

96 Joanne Csete et al., *Vertical HIV Transmission Should Be Excluded from Criminal Prosecution*, 17 Reprod. Health Matters, Dec. 3, 2009, at 154, 158.

97 *See id.*

98 Goodwin, *supra* note 30, at 806.

99 *Id.* at 807.

100 Paltrow & Flavin, *supra* note 10, at 312–14 (finding that "[i]n several cases a woman's efforts to seek help after having been physically abused resulted in her arrest, although factors such as drinking alcohol or using an illegal drug while pregnant were cited as grounds for those arrests").

101 *See* Goodwin, *supra* note 30, at 826; Ed Pilkington, *Indiana Prosecuting Chinese Woman for Suicide Attempt that Killed Her Foetus*, Guardian (May 30, 2012, 1:36 PM), https://www.theguardian.com/world/2012/may/30/indiana-prosecuting-chinese-woman-suicide-foetus.

102 *See* Pilkington, *supra* note 101.

103 *See id.*

Indiana under a theory of murder of a fetus.[104] Shuai was charged with a homicide offense because she was pregnant at the time of the suicide attempt and the fetus did not survive.[105] As a woman of color, she was not seen as a person in distress, but rather a deviant mother in need of punishment. These women were engaging in activities that are typically not criminalized. Nevertheless, they were arrested and prosecuted for fetal harm. Thus, the prosecutions were based on the woman's membership in a class of pregnant persons and would not have occurred but for the fact that the woman was pregnant.

C. Pregnancy as a Sentencing Enhancement

Pregnancy as a status has also been used as a basis for additional penalties for women convicted of separate offenses and for the imposition of degrading treatment once incarcerated. For example, one judge in Tennessee considered imposing a sentencing enhancement for a woman who manufactured methamphetamine while pregnant.[106] In that case, Lacey Weld was charged with manufacturing methamphetamine, a crime that carries a penalty of ten to twelve years of imprisonment.[107] However, if the sentencing enhancement for child endangerment were to have been applied, she could have been sentenced to twenty-four years of imprisonment, approximately double the sentence she would have otherwise faced had she not been pregnant.[108]

Judges have also used their discretion to sentence pregnant women with drug addictions or other health concerns that may affect fetal life to longer terms of incarceration, purportedly to protect the health of the fetus. In one case, a judge enhanced the sentence of an HIV-positive Cameroonian woman charged with possession of false documents to keep her in prison until the end of her pregnancy in order to "oblige her to take measures to prevent vertical transmission."[109] In describing the rationale for the imposition of the enhancement, the judge stated the following: "I don't think the transfer of

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104 *See id.*

105 *See id.*

106 Katie McDonough, *Federal Judge: Pregnancy Can Be Grounds for Enhanced Criminal Penalties*, SALON (July 15, 2014, 3:49 PM), http://www.salon.com/2014/07/15/tennessee_woman_may_face_a_double_prison_sentence_simply_because_she_was_pregnant/.

107 *Id.*

108 *Id.*

109 Csete et al., *supra* note 96, at 158–59.

HIV to an unborn child is a crime technically under the law, but it is as direct and as likely as an ongoing assault."[110]

In another case, Simmone Ikerd, a drug-addicted pregnant woman, was sentenced for a probation violation (for an underlying welfare fraud offense) to a term of incarceration solely to prevent future drug use during pregnancy.[111] At the time of the sentencing, Ikerd was eleven weeks pregnant and "remained drug-addicted, but she stated that she was undergoing drug treatment through a methadone clinic."[112] She was sent to jail over objections that she would not be able to access treatment while incarcerated.[113] In reviewing the decision of the sentencing judge, the New Jersey Court of Appeals noted, "Ikerd was punished by being subjected to the extended prison term because she was pregnant and addicted, and for no other reason."[114] Finding this rationale inappropriate, the court reversed the trial court ruling, noting that a "drug-addicted woman who has violated the conditions of her probation cannot be sentenced to prison for the avowed purpose of safeguarding the health of her fetus."[115] Notwithstanding this reversal, many women continue to be at risk for these types of punishments.

II. Pregnancy Exclusion: Status, the Eighth Amendment, and the Failure to Protect Pregnant Women

As Part I highlighted, pregnancy is the status that triggers criminal sanctions for poor pregnant women who are arrested or prosecuted for compromising fetal health. Indeed, when nonpregnant persons engage in the same conduct, such conduct carries a significantly reduced penalty or no criminal liability at all. For example, in the case of women prosecuted for drug use during pregnancy, it is not the drug use that triggers state intervention; after all, very few jurisdictions criminalize use alone.[116] Indeed, women who were being prosecuted for drug use during pregnancy have had such cases dismissed after an abortion.[117] As one legal scholar noted, "In these cases, the charges are dropped because the woman is no longer pregnant."[118]

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110 *Id.* at 159.

111 State v. Ikerd, 850 A.2d 516, 518–19 (N.J. Super. Ct. App. Div. 2004).

112 *Id.* at 518.

113 *Id.*

114 *Id.* at 522.

115 *Id.* at 518.

116 *See* Paltrow & Flavin, *supra* note 10, 316–18.

117 *See, e.g.*, *id.* at 308.

118 Springer, *supra* note 58, at 482.

When women are prosecuted for failure to follow doctor's orders, the essential role of pregnancy as a basis for criminalization is even clearer, as individuals have a constitutional right to refuse medical care.[119] Such cases demonstrate that it is the status of "becoming and remaining pregnant" that attracts the attention of the punitive state.[120]

As a general matter, states are granted wide constitutional authority to define crimes and impose punishments.[121] There are, however, a few exceptions. Status offenses—laws that criminalize an aspect of identity or membership in a class[122]—have been deemed to be constitutionally suspect.[123] In *Robinson v. California*, the Supreme Court struck down a statute that criminalized the status of being addicted to drugs as a violation of the Eighth Amendment.[124] The Court reached this conclusion, in part, because the statute was not therapeutic in nature, but rather designed to stigmatize and incapacitate classes of people who have been deemed social pariahs.[125] As such, the Court's decision is in line with the notion that the criminalization of status does not comport with the "evolving standards of decency" that undergird the Eighth Amendment inquiry.[126]

In articulating why the narcotics addiction statute deviated from the "evolving standards of decency," the Court highlighted the passive nature of addiction, the prevailing understanding of addiction as a disease or illness, the potentially involuntary nature of illnesses such as addiction, the inability to deter the disease, and the inappropriateness of assigning fault to a status which is not blameworthy.[127] The Court

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119 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (finding that competent adults have the constitutional right to refuse medical care).

120 Flavin & Paltrow, *supra* note 2, at 234; *see also* Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1110 (2014).

121 *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 724–25 (2005) (explaining that states can easily manipulate the elements of certain crimes to make guilt easier to establish at trial).

122 *See infra* Section II.A.

123 *See, e.g.*, Robinson v. California, 370 U.S. 660, 666–67 (1962).

124 *Id.*

125 *See id.* at 666.

126 *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (finding the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

127 *See Robinson*, 370 U.S. at 666–67. In many ways, this reflects the Court's concern about the dearth of moral blameworthiness in those afflicted with an illness or a disease. *See* Elyn R. Saks, *The Status of Status Offenses: Helping Reverse the Criminalization of Mental Illness*, 23 S. CAL. REV. L. & SOC. JUST. 367, 376–78 (2014). Rather, it recognizes the inherent vulnerability of the human body to injury, the cruelties of nature in the infliction of disease, and the vagaries of biology reflected in various kinds of illness. *Id.* Importantly, the concern with the universality of human vulnerability to disease and illness was as present even in cases where the disease may

speculated, "a law which made a criminal offense of [a disease such as leprosy] would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[128] Through its decision in *Robinson*, the Court signaled the constitutional disfavor accorded to status offenses in criminal law.

What constitutes status post-*Robinson*, however, is not self-evident. This Part describes four ways in which status has been policed, highlighting the interaction between identity, conduct, and discriminatory law enforcement in constituting and regulating status. These categories range from narrow conceptions of status, which focus on identities rather than actions, to broader definitions in which conduct is a constitutive element of status.

This Part will also note how, in light of the various ways in which status may be understood, courts have wrangled over how to define status and whether status can be differentiated from conduct for which criminal liability may rightfully be imposed. In *Powell v. Texas*, a fractured Supreme Court was called upon to address the conflicting conceptions of status, ultimately adopting a narrower definition, divorced from conduct, leaving the state free to criminally regulate most forms of status, including pregnancy.[129] This Part argues that the definition of status adopted by the *Powell* Court is insufficiently protective of pregnant women and other classes that are subject to targeted forms of criminal regulation.

A. Forms of Status

1. Status as Identity

The most dominant understanding of the status offense is one that criminalizes mere identity. Under the "status as identity" rubric, as the term implies, status is rooted in an individual or collective identity. Although defining identity is notoriously difficult and has been extensively debated amongst theorists, in this context identity may be understood as the social meaning attributed to an individual or group

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have been contracted through voluntary conduct (e.g., venereal disease). *See* Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the* Robinson *Doctrine to Homelessness and Other Contextual "Crimes*," 96 J. CRIM. L. & CRIMINOLOGY 329, 335–36 (2005). For the Court, the criminalization of the status of addiction would serve to undermine the principle of moral fault, a long-established principle justifying the imposition of criminal punishment. *See id.* at 361.

128 *Robinson*, 370 U.S. at 666.

129 Powell v. Texas, 392 U.S. 514, 531–37 (1968).

characteristic that is a basis for differentiation from others.[130] Such characteristics or categories may be biologically occurring or legally constructed social categories. With regard to criminal policing of status, criminal liability may attach to ascriptive identities that are externally imposed and assigned "based on whether an individual meets certain biological, social, or cultural standards that are considered objective."[131] Such identities, although externally imposed, may be fixed or transient.[132] These identities, however, must be publicly cognizable in some form so as to come to the attention of law enforcement. The regulation of "status as identity" often relies on essentialist notions of the characteristics and propensities of identity group members and the social harms that may be caused by those in the identity category.[133]

Under this "status as identity" framework, identity is constructed as passive, requiring no further action on the part of the individual occupying the identity status. As such, status is defined in opposition to conduct, cast as a state of being rather than an action.[134] As Francisco Valdes notes, "status becomes an attribute of the person that lingers even when he or she is not engaged in any specific category of conduct."[135] The identity status itself is presumed to be a harm or threat to the social order.[136]

The identity-based form of status offense has been used by the state to assert control over disfavored populations. In *Robinson v. California*, for example, the Supreme Court struck down a statute that

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130 Merriam-Webster defines "identity" as "the distinguishing character or personality of an individual" and as "the condition of being the same with something described or asserted." *Identity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/identity [https://perma.cc/Y2K6-NR2Y] (last visited June 13, 2017). This definition is contrasted against a notion of a more personal identity: "Personal identity is a set of attributes, beliefs, desires, or principles of action that a person thinks distinguish her in socially relevant ways and that (a) the person takes a special pride in; (b) the person takes no special pride in, but which so orient her behavior that she would be at a loss about how to act and what to do without them; or (c) the person feels she could not change even if she wanted to." James D. Fearon, What is Identity (As We Now Use the Word)? 25 (Nov. 3, 1999) (unpublished manuscript) (on file with author).

131 Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 757 (2015); *see also* Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1508, 1512 (2014) (defining ascriptive racial identity as "one [that] is involuntary [sic] assigned because of a third party's racial categorization judgments").

132 *See Robinson*, 370 U.S. at 666 (citing transient or mutable identities, such as individuals with drug addiction).

133 *See* Clarke, *supra* note 131, at 762.

134 *See* Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1204–05 (1953).

135 Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 395 (1994).

136 *See infra* Part III.

criminalized the identity of being an addict even if he or she had never "used or possessed any narcotics within the State" or engaged in "any antisocial behavior there."[137] Rather, the statute enabled punishment for the continuing violation that was embodied by the mere physical condition of addiction, combined with physical presence in the jurisdiction where the statute was in effect.[138] In other instances, states have criminalized the identities of felons who are present in a jurisdiction without registering[139] and individuals with physical disabilities who are seen in public.[140] In these "status as identity" cases, membership in an ascribed biological or socially constructed category was sufficient for criminalization. These offenses were passive in that they did not require any conduct on the part of the individual prior to the imposition of criminal liability. Most critically, the imposition of criminal liability signifies the stigmatized and marginalized status of an entire group based on nothing more than an ascribed identity.

2. Status as Identity Performance

Another category of status offense criminalizes the performative aspects of identity. By performative aspects of identity, I refer to conduct or behavior that constitutes or comprises essential parts or representations of identity.[141] The understanding of status as identity performance has much in common with the status as identity framework. Indeed, like status as identity, criminal regulation of ascribed identities and social groups, whether fixed or impermanent, is a core function of the status offense. The criminalization of identity signifies the stigma and deviance assigned to the identity category. Although there are significant similarities between the two status offense categories, they differ with regard to the approach to the relationship between status and conduct.

While the "status as identity" construct of the status offense draws a distinction between identity status and conduct, the "status as

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137 *Robinson*, 370 U.S. at 666.

138 According to the definitive interpretation of the statute, the term addiction was defined to mean "a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms." *Id.* at 662–63 (alteration in original).

139 Lambert v. California, 355 U.S. 225, 229–30 (1957) (striking down a statute that criminalized felons who failed to register with the state on due process grounds).

140 Susan M. Schweik, The Ugly Laws: Disability in Public 1–3 (2009).

141 *See, e.g.*, Devon W. Carbado & Mitu Gulati, Acting White?: Rethinking Race in "Post-Racial" America 141–46 (2013); Daniel J. Sharfstein, Essay, *The Secret History of Race in the United States*, 112 Yale L.J. 1473, 1475–76 (2003).

identity performance" construct views them as inseparable. In critiquing the distinction, Francisco Valdes has noted that "'status' and 'conduct' ultimately do not separate into neat or tidy categories. On the contrary, status and conduct ultimately converge in ways that may require at least a partial rejection of the distinction."[142] In line with this critique, the status as performative identity framework posits that conduct and status are overlapping and mutually constitutive of one another. Indeed, adherents to a performative definition of status assert that conduct is what gives meaning to identity and renders identity recognizable to others.

The criminalization of sodomy[143] and sitting or lying in public places[144] are prime examples of the status offenses that regulate performative identity. In the context of sodomy statutes, states criminalize intimate sexual acts that are essential to gay and lesbian identity. Indeed, it is sexual attraction combined with the performative act of sexual intimacy that constitutes the identity. In the context of jurisdictions that criminalize the act of sitting, lying, or sleeping in public, they are ostensibly articulating a conduct rule of general application. This conduct rule, however, directly targets the performative acts that are essential aspects of homelessness, as people without homes must sit and sleep in public.

3. Status as Class-Based Enforcement

In addition to status offenses that criminalize performative aspects of identify, status offenses also criminalize conduct if committed by members of targeted classes. In such cases, the identity of the class and particular conduct by a member of the class are necessary elements of the offense. Conduct is used as a means to control the specific classes that present special threats of harm to themselves or society because of aspects of their identity.

Status offenses targeting juveniles is an example of this kind of class-based offense. Indeed, a juvenile adjudicated as a runaway may engage in the conduct of leaving home without permission or intent to return, but what makes such conduct warrant state regulation as a juvenile status offense is the individual's status as a minor. For all others, outside of the category of a minor, such conduct would be beyond the scope of criminal regulation. Juveniles are subject to these kinds of regulations because they are believed to be impetuous and

142 Valdes, *supra* note 135, at 387.

143 Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

144 Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006)

irresponsible and therefore in need of governmental supervision. Similar kinds of class-based regulations have criminalized gang members for loitering[145] and people convicted of felonies for possessing firearms.[146] In each of these instances, had a non–gang member or a nonfelon engaged in the same conduct, they would not be guilty of the crime. The targeted treatment of felons and gang members is justified by the perceived threat of violence and disorder posed by members of such groups.

4. Status as Selective Enforcement

Lastly, statuses are often policed based on the selective enforcement of rules of general application against targeted groups. Specific identities, however, are not referenced by such statutes. Rather, such rules of general application grant law enforcement significant discretion and therefore enable selective enforcement against targeted groups. Anti-labor solicitation laws are contemporary examples of statutes that are facially neutral yet almost exclusively enforced against undocumented day laborers.[147]

B. Pregnancy, the Eighth Amendment, and Constitutional Definitions of Status

Pregnancy is a status that defies simple categorization. It is a natural process that is most often understood to be transient, yet rooted in biological or physiological processes.[148] At times, these biological processes can result in physical complications or limitations which justify pregnancy's treatment as a disability for purposes of antidiscrimination law.[149] While pregnancy is characterized as an identity rooted in biology, it is also defined by social markers of identity. By

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145 *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 45–51 (1999) (striking down an ordinance that prohibited loitering by gang members on due process grounds).

146 *See, e.g.*, CAL. PENAL CODE § 29800(a)(1) (West, Westlaw through Ch. 9 of 2017 Reg. Sess.) (prohibiting the possession of firearms by individuals convicted of a felony).

147 *See, e.g.*, Valle del Sol Inc. v. Whiting, 709 F.3d 808, 814 (9th Cir. 2013) (finding an Arizona anti-solicitation ordinance to be an unconstitutional regulation of free speech and subject to arbitrary enforcement); Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 940–41 (9th Cir. 2011) (same).

148 *See* Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.–C.L. L. REV. 329, 373–74 (2010).

149 *See, e.g.*, Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1344–45 (2015) (examining the permissible scope of Title VII liability for an employer's failure to provide disability accommodation to pregnant women while providing accommodations for other categories of temporarily disabled workers); Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 821 (2001).

this I refer to the ways in which pregnancy is an ascriptive identity that is imposed upon women based on the physical manifestations of pregnancy that differentiate pregnant women from others.[150] In turn, this ascriptive identity is "shaped by cultural forces," which are largely performative in nature, that "define women's roles in mothering and gestating children in disadvantaging ways."[151] While pregnancy is most commonly understood as a physiological identity, it is the performative aspects of identity that most often lead to censure and criminalization.

As noted in the previous Section, nearly 1000 women have been prosecuted for drug use or for engaging in behavior which endangers fetal life, each of which deviates from prevailing norms associated with motherhood. In nearly all of these cases, the government has asserted that women are being punished for their deviant conduct and not for their biologically-rooted status as pregnant persons, thus adopting the more restrictive "status as identity" definition of status.[152] Pregnant women and their advocates, however, have argued that they are being prosecuted for performative acts and subjected to selective and class-based criminalization.

The broader definition of status that was advanced by pregnant women and their advocates was foreclosed by a plurality of the Court in *Powell v. Texas*.[153] In *Powell*, the Court considered whether punishing a chronic alcoholic for public intoxication constituted the criminalization of status in violation of the Eighth Amendment.[154] The defendant argued that *Robinson* covered not only the criminalization of a passive identity status, but performative acts that are essential to an identity.[155] Justice Marshall, writing for himself and three others in a plurality opinion, declined to interpret *Robinson* in such a manner.[156] Rather, the Court limited *Robinson* to a conception of status that was divorced from conduct, noting:

> On its face the present case does not fall within that holding, since appellant was convicted, not for being a

150 *See, e.g.*, Saru M. Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L. REV. 187, 199 (2016).

151 *Id.*

152 *See supra* Section I.A.1.

153 392 U.S. 514, 517 (1968) (considering the Texas Penal Code which stated: "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.").

154 *Id.*

155 *Id.* at 531–32.

156 *Id.* at 536.

> chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards . . . .[157]

According to the *Powell* plurality, such a narrow read of *Robinson* was necessary because to hold otherwise would create a limitless constitutional rule of criminal law, where the Court would become "the ultimate arbiter of the standards of criminal responsibility."[158] Given this hesitancy, the plurality read *Robinson* to mean that "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*."[159] In upholding Powell's conviction, the plurality held that he was convicted for his action of being drunk in public, not his status as an alcoholic.[160]

The plurality rejected the broader approaches of Justice White in concurrence and Justice Fortas in dissent. The concurring and dissenting Justices, who represented five members of the Court, argued that the Eighth Amendment prohibits the criminalization of conduct that is an unavoidable consequence of an individual's status.[161] In staking out this position, Justices White and Brennan adopted a performative view of status. Justice White, for example, asserted that "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name."[162] Moreover, Justice White viewed the act of appearing in public as part of the underlying status of alcoholism that could not be punished because "[f]or all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking."[163]

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157 *See id.* at 532.

158 *Id.* at 533; *see also* Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1605 (2013).

159 *Powell*, 392 U.S. at 533.

160 *Id.*

161 *Id.* at 548 (White, J., concurring in the result); *id.* at 554 (Fortas, J., dissenting).

162 *Id.* at 548 (White, J., concurring in the result) (citation omitted).

163 *Id.* at 551.

Notwithstanding the adoption of a performative view of status by a majority of the Court, one which rejected the distinction between status and conduct, this definition of status has largely been obscured in the years since *Powell* was decided.[164]

In the wake of *Powell*, states have enacted statutes that increase punishments for habitual offenders,[165] and cities have criminalized activities associated with homelessness[166] and targeted alleged gang members with anti-loitering ordinances.[167] When challenged, such status offenses have largely been deemed to pass constitutional muster. For example, courts have rejected Eighth Amendment claims that habitual offender statutes criminalize the status of being an offender.[168] Instead, these courts have reasoned that such statutes serve as an enhancement on the sentence imposed for the commission of a new crime rather than one's identity as a felon.[169] Pregnancy prosecutions may fall prey to the similar argument that it is not pregnancy that is being criminalized, but the actions of pregnant mothers which are alleged to endanger fetal health.

III. Criminalizing Performative Status as a Mechanism of Social Control

The Sections that follow criticize the *Powell* plurality's adoption of the narrow definition of "status as identity" and argue that this narrow conception of status is inconsistent with the historical evolution of status offenses. Indeed, early status offenses targeted characteristics such as race, gender, class, and disability through the criminalization

164 Justice White voted to sustain Powell's conviction because there wasn't sufficient evidence of Powell's alcoholism or homelessness. *See id.* at 553–54.

165 *See, e.g.*, Matt Taibbi, *Cruel and Unusual Punishment: The Shame of Three Strikes Laws*, Rolling Stone (Mar. 27, 2013), http://www.rollingstone.com/politics/news/cruel-and-unusual-punishment-the-shame-of-three-strikes-laws-20130327.

166 *See, e.g.*, Andrew Mach, *Interactive Map: Number of U.S. Cities Criminalizing Homelessness Surges*, PBS Newshour (Dec. 13, 2015, 1:30 PM), http://www.pbs.org/newshour/updates/interactive-map-number-of-u-s-cities-criminalizing-homelessness-doubles/. *See generally* Policy Advocacy Clinic, U.C. Berkeley Sch. of Law, California's New Vagrancy Laws: The Growing Enactment and Enforcement of Anti-Homeless Laws in the Golden State (2016), http://wraphome.org/wp-content/uploads/2016/06/NVL-Update-2016_Final.pdf (describing the number of California cities with anti-homeless ordinances).

167 *See, e.g.*, Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 Yale L.J. 2249, 2263–64 (1998).

168 *E.g.*, State v. Ames, 950 P.2d 514, 518 (Wash. Ct. App. 1998).

169 *See, e.g.*, Sanchez v. Nelson, 446 F.2d 849, 850 (9th Cir. 1971) (upholding recidivist statute that heightened penalties for repeated drug possession convictions); People v. Hendrick, 217 N.W.2d 112, 115 (Mich. Ct. App. 1974) (upholding recidivist statute against Eighth Amendment challenge).

of performative conduct and imposing class-based burdens. Moreover, this Section describes the ways in which status offenses historically operated as a targeted form of social control that enabled the state to "isolate undesirable elements from the general public"[170] and to remove groups who are viewed as dangerous to the prevailing order.[171] Through the enforcement of criminal law, individuals and communities were stigmatized—marked as dangerous and socially deviant.

A. Economic Status

The first status offenses were enacted by the English Parliament to regulate economic disorder and ensure a steady supply of cheap labor.[172] This status offense, which largely regulated passive identity, was initially conceived of as an economic crime intended to deter criminality and to "prevent [those] individuals from becoming public charges."[173] Toward that end, English law identified the poor as targets of social regulation through the criminalization of vagrancy.[174] In 1349 and 1350, the English Parliament passed "the Statutes of Labourers, confining the laboring population to stated places of abode and fixing wages at specific rates. 'Wandering or vagrancy thus became a crime.'"[175] Stated differently, one needed only to be poor and without work to come within the scope of the criminal prohibition.[176] Thus, as historian Linda Kerber argues, "vagrancy is a status offense; the crime is not what a person has done but what the person *appears*

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170 Cuomo, *supra* note 19, at 464.

171 *See* Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity 2–3 (2009); Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. Crim. L. & Criminology 829, 919 (2001); Franklin E. Zimring, *Kids, Guns, and Homicide: Policy Notes on an Age-Specific Epidemic*, Law & Contemp. Probs., Winter 1996, 25, 35 ("Despite the definitional similarity of all age-related prohibitions, status offense prohibitions to youth fall into two discrete categories of justification: those designed only to protect the young person and those designed to protect the community as well as the youth from harm.").

172 Lorne Sossin, *The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement*, 22 N.Y.U. Rev. L. & Soc. Change 623, 642 (1996). *See generally* A.L. Beier, Masterless Men: The Vagrancy Problem in England 1560–1640 (1985).

173 Cuomo, *supra* note 19, at 464.

174 Gary V. Dubin & Richard H. Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. Rev. 102, 104–07 (1962).

175 *Id.* at 104 (footnotes omitted); *see also* Schweik, *supra* note 140, at 4 (describing the ways in which people with maimed limbs were arrested for begging on the street and merchants suggested whippings for violation of social norms).

176 *See* Dubin & Robinson, *supra* note 174, at 104–05.

to be."[177] Through this legislation, the state was attempting to ensure a class of readily exploitable workers by punishing the failure to perform an act.

Poor people were criminalized by these early status offenses based on their "probable criminality," the assumption that idleness presaged criminality such as begging, stealing, and prostitution.[178] Indeed, "[w]hat formerly had been punished as 'economic criminality' now became equally punishable as a criminal status, the members of which class were presumed destined for a life of crime."[179] The use of the status offense in this manner enhanced the state's power to manage the despised poor on public streets and elsewhere.[180] The use of status to criminalize unpopular or marginalized populations was not limited, however, to the English context. Rather, the criminalization of status traveled across the Atlantic, influencing American criminal law.

B. Racial Status

In the United States, status offenses have been used to establish and control racialized or "undesirable" classes of people. For example, status offenses were enacted to ensure the racially subordinate position of enslaved Africans through slave codes that imposed criminal penalties for slaves who learned to read or write or traveled without authorization from their slave masters.[181] Thus, slave codes differed from early English vagrancy laws because they criminalized racial status through targeted law enforcement only as against the conduct of enslaved persons. These laws were designed to prevent insurrection and functioned to reinforce the racialized commodification of human

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177 LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 54 (1998).

178 Cuomo, *supra* note 19, at 464 ("The principal justification of 'status criminality' is that it prevents crime based on the assumption that the possessor of such status is a 'probable criminal.'"); Dubin & Robinson, *supra* note 174, at 105–06.

179 Dubin & Robinson, *supra* note 174, at 106.

180 Cuomo, *supra* note 19, at 464, 466.

181 Justin S. Conroy, *"Show Me Your Papers": Race and Street Encounters*, 19 NAT'L BLACK L.J. 149, 151 (2006) ("In Virginia, the first major slave codes appeared as early as 1680 and served to legally deprive nonwhites of all basic human rights. The act destroyed the mobility of slaves by prohibiting any 'Negro or slave . . . from [leaving] his owner's plantation without certificate and then only on necessary occasions.'" (alterations in original) (footnote omitted)); *see also* Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 303–04 (2006); Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1174–75 (2013).

bodies.[182] The codes also promoted the process of racial differentiation between enslaved Africans, whites who were indentured European servants, and Native Americans.[183] Moreover, the enforcement of these status offenses against enslaved Africans functioned to establish the value of whiteness.[184] Following the abolition of slavery, the use of the criminal law to regulate, manage, and punish racially and economically marginalized communities continued,[185] particularly during periods of political upheaval or economic instability.[186]

During the post–Civil War era, jurisdictions across the country enacted sweeping status offenses to manage socially, racially, and economically marginalized populations. These criminal regulations—promulgated against the backdrop of anxieties stemming from the abolition of slavery, the industrial revolution, and immigration from Europe—were used to assist in the maintenance of the prevailing social order.[187] Like their European counterparts, vagrancy statutes criminalized the misspender of time, the known criminal, the common prostitute, the drug addict, and the lewd or lascivious person.[188] Such laws targeted conduct and movement by individuals and groups associated with crime and disorder, particularly African-Americans. Indeed, these vagrancy laws, which came to be known as the Black Codes, were used to reassert control over newly freed African-Americans through the operation of the criminal law.[189]

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182 *See* Conroy, *supra* note 181, at 151.

183 *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715–18 (1993).

184 *See id.* at 1717.

185 KERBER, *supra* note 177, at 55–59.

186 *See* Dubin & Robinson, *supra* note 174, at 104.

187 SCHWEIK, *supra* note 140, at 189.

188 Dubin & Robinson, *supra* note 174, at 109–10; Lacey, *supra* note 134, at 1203 (noting that status offenses applied to categories such as the "common prostitute, common thief, tramp, or disorderly person").

189 *See, e.g.*, 1865 Miss. Laws 165; ANGELA Y. DAVIS, *Racialized Punishment and Prison Abolition*, *in* THE ANGELA Y. DAVIS READER 100 (Joy James ed., 1998) ("Black Codes . . . criminalized such behavior as vagrancy, breech [sic] of job contracts, absence from work, the possession of firearms, insulting gestures or acts."); BLACK CODE OF MISSISSIPPI 1865, *in* DOCUMENTS OF AMERICAN HISTORY 452–55 (Henry Steele Commager ed., 8th ed. 1968) (explaining that in Mississippi, for example, vagrancy was applied to "[a]ll freedmen, free negroes and mulattoes in this State, over the age of eighteen years" and was defined to mean a person "with no lawful employment or business, or found unlawfully assembling themselves together, either in the day or night time"); BLACK CODE OF LOUISIANA 1865, *in* DOCUMENTS OF AMERICAN HISTORY, *supra*, at 455–57; ERIC FONER, GIVE ME LIBERTY!: AN AMERICAN HISTORY VOL. II 561–62 (2d ed. 2009); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 20–22 (1996); Stewart, *supra* note 167, at 2257–63. Vagrancy laws, however, were not exclusive to the American South. As legal historian Risa Goluboff notes, "Among the many sections of the California vagrancy law criminalizing wanderers, beg-

Under these statutes, vagrancy was broadly and racially defined to require African-Americans to be employed[190] and to heighten penalties for petty offenses committed by the formerly enslaved. African-Americans were arrested for standing in public places, congregating in groups, and traversing streets or roads.[191] African-Americans were arrested based on allegations of wrongdoing by a disgruntled former employer or for no reason at all.[192] These laws relied on the presumed criminality of African-Americans[193] and allowed for the summary arrest of thousands of African-Americans who were forced into hard labor at a convict leasing camp or chain gang as punishment.[194] As such, vagrancy status offenses were utilized to "maximize[] police power, particularly over non-white people."[195]

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gars, drunkards, and the like, was subdivision five, section 647 of the California Penal Code, which made a vagrant of anyone who was 'lewd or dissolute.'" RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 14 (2016). California's vagrancy laws were used to police deviance among poor white, working-class men who were seen as threats to norms surrounding white masculinity given their itinerate labor practices, lack of familial attachment, and sexual practices. *See generally* Kelly Lytle Hernández, *Hobos in Heaven: Race, Incarceration, and the Rise of Los Angeles, 1880–1910*, 83 PAC. HIST. REV. 410 (2014).

190 *See* FONER, *supra* note 189, at 561, 646.

191 *See* BLACK CODE OF MISSISSIPPI 1865, *supra* note 189, at 454; FONER, *supra* note 189, at 561–62, 646.

192 *See supra* note 191.

193 *See generally* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2011) (arguing that slave codes and vagrancy laws functioned to solidify the link between Blackness and criminality).

194 Jennifer Mason McAward, *The Scope of Congress's Thirteenth Amendment Enforcement Power After* City of Boerne v. Flores, 88 WASH. U. L. REV. 77, 108 (2010); *see* Stewart, *supra* note 167, at 2260–61. During this period, thousands of African-Americans were arrested and prosecuted pursuant to the racially-specific status offenses that proliferated throughout the South. *See* FONER, *supra* note 189, at 561–62, 646. African-American women were subjected to both racialized and gendered policing as they were often arrested on suspicion of prostitution or violating gendered norms through "unruly behavior" such as swearing in public. *See* Ocen, *Punishing Pregnancy*, *supra* note 33, at 1262–65; *see also* Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 770–71 (1999). Moreover, the reproductive autonomy of Black women was targeted for criminal prosecution as Black women were disproportionately arrested for crimes such as infanticide and subject to incarceration and hard labor in male prisons. *See, e.g.*, Ocen, *Punishing Pregnancy*, *supra* note 33, at 1252–53. In the West, cities also passed ordinances to prevent Chinese people from carrying laundry poles outside in order to insulate white businesses from competition. SCHWEIK, *supra* note 140, at 188; *see also* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (finding that race-neutral rules regulating laundry operations in San Francisco were discriminatorily enforced against Chinese Americans in violation of the Equal Protection Clause).

195 SCHWEIK, *supra* note 140, at 192.

C. Sexuality and Reproductive Status

The status offenses confronted by African-Americans in the post–Civil War era were not only racialized, but gendered as well. As such, status offenses were used to criminalize the conduct of Black women who were disproportionately subject to criminalization and incarceration.[196] In Atlanta, Georgia, for example, Black women were six times more likely to be arrested than their white counterparts in the 1890s.[197] Like their male counterparts, Black women were often arrested for the crime of vagrancy.[198] What was distinctive, however, about the forms of criminalization that they confronted, was the way in which the criminal law punished them for performative acts that violated gender norms and traversed the constraints of womanhood.[199] Black women were routinely charged with engaging in conduct such as using profanity and sent to hard labor.[200] In many cases, the status offense of vagrancy was used to police their sexuality as it often "referred to prostitution."[201]

In addition, through the enforcement of racialized and gendered status offenses, the reproductive choices of Black women were subject to heighted scrutiny and punishment by state authorities.[202] Black women were often subject to surveillance and chastisement for their alleged failures as mothers, particularly for the crime of infanticide.[203] According to historian Sarah Haley, "Between 1868 and 1936 there were at least twenty-two women imprisoned for infanticide in Georgia . . . . Of that number only three were white."[204] While there were reports of white women who were suspected of infanticide or white babies discovered dead in public places, few white women were ever tried or convicted of the crime.[205] In the cases against Black women accused of infanticide, "the evidence for this crime during this period was often so thin, unscientific, and speculative that it is virtually im-

196 KERBER, *supra* note 177, at 51 ("With little property to manage and with few sophisticated legal skills, marked as dependent by their class, their race, and their sex, impoverished black women found themselves especially vulnerable in their dealings with state authority.").

197 SARAH HALEY, NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY 30 (2016).

198 KERBER, *supra* note 177, at 51.

199 HALEY, *supra* note 197, at 56–57.

200 *Id.* at 30.

201 *Id.*

202 *See id.* at 46.

203 *Id.*; TALITHA L. LEFLOURIA, CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH 41–43 (2015).

204 HALEY, *supra* note 197, at 46.

205 *Id.* at 47.

possible to know if most women were guilty."[206] Because the women were Black, they received little sympathy from the public. Instead they were blamed for their misfortune. Such prosecutions ignored factors related to poverty, hard labor, and stress induced by racial terror that might be responsible for pregnancy loss or stillbirth.[207] As Haley notes, "Beneath the vague charges was the goal of making [Black women] good domestics but disassociating them from femininity by presenting them as bad mothers and aggressive beings who were dangerous because they might produce more of their kind."[208]

D. Biology and Disability Status

In addition to status offenses that regulated race, reproduction, and sexuality, status offenses have also been used to manage illness and disability, reflecting a "primordial obsession with perfect, public bodies."[209] In the early twentieth century, cities passed ordinances that prohibited people with visible physical disabilities from assembling or being present in public spaces.[210] "Many versions of these statutes made clear in their titles that city leaders aimed the laws at a very particular target, the person who 'exposed' disease, maiming, deformity, or mutilation for the purpose of begging."[211] Pursuant to the vagrancy statutes, people who suffered from disabilities such as paralysis or disfigurement, or who were otherwise viewed as unsightly, were criminalized and removed from society. Such laws extended to people with mental disabilities as cities such as Los Angeles criminalized drug addiction.[212] The poor and disabled were regarded "as individual problems rather than relating them to broader social inequalities."[213]

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206 *Id.* at 46.

207 *See id.* at 53.

208 *Id.* at 38. However, if white women, particularly those who were mothers, were imprisoned, it served as a cause for alarm. *Id.* at 33 (noting one article that exclaimed, "A white woman in jail! Not only that—a widow and a mother, a woman whose hair is turning gray").

209 SCHWEIK, *supra* note 140, at 15 (quoting Tobin Siebers, *What Can Disability Studies Learn from the Culture Wars?*, 55 CULTURAL CRITIQUE 182, 198 (2003)).

210 An 1881 Chicago ordinance read: "Any person who is diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object, or an improper person to be allowed in or on the streets, highways, thoroughfares, or public places in this city, shall not therein or thereon expose himself to public view, under the penalty of a fine of $1 [about $20 today] for each offense." SCHWEIK, *supra* note 140, at 1–2 (alteration in original). Cities such as Denver, Colorado, Lincoln, Nebraska, and Portland, Oregon, had similar ordinances. *Id.* at 1-3.

211 SCHWEIK, *supra* note 140, at 2.

212 *See, e.g.*, Robinson v. California, 370 U.S. 660, 666–67 (1962) (finding a statute that criminalized the status of addiction unconstitutional).

213 SCHWEIK, *supra* note 140, at 5.

In criminalizing these classes, the state promoted an "institutionalized system of social humiliation."[214]

In these cases, as historian Susan Schweik notes, "Unsightliness was a status offense, illegal only for people without means."[215] Such laws criminalized conduct only when committed by individuals with disabilities and punished performative acts that were inherent in poverty and disability. Ironically, the harm that "unsightly" disabled persons could cause to fetal life was used as a justification for these forms of status offenses.[216] In particular, these laws were rooted in the concept of "'maternal impression' or mother's marks, the idea that what pregnant women saw would stamp and shape their children."[217] At the turn of the twentieth century, doctors concerned about the health of fetal life argued for the enactment of ordinances criminalizing the disabled and disfigured.[218] In particular, "they rallied to defend [pregnant women] from pestering beggars 'who insist . . . on exposing to her gaze a horribly distorted limb' or other 'distressing sight.'"[219]

Taken together, these historical examples highlight the ways in which status offenses are used to target the conduct of disfavored populations and to regulate performative actions associated with marginalized identities.[220] In these arenas, both passive identity and performative were understood to be constitutive aspects of identity. Indeed, the criminalization of racial identity, sexuality, and disability required some form of conduct on the part of the regulated class prior to the imposition of criminal liability.

In these cases, status offenses operated as a form of social control that identified and targeted purportedly deviant populations such as the poor, the racially marginalized, sexual minorities, and the disabled. The targeting of these groups was justified not based on the particular harm caused by members of a group or class, but by the risk of harm posed by such groups or classes. Rather, classes were targeted because of the risk of harm they presented, as they were viewed as probable criminals or persons likely to become public charges. As such, the criminalization of the poor, racially subordinated, and dis-

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214 Paul K. Longmore, Why I Burned My Book and Other Essays on Disability 240 (2003).

215 Schweik, *supra* note 140, at 16.

216 *See id.* at 153–54.

217 *Id.*

218 *Id.* at 155–56.

219 *Id.* at 156 (ellipsis in original).

220 The Supreme Court has since declared broad, status-based vagrancy laws unconstitutional. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 161–62 (1972).

abled populations naturalized inequality, marked groups as perpetual dangers, and rationalized social hierarchy as a function of individual or cultural pathology. Furthermore, enactment and enforcement of the vagrancy laws, slave codes, Black codes, and the laws criminalizing disability rendered targeted populations vulnerable to further subordination or exploitation.

While the Court's decision in *Robinson* struck down some of the most obvious and egregious status offenses, such as those regulating disease and disability, its narrow interpretation of status in *Powell* enabled the criminalization of status to continue to exist in various forms. The next Part addresses how, in the contemporary era, the criminal law is increasingly used to police performative acts associated with pregnancy and to impose targeted forms of liability against pregnant women as a class. Like earlier status offenses, the pregnancy-based status offense criminalizes a biological function selectively among the poor and racially marginalized. In so doing, it reinforces idealized notions of reproduction, motherhood, and female sexuality.[221]

IV. Criminalizing Pregnancy as a Means of Regulating Disfavored Women

The criminalization of status enables the state to manage and control disfavored populations. Through the imposition of criminal liability for conduct during pregnancy, the state controls women who are perceived to be deviant mothers and manages the risk that their offspring will be economically dependent on society.[222] This Part argues that the criminalization of the status of pregnancy has much in common with its historical forebearers with regard to the management of people deemed to present a risk to the public, their removal from society through incarceration, and the erasure of structural inequality as an explanation for social problems. First, poor pregnant women, particularly women of color, are identified as "presumed criminals," and the criminal law is deployed as a means to manage the risks associated with their childbearing. Second, the use of pregnancy-based status offenses facilitates the punishment of poor pregnant women and

221 *See infra* Part IV.

222 *See, e.g.*, Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 Criminology 449, 452, 457 (1992); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611, 614 (2014) (arguing that the criminal justice system has come to adopt a managerial model concerned with assessment of risk and the management of low-level offenders who are perceived as posing risks to the community over time).

their removal from society through incarceration. Third, through the prosecution of pregnant women for negative fetal outcomes, the state effectively blames women for such outcomes. Such blaming obscures the role of structural factors—such as violence, poverty, or lack of access to health care—in producing negative fetal outcomes and exonerates the government from having any responsibility to address structural inequality.

A. Punishing Pregnant Women as a Means of Policing Gender Norms

Like earlier status offenses, the criminalization of performative conduct by pregnant women enables the state to enforce normative standards, particularly those associated with motherhood and childrearing. Indeed, pregnancy-based status offenses are predicated on the fact that poor pregnant women are often viewed as irresponsible and more likely to engage in behavior that will harm themselves and the fetuses they are carrying.[223] They are also perceived to be unable to meet the biologically ingrained duties[224] of motherhood, which compounds the belief that their children will be damaged by them and become public charges or, worse, future criminals. Poor women's reproductive capacities have long been viewed as a public threat as they and their families are viewed as sources of public disorder and moral disintegration. Poor women's reproduction, however, is not merely viewed as a matter of concern for the medical field; instead, the concerns projected onto poor women's reproduction have been placed under the auspices of the criminal justice system.[225] Because of poor women's perceived deviation from prevailing gender norms and the expectations of motherhood, they are subjected to heightened forms

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223 *See supra* Part II.

224 *See, e.g.*, Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES MAG. (Apr. 25, 2012), http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?_r=0 (exploring the way prosecutors are leveraging criminal statutes to punish women for their failure to adhere to normative standards of motherhood). Mitch Floyd, a prosecutor from Albertville, Alabama who has "prosecuted chemical-endangerment cases against new mothers more aggressively than anyone else," stated the following:

> Addiction is "a very powerful force . . . . However, there's a force that's more powerful than that to me, and that is a child is helpless, and God has put one person on this planet to be the last-line defense, to be the fiercest protector of that child, and that is its mother. My wife would literally claw someone's eyes out—fight you to the death for our children. I mean, that's just what mothers are supposed to do. When that child's ultimate protector is the one causing the harm, what do you do?"

Id.

225 *See id.*

of scrutiny by medical staff and more often referred to law enforcement for investigation.[226]

Indeed, reproduction and pregnancy have long served as terrains upon which legal and cultural contestations about gender and race are waged.[227] As legal scholar Reva Siegel has observed, "Ideological norms and institutional practices pertaining to reproduction play a central part in defining women's status, the dignity they are accorded, the degradations to which they are subjected, and the degree of autonomy they are allowed or dependency they must suffer."[228] Through ideological norms associated with reproduction, women are reduced to their biological functions and assigned specific reproductive obligations and incapacities that facilitate their subordination.[229] Women are expected to serve as vessels for procreation.[230] When pregnant, they are to provide an ideal gestational environment; as mothers they are to be self-sacrificing, "altruistic and intensive, which includes the assumption of primary responsibility for the care of their children,"[231] and submissive to patriarchal control.[232]

The gendered norms associated with reproduction cohere into the social construct of motherhood. As sociologist Evelyn Nakano Glenn notes, "motherhood may be seen as a normal and expected role for women because it appears unavoidable, a status springing from women's reproductive capacity."[233] Motherhood is conceived of as being instinctive and biological; mothers are required to be selflessness care-

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226 *See* Paltrow & Flavin, *supra* note 10.

227 *See, e.g.*, Julia E. Hanigsberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 MICH. L. REV. 371, 388–89 (1995).

228 Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 267 (1992).

229 Jenny Wald, Note, *Outlaw Mothers*, 8 HASTINGS WOMEN'S L.J. 169, 172 (1997).

230 *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 124–25 (1995) ("[Pregnancy is] a colonized concept—an event physically practiced and experienced by women but occupied and defined, given content and value, by the core concepts of patriarchal ideology."); Siegel, *supra* note 228, at 296–97 (noting that early campaigns against abortion relied on the notion that women "had a duty . . . to the community" to produce children and that "[l]aws against abortion and contraception were necessary to protect the *public's* interest in procreation").

231 April L. Cherry, *Shifting Our Focus from Retribution to Social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses*, 28 J.L. & HEALTH 6, 40 (2015).

232 Roberts, *supra* note 30, at 102–03.

233 Cherry, *supra* note 231, at 41 (citing Evelyn Nakano Glenn, *Social Construction of Mothering: A Thematic Overview*, *in* MOTHERING: IDEOLOGY, EXPEREINCE, AND AGENCY 3 (Evelyn Nakano Glenn, Grace Change & Linda Rennie Forcey eds., 1994)); *see also* Martha E. Gimenez, *Feminism, Pronatalism, and Motherhood*, *in* MOTHERING: ESSAYS IN FEMINIST THEORY 291, 296–97 (Joyce Trebilcot ed., 1983).

takers of their children.[234] Women who meet this standard of normative motherhood are deemed "good" mothers and are "reward[ed] [for] conduct that fulfills a woman's maternal role."[235] Pregnant and parenting women who embody characteristics outside of the normative construct of motherhood are labeled as "bad" or deviant mothers and they are discouraged from exercising their reproductive capacities through direct and indirect discipline and criminal punishment by the state.[236] Indeed, pregnancy-based status offenses operate as a form of social control designed to police the boundary between "good" and "bad" motherhood.[237] The deployment of the criminal law to police this boundary of motherhood through pregnancy functions to reinforce social obligations that are imposed through the construct of motherhood and to separate those who are perceived to adhere to this standard from those who do not.

Indeed, the criminalization of pregnant women is often driven by cultural and political discourses that identify as deviant pregnancies those that do not adhere to normative standards of motherhood with regard to medical care. In the context of medical care, the construct of motherhood "assumes that pregnant women will assume the individual responsibility to provide their unborn child with the ideal gestational environment, and to best provide this environment she must comply with biomedical risk management and care."[238] These expectations are enforced by medical professionals and legal actors even when pregnant women are terminally ill[239] or brain dead,[240] as the

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234 Roberts, *supra* note 23, at 102–03.

235 *Id.* at 97–98.

236 Historians Molly Ladd-Taylor and Lauri Umanski argue that there are social categories that reliably lead to a pregnant or parenting woman being labeled a deviant mother: (1) parenting outside of a traditional nuclear family, (2) mothers whose children grew up to be criminals or deviant in some way, (3) failure to protect children from harm. *See* "BAD" MOTHERS: THE POLITICS OF BLAME IN TWENTIETH-CENTURY AMERICA 3–4 (Molly Ladd-Taylor & Lauri Umansky eds., 1998).

237 *See, e.g.*, Grace Howard, *The Limits of Pure White: Raced Reproduction in the "Methamphetamine Crisis,"* 35 WOMEN'S RTS. L. REP. 373, 375 (2014) (arguing that "the disproportionately white, poor, and methamphetamine related arrest demographics are reflective of anxiety about perceived white degeneracy—that this population of deviant whites are perceived as polluting the white race and violating the norms of supposed white moral superiority").

238 Lauren Fordyce, *When Bad Mothers Lose Good Babies: Understanding Fetal and Infant Mortality Case Reviews*, 33 MED. ANTHROPOLOGY 379, 382 (2014).

239 *In re* A.C., 573 A.2d 1235, 1237 (D.C. 1990).

240 *See, e.g.*, Manny Fernandez & Erik Eckholm, *Pregnant, and Forced to Stay on Life Support*, N.Y. TIMES (Jan. 7, 2014), http://www.nytimes.com/2014/01/08/us/pregnant-and-forced-to-stay-on-life-support.html?_r=0.

state has forced such women to undergo medical procedures for the benefit of fetal life.

In addition to enforcing social norms regarding traditional pregnancy care, criminalization punishes women for exercising their own judgment about what is best for their pregnancies when it conflicts with normative standards. Indeed, many pregnant women who are addicted to drugs and wish to have healthy pregnancies often find themselves in no-win situations. On the one hand, poor pregnant drug users wish to stop using drugs but do not have access to drug treatment programs.[241] On the other hand, they cannot stop using drugs cold turkey for fear that they will suffer a miscarriage.[242] Given these circumstances, a pregnant drug user runs the risk of punishment no matter what she does: she may be punished for using drugs during pregnancy if the child is born, and she may be charged with a homicide if she suffers a pregnancy loss after she stops using drugs.

When women fail to meet the expectations of good motherhood, they are presumed to be criminal and are targets of heightened supervision by public and private actors, such as medical staff.[243] In the 276 cases of arrest, detention, or prosecution of pregnant women examined in the Flavin and Paltrow study discussed above, 112 of these cases originated with reports from health care or social service providers.[244] Indeed, "[n]ineteen states consider a baby born positive for an illegal drug 'neglected' under civil child welfare laws, and 15 states require hospitals to report babies that test positive for illegal drugs at

241 Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 HEALTH & JUST., no. 2, 1, 3 (2015) (noting that women have few options for drug addiction treatment during pregnancy).

242 Kristin Gourlay, *Tiny Opioid Patients Need Help Easing Into Life*, NPR (Mar. 25, 2016, 5:00 AM), http://www.npr.org/sections/health-shots/2016/03/25/471279600/tiny-opioid-patients-need-help-easing-into-life.

243 *See generally* Khiara M. Bridges, *Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies*, 3 Nw. J.L. & SOC. POL'Y 62, 64 (2008). The risks inherent in the disregard of privacy extend beyond drug use, as medical concerns could be used to prosecute women who fail to exercise, who do not eat properly during pregnancy, contract a disease, or fail to follow a doctor's orders. Such law enforcement intrusions into medical privacy and bodily integrity could go beyond the pregnancy context altogether. For example, hospitals or medical professionals could identify drug use more generally as a basis for civil or criminal state action against unsuspecting individuals for whom the state might assert an interest. The deployment of the criminal justice system to regulate pregnant women fundamentally expands the scope of the criminal justice system and undermines privacy as a limit on state power, putting us further along the path of mass incarceration that stems from mass surveillance.

244 *See* Paltrow & Flavin, *supra* note 10, at 326; *see also, e.g.*, Goodwin, *supra* note 30, at 824–29 (describing the collaboration between a South Carolina hospital and law enforcement to detect and prosecute poor, pregnant, and predominately African-American drug users).

birth to child welfare authorities."[245] These states, however, do not provide clear guidance on when to test women and newborn infants for drugs.[246] In one survey of medical providers in Tennessee, a state that criminalized pregnant women who use drugs, it was found that "some hospitals drug-test mothers before birth and others do not. Some test all mothers; others test based on appearance and behavior. Some hospitals in poor neighborhoods test everyone; in rich neighborhoods, not so much . . . ."[247] Such testing, if positive, was referred to child protective services or other state authorities. Once referrals are made to child protective services, police are often notified and women become vulnerable to criminal prosecution.[248] The evidence of the efficacy of such reporting, however, seems scant at best as "[n]ot one of these states has reported improved outcomes for children."[249] This pattern of surveillance and criminalization without clear health benefits reflects the ways in which poor pregnant women are subject to surveillance and social control for their failure to meet normative standards of motherhood, rather than the infliction of harm to their children.

The notion of presumed criminality drives the evaluation of poor pregnant women's behavior by medical professionals and enables the criminalization of the status of pregnancy. Take, for example, a study of fetal and infant mortality in which a case review team in Florida

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245 Emma S. Ketteringham, *Test and Report: Bad for Children and Families*, HUFFINGTON POST (June 25, 2014), http://www.huffingtonpost.com/emma-s-ketteringham/test-and-report-bad-for-children-and-families_b_5175106.html. The number of women and newborns tested for drugs is likely to increase as policymakers and academics call for universal testing and increased attention toward the opioid crisis. *See, e.g.*, Elizabeth Bartholet, *Parental Custody? Not if They're Addicts*, BOS. GLOBE (Apr. 17, 2014) http://www.bostonglobe.com/opinion/columns/2014/04/16/parental-custody-not-they-addicts/bxv08D20cH87AUQd0ZeepO/story.html; Duff Wilson & John Shiffman, *Newborns Die After Being Sent Home with Mothers Struggling to Kick Drug Addictions*, REUTERS (Dec. 7, 2015, 9:00 PM), http://www.reuters.com/investigates/special-report/baby-opioids/.

246 Ketteringham, *supra* note 245.

247 Rosa Goldensohn & Rachael Levy, *The State Where Giving Birth Can Be Criminal*, NATION (Dec. 10, 2014), https://www.thenation.com/article/state-where-giving-birth-can-be-criminal/.

248 The loss of privacy experienced by poor women of color contributes to the disproportionate rates of child removal through the juvenile dependency system. *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002). Forty-two percent of the children in foster care are black. *Id.* at 8–10. The disproportionate placement of black children into the juvenile dependency system increases state supervision of women as they are required to comply with rigid court orders if they wish to regain custody of their children. *See generally id.* The myriad requirements that women must comply with include drug-testing, supervised visits, regular reporting to the court, and job requirements. *See id.*

249 Ketteringham, *supra* note 245.

was tasked with reviewing cases of fetal death and assigning causes of stillbirth.[250] The review team's discussions surrounding cases of fetal death often focused on whether a woman was conforming with standards of good motherhood, such as compliance with biomedical care.[251] In one woman's case, she sought treatment after the thirteenth week of her pregnancy and had five subsequent visits but nevertheless experienced fetal loss.[252] In discussing her case, members of the team "questioned her delay in initiating care" without similarly questioning whether there were barriers to obtaining care or other factors that led to the loss.[253] According to the study's author, the delay in seeking medical care was perceived as evidence of parental irresponsibility and maternal deviance that warranted condemnation and criminal intervention.[254] Such evaluations by medical professionals can trigger a host of state interventions, including criminal prosecution.

Moreover, when reviewing case studies with evidence of multiple contributing factors, review team members in the same Florida study were more likely to overlook such factors that are not stereotypically associated with poor women, and cite drug use as the basis for fetal death. For example, in one case involving a placenta abruption experienced by a poor pregnant woman that led to fetal death,[255] review group members assumed that drug use was the cause despite a lack of evidence of such use, while they overlooked numerous other factors that were present, such as maternal trauma from an auto accident and multiple pregnancies.[256] This case reveals the ways in which the search for the bad mother is shaping medical assessments when women who do not meet normative standards of motherhood come into contact with the health care system.

Assumptions of criminality and assessments of the risk of harm to fetal life are deeply informed by the intersection of race and class.[257] Indeed, a 2010 study of facially neutral drug testing protocols in a hospital in New York State found that "the hospital tested and reported greater numbers of women of color regardless of whether they met

250 *See* Fordyce, *supra* note 238, at 380–81.

251 *Id.* at 379–82.

252 *Id.* at 382.

253 *Id.*

254 *Id.*

255 A placenta abruption occurs when the placenta becomes separated from the uterine lining. *See id.* at 383.

256 *Id.* at 384–85.

257 *See, e.g.*, Crenshaw, *supra* note 17, at 1242 (noting that the violence and marginalization experienced by women of color "is often shaped by other dimensions of their identities, such as race and class").

guidelines."[258] Given the racial bias in testing, it is unsurprising that Black women are far more likely to be reported for drug use than their white counterparts, even though white women are more likely to use drugs or other substances such as alcohol or tobacco during pregnancy.[259] These statistics reveal that "[t]he burden of these [testing and reporting] policies falls disproportionately on poor women and women of color, as those who use public health and social services are subject to increased surveillance and heightened risk of being tested and reported to criminal justice authorities."[260]

Indeed, as legal scholar Khiara Bridges has noted, African-American women who seek prenatal services through publicly subsidized health care programs are often treated with suspicion and disregard by medical staff.[261] In a study of treatment of African-American women, Bridges observed that African-American women who sought care were constructed as a "wily patient," the analog to the "welfare queen."[262] According to Bridges, "the wily patient is the welfare queen as she is envisioned in the context of a public hospital's obstetrics clinic, where poor women get 'free' prenatal care to support their 'illegitimate' pregnancies."[263] Furthermore, the wily patient is conceived of as an "uneducated and unintelligent woman with the uncanny ability to exploit government beneficence and obtain undeserved cash assistance."[264] As a consequence of these and other racialized constructs that cast African-American motherhood as deviant, staff at the hospital were observed treating pregnant African-American patients badly and subjecting them to heightened forms of scrutiny through urine and blood testing.[265] This perception that African-American mothers are bad and their pregnancies are illegitimate underlies medical attempts to monitor African-American women for

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258 Ketteringham, *supra* note 245 (citing Marc A. Ellsworth et al., *Infant Race Affects Application of Clinical Guidelines when Screening for Drugs of Abuse in Newborns*, 125 PEDIATRICS 1379 (2010)).

259 Cynthia Dailard & Elizabeth Nash, *State Responses to Substance Abuse Among Pregnant Women*, GUTTMACHER POL'Y REV. (Dec. 1, 2000), https://www.guttmacher.org/gpr/2000/12/state-responses-substance-abuse-among-pregnant-women.

260 Stone, *supra* note 241, at 3.

261 *See* Khiara M. Bridges, *Wily Patients, Welfare Queens, and the Reiteration of Race in the U.S.*, 17 TEX. J. WOMEN & L. 1, 12–15 (2007).

262 Khiara M. Bridges, *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609, 617–18 (2009).

263 *Id.* at 618.

264 *Id.*

265 *Id.* at 615 & n.15.

evidence of drug use or other forms of fetal abuse, which can ultimately lead to criminalization.

Similar images have extended to Latina mothers, viewed as fraudulently attempting to access health care and U.S. citizenship by giving birth to "anchor babies."[266] In one study, researchers found that when immigrant women experienced pregnancy loss, members of infant death review panels speculated that the woman timed their travel and pregnancies such that they would give "birth in the United States to ensure American citizenship."[267] This reinforces the notion that immigrant women are pursuing fraudulent or illegitimate pregnancies and that their motives for becoming mothers are selfish rather than selfless. As a result, they are cast as bad mothers in need of reprimand. Moreover, the study found that when undocumented women did not obtain prenatal care, perhaps out of a fear of deportation, they were identified as the source of negative pregnancy outcomes rather than the structural barriers to medical care:

> For an undocumented woman to avoid prenatal care was equated with maternal neglect, a moral failing on the part of this woman and her family but not necessarily envisioned as a result of structural violence resulting from fear of deportation or the difficulties in accessing medical care as an undocumented migrant.[268]

Thus, undocumented women of color are blamed and cast as bad mothers when they access care and when they do not. This double bind of bad motherhood places undocumented women of color in a persistent state of supervision by medical professionals and increases their risk of being prosecuted for a pregnancy-based offense.

B. Risk Management Through Punishment and Removal of Bad Mothers from the Society

In addition to policing identity and social norms, status offenses have historically been deployed to manage presumed criminals and to prevent individuals from becoming public charges. In utilizing the term "presumed criminal," I refer to the ways in which individuals, because of stereotypes attached to their identities, are perceived to be a "criminal or a potential criminal."[269] The heightened surveillance

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266 Allison S. Hartry, *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 60 (2012).

267 Fordyce, *supra* note 238, at 383.

268 *Id.* at 384.

269 Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1017 (2002); *see also* Ocen, *The New Racially Restrictive Covenant*, *supra* note 33, at 1564 (highlight-

that individuals who are presumed to be criminal encounter then reinforces the presumption of criminality that is projected onto their bodies, thus justifying the disproportionate contact with the criminal justice system.

While the criminalization of pregnant women is justified by a purported concern about fetal life, it is the perception of dangerousness and the risk of bad mothering that is being regulated by the criminal law. As Cortney Lollar observes, "Strikingly, in the majority of cases, no evidence of harm to the fetus or newborn was present. Rather, in many cases, the criminal charges relied on a positive drug test or an identified 'risk of harm.' Often, that 'risk of harm' never evolved into an actual harm."[270] For example, a thirty-six-year-old African-American woman was prosecuted under Alabama's chemical endangerment law after she gave birth to a healthy baby who tested positive for cocaine.[271] The woman was eventually sentenced to five years in prison despite no prior trouble with the law, her enrollment in a substance abuse program, and her returning to school.[272] The woman petitioned her sentencing court on numerous occasions for supervised release so that she could receive care at a substance abuse treatment facility near her family.[273] Each time, her requests were denied.[274]

In another case, a pregnant woman named Naomi called the police to report a domestic assault after her partner attempted to choke her.[275] The woman also struggled with a drug addiction. When police responded to the call, her partner attempted to undermine Naomi's credibility and told the officers, "This woman is an unfit mother. She's a junkie. Look at her arms."[276] Naomi, not her partner, was arrested

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ing the presumed criminality that is often attached to poor Black women). As a result of the presumed criminality that is attached to African-Americans and Latinos, for example, individuals who are members of those racial groups are viewed with suspicion by law enforcement. For example, the presumed criminality of communities of color was cited as the justification for racial profiling and policies such as stop-and-frisk in New York City. Jennifer Fermino, *Mayor Bloomberg on Stop-and-Frisk: It Can Be Argued 'We Disproportionately Stop Whites Too Much. And Minorities Too Little,'* N.Y. DAILY NEWS (June 28, 2013, 6:37 PM), http://www.nydailynews.com/new-york/mayor-bloomberg-stop-and-frisk-disproportionately-stop-whites-minorities-article-1.1385410.

270 Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. (forthcoming 2017) (manuscript at 8) (footnotes omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2806691.

271 Martin, *supra* note 10.

272 *Id.*

273 *Id.*

274 *Id.*

275 Kimberly Theidon, *Taking a Hit: Pregnant Drug Users and Violence*, 22 CONTEMP. DRUG PROBS. 663, 680 (1995).

276 *Id.*

by police.[277] The cases of Cornelia and Naomi reflect the ways in which perceptions of bad mothering attract the attention of law enforcement, as their pregnancies were used as the basis for punishment and regulation.

Moreover, Cornelia and Naomi were criminalized despite the fact that there was no evidence of fetal harm in either case. The women were punished despite their obvious calls for assistance and requests for protection from abuse. Instead, the coercive and stigmatizing power of the criminal law was imposed as a means of social control to denigrate these women who were perceived as deviant mothers whose reproduction should be discouraged. For pregnant women who are prosecuted for crimes such as child endangerment or assault, prolonged separation from their children reinforces their stigmatized or deviant status as they are unable to perform the role of mother by providing nurturing care to their children.[278] These women are not alone. Nearly sixty-five percent of individuals incarcerated in women's prisons were the primary caretakers of minor children at the time of their incarceration, often for drug-related offenses.[279]

By virtue of their incarceration, women are unable to parent their children and their identity as deviant mothers is reinforced. The perceived deviant status of incarcerated mothers is reflected in the comments of one jail administrator:

> I'm a mother of two and I know what that impulse, that instinct, that mothering instinct feels like. It just takes over, like, you would never put your kids in harm's way. . . . Women in here lack that. Something in their nature is not right, you know? They run out and leave their kids alone, babies, while they score drugs or go over to their boyfriend's house, you know? . . . That's a sign something is wrong, some kind of psychological problem or something.[280]

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277 *Id.* Pregnant women experience high rates of domestic violence. In one study, violence during pregnancy was reported in twenty-five percent of families reporting violence. *Id.* at 666. Other studies have found that between four and twenty percent of pregnant women are physically abused by their partners. *Id.* Women, including pregnant women, who experience physical abuse often turn to drugs to soothe or assuage the trauma they experience. *Id.* at 670–71. The current punitive approach discourages or prevents them from seeking help for the violence, drugs, or the fetus. *Id.* at 664.

278 *See* JODY RAPHAEL, FREEING TAMMY: WOMEN, DRUGS, AND INCARCERATION 40–42 (2007).

279 LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN (2010), https://www.bjs.gov/content/pub/pdf/pptmc.pdf.

280 Jill A. McCorkel, *Embodied Surveillance and the Gendering of Punishment*, 32 J. CONTEMP. ETHNOGRAPHY 41, 69 (2003) (first alteration in original).

Because of their failure to perform the gendered roles that are viewed as essential to women's humanity, it is then easier to engage in practices within prisons that function to dehumanize women, such as denial of medical care, disproportionate use of solitary confinement, and sexual assault. Women are viewed as the deviant "other" and, like them, the conditions they confront in prison are rendered invisible.

C. Blaming Mothers for Pregnancy Outcomes and Broader Social Problems

Through the criminalization of pregnancy, poor women are blamed for negative fetal outcomes and a wide array of social problems. This is particularly true of women of color who are "more likely than white or unraced pregnant drug-using women to be blamed for social problems, characterized as bad mothers, and linked with adoption and foster care issues."[281] Indeed, racial stereotypes and biases play a central role in the public's willingness to punish the poor, including pregnant women, and its unwillingness to fund social programs that address poverty or mental illness.[282] Through the criminalization of poor pregnant women, a host of structural social problems are reduced to the individual and individual choice. As such, the disciplinary apparatus of the state, through the criminal legal system, becomes the primary vehicle for addressing disorder that is deemed rooted in the individual.

Blaming poor women of color for pregnancy outcomes that are rooted in their poverty, trauma, and lack of access to health care functionally erases these structural problems and makes criminalization seem like the more rational response to individual choice. Once the structural sources of the problems, including poverty, sexual abuse, and depression, for example, are erased, the criminal legal system can be utilized to discipline the individual character flaws that led to the negative pregnancy outcomes. The character flaws often associated with the women who are subject to criminal punishment as a result of pregnancy-based status offenses include unrestrained sexuality, irresponsibility, impulse control, and deviance from gendered norms. The blaming and policing of the status of pregnancy obscures the ongoing

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281 Springer, *supra* note 57, at 491.

282 *See* MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 71 (1999) (finding that "perceptions of blacks continue to play the dominant role in shaping the public's attitudes toward welfare"); Joshua J. Dyck & Laura S. Hussey, *The End of Welfare as We Know It?: Durable Attitudes in a Changing Information Environment*, 72 PUB. OPINION Q. 589, 590 (2008) (noting that welfare opinions are tied to views of the work ethic of Black people).

forms of violence that poor pregnant women confront and the lengths to which they go to navigate social institutions in an effort to have a healthy pregnancy.

Indeed, for women who use drugs during pregnancy, there is often substantial evidence of abuse, trauma, and self-medication that goes unaddressed.[283] For example, Regina McKnight was prosecuted for "homicide by child abuse" after her fetus was stillborn and drug use during pregnancy was detected.[284] According to reports, McKnight had an I.Q. of seventy-two, reportedly "function[ed] at a level much lower than expected of someone with [that] I.Q.," and lived at home with her mother.[285] Following her mother's death, McKnight became distraught and turned to drugs, eventually becoming homeless and then pregnant.[286] McKnight was not offered drug treatment or psychological treatment.[287] Instead, she was punished.[288] In many ways, the prosecution of women like McKnight exemplifies what Beth Richie calls "gender entrapment."[289] According to Richie, gender entrapment exists under "conditions that compel women to crime and implicate an overly punitive criminal justice system that ignores the conditions in which women are often revictimized as a result of persistent poverty and violence."[290]

Recently, however, the South Carolina Supreme Court reversed Regina McKnight's homicide conviction because her attorney failed to introduce evidence that her drug use did not cause the death of her fetus.[291] During its initial review of her conviction, the South Carolina Supreme Court found that there was sufficient evidence that cocaine was the cause of the fetus's death.[292] Five years later, however, the South Carolina Supreme Court reversed McKnight's conviction.[293] Although the Court did not explicitly rule on the issue of causation, it did find that McKnight received ineffective assistance of counsel as a

283 Martin, *supra* note 10. *See generally* Theidon, *supra* note 275.

284 State v. McKnight, 576 S.E.2d 168, 171 (S.C. 2003).

285 Dana Page, Note, *The Homicide by Child Abuse Conviction of Regina McKnight*, 46 How. L.J. 363, 365–69 (2003).

286 *See id.* at 369.

287 *See id.*

288 *See id.*

289 Beth E. Richie, Arrested Justice: Black Women, Violence, and America's Prison Nation 154 (2012).

290 *Id.*

291 McKnight v. State, 661 S.E.2d 354, 359 (S.C. 2008).

292 State v. McKnight, 576 S.E.2d 168, 172 (S.C. 2003).

293 *McKnight*, 661 S.E.2d at 366.

result of her lawyer's failure to introduce available evidence contesting the causal element of the state's case.[294]

Despite the South Carolina Supreme Court's reversal of her conviction, McKnight spent over five years in prison for a pregnancy-based status offense without clear evidence that her drug use caused the pregnancy loss. Like so many other women, McKnight was subject to punishment based on assumptions of the harmfulness of her behavior; her conviction was premised on misinformation and hostility toward the "deviant" identity she occupied as a poor, pregnant woman of color struggling with a drug addiction.[295] Viewed through this lens, the punishment of impoverished pregnant women of color and the separate standards of criminal liability applied to them reflect that the threat they pose to society is as much or more of a state concern than the fetal life that is used as a justification for punishment. As discussed, such prosecutions absolve society of its obligation to care for the poor through structural interventions and instead place blame for negative social outcomes on "bad mothers."[296] As Kaaryn Gustafson notes, "Law and policies deny low-income individuals their dignity, intrude on their privacy, exacerbate economic disparity, marginalize, criminalize, and reinforce the idea that low-income mothers are both deservingly poor and inherently criminal."[297]

The criminalization of pregnant women of color elides the persistent health disparities that threaten not only fetal health but also the health of women of color themselves. Contrary to the assertions of prosecutors in pregnancy-based homicide offenses, in cases of miscarriages and stillbirths, cause is often undetermined.[298] Miscarriages occur prior to the twentieth week of pregnancy and are estimated to impact roughly fifteen percent of pregnant women.[299] After twenty weeks of pregnancy, a pregnancy loss is "referred to as a stillbirth."[300] Although the risk of pregnancy loss after twenty weeks is relatively low, it is higher for women "over 35 years old[,] . . . black women and

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294 *Id.* at 360 ("McKnight also argues that counsel was ineffective in failing to investigate medical evidence contradicting the State's experts' testimony on the link between cocaine and stillbirth, and in further failing to investigate methods to challenge Dr. Woodard's conclusions ruling out natural causes of death. We agree.").

295 *See supra* Part I.

296 *See supra* Section III.B.

297 Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 336 (2013).

298 JEANNE FLAVIN, OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA 105 (2009).

299 *Id.* at 105–06.

300 *Id.* at 105.

poor women, women who had previously delivered by cesarean section, and women who have conditions such as diabetes and high blood pressure."[301] The populations who are more likely to experience unexplained stillbirth are thus often the very same populations targeted by prosecutors for pregnancy-based status offenses, including murder and manslaughter.

Women of color, particularly African-American women, are more likely to experience negative pregnancy outcomes, including fetal loss and maternal death, than their white counterparts. Studies have found that Black women die during pregnancy, childbirth, or shortly thereafter at three times the rate of white women.[302] In New York City for example, "1 of every 2,500 black women . . . who becomes pregnant dies. The similar figure for white women is 1 in 14,000."[303] According to legal scholar Khiara Bridges:

> The leading causes of maternal death have been identified as hemorrhage, pulmonary embolism, pregnancy-induced hypertension . . . , puerperal infection, and ectopic pregnancy. That these conditions affect Black women with a disproportionate frequency and are more fatal has been attributed to the higher rates among Black women of high blood pressure, preexisting and gestational diabetes, and obesity.[304]

Even when studies control for class and access to insurance, Black women continue to experience negative pregnancy outcomes at rates higher than their white counterparts.[305]

Although the reasons for this disparity are not entirely clear, numerous studies have suggested that environmental and structural factors, including racial discrimination, might play a significant role in these outcomes. Some researchers argue that these disparities can be explained by bias in the provision of medical care.[306] Notwithstanding these findings, prosecutors are choosing to criminally punish women for such outcomes rather than direct resources toward the root problems of poverty, lack of access to health care, and racial discrimination. This suggests that the true motive may be the regulation of

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301 *Id.* at 105–06.

302 KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION 107 (2011).

303 *Id.* (quoting Jing Fang et al., *Maternal Mortality in New York City: Excess Mortality of Black Women*, 77 J. URB. HEALTH 735, 742 (2000)).

304 *Id.* at 108.

305 *Id.* at 109.

306 *See id.* at 110.

pregnancy more generally and the constraint of deviant mothers more specifically.

The use of the criminal law to police the status of pregnancy, to punish "bad" mothers, and to individualize structural inequality has had the ironic effect of putting fetal life at greater risk. Indeed, although the purported purpose of pregnancy prosecutions is to protect fetal life and to prevent drug use during pregnancy, such prosecutions may actually discourage poor pregnant women from seeking treatment and encourage abortions.[307] An anecdote from a recent story on the effect of the chemical endangerment prosecutions in Alabama reflects this dynamic:

> Carmen Howell, a defense lawyer in Enterprise, says she knows of one woman who drove to Georgia when she went into labor and another who gave birth to a three-pound baby in a bathtub at home. She is concerned that women who use drugs may also be having abortions to avoid prosecution. This law, she says, "is a deterrent to choosing life."[308]

Moreover, the disruptive effects of prosecutions often mean that children will be separated from their parents and placed in foster care where they may not receive adequate care and support.[309] Indeed, newborns who remain with their mothers often have better short-term outcomes than those taken into the custody of child protective services.[310]

Additionally, once women are subject to arrest and prosecution, many have difficulties finding employment or accessing social welfare programs to support their families. Hope Ankrom, an Alabama woman convicted of chemical endangerment during pregnancy, described the frustration that women who are subject to prosecution encounter: "What's killing me is I had a bright future . . . . When you want to work with children or the elderly, they see that abuse charge and they're like: 'Whoa, no, thank you, ma'am. You're not going to work here.'"[311]

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307 *See* CTR. FOR REPROD. RIGHTS, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY 3 (2000), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_punishingwomen.pdf (noting that criminal prosecutions of pregnant women may result in an increased number of abortions).

308 Calhoun, *supra* note 224.

309 *See, e.g.*, Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1583 (2007).

310 Ketteringham, *supra* note 245.

311 Calhoun, *supra* note 224.

In sum, the criminalization of pregnancy, like its historical counterparts, operates as a part of a broader system of social control, one that regulates the reproductive capacities of women, particularly poor women of color. Under this regime, doctors' offices and hospitals are transformed from places of healing and care to sites that police women's adherence to gender norms surrounding motherhood. The surveillance and policing of poor pregnant women enables the state to manage the risks of criminality and disorder associated with them and their children. When negative fetal outcomes occur, criminalization permanently marks affected women as bad mothers, assigns blameworthiness to women for social dynamics beyond their control and obscures the ways in which structural inequality makes it difficult to have healthy pregnancies and raise healthy families.

V. RECLAIMING *ROBINSON*: THE CRIMINALIZATION OF PREGNANCY AS CRUEL AND UNUSUAL PUNISHMENT

Notwithstanding the significant harms criminalization imposes upon pregnant women, generally speaking, states have been granted wide constitutional authority to define crimes and impose punishments for proscribed conduct.[312] Although the Court has placed substantive limits on the state's ability to criminalize status,[313] it has been loath to use such substantive limits to protect individuals and groups, such as pregnant women, who are most vulnerable to abuse by the state.[314] Indeed, as noted previously, the Supreme Court has undertaken an approach to the Eighth Amendment that disaggregates status, or mere identity, from conduct so as to severely restrict the constitutional prohibition on the criminalization of status and to free the state to use the criminal law to broadly regulate the conduct of targeted communities.[315] As Janet Halley notes, "status is now hidden in a new language of conduct so capacious that virtually any performa-

312 *See* Luna, *supra* note 121, at 724–25 (explaining that states can easily manipulate the elements of certain crimes to make guilt easier to establish at trial).

313 *See, e.g.*, Robinson v. California, 370 U.S. 660, 666 (1962).

314 *See* Luna, *supra* note 121, at 724–25.

315 Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879, 881–82 (2015) (arguing for a change in the law because "[a]ttaching criminal sanctions to conduct that immigrants must engage in as a result of their status is no less a perversion of state criminal justice systems than making their status itself a crime, and states should not be permitted to do indirectly what courts have already said they cannot do directly").

tive gesture, verbal or bodily"[316] can justify criminalization; a result she calls "systematically incoherent."[317]

In light of the incoherence and failures of the Eighth Amendment's status framework, this Part calls for a reimagining of what constitutes status and a reclaiming of the promise of *Robinson* so as to better protect the rights and interests of pregnant women. In particular, I argue for a broader test for status that is inclusive of performative conduct and the imposition of arbitrary class-based criminal liability. This argument draws upon recent appellate cases applying the Eighth Amendment to performative conduct that is inherent in identity, as well as the Supreme Court's jurisprudence in the substantive due process arena in cases such as *Lawrence v. Texas*.[318] In these cases, courts prohibited the use of the criminal law to impute moral fault and assign deviance to unpopular classes such as the homeless and queer communities. Moreover, such decisions have challenged the targeting of marginalized groups in ways that are arbitrary, discriminatory, and reinforce existing social hierarchies. Similarly, this Part argues that the state may not criminalize conduct that is essential to, or an unavoidable consequence of, being pregnant.

A. Performative Status and the Eighth Amendment

Recent appellate cases examining the constitutionality of anti-homeless ordinances have found such policies unconstitutional because of their regulation of performative conduct that is essential to the status of homelessness.[319] In one such case, *Pottinger v. City of Miami*,[320] a class of homeless persons challenged a city ordinance that criminalized the homeless for "engaging in basic activities of daily life—including sleeping and eating—in the public places where they are forced to live."[321] There, the district court found that the homeless

316 Janet E. Halley, *The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy: A Legal Archaeology*, 3 GLQ 159, 162 (1996).

317 Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1741 (1993).

318 *See generally* Sheldon Bernard Lyke, Lawrence *as an Eighth Amendment Case: Sodomy and the Evolving Standards of Decency*, 15 WM. & MARY J. WOMEN & L. 633 (2009).

319 *See, e.g.*, Johnson v. City of Dallas, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995) (finding that the criminalization of conduct associated with homelessness violated the Eighth Amendment). At least one court has held that the criminalization of an alcoholic for being drunk in public is an impermissible criminalization of an involuntary status under the state constitution. *See* State v. Zegeer, 296 S.E.2d 873, 886 (W. Va. 1982).

320 810 F. Supp. 1551 (S.D. Fla. 1992).

321 *Id.* at 1554.

seldom choose to be of that status.[322] Rather, it was an involuntary condition, often a result of unemployment or mental illness.[323] Most significantly, the court found that the available shelter space and affordable housing were insufficient to meet the needs of the homeless population, noting, "Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places."[324] Given this, the court found that "the conduct for which they are arrested is inseparable from their involuntary homeless status."[325]

A panel of Ninth Circuit judges reached the same conclusion when presented a criminal statute targeting homelessness. In *Jones v. City of Los Angeles*,[326] the court invalidated an ordinance that prohibited the "sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within Los Angeles's city limits."[327] Similar to *Pottinger*, the court found that homelessness was a status, even if becoming homeless was both within and beyond the plaintiff's immediate control.[328] The court found that sitting and lying on sidewalks was an unavoidable consequence of homelessness given that the City's shelters were at capacity and the homeless were forced to involuntarily stay outside and engage in proscribed behavior.[329] Interpreting *Robinson*, the panel found the opinion to stand for the "proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being."[330] As a result, the panel concluded that the "City could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status."[331]

More recently, the Department of Justice endorsed the broader view of status embraced by the *Jones* court. In a case involving a challenge to an anti-camping ordinance enacted by the city of Boise,[332] the DOJ argued:

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322 *Id.* at 1563.

323 *Id.* at 1564.

324 *Id.*

325 *Id.* at 1561.

326 444 F.3d 1118 (9th Cir. 2006), *vacated on other grounds*, 505 F.3d 1006 (9th Cir. 2007).

327 *Id.* at 1120.

328 *See id.* at 1137.

329 *See id.*

330 *Id.* at 1135.

331 *Id.* at 1132.

332 *See* Statement of Interest of the United States at 3 & n.7, Bell v. City of Boise (D. Idaho

> It should be uncontroversial that punishing conduct that is a "universal and unavoidable consequence[] of being human" violates the Eighth Amendment. . . .
>
> . . . Sleeping is a life-sustaining activity—*i.e.*, it must occur at some time in some place. If a person literally has nowhere else to go, then enforcement of the anti-camping ordinance against that person criminalizes her for being homeless.[333]

The decisions by federal courts and the recommendation of the Department of Justice in cases involving the criminalization of homelessness mark a significant shift in Eighth Amendment jurisprudence. Indeed, these courts have extended the protections provided to vulnerable classes and groups whose conduct is targeted for unique burdens by the criminal justice system.

B. Performative Status and Substantive Due Process

While the Eighth Amendment's ban on the criminalization of status has largely been underenforced by the Supreme Court, the Court has been more aggressive in regulating the criminalization of conduct that is inherent in status in other doctrinal areas. Indeed, in the arena of substantive due process, the Court has rejected the conduct-versus-status distinction, adopting a performative view of status, particularly in cases involving sexual identity.

In *Lawrence v. Texas*, for example, the Court considered the constitutionality of a Texas law that criminalized same-sex sodomy.[334] In reviewing the ban on same-sex sodomy, the Court was called upon to reexamine its previous decision in *Bowers v. Hardwick*.[335] In *Bowers*, a bare majority of the Court upheld a sodomy statute on the grounds that the state was regulating gay and lesbian conduct, not status.[336] The conduct-versus-status distinction adopted by the Court in *Bowers* mirrored the Court's analysis and ongoing debate regarding status in the Eighth Amendment context.[337] Indeed, while Justice White, who wrote for the majority, adhered to the distinction drawn in *Powell*,

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2015) (No. 1:09-cv-540-REB) (challenging Boise City Code § 9-10-02, which prohibited the use of "any of the streets, sidewalks, parks or public places as a camping place at any time, or to cause or permit any vehicle to remain in any of said places to the detriment of public travel or convenience").

333 *Id.* at 11–12 (first alteration in original) (quoting *Jones*, 444 F.3d at 1136).

334 Lawrence v. Texas, 539 U.S. 558, 562 (2003).

335 478 U.S. 186 (1986).

336 *See id.* at 194–96.

337 *See id.* at 194–97.

Justice Blackmun's dissenting opinion argued that the sodomy statute criminalized acts that were inherent to gay and lesbian identity in violation of the Eighth Amendment.[338] In particular, Justice Blackmun contended that

> the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances. An individual's ability to make constitutionally protected "decisions concerning sexual relations" is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.[339]

In *Lawrence*, the Court noted that the conduct distinction drawn in *Bowers* facilitated widespread stigmatization and discrimination against gay and lesbian communities.[340] Through the criminalization of conduct that is inherent in status, gays and lesbians were marked as deviant and their exclusion from broader forms of social protection was justified on that basis. Ultimately, the *Lawrence* Court repudiated its decision in *Bowers*, finding that the same-sex sodomy statute regulated conduct that was inherent in, or essential to, gay and lesbian identity, and intruded upon a constitutionally protected interest in sexual intimacy.[341] The rejection of the conduct-versus-status distinction in the arena of substantive due process was echoed by Justice O'Connor in her concurrence.[342] While Justice O'Connor would have struck the sodomy ban on equal protection grounds, she similarly noted that "the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."[343] Like the more recent Eighth Amendment cases, the Court prohibited the government from targeting particular classes—gays and lesbians—by criminalizing performative acts that are inherent in or essential to their status or identity.

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338 *Id.* at 199–201 (Blackmun, J., dissenting).

339 *Id.* at 202 n.2 (citation omitted) (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 711 (1977) (Powell, J., concurring in part and concurring in the judgment)).

340 *Lawrence*, 539 U.S. at 575.

341 *Id.* at 567 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

342 *See id.* at 583–85 (O'Connor, J., concurring in the judgment).

343 *Id.* at 583.

C. Criminalization of the Status of Pregnancy for Fetal Harm as Cruel and Unusual Punishment

The recent Eighth Amendment decisions by the federal courts and the Supreme Court's decision in *Lawrence* reimagined and redefined status as something more than passive identity. Rather, these decisions recast status as inclusive of conduct that is essential to, or a performance of, identity. This trend toward a broader understanding of status is reflective of the evolving standards of decency that prevent the criminalization of pregnancy and conduct that is inherent in the status of pregnancy.

For cases involving non-substance-addicted pregnant women, such as the case arising from a pregnant woman's fall down stairs or the case stemming from a pregnant woman's failure to follow doctor's orders, the women's status as pregnant persons drove the initiation of the offense. Indeed, the women are being prosecuted for their failure to promote an ideal gestational environment. In such cases, women are not viewed as human beings, but as vessels for fetal life, and their inability to serve as "good" mothers who provide such an environment is the factor that led to their criminalization. To the extent that women engage in such behaviors and remain in jurisdictions that prosecute pregnant women for suspected fetal harm, their very existence as pregnant persons constitutes a "continuing violation." So long as they are pregnant, moral fault may be imputed to them, they may be labeled deviant—i.e., "bad"— mothers, and they may be subject to the stigmatizing effects of a criminal identity.

In such cases, pregnant women are being punished for wholly innocent and necessary human conduct such as walking and sexual intercourse. Pregnancy—the status that they occupy while engaging in this conduct—involves no moral fault; nor do the ordinary life activities such as walking down stairs, determining how and whether to follow doctor's orders, or choosing a home birth over hospitalization. Indeed, procreation and the rejection of medical care are constitutionally protected rights.[344] Moreover, pregnancy is subject to protection under a diverse array of antidiscrimination statutes at the state and federal levels.[345] As such, the criminalization of innocent and indeed protected conduct based on one's status is an impermissible use of the state's power to punish, as substantively limited by the Eighth

344 *See* KATHLEEN S. SWENDIMAN, CONG. RESEARCH SERV., R40846, HEALTH CARE: CONSTITUTIONAL RIGHTS AND LEGISLATIVE POWERS 3 (2012).

345 *See, e.g.*, Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1343–44 (2015) (considering the scope of protection afforded under the Pregnancy Discrimination Act).

Amendment. As a district court applying *Robinson* to strike down a vagrancy statute noted, "Since this ordinance effectively transforms into criminal behavior ordinary conduct of individuals on the basis of . . . suspected status, it is patently unconstitutional."[346]

With regard to women who are convicted of crimes based on a theory of fetal exposure to (legal or illegal) drugs, some may argue that the prosecutions capture conduct of proven drug use, which the *Robinson* court explicitly recognized as a legitimate area of regulation by the states.[347] Thus, the criminalization of drug-addicted pregnant women falls outside the scope of *Robinson*. This argument, however, fails to recognize that it is not drug use that is being punished, but the status of being pregnant and the choice to carry a pregnancy to term. Indeed, if women were no longer pregnant, the state would likely have no authority to punish drug use alone. As a result, the criminalized status is not their status as addicts, but rather pregnant persons.

Indeed, poor pregnant women who are addicted to drugs are punished because of their inability to access necessary health care and drug treatment programs. As noted previously, poor pregnant women often encounter significant difficulties in accessing drug treatment facilities. As poor women, they likely do not have adequate resources for drug treatment programs. Even if some women do have insurance or the resources to afford drug treatment programs, many of these programs refuse to accept pregnant women because they lack the expertise necessary to provide pregnancy-specific care or because they are wary of liability issues.[348]

For states to punish women for drug use during pregnancy under these circumstances is to punish women for remaining pregnant. Indeed, in cases challenging the criminalization of homelessness, courts have held that criminalizing a person for public intoxication when they have nowhere to live is to criminalize the status of homelessness.[349] Similarly, drug-addicted women who carry their pregnancies to term have little choice but to use drugs during pregnancy given the limited options available to them. Such women cannot leave their bodies when they use drugs, they are often unable to access appropri-

346 Farber v. Rochford, 407 F. Supp. 529, 534 (N.D. Ill. 1975) (footnote omitted).

347 In reviewing the statute and Robinson's conviction, the Court noted that the state may undoubtedly adopt regulations against "the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders." Robinson v. California, 370 U.S. 660, 664 (1962).

348 *See* John J. Lieb & Claire Sterk-Elifson, *Crack in the Cradle: Social Policy and Reproductive Rights Among Crack-Using Females*, 22 CONTEMP. DRUG PROBS. 687, 693 (1995).

349 *See supra* Section II.B.

ate drug treatment during pregnancy, and women who wish to terminate their pregnancies may confront legal barriers preventing their ability to do so. In other words, pregnant women who use drugs engage in conduct that is a consequence of their status as pregnant persons due to the combination of pregnancy, poverty, and, for many, racial inequality.

Moreover, poor pregnant women, like the homeless and queer populations addressed in recent decisions by federal courts, are singled out for punishment because of their structural vulnerability, marginalization, and relative powerlessness. First, many local agencies choose to criminalize a symptom—drug use during pregnancy—rather than the structural vulnerabilities to poverty or lack of health care that produce such outcomes. Second, local prosecutors are utilizing status—in this context both pregnancy and drug addiction—to justify the deployment of the state's power to punish a vulnerable class of people.[350] Third, the application of pregnancy-based status offenses, like the ordinances at issue in *Pottinger* and *Jones*, singles out a particular group for punishment while treating the same behavior as lawful when committed by others outside of the group. Such status-based treatment reinforces the marginal space occupied by pregnant women of color and functions to stigmatize their identity as mothers. In many ways, women are subject not only to pregnancy-based status offenses that threaten them with unique punishments, they are also subject to a pregnancy-based constitutional regime that marginalizes them from the constitutional protections that could restrict state authority to punish them in the first place.[351]

A criminal regime that punishes the status of pregnancy is inconsistent with the evolving standards of decency that undergird the Eighth Amendment's Cruel and Unusual Punishments Clause. Through the punishment of conduct of pregnancy, the state imposes criminal liability for social dynamics that are beyond their control and functions to diminish the reproductive autonomy and bodily integrity enjoyed by women. The cruelty inherent in the punishment of pregnant women is demonstrated by the fact that no other advanced democracy criminalizes pregnancy and only one state in the United States has punished pregnant women in this manner. The Eighth Amendment's prohibition on the regulation of status, including conduct inherent in status, demands that the Constitution relegate the prosecution of pregnant women to the dustbins of history.

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350 *See* Martin, *supra* note 10.

351 *See* McGinnis, *supra* note 30, at 520.

CONCLUSION

Poor women, particularly women of color, exist at an unmarked intersection of narrowing reproductive rights and an expanding criminal justice system. On the one hand, women have experienced increased governmental intrusion into their reproductive choices.[352] This is true not only with respect to abortion and contraceptives, but also with respect to another critical aspect of reproductive autonomy: the right to have a child. On the other hand, people of color have been subject to ever-expanding police surveillance, regulation of their movement through public and private spaces, and historically high rates of incarceration.[353] These two happenings are seldom seen as connected. Yet, for poor women, the two are inextricably linked.

Indeed, states have increasingly utilized the racialized fears that often accompany the exercise of reproductive capacity by women of color to justify the construction of a pregnancy-based status offense. The prosecution of these offenses has expanded the power of the state to punish, reinforced racial stratification, and functioned to displace critical social infrastructure needed to promote maternal and fetal health. As social welfare institutions are commandeered by law enforcement for purposes of regulating pregnant women, the health care needs of women and their children are subsumed by the state's interest in punishment. Pregnant women struggling with addiction, poverty, or mental illness receive the message that they can no longer turn to hospitals or social service agencies for help, as they run the risk of receiving a set of handcuffs rather than health care.[354] Instead of promoting fetal health, such pregnancy-based status offenses drive women away from seeking help and may discourage them from choosing to carry a pregnancy to term. Centering on poor pregnant women and interrogating the troubling intersections at which they exist highlights

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352 *See* NAT'L WOMEN'S LAW CTR., 2014 STATE LEVEL ABORTION RESTRICTIONS: AN EXTREME OVERREACH INTO WOMEN'S REPRODUCTIVE HEALTH CARE (2015), http://www.nwlc.org/sites/default/files/pdfs/2014_state_abortion_legislation_factsheet_1.22.15v2.pdf; *An Overview of Abortion Laws*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf (last updated June 1, 2017).

353 *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6–9 (2010); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 18–21 (2007); RICHIE, *supra* note 289, at 102–05.

354 This phrase is derived from the title of a recent report by the ACLU and the Drug Policy Alliance. *See* CHLOE COCKBURN ET AL., ACLU & DRUG POL'Y ALLIANCE, HEALTHCARE NOT HANDCUFFS: PUTTING THE AFFORDABLE CARE ACT TO WORK FOR CRIMINAL JUSTICE AND DRUG POLICY REFORM (2013), http://www.drugpolicy.org/sites/default/files/Healthcare_Not_Handcuffs_12.17.pdf.

the ways in which the turn toward mass criminalization as a means of gendered and racialized social control undermines maternal and fetal health.