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# PREGNANCY AND THE CARCERAL STATE

*Khiara M. Bridges\**

POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD. By *Michele Goodwin*. Cambridge University Press. 2020. Pp. xiv, 323. \$29.99.

## INTRODUCTION

In December 2018, Marshae Jones was five months pregnant when she got into an altercation with another woman, Ebony Jemison, in the parking lot of a Dollar General store in Pleasant Grove, Alabama.<sup>1</sup> There was evidence that, at some point in the fight, Jemison was pinned inside of her car, making her unable to escape the punches that Jones threw at her from outside of the vehicle.<sup>2</sup> The fight ended when Jemison pulled out a gun and shot Jones in the stomach.<sup>3</sup> While Jones survived the shooting, her fetus did not.<sup>4</sup> A jury declined to indict Jemison on any charges related to the death of Jones's fetus.<sup>5</sup> *Jones*, however, was indicted for the manslaughter of her fetus. The theory was that she had recklessly caused its death by engaging in the fight with Jemison.<sup>6</sup> As Lieutenant Danny Reid of the Pleasant Grove Police Department explained, "When a five-month-pregnant woman initiates a fight and attacks another person, I believe some responsibility lies with her as to any injury to her unborn child . . . . That child is dependent on its mother to try to keep it from harm, and she shouldn't seek out unnecessary physical altercations."<sup>7</sup> After the case caught media attention and a national outcry about Jones's prosecution followed, the district attorney decided to drop the criminal charges against her.<sup>8</sup>

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1. Holly Yan & Madeline Holcombe, *A Pregnant Woman Shot in the Stomach Is Indicted in Her Unborn Child's Death*, CNN (June 28, 2019, 8:13 PM), <https://www.cnn.com/2019/06/27/us/alabama-pregnant-woman-shot-in-stomach-manslaughter-indictment-trnd/index.html> [<https://perma.cc/EK5Q-FTSP>].

2. Farah Stockman, *Manslaughter Charge Dropped Against Alabama Woman Who Was Shot While Pregnant*, N.Y. TIMES (July 3, 2019), <https://www.nytimes.com/2019/07/03/us/charges-dropped-alabama-woman-pregnant.html> [<https://perma.cc/4NXU-CEC4>].

3. See Yan & Holcombe, *supra* note 1.

4. See *id.*

5. *Id.*

6. See Stockman, *supra* note 2.

7. *Id.* (quoting Lieutenant Danny Reid of the local police department).

8. See *id.*

Marshaé Jones's case is part of a disturbing phenomenon that Professor Michele Goodwin<sup>9</sup> exhaustively documents and incisively analyzes in her newest book, *Policing the Womb: Invisible Women and the Criminalization of Motherhood*. In their professed zeal to protect fetuses from harm, states increasingly have brought the full weight of the criminal law against pregnant women<sup>10</sup> who experience negative birth outcomes. Thus, pregnant women have faced criminal charges for suffering miscarriages and for giving birth to stillborn babies.<sup>11</sup> Further, states have subjected pregnant women to criminal punishment and civil constraints for doing things that would be perfectly legal if done by a person who was not pregnant—things like falling down steps,<sup>12</sup> or attempting suicide while mired in a depression.<sup>13</sup> Of course, it ordinarily is not illegal to fall down steps or to attempt suicide.<sup>14</sup> Nevertheless, the laws that Goodwin analyzes allow the fact of pregnancy to transform legal behavior into the stuff of criminal liability. Thus, pregnant women, as a class, are subjected to different laws and are vulnerable to more thoroughgoing state regulation than the general population. This is what Goodwin calls the “pregnancy penalty” (Chapter Eight).

While Goodwin's examination is detailed, nuanced, and eminently praiseworthy, there are two aspects of her analysis that we might press further. The first is her claim that while poor women of color were the first group to suffer the pregnancy penalty, they were no more than “canaries in the coal mine” (p. 14). That is, Goodwin proposes that poor women of color were simply the first to experience a punitive, regulatory state power to which all women—including those who are white and affluent—eventually will be vulnerable. This Review wonders if Goodwin here underestimates the

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10. Of course, cisgender women are not the only people with the capacity for pregnancy. See, e.g., Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173 (2019). Consequently, laws and policies that endeavor to protect fetuses by punishing or otherwise constraining the liberty of pregnant persons affect transgender men and nonbinary persons as profoundly as they affect cisgender women. Nevertheless, in keeping with the language that Goodwin employs in her book, this review uses “women” to refer those with the capacity for pregnancy.

11. Opinion, *When Prosecutors Jail a Mother for a Miscarriage*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html> [<https://perma.cc/A86D-8644>].

12. *Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy . . . Seriously.*, ACLU ME. (Feb. 11, 2010, 5:04 PM), <https://www.aclumaine.org/en/news/iowa-police-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously> [<https://perma.cc/WMB9-YTKT>].

13. Jessica Mason Pieklo, *Legal Wrap: Finally Some Justice for Bei Bei Shuai*, REWIRE NEWS GRP. (Aug. 6, 2013, 9:14 AM), <https://rewire.news/article/2013/08/06/legal-wrap-finally-some-justice-for-bei-bei-shuai/> [<https://perma.cc/2BZL-9CXM>].

14. While suicide is no longer prohibited by statute anywhere in the United States, jurisdictions that still recognize common law crimes could treat suicide as one. Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 350 n.22 (1986). However, states largely do not criminally punish survivors of suicide attempts. Sean Sweeney, Note, *Deadly Speech: Encouraging Suicide and Problematic Prosecutions*, 67 CASE W. RESRV. L. REV. 941, 947 (2017).

power of race and class privilege to protect those who enjoy them. The second aspect of Goodwin's analysis that might be pushed is her suggestion that framing reproductive rights as an issue of equality, as opposed to an issue of liberty, would lead the variety of laws that impose a "pregnancy penalty" to be struck down as unconstitutional (pp. 176–77). This Review queries whether Goodwin here might take too lightly the role of culture in producing the legal present that she analyzes. In other words, there is an argument that the laws that Goodwin examines are the product of a culture that venerates the fetus while denigrating the women whose bodies sustain fetuses. The argument is that we will not produce a different legal landscape until we produce a culture that respects the humanity of those who gestate fetuses.

This Review proceeds in three Parts. Part I describes Goodwin's brilliant work in *Policing the Womb* of documenting and theorizing the horrors of fetal protectionism gone mad. Part II interrogates whether all people with the capacity for pregnancy—wealthy and poor, white and nonwhite, privileged and unprivileged—are at risk of being victimized by the fetal protectionism that Goodwin analyzes. Finally, Part III asks about the role that culture has played in producing the legal landscape that Goodwin investigates. If a misogynist culture has produced our legal present of fetal protectionism, then we may have to foreground cultural change in our efforts to realize legal change in this arena.

#### I. THE INHUMANITY OF POLICING WOMBS

Goodwin canvasses the staggering variety of laws that penalize pregnant women for engaging in behavior that produces—or creates a risk of producing—a negative birth outcome. These laws include the "maternal conduct laws" discussed above, "which seek to criminalize otherwise legal conduct that may cause risk to pregnancies" (p. x). They also include "fetal drug laws," which punish women for ingesting some controlled substances during their pregnancies.<sup>15</sup> Only Tennessee has passed a law that specifically criminalizes substance use during pregnancy.<sup>16</sup> Courts in other states achieve the

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15. P. x. To a certain extent, "fetal drug laws" are also maternal-conduct laws that "seek to criminalize otherwise legal conduct that may cause risk to pregnancies." P. x. This is because most states and the federal government criminalize substance *possession*, not *use*. See Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947, 949, 998 (2017). Thus, arresting and prosecuting a pregnant woman or new mother who is not in *possession* of a controlled substance, but whose drug screen reveals that she has *used* a controlled substance, involves criminalizing otherwise legal conduct.

16. See Cara Angelotta, Carol J. Weiss, John W. Angelotta & Richard A. Friedman, *A Moral or Medical Problem? The Relationship Between Legal Penalties and Treatment Practices for Opioid Use Disorders in Pregnant Women*, 26 WOMEN'S HEALTH ISSUES 595, 596 (2016); Mina Dixon Davis, Note, "Bad Moms" and Powerful Prosecutors: Why a Public Health Approach to Maternal Drug Use Is Necessary to Lessen the Hardship Borne by Women in the South, 25 GEO. J. ON POVERTY L. & POL'Y 305, 313 (2018) ("In 2014, Tennessee became the first state in the nation to pass a statute that explicitly, directly criminalized prenatal substance abuse."). Legislators refused to renew the law after activists in the state engaged in a campaign to achieve that very result. See Melissa Jeltsen, *Wave Goodbye to Harsh Tennessee Law Targeting Pregnant*

same result by allowing for creative applications of existing laws. For example, prosecutors in Alabama have brought criminal charges against women who use substances during their pregnancies under a law that the legislature intended to use against people who manufacture methamphetamine in the presence of children, thereby exposing the children to the risk of an exploding “meth lab.”<sup>17</sup> Prosecutors in other states have charged women who used substances during their pregnancies with child abuse, aggravated assault, assault with a deadly weapon, and like crimes—even though it seems patent that the legislatures that passed these laws did not intend for them to apply to pregnant women’s conduct vis-à-vis the fetuses that they carry.<sup>18</sup> When prosecutors have successfully secured convictions using creative interpretations and applications of existing criminal law, the outcomes have been devastating. After Regina McKnight, a poor black woman who ingested crack cocaine during her pregnancy, suffered a stillbirth, prosecutors charged her with murder (p. 16). Although the evidence could not establish that her cocaine use—as opposed to her poverty and an untreated infection—caused the death of her fetus,<sup>19</sup> McKnight was convicted and sentenced to twenty years in prison (p. 16). Her conviction was ultimately overturned—but only after she had already been incarcerated for a decade (p. 16).

Notably, while many of the fetal protectionist laws and policies that Goodwin analyzes subject pregnant women and new mothers to *criminal* punishment, many of them do not. There are the laws and policies that denied chemotherapy and radiation therapy to a pregnant Angela Carder—even though she wanted this treatment, and even though it was undisputed that the failure to give her the treatment would result in her death from the cancer that she had defeated once before (p. 93). However, doctors were concerned that the treatment would harm her fetus (p. 94). In the name of protecting Carder’s fetus, doctors ultimately secured a court order to perform a cesarean section on Carder against her wishes, as she knew that the invasive operation would accelerate her death (pp. 94–95). Her fetus survived only a couple of hours after the forced cesarean (p. 95). Carder died two days later (p. 96). Goodwin, in fact, begins the book with an illustration of the brutality that noncriminal laws can inflict on pregnant people. She

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*Drug Users*, HUFFINGTON POST (Mar. 23, 2016, 10:55 AM), [https://www.huffingtonpost.com/entry/tennesseepregnant-women-drugs\\_us\\_56e862b3e4b065e2e3d79320](https://www.huffingtonpost.com/entry/tennesseepregnant-women-drugs_us_56e862b3e4b065e2e3d79320) [<https://perma.cc/73DV-A22T>].

17. ALA. CODE § 26-15-3.2 (2020); see Grace Howard, *The Limits of Pure White: Raced Reproduction in the “Methamphetamine Crisis,”* 35 WOMEN’S RTS. L. REP. 373, 374 (2014) (explaining that this law has been used to arrest “pregnant women on charges ranging from chemical child endangerment to manslaughter for their behaviors during pregnancy, primarily for alleged illegal substance use”).

18. Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 807 (2020); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432 (1991).

19. Jeanne Flavin & Lynn M. Paltrow, *Punishing Pregnant Drug-Using Women: Defying Law, Medicine, and Common Sense*, 29 J. ADDICTIVE DISEASES 231, 235 (2010).

tells the story of Marlise Muñoz, a Texas woman who was fourteen weeks pregnant when she suffered what her husband, Erick, believed to be a pulmonary embolism that left her brain-dead.<sup>20</sup> Although Erick otherwise had the legal right to direct the medical care that his wife would receive, and although Erick requested that doctors abandon attempts to resuscitate his wife or otherwise keep her alive, doctors insisted upon fastening Marlise to a ventilator and other machines that would bring hydration to her body.<sup>21</sup> They did this, despite Erick's legal rights and express wishes, because Texas has a law that requires healthcare providers to continue to give life-sustaining treatment to a pregnant person—even if the pregnant person has executed a do-not-resuscitate order and/or the person's next of kin has requested the cessation of life support.<sup>22</sup> Eighteen other states have similar laws on the books.<sup>23</sup> Thus, in the name of protecting Marlise's fetus,

[t]he hospital cuts a hole into Marlise's neck to create an opening in the trachea. She will receive a tracheotomy . . . [H]er light brown skin transitions from supple to hard—like a mannequin . . . Her body loses muscle tone and begins to smell . . . [T]he smell that fills the room and Erick's nostrils—and those of anyone who visits the room—is that of a rotting body. (p. 2)

Texas ultimately kept Marlise, who was undeniably *dead*, tethered to life support for seven weeks.<sup>24</sup> Goodwin notes the macabre irony: “The state refers to this as fetal protection” (p. 2).

Goodwin observes how the state's fanaticism with regard to protecting fetuses has traveled outside of the borders of the United States. She explores the “global gag rule,” formally known as the Mexico City Policy, which goes beyond merely preventing nongovernmental organizations (NGOs) that receive federal financial support from using U.S. monies to fund, or provide advice, information, or education about, abortion.<sup>25</sup> The “global gag rule”

20. Jana J. Pruet, *Texas Hospital Ends Life Support for Brain-Dead Pregnant Woman*, REUTERS (Jan. 26, 2014, 8:30 PM), <https://www.reuters.com/article/us-usa-pregnant-texas/texas-hospital-ends-life-support-for-brain-dead-pregnant-woman-idUSBREA0N1RP20140127> (on file with the *Michigan Law Review*).

21. *See id.*

22. *See id.*

23. Erin S. DeMartino, Beau P. Sperry, Cavan K. Doyle, Julie Chor, Daniel B. Kramer, David M. Dudzinski & Paul S. Mueller, *US State Regulation of Decisions for Pregnant Women Without Decisional Capacity*, 321 J. AM. MED. ASS'N. 1629, 1630 (2019) (stating that “[n]ineteen states prohibit[] a surrogate decision maker from withdrawing life-sustaining therapies from a pregnant woman”).

24. Pruet, *supra* note 20.

25. P. 154. Goodwin notes that the predecessor to the “global gag rule” was the Helms Amendment, which prohibited NGOs receiving U.S. funds from using those funds “to promote, educate about, provide information on, or fund abortions,” but allowed recipient NGOs to use other, non-U.S. funds to perform those abortion-related interventions. P. 154. She is careful to remind the reader that the author of the Helms Amendment, North Carolina Senator Jesse Helms, was a known racist, homophobe, and misogynist. *See* pp. 149–50. With regard to

also prevents NGOs receiving U.S. funds from using *non-U.S. funds* to provide these abortion-related interventions (p. 154). Thus, the “global gag rule” places NGOs in a terrible predicament. If they accept U.S. funds, they are effectively silenced from talking about abortion. This is true although many NGOs work in countries that have been ravished by war, social unrest, or, simply, patriarchy—countries where rape and forced pregnancy have become horrific banalities and the dearth of safe and legal abortion services represents a humanitarian crisis (pp. 159–61). On the other hand, if these NGOs refuse U.S. funds, they can engage in efforts to ensure that women in the nations where they do their work have access to the medical care, including abortion services, that they need. However, they lose a significant amount of resources that can help them accomplish their missions. As with the examples of fetal protectionism that occur within U.S. borders, the “global gag rule” amounts to the state working to save fetuses at the expense of women. As Goodwin explains, the United States’ antiabortion foreign policy “result[s] in less accessible legal abortions in developing countries that receive foreign aid from the United States. [Yet,] women in developing countries continue to terminate their pregnancies—albeit under unsafe conditions and mostly illegal circumstances” (p. 161). She concludes that “these policies will never end abortions, but their being driven underground puts women’s lives at greater risk” (p. 161).

*Policing the Womb* goes well beyond simply documenting varied instances of fetal protection gone awry. Goodwin takes care to contextualize the present in a history of state control of women’s reproduction. She links prosecutions of vulnerable black women like Regina McKnight, discussed above, to chattel slavery (p. 47). As enslaved black women had to endure the brutality of sexual violence, forced pregnancy, and the loss of their children to the market for slaves, Regina McKnight and women like her have had to endure the brutality of the state’s responding to the deaths of their fetuses with arrests, prosecutions, and incarceration—as opposed to social services and healthcare. Goodwin argues that the historical antecedent of the state’s current attempt to regulate the reproduction of women who it deems undesirable is the eugenics movement and the state’s attempt to improve the country’s genetic stock through the compulsory sterilization of those it deemed unfit to reproduce (pp. 23–25). Inasmuch as slavery and the eugenics movements in the United States were both profoundly and undeniably racist, Goodwin’s identification of present-day fetal-protection efforts as

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Helms’s misogyny, Goodwin reminds us that Helms thought so little of women that he took the occasion of International Women’s Day to “once again announce[] his opposition to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),” and he successfully worked to prevent the United States’ ratification of the treaty. P. 151. In essence, the figure of Jesse Helms dramatizes a point that Goodwin underscores in her book: those who seek to protect fetuses at all costs often do not hold women in high regard. It is likely true that a lack of regard for women is a prerequisite—a condition of possibility—for the rabid fetal protectionism that Goodwin investigates in *Policing the Womb*.

heirs to these institutions reveals current efforts to be manifestations of white supremacy.

Moreover, Goodwin theorizes the work that these current efforts do to make a mess of existing—some would say foundational—legal principles. Goodwin notes that when women have faced arrest and prosecution, civil confinement, or other deprivations of autonomy and liberty because of behavior in which they have engaged during their pregnancies, it is usually the women’s healthcare providers who have turned them over to the police or courts (p. 80). Indeed, in Angela Carder’s case, discussed above, it was her doctors who sought a court order that would allow them to perform a cesarean section on her against her wishes (p. 95). Goodwin notes that many fetal-protection laws enlist doctors and other healthcare providers in the task of policing their pregnant patients—an enlistment that perverts the fiduciary relationship between doctor and patient (p. 201). Goodwin writes that medical providers’ “roles as undercover informants and modern day ‘snitches’ belie their sacred fiduciary obligations” (p. 80). Indeed, when fetal protectionism reigns, doctors—sometimes by force, sometimes voluntarily—take up “the mantle of deputized law enforcement” (p. 195).

Goodwin also places fetal protectionism in the United States in the context of mass incarceration. Many fetal protectionist efforts use the criminal law to regulate women’s conduct during their pregnancies—threatening women with jail or prison if they fail to behave in the ways that the state demands. Goodwin observes that using the criminal legal system to attempt to produce positive birth outcomes is apiece with the country’s general tendency to use jails and prisons as its primary means for addressing social problems (pp. 197–98)—a tendency that has led the United States to its problematic status as the nation with the highest rate of incarceration, as well as the largest incarcerated population, in both the developed and developing world.<sup>26</sup> When the nations that the United States likes to think of as its peers confront a social ill—like substance use during pregnancy, for example—they are less inclined than the United States to believe that the problem can be solved by putting more people in jails and prisons.<sup>27</sup> Nevertheless, that is precisely what the United States has done when confronted by the poor birth outcomes, and the risk of poor birth outcomes, that some exceedingly vulnerable women suffer. In observing that the use of the criminal legal system to engage in fetal protectionism manifests “the reflexive and often ineffective use of criminal law to address tough social issues, such as endemic poverty, lack of employment, drug addiction, depression, homelessness, and hope-

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26. John Gramlich, *America’s Incarceration Rate Is at a Two-Decade Low*, PEW RSCH. CTR. (May 2, 2018), <https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/> [https://perma.cc/XZU9-TSPC].

27. See P. 120 (noting the high level of incarceration among women in the United States compared to other countries); see also Hadar Aviram, *The Master’s Tools Will Never Dismantle the Master’s House: Kavanaugh’s Confirmation Hearing and the Perils of Progressive Punitivism*, 33 J. C.R. & ECON. DEV. 1, 33–34 (2019) (describing America’s tendency to resort to criminal measures in response to social problems).



lessness” (pp. 197–98), Goodwin embeds the fetal protectionist efforts that she analyzes within a larger literature that interrogates and problematizes the incessantly punitive approach that the United States takes to “solving” its social problems.<sup>28</sup>

Moreover, in observing that fetal protectionism oftentimes *intentionally* results in women’s incarceration, Goodwin intervenes in literatures that problematically construct mass incarceration as a phenomenon that only affects *men*.<sup>29</sup> That is, women are often elided as subjects of mass incarceration.<sup>30</sup> However, Goodwin uses her analysis of states’ deployment of the criminal law to protect fetuses as an opportunity to correct the misperception that the nation’s tendency to attempt to jail and imprison its way out of social problems has not affected women. Correcting this misperception is important. Goodwin argues that because of women’s erasure as subjects of the United States’ tragically muscular criminal legal system, “their experiences with mass incarceration, police brutality, sexual violence, shackling while pregnant . . . , birthing behind bars, medical neglect, restrictions on housing access after release, and other pernicious encroachments on their daily lives are rarely rendered visible in news media or by policymakers” (p. 117).

One of the most incisive critiques that Goodwin makes is her observation that the laws and policies that she investigates demonstrate that the state is convinced that “all pregnancies produce healthy babies except if the mother’s conduct threatens fetal health” (p. 42). But, Goodwin observes how inane this position is in light of all that the state *does not do* to ensure that women give birth to healthy babies. On the one hand, states punish women and deny them liberty when they engage in conduct that could harm fetuses. On the other hand, states refuse to engage in other efforts to ensure that fetuses are not harmed. In other words, there is something profoundly hypo-

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28. See, e.g., KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 51 (2011) (exploring the “criminalization of poverty” achieved by policies that equate the receipt of welfare with criminality); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1156 (2015) (arguing that “incarceration and prison-backed policing neither redress nor repair the very sorts of harms they are supposed to address—interpersonal violence, addiction, mental illness, and sexual abuse, among others”); Aviram, *supra* note 27, at 33 (noting that in the United States, “institutions and actors across the political spectrum” treat the criminal law as “the quintessential solution to society’s ills”).

29. Cf. Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1427 (2012) (noting that many studies of mass incarceration, which tend to level racial critiques against the practice, ignore the “hyperpresence of women of color in the system”).

30. See *id.* at 1436–37 (“[T]he fact that Black men are more likely to be incarcerated than any other cohort has reinforced a notion that Black men are uniquely subject to racial discrimination and control in a way that Black women are not. Yet upon closer inspection, the racial disparities in incarceration between men and women across all racial groups are in fact quite similar.”).

critical about a state that punishes women who suffer (or might suffer) poor birth outcomes, but also:

- criminalizes only the use of *illicit* drugs during pregnancy, leaving the equally harmful prescription drugs that wealthier pregnant women are more likely to use outside of the bounds of criminal proscription and prosecution (pp. 189, 195);
- refuses to regulate the use of assisted reproductive technologies, even though researchers have documented that these technologies “increase the incidences of cerebral palsy, hearing impairment, . . . premature births, and cognitive delays” in the babies that they produce (pp. 200, 206);
- selects poor communities and communities of color as sites for “chemical plants, oil refineries, garbage dumps, and other hazardous waste” (p. 138), although it is well-documented that the babies born to those who live in proximity to such sites suffer an increased incidence of health impairments (p. 139);
- erects a social safety net for its impoverished citizens that is punitive and radically incomplete,<sup>31</sup> although researchers established long ago that poverty compromises fetal health and increases the likelihood of poor birth outcomes;<sup>32</sup> and
- puts pregnant women whose behavior might lead to poor birth outcomes in jails and prisons, although jails and prisons are unsanitary, health-compromising sites that certainly are not conducive to maternal—and, therefore, fetal—health.<sup>33</sup>

An important intervention that Goodwin’s book makes is to observe the shifting racial demographics of those who have faced arrests and criminal

31. GUSTAFSON, *supra* note 28, at 1–2, 51.

32. See Susan FitzGerald, ‘Crack Baby’ Study Ends with Unexpected but Clear Result, PHILA. INQUIRER (July 21, 2013, 3:01 AM), [https://www.inquirer.com/philly/health/20130721\\_\\_Crack\\_baby\\_\\_study\\_ends\\_with\\_unexpected\\_but\\_clear\\_result.html](https://www.inquirer.com/philly/health/20130721__Crack_baby__study_ends_with_unexpected_but_clear_result.html) [<https://perma.cc/BN5U-AGN2>] (quoting neonatologist Hallam Hurt, who concluded that “[p]overty is a more powerful influence on the outcome of inner-city children than gestational exposure to cocaine”).

33. Goodwin notes that some incarcerated pregnant women in Maryland have been placed into “restrictive housing”—which appears to be indistinguishable from solitary confinement. P. 142. Studies have documented the negative effects that solitary confinement has on the health of those so constrained. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441 (2006) (concluding that solitary confinement does significant damage to many prisoners). Goodwin also discusses the poor records that jails and prisons have when it comes to providing healthcare to incarcerated people, and she recounts incidents where this fact has had devastating consequences for pregnant women. P. 144. She tells the story of Ambrett Spencer, jailed in Phoenix for driving under the influence, who informed jail staff at three in the morning that she was experiencing intense pain. P. 144. Four hours passed before jail staff acted on her request for medical assistance and called an ambulance. P. 144. Her fetus ultimately did not survive. P. 144. Subsequent medical care revealed that “Ambrett suffered from placental abruption, a condition in which fetuses have a promising rate of survival, but only if the patient receives timely treatment.” P. 144.

prosecution under the newest wave of fetal-protection laws.<sup>34</sup> It is undeniably true that when states first began to use criminal codes to police and punish women whose behavior might compromise fetal health—during the crack cocaine scare in the 1980s and 1990s—most of the women who were arrested, prosecuted, and convicted for crimes related to their conduct vis-à-vis their fetuses were poor and black.<sup>35</sup> Because black women bore the brunt of arrests and prosecutions for using crack cocaine while pregnant, black women became the face of a state that was hell-bent on using jails and prisons to address a public health problem.<sup>36</sup> Black women became the face of a state that would purport to protect fetal health by incarcerating the women who gestate those fetuses.

However, times have changed (slightly). There has been a new drug scare: an opioid epidemic.<sup>37</sup> And this new epidemic has hit white communities about as hard as the crack cocaine scare of the 1980s and 1990s hit black communities.<sup>38</sup> As a result, when the state, in the throes of the opioid epidemic, brings the force of the criminal law down upon a woman for using controlled substances during her pregnancy, that woman, with an increased frequency, is white.<sup>39</sup> Goodwin notes this, writing, “Most of [the pregnant women prosecuted in Alabama under the state’s chemical-endangerment statute] were white and overwhelmingly poor. A decade ago, my research began articulating these concerns, including a prediction that fetal protection prosecutions could jump the so-called color line” (p. 14; footnote omitted).

It is important to recognize white women’s vulnerability to punitive state power. It is intellectually dishonest—and likely politically disastrous<sup>40</sup>—to refuse to acknowledge that not all white people are doing particularly well. Whiteness does not always and in every case protect those who possess it from a state whose veneration of fetuses blinds it to women’s humanity and dignity. Goodwin articulates this essential insight, noting that “[f]requently, class matters as much as race, meaning that Black and Latina women no longer serve as the default targets of fetal protection prosecutions and laws” (p. 14).

However, it is possible that Goodwin overstates the fact of white women’s vulnerability to state power deployed on behalf of fetuses. In concluding that “Black women were simply the euphemistic canaries in the coal mine”

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34. I have made a similar observation in my other work. Bridges, *supra* note 18.

35. *Id.* at 817.

36. *Id.* at 819.

37. *Id.* at 785–88.

38. *Id.* at 788–89, 791.

39. *Id.* at 820–22.

40. See Anne Case & Angus Deaton, *American Capitalism Is Failing Trump’s Base as White Working-Class ‘Deaths of Despair’ Rise*, NBC NEWS: THINK (Apr. 14, 2020, 4:30 AM), <https://www.nbcnews.com/think/opinion/american-capitalism-failing-trump-s-base-white-working-class-deaths-ncna1181456> [<https://perma.cc/9ESY-FCFK>].

(p. 14), Goodwin might efface the continued fact of white privilege. The next Part explores this possibility.

## II. ON DIFFERENT CANARIES IN COAL MINES

Goodwin clearly recognizes that poor women of color have borne the brunt of the state's efforts to criminalize women's reproduction. Indeed, the stories of these women anchor Goodwin's analysis, and Goodwin takes pains to ensure that these women, whom the state has worked earnestly to make invisible, are not lost in her analysis. Nevertheless, an important facet of Goodwin's argument is that a state that fetishizes fetuses so intensely that it is willing to run roughshod over basic legal principles, like those surrounding fiduciary duties, will not stop at poor women of color. Instead, according to Goodwin, *all* people capable of gestating fetuses, including those who are affluent and white, are vulnerable to the treatment poor women of color were the first to experience.

Goodwin underscores this point by telling the story of a talk that she gave at a country club in Orange County to a group of affluent women, most of whom were white (p. 98). She writes that the tales that she told of poor black women whose doctors had turned on them and handed them over to the criminal legal system truly resonated with her well-heeled audience (p. 100). Many of the women in the audience had personal experiences with doctors whose loyalties lay not with the women but elsewhere. One of these privileged women had encountered a doctor who threatened to call the police if she did not obey his directives (p. 100). Another woman had suffered a miscarriage, but her doctor refused to provide medical care for her "because it would mean terminating the pregnancy" (p. 100). She writes, "As hands were raised and stories told, it became clear to each of us that any woman could potentially be vulnerable to surveillance, policing, and criminalization during pregnancy, even in California, a state that embedded a woman's right to reproductive privacy in its constitution" (p. 100). She makes clear the message that readers should take away from her experience in Orange County: "Despite their affluence, wealth did not spare the women" (p. 100).

Goodwin is not alone in proposing that race and class privilege will not protect women from state power in this arena. She quotes Loretta Ross, one of the scholars and activists to whom we owe the reproductive justice framework,<sup>41</sup> as stating her belief that women of color "are the roadkill on the pathway to policing white women's pregnancies" (p. 167).

Ross and Goodwin could be right. But, it is possible that they misrecognize the ways in which race and class privilege operate.

One of the lessons of intersectionality, as theorized by legal scholar Kimberlé Crenshaw, is that the forms that marginalization (and domination)

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41. Dani McClain, *Why Is Reproductive Justice Vital in This Political Moment? A New Book Breaks It Down*, NATION (June 13, 2017), <https://www.thenation.com/article/archive/why-is-reproductive-justice-vital-in-this-political-moment-a-new-book-breaks-it-down> (on file with the *Michigan Law Review*).

take depend on the characteristics that the subject possesses.<sup>42</sup> The example that Crenshaw provided in her first theorizations of intersectionality as an analytical framework was that of black women and white women.<sup>43</sup> As Crenshaw explained, while both black women and white women are disadvantaged on the basis of sex, white women are advantaged along the basis of race.<sup>44</sup> Accordingly, while sexism, misogyny, and patriarchy certainly marginalize both black and white women, the *forms* that sexism, misogyny, and patriarchy take differ for the two groups of women. Indeed, there have been times in which white women's marginalization has looked completely different from black women's marginalization—although both groups have been marginalized on the basis of sex.

Consider sterilization. At the turn of the century, eugenicists had the ear of many powerful people in society—including, ultimately, Justice Oliver Wendell Holmes, who agreed with seven of his comrades on the Supreme Court that forcible eugenic sterilization did not offend the Constitution, as “[t]hree generations of imbeciles are enough.”<sup>45</sup> While a key element in eugenicists' program to improve the genetic stock of the country was to prevent the reproduction of socially *undesirable* people (i.e., those who were poor, intellectually disabled, dependent on substances, single mothers, etc.), another essential element of the eugenics program was to increase the reproduction of socially *desirable* people.<sup>46</sup> This latter group was comprised entirely of those who were native-born, wealthy, not disabled, and white.<sup>47</sup> Thus, affluent white women's bodies were conscripted into the cause of saving the United States from being overrun by inferior genes. As a result, the state and private doctors denied this group contraception, abortion, and sterilization—tools that could allow them to “shirk” their racialized national duty to become pregnant.<sup>48</sup> In essence, for native-born, wealthy, white wom-

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42. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

43. See *id.* at 1242–43.

44. See *id.*

45. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

46. Ari M. Brostoff, *How White Nationalists Aligned Themselves with the Antiabortion Movement*, WASH. POST (Aug. 27, 2019, 9:16 AM), <https://www.washingtonpost.com/outlook/2019/08/27/how-white-nationalists-aligned-themselves-with-antiabortion-movement/> (on file with the *Michigan Law Review*) (describing “positive” eugenic policies designed to expand “desirable” populations by ensuring that “desirable” women bear children).

47. See WENDY KLINE, *BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM* 14 (2001) (documenting eugenicists' hope that “by encouraging middle-class white women to return to full-time motherhood, eugenics would both prevent the new woman from succeeding in her ‘vain attempts to fill men's places’ . . . and ensure that the white race once again would be healthy and prolific” (footnote omitted)).

48. See, e.g., *id.* at 63–65; Brostoff, *supra* note 46; Dov Fox, *Abortion, Eugenics and Personhood in the Supreme Court*, FERTILITY & STERILITY (Jan. 25, 2020), <https://www.fertstertdialog.com/users/16110-fertility-and-sterility/posts/58704-fox-consider-this> [<https://perma.cc/UA9V-KHKR>] (observing that native-born white women were denied

en, sexism, misogyny, and patriarchy took the form of *compelled* motherhood. Indeed, affluent white women struggled to access contraceptive sterilization well after eugenics fell into disrepute. Up until the 1970s, most *private* hospitals, where wealthy white women received their care, adhered to the “120 rule,” under which doctors would refuse to perform a sterilization procedure on a woman unless her age multiplied by the number of children that she had equaled 120.<sup>49</sup>

While class-privileged white women were being denied access to the sterilizations that they desired—sterilizations that would enable them to avoid a lifetime of constant pregnancy—nonwhite women struggled to become mothers. In a country that imagined nonwhite reproduction to be a drain on national resources and that figured nonwhite babies as future social problems, reducing nonwhite fertility became a national imperative.<sup>50</sup> And so: the nation attempted to prevent nonwhite motherhood. This program took the form of coercive, oftentimes nonconsensual sterilizations of nonwhite women.<sup>51</sup> Thus, we get the statistics describing that in the 1970s, over a quarter of indigenous women were sterilized after receiving healthcare from the Indian Health Service.<sup>52</sup> We get the statistics describing that a third of reproductive-age women living in Puerto Rico had submitted to *la operación*—a tubal ligation.<sup>53</sup> We get the phrase “Mississippi appendectomy,” which refers to southern doctors’ practice of surreptitiously performing sterilizations on poor black women after telling them that they were submitting to an entirely different medical procedure.<sup>54</sup> We get the story of Minnie Lee and Mary Alice Relf, two poor black sisters who were sterilized

abortions due to fear that immigrant women were outpacing them in childbearing); COMM. ON ETHICS, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 695, STERILIZATION OF WOMEN: ETHICAL ISSUES AND CONSIDERATIONS 3, 5 (2017) [hereinafter *Committee Opinion No. 695*], <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2017/04/sterilization-of-women-ethical-issues-and-considerations.pdf> [<https://perma.cc/H6PD-V9SY>] (noting that white middle-class women under the care of private physicians were particularly likely to be denied desired sterilization).

49. See *Committee Opinion No. 695*, *supra* note 48.

50. Thomas C. Leonard, “More Merciful and Not Less Effective”: Eugenics and American Economics in the Progressive Era, 35 *HIST. POL. ECON.* 687, 692–99 (2003).

51. Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS: INDEP. LENS (Jan. 29, 2016), <https://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states/> [<https://perma.cc/D9TB-ERAV>].

52. Erin Blakemore, *The Little-Known History of the Forced Sterilization of Native American Women*, *JSTOR DAILY* (Aug. 25, 2016), <https://daily.jstor.org/the-little-known-history-of-the-forced-sterilization-of-native-american-women/> [<https://perma.cc/U32E-L7GZ>].

53. Florita Z. Louis de Malave, *Sterilization of Puerto Rican Women: A Selected, Partially Annotated Bibliography*, UNIV. WIS.-MADISON LIBR. (1999), <https://www.library.wisc.edu/gwslibrarian/bibliographies/sterilization/> [<https://perma.cc/FJ9E-UP2W>].

54. Courtney Hutchison, *Sterilizing the Sick, Poor to Cut Welfare Costs: North Carolina’s History of Eugenics*, ABC NEWS (July 17, 2011, 9:41 PM), <https://abcnews.go.com/Health/WomensHealth/sterilizing-sick-poor-cut-welfare-costs-north-carolinas/story?id=14093458> [<https://perma.cc/6Y6Z-ZQAF>].

with federal funds at the ages of twelve and fourteen years old.<sup>55</sup> Their mother, who was unable to read, had signed the form that purported to document her informed consent with an “X.”<sup>56</sup> Subsequent litigation revealed that over 150,000 indigent women, many of whom had not consented to the procedure, had been sterilized with federal funds.<sup>57</sup> We get the litigation that culminated in *Madrigal v. Quilligan*, in which ten Latinx women in Los Angeles County sued after they discovered that the public hospital where many poor Latinx women received their care had a practice of nonconsensually sterilizing their indigent charges when they presented at the hospital to give birth.<sup>58</sup>

This is to say: for nonwhite women, sexism, misogyny, and patriarchy took a dramatically different form than they took for women with race and class privilege. Indeed, for nonwhite women, when disadvantage on the basis of sex intersected with disadvantage on the basis of race, sexism, misogyny, and patriarchy took the form of *denied* motherhood. For this group, sex equality looked like *limitations* on the ability of the state and private actors to sterilize them. At the same time, sex equality for their counterparts with race and class privilege looked like the elimination of those same limitations on sterilization.

In light of this history, Goodwin’s proposition—that the brutal treatment that poor women of color have endured at the hands of fetus-fetishizing state and private actors forecasts the treatment that wealthy and white women can expect to endure—might misapprehend how the multiple characteristics of the subject transform the shape that subordination takes. In other words, all people capable of gestating fetuses—poor cis women of color, affluent cis white women, immigrant trans men, nonbinary people with disabilities—may reproduce under a state that venerates the fetus above everything else. But, it may be a mistake to believe that fetal fetishization will assume the same form for all those capable of pregnancy. Will we read stories of affluent white women who have taken prescription medications throughout their pregnancies being arrested hours after giving birth and dragged to jails in their bloodied hospital gowns? (pp. 109–10). Will there be reports of race- and class-privileged women facing felony homicide charges after they fell down steps or attempted suicide and lost their pregnancies?<sup>59</sup> Maybe. But, if history is a teacher, then we might be attuned to different forms that fetal protectionism might take for those who are privileged. Indeed, if history is a teacher, we might expect that fetal protectionism will be

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55. B. Drummond Ayres Jr., *Sterilizing the Poor: Exploring Motives and Methods*, N.Y. TIMES, July 8, 1973, at E4, <https://www.nytimes.com/1973/07/08/archives/exploring-motives-and-methods-the-nation-sterilizing-the-poor.html> [<https://perma.cc/Q5EB-74TZ>].

56. *Id.*

57. See Ko, *supra* note 51.

58. No. CV 75-2057 (C.D. Cal. 1978), *aff’d* 639 F.2d 789 (9th Cir. 1981) (unpublished table decision); see also Marcela Valdes, *When Doctors Took ‘Family Planning’ Into Their Own Hands*, N.Y. TIMES (Feb. 1, 2016), <https://www.nytimes.com/2016/02/01/magazine/when-doctors-took-family-planning-into-their-own-hands.html> [<https://perma.cc/T4U2-SB87>].

59. See, e.g., Pieklo, *supra* note 13.

punitive, violent, and cruel for women without racial privilege, but more paternalistic (and less vicious) for white women. The lesson here is that fetal protectionism certainly subordinates. But, it may subordinate in different ways for those who exist at the intersections of some categories of privilege.

### III. EQUAL PROTECTION AND THE ROLE OF CULTURE

Goodwin proposes a two-part prescription to remedy the atrocities that she documents in *Policing the Womb*. The first part of the prescription is something that she calls a “Reproductive Justice New Deal or Bill of Rights” (pp. 164–70). This platform consists of eight rights that take into account the “social, political, cultural, and economic institutions” that impact and constrain women’s ability to be autonomous actors (p. 169). Thus, the Reproductive Bill of Rights makes explicit rights that the Court has held to be implicit in the Constitution, like the right to “[r]eproductive self-determination” and “the right to decide if, when, how, or not to procreate” (p. 169).

The second part of the prescription Goodwin identifies is to frame reproductive rights, and discrimination on the basis of pregnancy,<sup>60</sup> as a matter of sex equality—as opposed to the liberty framework that guides current constitutional interpretation.<sup>61</sup> She explains,

I urge reasserting an equality framework in women’s reproductive health generally, and specifically to apply to fetal protection cases in pregnancy such as those described in this book. A sex equality argument in fetal protection would ask whether state interventions are really about promoting fetal health, or whether fetal protection laws might also manifest constitutionally repugnant judgments about women, particularly pregnant women. (pp. 176–77)

Under the equality framework that Goodwin proposes, the fetal protectionist laws that she canvasses in the book would only survive constitutional scrutiny if they are supported by an “exceedingly persuasive justification,” as required by *United States v. Virginia*.<sup>62</sup> Moreover, defenders of these laws would have to demonstrate that the laws are “substantially related” to the end of protecting fetuses, as the Court’s intermediate scrutiny has provided since the time of *Craig v. Boren*.<sup>63</sup> Goodwin predicts that these laws cannot

60. Part of Goodwin’s intervention here is to counter the widely held notion that *Geduldig v. Aiello*, 417 U.S. 484 (1974), stands for the proposition that discrimination on the basis of pregnancy can never be discrimination on the basis of sex. She writes that the opinion, when properly read, only held that “state regulations affecting pregnancy *are not always* suspect of sex discrimination.” P. 181 (emphasis added). She clarifies that “the Court’s language is unambiguous[: s]elective actions by a state involving pregnancy, based purely on pretext for other causes or concerns, can be invidious.” P. 181.

61. See p. 176.

62. 518 U.S. 515, 515 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)); p. 187.

63. 429 U.S. 190, 197 (1976).



pass the substantial-relationship test insofar as they are wildly underinclusive, regulating women for engaging in behavior that might harm fetuses while refusing to regulate men for engaging in the same (p. 185). Goodwin proposes that an equality framework can and should also require states to prove that their efforts “actually promote fetal health” (p. 187). States cannot do this, Goodwin argues: threatening criminal punishment against women who engage in behavior that might pose a risk to fetal health, and empowering their healthcare providers to act as agents of law enforcement, actually drives women away from prenatal care (p. 187). Thus, fetal protectionist laws *compromise* fetal health inasmuch as they function to scare women away from the care that has been demonstrated to improve birth outcomes (p. 187).

While Goodwin’s analysis of the limits of liberty, and the possibilities of equality, with respect to reproductive right is insightful, there is a possibility that she is too hopeful that the solution to the dangerous (and ineffective) fetal protectionism that she analyzes in *Policing the Womb* lies with the law. That is, she may incorrectly identify reproductive rights’ current framing as that which has made possible the fetal protectionist laws and policies that she analyzes. This identification may pay too little attention to the role of culture in producing our present legal landscape. And it may fail to account for the role that culture will play in leading us to a legal landscape that is more respectful of the dignity and humanity of all those who are capable of gestating fetuses.

There is a compelling argument to be made that the national struggle over the legality of abortion is the origin of the fetal protectionism that led Marshaé Jones to be charged for the homicide of her fetus after she was shot in the abdomen during an altercation, Regina McKnight to be convicted of murder after she suffered a stillbirth, Marlise Muñoz’s dead body to be conscripted into serving as an incubator for her fetus, and Angela Carder to be denied treatment for the cancer that she knew would kill her if left untreated. This is true although none of these cases involved abortion—that is, the intentional termination of a pregnancy. The argument here is that “pregnancy exclusion laws” that void pregnant people’s do-not-resuscitate orders, hospital policies and court orders that disregard pregnant people’s express wishes with regard to their medical care, and criminal laws (and creative interpretations of criminal laws) that enable prosecution of pregnant women for engaging in behavior that may risk fetal health are all products of the nation’s ongoing fight over the legality and propriety of abortion.

Opponents of abortion rights have engaged in a multiprong strategy to overturn, or otherwise render obsolete, *Roe v. Wade*.<sup>64</sup> One strategy involves establishing fetal rights.<sup>65</sup> If fetuses have rights, then governments may be obliged to protect these rights. Further, if fetuses have a right to *life*, then

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64. 410 U.S. 113 (1973); see Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 999 (1999).

65. Paltrow, *supra* note 64.

governments may need to outlaw abortion in order to defend this right.<sup>66</sup> Importantly, the idea that fetuses have rights has leaked beyond the strict boundaries of the struggle about the legality of abortion. If fetuses have rights that need to be protected, not only must these rights be defended when a fetus might be “killed” in the abortion context, but they must also be defended whenever a fetus has been, or might have been, harmed. Which is to say: there is a direct line that connects the struggle over abortion to the tragedies that befell Marshaé Jones, Regina McKnight, Marlise Muñoz, and Angela Carder.

If there is something to the claim that fetal protectionist laws are really “about” abortion, there remains the question of whether it is proper to suggest that “culture” has anything to do with it. Why describe fetal protectionism as reflecting a stance vis-à-vis a *cultural*—as opposed to only a *political*—conflict? Sociologist and legal scholar Kristin Luker’s work here is instructive. Luker’s study of the views held by supporters and opponents of abortion rights reveals that a person’s political stance on the question of abortion often depends on their convictions about traditional gender norms.<sup>67</sup> Those who believe that women’s proper role is to be mothers and caretakers of homes and families (and, concomitantly, men’s proper role is to be breadwinners and the financial supporters of their families) tend to oppose abortion rights.<sup>68</sup> For these individuals, abortion confounds women’s arrival into their natural (and appropriate) destiny. Those, on the other hand, who believe that women’s lives should not, as a matter of course, center on birthing and raising children tend to support abortion rights.<sup>69</sup> For these individuals, abortion is a technique that allows women’s worlds to be wider than the domestic sphere.

Luker’s findings suggest that the struggle over abortion rights is about the role of women. The decades-long conflict over safe and legal abortion in the United States is a conflict about what womanhood *means*. If Clifford Geertz, the grandfather of modern sociocultural anthropology, was right when he proposed that “culture consists of socially established structures of *meaning*,”<sup>70</sup> then the fight about abortion is a fight about cultural meaning.<sup>71</sup>

Legal scholar Reva Siegel’s history of criminal-abortion laws is also instructive here.<sup>72</sup> Siegel’s work shows that the first criminal-abortion laws in the United States were not born of a concern about the moral status of the

66. *Id.*

67. See KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 158–59 (1984).

68. See *id.* at 159–61.

69. See *id.* at 175–76.

70. CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES 3, 12 (1973) (emphasis added).

71. I am not arguing that attitudes about the meaning of womanhood are *not* political. I am solely arguing that attitudes about what womanhood means are *also* cultural.

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

fetus;<sup>73</sup> indeed, to view these first abortion regulations as fetal protectionist measures is anachronistic. Rather, the first criminal-abortion laws in the United States were born of a concern about women's place in society.<sup>74</sup> The male physicians who advocated in favor of criminalizing the practice of abortion often argued that abortion was wrong because it upset traditional gender roles: abortion allowed for the creation of a world in which "woman" did not necessarily mean "mother." Indeed, "[a]nti-abortion tracts repeatedly asserted that women had a duty to bear children."<sup>75</sup> To those who believed that society was only *properly* ordered when men and women performed traditional gender roles, a world in which abortion was legal and women bore no children was a world gone mad.<sup>76</sup>

The history that Siegel excavates shows that the conflict over whether abortion should be safe and legal has always been about the *meanings* that attach to the fact of womanhood. Opponents of abortion rights believe that womanhood means motherhood. Supporters of abortion rights believe that womanhood can mean a number of different things. If culture consists of webs of meaning, then the struggle over abortion is the stuff of a *culture war* inasmuch as it is a struggle about the meanings that society will allow to attach to womanhood.

If the fetal protectionist laws that Goodwin explores have their origin in the fight over abortion and the cultural meanings that can and should attach to the fact of womanhood, then we may be looking to the wrong place when we look to *law* to fix the problem of rabid fetal protectionism. We may instead need to look to culture.

I am suggesting that if we transformed culture such that women no longer occupy the subordinate social status that they currently occupy, then we may have hope that will see the end of the fetal protectionism that Goodwin canvasses and analyzes. It deserves underscoring that fetal protectionism's brutality is accomplished only through its denigration of women. It is only through denying the dignity and humanity of the women who gestate fetuses that states can inflict the cruelty that they inflict under the banner of protecting fetuses. Consider the disregarded *horror* that Marsha Jones and

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73. *Id.* at 281–83.

74. The claim that "the first criminal abortion laws in the United States were born of a concern about women's place in society" is true in two respects. It is true in the sense that proponents of criminal-abortion statutes endeavored to keep women in the home—as wives and mothers. *See supra* notes 67–69 and accompanying text. But, it is also true in the sense that proponents of the first criminal-abortion statutes, male physicians, were trying to wrest dominance over reproductive healthcare from female midwives. *See Siegel, supra* note 72, at 283–84. Attacking the legitimacy of abortion was a means of attacking the legitimacy of midwives, who performed abortions. *See id.* Thus, criminal-abortion laws evidenced a concern about "women's place in society" inasmuch as they were borne of a desire to render the women who provided reproductive healthcare to women subordinate to the male OB/GYNs who desired to take their place.

75. Siegel, *supra* note 72, at 293.

76. *See id.* at 287 (noting that physicians writing against abortion in the late nineteenth-century figured "abortion as a threat to the life of society as a whole").

Regina McKnight must have felt when they learned that their fetuses had died. Consider Marlise Muñoz's rotting body tethered to machines. Consider Angela Carder's ignored pleas for treatment for the cancer that was killing her.

Notably, if the condition of possibility for fetal protectionism is the disdain of women, then we should *expect* brutal fetal protectionism. This is because, as Goodwin poignantly explores in her final chapter, women's status is abysmally low at the current cultural moment (pp. 209–22). As Goodwin describes, we live in a time in which judges sentence privileged young white men who rape unconscious women on elite college campuses to six months in jail (p. 211). Judge Persky, the sentencing judge in the Brock Turner case, apparently found convincing the claim that “[twenty] minutes of action” (p. 212) should not derail Turner's life; at the same time, Persky seemingly found unconvincing, or inconsequential, the fact that sexual violence may derail the life of the survivor of Turner's brutality, Chanel Miller. We live in a time in which an individual can secure sixty million votes and win the presidency even after being caught on tape gloating that he could “grab [women] by the pussy”—without their consent—because he is “a star” (p. 219). Fetal protectionism will not go away until our culture is such that stories like these are unimaginable.

Of course, law plays a role in cultural change. Litigation (or even legislation) may raise awareness about certain issues and reveal the stakes of existing injustices.<sup>77</sup> But, it is likely true that cultural contestation precedes the battles that take place in courthouses and legislatures.<sup>78</sup> It is certainly true that legal change cannot exist without cultural change.

#### CONCLUSION

It is likely that Goodwin would be sympathetic to the suggestion that we, as lawyers, ought not lose sight of the role that culture plays in producing and transforming the law. (Indeed, Goodwin explicitly claims that “ethnography”—the methodology that anthropologists employ to study culture<sup>79</sup>—is important to her investigation.<sup>80</sup>) If culture is the real lever that we must push in order to prevent future stories like those of Marshae Jones, Regina McKnight, Marlise Muñoz, and Angela Carder—as well as Brock Turner and

77. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 984 (2011).

78. Elsewhere, I examine the contexts of voting rights for black people and same-sex marriage rights for LGBTQ people to make the argument that culture and law have a dialectical relationship—with cultural change producing legal change, and legal change producing cultural change. See KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017). In that examination, I conclude that cultural change “jumpstart[s] the dialectic.” *Id.* at 220.

79. See GEERTZ, *supra* note 70, at 5–6.

80. See p. 15 (stating that she “takes up the challenge presented by Professor Victoria Nourse,” who argued that “we must take the ethnographer's view of experience about our most basic cultural and social concepts, whether they find their way into law cases or newspapers, diaries or Supreme Court opinions”).

Donald Trump—then turning to legislatures and courtrooms with new legal arguments may not achieve our goals. Instead, we may need to engage in *social movements* with the hope that we can transform culture and rid it of the misogyny that makes fetal protectionism possible.