American Journal of Law & Medicine (2022), 48: 2-3, 200–208
doi:10.1017/amj.2022.22

American Society of Law, Medicine & Ethics
Where Multidisciplinary Education Improves Practice

ARTICLE

Reversing the Criminalization of Reproductive Health Care Access

Meghan Boone

Wake Forest University School of Law, Winston-Salem, NC, USA
Email: boonem@wfu.edu

Introduction

The state is increasingly criminalizing reproduction. While prosecutions of pregnant people for prenatal drug use began occurring several decades ago,[1] this type of prosecution remained relatively rare for many years.[2] But such prosecutions have increased dramatically—thousands have now occurred across the United States.[3] In addition, the criminalization of reproduction is not limited to instances of prenatal drug use,[4] but extends to a wide array of prosecutions in the reproductive space—including the criminalization of stillbirth,[5] miscarriage,[6] breastfeeding,[7] home births,[8] and c-section refusals.[9] And, of course, recent changes in the Supreme Court have resulted in an almost certain change in the criminal regulation of abortion, as well.[10] The criminalization of reproduction often occurs at an initial point of

[1]*See* Linda C. Fentiman, Blaming Mothers: American Law and The Risks To Children's Health 110–12 (2017). Courts long resisted validating the criminal prosecution of pregnancy-related offenses on the theory that fetuses were not considered legal persons, and thus civil and criminal law did not apply to them in the same way. Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, 47 Hastings Ctr. Rep. 19, 21 (2017).

[2]*Id.*

[3]*See* Amnesty Int'l, *USA: Criminalizing pregnancy: policing pregnant women who use drugs in the USA*, AI Index AMR 51/6203/2017 (May 23, 2017) (collecting data on pregnant women who have been criminally prosecuted); National Advocates for Pregnant Women, *Arrests and Prosecutions of Pregnant Women: 1973-2020* (Sept. 18, 2021), https://www.nationaladvocatesforpregnantwomen.org/arrests-and-prosecutions-of-pregnant-women-1973-2020/ [https://perma.cc/C3L6-LCVM] (documenting 413 cases of the criminalization of pregnancy in the 32-year period from 1973-2005 and 1,254 cases in the 14-year period from 2006-2020).

[4]And is not limited even then to the use of illegal drugs during pregnancy. *See* Moira Donegan, *Alabama is prosecuting a mom for taking prescribed medication while pregnant*, The Guardian (Jul. 27, 2021).

[5]*How My Stillbirth Became a Crime*, N.Y. Times (Dec. 28, 2018).

[6]Michelle Goldberg, *When a Miscarriage is Manslaughter*, N.Y. Times (Oct. 18, 2021) (describing the case of 19-year-old Brittney Poolaw, who was sentenced to four years in prison following a miscarriage).

[7]Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding the New Markets for Breast Milk and Infant Formula*, 10 Nev. L. J. 29, 56 (2009) ("[W]omen have been harassed and arrested for breastfeeding on public transportation and in other public venues."). A particularly tragic case occurred when Jacqueline Mercado was charged with child pornography for a photo she took of her breastfeeding her infant son. Thomas Korosec, *1-Hour Arrest*, Dallas Observer (Apr. 17, 2003), http://www.dallasobserver.com/news/1-hour-arrest-6419852 [https://perma.cc/5FHE-PMMZ].

[8]Teddy Wilson, "Mississippi Woman Criminally Charged for Pregnancy Outcome After Home Birth," Rewire News, (Feb 6, 2018), https://rewirenewsgroup.com/article/2018/02/06/mississippi-woman-criminally-charged-pregnancy-outcome-home-birth/ [https://perma.cc/6NVR-3UTN].

[9]Charles Marwick, *Mother accused of murder after refusing caesarean section*, 328 BMJ 7441 (2004); Letitia Stein, *USF Obstetrician Threatens to Call Police If Patient Doesn't Report for C-Section*, Tampa Bay Times, (Mar. 7, 2013).

[10]Amy Howe, *Majority of court appears poised to roll back abortion rights*, SCOTUSblog (Dec 1, 2021), https://www.scotusblog.com/2021/12/majority-of-court-appears-poised-to-uphold-mississippis-ban-on-most-abortions-after-15-weeks/ [https://perma.cc/WDR3-HNE5]. Criminal laws often result in the punishment of pregnant people for actions that would not be criminal were they to be undertaken while not pregnant. This has led some scholars to describe the criminalization of pregnancy as a "status offense" – meaning it is the pregnancy itself and not a particular action that is the basis for criminalization. Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 Geo. Wash. L. Rev. 1163 (2017).

access to the health care system – at the hospital, the doctor's office, the lactation consultant appointment, or the addiction treatment clinic. In this way, health care settings become gateways into the criminal justice system, and it is the attempt to access reproductive health care that results in criminal prosecution.[11]

Certain groups bear the brunt of the criminalization of reproductive health care access – poor women,[12] women of color,[13] and other marginalized groups[14] are significantly more likely to suffer criminal liability for reproductive choices. To be clear, this increased criminalization does not flow from a higher likelihood of these individuals to *engage* in criminal activity – for instance, some evidence actually suggests that white women may abuse certain drugs while pregnant in higher percentages than women of color.[15] But systemic discrimination coupled with increased baseline surveillance of these populations results in a disproportionate criminalization of reproductive choices within these groups than in more privileged groups.[16] This disproportionate risk of criminal liability makes the health care space a much riskier one for disadvantaged individuals, even though it is often precisely these individuals who would most stand to benefit from reproductive health care access.[17]

This disproportionate criminalization of reproductive health care access for marginalized groups is a tragedy, a moral outrage, and a potential constitutional violation all wrapped into one. As a result, much of the scholarship and advocacy in this area has focused on the harms to those that are criminally prosecuted and the ways that this harm is unfairly borne by certain groups.[18] This is critical work. Nevertheless, it sometimes spends little or no time describing the less extreme but more widespread harms that also result from criminalizing reproductive health care access. This Essay focuses here: not on the most dramatic examples of harm or the disproportionate nature of the harm, but instead on the less obvious and more nuanced ways that reproductive criminalization creates harm — even among populations highly unlikely to experience actual criminal prosecution. This approach has two potential benefits. First, it is a more holistic picture of the ways in which the criminalization of reproduction dampens reproductive autonomy for all, including both obvious and more subtle harms. This includes narratives about how the criminalization of reproductive health care harms health care providers. Second, it may convince individuals from a variety of backgrounds that this is a problem that requires a

[11] *See* Goodwin, *supra* note 1, at 22 (noting that medical visits were the triggering event for criminalizing reproductive choices in a variety of circumstances).

[12] Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 Wm. & Mary L. Rev. 809, 810 (2019)

[13] Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv. L. Rev. 1419 (1991).

[14] Religious or cultural minorities are often implicated in debates about criminal reproduction. *See* Tyler Pager, *She Helped deliver Hundreds of Babies. Then She was Arrested,* N.Y. Times (Mar. 5, 2019), https://www.nytimes.com/2019/03/05/nyregion/mennonite-midwife-arrest.html [https://perma.cc/KS2A-2MGQ] (discussing the prosecution of Mennonite birth attendant). Homeless individuals are disproportionately criminalized for reproductive choices. *See generally* Bridget Lavender, *Coercion, Criminalization, and Child "Protection': Homeless Individuals' Reproductive Lives*, 169 U U. Pa. L. Rev. 1607, 1640 (2021). For instance, a homeless New York mother was prohibited from becoming pregnant by order of a family court judge. *See* Matter of Bobbijean P., NYCLU, https://www.nyclu.org/en/cases/matter-bobbijean-p-challenging-court-ruling-prohibiting-homeless-woman-becoming-pregnant [https://perma.cc/8JG3-2N4K]. Disabled parents and the disabled children of non-disabled parents, too, can be drawn into conversations about what reproduction is "criminal." *See* Alison Piepmeier, *The Inadequacy of "Choice": Disability and What's Wrong with Feminist Framings of Reproduction*, 39 Feminist Stud. 159, 164-66 (2013) (describing how readers had reacted to the author's choice to give birth to a child with a disability "as an act of 'harm' or cruelty, even as a 'crime.").

[15] See Am. Coll. of Obstetricians & Gynecologists Comm. on Health Care for Underserved Women, Committee Opinion Number 538: Nonmedical Use of Prescription Drugs 2 (2012) ("White women are more likely to abuse prescription pain relievers than women of any other race or ethnicity.").

[16] *See* Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 150-201 (1st ed., 1997).

[17] *See* El-Mohandes et al., *Prenatal Care Reduces the Impact of Illicit Drug use on Perinatal Outcomes*, 23 J. of Perinatology 354 (2003).

[18] *See, e.g.,* Bach, *supra* note 12 (discussing criminalization of poor pregnant women); Roberts, *supra* note 13 (discussing criminalization of Black pregnant women).

https://doi.org/10.1017/amj.2022.22 Published online by Cambridge University Press

solution – by describing how criminalization harms individuals across the political, racial, and socio-economic spectrum and thus incentivizing disparate populations to champion its reversal.

The hidden harms of criminalizing reproductive health care access

Though reproductive criminalization is increasing year after year, the chance that any particular individual is prosecuted for a reproductive choice is still relatively small. And for women whose race, wealth, or other privilege places them outside of the criminal justice surveillance system that often pervades the lives of women with less privilege,[19] the realistic threat of criminal prosecution is almost (although not entirely) non-existent. Even absent the realistic threat of criminal liability for oneself, however, the awareness that reproductive health care is increasingly criminalized changes even a privileged individual's willingness to access reproductive health care and the scope of that access. This is for two reasons. First, because uncertainty about both what is criminal and the likelihood of criminal prosecution can and does cause individuals to modify their behavior.[20] In other words, uncertainty about the potential for criminalization obscures the truth that the chance of actual prosecution is very low. And second, because the stigma associated with criminal behavior can be as powerful as actual criminal prosecution.[21]

In the face of uncertainty regarding whether a particular action is criminal or whether criminal punishment is possible or likely, many people will reasonably err on the side of not taking such action – whether it is seeking prenatal care or lactation support, utilizing the services of a midwife or choosing a homebirth, or continuing to take a much-needed medicine during pregnancy. In each of these circumstances, an individual unsure of their potential criminal liability may rationally conclude that it is simply not worth the benefit of engaging in the activity.[22] This phenomenon, in which a legal prohibition results in a chill on activity that is perfectly legal, is well known in other contexts – most notably in free speech jurisprudence.[23]

At the intersection of reproduction and criminal law, uncertainty abounds. First, prosecutors have been willing to stretch existing criminal laws in creative and unexpected ways in order to criminalize reproductive behavior clearly not contemplated by the legislators who originally enacted the law.[24] Thus, the "plain text" of the criminal law does little to help individuals understand how to avoid criminal penalty.[25] While these stretched interpretations of existing criminal law have been struck

[19]Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 Yale J.L. & Feminism (2013).

[20]*See generally* Tom Baker et. al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 Iowa L. Rev. 443 (2004) (establishing that the uncertainty of criminal punishment and extent of punishment affects individuals' willingness to engage in criminal behavior).

[21]*See* Kenworthey Bilz & Janice Nadler, Law, *Moral Attitudes, and Behavioral Change*, *in* The Oxford Handbook of Behavioral Economics and the Law 241, 253-58 (Eyal Zamir & Doron Teichman eds., 2014) ("[I]f laws change moral attitudes, we reduce—maybe drastically—the need for the state to act on or even monitor regulated players").

[22]*See* Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 Health & Just. At 13 (Feb. 12, 2015) (describing results of qualitative study that suggest that "punitive policies have indeed had some chilling effect on women's help-seeking behavior by discouraging women from accessing prenatal care or leading them to skip appointments to withhold medically relevant information…").

[23]The Supreme Court has indicated on multiple occasions that the First Amendment guarantee of free speech needs "breathing room" – recognizing that individuals will naturally give a wide berth to activity that might result in criminal prosecution and as a result the law must not regulate conduct in a manner that will have the effect of chilling a wider swath of speech than intended, particularly when it is constitutionally protected speech. *See* Boos v. Barry, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space to the freedoms protected by the First Amendment.") (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

[24]*See* Meghan Boone & Ben McMichael, *State-Created Fetal Harm*¸ 109 Geo. L. J. 475, 481 (2021).

[25]*See, e.g. Papachristou v. City of Jacksonville*, 405 U.S. 156, 162–63 (1972) (striking down void criminal prohibitions on vagrancy, stating, "[t]he poor among us, the minorities, the average householder are not in business and not alerted to the

https://doi.org/10.1017/amj.2022.22 Published online by Cambridge University Press

down by courts in some states, they have been upheld by courts in other states (and yet to be tested in still others).[26] Even in states where courts have *already* invalidated prosecutors' stretched interpretations of criminal law, it does not always eliminate prosecutors' willingness to bring these types of charges. In states where courts have specifically rejected the prosecution of particular reproductive acts, individuals cannot rely on these interpretations entirely in light of prosecutors' willingness to continue to file charges.[27] Moreover, formal charges need not be filed for women to endure surveillance or arrest from law enforcement officers who (incorrectly) believe they are enforcing the law.[28] There are not even consistent approaches within single communities – one hospital might drug test all women who come to give birth, triggering reports to law enforcement agencies, while another hospital just down the road will not.[29] All of these circumstances combine to create a great deal of uncertainty regarding what is criminally prohibited and the real likelihood that any particular act could result in actual criminal prosecution.

It is important to underscore that uncertainty regarding what is criminally prohibited inures to the benefit of those that would seek to limit reproductive autonomy – resulting in a chilling effect even on behavior that is *not* criminal. Thus, it is not only the increase in the *actual* criminalization of reproduction that harms access to reproductive health care, but also the increase in the *uncertainty* regarding the scope of the criminal prohibition.

Compounding the effects of uncertainty, the stigma associated with criminalization is just as likely to chill individuals' willingness to access reproductive health care.[30] Criminal prosecution carries with it a strong association that the criminalized individual has breached community standards of morality.[31] The English language uses "criminal" as a synonym for "corrupt," "illicit," or "immoral." Thus, even for those individuals who don't realistically fear *actual* criminalization, there still exists the threat of stigma attaching to behavior that is perceived as potentially criminal.[32]

For some, this threat of stigma and cultural ostracization can be just as powerful as the threat of actual criminal liability. For instance, the realistic threat of being arrested for consuming alcohol and then breastfeeding is, in reality, very low. But the perceived immorality of such behavior—fueled in part by the amorphous threat of criminalization —is likely sufficient to disincentivize some breastfeeding parents from honest conversations with health care providers regarding alcohol consumption. It may even be sufficient to disincentivize accessing lactation support at all, if there exists a fear of moral disapproval from health care providers or others regarding alcohol use while lactating. Another example is the increasing criminalization of abortion, which has created additional stigma around accessing health care for stillbirth or miscarriage.[33]

---

regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them").

[26]Boone & McMichael, *supra* note 24, at 481-83.

[27]*Id.* at 483-84.

[28]This often happens regarding public breastfeeding which – while legal in all fifty states – often prompts law enforcement officers to intervene and even arrest breastfeeding people. *See* Fentiman, *supra* note 7, at 56 ("[W]omen have been harassed and arrested for breastfeeding on public transportation and in other public venues.").

[29]Anna Claire Vollers, *New Moms in Alabama Face Suspicion Over Error-Prone Drug Screens*, AL.COM: NEWS (Feb. 9, 2020, 8:30 AM), https://www.al.com/news/2020/02/new-moms-in-alabama-face-suspicion-over-error-prone-drug-screens.html#:~:text=09%2C%202020%2C%201%3A11,but%20the%20experience%20was%20traumatic [https://perma.cc/F7ZN-9JZS] (describing how policies differ from "hospital to hospital.").

[30]*See* Goodwin, *supra* note 1, at 20 ("[C]riminalization further entrenches negative social and cultural norms like stigma, blame, and discrimination against women of certain social groups.").

[31]*See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 575 (2003) (discussing the stigma associated with criminal prohibition).

[32]The connection between criminality and potential stigma is well-documented. *See* Reno v. Am. C.L. Union, 521 U.S. 844, 872 (1997) (noting the "opprobrium and stigma of a criminal conviction").

[33]Amanda Allen & Cari Siestra, *Miscarriages are Awful, and Abortion Politics Make Them Worse*, N.Y. TIMES: OPINION (June 22, 2021), https://www.nytimes.com/2021/06/22/opinion/miscarriage-abortion.html?searchResultPosition=1 [https://perma.cc/J6QH-84EZ].

https://doi.org/10.1017/amj.2022.22 Published online by Cambridge University Press

Even when health care access is not prevented entirely, the threat of criminalization changes the way that health care is sought and provided.[34] It is not hard to imagine a pregnant person "failing to mention" to their doctor the over-the-counter headache medicine they recently took, or that they are considering a homebirth. A laboring person may not fully and honestly communicate with hospital staff out of concern that a full accounting of her symptoms or medical history, if reported, might result in a forced cesarean section that she does not want.[35] Even a new mother fearing she could be misconstrued as negligent (or worse), may decide against reporting her completely normal post-partum feelings of sadness or isolation to her doctor.[36] As re-criminalization of abortion continues to increase post-*Dobbs*, women will increasingly seek unsafe abortions outside of the traditional health care context,[37] and perhaps decline to report these abortions to their health care providers as part of medical histories. And it is already clear that women who are miscarrying will receive unwarranted interrogation from overzealous law enforcement intent on enforcing criminal laws regarding abortion or feticide—introducing the potential for additional negative mental health outcomes on top of those already associated with pregnancy loss.

In each of these circumstances, the harm is both amorphous (a loss of trust and communication, a small but unwarranted exacerbation of mental health issues, the selection of a choice not truly reflective of an individuals' wishes) and potentially concrete (a patient may not get access to services that her or her child might actually need). At very least, these circumstances illustrate the heightening sense of anxiety around all decisions connected to reproductive health care and all contacts with the reproductive health care system.[38] Thus, even if none of the individuals experiencing the hypotheticals above could reasonably expect to be personally criminally prosecuted, the high-profile cases of the criminalization of other women for their own reproductive choices changes patients' experience of health care.

In *Policing the Womb*, Michele Goodwin compellingly describes how a group of wealthy, white women recounted their own negative experiences with health care providers—experiences informed by the background threat of criminality that now pervades reproductive health care.[39] Despite the risk of criminalization being truly miniscule, the uncertainty and stigma that surround the criminalization of reproductive health care is enough to meaningfully change both behavior and outcomes on a population-wide basis.

[34]*See* Goodwin, *supra* note 1, at 21 ("How might the threat of criminal prosecution affect women's willingness to disclose to their doctors and nurses traumas associated with their lives and pregnancies? Indeed, might some pregnant women decide not to participate in prenatal care if they realize that law enforcement interests may supersede or even outweigh the goals of medical care and treatment?").

[35]*See* Elizabeth Kukura, *Choice in Birth: Preserving Access to VBAC*, 114 Penn St. L. Rev. 955, 984-85 (2010) (discussing how restrictive VBAC (vaginal birth after cesarean) policies creates an "adversarial" relationship between health care providers and pregnant women, even transforming hospital staff into "obstetrics police").

[36]Of course, stigma associated with reproductive choices is not merely a function of criminal law – although criminalization invariably strengthens the stigma associated with a particular choice. *See* Swara Saraiya, *Conceiving Criminality: An Evaluation of Abortion Decriminalization Reform in New York and Great Britain*, 57 Colum. J. Transnat'l L. 174, 219 (2018) (discussing interaction of criminal and non-criminal stigma in the abortion context).

[37]U.N. Working Group on the issue of discrimination against women in law and in practice, *Human Rights Special Procedures, Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends* (Oct. 2017), https://www.iccl.ie/wp-content/uploads/2017/11/WomenAutonomyEqualityReproductive.pdf [https://perma.cc/A9G4-5G5G] ("WHO data has clearly demonstrated that criminalizing termination of pregnancy does not reduce women's resort to abortion procedures. Rather, it is likely to increase the number of women seeking clandestine and unsafe solutions.").

[38]Michele Goodwin, Policing the Womb 43 (2020) (discussing how the "vague and overbroad" standards that have been used to criminalize pregnant women "could logically produce extreme anxiety in any pregnant woman, because even drinking tap water in certain U.S. cities and town could produce negative impacts in fetuses and children.").

[39]*Id.* at 100 (describing a talk with a group of white wealthy women and their own negative experiences in the reproductive health care space, and that these women "expressed feeling vulnerable rather that confident with their doctors" as a result of the looming threat of criminalization).

https://doi.org/10.1017/amj.2022.22 Published online by Cambridge University Press

Patients are not the only group affected by the criminalization of reproductive health care. These are also powerful disincentives for health care providers to *offer* reproductive health care services.[40] And if there are few or no health care providers that are willing to provide services, patients will not be able to access those services even if they seek to do so. The recent Texas law providing for civil penalties for those that aid or abet an abortion after fetal cardiac activity can be detected[41] is a perfect example of how uncertainly regarding potential legal exposure results in decreased reproductive health care access. Following the passage of the law and the refusal of the Supreme Court to grant an injunction staying its effective date,[42] many abortion providers in Texas refused to provide abortion services past detection of fetal cardiac activity,[43] despite the fact that such procedures were still legal at the time under controlling Supreme Court precedent. Nevertheless, the *uncertainty* regarding liability that the Texas law might create for health care providers reasonably caused providers to err on the side of safety and to stop offering these services.[44] Even if women seeking abortion services in Texas might have been willing to risk potential legal action in order access abortion, the lack of willing providers made it impossible to take that risk.

And abortion providers are not the only health care providers whose practices are being chilled. As more aspects of the reproductive process become potential targets of criminal surveillance, more health care providers will reasonably worry about their own potential liability in these spaces[45]—whether they are providing routine prenatal care, birth attendant services, lactation consultant services, or postpartum care. Health care providers, too, are disincentivized to offer certain types of reproductive care if such care is stigmatized.[46] At very least, the threat of criminalization will likely alter the ways in which such services are offered.[47]

And finally, even if they are not themselves the target of criminal prosecution, at least some health care providers may choose to not offer reproductive services if, by so doing, they become an unwilling participant in funneling information to the criminal justice system that is then used to criminalize their patients.[48] Health care providers might reasonably balk at being conscripted into a system that harms the very patients they are attempting to care for. Thus, when we talk about how criminalization harms reproductive health care access, we must discuss both sides of the health care equation: the patients seeking care and the providers who offer it.

---

[40]Jennifer C. Nash, *Home Is Where the Birth Is: Race, Risk, and Labor During Covid-19*, 32 Yale J.L. & Feminism 103, 124 (2021) (discussing the "legal ambivalence" surrounding certified professional midwives and the high-profile criminal cases that have occurred against them).

[41]Tex. Health & Safety Code Ann. § 171.203 (West 2021) ("…a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child…").

[42]United States v. Texas, 142 S. Ct. 14 (2021).

[43]Karen Brooks Harper & Eleanor Klibanoff, *Fewer Patients, smaller staff, an uncertain future: abortion providers await court decision on Texas law*, Tex. Tribune (Nov. 23, 2021).

[44]*See* Lauren K. Hall, The Medicalization of Birth and Death 185 (Robin Coleman ed., John Hopkins University Press 2019) (describing how even though a very small number of physicians are actually criminally prosecuted, these highly publicized incidents result in 40% of physicians reporting that they have acted against their medical conscience as a result, at least partly, of the fear of prosecution).

[45]*Id.* at 169 ("The civil and criminal system is similarly complex, and while the courts support physicians in the majority of civil cases, the stress of an investigation and reputational concerns cause considerable fear and heighten perceptions of the risk of suits.").

[46]Lisa H. Harris et al., *Physicians, Abortion Provision and The Legitimacy Paradox*, 87 Contraception 11, 12-15 (2013) (describing stigma associated with abortion care and how it affects the provision of services and the number of doctors willing to provide services).

[47]Hall, *supra* note 44, at 169 ("In both birth and death, legal fears over both civil and criminal penalties influence practitioner behavior, pushing medical care away from best practices and even warping the standard of care over time.").

[48]*See* Am. Coll. of Obstetricians and Gynecologists, *Statement of Policy: Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period* (2020), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period [https://perma.cc/Q3U9-AS5L].

https://doi.org/10.1017/amj.2022.22 Published online by Cambridge University Press

Crucially, if doctors' offices became gateways to the criminal justice system in the area of reproductive health care, there is no principled reason why they would not serve as a similar gateway in other areas of health care. Those struggling with addiction or mental illness might, too, find that conversations with health care providers change in light of the looming threat that such conversations could be used to bolster criminal prosecutions. Inviting the criminal justice system into our health care institutions changes the nature of those institutions and our experiences inside of them in ways that are not always easy to control or contain.

Building political consensus against the criminalization of reproductive health care access

The heaviest burden of the criminalization of reproductive health care access is borne by those who are at risk of its most extreme consequences: the severance of familial relationships and/or criminal punishment, including all of the negative collateral consequences that flow from the latter. As Goodwin persuasively argues, "vulnerable women in the United States cannot even begin to have any kind of meaningful reproductive autonomy while they are criminalized for pregnancies, reproductive choices, and birth outcomes that often may be beyond their control."[49] The recognition of this unequal burden, and its connections to intersecting systems of socioeconomic and racial inequality, is crucial to understanding the nature and scope of the problem. But such a recognition should not inevitably lead to the conclusion that hyperfocus on this disproportionate harm is the best mechanism by which to disrupt the trend towards the criminalization of reproductive health care access or, ultimately, to reverse it.

The unfortunate truth is that the ever-increasing criminalization of reproductive health care access is not an accident—it reflects a culture that (1) increasingly requires adherence to a cultural standard for "perfect" motherhood that is unattainable to many and (2) harbors a desire to punish those that inevitably fail to meet this standard.[50] The impossible maternal standard is deeply steeped in both racial and class prejudice. Thus, prejudice against marginalized people—including that involving racial animus—drives at least some of the urge to criminalize in the first place.[51]

While the existence of, and reasons for, this type of prejudice should continue to be the focus of scholarly inquiry and targeted advocacy, appeals to individuals' better natures in this regard simply cannot be the basis for a successful campaign to reverse the damaging criminalization that is already occurring in reproductive health care. The appetite of the public to criminalize reproductive behavior is not abating; it is only growing stronger.[52] Thus, through attempting to change policy through highlighting the experience of pregnant people who do not embody an idealized vision of motherhood (even if for reasons completely outside of their control),[53] advocates may actually increase the political appetite for criminalization, not dampen it.[54] As unfair as it is, this approach is akin to throwing water on a grease fire.

[49]*See* Goodwin, *supra* note 1, at 25.

[50]Dara E. Purvis, *The Rules of Maternity*, 84 Tenn. L. Rev. 367, 440 (2017) (describing a "regulated and policed motherhood, corralled from all sides into an ideal of mothering that may not exist in reality.").

[51]Roberts, *supra* note 16, at 6 ("[R]egulating Black women's reproductive decisions has been a central aspect of racial oppression in America.").

[52]For instance, in 2014 Tennessee became the first state in the country to specifically criminalize prenatal drug use, *see* Tenn. Code Ann. § 39-13-107(c)(2) (2014) (effective until July 1, 2016), but many other states have introduced similar legislation. *See* Amnesty Int'l, *USA: Criminalizing pregnancy: policing pregnant women who use drugs in the USA*, AI Index AMR 51/6203/2017 (May 23, 2017) (describing seventeen state legislatures' proposed criminal-fetal endangerment measures). States are also increasingly criminalizing self-managed abortion care. *See* Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, Guttmacher Policy Review (Sept. 22, 2015).

[53]*See* Goodwin, *supra* note 1, at 24 ("A woman's ability or inability to experience pregnancy in line with her values and goals frequently maps along race and class status.").

[54]*See, e.g.*, Michele Adashek, Letters to the Editor, *How To Hold a Drug-Using Woman Who Had a Stillbirth Accountable*, L.A. Times (Nov. 21, 2019), https://www.latimes.com/opinion/story/2019-11-21/meth-mother-stillbirth [https://perma.cc/E86Q-2URR].

https://doi.org/10.1017/amj.2022.22 Published online by Cambridge University Press

In the face of this truism, more effective strategies are required in order to harness the requisite political will to counteract the troubling trend towards criminalization. One potential alternative strategy is to more aggressively incorporate the narratives highlighted in this Essay regarding the ways in which the criminalization of reproductive health care access harms *everyone*: those who face the actual threat of criminal liability *and* those who do not face a realistic threat of such liability but who are nevertheless harmed by reproductive criminalization. For instance, highlighting how the criminalization of reproductive health care access alters wealthy individuals' access to assisted reproductive technologies like surrogacy might aid in these efforts.[55] Focusing on an issue like birth choice, an issue which resonates with many traditional religious groups as well as a growing proportion of white women seeking home births, might be another effective method of drawing attention to the pervasiveness of reproductive criminalization.[56] The story of a poor, HIV-positive woman who is criminalized for breastfeeding could be reinforced with the story of upper-class women who are penalized for nursing their children past infancy.[57] Overall, if the narratives we use to describe how the criminalization of reproductive health care emphasize how such criminalization results in less choice and access for *many* types of groups and people, the political will to reverse criminalization efforts will fortify.

This approach is not new. Building political will often involves convincing disparate interest groups that their interests align. In his foundational article *Brown v. Board of Education and the Interest Convergence Dilemma*,[58] Derrick Bell, Jr. argues that school desegregation only occurred when a sufficient proportion of the white majority believed that desegregation would also benefit the interests of white people.[59] The history of reproductive rights activism, too, has powerful examples of different groups making common cause.[60] To employ this strategy involves risk, including a hypervigilance against abandoning the marginalized individuals who are harmed and focusing only on protection for more privileged groups.[61] The approach outlined above, however, avoids most of these pitfalls because it does not sideline the most marginalized members of a community in an effort to attain political success. Rather, it only draws a larger cross-section of affected populations into the conversation about the harms of reproductive criminalization.

Conclusion

We must not abandon the stories and experiences of those at the margins. Telling these stories is vital to the larger story of reproductive criminalization and how, if left unchecked, it can manifest in extreme outcomes.[62] But to share only these stories in an effort to advance awareness of the harms imposed by

[55]Certain states have historically criminalized surrogacy agreements. *See* MICH. COMP, LAWS ANN § 722.859 (2014) ("A participating party … who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than $10,000.00 or imprisonment for not more than 1 year, or both."). This is one area, however, where the trend is towards increasing decriminalization. *See* Joanna L. Grossman, *A New Age: New York Repeals Longstanding Criminal Ban on Surrogacy*, VERDICT (Feb. 22, 2021).

[56]Pager, *supra* note 14 (discussing the prosecution of Mennonite birth attendant); Nash, *supra* note 41, at 111–12 ("Home birth's modest growth has been largely driven by the shifting interests and commitments of white women, particularly affluent white women, who have turned to non-medicalized or quasi-medicalized birthing options to secure better health outcomes and increased birthing autonomy, and who have been largely able to do so free from the stigma of irresponsibility.").

[57]Purvis, *supra* note 51, at 417-18 (describing criminalization and stigmatization of extended breastfeeding practices).

[58]Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

[59]*Id.* at 523 ("[T]he principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

[60]Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U.L. REV. 453 (2014) (describing how feminists, the business lobby, and anti-abortion activists all worked towards the passage of the Pregnancy Discrimination Act).

[61]*See cf.* Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 561 (2019) (discussing the benefit and drawbacks of "assimilationist" social justice strategies and advocating for inclusive legal strategies).

[62]It continues to be true that the most extreme burdens will likely continue to be borne by those without race or class privilege, even as privileged individuals are affected in other ways. *See* Khiara M. Bridges, *Pregnancy and the Carceral State*,

https://doi.org/10.1017/amj.2022.22 Published online by Cambridge University Press

reproductive criminalization could impair the opportunity to unite broad populations against efforts to criminalize reproductive health care. The law generally—and criminal law specifically—shapes societal behavior and practices in meaningful ways that are not always fully captured by focusing solely on actual criminal prosecutions. And political realities suggest that reversing the trend towards the criminalization of reproductive health care access is unlikely to garner the broad support necessary: that is, unless we can meaningfully tell this larger story of broad harm. Reproductive criminalization is harming people: the harm simply materializes in many forms.[63] Each is a powerful story worth telling.

119 MICH. L. REV. 1187, 1200–01 (2021) ("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 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.").

[63]Mary Crossley, *Whack-a-Mole, Fungi, and Intersectionality, or What I've Learned from Health Justice*, Bill of Health (Sept. 14, 2021), https://blog.petrieflom.law.harvard.edu/2021/09/14/health-justice-intersectionality/ [https://perma.cc/N2EK-CY35] ("The health of rich and poor, of Black and White is all bound together. The ripple effects of an injustice that harms a marginalized group's health spread negative effects broadly.").

Cite this article: Boone, M. (2022), 'Reversing the Criminalization of Reproductive Health Care Access', *American Journal of Law & Medicine*, **48**, pp. 200–208. https://doi.org/10.1017/amj.2022.22