

Winter 2021

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Recommended Citation

Madeline Martin, *Pregnancy, Incarcerated: How Incarcerating Pregnant Women in the United States is Incompatible with Theories Justifying Punishment*, 32 *Hastings Women's L.J.* 53 (2020).
Available at: <https://repository.uchastings.edu/hwj/vol32/iss1/7>

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Pregnancy, Incarcerated: How Incarcerating Pregnant Women in the United States is Incompatible with Theories Justifying Punishment

*Madeline Martin**

INTRODUCTION

What started with a suspended driver's license soon turned into a post-traumatic stress inducing nightmare for expecting mother Jessica Preston. On March 15, 2016, Preston was driving in Macomb County, Michigan when she was pulled over because of a rosary hanging from and obstructing her rear-view mirror.¹ Upon running her information, authorities arrested Preston because she was driving with a suspended license.² The judge set her bond at an unpayable \$10,000 and she was booked into Macomb County Jail that same day.³ After her booking, jail officials discovered Preston was nearly eight months pregnant and had a scheduled cesarean section for April 26, 2016.⁴ Preston attempted to explain that the pregnancy was deemed high-risk,⁵ but jail officials did not create a treatment plan for Preston for another two days.⁶

Five days after being booked and while awaiting her pretrial hearing, Preston went into labor on March 20th, over a month earlier than her

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1. Click On Detroit | Local 4 | WDIV, *Woman Forced to Give Birth on Floor of Macomb County Jail Cell Files Lawsuit Against County*, YOUTUBE (July 28, 2018), https://www.youtube.com/watch?v=IFlopSnW_gE [<https://perma.cc/4D5U-2ELA>].

2. *Id.*

3. James Cook, *Doctor Added to Macomb County Jail Birth Lawsuit*, MACOMB DAILY (Aug. 9, 2019), https://www.macombdaily.com/news/copscourts/doctor-added-to-macomb-county-jail-birth-lawsuit/article_4288b0c4-bb19-11e9-a42f-13b44ad4c17e.html [<https://perma.cc/PM9V-STKD>].

4. *See id.*

5. The Associated Press, *Woman Who Gave Birth in Jail Sues Macomb County*, THE DETROIT NEWS (July 25, 2018), <https://www.detroitnews.com/story/news/local/macomb-county/2018/07/25/woman-gave-birth-jail-sues-macomb-county/37112435/> [<https://perma.cc/3TNU-MW4C>].

6. Cook, *supra* note 3.

scheduled cesarean.⁷ While experiencing contractions between 7:30 am and 12:00 pm, Preston was shuttled between her own cell and a medical cell twice before the jail medical staff ultimately placed her in an uncleaned medical cell at 1:30 pm.⁸ Preston gave birth vaginally to her son on the floor of the cell surrounded by jail medical staff just over an hour later, and she remained in jail until May 28, 2016.⁹

Less than two years later five states away, Diana Sanchez went into labor on July 31, 2018, in Colorado's Denver County Jail.¹⁰ Sanchez was booked at eight months pregnant on July 14, 2018 for a probation violation for cashing a check with her sister's name on it.¹¹ Jail officials were aware of her advanced pregnancy as Sanchez was moved to a medical unit and informed guards multiple times when she began experiencing contractions.¹²

Surveillance footage from inside Sanchez's locked cell shows she began laboring alone.¹³ After knocking on the window of her cell and apparently speaking with someone on the other side of the glass, a small, folded absorbent pad – the same sort that pet owners often use for their dogs to urinate indoors – was slid underneath the crack of the cell door.¹⁴ This was the last interaction Sanchez had with any staff or medical personnel before the surveillance video shows Sanchez writhing in pain on the unfolded pad on a cot.¹⁵ At one point, a guard looked into the cell, as Sanchez was agonizing in pain, before he walked away.¹⁶ Only after Sanchez gave birth and the baby was completely delivered did someone enter the cell to examine the newborn.¹⁷

For too many, Jessica Preston and Diana Sanchez are the pictures of what modern incarcerated pregnancy looks like. Both women filed lawsuits against the jails for violating their civil rights based on the treatment during their respective deliveries and the lack of adequate medical care, resulting

7. Cook, *supra* note 3.

8. *Id.*

9. *Id.*; Click on Detroit, *supra* note 1.

10. Mariel Padilla, *Woman Gave Birth in Denver Jail Cell Alone, Lawsuit Says*, N.Y. TIMES (Sept. 1, 2019), <https://www.nytimes.com/2019/09/01/us/diana-sanchez-birth-denver-jail.html?login=smartlock&auth=login-smartlock> [https://perma.cc/3EFA-2EXV].

11. *Id.*

12. *Id.*

13. Scott McLean, *A Denver woman is suing after giving birth in a jail cell. The sheriff's department says it acted by the book.*, CNN (Aug. 13, 2019), <https://www.cnn.com/2019/08/30/us/denver-birth-in-jail-lawsuit/index.html> [https://perma.cc/Y94Y-C22A].

14. *Id.*

15. Amanda Woods, *Woman in labor said she was ignored as she gave birth alone in jail*, N.Y. POST (Aug. 29, 2019), <https://nypost.com/2019/08/29/woman-in-labor-said-she-was-ignored-as-she-gave-birth-alone-in-jail/> [https://perma.cc/6M7W-DBAQ].

16. See McLean, *supra* note 13.

17. *Id.*

in trauma suffered by both women in the form of flashbacks.¹⁸ For Preston, flashbacks have become so severe that she was subsequently diagnosed with PTSD.¹⁹ In addition to the alleged civil rights violations, could Preston and Sanchez seek recourse against jail *staff* or personnel individually for having negligently handled their deliveries while in custody?

According to both counties, jail staffs' handling of both births properly comported with policies to handle pregnant inmates giving birth.²⁰ In Preston's case, Macomb County Sheriff Anthony Wickersham explained that he was "one hundred percent" confident everything the jail medical staff did was "within procedures," including checking Preston twice the morning she gave birth before returning her to her cell after not believing she was in labor. This was a decision that delayed the amount of time needed to get Preston to a hospital.²¹ Denver County Sheriff Department spokesperson Daria Serna expressed similar sentiments as Wickersham, explaining that after an internal review, jail deputies took "appropriate actions" and followed proper "protocol and policies" in handling Sanchez's delivery.²²

It seems archaic that in this century, policies allowing pregnant women to deliver their children on concrete floors, completely alone, and without the supervision of medical staff still exist in the world, let alone in the United States. Macomb County Corporation counsel John Schapka summed up a potential rationale behind such policies, while speaking about Preston's case, stating that "there is no constitutional right to be born in a hospital, or any collateral right to be born outside a jail."²³

Be that as it may (indeed, nowhere in the Constitution did the framers explicitly mention birth location), the visceral images of mothers bringing infants into the world within the confines of their concrete imprisonment seem wholly inconsistent with our culture, values, and ideals. Is incarcerating pregnant women consistent with theories behind why we punish?

18. The Associated Press, *supra* note 5; Padilla, *supra* note 10.

19. The Associated Press, *supra* note 5.

20. See Mark Hicks, *Macomb County Jail birth sparks controversy*, DETROIT NEWS (Feb. 7, 2017), <https://www.detroitnews.com/story/news/local/Macomb-county/2017/02/07/macomb-county-jail-birth-sparks-controversy/97620608/> [<https://perma.cc/8Y4G-VH66>]; see also Padilla, *supra* note 10.

21. Haley Goldberg, *A Michigan Woman Says She Was Forced to Give Birth in Jail*, SELF (Feb. 14, 2017), <https://www.self.com/story/michigan-woman-gives-birth-in-jail> [<https://perma.cc/URB7-RDV6>]; see Hicks, *supra* note 20.

22. Allyson Chiu, *'Nobody cared': A woman gave birth alone in a jail cell after her cries for help were ignored, lawsuit says*, WASH. POST (Aug. 29, 2019), <https://www.washingtonpost.com/nation/2019/08/29/pregnant-woman-diana-sanchez-birth-alone-jail-cell-denver/> [<https://perma.cc/C6HH-RY55>] (Following the internal review after Sanchez's delivery, Denver County Jail's policies were updated to ensure mandatory transport to a hospital for pregnant inmates at any stage of labor.); Padilla, *supra* note 10.

23. The Associated Press, *supra* note 5.

Jessica Preston and Diana Sanchez merely scratch the surface of giving a face to the population of incarcerated pregnant women in the United States. This examination will begin by taking a closer look at who these women are at both the state and federal prison level, starting with a data-based breakdown of female incarceration trends. It will then turn to exploring the varied theories underlying punishment administered by the state before finally examining whether incarceration of pregnant women in the United States can be reconciled with these theories.

Who is the state imprisoning? A statistical overview

Those who are considered under correctional supervision within government jurisdiction constitutes a broad array of different situations, including probation, local jails, state prisons, and federal prisons.²⁴ Correctional jurisdiction is far reaching, as prisoners under jurisdiction of federal or state officials can be held in either secure or non-secure facilities that can be privately or publicly funded.²⁵ Unless indicated otherwise, the Bureau of Justice Statistics²⁶ tabulates figures based on the total number of prisoners under federal or state jurisdiction, regardless of where the prisoner is actually held.²⁷

Overall, federal prison numbers are consistently less than the number of state prisoners. Recent figures from the end of 2017 reflect that the total number of both men and women incarcerated under federal jurisdiction was 183,058, while the total number of men and women incarcerated under state jurisdiction was 1,306,305.²⁸ The number of women prisoners under federal and state jurisdiction trend similarly to these overall numbers, with a total of 11,272 women under federal jurisdiction and a total of 93,761 women under state jurisdiction in 2017.²⁹

24. See generally Lawrence A. Greenfeld & Tracy L. Snell, *Women Offenders*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (2000), <https://www.bjs.gov/content/pub/pdf/wo.pdf> [<https://perma.cc/JV8J-VSGW>]; see also *Incarcerated Women and Girls*, THE SENTENCING PROJECT (June 6, 2019), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> [<https://perma.cc/5NPR-87CS>] [hereinafter *Incarcerated Women and Girls*].

25. Jennifer Bronson, Ph.D. & E. Ann Carson, Ph.D., *Prisoners in 2017*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS 1, 2 (Apr. 2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/K7NP-VXDQ>].

26. The Bureau of Justice Statistics is the office that keeps official prisoner statistics and it is located within the Office of Justice Programs, which itself is a branch of the U.S. Department of Justice.

27. Bronson & Carson, *supra* note 25, at 5.

28. *Id.* at 3.

29. *Id.* at 7.

These totals reflect a continuing trend of a decrease in the overall prison population.³⁰ Between 2007 and 2017, the total number of men and women under federal jurisdiction dropped 8.3%, and in the same time frame, the total number of men and women under state jurisdiction dropped 6.5%.³¹

While the percentages indicating a national decarceration trend seem promising, a closer look at the data reveals that male prisoner populations are benefitting from decarceration efforts disproportionately compared to females.³² Of the decreased federal and state prison rates between 2007-2017, 7.1% were men while only 2.6% were women.³³ Thus, even though the total number of incarcerations decreased within the last decade, the bulk of the decrease has been in male populations.³⁴

This disparity is more stark in, and primarily driven by, states (as opposed to people under federal jurisdiction).³⁵ Despite the national overall decarceration trend, and taking into account that the total number of men incarcerated in state prison is vastly greater than the number of women, the rate at which women are incarcerated has grown immensely in recent decades.³⁶ Between 1980 and 2017, the number of women incarcerated jumped over 750%, from 26,378 in 1980 to 225,060 in 2017.³⁷ And since 1978, the women's state prison populations more than doubled the pace of growth among men's state prison populations.³⁸

The differences in state-level trends of female imprisonment are vast and varied between states.³⁹ At the state level, incarcerated women's population numbers have fared worse than men since 2009 in 35 states.⁴⁰ In other words, in some states between 2009-2015, women's populations grew steadily while male populations declined.⁴¹ In other states, both men

30. I will use the term "decarcerat[ion]" henceforth to refer to the trend of decreasing incarceration rates and prison numbers.

31. Bronson & Carson, *supra* note 25, at 3.

32. Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POLICY INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [<https://perma.cc/658W-B4ZK>].

33. Bronson & Carson, *supra* note 25, at 3.

34. *Id.*

35. Sawyer, *supra* note 32.

36. Jenni Vainik, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 FAM. CT. REV. 670, 670 (2008); Sawyer, *supra* note 32 (describing the female prison numbers as "skyrocketing").

37. *Incarcerated Women and Girls*, *supra* note 24.

38. Sawyer, *supra* note 32.

39. *See id.*

40. *Id.*

41. *Id.* (Indicating how in "2009-2015, Michigan reduced the number of men incarcerated in its state prisons by 8% but incarcerated 30% more women. During the same time period in Iowa and Washington state, the reductions those states made in men's state prison populations were completely cancelled out by the increase in women's state prison populations.").

and women's populations grew but women's growth outpaced men's population growth.⁴² And in other states still, trends have swung more in women's favor as women's populations are decarcerating at a faster rate than men.⁴³ The data coming from each state is wildly different, paints a convoluted picture, and raises arguably more questions than answers. But such diverse results across the board suggest that policies at the *state* and *local* levels are playing a huge role and serve as a driving force behind women's incarceration rates.⁴⁴

The type of offenses women are incarcerated for are also notable. According to a 2000 BJS report, women comprise only 14% of all violent offenders.⁴⁵ And almost 75% percent of violent offenses committed by women were simple assaults, as opposed to sexual assaults, robberies, or aggravated assaults.⁴⁶ For comparison, just over 50% of violent offenses committed by men are simple assaults.⁴⁷ Moreover, most women held accountable for crimes classified as violent tend to fall on the least violent side of the spectrum.⁴⁸ Instead, women are increasingly imprisoned for drug and non-violent offenses related to poverty.⁴⁹ For example, in a span of ten years between 1986-1996, women arrested for drug offenses climbed 888%.⁵⁰ These trends suggest that women as a whole pose a lower safety risk than men.⁵¹

Data suggests that policies starting in the late 2000's have trended towards overall decarceration, yet data also indicates an overall growth of women's incarceration rates simultaneously. How can these positions be

42. Sawyer, *supra* note 32. (explaining how the growth of women's populations in four states drove increases in total state prison populations between 52%-97%).

43. *Id.* (describing how "California and New Jersey, state decarceration efforts across the entire system resulted in women's populations faring better than men's populations since 2009").

44. *Id.*

45. Greenfeld & Snell, *supra* note 24, at 1.

46. *Id.* at 2.

47. *Id.*

48. Allison L. Smock, *Childbirth in Chains: A Report on the Cruel but Not So Unusual Practice of Shackling Incarcerated Pregnant Females in the United States*, 3 TENN. J. RACE, GENDER, & SOC. JUST., 112, 114 (2014), <https://trace.tennessee.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1056&context=rgsj> [<https://perma.cc/B9MV-EJ2W>].

49. Marc Mauer, Cathy Potler, and Richard Wolf, *Gender and Justice: Women, Drugs and Sentencing Policy*, THE SENTENCING PROJECT, 2 (1999), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Gender-and-Justice-Women-Drugs-and-Sentencing-Policy.pdf> [<https://perma.cc/G5RS-Y94N>]; Becki Ney, Rachelle Ramirez, and Dr. Marilyn Van Dieten, *Ten Truths that Matter When Working with Justice Involved Women*, NATIONAL RESOURCE CENTER ON JUSTICE INVOLVED WOMEN i, 1 (2012), http://cjinvolwedwomen.org/wp-content/uploads/2015/09/Ten_Truths.pdf [<https://perma.cc/JW4V-TDT6>].

50. Mauer et al., *supra* note 49, at 2.

51. Ney et al., *supra* note 49, at 1.

reconciled? Underlying the present criminal justice system is a design that was created for male prisoners, so one possible explanation may be found by analyzing the system trying to fit women prisoners into this male-centric mold, ultimately working against present decarceration efforts.⁵² Criminologist Meda Chesney-Lind explains the underpinnings of this phenomenon, writing how “[l]ittle or no thought was given to the possibility of a female prisoner until she appeared at the door of the institution. It was as though crime and punishment existed in a world in which gender equaled male.”⁵³ With the implementation of zero-tolerance policies during the war on drugs era in the 1970s and 1980s, incarceration rates for both men and women skyrocketed.⁵⁴ Yet, in the wake of the civil rights and women’s rights movements, criminal justice facilities adopted gender-neutral policies.⁵⁵ While the theory behind adopting these gender-neutral policies may have been in an effort to increase parity in the criminal justice system, melding women into a male-designed penal model may in fact be the very thing hampering female decarceration. Thus, it is possible that viewing women’s incarceration as an “afterthought” has hindered overall decarceration efforts for the female population.⁵⁶

Mothers as Prisoners

As rates of women prisoners increased, the number of children with incarcerated mothers, predictably, increased as well.⁵⁷ Between 1991 and 2007, the number of minor children with a parent, mother or father, in state and federal prison increased from 945,600 to 1,706,600.⁵⁸ During this time frame, the number of children with a mother in prison increased more than twofold in a 131% increase, and the number of children with a father in prison rose 77%.⁵⁹ This faster rate of growth in the number of mothers in state and federal prison is consistent with the faster rate of growth in the

52. See generally Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1243 (2012).

53. Ocen, *supra* note 52, at 1243.

54. Sarah Yager, *Prison Born*, THE ATLANTIC (July/Aug. 2015), <https://www.theatlantic.com/magazine/archive/2015/07/prison-born/395297/> [<https://perma.cc/E8L4-7GMJ>].

55. *Id.*; Colleen Mastony, *Childbirth in Chains*, THE CHICAGO TRIBUNE (July 18, 2010), <https://www.chicagotribune.com/news/ct-xpm-2010-07-18-ct-met-shackled-mothers-20100718-story.html> [<https://perma.cc/LT5Q-DXQM>].

56. See Sawyer, *supra* note 32.

57. See generally Laura E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (2010), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> [<https://perma.cc/Z9FK-BPR8>].

58. *Id.* at 2.

59. Glaze & Maruschak, *supra* note 57, at 2.

number of incarcerated women overall.⁶⁰ A 2000 Bureau of Justice Statistics (BJS) report reflected that women under any sort of supervision by criminal justice system agencies were mothers to an estimated 1.3 million minor children.⁶¹ According to a 2004 BJS report, the majority of prisoner's with children reported having a minor child under the age of 18.⁶² Over a third of those minor children would reach the age of maturity (18) before their parent would be released from prison.⁶³

Approximately 70% of women under correctional supervision have minor children under the age of 18: 72% of women on probation, 70% of women held in local jails, 65% of women in state prisons, and 59% of women in federal prisons.⁶⁴ Women on probation reported having the fewest minor children, with an average of 2.07, while women in state prison reported the highest for an average of 2.38 minor children.⁶⁵ Women are also disproportionately represented in local jails even after being convicted,⁶⁶ and some estimates range as high as 80% of women in local jails are mothers.⁶⁷

Expectant Mothers as Prisoners

Despite the plethora of incarceration statistics and data, similar data is less prevalent for women who are incarcerated while pregnant. The federal government does not require data collection on pregnancy and childbirth for female inmates, and the data that *is* available from U.S. federal agencies is scant and out of date.⁶⁸ A 2000 BJS report from 2000 reflected that 6%

60. See Glaze & Maruschak, *supra* note 57, at 2.

61. Greenfeld & Snell, *supra* note 24, at 1.

62. Glaze & Maruschak, *supra* note 57, at 2.

63. *Id.* at 4.

64. Greenfeld & Snell, *supra* note 24, at 7; see also *Incarcerated Women and Girls*, *supra* note 24.

65. Greenfeld & Snell, *supra* note 24, at 7-8.

66. Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pic2019women.html> [<https://perma.cc/MH34-C758>] ("Even once convicted, the system funnels women into jails: About a quarter of convicted incarcerated women are held in jails, compared to about 10% of all people incarcerated with a conviction.").

67. *Id.*; Wanda Bertram and Wendy Sawyer, *Jail will separate 2.3 million mothers from their children this year*, PRISON POLICY INITIATIVE (May 13, 2018), <https://www.prisonpolicy.org/blog/2018/05/13/mothers-day-2018/> [<https://perma.cc/PYP4-Q7M3>].

68. Lori Teresa Yearwood, *Pregnant and Shackled: Why Inmates are Still Giving Birth Cuffed and Bound*, THE GUARDIAN (Jan. 24, 2020), https://www.theguardian.com/us-news/2020/jan/24/shackled-pregnant-women-prisoners-birth?fbclid=IwAR1WxcivwX1SHelnB1yH8tkUeIsbAsR66aADSwbjN4_UtyNsYgurjpLWA-I [<https://perma.cc/57VZ-3X46>]; see *First of its Kind Statistics on Pregnant Women in U.S. Prisons*, JOHNS HOPKINS MEDICINE (Mar. 21, 2019), <https://www.hopkinsmedicine.org/news/newsroom/news-releases/first-of-its-kind-statistics-on-pregnant-women-in-us-prisons> [<https://perma.cc/96J6-TKYF>] [hereinafter JOHNS HOPKINS]; see Victoria Law, *U.S. Prisons and Jails Are*

and 5% of women admitted into local jails and state prisons, respectively, were pregnant at the time of admission.⁶⁹ Further, 3% and 4% of women who were admitted into local jails and state prisons, respectively, received prenatal care at some point since their admission.⁷⁰ A 2004 BJS report reflected even smaller numbers, finding that 3% of women in federal prisons and 4% of women in state prisons were pregnant at intake.⁷¹ But historically, these numbers have not been tracked even though most incarcerated women in America are of reproductive age.⁷² In fact, until a groundbreaking Johns Hopkins Medicine study was conducted between 2016-2017, the 2000 and 2004 BJS reports were the only official data on pregnancy information and prevalence in U.S. prisons.⁷³

Johns Hopkins' study was conducted across 22 state and federal prisons comprising 57% of all imprisoned women in the United States for twelve months between 2016 and 2017.⁷⁴ Overall, the results of the study were positive. The study found that 1,396 women were pregnant at intake. Of the 819 pregnancies that ended while the women were in custody during the course of the study, a total of 753, or over 90%, of these pregnancies ended in live births.⁷⁵ Further, there were no maternal deaths. Only 6% of the live births were preterm, a figure that is interestingly 4% lower than general population percentage of live births at 10%.⁷⁶ The percentage of births delivered by cesarean section while in custody was marginally more consistent with the percentage of cesarean births in the general population, at 30% and 31.9%, respectively.⁷⁷

Given the variables at play, including differences in reproductive healthcare pre-incarceration and between individual prisons and prison systems, these percentage discrepancies are difficult to account for, and results varied widely by state.⁷⁸ Additionally, researchers cautioned against drawing sweeping conclusions from some of these figures and acknowledged that the study had limitations. For instance, how far along

Threatening the Lives of Pregnant Women and Babies, IN THESE TIMES (Sept. 28, 2015), <http://inthesetimes.com/article/18410/u.s.-prisons-are-threatening-the-lives-of-pregnant-mothers-and-newborns> [<https://perma.cc/8S4W-BFE7>].

69. Greenfeld & Snell, *supra* note 24, at 8.

70. *Id.*

71. JOHNS HOPKINS, *supra* note 68.

72. *Id.* (At the end of 2016, the BJS reported that there were 110,000 women incarcerated in federal and state prisons, with 75% of these women aged 18-44.).

73. *Id.*

74. *Id.* (This study did not follow women under the supervision of correctional officials in all forms. Notably, women incarcerated in local jails were not included.).

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.* (For example, whereas 3.30% of the pregnancies ended in miscarriage across the study, 20% or more of the pregnancies in Kansas, Vermont, and Arizona ended in miscarriage.).

women were in their pregnancies at intake and variance in prison living conditions were not assessed in the study.⁷⁹ Three large prison systems declined participation as well, so the numbers reflected by the study are, statistically, much lower than the actual number of pregnant women incarcerated.⁸⁰ Further, this purely statistical analysis did not include interviews or correspondence with incarcerated pregnant women to gain insight into individual treatment and experiences of the women.⁸¹ Nevertheless, the data provides a useful look into a previously unstudied population, and it shows that pregnancy behind bars does indeed exist.

Policies for pregnant mothers who are imprisoned

Healthcare as a general right for prisoners is a relatively modern concept, with the Supreme Court not holding until 1976 that “deliberate indifference” to a prisoner’s serious medical needs constitutes the “unnecessary and wonton infliction of pain” prohibited by the Eighth Amendment.⁸² Indeed, even over forty years later, there are no mandatory standards of care for pregnant women incarcerated in the United States.⁸³ The Federal Bureau of Prisons’ governing policy simply states that, “[t]he Warden shall ensure that each pregnant inmate is provided medical, case management, and counseling services” and “[m]edical staff shall arrange for the childbirth to take place at a hospital outside the institution.”⁸⁴ Yet these lone rules in the Code of Federal Regulations are wide open for interpretation and allow for exercising broad discretion between federal and state prison systems and within and amongst individual state prisons and jails. Because there are no universal standardized guidelines, states vary widely on their policies that govern the care of pregnant inmates.⁸⁵ And while organizations such as the National Commission on Correctional Health Care and the American College of Obstetricians and Gynecologists

79. JOHNS HOPKINS, *supra* note 68.

80. *See id.* (stating that California, New York, and Florida did not participate).

81. *Id.*

82. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia* 428 U.S. 153, 173 (1976)).

83. JOHNS HOPKINS, *supra* note 68; *see* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES, COMMITTEE OPINION NO. 511 (Nov. 2011), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/11/health-care-for-pregnant-and-postpartum-incarcerated-women-and-adolescent-females> [<https://perma.cc/4JT3-NMZD>] [hereinafter AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS].

84. 28 C.F.R. § 551.22 (a), (c) (1994); Vainik, *supra* note 36, at 677.

85. *See e.g.*, JOHN HOPKINS, *supra* note 68 (acknowledging that discrepancies in prison health care and prenatal policies between facilities may have been a limitation in their study and results).

have created minimum standards for pregnancy-related care in correctional facilities, these guidelines are strictly optional.⁸⁶

For example, one such policy rife with debate in recent years that warrants a closer examination is the use of restraints on pregnant women in jails and prisons.⁸⁷ Commonly known as “shackling,” the practice involves applying restraints to physically restrict or control a prisoner’s movement.⁸⁸ Restraints can be applied in different ways and combinations, including iron chains around the ankles, a belly-chain around the abdomen, handcuffs around the wrists in front of the body or behind the back, or even connecting one prisoner to another.⁸⁹

All inmates, male or female, are shackled to some degree when transported out of a correctional facility for a court appearance or hospital visit because of the inherent flight risk posed by removing them from the secure facility.⁹⁰ However, the use of such chains for pregnant incarcerated women has been condemned widely by mothers and activist groups such as the American College of Obstetricians and Gynecologists, the American Medical Association, the American Psychological Association, and the American Civil Liberties Union, among others.⁹¹ Such groups argue that the practice is unnecessary, inhumane, and logically unwarranted in the context of pregnancy to prevent absconding.⁹²

More importantly, shackling poses significant danger and health risks to expecting mothers and their baby.⁹³ Pregnant women are at higher risk of falling due to loss of balance, and shackling exacerbates this risk by

86. See AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 83; Chloe Atkins, *New Law Ends Use of Restraints on Pregnant Inmates as Advocates Push for More to Be Done*, NBC NEWS (May 25, 2019), <https://www.nbcnews.com/politics/donald-trump/new-law-ends-use-restraints-pregnant-inmates-advocates-push-more-n1007526> [<https://perma.cc/G8HL-KRF8>].

87. See *The Use of Restraints on Pregnant Women in Jails and Prisons*, National Resource Center on Justice Involved Women (last accessed Apr. 4, 2020), <https://cjinvolwedwomen.org/the-use-of-restraints-on-pregnant-women-in-jails-and-prisons/> [<https://perma.cc/4BX3-NTMP>] [hereinafter *The Use of Restraints on Pregnant Women in Jails and Prisons*].

88. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 83; CAROLYN SUFRIN, *JAILCARE: FINDING THE SAFETY NET FOR WOMEN BEHIND BARS* 147-48 (1st ed. 2017).

89. Sufrin, *supra* note 88, at 147-48.

90. *Id.* at 147.

91. *An “Act to prohibit the shackling of pregnant prisoners” model state legislation*, AMERICAN MEDICAL ASSOCIATION ADVOCACY RESOURCE CENTER (2015) [hereinafter *Act to prohibit the shackling of pregnant prisoners*]; see also *The Use of Restraints on Pregnant Women in Jails and Prisons*, *supra* note 87.

92. *Act to prohibit the shackling of pregnant prisoners*, *supra* note 91; Vainik, *supra* note 36, at 678.

93. *Act to prohibit the shackling of pregnant prisoners*, *supra* note 91; Vainik, *supra* note 36, at 678; *The Use of Restraints on Pregnant Women in Jails and Prisons*, *supra* note 87.

further compromising a woman's balance and preventing a woman from bracing herself during a fall.⁹⁴ Shackling also poses serious health risks if a doctor cannot adequately perform an exam or take necessary actions, and it can hinder emergency procedures if required.⁹⁵ Further, shackles prevent a pregnant woman from shifting positions during labor or childbirth.⁹⁶ Not only can this cause pain and discomfort but also serious and sometimes long-lasting physical and mental maladies.⁹⁷

The growing international and national debates surrounding the shackling of pregnant inmates have sparked recent policy changes. In 2010, the United Nations (U.N.) adopted what are known as the Bangkok Rules, outlining guidelines for the treatment of female prisoners and for non-custodial measures for women offenders.⁹⁸ The U.N. took a strong stance against custodial measures for pregnant incarcerated women, emphasizing that "when sentencing or deciding on pretrial measures for a pregnant woman . . . non-custodial measures should be preferred where possible and appropriate..."⁹⁹ Moreover, the U.N. explicitly banned using shackles or restraints in Rule 24, stating that "[i]nstruments of restraint shall never be used on women during labour, during birth and immediately after birth."¹⁰⁰

Some states have been in lockstep with and even ahead of these international guidelines. In 1999, Illinois became the first state to ban the practice for women in labor or in transport to a hospital to deliver a child, followed by California adopting a similar policy in 2005.¹⁰¹ Other states soon followed suit and adopted their own policies, and according to a 2017 report by the American Psychological Association, 30 states had some policy or initiative to provide some level of protections against the use of restraints on incarcerated pregnant women.¹⁰² Finally, the Bureau of

94. AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 83; Smock, *supra* note 48, at 121.

95. Smock, *supra* note 48, at 119.

96. *Id.* at 21.

97. See *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 526-26 (8th Cir. 2009) (stating pregnant plaintiff was forced to endure final stages of labor with each leg shackled to opposite sides of a gurney which led to permanent hip injuries, torn stomach muscles, and permanent inability to bear full weight on one side of her body); see also Elizabeth Alexander, *Unshackling Shawanna: The Battle over Chaining Women Prisoners During Labor and Delivery*, 32 UNIV. OF ARK., LITTLE ROCK L. REV. 435, 441 (2010).

98. *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, The Economic and Social Council, 45th plenary meeting (July 22, 2010) <https://www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf>.

99. *Id.*

100. *Id.* at Rule 24.

101. Mastony, *supra* note 55; Sufirin, *supra* note 88, at 149 (stating California prohibited shackling of pregnant women in transport).

102. Public Interest Government Relations Office, *End the Use of Restraints on Incarcerated Women and Adolescents*

Prisons ended shackling pregnant inmates as a routine in all federal correctional facilities in 2008.¹⁰³

Yet despite the international and national movements and bans against shackling, the practice still persists in state correctional facilities today. Not all states have adopted policies banning the practice, and the states that have some sort of policy vary widely from one another.¹⁰⁴ Unfortunately, even in states that do ban the practice, shackling still often occurs. Despite the federal ban, state correctional facilities are free to adopt their own policies, and pregnant women are shackled often based on the mercy of whatever guard is with them.¹⁰⁵ Shackling is a gruesome, visceral example of inconsistencies in law and policy affecting thousands of pregnant incarcerated women at state and federal level.

Punishment – An Overview of Modern Justifications

There are inconsistencies facing pregnant prisoners at nearly every turn, from numbers of pregnant women incarcerated to varying policies regarding the treatment and care of pregnant prisoners. Could there be inconsistencies in the reasonings behind why these women are imprisoned in the first place? And is incarcerating pregnant women consistent with justifications for legal punishment in the United States?

Noli me tangere – The Evolution of Modern Punishment

Before analyzing different punishment models, it is worth exploring a brief historical overview for background and context that gave rise to more modern theories beginning around the late eighteenth-century Enlightenment period in Europe. Prior to such reform movements, punishment administered by the state mostly included torture, public

during Pregnancy, Labor, Childbirth, and Recovery, AM. PSYCH. ASS'N (Aug. 2017), <https://www.apa.org/advocacy/criminal-justice/shackling-incarcerated-women.pdf>.

103. The Rebecca Project for Human Rights, *Mothers Behind Bars: A state-by-state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children*, NAT'L WOMEN'S L. CENTER, Oct. 2010, at 11, <https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf> [hereinafter *Mothers Behind Bars*]; Vania Leveille, *Bureau of Prisons Revises Policy on Shackling of Pregnant Inmates*, AM. CIV. LIBERTIES UNION (Oct. 20, 2008), <https://www.aclu.org/blog/bureau-prisons-revises-policy-shackling-pregnant-inmates> [<https://perma.cc/2F76-PLAK>].

104. *Mothers Behind Bars*, *supra* note 103, at 17 (A study rated state correctional facilities on their shackling policies using the categories “No restraints any time,” “Handcuffs during transportation OR after delivery,” “Handcuffs during transportation AND after delivery,” and “No limits when restraints are used, or leg irons and waist chains are allowed, or no policy,” and it found that state policies existed in every category).

105. Yearwood, *supra* note 68; Mastony, *supra* note 55.

humiliation and spectacle, or public execution.¹⁰⁶ Progressing into a more modern era, the role of God's judgment in delivering the sentence and the sovereign appointing magistrates to the role of all-powerful inquisitor began to fade.¹⁰⁷ As society evolved during the Enlightenment, a legitimate limit to the state's power to punish began to emerge for the first time.¹⁰⁸

French philosopher and famed social theorist Michel Foucault uses the Latin phrase *noli me tangere* – “touch me not” – to illustrate this shift in conceptualizing punishment and the revolution from physical torture and inquisitions to the idea of *humane* punishment.¹⁰⁹ The sovereign was becoming increasingly powerless, no longer blindly equipped with divine right from God to inflict corporeal torture on his citizens.

Societal changes, particularly economic, during the same time this paradigm shift was gaining traction complicated but helped develop reformers' movements. Economic changes in society began to shift the nature of criminality.¹¹⁰ Crime became less violent as economic growth, demographic expansion, and the rise of the new bourgeois classes contributed to increased property crimes such as theft and fraud.¹¹¹ Reciprocally, punishment became incrementally less severe, albeit at a much slower rate than the proliferation of new crime, and the pardon or show of mercy became less frequent as it became seen as less necessary with the implementation of less severe punishments.¹¹²

With increasing economic offenses, penal controls and interventions correspondingly grew in number. Such intolerance for these growing offenses also led to premature interventions, which in turn contributed to imbalances of power on both sides.¹¹³ Powerful prosecution measures against the completely non-equipped accused were sometimes overcorrected by judges with broad discretion.¹¹⁴ This “dysfunction” of power was growing, with increasing loopholes, imbalances of power between judges and barristers, and unequal application.¹¹⁵ Yet at its core, the principle goal of the reform movement was to streamline power to make punishment distribution more even and thus, equitable for each individual comprising the society.¹¹⁶

106. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 5-7 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

107. FOUCAULT, *supra* note 106, at 40, 57.

108. *Id.* at 74.

109. *Id.* at 74, 91.

110. *Id.* at 75.

111. *Id.* at 75-76, 84.

112. *Id.* at 75-76; CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 283 (Joseph E. Jacoby ed., Classics of Criminology, 2d ed. 1994) (1764).

113. FOUCAULT, *supra* note 106, at 78.

114. *Id.* at 79.

115. *See id.* at 79-80.

116. *Id.* at 80.

New goals to satisfy this strategy took hold, including a chief objective of making punishment more regular in order to function “coextensive[ly]” with society. Punishing *better* became the goal, with the severity of punishment reduced for the purpose of more universality. This was essential to drive the power to punish deeper into the social conscious.¹¹⁷ Concurrently with the rise in property crimes proliferating at booming ports, flourishing workshops, and with new modes of investment, criminality continued expanding.¹¹⁸

Legislation began to emerge to properly define illicit criminal practices and to assure punishment, though inconsistencies still had not yielded consistent nor proportional punishments to the offenses.¹¹⁹ While revolutionary at the time, this idea of crimes set forth by legislative statute is a fundamental tenant of our justice system today, and it was prescient of what is modernly known as “principle of legality.” This principle requires that all crime and any punishment stemming from its commission must have been previously defined by statute.¹²⁰ In other words, there must be a law passed by the legislature criminalizing a behavior before someone can be convicted of that crime, and a law passed afterwards cannot be retroactively applied against an individual. The clear codification of crimes during this early reform period helps explain how widespread punishment became not only accepted, but expected, leading to a general consensus of the state’s power to punish.¹²¹

These foundational ideas help explain the modern acceptance of our carceral state.

Theories of Punishment – Retributivism Versus Utilitarianism

Embedded within the reform movement of the eighteenth century and continuing into our penal system today are different rationales, or justifications, for the state’s ability to inflict punishment upon its citizens. Though many different nuances of these theories exist, most fall within two broad categories: retributivism and utilitarianism.¹²² A primary distinction between these two theories is where the power to punish comes from. For retributivists, punishment is purely intrinsic, whereas utilitarianists

117. FOUCAULT, *supra* note 106, at 82.

118. *Id.* at 85.

119. *Id.* at 86.

120. JOSHUA DRESSLER, CRIMINAL LAW BLACK LETTER OUTLINES 5 (West ed., 2nd ed. 2010) <http://euro.ecom.cmu.edu/program/law/08-732/Types/DresslerCriminal.pdf>; *see e.g.*, *Keeler v. Superior Court*, 2 Cal. 3d 619, 633 (1970) (holding that there is a violation of Due Process where a court applies an expanded definition criminal statute retroactively to a person’s conduct).

121. FOUCAULT, *supra* note 106, at 89.

122. DRESSLER, *supra* note 120, at 3.

conceptualize punishment as an extrinsic means to an end.¹²³ Both theories endorse proportionality as an essential component of punishment, meaning that the punishment should fit the crime.¹²⁴

Retributivist Models of Punishment

For a retributivist, punishment is intrinsically justified in and of itself because the offender deserves it.¹²⁵ The offender is morally culpable because of her conduct, and this moral culpability itself is enough on its own to justify the punishment. In other words, moral desert is a necessary condition of punishment. Under this theory, when an offender breaks the law and commits a crime, she disrupts society's moral equilibrium.¹²⁶ By inflicting punishment upon the offender, that equilibrium is restored.¹²⁷ A criminal receives an advantage in society by breaking the law, and punishment removes that advantage by employing some burden on her.¹²⁸

Like utilitarianism, retributivism endorses proportionality. The punishment should be appropriate given the harm caused by the particular offense, and it should take into consideration the offender's level of culpability.¹²⁹ Retributivism is backwards looking in this sense, and focused on weighing the harm of the crime itself and how culpable the offender was in its commission to determine the appropriate level of punishment.

Scholars make distinctions between positive retributivism and negative retributivism.¹³⁰ The positive retributivism account resembles the more classic idea of a punishment being intrinsically justified because the offender is receiving her just deserts. Under positive retributivism, deservedness is the reason for the administration and affirmative application of punishment.¹³¹ Negative retributivism, on the other hand, is a reframing of this idea, holding that punishment should only be administered upon those who deserve it.¹³² Negative retributivism thus serves as a constraint or limit on punishment rather than as justification for

123. See generally Antony Duff & Zachary Hoskins, *Legal Punishment*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter ed. 2019) <https://plato.stanford.edu/archives/win2019/entries/legal-punishment/> [<https://perma.cc/5GE2-VXTD>].

124. Duff & Hoskins *supra* note 123; see *infra* Section II.e.

125. Duff & Hoskins *supra* note 123; DRESSLER, *supra* note 120, at 4.

126. See FOUCAULT, *supra* note 106, at 92 (quoting GAETANO FILANGIERI, LA SCIENCE DE LA LEGISLATION 214 (French trans., 1786)).

127. DRESSLER, *supra* note 120, at 4.

128. Duff & Hoskins, *supra* note 123.

129. *Id.*; see DRESSLER, *supra* note 120, at 5.

130. Duff & Hoskins, *supra* note 123.

131. *Id.*

132. *Id.*

an active application of it, looking at the individual to determine if she deserves punishment.¹³³

Retributivist justifications are mostly inconsistent with incarceration as punishment for pregnant women

Applying a retributive account of punishment towards a pregnant woman presents unique challenges. On one hand, when a pregnant woman commits a crime, under a retributivist account she harms society and disrupts the moral equilibrium. Thus, applying punishment of some sort to her would be justified as a means for restoring that equilibrium. However, the very state of the female offender being pregnant seems to necessitate having an effect on determining the level of punishment.¹³⁴ Punishment against the mother may be justified to restore the societal disruption, but only insofar as the punishment does not extend into affecting the gestation. Under retributivism, the offender's pregnancy seems to suggest that any punishment meant to restore the equilibrium must be restricted to the mother herself, and not her unborn child.¹³⁵ It is difficult to conceive of some crime committed that would warrant extension of the punishment to the unborn child while maintaining proportionality.

In the United States, punishment is administered through the carceral system and often indeed results in incarceration. Retributivist thoughts on just deserts proportional to the offense are embedded in variable sentencing for different crimes, depending on the offense. A pregnant offender could be sentenced according to sentencing schedules for her particular crime, which seems to fit with the account of positive retributivism. If serving her sentence had no effect on the gestation, then theoretically the punishment could be justified under retributivism.

However, under the current state of imprisonment in the United States, this is simply not the case; without policies for minimum standards of care for pregnant inmates across state prisons, women's pregnancies can be affected by being incarcerated in jails and prisons.¹³⁶ While the Johns Hopkins study found that there were similar rates of preterm births and no mother mortalities, the study is limited in its scope by not having full state participation and by not accounting for any jails, where the majority of incarcerated women are held.¹³⁷ Policies like shackling still exist, which

133. Duff & Hoskins, *supra* note 123.

134. *See infra* Section II.e.

135. *See id.*

136. *Cf.* Sufrin, *supra* note 88, at 142 (arguing that in the San Francisco jail system, there is a higher rate of prenatal care within the jail than what most pregnant inmates were receiving outside of the jail setting).

137. Wendy Sawyer, *Who's helping the 1.9 million women released from prisons and jails each year?*, PRISON POLICY INITIATIVE (July 19, 2019), <https://www.prisonpolicy.org/blog/2019/07/19/reentry/> [<https://perma.cc/8JAA-M8E7>].

pose unique risks for pregnant inmates as opposed to other inmates who are shackled, resulting in a heightened level of punishment exerted on the pregnant inmate as compared to other inmates.

Negative retributivism may present a solution to reconciling incarcerating pregnant women with a retributivist theory of punishment. By serving as a limit on punishment, applying a negative retributivism view would allow the offender's pregnancy to be taken into account when deciding whether the proposed punishment was appropriate or deserved. Yet, pregnancy is often overlooked by judges when sentencing.¹³⁸ Until retributivism as a limiting principle is entertained, the present state of incarcerating pregnant women is unjustifiable by retributivism – it goes beyond restoring the equilibrium disrupted by the crime committed by affecting the pregnancy despite the unborn child not being served by the unfair advantage gained by his mother in breaking the law.

Utilitarianism Models of Punishment

Utilitarianism as broad category encompasses numerous theories of punishment. What all utilitarian models have in common is the ultimate goal of maximizing the greatest happiness, or at least minimizing harm, for the greatest number of people.¹³⁹ In the context of punishment, utilitarianism argues for crime reduction as the primary means of serving this ultimate goal. Crime is defined only as what is harmful. Therefore, by reducing crime, the state is reducing the harms that crime causes to society.¹⁴⁰ By removing harms in society, the total happiness in society will increase.¹⁴¹ Punishment is therefore an extrinsic means to an end under utilitarian models, with crime reduction as the means to achieve the ultimate end of total happiness.¹⁴² With this foundation, different utilitarian flavored justifications for punishment have sprouted.

One utilitarian justification for punishment is deterrence. The broad goal of this theory is to prevent future criminal conduct by administering punishment. Two methods exist as a way to achieve this: general and specific deterrence.¹⁴³ General deterrence justifies punishment as communicating a message to society.¹⁴⁴ By punishing an individual for certain conduct, a message is sent to everyone else in society to not engage in that conduct or else they will suffer the same consequences. Finding the

138. *See infra*, Introduction (Jessica Preston was taken to jail after not being able to pay a \$10,000 bond despite being 8 months pregnant, and Diana Sanchez was a low-level offender).

139. *See id.*; *see* DRESSLER, *supra* note 120, at 3.

140. Duff & Hoskins, *supra* note 123.

141. DRESSLER, *supra* note 120, at 3.

142. Duff & Hoskins, *supra* note 123.

143. DRESSLER, *supra* note 120, at 3.

144. *See id.*; *see* Duff & Hoskins, *supra* note 123.

appropriate punishment to achieve this requires striking a balance between deterring others in society and inflicting the least level of harm on the offender.¹⁴⁵ On the other hand, specific deterrence focuses on the individual offender rather than society at large.¹⁴⁶ By punishing the individual, the person will be less likely to commit the harm again in the future.¹⁴⁷ The amount of punishment should be exactly proportionate so as to prevent the offender from repeating his offense.¹⁴⁸

Incapacitation is a common mode of punishment used to achieve specific deterrence.¹⁴⁹ By incapacitating the offender, the punishment seeks to prevent that individual from committing crime again and thus protects society from harm wrought onto it.¹⁵⁰ Incapacitation can be a physical constraint such as incarceration,¹⁵¹ but it can also be anything that takes away the possibility of reoffending, such as an ankle monitoring bracelet, deportation, or in-car breathalyzers to start a vehicle. Since the United States system is largely incapacitative, I will not spend a great deal of time applying this sub-theory to pregnant women, as incapacitation is largely the primary means by which our system punishes all offenders.

Another utilitarian justification advocates for punishment as a tool to rehabilitate or reform the offender.¹⁵² In this model, reforming the individual with training, skills, or psychology reduces future crime and offending.¹⁵³ Reform as punishment does not view the offender as a rational being, but as an object that will be submitted to reform techniques in order to benefit society by preventing future crime using whatever humane means possible.¹⁵⁴

Utilitarian justifications are wholly inconsistent with incarceration as punishment for pregnant women

Applied in this context, at first glance, general deterrence may seem well served by incarcerating pregnant offenders. Assuming that a pregnant woman is considered to have an elevated sacred status due to her carrying another future human life, the message sent through her punishment is quite strong. If the state is willing to punish the pregnant offender with incarceration, a message that can be inferred is that the state will surely

145. FOUCAULT, *supra* note 106, at 95 (quoting CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (ed. 1856) (1764)).

146. DRESSLER, *supra* note 120, at 4.

147. *Id.*

148. *See* FOUCAULT, *supra* note 106, at 93.

149. *See* DRESSLER, *supra* note 120, at 4.

150. *See* Duff & Hoskins, *supra* note 123.

151. DRESSLER, *supra* note 120, at 4.

152. *Id.*; *see* Duff & Hoskins, *supra* note 123.

153. DRESSLER, *supra* note 120, at 4.

154. Duff & Hoskins, *supra* note 123.

punish almost anyone, as the majority of society will not be in this elevated status at any one given time. However, using the pregnant offender's status in order to serve the principle of general deterrence raises issues. Specifically, it risks unequal enforcement in order to communicate a message to society. With general deterrence as the justification, and if an individual's status positively impacts the level of general deterrence, this could lead to unequal enforcement and uneven targeting of people in these elevated statuses. A system that would target pregnant individuals or others where the general deterrent message is strong is simply untenable because it undermines the fundamental principle of equal enforcement under the eyes of the law.

Specific deterrence may also be undermined by new circumstances presented to the offender after becoming a mother in custody. If a pregnant inmate gives birth while in custody, she must eventually deal with the consequences from the separation from her child upon her release from confinement. Thus, incarceration would not serve as a specific deterrent if, upon release, the mother is forced to engage in further criminal conduct in order to see or provide for the child she was separated from while incarcerated. Despite not wanting to engage in the same criminal conduct that led to her incarceration initially, a newly released mother may turn to criminal acts if she lacks resources to provide for her child and herself. If not for incarceration, she would not have been separated her from her child, thus incarceration created a new impediment to specifically deterring the woman from recidivating again.

Further, a utilitarian rehabilitative model is not consistent with incarcerating pregnant women because it diminishes the woman's autonomy.¹⁵⁵ Viewing an offender as a passive object to be "fixed" is an especially dangerous justification when the offender is a pregnant woman. This risks treating her as a mere vessel carrying a child subject to whatever reform the state determines most effective, undoubtedly raising serious ethical issues regarding the state's role and control over the offender's pregnancy. A modified rehabilitation model tailored to recognizing the pregnant offender in her role as a mother may be a justifiable alternative punishment model.¹⁵⁶

Lastly, incarcerating pregnant women is inconsistent with utilitarianism on a broader scale. The utilitarian goal of minimizing societal harm by maximizing happiness is undercut by incarcerating pregnant women because it creates an additional new societal harm by separating the incarcerated mother from her child. When a woman gives birth while incarcerated, she remains under correctional supervision to complete her

155. See Duff & Hoskins, *supra* note 123.

156. See *infra* Section III.

sentence, while her baby generally does not.¹⁵⁷ Depending upon the length of the mother's sentence and availability of child-care outside of the correctional facility, the inmate's child could go years without seeing her mother or enter the state foster care system. Weakened relationships due to separation are detrimental to child development and can lead to abandonment issues for life.¹⁵⁸ Research has shown that children who have had parents arrested or witnessed their parent arrested have a 73% increased risk of suffering symptoms related to post-traumatic stress than children who did not.¹⁵⁹ Childhood trauma could contribute to destruction to society if the children separated from their mothers by incarceration fail to become contributing and productive members due to trauma stemming from their mothers' incarcerations. This undermines the entire goal of utilitarian maximization of happiness by minimizing societal harm, and so incarcerating pregnant women is entirely incompatible with utilitarian justifications of punishment.

Problems with the requirement of proportionality in general with regard to pregnant incarcerated women.

Regardless of the justification, all theories of punishment support an idea of proportionality such that the punishment must fit the crime.¹⁶⁰ For retributivists, the punishment must be sufficiently proportional to the crime itself in order to serve the offender with her just deserts.¹⁶¹ For utilitarianists, the punishment is sufficiently proportional if it strikes the right balance between sending a condemning message to society and the offender while inflicting the least amount of harm in order to accomplish this.¹⁶²

The universal requirement of proportionality is inherently disproportional when the offender is a pregnant woman. Despite the unique situation pregnant offenders are in, pregnancy is not taken into account when an offender is incarcerated for her crime. Incarceration for a pregnant woman comes with a heavier burden and poses additional risks than for everyone else imprisoned. When a pregnant offender and a non pregnant offender receive the same sentence for committing the same crime, that punishment is immediately and inherently less proportional for the pregnant offender than it is for the other. The failure to provide for a minimum adequate level of prenatal care can lead to medical complications

157. *But see* Yager, *supra* note 54 (where the rare prison nurseries have provided a space for incarcerated mothers to remain with their newborn children); *see infra* 0.

158. Ney, et al., *supra* note 49, at 11.

159. Susan D. Phillips and Jian Zhao, *The relationship between witnessing arrest and elevated symptoms of posttraumatic stress: Findings from a national study of children involved in the child welfare system*, 32 CHILDREN AND YOUTH SERVICES REVIEW 1246, 1253 (2010).

160. *See supra* Section II.c, Section II.d.

161. *See supra* Section II.c.

162. *See supra* Section II.d.

for the mother and her baby.¹⁶³ This goes far beyond the sentence for the crime she committed. It effectively serves an additional layer of punishment, and imposes a sentence not only on her, but on the gestation of her unborn child.

Moreover, female inmates are at risk of becoming pregnant while incarcerated. Some incarcerated women are raped or engage in consensual sex with prison guards resulting in pregnancy.¹⁶⁴ When this occurs, the proportionality of her sentence to her crime is thrown out of balance. Grappling with an unexpected pregnancy can be difficult for any woman, and the heightened stress of dealing with becoming pregnant while incarcerated extends far beyond whatever proportionality her sentence bore to her initial offense.

When pregnancy is not taken into account when determining a pregnant offender's punishment, the incarceration sentence is immediately and inherently disproportional to her crime.

Looking Ahead

With the two widely held and implemented theories of punishment rendered inconsistent with incarceration of pregnant women, we are left to wonder what alternatives there might be. After all, few would likely view pregnancy as a real-life get-out-of-jail-free card *carte blanche*. Scholars have developed some mixed theories to combat critiques of pure retributivism and utilitarianism.¹⁶⁵

One alternative justification is what Jean Hampton refers to as the moral education theory of punishment. Under this mixed theory, the goal of punishment is to teach the offender that the offense she committed is morally wrong.¹⁶⁶ The offender must reflect on why the offense is morally wrong in the hopes she does not reoffend.¹⁶⁷ In this way, a deterrent effect is baked into this method.¹⁶⁸ A moral education theory differs from a rehabilitation utilitarianism model because moral education assumes and requires treating the offender as autonomous.¹⁶⁹ Moreover, the punishment is directed the individual offender herself rather than being directed towards society.¹⁷⁰ Applying this model would take a pregnant inmate's situation into account by recognizing her as a self-determinative individual.¹⁷¹

163. Vainik, *supra* note 36, at 676.

164. Vainik, *supra* note 36.

165. *See* Duff & Hoskins, *supra* note 123.

166. Jean Hampton, *The Moral Education Theory of Punishment*, 13 *PHILOSOPHY & PUBLIC AFFAIRS* 208, 212 (1984), <http://www.jstor.org/stable/2265412>.

167. *Id.*

168. *Id.*

169. *Id.* at 213.

170. *See id.*

171. *See id.*; *see generally* Duff & Hoskins, *supra* note 123.

Within the United States' system of punishment, a pure form of the moral education theory does not exist. However, certain limited programs that allow incarcerated pregnant inmates to remain with their newborns provide a glimpse into what adopting a similar justification for punishing pregnant inmates could look like. Prison nurseries, like the one at the all-female Bedford Hills Correctional Facility in New York, allow a small number of low-level pregnant offenders to apply for the program.¹⁷² After giving birth, the women are not separated from their newborns but instead live together in a separate unit of the correctional facility known as the Infant Development Center.¹⁷³ Children can live with their mothers up until they are one year old, but mothers can petition for an extension of up to 18 months old if they are close to release.¹⁷⁴ The mothers sleep in the same unit together at night, contributing to a sense of camaraderie and help amongst the new mothers. And during the day, when the children are watched over in the Infant Development Center, the mothers attend daily programming including classes to obtain their GED, substance-abuse treatment and education, and career training.¹⁷⁵ Not only does the program reduce the risks that separation during early childhood development poses, it also seems to be working. The recidivism rate among women who go through the nursery program is lower than that of the general prison population.¹⁷⁶ By combining programs that educate the offenders while emphasizing and supporting their role as mothers, Bedford Hills deploys a variant of the moral education theory successfully and could serve as a model for other states to follow.¹⁷⁷

An alternative form of punishment to incarceration entirely could include non-custodial measures, such as home detention or a requirement to attend classes while maintaining the flexibility to be seen by normal doctors and nurture the pregnancy. Indeed, non-custodial measures are advocated for on the international level when sentencing pregnant women.¹⁷⁸ However, this would require a complete overhaul of the justice system in the United States, or at least the acceptance of the unique demands required by punishing pregnant offenders.

The problems facing pregnant incarceration are extremely complex and multifaceted.¹⁷⁹ Pregnancy within the criminal justice system presents myriad unique challenges including class, race, and trauma, most of which are not covered with sufficient breadth nor study here. However, this

172. Yager, *supra* note 54.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.*

178. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, *supra* note 98.

179. *See generally* Ney, et al, *supra* note 49, at 11.

examination primarily serves to reveal basic cracks in the foundations of the justifications underlying our system of incarceration as punishment when pregnant women are placed in that system. There are tenable arguments that the present state of mass incarceration as a whole is inconsistent with justifiable punishment, regardless of who is placed behind the bars.¹⁸⁰ Yet, pregnant inmates present challenges that a carceral state designed for men is not equipped to adequately handle. Until attitudes regarding the goals of punishment shift, incarcerating pregnant women unjustifiably will continue.

180. See generally Ruth Wilson Gilmore, *Is Prison Necessary?*, N.Y. TIMES (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html?fbclid=IwAR3CB4P4tNSnNyUHZGQYo_EmmvsAXLdsdie3fwkhdtkVLelyXUPOdoDI3EY [https://perma.cc/M3TB-A9JV].