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Michele Goodwin  
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## POLICING THE WOMB

*Policing the Womb* brings to life the chilling ways in which women have become the targets of secretive state surveillance of their pregnancies. Michele Goodwin expands the reproductive health and rights debate beyond abortion to include how legislators increasingly turn to criminalizing women for miscarriages, stillbirths, and threatening the health of their pregnancies. The horrific results include women giving birth while shackled in leg irons, in solitary confinement, and even delivering in prison toilets. In some states, pregnancy has become a bargaining chip, with prosecutors offering reduced sentences in exchange for women agreeing to be sterilized. The author shows how prosecutors may abuse laws and infringe women's rights in the process, sometimes with the complicity of medical providers who disclose private patient information to law enforcement. Often the women most affected are poor and of color. Goodwin warns, however, poor women are simply the canaries in the coal mine, as some legislators now claim that women's constitutional rights equal those of embryos and fetuses. In this timely book, Michele Goodwin brings to light how the unrestrained efforts to punish and police women's reproduction has led to the United States being the deadliest country in the developed world for pregnant women.

Michele Goodwin is an Executive Committee member of the American Civil Liberties Union and elected member of the American Law Institute. She is also a Chancellor's Professor at the University of California, Irvine, where she teaches torts, constitutional law, and directs the Center for Biotechnology and Global Health Policy. She is an internationally recognized voice on women's rights, reproductive health, health policy, and constitutional law and lectures worldwide on matters relating to the exploitation of women and girls and the rising regulation of pregnancy and criminalization of women.

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# Policing the Womb

INVISIBLE WOMEN AND THE CRIMINALIZATION  
OF MOTHERHOOD

**MICHELE GOODWIN**

University of California, Irvine



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*For the Triplets and the Nieces*

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## Preface

Making child abuse laws applicable to pregnant women and fetuses would, by definition, make every woman who is low-income, uninsured, has health problems, and/or is battered who becomes pregnant a felony child abuser.

National Advocates for Pregnant Women<sup>1</sup>

In the twenty-first century reproduction translates differently across class and race lines. On inspection, examples abound in this context, but assisted reproductive technology (ART) provides a particularly provocative illustration of my point. In that sphere, liberty and risk translate into a multi-billion-dollar industry, where a woman's reproductive possibilities resemble a candy store of options: freedom to purchase ova and sperm in her local community or across the country and world, in vitro fertilization, preimplantation genetic diagnosis, intracytoplasmic sperm injection (ICSI) of ova, embryo grading, cryopreservation of ova, assisted hatching, embryo transfer, day-five blast transfers, and more. This dizzying array of options is mostly unchecked by federal and state regulations, leaving physicians and their wealthier patients to coordinate pregnancies according to personal choices.

Technology facilitates a degree of leisure associated with some of these practices, as a few options described above are easily coordinated from the comfort and privacy of home. Functionally, then, with the click of a computer button, an intended parent may purchase sperm, rent a womb, buy ova, and select a clinic to assist in the harvesting, implantation, or embryo development processes. For wealthy women (infertile or not), reproductive privacy and freedom are tangible concepts in uninterrupted operation. Noticeably, there is little, if any, state regulation or interference in this domain, despite considerable risks, poor health outcomes, and miscarriages associated with some of these medicines.

By contrast, recent criminal prosecutions targeting destitute pregnant women illuminate another reproductive space, where the threat of state intervention through punishment and extralegal retribution overarch pregnancies and compromise the physician-patient relationship. In this alternate reproductive realm, public

regulation trumps expectations of privacy. Undeniably, in the United States a poor pregnant woman's reproductive options are deeply constrained and contested. For example, a woman's poverty and drug dependence or use during pregnancy might result in heightened legal consequences, including the threat of life imprisonment, birthing while in jail, and even shackling during labor, depending on the state in which the pregnant woman resides.

A poor woman determined to carry a pregnancy to term often unwittingly exposes herself to nefarious interagency collaborations between police and physicians, quite possibly leading to criminal prosecution, incarceration, and giving birth while in highly unsanitary prison conditions, sometimes without the appropriate aid of hospital physicians and staff. But make no mistake, all women should be wary of the political mobilization against reproductive health, rights, and justice.

Today, it is not uncommon for a headline to feature a tragic story about a woman giving birth alone in a jail, without the aid of anyone, let alone medical staff. This is what happened to Diana Sanchez as she screamed and "writhed on the small bed inside her cell . . . gripping the thin mattress with one hand," as she tried frantically to free a leg as the baby was crowning. A *Washington Post* headline captured her experience this way: "*Nobody Cared*": *A Woman Gave Birth Alone in a Jail Cell After Her Cries for Help Were Ignored, Lawsuit Says*.

Sadly, these are not outlier incidents, but rather what has bled into the soil of reproductive politics in the United States, which now uses pregnancy as a proxy for punishment, particularly against poor women. The depth of state-sanctioned cruelty targeted toward poor pregnant women seemingly has no boundaries in contemporary American politics. Gone are the days when Prescott Bush, the father of George H.W. Bush, served as treasurer of Planned Parenthood or Richard Nixon signed Title X into law, which provided reproductive healthcare for the poorest Americans.

A range of laws now police and criminalize behavior during pregnancy. These include fetal protection laws (FPLs); laws that criminalize illicit drug use during pregnancy – fetal drug laws (FDLs); child abuse laws pertaining to fetuses – maternal conduct laws (MCLs), which seek to criminalize otherwise legal conduct that may cause risk to pregnancies, including cigarette smoking, alcohol consumption, falling down steps, and refusing bed rest. The emergence of such legislation offers an important opportunity to present a counternarrative to the provocative accounts offered by legislators advocating the use of "sticks" to discourage certain prenatal conduct.

Importantly, as this book shows, what legislators seek to reduce – the incidence of babies born with low birth weight in their states – is tangled in race and class profiling, which detracts from an evidence-based approach to reducing fetal health harm. On inspection, prescription drug use, domestic violence, and assisted reproductive technology measure significantly (and more so) in the incidence of fetal health harm and the rise in neonatology treatments and costs. Building on prior work, this book deliberates on an important social policy matter – the policing of

women's reproductive conduct and the absurdity of lawmaking in this regard. The book weighs the social, economic, and health costs associated with punitive state policies that effectively harm all pregnant women and their interests.

This book tells a public policy story by elevating the narratives and experiences of pregnant women and girls, investigating how the state tracks pregnant women, and reporting the consequences of punitive state actions. It exposes the irrationality of laws that suppress sex education, force brain-dead pregnant women to gestate fetuses while their bodies rot and decompose, and threaten pregnant women with life imprisonment for endangering their fetuses. It reflects on the history of pernicious state legislating of women's reproductive rights dating back to eugenics and slavery.

The book comes about because rarely are the voices of those caught under the state's gaze afforded a legal venue. Legal casebooks carefully edit out what facts may be available to the authors, and because appellate decisions focus on the legal questions, students, scholars, and those who read legal cases and legal scholarship bypass the personal accounts that humanize litigants, victims, or defendants. As described in this book, an emerging jurisprudence stands replete with instances of women giving birth in handcuffs and shackles, on metal prison benches, and being dragged away from hospitals in bloodied gowns. Yet, their chilling experiences rarely become an elemental or integral component of legal reflection.

The origins of this book emerged as I studied assisted reproductive technology. The glaringly high failure rates often resulted in miscarriages and stillbirths after Herculean efforts by some couples and individuals to become pregnant, often involving hyperstimulation of ovaries, drug injections, and repeated cycles of this. Yet, the failures resulted in enormous personal losses and tragedies for the individuals and their seeking to conceive. The public responses were nearly universal with sympathy and support. When such tragic cases made the news, financial support and prayers often followed.

With success rates hovering at only 35 percent in the best cases, inevitably the practice is something of a lottery, which is why, prior to Nadia Suleman's birth of eight babies, doctors often implanted multiple embryos in the intended mother or surrogate, trying to game the odds of a pregnancy resulting. When the cycles failed, or miscarriage resulted, criminal punishment was surely not the answer.

However, the media and legal responses were startlingly different for poor women struggling through their pregnancies. Early on, I began to notice arrests and the promulgation of laws that, when enforced, targeted poor, pregnant Black women. Even then, I thought these women would ultimately become the euphemistic canaries in the coalmine. At the time, they were condemned as pariahs in their states – girls like Rennie Gibbs, at sixteen years old charged by a Mississippi prosecutor with depraved heart murder for having a stillbirth; or Regina McKnight, a South Carolinian woman, who at twenty-three years old was criminally charged for her stillbirth and was sentenced to twenty years in prison. This book unpacks these

stories and more, examining the long arc of women's efforts to achieve reproductive justice.

The journey to tell this story has been long and winding. In 2000, I began conceptualizing the ideas in this book, but anticipated that someone else would write it. A few years before, I read Professor Dorothy Roberts' *Killing the Black Body* with great enthusiasm, shortly after its publication. Groundbreaking in its depth and scope, it affirmed the experiences of so many Black women and told the story that needed airing about systemic harms to Black women's bodies from slavery through the last century. Her work remains deeply influential for me. Dorothy's work was an invitation to consider exploring the meaning of liberty in the reproductive context that included women of color generally, and Black women specifically. I took that invitation to extend to matters of assisted reproduction and emerging strategies deployed in the service of policing women's bodies.

In part, the journey of writing this book is the story of the book. The more one looked, the more there was to find – harmful laws restricting women's reproductive health rights, criminalization and arrests of poor women, absurd state interventions in women's reproductive lives – and the graver became the consequences of the failed drug war and its sticky tentacles. The drug war reached into the lives of poor women, making collateral damage of them and their children. However, too frequently, their arrests were rendered invisible while activists and politicians skeptical about the drug war focused on justice for male, nonviolent drug offenders. For me, steeped in this research for nearly two decades, the more obvious was the impending opioid crisis, but also the resistance of legal scholars to credit that the struggles of poor Black women during pregnancy could one day be reflected in white women's addictions to prescribed opioids.

This research involved extensive interviewing, visiting women's prisons and girls' juvenile detention centers, and compiling a data set of legal cases and prosecutions from many primary sources. I reviewed pleadings and briefs and interviewed attorneys involved in these cases, including state prosecutors and lawyers who represent these women. My research also involved participant observation. I served as an expert witness in Bei Bei Shuai's case, conceptualized and chaired Amnesty International's first engagement with this issue (Taskforce on Criminalizing Pregnancy, which gave rise to the 2017 Criminalizing Pregnancy Report), consulted with the Obama White House on the criminalization of women, and joined the boards of organizations focusing on women's incarceration, reproductive rights, and civil liberties. In these various roles, my research benefited from being at the center of articulating policies and interventions. My aim is to humanize the women who are the subjects of these cases and prosecutions so as to illuminate what is at stake when state power is used against them.

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I am grateful to John Berger, my editor at Cambridge University Press and friend. He saw the value in this project many years ago and waited patiently for the story to emerge in this form. This book is among the final manuscripts that John will shepherd through Cambridge University Press. For so many of his authors, John has provided a platform for us to engage and enlighten, to broaden perspectives and revisit our own preconceptions, and meaningfully contribute to discourse. I am proud of the work we have done together and thankful for our friendship.

One of the most meaningful aspects of being a professor is teaching and working with outstanding law students. I have been fortunate to teach, mentor, and work with dynamic women and men who served as my research assistants at different points along this journey. They are familiar with my encouragement – “*blossom where you are planted.*” This book and many articles represent the evolution from seeds planted over the years, and I am thankful to them for sowing and tilling with me. I am grateful for the excellent research assistance provided by students who cared deeply about my work and the future of reproductive health, rights, and justice. Those who contributed in some part to this research include John Roberts, Ana Bosch, Cathy Sons, Joni Holder, Stephanie Jean-Jacques, Sarah Malkerson, Nicole Elasser, Oleg Shik, Robert Crist, Shiveta Vaid, Meigan Thompson, Haley Penan, Mariah Lindsay, Sabrina Ly, and Allison Whelan. This work was further aided by Garret Stallins, whose sharp eye is deeply appreciated.

My gratitude also extends to law librarians at the University of Minnesota Law School, the University of Virginia Law School, and the University of California, Irvine School of Law. With them, I was able to access obscure archives – including treatises from the 1600s that demarcated women as property or that clarified the historical status of the fetus – and obtain police records, mug shots, sentencing briefs, and more.

This book gained further context through conversations and interviews with lawyers, judges, nurses, doctors, researchers, activists, prosecutors, women and girls impacted by state prosecutions, and families affected by maternal deaths, as

well as colleagues who take a different view than I do. Among the many, I am thankful to retired Chief Judge Pamela Alexander; Sue Ellen Allen, Founder and Executive Director of Reinventing ReEntry; Jack Cole, Cofounder and former Executive Director of Law Enforcement Against Prohibition; Dr. Claire Coles, Professor and Director of the Maternal Substance Abuse and Child Development Program at Emory University; Carol Gilligan, University Professor at New York University; retired Chief Judge Glenda Hatchett; Dr. Hallum Hurt, Medical Director of the Neonatal Follow-up Program and Attending Neonatologist at CHOP Newborn Care at the Hospital of the University of Pennsylvania; Charles Johnson, Founder of 4Kira4Mom, an organization founded in the wake of his wife's death shortly after she gave birth; Louise Melling, Deputy Legal Director and Director of the Center for Liberty at the American Civil Liberties Union (ACLU); Aryeh Neier, President Emeritus of the Open Society Foundations and former Director of the ACLU; Professor David Orentlicher, former Director of the American Medical Association's Division of Medical Ethics and drafter of the AMA's first patients' bill of rights; Lynn Paltrow, Executive Director of National Advocates for Pregnant Women; Linda Pence, who courageously defended Bei Bei Shuai; Anthony Romero, Executive Director of the ACLU; and Loretta Ross, Cofounder and former National Coordinator of SisterSong Women of Color Reproductive Justice Collective.

Filmmakers also offered the means to further express the urgency behind this book. Among them, I am grateful for the collaborations with Rebecca Haimowitz, Marion Lipschutz, Rose Rosenblatt, and Civia Tamarkin.

This book tells a story about the ways in which law enforcement intervene in pregnant women's lives. Interviews with prosecutors, especially in Alabama, including Lyn Head, Kyle Brown, Angela Hulsey, and Steve Marshall, current Attorney General of the state of Alabama, were essential to helping me understand their motivations, the manner in which they interpret law, and even how prosecutors' personal and even religious beliefs sometimes spill over into their work for the state. My research gained further clarity and urgency based on my interviews with them. I provide a special salute to my colleagues within the ACLU, an organization committed to protecting the civil liberties of the marginalized and disenfranchised, including for many women who recognized the organization as their only point of hope.

Finally, my deep appreciation and special recognition go to the organizations that have long recognized the human dignity of the most vulnerable women and advocate on their collective behalf.

To the Triplets and Nieces. May you be able to shape your own paths and destinies.