

Roe v Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration

[Lynn M. Paltrow, JD](#)

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Abstract

All pregnant women, not just those who seek to end a pregnancy, have benefited from *Roe v Wade*. Today's system of mass incarceration makes it likely that if *Roe* is overturned women who have abortions will go to jail.

Efforts to establish separate legal "personhood" for fertilized eggs, embryos, and fetuses, however, are already being used as the basis for the arrests and detentions of and forced interventions on pregnant women, including those who seek to go to term.

Examination of these punitive actions makes clear that attacks on *Roe* threaten all pregnant women not only with the loss of their reproductive rights and physical liberty but also with the loss of their status as full constitutional persons.

IN HER BOOK *THE NEW JIM Crow*, Michelle Alexander argues that the system of mass incarceration in the United States, fueled by the war on drugs, operates in a seemingly color-blind, race-neutral way to create a new Jim Crow system that forces African Americans, especially African American men, into a permanent underclass.¹ I believe that attacks on *Roe v Wade*² and efforts to treat fertilized eggs, embryos, and fetuses as separate legal persons will establish a system of law in which women who have abortions will go to jail. Furthermore, all pregnant women are at risk of being assigned to a second-class status that will not only deprive them of their reproductive rights and physical liberty through arrests, but also effectively strip them of their status as full constitutional persons.^{3,4}

Here I address major changes in US law enforcement since *Roe v Wade* was decided in 1973 that make it likely that if *Roe* is overturned women who have abortions will be arrested and sentenced to incarceration. I discuss how efforts to undermine *Roe* and to establish separate legal personhood for fertilized eggs, embryos, and fetuses are already providing the basis for the arrests and detentions of and forced interventions on pregnant women. I conclude that these efforts, if unchecked, not only will result in massive deprivations of pregnant women's liberty, but also will create a basis for ensuring a permanent underclass for pregnant women or, for lack of a better term, a new Jane Crow.

In 1971, before *Roe v Wade* was decided, Shirley Wheeler was arrested and prosecuted for the crime of manslaughter after hospital staff in Florida discovered her illegal abortion and reported her to the police. After a two-day jury trial she was convicted of manslaughter, a crime that carried a possible penalty of 20 years' imprisonment. Although the conviction would later be overturned by the Florida Supreme Court,⁵ the trial court sentenced Wheeler to two years' probation that required her to either marry the man she was living with or return to her home state to live with her parents.^{6,7} Before *Roe*, other women were also arrested for having abortions.⁸ It was far more common, however, for the abortion provider to be arrested and the woman suspected of having the illegal abortion to be subjected to grueling police interrogations designed to obtain evidence against that provider.⁹

Today's criminal justice system, however, is radically different from the one that existed when *Roe* was decided. In the 1970s, the United States had approximately 300 000 prisoners,¹⁰ and relatively few women were prosecuted for any crime, including abortion.

Between 1970 and 2000, the US population rose by less than 40%, yet the number of people in prisons and jails rose by more than 500%.¹⁰ The United States now has a prison-industrial complex that includes a for-profit prison industry that reaps enormous financial gain from building prisons, providing ongoing services to those prisons, and ensuring that those prisons remain filled.^{11–13}

Currently, US prisons and jails hold more than 1.5 million people, and 4.8 million more are under some form of criminal justice supervision in the community, such as probation and parole.¹⁴ In 1977, the number of women in prison was 11 212¹⁵ and in 2009, it was 105 197¹⁶—an increase of 938%. Today, more than 200 000 women are behind bars, and more than one million women are on probation or parole.^{17,18} The fact that a woman is also a mother caring for one or more children is no deterrent to incarceration. Two thirds of the incarcerated women in the United States have at least one minor child,²¹ and approximately five percent of women are pregnant when they begin their incarceration.^{19,20}

This new era of mass incarceration—which is largely accepted by the public, defended by an army of lobbyists, and justified by a war on drugs deeply rooted in America's history of slavery and racism^{1,22}—makes it far more likely today than in 1973 that if *Roe* is overturned women will themselves be arrested and jailed.²³ It is also likely that women having or considering having abortions will be subject to far more government surveillance than in the past.

Federal and state law enforcement agencies are twice as big as they were in 1973, and their investigative powers—including wiretapping—have been dramatically expanded.^{24–26} Moreover, since 1973 drug testing has become a multibillion-dollar industry.²⁷ As a result of US Supreme Court decisions^{28,29} and local policies, even middle school students who want to join the afterschool scrapbooking club are being required in some schools to submit to urine drug testing.³⁰ Once a urine sample is in the possession of state authorities, it may just as easily be used to test for pregnancy.

In the post-*Roe* world, however, it is not only women who seek to end pregnancies who must fear the possibility of surveillance and arrest. Approximately one million women in the United

States each year terminate their pregnancies, close to another million suffer miscarriages and stillbirths, and more than four million women continue their pregnancies to term.³¹ Each and every one of these women benefits from the US Supreme Court's decision in *Roe v Wade*,² which not only protects a woman's right to terminate her pregnancy but also, as later US Supreme Court cases explained, has been "sensibly relied upon to counter" attempts to interfere with a woman's decision to become pregnant or to carry her pregnancy to term.³² As a result, all pregnant women, not just those seeking to end a pregnancy, risk losing their reproductive rights and their liberty.

Indeed, pregnant women who have abortions, experience pregnancy losses, or fail to heed their doctor's recommendations, and even those who go to term and give birth to healthy children, are already being arrested and subjected to massive assaults on their physical liberty. A recent study that I coauthored with Jeanne Flavin found, between 1973 and 2005, 413 cases in the United States in which a woman's pregnancy was a necessary factor leading to attempted and actual deprivations of her liberty.³³ The evidence we obtained indicated that this was a substantial undercount, possibly by hundreds if not more, of the number of pregnant women subject to arrests or the equivalent during this period. In addition, we have documented more than 200 cases since 2005 in which pregnant women have been arrested. In almost all cases, the arrests and other actions taken would not have happened but for the fact that the woman was or had been pregnant at the time of the alleged violation of law.

Many states still have their pre-*Roe* abortion laws on the books, and virtually all have laws distinguishing between legal and illegal abortions.^{34,35} Between 1973 and today, women in Idaho,³⁶ New York,³⁷⁻³⁹ and South Carolina⁴⁰ who ended their pregnancies through abortion have been charged with violating state criminal abortion laws. Criminal abortion charges have also been filed against women in Florida,⁴¹ Georgia,⁴² and Tennessee,⁴³ who, in acts of desperation, shot themselves while pregnant. In an Illinois case, criminal abortion charges were filed against a woman who apparently attempted to remove a dead fetus from inside her after experiencing a pregnancy loss while at home.⁴⁴

In light of the increasingly heated antichoice rhetoric routinely describing abortion as "murder," "killing,"⁴⁵ and "genocide,"⁴⁶ it should not be surprising to learn that prosecutors in Alaska,⁴⁷ Arizona,⁴⁸ California,⁴⁹⁻⁵¹ Florida,⁴¹ Georgia,⁵² Hawaii,⁵³ Indiana,⁵⁴ Illinois,⁵⁵ Kentucky,⁵⁶ Louisiana,^{57,58} Massachusetts,^{59,60} Mississippi,⁶¹ New Jersey,⁶² Nevada,⁶³ Oklahoma,⁶⁴ South Carolina,⁶⁵ Tennessee,⁶⁶ and Utah⁶⁷ have also used their existing murder, fetal murder, feticide, and manslaughter laws as a basis for arresting and prosecuting pregnant women who had abortions, who suffered miscarriages or stillbirths, or who were unable to guarantee that the children they gave birth to would survive.

Cases include a woman who used a knitting needle to end her own pregnancy,⁵⁶ a woman who delayed having cesarean surgery,⁶⁷ a woman who experienced an early miscarriage after receiving the medically prescribed contraceptive Depo Provera,⁵⁸ a woman who experienced a stillbirth while giving birth at home,⁶⁸ and women who suffered stillbirths and lost infants shortly after birth and were accused, without scientific evidence, of causing their pregnancy loss or newborn's death by taking an illegal drug.^{47,65} In March of 2011, Bei Bei Shuai was charged in Indiana with murder and attempted feticide after becoming so depressed during her pregnancy

that she attempted suicide and suffered the loss of her newborn.⁶⁹ Because murder is not treated as a bailable offense, Ms. Shuai was incarcerated in a county jail for more than a year before a court of appeals ordered her release. Thus far, Indiana courts have rejected attempts to have the charges dismissed; Ms. Shuai is now preparing for a murder trial.⁵⁴

In a majority of the cases we documented, however, women went to term and gave birth to children who had no reported health problems.³³ These women, pregnant and alleged to have used an illegal drug or alcohol, were arrested for such crimes as child (fetal) endangerment and delivery of drugs to a minor through the umbilical cord. Women have been arrested while still pregnant, taken straight from the hospital in handcuffs, and sometimes shackled around the waist and at the ankles.⁷⁰ They have been arrested shortly after giving birth⁷¹ and while still dressed only in hospital garb.^{71–73} Pregnant women have been held in jails,⁷⁴ prisons,⁷⁵ and under house arrest.⁷⁶ At least one woman who was still pregnant at the time of arrest was shackled during much of her labor.⁷²

State authorities have deprived pregnant women of their liberty not only through the criminal justice system, but also through civil commitment proceedings and actions taken pursuant to civil child welfare laws. Pregnant women have been held in locked psychiatric wards^{77–80} and in treatment programs under 24-hour guard.⁸¹ They have been forced to undergo intimate medical examinations⁸² and blood transfusions over their religious objections.^{83,84} Women have been forced to submit to cesarean surgery, and some have been physically restrained with leather wrist and ankle cuffs so that they could be subjected to medical procedures they opposed.⁸⁵

Angela Carder was so debilitated at the time a court ordered her to undergo cesarean surgery that such restraints were unnecessary. Ms. Carder was 27 years old and 25 weeks pregnant when she became critically ill. She, her family, and her attending physicians all agreed on treatment designed to keep her alive for as long as possible. The hospital, however, called an emergency hearing to determine the rights of the fetus. Despite knowing that cesarean surgery could kill Ms. Carder, the court ordered it, claiming that the fetus had independent legal rights. The fetus was born alive but died 2 hours later. Angela Carder died 2 days later, with the surgery listed as a contributing factor.⁸⁶

The highest court of the District of Columbia later vacated the order as one that violated Ms. Carder's right to "accept or refuse medical treatment."⁸⁶^(p1252) Indeed, the vast majority of appellate court decisions in the United States have found that the arrests and interventions described here are contrary to law and public health policy.^{53,87–105} Nevertheless, these arrests and interventions continue to occur, and virtually all of them rely on the claim that fertilized eggs, embryos, and fetuses should be treated as separate persons.³³ The decision in *Roe* explicitly rejected the argument that fetuses, at any stage of development, are to be treated as if they are separate constitutional persons under the law.² Despite this, passage of feticide laws¹⁰⁶ and antiabortion measures (including those that have declarations of separate rights for fertilized eggs, embryos, and fetuses)^{107,108} and efforts to pass so-called personhood measures¹⁰⁹ are providing the legal theory not only to justify the arrests of pregnant women, but also to deprive them of their constitutional personhood.

The dissenting judge's view in the Carder case makes this painfully clear. This judge argued that the viable unborn child is a person with rights separate from the pregnant woman.⁸⁶^(pp1254-1257)(Belson J, dissenting in part) He then articulated a clear rationale for the inevitable injury that the recognition of such rights would do to women's legal status: he claimed that "the expectant mother," by undertaking to bear another human being and carrying an unborn child to viability places "herself in a special class of persons."⁸⁶^(p1254)(Belson J, dissenting in part) As exemplified in Carder's case and confirmed in the hundreds of others we documented in our study, when eggs, embryos, and fetuses are treated as separate persons, the state will have the authority to consign pregnant women to "a unique category of persons"⁸⁶^(p1254)(Belson J, dissenting in part) in which they may be deprived of virtually every right associated with constitutional personhood, including, as in Carder's case, the right to life.[86,110,111](#)

In the name of separate rights for eggs, embryos, and fetuses, pregnant women have been locked up (deprived of the right to liberty) and forced to undergo major surgery (the right to liberty, bodily integrity, and medical decision-making),[112](#) sometimes over their religious objections (the right to religious liberty).[82,113-116](#) Women have been denied medical care[70](#) and have been forced to give birth while shackled and subjected to grossly disproportionate penalties (the right to be free of cruel and unusual punishment).[65](#) They have had bail deliberately set at levels so high that they were forced to remain in jail (right not to pay excessive bail).[70,117](#)

These deprivations have taken place after court proceedings where women were represented by inadequate counsel or no counsel at all (right to counsel)[118-120](#) and where they had no meaningful opportunity to challenge the claims being made against them (the right to due process).[118-122](#) Pregnant women have been prevented from leaving the state (the right to travel).[123](#) Pregnant women have been secretly searched (the right to be free of unwarranted searches)[124,125](#) and had their confidential medical information disclosed (right to informational privacy).[94](#) Pregnant women have been coerced into having unwanted abortions,[126](#) and they have been penalized for giving birth,[127](#) for experiencing pregnancy losses, and for terminating or seeking to terminate a pregnancy (the right to reproductive privacy).[128](#)

Pregnant women have also been denied the right to equal protection under the law. They have been required to prioritize their pregnancies over everything else in their lives, including their jobs[128](#) and their responsibilities for the children they already have.[129](#) And although our study confirmed that arrests and detentions of and forced interventions on pregnant women are happening in every region of the country and affect women of all races, we also found that African American pregnant women are significantly more likely than White women to be arrested, reported by hospital staff, and subjected to felony charges.[33,130,131](#)

These cases thus reveal that both pregnant women who have abortions and those who do not are already being arrested and incarcerated. They also demonstrate that there is no gender-neutral way to add fertilized eggs, embryos, and fetuses to the Constitution without subtracting all pregnant women from the community of constitutional persons and creating a Jane Crow system of law that disproportionately punishes African American women.

In light of the pressing need to dismantle the US system of mass incarceration, we must oppose the recriminalization of abortion and passage of so-called personhood measures that would expand it. In my experience, the majority of people, whether they identify as pro-life or pro-choice, do not want to see pregnant women who have abortions (61% of whom are already mothers),[132–134](#) who experience pregnancy losses, or who go to term sent to jail or consigned to a second-class status.[135,136](#) It is my hope then that we will be able to work together not only to oppose attacks on *Roe* and to defend reproductive rights, but more fundamentally to support a true culture of life: one that values and fully protects the personhood of the women who bring forth that life.

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