Criminalizing Care*

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Introduction

In the spring of 2013, in a hearing room in Tennessee, a group of legislators came together to create a new crime – the crime of fetal assault. A woman would be guilty of this crime if she took illegal narcotics while pregnant and if her child was harmed as a result. The maximum punishment for this crime was eleven months and twenty-nine days in jail. Ultimately over the course of two years, about 120 mostly low-income women - rural, urban, Black and white - would be prosecuted in Tennessee for fetal assault. The law was justified, in large part, by a very strange and deeply disturbing set of ideas: that the only way to help women who used illegal drugs while pregnant was to prosecute them, and that the prosecution itself was not only a road to treatment but was actually a form of treatment in and of itself. Despite these perhaps benevolent-seeming ideas, the reality was quite different. Overwhelmingly those women pled guilty and faced sentencing. Despite the strong assertions by the law's proponents that the prosecution was a road to accessing treatment, it appears that very few women actually got access to treatment through prosecution. Instead they got what the criminal system almost always delivers: they were placed on probation; they went to jail, and they found themselves owing sometimes thousands of dollars in criminal debt. At the same time, these same women were subject to a child welfare system that equated their substance use during pregnancy with severe abuse and as grounds for rapid termination of their parental rights. Moreover, when we pull the lens out from the individual cases to the legal and social welfare systems in which their cases were embedded – the healthcare system, the child welfare system and the criminal legal system – we see that for these deeply stigmatized women and others like them, to the extent they do receive any care, that care is deeply corrupted by its location within or near punishment systems. In 2016, though, the Tennessee fetal assault law expired, putting an end to these prosecutions.

It's a fair question, then, to ask why one might want to read (or write) an entire book about these particular prosecutions and the systems in which they took place. The answer, quite simply, is that the ideas that drove the creation of this crime – that criminalization is a road to care and that, conversely, for those who society deeply stigmatizes, all too often care corrupted by its

linkage to punishment is the only kind of care that society is willing to provide - sit firmly at the heart of the U.S. criminal, child welfare, and social welfare systems. The systems at the heart of this book operate on the assumption that poor people and poor communities are not worthy of care in the best sense of that word. In fact, if we look not at what is said but instead is at what is done, not at what some in power purport but at the operation of the systems they create, it is clear that the United States has a set of rules and systems that assume that whole categories of deeply stigmatized poor people do not deserve what this book broadly terms care - economic security, housing, healthcare, safety, or support. In poor communities, systems might dole out some meager support, some meager approximation of care, but there is always a high price to pay. That price all too often comes in the form of stigmatization, surveillance, and punishment. Even beyond this, these purported offers of care are often nothing more than façade behind which we find mostly subordination. A central idea at the heart of these systems is what this book terms *criminalizing care* – the idea and practice of linking the provision of care (in the Tennessee example healthcare and drug treatment) to involvement in systems that punish and the devastating outcomes that result. So the Tennessee story and this book, is not only a story about the operation of one law in the lives of 120 women. It is also a book that highlights that story as an extreme and crystal-clear example of criminalizing care, a phenomenon at the heart the U.S. social welfare, child welfare, and criminal system policy.

It's important to note, at the outset, that both the ideas that drive these phenomena and the systems that manifest and carry out these ideas have everything to do with race, gender and socioeconomic status. Both the ideas and the systems that have resulted were originally built to punish and control poor, Black women and their families. But these systems also draw on and perpetuate a complicated mix of white privilege, when society sees addiction of white communities as a healthcare need rather than a crime wave, and long-existing stigmas around and aggressive efforts to control reproduction by poor women, both white and Black. The book will touch on and attempt to tease out this complicated race, class, and gender story and the way that these stories underpin and support what is termed here criminalized care.

To step back before diving deeper in, it is important to understand how this book uses the two words in the title: criminalizing and care. Criminalizing, or criminalization, in its most basic form, happens when society uses criminal law and criminal systems (think criminal courts, police, probation and parole) to address a particular social problem. So, we criminalize conduct like

murder, rape, robbery, and assault, and individuals who commit those crimes are subject to the criminal system, with all its systems, punishment and surveillance tools, and actors. But criminalization here also refers to three other, broader phenomena: first, criminalization occurs when society makes conduct criminal when a social welfare solution is available (for example making it a crime to sleep outside and then prosecuting homeless people for that crime). Second criminalization occurs when social welfare programs are built to make its participants feel like criminals, for example by fingerprinting welfare applicants and subjecting them to extensive monitoring that is structured in a way that is eerily similar to probation. Third and finally criminalization occurs when seeking assistance in a social welfare program puts stigmatized members of society at risk for punishment in the criminal and child welfare system, for example when welfare recipients are drug tested and those drug test results are shared with child welfare and probation staff.

The second word in the title, care, as used in this book, is intentionally broad and evocative of basic human rights. In its deepest and broadest sense, care is something society owes to its members. It is a set of basic supports – housing, economic security, healthcare, safety, education. But care as it is used here is not only about what society should provide to its members. It is also, crucially, about how it should be provided. Care, as it is used here and in its best form, is inextricable from dignity. Society provides care, in its broadest sense, when it does so in a way that enhances, rather than undermines the dignity and well-being of the individual, family, or community receiving that care. Throughout this book, because the book's prime example is about substance use during pregnancy, the forms of care the book talks about the most is obstetrics, gyncology, and addiction treatment, but keep in mind as you read that these forms of healthcare are merely examples of kinds of care that society sometimes provides and that should be provided in a form that enhances the dignity and well-being of those who require it.

When it comes to care, one of the central arguments of this book is that there is a wide gulf between both the substance and the form of care available in the United States and that this gulf breaks down on race and class lines. When it comes to those in poverty, many of whom society deeply stigmatizes, what society provides falls far short of a robust form care. Instead when it comes to women like those prosecuted for fetal assault in Tennessee, care is all too often criminalized. Offers of care are often nothing more than a smokescreen for punishment; care comes at the risk of severe punishment, and, even when care is provided, its proximity to

punishment systems degrades the quality of care itself. This book highlights the prosecution of 120 women for fetal assault as a way to understand criminalizing care: the ideas that drive criminalized care, the means by which criminalized care comes into existence in society's systems, and what actually happens, both to people and to care, when criminalized care dominates parts of the healthcare, child welfare and criminal systems. Finally, this books asks what the United States might do to shrink our systems of punishment, build better systems of care outside of and away from punishment and, in the meantime, erect firm walls between systems that can punish and systems that deliver support.

To tell the fetal assault story as an example of criminalized care, the book draws on several bodies of data.[1] The criminal court case files are central to the story. These files, which the research team gathered, over nearly a year from court clerks, prosecutors, and sheriffs across the state lay out, in tellingly bureaucratic form, who was prosecuted and what happened in the prosecution. Through them we learn about the charges that were brought, how much jail time a woman served, whether she pled guilty, what sentence was imposed, what we she was required to do, whether there is any indication that treatment was offered as a part of the case, and what fees and other costs were assessed. In addition, the story relies on the birth records of infants who were born with neonatal abstinence syndrome (the condition that those who supported the law said they were targeting) when the law was in effect. Those files enable us to learn more demographic information about the women who were prosecuted and crucially to assess how effective the criminal system was at targeting women who gave birth to infants diagnosed with neonatal abstinence syndrome, the syndrome purportedly targeted by the fetal assault law.

The bulk of the remaining data comes from in-depth interviews of professionals in the healthcare, child welfare, and criminal legal systems in Tennessee. Over the course of about two years, I interviewed over forty professionals in those systems both about their particular views and experiences in the fetal assault cases and about their views and practices about providing care close to and inside punishment systems. In addition, I interviewed several medical experts, both in Tennessee and nationally, about best practices for women who are pregnant and struggling with substance use disorder. Finally, although the qualitative research for this book focused primarily on the systems and the views of system actors, the voices of the women who were prosecuted are

[1] This book does not contain a separate methodology section. However, as conclusions from various data sources are introduced, the endnotes contain a description of the data and methods employed.

also heard here. These voices come from public records, from moments in which women who were subject to prosecution testified or spoke publicly and, crucially, from qualitative research on the implementation of the fetal assault law conducted by SisterReach, a non-profit based in Memphis, Tennessee "that supports the reproductive autonomy of women and teens of color, poor and rural women, LGBTQIA+ people and their families through the framework of Reproductive Justice" and whose mission is to "empower our base to lead healthy lives, raise healthy families and live in healthy and sustainable communities."[2]

Ultimately *Criminalizing Care* seeks to use the example of the fetal assault law to convince you of several interconnected ideas. First, the United States targets criminalized care not at all people who engage in particular stigmatized conduct (in this case taking illegal drugs while pregnant) but only at poor people, who are racialized in very specific ways. Second, when those in power put forward the idea of offering care in the criminal system, often that's just a smokescreen. Instead for this group of stigmatized poor people, they are prosecuted. Prosecution in turn leads not only to deepened poverty but it goes hand-in-hand with a deeply degraded form of justice. Third in poor communities in Tennessee and well-beyond, care is linked to punishment: To the extent that society is willing to provide care in poor communities, it has increasingly linked offered that care in ways that are closely linked to systems that punish. And locating care within punitive systems fundamentally corrupts the structure and quality of that care. That corruption plays out in public assistance and healthcare, in child welfare, and in the criminal legal system itself. And finally the book seeks to convince you that there is a better way, that we can and that we must shrink our punishment systems, erect firm legal walls between systems that support and systems that punish. and invest substantial resources in creating systems of care that promote the dignity and well-being of all individuals and families.

The argument is laid out in four sections. Section One, *A Problem, A Solution and Quick Dive into History and Theory,* provides much-needed context. Chapter One, *Creating a Crime to Create Care,* begins to delve into the case study, describing the basic structure of the fetal assault law. It also draws on the law's legislative history to describe the thesis about both the problem and the solution presented by those who supported the creation of the fetal assault law. The law's proponents argued, for the women they were targeting, a group a prosecutor described in a hearing as "the worst of the worst," both that care is better provided inside rather than outside punishment

[2] SisterReach, *Who We Are* (2021), *available at* https://www.sisterreach.org/who-we-are.html.

systems and that criminal system processes in of themselves are a form of care. Both these ideas are central to the criminalization of care. Chapter Two, *What is the Problem?*, delves more deeply into how we think about the "problem" that this law was supposed to solve. It presents both the framing of the problem as described by those who supported the law and then, drawing on medical research, the research of SisterReach, as well as the qualitative interviews of several experts, reframes the serious needs of poor pregnant women struggling with addiction to start to introduce a different notion of what "problem" might exist and what kinds of solutions and support might actually help. Finally, Chapter Three, *Historical and Theoretical Roots*, turns briefly to history and theory, contextualizing the Tennesssee law as an example of a far broader history of prosecuting pregnant women for substance use during pregnancy, the location of care resources within courts, and the criminalization of social welfare programs.

Section Two, *Prosecuting Poverty*, returns to the case study. Chapter Four, *Punishing Poverty*, presents evidence that the prosecutions targeted not fetal harm in general and by all classes of women but instead drug use by poor women, predominantly white in Appalachia and both black and white women in Memphis. Moreover, in the majority of cases, the files bear no evidence that women were offered care as part of their criminal cases. Instead the women faced what every poor person faces when charged with a misdemeanor: bail, jail, probation, fines and fees, and sometimes more jail. While we tend to focus on felonies when we talk about the injustices at the heart of the criminal legal system, these cases add data to the scholarship describing the crushing nature of our misdemeanor system. Chapter Five, *Deepening Poverty and Degrading Justice*, demonstrates that the punishment women received was just that – punishment, and that punishment came in forms characteristic of the misdemeanor system. So rather than addressing the poverty or healthcare needs of these women, prosecution deepened their poverty through the imposition of high degrees of criminal debt. In addition, again as is characterized by cases at the low end of the criminal system, little justice was available. Instead women faced extraordinary pressure to plead guilty and subject themselves to the risk of additional punishment, even in those cases when their files indicated a strong possibility of a defense to the charge. In all these ways the rhetorical focus on care in the legislation turned out, in the majority of cases, to be nothing more than a smokescreen for deepening poverty and degrading justice.

Section Three, *Degrading Care*, presents the books' second primary argument about the nature of criminalized care. This section argues that when you link care to punishment defendants face

not only a tremendous set of risks of additional punishment as a cost of care, but they receive a degraded form of care. Chapter Six, *Care at a Cost,* returns to the cases of the minority of women whose criminal court files indicate that they received an offer of care as a part of their criminal case and demonstrates the high price they paid, in the form of incarceration and financial costs, and the high risk they took for accessing care in this way. Chapters Seven through Nine turn from the cases to the systems, drawing largely on interviews of key system actors and laying out the ways in which the provision of care is affected by the proximity to or location within punitive systems. Here we see how both systems and actors within those systems are deeply constrained by the idea of these women as criminal. Chapter Seven, *Healthcare and Medicine*, begins this argument in the health care setting and describes how the notion of these particular women as criminal in nature led to a series of practices that both undermine trust and undermine care. In the words of one woman interviewed by SisterReach about the fetal assault law, "I was scared to death to have that open relationship with my doctor because the laws in effect prevent me from it being a care thing." But beyond disclosures and undermined trust, criminalizing care also effects medical practice. For example, nurses ignore best practices in their focus on their perceived role as detecting bad behavior by mothers, and doctors make care choices indicating that the see their duty as saving infants from bad mothers rather than treating the mother and infant as a family in need of care.

Chapter Eight, *Child Welfare,* shift to a system that many scholars now label the Family Intervention System, to signal its' extraordinarily harmful effect on both parents and children. The chapter traces the way that child welfare rules, on the federal and state level, draw cases into the child welfare system even when the woman is following her doctor's instructions and is receiving care, for both herself and her infant, from healthcare providers. Once in the system, it is again structured to expose women to additional punishment. Chapter Eight also begin two conversations, both of which are continued in Chapter Nine. The first describes the ways in which treatment spots appear to be more easily accessed behind the doors of punitive systems (in this case child welfare). The second focuses on what Dr. Stephen Lloyd, the Director of an inpatient treatment program in Tennessee and the former Drug Czar for the state, calls "practicing medicine without a license" – the influencing of medical decisions by judges. Chapter Nine, *Criminal Legal System,* briefly recaps the price women paid for accessing care in that system and then goes onto to add more information to the linking of treatment slots to court, the ways in which jails and

incarceration are used, quite intentionally, as a part of "treatment" plans, the ways in which judges' opinions affect care decisions (more practicing medicine without a license), and the pervasive, but unproven belief that care must include coercion.

The final section, *Rejecting Criminalization and Reconceptualizing The Relationship Between Punishment and Care*, concludes. Chapter Ten, *Law, Sociology, and Criminalizing Care*, offers some additional reflections on the contributions this book makes to various conversations in Law and Sociology. Finally, Chapter Eleven, *A Path Forward*, turns to the issue of reform. It begins by highlighting the power of bias, the strength of the conditions that gave rise to criminalized care, and the resulting limitations of reform without significant political change. It then turns to possible incremental reforms, in the healthcare, child welfare and criminal legal systems, that might, nevertheless, partially mitigate the harms described in this book. it concludes by recentering the notion of reproductive justice and demanding a set of systems and rules that provide the care that low-income communities need and deserve.

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