

Members of the Judiciary Committee, thank you for the opportunity to testify. I am Linda Fentiman, Professor Emerita at the Haub School of Law at Pace University in New York. My research focuses on criminal law, mental disability law, and health law. I am testifying in support of HB23-1187, which provides an important counter-weight to the unconscious mental processes involved in assessing risk.

My book, Blaming Mothers: American Law and the Risks to Children's Health, examines the connections between the unconscious process of risk assessment and legal conclusions about blame and criminal responsibility. In brief, I found that assessing risk is inherently subjective and that unconscious mental processes often lead prosecutors, judges, and juries to hold pregnant women and mothers to a higher standard than other defendants.

This Bill's rebuttable presumption against incarcerating pregnant and postpartum women is an important way to counter unconscious bias and stereotypes about pregnant women and mothers, without violating the equal protection clause. The Supreme Court has never held that all gender-based distinctions are prohibited. Instead, it has ruled that the law can treat men and women differently, based on real biological differences between them, as opposed to stereotypes based on outmoded views of their appropriate social roles.

Social science research shows that people's perceptions of risk reflect their personal worldviews as well as unconscious biases and stereotypes. These unconscious mental processes affect how key players in the legal system – including prosecutors and judges - exercise discretion. Many people hold idealized views of how pregnant women and mothers should behave. Any deviation from this ideal can result in a negative, sometimes harsh, judgment against a pregnant or post-partum defendant. These judgments include the decisions to prosecute and convict, as well as what sentence to impose and whether defendants should remain free on bond.

This Bill seeks to counter unduly stringent risk assessments by creating a rebuttable presumption against incarcerating pregnant and post-partum women. Substantial medical evidence shows that incarceration can adversely affect women's and children's health. The presumption against incarceration does not preclude judges from ordering incarceration. Rather, it channels and guides judges' exercise of discretion by requiring them to articulate specific facts to support their decision.