



PREGNANCY  
**JUSTICE**

# Pregnancy as a Crime:

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A Preliminary Report on the  
First Year After *Dobbs*

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# Executive Summary

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This report presents the preliminary findings of a research study seeking to document all charges of pregnancy criminalization in the country in the three years after *Dobbs v. Jackson Women's Health Organization*. The report covers the first year after *Dobbs*, from June 24, 2022 to June 23, 2023. The research is ongoing and will result in additional reports in the coming years. The research protocol is approved by the Institutional Review Board of University of Tennessee-Knoxville.

In the first year after *Dobbs*, at least 210 pregnant people faced criminal charges for conduct associated with pregnancy, pregnancy loss, or birth. In one sense, this is nothing new. Pregnancy Justice, along with other reporters and researchers, has documented over 1,800 cases of pregnancy-related charges between 1973 and the *Dobbs* decision in 2022.

Yet the 210 prosecutions initiated in this one-year period represent a high-water mark—the largest single-year number since researchers began tracking these cases. Two important caveats temper this finding. First, even a number as high as 210 prosecutions represents an undercount of cases; in fact, the research team continues to uncover additional cases initiated during this period and will add them to the dataset as part of a comprehensive three-year report published at the end of the study. Second, the research team had more resources to devote to uncovering cases and focused on a shorter time period than prior researchers. Therefore, it is possible that those resources allowed the team to uncover a higher proportion of cases than in the past.

## Key Preliminary Findings:

- » There were at least 210 pregnancy-related prosecutions in the first year after *Dobbs*—June 24, 2022 to June 23, 2023—the highest number of pregnancy-related prosecutions documented in a single year.
- » Prosecutions in Alabama represent nearly half of the documented prosecutions (104) and Oklahoma represented nearly a third

(68), followed by South Carolina (10), Ohio (7), Mississippi (6), and Texas (6).

- » The majority of defendants are low income. One hundred forty-three of the 210 defendants were white; thirty were Black; thirteen were Native American; nine were Latinx, and fifteen had no information with respect to either race or ethnicity.
- » The majority of pregnancy-related charges (198/220) allege a form of child abuse, neglect, or endangerment. The remaining include nine charges of criminal homicide; eight drug charges; one abortion-specific crime (under a now-repealed portion of a criminal abortion statute); one charge of abuse of a corpse, and three additional miscellaneous crimes.
- » The majority of charges alleged substance use during pregnancy. In 133 cases, substance use was the only allegation made against the defendant.
- » Five cases included allegations concerning abortion. Those cases alleged an abortion procedure, an attempt to end a pregnancy or an allegation that the defendant researched or explored the possibility of an abortion. One person faced an abortion crime charge and the rest faced homicide, abuse of a corpse, or child neglect charges. Four of the five pregnancy outcomes in these cases took place outside a medical setting.
- » Twenty-two cases involved a fetal or infant demise and allegations regarding conduct concerning pregnancy, pregnancy loss, or birth.
- » Prosecutors overwhelmingly charged pregnant people with offenses that allow them to obtain convictions without having to prove that the pregnant person harmed the fetus or infant. One hundred ninety-one of 220 charges lacked a harm requirement.
- » In 121 of the 210 cases, information was obtained or disclosed in a medical setting, and 114 cases indicated involvement by the family policing system.

## **A Note on Language**

Throughout this report, we use the term “pregnant people” as well as the term “pregnant women.” This is because in the face of “fetal personhood,” it is important to center pregnant women and all pregnant people as persons entitled to dignity and the right to make autonomous decisions about their bodies, health and lives. And while the majority of people who become pregnant are cisgender women, trans men and nonbinary people’s experiences of pregnancy are shaped by gender identity realities outside that of most cisgender women. Sexism based on the gender binary and the patriarchal drive to impose traditional gender roles on women and to erase trans and nonbinary people’s experiences must be acknowledged. Our language reflects the broad community of people with the capacity for pregnancy.

# Introduction

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In *Dobbs v. Jackson Women's Health Organization*,<sup>2</sup> the Supreme Court overturned *Roe v. Wade*,<sup>3</sup> **inviting states to ban abortion across the country,<sup>4</sup> opening the door to government intrusion into pregnancy** in unprecedented ways,<sup>5</sup> and throwing suspicion on pregnancy loss, particularly outside medical settings.

*Dobbs* also emboldened state legislatures, judges, anti-abortion activists, and prosecutors to develop ever more aggressive strategies to protect fetal “victims.” The movement to enshrine fetal rights takes many forms. States enact abortion crimes. Courts vindicate the rights of “extrauterine children” frozen in an embryology lab. Activists push to have prosecutors charge those who seek or provide abortion under the federal Comstock Act. The longstanding prosecution of pregnant people for acts associated with pregnancy stands alongside these emerging examples.

The *Dobbs* decision opened up a score of legal and empirical questions. One was clear: how would criminal laws be used after *Dobbs* to prosecute acts associated with pregnancy? This research team set out to find the answer. This report shares preliminary results, focusing solely on charges brought and allegations made in the first year after *Dobbs*. The data suggest an escalation: 210 pregnancy-related prosecutions—the highest number of such cases documented in a single year. These cases reveal that, as in the past, prosecutions target pregnant people predominantly (compared to helpers or providers), causing lasting harm to them and their families and doing nothing to improve health or wellbeing. While year one included a handful of cases brought against non-pregnant people for pregnancy-related crimes, we have reserved analysis of these cases for future reports.

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**This report shares preliminary results, focusing solely on charges brought and allegations made in the first year after *Dobbs*. If an investigation did not lead to charges, it is not included in the report.**

# Pregnancy Criminalization and Fetal Personhood

Pregnancy criminalization occurs when the state wields a criminal law to render acts associated with a pregnancy, pregnancy loss, birth, and/or associated healthcare the subject of criminal prosecution. While the *Dobbs* decision ushered in a wave of criminal abortion laws,<sup>6</sup> pregnancy criminalization is nothing new. From 1973 to June 2023, at least 2,000 individuals across the United States have faced prosecution and punishment for circumstances surrounding their pregnancies and pregnancy outcomes. Pregnant people have been prosecuted when they took prescription medications on the advice of their physicians, when they had a substance use disorder, when they were shot, when mental health crises led to suicide attempts, and when they experienced miscarriages or stillbirths.<sup>7</sup> Women have gone to prison, sometimes for decades, for these acts. In nearly every case, the criminal legal system treated the embryo or fetus as the victim of a crime. As is sadly characteristic of the criminal system overall, poor Black pregnant people and, in more recent decades, poor people regardless of race, have borne the brunt of these prosecutions.

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While laws that criminalize abortion have proliferated after *Dobbs*, these laws have never accounted for more than a handful of pregnancy-related prosecutions.<sup>8</sup> Instead, prosecutors, by conceptualizing embryos and fetuses as potential crime victims and pushing the boundaries of other criminal statutes, have prosecuted pregnant people with general crimes like child abuse, neglect, or endangerment or homicide. These charges normalize the policing of pregnant people's behavior, mental health, and medical decision-making.

Without fetal personhood, pregnancy criminalization could not exist. Virtually every prosecution documented in this preliminary study, the over 1,800 previous pregnancy-related prosecutions from 1973 to June 2022, and every potential prosecution that could be charged for violating the scores of new criminal abortion statutes in the United States, rest on the idea that a fertilized egg, embryo, or fetus is a person separate and apart from the pregnant person who carries it. It is not surprising, then, that of the six states with the highest number of prosecutions in this report, all but one of them have explicitly enshrined fetal personhood in their civil and criminal laws through judicial decision, statute, constitutional amendment, or a combination of the three.<sup>9</sup>

Fetal personhood, as manifested through pregnancy criminalization, is not about protecting fetuses from harm. It is about controlling and punishing pregnant people, particularly women who do not conform to racialized ideals of motherhood.<sup>10</sup> Far from making pregnancy, birth, and parenting safer and healthier, criminalization threatens all people's bodily autonomy,<sup>11</sup> their power to make reproductive healthcare decisions free from government interference, and their ability to live and parent in safe and healthy communities.<sup>12</sup>

# Pregnancy-Related Prosecutions: Study Definition and the Parameters of this Report

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This three-year study seeks to document pregnancy-related prosecutions. The study defines a pregnancy-related prosecution as one in which:

1. the criminal charge is based on allegations related to a pregnancy, pregnancy loss, or birth, and prosecutors argue those allegations meet an element of the criminal offense; or
2. the State imposes harsher and/or different penalties (e.g., parole or probation revocation, sentence enhancement, or modification to pretrial release conditions) on a person for being pregnant, even if the precipitating charge itself is not associated with pregnancy.

This initial report focuses on a subset of pregnancy-related prosecutions—cases in category one above, brought against a pregnant person in the first year after *Dobbs*. The report also focuses only on a subset of information about those cases—the geographic location and demographic information of the defendants and the charges and allegations made against them.

## Allegations Not Facts

The primary data sources for this report are court files and police investigation reports. These documents are evidence of what police and prosecutors claim happened in a particular case. They are also evidence of the crime those actors believe occurred, what they believe they must prove in order to convict a defendant of that crime, and the range of punishment they will have the authority to seek if the defendant is convicted. When police and prosecutors make allegations, it can lead to guilty pleas, convictions, and punishment. These documents, standing alone, are not proof of the assertions they contain. Just because the prosecutor or investigator claims, for example, that a person took a particular drug during pregnancy or that the substance harmed the fetus does not mean that is true. But allegations matter. Understanding them teaches us a good deal about the nature and scope of pregnancy criminalization. Allegations start the criminal process and determine the scope of pregnancy criminalization. For that reason, they are the focus of this report.

# Methods

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## Case Identification

This preliminary report includes cases that met four criteria. First, researchers must have had access to the charged person's name, date of case initiation, and county and state of indictment. Second, researchers required that the charging document confirm that the case met part one of the study's definition of a pregnancy-related prosecution as defined above. Third, the prosecution must have been initiated between June 24, 2022 and June 23, 2023. Fourth, the prosecution must have targeted the pregnant person.

The research team relied on several methods to identify cases: intakes from Pregnancy Justice, outreach, web searches, and bulk records requests. Pregnancy Justice attorneys are regularly contacted via their legal intake line concerning pregnancy criminalization cases, and at least sixteen cases in this study were identified this way. The research team also conducted extensive outreach with public defenders, the private criminal defense bar, reproductive justice advocates, academic institutions, and journalists to encourage them to share publicly-available information about prosecutions. In addition, the team created a list of Boolean search strings based on common phrases and keywords to regularly query legal and media databases. Finally, the team identified several jurisdictions where it knew pregnant people were being charged with pregnancy-related crimes and used public records requests to seek information on cases involving offenses that had previously been charged against pregnant people in that jurisdiction. In those jurisdictions, the team obtained the court files and, when available, investigation files for every charge of that nature and analyzed each one to determine whether they met our study criteria.

### LIMITATIONS

Criminal legal data systems in the United States are notoriously opaque.<sup>13</sup> There is no centralized national database for criminal cases, and the ability to identify cases varies significantly from jurisdiction to jurisdiction. For example, in Texas there are 254 counties and inquiries need to be made

on a county-by-county basis. Further, the vast majority of pregnancy criminalization charges are not brought under statutes that are explicitly pregnancy-related but rather are charged as child abuse or homicide. In these circumstances, it is impossible to know which cases are pregnancy-related without making generalized information requests and reviewing every single case to determine if it belongs in the dataset. Identifying every case charging a particular crime in any given jurisdiction can be tremendously difficult and time-consuming. Court files are not always accessible online, and even when they are, databases rarely permit searches for every instance of a particular charge. There are exceptions and, as noted above, where possible and when resources allowed, the research team collected and reviewed such information county- or state-wide in jurisdictions where pregnancy criminalization historically has been the most common.

Because the 210 cases identified here do not represent every pregnancy criminalization case brought during this period, this report includes only descriptive data. In the coming years, the team will utilize additional methods to identify, as comprehensively as possible, the scope of pregnancy criminalization in the three years after *Dobbs*.

## Coding and Data Analysis

The coding protocol involved multiple steps and two analytic tools. The team first identified research questions that could be answered confidently based on the data available for this first initial report. The team then developed coding tools, which included codes in a qualitative software program (Dedoose) and a Qualtrics survey. A test run clarified relevant codes and ensured consistency across tools. To code each case, coders applied codes in Dedoose and completed the Qualtrics survey; then the

principal investigators reviewed the coding in both Dedoose and Qualtrics, corrected any errors, and marked the survey answers complete. During this process, the principal investigators provided ongoing feedback and remained in constant communication with the ten coders. The team chose this process over a more standard inter-rater reliability check because it concluded that, given the highly technical legal information central to the coding protocol, this closely-held review process would yield more accurate and consistent results. Once the surveys were complete, the data set was cleaned and analyzed in SPSS 29, leading to the results contained in this report.

## **The Relationship Between Prior and Current Research Methods**

In September 2023, Pregnancy Justice published *The Rise of Pregnancy Criminalization*, documenting and analyzing 1,396 cases of pregnancy criminalization from 2006 to the *Dobbs* decision. The current research project builds upon and refines the methods used in that prior report. First and most importantly, the current research team has significantly more staffing and resources than prior efforts and is concentrating its efforts on a shorter time period. This has and will continue to enhance the team's ability to identify and comprehensively analyze cases. In addition, some coding variable definitions were added or refined from one study to the next and additional variables, particularly those that examine the charges and their possible penalties, were added to the analysis. For these reasons, the researchers cannot directly compare one set of results with the other. For example, while the research team is able to state that it has documented more pregnancy criminalization charges in the first year post-*Dobbs* than in any prior year, it cannot say whether that increase is due to the team's ability to locate and identify prosecutions or whether more prosecutions occurred because of shifts in the political and legal landscape surrounding pregnancy. The team suspects it may be both.

## **Questions for Further Research**

This initial report focuses solely on the initiation of prosecutions that meet part of the study criteria. Many of the cases remain open at the time of this writing. Later reports will focus not only on cases in the coming years but also on providing a fuller picture of what happened in these cases. The research team intends to analyze bail, plea agreements, outcomes at trial, and sentences, as well as the relationship between the defendant's race and these variables. The team will also be devoting resources to the second part of our study definition and to additional qualitative work.

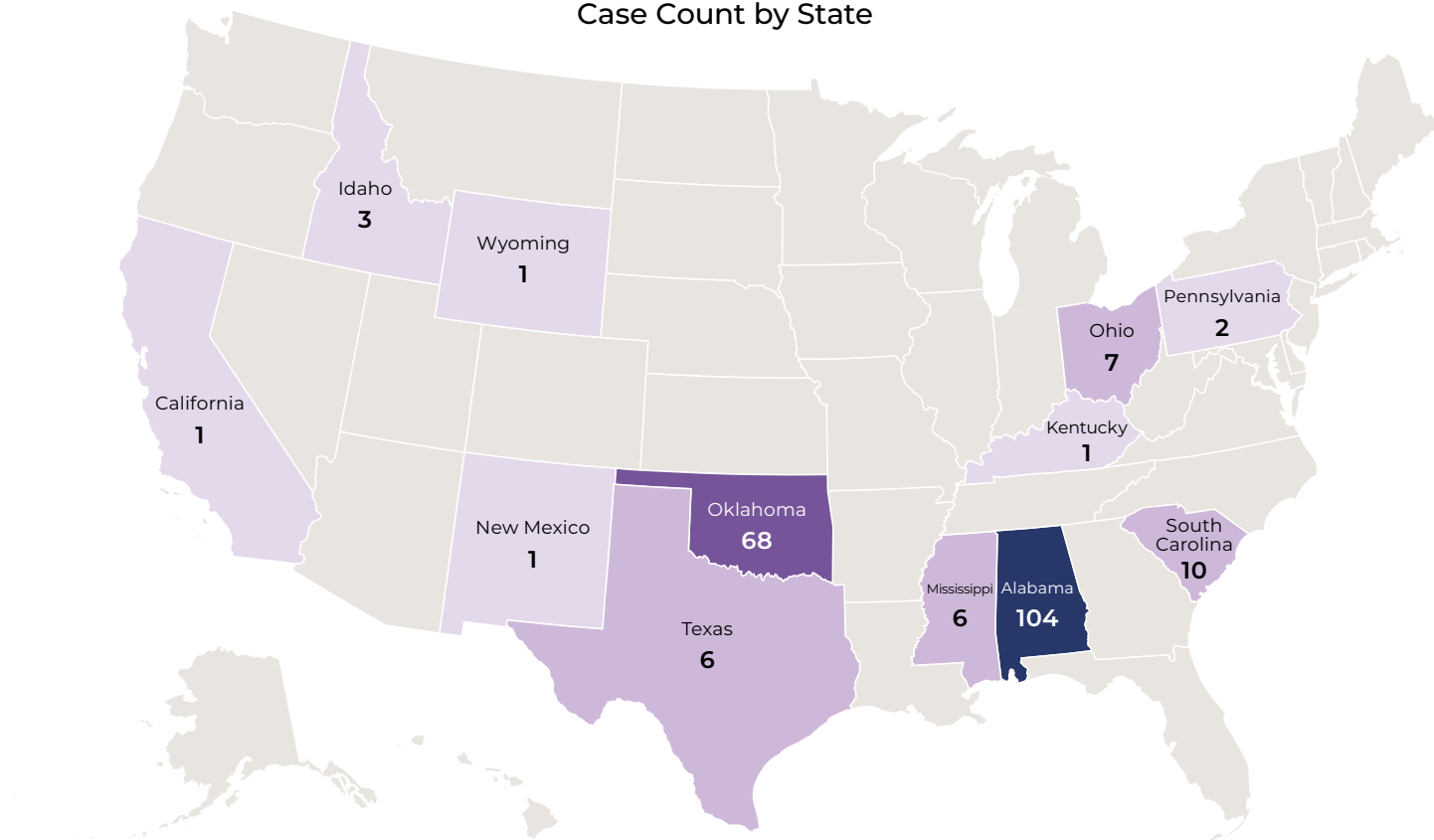
# Preliminary Findings

## Scope and Geography

Between June 24, 2022 and June 23, 2023, the first year after the *Dobbs* decision, at least 210 criminal cases were initiated charging pregnant people with crimes related to pregnancy, pregnancy loss, or birth. Documented prosecutions were initiated in twelve states—Alabama, California, Idaho, Kentucky, Mississippi, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, and Wyoming. While prosecutions were brought in all of these states, six collectively account for

the majority of the reported cases, with Alabama and Oklahoma accounting for the overwhelming majority. As shown in Figure A, cases documented in Alabama (104) represent nearly half of the documented prosecutions. Oklahoma represented nearly a third (68), followed by South Carolina (10), Ohio (7), Mississippi (6), and Texas (6), which continue to bring a notable number of prosecutions.

**FIGURE A**  
Case Count by State



## Maternal Mortality

These cases are all the more significant because the United States faces an urgent and dire maternal health crisis, with hundreds of people dying every year during pregnancy or shortly after. The country's maternal mortality rates far surpass those of other high-income countries.<sup>14</sup> Over 80% of pregnancy-related deaths are preventable.<sup>15</sup> Black women are three times more likely to die from a pregnancy-related cause than white women.<sup>16</sup> Amidst this public health crisis, with options for terminating a pregnancy intentionally out of reach, many states fail to invest in or prioritize quality, affordable, and accessible healthcare for pregnant people. In fact, the states that have the highest number of documented prosecutions in this study are states with some of the worst maternal and infant health outcomes.<sup>17</sup> These states also rank among the lowest in health care quality, measured in births by cesarean surgery for low-risk pregnancies, preventive care use, prenatal and postpartum care, and mental health screening.<sup>18</sup> Despite this reality, failure to access care is held up as a personal failure. And rather than invest in care, these states continue to invest in prosecution and punishment.

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## Race, Ethnicity, and Income Status

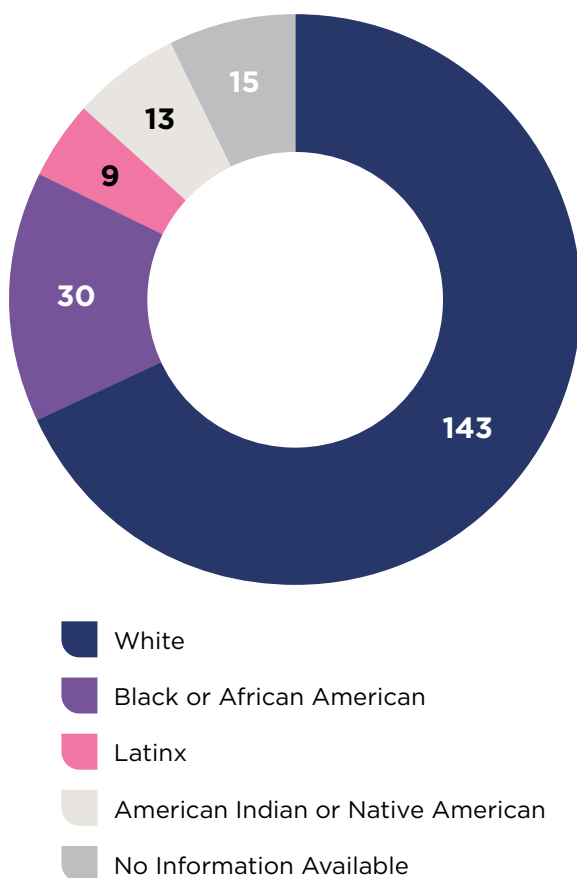
The United States's history of wielding the criminal law to control and punish reproduction has deep racist, patriarchal roots. The criminal law and its associated civil systems have long targeted the most marginalized women, whose humanity and motherhood have long been degraded. It originates in the rape and forced pregnancy of enslaved women<sup>19</sup> and passes down through a history of obstetric violence<sup>20</sup> and forced sterilization,<sup>21</sup> and continues today in the form of obstetric racism and unjustly high maternal mortality rates for Black women.<sup>22</sup> The war on

drugs built on this long history of degradation and violence toward women, disproportionately Black but also poor Native American, Latinx, and white women.<sup>23</sup> Beginning in the 1980s, prosecutors relied on now-discredited narratives that in-utero exposure to crack cocaine would lead to a generation of destroyed children<sup>24</sup> to charge women who used crack cocaine during pregnancy with child abuse.<sup>25</sup> While this initial wave of prosecutions focused predominantly on poor Black women, as patterns of drug use shifted, so, too, did the prosecutions. The second wave, which began in the mid-2000s and continues today, expanded the target of pregnancy prosecutions to include opiates and methamphetamine and the predominantly white communities that use those drugs. While the racial demographics of the targets of pregnancy-related prosecutions have shifted over time, the income status of those targeted has not. Low-income communities bear the brunt of both pregnancy-related prosecutions<sup>26</sup> and criminal prosecutions overall.<sup>27</sup>

The cases documented in this report signal a continuation of these trends. Information concerning the race of the defendants was dependent, like all the data, on information contained within court, police, or jail records. This information is notoriously unreliable, particularly

when it comes to recording ethnicity and multi-racial identity.<sup>28</sup> The files gathered reflected this truth. At times, documents reported inconsistent racial or ethnic identities for the same defendant, failed to separate race from ethnicity, or neglected to record race or ethnicity at all. To the extent that the files did contain data on race and ethnicity, they indicated, as shown in Figure B, that 143 of the 210 defendants were white, thirty were Black, thirteen were Native American, nine were Latinx, and fifteen had no information with respect to either race or ethnicity.

**FIGURE B**  
Race



## Racial Construction & Protection of “Deserving Victims”

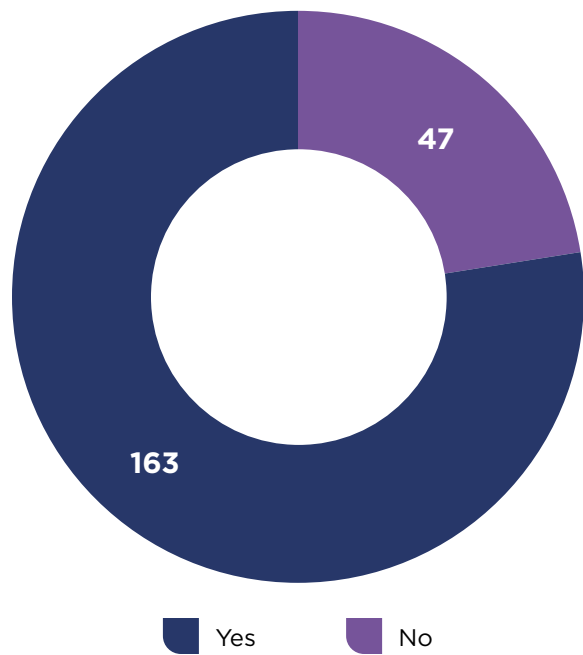
One way of understanding racial disparities in the criminal legal system is through the lens of whom the system punishes and punishes most harshly – typically Black defendants. But another way of understanding racial disparity in the system is *for whom* the system punishes most harshly: white victims. Thinking about the system’s racism from this perspective sheds light on how to understand the prosecutions of the poor white women whose cases are represented here.

The race of victims plays a prominent role in how the U.S. criminal legal system prioritizes cases, investigates, and punishes. The death penalty provides the quintessential example. In Southern states that applied the death penalty for rape, those sentences were overwhelmingly imposed on Black men for the alleged rape of white women.<sup>29</sup> To this day, prosecutors disproportionately seek and secure capital sentences for those who have killed white victims.<sup>30</sup>

In the context of pregnancy prosecutions, the race of the victim will often be assumed to follow from the race of the defendant, that is, white mothers will often be assumed to have white children, while Black mothers will be assumed to have Black children.<sup>31</sup> As a result, if the criminal legal system values white infants more highly as victims than Black infants, police, prosecutors, judges, and legislators will be willing to expend more resources on their behalf: surveilling, investigating, charging, diverting, prosecuting, supervising, and incarcerating white women to protect their white infants.<sup>32</sup>

The available data indicate that slightly over three quarters of the defendants in this report are low income, as shown in Figure C. Individuals were coded as low income if counsel was appointed<sup>33</sup> or if there was some indication that they received a means-tested benefit like public housing, Temporary Assistance for Needy Families, Medicaid, or Supplemental Nutrition Assistance. Given prior research, this finding is unsurprising.<sup>34</sup>

**FIGURE C**  
Low-Income Status

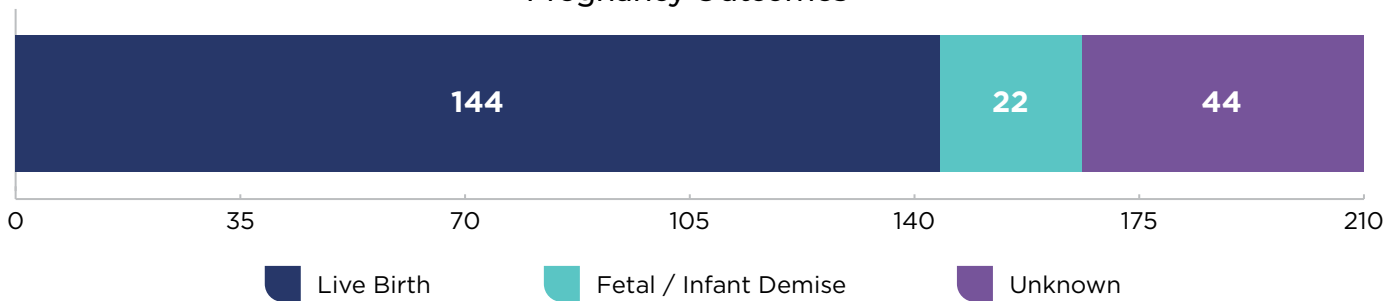


**Pregnancy Outcomes**

Of the 210 cases of pregnancy criminalization described in this report, 166 contained information concerning the outcome of the pregnancy. As shown in Figure D, pregnancy outcomes were split into two categories: cases with a live birth and no subsequent infant demise (144/166) and cases in which there was a fetal or infant demise (22/166).<sup>35</sup> Cases involving a live birth represent the overwhelming majority of documented pregnancy criminalization charges. Prior research shows that these cases often involve immediate separation of the mother and baby within days of giving birth,<sup>36</sup> to devastating and life-altering consequences for both. Many of these cases also lead to detention in jail without even the most basic postpartum physical or mental health care.<sup>37</sup>

A significant minority of the cases involve an alleged fetal or infant demise. In conformity with our study definitions, a case was only included if it contained allegations related to a pregnancy, pregnancy loss, or birth and prosecutors argue those allegations meet an element of the criminal offense. Therefore, cases of infant demise or alleged harm to an infant, without these other elements, are not included in the study. The fetal or infant demise cases included in the study often involve pregnancies ending suddenly and tragically; people giving birth alone, losing consciousness, in pools of blood; and pregnant people with co-occurring psychiatric disabilities and substance use disorders experiencing devastating losses without the support of healthcare providers. In some of these cases, people chose to give birth outside a medical setting. In those cases, their preparations for giving birth, like securing supplies needed to give birth safely at home, have been transformed into evidence used to prove they committed a crime.

**FIGURE D**  
Pregnancy Outcomes



## Cases, Charges, and Allegations

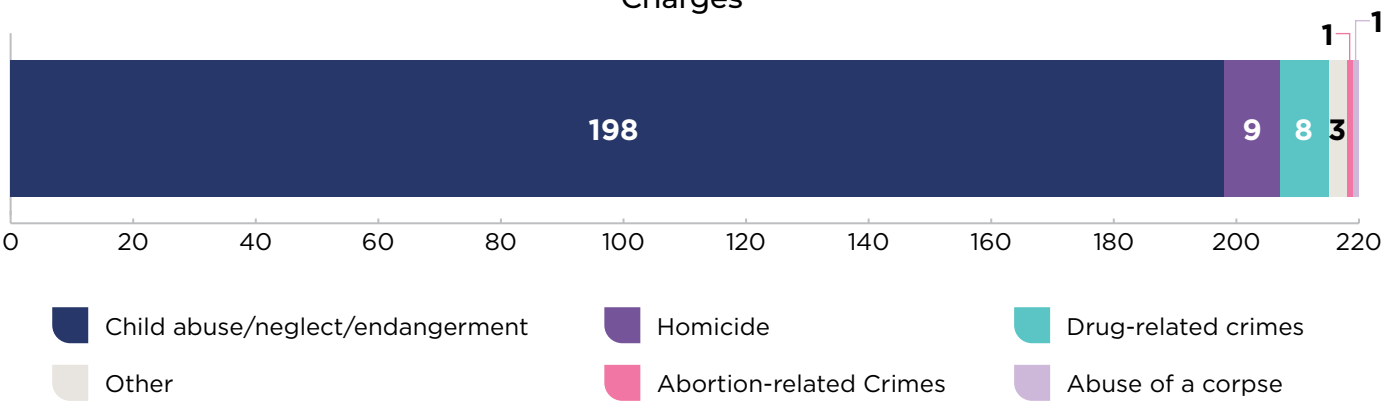
The research team next analyzed both what charges were brought and what allegations were made. The court and investigation files analyzed for this report contained extensive information regarding the criminal charges filed against all 210 defendants and the allegations made by police and prosecutors in these cases. Each of the 210 defendants faced at least one criminal charge, and several faced more than one. In total, the 210 defendants faced 220 charges for conduct related to pregnancy, pregnancy loss, or birth. Based on the researchers’ prior knowledge of pregnancy criminalization as well as a preliminary review of the case files, the team created a list of allegations to track and coded the files if those allegations appeared. In total, the 210 cases contained 323 coded factual allegations in support of the state’s theory that the defendants committed the crime or crimes charged. In addition, when files contained an allegation of substance use during pregnancy, we coded the substance alleged. While some cases alleged only one substance, many alleged exposure to multiple substances.

## Charges

Prosecutors used a wide variety of criminal statutes to charge the defendants in these cases, often bringing more than one charge against an individual defendant. In total, the 210 defendants faced 220 charges for conduct related to pregnancy, pregnancy loss, or birth. As shown in Figure E, the majority of charges (198/220) asserted some form of child abuse, neglect, or endangerment. The remaining include nine

charges of criminal homicide, eight drug charges, one abortion-specific crime (under a now-repealed portion of a criminal abortion statute), one charge of abuse of a corpse, and three additional miscellaneous crimes. With one exception, all of the criminal charges applied general criminal laws (child abuse, neglect, or endangerment, homicide, drug-related crimes, or other general crimes) to prosecute pregnant people.

FIGURE E  
Charges

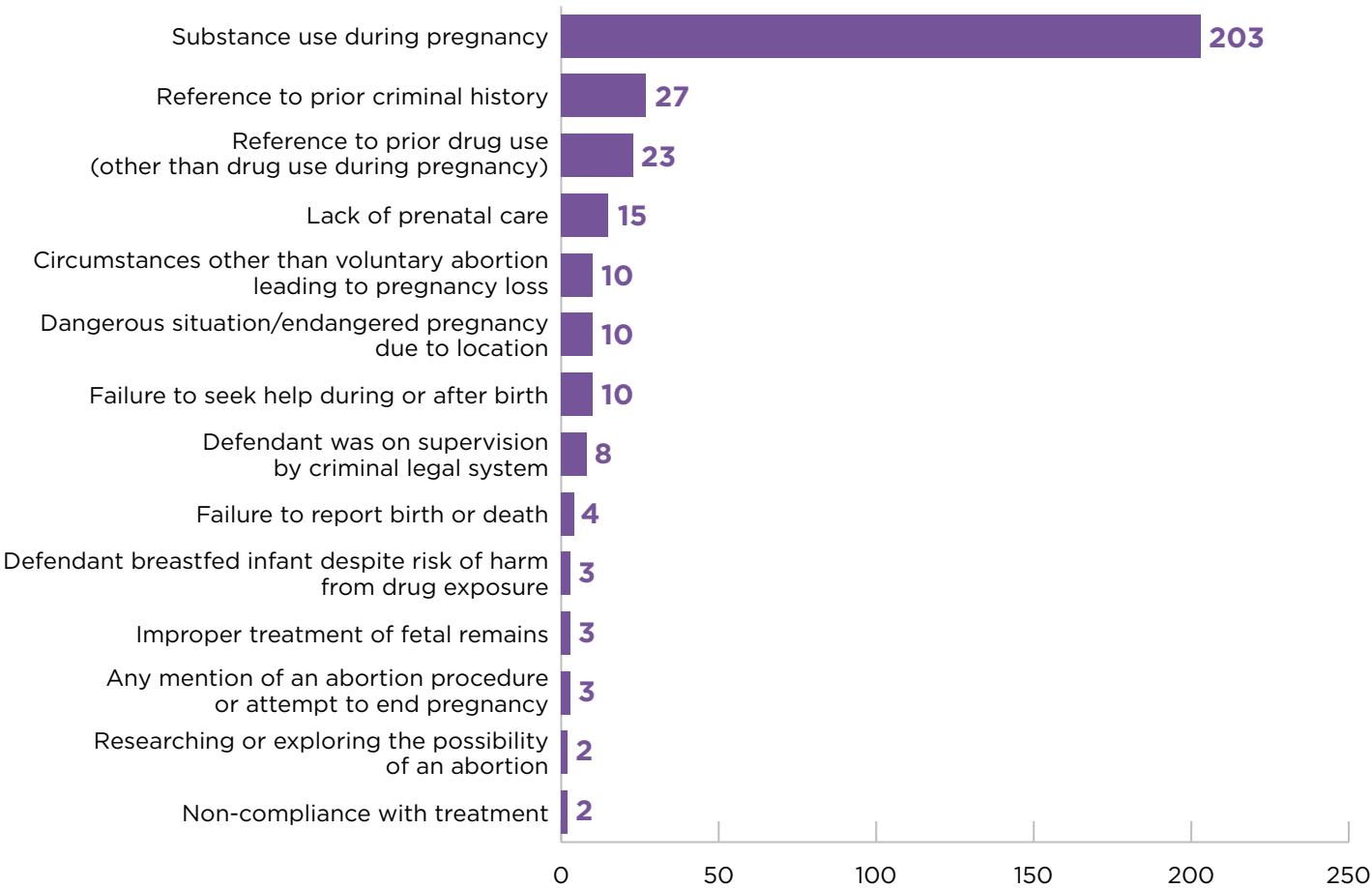


# Allegations

Charging documents must specify the actions a person allegedly took to violate the law. As a result, charging documents, along with supporting police reports, affidavits, and other court documents, reveal a clearer picture of what acts police and prosecutors consider criminal when associated with pregnancy. The study

categorized allegations found in the assembled case files. These allegations and the frequency with which they appeared in the files are shown in Figure F. Because many cases contained multiple allegations, the total number of allegations (323) far exceeds the number of prosecutions (210).

FIGURE F  
Allegations



## CRIMINALIZING PRECARIOUS PREGNANCY AND BIRTH

The allegations in these cases are particularly notable for the way that they criminalize precarious pregnancy and birth and meet healthcare needs with punishment rather than care. For example, in three cases, police or prosecutors described the simple act of breastfeeding as evidence of a crime. It is also noteworthy that several women who appear to have faced serious health conditions, devastating pregnancy losses, and enormous trauma, were met not with offers of care but threatened with punishment for finding themselves in allegedly dangerous situations or allegedly not seeking help quickly enough in traumatic moments. Striking, too, in the midst of a wide-ranging crisis in maternal health care, is the condemnation of pregnant people for not accessing prenatal care. As shown in Figure F, in fifteen cases, prosecutors or police argued that pregnant people's failure to obtain prenatal care was evidence of a crime. In one case, police were called to the scene because a pregnant woman was overdosing. After administering Narcan, police charged her with abuse of her "unborn child." In another, an incarcerated pregnant woman wrote to the judge, begging to be transferred to a treatment facility. Her request was denied, and she gave birth in jail.

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**In fifteen cases, prosecutors or police argued that pregnant people's failure to obtain prenatal care was evidence of a crime.**

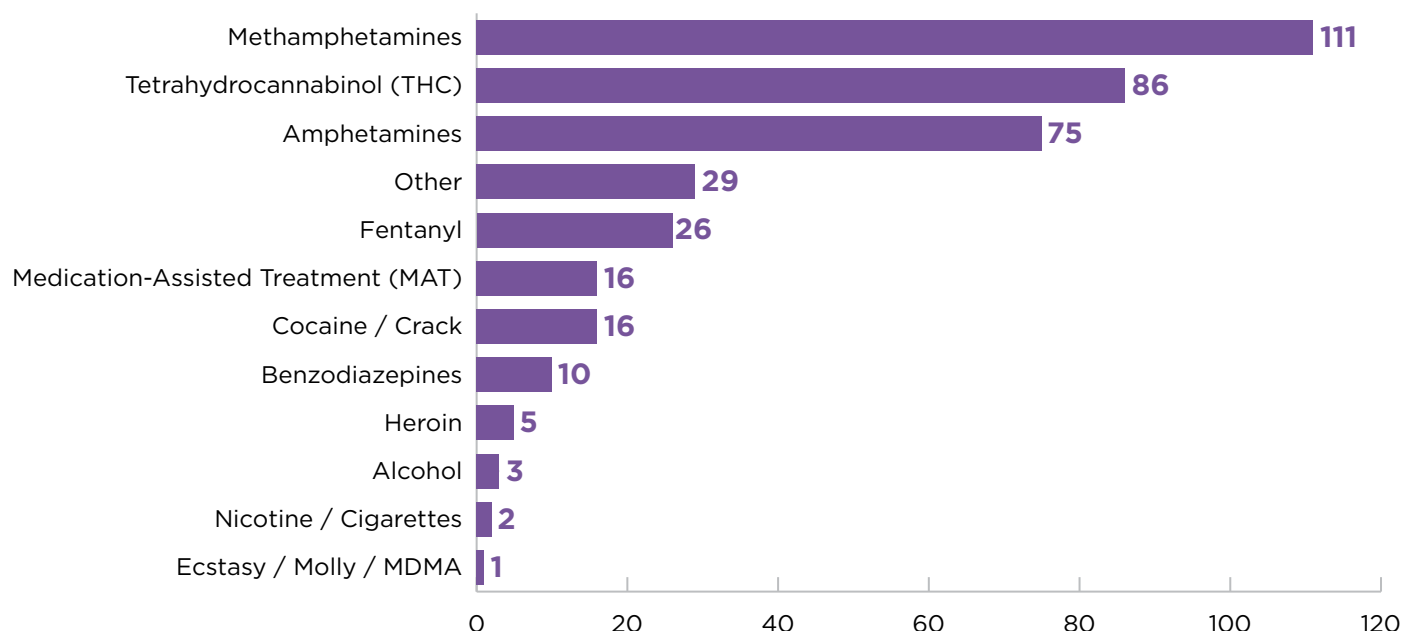
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**Several women who appear to have faced serious health conditions, devastating pregnancy losses, and enormous trauma, were met not with offers of care but threatened with punishment for finding themselves in allegedly dangerous situations or allegedly not seeking help quickly enough.**

## PREGNANCY AND SUBSTANCE USE

As has been the case for decades,<sup>38</sup> nearly all the cases alleged the pregnant person used a substance during pregnancy. In 133 of those cases, substance use was the only allegation made against the defendant. As drug use patterns have changed, pregnancy prosecutions have shifted from targeting the use of crack cocaine<sup>39</sup> to focusing on the use of methamphetamines, amphetamines, marijuana, and opiates.<sup>40</sup> The data confirms these trends. Figure G details all the substances that prosecutors and police allege that pregnant people used in the 203 cases that allege substance use either alone or in combination with other allegations.

**FIGURE G**  
**Alleged Substances**



It is significant that, in eighty-six cases, the police or prosecution alleged that the defendant took some form of THC during her pregnancy, and in thirty-one of those eighty-six cases, the only allegation supporting prosecution was THC use. Even more startling, in five of those cases, the court file included statements that the defendant had a medical marijuana card, indicating that she was being charged with taking legally prescribed medication.

Also striking is the continued use of criminalization rather than care to address opioid use. Opioid-related deaths are the leading cause of death among pregnant people, with mortality rates rising more than 80% between 2017 and 2020.<sup>41</sup> Despite this crisis, pregnant people with substance use disorders<sup>42</sup> face significant barriers to accessing care, treatment, and social support.<sup>43</sup> Criminalization only worsens this crisis. Women who use drugs are generally highly motivated to attempt to desist from drug use when they become aware of their pregnancy.<sup>44</sup> For these

reasons, continued use may indicate that a pregnant person may both need and want voluntary treatment. But largely out of fear of criminalization and family separation, many pregnant people avoid healthcare settings, even when they desire care.<sup>45</sup> More than one woman in this study made precisely this choice, stating that her decision to give birth at home resulted from her fear of criminal charges or family separation.

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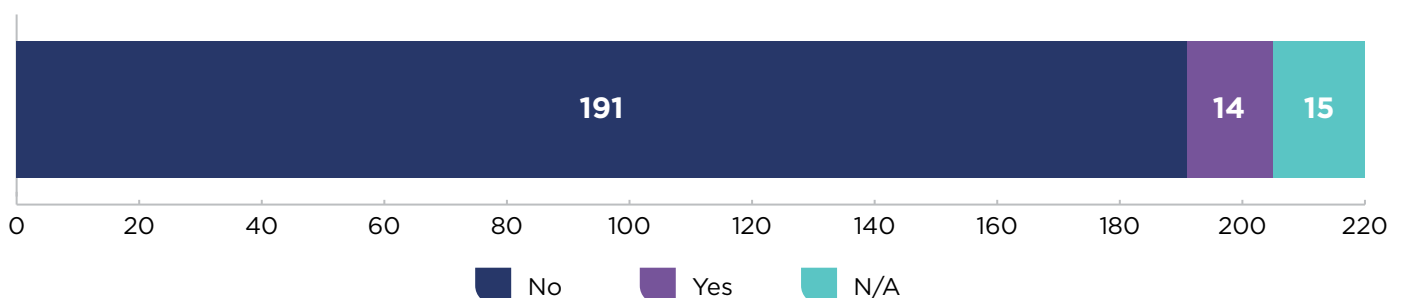
## Prosecuting Unrealized Risk

Those who support pregnancy-related prosecutions purport to do so in the name of protecting the fetus from harm perpetrated by the pregnant person. But the data belie this claim. Prosecutors overwhelmingly charged pregnant people with offenses that allow them to obtain convictions without proving that the pregnant person actually harmed the fetus or infant. The lack of a harm requirement was present in 191 of the 220 charges that alleged conduct related to pregnancy, pregnancy loss, or birth, as shown in Figure H.<sup>46</sup> In general, under these statutes,<sup>47</sup> the only burden on the prosecution is to prove that the defendant engaged in conduct that exposed the embryo or fetus to “risk.” These statutes, however, do not clearly define reasonable and unreasonable risks. Instead, police and prosecutors typically rely on lay, rather than medical, assessments of risk.<sup>48</sup> As a result, defendants can be found guilty even if the pregnancy results in a healthy child and even when the science does not support the assumption that a positive drug test proves the fetus was harmed.<sup>49</sup>

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**Prosecutors overwhelmingly charged pregnant people with offenses that allow them to obtain convictions without having to prove that the pregnant person actually harmed the fetus or infant.**

**FIGURE H**  
Do Statutes Require Proof of Harm?



Like other pregnancy-related charges, these “no harm” prosecutions do not involve mere slaps on the wrist. They carry the risk of severe punishment. For example, the sixty-eight Oklahoma defendants charged with Child Neglect, Delinquency, or Abuse, for being pregnant or giving birth and testing positive for a substance face sentences up to life in prison if found guilty. Similarly, ninety-three of the Alabama defendants charged with Chemical Endangerment of a Minor were charged under the subsection of that statute that defines guilt based only on a showing of exposure. Those ninety-three women, if convicted, could be sentenced to prison for up to ten years. These findings strongly suggest that, rather than focusing on fetal harm, these prosecutions seek to control and punish pregnant people.

## **The Role of Abortion and Self-Managed Abortion**

Consistent with prior data, very few documented prosecutions involve an explicit abortion-related charge.<sup>50</sup> One pregnancy-related prosecution in the dataset charged a person with performing a self-managed abortion under a now-repealed portion of a criminal abortion statute.<sup>51</sup> In that case, the defendant was accused of taking an abortion pill with the intent to end her pregnancy. While that case is the only explicit abortion-related crime, four other cases include allegations pertaining to abortion, suggesting that even when prosecutors do not or cannot charge abortion-specific crimes, they wield criminal law to condemn and punish abortion. These defendants, three of whom faced homicide charges and one of whom was charged with abuse of a corpse, had experienced pregnancy outcomes under emergency circumstances at home. Their case files referenced their possession of abortion medication or their attempts to obtain an abortion. Although it is not clear how the state intends to use that evidence, it appears that, in the homicide cases, the prosecution may use this information to prove the defendants’ intent to kill.<sup>52</sup> These cases show that even when abortion is not charged, pregnant people’s contemplation of abortion can be weaponized against them.

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**Even when abortion is not charged, pregnant people’s contemplation of abortion can be weaponized against them.**

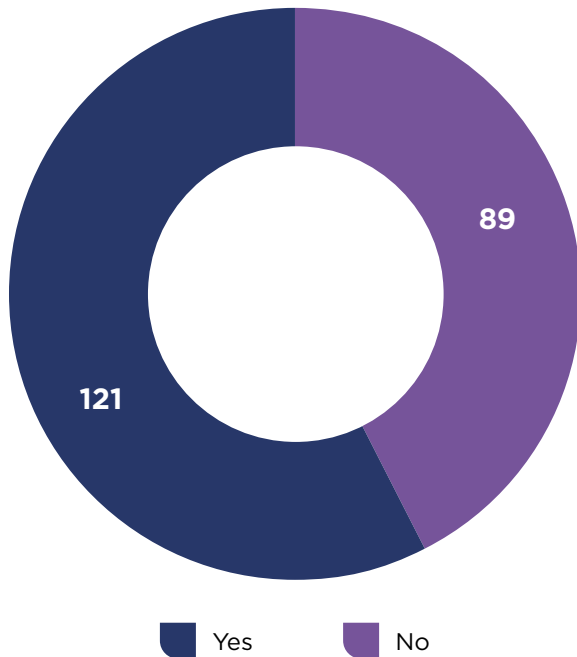
## **The Role of Healthcare Providers**

Pregnancy criminalization continues to co-opt healthcare providers as law enforcement to achieve compliance with its aims. Pregnant people are often drug tested without their knowledge or consent during pregnancy and/or during labor and delivery.<sup>53</sup> The results of these tests are shared with family policing agencies.<sup>54</sup> Those agencies, in turn, often share that information with law enforcement.<sup>55</sup> While the case files in this study rarely reveal precisely who called either the family policing agency or the police, the files indicate that healthcare systems and system actors play a key role in these prosecutions. To understand this role, the study determined whether the files contained information obtained or disclosed in a medical setting. We coded a file as containing this information if it included statements by healthcare providers, drug test results that clearly came from a medical setting, descriptions of events that took place in a hospital or other healthcare setting, or prosecution witness lists that included doctors and nurses. As detailed in Figure J, 121 of the 210 files contained such information.

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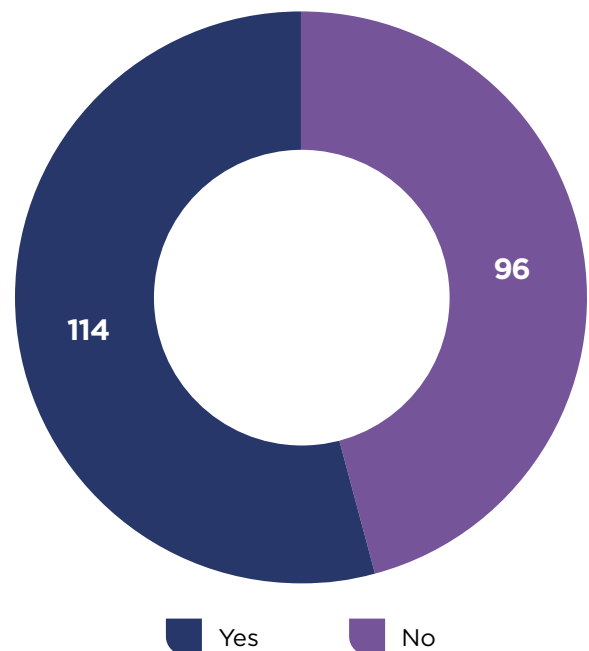
**Pregnancy criminalization continues to co-opt healthcare providers as law enforcement to achieve compliance with its aims.**

**FIGURE J**  
Information Obtained in a Medical Setting



crimes. The family policing system’s involvement plays no role at trial, even as it may play an important role in instigating the investigation or obtaining facts used by the prosecution. For this reason, these figures likely undercount the number of defendants who experienced intervention by the family policing system. Further, it is well documented that the family policing system is heavily involved in policing pregnancy, particularly in the context of substance use. Infants represent the fastest-growing age group in foster care, accounting for more than 20% of placements each year<sup>57</sup>—most associated with parental substance use.<sup>58</sup> The family policing system overwhelmingly burdens Black families, and its involvement in policing pregnancy is no different. Past studies show Black pregnant women are more likely to be referred to family policing agencies compared to white pregnant women.<sup>59</sup>

**FIGURE K**  
Family Policing System Involvement



## The Role of the Family Policing System

While pregnancy-related prosecutions, as defined here, focuses on the use of criminal law and criminal systems to punish pregnancy-related conduct, the criminal system works hand in hand with the family policing system to surveil and punish pregnancy-related conduct.<sup>56</sup> For this reason, the study examined case files for any indication of involvement with the family policing system. As shown in Figure K, 114 of the 210 files indicated such involvement. Still, this data likely underestimates both the role of the family policing system in these cases and the depth of the system’s policing of pregnancy. The court and police investigation documents in this study tend to focus on facts necessary to prove the charged

# Emerging Threats

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While additional resources and new methods enhanced the research team's ability to identify pregnancy-related prosecutions, the high number of prosecutions documented in a single year suggests a possible escalation in pregnancy-related prosecutions.

*Dobbs* unleashed an opportunity for states to further enshrine fetal personhood in statutes, state constitutions, and judicial decisions. The decision offers implicit support for fetal personhood by confirming that the government's interest in fetal life can override a pregnant person's bodily autonomy at any point during pregnancy. Further, Justice Alito's intentional use of the words "unborn human being" and "potential life" throughout the decision gestures toward fetal personhood. The decision invites states to criminalize abortion and enforce new and old criminal laws to do so, and states have taken up the charge.<sup>60</sup> While it remains true that criminal abortion statutes have so far exempted pregnant people from prosecution, some anti-abortion advocates support amending criminal abortion statutes to include self-managed abortion. In 2023, seventeen states introduced twenty-two bills targeting the practice. None were enacted.<sup>61</sup> Nevertheless, as self-management becomes more common,<sup>62</sup> there is mounting concern that self-managed abortion may be targeted by the criminal system through the use of existing criminal laws or the enactment of new ones.<sup>63</sup>

States have also sought to expand the application of criminal laws to reach pregnancy-related conduct by "scheduling" abortion medication. A drug schedule refers to the classification of drugs based on their "abuse or dependency potential."<sup>64</sup> "Scheduling" a drug refers to putting it into one of five controlled substance categories, which has the effect of making it a crime to possess or distribute that medication.<sup>65</sup> Efforts are also underway to expand the tracking and surveillance of pregnant people<sup>66</sup> and to misuse the federal Comstock Act to impose criminal penalties on anyone transporting any "article or thing designed, adapted, or intended for producing abortion."<sup>67</sup> Charging people under this improper application of the Comstock Act would unleash an unprecedented federal criminalization regime targeting pregnant people, healthcare providers, and those who help patients.

Because fetal personhood is generally unpopular, there is a concerted effort to constitutionalize fetal personhood through judicial decisions. Anti-abortion legal scholars and lawmakers have long argued that a fetus is a "person" covered by the language of the Fourteenth Amendment,<sup>68</sup> which states, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>69</sup> These individuals argue that such an interpretation, never before applied by the federal courts, would outlaw abortion nationwide. Prosecutors could then easily argue that such an interpretation makes all abortion murder.<sup>70</sup>

# Recommendations

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Reversing fetal personhood and pregnancy criminalization requires significant legal and policy changes and a full set of recommendations is beyond the scope of this interim report. For additional recommendations, please see Pregnancy Justice's 2023 report, *The Rise of Pregnancy Criminalization*.<sup>71</sup> While further recommendations will accompany future reports, a few timely priorities are offered below:

## » **Use the Power of Federal Civil Rights Agencies to Challenge Pregnancy Criminalization**

The federal government should utilize existing authority to better protect pregnant people against targeted campaigns to charge them with pregnancy-related crimes. The Department of Justice should investigate local law enforcement offices that prosecute pregnancy-related crimes for engaging in unlawful discrimination on the basis of sex. The Office of Civil Rights at the Department of Health and Human Services should investigate complaints of drug testing of pregnant patients by hospitals to prevent unlawful sex discrimination.

## » **Protect Against the Unfounded Use of the Comstock Act to Effect a National Abortion Ban**

The federal government should pass legislation to ensure that the Comstock Act cannot be misused to criminalize abortion.<sup>72</sup> Anti-abortion activists intend to misuse the Comstock Act to make it a crime to send or receive medications or devices that are used in abortion care by mail or common carriers like UPS and FedEx, effectively banning abortion nationwide.

## » **Ensure that Maternal Health Initiatives Address the Needs of Pregnant People Who Have Substance Use Disorder and Other Mental Health Disorders**

Drug overdoses are the leading cause of maternal mortality in multiple states in the United States and rates of substance use disorder among pregnant and postpartum women are growing.<sup>73</sup> Investment in non-punitive, voluntary, and confidential

programs and in-patient treatment centers for pregnant people, where they can continue to stay with their newborns and receive familial support, is critical to saving lives. States can avail themselves of this funding through Title V Block Grants and Substance Abuse Prevention and Treatment Block Grants, through opioid settlement funds, and by redirecting funds away from "crisis pregnancy centers" to providers of essential, non-punitive, confidential, and evidence-based care that will improve health outcomes for babies and mothers. In addition, the Department of Health and Human Services should ensure that Title V Maternal and Child Services Block Grant funding is not used to support institutions that routinely drug test pregnant patients without their knowledge or consent and that share that information with law enforcement.

## » **Expand and Enforce Privacy Protections**

The federal government should reinforce HIPAA privacy protections through legislation codifying the HIPAA Rule to Support Reproductive Healthcare Privacy.<sup>74</sup> The legislation should go further than the rule by considering the impact of state fetal personhood laws and judicial decisions to ensure expansive protection for pregnant people who are most likely to experience privacy violations during pregnancy.<sup>75</sup>

## » **Pass State Laws Increasing Protections for Pregnant People**

States should pass laws that ensure that providers must obtain informed consent from pregnant people before they administer a drug test to the pregnant person or their newborn. In states with protective abortion laws, state legislatures should augment those laws to ensure pregnant people cannot be charged with pregnancy-related crimes in connection with the circumstances of their pregnancies, pregnancy losses, or births and/or explicitly renounce fetal personhood.<sup>76</sup> States should pass legislation that expressly decouples the anonymized reporting of "substance-affected newborns" required by the Child Abuse Prevention and Treatment Act from reporting to state family policing agencies.<sup>77</sup>

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**We build toward a future without criminalization and where everyone can access the healthcare and support they need to live and thrive, free from discrimination, state violence or coercion, family separation, or stigma.**

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# Endnotes

- 1 Wendy A. Bach is a Professor of Law and the Co-Director of the University of Tennessee's Appalachian Justice Research Center; Madalyn K. Wasilczuk is an Assistant Professor of Law at the University of South Carolina, Joseph F. Rice School of Law. Institutional affiliations and titles are provided for identification purposes only. This publication does not represent the views or positions of either the University of Tennessee or the University of South Carolina. The authors' collaboration with Pregnancy Justice was made possible by the generous support of an anonymous funder.
- 2 597 U.S. 215 (2022).
- 3 410 U.S. 113 (1973).
- 4 Abortion bans since *Dobbs* have severely restricted abortion access across the country, closed clinics, denied life-saving emergency care to pregnant people, and led to far worse health outcomes for pregnant people. Kimya Forouzan et al., *The High Toll of US Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care*, GUTTMACHER INST. (Dec. 2023), <https://www.guttmacher.org/2023/12/high-toll-us-abortion-bans-nearly-one-five-patients-now-traveling-out-state-abortion-care> [<https://perma.cc/2P5E-LNYJ>]; DANIEL GROSSMAN ET AL., ADVANCING NEW STANDARDS IN REPROD. HEALTH, CARE POST-ROE: DOCUMENTING CASES OF POOR-QUALITY CARE SINCE THE *DOBBS* DECISION (2023), <https://www.ansirh.org/sites/default/files/2023-05/Care%20Post-Roe%20Preliminary%20Findings.pdf> [<https://perma.cc/7EP9-6PRU>]; CTR. FOR REPROD. RTS., CRIMINALIZED CARE: HOW LOUISIANA'S ABORTION BANS ENDANGER PATIENTS AND CLINICIANS (2024), <https://reproductiverights.org/report-criminalized-care-louisiana-abortion-bans-patients-clinicians> [<https://perma.cc/3RUM-9FG3>]; ABORTION CARE NETWORK, COMMUNITIES NEED CLINICS (2023), <https://abortioncarenetwork.org/communitiesneedclinics/> [<https://perma.cc/VYR2-KVDJ>]; Amanda Seitz, *Dozens of Pregnant Women, Some Bleeding or in Labor, Are Turned Away from ERs, Despite Federal Law*, ASSOCIATED PRESS (Aug. 12, 2024), <https://apnews.com/article/pregnant-women-emergency-room-ectopic-er-edd66276d2f6c412c988051b618fb8f9> [<https://perma.cc/V7W8-U3NT>].
- 5 Targeted at anyone who helps someone obtain an abortion, including healthcare providers, criminal abortion laws have created a harmful chilling effect on providers and those who help patients. Unable to provide standard of care without fear of punishment, providers have been forced to shift the care or services they provide, cease offering abortion care, or leave abortion ban states altogether, creating a care crisis in these states. PHYSICIANS FOR REPROD. HEALTH, *DOBBS' EROSION OF THE HEALTH CARE WORKFORCE: HARMS TO PROVIDERS AND PATIENTS* (Mar. 2024), <https://prh.org/updates/issue-brief-dobbs-erosion-health-care-workforce/> [<https://perma.cc/C9SG-TP9J>]; OFF. OF MARIA CANTWELL ET AL., TWO YEARS POST-*DOBBS*: THE NATIONWIDE IMPACT OF ABORTION BANS (July 11, 2024), [https://www.cantwell.senate.gov/imo/media/doc/2024\\_dobbs\\_anniversary\\_national\\_report\\_final.pdf](https://www.cantwell.senate.gov/imo/media/doc/2024_dobbs_anniversary_national_report_final.pdf) [<https://perma.cc/GF4K-M3AC>]. For the critical network of funds and advocates who support abortion seekers, the threats of legal consequences loom large. KEBE ET AL., IF/WHEN/HOW, STATE VIOLENCE AND THE FAR-REACHING IMPACT OF *DOBBS* (2024), <https://ifwhenhow.org/resources/reprolegalhelpline-report2024/> [<https://perma.cc/6YGX-JWGB>].
- 6 As a result of *Dobbs*, statutes across the nation today make it a crime to provide an abortion. The penalties are severe. *After Roe Fell, Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> [<https://perma.cc/A2GQ-9BTU>]. Legislators at the federal level have proposed a nationwide criminal abortion law. Protecting Pain-Capable Unborn Children from Late-Term Abortions Act, S. 4840, 117th Cong. (2022). States across the country are seeking to expand their criminal laws to make more and more abortion-related conduct a crime, even when pregnant people face life and health-threatening medical emergencies. *Medical Exceptions to State Abortion Bans: Idaho, Tennessee, Oklahoma, Stories: Patients and Physicians*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/case/emergency-exceptions-abortion-bans-idaho-tennessee-oklahoma/medical-exceptions-id-tn-ok-patients-doctors-stories/> [<https://perma.cc/4A3Q-3RUQ>]; Julia Luchetta et al., *Idaho's Biggest Hospital Says Emergency Flights for Pregnant Patients Up Sharply*, NAT'L PUB. RADIO (Apr. 26, 2024), <https://www.npr.org/2024/04/25/1246990306/more-emergency-flights-for-pregnant-patients-in-idaho> [<https://perma.cc/U3A9-8BDR>]; Pam Belluck, *They Had Miscarriages, New Abortion Laws Obstructed that Treatment*, N.Y. TIMES (July 17, 2022), <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html> [<https://perma.cc/26S4-LTE6>]; Nadine El-Bawab et al., *Delayed and denied: Women pushed to death's door for abortion care in post-Roe America*, ABC (Dec. 14, 2023), <https://abcnews.go.com/US/delayed-denied-women-pushed-deaths-door-abortion-care/story?id=105563255> [<https://perma.cc/GQ2Z-CWUN>].
- 7 Brief of National Advocates for Pregnant Women, Academy of Perinatal Harm Reduction, Birth Rights Bar Association, Black Women's Blueprint, Choices Memphis Center for Reproductive Health, elephant Circle, every Mother Counts, Healthy and Free Tennessee, Human Rights in Childbirth, March for Moms, National Perinatal Association, North American society for Psychosocial obstetrics & Gynecology and PUSH for empowered Pregnancy as Amici Curiae in support of Respondent at 3, 597 U.S. 215 (2022) (No. 19-1392), [https://www.supremecourt.gov/DocketPDF/19/19-1392/193710/20210924170501991\\_19-1392%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/19/19-1392/193710/20210924170501991_19-1392%20Brief.pdf) [<https://perma.cc/VN7R-TG7D>].
- 8 Even after *Dobbs*, to date this team has located no prosecutions charging the violation of a criminal law prohibiting the performance of an abortion.
- 9 *Ex Parte Ankrom*, 52 So.3d 397 (Ala. 2013); ALA. CONST. § 36.06; *State v. Green*, 474 P.3d 886 (Okla. Crim. App. 2020); *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); 18 Pa. Cons. Stat. § 3202; *Com.v. Morris*, 142 S.W.3d 654 (Ky. 2004) (citing Ky. Rev. Stat. Ann. § 500.080); Ohio Rev. Code Ann. § 2901.01; Tex. Penal Code Ann. § 1.07.
- 10 As Dorothy Roberts has explained, blaming Black mothers for fetal harm served two principal social purposes. It "degrade[s] women whom society views as undeserving to be mothers and to discourage them from having children." Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1435-36 (1991); WENDY A. BACH, PROSECUTING POVERTY, CRIMINALIZING CARE 47-58 (2022); GRACE E. HOWARD, THE PREGNANCY POLICE: CONCEIVING CRIME, ARRESTING PERSONHOOD 79-80 (2024).

- 11 Government overreach into medical decision making is not limited to pregnancy. “It is not a coincidence that the states which have the most punitive and draconian bans on abortion have also adopted the most aggressive targeting of transgender people and medical care. The bills are part of the same project by conservatives, who have been emboldened in their campaign of gender revanchism in the wake of *Dobbs*. Both abortion bans and transition care bans further the same goal: to transform the social category of gender into an enforceable legal status, linked to the sexed body at birth and to prescribe a narrow and claustrophobic view of what that gender status must mean.” Moira Donegan, *Conservative Attacks on US Abortion and Trans Healthcare Come From the Same Place*, GUARDIAN (May 24, 2023), <https://www.theguardian.com/commentisfree/2023/may/24/rightwing-abortion-transgender-care-gender-hierarchy> [<https://perma.cc/DNQ7-VUTU>].
- 12 These principles are at the heart of reproductive justice, a concept developed in 1994 in a conversation among twelve African American women attending a national pro-choice conference. Reproductive justice is steeped in intersectionality theory and demands three interlocked human rights: “the right not to have children using safe birth control, abortion, or abstinence; the right to have children under the conditions we choose; and the right to parent the children we have in safe and healthy environments.” Crucially, the framework is based not only on the right “to make personal decisions about one’s life” but also “the obligations of government and society to ensure that the conditions are suitable for implementing one’s decisions.” Loretta J. Ross et al., *Introduction to RADICAL REPRODUCTIVE JUSTICE: FOUNDATIONS, THEORY, PRACTICE, CRITIQUE* 16 (Loretta J. Ross et al. eds., 2017); see also *About Us*, SISTERSONG: WOMEN OF COLOR REPROD. JUST. COLLECTIVE, <https://www.sistersong.net/about-x2> [<https://perma.cc/D6ZT-39KP>].
- 13 For general information on the weakness of these systems as well as for organized efforts to address this problem, see, for example, the work of Measures for Justice. *A Better Criminal Justice System Begins with High-Quality Data*, MEASURES FOR JUST., <https://measuresforjustice.org/> [<https://perma.cc/2ZY9-JA5A>].
- 14 In 2022, there were approximately 22 maternal deaths for every 100,000 live births in the United States. Munira Z. Gunja et al., *Insights into the US Maternal Mortality Crisis: An International Comparison*, COMMONWEALTH FUND (June 4, 2024), <https://www.commonwealthfund.org/publications/issue-briefs/2024/jun/insights-us-maternal-mortality-crisis-international-comparison> [<https://perma.cc/K6R7-N49H>].
- 15 Susanna Trost et al., *Pregnancy-Related Deaths: Data from Maternal Mortality Review Committees in 36 U.S. States, 2017–2019*, CTRS. FOR DISEASE CONTROL (May 28, 2024), [https://www.cdc.gov/maternal-mortality/php/data-research/mmrc-2017-2019.html?CDC\\_AAref\\_Val=https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html](https://www.cdc.gov/maternal-mortality/php/data-research/mmrc-2017-2019.html?CDC_AAref_Val=https://www.cdc.gov/reproductivehealth/maternal-mortality/erase-mm/data-mmrc.html) [<https://perma.cc/3GLP-VXR9>].
- 16 *Working Together to Reduce Black Maternal Mortality*, CTRS. FOR DISEASE CONTROL (April 8, 2024), <https://www.cdc.gov/womens-health/features/maternal-mortality.html> [<https://perma.cc/LL75-G8YB>]; CHARMAIN N. SCARLETT & ANGELA D. AINA, BLACK MAMAS MATTER ALLIANCE, ISSUE BRIEF: BLACK MATERNAL HEALTH (Sept. 2020), [https://blackmamasmatter.org/wp-content/uploads/2022/04/0322-BMHSStatisticalBrief\\_Final.pdf](https://blackmamasmatter.org/wp-content/uploads/2022/04/0322-BMHSStatisticalBrief_Final.pdf) [<https://perma.cc/AC3C-8VXV>].
- 17 Alabama, Oklahoma, South Carolina, Ohio, and Mississippi place near the bottom of state rankings of women’s health and reproductive care outcomes, including all-cause mortality, maternal and infant mortality, preterm birth rates, and critical indicators of physical and mental health status. Alabama and Oklahoma, for example, both rank 47 for these outcomes. South Carolina ranks 36; Ohio ranks 35; Mississippi ranks 51. Sara R. Collins et al., 2024 *State Scorecard on Women’s Health and Reproductive Care*, COMMONWEALTH FUND, (July 18, 2024), <https://www.commonwealthfund.org/publications/scorecard/2024/jul/2024-state-scorecard-womens-health-and-reproductive-care> [<https://perma.cc/L7ZD-W6XP>]; Alabama and Mississippi also have some of the highest rates of fetal mortality in the country. Gregory, Elizabeth CW et al., *Fetal Mortality in the United States: Final 2020– 2021 and 2021– Provisional 2022*, CTRS. FOR DISEASE CONTROL (November 2023), <https://www.cdc.gov/nchs/data/vsrr/vsrr032.pdf> [<https://perma.cc/KS5D-QLFD>].
- 18 Oklahoma ranks 47, for example. Overall, Alabama performed worst on maternal care workforce per 100,000 women ages 15–44 (rank 48); preterm birth rate (rank 48); and infant mortality per 1,000 live births (rank 49), while Oklahoma performed worst on women ages 18–44 who went without care because of cost (rank 48); uninsured women, ages 19–64 (rank 48); and maternity care workforce per 100,000 women ages 15–44 (50 of 51). See Alabama and Oklahoma state profiles. *Id.*
- 19 See, e.g., Christine Kennelly, *Large DNA Study Traces Violent History of American Slavery*, N.Y. TIMES (Sept. 20, 2021), <https://www.nytimes.com/2020/07/23/science/23andme-african-ancestry.html> [<https://perma.cc/84JS-6VYZ>] (explaining how the largest DNA study to date found that “enslaved women in the United States contributed 1.5 times more to the modern-day gene pool of people of African descent than enslaved men” because “[e]nslaved women were often raped and forced to have children” by their enslavers).
- 20 Monica Cronin, *Anarcha, Betsey, Lucy, and the women whose names were not recorded: The legacy of J. Marion Sims*, 48 ANESTHESIA & INTENSIVE CARE 3 (2020) (detailing how J. Marion Sims performed highly dangerous experimental gynecological surgery on enslaved women without anesthesia and without their consent); Anastazia Schmid, *Mary Jane and Dr. Parvin at the Reformatory*, in WHO WOULD BELIEVE A PRISONER? INDIANA WOMEN’S CARCERAL INSTITUTIONS, 1848–1920 113–38 (Michelle Daniel Jones & Elizabeth Angeline Nelson, eds. 2023) (describing Dr. Theophilus Parvin’s invasive gynecological and medical experiments on women in Indiana’s prisons in the 19th century).
- 21 In 1927, the U.S. Supreme Court decided, by a vote of 8 to 1, to uphold a state’s right to forcibly sterilize a person considered unfit to procreate. The case, *Buck v. Bell*, centered on a young woman named Carrie Buck, whom the state of Virginia had deemed to be “feebleminded.” The decision has never been overturned. 274 U.S. 200 (1927). For an in depth discussion of this case in the context of eugenics, see Howard, *supra* note 7, at 81; see also Jessica Pearce, *Mississippi Appendectomies: Reliving Our Pro-Eugenics Past*, MS. MAG. (Oct. 28, 2020), <https://msmagazine.com/2020/10/28/ice-immigration-mississippi-appendectomies-usa-eugenics-forced-coerced-sterilization/> [<https://perma.cc/9T6T-MHK4>] (explaining how in the 1960s and 1970s, unnecessary hysterectomies of women of color were so commonplace that they were deemed “Mississippi appendectomies”).

22 See *supra* notes 11-15.

23 In discussing the targeting of poor white women, Professor Khiara M. Bridges explains, “[i]n the 1980s, the nation was confronted with a frightening drug scare and the possibility that infants were being irreparably harmed by a substance that was decimating communities. Society chose to address this phenomenon with the criminal system . . . and rejected less punitive alternatives, in part because the phenomenon was racialized as black. More than three decades later, the nation faces an equally frightening drug scare and the possibility that infants are being irreparably harmed by a substance that is decimating communities. The thing is: we have a racist precedent for dealing with this very situation. This racist precedent constrains the ability of society to imagine and implement different mechanisms for addressing the phenomenon. As a nation, we might have a path dependence. The racist path that we generated in the 1980s has led us to be punitive toward a population that, due to its racial privilege, might have escaped our nation’s punitive inclinations.” Khiara M. Bridges, *Race, Pregnancy and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 848-49 (2020).

24 For an extensive recounting of the history of pregnancy criminalization see BACH, *supra* note 7, at 47-56.

25 These prosecutions were at the center of *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), a case in which the U.S. Supreme Court held that the policy of drug testing pregnant women without their knowledge or consent and sharing the results of those tests with law enforcement constituted an unreasonable search. The Court found that the government interest in using the threat of criminal sanctions to deter pregnant women from using cocaine cannot justify a departure from the general rule that an official non-consensual search is unconstitutional if not authorized by a valid warrant.

26 PURVAJA S. KAVATTUR ET AL., PREGNANCY JUST., THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT (2023), <https://www.pregnancyjusticeus.org/rise-of-pregnancy-criminalization-report/> [https://perma.cc/YU52-AXDR].

27 Although there is no comprehensive data set documenting the income levels of those in the criminal legal system, all the available evidence suggests that it is a system targeted disproportionately at the poor. For a more in-depth discussion of this issue see BACH, *supra* note 7, at 95-96.

28 NANCY RODRIGUEZ & REBECCA TUBLITZ, UCI SCHOOL SOC. ECOLOGY, EXPLORING LATINO/A REPRESENTATION IN LOCAL CRIMINAL JUSTICE SYSTEMS: A REVIEW OF DATA COLLECTION PRACTICES AND SYSTEMS-INVOLVEMENT 6 (2023), [https://socialecology.uci.edu/sites/default/files/users/mkcruz/sjc\\_latinos\\_in\\_cjs\\_march\\_2023.pdf](https://socialecology.uci.edu/sites/default/files/users/mkcruz/sjc_latinos_in_cjs_march_2023.pdf) [https://perma.cc/6R2J-ANEF] (finding that criminal justice systems do not consistently keep data about Hispanic/Latino/a ethnicity); Amie M. Schuck et al., *The “Invisible” Hispanic? The Representation of Hispanics in Criminal Justice Research: What Do We Know and Where Should We Go?*, 2 J. ETHNICITY CRIM. JUST 5, 8 (2004) (noting that one reason for the relative lack of research on Hispanics, Asians,

and Native Americans in criminal justice is a lack of data); MICHAEL L. WALKER, INDEFINITE: DOING TIME IN JAIL 52 (2022) (explaining that correctional officers often categorization incarcerated people by race based on appearance rather than self-identification); Ayobami Laniyonu & Samuel T. Donahue, *Effect of Racial Misclassification in Police Data Estimates of Racial Disparities*, 61 CRIMINOLOGY 295, 296 (2022) (demonstrating that a mismatch between racial self-identification and officer-identification can bias estimates of racial disparities in policing data).

29 See Madalyn K. Wasilczuk, *Coker v. Georgia, Rewritten Opinion*, in FEMINIST JUDGMENTS: REWRITTEN CRIMINAL LAW OPINIONS 65 (Bennet Capers et al., eds. 2023) (noting that of the 455 men executed for rape between 1930 and 1972, 89.5% of them were Black men).

30 Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 988 n.14 (2020) (detailing a series of studies that have found race-of-victim disparities in seeking and imposing the death penalty). Scholars like Alexis Hoag-Fordjour have argued that race-of-victim disproportionality reflects a devaluation of Black life. Lower murder clearance rates for cases involving Black murder victims and missing and murdered Indigenous women and girls similarly reflect a deprioritization and devaluing of Black and Native lives. See Gian Maria Campedelli, *Homicides Involving Black Victims Are Less Likely to Be Cleared in the United States*, 62 CRIMINOLOGY 90, 120 (2023) (finding that probability of clearance fell between 3.4 and 4.8 percent for Black victims compared to non-Black victims); Meenakshi Richardson et al., *The Awareness of Missing and Murdered Indigenous Women and Girls (MMIWG): Policy Steps Toward Addressing the Crisis*, 12 AM. INDIAN L. J. 1, 1 (2024); Morgan B. Hawes et al., *Understanding the Missing and Murdered Indigenous Women Crisis: An Analysis of the NamUS Database*, 34 CRIM. JUST. POL’Y REV. 184 (2023).

31 Given that race in the United States is often understood through the “one-drop rule,” white women’s children may be socially understood as non-white if their fathers are Black, while Black women’s children are less likely to be socially understood as non-Black, even if their fathers are non-Black. One study examining the validity of race/ethnicity on birth certificates demonstrates some persistence of the “one-drop rule” while also exploring the variation in how birth certificates and families might conceive of an infant’s race. Lisa Reyes Mason, Yunju Nam, & Youngmi Kim, *Validity of Infant Race/Ethnicity from Birth Certificates in the Context of U.S. Demographic Change*, 49 HEALTH SERV. RSCH. 249, 262-64 (2014). In his book *Traces of History*, Patrick Wolfe notes that the racial project in what is now the United States treated and treats Native and Black people differently. For purposes of racial inheritance, the “one-drop” rule for Black racial identity stands in contrast to the “blood-quantum” conception of Native racial identity. PATRICK WOLFE, *TRACES OF HISTORY: ELEMENTARY STRUCTURES OF RACE* 14–16 (2016).

32 The differences in conception of Black and Native racial identity based on birth may mean the race-of-victim effects could work differently for children of Native American mothers, who could, in some instances, be viewed as white by healthcare providers and law enforcement despite the racial identities of themselves or their parents.

- 33 While appointment of counsel is the best proxy in the data for income level, it is not a particularly strong proxy. Despite the requirement established in *Gideon v. Wainwright*, 37 U.S. 335 (1963), that counsel be appointed for criminal defendants who cannot afford counsel, there is wide variation in both formal standards and court practice. See, e.g., Josh Bowers et al., Panel 3: New Cases and New Tactics: Approaching *Gideon* Through a Modern Lens at the Frances Lewis Law Center Symposium: *Gideon* at 50: Reassessing the Right to Counsel (Sept. 11, 2012); John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1202-04 (2013) (describing variability in judicial practice even in states that adopt the federal poverty guidelines as a standard for indigency); Phyllis E. Mann, *The Ethical and Professional Battles of Public Defenders: Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715, 731 (2010) (describing the variability in court practice with regard to income and asset verification and the variability in standards applied); Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L. REV. 571, 581 (2005) (highlighting jurisdictions with “no guidepost and unfettered discretion”).
- 34 KAVATTUR ET AL., *supra* note 23. For a more in-depth discussion of this issue see BACH, *supra* note 7, at 95-96.
- 35 Complicating the categorization of pregnancy outcome, court documents often contain allegations by law enforcement or prosecutors that an infant was born alive while the pregnant person alleges that the pregnancy ended in a miscarriage or stillbirth. Likewise, the nature and source of data on non-live birth pregnancy outcomes led the study to treat them as a single category rather than rely on legal documents to determine medical facts such as whether the pregnancy ended in a miscarriage or stillbirth.
- 36 DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES AND HOW ABOLITION CAN BUILD A SAFER WORLD*, 171-75 (2022) (describing drug testing policies of newborns); Sarah C.M. Roberts et. al., *Training health professionals to reduce overreporting of birthing people who use drugs to child welfare*, 19 ADDICTION SCI. & CLINICAL PRAC. 32, 32 (2024) (reporting that “health care providers are a key source of reports of infants to child welfare related to birthing people’s substance use.”); Danielle N. Atkins & Christine Piette Durrance, *The impact of state-level prenatal substance use policies on infant foster care entry in the United States*, 130 CHILDREN & YOUTH SERV. REV. 106, 194 (2021) (finding that state policies that treat prenatal substance use identified at birth as child abuse or neglect, “increase the rate of entry into the foster care system for children under the age of 1 by approximately 9.5 percent.”).
- 37 For in-depth information regarding pregnancy in jail and prison see *The Pregnancy in Prison Statistics Project*, ADVOC. & RSCH. ON REPROD. WELLNESS OF INCARCERATED PEOPLE, <https://arrwip.org/projects/pregnancy-in-prison-statistics-pips-project/> [<https://perma.cc/7EJ2-7YUC>].
- 38 KAVATTUR ET AL., *supra* note 23.
- 39 Bridges, *supra* note 20, at 775.
- 40 BACH, *supra* note 7, at 49; Howard, *supra* note 7, at 78-80.
- 41 Emilie Bruzelius & Silvia S. Martins, *US Trends in Drug Overdose Mortality Among Pregnant and Postpartum Persons*, 2017-2020, 328 J. AM. MED. ASSOC. 2159 (2022).
- 42 A substance use disorder is a treatable, chronic disease characterized by a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems. *Treatment of Substance Use Disorders*, CTRS. FOR DISEASE CONTROL (Apr. 25, 2024), <https://www.cdc.gov/overdose-prevention/treatment/index.html> [<https://perma.cc/7SE6-6TYH>].
- 43 *Overdose Deaths Increased in Pregnant and Postpartum Women from Early 2018 to Late 2021*, NAT’L INST. OF HEALTH (Nov. 22, 2023), <https://www.nih.gov/news-events/news-releases/overdose-deaths-increased-pregnant-postpartum-women-early-2018-late-2021> [<https://perma.cc/7FWC-W8ZL>]. Major medical and public health groups agree that targeting pregnant people for punishment and prosecution only produces worse maternal and fetal outcomes and emphasize a need to invest in non-carceral solutions to substance use disorder for pregnant people. PREGNANCY JUST., MEDICAL AND PUBLIC HEALTH GROUPS OPPOSE PUNISHMENT OF PREGNANT PEOPLE (June 21, 2023), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/Medical-Public-Health-Statements-2023.pdf> [<https://perma.cc/8FBQ-VVDP>].
- 44 See BACH, *supra* note 7, at 22 (“[W]omen who become pregnant do make substantial efforts to curtail their drug use and obtain prenatal care. For example, in 2002 a group of researchers published the Maternal Lifestyle Study, which was based on data from 19,079 mother-infant pairs at four clinical centers across the country. The researchers were looking at the short term effects of substance use during pregnancy with a focus on cocaine, opiates, and polysubstance use. The researchers gathered data at the time of and shortly after delivery. They found an impressive level of engagement with prenatal care. Seventy-six percent of women who used cocaine only and 94 percent of those who used opiates (in contrast to the 97 percent of the women whose infants were not exposed) reported receiving prenatal care during their pregnancies. Qualitative studies suggest similar results. For example, in 2003, Martha A. Jessup and colleagues published a qualitative study designed to identify barriers to treatment. Based on qualitative interviews of thirty-six women, they concluded that, although women feared punitive responses, overwhelmingly they sought care. ‘Most participants (n = 34) sought prenatal care. Many (n = 28) spoke of the importance of prenatal care for themselves and their infants, and 21 sought care independent of a mandate from substance abuse treatment or jail.’ Moreover, engagement in voluntary treatment during pregnancy appears to lead to more prenatal engagement. For example, in a study conducted in the late 1990s in California, a group of researchers examined the outcomes for substance-using women and infants for whom voluntary outpatient, onsite care, in the form of counseling, and, when appropriate, access to chemical dependence treatment programs was available. Women in that study who engaged in treatment had significantly higher rates of prenatal care than those who used substances during pregnancy but did not engage in treatment.”).
- 45 Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 HEALTH & JUST. 1 (2015). PREGNANCY JUST., *supra* note 40.
- 46 The following statutes were charged in these cases: Ala. Code § 26-15-3.2(a)(1)-(3) (2006); Miss. Code Ann. § 97-5-39(1), (2)(a), (4)(a) (West 2023); Ohio Rev. Code Ann. §§ 2903.04 (West 2002), 2919.22(A), (E)(2)(b)-(c) (West 2022),

- 2925.02(A)(3), (A)(5) (West 2022); Okla. Stat. tit. 21, § 843.5(C) (2021); Okla. Stat. tit. 47, §11.902 (2020); S.C. Code Ann. §§ 16-3-85(A)(1) (2000, 63-5-70 (2008); Tex. Penal Code Ann. §§ 22.04(f) (West 2021), 22.041(f) (West 2023), 42.08 (West 2017); Certain statutes charged in these cases are withheld here to avoid inadvertently identifying individuals.
- 47 To reach this conclusion, for each statute charged, the research team analyzed the elements of the particular section of the statute charged and made a determination as to whether, based on the legal elements of the charge, a prosecutor would have to prove that the fetus or infant was harmed as a result of the conduct. We then generated a list of all the statutes for which no proof of harm was required and matched it with our data on what charges were brought to determine the total amount of charges brought in this category. It is important to note that fifteen charges alleged crimes that did not fall easily into this harm/no harm analysis and were excluded from this analysis.
- 48 KATHLEEN M. CROWTHER, *POLICING THE PREGNANT BODY: FROM ANCIENT GREECE TO POST-ROE AMERICA* 110-11 (2023).
- 49 Cary Aspinwall, *These States Are Using Fetal Personhood to Put Women Behind Bars*, MARSHALL PROJECT (July 25, 2023), <https://www.themarshallproject.org/2023/07/25/pregnant-women-prosecutions-alabama-oklahoma> [https://perma.cc/H76W-B5WL].
- 50 KAVATTUR ET AL., *supra* note 23; LAURA HUSS ET AL., *IF/WHEN/HOW, SELF-CARE CRIMINALIZED: PRELIMINARY FINDINGS* (Aug. 1, 2022), <https://ifwhenhow.org/resources/self-care-criminalized-august-2022-preliminary-findings/> [https://perma.cc/2KAA-HKGZ].
- 51 This prosecution was brought in one of the few states in which self-managing abortion can be charged as a crime. Today only Nevada allows such a prosecution. Nev. Rev. Stat. Ann. § 200.220 (West 1995). In the rest of the country, even those with a criminal abortion ban, the pregnant person is exempt from prosecution.
- 52 HUSS ET AL., *supra* note 50.
- 53 Jeffrey Ecker et al., *Substance Use Disorders in Pregnancy: Clinical, Ethical, and Research Imperatives of the Opioid Epidemic*, 221 AM. J. OBSTETRICS & GYNECOLOGY B5 (2019).
- 54 Following the lead of scholars like Dorothy Roberts and advocates, we abandon the terms child welfare and child protection and use instead the term family policing to more accurately describe the operation of these systems. *Abolition is the Only Answer: A Conversation with Dorothy Roberts*, RISE (October 20, 2020), <https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts/> [https://perma.cc/5QGY-EMZR] (“To me, the most accurate term is ‘family policing system’....Policing captures what this system does. It polices families with the threat of taking children away. Even when its agents don’t remove children, they can take children and that threat is how they impose their power and terror. It is a form of punishment, harm and oppression.”).
- 55 For an in-depth discussion of this procedural pathway, see BACH, *supra* note 7, at 129-142.
- 56 *Id.*
- 57 GILBERT CROUSE ET AL., *FOSTER CARE ENTRY RATES GREW FASTER FOR INFANTS THAN FOR CHILDREN OF OTHER AGES, 2011-2018* (2021), <https://aspe.hhs.gov/sites/default/files/documents/6d33e5089448eea28d50274d8ef6248a/infant-foster-care-brief.pdf.pdf> [https://perma.cc/2ESW-TSMM].
- 58 Stephen W. Patrick, *Improving the Child Welfare System to Respond to the Needs of Substance-Exposed Infants*, 9 HOSP. PEDIATRICS 651 (2019).
- 59 OFF. OF NAT’L DRUG CONTROL POL’Y, *SUBSTANCE USE DISORDER IN PREGNANCY: IMPROVING OUTCOMES FOR FAMILIES* (2022), [https://www.whitehouse.gov/wp-content/uploads/2021/10/ONDCP\\_Report-Substance-Use-Disorder-and-Pregnancy.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/10/ONDCP_Report-Substance-Use-Disorder-and-Pregnancy.pdf) [https://perma.cc/G733-TN4F].
- 60 *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (July 29, 2024), <https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans> [https://perma.cc/JXB4-FDGC].
- 61 CTR. FOR REPROD. RTS., *2023 STATE LEGISLATIVE WRAP UP 23* (2023), [https://reproductiverights.org/wp-content/uploads/2023/12/CRR\\_LegislativeWrapUp\\_2023\\_Digital\\_NEW\\_12-20-23.pdf](https://reproductiverights.org/wp-content/uploads/2023/12/CRR_LegislativeWrapUp_2023_Digital_NEW_12-20-23.pdf) [https://perma.cc/E6P3-23F4]. In addition to these threats, Project 2025 includes a variety of proposals including new legislation and regulatory changes that would widen the scope of pregnancy criminalization. See DAREN BAKST ET AL., *MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE* (Paul Dans & Steven Groves eds., 2023).
- 62 Findings show that the proportion of the U.S. female population that has ever tried to end a pregnancy on their own without medical assistance increased from approximately 5% pre-*Dobbs* to 7% post-*Dobbs*. *New Research Shows that Self-Managed Abortion Increased in the Aftermath of the Dobbs Decision*, ADVANCING NEW STANDARDS IN REPROD. HEALTH (July 30, 2024), <https://www.ansirh.org/research/research/new-research-shows-self-managed-abortion-increased-aftermath-dobbs-decision>; Anna Claire Vollers, *Conservatives Push to Declare Fetuses as People, with Far-Reaching Consequences*, STATELINE (July 31, 2024), [https://stateline.org/2024/07/31/conservatives-push-to-declare-fetuses-as-people-with-far-reaching-consequences/?utm\\_source=substack&utm\\_medium=email](https://stateline.org/2024/07/31/conservatives-push-to-declare-fetuses-as-people-with-far-reaching-consequences/?utm_source=substack&utm_medium=email) [https://perma.cc/5Q3S-2HH8].
- 63 Craig Monger, *‘Self-Managed’ Abortions Could Still Bring Criminal Prosecution Under Child Chemical Endangerment Laws*, 1819 NEWS (Jan. 7, 2023), <https://1819news.com/news/item/self-managed-abortions-could-still-bring-criminal-prosecution-under-child-chemical-endangerment-laws> [https://perma.cc/ZJ9P-4CPS].
- 64 *Drug Scheduling*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/drug-information/drug-scheduling>.
- 65 Louisiana is the only state to have taken this step so far. In May 2024, the state made abortion pills a controlled substance, imposing a five-year sentence for their possession by anyone but a pregnant person for her own use. S. 276, Reg. Sess. (La. 2024); Fiona Rutherford et al., *Louisiana First in US to Make Possessing Abortion Pills a Crime*, BLOOMBERG NEWS (May 24, 2024), <https://news.bloomberglaw.com/us-law-week/louisiana-first-in-us-to-make-possessing-abortion-pills-a-crime> [https://perma.cc/UC5Q-WB6Y].

- 66 Expanded tracking and surveillance have the potential to expose more people to criminal prosecution at the state and federal levels. The Centers for Disease Control and Prevention could expand surveillance of pregnant people seeking abortion across state lines to prevent what anti-abortion activists call “abortion tourism” or “trafficking.” BAKST ET AL., *supra* note 61, at 455. This surveillance data could be used by the federal government in the event of a nationwide abortion ban or could be used to inform state prosecutions pursuant to abortion trafficking or travel laws like Idaho’s. Jessica Valenti, *Idaho’s First ‘Abortion Trafficking’ Arrest*, ABORTION, EVERY DAY (Oct. 31, 2023), <https://jessica.substack.com/p/idahos-first-abortion-trafficking> [<https://perma.cc/9PVF-8J28>]. States have also taken steps to expand surveillance of pregnant people. For instance, Indiana Attorney General Todd Rokita issued an advisory opinion that argues abortion data collected by the state is public information rather than a private medical record, aiming to use that information to investigate providers. Off. Att’y Gen. for Ind., Opinion Letter on the Nondisclosure of Terminated Pregnancy Reports (Apr. 11, 2024). Private surveillance can also expand the reach of pregnancy criminalization. Senator Ron Wyden’s office revealed in February 2024 that an anti-abortion group purchased mobile phone geolocation data to target people who visited reproductive health clinics with misinformation and sounded the alarm that the same data could be shared with anti-abortion prosecutors. Wyden Reveals Phone Data Used to Target Abortion Misinformation at Visitors to Hundreds of Reproductive Health Clinics, RON WYDEN U.S. SEN. FOR OREGON (Feb. 13, 2024), <https://www.wyden.senate.gov/news/press-releases/wyden-reveals-phone-data-used-to-target-abortion-misinformation-at-visitors-to-hundreds-of-reproductive-health-clinics> [<https://perma.cc/4M83-AGZQ>].
- 67 Project 2025 suggests that the administration should use the Act, 18 U.S.C. § 1461, to prevent people from sending abortion pills through the mail and use criminal prosecutions to do so. BAKST ET AL., *supra* note 61 at 459, 562. As an interpretation of federal law, such an interpretation would apply both in states where abortion is prohibited and those in which it is legal.
- 68 H.R. Res. 464, 118th Cong. (2023); John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A Dobbs Brief*, 45 HARV. J. L. & PUB. POL’Y 927, 930, 933 (2022).
- 69 U.S. CONST. amend. XIV, § 1.
- 70 Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes*, N.Y. TIMES (June 21, 2023), <https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html> [<https://perma.cc/V5D8-VM4W>].
- 71 KAVATTUR ET AL., *supra* note 23.
- 72 This could be achieved through the passage of the Stop Comstock Act. See *Stop Comstock Act: Comstock Act Repeal*, TINA SMITH U.S. SEN. FOR MINNESOTA (June 20, 2024), <https://smithsenate.app.box.com/s/lukg6iugfejf71h3kvth7dkh5mdncuk> [<https://perma.cc/3WKU-4X5N>].
- 73 Rohan R. D’Souza et al., *Person-Centered Hospital Discharge Data: Essential Existing Infrastructure to Enhance Public Health Surveillance of Maternal Substance Use Disorders in the Midst of a National Maternal Overdose Crisis*, 94 ANNALS EPIDEMIOLOGY 64 (2024).
- 74 HIPAA Privacy Rule Final Rule to Support Reproductive Health Care Privacy: Fact Sheet, U.S. DEPT. OF HEALTH & HUMAN SERVICES (Apr. 22, 2024), <https://www.hhs.gov/hipaa/for-professionals/special-topics/reproductive-health/final-rule-fact-sheet/index.html> [<https://perma.cc/3NX4-BRW7>].
- 75 For detailed suggestions, see Letter from Emma Roth, Staff Attorney, Pregnancy Justice, to Melanie Fontes Rainer, Office of Civil Rights, Director (June 16, 2023), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/06/2023.6.16-Pregnancy-Justice-Comment-on-HIPAA-Reproductive-Health-Care-Privacy.pdf> [<https://perma.cc/3AXE-FTBB>].
- 76 See e.g., H.R. 1279, 74th Gen. Assemb., Reg. Sess. (Colo. 2022) (The act declares that every individual has a fundamental right to use or refuse contraception; every pregnant individual has a fundamental right to continue the pregnancy and give birth or to have an abortion; and a fertilized egg, embryo, or fetus does not have independent or derivative rights under the laws of the state).
- 77 See, e.g., H.R. 4758, 193rd Gen. Ct., Reg. Sess. (Mass. 2024) (An Act relative to treatments and coverage for substance use disorder and recovery coach licensure); e disorder and recovery coach licensure); PREGNANCY JUST., CHILD ABUSE PREVENTION AND TREATMENT ACT (CAPTA) REQUIREMENTS RELATED TO NEWBORNS “AFFECTED BY SUBSTANCE ABUSE” (2021), [https://www.pregnancyjusticeus.org/wp-content/uploads/2021/08/CAPTA-Recommendation-Chart\\_1.5.2021-1.pdf](https://www.pregnancyjusticeus.org/wp-content/uploads/2021/08/CAPTA-Recommendation-Chart_1.5.2021-1.pdf) [<https://perma.cc/6FBY-7FYN>].

