

Endnotes

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- 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://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://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://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_BMHStatisticalBrief_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://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 Lanijonu & 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 deprivitization 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-TSM].
- 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://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://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://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/lukg6iugfefff71h3kvth7dkh5mdncuk> [<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); 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://perma.cc/6FBY-7FYN>].