

INTRODUCTION

In June 2022, the U.S. Supreme Court issued its ruling in *Dobbs vs. Jackson Women’s Health Organization*, overturning *Roe v. Wade* and dramatically altering the legal, legislative, and health landscape across the country. Dismissing nearly 50 years of precedent, the *Dobbs* court took the extreme step of eliminating the federal, constitutionally protected right to abortion. The ruling allowed states to ban the procedure entirely, placing both clinicians and people seeking abortions at risk of criminalization.² But the protections in *Roe* and *Planned Parenthood v. Casey* extended beyond establishing abortion as a fundamental right. *Roe* also held that pregnant people—and not the “developing organisms” they carry—are persons entitled to full and equal protection under the Fourteenth Amendment.³ *Roe* was central to upholding the civil and human rights not only of those seeking abortions but also of all six million people who become pregnant annually in the United States, including the four million who continue their pregnancies to term and the one million who have the dishearteningly common experience of pregnancy loss.⁴

Despite these protections, from the *Roe* decision in 1973 until the *Dobbs* decision in 2022, in more than 1,800 cases across the country, state actors—including police, prosecutors, healthcare workers, family regulation workers, and judges—have deprived pregnant people of virtually every constitutional right on the pretext of protecting “unborn life.” The *Dobbs* decision will not only further encourage prosecutors to bring the full weight of their power to bear against people who seek abortions or are suspected of doing so, it will also embolden them to pursue punishment

on the basis of groundless theories that giving birth to a healthy baby who had been subject to a perceived risk of harm in utero is felony “child abuse” or that experiencing a pregnancy loss is murder. In short, *Dobbs* will further accelerate an existing crisis, putting anyone who is pregnant or has the capacity to become pregnant at even greater risk.

This report defines pregnancy criminalization as an instance in which someone is either arrested for reasons related to their pregnancy, or where the terms of their bail, sentencing, or probation are heightened because they became pregnant after being charged with an unrelated crime. While much attention has been paid to the risks that patients and providers face surrounding abortion,⁵ thus far, cases involving the criminalization of abortion have been quite rare. Other pregnancy outcomes, including birth and pregnancy loss, have been far more likely to result in criminalization.⁶ People have been criminalized overwhelmingly for being pregnant and using illicit substances,⁷ but also for being pregnant and in a dangerous place or situation,⁸ being pregnant and having HIV,⁹ being pregnant and drinking alcohol,¹⁰ and not arriving at the hospital quickly enough on the day of delivery.¹¹ These instances run counter to a large body of scientific literature demonstrating that pregnancy criminalization can have harmful health consequences for pregnant people and their children, as well as evidence that neighborhood safety,¹² HIV transmission,¹³ substance use disorder,¹⁴ and delays in healthcare delivery¹⁵ represent deeper systemic failures of the social safety net.¹⁶

In 2013, Pregnancy Justice published the first comprehensive national documentation effort capturing pregnancy-related arrests and deprivations of liberty. The 2013 study identified 413 reported cases from 1973 through 2005, arising out of 44 states and the District of Columbia,¹⁷ and involving a range of pregnancy outcomes including abortions, live births, miscarriages, and stillbirths.¹⁸ Overwhelmingly, the cases occurred despite a lack of legal authority, in defiance of numerous and significant appellate court decisions dismissing or overturning such actions,¹⁹ and contrary to the extraordinary consensus across the medical community that prosecution undermines rather than improves maternal, fetal, and child health.²⁰ In 86% of these cases, pregnant people faced prosecution through the use of existing criminal statutes intended for other purposes.²¹

This report begins where the first study left off, documenting cases of pregnancy criminalization from January 2006 until the *Dobbs* ruling in June 2022. What we found was deeply concerning. Over these 16.5 years, we identified 1,396 cases. In other words, of the 1,800 pregnancy criminalization cases that took place over the last half-century, over three-quarters occurred after 2005. Through an alarming combination of carceral approaches to substance use and the spread of fetal personhood laws, state actors have increasingly penalized pregnant people. Understanding this disturbing phenomenon—including who is most affected, how, and under what pretense—will be essential to fighting for pregnant people’s liberties as we enter the post-*Dobbs* era.

The Rise of the Fetal Personhood Movement

The rise in pregnancy criminalization is fueled in part by the ascendance of “fetal personhood,” a radical concept with far-reaching and devastating implications, in anti-abortion rhetoric and laws. In the 1989 Supreme Court case *Webster v. Missouri*, the U.S. Supreme Court did not strike down a Missouri statute codifying the concept that “life begins at conception,” suggesting that fetal personhood is not an infringement on pregnant people’s constitutional rights. Since 1989, 16 states have passed similar laws²² and three state supreme courts (South Carolina, 1998; Alabama, 2012; and Oklahoma, 2020)²³ have ruled that criminal laws protecting children from harm can also be applied to fetuses.²⁴ In disregarding the fact that fetuses and pregnant people are inherently related to each other, these three state supreme court decisions failed to acknowledge that they were adding pregnant people as a unique group covered by child endangerment laws.

Collectively, these three states alone contributed to almost three in five (57.3%) pregnancy criminalization arrests from *Roe* until *Dobbs*.²⁵ And while the majority in *Dobbs* claimed it was not taking a position on the issue, the decision permitted states to recognize fetal personhood and to do so in ways that diminish the constitutional rights of women and all people with the capacity for pregnancy.²⁶

As of this writing (July 2023), at least 11 states have broadly incorporated fetal personhood into their state constitutions or state laws covering both criminal and civil laws, and at least 5 additional states have incorporated fetal personhood into their criminal laws specifically.²⁷ Thirty-eight states have “fetal homicide” statutes, creating a separate and unique crime for causing the loss of a pregnancy.²⁸ Often heralded as a way to protect pregnant people from violence and other external harm, these laws normalized the concept of the fetus as a separate and unique victim. Contrary to their purported aims, fetal homicide laws have been used repeatedly against pregnant people for allegedly causing their own pregnancy loss. The concept of fetal personhood also extends to the interpretation of “mandated reporter” laws. In about half of U.S. states, certain people, including healthcare providers and social workers, are required to report pregnant people who they perceive to be endangering their pregnancies, because they are now potentially engaging in either civil and/or criminal “child abuse” leading to family regulation system involvement, criminal charges, and a host of draconian collateral consequences.²⁹

Criminalizing Pregnancy and Poverty through the War on Drugs

The overwhelming majority of pregnancy criminalization cases identified in this report used allegations of substance use as a pretext to strip pregnant people of their rights. Since its origins in the 1970s, much has been written about the “war on drugs”³⁰—its explicitly racist and political motivations; its role in mass incarceration and the generational disruption and destruction it has wrought on Black, Indigenous, and Latinx communities; and its complete failure to stop people from using or obtaining criminalized substances.³¹ Recent years have witnessed a movement toward more humane, evidence-based, non-carceral, and harm-reductionist approaches to substance use disorders, as well as nationwide efforts to decriminalize and regulate marijuana.³² Yet rates of criminalization of pregnancy and substance use have steadily increased, even in states that decriminalized certain types of drug use for non-pregnant people.³³

Pregnancy criminalization first became widespread in the 1980s, amid the sensationalized, racialized, and resoundingly debunked “crack baby epidemic.”³⁴ This armed the anti-abortion movement with a perfect narrative to move their agenda forward: it played on racist and sexist tropes about Black women and their right to reproduce; it exploited white America’s fears of having to pay and care for “a bio-underclass, a generation of physically damaged cocaine babies whose biological inferiority is stamped at birth”,³⁵ and it created a new category of crime victim: the innocent fetus, fertilized egg, or embryo. Black women were overwhelmingly the targets of pregnancy criminalization in the first several decades after *Roe*.³⁶

Given the racial dynamics described above, it might be expected that cases between January 2006 and June 2022 would also involve a disproportionate number of Black pregnant people. However, contrary to our initial hypothesis

that Black pregnant people would continue to be vastly over-represented, if any conclusions can be drawn from a sample where races, especially those other than “Black” or “white” are often miscoded, it is that white pregnant people now make up a majority of pregnancy criminalization cases. This shift could be driven, in part, by the racial makeup of the most recent drug epidemics.

The criminal legal system disproportionately targets poor people,³⁷ and people targeted for pregnancy criminalization are also overwhelmingly poor. Because poor people often face increased surveillance and scrutiny by state actors in order to access care and assistance, they are more often exposed to risks for pregnancy criminalization, such as being drug tested in the presence of mandated reporters, which can lead to arrest.³⁸ Pregnant people who can afford private physicians and avoid public services are likely better able to avoid testing, detection, and reporting.³⁹

State laws generally make it a crime for members of certain professions—such as social workers, teachers, and healthcare providers—to withhold information about suspected or known instances of child abuse or neglect from state family regulation agencies. These people are referred to as mandated or mandatory reporters. The mandatory reporting system, a “bedrock of the child welfare system,” has “created a vast family surveillance apparatus, turning educators, health care workers, therapists, and social services providers into the eyes and ears of a system that has the power to take children from their parents.”⁴⁰ More than half of states have laws that require reporting related to people’s use of alcohol or drugs during pregnancy and/or define alcohol or drug use during pregnancy as child abuse or neglect.⁴¹ Because of this legal apparatus, the healthcare and family regulation systems have come to play a significant role in sustaining efforts to criminalize pregnancy.

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Substance Use & Pregnancy

Expanding options for voluntary, non-coercive treatment for pregnant people struggling with substance use disorders leads to far better outcomes for pregnant people and their babies than carceral solutions do.⁵⁷ Contrary to claims that arresting and prosecuting pregnant people will encourage them to desist from substance use and thus improve maternal and fetal health, fears of detection and punishment present a significant barrier to care, causing some people to delay or avoid prenatal care altogether.⁵⁸ This creates a health risk, since substance-using pregnant people who do receive prenatal care experience more positive birth outcomes and have more opportunities for other health-promoting interventions than those who do not receive care.⁵⁹

Further, the risk of poor health outcomes from avoiding care out of fear of criminalization or family separation is greater than the risk of poor health outcomes from the use of illicit substances such as cocaine, methamphetamine, or cannabis.⁶⁰ For example, amidst the moral panic about “crack babies” in the 1980s and 1990s, a meta-analysis of over 70 studies found “no convincing evidence that prenatal cocaine exposure is associated with developmental toxic effects that are different in severity, scope, or kind from the sequelae of multiple other risk factors.”⁶¹

Similarly, the myth that methamphetamine use during pregnancy harms fetuses contributes severely to the criminalization of pregnant people. Although researchers have observed an association between a positive toxicology test for methamphetamine and reduced gestational age for exposed infants, they found no difference in neonatal intensive care unit (NICU) admissions or length of neonatal hospital stays.⁶² Importantly, the study did not confirm a *causal* link between the two.⁶³ Further, no definitive link has been established between methamphetamine use and pregnancy complications such as placental abruption, preeclampsia, or postpartum hemorrhage.⁶⁴ Studies similarly confirm that cannabis, which is highly criminalized during pregnancy, has no conclusive effect on fetal development.⁶⁵ And although some newborns prenatally exposed to the above-mentioned substances may experience withdrawal symptoms, any difference in their development disappears within a few months.⁶⁶

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Report Overview

Since Pregnancy Justice's 2013 study, there has been no new effort to document the criminalization of all pregnancy outcomes that have occurred in the United States after 2005. As a result, the scope of the problem in recent years has not been fully understood. This report hopes to begin to address this gap by examining trends in pregnancy criminalization during the 16.5 years prior to *Dobbs* and situating those trends in the legal landscape. Understanding who has been targeted and how will be essential to combating pregnancy criminalization moving forward.

While this is the only study of its kind, literature that speaks to the issue of pregnancy criminalization is wide-ranging. Researchers have examined health access barriers and the health effects of incarceration on pregnant people,⁴² recounted case studies of individuals who have been criminalized for their pregnancies, and explored the socio-legal effects of pregnancy criminalization on conceptions of motherhood.⁴³ The literature has also explored the criminalization of conduct during pregnancy, with a specific focus on co-occurring substance use⁴⁴ and the role of the family regulation system in penalizing such conduct.⁴⁵ Further, there is a specific focus on abortion criminalization, either analyzing effects on abortion access,⁴⁶ investigating the effects of *Dobbs* on providers and patients,⁴⁷ examining interjurisdictional abortion access issues,⁴⁸ tracking anti-abortion laws,⁴⁹ or comparing cross-country abortion criminalization.⁵⁰

This report begins with a short methods section, which focuses on the research questions that animated this study (this section also references the methods appendix, which describes in further detail the inclusion and exclusion criteria, data

collection methods, data cleaning, and statistical analysis processes. Interested readers will also find a further exploration of our conclusion that the findings represent an undercount of cases, as well as a discussion of other limitations).

The findings show that, as a result of claims of fetal personhood combined with drug war propaganda and policies, pregnant people have been subjected to arrest, pretrial incarceration, substantial bail, prison time, family separation, mandated drug treatment programs, and continued surveillance during probation and parole. Arrests were overwhelmingly concentrated in the South, specifically in states with high-court decisions that expanded definitions of "child" to include fetuses or that had a fetal assault law in place that explicitly criminalized pregnant people for unlawful acts and omissions. In these states, pregnant people were charged with criminal child neglect and endangerment due to alleged substance use, against public health recommendations opposing carceral approaches to healthcare⁵¹ and despite a lack of scientific evidence showing that prenatal exposure to any criminalized substance causes unique and specific harms.⁵² The discussion and recommendations sections conclude that ending pregnancy criminalization will require concerted efforts to end the stigma associated with substance use during pregnancy, increase knowledge of the evidence base supporting non-carceral approaches to substance use disorder as a public health (rather than criminal justice) problem, elevate an understanding of the racial underpinnings of the over-representation of white pregnant people in the study, attenuate the role of the social and healthcare systems (including mandated reporting) in pregnancy criminalization, and reject the ideology of "fetal personhood."

Fetal Personhood

At least 11 states have broadly incorporated fetal personhood into their state constitutions or state laws covering both criminal and civil laws, and at least 5 additional states have incorporated fetal personhood into their criminal laws specifically.⁵³ Thirty-eight states have feticide laws, and 29 of those states have laws that authorize homicide charges for causing the loss of a pregnancy to apply at conception or an equivalently early stage of pregnancy.⁵⁴ Three state supreme courts have ruled that criminal laws protecting against harm to children can be applied to fetuses.⁵⁵ Such decisions have served as judicially enacted "personhood" measure[s] in disguise,⁵⁶ and by extension such decisions have expanded criminal child abuse, neglect, and/or endangerment to govern and surveil pregnant people's behavior.