

DISCUSSION

According to the case data, between January 2006 and June 2022, the month of the *Dobbs* ruling, there were at least 1,396 instances of criminalization based on pregnancy—that is, cases in which a person would not have faced criminalization but for their pregnancy. This represents a swift acceleration in pregnancy criminalization since Pregnancy Justice’s first study of the phenomenon in 2013, which identified 413 such cases over the first 33 years post-*Roe* (1973–2005). This report documented over triple the arrests in only 16.5 years, less than half the time period—an alarming trend that will only worsen with the *Dobbs* ruling.

The arrests were overwhelmingly concentrated in southern states where judicial decisions have expanded definitions of “child” to include fetuses in criminal child abuse statutes, to effectively penalize and regulate pregnant people,¹¹¹ or had a fetal assault law in place that explicitly criminalized

pregnant people.¹¹² Ultimately, using substance use and pregnancy as an entry point, prosecutors employed fetal personhood to argue that a wide range of criminal laws should be interpreted to reach the context of pregnancy. Notably, only a small fraction of these cases involved abortion.

In addition to fetal personhood, pregnancy criminalization relied on a confluence of other factors, including socioeconomic disparities in policing and surveillance, carceral approaches to substance use spawned from the war on drugs, and the complicity of the U.S. healthcare and family regulation systems. This is all despite an abundance of research indicating that such policies harm pregnant people and their families.

“

Racism in medical settings is pervasive and well-documented, particularly against Black pregnant people, resulting in horrific maternal mortality disparities that make it three times as likely for a Black person to die during childbirth than a white person.”

Racial and Socioeconomic Factors

Pregnancy criminalization disproportionately targets poor people; nearly 85% of cases involved criminal charges against a pregnant person who was deemed legally “indigent,” meaning that they faced considerable financial hardship such that incurring legal fees would mean they would be unable to afford basic life necessities. The vast majority of pregnancy criminalization arrests were of people from lower socioeconomic levels, regardless of race.

Racism in medical settings is pervasive and well-documented, particularly against Black pregnant people, resulting in horrific maternal mortality disparities that make it three times as likely for a Black person to die during childbirth than a white person.¹¹³ Racism abounds in other aspects of pregnancy care as well. Black people are more likely to be drug tested during pregnancy, subjected to family policing, and separated from their children, despite generally similar drug use rates across racial groups.¹¹⁴

As is clear from the demographic data discussed earlier, the racial dynamics of pregnancy criminalization have undergone a transformation

since 2005. This is not to say that race and racism are no longer factors in pregnancy criminalization. On the contrary, it is the racist carceral tactics established during the war on drugs that are now being extended to target poor white communities in the midst of the opioid and methamphetamine epidemics.

People from all financial backgrounds use illicit drugs at similar rates, yet pregnant people from lower socioeconomic levels were far and away the primary targets of pregnancy criminalization.¹¹⁵ At nearly every turn, the healthcare system steers poor pregnant people toward the carceral system and non-poor pregnant people away from it.¹¹⁶ The vast majority of cases involved people who were financially precarious even before their arrest, and pregnancy criminalization only exacerbates financial problems: the median bail was set at \$10,000, and the majority of arrests resulted in prison and jail time, likely interrupting employment and deepening financial hardship.¹¹⁷ Pregnancy criminalization constitutes a substantial financial shock and disrupts familial and community bonds at a particularly vulnerable and stressful moment in people’s lives.

The Underpinnings of Criminalizing Pregnancy and Substance Use

Though purportedly rooted in the desire to preserve fetal life and health, criminalizing substance use and pregnancy deters pregnant people from seeking healthcare and actually increases risks to maternal, child, and fetal health.¹¹⁸ Overwhelmingly, law enforcement officials used alleged substance use as a basis for charging pregnant people with criminal child neglect or endangerment. In approximately 9 in 10 (92.0%) cases, the case information showed accusations or evidence of substance use. The three most common substances associated with pregnancy criminalization cases were methamphetamine, cannabis, and cocaine, in descending order. Almost two in five (38.9%) arrests involved allegations of methamphetamine use, one in three (34.1%) involved allegations of cannabis use, and one in four (23.8%) involved allegations of cocaine use.

Carefully constructed, unbiased scientific research has not found that prenatal exposure to any criminalized drugs causes specific or unique harms,¹¹⁹ nor has it found that any of these criminalized substances are abortifacients, cause miscarriages or stillbirths, or cause specific harms or impairments to the children prenatally exposed.¹²⁰ Research indicates that risks associated with prenatal exposure to any of the above criminalized drugs are comparable to or less than those associated with much more commonly used legal substances.¹²¹ Studies have found that any developmental differences at birth that can be attributed to prenatal exposure to criminalized substances taper off with age and do not affect long-term development.¹²²

This report also found that a striking one-quarter of cases involved alleged use of legal substances, including prescription opiates (20.6%), nicotine (1.6%), and alcohol (2.5%). These findings confirm well-founded fears that permitting criminalization of pregnancy and illegal substance use can lead to criminalization in other contexts.

Pregnancy criminalization arrests are a function of harmful racial stereotypes and broader cultural trends in drug prosecution and the “war on drugs.” Reverberations of the “crack baby epidemic”¹²³ and the opioid crisis¹²⁴ are apparent in the documentation: one in two (51.5%) arrests of Black pregnant people involved allegations of cocaine use, and one-third of arrests of white pregnant people involved allegations of opiate use. Further, Indigenous and Black pregnant people were overrepresented in arrests involving cannabis use, indicating that these two populations have been penalized more harshly for minor drug offenses and the enforcement of marijuana laws.¹²⁵

Instead of receiving treatment and support, pregnant people face criminal prosecution and are incarcerated and placed in jails and prisons with substandard and sometimes dangerous pregnancy and post-partum care.¹²⁶ Rather than addressing the actual factors contributing to poorer health outcomes through public health and medical interventions, pregnancy criminalization perpetuates medical misinformation and intensifies the inequities that make pregnant people vulnerable to arrest in the first place.

“

Instead of receiving treatment and support, pregnant people face criminal prosecution and are incarcerated and placed in jails and prisons with substandard and sometimes dangerous pregnancy and post-partum care.”

Medical Professionals' Role in Criminalization

Medical professionals and family regulation workers play a significant role in pregnancy criminalization, either by directly reporting to law enforcement or by contributing to investigations against pregnant people. One in three (33.8%) pregnancy-related arrests were first instigated by a medical professional either directly or indirectly reporting to law enforcement.¹²⁷ Two in five (42.6%) arrests involved the presence of family regulation workers. Family regulation workers contributed to arrests in various ways, including by reporting individuals to law enforcement, conducting background screenings of pregnant people and their families, providing witness statements, and monitoring compliance with parole and probation conditions, particularly drug testing.

Medical professionals and social workers working with pregnant populations often do so with the aim of supporting and fostering healthy families. But their involvement with law enforcement runs counter to these goals. Pregnancy criminalization threatens to separate a pregnant person from their children and communities, and the threat alone is enough to destabilize a family.¹²⁸

The involvement of the healthcare and family regulation systems highlights two distinct pipelines to pregnancy criminalization—the hospital-to-prison pipeline and the family regulation system-to-prison pipeline. These pipelines often overlap, most commonly through a hospital-to-family regulation system-to-police mechanism. These mechanisms turn pregnant people's need for medical care and a social safety net, financial and otherwise, against them. The pregnancy criminalization pipelines must be dismantled to ensure that pregnant people's needs are not turned into rights violations.

Every major medical and public health organization opposes punitive approaches to addressing the issue of pregnancy and drug use, which ultimately endanger maternal, fetal, and child health.¹²⁹ The threat of arrest or prosecution makes pregnant

“

Criminalizing pregnancy and substance use for the purported purpose of “preserving fetal life” ultimately worsens maternal, fetal, and child health outcomes.”

people afraid to access health and medical services, putting them and their babies at increased risk of harm.¹³⁰ In fact, “[f]or pregnant substance users, the receipt of adequate prenatal care is especially critical. Several studies have reported that increasing the adequacy of prenatal care utilization in pregnant substance users reduces risks for prematurity, low birth weight, and perinatal mortality.”¹³¹ It is therefore especially important to note that prisons and jails provide substandard prenatal and postpartum care.¹³² The fear of law enforcement involvement also discourages people from having open and honest conversations about drug use with their healthcare providers. This can interfere with healthcare providers' ability to detect substance use disorders and determine appropriate treatment options.¹³³ For example, “[t]he standard of care for treating pregnant people with substance use disorder is often medication-assisted treatment,” which cannot be implemented by healthcare providers when their patients are too afraid to speak openly about their substance use.¹³⁴ Criminalizing pregnancy and substance use for the purported purpose of “preserving fetal life” ultimately worsens maternal, fetal, and child health outcomes.

Arrest Outcomes

As in much of the criminal legal system,¹³⁵ the majority of pregnancy criminalization cases involved some form of pretrial incarceration. Pretrial incarceration, and the resulting separation of the pregnant person from their community, likely explains why the majority of cases involved a plea. The high rate of plea deals is also a symptom of an under-funded or virtually non-existent public defense system, in which overworked and under-resourced public defenders or court-appointed attorneys are not accustomed to or do not have the resources to challenge the legality of criminalization based on pregnancy. Among cases where plea information was available, two in three (66.4%) involved the pregnant person pleading guilty to the original or a lesser charge. When given the option of immediate release in exchange for a plea deal, pregnant people often feel pressured to plead guilty, especially if they have children at home. This becomes more acute the longer a person remains in jail while awaiting trial.¹³⁶

Among the cases that provided information on incarceration, four in five (83.1%) arrests resulted in a prison sentence. The median minimum sentence length was 12 months incarcerated, and the median maximum sentence length was 48 months. Women are more likely than men to be the primary caregivers of their children,¹³⁷ and almost all cases identified in this study involved cisgender women, with the majority between ages 30 and 39. Caregiving responsibilities are rarely taken into consideration when determining the length of incarceration, as sentencing guidelines in most states do not factor in a defendant's parental status.¹³⁸ Separation from an incarcerated parent can have lasting consequences for children's health and development.¹³⁹ Many incarcerated women detained in rural areas are far away from their families.¹⁴⁰ This distance can damage family structures and relationships. Importantly, "incarceration and physical separation from children are grounds for termination of parental rights in 25 states."¹⁴¹

Convictions that do not result in prison sentences can nonetheless involve time-consuming, expensive, and burdensome court-ordered diversion that makes it nearly impossible to stay employed or meet parenting obligations. Diversion includes deferred prosecution, suspended sentencing, community service, forced drug treatment rehabilitation programs,

“

Among the cases that provided information on incarceration, three in five (61.3%) arrests resulted in a prison sentence.”

and/or probation instead of incarceration (all of which, except for probation, can occur after prison as well), much of it at the defendant's own cost. Even if a person is not ultimately charged or convicted, arrest alone has damaging effects. Individuals who pass through the criminal system experience increased levels of chronic stress over their lifetimes,¹⁴² stigma in society,¹⁴³ and lowered income and employability,¹⁴⁴ in addition to the potentially detrimental financial impacts of costs associated with court-ordered requirements, legal fees, and lost wages.¹⁴⁵

Criminalization and Maternal Mortality

The U.S. maternal mortality rate is the highest among peer nations, and it is getting worse.¹⁴⁶ Not only is the U.S. maternal mortality rate unacceptably high, it is also marked by severe racial disparities: in 2021, the rate for Black women was 2.6 times the rate for white women.¹⁴⁷ The states with the highest rates of pregnancy criminalization also have some of the worst maternal mortality rates in the country. All five of the states with the most pregnancy criminalization cases in this report—Alabama, South Carolina, Tennessee, Oklahoma, and Mississippi—rank among the top 11 states in maternal mortality.¹⁴⁸ Every major medical group opposes pregnancy criminalization because, among many other concerns, it disrupts the patient-provider relationship and makes it harder for people who need care to access it.¹⁴⁹ Carceral approaches to pregnancy result in poorer health outcomes for pregnant and postpartum people and their newborns.¹⁵⁰ Pregnancy criminalization arrests reveal a contradiction in state actors' purported aim to protect fetal life given the worsening maternal, fetal, and child health outcomes to which it contributes.