



PREGNANCY  
**JUSTICE**

# The Rise of Pregnancy Criminalization:

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A Pregnancy Justice Report

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# PRESIDENT'S NOTE

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Pregnant people are uniquely and increasingly vulnerable to criminalization in ways that do not exist for other subsets of the population. For too long, this has not been a central concern of the reproductive rights movement in the United States. Central to criminalization are increasing efforts to grant legal recognition of fertilized eggs, embryos, and fetuses as people. So-called “fetal personhood” has concerningly gained significant momentum in state laws and judicial decisions. Rather than an abstract ideology, fetal personhood has very real, and truly devastating, impacts on pregnant people’s rights, health, and well-being. Pregnant people are, simply by virtue of being pregnant, vulnerable to criminal charges: child abuse or endangerment if they are accused of exposing their fetus to some perceived or actual risk of harm; or murder, feticide, or manslaughter if they experience a pregnancy loss. This report, documenting nearly 1,400 cases in just 16.5 years, demonstrates the accelerating trend of pregnancy criminalization in the United States, connected most directly to the expanding ideology of fetal personhood.

Fetal personhood is also very much at the heart of restrictions and bans on abortion. This report documents the alarming rise in pregnancy criminalization prior to the U.S. Supreme Court’s *Dobbs v. Jackson Women’s Health Organization* ruling, from 2006 until June 2022. It situates this phenomenon during a time in which abortion was still recognized as a fundamental right, but one that was rapidly eroding. The 1973 *Roe v. Wade* decision not only established the right to abortion, it also rejected the concept of fetal personhood and affirmed that people do not lose their constitutional rights upon becoming pregnant. And now, without the protections of *Roe*, we can expect pregnancy criminalization to continue to increase.

This report builds on Lynn M. Paltrow and Jeanne Flavin’s seminal article, published in 2013 in the *Journal of Health Law and Policy*, which documented and analyzed pregnancy criminalization for the first time. It is a critical reminder that reproductive autonomy is about more than just abortion—the overwhelming majority of cases documented since 1973 did not target abortion, but pregnancy loss or alleged “child abuse” while pregnant. While the

“war on drugs” and reproductive oppression have historically targeted Black, Brown, and Indigenous women, they also established a model for addressing substance use and pregnancy through the criminal system and constrained alternative policy pathways. As a result, policies enacted to police communities of color are now being imposed on poor white communities as well. As shown in this report, being poor is currently the greatest indicator of pregnancy criminalization.

The criminalization of substance use and pregnancy, specifically among poor people, is the vehicle by which fetal personhood has gained a foothold. The echoes of the “war on drugs” continue to reverberate in the cases documented here. In the wake of the *Dobbs* decision, which erased the constitutional right to abortion, the public is more clearly seeing the connection between reproductive justice and criminal justice—that the fight for reproductive justice will now be fought in criminal courts just as much as it will be fought in other venues. This report serves as a pressing reminder that the criminalization, rights violations, and dehumanization of pregnant people are not new. The risk to a pregnant person exists whether that person has an abortion, a miscarriage, a stillbirth, or a healthy birth outcome.

There is much to learn about our post-*Dobbs* future by looking at our recent past. We know this research will be fundamental to envisioning a future without criminalization, where healthcare is divorced from the criminal legal and family regulation systems, where neither poverty nor race is criminalized, and where everyone can receive the healthcare and support they need without discrimination, state violence or coercion, family separation, or stigma.

**We invite you to read this report, utilize it in your advocacy, partner with us, and help us create a collective future where pregnant people’s human rights are realized and no one is criminalized because of pregnancy.**

*Lourdes A. Rivera*

# EXECUTIVE SUMMARY

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In June 2022, the U.S. Supreme Court issued its ruling in *Dobbs vs. Jackson Women’s Health Organization*, which overturned *Roe v. Wade* and took the extreme step of eliminating the federal, constitutionally protected right to abortion. The decision sparked warranted outrage over the dangers it poses to both clinicians and people seeking abortions. Thus far, however, conversations surrounding reproductive rights have largely neglected a burgeoning trend: even prior to *Dobbs*, people have increasingly been criminalized for their pregnancies, regardless of birth outcome.

From the *Roe* decision in 1973 until the *Dobbs* decision in 2022, in more than 1,800 cases across the country, state actors—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 cases show that pregnancy outcomes other than abortion, including birth and pregnancy loss, have been far more likely to result in criminalization,<sup>1</sup> most often under the guise of addressing pregnancy and substance use. Through an alarming combination of carceral approaches to substance use and the legal expansion of the concept of fetal personhood, state actors have increasingly penalized pregnant people for actions that would not have been criminalized but for their pregnancies.

The *Dobbs* ruling will further accelerate an existing crisis, putting anyone who is pregnant or has the capacity to become pregnant at even greater risk of arrest, prosecution, and conviction. Understanding this 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.

In 2013, Pregnancy Justice published the first comprehensive national documentation effort capturing pregnancy-related arrests and deprivations of liberty between 1973 and 2005. This report picks up where the previous study left

off, identifying cases that occurred between 2006 and the *Dobbs* ruling in June 2022. We define 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.

The rise in pregnancy criminalization is fueled in large part by the rise of the concept of “fetal personhood” in anti-abortion rhetoric and laws. This radical notion, which enshrines the rights of fertilized eggs, embryos, and fetuses into our legal and political systems, has far-reaching implications. This report found that over three quarters (76.9%) of the cases of pregnancy criminalization occurred in a small number of states that expanded the definitions of child abuse to include fetuses, fertilized eggs, and embryos.

While state actors have used various justifications for criminalizing pregnancy, the overwhelming majority of cases rely on substance use allegations, usually as a basis for charging pregnant people with criminal child neglect or endangerment. With substance use and pregnancy as an entry point, prosecutors have employed fetal personhood to argue that a wide range of criminal laws should be interpreted to reach the context of pregnancy. More than half of states have laws that require reporting to family regulation authorities related to people’s use of alcohol or drugs during pregnancy and/or define alcohol or drug use during pregnancy as civil child abuse or neglect.<sup>2</sup> Because of this legal apparatus, the healthcare and family regulation systems have come to play a significant role in sustaining efforts to criminalize pregnancy. The focus on criminalizing pregnancy and substance use defies medical consensus that doing so deters pregnant people from seeking healthcare and increases risks to maternal, child, and fetal health, harming the very interests such criminalization its proponents claim it is protecting.<sup>3</sup>

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1 Confronting Pregnancy Criminalization: A Practical Guide for Healthcare Providers, Lawyers, Medical Examiners, Child Welfare Workers, and Policymakers, Pregnancy Justice (June 23, 2022), <https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/202211-PJ-Toolkit-Update-2.pdf>

2 Sarah CM Roberts et al., Health Care Provider Decision-Making Around Prenatal Substance Use Reporting, 237 *Drug & Alcohol Dependence* 1 (2022). <https://www.sciencedirect.com/science/article/pii/S0376871622002514?via%3DIihub>.

3 Meghan Boone & Benjamin J. McMichael, State-Created Fetal Harm, 109 *Geo. L.J.* 475 (2021).

# KEY FINDINGS

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- » The report found that **1,396 criminal arrests of 1,379 people** (a small number of individuals are or were involved in more than one case) took place over the 16.5 years between January 1, 2006, and June 23, 2022, the day before the *Dobbs* ruling. This represents a startling increase compared to the findings of the 2013 Pregnancy Justice study, which reported 413 cases during a 33-year period: over three times as many cases in half as many years.
- » While this study found cases of pregnancy criminalization in 46 states and U.S. territories, **nearly four in five (79.4%) arrests took place in just five southern states:** Alabama (46.5%), South Carolina (13.0%), Tennessee (9.4%), Oklahoma (8.1%), and Mississippi (2.6%).<sup>4</sup> Alabama had far and above the highest number of pregnancy criminalization arrests, representing almost half (46.5%) of the total. With the exception of Mississippi, these were the only states in the country that either had judicial decisions that expanded definitions of “child” to include fetuses in their criminal laws, or, in the context of Tennessee, had a law in place that explicitly criminalized the pregnant person if the newborn was born exposed to or harmed by a drug.<sup>5</sup>
- » More than **9 in 10 cases involved allegations of the co-occurrence of pregnancy and substance use.** The three most common substances associated with pregnancy criminalization cases were methamphetamine, cannabis, and cocaine.
- » A striking **one-quarter of cases involved alleged use of legal substances,** including prescription opiates (both prescription status known and unknown) (20.6%), nicotine (1.6%), and alcohol (2.5%).
- » **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.
- » Reports made by medical professionals or hospital-based social workers were the most common basis for pregnancy criminalization arrests. **One in three cases were first instigated by a medical professional, and two in five involved family regulation workers.**
- » According to the case information available, **poor Black pregnant people and poor white pregnant people bore the brunt of the consequences** of pregnancy criminalization. Black people represented 18.2% of arrests due to pregnancy criminalization from January 2006 to June 2022, despite Black women making up only 13.0% of the U.S. population. Similarly, white pregnant people accounted for eight in ten (79.0%) of the total reported arrests, yet white women represent 58.8% of the population. This indicates a marked shift in the racial patterns of arrests compared to the first three decades following *Roe*, when pregnancy criminalization disproportionately targeted Black communities.<sup>6</sup> Today, poor white people are now over-represented in the data. 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.
- » In cases where such information was available, **we found a wide variety of pregnancy outcomes.** Two in three (66.0%) cases involved a live birth with no mention of negative health outcomes for the infant; 14.9% involved a live birth with the data indicating the baby had health problems at birth. Slightly under one in ten arrests (9.9%) occurred while the person was still pregnant. The remaining cases involved stillbirths (7.2%), miscarriages (1.4%), or abortions (0.6%). In 217 (15.5%) cases, the pregnancy outcome could not be determined from the data.

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4 The CDC considers the following states to be part of the South Census region: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. List of States in South Census Region, CDC (May 17, 2021), <https://www.cdc.gov/hiv/funding/announcements/ps22-2201/attachments/south-cesus-region.html>.

5 See Cary Aspinwall, These States Are Using Fetal Personhood to Put These Mothers Behind Bars, The Marshall Project (July 25, 2023) <https://www.themarshallproject.org/2023/07/25/pregnant-women-prosecutions-alabamaoaklahoma> (“Mississippi doesn’t have a fetal personhood law, but that hasn’t stopped prosecutors in at least two counties from filing criminal charges against women who tested positive for drugs while pregnant.”)

6 The case information indicates only one arrest of a non-cisgender woman. This may not be an accurate reflection of the gender identities in the dataset, as the criminal legal system and state actors within it may not accurately or properly categorize people based on their gender identity, nor is there often an option to self-identify as non-binary.

## Conclusion and Recommendations

Ending pregnancy criminalization will require concerted efforts to: reject the ideology of “fetal personhood”; address 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 problem; ensure that pregnancy criminalization across all pregnancy outcomes is considered a key concern in the fight to restore and expand abortion rights; elevate an understanding of the racial and sexist underpinnings of the criminalization of pregnant people; and attenuate the role of the social and healthcare systems in pregnancy criminalization. Without the protections of *Roe*, pregnant people across the country are more vulnerable than ever. The findings outlined in this report provide a roadmap for safeguarding their rights moving forward.

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**Thank  
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# GLOSSARY

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A-D

## **ABORTION**

The intentional termination of a pregnancy.

## **ADVERSE HEALTH OUTCOME AT BIRTH**

An undesirable clinical outcome that prolonged the infant's hospital stay, caused permanent harm, required life-saving intervention, or contributed to the infant's death.

## **ARREST WARRANT**

A document issued by a judge or magistrate on behalf of the state that authorizes the arrest and detention of an individual.

## **BAIL**

The terms under which an accused person can be released from custody. Those terms include a promise that the accused person will appear back in court at a place and time specified. The terms may also include the payment of, the promise to pay, or the deposit of property to the court of a specified sum of money or property if the person does not appear.

## **BOND**

An enforceable contract to pay a sum of money to the court in the event the defendant does not return to court when ordered to do so. A bond may be secured, meaning funds are deposited to secure the promise, or unsecured, meaning that the contract is merely a promise to forfeit some amount of money in the future if the defendant fails to appear in court as ordered. A bond may be posted by a bail bond company, by the defendant, or by a third party willing to forfeit funds if the defendant does not return to court.

## **CENSUS REGION (NORTHEAST, MIDWEST, SOUTH, WEST)**

One of the four statistical regions, comprising the 50 states and the District of Columbia, established by the United States Census Bureau for statistical and reporting purposes.

## **CHILD NEGLECT**

Neglect is generally defined as a caregiver failing to provide adequate food, clothing, hygiene, nutrition, shelter, medical care, or supervision in ways that threaten the well-being of the child.

## **CHILD ABUSE**

Child abuse generally involves an act or failure to act by a parent or caretaker that causes actual harm or imminent risk of harm to the child.

## **CHILD ENDANGERMENT**

Child endangerment occurs when a caregiver fails to adequately protect a child from harm.

## **CISGENDER**

People whose gender identity is the same as their assigned or presumed sex at birth.

## **CONTROLLED SUBSTANCE**

A drug or other substance whose manufacture, possession, and use is limited, controlled, and/or regulated by the government.

## **ILLICIT SUBSTANCE**

An illegal substance.

## **DEFERRED PROSECUTION**

An alternative to prosecution offered at the discretion of the prosecutor's office in which a prosecutor voluntarily agrees to cease the prosecution without a judicial adjudication. This may be in exchange for the defendant agreeing to fulfill certain requirements or acknowledge the accuracy of certain allegations.

## **DIVERSION**

A court-imposed alternative to incarceration, including, but not limited to, a deferred prosecution, a compulsory drug treatment program, community service, or supervised parole.

### **FAMILY REGULATION SYSTEM**

The term, popularized by Professor Dorothy Roberts, represents the realities of the group of state-level agencies that constitute what is often called the “child protective” or “child welfare” system. While the stated goal of this system is to protect children and promote their welfare, the reality is often state regulation and surveillance of children’s families in a fashion that harms rather than helps. Accordingly, we use the terms family regulation system throughout this report.

### **FELONY**

A crime punishable by imprisonment for more than one year or by death.

### **FETAL ASSAULT**

An addition to Tennessee’s criminal code from 2014 until 2016, which stated that “[n]othing in this section shall preclude prosecution of a woman for assault...for the illegal use of a narcotic drug... while pregnant, if her child is born addicted to or harmed by the narcotic drug and the addiction or harm is a result of her illegal use of a narcotic drug taken while pregnant.”<sup>1</sup>

### **FETAL PERSONHOOD**

A legal concept that extends all legal and constitutional protections to fetuses (and often fertilized eggs and embryos), including the right to life.

### **FETICIDE/FETAL HOMICIDE**

The concept that ending a pregnancy is equivalent to murder; the specific definition varies from state to state, but some form of criminal feticide exists in 38 states.

### **INCARCERATION**

The state of being confined in prison; imprisonment.

### **INTERCODER RELIABILITY**

A measure of consistency used to evaluate independent observers who rate, code, or assess the same phenomenon.

### **INDIGENCY**

An economic condition, as determined by the state or locality, whereby an individual’s inability to pay for the expenses necessary for effective representation, release on bond, and the basic necessities of life grants them assignment of legal counsel paid for by the state.

### **JAIL**

A short-term holding facility typically under the jurisdiction of a city, local district, or county for the newly arrested, those awaiting trial or sentencing, or those typically serving not more than a year.

### **MANDATED REPORTER**

A person who, by virtue of their profession, is legally required to report observed or suspected child neglect or endangerment, physical abuse, sexual abuse, or other types of mistreatment of children.

### **MANSLAUGHTER**

A common legal term for the crime of killing a human being without malice aforethought, or otherwise in circumstances not amounting to murder.

### **MISCARRIAGE**

A pregnancy loss before 20 weeks.

### **MISDEMEANOR**

A type of criminal offense typically punishable by 12 months of jail or less.



## A Note on Language

Throughout this report, Pregnancy Justice uses the terms “pregnant people” or “pregnant person” more frequently than “pregnant women.” This is because in the face of “fetal personhood” it is important to exert the personhood of the people who are pregnant. This is also in recognition that not everyone who becomes pregnant identifies as a woman.

At the same time, sexism based on the gender binary is a clear throughline in pregnancy criminalization cases, and the patriarchal desire to impose traditional gender roles on women must be acknowledged. In recognition of all of these complexities, we use the terms “pregnant person/people” and “pregnant woman/women” depending on the context and as appropriate when referring to data.

P-T

### **PAROLE**

The discretionary release of a prisoner by a politically appointed panel before the completion of a sentence where the prisoner agrees to abide by certain behavioral conditions, or else they may be re-arrested and returned to prison.

### **PRETRIAL INCARCERATION**

Detention of a person charged with a crime after they are arrested and until their trial, most commonly in a short-term holding facility like a jail.

### **PRISON**

A long-term holding facility under the jurisdiction of the state or federal government for those who have been convicted of serious crimes, typically any felony.

### **PROBATION**

A period of supervision over an offender, ordered by the court often in lieu of incarceration, during which the offender must abide by certain behavioral conditions, the violation of which may result in re-incarceration.

### **SENTENCE**

The punishment assigned to a defendant found guilty by a court, or fixed by law, for a particular offense.

### **STILLBIRTH**

A pregnancy loss after 20 weeks of pregnancy.

### **TOXICOLOGY TEST**

A test that seeks to detect, isolate, and identify the type and sometimes the concentration of a substance, legal or not, that the person has ingested in their blood, urine, or hair. A positive value could mean that alcohol, prescription medicines, and/or illegal drugs have been detected; a negative value could mean the above-mentioned drugs have not been detected.

### **TRANSGENDER/GENDER NON-BINARY**

Transgender, or trans, is an umbrella term for people whose gender identity or gender expression does not conform to that typically associated with the sex to which they were assigned at birth. Non-binary is an identity embraced by some people who do not identify exclusively as a man or a woman; it can also be used as an umbrella term encompassing identities such as agender, bigender, genderqueer, or gender fluid.

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# INTRODUCTION

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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.<sup>2</sup> 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.<sup>3</sup> *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.<sup>4</sup>

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,<sup>5</sup> 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.<sup>6</sup> People have been criminalized overwhelmingly for being pregnant and using illicit substances,<sup>7</sup> but also for being pregnant and in a dangerous place or situation,<sup>8</sup> being pregnant and having HIV,<sup>9</sup> being pregnant and drinking alcohol,<sup>10</sup> and not arriving at the hospital quickly enough on the day of delivery.<sup>11</sup> 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,<sup>12</sup> HIV transmission,<sup>13</sup> substance use disorder,<sup>14</sup> and delays in healthcare delivery<sup>15</sup> represent deeper systemic failures of the social safety net.<sup>16</sup>

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,<sup>17</sup> and involving a range of pregnancy outcomes including abortions, live births, miscarriages, and stillbirths.<sup>18</sup> Overwhelmingly, the cases occurred despite a lack of legal authority, in defiance of numerous and significant appellate court decisions dismissing or overturning such actions,<sup>19</sup> and contrary to the extraordinary consensus across the medical community that prosecution undermines rather than improves maternal, fetal, and child health.<sup>20</sup> In 86% of these cases, pregnant people faced prosecution through the use of existing criminal statutes intended for other purposes.<sup>21</sup>

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 laws<sup>22</sup> and three state supreme courts (South Carolina, 1998; Alabama, 2012; and Oklahoma, 2020)<sup>23</sup> have ruled that criminal laws protecting children from harm can also be applied to fetuses.<sup>24</sup> 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*.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> Thirty-eight states have “fetal homicide” statutes, creating a separate and unique crime for causing the loss of a pregnancy.<sup>28</sup> 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.<sup>29</sup>

## 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”<sup>30</sup>—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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

Pregnancy criminalization first became widespread in the 1980s, amid the sensationalized, racialized, and resoundingly debunked “crack baby epidemic.”<sup>34</sup> 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”,<sup>35</sup> 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*.<sup>36</sup>

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,<sup>37</sup> 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.<sup>38</sup> Pregnant people who can afford private physicians and avoid public services are likely better able to avoid testing, detection, and reporting.<sup>39</sup>

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.”<sup>40</sup> 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.<sup>41</sup> Because of this legal apparatus, the healthcare and family regulation systems have come to play a significant role in sustaining efforts to criminalize pregnancy.

“

**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.”**

## 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

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.<sup>60</sup> 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.”<sup>61</sup>

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.<sup>62</sup> Importantly, the study did not confirm a *causal* link between the two.<sup>63</sup> Further, no definitive link has been established between methamphetamine use and pregnancy complications such as placental abruption, preeclampsia, or postpartum hemorrhage.<sup>64</sup> Studies similarly confirm that cannabis, which is highly criminalized during pregnancy, has no conclusive effect on fetal development.<sup>65</sup> 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.<sup>66</sup>

“

**...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.”**

## 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,<sup>42</sup> 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.<sup>43</sup> The literature has also explored the criminalization of conduct during pregnancy, with a specific focus on co-occurring substance use<sup>44</sup> and the role of the family regulation system in penalizing such conduct.<sup>45</sup> Further, there is a specific focus on abortion criminalization, either analyzing effects on abortion access,<sup>46</sup> investigating the effects of *Dobbs* on providers and patients,<sup>47</sup> examining interjurisdictional abortion access issues,<sup>48</sup> tracking anti-abortion laws,<sup>49</sup> or comparing cross-country abortion criminalization.<sup>50</sup>

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 healthcare<sup>51</sup> and despite a lack of scientific evidence showing that prenatal exposure to any criminalized substance causes unique and specific harms.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> Three state supreme courts have ruled that criminal laws protecting against harm to children can be applied to fetuses.<sup>55</sup> Such decisions have served as judicially enacted "personhood" measure[s] in disguise,<sup>56</sup> and by extension such decisions have expanded criminal child abuse, neglect, and/or endangerment to govern and surveil pregnant people's behavior.



# METHODS

This study captures trends in pregnancy criminalization across the United States from January 1, 2006, until the day before the *Dobbs* decision, June 23, 2022, specifically through examining cases in which a person's pregnancy was a necessary factor leading to their arrest. In most included cases, pregnancy provided a “but for” factor, meaning that but for the pregnancy, the criminal penalty taken against the pregnant person would not have occurred.<sup>67</sup> In this study, pregnancy criminalization includes when a person faced any of the following state actions due to their pregnancy:

- » a criminal arrest;
- » the issuance of an arrest warrant or court order, regardless of whether it was acted upon;
- » following a non-pregnancy-related arrest, the use of pregnancy to justify more restrictive bond conditions or changes in conditions of pretrial release, sentencing, or community supervision; or,
- » following a non-pregnancy-related conviction, the use of pregnancy to justify probation or parole revocation.

The cases were identified and then coded using a structured framework (“coding scheme”) that was deductively developed to answer pre-identified research questions, stated below. Ten researchers were trained to use the coding scheme and enter results into a spreadsheet prepared for that purpose. Data were analyzed in Stata and R, commonly used statistical programs, and all statistics were checked by an independent second analyst. Intercoder reliability was calculated and discussed until coders could reliably code the variables.

Further information about the methods used in this study (inclusion and exclusion criteria, data collection, data entry, analytic framework, and limitations) is available in the appendix.

## Research Questions

Laws and legal decisions governing fetal personhood are state-specific. Given the findings of the 2013 Pregnancy Justice study, other literature on the criminal legal system, and feminist analyses of pregnancy—which have consistently found that

those in poverty are most affected by the criminal legal system and by curtailment of reproductive rights—this study asked:

### RQ1 (Sample Description)

How many cases of pregnancy criminalization occurred in the years of the study, and where, when, and to whom did they occur?

There are a number of actors who make decisions and take actions that lead to the criminalization of pregnancy. Thus, we asked:

### RQ2 (Involved Actors)

What people and institutions were involved in initiating the criminalization of pregnancy?

The characteristics and outcomes of these types of cases have not been documented since the 2013 study.

### RQ3 (Procedural Characteristics)

What are the characteristics and outcomes of these cases?

Given the role that substance use played in the 2013 study, we wanted to understand what role it played in the criminalization of pregnancy during this study period.

### RQ4 (Substance Use and Pregnancy)

What role does substance use play in pregnancy criminalization?

Because much attention has been paid to the criminalization of abortion, we wanted to have a fuller picture of the kinds of pregnancy outcomes criminalized.

### RQ5 (Pregnancy Outcomes)

What kinds of pregnancy outcomes are being criminalized?

# FINDINGS

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This study identified 1,396 criminal arrests of 1,379 people (a small number of individuals are or were involved in more than one case) between January 1, 2006 and June 23, 2022, the day before the *Dobbs* ruling. This represents a startling increase in the rate of pregnancy criminalization in comparison to the 2013 Pregnancy Justice study, which reported 413 cases over 33 years.

While much attention has been paid to the criminalization of abortion, a look at the case information shows that pregnant people are at risk of being targeted by the criminal legal system, regardless of birth outcome. Primarily carried out under the guise of addressing the issue of pregnancy and substance use, these arrests represent the merging of the fetal personhood movement with the war on drugs to criminalize people for acts and omissions that would not otherwise have been treated as criminal but for their pregnancy. The vast majority of charges were for criminal child neglect, abuse, and/or endangerment. These cases relied on an expansion of the category of “children” to include fetuses—a radical augmentation of the intended definition with sweeping implications. These cases also often relied on the cooperation of the healthcare and family regulation systems with law enforcement.

This report found a marked shift in the racial patterns of arrests compared to the first three decades following *Roe*, when pregnancy criminalization disproportionately targeted Black communities. Relying on racialized carceral tactics established during the height of the “crack epidemic,” the phenomenon has now extended to criminalize white poverty across all regions of the country. The arrests disproportionately affected people from lower socioeconomic levels across all races and were overwhelmingly concentrated in the South.<sup>68</sup>

In examining trends in pregnancy criminalization, this report includes an overview of the 1,396 cases (*Sample Description*), the people and institutions involved in the criminalization of pregnancy (*Involved Actors*), the characteristics and outcomes of these cases (*Procedural Characteristics*), and how these arrests related to the criminalization of controlled substances (*Pregnancy Criminalization Centered on Allegations of Substance Use*). We provide illustrative case studies throughout this section.

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**While much attention has been paid to the criminalization of abortion, a look at the case information shows that pregnant people are at risk of being targeted by the criminal legal system, regardless of birth outcome.”**

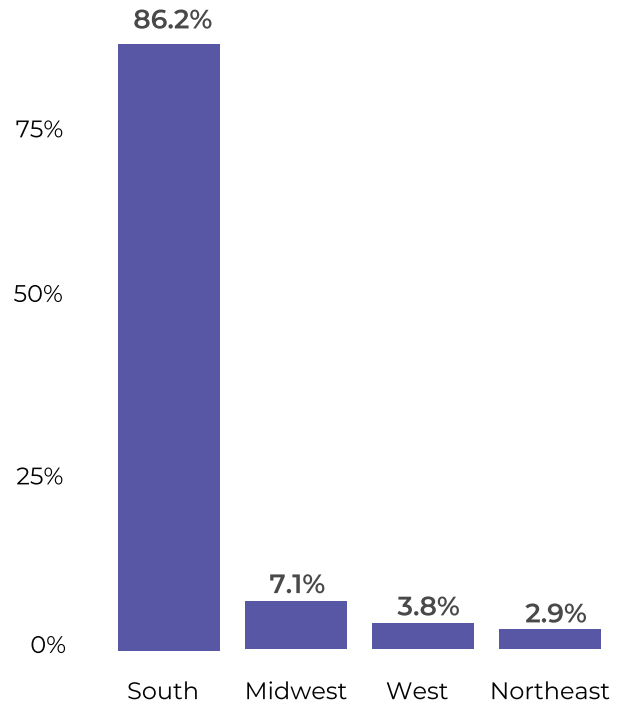
## Sample Description

### Geographic Patterns

While this study found cases of pregnancy criminalization in 46 states and U.S. territories, the overwhelming majority—86.2%—occurred in the South. The Midwest accounted for the second-highest number of cases, approximately every 1 in 20 (7.1%). The remaining arrests were distributed relatively evenly across the remaining regions (West, Northeast, and U.S. territories). Figure 1 excludes U.S. territories because there were less than five cases.

The vast majority of arrests—nearly four in five (79.4%)—took place in just five southern states:<sup>69</sup> Alabama, South Carolina, Tennessee, Oklahoma, and Mississippi. Alabama had far and above the highest number of pregnancy criminalization arrests, representing almost half (46.5%) of the total, followed by South Carolina (12.9%), Tennessee (9.4%), Oklahoma (8.1%), and Mississippi (2.6%). It is important to note that, with the exception of Mississippi, these were the only states in the country that either had judicial decisions that expanded definitions of “child” to include fetuses (and consequently expanded to limit pregnant people’s rights) in their criminal laws, or, in the context of Tennessee, had a specific law in place that explicitly criminalized the pregnant person if the newborn was born exposed to or harmed by a drug.

FIGURE 1  
Census Region



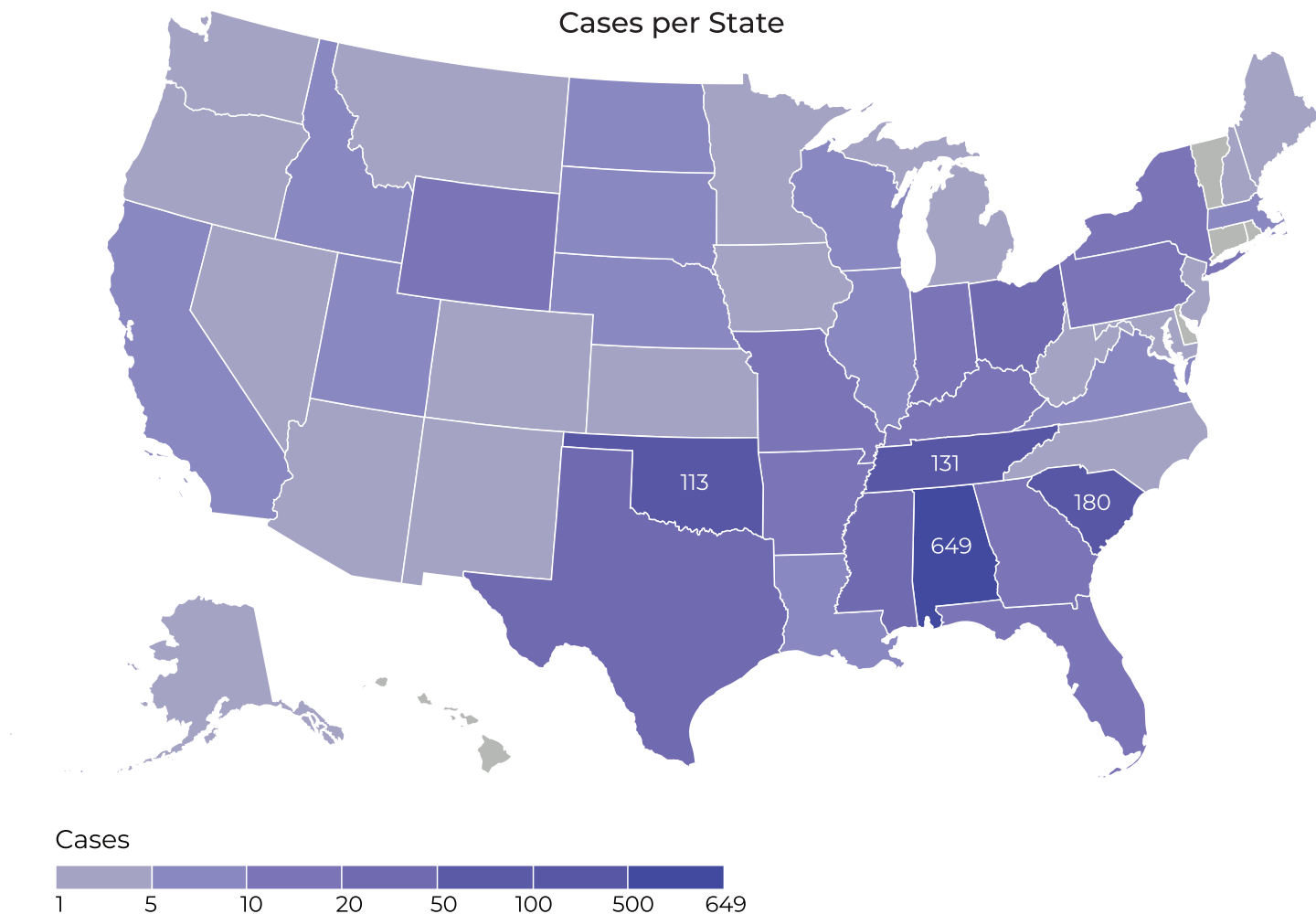
— CASE STUDY —

**A typical chemical endangerment arrest in Etowah County, Alabama—the county with the highest number of cases in the United States.**

STATE | ALABAMA  
CHARGES | CHEMICAL ENDANGERMENT  
ARREST YEAR | 2021

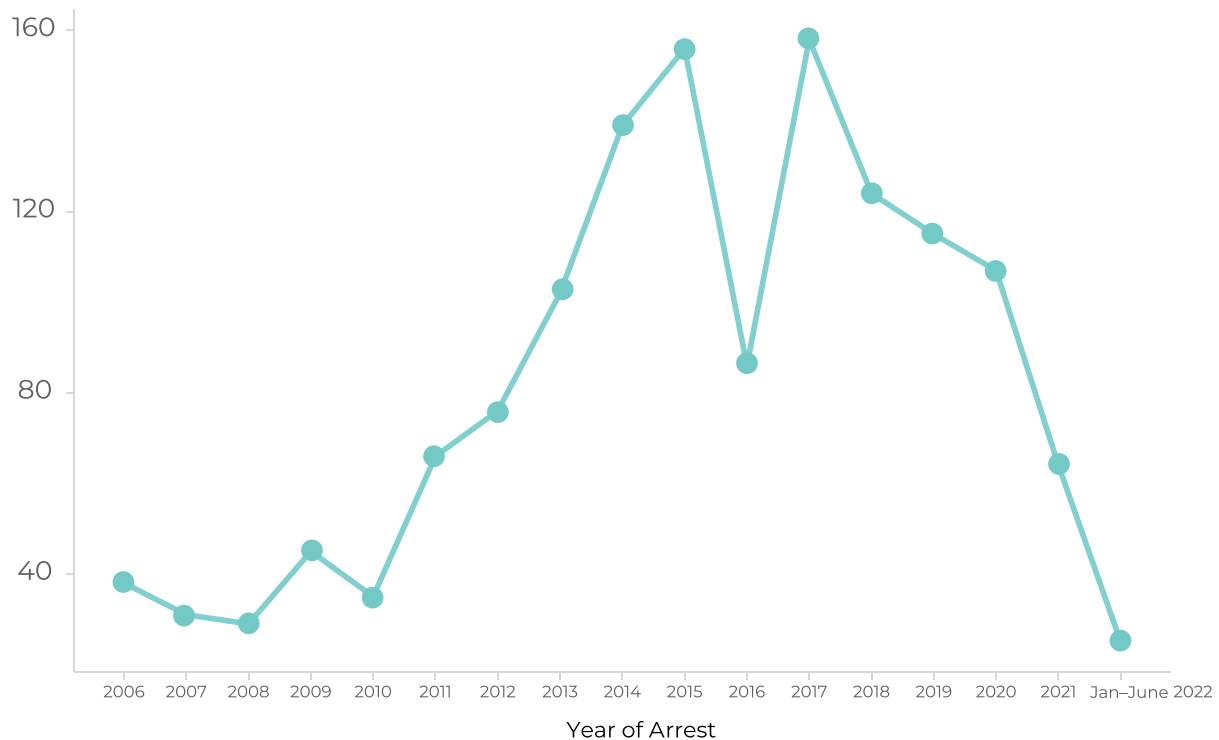
N.K., a 33-year-old white woman, gave birth to a baby boy in September 2020.<sup>70</sup> Although N.K. had a negative toxicology test after labor, her son tested positive for opiates and marijuana. Nearly a year after giving birth, N.K. was arrested for “chemical endangerment of a minor” in December 2021. Less than a month later, she pleaded guilty to the charge and received a suspended sentence of 36 months and 24 months of supervised probation.

**FIGURE 2**  
Cases per State



State	Cases	State	Cases	State	Cases	State	Cases	State	Cases
Alabama	649	Hawaii	0	Michigan	4	North Carolina	4	Utah	6
Alaska	1	Idaho	8	Minnesota	3	North Dakota	9	Vermont	0
Arizona	3	Illinois	6	Mississippi	36	Ohio	31	Virginia	7
Arkansas	11	Indiana	13	Missouri	10	Oklahoma	113	Washington	3
California	8	Iowa	1	Montana	4	Oregon	1	West Virginia	3
Colorado	4	Kansas	1	Nebraska	7	Pennsylvania	17	Wisconsin	6
Connecticut	0	Kentucky	12	Nevada	2	Puerto Rico	0	Wyoming	12
Delaware	0	Louisiana	8	New Hampshire	2	South Carolina	180		
District of Columbia	0	Maine	1	New Jersey	1	South Dakota	8		
Florida	13	Maryland	3	New Mexico	1	Tennessee	131		
Georgia	10	Massachusetts	7	New York	12	Texas	23		

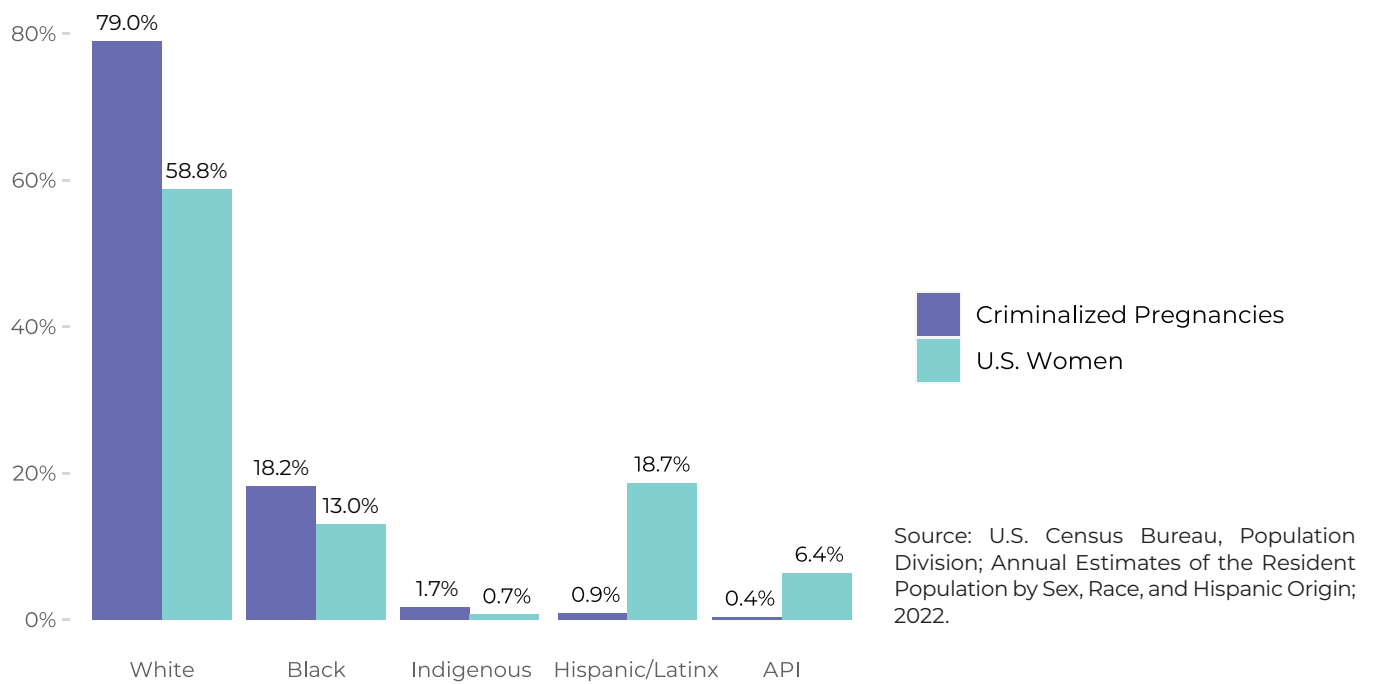
**FIGURE 3**  
Arrests per Year



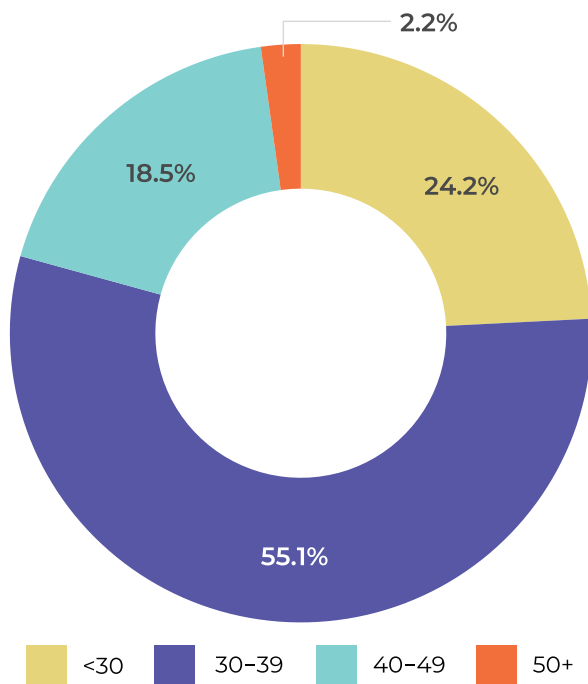
## Overall Trends

This report identified 1,396 arrests due to pregnancy criminalization between January 2006 and June 2022, with an overall upward trend (see figure 3). Arrests rose steadily from 2010 through 2015, followed by a temporary drop in 2016. The rise and subsequent dip in arrests in 2016 can likely be explained by several factors: legislative amendments to Alabama’s chemical endangerment law went into effect in 2016, prohibiting the application of the law to pregnant people who take prescribed or over-the-counter medications; there had been significant investigative journalism in 2015 exposing the harms of prosecuting pregnancy in the state;<sup>71</sup> and Tennessee’s Fetal Assault Law was active between 2014 and 2016.<sup>72</sup> Arrests rebounded with a vengeance in 2017, which was the year with the highest number of cases (158). The year 2008 had the lowest number (excluding 2022, which had 25 arrests from January through June). Cases began to fall again in 2020, likely driven in part by the COVID-19 pandemic, which caused a number of processing delays in the criminal legal system as well as a drop in the overall arrest rate during a portion of this period.<sup>73</sup>

**FIGURE 4**  
Criminalized Pregnancies and U.S. Women by Race



**FIGURE 5**  
Age Distribution



### Age

Although women ages 20–29 had the highest birth rate,<sup>74</sup> over half (55.1%) of arrests due to pregnancy criminalization were of those between 30 and 39 years old. Around one-quarter (24.2%) of pregnancy criminalization arrests were of those under 29,<sup>75</sup> and slightly under one in five (18.5%) arrests were of pregnant people ages 40–49. The remaining (2.2%) arrests were of pregnant people over age 50.

### Racial Demographics

According to the case information available, poor Black pregnant people and poor white pregnant people bore the brunt of the consequences of pregnancy criminalization. Black people represented 18.2% of arrests due to pregnancy criminalization from January 2006 to June 2022, despite Black women making up only 13.0% of the U.S. population. Similarly, white pregnant people accounted for eight in ten (79.0%) of the total reported arrests, yet white women represent 58.8% of the population. The remainder of the arrests were of Indigenous pregnant people (1.7%), Hispanic/Latinx pregnant people (0.9%), and Asian American and Pacific Islander (API) pregnant people (0.4%).

Arrests of people identified as Hispanic/Latinx and API were not representative of their population size, and were underrepresented in the report data. This could reflect inconsistent and poor accounting of people who identify as Hispanic/Latinx, Indigenous, API, and multiracial in the criminal legal system. We recognize the complexity and diversity of racial identities and the limits of accurate categorization, particularly within the criminal legal system. Because of these limitations, our conclusions about the racial demographics of people who experienced pregnancy criminalization were confined to those who were classified in criminal legal documents as “Black” or “white.” Keeping these limitations in mind, the data shows that white pregnant people made up a majority of pregnancy criminalization cases during the study period.

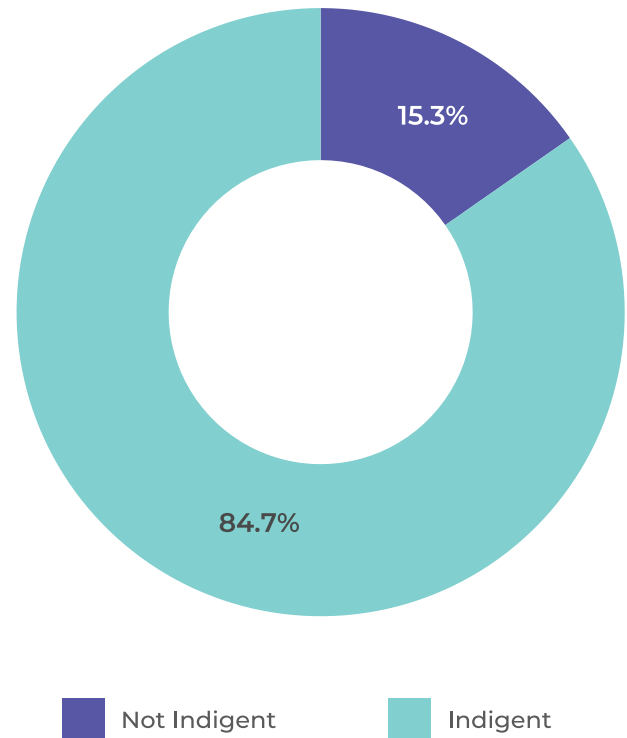
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**The case information available suggests pregnancy criminalization overwhelmingly affected poor people.”**

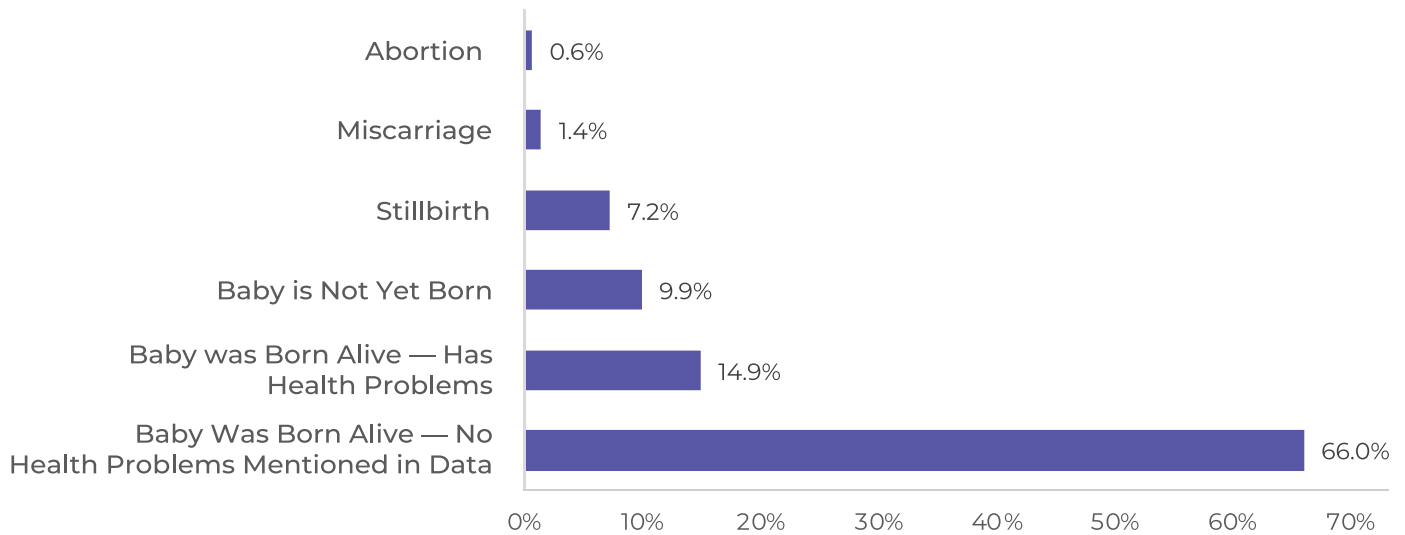
### Socioeconomic Level

The case information available suggests pregnancy criminalization overwhelmingly affected poor people. Over 8 in 10 (84.7%) pregnancy criminalization arrests involved a pregnant person who qualified as “indigent.” A defendant who is indigent<sup>76</sup> has a constitutional right to court-appointed representation.<sup>77</sup> While the threshold to qualify for court-appointed counsel varies from state to state, “indigency” generally means that the court determined the defendant could not afford a lawyer. This suggests that most of the pregnant people arrested faced substantial financial hardship.

FIGURE 6  
Indigency



**FIGURE 7**  
Pregnancy Outcomes



## Pregnancy Outcomes

In cases where information on pregnancy outcomes was available, we found a wide variety of outcomes. Slightly under 1 in 10 (9.9%) arrests occurred while the person was still pregnant. A smaller share of cases involved stillbirths (7.2%), miscarriages (1.4%), or abortions (0.6%). Two in three (66.0%) cases involved a live birth with no mention of negative health outcomes for the infant; 14.9% involved a live birth with the data indicating the baby had health problems at birth. Consistent with the robust scientific literature, we did not consider a positive toxicology test alone to indicate a negative fetal health outcome. While acknowledging that neonatal abstinence syndrome (NAS), or withdrawal, is a treatable and temporary condition if properly addressed (treatment methods include rooming-in with mothers after birth, breastfeeding, skin-to-skin contact, swaddling, minimizing stimuli, and, if warranted, pharmacologic methods like medication), this report considered negative health outcomes to include noted signs of NAS, respiratory issues, and other conditions requiring the newborn be admitted to the neonatal intensive care unit.<sup>78</sup> In 217 (15.5%) cases, the pregnancy outcome could not be determined.

— CASE STUDY —

**Most commonly, pregnant people are charged with child abuse or endangerment, even when their baby is born with no health problems.**

STATE | OKLAHOMA  
CHARGES | CHILD ABUSE  
ARREST YEAR | 2020

J.W., a 35-year-old white woman, gave birth to a healthy baby girl at a local hospital in August 2019.<sup>79</sup> When her daughter's meconium test came back positive for marijuana, the Department of Human Services (the state family regulation agency) and the county police department initiated an investigation. Two weeks after J.W. gave birth, law enforcement conducted a home visit and questioned her about her drug use during her pregnancy. J.W. confirmed that not only did she have a medical marijuana card confirming her lawful use of medical marijuana in the state, but also that she had confirmed with her doctor that she could still use marijuana while pregnant. Despite these facts, law enforcement arrested and charged her with a felony count of child abuse by injury the following July. In early 2023, after several delays, the state moved to dismiss the charges.



## Involved Actors

While not all routes to pregnancy criminalization were documented in the available data, cases came to the attention of law enforcement through many means. These included, but were not limited to, care professionals reporting patients to child welfare authorities, who then informed the police; police recovery of fetal remains; anonymous tips to the police; drug testing of pregnant people as per probation conditions or randomly at the discretion of the overseeing officer; police response to an emergency medical situation; police searches for controlled substances in people's cars; and/or friends, parents, or intimate partners reporting the pregnant person to the police directly.

### Healthcare and Family Regulation Workers

Reports made by medical professionals (e.g., doctors, nurses, or medical assistants) or hospital-based social workers were the most common basis for an arrest. Many of these reports were initially made pursuant to civil child abuse mandatory reporting laws, hospital policies, or the misperception that such reporting was legally required. One in three pregnancy criminalization arrests (33.8%) were first instigated by a medical professional, and two in five (42.6%) involved family regulation workers. Medical professionals can play both direct and indirect roles in pregnancy criminalization—for example, they might notify law enforcement officials, or they might notify family regulation workers who then alert law enforcement. The family regulation system can also be involved in arrests in a number of 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.

#### — CASE STUDIES —

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**Pregnancy criminalization frequently begins in a hospital setting. Hospital workers and family regulation workers were often the ones to report pregnant people to law enforcement.**

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STATE | OKLAHOMA  
CHARGES | CHILD NEGLECT  
ARREST YEAR | 2021

Prior to giving birth, B.D., a 20-year-old Indigenous woman, admitted to using methamphetamine and drinking alcohol twice a week while pregnant.<sup>80</sup> She then gave birth to her child, who tested positive for methamphetamine and marijuana. Shortly after, the Department of Human Services, the state family regulation agency, opened an investigation, and B.D.'s case worker reported her to local police. The warrant for her arrest relied exclusively on the facts her case worker provided to law enforcement. Within six months of becoming a new mother, B.D. was arrested for child neglect, for which she pleaded guilty and received a 12-year suspended sentence.

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STATE | MISSISSIPPI  
CHARGES | CHILD ENDANGERMENT  
ARREST YEAR | 2018

In September 2017, A.R., a 30-year-old Black woman, gave birth to a baby boy.<sup>81</sup> At the time of birth, both A.R. and her baby tested positive for cocaine. After receiving the test results, hospital staff notified the state family regulation agency. A case worker then contacted local law enforcement and later provided police with copies of A.R.'s and her child's test results. While collaborating closely with state family regulation case workers, law enforcement located and arrested A.R. for felony child abuse. A.R. moved to dismiss the charges under the argument that an unborn child does not constitute a "child" under Mississippi's child abuse statute, but the motion failed in November 2018. The following March, A.R. pleaded guilty to her original charge and was sentenced to 10 years imprisonment and three years of post-release supervision.

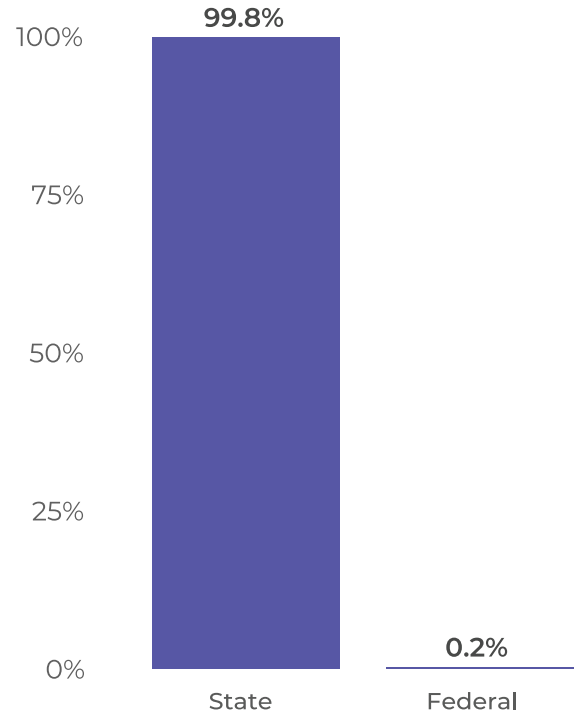
## Procedural Characteristics

### Initial Charges and Court of Origin

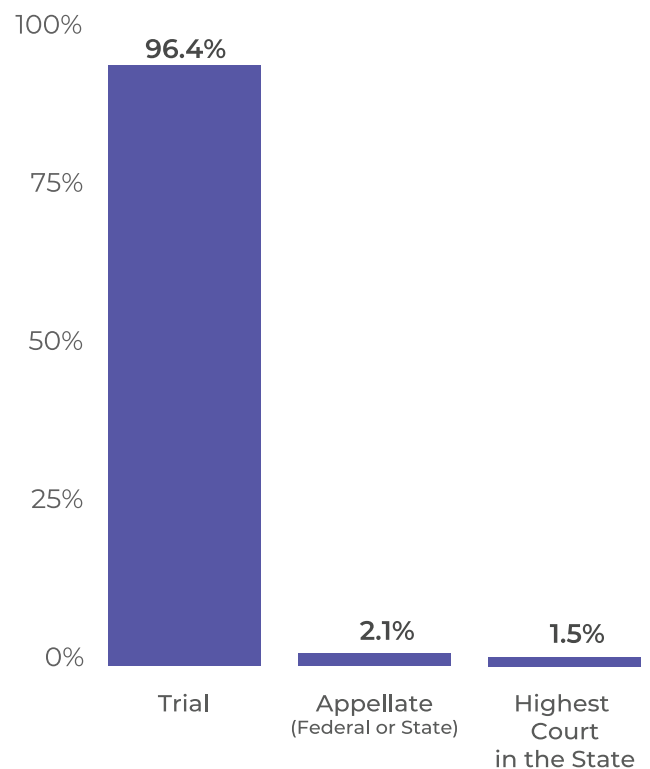
Nearly all (98.8%) of the cases documented in this report involved a criminal arrest that took place during or after the person’s pregnancy (“Arrest During or After Pregnancy”). In a much smaller number of cases, less than 1 in 20 (4.5%), an arrest occurred before pregnancy (“Arrest Before Pregnancy”), but a judge used the person’s later pregnancy as justification for modifying the conditions of their sentencing, parole, or probation. In a very small number of cases (3.3%), the same pregnancy was both the justification for a new arrest and a justification for modifying the conditions of sentencing, parole or probation of a prior criminal case (3.3%, “Both”).

Almost every case (99.8%) where the initial court could be determined began in state (rather than federal or tribal) court. In nearly all cases (96.4%), the highest level reached was trial court, with the small number of other cases reaching either a federal or state appellate court (2.1%) or the highest court in the state (1.5%). Certain states have only trial and highest-level courts, and no intermediate appellate courts,<sup>82</sup> meaning that the statistic regarding the highest court in the state might be overstated.

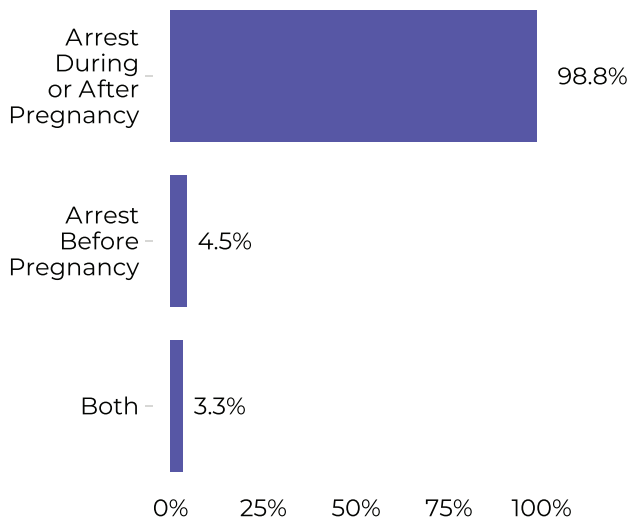
**FIGURE 9**  
Court of Origin



**FIGURE 10**  
Highest Court Reached



**FIGURE 8**  
Initial Charges



## Criminal Charge Details

Criminal charges identify the law and the statutory citation a defendant is accused of violating. This study used official court documents such as an indictment, criminal information, arrest warrant, probable cause statement, court transcript, police testimony, and/or judicial decision to ascertain the criminal charge(s).

The cases fell into nine primary categories of criminal charges: attempted or completed criminal child neglect, abuse, or endangerment; unlawful possession of a substance; drug use; drug delivery to a minor; feticide/murder/manslaughter; legally unauthorized abortion; failure to report a birth or death; tampering or mistreating fetal remains; and fetal assault. Most of the criminal laws used to charge pregnant people were never intended to apply to pregnancy; in most cases, government actors applied criminal statutes beyond their original intent to criminalize otherwise legal acts and omissions by pregnant people. Almost all (97.8%) pregnancy criminalization case files included criminal charge information.

CHILD ENDANGERMENT/ABUSE/NEGLECT		
Charge Type	N	Percent
Misdemeanor	46	4.0%
Felony	1,099	96.0%
Total with Charges	1,145	100%
SUBSTANCE POSSESSION		
Charge Type	N	Percent
Misdemeanor	28	26.4%
Felony	78	73.6%
Total with Charges	106	100%
DRUG USE		
Charge Type	N	Percent
Misdemeanor	9	47.4%
Felony	10	52.6%
Total with Charges	19	100%
FETICIDE/MURDER/MANSLAUGHTER		
Charge Type	N	Percent
Misdemeanor	0	0
Felony	80	100%
Total with Charges	80	100%
LEGALLY UNAUTHORIZED ABORTION		
Charge Type	N	Percent
Misdemeanor	1	6.2%
Felony	15	93.8%
Total with Charges	16	100%

FAILURE TO REPORT BIRTH/DEATH		
Charge Type	N	Percent
Misdemeanor	9	64.3%
Felony	5	35.7%
Total with Charges	14	100%
TAMPERING REMAINS OR ABUSE OF A CORPSE		
Charge Type	N	Percent
Misdemeanor	6	22.2%
Felony	21	77.8%
Total with Charges	27	100.0%
FETAL ASSAULT		
Charge Type	N	Percent
Misdemeanor	99	100.0%
Felony	0	0.0%
Total with Charges	99	100.0%
DRUG DELIVERY		
Charge Type	N	Percent
Misdemeanor	2	8.0%
Felony	23	92.0%
Total with Charges	25	100.0%
OTHER CHARGES		
Charge Type	N	Percent
Misdemeanor	22	30.6%
Felony	50	69.4%
Total with Charges	72	100.0%

“

**Neglect and endangerment laws do not require any evidence of harm, or evidence that the neglect or endangerment led to harm—they require only that someone knowingly or recklessly acted in ways that risked harm.”**

## CHILD NEGLECT, ABUSE, AND/OR ENDANGERMENT

Among the cases with charge information, four in five (83.9%) were instances of pregnant people being charged with criminal child neglect, abuse, and/or endangerment. The majority (96.0%) of these charges were felonies, and the remaining (4.0%) were criminal misdemeanor charges.

While definitions vary, state laws generally define “neglect” as a caregiver failing to provide adequate food, clothing, hygiene, nutrition, shelter, medical care, or supervision in ways that threaten the child’s well-being.<sup>83</sup> Child endangerment occurs when a caregiver fails to adequately protect a child from harm. Child abuse generally involves an act or failure to act by a parent or caretaker that causes actual harm or imminent risk of harm.<sup>84</sup>

Neglect and endangerment laws do not require any evidence of harm, or evidence that the neglect or endangerment led to harm—they require only that someone knowingly or recklessly acted in ways that risked harm. This sole focus on risk—and not on actual harm—is key to criminalizing pregnancy,<sup>85</sup> in part because it allows state actors

to use exposure to substances alone, rather than any actual harm, as a basis for criminalization.<sup>86</sup>

Some states have also expanded statutory definitions of children to include fertilized eggs, embryos, and fetuses. This changes the status of pregnant people, allowing them to be charged with attempted or completed child neglect, abuse, or endangerment for allegedly risky behaviors during pregnancy. Most notably, the Alabama Supreme Court redefined Alabama’s “chemical endangerment of a minor” law, originally meant to prevent children from being exposed to toxic fumes produced by home methamphetamine labs, to apply to fertilized eggs, embryos, and fetuses, and has been used to criminalize pregnant people for using controlled substances at any point in pregnancy.<sup>87</sup> The highest courts in South Carolina and Oklahoma have similarly sanctioned the expansion of their child abuse laws to apply to fetuses, which have been used to charge people for pregnancy and substance use.<sup>88</sup>

“

**Pregnant people have been arrested under this charge for their alleged use of both illegal and legal substances, including medications such as methadone and buprenorphine, which are used to treat substance use disorders.”**

**EXPLICITLY DRUG-RELATED CHARGES:  
POSSESSION, USE, AND DELIVERY**

Criminal drug use, possession, and delivery cases represented 10.0% of pregnancy-related arrests. This is because, as discussed above, prosecutors were far more likely to use child neglect, endangerment, or abuse statutes to criminalize pregnancy and substance use. Among the cases with charge information, 7.8% involved cases of pregnant people charged with drug possession. Of those, three in four (73.6%) were felonies and the remaining quarter (26.4%) were misdemeanor charges. Drug delivery charges accounted for 1.8% of cases. The majority (92.0%) of these drug delivery charges were felonies, and the remainder (8.0%) were misdemeanor charges. Drug use cases accounted for 1.4% of cases. More than half of the drug use arrests (52.6%) were felony charges and the remainder (47.4%) were misdemeanor charges.

Typically, criminal laws governing controlled substances criminalize possession and not use, to avoid deterring people from seeking treatment for substance use disorder.<sup>89</sup> Yet we found cases of pregnant people being charged with drug possession even when the underlying facts involved only drug use. They were also charged with drug use in the rare states in which use alone is a criminal activity.<sup>90</sup> Prosecutors used “drug delivery” charges, a separate but related category, to charge pregnant people accused of allegedly distributing controlled substances to a fetus in utero or, despite being scientifically unsupported, to the newborn via the umbilical cord after delivering the baby but before the cord was cut or via breast milk.

— CASE STUDY —

**Pregnant and postpartum people have been arrested on the scientifically unfounded basis of drug delivery via the umbilical cord or breast milk.**

STATE | WYOMING  
CHARGES | CHILD ENDANGERMENT  
ARREST YEAR | 2019

L.D., a 23-year-old white woman, gave birth to a baby girl in August 2019.<sup>91</sup> Shortly after birth, her daughter’s urine tested positive for amphetamines. Following this discovery, hospital staff contacted law enforcement and L.D. was questioned about her drug use during pregnancy. L.D. admitted to police that she used methamphetamine while pregnant, and hospital staff confirmed L.D. tested positive for amphetamines during her pregnancy. Two months later, L.D. was arrested for child endangerment under a provision that criminalizes “giving” a child an illegal drug. Prosecutors claimed that in the seconds immediately after giving birth, before the umbilical cord was severed, L.D. knowingly furnished drugs to her newborn daughter. After the court denied her motions to dismiss and request to certify questions of the law, L.D. pleaded guilty to child endangerment but reserved the right to appeal the court’s denial of her motion to dismiss.

## FETAL ASSAULT

In about 1 in 13 (7.3%) cases, law enforcement officials charged pregnant people with fetal assault. All (100%) of these cases were misdemeanor fetal assault charges arising out of Tennessee's S.B 1391 Fetal Assault Law, which was in effect from July 1, 2014, through July 1, 2016. Tennessee law enforcement officials used this law to arrest pregnant people if the newborn was "born exposed to or harmed by a drug."<sup>92</sup> Pregnant people have been arrested under this charge for their alleged use of both illegal and legal substances, including medications such as methadone and buprenorphine, which are used to treat substance use disorders.<sup>93</sup>

“

**Pregnant people have been arrested under this charge for their alleged use of both illegal and legal substances.”**

### — CASE STUDY —

#### A typical fetal assault case in Tennessee

STATE | TENNESSEE  
CHARGES | FETAL ASSAULT  
ARREST YEAR | 2014

J.C., a 24-year-old white woman, gave birth to a baby girl in a car on the side of the road in August 2014.<sup>94</sup> After receiving an anonymous tip, police began investigating J.C. about the nature of her birth and pregnancy. While being questioned by the police, J.C. admitted to using Xanax during her pregnancy and that she was struggling to breastfeed her daughter. As a result, J.C. and her daughter were transported to the local hospital, where J.C. tested positive for opiates. At the hospital, police contacted the Department of Children's Services to remove J.C.'s daughter from her custody. Three months later, J.C. was arrested and charged with "assault on a fetus" and child abuse. In early 2016, J.C. pleaded guilty to assault and the lesser charge of child neglect and was sentenced to 11.5 months of supervised probation.

## FETICIDE, MURDER, AND MANSLAUGHTER

In some cases, law enforcement officials charged people who experienced pregnancy loss, had pregnancy-related complications, or had an abortion with attempted or completed fetal homicide (also called feticide), murder, or manslaughter. Among pregnancy criminalization cases with charge information, more than 1 in 20 (5.9%) were charged with felony feticide, murder, or manslaughter.

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**Among pregnancy criminalization cases with charge information, more than 1 in 20 were charged with felony feticide, murder, or manslaughter.”**

### — CASE STUDIES —

#### Pregnant people are charged with murder for experiencing pregnancy loss.

STATE | OKLAHOMA  
CHARGE | MANSLAUGHTER  
ARREST YEAR | 2020

M.R., an Indigenous woman, was 19 years old when she had a miscarriage at 15–17 weeks of pregnancy.<sup>95</sup> In March 2020, M.R. was arrested and charged with first-degree manslaughter for her miscarriage based on methamphetamine use, despite the fact that the medical examiner did not identify methamphetamine toxicity as the cause of the miscarriage, but rather as a possible contributing factor (despite a lack of scientific basis). In fact, the examiner identified five other significant conditions that could have contributed to the pregnancy loss, including a congenital abnormality, placental abruption, bacterial infections, and inflammation. Nonetheless, in October 2021, M.R. was convicted of first-degree manslaughter based on the prosecutor’s theory that her methamphetamine use caused the miscarriage. After a jury trial, M.R. was sentenced to four years in a state prison. After her conviction, M.R. chose not to appeal to avoid facing the risk of a life sentence.

STATE | SOUTH CAROLINA  
CHARGE | HOMICIDE BY CHILD ABUSE  
ARREST YEAR | 2006

In September 2006, C.L., a 33-year-old white woman, went to a South Carolina hospital complaining of stomach pains and later delivered a stillbirth.<sup>96</sup> At the hospital, C.L. tested positive for cocaine and confided to staff that she used cocaine three to four days prior to giving birth. She also shared that she did not want a child and had intended to have an abortion. The following November, she was arrested and charged with “homicide by child abuse.” Despite the fact that cocaine use does not cause pregnancy loss, the prosecution relied, in part, on the fact that the fetus’s time of death approximately coincided with C.L.’s cocaine use to build their case. Two years later, C.L. pleaded guilty to a lesser charge, “inflicting great bodily injury to a child,” and was sentenced to five years suspended to 90 days served in the county detention center.

## LEGALLY UNAUTHORIZED ABORTION

Among cases with charge information, 1.2% involved a charge for unsanctioned abortion. It is important to note that cases involving facts or allegations regarding an unsanctioned abortion do not always involve a charge of unsanctioned abortion, but may involve a charge of murder, manslaughter, or feticide (see, for example, the case study on this page). Almost all (93.8%) of these cases were felonies, with the exception of one misdemeanor charge. While *Roe v. Wade* was in effect for the entire time period covered in this report, pregnant people have nonetheless been charged for having a legally unauthorized abortion after state gestational time limits, obtaining an abortion from a non-licensed medical professional, using abortion pills outside of authorized methods, or using medicinal herbs to induce a pregnancy loss.

### — CASE STUDY —

#### Pregnant people have been arrested for self-managed abortions.

STATE | GEORGIA  
CHARGE | MURDER  
ARREST YEAR | 2015

During her second trimester, D.R., a 23-year-old Black woman, consumed misoprostol to terminate her pregnancy.<sup>97</sup> D.R. delivered the baby, who died shortly after she arrived at the hospital. Hospital social workers subsequently notified police, and D.R. was arrested and held without bond on the charge of “malice murder.” Although the prosecutor later concluded that there existed no legal grounds in Georgia for charging a pregnant woman with murder for terminating her own pregnancy, D.R. still faced a misdemeanor charge of possession of a dangerous drug. D.R.’s defense counsel prepared motions to dismiss the case and to suppress and exclude evidence, and the possession charge was dropped in 2016.

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**While *Roe v. Wade* was in effect for the entire time period covered in this report, pregnant people have nonetheless been charged for having a legally unauthorized abortion after state gestational time limits, obtaining an abortion from a non-licensed medical professional, using abortion pills outside of authorized methods, or using medicinal herbs to induce a pregnancy loss.”**



## TAMPERING WITH REMAINS OR ABUSE OF A CORPSE

Among cases with charge information, 2.0% involved pregnant people who were charged with tampering with remains or abuse of a corpse; of these, more than three-quarters (77.8%) were felony charges and slightly less than one-quarter (22.2%) were misdemeanor charges.

Typically, law enforcement officials charge a person with tampering with or abuse of a corpse when they intentionally or unlawfully disinter, dig up, remove, conceal, mutilate, or destroy part of a human corpse or ashes. In the pregnancy criminalization cases documented, this charge was applied to pregnant people who experienced a pregnancy loss outside of a traditional medical setting. People who experienced a pregnancy loss have been charged both for bringing the fetal remains to a medical provider and for burying or disposing of the fetal remains themselves.

### — CASE STUDY —

#### Pregnant people are arrested for experiencing a pregnancy loss and disposing of remains.

STATE | ARKANSAS  
CHARGES | ABUSE OF CORPSE  
ARREST YEAR | 2018

In December 2017, G.B., a 24-year-old Black woman, awoke late at night due to severe stomach pains<sup>98</sup>. Shortly thereafter, she gave birth to stillborn twins. In a moment of panic, G.B. laid her deceased children in a suitcase and placed it on the side of the road. When law enforcement discovered the suitcase several weeks later, they confirmed that the babies died in the womb and had no illegal substances in their systems. Still, G.B. was arrested and charged with two felony counts of abuse of a corpse. Three years after her arrest, G.B. entered a plea of no contest and was sentenced to a total of four years but given a suspended sentence of five years supervised probation.

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**In the pregnancy criminalization cases documented, this charge was applied to pregnant people who experienced a pregnancy loss outside of a traditional medical setting.”**

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**People are arrested for experiencing a pregnancy loss and disposing of fetal remains.**

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STATE | ARKANSAS  
CHARGES | CONCEALING A BIRTH; ABUSE OF A CORPSE  
ARREST YEAR | 2015

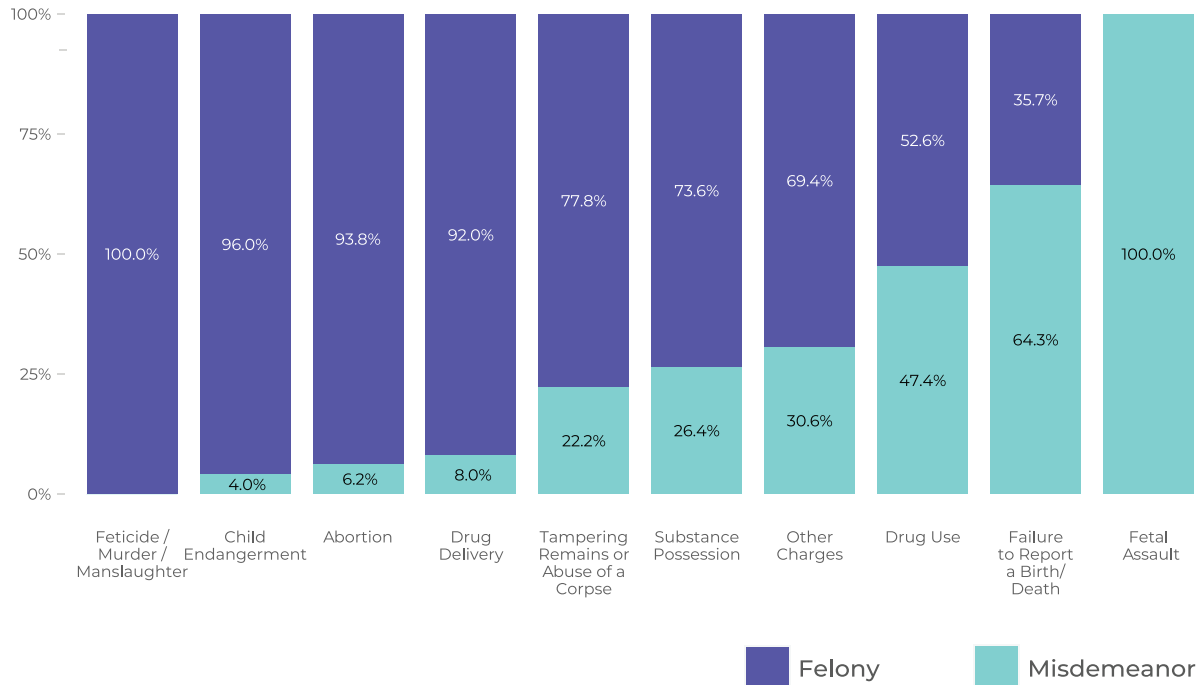
S.W., a 37-year-old white woman, was arrested after experiencing a stillbirth at home.<sup>99</sup> After the stillbirth, S.W. safeguarded the fetal remains and several hours later brought those remains to a hospital, asking to see a doctor. Five days later, she was arrested on charges of “concealing a birth” and “abuse of a corpse.” Local law enforcement alleged that S.W. took a number of pills to induce an abortion, after which her pregnancy ended with a stillbirth. Although the trial court dismissed the abuse of a corpse charge, a jury found S.W. guilty of “concealing a birth” and subsequently sentenced her to six years’ imprisonment. S.W. appealed the conviction and the Arkansas Court of Appeals ruled unanimously to reverse her conviction for “concealing a birth.”

**FAILURE TO REPORT  
A BIRTH OR DEATH**

Among cases with charge information, 1.0% were charged with failing to report a birth or a death. Roughly one-third (35.7%) of these charges were felonies and the remaining (64.3%) were misdemeanor charges. In these cases, people faced criminal charges for bringing a newborn or fetal remains to a hospital, for a home birth, or for burying fetal remains themselves after a pregnancy loss. Essentially, people were at risk of being charged for both reporting and not reporting a pregnancy loss.

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**Essentially, people were at risk of being charged for both reporting and not reporting a pregnancy loss.”**

**FIGURE 11**  
Proportion of Felony Charges for Each Criminal Charge Type

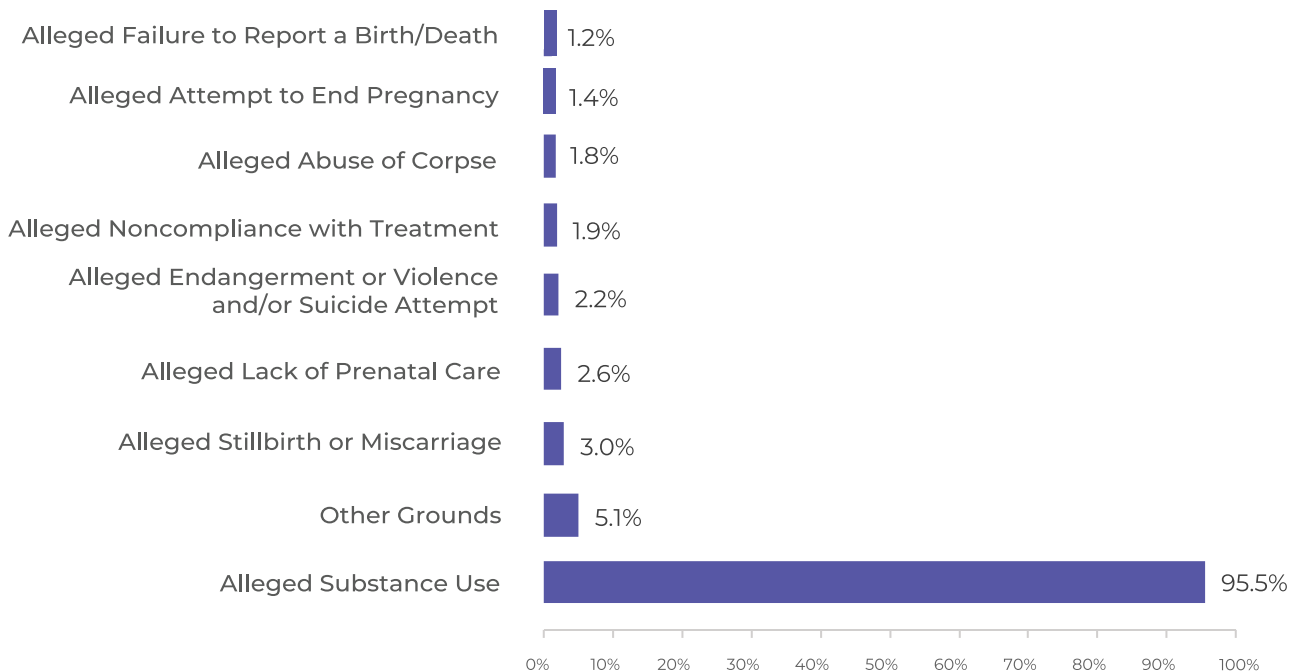


## Grounds for Arrest

Before police officers can make an arrest or execute an arrest warrant, they have to establish probable cause—a reasonable belief that someone has committed a crime. Because criminal charges on their own do not always establish what kind of conduct is being criminalized, “grounds for arrest” provide information on the factual allegations of criminal behavior. To ascertain the stated grounds for arrest, we used official court documents such as an indictment, criminal information, arrest warrant, probable cause statement, court transcript, police testimony, court judgment and/or ruling.

In approximately three in four (73.2%) cases, the case file contained official documents that indicated the grounds for the criminal arrest (in the remaining cases, we could not determine the grounds due to a lack of such documentation<sup>100</sup>). Grounds for arrest are not mutually exclusive; multiple factual allegations may be used to justify an arrest. For example, it may be that the basis for a child neglect charge was substance use and that the indictment also indicated that the pregnant person lacked consistent prenatal care. Nearly all (95.5%) cases where such information was available mentioned substance use at least once in the official grounds for arrest.

**FIGURE 12**  
Grounds Given for Criminal Arrest



## Bail Information

After an arrest, in most cases, a judge sets a bail amount after considering a number of factors, such as flight risk, the severity of the alleged crime, and safety to community.<sup>101</sup> Bail is typically monetary, but can also require the defendant to adhere to certain terms, such as not leaving the state. If the individual can afford to pay bail or pay a portion of bail to a bail bondsman, they can be released from pretrial detention (jail or police custody) while awaiting trial or the resolution of their case.<sup>102</sup> Once court fees are deducted, bail is returned to defendants when their trial is over. Bail is purportedly used to ensure that a defendant will appear for trial and all mandatory pretrial hearings once released.

Among cases with the relevant information available, approximately four in five (79.2%) arrests involved an initial non-zero bail amount. Of those arrests, over two-thirds (63.9%) of defendants had their bail granted and were released after bail was set. The initial bail amount set ranged from \$10 to \$5,000,000; however, the median bail amount set was \$10,000. The median initial bail amount varied by criminal charge.

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**In slightly over one-tenth of the total arrests, the pregnant person either had bail set but was released on a personal recognizance bond or had a zero bail amount set.**”

For example, feticide charges were associated with a median \$50,000 initial bail amount, possession with a median \$15,000 initial bail amount, and child endangerment and fetal assault charges with a median \$10,000 bail amount. In slightly over one-tenth (13.2%) of the total arrests, the pregnant person either had bail set but was released on a personal recognizance bond or had a zero bail amount set, thus allowing them to be released from custody with only a written agreement to appear in court and without the requirement of posting bail or bond.

## Final Disposition

Legal proceedings can take a considerable amount of time from the moment of initial investigation and arrest to the final judgment and sentencing order. Given the recency of many of the pregnancy criminalization arrests included in this study, a substantial number of cases were still pending as of this writing, and thus the final disposition remains unknown. Where information was available and cases were resolved, we documented case outcomes, including guilty pleas and convictions after trial.

Plea information was available for about three in five (58.5%) cases. Of these, in two in three (66.4%) cases, the pregnant person pleaded guilty to the original or a lesser charge.

Among the cases where the trial outcome information was available and the pregnant person did not plead guilty, 15.8% went to trial and were convicted of either their original charge or a lesser charge. In the remaining cases, the pregnant person was not convicted, the conviction was overturned after trial, the case was dismissed or dropped before trial, or the final disposition is still unknown. However, it is important to keep in mind that even in instances where cases are dismissed or dropped before trial, defendants experience significant financial and psychological strain, and these proceedings can take several years.<sup>103</sup>

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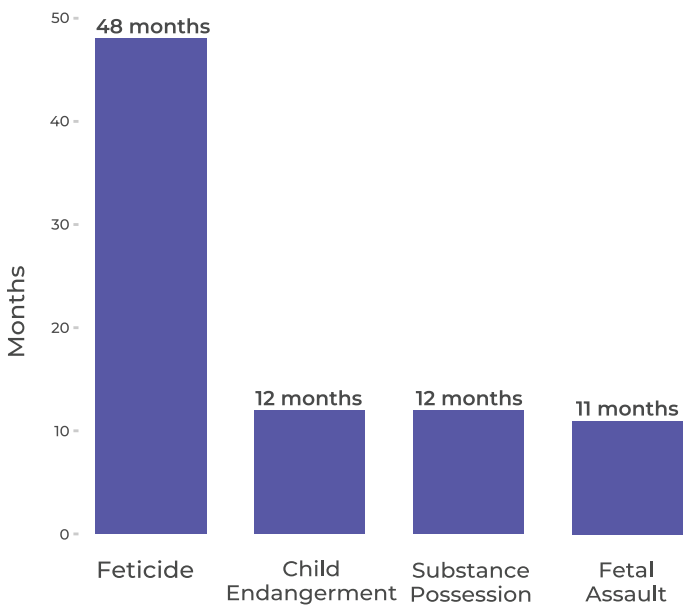
**However, it is important to keep in mind that even in instances where cases are dismissed or dropped before trial, defendants experience significant financial and psychological strain, and these proceedings can take several years.”**

## Sentencing, Incarceration, Parole, and Probation

Sentencing information was available in 95.3% of cases in which a pregnant person pleaded guilty or was convicted at trial. Among these, more than four in five (83.1%) cases resulted in incarceration and prison time.<sup>104</sup> The median minimum sentence length was 12 months incarcerated, and the median maximum sentence length was 48 months incarcerated. Minimum sentence length ranged from zero to 312 months, and the maximum sentence length ranged from one to 480 months. However, median minimum sentence length varied by charge convicted. Whereas pregnant people convicted of feticide had a median minimum sentence length of 48 months, child endangerment charges and substance possession charges were associated with a median minimum sentence of 12 months, followed by 11 months for fetal assault.

**FIGURE 13**

Median Minimum Sentence Length



Among cases with information on parole and probation, approximately one in five (20.4%) involved revocation of parole or probation. The conditions of probation and parole can be onerous, costly, and time-consuming. Reasons that a judge might revoke parole or probation include not completing a drug treatment program, missing a meeting with their probation officer, or testing positive for controlled substances, which often indicates that a person with a history of substance use disorder has experienced a relapse.

— CASE STUDY —

**Instead of being provided with treatment, pregnant people were arrested and rearrested for their alleged substance use.**

STATE | ALABAMA  
 CHARGES | CHEMICAL ENDANGERMENT  
 ARREST YEAR | 2019

P.L., a 27-year-old white woman, was arrested in 2019 for “chemical endangerment of a minor” after her newborn daughter tested positive for methamphetamine at birth.<sup>105</sup> P.L. pleaded guilty to the charge and was diverted to a community corrections program for monitoring and treatment. Between September 2019 and February 2021, P.L. failed to appear for drug court review twice and tested positive for marijuana—all violations of her deferred sentencing agreement. P.L. was later arrested in 2021 on a second chemical endangerment charge for testing positive for amphetamines at the birth of her child; she pleaded guilty to this charge in January 2022. She subsequently received a suspended sentence of five years and three years of supervised probation. Due to her failure to report to her probation officer on several occasions, P.L. was rearrested in April 2023 and required to serve her original underlying sentence in prison.

This study also identified cases of parole and probation revocation based on an individual's status as pregnant. These cases typically began with a non-pregnancy-related underlying charge. When information about a person's pregnancy was discovered during their probation or parole, a judge modified or revoked the pregnant person's parole or probation. Among all cases, 4.2% involved a change to the original sentence length.

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**Although R.W.'s challenge was successful, she still served her sentence in full and remained incarcerated throughout her entire pregnancy.”**

— CASE STUDY —

**The criminal system addresses relapse, an expected aspect of recovery, through incarceration instead of healthcare.**

STATE | MICHIGAN  
CHARGE | POSSESSION OF METHAMPHETAMINE  
CHARGE | POSSESSION OF MARIJUANA  
ARREST YEAR | 2018

R.W., a white, 31-year-old mother of two, came before a judge in November 2018 for violating the terms of her three-year probation.<sup>106</sup> During the hearing, R.W.'s attorneys revealed that she was pregnant. Citing R.W.'s relapse with methamphetamine and cocaine while participating in the drug court program, the judge sentenced her to 13 to 24 months in custody. He reasoned that her child had better chance of avoiding “a lifetime of permanent disability” if she was incarcerated for the remainder of her pregnancy. Appellate judges denied R.W.'s first appeal, but in a 2-1 opinion, the Michigan Court of Appeals determined the trial court demonstrated extreme bias by revoking R.W.'s probation and sending her to prison because of her pregnancy. Although R.W.'s challenge was successful, she still served her sentence in full and remained incarcerated throughout her entire pregnancy.

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**The fact that pregnancy criminalization overwhelming involves substance use allegations cannot be considered in a vacuum. Every year, over one million people are criminally prosecuted for drug-related charges in the United States.”**

## **Pregnancy Criminalization Centered on Substance Use Allegations**

In approximately 9 in 10 (92.0%) cases of pregnancy criminalization, the case information showed accusations or evidence of substance use. Of cases involving allegations of substance use or possession during pregnancy, almost half (47.0%) involved a drug test conducted on the pregnant person, and approximately three in five (58.5%) involved a drug test conducted on a newborn.

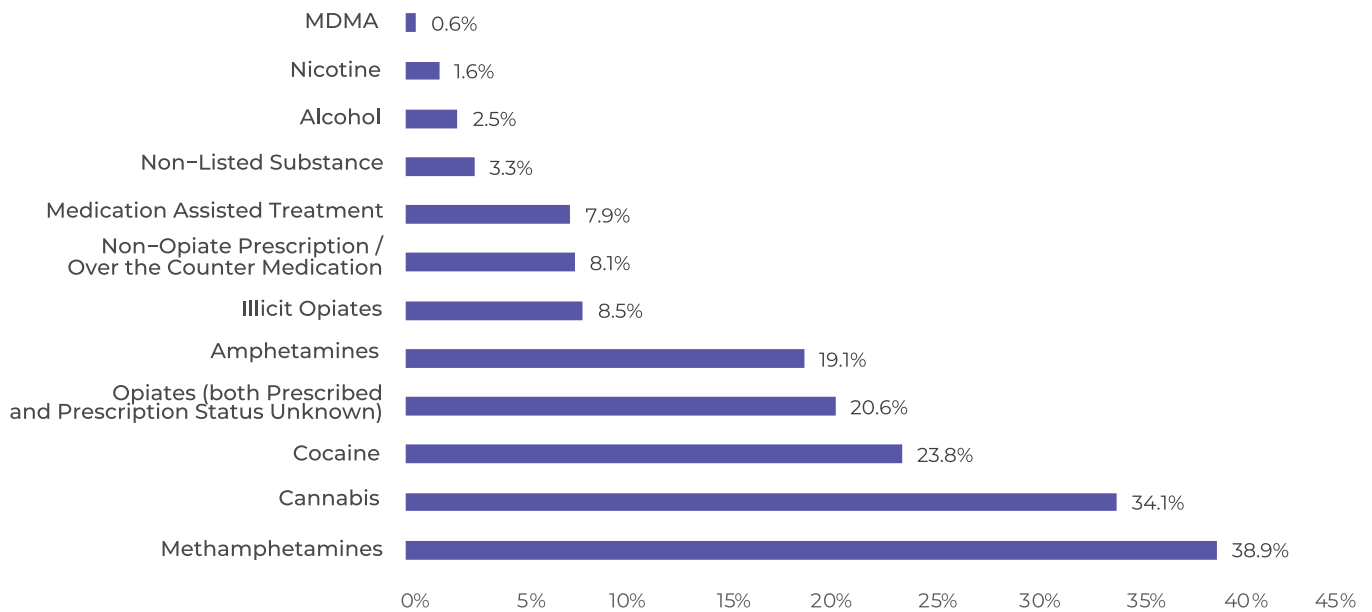
Pregnant people were criminalized for allegations of using both criminalized and legal substances.<sup>107</sup> The three most common substances were methamphetamine (38.9%), cannabis (34.1%), and cocaine (23.8%). This is followed by almost one in five arrests involving allegations of amphetamines (19.1%) and opiates (both prescribed and those with unknown prescription status) (20.6%). One in ten arrests involved allegations of illicit opioids (8.5%), non-opiate prescription or over-the-counter medication (8.1%), and medication-assisted treatment (7.9%). The remainder were allegations

related to alcohol (2.5%), nicotine (1.6%), MDMA (0.6%), and all other substances (3.3%). Nearly half (45.9%) of all the cases that mentioned substances involved allegations of more than one substance. The allegations of substance use reported in figure 15 are not mutually exclusive.

The fact that pregnancy criminalization overwhelming involves substance use allegations cannot be considered in a vacuum. Every year, over one million people are criminally prosecuted for drug-related charges in the United States.<sup>108</sup> Suspicion or knowledge of a parent using drugs or alcohol has become one of the most common justifications harnessed by states to condemn, investigate, and separate families, primarily through the “child welfare” system. Between 2000 and 2019, the frequency with which parental alcohol or drug use was cited as a contributing factor for child removal more than doubled, from 18.5% to 38.9% nationwide.<sup>109</sup>



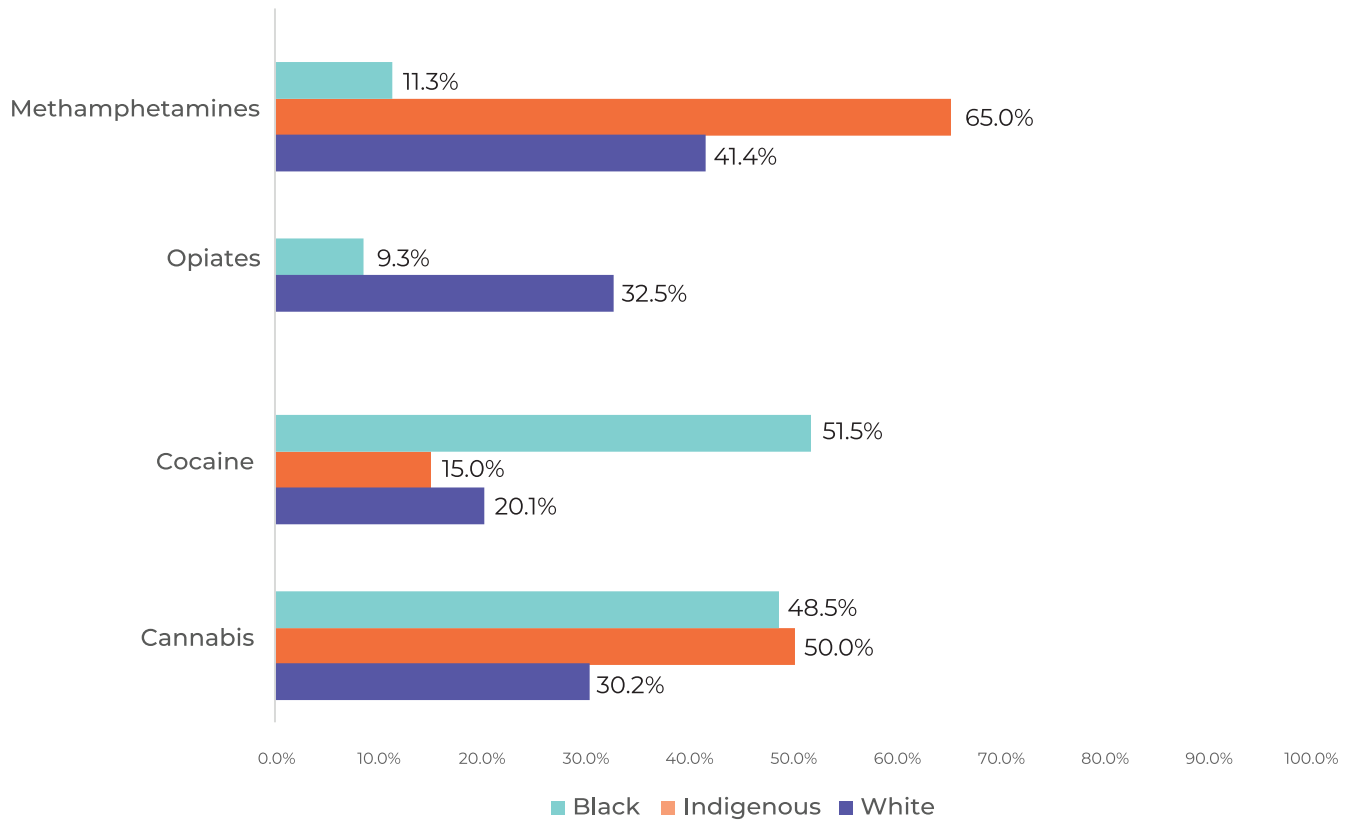
**FIGURE 14**  
Substance Type



The distribution of pregnancy and substance use cases varies slightly by race. Of the arrests of Indigenous pregnant people, 100% involved allegations of substance use, followed by 94.4% of arrests of white pregnant people and 91.5% of arrests of Black pregnant people. The racial distribution of arrests also varied based on substances alleged to have been used, despite no statistically significant difference in illicit substance use rates between races.<sup>110</sup> For example, one-third (32.5%) of arrests of white people involved allegations of opiate use, including both non-prescription opiates such as heroin and prescription opiates, compared to less than 1 in 10 (9.3%) arrests of Black people. One in two arrests of Indigenous people (50.0%) and Black people (48.5%) involved

allegations of cannabis use, compared to less than one in three arrests involving white people (30.2%). One in two (51.5%) arrests of Black people involved allegations of cocaine use, compared with one in five (20.1%) arrests of white people and less than one in five (15.0%) arrests of Indigenous people. Two in three (65.0%) arrests of Indigenous people involved allegations of methamphetamine use, compared to two in five arrests (41.4%) of white people and 1 in 10 (11.3%) of Black people. It should be noted that the rates for racial groups are only reported if the sample size per each substance type exceeded 15 cases; therefore, the breakdown of arrests of API, Hispanic/Latinx, and Indigenous people do not appear for every substance listed.

**FIGURE 15**  
Arrests Involving Substance Use by Type and Race



# DISCUSSION

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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,<sup>111</sup> or had a fetal assault law in place that explicitly criminalized

pregnant people.<sup>112</sup> 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.

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**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.<sup>113</sup> 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.<sup>114</sup>

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.<sup>115</sup> At nearly every turn, the healthcare system steers poor pregnant people toward the carceral system and non-poor pregnant people away from it.<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> 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,<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup>

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”<sup>123</sup> and the opioid crisis<sup>124</sup> 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.<sup>125</sup>

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.<sup>126</sup> 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.

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**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.<sup>127</sup> 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.<sup>128</sup>

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.<sup>129</sup> The threat of arrest or prosecution makes pregnant

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**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.<sup>130</sup> 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.”<sup>131</sup> It is therefore especially important to note that prisons and jails provide substandard prenatal and postpartum care.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> 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,<sup>135</sup> 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.<sup>136</sup>

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,<sup>137</sup> 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.<sup>138</sup> Separation from an incarcerated parent can have lasting consequences for children's health and development.<sup>139</sup> Many incarcerated women detained in rural areas are far away from their families.<sup>140</sup> 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."<sup>141</sup>

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,

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**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,<sup>142</sup> stigma in society,<sup>143</sup> and lowered income and employability,<sup>144</sup> in addition to the potentially detrimental financial impacts of costs associated with court-ordered requirements, legal fees, and lost wages.<sup>145</sup>

## Criminalization and Maternal Mortality

The U.S. maternal mortality rate is the highest among peer nations, and it is getting worse.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup> Carceral approaches to pregnancy result in poorer health outcomes for pregnant and postpartum people and their newborns.<sup>150</sup> 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.

# RECOMMENDATIONS

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Over the past two decades, the criminal legal system has increasingly treated pregnancy-related issues as inherently criminal matters to be addressed by a carceral state rather than by long-vetted public health, medical, and harm reduction mechanisms. In effect, by separating pregnant people from their communities, families, and support and health systems, pregnancy criminalization exacerbates poor maternal, fetal, and child health outcomes, disproportionately affecting those already marginalized across race and class lines. Without action, the number of pregnancy criminalization cases could increase exponentially post-*Dobbs* under the guise of fetal protection. Below, we outline the steps needed to curb this alarming trend and protect pregnant people across the country.

**1** **Repeal** Fetal Personhood Legislation

**6** **Restore and Protect** Abortion Rights

**2** **Promote** Pregnant People's Personhood

**7** **Ensure** Criminalized Pregnant People Have a Robust Defense

**3** **Follow** the Scientific Evidence

**8** **Expand** HIPAA Protections

**4** **Ensure** Pregnant People Are Included in Drug Decriminalization Efforts

**9** **Connect** Pregnancy Criminalization to the Maternal Health Crisis

**5** **Support** Pro-Active Approaches to Decouple Healthcare and Policing



# 1

## Repeal Fetal Personhood Legislation

Fetal personhood laws enshrine the logic of a dual personhood into our legal and political systems. In effect, these laws subordinate a pregnant person's legal rights to those of a fetus. Pregnant people are surveilled, stripped of their parental rights, subjected to invasive family regulation investigations, coerced into medical treatments, and threatened with criminal arrest and incarceration—all in apparent service to the needs of a fetus.

Ending pregnancy criminalization will require opposing or repealing fetal personhood laws, feticide laws, and any other statutes that could attach criminal liability to pregnant people's conduct with respect to their own health. Given the strong association between the number of pregnancy criminalization cases and state-level judicial decisions and laws that expand definitions of child abuse to include fetuses, fertilized eggs, and embryos, repealing these statutes is crucial to healing the harms exposed in this report.

# 2

## Promote Pregnant People's Personhood

The repeal of fetal personhood statutes alone is not enough. It is equally essential to advocate for the unequivocal recognition of a pregnant person's own personhood and affirmative equal protection laws that would ensure that pregnant people do not continue to face discrimination and heightened surveillance by state actors.

Pregnant people and parents from low-income backgrounds already experience a diminished expectation of privacy. The threat of state intervention looms large in their communities, homes, and everyday lives, as various state agencies intrude into their reproductive and familial decision-making. It is critical to have statutory language that enshrines that pregnant people and people with the capacity for pregnancy have the same and equal rights as everyone else, particularly in the context of the policing of poverty.

# 3

## Follow the Scientific Evidence

Law enforcement, healthcare providers, and family regulation system workers should be trained to view substance use disorder not as a crime but as a public health issue, as the medical community has understood for decades. Substance use disorder is a treatable mental disorder with genetic components that can and should be managed by healthcare providers, not a criminal issue warranting punishment.<sup>151</sup> Medical and public health experts widely acknowledge that criminalization and incarceration are ineffective both in deterring substance use and in treating people with problematic drug dependency.<sup>152</sup> Substance use disorder in pregnant and postpartum people should not be understood or treated any differently.

This report found that most pregnancy criminalization cases started with law enforcement learning that a pregnant person tested positive for drugs or suspecting them of substance use. This is based in the dual stigma of substance use<sup>153</sup> and pregnancy,<sup>154</sup> compounded by a stubborn refusal of policymakers and the criminal legal system to recognize the medical research showing that controlled substances do not pose unique harms to fetal or child development.<sup>155</sup> Indeed, scientific evidence compellingly refutes beliefs that such substances cause either fetal harm or pregnancy loss, and shows that associated risks are no greater or less than those for commonly used legal substances<sup>156</sup> or poverty.<sup>157</sup> Treatment options surrounding pregnancy and substance use situated within public health and harm reduction systems, and that fundamentally center pregnant people's autonomy, reflect the most recent and robust scientific evidence base.

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**Without specific language ensuring they are protected, pregnant people will continue to face criminalization even for using legal and regulated substances.”**

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### **Ensure Pregnant People Are Included in Drug Decriminalization Efforts**

In recent years, drug decriminalization efforts have made heartening progress.<sup>158</sup> But without specific language ensuring they are protected, pregnant people will continue to face criminalization even for using legal and regulated substances—a legal risk that does not exist for any other category of people. Broader drug decriminalization efforts must also include specific language preventing the family regulation system from penalizing pregnant people for substance use.

5

### **Support Pro-Active Approaches to Decouple Healthcare and Policing**

The hospital-to-prison pipeline must be dismantled. This means extricating law enforcement from healthcare systems. Too often, pregnant and postpartum people confide in medical professionals or seek care only to have their confidential discussions and medical records turned over to law enforcement. Our findings show that some medical professionals and hospital-based family regulation workers have played a role in pregnancy criminalization, either by directly reporting to law enforcement or by contributing to investigations against pregnant people.

Typically, criminal investigations are based on a single positive toxicology test result. The fact of pregnancy itself is not a medical justification for drug testing. Research also shows that Black people are much more likely to be drug tested.<sup>159</sup> Medical professionals and family regulation workers have a key part to play in disentangling carceral systems from healthcare and in removing incentives to report the co-occurrence of pregnancy and substance use.

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**Mandated reporting results in the disproportionate over-policing and incarceration of communities marginalized across race and class. It also forms a direct link between hospitals and law enforcement.”**

### **End Mandated Reporting of the Co-occurrence of Substance Use and Pregnancy Alone**

Mandated reporting results in the disproportionate over-policing and incarceration of communities marginalized across race and class.<sup>160</sup> It also forms a direct link between hospitals and law enforcement. The hospital-to-prison pipeline cannot be dismantled without first ending the mandated reporting structures that help sustain it.

Until that happens, healthcare professionals should be familiar with their state’s mandated reporting laws and applicable hospital guidance on drug testing. They should also understand the potentially grave consequences of reporting drug test results to state authorities, and should therefore avoid reporting beyond state requirements. For example, care professionals should be aware that the federal Child Abuse Prevention and Treatment Act and the Comprehensive Addiction and Recovery Act do not require the reporting of substance-exposed newborns to family regulation agencies. Rather, these laws require only de-identified, aggregate data about the number of children born who fall under the relevant categories. This data collection should be performed in a way that does not make families vulnerable to family regulation involvement.

### **Improve, Promote, and Expand Informed Consent Laws**

Pregnant people should be empowered to know their rights throughout the entire timeline in which they could face pregnancy criminalization, and patient protections must be further expanded. Non-consensual drug testing can result in pregnancy criminalization and traumatic family separation. It can also have a chilling effect on healthcare uptake due to the threat of law enforcement involvement. Legislation is necessary to require that healthcare providers obtain informed consent before drug testing pregnant and postpartum people and newborns. Such legislation must also ensure pregnant and postpartum patients do not face retaliation or penalization for refusing to consent. This should include a private right of action for pregnant people who face non-consensual drug testing or retaliation for refusing to provide consent.

## 6

### Restore and Protect Abortion Rights

Codifying abortion rights would go a long way to stem the tide of pregnancy criminalization. While *Roe* had major flaws, it explicitly rejected the argument that zygotes, embryos, and fetuses may be treated as separate constitutional persons, holding that fetuses at any stage of development do not have rights competitive with the constitutional rights of pregnant people.<sup>161</sup> Before the *Dobbs* decision, when pregnancy criminalization prosecutions were challenged, many cases were dismissed by trial courts, eventually dropped by prosecutors, or deemed unlawful in state appellate decisions under the principles articulated in *Roe* and *Casey*.<sup>162</sup> Without *Roe*, the risk of further entrenching fetal personhood through pregnancy criminalization is a serious threat. Legislative and judicial steps toward restoring and protecting abortion rights are imperative to prevent the criminalization not only of abortion but of pregnancy in general, regardless of outcome.

Further, state legislatures should embrace the practice of requiring impact statements from pregnant people and people with the capacity for pregnancy for any bill regulating abortion or addressing fetal rights. Given abortion policies' lifelong ramifications for individuals and their families,<sup>163</sup> it is vital that pregnant people are given a venue where they can be heard. Just as financial statements analyze a bill's cost and economic impact, statements from the people who abortion and fetal rights regulations affect are necessary to show legislators the real public health, legal, social, and economic impacts of such laws.

## 7

### Ensure Criminalized Pregnant People Have a Robust Defense

In many pregnancy criminalization cases, the charge is based on an erroneous assumption that a person engaged in acts or omissions that harmed the fetus. Defense attorneys can challenge these prosecutions in several ways. First, they must challenge the supposed *causal* link between the alleged behavior and the alleged harm in as many ways as possible. Miscarriages and pregnancy loss are extremely common and can be caused by myriad factors.<sup>164</sup> None of the criminalized drugs are abortifacients, and most do not have a plausible pathway by which they could theoretically end a pregnancy. Proving causation between any act or omission and a pregnancy loss such as a miscarriage or stillbirth is virtually impossible, and a court should be made aware of this in no uncertain terms as early and often in the process as possible. This could include obtaining experts like forensic pathologists, OBGYNs, and perinatal epidemiologists to challenge any alleged *causal* links. Obtaining the client's medical records is essential both to show the lack of causation and to highlight other potential causes for adverse fetal health outcomes.

It is also critical to challenge the expertise of the opposing expert and file *Daubert* motions to address the relevance and reliability of their opinions.<sup>165</sup> Law enforcement officials are not medical experts and should not be allowed to give opinions on medical and scientific facts.<sup>166</sup> Nor is the average medical doctor, including a pediatrician, a trained researcher who is qualified to say a certain drug caused a certain outcome.<sup>167</sup> The prosecution's purported scientific evidence can carry substantial weight, and, if unchallenged, may dangerously prejudice the client.

Criminal defense attorneys representing pregnant people should always consider Fourth Amendment arguments citing *Ferguson v. City of Charleston*<sup>168</sup> if their client faces drug testing used to collect evidence against them, as well as the threat of a Health Insurance Portability and Accountability Act violation if a hospital retaliates against a pregnant person for refusing to give consent.

## 8

### **Expand HIPAA Protections**

The Health Insurance Portability and Accountability Act (HIPAA) should be expanded to further reduce the risk of criminalization, by barring disclosures related to pregnancy and substance use as well as self-managed abortion,<sup>169</sup> by creating explicit protections against disclosures to law enforcement related to pregnancy and substance use, and by narrowing the exception for child abuse reports to ensure perinatal patients are not criminalized for acts or omission during pregnancy.<sup>170</sup> Without these essential changes, HIPAA will continue to leave the most marginalized pregnant patients at outsized risk of criminalization and other punitive state actions.

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**Without these essential changes, HIPAA will continue to leave the most marginalized pregnant patients at outsized risk of criminalization and other punitive state actions.”**

## 9

### **Connect Pregnancy Criminalization to the Maternal Health Crisis**

Any efforts to confront the United States' maternal mortality crisis must account for the ways in which abortion bans and the threat of pregnancy criminalization, family regulation system involvement, and family separation impact and exacerbate maternal health disparities and adverse maternal health outcomes. Efforts to address this crisis should include a call for an end to the healthcare-to-family regulation system-to-prison pipeline.<sup>171</sup>

# APPENDIX: EXTENDED METHODS DESCRIPTION

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## Inclusion and Exclusion Criteria

This report documents arrests of pregnant people across the United States and U.S. territories that occurred from January 1, 2006 through June 23, 2022. The start date was chosen because it is one day after the end date of the last national study capturing the arrests of pregnant people in the United States. The end date was chosen because it is the day before the U.S. Supreme Court's *Dobbs v. Jackson Women's Health Organization* decision, which officially overturned *Roe v. Wade*. This end date was selected to ensure that all the people arrested were subject to the same federal constitutional protections and to simplify the analysis.

Cases were included if information on the person's name and the year, county, and state of arrest were all available, and the case met at least one of the following criteria:

- I. Any arrest or issuing of an arrest warrant to a person where the reason for the arrest warrant included the factor of being pregnant, having an abortion, experiencing a pregnancy loss, or giving birth.
- II. Any arrest or issuing of an arrest warrant to a person for allegations of an action taken or not taken during pregnancy, labor, or birth. This included but was not limited to cases in which the pregnant person was charged for concealing a birth or a death, being in a "dangerous situation" while pregnant, not complying with medical treatment, lacking prenatal care, having a digital search history for abortion, allegedly engaging in "abuse of a corpse" or "improper disposal" of their fetal remains, or alleged neglect, abuse, assault, or endangerment to a fetus based on the pregnant person's substance use.
- III. Any occasion where the state imposed harsher penalties on a person for being pregnant, even if the precipitating arrest itself was not associated with pregnancy. This includes cases where the original charge was unrelated to pregnancy, but because the person was pregnant, there was post-conviction parole or probation revocation, sentence enhancement, or a modification to pretrial release conditions.

Similar to the previous study,<sup>172</sup> cases that did not fit our inclusion criteria included instances when pregnancy influenced how a person was treated when in jail or prison, instances when pregnancy was discussed in connection to an alleged crime but the pregnancy was not defined as part of the criminal action or inaction, and civil child welfare cases and investigations, even where pregnancy-related conduct was at issue. Further, unlike the previous documentation effort, this study did not include civil or family court cases that involved house detentions or forced medical interventions such as forced cesarean sections or blood transfusions.

After applying the inclusion and exclusion criteria, we identified 1,396 cases for this review. Each case corresponds to a unique arrest. However, certain people faced multiple pregnancy-related arrests at different points in time, and are therefore represented multiple times in our dataset. Overall, our dataset includes 1,379 unique individuals.

## Data Collection

We identified cases through a variety of sources. Documentation was gathered through repeated and systematic searches using legal databases including WestLaw, LexisNexis, and Bloomberg Law to identify federal cases, state cases, and secondary sources. Pregnancy Justice staff identified cases as a result of our direct involvement in them or if those individuals reached out to our organization in need of legal assistance. Additionally, cases came to staff members' attention through their relationships with and informal inquiries from public defenders, other legal advocates, academics, judges, healthcare providers, and investigative and legal journalists who work with pregnant populations. The research team also conducted repeated and systematic Google searches to identify media coverage of potential cases.

Once we determined that a case met the inclusion criteria, a digital file was created for each case that contained all available documentation on that specific arrest. This could include any combination of the following documents: docket sheets, arrest warrants, indictments, orders, decisions, pleadings, briefs, written memoranda, documentation relating to sentencing, probation,

and parole, media reporting, online public court records, documents from inmate and offender public databases, public memoranda, published photographs, and other documents filed in court. Documentation was gathered from public police and court record requests, Google searches, and Google Alerts for media records, as well as by contacting attorneys and parties involved in the cases and documenting their responses. Certain files only contain secondary source material such as media articles and newspaper headlines, as the court documents were unavailable. All the digital files are stored on Pregnancy Justice's secure internal electronic database.

### Definitions

This report relied on criminal charge information to identify the birth outcome. Therefore, we considered a case to have an abortion birth outcome if the most recent official documents from either a court or law enforcement stated abortion as the final birth outcome. Cases were not considered to be abortion cases if they started off as an abortion investigation but the birth outcome was eventually found to be a miscarriage or stillbirth. As such, this study reports a lower abortion criminalization count than other sources.

We ascertained a pregnant person's indigent status using affidavits of financial hardship, documented houselessness, court-appointed counsel, attorney-client agreements indicating pro bono representation due to financial hardship, and client transcripts in case files.

Charges for drug possession were only included in our dataset in one of two circumstances: 1) if the possession charge was based solely on the ingestion of a substance or a positive toxicology test obtained in the course of perinatal care, or 2) if the possession charge was brought in addition to other charges that relied on pregnancy as an element of the crime. Put differently, a traditional possession case, in which someone was caught by law enforcement with any amount of a controlled substance on their person, would not on its own meet the inclusion criteria for our study. Only possession charges that would not have arisen but for a person seeking prenatal care or charges brought in conjunction with other pregnancy-related charges were included in our research.

### Qualitative Methods and Coding of Cases

The research team developed guidance to code the cases. A team of 11 coders used qualitative coding recorded in a spreadsheet to categorize cases using information from their corresponding digital files. This tool was piloted and refined in an iterative process, with individual coders noting where codes were ambiguous. As part of the refinement process, intercoder reliability was calculated on 1,396 cases, which were coded by two different coders. In keeping with common practice,<sup>173</sup> when intercoder reliability was below 0.6, definitions and guidance were refined and cases recoded. A second set of intercoder reliability was performed, in which all variables included in this report met the criteria.

The final data tool captured information on 144 variables. The variables fell into eight categories: basic demographic information (race, gender, age, etc.), administrative information on each arrest (state of arrest, county of arrest, date of arrest, etc.), substance use and possession allegations (type of substances included in drug allegations, drug testing of the pregnant person, drug testing of the fetus, etc.), grounds for arrest (reasons for arrest given in official court documents, etc.), context for arrest (other reasons for arrest given in unofficial non-court documents); actors involved in the instigation of the arrest (hospital worker involvement, family regulation worker involvement, arrested by a police officer, etc.), procedural characteristics (type of counsel, bond conditions, case outcome, probation conditions, etc.), and birth outcome (abortion, birth with no adverse health outcomes, pregnancy loss, etc.).

### Analysis

Data were appended together into one dataset and analyzed in Stata and R. Two analysts calculated all statistics independently in order to ensure accuracy.

### Limitations

Although the research team went to great lengths to collect cases of pregnancy criminalization across the United States, there were several limitations to the scope of this study. Due to barriers in retrieving case information and the study's strict inclusion criteria, it is likely that the 1,396 pregnancy criminalization cases identified represent a substantial undercount of the actual cases.

## Data Collection Limitations

Absent a published court opinion, a majority of cases were identified by defense attorneys, prospective clients, coalition partners, and investigative journalists, or by the research team through media reports and online searches. Though it is possible to make bulk public records requests for all arrests under a specific criminal statute, with one exception, the laws used to charge people with pregnancy-related crimes are not unique to pregnancy, but are rather charges like child abuse, which apply far more broadly. Notably, there is no searchable database of criminal cases involving pregnancy; decisions from Native American tribal courts are not easily accessible; and cases in which juveniles have been deprived of their liberty through court proceedings remain confidential. Cases of pregnancy criminalization are often legal aberrations that reflect state prosecutors' experimentation with or misapplication of existing statutes; as such, the research team relied heavily on media reporting to identify novel applications of the law. Some case files only had media files and unofficial documents. Each state has different laws and procedures for requesting official court documents. While some jurisdictions have publicly accessible web-based filing systems, others require document requests to be made in person by a state resident. And without personal identifiable information such as the arrestee's date of birth, some public records clerks are unable to locate the relevant documents. The absence of official documents resulted in missing data, for both demographic variables and variables related to grounds for criminal arrest.

## Demographics

The information provided in this report was limited by the data available on cases. Official documents often offer only limited racial category options, and sometimes the options leave out important categories or artificially force the choice of one race. It can therefore be difficult or impossible to differentiate between (for example) Middle Eastern/North African and white or non-Hispanic white and Hispanic-white, or to accurately ascertain when individuals are multiracial. In

addition, official documents rarely allow for the reporting of gender identities such as transgender, gender non-conforming, non-binary, or intersex (TGNCNBI). Further, the data cannot determine the degree to which non-indigent pregnant people were above the threshold for indigency.

## Disposition

About 4 in 10 case files did not have information on disposition either because the case had not yet been resolved or because the case file was missing information.

## Grounds for Arrest

The case files contained official documents indicating the grounds for the criminal arrest in approximately three in four cases. In the remaining cases, we could not determine the grounds due to a lack of such documentation.<sup>174</sup>

## Case Investigation Actors

Despite the complex—and often integral—role that hospital social workers, drug treatment counselors, and family regulation authorities play in pregnancy criminalization, the research team only systematically tracked whether a case was instigated at a hospital or if family regulation services were involved in the case. It is often impossible to know with certainty that a specific actor, be it a hospital social worker or family regulation worker, initiated the report to police, because that information is not typically documented. Such reports could be inferred given the underlying circumstances. Even though police work closely with social workers and hospital personnel to report new parents, there are many other actors—including friends, family, partners, and neighbors—who instigate criminal investigations of pregnant and perinatal people. This report did not specifically track their involvement, but examining the role of these actors could reveal other pathways to pregnancy criminalization.

Despite these limitations, this study represents the most comprehensive accounting of pregnancy criminalization cases from 2006 to *Dobbs*.



# ENDNOTES

- 1 Tenn. Code Ann. § 39-13-107(c)(2) (2014) (expired July 1, 2016)
- 2 *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022); *Dobbs v. Jackson Women's Health Organization: The Court Takes Away a Guaranteed Nationwide Right to Abortion*, NAT'L WOMEN'S L. CTR. (July 12, 2022), <https://nwl.org/resource/dobbs-v-jackson-womens-health-organization-the-court-takes-away-a-guaranteed-nationwide-right-to-abortion/>.
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- 82 For example, Oklahoma, which has the fourth highest number of pregnancy criminalization arrests in the United States, for its criminal court system, has two levels – the trial courts and the Oklahoma Court of Criminal Appeals. See *The Oklahoma Court System*, OKLA. STATE CTS. NETWORK, <https://www.oscn.net/courts/> (last visited July 12, 2023).
- 83 *“If I Wasn’t Poor, I Wouldn’t Be Unfit,”* HUM. RTS. WATCH (Nov. 17, 2022), <https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare>.

- 84 *What is Child Abuse or Neglect?*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/answers/programs-for-families-and-children/what-is-child-abuse/index.html> (last visited July 12, 2023).
- 85 *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997). This was the first case in South Carolina and laid the groundwork for South Carolina criminalization based on risk and allegedly risky behaviors. People have been criminalized beyond allegations of substance use, for not getting adequate prenatal care or for attempting suicide. See, e.g., *Shuai v. State*, 966 N.E.2d 619 (Ind. Ct. App. 2012).
- 86 LINDA C. FENTIMAN, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH* (2019)
- 87 *Ex parte Ankrom*, 152 So. 3d 397, 429 (Ala. 2013); ALA. CODE § 26-15-3.2 (2006).
- 88 *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); *State v. Green*, 474 P.3d 886 (Okla. Crim. App. 2020).
- 89 *Robinson v. California*, 370 U.S. 660, 667 (1962) (“We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”).
- 90 See, e.g., OHIO REV. CODE ANN. § 2925.31 (West 2016); S.D. CODIFIED LAWS § 22-42-5.1 (2013); *Id.* § 22-42-15.
- 91 Case Study L. To maintain confidentiality and anonymity, the case number, legal citation, and name regarding this case study have been altered or removed from this white paper. You can request further details on this case study by emailing [info@pregnancyjusticeus.org](mailto:info@pregnancyjusticeus.org), email subject: White Paper Case Study request. Please specify Case Study L and the purpose of your request.
- 92 Sister Reach et al., *Tennessee's Fetal Assault Law: Understanding its Impact on Marginalized Women*, PREGNANCY JUSTICE, [https://www.pregnancyjusticeus.org/wp-content/uploads/2020/12/SisterReachFinalFetalAssaultReport\\_SR-FINAL-1-1.pdf](https://www.pregnancyjusticeus.org/wp-content/uploads/2020/12/SisterReachFinalFetalAssaultReport_SR-FINAL-1-1.pdf) (last visited July 12, 2023).
- 93 TENN. CODE ANN. § 39-13-107(c)(2) (2014) (expired 2016). The statute adds the following language to the “Fetus as Victim” provisions of the assault sections of the criminal code: “(3) *It is an affirmative defense to a prosecution permitted by subdivision 1(2) that the woman actively enrolled in an addiction recovery program before the child is born, remained in the program after delivery, and successfully completed the program, regardless of whether the child was born addicted to or harmed by the narcotic drug.*” This inclusion precludes methadone and buprenorphine treatment since it is ongoing—like insulin—and is not generally “completed.”
- 94 Case Study I. To maintain confidentiality and anonymity, the case number, legal citation, and name regarding this case study have been altered or removed from this white paper. You can request further details on this case study by emailing [info@pregnancyjusticeus.org](mailto:info@pregnancyjusticeus.org), email subject: White Paper Case Study request. Please specify Case Study I and the purpose of your request.
- 95 Case Study E. To maintain confidentiality and anonymity, the case number, legal citation, and name regarding this case study have been altered or removed from this white paper. You can request further details on this case study by emailing [info@pregnancyjusticeus.org](mailto:info@pregnancyjusticeus.org), email subject: White Paper Case Study request. Please specify Case Study E and the purpose of your request.
- 96 Case Study F. To maintain confidentiality and anonymity, the case number, legal citation, and name regarding this case study have been altered or removed from this white paper. You can request further details on this case study by emailing [info@pregnancyjusticeus.org](mailto:info@pregnancyjusticeus.org), email subject: White Paper Case Study request. Please specify Case Study F and the purpose of your request.
- 97 Case Study K. To maintain confidentiality and anonymity, the case number, legal citation, and name regarding this case study have been altered or removed from this white paper. You can request further details on this case study by emailing [info@pregnancyjusticeus.org](mailto:info@pregnancyjusticeus.org), email subject: White Paper Case Study request. Please specify Case Study K and the purpose of your request.
- 98 Case Study M. To maintain confidentiality and anonymity, the case number, legal citation, and name regarding this case study have been altered or removed from this white paper. You can request further details on this case study by emailing [info@pregnancyjusticeus.org](mailto:info@pregnancyjusticeus.org), email subject: White Paper Case Study request. Please specify Case Study M and the purpose of your request.
- 99 Case Study C. To maintain confidentiality and anonymity, the case number, legal citation, and name regarding this white paper have been altered or removed. You can request further details on this case study by emailing [info@pregnancyjusticeus.org](mailto:info@pregnancyjusticeus.org), email subject: White Paper Case Study request. Please specify Case Study C and the purpose of your request.
- 100 For the remaining cases, other non-court documents available provide information which confirms the case file meets the study inclusion criteria for pregnancy criminalization.
- 101 *How Courts Work: Bail*, AM. BAR ASS'N (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/bail/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/).
- 102 *How Courts Work: Bail*, AM. BAR ASS'N (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/bail/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/).
- 103 Brief for National Advocates for Pregnant Women et al. as Amici Curiae Supporting Respondent, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) at 24–25, [https://www.pregnancyjusticeus.org/wp-content/uploads/2021/09/Final-20210921172824167\\_19-1392-Brief.pdf](https://www.pregnancyjusticeus.org/wp-content/uploads/2021/09/Final-20210921172824167_19-1392-Brief.pdf) (“It is critical, however, to highlight the ways in which these kinds of favorable judicial decisions fail to adequately protect pregnant women’s rights. When an appellate court overturns a pregnancy-based prosecution, or invalidates an impermissible court-ordered medical intervention, its decision does not remedy the indignities, harms, and constitutional wrongs inflicted.”).

- 104 While this section discusses sentences in the context of time incarcerated, sentences can include incarceration, community service, and/or mandatory drug treatment rehabilitation programs. Courts can also release an individual after they have served part of their incarceration pursuant to a parole determination. In those cases, individuals serve the remainder of their sentence in their community.
- 105 Case Study J. To maintain confidentiality and anonymity, the case number, legal citation, and name regarding this case study have been altered or removed from this white paper. You can request further details on this case study by emailing [info@pregnancyjusticeus.org](mailto:info@pregnancyjusticeus.org), email subject: White Paper Case Study request. Please specify Case Study J and the purpose of your request.
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- 116 WENDY BACH, PROSECUTING POVERTY, CRIMINALIZING CARE 95 (2022).
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