Criminalization and Punishment for Abortion, Stillbirth, Miscarriage, and Adverse Pregnancy Outcomes
Shadow Report to the UN Human Rights Committee
for the Fifth Periodic Review of the United States

Submitted by

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This shadow report focuses on the punishment and criminalization of individuals for abortion, stillbirths, miscarriages, and adverse pregnancy outcomes. In the U.S., human rights violations occur when states pass laws that explicitly criminalize performing abortions and when state officials misuse other laws to surveil, investigate, arrest, detain, and prosecute pregnant individuals based on the perceived impact of their actions on their pregnancy.

In the past year since the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, the U.S. has been thrown into a state of chaos as states race to either enact draconian restrictions or create protections for abortion access. Currently, fourteen states are enforcing total or near-total bans on abortion.[1] And caught in the middle of the pitched political battles are the millions of people who will need abortion care in states where it is being moved out of reach, and in many cases criminalized, who have to determine where they can turn and whom they can trust to get the care they need.

The Human Rights Committee has recognized that criminalizing abortion and adverse pregnancy outcomes turns pregnant people away from needed health care and increases the likelihood that individuals will resort to unsafe abortion or forgo needed health care in violation of Article 6. In addition, the Committee and other human rights bodies emphasize that health care providers must respect the confidentiality of patients suffering obstetric emergencies and have condemned reports to law enforcement as a violation of the rights to life (Art. 6), privacy (Art. 17), and to be free from torture, cruel, unhuman, and degrading treatment (Art. 7).

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Criminalization of individuals for obstetric outcomes also constitutes gender discrimination under Articles 2, 3, and 26. Laws criminalizing behavior that is predominantly performed by women, like abortion, or criminalizing behavior because of pregnancy or a pregnancy outcome that is not similarly criminalized in any other circumstance per se constitute gender discrimination. Further, criminalization of people for obstetric outcomes disproportionately impacts Black and Indigenous women and women of lower socio-economic status who are subject to over-surveillance and more likely to experience violations of their rights to fair trial and access to justice, reflecting gender and racial stereotypes about women's roles as mothers and the "unfitness" of Black and Indigenous mothers–as well as improper criminalization of pregnant people based on their lack of access to health care and socio-economic status in violation of Articles 2, 3, 9, 14, and 26.

I. Imposing Criminal Penalties for Abortion and Obstetric Emergencies Violates the Right to Life and Non-Discrimination and Equal Protection of the Law (Art. 6, 2, 3, 26) (List of Issues Questions 7 and 12)

Overview:

Since the *Dobbs* decision, many states have explicitly criminalized the provision of abortion, and the law in one state criminalizes people who self-manage their abortions. In addition, even before *Dobbs* opened the door to the vast expansion of criminal abortion laws, there is a long history of arrests and prosecution of people who are suspected of self-managing abortions or who suffer adverse pregnancy outcomes even without explicit statutory authorization. In these cases, anti-abortion stigma and a desire to punish behavior that does not conform to gender stereotypes about how a pregnant person should behave improperly influence investigations and judicial proceedings. Prosecutors misuse their immense discretion to charge a broad range of crimes–from concealing a corpse to homicide crimes–resulting in pressure on individuals to plead guilty for fear of lengthy sentences. In addition to authorizing prosecutions for people who perform abortions in certain states, the proliferation of criminal abortion laws post-*Dobbs* increases abortion stigma, creating an atmosphere that encourages rogue prosecutions of people who self-manage abortions (and those who help them) as well as people who suffer miscarriages or stillbirths.

These criminal laws and prosecution practices violate Article 6 (right to life) because they turn pregnant people away from health care and deny access to safe abortion.[2] Further criminalizing abortion, a form of healthcare predominately needed by women, and criminalizing behavior because of pregnancy or a pregnancy outcome that is not similarly criminalized in any other circumstance constitute gender discrimination in violation of Articles 2, 3 and 26.[3]

A. Criminal Abortion Laws Violate Articles 6, 2, 3, and 26

As of September 5, 2023, approximately 33 states have laws imposing criminal penalties for performing abortions in some instances.[4] Of those, at least 16 states have made it a felony to perform an abortion at any stage of gestation.[5] Additionally, 4 states have passed laws

imposing criminal penalties for performing an abortion after 6 weeks,[6] and others impose criminal penalties for performing an abortion later in gestation. Criminal penalties potentially include life imprisonment and fines up to $100,000.[7] Nevada law criminalizes people who self-manage.[8] These criminal laws have endangered patients' lives as doctors fearing arrest in Texas and other states have denied abortion care to patients facing severe and dangerous pregnancy complications.[9] Threats of prosecution have turned people away from clinical abortion care and have prevented or chilled people's access to information about safe abortion.

In the nine months following the June 24, 2022 *Dobbs* decision, the average number of patients accessing abortions in a clinic setting in the U.S. decreased by 2,849 per month compared to April 2022.[10] During this period, although some patients appear to have traveled to nearby states to get care, increases in abortions in states where abortion remained legal did not compensate for reductions in states with abortion bans.[11] It is unknown how many pregnant people denied abortions in the formal healthcare setting self-managed abortions (or the methods they used) and how many were forced to carry unwanted pregnancies to term.[12]

Researchers caution that it is too early to develop a long term narrative on national abortion trends, but there are important state trends.[13] Since *Dobbs*, it has been all but impossible to obtain an abortion in approximately 14 states.[14] The state declines in access to legal abortions disproportionately impacts people of color, people living in poverty, and people in vulnerable situations. The states with the greatest declines have "the greatest structural and social inequities in terms of maternal morbidity and mortality and poverty."[15] Individuals unable to overcome travel barriers are likely to be those with the fewest socio-economic resources, including young people, incarcerated people, people on parole with travel limitations, and immigrants.[16] Black, Indigenous, and other people of color have experienced the greatest increase in travel times to abortion facilities post-*Dobbs*.[17]

In states that criminalize providing abortion care, the vagueness of the laws and the threat of state officials with an anti-abortion agenda have chilled health care providers' willingness to even provide basic information about abortion or refer patients to other states.[18] In at least two states, the Attorney General has threatened to prosecute doctors who refer patients out of state and individuals and organizations that provide information and help pregnant people access abortion in states where it is legal.[19] These threats of prosecution further endanger the health and lives of people seeking abortion care by denying them access to health information and delaying their access to timely care.

B. **Use of Facially Inapplicable Laws to Prosecute and Punish People for Abortion, Behavior During Pregnancy, and Obstetric Emergencies Violates Articles 6, 7, 2, 3, and 26**

While the rapid expansion of laws criminalizing the provision of abortion has created a human rights crisis, it is important to recognize that criminalization and punishment of individuals for self-managed abortions and adverse pregnancy outcomes regularly occurred prior to the *Dobbs* decision through prosecutors' improper use of laws meant to protect pregnant people and

children and misuse of other laws. As a result, states must go beyond repealing criminal abortion laws and explicitly prohibit and prevent any form of criminalization or punishment for abortion, obstetric emergencies, or pregnancy outcomes.

From 2000 to 2020, at least 61 people were criminally investigated or arrested for ending their own pregnancies or helping someone else do so.[20] In addition, from 2006-2020, more than 1,300 people were arrested in relation to their conduct during pregnancy.[21] Because it is difficult to determine the cause of miscarriages and stillbirths, these cases include people who were suspected of self-managing abortions as well as people whom the state sought to blame or punish for experiencing an adverse pregnancy outcome.[22]

After recent amendments, only one state explicitly authorizes criminal charges for self-managed abortion and three states permit using criminal child abuse and/or endangerment statutes to prosecute behavior while pregnant that poses some perceived risk of harm to the fetus.[23] To date, the vast majority of cases against pregnant people reflect improper prosecutorial overreach driven by stigma against people who self-manage abortions and against pregnant people who use drugs. Using–and frequently overstepping–their wide discretion to decide whom to prosecute and what crimes to charge, prosecutors utilize "spaghetti charging" by employing a patchwork of laws to see what sticks[24] and leveraging threats of murder or homicide convictions to pressure individuals to plead guilty to lesser offenses. Even in cases where charges are eventually dismissed or successfully appealed, criminal investigations impose immense stress and costs.[25] People involved in these cases have been shamed and ostracized in their communities, forcing them to move or change their name to get or keep jobs.[26] Others have lost custody of their children and have been turned over to immigration authorities for deportation.[27]

In its most recent guidelines based on public health evidence, the World Health Organization (WHO) recommended that States decriminalize abortion, which includes removing abortion from all criminal laws and "not applying other criminal offences (e.g., murder, manslaughter) to abortion, and ensuring there are no criminal penalties for having, assisting with, providing information about, or providing abortion."[28] "In line with human rights requirements," the WHO also recommends that "self-management of abortion should not be criminalized." [29]

Fetal Harm Laws Create Risk of Homicide and Other Criminal Charges. While prosecutors employ a range of laws to prosecute people for obstetric emergencies and pregnancy outcomes, the most pernicious practice is the repurposing of fetal harm laws and the use of the concept of "fetal personhood" to prosecute people for crimes against their own pregnancies.[30] Fetal harm laws were initially designed to protect pregnant people from criminal acts against pregnant individuals that result in pregnancy loss or harm to a fetus and can impose homicide-level criminal penalties.[31]

At least 38 states authorize homicide charges for causing pregnancy loss.[32] Some states have created unique homicide crimes (e.g., feticide).[33] Others have retrofitted existing homicide statutes and other criminal statutes by changing the definition of a "victim" or "person" to

include a zygote, embryo, or fetus.[34] In addition, some states have adopted general "fetal personhood" provisions that create the risk that rogue prosecutors will try to use the provisions to expand the interpretation of criminal laws.[35] The majority of fetal homicide laws explicitly prohibit criminal charges against a pregnant person in relation to their own pregnancy.[36] However, laws in many states lack explicit exceptions, and even when a commonsense reading of statutory language should exclude prosecution of a pregnant person, prosecutors have tried to stretch the laws to prosecute individuals for their own pregnancy loss.[37] Three states provide only limited exceptions for pregnant people.[38] Of these, two states (Oklahoma and Utah), allow homicide charges against pregnant people for miscarriage or stillbirth in certain circumstances.[39] In October 2021, B.P. a 19 year-old Indigenous woman was convicted of manslaughter in Oklahoma after suffering a miscarriage based on methamphetamine use even though the medical examiner did not indicate methamphetamine toxicity was the cause of miscarriage (see discussion below in Section III.B). While several states also include explicit exceptions in their fetal harm laws for legal abortions,[40] others do not, and, in at least 8 states with exceptions for legal abortion, abortion is now illegal in most circumstances, creating a risk of homicide prosecutions for people who perform abortions.[41]

Prosecutor Abuse and Overreach. Even in states where abortion and fetal homicide laws explicitly prohibit charging pregnant people for abortion and pregnancy loss, overzealous prosecutors still try to prosecute them, ignoring statutory limitations or attempting to use other laws to work around the limitation.[42] In 2019, Alabama prosecutors arrested a 28 year-old Black woman who suffered a miscarriage after being shot in the stomach.[43] Although Alabama's fetal homicide law prohibits charges against a pregnant individual,[44] prosecutors argued that she could be charged under an accomplice liability theory because she "instigated" the dispute that led to the shooting.[45] In April 2022, a 26 year-old Latina woman was indicted for murder in Texas for "intentionally and knowingly" causing the death of an individual by "self-induced abortion" even though Texas's criminal abortion laws do not apply to pregnant people and the penal code explicitly excludes pregnant people from murder charges in connection with the death of an unborn child.[46] Following extensive press coverage and public outcry, charges in these two cases were eventually dropped,[47] but, as discussed below, others have not been as fortunate.

Prosecutors largely are left to self-police at the indictment stage, with no defense attorneys to challenge junk science or judges to correct misstatements of the law before grand juries. After charges are filed, individuals often rely on court-appointed defense attorneys who have little or no experience with these types of cases. In addition, in many states there is no public defender and appointed defense attorneys work without the resources or support of an institutional public defender office. In this context, the threat of homicide charges with lengthy criminal sentences and the prospect of extended periods in jail awaiting trial impose intense pressure on individuals to plead guilty to some crime. Public records indicate that murder or homicide charges were raised by law enforcement in 43% of 61 cases involving self-managed abortion.[48] In 2017, after spending more than a year in jail, a 32-year-old Tennessee woman pleaded guilty to a felony charge of attempted procurement of a miscarriage for attempting to end her own pregnancy.[49] In July 2023, a Nebraska teen who self-managed an abortion (prior to the *Dobbs*

decision) and her mother who helped her obtain abortion medication pleaded guilty to the felony crime of concealing human remains.[50] Her mother also pleaded guilty to performing an illegal abortion and false reporting.[51]

In addition to people suspected of having abortions, prosecutors also charge pregnant people with crimes based on their behavior during pregnancy, including using controlled and even legal substances. Every major medical and public health organization opposes using punitive approaches to address pregnancy and drug use because they are ineffective and harm maternal, fetal, and child health by turning people away from care.[52] The Special Rapporteur on the Right to Health has recommended that States decriminalize or depenalize the use of drugs because criminalization violates the right to health and other human rights.[53] Yet, prosecutors continue arrests and prosecutions for miscarriages and stillbirths based on drug use even when the operative statutes exclude such prosecutions.

In 2017, A.P. was charged with murder in California after experiencing a stillbirth.[54] California's homicide statute includes causing the death of a fetus but prohibits charging people for crimes related to their own pregnancies.[55] Facing a possible life sentence, A.P. pleaded no contest to fetal manslaughter (a crime that does not exist under California law) and was sentenced to 11 years in prison.[56] After years of appeals with new counsel, a court overturned her sentence in 2022, and she was released after serving four years in prison (see discussion below in Section III.B).[57]

In Missouri, state law prohibits applying a state fetal personhood provision "against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program for prenatal care."[58] Yet, Missouri prosecutors have charged scores of pregnant people for subjecting unborn children to perceived risks of harm, including one person who admitted to using marijuana once and another who drank alcohol.[59] In Arkansas, prosecutors continue to charge pregnant people under a law prohibiting the "introduction of a controlled substance into the body of another person" despite a state Supreme Court case holding that the law does not apply to drug use by pregnant people.[60]

In many states, politically driven prosecutors have publicly announced their support of arcane legal theories to improperly stretch criminal laws to prosecute pregnant people. In January 2023, despite explicit statutory exemptions from criminal abortion and fetal homicide provisions for pregnant people, Alabama's Attorney General suggested that pregnant women could be prosecuted for taking abortion pills, citing Alabama's chemical endangerment law (described below) that has been used to punish women for drug use during pregnancy.[61]

Misuse of Child Protection Laws Against Pregnant People. As a result of court decisions, three states, Alabama, South Carolina, and Oklahoma, allow prosecution of pregnant people for their behavior during pregnancy under criminal child abuse and/or endangerment laws.[62] From 2014 to 2016, Tennessee adopted a statute that explicitly targeted people who used drugs while pregnant under a fetal assault law.[63] The law, which was only in effect for two years, resulted in the arrest of over 100 women and negatively impacted maternal and infant health outcomes.[64]

Researchers found that, controlling for all other factors, the law resulted in twenty fetal deaths and sixty infant deaths in 2015 alone.[65]

Other states assert jurisdiction over "unborn" children to police the behavior of pregnant people under civil child welfare statutes, exposing pregnant people to surveillance, and potential loss of child custody. Five states consider substance use during pregnancy as grounds for civil commitment.[66] In 2014, a pregnant Wisconsin woman was arrested and served 18 days in jail without prenatal care, including 36 hours in solitary confinement, because she refused to report to inpatient drug treatment.[67] Between 2007 and 2022, Wisconsin authorities screened an average of 382 complaints each year against pregnant people for "unborn child abuse."[68] Because court records are not public, we do not know how many people were detained against their will or lost custody of their infants after birth.[69] Not only are these measures an ineffective way to treat substance use disorders, they often result in detention or surveillance of pregnant people who have positive drug tests but do not have substance use disorders.

According to the Special Rapporteur on the Right to Health, compulsory drug treatment violates the right to health, including the right to evidence-based treatment, the right to be free from non-consensual medical treatment (Article 7), and the right to informed consent.[70] The U.N. Working Group on Arbitrary Detention (WGAD) has found that involuntary commitment and compulsory drug treatment are unsupported by human rights law and that criminal and administrative detention for drug control purposes has a "disproportionate impact on vulnerable groups, such as women, children, [and] minority groups."[71] In 2016, the WGAD criticized the detention of pregnant women in the U.S. who used or were suspected to have used criminal drugs, noting that "[t]his form of deprivation of liberty is gendered and discriminatory in its reach and application."[72]

Like laws that explicitly criminalize abortion, the practice of prosecuting, punishing, and detaining people for abortion, pregnancy outcomes, and behavior during pregnancy violate the right to life under Article 6, the right to be free from non-consensual medical treatment under Article 7, and the right to non-discrimination under Articles 2, 3, and 26.

II. Injecting Surveillance and Law Enforcement into Health Care Settings Violates the Right to Life, Constitutes Cruel, Inhuman, and Degrading Treatment or Torture and Violates the Right to Health Care Privacy (Art. 6, 7, 17)

Overview:

In the United States, health care providers have become increasingly intertwined with law enforcement, creating an atmosphere of distrust and surveillance in health care settings. The threat of criminalization of abortion providers and people who support abortion seekers has exacerbated this problem. Improper involvement of health care authorities with law enforcement and state regulation endangers the life and health of pregnant people because it turns people away from essential medical care.

Human rights law requires that when patients seek post-abortion or emergency obstetric care, health care providers respect patient confidentiality without threats of punitive measures or criminal prosecution.[73] Laws and practices that impose a legal duty on health care providers to report individuals who have had abortions or are seeking emergency obstetric care violate the right to life (Article 6) and the right to privacy (Art. 7).[74] Further, denying or conditioning access to post-abortion care as a form of punishment or to elicit information for criminal investigations violates the right to be free from torture and cruel and degrading treatment (Article 17). [75]

A. Health Care Providers Reporting People for Abortions, Adverse Pregnancy Outcomes, and Behavior During Pregnancy Violates Articles 6, 7, and 17

Health care providers have an ethical obligation to protect "patient autonomy, confidentiality, and the integrity of the patient-physician relationship."[76] The WHO emphasizes that decriminalization of abortion requires that "anyone who experienced pregnancy loss does not come under suspicion of illegal abortion when they seek care" and that States "must not require health workers to report persons suspected of undertaking unlawful abortion, or require them to provide any potentially incriminating information during or as a prerequisite to receiving post-abortion care."[77] The Working Group on Discrimination Against Women and Girls has criticized "widespread State policing and surveillance and mandatory reporting requirements in relation to suspicions of drug use and child abuse or neglect, which often deters pregnant women from seeking reproductive healthcare and undermines their trust in health service providers."[78]

Major medical groups also have denounced the reporting of conduct during pregnancy, in particular substance use, to law enforcement and child protective services and have warned that reporting discourages pregnant people from seeking timely medical treatment and being forthcoming with their physicians.[79] Yet, health care providers often report people who have experienced pregnancy loss and obstetric emergencies to state authorities for things they think might be illegal or that they disapprove of.

Prior to the *Dobbs* decision, 39% of the documented cases of people investigated or prosecuted for self-managing abortions or helping someone else do so were reported to law enforcement by healthcare providers.[80] Health care providers also have reported women who have suffered pregnancy loss, individuals who have sought emergency medical care after experiencing physical trauma, and women who delivered healthy babies but admitted to taking a substance during pregnancy based on the suspicion that they played a role in harming, or attempting to harm, their pregnancies.[81]

In the U.S., the federal Health Insurance Portability and Accountability Act (HIPAA) generally prohibits providing results of patient health information to a state agency without a specific exemption or the patient's informed consent.[82] Some states require reporting of prenatal drug use. However (as discussed below), too often, reporting reflects confusion about legal reporting obligations, health care providers' judgment about the conduct or decisions of pregnant people, or their lack of understanding about the impact of reporting on their patients. Reports

have led to arrests, detentions in hospitals, civil child welfare investigations, family separation, and termination of parental rights.[83]

B. State Failure to Clarify Reporting Obligations and Laws Requiring That Health Care Providers Report Pregnant People Who Use Drugs Violate Articles 6, 7, and 17

There is no legal requirement that health care providers report a miscarriage, stillbirth, or suspected self-managed abortion to law enforcement or child protective authorities.[84] However, the American Public Health Association has noted that "administrative policies may be misinterpreted to permit or require clinicians to report self-managed abortion, compromising patient trust and undermining ethical and legal requirements to protect patient privacy and health."[85] In addition, abortion stigma and judgments about the proper behavior of pregnant people can result in reports even when they are not required. In fact, 39% of the criminalization of abortion arises from health care providers reporting and an additional 6% stems from reports by social workers.[86]

Outside of the abortion context, 26 states and the District of Columbia require that health care professionals report suspected prenatal drug use.[87] In other states, health care providers do not have a legal obligation to report prenatal drug use unless there are other indicators of abuse or neglect.[88] Some health care providers incorrectly assume that the federal Child Abuse Prevention and Treatment Act (CAPTA) and the Comprehensive Addiction and Recovery Act (CARA) require reporting of all substance-exposed newborns to child welfare agencies. However, CAPTA only requires that states develop policies for notification to child welfare agencies, which can be satisfied by aggregate data about the number of infants affected by substance abuse, withdrawal symptoms from prenatal substance exposure, and Fetal Alcohol Spectrum disorder rather than reporting substance-exposed infants to child welfare authorities.[89]

The threat of reporting to state authorities for self-managed abortions or acts or omissions that can be perceived as creating a risk of harm during pregnancy erodes trust in health care providers and turns people away from formal health care, including prenatal care and treatment in cases of obstetric emergencies out of fear of state involvement, loss of child custody, or criminalization.[90] Health care provider reports of obstetric emergencies and behavior during pregnancy violate the right to privacy (Article 17), endangers the health and lives of pregnant people, and worsens fetal, neonatal, and infant health in violation of Article 6.

III. Arrests And Prosecutions of People for Abortion, Miscarriage, and Pregnancy Outcomes in Practice Constitute Discrimination Based on Gender Intersecting with Race and Socioeconomic Status and Violation of Fair Trial Rights (Art. 2, 3, 9, 14, 26)

Criminal cases involving abortion, obstetric emergencies, and conduct during pregnancy reflect gendered stereotypes about women and motherhood that improperly impact prosecutors, judges, and juries.[91] In the U.S., gender intersects with other identities, including race and

socio-economic status,[92] making it difficult or impossible for individuals to obtain fair trials and access to justice.

The cases involving abortion, miscarriage, and stillbirth documented by Pregnancy Justice and If/When/How typically involve inconsistencies, irregularities, lack of due process, and disproportionate sentences reflecting the impact of stigma and stereotypes.[93] These prosecutions violate Articles 9 and 14 in conjunction with Articles 2, 3, and 26.

A. Prosecutions and Child Welfare Investigations Based on Pregnancy Behavior and Outcomes Disproportionately Impact Black, Indigenous, and People with Lower Socio-Economic Status in Violation of Articles 2, 3 and 26

Prosecutions of people for suspected abortions or adverse pregnancy outcomes reflect gendered and stereotypical views about a pregnant person's behavior and attitude towards pregnancy. In the United States, these views often are influenced by negative stereotypes about Black and Indigenous maternal "unfitness" and stereotypes about other minority communities.[94] Poor and birthing people of color also face greater risk of criminalization relative to wealthier white people because they are more likely to self-manage abortions and experience adverse birth outcomes. As a result of interpersonal and structural racism, Black and Indigenous women experience higher maternal mortality rates,[95] and their pregnancies are more likely to result in preterm births, low birth weights, and infant mortality[96] compared to white women. Black, minority, and poor communities are also more likely to experience over-policing and surveillance in health care settings.[97] Pregnant women of color are disproportionately drug tested despite the reported same rate of drug use by Black and white women in the U.S.[98]

Of the 61 documented cases of people investigated or prosecuted for self-managing abortions or helping someone else do so, at least 41% of adults belonged to minoritized racial and ethnic groups and 56% of cases that proceed through the courts involved people living in poverty.[99] In self-managed abortion cases, consideration of a homicide charge was twice as likely in cases involving people of color compared to non-Hispanic white individuals.[100]

Following a 2018 visit to the United States, the Special Rapporteur on Extreme Poverty expressed concern that pregnant women in poverty are disproportionately criminalized and subjected to interrogations that strip them of privacy rights.[101] In 2022, the Committee on the Elimination of Racial Discrimination (CERD) expressed concern about the disparate racial impact of legislation and other measures criminalizing abortion as well as the disproportionate surveillance of racial and ethnic minorities in child welfare investigations.[102]

B. Stigma and Stereotypes Improperly Influence Arrests and Prosecutions in Violation of Articles 2, 3, and 26 in Conjunction with Articles 9 and 14

The coercive power of the criminal justice system, gendered stereotypes about maternal behavior, stigma against pregnant people who have abortions and who use drugs, and

misconceptions about pregnancy risks and harms result in investigations and prosecutions that violate the right to be free from arbitrary arrest (Art. 9) and due process (including equality before the courts, fair hearing before an impartial tribunal, and presumption of innocence) (Art. 14) in conjunction with the right to non-discrimination based on gender intersecting with race, class, and other identities (Arts. 2, 3, and 26).[103]

Pregnancy-related prosecutions typically reflect stereotypical beliefs or political agendas of police, prosecutors, judges, and juries, resulting in prosecutions that misapply or distort statutes (see Section I.B), rely on faulty or discredited expert opinions and medical evidence, rely on biased assumptions, and ignore exculpatory evidence. Once prosecutors decide to pursue a case, there is immense pressure on victims to plead guilty even if the law and facts do not support a guilty verdict. In many jurisdictions, juries are heavily biased against people alleged to have had abortions,[104] creating substantial risks in opting to go to trial or appeal and face a new trial. Of the 43 self-managed abortion cases that proceeded through the criminal court process, only 9% went to trial resulting in a guilty verdict and 44% ended in a guilty plea.[105]

In many cases, prosecutions are based on erroneous assumptions that acts or omissions during pregnancy harmed a fetus or caused a miscarriage or stillbirth. In fact, an estimated 26% of all pregnancies end in miscarriage (pregnancy loss before the 20th week of pregnancy).[106] Stillbirths (pregnancy loss after 20 weeks) occur in 1 in 160 deliveries, and it is typically difficult to determine their cause.[107] Medical research "does not support the finding of a direct causal relationship between prenatal exposure to criminalized drugs and miscarriage or stillbirth,"[108] and prosecutors often rely on discredited tests like the "lung float test" and outdated studies about the impact of drug use on a fetus.[109]

Two prosecutions of young, unmarried women of color for pregnancy loss illustrate the role of stereotypes and political agendas. Despite a lack of scientific evidence that methamphetamine use caused their pregnancy losses,[110] prosecutors relied on bias against pregnant people who use substances to assume causation and ignored other health issues as possible causes.[111] In these cases, B.P. and A.P. also experienced procedural violations and lack of effective counsel.[112]

- B.P., an unmarried, Indigenous woman in Oklahoma, was 19 when she suffered a miscarriage at 17 weeks of pregnancy. In March 2020, she was arrested and charged with first-degree manslaughter based on her methamphetamine use during pregnancy. At B.P.'s trial, the prosecutor's case consistently relied on stereotypes based on gender, race, and substance use. The prosecutor presumed her guilt even though the State's own medical examiner did not identify methamphetamine toxicity as the cause of the miscarriage and identified five other significant conditions that could have contributed to the pregnancy loss. Ignoring the inadequate evidence of causation, the prosecutor built a case based on stereotypes that B.P. failed to act like a "good mother" and put "her wants over the needs of baby boy P." The prosecutor criticized B.P. for being ambivalent about her pregnancy, failing to obtain prenatal care (even though she lacked

private health insurance and was turned away by Indian Health Services), and failing to immediately call 911 following her miscarriage (even though multiple witnesses stated that after the miscarriage B.P. was in pain, severely hemorrhaging and need of surgery and a blood transfusion). Ironically, the prosecutor suggested that B.P. failed to get prenatal care and delayed calling 911 *out of fear that she would be prosecuted for drug use.* B.P.'s defense attorney waived his opening argument and failed to call a single witness or engage an expert to address the lack of scientific evidence supporting causation. After a one-day jury trial, B.P. was convicted of first-degree manslaughter and sentenced to four years in prison. Recognizing the stereotypes and biases that juries have against pregnant people who use substances, B.P., who had already served 18 months in jail awaiting trial, chose not to appeal to avoid facing the risk of a re-trial and a possible life sentence.[113]

- Although California's homicide law does not authorize charging pregnant people in connection with their own pregnancy loss, in 2018 a local DA charged A.P., a 29-year-old single Latina woman, with murder after she suffered a stillbirth. The prosecutor claimed without scientific basis that the stillbirth was caused by A.P.'s methamphetamine use. Her court-appointed counsel failed to challenge the legitimacy of the prosecution and advised her to plead guilty to manslaughter of a fetus to avoid a life sentence, even though the offense does not exist under California law. A.P. was sentenced to 11 years in prison. After A.P. retained new counsel to reopen an appeal in 2022, a court ruled that the manslaughter conviction was improper. The DA initially indicated that he would retry A.P. for murder but eventually dropped the charges because he could not identify a medical expert to testify that her methamphetamine use caused the stillbirth.[114]

IV. **State Response**

List of Issues, Question 7 requests information on steps taken to address "racial disparities in the criminal justice system." However, the Government's Report does not address racial disparities in the criminalization of pregnancy outcomes.[115]

Question 12 requests information on "(b) state laws enacted . . . which restrict women's access to reproductive health and abortion services and create new barriers to them in practice, particularly in the light of the Committee's interpretation of article 6 of the Covenant that any State party's regulation of pregnancy or abortion must ensure that women and girls do not have to undergo unsafe abortions; [and] (c) the criminalization of pregnant women using drugs." The Government's response rejects any state obligation to ensure access to safe abortion under Article 6 and refuses to address state laws that restrict access to abortion services, including criminal laws.[116] Annex B to the Government's response recognizes the need to expand treatment programs and support services for substance-using women and pregnant people.[117] However, it fails to disavow or address the criminalization of pregnant people who use drugs.

V. **Positive Developments**

- Many states have recognized that abortion should not be criminalized. Some states have repealed laws criminalizing abortion and passed laws or state constitutional amendments prohibiting prosecution of individuals for abortion and adverse pregnancy outcomes. Legislatures have also clarified that certain criminal laws do not apply to pregnancy-related conduct or outcomes.
- Some state officials have made public statements recognizing that state laws do not authorize prosecutions against pregnant people for abortions or adverse birth outcomes and have recognized the harm that such prosecutions cause.
- The federal Department of Health and Human Services has issued guidance clarifying that disclosure of patient abortion care information violates HIPAA and is undertaking further guidance to protect health information.

VI. Recommendations

1. Recognize, respect and ensure the right to reproductive and bodily autonomy and non-discrimination for pregnant people and ensure that all people have access to abortion and other reproductive and obstetric health services without unnecessary barriers or fear of criminalization or punishment.
2. Suspend and repeal all criminal sanctions for abortion and obstetric emergencies.
3. Ensure that people who use criminalized drugs have access to high quality prenatal care and drug treatment without involvement of punitive state systems.
4. Legislatures should make it clear that provisions protecting prenatal life do not authorize or permit actions against pregnant people or those who help them and explicitly repeal laws granting legal rights to prenatal life.
5. Legislatures should explicitly prohibit criminal penalties or punishment for abortion or adverse pregnancy outcomes. The State should review all cases where individuals have been imprisoned for abortion-related and/or obstetric emergencies with the aim of ensuring their release and ensuring that they have legal assistance and due process.[118]
6. Patient privacy laws should prohibit reporting and disclosure of patient information in cases involving abortion, obstetric emergencies, and conduct during pregnancy. The federal government should enforce HIPAA protections that prohibit reporting and disclosure of private health information and amend CAPTA and CARA to state, or issue guidance clarifying, that the statutes do not require reporting individual cases of substance-exposed newborns. States should repeal laws requiring reports of prenatal substance use.

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[1] *See After Roe Fell*, CENTER FOR REPRODUCTIVE RIGHTS, *https://reproductiverights.org/maps/abortion-laws-by-state/.*

[2] Human Rights Committee*,* General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights on the right to life*,* CCPR/C/GC/36, ¶ 8 (2019) (stating that states should not apply "criminal

sanctions to [people who have abortions] or to medical service providers who assist them in doing so, since taking such measures compels [people] to resort to unsafe abortion"). *See* Human Rights Committee, Concluding observations on the seventh periodic report of El Salvador, CCPR/C/SLV/CO/7, ¶ 16 (2018) (stating that El Salvador "should not apply criminal sanctions to [people] who undergo abortions or to medical service providers who help them do so, since such measures compel women and girls to resort to unsafe abortions"); Human Rights Committee, Concluding observations on the fifth periodic report of Cameroon, CCPR/C/CMR/CO/5, ¶ 22 (2017) (stating that Cameroon should "ensure that women and girls who have recourse to abortions and the doctors that attend them are not subject to criminal penalties, inasmuch as the existence of such penalties obliges women and girls to resort to unsafe abortions").

[3] Committee on the Elimination of All Forms of Discrimination Against Women, General recommendation No. 33 on women's access to justice, CEDAW/C/GC/33, ¶ 47 (2015); Report of the Working Group on the issue of discrimination against women in law and in practice, A/HRC/32/44, ¶¶ 14, 29, 76, 78 (2016); Working Group on Arbitrary Detention, Opinion No. 68/2019 concerning Sara del Rosario Rogel García, Berta Margarita Arana Hernández, and Evelyn Beatriz Hernández Cruz (El Salvador), A/HRC/WGAD/2019/68 (2020), ¶ 115 (2019) ("[A] legislative framework that affects only one gender and restricts women's rights in the way that this case demonstrates, is discriminatory", and a complete abortion ban is prima facie discrimination under Arts. 2 and 26 because it "criminalize[s] the exercise of women's reproductive rights.")

[4] Ala. Code § 26-23H-4; Ariz. Rev. Stat. Ann. § 36-2322; Ark. Code Ann. §§ 5-61-301–304; Del. Code. Ann. Tit. 24, § 1790 (b); Fla. Stat. Ann. §§ 390.01112, 390.0111; Ga. Code Ann. §§ 16-12-140, 16-12-141; Idaho Code § 18-622; Ind. Code Ann. § 16-34-2-1; Iowa Code Ann. §§ 146B.2, 707.7; Kan. Stat. Ann. § 65-6724(j); Ky. Rev. Stat. § 311.772; La. Stat. Ann. § 14:87.7; Miss. Code Ann. § 41-41-45; Mo. Rev. Stat. § 188.017(2); Mont. Code Ann. §§ 50-20-109, 50-20-112; Neb. Rev. State. §28-3,106; Nev. Rev. Stat. Ann. § 200.220; N.H. Rev. Stat. § 329.46; N.M. Stat. Ann. §§ 30-5A-3, 30-5A-5; N.C. Gen. Stat. § 90-21.81B(2); S.B. 2150, 68th Leg. Sess., Reg. Sess. (N.D. 2023); Ohio Rev. Code Ann. § 2919.195(A); Okla. Stat. Tit. 21, § 861; 18 Pa. Stat. and Cons. Stat. Ann. § 3211(a); S.C. Code Ann. § 44-41-630(B); S.D. Codified Laws § 22-17-5.1; Tenn. Code Ann. § 39-15-213; Tex. Health & Safety Code Ann. § 170A.004; Utah Code Ann. § 76-7a-201; Va. Code. Ann. §18.2-71.1; W. Va. Code §16-2R-3; Wis. Stat. Ann. § 253.107; Wyo. Stat. Ann. § 35-6-123. As of September 5, 2023, courts have enjoined or partially enjoined these laws in Utah and Wyoming. *August 2023 Update: After the Utah Supreme Court Hearing*, PLANNED PARENTHOOD ACTION COUNCIL OF UTAH, INC., https://www.plannedparenthoodaction.org/planned-parenthood-action-council-utah-inc/policy/lawsuits; Aedan Hannon, *Suspended bans and expanding access are helping Wyoming women get abortions,* CASPER STAR TRIBUNE, https://trib.com/news/local/business/health-care/wyoming-abortion-ban-just-pill/article_5787a7ac-2fd5-11ee-98a6-931df23f6d34.html.

[5] Ala. Code § 26-23H-4; Ark. Code Ann. §§ 5-61-301-304; Idaho Code § 18-622; Ind. Code § 16-34-2-1; Ky. Rev. Stat. § 311.772; La. Stat. Ann. 14 §87.7; Miss. Code Ann. § 41-41-45; Mo. Rev. Stat. § 188.017(2); S.B. 2150, 68th Leg. Sess., Reg. Sess.1 § 1 (N.D. 2023); Okla. Stat. Tit. 21, § 861; S.D. Codified Laws § 22-17-5.1; Tenn. Code Ann. § 39-15-213; Tex. Health & Safety Code Ann. § 170A.004; Utah Code Ann. § 76-7a-201; W. Va. Code §16-2R-3; Wyo. Stat. Ann. § 35-6-123.

[6] Ga Code Ann. §§ 16-12-140, 16-12-141; Ohio Rev. Code Ann. § 2919.195(A); S.C. Code Ann. § 44-41-630(B); Fl. Stat. Ann. § 390.0111. As of September 5, 2023, the Ohio 6-week ban has been enjoined, and Florida's 6-week ban has not gone into effect pending a judicial ruling. *Ohio Lower Court Blocks Six-Week Abortion Ban, Restoring Reproductive Rights Across State*, ACLU OF OHIO (Sept. 14, 2022), https://www.aclu.org/press-releases/ohio-lower-court-blocks-six-week-abortion-ban-restoring-reproductive-rights-across#:~:text=CINCINNATI%20%E2%80%94%20The%20Hamilton%20County%20Court,legal%20in%20Ohio%2C%20effective%20immediately.

[7] Ala. Code §§ 26-23H-6(a),13A-5-6 (imposing class A felony subject to life imprisonment or a sentence up to 99 years); Tex. Health & Safety Code Ann. § 170A.004 ; Tex. Penal Code Ann. § 12.32 (imposing first degree felony subject to 5 to 99 years or life and a fine up to $10,000); La. Stat. Ann. § 14:87.7(C) (imposing a sentence of 1 to 10 years and fines from $10,000-$100,000); Ark. Code Ann. § 5-61-404(b) (imposing up to a 10 year prison sentence and $100,000 penalty).

[8] Laura Huss, Farah Diaz-Tello, & Goleen Samari, Self-Care, Criminalized: August 2022 Preliminary Findings, 1 n. 4 (Aug. 2022),https://www.ifwhenhow.org/resources/self-care-criminalized-preliminary-findings/. [hereinafter

If/When/How, Self-Care, Criminalized]. Several states have repealed criminal laws punishing self-managed abortions. However, Nevada still criminalizes SMA after 24 weeks pregnancy. Nev. Rev. Stat. Ann. § 200.220.

[9] *See* Center for Reproductive Rights et al. Report to Human Rights Committee, Retrogression in U.S. Reproductive Rights and the Ongoing Fight for Reproductive Autonomy, Section II.2.c (discussing denial of standard medical care endangering people's lives and health resulting from Texas criminal abortion ban).

[10] Society of Family Planning, #WeCount Report, 6, June 15, 2023, https://societyfp.org/wp-content/uploads/2023/06/WeCountReport_6.12.23.pdf [hereinafter *#WeCount Report*].

[11] *Id.*

[12] *Id*. at 7.

[13] *Guttmacher Launches New Research Initiative to Track Monthly State Abortion Occurrence in the United States*, GUTTMACHER INST. (Sept. 7, 2023), https://www.guttmacher.org/news-release/2023/guttmacher-launches-new-research-initiative-track-monthly-state-abortion.

[14] *Id.* (stating that, in the first 6 months of 2023, "abortion was banned or unavailable in 14 states" where 113,630 abortions were performed in the first 6 months of 2020); *#WeCount Report, supra* note 10, at 3, 7, tbl.1 (stating that, in the 9 months following *Dobbs*, there was a 100% decrease in abortions in clinical settings corresponding to an estimated 65,920 fewer abortions).

[15] *#WeCount Report, supra* note 10, at 8.

[16] *Id.*

[17] *Id.*

[18] Michelle Oberman & Lisa Soleymani Lehmann, *Doctors' Duty to Provide Abortion Information,* 10 J LAW & BIOSCIENCES (forthcoming 2023) (manuscript at 7-10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4430194.

[19] The Alabama Attorney General has stated that he is looking into conspiracy and accomplice liability theories to prosecute health care providers and funds that assist people in accessing legal out-of-state abortions, and the Idaho Attorney General issued an opinion suggesting that legal restrictions on "assisting" an abortion included referrals out of state. Lawsuits have been brought to prevent these prosecutions. Mary Anne Pazanowski, *Abortion 'Helpers' Sue Alabama Over Threatened Prosecution*, BLOOMBERG LAW (July 31, 2023), https://news.bloomberglaw.com/litigation/abortion-helpers-sue-alabama-over-threatened-prosecution; Julie Luchetta, *Federal judge blocks Attorney General from prosecuting Idaho providers for out-of-state abortion referrals*, BOISE STATE PUBLIC RADIO (Aug. 2, 2023), https://www.boisestatepublicradio.org/politics-government/2023-08-02/idaho-abortion-attorney-general-labrador-planned-parenthood.

[20] *If/When/How, Self-Care, Criminalized, supra* note 8, at, 2.

[21] Pregnancy Justice, Confronting Pregnancy Criminalization, 9, July 2022, https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/202211-PJ-Toolkit-Update-2.pdf [hereinafter *Pregnancy Justice, Confronting Pregnancy Criminalization*].

[22] *Id.*

[23] Nev. Rev. Stat. § 200.220 (prohibiting taking, using, or submitting to any means with the intent to terminate a pregnancy after 24 weeks of pregnancy); Pregnancy Justice, When Fetuses Gain Personhood, 13, Aug. 17, 2023, https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-personhood-with-appendix-UPDATED-1.pdf [hereinafter *Pregnancy Justice, When Fetuses Gain Personhood*]; Ex parte Ankrom, 152 So. 3d 397, 429 (Ala. 2013); State v. Green, 474 P.3d 886 at 893 (Okla. Crim. App. 2020); Whitner v. State, 492 S.E.2d 777, 781-782 (S.C. 1997).

[24] Farah Diaz-Tello, Melissa Mikesell, & Jill E. Adams, Roe's Unfinished Promise, 19, 2022, https://www.ifwhenhow.org/download/?key=XpBzIyAguykWnk32raFjX28RDycRiCHNDUx5tWmkJe2zr1tdJB8WitpkmyzyMMdn [hereinafter *Roe's Unfinished Promise*]. Offenses include mishandling of human remains, concealment of a birth, and practicing medicine without a license. *Id.* at 6, 12.

[25] *Pregnancy Justice, Confronting Pregnancy Criminalization*, *supra* note 21, at 23.

[26] *If/When/How, Self-Care, Criminalized, supra* note 8, at 4.

[27] *Id.* at 3.

[28] World Health Organization, Abortion Care Guideline, Section 2.2.1, 24-25, Mar. 8, 2022, https://apps.who.int/iris/rest/bitstreams/1394380/retrieve.

[29] *Id.* at 102.

[30] *Pregnancy Justice, Confronting Pregnancy Criminalization*, *supra* note 21, at 5, 45, 51.

[31] *Id.* at 5; *If/When/How, Self-Care, Criminalized, supra* note 8, at 3.

[32] Pregnancy Justice, Who Do Fetal Homicide Laws Protect?, 1, June 16, 2023, https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-homicide-brief-with-appendix-UPDATED.pdf [hereinafter *Pregnancy Justice, Who Do Fetal Homicide Laws Protect?*].

[33] *Id.* at 2-3.

[34] *Id.*

[35] Cynthia Soohoo, *An Embryo is Not a Person: Rejecting Prenatal Personhood for a More Complex View of Fetal Life,* 14 CONLAWNOW 81, 103-106 (2023) (noting that six states–Arizona, Georgia, Kansas, Kentucky, Missouri, and Pennsylvania–have general personhood provisions). In addition, other states including Alabama, Arkansas, Montana, Tennessee, and Utah have adopted personhood public policy statements or legislative findings. *See Pregnancy Justice, When Fetuses Gain Personhood*, *supra* note 23 at 4-5.

[36] *Pregnancy Justice, Who Do Fetal Homicide Laws Protect?*, *supra* note 32 at 1.

[37] For instance, two California women were prosecuted for stillbirths even though the California statute authorizing murder charges for the unlawful killing of a fetus has an exception for acts "solicited, aided or abetted, or consented to by the mother of the fetus." Cal. Penal Code § 187(b)(3); *Murder Charge Against Chelsea Becker for Experiencing a Stillbirth Is Dismissed*, PREGNANCY JUSTICE (May 20, 2021), https://www.pregnancyjusticeus.org/murder-charge-against-chelsea-becker-for-experiencing-a-stillbirth-is-dismissed/; *After Four Long Years in Prison, Adora Perez's Murder Charge for Stillbirth Is Dropped*, PREGNANCY JUSTICE (May 9, 2021), https://www.pregnancyjusticeus.org/adora-perez-case-dismissed/.

[38] Utah Code Ann. § 76-5-201(3)(b) & (3)(c); 21 Okla. Stat. Ann. tit. 21, § 691; Mo. Ann. Stat. § 1.205(4) (creating an exception for a pregnant person for "indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.")

[39] Oklahoma excludes pregnant people from its fetal homicide law "unless the mother has committed a crime that caused the death of the unborn child." Okla. Stat. Ann. tit. 21, § 691. Utah provides an exception to its fetal homicide law if an abortion is either "caused by a criminally negligent act or reckless act of the woman" or "not caused by an intentional or knowing act of the woman." Utah Code Ann. § 76-5-201(3)(c).

[40] *Pregnancy Justice, Who Do Fetal Homicide Laws Protect?*, *supra* note 32 at 4-5.

[41] Ark. Code Ann. § 5-1-102(13)(B(ii); Ind. Code Ann. § 35-42-1-6.5; Miss. Code Ann. § 97-3-37(3); Mo. Ann. Stat. § 1.205; Okla. Stat. Ann. tit. 21, § 691(C)(1); Tenn. Code Ann. § 39-13-214(c); Tex. Penal Code Ann. § 19.06(2); W. Va. Code Ann. § 61-2-30(d)(1).

[42] *Roe's Unfinished Promise*, *supra* note 24, at 19.

[43] Sarah Mervosh, *Alabama Woman Who Was Shot While Pregnant Is Charged in Fetus's Death*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/pregnant-woman-shot-marshae-jones.html.

[44] Ala. Code § 13A-6-1(d)(1).

[45] Sarah Mervosh, *supra* note 43.

[46] Giulia Heyward & Sophie Kasakove, *Texas Will Dismiss Murder Charge Against Woman Connected to 'Self-Induced Abortion'*, N.Y. TIMES (Apr. 10, 2022), https://www.nytimes.com/2022/04/10/us/texas-self-induced-abortion-charge-dismissed.html.

[47] *Id.;* Farah Stockman, *Manslaughter Charge Dropped Against Alabama Woman Who Was Shot While Pregnant*, N.Y. TIMES (July 3, 2019), https://www.nytimes.com/2019/07/03/us/charges-dropped-alabama-woman-pregnant.html.

[48] I*f/When/How, Self-Care, Criminalized, supra* note 8, at 2-3.

[49] *Pregnancy Justice, Confronting Pregnancy Criminalization*, *supra* note 21, at 25; Daniella Silva, *Anna Yocca, Tennessee Woman in Coat-Hanger Attempted Abortion Case, Released From Jail a Year Later*, NBC NEWS (Jan. 11, 2017),

https://www.nbcnews.com/news/us-news/anna-yocca-tennessee-woman-coat-hanger-attempted-abortion-case-released-n705416.

[50] Michael Levenson, *Nebraska Teen Who Used Pills to End a Pregnancy Gets 90 Days in Jail,* N.Y. TIMES (July 7, 2023), https://www.nytimes.com/2023/07/20/us/celeste-burgess-abortion-pill-nebraska.html

[51] *Id.*

[52] *Pregnancy Justice, Confronting Pregnancy Criminalization*, *supra* note 21, at 20 n. 118, 42 n. 254; Pregnancy Justice, Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women (revised June 2021), https://www.pregnancyjusticeus.org/wp-content/uploads/2023/03/Medical-and-Public-Health-Group-Statements-Opposing-Prosecution-and-Punishment-of-Pregnant-Women.pdf.

[53] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/65/255 (Aug. 6, 2010), ¶¶ 18, 49, 76.

[54] Gregory Yee, *California Judge Overturns 11-year Prison Term for Woman Whose Baby was Stillborn,* L.A. TIMES (Mar. 18, 2022), https://www.latimes.com/california/story/2022-03-18/california-judge-overturns-conviction-woman-whose-baby-was-stillborn.

[55] *Attorney General Bonta: California Law Does Not Criminalize Pregnancy Loss,* CAL. DEP'T OF JUST. (*Jan. 6, 2022),* https://oag.ca.gov/news/press-releases/attorney-general-bonta-california-law-does-not-criminalize-pregnancy-loss.

[56] Gregory Yee, *supra* note 54.

[57] *Id.*; After Four Long Years In Prison, Adora Perez's Murder Charge for Stillbirth is Dismissed, Pregnancy Justice (May 9, 2022), https://www.nationaladvocatesforpregnantwomen.org/adora-perez-case-dismissed/.

[58] Mo. Ann. Stat. § 1.205(4).

[59] *Pregnancy Justice, Confronting Pregnancy Criminalization*, *supra* note 21, at 5 nn. 10-12.

[60] *Id.* at 5 nn. 13-14; Arms v. State, 471 S.W.3d 637 (2015).

[61] Caroline Kitchener and Ellen Francis, *Talk of Prosecuting Women for Abortion Pills Roils Anti Abortion Movement,* WASH. POST (Jan. 11, 2023), https://www.washingtonpost.com/nation/2023/01/11/alabama-abortion-pills-prosecution/.

[62] *Pregnancy Justice, When Fetuses Gain Personhood*, *supra* note 23 at 13.

[63] Tenn. Code Ann. § 39-13-107(c)(2) (2014) (effective until July 1, 2016).

[64] *Pregnancy Justice, Confronting Pregnancy Criminalization*, *supra* note 21, at 7, 42; SisterReach, Ibis Reproductive Health, & Pregnancy Justice (f/k/a National Advocates for Pregnant Women), Tennessee's Fetal Assault Law: Understanding Its Impact on Marginalized Women, 4, May 9, 2022, https://www.pregnancyjusticeus.org/wp-content/uploads/2020/12/SisterReachFinalFetalAssaultReport_SR-FINAL-1-1.pdf.

[65] *Pregnancy Justice, Confronting Pregnancy Criminalization*, *supra* note 21, at 7, 42.

[66] *Substance Use During Pregnancy,* GUTTMACHER INST. (July 1, 2023), https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy.

[67] *Pregnancy Justice, Confronting Pregnancy Criminalization*, *supra* note 21, at 55.; Phoebe Petrovic, *Policing Pregnancy: Wisconsin's 'Fetal Protection' Law Forces Women into Treatment or Jail,* WIS. WATCH (Dec. 14, 2022), https://pbswisconsin.org/news-item/policing-pregnancy-wisconsins-fetal-protection-law-forces-women-into-treatment-or-jail/.

[68] *Id.*

[69] *Id.*

[70] A/65/255, ¶¶ 32-33 (2010).

[71] Report of the Working Group on Arbitrary Detention, A/HRC/30/36, ¶¶ 58-59 (2015).

[72] Report of the Working Group on Arbitrary Detention on its visit to the United States of America, A/HRC/36/37/Add.2, ¶ 74 (2017).

[73] *See* CCPR/C/SLV/CO/7, ¶¶ 15, 16 (El Salvador 2018), (expressing concern that "women treated in public hospitals are being reported by medical and administrative staff for the offence of abortion" and stating that the

professional secrecy of medical staff and patient confidentiality must be observed); Committee on Economic, Social and Cultural Rights, Concluding observations on the combined third, fourth and fifth periodic reports of El Salvador, E/C.12/SLV/CO/3-5, ¶ 22 (El Salvador 2014), (expressing concern that health systems reported women suspected of having an abortion and urging state to provide quality health care for unsafe abortions "rather than focusing on criminal prosecution"); Convention on the Elimination of All Forms of Discrimination against Women, Concluding observations on the combined eighth and ninth periodic reports of El Salvador, CEDAW/C/SLV/CO/8-9, ¶¶ 38(b), 39 (El Salvador 2017), (expressing concern over reporting of women to authorities by health personnel who fear punishment and recommending that the state ensure that "professional secrecy for all health personnel and confidentiality for patients are guaranteed"); Working Group on Arbitrary Detention, A/HRC/WGAD/2019/68, ¶ 114 (El Salvador 2020), (noting that criminal abortion bans "[lead] to the exercise of official police duties and the provision of health services in a manner that violates the rights enshrined in the {ICCPR} and the [UDHR]").

[74] Interim Report of Special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/66/254, ¶ 30 (2011), ("Laws must not require health-care personnel to report women for abortion-related care to law enforcement or judicial authorities"); *See* Manuela et. al. v. El Salvador, Inter-Am Ct. of HR, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 441, ¶¶ 224, 225 (November 2, 2021), (holding that in cases of obstetric emergency a physician's obligation to respect patient confidentiality must be given priority over reporting obligations).

[75] *See* Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, A/HRC/22/53, ¶ 50 (2013); Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, A/HRC/31/57, ¶ 44 (2016), ("The practice of extracting, for prosecution purposes, confessions from women seeking emergency medical care as a result of illegal abortion . . . amounts to torture or ill-treatment."); Committee Against Torture, Conclusions and recommendations of the Committee against Torture, CAT/C/CR/32/5, ¶¶ 6(j), 7(m) (Chile 2004), (recommending that Chile end the practice of extracting confessions from women seeking emergency medical care after illegal abortion).

[76] Pregnancy Justice, Confronting Pregnancy Criminalization, *supra* note 21, at 42, n. 252-253.

[77] World Health Organization, *supra* note 28, Section 2.2.1, at 24–25, 80.

[78] Working Group on Discrimination Against Women and Girls, Women's and Girl's Sexual and Reproductive Health Rights in Crisis, A/HRC/47/38, ¶ 67 (2021).

[79] Pregnancy Justice, Confronting Pregnancy Criminalization, *supra* note 21, at 52, n. 313-16.

[80] *If/When/How, Self-Care, Criminalized, supra* note 8, at 3.

[81] Pregnancy Justice, Confronting Criminalization of Pregnancy, *supra* note 21, at 37, n. 217.

[82] *Id.* at 39; Office for Civil Rights, U.S. Department of Health & Human Services, HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html

[83] *Id*. at. 37.

[84] Sarah C. M. Roberts, Claudia Zaugg, and Daniel Grossman, Health Care Provider Reporting Practices Related To Self-Managed Abortion, 23 BMC WOMEN'S HEALTH 136, Mar. 27, 2023, manuscript at 2, https://doi.org/10.1186/s12905-023-02266-7

[85] American Public Health Association, *Decriminalization of and Support for Self-Managed Abortion*, Policy Number 20217 (October 26, 2021).

[86] *If/When/How, Self-Care, Criminalized, supra* note 8, at 3.

[87] *Substance Use During Pregnancy,* GUTTMACHER INST. (July 1, 2023), https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy.

[88] Pregnancy Justice, Confronting Criminalization of Pregnancy, *supra* note 21, at 38.

[89] *Id.*

[90] *Id.* ¶¶ 37, 39.

[91] CEDAW/C/GC/33, ¶ 26 ("Stereotyping distorts perceptions and results in decisions based on preconceived beliefs and myths rather than relevant facts. Often, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes."), ¶ 27

("Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials") (2015).

[92] *Id.* at ¶ 8 ("discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women" including race, ethnicity, indigenous or minority status, socio-economic status); *Cf.* Working Group on Arbitrary Detention, Opinion No. 68/2019 concerning Sara del Rosario Rogel García, Berta Margarita Arana Hernández and Evelyn Beatriz Hernández Cruz (El Salvador), A/HRC/WGAD/2019/68, ¶ 100 (2020) (noting that the vast majority of women criminalized for suffering obstetric emergencies were living in poverty).

[93] Human Rights Committee, Concluding observations by the Human Rights Committee, CCPR/C/ARG/CO/4, ¶13 (Argentina 2010), (expressing concern over inconsistency in interpretation of criminal abortion provisions); CCPR/C/SLV/CO/7, ¶ 15 (El Salvador 2018), (noting the disproportionate sentences of 40 years imprisonment imposed on women seeking abortions or suffering miscarriages). *See* CEDAW/C/SLV/CO/8-9, ¶ 38(a), 39 (El Salvador 2017), (expressing concern over long periods in pretrial detention and disproportionate criminal penalties applied to women seeking abortions or suffering miscarriages); E/C.12/SLV/CO/3-5, ¶ 22 (El Salvador 2014), (expressing concern that disproportionate criminal penalties have been imposed on women suspected of having an abortion with no regard for due process).

[94] A/HRC/47/38, ¶ 67 (2021) (describing stereotypes about Black "maternal unfitness.").

[95] Centers for Disease Control and Prevention, Pregnancy Mortality Surveillance System: Pregnancy-Related Deaths by Race/Ethnicity, (April 13, 2022), https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm#:~:text=39.9%20deaths%20per%20100%2C000%20live,among%20non%2DHispanic%20Asian%20persons., (noting that pregnancy-related mortality rate for Non-Hispanic Black women is almost three times higher than for Non-Hispanic White women); Guttmacher Institute, Maternal Mortality Review Committees, (September 1, 2023), (noting that "Indigenous and Black women are dying at two to three times the rate of White women"), https://www.guttmacher.org/state-policy/explore/maternal-mortality-review-committees

[96] U.S. Dept. of Health and Human Services, Office of Minority Health, Infant Mortality and American Indians/Native Americans (Jul. 9, 2021), https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=38, (American Indian/Alaska Natives have almost twice the infant mortality rate as non-Hispanic whites); Dept. of Health and Human Services, Office of Minority Health, Infant Mortality and African Americans Indians/Native Americans (Jul. 8, 2021), https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=23, (Non-Hispanic Blacks/African Americans have an infant mortality rate 2.4 times higher than that of non-Hispanic whites).

[97] Elizabeth Hinton, LeShae Henderson, and Cindy Reed, An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System, VERA INST. OF JUSTICE, May, 2018, at 2 ¶ 2; Prison Policy Initiative, Policing Women: Race And Gender Disparities in Police Stops, Searches, and Use of Force, May 14, 2019; Leah Iman Aniefuna, M. Amari Aniefuna & Jason M. Williams, Creating and Undoing Legacies of Resilience: Black Women as Martyrs in the Black Community Under Oppressive Social Control, WOMEN & CRIMINAL JUSTICE (May 5, 2020) at 16. For more information about the racially discriminatory over-surveillance of minority families by the child welfare system please see the reports submitted to Human Rights Committee by the ACLU and by Children's Rights and JMACforFamilies.

[98] Pregnancy Justice, Confronting Criminalization of Pregnancy, *supra* note 21, at 20, n. 124.

[99] *If/When/How, Self-Care, Criminalized, supra* note 8, at 2, n. 6, 7.

[100] *Id.* at 3.

[101] Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America, A/HRC/38/33/Add.1, ¶ 56 (2018).

[102] Committee on the Elimination of Racial Discrimination, Concluding observations on the combined tenth to twelfth reports of the United States of America, CERD/C/USA/CO/10-12, ¶¶ 35-36, (expressing concern about the disparate impact of U.S. legislation and other measures criminalizing abortion and recommending that the U.S. "take all measures necessary to mitigate the risks faced by women seeking an abortion and by health providers assisting them, and to ensure that they are not subjected to criminal penalties."), ¶ 44 (recognizing

disproportionate surveillance of families of racial and ethnic minorities for purposes of child welfare investigations.") (2022).

[103] *See* Manuela v. El Salvador, Inter-Am Ct. of HR (November 2, 2021), ¶ 146, 160, (finding that prejudices and negative gender stereotyping violated Manuela's rights to be tried by an impartial court, right to a presumption of innocence, and right to equality under the law under Articles 1(1), 8 and 24 of the American Convention on Human Rights).

[104] *If/When/How, Self-Care, Criminalized, supra* note 8, at 4.

[105] *Id.* at 3.

[106] Pregnancy Justice, Confronting Criminalization of Pregnancy, *supra* note 21, at 20, n. 127.

[107] *Id.* at 20-21, n. 129-130.

[108] *Id.* at 46.

[109] *Id.* at 27, n. 64-65.

[110] *See* Josephine Taylor, Sajeel A. Shah, Nikolas P. Lemos, *The Criminalisation Of Miscarriage Associated With Illicit Substance Consumption Whilst Pregnant*, 63(3), MED. SCI. LAW, (2022), www.ncbi.nlm.nih.gov/pmc/articles/PMC10262324/#:~:text=In%20October%202021%2C%20the%20state,to%20four%20years%20in%20prison. (noting the lack of scientific research on impact of methamphetamine and cannabis on fetal development and a study finding that "the effects of poverty, poor diet, and tobacco use . . . to be as harmful or more harmful than drug use itself.")

[111] *Cf.* Manuela v. El Salvador, Inter-Am Ct. of HR (November 2, 2021),¶ 152 ("[R]easoning of the judgment did not establish the causal nexus between Manuela's actions and the death of the newborn with factual evidence [...] This absence of reasoning was substituted by stereotypes and preconceived ideas, rather than by [reliable] evidence"); ¶ 144, (Investigator had "preconceived ideas with regard to the role of women and maternity"), ¶ 146, (presuming Manuela's guilt and making little effort to investigate issues like Manuela's health at the time of the delivery that could have disproved her guilt).

[112] Working Group on Arbitrary Detention, A/HRC/WGAD/2019/68, ¶ 102 (In these cases, "women normally suffer systematic violations of their procedural rights owing to a lack of effective legal assistance during interrogations and the trial, the irregular collection of evidence and the assessment of evidence from a stereotypical perspective of women's role in society.")

[113] Pregnancy Justice, *Oklahoma Prosecution and Conviction go a Woman for Experiencing a Miscarriage is Shameful and Dangerous*, October 13, 2021, https://www.pregnancyjusticeus.org/oklahoma-prosecution-and-conviction-of-a-woman-for-experiencing-a-miscarriage-is-shameful-and-dangerous/; Trial transcript on file with Pregnancy Justice.

[114] Cecelia Nowell, *Adora Perez is free*, THE CUT, May 12, 2022, https://www.thecut.com/2022/05/adora-perezs-murder-charges-over-stillbirth-are-dropped.html; Gregory Yee, *supra* note 54; *After Four Long Years In Prison, Adora Perez's Murder Charge for Stillbirth is Dismissed*, PREGNANCY JUSTICE (May 9, 2022), https://www.nationaladvocatesforpregnantwomen.org/adora-perez-case-dismissed/. Transcript on file with Pregnancy Justice.

[115] Fifth periodic report submitted by the United States of America, CCPR/C/USA/5, ¶ 17-21 (2021).

[116] *Id.* ¶ 32.

[117] Annex B to the Fifth periodic report submitted by the United States of America, CCPR/C/USA/5, ¶ 15(c)-16 (United States 2021).

[118] CEDAW/C/SLV/CO/8-9, ¶ 38-39(a) (El Salvador 2017), (expressing concern about absolute criminalization of abortion and recommending a moratorium on enforcement and review of detention of women on abortion-related offenses to ensure their release and uphold the presumption of innocence and due process); CCPR/C/SLV/CO/7, ¶ 16 (El Salvador 2018).