

**Racial Coercion and Control Over Reproductive Decision-Making and Families  
Shadow Report to the UN Committee on the Elimination of Racial Discrimination  
for the Tenth Periodic Review of the United States<sup>1</sup>**

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July 14, 2022

Introduction

In the United States, gender and the capacity to become pregnant intersect with race to create distinct forms of racial discrimination and human rights violations in the context of pregnancy, childbirth and parenting.<sup>2</sup> This report focuses on three forms of state violence that disproportionately impact Black, Indigenous and other communities of color: (1) the criminalization of women and birthing people who are suspected of self-managed abortions or prosecuted for having miscarriages or stillbirths, (2) the improper separation of children from their families by state child protective services and (3) obstetric violence in childbirth settings.

The CERD Committee has emphasized the importance of addressing unique forms of racial discrimination that result when gender intersects with race.<sup>3</sup> In its prior reviews of the United States, the Committee consistently raised concerns about wide racial disparities in sexual and reproductive health,<sup>4</sup> the disproportionate arrest and incarceration of “members of racial and ethnic minorities, particularly African Americans”<sup>5</sup> and the separation of indigenous children and children from ethnic and racial minorities from their families by the criminal justice and family regulation systems.<sup>6</sup> We encourage the

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<sup>2</sup> CERD General recommendation No. 34 adopted by the Committee 4, CERD/C/GC/34 (2011); CERD, General recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 2, from A/60/18, pp. 98-108 (2005). *See also* International Convention on the Elimination of All Forms of Racial Discrimination, Concluding observations on the combined fourth to eighth reports of Thailand, 3, CERD/C/THA/CO/4-8 (2022) (recommending “the State party take all measures necessary to combat the intersecting and multiple forms of discrimination faced by women, [and] children.”).

<sup>3</sup> CERD General Recommendation 25 on gender -related dimensions of racial discrimination (2000), para. 2, 3.

<sup>4</sup> Concluding observations of the Committee on the Elimination of Racial Discrimination, CERD/C/USA/6, May 8, 2008, para. 33; Concluding observations on the combined seventh to ninth periodic reports of the United States of America, CERD/C/USA/CO/7-9, Sept. 24, 2014, para. 15.

<sup>5</sup> CERD Committee, Concluding observations on the combined seventh to ninth periodic reports of the United States of America, CERD/C/USA/CO/7-9 (Sept. 25, 2014), para. 20.

<sup>6</sup> *Id.*, paras. 20, 24.

Committee to explicitly recognize how these issues intersect and take a strong position opposing the racially disproportionate prosecution of pregnant people for abortions and obstetric emergencies, separation of families and mistreatment in childbirth settings.

The United States is a state-based federation in which the federal government has limited jurisdiction. Jurisdiction over family relations and crimes taking place in a state lie at the state level, and state authority to pass such laws are only limited by the U.S. or state constitutional protections or superseding federal law. Since the 1973 Supreme Court case, *Roe v. Wade*, a pregnant person's right to terminate a pregnancy before fetal viability was recognized as a federal constitutional right in the United States, limiting states' ability to make abortion illegal. The recent Supreme Court case *Dobbs v. Jackson Women's Health Organization* has overruled *Roe v. Wade* and as a result, many states have already enacted laws that criminalize the provision of abortion care.

## **I. Criminalization: Pregnant people are being subjected to racially-discriminatory prosecutions for abortions and pregnancy losses**

The right to seek an abortion was legal across the United States since the Supreme Court decided *Roe v. Wade* in 1973, creating a constitutional framework for the protection of reproductive privacy. But despite this legalization, from 1973 to 2020, there were approximately 1,600 arrests and other deprivations of liberty in relation to pregnancy.<sup>7</sup> More than four in five of these (1,300) occurred in the 15 year period 2005 and 2020 alone.<sup>8</sup> These arrests emerge under a variety of legal theories, many of them from improper application of state criminal laws by prosecutors.<sup>9</sup> Using – and frequently overstepping – their wide discretion to decide whom to prosecute and what crimes to charge, local prosecutors have used laws initially designed to protect pregnant people from third-party criminal acts to criminally charge them with causing the death of a fetus when they end a pregnancy or experience a pregnancy loss.<sup>10</sup>

This distortion of the law has not only been used for intended pregnancy outcomes like abortion, but also for unintended pregnancy outcomes like miscarriages or stillbirths.<sup>11</sup> For example, after experiencing a stillbirth in 2017, Adora Perez was charged with murder in California courts.<sup>12</sup> The King County prosecutor filed the charge despite the fact that the homicide statute explicitly prohibits charging people for crimes related to their own pregnancies,

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<sup>7</sup> National Advocates for Pregnant Women, *Arrests and Other Deprivations of Liberty of Pregnant Women, 1973-2020*, Arrests and Prosecutions of Pregnant Women, 1973-2020 (Sept. 2021), <https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/Arrests-of-Pregnant-Women-1973-2020-Fact-Sheet.pdf>, Amicus Brief of NAPW et al. in *Dobbs v. Jackson*, No. 19-1392, at 2, [https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/Final-20210921172824167\\_19-1392-Brief.pdf](https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/Final-20210921172824167_19-1392-Brief.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> Farah Diaz-Tello, Melissa Mikesell, and Jill E. Adams, *Roe's Unfinished Promise: Decriminalizing Abortion Once and for All* (2017) at 13-20, <https://www.ifwhenhow.org/resources/roes-unfinished-promise/> <https://www.ifwhenhow.org/resources/roes-unfinished-promise-2019-update/>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 14

<sup>12</sup> Gregory Yee, *California Judge Overturns 11-year Prison Term for Woman Whose Baby was Stillborn*, Los Angeles Times, Mar. 18, 2022, <https://www.latimes.com/california/story/2022-03-18/california-judge-overturns-conviction-woman-whose-baby-was-stillborn>

a fact since publicly reiterated by the California Office of the Attorney General.<sup>13</sup> Facing a possible life sentence, Perez was advised by her public defender to plead no contest to fetal manslaughter, a crime that does not exist under California law. She was sentenced to 11 years in prison.<sup>14</sup> After years of litigation complicated by the fact that defendants who plead guilty lose most avenues for appeal, her sentence was overturned and she was released, having served four years in prison.<sup>15</sup> A similar prosecutorial overreach occurred in Alabama in 2019, when a woman named Marsha Jones suffered a miscarriage as a result of being shot in the stomach. Prosecutors argued that she was liable for her pregnancy loss under an accomplice liability theory generally applied to co-defendants in a crime because she instigated the dispute; the shooter's charges were dismissed.<sup>16</sup> As in California, Alabama's fetal homicide law prohibits charges against the pregnant individual. Unfortunately, the secretive and unilateral nature of grand jury proceedings leaves prosecutors to self-police, with no defense attorneys to challenge junk science or judges to correct misstatements of the law. These prosecutions have taken place despite the lack of legal authorization and constitutional protection for the right to end a pregnancy. The Supreme Court's recent decision overturning *Roe v. Wade* allows states to pass criminal laws banning the provision of abortion care, which will lead to an increase in prosecutions.

In its 2014 Concluding Observations, the Committee recognized that racial disparities in arrest rates are “exacerbated by prosecutorial discretion.”<sup>17</sup> One study found that in Florida, where Black people constitute only 15% of the population, they accounted for 75% of arrests related to pregnancy.<sup>18</sup> In South Carolina, where Black people constitute 30% of the population, they accounted for 74% of arrests related to pregnancy.<sup>19</sup>

Prosecutions of people for suspected abortions or adverse pregnancy outcomes often reflect subjective views about the pregnant person's behavior and attitude towards their pregnancy. In the United States, these attitudes often are influenced by negative stereotypes about Black and Indigenous maternal unfitness (these stereotypes are discussed *infra* Section

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<sup>13</sup> California Dep't of Justice, Press Release, *Attorney General Bonta: California Law Does Not Criminalize Pregnancy Loss*, January 6, 2022, <https://oag.ca.gov/news/press-releases/attorney-general-bonta-california-law-does-not-criminalize-pregnancy-loss>

<sup>14</sup> *Id.* NAPW, *After Four Long Years In Prison, Adora Perez's Murder Charge for Stillbirth is Dismissed*, May 9, 2022, <https://www.nationaladvocatesforpregnantwomen.org/adora-perez-case-dismissed/>.

<sup>15</sup> *Id.*

<sup>16</sup> Carol Robinson, *Alabama Woman Loses Unborn Child After Being Shot, Gets Arrested; Shooter Goes Free*, Al.com, June 27, 2019, <https://www.al.com/news/birmingham/2019/06/woman-indicted-in-shooting-death-of-her-unborn-child-charges-against-shooter-dismissed.html>

<sup>17</sup> UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, CERD/C/USA/CO/7-9, 25 Sept. 2014, ¶ 20, available at <https://undocs.org/CERD/C/USA/CO/7-9>. See UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, 2005, ¶ 20, available at: <https://www.refworld.org/docid/48abd56dd.html> (calling on states to take efforts to address racial profiling).

<sup>18</sup> Lynn M. Paltrow, Jeanne Flavin; *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 (2), *J Health Polit Policy Law*, 299, at 311 (Apr. 2013), <https://doi.org/10.1215/03616878-1966324>.

<sup>19</sup> *Id.* at 312.

II.A and stereotypes about other minority communities.<sup>20</sup> The interplay of racist stereotypes and pregnancy criminalization is typified by actions of the state of Indiana, which to date has prosecuted two women for pregnancy loss, both of whom are Asian. Bei Bei Shuai, a Chinese immigrant, was charged with homicide after surviving a suicide attempt while pregnant and giving birth to an infant who died. Purvi Patel, an Indian-American woman, was charged with feticide and child neglect after allegedly obtaining medication on the internet to end her pregnancy. Commentators have argued that these prosecutions reflect racist stereotypes promoted by abortion opponents that Asian cultures are prone to child neglect and abortion.<sup>21</sup> These stereotypes have informed and been fueled by efforts to pass bans on sex-selective abortion in many states, despite a lack of evidence that such a practice exists in the United States within any culture.<sup>22</sup> For instance, in Indiana, bill sponsors pushing for a sex-selection ban in 2015 argued it was necessary in part to protect from “Chinese family values” that “prefer boys over girls.”<sup>23</sup>

Birthing people of color face also greater risk of criminalization relative to white people because they are more likely to have adverse birth outcomes. As a result of interpersonal and structural racism, Black and Indigenous women experience higher maternal mortality rates<sup>24</sup> and their pregnancies are more likely to result in preterm births, low birth weights and infant mortality<sup>25</sup> compared to white women. Black and minority communities also are more likely to

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<sup>20</sup> UN Working Group on Discrimination Against Women and Girls, *Women’s and Girl’s Sexual and Reproductive Health Rights in Crisis*, A/HRC/47/38, 28 Apr. 2021, ¶ 67, (accessed 12 Apr. 2022), [https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_47\\_38\\_E.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_47_38_E.pdf).

<sup>21</sup> Miriam Yeung, *How Asian American Women Became the Target of Anti-Abortion Activism*, Wash. Post, Nov. 4, 2015, <https://www.washingtonpost.com/posteverything/wp/2015/11/04/how-asian-american-women-became-the-target-of-anti-abortion-activism/>

<sup>22</sup> Guttmacher Inst., *Evidence You Can Use: Banning Abortions in Cases of Race or Sex Selection or Fetal Anomaly*, Jan. 2020, <https://www.guttmacher.org/evidence-you-can-use/banning-abortions-cases-race-or-sex-selection-or-fetal-anomaly>

<sup>23</sup> Andi TenBarge, *Bill Bans Abortions for Gender Selection, Disabilities*, Journal & Courier (Lafayette, Ind.), Feb. 18, 2020 <https://www.jconline.com/story/news/politics/2015/02/18/bill-bans-abortions-for-gender-selection-disabilities/23636089/>

<sup>24</sup> See *infra* Section III.A. Black and Indigenous women have maternal mortality rates 2-3 times that of white women. Guttmacher Inst., *Fact Sheet: Unintended Pregnancy in the United States*, Fact Sheet (Jan. 2019), <https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf>.; Centers for Disease Control and Prevention, *Pregnancy Mortality Surveillance System: Pregnancy-Related Deaths by Race/Ethnicity*, (last updated April 13, 2022), [www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html](http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html). <https://www.guttmacher.org/state-policy/explore/maternal-mortality-review-committees>

<sup>25</sup> The risk of preterm birth and low birth weight is nearly two times greater for Black mothers. Dean E. Robinson, Jessica Pearlman *State Policies, Racial Disparities, and Income Support: A Way to Address Infant Outcomes and the Persistent Black-White Gap?* 47 (2), J. Health Polit Policy Law, 2021, 255-258, (Apr. 2022), <https://doi.org/10.1215/03616878-9517205>. American Indian/Alaska Natives have almost twice the infant mortality rate as non-Hispanic whites. U.S. Dept. of Health and Human Services, Office of Minority Health, *Infant Mortality and American Indians/Native Americans* (7/9/21), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=38>. Non-Hispanic Blacks/African Americans have an infant mortality rate 2.3 times higher than that of non-Hispanic whites. Dept. of Health and Human Services, Office of Minority Health, *Infant Mortality and African Americans Indians/Native Americans* (July 8, 2021), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=23>.

experience over-policing and surveillance.<sup>26</sup> Over-surveillance and racial bias also impact health care settings. One U.S. study found that, among women seeking medical care related to pregnancy, women of color were significantly more likely to be reported to law enforcement by the very people they turned to for help.<sup>27</sup>

### **Increased Legal Peril for People Who Self-Managed Abortions**

One factor increasing the likelihood that people will be criminalized on the basis of pregnancy outcomes is the escalation in restrictions on abortion. Over 100 new state abortion restrictions were passed in the U.S. in 2021.<sup>28</sup> In 2022, in anticipation that *Roe v. Wade* will be overturned, states have passed laws that not only restrict access to abortion, but outright ban abortion from conception or early in pregnancy. These restrictions disproportionately affect Black, Indigenous, and other people of color.<sup>29</sup> These restrictions have dramatic socio-economic consequences, from widespread stigma amongst doctors and abortion providers and patients, to increased anxiety and stress for pregnant people seeking abortions, increased travel distance, lost wages due to poor local access to clinic-based care, delays in accessing reproductive medical attention, and more.<sup>30</sup>

Both history and current-day research bear out that when waves of new restrictions push pregnant people out of the formal medical system, they find ways to self-manage abortions. Self-managed abortion is any abortion that takes place outside of a formal medical setting without health care providers as intermediaries of care. It can include self-sourcing the same medications provided by clinics, herbal, or other traditional remedies, or inserting objects into the cervix.<sup>31</sup> While some people self-manage because clinic-based care is inaccessible, others may prefer to

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<sup>26</sup> Elizabeth Hinton, LeShae Henderson, and Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, (May 2018), Vera Institute of Justice, at 2 ¶ 2 <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.; Prison Policy Initiative, *Policing Women: Race And Gender Disparities in Police Stops, Searches, and Use of Force*, ( May 14, 2019), <https://www.prisonpolicy.org/blog/2019/05/14/policingwomen/>.; 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 available at <https://doi.org/10.1080/08974454.2020.1752352>

<sup>27</sup> Paltrow & Flavin, at 326–27. When white women are reported to law enforcement in the context of health care it is often the result of surveillance systems put in place to track families of color. See Khiara Bridges <https://harvardlawreview.org/2020/01/race-pregnancy-and-the-opioid-epidemic-white-privilege-and-the-criminalization-of-opioid-use-during-pregnancy/>

<sup>28</sup> Elizabeth Nash, Guttmacher Inst., *Policy Analysis: For the First Time Ever, U.S. States Adopt More Than 100 Abortion Restrictions in a Single Year*, (Oct. 20, 2021) <https://www.guttmacher.org/article/2021/10/first-time-ever-us-states-enacted-more-100-abortion-restrictions-single-year>

<sup>29</sup> Am. Coll. of Obstetricians & Gynecology, *Increasing Access to Abortion*, 136 (6), *Obstetrics and Gynecology*, 1240, (Dec. 2020), [https://journals.lww.com/greenjournal/Fulltext/2020/12000/Increasing\\_Access\\_to\\_Abortion\\_\\_ACOG\\_Committee.38.aspx](https://journals.lww.com/greenjournal/Fulltext/2020/12000/Increasing_Access_to_Abortion__ACOG_Committee.38.aspx).

<sup>30</sup> *Id.*

<sup>31</sup> Heidi Moseson, Stephanie Herold, Sofia Filippa, Jill Barr-Walker, Sarah E. Baum, and Caitlin Gerds, *Self-Managed Abortion: A Systematic Scoping Review*. 63, *Best Practice & Research Clinical Obstetrics & Gynaecology*, 87, at 3 ¶ 68, (Feb. 2020), [https://escholarship.org/content/qt1mj5832t/qt1mj5832t\\_noSplash\\_a14d60ca920a7e42023512fd0f96c275.pdf](https://escholarship.org/content/qt1mj5832t/qt1mj5832t_noSplash_a14d60ca920a7e42023512fd0f96c275.pdf).

self-manage for a more private experience in familiar home surroundings, or to keep the abortion secret from an abuser or other parties. Cost, which is driven in large part by onerous, medically unnecessary requirements imposed on providers by lawmakers, was one of the most frequently cited reasons people sought self-managed abortion in one study.<sup>32</sup> People in states with restrictive policy were more likely to seek self-managed care.<sup>33</sup> In the weeks after Texas imposed a ban on abortion after 6 gestational weeks, requests to one service providing pills increased sharply.<sup>34</sup> But while the medical risks of self-managed abortion have decreased with the advent of safe medications and feminist-led services that people can consult for free medical and other support,<sup>35</sup> people who self-manage their abortions face the possibility of criminal prosecution.

### A. Legal Theories Used to Prosecute Abortions, Miscarriages, and Stillbirths

In many states, prosecutors have prosecuted people who self-managed (or were suspected of self-managing) an abortion, regardless of state policy or laws. Currently 3 states have laws specifically imposing criminal penalties for self managing an abortion.<sup>36</sup> However, where the laws lack specificity to achieve their ends, prosecutors deliberately twist archaic laws and loopholes beyond their intended application to criminalize people who self-managed their abortions. Thirteen states retain laws criminalizing performing abortions, many of them dating back to the nineteenth century.<sup>37</sup> In recent years, these laws have been manipulated to criminalize people for having self-managed an abortion.<sup>38</sup>

Even more destructive than the use of antiquated laws penalizing abortion and self-managed abortion, however, is the repurposing of feticide and fetal harm laws to prosecute people for crimes against their own pregnancies.<sup>39</sup> Feticide laws are laws created specifically to punish causing the death of a fetus as tantamount to homicide, even though fetuses are not considered persons under the law for most purposes. Currently, thirty-eight of the fifty states

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<sup>32</sup> Abigail R A Aiken, Jennifer E. Starling, Rebecca Gomperts, *Factors Associated With Use of an Online Telemedicine Service to Access Self-managed Medical Abortion in the US*, JAMA Network Open, May 21, 2021, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2780272>

<sup>33</sup> *Id.*

<sup>34</sup> Abigail R A Aiken, Jennifer E. Starling, Rebecca Gomperts, *Research Letter: Association of Texas Senate Bill 8 With Requests for Self-managed Medication Abortion*, JAMA Network Open, Feb 25. 2022 <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789428>.

<sup>35</sup> See e.g. M+A HOTLINE, <https://www.mahotline.org/>; SASS, <https://abortionpillinfo.org/>, Repro Legal Helpline, <https://www.reprolegalhelpline.org/>,

<sup>36</sup> The three states are Nevada, Oklahoma and South Carolina. See Nev. Rev. Stat. Ann. § 200.220 (defining “[t]aking drugs to terminate pregnancy”); Okla. Stat. Ann. tit. 21, § 862 (defining “[s]ubmitting to or soliciting” abortion), S.C. Code Ann. § 44-41-80(b) (defining “soliciting unlawful abortion”).

<sup>37</sup> See Farah Diaz-Tello, Melissa Mikesell, and Jill E. Adams, If/When/How (formerly SIA Legal Team), *Roe’s Unfinished Promise: Decriminalizing Abortion Once and for All* (2017), <https://www.ifwhenhow.org/resources/roes-unfinished-promise/>; If/When/How, *Fulfilling Roe’s Promise: 2019 Update*, at 2, <https://www.ifwhenhow.org/resources/roes-unfinished-promise/> (listing 14 states). Since publication, one state, Nevada, has repealed its law, bringing the total down to 13: <https://apnews.com/article/nevada-nv-state-wire-statutes-legislation-abortion-fl82bcd5e1c34142a0c0ac56b12a76bc>

<sup>38</sup> Diaz-Tello et al, *supra* note 36.

<sup>39</sup> *Id.*

have fetal harm laws.<sup>40</sup> Some states have accomplished this by creating a separate crime for causing the death of a fetus; others have retrofitted existing homicide statutes by changing the definition of a “victim” or “person” to include a fetus.<sup>41</sup> The majority of these contain explicit protections to ensure that the pregnant person is not charged with a crime against a fetus they are carrying; however, laws in nine states lack such protections.<sup>42</sup> Of these, two states (Oklahoma and Utah), implicitly allow homicide charges against people who are pregnant for even unintended pregnancy outcomes like miscarriage or stillbirth.<sup>43</sup> Some of these laws attach liability at the point of fertilization,<sup>44</sup> opening the possibility of criminal charges at the earliest stages of pregnancy when spontaneous (and potentially inexplicable) pregnancy losses are substantially more likely to occur.

Prosecutors have also used laws that govern the disposal of human remains or forbid “abuse” of a corpse to punish people for disposing of fetal remains after a self-managed abortion.<sup>45</sup> As a result of these prosecution practices at least 60 people in the United States have been arrested for ending their pregnancies or helping others do so since 2000.<sup>46</sup> The number of prosecutions and the length prosecutors will go to find a crime to charge despite the fact that most states do not have laws criminalizing self-managed care reflects the level of general abortion stigma as well as stigma specifically related to self-managed abortion based on incorrect perceptions that there is one “preferred” or “correct” way to seek abortion care.

While prosecution for self-managed abortion has been unusual, the number of prosecutions is likely to dramatically increase as a result of the Supreme Court's overturning *Roe v. Wade* which potential permits states to criminalize seeking abortion and invites prosecutorial overreach.

## **II. Separation of Families: Pervasive Racial and Class Disparities in the Family Regulation System Disproportionately Impact Families of Color**

*“[Child protective authorities] exercise[] the same discretion to target ‘offenders’ as police and prosecutors, resulting in a system that, as one leading scholar on race, gender and the law describes, ‘systematically demolish[es] [B]lack families.’”<sup>47</sup>*

### **A. Overview & History**

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<sup>40</sup> *Id.*, at 14.

<sup>41</sup> *Id.*

<sup>42</sup> If/When/How, *supra* note 36, at 3 (listing 10 states).

<sup>43</sup> Utah Code Ann. § 76-5-201(3)(b) & (4)(b), 21 Okla. Stat. Ann. § 961.

<sup>44</sup> Cynthia Soohoo and Dana Sussman, The Threat of Murder Charges for Abortion Already Exists, *Jurist* (May 14, 2022), <https://www.jurist.org/commentary/2022/05/cynthia-soohoo-dana-sussman-abortion-criminal-charges/>

<sup>45</sup> Diaz-Tello et al., *supra* note 36.

<sup>46</sup> Research on file with If/When/How, publication forthcoming.

<sup>47</sup> Lisa Sangoi, Movement for Family Power, “*Whatever They Do, I’m Her Comfort, I’m Her Protector*”: *How the Foster System Has Become Ground Zero for the U.S. Drug War*, 6 (2020), <https://www.movementforfamilypower.org/s/MFP-Drug-War-Foster-System-Report.pdf> [hereinafter Ground Zero Report ] (citing to Dorothy Roberts, *Shattered Bonds, The Color of Child Welfare* (2003).) .

During its 2014 review of the United States, the CERD Committee expressed concern about U.S. policies that disproportionately separate Black, indigenous, and other families of color noting the “negative impact of parental incarceration on children from racial and ethnic minorities”<sup>48</sup> and the ongoing “removal of indigenous children from their families and communities through the United States child welfare system,<sup>49</sup> or what advocates are increasingly calling the family regulation system. In the United States, responsibility for child welfare primarily rests with the states.<sup>50</sup> Each state has a local child protective service agency that is empowered to investigate and intervene in cases of reported abuse or neglect.<sup>51</sup> These powers include the ability to remove children from their families and place them in foster care.<sup>52</sup>

Across the United States, there are stark racial disparities in the removal of children from their families and placement in foster care.<sup>53</sup> Recent statistics demonstrate that overrepresentation of Black children in the foster care system is a nationwide phenomenon.<sup>54</sup> In 2018, there were over 400,000 children in the foster system.<sup>55</sup> In 2018, Black children represented 14% of the United States child population but made up 23% (97,520) of the foster system population, whereas White children represented 50% of the nation’s child population and made up 44% of the foster system population.<sup>56</sup> National data estimates that 53% of Black children’s families will have been subjected to an investigation

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<sup>48</sup> CERD, Concluding observations on the combined seventh to ninth periodic reports of United States of America 10, CERD/C/USA/CO/7-9 (citing to arts. 2, 5 and 6) (2014).

<sup>49</sup> *Id.* at 11. See CERD, Concluding observations on the eighteenth to twentieth periodic reports of Australia 6, CERD/C/AUS/CO/18-20 (2017) (expressing concern that “indigenous children face a higher risk of being removed from their families.”).

<sup>50</sup> Child Welfare Information Gateway, *How the Child Welfare System Works* (2020) <https://www.childwelfare.gov/pubPDFs/cpswork.pdf>

<sup>51</sup> *Id.*

<sup>52</sup> See e.g. NYC ACS, A Parent’s Guide to Child Protective Services in New York City, [https://www1.nyc.gov/assets/acs/pdf/child\\_welfare/ACS\\_Parents\\_Guide\\_to\\_the\\_Child\\_Protective\\_Investigation.pdf](https://www1.nyc.gov/assets/acs/pdf/child_welfare/ACS_Parents_Guide_to_the_Child_Protective_Investigation.pdf)

<sup>53</sup> Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* at vi (2002); Child Welfare Information Gateway, “Racial disproportionality and disparity in child welfare,” Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau (Nov. 2016), [https://www.childwelfare.gov/pubpdfs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf); Robert B. Hill, Casey-CSSP Alliance for Racial Equity in the Child Welfare System, “Synthesis of Research on Disproportionality in Child Welfare: An Update” (2006), <https://www.aecf.org/resources/synthesis-of-research-on-disproportionality-in-child-welfare-an-update/> (In the majority of research on race and class in the child welfare system, race was indicated as the primary determinant of child protective services decisions at almost all stages of involvement); Dorothy Roberts and Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, *The Appeal*, 26 March 2018, <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/> (“Racial disparities exist at every stage of child welfare decision-making.”).

<sup>54</sup> Leah A. Hill, *Do You See What I See - Reflections on How Bias Infiltrates the New York City Family Court - The Case of the Court Ordered. Investigation*, Fordham Law School 542 (2007) (citing Robert B. Hill, Casey-CSSP Alliance for Racial Equity, *Synthesis Of Research On Disproportionality In Child Welfare: An Update* (2006)).

<sup>55</sup> Angela Olivia Burton, Esq. & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection From Family Well-Being*, 11 *Columbia J. Race & L.* 6 (2021) (citing to See Child. ’s Bureau, Admin. for Child. & Fams., U.S. Dept. Health & Hum. Servs., *The AFCARS Report 1* (2020) [hereinafter AFCARS Report], <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf>).

<sup>56</sup> *Id.* at 6 (2021)(citing , Kids Count Data Ctr., *Black Children Continue to Be Disproportionately Represented in Foster Care* (April 13, 2020), <https://datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity>).

by child welfare authorities during their childhood, as compared to 37% of all United States children.<sup>57</sup> In 2021, the foster care rate for Black children was 1.66 times their proportion of the national population, and the rate for Indigenous children was 2.84 times their proportion of the national population.<sup>58</sup>

The Committee has recognized the particular vulnerability of children of African descent rooted in the history of slavery.<sup>59</sup> Indeed in the U.S. current racial disparities reflect a history of devaluing Black families. Assertions that certain parents are “unfit” and that their childbearing is undesirable were used to support historical practices such as enslavement and forced separation of Black families and removal of Indigenous children to boarding schools to erase their cultural heritage.<sup>60</sup> These practices fueled perceptions that certain families are less deserving of support and preservation, and have shaped U.S. attitudes and policies around sterilization, contraception and childbearing, support of families, immigration, and child protection that endure to the present day.<sup>61</sup>

The Committee has also explicitly expressed concern about the “removal of indigenous children from their families and communities through the United States child welfare system.”<sup>62</sup> In the United States, the history of colonialism and separation of Indigenous families reflects a similar devaluing of Indigenous families and stereotypes about Indigenous parents.<sup>63</sup>

Ingrained social attitudes about the “unfitness” of poor, Black and Indigenous parents and the desire to impose middle class norms and white standards of behavior continue to impact how families are treated.<sup>64</sup> Perhaps more insidious, these attitudes have driven decades of policy decisions, creating and funding systems that seek to “protect children” by surveilling and punishing parents.<sup>65</sup> The current family regulation system in the United States is incompatible with human rights principles and law, which

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<sup>57</sup> *Id.* at 6-7 (2021) (citing to Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among U.S. Children*, 107 Am. J. Pub. Health 274, 278 (2017)).

<sup>58</sup> Children’s Defense Fund, *The State of America’s Children 2021*, 28 and Table 29, <https://www.childrensdefense.org/wp-content/uploads/2021/04/The-State-of-Americas-Children-2021.pdf>

<sup>59</sup> *General recommendation No. 34 adopted by the Committee, para. 6, 25, CERD/C/GC/34 (2011).*

<sup>60</sup> See Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. Ill. Rev. 171, 178-79 (2003) (for a discussion on how the American slavery system disrupted Black families); Loretta Ross and Rickie Solinger, *Reproductive Justice: An Introduction* at 18-29 (2017). See also Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 Marq L. Rev. 215, 235-36 (2013) (for a discussion on the history of European colonization and the removal of Native American children from their families for forced assimilation).

<sup>61</sup> See Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, (1998); Kylie Cheung, *The Policing of Native American Pregnancies Has to Stop*, Jezebel, Nov, 25, 2021, <https://jezebel.com/the-policing-of-native-american-pregnancies-has-to-stop-1848113033>

<sup>62</sup> CERD, Concluding observations on the combined seventh to ninth periodic reports of United States of America 10, CERD/C/USA/CO/7-9, para. 24(d).

<sup>63</sup> Kylie Cheung, *The Policing of Native American Pregnancies Has to Stop*, Jezebel, Nov, 25, 2021, <https://jezebel.com/the-policing-of-native-american-pregnancies-has-to-stop-1848113033>.

<sup>64</sup> HRGJ Interview Michelle Burrell, 12/20/2019; Erin Miles Cloud Int.

<sup>65</sup> See Erin Cloud, Rebecca Oyama, & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68 (2017), <http://www.cunylawreview.org/family-defenseblack-lives-matter/> (discussing the systematic surveillance and destruction of family bonds in Black families by the child welfare system); See also Michelle Sanchez et al, *Opinion: A better way of keeping kids safe*, NYN Media (Dec. 13, 2021), <https://nynmedia.com/content/opinion-better-way-keeping-kids-safe> (reporting that “government safety” actually means surveillance, prosecution and policing).

recognizes the interconnectedness of children and parental rights<sup>66</sup> and that the best way to protect the interests of children is to support their parents.<sup>67</sup>

## B. Illustrative Example: New York City & Bias in Child Protective Authority Decision-making

The unnecessary and disproportionate separation of Black families by New York City's child protective authority, the Administration of Child Services (ACS), illustrates how racial discrimination occurs despite laws that are racially neutral. On its face, New York state law appears to recognize that the state should only separate children from their parents in exceptional circumstances, but there is a problematic disconnection between what the law says and the lived experiences of families, particularly Black families, and families of color.

### 1. Bias in Reporting and Decision-Making

In NYC, structural racism and individual bias perpetuate racial disparities at every level of the child protective system. A study of 2014 data by the NY State Office of Children and Family Services found that racial disparities in NYC *increased with each decision point* in which a decision-maker exercised discretion. Thus, while Black children were 6.2 times more likely to be involved in a report of child abuse or neglect, they were 7.8 times more likely to be involved in a report deemed credible by Child Protective Services, 12.8 times more likely to be admitted into the foster system,<sup>68</sup> and 13.3 times more likely to be in the foster system than white children.<sup>69</sup> An equity assessment conducted by ACS in July 2021 similarly recognized a number of racial disparities such as (1) Black/African American and Hispanic/Latinx children are disproportionately involved in abuse and/or neglect investigations;<sup>70</sup> (2) Black/African American families have disproportionately high rates of foster system placement and involvement in Court-Ordered Supervision (COS), compared to the child population of the city;<sup>71</sup> (3) Black/African American families have disproportionately long lengths of stay in the foster system;<sup>72</sup> and (4) Black/African American children are disproportionately less likely to be in prevention case openings following a substantiated investigation.<sup>73</sup>

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<sup>66</sup> CRC, Art. 18, 27, ICCPR, Art. 23(1) ("Given the interconnected nature of children's and parents' rights, human rights law recognizes that a state's obligation to protect children is linked to its obligation to provide assistance to parents.").

<sup>67</sup> The UN Human Rights Committee has expressly linked state's obligation to provide protection to families under ICCPR, Art. 23(1) to the obligation to protect children under Art. 24(1). General Comment No. 17, Rights of the Child (Art. 24), ¶ 6 (noting that states have a "responsibility to assist the family in ensuring their protection of the child.").

<sup>68</sup> OFCS's foster care data combines children who entered the foster care system through Art. 10 proceedings and children who are in foster care due to voluntary placements/surrenders, persons in need of supervision and JD petitions, and termination of parental rights. Vajeera Dorabawila & Nicole D'Anna, "Disproportionate Minority Representation (DMR) in Child Welfare and Juvenile Justice Systems," RFP December 2015 p. 2, <https://ocfs.ny.gov/main/contracts/docs/DMR-Section-Seven-of-Grant-RFP-2015.pdf>.

<sup>69</sup> *Id.* at 7.

<sup>70</sup> ACS, Local Law 174 Reporting, 1 (July 1, 2021),

<https://www1.nyc.gov/assets/operations/downloads/pdf/reporting/LL174-July-2021-Submission.pdf> ("Black children were 6.08 more likely to be involved in an investigation than white children" whereas "Latinx children were 4.15 more likely to be involved in an investigation than white children.").

<sup>71</sup> *Id.* at 4.

<sup>72</sup> *Id.* at 6 ("Black/African American children accounted for 57% of the children in care for two or more years at the beginning of 2020.").

<sup>73</sup> *Id.* at 8-9.

It is well documented that bias influences reports of abuse and neglect that trigger ACS investigations.<sup>74</sup> Studies show that medical professionals have implicit biases linking race and class to abuse; these biases influence “the evaluation and reporting of pediatric fractures for child abuse, particularly in toddlers with accidental injuries.”<sup>75</sup> ACS has publicly recognized that mandated reporters must be made aware of other options besides filing a report.<sup>76</sup>

## 2. Surveillance, Drug Testing and Mandatory Reports

In addition to bias, disproportionate surveillance of Black and Latinx families helps to drive disparities. In New York City, family separations overwhelmingly occur in poor neighborhoods and the families separated are disproportionately Black and Latinx.<sup>77</sup> The five community districts with the highest rates of investigation are among the seven poorest community districts and all are at least 94% Black and Latinx.<sup>78</sup> People living in these neighborhoods are more likely to rely on public services such as hospitals, schools, housing, and food and cash assistance. Each of these points of contact with the state is another opportunity for surveillance by mandated reporters and the police.<sup>79</sup>

Studies suggest that drug testing of Black pregnant women before or immediately following childbirth, despite similar rates of drug use as White women, has become a pervasive issue throughout public and private hospitals which disproportionately affects Black families and families of color.<sup>80</sup> Black newborns are four times more likely than White newborns to be reported to ACS at delivery, despite Black women having alcohol/drug use at similar rates to White women.<sup>81</sup> Black pregnant women are then more likely to be deemed unfit parents and therefore, often lose custody of their babies.

Coercive drug testing of pregnant people and their newborns is part of a broader pattern of ACS, invading parents’ privacy, and gathering information against them without informing parents of their rights. Mothers who have been impacted and family advocacy organizations report that public hospitals routinely drug test clients without their clients’ knowledge, informed consent, and sometimes despite

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<sup>74</sup> Testimony of ACS Commissioner David Hansell before the New York City Council’s Committee on General Welfare, October 31, 2019; Stephanie Clifford, *When the Misdiagnosis is Child Abuse*, The Atlantic (August 20, 2020) (citing studies showing that socio-economic cues and race influence abuse screenings).

<sup>75</sup> Jessica Horan-Block & Elizabeth Tuttle Newman, *Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation*, 22 CUNY L. REV. 382, 394 (2019).

<sup>76</sup> ACS Local Law 174 Agency Equity Assessment Summary (2019) (stating that one disparity identified was that “Black/African and Hispanic/Latinx children are disproportionately involved in abuse and/or neglect investigations”).

<sup>77</sup> New School Center for New York City Affairs, “Watching the Numbers” (December 2019) (finding that “foster care placements remain highest in the lowest income, majority Black and Latinx community districts in the city.”).

<sup>78</sup> New School Center for NYC Affairs, *Watching the Numbers* (December 2019).

<sup>79</sup> Jessica Horan-Block & Elizabeth Tuttle Newman, *Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation*, 22 CUNY L. Rev. 382, 394 (2019).

<sup>80</sup> Hillary Veda Kunnis et al, *The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting*, 16 J Womens Health 245, 245 (2007) (finding that Black women are 1.5 more likely to be tested for illicit drugs than White women); See also Dinah Ortiz, *Battling an Unjust System: How the War on Drugs Stole My Daughter*, S&F Online (2019), <https://sfoonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/battling-an-unjust-system-how-the-war-on-drugs-stole-my-daughter/>; Ericka Brewington, *A Drug Test is Not a Parenting Test*, Black Health (Jan. 17, 2022), <https://nblch.org/news/a-drug-test-is-not-a-parenting-test/>.

<sup>81</sup> Sarah C.M. Roberts & Amani Nuru-Jeter, *Universal Screening for Alcohol and Drug Use and Racial Disparities in Child Protective Services Reporting*, 39 J. Behav. Health Servs. & Res. 3, 3 (2012).

specific refusals.<sup>82</sup> Outside of healthcare settings, ACS frequently asks parents about drug use or requests that they submit to drug testing without advising parents that they have no obligation to take the test or of the ramifications of drug use. According to Nila Natrajan of the Brooklyn Defenders, “Parents often agree to these invasive tests because they are not told they have a right to refuse, and are fearful of negative consequences, including losing custody of their children.”<sup>83</sup>

Separations and removals based on positive drug tests are particularly troubling because drug tests are being used as parenting tests which impact families differently depending on their income. To illustrate, police do not monitor the drug use of white and middle/higher income people with private insurance the same way as low income people who rely on public insurance.<sup>84</sup> In 2012, the NY Daily News reported that “[p]rivate hospitals in rich neighborhoods rarely test new mothers for drugs, whereas hospitals serving primarily low-income moms make those tests routine and sometimes mandatory.”<sup>85</sup> Even within the same hospital, studies indicate that women of color and their newborns are tested and reported for drug use at much higher rates.<sup>86</sup>

Allegations of substance use drive a significant portion of child welfare cases that involve parental neglect.<sup>87</sup> While cases range from various ends of the spectrum — from occasional cannabis use to severe substance use disorder — they all share common themes. “Virtually every case is characterized by gross misinformation on the nature of substance use,<sup>88</sup> involves a punitive legal process that resembles the criminal legal system but lacks even the most basic rights protections,<sup>89</sup> and relies on harsh and non-evidence-based responses to substance use.”<sup>90</sup>

The current one size fits all, zero tolerance approach to drug or alcohol use without a separate assessment of whether there is an actual imminent risk to children leads to unnecessary removals. ACS has stated that its policy is that a parent’s use of a legal or illegal substance alone should not be the basis

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<sup>82</sup> Burrell NYC Marijuana Policies Testimony at 5 (noting that while it is difficult to determine whether informed consent was given, “[w]e do know, however, that at least in some cases these tests are being affirmatively refused and our clients’ babies are being tested anyway”); Nila Natarajan, NYC Marijuana Policies Testimony at 3 (“It is common for our clients and their newborns to be drug-tested at birth, often without their knowledge, without their informed consent, or even despite their explicit refusal”); Ketteringham, NYC Marijuana Policies Testimony at 45 (“In our experience, hospitals do not always obtain a woman’s consent, let alone informed consent for the test and often do not even notify the woman that the test is being performed on her or her newborn.”); Ground Zero Report, *supra* note \_\_, at 67; *See also* Elizabeth Brico, *Doctors Drug Test Black and Poor Families at Higher Rates, Risking Family Separation*, Talk Poverty (Dec. 1, 2021), <https://talkpoverty.org/2021/12/01/doctors-can-drug-test-new-parents-without-consent-pick-depends-race-class/> (explaining that drug testing Black mother and infants without informed consent is a common practice in the United States).

<sup>83</sup> Nila Natarajan, NYC Marijuana Policies Testimony, at 4.

<sup>84</sup> Ground Zero Report, *supra* note \_\_, at 89.

<sup>85</sup> Orin Yaniv, “WEED OUT: More than a dozen city maternity wards regularly test new moms for marijuana and other drugs,” Daily News (Dec. 29, 2012).

<sup>86</sup> Ketteringham, NYC Marijuana Policies Testimony at 10; Legal Aid NYC Marijuana Policies Testimony at 4 (“Reports of drug use by mandated reporters like law enforcement and medical personnel at public hospitals to child protective services are more likely to happen to Black parents”).

<sup>87</sup> Ground Zero Report, *supra* note \_\_ t at 6.

<sup>88</sup> *Id.* (citing Drug Policy Alliance Reform Conference, 2013, “Overlooked Punishment” Panel, featuring Dr. Carl Hart of Columbia University, Emma Ketteringham of Bronx Defenders, Dr. Kay Teel of University of Colorado School of Medicine, and moderated by Lynn Paltrow of National Advocates for Pregnant Women).

<sup>89</sup> *Id.* (citation omitted).

<sup>90</sup> *Id.* (citation omitted).

for removal or filing a case for neglect.<sup>91</sup> However, family defenders and community members report that positive drug tests or failure to complete drug treatment programs often result in children being removed, reunifications delayed<sup>92</sup> and visitation curtailed.<sup>93</sup> Even in cases where ACS decides not to conduct an emergency removal or a court orders a newborn's return, at a minimum, reports of positive drug tests are likely to result in a "social hold,"<sup>94</sup> separating mothers and newborns during a crucial time for maternal-infant bonding, and can also interrupt the establishment of lactation, denying the newborn this developmentally important resource.<sup>95</sup>

### III. Obstetric Violence: Racism and mistreatment of birthing people in healthcare settings

#### A. Overview

Obstetric violence and other forms of mistreatment in maternal health care by medical professionals in hospitals and birthing facilities reflect structural racism and gender discrimination in the U.S. health care system. These violations occur on a spectrum, from withholding information and options, to coercion, verbal abuse, and other forms of intimidation, to threats of legal action to compel unwanted medical interventions, to violent or unconsented treatment.<sup>96</sup> The World Health Organization has acknowledged obstetric violence as a "violation of women's fundamental human rights."<sup>97</sup> Obstetric violence and mistreatment of birthing people violate trust between patients and health-care providers, increase the likelihood of negligent treatment or other medical errors, and create disincentives for

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<sup>91</sup> Testimony of David A. Hansell, Commissioner ACS, NYC Committees on General Welfare and Hospitals, "Oversight-Impact of Marijuana Policies on Child Welfare," April 10, 2019, at 1. See ACS, Division of Child Protection All Staff Bulletin, Policy and Practice on Cases Involving Marijuana Use by Parents (April 19, 2019), 1 ("State and city policy is that a parent's use of marijuana is not in and of itself a basis for indicating a report or filing a neglect case.").

<sup>92</sup> Burrell, NYC Marijuana Policies Testimony, at 3-4. Ketteringham, NYC Marijuana Policies Testimony, 19; Legal Aid Society Testimony, NYC Committees on General Welfare and Hospitals, "Oversight-Impact of Marijuana Policies on Child Welfare" [Burrell, NYC Marijuana Policies Testimony] (April 10, 2019), 8 ("Our clients in foster care are regularly denied reunification with their parents following the parent's positive test for marijuana"), Nila Natarajan, Brooklyn Defenders, NYC Committees on General Welfare and Hospitals, "Oversight-Impact of Marijuana Policies on Child Welfare" (April 10, 2019), at 2 ("A parent's ability to achieve total abstinence becomes more important than their commitment to their families and their ability to safely care for their children – due we believe, to the stigma of marijuana use by Black and Latinx parents.") [Natarajan, NYC Marijuana Policies Testimony].

<sup>93</sup> Burrell, NYC Marijuana Policies Testimony, at 6 ("Even when the allegations that led to the removal are not related to marijuana use, a positive drug test for marijuana is routinely used as a barrier to expansion of visitation (regardless of the fact that the use was not done around the child) and/or it can be used to restrict more liberal visitation plan."); Ground Zero Report, *supra* note \_\_ at 75.

<sup>94</sup> Written Testimony of The Bronx Defenders by Emma Ketteringham, Hearing on Fam. Separation in New York City, New York City Council 13 (Nov. 27, 2018) ("A social hold is when a hospital holds a baby in the hospital while discharging his mother home without court order.").

<sup>95</sup> Ketteringham, NYC Marijuana Policies Testimony, at 4, 9 (noting that even if a court does not order removal of an infant "ACS might require the parent alleged to have used marijuana to leave her home [...] and the leave the baby in the care of the other parent. The baby might also be held at the hospital on a so-called 'social hold [while ACS petitions a court for removal]'").

<sup>96</sup> Farah Diaz-Tello, *Invisible Wounds: Obstetric Violence in the United States*, 47 *Reproductive Health Matters* 56 (2016), at 59, available at <https://doi.org/10.1016/j.rhm.2016.04.004>.

<sup>97</sup> See *WHO recommendations Intrapartum care for a positive childbirth experience*, (2018), <https://apps.who.int/iris/bitstream/handle/10665/260178/9789241550215-eng.pdf>

vulnerable populations to use maternal health care services.<sup>98</sup> Global health experts agree that ensuring universal access to safe, acceptable, good quality sexual and reproductive health care and maternal health care can dramatically reduce global rates of maternal morbidity and mortality.<sup>99</sup>

The United States has the highest maternal mortality rate among wealthy nations, in large part because of racial inequities.<sup>100</sup> The Centers for Disease Control and Prevention (CDC) reports that in 2020, the maternal mortality rate for Black women was 2.9 times higher than the rate for non-Hispanic White women.<sup>101</sup> Data from 2011-15 reflected a maternal mortality rate for indigenous women that was 2.5 times that of non-Hispanic White women.<sup>102</sup> In 2014, the CERD Committee expressed concern about the high rate of maternal and infant death in the African- American community.<sup>103</sup> These concerns were echoed by the Special Rapporteur on extreme poverty and human rights in 2018.<sup>104</sup>

An antidote to inequities in health outcomes is respectful maternity care. In 2016, the World Health Organization published updated standards for quality maternal and newborn care.<sup>105</sup> These standards addressed the harmful effects of unnecessary or harmful practices during labor, childbirth and the early postnatal period, and the importance of preserving birthing people's dignity.<sup>106</sup> Racial disparities

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<sup>98</sup> In 2015, Bohren and colleagues created a typology of mistreatment of women during facility-based childbirth consisting of seven domains: (1) physical abuse, (2) sexual abuse, (3) verbal abuse, (4) stigma and discrimination, (5) failure to meet professional standards of care, (6) poor rapport between women and providers, and (7) health system conditions and constraints. This typology of the mistreatment of women during childbirth in health facilities demonstrates that mistreatment can occur at the level of interaction between the woman and provider, as well as through systemic failures at the health facility and health system levels. Meghan Bohren et al., *The Mistreatment of Women during Childbirth in Health Facilities Globally: A Mixed Methods Systematic Review*. 12(6) PLoS Med e1001847 (2015). <https://doi.org/10.1371/journal.pmed.1001847>

<sup>99</sup> See World Health Org., *Standards for Improving Quality of Maternal and Newborn Care in Health Facilities* (2016) <https://www.who.int/docs/default-source/mca-documents/advisory-groups/quality-of-care/standards-for-improving-quality-of-maternal-and-newborn-care-in-health-facilities.pdf>; Special Rapporteur on Violence against Women; *Report of the Special Rapporteur on violence against women, its causes and consequences on a human rights-based approach to mistreatment and violence against women in reproductive health services with a focus on childbirth and obstetric violence*, (2019), <https://digitallibrary.un.org/record/3823698?ln=en>.  
; Suellen Miller, et al. *Beyond Too Little, Too Late and Too Much, Too Soon: A Pathway Towards Evidence-Based, Respectful Maternity Care Worldwide* 388 Lancet 2176 (2016);

<sup>100</sup> See Center for Reproductive Rights et al, *Systemic Racism and Reproductive Injustice in the United States: A Report for the UN Committee on the Elimination of Racial Discrimination*.

<sup>101</sup> *Maternal mortality rates in the United States, 2020*, Centers for Disease Control and Prevention (2022), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm>.

<sup>102</sup> Emily E. Petersen, et al, Centers for Disease Control and Prevention, *Vital Signs: Pregnancy-Related Deaths, United States, 2011-15, and Strategies for Prevention, 13 States, 2013-2017*, 68(18) Morbidity & Mortality Weekly Rep. 433 (May 10, 2019) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6542194/>

<sup>103</sup> Committee on the Elimination of Racial Discrimination (CERD), *Concluding Observations—United States of America*, UN Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014), at para. 15.

<sup>104</sup> Special Rapporteur on extreme poverty and human rights, *Report of the Mission to the United States of America*, U.N. Doc. A/HRC/38/33/Add.1, at para. 57;

<sup>105</sup> World Health Org., supra note 95.

<sup>106</sup> *Id.*

in maternal outcomes are inextricably linked to mistreatment and violence against pregnant people during birth,<sup>107</sup> and the disparities can only be overcome by ensuring respectful care for all birthing people.<sup>108</sup>

## B. Coercion in Care

Birthing people report having health care providers threaten to withhold treatment or force them to accept treatment they do not want.<sup>109</sup> Provider coercion can take many forms: threats to secure a court order compelling treatment, threats to report “abuse or neglect” of a fetus for declining treatment, policies forbidding people from having a vaginal birth after cesarean (VBAC), and threats to withhold pain medication to secure consent to treatment, among others.<sup>110</sup> These coercive actions violate patients’ rights to bodily autonomy and informed consent by depriving them of the ability to weigh the risks and benefits of different birthing options and decide the best course of action for themselves.<sup>111</sup> These abuses violate the foundations of respectful care by stripping the birthing person of their autonomy to decide their own care and the ability to consent to or refuse any procedures on an equal basis with other patients.<sup>112</sup>

## C. Racism in Care

The Black birthing experience in the U.S. reflects the country’s long history of racially discriminatory policies and practices affecting every aspect of public life, including health care services. This is apparent in racial disparities in maternal health outcomes and reports of mistreatment in birth.<sup>113</sup> The health disparities begin long before pregnancy for Black birthing people: they have less access to health care across their lifespan, endure racism and face unique stressors stemming from inequality in daily life.<sup>114</sup> These factors are exacerbated by harmful interactions with providers stemming from racist attitudes and non-inclusive practices.<sup>115</sup> The same is true for Indigenous people who experience ongoing harms stemming from colonization, including, but certainly not limited to the underfunding of the Indian Health Service, a source of treaty-bound health delivery for many tribes that directly impacts access to all kinds of health care including perinatal care.<sup>116</sup> Birthing people of color report higher rates of

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<sup>107</sup> See *Report to the U.N. Special Rapporteur on Violence Against Women: Mistreatment and Violence Against Women During Reproductive Health Care With a Focus on Childbirth in the United States of America*, [https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/ReproductiveHealthCare/Joint\\_submission\\_If\\_When\\_How\\_Lawyer\\_for\\_Reproductive\\_Justice\\_USA\\_et\\_others.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/ReproductiveHealthCare/Joint_submission_If_When_How_Lawyer_for_Reproductive_Justice_USA_et_others.pdf) (*Hereinafter: 2019 Joint Submission*) at pg. 2

<sup>108</sup> José M Belizán at al., *Every Woman in The World Must Have Respectful Care During Childbirth: A Reflection*. 17(1) *Reprod. Health* 7 (Jan. 7, 2020) <https://doi.org/10.1186/s12978-020-0855-x>

<sup>109</sup> Saraswathi Vedam. et al. *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*. 16 *Reprod. Health* 77 (2019). <https://doi.org/10.1186/s12978-019-0729-2> (*hereinafter: Giving Voice to Mothers*)

<sup>110</sup> See *Birth Monopoly, Data collected by the International Cesarean Awareness Network's "VBAC Ban Call Project."*, <https://birthmonopoly.com/vbac-bans/>; Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 184: Vaginal Birth After Cesarean Delivery* 130 (5) *Obstetrics & Gynecology* e217 (Nov. 2017).

<sup>111</sup> *2019 Joint Submission*, at pg. 14

<sup>112</sup> Belizán, *supra* note 103, at 1.

<sup>113</sup> *Giving Voice to Mothers*, at pg. 10

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Nat’l Congress of Am. Indians, *Healthcare: Reducing Disparities in the Federal Healthcare Budget*, NCAI.org (2019), [https://www.ncai.org/07\\_NCAI-FY20-Healthcare.pdf](https://www.ncai.org/07_NCAI-FY20-Healthcare.pdf).

mistreatment than white women.<sup>117</sup> The bias within health systems is so pervasive that birthing people with a Black partner reported mistreatment, regardless of their own race.<sup>118</sup>

Current criminal justice and child welfare policies criminalizing birthing people who use drugs and those with substance use disorders are enforced disproportionately against people of color. For example, Black birthing people are disproportionately tested for criminalized drugs, often without their knowledge or consent.<sup>119</sup> Such policies systemically deprive pregnant people of birthing options by deterring them from seeking prenatal care, and endangers their health by exposing them to legal risk if they seek treatment for substance use disorders.<sup>120</sup> Persons with intersecting marginalized identities also face a disproportionate rate of obstetric violence. Younger women, women with a history of substance use, incarceration and/or interpersonal violence (IPV) and those of low socio-economic status report increased mistreatment compared with those without those risk factors.<sup>121</sup> In addition, those who disagree with care providers also report the highest rates of obstetric violence.<sup>122</sup> People who use drugs are frequently subjected to hostile and demeaning treatment resulting from drug stigma.

#### D. The U.S. Government's Response

In its report on U.S. compliance with CERD, the U.S. noted that it has created Title V, a fund to support maternal and child health<sup>123</sup> and developed monitoring tools and accountability mechanisms for preventable maternal mortality.<sup>124</sup>

However, much work is still needed to ensure the health and autonomy of pregnant people. For example, Title V allots just 6 percent of funding to the birthing persons' health, compared to 78 percent for infants and special-needs children,<sup>125</sup> which ignores public health data that shows that investing in

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<sup>117</sup> According to one study, "27.2% of women of color...reported any mistreatment versus 18.7% of white women." *Giving Voice to Mothers*, *supra* note \_\_ at 9. Black, Hispanic and Indigenous women, primiparas and women with elevated pregnancy risks were "significantly more likely to report mistreatment, compared with White women." *Id.* at 13. And "[a]ll women who self-identified as Black, Indigenous, Hispanic, or Asian reported higher than average experiences of mistreatment." *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Ira J. Chasnoff, Harvey J. Landress & Mark E. Barrett, *The Prevalence of Illicit-Drug Or Alcohol Use during Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322(17) *New Eng. J. Med.* 1202 (1990); *Hospital Staff More Likely to Screen Minority Mothers*, Daily News of Los Angeles, June 29, 2008, available at <http://bit.ly/2LROec8>; Sarah C. Roberts & Amani NuruJeter, *Women's Perspectives on Screening for Alcohol and Drug use in Prenatal Care*, 20(2) *Women's Health Issues* : 193 (2010); Brenda W. Rotzoll, *Black Newborns Likelier to be Drug Tested: Study*, Chicago Sun-Times, Mar. 16, 2001.

<sup>120</sup> American College of Obstetricians & Gynecologists, Committee on Health Care for Underserved Women, *Committee Opinion 473: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, (Jan. 2011), <http://bit.ly/2JLJ4Mf>.

<sup>121</sup> *Id.* at 10.

<sup>122</sup> *Giving Voice to Mothers*, at 2

<sup>123</sup> See Combined tenth to twelfth periodic reports submitted by the United States of America under article 9 of the Convention

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fUSA%2f10-12&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fUSA%2f10-12&Lang=en)

<sup>124</sup> *Id.*

<sup>125</sup> Nina Martin & Renee Montagne, *The Last Person You'd Expect to Die in Childbirth*, ProPublica (May 12, 2017), <https://www.propublica.org/article/die-in-childbirth-maternal-death-rate-health-care-system>;

care for pregnant and birthing people leads to better outcomes for both the parent and their infant.<sup>126</sup> There is a lack of social support and basic health care services for those who cannot afford to pay for them, and many immigrants are excluded from coverage under public insurance and plans created under the Affordable Care Act.<sup>127</sup> Accountability mechanisms fail to ensure redress for victims of mistreatment and violence, as policies fail to meaningfully address these issues within the U.S.'s complex, disconnected medical care system.

Despite the government's stated commitment to improve care for birthing people, standardized data collection still fails to capture the abuse, coercion, and disrespect birthing people experience.<sup>128</sup> The lack of systematic data regarding racism, mistreatment in patient care, and maternal mortality and morbidity makes it impossible to make strides toward remedying preventable maternal deaths and injuries, not to mention patient reports of mistreatment and disrespect. The problem of data collection is further complicated by the fact that few U.S. hospitals are publicly owned and operated.<sup>129</sup> Even when hospitals are publicly operated, they are run by local governments, which are disconnected from one another and may have different data collection practices.<sup>130</sup> The lack of a nationwide standard for data collection has resulted in a failure to capture the full scope of the problem of obstetric violence and make it impossible for individuals and communities directly impacted to hold these systems accountable.

## ***Conclusion & Recommendations***

### **Overall**

Investigate criminalization, separation of families, and obstetric violence as forms of discrimination which can be addressed by federal and state civil rights laws.

### **Criminalization of self-managed abortions, miscarriages and stillbirths**

- Encourage states to repeal laws that criminalize abortion care
- Encourage states to investigate and end practices that lead to prosecutorial abuses and criminalization of reproductive outcomes in the absence of laws authorizing such charges
- Encourage states to adopt laws specifically prohibiting the state from penalizing, prosecuting or otherwise taking adverse action against a person for taking actions or refraining from taking actions during the individual's own pregnancy based on the potential, actual, or perceived impact on the pregnancy, the pregnancy's outcomes, or on the pregnant individual's health.

### **Separation of Families**

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<sup>126</sup> Zohra S. Lassi et al., *The Interconnections Between Maternal And Newborn Health Evidence And Implications For Policy*, 26 J. Maternal-Fetal & Neonatal Med. 3 (2013) (recommending an integrated continuum of care approach because the cause of maternal and newborn death are linked.)

<sup>127</sup> Samantha Artiga et al., Kaiser Family Fdn., *Health Coverage and Care for Immigrants*, <http://www.kff.org/disparities-policy/issue-brief/health-coverage-and-care-for-immigrants/>.

<sup>128</sup> See *Giving Voice to Mothers*.

<sup>129</sup> Of 6,210 total hospitals in the U.S., 972 are run by state and local governments, and 208 by the federal government. The federal facilities are mostly for special populations, such as Native Americans or current or former U.S. armed service members, not the general public. The majority of hospital facilities are run by private for-profit or non-governmental organizations. American Hospital Association, *Fast Facts on US Hospitals* (January 2019), <http://bit.ly/2Q9czZD>.

<sup>130</sup> *Id.*

- Halt removal of Black, indigenous children and other children of color from their families and communities
- Decrease the the number of **Black and indigenous children and children of color in foster system**, including by developing and implementing a resourced national strategy in partnership with minority communities and Indigenous Peoples;
- **Increase investment in supporting families outside the family regulation system**, and ensure that well-resourced community-led organizations not connected to family regulation system agencies can provide child and family support services with a view to reducing child removal rates.
- Repeal the Adoption and Safe Families Act (ASFA), and eliminate all together timelines which constrain the time a parent has to regain custody of their child or lose them forever.
- Abolish termination of parental rights and legalized estrangement of living families. Create alternatives to termination of parental rights, including guardianship arrangements, and procedures for reinstatement of parental rights.
- Repeal the Child Abuse Prevention Treatment Act, in particular the plan of safe care provision which has incentiveized hospitals to report to Child Protective Service agents certain cases of children exposed to controlled substances in utero.
- Decrease and then end the federal open ended entitlement for funding foster care, reinvest that money into community based organizations that can provide services families need and do not make these organizations mandated reporters.
- Create and fund meaningful legal protections for parents accused of child abuse maltreatment or facing termination of parental rights, including the right to remain silent, the right to effective assistance of counsel, the right to challenge your child’s initial detention, the right to exclude evidence illegally obtained, and the right to require the state to prove beyond a reasonable doubt that family separation is needed to protect the child.
- Increase funding to social safety nets like cash assistance, medicaid, and housing.

## **Obstetric Violence**

- Create a standard to guarantee respectful maternity care for all birthing people
- Enforce informed consent
- Expand discrimination laws to ensure that discrimination in public accommodations due to pregnancy is not allowed and that intersections in discrimination across protected classes is actionable
- Guarantee effective access to affordable and adequate maternal care services
- Eliminate inequities in outcomes based on race in the field of sexual and reproductive health
- Eliminate misuse of tools that reinforce inequities based on race, like the VBAC calculator
- Ensure all perinatal people have access to evidence-based care like midwifery and non-pharmacological comfort measures, and can opt-out of interventions
- Standardize data collection on adverse childbirth outcomes, including maternal and infant death and include patient reports of mistreatments
- Improve monitoring and accountability mechanisms for not just preventable maternal mortality but all preventable forms of harm.