

# A CATCH-22: MENTAL HEALTH, PREGNANCY, AND PUNISHMENT

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Mental health conditions, including deaths by suicide and overdose, are among the leading causes of pregnancy-related deaths in the United States.<sup>1</sup> These

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I am deeply grateful to Dr. Khiara M. Bridges, whose scholarship on pregnancy criminalization and insights on the false hierarchy between mental and physical health sharpened this Article’s central claims; to Dr. Kimá Joy Taylor and Dr. Mishka Terplan, whose research and advocacy at *Doing Right By Birth* offer a maternal-health blueprint that rejects punitive responses to pregnancy and calls instead for investment in care, services, and material support; and to Dr. Jennifer Payne, whom I have had the privilege of working closely with through litigation challenging Idaho’s abortion bans, and whose brilliance in reproductive psychiatry shaped my understanding of the harms that follow when pregnant people living with mental health conditions are stigmatized and denied protection. I am profoundly grateful to my mama, Dr. Sadaf Sultana Ijaz, a psychiatrist, whose example grounded both my spiritual understanding and this Article’s moral imagination. In doing this work, I often return to the Qur’anic account of Mary, who, in labor and despair, cries out, “I wish I had died before this and was a thing forgotten, utterly forgotten.” Qur’an 19:23. A stream appears beneath her, and the lifeless date tree against which she leans bears fruit. Qur’an 19:24–25. That image—of anguish met with compassion instead of punishment—has stayed with me as a reminder of what we are fighting for.

<sup>1</sup> *Pregnancy-Related Deaths: Data From Maternal Mortality Review Committees*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 22, 2025), <https://www.cdc.gov/maternal-mortality/php/data-research/mmrc-2017-2019.html> [<https://perma.cc/GY6D-4DYQ>]; see also Cecilia Nowell, *The Face of the Opioid Crisis Is Changing, and Treatments Need to Catch Up: Why Women Are Now Bearing the Brunt of the Epidemic*, WOMEN’S HEALTH (Mar. 8, 2024), <https://www.womenshealthmag.com/health/a46867416/women-opioid-epidemic-overdose-deaths/>

are not mystifying realities but preventable tragedies: foreseeable outcomes of laws and policies that prioritize harm and punishment over compassion and support.<sup>2</sup> For millions of people with mental health conditions, jails and prisons have become de facto “treatment” centers.<sup>3</sup> Pregnant people living with a mental health condition, particularly a substance use disorder, are trapped in a Catch-22. Those who would have chosen to terminate a pregnancy cannot access that care due to laws criminalizing abortion providers in several states.<sup>4</sup> Those who choose to remain pregnant with hopes of parenting often cannot because many state criminal and family policing<sup>5</sup> systems punish them for existing. The problem is a patchwork of regimes that criminalize either choice, instead of supporting the choices that further

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[<https://perma.cc/7LTJ-6ZDC>]; *The Most Common Causes of Maternal Death May Surprise You*, COLUMBIA UNIV. IRVING MED. CTR. (Feb. 11, 2026), <https://www.cuimc.columbia.edu/news/most-common-causes-maternal-death-may-surprise-you> [<https://perma.cc/P4NK-VMBJ>].

<sup>2</sup> *Interrupting Punitive Responses to Substance Use and Pregnancy*, PREGNANCY JUST. (June 2025), <https://www.pregnancyjusticeus.org/wp-content/uploads/2025/06/Interrupting-Punitive-Responses.pdf> [<https://perma.cc/Y7TX-7XG5>]; *Guide to Accurate and Compassionate Reporting on Drug and Alcohol Use During Pregnancy*, U. CAL. SAN FRANCISCO, BIXBY CENTER FOR GLOBAL REPRODUCTIVE HEALTH (Apr. 9, 2024), <https://bixbycenter.ucsf.edu/guide-accurate-and-compassionate-reporting-drug-and-alcohol-use-during-pregnancy> [<https://perma.cc/GXK6-FL5K>]; see also Cecily May Barber & Mishka Terplan, *Principles of Care for Pregnant and Parenting People with Substance Use Disorder: The Obstetrician Gynecologist Perspective*, 11 FRONTIERS PEDIATRICS 1 (2023) (“Most people in the US use drugs (opioids, alcohol, nicotine/tobacco, stimulants, and cannabis) to which some people develop an addiction, including people who are capable of pregnancy. Most people quit or cut back substance use when they become pregnant. However, those who continue to use, likely have a substance use disorder (SUD). Addiction, or SUD, is a chronic and treatable medical condition. Untreated SUD is associated with preterm delivery, low birth weight, and other negative birth outcomes. In contrast, people with treated addiction are more likely to deliver a normal weight infant at term.”).

<sup>3</sup> Mia Ives-Rublee & Christina Stafford, *Long-Term Solutions to the Overincarceration of People With Mental Health Disabilities*, CENTER FOR AMERICAN PROGRESS (Jan. 11, 2024), <https://www.americanprogress.org/article/long-term-solutions-to-the-overincarceration-of-people-with-mental-health-disabilities/> [<https://perma.cc/B6PG-HDVU>].

<sup>4</sup> See *Abortion in the United States Dashboard*, KFF (last visited July 2, 2025), <https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/> [<https://perma.cc/B28T-JUG5>].

<sup>5</sup> This Article uses the term “family policing system” to refer to what is often called the “child welfare system.” The term reflects a growing body of scholarship and advocacy recognizing that the system functions less as a provider of care and more as a carceral apparatus that surveils, coerces, separates, and devastates families, disproportionately targeting poor communities, disabled people, and communities of color. See, e.g. Dorothy Roberts, *Building a World Without Family Policing*, LPE PROJECT (July 17, 2023), <https://lpeproject.org/blog/building-a-world-without-family-policing/> [<https://perma.cc/C4H8-BKGM>] (“‘Policing’ is the word that captures best what the system does to America’s most disenfranchised families.”). Scholars have observed that the family policing system operates in close conjunction with the criminal legal system and, in some respects, with even less transparency, as family court proceedings and fortified records are often shielded from public scrutiny. Dorothy E. Roberts & Cary Coglianese, *‘Black Families Matter,’* PENN TODAY (Nov. 18, 2021), <https://penntoday.upenn.edu/news/black-families-matter-dorothy-roberts-cary-coglianese> [<https://perma.cc/HSW6-9MJK>]; Cynthia Godose, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939, 952 (2023). At the same time, it reflects longstanding eugenic assumptions about which families are deemed fit to raise children and which are subject to state intervention and parental rights termination, in other words, whose lives are worthy of dignity and autonomy. *Id.* at 950.

pregnant people's dreams and their rights to safety, dignity, and the pursuit of happiness.

The engine behind these punitive frameworks is prenatal personhood,<sup>6</sup> the legal fiction that fertilized eggs, embryos, and fetuses are “children.”<sup>7</sup> Laws and policies recast prenatal substance use, poverty, and other psychosocial factors as “child abuse,” transforming the womb into a site of surveillance and control. Pregnant and postpartum people are, thus, punished for their prenatal conduct or pregnancy outcomes and severed from communities and support systems they need to sustain their emotional health.<sup>8</sup>

Family-defense and disability-justice advocates remind us that disabled people, people living with mental health conditions, and pregnant people have long been cast as deviant, expendable bodies. American eugenics cemented a regime in which the state sorted the “fit” from the “unfit” to justify using a chilling matrix of laws and policies to disappear people through sterilization, institutionalization, and family separation.<sup>9</sup> That legacy endures in today's laws and policies, which target Black, Indigenous, disabled, poor, and otherwise marginalized communities for heightened scrutiny and punishment under the guise of protecting “children.”<sup>10</sup>

How does this happen? Often, hospitals—meant to be sanctuaries of care, not sites of surveillance—become entry-points into criminal or child-welfare investigations.<sup>11</sup> In many medical facilities across the country, pregnant and postpartum people are subjected to nonconsensual drug testing, and the results are routinely shared with law enforcement or family policing authorities and used to initiate criminal charges or terminate parental rights.<sup>12</sup> This happens even sometimes despite documented false positives caused by cross-reactivity with prescription medications, certain foods, and over-the-counter drugs.<sup>13</sup> These practices disproportionately target women of color, even though drug use by Black and white

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<sup>6</sup> Prenatal personhood bestows “legal personhood on zygotes, embryos, or fetuses.” Cynthia Soohoo, *An Embryo Is Not a Person: Rejecting Prenatal Personhood for a More Complex View of Prenatal Life*, 14 CONLAW NOW 81, 81 (2023); see generally, MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD (2020).

<sup>7</sup> *Unpacking Fetal Personhood: The Radical Tool That Undermines Reproductive Justice*, PREGNANCY JUST. 4 (Sep. 2024), <https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Fetal-personhood.pdf> [<https://perma.cc/YKGG7-T7MZ>].

<sup>8</sup> See, e.g., Ives-Rublee & Stafford, *supra* note 3.

<sup>9</sup> See, e.g., SmartGirls Staff, *Conversations with the Disability Project at the Transgender Law Center*, AMY POEHLER'S SMART GIRLS (Aug. 26, 2020), <https://amysmartgirls.com/conversations-with-the-disability-project-at-the-transgender-law-center-582a1b1084c8> [<https://perma.cc/2JJU-SRD9>]; James Salanga, *Q&A: Guide for Reporting on Disabled Communities*, Objective Journalism (Apr. 4, 2025), <https://objectivejournalism.org/2025/04/qa-guide-for-reporting-on-disabled-communities/> [<https://perma.cc/S4F7-L8A7>].

<sup>10</sup> DOROTHY E. ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022).

<sup>11</sup> Wendy A. Bach & Madalyn K. Wasilczuk, *Pregnancy as a Crime: A Preliminary Report on the First Year After Dobbs*, PREGNANCY JUST. (Sept. 2024), <https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Pregnancy-as-a-Crime.pdf> [<https://perma.cc/3NS4-W42P>].

<sup>12</sup> See *Clinical Drug Testing of Pregnant People and Newborns*, PREGNANCY JUST., 2–3 (Feb. 2024), <https://www.pregnancyjusticeus.org/wp-content/uploads/2024/02/Updated-Clinical-Drug-Testing-FactSheet-1.pdf> [<https://perma.cc/YH4G-SUZW>].

<sup>13</sup> *Id.*

women occurs at approximately the same rate in the United States.<sup>14</sup> The U.S. Supreme Court has held that when a public hospital conducts drug testing for law enforcement purposes without informed and specific consent, the practice violates the Fourth Amendment.<sup>15</sup> Yet similar testing practices continue to take shape in healthcare settings across the country. Various laws, including mandatory reporting statutes, or their overbroad interpretations, also deputize clinicians into informants to report people for prenatal substance use.<sup>16</sup> Unsurprisingly, this deters people from seeking help. People stay home instead of seeking care, and get perilously sick, which drives up both maternal and infant morbidity and mortality rates.<sup>17</sup> And it is precisely why every major medical association condemns punitive responses to prenatal conduct, including substance use.<sup>18</sup>

Pregnancy could be a critical opportunity for providing non-judgmental,<sup>19</sup> voluntary, and trauma-informed, evidence-based healthcare. Instead, federal actors have too often met this moment with divestment and distortion. A federal court recently invalidated the U.S. Department of Health and Human Services (HHS) 2024 HIPAA Rule,<sup>20</sup> clarifying that “person” refers only to a born individual, excluding fetuses,<sup>21</sup> as this definition would unlawfully prevent providers from reporting substance use *during pregnancy* as “child abuse”—in 21 states where such reporting is required, i.e., a form of pregnancy exceptionalism.<sup>22</sup>

At the same time, HHS leadership, under Secretary Robert F. Kennedy Jr., has amplified disinformation about the use of antidepressants during pregnancy, while the Food and Drug Administration has convened panels in which participants advanced unsubstantiated claims linking antidepressants in pregnancy to autism,

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<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* (citing *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)).

<sup>16</sup> See Sabrina Malhi, *Overdose Deaths Have Soared Among Pregnant People, Study Reveals*, THE WASHINGTON POST (Nov. 22, 2023), <https://www.washingtonpost.com/health/2023/11/22/overdose-pregnancy-opioids/> [<https://perma.cc/J6D2-MC25>].

<sup>17</sup> *Id.*

<sup>18</sup> See *Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant People*, PREGNANCY JUST. (June 2023), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/Medical-Public-Health-Statements-2023.pdf> [<https://perma.cc/5A59-W8UV>]; Erika Edwards, *Doctors Call for Changes to Laws That Criminalize Drug Use During Pregnancy*, NBC NEWS (May 31, 2023, 4:01 AM PDT), <https://www.nbcnews.com/health/health-news/laws-criminalizing-drug-use-pregnancy-need-change-research-rcna83500> [<https://perma.cc/G6AN-226D>]. For example, “research suggests that pregnancy-specific alcohol policies are mostly ineffective and possibly harmful to general public health outcomes” because they “are associated with increased low birth weight and preterm birth and decreased prenatal care.” Sarah C. M. Roberts, Alex Schulte, Claudia Zaugg, Douglas L. Leslie, Tammy E. Corr & Guodong Liu, *Association of Pregnancy-Specific Alcohol Policies With Infant Morbidities and Maltreatment*, JAMA NETWORK OPEN, 2 (Oct. 13, 2023).

<sup>19</sup> See, e.g., Currie Engel, *This Pregnant Mom Is Proof That Medication-Assisted Treatment Works for Opioid Use Disorder: “I’m Just a Normal Human Who Struggles with a Complex Mental Health Disease”*, WOMEN’S HEALTH (Mar. 7, 2024), <https://www.womenshealthmag.com/health/a46131243/opioid-use-disorder-pregnancy-jesse-essay/> [<https://perma.cc/N3LU-QRTM>].

<sup>20</sup> *Purl v. U.S. Dep’t of Health & Hum. Servs.*, No. 2:24-CV-228-Z (N.D. Tex. June 18, 2025), ECF No. 110, at \*1.

<sup>21</sup> *Id.* at \*6.

<sup>22</sup> *Id.* at \*40.

claims publicly rejected by the American College of Obstetricians and Gynecologists and the Society for Maternal-Fetal Medicine.<sup>23</sup> Cuts to the Substance Abuse and Mental Health Services Administration (SAMHSA),<sup>24</sup> and to Medicaid<sup>25</sup> further undermine access to treatment for substance use and mental health conditions.<sup>26</sup> These divestments ensure that trauma compounds and help explain why the United States remains the deadliest wealthy country in which to be pregnant.<sup>27</sup>

That trauma is not evenly distributed. Black women remain more than three times as likely to die from pregnancy-related causes as white women,<sup>28</sup> twice as likely to experience peri- and post-natal mental health conditions, and half as likely to receive treatment<sup>29</sup>—barriers rooted in structural racism<sup>30</sup> and weathering,<sup>31</sup> socioeconomic inequities,<sup>32</sup> environmental injustices,<sup>33</sup> and the ever-present threat of criminalization and family separation.<sup>34</sup>

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<sup>23</sup> Casey Quinlan, *Trump Has Made Pregnancy in America Harder than Ever*, THE NEW REPUBLIC (Jan. 22, 2026), <https://newrepublic.com/article/204931/trum-kennedy-health-policy-pregnancy> [<https://perma.cc/U7YB-6CUZ>].

<sup>24</sup> Jan Hoffman, *Federal Agency Dedicated to Mental Illness and Addiction Faces Huge Cuts*, N.Y. TIMES (Mar. 12, 2025), <https://www.nytimes.com/2025/03/12/health/federal-cuts-substance-abuse-mental-health.html> [<https://perma.cc/7R6F-6YU8>].

<sup>25</sup> Lev Facher, *GOP Tax Law Will Increase Overdose Deaths by 1,000 Each Year, Analysis finds*, STAT (Jul. 18, 2025), <https://www.statnews.com/2025/07/18/medicaid-cuts-researchers-predict-fatal-overdose-spike/> [<https://perma.cc/4EUM-K4PE>].

<sup>26</sup> Brian Mann, *Exclusive: Trump Team Withholds \$140 Million Budgeted for Fentanyl Fight*, NPR (Jul. 16, 2025), <https://www.npr.org/2025/07/16/nx-s1-5468535/fentanyl-trump-addiction-funding> [<https://perma.cc/9EHL-A3YT>].

<sup>27</sup> Munira Z. Gunja, Even D. Gumas, Relebohile Masitha & Laurie C. Zephyrin, *Insights into the U.S. Maternal Mortality Crisis: An International Comparison*, THE COMMONWEALTH FUND (Jun. 4, 2024), <https://www.commonwealthfund.org/publications/issue-briefs/2024/jun/insights-us-maternal-mortality-crisis-international-comparison> [<https://perma.cc/XPT7-CZB2>].

<sup>28</sup> Carly Mallenbaum, *Maternal Deaths Drop — Except for Black Women*, AXIOS (Feb. 6, 2025), <https://www.axios.com/2025/02/06/black-maternal-mortality-rate-cdc-chart> [<https://perma.cc/6DK6-L32T>].

<sup>29</sup> *Black Maternal Mental Health: the Data, the Barriers, and Organizations to Support*, MATERNAL MENTAL HEALTH LEADERSHIP ALLIANCE (Feb. 1, 2024), <https://www.mmhla.org/articles/black-maternal-mental-health-the-data-the-barriers-and-organizations-to-support> [<https://perma.cc/6Y3T-UY5S>]; *FACTSHEET: Black Maternal Mental Health*, BLACK MAMAS MATTER ALLIANCE (last visited July 2, 2025), <https://blackmamasmatter.org/wp-content/uploads/2022/08/Factsheet-Black-Maternal-Mental-Health.pdf> [<https://perma.cc/QXL3-JWGD>].

<sup>30</sup> *Issue Brief: Black Maternal Health*, BLACK MAMAS MATTER ALLIANCE (last visited July 2, 2025), [https://blackmamasmatter.org/wp-content/uploads/2022/04/0322\\_BMHStatisticalBrief\\_Final.pdf](https://blackmamasmatter.org/wp-content/uploads/2022/04/0322_BMHStatisticalBrief_Final.pdf) [<https://perma.cc/WR7T-5PHU>].

<sup>31</sup> *America Is Failing Its Black Mothers*, HARVARD PUBLIC HEALTH (Dec. 18, 2018), <https://hsph.harvard.edu/news/america-is-failing-its-black-mothers/> [<https://perma.cc/6Y3T-UY5S>].

<sup>32</sup> *Issue Brief: Black Maternal Health*, *supra* note 30.

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

<sup>34</sup> Edwin Rios, *'Family Policing system': How the US Criminalizes Black Parenting*, THE GUARDIAN (Apr. 14, 2023), <https://www.theguardian.com/world/2023/apr/14/family-policing-system-black-childcare> [<https://perma.cc/47SE-LQNG>]; *How the "Child Welfare" System Destroys Black Families*, N.Y. CIVIL LIBERTIES UNION (Sep. 14, 2023), <https://www.nyclu.org/podcast/s2-ep-7-how-the-child-welfare-system-destroys-black-families-with-prof-dorothy-roberts> [<https://perma.cc/S5NN-N4EE>]; Tamar Sarai, *Reparative Justice Is Needed for Victims and Survivors of Family Policing*, *New Report*

What we are seeing is a uniquely punishing logic at the center of a brutal Venn diagram—ableism, mental health stigma,<sup>35</sup> and misogyny combine to strip pregnant people of their rights.<sup>36</sup> That logic echoes the infamous *Buck v. Bell* decision, where the U.S. Supreme Court upheld compulsory sterilization of institutionalized people labeled “feeble-minded,” legitimizing eugenic violence.<sup>37</sup> Carrie Buck herself had been raped while in a foster home, became pregnant, then committed, after which Justice Holmes declared, “[t]hree generations of imbeciles are enough,” and framed sterilization as a social good, brushing aside due-process and equal-protection arguments.<sup>38</sup> Today, in addition to disappearing people through prisons and involuntary commitment, thirty-one states plus the District of Columbia disappear their lineage by permitting non-consensual sterilization of disabled people, often through guardianship regimes.<sup>39</sup>

This Article traces how (1) civil confinement regimes, (2) “child” abuse registries, (3) family separation policies, (4) criminal prosecutions, and (5) abortion bans construct a different legal universe for pregnant people living with mental health conditions—one in which they are denied care, criminalized, and rendered expendable—and argues that our collective liberation depends on abandoning these carceral reflexes in favor of abolitionist,<sup>40</sup> health-equity approaches that center support, dignity, and care.

## I. MODERN-DAY COVERTURE: CIVIL CONFINEMENT

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*Urges*, PRISM (Mar. 6, 2025), <https://prismreports.org/2025/03/06/family-policing-black-families-reparations/> [<https://perma.cc/CJ4E-762Y>].

<sup>35</sup> *Stigma, Prejudice and Discrimination Against People with Mental Illness*, AM. PSYCHIATRIC ASS’N (last visited July 2, 2025), <https://www.psychiatry.org/patients-families/stigma-and-discrimination> [<https://perma.cc/MBK7-4C2Z>].

<sup>36</sup> Samantha Lee, *Harming Fathers: How the Family Court System Forces Men to Regulate Pregnancy*, PREGNANCY JUST. (Sep. 2023), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/harming-fathers-with-appendixes-UPDATED.pdf> [<https://perma.cc/5LRU-QQGS>].

<sup>37</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>38</sup> *Id.* at 207.

<sup>39</sup> NAT’L WOMEN’S LAW CTR. & AUTISTIC WOMEN & NONBINARY NETWORK, *Forced Sterilization of Disabled People in the United States* 3–6 (2022), [https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC\\_SterilizationReport\\_2021.pdf](https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2021.pdf) [<https://perma.cc/ZWS9-89JD>] (“These laws affect mostly people with developmental and intellectual disabilities. They also affect people with disabilities related to mental health.”); *see also* DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 56–84 (1997) (Dr. Dorothy Roberts’ scholarship situates this continuum within a broader regime that polices reproduction and family life: *Killing the Black Body* traces how state power has long controlled the fertility of Black women, including through coerced sterilization.).

<sup>40</sup> *See, e.g.*, Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/MD8C-DDV5>] (“We should redirect the billions that now go to police departments toward providing health care, housing, education and good jobs.”).

At least five states—Minnesota, Oklahoma, North Dakota, South Dakota, and Wisconsin—authorize civil commitment based on prenatal substance use.<sup>41</sup> Courts have ordered pregnant people into inpatient drug treatment programs, confinement at a relative’s home, and even jail, often without meaningful due process.<sup>42</sup>

Wisconsin’s Act 292 is among the most extreme.<sup>43</sup> The law allows courts to seize custody of an “unborn child,” and forcibly detain a pregnant person based merely on the *suspicion* that they have or *may* consume alcohol or a controlled substance; no medical evidence is required.<sup>44</sup> These proceedings take place in juvenile court, based on the premise that the fetus is the juvenile in question. Worse still, the fetus is guaranteed a lawyer, but the pregnant person is not.<sup>45</sup>

In the first stage of the process, pregnant people may be taken into protective custody by police or child welfare agents.<sup>46</sup> They may be held for 48 hours before any judicial hearing takes place. Only when the state seeks longer-term detention does the pregnant person gain access to legal representation—after confinement, not before it.<sup>47</sup> Hundreds of people have been swept into this process, often without meaningful notice or opportunity to contest the allegations against them, granting them far fewer rights than if they were caught in a criminal case.<sup>48</sup> In *Loertscher v. Anderson*, a federal court found Wisconsin’s law unconstitutionally vague, faulting its core standards of a “habitual lack of self-control” and a “substantial risk” to an “unborn child” for providing neither fair notice nor meaningful limits on

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<sup>41</sup> *Pregnancy and Alcohol: Civil Commitment*, ALCOHOL POLICY INFO. SYS., <https://alcoholpolicy.niaaa.nih.gov/apis-policy-topics/civil-commitment/20/about-this-policy> [<https://perma.cc/78LS-Z6G8>] (last visited Aug. 29, 2024); MINN. STAT. ANN. §§ 253B.01-24; OKLA. STAT. tit. 63, § 1-546.5; N.D. CENT. CODE ANN. § 50-25.1-16 (“controlled substances”); N.D. CENT. CODE ANN. § 50-25.1-18 (“alcohol abuse”); S.D. CODIFIED LAWS § 34-20A-70; WIS. STAT. ANN. § 48.193.

<sup>42</sup> *Pregnancy and Alcohol: Civil Commitment*, *supra* note 41.

<sup>43</sup> In 1997, the Wisconsin legislature amended the Children’s Code to define “unborn child” as a “human being from the time of fertilization to the time of birth,” and enacted the “Unborn Child Protection Act” or Act 292. WIS. STAT. ANN. § 48.02(19); *See* WIS. STAT. ANN. § 48.193; 1997 WISC. ACT 292.

<sup>44</sup> *See* WIS. STAT. ANN. § 48.193; 1997 WIS. ACT 292.

<sup>45</sup> *Id.*

<sup>46</sup> *Pregnancy and Alcohol: Civil Commitment*, *supra* note 41.

<sup>47</sup> *Wisconsin Case Addresses Right to Counsel for Confinement of Pregnant Women*, Nat’l Coalition for a Civil Rt. to Counsel, [https://civilrighttocounsel.org/major\\_developments/wisconsin-case-addresses-right-to-counsel-for-confinement-of-pregnant-women/](https://civilrighttocounsel.org/major_developments/wisconsin-case-addresses-right-to-counsel-for-confinement-of-pregnant-women/) [<https://perma.cc/PY2G-8KGE>] (last visited Apr. 24, 2026).

<sup>48</sup> Phoebe Petrovic, Policing Pregnancy: Wisconsin’s ‘Fetal Protection’ Law, One of the Nation’s Most Punitive, Forces Women into Treatment or Jail, WXPB (Dec. 9, 2022), <https://www.wxpr.org/politics-government/2022-12-09/policing-pregnancy-wisconsins-fetal-protection-law-one-of-the-nations-most-punitive-forces-women-into-treatment-or-jail> [<https://perma.cc/DP7P-8N36>] (“Officials investigate about 400 pregnant people a year for alleged ‘unborn child abuse’ under Act 292.”).

enforcement.<sup>49</sup> The case was later dismissed as moot on appeal after Ms. Loertscher moved out of state, leaving the statute on the books.<sup>50</sup>

Ms. Loertscher shared in confidence with her clinicians that she had used methamphetamine and cannabis in the past to self-medicate an untreated serious thyroid condition and resulting depression; she was reported to child protective services by the very people she turned to for help.<sup>51</sup>

The consequences extend beyond confinement. Act 292 turns healthcare providers into state informants by authorizing and encouraging reports of suspected “unborn child abuse” to family policing agencies—reports that can trigger court-ordered detention and law enforcement involvement.<sup>52</sup> This corrodes the doctor–patient relationship and chills access to medical care. Even Wisconsin’s own Maternal Mortality Review Team has urged a shift away from automatic referrals.<sup>53</sup>

Minnesota’s law allows nearly anyone deemed an “interested person”—a spouse, parent, or even an *adult child*—to petition to confine a pregnant person.<sup>54</sup> The statute can be weaponized by abusive partners or family members seeking to punish or control pregnant people. Pregnancy, already a time of heightened vulnerability, can be further exploited as a pretext for state-sanctioned retaliation. Intimate partner violence is a well-documented psychosocial factor that worsens perinatal mental health, and homicide (often by intimate partners) is one of the leading causes of pregnancy-related deaths.<sup>55</sup> The legal fodder that a pregnant person should be monitored and surveilled by family members is thus unconscionable. Civil commitment regimes resurrect patriarchal paradigms in modern form. Where coverture once rendered women legally subordinate to their fathers and husbands, Minnesota’s law reassigns power to those same actors, recasting them as wardens rather than equals.<sup>56</sup>

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<sup>49</sup> Amy Forliti, *Case Challenging Wisconsin’s ‘Cocaine Mom’ Law Is Dismissed*, ASSOCIATED PRESS (June 18, 2018), <https://apnews.com/general-news-2cbeed6ad1494652ac70c246cbef8477> [<https://perma.cc/TU2Q-XFQ7>].

<sup>50</sup> *Id.*

<sup>51</sup> Declaration of Tamara M. Loertscher, *Loertscher v. Van Hollen*, No. 14-cv-870-jdp (W.D. Wis. Jan. 7, 2015), ECF No. 19.

<sup>52</sup> See Wisconsin’s “Unborn Children Protection Act” (Act 292), PREGNANCY JUST. (Dec. 2022), <https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/WI-act-292-12-12.pdf> [<https://perma.cc/M8FH-H7W5>].

<sup>53</sup> Wisconsin Maternal Mortality Review Team, *September 2024 Meeting Summary*, WISCONSIN DEP’T OF HEALTH SERVS. (Sep. 2024), <https://www.dhs.wisconsin.gov/mch/september-2024-mmrt-meeting-summary.pdf> [<https://perma.cc/F9G7-CSSA>].

<sup>54</sup> *Pregnancy and Alcohol: Civil Commitment*, ALCOHOL POLICY INFO. SYS. (last visited Aug. 29, 2024), <https://alcoholpolicy.niaaa.nih.gov/apis-policy-topics/civil-commitment/20/about-this-policy> [<https://perma.cc/3ULG-7HZL>].

<sup>55</sup> *Homicide Leading Cause of Death for Pregnant Women in U.S.*, HARV. SCH. PUB. HEALTH (Oct. 21, 2022), <https://hsph.harvard.edu/news/homicide-leading-cause-of-death-for-pregnant-women-in-us> [<https://perma.cc/B9C4-GFQV>].

<sup>56</sup> See *Substance Use During Pregnancy and Child Abuse or Neglect: Summary of State Laws*, LEG. ANALYSIS & PUBLIC POL’Y ASS’N 78-82 (June 2024), <https://legislativeanalysis.org/wp-content/uploads/2024/06/Substance-Use-During-Pregnancy-and-Child-Abuse-50-State-Summary.pdf> [<https://perma.cc/3PAS-ZQEQ>]; compare Reva B. Siegel, *The Modernization of Marital Status Law*, 82 GEO. L.J. 2127 (1994) (“For centuries, the common law of coverture gave husbands rights in their wives’ property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or

The legal gaze fixates exclusively on the pregnant person. There is no parallel system to monitor non-pregnant prospective co-parents for substance use or fitness to parent—revealing the deeply gendered logic at the heart of these laws and policies. The Fourteenth Amendment prohibits differential treatment based on sex without an “exceedingly persuasive justification.”<sup>57</sup>

## II. ENSHRINING STIGMA: “CHILD” ABUSE REGISTRIES

In many states across the country, pregnant people can be placed on child abuse registries based solely on prenatal substance use—often without any showing of live, ongoing harm to a born child, or any opportunity to meaningfully contest the finding.<sup>58</sup> Legal thresholds vary by state, but the result is the same: long-lasting inclusion on a stigmatizing list that has all sorts of collateral consequences, including on employment, housing, licensure, and parental rights.<sup>59</sup>

In Idaho, any prenatal use of a controlled substance, unless prescribed by a physician, is automatically classified as child abuse or neglect.<sup>60</sup> That designation triggers a mandatory ten-year inclusion on the Central Registry, with removal permitted only by petition.<sup>61</sup> A pending class action lawsuit argues that automatic placement for prenatal cannabis use violates the Fourteenth Amendment’s guarantees of equal protection and procedural due process.<sup>62</sup> In South Carolina, registry placement is also mandatory when a newborn tests positive for a controlled substance or non-prescribed medication at birth.<sup>63</sup> No finding of a live, present, and ongoing harm to a born child is required.<sup>64</sup>

Georgia’s courts have carved out a more limited exception. In *C.W. v. Department of Human Services*, the Court of Appeals held that marijuana is not a “controlled substance” under Georgia law, and prenatal use cannot serve as a basis

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holding property in their own names.”), and Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2123 (1996) (“As master of the household, a husband could command his wife’s obedience, and subject her to corporal punishment or ‘chastisement’ if she defied his authority.”), with Lee, *supra* note 36, at 3 (describing how modern family court practices empower men to monitor and control pregnant partners).

<sup>57</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>58</sup> *Substance Use During Pregnancy and Child Abuse or Neglect*, *supra* note 56.

<sup>59</sup> Julia Hernandez & Tarek Ismail, *Radical Early Defense Against Family Policing* 132 *YALE L.J.* 659, 661 (Nov. 18 2022); ‘*If I Wasn’t Poor, I Wouldn’t Be Unfit*,’ HUMAN RTS. WATCH (Nov. 17, 2022), <https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare> [<https://perma.cc/TXJ5-XF4H>].

<sup>60</sup> IDAHO ADMIN. CODE r. 16.06.01.563 (2022).

<sup>61</sup> *Id.*

<sup>62</sup> *Rossov v. Jeppesen*, No. 1:23-cv-00131-BLW (D. Idaho Mar. 18, 2025), ECF No. 86, <https://law.justia.com/cases/federal/district-courts/idaho/iddce/1:2023cv00131/51950/86/>.

<sup>63</sup> S.C. CODE ANN. § 63-7-1940 (2024) (court order for placement in central registry of child abuse and neglect).

<sup>64</sup> *Id.*

for registry placement,<sup>65</sup> and that prosecutorial discretion was not boundless.<sup>66</sup> In *Ridgell v. Department of Child Safety*, Arizona’s Court of Appeals reversed the inclusion of a pregnant woman on the central registry for medical marijuana use.<sup>67</sup> The court held that her use, under a physician’s direction and with a medical marijuana card, was lawful under the Arizona Medical Marijuana Act.<sup>68</sup> However, the Court stopped there and opined, “[a] person may be placed on the Central Registry if her newborn infant has been exposed to certain drugs, including marijuana, but only if that exposure did not result from medical treatment administered by a health professional.”<sup>69</sup> In so doing, the Court may have narrowed the most extreme application, but left intact a framework in which prenatal drug exposure remains a trigger for collateral consequences and stigma.

### III. SEVERING BONDS: FAMILY SEPARATION

Across the country, pregnancy and the stigma surrounding mental health are increasingly used as a pretext to punish prospective parents who are *pregnant* with family separation—often with no showing of harm to an actual born child.<sup>70</sup> Instead of investing in services that address the social determinants of health of a child’s health<sup>71</sup>—poverty, pollution, and safe, stable, and habitable housing, childcare, and healthcare—states pathologize pregnant people and in many cases, terminate their parental rights.<sup>72</sup>

In Vermont, the American Civil Liberties Union and Pregnancy Justice filed a lawsuit against the Department for Children and Families (DCF) for forcibly

<sup>65</sup> C. W. v. Dep’t of Hum. Servs., 836 S.E.2d 836, 836–38 (2019).

<sup>66</sup> *Id.*; see also GA. CODE ANN. § 16-13-21 (West) (“Controlled substance” means a drug, substance, or immediate precursor in Schedules I through V of Code Sections 16-13-25 through 16-13-29 and Schedules I through V of 21 C.F.R. Part 1308.”).

<sup>67</sup> Mary Jo Pitzl, *Medical Marijuana Use OK during Pregnancy if Mom Is Under Doctor’s Care*, *Court rules*, USA TODAY (Apr. 1, 2022), <https://www.usatoday.com/story/news/politics/arizona/2022/04/01/medical-marijuana-use-while-pregnant-not-neglect-if-under-doctors-care-arizona-court-rules/7053073001/> [<https://perma.cc/P4PL-RMYZ>].

<sup>68</sup> *Id.*

<sup>69</sup> *Ridgell v. Arizona Dep’t of Child Safety*, 508 P.3d 1143, 1144 (Ariz. Ct. App. 2022), *as amended* (Apr. 5, 2022) (citing ARIZ. REV. STAT. ANN. § 8–201(25)(c)).

<sup>70</sup> See Shoshana Walter, *They Followed Doctors’ Orders. Then Their Children Were Taken Away.*, N.Y. TIMES (June 29, 2023), <https://www.nytimes.com/2023/06/29/magazine/pregnant-women-medication-suboxonbabies.html> [<https://perma.cc/HG2R-TFAU>].

<sup>71</sup> See, e.g., Stephen W. Patrick, Laura J. Faherty, Andrew W. Dick, Theresa A. Scott, Judith Dudley & Bradley D. Stein, *Association Among County-land Economic Factors, Clinician Supply, Metropolitan or Rural Location and Neonatal Abstinence Syndrome*, 321 JAMA 385 (2019) (providing counties with the highest unemployment rates, especially rural counties, had neonatal abstinence syndrome (NAS) rates over 2.5 times greater than counties with the lowest unemployment rates. Additionally, counties with a shortage of mental health workers also had significantly more NAS cases.).

<sup>72</sup> See ROBERTS, *TORN APART*, *supra* note 10, at 310 (“The litany of reforms has left undisturbed the false narrative undergirding the child welfare system: that children’s hardships are caused by parental pathologies and child safety is achieved by policing families.”).

removing a newborn from her mother immediately after birth, based on the *perception* that she had a mental health condition during pregnancy.<sup>73</sup> The false accusation originated from a shelter for unhoused people where the mother had sought support.<sup>74</sup> Never mind that mental health should not be a reason for family separation. There was no due process, no hearing, and no opportunity to contest the allegations before the newborn was taken.<sup>75</sup> The result was the irreversible trauma of losing seven months with her newborn—time she will never get back. Her case is not an isolated one.<sup>76</sup> In fact, “[t]op officials at the Department for Children and Families acknowledged the existence of an internal calendar used to monitor Vermonters’ pregnancies, confirming an allegation made in” the lawsuit.<sup>77</sup>

The Colorado Supreme Court’s decision in *Colorado v. A.B.* reveals how, even in states that formally protect pregnant and postpartum people, prenatal drug use can be used to justify family separation policies.<sup>78</sup> In 2022, Colorado enacted the Reproductive Health Equity Act, which disavowed fetal personhood<sup>79</sup> and prohibited government entities from punishing prenatal conduct,<sup>80</sup> from “depriv[ing], through prosecution, punishment, or other means,” an individual of the right to act or refrain from acting during their own pregnancy based on the potential, actual, or perceived impact on the pregnancy or its outcomes.<sup>81</sup> By distinguishing “prosecution” from “punishment” and further adding “other means,” the statute’s plain language extends beyond criminal charges to encompass civil and administrative consequences—including the loss of parental rights. Under ordinary principles of statutory interpretation, each term must be given independent meaning; “punishment” cannot be read as redundant of “prosecution.”<sup>82</sup> Yet in *Colorado v. A.B.*, the court nevertheless permitted state intervention premised on prenatal substance use and upheld an adjudication of dependency and neglect.

The mother, who gave birth while experiencing homelessness, had been actively seeking treatment for a substance use disorder.<sup>83</sup> Every doctor that testified acknowledged that they could not definitely say whether her newborn “would actually experience any future effects” from in utero methamphetamine exposure.<sup>84</sup>

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<sup>73</sup> Holly Ramer, *Lawsuit Alleges Vermont Tracks Pregnant Women Deemed Unsuitable for Parenthood*, AP (Jan. 17, 2025), <https://apnews.com/article/pregnancy-child-welfare-lawsuit-vermont-2fb1e1b3f89883ecb86b090ac22bf54c> [<https://perma.cc/72PQ-F59Z>].

<sup>74</sup> Complaint, *A.V. v. Vt. Dep’t for Child. & Fams.*, No. 25-CV-00222 (Vt. Super. Ct., Lamoille Unit Civ. Div. Jan. 15, 2025).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Peter D’Auria, *Department for Children and Families Acknowledges Using Calendar to Monitor Some Pregnant Vermonters*, VT DIGGER (Mar. 27, 2025), <https://vtdigger.org/2025/03/27/department-for-children-and-families-acknowledges-using-calendar-to-monitor-some-pregnant-vermonters/> [<https://perma.cc/QSW9-GAE2>].

<sup>78</sup> *Colorado v. A.B.*, 569 P.3d 74. (Colo. 2025).

<sup>79</sup> Colo. Rev. Stat. § 25-6-403(3) (2024) (declaring fertilized eggs, embryos, and fetuses “do[] not have independent or derivative rights under the laws of this state”).

<sup>80</sup> *See id.* §§ 25-6-404(1); 24-10-103(5); C19-3-102(1)(g).

<sup>81</sup> *Id.* § 25-6-404(1)(b).

<sup>82</sup> *See, e.g., Colorado v. C.J.T.*, 546 P.3d 1150, 1158 (Colo. 2023).

<sup>83</sup> *Colorado v. A.B.*, 569 P.3d at 77-78.

<sup>84</sup> *Id.* at 77.

One physician even emphasized that the risks were “possibilities, not probabilities.”<sup>85</sup> The dissent also cited evidence that her newborn was “doing very well” developmentally and was described by physicians as “a healthy baby.”<sup>86</sup> The majority, however, concluded that the mother’s need for continued treatment constitutes a sufficient threat to the child’s welfare—even in the absence of demonstrated harm.<sup>87</sup>

In reaching that conclusion, the Court distorted the purpose of Colorado’s 2020 statutory amendments to the dependency and neglect statute, which were explicitly intended to *deemphasize* positive drug tests at birth and focus instead on a holistic assessment of family needs and strengths.<sup>88</sup> Lawmakers aimed to remove the punitive threat attached to substance use disorder, so that parents could seek help without fear of losing their children.<sup>89</sup> The court’s decision undermines that legislative intent and signals to pregnant people: efforts in earnest to parent better can be used against you.

Courts across the country in California, Georgia, Michigan, New Jersey, New York, Ohio, Tennessee, Texas, West Virginia, and Wisconsin have similarly stretched civil child welfare laws to apply to fetuses, sometimes citing tort doctrines, including wrongful death or prenatal negligence to justify this expansion.<sup>90</sup> In one case, a court reasoned that “a child has a legal right to begin life with a sound mind and body.”<sup>91</sup> This logic collapses the distinction between pregnancy and parenting, treating prenatal conduct, i.e., deviations from idealized maternal behavior—often inextricable from structural inequity (poverty, disability, trauma)—as grounds for devastating family separations.<sup>92</sup>

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<sup>85</sup> *Colorado v. A.B.*, 569 P.3d at 77.

<sup>86</sup> *Id.* at 88.

<sup>87</sup> *Id.* at 82.

<sup>88</sup> *Id.* at 84

<sup>89</sup> *Id.*

<sup>90</sup> See, e.g., *Troy D. v. San Diego Cnty. Dep’t of Soc. Servs.*, 263 Cal.Rptr 869, 874, n. 7 (Cal. Ct. App. 1989); *Jefferson v. Griffin Spalding Cnty Hosp. Auth.*, 247 Ga. 86, 88 (1981); *Matter of Baby X*, 293 N.W.2d 736, 739 (Mich. 1980); *Hoener v. Bertinato*, 171 A.2d 140, 142-144 (Bergen County Ct. 1961); *Stefanel Tyeshia C. v. Leslie C.*, 157 A.D.2d 322, 329 (N.Y. App. Div. 1990); *In re Baby Boy Blackshear*, 736 N.E.2d 462, 464 (Ohio 2000); *In re Benjamin M.*, 310 S.W.3d 844, 847 (Tenn. Ct. App. 2009); *Cervantes-Peterson v. Tex. Dep’t of Fam. & Protective Servs.*, 221 S.W.3d 244, 253 (Tex. Ct. App. 2006); *In re A.L.C.M.*, 801 S.E.2d 260, 272 (W. Va. 2017); *Gabriella M. v. Michelle S.*, 625 N.W.2d 360 (Wis. Ct. App. 2001).

<sup>91</sup> *Matter of Baby X*, 293 N. W.2d at 739.

<sup>92</sup> *Unpacking Fetal Personhood*, *supra* note 7, at 15-17; see also *In re Adrianna S.*, 520 S.W.3d 548, 557-60 (Tenn. Ct. App. 2016) (holding that a father’s parental rights could be terminated because the term “child” in the statute includes a “child in utero” and rejecting the father’s argument that his rights could not be terminated because he was unaware his child had been conceived at the time of his criminal sentencing); *Mark S. v. Felicia B.*, 543 N.Y.S.2d 637, 637-38 (Fam. Ct. 1989) (rejecting a mother’s motion to dismiss a neglect petition where she allegedly used cocaine while pregnant and the child was allegedly born with a positive toxicology); Roberts, *Building a World Without Family Policing*, *supra* note 5 (“‘Policing’ is the word that captures best what the system does to America’s most disenfranchised families. It subjects them to surveillance, coercion, and punishment. It is a family-policing system.”).

## IV. THE WOMB AS A CRIME SCENE: PROSECUTIONS AND INCARCERATION

Pregnant people living with a substance use disorder can face criminalization in many states that redefine an embryo and a fetus as a crime victim, and/or a person with constitutional rights.<sup>93</sup> These states also have extreme abortion bans with inadequate health exceptions.<sup>94</sup>

Alabama is a stark example. While Alabama is ironically the only state that recognizes a mental health exception in its abortion ban, even when patients qualify, providers still fear the threat of life in prison for providing that care if a prosecutor or jury later disagrees with their medical judgment.<sup>95</sup> Alabama leads the nation in prosecuting and incarcerating pregnant people for drug use under child abuse charges.<sup>96</sup> This punitive framework was cemented by the Alabama Supreme Court in *Hicks v. State*, which held that the term “child” under the state’s chemical endangerment statute includes fetuses.<sup>97</sup> Alabama also enshrined a broad personhood amendment to its constitution that recognizes fertilized eggs, embryos (even frozen ones, thanks to an Alabama Supreme Court decision),<sup>98</sup> and fetuses as rights-bearing persons.<sup>99</sup> As a result, pregnant people who use substances can be charged with felonies in the interest of so-called fetal rights.<sup>100</sup>

The case of Ashley Caswell shows how this regime operates in practice. After being charged with felony fetal endangerment for alleged prenatal substance use, Ashley Caswell was jailed at the Etowah County Detention Center, where she was denied her prescribed psychiatric medication during pregnancy despite jail

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<sup>93</sup> Bach & Wasilczuk, *supra* note 11, at 1, 3.

<sup>94</sup> *Policy Tracker: Exceptions to State Abortion Bans and Early Gestational Limits*, KFF (Nov. 24, 2025), <https://www.kff.org/womens-health-policy/exceptions-in-state-abortion-bans-and-early-gestational-limits/> [https://perma.cc/99CW-VDMF].

<sup>95</sup> See ALA. CODE § 26-23H-3(6) (2019); see, e.g., Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (June 6, 2024) <https://www.kff.org/womens-health-policy/a-review-of-exceptions-in-state-abortion-bans-implications-for-the-provision-of-abortion-services/> [https://perma.cc/7QT9-S2ZK].

<sup>96</sup> Becca Damante & Kierra B. Jones, *A Year After the Supreme Court Overturned Roe v. Wade, Trends in State Abortion Laws Have Emerged* (June 15, 2023; corrected July 31, 2023), CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/article/a-year-after-the-supreme-court-overturned-roe-v-wade-trends-in-state-abortion-laws-have-emerged/> [https://perma.cc/B2Q7-6HVZ].

<sup>97</sup> *Hicks v. State*, 153 So.3d 53 (Ala. 2014) (deciding the word “child” in ALA. CODE § 26-15-3.2, related to chemical endangerment of a child, includes “unborn children” and, thus, unless one of the exceptions set out in ALA. CODE § 26-15-3.3 applies, using controlled substances while pregnant [unless it’s a prescribed substance as defined under ALA. CODE § 26-15-3.3] subjects the pregnant individual to criminal penalties under Ala. Code § 26-15-3.2).

<sup>98</sup> See generally *LePage v. Ctr. for Reprod. Med., P.C.*, No. SC-2022-0515, 2024 WL 656591 (Ala. Feb. 16, 2024).

<sup>99</sup> ALA. CONST. art. I, § 36.06(a)-(b).

<sup>100</sup> See *Unpacking Fetal Personhood*, *supra* note 7 at 12-14; Katherine Koster, *Alabama’s Chemical Endangerment Laws: Where the War on Drugs Meets the War on Women*, HUFFPOST (Sep. 25, 2015), [https://www.huffpost.com/entry/alabamas-chemical-endange\\_b\\_8193196](https://www.huffpost.com/entry/alabamas-chemical-endange_b_8193196) [https://perma.cc/35PZ-8YMQ].

medical records reflecting multiple mental health diagnoses,<sup>101</sup> and prior history of hospitalization for a suicide attempt after jail staff refused to provide her prescribed psychiatric medication during a prior pregnancy.<sup>102</sup> In October 2021, she went into labor and, according to her federal civil rights complaint, was forced her to give birth alone in a jail shower without medical assistance, screaming in pain for hours while staff dismissed her pleas to go to the hospital, leaving her and her baby covered in blood as staff took photos and passed the newborn around while the umbilical cord was still attached.<sup>103</sup>

Ashley Caswell’s case exposes the hollowness of the state’s professed interests in fetal rights and the cruelty of its carceral regime: officials incarcerated her and many like her to ostensibly “protect” fetuses, then denied her basic psychiatric and obstetric care, subjected her to a traumatic birth experience, and endangered both her life and her newborn’s. Worse still, incarceration itself causes intergenerational trauma, as a growing body of research shows that imprisoning pregnant and parenting people disrupts crucial parent-child bonds and can produce long-term trauma for children.<sup>104</sup>

Indeed, the science shows that the harmful effects of many illicit substances on newborns have been exaggerated, while the far more predictive forces—socioeconomic inequities, environmental injustices, structural racism—remain unaddressed and underfunded.<sup>105</sup> Alabama’s Maternal Mortality Review Committee has even called for ending punitive responses to pregnancy, warning that they “lead[] to missed opportunities for treatment.”<sup>106</sup>

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<sup>101</sup> Complaint at 1-4, *Caswell v. Etowah County Detention Center*, No. 4:23-cv-01380-ACA-NAD (N.D. Ala. Oct. 13, 2023), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/10/Caswell-Complaint.pdf> [<https://perma.cc/VX4S-QVWE>].

<sup>102</sup> *Id.* at 12, 32-33.

<sup>103</sup> *Id.* at 2, 18-20.

<sup>104</sup> Tessa Stuart, *Rolling Stone: Alabama’s War on Women*, ACLU ALABAMA (May 20, 2024), <https://www.aclualabama.org/en/news/rolling-stone-alabamas-war-women> [<https://perma.cc/A6TR-U7NM>] (“Evidence indicates that separating a mother and child at birth or early in life can have profound, lifelong effects on brain chemistry, increasing the likelihood of post-traumatic stress, anxiety, mood, psychotic, and substance-use disorders. When it comes to exposure to controlled substances, ‘generally speaking, we grossly overstate the consequences of an in-utero chemical exposure, and greatly minimize the role of the caregiving environment,’” according to Dr. Mishka Terplan, an OB-GYN and addiction-medicine specialist.).

<sup>105</sup> Barber & Terplan, *supra* note 2, at 1; Mishka Terplan, Alene Kennedy-Hendricks, & Margaret Chisolm, *Prenatal Substance Use: Exploring Assumptions of Maternal Unfitness*, 20 SUBSTANCE ABUSE: RSCH. & TREATMENT 1, 1-4 (2015) (“Prenatal substance use first attracted widespread public attention in the United States (US) during the 1980s when preliminary research raised concern about potential negative birth outcomes among women using crack cocaine. This attention occurred in the context of the growing antiabortion movement and the push for welfare reform and coalesced around the symbol of the crack baby. Public concern focused on pregnant women as the agents responsible for propagating a predicted underclass of children whose cognitive and developmental disabilities would strain the country’s economic and social welfare system for years to come. Although subsequent research debunked many of these exaggerated claims, the assumption of prenatal substance use (particularly illicit substance use) as an indicator of maternal unfitness has persisted.”)

<sup>106</sup> 2020 *Maternal Mortality Review*, ALA. DEP’T OF PUB. HEALTH (2022),

[https://www.alabamapublichealth.gov/perinatal/assets/2020\\_annual\\_mmr.pdf](https://www.alabamapublichealth.gov/perinatal/assets/2020_annual_mmr.pdf)

[<https://perma.cc/6PYF-SYXX>]; see also Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*,

Mississippi illustrates how prosecutors deploy similar logics even without explicit prenatal personhood statutes. Despite the absence of criminal laws covering prenatal drug use or redefining embryos and fetuses as crime victims, prosecutors in Jones and Monroe County have pursued felony child abuse charges against women for allegedly “poisoning” their “unborn children” with drugs.<sup>107</sup> In Jones County alone, the local prosecutor reports bringing roughly twenty such felony child-abuse cases since 2015, and journalists have documented that multiple women have been jailed—some held until they gave birth—based solely on prenatal or postnatal drug tests.<sup>108</sup> These arrests are grounded not in legislative mandates but in prosecutors’ whims. Even where prenatal personhood is not codified, it is increasingly enforced through charging decisions.

Though the United States is home to only “4 percent of the world’s women,” it incarcerates one-quarter of all women worldwide,<sup>109</sup> and an estimated 4-5% of those incarcerated women are pregnant when first incarcerated.<sup>110</sup> Incarceration during pregnancy routinely means forced withdrawal from medications and other substances, inadequate prenatal care, higher rates of miscarriage and preterm birth, and newborns sent to intensive care units.<sup>111</sup> People who labor and give birth in

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PROPUBLICA (Sept. 23, 2015), <https://www.propublica.org/article/when-the-womb-is-a-crime-scene> [<https://perma.cc/H28Q-92AZ>].

<sup>107</sup> Michelle Liu & Erica Hensley, *Delivering Justice: Why a Mississippi County is Prosecuting Some Pregnant Women and New Moms*, MISS. TODAY (May 11, 2019), <https://mississippitoday.org/2019/05/11/delivering-justice/> [<https://perma.cc/2HV3-UJ3B>]; Anna Wolfe, *They Were Prosecuted for Using Drugs while Pregnant. But It May Not Have Been a Crime*, MISS. TODAY (Nov. 16, 2023), <https://mississippitoday.org/2023/11/16/mississippi-pregnant-women-drugs/> [<https://perma.cc/QF2Z-K2EL>]; Anna Wolfe, *Women Released from Prison Following Mississippi Today Investigation, Mother Sharing Her Story*, MISS. TODAY (Feb. 10, 2025), <https://www.mississippitoday.org/2025/02/10/women-released-from-prison-following-mississippi-today-investigation-mother-sharing-her-story/> [<https://perma.cc/PCP8-2CZU>].

<sup>108</sup> Jane Smith, *Mississippi Women Prosecuted for Drug Use During Pregnancy*, MISS. TODAY (Dec. 12, 2024), <https://mississippitoday.org/2024/12/12/mississippi-women-prosecuted-pregnancy-drug-use/>; Liu & Hensley, *supra* note 107.

<sup>109</sup> Emily Widra & Aleks Kajstura, *In 2025, Every U.S. State Outranks Most Democratic Countries in Women’s Incarceration, New Report Shows*, PRISON POL’Y INITIATIVE BLOG (Sept. 23, 2025), <https://www.prisonpolicy.org/blog/2025/09/23/womens-global/> [<https://perma.cc/AD6W-L4GQ>].

<sup>110</sup> *Pregnant Women in State Prisons and Local Jails: Federal Assistance to Support Their Care*, U.S. G.A.O. (Oct. 2, 2024), <https://www.gao.gov/products/gao-25-106404> [<https://perma.cc/4GNK-66NK>].

<sup>111</sup> *Incarceration Harms Moms and Babies*, NAT’L P’SHIP FOR WOMEN AND FAMILIES (2021), <https://nationalpartnership.org/report/incarceration-harms-moms-and-babies/#:~:text=Being%20incarcerated%20during,communities%20of%20color> [<https://perma.cc/296Z-5YPB>]; Carolyn Sufrin, Lauren Beal, Jennifer Clarke, Rachel Jones & William D. Mosher, *Pregnancy Outcomes in U.S. Prisons, 2016-2017*, 109 AM. J. PUB. HEALTH 799 (2019) (“Incarcerated pregnant women are more likely to have these and other risk factors for poor perinatal outcomes than are nonincarcerated pregnant women.”); Chris Ahlback Carolyn Sufrin & Rebecca Shlafer, *Impact of Incarcerating Pregnant People with Opioid Use Disorder: Equity and Justice Implications*, 136 OBSTETRICS & GYNECOLOGY 576; Leah Wang, *Unsupportive Environments and Limited Policies: Pregnancy Postpartum and Birthing During Incarceration*, PRISON POL’Y INITIATIVE (Aug. 19, 2021), [https://www.prisonpolicy.org/blog/2021/08/19/pregnancy\\_studies/](https://www.prisonpolicy.org/blog/2021/08/19/pregnancy_studies/) [<https://perma.cc/AD6W-L4GQ>] (“When pregnancy did end in custody, in some states like Arizona, Kansas, and Minnesota, rates of miscarriage ranged from 19-221% exceeding estimates of the national rate.”); *Interrupting Punitive Responses to Substance Use and Pregnancy*, *supra* note 2;

custody report being denied support, shackled in childbirth, and separated from their newborns within hours; these are all conditions that worsen perinatal outcomes rather than protect anyone's health.<sup>112</sup>

#### V. LIVING IN A DIFFERENT AMERICA: HEALTHCARE DEPRIVATION

Last year, a state court in Idaho affirmed that patients facing physical complications may access life-saving abortion care under the state's bans.<sup>113</sup> But those experiencing psychiatric emergencies of “self-harm”—realities brought on by symptoms of suicidality, psychosis, and catatonia—remain categorically excluded.<sup>114</sup> This decision forces people to continue pregnancies that actively endanger their lives and endorses a hierarchy in which mental health is treated as less real, and less worthy of protection, than physical health.<sup>115</sup>

Idaho is not alone. Abortion bans in states, including Georgia, Florida, Iowa, Kentucky, Louisiana, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, West Virginia, and Wyoming explicitly exclude mental and emotional health from their medical exceptions.<sup>116</sup> Others, including Texas, Oklahoma, Mississippi, Kentucky, and Arkansas, “limit their life and/or health exceptions to physical conditions.”<sup>117</sup>

For many, pregnancy itself induces harrowing psychiatric symptoms.<sup>118</sup> Dr. Jennifer Payne, a leading and prolific reproductive-psychiatrist and researcher, who testified in the Idaho litigation, has identified epigenetic biomarkers that can predict whether pregnancy will exacerbate an existing mental health condition or usher in

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Mackenzie Mays, Bloomberg Law & Jon Schuppe, ‘Why Won’t You Help Me?’ *Pregnant Women and Their Babies Endure Inhumane Conditions in Jails*, NBC NEWS (Nov. 20, 2025), <https://www.nbcnews.com/news/us-news/pregnant-women-babies-endure-inhumane-conditions-jails-rcna241871> [https://perma.cc/V4SM-2NNK]; Jennifer G. Clark & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, AMA J. ETHICS POL’Y FORUM (Sep. 2013), <https://journalofethics.ama-assn.org/article/shackling-and-separation-motherhood-prison/2013-09#:~:text=After%20giving%20birth%2C%20most%20incarcerated%20mothers%20are%20allowed%20only%2024%20hours%20with%20their%20newborns%20in%20the%20hospital%3B%20the%20infants%20are%20then%20either%20placed%20with%20relatives%20or%20in%20foster%20care%2C%20and%20the%20mothers%20are%20returned%20to%20prison%20or%20jail%20%5B24%5D.%20This%20separation%20is%20devastating%20for%20both%20mother%20and%20infant> [https://perma.cc/C5CV-YNU6].

<sup>112</sup> *Incarceration Harms Moms and Babies*, *supra* note 111; Sufirin et al., *supra* note 111; Ahlback et al., *supra* note 111; Wang, *supra* note 111; *Interrupting Punitive Responses to Substance Use and Pregnancy*, *supra* note 2; Mays et al., *supra* note 111; Clark & Simon, *supra* note 111.

<sup>113</sup> Judgment, *Adkins v. State*, No. CV01-23-14744 (Idaho 4th Jud. Dist. Ct., Ada Cnty. Apr. 11, 2025).

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

<sup>115</sup> See Plaintiffs’ Proposed Findings of Fact and Conclusions of Law at 83, 87-90, *Adkins v. Idaho*, No. CV01-23-14744.

<sup>116</sup> Felix, Sobel & Salganicoff, *supra* note 95.

<sup>117</sup> *Id.*

<sup>118</sup> Maureen Sayres Van Niel & Jennifer L. Payne, *Perinatal Depression: A Review*, 87 CLEV. CLINIC J. MED. 273 (2020).

the onset of one due to heightened sensitivity to hormonal shifts during pregnancy.<sup>119</sup> These symptoms may be resistant to conventional treatment, but can be alleviated by removing the exacerbating factor, the pregnancy itself.<sup>120</sup> Other patients require last-resort psychiatric medications that are contraindicated in pregnancy but are essential to preventing life-threatening psychiatric symptoms.<sup>121</sup>

These harms do not occur in a vacuum; they are enabled by federal abdication. Across administrations, the federal government has not accounted for the established science on perinatal mental health. In *Moyle v. United States*, the Court considered whether the federal Emergency Medical Treatment and Labor Act (EMTALA) preempts Idaho's abortion ban when a pregnant patient arrives at an emergency department with a health-threatening condition that is not yet certain to be fatal. During oral argument, the federal government stated that abortion "is not the accepted standard of practice to treat any mental health emergency."<sup>122</sup> Life-endangering mental health crises are as urgent as other obstetric crises like placental abruption or preeclampsia,<sup>123</sup> and patients in psychiatric crisis can face catastrophic outcomes when abortion is categorically excluded from stabilizing care.<sup>124</sup> The current Trump administration has withdrawn EMTALA guidance on emergency abortion, abandoned federal enforcement efforts, and moved to wind down pending EMTALA abortion cases—effectively signaling that it will not enforce EMTALA's stabilizing-care mandate where states criminalize needed abortion care, let alone in psychiatric emergencies.<sup>125</sup>

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<sup>119</sup> See Plaintiff's Proposed Findings of Fact and Conclusions of Law, *supra* note 115, at 88; Jennifer L. Payne, Lauren M. Osbourne, Olivia Cox, John Kelly, Samantha Meilman, Ilenna Jones, Winston Genier, Karen Clark, Evelyn Ross, Rachel McGinn, Pathik D. Wadhwa, Sonja Entringer, Anne L. Dunlop, Anna K. Knight, Alicia K. Smith, Claudia Buss & Zachary A. Kaminsky, *DNA Methylation Biomarkers Prospectively Predict Both Antenatal and Postpartum Depression*, 285 PSYCHIATRY RES. 112711 (2020), Zachary Kaminsky & Jennifer Payne. *Seeing the Future: Epigenetic Biomarkers of Postpartum Depression*, NEUROPSYCHOPHARMACOLOGY REV. 39, 234 (2014).

<sup>120</sup> See Plaintiff's Proposed Findings of Fact and Conclusions of Law, *supra* note 115, at 88.

<sup>121</sup> *Id.* at 89-90.

<sup>122</sup> Sheela Ranganathan, Rebecca Reingold & Emily Schneider, *Threats to EMTALA: Unpacking the Oral Arguments in Idaho v. United States*, GEORGETOWN O'NEILL CTR. FOR HEALTH L. & POL'Y (May 8, 2024), <https://oneill.law.georgetown.edu/threats-to-emtala-unpacking-the-oral-arguments-in-idaho-v-united-states/> [<https://perma.cc/VP3F-8SJP>]; see also Khiara M. Bridges, *Pregnancy Criminalization & Privacy*, YOUTUBE (June 28, 2024), <https://www.youtube.com/watch?v=hAV0wtTGIMU&t=8132s> [<https://perma.cc/T95W-RHJR>] ("Why wouldn't our mental health count? Why wouldn't it be as significant as our physical health? So as we think about this world that [we] want to create, right, this world that never existed . . . it has to be a world in which mental health is not subordinate to physical health. It has to be one in which they're equal and that we can't dichotomize those things because, I mean, to separate mind and body is a fallacy.")

<sup>123</sup> *Facts Are Important: Abortion Is Healthcare*, ACOG ADVOCACY (last updated 2025), <https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare> [<https://perma.cc/K876-3KRE>].

<sup>124</sup> See Plaintiffs' Proposed Findings of Fact and Conclusions of Law, *supra* note 115, at 83, 97-90.

<sup>125</sup> Amanda Seitz & Geoff Mulvihill, *Trump Administration Revokes Guidance Requiring Hospitals to Provide Emergency Abortions*, AP NEWS (Jun. 3, 2025), <https://apnews.com/article/abortion-emtala-biden-trump-emergency-hospital-3640bff165dac1d28b91e8adee7e47dd> [<https://perma.cc/KXF5-W75H>]; Laurie Sobel, *What Does the Trump Administration's Dismissal of*

There is a throughline of violence and neglect in the way the state responds to pregnant people living with mental health conditions. Public messaging, legislation, and policing channel structural abandonment into blame—villainizing or infantilizing pregnant people,<sup>126</sup> whichever better advances state control,<sup>127</sup> siphoning them into incarceration and civil confinement, isolating them with family separation, stigmatizing them with registries, and forcing them into martyrdom by denying them abortion care. Even under *Roe*, prosecutors in Indiana charged a woman with attempted feticide after a suicide attempt resulted in pregnancy loss, a harrowing reminder that mental health crises in pregnancy have long been treated as crimes rather than calls for care.<sup>128</sup> The Catch-22 is cruel: we deny essential care to those in crisis, then punish them for the consequences of that denial.

## VI. CHARTING A DIFFERENT FUTURE

This bleak reality raises an urgent question: What would it look like if our most powerful institutions banded together to protect pregnant people? It certainly wouldn't resemble a country with the most devastating rates of maternal mortality among comparably resourced nations.<sup>129</sup>

### A. Reproductive Justice and Human Rights

If we sincerely wanted to chart a different future, we would begin by animating core human rights principles. Reproductive-justice leaders, including SisterSong and Loretta Ross, remind us that true reproductive freedom means the human right to maintain bodily autonomy, to have children, not to have children, and to parent children in safe, sustainable communities.<sup>130</sup> Representative Nikema

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*EMTALA Litigation Mean for Emergency Abortion Care?*, KFF (Mar. 24, 2025), <https://www.kff.org/quick-take/what-does-the-trump-administrations-dismissal-of-emtala-litigation-mean-for-emergency-abortion-care/> [<https://perma.cc/N2BQ-2HW2>]; *What to Know About the Idaho Emergency Abortion Case Dropped by the Trump Administration*, PBS NEWS (Mar. 6, 2025), <https://www.pbs.org/newshour/health/what-to-know-about-the-idaho-emergency-abortion-case-dropped-by-the-trump-administration> [<https://perma.cc/KS3Q-FUT2>].

<sup>126</sup> *Guide to Accurate and Compassionate Reporting on Drug and Alcohol Use During Pregnancy*, *supra* note 2 (providing alternative to harmful messaging around prenatal substance use).

<sup>127</sup> Mishka Terplan, *Substance Use and Use Disorder in Pregnancy and Postpartum*, 33 INT'L J. PSYCHIATRY 501 (2021).

<sup>128</sup> Ed Pilkington, *Indiana Prosecuting Chinese Woman for Suicide Attempt That Killed Her Foetus*, THE GUARDIAN (May 30, 2012), <https://www.theguardian.com/world/2012/may/30/indiana-prosecuting-chinese-woman-suicide-foetus> [<https://perma.cc/2HV2-JXAJ>].

<sup>129</sup> Jacqueline Howard, *US Has the Highest Rate of Maternal Deaths Among High-Income Nations. Norway Has Zero*, CNN (June 4, 2024), <https://www.cnn.com/2024/06/04/health/maternal-deaths-high-income-nations/index.html> [<https://perma.cc/C9CW-VSDH>].

<sup>130</sup> *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice> [<https://perma.cc/YU72-QPHQ>] (last visited Mar. 5, 2026); Loretta J. Ross, *2006 Creating Change Human Rights Speech* (Dec. 2, 2020), <https://lorettajross.com/dred-feminist-blog/2006-creating-change-human-rights-speech-2006-lross> [<https://perma.cc/PZX5-4RU3>].

Williams’s 2025 congressional resolution endeavors to translate that vision into law, affirming reproductive freedom as a fundamental human right under U.S. and international law and condemning abortion bans and pregnancy-based criminalization as violations of those obligations.<sup>131</sup> As maternal-health physician and policy expert Kimá Joy Taylor explains, improving maternal and child outcomes requires “centering love not punishment” for pregnant and parenting people who use drugs and building systems that provide welcoming, evidence-informed, non-punitive care across the full continuum of health and social services.<sup>132</sup> As a threshold matter, that care must be voluntary and non-coercive, as forced withdrawal and compulsory programs are associated with high rates of return to use and increased overdose risk after discharge.<sup>133</sup>

### B. *The Road to Abolition: States Can Invest and Divest*

Some states, communities, and advocates are already sketching a different future. Model legislation can operationalize these principles by ending non-consensual drug testing, prohibiting automatic reporting based on positive toxicology at birth, and expanding voluntary, trauma-informed services instead of surveillance and punishment.<sup>134</sup> New York’s proposed Informed Consent Act, for example, would prohibit clinicians from drug testing pregnant and birthing people, and their newborns,<sup>135</sup> without informed, specific consent, and create oversight mechanisms to ensure hospitals follow the law.

In Massachusetts, the Moms Do Care program connects pregnant and postpartum people<sup>136</sup> with voluntary, trauma-informed medical and behavioral healthcare, peer recovery, parenting support, and case management for more than 1,000 participants, offering a concrete alternative to pregnancy criminalization.<sup>137</sup> Some proposals similarly urge shifting funds out of criminal legal system and family-policing systems and into direct community grants that provide housing, childcare, and treatment without coercion, alongside expanded Medicaid home- and

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<sup>131</sup> H. R. Con. Res. 130, 118th Cong. (2025).

<sup>132</sup> Kimá Joy Taylor, *A Different Vision: Centering Love Not Punishment for Families Affected by Substance Use*, 27 *MATERNAL AND CHILD HEALTH J.* 182 (2023)

<sup>133</sup> Leo Beletsky, *Involuntary Treatment for Substance Use Disorder: A Misguided Response to the Opioid Crisis*, HARVARD HEALTH PUBLISHING (Jan. 28, 2018), <https://www.health.harvard.edu/blog/involuntary-treatment-sud-misguided-response-2018012413180> [https://perma.cc/2R3Q-XHPH]; Alexander R. Bazazi, *Unpacking Involuntary Interventions for People who Use Drugs*, NAT’L LIBRARY OF MEDICINE (June 2018), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7006027/> [https://perma.cc/SDN6-9BH2].

<sup>134</sup> Loyal Bou Harfouch, *Healthy Families Start with Compassionate Policy: Addressing Drug Use During Pregnancy*, REASON FOUNDATION (July 9, 2005), <https://reason.org/commentary/healthy-families-start-with-compassionate-policy-addressing-drug-use-during-pregnancy/?asam.org> [https://perma.cc/V5SC-EXXC].

<sup>135</sup> *Informed Consent NY*, INFORMED CONSENT COALITION, <https://www.informedconsentny.com/> [https://perma.cc/2N36-26XS] (last visited Mar. 5, 2026).

<sup>136</sup> *Interrupting Punitive Responses to Substance Use and Pregnancy*, *supra* note 2, at 15.

<sup>137</sup> *Id.*

community-based services and income supports that make it materially possible to parent.<sup>138</sup>

Washington’s recent reforms<sup>139</sup> likewise move newborns and birthing parents out of the crosshairs of family policing as hospitals are no longer required to report people for giving birth to substance-exposed newborns,<sup>140</sup> and under the state’s “Eat, Sleep, Console” model, most substance-exposed infants are treated first with non-pharmacologic supports while remaining with their birthing parents to promote bonding, emphasizing skin-to-skin contact and feeding, to eat, sleep, and be consoled.<sup>141</sup> A large NIH-funded trial has found that the Eat, Sleep, Console method shortens hospital stays.<sup>142</sup> Washington officials describe the shift as part of a broader effort to reduce stigma and recognize substance-use disorder as a medical condition, not a moral failure.<sup>143</sup>

Communities, including grandparents, extended kin, neighbors, and peer networks, have long supported child-rearing, knowing it takes a village to support a parent, without the collateral consequences of family policing.<sup>144</sup> In fact, research shows that children thrive when families remain intact and are provided concrete supports, including safe housing, accessible healthcare, child care, and income security, instead of surveillance and separation.<sup>145</sup> The invest-divest and community control principles of abolition frameworks simply name what communities have long practiced, shifting power and resources away from punishment and toward collective care.<sup>146</sup>

In a federal vacuum, it is even more critical for states to divest our taxpayer dollars from punitive infrastructures and invest in services and programs that demonstrably improve maternal health.<sup>147</sup> It also means rejecting the local carceral ecosystems—like those in Alabama’s Etowah County—where jails, courts, private medical contractors, and mandated treatment programs profit from cycling pregnant people through incarceration and court-ordered rehab instead of providing the care and material support the state has failed to offer.<sup>148</sup>

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<sup>138</sup> Ives-Rublee & Stafford, *supra* note 3.

<sup>139</sup> *Plan of Safe Care*, WASH. STATE DEP’T OF CHILDREN, YOUTH & FAMILIES, <https://dcyf.wa.gov/safety/plan-safe-care> [<https://perma.cc/QQ5N-9AB2>] (last visited Mar. 1, 2026).

<sup>140</sup> Elise Takahama, *WA Hospitals No Longer Required to Report All Substance-Exposed Infants*, SEATTLE TIMES (June 9, 2023), <https://www.seattletimes.com/seattle-news/health/wa-hospitals-no-longer-required-to-report-all-substance-exposed-infants/> [<https://perma.cc/7U78-Y2CL>].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See, e.g., *Help Is NOT on the Way: How Family Policing Perpetuates State Directed Terror*, UPEND, [https://upendmovement.org/wp-content/uploads/2022/06/upEND-Movement-Help-is-NOT-on-the-Way-06\\_2022.pdf](https://upendmovement.org/wp-content/uploads/2022/06/upEND-Movement-Help-is-NOT-on-the-Way-06_2022.pdf) [<https://perma.cc/J4TP-SRF3>] (last visited Apr. 24, 2026).

<sup>145</sup> Vivek Sankaran, *Children Deserve More Than an Investigation*, THE IMPRINT (Aug. 18, 2025), <https://imprintnews.org/opinion/children-deserve-more-than-an-investigation/264960> [<https://perma.cc/NN78-WQGF>].

<sup>146</sup> Sandeep Singh Dhaliwal, *Investing in Abolition*, 112 GEO. L.J. 1, 50–52 (2023).

<sup>147</sup> Harfouch, *supra* note 134.

<sup>148</sup> Amy Yurkanin, *How One Alabama County Declared War on Pregnant Women Who Use Drugs*, THE MARSHALL PROJECT, (July 26, 2023), <https://www.themarshallproject.org/2023/07/26/alabama-pregnant-women-drugs> [<https://perma.cc/F77R-GJMS>] (Etowah County, Alabama has systematically

Beyond cruelty, criminalizing pregnant people is extraordinarily expensive. Incarcerating a single person costs states an average of \$33,000 annually, and over \$70,000 in high-cost states including California and New York.<sup>149</sup> If incarceration results in foster care placements, taxpayers incur an additional \$25,000 per child per year.<sup>150</sup> These expenditures mount while punitive policies fail to improve outcomes for substance use or maternal and infant health.<sup>151</sup> By contrast, community-based approaches, including housing, income support,<sup>152</sup> voluntary treatment, and peer care, are both more effective and less costly.<sup>153</sup>

Additionally, states now control billions of dollars in opioid settlement funds (money taken from the very companies that helped create the overdose crisis) and can redirect it toward voluntary perinatal treatment, stable housing, and community supports instead of police budgets and jail spending, where much of it currently flows.<sup>154</sup>

### C. *When Tides Shift Nationally*

When political will shifts at the national level, the same mechanisms that have been wielded to dismantle public health infrastructure and visit a nightmare on immigrant communities can be repealed to invest in community-based care instead. This encompasses universal pre- and post-natal care, including care to support people's emotional health, and voluntary, non-judgmental, and trauma-informed

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used the chemical-endangerment law to jail pregnant people, often holding them pretrial on high bonds and conditioning release on costly rehab beds).

<sup>149</sup> Harfouch, *supra* note 134.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See, e.g., Nicole Leonard, *Philadelphia Families Say Philly Joy Bank Guaranteed Income Program Provided Stability During Pregnancy*, WHY? (Oct. 7, 2025),

<https://whyy.org/articles/philly-joy-bank-income-pregnancy/> [<https://perma.cc/B3PQ-B3VR>] (discussing the Philly Joy Bank, a program providing cash assistance for pregnant parents in Philadelphia).

<sup>153</sup> See, e.g., *Diversion to Treatment*, LEGAL ACTION CENTER, <https://www.lac.org/work/priorities/building-health-equity/diversion-to-treatment> [<https://perma.cc/X6BS-7URV>] (last visited Feb. 27, 2026).

<sup>154</sup> *Guides for Community Advocates on the Opioid Settlements*, VITAL STRATEGIES, <https://www.opioidsettlementguides.com/> [<https://www.opioidsettlementguides.com/>] (last visited Feb. 27, 2026); Aneri Pattani, *From Narcan to Gun Silencers, Opioid Settlement Cash Pays Law Enforcement Tabs*, KFF HEALTH NEWS, (Nov. 3, 2025), <https://kffhealthnews.org/news/article/opioid-settlements-law-enforcement-spending-states-towns-guns-narcan/> [<https://perma.cc/69FD-494J>]; Aneri Pattani, *Law Enforcement Eyes Opioid Settlement Cash for Squad Cars and Body Scanners*, NPR, (Oct. 20, 2023), <https://www.npr.org/sections/health-shots/2023/10/20/1206326239/law-enforcement-eyes-opioid-settlement-cash-for-squad-cars-and-body-scanners> [<https://perma.cc/K37M-9KYC>]; Jan Hoffman, *Opioid Settlement Money is Being Spent on Police Cars and Overtime*, N.Y. TIMES (Aug. 14, 2023), <https://www.nytimes.com/2023/08/14/health/opioids-settlement-money.html> [<https://perma.cc/HG5N-NCZM>].

treatment for substance use, as called for in the prior federal administration’s National Strategy to Improve Maternal Mental Healthcare.<sup>155</sup>

Additionally, Modern Monetary Theory provides that, unlike states and cities, the federal government is a sovereign currency issuer that can create far more money for public resources, meaning that transformative investment in housing, health care, and community support can precede divestment from carceral and violent infrastructures rather than waiting for it.<sup>156</sup> In other words, at the federal level the goal need not be a zero-sum “defund to fund” trade, but a deliberate choice to expand public spending for care while shrinking carceral budgets as a matter of constitutional and human-rights commitment.<sup>157</sup>

The U.S. Department of Justice could also investigate state and local practices that punish pregnant people simply for living with a substance use disorder—a recognized mental health condition<sup>158</sup>—as potential disability discrimination under federal law. HHS can similarly investigate hospitals that target pregnant people for non-consensual drug testing. Congress can use legislative machinery to protect people from surveillance, punishment, and deprivations based on their pregnancy status with a full-throated declaration affirming their human rights.<sup>159</sup> It is not easier to dismantle protections than it is to build them; it is a matter of political choice.

We are living through a profound contraction of civil and human rights and cannot afford to make concessions. The fight for maternal and mental health is, at its core, a fight for life and human dignity.<sup>160</sup> In a nation where people can be forced

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<sup>155</sup> *HHS Announces National Strategy to Improve Maternal Mental Health Care*, AMERICAN HOSPITAL ASSOCIATION, (May 14, 2024), <https://www.aha.org/news/headline/2024-05-14-hhs-announces-national-strategy-improve-maternal-mental-health-care> [<https://perma.cc/KE32-8LTW>]; see also *Understanding CAPTA and State Obligations*, PREGNANCY JUST., (Nov. 2020), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/Understanding-CAPTA-and-State-Obligations-3.pdf> [<https://perma.cc/SX5M-XQCL>] (“The federal funds can be used by states to develop a myriad of ways to offer confidential services and support to families after a baby has been identified outside of the context of a punitive child neglect investigation and proceeding. Providing confidential care can be an important part of harm reduction and has been shown to support infants and their caregivers’ wellbeing.”); Caroline Le & Sarah Coombs, *Substance Use Disorder Hurts Moms and Babies*, NAT’L P’SHIP FOR WOMEN & FAMILIES, 5 (2021), <https://nationalpartnership.org/wp-content/uploads/2023/02/substance-use-disorder-hurts-moms.pdf> [<https://perma.cc/83DY-9AYB>]; Stephanie Green, *The Maternal Mental Health Crisis Undermines Moms’ and Babies’ Health*, NAT’L P’SHIP FOR WOMEN & FAMILIES, 4 (2021), <https://nationalpartnership.org/wp-content/uploads/2023/02/maternal-mental-health-crisis.pdf> [<https://perma.cc/EX65-GX5Y>].

<sup>156</sup> Dhaliwal, *supra* note 146, at 58–60.

<sup>157</sup> *Id.*

<sup>158</sup> *Substance Use Disorder and Mental Health*, UCSF DEP’T OF PSYCHIATRY & BEHAV. SCIS., <https://psych.ucsf.edu/substanceabuse> [<https://perma.cc/QQ4X-P4PG>] (last visited July 2, 2025).

<sup>159</sup> See, e.g., H. R. Con. Res. 130, *supra* note 131.

<sup>160</sup> Across multiple doctrines, the Court has treated dignity as a core constitutional value that undergirds rights to expression, privacy, bodily integrity, and decisional autonomy. See, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971) (describing First Amendment protections as supporting “the individual dignity and choice upon which our political system rests”); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (identifying “protect[ion of] personal privacy and dignity against unwarranted intrusion by the State” as the “overriding function” of the Fourth Amendment); *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (locating the privilege against self-incrimination in “the respect a

to give birth without access to healthcare or basic safety, it is clear as day, sharp as night, that these realities are abject government failures. With stakes so high, we can't continue to lose sight of our collective responsibility.<sup>161</sup>

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government—state or federal—must accord to the dignity and integrity of its citizens”); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”); *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (explaining that the liberties protected by the Fourteenth Amendment “extend to certain personal choices central to individual dignity and autonomy”).

<sup>161</sup> See, e.g., *Visioning New Futures for Reproductive Justice Declaration 2023*, SISTERSONG WOMEN OF COLOR REPROD. JUST. COLLECTIVE, <https://www.sistersong.net/visioningnewfuturesforrj> [<https://perma.cc/UYD5-XHDL>] (last visited Apr. 20, 2026).