

TRUE ABOLITION: DISMANTLING CRIMINAL ABORTION LAWS AND BUILDING POLICIES TO REALIZE REPRODUCTIVE JUSTICE

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INTRODUCTION

In anticipation of, and immediately following, the Supreme Court’s overturn of *Roe v. Wade*,¹ several states rushed to enact criminal abortion laws. Three years later, some states are doubling down on criminal approaches. The most extreme bills, pushed by self-described “abortion abolitionists,”² would authorize murder

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¹ *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

² “Abortion abolitionists” are a militant wing of the anti-abortion movement led by “a new generation of White male conservative Baptists, Presbyterians, and Christian Reconstructionists” that

prosecutions of people who have abortions. These bills reflect the most extreme product of the assumption underlying all criminal abortion laws—that protection of “life” requires state control of pregnant people through coercive means, including the use of criminal law. This essay challenges the idea that the rights of pregnant people and protection of prenatal life are inherently in conflict, describes measures that states can take to protect prenatal life that also respect the dignity, health and rights of people who are, or can become, pregnant, and considers obstacles that have prevented U.S. law makers from taking this approach.

Based on their experience with criminal abortion laws, the high courts of Mexico and Colombia—countries that, unlike the United States, have a constitutional commitment to protecting prenatal life³—struck down criminal laws because they simply don’t work⁴ and impose real harm.⁵ Three years after *Dobbs v. Jackson Women’s Health Organization*,⁶ we are seeing similar outcomes in the United States. Criminal abortion laws have not decreased the overall number of abortions in the United States⁷ and have caused significant harm. Not only do these laws violate the dignity and rights of pregnant people, they have also caused their deaths and undermined their healthcare.⁸ Given these realities, the Mexican and Colombian courts urged their legislatures to fulfill the state’s obligation to protect prenatal life while simultaneously respecting the rights of women and people who can become pregnant by adopting measures to provide contraception and family planning information, guarantee access to sexual and reproductive health services, including abortion, and support pregnant people and families so that they can afford to have children.

The policies described by the Mexican and Colombian high courts reflect reproductive justice and human rights principles emphasizing not only that people have the right to control their fertility and terminate unwanted pregnancies but that they also have a right to have and parent children in safe and healthy environments and the state should facilitate their ability to enjoy these rights.

The approach adopted by the Mexican and Colombian courts could create common ground for reproductive justice activists and opponents in the United States. Despite abortion abolitionists’ extreme claims that prenatal life at all stages of development should be recognized as legal persons, most people who oppose abortion do not support granting zygotes, embryos and fetuses full legal rights and

advocate for the total criminalization of abortion without exceptions, including those who have abortions who historically have not been targeted by criminal laws in the U.S. See Hannah Silver & Cloee Cooper, *101 Abortion Abolitionists*, POLITICAL RESEARCH ASSOCIATES (July 24, 2024) <https://politicalresearch.org/2023/10/26/101-abortion-abolitionists> [<https://perma.cc/8TUJ-8DGC>].

³ Corte Constitucional [C.C.] [Constitutional Court], febrero 21, 2022, Sentencia C-055/2022, ¶¶ 264–67 (Colom.), translated in Ruling C-055 of 2022 (English), CTR. FOR REPROD. RTS (July 2023), <https://reproductiverights.org/wp-content/uploads/2023/07/Constitutional-Court-Ruling-C-055-de-2022-ENGLISH-VERSION.pdf> [hereinafter C-055/2022 (Col)]; Acción de Inconstitucionalidad 148/2017, Pleno de la Suprema Corte de Justicia de la Nación [SCJN], Décima Época, Sentencia de 7 septiembre de 2021, ¶ 166 (Mex.) [hereinafter 148/2017 (Mex)].

⁴ C-055/22 (Col), *supra* note 3, ¶ 434; 148/2017 (Mex), *supra* note 3, ¶¶ 246–47.

⁵ C-055/22 (Col), *supra* note 3 ¶ 436; 148/2017 (Mex), *supra* note 3, ¶¶ 258–59.

⁶ 597 U.S. 215 (2022).

⁷ See *infra* note 74.

⁸ See *infra* notes 75–79 and accompanying text.

express concern for pregnant people and families. On the flip side, reproductive justice advocates opposing abortion bans emphasize that the state should ensure that people have access to sexual and reproductive services and prenatal care and that families have the support they need to raise their children.

This essay describes Mexican and Colombian decisions and then posits that abandoning carceral approaches will require three major shifts in U.S. discourse: (1) dismantling gender stereotypes and recognizing women as full rights holders; (2) disentangling protection for prenatal life from Prenatal Personhood claims; and (3) building support for government programs that support the health, welfare, and autonomous choices of women and families.

I. COUNTRIES WITH A COMMITMENT TO PRENATAL LIFE REJECT CRIMINAL ABORTION LAWS

In Mexico and Colombia, the government has an affirmative obligation to protect prenatal life, but courts have rejected the use of criminal law to regulate abortion.⁹ Based on their experience with criminalization, the courts found that criminal law was not an effective means to prevent abortions or protect prenatal life.¹⁰ The laws also imposed serious harm. Not only did they violate the rights of women and people who can become pregnant, they also endangered their health and lives and disproportionately impacted marginalized and disadvantaged communities.¹¹ Because of these factors, the courts struck down criminal laws and urged their legislatures to adopt alternative measures to protect prenatal life and the right to reproductive self-determination.¹²

The courts' conclusions echo the experience of countries around the world. Based on a systematic review of studies published between 2010 and 2019, the World Health Organization (WHO) found that "criminalization [does] not impact the decision to have an abortion, prevent women having abortions, or prevent women from seeking information on and referral to services Instead, criminalization limits access to safe and legal abortion, and increases recourse to unlawful and unsafe abortion."¹³ Based on these realities, U.N. human rights bodies and the WHO have condemned criminal abortion laws.¹⁴

⁹ Cynthia Soohoo, *Turning Away from Criminal Abortion Laws and Towards Support for Pregnant People and Families*, 104 B.U. L. REV. ONLINE 109, 112-14 (2024) [hereinafter Soohoo, *Turning Away from Criminal Abortion Laws*] (noting that in several cases courts found particular criminal laws unconstitutional as applied to prevent abortions or protect prenatal life).

¹⁰ *Id.* at 123.

¹¹ *Id.* at 123-24.

¹² *Id.* at 125-27. Other high courts have reached similar conclusions. See MARY ZIEGLER, PERSONHOOD 220 (Yale U. Press 2025) (discussing a 1993 German Federal Constitutional Court case recognizing alternatives to criminal law to protect fetal life and a 2019 South Korean Supreme Court case invalidating a criminal abortion law).

¹³ WORLD HEALTH ORGANIZATION, *Law & Policy Recommendation 1: Criminalization (2.2.1), in ABORTION CARE GUIDELINE* (2024) [hereinafter WHO, ABORTION CARE GUIDELINE], <https://srhr.org/abortioncare/chapter-2/recommendations-relating-to-regulation-of-abortion-2-2/law-policy-recommendation-1-criminalization-2-2-1/> [https://perma.cc/67A4-QX3R].

¹⁴ *Id.* See U.N. Hum. Rts. Comm., *General Comment No. 36 on Article 6: Right to Life*, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019); Working Group on Discrimination Against Women & Girls,

Instead of criminal laws, the Mexican and Colombian courts encouraged lawmakers to adopt policies that both protect prenatal life and support the rights and wellbeing of pregnant people. Rather than focusing on the abortion decision in isolation, the courts recognized the need for comprehensive sexual and reproductive health policies.¹⁵ They also stressed the need to address material conditions that prevent people, especially people in marginalized communities, from being able to control their fertility, protect their health and make and realize autonomous decisions about parenting.¹⁶ Instead of carceral approaches, the courts described policies to inform and counsel pregnant people,¹⁷ ensure access to contraception and the full range of sexual and reproductive care (including both maternity and abortion care)¹⁸ and provide material support and legal protections for pregnant and parenting people to make childbearing an attainable choice.¹⁹

II. BARRIERS TO SENSIBLE POLICIES IN THE U.S.

So, what is holding the U.S. back from abandoning criminal law and adopting strategies that decrease the need for abortion and respect, protect and ensure the rights of pregnant people? Currently most of the initiatives proposed by “prolife” legislators assume that the state can only protect prenatal life by taking away the rights of pregnant people through coercive actions—like criminalization. This section examines how U.S. attitudes towards women and pregnant people have facilitated acceptance of state reproductive coercion. The first part considers the failure to recognize women and pregnant people as full rights holders and the role of gender stereotypes. The second part addresses how the concept of Prenatal Personhood has been used to justify carceral approaches.

Joint Web Statement by UN Human Rights Experts on Supreme Court Decision to Strike Down Roe v. Wade (June 24, 2022) [hereinafter *HR Experts Joint Web Statement*], <https://www.ohchr.org/en/statements/2022/06/joint-web-statement-un-human-rights-experts-supreme-court-decision-strike-down> [https://perma.cc/7UJD-FMA3]; C-055/2022 (Col), *supra* note 3, ¶¶ 235–36, 251 (discussing UN bodies that have endorsed decriminalization of abortion).

¹⁵ C-055/2022 (Col), *supra* note 3, ¶¶ 591, 643–45; 148/2017 (Mex), *supra* note 3, ¶¶ 118–19.

¹⁶ 148/2017 (Mex), *supra* note 3, ¶ 145 (describing the need to take action to overcome conditions of inequality, marginalization and precarity); *id.* ¶ 111 (describing the state’s obligation to ensure that public health services provide access to services); C-055/2022 (Col), *supra* note 3, ¶¶ 551, 574 (describing need for policies that benefit vulnerable populations and individuals who are subject to intersectional discrimination).

¹⁷ The Mexican court recognized that counseling requirements can be abused to delay or coerce decisions about pregnancy termination. It emphasized that counseling must respect patient confidentiality and autonomy. 148/2017 (Mex), *supra* note 3, ¶¶ 148, 150, 152–53. Information must be truthful and scientifically accurate, and counseling must not impose delay. *Id.* ¶¶ 149–50.

¹⁸ C-055/2022 (Col), *supra* note 3, ¶ 574; 148/2017 (Mex), *supra* note 3, ¶¶ 143, 155, 159–63.

¹⁹ 148/2017 (Mex), *supra* note 3, ¶ 197 (describing the need to protect the rights of pregnant people to protect prenatal life through prenatal health care, reduction of maternal mortality and measures to ensure help working parents and ensure equal access to educational and employment opportunities); C-055/2022 (Col), *supra* note 3, ¶¶ 570–72 (describing initiatives in other countries that expanded rights and supports for people who have children).

A. Attitudes Towards Women and Pregnant People

1. Recognizing the Rights of People Who Need Abortions

After a long, but flawed, discussion about the lack of a historical basis for a constitutionally protected right to abortion,²⁰ the *Dobbs* majority declined to seriously consider the impact that prohibiting abortion has on the rights of people who may become pregnant.²¹ The decision reflects a failure to recognize women and pregnant people as autonomous rights holders and a willful disregard of the harm imposed when the state is given the power to control an individual's reproductive capacity.

In contrast, the Colombian and Mexican cases consciously seek to mediate between the rights of women and people who can become pregnant and their constitutional value of protecting prenatal life. In doing so, they recognize that multiple rights are violated when people are denied access to abortion. These include the right to health, life, non-discrimination, autonomy, privacy, and freedom from torture and cruel, inhuman and degrading treatment.²²

The Mexican court describes a “right to decide” that arises from the rights to dignity, autonomy and free development of personality, equality, and health and reproductive freedom.²³ In addition to the decision about whether to terminate a pregnancy,²⁴ the “right to decide” includes access to sex education, access to contraceptive information, counseling and services, the ability to make informed decisions regarding pregnancy termination or continuation, resources and services to effectuate the decision (abortion and pregnancy care), and free, safe, confidential, timely, unobstructed and non-discriminatory public health services.²⁵

²⁰ See Serena Mayeri, *Reproductive Injustice, Feminist Resistance, and the Uses of History in Constitutional Interpretation*, 33 WM & MARY BILL RTS. J. 519, 522 (2024) (criticizing the “narrow and selective version of history-and-tradition” adopted by the *Dobbs* majority).

²¹ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 369 n.1 (2022) (Breyer, J., dissenting) (“The majority thinks that a woman has *no* liberty or equality interest in the decision to bear a child, so a State’s interest in protecting fetal life necessarily prevails.”).

²² 148/2017 (Mex), *supra* note 3, ¶ 52 (basing its holding in part on the combination of constitutional rights to privacy, equality, health and reproductive freedom); C-055/2022 (Col), *supra* note 3, ¶ 261 (finding that the criminal law was in constitutional tension with constitutional guarantees to “health and reproductive rights, the equality of women in situations of vulnerability and irregular migratory status [and] freedom of conscience” as well as constitutional imperatives against using criminal law except as a last resort). See also Brief of U.N. Mandate Holders as Amici Curiae in Support of Respondents at 7–31, *Dobbs*, 597 U.S. 215 (2022) (No. 19-1392) (describing prohibitions on abortion as breaching the rights to non-discrimination, privacy, life, health, and to be free from torture and cruel, inhuman or degrading treatment).

²³ 148/2017 (Mex), *supra* note 3, ¶ 52 (author’s translation).

²⁴ The Mexican Court, while recognizing a right to terminate a pregnancy, restricted the right to a “brief period at the beginning of gestation.” *Id.* ¶ 164 (author’s translation).

²⁵ Soohoo, *Turning Away from Criminal Abortion Laws*, *supra* note 9, at 126. See also 148/2017 (Mex), *supra* note 3, ¶¶ 140–63 (discussing the various elements of sexual and reproductive health care from sex education through abortion and pregnancy care and access to non-discriminatory health services that are necessary to effectuate a right to decide).

2. *Combatting Gender Stereotypes*

Stereotypes about women’s roles as mothers and their inability to make autonomous choices undergird criminal abortion laws. The stereotypes reflect historic attitudes about women’s nature as well as conscious efforts to deploy and exploit gender stereotypes for strategic and political purposes.²⁶ Stereotypes about “women’s natural role” justify laws that punish women who reject motherhood by having abortions or criminalize the provision of abortion to protect women from having abortions they will “regret.”²⁷

While stereotypes are baked into all restrictive abortion laws, women protective stereotypes complicate who is targeted. Pre-*Roe* in the U.S., the majority of states that had criminal laws targeted abortion providers rather than the people who had abortions, and until recently, prominent anti-abortion groups sought to criminalize abortion providers but not patients.²⁸ This approach cast women as the “second victim” of abortion in need of protection from “abortionists.”²⁹ Although the criminal laws did not target pregnant people, they were designed to control their behavior by forcing them to become mothers and continue pregnancies against their will.³⁰

It is important to note that despite *Roe v. Wade*’s prohibition on criminalizing abortions prior to fetal viability from 1973–2022, criminal prosecutions of pregnant

²⁶ Scholars have described how in the 1970s, political strategists encouraged the public to link opposition to abortion and feminism with the protection of motherhood and traditional gender roles and family structures to mobilize support and create a new base for the Republican party. See Yvonne Lindgren, *Trump’s Angry White Women: Motherhood, Nationalism and Abortion*, 48 HOFSTRA L. REV. 1, 4, 15–16 (2019) (discussing the history of such efforts). See also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 420 (2007) (discussing 1970s conservatives’ “construction of abortion as a threat to traditional family values”).

²⁷ The assumption that women who have abortions must experience regret and suffer psychological and emotional harm is based on the stereotype that women’s natural role is motherhood. Lindgren, *supra* note 26, at 25–26; Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1661, 1669 (2008) [hereinafter Siegel, *The Right’s Reasons*]. The woman-protective model also assumes that women are victims and are incapable of making and not responsible for their decisions around reproductive health and parenthood. Jolynn Dellinger & Stephanie Pell, *Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in A Post-Dobbs World*, 19 DUKE J. OF CON. L. & PUB. POL’Y 1, 15 (2024).

²⁸ Dellinger & Pell, *supra* note 27, at 33; Kim Bellware, *Fringe Movement Sparks Divide with Push to Charge Women Who Get Abortions*, WASHINGTON POST (May 14, 2025), <https://www.washingtonpost.com/nation/2025/05/14/abortion-abolitionists-criminal-charges-pregnant-women/> [<https://perma.cc/US47-PL4J>].

²⁹ Carter Sherman, *An ‘Abortion Abolitionist’ Became an Oklahoma Senator. The fringe Is Celebrating its Big Victory*, GUARDIAN (Dec. 6, 2023), <https://www.theguardian.com/world/2023/dec/14/abortion-abolitionist-oklahoma-fringe-victory-roe-v-wade> [<https://perma.cc/DB3Y-TJCM>] (describing the mainstream anti-abortion conceptualization of women as victims); Colleen Scerpella, *Abolitionists’ Push Legislation to Criminalize All Abortion as Homicide*, AM. PROSPECT (May 5, 2025), <https://prospect.org/justice/2025-05-05-abolitionists-push-legislation-criminalize-all-abortion/> [<https://perma.cc/284H-WC6Y>]. See Lindgren, *supra* note 26, at 1, 15–16 (describing “woman-protective” arguments for abortion regulation).

³⁰ Dellinger & Pell, *supra* note 27, at 7–9 (noting that regardless of whether women are the explicit subject of prosecution, criminal laws result in the investigation and surveillance of women to prevent them from having abortions).

people for abortion and pregnancy loss still occurred.³¹ Prosecutors used their discretion to prosecute people who self-managed abortions or suffered miscarriages or stillbirths by charging them with other crimes.³² These prosecutions reflected a desire to punish individuals who did not behave as “good mothers.” The individuals targeted reflected disparities based on race and class.³³ Decisions about who to “protect” and who to punish often incorporated stereotypes about the maternal “unfitness” of poor and Black mothers as well as the over-policing of certain communities.³⁴

In the post-*Roe* world, a split has emerged in the anti-abortion movement over who should be criminalized and to what extent.³⁵ Abortion Abolitionists reject the “woman-protective” frame and embrace the full-throated use of criminal law to punish people—in their worldview women—who have abortions. Based on their belief in Prenatal Personhood (discussed below) Abortion Abolitionists argue not only that people who have abortions should face criminal charges, without rape or incest exceptions, but also that they be prosecuted for homicide.

Abortion Abolitionists espouse an ultra-conservative, traditionalist worldview.³⁶ The movement is “unapologetically biblical.”³⁷ Its leaders are overwhelmingly male,

³¹ From 2000–2020, at least 61 people were criminally investigated or arrested for allegedly ending their own pregnancies or helping someone else do so. LAURA HUSS, FARAH DIAZ-TELLO & GOLEEN SAMARI, SELF-CARE, CRIMINALIZED: THE CRIMINALIZATION OF SELF-MANAGED ABORTION FROM 2000 TO 2020, at 21 (2023), <https://www.ifwhenhow.org/wp-content/uploads/2023/10/Self-Care-Criminalized-2023-Report.pdf>. Pregnancy Justice documented 1,396 cases of pregnancy criminalization between Jan. 2006 and June 2022. *Pre-Dobbs Pregnancy Criminal Cases*, PREGNANCY JUSTICE (last accessed Aug. 16, 2025, 9:27 AM), <https://www.pregnancyjusticeus.org/pre-dobbs-pregnancy-criminalization/> [<https://perma.cc/7BND-JRLQ>].

³² HUSS, DIAZ-TELLO & SAMARI, *supra* note 31, at 36–40. See also Michelle Oberman, *The Control of Pregnancy and the Criminalization of Femeness*, 7 BERKELEY W. L.J. 2 (1992) (discussing how in criminal cases involving women’s reproductive behavior, the state sits in judgement of the reproductive decisions of poor women, young women and women of color).

³³ HUSS, DIAZ-TELLO & SAMARI, *supra* note 31, at 60.

³⁴ *Id.*; PREGNANCY JUSTICE, THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT 4, 44 (2023), <https://www.pregnancyjusticeus.org/wp-content/uploads/2023/09/9-2023-Criminalization-report.pdf>; Priscilla A. Ocen, *Birth Injustice: Pregnancy As A Status Offense*, 85 GEO. WASH. L. REV. 1163, 1176–1180 (2017); Sandhya Dirks, *Criminalization of Pregnancy Has Already Been Happening to the Poor and Women of Color*, NPR (Aug. 3, 2022), <https://www.npr.org/2022/08/03/1114181472/criminalization-of-pregnancy-has-already-been-happening-to-the-poor-and-women-of> [<https://perma.cc/48UH-AGZF>].

³⁵ The push to criminalize people who have an abortion also reflects the reality that medication abortion allows an individual to terminate a pregnancy outside of the formal medical system, removing the abortion provider, the traditional target of criminal laws, from the equation. Odette Yousef, *How Abortion ‘Abolitionists’ Are Gaining Ground in the U.S.*, NPR (May 13, 2025), <https://www.npr.org/2025/05/13/nx-s1-5388475/how-abortion-abolitionists-are-gaining-ground-in-the-u-s> [<https://perma.cc/FUS5-8TB6>].

³⁶ Heidi Beedle, *The New Abolitionists: The Christian Anti-Abortion Movement Gaining Ground in State Legislatures*, COLO. TIMES REP. (Mar. 7, 2023), <https://coloradotimesrecorder.com/2023/03/the-new-abolitionists-the-christian-anti-abortion-movement-gaining-ground-in-state-legislatures/52204/> [<https://perma.cc/GX87-ZXES>].

³⁷ Kiera Butler, *The Anti-Abortion Movement is Splintering*, MOTHER JONES (Feb. 24, 2025), <https://www.motherjones.com/politics/2025/02/the-anti-abortion-movement-is-splintering/> [<https://perma.cc/E3MD-FLYD>] (“Abolitionist leader Jason Storms has called for “peace through superior firepower”).

conservative Christians.³⁸ Abolitionist rhetoric incorporates the concept of “biblical manhood” and frequently targets feminism and women’s rights and leadership.³⁹ Jeff Durbin, the leader of End Abortion Now, has promoted the message that “from the beginning, God has intended men to lead in the home and in the church,”⁴⁰ and Durbin has called for the death penalty for women who have abortions.⁴¹

Rather than accepting stereotypes, the Mexican and Colombian courts called out the gender stereotypes behind criminal abortion laws.⁴² They emphasized the need to dismantle, rather than reinforce stereotypes that assign a social role based on childbearing capacity.⁴³ The Mexican court also noted that repealing criminal laws helps to dismantle gender stereotypes by removing stigma.⁴⁴ Human Rights bodies have also cautioned against using criminal law to punish behavior that does not conform to stereotypes and recognized the due process violations that occur when stereotypes impact judicial proceedings.⁴⁵ They recognize that gender often intersects with race and status to create or compound negative stereotypes.⁴⁶

B. Attitudes Towards Prenatal Life

Despite the Supreme Court’s explicit rejection of arguments that the Constitution recognizes Prenatal Personhood in *Roe v. Wade*,⁴⁷ personhood claims have continued to impact attitudes towards abortion and criminal laws.⁴⁸ Indeed, the Court’s decision may have helped “personhood” rhetoric remain a powerful organizing tool. Often abortion opponents invoke personhood without specifying whether they are using the term in a religious, moral, philosophical, scientific or

³⁸ Scerpella, *supra* note 29.

³⁹ ZIEGLER, *supra* note 12, at 207. For instance, Abortion Abolitionists have stated that, “[i]f women couldn’t vote abortion would’ve never been legalized” and “[f]eminism is the main reason why abortion persists. We need Christian men leading the fight against abortion, not feminist women.” Butler, *supra* note 37.

⁴⁰ ZIEGLER, *supra* note 12, at 188.

⁴¹ Sherman, *supra* note 29; Scerpella, *supra* note 29.

⁴² C-055/2022 (Col), *supra* note 3, ¶ 535; 148/2017 (Mex), *supra* note 3, ¶ 88.

⁴³ C-055/2022 (Col), *supra* note 3, ¶¶ 527, 535; 148/2017 (Mex), *supra* note 3 ¶¶ 91, 100, 101, 105.

⁴⁴ 148/2017 (Mex), *supra* note 3, ¶ 264.

⁴⁵ Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 33 on Women’s Access to Justice*, ¶¶ 26–27, U.N. Doc. CEDAW/C/GC/33 (Aug. 3, 2015); Manuela v. El Salvador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 441, ¶¶ 146, 152, 160 (Nov. 2, 2021) (finding that prejudices and negative gender stereotyping improperly influenced criminal trial including reliance on stereotypes about maternal behavior rather than evidence). See also Ocen, *supra* note 34, at 1199 (stating that criminalization of pregnant people “enables the state to enforce normative standards, particularly those associated with motherhood and childrearing”).

⁴⁶ Working Group on Discrimination Against Women and Girls, *Women’s and Girl’s Sexual and Reproductive Health Rights in Crisis*, ¶ 67, U.N. Doc. A/HRC/47/38 (Apr. 28, 2021) (discussing stereotype of Black “maternal unfitness”).

⁴⁷ *Roe v. Wade*, 410 U.S. 113, 158 (1973). The *Dobbs* decision does not overrule this aspect of *Roe* and states that it does not express a view about when a state should regard prenatal life as having rights or legal interests. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 254, 263 (2022).

⁴⁸ *Dobbs*, 597 U.S. at 254 (stating that historically criminal abortion laws were “spurred by a sincere belief that abortion kills a human being”).

legal sense.⁴⁹ Until recently, they have not had to grapple with the actual consequences of legal personhood. This is no longer the case.

Since the *Dobbs* decision, Abortion Abolitionists, who argue that zygotes, embryos and fetuses are equivalent to and should have the same rights as legal persons, have pushed their claims in legislatures and courts.⁵⁰ In 2025, their supporters introduced Prenatal Equal Protection bills in at least thirteen states (collectively “2025 Prenatal EP Bills”).⁵¹ The bills would treat pregnancy termination⁵² as homicide and allow assault charges to be brought for causing harm to a zygote, embryo or fetus.⁵³

Abortion Abolitionists try to link their claims to 19th Century anti-slavery abolitionists.⁵⁴ These offensive claims mischaracterize Prenatal Personhood as a fight for individual rights. Instead, Abortion Abolitionists seek to expand state power to control and diminish the rights of pregnant people.⁵⁵ Prenatal Personhood has also been deployed by private individuals to harass and control women. Following determinations that embryos and fetuses are protected under state wrongful death statutes, former partners of women who had abortions brought claims against an abortion provider and friends who helped a woman get an abortion.⁵⁶ Notably, the plaintiffs could not sue their former partners because the wrongful death statutes prohibited actions against pregnant people for the loss of their own pregnancies. The 2025 Prenatal EP Bills would get rid of these protections.⁵⁷

Many people believe that the state should protect prenatal life but do not believe that the law should recognize it as a legal person. Yet, personhood rhetoric pervades anti-abortion arguments, and efforts to end criminalization must disentangle the claim for Prenatal Personhood from protection of prenatal life.⁵⁸ The Mexican and Colombian approaches illustrate how the state can take actions to protect prenatal life while explicitly rejecting Prenatal Personhood.

⁴⁹ See ZIEGLER, *supra* note 12, at 219 (noting that “personhood partly captivated so many conservatives because its meaning could and did change.”).

⁵⁰ See, e.g., Pet. for a Writ of Cert. at *1, *Doe v. McKee*, 143 S.Ct. 309 (2022) (No. 22-201); Brief for Amici Curiae Ill. Right to Life & Steve Jacobs in Support of Pet’rs at 22–25, *Dobbs*, 597 U.S. 215 (2022) (No. 19-1932); Scerpella, *supra* note 29 (listing Prenatal Personhood bills).

⁵¹ Scerpella, *supra* note 29.

⁵² The bills do include exceptions for attempting to save the life of a pregnant person, but they are ill-defined making it difficult for clinicians to rely on in practice. *Id.*

⁵³ *Id.*

⁵⁴ Cynthia Soohoo, *An Embryo is Not a Person: Rejecting Prenatal Personhood for a More Complex View of Prenatal Life*, 14 CONLAWNOW 81, 88 (2023) [hereinafter Soohoo, *An Embryo is Not a Person*]; Silver & Cooper, *supra* note 2; Scerpella, *supra* note 29.

⁵⁵ Soohoo, *An Embryo is Not a Person*, *supra* note 54, at 110–12.

⁵⁶ *Magers v. Ala. Women’s Ctr. Reprod. Alts., LLC*, 325 So.3d 788, 789 (Ala. 2022); Nicole Santa Cruz, *Her Ex-Husband is Suing a Clinic Over the Abortion She Had Four Years Ago*, PROPUBLICA (July 15, 2022), <https://www.propublica.org/article/arizona-abortion-father-lawsuit-wrongful-death> [<https://perma.cc/NSD3-53F4>].

⁵⁷ See, e.g., H.B. 2171, 2025-2026 Reg. Sess., § 3 (Kan. 2025) (amending wrongful death statute to repeal exception for “acts committed by the mother of the unborn child.”).

⁵⁸ Justice Alito’s opinion in *Dobbs* is an example of how arguments about the extent of the state’s power to protect prenatal life become conflated with Prenatal Personhood. Soohoo, *An Embryo is Not a Person*, *supra* note 54, at 85–86.

The Mexican and Colombian decisions recognized an inherent value in prenatal life, but rejected Prenatal Personhood as a legal concept.⁵⁹ Citing an earlier 2006 decision, the Colombian court reiterated that protection of prenatal life is a compelling constitutional objective but it is not an absolute value or right.⁶⁰ The Mexican court similarly found that prenatal life deserves state protection but is not a legal person or holder of fundamental rights.⁶¹ International human rights law also rejects arguments that individuals are rights holders before birth.⁶²

III. PROTECTING PRENATAL LIFE AND REJECTING CRIMINALIZATION

A. *Moving Past Prenatal Personhood*

Many people in the U.S. believe there is an inherent value in prenatal life that justifies legal protection. This is reflected by state laws providing criminal or tort remedies recognizing the harm imposed when third parties cause a pregnant person to lose a wanted pregnancy.⁶³ Some state constitutions proclaim it state policy to protect prenatal life.⁶⁴ But respecting the value of prenatal life should not be conflated with Prenatal Personhood and, despite the rhetoric of Abortion Abolitionists, most people in the United States get the distinction.

When the issue is directly on the ballot, voters consistently reject Prenatal Personhood.⁶⁵ In a 2025 survey, over half of respondents opposed giving legal rights to embryos and fetuses (52%) while only 38% supported doing so.⁶⁶ Respondents are even more concerned about the harm imposed by criminal abortion laws. In a 2023 poll, 75% of respondents were concerned that people who get an abortion could be charged with a felony or go to jail and 80% were concerned that the risk of criminal charges would make health care providers unsure about providing an abortion that could save a patient's life.⁶⁷

⁵⁹ 148/2017 (Mex), *supra* note 3, ¶¶ 171–72; 175–76; C-055/2022 (Col), *supra* note 3, ¶ 279.

⁶⁰ C-055/2022 (Col), *supra* note 3, ¶¶ 264, 267.

⁶¹ 148/2017 (Mex), *supra* note 3, ¶¶ 176, 183–84.

⁶² *HR Experts Joint Web Statement*, *supra* note 14; *Murillo v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 244 (Nov. 28, 2012) (reviewing international and regional human rights standards and concluding that they do not support treating an embryo as a person). *See Soohoo, An Embryo is Not a Person*, *supra* note 54, at 89 (discussing the rejection of Prenatal Personhood by international human rights bodies); 148/2017 (Mex), *supra* note 3, ¶¶ 173–74; 177–82 (summarizing jurisprudence from UN and Inter-American System).

⁶³ *See Soohoo, An Embryo is not Person*, *supra* note 54, at 95–97.

⁶⁴ *See, e.g.,* ALA. CONST. art. I, § 36.06 (making it Alabama public policy to “recognize and support . . . the rights of unborn children, including the right to life” and to “ensure the protection of the rights of the unborn child in all manners and measures lawfully appropriate”); ARK. CONST. amend. 68, § 2 (declaring it Arkansas state public policy “to protect the life of every unborn child from conception until birth, the extent permitted by the Federal Constitution.”).

⁶⁵ Soohoo, *An Embryo is Not a Person*, *supra* note 54, at 91–93.

⁶⁶ Memo to National Women’s Law Center and Pregnancy Justice, LAKE RESEARCH PARTNERS (Apr. 7, 2025), <https://nwlc.org/wp-content/uploads/2025/04/Final-Lake-Research-Partners-Memo-NWLC-and-Pregnancy-Justice-Updated-4.30.25.pdf>.

⁶⁷ Katherine Gilyard, *A Vast Majority of Americans Are Concerned People Could Face Criminal Penalties for Abortion*, THE 19TH (Jan. 30, 2023), <https://19thnews.org/2023/01/americans-concerned-possibility-abortion-crime/> [https://perma.cc/MGZ2-PQWS]. *See also* Sarah McCammon,

Even for mainstream abortion opponents, Prenatal Personhood goes too far.⁶⁸ While personhood rhetoric pervades anti-abortion arguments, the mainstream movement does not support legal personhood and criminalization of pregnant people. Of the thirteen 2025 Prenatal EP Bills, only the North Dakota bill made it out of committee to a floor vote, and it failed to pass.⁶⁹ Susan B. Anthony, Pro-Life America and Students for Life of America have publicly stated they do not support laws that criminalize people who have abortions.⁷⁰

B. *Crafting Solutions*

1. *Recognizing That Criminal Laws Don't Work and Cause Harm*

Rejecting Prenatal Personhood and recognizing the gender stereotypes inherent in criminal abortion laws helps to counter retributive, punitive and expressive justifications for use of criminal law and shifts the focus to whether criminal abortion laws are a reasonable means to further the state's interest in prenatal life.⁷¹ The impact of criminal abortion laws in the U.S. since *Dobbs* suggests that they are not a reasonable means to protect prenatal life.

As of August 15, 2025, twelve states ban abortion from fertilization and four ban abortion after six weeks.⁷² Almost all impose criminal penalties for performing

Republicans Try to Soften Stance on Abortion as 'Abolitionists' Go Farther, NPR (May 21, 2024), <https://www.npr.org/2024/05/21/1252320298/abortion-republicans-abolitionist-ivf> [<https://perma.cc/NL5S-7U8X>].

⁶⁸ Prior to the *Dobbs* decision, more mainstream abortion opponents could work side by side with Abortion Abolitionists, supporting anti-abortion laws incorporating extreme rhetoric and Personhood language because even if the legislation passed, the courts ensured that Personhood provisions would be enjoined and never take effect. Without *Roe* providing guiderails, anti-abortion organizations and legislators must consider when prenatal protections go too far. *See, e.g.*, Yousef, *supra* note 35 (noting that almost half of the sponsors of a similar bill in South Carolina in 2023, withdrew their names after a national publication wrote about it).

⁶⁹ Even the co-director and general counsel of the North Dakota Catholic Conference testified against the bill. Scerpella, *supra* note 29.

⁷⁰ Bellware, *supra* note 28.

⁷¹ By equating prenatal life with legal persons, Abortion Abolitionists argue that embryos and fetuses must be afforded the same protections under criminal law as legal persons. If we reject this rhetorical sleight of hand and recognize that the state has an interest in protecting prenatal life, but embryos and fetuses are not independent rights holders, criminal law becomes only one of many tools that the state can use to further its interest in prenatal life. In states that recognize that criminal abortion laws infringe on constitutionally protected rights, courts should consider the ineffectiveness of criminal abortion laws and the harm they impose in evaluating the means adopted by the state to further its interest. *See* Soohoo, *Turning Away from Criminal Abortion Laws*, *supra* note 9, at 138. Indeed, there is an argument that criminal abortion laws do not even satisfy rational basis review. *Id.* at 139–40. In addition to legal challenges, public debates should focus on the need for legislation that promotes reproductive justice, including sexual and reproductive and maternal health and support parents and families rather than criminal abortion laws that violate rights, create public health harm, and do not prevent abortions.

⁷² *See State Bans on Abortion Throughout Pregnancy*, GUTTMACHER (July 7, 2025), <https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans> [<https://perma.cc/P2GQ-5SD8>]. Other states have passed laws banning abortion from fertilization or early in pregnancy, but the laws have been enjoined by courts. *See, e.g.*, Access Indep. Health Serv., Inc. v. Wrigley, 2025 ND 26, ¶¶ 2–3, 16 N.W.3d 902 (denying motion to stay district court's judgment

an abortion.⁷³ These laws have not decreased the number of abortions. In fact, abortions in the U.S. have increased since the *Dobbs* decision.⁷⁴ The laws violate the dignity and rights of pregnant people by treating them as instruments of reproduction and have endangered their lives. Criminalization has undermined health care for pregnant people creating health care deserts as OB/Gyns move out of states with criminal laws.⁷⁵ It has also compromised health care for people who need abortions, including pregnant people who need treatment for miscarriages or ectopic pregnancies because providers deny or delay care out of fear of being accused of performing an abortion.⁷⁶ As of November 2024, ProPublica documented five cases where women died because they did not receive timely care for pregnancy complications,⁷⁷ and one study found that Texas' maternal death rate rose by 56%

declaring ban unconstitutional pending appeal); *Johnson v. State*, No. 2023-CV-18853 (Wyo. Dist. Ct. Teton Cnty. Nov. 18, 2024).

⁷³ ALA. CODE § 26-23H-6 (2025); ARK. CODE ANN. § 20-16-704 (2024); IDAHO CODE § 18-622 (2025); IND. CODE § 16-34-2-7 (2025); KY. REV. STAT. ANN. § 311.772(3)(b) (West 2025); LA. REV. STAT. ANN. § 14:87.7(C) (2025); MISS. CODE ANN. § 41-41-45(4) (2026); OKLA. STAT. ANN. tit. 63, § 1-729.2 (West 2026); S.D. CODIFIED LAWS § 22-17-5.1 (2026); TENN. CODE ANN. § 39-15-213(b) (West 2026); TEX. HEALTH & SAFETY CODE § 170A.004 (West 2025); FLA. STAT. ANN. § 390.0111(10)(a) (West 2026) (six weeks); GA. CODE ANN. § 16-12-140 (West 2026) (six weeks); S.C. CODE ANN. § 44-41-630(B) (2026) (six weeks). West Virginia claims its pre-Roe criminal abortion ban is enforceable, but it is currently enjoined. *Women's Health Ctr. of W. Va. v. Miller*, No. 22-C-556 (W. Va. Cir. Ct. July 20, 2022).

⁷⁴ The estimated number of abortions in 2024 increased by 12% compared to 2020. *Fact Sheet: Abortion in the United States*, GUTTMACHER INST. (Apr. 2025), <https://www.guttmacher.org/factsheet/induced-abortion-united-states> [<https://perma.cc/ULR5-U6YX>]. This does not include self-managed abortions, which evidence suggests also increased since the *Dobbs* decision. *Id.* Initial data from 2025, indicated a 5% decrease in clinician-provided abortions in the first half of 2025 compared to the first half of 2024, but the numbers do not reflect self-managed abortions or abortion pills mailed by clinicians to banned states under abortion shield laws. Kelly Baden, Isabel DoCampo & Emma Stoskopf-Ehrlic, *States Without Total Abortion Bans See Declines in Clinician-Provided Abortions and Out-of-State Patients*, GUTTMACHER INST. (Sept. 30, 2025), <https://www.guttmacher.org/2025/09/states-without-total-abortion-bans-see-declines-clinician-provided-abortions-and-out-state> [<https://perma.cc/7WQ5-MAPU>]. See also *#WeCount Report, April 2022 to December 2024*, SOC'Y FOR FAM. PLANNING (June 23, 2025), <https://societyfp.org/research/wecount/wecount-december-2024-data/> [<https://perma.cc/G8UF-MGXF>] (finding that abortion volume was higher in 2024 than it was in 2023 or 2022).

⁷⁵ Erika Edwards, *Pregnant Women Are Less and Less Able to Access Maternity Care*, NBC NEWS (Sept. 20, 2024), <https://www.nbcnews.com/health/health-news/pregnant-women-cant-find-doctors-growing-maternity-care-deserts-rcna169609> [<https://perma.cc/8HPR-7TQY>].

⁷⁶ Soohoo, *Turning Away from Criminal Abortion Laws*, *supra* note 9, at 129–30. For instance, after Texas made performing an abortion a felony, emergency room visits for early miscarriages rose by 25% and blood transfusions for first trimester miscarriages increased by 54% because doctors delayed provided care. Kavitha Surana, Lizzie Presser & Andrea Suozzo, *A “Striking” Trend: After Texas Banned Abortion, More Women Nearly Bled to Death During Miscarriage*, PROPUBLICA (July 1, 2025), <https://www.propublica.org/article/texas-abortion-ban-miscarriage-blood-transfusions> [<https://perma.cc/8URL-A3CB>]. Delays have resulted in deaths and loss of reproductive organs. *Id.*; Amanda Seitz, *Texas Hospital that Discharged Woman with Doomed Pregnancy Violated the Law, a Federal Inquiry Finds*, AP NEWS (June 4, 2025), <https://apnews.com/article/abortion-texas-hospital-doomed-pregnancy-discharge-308ea695a17f72500cbf31622fdb521a> [<https://perma.cc/DP44-FJM4>].

⁷⁷ See, e.g., Lizzie Presser & Kavitha Surana, *A Third Women Died Under Texas' Abortion Ban. Doctors Are Avoiding D&Cs and Reaching for Riskier Miscarriage Treatments*, PROPUBLICA (Nov. 25, 2024), <https://www.propublica.org/article/porsha-ngumezi-miscarriage-death-texas-abortion-ban> [<https://perma.cc/CX2K-M4ES>]. It is difficult to know how many avoidable deaths have occurred

after it banned abortion in 2021.⁷⁸ The criminal restrictions have disproportionately impacted people of color, people living in poverty and people in vulnerable situations.⁷⁹

2. *Reconceptualizing the Relationship*

In crafting solutions, the Mexican and Colombian courts rejected a fundamental conflict between protection of prenatal life and pregnant people.⁸⁰ The Mexican court emphasized the need for a joint effort between the State and pregnant women or childbearing individuals through government policies designed to protect all the rights and interests involved.⁸¹ Given constitutional protections for the “right to decide,” protecting people who can become pregnant is the best way for the state to protect prenatal life.⁸² Other countries have declined to recognize Prenatal Personhood, instead focusing on the well-being of the maternal-fetal dyad.⁸³

Feminist scholars have long recognized the law’s failure to account for pregnant bodies.⁸⁴ Consistent with the Mexican court’s approach, recent scholarship seeks to better capture the realities of pregnancy.⁸⁵ Professors Meghan M. Boone and Benjamin J. McMichael describe the mismatch that occurs if personhood is granted to prenatal life within the existing U.S. legal framework premised on “people as singular, autonomous actors housed within physically separate and distinct

because state maternal mortality committees have done little to track the impact of delays on care, and in some states, political leaders are actively interfering with committees’ work, and in Texas, the committee is prohibited from reviewing abortion related deaths. Kavitha Surana, Mariam Elba, Cassandra Jaramillo, Robin Fields & Ziva Branstetter, *Are Abortion Bans Across America Causing Deaths? The States That Passed Them Are Doing Little to Find Out*, PROPUBLICA (Dec. 18, 2024), <https://www.propublica.org/article/abortion-bans-deaths-state-maternal-mortality-committees> [https://perma.cc/K763-DR6K].

⁷⁸ Erika Edwards, Zinhle Essmuh & Jason Kane, *A Dramatic Rise in Pregnant Women Dying in Texas After Abortion Ban*, NBC NEWS (Sept. 20, 2024), <https://www.nbcnews.com/health/womens-health/texas-abortion-ban-deaths-pregnant-women-sb8-analysis-rcna171631> [https://perma.cc/DL5X-LZ3D].

⁷⁹ Soohoo, *Turning Away from Criminal Abortion Laws*, *supra* note 9, at 130; LIFT LA., PHYSICIANS FOR HUM. RTS., REPROD. HEALTH IMPACT & CTR. FOR REPROD. RTS., CRIMINALIZED CARE 29 (2024), <https://reproductiverights.org/wp-content/uploads/2024/03/Criminalized-Care-Report-Updated-as-of-3-15-24.pdf>.

⁸⁰ 148/2017 (Mex.), *supra* note 3, ¶ 194.

⁸¹ *Id.* at ¶ 19.

⁸² *Id.* at ¶ 194.

⁸³ See Linda Fentiman, *Pursuing the Perfect Mother: Why America’s Criminalization of Maternal Substance Abuse is Not the Answer – A Comparative Legal Analysis*, 15 MICH. J. GENDER & L. 389, 393 (2009) (criticizing the U.S.’s “focus on the fetus as the sole ‘person’ at risk, rather than on the maternal-fetal dyad”). Prof. Fentiman describes the Canadian approach recognizing the uniqueness of the maternal-fetal relationship and treating the mother and “unborn child” as one. *Id.* at 428.

⁸⁴ Amanda Gvozden, *Fetal Protection Laws and the “Personhood” Problem: Toward a Relational Theory of Fetal Life and Reproductive Responsibility*, 112 J. CRIM. L. & CRIMINOLOGY 407, 412 (2022); Meghan M. Boone & Benjamin J. McMichael, *Reproductive Objectification*, 108 MINN. L. REV. 2493, 2520 n.109, 2521 n.114, 2524 nn.122–24, 2525 nn.125–26 (2024); Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 776, 697–700 (2006).

⁸⁵ See, e.g., Boone & McMichael, *supra* note 84, at 2497–98 (critiquing U.S. law’s failure to “rethink . . . the fundamental understanding of personhood [and] problematiz[e] the notion of the individuated, independent right’s holder.”); Gvozden, *supra* note 84.

bodies,”⁸⁶ which does not contemplate two rights holders in one body where one individual is entirely dependent on the other.⁸⁷

Amanda Gvozden criticizes the ways the law constructs an antagonistic relationship between the fetus and its mother, proposing the “Fetal Maternal Identity” theory as an alternative.⁸⁸ Because a fetus “[does not function independently] and cannot claim independent rights,” she argues the law should recognize one maternal fetal entity where “[r]ights essentially ‘flow through’ the woman to her fetus, and fetuses are only afforded protection to the extent the woman is protected because of their unique relationship of necessary dependence.⁸⁹ Other commentators suggest that the legal status of prenatal life should depend on the pregnant person’s intent to become, or not become, a parent or their subjective attitude towards the embryo or fetus.⁹⁰ This would preclude the state from asserting any *parens patriae* interest on the fetus’s behalf if the pregnant person does not intend to continue the pregnancy.⁹¹

3. *Programs to Support Prenatal Life, Pregnant People and Families*

Although the current Supreme Court is unlikely to strike down criminal abortion laws, many states recognize constitutional protection for abortion. When considering legal challenges to criminal abortion laws, courts in these states should consider the poor fit between criminal laws and the goal of protecting prenatal life and that criminal laws are not the least intrusive means to further the state’s interest.⁹²

Rather than doubling down on carceral approaches, “prolife” legislators should reject criminal laws and instead support policies and programs that prevent unwanted pregnancies and help people bear the costs and burdens of parenthood. These policies fall into three broad categories: (1) supporting sex education and contraception; (2) expanding access to health care, including maternal health care; and (3) increasing support for pregnant people and families, including by providing

⁸⁶ *Id.* at 2496.

⁸⁷ *Id.* at 2496–97.

⁸⁸ Gvozden, *supra* note 84, at 421–23, 433.

⁸⁹ *Id.* at 412.

⁹⁰ Laura Hermer, *Intentional Parenthood, Contingent Fetal Personhood, and the Right to Reproductive Self-Determination*, 57 U. MICH. J.L. REFORM 259, 281 (2024) (arguing that “the fetus’s legal status should turn not on conception or birth but rather on the intent of the parties involved in bringing the fetus into being”); Greer Donley & Jill Weber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1684 (2022) (arguing that the conceptualization of the fetus as a potential person will vary depending on the social and moral beliefs of the pregnant person).

⁹¹ Hermer, *supra* note 90, at 287–88.

⁹² See Soohoo, *Turning Away from Criminal Abortion Laws*, *supra* note 9, at 136–41 (sketching out possible arguments to challenge criminal abortion laws in state courts); Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 84 (2022) (arguing that criminal abortion laws violate equal protection when states fail to explore alternative non-coercive means to achieve its ends).

adequate benefits for poor families and supporting pregnant and parenting people in the workplace and educational settings.⁹³

States with the most severe criminal laws have generally failed to adopt policies supporting sex education, contraceptive access, healthy pregnancies, or legal protections and benefits for families.⁹⁴ Gender stereotypes and conservative attitudes towards sex may explain the lack of support for sex education and contraceptives access, even though, preventing unwanted pregnancies also prevents abortions. But why the lack of support for healthy pregnancies and families?

After *Roe* precluded the use of criminal law to prohibit abortions before fetal viability,⁹⁵ some anti-abortion activists advocated for providing support for pregnant people and mothers to dissuade them from having abortions.⁹⁶ But the movement's alliance with the Republican party, which touted fiscal as well as social conservatism, prevented the movement from incorporating government social programs into its strategy.⁹⁷ In the 1980s, Crisis Pregnancy Centers (CPCs), which purported to focus on pregnant women's wellbeing, proliferated.⁹⁸ However, instead of addressing material needs, CPCs focused on dissuading women from having abortions to prevent them from experiencing "abortion regret."⁹⁹

⁹³ The *Dobbs* decision does discuss social programs, but it never seriously considers them as a less intrusive alternative to criminal abortion laws to further the state's interest in protecting prenatal life. Justice Alito writes that abortion opponents tout "modern developments" that have expanded workplace protections and benefits for pregnant people, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 258 (2022), but the initiatives are not considered as part of state policies designed to enable people to exercise reproductive autonomy and decrease the need for abortions (including by helping people avoid unwanted pregnancy and helping people afford to parent). Instead, Justice Alito uses the expansion of protections during pregnancy to discount the harm imposed when abortion bans force people to continue a pregnancy against their will, essentially arguing that pregnancy is less difficult than once was and that "safe haven" laws make it easier to put up a newborn for adoption. *Id.* In addition to discounting the harm of forced pregnancy, Justice Alito blithely asserts that because of safe haven laws there is "little reason to fear that the baby will not find a suitable home," *id.* at 258–59, ignoring the harm a pregnant person may experience when forced to carry and give up a child for adoption and the experience of black and brown babies in the adoption market. Peggy Cooper Davis, *A Response to Justice Amy Coney Barrett*, HARV. L. REV.: BLOG (June 14, 2022), <https://harvardlawreview.org/blog/2022/06/a-response-to-justice-amy-coney-barrett/> [<https://perma.cc/LY6K-D5CX>] (discussing why Safe Haven laws provide little comfort for birthing people of color and individuals who are forced to continue an early and unwanted pregnancy).

⁹⁴ Soohoo, *Turning Away from Criminal Abortion Laws*, *supra* note 9, at 131–34; Siegel, Mayeri & Murray, *supra* note 92, at 83–84 (noting that lawmakers who pass criminal abortion laws "do not support policies that would lower abortion rates by less restrictive and noncoercive means—by helping individuals to prevent unwanted pregnancies, or by alleviating the conditions of poverty that lead many people to end pregnancies.").

⁹⁵ *Roe v. Wade*, 410 U.S. 113 (1973) (holding that Texas criminal abortion law prohibiting abortion at any stage of pregnancy except to save the life of the pregnant person was unconstitutional), *overruled by Dobbs*, 597 U.S. 215 (2022).

⁹⁶ Siegel, *The Right's Reasons*, *supra* note 27, at 1666 (describing Feminists for Life spokesperson Frederica Mathewes-Green's position that the anti-abortion movement would be more successful if it helped women address the problems they faced rather than "the violent—and gendered—presuppositions of the 'rescue' paradigm"); Lindgren, *supra* note 26, at 17–18.

⁹⁷ Carter Sherman, *How Idea of Charging Women with Murder Infiltrated the Anti-Abortion Movement*, GUARDIAN (Apr. 23, 2025), <https://www.theguardian.com/us-news/ng-interactive/2025/apr/23/anti-abortion-fetal-personhood> [<https://perma.cc/BST2-F87V>].

⁹⁸ Siegel, *The Right's Reasons*, *supra* note 27, at 1659 n.67.

⁹⁹ *Id.*

In addition, in the United States, racism has intertwined with neoliberalism to diminish support for social programs that help poor families. National commitment to the Federal Aid to Families with Dependent Children (AFDC) program waned after the civil rights and welfare rights movement increased Black mothers' ability to access benefits.¹⁰⁰ In the late 1960s, AFDC shifted away from providing support to help mothers stay at home with their children towards moving them into the labor market.¹⁰¹ By the 1990s, "welfare reform," championed by Republicans but passed during Bill Clinton's presidency, resulted in the repeal of AFDC and the creation of the Temporary Assistance to Needy Families (TANF) program, which ended entitlements to benefits and added new requirements.¹⁰²

As of February 2025, at least eighteen states have Alternative to Abortion (A2A) programs,¹⁰³ which anti-abortion groups such as the Charlotte Lozier Institute describe as supporting pregnant people and new parents with "counseling, education and material goods."¹⁰⁴ These programs have been criticized for funding CPCs, which provide minimal material resources and employ false information and coercive tactics to discourage people from obtaining abortions.¹⁰⁵ Rather than raising and distributing funds, A2A programs refer clients to existing government benefit programs and often *divert* TANF funds that could be used to provide benefits to poor families to A2A programs.¹⁰⁶

Since the *Dobbs* decision, the number of maternity homes, often affiliated with anti-abortion groups, churches, or Christian nonprofits, has increased.¹⁰⁷ Maternity homes provide longer-term housing and wraparound services for pregnant people

¹⁰⁰ Cynthia Soohoo, *Reproductive Justice and Transformative Constitutionalism*, 42 CARDOZO L. REV. 819, 857–58 (2021) (noting that historically the program had been structured and administered to deny support for unwed and Black mothers).

¹⁰¹ *See id.* at 858 (discussing the shift to work requirements in the AFDC program).

¹⁰² *Id.*; GENE FALK, CONG. RSCH. SERV., RL44668, THE TEMPORARY ASSISTANCE TO NEEDY FAMILIES (TANF) BLOCK GRANT: A LEGISLATIVE HISTORY 8–9, 12, 13–15 tbl.1 (2026), https://www.congress.gov/crs_external_products/R/PDF/R44668/R44668.35.pdf.

¹⁰³ Jeanneane Maxon, *Fact Sheet: State Alternatives to Abortion Funding*, CHARLOTTE LOZIER INST. (Feb. 25, 2025), <https://lozierinstitute.org/fact-sheet-state-alternatives-to-abortion-funding/> [<https://perma.cc/G46H-3VUN>].

¹⁰⁴ Amanda Stirone Mansfield, *Alternatives to Abortion Programs: Support for Mothers and Families*, CHARLOTTE LOZIER INST. (Feb. 14, 2022), <https://lozierinstitute.org/alternatives-to-abortion-programs-support-for-mothers-and-families/> [<https://perma.cc/F3GT-VAH2>].

¹⁰⁵ Soohoo, *Turning Away from Criminal Abortion Laws*, *supra* note 9, at 136; SOFIA ESPINOZA, MELISSA GOODMAN & CARLEY TOWNE, UCLA CTR. FOR REPROD. HEALTH, L. & POL'Y, UNCONDITIONAL CASH TRANSFER PROGRAMS AS A PROMISING REPRODUCTIVE JUSTICE AND RACIAL JUSTICE POLICY INTERVENTION 6 (2025) (criticizing crisis pregnancy programs for offering limited resources like vitamins and diapers with "unsolicited, high-pressure, often religious or deceptive counseling to not have abortions").

¹⁰⁶ Soohoo, *Turning Away from Criminal Abortion Laws*, *supra* note 9, at 136.

¹⁰⁷ Currently there are an estimated 450–500 maternity homes operating in forty-eight states in the U.S and more than a third of them are affiliated with the anti-abortion group Heartbeat International. Susan Matthews, *The Most Tragic Unforeseen Consequences of the Supreme Court's Reversal of Roe*, SLATE (June 24, 2025), <https://slate.com/news-and-politics/2025/06/abortion-news-adoption-supreme-court-dobbs-anniversary.html> [<https://perma.cc/GE5Y-EB32>]; Tiffany Stanley, *After the End of Roe, a New Beginning for Maternity Homes*, AP NEWS (Aug. 2, 2024), <https://apnews.com/article/abortion-maternity-homes-catholic-evangelical-roe-f455da4fd46c195246df43bc6dd16a67> [<https://perma.cc/6NH3-473K>].

and mothers with young children.¹⁰⁸ However, maternity homes are often unregulated and impose control on residents' lives, which can include mandatory religious programs and restrictions on outside communications and movement.¹⁰⁹ Many maternity homes are affiliated with adoption agencies, raising conflict of interest concerns.¹¹⁰

Valerie Harkins, director of one of the largest maternity home networks, emphasizes that maternity homes address the “perfect storm” of the lack of livable wage jobs and affordable childcare, inflation, and the increased unaffordability of housing.¹¹¹ But, there are better ways to address poverty and the lack of a robust safety net than forcing individuals to rely on unregulated maternity homes and diverting government funds into A2A programs.

Recently some states have experimented with Unconditional Cash Transfer (UCT) Programs, which provide a monthly or regular “no-strings attached benefit.”¹¹² Some programs assist people during pregnancy and the first year of their child’s life.¹¹³ UCT programs alleviate the financial costs of parenting without coercing people to continue pregnancies or give their children up for adoption.¹¹⁴ Recognizing the myriad expenses associated with pregnancy and parenting, the programs allow individuals to decide how to allocate funds depending on their own situation and needs.¹¹⁵

CONCLUSION

The majority of U.S. adults think abortion should be legal in all or most cases.¹¹⁶ At the same time, many also think the government should adopt measures to protect prenatal life.¹¹⁷ While often presented as an insurmountable conflict, as illustrated by the decisions of the high courts of Colombia and Mexico, there is room for common ground policies that protect prenatal life *and* support the rights of people who are or can become pregnant.

¹⁰⁸ Tiffany Stanley, *What Are Maternity Homes? Their Legacy Is Checkered*, AP NEWS (Aug. 2, 2024), <https://apnews.com/article/abortion-maternity-homes-catholic-christian-roeb-cbc70b49618c2541838085456eb1c162> [https://perma.cc/B4W4-MVUY].

¹⁰⁹ Laura C. Morel, *These Maternity Homes Offer Sanctuary, But It Can Feel Oppressive*, N.Y. TIMES (Sept. 24, 2024), <https://www.nytimes.com/2024/09/24/us/florida-maternity-homes-abortion-restrictions.html> [https://perma.cc/HQR7-FV4Z].

¹¹⁰ Michelle Harvan, *‘Liberty Lost,’ Maternity Homes, and Crisis Pregnancy Centers*, 1A (June 6, 2025), <https://the1a.org/segments/liberty-lost-maternity-homes-and-crisis-pregnancy-centers/> [https://perma.cc/J3KX-DBRR].

¹¹¹ Anna Claire Vollers, *Faith-Based Maternity Homes ‘Create a Haven’ in States with Strict Abortion Laws*, LA. ILLUMINATOR (Oct. 3, 2023), <https://lailluminator.com/2023/10/03/maternity-homes/> [https://perma.cc/ES6Y-AMUT]; Stanley, *supra* note 107.

¹¹² ESPINOZA, GOODMAN & TOWNE, *supra* note 105, at 2.

¹¹³ *Id.* at 2.

¹¹⁴ *Id.* at 6.

¹¹⁵ *Id.* at 6–7.

¹¹⁶ According to a 2024 Pew Research Center polling, 63% of U.S. adults say abortion should be legal in all or most cases and 36% say it should be illegal in all or most cases. *Public Opinion on Abortion*, PEW RSCH. CTR. (Mar. 12, 2026), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/> [https://perma.cc/YQS2-P86M].

¹¹⁷ See *supra* Part II.B.

A starting point is the rejection of carceral approaches. Criminal abortion laws violate the human rights of people in need of abortions.¹¹⁸ And, as experience has shown in the U.S. and around the world, they also don't prevent abortions and impose real public health harms.

A more inclusive "pro-life" agenda would design positive state programs to ensure that people have access to sexual and reproductive services (to decrease the need for abortions), families have the support they need to raise their children in safe and healthy environments (to make it easier for families to choose to continue pregnancies), and pregnant people have access to appropriate prenatal care.

¹¹⁸ See WHO, ABORTION CARE GUIDELINE, *supra* note 13; U.N. Hum. Rts. Comm., *supra* note 14; HR Experts Joint Web Statement, *supra* note 14; C-055/2022 (Col), *supra* note 3, ¶¶ 235–36, 251 (discussing UN bodies that have endorsed decriminalization of abortion).