



National Advocates
for Pregnant Women

N A P W

The City University of New York

CUNY SCHOOL OF LAW

THE SIA LEGAL TEAM

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Human Rights & Gender Justice Clinic, City University of New York Law School

National Advocates for Pregnant Women

SIA Legal Team

Submission to the United Nations Working Group on Discrimination Against Women

October 1, 2018

I. Introduction

The Human Rights and Gender Justice Clinic at the City University of New York, National Advocates for Pregnant Women, and the SIA Legal Team submit this report to the United Nations Working Group on Discrimination. This report describes how women in the United States have been detained and criminally punished because of their capacity to be pregnant. In particular, women are punished for their actions while pregnant, for pregnancy outcomes, and for taking actions to end a pregnancy. This trend of criminalizing women for pregnancy-related actions or outcomes results in prosecutions for a wide range of crimes including abortion, child endangerment and neglect, and under laws criminalizing harm to a fetus, as well as other unexpected and unsupported charges.

For instance, in 2018, the Virginia Court of Appeals upheld the conviction of Katherine Dellis, a 25-year old woman, who was sentenced to five months in prison after suffering a stillbirth at home and losing consciousness on her bathroom floor.¹ After awakening, she disposed of the fetal remains and then sought medical treatment. Although there are no laws defining what a woman should do in the event of a stillbirth, she was charged with the crime of “concealing a dead body” after a doctor alerted the police about the incident. The Court of Appeals rejected the argument that the statute could not apply since the fetus “was never alive...[so] it cannot be dead.”²

While the laws used to prosecute women vary, the prosecutions are driven by patriarchal and stereotypical attitudes about the proper roles and actions of women and result in violation of the human rights of women because of their capacity to be pregnant.

II. Background about women in prison population in the US (WG Question I.4)

Today, the U.S. is the world’s leader in incarceration, with 2.2 million people in the nation’s prisons and jails.³ Women are the fastest growing segment within the prison population in the United States.⁴ Between 1980 and 2016, the number of women in prison increased by more than 700%, which is about 1.5 times the rate of men.⁵ As of 2016, there are 213,722 women incarcerated in total in the U.S., with another million under correctional supervision.⁶ The majority of these women are mothers, with more than 60% of women in state prison having at least one child under the age of 18,⁷ and 5% of women admitted into jails are pregnant.⁸

¹ Katherine Nicole Dellis v. Commonwealth of Virginia (Va. Ct. App. 2018) (unpublished) (Memorandum Opinion by Judge Teresa M. Chafin). Available at https://www.courtlistener.com/pdf/2018/04/24/katherine_nicole_dellis_v._commonwealth_of_virginia.pdf.

² On June 1st, 2018, Virginia Gov. Ralph Northam issued his first pardon, striking her conviction. See *infra* note 37.

³ The Sentencing Project, *Criminal Justice Facts* (2016). Available at <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Sept. 9, 2018).

⁴ American Civil Liberties Union, *Facts About the Over-Incarceration of Women In The United States* (2018). Available at <https://www.aclu.org/other/facts-about-over-incarceration-women-united-states?redirect=facts-about-over-incarceration-women-united-states> (last visited Sept. 9, 2018) [hereinafter ACLU].

⁵ The Sentencing Project, *Incarcerated Women Fact Sheet* (May 10, 2018). Available at <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> (last visited Sept. 9, 2018).

⁶ *Id.* (113,724 women are out on parole, and approximately 918,000 currently on probation).

⁷ *Id.*

⁸ Human Rights Watch, *You Miss So Much When You’re Gone* (September 26, 2018), Note 71 and accompanying text, available at <https://www.hrw.org/report/2018/09/26/you-miss-so-much-when-youre-gone/lasting-harm-jailing-mothers-trial-oklahoma> (last visited Sept. 27, 2018) [hereinafter HRW].

It is clear that poor, under-educated women suffer the most. Close to half of women in state prisons have not completed high school.⁹ Furthermore, the rate of imprisonment for African American women is more than twice the rate of incarceration for white women, and Hispanic women are incarcerated at 1.2 times the rate of white women.¹⁰ In total, incarcerated women are 53% White, 28.6% Black, 14.2% Hispanic, 2.5% American Indian and Alaskan Native, 0.9% Asian, and 0.4% Native Hawaiian and Pacific Islander. These incarceration rates disproportionately affect women of color who represent 30% of all incarcerated women in the U.S., although they are only an estimated 13% of the total female population in the United States.¹¹

Mental health disorders are more common among incarcerated women than in incarcerated men.¹² Major depressive disorder is the most widespread, followed by bipolar disorder and post-traumatic stress disorder (PTSD).¹³ A multi-site study of jails in the U.S. found that 86% had experienced sexual violence in their lifetime and 77% had survived intimate partner violence.¹⁴ Incarcerated women's economic situations are also worse than their male counterparts.¹⁵ This means that women have an even more difficult time affording cash bail, which helps explain why an estimated 60% of women in jail have not been convicted of a crime and are awaiting trial.¹⁶ Women who could not make bail had an annual median income of just \$11,071.3 Among those women, women of color had a median annual income of only \$9,083.¹⁷ A typical bail amount is \$10,000, which would amount to a full year's income for many women.¹⁸

III. Causes of Incarceration (WG Question I.1 &4)

The growth of the U.S. prison rate and the incarceration of women can be traced back to the country's "war on drugs." In 1986, the Anti-Drug Abuse Act created mandatory minimum sentencing for a simple drug possession, which has had devastating consequences.¹⁹ In recent years, the incarceration rate in the U.S. has been fueled by the rise in use of methamphetamine, a drug that is disproportionately used by white and Latinx people. As a result, the rate of incarceration for white women continues to

⁹ The Sentencing Project, *Women in the Criminal Justice System: Briefing Sheets* (May 2007). At p. 3. Available at <https://www.sentencingproject.org/wp-content/uploads/2016/01/Women-in-the-Criminal-Justice-System-Briefing-Sheets.pdf> (last visited Sept. 9, 2018).

¹⁰ The Sentencing Project, *Fact Sheet: Incarcerated Women and Girls 1980-2014* (2014). Available at <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> (last visited on Sept. 9th) (Note: These numbers are as of 2014. The updated version of this study does not mention race as specifically).

¹¹ *Supra*, Note 4; See also ACLU, *Women's Mass Incarceration: The Whole Pie 2017* (2017). Available at https://www.aclu.org/sites/default/files/field_document/womenprisonreport_final.pdf.

¹² In a 2012 study, a larger percentage of females in prison (20%) or jail (32%) than males in prison (14%) or jail (26%) met the threshold for serious psychological distress (SPD). U.S. Department of Justice, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates 2011-2012* (June 2017). Available at <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf>.

¹³ *Id.*

¹⁴ HRW, *You Miss So Much When You're Gone*, *Supra* note 8, note 16, and accompanying text.

¹⁵ *Supra* note 12 at p. 3.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*, See also H.R. 5484 - Anti-Drug Abuse Act of 1986, Available at <https://www.congress.gov/bill/99th-congress/house-bill/5484>.

significantly rise, while the rate of imprisonment for African American women has been in decline since 2000.²⁰

Another factor in the growing incarceration of women is the trend of criminalizing women for ending a pregnancy or for pregnancy-related complications. In the U.S., there is a long history of imposing criminal penalties rather than addressing underlying causes of social problems and using criminalization to control marginalized communities. Current concern about the health implications of drug use by pregnant women has failed to address the lack of adequate prenatal care or voluntary treatment programs for pregnant women with substance use disorders (SUD). Instead, as discussed in Section V, prosecutors are criminally prosecuting pregnant women who use drugs as “bad” mothers. These prosecutions assume that the state should be able to intervene to protect fetuses, including by punishing the women carrying them, and that drug use is a moral failing that should be addressed through arrest and incarceration.

Further, although women have a constitutional right to access abortion, stigma against abortion has resulted in the growing prosecution of women who chose to end their pregnancies outside of the formal medical system. Today because of growing restrictions on clinic-based abortion care and the increased availability of medication abortion as a safe and effective method to terminate a pregnancy,²¹ more women may be choosing to have self-managed abortions, placing them at risk for prosecution. Women also may seek to avoid abortion clinics because of concerns about being exposed or intimidated by hostile clinic protesters. While some women may prefer the more personal and private experience of being able to end a pregnancy outside of a formal medical setting,²² those at greatest risk of arrest are likely to be women with fewer economic resources. People in poverty are more likely to seek self-managed care when they can’t afford a clinic-based abortion,²³ and hurdles to clinical care created by lawmakers, such as waiting periods or mandatory ultrasounds and the difficulty in traveling long distances, disproportionately impact poor women. Women of color may also be disproportionately affected because adverse outcomes are more likely to be considered “suspicious” or because they may be members of communities that have experienced oppression at the hands of the medical profession, such as forced sterilization or unconsented medical testing, and thus distrust the formal medical system.

²⁰ *Supra* note 5 (which states that between 2000 and 2016, the rate of imprisonment for white women rose by 44%); See also The Sentencing Project, *The Changing Racial Dynamics of Women’s Incarceration* (February 13, 2013). At p. 10. Available at <https://sentencingproject.org/wp-content/uploads/2015/12/The-Changing-Racial-Dynamics-of-Womens-Incarceration.pdf> (last visited Sept. 9, 2018).

²¹ Medication abortion using Mifepristone (also known as RU-486) and Misoprostol (commonly referred to by its brand name Cytotec) is considered extremely safe--the rate and nature of complications is similar to that of spontaneous miscarriage; furthermore, both drugs are considered essential by the World Health Organization. Using Misoprostol alone is up to 85% effective in ending a pregnancy. These two medications together are up to 98% effective. Andrea Rowan, Information Box “Mifepristone and Misoprostol,” *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 *Guttmacher Policy Review* 3 (Summer 2015). At p. 72. Available at <https://www.guttmacher.org/sites/default/files/pdfs/pubs/gpr/18/3/gpr1807015.pdf> (last visited Sept. 22, 2018); See also SIA Legal Team and Human Rights & Gender Justice Clinic, *Submission to WGDAW – Criminalization of Women Who Self-Induce Abortions in the United States* (June 2017). At pp. 4-5 [Hereinafter “SIA/HRGJ Submission to WGDAW”].

²² SIA/HRGJ Submission to WGDAW. At p. 6, ¶ 3.

²³ “A significant barrier to abortion access for women living in poverty is a policy known as the Hyde Amendment, which was implemented in 1977 and renewed annually thereafter. It prohibits Medicaid coverage for abortions for social or economic reasons unless the woman can prove that she was sexually assaulted or that she will die without an abortion.” CRRJ and CUNY Submission to the Special Rapporteur on Poverty (October 14, 2017). At p. 4, ¶ 2. Available at <https://www.ohchr.org/en/issues/poverty/pages/callforinput.aspx>

Prosecution of pregnant women for drug use also disproportionately impacts poor women and women of color. The way the State obtains information about drug use is directly related to a woman's economic situation. Invasions of privacy for the poor – particularly poor pregnant women – are commonplace and have devastating consequences.²⁴ Many pregnant women who are arrested are on government assistance of some kind and rely on public health care facilities, where they may be subjected to drug tests without knowledge that evidence of drug use could lead to prosecution. Their wealthier counterparts who rely on private health providers do not face the same consequences.²⁵ In most states, including New York, California, and Illinois, pregnant women receiving care through Medicaid need to submit to a battery of interviews and counseling sessions with a State actor as part of their pre-natal care before meeting with an obstetrician, who will then assess the health of their fetus. By mandating a social worker consultation before access to medical personnel, the privacy rights of poor mothers are often legally invaded.²⁶ The information that is shared by these poor mothers is not private, with the State often communicating information among agencies.²⁷ Their reproductive privacy is also often violated with the State consistently implicating itself in poor women's decisions around pregnancy and motherhood. The ways in which pregnant women are being prosecuted are discussed in depth below.

IV. Criminalization of Women for Ending Pregnancy or Adverse Pregnancy Outcomes

State prosecutors are manipulating pre-*Roe v. Wade* statutes and laws that purport to protect pregnant women to prosecute and convict women for ending their own pregnancies and for miscarriages and stillbirths. In addition to discriminatorily criminalizing women based on their capacity to become pregnant and their choices about their own bodies, the fear of criminalization places a barrier to necessary health care and inevitably endangers women's health. Prosecution under these laws target the most marginalized in U.S. society: low-income women and women of color. These women are the ones most likely to have factors—such as lack of money, childcare, transportation, legal immigration status, and/or a mistrust of the medical system—that push or pull them toward self-managed abortion.²⁸

A. State Laws and Stigma That Result in Criminalization of Women for Self-Managed Abortion

Numerous state statutes directly and indirectly criminalize women for having self-managed abortions; the severity of convictions range from misdemeanors to felonies.²⁹ In several states, statutes explicitly provide that women can be prosecuted for ending pregnancies. However, even where laws do not explicitly authorize criminal prosecution of women, stigma against abortion and women who resort to self-managed care increasingly result in criminal prosecutions. Politically-motivated prosecutors overreach, using criminal statutes that were meant to regulate abortion providers, statutes that criminalize harm to fetuses, and other statutes to punish women. Although many of the convictions are eventually overturned, the women prosecuted suffer the mental, physical, and financial consequences of having to defend themselves and often spend a significant amount of time in jail or prison as they do so.

²⁴ Khiara Bridges, *Introduction: The Poverty of Privacy Rights*, Stanford University Press (June 2017). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2984982.

²⁵ *Id.*

²⁶ “*The Poverty of Privacy Rights*” with Khiara Bridges, VIMEO (October 5, 2017). Available at <https://vimeo.com/237181229>.

²⁷ *Id.*, for instance, food stamp agencies often collaborate with law enforcement to apprehend those with outstanding warrants. People are called in to discuss food stamp benefits, and on arrival are arrested. This program is called Operation “Talon.”

²⁸ *Supra*, Section III.

²⁹ SIA/HRGJ Submission to WGDAW, at pp. 8 – 10

Laws Explicitly Criminalizing Women Who End Their Pregnancies

At least seven state statutes explicitly provide that women can be criminally prosecuted for terminating their own pregnancy: Arizona, Delaware, Idaho, Nevada, New York, Oklahoma, and South Carolina.³⁰ These laws existed before the Supreme Court's decision in *Roe v. Wade* laid out the constitutional limits of the state's ability to restrict abortion, and there are arguments that they are likely unconstitutional. However, women who self-manage abortions continue to be prosecuted under them, including a 2011 prosecution in New York.³¹

Law That Regulate Abortion Providers Manipulated to Prosecute Women Who End Their Pregnancies

States also have old pre-*Roe v. Wade* laws that criminalize the provision of abortion in addition to newer laws that regulate the provision of abortions. Historically, these laws were understood to apply to people who perform abortions on others to *protect women from unscrupulous or unsafe abortion providers*; however, prosecutors have begun to use these laws to prosecute women for terminating their own pregnancies. For instance, in 2015, a woman tried to end her own pregnancy using a coat hanger in Tennessee and was charged with performing an abortion that did not conform with statutory requirements.³² In 2013, a Pennsylvania mother was convicted of offering medical consultation without a license for purchasing medication abortion drugs for her daughter.³³ Fourteen states have laws that are susceptible to misuse in this fashion.³⁴

Law Criminalizing Fetal Harm

³⁰ *Id.*, at p. 8, ¶ 2.

³¹ *Id.*, at p. 10, ¶ 2; See also Anemona Hartocollis, *After Fetus is Found in Trash, A Rare Charge of Self-Abortion*, NEW YORK TIMES, December 1, 2011, available at <https://www.nytimes.com/2011/12/02/nyregion/self-abortion-charge-after-fetus-found-in-trash-in-washington-heights.html> (last visited Sept. 22, 2018). "Since 1980, four other women have been charged with self-abortion in the first degree or second degree, a lesser charge that can apply when the attempt is not successful." At ¶ 15.

³² SIA/HRGJ Submission to WGDAW, at p. 16, ¶ 2.

³³ Emily Bazelon, *A mother in jail for helping her daughter have an abortion*, NEW YORK TIMES MAGAZINE, Sept. 22, 2014, available at <http://www.nytimes.com/2014/09/22/magazine/a-mother-in-jail-for-helping-herdaughter-have-an-abortion.html> (last visited Sept. 22, 2018). The closest medical facility was 75 miles away and cost between \$300 and \$600. Pennsylvania requires women to get counseling and wait 24 hours before the procedure which would have required either two trips or an overnight stay. *Id.*

³⁴ In alphabetical order, these states are Alabama, Arizona, Kentucky, Michigan, Minnesota, Mississippi, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Tennessee, Virginia, and West Virginia. For the statutory provisions, see SIA/HRGJ Submission to WGDAW, at p. 17, footnote 77. See also SIA Legal Team, *Roe's Unfinished Promise*, p. 17-18, Available at <https://www.sialegalteam.org/roes-unfinished-promise>. [Hereinafter "*Roe's Unfinished Promise*"]. Recently, Massachusetts voted to repeal its 1845 statute that criminalized abortion. *Gov. Baker Signs Bill Repealing Antiquated Mass. Abortion Ban*, WBUR News & Wire Services, July 27, 2018, available at <http://www.wbur.org/news/2018/07/27/baker-smoking-age-abortion-laws> (last visited Sept. 22, 2018).

At least thirty-eight states have laws criminalizing harm to fetuses.³⁵ Ten of those states lack adequate exceptions for pregnant women.³⁶ Many of these laws were passed in the name of protecting pregnant women. The 2015 prosecution of Purvi Patel in Indiana is one clear example of how a state law has been twisted to prosecute a pregnant woman for a self-managed abortion. Indiana recently amended its law,³⁷ but its old feticide statute criminalized “a person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.” The statute was passed in 1979 after an incident in which a pregnant bank teller was shot in the abdomen by a robber. She survived, but tragically lost her twin pregnancy. In 2015, prosecutors convicted Purvi Patel under the feticide statute based on the theory that she took drugs to try to self-induce an abortion. The Indiana Court of Appeals eventually held that the feticide statute does not apply to pregnant women who attempt an abortion, but not before Patel had been incarcerated for three years.³⁸ Research has shown that in virtually every state in which the law punishes harm to fetuses, prosecutors have attempted to use these laws to punish women for the outcomes of their pregnancies.³⁹ Women who have taken steps to end their own pregnancies have also been charged with murder.⁴⁰

Other Laws

When prosecutors suspect that a woman has terminated a pregnancy outside of the established medical system, the zeal to prosecute is so great that they often find other crimes to charge even if the women cannot be charged for ending the pregnancy itself.⁴¹ For example, in Virginia, the court interpreted a law regarding disposal of a dead body to include a fetus and affirmed the arrest and conviction Katherine Dellis of a felony for concealing a dead body following a stillbirth.⁴² And in

³⁵ The states with fetal homicide laws are: Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin. National Conference of State Legislatures, *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, May 1, 2018, available at <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> (last visited Sept. 22, 2018).

³⁶ These states are Arkansas, Iowa, Massachusetts, Michigan, Mississippi, Missouri, Oklahoma, Rhode Island, and Utah, and Washington. *Roe’s Unfinished Promise*, at pp. 6-8, 13-16. *Supra* note 34

³⁷ On March 25, 2018, the Indiana governor signed a bill that creates exceptions from the crimes of murder, voluntary manslaughter, involuntary manslaughter, and feticide for lawfully performed abortions or a pregnant person who terminates or causes the termination of their own pregnancy. Available at <https://rewire.news/legislative-tracker/law/indiana-fetal-homicide-bill-sb-203/> (last visited Sept. 22, 2018). However, prior to the amendment, in February 2018, a second woman was charged with feticide for her actions concerning her own pregnancy. The case is still pending. *The IndyChannel.com, Woman charged with baby’s death after police say she admitted to drug use during pregnancy*, February 15, 2018. Available at <https://www.theindychannel.com/news/local-news/madison-county/woman-charged-with-babys-death-after-police-say-she-admitted-to-drug-use-during-pregnancy> (last visited Sept. 27, 2018).

³⁸ SIA/HRGJ Submission to WGDAW, at p. 13.

³⁹ Lynn M. Paltrow, Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 *Journal of Health Politics, Policy and Law* 2 (Apr. 2013), at pp. 326-327, available at <http://bit.ly/2q0I3FU>.

⁴⁰ Crimesider Staff, *Woman who took abortion pill charged in death of fetus*, CBSNEWS, June 9, 2015, available at <https://www.cbsnews.com/news/woman-who-took-abortion-pill-charged-in-death-of-fetus/> (last visited Sept. 27, 2018).

⁴¹ *Roe’s Unfinished Promise*, at p. 19. *Supra* note 34

⁴² In February 2017, a Virginia Court sentenced Katherine Dellis to five months in jail for “concealing a dead body” because she suffered a stillbirth and disposed of the remains before seeking medical help. On appeal, Appeals Court

Arkansas, a woman was charged with abuse of a corpse and concealing a birth after she went to a hospital and was suspected of ending her own pregnancy. The abuse of a corpse charge was dropped but she was sentenced to six years in prison for concealing a birth in 2016.⁴³ Recently, the Arkansas Court of Appeals reversed the conviction because the trial court improperly admitted prejudicial evidence.⁴⁴

B. Criminalization Prevents Women from Seeking Medical Care of Miscarriages and Self-Managed Abortion

When women are criminalized for having abortions, healthcare providers often act as a law enforcer. Fear of arrest or prosecution endangers the health of women by driving them away from healthcare in the event of a complication from a self-managed abortion. Indeed, many of the women who have been arrested in recent years came to the attention of law enforcement when they sought emergency medical care. A study of arrests and detentions of women based on alleged actions or inactions during pregnancy found that in nearly a quarter of all cases, women were reported by health care or social work professionals when they sought help.⁴⁵

For example, in December 2013, Pennsylvania brought criminal charges against a mother because she purchased drugs for a medication abortion for her 16 year old daughter.⁴⁶ When she took her daughter to the emergency room because she was concerned about bleeding, the medical center sent them home but reported the mother to Child Protective Services. The mother was charged with multiple crimes and convicted of offering medical consultation about abortion without a medical license.

Even women experiencing spontaneous miscarriages or stillbirths may be deterred from health care because of the suspicion of self-inducing a miscarriage and the real risk of being prosecuted for such suspicion.⁴⁷ When Katherine Dellis was prosecuted for concealing a dead body because of her disposal of fetal remains following an at home stillbirth, it was her doctor that alerted the police after she sought emergency medical care.⁴⁸

Criminalization of abortion has a disproportionate impact on poor women and women of color, who disproportionately rely on public health care providers making them more likely to be turned over by the people they turned to for care.⁴⁹ This leads to racial disproportionalities in punishment; for instance,

Judge Theresa M. Chafin affirmed the conviction concluding that "the legislature intended that a fetus be treated the same as a dead body." See <https://casetext.com/case/dellis-v-commonwealth> (last visited Sept. 22, 2018).

Ms. Dellis was later pardoned by Virginia Gov. Ralph Northam but the pardon does not prevent further prosecutions of women in similar situations. Justin Jouvenal, *Va. governor pardons woman convicted of disposing of stillborn fetus*, WASHINGTON POST, June 1 2018, available at https://www.washingtonpost.com/local/public-safety/va-governor-pardons-woman-convicted-of-disposing-of-stillborn-fetus/2018/06/01/8ec206be-6ed0-4ebc-ae16-ff835f9e202a_story.html?utm_term=.d2c49e4edba0 (last visited Sept. 22, 2018).

⁴³ Patty Wooten, *Judge Acquits Woman of Abuse of Corpse, Jury Convicts Her of Concealing Birth*, SEARKTODAY, March 6, 2016, available at <http://searktoday.com/judge-acquits-woman-of-abuse-of-corpse-jury-convicts-her-of-concealing-birth/> (last visited Sept. 24, 2018).

⁴⁴ National Advocates for Pregnant Women, *Arkansas Court of Appeals Overturns Criminal Conviction for Concealing a Birth*, March 14, 2018, available at http://advocatesforpregnantwomen.org/blog/2018/03/arkansas_court_of_appeals_over.php (last visited Sept. 22, 2018).

⁴⁵ SIA/HRGJ Submission to WGDAW, p. 7, ¶ 1.

⁴⁶ *Supra* note 42.

⁴⁷ SIA/HRGJ Submission to WGDAW, p. 7, ¶ 1.

⁴⁸ *Supra* note 42.

⁴⁹ *Supra* note 23, at pp. 5 – 6. See also SIA/HRGJ Submission to WGDAW, at p. 7.

although Black people make up 15% of the population of the state of Florida, nearly 75% of the prosecutions of pregnant Floridians were against Black women.⁵⁰ With respect to self-induced abortion, this disparity is likely to be compounded by the fact that women of color are more likely to face barriers to clinic based abortion, and are more likely to suffer adverse pregnancy outcomes that may bring them under scrutiny, even if the causes of poor pregnancy outcomes are structural and largely outside of their control.⁵¹

V. Criminalization of Pregnant Women for Use of Drugs or Actions Concerning Their Pregnancies

In the U.S., pregnant women have been criminally prosecuted for using drugs or for being accused of causing harm to their fetus. This often occurs when laws criminalizing harm to children (e.g. criminal child abuse or endangerment laws) or harm to fetuses (e.g., fetal assault, fetal homicide or fetal protection laws) are enforced against pregnant women.⁵² South Carolina, Alabama, and previously Tennessee, explicitly allow criminal prosecution of mothers for drug use during their pregnancy.

Criminalization of women for their conduct when pregnant typically occurs when their embryo or fetus is treated as though it is a separate person or entity entitled to protection by criminal laws. This potentially criminalizes any behavior that a pregnant woman engages in impacting her body that could be deemed potentially harmful to a fetus.⁵³ For example, a woman driving a car without a seatbelt may receive a small fine and loss of demerit points, but a pregnant woman driving a car without a seatbelt could be charged with reckless endangerment of a child. Such prosecutions discriminate against women, exposing them to unique criminal penalties because of their ability to become pregnant.

Further because of current public concern about drug use, pregnant women who use controlled substances often are prosecuted without any evidence that their behavior actually imposes harm to their pregnancy or fetal health. States use positive toxicology reports of criminalized substances (cocaine, heroin, methamphetamine, marijuana and prescription pills) in pregnant women or their newborn as evidence for criminal charges of child endangerment and abuse and chemical endangerment of a child, homicide, manslaughter and reckless injury to a child without evidence that the fetal exposure actually causes harm.⁵⁴ Often information about drug use is obtained in violation of the pregnant women's privacy rights.⁵⁵

The women most commonly prosecuted for drug use during pregnancy are predominantly people of color or poor rural women. Finally, the criminalization is counter-productive as a means to promote healthy pregnancies and violates the right to health because the threat of criminal prosecution deters pregnant women from obtaining prenatal care or drug treatment, if needed.⁵⁶

A. State Laws That Are Used to Prosecute and Detain Pregnant Women

Criminal Child Endangerment Statutes

⁵⁰ *Supra* note 41.

⁵¹ *Id.*

⁵² Amnesty International. *USA: Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA* (2017), at pp. 17-19. Available at <https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf> (last visited Sep 9, 2018).

⁵³ *Id.*, at 18.

⁵⁴ *Id.*

⁵⁵ *See supra* Section III.

⁵⁶ *See infra* Section V.B.

Women have been prosecuted under criminal child endangerment and abuse statutes when prosecutors argued that their fetus is a child protected under the statutes. Most State Appellate and Supreme Courts have overturned criminal convictions of women for drug use during their pregnancy properly finding the interpretation of child protection statutes to include fetuses to be overly broad and impermissible.⁵⁷ However in two states, South Carolina and Alabama, courts explicitly allow prosecution of women for their conduct while pregnant based on the theory that a fetus or unborn child is within the definition of “a child.”

In 1997, the South Carolina Supreme Court upheld the felony conviction of a pregnant woman for drug use under South Carolina’s criminal child abuse and endangerment statute finding that “a child” under SC Code Ann §20-7-50 includes “a viable fetus.” In *Whitner*, the mother was charged with child neglect based on cocaine metabolites in her baby’s system at birth.⁵⁸ Since *Whitner*, there have been at least 108 arrests in South Carolina for child endangerment due to drug use during pregnancy.⁵⁹

Similarly, Alabama has enacted a “chemical-endangerment statute” which was intended to criminalize a specific kind of child abuse, exposing a child to an environment where she or he is exposed to a controlled substance.⁶⁰ The Alabama Supreme Court in *Hicks v. State*⁶¹ and *Ex parte Ankrom*⁶² interpreted “a child” to include viable fetuses. As a result, pregnant women who have ingested any amount of a controlled substance can be convicted and sentenced from 1 to 10 years in prison, even when the exposure does not result in any harm to the fetus. Between 2006 - 2015, 479 new and expectant

⁵⁷ Krista Stone-Manista, *Protecting Pregnancy Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 *Journal of Criminal Law and Criminology* 825–826 (2009). Available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7334&context=jclc> (last visited September 20, 2018).

⁵⁸ *Whitner v. State*, 328 SC 1, 6, 492 SE2d 777, 779 (1997) S.C. Code Ann §20-7-50 for the relevant parts provides: “Any person having the legal custody of any child . . ., who shall, without lawful excuse, refuse or neglect to provide . . . the proper care and attention for such child . . ., so that the life, health or comfort of such child . . . is endangered or is likely to be endangered, shall be guilty of a misdemeanor . . .”

⁵⁹ *Supra* note 52.

⁶⁰ Ala. Code 1975 § 26-15-3.2 for the relevant part provides:

“(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:

(1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260. A violation under this subdivision is a Class C felony.

(2) Violates subdivision (1) and a child suffers serious physical injury by exposure to, ingestion of, inhalation of, or contact with a controlled substance, chemical substance, or drug paraphernalia. A violation under this subdivision is a Class B felony.

(3) Violates subdivision (1) and the exposure, ingestion, inhalation, or contact results in the death of the child. A violation under this subdivision is a Class A felony.

(b) The court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment.

(c) It is an affirmative defense to a violation of this section that the controlled substance was provided by lawful prescription for the child, and that it was administered to the child in accordance with the prescription instructions provided with the controlled substance.”

⁶¹ *Hicks v. State*, 153 So 3d 53, 59 (Ala. 2014).

⁶² *Ex parte Ankrom*, 152 So 3d 397, 406 (Ala. 2013).

mothers women were prosecuted under the chemical child endangerment law.⁶³ Eighty-nine percent of women charged with “chemical endangerment” of a child were unable to afford their own attorney.⁶⁴

Fetal Harm Laws

As discussed in Section IV.A., 38 states have laws that criminalize harm to a fetus. These include fetal assault, fetal homicide, or fetal protection laws. These laws were originally passed to recognize the loss suffered by a pregnant woman who was the victim of a crime committed by a third-party. However, unless the laws contain a clear exception for a pregnant woman’s own actions, they can be used to prosecute pregnant women.⁶⁵ In fact, these laws have been broadly interpreted and used to charge pregnant women with endangering a fetus for conduct that is otherwise not a crime: not wearing a seatbelt, falling down the stairs, attempting suicide, or refusing medical interventions.⁶⁶

In 2014, Tennessee amended its “fetal assault laws” to explicitly make it a crime to give birth to a child harmed by prenatal exposure to narcotics. In the two years the provision was in effect in Tennessee, about 100 women were charged.⁶⁷ Due to considerable evidence that the laws undermine the wellbeing of the child and mother, after the law lapsed in 2016, it has not been re-enacted. However, in February 2017 there were legislative attempts to re-enact the law under Senate Bill 1381 that has passed second consideration and is pending review from the Senate Judiciary Committee.⁶⁸

Detention under Civil Child Abuse Statutes

Pregnant women who are suspected of using drugs can face severe civil penalties, including termination of parental rights under child welfare laws. In most states, a child’s prenatal exposure to controlled substances can be the basis of a child welfare investigation, and some states as well as the District of Columbia specifically include substance use during pregnancy as a form of maltreatment under their civil child welfare laws. In one state, Wisconsin, they can be involuntarily detained and forced into in-patient drug treatment

Under 1997 Wisconsin Act 292 (“Act 292”), juvenile courts may claim jurisdiction over fertilized eggs, embryos, and fetuses at any gestational stage as a child in need of protection if a pregnant woman “lacks self-control” in alcoholic beverage or controlled substance use.⁶⁹ When a court asserts jurisdiction, it may order the detention of a pregnant woman in an inpatient treatment center to receive potentially unwanted or unnecessary medical treatment.⁷⁰ The law authorizes the court to appoint a guardian ad litem

⁶³ Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, ProPublica, September 23, 2015. Available at <https://www.propublica.org/article/when-the-womb-is-a-crime-scene> (last visited Sep 17, 2018).

⁶⁴ *Id.*

⁶⁵ See *supra* note 36 and accompanying text.

⁶⁶ *Supra* note 52.

⁶⁷ *Supra* note 52.

⁶⁸ Tennessee Fetal Assault Law (HB 1295). Available at <https://rewire.news/legislative-tracker/law/tennessee-pregnancy-criminalization-law-hb-1295/>

⁶⁹ See WIS. STAT. ANN. § 48.133 (2016) (The court has exclusive original jurisdiction over an unborn child alleged to be in need of protection or services which can be ordered by the court whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control. [. . .]). Available at <https://docs.legis.wisconsin.gov/document/statutes/48.133>

⁷⁰ Soohoo & Kaufman, ACS brief page 3

for the fetus immediately whereas if the pregnant woman qualifies for appointed counsel, she is not entitled to representation at the initial proceedings and may be held in custody for up to 30 days before she has a right to counsel.⁷¹ The Wisconsin civil child welfare law also enables the court to hold a woman in contempt and incarcerate her if she fails to comply with the court's order. This law has impacted thousands of Wisconsin women. Between 2004-2014, 467 women faced additional deprivation of liberty as a result of "substantiated" unborn child abuse claims.⁷²

Following a visit to the U.S., UN Working Group on Arbitrary Detention stated that "[t]his form of deprivation of liberty is gendered and discriminatory in its reach and application, as pregnancy, combined with the presumption of drug or other substance use, is the determining factor for involuntary treatment."⁷³ The statute was successfully challenged at the trial court level by a mother who was jailed and placed in solitary confinement after she sought prenatal care and treatment for a depression and a serious thyroid condition after she disclosed that she had previously used drugs,⁷⁴ but an Appellate Court recently vacated the decision based on the ground that because she no longer lived in the state, she did not have standing to bring the case.⁷⁵ As a result of the Appellate Court decision, the statute remains in effect.

B. Adverse Impact of Such Laws

Criminalization and involuntary detention and treatment of pregnant women for drug use are portrayed as protecting the mother and her fetus but actually have a profound negative impact on the health and lives of women, their children and their family stability.⁷⁶ Most medical and public health professionals agree that such prosecutions are contrary to public health goals because they deter pregnant women from seeking healthcare and undermine their relationship with healthcare providers.⁷⁷ According to the American Congress of Obstetricians and Gynecologists, pregnant women tend to "react to the threat of prosecution not by terminating their drug use, but by avoiding prenatal care. As with other chronic diseases, managing drug addiction requires targeted treatment."⁷⁸ In addition, when medical professionals report pregnant patients' suspected drug use,⁷⁹ it violates patient confidentiality and strains the therapeutic, nurturing relationship between obstetrician gynecologist or healthcare physician and the patient by placing them in a potentially adversarial relationship.

⁷¹ *Supra* note 70.

⁷² Plaintiff's Motion for Summary Judgment, *Loertscher v. Schimel*, 3:14CV00870.

⁷³ Working Group on Arbitrary Detention: Preliminary Findings from its visit to the United States of America (11-24 October 2016). Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E.

⁷⁴ Jessica Glenza, *Pregnant woman's drug use equivalent to 'child abuse,' court says*, THE GUARDIAN, Dec. 12, 2014, available at <https://www.theguardian.com/lifeandstyle/2014/dec/12/pregnant-womans-drug-use-equivalent-to-child-abuse-court-says> (last visited Sept. 27, 2018).

⁷⁵ *Loertscher v. Anderson*, 893 F.3d 386 (2018).

⁷⁶ *Supra* note 52.

⁷⁷ Kandall SR, *Substance and shadow: women and addiction in the United States*. Cambridge, Massachusetts: Harvard University Press (1996).

⁷⁸ American Congress of Obstetricians and Gynecologists, *Toolkit on State Legislation: Pregnant Women and Prescription Drug Abuse, Dependence and Addiction*, 3, available at www.acog.org/-/media/Departments/Government-Relations-and-Outreach/NASToolkit.pdf (last visited Sep 9, 2018)

⁷⁹ Women giving birth in Alabama report not knowing that they were tested for drugs and that positive results could result in prosecution. Nina Martin, *How Some Alabama Hospitals Quietly Drug Test New Mothers - Without Their Consent*. ProPublica, Sept. 30, 2015, available at <https://www.propublica.org/article/how-some-alabama-hospitals-drug-test-new-mothers-without-their-consent> (last visited Sep 17, 2018).

The criminalization of pregnant women disproportionately affects minority and economically disadvantaged women.⁸⁰ In one study, black women who tested positive for substances at birth were reported to authorities 10 times more frequently than white women despite similar substance use rates.⁸¹ These individuals are less likely to have easy access to substance use disorder treatment, when necessary, nor have an abundance of resources to hire an attorney indicated by the fact that 71% of the women prosecuted, qualified for indigent defense (one without sufficient income to afford a lawyer for defense in a criminal case).⁸²

Further, it is unclear whether criminalizing pregnant women for a causal relationship between harm to their fetus and use of controlled substances can be justified as a matter of medical science. Many factors, such as access to healthcare, nutrition, and socioeconomic status, affect fetal development. There have been studies that make conclusory statements as to the correlation between fetal development and substance use. However, they fail to take into the account the impact of the other factors.⁸³ For instance, as noted by the Supreme Court of South Carolina, doctors now recognize that studies show “that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.”⁸⁴ It also is problematic to assume that any pregnant woman can guarantee a particular pregnancy outcome or is solely responsible for the health of a newborn given the other social determinants of health.⁸⁵

Further, the criminal justice goals of punishment and deterrence are not appropriate in the context of pregnant women with a substance use disorder. SUD is a medical condition that women do not experience because they want to harm their fetuses or do not care about their children. According to the National Institute on Drug Abuse, “Addiction is a chronic, often relapsing brain disease that causes compulsive drug seeking and use, despite harmful consequences to the addicted individual and to those around . . . her.”⁸⁶

Such punishment and/or involuntary detention and treatment can expose a pregnant woman and her family to other collateral consequences, including loss of custody of her children, incarceration, and loss of housing. Arrest and detention removes pregnant women from their homes, families, and employment, putting them in more tenuous positions than they would have been without state intervention.⁸⁷ It also can coerce women’s reproductive choices, as in some cases, these laws have

⁸⁰ *Id* at 42.

⁸¹ Chasnoff IJ, Landress HJ, Barrett ME, *The prevalence of illicit-drug or alcohol use during pregnancy and discrepancies in mandatory reporting in Pinellas County, Florida*. *N Engl J Med* 322, 1202–6, (1990).

⁸² *Supra* note 39.

⁸³ Bishop D, Borkowski L, Couillard M, Allina A, Baruch S, Wood S, *Pregnant Women and Substance Use, Overview of Research & Policy in the United States reporting in Jacobs Institute of Women’s Health Bridging the Divide*, at pp. 12-13, 17-18, 20-21 (2017)

⁸⁴ *McKnight v. State*, 378 SC 33, 41, n. 2, 661 SE2d 354, 35 (2008).

⁸⁵ See World Health Organization, *Social Determinants of Health* (2017). Available at http://www.who.int/social_determinants/sdh_definition/en/ (“social determinants of health are the conditions in which people are born, grow, live, work and age.”); See also Kim Krisberg, American Public Health Association, *Transforming Public Health Works: Targeting Causes of Health Disparities*, 46 *The Nation’s Health* (July 2016) (“at least 50% of health outcomes are due to the social determinants . . .”).

⁸⁶ National Institute on Drug Abuse, *The Science of Drug Use and Addiction: The Basics NIDA*, Available at <https://www.drugabuse.gov/publications/media-guide/science-drug-use-addiction-basics> (last visited Sep 24, 2018).

⁸⁷ *Report of the Working Group on Arbitrary Detention on its visit to the United States of America*, 36 United Nations General Assembly 15–20 (2017).

encouraged women who wanted to carry their pregnancy to term to seek an abortion to avoid criminal prosecution.⁸⁸

Rather than criminalizing drug use in pregnant women, healthcare and state professionals should find other ways to promote health goals that do not propagate fear and punishment in already marginalized populations. These practices are discriminatory and harmful to women, their children and their families.

⁸⁸ *State v. Greywind*, No. CR-92-447, N.D. Cass County Ct. (1992). (Martina Greywind from Fargo was 28 year old homeless Native American who was approximately 12 weeks pregnant when she was arrested and charged with the offense of Reckless Endangerment, a class A misdemeanor, for ingesting vapors of paint fumes at which point she sought an abortion to terminate her pregnancy to avoid incarceration and successfully dismissed the child endangerment charge.). Available at http://www.advocatesforpregnantwomen.org/issues/criminal_cases_and_issues/ (last visited September 21, 2018).