

POLICING PREGNANCY “CRIMES”

VALENA E. BEETY* & JENNIFER D. OLIVA**

The Supreme Court’s decision in Dobbs v. Jackson Women’s Health Organization held that there is no right to abortion healthcare under the United States Constitution. This Essay details how states prosecuted pregnant people for pregnancy behaviors and speculative fetal harms prior to the Dobbs decision. In this connection, it also identifies two, related post-Dobbs concerns: (1) that states will ramp up their policing of pregnancy behaviors and (2) that prosecutors will attempt to substantiate these charges by relying on invalid scientific evidence. This Essay examines the faulty forensic science that states have used to support fetal harm allegations and reminds defense attorneys of their obligation to challenge junk science in the courtroom.

INTRODUCTION	29
I. CRIMINALIZING PREGNANCY BEHAVIOR	35
II. EXPANDING PREGNANCY CRIMINALIZATION.....	41
III. STILLBIRTHS AND MISCARRIAGES AS MURDER.....	46
IV. CHALLENGING FAULTY FORENSIC EVIDENCE IN COURT IN PREGNANCY BEHAVIOR CASES	51
CONCLUSION	53

INTRODUCTION

In the new and ever-evolving legal landscape begat by *Dobbs v. Jackson Women’s Health Organization*,¹ states are likely to more vigorously enforce feticide and other harm-to-fetus laws because it is now permissible to criminalize abortion healthcare.² Fetal harm laws have been on the books for

* Professor of Law, Arizona State University Sandra Day O’Connor College of Law. Thank you to participants in the ABA Criminal Justice Section Academics Committee Works-In-Progress Roundtables for their feedback and Professors Yvette Butler, Sean Bland, and Carla Laroche for their insights. We also extend our gratitude to our amazing student editor Hannah Warntjes for her thoughtful review of our piece.

** Professor of Law & Co-Director, UCSF/UC Law Consortium on Law, Science and Health Policy, University of California College of the Law, San Francisco. Copyright © 2023 by Valena E. Beety and Jennifer D. Oliva.

¹ See 142 S. Ct. 2228 (2022).

² See, e.g., MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 11 (2020) (analyzing the consequences of antiabortion lawmaking); Madiba Dennie & Jackie Fielding, *Miscarriage of Justice: The Danger of Laws Criminalizing Pregnancy Outcomes*, BRENNAN CTR. FOR JUST. (Nov. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/miscarriage-justice-danger-laws-criminalizing-pregnancy-outcomes> [<https://perma.cc/FGC9-P6QC>] (predicting the likely effects of

decades, but *Roe v. Wade* and its progeny required state criminal laws to strike a balance between maternal and fetal rights.³ *Dobbs*, however, gives states the green light to shift that balance in favor of fetal rights and, concomitantly, to fervently police the gestational behavior of pregnant persons.⁴ States that choose to severely restrict or criminalize abortion are likely to enhance their policing of pregnant peoples' bodies and criminalization of pregnancy conduct and outcomes. As law professor Michele Goodwin explains, "robust legislating that chips away at reproductive rights and encroaches on women's reproductive healthcare is about more than abortion."⁵

This is particularly concerning because prosecutors have long relied on debunked or questionable science to secure fetal harm convictions against socioeconomically marginalized and racialized individuals.⁶ Between 1973 and 2020, states arrested or detained over 1,700 pregnant people in cases where being pregnant was a necessary element of the crime.⁷ Then, on June

Texas's S.B. 8 once allowed to take effect); Melissa Jeltsen, *The Coming Rise of Abortion as a Crime*, THE ATLANTIC (July 1, 2022), <https://www.theatlantic.com/family/archive/2022/07/roe-illegal-abortions-pregnancy-termination-state-crime/661420> [https://perma.cc/TLF8-HW2Q] (predicting likely effects of the *Dobbs* decision).

³ *Roe v. Wade*, 410 U.S. 113, 164–66 (1973); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (upholding the constitutional right to an abortion and creating the undue burden standard).

⁴ See David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After Dobbs*, 75 STAN. L. REV. ONLINE 1, 2–6 (2022) (discussing the shifts from abortion as a fundamental right to previability abortion as a privacy right, and then to the elimination of this right and the focus on fetal protection).

⁵ GOODWIN, *supra* note 2, at 11.

⁶ See, e.g., FARAH DIAZ-TELLO, MELISSA MIKESSELL & JILL E. ADAMS, THE SIA LEGAL TEAM, *ROE'S UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL*, at v (2018), <https://www.ifwhenhow.org/resources/roes-unfinished-promise> [https://perma.cc/X3YH-ZE2T] (explaining that "such arrests typically target people who are marginalized in our society, especially people living in poverty and people of color, who may experience a multitude of push factors . . . or pull factors . . . that lead them toward non-clinical abortion care"); *Patel v. State*, 60 N.E.3d 1041, 1044, 1048 (Ind. Ct. App. 2016) (explaining that the state charged a woman racialized as a minority with feticide for taking abortion medications and delivering a baby who died shortly post-birth, thereby "knowingly terminat[ing] her pregnancy with the intention other than to produce a live birth or to remove a dead fetus"); Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. TIMES MAG. (Apr. 1, 2015), <https://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html> [https://perma.cc/EUB3-KDTS] (recounting criticism of the floating lung test evidence used to prosecute Patel as "just not valid" and unreliable, and comparing it to "the old test for witchcraft"); Ed Pilkington, *Indiana Prosecuting Chinese Woman for Suicide Attempt that Killed Her Foetus*, THE GUARDIAN (May 30, 2012), <https://www.theguardian.com/world/2012/may/30/indiana-prosecuting-chinese-woman-suicide-foetus> [https://perma.cc/U7L7-NN2P] (explaining that Indiana brought feticide charges against a Chinese immigrant who was depressed and attempted suicide while pregnant).

⁷ ARRESTS AND PROSECUTIONS OF PREGNANT WOMEN, 1973–2020, PREGNANCY JUST. (Sept. 18, 2021), <https://www.nationaladvocatesforpregnantwomen.org/arrests-and-prosecutions-of-pregnant-women-1973-2020> [https://perma.cc/Y289-5R84]; see also Lynn M. Paltrow, *Constitutional Rights for the "Unborn" Would Force Women to Forfeit Theirs*, MS. MAG. (Apr.

24, 2022, the United States Supreme Court decided *Dobbs*.⁸ *Dobbs* held that there is no federal constitutional right to abortion healthcare, overruling *Roe v. Wade* and *Planned Parenthood v. Casey*.⁹

In anticipation of the *Dobbs* decision, several states rushed to restrict or criminalize abortion. Before the Court issued *Dobbs*, Texas, Oklahoma, and Idaho had enacted “bounty hunter” statutes that permit private citizens to enforce abortion laws that extend their reach to so-called “aiders and abettors.”¹⁰ Immediately upon the issuance of *Dobbs*, abortion-restrictive trigger bans that had lain dormant for years became enforceable law in several states,¹¹ and on August 5, 2022, Indiana became the first post-*Dobbs* state to enact a new law that placed a near-total ban on abortion healthcare.¹²

15, 2021), <https://msmagazine.com/2021/04/15/abortion-constitutional-rights-unborn-fetus-14th-amendment-womens-rights-pregnant> [<https://perma.cc/8GXA-HJ3P>] (documenting more than 1,000 such cases from 2006 to 2020 in the United States); see, e.g., DIAZ-TELLO, MIKESSELL & ADAMS, *supra* note 6, at 6–21 (cataloguing state laws that criminalize pregnancy behaviors); Grace Elizabeth Howard, *The Criminalization of Pregnancy: Rights, Discretion, and the Law* 43–54 (Oct. 2017) (unpublished dissertation), <https://rucore.libraries.rutgers.edu/rutgers-lib/55493/PDF/1/play> [<https://perma.cc/3UW4-DCHL>] (cataloguing states with laws criminalizing harm to pregnant women, fertilized eggs, embryos, and/or fetuses as well as laws criminalizing pregnant people’s actions with regard to fertilized eggs, embryos, and/or fetuses).

⁸ 142 S. Ct. 2228 (2022).

⁹ *Id.* at 2242 (overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

¹⁰ Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NAT’L PUB. RADIO (July 11, 2022), <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law> [<https://perma.cc/YA5Y-PE9T>].

¹¹ See, e.g., Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans – Here’s What Happens When Roe is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [<https://perma.cc/H8XM-RYVU>] (anticipating that those states would be Texas, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming); Alison Durkee, *As 3 More Abortion Trigger Bans Take Effect, Here’s Where Laws Are Being Enforced – And Where They’ve Been Blocked*, FORBES (Aug. 25, 2022), <https://www.forbes.com/sites/alisondurkee/2022/08/25/as-3-more-abortion-trigger-bans-take-effect-heres-where-laws-are-being-enforced---and-where-theyve-been-blocked/?sh=53a6d24e56f3> [<https://perma.cc/R7W7-625F>] (discussing states where abortion trigger bans went into effect after the Supreme Court overruled *Roe*); Kelcie Moseley-Morris, *Idaho Supreme Court Upholds Abortion Ban, Civil Enforcement Law*, IDAHO CAP. SUN (Jan. 5, 2023), <https://idahocapitalsun.com/2023/01/05/idaho-supreme-court-upholds-abortion-ban-civil-enforcement-law> [<https://perma.cc/2DSD-PNG3>] (explaining that the Idaho Supreme Court upheld the state’s abortion ban).

¹² Mitch Smith & Julie Bosman, *Indiana Governor Signs First Post-Roe Abortion Ban, with Limited Exceptions*, N.Y. TIMES (Aug. 5, 2022), <https://www.nytimes.com/2022/08/05/us/indiana-abortion-vote.html> [<https://perma.cc/JAA6-M9AW>]. The law was stayed by a preliminary injunction that went into effect on September 22, 2022. Cierra Putman, *Judge Grants Injunction, Blocking Enforcement of Indiana’s New Abortion Ban Law*, WTHR (Sept. 22, 2022), <https://www.wthr.com/article/news/special-reports/indiana-abortion/judge-grants-injunction-blocking-indianas-new-abortion-ban-law-sb1-enforcement-exceptions/531-76dda76c-7345-4115-b398-72d17abea5a8> [<https://perma.cc/J874-78H3>]. A second injunction went into effect on

This Essay anticipates that prosecutors will ramp up not only their surveillance, policing, and criminalization of pregnant people, but also their pursuit of pregnancy conduct prosecutions grounded in faulty forensic scientific evidence post-*Dobbs*. *Dobbs* gives states permission to criminalize allegedly intentional or reckless pregnancy terminations as well as the behavior of pregnant persons that allegedly cause fetal harm. Prosecutors can even bring such charges where a child is born healthy on theories of attempt and speculation about risk of fetal harm.¹³ Such tactics will result in the wrongful conviction of individuals who have experienced spontaneous miscarriages or stillbirths and people who give birth to healthy children but who used drugs while pregnant. This Essay further predicts that antiabortion states will rationalize their enhanced criminalization of pregnant people and of various stigmatized “pregnancy behaviors” as fetal protective and pro-child.¹⁴ The end game of the fetal personhood movement, of course, is to convince the state to place so-called fetal rights above all other health, welfare, and safety considerations.¹⁵

December 2, 2022. Daniel Trotta & Will Dunham, *Judge Blocks Indiana Abortion Ban on Religious Freedom Grounds*, REUTERS (Dec. 2, 2022), <https://www.reuters.com/legal/judge-blocks-indiana-abortion-ban-religious-freedom-grounds-2022-12-03> [<https://perma.cc/9XSY-B37F>].

¹³ For example, in a 1997 case in South Carolina, the defendant gave birth to a healthy child yet was arrested and charged with criminal child neglect when the baby tested positive for an illegal drug. *Whitner v. State*, 492 S.E.2d 777, 778–79 (S.C. 1997). The South Carolina Supreme Court permitted the prosecution, holding that the child abuse statute appropriately applied to a pregnant person risking harm to a fetus. *Id.* at 778, 781. Relatedly, parents can lose custody rights of their newborn based on the mere speculation of harm. *See, e.g.*, N.J. Div. of Youth & Fam. Servs. v. V.M., 974 A.2d 448, 450 (N.J. Super. Ct. App. Div. 2009) (Carchman, J., concurring) (upholding the removal of a healthy newborn from parents’ custody and the placement of the child in foster care based on a pregnant mother’s refusal to pre-authorize a cesarean surgery and decision to deliver vaginally, despite her willingness to consent had a C-section become medically necessary).

¹⁴ For purposes of this paper, we define “pregnancy behaviors” as actions or conduct engaged in by pregnant persons that the state deems as harmful or potentially harmful to the pregnancy, including, but not limited to, actions or conduct during pregnancy that would not be criminal or punishable if they were engaged in by a non-pregnant person.

¹⁵ For example, in a 1987 case, the D.C. Court of Appeals approved a forced cesarean surgery on pregnant parent Angela Carder without her consent while Carder was ill with cancer. *In re A.C.*, 533 A.2d 611, 611, 612–13 (D.C. App. 1987). The fetus was born alive but died two hours later, and Carter died two days later, with the cesarean surgery listed as a contributing factor to her death. *Id.* at 612–13. Notably, while one attorney represented Carder, two attorneys represented the fetus: an appointed attorney and an attorney for the District of Columbia who appeared as *parens patriae*. *Id.* at 611; *see also, e.g.*, Mary Zeigler, *The Next Step in the Anti-Abortion Playbook is Becoming Clear*, N.Y. TIMES (Aug. 31, 2022), <https://www.nytimes.com/2022/08/31/opinion/abortion-fetal-personhood.html> [<https://perma.cc/D7EA-SS7G>] (explaining that, post-*Dobbs*, “the emerging plan is an all-out fight for fetal personhood”); David Schultz, *Fetal Personhood Promises to Be Next Major Fight in Abortion War*, BLOOMBERG L. (Jan. 9, 2023), <https://news.bloomberglaw.com/us-law-week/fetal-personhood-promises-to-be-next-major-fight-in-abortion-war> [<https://perma.cc/38WW-NK7X>] (“Consideration of what rights a fetus might have as a person is where the new battle over abortion is headed.”); Kelsey Butler & Patricia Hurtado, *Is a Fetus a Person? The Next Big Abortion Fight Centers on Fetal Rights*, WASH. POST (Oct. 12, 2022), <https://www.washingtonpost.com/business/is-a-fetus-a-person-the-next-big-abortion-fight->

In 2009, the National Academy of Sciences (NAS) published a report, *Strengthening Forensic Science in the United States: A Path Forward*,¹⁶ that cast a national spotlight on the widespread use of myriad forms of faulty forensic “science” in the American criminal legal system. That Report instigated the critique of various forensic disciplines by scientists and policymakers.¹⁷ It also provoked the authors of this Essay to publish a trilogy of articles criticizing the courts’ admission of faulty forensic evidence in criminal cases.¹⁸ The courts’ ongoing admission of junk science is one of the leading causes of wrongful convictions in the United States.¹⁹ Even the Supreme Court has acknowledged that “[s]erious deficiencies have been found in the forensic evidence used in criminal trials.”²⁰ Nonetheless, courts

centers-on-fetal-rights/2022/10/12/ad47ef44-4a5c-11ed-8153-96ee97b218d2_story.html [https://perma.cc/2MN2-GYUX] (“Personhood—the concept of granting legal rights to the unborn at conception or a couple of months after—is shaping into the next battleground in the fight over abortion rights in the US.”).

¹⁶ COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT’L RES. COUNCIL, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009) [hereinafter NAS REPORT].

¹⁷ See, e.g., *Ten Years Later: The Lasting Impact of the 2009 NAS Report*, INNOCENCE PROJECT (Feb. 19, 2019), <https://innocenceproject.org/lasting-impact-of-2009-nas-report> [https://perma.cc/N53B-257X].

¹⁸ See Jennifer D. Oliva & Valena E. Beety, *Discovering Forensic Fraud*, 112 NW. U. L. REV. 121 (2017) (identifying the widespread use of faulty forensic evidence in criminal proceedings that is inadmissible in comparable civil litigation and proposing the adoption of pretrial civil discovery and disclosure rules in criminal proceedings to halt the flood of junk science routinely admitted against criminal defendants); Valena E. Beety & Jennifer D. Oliva, *Evidence on Fire*, 97 N.C. L. REV. 483 (2019) (contrasting the courts’ ongoing lax admissibility of unreliable fire-science evidence in criminal cases with their strict exclusion of the same flimsy evidence in civil cases, notwithstanding that both criminal and civil courts are required to operate under the same exclusionary rules for expert evidence and proposing reforms); Jennifer D. Oliva & Valena E. Beety, *Regulating Bite Mark Evidence: Lesbian Vampires and Other Myths of Forensic Odontology*, 94 WASH. L. REV. 1769 (2019) (contending that national and state forensic odontology oversight entities and state boards of dental practice enhance their regulation of faulty bite mark identification evidence “experts”).

¹⁹ As of December 27, 2022, the National Registry of Exonerations documents “False or Misleading Forensic Evidence” as a contributing factor in 23% of exonerations or 758 cases. See % *Exonerations by Contributing Factors*, NAT’L REGISTRY OF EXONERATIONS, [https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-](https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=Contributing%5Fx0020%5Ffactors%5Fx0020&FilterValue1=False%20or%20Misleading%20Forensic%20Evidence)

[4B326208BAF8}&FilterField1=Contributing%5Fx0020%5Ffactors%5Fx0020&FilterValue1=False%20or%20Misleading%20Forensic%20Evidence](https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=Contributing%5Fx0020%5Ffactors%5Fx0020&FilterValue1=False%20or%20Misleading%20Forensic%20Evidence) [https://perma.cc/7JWB-A83P] (last visited Dec. 27, 2022). The study on the first 137 DNA exonerations, published in 2009, demonstrated that 60% of wrongful convictions “involved invalid forensic science testimony.” Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 14 (2009). A follow up study by the Innocence Project looked at all DNA exonerations from 1989 to 2014 and found “[t]he misapplication of forensic science played a role in the convictions of 47% (154) of the 325 individuals exonerated by DNA nationwide, making it the second most common contributing factor.” Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 ALB. L. REV. 717, 743 (2016).

²⁰ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) (alteration in original). The

continue to admit debunked science to convict and incarcerate pregnant people who miscarry, deliver stillbirths, or test positive for drug use before or shortly after delivery.²¹ We anticipate an unfortunate uptick in faulty forensic evidence-driven criminal prosecutions against pregnant persons due to the heightened surveillance of pregnancy behaviors and the criminalization of abortion healthcare post-*Dobbs*.²² To law enforcement and prosecutors in abortion restrictive and criminalization states, the *Dobbs* decision extended the full fury of those states' criminal laws to police pregnancy—and it goes without saying that one of a state's most powerful and dangerous tools against pregnant people is incarceration.

This Essay proceeds in four parts. Part One analyzes the current criminalization of pregnancy behaviors with a focus on the practice of charging pregnant and postpartum people with child abuse for gestational drug use. It also examines the impact of racism and faulty science on these prosecutions. Part Two explains that *Dobbs* extends to states the permission to criminalize various licit pregnancy behaviors, ranging from smoking to consumption of fish to refusal to submit to bedrest, with few guardrails. Part Three critiques the use of faulty forensic evidence to charge people who suffer stillbirths and miscarriages with homicide and other felonies. The Essay concludes by proposing methods to challenge the faulty forensic evidence that prosecutors are likely to use in court to secure pregnancy behavior convictions.

Supreme Court also mentioned how “[o]ne commentator asserts that “[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.”” *Id.* at 319 (quoting Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491 (2006)).

²¹ See, e.g., 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 J. HEALTH POL., POL'Y & L. 299, 305–09 (2013) (providing a descriptive summary of five cases representing “only a fraction of the state actions taken against [pregnant people] in the United States”). Such cases have included the arrest and conviction of a South Carolina woman racialized as Black for homicide by child abuse stemming from allegations that she ingested cocaine while pregnant; reckless endangerment charges against a North Dakota indigenous woman “based on the claim that by inhaling paint fumes she was creating a substantial risk of bodily injury or death to her unborn child”; and an indictment for second-degree murder of a Louisiana woman racialized as Black who had suffered a miscarriage. *Id.* at 308.

²² See, e.g., Caroline Bologna, *Without Roe v. Wade, Pregnant Women May Face Arrest for All Kinds of Behaviors*, HUFFPOST (June 17, 2022), https://www.huffpost.com/entry/roe-v-wade-pregnancy-criminalization-arrest_1_629f6619e4b0c184bdd5b0df [<https://perma.cc/FV8H-GH3P>] (explaining that, post-*Dobbs*, “[h]aving a glass of wine, eating deli meats and soft cheeses, exercising too hard, getting up to take care of your other children during your doctor-ordered bedrest, taking your prescribed antidepressants . . . are all actions that . . . could serve as grounds for arrest”); Cary Aspinwall, Brianna Bailey & Amy Yurkain, *They Lost Their Pregnancies. Then Prosecutors Sent Them to Prison*, THE MARSHALL PROJECT (Sept. 1, 2022), <https://www.themarshallproject.org/2022/09/01/they-lost-their-pregnancies-then-prosecutors-sent-them-to-prison> [<https://perma.cc/X8PY-RAPS>] (contending that “[w]hile the repercussions of *Dobbs* are still unfolding, it gives states leeway to expand child endangerment and homicide laws to punish people for what happens during their pregnancies”).

I

CRIMINALIZING PREGNANCY BEHAVIOR

The delivery of a healthy child does not protect people from postpartum criminalization. Healthcare provider or police suspicion of drug use during pregnancy frequently triggers criminal charges against individuals who deliver healthy infants.²³ During the 1980s crack-cocaine epidemic, the national media often ran stories featuring “crack babies”; that is, children who allegedly suffered birth defects due to their mother’s drug use during pregnancy.²⁴ Years later, scientists who tracked and continuously evaluated so-called “crack babies” proved that the use of cocaine during pregnancy was no more harmful to fetuses than smoking cigarettes while pregnant, the latter of which is legal in the United States.²⁵ As their research revealed, the entire notion of “crack babies” was grounded in junk science.²⁶ A widely-accepted 2011 national longitudinal study, for example, documented that

²³ See, e.g., *Substance Use During Pregnancy*, GUTTMACHER INST. (Dec. 1, 2022), <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy> [https://perma.cc/2HDM-5J85] (noting that “24 states and the District of Columbia consider substance use during pregnancy to be child abuse under civil child-welfare statutes, and 3 consider it grounds for civil commitment,” and “25 states and the District of Columbia require healthcare professionals to report suspected prenatal drug use, and 8 states require them to test for prenatal drug exposure if they suspect drug use”); Howard, *supra* note 7, at 28 (explaining that “[c]oncern about maternal deviance and the quality of offspring post-*Roe v. Wade* has been intimately tied to concern about drug use” and that “[c]oncern about prenatal exposure to drugs has been a key feature of [three waves: crack-cocaine, methamphetamine, and opioids] of racialized drug panic”); see also *id.* at 28–39 (explaining that most of the theories about alleged fetal harm resulting from use of cocaine, methamphetamine, and opioids during pregnancy have been overblown or debunked and drawing the connection between the push to criminalize pregnant people who use opioids with the prior movements to criminalize people who used crack cocaine and methamphetamine while pregnant); *Ferguson v. City of Charleston*, 532 U.S. 67, 70–71, 73 (2001) (involving a Fourth Amendment challenge to a public hospital’s official agreement with police to surreptitiously drug test its “suspicious” maternity patients without their consent for evidence of criminal conduct while pregnant to facilitate the criminal prosecution of the patients that tested positive for drug use).

²⁴ Susan FitzGerald, “*Crack Baby*” Study Ends with Unexpected but Clear Result, PHILA. INQUIRER (July 21, 2013), https://www.inquirer.com/philly/health/20130721__Crack_baby__study_ends_with_unexpected_but_clear_result.html [https://perma.cc/8DRJ-UUT4] (explaining that “[t]roubling [media] stories were circulating about so-called crack babies” and “[t]he ‘crack baby’ image became symbolic of bad mothering” yet “one of the largest and longest-running studies of in-utero cocaine exposure” “consistently found no significant differences between the cocaine-exposed children and the controls”).

²⁵ See, e.g., Deborah A. Frank, Marilyn Augustyn, Wanda Grant Knight, Tripler Pell & Barry Zuckerman, *Growth, Development, and Behavior in Early Childhood Following Pre-Natal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613, 1626 (2001).

²⁶ See *id.* at 1619 (concluding “that after control for exposure to tobacco and alcohol, effects of prenatal cocaine on physical growth are not shown” and “[r]esearchers have not found a negative association of prenatal cocaine exposure, independent of environmental risk and exposure to other psychoactive substances, with developmental scores from infancy to age 6 years”). The South Carolina Supreme Court also conceded 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.” *McKnight v. State*, 661 S.E.2d 354, 358 n.2 (S.C. 2008).

exposure to cocaine *in utero* had little impact on a child's cognitive and motor development, memory, or language skills.²⁷

The “crack babies” narrative was nonetheless immensely impactful. It ingrained in the American psyche a prototypical “bad mother” and popularized the criminalization of people who use drugs while pregnant.²⁸ Dubious charities like C.R.A.C.K. (Children Requiring A Caring Kommunity) provided “free” sterilization services to racialized and poor women with a history of drug use, and even paid them to consent to sterilization or long-term birth control.²⁹ Acclaimed legal scholar Dorothy Roberts chronicled the states’ crack-cocaine-era hyper-surveillance and criminalization of predominantly poor, Black, pregnant women who suffered from substance use disorders in a *Harvard Law Review* article written nearly thirty years ago.³⁰ As Professor Roberts explained, widespread criminalization did little to stymie drug use during pregnancy. Instead, criminalization

deter[red] pregnant women from using available health services and counseling because it causes women to fear that, if they seek help, they could be reported to government authorities and charged with a crime. Moreover, prosecution blinds the public to the possibility of nonpunitive solutions and to the inadequacy of nonpunitive solutions that are currently available.³¹

America’s ongoing drug overdose crisis has incentivized prosecutors to dust off crack-cocaine-era criminal laws and advocate for the enactment of new statutes to charge and either criminally convict or civilly commit individuals who use opioids during pregnancy.³² Currently, at least twenty-

²⁷ Laura M. Betancourt, Wei Yang, Nancy L. Brodsky, Paul R. Gallagher, Elsa K. Malmud, Joan M. Giannetta, Martha J. Farah & Hallam Hurt, *Adolescents With and Without Gestational Cocaine Exposure: Longitudinal Analysis of Inhibitory Control, Memory and Receptive Language*, 33 NEUROTOXICOLOGY & TERATOLOGY 36, 41 (2011) (“In this report we found no difference between GCE [gestational cocaine exposure adolescents] and Control adolescents on specific NC [neuroscience cognition] outcomes: inhibitory control, working memory, or receptive language.”).

²⁸ See Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947, 953 (2017).

²⁹ Frank et al., *supra* note 25, at 1626; William Lee Adams, *Why Drug Addicts are Getting Sterilized for Cash*, TIME (Apr. 17, 2010), <http://content.time.com/time/health/article/0,8599,1981916,00.html> [<https://perma.cc/QMC4-RH4C>]; Pam Belluck, *Cash-for-Sterilization Plan Draws Addicts and Critics*, N.Y. TIMES (July 24, 1999), <https://www.nytimes.com/1999/07/24/us/cash-for-sterilization-plan-draws-addicts-and-critics.html> [<https://perma.cc/X9CE-DFMK>].

³⁰ Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1423–28 (1991) (arguing that prosecuting drug use during pregnancy violates the Equal Protection Clause as well as pregnant peoples’ right to privacy, autonomy, and freedom).

³¹ *Id.* at 1422.

³² See Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 812–14 (2019) (explaining that the ongoing opioid crisis provoked the Sullivan County, Tennessee District Attorney to advocate for the enactment of a fetal assault statute in 2014 and

four states and the District of Columbia have laws that construe the use of drugs during pregnancy as actionable child abuse.³³ The South Carolina and Alabama Supreme Courts have upheld such convictions.³⁴ In fact, an Alabama prosecutor recently brought felony charges against a pregnant mother of six for filling a hydrocodone prescription that she received from her doctor to treat her chronic pain condition.³⁵

In utero exposure to opioids can lead to Neonatal Abstinence Syndrome (NAS). But while NAS can result in treatable conditions such as excessive crying, irritability, and poor sucking reflexes in infants, it is not associated with long-term adverse health impacts.³⁶ Low-level *in utero* exposure to other drugs is similarly unassociated with any negative health outcomes for newborns. As one investigative report explained, “[e]xposure to too much benzodiazepine during pregnancy can cause newborns to be fussy or floppy-limbed. But occasional, small doses of diazepam (the generic name for

documenting 124 cases in which women were prosecuted for that offense in Tennessee from 2014 to 2016); *Substance Use During Pregnancy*, *supra* note 23; Howard, *supra* note 7, at 38–39 (explaining that “[c]rack cocaine, methamphetamine, and opioid drugs are all described as creating mothers devoid of maternal feeling and warmth”; “[a] pregnant drug user may not only violate drug laws, but also the social expectation that a mother be self-sacrificial and morally pure”; and, “[i]f the impact of recreational substances on fertilized eggs, embryos, or fetuses is as bad as it seems, these women are not only seen as irresponsible and selfish, they are also cruel, deliberately harming their babies, and unleashing them upon the world”); *see also Substance Use During Pregnancy*, *supra* note 23.

³³ *Substance Use During Pregnancy*, *supra* note 23.

³⁴ *Whitner v. State*, 492 S.E.2d 777, 778, 786 (S.C. 1997) (holding that the word “child” in South Carolina’s child abuse and endangerment statute includes “viable fetuses” and affirming *Whitner*’s conviction for criminal child neglect “for causing her baby to be born with cocaine metabolites in its system”); *State v. McKnight*, 576 S.E.2d 168, 171–72 (S.C. 2003) (affirming *McKnight*’s homicide by child abuse conviction on the theory that her alleged ingestion of cocaine while pregnant caused her stillbirth); *Ex parte Ankrom*, 152 So.3d 397, 401–02 (Ala. 2013) (holding that the word “child” in Alabama’s chemical endangerment statute includes an unborn child and affirming *Ankrom*’s conviction for endangerment due to her post-delivery positive drug test for cocaine).

³⁵ Meryl Kornfield, *A Pregnant Woman Took a Prescribed Opioid for Her Chronic Pain. Now She’s Facing a Felony Charge.*, WASH. POST (June 24, 2021), <https://www.washingtonpost.com/nation/2021/06/24/pregnant-woman-charged-prescription> [<https://perma.cc/9YHZ-JLRB>].

³⁶ Lollar, *supra* note 28, at 971 & n.182 (citing Walter K. Kraft & John N. van den Anker, *Pharmacological Management of the Opioid Neonatal Abstinence Syndrome*, 59 PEDIATRIC CLINICS OF N. AM. 1147 (2012) (explaining that “there is no evidence of long-term adverse outcomes in children treated with pharmacological agents in comparison with infants who do not require treatment for NAS”)); *see also* Lindsay Beyerstein, *Bad Medicine in Tennessee for Pregnant and Drug-Addicted Women*, AL JAZEERA AM. (Sept. 30, 2014), <http://america.aljazeera.com/articles/2014/9/30/tennessee-new-lawsb1391.html> [<https://perma.cc/NP32-3K6F>] (contending that “[i]f properly managed, NAS is a transient condition, treated with a tapering dose of opiates to wean the baby off the drugs without causing withdrawal” and quoting a doctor as emphasizing that “[t]here has never been any evidence suggesting that [NAS] leads to lasting problems”).

Valium) are considered safe.”³⁷ In fact, most pregnant people who undergo cesarean deliveries are provided post-procedure opioids for pain relief by their healthcare provider, including when they are breastfeeding.³⁸

In addition, and as Professor Roberts observed decades ago, the resurgence of the “bad mom” trope in the throes of a drug overdose crisis has discouraged pregnant people from seeking prenatal care for fear of criminal prosecution and child welfare interventions.³⁹ Hospitals routinely drug test people in labor or those who have recently delivered a baby, either with or without their consent. The state can then use a positive test result to criminally charge a patient with child neglect, abuse, or endangerment. The state can also bring charges against such patients for delivering drugs to a minor.⁴⁰ These criminal laws were designed to punish pregnant people and often do just that.

Prosecutors also distort laws *not* aimed at controlling pregnant people to criminalize their behavior. Alabama enacted a “chemical endangerment” law to punish people who operate illicit methamphetamine laboratories and expose children to an “environment in which controlled substances are produced or distributed.”⁴¹ Prosecutors, however, utilize that law—which makes this a felony punishable by up to 99 years in prison⁴²—to charge pregnant people who use drugs on the theory that the womb is analogous to an illicit methamphetamine laboratory:⁴³ “A woman can be charged with chemical endangerment from the earliest weeks of pregnancy, even if her baby is born perfectly healthy, even if her goal was to protect her baby from greater harm.”⁴⁴ Indeed, the majority of tracked criminal cases from 1973 to 2005 involved a positive drug test but no evidence of harm to the fetus or

³⁷ Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), <https://www.propublica.org/article/when-the-womb-is-a-crime-scene> [<https://perma.cc/CR9R-2DKM>].

³⁸ Eran Bornstein, Gregg Husk, Erez Lenchner, Amos Grunebaum, Therese Gadomski, Cristina Zottola, Sarah Werner, Jamie S. Hirsch & Frank A. Chervenak, *Implementation of a Standardized Post-Cesarean Delivery Order Set with Multimodal Combination Analgesia Reduces Inpatient Opioid Usage*, 10 J. CLINICAL MED. 1, 2 (Dec. 22, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7793107/pdf/jcm-10-00007.pdf> [<https://perma.cc/2599-5FUV>] (“Most women following cesarean delivery are administered opioids for pain control, with as many as 87% of women given a prescription for opioids upon discharge home based on one study.”).

³⁹ Emma Milne, *Putting the Fetus First – Legal Regulation, Motherhood, and Pregnancy*, 27 MICH. J. GENDER & L. 149, 169 (2020).

⁴⁰ Lollar, *supra* note 28, at 947.

⁴¹ ALA. CODE § 26-15-3.2.

⁴² Martin, *supra* note 37 (explaining that, under this Alabama law, “[t]he penalties are exceptionally stiff: one to 10 years in prison if her baby suffers no ill effects, 10 to 20 years if her baby shows signs of exposure or harm and 10 to 99 years if her baby dies”).

⁴³ *Id.*

⁴⁴ *Id.*

newborn.⁴⁵ Although the Alabama criminal law aimed at methamphetamine labs was never intended to apply to pregnant people struggling with drug use, the state has used it to prosecute at least 479 pregnant or new moms since 2006.⁴⁶

The American Civil Liberties Union (ACLU) has argued that Alabama’s use of its criminal chemical endangerment laws to punish pregnant persons with substance use disorder violates those individuals’ constitutional rights to due process, privacy, and autonomy.⁴⁷ The ACLU also pointed out that such criminalization violates the equal protection clause because it punishes pregnant people and new moms who use drugs but does not extend to expecting fathers or new dads who use the same illicit substances.⁴⁸ It would, in fact, be impossible for Alabama to prosecute any non-pregnant person with chemical child endangerment simply for ingesting drugs under a plain reading of the statute.⁴⁹

Medical experts agree that the gold standard treatment for pregnant people who suffer from opioid use disorder, or are otherwise engaged in problematic opioid use, is to take opioid agonist medications like methadone and buprenorphine.⁵⁰ The health harms associated with compulsory opioid detoxification while pregnant, alternatively, are significant.⁵¹ Forced opioid

⁴⁵ 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 J. HEALTH POL., POL’Y & L. 299, 317–18 (2013).

⁴⁶ *Id.*

⁴⁷ Brief for ACLU as Amicus Curiae Supporting Appellant at 3, *Kimbrough v. Alabama*, CR-09-0485 (filed July 6, 2010), https://www.aclu.org/sites/default/files/field_document/2010-7-6-KimbroughvAlabama-AmicusBrief_0.pdf [<https://perma.cc/G2VQ-LPAT>] [hereinafter *Kimbrough Amicus Brief*].

⁴⁸ *Id.* at 3–4.

⁴⁹ *See id.* at 6 (positing that such a prosecution would not have been possible here).

⁵⁰ *See* Jennifer D. Oliva, *Policing Opioid Use Disorder in a Pandemic*, U. CHI. L. REV. ONLINE (Nov. 16, 2020), <https://lawreviewblog.uchicago.edu/2020/11/16/covid-oliva> [<https://perma.cc/JD8J-6JCD>] (explaining that “[r]esearch overwhelmingly demonstrates that methadone and buprenorphine are the best available treatments for” opioid use disorder (OUD) and that the National Academy of Science’s Committee on Medication-Assisted Treatment for Opioid Use Disorder “found that methadone and buprenorphine treatment reduced mortality of individuals with OUD by up to 50 percent and was associated with” various other positive health outcomes); Brandi Jancaitis, Sydney Kelpin, Saba Masho, James May, Nancy A. Haug & Dace Svikis, *Factors Associated with Treatment Retention in Pregnant Women with Opioid Use Disorders Prescribed Methadone or Electing Non-Pharmacological Treatment*, 60 WOMEN & HEALTH 1, 1 (2019) (“Methadone maintenance therapy (MMT) has been the gold standard for treatment of opioid use disorders during pregnancy; however, its use is limited in clinical practice due to availability, stigma, and reluctance on the part of clinicians.”); Kelley A. Saia, Davida Schiff, Elisha M. Wachman, Pooja Mehta, Annmarie Vilkins, Michelle Sia, Jordana Price, Tirah Samura, Justin DeAngelis, Clark V. Jackson, Sawyer F. Emmer, Daniel Shaw & Sarah Bagley, *Caring for Pregnant Women with Opioid Use Disorder in the USA: Expanding and Improving Treatment*, 5 CURRENT OBSTETRICS GYNECOLOGY REPS. 257, 258 (2016) (explaining that opioid agonist treatment “is the first-line recommendation for pregnant women with opioid use disorder”).

⁵¹ *See* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, OPIOID USE AND OPIOID USE

detoxification can lead to miscarriage, premature labor, or stillbirth.⁵² Notwithstanding that the serious harms that attend to supervised withdrawal outweigh any known risks of opioid agonist treatment, pregnant people continue to face tremendous barriers to accessing medication treatment due to stigma and fear of civil and legal consequences.⁵³ Worse yet, women of color, who are already three times more likely to die from pregnancy-related complications than their white counterparts, suffer from the most extreme barriers to treatment.⁵⁴

Low-income women and women of color are at higher risk for barriers to appropriate care of substance use disorders during pregnancy, in part explaining the poor perinatal outcomes associated with this population. One study found a clear association between little or no prenatal care and opioid use, with a cohort of postpartum patients reporting external locus of control, fear of being reported to the police, and disbelief in the efficacy of care as factors.⁵⁵

Not coincidentally, prosecutors who interpret state laws expansively to criminalize and punish pregnant people and new mothers often work in states, like Alabama, that have the highest maternal mortality rates in the country.⁵⁶ Consequently, not only do pregnancy criminalization laws fail to

DISORDER IN PREGNANCY (Aug. 2017), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/08/opioid-use-and-opioid-use-disorder-in-pregnancy> [<https://perma.cc/8TMZ-G7LJ>] (explaining that, “[f]or pregnant women with an opioid use disorder, opioid agonist pharmacotherapy is the recommended therapy and is preferable to medically supervised withdrawal because withdrawal is associated with high relapse rates, which lead to worse outcomes”); Annalisa Merelli, *The Dangerous Stigma Against Pregnant Women Addicted to Opioids*, QUARTZ (Dec. 23, 2018), <https://qz.com/1479983/the-dangerous-stigma-against-pregnant-women-addicted-to-opioids> [<https://perma.cc/NC4V-TDQA>] (noting that a pregnant person “who experiences withdrawal symptoms during pregnancy might be more likely to suffer from a miscarriage, for instance, and getting off opioids can put the fetus in distress”).

⁵² Martin, *supra* note 37; Saia et al., *supra* note 50, at 258.

⁵³ See Lynn M. Madden, Jennifer Oliva, Anthony Eller, Elizabeth DiDomizio, Mat Roosa, Lisa Blanchard, Natalie Kil, Frederick L. Altice & Kimberly Johnson, *Pregnant Women and Opioid Use Disorder: The Legal Landscape for Controlling Women’s Reproductive Health*, 48 AM. J.L. & MED. 209 (2022) (“Recent research in a Medicaid population in one state indicated that less than thirty percent of pregnant women with O[pioid Use Disorder] received medication, and rural and minority women were less likely than urban white women to receive MOUD.”); Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 806 (explaining that “addressing substance use disorder during pregnancy with criminal law worsens maternal and infant health outcomes,” “criminal penalties scare pregnant women with substance use disorders away from prenatal care altogether, giving them a reasonable fear that their healthcare providers will turn them over to the police upon discovery of their drug use,” and “this is precisely what has happened to many women in states that have criminalized drug use during pregnancy”); Saia et al., *supra* note 50, at 258.

⁵⁴ *Working Together to Reduce Black Maternal Mortality*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 6, 2022), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html> [<https://perma.cc/T3UA-MUY6>].

⁵⁵ Saia et al., *supra* note 50, at 258.

⁵⁶ *Maternal Mortality Rate by State 2022*, WORLD POP. REV.,

accomplish their stated objectives of improving fetal health and protecting infants, but they also actively undermine their own purposes by exacerbating poor health outcomes for pregnant individuals and their children.

The U.S. Supreme Court has also made it clear that, while the government can charge an individual with possession of illicit drugs, it cannot criminalize a person’s substance use disorder health status.⁵⁷ In addition, several courts, including state courts in New Mexico, Arizona, Nevada, Florida, and Maryland, have ruled that the state cannot criminally punish a pregnant person for continuing a pregnancy despite an underlying health problem, such as substance use disorder.⁵⁸ Other state courts, however, continue to disagree.⁵⁹ The lack of legal guardrails relating to the criminalization of pregnancy behaviors—including the criminalization of drug use while pregnant—and this criminalization’s exacerbation of poor health outcomes is the subject of the next section of this Essay.

II

EXPANDING PREGNANCY CRIMINALIZATION

The criminalization of pregnancy behavior that could potentially impact a fetus is highly problematic due to its nearly boundless parameters. According to a 2014 study, 15.4% of pregnant people reported smoking cigarettes in the third trimester of pregnancy.⁶⁰ There is no scientific dispute

<https://worldpopulationreview.com/state-rankings/maternal-mortality-rate-by-state> [https://perma.cc/JF4F-UWDF]; see also AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, OPPOSITION TO CRIMINALIZATION OF INDIVIDUALS DURING PREGNANCY AND THE POSTPARTUM PERIOD (Dec. 2020), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period> [https://perma.cc/4T5L-KVU6] (“Any statute or legal measure that utilizes the criminal legal system as a way to control or manage behaviors during pregnancy is counterproductive to the overarching goal of improving maternal and neonatal outcomes.”); John A. Tures, *States with Strong Antiabortion Laws Have High Maternal and Infant Mortality Rates*, MO. INDEP. (July 6, 2022), <https://missouriindependent.com/2022/07/06/states-with-strong-antiabortion-laws-have-high-maternal-and-infant-mortality-rates/#:~:text=Texas%2C%20Alabama%2C%20South%20Carolina%2C,mothers%20dying%20per%20100%2C000%20births> [https://perma.cc/N47Y-JE7L] (explaining that states with the most restrictive abortion healthcare laws have the highest maternal and infant mortality rates in the country).

⁵⁷ See *Robinson v. California*, 370 U.S. 660, 666–68 (1962) (holding unconstitutional in violation of the Eighth Amendment’s cruel and unusual punishment clause a California law that criminalized the status of having a substance use disorder).

⁵⁸ Kimbrough Amicus Brief, *supra* note 47, at 5–6 n.1 (listing illustrative cases in those states).

⁵⁹ *E.g., id.* (citing *Whitner v. State*, 492 S.E. 2d 777, 782 (S.C. 1997)); *Ex parte Ankrom*, 152 So. 3d 397, 401 (Ala. 2013).

⁶⁰ SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 26, 37, 51 (2014).

that exposure to cigarette smoke is unhealthy for a fetus.⁶¹ That same national study also concluded that 9.4% of pregnant people consumed alcohol, which is another drug that can negatively impact fetal health.⁶²

But why limit the criminal law's dominion over pregnant persons to licit yet potentially addictive substances? The consumption of fish, raw eggs, or unpasteurized milk (which is often present in soft cheeses) while pregnant can result in fetal harm just as can *in utero* exposure to a litany of common chemicals and other products, including paint, lead, mosquito repellent, mercury, nail polish, litter boxes, cleaning products, and natural gas used to power residential appliances.⁶³ The post-*Dobbs* enactment of fetal personhood laws⁶⁴ in several states promises to further criminalize

⁶¹ See U.S. Preventive Servs. Task Force, *Interventions for Tobacco Smoking Cessation in Adults, Including Pregnant Persons*, 325 JAMA 265, 266 (2021), <https://jamanetwork.com/journals/jama/article-abstract/2775287> [<https://perma.cc/A5PJ-5B4V>] (“Smoking during pregnancy can increase the risk for miscarriage, congenital anomalies, stillbirth, fetal growth restriction, preterm birth, placental abruption, and complications in the offspring, including sudden infant death syndrome and impaired lung function in childhood.”); Tuba Saygin Avşar, Hugh McLeod & Louise Jackson, *Health Outcomes of Smoking During Pregnancy and the Postpartum Period: An Umbrella Review*, 21 BMC PREGNANCY & CHILDBIRTH 1, 2 (2021), <https://bmcpregnancychildbirth.biomedcentral.com/articles/10.1186/s12884-021-03729-1> [<https://perma.cc/BPT4-NWGP>] (“Smoking during pregnancy . . . is a significant public health concern due to adverse health outcomes on mothers and infants, such as miscarriage, low birth weight . . . , preterm birth, and asthma.”); *How Smoking Affects You and Your Baby During Pregnancy*, CLEVELAND CLINIC (Jan. 1, 2018), <https://my.clevelandclinic.org/health/articles/4269-how-smoking-affects-you-and-your-baby-during-pregnancy> [<https://perma.cc/Z43F-XBJ7>] (“Smoking during pregnancy affects your and your baby’s health before, during, and after your baby is born. The nicotine (the addictive substance in cigarettes), carbon monoxide, lead, arsenic, and numerous other poisons you inhale from a cigarette are carried through your bloodstream and go directly to your baby.”).

⁶² SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 60, at 37.

⁶³ See, e.g., Philippe Grandjean & Philip J. Landrigan, *Neurobehavioural Effects of Developmental Toxicity*, 13 LANCET 330, 330 (2014) (identifying “five industrial chemicals as developmental neurotoxicants: lead, methylmercury, polychlorinated biphenyls, arsenic, and toluene” and explaining that, “[s]ince 2006, epidemiological studies have documented six additional developmental neurotoxicants—manganese, fluoride, chlorpyrifos, dichlorodiphenyltrichloroethane, tetrachloroethylene, and the polybrominated diphenyl ethers”); Jenna Fletcher, *What to Avoid During Pregnancy*, MED. NEWS TODAY (July 18, 2022), <https://www.medicalnewstoday.com/articles/322873> [<https://perma.cc/NG2N-3DYH>] (explaining that the exposure to myriad products and chemicals can lead to pregnancy complications or poor fetal health outcomes, including, among other things, litter boxes, unpasteurized dairy products, soft cheeses, fish high in mercury, and raw eggs); Robin Jacobs, *8 Common Products Expecting Moms Should Avoid*, EARTHEASY (Mar. 18, 2014), <https://learn.eartheasy.com/articles/8-common-products-expecting-moms-should-avoid> [<https://perma.cc/B4EY-FY97>] (explaining that pregnant people should avoid pesticides, paints and solvents, cleaning products, and certain cosmetic products); Heather Payne & Jennifer D. Oliva, *Warranting Health Equity*, 70 U.C.L.A. L. REV. (forthcoming 2023) (manuscript at 35) (detailing the litany of potential adverse health impacts that can result from *in utero* exposure to the natural gas by-products emitted by residential gas appliances).

⁶⁴ “Fetal personhood is the idea that every fertilized egg is entitled to full protections of the law, and is a constitutionally-protected entity separate from the pregnant person.” Lisa Needham,

pregnancy-related non-action, such as failure to access adequate prenatal care or refusal to submit to bedrest.⁶⁵

In addition, how will states logically define the boundaries of the criminal law regarding the habits, behaviors, actions, or inactions of pregnant people? It is difficult to sum it up any better than did the Maryland Supreme Court. In a case in which that court was asked to determine whether a person who had ingested cocaine while pregnant could be convicted of creating a substantial risk of harm to her fetus, it aptly observed that “criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be.”⁶⁶

The Tennessee legislature enacted a law that created the crime of fetal assault in 2014.⁶⁷ That statute mercifully included a two-year sunset provision and, thus, expired in 2016.⁶⁸ While it was on the books, however, prosecutors used it to charge 124 women who allegedly took a narcotic without a prescription while pregnant, which allegedly resulted in harm to the fetus.⁶⁹ University of Tennessee law professor Wendy Bach conducted a study on the Tennessee fetal assault law and found that the state brought fetal assault charges almost exclusively against low-income pregnant people.⁷⁰

One of the purported objectives that Tennessee advanced in enacting such a harsh criminal law was the state’s desire to “help” women with opioid use disorder access treatment and become good mothers. One Tennessee legislator explicitly described the fetal assault law as “offering mothers the

A Brief Guide to Fetal Personhood, the Next Frontier in Anti-Choice Politics, BALLS & STRIKES (May 25, 2022), <https://ballsandstrikes.org/law-politics/fetal-personhood-explainer/> [<https://perma.cc/5QZM-SDLB>].

⁶⁵ This latter point is hardly a speculative hypothetical. More than a decade ago, a Florida hospital sought and obtained a court order to shackle a pregnant woman—a trained nurse who was actively seeking prenatal care—to a hospital bed against her will and leaving her two toddlers motherless for several days for refusing to submit to bed rest. *See, e.g.*, Susan Donaldson James, *Pregnant Woman Fights Court-Ordered Bed Rest*, ABC NEWS (Jan. 14, 2010), <https://abcnews.go.com/Health/florida-court-orders-pregnant-woman-bed-rest-medical/story?id=9561460> [<https://perma.cc/48C6-S5D3>]. “In other cases in 2004, a 28-year-old mentally ill Florida woman was charged with first-degree murder for refusing to undergo an immediate Caesarian section deemed vital for the well-being of the fetus.” *Id.* “And in Pennsylvania, a hospital obtained a court order when a mother of six refused a Caesarian because the fetus had suspected macrosomia, or excessive weight. She fled and later gave birth vaginally to a healthy 11-pound baby.” *Id.*

⁶⁶ Valena Elizabeth Beety, *Mississippi Initiative 26: Personhood and the Criminalization of Intentional and Unintentional Acts by Pregnant Women*, 81 MISS. L.J. 55, 61 n.32 (2011) (citing *Kilmon v. State*, 905 A.2d 306, 311–12 (Md. 2006)).

⁶⁷ Act of Apr. 29, 2014, ch. 820, 2014 Tenn. Pub. Acts Ch. 820 (codified at TENN. CODE ANN. § 39-13-107(c)).

⁶⁸ *Id.*

⁶⁹ *Id.*; Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 812, 814 (2019).

⁷⁰ Bach, *supra* note 69, at 815; *see also* WENDY A. BACH, *PROSECUTING POVERTY, CRIMINALIZING CARE* (2022).

help they so desperately need but cannot obtain on their own.”⁷¹ Another supported the bill on the theory that “drugs tend to take your right mind away . . . [with the] discipline . . . [of the] court system . . . [the mothers can] go back to being the nurturing caring parents that they would want to be.”⁷² Sullivan County District Attorney Barry Staubus, whose county suffered from a high rate of opioid overdose deaths, also testified in support of the bill, opining that the statute would “bring lots and lots of women into a program [Sullivan County] creat[ed] specifically for drug addicted mothers.”⁷³

When the law passed, Tennessee became the only state in the nation to explicitly criminalize pregnant people for illicit opioid use.⁷⁴ In pursuit of those “helpful” prosecutions, law enforcement relied heavily on healthcare providers.⁷⁵ Hospital workers repeatedly reported sensitive patient information to police and prosecutors to aid them in establishing the fetal assault criminal law elements.⁷⁶ Professor Bach reflected that it was “extraordinary” that a state would invent a crime to “generate opportunities for the creation and distribution of social welfare support (in the form of addiction treatment) for the women who were prosecuted.”⁷⁷

And extraordinary it was. Tennessee could have enacted a civil law that provided pregnant people suffering from opioid use disorder with the gold standard, evidence-based healthcare treatment to ensure the health of mother and child. Instead, the state decided to charge, prosecute, and criminalize these so-called “bad mothers,” and directed them into the criminal legal system where such care was not and has never been prioritized.⁷⁸ As Professor Bach shares,

[T]he women faced what most people face when they are prosecuted: bail, jail, fees, tremendous pressure to plead guilty, then monitoring and, often, more jail and more fines. Although the law was described by its supporters as a ‘velvet hammer’ leading to care, the focus of the prosecution was, to put it bluntly, just a hammer.⁷⁹

If there are any lessons to be gleaned from American drug use law and policy over the last five decades, it is that we simply cannot incarcerate our way out of drug overdose crises or improve health outcomes with punitive

⁷¹ *Id.* at 821.

⁷² *Id.* at 844 n.226.

⁷³ *Id.* at 813.

⁷⁴ Bach, *supra* note 69, at 813–14.

⁷⁵ *See id.* at 815 (explaining that “the prosecutions were supported by extensive medical evidence gathered in the hospital setting and shared with child welfare, police, and prosecutors”).

⁷⁶ *Id.* at 863 (describing this recurring practice).

⁷⁷ *Id.* at 814.

⁷⁸ *Id.* at 815.

⁷⁹ *Id.* at 815–16.

tactics.⁸⁰ There is zero evidence that suggests that incarcerating pregnant people and parents and separating them from their children improves the health and well-being of either the parents or their children. The American Medical Association, American Academy of Pediatrics, American College of Obstetricians & Gynecologists, and American Psychiatric Association have issued position statements explaining that they are staunchly opposed to the criminalization of pregnant people for drug use because such tactics undermine the health of the very people that those laws are allegedly designed to “help” and “protect” from harm: pregnant people and their children.⁸¹

The American criminal legal system is a known detriment to public health.⁸² The enhanced criminalization of pregnant people with substance disorder is particularly harmful because such individuals are far less likely to seek prenatal healthcare services if they suspect they will be investigated and arrested as a result of their overlapping health statuses. It is illogical to assert that criminalizing pregnant people either improves their health or protects their children. Worse still, the prosecutions of pregnant people are based on scientifically debunked notions that *in utero* exposure to various controlled substances harms fetal health.⁸³ Scant reliable scientific evidence exists to determine whether a miscarriage is spontaneous or intentional, an important component of criminal charges.⁸⁴ As discussed below, the scientific evidence used to determine whether a child is born alive and

⁸⁰ See, e.g., Taleed El-Sabawi & Jennifer Oliva, *The Influence of White Exceptionalism on Drug War Discourse*, 94 TEMPLE L. REV. 649 (2022).

⁸¹ *Position Statements of Medical Associations Opposing Criminal Sanctions for Pregnant Women with Substance Abuse Problems*, AM. C.L. UNION (2010), https://www.aclu.org/files/assets/2010-7-6-Position_Statements_of_Medical_Associations_Opposing_Criminal_Sanctions_for_Pregnant_Women_With_Substance_Abuse_Problems.pdf [<https://perma.cc/U3S5-HNC2>].

⁸² See, e.g., *Incarceration and Health: A Family Medicine Perspective (Position Paper)*, AM. ACAD. OF FAM. PHYSICIANS,

<https://www.aafp.org/about/policies/all/incarceration.html#:~:text=As%20a%20population%2C%20people%20in,problems%2C%20and%20substance%20use%20disorders> [<https://perma.cc/8LMT-9ZWK>] (“Inmates . . . have significantly higher rates of disease than the general population, and correctional facilities are often an ill-equipped [medical] provider . . . This population . . . suffer[s] in greater numbers from infectious disease, mental health problems, and substance use and addiction. Their health can also be affected negatively by . . . their environment . . .” (internal citations omitted)); *id.* (“Studies have shown that individuals who have been incarcerated have higher rates of morbidity and mortality than the general population. As a population, people in prison exhibit a high burden of chronic and noncommunicable diseases . . . as well as communicable diseases . . . , mental health problems, and substance use disorders.” (internal citations omitted)).

⁸³ See *supra* notes 24–26, 35–37.

⁸⁴ See, e.g., Howard, *supra* note 7, at 28–39 (explaining that most of the theories about alleged fetal harm resulting from use of cocaine, methamphetamine, and opioids during pregnancy have been overblown or debunked and drawing the connection between the push to criminalize pregnant people who use opioids with the prior movements to criminalize people who used crack cocaine and methamphetamine while pregnant).

murdered or instead delivered stillborn is notoriously unreliable. Unfortunately, law enforcement weaponization of faulty scientific evidence to criminalize pregnant people is poised to pick up steam after *Dobbs*.

III

STILLBIRTHS AND MISCARRIAGES AS MURDER

Law enforcement has long investigated and prosecuted people who have experienced a heartbreaking pregnancy loss. Take, for example, a Glendale, California woman who received the tragic news from her healthcare provider that her fetus's heartbeat had stopped just a month into her pregnancy.⁸⁵ Shortly thereafter, she suffered a natural miscarriage at home and called a mortuary seeking burial services for her expelled fetus.⁸⁶ The coroner, however, called the local police department, which, in turn, immediately dispatched six uniformed officers to her home to conduct a warrantless search for evidence of feticide.⁸⁷ Police also have arrested, jailed, and threatened to charge pregnant people who have accidentally fallen down the stairs and gone to the hospital to seek treatment.⁸⁸

In 2006, a sixteen-year-old Black teenager from Columbus, Mississippi named Rennie Gibbs delivered a stillborn child.⁸⁹ Forensic pathologist Dr. Stephen Hayne conducted an autopsy of the infant.⁹⁰ Dr. Hayne is notorious for having provided faulty and false expert evidence at trials that resulted in the wrongful conviction of several people in Mississippi.⁹¹ In his autopsy of

⁸⁵ Steve Lopez, *Couple's Attempt to Do the Right Thing Brings More Grief*, L.A. TIMES (Mar. 11, 2009), <https://www.latimes.com/archives/la-xpm-2009-mar-11-me-lopez11-story.html> [https://perma.cc/BUA9-4J2M].

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *See Iowa Police Almost Prosecute Woman for her Accidental Fall During Pregnancy . . . Seriously*, AM. C.L. UNION OF ME. (Feb. 11, 2010), <https://www.aclumaine.org/en/news/iowa-police-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously> [https://perma.cc/RQK7-5GHL].

⁸⁹ Nina Martin, *A Stillborn Child, a Charge of Murder and the Disputed Case Law on 'Fetal Harm'*, PROPUBLICA (Mar. 18, 2014), <https://www.propublica.org/article/stillborn-child-charge-of-murder-and-disputed-case-law-on-fetal-harm> [https://perma.cc/Y2FH-P87R].

⁹⁰ *Id.*

⁹¹ *Id.* (“At least four murder convictions based on Hayne’s evidence . . . have been overturned since 2007.”); *see also, e.g.,* Radley Balko, *Solving Kathy Mabry’s Murder: Brutal 15-Year-Old Crime Highlights Decades-Long Mississippi Scandal*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/kathy-mabry-murder-steven-hayne-michael-west_n_2456970 [https://perma.cc/8HXZ-DUNN] (“Media investigations over the years . . . have revealed that [] Hayne [has] contributed critical evidence that led to the convictions of people who were later exonerated, and routinely and flagrantly flouted the ethical and professional standards of [his] field[.]”); Radley Balko, *New Case Again Demonstrates Duplicity of Embattled Mississippi Medical Examiner*, WASH. POST (May 15, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/05/15/new-case-again-demonstrates-duplicity-of-embattled-mississippi-medical-examiner> [https://perma.cc/8FYA-HESL] (describing how “DNA testing exonerated two men who

the infant, he detected traces of a cocaine byproduct in the child’s remains and, consequently, ruled the stillbirth a homicide by cocaine toxicity.⁹² State prosecutors subsequently charged Gibbs with depraved heart murder and, during her trial, argued that Gibbs’s reckless use of cocaine while pregnant endangered the fetus and caused the stillbirth.⁹³ Gibbs, who was the victim of statutory rape under Mississippi law due to her age at the time she became pregnant, faced a mandatory life sentence.⁹⁴

The crime for which Gibbs was indicted, depraved heart murder, applies where the prosecution proves that the defendant engaged in behavior so “eminently dangerous to others” that it exhibited reckless disregard for the victim. The state is not required to establish that the defendant intended to inflict any harm—let alone death—on another person.⁹⁵ That said, the Mississippi feticide statute in place at the time of Gibbs’s stillbirth was only intended to apply to third parties who engaged in dangerous behavior that recklessly harmed a fetus like, for example, brutally beating a pregnant person. As was clear on the face of the statute, which was titled “Injury to pregnant woman resulting in miscarriage or stillbirth,” the feticide law was enacted to protect pregnant people from domestic violence and other abuse, not to prosecute pregnant people suffering from substance use disorder.⁹⁶

Nearly seven years after the prosecutor indicted Rennie Gibbs, a court finally dismissed the depraved heart murder charge.⁹⁷ Mississippi’s attempt

had been convicted in the early 1990s of raping and murdering two little girls” and that the innocent defendants “were implicated almost exclusively because of testimony from Steven Hayne and Michael West”).

⁹² Martin, *supra* note 89.

⁹³ Beety, *supra* note 66, at 59. Gibbs’s indictment stated that she “kill[ed] her unborn child, a human being, while engaged in the commission of an act eminently dangerous to others and evincing a depraved heart, by using cocaine while pregnant with her unborn child . . . in violation of MCA. 97-3-19 . . .” Record Excerpts, *Gibbs v. State*, No. 2010-IA-0819-SCT (Miss. Nov. 12, 2010); *see also* Order Dismissing Appeal at 4–5, *Gibbs*, No. 2010-IA-0819-SCT (Miss. Oct. 27, 2011) (en banc) (King, J., objecting), https://courts.ms.gov/appellatecourts/docket/sendPDF.php?f=700_61759.pdf&c=71550&a=N&s=2 [<https://perma.cc/Q869-GWGV>] (summarizing the indictment’s specific charges).

⁹⁴ Beety, *supra* note 66, at 59 n.18; Martin, *supra* note 89; Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, in JUST REPRODUCTION: REIMAGINING AUTONOMY IN REPRODUCTIVE MEDICINE, 47 HASTINGS CTR. REP. S19, S19 (2017), <https://onlinelibrary.wiley.com/doi/pdf/10.1002/hast.791> [<https://perma.cc/R4FL-68QA>] (“By state statute, Gibbs’s pregnancy was by default the product of statutory rape, given her age.”).

⁹⁵ MISS. CODE ANN. § 97-3-19(1)(b) (2022).

⁹⁶ *Id.* § 97-3-37 (2006). The entire title of the Mississippi feticide statute was “Injury to pregnant woman resulting in miscarriage or stillbirth; ‘human being’ defined; crimes; exceptions.” *Id.*; *see also* Goodwin, *supra* note 94, at S19 (“Laws previously understood to protect pregnant women from domestic violence during pregnancy, such as fetal protection laws, now serve as the vehicles for prosecuting pregnant women.”).

⁹⁷ *Cocaine Case Puts Spotlight on Fetal Harm Prosecutions*, NAT’L PUB. RADIO (Apr. 7, 2014, 11:54 AM), <https://www.npr.org/2014/04/07/300241347/cocaine-case-puts-spotlight-on-fetal-harm-prosecutions> [<https://perma.cc/4RUF-84KR>]. It should be emphasized that,

to extend its feticide statute to a stillbirth is disturbing for several reasons. First, there is scant scientific evidence that cocaine use during pregnancy causes stillbirth. According to Boston University School of Medicine pediatrician Deborah A. Frank, who is an expert on the topic, “[t]here is no consistent association between cocaine use during pregnancy and serious fetal harms, birth defects, or serious long term physical or developmental impairments.”⁹⁸

Second, the state failed to proffer any proof that Gibbs’s cocaine use caused her specific stillbirth.⁹⁹ As mentioned, the only expert who advanced that unfounded theory was long-standing purveyor of false scientific testimony, Dr. Hayne.¹⁰⁰ Other experts who examined the pertinent medical records in the Gibbs case, in fact, determined that Gibbs’s child likely died from strangulation from the umbilical cord, which was wrapped around the baby’s neck at the time of delivery.¹⁰¹

Third, the expansive interpretation of homicide laws to encompass miscarriage and stillbirths could have dramatic impacts on an enormous number of pregnant people. Nearly a quarter of all pregnancies end in miscarriage or stillbirth.¹⁰² In addition, no scientific method exists that enables experts to distinguish between a spontaneous miscarriage and a medication abortion.¹⁰³ Nevertheless, if history is our guide, prosecutors will proceed to charge pregnant people with crimes due to their pregnancy behaviors either with no scientific evidentiary support or by relying on junk science.

For example, “proof” that a fetus was born alive is often a component of homicide charges, and prosecutors have relied on junk science to establish a live birth instead of a stillbirth. One such junk science example is the

immediately upon that dismissal, the state prosecutor announced that he intended to reindict Gibbs for manslaughter. *Id.*

⁹⁸ See Martin, *supra* note 89.

⁹⁹ See *id.* (discussing the defense’s challenges to the prosecution’s expert evidence).

¹⁰⁰ See *id.* (discussing many questions that had arisen about Hayne’s credibility).

¹⁰¹ *Id.*

¹⁰² Beety, *supra* note 66, at 61; see also, e.g., Eleanor Cummins, *In a Post-Dobbs World, Pathologists Who Study Pregnancy Loss Walk a Thin Line Between Medicine and the Law*, STAT NEWS (Jan. 19, 2023), <https://www.statnews.com/2023/01/19/miscarriage-abortion-pregnancy-loss-pathology> [<https://perma.cc/3ZGQ-XZWJ>] (noting that “[i]n the U.S., as many as 1 in 4 pregnancies end in miscarriage or stillbirth”); Linda Searing, *Up to 1 in 4 Known Pregnancies May End in Miscarriage*, WASH. POST (Aug. 2, 2022, 5:24 AM), <https://www.washingtonpost.com/health/2022/08/02/miscarriage-risk-pregnancy> [<https://perma.cc/3SZL-DPCT>]; *What is Stillbirth?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/stillbirth/facts.html> [<https://perma.cc/QL8J-Q489>] (noting that “[s]tillbirth affects about 1 in 175 births, and each year about 21,000 babies are stillborn in the United States”).

¹⁰³ Nat’l Women’s Health Network Staff, *Consumer Health Info: Medication Abortion and Miscarriage*, NAT’L WOMEN’S HEALTH NETWORK (Aug. 15, 2019), <https://nwhn.org/abortion-pills-vs-miscarriage-demystifying-experience> [<https://perma.cc/Y93T-642P>] (“[T]he medicines used in medication abortion [also] are used to help safely manage an incomplete miscarriage.”).

Floating Lung Test, an experiment from the Middle Ages, which hypothesizes that if the child’s lungs float when submerged in water, the child took its first breath and, thus, was born alive.¹⁰⁴ This medieval “test” regularly, and dangerously, produces demonstrably false positive results.¹⁰⁵

Dobbs allows states to not only criminalize any form of intentional pregnancy termination, but also to determine the requisite intent for proving such crimes.¹⁰⁶ Some crimes, such as drug-induced homicide, can be strict liability crimes that require no proof of intent.¹⁰⁷ In fact, prosecutors would only need to prove that the pregnant person shared a drug with the fetus to secure such a conviction.¹⁰⁸ Similar to Rennie Gibbs’s case, prosecutors could rely on unproved scientific evidence to establish that a drug was a “but-for” cause of death.¹⁰⁹ The pregnant person could be found guilty of homicide for consuming the drug, regardless of a lack of intent to harm the fetus.¹¹⁰

Where the state deems the pregnant person’s behavior reckless, it is likewise not required to prove intent.¹¹¹ Moreover, prosecutors have long “supported” their criminal pregnancy termination theories with speculation and junk science unchecked by the courts.¹¹² And it warrants emphasis that

¹⁰⁴ See generally Aziza Ahmed, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions*, 100 B.U. L. REV. 1111 (2020) (explaining the Floating Lung Test/Hydrostatic Lung Test, and its use in cases against people for self-induced abortions, most notably in *Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016)).

¹⁰⁵ See *id.* at 1126–27 (noting various experts’ disappointment at the test’s centuries of negative impact on innocent women).

¹⁰⁶ See Roxanna Asgarian, *How States Will Target Pregnant People Now that Roe Has Fallen*, SLATE (June 24, 2022, 3:34 PM), <https://slate.com/news-and-politics/2022/06/dobbs-decision-paves-the-way-for-criminalizing-reproductive-healthcare.html> [<https://perma.cc/DQC7-L2QR>] (anticipating the consequences of *Dobbs*).

¹⁰⁷ See Valena E. Beety, *The Overdose/Homicide Epidemic*, 34 GA. ST. U. L. REV. 983, 988, 990–91 (2018) [hereinafter Beety, *The Overdose/Homicide Epidemic*] (defining drug-induced homicide as sharing or “aiding and abetting” the drug use that allegedly killed the decedent, and discussing the problem of faulty forensic science supporting these charges); Valena E. Beety, Alex D. Kreit, Ann Boustead, Jeremiah Goulka & Leo Beletsky, *Drug-Induced Homicide: Challenges and Strategies in Criminal Defense*, 70 S.C. L. REV. 707, 731–35 (2019) (querying the reliability of cause of death determinations in drug-induced homicide charges).

¹⁰⁸ Beety, *The Overdose/Homicide Epidemic*, *supra* note 107, at 990–91.

¹⁰⁹ See *id.*

¹¹⁰ Indeed, the Illinois General Assembly twice considered a bill to create the strict liability offense of drug-induced homicide of an unborn child—by consuming a controlled substance—in 2014 and 2018. Drug-induced homicide of an unborn child, H.B. 5302, 98th Gen. Assemb., Reg. Sess. (Ill. 2014); Drug-induced homicide of an unborn child, H.B. 4493, 100th Gen. Assemb., Reg. Sess. (Ill. 2018).

¹¹¹ Recklessness generally “entails the conscious disregard of a substantial and unjustifiable risk that a forbidden result may occur or that relevant circumstances exist.” LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 23 (2009); see also *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994) (explaining that “the criminal law . . . generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware”).

¹¹² See, e.g., Ahmed, *supra* note 110, at 1126–30 (discussing prosecutors’ reliance on the

such dynamics are not limited to conservative states.

In 2019, a Kings County, California prosecutor charged twenty-five-year-old Chelsea Becker with “murder of a human fetus.”¹¹³ Becker was eight months pregnant and struggling with substance use when she tragically delivered a stillbirth at a hospital.¹¹⁴ Becker’s attorney argued that “there was no evidence that [Becker’s] substance use caused the stillbirth” and that such a prosecution was impermissible under California law.¹¹⁵ In fact, the law under which Becker was charged was enacted

in 1970 in response to the case of a man who had attacked a pregnant woman, causing a stillbirth. The law does not apply to an act “consented to by the mother of the fetus”, and the primary author of the legislation, a Republican lawmaker, later testified that the mention of fetus was solely intended for prosecuting “a third party’s willful assault on a pregnant woman.”¹¹⁶

Becker nonetheless spent 16 months in jail.¹¹⁷ She lost custody of her two-year-old son before a judge dismissed the state’s bogus homicide charges in 2021.¹¹⁸ As a California criminal defense attorney acquainted with the prosecutor’s expansive interpretation of the state’s “murder of a human fetus” law explained, “[i]f [a woman] works at a dangerous factory while she’s pregnant and loses her child, that’s murder. If she is ill and needs cancer treatment that could harm her fetus, that’s murder.”¹¹⁹

Finally, and as law professor Michele Goodwin detailed in *Policing the Womb: Invisible Women and the Criminalization of Motherhood*, states are more likely to charge poor and minority women who suffer stillbirths and late-term miscarriages with murder or feticide.¹²⁰ Charges against pregnant women for consumption of illicit drugs likewise disparately impact poor women and women of color, regardless of the fact that wealthier, white

Floating Lung Test in the Patel case despite critiques of the test’s validity); Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), <https://www.propublica.org/article/when-the-womb-is-a-crime-scene> [https://perma.cc/QKF2-NUP9] (investigating this practice in Alabama).

¹¹³ Sam Levin, *She Was Jailed for Losing a Pregnancy. Her Nightmare Could Become More Common*, THE GUARDIAN (June 4, 2022), <https://www.theguardian.com/us-news/2022/jun/03/california-stillborn-prosecution-roe-v-wade> [https://perma.cc/5FQR-MY4G].

¹¹⁴ *Id.*

¹¹⁵ *Id.* (“Two physician experts testified that Becker’s arrest was rooted in ‘medical misinformation’ and that the claims that meth use causes stillbirths were unfounded.”).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ GOODWIN, *supra* note 2, at 11; *see also* Sandhya Dirks, *Criminalization of Pregnancy Has Already Been Happening to the Poor and Women of Color*, NPR (Aug. 3, 2020), <https://www.npr.org/2022/08/03/1114181472/criminalization-of-pregnancy-has-already-been-happening-to-the-poor-and-women-of> [https://perma.cc/W8SX-JXF3].

women are more likely to voluntarily report gestational substance use.¹²¹ Among other reasons, this is because relatively resource-poor women who seek miscarriage or stillbirth care in public clinics and hospitals are far more likely to be screened for drug use by their healthcare providers.¹²² Given the states’ long history of targeting marginalized and racialized populations for various pregnancy behaviors,¹²³ it is critical that criminal defense attorneys deploy the tools that are available to them to challenge the bogus forensic evidence that prosecutors often rely on to obtain pleas or secure trial convictions in these cases. An overview of those tools is explored in the following section of this Essay.

IV

CHALLENGING FAULTY FORENSIC EVIDENCE IN COURT IN PREGNANCY BEHAVIOR CASES

In the years since the National Academy of Sciences released its 2009 report on faulty forensic evidence, the Supreme Court has clarified defense counsel’s obligation to challenge the state’s use of questionable forensic evidence in criminal proceedings. The Court has recognized that the criminal forensic disciplines on which prosecutors base their proof are often unreliable, and it has edged in the direction of demanding greater trial confrontation of the state’s forensic experts.¹²⁴ Perhaps most importantly, the federal courts have ruled that criminal defense attorneys have specific duties under the U.S. Constitution to which they must adhere and criminal defendants have specific rights when—as is often the case in pregnancy behavior criminal cases—the state is relying on debatable “expert” evidence to establish guilt.¹²⁵

An important decision in this line of cases is *Hinton v. Alabama*.¹²⁶ An

¹²¹ See, e.g., Lollar, *supra* note 28, at 966.

¹²² DOROTHY ROBERTS, KILLING THE BLACK BODY 104–201 (1997).

¹²³ Dirks, *supra* note 120.

¹²⁴ See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318–21 (2009) (finding that forensic findings reports are testimonial and defense must be permitted to cross-examine the analysts under the Confrontation Clause); *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011) (holding that a forensic laboratory report is testimonial and the analyst who performed the testing must be available to testify under the Confrontation Clause); see also Valena Beety, *Changing the Culture of Disclosure and Forensics*, 73 WASH. & LEE L. REV. ONLINE 580, 583–84 (2017) (analyzing these trends in Supreme Court jurisprudence).

¹²⁵ See, e.g., *Thomas v. Clements*, 789 F.3d 760, 771 (7th Cir. 2015) (holding that where intent of harm was the only issue, counsel was ineffective for failing to hire a pathologist to evaluate and rebut testimony of prosecution expert and thus requiring a new trial, with reference to the fact that “[t]he state’s case was not ironclad by any stretch of the imagination”); *People v. Ackley*, 870 N.W.2d 858, 863 (Mich. 2015) (“[C]ounsel performed deficiently by failing to investigate and attempt to secure an expert witness who could both testify in support of the defendant’s theory that the child’s injuries were caused by an accidental fall and prepare counsel to counter the prosecution’s expert medical testimony.”).

¹²⁶ 571 U.S. 263 (2014).

Alabama jury convicted Anthony Ray Hinton of two counts of capital murder and sentenced him to death.¹²⁷ Save for its forensic ballistics theory, the state had absolutely no evidence to tie Hinton, who had a solid alibi, to the two crimes for which he was indicted.¹²⁸ Specifically, the state's case relied on two ballistics experts who testified that the six .38 caliber bullets the police recovered from the pertinent crime scenes were fired by a .38 caliber revolver owned by Hinton's mother.¹²⁹ Operating under the mistaken belief that he was only entitled to request \$1,000 to retain a reliable defense ballistics expert, Hinton's attorney hired an entirely inept firearms expert who was "badly discredited" by the state on cross-examination.¹³⁰

The Supreme Court ruled that Hinton's counsel's failure to ask the trial court for sufficient expert funds to hire a competent expert constituted ineffective assistance of counsel on the theory that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence."¹³¹ The Court further noted that "[p]rosecution experts . . . can sometimes make mistakes. . . [and] we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts."¹³² In sum, the Sixth Amendment requires criminal defense attorneys to request adequate funds for a competent defense expert to testify on theories crucial to a defendant's case.

Since *Hinton* was decided, it has become increasingly expected that criminal defense attorneys should challenge prosecutor forensic experts in pre-trial *Daubert* reliability hearings.¹³³ This defense attorney duty, of

¹²⁷ *Id.* at 264–65, 269.

¹²⁸ *See id.* at 265–66 (“[T]he only evidence linking Hinton to the two murders were forensic comparisons of the bullets recovered from those crime scenes to the Hinton revolver.” (quoting *Ex parte Hinton v. Alabama*, 172 So. 3d 332, 334 (Ala. 2008))).

¹²⁹ *Id.* at 265–68.

¹³⁰ *Id.* at 266–70.

¹³¹ *Id.* at 273 (quoting *Harrington v. Richter*, 562 U.S. 86, 106 (2011)). Other relevant cases decided by federal circuit courts the same year as *Hinton* include *Canales v. Stephens*, 765 F.3d 551 (5th Cir. 2014) (finding counsel ineffective for failing to determine available funding and hire experts and investigators for mitigation in a capital case), and *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014) (finding counsel ineffective for failing to raise on appeal that trial court had refused to award funding for neurological test that was crucial to defendant's insanity defense and establishing defendant's brain damage).

¹³² *Hinton*, 571 U.S. at 276 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009)).

¹³³ *See, e.g., Case-Based Tools, Forensic Science*, NACDL RES. CTR., <https://www.nacdl.org/Landing/ForensicResources> [<https://perma.cc/24C9-X6B4>] (providing strategies and resources for litigating *Daubert* hearings); Brandon L. Garrett, Glinda S. Cooper & Quinn Beckham, *Forensic Science in Legal Education*, 51 J.L. & EDUC. 1, 2 (2022) (“The responsibilities of defense lawyers to effectively present forensic evidence have increasingly been a subject for constitutional litigation and Supreme Court post-conviction rulings.”); *see also* Mark Loudon-Brown, *Garbage In, Garbage Out: Revising Strickland as Applied to Forensic Science Evidence*, 34 GA. ST. U.L. REV. 893, 895, 907–08 (2018) (relying in part on *Hinton v. Alabama* to

course, often hinges on whether the prosecutor discloses the state’s forensic evidence and findings pre-plea, rather than retaining that information until the pre-trial stage of the proceedings.¹³⁴ Unfortunately, notwithstanding that nearly 94% of state criminal cases end with a guilty plea, only a small number of states require pre-plea disclosure.¹³⁵ At sentencing, however, forensic evidence faces no admissibility challenges.¹³⁶

That stated, criminal defense attorneys who are aware that the state is relying on questionable forensic evidence in a pregnancy behavior prosecution are required to request adequate and sufficient funding from the court to hire a competent expert to counter the faulty forensic evidence that prosecutors frequently advance in these cases. Defense attorneys also should be prepared to challenge the state’s expert pre-trial because the courts are highly likely to accept the state’s “proof”—no matter how absurd—and convict the defendant unless there is a robust defense challenge. Criminal defense attorneys who fail to investigate and challenge the state’s flimsy forensic “evidence” in pregnancy behavior prosecutions violate their constitutional duties to their clients.

CONCLUSION

Before *Dobbs* was decided, states had criminalized pregnant people for “falling down stairs; giving birth at home; exposing a fetus to dangerous ‘fumes’; having HIV; not resting enough during pregnancy; not getting to a

propose that, should a court determine that a defense attorney “performed deficiently in combating incriminating forensic science evidence, *Strickland* prejudice should be presumed”); Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1633–34 (2020) (reconstructing *Strickland* and trial attorney ineffectiveness by disaggregating how the Supreme Court has created multiple tests for assessing deficient performance, including the *per se* deficient performance recognized in *Hinton v. Alabama*).

¹³⁴ See Meghan J. Ryan, *Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1557 (2022) (describing limited prosecutorial discovery and the predominance of “closed-file systems, meaning that prosecutors will often disclose to the defense only material that is required by the Constitution or applicable, generally narrow, statutes”); see also Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016) (describing the variance among state rules for pre-plea discovery because the U.S. Supreme Court does not require such disclosure and analyzing two models for discovery).

¹³⁵ *The Truth About Trials*, THE MARSHALL PROJECT (Nov. 4, 2020), <https://www.themarshallproject.org/2020/11/04/the-truth-about-trials> [https://perma.cc/V5S7-742L]; *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) and its progeny, see *United States v. Bagley*, 473 U.S. 667 (1985), only require disclosure of material and exculpatory evidence pre-trial, a standard Justice Thurgood Marshall described as “invi[te] a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive.” *United States v. Bagley*, 473 U.S. 667, 701 (1985) (Marshall, J., dissenting). *But see* *Buffey v. Ballard*, 782 S.E.2d 204, 216 (W. Va. 2015) (holding that *Brady* disclosure obligations extend to plea negotiations in West Virginia).

¹³⁶ See generally Maneka Sinha, *Junk Science at Sentencing*, 89 GEO. WASH. L. REV. 52 (2021) (identifying how scientific evidence is regularly used at sentencing without the admissibility guards of Federal Rule of Evidence 702 or its state equivalents).

hospital fast enough while in labor; being the victim of a shooting; and self-inducing an abortion.”¹³⁷ States have pursued criminal charges against pregnant people even when there was no scientific evidence to support any claim that they had caused harm to their fetus and when their children were born healthy.¹³⁸ Worse yet, the policing of pregnant people heightens—rather than mitigates—maternal and fetal health risks because it incentivizes individuals to avoid healthcare services. It also instigates a cascade of attendant negative outcomes, including but not limited to the potential loss of custody of children, difficulty in obtaining employment, and exclusion from public benefit programs.¹³⁹ There is little doubt that *Dobbs* will motivate the enhanced surveillance, policing, and prosecution of pregnant people.¹⁴⁰ The post-*Dobbs* world is shaping up as an extraordinarily dangerous place for pregnant people and their families, and it is critical that defense attorneys are prepared to vigorously challenge the state’s evidence in these cases.

¹³⁷ Levin, *supra* note 113.

¹³⁸ See, e.g., Kassie McClung & Brianna Bailey, *She Was Charged with Manslaughter After a Miscarriage. Cases like Hers Are Becoming More Common in Oklahoma*, THE FRONTIER (Jan. 7, 2022), <https://www.readfrontier.org/stories/she-was-charged-with-manslaughter-after-a-miscarriage-cases-like-hers-are-becoming-more-common-in-oklahoma> [<https://perma.cc/T3ZB-BAXW>] (explaining that, in Oklahoma, “[w]omen can be prosecuted [for substance use during pregnancy] even if their babies are born healthy”); *Whitner v. State*, 492 S.E.2d 777, 778–79 (S.C. 1997) (indicating that the defendant gave birth to a healthy child yet was arrested and charged with criminal child neglect when the baby tested positive for an illegal drug); see also Carolyn Coffey, *Whitner v. State: Aberrational Judicial Response or Wave of the Future for Maternal Substance Abuse Cases?*, 14 J. CONTEMP. HEALTH L. & POL’Y 211, 232 (1997) (explaining that “Cornelia Whitner gave birth to a baby who tested positive for cocaine but was otherwise healthy” and the state nevertheless brought criminal charges).

¹³⁹ See, e.g., Lollar, *supra* note 28, at 981–95 (discussing various consequences of criminalizing pregnancy).

¹⁴⁰ See, e.g., Katrina Kimport, *Abortion After Dobbs: Defendants, Denials, and Delays*, SCI. ADVANCES (Sept. 7, 2022), <https://www.science.org/doi/10.1126/sciadv.ade5327> [<https://perma.cc/D2DC-7DHJ>] (explaining that “[f]ollowing *Dobbs*, we can expect a dramatic increase in the surveillance and criminalization of activities during pregnancy and inequality in how that happens”).