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## A Review and Look Ahead at Criminalizing Pregnancy in the Name of State Interest in Fetal Life

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# A REVIEW AND LOOK AHEAD AT CRIMINALIZING PREGNANCY IN THE NAME OF THE STATE INTEREST IN FETAL LIFE

*Sarah E. Burns and Sarah S. Wheeler\**

## ABSTRACT

*Across the United States, and especially in communities that are highly policed and in places hostile to abortion, pregnant people are dying, suffering, being separated from their children and families, and going to jail and prison in purported service of the state interest in fetal life recognized in Roe v. Wade and expanded in Planned Parenthood of Pennsylvania v. Casey. This Article focuses on two common practices that cause these harms: criminalizing pregnant people and denying them medical decision-making authority. While these practices are not new, the U.S. Supreme Court's decision in Dobbs v. Jackson Women's Health Organization is accelerating them. With abortion returned to the states without a U.S. constitutional floor, the state interest in fetal life can go largely unchecked with respect to all pregnant people, not just those who need abortions.*

*In this Article, we look back at several cases from the 1990s and early 2000s involving denials of medical decision-making authority and criminalization of pregnant people for substance use during pregnancy. We also discuss contemporary instances of these phenomenon, focusing on Alabama's Child Chemical Endangerment Act and 1997 Wisconsin Act 292, both of which are currently and fervently used to punish pregnant people for actual or suspected substance use and which fail entirely to advance fetal or parental well-being.*

*Based on our survey of these past and present cases, we reflect on several legal arguments and strategies to demand and restore full personhood for pregnant people. We link pregnancy criminalization to legally cognizable*

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\* Sarah S. Wheeler is a Supervising Lawyer and Director of the Reproductive Justice Clinic at NYU School of Law. Sarah E. Burns is a Professor of Clinical Law at NYU School of Law. Our Clinic, in operation since the Fall of 2013, superb clinic participants, and allies have worked on matters discussed in this Article. We offer this as a modest tribute to attorney Lynn Mara Paltrow and her colleagues at the organization National Advocates for Pregnant Women, now called Pregnancy Justice, who led us into and continue to be leaders in the work. We also extend our in-the-trenches gratitude to Abigail Lahvis and Abigail Schultz at SMU Law Review, for their tireless work with us on this Article and to the many class years of NYU Law Reproductive Justice Clinic students whose work and ideas continue to inspire us.

*animus, observing that hallmark features of such animus abound when substance use during pregnancy is criminalized. We link environmental injustice to pregnancy criminalization, observing that it is irrational to punish and jail people for “polluting” the micro-environment of the womb in service of an interest in fetal life when all people—particularly the most policed—are perniciously, macro-environmentally exposed to toxins that impact reproduction and pregnancy. We reiterate that informed consent to medical treatment is the bedrock guarantee of healthcare and bodily autonomy—and pregnancy demands rather than diminishes this guarantee—and that drug tests without consent that lead to law enforcement consequences violate both this and the Fourth Amendment. We also very briefly emphasize that mandatory reporting of suspected child abuse or neglect based on a positive drug test fails to protect anyone and that mandatory reporters can challenge this obligation where it frustrates core professional duties.*

*Together, all of these threads intersect to show that criminalizing pregnancy and denying pregnant people medical decision-making authority is about the social control and exclusion that punishment accomplishes. The impulse to control and exclude surely varies intersectionally, corresponding to the expectations and stereotypes about parenting applicable to the punished person or community. But in the end, in every case, no fetal life, no parental life, no family life, and no constitutional right or medical objective is protected or furthered when pregnancy is criminalized and pregnant people are denied medical decision-making authority.*

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## I. INTRODUCTION

**D**OBBS *v. Jackson Women’s Health Organization* held that the Fourteenth Amendment does not protect abortion;<sup>1</sup> it denies all pregnant people<sup>2</sup>—regardless of whether they seek abortions—

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1. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2267–68, 2279 (2022).  
2. Most people capable of pregnancy are women, and all women are persons. We use terms such as “pregnant persons” and “pregnant women” interchangeably to reinforce that all people capable of pregnancy are “persons” and acknowledge that not all of them are women.

the anti-subordination guarantees of the Fourteenth Amendment. By returning abortion to the states without a federal constitutional floor, *Dobbs* allows the state interest in fetal life developed in the Court's abortion precedents<sup>3</sup> to grow to a crushing size. States have, for decades, incorrectly applied the state interests recognized in abortion precedents to criminalize pregnant people and deny them medical decision-making authority. Courts upheld these misuses of the law, reasoning that if the interest in fetal life can be used to ban abortion, it can also be used to "protect" the fetus even if no abortion is sought.<sup>4</sup>

This is not news.<sup>5</sup> Enlargement of the state interest in fetal life from *Roe* in 1973 to *Casey* in 1992<sup>6</sup> tracked—and facilitated—efforts to personify fetuses in the law and in public discourse and imagination.<sup>7</sup> The rise of the fetal personhood movement and its relation to anti-abortion strategies has been amply documented, as have the harms it inflicts on

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3. See *Roe v. Wade*, 410 U.S. 113, 149 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992). The pre-*Dobbs* fundamental right to abortion was not unmediated, and it could be limited by state interests in maternal life and health and fetal life. *Roe*, 410 U.S. at 158, 162–66. In *Roe*, the Court developed a trimester framework to balance the constitutional right to abortion against state interests that could limit its exercise. In the first trimester of pregnancy, no state interest was compelling enough to justify regulation; in the second trimester, the state interest in maternal health and life could justify regulation; and in the third trimester, around the point of fetal viability, the state interest in fetal life was strong enough to justify bans, though exceptions for maternal life and health always were required. *Id.* *Casey* altered the balance of those interests and adopted the "undue burden" test for abortion regulations. *Casey*, 505 U.S. at 876–78. *Casey* concluded *Roe* undervalued the state interest in fetal life and that it could justify abortion regulations in all three trimesters, provided the regulations did not "unduly burden" the right to abortion. *Id.* at 875–78.

4. The threats of policing and criminalization are not experienced monolithically by all pregnant people, and vary—and worsen—as they intersect with other points of marginalization. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 141 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 834 (2020) (explaining that punishment of White pregnant people does not disprove claims that racism exists in the punishment of pregnant people; rather, it affirms that punishment and criminalization are tools used to police racial boundaries); LORETTA ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 12–14 (2017). For discussion on the subordination of Black women more generally, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1420, 1462 (1991).

5. One scholar who early identified this concern was Janet Gallagher. See generally Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); see also CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLICIES OF FETAL RIGHTS* 2–4 (1993); see generally *About Us*, PREGNANCY JUST., <https://www.pregnancyjusticeus.org/about-us> [<https://perma.cc/N5SV-KJ5H>].

6. See sources cited *supra* note 3 and accompanying text.

7. See generally *The Personhood Movement*, PROPUBLICA, <https://www.propublica.org/article/the-personhood-movement-timeline> [<https://perma.cc/8HZ6-MRYB>]; see also PREGNANCY JUST., *WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND* 4 (2022).

pregnant people and their families.<sup>8</sup> Importantly, scholars and communities continue to elucidate that reproductive harms are as diverse as the people who experience them, because people experience reproductive oppression differently depending on their intersectional identities.<sup>9</sup>

We enter the conversation about abortion, criminalization, and denials of medical decision-making authority as practitioners and teachers in the Reproductive Justice Clinic at NYU School of Law. These topics consistently arise in our work. We see that worst practices abounded before *Dobbs* and are proliferating post-*Dobbs*,<sup>10</sup> but that stories and strategies can be siloed.

This Article tries to do some de-siloing work and some visioning work. As to de-siloing, and as mentioned above, the state interest in fetal life has long been borrowed from abortion law to tyrannize and diminish pregnant people across their reproductive lives, regardless of whether they seek abortions. Banning and regulating abortion, criminalizing pregnancy, and denying pregnant people medical decision-making authority

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8. See generally PREGNANCY JUST., *supra* note 7; see also IF/WHEN/HOW: LAWYERING FOR REPRODUCTIVE JUSTICE (2019), <https://www.ifwhenhow.org/resources/roes-unfinished-promise-2019-update> [<https://perma.cc/8M5K-BR67>]; LINDA C. FENTIMAN, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH* (2017). Michele Godwin, Jeanne Flavin, and Lynn Paltrow have also written on this topic.

9. See, e.g., Roberts, *supra* note 4, at 1419, 1420, 1462; Lynn M. Paltrow, *Constitutional Rights for the "Unborn" Would Force Women to Forfeit Theirs*, Ms. MAG. (Apr. 15, 2021), <https://msmagazine.com/2021/04/15/abortion-constitutional-rights-unborn-fetus-14th-amendment-womens-rights-pregnant> [<https://perma.cc/B4PH-9DX7>] (reporting more than 1,000 arrests of women related to pregnancy outcome from 2006–2020 nationwide); Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 814, 848–49 (2019) (documenting 124 prosecutions in Tennessee from 2014 to 2016); SIA LEGAL TEAM, *ROE'S UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL* 1, 6, 20 (documenting twenty-one arrests for people ending their pregnancies in twenty states from 1973–2018); Editorial Board, *A Woman's Rights*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html> [<https://perma.cc/WQ23-AM4G>]; Grace Elizabeth Howard, *The Criminalization of Pregnancy: Rights, Discretion, and the Law* 3, 62–63, (Oct. 2017) (unpublished Ph.D. dissertation, Rutgers University) (documenting cases of arrests for “maternally mediated fetal harm”: 182 cases in South Carolina, 501 cases in Alabama, and 99 cases in Tennessee from 1973 to 2015); *The Dangerous State Laws that are Punishing Pregnant People*, THINKPROGRESS (Sept. 28, 2016, 5:36 PM), <https://archive.thinkprogress.org/criminalization-pregnancy-us-43e4741bb514> [<https://perma.cc/3WPF-5DFR>] (reporting more than 1,000 cases in the United States from 1973–2016); 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/TCM8-64EY>] (documenting 479 cases dealing with pregnant people's substance use in Alabama from 2006–2015); 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, 299, 309 (2013) [hereinafter Paltrow & Flavin, 2013 Arrest Study] (documenting 413 cases across the United States from 1973–2005). Several books offer more narratives and in-depth insight into pregnancy hyper-regulation. See, e.g., MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2020); FENTIMAN, *supra* note 8, at 4–6; JEANNE FLAVIN, *OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA* 4–7 (2009).

10. See Jia Telentino, *We're Not Going Back to the Time Before Roe. We're Going Somewhere Worse*, NEW YORKER (June 24, 2022), <https://www.newyorker.com/magazine/2022/07/04/we-are-not-going-back-to-the-time-before-roe-we-are-going-somewhere-worse> [<https://perma.cc/6RTU-M72J>].

are entwined legally and expressively. Reiterating this interconnectedness—and recognizing that the connections vary depending on a person’s intersecting identities—can anchor cross-issue, cross-movement conversations.

As to visioning, we venture and engage several ideas for post-*Dobbs* advocates. For one, this Article discusses equality arguments regarding pregnancy criminalization. Features of legally cognizable animus mapped by other scholars<sup>11</sup> are consistently present in pregnancy criminalization and can support arguments under state constitutions or the U.S. Constitution that criminalizing pregnancy is always illegitimate discrimination, in addition to being irrational. Another equality argument this Article ventures is that environmental (in)justice connects meaningfully to arguments that criminalizing pregnancy denies pregnancy-capable people equal protection.

This Article also discusses the Fourth Amendment, particularly that entanglement of law enforcement in healthcare through prenatal and post-partum drug tests, and mandatory reporting of results to police and child welfare which, without meaningful respect for consent, deprives pregnancy-capable people of Fourth Amendment protections against unreasonable search and seizure. This disrupts essential needed and wanted healthcare, which individuals must not have to sacrifice their liberty to access.

Regarding animus, we draw on existing theories of animus doctrine<sup>12</sup> that identify features probative of animus. These features include deviations from usual procedural or evidentiary processes; statements or decisions characterized by “emotional and strongly negative” reactions;<sup>13</sup> reliance on junk science or none at all;<sup>14</sup> circumstances where the burdens on the harmed group seem intentional;<sup>15</sup> and the structure of a law, i.e., a mismatch of means and ends where fear, stigma, and moral disapproval

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11. See generally William D. Araiza, *Animus and its Discontents*, 71 FLA. L. REV. 155, 184 (2019); Susannah Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

12. Although animus typically pertains to laws themselves, i.e., whether a law should be struck down because its purpose is to legislate animus and is therefore unconstitutional, as William Araiza explains, the concept is a “portable” one and we use it here to refer both to laws criminalizing pregnancy and also to judicial decisions applying those laws, which often involve striking divergences from typical procedural requirements and expansions of legislative purpose and statutory terms rooted in moral disapproval and fear rather than evidence. See Araiza, *supra* note 11, at 158–59 (characterizing the animus concept as portable and describing how it has been imported into Free Expression and Establishment Clause claims and decisions).

13. See Araiza, *supra* note 11, at 184 (drawing connections between the Supreme Court’s precedents on findings of discriminatory purpose in equal protection cases, and finding animus and observing that the inquiry can be both subjective and objective).

14. See generally Valena E. Beety & Jennifer D. Olivia, *Policing Pregnancy “Crimes”*, 98 N.Y.U. L. REV. ONLINE 29 (2023) (examining the faulty forensic science that states have used to support fetal harm allegations and reminding defense attorneys of their obligation to challenge junk science in the courtroom).

15. Araiza, *supra* note 11, at 205–07.

of a group, or a particular way of living, is evident.<sup>16</sup> These features are present in the instances of pregnancy criminalization discussed in this Article.<sup>17</sup> Examples include statements about the scourge of drug use; reliance on junk science or none at all; substitution of fears and disapproval about the dangerousness of drugs for legal conclusions about intent and causation; lax drug testing procedures; laws where the means (criminalization) fails to relate to the ends (a purported interest in fetal life), and actually frustrate those ends by deterring people from seeking care and making abortion the only off-ramp from criminalization; extended pre-trial jail time and unusually burdensome bond conditions; and the creation of a stigmatized, excluded class: pregnant substance users. In light of all this, animus doctrine makes sense as a way to understand the distortions pregnancy criminalization produces. As Professor Araiza aptly states, animus doctrine can “play a useful role in ferreting out, at a more granular level,” new axes of subordination that the “Reconstruction generation would have characterized and condemned as caste-creating.”<sup>18</sup>

This Article also engages with the idea that punishing pregnant substance users for alleged fetal substance exposures via the micro-environment of the womb while tolerating and sometimes incentivizing macro-environmental pollution of equal or greater reproductive impact violates equality guarantees. All pregnant people—regardless whether they use drugs—are persistently substance-exposed in their living environments. Pregnant substance users are not a unique class of pregnant people; they are just uniquely punished. Pregnant people who do not use drugs similarly have substance-exposed fetuses. These classes—substance users and pregnant people who are macro-environmentally substance-exposed—are similarly situated in view of laws aimed to further the state interest in fetal life. The rush to punish people who use drugs, while tolerating reproductively toxic macro-environments, belies discrimination and irrationality that good law cannot abide, particularly where the state interest in fetal life is so strong that pregnant people go to jail or prison to “protect” their fetuses and families. Of course, the macro-environmental substance exposure is the worst for people exposed to the most

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16. Throughout this Article, we theorize that punishing and criminalizing pregnancy expresses animus in a form courts have recognized. We are indebted to Susannah Pollvogt for her article, *Unconstitutional Animus*, which cogently defines and theorizes judicial findings and recognitions of animus that this Article employs in the relationship to policing and criminalizing pregnancy and identifies fear, stigma, and morality as factors that can support an inference of animus, and William D. Araiza for his article, *Animus and its Discontents*, which responds to and fills gaps in the scholarship on animus and discusses how to identify animus by drawing parallels to discriminatory purpose decisions, as well as how courts and lawyers can understand animus as a genuine, useful, and historically grounded component of equal protection doctrine. See generally Pollvogt, *supra* note 11; Araiza, *supra* note 11.

17. We recognize and take seriously the critique that animus is an unproductive form of “name calling.” See Araiza, *supra* note 11, at 171–74, 215 (discussing the work of Professor Steven D. Smith and others regarding animus as a “jurisprudence of denigration”). We use that term here because the interpersonal, familial violence of criminalizing pregnancy reflects dislike and distrust appropriate to the term “animus,” although this Article is not about a theory of animus.

18. Araiza, *supra* note 11, at 206.



environmental injustice, i.e., people of color and people living in conditions of poverty.

As to pregnancy and the Fourth Amendment, this Article discusses in some detail the Supreme Court's decision in *Ferguson v. City of Charleston*, the leading precedent on criminalizing pregnant people who are drug tested in healthcare settings.<sup>19</sup> This Article submits that decisions limiting *Ferguson* to its precise facts miss the essential logic of that decision, resulting in unconstitutional outcomes. *Ferguson* stands for the proposition that where the objective facts and circumstances make it foreseeably likely that purportedly diagnostic drug tests taken by a healthcare provider will end up with the police, Fourth Amendment strictures must apply.<sup>20</sup> Testing a newborn instead of a parent cannot circumvent that rule because in the immediate postpartum period, the newborn body and the postpartum body contain the same evidence. Notably, such drug tests are more uniformly essential to criminalize pregnancy than to provide any medical treatment.

This Article also aims to identify or amplify—in some cases we refer to work already happening—some legal and advocacy responses to the harms we highlight. In particular, this Article addresses informed consent to treatment and ending mandatory reporting of prenatal drug use. This Article emphasizes that informed consent to medical treatment is solely consent to treatment and in no way represents consent to search and seizure, nor does any result of consented-to medical treatment make search and seizure reasonable.

Finally, it is necessary to clarify the term “criminalizing pregnancy,” and to address the distracting claim that drug use during pregnancy is risky. Regarding “criminalizing pregnancy,” this Article discusses cases where certain punishment would not have happened without the pregnancy. Each case involves facts other than pregnancy, like drugs and cancer.<sup>21</sup> But the cases are not primarily about drugs or cancer; they are about pregnancy. The intervention is rooted in the fact of pregnancy, i.e., the existence of a fetus in which the state claims an interest. This is why we and other advocates say “criminalizing pregnancy”—without the pregnancy, the punishment or intervention would not happen. Regarding the risk of drug use during pregnancy, the essence of this Article's claim is that criminalization and policing represent immediate, traceable harms which far exceed any supposed risk of substance use during pregnancy, and therefore are irrational and unjustified. This Article does not claim that controlled substances, or any substance for that matter, have no risk; it claims that the popular and common legal narratives about risk and causation in relation to pregnancy criminalization make claims that far exceed reality and do more harm than good. Nor does this Article argue that controlled substances used in excess could never be risky or harmful.

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19. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

20. *See id.* at 84–86.

21. *See infra* Part III.

It is said that drinking too much water can kill a person.<sup>22</sup> That this were demonstrably true would not justify building an entire government-private industry aimed at controlling water overconsumption by severely policing and punishing supposed excess water consumption.

By way of a roadmap, Part II focuses on *In re A.C.*, a case invoking the state interest in fetal life recognized in *Roe* to justify a forced caesarean section without informed consent, ending in the deaths of a mother and her newborn daughter.<sup>23</sup> Part III focuses on the criminalization of pregnancy. First, Part III discusses three decisions out of South Carolina from the 1990s—*Whitner v. State*,<sup>24</sup> *State v. McKnight*,<sup>25</sup> and *Ferguson v. City of Charleston*<sup>26</sup>—where pregnant people were criminalized for substance use during pregnancy. These cases date from the so-called crack epidemic—a designation now debunked as false and racist<sup>27</sup>—but they are still enforced as precedents and illustrate consistent features of criminalizing pregnancy. Close readings of *McKnight* and *Whitner* indicate that legally cognizable animus is at work in criminalizing pregnancy.<sup>28</sup> Those decisions include factors scholars have identified as probative of animus, including lax procedural and evidentiary practices, means-ends mismatches, and expressions of fear, stigma, and moral disapproval. *Ferguson* addressed Fourth Amendment protections for pregnant and postpartum people, and held that Fourth Amendment protections apply where law enforcement is embedded and intertwined in hospital drug testing.<sup>29</sup> Second, Part III describes how Alabama’s Chemical Child Endangerment Act currently is used to punish and jail pregnant and postpartum people.<sup>30</sup> This criminal law, which carries penalties up to ninety-nine years in prison, was interpreted by Alabama’s Supreme Court to apply as early as fertilization (before a pregnancy exists) to anyone capable of pregnancy who is exposed to a non-prescribed, controlled sub-

22. See, e.g., *What happens if you drink too much water?*, MEDICAL NEWS TODAY (Jan. 4, 2023), <https://www.medicalnewstoday.com/articles/318619> [<https://perma.cc/M5LT-U8S3>] (“In severe cases, water intoxication can cause seizures, brain damage, a coma, and even death.”).

23. *In re A.C.*, 533 A.2d 611 (D.C. Cir. 1987); *In re A.C.*, 573 A.2d 1235 (D.C. Cir. 1990) (en banc).

24. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

25. *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003) (appeal from conviction); see also *McKnight v. State*, 661 S.E.2d 354 (S.C. 2008) (ineffective assistance of counsel decision).

26. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

27. Susan Okie, *Crack Babies: The Epidemic That Wasn't*, N.Y. TIMES (Jan. 26, 2009), <https://www.nytimes.com/2009/01/27/health/27coca.html> [<https://perma.cc/8WTQ-ZGQM>]; see also *McKnight*, 661 S.E.2d at 358–62, 358 n.2 (concluding that the state relied on “outdated” research about the consequences of cocaine use on the fetus, and that defendant’s counsel had failed to call experts who would have testified to “recent studies showing 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”).

28. See *infra* Part III.A.

29. *Ferguson*, 532 U.S. at 84–86.

30. The name of this law in the Alabama Code is “Chemical endangerment of exposing a child to an environment in which controlled substances are produced or distributed.” ALA. CODE § 26-15-3.2. For brevity, this Article refers to § 26-15-3.2 as “Alabama’s Criminal Child Endangerment Act” or “ACCEA.”

stance.<sup>31</sup> Part IV summarizes the experience of Tamara Loertscher, who was ordered into drug treatment and jailed for eighteen days without necessary prenatal healthcare pursuant to 1997 Wisconsin Act 292<sup>32</sup> because she was pregnant and disclosed a health condition and instances of substance use to her healthcare provider. Part V offers reflections on lawyering in the landscape we describe in this Article. It covers animus and environmental toxicity as they pertain to equality arguments and the Supreme Court's decision in *Ferguson*. It also outlines some best practices regarding informed consent to medical treatment and some ideas about ending mandatory reporting of prenatal drug use. Part VI offers a brief conclusion.

## II. *IN RE A.C.*: INVOKING THE STATE INTEREST IN FETAL LIFE RECOGNIZED IN *ROE* TO FORCE SURGERY ON A DYING PREGNANT PATIENT

The decisions in *In re A.C.* exemplify how a tragedy becomes a brutality when the state interest in fetal life is invoked to override patient informed consent because a patient is pregnant.<sup>33</sup> *In re A.C.* is an extreme example of this scenario involving terminal illness and sedation, but it captures the practice<sup>34</sup> of denying pregnant people—because they are pregnant—the medical decision-making authority and bodily integrity they are guaranteed under the U.S. Constitution and some state constitutions, along with their statutory, common law, and human right to informed consent.<sup>35</sup>

Angela Carder<sup>36</sup> became pregnant during a remission from cancer.<sup>37</sup> At about twenty-five weeks gestation, she learned that her chest pains were symptoms of an inoperable lung tumor, and about one week later she learned her cancer was terminal.<sup>38</sup> She expressed a desire to continue

31. See *infra* Part III.B.

32. Unborn Child Protection Act, WIS. STAT. § 48.193 (2015).

33. See *In re A.C.*, 533 A.2d 611, 617 (D.C. Cir. 1987); *In re A.C.*, 573 A.2d 1235, 1253 (D.C. Cir. 1990) (en banc).

34. See, e.g., *Dray v. Staten Island Univ. Hosp.*, No. 500510/14, 2022 N.Y. Misc. LEXIS 5656, at \*10–11 (N.Y. Sup. Ct. Sept. 6, 2022).

35. See *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 286 (1990); *id.* at 289 (O'Connor, J., concurring) (“[T]he liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual’s deeply personal decision to reject medical treatment . . . .”); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”).

36. Although this matter took place under confidential family court processes, Angela Carder’s family chose to make the story public and disclosed Angela’s name. Associated Press, *Family Wins Settlement Over Forced Cesarean*, L.A. TIMES (Nov. 29, 1990, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1990-11-29-mn-7471-story.html> [<https://perma.cc/WRB7-MKDW>].

37. *In re A.C.*, 573 A.2d at 1237–38.

38. *Id.*; Terry E. Thornton & Lynn Paltrow, *The Rights of Pregnant Patients: Carder Case Brings Bold Policy Initiatives*, PREGNANCY JUST.: HEALTHSPAN (Jan. 31, 1991), [https://www.pregnancyjusticeus.org/the\\_rights\\_of\\_pregnant\\_patients\\_carder\\_case\\_brings\\_bold\\_policy\\_initiatives](https://www.pregnancyjusticeus.org/the_rights_of_pregnant_patients_carder_case_brings_bold_policy_initiatives) [<https://perma.cc/WRB7-MKDW>].

the pregnancy and decided on palliative care to try to extend her life, at least to when the fetus would reach twenty-eight weeks gestation.<sup>39</sup> Her medical team thought birth at twenty-eight weeks or later gave the fetus the best chance at health.<sup>40</sup> But Angela Carder's health declined rapidly; within days of her metastatic diagnosis, her breathing and oxygen levels required intubation.<sup>41</sup> The morning after she was intubated, as her own and her fetus's oxygen levels dipped, George Washington University Hospital sought a declaratory judgment from a District of Columbia trial court about whether to perform a caesarean section on Angela Carder to deliver her twenty-six-week fetus.<sup>42</sup> At a rushed hearing in the hospital, the trial court noted there was no evidence that Angela Carder had ever "consented to, or even contemplated, a caesarean section before her twenty-eighth week of pregnancy."<sup>43</sup> The trial court ordered the caesarean section anyway; a hastily convened D.C. Circuit panel declined to stay that order.<sup>44</sup> A caesarean section was performed without Angela Carder's informed consent.<sup>45</sup> Angela Carder died within days of surgery and her newborn daughter died within hours of delivery.<sup>46</sup>

The state interest in fetal life recognized in *Roe* figured prominently in the decision to order the caesarean section.<sup>47</sup> The trial court reasoned that because the fetus was viable, there was a compelling interest in fetal life (borrowing a framework from *Roe* about viability and strength of state interest).<sup>48</sup> Conversely, the court thought that because Angela Carder was close to death, she had diminished interest in her own life and bodily integrity, a value judgment unsupported by the law it relied on—*Roe* required exceptions for women's life and health in any post-viability ban because no interest in fetal life was more compelling than the pregnant person's interest in their own life and health.<sup>49</sup> While *In re A.C.* involved terminal cancer, the zero sum view of the state interest in fetal life evident in that decision—that as the state interest in fetal life grows, any interest in the woman's life diminishes—pervades instances where pregnancy is criminalized or pregnant people experience diminished informed consent.

Several months after the forced surgery and deaths of mother and baby, the D.C. Circuit convened en banc to reflect on the trial court order

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perma.cc/97JJ-3JN3]. George Washington Hospital undertook major patient-centered policymaking in the wake of *In re A.C.*. *Id.*

39. *In re A.C.*, 573 A.2d. at 1238–39.

40. *Id.*

41. *Id.*

42. *Id.* at 1239.

43. *Id.*

44. *Id.* at 1238–41.

45. *Id.* at 1241.

46. *Id.*

47. *See id.* at 1240.

48. *See id.*; *see Roe v. Wade*, 410 U.S. 113, 164–66 (1973).

49. *See Roe*, 410 U.S. at 162–65 (“If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”).

forcing a caesarean section.<sup>50</sup> What happened to Angela Carder was wrong, and the en banc court knew it. The en banc court issued an opinion clarifying that the law of informed consent does not diminish just because a patient is pregnant, close to death, or both.<sup>51</sup>

Notably for advocates working on pregnancy-related healthcare post-*Dobbs*, the en banc decision stated, “[A] fetus cannot have rights . . . superior to those of a person who has already been born.”<sup>52</sup> This is still true as a matter of U.S. constitutional law; *Dobbs* did not hold that fetuses are people for purposes of the Fourteenth Amendment. It held that a right to abortion—a right belonging to the pregnant person—is not protected by the Fourteenth Amendment.<sup>53</sup> However, the *In re A.C.* en banc court also stated, “We do not quite foreclose the possibility that a conflicting state interest may be so compelling that the patient’s wishes must yield, but we anticipate that such cases will be extremely rare and truly exceptional. This is not such a case.”<sup>54</sup> Above all, the court concluded that informed consent must always be obtained, even in emergencies; that the existence of a fetus does not diminish the need for informed consent; and that, where informed consent cannot be obtained because of patient incapacity, the procedure to follow is substituted judgment to ascertain as best as possible what the patient would want, instead of enforcing an external judgment.<sup>55</sup> Nothing about pregnancy or capacity for pregnancy diminishes a patient’s fundamental right to make medical decisions for themselves; in emergencies where they cannot do so, their wishes must guide as best as they can be ascertained—not the values of the state.

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50. The decisions concerning the original trial order and stay denial are reported in *In re A.C.*, 533 A.2d 611 (D.C. Cir. 1987) and *In re A.C.*, 539 A.2d 203 (D.C. Cir. 1988). The en banc D.C. Circuit revisited the trial court’s key findings: “[F]irst, that A.C. would probably die, according to uncontroverted medical testimony, ‘within the next twenty-four to forty-eight hours’; second, that A.C. was ‘pregnant with a twenty-six and a half week viable fetus who, based upon uncontroverted medical testimony, has approximately a fifty to sixty percent chance to survive if a caesarean section is performed as soon as possible’; third, that because the fetus was viable, ‘the state has [an] important and legitimate interest in protecting the potentiality of human life’; and fourth, that there had been some testimony that the operation ‘may very well hasten the death of [A.C.]’ but that there had also been testimony that delay would greatly increase the risk to the fetus and that ‘the prognosis is not great for the fetus to be delivered post-mortem.’” *In re A.C.*, 573 A.2d at 1240 (rehashing the trial court’s key finding).

51. See *In re A.C.*, 573 A.2d at 1251–52.

52. *Id.* at 1244.

53. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242–43 (2022).

54. *In re A.C.*, 573 A.2d at 1252.

55. See *id.* at 1242–53.

III. CRIMINALIZING PREGNANT PEOPLE USING CRIMINAL LAW: DECISIONS OUT OF SOUTH CAROLINA  
 CRIMINALIZING PREGNANT PEOPLE AND ALABAMA'S CHEMICAL CHILD ENDANGERMENT LAW (ACCEA).

Part III is about criminalization of pregnant persons using criminal laws. Part A discusses three cases out of South Carolina that exemplify hallmark features of criminalizing pregnancy and build on one another's reasoning. Part B discusses Alabama's Chemical Child Endangerment Law, a criminal law with felony penalties up to 99 years in jail that is regularly used to put pregnant and parenting people in jail and prison for alleged substance use during pregnancy.

A. South Carolina: *WHITNER v. STATE*, *STATE v. MCKNIGHT*, AND *FERGUSON v. CITY OF CHARLESTON*

During the 1980s and 1990s, criminalization of controlled substances proliferated as part of the so-called war on drugs.<sup>56</sup> Also during this time, anti-abortion and fetal personhood political forces were gaining momentum.<sup>57</sup> Substance use among pregnant people emerged as a target for policing and criminalization.<sup>58</sup>

In each case discussed below—*Whitner v. State*, *State v. McKnight*, and *Ferguson v. City of Charleston*—pregnant people were criminalized for substance use because they were pregnant. Each case also explicitly or impliedly relied on the state interest in fetal life recognized in abortion law to justify criminalization, and each case instantiates the central role that fear, stigma, and moral disapproval play in criminalizing pregnancy.

1. *Whitner v. State*

South Carolina, a state with powerful anti-abortion and fetal personhood movements, was an early adopter of pregnancy criminalization by reference to the state interest in fetal life recognized in abortion law. The South Carolina Supreme Court's decision in *Whitner v. State* is the

56. See Andre Douglas Pond Cummings & Stephen A. Ramirez, *The Racist Roots of the War on Drugs and the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 461, 466–67 (2022) (surveying the racist, politicized roots of the “war on drugs”); Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 386–87 (2008) (documenting the United States’ “war on drugs” and its relationship to punishing pregnant people). In 1994, Dan Baum interviewed John Ehrlichman, White House Counsel under President Nixon, who described the reason for pursuing the war on drugs. In short, it was the public association with “the antiwar left and [B]lack people.” Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER’S, Apr. 2016 at 22, 22. By criminalizing drugs associated with these communities, the Nixon Administration targeted their leaders and disrupted them. *Id.*

57. See Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALA. L. REV. 999, 1008–09 (1999).

58. See *id.* at 1019–20.

first of the trilogy we discuss in this section.<sup>59</sup>

*Whitner* was an appeal from a grant of post-conviction relief to Cornelia Whitner, a Black woman and a mother of three who pled guilty to criminal child neglect for using cocaine while pregnant with her third child, a son.<sup>60</sup> The hospital drug tested her newborn after birth and found cocaine metabolites in his urine.<sup>61</sup> Cornelia Whitner pled guilty to criminal child abuse. No one—not even her lawyer—told Cornelia Whitner that the criminal child abuse statute under which she was charged did not apply to fetuses. She pled guilty to a crime that did not exist. South Carolina courts lacked subject matter jurisdiction to accept a guilty plea to a non-existent crime, but a court accepted it anyway and she went to prison.<sup>62</sup> Cornelia Whitner raised this decisive jurisdictional issue before the South Carolina Supreme Court, which concluded that “child” in the South Carolina Children’s Code, which included the criminal child abuse statute in *Whitner*, included viable fetuses.<sup>63</sup>

Invoking the state interest in fetal life and the corresponding viability line developed in abortion law,<sup>64</sup> the South Carolina Supreme Court stated: “South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges.”<sup>65</sup> The South Carolina Supreme Court drew on “policies enunciated in the Children’s Code” to reinforce its interpretation that “person” included “viable fetus.”<sup>66</sup> The court noted that the policy of the Children’s Code made prevention of children’s problems “the most important strategy which can be planned and implemented on behalf of children and their families.”<sup>67</sup> In turn, even though the Children’s Code never mentioned pregnancy, the Court speculated that “the consequences of abuse or neglect which takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth.”<sup>68</sup> The court cited no evidence establishing any of these fears were probable or likely.<sup>69</sup> Regarding the two

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59. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

60. *Id.* at 778–79.

61. *See id.* at 778–79; *see also* Arlene Levinson, *Crack Mom Doing Time As Her Children Grow*, SOUTH COAST TODAY (Jan. 11, 2011, 2:56 AM), <https://www.southcoasttoday.com/story/news/nation-world/1998/04/26/crack-mom-doing-time-as/50571404007> [https://perma.cc/PB9W-28CC].

62. *See Whitner*, 492 S.E.2d at 779.

63. *See id.* (“S.C.Code Ann. § 20-7-50 provides: Any person having the legal custody of any *child* or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such *child* or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court. (emphasis added).”).

64. *See sources cited, supra* note 3 and accompanying text.

65. *See Whitner*, 492 S.E.2d at 779.

66. *See id.* at 780–81.

67. *Id.* at 780.

68. *See id.*

69. *See generally* Roberts, *supra* note 4.

articles the court did cite,<sup>70</sup> one of the lead authors, Dr. Chasnoff, was surprised at the intense public reaction to his initial research. By the time the *Whitner* decision issued in 1997, he had publicly said, multiple times, that his research was taken out of context as support for overblown scare publicity.<sup>71</sup>

Elsewhere in the opinion, the *Whitner* court conceded that “the precise effects of maternal crack use during pregnancy are somewhat unclear.”<sup>72</sup> But it nevertheless invoked “the realm of public knowledge” to decide that “such use can cause serious harm to the viable unborn child.”<sup>73</sup> In the end, the court denied Cornelia Whitner post-conviction relief—keeping her in prison, apart from her three children—based on cocaine metabolites in the newborn’s system and fears about dangerousness.<sup>74</sup>

## 2. *State v. McKnight and Ferguson v. City of Charleston*

### a. *State v. McKnight*: First Mistrial, Second Trial Resulting in Conviction, Post-Conviction Ineffective Assistance of Counsel Claim

In *State v. McKnight*, Regina McKnight was convicted of homicide by child abuse because she experienced a stillbirth between thirty-four and thirty-seven weeks into pregnancy and cocaine metabolites were found in her baby’s system.<sup>75</sup> The autopsy report listed three causes of death: in-

70. *Whitner*, 492 S.E.2d at 782 (citing Joseph J. Volpe, *Effect of Cocaine Use on the Fetus*, 327 NEW ENG. J. MED. 399 (1992) and Ira J. Chasnoff, et al., *Cocaine Use in Pregnancy*, 313 NEW ENG. J. MED. 666 (1985)).

71. See, e.g., Ellen Goodman, “Crack Baby” Hyperbole, WASH. POST (Jan. 11, 1992), <https://www.washingtonpost.com/archive/opinions/1992/01/11/crack-baby-hyperbole/e811a350-34bb-4c9d-aa7f-69bbd410899b> [https://perma.cc/B72A-HHN3] (quoting Chasnoff discussing babies exposed to cocaine in utero) (“Their average developmental functioning level is normal. They are no different from other children growing up. They are not the retarded imbeciles people talk about . . . As I study the problem more and more, I think the placenta does a better job of protecting the child than we do as a society.”); see also Retro Report, *The Crack Baby Scare: From Faulty Science to Media Panic*, YOUTUBE (Jan. 22, 2019), <https://www.youtube.com/watch?v=DYvOzlBsRIE> [https://perma.cc/VE38-X7W8] (narrating the “Crack Baby” story, including Chasnoff’s positions over time).

72. See *Whitner*, 492 S.E.2d at 782 (“Although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child.”).

73. *Id.* at 782.

74. See *id.* at 786. For thorough documentation and citation on the lack of harm traceable to cocaine, methamphetamine, opioid, or cannabis use during pregnancy, see PREGNANCY JUST., PRENATAL DRUG AND ALCOHOL EXPOSURE: SCIENCE REFUTES MEDIA HYPE AND ENDURING MYTHS 1 (2022), <https://www.pregnancyjusticeus.org/prenatal-drug-and-alcohol-exposure-science-refutes-media-hype-and-enduring-myths> [https://perma.cc/3KVZ-VFSU] (collecting and citing evidence-based research to show that there is “no scientific evidence of unique, certain, or irreparable harm for fetuses exposed to cocaine, methamphetamine, opioids, or cannabis in utero” and that “no criminalized substances have been found to be abortifacients”). Yet, even if harm could be established, policing and criminalizing pregnancy would remain irrational as a matter of law—policing and criminalizing fail to achieve any positive outcomes, so the means do not fit the ends—and express class-based animus toward pregnant people because the substance use is punished more harshly in relation to fear, anger, and class-based judgments about morality and motherhood.

75. *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003).



flammation of the placenta, inflammation of the umbilical cord, and cocaine.<sup>76</sup> Inflammation of the placenta and umbilical cord can be caused by an infection, but the pathologist ruled the death a homicide and Regina McKnight was indicted.<sup>77</sup>

Regina McKnight's first trial ended in a mistrial for reasons related to lack of evidence that cocaine caused the death.<sup>78</sup> After hours of deliberation, several jury members went home and did research about "medical issues related to the case."<sup>79</sup>

Regina McKnight's second trial ended in a conviction and a twenty-year sentence.<sup>80</sup> As discussed below in relation to the South Carolina Supreme Court's conclusion that McKnight's lawyer rendered ineffective assistance, this second trial included less defense evidence on cocaine and stillbirth, and the autopsy report, which listed several possible causes of death, was not even admitted into evidence.<sup>81</sup> On direct appeal from the jury verdict in the second trial,<sup>82</sup> the South Carolina Supreme Court considered several arguments.<sup>83</sup> We discuss three of these arguments: (1) whether the trial court erred in refusing to direct a verdict because there was insufficient evidence of cause of death; (2) whether the trial court erred because there was no evidence of criminal intent; and (3) whether the trial court violated McKnight's Fourth Amendment rights by refusing to exclude urine specimen results obtained.<sup>84</sup>

#### b. Cause of Fetal Death in *McKnight*

On appeal from the jury verdict in her second trial, McKnight argued that no evidence proved cocaine caused the stillbirth.<sup>85</sup> The South Carolina Supreme Court disagreed.<sup>86</sup> However, its review of the expert testimony on causation shows that stigma and fear about the danger of drugs were essential to her conviction.<sup>87</sup> Indeed no expert ever established that cocaine caused the stillbirth.<sup>88</sup> Two experts testified for the state. The first expert had prepared the autopsy report identifying three causes of death: placental and umbilical inflammation and cocaine consumption.<sup>89</sup> That

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76. *Id.*

77. *Id.*

78. *Id.*

79. *McKnight v. State*, 661 S.E.2d 354, 358 (S.C. 2008).

80. *McKnight*, 576 S.E.2d at 171.

81. *See McKnight*, 661 S.E.2d at 365 (observing that unlike in the first trial, the autopsy report was not admitted and an expert who testified in the first trial that cocaine does not cause stillbirth did not testify in the second trial).

82. *McKnight*, 576 S.E.2d 168, 171.

83. These issues include: refusal to direct a verdict, refusing to dismiss the indictment, due process, privacy, and equal protection arguments, as well as a Fourth Amendment claim regarding the trial court's error in refusing to suppress a urine specimen taken after birth. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 172.

87. *See id.*

88. *See id.* at 171-72.

89. *Id.* at 171-72.

expert “testified that the only way for the infant to have [cocaine metabolites] present was through cocaine, and that the cocaine had to have come from the mother.”<sup>90</sup> He ruled the death a homicide on the autopsy report.<sup>91</sup> But the only causation identified by this testimony is that the mother *caused* the fetus to be exposed to cocaine.<sup>92</sup> The court never states that the key legal conclusion in a homicide case, that the cocaine *caused* death, was explicitly made by this expert.<sup>93</sup> Fear and stigma likely filled the gap. Indeed in the first trial, which resulted in a mistrial, this same expert “made general statements on the lethal effects of maternal cocaine consumption on fetuses” but “admitted it was possible for [placental and umbilical inflammations] alone to have caused the death . . . .”<sup>94</sup>

The second expert for the state acknowledged that placental and umbilical inflammation were present but testified that those conditions had not caused the death.<sup>95</sup> He could not explain “the exact mechanism by which the cocaine” supposedly caused the death, but testified anyway that “the death was caused solely by the cocaine . . . .”<sup>96</sup> His testimony in the first trial was similarly conclusory, stating that “by ruling out other possible causes of death,” he could conclude that “cocaine use alone” caused the inflammation in the fetus resulting in fetal death.<sup>97</sup>

One of McKnight’s own expert witnesses in the first mistrial—a cardiac pathologist and expert in drug-related deaths, whose lack of testimony in the second trial supported the ineffective assistance finding—identified the flawed causation analysis that equates maternal drug use with death.<sup>98</sup> That expert explained that the “only conclusion he could make from the presence of [cocaine metabolites] was that the mother was a cocaine user.”<sup>99</sup> He testified he “could not determine the underlying cause” of the placental and umbilical inflammation that caused the death.<sup>100</sup> He also “rebutted the State’s experts’ testimony on the harmful effects of cocaine and the notion of ‘crack babies’” and “went on to describe recent studies which had been unable to conclusively link cocaine to stillbirth, and discussed the flaws in earlier studies that had shown otherwise.”<sup>101</sup> Research on cocaine not causing stillbirth “supplement[ed] his

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90. *Id.* at 172.

91. *Id.*

92. *See id.* (identifying three causes of death, a causal connection between presence of cocaine metabolites in system and maternal cocaine use, and a conclusion of homicide, but not causally connecting cocaine use alone to the conclusion of homicide).

93. *See id.*; *see also* McKnight v. State, 661 S.E.2d 354, 358 (S.C. 2008) (identifying Dr. Woodard, the second expert, as “the sole expert to testify that cocaine alone caused fetal demise”).

94. *McKnight*, 661 S.E.2d at 357.

95. *McKnight*, 576 S.E.2d at 172.

96. *See id.*

97. *McKnight*, 661 S.E.2d at 357–58.

98. *See id.* at 358.

99. *Id.*

100. *Id.*

101. *Id.*

explanation as to why particular natural causes could not be ruled out as having caused fetal death.”<sup>102</sup>

No expert in the second trial established that cocaine caused Regina McKnight’s stillbirth, or even that it can cause stillbirth at all.<sup>103</sup> Failure to offer expert testimony that cocaine does not cause stillbirth, or to investigate existing scientific evidence on this point, amounted to the eventual conclusion that ineffective assistance was rendered in the second trial.<sup>104</sup>

As to animus in *McKnight*, the unsupported conclusion that cocaine caused stillbirth reflects an irregularity with respect to the high burden of “beyond a reasonable doubt” standard required in criminal cases.<sup>105</sup> There was no proof that Regina McKnight’s cocaine use caused the stillbirth; the conclusion that her cocaine use amounted to homicide was based on process of elimination reasoning by experts who themselves acknowledged they could not be sure. Unable to identify a cause of death, they concluded it must have been cocaine.<sup>106</sup> Not every fetal death can be traced to a discrete cause. And no evidence established that cocaine caused the stillbirth. This loose, deductive reasoning reveals stigma and fear about the “dangerousness” of drugs and drug-using parents, and it substitutes stigma and fear for causation. The result was prison without proof.

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102. *Id.*

103. *See* State v. McKnight, 576 S.E.2d 168, 172 (S.C. 2003); *see also* PREGNANCY JUST., *supra* note 74, at 1–2. McKnight’s expert in the second trial purported to “ruled out the possibility” of the other potential causes of death. *See McKnight*, 576 S.E.2d at 172.

104. *McKnight*, 661 S.E.2d at 360 (“In our opinion, counsel’s two-fold error in calling an expert witness whose testimony was known to have previously been used to bolster the State’s case, while neglecting to elicit favorable testimony from other experts when such testimony was known to exist and readily available, represents counsel’s inadequate preparation for trial rather than a valid trial strategy. Accordingly, we find that counsel’s performance in this regard was deficient. Because we further find that this deficient performance prejudiced McKnight’s case, we hold that the PCR court erred in determining that counsel was not ineffective on these grounds.”); *see also id.* (“McKnight also argues that counsel was ineffective in failing to investigate medical evidence contradicting the State’s experts’ testimony on the link between cocaine and stillbirth, and in further failing to investigate methods to challenge Dr. Woodard’s conclusions ruling out natural causes of death. We agree . . . . Counsel, however, did not attempt to rebut the medical studies she knew the State’s experts would cite, nor did she examine Dr. Conradi on the study the doctor cited at the first trial that concluded cocaine is no more harmful to fetuses than other adverse factors during pregnancy . . . . Furthermore, in the absence of testimony from the defense on medical research to the contrary, there is a reasonable probability that the jury used the adverse and apparently outdated scientific studies propounded by the State’s witnesses to find additional support for the State’s experts’ conclusions that cocaine caused the death of the fetus. Accordingly, we hold that the PCR court erred in determining that counsel was not ineffective on these grounds.”).

105. RALPH KING ANDERSON, JR., ANDERSON’S SOUTH CAROLINA REQUESTS TO CHARGE: CRIMINAL §1-5 (2d. ed. 2012) (“The State has the burden of proving the defendant guilty beyond a reasonable doubt. The State is required to prove every element of the charged offense by evidence which satisfies the jury of the guilt of the defendant beyond a reasonable doubt. The defendant is not required to prove his innocence.”).

106. *See McKnight*, 661 S.E.2d at 360 (observing that all the experts used the same process by elimination methodology).

c. Intent in *McKnight*: Deliberate Indifference to Human Life

On appeal from the jury verdict, Regina McKnight argued that the state failed to show she had the requisite intent for criminal homicide, and that the trial court erred for failing to dismiss on that ground.<sup>107</sup> Relatedly, in her ineffective assistance claim she argued the trial court “counsel was ineffective in failing to object to the trial court’s charge on the measure of criminal intent required for conviction” under the applicable homicide by child abuse statute.<sup>108</sup>

The requisite intent for homicide by child abuse was “extreme indifference to human life” which, for the purposes of the child abuse statute, meant “a mental state akin to intent characterized by a deliberate act culminating in death.”<sup>109</sup> McKnight argued she lacked this intent because “there was no evidence of how likely cocaine is to cause stillbirth, or that she knew the risk that her use of cocaine could result in the stillbirth of her child.”<sup>110</sup> The South Carolina Supreme Court, on the trial verdict appeal, concluded McKnight did not deserve a directed verdict on intent—something a criminal defendant gets if there is no evidence on an essential element of the claim.<sup>111</sup> But there was no evidence that McKnight thought prenatal cocaine use was risky, much less deadly (and it is not), indicating she did not deliberately do something she thought would harm her pregnancy.

In lieu of evidence of McKnight’s intent, the court invoked so-called public knowledge about the harmfulness of cocaine.<sup>112</sup> Expressing almost apocalyptic fear and moral disapproval about drug use, the court seems to indicate—without any evidence—that McKnight must have intended to harm her fetus because drugs are bad and dangerous:

The drug “cocaine” has torn at the very fabric of our nation. Families have been ripped apart, minds have been ruined, and lives have been lost. It is common knowledge that the drug is highly addictive and potentially fatal. The addictive nature of the drug, combined with its expense, has caused our prisons to swell with those who have been motivated to support their drug habit through criminal acts. In some areas of the world, entire governments have been undermined by the cocaine industry.<sup>113</sup>

In light of its views on the scourge of drug use—and even though it conceded that “the precise effects of maternal crack use during pregnancy

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107. *McKnight*, 576 S.E.2d at 172.

108. *McKnight*, 661 S.E.2d at 361.

109. *McKnight*, 576 S.E.2d at 173.

110. *Id.*

111. *See, e.g.*, *State v. Jarrell*, 564 S.E.2d 362 (S.C. Ct. App. 2002) (“In ruling on a directed verdict motion, the trial court is concerned with the existence or non-existence of evidence, not its weight. Furthermore, ‘[i]f the State presents any evidence which reasonably tends to prove the defendant’s guilt or from which the defendant’s guilt could be fairly and logically deduced, the case must go to the jury.’” (citation and quotation omitted)).

112. *See McKnight*, 576 S.E.2d at 173.

113. *See id.* (quoting *State v. Major*, 391 S.E.2d 235, 237 (S.C. 1990)).

are somewhat unclear”<sup>114</sup>—the court affirmed the trial court’s refusal of a directed verdict on intent.<sup>115</sup> Appealing to fear, stigma, and moral disapproval about drug use and its impact on families, instead of evidence about McKnight’s intent, the South Carolina Supreme Court gave animus the force of law.

d. Regina McKnight’s Fourth Amendment Suppression Claim

The *McKnight* court’s constrained reading of the Supreme Court’s decision in *Ferguson v. City of Charleston* is also important for post-*Dobbs* advocates.<sup>116</sup> Regina McKnight argued that the hospital violated her Fourth Amendment rights under *Ferguson* when it drug tested her, because a warrantless drug test for law enforcement purposes is a Fourth Amendment search requiring normal Fourth Amendment strictures.<sup>117</sup> In McKnight’s case—as in thousands of others around the United States<sup>118</sup>—the results of a drug test administered in connection with pregnancy-related healthcare led to law enforcement consequences: a criminal charge, prosecution, and prison.<sup>119</sup> The *McKnight* court concluded that *Ferguson* did not apply for a number of reasons—which are discussed in Part V—including that the hospital policy in *McKnight* was not developed with law enforcement like the policy in *Ferguson*.<sup>120</sup> *McKnight* also distinguished *Ferguson* on the basis that in *McKnight*, positive results first went to social services and not directly to the police.<sup>121</sup> As discussed in Part V, *McKnight*’s application of *Ferguson* reasons by form over substance. *Ferguson* means that when healthcare providers drug test patients, and those tests objectively can be expected to double as evidence of a crime, Fourth Amendment strictures must apply.

B. ALABAMA: THE CRIMINAL CHILD CHEMICAL ENDANGERMENT ACT<sup>122</sup>

Alabama’s Criminal Child Chemical Endangerment Act (ACCEA) is the only law in the nation that, as interpreted by Alabama’s Supreme

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114. *Id.* (citing *Whitner v. State*, 492 S.E.2d 777, 782 (S.C. 1997)).

115. *Id.*

116. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding that the special needs exception did not apply and that Fourth Amendment strictures do apply to an in-hospital diagnostic test the results of which will not inadvertently, but foreseeably, end up with police).

117. *See McKnight*, 576 S.E.2d at 178–79.

118. *See Paltrow & Flavin*, 2013 Arrest Study, *supra* note 9.

119. *See McKnight*, 576 S.E.2d at 179.

120. *See id.*

121. *See id.*

122. We and our clinic have spent years working on ACCEA-related projects. Our chief partner in this work, Pregnancy Justice, has been following developments in Alabama since before 2013, pursuing advocacy strategies to educate and provide other resources to Alabama defense counsel, and advising policymakers about problems with the ACCEA. We pursued freedom of information law inquiries about ACCEA implementation with Alabama law enforcement departments and hospitals, facing considerable resistance from both sources. More recently, we surveyed court records of ACCEA prosecutions in three Alabama counties from 2015–2022 and interviewed seventeen stakeholders including

Court, makes it a felony to “expos[e]” a fertilized egg, embryo, or fetus to a controlled substance.<sup>123</sup> The ACCEA has a *mens rea* requirement,<sup>124</sup> but enforcement is substantially unconstrained.<sup>125</sup> The ACCEA carries penalties up to ninety-nine years in prison and is regularly enforced using lax procedural processes, guileful testing and reporting regimes, extended pre-trial jail time without adequate, if any, healthcare, and extremely onerous bond conditions.<sup>126</sup> The result is that pregnant people who seek healthcare in Alabama counties are drug tested without their knowledge or consent;<sup>127</sup> can be held in jail and separated from their children and healthcare providers for days, weeks, or months; and can be charged and convicted of a felony based on unconfirmed drug test results subject to no chain of custody, a standard below the one applicable to drug tests where no criminal charges are at issue.<sup>128</sup>

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defendants (formerly pregnant persons), a former prosecutor, defense counsel, healthcare and drug care providers concerning the ACCEA’s application. We thank former clinic law students Natali Rey, Tahlisia Brougham, Rachel Harrington, and Julie Pinkham-Goldsmith who evaluated county court data on ACCEA prosecutions and interviewed Alabama stakeholders. Results are on file with the authors.

123. See ALA. CODE § 26-15-3.2; see also *Ex parte Ankrom*, 152 So.3d 397, 421 (Ala. 2013) (“We conclude that Court of Criminal Appeals correctly held that the plain meaning of the word ‘child’ in the chemical-endangerment statute includes an unborn child or fetus. However, we expressly reject the Court of Criminal Appeals’ reasoning insofar as it limits the application of the chemical-endangerment statute to a viable unborn child. With that exception, we . . . affirm those decisions.”); see also *Hicks v. State*, 153 So.3d 53, 54 (Ala. 2014) (“[T]he use of the word ‘child’ in the chemical-endangerment statute includes all children, born and unborn, and furthers Alabama’s policy of protecting life from the earliest stages of development.”).

124. The ACCEA makes it a crime to “[k]nowingly, recklessly, or intentionally cause[ ] or permit[ ] a child to be exposed to . . . a controlled substance, chemical substance, or drug paraphernalia . . .” ALA. CODE § 26-15-3.2.

125. See Shawnza Mizelle & Chris Boyette, *Alabama Attorney General Says People Who Take Abortion Pills Could be Prosecuted*, CNN (Jan. 12, 2023, 2:24 PM), [www.cnn.com/2023/01/12/politics/alabama-abortion-women-prosecution/index.html](https://www.cnn.com/2023/01/12/politics/alabama-abortion-women-prosecution/index.html) [<https://perma.cc/A8ZE-J8PJ>].

126. Depending on the felony class, penalties under the ACCEA range from 366 days to 99 years in prison. ALA. CODE § 26-15-3.2(a)(1)–(3); E.A. Gjelten, *Alabama Felony Crimes by Class and Sentences*, NOLO, <https://www.criminaldefenselawyer.com/resources/criminal-defense/felony-offense/alabama-felony-class.htm> [<https://perma.cc/U6CT-RRTH>]. Where the controlled substance supposedly harmed the fetus, the statute directs up to twenty years in prison, and if stillbirth, miscarriage, or death occur, the statute directs between ten and ninety-nine years in prison. See ALA. CODE § 26-15-3.2(a)(2)–(3); Gjelten, *supra*. These penalties apply even though no controlled substance is proven to cause stillbirth or miscarriage. The ACCEA also directs courts that its minimum punishments preempt other statutory sentences unless another statute punishes more harshly than the ACCEA. See ALA. CODE § 26-15-3.2(b).

127. See Nina Martin, *How Some Alabama Hospitals Quietly Drug Test New Mothers—Without Their Consent*, PROPUBLICA (Sept. 30, 2015, 11:00 AM), <https://www.propublica.org/article/how-some-alabama-hospitals-drug-test-new-mothers-without-their-consent> [<https://perma.cc/LB95-4HE8>].

128. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 651 (1995) (explaining that where no law enforcement purpose or consequences existed, “[i]f a sample tests positive, a second test is administered as soon as possible to confirm the result”); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 662 (1998) (Explaining that where no law enforcement purpose or consequence existed, “[t]wo tests are used. An initial screening test uses the enzyme-multiplied-immunoassay technique (EMIT). Any specimen that is identi-

1. *Alabama Supreme Court's Interpretation of "Child" in the ACCEA Makes Explicit the Connection Between Abortion and Criminalizing Pregnancy*

In *Ex Parte Ankrom*, Hope Ankrom and Amanda Helaine Borden Kimbrough petitioned the Alabama Supreme Court to review criminal court decisions in their cases.<sup>129</sup> Hope Ankrom and Amanda Kimbrough had each been convicted of violating the ACCEA during pregnancy.<sup>130</sup> The criminal court decisions relied on *Whitner*, among other things, to conclude that "child" in the ACCEA included a viable fetus.<sup>131</sup>

Hope Ankrom tested positive for marijuana and cocaine before birth, and her baby tested positive after birth.<sup>132</sup> She was charged with violating the ACCEA and moved to dismiss, making vagueness, equal protection, due process, and statutory interpretation arguments; she argued "child" in the ACCEA did not include fetuses.<sup>133</sup> She was sentenced to three years in prison, which was suspended as she served probation for one year.<sup>134</sup>

Amanda Kimbrough, the other plaintiff, was convicted of violating the ACCEA in connection with the death of her son shortly after his birth around 25 weeks' gestation.<sup>135</sup> Amanda Kimbrough used methamphetamine while pregnant.<sup>136</sup> Like Hope Ankrom, she made equal protection and statutory interpretation arguments, among others.<sup>137</sup> Statements from her lawyer in the published decision indicate she was denied indigency status and thus was unaided in the cost of retaining expert witnesses.<sup>138</sup> Expertise in criminalization cases is vital; in Regina McKnight's case, failure to get an expert witness on cocaine and stillbirth justified an ineffective assistance finding.<sup>139</sup>

The Alabama Supreme Court did not address any of the constitutional challenges raised by Ankrom and Kimbrough.<sup>140</sup> It affirmed their convictions by interpreting "child" in the ACCEA to include a fetus.<sup>141</sup> Judge Parker wrote the majority and a concurring opinion, explicitly connecting pregnancy criminalization to abortion and casting *Roe* as the exception to the rule of fetal personhood.<sup>142</sup>

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fied as positive on this initial test must then be confirmed using gas chromatography/mass spectrometry (GC/MS).").

129. *Ex Parte Ankrom*, 152 So.3d 397, 400–01 (Ala. 2013).

130. *Id.* at 401–02.

131. *See id.* at 404–07.

132. *Id.* at 401–02.

133. *Id.* at 401–03.

134. *Id.* at 402.

135. *Id.* at 403.

136. *Id.*

137. *Id.* at 402.

138. *Id.* at 403.

139. *See McKnight v. State*, 661 S.E.2d 354, 366 (S.C. 2008); *see supra* Part III.A.2.

140. *Ex Parte Ankrom*, 152 So.3d at 420–21.

141. *Id.* at 419–20.

142. *See id.* at 421 (Parker, J., concurring); *see also* Nina Martin, *This Alabama Judge Has Figured Out How to Dismantle Roe v. Wade*, PROPUBLICA (Oct. 10, 2014), <https://>

The ACCEA does not define what “expose” a fetus means, but *Ex Parte Ankrom* cites to a decision construing “expose” to include “an actual risk of harm.”<sup>143</sup> Pregnancy is a complex biologic process with myriad confounding variables, making “actual risk of harm” an elusive standard unless the jurisdiction, as Alabama apparently does, operates on the assumption that any ingestion of a controlled substance while pregnant is per se harm. Evidence shows that the most used drugs—marijuana, cocaine, and methamphetamine—do not cause miscarriage or stillbirth, but the ACCEA requires a ten to ninety-nine-year prison sentence if death occurs.<sup>144</sup>

As advocates and open-source publications have reported, and as Hope Ankrom and Amanda Kimbrough argued, the ACCEA has disastrous consequences for pregnant and parenting people in Alabama,<sup>145</sup> a state that has staggeringly high rates of maternal mortality and morbidity.<sup>146</sup>

## 2. Especially Lax Procedures Are Used for Toxicology Samples Referenced as Evidence in ACCEA Cases

Criminalizing pregnant people under the ACCEA routinely happens without appropriate procedures for confirming and handling drug test results. To reiterate, pregnant and postpartum patients in Alabama are regularly jailed based on unconfirmed, positive drug tests alone.<sup>147</sup> Best practice is to give pregnant people the healthcare they need, not jail, and to perform a second, confirmatory drug test before acting on initial, typically deemed preliminary, test results; this is because false positives are not uncommon.<sup>148</sup> One study on urinary drug tests completed confirma-

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[www.propublica.org/article/this-alabama-judge-has-figured-out-how-to-dismantle-roe-v-wade](http://www.propublica.org/article/this-alabama-judge-has-figured-out-how-to-dismantle-roe-v-wade) [https://perma.cc/26YF-JTAV].

143. *Ex Parte Ankrom*, 152 So.3d at 407 n.1 (“We note that, although the word ‘expose’ is not defined in the chemical-endangerment statute and none of the parties have raised the meaning of that word as an issue in this case, that word in a similar statute in another state has been interpreted to mean placing a child in a situation that involves a risk of physical harm.”).

144. ALA. CODE § 26-15-3.2 (a)(3); Gjeltén, *supra* note 126.

145. See Nina Martin, *Alabama Mom’s Charges Are Dropped, but Only After an Arduous Battle*, PROPUBLICA (June 2, 2016, 10:29 AM), <https://www.propublica.org/article/alabama-moms-charges-are-dropped-but-only-after-an-arduous-battle> [https://perma.cc/3UTQ-Y34F]. See generally *Pregnancy Justice Secures Release of 9 Pregnant or Postpartum Women from Alabama Jail and a Policy Change*, PREGNANCY JUST. (Sept. 26, 2022), <https://www.pregnancyjusticeus.org/pregnancy-justice-secures-release-of-nine-alabama-women-and-policy-change> [https://perma.cc/K778-TPHC].

146. See, e.g., Anna Claire Vollers, *Alabama Has Third-Highest Death Rate of Mothers in the Nation, New Federal Report Says*, AL (Feb. 18, 2020, 7:40 AM), <https://www.al.com/news/2020/02/alabama-has-third-highest-death-rate-of-mothers-in-the-nation-new-federal-report-says.html> [https://perma.cc/RQF4-KFLM].

147. See, e.g., Amy Yurkanin, *Pregnant Women Held for Months in One Alabama Jail to Protect Fetuses From Drugs*, AL (Sept. 8, 2022, 4:03 PM), <https://www.al.com/news/2022/09/pregnant-women-held-for-months-in-one-alabama-jail-to-protect-fetuses-from-drugs.html> [https://perma.cc/VNE7-57HJ].

148. Leading medical organizations recommend that positive urine tests should be verified with either another test or a different kind of test. For instance, the American College of Obstetricians and Gynecologists (ACOG) states, “False-positive test results can occur



tory testing on 786 urine samples that had tested positive for controlled substances.<sup>149</sup> Of the samples testing positive for opioids, only 86.8% withstood confirmatory testing; for benzodiazepines that percentage decreased to 74.6%, and for methamphetamines it decreased even further to 44.1%.<sup>150</sup> The false positive rate for amphetamines was particularly high with only 9.3% of the 387 positive tests containing amphetamines.<sup>151</sup> Many substances that can cause false positives are legal, common household items, including ibuprofen, poppy seeds, body wash, anti-depressants, anti-histamines and other medications.<sup>152</sup> In spite of this—or maybe because of it—the ACCEA is enforced against people without confirmatory tests, and where breakdowns in the chain of custody occurred.<sup>153</sup> One Alabama defense lawyer confirmed that there is not a requirement for a verified, confirmatory toxicology test or chain of custody in ACCEA cases; a single witness to the existence of a positive tox screen, without any sample, is deemed adequate.<sup>154</sup> This creates enormous unfairness to defendant-parents who seek to challenge the accuracy of the drug test result, and by extension their ACCEA charge. For example, in *Pickering v. State*, Allison Pickering moved to suppress evidence of her and her newborn’s positive urine test results because the tests were de-

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with immune-assay testing and legal consequences can be devastating to the patient and her family.” ACOG Comm. Op., *Opioid Use and Opioid Use Disorder in Pregnancy*, ACOG (Aug. 2017), [www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/08/opioid-use-and-opioid-use-disorder-in-pregnancy](http://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/08/opioid-use-and-opioid-use-disorder-in-pregnancy) [https://perma.cc/W6BC-JDZE]; see also ACOG Comm. Op., *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, ACOG (Jan. 2011), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy-the-role-of-the-obstetrician-gynecologist> [https://perma.cc/JF2F-LG6K] (“Legally mandated testing and reporting puts the therapeutic relationship between the obstetrician-gynecologist and the patient at risk, potentially placing the physician in an adversarial relationship with the patient . . . Drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus.”). Similarly, the Substance Abuse and Mental Health Services Administration (SAMHSA) provides that “[h]ealthcare professionals need [to] confirm any positive test results given the life-changing ramifications for the mother and infant if there is a false positive.” SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., CLINICAL GUIDANCE FOR TREATING PREGNANT AND PARENTING WOMEN WITH OPIOID USE DISORDER AND THEIR INFANTS 80 (2018).

149. Roger L. Bertholf, Rohit Sharma & Gary M. Reisfield, *Predictive Value of Positive Drug Screening Results in an Urban Outpatient Population*, 40 J. ANALYTICAL TOXICOLOGY 726, 728 (2016).

150. *Id.*

151. *Id.*

152. See Adam Algren & Michael R. Christian, *Buyer Beware: Pitfalls in Toxicology Laboratory Testing*, 112 MO. MED. 206, 208 (2015); Nancy C. Brahm et al., *Commonly Prescribed Medications and Potential False-Positive Urine Drug Tests*, 67 AM. J. HEALTH SYS. PHARMACY 1344, 1344, 1347 (2010).

153. See *Pickering v. State*, 194 So.3d 980, 982–85 (Ala. Crim. App. 2015) (denying motion to suppress unconfirmed drug test lacking chain of custody on the grounds that the defendant could or should have requested sample preservation and confirmatory testing in the hospital when testing took place, and thus holding that the unconfirmed medically purposed test may be admitted as evidence).

154. Information about the minimum evidence required to convict someone of chemical endangerment was brought to our attention by an Alabama defense attorney (whose name is withheld to protect confidentiality) in an interview on November 12, 2021. The interview is on file with the authors.

stroyed during the chain of custody before she could have them re-tested or independently verified.<sup>155</sup> The trial court denied her motion and the Court of Criminal Appeals affirmed.<sup>156</sup> The prosecutor argued that if Allison Pickering wanted to re-test or independently test her sample, she should have asked for it herself.<sup>157</sup> Presenting no evidence, he said Allison Pickering had “abscond[ed]” from and “fle[d]” the hospital, and that it “makes no sense to allow” her to suppress the samples because “fleeing the hospital” was “the act that precluded additional or further testing.”<sup>158</sup> Allison Pickering had just given birth. Very probably, her newborn had been taken from her. She was policed where she sought healthcare. If she knew a drug test had come back positive, she may have feared—rightfully—what was impending: a felony charge. The burden to follow best practices for handling drug tests cannot rightfully be on the punished; it is not placed on classes of people subject to drug tests in other contexts.<sup>159</sup>

The trial court in *Pickering* concluded the destroyed sample did not prevent Allison Pickering from presenting a valid defense.<sup>160</sup> It reasoned circularly that the destroyed drug test could not be exculpatory because it was the proof.<sup>161</sup> As discussed above, studies indicate that false positives are not uncommon. The trial court further concluded that even if the sample were exculpatory, no one knew that before it was destroyed and there was no “state actor” culpability.<sup>162</sup> The court ruled that evidence of the destroyed results could be admitted, which was upheld by the Court of Criminal Appeals.<sup>163</sup> Allison Pickering pled guilty and was sentenced to eight years in prison.<sup>164</sup> She served twelve months with thirty-six months of probation.<sup>165</sup>

Notably some people criminalized under the ACCEA do not even realize that they received a preliminary positive test result when they received medical care, and so they lack any opportunity to request confirmatory testing. Some learn of a positive test result for the first time when they are arrested, which can happen weeks or months later. Moreover, there is no guarantee that a hospital will perform confirmatory testing upon request, as doing so is currently not required by law.<sup>166</sup>

While confirmatory testing and chain of custody requirements would not cure the ACCEA’s fundamental flaws, failure to implement these

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155. *Pickering*, 194 So.3d at 981.

156. *Id.* at 985.

157. *Id.* at 982.

158. *Id.* at 983.

159. *See infra* notes 169–70 and accompanying discussion.

160. *Pickering*, 194 So.3d at 982.

161. *See id.* at 983.

162. *See id.* at 982–83.

163. *Id.* at 985.

164. *Id.* at 981.

165. *Id.*

166. E-mail from Emma Roth, Att’y, Pregnancy Just., to authors (Apr. 5, 2023) (on file with authors).

widely accepted procedural practices exposes a rush to punish and represents uniquely lax criminal procedures in a state where criminalization based on positive drug tests is a pervasive, well-known fact. Against this backdrop of criminalization, cloaked with medical authority and mandatory reporter status<sup>167</sup> (and its accompanying immunity for mistaken reports<sup>168</sup>), actors within the Alabama healthcare system interacting with pregnant people are agents of the criminal-legal systems enforcing the ACCEA.

The handling of drug test results in ACCEA cases diverges from Alabama rules for drug tests in other contexts. For example, under Alabama's workplace drug testing law, positive drug tests must be verified by a confirmation test that is "capable of providing requisite specificity, sensitivity, and quantitative accuracy."<sup>169</sup> Employers must use chain of custody procedures "to ensure proper record keeping, handling, labeling, and identification of all specimens to be tested."<sup>170</sup>

### 3. *Excessive Bail Conditions Applied to Pregnant People Result in Extended Pre-Trial Jailing*

Pregnant and postpartum people in Alabama charged under the ACCEA have been subjected to uniquely burdensome bail conditions. Etowah County, Alabama has prosecuted pregnant persons for child chemical endangerment for years.<sup>171</sup> The Etowah County Sheriff's Office has arrested 150 pregnant persons under the law.<sup>172</sup>

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167. See ALA. CODE § 26-14-3(a). The Alabama Child Abuse Reporting Act provides that any "person called upon to render aid or medical assistance to any child, when the child is known or suspected to be a victim of child abuse or neglect, shall be required to report orally, either by telephone or direct communication immediately, and shall be followed by a written report, to a duly constituted authority." *Id.* The Act specifically identifies hospitals, doctors, nurses, and other classes of healthcare workers as mandatory reporters. See *id.*

168. ALA. CODE § 26-14-9.

169. ALA. CODE § 25-5-331(3).

170. ALA. CODE § 25-5-335(c)(9).

171. See, e.g., Molly Olmstead, *How a Pregnant Woman in Alabama Got Stuck in Jail for Months Despite No Arrest*, SLATE (Sept. 8, 2022, 12:17 PM), <https://slate.com/news-and-politics/2022/09/alabama-jail-pregnant-woman-fetus-marijuana.html> [https://perma.cc/NB5J-9RT2]; Elizabeth Nolan Brown, *Alabama Jails Woman for Endangering Her Fetus. She Wasn't Pregnant.*, REASON (Nov. 22, 2022, 9:32 AM), <https://reason.com/2022/11/22/alabama-jails-woman-for-endangering-her-fetus-she-wasnt-pregnant> [perma.cc/6DCM-63HZ]. In May of 2013, Etowah County formally announced that its district attorney, sheriff, and child services pledged to cooperate in enforcing the ACCEA. See William Thornton, *Etowah County DA, Sheriff Pledge Greater Cooperation on Chemical Endangerment Cases*, AL (May 20, 2013, 5:00 PM), <https://www.al.com/east-alabama/2013/05/etowah-county-da-sheriff-pledg.html#:~:text=entrekin%20announced%20that%20two%20Etowah,Both%20face%20chemical%20endangerment%20charges> [https://perma.cc/9SHR-4GUP].

172. E-mail from Pregnancy Just., to authors (Apr. 5, 2023) (on file with authors) (discussing an ongoing arrests study conducted by Pregnancy Justice indentifying 150 ACCEA arrests in Etowah County). See also Marisa Iati, *Pregnant Women Were Jailed Over Drug Use to Protect Fetuses, County Says*, WASH. POST (Sept 8, 2022, 6:21 PM), <https://www.washingtonpost.com/nation/2022/09/08/pregnant-women-drugs-jail> [https://perma.cc/J6BT-XZUT] (citing arrests of pregnant women in Etowah County: "more than 150 in the last decade").

The Etowah County Sheriff's office has so doggedly jailed women for substance use, purportedly to protect fetuses, that it jailed one woman, who was not pregnant, for thirty-six hours even though she offered to take a pregnancy test immediately upon arrest.<sup>173</sup>

Until a recent successful legal challenge, people arrested under the ACCEA in Etowah County faced a "\$10,000 cash bond" and a requirement "to go through a drug treatment program and to be supervised by Etowah County Community Corrections upon release from treatment."<sup>174</sup> These conditions existed since at least 2016.<sup>175</sup> For many pregnant and parenting people, the Etowah County bail terms were impossible to meet. The county's cash bond requirement meant people needed to have \$10,000 cash, instead of a bail bond which requires only a small percentage posted in cash. It also required drug treatment programs, even though not all of the people jailed under the ACCEA needed or could benefit from treatment. And spots in drug treatment programs can be scarce, especially government-subsidized ones, which require people to have a substance use disorder to qualify for treatment. Many substance users, including some jailed in Etowah County, do not have a substance use disorder. This created a no-win situation of pleading guilty or staying in jail while pregnant, birthing, postpartum, or all three. People were separated from their families, including their newborns, other children, and essential healthcare for long stretches of time.

These extraordinary Etowah County bail conditions were successfully challenged in August 2022. Two people—one detained while pregnant and the other detained postpartum, both jailed because they could not meet the bail conditions—filed habeas corpus petitions.<sup>176</sup> Filings in those

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173. See Shira Li Bartov, *A Woman Was Jailed for "Endangering" Her Fetus—She Wasn't Even Pregnant*, NEWSWEEK (Nov. 22, 2022, 5:41 PM), <https://www.newsweek.com/woman-jailed-endangering-fetus-wasnt-pregnant-1761547> [<https://perma.cc/HJD9-YSB8>] (documenting the story of Stacey Freeman, who was held in an Etowah County jail for thirty-six hours on child chemical endangerment charges while not pregnant, despite offering to take a pregnancy test upon arrest; a lawsuit was filed on her behalf); Brown, *supra* note 171 (further documenting Freeman's story with more details suggesting the impossibility of current pregnancy and no need for medical intervention).

174. Press Release, Etowah Cnty. Sheriff's Off., Chemical Endangerment Arrest (May 31, 2022), [https://www.etowahcountysheriff.com/press\\_view.php?id=4](https://www.etowahcountysheriff.com/press_view.php?id=4) [<https://perma.cc/5CWS-E574>]; see also Press Release, Etowah Cnty. Sheriff's Off., Chemical Endangerment Arrest (Sept. 6, 2022), [https://www.etowahcountysheriff.com/press\\_view.php?id=36](https://www.etowahcountysheriff.com/press_view.php?id=36) [<https://perma.cc/EHA4-2UEU>] (bail conditions include \$10,000 cash bond, an inhouse treatment program, and monitoring by Corrections upon release).

175. See, e.g., Times Staff, *Gadsden Woman Charged with Chemical Endangerment*, GADSDEN TIMES (Aug. 24, 2016, 9:33 AM), <https://www.gadsdentimes.com/story/news/crime/2016/08/24/gadsden-woman-charged-with-chemical-endangerment/25594934007> [<https://perma.cc/259U-XWCH>] (detainee Whitney Jasmine Concepcion-Gibson held on \$10,000 cash bond and successful completion of drug rehab bail requirements).

176. See Amended Petition for Writ of Habeas Corpus and Application for Immediate Release, *Banks v. State*, 31-cv-2022-900336 (Cir. Ct. Etowah Cty. Ala. Aug. 24, 2022) [hereinafter *Banks Habeas Petition*]; Petition for Writ of Habeas Corpus and Application for Immediate Release, *Burns v. State*, 31-cv-2022-900317 (Cir. Ct. Etowah Cty. Ala. Aug. 10, 2022) [hereinafter *Burns Habeas Petition*]; Petition for Writ of Habeas Corpus, *Burns v. State*, cv-2022-0900317 (Ala. Ct. Crim. App. Aug. 25, 2022) [hereinafter *Burns Habeas Appeal*]. See also Decca Muldowney, *Alabama Officials Back Down on Jailing Pregnant*

cases reveal Etowah County failed to provide even minimal accommodations or medical care necessary for pregnancy and delivery,<sup>177</sup> even though the Etowah County Sheriff's Office has proudly jailed lots of people purportedly to protect a fetus, as reflected in the Office's press releases.<sup>178</sup> One of the people who filed a habeas corpus petition, Ashley Morris Banks, was a pregnant twenty-three-year-old Etowah County resident with one 3-year-old child; she was arrested May 25, 2022, for alleged possession of a small amount of marijuana.<sup>179</sup> She learned she was pregnant two days before being arrested.<sup>180</sup> No drug test was conducted, and no evidence existed that she had used marijuana once she learned she was pregnant.<sup>181</sup> She was jailed for months, from May 25 until release based on a habeas corpus petition filed on August 24; she had no prior felonies.<sup>182</sup> Her family had "scraped together the money for the \$10,000 cash bond, but, according to an independent third-party assessor, Ms. Banks did not qualify for inpatient treatment because she is not a drug addict, so she cannot attend such treatment."<sup>183</sup> The Etowah County Sheriff's Office and court refused to lift the mandatory drug treatment condition, so she was forced to stay in jail while pregnant.<sup>184</sup> Her habeas petition submissions document the abhorrent conditions she experienced while in jail for three months, revealing Etowah County's lack of interest in fetal or parental well-being:

[S]he has not received adequate prenatal care for her high-risk pregnancy, and she has been forced to sleep on the floor of her cell. In fact, she has had to beg jail staff to take her to the emergency room no less than two times as a result of complications from her high-risk pregnancy. Her first trip ended with a diagnosis of "threatened abortion" and "subchorionic hematoma" because of uncontrollable bleeding. And her second trip resulted from her constant fainting, a condition that could be deadly for both her and the baby.<sup>185</sup>

Filings in the other habeas petition, on behalf of Ms. Burns, reinforce Etowah County's disdain for the well-being of a pregnant person and her family, indifference to best practices of keeping parents and newborns together, and disregard of treatment options for substance use disorders.<sup>186</sup> Ms. Burns was a 34-year-old mother of two when she was ar-

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*Women to "Protect" Fetuses*, DAILY BEAST (Sept. 26, 2022, 5:10 PM), <https://www.thedailybeast.com/five-pregnant-woman-who-were-jailed-in-etowah-county-alabama-to-protect-their-fetuses-are-released> [<https://perma.cc/55M8-Y3KP>].

177. See Banks Habeas Petition, *supra* note 176, at 3–11; Burns Habeas Petition, *supra* note 176, at 3–10; Burns Habeas Appeal, *supra* note 176, at 1–10; Iati, *supra* note 172.

178. See sources cited *supra* note 174.

179. Banks Habeas Petition, *supra* note 176, at 3.

180. *Id.* at 4.

181. See *id.* 3–4.

182. *Id.*

183. *Id.* at 2.

184. *Id.*

185. *Id.* at 1–2.

186. See generally Burns Habeas Appeal, *supra* note 176. See also Order, Burns v. State, 31-cv-2022-900317 (Cir. Ct. Etowah Cty. Ala. Aug. 19, 2022) [hereinafter Burns Order].

rested on ACCEA charges five weeks after giving birth to her second child.<sup>187</sup> The ACCEA charges were based on two drug tests, one which detected opiates and the other which detected amphetamines.<sup>188</sup> Her legal filings explained that the opiate positive was due to her use of Subutex, the medication for opiate addiction step-down that is recommended during pregnancy.<sup>189</sup> The amphetamine positive was due to her prescription use of antihistamines for a chronic sinus infection.<sup>190</sup> Etowah County imposed the \$10,000 cash bond and inpatient treatment conditions for release from jail.<sup>191</sup> She had to wait in jail for weeks for an inpatient bed to become available only to be denied admission due to a positive drug test; this occurred despite several contemporaneous negative drug tests, including one taken at the same time as the false positive.<sup>192</sup> By habeas petition appeal, her lawyers submitted evidence regarding her medical conditions and treatment, the fact of her ongoing treatment for a substance use disorder and a serious sinus condition, the ongoing prescription treatment bases for her claim of false positives on both opiates and amphetamines, and the related science, evidence of numerous other drug test results which came back negative, and her indigent status.<sup>193</sup> They also submitted expert testimony regarding the harm of incarceration postpartum without medical treatment for depression and harm to the newborn caused by separation from its mother during the critical postpartum time for infant-maternal bonding.<sup>194</sup> On August 19, 2022, the Etowah County Court denied the habeas petition and persisted in requiring inpatient treatment for her as a condition for release from jail.<sup>195</sup> Counsel appealed the denial to the Court of Criminal Appeals on August 25, 2022.<sup>196</sup> On September 11, 2022, the Etowah County District Court reduced her bond to \$2,500, ordered her to stay drug free except for drugs prescribed by a medical physician, not to ingest any substance that might give a “false positive” drug test, and committed her to the supervision of Etowah County Community Corrections.<sup>197</sup> Eventually, the Court of Criminal Appeals dismissed her habeas appeal as moot after her legal counsel advised that court of her release under the September 11, 2022 District Court Order.<sup>198</sup> This narrative about the multiple petitions with attendant affidavits and briefing, multiple orders and

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187. Burns Habeas Appeal, *supra* note 176, at 1–2.

188. *Id.* at 2.

189. *Id.* at 2–4.

190. *Id.* at 5–7.

191. *See* Burns Order, *supra* note 186, at 1–2. *See also* Burns Habeas Appeal, *supra* note 176 *passim*.

192. Burns Habeas Appeal, *supra* note 176, at 11–13.

193. Burns Habeas Appeal, *supra* note 176 *passim*.

194. *See* Burns Habeas Appeal, *supra* note 176, Exhibit 3 (Affidavit of Dr. Hytham Inseis), ¶¶ 22–25.

195. *See* Burns Order, *supra* note 186.

196. *See* Burns Habeas Appeal, *supra* note 176.

197. *See* Order, State v. Burns, 31-DC-2022-001751 (Dist. Ct. Etowah Cty. Ala. Sept. 11, 2022).

198. Order, *Ex Parte* Burns, CR-2022-1027 (Ala. Ct. Crim. App. Oct. 12, 2022).

the needed appeal demonstrates the tenacity with which Etowah County, Alabama, exerts control over pregnant and postpartum persons alleged to have used controlled substances during pregnancy.

Each Alabama county imposes its own bail conditions and we do not know whether or which, if any, of Alabama's sixty-six other counties also impose onerous pretrial detention of pregnant women charged under the ACCEA.

The far-reaching statutory interpretation of the ACCEA, failures in appropriate procedural protections for drug tested samples, and the practices of aggressively jailing pregnant people drives people away from seeking medical care. One person we interviewed told us she considered giving birth in what she described as a "drug house."<sup>199</sup>

To our knowledge, no research has assessed the ACCEA's effect on pregnant women and fetuses.<sup>200</sup> But data from Tennessee is instructive. From 2014–2016, Tennessee had a two-year time-limited statutory provision which criminalized in utero drug exposure much like the ACCEA does.<sup>201</sup> Analyzing prenatal care, fetal and infant deaths, and maternal morbidity using techniques to assess impact on outcomes, researchers concluded that the Tennessee law deterred 5,421 pregnant persons from prenatal care in 2015 alone and that the chilling effect persisted after the law's sunset.<sup>202</sup> They also found fetal and infant deaths and maternal mortality and morbidity increased when the law was in effect.<sup>203</sup> There is reason to think Alabama's ACCEA does similar harm.

#### IV. PUNISHING AND JAILING PREGNANT PEOPLE USING CIVIL CHILD ABUSE LAWS: 1997 WISCONSIN ACT 292

Around the same time as *Whitner*, the Wisconsin Supreme Court decided that the word "child" in Wisconsin's civil child abuse statute did *not* include fetuses, and that Wisconsin's child abuse system had no jurisdiction over pregnant people.<sup>204</sup> With the urging of the National Committee on the Right to Life, the Wisconsin legislature responded to the decision by passing 1997 Wisconsin Act 292 (Act 292).<sup>205</sup> Act 292 empowered Wisconsin's child welfare personnel, law enforcement, and family courts to take a pregnant person into custody—denying her the fundamental right to physical liberty—if she satisfied the vague criteria of "habitually lack[ing] self-control" by using alcohol or controlled substance "to a se-

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199. The name of the interviewee is withheld to protect confidentiality. The interview was conducted on March 8, 2022, and it is on file with the authors.

200. See generally Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 GEO. L.J. 475 (2021).

201. See TENN. CODE ANN. § 39-13-107(c)(2) (2014) (effective until amended on July 1, 2016).

202. See Boone & McMichael, *supra* note 200, at 477–78, 498, 504–505, 507.

203. See *id.* at 501, 513 n.171. The Tennessee fetal assault criminal law resulted in twenty fetal deaths and sixty infant deaths in 2015 alone. *Id.* at 507.

204. State *ex rel.* Angela M.W. v. Kruzicki, 561 N.W.2d 729, 737–38 (Wis. 1997).

205. See 1997 Wisconsin Act 292, WIS. STAT. §§ 46.001–48.065.

vere degree.”<sup>206</sup> Wisconsin’s child welfare system, like most, operates in strict confidence, so it took years for anyone harmed by this law to emerge from the system and bring any constitutional challenges.

Tamara Loertscher was 29 years old living in Taylor County, Wisconsin, when she suspected she might be pregnant.<sup>207</sup> Having lost her thyroid gland to cancer as a teenager, she believed it unlikely she could become pregnant.<sup>208</sup> At the time, late July 2014, she had no thyroid medication because she could not afford it.<sup>209</sup> To cope with the resulting depression and fatigue, she used methamphetamine and marijuana.<sup>210</sup> After a second home pregnancy test was positive, she sought medical care and was referred to an emergency room where medical staff administered a pregnancy test, confirmed she was pregnant, and performed an ultrasound.<sup>211</sup> They also confirmed that her thyroid stimulating hormone (TSH) numbers were high, indicating that she needed thyroid replacement medication.<sup>212</sup> The risk of miscarriage was high without the medication but the pregnancy was healthy.<sup>213</sup>

A social worker at the hospital reported Tamara Loertscher to child welfare after she admitted to using drugs and alcohol before she knew she was pregnant; this initiated an unborn child abuse (UCHIPS) proceeding against her under Act 292.<sup>214</sup> A lawyer was immediately appointed for Tamara Loertscher’s fetus.<sup>215</sup> Ms. Loertscher repeatedly asked for a lawyer, but none was forthcoming despite her indigent status.<sup>216</sup> The family court ordered her to go to an inpatient drug treatment facility and issued a hold forcing her to stay in the hospital until she did,

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206. WIS. STAT. § 48.01(1)(bm).

207. See *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 908–09 (W.D. Wis. 2017), *vacated*, 893 F.3d 386 (7th Cir. 2018).

208. See *id.*

209. See *id.*

210. See *id.*

211. See *id.* at 909.

212. See *id.*

213. See *id.* at 909, 913.

214. See *id.* at 909–10.

215. See *id.* at 910. Act 292 provides immediate appointment of counsel for the *fetus*, but not for the pregnant woman. See WIS. STAT. § 48.235(1)(f). In practice, the Act fails all requisite procedural requirements—notice, a meaningful opportunity to be heard, the right to counsel when core interests are at stake—that are needed to meet due process requirements. See *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976). Further, it fails equal protection when held up to the robust procedural protections of Wisconsin’s own civil commitment statute, which affords respondents written notice, even prior to an emergency proceeding; state supported legal counsel from first notice; the right to expert testimony paid by the court; and a full hearing subject to a standard of clear and convincing evidence. See WIS. STAT. § 51.20(2)(b), (3), (9)(a)(3), (13)(e). One way to understand Act 292 is as an end run around Wisconsin’s laudable procedural protections in involuntary commitment. A person is considered a subject for a Wisconsin Chapter 51 civil commitment if the person is: (1) mentally ill, drug dependent, or developmentally disabled; (2) represents “a substantial probability of physical harm to himself or herself” or others that is evident by recent acts or omissions, attempts or threats; and (3) constitutes “a proper subject for treatment.” *Id.* § (1)(a).

216. See *Loertscher*, 259 F. Supp. 3d at 910–12.



effectively turning the hospital into a jail.<sup>217</sup> Seeing no medical reason to detain her, the hospital gave her a medical release and she went home.<sup>218</sup>

Several days later, the family court held a contempt hearing because the fetus's lawyer moved for one; to reiterate, the fetus had a lawyer and Tamara Loertscher did not.<sup>219</sup> At that hearing, Tamara Loertscher testified,

I don't feel like I need treatment. Like I feel like I went to the hospital and sought treatment and then they violated my rights and all these people got this information that I feel they shouldn't have gotten. And I feel my whole stay there was made worse.<sup>220</sup>

The court found her in contempt and "ordered her to either cooperate with the [Taylor County Department of Human Services] and go to the inpatient treatment facility, or serve 30 days in jail."<sup>221</sup> Even though the fetus's lawyer was at the initial commitment hearing and heard testimony from Ms. Loertscher's OBGYN that "her greatest concern for Ms. Loertscher's pregnancy related to Ms. Loertscher's ability to get appropriate prenatal care and to her severe hypothyroidism,"<sup>222</sup> the fetus's lawyer made no objection to sending Ms. Loertscher to jail (where she would necessarily lack ready access to prenatal care or her thyroid medication) as sanction for contempt,<sup>223</sup> evidencing the punitive rather than health-protective motivations at work.

Ms. Loertscher considered her options and went to jail.<sup>224</sup> As the federal district court later presented as fact, she spent 18 days in jail:

During that time, she did not receive any prenatal care, because the jail would not provide prenatal care if Loertscher did not submit to a pregnancy test to "confirm" her pregnancy. Loertscher experienced pain and cramping, and she feared that she may have a miscarriage. Loertscher repeatedly asked to see an obstetrician; instead, she saw the jail doctor, who was not an obstetrician. The jail doctor told Loertscher to take a pregnancy test. When she refused, jail personnel put her in solitary confinement.<sup>225</sup>

While Ms. Loertscher was in jail, after she was forced to wait for the prescription for thyroid medication to be refilled, jail staff refused to give her the medication when it arrived.<sup>226</sup> Taylor County Jail personnel told Ms. Loertscher it was okay for her to miss a dose and that this would

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217. *See id.* at 911.

218. *See id.*

219. *See id.* at 911–12.

220. *Id.* at 912.

221. *Id.* (recounting the outcome of a previous Taylor County court proceeding).

222. Plaintiff's Proposed Findings of Fact in Support of Plaintiff's Motion for Summary Judgment at 29, *Loertscher v. Schimel*, No. 3:14-cv-00870 (W.D. Wis. Nov. 10, 2016) [hereinafter *Loertscher Proposed Findings of Fact*], ECF No. 178 (citation omitted).

223. *Id.* at 36–37.

224. *See Loertscher*, 259 F. Supp. 3d at 912.

225. *Id.*

226. *Loertscher Proposed Findings of Fact*, *supra* note 222, at 38.

keep the medication on schedule.<sup>227</sup> Ms. Loertscher had always been advised by her doctors that she should take the medication as soon as possible after a missed dose, and that it is not okay to miss a dose.<sup>228</sup>

Ms. Loertscher found a list of public defenders and reached out.<sup>229</sup> A public defender was appointed and negotiated her release from jail per a consent decree.<sup>230</sup> The court then purged its finding of contempt contingent on her compliance with the consent decree.<sup>231</sup> Tamara Loertscher then went home and gave birth to a healthy baby boy.<sup>232</sup>

Loertscher sued the State of Wisconsin and Taylor County under 42 U.S.C. § 1983, seeking damages and declaratory and injunctive relief.<sup>233</sup> She argued that Act 292, facially and as applied, was unconstitutional because it was “void for vagueness and that it violate[d] her substantive due process rights, procedural due process rights, First Amendment rights, Fourth Amendment rights, and right to equal protection.”<sup>234</sup> On cross motions for summary judgment, Judge James D. Peterson of the U.S. District Court for the Western District of Wisconsin found Act 292 unconstitutional for vagueness and enjoined the statute.<sup>235</sup>

Judge Peterson offered cogent observations about Act 292, including its enactment and operation. Reflecting on the legislative deliberation, he noted:

Before the legislature passed the Act, the Wisconsin Legislative Council warned the legislature that extending the Act to “all stages of pregnancy” would render its constitutionality “*highly doubtful*.” And the Wisconsin Division of Children and Family Services (now the Department of Children and Families), the Division of Public Health’s substance abuse bureau, and the City of Milwaukee Health Department opposed the Act. Specifically, the DCFS feared that the

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227. *Id.*

228. *Id.*

229. *Loertscher*, 259 F. Supp. 3d at 912.

230. *Id.* The consent decree required that she (1) undergo an alcohol and substance abuse assessment; (2) comply with the assessment’s recommended treatment; (3) undergo and pay for weekly drug testing; (4) send the test results to the county and sign off on all necessary releases to transmit the information; and (5) sign any other releases the county requested. *Id.*

231. *See id.*

232. *See id.* at 913.

233. *See id.* at 906.

234. *Id.*

235. *See id.* at 922, 926. The district court also denied the State of Wisconsin’s motion to stay the injunction. *Loertscher v. Anderson*, No. 14-cv-870, 2017 WL 2198193, at \*2 (W.D. Wis. May 18, 2017). However, the Supreme Court granted to motion to stay the injunction pending appeal. *Anderson v. Loertscher*, 137 S. Ct. 2328 (2017). On appeal, a Seventh Circuit panel vacated the trial court’s judgment on the grounds that the case was moot because Tamara Loertscher had moved out of the state and was no longer subject to Act 292. *Loertscher v. Anderson*, 893 F.3d 386, 388, 396 (7th Cir. 2018). The district court’s analysis of the Act’s vagueness remains undisturbed, but Wisconsin Act 292 is still in operation. *See* Phoebe Petrovic, *Policing Pregnancy: Wisconsin’s “Fetal Protection” Law, One of the Nation’s Most Punitive, Forces Women Into Treatment or Jail*, WIS. WATCH (Dec. 1, 2022), <https://wisconsinwatch.org/2022/12/policing-pregnancy-wisconsins-fetal-protection-law-one-of-the-nations-most-punitive-forces-women-into-treatment-or-jail> [https://perma.cc/7MM9-C5WX].

Act would scare women away from treatment and vital prenatal care, and the City of Milwaukee Health Department opposed the Act in light of “the serious potential [the Act] has for reducing the length and quality of prenatal care in this state, thereby negatively affecting the health of mothers and children.” Both organizations were concerned that “a criminal justice approach to maternal and child health is not the best alternative, that it is destructive, and that readily available drug and alcohol treatment for expectant mothers would be preferable to threatening mothers with incarceration and loss of paternal rights.”<sup>236</sup>

Regarding evidence concerning risks<sup>237</sup> associated with substance use, the court concluded:

The reality is that both sides have adduced voluminous and, at times, conflicting evidence regarding the specific risks associated with alcohol and other substance abuse while pregnant and the efficacy of state-mandated treatment programs. But one thing remains undisputed: the experts cannot ascertain with any degree of medical certainty the precise levels of alcohol and controlled substance use that trigger a risk of serious danger to the unborn child. There appears to be a consensus that certain high levels of use pose a danger to fetal health; there are disputes about whether certain low levels of consumption pose any risk. But all agree that medical science can draw no reasonably precise line where consumption levels transition from benign to seriously risky.<sup>238</sup>

The federal district court recognized that Act 292 implicated fundamental constitutional rights including privacy, bodily integrity, and the right to medical decision-making.<sup>239</sup> It also noted that, because the Act allowed physical detention—the loss of physical liberty—it was more akin to a criminal statute than the civil one it was styled to be.<sup>240</sup> For its finding of unconstitutionality, the court focused on the vagueness of the statutory language regarding an “expectant mother” who:

habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control.<sup>241</sup>

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236. *Loertscher*, 259 F. Supp. 3d at 907 (emphasis in original) (citations omitted).

237. Another topic beyond the scope of this Article that bears noting is the difference between risks and harms, and the futility, as a matter of law or public policy, of policing pregnancy—a complex biologic process inherently risky in some sense—to reduce risk and harm when non-policing alternatives are available, could be made more available, and could meaningfully reduce the harm associated with policing while providing access to care and support for those who want it.

238. *Loertscher*, 259 F. Supp. 3d at 913–14.

239. *See id.* at 915–17.

240. *See id.*

241. *Id.* at 917 (quoting WIS. STAT. § 48.133).

Rejecting the state’s argument that dictionary definitions cured vagueness, the district court explained the Act’s ambiguities, including the impossibility of identifying what qualified as “habitual lack of self-control” or constituted a “substantial risk that the physical health of the child will be seriously affected or endangered.”<sup>242</sup> Assessing whether the statutory language gave fair notice about the conduct it proscribed and provided adequate guidance to ensure that enforcement was not arbitrary, it found the Act met neither requirement and was void for vagueness.<sup>243</sup> The court explained:

Because the jurisdictional and substantive standards of the Act are fundamentally indeterminate, those who enforce the Act are free to do so on the basis of “nothing but their own preferences and beliefs.” This unfettered discretion is particularly dangerous here because the Act authorizes such a broad range of initial enforcers—including “[a]ny person authorized to provide . . . intake or dispositional services for the court under s. 48.067 or 48.069.” Erratic enforcement, driven by the stigma attached to drug and alcohol use by expectant mothers, is all but ensured.<sup>244</sup>

While no state law or policy requires collecting data on how many people are charged under Act 292, the district court in *Loertscher* found as undisputed material fact that “[b]etween 2005 and 2014, 3,326 reports of unborn child abuse were ‘screened-in’ under the Act, and 467 of those reports were substantiated.”<sup>245</sup>

Information about Act 292’s application to at least two other pregnant persons is publicly available, and their experiences closely track Tamara Loertscher’s.<sup>246</sup> Each voluntarily sought pregnancy-related healthcare.<sup>247</sup> They lived in different counties, were reported by different individuals, and were offered differing, but ineffectual or inappropriate, treatment programs.<sup>248</sup> Each person ended up in physical custody against their will, without the immediate opportunity to speak with an attorney.<sup>249</sup>

Pregnant people who use substances or who have substance use disor-

242. *Id.* at 918–21.

243. *See id.* at 921–22.

244. *Id.* (quoting *Karlin v. Foust*, 188 F.3d 446, 465 (7th Cir. 1999) and WIS. STAT. § 48.08(3)).

245. *Id.* at 908.

246. For the story of Rachel Lowe, see David Steinkraus, *Pregnant and Addicted—Hooked on OxyContin, Woman Remains Confined as She Seeks Help for Herself, Her Unborn Baby*, J. TIMES (May 12, 2005), [https://journaltimes.com/news/local/pregnant-and-addicted-hooked-on-oxycontin-woman-remains-confined-as-she-seeks-help-for-herself/article\\_d302a479-2a58-5416-baec-0b6cef070fae.html](https://journaltimes.com/news/local/pregnant-and-addicted-hooked-on-oxycontin-woman-remains-confined-as-she-seeks-help-for-herself/article_d302a479-2a58-5416-baec-0b6cef070fae.html) [<https://perma.cc/8ZHX-FSD5>]; see also Paltrow & Flavin, 2013 Arrest Study, *supra* note 9, at 307–08. For the story of Alicia Beltran, see Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 by a Person in Custody, *Beltran v. Loenish*, 2:13-cv-01101 (E.D. Wis. Sept. 30, 2013) [hereinafter *Beltran Writ*], ECF No. 1; see also Pregnancy Just., *NAPW: The Case of Alicia Beltran*, VIMEO (2017), <https://vimeo.com/202241357> [<https://perma.cc/SK8P-V9YQ>].

247. *See* Steinkraus, *supra* note 246; *see* *Beltran Writ*, *supra* note 246, at 8.

248. *See* Steinkraus, *supra* note 246; *see* *Beltran Writ*, *supra* note 246, at 8–10.

249. *See* Steinkraus, *supra* note 246; *see* *Beltran Writ*, *supra* note 246, at 9–10.

ders may want treatment,<sup>250</sup> but Act 292 is not designed to provide or improve drug treatment availability. A 2018 report by the Pew Charitable Trusts concluded that Wisconsin’s Act 292 is a “statutory deterrent[ ]” preventing people from accessing substance use treatment or healthcare for their pregnancies.<sup>251</sup> The Pew report concluded that Act 292 “potentially puts pregnant women and their child at greater risk of harm than they would be if this policy did not exist.”<sup>252</sup>

Like the other cases and stories discussed in this Article, Wisconsin Act 292 and Tamara Loertscher’s experience indicate that criminalizing pregnancy is so targeted and destructively counter-productive that it supports an inference that discrimination is at work. Tamara Loertscher sought pregnancy-related healthcare and ended up policed, jailed, and denied access to the healthcare she wanted. This is in no one’s best interest. Of course, that is not the point of laws like Act 292, regardless of the ends they purport to serve. Indeed, while Act 292’s language is vague for compliance and enforcement purposes, it communicates fear, stigma, and moral disapproval quite clearly—referring to an “expectant mother” who “habitually lacks self-control.” Act 292 also is, as the district court concluded, standardless<sup>253</sup> and therefore a vessel for fear, moral disapproval, and discriminatory “common sense” like that relied on in *Whitner, Mc-Knight*, and Alabama’s ACCEA enforcement.<sup>254</sup>

## V. REFLECTIONS ON CORRECTING LEGAL WRONGS IN RELATION TO POLICING AND CRIMINALIZING PREGNANCY

We reflect here on the decisions and ideas discussed in this Article to explore—and in some instances amplify—existing strategies for resisting pregnancy criminalization and diminished informed consent as the state interest in fetal life gets more weight post-*Dobbs*. The current composition of the U.S. Supreme Court and some federal and state courts is doubtless hostile to many of these ideas. Still, naming and mapping the wrongfulness of relying on pregnancy to criminalize and deny medical decision-making authority to people is essential for curing the state-spon-

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250. See Mishka Terplan, Shaalini Ramanadhan, Abigail Locke, Nyaradzo Longinaker & Steve Lui, *Psychosocial Interventions for Pregnant Women in Outpatient Illicit Drug Treatment Programs Compared to Other Interventions*, COCHRANE DATABASE SYS. REV., Apr. 2015, at 6, <https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD006037.pub3/full> [<https://perma.cc/GNC5-SDU3>] (“Pregnancy can be considered as a ‘window of opportunity’ for drug treatment intervention. Maternal concern for the pregnancy has been thought of as a motivator to seek drug treatment.” (citations omitted)).

251. PEW CHARITABLE TRS., *SUBSTANCE USE DISORDER TREATMENT POLICY RECOMMENDATIONS FOR THE STATE OF WISCONSIN* 39 (2018).

252. *Id.*

253. See *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 921 (W.D. Wis. 2017), *vacated*, 893 F.3d 386 (7th Cir. 2018) (stating the Act does not “provide meaningful standards for enforcement”).

254. See *supra* Part III.

sored harms and subordinating distortions of rights documented in this Article.

A. REFLECTIONS ON LINKING ANIMUS THEORIES TO CRIMINALIZING PREGNANCY

The decisions and stories in this Article show that criminalizing pregnancy does not protect anyone. It treats pregnant people differently from other people, and it treats pregnant substance users differently from other pregnant people. That different treatment frustrates, rather than relates to, any state interest in fetal life (or parental life and health). Advocates have long made equal protection arguments in connection with criminalizing pregnancy, challenging the different treatment as sex-based, status-based, and irrational. These are important, serious arguments. Linking these equality arguments to animus doctrine may help capture the legal significance of consistent features of criminalizing pregnancy. A finding of animus may mean stricter tiered scrutiny, whether rational basis or intermediate, or may cut straight to a conclusion of unconstitutionality because a finding of animus indicates invidious discrimination.<sup>255</sup>

Features of pregnancy criminalization relevant to animus are: conspicuous lack of a means-ends connection between criminalization and protecting fetal life; lax procedural and evidentiary standards like jailing, charging, and convicting people based on unconfirmed, destroyed test results; jailing people without legal process or counsel; or keeping pregnant people in jail based on unmeetable bond conditions.<sup>256</sup> Expressions of fear, stigma, and morality regarding drug use and parenthood also are consistent features of criminalizing pregnancy. In *McKnight* and *Whitner*, so-called common sense and public knowledge and statements about the social ills of drug use substituted for legal conclusions about intent and causation.<sup>257</sup> The *McKnight* court acknowledged that “the precise effects of maternal crack use during pregnancy are somewhat unclear . . . .”<sup>258</sup> But it affirmed Regina McKnight’s conviction for homicide by child abuse anyway. The *McKnight* court described cocaine as having “torn at the very fabric of our nation”<sup>259</sup>—a lament about societal decay not unlike the worries expressed in laws treating so-called hippies,<sup>260</sup> same-sex

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255. See Pollvogt, *supra* note 11, at 889 (describing animus as a “silver bullet”); Araiza, *supra* note 11, at 179–80 (commenting that Pollvogt correctly concludes that “animus must be understood as a per se constitutional wrong rather than, say, as a trigger for heightened scrutiny of some sort”).

256. See, e.g., *Loertscher*, 259 F.Supp.3d at 910–11 (recounting a telephonic hearing from which Tamara Loertscher was absent and at which she was not represented by counsel, where the judge ordered that Loertscher must stay in temporary physical custody at the Mayo Clinic and then at an inpatient drug treatment program “until the program directors deem it appropriate to release her” (citation and quotation omitted)).

257. See *State v. McKnight* 576 S.E.2d 168, 173 (S.C. 2003); *Whitner v. State*, 492 S.E.2d 777, 782 (1997).

258. *McKnight*, 661 S.E.2d at 173 (citing *Whitner*, 492 S.E.2d at 782).

259. *Id.* (citation and quotation omitted).

260. See generally *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).

couples,<sup>261</sup> and people with disabilities<sup>262</sup> differently based on unconstitutional animus. Fear, stigma, and morality also figure prominently into the law under which Tamara Loertscher was jailed. Key statutory terms of Wisconsin Act 292—an “expectant mother” who “habitually lacks self-control”—evoke a gendered fear of dysregulated parents.<sup>263</sup> Finally, a consistent result of criminalizing pregnancy relevant to animus is that it creates a sub-class of pregnant people who are excluded from equal access to parenthood based on their status and “living choices”<sup>264</sup> by some combination of jail, stigma, or child welfare.<sup>265</sup>

As to the lack of means-ends connection that can help support an inference of animus, it is true that government gets it wrong a lot, and is allowed to. But the cases in this Article show that government is not getting it wrong by mistake. Something else is at work. The gap between means and ends, together with the expressions of fear, moral disapproval, and stigma that pepper decisions to criminalize pregnancy, show a desire to punish a disfavored group. It is also relevant that the harms and distortions that result from the gap between means and ends are enormous. The harms include death,<sup>266</sup> diminished health, and separation of families via jail and foster care. The distortions are striking: people are killed in the name of saving life; people are jailed and denied healthcare<sup>267</sup> and separated from existing children<sup>268</sup> in the name of fetal/familial protection; people are convicted of murder without evidence of causation;<sup>269</sup> patients are foreseeably prosecuted for tests they thought were routine healthcare.<sup>270</sup> To reiterate much of the above, all of these factors—the failed means-ends connection and the resulting harms and distortions, as well as the roles of stigma, fear, and morality in enforcement—hook into theories of legal animus.<sup>271</sup> As Cornelia Whitner said from Leath Correctional Institute, “It’s a drug problem. I just don’t think I deserve prison.”<sup>272</sup> Criminalizing people because their living choices are disfavored and evoke fears about dangerousness, but are not clearly harmful

261. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

262. See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

263. See WIS. STAT. § 48.133.

264. See Araiza, *supra* note 11, at 203.

265. See generally *Obergefell*, 576 U.S. 644 (identifying harm of exclusion from a social good as relevant to conclusion of unconstitutionality).

266. See *In re A.C.*, 573 A.2d 1235, 1237 (D.C. Cir. 1990) (en banc).

267. See *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 912 (W.D. Wis. 2017), *vacated*, 893 F.3d 386 (7th Cir. 2018).

268. See *Levinson*, *supra* note 61.

269. See *McKnight v. State*, 661 S.E.2d 354, 356, 358 (S.C. 2008).

270. See generally *Stress Effects on the Body*, AM. PSYCH. ASS’N (Mar. 8, 2023), <https://www.apa.org/topics/stress/body> [<https://perma.cc/5WXF-YFA9>]; Linda Villarossa, *Why America’s Black Mothers and Babies Are in a Life or Death Crisis*, N.Y. TIMES (Apr. 11, 2018), <https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html> [<https://perma.cc/UG6X-RMFK>].

271. See generally Pollvogt, *supra* note 11 (defining and theorizing on judicial findings and recognitions of animus that this Article employs in the relationship to policing and criminalizing pregnancy); Araiza, *supra* note 11.

272. *Levinson*, *supra* note 61.

or causally related to what is being punished,<sup>273</sup> gives discrimination the force of law; this is the essence of what equal protection guarantees forbid.<sup>274</sup>

B. REFLECTIONS ON THE “SIMILARLY SITUATED” COMPONENT OF  
EQUAL PROTECTION: THE CRIMINALIZED MICRO-  
ENVIRONMENT OF THE WOMB AND THE DE-  
CRIMINALIZED, ENVIRONMENTALLY  
TOXIC MACRO-ENVIRONMENT

Courts sometimes dismiss equal protection claims without reaching their constitutional merits at the “similarly situated” stage, concluding either that the litigant got the relevant groups wrong, or that no group is “similarly situated” to the allegedly burdened group in view of the purpose of the challenged law. This second conclusion, that no one is similarly situated to substance-using pregnant people, is worth addressing; while it may have superficial appeal, it is false.

Whether pregnancy is unique and when the law should recognize its uniqueness is well beyond the scope of this Article. But as to equal protection arguments regarding pregnancy criminalization, the question is whether groups are similar in view of the purpose of the challenged law. Where a law aims to protect fetal life or express the state interest in fetal life, we submit that substance-using pregnant people are similar to all pregnant people because all pregnant people in the United States are perniciously substance-exposed via environmental toxicity.<sup>275</sup> This is especially true and increasingly well-documented for people who live in communities—often as a result of redlining—where environmental toxicity is highest and most dangerous.<sup>276</sup> Substance-using pregnant people are not unique, just uniquely punished.

The idea that substance-using pregnant people are similar to no one includes a racialized fiction about pregnancy and maternal/parental-fetal bodies, namely that they are a bulwark against “substance exposure” if

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273. Research shows that there are no clear harms from prenatal exposure to cocaine, methamphetamine, or opioids, and scholarship documents that policing and criminalizing pregnancy in relation to those drugs reflects persistent fears stoked by the war on drugs about so-called “crack babies.” See Bridges, *supra* note 4, at 815–19, 834; see generally Ehrlich, *supra* note 56. Importantly, the irrationality of laws and policies that police and punish pregnancy is not about lack of fetal harm attributable to criminalized substances. The irrationality would persist even if harm were established because policing and criminalizing pregnancy is detrimental to the families, communities, and maternal bodies it purports to be helping. See, e.g., Boone & McMichael, *supra* note 200, at 504–05, 513–14.

274. See Roberts, *supra* note 4, at 1433–34, 1471–72; FENTIMAN, *supra* note 8, at 410.

275. See, e.g., Eric Lipton, *Living and Breathing on The Front Line of a Toxic Chemical Zone*, N.Y. TIMES (May 5, 2023), <https://www.nytimes.com/2023/05/05/us/politics/toxic-chemicals-restrictions-biden.html?smid=NYtcore-ios-share&referringSource=ArticleShare> [<https://perma.cc/N8HN-BGVH>].

276. See, e.g., Merrit Kennedy, *Lead-Laced Water in Flint: A Step-By-Step Look at the Makings Of a Crisis*, NPR (April 20, 2016), <https://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis> [<https://perma.cc/2YGX-HGPY>].



only the pregnant person has sufficient “self-control.”<sup>277</sup> Inherent in the concept of a “substance exposed” fetus or baby is the concept of a “pure” one. But pregnant people, and their babies and fetuses, are relentlessly exposed to environmental toxins in utero,<sup>278</sup> and this is attributable to state-sanctioned and encouraged consumer and business environmental practices.<sup>279</sup> These exposures happen through personal care products, menstrual products, food, air, water, containers, cars, mattresses, clothing, toys, home building materials, and myriad other products people interact with daily.<sup>280</sup> These exposures also happen as a result of drilling sites for oil and gas and shale development. Studies suggest a correlation between adverse birth outcomes, such as low birth weight, and living close to oil and gas drilling and shale gas development sites, which are abundant in many places and particularly in Texas (one of the harshest anti-abortion states in the United States).<sup>281</sup> Based on 23,487 birth records in Texas’s Eagle Ford Shale region between 2012 and 2015, one study examined the impact of proximity to flaring events (flaring is a process to burn off extra natural gas when oil and gas are being collected, produced, and transported) on birth outcomes.<sup>282</sup> Pregnant people exposed to a “high level of flaring” had “50% higher odds of preterm birth . . . and shorter gestation . . . .”<sup>283</sup> A National Institute of Health study on methamphetamine exposure in utero found no adverse health outcomes beyond correlation with lower birth weights and shorter gestation;<sup>284</sup> the same outcome as for people living near flaring events. A study also found that parents who identified as Hispanic or Latina “were exposed to more

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277. See, e.g., 1997 Wisconsin Act 292, WIS. STAT. § 48.133.

278. See, e.g., Laura Kurtzman, *Study Finds Wide Exposure to Environmental Toxins in Cohort of Pregnant Women*, OBGYN & RS MATERNAL-FETAL MEDICINE (Nov. 2, 2016), <https://obgyn.ucsf.edu/news/toxic-chemicals-pregnant-women-and-their-newborns> [<https://perma.cc/KE7S-5FY8>].

279. See Goodman, *supra* note 71. See generally *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2616 (2022) (reducing the EPA’s ability to regulate states’ carbon emissions).

280. See, e.g., Knvul Sheikh, *Many Personal Care Products Contain Harmful Chemicals. Here’s What To Do About It.*, N.Y. TIMES (Feb. 24, 2023), <https://www.nytimes.com/2023/02/15/well/live/personal-care-products-chemicals.html> [<https://perma.cc/FP66-RDXR>]; *Personal Care Products*, ENV’T WORKING GRP., <https://www.ewg.org/ewgverified/personal-care.php> [<https://perma.cc/W4RB-FQ7E>]; Dana G. Smith, *Common Consumer Products Contain Multiple Toxic Chemicals, New Study Shows*, N.Y. TIMES (May 3, 2023), <https://www.nytimes.com/2023/05/03/well/live/consumer-products-toxic-chemicals.html> [<https://perma.cc/4MH5-3ZG3>].

281. See, e.g., Irena Gorski & Brian S. Schwartz, *Environmental Health Concerns From Unconventional Natural Gas Development*, GLOB. PUB. HEALTH (Feb. 25, 2019), <https://doi.org/10.1093/acrefore/9780190632366.013.44> [<https://perma.cc/AZ39-P4NP>].

282. See Lara J. Cushing, Kate Vavra-Musser, Khang Chau, Meredith Franklin & Jill E. Johnston, *Flaring from Unconventional Oil and Gas Development and Birth Outcomes in the Eagle Ford Shale in South Texas*, 128 ENV’T HEALTH PERSPS. 1 (2020).

283. *Id.* at 4.

284. See Tricia E. Wright, Renee Schuetter, Jacqueline Tellei & Lynnae Sauvage, *Methamphetamines and Pregnancy Outcomes*, 9(2) J. ADDICT MED. 1, 1 (2015) (studying 144 infants exposed to methamphetamine during pregnancy and a methodology to control for confounding variables and concluding that “methamphetamine use during pregnancy is associated with [not a clear causal factor in] shorter gestational ages and lower birth weight, especially if used continuously during pregnancy”).

flaring . . . than White parents . . .”<sup>285</sup> Reporting on the study, one article observed, “Despite the high level of flaring that’s occurring in the U.S. and in Texas, there are few federal or state regulations on the practice, and most of the data on flares is sporadically self-reported by the industry.”<sup>286</sup>

A similar study focusing on pregnant people in Pennsylvania examined the connection between birth outcomes and living near heavy “unconventional gas drilling,” i.e., fracking.<sup>287</sup> Examining 15,451 live births between 2007 and 2010, the study found that the most exposed pregnant people had babies who were more likely to be small for gestational age and have lower birth weight than the least exposed.<sup>288</sup> And through redlining, oil and gas drilling is concentrated in predominantly Black and Latinx communities, meaning that these environmental exposures happen more persistently in communities of color, which abundant research and scholarship establishes are more highly policed in the first place.<sup>289</sup>

The baseline environmental toxicity to which all pregnant people are exposed makes clear that substance-using pregnant people are not a unique class exposing fetuses to substances. These two groups are similarly situated in view of laws rooted in a state interest in fetal life. Criminalizing only pregnant people while enabling and incentivizing similar or worse substance exposure is unequal treatment lacking even a rational basis. To be sure, government failure to solve all problems at once does not always support an inference or conclusion of irrationality, but policing and criminalizing pregnant people while allowing, and sometimes deregulating, environmental toxins is unjustifiably irrational in a system that values fetal life so highly that it justifies jailing and terrorizing pregnant people and separating them from their families. As the climate crisis and environmental toxicity mounts, the motivations underlying states’ punitive fixation on the womb as a potentially toxic micro-environment controlled entirely by the pregnant person comes into clearer view as discriminatory and hypocritical. Across movements, advocates must continue to develop arguments that pregnant people are not unique and equality arguments are not unavailing, particularly when claims relate to criminalizing pregnant people for substance use.

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285. Kristina Marusic, *Babies Born Near Natural Gas Flaring are 50 Percent More Likely to be Premature: Study*, ENV’T HEALTH NEWS (July 16, 2020), <https://www.ehn.org/fracking-preterm-births—2646411428.html> [<https://perma.cc/3YMB-GRC5>].

286. *Id.*

287. Shaina L. Stacy, LuAnn L. Brink, Jacob C. Larkin, Yoel Sadovsky, Bernard D. Goldstein, Bruce R. Pitt & Evelyn O. Talbott, *Perinatal Outcomes and Unconventional Natural Gas Operations in Southwest Pennsylvania*, PLOS ONE, June 3, 2015, at 1.

288. *Id.*

289. See Darryl Fears, *Black, Latino Communities Have a Higher Level of Oil Drilling and Pollution*, WASH. POST (April 15, 2022), <https://www.washingtonpost.com/nation/2022/04/15/redlined-oil-drilling-pollution-study> [<https://perma.cc/8VT2-RMLA>].

C. REITERATING THAT PREGNANCY DOES NOT DIMINISH  
FUNDAMENTAL RIGHTS TO BODILY INTEGRITY AND  
INFORMED CONSENT TO HEALTHCARE

After the forced caesarean section tragedy of *In re A.C.*, the District of Columbia Court of Appeals en banc scrutinized the decisional process and concluded that patient informed consent should always guide medical treatment decision-making, even if the patient is pregnant or unable to express their wishes.<sup>290</sup> That is the only principled way to guide medical treatment decision-making. Any other approach decouples the medical decision-making process from the person who will live (or die) with the outcome and who, of course, has the most knowledge and understanding of what living or dying might mean.

The premise underlying *Whitner*, *McKnight*, *Ferguson*, the ACCEA, and 1997 Wisconsin Act 292, that concern for the fetus should disrupt the pregnant patient's informed consent, extracts medical treatment decision-making from the solid grounding that patient-provider communication brings to complex medical treatment. The illogical, apparently fear-driven outcomes we observe in those instances should be no surprise. The only guidance offered—fetus comes before pregnant person—replaces the meaningful information inherent in the informed consent process with a meaningless priority.

Advocates should be—and already are<sup>291</sup>—organizing to demand unwavering, robust informed consent procedures for all pregnant people. Informed consent procedures must be developed with cultural humility and in conversation with the people and communities to whom this right has long been denied. This is because access to informed consent is not equally distributed, and it has long been weak or nonexistent for people and communities whose healthcare intersects with poverty and public insurance,<sup>292</sup> racism,<sup>293</sup> and other forms of discrimination. As laws and policies that treat eggs, embryos, and fetuses as people are enacted and enforced, efforts to legislate the view that pregnancy is a forfeiture of decisional autonomy—advanced by Judge James A. Belson, dissenting in part in *In re A.C.*<sup>294</sup>—will proliferate. Many states already have laws that void patient advance directives if the patient is pregnant.<sup>295</sup> Where fed-

290. See *In re A.C.*, 573 A.2d 1235, 1252–53 (D.C. Cir. 1990) (en banc).

291. Coalitions in New York and elsewhere are developing such best practices. See, e.g., *Family Separation in the Hospital Setting*, MOVEMENT FAM. POWER, <https://www.movementforfamilypower.org/reimagine-support> [<https://perma.cc/R5TY-MVS6>].

292. See KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 86–87 (2017).

293. See generally *Madrigal v. Quilligan*, No. cv-75-2057 (C.D. Cal. June 7, 1978), *aff'd*, 639 F.2d 789 (9th Cir. 1981) (class action involving sterilization of Latina women and people capable of pregnancy performed without consent); Roberts, *supra* note 4, at 1432, 1461; Bridges, *supra* note 4, at 834.

294. See *In re A.C.*, 573 A.2d 1235, 1256–58 (D.C. Cir. 1990) (en banc) (Belson, J., concurring in part and dissenting in part) (arguing that a woman has effectively forfeited her autonomy when she becomes pregnant and must expect that the interests of the fetus might be placed before her own).

295. See Katherine Taylor & Lynn Paltrow, *It's Time to Repeal State Advance Directive Laws That Discriminate Against Women*, REWIRE NEWS GRP. (Apr. 10, 2014, 5:41 PM),

eral constitutional guarantees of bodily integrity and medical decision-making are enforceable (i.e., if the hospital is public or satisfies a public-function test), these denials should be subject to heightened scrutiny, because the right to bodily autonomy is fundamental. The same is true of states that follow or provide more protections than the U.S. Constitution. Advocates can work to incorporate these guarantees, and appropriate definitions of places of public accommodation, into state and local codes like human rights laws, so that all healthcare providers are covered by them. In all cases, the law of informed consent demands that patient decisions control the patient-provider relationship, and that the rule of substituted judgment applies where a patient cannot decide.<sup>296</sup>

Pregnancy is not an exception to these guarantees. Pregnancy-related healthcare cannot be forced just because a provider or the state thinks it is a good idea or distrusts the patient.<sup>297</sup> Whether in relation to birth, drug testing, maternal or newborn medical treatment, or any other pregnancy-related healthcare, patients' informed consent must: be obtained and enforced in circumstances when patients can receive and give information; be culturally competent; be transparent about mandatory reporting and criminalization; and include enforceable guarantees of non-retaliation and options for alternative treatments for patients who do not consent to treatment.<sup>298</sup> Reaffirming the essential role of informed consent in medical treatment processes restores medical confidentiality and trust, which are gravely disrupted for pregnant people at this point in time.

In some cases like *In re A.C.*, the patient may be unable to give consent,<sup>299</sup> but more commonly, the patient's informed consent is overridden or not obtained to impose the "right" medical decision. The illusion that someone other than the patient can determine the "right" treatment is often an expression of medical racism and misogyny, whether it impacts Black, Brown, Indigenous, or White parents.<sup>300</sup> Yet, courts routinely invoke state interest in the fetus recognized in abortion law to justify in-

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<https://rewirenewsgroup.com/2014/04/10/time-repeal-state-advance-directive-laws-discriminate-women> [<https://perma.cc/M74D-JUC3>].

296. As with all standards where "competency" and "capacity" to make decisions are incorporated, racism, sexism, ableism, and myriad other forms of discrimination abound in essential threshold judgments. These normative claims about the law of informed consent are not intended to diminish the reality that informed consent, like all legal protections, has not been equally robust for all people. We state these claims in the strongest terms because we seek to make normative demands rooted in what the law guarantees, rather than in the anemic forms it has sometimes been allowed to operate.

297. The right to bodily integrity in medical decision-making is subject to certain judicially-recognized exceptions, including harm to third parties, but equating fear of harm to a fetus with certain harm to third parties is not an appropriate exception to bodily integrity in medical decision-making. See Brief of National Advocates for Pregnant Women et al. as Amici Curiae in Support of Plaintiff Rinat Dray at 6–7, *Dray v. Staten Island Univ. Hosp.*, No. 500510-2014 (N.Y. Sup. Ct. Dec. 23, 2014).

298. See generally *Family Separation in the Hospital Setting*, *supra* note 291 (discussing informed consent to treatment for pregnant people).

299. See *In re A.C.*, 573 A.2d at 1240–41.

300. See *Bridges*, *supra* note 4, at 833–36.

fringing upon pregnant patients' fundamental right to bodily integrity and informed consent.<sup>301</sup> This is illegal and bad medicine.

As *Ferguson* and *Whitner* show, informed consent to drug testing is an area of critical concern as to newborns as well.<sup>302</sup> It is common practice to drug test a newborn's urine, meconium, or blood for purported medical purposes.<sup>303</sup> The results of these drug tests can involve child welfare and law enforcement in the family's life. Serious arguments can be developed about the illegality—under federal and state constitutional law—of drug testing newborns to obtain evidence that will be used to incriminate a parent in family court or in a criminal proceeding.<sup>304</sup> Parents generally do not have Fourth Amendment rights in third parties, including their children, though they can make claims on behalf of their children. However, we submit that in the immediate postpartum period, because the newborn's body holds information about the parent's body, a search of the baby is a search of the parent.<sup>305</sup> Given this physiological reality—the newborn is effectively a satellite of the parent—drug testing newborns when the results of that drug test can result in policing and criminalizing their parents is an unconstitutional end run around the Fourth Amendment. Searching a newborn's body for evidence to incriminate a parent

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301. See *In re A.C.*, 573 A.2d at 1243 (citing *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981) (per curiam) (ordering that caesarean section be performed on a woman in her thirty-ninth week of pregnancy to save both the mother and the fetus)); *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537, 537–38 (N.J. 1964) (per curiam) (ordering blood transfusions over the objection of a Jehovah's Witness in her thirty-second week of pregnancy to save her life and that of the fetus); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 899–900 (N.Y. Sup. Ct. 1985) (ordering the transfusion of blood to a Jehovah's Witness eighteen weeks pregnant, who objected on religious grounds, and finding that the state's interest in the not-yet-viable fetus outweighed the patient's interests); *Crouse Irving Mem'l Hosp., v. Paddock*, 485 N.Y.S.2d 443, 444–45 (N.Y. Sup. Ct. 1985) (ordering transfusions over religious objections to save the mother and a fetus that was to be prematurely delivered); *Dray v. Staten Island Univ. Hosp.*, No. 500510-2014, 2019 WL 13079315, at \*6 (N.Y. Sup. Ct. 2019) (“New York trial courts have found that this interest in the well being of a viable fetus is sufficient to override a mother's objection to medical treatment, at least where the intervention itself presented no serious risk to the mother's well being.” (collecting sources)).

302. See *supra* Part III.A; *Ferguson v. City of Charleston*, 532 U.S. 67, 70–73 (2001); *Whitner v. State*, 492 S.E.2d 777, 778–79 (S.C. 1997).

303. See Hayley R. Price, Abby C. Collier & Tricia E. Wright, *Screening Pregnant Women and Their Neonates for Illicit Drug Use: Consideration of the Integrated Technical, Medical, Ethical, Legal, and Social Issues*, 9 FRONTIERS IN PHARMACOLOGY 1, 1–2 (2018).

304. See generally *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (stating that the reasonableness of a Fourth Amendment search “depends on the context within which a search takes place”); *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999) (finding violation of Fourth Amendment rights where a social worker and a police officer entered a home without consent and interviewed and examined children); *Greene v. Camreta*, 588 F.3d 1011, 1030 (9th Cir. 2009) (holding that a social worker and sheriff deputy violated the Fourth Amendment when they seized and interrogated a child at school without parental consent), *vacated as moot*, *Camreta v. Greene*, 563 U.S. 692 (2011) (*vacated as moot* because the child in the case was no longer in need of protection due to her age and relocation).

305. See generally *Ferguson*, 532 U.S. at 85–86 (holding that hospital staff conducting drug tests on newborn babies after birth for potential criminal prosecutions violated the Fourth Amendment because they did so without the consent of the mother).

without a warrant or consent violates the Fourth Amendment.<sup>306</sup>

One challenge for advocates has been claims that parent or newborn drug tests are primarily for medical purposes, and their later use in criminal or civil child welfare proceedings is ancillary.<sup>307</sup> If the medical purpose is credited as the primary purpose for the test, it can sometimes launder the law enforcement purpose and the required Fourth Amendment protections.<sup>308</sup> These decisions are too formalistic, reasoning that the test is medical because a healthcare provider performed it. Advocates should be prepared to probe what, if any, medical treatment consistently follows from these drug tests and also to establish that mandatory reporting is a factor in this medical scenario. Such testing is done out of habit or fear rather than a genuine treatment plan that would depend on certain test results. For example in cases where medical treatment for withdrawal symptoms in a newborn is appropriate, the need for such treatment can be ascertained based on observable symptoms that develop after birth;<sup>309</sup> drug tests are unnecessary. In this way, the tests in a mandatory reporting medical context are inherently investigatory of the parent. In addition, the best treatment for a newborn exposed to substances is often skin-to-skin contact and breastfeeding (where that is a chosen nutrition support), but a positive drug test often means parent and baby are separated,<sup>310</sup> disrupting the much-needed nurturant contact. Finally, as discussed more below, tests frequently have multiple concurrent purposes so positing a medical one does nothing to disprove the existence of a law enforcement one.

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306. *See id.* at 85 (“[W]hen [hospital staff] undertake to obtain such evidence from their patients for the specific purpose of incriminating those patients, they have a special obligation to make sure that the patients are fully informed about their constitutional rights.” (emphasis in original)); *see also Calabretta*, 189 F.3d at 817.

307. *See, e.g., Estiverne v. Esernio-Jenssen*, 910 F. Supp. 2d 434, 438 (E.D.N.Y. 2012) (noting that doctors ordered additional testing on nine-month-old to identify any other injuries, and secondarily because “the results of such testing could reflect whether abuse or neglect was occurring”).

308. *See, e.g., V.S. v. Muhammad*, No. 07-cv-213, 2011 WL 4434216, at \*37–38 (E.D.N.Y. Sept. 22, 2011) (denying a parent’s Fourth Amendment challenge to medical tests performed on their child because the challenged child abuse tests had a medical, non-investigatory purpose; “there is unchallenged evidence: that a private medical professional, exercising medical judgment, would—as the medical defendants say they did here—order these exams as part of a diagnostic workup without regard to” the child abuse claims); *Simmons v. Mason*, No. 17-cv-8886, 2019 WL 4525613, at \*5 (S.D.N.Y. Sept. 18, 2019) (“Where blood or urine samples are taken for medical purposes, rather than to facilitate prosecution of the patient, the Fourth Amendment is not implicated.”); *Estiverne*, 910 F. Supp. 2d at 443 (considering a parent’s Fourth Amendment challenge to radiological tests performed on their son without their consent after he was admitted and treated for a wrist injury and finding that, because the tests were “motivated by at least a partial medical purpose,” they did not constitute state action by the physicians); *Kia P. v. McIntyre*, 235 F.3d 749, 752, 756–57 (2d. Cir. 2000) (deciding that holding an infant for nine days and performing a drug test on her was medically necessary care because of the child’s “tremors and irritability,” a need to monitor symptoms during a symptomatic window, and a long wait for methadone test results).

309. *See, e.g., Kia P.*, 235 F.3d at 752 (“[A]n infant’s methadone withdrawal can take a minimum of one week to manifest itself.”).

310. *See id.*; *see also Ferguson*, 308 F.3d at 390–93.

D. SEARCHES OF PREGNANT AND POSTPARTUM PEOPLE FOR  
SUBSTANCE USE DURING PREGNANCY WHERE A LAW  
ENFORCEMENT PURPOSE IS OBJECTIVELY  
FORESEEABLE

Related to the above Part C, advocates can clarify that the *Ferguson* decision—and decisions applying it—is not limited in the way the *McKnight* court applied it. Regina McKnight argued her urine test results should have been suppressed because they were taken in violation of the Fourth Amendment under *Ferguson*.<sup>311</sup> But the South Carolina Supreme Court said *Ferguson* did not apply because *McKnight* was “distinguishable.”<sup>312</sup> This conclusion ignored essential similarities of constitutional significance between *McKnight* and *Ferguson*. The *McKnight* court’s constrained reading of *Ferguson* fails to grasp *Ferguson*’s core logic, and privileges form (whether an identical drug testing policy existed) over substance (whether law enforcement involvement was foreseeably inevitable) to unconstitutional ends.

*Ferguson* is the leading Supreme Court decision on Fourth Amendment protections related to drug testing pregnant patients.<sup>313</sup> The constitutional question in *Ferguson* was whether drug testing pregnant patients without their consent and reporting results to the police satisfied the “special needs” exception to the Fourth Amendment.<sup>314</sup> This exception applies when a search or seizure is justified by “special needs” beyond normal law enforcement, relaxing the usual requirements of consent or a warrant and probable cause.<sup>315</sup> The public hospital drug tested patients pursuant to a drug testing policy developed together with law enforcement.<sup>316</sup> The hospital claimed the programmatic purpose of the policy was to encourage substance-using pregnant and postpartum people to seek treatment through the threat of law enforcement, and that it therefore served a “special need.”<sup>317</sup> The Court disagreed, concluding that *Fer-*

311. See *State v. McKnight*, 576 S.E.2d 168, 178 (S.C. 2003).

312. See *id.* at 179.

313. See Samantha Weyrauch, *Inside the Womb: Interpreting the Ferguson Case*, 9 DUKE J. GENDER L. & POL’Y 81, 81–85 (2002).

314. See *Ferguson*, 532 U.S. at 69–70, 76 (holding only that nonconsensual urine tests violated the Fourth Amendment).

315. See *id.* at 74–76.

316. See *id.* at 69–72.

317. See *id.* at 72, 76. Abundant evidence shows that the threat of law enforcement and law enforcement involvement in pregnancy is harmful, and that policing pregnancy via healthcare providers is bad medicine that harms pregnant people. See *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period*, ACOG (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/8R7Y-Z6YR>]. For example, in 2017, the Wisconsin Medical Society, American Medical Association (AMA), American College of Obstetricians and Gynecologists (ACOG), American Academy of Addiction Psychiatry (AAAP), American Academy of Pediatrics (AAP), American Medical Women’s Association (AMWA), American Nurses Association (ANA), American Public Health Association (APHA), American Society of Addiction Medicine (ASAM), and Wisconsin Society of Addiction Medicine (WISAM) all joined together to argue that scientific, medical, and public health experts

guson’s warrantless searches were not “special needs” searches because the primary purpose of the search policy was law enforcement.<sup>318</sup> The Court held that the special needs exception did not apply and, importantly, that because the law enforcement involvement was not inadvertent and the tests had a “specific” law enforcement purpose, Fourth Amendment strictures must apply.<sup>319</sup> This second conclusion is important. The Court reasoned that the inevitable threat of law enforcement flowing from the tests required Fourth Amendment strictures, and remanded on the issue of consent.<sup>320</sup>

As to what made *Ferguson* distinguishable, the *McKnight* court reasoned that *Ferguson* did not apply to Regina McKnight’s urine toxicology test because: (1) the test was not conducted pursuant to a policy developed with the police, (2) hospital staff was not required to turn the results over to law enforcement, and (3) McKnight consented to the test.<sup>321</sup> Each of these conclusions contains errors in interpreting *Ferguson* and are discussed in turn below.

*McKnight*’s first conclusion about lack of a policy like the one in *Ferguson* makes too much of the *Ferguson* policy as it pertained to the holding that Fourth Amendment strictures applied. *Ferguson* concluded—without much reference to the policy, which was the subject of its “special needs” analysis—that Fourth Amendment strictures apply to drug test that have a non-inadvertent and “specific” law enforcement purpose.<sup>322</sup> Under *Ferguson*, Fourth Amendment strictures are needed even if no policy exists but it is foreseeably likely that the results of a drug test will go to law enforcement. The Court contrasted this conclusion with the scenario in which health care providers “inadvertently” found evidence of a crime and had to report it.<sup>323</sup> The lodestar of this analysis is not whether a policy existed or was developed with law enforcement, but that evidence—the urine test results—was collected by healthcare professionals for the “specific” non-inadvertent purpose of going to police. As the decisions and stories in this Article show, it is objectively foreseeable and not inadvertent that a positive drug test will result in punishment and criminalization. It is also a reality of healthcare that blood and urine tests have multiple purposes, so that a test can have a “specific” law enforcement purpose in a jurisdiction where the objective realities make that outcome non-inadvertent, even if it simultaneously has other more benign purposes. *Ferguson* does not tether Fourth Amendment strictures to a “pri-

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“are unequivocal in their opposition” of laws that mandate state intervention into pregnancy. See Brief of Wisconsin Medical Society et al. as Amici Curiae Supporting Plaintiff-Appellee, *Loertscher v. Anderson*, 893 F.3d 386 (7th Cir. 2018) (No. 17-1936), ECF No. 47.

318. See *Ferguson*, 532 U.S. at 81–84.

319. See *id.* at 74, 83–85.

320. *Id.* at 84–86.

321. *State v. McKnight*, 576 S.E.2d 168, 179 (S.C. 2003).

322. See *Ferguson*, 532 U.S. at 68–69 (“The fact that positive tests results were turned over to the police . . . provides an affirmative reason for enforcing the Fourth Amendment’s strictures.”).

323. See *id.* at 84–85.



mary purpose”; that part of the Court’s analysis pertains to the “special needs” question regarding the programmatic purpose for the searches.<sup>324</sup>

In *Ferguson*, the development and terms of the hospital’s policy made law enforcement involvement especially obvious. But situations abound in which law enforcement is entrenched in hospitals, and police-health-care-child welfare are so entangled that they are doing the same thing as in *Ferguson* for Fourth Amendment purposes, regardless of whether there is a policy. These situations cannot reasonably escape Fourth Amendment requirements just because healthcare and law enforcement did not call a meeting and write down a policy; the question is whether the objective circumstances show that it is so likely that the drug tests will end up with the police that the test has that purpose and the outcome is not inadvertent. Tests can and do have multiple purposes, and where law enforcement involvement is foreseeable and not inadvertent, Fourth Amendment strictures apply. In-hospital drug tests performed in places where criminalization of pregnancy happens are nothing like “inadvertent” discoveries of evidence of a crime; where it is common knowledge that criminalization of substance use during pregnancy is happening, no policy need exist to satisfy the *Ferguson* factors. Regina McKnight’s case offers an example. She was urine tested after experiencing a stillbirth.<sup>325</sup> An autopsy was performed on her baby, revealing a substance which is metabolized from cocaine.<sup>326</sup> When Regina McKnight tested positive, a second test for forensic (medical *and legal*) purposes was performed.<sup>327</sup> The hospital had a chain of custody form for forensic samples.<sup>328</sup> This evidence was used against Regina McKnight in a criminal proceeding; the hospital did not have a treatment objective for the tests—the baby was stillborn, a condition for which there is no treatment, and Regina McKnight had disclosed her use of cocaine during pregnancy. The test results in Regina McKnight’s case were not inadvertently used for law enforcement purposes. There was nothing to do—no healthcare to provide—except to charge her with a crime. It was the kind of warrantless, nonconsensual search for which the Fourth Amendment requires consent or a warrant based on probable cause, and the logic of *Ferguson* supports this conclusion. A better decision by the *McKnight* court would have read *Ferguson* as holding that the Fourth Amendment affirmatively applies to hospital drug tests where a positive in-hospital drug test has a specific, foreseeable law enforcement purpose.<sup>329</sup>

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324. *See id.* at 81–82 (“In looking to the programmatic purpose, we consider all the available evidence in order to determine the relevant primary purpose.”).

325. *See McKnight*, 576 S.E. at 171.

326. *See id.*

327. *See id.* at 178.

328. *Id.*

329. *See Calabretta v. Floyd*, 189 F.3d 808, 816–17 (9th Cir. 1999); *Green v. Camreta*, 588 F.3d 1011, 1027–28 (9th Cir. 2009), *vacated in part*, 563 U.S. 692 (2011) (vacated as to the Fourth Amendment issue) (observing that “although the Supreme Court has ‘tolerated suspension of the Fourth Amendment’s warrant or probable-cause requirement[s] [when] there was no law enforcement purpose behind the searches . . . and . . . little, if any, entan-

As to consent, Regina McKnight did not provide consent to a Fourth Amendment search. Informed consent to a medical or forensic drug test in a hospital is not consent to a Fourth Amendment search. Fourth Amendment consent is different than informed consent to treatment. *McKnight* includes testimony from a nurse that she told McKnight that the test could be used for “legal purposes,” but did not mention the potential police consequences to Regina McKnight when obtaining her consent.<sup>330</sup> *Ferguson* recognizes the essential difference, from a patient’s standpoint, between tests done for medical purposes and tests where the results might be shared with third parties, particularly law enforcement.<sup>331</sup> As the *Ferguson* court explained, when hospital employees “obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights, as standards of knowing waiver require.”<sup>332</sup>

As to social services, the *McKnight* court’s conclusion that *Ferguson* was inapposite because the drug test results went to social services rather than police raises two important points for post-*Dobbs* advocates. First is a view that social services and child welfare are “non-policing” agencies and actors. Advocates and movement lawyers specializing in family regulation recognize that child welfare is a form of family policing with law enforcement roots; the criminal and civil child welfare consequences that flow from social services investigations are often indistinguishable from—and just as brutal as—those that flow from police investigations. Serious scholarship continues to develop this idea, naming also its racially disparate dimensions.<sup>333</sup>

Second is that the entanglement discussed above—statutory or common-practice schemes where the doctors, police, and child welfare actors all know each other and work together—cannot allow actors to “launder” the law enforcement purpose of a search through social services. This is unprincipled and unconstitutional. Where all the actors are working together and pregnancy criminalization is part of the legal landscape, drug

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glement with law enforcement’ in conducting them, the Court hasn’t relaxed traditional Fourth Amendment protections when the main purpose of an ostensibly administrative search was to gather evidence for use in subsequent criminal proceedings, or when law enforcement personnel were substantially involved in the design and implementation of the administrative program”) (citing and quoting *Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001)) (citations omitted).

330. See *McKnight*, 576 S.E.2d at 178.

331. See *Ferguson*, 532 U.S. at 78 (“The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those test will not be shared with nonmedical personnel without her consent.”).

332. *Id.* at 85 (emphasis in original).

333. See DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE passim* (2002) (describing the devastating impact of the child welfare system and its policing function for Black families); Tarek Ismail, *Family Policing and the Fourth Amendment*, 111 CAL. L. REV. (forthcoming 2023) (examining how child protective services (CPS) searches have evaded Fourth Amendment review, explaining how CPS has policing powers, and arguing for universal application of Fourth Amendment principles to searches by CPS).

tests have a specific, non-inadvertent law enforcement purpose even if the results go to a child welfare agency before the police. Again, Regina McKnight's experience makes this clear: social services was notified first, but the baby was stillborn. The test was also for legal purposes, and a chain of custody form was involved.<sup>334</sup>

E. RESISTING NARRATIVES THAT MANDATORY REPORTING OF POSITIVE PRENATAL OR POSTPARTUM DRUG TESTS IS REQUIRED OR HELPFUL

Advocates can work on removing the policing function from healthcare institutions, particularly by focusing on reforming or abolishing the role of mandatory reporters; they can also work on the relationship among healthcare, child welfare and family regulation agencies, and law enforcement. As cases in this Article show, punishment and criminalization routinely start when a pregnant person tells a healthcare provider something they think is relevant to the pregnancy. This is noteworthy—criminalization often begins with patient disclosure. Almost everyone a patient interacts with in a healthcare setting is a mandatory reporter under applicable state law: nurses, doctors, social workers, and advance practice clinicians.<sup>335</sup> The damage of driving pregnant people away from prenatal care should preclude mandatory reporting in the context of pregnancy, even where laws classify fertilized eggs, embryos, and fetuses as children.

Nevertheless, because mandatory reporting laws impose consequences on providers if they do not report, but insulate them from liability if they do, even when wrong,<sup>336</sup> reporters often adhere to a “better safe than sorry” approach. This has disastrous results for healthcare and patients; it turns healthcare into surveillance for law enforcement and child welfare. This defeats the goal of providing healthcare and the purported state interest in fetal well-being because it erodes trust, violates provider-patient confidentiality, deters open communication, and pushes pregnant people to avoid the healthcare system altogether.

Finally, mandatory reporters themselves can bring suit where mandated reporting frustrates their ethical and clinical duties of care,<sup>337</sup> and they can organize to improve or abolish the state and local laws and hospital policies and practices to reduce as much harm as possible in relation to reporting.

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334. See *McKnight*, 576 S.E.2d at 171.

335. See, e.g., ALA. CODE § 26-14-3(a).

336. See *id.*; *id.* § 26-14-9.

337. See generally *Mathews v. Becerra*, 455 P.3d 277, 299 (Cal. 2019). Here, the California Supreme Court reversed the lower courts' dismissals, holding that plaintiffs could state claims under the California constitution that mandatory reporting of patients' disclosures to psychotherapists violated the patients' informational privacy rights under the California constitution. *Id.* Patients disclosed to their therapists that they had viewed child pornography, but the admissions did not trigger the therapists' concerns that actual abuse was taking place. *Id.* at 280. See also *Don't Drive Child-Porn Viewers Away From Therapy*, L.A. TIMES (Dec. 10, 2019, 3:00 AM), <https://www.latimes.com/opinion/story/2019-12-10/child-porn-reporting-law-fails-victims> [<https://perma.cc/Y7FY-RKJW>].

## VI. CONCLUSION

This Article spans topics and types of laws to map for post-*Dobbs* advocates much, but certainly not all, of what is known about the legal and expressive landscape of criminalizing pregnancy. Sharing and documenting stories of pregnancy criminalization post-*Roe*, and reflecting on the failures of legal reasoning that either supported those instances or that enshrine and reproduce them, is as important now as ever. We hope this Article seeds knowledge-building, resistance, and some hope. Criminalizing pregnancy is wrong and unfaithful to constitutional guarantees of equality. So is forcing healthcare on pregnant people without their informed consent. These practices result in caste-based subordination, exactly what the Fourteenth Amendment was designed to end, for all people and most especially for Black and Brown people, along with people living in conditions of poverty. While United States law has yet to fully recognize this, all of it violates basic human rights.

