

The Pregnancy Police: Surveillance, Regulation, and Control

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A wave of state legislation restricting the right to abortion in 2019 has drawn attention to the contingency of rights of pregnant people. However, the regulation and criminalization of pregnant bodies in the United States began many years before. Drawing from original research in criminal cases, as well as from notable family court hearings, lawsuits, and news reports, this article explores some of the ways in which pregnant people have become subject to surveillance, regulation, and control because of the fact of their pregnancies through criminal prosecution for pregnancy endangerment, involuntary detention, and forced medical intervention. Using a reproductive justice framework, it discusses the ways in which these developments have already laid the foundation for the further erosion of the rights of pregnant people, and the merging of the criminal justice and health-care systems, both legally and informally. Taken together, this overwhelming pattern of rights violations indicates that, abortion legality aside, there is an ever-growing precedent for the reduced citizenship of pregnant people in the United States.

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In May 2019, Alabama Governor Kay Ivey signed a law making the performance of abortion a felony, including an exception only when a pregnancy poses a risk to the life of the pregnant person, but not for rape or incest.¹ This law stands in direct contradiction to precedent set by the U.S. Supreme Court in *Roe v. Wade*.² Given the new composition of the court—with the confirmation of Brett Kavanaugh and Neil Gorsuch—anti-abortion legislators in the states are offering courts a smorgasbord of different test cases, setting the stage for the Supreme Court to establish a new legal standard governing abortion. However, the regulation and criminalization of pregnant bodies in the United States is not the sole product of the recent, Trump-emboldened tidal wave. Rather, in the years since the U.S. Supreme Court decriminalized abortion in *Roe v. Wade*, pregnancy has been regulated in other ways.

Drawing from original research in criminal cases, as well as from notable family court hearings, lawsuits, and news reports, this article explores

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¹ ALA. CODE § 26-23H-4 (West, Westlaw through Act 2019-540).

² 410 U.S. 113 (1973).

some of the ways in which pregnant people have become subject to surveillance, regulation, and control because of the fact of their pregnancies through criminal prosecution for pregnancy endangerment, involuntary detention, and forced medical intervention. Surveillance refers to the ways in which pregnant people may find their right to medical privacy weakened such that healthcare providers can use privileged information as evidence against their patients in criminal cases. Regulation examines the involuntary detention of pregnant people who are found to be “habitually out of control” due to substance use. Control explores cases in which a pregnant person’s right to refuse medical treatment becomes dependent on a balancing test between the rights of individual women and a societal need, or the rights of individual women and the fetuses they gestate. I will also discuss the ways in which these changes have already laid the groundwork for the further erosion of the rights of pregnant people, and the merging of criminal justice and healthcare systems, both legally and informally.

BACKGROUND

Abortion is one of the more commonly explored areas of the exceptional treatment of pregnant people. However, while the right to abortion is incredibly important, when viewed in isolation from other issues related to human reproduction, we get an incomplete picture of the ways in which pregnant and potentially pregnant people find their lives regulated and their rights diminished.³ Indeed, the myopic focus on abortion legality has perhaps made it possible for so many to be surprised by this most recent round of punitive and restrictive abortion laws. As Silliman and Bhattacharjee explain, one limitation of the “pro-choice” framework is that the emphasis on individual choice “obscures the social context in which individuals make choices, and discounts the ways in which the state regulates populations, disciplines individual bodies, and exercises control over sexuality, gender, and reproduction.”⁴ A framework centered around the individual’s ability to choose to have an abortion may fail to critically examine the range of options available to the chooser, the conditions in which the choice is made, and societal patterns of choice-making.

As such, I adopt a broader approach, informed by the Reproductive Justice framework. As Ross and Solinger explain, the reproductive justice framework is fundamentally a human rights framework, which can be used

³ See Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 335–38 (2013); see generally LORETTA ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* (2017); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) [hereinafter “KILLING THE BLACK BODY”] (discussing the reproductive capacities of black women); Dorothy Roberts, *Reproductive Justice, Not Just Rights*, *DISSENT*, Fall 2015, <https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights> [<https://perma.cc/YZ4C-URED>].

⁴ JAELE SILLIMAN & ANANNYA BHATTACHARJEE, *POLICING THE NATIONAL BODY: SEX, RACE, AND CRIMINALIZATION*, at xi (2002).

to “draw attention to—and resist—laws and public and corporate policies based on racial, gender, and class prejudices.”⁵ It “goes beyond the pro-choice/pro-life debate and has three primary principles: (1) the right *not* to have a child; (2) the right to *have* a child; and (3) the right to *parent* children in safe and healthy environments. In addition, reproductive justice demands sexual autonomy and gender freedom for every human being.”⁶ The expanded focus points to the many ways that people with the capacity for pregnancy are surveilled, regulated, and controlled. As Silliman and Bhattacharjee write, “an examination of the body politics, the state’s power of regulation, surveillance, and control of bodies (individual and collective),⁷ elucidates the scope and venues through which the state regulates its populations ‘in reproduction and sexuality, in work and in leisure, in sickness and other forms of deviance and human difference.’”⁷ Indeed, as this piece will discuss, those who do *and* those who do not intend to carry their pregnancies and give birth have been and continue to be subject to regulation, surveillance, and prosecution *because* of their pregnancies or presumed ability to gestate a pregnancy. For example, pregnant people may be involuntarily detained, may lose their right to medical privacy, or may even lose their right to medical decision-making due to concern over the wellbeing of the fertilized egg, embryo, or fetus.

Regulations that restrict the rights of pregnant people are usually framed as an effort to find a balance between the rights of individual women⁸ against a concept of a societal good, such as the state’s interest in the quality of offspring; the state’s interest in protecting maternal health; the state’s interest in what kind of people give birth and when.⁹ They have also been framed as the state balancing the rights of individuals against one another—what has come to be known as the maternal-fetal conflict, or the idea that the pregnant person and her pregnancy are separate individuals with competing interests.¹⁰ Though the justifications vary, these policies and attitudes have the effect of legally defining pregnant people as a class with diminished rights relative to other, similarly situated people. I call this pregnancy exceptionalism—one of many systems of rights deprivations embedded in U.S. law, an exploration of which can contribute to a more thorough understand-

⁵ ROSS & SOLINGER, *supra* note 3, at 10.

⁶ *Id.* at 9.

⁷ SILLIMAN & BHATTACHARJEE, *supra* note 4, at xi.

⁸ There is a tension between current legal terminology and reality. Cisgender women are not the only people who have the capacity for pregnancy. Trans, nonbinary, and queer individuals also experience pregnancy and will experience the impact of regulations on pregnant bodies. However, currently, legislation and court cases do not generally acknowledge this, instead only referring to “women.” I will vary my use in this paper, referring to the impact that these laws will have on all pregnant or potentially pregnant bodies, while reflecting the language used in laws and court cases.

⁹ See generally *Buck v. Bell*, 274 U.S. 200 (1927); *Muller v. Oregon*, 208 U.S. 412 (1908); Rachel Roth, “No New Babies?” *Gender Inequality and Reproductive Control in the Criminal Justice and Prisons System*, 12 AM. U. J. GENDER SOC. POL’Y & L. 391, 408 (2004).

¹⁰ See ROSAMUND SCOTT, *RIGHTS, DUTIES AND THE BODY: LAW AND ETHICS OF THE MATERNAL-FETAL CONFLICT*, n.xxvi-xxvii (2002).

ing of the legal personhood of pregnant people, and the contingency of rights in general. Pregnancy exceptionalism refers to standards of rights rather than specific kinds of treatment because, sometimes, differential treatment is necessary if a right is to be maintained. For example, though shackling is standard during the transport of incarcerated persons, doing so would pose unique harms to a pregnant person in state custody.¹¹

While these regulations threaten every person capable of becoming pregnant, they disproportionately target bodies defined as deviant. In her historical account, Dorothy Roberts explores “a long experience of dehumanizing attempts to control Black women’s reproductive lives. The systematic, institutionalized denial of reproductive freedom has uniquely marked Black women’s history in America.”¹² Indeed, even when poor whites were targeted for eugenic sterilization, as was the case in *Buck v. Bell*,¹³ the social and political context was one in which deviant whites, read as biologically degenerate, needed to be eliminated in order to shore up the strength of the white race against the looming threat of black populations and immigrants.¹⁴

Any kind of deviance or imperfection could justify surveillance, regulation, and control. Jeanne Flavin writes:

As an official agent of social control, the criminal justice system responds not only to crime but also to transgressions against gender norms. By restricting some women’s access to abortion and obstetric and gynecologic care, by telling some women not to procreate and pressuring them to be sterilized, by prosecuting some women who use drugs and become pregnant, and by failing to support the efforts of incarcerated women and battered women to rear their children, the law and the criminal justice system establish what a “good woman” or a “fit mother” should look like and how conception, pregnancy, birth, and child care and socialization are regulated.¹⁵

These regulations have historically posed reproduction as either a threat or common good. Enslaved women were forced to reproduce the enslaved workforce.¹⁶ Workers with the potential for pregnancy were barred from certain kinds of employment to prevent a prenatally harmed generation of chil-

¹¹ See AMNESTY INT’L, “NOT PART OF MY SENTENCE”: VIOLATIONS OF HUMAN RIGHTS OF WOMEN IN CUSTODY n.62-73 (1999), <https://www.amnesty.org/download/Documents/144000/amr510011999en.pdf> [<https://perma.cc/3Q6D-MFE9>].

¹² KILLING THE BLACK BODY, *supra* note 3, at 4.

¹³ 274 U.S. 200 (1927).

¹⁴ See generally at 205–06; JOHN HARTIGAN JR., *ODD TRIBES: TOWARD A CULTURAL ANALYSIS OF WHITE PEOPLE* (2005); ALEXANDRA MINNA STERN, *EUGENIC NATION: FAULTS & FRONTIERS OF BETTER BREEDING IN MODERN AMERICA* (2d ed. 2016); Grace Howard, *The Limits of Pure White: Raced Reproduction in the Methamphetamine Crisis*, 35 WOMEN’S RTS. L. REP. 373, 378 (2013).

¹⁵ JEANNE FLAVIN, *OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN’S REPRODUCTION IN AMERICA* 4 (2008).

¹⁶ See KILLING THE BLACK BODY, *supra* note 3, at 22–55.

dren, and to protect their employers from legal liability.¹⁷ Social undesirables were involuntarily sterilized to prevent them from passing on their supposed degeneracy.¹⁸ Families receiving welfare benefits were barred from receiving additional financial support for subsequent children to prevent the supposed exploitation of government assistance.¹⁹ Though the stated purpose may shift over time, ultimately these are all examples of government enabled control over pregnant or potentially pregnant people defined as deviant to achieve some end.

II. SURVEILLANCE: PURSUING FETAL PERSONHOOD THROUGH DRUG PROSECUTIONS

Currently, thirty-eight states recognize the fetus as a potential victim of crime.²⁰ These laws are often passed in the context of violence against pregnant people.²¹ They allow additional charges to be brought against someone who does harm to a pregnant person and causes damage to the pregnancy.²² Instead of being charged with harming just the pregnant person, they would be charged with harming both the person who is pregnant and with harming the pregnancy itself.²³ Though framed as an essential tool for protecting women, these laws have been used to punish pregnant people for crimes against the fertilized eggs, embryos, and fetuses they gestate.²⁴ Arrests of pregnant people have been made in nearly every state throughout the United States.²⁵

For example, a public hospital in Charleston, South Carolina enacted a policy to drug test pregnant patients.²⁶ This policy was developed in the midst of the now thoroughly debunked “crack baby” epidemic, or the idea that low-income black women were willfully consuming crack cocaine with no regard for their children, breeding a generation of inherently broken individuals who would grow to be criminal, disorderly, and non-productive.²⁷ Indeed, more recent and robust medical study has indicated that there are

¹⁷ *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 191–92 (1991).

¹⁸ See generally PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND Buck v. Bell* (2008).

¹⁹ See *KILLING THE BLACK BODY*, *supra* note 3, at 202–45.

²⁰ See *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONF. ST. LEGISLATURES (May 1, 2019), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> [<https://perma.cc/8LFW-PSRY>].

²¹ See 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, 323 (2013); Grace Elizabeth Howard, *The Criminalization of Pregnancy n.40-44* (Oct. 2017) (unpublished Ph.D. dissertation, Rutgers University), <https://rucore.libraries.rutgers.edu/rutgers-lib/55493/PDF/1/play/> [<https://perma.cc/W5DL-BTAC>].

²² See *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, *supra* note 20.

²³ See *id.*

²⁴ See Paltrow & Flavin, *supra* note 21 at n.322-324; Howard, *supra* note 21 at n.40-44.

²⁵ See Howard, *supra* note 21 at n.1.

²⁶ See *Ferguson v. City of Charleston*, 532 U.S. 67, 71–74 (2001).

²⁷ See *KILLING THE BLACK BODY*, *supra* note 3, at 153–83.

“no significant differences between . . . cocaine-exposed children and the controls,” arguing that “poverty is a more powerful influence on the outcome of inner-city children than gestational exposure to crack cocaine.”²⁸ As revealed by the case challenging this practice, *Ferguson v. City of Charleston*,²⁹ a nurse organized healthcare personnel and law enforcement officials to drug test laboring patients without their knowledge,³⁰ a warrant,³¹ or even reasonable suspicion,³² a flagrant Due Process violation that will be explored in more detail below. All but one of the dozens of women charged due to this policy were black.³³ The sole white woman, it was noted, was partnered with a black man.³⁴

As a result of the drug test, hospital employees became an extension of the local police force, conducting drug tests solely for the purpose of evidence collection and then transferring the results to law enforcement.³⁵ Patients challenged the constitutionality of this policy, eventually landing in the U.S. Supreme Court.³⁶ The petitioners argued that the hospital policy constituted an unlawful search—that without a warrant or the patient’s informed consent, these tests were an unconstitutional violation of the Fourth Amendment’s prohibition on unlawful search and seizure.³⁷ The Court applied a balancing test, weighing the intrusion on the individual’s right to privacy against the “special needs” that supported the drug testing programs.³⁸

The Court had ruled on the constitutionality of drug testing before. For example, in *Skinner v. Railway Labor Executives’ Ass’n*³⁹ the court found that drug tests administered to employees engaged in safety-sensitive tasks were constitutional.⁴⁰ The individuals being tested fully understood the purpose of testing, and there were protections against the dissemination of test results to third parties, including law enforcement.⁴¹ These tests were conducted in order to fulfill a “special need”⁴² that was “divorced from the State’s general

²⁸ Hallam Hurt, Lecture at the University of Pennsylvania (2013). See also Susan Fitzgerald, ‘Crack Baby’ Study ends with unexpected but clear result, Phila. Inquirer (Jul. 21, 2013), https://www.inquirer.com/philly/health/20130721_Crack_baby_study_ends_with_unexpected_but_clear_result.html [https://perma.cc/4NRU-KNLY].

²⁹ 532 U.S. 67 (2001).

³⁰ See *id.* at 77.

³¹ See *id.* at 70.

³² See *id.* at 76–77.

³³ See KILLING THE BLACK BODY, *supra* note 3, at 166.

³⁴ See *id.*

³⁵ See *Ferguson*, 532 U.S. at 71–74.

³⁶ See *id.* at 76.

³⁷ See *id.* at 73–74.

³⁸ See *id.* at 78.

³⁹ 489 U.S. 602 (1989).

⁴⁰ See *Skinner*, 489 U.S. at 612–14.

⁴¹ See *Skinner*, 489 U.S. at 622.

⁴² See *Skinner*, 489 U.S. at 619–21.

interest in law enforcement.”⁴³ By contrast, the tests conducted in Charleston were performed specifically so that results could be reported to the police.⁴⁴ As such, the Court found that these searches were not constitutional.⁴⁵

However, the decision in *Ferguson v. City of Charleston* was narrow in scope, leaving room for similar drug testing programs to continue. Much of the opinion focused on the fact that the drug testing policy was designed, from its outset, with the involvement of law enforcement personnel, and that the searches were specifically conducted as a form of evidence collection separate from medical treatment.⁴⁶ The opinion also only applied to public hospitals and targeted drug testing based on highly discriminatory criteria.⁴⁷ As a result, public hospitals can still conduct widespread drug testing without violating *Ferguson*. For example, if a public hospital tests *all* patients for drugs, reporting the results of these tests to law enforcement would not violate the *Ferguson* decision. If healthcare providers conduct selective screening and then report positive drug tests to the Department of Social Services, which then reports positive tests to law enforcement, they would not be in violation of *Ferguson*. Hospitals can also conduct selective drug screens on newborns, specifically for the purpose of collecting evidence of prenatal misconduct for law enforcement, without violating *Ferguson*. These kinds of drug testing and reporting protocols have continued.

In addition to policies targeting pregnant people directly, laws meant to protect children from harm have also been used against pregnant people. In 2006, the Alabama legislature created the new crime of Chemical Endangerment of a Minor.⁴⁸ Carrying penalties from one to ninety-nine years in prison, the law was passed primarily to protect children from exposure to methamphetamine manufacturing.⁴⁹ According to this law, a “responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following: (1) knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia”⁵⁰ The statute said nothing about pregnancy or “unborn” children.⁵¹ Indeed, nothing in the Alabama criminal code addressed fertilized eggs, embryos, or fetuses at that time.⁵² The Alabama legislature had, on multiple occasions, declined the opportunity to in-

⁴³ *Ferguson*, 532 U.S. at 79.

⁴⁴ *See id.* at 80.

⁴⁵ *See id.* at 73–76.

⁴⁶ *See id.* at 79–85.

⁴⁷ *See id.* at 76–77.

⁴⁸ *See* ALA. CODE § 26-15-3.2 (West, Westlaw through Act 2019-540).

⁴⁹ *See id.*

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *See id.*

clude “unborn children” as potential crime victims, twice in 2002, and three times in 2004.⁵³

Though the chemical endangerment law was not meant to apply to pregnancy, after it went into effect, law enforcement and prosecutors from several counties around the state started using this law to regulate *uterine* “environments” and *unborn* “minors.”⁵⁴ By essentially transferring the bad science on in-utero crack cocaine exposure to in-utero methamphetamine exposure, and swapping out the specter of child-hating poor black women for child-hating poor white women, prosecutors hoped to use the threat of criminal punishment to force people into drug treatment.⁵⁵ The racialized drug panics which motivated prosecutors in both South Carolina and Alabama aligns with the race of defendants in each state; South Carolina arrests disproportionately involving black women, Alabama arrests disproportionately involving low-income whites.⁵⁶ People who themselves (or whose newborn children) tested positive for controlled substances during pregnancy or immediately postpartum were arrested and charged with chemical endangerment of a minor. Two defendants appealed their charges, arguing, among other things, that because the law failed to mention pregnancy, it was unconstitutionally vague.⁵⁷

In 2013, the Alabama Supreme Court found in favor of this new application of the law, stating that the common understanding of the word “minor” includes “unborn” minors from the moment of conception.⁵⁸ As such, anyone who consumes a controlled substance that could potentially have a negative impact on a pregnancy at any stage of pregnancy has committed felony child abuse. Through 2015, at least five hundred and one women in Alabama were charged with chemically endangering their pregnancies.⁵⁹ Though some of these arrests were made on the basis of evidence collected during the course of probationary drug testing for prior legal offenses, the vast majority of charges were brought due to evidence collected and reports made by healthcare providers during the course of providing care.⁶⁰

One of these women was named Heather Capps. Heather struggled with dependence on oxycodone and was worried about what it would mean for her pregnancy.⁶¹ She had heard about a local policy that was being used to charge people with child abuse for drug use during pregnancy, but she was

⁵³ See H.R. 192, 2004 Leg., Reg. Sess. (Ala. 2004); H.R. 255, 2004 Leg., Reg. Sess. (Ala. 2004); S. 469, 2004 Leg., Reg. Sess. (Ala. 2004); S. 415, 2002 Leg., Reg. Sess. (Ala. 2002); S. 402, 2002 Leg., Reg. Sess. (Ala. 2002).

⁵⁴ See Howard, *supra* note 21 at n.50-52.

⁵⁵ See *id.* at n.156-157.

⁵⁶ See *id.* at n.64-75.

⁵⁷ See *Ankrom v. Alabama*, 152 So. 3d 397, n.4; 6 (Ala. 2013).

⁵⁸ See *id.* at 411-12.

⁵⁹ See Howard, *supra* note 21 at n.63.

⁶⁰ See *id.* at n.78.

⁶¹ See Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES MAG. (Apr. 25, 2012), <https://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html> [<https://perma.cc/5JMQ-9XLN>].

concerned about the health ramifications for her baby if she discontinued use of the drug altogether, which would likely produce withdrawal symptoms.⁶² She sought treatment, but was unable to find an outpatient program close to home that would allow her to continue to care for her two young children.⁶³ Fearing for the health of her unborn baby, and for her own freedom, Heather did her best to reduce her use of the drug on her own.⁶⁴ Two days after she gave birth via cesarean section, Heather was arrested at the hospital for chemical endangerment of a minor.⁶⁵ She was held in jail for three months, away from her newborn and her two other children, unable to post five hundred thousand dollars bail.⁶⁶ In essence, Heather was charged with a felony and separated from her children because she struggled with substance dependence, became pregnant, and was unable to access appropriate health-care.⁶⁷ Heather is just one of the hundreds of women who have been forced by Alabama's inappropriate application of the law to choose between a prison cell and debilitating withdrawal symptoms.⁶⁸

In this way the state has extended its criminal surveillance apparatus into the healthcare setting, essentially turning nurses and doctors into law enforcement, and any pregnant patient into a potential criminal in need of surveillance. Pregnant and potentially pregnant patients, then, have an incentive to avoid care for their pregnancies and to withhold medically relevant information from the people who are charged with their care, both of which have been evidenced in states where these sorts of laws have been enacted.⁶⁹ This poses problems both for the legitimacy of the medical profession and for the wellbeing of patients. If the purpose of the law was to improve pregnancy outcomes, the reality of avoidance undermines this goal. A study of arrest cases indicated that, for example, one pregnant woman gave birth on the side of the highway after trying and failing travel across state lines to give birth in a state where she would not face felony charges.⁷⁰ Additionally, though initially developed to detect pregnant drug users, these kinds of policies and practices have also been used to prosecute pregnant people who survive suicide attempts,⁷¹ who are found to be at fault for miscarriage or stillbirth,⁷² or who induce (or are suspected to have induced) abortion.⁷³

The stated purpose of the prosecution strategies varies: a desire to push people into drug treatment; a political effort to extend personhood to fertil-

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See Howard, *supra* note 21 at n.63.

⁶⁹ See *id.* at n.78-81.

⁷⁰ See *id.* at n.78.

⁷¹ See *Shuai v. State*, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).

⁷² See *Bynum v. State*, 546 S.W.3d 533, 536-37 (Ark. Ct. App. 2018).

⁷³ See *Patel v. State*, 60 N.E.3d 1041, 1043-44 (Ind. Ct. App. 2016).

ized eggs, embryos, and fetuses; a need to punish those who would unleash supposedly damaged children. In any case, these prosecutions hold pregnant people criminally accountable for things that, but for the fact of their pregnancies, are not generally prosecutable. Typically, such charges would be brought against individuals who, for example, were found to be in possession of, or operating a vehicle under the influence of, or engaged in the sale or production of controlled substances, and not simply for substance use. They have essentially created status crimes for pregnant people, setting a separate standard of medical privacy rights for people who are or who could become pregnant.

III. REGULATION: NON-CRIMINAL INVOLUNTARY DETENTION

The previous section explored the criminal prosecution and detention of pregnant and newly postpartum people on the basis of pregnancy endangerment. This section will discuss one of the ways that pregnant people can be involuntarily detained apart from the criminal justice system. The Wisconsin Unborn Child Protection Act of 1997 was signed into law with the purpose of providing “a just and humane program of services to children and unborn children in need of protection or services, nonmarital children and the expectant mothers of those unborn children; to prevent dependency, mental illness, developmental disability, mental infirmity and other forms of social maladjustment by a continuous attack on causes,” among other things.⁷⁴ This law, also known by the racially charged nickname, the “crack mom” law, allows the state to take “jurisdiction over unborn children in need of protection or services and the expectant mothers of those unborn children” on the basis that the expectant mother “habitually lacks self-control.”⁷⁵ Essentially, the law enables the state to detain people at any stage of pregnancy if they use controlled substances.⁷⁶

There are many aspects of this law worthy of critique. In essence, the Wisconsin law allows the use of what may otherwise be considered private health information to detain a pregnant person for the duration of their pregnancy, under the premise of protection and service provision. Unlike the aforementioned criminal cases, however, people who are detained using this law are guaranteed none of the protections (however inadequate) granted to criminal defendants. Protection from wrongful arrest in U.S. law can be traced back to English Common Law.⁷⁷ The Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due pro-

⁷⁴ See 1997 Wis. Legis. Serv. 2166 (current version at WIS. STAT. § 46.001 (West, Westlaw through 2019 Act 69, published Nov. 27, 2019)).

⁷⁵ WIS. STAT. § 48.133 (West, Westlaw through 2019 Act 69, published Nov. 27, 2019).

⁷⁶ See WIS. STAT. § 48.19(1)(d)(8) (West, Westlaw through 2019 Act 69, published Nov. 27, 2019).

⁷⁷ See Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1129–32 (1969).

cess of law.⁷⁸ Further protections against wrongful imprisonment include the Sixth Amendment's right to a speedy, public trial, a lawyer, and an impartial jury.⁷⁹

The case of Alicia Beltran is illustrative of how the Wisconsin law works in practice.⁸⁰ Beltran was twelve weeks pregnant when she told her healthcare provider about her prior use of prescription painkillers.⁸¹ Seeing no evidence of formal drug treatment, a healthcare provider contacted law enforcement.⁸² Beltran was taken into state custody and brought to a family court hearing where she had no right to counsel, but an attorney was appointed for the fetus she gestated.⁸³ She had no right to a jury of her peers or to an open trial.⁸⁴ The state took the fetus into protective custody—taking Beltran with it.⁸⁵ She was forcefully detained for seventy-eight days in a drug treatment facility and was forced to undergo medicated treatment for a drug problem she no longer had.⁸⁶ Because she was held in an inpatient facility, Beltran was unable to go to work, and she eventually lost her job.⁸⁷ She filed a lawsuit asserting rights violations but the suit was dismissed as moot because, by the time it was heard, she was no longer pregnant.⁸⁸

Another court challenge came a year later. After losing her health insurance and access to thyroid medication, Tammy Loertscher began self-medicating with marijuana and amphetamine.⁸⁹ When she suspected that she was pregnant, she went to the doctor for a pregnancy test, as well as help treating her depression and thyroid problem.⁹⁰ She disclosed her history of substance use.⁹¹ Her healthcare providers reported her to social services, who began legal proceedings to detain her against her will.⁹²

The state ordered Loertscher to attend an inpatient drug rehabilitation program when she was fourteen weeks pregnant.⁹³ She refused and was jailed for eighteen days, thirty-six hours of which were spent in solitary confine-

⁷⁸ See U.S. CONST. amend. V.

⁷⁹ See U.S. CONST. amend. VI.

⁸⁰ See Petition for Writ of Habeas Corpus at XX, *Beltran v. Loenish*, No. 2:13-cv-01101 (E.D. Wis. Sept. 30, 2013).

⁸¹ Eric Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. TIMES (Oct. 23, 2013), <https://www.nytimes.com/2013/10/24/us/case-explores-rights-of-fetus-versus-mother.html> [<https://perma.cc/J9PL-MHBK>].

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ Order Granting Motions to Dismiss and Dismissing Case, *Beltran v. Loenish*, No. 2:13-cv-01101 at 12-13 (E.D. Wis. Sept. 30, 2014).

⁸⁹ See *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 908 (W.D. Wis. 2017), *vacated*, 893 F.3d 386 (7th Cir. 2018).

⁹⁰ See *id.* at 909.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.* at 911.

ment.⁹⁴ Even after she was released, she was drug tested weekly for the duration of her pregnancy.⁹⁵ She sued the state, arguing that the terms of the law were unconstitutionally vague.⁹⁶ A federal district court agreed with Loertscher, stating that the Wisconsin law “affords neither fair warning as to the conduct it prohibits nor reasonably precise standards for its enforcement,” but the state appealed.⁹⁷ In July 2017, the U.S. Supreme Court lifted the injunction on the law, stating that the injunction is “stayed pending final disposition of the appeal by the United States Court of Appeals for the Seventh Circuit,” but offering no reasoning for its decision.⁹⁸ A year later, the Seventh Circuit Court of Appeals dismissed the suit for mootness, because Loertscher no longer lived in Wisconsin.⁹⁹ The state is free to continue the detentions.

Because the Wisconsin law calls for these cases to be addressed in juvenile court, where records are sealed, it is difficult to know how many people have been and continue to be detained. Though an important mechanism by which to protect the identities of juveniles, sealing these records has stifled research about the prevalence and characteristics of cases in which an adult pregnant person is threatened with detention. By one estimate, there have been three thousand and four hundred cases in the state since 2006.¹⁰⁰ The details of those cases, including the length of detention, the conditions of detention, the factors that led to detention are, however, not known to the public.

The Wisconsin law is an example of the maternal-fetal conflict enshrined in law.¹⁰¹ By appointing a legal guardian for the fertilized egg, embryo, or fetus, the state is asserting the individuality of the fetus as separate from the person gestating it. In this way the state also asserts its will to regulate the pregnant body in order to protect the fetus, despite the various major medical groups and associations who reject such policies for their potential to do harm. The American College of Obstetricians and Gynecologists, for example, has stated that these kinds of drug enforcement policies

⁹⁴ See *id.* at 912.

⁹⁵ See Shamane Mills, *Opponents of Wisconsin's 'Cocaine Mom' Law Continue Fight*, WIS. PUB. RADIO (Aug. 1, 2018), <https://www.wpr.org/opponents-wisconsins-cocaine-mom-law-continue-fight> [<https://perma.cc/FUW8-YE2P>].

⁹⁶ See Loertscher, 259 F. Supp. 3d at 906.

⁹⁷ *Id.*

⁹⁸ *Anderson v. Loertscher*, 137 S. Ct. 2328, 2328 (2017).

⁹⁹ See *Loertscher v. Anderson*, 893 F.3d 386, 394–95 (7th Cir. 2018).

¹⁰⁰ Revealing of this sentiment is the statement, made by one of the bill's authors, that: “If the mother isn’t smart enough not to do drugs, we’ve got to step in.” Nina Liss-Schultz, *A Judge Struck Down the 'Cocaine Mom' Law That Put Pregnant Women in Jail*, MOTHER JONES (May 1, 2017), <https://www.motherjones.com/politics/2017/05/tamara-loertscher-unborn-child-protection-wisconsin-pregnant-jail/> [<https://perma.cc/Y6HW-VCFN>].

¹⁰¹ See Eckholm, *supra* note 81.

deter patients from seeking prenatal care and put the relationship between the patient and their healthcare provider at risk.¹⁰²

IV. CONTROL: FORCED MEDICAL INTERVENTION

“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.”¹⁰³ As Warren and Brandeis succinctly articulated, the right to privacy is primarily a “right to be let alone.”¹⁰⁴ Medical privacy as a standard part of ethical medical practice is nothing new, dating as far back as the Roman Hippocratic Oath.¹⁰⁵ The legal understanding of medical privacy in the United States is drawn from English Common Law, but was not stated definitively as a constitutional right until 1965 in *Griswold v. Connecticut*.¹⁰⁶

The freedom to refuse medical treatment is derived from the same legal foundation as medical privacy, affirmed in *Union Pacific Railway Co. v. Botsford*.¹⁰⁷ Surgery performed without consent is considered a form of battery.¹⁰⁸ In *Cruzan v. Director, Missouri Department of Health*,¹⁰⁹ the U.S. Supreme Court asserted that a competent person has a constitutionally protected right to refuse lifesaving treatment, including nutrition and hydration, given adequately clear and convincing evidence.¹¹⁰ However, this right is not absolute. States may override a patient’s decisions in order to preserve the interests of a third party, for example, by requiring a patient to receive mandatory vaccinations.¹¹¹

The state may use a balancing test to determine whether its interest in the protection of a third party is sufficiently compelling to override the interest in protecting a patient’s rights.¹¹² This third-party interest has been interpreted to mean the protection of public health and not as a protection of an individual person’s interests.¹¹³

¹⁰² See COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, SUBSTANCE ABUSE REPORTING AND PREGNANCY: THE ROLE OF THE OBSTETRICIAN-GYNECOLOGIST (2011), <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co473.pdf?dmc=1&ts=20200129T1657455808> [<https://perma.cc/47QU-T93S>].

¹⁰³ *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

¹⁰⁴ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

¹⁰⁵ See Ian E. Thompson, *The Nature of Confidentiality*, 5 J. MED. ETHICS 57, 57 (1979).

¹⁰⁶ See *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

¹⁰⁷ *Union Pac. Ry. Co.*, 141 U.S. at 257.

¹⁰⁸ See, e.g., *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (1914)

¹⁰⁹ 497 U.S. 261 (1990).

¹¹⁰ *Id.* at 262 (1990).

¹¹¹ See *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

¹¹² See *Superintendent of Belchertown State Sch v. Saikewicz*, 373 Mass. 728, 741–42 (1977).

¹¹³ See *id.*

However, in the event of pregnancy, the balancing test may be tilted against the individual patient's rights.¹¹⁴ Though in other cases it has been ruled unconstitutional to force a person to undergo a medical procedure in order to benefit another individual person, courts sometimes employ the balancing test to weigh the individual pregnant person's rights against the interests of the fetus she gestates.¹¹⁵ In other words, the balancing test of "public" interest versus "individual" right, in the context of pregnancy," morphs into an unconstitutional balancing test of the rights of an individual fetus against the rights of the person gestating it. James Filkins notes, "applying a balancing test in these circumstances imposes upon a pregnant woman affirmative duties with regard to her living or unborn children that courts have declined to uphold regarding patients who are not pregnant."¹¹⁶ As such, a pregnant woman is held accountable for the way she treats her own body in a way that is truly exceptional, relative to other, similarly situated people.

Healthcare providers have sought court orders to compel medical treatment against a patient's objections, apparently in defense of the fetus. Angela Carder's case may be one of the most striking examples of a pregnant woman losing the right to refuse medical treatment. Carder was dying of cancer at twenty-six weeks of pregnancy.¹¹⁷ She hoped to live for two more weeks so that her baby had a better chance of survival at birth.¹¹⁸ Hospital administrators, who did not believe Carder would live that long, obtained a court order authorizing a cesarean section against Carder's will and against the advice of her own doctors.¹¹⁹ Despite Carder's silent pleas (she was using a respirator that made vocalization impossible), repeatedly mouthing the words "I don't want it done," a cesarean was performed.¹²⁰ The baby lived for two hours, and Carder died two days later.¹²¹ The D.C. Court of Appeals heard Carder's case en banc and vacated the previous court's ruling in *In re A.C.*¹²² While the court generally found against overriding a pregnant patient's refusal of a cesarean, it did not foreclose the option completely, stating that a patient's wishes must be followed unless there are "truly extraordinary or compelling reasons to override them."¹²³

Three years later in Florida, Laura Pemberton labored at home with a midwife because no local hospital would allow her to attempt a vaginal birth

¹¹⁴ Some examples of this include forcible HIV treatment, cesarean section, blood transfusion, and substance abuse treatment.

¹¹⁵ See *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1251 (N.D. Fla. 1999); *In re A.C.*, 573 A.2d 1235, 1253 (D.C. 1990); *Dray v. Staten Island Univ. Hosp.*, 75 N.Y.S.3d 59, 62 (N.Y. App. Div. 2018).

¹¹⁶ James Filkins, *A Pregnant Mother's Right to Refuse Treatment Beneficial to Her Fetus: Refusing Blood Transfusions*, 2 DEPAUL J. HEALTH CARE L. 361, 363 (1997).

¹¹⁷ *A.C.*, 573 A.2d at 1253.

¹¹⁸ See *id.* at 1238-39.

¹¹⁹ See *id.* at 1240.

¹²⁰ *Id.* at 1240-41.

¹²¹ See *id.* at 1238.

¹²² See *id.* at 1253.

¹²³ *Id.* at 1246.

after cesarean.¹²⁴ Pemberton became dehydrated after a full day of labor and traveled to the hospital to receive IV fluids.¹²⁵ Hospital personnel quickly organized to force Pemberton to have a cesarean. She fled the hospital but, a short time later, a sheriff arrived at her front door.¹²⁶ A judge had granted a court order to force Pemberton to have a cesarean.¹²⁷ Pemberton was arrested, her legs shackled together, and was operated on against her will.¹²⁸

Pemberton later sued the hospital for damages.¹²⁹ A U.S. District Court asserted in *Pemberton v. Tallahassee Memorial Regional Hospital*, “whatever the scope of Ms. Pemberton’s personal constitutional rights in this situation, they clearly did not outweigh the interests . . . in preserving the life of the unborn child.”¹³⁰ The court rejected all of Pemberton’s claims that her rights had been violated and denied that her doctors had been negligent.¹³¹ Citing *In re A.C.*, the court argued that Pemberton’s case was precisely the kind of “extraordinary” situation in which it was legally appropriate to override a patient’s right to refuse medical treatment.¹³²

Pregnant people in the United States continue to be subject to forced obstetric interventions. For example, in 2014, New York resident Rinat Dray refused a cesarean section.¹³³ Her doctor acknowledged her refusal to consent to the surgery, writing in his notes, “The woman has decisional capacity. I have decided to override her refusal to have a c-section.”¹³⁴ Dray begged on the operating table for the doctors to not perform the surgery.¹³⁵ The surgeon responded by ordering Dray to not speak.¹³⁶ The surgeon cut Dray’s bladder, which he blamed on her “own ‘culpable conduct and want of care.’”¹³⁷ The hospital, Staten Island University Hospital, apparently had an unadvertised policy that allowed physicians to override a patient’s decisions without seeking a court order.¹³⁸ Dray lost a malpractice lawsuit against the hospital and two physicians with the court finding, “the state interest in the

¹²⁴ See *Pemberton v. Tallahassee Mem’l Reg’l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247, 1251 (N.D. Fla. 1999).

¹²⁵ See *id.* at 1249.

¹²⁶ See *id.*

¹²⁷ See *id.* at 1249–50.

¹²⁸ See Paltrow & Flavin, *supra* note 21, at 306–07.

¹²⁹ See *Pemberton*, 66 F. Supp. 2d at 1250.

¹³⁰ *Id.* at 1251.

¹³¹ See *id.*

¹³² *Id.* at 1254.

¹³³ See *Dray v. Staten Island Univ. Hosp.*, 75 N.Y.S.3d 59, 62 (N.Y. App. Div. 2018).

¹³⁴ Emily Shire, *The Mom Forced to Have a C-Section*, DAILY BEAST (July 12, 2017, 5:30 AM), <https://www.thedailybeast.com/the-mom-forced-to-have-a-c-section> [<https://www.thedailybeast.com/the-mom-forced-to-have-a-c-section>].

¹³⁵ See Molly Redden *New York Hospital’s Secret Policy Led to Woman Being Given C-Section Against Her Will*, THE GUARDIAN (Oct. 5, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/oct/05/new-york-staten-island-university-hospital-c-section-ethics-medicine> [<https://perma.cc/XXF5-QXDC>].

¹³⁶ See Farah Diaz-Tello, *Invisible Wounds: Obstetric Violence in the United States*. 47 REPRODUCTIVE HEALTH MATTERS 56, 58 (2016).

¹³⁷ Shire, *supra* note 136.

¹³⁸ See Redden, *supra* note 137.

well being of a viable fetus is sufficient to override a mother's objection to medical treatment, at least where there is a viable full term fetus and the intervention itself presents no serious risk to the mother's well being.¹³⁹ Dray appealed the ruling but, in April 2018, a New York appeals court affirmed the lower court's decision.¹⁴⁰ By using the balancing test to curtail a pregnant woman's right to refuse medical care, her rights teeter on the whims of healthcare providers, judges, and on the specific details surrounding her pregnancy.

The courts are split on what specific factors are weighty enough to tip the balance in favor of forced medical intervention. For example, in *In re Jamaica Hospital*, the court argued that the state had a "highly significant interest" in protecting the fetus—even one that was not viable—that outweighed the interests of the patient.¹⁴¹ By contrast, in *In re Baby Boy Doe*, the First District Appellate Court of Illinois found in favor of upholding a pregnant woman's right to refuse medical treatment, even when this choice could be harmful to her fetus.¹⁴² Though the court in *In re Baby Boy Doe* found in favor of upholding that specific pregnant woman's rights, it does not represent a decisive victory in the battle for reproductive justice. The fight for the rights of all pregnant people, regardless of the state in which they live, or the specific circumstances of their pregnancy, continues.

CONCLUSION

In this paper I have offered a brief examination of three areas of reproductive life in which pregnant people are subject to surveillance, regulation, and control. To be sure, there are many others. Taken together, this overwhelming pattern of rights violations indicates that, abortion legality aside, there is an ever-growing precedent for the reduced citizenship of pregnant people in the United States. Pregnancy, wanted or unwanted, planned or unplanned, viable or otherwise, is a common thread justifying major reductions in legal status. Furthermore, the discretion and inconsistency of treatment, ambivalence both in law as written and in the practice of law, means that in the United States, a pregnant person can never truly be certain of their rights.

Nurses, physicians, and other healthcare workers can use pre-established protocols and networks to report their patients to social services or law enforcement for miscarrying, or for using substances during pregnancy.¹⁴³ Juvenile courts can detain unruly, deviant, or disobedient pregnant people

¹³⁹ Order at 12, *Dray v. Staten Island Univ. Hosp.*, No. 500510/14 (N.Y. Sup. Ct. Oct. 9, 2015).

¹⁴⁰ See *Dray v. Staten Island Univ. Hosp.*, 75 N.Y.S.3d 59, 61–62 (N.Y. App. Div. 2018).

¹⁴¹ *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (N.Y. Sup. Ct. 1985).

¹⁴² See *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994).

¹⁴³ See generally *Ankrom v. Alabama*, 152 So. 3d 397 (Ala. 2013); *Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016).

indefinitely, with none of the rights protections given in the context of the criminal justice system.¹⁴⁴ Hospitals can use their legal representation, or pre-existing policies, to override the wishes of their patients, even when these may result in direct bodily or emotional harm. The pregnancy police are already well practiced, using the bodies of enslaved people, black and brown people, poor people, and other socially and politically marginalized people. When and if the U.S. Supreme Court rules to further restrict abortion, it will do so as part of a system which has already established policies, strategies, and practices to surveil, regulate, and control pregnant people.

¹⁴⁴ See generally *Loertscher v. Anderson*, 893 F.3d 386 (7th Cir. 2018).

