

Stand Against *Dobbs* and White Supremacy by Ending Collusion with the Carceral System

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“I get frustrated when I hear people talk about how ‘if I had been living during the time of slavery, of course I would have been an abolitionist.’ And most people think that if they had been living when mobs were gathering to lynch black people on the courthouse lawn, they would have said something. Everybody imagines that if they were in Alabama in the 1960s, they would have been marching with Dr. King. And the truth of it is, I don’t think you can claim that if today you are watching these systems be created that are incarcerating millions of people, throwing away the lives of millions of people, destroying communities, and you’re doing nothing.”

— Bryan Stevenson

The fight to overturn *Roe v. Wade*, decades in the making, has never been merely about abortion. Rather, the anti-abortion movement is and always has been about power and domination. The push to end abortion is grounded in the values of white supremacy, including heteropatriarchy and the subjugation of women. It is part of a broader movement which seeks to maintain and increase oppressive control over marginalized groups. Opposition to abortion is also an important lodestone of white nationalism, a movement with “its own distinct ideology with an emphasis on antisemitism and the creation of all-white ethnostates through violence and policies that increase the vulnerability, criminalization and removal of minorities and other targeted communities.”² The effort to overturn *Roe* was a relentless, disciplined, and strategic crusade to entrench white supremacist values more deeply in the everyday workings of this country, and to further the goals of white nationalism.

To fully understand this moment, it is necessary to acknowledge that white supremacy is the original sin of the United States. This country was founded on racial inequality. When Oregon came into existence as a state, white colonists explicitly codified racial hierarchy and subordination into state law. From the inceptions of these two sovereigns, a narrative of racial difference has justified innumerable atrocities, including the genocide of Native Americans and

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² *Confronting Conspiracy Theories and Organized Bigotry at Home: A Guide for Parent and Caregivers*. Written by Christine Saxman, Shelly Tochluk, Joanna Schroeder & Western States Center Staff. Published by Western States Center. 2022.

theft of their land, and ever-evolving iterations of anti-Black violence and terror. The line that connects these iterations—from slavery, to lynching, to Jim Crow and segregation, and finally to mass incarceration—is clear and undeniable. Without candidly admitting that this line exists, we will be unable to “see the way that line claims lives unfairly.”³

The Western States Center defines “white supremacy” in the United States as, in part:

[A] power structure created by a western European colonial ruling class **to control and exploit indigenous populations, Black people, poor whites, immigrants, and women’s sexual reproduction.** It established and maintained the political, cultural, economic, and social domination of those identified as white, while finding multifaceted ways to define Indigenous, Black, and people of color as inferior in order to maintain the systems initially created to justify genocide and enslavement, enshrining race as a primary way in which human difference is understood and interpreted. . . . Anti-Indigenous and anti-Black violence, laws, social restrictions, stereotypes, and other control mechanisms were maintained in order to enforce a hierarchical social structure and worldview. During the second half of the 20th Century, de jure white supremacy (legally recognized) was morally and politically defeated by the Civil Rights Movement. It gave way to de facto white supremacy (generally known to exist in society, economy, culture, policies, and services, even if not legally authorized) which still structures our institutions today.⁴ [Emphasis added.]

While white nationalism is a movement, white supremacy is a system of oppression based on privileging whiteness. It operates at both an individual and structural level, and racial animus or hatred is not a necessary factor in perpetuating this system.⁵

The white nationalist movement will markedly benefit from the parallel movement to build up the U.S. carceral system, which is now the most comprehensive and elaborate infrastructure of incarceration and punishment the world has known. The *Dobbs* decision does not return us to a pre-*Roe* society of the 1970s. We are in a far more terrifying reality of mass government surveillance and criminalization. Since the 1970s, federal and state law enforcement agencies have more than doubled in size and possess far greater investigative powers. The number of criminal laws has greatly increased, along with the use of criminal theories like conspiracy, attempt, and accomplice liability to expand the reach of the criminal legal system. We have over 5,000 jails and prisons in the U.S. that detain two million people—a 500% increase in

³ True Justice: Bryan Stevenson’s Fight for Equality (HBO 2019), available at <https://eji.org/projects/true-justice/>.

⁴ Western States Center, *supra* note 1, at 27-28.

⁵ *Id.* at 4.

incarcerated people over the last 40 years. Black and Brown people are disproportionately surveilled, criminalized, and incarcerated. This ramp up of our carceral system has occurred even as crime rates have drastically declined, with current rates the lowest they have been since the 1980s. The vast network of the carceral system is now being deployed against those who are seeking an abortion, and their medical providers and supporters. Experts predict that with the overturning of *Roe* and new anti-abortion laws, this country will experience “mass criminalization on an unprecedented scale and without even the necessity of new legislative action of the kind that provided the basis for the war on drugs.”⁶

We recognize that the overturning of *Roe* created immediate mass harm by denying many the right to access medically-managed abortions and by instilling profound fear in those who care for and support people seeking safe abortions. We commend medical providers, community organizations, and community members who are, at this very moment, doing all that they can to mitigate the immediate threats to the health, dignity, and liberty of those seeking an abortion.

At the same time, we must also be awake to the reality that the overturning of *Roe* also puts *all* pregnant people at greater risk for criminal investigation, arrest, and prosecution—not just those seeking an abortion. This danger is present even in states with laws protecting abortion rights. As the American College of Obstetricians and Gynecologists explains below, the criminalization of pregnancy is broad in scope:

Criminalization of pregnancy is the punishing or penalizing of individuals for actions that are interpreted as harmful to their own pregnancies, including enforcement of laws that punish actions during pregnancy that would not otherwise be criminal or punishable. Criminalization also occurs when laws not specific to pregnancy are either applied in a discriminatory way against pregnant people or have a disproportionate effect on pregnant people. Criminalization has taken many forms including, but not limited to, the passage of fetal assault laws, policies that punish or penalize pregnant people for substance use during pregnancy, and the practice of judicial intervention or legal attempts at coercion for refusal of care during pregnancy.⁷

The effect of the *Dobbs* decision is that *all* pregnant people are now at greater risk of criminalization, having been stripped of the constitutional protections afforded to non-pregnant

⁶ National Association of Criminal Defense Lawyers, NACDL Foundation for Criminal Justice, *Abortion in America: How Legislative Overreach Is Turning Reproductive Rights into Criminal Wrongs 7* (2021), *available at* <https://www.nacdl.org/Document/AbortioninAmericaLegOverreachCriminalizReproRights> [hereafter “NACDL Report, Abortion in America”]

⁷ American College of Obstetricians and Gynecologists Statement of Policy, *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period* (Dec. 2020), *available at* <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>.

people. As the dissent in *Dobbs* acknowledged, the decision serves to diminish the status and equal rights of women and pregnant people in the eyes of the law. As explained below, criminalization of pregnancy has been a significant problem for decades, though it has attracted relatively little attention. The overturning of *Roe* is a green light to further criminalize pregnant people, beyond those individuals who are seeking an abortion.

Yes, these increased risks apply even to those who live in Oregon where, at least for now, state laws explicitly protect the right to obtain an abortion, with no gestational time limits imposed. Experts who advocate for the rights of pregnant people and defend pregnant people in criminal proceedings, like the National Advocates for Pregnant Women (NAPW), have long been telling us that “[for] decades, women across America have been subjected to criminalization and deprivation of liberty that only occurred because of their status as pregnant or postpartum women.”⁸ NAPW, along with other experts, have forewarned of the nation-wide mass criminalization and loss of liberty and other rights that will ensue for *all* pregnant and postpartum people immediately upon the overturning of *Roe*.⁹

The criminalization of pregnant people is not a new phenomenon. Since 1973, researchers at NAPW have documented more than 1700 instances across the U.S. in which the state deprived a person of liberty because of their pregnancy status or pregnancy outcome. These cases reveal a pattern of oppression against pregnant people in this country, whereby the very fact of pregnancy makes the person a target for forms of state surveillance, control, and punishment that a non-pregnant person would not incur. In the fifty years since *Roe* enshrined the right to abortion, pregnant and postpartum people have experienced an array of state harms inflicted by the carceral system under the pretense of protecting the unborn fetus; from being arrested, investigated, and forced to participate in lengthy court proceedings, to being convicted of crimes, and serving time in prison. Criminal prosecution is far from the only means of liberty deprivation; pregnant people have also experienced detention in psychiatric hospitals, civil commitment, and been forced to undergo unwanted medical procedures. Further, these cases have significantly

⁸ NAPW, *Confronting Pregnancy Criminalization: A Practical Guide for Healthcare Providers, Lawyers, Medical Examiners, Child Welfare Workers, and Policymakers* 4 (Jun. 23, 2022), *available at* <https://www.nationaladvocatesforpregnantwomen.org/confronting-pregnancy-criminalization/>. In reference to its use of the word “women” here, NAPW explains in an endnote, “This document uses the phrase ‘pregnant women’ throughout. However, we recognize that not all people who become pregnant are women, and that systems of oppression that seek to criminalize pregnancy are connected to those that also marginalize and target non-binary, trans, and gender non-conforming people.” *Id.* at n 1.

⁹ *See, e.g.*, Lynn M. Paltrow, *Roe v. Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103(1) *Am. J. Pub. Health* 17 (2013), *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3518325/pdf/AJPH.2012.301104.pdf>; Brief for Nat’l Advocates for Pregnant Women et al. as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women’s Health Organization et al.*, No. 19-1392, 597 U.S. ____ (2022), *available at* https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/20210920133356568_19-1392-Amici-Brief.pdf; NACDL Report, *Abortion in America*, *supra* note 5.

increased in recent years, with NAPW documenting about three times as many incidents between 2006 and 2020 than were found between 1973 and 2005.

Prosecutors across the U.S. have brought a wide range of criminal charges against pregnant people, ranging from child abuse to murder, on the basis that the pregnant person harmed or created a risk of harm to the fetus. Many of these cases involve pregnant people who were targeted by law enforcement after experiencing miscarriage or stillbirth, but prosecutors have also gone after those whose pregnancies resulted in the birth of a healthy baby. People have been reported to law enforcement by medical personnel, social workers, child welfare actors, and family members. Below are examples of non-abortion activities and circumstances that have led to criminal charges and other forms of liberty deprivations of pregnant people:

- Using illicit drugs, alcohol, or prescription medications
- Attempting suicide
- Being involved in a car accident
- Driving without a seatbelt
- Falling down a flight of stairs
- Being physically assaulted by another person
- Giving birth at home
- Refusing to undergo cesarean surgery

As with mass incarceration generally, people of color and low-income people are disproportionately impacted by the criminalization of pregnancy. People who use drugs or are suspected of drug use are also particularly vulnerable to becoming targeted for criminal prosecution and/or intervention from family policing systems, under the pretext of protecting children. Often, prosecutors have sought to expand the use of existing criminal laws in ways they were never intended to be applied, and many prosecutors have persisted in filing charges even when doing so is plainly contrary to black-letter law and court rulings. Of course, even when criminal charges are ultimately rejected by courts, the tremendous damage and suffering that pregnant people and those close to them experience within the criminal system has already been inflicted and cannot be undone. Critically, these prosecutions went on for decades when *Roe* was law, despite being contrary to the principle under *Roe* that pregnant people have full constitutional personhood equal to that of non-pregnant persons. Now that *Roe* has fallen, state actors who wish to control and punish women and pregnant people will only be more emboldened. Their past actions clearly show that they will not wait for legislative authority to act, nor will they concern themselves with whether courts will uphold the charges.

Oregon has not been immune to pregnancy-related criminalization and liberty deprivation during the *Roe* era. In 2004, a 19-year-old Deschutes County woman was prosecuted for ingesting methamphetamine while pregnant, under a theory that she allowed substances to

pass through her umbilical cord in the seconds after giving birth.¹⁰ The trial court dismissed the charges, but the state attorney general decided to appeal, thereby endorsing this theory. The Oregon Court of Appeals affirmed the trial court dismissal, but by then, the mother had spent the first year of her child's life under indictment, followed by several years of litigating the state's appeal. In another case, a Washington County trial court ordered a pregnant woman to be detained in a psychiatric hospital against her will, because she had allegedly missed medical appointments for her gestational diabetes. The state argued that the woman's alleged mental health condition made her unable to properly care for her basic needs and that this posed a threat to her health and the health of the fetus. On appeal, the Oregon Court of Appeals disagreed and reversed the trial court order, pointing to a lack of evidence in the record to support the state's assertions.¹¹

There have also been instances in Oregon of government officials obstructing the ability of incarcerated women to obtain abortions. For example, in Yamhill County, a local ordinance prohibits county employees from facilitating abortions (the ordinance is still in effect).¹² Shortly after the ordinance was enacted in 1997, a pregnant woman held in Yamhill County jail sought an abortion which she urgently needed to avoid potentially life-threatening complications. After being denied release on bail, she asked officials at the sheriff's department for help arranging transport to a hospital for an abortion. They refused, in accordance with the county ordinance.¹³ In another troubling case, in 2011, a woman who was detained at Yamhill County jail while awaiting trial encountered strong resistance from local officials when she sought temporary leave from jail to obtain an abortion. The trial court judge declined to order her release, instead ordering psychiatric treatment. When the woman asked the sheriff's department to authorize a medical leave from jail, the sheriff also refused.¹⁴ The above examples illustrate that that all pregnant people in Oregon, as much as anywhere else in the U.S., are vulnerable to harm and criminalization when state actors are in a position to make discretionary decisions affecting their liberty. Pregnant people will be even more vulnerable to such abuses in the post-*Dobbs* era.

To some, the idea that we are facing mass criminalization and loss of liberty in the wake of *Dobbs* may seem like an exaggeration. But to underestimate the dangers of this moment is to be ignorant to the historical and continuing structures of racial and social control in this country. Our carceral system is rooted in white supremacy; there is no reasonable debate on this point any longer. The current era of mass incarceration is the result of intentional, cooperative, and

¹⁰ *State v. Cervantes*, 232 Or App 567, 223 P3d 425 (2009).

¹¹ *State v. Alaya*, 164 Or App 399, 991 P3d 1100 (1999).

¹² Yamhill County Ordinance 634 (B.O. 97-636) (Aug. 28, 1997), <https://www.co.yamhill.or.us/commissioners/ordinances/ORD634.PDF>.

¹³ *Inmate Refused Requested Abortion*, Chicago Tribune, Aug. 30, 1997, <https://www.chicagotribune.com/news/ct-xpm-1997-08-31-9708310205-story.html>.

¹⁴ *Inmate With Mental Illness Must Be Stable Before Judge Decides Abortion Request*, KATU.com, July 6, 2011, archived at <https://www.mentalhealthportland.org/inmate-with-mental-illness-must-be-stable-before-judge-decides-abortion-request/>.

complicit actions to regulate, subjugate, and oppress people in the furtherance of white supremacy. We continue to see our vast carceral system be increasingly deployed to prey upon whole swaths of our communities, including here in Oregon: Black and Brown people, immigrants, the houseless and the poor, people with disabilities, people with mental illness, and people who use drugs. Given the decades-long criminalization of pregnant people and the decision in *Dobbs*, it is naïve to believe that pregnant people will escape our carceral system. To put it another way: Why would those who aggressively forward an extremist ideology refrain from using the carceral system to reinforce and implement their value system? And when have we ever seen the carceral system show restraint in punishing those who are deemed by the system to be of lesser value?

In the analysis put forth by the *Dobbs* majority—scorning the constitutional right to privacy and bodily autonomy as nothing more than *Roe*'s judicial overreach—they have signaled that they are clearing an imminent path to strip away other protections and freedoms. Of immediate concern, the right to privacy identified in *Roe* is also the cornerstone of the court's decisions protecting the right to take contraceptives, to engage in non-heterosexual intimate relationships, and to marry the person of our choosing. As the *Dobbs* dissent warned, those rights against government intrusion into our private lives are also now at risk. And if the court overturns these decisions, states will be free to implement oppressive laws to further regulate our most intimate decisions. There is no reason to believe that states will not also call upon the criminal system to enforce these laws.

The *Dobbs* decision also represents a political victory for white nationalism. The language and analytical approach used by the *Dobbs* majority is in harmony with the goal of the white nationalist movement—to perpetuate a social order in which white men dominate and control everyone else. The majority relies on the “originalist” philosophy of constitutional interpretation and rejects the “living constitution” approach that guided *Roe* and its progeny.¹⁵ Originalism purports to identify the singular fixed meaning of constitutional text, using historical research as a guide. But as *Dobbs* illustrates, modern originalism is nothing more than a tool to further a regressive, white supremacist agenda, under the guise of specious reasoning. In overturning *Roe*, the majority invoked the originalist principle that the constitution does not protect individual rights unless the right is mentioned in the document, or if the right is one that the court decides is “deeply rooted in the Nation’s history and tradition.”¹⁶ This point of view is anathema to an intellectually honest reckoning with the history of this country. Indeed, modern originalism

¹⁵ Proponents of originalism maintain that the meaning of the text of the constitution is fixed and singular, and that the court's role is to interpret this meaning by determining how the public would have understood the text at the time of its adoption. Originalists maintain that the court may not treat the constitution as a “living” document whose meaning is subject to evolving interpretations.

¹⁶ For example, the *Dobbs* majority argues that abortion does not meet this test because in the early U.S., abortion could be punished as a crime. To support this argument, *Dobbs* cites “eminent common-law authorities” such as Lord Matthew Hale, an English judge who presided over witch trials and is infamous for creating the marital rape exception. See *Dobbs v. Jackson Women’s Health Organization et al.*, No. 19-1392, slip op. at 17, 597 U.S. ____ (2022).

evolved as a backlash to the advancements of the civil rights movement of the 1960s and 1970s. At its core, originalism is a philosophy that distorts history in order to revere and uphold a past when only white men were considered to have full rights and personhood. *Dobbs* is part of this legacy of oppression.

Because the effort to overturn *Roe* was never just about abortion, our collective response to this watershed moment cannot be limited only to the issue of access to abortion. Many people are struggling to make sense of how we found ourselves in this moment. It is incumbent upon us to understand the historical context and the present social context of the *Dobbs* decision and to open our eyes and recognize that this is a profound attack on the future freedoms of this country. Otherwise, we will find ourselves in more dire circumstances—a country where we accept mass policing and criminalization, even greater than what we now accept and live in, with a majority of people once again baffled and wondering, “How did we get here?”

In the history of the U.S., we have never experienced the current confluence of ideologies, politics, and systems. Our local and national democratic institutions are being taken over by individuals who are either actively forwarding a white nationalist value system or are complicit in its mainstreaming through inaction and acceptance. Nationwide, we have developed and nurtured an immense carceral system—an extensive and comprehensive network of surveillance, a robust and emboldened system of prosecution, and an infrastructure for mass incarceration. As the white nationalist value system metastasizes through our local democratic institutions, local actors will seek to enforce these bigoted values through our existing carceral system. Now, we are in the midst of a rapid roll back of federal protections of our rights and liberties by the U.S. Supreme Court, seemingly intent on advancing a narrow and bigoted interpretation of the U.S. Constitution. We are no longer able to rely on federal protections to check local actors who are intent on dominating and controlling segments of our population in furtherance of white nationalism.

The criminalization of pregnant people is simply the next group of people to be targeted, joining a long list of marginalized groups who have already been entrapped in the broad net of our criminal legal system. These systems and ideologies of control and extremism are counting on our complacency and acceptance that pregnant people, and their associates, should be viewed with suspicion, are in need of surveillance, and should be controlled. Given our country’s history and current state, other groups of people to be targeted and controlled will soon follow.

Therefore, our collective response to *Dobbs* must include the dismantling of our carceral system and the infrastructures and policies that sustain it. While this is a monumental task, there are steps that we can take now. To start, it is imperative in this moment that we refuse to accept the myth that law enforcement, state control, and mass incarceration keeps us safe and healthy.

We must actively reject the false premise that policing and reporting to police protects our community well-being. In a society where people are facing increased criminalization for being pregnant or in their postpartum period, we must recognize when we are being complicit in the expansion of law enforcement and carceral apparatus. We must stop colluding with law enforcement and other state actors who participate in the punishment system by not reporting pregnant or postpartum people to them. As medical professionals and other experts have expressed, doing so serves no purpose for improved health care and well-being; and in fact, endangers maternal and infant health.

Further, we must demand that government actors at all levels refuse to perpetrate the injustices of pregnancy criminalization. We must actively confront those who sustain systems of control and incarceration and demand that they are accountable to mitigate the harm that *Dobbs* will inflict. Demand that law enforcement refrain from arresting people who are reported on because of their pregnancy status or pregnancy outcomes. Demand that district attorneys decline to investigate and prosecute people on the basis of their pregnancy or pregnancy outcomes. Demand that the Oregon Attorney General not defend these prosecutions and punishments. Demand that the governor pardon people who are convicted following prosecution for their pregnancies. And when government leaders discuss matters of public safety and community well-being, including our state legislators, we must demand that they stop expressing unjustified, automatic deference to law enforcement and district attorneys. Those state actors have proven that they do not have an expertise in advancing community well-being. Certainly, they have no expertise on the health and needs of people experiencing pregnancy or postpartum, and their loved ones.

The Women's Justice Project of the Oregon Justice Resource Center is committed to responding to this moment and doing all that we can to help protect the rights, liberties, and dignity of those individuals who are pregnant and in the crosshairs of the criminal legal system and mass incarceration. Immediately, we are:

- Sending letters to all of Oregon's 36 district attorneys and asking them to publicly commit to not investigate or prosecute people for actions or incidents related to their pregnancy status or pregnancy outcomes; to fight attempts to hold pregnant people in pretrial custody; and to affirm that they will adhere to Governor Brown's commitments to not cooperate with out-of-state investigations and arrests regarding abortions obtained in Oregon and to refuse non-fugitive extradition of those charged with crimes out-of-state for receiving abortions in Oregon.
- Sending a letter to Attorney General Rosenblum asking for a public commitment to not defend on appeal prosecutions, convictions, and punishments of people for actions or incidents related to their pregnancy status or pregnancy outcomes.

- Sending a letter to Governor Brown commending her for her commitments to not cooperate with out-of-state investigations and arrests regarding abortions obtained in Oregon and to refuse non-fugitive extradition of those charged with crimes out-of-state for receiving abortions in Oregon; and asking for a public commitment to instruct Oregon State Police to not arrest, detain, or investigate people for actions or incidents related to their pregnancy status or pregnancy outcomes and to pardon people with criminal convictions that were based on their pregnancy status or pregnancy outcomes.
- Sending letters to all law enforcement agencies for a public commitment to not arrest, detain, or investigate people for actions or incidents related to their pregnancy status or pregnancy outcomes; and to affirm that they will adhere to Governor Brown's commitments to not cooperate with out-of-state investigations and arrests regarding abortions obtained in Oregon and to refuse non-fugitive extradition of those charged with crimes out-of-state for receiving abortions in Oregon
- Requesting from sheriffs the policies and procedures regarding access to abortion and healthcare for pregnant people in their jails.
- Creating an online, confidential portal for public defenders and criminal defense attorneys to share their experiences of representing individuals who have been charged with and/or convicted of crimes for pregnancy-related issues.
- Working with medical doctors to create resources for medical professionals reinforcing that they do not have to and must not engage with law enforcement or allow themselves to be complicit in the carceral apparatus.

We commend Oregon for protecting access to abortion. But given that that the reversal of *Roe* exacerbates the broader existing threat of pregnancy criminalization, Oregon must also protect the rights and dignities of all pregnant and postpartum people. The Women's Justice Project will continue to track and monitor this issue and will have additional information in the upcoming months.

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