# RESISTING CRIMINALIZATION OF REPRODUCTIVE AUTONOMY: POLICY DOs AND DONT's[1]

In response to the expanding criminalization of reproductive autonomy through increasing restrictions on abortion and reproductive care, and the growing criminalization of pregnant people and parents, a group of reproductive justice and anti-criminalization organizers and advocates came together in May 2019 to develop a shared analysis and resistance strategies.

This preliminary list of policies which can contribute to increased surveillance, policing, criminalization, and punishment of pregnant people, parents, and providers emerged from these conversations.

This document is intended to inform policymakers and advocates concerned about reproductive justice, intimate partner and domestic violence, public health, and criminalization about the potential consequences of the policy approaches outlined below, and to offer alternative strategies that carry less risk of contributing to the criminalization of reproductive autonomy.

## FOR ANTI-VIOLENCE ADVOCATES

### Avoid policies that increase criminal penalties for harm to pregnant people under the guise of protecting pregnant people from domestic and community violence.

These laws do not deter violence against pregnant people, and are often used to criminalize them instead: pregnant people who have attempted suicide, used drugs or alcohol while pregnant, exercised autonomy around prenatal care or birth plans, or who have been suspected of self-managed abortion have been charged with feticide, fetal homicide, or fetal assault under laws ostensibly passed to protect them.[2] Laws criminalizing harm to pregnant people also advance anti-abortion agendas by establishing legal "personhood" from the moment of conception.

**Examples:** For an overview of state feticide laws, please visit: http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx

**Alternatives:** Existing laws already address harm to pregnant people. Instead of enacting new laws or enhancing criminal penalties when a pregnant person is harmed, policies and programs should focus on the specific vulnerabilities of pregnant people in domestic violence prevention efforts, prenatal care, drug abuse prevention and treatment, community mental health initiatives, and workplace protections. Focus on solutions that build individual and community power to prevent and address harm, instead of using punitive measures that have not been shown to curb violence against pregnant people.

## Avoid laws that create distinctions based on gestational age or fetal viability.

These are an easy pitfall for advocates to fall into when advocating for maintaining the *status quo* created by *Roe*. Pre- and post-viability laws can be used to dictate what actions are criminalized, both by a pregnant person and their doctor or other providers and/or caretakers. Generally speaking it is critical to avoid reinforcing categories in law and policy that can allow for people who do not fall within those to become targets for criminalization.

**Examples:** Arguments that the law doesn't allow for the criminalization of "pre-viability" abortions implies that "post-viability" abortions can or should be criminalized.

**Alternatives:** Everyone should have full unfettered access to abortion on demand; nobody should be ever punished for accessing an abortion.

## Avoid laws that establish specific professional licensing requirements for abortion care, and laws prohibiting self-managed abortion.

These laws create a set of actors who are not allowed to provide abortion care, including advanced practice providers, lay providers, pregnant people self-managing abortion, and people assisting them.

**Examples:** According to the Guttmacher Institute, 40 states require an abortion to be performed by a licensed physician.[3] If/When/How reports that five states criminalize self-managed abortions.[4]

**Alternatives:** While it's important to ensure that people receive quality care, there are already regulatory and civil legal structures governing provision of health care and individual redress for harm. The criminal legal system does little or nothing for individuals who have experienced harm. Conversely, laws that overregulate abortion care are used by opponents of abortion to reduce access and target those who end pregnancies for criminalization.

## FOR CRIMINAL JUSTICE ADVOCATES

### Avoid diversion programs and family treatment courts that mandate drug treatment, drug testing, or mandatory mental health treatment, and parenting classes.

Drug testing and mandatory, nonconfidential drug or mental health treatment can lead to the criminalization of pregnant people and parents instead of providing supportive services and meeting basic needs. Additionally, very few drug treatment programs are available for pregnant people and parents, leading to their incarceration for minor offenses even where diversion programs are otherwise available to non-pregnant people or people who are not parents.

Advocates should also avoid strategies that decriminalize 'prostitution' for young people, but require their partcipation in court ordered services which can contribute to the criminalization of pregnant people and parents through mandatory drug testing, forced compliance with services, stay away orders, child welfare intervention, and mandated "exit" from the sex trades.

## FOR CRIMINAL JUSTICE AND DOMESTIC VIOLENCE ADVOCATES

### Avoid policies that contribute to increased pre-trial detention.

Eighty percent of people incarcerated in jails for women are mothers, and approximately 150,000 women jailed each year are pregnant when locked up.[5] Policies that contribute to increased pre-trial detention, including cash bail or risk assessments relying on racially discriminatory data and algorithms, increase the amount of time these women will be separated from their children or receive substandard prenatal care. They also increase the risk that women will give birth while incarcerated, which in some states means literally giving birth in chains.

**Alternatives:** Join campaigns to end money bail and pre-trial detention, and to advocate for consideration of a person's pregnancy or parental status when determining whether a person will be held pre-trial and the length or type of sentence, if convicted.

## Avoid policies and practices that criminalize drug and alcohol use or other activities during pregnancy.

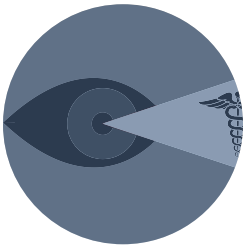
Several states have prosecuted people who use criminalized drugs, using "fetal assault," "child abuse," "chemical endangerment of a child," or "delivery of drugs to a minor" laws to charge pregnant people with harm to a fetus, embryo, or fertilized egg.[6] Additionally, currently 23 states and the District of Columbia deem drug use during pregnancy to be a civil offense under child welfare laws, and in 3 states a pregnant person can be subject to civil commitment.[7]

**Examples:**

- Almost 500 pregnant women have been prosecuted under Alabama's criminal "chemical endangerment of a child law" between 2006 and 2015.[8]
- A law in effect in Tennessee between 2014 and 2016 criminalizing illegal use of narcotics during pregnancy led to the arrest of over 100 women based solely on often non-consensual drug test results or their child's diagnosis with neonatal abstinence syndrome.
- Arizona,[9] Kentucky,[10] and Texas[11] have made it easier to terminate the parental rights of people who use controlled substances while pregnant through the child welfare system. Arizona's legislation, which became law in April 2018, permits termination of a mother's parental rights, either immediately at birth or within one year of birth, depending on how chronic the illicit drug use appears to the court.
- Kentucky's legislation, also effective in 2018, permits termination of a mother's parental rights if her newborn exhibits signs of withdrawal, known as neonatal abstinence syndrome, as the result of illicit opioid use, unless the mother is in substantial compliance with both a drug treatment program and a regimen of postnatal care within 90 days of giving birth.

**Alternatives:** Policies and programs providing non-judgmental, culturally appropriate, harm reduction-based prenatal care and voluntary drug treatment, along with other supports, for pregnant people and parents.

## FOR PUBLIC HEALTH AND ANTI-POVERTY ADVOCATES



**Avoid laws and policies that increase surveillance of people accessing public health services and health care, including increased collection of public health data.**

**Examples:**

- Laws requiring drug testing of people accessing welfare benefits or public health care, public housing or public employment.
- Expansion of universal drug testing or drug screening in prenatal/perinatal settings.
- Expansion of mandated reporting policies and practices for prenatal/perinatal/neonatal healthcare providers following positive toxicologies.
- Expansion of mandated reporting laws to more professions and situations.
- Policies that increase police and immigration enforcement presence in health care facilities, schools, social services, courts, shelters, day care centers, and other places where surveillance of pregnant people is likely to occur.

## FOR REPRODUCTIVE RIGHTS ADVOCATES


**Avoid policies providing for "heightened protection zones" that increase criminal penalties for infractions on abortion clinics or for heightened police presence around abortion clinics.**

Particularly where clinics are located in communities of color and low-income neighborhoods, such policies result in increased surveillance and criminalization, including of people seeking care and their families, and undermine trust between communities and health care providers.

# ENDNOTES

1 This is a working document. For more information or to make additions, suggestions, and revisions, please contact *veronica@caip.us* or *aritchie@barnard.edu*

2 See New York Times Editorial Board, "A WOMAN'S RIGHTS: PART 2: The Feticide Playbook, Explained," *New York Times*, December 28, 2018, available at: http://advocatesforpregnantwomen.org/2-The%20Feticide%20PLaybook%2C%20Explained.pdf; Emily Bazelon, "Purvi Patel Could Be Just the Beginning," *New York Times*, April 1, 2015, available at: https://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html; Paltrow and Jeanne Flavin, "The Policy and Politics of Reproductive Health: Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-3005: Implications for Women's Legal Status and Public Health," *Journal of Health Politics, Policy and Law* 38(2) (April 2013); Brave New Films, *Prison for Pregnancy*, available at: https://www.bravenewfilms.org/prisonforpregnancy

3 Guttmacher Institute, "An Overview of Abortion Laws" (updated December 1, 2019), available at: https://www.guttmacher.org/state-policy/explore/overview-abortion-laws

4 If/When/How, "Roe's Unfinished Promise: 2019 Update," available at: https://www.ifwhenhow.org/resources/roes-unfinished-promise-2019-update/

5 Wendy Sawyer and Wanda Bertram, *Jail will separate 2.3 million mothers from their children this year*, Prison Policy Institute, May 13, 2018, https://www.prisonpolicy.org/blog/2018/05/13/mothers-day-2018/

6 One state, Tennessee, had a statute that permitted "fetal assault" charges against a person's own fetus in operation from 2014-2016. SisterReach, Ibis Reproductive Health and National Advocates for Pregnant Women, *Tennessee's Fetal Assault Law: Understanding its Impact on Marginalized Women* (2018); Amnesty International, *Criminalizing Pregnancy: Policing Women Who Use Drugs in the USA*, available at: https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf (2017); Two states have judicially interpreted their criminal child abuse and endangerment laws to apply to acts by pregnant people that might affect their fetus. Nina Martin, "Take A Valium, Lose Your Child," ProPublica.com Sept. 23, 2015 available at: https://www.propublica.org/article/when-the-womb-is-a-crime-scene

7 Guttmacher Institute, *Substance Use During Pregnancy*, https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy (October 1, 2019).

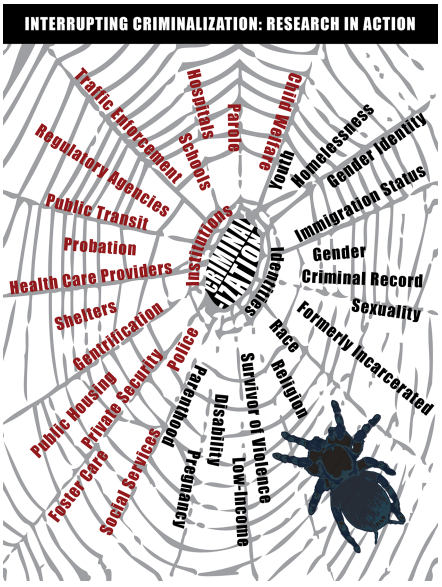
8 Amnesty International, *Criminalizing Pregnancy: Policing Women Who Use Drugs in the USA*, available at: https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf (2017)

9 Section 8-503 of Arizona Revised statutes shortened the time frame for termination of parental rights for infants from 18 months to 12 months. Section 8-846 of Arizona Revised statutes permits the child welfare department to move immediately to termination without providing any services if a child under six months is exposed to drugs in utero and it is determined that the parent will not be able to remedy their substance use disorder.

10 Ky. Rev. Stat. § 625.090.

11 Section 161.001 of the Texas Family Code allows for termination of parental rights ("TPR") where the parent is "the cause of the child being born addicted to alcohol or a controlled substance." TEX. FAM. CODE ANN. § 161.001(b)(1)(R)

## For more information or to contribute to this document, please contact:

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