

**Keywords:** Pregnancy, Parenting, Drug Policy, Gender Equality, Racial Equality, Criminalization, Discrimination against People who Use Drugs, Reproductive Justice, Reproductive Health, Reproductive Rights, Health Care, Child Welfare.

## **I. Introduction**

1. If/When/How: Lawyering for Reproductive Justice, National Advocates for Pregnant Women, Movement for Family Power, and the signatory organizations are U.S. and international organizations dedicated to securing the rights and dignity of pregnant people and parents. They submit this joint report to the United Nations Universal Periodic Review of the United States of America, to specifically address the human rights concerns surrounding criminal and civil legal systems' punitive actions against people because of their reproductive capacity.
2. Across the United States, people have been criminalized and punished based on their capacity for pregnancy, including allegedly causing harm or even merely risking harm to their own pregnancies.<sup>1</sup> Child welfare authorities also subject pregnant people and parents to non-consensual drug testing, and court-ordered supervision and mandatory treatment programs after they become parents. These punitive government actions are a result of state and federal laws, law enforcement policies and judicial decisions, and are violative of individuals' human rights, including but not limited to: life, equality and non-discrimination, bodily integrity, health and privacy.
3. The right to end a pregnancy is protected by the U.S. Constitution and no state currently has in effect a law explicitly criminalizing pregnancy loss. Nevertheless, prosecutors misuse a variety of laws, from: criminal child endangerment laws; to feticide laws; to antiquated laws criminalizing abortion, to prosecute people who have ended or lost a pregnancy or for other actions or omissions during a pregnancy,<sup>2</sup> disregarding binding court decisions or explicit statutory language clarifying that these laws do not criminalize pregnancy loss or other circumstances of pregnancy.<sup>3</sup> Prosecutions or civil proceedings against pregnant people improperly punish a pregnant person for their treatment of their own body.
4. This criminalization is calculated to enshrine in the law that fetuses should be treated as though they have rights in conflict with the person who carries and sustains them. This creates a second-class status for pregnant and postpartum people, who lose their rights to privacy and bodily integrity upon becoming pregnant and are singled out for surveillance and punishment.<sup>4</sup>
5. For instance, a Native American woman named Samantha Flute is currently awaiting trial in federal court in South Dakota for the charge of manslaughter, after she experienced a stillbirth, sought medical care, and was subsequently reported to law enforcement officials.<sup>5</sup>

## **II. Legal Framework**

6. The human rights violations experienced by people prosecuted due to their reproductive capacity run counter to the standards set forth in the Universal Declaration of Human Rights

(Articles 1, 2, 7 and 16), and contravene the United States' obligations under treaties it has ratified, notably: the International Covenant on Civil and Political Rights, (ICCPR) (Articles 2, 3, 7, 17, and 26); the International Convention on the Elimination of All Forms of Racial Discrimination (Articles 2, 5 and 6); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment. These violations have been addressed by treaty bodies and other human rights experts, both generally and with respect to the United States specifically.

7. The U.S. has also signed but not ratified the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As a signatory, the U.S. should not undermine or engage in actions that defeat the object and purpose of these conventions.
8. In 2019, the UN Human Rights Committee (HRC) included the issue of termination of pregnancy and reproductive rights, specifically including the "criminalization of pregnant women using drugs," in the List of Issues Prior to Reporting for the upcoming review of the U.S.<sup>6</sup>

Treaty Body Statements and Recommendations:

9. The HRC's recent General Comment 36 (Right to Life) protects reproductive autonomy, dignity and health asserting that "restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering which violates article 7, discriminate against them or arbitrarily interfere with their privacy." Furthermore, states "should not . . . . apply criminal sanctions against women and girls undergoing abortion." States should also protect the lives of women and girls by "prevent[ing] the stigmatization of women and girls seeking abortion" and "ensur[ing] the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls, in all circumstances, and on a confidential basis."<sup>7</sup>
10. In addition to this General Comment, the HRC has also raised concerns about the U.S. criminal justice system as a whole. In its 2014 Concluding Observations regarding the U.S., the HRC expressed concern about the racial disparities in the criminal justice system, including disproportionate arrests.<sup>8</sup> The Committee on the Elimination of Racial Discrimination (CERD) has also recognized the need for the U.S. to address racial disparities in sexual and reproductive health and maternal mortality, and the disproportionate removal of children and lack of effective remedies in child welfare proceedings for indigenous families and racial and ethnic minorities.<sup>9</sup>
11. The UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), in its General Comment 35, explicitly stated that the criminalization of abortion is a violation of women's sexual and reproductive health and rights and a form of gender-based violence and urged States to repeal all legislation that criminalizes abortion.<sup>10</sup>

12. Human rights treaty bodies have repeatedly condemned laws that prohibit health services that only women need. Human rights experts have also confirmed that “criminalization of or other failure to provide services that only women require, such as abortion and emergency contraception, constitute discrimination based on sex.”<sup>11</sup> The CEDAW Committee has explicitly stated that: “it is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women.”<sup>12</sup> The Committee has also long recognized that neglecting, overlooking or failing to accommodate women’s specific health needs, including in relation to pregnancy, is a form of discrimination against women.<sup>13</sup>
13. Treaty bodies have warned other states with practices similar to the United States that criminalization of abortion and other pregnancy outcomes violate human rights. Human rights treaty bodies have consistently found that denying access to abortion or imposing barriers to such access undermines women’s reproductive autonomy and violates their rights to privacy and equality, alongside their rights to life, health, and freedom from torture or ill-treatment.<sup>14</sup>
14. For instance, the HRC and the CEDAW Committee have urged El Salvador to end the prosecution of women who undergo abortions and suffer miscarriages and expressed concern that women who seek care in hospitals are being reported to authorities.<sup>15</sup> They have emphasized that the state must ensure that all medical personnel respect patient confidentiality.<sup>16</sup>
15. UN experts have also noted that restrictive laws and policies on abortion not only contravene human rights law, but also “negate [women’s] autonomy in decision-making about their own bodies.”<sup>17</sup> Along similar lines, the UN Committee on the Rights of the Child (CRC Committee) has called on states to ensure that the views of pregnant girls are always heard and respected in abortion decisions.<sup>18</sup>

#### Recommendations by other Human Rights Experts to the United States

16. Numerous Special Procedures have pointed out the threat to human rights caused by civil and criminal punishment related to reproductive health issues. The Working Group on Discrimination Against Women has emphasized that “[c]riminalization of behavior that is attributed only to women is discriminatory” and undermines access to sexual and reproductive health services.<sup>19</sup> It has criticized criminalization of abortion because it subjects women to “risks to their lives or health in order to preserve their function as reproductive agents and depriv[es] them of autonomy in decision-making about their own bodies.”<sup>20</sup>
17. The Working Group further noted in its report on Women Deprived of Liberty that laws aimed at imposing punishment for failure to adhere to gendered norms of behavior and criminalization of sexual and reproductive decisions threatens women’s human rights, specifically mentioning criminalization of people who have abortions and miscarriages. The resulting deprivation of liberty “involves human rights violations and has devastating

consequences for women's lives, putting them at risk of torture, violence and abuse, unsafe and unsanitary conditions, lack of access to health services and further marginalization.”<sup>21</sup>

18. Following a 2017 visit to the United States, the UN Special Rapporteur on Extreme Poverty expressed concern that people living in poverty, and in particular pregnant people, are disproportionately criminalized and subjected to interrogations that strip them of privacy rights.<sup>22</sup> The report further explained:

Low income women who would like to exercise their constitutional, privacy-derived right to access abortion services face legal and practical obstacles, such as mandatory waiting periods and long driving distances to clinics.<sup>23</sup> This lack of access to abortion services traps many women in cycles of poverty.

19. The Special Rapporteur on Extreme Poverty also described the punishment of poverty through the civil child welfare system, noting that:

When a child is born to a woman living in poverty, that woman is more likely to be investigated by the child welfare system and have her child taken away from her. Poverty is frequently treated as a form of “child neglect” and thus as cause to remove a child from the home, a risk exacerbated by the fact that some states do not provide legal aid in child welfare proceedings.<sup>24</sup>

20. In 2017, the Working Group on Arbitrary Detention reported on the deprivation of liberty in the context of criminal justice and “health related grounds” in the United States and “identified a trend involving the increasing use of civil laws to confine pregnant women suspected of substance abuse.”<sup>25</sup> The Working Group concluded that such proceedings lacked “due process and serve[d] as a deterrent for other women who require health care.”

### **III. Compliance with International Human Rights Obligations**

#### **Background of U.S. Landscape**

21. The selective punishment of people based on their reproductive capacity through criminal and civil legal systems in the United States traces its origin to several different sources, including a trend toward creation of a legal status for fetuses, and a decades-long campaign of attempting to address the public health consequences of narcotics and other intoxicating drugs through criminalization of people who use them. Both of these campaigns have the effect of contributing to surveillance, control, and punishment of pregnant people and parents.

#### **A. Personhood / Fetal Rights laws**

22. A primary driver in the criminalization of pregnancy and pregnancy outcomes has been the trend of attempting to elevate the fetus as a separate juridical entity from the pregnant person. Traditionally, U.S. law has recognized that, while the state may have an interest in the

protection of potential life under some circumstances, the human and other rights guaranteed by the U.S. Constitution attach at birth.<sup>26</sup>

23. After the legalization of abortion in 1973, abortion opponents seeking to re-criminalize abortion have attempted to create legal recognition for fetuses *in utero* by passing laws that impose penalties for harm to a fetus, including through criminal laws. Currently, at least 38 states and the federal criminal code feature laws that criminalize harm to fetuses.<sup>27</sup> These laws have garnered widespread support because they are usually passed in the name of protecting or vindicating pregnant people, often arising in the wake of a high-profile act of violence against a pregnant individual.
24. In practice, however, these laws leave pregnant people vulnerable to criminalization when prosecutors attempt to charge people with crimes related to their own pregnancies. They may face criminal investigations either for ending a pregnancy, or for losing a pregnancy based on an often unsupported perception that their conduct resulted in harm to the fetus.
25. Research indicates that in virtually every state in which the law punishes harm to fetuses, arguments that fetuses constitute an independent legal entity have been used to justify reporting pregnant people to law enforcement and subjecting them to criminal investigations, to the extent of imprisoning them on the basis of acts or omissions believed to have caused or merely *risked* harm to a fetus.<sup>28</sup> In fact, prosecutors seeking to radically expand criminal liability for reproductive health matters have permitted such arrests even when the law explicitly prohibits charging a pregnant individual with a crime.<sup>29</sup>
26. This creates a second-class status for pregnant and postpartum individuals, who lose effectively their rights to privacy, autonomy, liberty and bodily integrity upon becoming pregnant and are singled out for surveillance and punitive actions. This second-class status is further compounded by the racial inequities in policing in the United States, particularly as related to enforcement of laws intended to address criminalized drugs: while U.S. law criminalizes the possession, sale or other actions pertaining to certain drugs, pregnant people are singled out for criminal charges for having only ingested a drug in the past.

## **B. Drug Policy in the U.S.**

27. U.S. criminal drug laws have served as a tool to further the fetal rights argument and to prosecute pregnant and parenting people for the alleged harm caused by substance use. In the 1980s, U.S. criminal drug laws and enforcement policies were expanded through the “war on drugs” and used to prosecute and incarcerate unprecedented numbers of people, with a disproportionate impact on Black and poor communities.<sup>30</sup>
28. In “October 1986: [U.S. President] Reagan sign[ed] the Anti-Drug Abuse Act” which appropriated “\$1.7 billion to fight the drug war.” It also created “mandatory minimum penalties for drug offenses, which are increasingly criticized for promoting significant racial disparities in the prison population because of the differences in sentencing for crack and powder cocaine.

Possession of crack, which is cheaper, results in a harsher sentence; [and] the majority of crack users are lower income.”<sup>31</sup> In 1989, stories of Black women being prosecuted for drug use, specifically crack-cocaine, and pregnancy also emerged. According to Dorothy Roberts, a legal scholar on gender and race, she “immediately suspected that most of the defendants were Black women. Charging someone with a crime for giving birth to a baby seemed to fit into the legacy of devaluing Black mothers.”<sup>32</sup> Professor Roberts was right; the majority of the cases were brought against people of color. The media also fueled exaggerated fears surrounding the impact on a child from prenatal exposure to cocaine and the term “crack baby” proliferated.<sup>33</sup> The medical community rejected the notion that a child’s prenatal exposure to cocaine was uniquely dangerous or caused permanent harm, but that image was used to justify and excuse these prosecutions, especially of Black and poor mothers.<sup>34</sup>

29. Consequently, the female prison population in the U.S. has sharply increased even though there have not been changes in offending patterns. “During the 1980s, the estimated number of women in state prisons whose most serious offense was a drug crime grew nearly tenfold. That increase alone was responsible for 40% of the total growth of women in state prisons during that time.”<sup>35</sup>
30. Today, women are the fastest growing correctional population in the U.S., and a disproportionate number are Black and brown mothers.<sup>36</sup>
31. The use of criminal laws to target and prosecute people with the capacity for pregnancy, especially poor people and people of color, has perpetuated gendered and discriminatory government policies in the U.S. These policies serve to improperly criminalize substance use and people with substance use disorders, rather than to promote people’s health, e.g. by ensuring that treatment, for those in need, is voluntary, available and accessible.

#### **IV. Prosecuting Pregnancy and Birth**

32. There are a wide range of civil and criminal laws that are used to prosecute pregnant and parenting people in the United States<sup>37</sup>, including: the misuse of general criminal laws; “fetal” protection laws; civil child welfare laws; and civil commitment proceedings.<sup>38</sup> Drug enforcement policies have played a significant role in the state’s punitive actions against pregnant and parenting people, though they are not the only basis for these prosecutions. Reports have documented more than 1000 cases<sup>39</sup> of people being criminally prosecuted or otherwise targeted for punitive government actions based on being or having been pregnant.

##### **A. Criminal Child Abuse Cases**

33. Laws criminalizing harm to children (e.g., criminal child abuse or endangerment laws) are one of the avenues used to prosecute pregnant people. These laws are intended to prosecute people for harming or posing a risk of harm to children. However, prosecutors across the U.S. have attempted to use these criminal laws of general applicability as a way to target pregnant people for the alleged harm posed to themselves and their own pregnancies.

34. In two jurisdictions, Alabama and South Carolina, the states' highest courts have judicially expanded criminal statutes that protect children to include fertilized eggs, embryos and fetuses, and permitted prosecution of the pregnant people who carry them, in violation of their right to due process of law.<sup>40</sup>
35. In Alabama, more than 600 people<sup>41</sup> have been charged with the crime of "chemical endangerment of a child" for being pregnant and alleged substance use, even though the charge was intended to prosecute people for bringing a child to dangerous environments, such as a laboratory that produces controlled substances. Charges typically stem from the drug testing of pregnant patients or their newborn children by healthcare facilities during labor and delivery, and the reporting of those results to government officials. The testing and reporting is often done without patients' explicit knowledge or specific, informed consent.
36. These prosecutions are gender-specific because they target pregnant people, and discourage them from seeking healthcare, including prenatal care and substance use disorder treatment. They also violate medical privacy and due process rights -- both the right to be free from testing without consent, and the right to bodily autonomy -- and increase stigma and fear among those in communities already targeted for prosecution, including low-income individuals and people of color. In his December 2017 statement after visiting Alabama, the UN Special Rapporteur on extreme poverty and human rights reinforced: "Many states have introduced highly punitive regimes directed against pregnant women, rather than trying to provide sympathetic treatment and to maximize the well-being of the fetus."<sup>42</sup>
37. Further, these prosecutions persist despite the fact that there is no scientific basis for the contention that exposure to a criminalized drug is tantamount to abuse or neglect, and often in the absence of any actual effect on the fetus or child after birth.<sup>43</sup>

## **B. Civil Child Welfare System**

38. The U.S. civil child welfare system is composed of child protective service (CPS) agencies, foster care and adoption agencies and family courts. Despite being civil in nature, the child welfare system possesses one of the greatest and most violent powers a government can exercise against its people: the power to intervene in families and permanently separate children from their parents.
39. Every U.S. state has a distinct agency mandated to receive and investigate allegations against parents for suspected child neglect and abuse, and civil courts that are empowered to issue orders against parents to comply with a variety of programs and services, remove children from their care, and even permanently sever the parent child relationship. Parents in the system are overwhelmingly poor, and Black and American-Indian parents are vastly overrepresented.<sup>44</sup>
40. With the expansion of punitive drug laws in the 1980's and 1990's (described above) and continuing to the present day, medical professionals in the United States began conducting

widespread and medically unnecessary drug testing on pregnant and postpartum people and their newborns, and reporting new mothers to CPS as risking harm to their children, based primarily on the results of those tests.

41. This drug testing has occurred almost exclusively with populations who use public health insurance such as Medicaid, and disproportionately on Black and Indigenous mothers--despite similar rates of drug use between people of different races and income levels.<sup>45</sup> Hospitals drug test and release medical records to CPS without obtaining specific and informed consent from the patient, against the recommendation of leading medical organizations, such as the American College of Obstetricians and Gynecologists.<sup>46</sup>
42. Additionally, hospitals, CPS agencies and family courts use these drug tests to make assessments about parenting, despite the admonition of leading medical organizations that a positive toxicology should not be conflated with an assessment of whether someone is a fit parent.<sup>47</sup> After hospitals make allegations against their patients, CPS and courts may quickly and aggressively subject families to intensive supervision, order family separation, and sometimes order permanent family dissolution. Immediately after giving birth, new mothers, either separated from their newborns or facing the risk of separation, are forced to navigate the family court system, which is widely recognized in the United States as lacking even the most basic legal protections, such as the right to effective assistance of counsel.<sup>48</sup>
43. One particularly egregious example of this is the state of Wisconsin's Unborn Child Protection Act, also known as the "cocaine mom" law, in which the Juvenile Court subject pregnant persons to forced medical treatment and detention in the name of protecting the unborn from exposure to controlled substances. There is also no right to assigned legal counsel for the pregnant person during the proceeding's earlier stages, even though the fetus is immediately assigned a lawyer.<sup>49</sup>
44. In 2017, the Working Group on Arbitrary Detention critiqued this law and concluded that this "form of deprivation of liberty is gendered and discriminatory in its reach and application, as pregnancy, combined with the presumption of drug or other substance abuse, is the determining factor for involuntary treatment." The Working Group also recommended that U.S. federal "drug treatment funding to states could be made conditional on the elimination of policies that threaten maternal health by permitting involuntary detention."<sup>50</sup>
45. Wisconsin's law remains unchanged today and there have not been any changes in federal funding to take into account the Working Group's recommendations or concerns.<sup>51</sup>
46. Prosecution of drug use during pregnancy is just one of the ways the civil child welfare system punishes the reproduction and parenting of poor women and Black, Indigenous, and Latinx people. Another concerning example is that a person's status as having a disability, or having a substance use disorder, or being incarcerated, or having had a prior child taken by the child welfare system, or having been accused of certain crimes, may in and of itself serve as legal



grounds to permanently sever the mother's right to any future children from the moment of birth.

## **V. Criminalization of Abortion and Miscarriage**

47. The proliferation of laws punishing harm to fetuses, coupled with hostility toward people who have abortions, has led to criminal prosecutions of people for a range of pregnancy outcomes. People are arrested for ending their own pregnancies outside a clinical setting, as well as because of the actual or suspected circumstances of a pregnancy loss, such as the use of alcohol or criminalized drugs. The vast majority of cases are prosecuted under statutes that do not authorize criminalization of a pregnant person. Further, the right to abortion is constitutionally protected in the United States, and no state has a law in effect explicitly criminalizing pregnancy loss.

### **A. Abortion**

48. U.S. jurisprudence recognizes that the right to end a pregnancy is protected by the Constitution, and health care providers may legally provide abortion care at least through viability, subject to restrictions, in every state and the District of Columbia. Nevertheless, prosecutors use a variety of laws, from feticide laws, to antiquated laws criminalizing abortion, to laws criminalizing the handling of human remains to punish people who have ended their own pregnancies and the people who have provided them support.<sup>52</sup>
49. Such misuse of laws violates women's civil and human rights, but often persists unchecked because the pregnant people most likely to be targeted -- people of color, those living in poverty, and those with untreated substance use disorders -- are far less likely to have access to adequate legal representation or be able to bear the collateral burdens of fighting their prosecutions.<sup>53</sup> Further, the consequences to public health<sup>54</sup> that ensue from threatening arrest for seeking reproductive health care following a miscarriage or abortion complications are devastating.<sup>55</sup>
50. Indiana resident Purvi Patel was charged with feticide for allegedly having taken pills she obtained through the internet to end her pregnancy.<sup>56</sup> Ms. Patel came to the attention of law enforcement when she sought emergency help for a severe hemorrhage at a Catholic hospital. The obstetrician treating her, a member of an anti-abortion professional society, summoned police to her hospital room; Ms. Patel endured a 3 a.m. bedside interrogation with no attorney present as she recovered from surgery to remove a retained placenta. After a spectacle of a trial in which she was cast as cold, calculating, and selfish by prosecutors, she was convicted and sentenced to 20 years in prison. Fortunately, the Court of Appeals of Indiana ruled that neither Indiana's feticide law nor its criminal abortion laws were intended to punish women for self-inducing abortions. In 2018 the law was amended to prevent similar prosecutions from recurring. Nevertheless, with a felony conviction on her record<sup>57</sup> and her name notorious in

local and national media, it is unlikely Ms. Patel will ever be truly free of the stigma related to her prosecution and incarceration.

51. Ms. Patel's is just one of the many arrests for abortion or suspected abortion: even though people may legally obtain abortions from health care providers in the U.S. and courts have historically rejected attempts to criminalize people who end their own pregnancies, at least 21 people have been criminally prosecuted since the year 2000 for ending a pregnancy or helping someone else do so.<sup>58</sup> The continued criminalization of people who have abortions and pregnancy losses creates an atmosphere of fear and mistrust when people seek health care, deterring them from seeking help when they most need it.

## **B. Miscarriage/Stillbirths**

52. No U.S. state has a law in effect criminalizing pregnancy loss: there is no law currently in effect making it a crime to experience a miscarriage or stillbirth for any reason in any state. But hundreds of women have been criminally prosecuted for experiencing adverse pregnancy outcomes when law enforcement suspect that some act or omission of the pregnant person caused the miscarriage.
53. Prosecutors have used any law they can possibly find to charge people for pregnancy losses they believe to be morally culpable in some way. For instance, an Arkansas woman named Anne Bynum was charged with two felonies after she experienced a stillbirth at home. She was charged with "abuse of a corpse" because she placed the stillborn in a bag to take to the hospital; she was charged with "concealment of a birth" because she waited until she saw her child off to school before reporting to the hospital after the stillbirth. While the court dropped the charge of abuse of a corpse, she was convicted by a jury after a mere four minutes of deliberation and sentenced to the maximum prison term of six years. Her conviction was eventually overturned on the basis that the prosecution had introduced irrelevant and inflammatory evidence regarding prior abortions and her having taken medication to bring on labor.<sup>59</sup>

## **VI. Suggested Recommendations**

54. Ratify the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
55. Eliminate federal and state laws that permit criminalization of people for pregnancy-related decisions or experiences, including abortions, miscarriages, stillbirths, or adverse outcomes.
56. Eliminate the practice of civilly and criminally punishing people for charges related to their pregnancies.

57. Prioritize funding for universal healthcare, which includes abortion care as part of comprehensive reproductive healthcare and evidence-based approaches to health concerns during pregnancy.
58. Ensure the availability of healthcare services that are completely severed from child protective services and law enforcement.
59. Ensure that *federal and state laws* protect patients' rights to full and informed consent for all tests and procedures conducted at healthcare facilities, including being informed of the potential negative legal consequences of seeking healthcare, consenting to tests, and revealing personal information, and create a cause of action for patients whose rights have been violated.
60. Ensure that all state jurisdictions establish an absolute right to assigned legal counsel for all parents at every stage of a civil child welfare proceeding.

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<sup>1</sup> See Amnesty International, USA, *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA* (2017). Available at <https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf> (attached as Annex 1).

<sup>2</sup> *Id* at p.7.

<sup>3</sup> See e.g., *Kentucky v. Welch*, 864 S.W.2d 289 (KY 1993). The Kentucky state supreme court held the charge of criminal child abuse should not have been extended to prosecute the defendant for alleged substance use during pregnancy because "a fetus is not a person as that word is used in" the "criminal child abuse statute" and such a use of the law would violate the "statute's intent" and "due process guarantee of fair notice." The court also cited cases from across the U.S. and explained: "All of these cases address statutes similar in effect to the present one, and all conclude that, properly construed, the statutes involved do not intend to punish as criminal conduct action . . . by an expectant mother . . . All of these cases point out in one way or another that to construe the statute involved otherwise makes it impermissibly vague, and that if their state legislature intended to include a pregnant woman's" actions "within the conduct criminally prohibited, it would have done so expressly." See *Pennsylvania v. Dischman*, 195 A.3d 567 (Pa. Super. Ct. 2018) (lower court properly dismissed "assault of an unborn child" charge based on statute's clear nonliability provision barring prosecution of pregnant defendant.) See also *West Virginia v. Louk*, 786 S.E.2d 219 (WV 2016) ("we note that the overwhelming majority of the jurisdictions confronted with the prosecution of a mother for prenatal conduct . . . refuse to permit such prosecutions.") *Arms v. State of Arkansas*, 471 S.W.3d 637 (Ar. 2015); *Hawaii v. Aiwohi*, 123 P.3d 1210 (HI 2005); *Kilmon v. Maryland*, 905 A.2d 306 (MD 2006); *Michigan v. Hardy*, 469 NW2d 50 (Mich. Ct. App. 1991); *New Mexico v. Martinez*, 137 P.3d 1195 (NM 2006); *North Dakota v. Stegall*, 828 N.W.2d 526 (ND 2013); *Reinesto v. Superior Ct. of Arizona*, 894 P.2d 733 (Ariz. Ct. App. 1995); *Sheriff, Washoe County, Nev. v. Encoe*, 885 P.2d 596 (NV 1994).

<sup>4</sup> Nora Sandstad, *Pregnant Women and the Fourteenth Amendment, A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 Law & Ineq. 171 (2008) (noting "[i]f the fetus is a person, there are no limits on the state's power to police and punish pregnant women").

<sup>5</sup> Danielle Ferguson, *South Dakota woman re-charged with manslaughter after her baby's drug related death*, Sioux Falls Argus Leader, July 10, 2019, <http://bit.ly/2m98Yjo>.

<sup>6</sup> Human Rights Committee, *List of issues prior to submission of the fifth period report of the United States of America*, para 12, U.N. Doc. CCPR/C/USA/QPR/5 (Apr. 18, 2019).

<sup>7</sup> Human Rights Committee, *General comment No. 36 on article 6 of the ICCPR, on the right to life*, para 8, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

<sup>8</sup> Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America*, para 6, U.N. Doc. CCPR/C/USA/CO/4 (April 23, 2014); CERD Committee, *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, para 20, CERD/C/USA/CO/7-9, (September 25, 2014).

<sup>9</sup> CERD, *supra* note 8 at para. 15.

<sup>10</sup> See CEDAW, General Recommendation 35 on gender-based violence against Women, Updating General Recommendation 19, UN Doc. CEDAW/C/GC/35, 2017.

<sup>11</sup> Joint Statement by the UN Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, on the situation of human rights defenders, on violence against women, its causes and consequences, and the Working Group on discrimination against women in law and in practice, Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples' Rights, "The 2030 Agenda for Sustainable Development and its implementation mark a unique opportunity to ensure full respect for sexual and reproductive health and rights which must be seized", 2015, available at: <http://bit.ly/2opMw6q>.

<sup>12</sup> CEDAW Committee, General Recommendation 24: Article 12 of the Convention (Women and Health), UN Doc. A/54/38/Rev.1, chap. I, 1999, para. 11.

<sup>13</sup> CEDAW, General Recommendation 24 (Art. 12: women and health), UN Doc. A/54/38/Rev.1, chap. I, 1999, paras. 6, 11, 12; *Alyne da Silva Pimentel Teixeira v Brazil*. CEDAW Communication 17/2008, 2011; R.J. Cook and V. Undurraga, Article 12 [Health], in M. Freeman, C. Chinkin and B. Rudolf (eds.), *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY*, 2012, 311-333, pg. 326-7; see also CESCR, General Comment 22 (right to sexual and reproductive health), UN Doc. E/C.12/GC/22, 2016, paras. 9-10, 28 and 34; Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN Doc. A/66/254, 2011, paras. 16, 34; UN Working Group on the Issue of Discrimination against Women in Law and Practice, Report of the Working Group, Human Rights Council, UN Doc. A/HRC/32/44, 2016, para. 23; HRC, *Mellet v Ireland*, Comm. No. 2324/2013, 2016, concurring opinions of members: Cleveland, Ben Achour, and Rodríguez Rescia, de Frouville and Salvoli.

<sup>14</sup> See, e.g., *K.L. v Peru*, Human Rights Committee, Comm. No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003 (2005); *L.C. v. Peru*, CEDAW Committee, Comm. No. 22/2009, para. 8.15, UN Doc. CEDAW/C/50/D/22/2009 (2011).

<sup>15</sup> Human Rights Committee, *Concluding Observations on the seventh periodic report of El Salvador*, para 15-16, U.N. Doc. CCPR/C/SLV/CO/7 (May 9, 2018); Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic report of El Salvador*, para 36-37, U.N. Doc. CEDAW/C/SLV/CO/8-9 (March 3, 2017).

<sup>16</sup> Human Rights Committee, *Concluding Observations on the seventh periodic report of El Salvador*, *supra* note 15, para. 16; Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic report of El Salvador*, *supra* note 15, para. 37.

<sup>17</sup> See OHCHR, 'Unsafe abortion is still killing tens of thousands women around the world' - UN rights experts warn, 28 Sept 2016, Alda Facio, Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice; Dainius Pūras, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and Dubravka Šimonović, Special Rapporteur on violence against women, <http://bit.ly/2peWoAD>.

<sup>18</sup> Committee on the Rights of the Child Concluding Observations: Ireland, (2016), para. 58(a); Committee on the Rights of the Child Concluding Observations: Morocco (2014), para. 57 (b); Committee on the Rights of the Child Concluding Observations: Kuwait (2013), para. 60; Committee on the Rights of the Child Concluding Observations: Sierra Leone (2016), para. 32 (c); Committee on the Rights of the Child Concluding Observations: United Kingdom of Great Britain and Northern Ireland (2016), para. 659(c).

<sup>19</sup> Working Group on the issue of discrimination against women in law and practice, *Thematic analysis: eliminating discrimination against women in the area of health and safety, with a focus on the instrumentalization of women's bodies*, para 78, U.N. Doc. A/HRC/32/44, (April 8, 2016).

<sup>20</sup> *Id.* at para. 79

<sup>21</sup> Working Group on the issue of discrimination against women in law and practice, *Women Deprived of Liberty*, paras. 30, 33, 39, 40, 74, U.N. Doc. A/HRC/41/33 (May 15, 2019).

<sup>22</sup> Special Rapporteur on extreme poverty and human rights, *Report of the Mission to the United States of America*, para 56, U.N. Doc. A/HRC/38/33/Add.1, (May, 4, 2018) (by Philip Alston).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Working Group on Arbitrary Detention, *Report of the Mission to the United States of America*, para 72, U.N. Doc. A/HRC/3/6/37/Add.2 (Sept. 2017).

<sup>26</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 158 (1973) (“All this, together with our observation, *supra*, that, throughout the major portion of the 19th century, prevailing legal abortion practices were far freer than they are today, persuades us that the word “person,” as used in the Fourteenth Amendment, does not include the unborn.”)

<sup>27</sup> Nat’l Conference of State Legislatures, *State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women* (May 1, 2018), <http://bit.ly/2qToXCL>.

<sup>28</sup> Jeanne Flavin & Lynn M. Paltrow, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 *Journal of Health Politics, Policy and Law* 326, (Apr. 2013), <http://bit.ly/2q0I3FU>.

<sup>29</sup> See Andrea Grimes, *Pregnant Texans are Being Charged with Crimes that Don’t Exist*, *Rewire*, Oct. 16, 2014, <http://bit.ly/2px7wmX>.

<sup>30</sup> National Public Radio, *Timeline: America’s War on Drugs*, (Apr. 2, 2007), <https://n.pr/2m9j7wv>.

<sup>31</sup> *Id.*

<sup>32</sup> Dorothy Roberts, *Unshackling Black Motherhood*, 95 *Mich. L. Rev.* 938 (1996-97).

<sup>33</sup> NY Times Editorial Board, *A Woman’s Rights: Part 4 Slandering the Unborn*, *NY Times* (Dec. 28, 2018).

<sup>34</sup> Mishka Terplan, *The Effects of Cocaine and Amphetamine Use during Pregnancy on the Newborn: Myth versus Reality*, 30 *Journal of Addictive Diseases* 1 (2011); see also *Decades Later, Drugs Didn’t Hold Crack Babies Back*, *National Public Radio Transcript of Tell Me More* (July 31, 2013).

<sup>35</sup> Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Grown*, *Prison Policy Initiative* (Jan. 9, 2018), <http://bit.ly/2m7REet>.

<sup>36</sup> ACLU & Human Rights Watch, *You Miss So Much When You’re Gone: The Lasting Harm of Jailing Mothers Before Harm in Oklahoma* (2018), <http://bit.ly/2l9Giq5>.

<sup>37</sup> There have also been documented cases of patients being threatened with the possibility of civil/criminal authorities being called if they did not submit to certain procedures. See Alexa Richardson, *The Use of Child Protective Services and Court Orders to Enforce Medical Compliance in the Labor and Delivery Room: How Threats of Legal Action Limit Reproductive Choice*, *Harvard Journal of Law & Gender* (blog) (November 20, 2018), <http://bit.ly/2Q9tk6l>.

<sup>38</sup> *Substance Use During Pregnancy*, Guttmacher Institute (Sept. 1, 2019), <http://bit.ly/2kYmLZV>; If/When/How: Lawyering for Reproductive Justice (formerly SIA Legal Team), *Roe’s Unfinished Promise: Decriminalizing Abortion Once and For All* (2018), [bit.ly/2WvuEm2](http://bit.ly/2WvuEm2) (Attached as Annex 2).

<sup>39</sup> See Wendy Bach, *Prosecuting Poverty, Criminalizing Care*, 60 *William & Mary Law Review* 809 (2019); Flavin & Paltrow, *supra* note 28; Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, *ProPublica*, Sept. 23, 2015, <http://bit.ly/2UE9Loi>; SisterReach et al., *Tennessee’s Fetal Assault Law: Understanding its Impact on Marginalized Women* (2019), available at <http://bit.ly/2mE56qL> (Attached at Annex 3).

<sup>40</sup> See *Whitner v. State*, 492 SE2d 777, 779 (S.C. 1997); S.C. Code Ann §20-7-50 (relevant parts state: “Any person having the legal custody of any child ..., who shall, without lawful excuse, refuse or neglect to provide ... the proper care and attention for such child ..., so that the life, health or comfort of such child ... is endangered or is likely to be endangered, shall be guilty of a misdemeanor”); *Hicks v. State*, 153 So 3d 53, 59 (Ala. 2014).

<sup>41</sup> See Martin, *supra* note 39.

<sup>42</sup> United Nations Office of the High Commissioner for Human Rights, *Statement on Visit to the USA, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights*, para. 39 (Dec. 15, 2017), available at <http://bit.ly/2DQptY3>.

<sup>43</sup> See e.g., D. Frank, et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 *JAMA* 1613 (2001); Bobbe Ann Gray and Cindra Holland, *Implications of Psychoactive ‘Bath Salts’ Use During Pregnancy*, 18 *Nursing for Women’s Health* 223 (2014) (“Information regarding the short- and long-term effects of [psychoactive bath salts] and related drug use by pregnant women is virtually nonexistent.”) Mayes, et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 *JAMA* 406 (1992).

<sup>44</sup> Robert B. Hill, Casey-CSSP Alliance, Synthesis of Research on Disproportionately in Child Welfare (2006), <http://bit.ly/2mQutWT>.

<sup>45</sup> See U.S. Dept. of Health & Human Services, *Results from the 2013 National Survey on Drug Use and Health Summary of National Findings* (2014), <https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>.

<sup>46</sup> American College of Obstetricians and Gynecologists, Committee Opinion, *Alcohol Abuse and Other Substance Use Disorders: Ethical Issues in Obstetric and Gynecologic Practice* (2013).

<sup>47</sup> American College of Obstetricians and Gynecologists, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, (January 2011, Reaffirmed 2019), available at <http://bit.ly/2JL4Mf>.

<sup>48</sup> Martin Guggenheim writes “Child welfare and Family Court practice feels, to those who endure it, like a process designed to overwhelm and exact despair from parents. Parents who succeed in child welfare proceedings are usually those who are able to cope with extraordinary stress needlessly imposed on them.” Martin Guggenheim, *Parental Rights in Child Welfare Cases in New York City Family Courts*, 40 Colum. J.L. & Soc. Probs. 507, 524 (2007).

<sup>49</sup> Wisconsin Statutes Annotated Section 48.133; Abby Johnston, *Wisconsin Jailed Tamara Loertscher to Protect the “Child” She Hadn’t Known She was Having*, Bustle (Jan. 1, 2015), <http://bit.ly/2kCPyD3>.

<sup>50</sup> Working Group on Arbitrary Detention, *Report of the Mission to the United States of America*, *supra* note 25, para. 74.

<sup>51</sup> In-fact, there have been increases in federal funds appropriated for matters related to pregnancy, substance use, and children. See H.R. 2480, 116<sup>th</sup> Cong. (2019)

<sup>52</sup> See If/When/How: Lawyering for Reproductive Justice, *supra* note 38.

<sup>53</sup> Khiara Bridges, *Introduction: The Poverty of Privacy Rights*, Stan. U. Press (June 2017), available at <http://bit.ly/2HPRIQ3>; Martin, *supra* note 39.

<sup>54</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.23 (2001) (noting the *amicus* submissions of numerous leading medical and public health organizations concluding that searching pregnant women for evidence of drug use and facilitating their arrest will harm prenatal health by discouraging women from seeking prenatal care); Stephen Kandall, *Substance and shadow: women and addiction in the United States*, Harv. U. Press (1996); National Perinatal Association, Position Statement, *Substance Abuse Among Pregnant Women* (revised 2012) (“NPA supports comprehensive drug treatment programs for pregnant women that are family-centered and work to keep mothers and children together whenever possible. . . NPA opposes punitive measures that deter women from seeking appropriate care during the course of their pregnancies”).

<sup>55</sup> Nora Sandstad, *Pregnant Women and the Fourteenth Amendment, A Feminist Examination of the Trend to Eliminate Women’s Rights During Pregnancy*, 26 Law & Ineq. 171 (2008) (noting “[i]f the fetus is a person, there are no limits on the state’s power to police and punish pregnant women”).

<sup>56</sup> See Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. Times, Apr. 1, 2015, <http://nyti.ms/2pifkxs>; and *Purvi Patel is Released After Feticide Conviction Overturned*, Indianapolis Star, Sept. 1, 2016, <http://indy.st/2qQ1O4f>.

<sup>57</sup> Ms. Patel was also charged with child neglect leading to death based on a theory that she had delivered a live infant. Even though the evidence presented at trial included a long-discredited “fetal lung float test,” a jury found that Ms. Patel delivered a live but fatally premature infant. The appellate court, forced to give deference to this finding, nevertheless ruled that the state had failed to prove that Ms. Patel did anything after the birth that contributed to the death of the infant, meaning that the most she could have been convicted for was child neglect without the penalty enhancement for a resulting death. Her sentence was reduced accordingly.

<sup>58</sup> See SIA Legal Team, *Roe’s Unfinished Promise: Decriminalizing Abortion Once and For All* (2017), <http://bit.ly/2Vjp62g>; If/When/How: Lawyering for Reproductive Justice, *Fulfilling Roe’s Promise, 2019 Update* (May 2019), <http://bit.ly/2Wu2F6m> (attached as Annex 4).

<sup>59</sup> *Bynum v. State*, 546 S.W.3d 533 (Ark. Ct. App. 2018).