

# Notes

## PREFACE

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## 1 INTRODUCTION

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3. *Id.*
4. *Unintended Pregnancy in the United States*, GUTTMACHER INST. (Jan. 2019), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states> (citing Susheela Singh et al., *Unintended Pregnancy: Worldwide Levels, Trends, and Outcomes*, 41 STUD. FAM. PLAN. 241 (2010)).
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  11. Jessica Ravitz, *Maternal Deaths Fall Across Globe but Rise in US, Doubling in Texas*, CNN (Apr. 17, 2018), <https://www.cnn.com/2016/08/24/health/maternal-mortality-trends-double-texas/index.html>.
  12. Sophie Novack, *Texas’ Maternal Mortality Rate: Worst in Developed World, Shrugged Off by Lawmakers*, TEX. OBSERVER (June 5, 2017), <http://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities>.
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  19. Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL’Y REV. 70, 70 (2015).
  20. Those twenty-one states were: Alabama, Arkansas, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Wisconsin. For the specific provisions passed by each, see addendum. Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers – and the Women They Serve – in the Crosshairs*, 17 GUTTMACHER POL’Y REV. 9, 11 (2014).
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24. Act of July 18, 2013, ch. 1, §§ 1–12, 2013 Tex. Sess. Law Serv. 4795–802 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041–.048, 171.061–.064, & amending §§ 245.010–.011; amending TEX. OCC. CODE ANN. §§ 164.052, 164.055). There is no official title for this omnibus abortion bill. However, it is commonly referred to as “House Bill 2” or by its abbreviated form “H.B. 2.” See *Whole Woman's Health v. Cole*, 790 F.3d 563, 566 (5th Cir. 2015) (the Court naming “Texas’s law regulating abortions” the Texas House Bill No. 2 (“H.B. 2”)).
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26. See H.B. 2, 83d Leg., 2d Called Sess. (Tex. 2013).
27. See, e.g., Fernandez, *supra* note 25 (describing H.B. 2 as “some of the toughest restrictions on abortion in the country”); John Schwartz, *Texas Senate Approves Strict Abortion Measure*, N.Y. TIMES (July 13, 2013), <http://www.nytimes.com/2013/07/14/us/texas-abortion-bill.html> (characterizing H.B. 2 as “one of the strictest anti-abortion measures in the country”).
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29. 410 U.S. 113 (1973).
30. 505 U.S. 833 (1992).
31. JOHANNA SCHOEN, *ABORTION AFTER ROE* 170–71 (2015).
32. Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781, 785–88, 790, 792–93, 796, 799–812 (2014).
33. See, e.g., Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 558–63 (2009); Hannah Fingerhut, *On Abortion, Persistent Divides Between – and Within – the Two Parties*, PEW RES. CTR. (Apr. 8, 2016), <http://www.pewresearch.org/fact-tank/2016/04/08/on-abortion-persistent-divides-between-and-within-the-two-parties-2/>.
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35. See, e.g., PEW RES. CTR., *ISSUE RANKS LOWER ON THE AGENDA: SUPPORT FOR ABORTION SLIPS* 21–23 (2009), <http://www.pewforum.org/files/2009/10/abortion091.pdf> (explaining that “[r]eligious beliefs hold much stronger sway over those who oppose abortion than over those on the pro-choice side of the abortion issue”); Diane di Mauro & Carole Joffe, *The Religious Right and the Reshaping of Sexual Policy: An*

- Examination of Reproductive Rights and Sexuality Education*, 4 SEXUALITY RES. AND SOC. POL'Y: J. NAT'L SEXUALITY RES. CTR. 67, 73 (2007) (noting that “[t]he Religious Right has [so] skillfully capitalized on the power of ultrasounds” that the result has included shifts in legislation and millions diverted to pregnancy crisis centers); Karen F.B. Gray, *An Establishment Clause Analysis of Webster v. Reproductive Health Services*, 24 GA. L. REV. 399, 418 (1990) (arguing that government-enacted abortion statutes reflect pressure from the “groups aligned with religiously motivated, anti-abortion beliefs”).
36. CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 143 (2005).
  37. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 341, 366 (1992).
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## 2 PREGNANCY AND STATE POWER: PROSECUTING FETAL ENDANGERMENT

1. Abortion rights may include the liberty to receive or have access to pregnancy termination during the first trimester, second trimester, or third trimester. The legal minefields shaping debates on abortion include whether the right to an abortion shifts or should exist at all depending on the stage in a woman's pregnancy, such as the first, second, or third trimester. Legislation pending in states would ban abortion after ten or twelve weeks, preserving the right only in the first trimester, which arguably burdens the abortion right to such a degree that it becomes more illusory than real for many women.
2. See Katherine Becket, *Choosing Cesarean: Feminism and the Politics of Childbirth in the United States*, 6 FEMINIST THEORY 251 (2005); Jessica Shaw, *Full-Spectrum Reproductive Justice: The Affinity of Abortion Rights and Birth Activism*, 7 STUD. IN SOC. JUST. 143 (2013); Robbie Davis-Floyd, *Anthropology and Birth Activism: What Do We Know?*, ANTHROPOLOGY NEWS 37 (May 2005); Madeleine Akrich et al., *Practising Childbirth Activism: A Politics of Evidence*, PAPIERS DE RECHERCHE DU CSI/CSI WORKING PAPER SERIES, NO. 023 (2012) (on file with author).
3. See Loretta Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 OFF OUR BACKS 14 (2004).
4. See also Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination*, 59 DUKE L.J. 771 (2010); *Court Backs Air Force's Ouster of an Unwed Pregnant Officer*, N.Y. TIMES, Nov. 16, 1971, at L33.
5. 460 F.2d 1372 (9th Cir. 1971).
6. See Jessica Weisberg, *This Woman's Little-Known 1972 Case Could Have Reframed Abortion History*, ELLE MAG. (Oct. 21, 2014), <https://www.elle.com/culture/career-politics/a14816/susans-choice/> (“a supervisor ordered her to leave Vietnam within 48 hours”); see also *Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States*, 103d Cong. 150, 205–07 (1993) (testimony of Judge Ginsburg).
7. Brief for the Petitioner at 12–13, *Struck v. Sec'y of Def.*, 460 F.2d 1372 (9th Cir. 1971) (No. 72-178).
8. 460 F.2d 1372.
9. *Id.* at 1375.
10. *Id.*
11. *Id.*

12. *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972).
13. A few years after *Roe v. Wade* was decided, the Department of Defense officially changed its policy, permitting pregnant women (and those who adopted children) the option to elect remaining on active duty or discharge. *See, e.g.*, JUDITH HICKS STIEHM, *ARMS AND THE ENLISTED WOMAN* 117 (1989); MARSHA S. OLSON & SUSAN S. STUMPF, *PREGNANCY IN THE NAVY: IMPACT ON ABSENTEEISM, ATTRITION, AND WORKGROUP MORALE* 2 (1978). *See also* *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) (holding that the Marine Corps regulation requiring immediate discharge of a pregnant marine violated the Fifth Amendment).
14. *See* KARA DIXON VUIC, *OFFICER, NURSE, WOMAN: THE ARMY NURSE CORPS IN THE VIETNAM WAR* 126 (2010).
15. Letitia Stein, *USF Obstetrician Threatens to Call Police if Patient Doesn't Report for C-Section*, TAMPA BAY TIMES (Mar. 6, 2013), <http://www.tampabay.com/news/health/usf-obstetrician-threatens-to-call-police-if-patient-doesnt-report-for/2107387>.
16. *In re Unborn Child of Samantha Burton*, No. 2009 CA 1167, 2009 WL 8628562 (Fla. Cir. Ct. Mar. 27, 2009). The court order authorized the hospital to take action “necessary to preserve the life and health of Samantha Burton’s unborn child, including but not limited to restricting [her] to bed rest, administering appropriate medication, postponing labor, taking appropriate steps to prevent and/or treat infection, and/or eventually performing a cesarean section delivery of the child at the appropriate time.” *See also* Brief of Amici Curiae American Civil Liberties Union, American Civil Liberties Union of Florida, and American Medical Women’s Association in Support of Appellant at 2, *Burton v. Florida*, 49 So.3d 263 (Fla. Dist. Ct. App. Aug. 12, 2010) (No. 1D09-1958), [https://www.aclu.org/files/pdfs/reproductiverights/burton\\_v\\_florida\\_acluamicus.pdf](https://www.aclu.org/files/pdfs/reproductiverights/burton_v_florida_acluamicus.pdf).
17. *See* Kontji Anthony, *Police: Woman Earns DUI for Endangering Fetus*, WMCTV (June 30, 2013), <http://www.wmctionnews5.com/story/20525700/police-pregnant-woman-earns-dui-for-endangering-fetus/> (“A Memphis woman is behind bars on a DUI and child endangerment charge even though she did not have a child in the car with her, and blood alcohol level was under the legal limit.”).
18. LYNN PALTROW, *CRIMINAL PROSECUTION AGAINST PREGNANT WOMEN NATIONAL UPDATE AND OVERVIEW* (1992) (listing the racial identification of pregnant women subjected to state intervention, the majority of whom were African American); Gina Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. TIMES, July 20, 1990, at A13 (citing an ACLU study that found that 80 percent of the women targeted for criminal intervention for drug use during pregnancy were African American, Latina, and “members of other minorities”); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1421 n.6 (1991) (noting that the majority of women targeted for state criminal prosecution because of drug use during pregnancy “are poor and Black”).
19. Nina Martin, *The State That Turns Pregnant Women into Felons*, ALTERNET (Sept. 23, 2015), <https://www.alternet.org/drugs/when-womb-crime-scene>.
20. AMNESTY INT’L, *CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA* 23 (2017), <https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf>.
21. *See, e.g.*, Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1411 (2008).
22. 347 U.S. 483 (1954).
23. *See, e.g.*, Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES, Oct. 21, 2018; Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America’s*

- Biggest Companies*, N.Y. TIMES, June 15, 2018. See also *Young v. United Parcel Serv.*, 135 S. Ct. 1338 (2015) (holding that a plaintiff alleging the denial of accommodation under the Pregnancy Discrimination Act may show that she sought accommodation, that the employer refused to accommodate her, and that the employer did accommodate others similar in their inability or ability at work; the employer may seek to justify its refusal to accommodate).
24. See, e.g., Jorge Rivas, *California Prisons Caught Sterilizing Female Inmates Without Approval*, ABC NEWS (July 8, 2013), [https://abcnews.go.com/ABC\\_Univision/doctors-california-prisons-sterilized-female-inmates-authorizations/story?id=19610110](https://abcnews.go.com/ABC_Univision/doctors-california-prisons-sterilized-female-inmates-authorizations/story?id=19610110); Derek Hawkins, *Tennessee Judge, Under Fire, Pulls Offer to Trade Shorter Jail Sentences for Vasectomies*, WASH. POST (July 28, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/07/28/tennessee-judge-under-fire-pulls-offer-to-trade-shorter-jail-sentences-for-vasectomies/?noredirect=on&utm\\_term=.c4782cfa4d21](https://www.washingtonpost.com/news/morning-mix/wp/2017/07/28/tennessee-judge-under-fire-pulls-offer-to-trade-shorter-jail-sentences-for-vasectomies/?noredirect=on&utm_term=.c4782cfa4d21); Andy Sher, *Tennessee Judge Ends Controversial Sentence Reduction Program for Inmates Choosing Birth Control*, TIMES FREE PRESS (July 28, 2017), <https://www.timesfreepress.com/news/local/story/2017/jul/28/tennessee-judge-ends-sentence-reductiprogram/440713/>.
  25. See, e.g., AMNESTY INT'L, *supra* note 20.
  26. Ed Pilkington, *Indiana Prosecuting Chinese Woman for Suicide Attempt That Killed Her Foetus*, GUARDIAN (May 30, 2012, 1:36 PM), <http://www.guardian.co.uk/world/2012/may/30/indiana-prosecuting-chinese-woman-suicide-foetus>.
  27. Kevin Hayes, *Did Christine Taylor Take Abortion into Her Own Hands*, CBS NEWS (Mar. 2, 2010, 6:55 AM), [http://www.cbsnews.com/8301-504083\\_162-6255683-504083.html](http://www.cbsnews.com/8301-504083_162-6255683-504083.html).
  28. Eleanor J. Bader, *Criminalizing Pregnancy: How Feticide Laws Made Common Ground for Pro- and Anti-Choice Groups*, TRUTHOUT (June 14, 2012), <https://truthout.org/articles/criminalizing-pregnancy-how-feticide-laws-made-common-ground-for-pro-and-anti-choice-groups/>; see also PAN-AM. HEALTH ORG., DOMESTIC PARTNER VIOLENCE DURING PREGNANCY (2011), <http://www.paho.org/english/ad/ge/vawpregnancy.pdf> (pregnant women are “60% more likely to be beaten than women who are not pregnant”); Julie A. Gazmararian et al., *Prevalence of Violence Against Pregnant Women: A Review of the Literature*, 275 JAMA 1915, 1915–20 (1996).
  29. See *State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONFERENCE OF STATE LEGISLATURES (last updated May 1, 2018), <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx>.
  30. *Id.*
  31. 18 U.S.C. § 1841, 10 U.S.C. § 919a (2004) (“Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.”).
  32. Roberts, *supra* note 18, at 1421; Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781 (2014).
  33. See Victoria Nourse, *History, Pragmatism, and the New Legal Realism* (Nov. 2005) (on file with the author).
  34. *Id.*; see also Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory*, 95 CORNELL L. REV. 61, 64 (2009) (on varieties of methods and the need to focus on “real life problems” and the use of methods).
  35. *State v. McKnight*, 576 S.E.2d 168, 171 (S.C. 2003); see also Shalini Bhargava, *Challenging Punishment and Privatization: A Response to the Conviction of Regina McKnight*, 39 HARV. C.R.-C.L. L. REV. 513, 517 (2004).

36. Media Advisory, Nat'l Advocates for Pregnant Women, Petition Filed Today Seeking U.S. Supreme Court Review of Unprecedented South Carolina Decision Treating a Woman Who Suffered a Stillbirth as a Murderer (May 27, 2003), <http://www.advocatesforpregnantwomen.org/issues/prmcknight.htm>.
37. *Id.*
38. See *McKnight v. State*, 661 S.E.2d 354, 361 (S.C. 2008) (finding that the jury may have improperly used “outdated scientific studies” provided by the state’s witnesses).
39. Goodwin, *supra* note 21, at 1658.
40. E. Gaston, *Conway Homicide Case Sets Precedent*, SUN NEWS, May 18, 2001, at A1.
41. *McKnight v. State*, 661 S.E.2d. 354.
42. Briefing Paper from S.C. Advocates for Pregnant Women, Nat'l Advocates for Pregnant Women, to Democratic Presidential Candidates, *South Carolina: First in the Nation for Arresting African-American Pregnant Women; Last in the Nation for Funding Drug and Alcohol Treatment* (Jan. 8, 2003), <http://advocatesforpregnantwomen.org/issues/briefingpaper.htm>.
43. Interview with Lynn Paltrow, Executive Director, National Advocates for Pregnant Women (July 10, 2013).
44. Briefing Paper, *supra* note 42.
45. Charles Condon, *Clinton's Cocaine Babies*, 72 POL'Y REV. (Apr. 1, 1995), <https://www.hoover.org/research/clintons-cocaine-babies>.
46. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).
47. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936); Brief for Petitioners at 12, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936); Transcript of Oral Argument, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936); Brief of Respondents, *Ferguson*, 532 U.S. 67 (2001) (No. 99-936).
48. See Table 50. *Use of Selected Substances in the Past Month Among Persons Aged 12 and Over, by Age, Sex, Race, and Hispanic Origin: United States, Selected Years 2002–2016* NAT'L CTR. FOR HEALTH STAT. (2017), <https://www.cdc.gov/nchs/data/hus/2017/050.pdf>. (data shows Black women slightly more likely to use “any” illicit drug, whereas white women are more likely to misuse prescription or psychotherapeutic drugs, use alcohol, binge alcohol, engage in heavy alcohol use, use tobacco and cigars).
49. Brief for Petitioners, *supra* note 47 at 12 (citing Brown transcript, Brown Tr. 12/10/96 at 81:17–82:5 (JA 265–66)).
50. *Id.*
51. *Id.* at 13 n.10.
52. *Id.* (“The record demonstrates that Nurse Brown, who helped establish the Search Policy and was integral to its everyday implementation, held racist views.”).
53. *Id.* at 12 (citing Brown Tr. 12/10/96 at 5:18–21, 64:4–66:25, 71:6–74:9 (JA 209, 250–57); M. Williams Tr. at 132:7–133:1 (JA 1195–96); PX 119).
54. *Id.* (citing M. Williams Tr. at 128:9–129:5 (JA 1192–93)).
55. Brief for Petitioners, *supra* note 47, at 11.
56. *Id.* at 17 (citing Singleton Tr. at 61:11–14, 68:22–24, 69:5–8 (JA 1135–36, 1143); Powell Tr. at 152:2–11; 157:4 (JA 1014–15, 1020); Knight Tr. at 154:20–125:17 (JA 777–78); Griffin Tr. 11:9–12:4 (JA 551–52)).
57. *Id.* (citing Singleton Tr. 68:1–69:8 (JA 1142–43); Powell Tr. 153:7–20, 155:8–16).
58. *Id.* (citing Singleton Tr. 62–64 [JA 1136–39]; Powell Tr. at 154:2–156:24 (JA 1017–19); Griffin Tr. 10 (JA 549–50); Knight Tr. 126 at (JA 778–79)).

59. Charles Krauthammer, *Worse than “Brave New World”: Newborns Permanently Damaged by Cocaine*, PHILA. INQUIRER (Aug. 1, 1989), [http://articles.philly.com/1989-08-01/news/26148256\\_1\\_cocaine-babies-crack-babies-damage1](http://articles.philly.com/1989-08-01/news/26148256_1_cocaine-babies-crack-babies-damage1).
60. *Id.*
61. Douglas Besharov, *Crack Babies: The Worst Threat Is Mom Herself*, WASH. POST, Aug. 6, 1989, <http://www.welfareacademy.org/pubs/childwelfare/crackbabies-0889.shtml>; Krauthammer, *supra* note 59.
62. See Carl Hart, *The Real Opioid Emergency*, N.Y. TIMES (Aug. 18, 2017), <https://www.nytimes.com/2017/08/18/opinion/sunday/opioids-drugs-race-treatment.html>.
63. Priscilla Van Tassel, *Schools Trying to Cope with “Crack Babies,”* N.Y. TIMES, Jan. 05, 1992 (quoting Dan Griffith, a developmental psychologist, “This is just the tip of the iceberg”); Sandra Blakeslee, *Crack’s Toll Among Babies: A Joyless View, Even of Toys*, N. Y. TIMES, Sept. 17, 1989, at A1.
64. Krauthammer, *supra* note 59.
65. Charles Krauthammer, *Children of Cocaine*, Congressional Record, Proceedings and Debates of the 101st Congress, Aug. 1, 1989.
66. *Id.*
67. *Id.*
68. See, e.g., Ellen Hopkins, *Childhood’s End: What Life Is Like for Crack Babies*, ROLLING STONE, Oct. 18, 1990.
69. Telephone interviews with Dr. Claire Coles (July 28, 2013) and Dr. Hallam Hurt (Aug. 13, 2013).
70. Telephone interview with Dr. Claire Coles (July 28, 2013).
71. Hallam Hurt et al., *Children With and Without Gestational Cocaine Exposure: A Neurocognitive System Analysis*, 31 NEUROTOXICOLOGY & TERATOLOGY 334, 339 (2009). See also Hallam Hurt et al., *A Prospective Comparison of Developmental Outcome of Children with In Utero Cocaine Exposure and Controls Using the Battelle Developmental Inventory*, 22 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 21 (2001) [hereinafter *Developmental Outcome*]; Hallam Hurt et al., *Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects on Intelligence Testing*, 151 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 1237, 1241 (1997); Hallam Hurt et al., *School Performance of Children with Gestational Cocaine Exposure*, 27 NEUROTOXICOLOGY & TERATOLOGY 203, 207 (2011) (finding no statistically significant difference between successful grade progression in grades one through four between children with gestational cocaine exposure and a control group).
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73. Michael Winerip, *Revisiting the “Crack Babies” Epidemic That Was Not*, N.Y. TIMES, May 20, 2013; Peter Lyons & Barbara Rittner, *The Construction of the Crack Babies Phenomenon as a Social Problem*, 68 AM. J. ORTHOPSYCHIATRY 313 (1998).
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76. David Brown, *“Crack Baby” Theory Doubted*, WASH. POST, Mar. 28, 2001.
77. Winerip, *supra* note 73.

78. *Id.*
79. Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1202 (1990).
80. *Id.*
81. Gina Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. TIMES, July 20, 1990 at A13.
82. See, e.g., Allen A. Mitchell et al., *Medication Use During Pregnancy, with Particular Focus on Prescription Drugs: 1976–2008*, 250 AM. J. OBSTETRICS GYNECOLOGY 50 (2011).
83. *Id.*
84. *Abusing Prescription Drugs During Pregnancy*, AM. PREGNANCY ASS'N (July 2015), <http://www.americanpregnancy.org/pregnancyhealth/abusingprescriptiondrugs.html>.
85. Barry Yeoman, *Surgical Strike: Is a Group That Pays Addicts to Be Sterilized Defending Children or Exploiting the Vulnerable?*, MOTHER JONES, Nov./Dec. 2001.
86. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–20 (1996–7) (“White Americans who emphatically opposed slavery regularly disagreed about what it would mean to emancipate African-Americans. Some defined freedom from slavery as equality in civil rights; others insisted that emancipating African-Americans from slavery entailed equality in civil and political rights; but most white Americans who opposed slavery did not think its abolition required giving African-Americans equality in ‘social rights.’”).
87. *Id.* at 1111, 1116.
88. See ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 57 (2016).
89. *Id.*
90. *Id.*
91. *Buck v. Bell*, 274 U.S. 200, 207 (1927).
92. See *id.* (upholding a Virginia law that required the sterilization of incompetent persons). Carrie Buck, a victim of rape at age sixteen, bore a child out of wedlock. The state of Virginia claimed that Buck possessed low social character and intelligence; it predicted that were she to have more children they would be born of inferior intelligence. She and others like her were collected by public health officials to be sterilized. However, years after the case, Holmes and public health officials in Virginia were proven wrong: Buck’s daughter, Vivian, was a successful student – well above average.
93. *Buck*, 274 U.S. at 207.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Biography of Harry H. Laughlin*, TRUMAN STATE UNIVERSITY PICKLER MEMORIAL LIBRARY, <http://library.truman.edu/manuscripts/laughlinbio.asp>.
98. See, e.g., Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985).
99. *Buck*, 274 U.S. at 207 (“the principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes”).
100. Kim Severson, *Thousands Sterilized, a State Weighs Restitution*, N.Y. TIMES, Dec. 9, 2011, at A1.
101. Valerie Bauerlein, *North Carolina to Compensate Sterilization Victims*, WALL ST. J. (July 26, 2013), <http://www.wsj.com/articles/SB10001424127887323971204578629943220881914> (“About 2,000 of the 7,600 who were sterilized were under age 18”).

102. *Id.*; David Zucchino, *Sterilized by North Carolina, She Felt Raped Once More*, L.A. TIMES (Jan. 25, 2012), <http://articles.latimes.com/2012/jan/25/nation/la-na-forced-sterilization-20120126> [<http://perma.cc/7BPR-3UCM>].
103. *Sterilization Abuse*, SPLC, <http://www.splcenter.org/seeking-justice/case-docket/relf-v-weinberger> [<http://perma.cc/RL7M-WWP7>].
104. Yeoman, *supra* note 85.
105. *Id.*
106. Jeff Stryker, *Cracking Down*, SALON (July 10, 1998, 3:25AM), [http://www.salon.com/1998/07/10/cov\\_10feature/](http://www.salon.com/1998/07/10/cov_10feature/).
107. *Id.*
108. *Our Mission*, PROJECT PREVENTION, <http://www.projectprevention.org/>.
109. *Tennessee Sterilisations in Plea Deal for Women Evoke Dark Time in America*, GUARDIAN (Mar. 28, 2015), <https://www.theguardian.com/us-news/2015/mar/28/tennessee-forced-sterilizations-plea-deals-women>.
110. *Id.*
111. *Id.*
112. Corey G. Johnson, *Female Prison Inmates Sterilized Illegally, California Audit Confirms*, CENTER FOR INVESTIGATIVE REPORTING, REVEAL NEWS (June 19, 2014), <https://www.revealnews.org/article/female-prison-inmates-sterilized-illegally-california-audit-confirms/>.
113. CALIFORNIA STATE AUDITOR, ELAINE M. HOWLE, *STERILIZATION OF FEMALE INMATES REPORT: SOME INMATES WERE STERILIZED UNLAWFULLY, AND SAFEGUARDS DESIGNED TO LIMIT OCCURRENCES OF THE PROCEDURE FAILED* (JUNE 2014), <https://www.auditor.ca.gov/pdfs/reports/2013-120.pdf>.
114. *Id.* at iii.
115. See Johnson, *supra* note 112.
116. See JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 99 (Stuart D. Warner, ed., Liberty Fund 1993) (1874).
117. *Id.* at 98.

### 3 CREEPING CRIMINALIZATION OF PREGNANCY ACROSS THE UNITED STATES

1. See, e.g., ALA. CODE § 13A-6-1 (2006); ARIZ. REV. STAT. ANN. § 13-1102-05; FLA. STAT. ANN. 782.09 (West 2005); MISS. CODE ANN. § 97-3-19 (2013).
2. See, e.g., ALA. CODE § 26-15-3.2 (West 2006). The term “child” as used in this statute has been interpreted to encompass fetuses. *Ex parte Ankrom*, 2013 WL 135748, at \*11 (Ala. Jan. 13, 2013).
3. Utah’s House and Senate passed a “criminal miscarriage” law, presumptively exposing pregnant women to criminal prosecution for miscarrying. See H.B. 12, 58th Gen. Sess. (Utah 2010).
4. WISC. STAT. ANN. § 48.133 (West 2013) (granting the court “exclusive original jurisdiction” over an unborn child in need of protection when the expectant mother “habitually lacks self-control in the use of alcohol beverages, controlled substances”). The Wisconsin law allowed state authorities to incarcerate Alicia Beltran at fourteen weeks pregnant after she told a healthcare provider about a past (but not current) pill addiction. Erik Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. TIMES, Oct. 24, 2013, at A1.

5. See, e.g., *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997) (holding that a viable fetus is a “child” within the meaning of the state’s child abuse and endangerment laws).
6. For a discussion of the underlying legal theories behind these laws, see Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 322–26 (2013). See also Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin’s Revised Child Abuse Law: Right Goal, Wrong Remedy*, J.L. MED. & ETHICS 332, 332 (1999) (discussing laws in Wisconsin and South Dakota that allow confinement of pregnant women who abuse drugs or alcohol and how they are motivated by “the state’s interest in promoting the health of future citizens”).
7. Nina Martin, *The State That Turns Pregnant Women into Felons*, ALTERNET (Sept. 23, 2015), <https://www.alternet.org/drugs/when-womb-crime-scene>.
8. Paltrow & Flavin, *supra* note 6, at 300.
9. See, e.g., EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 50 (1680); WILLIAM STANFORD, LES PLEES DEL CORON bk. 1, ch. 13 (1557); *Twinslayer’s Case*, 1E3 23.P. Coron. 146 (1327); *Abortionist’s Case*, 22E.3.P. Coron. 263 (1348).
10. 1 MATTHEW HALE, HISTORIA PLACITORUM CORONÆ: THE HISTORY OF THE PLEAS OF THE CROWN 433 (London, E. & R. Nutt & R. Gosling 1736).
11. *Twinslayer’s Case*, 1E3 23.P. Coron. 146 (1327); *Abortionist’s Case*, 22E.3.P. Coron. 263 (1348).
12. *Regina v. Knight*, 2 F. & F. 46 (1860). Strangely, the court found it more repugnant that the pregnancy was concealed, and for that the defendant was found guilty and sentenced to hard labor.
13. *Rex v. Izod*, 20 Cox’s Criminal Law Cases 690, 691 (1904).
14. *Id.*
15. *Id.*
16. *Dietrich v. Northampton*, 138 Mass. 14, 16–17 (1884) (fetus “was a part of the mother at the time of the injury”). For over sixty years, this opinion served as the basis for common law jurisprudence regarding the legal standing of a fetus. Courts consistently ruled that a fetus had no legal status apart from the pregnant woman bearing it. See also *Stallman v. Youngquist*, 531 N.E.2d 335 (Ill. 1988) (denying recovery against a mother for unintentional injuries sustained in utero to a child born alive); *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).
17. *State v. Osmus*, 276 P.2d 469, 476 (Wyo. 1954).
18. *Id.* at 470–71.
19. *Id.* at 475; see also WYO. STAT. ANN. § 58-101 (1945). The statute in question reads: “It shall be unlawful for any person having or being charged by law with the care or custody or control of any child under the age of nineteen (19) years knowingly to cause or permit the life of such child to be endangered or the health or morals or welfare of such child to be endangered or injured, or knowingly to cause or permit such child to be in any situation or environment such that the life, health, morals, or welfare of such child will or may be injured or endangered, or willfully or unnecessarily to expose to the inclemency of the weather, or negligently or knowingly abandon or fail to provide the necessities of life for such child, or to ill-treat, abuse, overwork, torture, torment, cruelly punish such a child, or to negligently or knowingly deprive or fail to furnish necessary food, clothing or shelter for such child, or in any other manner injure said child.”
20. *Id.*

21. *Id.* at 472. *But see* *People v. Chavez*, 176 P.2d 92, 94 (Cal. Dist. Ct. App. 1947) (holding that a viable fetus in the process of birth is a human being within the meaning of homicide statutes even when the birth is not fully complete).
22. *Substance Use During Pregnancy*, GUTTMACHER INST. (Oct. 1, 2019), <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy>.
23. 1995 WISC. ACT 292 (1997).
24. Shamane Mills, *Opponents of Wisconsin's "Cocaine Mom" Law Continue Fight*, WISCONSIN PUBLIC RADIO (Aug. 1, 2018), <https://www.wpr.org/opponents-wisconsins-cocaine-mom-law-continue-fight>.
25. *See State Laws on Fetal Homicide and Penalty-Enhancement for Crimes Against Pregnant Women*, NAT'L CONFERENCE OF STATE LEGISLATURES (last updated May 1, 2018), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>.
26. Manny Fernandez & Erik Eckholm, *Pregnant, and Forced to Stay on Life Support*, N.Y. TIMES, Jan. 8, 2014, at A1.
27. *See, e.g., Ex parte Ankrom*, 2013 WL 135748, at \*11 (Ala. Jan. 13, 2013) (interpreting the term "child" in a child endangerment law to include fetuses); Adam Nositer, *In Alabama, a Crackdown on Pregnant Drug Users*, N.Y. TIMES (Mar. 15, 2008), [http://www.nytimes.com/2008/03/15/us/15mothers.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/03/15/us/15mothers.html?pagewanted=all&_r=0) (relating stories of women in Alabama prosecuted for using drugs while pregnant).
28. Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. TIMES (Apr. 1, 2015), <https://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer> ("The facts supporting each count are murky, but a jury convicted Patel in February, and on Monday she was sentenced to 20 years in prison.").
29. *Kilmon v. State*, 905 A.2d 306 (Md. 2006) (reversing a circuit court's finding of reckless endangerment based on use of controlled substances while pregnant).
30. *See, e.g., State v. Buckhalter*, 119 So. 3d 1015, 1017, 1019 (Miss. 2013) (affirming the trial court's dismissal of Nina Buckhalter's indictment for manslaughter, which alleged she "willfully" caused her child's death by using drugs during pregnancy, and concluding that the indictment was "fatally flawed"); Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES (Apr. 25, 2012), <http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?pagewanted=all> (relating the story of Rennie Gibbs, who was charged with "depraved heart murder" after her baby was stillborn and tested positive for cocaine); Emily Le Coz, *Mississippi Stillborn Manslaughter Charge Raising Fears*, USA TODAY (May 29, 2013, 1:01PM), <http://www.usatoday.com/story/news/nation/2013/05/29/mississippi-stillborn-manslaughter-charge-raising-fears/2369523/> (discussing Buckhalter's manslaughter trial for the loss of her fetus, which prosecutors claimed was caused by her illegal drug use).
31. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (concluding that a state hospital's policy requiring diagnostic tests to obtain evidence of a pregnant woman's drug use for law enforcement purposes constitutes an "unreasonable search" if the patient has not provided consent to the procedure).
32. *See* Kontji Anthony, *Police: Woman Earns DUI for Endangering Fetus*, WMCTV (June 30, 2013), <http://www.wmcactionnews5.com/story/20525700/police-pregnant-woman-earns-dui-for-endangering-fetus/>.
33. Paltrow & Flavin, *supra* note 6, at 300.
34. *Id.* (noting that their study may be an undercount of the instances where pregnant women's liberty has been subjected to liberty deprivations).
35. *Shuai v. State*, 966 N.E.2d 619, 622 (Ind. Ct. App. 2012).

36. See Carrie Ritchie, *Murder Charge Raises Women's Rights Questions*, USA TODAY (Jan. 6, 2013, 12:18 AM), <https://www.usatoday.com/story/news/nation/2013/01/05/infants-death-raises-womens-rights-questions/1566070/>.
37. Kara Kenney, *Inmates Sleeping on Floor at Marion County Jail*, RTV6, THEINDYCHANNEL (Oct. 17, 2017), <https://www.theindychannel.com/news/call-6-investigators/inmates-sleeping-on-floor-at-marion-county-jail> (the spokesperson for the Marion County Sheriff's Office describes the conditions as an ongoing "crisis"); Mark Alesia, *Lawsuit: Former Marion County Jail Inmate Denied His Cancer Treatment*, INDYSTAR (June 18, 2018), <https://www.indystar.com/story/news/2018/06/18/prison-medical-care-marion-county-jail-correct-care-solutions/637068002/>; Robin Y. Richardson, *Marion County Inmates Sue over Jail Conditions*, LONGVIEW NEWS JOURNAL (Oct. 1, 2016), [https://www.news-journal.com/news/police/marion-county-inmates-sue-over-jail-conditions/article\\_8eado79c-60dc-5670-9e9b-bce899224238.html](https://www.news-journal.com/news/police/marion-county-inmates-sue-over-jail-conditions/article_8eado79c-60dc-5670-9e9b-bce899224238.html) (highlighting litigation brought by inmates over black mold at the facility).
38. Ed Pilkington, *Indiana Prosecuting Chinese Woman for Suicide Attempt That Killed Her Foetus*, GUARDIAN (May 30, 2012, 1:36 PM), <http://www.guardian.co.uk/world/2012/may/30/indiana-prosecuting-chinese-woman-suicide-foetus>.
39. *Id.*
40. Ritchie, *supra* note 36.
41. Shuai v. State, 966 N.E.2d 618, 622 (Ind. Ct. App. 2012).
42. Pilkington, *supra* note 38.
43. Debra L. Karch et al., *Surveillance for Violent Deaths – National Violent Death Reporting System*, 16 *States*, 2009, MORBIDITY & MORTALITY WKLY. REP., SURVEILLANCE SUMMARIES 61(6), Sept. 14, 2013, at 1, <http://www.cdc.gov/mmwr/pdf/ss/ss6106.pdf>; CTRS. DISEASE CONTROL, *Suicide: Facts at a Glance* (2012), <http://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.PDF>.
44. Shuai, 966 N.E.2d at 622.
45. Michael R. Phillips et al., *Risk Factors for Suicide in China: A National Case-Control Psychological Autopsy Study*, 360 LANCET 1728, 1734 (2002).
46. Paul S. F. Yip & Ka Y. Liu, *The Ecological Fallacy and the Gender Ratio of Suicide in China*, 189 BRIT. J. PSYCHIATRY 465, 465–66 (2006).
47. Lakshmi Vijayakumar et al., *Socio-Economic, Cultural and Religious Factors Affecting Suicide Prevention in Asia*, in SUICIDE AND SUICIDE PREVENTION IN ASIA 19 (Herbert Hendin et al. eds., 2008); Kenneth R. Conner et al., *Low-Planned Suicides in China*, 35 PSYCHOLOGICAL MED. 1197 (2005); Veronica Pearson, *Ling's Death: An Ethnography of a Chinese Woman's Suicide*, 32 SUICIDE & LIFE-THREATENING BEHAV. 347 (2002); Veronica Pearson, *Goods on Which One Loses: Women and Mental Health in China*, 41 SOC. SCI. & MED. 1159 (1995); Yip & Liu, *supra* note 46, at 465.
48. Bruce Einhorn, *Suicide: China's Great Wall of Silence*, BLOOMBERG BUS. WK. (Nov. 1, 2004, 9:00 PM), <http://www.businessweek.com/stories/2004-11-01/suicide-chinas-great-wall-of-silence> (quoting Sartorius).
49. *Id.*
50. *New Study Shows 60 Percent of U.S. Counties Without a Single Psychiatrist*, NEW AM. ECON. (Oct. 23, 2017), <https://www.newamericaneconomy.org/press-release/new-study-shows-60-percent-of-u-s-counties-without-a-single-psychiatrist/>.
51. Terry Curry Discusses the Bei Bei Shuai Case, USA TODAY, <http://usatoday30.usatoday.com/video/terry-curry-discusses-the-bei-bei-shuai-case/2119743594001>.
52. Interview with Bei Bei Shuai (Apr. 6, 2013).
53. *Id.*

54. Richard Lacayo, *Down on the Downtrodden*, TIME, Dec. 18, 1994, at 30.
55. Brief of Appellee at 6, *Shuai v. State*, 966 N.E.2d 619 (Ind. Ct. App. 2012), (No. 49A02-1106-CR-486).
56. Brief of Appellant, Oral Argument Requested, *Gibbs v. State* at 1, No. 2010-M-819-SCT (Miss. Nov. 12, 2010).
57. *Id.*
58. Brief of Amicus Curiae of the National Association of Social Workers et al. in support of Petitioner, *Gibbs v. State* at 1–2, No. 2010-M-819 (Miss. May 19, 2010) [hereinafter NASW Amicus Brief], <http://www.socialworkers.org/assets/secured/documents/ldf/briefDocuments/Gibbs%20v%20State%20MS%20Sup.Ct.Amicus%20Brief.pdf>.
59. Brief of Appellant, *Gibbs v. State*, *supra* note 56, at 1.
60. Subsequently, the Mississippi Supreme Court granted Gibbs's petition for interlocutory review. *Id.* at 2. Under Mississippi's Rules of Appellate Procedure, an interlocutory appeal may be sought if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may: (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or (2) Protect a party from substantial and irreparable injury; or (3) Resolve an issue of general importance in the administration of justice. MISS. R. APP. PROC. 5(a) (2008).
61. Brief of Appellant, *Gibbs v. State*, *supra* note 56, at 36 ("Under the statutory interpretation advanced by the prosecution, Ms. Gibbs faces life in prison because of her combined status as a pregnant woman and drug user." The statute at issue reads: "The killing of a human being with the authority of law by any means or in any manner shall be murder in the following cases: . . . (b) When done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without premeditated design to effect the death of any particularly individual, shall be second-degree murder." MISS. CODE ANN. § 97-3-19(B) (West 2013). MISS. CODE ANN. § 97-3-21(2) (West 2013) provides that "a person who shall be convicted of second-degree murder shall be imprisoned for life . . . if the punishment is so fixed by the jury.")
62. Brief of the Appellant, *Gibbs v. State*, *supra* note 56, at 2.
63. *Id.*
64. *Id.*
65. Jessica Mason Pieklo, *Murder Charges Dismissed in Mississippi Stillbirth Case*, REWIRE NEWS (Apr. 4, 2014), <https://rewire.news/article/2014/04/04/murder-charges-dismissed-mississippi-stillbirth-case/>.
66. MISS. CODE ANN. § 97-3-19(B) (West 2013). MISS. CODE ANN. § 97-3-21(2) (West 2013).
67. *Id.* at 2.
68. FLA. STAT. ANN. § 782.09 (West 2005). Other provisions of the law created new crimes to include the killing of a fetus as manslaughter and extended punishment to vehicular homicide (FLA. STAT. ANN. § 782.071 (West 2001)).
69. FLA. STAT. ANN. § 782.071 (West 2001).
70. FLA. STAT. ANN. § 316.192 (West 2010).
71. ARIZ. REV. STAT. ANN. §§ 13-604, 13-604.01, 13-703, 13-1102, 13-1103, 13-1104, 13-1105, 13-4062, 31-412, 41-1604.11 and 41-1604.13.
72. See statutes cited *supra* note 71.
73. ALA. CODE § 26-15-3.2 (2006).
74. *Id.* (emphasis added).
75. *Ex parte Ankrom*, 2013 WL 135748, at \*22 (Ala. Jan. 13, 2013) (Parker, J., concurring) (concluding that "the decision of this Court today is in keeping with the widespread legal

- recognition that unborn children are persons with rights that should be protected by law”).
76. *Id.* at \*15. ALA. CODE § 26-15-3.2 (2006).
  77. Associated Press, *Kansas Law Maker Compares Abortion to Holocaust*, WICHITA EAGLE (Mar. 9, 2015), <http://www.kansas.com/news/politics-government/article13112999.html>.
  78. *Id.*
  79. Daniel Becker, *Georgia Legislature Passes Nation's First Embryo Adoption Law*, CHRISTIAN NEWS WIRE (Apr. 3, 2009), <http://www.christiannewswire.com/news/630359951.html>.
  80. HB 388, 2009 Gen. Assemb., Reg. Sess. (Ga.), codified at GA. CODE ANN. §§ 19-8-40 to 19-8-43.
  81. Georgia's "Defender of Life," GEORGIA RIGHT TO LIFE (date omitted), <http://www.grtl.org/?q=node/174>.
  82. Becker, *supra* note 79.
  83. Grace Wyler, *Personhood Movement Continues to Divide Pro-Life Activists*, TIME (July 24, 2013), <http://nation.time.com/2013/07/24/personhood-movement-continues-to-divide-pro-life-activists/>.
  84. S. Con. Res. 4009, 63d Leg. Assemb. (N.D. 2013).
  85. Laura Bassett, *North Dakota Personhood Measure Passes State Senate*, HUFFINGTON POST (Feb. 7, 2013, 5:24 PM), [http://www.huffingtonpost.com/2013/02/07/north-dakota-personhood\\_n\\_2640380.html](http://www.huffingtonpost.com/2013/02/07/north-dakota-personhood_n_2640380.html); <https://www.propublica.org/article/north-dakota-abortion-amendment-fails>.
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  97. Loertscher v. Anderson, 259 F. Supp. 3d 902 (W.D. Wis.), *stay granted*, 137 S. Ct. 2328 (2017).
  98. Loertscher v. Anderson, 259 F. Supp. 3d 902 (W.D. Wis.), *stay granted*, 137 S. Ct. 2328 (2017), *vacated as moot*, 893 F.3d 386 (7th Cir. 2018).
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  105. *Id.*
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  108. Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES MAG., Apr. 29, 2012, at MM30.
  109. *Prison Spending in 2015*, VERA INST., <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending>.
  110. Dietrich v. Northampton, 138 Mass. 14 (1884). *See also* Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 359–60 (1935); Allaire v. St. Luke’s Hosp., 184 Ill. 359, 368 (1900); Newman v. City of Detroit, 281 Mich. 60, 62–63 (1937); Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 612 (1926); Buel v. United Rys. Co., 248 Mo. 126, 132–33 (1913); Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 276 (1916); Gorman v. Budlong, 23 R.I. 169, 176–77 (1901).
  111. *See* Ferguson v. City of Charleston, 532 U.S. 67, 70–73 (2001).
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  113. Robert M. Silver et al., *Work-up of Stillbirth: A Review of the Evidence*, 196 AM. J. OBSTETRICS & GYNECOLOGY 433, 440 (2007) (noting that multiple factors may contribute to a stillbirth, but not cause it).

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120. Goldenberg et al., *supra* note 112, at 79, 85 (2004) (“in areas where syphilis is prevalent, up to half of all stillbirths may be caused by this infection alone”).
121. *See, e.g.*, Rowland Hogue, *supra* note 116. *See also* K. Wisborg et al., *Psychological Stress During Pregnancy and Stillbirth: Prospective Study*, 115 BJOG 882 (2008) (finding an association between psychological stress during pregnancy and an increased risk of stillbirth).
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126. Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 302, 311–14 (2014).
127. *Id.*

128. Tammerlin Drummond, *Mothers in Prison*, TIME (Oct. 29, 2000), <http://www.time.com/time/magazine/article/0,9171,58996,00.html> (noting that “Florida is attempting to address a disturbing national phenomenon: the explosion in the number of mothers in prison”).
129. CHANDRA KRING VILLANUEVA, INST. ON WOMEN & CRIMINAL JUSTICE, WOMEN’S PRISON ASSOCIATION, *MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES* 1, 4 ((Sarah B. From & Georgia Lerner eds., 2009).
130. *Id.* at 5 (“by keeping mothers and infants together, these programs prevent foster care placement and allow for the formation of maternal/child bonds during a critical period of infant development”).
131. *Id.*
132. Suzanne Smalley, *Should Female Inmates Raise Their Babies in Prison?*, NEWSWEEK (May 13, 2009), <http://www.newsweek.com/should-female-inmates-raise-their-babies-prison-80247>.

#### 4 ABORTION LAW

1. See, e.g., *Hyde v. Scysson* (1620) 79 Eng. Rep. 462, Cro. Jac. 538; *Ohio & Miss. Ry. v. Cosby*, 107 Ind. 32, 34–35 (1886); *Birmingham S. Ry. v. Lintner*, 141 Ala. 420, 427–28 (1904). See generally Jo-Anne M. Baio, *Loss of Consortium: A Derivative Injury Giving Rise to a Separate Cause of Action*, 50 FORDHAM L. REV. 1344 (1982).
2. See, e.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (affirming an Illinois statute that denied female law graduates admission to the bar because “civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”).
3. See DOROTHY ROBERTS, *KILLING THE BLACK BODY* 29–31 (1997).
4. See, e.g., Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000); Michele Goodwin, *Marital Rape: The Long Arch of Sexual Violence Against Women and Girls*, 109 AM. J. INT’L L. 326, 328 (2016). Moreover, states typically vindicated the legitimacy of marital rape and courts followed suit. See, e.g., *State v. Paoella*, 554 A.2d 702 (1989) (finding that CONN. GEN. STAT. § 53a-70a and § 53a-70a(a) exonerates a married man from the crime of rape if the victim is his wife); see also Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R. 4th 105 (1983).
5. *Minor v. Happersett*, 53 Mo. 58, 64–65 (1873).
6. See, e.g., *Ozawa v. United States*, 260 U.S. 178, 195 (1922); see also *United States v. Bhagat Singh Thind*, 261 U.S. 204, 209 (1923) (emphasis added) (denying citizenship to an Indian man who claimed that his Aryan lineage entitled him to the status of a white man in the United States).
7. See, e.g., *Parker v. Elliott*, 20 Va. (6 Munf.) 587 (1820).
8. See, e.g., Hasday, *supra* note 4; Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459 (2002); Damian Corless, *When a Wife Was Her Man’s Chattel*, INDEPENDENT (Jan. 4, 2015, 2:30 AM), <https://www.independent.ie/life/when-a-wife-was-her-mans-chattel-30871468.html>.

9. See generally COLIN DAYAN, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* (2013).
10. *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961) (“woman is still regarded as the center of home and family life”); see also *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).
11. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 140–42 (1873).
12. 39 Wis. 232, 244–45 (1875) (“Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things.”).
13. *Roe v. Wade*, 410 U.S. 113, 130–34 (1973) (referencing Christian theology).
14. *Id.* at 153.
15. *Id.* at 130 (footnote omitted) (stating that even Soranos, the “greatest of the ancient gynecologists,” who personally opposed abortion, “found it necessary to think first of the life of the mother”).
16. See generally GERTRUDE JACINTA FRASER, *AFRICAN AMERICAN MIDWIFERY IN THE SOUTH* (1998); Sharon A. Robinson, *A Historical Development of Midwifery in the Black Community: 1600–1940*, 29 J. NURSE-MIDWIFERY 247, 247 (1984) (“By the early 19th century, the male physician had succeeded in replacing midwives among upper- and middle-class white urban American women.”); Keisha La’Nesha Goode, *Birthing, Blackness, and the Body: Black Midwives and Experiential Continuities of Institutional Racism* (Oct. 1, 2014) (unpublished PhD dissertation, City University of New York) (on file with author).
17. See HORATIO R. STORER, *ON CRIMINAL ABORTION IN AMERICA* 56 (1860).
18. *Id.*
19. *Roe v. Wade*, 410 U.S. at 132 (emphasis added) (citation omitted).
20. Marie Solis, *Here’s What the Trump Administration’s Proposed Title X Rule Would Do to Abortion Access in America*, NEWSWEEK (May 2, 2018, 12:22 PM), <http://www.newsweek.com/heres-what-trump-administrations-proposed-title-x-rule-would-do-abortion-908474> [<https://perma.cc/XN9A-UVNF>].
21. 136 S. Ct. 2292 (2016) (holding that the state of Texas cannot impose restrictions on abortion services that substantially burden women seeking an abortion).
22. S.F. 704, 90th Sess. (Minn. 2017).
23. Policy Statement of the United States of America at the United Nations International Conference on Population, 2d Sess., Mexico City (Aug. 6–14, 1984), *reprinted in* 10 POPULATION & DEV. REV. 574 (1984).
24. STORER, *supra* note 17, at 7.
25. See FRASER, *supra* note 16; Robinson, *supra* note 16; Goode, *supra* note 16.
26. See Goode, *supra* note 16.
27. Robinson, *supra* note 16; Goode, *supra* note 16.
28. HORATIO R. STORER, *ON CRIMINAL ABORTION IN AMERICA* 7 (1860), see also HORATIO R. STORER, “WHY NOT?” A BOOK FOR EVERY WOMAN 16 (1868) (arguing that women who terminate their pregnancies have “deplorable tendencies of unbridled desire, of selfishness and extravagance . . . [and] an absence of true conjugal affection . . .”).
29. See, e.g., *id.* at 13.
30. HORATIO ROBINSON STORER, *WHY NOT?: A BOOK FOR EVERY WOMAN* 85 (1868) (also quoted in Leslie Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973*, in *THE REPRODUCTIVE RIGHTS READER* 82 (Nancy Ehrenreich ed., 2008)).
31. See STORER, *supra* note 17, at 13.

32. *Id.* at 80.
33. STORER, *supra* note 17, at 57–58.
34. Joseph B. DeLee, *Progress Toward Ideal Obstetrics*, Speech at Sixth Annual Meeting of the American Association for Study and Prevention of Infant Mortality (Nov. 11, 1915), in 73 AM. J. OF OBSTETRICS & DISEASES OF WOMEN & CHILDREN 407–15 (1916).
35. *Id.*
36. Robinson, *supra* note 16, at 247 (noting that, with the advent of medical tools such as forceps, gynecology became male-dominated in Europe and the United States).
37. A. de Jonge et al., *Perinatal Mortality and Morbidity in a Nationwide Cohort of 529,688 Low-Risk Planned Home and Hospital Births*, 116 BJOG 1177, 1177 (2009) (“However, this move from home to hospital birth for most women was not based on evidence . . .”). In this study, researchers noted that prior conflicting studies on the efficacy of midwives in homebirths “could not exclude high risk unplanned, unassisted home births from planned home birth group.” *Id.* at 1178.
38. DeLee, *supra* note 34, at 410.
39. See Liana Aghajanian, *Los Angeles Midwives Aim to End Racial Disparities at Birth*, ALJAZEERA AM. (Sept. 5, 2015), <http://america.aljazeera.com/articles/2015/9/5/to-los-angeles-midwives-racial-disparities-birth.html> (reporting that the Sheppard-Towner Maternity and Infancy Act “forced midwives to become licensed and receive training from nurses. As medical professionals established relationships in communities that midwives once served, the use of midwives diminished in much of the country.”).
40. Emily Friedman, *U.S. Hospitals and the Civil Rights Act of 1964*, HOSPS. & HEALTH NETWORKS DAILY (June 3, 2014), <http://www.hhnmag.com/articles/4179-u-s-hospitals-and-the-civil-rights-act-of-1964> (“Only 10 percent of Northern hospitals accepted African-American interns or residents; only 20 percent had them on staff. Only 6 percent of Southern hospitals accepted them as interns or residents, and only 25 percent granted them staff privileges.”).
41. DeLee, *supra* note 34, at 407–08.
42. See generally Melissa Cheyney et al., *Development and Validation of National Data Registry for Midwife-Led Births: The Midwives Alliance of North America Statistics Project 2.0*, 59 J. MIDWIFERY & WOMEN’S HEALTH 8 (2014); Melissa Cheyney et al., *Outcomes of Care for 16,484 Planned Home Births in the United States: The Midwives Alliance of North America Statistics Project, 2004–2009*, 59 J. MIDWIFERY & WOMEN’S HEALTH 17 (2014); de Jonge et al., *supra* note 37; J.T. Fullerton et al., *Outcomes of Planned Home Birth: An Integrative Review*, 52 J. MIDWIFERY & WOMEN’S HEALTH 323 (2007); E. Hutton et al., *Outcomes Associated with Planned Home and Hospital Births in Low-Risk Women Attended by Midwives in Ontario, Canada, 2003–2006: A Retrospective Cohort Study*, 36 BIRTH 180 (2009); P. Janssen, *Outcomes of Planned Home Birth with Registered Midwife Versus Planned Hospital Birth with Midwife or Physician*, 181 CANADIAN MED. ASS. J. 377 (2009).
43. Jane Sandall et al., *Midwife-Led Continuity Models Versus Other Models of Care for Childbearing Women*, COCHRANE DATABASE OF SYSTEMATIC REVIEWS, No. 4, 2016, at 1 (“We identified 15 studies involving 17,674 mothers and babies . . . . We included women at low risk of complications as well as women at increased risk, but not currently experiencing problems. . . . The main benefits were that women who received midwife-led continuity of care were less likely to have an epidural. In addition, fewer women had episiotomies or instrumental births. Women’s chances of a spontaneous vaginal birth were also increased and there was no difference in the number of caesarean births. Women were less likely to experience preterm birth, and they were also at a lower risk

- of losing their babies. In addition, women were more likely to be cared for in labour by midwives they already knew.” *Id.* at 3.).
44. Melissa Madera, *6 women Share Their Harrowing Stories of Illegal Abortion Before Roe v. Wade*, VICE NEWS (Jan. 22, 2018, 11:23 AM), [https://broadly.vice.com/en\\_us/article/43qm5d/6-women-share-their-harrowing-stories-of-illegal-abortion-before-roe-v-wade](https://broadly.vice.com/en_us/article/43qm5d/6-women-share-their-harrowing-stories-of-illegal-abortion-before-roe-v-wade).
  45. REAGAN, *supra* note 30, at 214.
  46. *Id.* at 210.
  47. *Id.*
  48. *Id.* at 210–11.
  49. *Id.* at 212–13 (explaining that “[t]he racial differences in abortion-related deaths and access to safe therapeutic abortions mirrored the racial inequities in health services in general and in overall health” and noting that “[m]aternal mortality rates of black women were three to four times higher than those of white women”).
  50. Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, 6 GUTTMACHER POL’Y REV. 8, 8 (2003).
  51. Alan F. Guttmacher, *Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415, 420–21 (1967).
  52. *See, e.g.*, NARAL FOUND., CHOICES: WOMEN SPEAK OUT ABOUT ABORTION 11 (1997).
  53. *Id.*
  54. Madera, *supra* note 44.
  55. *Id.*
  56. *Id.*
  57. *Id.*
  58. Stephanie Hallett, *Eight Stories That Show What Abortion Was Like Before Roe v. Wade*, MS. MAGAZINE BLOG (Jan. 19, 2016), <https://msmagazine.com/blog/2016/01/19/8-stories-that-show-what-abortion-was-like-before-roe-v-wade/>.
  59. *Id.* For accounts that further capture women’s painful, coercive experiences, *see* WHEN ABORTION WAS ILLEGAL: UNTOLD STORIES (Concentric Media 1992), [http://concentric.org/films/when\\_abortion\\_was\\_illegal.html](http://concentric.org/films/when_abortion_was_illegal.html) [<https://perma.cc/VVP6-BPQQ>]; Lisa Woods, *9 Older Women Share Their Harrowing Back Alley Abortion Stories*, THOUGHT CATALOG (Dec. 30, 2015), <http://thoughtcatalog.com/lisa-woods/2015/12/9-older-women-share-their-harrowing-back-alley-abortion-stories/> [<https://perma.cc/HW5V-MLJQ>].
  60. *Id.*
  61. Telephone interview with Aryeh Neier (Apr. 13, 2015).
  62. *Roe v. Wade*, 410 U.S. 113 (1973).
  63. *Id.* at 121.
  64. TEX. PENAL CODE ANN. §§ 1191–94, 1196 (1961) (historical).
  65. *Roe*, 410 U.S. at 117 n.1.
  66. *Id.*
  67. *See* Alex Witchel, *At Home With: Norma McCorvey; Of Roe, Dreams and Choices*, N.Y. TIMES (July 28, 1994), <http://www.nytimes.com/1994/07/28/garden/at-home-with-norma-mccorvey-of-roe-dreams-and-choices.html>.
  68. *Roe*, 410 U.S. at 120.
  69. *See* Witchel, *supra* note 67.
  70. *Roe*, 410 U.S. at 153.
  71. *Id.*
  72. The Pill, Anthony Comstock’s “Chastity” Laws, PBS, [http://www.pbs.org/wgbh/amex/pill/peopleevents/e\\_comstock.html](http://www.pbs.org/wgbh/amex/pill/peopleevents/e_comstock.html) (“The driving force behind the original anti-birth control statutes was a New Yorker named Anthony Comstock. A devout Christian . . . offended by

- explicit advertisements for birth control devices, he soon identified the contraceptive industry as one of his targets.”).
73. *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States*, 103d Cong. 150 (1993).
  74. *Maier v. Roe*, 432 U.S. 468, 469–70 (1977).
  75. *Id.* at 483–84 (Brennan, J., dissenting).
  76. *Id.*
  77. *Id.*
  78. *See International Union v. Johnson Controls*, 499 U.S. 187, 188 (1991).
  79. *Id.*
  80. 432 U.S. 464 (1977).
  81. 432 U.S. 438 (1977).
  82. 448 U.S. 297 (1980).
  83. *Id.* at 309; *Maier*, 432 U.S. at 465, 479–80; *Beal*, 432 U.S. at 444.
  84. *Harris*, 448 U.S. at 338 (Marshall, J., dissenting).
  85. Amendment No. 68. H.R. REP. NO. 94-1555, at 3 (1976) (Conf. Rep.).
  86. *Harris*, 448 U.S. at 356–57 (Stevens, J., dissenting).
  87. Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, GUTTMACHER INST., (Mar. 5, 2007), <https://www.guttmacher.org/about/gpr/2007/03/heart-matter-public-funding-abortion-poor-women-united-states>; see also 122 CONG. REC. 20410 (1976) (statement of Rep. Hyde).
  88. *Harris*, 448 U.S. at 311. See generally *id.* at 331–32 (Brennan, J., dissenting).
  89. *Id.* at 316 (majority opinion).
  90. *Id.* at 315.
  91. *Id.*
  92. *Id.*
  93. *Id.* at 338 (Marshall, J., dissenting).
  94. See, e.g., Pauli Murray, *The Liberation of Black Women*, in *WOMEN: A FEMINIST PERSPECTIVE* 351–62 (Jo Freeman ed., 1975); ROBERTS, *supra* note 3; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHICAGO LEGAL F. 139, 166 (urging that “[i]f any real efforts are to be made to free Black people of the constraints and conditions that characterize racial subordination, then theories and strategies purporting to reflect the Black community’s needs must include an analysis of sexism and patriarchy”).
  95. See, e.g., *State v. Paoletta*, 210 Conn. 110 (1989) (ruling that under CONN. GEN. STAT. § 53a-70a AND 53a-70a(a) a finding by a trier that the alleged offender and the victim were married exonerates the alleged offender, regardless of the proof of forcible sexual intercourse); see also Goodwin, *supra* note 4; Hasday, *supra* note 4; Jane E. Larson, “*Even a Worm Will Turn at Last*”: *Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1, 8–9, 18–19 (1997); Walsh, *supra* note 4; Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 64–65 (1990).
  96. See *Buck v. Bell*, 274 U.S. 200 (1927) (affirming the constitutionality of forced sterilization performed on an indigent female victim of rape). Sir Matthew Hale’s acclaimed 1736 treatise, *Historia Placitorum Coronae, The History of the Pleas of the Crown*, proclaimed that a “husband cannot be guilty of rape” because marriage conveys unconditional consent, whereby the wife has entered a binding contract and “hath given up herself in this kind unto her husband, which she cannot retract.” MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 628 (1736).

97. See *Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding Illinois law that denied women the right to become members of the state bar and therefore lawyers); *Minor v. Happersett*, 88 U.S. 162 (1875) (Court reasoning that while the Constitution granted women citizenship, it did not confer upon them a right to vote); *Miller v. Wilson*, 236 U.S. 373 (1915) (upholding California statute limiting women's working hours in certain jobs); *Bosley v. McLaughlin*, 236 U.S. 385 (1915) (extending the range of employment sectors where women could be barred from evening work hours that could secure them higher wages); *Radice v. New York*, 264 U.S. 292 (1924) (upholding New York law that forbade women waitresses from working nightshifts); *Buck v. Bell*, 274 U.S. 200 (1927) (denying poor women reproductive autonomy by upholding Virginia sterilization law against raped teenage girl). State courts too have arbitrarily denied women a range of basic rights over time: *In re Paquet's Estate*, 101 Or. 393, 200 P. 911 (1921) (wife not allowed to administer her deceased husband's estate); *In re Goodell*, 39 Wis. 232, 233 (1875) ("So we find no statutory authority for the admission of females to the bar of any court of this state. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law."); *Cooper v. Doyal*, 205 So. 2d 59 (La. Ct. App. 1967), *writ refused*, 251 La. 755, 206 So. 2d 97 (1968) (upholding employment contract provision that forced stewardesses to resign upon marriage); *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972) (upholding state's unwritten regulation denying women the right to obtain drivers' licenses in their own names); *Vorchheimer v. Sch. Dist. of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977) (upholding lower court decision to deny girls the right to attend an academic school that was all-male); *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388 (W.D. Mo. 1979) (upholding sanctions against a female employee for wearing pants to work); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987) (dismissing suit alleging that the "negative role model rule" permitting single pregnant women to be fired violated law).
98. 335 U.S. 464, 465 (1948).
99. *Id.* at 465.
100. *Id.* at 455–56.
101. *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961); *see also* *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879), *abrogated by* *Taylor v. Louisiana*, 419 U.S. 522 (1975).
102. *Hoyt*, 368 U.S. 57 at 62.
103. *See* *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 270, 281 (1979) (upholding a Massachusetts law that prioritized employment opportunities for veterans for civil service jobs that did not require military skills and which operated to overwhelmingly advantage men); *Rostker v. Goldberg*, 453 U.S. 57, 78–79 (1981) (affirming the rejection of women in military registration, reasoning that excluding women is not like exempting blacks or Lutherans, because "Congress' decision to authorize the registration of only men . . . does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration.").
104. 505 U.S. 833 (1992).
105. *Id.* at 846.
106. *Id.* at 844.
107. *Nomination of Ruth Bader Ginsburg*, *supra* note 73, at 150.
108. *Gonzales v. Carhart*, 550 U.S. 124, 161–67 (2007).
109. *Id.* at 166 (majority opinion).
110. *Id.* at 147.

111. *Id.* at 159.
112. M.A. Biggs, *Does Abortion Reduce Self-Esteem and Life Satisfaction?*, 23 *QUALITY LIFE RES.* 2505, 2509 (2014) (finding “no evidence to support [Justice Kennedy’s] assumption”).
113. U.S. DEP’T OF HEALTH AND HUMAN SERVICES., *POSTPARTUM DEPRESSION FACTS 2*, [https://www.nimh.nih.gov/health/publications/postpartum-depression-facts/postpartum-depression-brochure\\_146657.pdf](https://www.nimh.nih.gov/health/publications/postpartum-depression-facts/postpartum-depression-brochure_146657.pdf).
114. *Id.* at 7; DONNA E. STEWART ET AL., *POSTPARTUM DEPRESSION: LITERATURE REVIEW OF RISK FACTORS AND INTERVENTIONS 4* (2003), [http://www.who.int/mental\\_health/prevention/suicide/lit\\_review\\_postpartum\\_depression.pdf](http://www.who.int/mental_health/prevention/suicide/lit_review_postpartum_depression.pdf).
115. STEWART ET AL., *supra* note 114, at 4.
116. See Corinne H. Rocca et al., *Decision Rightness and Emotional Responses to Abortion in the United States: A Longitudinal Study*, 10 *PLoS ONE* 1 (July 8, 2015), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0128832&type=printable>.
117. *Id.* at 2.
118. *Id.* at 12.
119. Susan Newman, *Mothers With One Child Are Happiest*, *PSYCHOL. TODAY* (Feb. 5, 2010), <https://www.psychologytoday.com/blog/singletons/201002/mothers-one-child-are-happiest>.
120. HANS-PETER KOHLER, *DO CHILDREN BRING HAPPINESS AND PURPOSE IN LIFE?* 13 (Dec. 10, 2010), <http://www.ssc.upenn.edu/~hpkohler/working-papers/kohl11dw.pdf>.
121. *Id.* (noting also that “[m]ales . . . do not suffer the same declines in happiness with additional children that do females,” *id.* at 15).
122. Biggs, *supra* note 112, at 2505.
123. Jeffrey A. Van Datta, *Constitutionalizing Roe, Casey and Carhart: A Legislative Due-Process Anti-Discrimination Principle That Gives Constitutional Content to the “Undue Burden” Standard of Review Applied to Abortion Control Legislation*, 10 *S. CAL. REV. L. & WOMEN’S STUD.* 211, 213 (2001).
124. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).
125. Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, *N.Y. TIMES* (July 18, 2013), <http://www.nytimes.com/2013/07/19/us/perry-signs-texas-abortion-restrictions-into-law.html>.
126. Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *J. OBSTETRICS & GYNECOLOGY* 215, 217 (2012); D.A. Grimes, *Estimation of Pregnancy-Related Mortality Risk By Pregnancy Outcome, United States, 1991 to 1999*, 194 *AM. J. OBSTETRICS & GYNECOLOGY* 92 (2006); S. A. LeBolt, D.A. Grimes & W. Cates, Jr., *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 *JAMA* 188 (1982).
127. *Whole Woman’s Health*, 136 S. Ct. at 2302, 2311.
128. WORLD HEALTH ORGANIZATION, *SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS* 49 (2d ed. 2012).
129. See Raymond & Grimes, *supra* note 126.
130. TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West Cum. Supp. 2015).
131. TEX. HEALTH & SAFETY CODE ANN. § 245.010(a).
132. See Texas Pol’y Evaluation Project, *Access to Abortion Care in the Wake of HB2* (July 1, 2014), [http://www.utexas.edu/cola/txpep/\\_files/pdf/AbortionAccessafterHB2.pdf](http://www.utexas.edu/cola/txpep/_files/pdf/AbortionAccessafterHB2.pdf); see also Manny Fernandez & Erik Eckholm, *Court Upholds Texas Limits on Abortions*, *N.Y. TIMES* (June 9, 2015), <https://www.nytimes.com/2015/06/10/us/court-upholds-texas-law-criticized-as-blocking-access-to-abortions.html>; *Fewer Abortion Clinics in Texas*, *N.Y.*

- TIMES (June 10, 2015), <http://www.nytimes.com/interactive/2014/08/04/us/shrinking-number-of-abortion-clinics-in-texas.html>.
133. This impact was also attributable to fewer clinics being legally permitted to operate in Texas. Stephen Young, *Texas Women Face Long Abortion Waits in HB2's Wake*, DALLAS OBSERVER (Oct. 6, 2015), <http://www.dallasobserver.com/news/texas-women-face-long-abortion-waits-in-hb2s-wake-7658610>; Mark Reagan, *HB2 Increasing Wait Times for Women Seeking Abortion Services*, SAN ANTONIO CURRENT (Oct. 6, 2015), <http://www.sacurrent.com/Blogs/archives/2015/10/06/hb2-increasing-wait-times-for-women-seeking-abortion-services>.
  134. *About Us*, WHOLE WOMAN'S HEALTH, <https://wholewomanshealth.com/about-us/>.
  135. *Whole Woman's Health v. Hellerstedt*, 136 U.S. 2292, 2292 (2016).
  136. *See id.* at 2300.
  137. *Id.* at 2311 (citing *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684 (2014)).
  138. *Whole Woman's Health*, 136 U.S. at 2311 (citation omitted).
  139. *Id.* at 2312.
  140. *Id.*
  141. *Id.*
  142. *Id.*
  143. *Id.* at 2313.
  144. *Id.* at 2314.
  145. Brie Shea, *Here Are All the Anti-Abortion Laws Going into Effect Next Month*, REWIRE NEWS (June 28, 2019), <https://rewire.news/article/2019/06/28/here-are-all-the-anti-abortion-laws-going-into-effect-next-month/>.
  146. Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 29, 2010).
  147. *See* Emily Bazelon, *Obama's Executive Order on Abortion*, SLATE (Mar. 21, 2010, 5:37 P.M.), [http://www.slate.com/blogs/xx\\_factor/2010/03/21/the\\_executive\\_order\\_about\\_a\\_bortion\\_for\\_health\\_care\\_reform.html](http://www.slate.com/blogs/xx_factor/2010/03/21/the_executive_order_about_a_bortion_for_health_care_reform.html).
  148. *Id.*
  149. 75 Fed. Reg. at 15,599.
  150. Public Health and Welfare Act, 42 U.S.C. § 300a-7 (West, Westlaw current through Pub. L. No. 114-316) (prohibiting public officials from requiring an individual receiving federal funding “to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions” or an entity receiving federal funding “to make its facilities available” or “provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion” if it “would be contrary to the religious beliefs or moral convictions” of such entity or personnel.”).
  151. Pub. L. No. 111-17, § 508(d)(1), 123 Stat. 3034, 3280 (2009) (“None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”).
  152. 75 Fed. Reg. at 15,599.
  153. *Id.*
  154. *Id.*

## 5 CHANGING ROLES OF DOCTORS AND NURSES: HOSPITAL SNITCHES AND POLICE INFORMANTS

1. Linda Villarosa, *Why America's Black Mothers and Babies Are in a Life-or-Death Crisis*, N.Y. TIMES, Apr. 11, 2018; Nina Martin, *Black Mothers Keep Dying After Giving Birth: Shalon Irving's Story Explains Why*, NPR (Dec. 7, 2017), <https://www.npr.org/2017/12/07/568948782/black-mothers-keep-dying-after-giving-birth-shalon-irvings-story-explains-why>; Erika Stallings, *This Is How the American Healthcare System Is Failing Black Women*, OPRAH MAGAZINE, Oct. 2018.
2. UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Smedley et al. eds., 2003).
3. Report of Officer John Tadlock, Blountstown Police Department Services Event Report, Dec. 21, 2015, <https://bloximages.newyork1.vip.townnews.com/wtxl.com/content/tncms/assets/v3/editorial/2/bf/2bfe2a58-ad8c-11e5-a93a-7fef5fbo2d1d/568177c748993.pdf.pdf>; Christine Hauser, *Recordings Add Detail in Death of Woman Forced from Florida Hospital*, N.Y. TIMES (Jan. 7, 2016), <https://www.nytimes.com/2016/01/08/us/recordings-add-detail-in-death-of-woman-forced-from-florida-hospital.html>; *Florida Officer Resigns Months After Handcuffed Woman at Hospital Dies*, CBS NEWS (June 1, 2016), <https://www.cbsnews.com/news/florida-officer-resigns-months-after-handcuffed-woman-at-hospital-dies-barbara-dawson/>.
4. Hauser, *supra* note 3.
5. *Id.*
6. Letitia Stein, *USF Obstetrician Threatens to Call Police if Patient Doesn't Report for C-Section*, TAMPA BAY TIMES (Mar. 6, 2013), <http://www.tampabay.com/news/health/usf-obstetrician-threatens-to-call-police-if-patient-doesnt-report-for/2107387>.
7. In fact, her high-risk pregnancy was what led her to Dr. Yankowitz in the first place, because he was one of only a few doctors willing to try a vaginal birth after a cesarean. *Id.*
8. *Id.*
9. *Id.*
10. Press Release, Nat'l Advocates for Pregnant Women, Florida Doctor Threat of Arrest of Pregnant Woman Dangerous and Without Legal Authority (Mar. 6, 2013), [http://advocatesforpregnantwomen.org/blog/2013/03/press\\_statement\\_doctor\\_threat.php](http://advocatesforpregnantwomen.org/blog/2013/03/press_statement_doctor_threat.php).
11. See, e.g., *ex parte* Ankrom, 2013 WL 135748, at \*11 (Ala. Jan. 11, 2013) (interpreting the term “child” in a child endangerment law as including fetuses); Adam Nositer, *In Alabama, a Crackdown on Pregnant Drug Users*, N.Y. TIMES (Mar. 15, 2008), <http://www.nytimes.com/2008/03/15/us/15mothers.html> (relating stories of women in Alabama prosecuted for using drugs while pregnant).
12. *Kilmon v. State*, 905 A.2d 306 (Md. 2006) (reversing a circuit court's finding of reckless endangerment based on use of controlled substances while pregnant).
13. See, e.g., *State v. Buckhalter*, 119 So. 3d 1015, 1017, 1019 (Miss. 2013) (affirming the trial court's dismissal of Nina Buckhalter's indictment for manslaughter, which alleged she “willfully” caused her child's death by using drugs during pregnancy, and concluding that the indictment was “fatally flawed”); Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES (Apr. 25, 2012), <http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?pagewanted=all> (relating the story of Rennie Gibbs, who was charged with “depraved heart murder” after her baby was stillborn and tested positive for cocaine); Emily Le Coz, *Mississippi Stillborn Manslaughter Charge Raising Fears*, USA TODAY (May 29, 2013, 1:01PM), <http://www.usatoday.com/story/news/nation/2013/05/29/mississippi-stillborn-manslaughter-charge-raising-fears/2369523/>

- (discussing Buckhalter's manslaughter trial for the loss of her fetus, which prosecutors claimed was caused by her illegal drug use).
14. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (concluding that a state hospital's policy requiring diagnostic tests to obtain evidence of a pregnant woman's drug use for law enforcement purposes constitutes an "unreasonable search" if the patient has not provided consent to the procedure); *State v. McKnight*, 576 S.E.2d 168, 178–79 (S.C. 2003) (holding that a urine sample taken from Regina McKnight while in the hospital, which was used in her conviction for homicide by child abuse, did not violate her Fourth Amendment rights). Fortunately for McKnight, her petition for postconviction relief was granted and she was released from prison. *McKnight v. State*, 661 S.E.2d 354, 356 (S.C. 2008); Sharon Greene, *Regina McKnight Released from Prison*, [CAROLINALIVE.COM](http://www.carolinalive.com/news/story.aspx?id=149364#.UswdqfRDu4I) (June 19, 2008, 6:23PM), <http://www.carolinalive.com/news/story.aspx?id=149364#.UswdqfRDu4I>.
  15. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299, 303 (2013).
  16. See Brief of Amici Curiae American Civil Liberties Union, American Civil Liberties Union of Florida, and American Medical Women's Association in Support of Appellant at 3, *Burton v. Florida*, 49 So. 3d 263 (Fla. Dist. Ct. App. Aug. 12, 2010) (No. ID09-1958) [hereinafter ACLU Brief], [https://www.aclu.org/files/pdfs/reproductiverights/burton\\_v\\_florida\\_acluamicus.pdf](https://www.aclu.org/files/pdfs/reproductiverights/burton_v_florida_acluamicus.pdf).
  17. According to the Cleveland Clinic, nearly 20 percent of pregnant women are prescribed some form of bed rest each year. *Pregnancy Bed Rest*, CLEVELAND CLINIC, [http://my.clevelandclinic.org/healthy\\_living/pregnancy/hic\\_pregnancy\\_bed\\_rest.aspx](http://my.clevelandclinic.org/healthy_living/pregnancy/hic_pregnancy_bed_rest.aspx).
  18. See Susan Donaldson James, *Pregnant Woman Fights Court-Ordered Best Rest*, ABC NEWS (Jan. 14, 2010), <http://abcnews.go.com/Health/florida-court-orders-pregnant-woman-bed-rest-medical/story?id=9561460>.
  19. See Lisa Belkin, *Is Refusing Bed Rest a Crime?*, N.Y. TIMES (Jan. 12, 2010, 12:50 PM), <http://parenting.blogs.nytimes.com/2010/01/12/is-refusing-bed-rest-a-crime/> ("Burton asked to switch hospitals and the request was denied by the court."). Burton's attorney argued that there were a number of more appropriate treatment options for Burton, including bed rest at home, that would have allowed her to take care of her two daughters. See Martha Neil, *Pregnant Pro Se Mom Argued Treatment Case from Hospital Bed & Lost; Will Lawyer Win Appeal?*, ABA J. (Jan. 26, 2010, 3:22 PM), [http://www.abajournal.com/news/article/observers\\_await\\_appellate\\_ruling\\_in\\_suit\\_over\\_court-ordered\\_treatment\\_of\\_pr/](http://www.abajournal.com/news/article/observers_await_appellate_ruling_in_suit_over_court-ordered_treatment_of_pr/).
  20. *In re Unborn Child of Samantha Burton*, No. 2009 CA 1167, 2009 WL 8628562 (Fla. Cir. Ct. Mar. 27, 2009).
  21. *Burton v. State*, 49 So. 3d 263, 265 (Fla. Dist. Ct. App. 2010).
  22. *Id.*
  23. On petition by the state attorney, the order was granted. *In re Unborn Child of Samantha Burton*, No. 2009 CA 1167, 2009 WL 8628562 (Fla. Cir. Ct. Mar. 27, 2009).
  24. *Id.*
  25. *Id.*
  26. *Id.*
  27. As a "mandatory reporter" under Florida law, TMH must report "known or suspected child abuse, abandonment, or neglect by a parent" to allow the Florida Department of Children and Families to undertake "protective investigation." FLA. STAT. ANN. § 39.201(2)(a) (West 2013).

28. *Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights, S. Judiciary Comm.* (June 19, 2012) [hereinafter *Reassessing Solitary Confinement Hearing*] (opening statement of Dick Durban).
29. U.S. Senator John McCain, on his treatment as a prisoner of war. JOHN MCCAIN & MARK SALTER, *FAITH OF MY FATHERS* 206 (1999).
30. *In re Medley*, 134 U.S. 160, 168 (1890).
31. *Reassessing Solitary Confinement Hearing*, *supra* note 28.
32. *Reassessing Solitary Confinement Hearing*, *supra* note 28 (statement of Hon. Patrick Leahy, [http://www.judiciary.senate.gov/imo/media/doc/leahy\\_statement\\_06\\_19\\_12.pdf](http://www.judiciary.senate.gov/imo/media/doc/leahy_statement_06_19_12.pdf)).
33. Durban, *supra* note 28.
34. Leahy, *supra* note 32 (noting that, “far too often, prisoners today are placed in solitary confinement for minor violations that are disruptive but not violent”).
35. See ACLU Brief, *supra* note 16, at 3.
36. *Reassessing Solitary Confinement Hearing*, *supra* note 28 (testimony of Craig Haney, <http://www.judiciary.senate.gov/pdf/12-6-19HaneyTestimony.pdf>).
37. *Burton v. Florida*, 49 So. 3d 263, 266–67 (Fla. Dist. Ct. App. 2010) (Van Nortwick, J., concurring).
38. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
39. *Id.* at 344.
40. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26–27 (1981).
41. *Id.* at 27.
42. *Id.*
43. *In re Gault*, 387 U.S. 1, 36 (1967).
44. FAQ: Cesarean Birth, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, <http://www.acog.org/~media/For%20Patients/faq006.pdf?dmc=1&ts=20140107T1622543905>; Mayo Clinic Staff, C-Section, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/c-section/basics/risks/PRC-20014571>.
45. FLA. CONST. art. I, § 23.
46. See Bryan Nichols, *Burlington Woman Will Not Be Charged with Feticide*, RADIO IOWA (Feb. 10, 2010), <http://www.radioiowa.com/2010/02/10/burlington-woman-will-not-be-charged-with-feticide/>.
47. *Id.*
48. Lee Rood, “I Never Said I Didn’t Want My Baby”: Mom Won’t Be Prosecuted, DES MOINES REGISTER, Feb. 10, 2010, at 1A, 8A.
49. IOWA CODE ANN. § 707.7 (West 2011).
50. *Id.*
51. Rood, *supra* note 48.
52. See Associated Press, *Court to Hear Case of Woman Accused in Stillbirth*, JACKSON FREE PRESS (Apr. 1, 2013 10:39AM), <http://www.jacksonfreepress.com/news/2013/apr/01/court-hear-case-woman-accused-stillbirth/> (discussing two pending cases in Mississippi prosecuting Rennie Gibbs and Nina Buckwalter for their stillborns’ deaths); Calhoun, *supra* note 13.
53. Associated Press, *supra* note 52; Calhoun, *supra* note 13.
54. Brief of Appellant at 1, Oral Argument Requested, *Gibbs v. State*, No. 2010-M-819-SCT (Miss. Nov. 12, 2010) [hereinafter Brief of Appellant, *Gibbs v. State*], <http://judicial.mc.edu/briefs/2010-IA-00819-SCTT.PDF>.
55. *Id.*
56. Brief of Amicus Curiae of the National Association of Social Workers et al. in support of Petitioner at 1–2, *Gibbs v. State*, No. 2010-M-819 (Miss. May 19, 2010) [hereinafter NASW

- Amicus Brief], <http://www.socialworkers.org/assets/secured/documents/ldf/briefDocuments/Gibbs%20v%20State%20MS%20Sup.Ct.Amicus%20Brief.pdf>.
57. Brief of Appellant, *Gibbs v. State*, *supra* note 54, at 1.
  58. Eric Holder, Attorney Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.
  59. Charles Krauthammer, *Worse Than "Brave New World": Newborns Permanently Damaged by Cocaine*, PHILA. INQUIRER, Aug. 1, 1989, [http://articles.philly.com/1989-08-01/news/26148256\\_1\\_cocaine-babies-crack-babies-damage](http://articles.philly.com/1989-08-01/news/26148256_1_cocaine-babies-crack-babies-damage).
  60. Brief of Appellant, *Gibbs v. State*, *supra* note 54, at 36; MISS. CODE ANN. § 97-3-19(1)(b) (West 2013).
  61. MISS. CODE ANN. § 97-3-19(1) (West 2017).
  62. *Id.*
  63. Krauthammer, *supra* note 59 ("The inner-city crack epidemic is now giving birth to the newest horror: a bio-underclass, a generation of physically damaged cocaine babies whose biological inferiority is stamped at birth.").
  64. Hallam Hurt et al., *Children With and Without Gestational Cocaine Exposure: A Neurocognitive System Analysis*, 31 NEUROTOXICOLOGY & TERATOLOGY 334, 339 (2009). See also Hallam Hurt et al., *A Prospective Comparison of Developmental Outcome of Children with In Utero Cocaine Exposure and Controls Using the Battelle Developmental Inventory*, 22 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 21 (2001); Hallam Hurt et al., *Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects on Intelligence Testing*, 151 ARCHIVES OF PEDIATRIC ADOLESCENT MEDICINE, 1237 (1997) [hereinafter *Intelligence Testing*]; Hallam Hurt et al., *School Performance of Children with Gestational Cocaine Exposure*, 27 NEUROTOXICOLOGY & TERATOLOGY 203 (2011) (concluding: "In this inner-city cohort, cocaine-exposed and control children had similar poor school performance. Better home environment and higher Intelligence Quotient conferred an advantage for successful grade progression, regardless of gestational cocaine exposure."); Susan FitzGerald, "Crack Baby" Study Ends with Unexpected but Clear Result, PHILA. INQUIRER (July 22, 2013), [http://articles.philly.com/2013-07-22/news/40709969\\_1\\_hallam-hurt-so-called-crack-babies-funded-study](http://articles.philly.com/2013-07-22/news/40709969_1_hallam-hurt-so-called-crack-babies-funded-study); Janine Jackson, *The Myth of the "Crack Baby," Despite Research, Media Won't Give Up Idea of "Bio-Underclass,"* FAIRNESS & ACCURACY IN REPORTING, Sept. 1, 1998, <http://fair.org/extra-online-articles/the-myth-of-the-crack-baby/>.
  65. Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure*, 285 J. AM. MED. ASS'N, 1613, 1622–24 (2001).
  66. See Hurt et al., *Intelligence Testing*, *supra* note 64.
  67. Michael Winerip, *Revisiting the "Crack Babies" Epidemic that Was Not*, N.Y. TIMES (May 20, 2013), <http://www.nytimes.com/2013/05/20/booming/revisiting-the-crack-babies-epidemic-that-was-not.html>.
  68. Brief of Appellant, *Gibbs v. State*, *supra* note 54, at 1.
  69. R.L. Goldenberg et al., *Stillbirth: A Review*, 16 J. MATERNAL-FETAL & NEONATAL MED. 79, 79 (2004).
  70. Robert M. Silver et al., *Work-up of Stillbirth: A Review of the Evidence*, 196 AM. J. OBSTETRICS & GYNECOLOGY 433, 440 (2007) (noting that multiple factors may contribute to a stillbirth, but not cause it).
  71. Brief of Appellant, *Gibbs v. State*, *supra* note 54, at 30; NASW Amicus Brief, *supra* note 56, at 4; Claudia Malacrida, *Complicated Mourning: The Social Economy of Perinatal Death*, 9 QUALITATIVE HEALTH RES. 504, 505 (1999).

72. Melissa A. Sims & Kim A Collins, *Fetal Death: A 10-Year Retrospective Study*, 22 AM. J. FORENSIC MED. & PATHOLOGY 261, 261 (2001).
73. “Environment” could include both the physical, natural environment (such as exposure to toxins) and the social environment (income, education, etc.). See, e.g., Carol J. Rowland Hogue, *Demographics & Exposures*, in STILLBIRTH: PREDICTION, PREVENTION AND MANAGEMENT 57, 69–70 (Catherine Y. Spong ed., 2011) (discussing various social environment factors’ impact on stillbirth risk); Marc Edwards, *Fetal Death and Reduced Birth Rates Associated with Exposure to Lead-Contaminated Drinking Water*, 48 ENVIRON. SCI. & TECH. 730 (2014).
74. Victoria Flenady et al., *Major Risk Factors for Stillbirth in High-Income Countries: A Systemic Review and Meta-Analysis*, 337 LANCET 1331, 1337 (2011).
75. Hogue, *supra* note 73, at 71 (discussing a growing body of evidence showing that stress may affect stillbirth risk). See also K. Wisborg et al., *Psychological Stress During Pregnancy and Stillbirth: Prospective Study*, 115 BJOG 882 (2008) (finding an association between psychological stress during pregnancy and an increased risk of stillbirth).
76. Stillbirth Collaborative Research Network Writing Group, *Association Between Stillbirth and Risk Factors Known at Pregnancy Confirmation*, 306 J. AM. MED. ASS’N 2470, 2471 (2011).
77. John C. Smulian et al., *Fetal Deaths in the United States: Influence of High-Risk Conditions and Implications for Management*, 100 OBSTETRICS & GYNECOLOGY 1183, 1183 (2002).
78. Goldenberg et al., *supra* note 69, at 85 (“In areas where syphilis is prevalent, up to half of all stillbirths may be caused by this infection alone.”).
79. Flenady et al., *supra* note 74, at 1337.
80. According to the American Congress of Obstetricians and Gynecologists, “the most prevalent risk factors associated with stillbirth are non-Hispanic black race, nulliparity [no previous births], advanced maternal age, and obesity.” ACOG, *Management of Stillbirth*, 113 OBSTETRICS & GYNECOLOGY 748, 749 (2009).
81. *Id.* at 749.
82. Brief of Appellant, *Gibbs v. State*, *supra* note 54, at 2.
83. *Id.*
84. *Id.*
85. Subsequently, the Mississippi Supreme Court granted Gibbs’s petition for interlocutory review. *Id.* at 2. Under Mississippi’s Rules of Appellate Procedure, an interlocutory appeal may be sought if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:
  - (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or
  - (2) Protect a party from substantial and irreparable injury; or
  - (3) Resolve an issue of general importance in the administration of justice. MISS. R. APP. PROC. 5(a) (2008).
86. Manny Fernandez, *Texas Woman Is Taken Off Life Support After Order*, N.Y. TIMES (Jan. 26, 2014), <https://www.nytimes.com/2014/01/27/us/texas-hospital-to-end-life-support-for-pregnant-brain-dead-woman.html>; Manny Fernandez & Erik Eckholm, *Pregnant, and Forced to Stay on Life Support*, N.Y. TIMES (Jan. 8, 2014), <https://www.nytimes.com/2014/01/08/us/pregnant-and-forced-to-stay-on-life-support.html>.
87. Fernandez & Eckholm, *supra* note 86.

88. Megan Greene & Leslie R. Wolfe, *Pregnancy Exclusions in State Living Will and Medical Proxy Statutes*, CTR. FOR WOMEN POL'Y STUDS. 3 (Aug. 2012), [http://www.centerwomenpolicy.org/programs/health/statepolicy/documents/REPRO\\_PregnancyExclusionsinStateLivingWillandMedicalProxyStatutesMeganGreeneandLeslieR.Wolfe.pdf](http://www.centerwomenpolicy.org/programs/health/statepolicy/documents/REPRO_PregnancyExclusionsinStateLivingWillandMedicalProxyStatutesMeganGreeneandLeslieR.Wolfe.pdf).
89. *Id.*
90. *Id.* at 6.
91. Fernandez & Eckholm, *supra* note 86.
92. *Id.*
93. *Id.*
94. *See In re A.C.*, 573 A.2d 1235, 1237 (D.C. Ct. App. 1990) (holding that when a pregnant patient is near death and her fetus is viable, the decision of what is to be done is to be decided by the patient, unless incompetent).
95. *See id.* at 1238. *See also* Terry E. Thornton & Lynn Paltrow, *The Rights of Pregnant Patients Carder Case Brings Bold Policy Initiatives*, 8 HEALTHSPAN 10 (1991) (noting that “Angela . . . decided to institute aggressive treatment of her cancer”).
96. Affidavit of Ms. Carder’s Cancer Specialist at 6, dated Nov. 5, 1987, filed Nov. 10, 1987, *In re A.C.*, Misc. No. 199-87 (D.C. Super. Ct. 1987).
97. Amicus Brief at 3–4, NOW Legal Defense and Education Fund, National Abortion Rights Action League et.al., *In re A.C.*, Rehearing En Banc, Sept. 6, 1988 [hereinafter “NOW Brief”].
98. *Id.* at 4.
99. *Id.*
100. *Id.*
101. *Id.* at 5.
102. NOW Brief, *supra* note 97, at 5.
103. *In re A.C.*, 573 A.2d 1235, 1238–39 (D.C. Ct. App. 1990).
104. *See id.* at 1239.
105. *Id.* at 1240–41.
106. *Id.* at 1241.
107. *Id.* at 1257.
108. NOW Brief, *supra* note 97, at 6.
109. *Id.*
110. *In re A.C.*, 573 A.2d 1235, 1240 (D.C. Ct. App. 1990).
111. NOW Brief, *supra* note 97, at 6.
112. *In re A.C.*, 573 A.2d at 1240.
113. *Id.* at 1238.
114. *In re A.C.*, 573 A.2d at 613–14.
115. NOW Brief, *supra* note 97, at 6.
116. *Id.* at 8–9.
117. *In re A.C.*, 573 A.2d at 1237.
118. David Weiss, *Court Delivers Controversy*, TIMES LEADER (Wilkes-Barre, Pa.) (Jan. 16, 2004), at 1A, [http://archives.timesleader.com/2004/2004\\_01/2004\\_01\\_16\\_COURT\\_DELIVERS\\_CONTROVERSY\\_MOM\\_REJECTS\\_C\\_SECTIONS\\_\\_GIVES\\_BIRTH\\_O.html](http://archives.timesleader.com/2004/2004_01/2004_01_16_COURT_DELIVERS_CONTROVERSY_MOM_REJECTS_C_SECTIONS__GIVES_BIRTH_O.html).
119. *Id.*
120. Lisa Collier Cool, *Could You Be Forced to Have a C-Section*, ADVOCATES FOR PREGNANT WOMEN (May 2005), [http://advocatesforpregnantwomen.org/articles/forced\\_c-section.htm](http://advocatesforpregnantwomen.org/articles/forced_c-section.htm).

121. *Fetal Homicide Laws*, NAT'L CONF. STATE LEGS., <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> (last updated Feb. 2012).

## 6 REVISITING THE FIDUCIARY RELATIONSHIP

1. The Health Insurance Portability and Accountability Act of 1996 is a law enacted by Congress, which protects patients' medical records from nonconsensual disclosure.
2. Jeff Collins, *\$84,000 a Year Now Qualifies as Low Income in High-Cost Orange County*, ORANGE COUNTY REG. (May 3, 2017, updated Oct. 30, 2018), <https://www.ocregister.com/2017/05/03/84000-a-year-now-qualifies-as-low-income-in-high-cost-orange-county/>.
3. Kenneth M. Rosen, *Fiduciaries*, 58 ALA. L. REV. 1041 (2005).
4. Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 540 (1949).
5. JOSIAH ROYCE, *THE PHILOSOPHY OF LOYALTY* 16 (1930); Scott, *supra* note 4, at 540.
6. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).
7. *Id.*
8. *Id.*
9. *Id.*
10. See MODEL CODE OF PROF'L RESPONSIBILITY r. 1.6 (a), (c) (AM. BAR ASS'N 2018).
11. *People v. Belge*, 372 N.Y.S.2d 798 (1975).
12. New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 479 (1978).
13. See 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 189, 237 (U.S. Gov't Printing Office, 1946–1949) [hereinafter NUREMBERG CODE]; 18TH WORLD MEDICAL ASSOCIATION GENERAL ASSEMBLY, HELSINKI, FINLAND, JUNE 1964, DECLARATION OF HELSINKI: ETHICAL PRINCIPLES FOR MEDICAL RESEARCH INVOLVING HUMAN SUBJECTS, <http://www.wma.net/en/30publications/10politics/b3/17c.pdf>.
14. NUREMBERG CODE, *supra* note 13, at 181–82; GEORGE J. ANNAS ET AL., NAZI DOCTORS AND THE NUREMBERG CODE 97–100 (1992) (discussing a variety of the experiments conducted by the Nazis, which often involved “grave injury, torture, and ill-treatment”); George J. Annas, *The Legacy of the Nuremberg Doctors' Trial to American Bioethics and Human Rights*, 10 MINN. J.L. SCI. & TECH. 13, 20–21 (2009).
15. See AMA CODE OF ETHICS, *Opinion 5.05: Confidentiality*, AM. MED. ASS'N (last updated June 2007), <https://journalofethics.ama-assn.org/article/ama-code-medical-ethics-opinions-confidentiality-patient-information/2012-09>.
16. 45 C.F.R. Part 164.
17. *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914). *But see* Paul Lombardo, *Phantom Tumors and Hysterical Women: Revising Our View of the Schloendorff Case*, J. L. MED. & ETHICS 791, 793 (2005) (noting that the *Schloendorff* case may not have represented the sea change portended by Cardozo's “ringing pronouncement” until the 1950s when New York declined to recognize charitable immunity for hospitals).
18. See *Hundley v. St. Francis Hosp.*, 327 P.2d 131, 136 (Cal. Dist. Ct. App. 1958).
19. *Steele v. St. Paul Fire & Marine Ins. Co.*, 371 So. 2d 843 (La. Ct. App. 1979).
20. *Thimatariga v. Chambers*, 416 A.2d 1326 (Md. Ct. Spec. App. 1980).
21. See, e.g., *\$5M Settlement in Hysterectomy Trial*, ABC NEWS (Sept. 17, 2009), <http://abclocal.go.com/wls/story?section=news/local&id=7019803> (reporting a significant settlement in a medical case involving an unnecessary hysterectomy).
22. See generally *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

23. *Eisenstadt v. Baird*, 405 U.S. 438, 450 (1972).
24. 500 So. 2d 679, 679 (Fla. Dist. Ct. App. 1987). *See also In re Brown*, 478 So. 2d 1033, 1036 (Miss. 1985) (finding that a patient's right to reject a life-saving blood transfusion is "the individual's protection against the tyranny of the majority and against the power of the state").
25. *See, e.g., Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1972) ("The patient's reliance upon the physician is a trust of the kind which traditionally has exacted obligations beyond those associated with arms-length transactions."); *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 483 (Cal. 1990) (holding that a research physician must disclose conflicting financial interest to a patient); *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs.*, 317 P.2d 170, 181 (Cal. Ct. App. 1957); Charity Scott, *Why Law Pervades Medicine: An Essay on Ethics in Health Care*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 245, 264 (2000) ("Since the early part of this century, the law has expressed society's view that it was wrong – a violation of autonomy – to treat the patient without some kind of consent.").
26. *Natanson v. Kline*, 350 P.2d 1093, 1101, 1104 (Kan. 1960).
27. *Id.*
28. *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs.*, 317 P.2d 170, 181 (Cal. Ct. App. 1957).
29. *Bang v. Charles T. Miller Hosp.*, 88 N.W.2d 186, 190 (Minn. 1958).
30. *Davis v. Hubbard*, 506 F. Supp. 915, 930 (N.D. Ohio 1980) (explaining that "there is perhaps no right which is older than a person's right to be free from unwarranted contact"); *Natanson*, 350 P.2d at 1104 (holding that the law does not permit a physician to substitute her judgment for that of the patient). Only narrow exceptions render the patient's voice mute on the subject of autonomous decision-making, such as emergency or lack of capacity to consent to medical treatment. *Cunningham v. Yankton Clinic, P.A.*, 262 N.W.2d 508, 511 (S.D. 1978).
31. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996).
32. *Id.* at 9.
33. 42 U.S.C. § 290dd-2(a) (1998).
34. 42 U.S.C. § 290dd-2(c).
35. *N.D. State Bd. of Med. Examiners v. Wynkoop*, OAH File No. 20130085 (Nov. 22, 2013), [https://www.ndbomex.org/news/board\\_orders.asp](https://www.ndbomex.org/news/board_orders.asp).
36. *N.D. State Bd. of Med. Examiners v. Albertson* (Nov. 22, 2013), [https://www.ndbomex.org/news/board\\_orders.asp](https://www.ndbomex.org/news/board_orders.asp). *See also In re Sudol*, OIE No. 2009.5 (Dec. 9, 2009) (South Carolina medical examiners concluding that a therapist violated statutory provisions "by engaging in unethical and unprofessional behavior when she divulged confidential information without appropriate permission").
37. Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 453, 454, 469–70 (1999–2000) (citing WILLIAMS J. WHITRIDGE, *WILLIAMS OBSTETRICS* (Jack Pritchard & Paul MacDonald eds., 16th ed. 1980)).
38. *Id.* at 471.
39. 532 U.S. 67 (2001).
40. 42 U.S.C. § 1983 (1996).
41. Brief for Petitioners at 12, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936).
42. *Id.* at 12 (citing *Brown Tr.* 12/10/96 at 81:17–82:5 (JA 265–66)).
43. *Id.* at 13 n.10.
44. *Id.* ("The record demonstrates that Nurse Brown, who helped establish the Search Policy and was integral to its everyday implementation, held racist views.").

45. *Id.* at 12 (citing Brown Tr. 12/10/96 at 5:18–21, 64:4–66:25, 71:6–74:9 (JA 209, 250–57); M. Williams Tr. at 132:7–133:1 (JA 1195–96); PX 119).
46. *Id.* (citing M. Williams Tr. at 128:9–129:5 (JA 1192–93)).
47. *Id.* at 17 (citing Singleton Tr. at 61:11–14, 68:22–24, 69:5–8 (JA 1135–36, 1143); Powell Tr. at 152:2–11; 157:4 (JA 1014–15, 1020); Knight Tr. at 124:20–125:17 (JA 777–78); Griffin Tr. 11:9–12:4 (JA 551–52)).
48. *Id.* (citing Singleton Tr. 68:1–69:8 (JA 1142–43); Powell Tr. 153:7–20, 155:8–16).
49. *Id.* (citing Singleton Tr. 62–64 (JA [\*\*34] 1136–39); Powell Tr. at 154:2–156:24 (JA 1017–19); Griffin Tr. 10 (JA 549–50); Knight Tr. 126 at (JA 778–79)).
50. *See id.* at 12.
51. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).
52. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).
53. Brief for Petitioners, *supra* note 41, at 11.
54. *Id.* at 8.
55. *Id.*
56. *Id.* at 6. Months after the program began, drug addiction treatment was offered as an ultimatum to avoid immediate arrest. *Id.* at 8.
57. *Id.* at 4.
58. *Id.* at 3.
59. *Id.* at 11.
60. *See, e.g.,* Cynthia M.A. Geppert & Laura Weiss Roberts, *Protecting Patient Confidentiality in Primary Care*, 3 SEMINARS IN MED. PRAC. 7, 7 (2000) (“Many patients assume that physician-patient confidentiality is an absolute.”).

## 7 CREATING CRIMINALS: RACE, STEREOTYPES, AND COLLATERAL DAMAGE

1. S.N. McDonald, *Shanesha Taylor, Arrested for Leaving Children in Car During Job Interview, Speaks*, WASH. POST (June 23, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/06/23/shanesha-taylor-arrested-for-leaving-children-in-car-during-job-interview-speaks/>.
2. *Id.*
3. N.-M. Henderson, *Debra Harrell Back on Her Job at McDonald, Lawyer Says*, WASH. POST (July 24, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/07/24/debra-harrell-back-on-her-job-at-mcdonalds-lawyer-says/>.
4. C. Friedersdorf, *Working Mom Arrested for Letting Her 9-Year-Old Play Alone at Park*, ATLANTIC (July 15, 2014), <http://www.theatlantic.com/national/archive/2014/07/arrested-for-letting-a-9-year-old-play-at-the-park-alone/374436>.
5. *The Cost of Raising a Child*: \$233,610, U.S. DEP'T AGRIC. (USDA) (Mar. 2017), <https://www.usda.gov/media/blog/2017/01/13/cost-raising-child>.
6. *See The Cost of Child Care in Alabama*, ECON. POLICY INST. (Apr. 2016), <https://www.epi.org/child-care-costs-in-the-united-states/AL>.
7. Dayna M. Kurtz, *We Have a Child-Care Crisis in This Country. We Had the Solution 78 Years Ago*, WASH. POST (July 23, 2018), [https://www.washingtonpost.com/news/posteverything/wp/2018/07/23/we-have-a-childcare-crisis-in-this-country-we-had-the-solution-78-years-ago/?noredirect=on&utm\\_term=.246e347185bf](https://www.washingtonpost.com/news/posteverything/wp/2018/07/23/we-have-a-childcare-crisis-in-this-country-we-had-the-solution-78-years-ago/?noredirect=on&utm_term=.246e347185bf).
8. Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CTR. FOR AM. PROGRESS (Mar. 13, 2012), <https://www>

- .americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states [https://perma.cc/4QG7-P7RJ].
9. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013).
  10. See Melissa Luck, *Born Behind Bars: Inmates Raising Children in Prison*, KXLY (Sept. 9, 2011, 5:25 PM), <http://www.kxly.com/news/Born-Behind-Bars-Inmates-Raising-Children-in-Prison/-/101270/682766/-/115bpxz/-/index.html> [http://perma.cc/3HVK-P69Q] (“Right now, at Washington’s largest corrections center for women, 871 inmates are serving their sentences. Among them are 8 babies being raised right in the middle of it all.”); Paula Nelson, *Raised Behind Bars*, BOS. GLOBE (Dec. 14, 2012), [http://www.boston.com/bigpicture/2012/12/raised\\_behind\\_bars.html](http://www.boston.com/bigpicture/2012/12/raised_behind_bars.html) [http://perma.cc/32U3-BXV8] (noting the international institutionalization of children with their mothers); Suzanne Smalley, *Should Female Inmates Raise Their Babies in Prison?*, NEWSWEEK (May 13, 2009, 8:00 PM), <http://www.newsweek.com/should-female-inmates-raise-their-babies-prison-80247> [http://perma.cc/F8H6-6AE2] (reviewing the dire conditions in U.S. prisons).
  11. THOMAS P. BONCZAR, BUREAU OF JUST. STAT., PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 8 (2003).
  12. Eric Holder, Att’y Gen., U.S. Dep’t of Just., Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> [http://perma.cc/2VX5-DPH3].
  13. See, e.g., Charles J. Ogletree Jr., Opinion, *Condemned to Die Because He’s Black*, N.Y. TIMES (July 31, 2013), <http://www.nytimes.com/2013/08/01/opinion/condemned-to-die-because-hes-black.html?smid=pl-share> [http://perma.cc/KKV6-NYQC] (noting that race, specifically being Black, as a predictive status for “future” violence has been unconstitutionally introduced in Texas trials).
  14. Dan Roberts & Karen McVeigh, *Eric Holder Unveils New Reforms Aimed at Curbing US Prison Population*, GUARDIAN (Aug. 12, 2013), <http://www.theguardian.com/world/2013/aug/12/eric-holder-smart-crime-reform-us-prisons> [http://perma.cc/MQ3U-GRJA].
  15. President Barack Obama, Remarks at the NAACP Conference (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [https://perma.cc/L6A7-DVES].
  16. ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3, 5 (9th ed. 2011). See also JENIFER WARREN, PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (2009).
  17. See E. ANN CARSON, U.S. DEP’T OF JUST., PRISONERS IN 2013, at 16 (2009) (reporting that “more than half of prisoners serving sentences of more than a year in federal facilities were convicted of drug offenses”).
  18. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., NATIONAL DRUG CONTROL STRATEGY: FY 2010 BUDGET SUMMARY 1 (2009) (“In Fiscal Year 2010, the President requests \$15.1 billion in support of these key [drug] policy areas, which is an increase of \$224.3 million or 1.5 percent over the FY 2009 enacted level of \$14.8 billion.”). In reality, President Barack Obama allocated \$25.9 billion in the fiscal year 2010 for fighting the drug war. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., FY 2012 BUDGET AND PERFORMANCE SUMMARY: COMPANION TO THE NATIONAL DRUG CONTROL STRATEGY 5 (2011) [hereinafter FY 2012 BUDGET AND PERFORMANCE SUMMARY].
  19. FY 2012 BUDGET AND PERFORMANCE SUMMARY, *supra* note 18, at 5.

20. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., FY 2013 BUDGET AND PERFORMANCE SUMMARY: COMPANION TO THE NATIONAL DRUG CONTROL STRATEGY 1 (2012).
21. *A Drug Policy for the 21st Century*, OFF. NAT'L DRUG CONTROL POL'Y, <https://www.whitehouse.gov/ondcp/drugpolicyreform> [<http://perma.cc/HW89-U35V>].
22. See JEFFREY A. MIRON & KATHERINE WALDCOCK, CATO INST., THE BUDGETARY IMPACT OF ENDING DRUG PROHIBITION 1 (2010) (suggesting that legalization of drugs would result in \$25.1 billion in savings for state and local governments).
23. See Douglas A. Blackmon, *An Interview with Eric Holder on Mass Incarceration*, WASH. MONTHLY: TEN MILES SQUARE (Feb. 11, 2014, 12:01 PM), <http://www.washingtonmonthly.com/ten-miles-> (second alteration in original).
24. *Id.*
25. Holder, *supra* note 12.
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33. THOMAS P. BONCZAR, BUREAU OF JUST. STAT., PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 8 fig.5. (2003).
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53. *Id.*
54. GLAZE & MARUSCHAK, *supra* note 29, at 3.
55. *Id.* at 1.
56. *Id.*
57. *Id.* at 2 tbl.1.
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59. *Id.* at 4.
60. Kellie E.M. Barr et al., *Race, Class, and Gender Differences in Substance Abuse: Evidence of Middle Class/Underclass Polarization Among Black Males*, 40 SOC. PROBS. 314, 318 tbl.2 (1993) (showing little statistical variation in illicit drug use for African American and white women); cf. Sean Esteban McCabe et al., *Race/Ethnicity and Gender Differences in Drug Use and Abuse Among College Students*, 6 J. ETHNICITY SUBSTANCE ABUSE, no. 2, 2008, at 75, 82 tbl.1 (showing higher rates of illicit drug use among white undergraduate women as compared with African American undergraduate women).
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67. QUICK FACTS 2009, *supra* note 27.
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72. GLAZE & MARUSCHAK, *supra* note 29, at 2.
73. *Id.*
74. *Id.*
75. Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health*, 55 J. HEALTH & SOC. BEHAV. 302, 311–14 (2014).
76. CHANDRA KRING VILLANUEVA, INST. ON WOMEN & CRIMINAL JUST., WOMEN'S PRISON ASSOCIATION, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 4 (Sarah B. From & Georgia Lerner eds., 2009).
77. *Id.* at 5 (“By keeping mothers and infants together, these programs prevent foster care placement and allow for the formation of maternal/child bonds during a critical period of infant development.”).
78. Smalley, *supra* note 10.
79. See PARENTS IN PRISON, THE SENTENCING PROJECT 1–3 (2012) (showing that children with incarcerated parents are at a higher risk for particularly damaging social problems and that federal policies pose barriers that make it difficult for incarcerated parents to provide for their children's needs); Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1494 (2012) (depicting the “devaluation of incarcerated mothers” through the immediate placement of a pregnant mother's newborn in foster care).
80. Tammerlin Drummond, *Mothers in Prison*, TIME (Oct. 29, 2000), <http://www.time.com/time/magazine/article/0,9171,58996,00.html> [<http://perma.cc/YPA4-TDN9>] (“Florida is attempting to address a disturbing national phenomenon: the explosion in the number of mothers in prison.”).
81. See JACOBS, *supra* note 45.
82. *Id.*
83. See *id.* at xiii (explaining “how the expansion of criminal law and the intensification of law enforcement since the 1970s have resulted in the proliferation of criminal intelligence and investigative databases”).
84. *Id.* at 43.
85. *Id.* at 10–11.
86. *Id.* at 3.

87. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.).
88. 42 U.S.C. § 1437d(q)(1)(A) (2012).
89. Arin Greenwood, “One Strike” Public Housing Policy Hits Virginia Woman Who Needs Kidney Transplant, HUFFINGTON POST (Dec. 22, 2011, 11:45 AM), [http://www.huffingtonpost.com/2011/12/22/one-strike-policy-housing-alexandria-virginia-kidney-transplant\\_n\\_1151639.html](http://www.huffingtonpost.com/2011/12/22/one-strike-policy-housing-alexandria-virginia-kidney-transplant_n_1151639.html) [<http://perma.cc/W9BD-X4CL>].
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## 8 THE PREGNANCY PENALTY: WHEN THE STATE GETS IT WRONG

1. Interview with Judge Pamela Alexander (Oct. 19, 2013).
2. Brief for Am. Pub. Health Ass’n et al. as Amici Curiae Supporting Petitioner at 13, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936), 2000 WL 33599645.
3. WORLD HEALTH ORG., TRENDS IN MATERNAL MORTALITY: 1990 TO 2008; ESTIMATES DEVELOPED BY WHO, UNICEF, UNFPA AND THE WORLD BANK, annex 1 (2010).
4. Bekah Porter, *Dubuquer Gives Birth Alone in Jail Cell*, TELEGRAPH HERALD, May 15, 2009 (describing Tara Keil’s unsettling birth in a toilet after minutes of screaming for help and being offered food rather than a nurse or doctor). Similarly, Ambrett Spencer suffered the distressing effects of birthing while in prison. Her baby died after she had spent hours pleading for help. See John Dickerson, *Arpaio’s Jail Staff Cost Ambrett Spencer Her Baby, and She’s Not the Only One*, PHOENIX NEW TIMES (Oct. 30, 2008), <http://www.phoenixnewtimes.com/2008-10-30/news/arpaio-s-jail-staff-cost-ambrett-spencer-her-baby-and-she-s-not-the-only-one/>. Shawanna Nelson was forced to endure labor while shackled; guards finally relented for the actual delivery, but immediately shackled her right after her child’s birth. Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES (Mar. 2, 2006), <http://www.nytimes.com/2006/03/02/national/02shackles.html>.
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9. *Id.*
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12. Michael Finigan, *Societal Outcomes and Cost Savings of Drug and Alcohol Treatment in the State of Oregon*, NW. PROF. CONSORTIUM (1996), <http://www.npcresearch.com/Files/SOCS.pdf>.
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14. *Id.*
15. *Id.*
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17. *Id.* at 13–14.
18. See, e.g., Rucker C. Johnson, *Ever-Increasing Levels of Parental Incarceration and the Consequences for Children*, in DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM 177 (Steven Raphael & Michael A. Stoll eds., 2009).
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22. Telephone interview with Lyn Head (Mar. 3, 2014).
23. PAN AM. HEALTH ORG., DOMESTIC PARTNER VIOLENCE DURING PREGNANCY, <http://www.paho.org/english/ad/ge/vawpregnancy.pdf>.
24. Jacquelyn C. Campbell, *Health Consequences of Intimate Partner Violence*, 359 LANCET 1331, 1331–36 (2002).
25. *Id.*; see also J.A. Gazmararian et al., *Prevalence of Violence Against Pregnant Women: A Review of the Literature*, 275 JAMA 1915, 1915–20 (1996).
26. PAN AM. HEALTH ORG., *supra* note 23.
27. Campbell, *supra* note 24.
28. *Id.*; J.A. Gazmararian et al., *Violence and Reproductive Health: Current Knowledge and Future Research Directions*, 4 MATERNAL CHILD HEALTH J. 79, 79–84 (2000); L.F. Bullock & J. McFarlane, *Higher Prevalence of Low Birthweight Infants Born to Battered Women*, 89 AM. J. NURSING 1153, 1153–55 (1989).
29. Gazmararian et al., *supra* note 25.
30. Campbell, *supra* note 24 (noting that while some of the evidence is contradictory, the variation in subsamples and samples “could account for some of the differences in individual studies”).
31. Nor are the incidences of domestic violence and low birth weight concentrated among the economically disenfranchised, as at least one peer-reviewed study “suggest[s] a stronger relationship between abuse and birthweight in women of middle socioeconomic status than in poor women.” *Id.*; C.C. Murphy et al., *Abuse: A Risk Factor for Low*

- Birth Weight? A Systematic Review and Meta-Analysis*, 164 CANADIAN MED. ASS'N J. 1567, 1567–72 (2001).
32. See N. Tanya Nagahawatte and Robert. Goldenberg, *Poverty, Maternal Health, and Adverse Pregnancy Outcomes*, 1136 ANNALS OF N.Y. ACAD. SCI. 80, 81 (2008)(explaining that receiving “culturally inappropriate and unsatisfying services, reproach and sanctions for poor health habits may contribute to fewer prenatal visits among low income women”).
  33. See ELIZABETH HARRISON ET AL., JOHNS HOPKINS WOMEN’S & CHILDREN’S HEALTH POL’Y CTR., ENVIRONMENTAL TOXICANTS AND MATERNAL AND CHILD HEALTH: AN EMERGING PUBLIC HEALTH CHALLENGE 1, 2 (2009).
  34. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983), <http://archive.gao.gov/d48t13/121648.pdf>; HARRISON ET AL., *supra* note 33.
  35. See Claire B. Ernhart et al., *Intrauterine Exposure to Low Levels of Lead: The Status of the Neonate*, 41 ARCHIVES ENVTL. HEALTH 287 (1986); Tom Greene & Claire B. Ernhart, *Prenatal and Preschool Age Lead Exposure: Relationship with Size*, 13 NEUROTOXICOLOGY & TERATOLOGY 417 (1991).
  36. See Edward Patrick Boyle, *It’s Not Easy Bein’ Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 967 (1993) (noting “nationwide phenomenon that minority neighborhoods bear a disproportionately large environmental burden compared to whites”); Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 397 (1991); Marianne Lavelle & Marcia Coyle, *The Federal Government, in Its Cleanup of Hazardous Sites and Its Pursuit of Polluters, Favors White Communities over Minority Communities Under Environmental Laws Meant to Provide Equal Protection for All Citizens, a National Law Journal Investigation Has Found*, 15 NAT’L L.J., Sept. 21, 1992, at S2; Gerald Torres, *Race, Class, and Environmental Regulation*, 63 U. COLO. L. REV. 839 (1992); Keith Schneider, *Minorities Join to Fight Polluting Neighborhoods*, N.Y. TIMES, Oct. 25, 1991, at A20.
  37. See, e.g., Jane Kay & Cheryl Katz, *Pollution, Poverty, People of Color: The Factory on the Hill*, ENVTL. HEALTH NEWS, June 4, 2012, (noting that low-income residents living near hazardous sites may find affordable homes and “save money on shelter, but they pay the price in health”), <http://www.environmentalhealthnews.org/ehs/news/2012/pollution-poverty-and-people-of-color-richmond-day-1>.
  38. Bob Herbert, *Poor Black and Dumped On*, N.Y. TIMES, Oct. 5, 2006 (writing about the environmental impacts on African American health, he warns that “the carnage – the terrible illnesses and the premature deaths – is hidden”).
  39. *Id.*
  40. Curt Davidson, *Emelle, Alabama: Home of the Nation’s Largest Hazardous Waste Landfill*, <http://www.umich.edu/~snre492/Jones/emelle.htm>.
  41. Michael P. Healy, *The Preemption of State Hazardous and Solid Waste Regulations: The Dormant Commerce Clause Awakens Once More*, 43 WASH. U. J. URB. & CONTEMP. L. 177, 179 (1993); Richard Lazarus, *Pursuing Environmental Justice: The Distributional Effects of Environmental Justice*, 87 NW. U. L. REV. 787, 790 (1993) (noting that environmental justice has been relatively underexplored by lawyers).
  42. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 34.
  43. CAL. BIRTH DEFECTS MONITORING PROGRAM, BIRTH DEFECTS AND HAZARDOUS WASTE SITES (Apr. 1999), <http://www.cdph.ca.gov/programs/CBDMP/Documents/MO-CBDMP->

- [HazWasteSites.pdf](#). In this study, the authors found that women who birthed babies with isolated oral clefts were 5.7 times more likely than control-group mothers to live within one mile of a hazardous waste site. *Id.* at 6. Close proximity to hazardous waste was also associated with spina bifida and anencephaly. *Id.* The authors also noted characteristics among the women who lived in closer proximity to hazardous waste sites: they were more often Latina and with modest education. *Id.* at 8.
44. JEAN D. BRENDER & JOHN S. GRIESENBECK, TEX. A&M SCH. RURAL PUB. HEALTH, HAZARDOUS WASTE SITES, INDUSTRIAL FACILITIES, AND ADVERSE PREGNANCY OUTCOMES IN DALLAS, DENTON, AND TARRANT COUNTIES, 1997–2000, at 1 (2008) (noting that prior studies find “an association between living near hazardous waste sites and all congenital malformations combined [with], chromosomal anomalies, neural tube and heart/circulatory defects”).
  45. Susan FitzGerald, “Crack Baby” Study Ends with Unexpected but Clear Result, PHILA. INQUIRER, July 22, 2013.
  46. Blair Paley & Mary J. O’Connor, *Intervention for Individuals with Fetal Alcohol Spectrum Disorders: Treatment Approaches and Case Management*, 15 DEVELOPMENTAL DISABILITIES RES. REVS. 258, 258 (2009). See Phillip A. May & Phillip Goassage, *Maternal Risk Factors for Fetal Alcohol Spectrum Disorders*, 34 ALCOHOL RES. & HEALTH 16 (2011); Kenneth R. Warren et al. *Fetal Alcohol Spectrum Disorders: Research Challenges and Opportunities*, 34 ALCOHOL RES. & HEALTH 4 (2011).
  47. CTR. FOR DISEASE CONTROL & PREVENTION, *Tobacco Use and Pregnancy* (last updated Sept. 23, 2013), <http://www.cdc.gov/Reproductivehealth/TobaccoUsePregnancy/index.htm>.
  48. Emily Figdor & Lisa Kaeser, *Concerns Mount over Punitive Approaches to Substance Abuse Among Pregnant Women*, 1 GUTTMACHER REP. ON PUB. POL’Y, Oct. 1998, at 5 (citing National Institute on Drug Abuse). See also CTR. FOR BEHAVIORAL HEALTH STATS. & QUALITY ET AL., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS (Sept. 2011), <http://www.samhsa.gov/data/nsduh/2k10nsduh/2k10results.htm#4.3>.
  49. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 162 (2000) (Breyer, J., dissenting) (citing 61 Fed. Reg. 44398 (1996)).
  50. *Id.*
  51. *Id.* at 161.
  52. *Id.* at 137 (citing 7 U.S.C. § 1311(a)).
  53. U.S. DEP’T HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING – 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 117–18, 120 (2014).
  54. *Id.* at 68.
  55. *Food & Drug Admin.*, 529 U.S. at 139 (“A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.”).
  56. Joseph R. DiFranza et al., *Legislative Efforts to Protect Children from Tobacco*, 257 J. AM. MED. ASS’N 3387, 3387–89 (1987).
  57. See Jane Brody, *Coming a Long Way on Smoking with a Long Way to Go*, N.Y. TIMES BLOG (Jan. 20, 2014), <http://well.blogs.nytimes.com/2014/01/20/coming-a-long-way-on-smoking-with-a-way-to-go/?ref=smokingandtobacc>; U.S. DEP’T HEALTH & HUMAN SERVS., *supra* note 53; Editorial Board, *Fitful Progress in the Antismoking Wars*, N.Y. TIMES (Jan. 9, 2014), [http://www.nytimes.com/2014/01/10/opinion/fitful-progress-in-the-antismoking-wars.html?\\_r=0](http://www.nytimes.com/2014/01/10/opinion/fitful-progress-in-the-antismoking-wars.html?_r=0); Sabrina Tavernise, *List of Smoking-Related Illnesses Grows Significantly in U.S. Report*, N.Y. TIMES (Jan. 17, 2014) (noting, among a list of various diseases such as lung cancer, heart disease, and diabetes, that smoking is

- correlated with ectopic pregnancies), <http://www.nytimes.com/2014/01/17/health/list-of-smoking-related-illnesses-grows-significantly-in-us-report.html>.
58. Victoria Law, “You Go Through It Alone”: New Bill Would Keep Incarcerated Pregnant Women from Being Put in Medical Isolation, *REWIRE NEWS* (Mar. 22, 2019, 1:22 PM), <https://rewire.news/article/2019/03/22/you-go-through-it-alone-new-bill-would-keep-incarcerated-pregnant-women-from-being-put-in-medical-isolation/>.
  59. *Id.*
  60. *Id.* (quoting Tara Keil).
  61. John Dickerson, *Arpaio’s Jail Staff Cost Ambrett Spencer Her Baby, and She’s Not the Only One*, *PHOENIX NEW TIMES* (Oct. 30, 2008), <http://www.phoenixnewtimes.com/2008-10-30/news/arpaio-s-jail-staff-cost-ambrett-spencer-her-baby-and-she-s-not-the-only-one/>. Note that the following scenario is based on this source.
  62. Margaret Paulson & Anthony H. Dekker, *Healthcare Disparities in Pain Management*, 105 J. AM. OSTEOPATHIC ASS’N, S14 (Supp. 3 2005).
  63. Dickerson, *supra* note 61 (quoting Jarrid Ortiz).
  64. *Id.*; see also Renae D. Duncan et al., *Childhood Physical Assault as a Risk Factor for PTSD, Depression, and Substance Abuse: Findings from a National Survey*, 66 AM. J. ORTHOPSYCH. 437, 443 (1996); Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment: Toward an Integrated Approach*, 19 J. LEGAL MED. 471, 475–76 (1998).
  65. *Id.*
  66. *Id.* All the women who were turned over to police for using illegal drugs during pregnancy were Black, with one exception. In the case of the lone white woman surrendered to police, hospital officials made sure to note on her chart that the white patient “lives with her boyfriend who is a Negro.” *Id.*
  67. Condon, *supra* note 5 (justifying his metaphoric use of the “stick” in implementing fetal protection). Condon referred to drug addiction as a “blatant” form of child abuse. *Id.*
  68. Franklin D. Gilliam, Jr., *The “Welfare Queen” Experiment: How Viewers React to Images of African-American Mothers on Welfare*, *NIEMAN REP.* (Summer 1999).
  69. See, e.g., KAARYN S. GUSTAFSON, *CHEATING WELFARE, PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* (2011) (discussing how the perception of fraud and deception now pervades public understanding about welfare, which in turn has resulted in welfare policies becoming more punitive.); Catherine Albiston & Laura Beth Nielson, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls*, 38 HOW. L.J. 473, 475 (1995).
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## 9 POLICING BEYOND THE BORDER

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3. 119 CONG. REC. 32,292, 32,293 (1973) (statement of Sen. Helms).
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38. LARRY NOWELS, CONG. RESEARCH SERV., RL30830, INTERNATIONAL FAMILY PLANNING: THE “MEXICO CITY” POLICY 4 n.7 (2001). USAID interpreted the MCP as prohibiting funding for foreign NGOs that perform or actively promote abortion as a method of family planning, and applied the following definitions under the MCP:
  - (i) *Abortion is a method of family planning* when it is for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest (since abortion under these circumstances is not a family planning act).
  - (ii) *To perform abortions* means to operate a facility where abortions are performed as a method of family planning. Excluded from this definition are clinics or hospitals which do not include abortion in their family planning programs.
  - (iii) *To actively promote abortion* means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.
- JOHN BLANE & MATTHEW FRIEDMAN, MEXICO CITY POLICY IMPLEMENTATION STUDY, A-4 (1990) (emphasis added).
39. Sarah Mehta, *There’s Only One Country That Hasn’t Ratified the Convention on Children’s Rights*: U.S., ACLU (Nov. 20, 2015, 1:30 PM), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens> [<https://perma.cc/Q9M5-FNFJ>].
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## 10 LESSONS FOR LAW AND SOCIETY: A REPRODUCTIVE JUSTICE NEW DEAL OR BILL OF RIGHTS

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- or infringe upon their First Amendment rights” (quoting *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1160 (10th Cir. 2015)); *Planned Parenthood Association v. Herbert*, 839 F.3d 1301, 1307 (10th Cir. 2016) (Gorsuch, J., dissenting).
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## 11 CONCLUSION

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## EPILOGUE

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