
**TURNING AWAY FROM CRIMINAL ABORTION LAWS
AND TOWARDS SUPPORT FOR PREGNANT PEOPLE AND
FAMILIES**

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* Thanks to Viviana Waisman, Paula Avila-Guillen, Rebeca Ramos, Mariana Ardila Trujillo, and Gema Fernandez for sharing their expertise and for Symposium participants, including Erin Daly and Lynn M. Morgan. Many thanks to Martha Davis, Diana Kasdan, Alejandra Cardenas, and Jaime Gher for their generosity and insightful comments and to Talia Gallo for her thorough research and editing. A special thanks to Jaimee Francis and the editors of the B.U. L. Rev. Online for organizing this Symposium and their editing assistance.

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INTRODUCTION

For more than two decades, human rights bodies have recognized that restrictive abortion laws violate the dignity and human rights of women, girls, and people who can become pregnant, including their rights to autonomy, privacy, life, health, and equality, as well as freedom from cruel, inhuman, and degrading treatment. More recently, human rights bodies have emphasized the specific harm of using the criminal law to punish and regulate abortion, recommending that countries repeal criminal provisions and refrain from prosecuting individuals who have or perform abortions. Even as human rights bodies and countries around the world are condemning criminal abortion laws, the loss of a national minimum standard protecting the right to abortion following the Supreme Court's decision in *Dobbs v. Jackson* has opened the door to an onslaught of new state laws criminalizing abortion in the United States.

This article examines human rights critiques of criminal abortion laws and recent decisions from the high courts in Colombia and Mexico striking down criminal abortion laws. These critiques reflect the practical experience of countries around the world with criminal abortion laws that has resulted in widespread rejection of criminal regimes. As the United States faces the massive expansion of state laws criminalizing abortion, the experience and analysis of human rights bodies and respected high courts provide a helpful framework to analyze and challenge these laws.

In Colombia and Mexico, governments have an affirmative constitutional obligation to provide some protection for prenatal life, as well as an obligation to respect, protect and ensure the rights, health, and lives of pregnant people. Courts in those jurisdictions emphasized the need to strike a constitutional balance between the rights and interests and critiqued the use of criminal law. The courts applied the *ultima ratio* principle, which requires that criminal law only be used as a last resort to achieve a legitimate government purpose and that the criminal provision is effective, reasonable, and proportionate.

After examining the practical impacts of criminal abortion laws, the Mexican and Colombian high courts found that they were not effective in preventing abortions or protecting prenatal life and endangered the health and lives of pregnant

people who seek to terminate a pregnancy. The courts also found that criminal laws disproportionately impacted marginalized and disadvantaged communities, violating constitutional imperatives to alleviate rather than aggravate social inequality. Given the constitutional violations, harm caused by the criminal laws, and the existence of more effective means to protect prenatal life that also support the rights of pregnant people, the courts struck down the criminal provisions.

Human rights bodies and the Mexican and Colombian decisions specifically rejected the use of criminal law to regulate abortion because of the serious harm imposed on the rights, health, and lives of pregnant people. The Mexican and Colombian decisions dismissed false narratives that protection of prenatal life is fundamentally in conflict with respect for the rights of pregnant people. Rather than adopting ineffective criminal laws, the courts emphasized the need for laws and policies that support women and people who can become pregnant to make autonomous choices. The courts envisioned laws which provide individuals with information about, and the resources to access, family planning, abortion care and prenatal care as well as health care, financial support, childcare, and legal protections and opportunities in education and the workplace for people who choose to continue pregnancies.

Although there is no federal constitutional obligation to protect prenatal life in the United States, state laws criminalizing abortion often are promoted as a means to protect the state's interest in prenatal life. Human rights standards and the reasoning from Colombian and Mexican high courts provide strong arguments about why the use of criminal law to regulate abortion is never appropriate and an insight on how to balance protection for prenatal life with respect for the life, health, and fundamental rights of pregnant people. Encouraging dialogue and analysis along these lines would force courts and legislatures to recognize the harm caused by criminal abortion laws and consider policy alternatives that support individuals' sexual and reproductive health rights and provide material aid to people who wish to continue pregnancies.

Part I of this article provides an overview of the Mexican and Colombian cases. Part II discusses the rejection of criminal approaches by human rights bodies, the International Commission of Jurists and the Mexican and Colombian high courts. Part III considers other options to both protect prenatal life and the life, health and rights of women and people who can become pregnant. Part IV applies the forgoing analysis to the United States.

I. BACKGROUND ON THE MEXICAN AND COLOMBIAN HIGH COURT CASES

In recent cases, the Colombian Constitutional Court and the Mexican Supreme Court struck down criminal abortion laws, requiring that abortion be legal and available up to a certain stage in pregnancy and, after the initial period, in instances where denial of abortion violates the pregnant person's right to life or health or constitutes cruel and inhuman treatment. Both countries had a history of criminalizing abortion with the more recent development of exceptions in cases of life and health endangerment, rape, and fetal abnormalities incompatible

with life outside the womb. Based on their countries' experiences, the courts discussed the inadequacies of the exceptions model and issued strong critiques of the use of criminal law to regulate abortion. This section provides some background on the two cases and then summarizes key aspects of the cases. The next section discusses the courts' rejection of criminal law in more detail.

A. *Colombia, C-055/2022*

On February 21, 2022, the Colombian Constitutional Court held that the existing legal scheme regulating abortion was unconstitutional.¹ C-055/2022 challenged article 122 of the Criminal Code which provided that "The woman who causes her own abortion or allows another to cause it shall be imprisoned from sixteen (16) to fifty-four (54) months."²

This was not the first time the court considered the constitutionality of article 122. In 2006 in the groundbreaking case C-355, the court found article 122 unconstitutional in certain circumstances and judicially created exceptions to the law in instances where: the (1) continuation of pregnancy endangers the woman's life or health; (2) the fetus has a serious malformation that makes it nonviable; or (3) the pregnancy resulted from rape or incest or non-consensual artificial insemination³ ("2006 Exceptions"). After 2006, the court further fleshed out the contours of the right to abortion in a series of individual constitutional writs summarized in SU-096/2018.⁴

C-055/2022 held that even with the 2006 Exceptions, article 122 violated the Colombian Constitution. The court declared article 122 unconstitutional prior to twenty-four weeks, decriminalized abortion prior to that gestation period, and reiterated that abortions that fall under the 2006 Exceptions continue to be legal after twenty-four weeks. The court also exhorted the Congress and National Government to formulate and implement comprehensive sexual and reproductive health legislation to protect the dignity and rights of pregnant people and the state's legal interest in protecting prenatal life.

B. *Mexico, Coahuila Case, 148/2017 (2021)*

In 2021, the Mexican Supreme Court issued a groundbreaking decision striking down the criminal abortion law in the state of Coahuila ("the Coahuila Case").⁵ Mexico is a federal state, and abortion is primarily regulated by state

¹ Corte Constitucional [C.C.] [Constitutional Court], febrero 21, 2022, Sentencia C-055/2022 (Colom.).

² C. PEN. Art. 122 (2000). *See generally*, Isabel C. Jaramillo Sierra, *The New Colombian Law on Abortion*, 160 INT'L J. GYNECOLOGY & OBSTETRICS 345 (2023).

³ Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355 ¶ 105.

⁴ Corte Constitucional [C.C.] [Constitutional Court], octubre 17, 2018, Sentencia SU-096/18.

⁵ Acción de Inconstitucionalidad 148/2017, Pleno de la Suprema Corte de Justicia de la Nación [SCJN], Décima Época, Sentencia de 7 de septiembre de 2021 (Mex.)

criminal codes. In the 2000s, the federal district of Mexico (Mexico City) became the first state to liberalize its abortion law, first creating exceptions in its criminal law for the pregnant person's health and cases of congenital malformation in 2000 and later decriminalizing abortion up to twelve weeks.⁶ These laws were challenged by anti-abortion activists who claimed that the right to life prohibited the legislative exceptions in the penal code.

In a 2008 case, the court upheld the decriminalization of abortion up to twelve weeks finding that the right to life is not absolute and is dependent on developmental stage. Because the Mexican Constitution does not define when life begins, Mexican states have authority to define limits on protections for prenatal life.⁷ The court also discussed the principle of *ultima ratio*, noting that means other than criminal law should be used to resolve a problem, especially where criminal law has proven ineffective.⁸ After the 2008 case, the court heard a series of cases involving access to abortion where the pregnant person had been raped or required an abortion for health reasons.⁹ The court found that pregnant people have a right to abortion under these circumstances because denial of abortion in these cases violated the pregnant person's right to health and to be free from cruel, inhuman and degrading treatment.¹⁰

In 2017, the Attorney General brought the Coahuila Case, challenging the constitutionality of several sections of Coahuila's Criminal Code, including Section 196 which criminalized self-induced abortions or consensual abortions at any time during pregnancy.¹¹ The court invalidated Section 196 as an impermissible absolute prohibition of abortion backed by criminal sanction.¹²

The court also struck down language in Section 199 which precluded punishment for abortion in cases of rape, life and health endangerment, serious genetic or congenital disorders and pregnancy loss "due to the fault of the pregnant woman."¹³ The court took issue with language in the provisions describing these exceptions as "non-punishable abortion" that "shall be exempted from

⁶ GIRE, *STEP BY STEP: MEXICO'S SUPREME COURT RULINGS ON ABORTION* 34 (2022).

⁷ *Acción de Inconstitucionalidad 147/2007*, Pleno de la Suprema Corte de Justicia de la Nación [SCJN], Décima Época, Sentencia de 26 de abril de 2007. In addition, the court later held that although states have some authority to define the scope of protections for prenatal life, they cannot define when life begins. The court struck down a state constitutional provision that sought to grant the protection of the law and an absolute right to life to prenatal life from conception as unconstitutional. GIRE, *supra* note 7, at 79-81; *Acción de Inconstitucionalidad 106/2018* and *107/2018*.

⁸ GIRE, *supra* note 7, at 35.

⁹ *Id.* at 44-56.

¹⁰ *148/2017 supra* note 6, at 75, n. 96.

¹¹ Código Penal Coahuila art.196 (imposing one-to-three years of imprisonment to the woman who voluntarily performs an abortion or to the person who causes her to have an abortion with her consent).

¹² GIRE, *supra* note 7, at 72.

¹³ *148/2017*, at ¶¶ 13, 319.

punishment.”¹⁴ The court struck down this language because, although it created exceptions from punishment, it implied that abortion is a criminal act.¹⁵ The court emphasized the harm imposed when laws contribute to the notion that abortion is a crime.¹⁶ The court also struck down a twelve week limitation for the rape exception.¹⁷

The Coahuila Case is binding on judges but does not automatically nullify inconsistent legislation. Since 2021, several states have repealed criminal abortion laws to comply with the decision, and the court has applied similar reasoning in two subsequent cases striking down criminal provisions in federal law and in the state of Aguascalientes.¹⁸ The federal decision should ensure the availability to abortion services throughout the country in federal health facilities. The court also held that provisions in state constitutions recognizing a right to life from conception are unconstitutional.¹⁹

C. *Notable Aspects of Cases*

1. Incremental Constitutional Obligation to Protect Prenatal Life.

Notably, unlike the United States, both Mexico and Colombia recognize a limited constitutional duty to protect prenatal life. However, the courts are clear that zygotes, embryos, and fetuses are not legal persons or rights holders.²⁰ Further, the state obligation to protect prenatal life is not absolute and is of less weight during the early stages of pregnancy.²¹ This is consistent with international human rights law and decisions from the Inter-American human rights system that address the status of prenatal life.²² According to the Mexican court, the constitutional value of prenatal life increases with the development of traits associated with a human being and the “increase in the possibility of independent

¹⁴ *Id.* at ¶ 312.

¹⁵ *Id.* at ¶ 316-19 (replacing the provisions with language saying that “abortion shall not be prosecuted” and ridding the statute of the implication that abortion is a crime and making it clear that abortion under these circumstances should not be investigated or prosecuted).

¹⁶ *Id.* at ¶ 318.

¹⁷ *Id.* at ¶ 333-34.

¹⁸ Associated Press, *Mexico’s Supreme Court Decriminalizes Abortion Nationwide*, PBS (Sept. 6, 2023, 4:51 PM), <https://www.pbs.org/newshour/world/mexicos-supreme-court-decriminalizes-abortion-nationwide>.

¹⁹ GIRE, *supra* note 7, at 79-81.

²⁰ C-055/2022 ¶ 279; 148/2017 ¶¶ 191-92.

²¹ C-055/2022, at ¶ 266; 148/2017, at ¶ 205.

²² See 148/2017, at ¶¶ 189-90 (discussing findings from the U.N. and Inter-American human rights system finding that prenatal life is not a rights holder); *Id.* at ¶ 190 (discussing findings there is no right to life from conception); Corte Interamericana de Derechos Humanos. *Caso Artavia Murillo y otros (Fecundación in Vitro) Vs. Costa Rica*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 28 de noviembre de 2012. Serie C No. 257 ¶ 264 (the right to life from conception is not absolute “but gradual and incremental according to [the] development [of prenatal life]”).

survival outside the mother's womb."²³ The Colombian court holds that after the twenty-fourth week of gestation, when there is a high probability that a fetus can survive independently and is not completely dependent on the pregnant person, the state's obligation to protect prenatal life rises to a level that can justify the use of criminal penalties.²⁴

2. Rights of Pregnant People

The courts recognized that criminal laws prohibiting abortion violate multiple constitutional rights of pregnant people. The Colombian court found that the criminal abortion law was in "constitutional tension" with (1) the right to sexual and reproductive health, (2) the right to equality for women in vulnerable situations and irregular migration status, (3) freedom of conscience, and (4) the purpose of criminal law and the principle of *ultima ratio*.²⁵ In the Coahuila Case, the Mexican court recognized a constitutional "right to decide" which springs from several constitutional rights and principles including dignity, autonomy and free development of personality, equality, the right to health and reproductive freedom.²⁶ In addition the second paragraph of article four of the Mexican constitution provides that "every person has the right to decide in a free, responsible and informed manner on the number and spacing of children."²⁷

3. Balancing

Rather than adopting "absolutist" positions, the courts emphasized the need to balance the life, health, and rights of pregnant people with the constitutional obligation to protect prenatal life.²⁸ According to the Colombian court, this will result in greater realization of the totality of values involved.²⁹ Similarly, the Mexican decision is "guided by an exercise of conciliation, integration and weighing of the principles, rights and constitutional interests involved."³⁰ There are three key findings that undergird the courts' balancing approach: (1) banning abortion from conception (and when exceptions apply) is unconstitutional; (2) there is no right to life from the moment of conception and the government's obligation to protect prenatal life gradually increases over time; and (3) there are means the state can adopt to protect prenatal life that are consistent with and less harmful to the life, health, and rights of pregnant people.

Criminalizing abortion from conception is unacceptable because it results in "the absolute protection of prenatal life and completely nullifies the right to

²³ 148/2007, at ¶ 206.

²⁴ C-055/2022 ¶¶ 157-58.

²⁵ *Id.* at ¶¶ 170, 261.

²⁶ 148/2017, at ¶ 53.

²⁷ *Id.* at ¶ 54.

²⁸ C-055/2022, at ¶ 582.

²⁹ *Id.* at ¶ 581.

³⁰ 148/2017, at ¶ 232.

decide.”³¹ Such criminal provisions violate the dignity and personal autonomy of pregnant individuals “based on a social construct that defines them as instruments of procreation rather than as independent human beings.”³² Respect for the dignity and autonomy of pregnant people requires that the “final say” on the decision to have an abortion “must always be the individual’s private conviction.”³³ But, in order “to provide a sphere of protection for both the conceived being and reproductive autonomy” the Mexican court stated that legal regulation of abortion must recognize the unrestricted right to terminate a pregnancy within a short period of time close to conception.³⁴ The Coahuila Case did not prescribe a specific time frame stating only that the period “must be reasonable.”³⁵ The Colombian court held that abortion can only be criminalized after twenty-four weeks when the state’s interest in prenatal life has risen to the level that justifies criminal penalties.³⁶

Both courts held that time limitations do not apply when denial of abortion results in extreme violations of the dignity of the rights of women. Thus, the Colombian court held that abortions that fall under the 2006 Exceptions cannot be criminalized irrespective of the state of gestation.³⁷ In the Coahuila Case, the Mexican court struck down a twelve week time limit in the criminal code’s rape exception and emphasized that abortions in cases of rape, life or health endangerment and serious genetic and congenital disorders and pregnancy loss caused by a pregnant person are not criminal acts.³⁸

II. REJECTION OF CRIMINAL LAW

The decisions from Colombia and Mexico reflect an evolution in the ways that the courts understand and protect the right to abortion. They also reflect broader changes in the way that the courts and the international community analyze when it is appropriate to use criminal law and increasing attention to the positive harm caused by criminal law.

A. *Human Rights Critiques of Criminal Law*

There is an emerging human rights consensus that states should never criminalize abortion. Human rights bodies have long recognized that states can regulate abortion, but “those measures must not result in violation of the right to life

³¹ *Id.* at ¶¶ 263-67, 293, 300; C-055/2022, at ¶ 577 (criminalization in its current form reflects preference for the protection of prenatal life over the rights of pregnant people).

³² 148/2017, at ¶ 131.

³³ *Id.* at ¶ 234.

³⁴ *Id.* at ¶ 231.

³⁵ *Id.* at ¶ 235. The court notes that the 2008 Mexico City case found that the first twelve weeks of pregnancy was reasonable period. *Id.* at ¶ 236.

³⁶ C-055/2022, at ¶¶ 607, 634-36.

³⁷ C-055/2022, at ¶¶ 592-93.

³⁸ 148/2017, at ¶¶ 318-19, 334.

of a pregnant woman or girl, or her other [human] rights.”³⁹ Accordingly, states cannot impose restrictions on abortion that jeopardize the lives or health of pregnant people, discriminate against women and girls, arbitrarily interfere with the right to privacy, or subject them to physical or mental pain or suffering.⁴⁰

Human rights bodies have emphasized that countries must ensure that people must have access to abortion when: (1) the pregnancy endangers the pregnant person’s health or life (because denial of an abortion would violate the pregnant person’s right to life and health); (2) the pregnancy is a result of rape or incest (because denial of an abortion would violate the pregnant person’s right to be free from cruel, inhuman and degrading treatment);⁴¹ and/or (3) the fetus has a fatal abnormality (because forcing the pregnant person to continue the pregnancy against their wishes would violate their right to be free from cruel, inhuman and degrading treatment).⁴²

In addition to requiring access to abortion in certain circumstances, human rights bodies also recognize limits on the appropriate use of criminal law. Specifically, human rights bodies have said that criminal law should never be used to regulate abortion. This is based both on the human rights violations and dignitary harms resulting from state coercion of a deeply personal decision about a person’s health, body and life path and the real world impact that criminal abortion laws have on the life and health of pregnant people. Human rights bodies also express concern about the discriminatory and disproportionate impact that criminal laws have on women from marginalized communities.

U.N. Special Rapporteur on the Right to Health. In 2011, the UN Special Rapporteur on the Right to Health identified criminal abortion laws as the “paradigmatic” example of “impermissible barriers to the realization of women’s health”⁴³ because criminal abortion laws both violate an individual’s right to make autonomous health decisions and create barriers to health services and negative health outcomes.

According to the Special Rapporteur, criminal law creates and perpetuates stigma preventing access to health services.⁴⁴ Criminal abortion laws generate “poor physical health outcomes, resulting in deaths that could have been

³⁹ U.N., Comm. On Human Rights, General Comment No. 36, U.N. Doc. CCPR/C/GC/36 (2019), at ¶ 8.

⁴⁰ *Id.* Notably respect for these rights require at a minimum safe, legal and effective access to abortion where the pregnant person’s life or health is at risk (because it violates the right to life), rape or incest and where the pregnancy is not viable (because forcing the pregnant person to carry the pregnancy to term would cause substantial pain or suffering in violation of the right to be free from cruel, inhuman, and degrading treatment).

⁴¹ *L.C. v. Peru*, CEDAW/C/50/D/22/2009 (2011).

⁴² *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (2005); *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016); *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017).

⁴³ Anand Grover (Special Rapporteur of the Human Rights Council), Interim Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical & Mental Health, ¶ 21, U.N. Doc. A/66/254 (2011).

⁴⁴ *Id.* at ¶ 17.

prevented, morbidity and ill-health.”⁴⁵ Criminalization creates conditions which lead to unsafe abortion, including limited access to information, risks associated with unskilled providers and service provision outside an appropriate facility, use of ineffective or unsafe methods and lack of follow up care.⁴⁶ Even in cases where abortion is legally allowed to save the life of a pregnant person, criminalization may “effectively block access to information about legal abortion services.”⁴⁷ In addition, the Special Rapporteur recognizes the negative mental health outcomes from denying women the ability to make reproductive health decisions and the threat of being hauled into the criminal system.⁴⁸

U.N. Human Rights Committee. In 2019, the UN Human Rights Committee (HRC) issued General Comment 36, which provides interpretative guidance on state obligations under Article 6 (the right to life) of the International Covenant on Civil and Political Rights. General Comment 36 specifically provides that states cannot prohibit access to abortion when a pregnancy endangers a person’s health,⁴⁹ but it goes further: the right to life includes a duty to “refrain from engaging in conduct resulting in arbitrary deprivation of life.”⁵⁰ Thus, the state may not regulate pregnancy or abortion “in a manner that runs contrary to [the state’s] duty to ensure that women and girls do not have to resort to unsafe abortion.”⁵¹ Because criminalization prevents access to health care and information and “compels women and girls to resort to unsafe abortion[,]” the HRC concluded that states should not “apply[] criminal sanctions to women and girls who undergo abortion or to medical service providers who assist them.”⁵² Consistent with General Comment 36, in recent concluding observations to Mexico and the United States, the HRC explicitly called for the repeal of criminal penalties.⁵³

Other Human Rights Bodies and the World Health Organization (“WHO”). Other U.N. human rights treaty bodies and experts also have called on states to decriminalize abortion because of the impact of unsafe abortion on the rights to life and health.⁵⁴ In its most recent Abortion Care Guideline, the WHO

⁴⁵ *Id.* at ¶ 21.

⁴⁶ *Id.* at ¶¶ 26, 32.

⁴⁷ *Id.* at ¶ 31.

⁴⁸ *Id.* at ¶ 21.

⁴⁹ U.N. Doc. CCPR/C/GC/36, at ¶ 8 (“[R]estrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy.”).

⁵⁰ *Id.* at ¶ 7.

⁵¹ *Id.* at ¶ 8.

⁵² *Id.*

⁵³ U.N., Comm. Human Rights, Concluding Observations on the Sixth Periodic Rep. of Mexico, ¶ 17(b), CCPR/C/MEX/CO/6 (2019). U.N., Comm. Human Rights, Concluding Observations on the Fifth Periodic Rep. of the United States of America, ¶ 29(b), CCPR/C/USA/CO/5 (2023).

⁵⁴ U.N., Comm. on Economic, Social & Cultural Rights, General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health, ¶¶ 40, 49(b) E/C.12/GC/22(2016); U.N.,

recommended that states decriminalize abortion, remove abortion from all criminal laws and “not apply[] other criminal offences (e.g. murder, manslaughter) to abortion, and ensur[e] there are no criminal penalties for having, assisting with, providing information about, or providing abortion.”⁵⁵ In 2016, the African Commission on Human and Peoples’ Rights launched a campaign for the decriminalization of abortion on the African continent, and the Commission continues to reiterate that human rights obligations require decriminalization of abortion.⁵⁶

Impact on Marginalized Communities. The Special Rapporteur on Health and UN treaty bodies have also recognized that criminal laws have a disproportionate impact on poor and marginalized women who are least likely to be able to access safe abortion services and information. While wealthy individuals can travel to jurisdictions where abortion is legal, travel may be more difficult or even impossible for people with fewer resources.⁵⁷ The Special Rapporteur

Comm. on Economic, Social & Cultural Rights, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Mexico, ¶ 63(a), E/C.12/MEX/CO/5-6 (2019) (recommending that Mexico do away with criminalization of women to make its legislation compatible with the right to health); U.N., General Assembly, Rep. of the Comm. on the Elimination of Discrimination Against Women, ¶ 393, A/54/38/Rev.1 (noting that abortion is the second cause of maternal deaths in Colombia and stating the Committee’s belief that Colombia’s criminal legal provisions on abortion violate the right to health and life); U.N., Comm. on the Elimination of All Forms of Discrimination Against Women, Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to Convention on the Elimination of All Forms of Discrimination against Women, ¶ 82, CEDAW/C/OP.8/GBR/1 (2018) (linking systemic violations of the rights of women to the retention of criminal laws and calling on Northern Ireland to repeal criminal abortion law); U.N., Comm on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, ¶¶ 51-52, CRC/C/URY/CO/2 (expressing concern over the criminalization of abortion given the negative impact illegal abortions have on the health of girls and recommending that Uruguay “review its criminalization of the termination of pregnancy”); U.N., Comm on the Rights of the Child, Concluding Observation on the Combined Fourth and Fifth Periodic Reports of Chile, ¶ 61(c), CRC/C/CHL/CO/4-5 (2015) (recommending decriminalization of abortion to guarantee safe abortion services); U.N., Human Rights Council, Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice, ¶ 77, UN Doc. A/HRC/32/44 (stating that women’s right to health and safety are violated by criminal prohibition on termination of pregnancy).

⁵⁵ WORLD HEALTH ORGANIZATION, ABORTION CARE GUIDELINE 24 (2022).

⁵⁶ Lucia Berro Pizzarossa, Michelle Maziwisa, & Ebenezer Durojaye, *Self-Managed Abortion in Africa: The Decriminalization Imperative in Regional Human Rights Standards*, 25 HEALTH & HUM. RTS. J. 171, 174 (2023); see also African Comm. on Human and Peoples’ Rights, General Comment No. 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2(a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa ¶ 32 (2014) (stating that the right to be free from discrimination requires that women not be subject to criminal proceedings for abortion or post-abortion care).

⁵⁷ CEDAW/C/OP.8/GBR/1, at ¶ 64 (describing “socioeconomic split” in access to abortion when pregnant people are forced to travel to different legal jurisdictions to get services

noted that abortions can be safely performed outside of the formal medical system, but such services “may be financially inaccessible for the most vulnerable women.”⁵⁸

B. *International Commission of Jurists*

On March 8, 2023, the International Commission of Jurists (ICJ) published legal principles on the use of criminal law in the context of sex, reproduction, drug use, HIV, homelessness and poverty (“the March 8 Principles”).⁵⁹ The principles are designed to help legislators, judges, policy makers, and prosecutors by articulating and providing applications of basic criminal law principles and principles concerning the interaction of criminal law and international human rights law.⁶⁰

As an initial matter, the use of criminal law is only appropriate to “proscribe conduct that inflicts or threatens substantial harm to the fundamental rights and freedom of others or to certain fundamental public interests.”⁶¹ Legitimate public interests include national security, public safety, public order, or public morals.⁶² However, the Special Rapporteur on Health has stated that it is never appropriate to use criminal law to regulate sexual and reproductive health for purposes of public health or public morality. Public morality cannot justify laws that violate human rights, and use of criminal laws to regulate public health must be evidence-based and proportionate. Because of the negative impact on health outcomes, use of criminal laws to regulate sexual and reproductive health contradicts its own justification.⁶³

Further, criminal law cannot restrict the exercise of human rights unless it is: (1) strictly necessary to achieving the legitimate interest; (2) proportionate (least restrictive means); (3) appropriate (rationally and reasonably connected to interest), and not arbitrary; (4) non-discriminatory; and (5) consistent with other rights recognized under human rights law.⁶⁴

and the potential to deepen socioeconomic divides); U.N., Comm. Human Rights, Concluding Observations on the Fourth Periodic Rep. of Ireland, ¶ 9, CCPR/C/IRL/CO/4 (2014) (noting the discriminatory impact of Ireland’s highly restrictive abortion law on women unable to travel abroad to seek abortions).

⁵⁸ U.N. Doc. A/66/254, at ¶ 31.

⁵⁹ INTERNATIONAL COMMISSION OF JURISTS, THE 8 MARCH PRINCIPLES FOR A HUMAN RIGHTS-BASED APPROACH TO CRIMINAL LAW PROSCRIBING CONDUCT ASSOCIATED WITH SEX, REPRODUCTION, DRUG USE, HIV, HOMELESSNESS AND POVERTY (2023) [hereinafter MARCH 8 PRINCIPLES].

⁶⁰ *Id.*

⁶¹ *Id.* at 15.

⁶² *Id.* at 18.

⁶³ U.N. Doc. A/66/254 at ¶ 18 (“When criminal laws and legal restrictions used to regulate public health are neither evidence-based nor proportionate, States should refrain from using them to regulate sexual and reproductive health, as they not only violate the right to health of affected individuals, but also contradict their own public health justification.”).

⁶⁴ MARCH 8 PRINCIPLES, *supra* note 59, at 18.

The prohibition on discrimination specifically names sex, gender, pregnancy, childbirth, parenthood, and health status as prohibited grounds of discrimination.⁶⁵ It also recognizes direct and indirect discrimination and “multiple and intersecting” grounds of discrimination.⁶⁶ Further, the principles prohibit holding someone criminally liable “for conduct that does not constitute a criminal offense if committed by another person.”⁶⁷ Moreover, when criminal law sanctions are employed, they must be proportionate to the gravity of the offense and nondiscriminatory.⁶⁸

Finally, the principles state that use of criminal law to restrict the exercise of human rights should be “applied only as a last resort, where other less restrictive means of achieving the above-mentioned legitimate interests are insufficient.”⁶⁹ In addition, the state must continuously re-evaluate the need for criminal law.⁷⁰

Based on the forgoing general principles, the March 8 Principles explicitly prohibit criminalization of abortion and pregnancy loss. Principle 15 states that:

Criminal law may not proscribe abortion. Abortion must be taken entirely out of the purview of the criminal law, including for having, aiding, assisting with, or providing an abortion, or abortion-related medication or services, or providing evidence based abortion-related information.⁷¹

The March 8 Principles also prohibit the use of other criminal laws as a back-door method of criminalizing the same conduct. Like the WHO Abortion Guideline, the principles specifically prohibit the misuse of homicide laws to criminalize abortions:

No other criminal offence, such as murder, manslaughter or any other form of unlawful homicide, may proscribe or be applied to having, aiding, assisting with, or providing an abortion, or abortion-related medication or services, or providing evidence-based abortion-related information.⁷²

C. *Rejection of Criminal Law by Mexican and Colombian Courts*

The Mexican and Colombian courts did not go as far as required by the March 8 Principles and human rights standards, stopping short of completely removing abortion from the penal law. However, consistent with the reasoning adopted by human rights bodies and the March 8 Principles, they applied the *ultima ratio* or last resort principle to strike down criminal abortion laws.⁷³ They emphasized that before adopting criminal penalties, the state should actively debate and

⁶⁵ *Id.* at 19.

⁶⁶ *Id.* at 18.

⁶⁷ *Id.* at 19.

⁶⁸ *Id.*

⁶⁹ *Id.* at 18.

⁷⁰ *Id.* at 18 (“[The state’s] assertions must be continuously scrutinized.”).

⁷¹ *Id.* at 22.

⁷² *Id.*

⁷³ C-055/2022, at ¶ 258; 148/2017, at ¶ 282.

consider less restrictive alternatives. In addition, the criminal law must be necessary and effective in achieving the legislative purpose.⁷⁴ The law also must be reasonable and proportionate, and reserve punitive sanctions “for the most harmful conducts.”⁷⁵ The courts also considered the criminal law’s impact on constitutional rights, the real world impact of the law, with specific attention to the impact on disadvantaged communities, and whether the law is discriminatory and/or promotes gender stereotypes.

C-055 builds on a series of cases where the Colombian Constitutional Court imposed limits on the use of criminal law.⁷⁶ According to these cases, because penal sanctions impose dignitary harms and restrict freedom, criminal law should only be used as a “last resort” to address the most serious attacks on a legal interest when it is not possible to use other means that are less restrictive to freedom.⁷⁷ The last resort principle requires that the legislature rationalize the choice to use criminal law, including by assessing the impact of criminal sanctions and actively considering less restrictive alternatives.⁷⁸

In addition, according to the Colombian court, there are material or substantive limits on the use of criminal law.⁷⁹ The use of criminal law must be necessary,⁸⁰ suitable and effective (“prone to the achievement of the functions and purposes of the penalties”)⁸¹ and reasonable and proportional.⁸² Proportionality includes a requirement that criminal sanctions are reserved “for the most harmful conducts.”⁸³

In the Coahuila Case, the Mexican court reaffirmed the principle that criminal law should only be used as a last resort and disavowed the use of criminal abortion laws as a symbolic tool.⁸⁴ The court found that criminal abortion laws are not justified as a means to preserve public morals because the decision to terminate a pregnancy is a constitutionally protected personal decision in a secular state.⁸⁵ Nor are criminal abortion laws justified as a public health measure because early stage termination poses the least health risk to a pregnant person.⁸⁶ Accepting that protecting prenatal life is a legitimate purpose, the court found

⁷⁴ C-055/2022, at ¶¶ 412, 415-417.

⁷⁵ C-055/2022, at ¶ 268

⁷⁶ C-055/2022, at ¶ 415; Jaramillo Sierra, *supra* note 2, at 348 (noting that since 2013, the Colombian Court has developed the concept of criminal law as a last resort in a series of prisoners’ rights cases).

⁷⁷ *Id.* at ¶ 414.

⁷⁸ *Id.* at ¶¶ 412, 415-417

⁷⁹ *Id.* at ¶ 412.

⁸⁰ *Id.* at ¶ 417.

⁸¹ *Id.* at ¶¶ 402, 412, 428

⁸² *Id.* at ¶ 417.

⁸³ *Id.* at ¶ 444.

⁸⁴ 148/2017, at ¶ 282.

⁸⁵ *Id.* at ¶ 257.

⁸⁶ *Id.* at ¶ 258.

that the use of criminal law violated the last resort principle and failed to meet other material limits on the use of criminal law.

1. Ineffectiveness.

Both courts emphasize that criminal law must have a preventative purpose (rather than a symbolic or punitive purpose), and it must be necessary and effective in achieving the law's purpose.⁸⁷ A key finding in both decisions was that criminal abortion laws are ineffective in protecting prenatal life given the social reality that they do not significantly decrease abortions but instead encourage abortions outside of the formal healthcare system.⁸⁸ Both courts considered comparative data showing that highly restrictive abortion laws do not lower abortion rates and result in illegal abortions.⁸⁹ The Mexican court also cited ICCPR General Recommendation 36.⁹⁰

2. Harm Caused by Criminal Provisions, Especially to Vulnerable Communities

The courts also considered the positive harm imposed by criminalization which relates to whether the use of criminal law was appropriate, reasonable, and proportionate.⁹¹ The courts found that the criminal laws endangered the life and integrity of women and people who can become pregnant by increasing the risk that they will have abortions outside of the health system under unsafe conditions.⁹²

The courts found it particularly troubling that the criminal abortion provisions disproportionately impacted women in vulnerable situations, including individuals with low incomes and less access to education and those living in the countryside or in an irregular immigration status.⁹³ These groups already faced limited access to sexual and reproductive health and services.⁹⁴ The Colombian court cited evidence that women who experienced intersectional discrimination were most likely to face criminal charges and adverse health outcomes.⁹⁵ It noted that rural women, poor women, migrants and refugees often do not have the resources or means to travel abroad to get abortion care or terminate a pregnancy without authorities becoming aware.⁹⁶ The Mexican court specifically found that

⁸⁷ C-055/2022, at ¶ 402; 148/2017, at ¶ 301 (stating it is not legitimate to use criminal law where “it does not provide the intended protection for the legal interests it seeks to protect”).

⁸⁸ C-055/2022, at ¶¶ 402, 434-43; 148/2017, at ¶¶ 280, 282, 286, 289.

⁸⁹ C-055/2022, at ¶ 437-41; 148/2017, at ¶¶ 286, 289.

⁹⁰ 148/2017, at ¶ 292.

⁹¹ *Id.* at ¶ 293 (stating that the danger imposed by the criminal law required that it be expelled from the regulatory system).

⁹² *Id.* at ¶¶ 282, 284, 285, 290; C-055/2022, at ¶ 436.

⁹³ C-055/2022, at ¶¶ 436-37, 443; 148/2017, at ¶ 294.

⁹⁴ 148/2017, at ¶ 294; C-055/2022, at ¶¶ 337, 362.

⁹⁵ C-055/2022, at ¶¶ 337, 362.

⁹⁶ *Id.* at ¶ 363.

the criminal abortion law was an illegitimate use of the state's coercive power because it aggravates situations of social inequality for groups that lack access to health services and economic and educational resources.⁹⁷

3. Impact on Constitutional Rights, Dignity and Non-Discrimination

The courts also considered the adverse impact that the criminal law had on the rights of pregnant people. Both courts emphasized that criminal law cannot be used to violate fundamental rights guaranteed by their constitutions and ratified human rights treaties even if the criminal law seeks to protect a constitutionally recognized interest.⁹⁸

In addition to the criminal abortion laws' direct violation of the constitutional rights of the pregnant people, the nature of the law also raised constitutional concerns about respect for human dignity and non-discrimination that reinforced the inappropriateness of criminal law.⁹⁹ The last resort principle was developed in recognition of the dignitary harms that result whenever criminal sanctions are imposed. The Colombian court emphasized the extreme harm to women's dignity caused by criminal abortion laws because such laws instrumentalize women for a reproductive purpose in blatant disregard their rights to freedom of conscience, autonomy, and self-determination.¹⁰⁰

Both Mexico and Colombia recognize constitutional and human rights obligations to modify laws that discriminate against women and perpetuate gender stereotypes.¹⁰¹ The courts noted that criminal abortion laws criminalize conduct linked to a sex-based distinction,¹⁰² disproportionately impact women,¹⁰³ and are rooted in gender based stereotypes about women's reproductive capacity.¹⁰⁴ The Mexican court also recognized the important role that abortion decriminalization plays in destigmatizing abortion and ending gender stereotypes about women's role in society.¹⁰⁵

4. Last Resort

Both courts found that the criminal abortion law violated the "last resort" requirement.

The Colombian court noted that the criminal abortion law dated back to the 1800s and described more recent failed legislative attempts to pass comprehensive legislation and regulate abortion without undue reliance on criminal law.¹⁰⁶

⁹⁷ 148/2017, at ¶ 301.

⁹⁸ *Id.* at ¶ 277, 284; C-055/2022, at ¶¶ 417.

⁹⁹ 148/2017, at ¶¶ 270, 284.

¹⁰⁰ C-055/2022, at ¶¶ 505, 507-10.

¹⁰¹ *Id.* at ¶ 527; 148/2017, at ¶¶ 87-88, 108.

¹⁰² C-055/2022, at ¶¶ 529-30, 534.

¹⁰³ *Id.* at ¶ 536.

¹⁰⁴ *Id.* at ¶ 535.

¹⁰⁵ 148/2017, at ¶ 298.

¹⁰⁶ C-055/2022, at ¶¶ 453, 460-65.

After the court created the 2006 Exceptions, the barriers preventing access to abortion became clear.¹⁰⁷ Yet, the legislature still failed to take comprehensive action to protect sexual and reproductive rights and continued to rely on criminal law to regulate abortion.¹⁰⁸ Similarly, the Mexican court found that the Coahuila legislature failed to consider alternatives to criminal law that do not violate the rights of pregnant people.¹⁰⁹

III. OTHER OPTIONS TO PROTECT PRENATAL LIFE AND THE SEXUAL AND REPRODUCTIVE RIGHTS OF WOMEN AND PEOPLE WHO CAN BECOME PREGNANT

Although the narrow question before both courts was the constitutionality of specific criminal abortion laws, the “last resort” principle engaged the courts in a broader discussion of alternatives to criminal law.¹¹⁰ Rather than narrowly focusing on the pregnant person’s decision about whether to have an abortion, the courts emphasized the need for comprehensive sexual and reproductive health policies that situate abortion and the protection of prenatal life within a broader context. The courts also recognized the need to address material conditions that prevent people, especially people in marginalized communities, from being able to access sex education, family planning, prenatal, childbirth, and abortion care and to provide resources and support so that people feel they can choose to raise a child. Rather than using criminal law to coerce and punish pregnant people to continue pregnancies against their will, the courts described policies to inform and counsel pregnant people, ensure access to contraception and the full range of sexual and reproductive care, and provide material support and legal protections for pregnant and parenting people to make childbearing a more attractive and attainable choice.

Notably, the courts rejected assumptions that the protection of prenatal life is inherently in conflict with rights of women and childbearing individuals.¹¹¹ The Mexican court emphasized that the best way to protect prenatal life is a “joint effort between the State and pregnant women or childbearing individuals, through the deployment of a government policy whose foundations are the broader protection of all the rights and interests involved.”¹¹² The court stated that given constitutional protections for the “right to decide,” only by protecting women and people who can become pregnant can the state protect prenatal life.¹¹³

Both courts emphasized the need for comprehensive policies that provide protection for sexual and reproductive health rights and meaningful access to

¹⁰⁷ *Id.* at ¶¶ 479-81.

¹⁰⁸ *Id.* at ¶ 503.

¹⁰⁹ 148/2017, at ¶¶ 296-97.

¹¹⁰ C-055/2022, at ¶¶ 447-48.

¹¹¹ 148/2017, at ¶ 226.

¹¹² *Id.* at ¶ 227.

¹¹³ *Id.* at ¶ 226.

services.¹¹⁴ The Mexican court described the right to choose an abortion as part of a broader right to decide that includes seven pillars: (1) sexual education;¹¹⁵ (2) access to contraceptive information, counseling and services;¹¹⁶ (3) recognition that women and individuals with childbearing capacity as the holders of the right to decide to continue or terminate a pregnancy;¹¹⁷ (4) guarantee of the ability to make an informed decision regarding termination;¹¹⁸ (5) the necessary health services to protect the decision (treatments for pregnancy and termination);¹¹⁹ (6) free, safe, confidential, timely, unobstructed and non-discriminatory access in public health services;¹²⁰ and (7) the right to terminate which is limited to “a brief period at the beginning of gestation.” According to the court, the best way to protect prenatal life and the rights of women and people who can become pregnant is through the adoption of policies guided by the right to decide that addresses the seven pillars.¹²¹

The courts emphasized the state’s obligation to ensure that people actually can access the information and services necessary to realize their right to sexual and reproductive health and reproductive autonomy. This includes an obligation to eliminate obstacles whether they are created by the state or individual actors¹²² and to take action to overcome “conditions of inequality, marginalization and precariousness”¹²³ that prevent people from accessing sex education, contraception, pregnancy care, and abortion.¹²⁴

The courts describe policies falling within three categories: (1) provision of sexual and reproductive health education and contraceptive information and services; (2) information and counseling for people considering pregnancy termination; and (3) support for pregnant people and parents.¹²⁵

Both courts emphasized that pregnant people have a right to information necessary to make an informed decision about whether to terminate a pregnancy and tout abortion counseling and waiting periods as an alternative to criminal abortion restrictions.¹²⁶ This raises the specter that abortion counseling will be

¹¹⁴ *Id.* at ¶¶ 121-22; C-055/2022, at ¶¶ 643-45.

¹¹⁵ 148/2017, at ¶¶ 157-58.

¹¹⁶ *Id.* at ¶¶ 159-61.

¹¹⁷ *Id.* at ¶¶ 162-63.

¹¹⁸ *Id.* at ¶¶ 164-69.

¹¹⁹ *Id.* at ¶¶ 170-74.

¹²⁰ *Id.* at ¶¶ 175-79.

¹²¹ *Id.* at ¶¶ 227, 230, 299.

¹²² C-055/2022, at ¶¶ 287-88, 333 (discussing duty to remove obstacles that prevent access to the services necessary for pregnant individuals to enjoy reproductive health).

¹²³ 148/2017, at ¶ 229.

¹²⁴ *Id.* at ¶¶ 170-79 (describing right to necessary health services for pregnancy and abortion and access in public health services).

¹²⁵ *Id.*; C-055/2022, at ¶ 187.

¹²⁶ C-055/2022, at ¶ 566; 148/2017, at ¶¶ 164-69.

biased or coercive.¹²⁷ However, the Mexican court stated that counseling must provide “accessible, clear, objective, scientific and truthful” information about the physical and psychological consequences of both pregnancy and abortion¹²⁸ in a confidential, non-mandatory, and non-invasive manner without delay.¹²⁹ The Colombian court noted that abortion counseling can also be used to provide information about support for pregnant people and parents including information about public assistance, health care coverage, labor rights, child care and tax benefits.¹³⁰

Finally, the state can make childbearing a more attractive and feasible choice by protecting the rights of pregnant people and parents and providing needed resources. These policy initiatives include providing health care and public benefits for pregnant people and families with young children, adopting measures to make parenting compatible with work and educational interests, including expanding labor protections and providing equal access to educational and employment opportunities and childcare, and developing alternatives for pregnant people, including adoption.¹³¹

The Colombian court described countries that have expanded rights and support for people who choose to have children. For instance, some countries have adopted regulations guaranteeing state assistance during pregnancy and the first years of a child’s life.¹³² In 2020, Argentina decriminalized abortion and passed legislation providing economic subsidies for pregnant people and parents of children up to three years of age that include monthly payments, a comprehensive health allowance for children and public provision of essential supplies for pregnant people and children including medicine, vaccines, and food.¹³³

IV. CRITIQUE OF CRIMINAL ABORTION LAWS IN THE UNITED STATES

Before the overturn of *Roe v. Wade*, some states had laws imposing criminal penalties for performing abortions under certain circumstances.¹³⁴ However, the *Dobbs* decision has opened the door to state criminal laws that ban abortion in

¹²⁷ This risk should not be underestimated. In the United States, biased mandatory counseling and burdensome delay periods were enacted and enforced for decades as part of a strategy to chip away at the right to abortion prior to the *Dobbs* decision. See Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GEND. & L. 1, 2 (2012).

¹²⁸ 148/2017, at ¶¶ 165.

¹²⁹ *Id.* at ¶¶ 166, 168-69.

¹³⁰ C-055/2022, at ¶ 569.

¹³¹ *Id.* at 574; 148/2017, at ¶ 230.

¹³² C-055/2022, at ¶ 570.

¹³³ *Id.* at ¶¶ 571-72.

¹³⁴ Human Rights & Gender Justice Clinic at CUNY School of Law, *If/When/How. Pregnancy Justice, Center for Reproductive Right, Birthmark Doula Collective, Changing Woman Initiative & We Testify, Criminalization and Punishment for Abortion, Stillbirth, Miscarriage and Adverse Pregnancy Outcomes 3* (2023) [hereinafter HRGJ Report].

all or most circumstances. Currently sixteen states have passed laws that criminalize performing abortions at all stages of pregnancy,¹³⁵ and four states have passed laws imposing criminal penalties for performing abortions after six weeks.¹³⁶ It is important to note that these laws criminalize the performance of abortion and do not explicitly make it a crime for a person to have or to self-manage an abortion. However, there is a long history of prosecutors misusing criminal laws to prosecute people suspected of self-managing abortions and for adverse pregnancy outcomes.¹³⁷

The patterns emerging in the U.S. are similar to Mexico and Colombia. Criminal bans are proving ineffective in preventing abortions, and they are inflicting real harm that disproportionately impacts marginalized communities. Further, the states that have adopted extreme criminal abortion bans are among the states with the worst maternal health outcomes and have almost uniformly failed to adopt policies that protect sexual and reproductive rights and support families.

A. *Criminal Abortion Laws Are Ineffective and Cause Harm*

Early studies indicate that criminal abortion provisions have not resulted in a nationwide decrease of abortions.¹³⁸ Instead, because abortion continues to be legal in more than half the states, there has been a shift in where people have

¹³⁵ ALA. CODE § 26-23H-4; ARK. CODE ANN. §§ 5-61-301-304; IDAHO CODE § 18-622; IND. CODE § 16-34-2-1; KY. REV. STAT. § 311.772; LA. STAT. ANN. 14 §87.7; MISS. CODE ANN. § 41-41-45; MO. REV. STAT. § 188.017(2); S.B. 2150, 68th Leg. Sess., Reg. Sess.1 § 1 (N.D. 2023); OKLA. STAT. TIT. 21, § 861; S.D. CODIFIED LAWS § 22-17-5.1; TENN. CODE ANN. § 39-15-213; TEX. HEALTH & SAFETY CODE ANN. § 170A.004; UTAH CODE ANN. § 76-7a-201; W. VA. CODE §16-2R-3; WYO. STAT. ANN. § 35-6-123. The Utah and Wyoming laws have been enjoined. *See* Planned Parenthood Ass'n of Utah v. State, No. 220903886, 2022 WL 2314556 (Utah Dist. Ct. June 27, 2022); *Johnson v. State*, No. 18853, 2023 WL 2711603 (Wyo. Dist. Mar. 22, 2023)

¹³⁶ GA CODE ANN. §§ 16-12-140, 16-12-141; OHIO REV. CODE ANN. § 2919.195(A); S.C. CODE ANN. § 44-41-630(B); FL. STAT. ANN. § 390.0111. The Ohio six-week ban was enjoined, and, in October 2023, Ohio voters amended the state constitution to protect the right to make and carry out reproductive decisions including abortion decisions. *Preterm-Cleveland v. Yost*, No. A2203203, 2022 WL 16137799 (Ohio Com.Pl. Oct. 12, 2022); Ohio Issue 1, Right to Make Reproductive Decisions Including Abortion Initiative (2023), BALLOTPEDIA, [https://ballotpedia.org/Ohio_Issue_1_Right_to_Make_Reproductive_Decisions_Including_Abortion_Initiative_\(2023\)](https://ballotpedia.org/Ohio_Issue_1_Right_to_Make_Reproductive_Decisions_Including_Abortion_Initiative_(2023)) (last visited Mar. 22, 2024); *see, After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> (last visited Mar. 31, 2024).

¹³⁷ Laura Huss, Farah Diaz-Tello, & Goleen Samari, *Self-Care, Criminalized: August 2022 Preliminary Findings*, IF/WHEN/HOW 2 (Aug. 2022), <https://www.ifwhenhow.org/resources/self-care-criminalized-preliminary-findings/> [hereinafter *If/When/How, Self-Care, Criminalized*]; HRGJ Report, *supra* note 134, at 4; PREGNANCY JUSTICE, THE RISE OF PREGNANCY CRIMINALIZATION (Sept. 2023).

¹³⁸ *Despite Bans, Number of Abortions in the United States Increased in 2023*, GUTTMACHER INSTITUTE (Mar. 19, 2024), <https://www.guttmacher.org/2024/03/despite-bans-number-abortions-united-states-increased-2023>.

abortions, and an increase in self-managed abortion outside of formal health care settings.¹³⁹ In addition to being ineffective, state criminal abortion laws impose substantial harm. The laws impose dignitary harm by treating pregnant people as instruments of reproduction, denying them the autonomy to make their own decisions about their bodies and lives. The laws criminalize acts based on a sex-based difference and further gender stereotypes. Several state criminal laws include extreme criminal penalties that are typically reserved for the most serious homicide crimes, including life imprisonment, that are in no way proportionate to the state's interest or alleged harm.¹⁴⁰

There is also clear evidence that the criminal abortion laws not only violate the dignity and rights of pregnant people but also endanger their health and lives. It is early to determine the ultimate impact of criminal laws on maternal mortality and morbidity.¹⁴¹ Attempts to provide information and resources to help people travel to obtain care and safely self-manage have no doubt helped prevent unsafe abortions. However, there is clear evidence that the criminal laws have endangered patients' lives and compromised medical care. Well documented cases reveal that doctors fearing arrest in states with criminal abortion bans have denied or delayed abortion care to patients facing severe and dangerous pregnancy complications.¹⁴² Fifty-five percent of OBGYNs in states with abortion bans and 47% in states with gestation bans say their ability to practice within the standard of care has worsened since the *Dobbs* decision.¹⁴³ In states with

¹³⁹ Kimya Forouzan & Isabel Guarnieri, *State Policy Trends 2023: In the First Full Year Since Roe Fell, a Tumultuous Year for Abortion and Other Reproductive Health Care*, GUTTMACHER INSTITUTE (Dec. 19, 2023), <https://www.guttmacher.org/2023/12/state-policy-trends-2023-first-full-year-roe-fell-tumultuous-year-abortion-and-other>.

¹⁴⁰ ALA. CODE § 26-23H-6(a) (2019) (imposing class A felony, which is subject to life imprisonment or a sentence up to ninety-nine years under ALA. CODE § 13A-5-6); TEX. HEALTH & SAFETY CODE ANN. § 170A.004(b) (West 2022) (imposing up to felony of the first degree, which is subject to five to ninety-nine years or life and a fine up to \$10,000 under TEX. PENAL CODE ANN. § 12.32); LA. STAT. ANN. § 14:87.7(C) (2022) (imposing a sentence of one to ten years and fines from \$10,000 to \$100,000); ARK. CODE ANN. § 5-61-404(b) (2021) (imposing up to a ten-year prison sentence and \$100,000 penalty).

¹⁴¹ Kavitha Surana, *Maternal Deaths Are Expected to Rise Under Abortion Bans, but the Increase May Be Hard to Measure*, PROPUBLICA (July 27, 2023), <https://www.propublica.org/article/tracking-maternal-deaths-under-abortion-bans>

¹⁴² LIFT LOUISIANA, PHYSICIANS FOR HUMAN RIGHTS, RH IMPACT & CENTER FOR REPRODUCTIVE RIGHTS, *CRIMINALIZED CARE* (March 2024), 22-26 [hereinafter *CARE CRIMINALIZED*]; *Medical Exceptions to State Abortion Bans*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/case/state-abortion-bans-medical-exceptions/> (last visited Mar. 31, 2024).

Kavitha Surana, *Hospitals in Two States Denied an Abortion to a Miscarrying Patient. Investigators Say They Broke Federal Law*, ProPublica (May 19, 2023, 5:00 AM), <https://www.propublica.org/article/two-hospitals-denied-abortion-miscarrying-patient-breaking-federal-law>

¹⁴³ BRITNI FREDERIKSEN, USHA RANJIL, IVETTE GOMEZ, & ALINA SALGANICOF, *A NATIONAL SURVEY OF OBGYNs' EXPERIENCES AFTER DOBBS* 13 (2023).

abortion bans, 40% of OBGYNs report that they have been constrained in providing care for miscarriages and 37% have been constrained in providing care in pregnancy related emergencies, compared to 10% in states where abortion is available in most circumstances.¹⁴⁴

The fear and stigma created by criminal abortion laws also negatively impacts other forms of reproductive health care. For instance, researchers have documented that OB/GYNS in states with criminal bans are delaying prenatal care until after the first trimester. During early pregnancy, there is an increased risk of spontaneous miscarriages, and doctors are concerned that if they treat patients experiencing miscarriages, they will be accused of performing abortions.¹⁴⁵ There are also reports that doctors are leaving states where they face the threat of civil and criminal penalties.¹⁴⁶ Because of the harmful public health impacts of criminal abortion laws, major medical and public health organizations have denounced criminalization of people who self-manage abortions, or support others in doing so, because it increases medical risk, impedes trust in health care systems and access to health information, and deters people from seeking necessary services in case of complications.¹⁴⁷

Criminal abortion restrictions have had a disproportionate impact on people of color, people living in poverty, and people in vulnerable situations. The states with criminal abortion bans have “the greatest structural and social inequities in terms of maternal morbidity and mortality and poverty.”¹⁴⁸ Individuals unable to overcome travel barriers are likely to be those with the fewest socio-economic resources, including young people, incarcerated people, people on parole with travel limitations, and immigrants.¹⁴⁹ Black, Indigenous, and other people of color have experienced the greatest increase in travel times to abortion facilities post-*Dobbs*.¹⁵⁰

¹⁴⁴ *Id.* at 14.

¹⁴⁵ CRIMINALIZED CARE, *supra* note 142, 26-27.

¹⁴⁶ *Id.* at 34-35; Sheryl Gay Stolberg, *As Abortion Laws Drive Obstetricians from Red States, Maternity Care Suffers*, N.Y. TIMES (Sept. 7, 2023), <https://www.nytimes.com/2023/09/06/us/politics/abortion-obstetricians-maternity-care.html>.

¹⁴⁷ *Opposition to the Criminalization of Self-Managed Abortion*, THE AMERICAN COLL. OF OBSTETRICIANS & GYNECOLOGISTS (July 6, 2022), <https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2022/opposition-to-the-criminalization-of-self-managed-abortion#1>; *Decriminalization of and Support for Self-Managed Abortion*, AM. PUB. HEALTH ASS'N, (Oct. 26, 2021), <https://www.apha.org/Policies-and-Advocacy/Public-Health-Policy-Statements/Policy-Database/2022/01/07/Decriminalization-of-and-Support-for-Self-Managed-Abortion>; *Oppose the Criminalization of Self-Managed Abortion H-5.980*, AM. MED. ASS'N (2022), <https://policysearch.ama-assn.org/policyfinder/detail/%22Oppose%20the%20Criminalization%20of%20Self-Managed%20Abortion%20H-5.980%22?uri=%2FAMADoc%2FHOD.xml-H-5.980.xml>.

¹⁴⁸ SOCIETY OF FAMILY PLANNING, #WECOUNT REPORT 9 (Oct. 2023).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* CRIMINALIZED CARE, *supra* note 142, 29-30 (stating that Louisiana's criminal abortion ban disproportionately impacts Black, Indigenous and other people of color).

B. *States with Criminal Abortion Bans Have Failed to Consider Alternatives*

It is also clear that state criminal abortion laws were not adopted “as a last resort” to protect prenatal life after the consideration of policy alternatives that work with and are consistent with the dignity and rights of pregnant people. States that criminalize abortions at all stages of pregnancy (sixteen states) and at six weeks (four states) (collectively “Criminal Ban States”)¹⁵¹ have generally failed to adopt policies to support sex education, contraceptive access, and healthy pregnancies, or legal protections and benefits for families. While some states have adopted Alternative to Abortion (A2A) programs, these programs are problematic because they often fund organizations using coercive, misleading, and abusive tactics, and they divert funding from programs providing needed cash assistance to families.

1. Sex Education and Contraception

Criminal Ban States have failed to mandate sexual education in public schools, and when sexual education is taught, the programs have largely centered on abstinence rather than contraception. More than half of the states that criminalize abortion at all stages of pregnancy do not require sex education in schools.¹⁵² Of the seven states with criminal bans at all stages that require sex education, only two require coverage of contraception.¹⁵³ The other five do not cover contraception and focus on abstinence.¹⁵⁴

Criminal Ban States have also failed to invest in contraceptive coverage compared to the rest of the country. States can support access to contraception (which is covered under Medicaid) and overall family health and well-being by expanding access to Medicaid.¹⁵⁵ Medicaid expansion prevents a coverage gap,

¹⁵¹ *Supra* notes 135-136.

¹⁵² Nine of the sixteen states with criminal bans at all stages do not mandate sex education in schools. These states are Alabama, Arkansas, Idaho, Indiana, Louisiana, Missouri, Oklahoma, South Dakota, and Wyoming. See SIECUS, *SEX ED STATE LAW & POLICY CHART 14-16* (2022), <https://siecus.org/wp-content/uploads/2021/09/2022-Sex-Ed-State-Law-and-Policy-Chart.pdf>; *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

¹⁵³ See SIECUS, *supra* note 152, at 14-16 (the states are Texas and West Virginia); *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

¹⁵⁴ See SIECUS, *supra* note 152, at 14-16 (the states are Kentucky, Mississippi, North Dakota, Tennessee, and Utah); *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

¹⁵⁵ Madeline Guth & Karen Diep, *What Does the Recent Literature Say About Medicaid Expansion? Impacts on Sexual and Reproductive Health*, KFF (Jun. 29, 2023), <https://www.kff.org/medicaid/issue-brief/what-does-the-recent-literature-say-about-medic-aid-expansion-impacts-on-sexual-and-reproductive-health/>. Medicaid a good investment for states, because costs are shared by the federal government and the states. The federal government’s share ranges from fifty to seventy-eight percent based on a formula that allocates a larger share to the federal government the lower the state’s average per capita income. Elizabeth Williams, Robin Rudowitz, & Alice Burns, *Medicaid Financing: The Basics*, KFF (Apr. 13, 2023), <https://www.kff.org/medicaid/issue-brief/medicaid-financing-the-basics/>. In

increasing coverage pre-pregnancy as well as the utilization of long-acting reversible contraception like IUDs or implants.¹⁵⁶ Only ten states have declined to expand Medicaid eligibility.¹⁵⁷ Significantly, eight of those are Criminal Ban States.¹⁵⁸ States are also permitted to expand Medicaid income eligibility levels for contraceptive coverage.¹⁵⁹ More than half of the states with criminal abortion bans at all stages of pregnancy have declined expanding eligibility for contraceptive coverage.¹⁶⁰

2. Health Care During Pregnancy

Criminal Ban States have also fallen short in adopting policies to support healthy pregnancies and protect maternal health. Nine of the ten states with the highest maternal mortality rates are Criminal Ban States.¹⁶¹ In 2021, states were given the option of temporarily expanding Medicaid coverage for pregnant people from sixty days to one year past birth, and in 2023, the option was made permanent.¹⁶² Expansion of health coverage postpartum is a “key state strategy to address the maternal mortality crisis.”¹⁶³ The only two states, Arkansas and Idaho, that have failed to take any action to extend coverage are Criminal Ban

addition, Medicaid provides higher federal reimbursement rates for family planning, and the federal government is currently paying 90% of costs for individuals under Medicaid expansion. *Id.*

¹⁵⁶ Guth & Diep, *supra* note 155.

¹⁵⁷ *Status of State Medicaid Expansion Decisions: Interactive Map*, KKF (Feb. 7, 2024), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/>.

¹⁵⁸ The states with a criminal ban are Alabama, Mississippi, Tennessee, Texas and Wyoming. The states with six-week bans are Florida, Georgia, and South Carolina. *See id.*; *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

¹⁵⁹ *States That Have Expanded Eligibility for Coverage of Family Planning Services Under Medicaid*, KKF (Jan. 2024), <https://www.kff.org/medicaid/state-indicator/family-planning-services-waivers/?currentTimeframe=0&sortModel=%7B%22collId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

¹⁶⁰ The nine states are Arkansas, Idaho, Kentucky, Missouri, North Dakota, South Dakota, Tennessee, Utah, and West Virginia. *See id.*; *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

¹⁶¹ *Maternal deaths and mortality rates per 100,000 live births*, KFF, <https://www.kff.org/other/state-indicator/maternal-deaths-and-mortality-rates-per-100000-live-births/?currentTimeframe=0&sortModel=%7B%22collId%22:%22Maternal%20Mortality%20Rate%20per%20100,000%20live%20Births%22,%22sort%22:%22desc%22%7D> (last visited Mar. 22, 2024) (the states with the highest maternal mortality rates per 10,000 live births are Arkansas, Mississippi, Tennessee, Alabama, Louisiana, Kentucky, Georgia, South Carolina, Arizona, and Indiana); *c.f. supra* notes 135-136 (every state listed except Arizona is a Criminal Ban State).

¹⁶² *State Efforts to Extend Medicaid Postpartum Coverage*, NAT'L ACAD. FOR STATE HEALTH POL'Y, <https://nashp.org/state-tracker/view-each-states-efforts-to-extend-medicaid-postpartum-coverage/> (Mar. 13, 2024).

¹⁶³ *Id.*

States.¹⁶⁴ As of January 2024, only ten states have failed to make the extension of coverage permanent, eight of them are Criminal Ban States.¹⁶⁵

The Children's Health Insurance Program (CHIP) provides an opportunity for states to provide healthcare for children whose families exceed the Medicaid income limit.¹⁶⁶ States have the option to cover uninsured pregnant people under CHIP, but only three of the twenty Criminal Ban States have done so.¹⁶⁷ Perhaps even more surprising, given the states' alleged concern for prenatal life, less than half of the states with criminal bans at all stages of pregnancy and no states with six week criminal bans, have exercised the option to cover an "unborn child" under CHIP.¹⁶⁸

3. Support of Families

The lack of support for families continues after birth. Criminal Ban States have disproportionately high levels of uninsured children. Seventy five percent of states with criminal bans (fifteen out of twenty) fall within the twenty-five states with the highest percentage of uninsured children.¹⁶⁹ Texas (10.9%) and

¹⁶⁴ *Id.*

¹⁶⁵ *Medicaid Postpartum Coverage Extension Tracker*, KFF (Feb. 22, 2024), <https://www.kff.org/medicaid/issue-brief/medicaid-postpartum-coverage-extension-tracker/> (listing states that have not made coverage permanent through ACA expansion are Alabama, Florida, Georgia, Kansas, Mississippi, South Carolina, Tennessee, Texas, Wisconsin, and Wyoming); *c.f. supra* notes 135-136 (listing the only two states that are not Criminal Ban States are Kansas and Wisconsin).

¹⁶⁶ *Children's Health Insurance Program (CHIP)*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/childrens-health-insurance-program-chip/> (last visited Mar. 22, 2024). Like Medicaid, CHIP is jointly funded by the federal government and states, but, in order to encourage coverage for children, the federal matching rate is generally fifteen percentage points higher than the Medicaid rate. *Financing*, MEDICAID.GOV, <https://www.medicaid.gov/chip/financing/index.html> (last visited Mar. 31, 2024).

¹⁶⁷ Only Kentucky, Missouri, and West Virginia cover pregnant people under CHIP. *See Medicaid and CHIP Income Eligibility Limits for Pregnant Women as a Percent of the Federal Poverty Level*, KFF, <https://www.kff.org/affordable-care-act/state-indicator/medicaid-and-chip-income-eligibility-limits-for-pregnant-women-as-a-percent-of-the-federal-poverty-level/?currentTimeframe=0&selectedDistributions=chip&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last updated Jan. 2023); *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

¹⁶⁸ The seven Criminal Ban States that cover "unborn children" under CHIP are Arkansas, Louisiana, Missouri, Oklahoma, South Dakota, Tennessee, and Texas. *See Medicaid and CHIP Income Eligibility Limits for Pregnant Women as a Percent of the Federal Poverty Level*, *supra* note 164; *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

¹⁶⁹ Arizona, Alaska, Nevada, Montana, and Pennsylvania are the only states in the top 20 that are not Criminal Ban States. *See Health Insurance Coverage of Children 0-18*, KFF, <https://www.kff.org/other/state-indicator/children-0->

Wyoming (8.8%) have the highest percentages of uninsured children in the country; both are Criminal Ban States.¹⁷⁰

Moreover, twelve of the fifteen states with TANF benefits below 20% of the poverty line are Criminal Ban States.¹⁷¹ Only seven states continue to impose TANF family caps which deny additional cash benefits for families who have additional children after their initial TANF benefit is determined.¹⁷² Five of those seven states have criminal abortion bans.¹⁷³

None of Criminal Ban States mandate paid family and medical leave.¹⁷⁴ Only four states have failed to adopt state laws banning pregnancy discrimination,¹⁷⁵ three (Alabama, Mississippi and South Dakota) of the four have adopted criminal abortion bans.¹⁷⁶ Similarly only three states have failed to adopt laws requiring pregnancy accommodations in the workplace, and all three have criminal abortion bans.¹⁷⁷

18/?currentTimeframe=0&sortModel=%7B%22collId%22:%22Uninsured%22,%22sort%22:%22desc%22%7D (last visited Mar. 22, 2024); *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

¹⁷⁰ *See id.*; *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

¹⁷¹ The states are Alabama, Arkansas, Idaho, Indiana, Kentucky, Indiana, Kentucky, Oklahoma, Mississippi, Missouri, and Texas (ban at all stages) and Florida, Georgia, and South Carolina (ban at six weeks). *See*

Gina Azito Thompson, Diana Azevedo-McCaffrey, & Da'shon Carr, *Increases in TANF Cash Benefits Levels Are Critical to Help Families Meet Rising Costs*, CENTER FOR BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/family-income-support/more-states-raising-tanf-benefits-to-boost-families-economic-security> (Feb. 3, 2023).

¹⁷² Urvi Patel & Aditi Shrivastava, *Reproductive Justice and TANF: Repealing "Family Cap" Policies Promotes Economic Justice and Family Autonomy*, CTR. FOR BUDGET & POL'Y PRIORITIES (Dec. 19, 2023, 12:36 PM), <https://www.cbpp.org/blog/reproductive-justice-and-tanf-repealing-family-cap-policies-promotes-economic-justice-and>.

¹⁷³ Arizona and North Carolina are the two non-Criminal Ban States with family caps. *See id.*; *c.f. supra* notes 135-136.

¹⁷⁴ *State Policies on Paid Family and Sick Leave*, KFF, <https://www.kff.org/other/state-indicator/paid-family-and-sick-leave/?currentTimeframe=0>; *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans). (last visited Mar. 24, 2024)

¹⁷⁵ *Employment Issues Related to Pregnancy, Birth and Nursing*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/wb/pregnancy> (last updated 2023) [hereinafter *Employment Issues*].

¹⁷⁶ The fourth is North Carolina. *See supra* notes 135-136.

¹⁷⁷ Mississippi, Wyoming, and Florida are the three states without accommodations. *Employment Issues*, *supra* note 175; *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

4. Alternative to Abortion Programs

At least eighteen states have adopted Alternative to Abortion or A2A programs.¹⁷⁸ Anti-abortion groups say A2A programs “support women and unborn children during pregnancy and during the first years of a child’s life” and fund “counseling, education and material goods, as a complement to the myriad existing government programs available to those in need.”¹⁷⁹ While the provision of accurate, non-coercive information and material benefits for pregnant people and families are examples of alternatives to criminal abortion bans that further the state’s interest in protecting prenatal life, many of the programs that receive A2A funding use “manipulative and misleading tactics” that violate the dignity, autonomy and rights of pregnant people.¹⁸⁰

The majority of Criminal Ban States have A2A programs.¹⁸¹ The fact that these states have criminal laws prohibiting abortion reflects a coercive state scheme. That is, for the most part, the programs are not in place to provide support for people so that they feel they can afford to choose to continue a pregnancy. Instead, they provide minimal resources and parenting classes to people who may have been forced to continue pregnancies against their will.¹⁸²

A2A programs have been criticized for funding Anti-Abortion Centers (also known as Crisis Pregnancy Centers).¹⁸³ State funding for Crisis Pregnancy Centers has doubled since the overturn of *Roe v. Wade*.¹⁸⁴ Anti-Abortion Centers have been widely criticized for misleading pregnant people about the services

¹⁷⁸ Jeanneane Maxon, *Fact Sheet: State Alternatives to Abortion Funding*, CHARLOTTE LOZIER INST. (Oct. 13, 2023), <https://lozierinstitute.org/fact-sheet-state-alternatives-to-abortion-funding/>.

¹⁷⁹ Amanda Stirone Mansfield, *Alternatives to Abortion Programs: Support for Mothers and Families*, CHARLOTTE LOZIER INST. (Feb. 14, 2022), <https://lozierinstitute.org/alternatives-to-abortion-programs-support-for-mothers-and-families/#:~:text=Referrals%20to%20maternity%20homes,clothes%2C%20infant%20diapers%2C%20and%20formula.>

¹⁸⁰ Melissa N. Montoya, Colleen Judge-Golden, & Jonas J. Swartz, *The Problems with Crisis Pregnancy Centers: Reviewing the Literature and Identifying New Directions for Future Research*, 14 INT’L J. WOMEN’S HEALTH 757, 757 (2022).

¹⁸¹ The states with bans are Florida, Georgia, Ohio, Arkansas, Indiana, Louisiana, Missouri, North Dakota, Oklahoma, Tennessee, Texas, and West Virginia. See Jeanneane Maxon, *supra* note 178; *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans).

¹⁸² See Montoya, Judge-Golden, & Swartz, *supra* note 180, at 758.

¹⁸³ See Mary Tuma, *Public Funding is Pouring into Texas’ Anti-Abortion Pregnancy Centers While Abortion Access Hangs in the Balance*, MOTHER JONES (Feb. 1, 2022), <https://www.motherjones.com/politics/2022/02/crisis-pregnancy-centers-texas-funding-alternatives-to-abortion-program-sb8/> (stating that Texas has the largest A2A program, and an open records request found that Anti-Abortion Centers dominate Texas’s investment in A2A programs).

¹⁸⁴ Kimberly Kindy, *Partisan Battle Grows Over State Funding for Antiabortion Centers*, WASHINGTON POST (Sept. 14, 2023), <https://www.washingtonpost.com/politics/2023/09/14/gop-lawmakers-crisis-pregnancy-centers-state-funding/>.

they provide, masquerading as medical facilities, providing false and misleading information about abortions, delaying people from seeking abortions within gestational limits and shaming people who want to terminate pregnancies.¹⁸⁵ Coercive and deceptive practices, like intentionally reporting incorrect gestational ages of pregnancies, can prevent or delay people living in Criminal Ban States from getting timely care out of state or from accessing abortion prior to gestational limits in states that allow abortions prior to six weeks.¹⁸⁶

A2A programs do not provide cash assistance, typically referring clients to existing government benefit programs.¹⁸⁷ At least seven Criminal Abortion Ban States are diverting or have diverted TANF dollars to A2A programs, decreasing the amount of direct cash assistance available to poor families.¹⁸⁸ While some A2A funded organizations provide basic necessities like diapers or baby clothes that can help people who wish to continue a pregnancy and lack resources, they do not address the underlying issues of income insecurity.¹⁸⁹ Clients' ability to receive these necessities often are conditioned on participating in programs or classes that are "religiously inflected" and upsetting.¹⁹⁰

C. *Judicial Review of Criminal Abortion Laws in the U.S.*

Courts hearing challenges to criminal abortion laws should consider that criminal laws are ineffective in preventing abortions and impose substantial harm. A state's failure to adopt other measures to protect prenatal life that respect the dignity and autonomy of pregnant people underscores the poor fit between means and ends. Reliance on criminalization without considering less intrusive alternatives also suggests that the state may be motivated by the impermissible

¹⁸⁵ See Cynthia McFadden, Maite Amorebieta, & Didi Martinez, *In Texas, State-Funded Crisis Pregnancy Centers Gave Medical Misinformation to NBC News Producers Seeking Counseling*, NBC (June 29, 2022, 4:30 AM), <https://www.nbcnews.com/politics/supreme-court/texas-state-funded-crisis-pregnancy-centers-gave-medical-misinformation-rcna34883>.

¹⁸⁶ See Montoya, Judge-Golden, & Swartz, *supra* note 180, at 760-761.

¹⁸⁷ See Rachel Wormer, *Mapping Deception: A Closer Look at How States' Anti-Abortion Center Programs Operate*, EQUITY FORWARD <https://equityfwd.org/research/mapping-deception-closer-look-how-states-anti-abortion-center-programs-operate> (last updated Sept. 2021).

¹⁸⁸ See *id.* (the states Indiana, Louisiana, Missouri, North Dakota, Ohio, Oklahoma, and Texas); *c.f. supra* notes 135-136 (indicating the states with criminal abortion bans). Since 2011, Louisiana has allocated over \$11 million dollars from TANF to its A2A program, CRIMINALIZED CARE, *supra* note 142, 13. The TANF program provides fixed federal block grants to states that can be used to assist families in need. However, many states have shifted funds away from direct cash assistance to other programs. *Policy Basics: Temporary Assistance for Needy Families*, CTR. ON BUDGET AND POLICY PRIORITIES, <https://www.cbpp.org/research/family-income-support/policy-basics-an-introduction-to-tanf>

¹⁸⁹ See Wormer, *supra* note 187.

¹⁹⁰ Anna North, *What "Crisis Pregnancy Centers" Really Do*, VOX (Mar. 2, 2020, 7:10 AM), <https://www.vox.com/2020/3/2/21146011/crisis-pregnancy-center-resource-abortion-title-x>.

purpose of hostility towards, and a desire to punish, people who perform abortions rather than the protection of prenatal life.

Of course, courts' analyses will turn on the standard of review they apply. State courts often protect different rights than the federal constitution, or interpret rights in a different way, and apply different levels of review for state constitutional challenges.¹⁹¹ It is beyond the scope of this article to analyze how the factors I have outlined will play out in specific contexts. However, I sketch out some possibilities below.

Although the Supreme Court no longer recognizes a fundamental right to abortion and, in dicta, rejected the argument that abortion restrictions are a form of sex discrimination,¹⁹² state courts may find that criminal abortion laws infringe on fundamental rights protected under state constitutions or violate state Equal Rights Amendments or Equal Protection Clauses and apply strict scrutiny.¹⁹³ Under strict scrutiny, the state would need to establish that criminal abortion laws are the least intrusive means to achieve a compelling state interest. Assuming that protecting prenatal life at all stages of development or very early in gestation is accepted as a compelling state interest,¹⁹⁴ criminal abortion laws

¹⁹¹ Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997, 1039-40, 1045-46 (2010). Just as the Mexican Supreme Court has recognized the right to decide based on multiple rights protected by the Mexican constitution, some state courts read two or more clauses together to enhance each other. *See supra* note 26 and accompanying text (discussing Mexican case which recognized right to decide); Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WISC. L. REV. 1001 (2021).

¹⁹² *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 236-37, 292 (2022).

¹⁹³ State court challenges to abortion laws can be based on a wide variety of rights, including the right to personal autonomy, the right to make health care decisions, or protections under State Equal Rights Amendments. *See Hodes & Nausser v. Schmidt*, 309 Kan. 610, 680 (2019) (holding that a ban on D&E abortion violated the right to personal autonomy protected by state constitution and applying strict scrutiny); Order Granting Preliminary Injunction at ¶ 35, *Johnson v. State of Wyoming*, Civ. Action No. 18732 (D.C. Teton Cnty. WY 2022), <https://www.brennancenter.org/sites/default/files/2022-11/Johnson%20v.%20Wyoming%20%5BPreliminary%20Injunction%20Order%5D.pdf> (granting a preliminary injunction after using strict scrutiny to find criminal abortion law interferes with the state constitutional right to make one's own health care decision); *Allegheny Reproductive Health Ctr. v. Pa. Dep't. of Hum. Servs.*, 2024 WL 318389 at *56-58, *61 (Pa. Jan. 29, 2024) (holding that court should apply strict scrutiny in considering state Equal Rights Amendment challenge to Medicaid abortion funding restrictions); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 851-52 (N.M. 1998) (applying strict scrutiny to Medicaid abortion funding restriction under state Equal Rights Amendment); *Doe v. Maher*, 515 A.2d 134, 162 (Conn. Super. 1986). *See generally State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/state-constitutions-and-abortion-rights/> (last visited Mar. 31, 2024).

¹⁹⁴ To the extent that protection of prenatal life in the early stages of pregnancy is based on the belief that prenatal life must be protected as a legal person, the interest could be challenged as an illegitimate government purpose that seeks to codify a specific religious view in

are clearly not the least intrusive means to further the state interest. This is most evident in cases where abortion bans do not include an exception to allow pregnant people to have an abortion to preserve their own life or health,¹⁹⁵ but, even with health and life exceptions, criminal abortion bans are not the least intrusive means to protect prenatal life, given their ineffectiveness in preventing abortions, the public health harm they create, and the availability of alternative policies that protect prenatal life and respect the rights and wellbeing of pregnant people.

Some states depart from federal tiered review and apply sliding scale or balancing tests in equal protection and due process cases.¹⁹⁶ Under the balancing test employed by the New Jersey Supreme Court, the court considers the nature of the affected right, the extent to which the government restriction intrudes upon it, and the public need for the restriction.¹⁹⁷ A greater public need will be required when the restriction involves an important personal right.¹⁹⁸ Under this standard, criminal abortion laws, which impose the most extreme form of government intrusion on a highly personal right would require a high showing of public need. Here again, the ineffectiveness of criminal restrictions and legislatures' failure to adopt other less intrusive measures should be accorded great weight.

Finally, even if federal courts or state courts apply "rational basis" scrutiny, many states employ a more rigorous form of rational basis review than the "canonical" federal rational basis review.¹⁹⁹ Criminal abortion bans embody many

violation of the Establishment Clause. *See* Caroline Mala Corbin, Religion Clause Challenges to Abortion Bans, 104 B.U. L. REV 37, 43-45.

¹⁹⁵ State supreme courts in Oklahoma and North Dakota have held that their constitutions protect the right to abortion where the pregnant person's life (Oklahoma) or life and health (North Dakota) are in danger and have applied strict scrutiny to strike down criminal bans with inadequate medical exceptions. *Oklahoma Call for Reproductive Justice v. Drummond*, 526 P.3d 1123, 1131 (Okla. 2023); *Wrigley v. Romanick*, 988 N.W.2d 231, 244 (N.D. 2023).

¹⁹⁶ *See, e.g., Sojourner A. v. N.J. Dept. of Hum. Servs.*, 177 N.J. 318, 332-33 (2003) (holding New Jersey courts differ from the federal tiered approach to equal protection and due process claims, and instead employing a balancing test which considered the nature of the affected right, the extent to which the restriction intrudes upon it, and the public need for the restriction); *Premera Blue Cross v. State Dep't of Com.*, 171 P.3d 1110, 1121 (Alaska 2007) (holding that Alaska applies a sliding scale to equal protection analysis where the court considers the weight that should be afforded the constitutional interest impaired, the state's purpose, and the state's interest in the particular means to further its interests with the level of scrutiny determined by the nature of the constitutional interest).

¹⁹⁷ *Greenberg v. Kimmelman*, 99 N.J. 552, 567 (1985).

¹⁹⁸ *Taxpayers Ass'n of Weymouth Twp., Inc. v. Weymouth Twp.*, 80 N.J. 6, 43 (1976) ("[W]here an important personal right is affected by governmental action, this Court often requires the public authority to demonstrate a greater 'public need' than is typically required in construing the federal constitution").

¹⁹⁹ Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1319, 1345 (2018) (describing the canonical federal rational basis review as "almost empty," "enormously deferential" and "meaningless."); *see* Jessica Bulman-Pozen & Miriam Seifter,

of the characteristics typically associated with laws the Supreme Court has struck down applying rational basis review. These characteristics include burdening a significant right, immutability, and animus.²⁰⁰ Indeed, courts have held that hostility towards a particular group is not a legitimate government purpose under rational basis review.²⁰¹

In *Goodridge v. Dep't of Pub. Health*, the Massachusetts Supreme Court applied rational basis review to strike down a restriction on same-sex marriage.²⁰² The court held that state rational basis review requires a “reasonable relation to a permissible legislative objective” and the service of a “legitimate purpose in a rational way.”²⁰³ Due process requires “a real and substantial relation” to the state purpose, and equal protection requires that an impartial law maker could logically believe a classification “serves a legitimate public purpose that transcends the harm to the members of the disadvantaged class.”²⁰⁴ Under this standard, courts should consider the type of evidence that led the Mexican and Colombian courts to reject criminal abortion laws because they do not effectively further the laws’ purpose and are not an appropriate, reasonable, and proportionate exercise of state power. The factors courts should consider include: the ineffectiveness of criminal abortion laws²⁰⁵ and the affirmative harm they impose by endangering patients’ health and lives and preventing healthcare providers from providing appropriate medical care.²⁰⁶ Like the Mexican and Colombian

State Constitutional Rights and Democratic Proportionality, 123 COLUM. L. REV. 1855, 1891-92 n. 209 (2023) (collecting state cases applying more rigorous review); *see also* Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 26 (2005) (stating that rational basis in Massachusetts is “not an empty exercise” and requires “setting aside more fanciful or speculative notions of a law’s purposes and its connection to state interests”).

²⁰⁰ Scholars have suggested that the Supreme Court has been more likely to apply a heightened form of rational basis review in cases involving immutability and the burdening of a significant right. Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072 (2015); Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 335 (2013) (“[O]nce the Court detects animus, it will apply rational basis ‘with bite.’”).

²⁰¹ *Romer v. Evans*, 517 U.S. 620, 634 (1996) (ruling amendment to state constitution depriving gay people of protection under state antidiscrimination law was “born of animosity toward the class of person affected” and had no rational relation to a legitimate government purpose).

²⁰² *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 341-42 (Mass. 2003).

²⁰³ *Id.* at 329-30.

²⁰⁴ *Id.* at 330.

²⁰⁵ *See supra* 1. Ineffectiveness. *c.f.*, *Plyer v. Doe*, 457 U.S. 202, 228, n. 24 (1982) (noting that challenged law was an ineffective means to further the state’s purpose of controlling the influx of undocumented immigrants).

²⁰⁶ *See supra* 2. Harm Caused by Criminal Provisions, Especially to Vulnerable Communities; *c.f.* *Goodridge*, 440 Mass at 336, 341 (2003) (stating that it cannot be rational to penalize children by depriving them of state benefits by prohibiting the marriage of their same sex parents and noting the “deep and scarring hardship on a very real segment of the

courts, federal courts applying rational basis review in other contexts also have considered the disproportionate harm laws impose on minority communities,²⁰⁷ and courts should consider the disproportionate impact criminal abortion laws have on people of color and people living in poverty or in vulnerable situations.²⁰⁸ Finally, under a rational basis standard, courts should consider the harm imposed by criminal abortion laws that perpetuate stereotypes about women's reproductive capacity and their role in society.²⁰⁹

Professor Katie R. Eyer argues that rational basis review performs important normative work by inviting dialogue to undermine the presumed rationality of laws and change societal understandings.²¹⁰ For instance, early cases striking down bans on same sex marriage under a rational basis standard made the case to the public that there is no objectively reasonable, secular reason for discriminating against same sex couples.²¹¹ In these cases, "the courts presented the public again and again with findings that the reasons for excluding same-sex couples from the institution of marriage were simply irrational."²¹² According to Professor Eyer, the courts' repeated questioning of the factual underpinnings of the bans "helped spur a national conversation about same sex-marriage and ultimately created durable, nationwide constitutional change."²¹³ And, even in cases where judges have not struck down laws, they have engaged in powerful critiques questioning the rationality of laws that have spurred legislative and administrative change.²¹⁴

Similarly, even if challenges to criminal abortion laws are not successful, it is important for courts to consider and engage with evidence that criminal laws (1) are ineffective in protecting prenatal life, (2) impose real harm, including by endangering the life and health of pregnant people and undermining the delivery of health care, (3) violate the dignity and rights of pregnant people and reinforce stereotypes about women and reproduction, and (4) disproportionately impact vulnerable communities. Further, courts and the public should question whether the legislative decision to criminalize the provision of abortion, often with severe

community"); *Lewis v. Harris*, 188 N.J. 415, 453 (2006) (applying N.J. equal protecting balancing test to prohibition of same sex marriage and finding "no rational basis" for disadvantaging children of same-sex couples); *Romer*, 517 U.S. at 635 (stating that the "continuing, and real injuries" imposed by Amendment 2 "outrun and belie any legitimate justification that may be claimed for it").

²⁰⁷ Eyer, *supra* note 199, at 1348 (describing how judges applying rational basis review to challenges to disparities in crack and cocaine sentencing have consider the "devastating effects on the African-American community").

²⁰⁸ See *supra* 3. Impact on Constitutional Rights, Dignity and Non-Discrimination.

²⁰⁹ See *id.*; *c.f. Goodridge*, 440 Mass at 333 (noting the harm of perpetuating stereotypes).

²¹⁰ Eyer, *supra* note 199, at 1329, n. 59, 1333-4, 1358.

²¹¹ *Id.* at 1345, quoting Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 300 (2015).

²¹² Eyer, *supra* note 199, at 1360-61.

²¹³ *Id.* at 1362.

²¹⁴ *Id.* at 1349-50.

criminal penalties, to protect prenatal life is the least restrictive means, or even rational, in states that have taken little or no action to protect prenatal life through policies that support pregnant people and families.

CONCLUSION

Anticipating or following the overturn of *Roe v. Wade*, many states rushed to pass laws criminalizing the provision of abortions in almost all circumstances. Many of these laws have been, currently are, or will be challenged for violating rights protected under state constitutions. Further abortion opponents are likely to propose new state legislation to create, or increase, criminal penalties for abortions. In these instances, courts and legislatures should consider factors that have led human rights bodies and the Colombian and Mexican high courts to reject the use of criminal laws to regulate abortion.

Increasingly, countries and human rights bodies grappling with criminal abortion laws have rejected them — not only because they violate the rights of women and people who can become pregnant — but because they constitute an illegitimate use of the state’s coercive power. The Mexican and Colombian high courts emphasize that before adopting criminal penalties, legislatures should consider less restrictive alternatives, especially when criminal laws infringe on important constitutional concerns. The courts also emphasize that criminal penalties always must be a necessary, proportionate, and reasonable means to achieve a legitimate state interest.

In striking down criminal abortion laws, the Mexican and Colombian high courts stressed that constitutional concerns about human dignity and discrimination made criminal law an improper means to regulate abortion. They noted the extreme dignitary harm imposed when women are instrumentalized for a reproductive purpose using the threat of criminal law. In addition, because criminal abortion laws penalize conduct based on a sex-based difference, the courts found the use of criminal laws inherently suspect, especially in light of constitutional obligations to eliminate sex-based discrimination and gender-based stereotypes.

The Mexican and Colombian high courts also found that criminal abortion laws are not a necessary, reasonable, or proportionate exercise of state power given their inefficacy and the harm they impose. As shown by global statistics and emerging data in the United States, criminal abortion laws are ineffective in furthering the state interest in protecting prenatal life because they do not decrease the number of abortions. Instead, they force people to travel to obtain care or to end pregnancies outside of the formal health care system. Globally, criminal abortion laws have resulted in high rates of maternal mortality and in the United States, women and people who can become pregnant are facing compromised medical care that is endangering their lives and health. The Mexican and Colombian high courts also recognized the disproportionate harm that the criminal abortion laws imposed on vulnerable communities that already face structural discrimination, lack of resources, and under investment in health services.

When considering alternatives to criminal penalties, decision makers should reject the construct that protection for prenatal life is inherently in conflict with the rights of women and people who can become pregnant and consider policies that both protect prenatal life and support the rights, life, and health and autonomous choices of women and people who can become pregnant. These policies include support for sex education and contraceptive access, evidence based non-coercive information about pregnancy and abortion, access to quality prenatal and abortion care, health care, material support for families, and legal and policy protections for pregnant people and caregivers in education and the workplace.