

Legislating in the Post-Roe World:

Understanding Pregnancy Criminalization, Self-Managed Abortion,
and the Role of State Legislatures in the Future of Reproductive Justice

August 17, 2-3 p.m. ET



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for Pregnant Women

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when
how
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STATE INNOVATION EXCHANGE

About SiX's RFLC:

The Reproductive Freedom Leadership Council is a program of the State Innovation Exchange and the country's only network of state legislators who champion reproductive health, rights, and justice. With hundreds of state legislators from around the country, this network of visionary leaders is changing the game to achieve the equitable, resilient, healthy, and prosperous future we long to see - a future that includes reproductive freedom for all.



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Panelists



National Advocates
for Pregnant Women

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About NAPW:

NAPW combines legal advocacy, public education and organizing to achieve a country in which no one is arrested, shamed, or denied constitutional or human rights because they have the capacity for pregnancy, are pregnant, or because of any outcome of their pregnancies — including births, miscarriages, stillbirths and abortions. NAPW is committed to advancing the equal rights and personhood of all pregnant people including those most likely to be targeted for arrest, detention, and blame — low income women, women of color, and drug-using women.



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1,700

Since 1973, National Advocates for Pregnant Women has documented more than 1,700 instances across the country in which women have been arrested, prosecuted, convicted, detained, or forced to undergo medical interventions because of their pregnancy status or pregnancy outcomes.



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The Guide:



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Confronting Pregnancy Criminalization

**A Practical Guide for
Healthcare Providers,
Lawyers, Medical Examiners,
Child Welfare Workers,
and Policymakers**

June 2022

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Main Legislative Issues

- fetal personhood laws, feticide laws, etc.
- unnecessary reporting of pregnancy outcomes and prenatal conduct to CPS and law enforcement.
- drug testing requirements and mandatory reporting of positive toxicology tests
- unnecessary family separation based on of prenatal conduct
- forced medical interventions against pregnant women; right to information, informed consent, and medical decisionmaking
- extension of pregnancy criminalization across state borders

- Good laws are only as protective as people's access to them
- It only takes is one rogue prosecutor or decisionmaker to upend lives.



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Fetal Personhood : A Radical Movement with Wide-Ranging Ramifications



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Overview

- **11 states** have the **broadest personhood provisions**, which purport to extend to all laws as a general rule of construction or interpretation policy.
- At least **5 states** define person/individual/human being to include a fetus **throughout the state criminal code**.
- At least **27 states** include personhood language in anti-abortion laws (not necessarily extending to other laws).
- **38 states** have **feticide laws**. 8 of those laws define person/another to include a fetus within homicide laws.
- **Every state** has **statutory and/or case law defining person to include a fetus for at least some purpose** (e.g., trusts & estates, child abuse, wrongful death, workers' compensation, insurance).

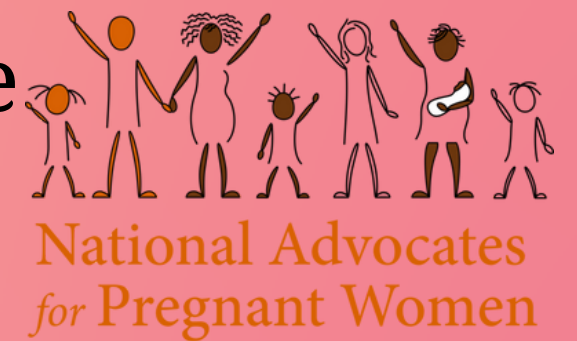


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The Broadest Personhood Laws

e.g., Mo. Rev. Stat. § 1.205

Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, **all the rights, privileges, and immunities available to other persons, citizens, and residents of this state**, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.



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Feticide Laws

- 38 states have fetal homicide/feticide laws. 8 of those laws define "person"/"another" to include a fetus within homicide laws.
- intended to protect pregnant people but prosecutors have weaponized them to criminalize pregnancy
- post-Dobbs, could be weaponized against abortion, IVF, and contraception



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Child Abuse Laws

- Highest courts in AL, OK, & SC interpreted "child" to include a fetus in criminal child abuse statutes, fueling acceleration of pregnancy criminalization
- 24 states + D.C. consider substance use during pregnancy to be child abuse under civil child welfare statutes



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Civil Wrongful Death Claims

Wrongful death statutes have been amended or interpreted in **40+ states** to include fetuses within the definition of “person” or otherwise allow recovery for fetal death.



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Former partners and anti-abortion activists have used wrongful death laws as a **tool to punish people for having abortions and intimidate abortion providers.**



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Negligence Claims Against Mothers

A woman who was seven months pregnant was struck by a car while crossing the street and, the next day, delivered her daughter by emergency cesarean surgery. The New Hampshire Sup. Ct. permitted the child to sue her mother for “failing to use reasonable care in crossing the street and failing to use a designated crosswalk.”

Bonte v. Bonte, 616 A.2d 464 (N.H. 1992)



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A legal duty of a mother to a fetus could “govern such details...as her diet, sleep, exercise, sexual activity, work and living environment, and, of course, nearly every aspect of her health care” – “the mother’s every waking and sleeping moment.”

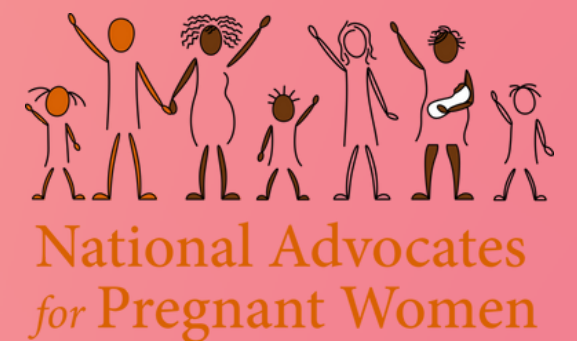
– dissenters in *Bonte v. Bonte*



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Implications of Personhood

- Denial of medical care (e.g., miscarriage; prescription medications)
- Forced medical interventions (e.g., C-sections, blood transfusions)
- Bans or restrictions on contraception
- Bans or restrictions on IVF & embryonic research
- (Former) partners suing to block abortions or harass partners who have already received abortions
- Child support
- Taxes (fetuses as "minor dependents")
- Bizarre applications, e.g., carpool lanes; age (child molestation, statutory rape; voting; candidacy)
- ...and more



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When fetuses gain personhood, pregnant people lose it.

Personhood laws are weaponized again and again to deny people with capacity for pregnancy their own full constitutional personhood.



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Recommendations

- Repeal or reject personhood laws
- Pass affirmative laws rejecting personhood
- Reduce the harm of existing laws
 - Careful wording
 - Explicit limits
 - Clear exclusions



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Pass Laws Rejecting Personhood

Reproductive Health Equity Act
(Colo. Rev. Stat. Ann. § 25-6-403)

"A fertilized egg, embryo, or fetus **does not have independent or derivative rights** under the laws of this state."



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The definition of “Natural Persons” throughout Puerto Rico’s Civil Code (31 L.P.R.A. § 81):

“Birth determines civil personality and capacity. A child shall be considered as born when completely separated from his mother's womb.”



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Careful Wording & Clear Limits

Colorado's civil statute allowing recovery of damages for unlawful termination of pregnancy & criminal statute for "Offenses Against Pregnant Women" contain the caveat:

"Nothing in this part...shall be construed to confer the status of 'person' upon a human embryo, fetus, or unborn child at any stage of development prior to live birth."

Both statutes **exclude pregnant people & medical providers** from liability or prosecution.



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If/When/How is a national nonprofit that trains, networks, and mobilizes law students and legal professionals to work within and beyond the legal system to champion reproductive justice.

We believe that achieving reproductive justice will take thoughtful action and strategic activism: acknowledging the intersection of identities, collaborating across disciplines, and working toward a critical transformation of the current legal system. Because ensuring that all people have the right to decide if/when/how to create families depends entirely on if, when, and how hard we fight.

WHY WE DO THIS WORK



Purvi Patel has 20-year sentence for inducing own abortion reduced

Indiana appeals court ruling means prison sentence for conviction, the first of its kind in the US, will be shortened by at least a decade

THE SLATEST

Georgia Woman Charged With Murder For Taking Abortion Pill, Could Face the Death Penalty

By MARK JOSEPH STERN

JUNE 09, 2015 • 2:08 PM



What is self-managed abortion?

Self-managed abortion may include the use of pharmaceutical pills, traditional herbs and plant-based medicine, or other means to end a pregnancy.

It is as old as pregnancy itself, and with new medical technologies, safe abortion outside the clinic is becoming more widespread and accessible.



Why do people self-manage?



STIGMA FURTHERS CRIMINALIZATION

Graphic from Cockrill et al., Addressing Abortion Stigma Through Service Delivery, The Sea Change Program, Advancing New Standards in Reproductive Health, and Ibis Reproductive Health, September 13, 2013.

LEVELS OF ABORTION STIGMA



LAWS USED TO CRIMINALIZE PEOPLE

Abortion Laws

pre-Roe laws banning self-managed abortion

pre-Roe laws criminalizing abortion generally

Drug Laws

Fetal Harm Laws

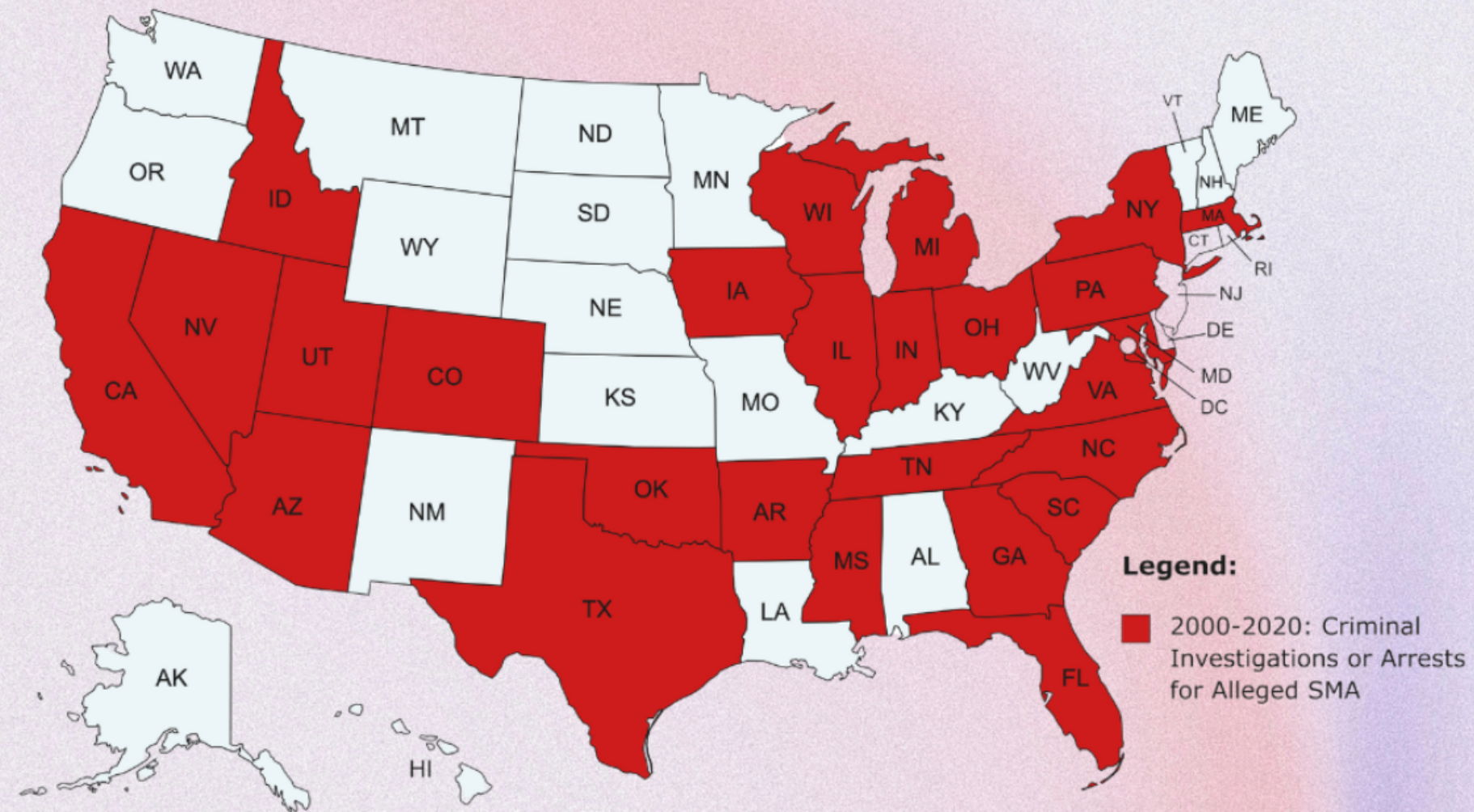
The Kitchen Sink





Self Care, Criminalized: August 2022 Preliminary Findings

Mapping abortion criminalization.



From 2000 to 2020, If/When/How identified 61 cases of people criminally investigated or arrested for allegedly ending their own pregnancy or helping someone else do so.

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45% CARE PROVIDERS

How Adult Cases Came to the Attention of Law Enforcement

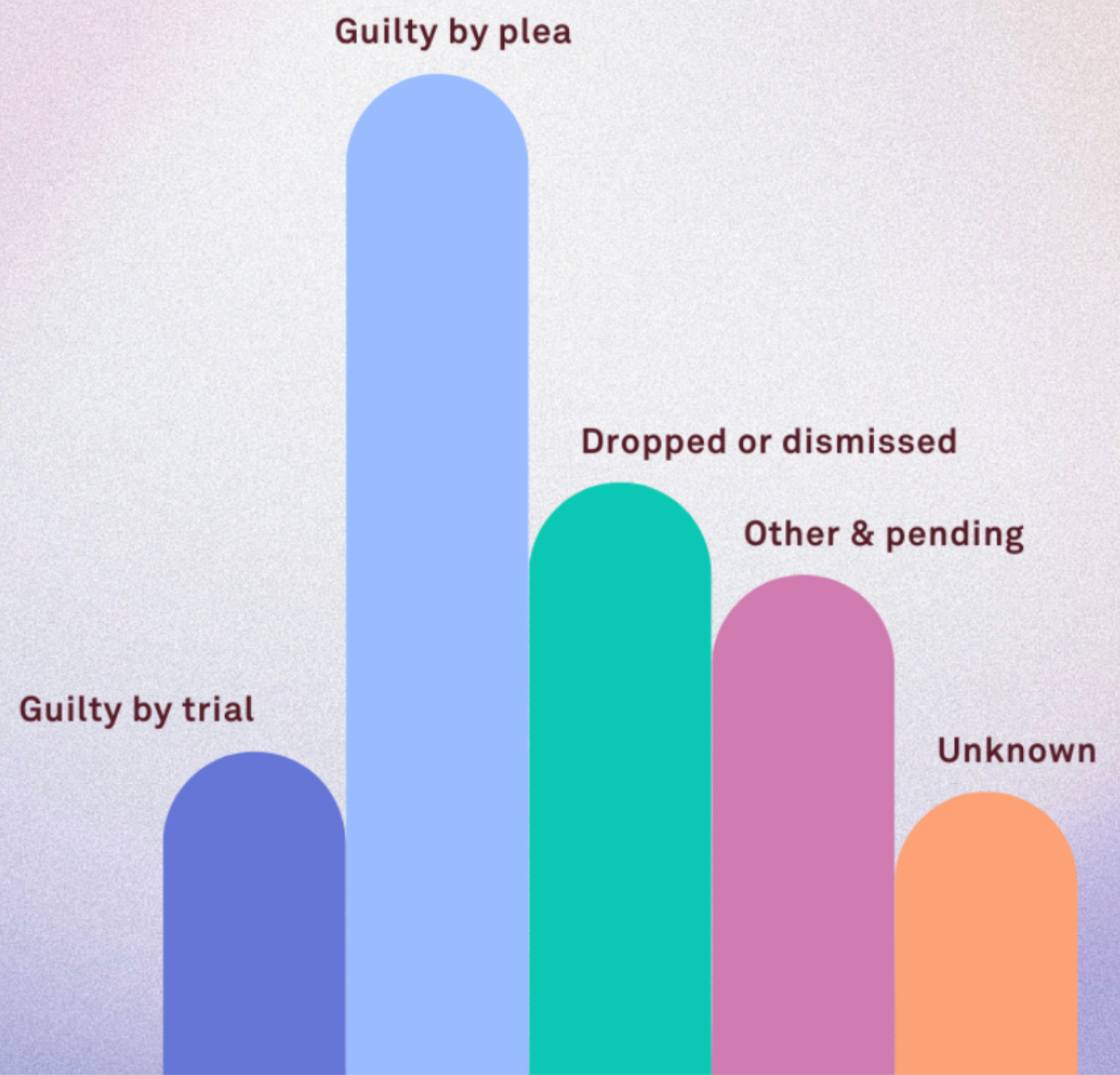
tinyurl.com/SelfCareCriminalizedBrief

11% UNKNOWN

18% OTHER

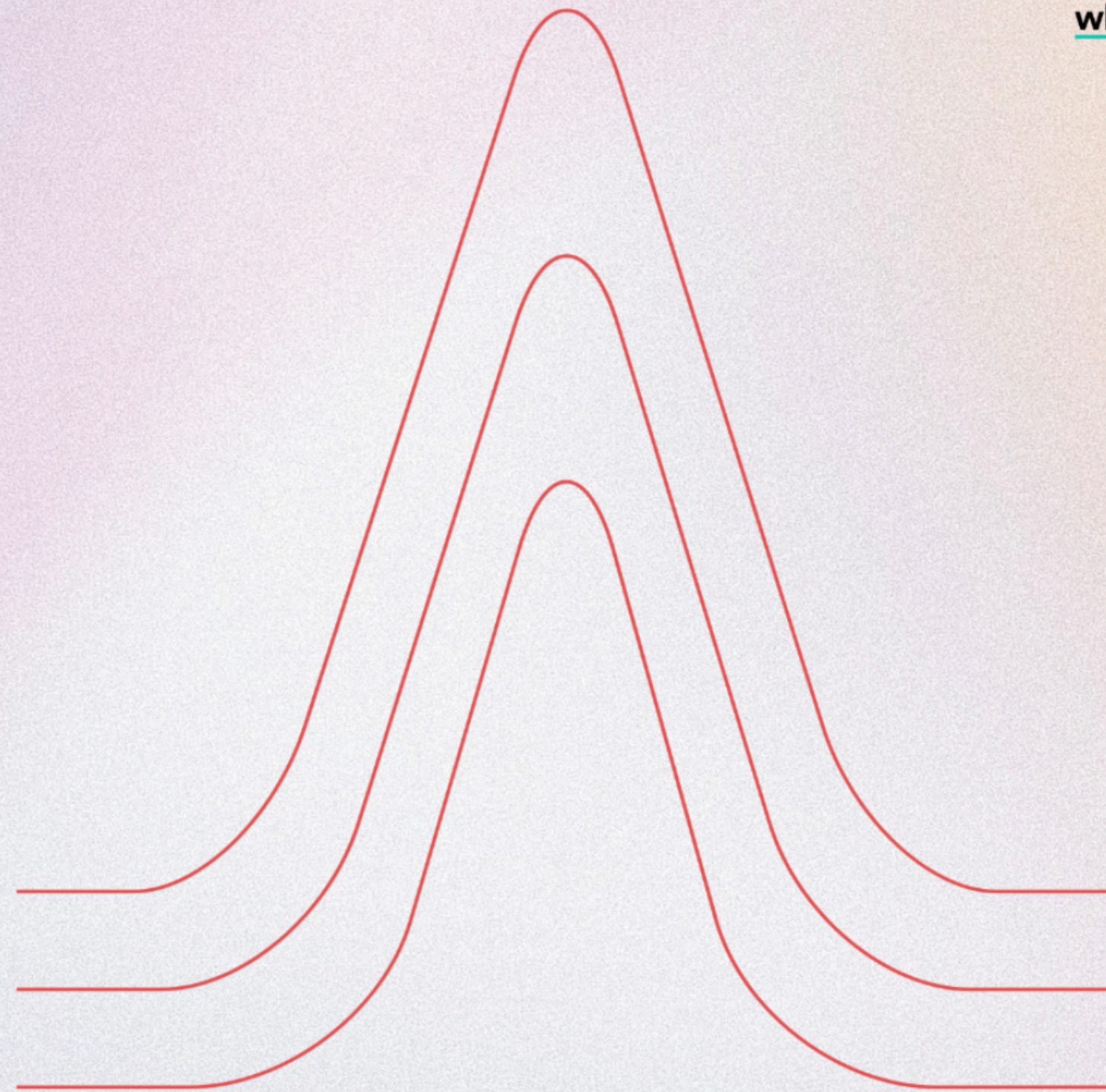
26% ACQUAINTANCES

Outcomes of self-managed abortion cases that went to court



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People who already face the heights of targeting and state surveillance — Black, Brown, Indigenous folks, and queer folks, people with low incomes, immigrants, and young people — are often more likely to be criminalized.



Policy Solutions

Repeal

Remove any and all statutes that can possibly be used to charge people with a crime against a fetus they are carrying

Reform

Where repeal of statutes that create risks of criminalization (such as feticide laws or criminal abortion laws targeting providers) is not politically feasible, advocates should consider reforming the statutes to ensure that pregnant people cannot be charged for abortions or pregnancy losses

Reinforce

Statutory frameworks should protect abortion rights and prohibit *any* criminal prosecution for abortion, miscarriage, or other pregnancy outcomes

Protect people who self-manage abortion by ensuring that acts *by others* that they consent to are not criminalized

Repeal

In 2021, Delaware's **HB 31** **repealed** its SMA criminal statute, which classified abortion as a crime and went a step further by declaring that a person who ends their own pregnancy or “submits to an abortion” can be charged with the misdemeanor crime of “self-abortion” (DE Code § 652).

Reform

Louisiana's **SB 388**, passed in 2022, prohibits abortion medications access & added criminal penalties to a 2020 law that prohibits the mailing of mifepristone and misoprostol. Advocates there knew that the law was going to pass, but they **forced several amendments** that ensure that **pregnant people can't be charged** for SMA or for possessing abortion medications.

Reinforce

California's **AB 2223** would ensure that no one in the State of California is investigated, prosecuted, or jailed for ending a pregnancy or experiencing pregnancy loss by **updating out-of-date provisions** that give coroners a duty to investigate certain pregnancy losses, including abortion care. **Includes a private right of action** for people whose reproductive rights have been violated to **seek accountability and redress**.

If/When/How: We can help!

In collaboration with state legislators, RJ orgs, and advocates, we can provide:

- Policy Analysis
- Model Bills
- Talking Points
- Drafting Support
- Testimony
- Connections with people who've experienced criminalization
- Training & media support
- And more!

Nicole A. Williams, Esq.

Maryland House of Delegates
Democrat, District 22,
Prince George's County



Nicole A. Williams, Esq.

Title	Pregnant Person's Freedom Act of 2022
Sponsored by	Delegates Williams , Acevero , Amprey , Atterbeary , Bartlett , Boyce , Carr , Charkoudian , Charles , Crutchfield , Cullison , Feldmark , W. Fisher , Foley , Forbes , Guyton , Hill , Ivey , Jalisi , D. Jones , R. Jones , Kelly , Korman , Lehman , J. Lewis , R. Lewis , Lierman , Lopez , Love , Luedtke , McIntosh , Moon , Palakovich Carr , Pena-Melnyk , Qi , Queen , Reznik , Ruth , Shetty , Smith , Solomon , Stein , Stewart , Terrasa , Washington , Wells , Wilkins , and K. Young
Status	In the House - Hearing 3/11 at 1:00 p.m.

Synopsis: Altering certain provisions of law relating to the termination of a pregnancy and investigations of or criminal penalties or civil liabilities for a pregnant person or a person assisting a pregnant person; prohibiting a certain provision of law that requires the termination of a pregnancy by a licensed physician from being construed to apply to a pregnant person who terminates the person's own pregnancy under any circumstances; etc.

