

Boom! Lawyered 203: Pregnant and Going to the Doctor? You Might End Up in Jail

- Imani Gandy: Hello, fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire Radio podcast hosted by the legal journalism team that is really excited about Black Panther. Wakanda forever! I'm Imani Gandy.
- Jess Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary, and analysis on the web, and the Team Legal podcast is part of that mission, so thank you so much for listening and subscribing.
- Imani Gandy: Yes, thank you. We love you, you love us. It's a love.
- Jess Pieklo: Everybody's in a good mood because of Black Panther.
- Imani Gandy: We really are.
- Jess Pieklo: So today, we're going to talk about law and policies that pipeline pregnant people into the criminal justice system, and how they intersect with attacks on abortion rights and access. We're going to start with a look at the legal doctrine that gives states the power to act on behalf of a fetus, and a Supreme Court case that dealt specifically with a hospital in Charleston, South Carolina and its policy of having pregnant patients who tested positive for cocaine arrested.
- Imani Gandy: Then we're going to talk to the amazing reproductive justice advocates at the SIA Legal Team, and hear about their work on behalf of people who have, or may need to in the future, self-induce an abortion, which is what "SIA" means: Self-Induced Abortions. And then we're going to get to listener reviews, because we have some this week, because you guys are awesome.
- Jess Pieklo: Yay!
- Imani Gandy: So first off, we are going to talk about the power of the state, or "in parens patriae."
- Jess Pieklo: "In parens" what?
- Imani Gandy: "In parens patriae." It's Latin for, quote, "parent of his or her country." Basically, the state has power to act as guardian for those who are unable to care for themselves, such as children or disabled individuals.
- Jess Pieklo: Under this doctrine, a judge has the power to do things like change a custody or a child support order over a parent's objections, or take kids into custody for claims of abuse and neglect against their parent, that kind of thing. The idea is that the state has this parental obligation, and can make decisions it deems in the best interest of a child.

Imani Gandy: This gets really weird in the law, because a lot of this power gets worked out in the criminal justice system, or in the quasi-criminal justice system, like family court or in guardianship proceedings. It is a tremendous amount of power that the state has, and not surprisingly, it's often wielded unchecked against people of color, especially pregnant people.

Jess Pieklo: That's just shocking.

Imani Gandy: Isn't it, though? I, for one, cannot believe that pregnant people in this country are under siege. [dog barks, laughing] And neither can a dog somewhere in the distance.

Jess Pieklo: Ripley is really pissed. She's pissed and is coming for us. Amazing she's been quiet this whole time up until now. How is this power really used to screw pregnant people?

Imani Gandy: Well, it's used in a lot of ways, like law enforcement coordinating with doctors to shuffle drug-addicted pregnant people into the criminal justice system or into some sort of civil proceeding, which might ultimately lead to them losing their kid or being forced into some sort of treatment program.

Jess Pieklo: That totally doesn't seem like a compassionate way to deal with drug use issues.

Imani Gandy: It's not. It really, really isn't. It's also a pretty severe violation of trust. Imagine going to see a doctor, and then ending up in jail. That's what's happening. Imagine if you have a drug addiction, let's say it's meth, and you find out that you're pregnant. You want to kick your habit and do all the prenatal stuff that you're supposed to do because you're really happy about being pregnant and you want to maintain this pregnancy. But you also have an addiction to meth, and that's a really hard habit to kick. So what do you do? Well, you go to the doctor, right? You'd go to the doctor, you'd ask the doctor to perhaps recommend a substance abuse treatment program. But what if instead of flat-out helping you, your doctor takes a look at you and decides to get law enforcement involved? So instead of your doctor working to help you, your doctor is working to help the police, and good things rarely happen to pregnant people when the police get involved.

Jess Pieklo: No kidding. This is all a nightmare.

Imani Gandy: It really is, and the scope of these laws are problematic. For example, they don't account for prescription medication, so if you have been prescribed some sort of narcotic that the police think or the doctors think may or may not harm your baby, you can get in trouble for that. These laws also tend to entrap women of color and poor women more than white women due to inherent biases. Remember, doctors are people, too, and they're more inclined to call the police if a poor woman shows up with a meth addiction than if a wealthy white woman shows up with a Valium addiction. Also, due to high maternal mortality rates among black women, black women are more likely to come in contact with

healthcare workers, and that increases the risk that those healthcare workers will get law enforcement involved in their pregnancy.

Jess Pieklo: And, not surprisingly, the Supreme Court hasn't exactly helped in this arena, either.

Imani Gandy: No, it has not, and we're going to talk about that after the break.

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Jess Pieklo: All right, so let's talk about *Ferguson v. City of Charleston*, a Supreme Court case that looked at drug testing pregnant people just because they were pregnant. In 1989, in Charleston, South Carolina, officials from the Medical University of South Carolina wanted to address concerns they had about cocaine use in pregnancy.

Imani Gandy: Wasn't that the same year that Charles Krauthammer and *The Washington Post* basically created, out of whole cloth, the quote-unquote "crack baby panic"?

Jess Pieklo: It sure was.

Imani Gandy: Ugh. I have a really interesting story about crack baby panic, but I'm going to save it for later in the show. But yeah, ugh.

Jess Pieklo: Exactly. And so you can already see where this is going to go, right? First, the hospital began to order drug screens to be performed on the urine samples from maternity patients who were suspected of using cocaine. If a patient tested positive, those patients were then referred to county substance abuse commissions for counseling and treatment.

Imani Gandy: Okay, well, that doesn't sound too horrible. I mean, getting patients into treatment seems like a reasonable idea.

Jess Pieklo: It does, right? I mean, and it also seems like part of the aim of healthcare providers, which is getting patients help for healthcare-related issues. But as the policy went on, the hospital staff didn't see a change in the number of patients testing positive for cocaine, and this really bothered them. So they came up with a new search and arrest policy with local law enforcement, and it's terrible.

Imani Gandy: Oh boy.

Jess Pieklo: Yeah, it's really bad.

Imani Gandy: That sounds like a really, really bad idea.

Jess Pieklo: And how it came about, according to the court documents, is just as terrible. A nurse, who was also a case manager for the hospital's OB department, heard of a news report of police in a neighboring town arresting pregnant cocaine users on the theory that the use harmed the fetus and was therefore child abuse. So the nurse went to the hospital's general counsel, the hospital's attorney, who then contacted the local prosecuting attorney's office and said, "Hey, the hospital is totally down to help prosecute patients whose newborns test positive for drugs at birth."

Imani Gandy: I think the idea that it's the people who are using cocaine that are the child abusers, when in my estimation, as a child who actually thought that they were a crack baby, it's the people who developed this crack baby panic that are the real child abusers. Let me ... I'm just going to tell you this story real quick. I was adopted when I was three months old. I've always known that I'm adopted; my parents have always told me. I love my parents to death. I have no interest in finding out anything about my bio parents because it would be basically like meeting strangers. But, as kids are wont to do, I was a bit of an asshole when I was a child, and so I was a-

Jess Pieklo: As a parent, I can confirm kids are wont to do this.

Imani Gandy: Right? And so I would say stuff like, "You're not my real mom, and you're not my real dad." And I would sit and I would wonder who my real mom was. What was my real mom like? And it just ... because at the same time, I was going through this crisis, and as I was going through this crisis, there was all of this news about crack babies and "how horrible they are, and they're a drain on society, and they're going to turn out to be criminals, and they've got problems." And I

thought to myself, "Well, I've got problems. I sometimes feel like I'm a drain on society. I don't know who my mom is. I must be a crack baby." And literally for about a decade, and maybe even more, I thought I was literally a crack baby, until years later, I had a medical issue that requires my mom to actually do some digging about who my bio mom was, and you know what?

My biological mom was an upper-middle class black chick who got pregnant in high school and decided to give me up because she wanted to go to law school and be a lawyer like her dad. That's weird. Somewhere out there is a woman who's probably like 16 years older than me that's a lawyer. I was born in Mountain View, California, and I live kind of close to Mountain View, California now, so I don't know. That's a total side story, and the relevance is that this crack baby panic really did emotional harm to black children, to children who were affected by this sort of rhetoric, and believed that there was something wrong with them because the media was saturated with this kind of language.

Jess Pieklo:

And, I mean, that story is just so right on for so many ways. I mean, it did real harm in your life, and then we have the case here in Ferguson, with prosecutors getting all whipped up about creating an entirely new class of potential criminals, right? Pregnant women. And here they are in a hospital, holding meetings and drafting a handbook for how to implement a policy that's just going to basically blanket drug test and target poor black women. And so this is the kind of thing that they did. The handbook included policies and instructions on how to handle the urine samples, for example, so the chain of custody wouldn't get contaminated. And "chain of custody" is an evidentiary term that deals with how prosecutors and law enforcement deal with evidence, and if that chain of custody is contaminated, then the chances of getting a prosecution and conviction go down dramatically.

Under this policy, the hospital staff searched a targeted group of pregnant women for evidence of cocaine use, so that they could then be arrested for crimes like possession of drugs, child neglect, distribution of drugs to a person under 18, those kinds of things. And what's wild is these patients didn't know about, or they didn't consent to the drug screen. They were doing the right thing: They were going in and getting routine prenatal care. That's what they'd given their urine samples for, not a drug test. But then, they were all of a sudden whipped up into the criminal justice system.

Imani Gandy:

Yeah, these stories are horrible, and it really bothers me that all of this harm was caused to real, live people because of some bullshit that the media decided to create out of panic, out of fear. And especially in this case, you have the hospitals that are helping police arrest patients sometimes mere hours after they give birth. They're carting them off from a hospital bed in handcuffs and shackles. Some patients were even still bleeding, according to court records. Some were arrested, some were thrown in jail while they were pregnant, and it's not like jail is providing excellent prenatal care, or really any sort of prenatal care or treatment options for these people.

Jess Pieklo: Right?

Imani Gandy: It's very frustrating, but fortunately, attorneys sued on behalf of 10 women who were targeted by this policy. The case went all the way up to the Supreme Court. The court ruled against the policy, holding that the searches, which were conducted without warrants or probable cause, violated the Fourth Amendment. Justice John Paul Stevens wrote the majority, Ginsberg, Breyer, O'Connor, and Souter joined. Kennedy filed an opinion concurring in the judgment. Scalia dissented, and Thomas and Rehnquist joined in his dissent.

Jess Pieklo: Let's talk about this decision for a little bit here. Generally speaking, a drug test is a search within the meaning of the Fourth Amendment, and as any of you who've seen an episode of Law & Order know, that search needs to be reasonable, and that generally means conducted with a warrant based on probable cause.

Imani Gandy: So what's probable cause? "Probable cause" is when police have a quote "reasonable basis" to believe that a crime has been committed. If you can't get a warrant, a search can still be okay because the law has some exceptions to the warrant requirement. Of course there are exceptions to the warrant requirement, because lawyers love us some exceptions. In this case, it's the special needs exception. And that just says that some exceptional circumstances may justify a search if that search is designed to meet non-law enforcement ends first and foremost.

Jess Pieklo: What would be some examples of something that would be an exceptional circumstance?

Imani Gandy: We're talking about stuff like drug testing high school athletes, because high school athletes have a less reasonable expectation of privacy. We're talking about drug testing train operators, because the last thing we want are drunk people driving trains, because then they're liable to jump off the tracks and drive into, I don't know, Disneyland. We're also ... [laughter]

Jess Pieklo: That's terrible.

Imani Gandy: It could happen. It could happen.

Jess Pieklo: I'm picturing some horrific monorail accident right now.

Imani Gandy: No, with Mickey going, "No! No!" [laughter] Also, we're talking about things like sobriety checkpoints. Those are the sorts of things that constitute exceptional circumstances. So Jess, I have a question for you. What was the state's reason for drug testing pregnant people willy-nilly, in cahoots with the hospital?

Jess Pieklo: Well, the state was trying to defend the hospital, and said that the purpose of the policy was benevolent, that what they were doing was protecting the health of both the patient and the developing pregnancy. Thankfully, though, the court

didn't buy it, and it said that the policy's, quote, "central and indispensable feature from its inception was the use of law enforcement to coerce patients into substance abuse treatment." In other words, the hospital was basically acting as an arm of law enforcement with its policy. This wasn't hospital employees being suspicious of a particular patient who was using illegal drugs during their pregnancy, and proceeding from there to try and help secure some care for the patient. This was a policy of testing for drugs for the purpose of arrest and prosecution.

Imani Gandy: This is all good news. Not the drug testing pregnant people and arresting them and prosecuting them, but the fact that the Court didn't buy the argument. But leave it to Justice Kennedy to rain on the parade with his fetus fetishism. Kennedy wrote a concurring opinion that basically said the state has a legitimate interest in fetal life, and then he proceeded to suggest the idea that the state could drug test and prosecute to protect a developing pregnancy. That was okay, it was just that this particular policy that this hospital was utilizing was really, really bad.

Jess Pieklo: And can I just say? This drives me bananas here, because talk about fetus fetish. This is absolutely what Kennedy has going on. This is not an abortion case. This has nothing to do with abortion, in terms of the law as it was posed before the court, and what does he do? He reaches into abortion case law to justify a policy that, in the future, would be okay to just strip pregnant people of their constitutional rights.

Imani Gandy: So in other words, Kennedy doesn't even pretend to care about resources for the pregnant person. He's all about punishing them.

Jess Pieklo: These cases teach us two things. One is that policies that punish pregnant people for using drugs are, and should be, unconstitutional. Being pregnant does not create an automatic state of probable cause for the state to go in searching you under the guise that you might be doing something to hurt your developing pregnancy.

Imani Gandy: And besides the fact, these laws are perverse. They actually incentivize people to get abortions. If you are a drug-addicted person, and you want to maintain a pregnancy but you don't want to be thrown in jail, and if you know that if you give birth to a child that is somehow dependent on drugs that you might get thrown in jail, what's your option? To have an abortion. And so therefore, this policy actually encourages women, pregnant people, to have abortions that they otherwise would not have.

Jess Pieklo: It's terrifying, and it's creating a real surveillance state. What we've seen from these cases, also, is that conservatives have been using the criminal justice system to police pregnant people for a long, long time now. And our guests from the SIA Legal Team are going to tell us more about that in just a minute.

We are lucky to have with us Jill Adams and Farah Diaz-Tello, two tremendous legal advocates from the SIA Legal Team. "SIA" stands for Self-Induced Abortion. Thank you both so much for joining us.

Jill Adams: Thanks for having us.

Farah DiazTello: Yeah, I'm glad to be here.

Jess Pieklo: Of course. First of all, I'd like it if you could just tell us a little bit about yourselves and SIA. How did the organization come to be? How did both of you get into doing birth justice work?

Jill Adams: Sure. The SIA Legal Team envisions a future when everyone can self-determine their reproductive lives and access care that meets their needs and upholds their dignity, and we're accomplishing this by transforming the legal landscape, so people who end their own pregnancies can do so with dignity and without punishment. Where did we come from? Well, we arose at the request of reproductive health and justice advocates, mostly grassroots activists who interface with people considering ending their own pregnancies, who were coming to legal advocacy organizations with questions that felt increasingly pressing in the face of high-profile arrests and disappearing options for clinic-based care. And so by responding to these requests and inquiries over the years, we've just organically grown into the go-to expert resource for all things law and policy related to self-managed abortion. It's a role we're honored and we're grateful to play, and we really feel we're seizing this rare opportunity to get ahead of abortion opponents and shape this issue on our terms, with the most impacted communities in the foreground and with our sharpest minds in the vanguard.

So we're coming at this from every useful angle, advancing multi-faceted strategies to increase access, to eliminate penalties, and to increase protections for those who self-manage their abortion. To break it down briefly, our work encompasses research; theory; scholarship; know-your-rights materials and trainings for diverse stakeholders; engagement with governmental bodies at the state, national, and international levels; criminal defense; civil litigation; and a ton of behind-the-scenes technical assistance and support to our friends and colleagues.

Farah Diaz-Tello: And I particularly appreciate the question about birth justice. First of all, because birthing is what brought me to lawyering in service of reproductive justice, but also because I suspect a lot of people wouldn't think that work relating to abortion is birth justice work. But the truth is, you don't have to get very far below the surface to see that they're actually contiguous. So issues related to birthing and to self-managed abortion really invoke a lot of the same tropes, especially this paternalistic notion that pregnant people need to be protected from themselves by any means necessary. And they share a lot of the same tensions with scientific and medical authority, not to mention legal authority, because obviously, abortion and birth predate all of these. They also share an

intertwined history with criminalization, so ... a little nerd digression. At common law, most abortion was considered legal, and it was considered a liberty possessed by the pregnant person, and in the US, it was fairly common to see advertisements for tinctures and pills for quote-unquote "female complaints," or "to restore the menses." And these were just openly in newspapers.

And it wasn't until the second half of the 19th century, when medicine started to become professionalized, that states started passing criminal abortion laws at the behest of none other than the newly-established American Medical Association. So physicians were trying to gain a foothold in obstetrics and gynecology by claiming moral authority on the basis of superior knowledge of fetuses, and by criminalizing their competition, which was midwives and community healers, out of existence.

Imani Gandy: That's interesting. Can you explain to our listeners what birth justice is, and any way it might differ from reproductive justice?

Farah Diaz-Tello: Yeah. I really see birth justice as being overlapping, or perhaps like it's a subset of concerns within reproductive justice. So birth justice is about really ensuring that people have access, in law and in fact, to respectful care during pregnancy and birth, that they're not faced with criminalization or threats by the state or private parties. When they're trying to get pregnant, give birth, they're receiving medical care that's going to let them have a healthy pregnancy. As we see in the United States, we have these vast disparities in maternal and infant outcomes based on race, and these are all affronts to birth justice. Essentially, it's taking the reproductive justice framework and zooming in on pregnancy and birthing, and it's really connected with abortion care, because an integral part of birth justice is people being able to decide when medical systems of care serve them and when they don't, and being able to seek healers who are within their cultural and community practice, and find the care that meets their needs and respects their dignity.

Jess Pieklo: You guys mentioned a whole lot of things that your organization and your advocacy does, but I'm wondering if you could break that apart a little bit and give our listeners some concrete examples of advocacy work. We're going to talk about cases in a little bit, but some of the other types of work that SIA and that you folks are involved in.

Farah Diaz-Tello: Yeah, so this kind of work ... I'll use a sports metaphor. It's kind of like roller derby. It involves playing offense and defense at the same time. Maybe there are other sports that do that; I'm not aware, because I don't do other sports. But states are in many different places on the issue of self-induced abortion, and it's not always where you would expect them to be. Take, for instance, New York, right? It liberalized its abortion laws in 1971, and then stayed there. So unfortunately, because the law was changed before Roe v. Wade, it retained some elements that don't really pass constitutional muster now. They're kind of crystallized in amber. Namely, those are the crimes of "self-abortion," quote-

unquote ... That's a terrible name for a statute ... in the first and second degree, which punished people for ending or even attempting to end a pregnancy.

So ironically, while people in the metropolitan areas of the state enjoy easier access to abortion than people in most parts of the country do, those who need or choose to end a pregnancy on their own risk arrest. So in that state, we've been working with advocates like the National Institute for Reproductive Health, and the New York Civil Liberties Union, and emerging grassroots groups like Rally+Rise, and all of these groups have been stuck in this longstanding deadlock in Albany with the Senate Republicans who think that New Yorkers have it good enough when it comes to abortion, and they won't even take steps to remove abortion from the penal code.

Then, on the other side, you have states like Indiana, which was, of course, the stage for one of the harshest, most high-profile prosecutions of someone who allegedly ended her own pregnancy, Purvi Patel. And based on the case law established by the decision in her case, Hoosiers can't be charged with a crime for ending a pregnancy, but the legislature definitely wants to make them feel like criminals, so right now, they've been fighting over a proposal that is supposedly about collecting public health information about abortion complications. But in fact, what it would require is for healthcare providers to essentially interrogate their patients who self-induce to find out how and where they obtained medications. So we've been working with groups like All-Options, Indy Feminists, Planned Parenthood, and ACOG to fight off laws that would make reproductive healthcare a threatening space instead of a safe one. That's all to say that we have the simultaneous tasks of repealing, reforming, and re-envisioning the law so that it doesn't pose a threat to people who end or lose a pregnancy.

Jill Adams:

And in addition to the kinds of advocacy Farah just described, the SIA Legal Team also has in place criminal and civil litigation strategies; the latter, which will directly challenge problematic laws, and the former, which integrates novel theories and powerful arguments to bolster defense claims and establish more good precedent in this area. We're excited to be building a nationwide legal defense and hotline referral network of attorneys who can answer questions and provide local support for people arrested for alleged acts related to self-managed abortion. The hotline's not up yet, but we will be announcing that broadly when it is. And also, to be clear, criminal defense attorneys aren't the only lawyers we're organizing. We know that criminalization of self-induced abortion is a cause for concern among many people, including lawyers with wide-ranging areas of expertise that can benefit the cause. So we're building a cadre of tax attorneys and internet lawyers, legal scholars, administrative law experts and more, who want to leverage their skills and their privilege to halt this illegitimate criminalization.

And also, in terms of advocacy work, we're equipping and empowering other advocates by putting knowledge into their hands. So we've published more than 25 reports, scholarly articles, resources for the media, professionals, and folks in

the repro health rights and justice field. And then as I mentioned briefly earlier, we also give a lot of presentations and trainings. I think we've done well over 50 presentations, and provided technical assistance to more than 40 defense attorneys and organizations with whom we find common cause.

Jess Pieklo: Are these attorneys that you're doing presentations for, have you found that they are sort of surprised by the pressing nature of it? Or this is on their radar and frankly, they're happy to have a spot, finally a central location, if you will, of organizing and resources?

Jill Adams: More often than not, it's the former. Lawyers, like most members of the general public, aren't aware of self-managed abortion. They don't realize that it's something of the present, not only of the past. Furthermore, they don't realize that this isn't the self-induced abortion of the days of yore. We've moved far beyond the coat hanger abortion in that, with access to accurate information, reliable methods, backup confidential medical care should it be needed, people can end pregnancies outside the formal healthcare system safely and effectively. And that, in this day and age, it's not physical threats from unsafe methods that are dangerous, it's actually the hand of the state that is posing the greatest threat and harm. And so that seems to come as a surprise to most lawyers we speak with, and they're outraged when they find out that this is the case. Many lawyers appreciate the rule of law, and to find out that overzealous prosecutors are really contorting the law, and misapplying laws far beyond their legislative intent or the letter of the law itself, can be pretty infuriating, but also animating to attorneys.

Imani Gandy: So this is an episode that we are talking about how the state pipelines pregnant people into the criminal justice system, and we talked about Ferguson v. City of Charleston, which is the South Carolina case, and how that case involved drug testing pregnant people. But there are also so many less obvious ways that criminalization of pregnancy can occur, so I'm wondering if you could share some examples from cases that you've worked on, or state and local policies that could sort of give a snapshot of what we're looking at here.

Farah Diaz-Tello: As Jill alluded to, something that I think a lot of people would find surprising is the fact that almost none of the criminalization of people for pregnancy outcomes or for ending a pregnancy, that we see, is actually authorized by law. There are two states that permit criminal child abuse-type charges against people who do something that someone believes either harmed or risked harm to a fetus, and as you point out, this is most often used against people who use drugs. And then there are seven states that retain these archaic, mostly 19th-century laws criminalizing self-abortion or soliciting an abortion; they vary in what they call it. But obviously, police investigations and arrests are happening in more than just those small handful of states. And in fact, the majority of the 19 arrests or criminal investigations of people who have ended their own pregnancy that have happened in the last 20 years have come from states where there was no legal authority for this type of arrest or investigation whatsoever.

So what we really see going on in most places is a dangerous combination of ignorance, antipathy, and political posturing. To give a hypothetical chain of events that I'd say is unfortunately common, you have someone, and they present to an emergency room with a complication from a self-induced abortion. And then because of the fraught legal atmosphere surrounding abortion, the health providers may incorrectly believe that they have to report a quote-unquote "illegal abortion" to law enforcement. Well, once that call gets made, the wheels get set into motion and healthcare providers generally lose any sense of semblance of control in that situation. This means bedside interrogations, prying into a person's digital footprint, lurid police blotter coverage from the local news, the whole nine yards, right? And then, the case makes its way to a prosecutor, and sometimes, the prosecutor will uphold the law.

This was the case when police in Albany, Georgia were urging homicide charges against Kenlissia Jones, and the prosecutor issued a statement acknowledging that ending one's own pregnancy isn't a crime. But other times, the prosecutor will contort other laws to try to fit the situation, and they'll use things like feticide laws, criminal abortion laws, laws related to disposal of human remains, or even archaic laws like concealing a birth. And the long story short is that when someone decides that they want to punish a person for having an abortion, they're going to find some way or another to do it, which, unfortunately, this makes criminalization a little bit of a moving target, but we're addressing this by making interventions with players at each of those steps in the process. For example, we've extensively researched mandatory reporting laws and have developed materials to help healthcare providers understand the legal difference between the situations where they have to report what they see, so when a child is suspected of being abused or a person comes in with a gunshot wound, versus when they're required to protect their patient's confidential information.

We already know of at least one situation where that legal information that we were able to provide helped healthcare providers realize that reporting a miscarriage to law enforcement would've been unnecessary, harmful, and also potentially unlawful. We've also learned from the harm reduction movement that law enforcement really don't want to be policing healthcare, and we envision helping them become more knowledgeable about the realities and the legalities of self-managed abortion, and helping them understand that treating patients as criminals really just threatens their health. And we've also begun to engage the progressive legal community, like alumni of the If/When/How Lawyering for Reproductive Justice and the National Lawyers Guild, to raise their awareness of efforts to halt criminalization of self-induced abortion through a variety of educational events. And as Jill mentioned, we're finding this is an issue that lawyers care about, so we're developing tools to educate defense attorneys, and hopefully even one day prosecutors, to understand that where abortion exists in the criminal code, it's unconstitutional and impermissible to use that crime against people who end their own pregnancies.

Jess Pieklo: In terms of front lines legal defense for people who have self-induced an abortion, are you able to, or to the extent that you can, talk about a couple of the cases for our listeners?

Farah Diaz-Tello: Yeah, I can talk about one case that folks should really be keeping an eye on, and this is the prosecution of a woman in Virginia named Michelle Roberts. She's being charged under an abortion law that clearly targets people who provide abortions, not the people who have them. In fact, this statute uses gendered pronouns, referring to the person who performs the abortion as "he"-

Imani Gandy: Amazing.

Farah Diaz-Tello: ... and the person who has the abortion as "she," so it's the first time that the gendered pronouns have actually helped us. The way this case is being prosecuted is truly bizarre. Miss Roberts wasn't criminally investigated until a year after she experienced a pregnancy loss, and it was yet another year after that before charges were filed. And so in the absence of definitive evidence that there was a live birth, which, of course, would've been required for a homicide charge, the commonwealth is opting to use this novel legal theory that effectively treats the pregnant person as an illegal abortion provider, right? And the thing that I think most people miss is that in our system, prosecutors aren't allowed to make novel legal arguments, and the commonwealth's theory of how she ostensibly caused the fetal demise is just equally fantastical. So either she used a sharp instrument with sufficient skill and precision to completely avoid injuring herself, or else it was the fact that she was in methadone maintenance treatment, so we come right back around to drug stigma. And neither one of these theories appears to be medically plausible in any way.

So the judge in this case is already committed to seeing the charge through, refusing to dismiss the charges on the basis the law doesn't apply. Fortunately, people should rest assured that decision doesn't create any legal precedent, but we should also be extremely leery of any shift toward permitting these old criminal abortion laws to be used against people who end or lose pregnancies.

Jess Pieklo: Can you back up for a little bit on this, because I know it's a question that's come up as I've done some reporting, and probably Imani, too? Folks are really often surprised at the length in time between a birth event and a charge, so I'm wondering if you can talk just a little bit about some of the sausage-making, right? Like why do prosecutors take so long, sometimes, to do this? And then also, if you could say some more about the fact that prosecutors aren't supposed to be trotting out these novel legal theories and why that is, because I think that that's probably, despite a lot of Law & Order episodes, something that folks don't have a good grasp of.

Farah Diaz-Tello: Yeah, definitely. I think the length of time that it takes for a charge to be filed has to do with the fact that it is really hard to tell what caused a pregnancy loss, and anybody who has experienced a pregnancy loss can tell you this, right? Often, they are searching for answers, and just none materialize. But when it comes to

criminally prosecuting somebody for ending a pregnancy, prosecutors are pretty sure that they're going to try to find an answer for what science doesn't even have an answer for. So instead of deciding not to criminally prosecute in these situations where we can't really tell cause and effect with any type of clarity, they use these arcane sort of witch hunt-type medical tests. One that keeps coming up is what's known as the fetal lung float test, and it's based on this idea that if there was a live birth, then that means that the infant drew a breath and the lungs were filled with air, and so during an autopsy, if they place the lungs in fluid, they will float. And if the lungs float, then it means that the person who gave birth did something to a live born child and killed them. And this like-

Jess Pieklo: It's not unlike what Monty Python says with the witch, right?

Farah Diaz-Tello: Absolutely, absolutely.

Jess Pieklo: It's that ridiculous.

Farah Diaz-Tello: It's completely macabre, and it's been debunked, and it's been used to convict people, not least of all Purvi Patel. This sort of junk science or non-science comes up. There have been situations, like in Bei Bei Shuai's prosecution in Indiana, where the medical examiner clearly had an ideological bent. So there's a lot of shenanigans, I think, that happens in the process of trying to pin down what caused a pregnancy loss or a fetal demise. And you also asked about why prosecutors can't use novel legal theories, and so there's kind of two things to point two here. The first one is always the Constitution, and people have this fundamental right to due process that includes laws that are sufficiently clear, so that a person of ordinary intelligence can know what is prohibited by the law. There's a lot of language in the jurisprudence about, like, people shouldn't be forced to risk their life and liberty under vague laws that can be arbitrarily used against them. What this means is that criminal laws only criminalize exactly what they say they do and nothing more. So you can't analogize, you can't say, "Well, you know, if a person is doing an abortion on themselves, then they're essentially an illegal abortion provider." No. Like in New York, it has to clearly say ending one's own pregnancy is the thing that's criminalized.

The other thing is the rule of lenity, which is, again, more nerdy stuff. But the canons of statutory interpretation say that if there's any ambiguity in the law, the ambiguity has to be resolved in favor of the accused. Our entire system is predicated on presumption of innocence and in favoring the accused, because we recognize that the state can enact injustice on people, and so we're going to give the individual the benefit of the doubt. And even in cases, like in South Carolina, where judges have said, "We're going to declare a new rule of law here. We're going to interpret a law in a novel way that is unanticipated." They won't apply it to the first person that that happens to. They'll say, "From here on out, we are going to interpret this law in this way," because it would be fundamentally unjust to the accused person to interpret a law in a way that is not readily understandable from the terms of the law itself.

Imani Gandy: I love that we had a little chat about statutory construction. I really nerd out on that stuff.

Jess Pieklo: I was going to say, you are in good company. We love nerding out on this stuff here.

Imani Gandy: Can you talk a little bit about the communities that are most impacted by policies that criminalize pregnant people, and that criminalize birth outcomes? In other words, who are the most affected by these policies, and what population of people should we be most concerned about?

Jill Adams: Well, people have many different reasons for seeking abortion care outside of a clinic setting. It may be a first preference for some, and a last resort for others, so for some pregnant people, clinic-based care just is not accessible. People may not be able to pull together the funds, particularly in states where public health insurance doesn't cover abortion care. They may face literal physical barriers, like border checkpoints, that keep them from reaching care, or may have to travel long distances because options in their community have disappeared. And then for other people, clinic-based care is not acceptable. That is, it doesn't meet their particular needs. And that might mean that they can't find care that affirms their gender or speaks their language, or they want to incorporate a spiritual practice or have a particular companion of their choosing that isn't permitted because of the restrictions on abortion clinics. Or maybe they don't have faith in institutionalized medicine because of histories of abuses, like unconsented medical testing and sterilizations, and they prefer to use methods like medications and remedies that are culturally familiar to them.

All of these factors I just named are more likely to be occurring in communities of color, in immigrant communities, among people living in poverty, and queer or gender non-conforming people. Add to that the fact that these communities are already over-policed. The results are fairly predictable: Our system control and marginalize the people they were designed to control and marginalize. So then, the role of race and ethnicity in this is undeniable. Black women are vulnerable to criminalization because they experience staggering health disparities that make them more likely to have an adverse pregnancy outcome that brings them to the attention of authorities. API women are often automatically under suspicion because of tropes that the right has seeded about sex-selective abortion and stereotypes about them as mothers. And people with ties to immigrant Latinx communities may have knowledge and access to medications that can safely end a pregnancy, that are readily available, and have long been in use in some Latin American countries.

I definitely honed in on the self-managed abortion, and I know your question, Imani, was broader than that, so I don't know if Farah wants to have a broader response.

Imani Gandy: I mean, your response definitely answered my question, but I'd love to hear from Farah, if she has anything to add.

Farah Diaz-Tello: I think that really, the answers are the same. Whether we're talking about people who are specifically being criminalized for self-managed abortion, or people who are being criminalized for the outcome of a pregnancy in general, the factors that lead people to be the clutches of law enforcement are the same, right? The increased health risks that they face and the over-policing of their communities. I mean, it's exactly the same thing.

Imani Gandy: Can you talk a little bit ... I know that there have been a lot of studies recently that demonstrate that doctors have inherent biases when it comes to their patients, right?

Jess Pieklo: [sarcastic] Yay.

Imani Gandy: For example, there was a study recently of med school students that showed that there were med school students who believed that black people had different nerve endings, and so therefore didn't feel pain in the same way. So I'm wondering if those sorts of medical biases could contribute to the sort of over-policing, and the contact that people of color, low-income women have with the state, because I imagine that a doctor would probably treat more kindly a wealthy white woman who may have an addiction to benzos, as opposed to a black woman or a brown woman who has an addiction to crack cocaine or a poor white woman who has an addiction to methamphetamines. Is there doctor biases that come into play here?

Farah Diaz-Tello: I mean, yes. Yes, absolutely. Yes to all of it. I think that it can play into it in various different ways, first of all with how physicians respond to people who disclose to them either that they're using a criminalized drug or that they smoke cigarettes or drink alcohol. It seems that the medical system is really geared to do harm reduction well when it comes to issues that people typically associate with people of privilege. I mean, even though we know that alcohol is a known cause of congenital birth defects, people who drink alcohol are told either to cut back or they're told one glass of wine won't hurt or whatever, right? There are all these sort of conflicting things. But if somebody discloses that they're using a criminalized drug, or even that they are using cannabis in states where it's legal, they are referred to child welfare authorities. Those, I think, really are triggering an instinct to punish.

And certainly, I have no doubt that the biases that come that are baked into the education, wherein people are told that black people experience pain in a different way or something like that, those are definitely going to play out, I think, in the reaction to a pregnancy loss, and whether providers extend compassion and care or whether the person is met with suspicion and treated as a suspect.

Jess Pieklo: You folks recently published a paper on Roe's unfinished promise-

Jill Adams: Yes.

Jess Pieklo: ... and I'm hoping you can talk a little bit about it, and specifically, I'm going to ask you kind of a mean question, but what's that unfinished promise? How do we finish it?

Imani Gandy: [laughs] Tell us how to fix it all.

Farah Diaz-Tello: We'll get there. Oh yeah, we'll get there. To talk first about what the report actually is, Roe's Unfinished Promise is the first of its kind, a comprehensive look at the ways that people who have abortions are criminalized across the country. We provide a state-by-state look at the major threats to people who end a pregnancy including, as we've mentioned, criminal bans on self-induced abortion, criminal abortion laws that are susceptible to misuse, feticide laws that don't provide adequate protection to pregnant people, and states where investigations or prosecutions have taken place. We refer to it as "Roe's unfinished promise" in acknowledgment of the fact that Roe, really at its core, is about decriminalization and the recognition that criminalizing healthcare endangers and degrades people.

The laws that Roe struck down were criminal abortion laws, and the court acknowledges a fundamental right to decide whether to carry a pregnancy to term. And criminalization really persists where we get sucked into these rabbit holes of abortion jurisprudence and undue burdens, and when we fail to step back and look at the bigger picture that something that's a fundamental right can't be a crime. So, our hope for this report is that it not only provided information about what the law is, but that it also set a vision for what the law should be and how people can contribute to that. I'd say the two biggest misconceptions about self-induced abortion are first, that it doesn't happen anymore, and second, that it's quote-unquote, "illegal," right? We're trying to both clarify the law and complicate what it means to be legal or illegal, and to help people understand that human rights and constitutional rights outweigh state criminal laws and the unlawful acts of rogue prosecutors.

Jess Pieklo: I want to pull-quote everything you said.

Jill Adams: That is my reality working with Farah on a daily basis.

Jess Pieklo: Both of you. No, both of you, I mean it. I am just in the palm of your hands listening to you say these things. This is like catnip for me.

Imani Gandy: Yeah, absolutely me, too. I mean, this is great.

Farah Diaz-Tello: I like to say, "We give a real big fuck."

Imani Gandy: You do give a real big fuck.

Farah Diaz-Tello: It's born of passion.

Imani Gandy: Oh my god, that is absolutely going into the episode.

Farah Diaz-Tello: Please don't cut that out. Please don't cut that out.

Imani Gandy: Please don't cut that out.

Jill Adams: That can be our new tagline-

Imani Gandy: It should be.

Jill Adams: ... SIA legal team: "We give a real big fuck."

Imani Gandy: SIA legal team: "We give a real big fuck." That's awesome. That's my new favorite thing, oh my god.

Farah Diaz-Tello: We'll for sure credit you for that, but expect to see that in circulation.

Imani Gandy: Oh, yeah. I'm going to tweet as soon as I get off this call.

Farah Diaz-Tello: I mean, I already couldn't show this episode to my mom, so we may as well go with the real big fuck.

Imani Gandy: So what are some of the things that listeners can do if, after hearing all of this, they feel helpless and they want to think, "Things are so terrible, but I have to do something"? What are some concrete things that people can do?

Jill Adams: Take a deep breath, pour yourself a stiff drink or some strong coffee, and know you are in great company. But beyond that, the good news is that everybody has a role to play in ensuring that people can access healthcare with dignity and in a setting that's right for them. So find out more about the law where you are. Check out Roe's Unfinished Promise, the report that Farah was describing, so you can understand the law in your state. And if you're in a state that has a criminal self-abortion law, we want to help you find ways to lead or plug into people-led movements to change law, and policies, and practices. Get trained. If you're a healthcare provider, a full-spectrum doula, an abortion fund volunteer, you are likely already having one-on-one conversations with people who are curious about or even considering ending their own pregnancy, and so we offer trainings and technical assistance to help you understand legal issues surrounding self-managed abortion, and navigate these conversations so that people in need of this kind of care can feel less desperate and more powerful. And then, finally, join our list. Visit our website, SIALegalTeam.org, and sign up for more information. And if you're an attorney, ooh, are we eager to put you to work.

Imani Gandy: So sometimes it is a good idea to go to law school, listeners, even though I keep telling you not to. You can go to law school and join the SIA legal team.

Jill Adams: Yes.

Jess Pieklo: And as much as we say that lawyers are the worst, I think we have shown that we have two examples of lawyers who are the fucking best.

Imani Gandy: The literal and entire best, yes.

Jess Pieklo: The absolute best. Is there anything else, before we say our goodbyes and thank you, that our listeners should know or consider on this huge topic of self-induced abortion care, and how we avoid and fight back against the criminalization of pregnant bodies and outcomes?

Farah Diaz-Tello: I mean, I think the one thing that I really want folks to come away with is an understanding that ending a pregnancy on one's own, or with help from a supportive community member, is something that has happened and been happening since people were able to become pregnant, right? This is not a new phenomenon. This is not the pre-Roe dangerous, clandestine abortion. This is something that's going on in communities, and something that people need access to, and I think it really falls on us to understand the issue, to understand why people might want or need this type of care, and to not fall into traps of setting up self-induced abortion as this worst-case scenario thing that must be stopped at all costs. Because I think the one thing that we have found is that this idea of protecting pregnant people from themselves often bears fruit in these really terrible ways, and ends up in criminalization and punishment. And so I think we need to be very careful about holding space for all the different type of ways that people might seek abortion care, and make sure that none of those get left behind when we're trying to do the good work of ensuring access to clinic-based care, too.

Jill Adams: Exactly. I'm glad you said that, Farah, because we do want to caution against this perception of self-managed abortion as an affront to clinic-based care, or as though it has the intention of replacing it entirely, because the majority of people having abortions today are having them with the support of medical professionals in clinic-based settings. And there will likely always be people who either need that or prefer that, and so the future we envision is one wherein people will have the full panoply of options available to them. It'll be a menu. If someone's pregnant and they don't want to be, they can get online, order reliable pills from an online pharmacy that are shipped to their house, and they will have a source of excellent instructions. And they can do the entire thing as a solo experience in total privacy if they so choose, but there would also be multiple forms of support before, during, and after the abortion if they want that, coming from, as Farah mentioned, community-based providers or perhaps clinic-based providers.

Maybe they want to pop over to their neighborhood pharmacy and buy pills off a shelf. Maybe they want to go to their botanical provider and use herbs that have been part of their cultural custom since the dawn of time. And maybe they want to go to a clinic and receive a procedural abortion. And all of those are legitimate for all of the reasons that people have for wanting them, and we are grateful to be a part of such a diverse coalition of repro health rights and justice

organizations that are trying to secure that future, and that people can access all of those options. And they'll be affordable, and without stigma, and with dignity.

Farah Diaz-Tello: Yes. I subscribe to that world. I love that.

Jess Pieklo: Thank you both so much for joining us. This has been--on such an important and what can be heavy topic--you have both been really just brilliant in cutting through it and shining a light in some areas that I think and hope our listeners are going to really find useful and enjoy.

Imani Gandy: Plus, you tickled our nerdy bone, so that's always fun.

Jess Pieklo: So fun.

Jill Adams: The canons of statutory interpretation, I was practically fanning myself.

Imani Gandy: I know. Rule of lenity, what?

So, now is the part of our show where we read our five-star reviews, because you listeners are really what make the show. If you weren't listening to this show, why would we be recording it? It would be weird. We would just be talking to each other, and we could just pick up the phone and talk to each other. No, we're talking to you, and we like to hear from you.

Jess Pieklo: Plus, the phone is weird.

Imani Gandy: I hate phones.

Jess Pieklo: Who talks on the phone?

Imani Gandy: I really don't like talking on the phone. I cannot stand it. I don't understand people. I have friends who yammer on the phone for hours at a time. I'm always traveling through a tunnel when I'm on the phone, even if I'm sitting on my couch.

Jess Pieklo: My kid FaceTimes with his friends, and I'm like, "Why?"

Imani Gandy: I don't understand. But we digress.

Jess Pieklo: We digress.

Imani Gandy: Okay, so here we have our first review from Lestack, and it's entitled, "Boom!" "Love this podcast, Imani and Jessica keep me simultaneously angry and informed and laughing, which is a hard balance to hit." That is exactly the balance we're trying to hit, so thank you so much for saying that.

Jess Pieklo: Seriously, thank you.

Imani Gandy: The next one we have is from Karen Irv. It's titled, "May I have some more, please?" "Maybe in my next life, I'll be a lawyer, too, because I find it all so interesting and, these days especially, very valuable and important. Thanks to Team Legal for breaking it all down! Tune in for this episode, dear listener, February 1st, where I come to realize that I was only about halfway there with my understanding about all the anti-abortion tomfoolery going on. Thanks also for the laughs, so that those yahoos don't make my esssplode." And she spelled it "esssplode." Thank you, Karen; thank you, Karen. The next one is from AlexandraG, and it's entitled, "Crucial listening for anyone who cares about ellipses, because Apple will not fix its fucking podcast app." Jeez.

Jess Pieklo: I care about ellipses, but not like that.

Imani Gandy: I mean, honestly. I care more about em dashes, frankly. I'm an em dash enthusiast. Moving on. "After seeing tweets about this podcast for months I finally got some time to tune, and I'm so glad that I did! Imani and Jessica do an incredible job explaining the fascinating nitty-gritty of key legal battles over reproductive rights and strategies used by anti-abortion activists. Plus, they're really funny! This is a must-listen if you care about reproductive rights." Thank you, AlexandraG, and I'm wondering, are you related to Alexander Graham?

Jess Pieklo: Ooh.

Imani Gandy: Eh? Alexandra Graham? I have questions, Alexandra, but I'll ask them later. Moving on, we have from lamJadehawk: "Team Legal Is Good For My Brain." "I usually have the attention span of an over-caffeinated squirrel, #ADDcheckin" ... I feel you, I really do ... "so information-dense podcasts are usually lost on me. But Imani and Jessica manage to present the issues in such a hilarious and entertaining way that my attention rarely drifts. Thank you so much for the work you're doing!" Thank you, lamJadehawk, and ADD solidarity. We got you.

Jess Pieklo: We do. Thank you.

Imani Gandy: The next one we have, from elicity: "Shout out to Imani from a fellow Obie." Hello! I don't know if ... Does Oberlin have a theme? All I know is our colors were red and gold. We were nerds. Anyway, social justice nerds, as they would say now. Social justice warrior nerds. "Team Legal delivers everything I look for in a podcast: information delivered succinctly, with humor and great rapport. Following Imani on Twitter has helped me keep sane over the past year, and now I follow Jess, too!" Way to go, Felicity. You couldn't have made a better choice on your Twitter followers-

Jess Pieklo: Yay, thank you.

Imani Gandy: ... or follows. And the last one we have is from ranjad, or ranjad, "Awesome Show." "I don't know what else to say that hasn't been said, the show is fast paced and thrilling. Although the content can be a super downer, the happy warrior attitudes of the hosts make it bearable and leave you more informed to

resist the misogynist fever dreams of 1/3 of our fellow countrymen.” Thank you. We do have a happy warrior attitude, I suppose, don’t we?

Jess Pieklo: I suppose we do, yeah. I mean, we got to laugh to keep from crying, right, Imani?

Imani Gandy: Got to laugh to keep from stabbing, is what I say, because my instinct is to just stab everything in sight. That wraps up our show for this week ... this bye week, I should say. You should please, please follow us on Twitter. I am @AngryBlackLady. Jessica is @Hegemommy, H-E-G-E mommy, M-O-M-M-Y. You should join our Facebook group. It’s called Boom! Lawyered, and you should go boom! Find it.

Jess Pieklo: Do it.

Imani Gandy: Please do it. And other than that, you know, just enjoy Black Panther this weekend, because I know everyone is going to see it.

Jess Pieklo: Do it.

Imani Gandy: Thanks a lot.

Jess Pieklo: Wakanda forever.

Imani Gandy: Wakanda forever!

Boom! Lawyered is created and hosted by Imani Gandy and Jessica Mason Pieklo. The show is produced by Nora Hurley, our executive producer is Marc Faletti, and Rewire’s editor-in-chief is Jodi Jacobson.