The U.S. Supreme Court has long recognized the constitutional importance of reproductive autonomy. However, for the unhoused the guarantees of this right can be seen as fictitious promises. This Comment aims to explore the continuum of limitations on reproductive autonomy faced by homeless individuals, and its implications for reproductive rights and justice. Homeless individuals encounter a web of overlapping and mutually reinforcing constraints on their reproductive autonomy at several stages of their reproductive lives—when they are not pregnant but have the capacity to be, during their pregnancy, and as they raise their children. First, in seeking welfare assistance and other public benefits, homeless individuals face significant coercive pressure towards marriage and/or away from pregnancy. Second, homeless individuals are particularly susceptible to the criminalization of pregnancy, which serves to further entrench their poverty. Finally, after a homeless individual gives birth, their lack of housing makes them and their families more susceptible to the child-welfare system, where they may eventually lose their child. In this Comment, I offer close examination of the above constraints and the way in which they subject the homeless population to unjust limitations on their fundamental right to decide “whether to bear or beget a child.”

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Desiree Quesada struggled with homelessness on the streets of Los Angeles for five years before she became pregnant. During her pregnancy, she was transient, sleeping in an RV parked on a side street, in a motel room, or in a shelter bed on Skid Row. Determined to provide for her child and promising herself that her child would never spend a night on the streets, she agreed to move into an apartment with her father before the baby was due. But, before she even had a chance to leave the hospital with her newborn son, the Department of Children and Family Services placed her child in foster care. Desiree has not seen her son since. “I never even got to take him home.”

Vivian Thorp, also from California, was a struggling single mother when she enrolled in the state’s welfare-to-work program. She and her family, which several years later included a fiancé and a second and third daughter, lived in and out of homelessness, struggling to pay the bills and manage her fiancé’s mental illness. Things became worse when, under California’s “Maximum Family Grant” rule, which denied cash assistance to any child born into a family already receiving assistance, Vivian was unable to receive additional welfare benefits to support her two youngest children. Her welfare check remained at $520 a month, not enough for three children. With seemingly no other option, Vivian took to stealing diapers and food to provide for her family. Over a decade later, Vivian says she is “still traumatized” and angry at laws that “deprive kids of basic things like food and clothing.”

Across the country, in Washington, D.C., Shakieta Smith had no place to go with her two children. She called the local shelter hotline but was told all shelters were full and there were no beds available. The hotline worker added

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2 Id.


4 See McCormick v. Cnty. of Alameda, 122 Cal. Repr. 3d 505, 512 (Ct. App. 2011) (explaining the maximum family grant rule). The rule has since been repealed. Editorial, Good Riddance to a Repugnant California Cap on Family Aid, L.A. TIMES (June 16, 2016, 8:00 AM), https://www.latimes.com/opinion/editorials/la-ed-maximum-family-grant-20160615-snap-story.html [https://perma.cc/W599-8BGP]. However, similar rules are still in effect across the country. See infra notes 158–162 and accompanying text.

5 Wiltz, supra note 3.

6 Id.

a “chilling warning”: if Shakieta admitted that she and her children “had nowhere safe to sleep, she’d be reported to the city’s Child and Family Services Agency for a possible investigation into abuse and neglect.” From then on, Shakieta lived in constant fear of Child Protective Services. She worried that her children would be taken while they were at school. “I was afraid that my kids would be taken from me just because I can’t afford to live in D.C.,” she said. “It’s not like I’m abusive or none of that. I ran into a situation where I don’t have no place to go.”

These vignettes, real stories of women struggling with homelessness, illustrate the unique challenges that individuals face in managing their reproductive lives when housing is unstable or nonexistent. Desiree’s, Vivian’s, and Shakieta’s stories are by no means rare—a wealth of scholarship documents local, state, and national efforts to regulate individuals’ reproductive autonomy. Yet while the impact of these regulations on low-income populations, particularly low-income women, is clearly documented, there is significantly less published on the ways homeless individuals’ reproductive autonomy in particular is regulated. This population, while sharing significant similarities with those who are low income but stably housed, faces additional barriers and has unique burdens, making their lived experiences markedly different.

In Part I of this Comment, I give a background on homelessness in the United States, describing both the demographics of the homeless population and the main causes of homelessness. Next, I discuss the Supreme Court’s reproductive rights jurisprudence. This framework is helpful for understanding infringements on these rights that homeless individuals face. Finally, I draw the distinction between the fight for reproductive rights and the Reproductive Justice movement, which reaches beyond the mere securing of rights and better helps us understand the lived experiences of homeless individuals and the barriers they face in making reproductive decisions.

In Part II, I examine in detail the multiple overlapping and mutually reinforcing constraints on reproductive autonomy faced by homeless individuals when considering becoming pregnant, while pregnant, and when raising their children. First, reliance on welfare and other public benefits subjects individuals to coercion into marriage and/or away from pregnancy. Such coercion is arguably a violation of their fundamental right to choose whether to marry or become a parent. Second, the criminalization of pregnancy, a phenomenon affecting...
pregnant individuals across the nation, is of particular concern for homeless populations due to their increased contact with and surveillance by government agencies, their increased rates of substance abuse and addiction, and the compounding effects of laws that criminalize the life-sustaining activities of the homeless. Finally, after a homeless individual gives birth, their lack of housing makes them and their families more susceptible to the child-welfare system, where they may eventually lose their child. Thus, at each of these stages of their reproductive lives, homeless individuals are subject to governmental regulation in distinctive ways tied to their lack of secure housing.

In Part III, I discuss the implications of my Comment for the Reproductive Justice movement, and the importance of considering homeless individuals’ lived experiences in the fight for reproductive autonomy. I then briefly discuss the constitutional implications of these impediments. Finally, I present evidence suggesting that the policies and practices I critique actually hinder child welfare goals and further entrench homelessness and poverty.

Although my analysis unpacks three stages of constraints on the reproductive autonomy of homeless individuals, it is important to note that not all homeless individuals with the capacity to become pregnant experience each constraint. Some never become pregnant. Others may voluntarily terminate their pregnancy or involuntarily lose it. Those who give birth are often the most susceptible to being coerced into long-acting contraceptives, either by physicians or the threat of losing needed welfare benefits. The stages are fluid, and it is possible for an individual to simultaneously face multiple sets of the constraints I discuss.

My analysis of the various ways the fundamental right of a homeless individual to decide “whether to bear or beget a child” contributes to discourses in the field of Reproductive Justice by focusing on an often-overlooked population—the homeless—and considering their lived experiences. Homeless individuals occupy the extreme end of poverty, while also disproportionately occupying other marginalized identities. For example,
they are more likely to be Black, LGBTQ+, and disabled. Their lives and bodies are systematically monitored, devalued, and regulated, with particular attention paid to their ability to procreate.

A note about the language used in this Comment. Many of the phenomena I discuss reflect the long history of state control over female bodies and reproduction, and the gendered nature of reproductive regulations. And many of the sources upon which I rely discuss these phenomena specifically in gendered terms, using the terms “woman” and “women.” Because of this, I sometimes use those terms to reflect the gendered nature of the regulations and the specific sources cited. But this language is


not fully representative of the range of gender identities affected by the regulations discussed. Not everyone who has the capacity to become pregnant is a woman, and it is important that the language in this space reflects that and does not erase the experiences of trans, nonbinary, and other LGBTQ+ people who have the capacity to become pregnant but who are not women.\textsuperscript{15} To this end, I use gender-neutral language in this piece as a default to fully and accurately describe the phenomena I write about without assuming an individual’s gender identity.

I. BACKGROUND

This Comment focuses specifically on the impact of the law on homeless individuals’ reproductive autonomy. I begin with an overview of the current problem of homelessness in the United States. I then introduce the concepts of reproductive rights and Reproductive Justice, and how these frameworks can help us to understand the lived experiences of the homeless.

A. Who Is Homeless?

Homelessness is defined as “lack[ing] a fixed, regular, and adequate nighttime residence,” and includes those who spend their nights in shelters, on the streets, in temporary or transitional housing, or in any other place that is public or private but not meant for human habitation.\textsuperscript{16} Though homelessness has existed in the United States since the nation’s beginning, it was not until the 1870s that it became an issue of national concern.\textsuperscript{17} The Department of Housing and Urban Development’s annual nationwide survey on homelessness, the only nationwide survey of homeless people, found that on a single night in 2019 there were 567,715 people experiencing


\textsuperscript{17} KENNETH L. KUSMER, DOWN AND OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY 13 (2002); see also NAT’L ACADS. OF SCI., ENG’G, & MED., PERMANENT SUPPORTIVE HOUSING: EVALUATING THE EVIDENCE FOR IMPROVING HEALTH OUTCOMES AMONG PEOPLE EXPERIENCING CHRONIC HOMELESSNESS app. B at 175 (2018), https://www.ncbi.nlm.nih.gov/books/NBK519584 [https://perma.cc/K3VF-DZ92] [hereinafter PERMANENT SUPPORTIVE HOUSING] (stating that the term homelessness was first used in the 1870s to describe “tramps” who traveled the country searching for work).
homelessness. This estimate is likely low; many homeless individuals are not easily identified in surveys because they live incredibly transient lives and may choose to eschew homeless shelters, one of the main sources of information on this vulnerable population. Homeless individuals have higher rates of mental or physical health disabilities than the general population or those living in poverty. There are also stark racial and ethnic disparities in the homeless population: in 2018, Black individuals made up 13% of the U.S. population but 35 to 40% of the homeless population and “51 percent of people experiencing homelessness as members of families with children.” The homeless population is also about 22% Hispanic or Latinx, whereas Hispanic or Latinx individuals make up only 18% of the U.S. population. These racial disparities can be traced back in part to the institution of slavery and the institutionalization of white supremacy in government.


19 Id. at 12.

21 2018 AHAR Part 1, supra note 12 at 1, 11-12, 22.

22 Id. at 12.

Perceptions of the homeless, currently and historically, are masculinized. Conceptions of the homeless individual, stereotyped into such tropes as “tramps” in the 1870s and “hobos” in the 1920s, have always been overwhelmingly male. This, in part, reflects the actual demographics of homelessness: in the late 1800s, homelessness shifted to become increasingly and predominantly masculine, even though “women made up a significant fraction of the homeless population of urban America” before the 1870s. Yet the masculinization was not because the causes of homelessness only affected men but was rather mostly “a consequence of the gender ideology of the Victorian era, which assumed that women were weaker and less able to care for themselves than men.”

Today, men comprise 60% of the homeless population. However, women make up a substantial and growing percentage of the population: “Women and families are the fastest growing segment of the homeless population, with 34% of the total homeless population composed of families.” 84% of homeless families are headed by women, usually single women. Additionally, research shows that women likely comprise a higher proportion of the homeless population than is commonly thought, for women tend to remain out of the public eye, in so-called “hidden homelessness.” A key impact of this phenomenon is that women are more likely not to be counted in national estimates because of their tendency to engage in “hidden homelessness.”

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24 KUSMER, supra note 17, at 13, 25.
25 Id. at 25.
26 Id.
27 Id.
30 Id.
homelessness,” outside of the public eye. Indeed, scholars have noted that “[o]ne of the most enduring documented features of women’s homelessness is that they engage in strategies that serve to conceal their situations and frequently remain hidden from public view.” Women experiencing homelessness are more likely than men to stay with family or friends, or even to form alliances with men, to avoid staying in homeless shelters or otherwise engaging with local homeless services.

B. What Causes Homelessness?

Today, there are five main causes of homelessness: (1) insufficient income, either from unemployment or low wages; (2) lack of affordable housing; (3) the post-2008 foreclosure crisis; (4) domestic violence; and (5) physical or mental health problems, including substance use disorders.

Insufficient income. Many individuals are homeless because they have insufficient income to cover housing costs or other costs associated with living, even if their rent or housing is affordable. Often, this lack of income stems from unemployment or underemployment. Individuals may be unemployed or underemployed for a variety of reasons, including having a limited education, a criminal record, unreliable transportation, poor

32 Mayock et al., supra note 31, at 880-81; Stickel, supra note 31; Williams, supra note 31.
33 Mayock et al., supra note 31, at 880.
34 Id. at 880-81.
39 See HOMELESS ALL. OF W. NY., LEFT BEHIND: HOW DIFFICULTIES WITH TRANSPORTATION ARE A ROAD BLOCK TO SELF-SUFFICIENCY 2 (2006), https://ppgbuffalo.org/files/documents/environment/transit/environment_-left_behind.pdf [https://perma.cc/2KY-GNEH] [hereinafter LEFT BEHIND] (finding that 42% of homeless surveyed had turned down a job in the past year because they lacked transportation to get there).
health, or a disability. Importantly, in at least one study of families experiencing homelessness, the most cited reasons for unemployment were pregnancy and/or lack of childcare. Unemployment for these reasons disproportionately affects women, who head 84% of homeless families.

Many of the reasons for unemployment or underemployment are symptoms of poverty. For example, being unable to afford to purchase and maintain a vehicle makes it difficult to get to work on time, especially in cities with unreliable or nonexistent public transportation. Poor communities of color are overcriminalized, creating a large disparity in who has a criminal record, which can be a virtual death sentence for future job applications. Due to systemic racism and a history of redlining and housing policies that stripped their neighborhoods of resources, non-white communities are more likely to have underfunded schools and, generally, worse health overall. Poverty and

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40 See Income, supra note 36 (stating that one factor causing un- or underemployment is poor health); LARISA ANTONISSE & RACHEL GARFIELD, KAISER FAM. FOUND., THE RELATIONSHIP BETWEEN WORK AND HEALTH: FINDINGS FROM A LITERATURE REVIEW 1 (2018), https://files.kff.org/attachment/Issue-Brief-The-Relationship-Between-Work-and-Health-Findings-from-a-Literature%20Review [https://perma.cc/TyTL-8ZRA] (“Being in poor health is associated with increased risk of job loss, while access to affordable health insurance has a positive effect on people’s ability to obtain and maintain employment.”).


42 See Ralph Nunez & Cybelle Fox, A Snapshot of Family Homelessness Across America, 114 POL. SCI. Q. 289, 294 (1999) (“Homeless families face many barriers to employment. The leading reason cited (41 percent) by homeless parents for current unemployment is lack of child care or pregnancy.”).

43 THE AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, supra note 29.


other impacts of structural inequality create life conditions in which it is difficult for individuals to work, leaving them susceptible to homelessness.

Importantly, women have been more likely than men to find themselves unemployed in 2020 and 2021 during the COVID-19 pandemic. In December of 2020, employers cut 140,000 jobs. But according to data from the U.S. Bureau of Labor Statistics, women—specifically, Black and Latina women—accounted for all of those losses. Men actually gained jobs that month. And an overview of total employment numbers throughout 2020 shows that “[w]omen ended 2020 with 5.4 million fewer jobs than they had in February” of 2020, whereas “men lost 4.4 million jobs over the same time period.”

While un- and under-employment undoubtedly cause homelessness, employment in and of itself is not a magic ticket out of homelessness; those who are employed may still find themselves homeless due to stagnant low wages. According to the National Alliance to End Homelessness, “[t]he typical American worker has seen little to no growth in his/her weekly wages over the past three decades.”

Lack of affordable housing. In addition to stagnant wages and difficulties getting a job, individuals often find themselves homeless due to a chronic lack of affordable housing. The United States is currently in what many call an affordable housing crisis, with more and more individuals being unable to afford safe housing each year. A study by the National Low Income Housing Coalition found that an individual working full-time at minimum wage cannot afford a two-bedroom apartment in any county across the nation. 20.8 million Americans across the nation—almost half of all renters—are cost-

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49 Id.
50 Id.
51 Id.
52 Income, supra note 36.
53 HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES, supra note 20.
55 See NAT’L LOW INCOME HOUS. COAL., OUT OF REACH 1 (2019), https://reports.nlinc.org/sites/default/files/oar/OOR_2019.pdf [https://perma.cc/2ACD-RVKY] (“A worker earning the federal minimum wage of $7.25 per hour must work nearly 127 hours per week (more than 3 full-time jobs) to afford a two-bedroom rental home . . . .”).
burdened, meaning they spend at least 30% of their income on rent.\textsuperscript{56} Within that population, nearly eleven million are severely burdened, spending more than 50% of their paycheck on housing alone.\textsuperscript{57} Research conducted in 2018 confirmed a link between escalating housing costs and homelessness, finding that “[c]ommunities where people spend more than 32 percent of their income on rent can expect a more rapid increase in homelessness.”\textsuperscript{58}

Post-2008 foreclosure crisis. The 2008 recession and resulting foreclosure crisis had a large impact on poverty levels and, particularly, homelessness and housing.\textsuperscript{59} In 2008, state and local groups reported a 61% increase in homelessness since the crisis began.\textsuperscript{60} Data from 2009 suggests that 19% of new homelessness that year resulted from the foreclosure crisis, and data from 2011 “shows that family homelessness ha[d] increased by an average of 16 percent in major U.S. cities since the crisis began.”\textsuperscript{61} Additionally, it was estimated in 2015 that 40% of families facing potential eviction and homelessness due to foreclosure are renters, raising concerns as more and more families begin to rent, rather than buy, housing.\textsuperscript{62} Although Congress passed the Protecting Tenants at Foreclosure Act of 2009 (PTFA), violations of the act were common; the National Law Center on Homelessness and Poverty’s survey of tenants and advocates across the U.S. revealed that many tenants were unaware of their rights under federal law, and that there were numerous violations of the PTFA, including “illegal, misleading, or inaccurate written notices” and “poor maintenance of foreclosed properties,” where housing is “neglected or wholly abandoned,” sometimes resulting in water, sewage, or electricity services to be shut off.\textsuperscript{63}


\textsuperscript{57} Id. Unsurprisingly, renters with yearly incomes below $30,000 a year are significantly more likely to be cost-burdened and severely burdened. Id.


\textsuperscript{59} HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES, supra note 20; see also NAT’L CTR. ON HOMELESSNESS & POVERTY, EVICTION (WITHOUT) NOTICE: RENTERS AND THE FORECLOSURE CRISIS 6 (2012), https://nlchp.org/wp-content/uploads/2018/10/Eviction_Without_Notice.pdf [https://perma.cc/4U77-SJ7V] [hereinafter EVICTION (WITHOUT) NOTICE] (“Research indicates that approximately 19% of new homelessness in 2009 was a result of the foreclosure crisis.”).

\textsuperscript{60} HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES, supra note 20.

\textsuperscript{61} EVICTION (WITHOUT) NOTICE, supra note 59, at 6.

\textsuperscript{62} Id. (“Approximately 40% of families facing eviction due to foreclosure are renters.”).

\textsuperscript{63} Id. at 8.
Domestic violence. Many victims of domestic violence become homeless when fleeing abuse.64 Not surprisingly, domestic violence is a leading cause of homelessness for homeless women.65 Some women who leave a violent situation may stay at a domestic violence shelter, but many shelters allow individuals to stay for a maximum of thirty days despite the fact that it can take much longer for victims and their children to find other adequate shelter.66 Homeless service programs may offer victims a safe place to stay as well as economic resources when they leave a violent situation.67 “On a single night in 2019, homeless services providers had more than 48,000 beds set aside for survivors of domestic violence.”68

Health concerns. Physical or mental health problems can lead to homelessness, especially when such problems generate high medical bills and diminish an individual’s ability to work.69 Additionally, homelessness can exacerbate existing medical conditions, as homelessness has been associated with poor health outcomes and is marked by a difficulty in accessing health care.70 According to the Department of Housing and Urban Development, homeless individuals71 are more than two times more likely than members of the general population to have a disability.72 Homeless individuals also have

64 See Victoria Tischler, Alison Rademeyer & Panos Vostanis, Mothers Experiencing Homelessness: Mental Health, Support and Social Care Needs, 15 HEALTH SOC. CARE CMTY. 246, 246 (2007) (“The experience of homelessness was stressful, but viewed as a respite for many of the participants because they had experienced violence and harassment prior to their stay in the hostels.”); see also ELLEN SHELTON, WALKER BOSCH & GREG OWEN, WILDER Rsch., 2012 MINNESOTA HOMELESS STUDY FACT SHEET: LONG-TERM HOMELESSNESS (2013), https://www.wilder.org/sites/default/files/imports/2012_LongTermHomeless_Factsheet_5-13.pdf [https://perma.cc/JR3G-45QL] (stating that 16% of people experiencing long-term homelessness are experiencing homelessness as a result of domestic violence).

65 HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES, supra note 20; Tischler et al., supra note 64, at 246-53; see also SHELTON ET AL., supra note 64.

66 See Ashley Lowe & Sarah R. Prout, Economic Justice in Domestic Violence Litigation, 90 Mich. BAR J. 32, 33 (2011) (“Most domestic violence shelters allow a 30-day maximum stay, yet it takes many dislocated families up to six months to secure permanent housing.”).


68 Id.


70 THE AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, supra note 29; Health, supra note 69.

71 Note that the study referenced collected data on homeless individuals living in shelters, not those living on the street (about whom data is notoriously difficult to collect).

72 DEPT. OF HOUS. & URB. DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 2: ESTIMATES OF HOMELESSNESS IN THE UNITED STATES xix
high rates of mental illness, substance abuse, and conditions such as diabetes, heart disease, and HIV/AIDS.\textsuperscript{73}

\textbf{C. Reproductive Rights, Reproductive Justice, and Homeless Individuals}

The Supreme Court of the United States has recognized that the Fifth and Fourteenth Amendments of the United States Constitution protect a fundamental right to “privacy.” Throughout the twentieth and twenty-first centuries, the Court repeatedly found that this right to privacy, encompassed in the Constitution’s guarantee of liberty, due process, and equal protection, allows individuals to make private, intimate decisions without government interference. These decisions include the right to use contraceptives,\textsuperscript{74} the right to marry,\textsuperscript{75} the right to procreate,\textsuperscript{76} the right to have an abortion,\textsuperscript{77} and the right

\textsuperscript{73} See THE AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, supra note 29; Health, supra note 59.

\textsuperscript{74} See Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (finding that the U.S. Constitution protects a right to privacy and striking down a state law denying married couples the ability to buy contraception); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (finding that the individual right to contraception does not depend on being married).

\textsuperscript{75} See Loving v. Virginia, 388 U.S. 1, 10-12 (1967) (recognizing marriage as a “basic civil right” and striking down a Virginia law preventing interracial marriage between a white person and a colored person); Obergefell v. Hodges, 135 S. Ct. 2584, 2604-08 (2015) (holding that the right to marry is a fundamental right protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment). It is important to note that the right to marry is not without limitations, particularly in the case of the public health or welfare. For example, twenty-five states prohibit marriage to certain family members. Dora Mekouar, Can Kissing Cousins Wed in the U.S?, VOA NEWS (May 7, 2019, 9:05 AM), https://www.voanews.com/usa/all-about-america/can-kissing-cousins-wed-us [https://perma.cc/U3NG-U3ZA]. And some states have set age limits on marriage, concerned about child marriage. See Sarah Ferguson, What You Need to Know About Child Marriage in the U.S., FORBES (Oct. 29, 2018, 4:33 PM), https://www.forbes.com/sites/unicefusa/2018/10/29/what-you-need-to-know-about-child-marriage-in-the-us-1 [https://perma.cc/4ELT-JX84].

\textsuperscript{76} See Skinner v. State of Oklahoma, 316 U.S. 528, 554 (1942) (“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”).

\textsuperscript{77} Roe v. Wade, 410 U.S. 113, 153 (1973) (finding that the U.S. Constitution protects the right to privacy, which “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874-79 (1992) (upholding Roe’s essential holding that the U.S. Constitution protects the right to terminate a pregnancy, and establishing the undue burden framework to determine when that right could be regulated); Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2922, 2318 (2016) (finding that certain abortion restrictions in Texas constituted an “undue burden on” the constitutional right to have an abortion). With former President Trump nominating three Supreme Court Justices, there have been increasing concerns that this precedent may be overturned or significantly weakened in the near future. See, e.g., Bridget Read, \textit{We Could Lose Roe v. Wade Next Year: What Now?}, CUT (Sept. 19, 2020), https://www.thecut.com/2020/09/ruth-bader-ginsburg-roe-v-wade-overturned-what-to-do.html [https://perma.cc/GN2L-K5L] (addressing the potential for Roe to fall and the potential consequences). In fact, just recently the Supreme Court granted review of \textit{Jackson Women’s Health Organization v. Dobbs}, a case involving a
to parent one’s children. These decisions affect and protect an individual’s reproductive autonomy, the right to make one’s own decisions about their reproductive life, whatever those decisions may be. Indeed, Justice Brennan, delivering the majority opinion in *Eisenstadt v. Baird*, wrote that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

The reproductive rights perspective is concerned with which rights are guaranteed and focuses on the “right” of women to make reproductive decisions. This focus, while helpful, does not necessarily concern itself with the practicality and feasibility of exercising those rights for disadvantaged and marginalized groups of women. Often missing from reproductive rights advocacy is the recognition that “a legal right to reproductive services, without support, leaves many women without meaningful choice.” The Reproductive Justice movement, on the other hand, addresses this oversight.

Activists—primarily women of color, trans* individuals, and indigenous women—advocated for Reproductive Justice long before the term was coined in 1994 by a group of Black women in Chicago who “sought to place a discussion about reproductive rights within a broader conversation about social and racial justice.” While recognizing the importance of reproductive
rights, including access to reproductive health care and services such as abortion, the Reproductive Justice movement “has demonstrated the limitations of the popular narrative of ‘choice.’” As such, advocates have “moved beyond the narrow focus on abortion and advocated for the realization of the full range of reproductive decisions, placing equal importance on the right to have a child, the right not to have a child, and the right to parent the children one has with dignity.” To adopt the Reproductive Justice framework is to understand that the ability to make meaningful and authentic choices about one’s reproductive life relies on more than just the “right to choose” abortion; reproductive choice “does not occur in a vacuum, but in the context of all other facets of an individual’s life, including barriers that stem from poverty, racism, immigration status, sexual orientation and disability.” The distinction between rights and justice is of the utmost importance to the broader struggle for racial equality. For working solely towards reproductive rights without a meaningful focus on Reproductive Justice predominantly helps affluent, white women, while doing very little to address the struggles of many others.

Understanding the connections between reproductive control and race in the United States is essential to understanding the Reproductive Justice movement. Leaders in the movement have long recognized that the reproductive choices of women of color in this country have been heavily regulated by the state since before the formal establishment of any state, tracing back to slavery. Professor Dorothy Roberts, in *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, analyzes the historical regulation

*Reproductive Justice, SISTERSONG, [https://www.sistersong.net/reproductive-justice](https://www.sistersong.net/reproductive-justice) [hereinafter Reproductive Justice (SisterSong)]. As Renee Bracey Sherman puts it:

As black feminists from the ‘70s onward sought to expand racial, gender and economic equality for women of color, they found themselves being left out of mainstream conversations about equal pay and reproductive rights. Their stories were left untold in a women’s rights movement, led mainly by white women. . . . They began the reproductive justice movement to bring to light the fact that communities of color lack access to basic healthcare and pregnancy options, including the opportunity to raise their children with dignity.


85 Ketteringham et al., supra note 84, at 83.
86 Id. (footnote omitted).
87 London, supra, note 80, at 72; see also DOROTHY ROBERTS, *KILLING THE BLACK BODY*, at xix-xx (2d ed. 2017) (“For too long, the rhetoric of ‘choice’ has privileged predominantly white middle-class women who have had the ability to choose from reproductive options that are unavailable to low-income women and women of color.”).
88 Reproductive Justice (SisterSong), supra note 84.
of black women’s bodies and their reproduction, starting with slavery’s control of Black women’s wombs and continuing to present day.\textsuperscript{89} Acknowledging this history necessitates a Reproductive Justice approach, one that understands that poor women of color “must deal with a whole range of forces that impair their choices. Their reproductive freedom . . . is limited not only by the denial of access to safe abortions, but also by the lack of resources necessary for a healthy pregnancy and parenting relationship.”\textsuperscript{90} Advocating for a new meaning of reproductive liberty, Roberts argues that a commitment to Reproductive Justice is necessary to ensure that individuals are able to make their own decisions about their lives, regardless of what that decision is.\textsuperscript{91}

Reproductive Justice principles offer a framework particularly useful to understanding the lives and specific needs of homeless individuals, who face not only the same assaults on their reproductive autonomy as wealthy housed individuals, but many other barriers based on poverty and lack of housing. Additionally, homeless individuals are disproportionately likely to be Black and/or Latinx, disabled, and to suffer from a behavioral health disorder, all of which add more barriers to their right to “choose” if, when, and how to have a child and become a parent. Research shows that homeless individuals have a higher pregnancy rate than housed low-income individuals,\textsuperscript{92} and are more likely to suffer from pregnancy complications and conditions,\textsuperscript{93} further highlighting the importance of focusing on this population in this Comment. Examining state intrusions into the right of reproductive autonomy from the experiential perspective of homeless individuals enhances our understanding both of the state’s conduct and of the constitutional implications of its conduct. It also adds to the literature and our understanding on both reproductive freedom and Reproductive Justice, and how unhoused individuals, disproportionately Black, bear the brunt of punitive state and federal policies, a continuation in the country’s legacy of devaluing poor and/or Black individuals’, and particularly women’s, livelihoods and reproduction.

II. A SYSTEM OF REPRODUCTIVE REGULATION

Homeless individuals with the capacity to have a child face many intrusions into their ability to decide when, if, how, and with whom to have a child, and

\textsuperscript{89} ROBERTS, supra note 87, at 22-55.
\textsuperscript{90} Id. at 300.
\textsuperscript{91} See id. at 301 (“A broader understanding of reproductive freedom does not reject abortion rights in favor of a right to procreate. Rather, it sees the right to terminate a pregnancy as one part of a broader right to autonomy over one’s body and one’s reproductive decisionmaking.”).
\textsuperscript{92} Judith A. Stein, Michael C. Lu & Lillian Gelberg, Severity of Homelessness and Adverse Birth Outcomes, 19 HEALTH PSYCH 524, 525 (2000).
\textsuperscript{93} See infra text accompanying notes 214–17.
into their efforts to subsequently raise that child. As opposed to the right-wing movement to promote childbearing, characterized by severe restrictions on contraceptives and abortion, control of reproduction among the homeless population seeks to deter childbearing and childrearing. In the following Sections, I explore how the homeless are encouraged to avoid getting pregnant and having children and are penalized when they do; their unhoused status makes them vulnerable to criminalization while pregnant and highly susceptible to losing their children and parental rights to the child welfare system.

A. Not Pregnant: Welfare and Reproductive Coercion

“We don’t allow dogs to breed. We spay them. We neuter them. We try to keep them from having unwanted puppies, and yet these women are literally having litters of children.”

This country has a shameful history of policies and procedures aimed at preventing poor women and women of color from having children. The

94 See Timeline: Trump’s Attacks on Access to Birth Control, PLANNED PARENTHOOD ACTION FUND (Jan. 2017), https://www.plannedparenthoodaction.org/flight-for-birth-control/facts/timeline-trumps-attacks-access-birth-control [https://perma.cc/BGD3-X6R7] (“Since even before his presidency began, efforts by Trump and his appointees to undermine access to birth control have been relentless—and show no sign of stopping.”); Danielle Campoamor, GOP Opposition to Birth Control Is Politics, Period, CNN (Nov. 9, 2018, 12:38 PM), https://www.cnn.com/2018/11/09/opinions/contraceptive-mandate-alabama-west-virginia-abortion-campoamor/index.html [https://opinions.perma.cc/3YUW-GSSB] (“[A]nti-abortion state legislatures have been . . . attack[ing] abortion access for women across America . . . . During the 2018 legislative session alone, almost 200 bills restricting abortion were introduced, 28 of which were enacted, continuing the nearly decadelong coordinated strategy to shutter clinics with burdensome regulations or sham bans . . . .”); Emma Green, Is This Really the End of Abortion?, ATLANTIC (Sept. 23, 2020), https://www.theatlantic.com/politics/archive/2020/09-abortion-supreme-court-vacancy/616430 [https://perma.cc/ZXT2-Y895] (“If President Donald Trump succeeds in appointing a replacement for Ginsburg, he will solidify a six-person conservative majority on the Supreme Court . . . . The most fundamental issue at stake is the right to abortion, which the conservative wing of the Court has been openly agitating to revisit for years.”).


96 See, e.g., Lindsay Glauner, Comment, The Need for Accountability and Reparation: 1830–1976 The United States Government’s Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans, 51 DEPAUL L. REV. 911, 939 (2002) (discussing a Bureau of Indian Affairs program designed to sterilize Native American women, “under the guise of medical necessity” or without the women’s knowledge or consent, that forcibly sterilized more than 42% of all Native women of childbearing age in the 1970s and 80s (footnotes omitted)); Nancy
history and current state of welfare is similarly shameful. In this section, I argue that the current welfare state, disproportionately relied upon by the homeless, builds upon that disturbing and not-so-distant history by interfering with homeless individuals’ right to privacy and reproductive autonomy. Specifically, current welfare laws attempt to coerce the poor into marriage and into preventing (or potentially terminating) pregnancy, and punish them if they fail to conform in either way.

1. Welfare and the Reproductive Control and Punishment of the Poor

Welfare has always been conceptualized as a feminized program, and mainstream views on welfare are dominated by stereotypical characterizations of poor, single women. Originally, public welfare began in the 1930s as a way to “provide mothers and their children a means to survive when breadwinning fathers either died or abandoned their families. . . . The idea behind welfare was to relieve poor single mothers of the necessity of wage-earning so that they might engage in the full-time care of their . . .”

Ehrenreich, The Colonialization of the Womb, 43 DUKE L.J. 492, 515 (1992) (“African-American women, along with Latina (especially Puerto Rican) and Native American women, were subjected to forced sterilization in appalling numbers up through the 1970s, a practice that continues in ‘milder’ forms today.” (footnote omitted)); Ellen J. Kennedy, On Indigenous Peoples Day, Recalling Forced Sterilizations of Native American Women, MINNPOST (Oct. 14, 2019), https://www.minnpost.com/community-voices/2019/10/on-indigenous-peoples-day-recalling-forced-sterilizations-of-native-american-women [https://perma.cc/3FCP-LWL2] (“Between 1907 and 1939, more than 70,000 people in 29 U.S. states were sterilized, unknowingly or against their will, while they were incarcerated in prisons or in institutions for the mentally ill. . . . Race and class figured prominently in the decisions . . .”); id. (”[M]ost physicians performing the non-voluntary sterilizations [in the 60s and 70s] were white males who believed that they were helping the country by limiting births in low-income minority families.”); cf. Buck v. Bell, 274 U.S. 200, 207 (1927) (“It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”).

97 See infra subsections II.A.1–2.

98 Referring to “the public assistance programs that give benefits, in cash and in kind, to those who meet the programs’ criteria,” Phoebe G. Silag, Note, To Have, To Hold, To Receive Public Assistance: TANF and Marriage-Promotion Policies, 7 J. GENDER, RACE & JUST. 413, 414 (2003).

99 The argument that the current welfare state hinders reproductive freedom is not novel—many scholars, including a number cited in this section, have written about it. This Comment’s emphasis is to analyze how these provisions and others regulate the reproductive lives of homeless individuals specifically.

children.”\textsuperscript{101} This view, espousing welfare as an alternative to wages for women raising children, faded in the following decades, replaced with a new conception of welfare as a sort of “safety net” for when wages were not available.\textsuperscript{102} These “[c]hanges in the idea of welfare reflected changes in our assessments of mothers who are poor and single.”\textsuperscript{103}

When President Bill Clinton pledged to end welfare in the 1990s, policymakers in Congress debated how to achieve this goal.\textsuperscript{104} However, despite the fact that many of the new proposed provisions harmed poor mothers specifically, “among policy makers, even the usual champions of gender equality erased mothers from the debate. Most Democratic liberals in Congress who fought to save welfare did so for the sake of children, not mothers.”\textsuperscript{105} These lawmakers were worried about children going into poverty, but “they cared little that new welfare provisions would pressure poor single mothers to surrender their civil rights as a condition of economic assistance.”\textsuperscript{106}

In the welfare reform debates, both parties promised limits on welfare eligibility, provisions to penalize having children out of wedlock, and other generally punitive “reforms” equating “welfare use with welfare abuse” that effectively punished those sufficiently poor to rely on welfare, as if their poverty evidenced a moral shortcoming.\textsuperscript{107} Encapsulating the idea that came to form the basis of the new policy, “Democrats argued that children should not have to pay for their mothers’ sins, that welfare reform should be ‘tough on parents, not tough on kids.’”\textsuperscript{108} One Senator even stated that “we should not be punishing the children for what the parents have not done correctly,” implying in no uncertain terms that being poor enough to need welfare was a personal failing that could and should have been avoided.\textsuperscript{109} Ultimately, both

\begin{itemize}
  \item \textsuperscript{101} MINK, supra note 100, at 1.
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} Id.
  \item \textsuperscript{104} The 1996 debates on ending and gutting welfare are not the first-time that politicians, mainly conservatives, have attempted to do so:
    \begin{quote}
      Political scientist Charles Noble argues that conservative politicians “have launched three major campaigns to cut public provision: the first was led by President Richard Nixon in the late 1960s and early 1970s, the second by President Ronald Reagan in the early 1980s and the third by Speaker of the House Newt Gingrich after the 1994 midterm elections.”
    \end{quote}
  \item \textsuperscript{105} MINK, supra note 100, at 2.
  \item \textsuperscript{106} Id. at 2.
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id. at 4.
  \item \textsuperscript{109} Id.
\end{itemize}
parties “agreed that welfare reform should be tough on mothers and that the end of welfare should be the reform of poor women.”

The 1996 welfare debate culminated in the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). With the passage of this Act, “welfare ceased being an entitlement and became instead a behavior modification program to control the sexual and reproductive decisions of cash poor mothers.” This Act and subsequent developments in welfare law continue to reflect punitive ideas about the role of welfare, particularly aimed at poor, single women. As one scholar notes, the welfare system as reformed has “tried to provide for poor children while avoiding giving aid or encouragement to lone mothers.”

Today, welfare policies and systems blame poor people, particularly mothers, for their poverty while simultaneously monitoring and punishing them. Scholars situate this approach to poverty management in the United States within a broader system of punitive governance, a system in which “all institutions in the United States increasingly address social inequality by punishing the communities that are most marginalized by it . . . [Institutions are] regulat[ing] the people who rely on [welfare], and . . . resort[ing] to a variety of punitive measures to enforce compliance.” This punitive governance of the welfare state “is rooted in the view that mothers’ poverty flows from moral failing.” Their moral failings include being unwilling to work, being unmarried (whether never married or divorced), and being irresponsible sexually, resulting in pregnancy while poor. Because these individuals are seen as having “failed” they are subject to constraints on their constitutional rights, including the fundamental right to privacy and to “make one’s own decisions about marriage, about family life, and about procreation.”

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110 Id.
113 Gordon, Who Deserves Help?, supra note 100, at 12.
114 Roberts, supra note 44, at 1698 (citing EUBANKS, supra note 44, at 17) (“Big data critics who decry a universal invasion of the public’s privacy make a similar mistake by failing to attend to the way state surveillance concentrates on poor people with an intensity unknown to middle-class and wealthy Americans.”). For more on the surveillance and monitoring of poor women, see generally Eubanks, supra note 44, and Khiara M. Bridges, Privacy Rights and Public Families, 34 HARV. J.L. & GENDER 113 (2011).
115 Roberts, supra note 44, at 1700 (footnotes omitted).
116 MINK, supra note 100, at 4.
117 See id. (highlighting the moral failings emphasized by both democrats and republicans about mothers on welfare).
118 Id. at 6; see also Bridges, supra note 114, at 122-24 (explaining how the constitutional privacy rights of pregnant women on welfare are constrained).
It is important to note the role of race in conceptions of poor women on welfare. Even before the 1990s, restrictive and punitive welfare rules—such as the “suitable home,” “employable mother,” “man in the house,” and “substitute father” rules—were aimed selectively at Black women to block them from receiving benefits. The welfare debates of the 1990s focused largely on Black families, and on the image of the “mythical Black welfare queen . . . who deliberately becomes pregnant to receive public assistance,” and the young Black men they raise, who grow up to be criminals. The myth of the “welfare queen,” created in 1976 by Ronald Reagan, made “the face of welfare both Black and female.” Reagan demonized one so-called “welfare queen,” Linda Taylor, claiming that “she has 80 names, 30 addresses, 12 Social Security cards and is collecting veterans’ benefits on four non-existing deceased husbands. She’s got Medicaid, getting food stamps and she is collecting welfare under each of her names. Her tax-free cash income alone is over $150,000.” Although this story was not true—Linda Taylor actually used four aliases and collected only $8,000—the “image of the welfare queen has remained central to our country’s understanding of public assistance.”

This pernicious association between race and welfare helps to explain why “White Americans . . . have been unwilling to create social programs that will facilitate Blacks’ full citizenship and economic well-being, even when those programs would benefit whites.”

2. TANF and Control of Homeless Women’s Reproduction

Scholars have examined a number of government programs aimed at regulating and controlling the poor, but in this section I focus on TANF, or the Temporary Assistance for Needy Families program, which was created by

119 EUBANKS, supra note 44, at 78.
120 ROBERTS, supra note 87, at 215.
121 EUBANKS, supra note 44, at 78-79.
122 Id.
123 Id. at 79. In fact, an analysis of television news coverage of U.S. welfare reform between 1992 and 2007 found the image of the welfare mother ubiquitous, consisting of racist stereotypes portraying women on welfare as

childlike, hyperfertile, lazy, and bad mothers . . . [T]hese stereotypes were deployed to support policies intended to control poor women’s reproduction and mothering. The welfare mother image was central to framing the debate in terms of the responsibility of public assistance recipients rather than the structural constraints that lead to families to require public assistance.

124 ROBERTS, supra note 87, at 244 (emphasis omitted).
125 See generally Roberts, supra note 44; EUBANKS, supra note 44.
the PRWORA and is the main source of cash assistance and welfare available today.\textsuperscript{126} TANF is a federal-state partnership: the federal government provides grants to states to implement the TANF program, and the program assists pregnant women and families with children by providing limited cash benefits.\textsuperscript{127} Many homeless mothers and homeless pregnant women rely on TANF to cover basic necessities for survival,\textsuperscript{128} but the program is punitive and controls participants’ reproductive decisions in exchange for receiving benefits.\textsuperscript{129} Homeless individuals’ rights are eroded by TANF welfare provisions.


\textsuperscript{127} The federal government provides states with general guidelines for the program, but states have a lot of flexibility in developing their state plan. § 601. TANF’s block grant structure causes some serious administrative concerns, and the evidence shows that TANF is not very effective at helping families in need. The Center on Budget and Policy Priorities Report on the subject found that “[i]n 2018, for every 100 families in poverty, only 23 received cash assistance from TANF—down from 68 families in 1996.” LAURA MEYER & IFE FLOYD, CTR. ON BUDGET & POL’Y PRIORITIES, CASH ASSISTANCE SHOULD REACH MILLIONS MORE FAMILIES TO LESSEN HARDSHIP 1 (2020), https://www.cbpp.org/sites/default/files/atoms/files/6-16-tanf.pdf [https://perma.cc/WH4W-ARTF]. In fact, the report noted that due to “fixed block grant funding and erosion, combined with TANF’s nearly unfettered state flexibility . . . very few families in need receive cash assistance.” Id. at 12. Others have written on the failings of TANF and its structure. See, e.g., Rebecca Vallas & Melissa Boteach, Top 5 Reasons Why TANF Is Not a Model for Other Income Assistance Programs, CTR. FOR AM. PROGRESS (Apr. 29, 2015, 9:49 AM), https://www.americanprogress.org/issues/poverty/news/2015/04/29/112034/top-5-reasons-why-tanf-is-not-a-model-for-other-income-assistance-programs [https://perma.cc/G2Y-KZ3E] (describing several reasons why TANF is ineffective, including that it does not help many struggling families); R. Kent Weaver, The Structure of the TANF Block Grant, BROOKINGS (Apr. 3, 2002), https://www.brookings.edu/research/the-structure-of-the-tanf-blockgrant [https://perma.cc/CZ2C-PN3A] (describing the structural failings of TANF block grants).


many [homeless families] may be eligible for TANF. They are extremely poor. Preliminary data from HUD's current multi-city study The Impact of Housing and Services Interventions on Homeless Families shows that the annual median income of homeless families is under $7,500, and nearly a third of these families report annual incomes below $5,000. The study indicates that 41 percent of families receive TANF cash assistance. Many others may be income-eligible, but are not receiving TANF support.

Id. at 1.

\textsuperscript{129} PRWORA and TANF have, from the beginning, explicitly aimed to reduce out-of-wedlock pregnancies and champion marriage, blaming poor single women for failing to marry and/or prevent pregnancy, leading to negative consequences on their children. In the original TANF statute, Congress stated these findings:

(1) Marriage is the foundation of a successful society. (2) Marriage is an essential institution of a successful society which promotes the interests of children. (3) Promotion of responsible fatherhood and motherhood is integral to successful child
that champion marriage, and by those that coerce individuals into preventing pregnancy and childbirth, and punish them if they do have children.\textsuperscript{130}

These coercive and punitive measures, which have sparked concern and critique for their impacts on poor women and women of color,\textsuperscript{131} have a particularly strong and troublesome impact on homeless women (who are also

rearing and the well-being of children.\ldots\textsuperscript{(C)} The increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women.\ldots\textsuperscript{(B)} The negative consequences of an out-of-wedlock birth on the mother, the child, the family, and society are well documented as follows: \ldots\textsuperscript{(B)} Children born out-of-wedlock have a substantially higher risk of being born at a very low or moderately low birth weight. \textsuperscript{(C)} Children born out-of-wedlock are more likely to experience low verbal cognitive attainment, as well as more child abuse, and neglect. \textsuperscript{(D)} Children born out-of-wedlock were more likely to have lower cognitive scores, lower educational aspirations, and a greater likelihood of becoming teenage parents themselves. \textsuperscript{(E)} Being born out-of-wedlock significantly reduces the chances of the child growing up to have an intact marriage. \textsuperscript{(F)} Children born out-of-wedlock are \textsuperscript{3} times more likely to be on welfare when they grow up.


130 See infra subsections II.A.2.a–b. Although this Comment focuses on two types of provisions directly related to their reproductive rights and autonomy, it is important to note another aspect of welfare that disproportionately impacts homeless individuals and, thus, their reproductive lives: work provisions. Welfare plans today routinely champion waged work, many even requiring it as a provision of receiving benefits. For example, Temporary Aid for Needy Families (TANF) recipients are required to work or participate in work or educational training programs. The Supplemental Nutrition Access Program, or SNAP, also requires individuals to work, and caps many individuals’ access to benefits at three months within a three-year period if they are not working. See generally HEATHER HAHN, ELEANOR PRATT, EVA ALLEN, GENEVIEVE KENNEY, DIANE K. LEVY & ELAINE WAXMAN, URB. INST., WORK REQUIREMENTS IN SOCIAL SAFETY NET PROGRAMS 1-13 (2017), https://www.urban.org/sites/default/files/publication/95566/work-requirements-in-social-safety-net-programs.pdf [https://perma.cc/49WR-F3HA]. These work requirements are particularly burdensome on the homeless. Without stable housing, it is difficult for homeless individuals to get to and from any work site. Additionally, homeless individuals generally do not have access to showers or a safe and secure place to take care of hygienic matters, and they often struggle with food insecurity and hunger, diminishing their ability to perform labor. Furthermore, homeless individuals, who are disproportionately criminalized (see infra subsection II.B.2) face additional barriers to obtaining a job. There are some exceptions to these work requirements, but they vary by state.

131 See, e.g., ROBERTS, supra note 87, at 202-45 (discussing the welfare system and its attempts to control the reproductive lives of poor, Black women, specifically discussing attempts at preventing mothers on welfare from having more children).
disproportionately likely to be women of color). Homeless women who want to marry or prevent pregnancy, but who lack the resources to do so on their own, face disdain and punishment from welfare agencies. Homeless women who do not want to marry or prevent pregnancy are similarly punished, potentially coercing their choices, especially when TANF benefits are the only form of support and assistance available to them. Either way, current welfare policy significantly impairs homeless women’s ability to make fully autonomous decisions about their reproductive lives.

a. Coerced Marriage and Partnership

Individuals have a protected right to marriage, and as such, to refrain from marriage.\(^{132}\) As long as marriage is between two consenting adults, the state must, for the most part, stay out of that aspect of individuals’ lives, regulating marriage only when needed for the public health or safety.\(^{133}\) PRWORA and TANF, however, both implicitly and explicitly encourage and promote marriage.\(^{134}\) In its stated purpose, TANF’s statute says that the program was designed to “end the dependence of needy parents on government benefits by promoting . . . marriage” and “prevent and reduce the incidence of out-of-wedlock pregnancies.”\(^{135}\) Like welfare itself, this promotion of marriage is gendered—it specifically seeks to encourage women to marry men. States, who have broad discretion under PRWORA to implement state-specific TANF plans,\(^{136}\) have taken this guidance seriously, implementing “pilot programs designed to promote marriage as a solution to poverty.”\(^{137}\) Arizona implemented a program to use over $1 million of its TANF budget for “marriage skills seminars,” allowing low-income couples to attend free of charge.

\(^{132}\) See supra note 75.

\(^{133}\) For example, no marriage between close relatives. See, e.g., ARK. CODE ANN. § 5-26-202 (West 2020) (criminalizing marriage between someone and their close relatives, including children, siblings and half-siblings, uncles, aunts, nephews, and nieces); see also Mekouar, supra note 75 (noting that twenty-five states prohibit marriage to certain family members).

\(^{134}\) See Cheryl Wetzstein, Welfare Promotes Marriage, WASH. TIMES (Sept. 16, 2002), http://www.fact.on.ca/news/news0209/wt020916.htm [https://perma.cc/2DA9-NGU3] (describing how TANF funds are being used to promote marriage through marriage education classes and “marriage initiative[s]”); Silag, supra note 98, at 417 (“Underlying the PRWORA is the belief that the ideal family is headed by a man and a woman who are married to each other.”).

\(^{135}\) 42 U.S.C.A. § 601(a). In 2002, the federal government proposed using $300,000,000 “in TANF allocations to promote marriage,” planning to “provide the marriage promotion funds to the states so that they could establish experimental programs, such as premarital counseling for poor heterosexual couples, divorce-avoidance counseling for poor people in troubled marriages, and publicity campaigns aimed at the general population about the virtues of heterosexual marriage.” SMITH, supra note 112, at 173.

\(^{136}\) See supra note 127 (describing the broad flexibility given to states to implement TANF).

\(^{137}\) SMITH, supra note 112, at 174.
and creating a TANF-funded agency to “produce and distribute a ‘healthy marriage’ handbook to all couples applying for a state marriage license.”138 In 2001, Oklahoma launched a $10 million “marriage initiative,” allowing parents on welfare to take “Prevention and Relationship Enhancement Program” (PREP) workshops for free.139 Michigan has required unmarried mothers on welfare to take classes in “marriage exploration.”140 And West Virginia gives married couples up to $100 more in welfare benefits each month if the family includes a “married man and woman and dependent children.”141

The idea that promoting marriage can end children’s poverty is what Dorothy Roberts calls a “welfare myth.”142 This myth is particularly sinister for homeless individuals due to the costs associated with getting married, the high rate of domestic violence abuse in homeless women’s previous and current living situations, and the difficulty homeless individuals face in meeting potential marriage partners who can improve their financial status.143

Getting married is expensive, especially for the homeless. A marriage license requires transportation to the courthouse, sometimes more than once due to mandatory waiting periods.144 Marriage licenses are an additional cost, ranging from around $20 to $120.145 And while a few states reduce that fee for couples completing a premarital education course,146 the course itself requires additional transportation, time, and energy. Additionally, marriage in some states requires

138 Id.; see also Silag, supra note 98, at 418 (describing the Arizona program).
139 See Silag, supra note 98, at 418.
140 Id. at 419.
142 ROBERTS, supra note 87, at 223 (“[The correlation between single motherhood and poverty] does not prove that single motherhood causes poverty. . . . It is especially unlikely that marriage or child support will eradicate the poverty of most Black children.”).
145 Id. (detailing the cost of marriage licenses in each state).
146 For instance, Minnesota’s marriage license fee is $115, but only $40 if you complete a premarital education program. Id. Georgia’s license fee is $67, but $27 if you complete a premarital education program. Id.
a government issued ID, but as reported by the National Law Center on Homelessness and Poverty, in addition to costing up to $29, it is particularly difficult for homeless individuals without a permanent home to get an ID.\footnote{See Nat’l. L. Ctr. on Homelessness & Poverty, Photo Identification Barriers Faced by Homeless Persons: The Impact of September 11, at 4-5 (2004). \url{https://nlchp.org/wp-content/uploads/2018/10/ID_BarrIers.pdf} (describing the barriers homeless people face in obtaining an ID).}

The multiple costs associated with the act of marriage make the promotion of marriage provisions in TANF particularly punitive towards homeless women. When money is tight, to scrape together even $20 for a marriage license can be an unmanageable burden. It is cruel to expect homeless women to pay up to $150 or more to get married, yet welfare agencies routinely ignore such barriers and promote marriage across the board for all recipients.

In addition to the costs they force upon the homeless, welfare provisions that promote marriage also ignore the reason many single women may need cash assistance to begin with—they left an abusive household. Indeed, as discussed above, domestic violence is a leading cause of homelessness among women. Women fleeing their abusers often have no place to stay long term,\footnote{See supra notes 64–68 and accompanying text.} and will also face disdain or disapproval from their welfare office. Indeed, women receive fewer benefits if they divorce an abusive husband than if they remain in the marriage and continue to suffer abuse.\footnote{See, e.g., W. VA. CODE § 9-9-6(d)(2) (2021) (providing that married couples receive more in welfare benefits than single individuals).} By promoting marriage and partnership with men, TANF encourages women facing abuse from their intimate partner to stay with their abuser.

Finally, the promotion of marriage ignores the difficulty homeless women face in dating and finding someone to marry. Poor women, particularly those without jobs, are significantly less likely to marry than non-poor women and poor women with jobs.\footnote{Diane K. McLaughlin & Daniel T. Lichter, Poverty and the Marital Behavior of Young Women, 59 J. MARRIAGE & FAM. 582, 592 (1997).} Research shows that low-income individuals face numerous barriers to marriage, including societal expectations, couples’ attitudes on childrearing, low male earnings, fear of divorce, and poor relationship quality.\footnote{See Kathryn Edin & Joanna M. Reed, Why Don’t They Just Get Married? Barriers to Marriage Among the Disadvantaged, FUTURE CHIL.D., August 2005, at 117, 117 (“Social barriers include marital aspirations and expectations, norms about childbearing, financial standards for marriage, the quality of relationships, an aversion to divorce, and children by other partners.”).} Research conducted in 2000 on low-income single mothers’ views towards marriage identifies several motivations for non-marriage. Most mothers interviewed agreed “that potential marriage partners must earn significantly more than the minimum wage,” and also emphasized...
the importance of “stability of employment, source of earnings, and the effort men expend to find and keep their jobs.”

The barriers to marriage poor women face are exacerbated for homeless women—particularly when it comes to finding a partner who can benefit them financially. Dating while homeless, although not often the focus of sociological research, does occur, but partners are likely to be similarly disadvantaged. Far more research has focused on difficult and in many cases dangerous aspects of homeless women’s romantic and sexual lives, including sexual abuse, exploitation, and domestic violence. So, although many homeless women may want to one day get married, they face numerous obstacles that are largely ignored by current welfare provisions championing marriage.

b. Coerced Non-Pregnancy

Consistent with the statute’s stated goals and the legislative history of the welfare reform debates, TANF programs across the country have implemented various programs aimed at discouraging poor individuals on welfare from having children. These programs and provisions are particularly coercive and harmful for homeless individuals, whose economic instability and vulnerability may make them extremely reliant on TANF benefits.

Scholars describe many of TANF’s provisions as “welfare sexual regulation.” Perhaps the best examples are family cap laws that punish poor families for having children by refusing them any additional benefits, and in some states even decreasing their benefits. These laws punish individuals

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153 See Graff, *supra* note 143 (documenting how many homeless individuals, if they do date, date others who are homeless). See generally, e.g., Rachel L. Rayburn & Jay Corzine, *Your Shelter or Mine? Romantic Relationships Among the Homeless*, 31 DEVIANT BEHAV. 756 (2010) (detailing the romantic lives of homeless individuals).

154 See generally JULIET WATSON, *YOUTH HOMELESSNESS AND SURVIVAL SEX* (2018) (analyzing the practice of "survival sex," which homeless individuals sometimes engage in in exchange for shelter or other essentials); Watson, *supra* note 143 (discussing the risks that homeless women face when they rely on "providing sex to manage homelessness").

155 Cf. Edin & Reed, *supra* note 151, at 119, 122 (stating that many poor individuals actually do aspire to marriage, but find it unattainable); McLaughlin & Lichter, *supra* note 150 (finding that poor women generally want to get married and revere the institution of marriage).

156 ROBERTS, *supra* note 87, at 209 (“The major goal of some welfare reformers is to reduce the number of children born to women receiving public assistance.”)


158 Kalena Thomhave, *Battle over TANF Family Cap Intensifies, SPOTLIGHT ON POVERTY & OPPORTUNITY* (Oct. 3, 2018), https://spotlightonpoverty.org/spotlight-exclusives/battle-over-tanf-family-cap-intensifies [https://perma.cc/5K4W-FRTX]. For example, under Massachusetts’ family cap law, a parent with two children would typically receive $578 in TANF benefits each month. But, if the second child was born while the family was already receiving TANF, that child would be
on TANF who have children and coerce them to prevent pregnancy or face harmful financial consequences. Though it may be claimed that family cap laws aim only at reducing the number of children born into welfare, legislators admit that the purpose of these laws is to discourage aid recipients from having children.\textsuperscript{19} Seen as “a way of ridding America of the burden poor people impose,” these laws may coerce poor individuals receiving TANF benefits into using contraceptives and/or getting abortions.\textsuperscript{160} Family cap laws were particularly prominent in the 1990s, when nearly half of all states had them.\textsuperscript{161} Fortunately, they have fallen out of favor in recent years, but they have not disappeared—as of 2019, 13 states still had them.\textsuperscript{162}

Contraceptive and abortion access for individuals who want it is an important goal but must be approached cautiously with an understanding of its troublesome history. Reproductive health care advocates, activists, and providers face a particular tension when it comes to contraceptives. This “long-standing tension” is “between some women’s lack of access to desired contraceptive care and others’ experiences of discriminatory or coercive overuse of those same methods.”\textsuperscript{163} Underlying this tension is what scholars term as “stratified reproduction,” the “idea that some people’s fertility and childbearing are more valued than others.”\textsuperscript{164}

\textsuperscript{19} See, e.g., Roberts, supra note 87, at 212 (“[T]he law’s primary sponsor . . . made it explicit. . . . ‘This bill is intended to discourage AFDC recipients from having additional children during the period of their welfare dependence.’”).

\textsuperscript{160} Id. at 216-17; see also id. at 212 (“Women say that the child exclusion has induced them to get an abortion they did not want.”). See generally Smith, supra note 10 (discussing the “insidious” effects of family cap policies, which include the coercing of poor women into having abortions).


\textsuperscript{162} Those thirteen states are Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Indiana, Mississippi, North Carolina, North Dakota, South Carolina, Tennessee, and Virginia. Id.


\textsuperscript{164} Id.; see also, e.g., \textsc{Comm. on Ethics, Am. Coll. of Obstetricians & Gynecologists, Committee Opinion No. 695 Sterilization of Women: Ethical Issues and Considerations} 2-3 (2017), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2017/04/sterilization-of-women-ethical-issues-and-considerations.pdf [https://perma.cc/UsJEP-M6T3] [hereinafter ACOG \textsc{Committee Opinion No. 695}] (“Race and socioeconomic status also have been found to affect a physician’s willingness to perform sterilization, with physicians more willing to sterilize black women compared with white women and poor women compared with more affluent women.”).
Sterilization is the prime example of the tension at issue here: throughout the nation’s history, poor, disabled, non-white, and native women have been sterilized without their knowledge or consent, even as wealthy white women could not access sterilization procedures. The federal government, under the guise of public welfare, funded sterilization programs that targeted specific populations: in the 1970s, the Family Planning Act, despite not ever mentioning sterilization, created clinics that began sterilizing 100,000 to 150,000 women each year. The women sterilized were disproportionately poor and Black. Over the years, the forced sterilization of poor and disadvantaged women, while still happening today, has morphed into a more devious and insidious form of pregnancy prevention: coerced contraceptives, particularly long-acting reversible contraceptives (LARC). These LARCs have been pushed on welfare recipients, sometimes through specific targeting and sometimes by conditioning benefits on using the contraceptives.

With the background of eugenics, coerced contraceptives, and poverty control in mind, it is undeniable that TANF family caps are nothing less than coerced contraception aimed at preventing poor individuals, particularly poor Black women, from having children. For example, California implemented a family cap in 1994. As Jessica Bartholow, legal advocate with Western Center on Law & Poverty, said, “The message to poor women [with these laws] was that they should not conceive and they should seek very permanent forms of birth control.” She reports that some of her clients “sought out

165 See generally Moniz et al., supra note 163.
167 Id.
169 ROBERTS, supra note 87, at 202-45 (discussing the coercive effects of the welfare system that encourages long-term contraceptives and discourages having additional children).
170 ROBERTS, supra note 87, at 211-17 (discussing family cap laws and the racist rhetoric and logic used to support them). See generally Dorothy E. Roberts, The Only Good Poor Woman: Unconstitutional Conditions and Welfare, 72 DENV. U. L. REV. 931 (1995) (arguing that some welfare reform proposals, including family caps, aim “to discourage poor women from having children”); Nicole Huberfeld, Three Generations of Welfare Mothers Are Enough: A Disturbing Return to Eugenics in the Recent “Workfare” Law, 9 UCLA WOMEN’S L.J. 97 (1998) (discussing how new welfare laws known as “workfare” “mirrors eugenics theory because its proponents are imposing . . . values upon the poor as a condition to providing them benefits”).
171 Wiltz, supra note 3.
172 Id.
sterilization” after the California law was passed, to preserve their benefits.\textsuperscript{173} In March 2016, when California was considering repealing the law, one woman even testified before a Senate committee “that she begged her doctor to sterilize her after she became pregnant at 18 so that she could keep her benefits, but he refused to perform the surgery because she was too young.”\textsuperscript{174} Later, when, ultimately, the young woman’s “birth control failed and she became pregnant again, her infant son was not entitled to any benefits.”\textsuperscript{175} Fortunately, California finally repealed its Family Cap law in 2016.\textsuperscript{176}

The popularity of family cap laws may be in decline, but such laws are not the only example of coerced non-pregnancy for TANF recipients. Other welfare policies incentivize states to decrease the number of out-of-wedlock pregnancies each year, leading to TANF-funded state programs to do just that. For example, TANF agencies across the nation provide family planning material and services to recipients.\textsuperscript{177} Others also provide abstinence education, often aimed at poor teenage women.\textsuperscript{178} As Anna Marie Smith writes in her book \textit{Welfare Reform and Sexual Regulation}, “[e]ach of these initiatives constitutes a State tool for discouraging childbirth and childrearing among poor women.”\textsuperscript{179}

Such provisions are particularly coercive and punitive when targeting the homeless, who are likely to rely on these benefits just to survive and who may need the cash assistance for such essentials as food, water, and warm clothing in the winter. Their economic insecurity and heavy reliance on public benefits make the homeless uniquely susceptible to the coercive power of punitive policies. When public assistance is the only thing feeding them day to day or

\textsuperscript{173} Id.
\textsuperscript{174} Id. (citing Meeting of Senate Budget Subcommittee No. 3, at 2:38:34 (Mar. 10, 2016), http://calchannel.granicus.com/MediaPlayer.php/view_id=7&clip_id=3444 [https://perma.cc/7SYE-EBNR] [hereinafter Cal. Senate Meeting]). This is actually a common occurrence—white women in particular report being denied sterilization procedures when they want them, highlighting again a tension in who doctors refuse to sterilize versus who doctors sterilize through coercive measures, or even without consent. See ACOG COMMITTEE OPINION NO. 695, supra note 164, at 2-3 (“Race and socioeconomic status also have been found to affect a physician’s willingness to perform sterilization, with physicians more willing to sterilize black women compared with white women and poor women compared with more affluent women.”); Julia Deardorff, \textit{Doctors Often Reluctant to Sterilize Young Women}, BUFFALO NEWS (May 17, 2014), https://buffalonews.com/news/national/doctors-often-reluctant-to-sterilize-young-women/article_06d62311-c3a6-5e15-4339-67ee3cd68eac.html [https://perma.cc/AUW7-AACL] (discussing Lori Witt, a white woman who wanted to get sterilized but found many physicians unwilling to even discuss it with her, as well as other women’s barriers to getting sterilized).
\textsuperscript{175} Wiltz, supra note 3 (citing Cal. Senate Meeting, supra note 174, at 2:38:45).
\textsuperscript{176} Wiltz, supra note 161.
\textsuperscript{177} SMITH, supra note 112, at 147.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
allowing them to purchase coats or mittens for their children in the winter months, coercion from the welfare agencies is especially insidious.

Although TANF and welfare programs discourage pregnancy, homeless individuals may actually be more likely than housed individuals to experience unplanned pregnancies, exacerbating the perceived problem. Moreover, homeless women’s risk of pregnancy increases the longer they remain homeless. This may be “in part due to high rates of sexual victimization and sexual risk behaviors as well as inconsistent contraception.” While it is important to remain skeptical toward and critical of any systematic attempts to force homeless women onto any form of birth control, their high rates of unplanned pregnancy suggest that at least some would avoid pregnancy if they were able to access birth control. But contraceptive access remains under attack in the United States. One qualitative study of homeless mothers, which is significant because it describes homeless women’s experiences in their own words, recounts the general dismay, fear, and confusion many interviewees felt upon discovering they were pregnant. These findings suggest that while welfare programs attempt to coerce homeless individuals into staying non-pregnant, these individuals may lack access to the contraceptives needed to do just that, making their situations particularly difficult and precarious.

The coerced non-pregnancy of welfare recipients is motivated by another common “welfare myth”—that welfare encourages childbirth. This is not true, and as Dorothy Roberts notes, “[m]any studies have found no significant causal relationship between welfare benefits and childbearing.” In fact, most mothers on welfare have only one or two children, and there is no convincing evidence to support the idea that welfare induces individuals to have children, especially when welfare benefits for poor families are not even sufficient to lift them out of poverty. There is also no convincing evidence that family cap laws actually reduce the number of children being born.

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181 Id.
182 Id. at 321 (citations omitted).
183 Id. at 324.
184 ROBERTS, supra note 87, at 218.
185 Id.
186 ALI SAFAWI & IFE FLOYD, CTR. ON BUDGET & POL’Y PRIORITIES, TANF BENEFITS STILL TOO LOW TO HELP FAMILIES, ESPECIALLY BLACK FAMILIES, AVOID INCREASED HARDSHIP 1 (2020), https://www.cbpp.org/sites/default/files/atoms/files/10-30-tanf.pdf [https://perma.cc/8R62-4F7Z] (“In every state, benefits are at or below 60 percent of the poverty line and fail to cover rent for a modest two-bedroom apartment.”).
187 See MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE 568 (2015) (“[T]here is no convincing evidence that welfare family caps impact childbearing
Instead, “considerable evidence suggests that these policies inflict additional hardships on poor women and their families.”

B. Pregnant: The Criminalization of Pregnancy’s Unique Impacts on the Homeless

In Section II.A of this Comment, I examined how the current welfare state coerces homeless women both into marriage and away from pregnancy. Nevertheless, many homeless individuals do still become pregnant, either by choice or due to lack of access to contraceptives. In this Section, I analyze how pregnant homeless individuals are subject to two distinct yet overlapping types of criminalization that further limit their reproductive autonomy: the criminalization of pregnancy and the criminalization of homelessness itself.

1. The Criminalization of Pregnancy

In early November 2019, a few weeks after she gave birth to a stillborn baby, Chelsea Cheyenne Becker was arrested in Hanford, California and charged with murder. Her bail was set at $5 million. Becker’s baby had methamphetamine in his system, and law enforcement believed that Becker was taking drugs while pregnant. Just four months earlier, in Chattanooga, Tennessee, Tiffany Marie Roberts gave birth to twins who died at the hospital, leading to her arrest for murder and child abuse. Both of her children tested positive for narcotics at birth. Her bond was set at $1 million. And just a month before that, Marshae Jones in Alabama “was charged with manslaughter for miscarrying a pregnancy after she was shot.”

by welfare recipients.”. For a critique on the view that “a poor woman approaches her sexual practices from a money-maximizing and cost-minimizing point of view,” see SMITH, supra note 112, at 41.

188 MURRAY & LUKER, supra note 187, at 568.
190 Id.
191 Id. Chelsea was held in county jail for sixteen months because she could not afford bail. Only recently did the charges against Chelsea get dismissed, nineteen months after her arrest. Murder Charge Against Chelsea Becker for Experiencing a Stillbirth Is Dismissed, NAT’L ADVOCS. FOR PREGNANT WOMEN (May 20, 2021), https://www.nationaladvocatesforpregnantwomen.org/murder-charge-against-chelsea-becker-for-experiencing-a-stillbirth-is-dismissed [https://perma.cc/ZY6W-F538].
193 Id.
194 Id.
195 Conley, supra note 189.
Law enforcement attempted to blame her for the death of her fetus, alleging that she started the fight with the person who eventually shot her.\textsuperscript{196}

These examples, occurring within a five-month period, involve just three of the growing number of pregnant people criminally charged for behaviors, such as drug use, that may harm a fetus. The criminalization of pregnancy, defined by Amnesty International as "the process of attaching punishments or penalties to women for actions that are interpreted as harmful to their own pregnancies,"\textsuperscript{197} has gained increased traction in the past several years as a direct result of the “fetal-personhood” movement.\textsuperscript{198} Although legal efforts to control women's reproductive choices began long before,\textsuperscript{199} the fetal personhood, or fetal rights, movement was popularized in the late 1980s and early 1990s, when "many Americans became seized with the fear—fanned by racism and, as it turned out false—that crack-addicted black mothers in inner cities were giving birth to a generation of damaged and possibly vicious children."\textsuperscript{200} These unwarranted fears spawned increasing anti-choice, pro-fetal-personhood rhetoric aiming to establish not only that the interests of the fetus and the interests of the pregnant person are different, but that they may, in fact, be in conflict. In cases of conflict, the fetal personhood movement argues that the fetus wins, even at the expense of the individual carrying it.\textsuperscript{201}

Recently, there has been an increase in “fetal assault” or “personhood” laws, which are “used to arrest and prosecute women who experience pregnancy

\textsuperscript{196} Id.


\textsuperscript{198} Editorial, A Woman’s Right, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html [https://perma.cc/SSZP-PCCX] ("[The criminalization of pregnancy cases] illuminate[s] a deep shift in American society, away from a centuries-long tradition in Western law and toward the embrace of a relatively new concept: that a fetus in the womb has the same rights as a fully formed person . . . the notion of fetal personhood . . .").

\textsuperscript{199} This Comment does not attempt to repeat historical accounts of state control of women's reproductive choices. For further analysis on the topic, see generally, e.g., Eliza Duggan, Note, A Velvet Hammer: The Criminalization of Motherhood and the New Maternalism, 104 CALIF. L. REV. 1299, 1308-17 (2016); Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 281-87 (1992). For an analysis specifically focused on state regulation, control, and devaluation of Black women’s reproduction, see ROBERTS, supra note 87.


\textsuperscript{201} Cf. Jesse Pournaras, I’m a Doula and I’ve Seen Firsthand How the Fetal Personhood Movement Harms Pregnant People, BUSTLE (July 10, 2019), https://www.bustle.com/p/how-the-fetal-personhood-movement-affects-pregnant-people-according-to-a-doula-18183178 [https://perma.cc/K3G5-V4LA] ("Fetal personhood laws, which grant fetuses and embryos full legal protections, mean that more often than not, the rights of the fetus take precedence over the rights of the pregnant person.").
complications and conditions such as drug dependence.”202 In the first two
months of 2017 alone, seventeen state legislatures introduced measures of this
nature.203 Many states have statutes that allow prosecutors to bring criminal
charges for actions “that would not otherwise be made criminal or punishable,”
thus criminalizing individuals because they are pregnant.204 Others have
statutes that do not specifically reference pregnancy but are applied
discriminatory to, or have a disproportionately high impact on, pregnant
people, “which can in practice work as de facto criminalization.”205 Under these
laws, people may face criminal charges for losing their pregnancy or for doing
something that is seen as endangering their fetus, even if the fetus survives.

A major target of these criminalization efforts are individuals who take
illegal drugs while pregnant, and some laws specifically punish the “chemical
endangerment” of fetuses. However, this criminalization may extend far
beyond illegal drug use. As the New York Times reported, individuals “who
took legal drugs during pregnancy—drugs prescribed by their doctors—all
have been accused of endangering their children.”206

Three decades ago, in writing about the criminalization of pregnancy,
Dorothy Roberts offered an observation that is no less true today: “Such
government intrusion is particularly harsh for poor women of color. They are
the least likely to obtain adequate prenatal care, the most vulnerable to
government monitoring, and the least able to conform to the white, middle-
class standard of motherhood. They are therefore the primary targets of
government control.”207 More recent scholarship addresses the impact of these
laws on poor individuals and people of color, noting that “fetal protection
efforts reveal hostility to the concerns of low-income pregnant” people partially
because the laws “do very little to promote fetal health,” instead “measur[ing]
[an individual’s] obedience and not fetal risk.”208 Ultimately, fetal protection
efforts and the criminalization of pregnancy “emphasize prosecution and
incarceration over patient autonomy and medical treatment, normalizing
shaming and stigmatization” of poor people’s pregnancies.209 This approach is
largely punitive. Poor people and people of color who decide to have children

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202 AMNESTY INT’L, supra note 197, at 7.
203 Id.
204 Id. at 5.
205 Id.
206 Editorial, supra note 198.
207 Roberts, supra note 200, at 1422 (footnote omitted).
209 Goodwin, supra note 208, at 794.
are targeted—through criminal charges, jail time, and losing custody of their children—for reproducing outside of the socially accepted practices.  

2. The Criminalization of Homeless Pregnancies

Although the literature on the criminalization of pregnancy is extensive and growing, it is lacking a substantive consideration of how this criminalization uniquely impacts homeless individuals. While the life circumstances and challenges of homeless individuals are in many ways similar to those of low-income individuals, their lack of stable housing makes the homeless particularly susceptible to criminalization and increased government intervention, which is often punitive. There are three reasons for this: (a) increased reliance on public hospitals and other governmental bodies, and thus increased exposure to government surveillance; (b) increased substance abuse and addiction rates; and (c) the compounding effects of the criminalization of homelessness with the criminalization of pregnancy, making homeless individuals the target of regulation and punishment for simply being homeless and pregnant.

a. Increased Reliance on Public Hospitals and Welfare Benefits

Dorothy Roberts writes: “poor women are generally under greater government supervision—through their associations with public hospitals, welfare agencies, and probation officers—[making] their drug use . . . more likely to be detected and reported.” While this remains true of those who are poor, the homeless are even more likely to be under government supervision through their disproportionate reliance on welfare and their use of government homeless programs and emergency shelters. The “[r]eceipt of welfare benefits is . . . increasingly criminalized,” and “[p]ublic assistance offices are patrolled by security guards and staff frequently call police to settle disagreements with recipients.” Additionally, “[t]he vast majority of

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210 As Dorothy Roberts explains,

When the government prosecutes, its intervention is not designed to protect babies from the irresponsible actions of their mothers . . . . Rather, the government criminalizes the mother as a consequence of her decision to bear a child . . . . The government has chosen to punish poor Black women rather than provide the means for them to have healthy children.

Roberts, supra note 200, at 1432, 1447.

211 Id. at 1432.

agencies that provide homeless programs are funded” with federal dollars, specifically the U.S. Department of Housing and Urban Development.\textsuperscript{213} Perhaps the most significant driver of government supervision and surveillance of the homeless is the high rate at which this population must rely on public hospitals. Homelessness and unstable housing are linked to decreased prenatal care and increased hospitalizations of pregnant people.\textsuperscript{214} One comparison study of 9,124 homeless women and 8,757 similarly situated low-income housed women found that those who were homeless had significantly higher odds of experiencing a pregnancy-related condition and complications, including anemia, hemorrhage, and hypertension.\textsuperscript{215} The associations found between homelessness and pregnancy complications “were not explained by mental health or substance use disorders,” even though both of those occurred more frequently among the homeless women.\textsuperscript{216} The authors found that homelessness seemed to be an independent risk factor for pregnancy complications,\textsuperscript{217} and that homeless women were more likely to visit emergency rooms.\textsuperscript{218} Other scholars have found that homeless individuals are more likely than others to need emergency visits to the hospital and hospitalizations overall.\textsuperscript{219} Their frequent need for hospitals and their corresponding need for hospitalization, coupled with little to no income and nowhere else to go, means that the homeless population is disproportionately likely to rely on public hospitals for emergency care, and public hospitals in turn are more likely report cases of prenatal substance use to government agencies.\textsuperscript{220}

\begin{itemize}
\item \textsuperscript{214} See Robin E. Clark, Linda Weinreb, Julie M. Flahive & Robert W. Seifert, Homelessness Contributes to Pregnancy Complications, 38 HEALTH AFFS. 139, 140 (2019) (discussing how homelessness contributes to pregnancy complications).
\item \textsuperscript{215} Id. at 142.
\item \textsuperscript{216} Id. at 143.
\item \textsuperscript{217} Id. (“The persistent strong effect of homelessness after matching and adjustment for a range of other characteristics and conditions suggests that it is an independent risk factor for pregnancy complications, or that unique social factors associated with homelessness place women at greater risk.”).
\item \textsuperscript{218} Id. at 144.
\item \textsuperscript{219} See Bill J. Wright, Keri B. Vartanian, Hsin-Fang Li, Natalie Royal & Jennifer K. Matson, Formerly Homeless People Had Lower Overall Health Care Expenditures After Moving into Supportive Housing, 35 HEALTH AFFS. 20, 20-27 (2016) (“[H]omeless people have rates of emergency department (ED) use and inpatient hospitalization that are three and four times higher than those of the average person, respectively.”); cf. Laura S. Sadowski, Romina A. Kee, Tyler J. VanderWeele & David Buchanan, Effect of a Housing and Case Management Program on Emergency Department Visits and Hospitalizations Among Chronically Ill Homeless Adults: A Randomized Trial, 301 JAMA 1771, 1771-78 (2009) (describing how rates of chronic medical illnesses are high among homeless adults, which increase hospital and emergency room visits).
\item \textsuperscript{220} Roberts, supra note 200, at 1431, 1449.
\end{itemize}
b. *High Substance Abuse and Addiction Rates*

Legislative intrusion into the womb has a long history in the United States, and nowhere is this paternalism more forceful than when illegal drugs are part of the equation. If the country’s war on drugs functions as a system of social control, that control is doubly exercised when a fetus is involved.221

The homeless population experiences a high rate of substance use disorders,222 which is a primary reason that pregnant individuals are criminalized for allegedly harming their fetuses. Contrary to popular belief, substance use has not been shown to have particularly negative effects on birth outcomes or fetal health, but homelessness has. A 2000 study on the severity of homelessness and adverse birth outcomes found that “substance use during pregnancy did not significantly predict adverse [birth] outcomes,” while homelessness was a strong predictor “beyond its relationship with risk factors for poor birth outcomes associated with homelessness.”223 Put simply, homelessness, not substance use, was an independent risk factor for low birth weight, pre-term deliveries, and other negative health outcomes.224 Current efforts to place the blame for these outcomes on substance use ignore “the forces that drive drug addiction” and thus fail to actually protect fetuses.225

Research on cocaine and methamphetamine exposure in the womb has found that babies “can recover quickly and develop normally.”226 Additionally, although the research on long-term opioid exposure is still far from complete, doctors who treat babies born to an addicted birthing parent say they “seem to recover fully within the first few months of life, given the right support.”227 In fact, doctors increasingly conclude that the best treatment is one that is

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221 Editorial, supra note 198.


223 Stein et al., supra note 92, at 531.

224 Id.

225 Editorial, supra note 198.

226 Id.

227 Id.
routinely taken away: their parent. This is an important medical conclusion, since it is common for opioid-dependent newborns going through withdrawal to be separated from their birthing parent and taken “to hospitals hours away,” making poor parents struggling with addiction unable to find the transportation or housing needed to visit. But studies show both that separating newborns from their parent(s) during the withdrawal process can slow their recovery, and that “infants in withdrawal require less medication and fewer costly days in intensive care” when they are close to and in routine contact with their birthing parent.

Prenatal care is certainly important, and any threat to successful birth outcomes is of concern, but the criminalization of pregnancy, rather than substance use, has been shown to create a causal link between homelessness and negative birth outcomes: pregnant people may be discouraged from accessing prenatal care because they fear their drug use being suspected or reported, resulting in them being charged with a crime and potentially losing their child.

For example, a 2014 Tennessee fetal assault law that attempted to deter drug use and incentivize pregnant people to seek out substance abuse treatment “by threatening them with jail time,” was discontinued after two years in part because it led to women avoiding prenatal care. A doctor in Tennessee reported that pregnant people suffering from addiction “would attempt to self-detox at home, attempt to stop at home without any treatment because they were afraid of what would happen if they admitted they had a problem.” Similarly, lawyers working for advocacy organizations similarly reported increased instances of pregnant people avoiding prenatal care as a result of the law.

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229 Id.

230 Id.

231 See Stein et al., *supra* note 92, at 531 (“In addition, drug-abusing women may be afraid to obtain prenatal care because of concerns about losing their other children or incarceration resulting from breaches of confidentiality concerning drug abuse issues.”); Kary L. Moss, *Legal Issues: Drug Testing of Postpartum Women and Newborns as the Basis for Civil and Criminal Proceedings*, 23 CLEARINGHOUSE REV. 1406, 1411-12 (1990) (quoting health care workers who have witnessed pregnant women avoiding prenatal care because of “fear of prosecution for drug use”); Editorial, *supra* note 198 (describing the increasing instances of pregnant women being charged with birth-related crimes in the U.S.).


234 Editorial, *supra* note 198; see also, e.g., Burke, *supra* note 233 (“Farah Diaz-Tello, a staff attorney with Advocates for Pregnant Women, said her organization received numerous reports of women avoiding treatment and prenatal care for fear of arrest.”).
In 2014, Brittany Hudson, pregnant and addicted to painkillers, gave birth without medical help in her friend’s car on the side of the road. In interviews with media, Hudson explained that she avoided going to the doctor throughout her pregnancy and during her birth “in hopes of keeping her family together.” However, in the weeks leading up to her delivery, Hudson “tried two rehab centers, both of which turned her away because they were full. ‘I wanted to get help,’ Hudson said, ‘but I was scared. I was embarrassed. I knew I was going to end up in trouble.’” Hudson ended up prosecuted under the fetal assault law anyway and had her baby placed in protective custody. Alarmingly, even in states without fetal assault laws, homeless pregnant people may be increasingly concerned about receiving medical treatment, for fear their child may be taken away from them and put into the foster care system.

c. The Compounding Effects of the Criminalization of Homelessness and the Criminalization of Pregnancy

In addition to the criminalization of pregnancy, homeless individuals are subjected to enhanced criminalization of their being through laws and ordinances that criminalize the very condition of homelessness. These two legal phenomena—the criminalization of pregnancy and the criminalization of homelessness—have compounding effects upon pregnant homeless people, making them highly susceptible to criminalization and regulation.

Homeless individuals have been criminalized since the modern era of homelessness began in the 1980s, although the trend has steadily increased. The criminalization of homelessness is defined by the National Law Center on Homelessness and Poverty as

[w]hen law enforcement threatens or punishes homeless people for doing things in public that every person has to do. This can include activities such as sleeping, resting, sheltering oneself, asking for donations, or simply existing in public places. It also includes arbitrarily or unfairly enforcing other laws,

235 Burke, supra note 233.
236 Id.
238 Burke, supra note 233.
such as jaywalking or disorderly conduct against homeless individuals, and the practice of ‘sweeps’ or displacing homeless people from outdoor public spaces through harassment, threats, and evictions from living in camps.\textsuperscript{240}

A study of 187 cities from 2006 to 2016 found that during this time period laws that punish homeless people for engaging in life-sustaining activities in public increased dramatically.\textsuperscript{241} Specifically, citywide camping bans increased by 69%, camping bans in a particular place increased by 48%, city-wide bans on sleeping in public increased by 31%, bans on sitting or lying down in public increased by 52%, bans on “loitering, loafing, and vagrancy city-wide” increased by 88%, laws prohibiting panhandling citywide increased by 43%, and laws that prohibit living in vehicles increased by 143%.\textsuperscript{242}

In late 2014, Honolulu, Hawaii, “outlawed sitting and lying in public places”; during the next two years, the city issued 16,215 warnings, 534 written summonses, and conducted multiple sweeps of homeless encampments that resulted in the loss of identification materials, medicine, tents, and other personal items, including children’s toys.\textsuperscript{243} Similarly, Puyallup, Washington, enacted several laws criminalizing their homeless, “making it illegal to camp, panhandle, sit or lie down in large swaths of the city, or to be present in public parks after closing.”\textsuperscript{244} Even worse, the city amended trespass laws, allowing people to be “banned from all public places within the city for up to five years if they violate any of these laws—an inevitability for homeless people who have no ability to comply due to a lack of alternatives.”\textsuperscript{245} And, in Dallas, Texas, the city continues to cite homeless individuals for sleeping in public: “[B]etween January 2012 and November 2015, the city issued over 11,000 citations for sleeping in public.”\textsuperscript{246} Since 2015, approximately 25% of the 9,394 individuals prosecuted for criminal trespass were homeless.\textsuperscript{247} Further, in 2017, 95% of homeless individuals charged with criminal trespass “were required to buy their freedom with a money bond, averaging $607, which almost none


\textsuperscript{242} \textit{Id.}

\textsuperscript{243} \textit{Id.} at 11.

\textsuperscript{244} \textit{Id.} at 12.

\textsuperscript{245} \textit{Id.}

\textsuperscript{246} \textit{Id.} at 11.

could pay.”

Unable to pay their bond, these individuals “often plead guilty to be released from jail, and 89 percent of the . . . homeless people charged with criminal trespass last year were convicted. They did not get services or help; instead, they received an average jail sentence of 33 days.”

A growing number of scholars argue that the ordinances criminalizing sleeping, sitting, laying, or simply being while homeless are unconstitutional. A number of ordinances have been challenged in court and struck down, particularly panhandling bans on First Amendment grounds following the Supreme Court’s 2015 decision in Reed v. Town of Gilbert. This decision, clarifying First Amendment law as prohibiting restrictions on signs based on their content, led to successful attempts across the country to strike down panhandling laws. Nevertheless, despite scholars and activists declaring them as unconstitutional, the

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248 Id. Indigent criminal defendants are often unable to pay their cash bail and thus are often kept behind bars for longer periods than wealthy defendants solely because of their financial status. This system criminalizes poverty and means that hundreds of thousands of people who are innocent of the crimes they’re accused of sit in jail awaiting trial due to inability to pay bail. They are then prevented from going to work, further entrenching poverty. For more on this inhumane system, see generally Dante Jones, The Demise of Anti-Homeless Ordinances, 70 Stan. L. Rev. 1569 (2018) (presenting an argument that modern anti-homeless ordinances violate the Eighth Amendment). 249

250 See Judith Welch Wegner & Matthew Norchi, Regulating Panhandling: Reed and Beyond, 63 S.D. L. Rev. 579, 607-09 (2019) (outlining the change in approach of lower courts after the Reed decision); Katie Pilgram Neidig, Comment, The Demise of Anti-Panhandling Laws in America, 48 St. Mary’s L.J. 543, 562-65 (2017) (discussing post-Reed cases in which courts struck down panhandling ordinances).
Supreme Court has yet to rule definitively on the constitutionality of state laws and city ordinances criminalizing homeless individuals for life-sustaining behaviors. To this day, homelessness is routinely criminalized, further entrenching individuals’ homelessness. The cycle is “devastating”:

A simple citation for violating a city ordinance easily traps people in the criminal justice system. For people living in homelessness, citation fines are typically out of reach. Their only option is to contest citations in court. But without an address or reliable transportation, they often fail to receive notice and do not appear in court. Failure to appear in court can result in a warrant for arrest. For that individual, the next act of sleeping on a bench or holding up a sign asking for money could lead to jail. Even if the charges are ultimately dismissed, an arrest carries devastating consequences. Spending even a night or two in jail can mean missing work or losing a spot at a shelter. Criminal records make securing housing, employment, and social services more difficult and, in some cases, impossible. These dynamics further entrench homelessness and poverty, leading people back to the park bench or the city plaza, where they likely will be fined or arrested yet again.253

In recent years, various technological developments, including data surveillance and high-tech algorithms, have enhanced efforts to manage and criminalize the homeless. Virginia Eubanks’ study of the homeless on Skid Row, and the coordinated entry system used to match this population with housing and other resources, exposes a devious connection between organizations aiming to connect the homeless with social services and law enforcement aiming to criminalize them. The coordinated entry system contains the data of over 21,000 of Los Angeles’s homeless.254 This “relaxed standard for disclosures” under which this data is managed provides an example of “social services and the police collaborating to criminalize the poor in the United States.”255 As Eubanks writes, “this kind of blanket access to deeply personal information makes little sense outside of a system that equates poverty and homelessness with criminality.”256 When “basic conditions of being homeless—having nowhere to sleep, nowhere to put your stuff, and nowhere to go to the bathroom—are also officially crimes,” the
homeless are likely to get tickets, which lead to fines, which lead to warrants.257 According to Eubanks, these warrants provide law enforcement with “further reason to search the databases to find ‘fugitives.’ Thus, data collection, storage, and sharing in homeless service programs are often starting points in a process that criminalizes the poor.”

Because criminalization is a vicious cycle that entrenches homelessness, the policies that punish homeless individuals for occupying public spaces do nothing to remedy homelessness or to address in any meaningful way the underlying problems that lead to homelessness.259 Instead, criminalization is an ineffective and overly costly “solution” that continues to contribute to these problems by making it harder for homeless individuals to obtain employment, stable housing, education, or photo identification so they can vote.260 Criminalization policies cost tax-payers money and are considered by some to be “the most expensive and least effective way of addressing homelessness[,] . . . wast[ing] scarce public resources.”261 In fact, research shows that the cost of homelessness and criminalization is far higher than the cost to provide housing to the homeless.262

The criminalization of pregnancy and of homelessness have compounding effects on the lives of homeless pregnant women. Combined, the two phenomena foster and sustain the hyper-regulation and criminalization of homeless pregnant people, their reproductive choices, and their bodily autonomy as a whole. They, because of their lack of housing, are likely to be seen as having interests in conflict with their fetus, especially in the eyes of those who see homelessness as a moral failing. City ordinances aim to control their very being, criminalizing a pregnant person for laying down in public when they have no other place to go. Their heavy reliance on and exposure to the government, through public welfare offices and state-run shelters, makes homeless individuals more likely than others to be reported for drug use or for engaging in other activities that allegedly harm their fetus. Such contacts with the criminal system, even for brief periods, have lasting negative impacts. Arrests and incarceration are often traumatizing (especially for survivors of sexual violence, and homeless individuals are disproportionately likely to have experienced past

257 Id. at 117.
258 Id.
259 BAUMAN, supra note 242, at 36.
260 Id. at 36-38.
261 Tars, supra note 239, at 6-35.
262 Id. The city of Charlotte, North Carolina, saved $2.4 million in a year by adopting a Housing First model—providing homeless individuals with housing first, rather than hinging housing eligibility on strict sobriety or work requirements. The $2.4 million was saved because, with housing provided, individuals “spent 1,050 fewer nights in jail and 292 fewer days in the hospital, and had 648 fewer visits to emergency rooms.” Id.
Criminal records make it more difficult, or, arguably, impossible, for homeless individuals to get a job, further entrenching their homelessness and increasing the likelihood that they will be continually criminalized in the future. Being arrested or cited by law enforcement often comes with fines and fees, “creating unaffordable debt” for the homeless.\(^{264}\)

Scholars writing about the criminalization of pregnancy acknowledge the particular impact it has on those already marginalized, particularly low-income women, and argue convincingly that punitive policies towards pregnant women do little but punish them for being “irresponsible” and choosing to have a child.\(^{265}\) The impacts of the criminalization of pregnancy are amplified for homeless women. Being homeless, particularly while pregnant, is seen as a moral failing, and is subsequently criminalized and punished.


Jennifer, a twenty-year-old woman with a three-year-old son in foster care, only saw her son once a week for two hours.\(^{266}\) Her son had been removed from her after she and her son’s father got into a violent fight in a city homeless shelter, leading to both parents’ arrest. When Jennifer found out she was again pregnant, she was “terrified” that the Administration of Children’s Services (ACS) caseworkers “would discover she was expecting a baby . . . . [W]ith one child already in state care, she was terrified to lose another.”\(^{267}\) Once her pregnancy was detected, her fears proved to be well-founded: Jennifer’s “reproductive choice to have a child was met mostly with scorn and disdain by ACS caseworkers.”\(^{268}\) And, once her daughter was born, she was almost immediately removed from Jennifer’s custody.\(^{269}\)

Jennifer’s story is both tragic and preventable. As Emma Ketteringham, Sarah Cremer, and Caitlin Becker explain:

At no time during her pregnancy did anyone meet with Jennifer to plan for the birth of her expected child. No one supported Jennifer’s parenting by asking her what she needed so that she could prepare to care for her arriving child. No

\(^{263}\) Cronley et al., supra note 180; cf. Kathryn Casteel, Julia Wolfe & Mai Nguyen, What We Know About Victims of Sexual Assault in America, FIVETHIRTYEIGHT (Sept. 21, 2018, 10:44 AM), https://projects.fivethirtyeight.com/sexual-assault-victims [https://perma.cc/FTK4-Z2YU] (discussing the link between poverty and sexual violence).

\(^{264}\) BAUMAN, supra note 242, at 11.

\(^{265}\) See supra notes 207–10 and accompanying text. See generally Roberts, supra note 200.

\(^{266}\) Ketteringham et al., supra note 84, at 79.

\(^{267}\) Id. at 79.

\(^{268}\) Id.

\(^{269}\) Id.
one advised her of housing options for pregnant women or helped her find a GED program so she could get her degree. No one considered that Jennifer’s relationship with the father of her son was over or spoke to Jennifer’s therapist. No one considered the ways in which Jennifer’s newborn would be at a disadvantage in state care, having lost the opportunity to nurse, bond, and be held by her mother. No one advocated or supported Jennifer in her negotiations with ACS. Instead, ACS summarily devalued Jennifer as a mother and took her newborn from the hospital, sending Jennifer to heal on her own.270

Unfortunately, Jennifer’s experience is far from rare. Rather, it represents the third branch of regulation I discuss in this Comment: homeless parents’, particularly homeless mothers’, interactions with the child welfare system. The child welfare system is, allegedly, “a group of services designed to promote the well-being of children” through the state.271 The system involves public child welfare agencies, as well as a “myriad of public, private, and nonprofit organizations” with which agencies contract and collaborate, making it a “typically . . . very complex system with processes and procedures that vary widely by state and community.”272 The child welfare system serves various roles, including providing services and support to families, investigating allegations of child abuse and neglect, placing children into foster care, and terminating or granting parental rights.273

Scholars identify multiple flaws with the child welfare system, particularly with the ways it interacts with poor and non-white families. For example, many of the defining symptoms of poverty are considered child abuse, neglect, or maltreatment, even absent any intent or imminent danger to the child.274 Poor parents are scrutinized and surveilled, and often pressured to give up custody of their children in exchange for access to much-needed resources.275 The government spends billions of dollars annually on placing

270 Id. at 80.
272 Id.
274 See, e.g., H. Elenore Wade, Note, Preserving the Families of Homeless and Housing-Insecure Parents, 86 GEO. WASH. L. REV. 869, 881-85 (2018) (describing how a family’s state of homelessness is often viewed by the child welfare system as neglect); EUBANKS, supra note 44, at 127-30 (noting that many indicators of “child mistreatment” may actually be symptoms of poverty rather than neglect).
275 See Dorothy E. Roberts, Kinship Care and the Price of State Support for Children, 76 CHI.-KENT L. REV. 1609, 1625-29 (2001) (identifying the “perverse” reality that the government is more willing to provide financial assistance to a parent’s relatives to care for a child under the state’s custody, than it is to provide welfare assistance for the parent to care for their own child); EUBANKS, supra note 44, at 165 (describing the social benefits made available for parents for relinquishing care
children into foster-care, and keeping them there, while allocating very little to family preservation efforts. In this Comment I focus specifically on the ways that the system disproportionately regulates, controls, and punishes homeless individuals who decide to have and raise children.

Homeless families, mostly headed by single women, are particularly targeted by the child welfare system, and are “a large share of the families involved with the child welfare system.” Research finds that homeless families have significantly higher rates of involvement with the child welfare system than families with stable housing, even when controlling for other factors. In 2015, approximately 27,000 children entering foster care “were removed from their families at least in part due to inadequate housing.” Additionally, it has been estimated that a lack of housing prevents nearly a third of children in the care of the state from being reunited with their families: if their families had adequate housing, their children could be returned.

In this Section, I explore the critical relationship between housing and the child welfare system to show how homeless parents are more likely than housed parents to utilize public services, to then be reported to child welfare agencies, and subsequently to become targets of investigation. These parents are more likely than others not only to lose their child to foster care, but also to have parental rights terminated altogether and lose their child to adoption.

1. Increased Likelihood of Investigation

Many child welfare investigations begin in response to a report of suspected child abuse or neglect. Because of their increased use of and

of their children as a penalty); Roberts, supra note 44, at 1702 (discussing Eubanks with approval and noting that certain social resources, such as counseling and drug treatment, are only made available to parents if they place their children in foster care).

276 State-by-State Data, CASEY FAM. PROGRAMS (Nov. 2020), https://perma.cc/R8PD-VC7R (“Most states currently are limited to using the bulk of the $9.8 billion in dedicated federal child welfare funding only for services related to foster care.”).

277 Wade, supra note 74, at 879.


279 CHILD WELFARE INFO. GATEWAY, BUILDING PARTNERSHIPS TO SUPPORT STABLE HOUSING FOR CHILD WELFARE-INVOLVED FAMILIES AND YOUTH 2 (2018), https://www.childwelfare.gov/pubPDFs/bulletins_housing.pdf [https://perma.cc/2BWP-8XAB].

reliance on public services, homeless individuals are subject to increased surveillance and exposure to mandatory reporters, which in turn makes them more likely to be reported. Additionally, homeless individuals are disproportionately Black, and racial discrimination fueled by stereotypical assumptions about who is inherently a “bad mother” or parent contributes to far more reporting of Black mothers and parents as compared to white. Once reported, these parents face a strong likelihood of a child welfare investigation even when by all measures they are loving and competent parents doing their best to care for their children.

a. Increased Reliance on Public Services

Virginia Eubanks observes that “parenting while poor means parenting in public.” She states that public scrutiny of their parenting is the norm for homeless parents since they have no adequate place to be or to live and they rely on public goods and services to provide for their children. Some child welfare agencies, confusing “parenting while poor with poor parenting,” regard the mere use of public services as a risk to children. Thus, simply by living in poverty and using means-tested programs, poor parents, and especially homeless ones, face high levels of scrutiny. For example, systems that aim to “predict” child abuse or neglect typically use variables that are “direct measures of poverty” and that “track use of means-tested programs such as TANF, Supplemental Security Income, SNAP, and county medical assistance.” In Allegheny County, Pennsylvania, a family receives a higher risk score if the mother has been on public benefits for a long time. Higher risk scores increase the risk of investigation, and risk scores higher than 16 (out of 20) automatically trigger investigations. Simply living in poverty and using means-tested programs increases the level of scrutiny given to poor parents, confusing “parenting while poor with poor parenting,” and this is disproportionately true for homeless parents.

Homeless parents’ use of public services also exposes them to mandated reporters. Every state has designated mandatory reporters—law enforcement,
teachers, doctors, and psychiatrists—who are required to report any child abuse suspicions that they have. This phenomenon is often called “visibility or exposure bias.”

Homeless parents are particularly likely to have their children reported for poor hygiene, dirty clothes, and being on the street because when these parents reach out for help or support, they are inevitably exposed to mandatory reporters. In Pennsylvania, for example, “the people most likely to offer poor parents help and support are all mandated reporters: teachers, doctors and nurses, psychiatrists and therapists, childcare providers, priests, volunteers at afterschool programs, employees of social service agencies.”

Some states “require everyone who suspects abuse or neglect to file a report.”

The higher visibility of poor families can lead to higher rates of child welfare reports. And mandatory reporters are not the only ones who can file reports; anyone who comes in contact with a homeless parent can report suspected child abuse or neglect. When someone has no private residence, or safe place to live, their life and parenting becomes increasingly publicized. Homeless parents are uniquely likely to have their children reported for poor hygiene, dirty clothes, and being on the street.

Ironically and frustratingly, homeless parents are often reported when engaging in behaviors to protect and care for their children, such as reaching out for help for themselves or their children. For example, homeless parents may visit homeless services agencies to secure emergency housing or other benefits for their children. Homeless services agency employees in turn often report those children.

Virginia Eubanks, in her study of families involved with the child welfare agency in Allegheny County, Pennsylvania, recounted how even taking care of a child’s medical needs can lead to an investigation: a poor parent brought his child to the ER and was subsequently investigated and put on file for child neglect.

In contrast, when wealthier families need the same kinds of support, they can reach out privately, “to therapists, private drug and alcohol rehabilitation, nannies, babysitters, afterschool programs, summer camps, etc.”

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287 Child Welfare Info. Gateway, Racial Disproportionality and Disparity in Child Welfare 6 (2016), https://www.childwelfare.gov/pubsdfs/racial_disproportionality.pdf [https://perma.cc/3RG8-R7TR] (“The poverty experienced by families and children of color also may amplify their exposure to social service systems, such as financial or housing assistance, which may further increase their exposure to mandated reporters. This is referred to as visibility or exposure bias.”).

288 Eubanks, supra note 44, at 160 (emphasis added).

289 Moore, supra note 271, at 3 (emphasis added).


291 Moore, supra note 271, at 3.

292 See, e.g., Eubanks, supra note 44, at 129 (“[A]n employee of a homeless services agency reported Stephen to a hotline again: he was wearing dirty clothes, had poor hygiene, and there were rumors that his mother was abusing drugs.”).

293 See id. at 149 (“Patrick was investigated for medical neglect in the early 2000s when he was unable to afford his daughter Tabatha’s antibiotic prescription after an emergency room visit.”).
tutors, and family doctors." The privilege of making such requests to privately funded actors shields affluent parents from scrutiny and child welfare involvement. “The same willingness to reach out for support by poor and working-class families, because they are asking for public resources,” can label homeless parents a risk to their children.

The constant and pervasive threat to homeless parents of exposure to mandatory reporters and others who may report “child neglect” is part of a larger system of poverty surveillance, particularly for homeless individuals. As discussed earlier, poverty management in the United States is punitive, prioritizing the surveillance and regulation of poor individuals. The fact that poor people in the United States “are generally under greater government supervision,” is even more true for the homeless due to their disproportionately high reliance on welfare and their use of government homeless programs, emergency shelters, and public hospitals. Systems ostensibly designed to help the homeless to access much needed resources simultaneously work to surveil and collect data on the individuals in the system, including extremely personal information about their past traumas, domestic violence history, immigration status, and more. For example, the coordinated entry system used in Los Angeles’s Skid Row includes detailed personal information “of 21,500 of Los Angeles’ most vulnerable people.” For their part, homeless individuals volunteer this information in the hopes of being connected to housing or other desperately needed resources, but many never are. Still, their data remains in the system, providing another example of homeless individuals’ weakened privacy rights.

b. Racial Discrimination in Reporting

Earlier, in discussing the demographics of the homeless population, I noted the stark racial disparities between it and the larger population. Black individuals in the United States comprise 40% of the homeless population but only 13% of the total population. And Black parents, particularly when poor, are more likely than their white counterparts to be reported to child welfare agencies, due in part to racial discrimination and racist ideas about motherhood and parental fitness. In Allegheny County, for example,

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294 Id. at 166.
295 Id.
296 Roberts, supra note 200, at 1432.
297 See EUBANKS, supra note 44, at 85, 94, 114-20.
298 Id. at 114.
299 2018 AHAR PART 1, supra note 12, at 1.
300 See EUBANKS, supra note 44, at 153 & n.13 (“[D]isproportionate referrals were often made based on . . . perceptions of problems in neighborhoods where people of color live, and class-inflected
The community calls child abuse and neglect hotlines about Black and biracial families more often than they call about white families. Though there were three and a half times as many white children as African American and biracial children in Allegheny County in 2006, there were equal numbers of reports... for each group.301

Nationwide, “children of color were overrepresented in reports of suspected maltreatment by all groups of reporters.”302 The referral bias evidenced in these figures leads to an overrepresentation of Black children in child welfare investigations and in foster homes.303 Because 40% of the homeless population is Black, this racial discrimination in reporting disproportionately affects them, increasing the likelihood that they are subject to a child welfare investigation.

2. Losing Children to Foster Care

Once under investigation, homeless parents are highly likely to lose their children to foster care. In 2015, for example, approximately 27,000 children “were removed from their families at least in part due to inadequate housing.”304 Lacking safe, stable housing increases the risk of children entering foster care, even if housing was not the listed reason for out-of-home placement.305

The statutory definition and practical application of child “neglect” foster and sustain the assumption that homeless parents neglect their children even absent any intent or proof of wrong-doing; one may lose one’s children simply by being homeless. Moreover, many laws that govern child welfare create perverse incentives for states to remove homeless parents’ children and place them into foster care rather than to make the required reasonable efforts toward family preservation. Finally, child welfare involvement involves “strict expectations of parenting.”); Dorothy Roberts & Lisa Sangoi, Black Families Matter: How the Child Welfare System Punishes Poor Families of Color, APPEAL (Mar. 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-3242882 ("Every day in family court buildings across the country, thousands of people, but disproportionately Black mothers, stand before child welfare officials and family court judges who subject their parenthood to extraordinary scrutiny and vilification."); Our Systems Meant to Help Are Hurting Black Families, NAT’L INST. FOR CHILD’S HEALTH QUALITY, https://www.nichq.org/insight/our-systems-meant-help-are-hurting-black-families [https://perma.cc/S6KZ-K9Q9] (describing instances where “mandated reporting disrupts the health of black families, ultimately causing harm to the children that providers intend to protect”).

301 EUBANKS, supra note 44, at 153.
302 CHILD WELFARE INFO. GATEWAY, supra note 287, at 9.
303 EUBANKS, supra note 44, at 152-53 (discussing referral bias against Black families).
304 CHILD WELFARE INFO. GATEWAY, supra note 279, at 2.
305 DWORSKY, supra note 278, at 2 ("[H]omeless families are more likely than their non-homeless counterparts to... have a child placed in out of home care.").
behavioral compliance requirements” which many homeless parents have difficulty meeting.\textsuperscript{306}

a. The Neglect Standard

The Child Abuse Prevention and Treatment Act, signed into law by President Nixon in 1974, gives states the “authority to prevent, investigate, and prosecute child abuse and neglect.”\textsuperscript{307} The majority of child welfare investigations—75% in 2015—involves neglect, not abuse.\textsuperscript{308} “In some states, neglect is identified as a reason for removal in over ninety percent of removals.”\textsuperscript{309}

Neglect is “a legal concept that lacks an intent standard and is often difficult to separate from a parent’s poverty and consequent inability to provide for a child’s physical needs.”\textsuperscript{310} While varying state laws generally fail to define clearly when homelessness can be considered neglect, “[n]early all of the indicators of child neglect are also indicators of poverty: lack of food, inadequate housing, unlicensed childcare, unreliable transportation, utility shutoffs, homelessness, lack of health care.”\textsuperscript{311} Many state statutes define child maltreatment and neglect broadly, as an “injurious environment.”\textsuperscript{312} Note that

\begin{itemize}
\item \textsuperscript{306} 
EUBANKS, supra note 44, at 161.
\item \textsuperscript{307} Id. at 129.
\item \textsuperscript{309} Wade, supra note 274, at 874.
\item \textsuperscript{310} Id. at 869; cf. Univ. of Pa. Carey L. Sch., Family Surveillance: A Future Without Foster Care Recording, YOUTUBE (Feb. 18, 2021), https://www.youtube.com/watch?v=HjDyNhN4bQ&amp;t=35, at 27:53 (discussing the use of the term “neglect” in the child welfare system).
\item \textsuperscript{311} EUBANKS, supra note 44, at 157; see also id. at 130 (“Where the line is drawn between the routine conditions of poverty and child neglect is particularly vexing. Many struggles common among poor families are officially defined as child maltreatment, including not having enough food, having inadequate or unsafe housing, lacking medical care, or leaving a child alone while you work.”).
\item \textsuperscript{312} See COLO. REV. STAT. ANN. § 19-3-102(1) (West 2020) (“A child is neglected or dependent if . . . [1] the child’s environment is injurious to his or her welfare.”); N.C. GEN. STAT. ANN. § 7B-101(15) (West 2019) (defining a “neglected juvenile” as “any juvenile less than 18 years of age . . . who lives in an environment injurious to the juvenile’s welfare”); see also People In Interest of J.G., 370 P.3d 1151, 1163 (Colo. 2016) (holding that when a child is in an injurious environment, Colorado law did not require proof of parental fault to establish that a child is dependent and neglected); In re Gabriel E., 867 N.E.2d 59, 64 (Ill. App. Ct. 2007) (“An ‘injurious environment’ is ‘an amorphous concept that cannot be defined with particularity, but has been interpreted to include the breach of a parent’s duty to ensure a safe and nurturing shelter’ for her children.” (quoting In re Kamesha J., 847 N.E.2d 621, 628 (Ill. App. Ct. (2006)))); cf. Diane L. Redleaf, Where Is It Safe and Legal to Give Children Reasonable Independence?, AM. BAR ASS’N (Sept. 30, 2020), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/where-is-it-safe-and-legal-to-give-children-reasonable-independence [https://perma.cc/5G28-7L3K] (finding that most states’ neglect laws are very open-ended, allowing child protective investigators . . . to declare a child neglected based on their own unbounded opinions as to what is ‘proper’ or ‘necessary care’). \end{itemize}
“the very condition of being homeless is judged neglectful” in many states, and can automatically trigger an investigation. When a family is experiencing homelessness, the parents are disproportionately likely to be seen as neglecting their children, and as such their children are particularly “vulnerable to removal to foster care due to their lack of safe housing.” In fact, it is estimated that almost one-third “of children in foster care could be reunited with their families if they had safe, affordable housing.” But rather than provide adequate structural support to homeless families, and particularly homeless single mothers, the child welfare system removes children from parents who desperately love and want to provide for them. Once removed, it is difficult—if not impossible—for homeless parents to regain custody of their children.

A manual on child neglect published by the Department of Health and Human Services (HHS) states that “[i]t is unclear whether homelessness should be considered neglect,” and “[u]nstable living conditions can have a negative effect on children, and homeless children are more at risk for other types of neglect in areas such as health, education, and nutrition.” According to HHS, homelessness is “considered neglect when the inability to provide shelter is the result of mismanagement of financial resources or when spending rent resources on drugs or alcohol results in frequent evictions.” While this language may be seen as an attempt to guard against using the mere fact of homelessness as a marker of neglect, there is confusion on both the state and federal level about how this may work in practice. Judges may differ widely in their interpretations of what “mismanagement of financial resources” means, and since the federal manual referenced above also includes many types of neglect that are actually symptoms of poverty, it effectively equates homelessness and neglect.

**Footnotes:**

313 EUBANKS, supra note 44, at 130.
314 Wade, supra note 274, at 882; see also § 19-3-102(1) (“A child is neglected or dependent if...the child is homeless.”); In re Dependency of Schermer, 169 P.3d 452, 462 (Wash. 2007) (“[A] child can be found dependent when the child is homeless as a result of the parent’s economic circumstances.”).
315 Wade, supra note 274, at 869.
316 Id. at 873.
317 Cf. Tilden v. Hayward, No. 11297, 1999 WL 131162, at *16 (Del. Ch. Sept. 10, 1999) (finding that the state was not obligated to provide “plaintiffs and members of the plaintiffs’ putative class with financial assistance to secure housing before the State may place children in foster care as a result of dependency or neglect proceedings”).
319 Id. at 12.
For example, the category of physical neglect includes “shuttling,” which is “when a child is repeatedly left in the custody of others for days or weeks at a time.”\textsuperscript{320} But shuttling is common among homeless families, especially when shelters are full or unavailable. According to a case study on homelessness and reports of child neglect in Washington, D.C., homeless families in D.C. “who cannot access shelter[] are forced to make very difficult choices about how to protect their children and keep their families together.”\textsuperscript{321} Some will couch surf, moving around every day or week, and “[s]ome choose to split up from their children or partners to find each family member a safe place to stay,” leaving their children in someone else’s care so they don’t have to sleep on the streets or in a car.\textsuperscript{322}

Physical neglect also includes: nutritional neglect, which is “when a child is undernourished or is repeatedly hungry for long periods of time,”; clothing neglect, which is “when a child lacks appropriate clothing, such as not having appropriately warm clothes or shoes”; and “other” physical neglect, which “includes inadequate hygiene.”\textsuperscript{323} And as mentioned, many statutes define child maltreatment broadly as an “injurious environment.”\textsuperscript{324} Again, all of the above-named markers of child neglect are markers of poverty, but instead of helping affected parents provide for children in need of appropriate clothing, food, or shelter, government agencies routinely investigate the parents for child neglect. This often culminates in the child being placed in foster-care and the limitation or termination of parental rights.

To complicate matters further for homeless parents, they are often reported for neglect for doing something to help their children. Take shuttling, for example: more often than not the reason for the separation and placement of the child in another’s care is to avoid the child sleeping on the street or in a car. It is both a vast oversimplification and an injustice to define shuttling as neglectful when for homeless parents it may be the only way to ensure that their child has somewhere safe and warm to sleep at night.

Even turning to a shelter can result in a report to child protective services. Mary Brown of Washington, D.C., was reported for child neglect when she requested shelter for her family and “admitted to the intake worker that she had no safe place to stay with her children.”\textsuperscript{325} She was turned away from

\textsuperscript{320} Id.
\textsuperscript{322} Id. at 24.
\textsuperscript{323} DEPANFILIS, supra note 318, at 12.
\textsuperscript{324} See supra note 312 and accompanying text.
\textsuperscript{325} Beresin, supra note 321, at 14–15.
shelter. Far from an isolated incident, her case exemplifies the priorities of a larger structure that punishes homeless parents for seeking safety for their children. The “various definitions of neglect create lose-lose situations for homeless parents who risk a report of neglect when they employ basic survival strategies to take care of themselves and their children or when they seek assistance from agencies tasked with helping them.”

There are some professed poverty defenses that at first glance appear to protect homeless and poor families from child neglect reports simply due to their income. For example, the HHS manual on child neglect states:

\[\text{[C]hildren may be poorly fed because their parents are poor and are unable to provide them with the appropriate type and amount of food. In such cases, it is important to identify factors that may be contributing to this inability to provide, such as mental illness. However, when a family consistently fails to obtain needed support . . . an intervention may be required.}\]

Unfortunately, under close reading the HHS language crumbles as a poverty; homelessness is chronic in a large number of cases, and many who are homeless will remain so for a significant period of time.

And even if all caseworkers and child welfare agencies strictly followed the above HHS guidance, a family might still face an intervention solely for failing to “obtain needed support,” particularly, shelter, which is the root of the problem. This is particularly cruel to homeless parents when considered with the meager support available to them; many states provide no legal right to shelter for their homeless, especially when the weather is above freezing.

\[\text{[s]even months out of the year in D.C.—when the weather is warm—families have no legal right to shelter even if their only alternative is a bus station, a laundromat, splitting up from their children, or remaining with an abuser. The policy of reporting homeless families for child neglect meant that whether a family was reported for neglect literally depended on the weather: If a family happens to lose their housing on a cold winter day, the family receives shelter and is not reported to child protective services.}\]

A minority of states provide “some version of a poverty defense to a finding of abuse or neglect” in their child welfare statutes. Take West Virginia for example, where statutes define a “neglected child” as a child whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child’s parent . . . to supply the child with necessary food, clothing, shelter, supervision, medical care, or education, when that refusal, failure, or inability is not due primarily to a lack of financial means on the part of the parent . . . .

Texas law similarly states that neglect includes “the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services had been offered and refused.” While these defenses are important, they only appear in a minority of state statutes. And in practice they may be weak and ineffective due to a lack of clarity on “whether a child would be subject to removal even without a finding of neglect on the basis that the child is still not in safe housing.”

b. The Reasonable Efforts Requirement and Funding System

Federal law requires child welfare agencies to make “reasonable efforts” towards family preservation before a child is removed from their home and before parental rights are terminated. This requirement comes from the Adoption Assistance and Child Welfare Act of 1980 (AACWA), which aimed to protect parental rights and encouraged states to focus on family preservation rather than foster care. The AACWA added the reasonable efforts requirement to “prevent or eliminate the need for removal of the child from his home” and to prevent the unnecessary termination of parental rights. AACWA used funding incentives to accomplish this goal:

Under AACWA, states would no longer be eligible for federal payments for foster care and adoption assistance unless a judicial finding was made that reasonable

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331 Wade, supra note 274, at 883.
332 W. VA. CODE, § 49-1-201 (2020) (emphasis added).
334 Wade, supra note 274, at 884.
efforts had been made to prevent the need for the child’s removal from his home or, where applicable, to make it possible for the child to return to his home.\footnote{338 Wade, supra note 274, at 886-87 (internal quotations omitted).}

While the above requirement was a step in the right direction, AACWA failed to provide a definition of reasonable efforts, leaving it to states to define.\footnote{339 See generally Will L. Crossley, Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation, 12 B.U. PUB. INT. L.J. 259 (2003).} Additionally, the Act gave “no guidance to states as to what types of services a parent might need or be entitled to before the state could remove a child for abuse or neglect or seek to terminate a parent’s rights.”\footnote{340 Wade, supra note 274, at 887.}

The Adoption and Safe Families Act of 1997 (ASFA) further undermined the reasonable efforts requirement. ASFA was “aimed at doubling the number of children adopted annually,” and “[represent[ed] a dramatic shift in federal child welfare philosophy from an emphasis on the reunification of children in foster care with their biological families toward support for the adoption of these children into new families.”\footnote{341 Roberts, supra note 336 at 112.} After ASFA, states’ top priority was “the health and safety of children in foster care.”\footnote{342 Id. at 113.} Perhaps most notable about the statute was that it suggested a conflict between children’s safety and parental rights; it “reflected an assumption that reasonable efforts protected bad parents to the detriment of children’s safety.”\footnote{343 Wade, supra note 274, at 889.}

Many scholars find that the undermining by ASFA of both the reasonable efforts requirement and the focus on family preservation makes children more likely to be taken from their parents and placed into foster care, particularly when the parents are poor or Black (or both).\footnote{344 See id. at 891 (“By accelerating adoptions and forcing family preservation to compete with adoption plans, ASFA undercut family preservation. . . . This continues to have deleterious consequences for the poor, vulnerable families for whom preservation efforts could make the most difference.”); Roberts, supra note 336, at 125-38 (critiquing ASFA and its effects, which undermine family preservation and particularly harm poor Black families); Brittany Lercara, The Adoption and Safe Families Act: Proposing a “Best Efforts” Standard to Eliminate the Ultimate Obstacle for Family Reunification, 54 FAM. CT. REV. 657, 658 (2016) (“However, the subjective nature of the reasonable efforts standard coupled with the financial incentives provided to states placing children into adoptive home effectively undermine the goal of reunification.”). See generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).}

A more recent law, the Family First Prevention Services Act,\footnote{345 See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, §§ 50701-50782, 132 Stat. 64, 232-68.} “aims to prevent children from entering foster care by allowing federal reimbursement for mental health services, substance use treatment, and in-home parenting
Some government funds are directed away from foster care and instead towards preventative services, but the law has been criticized as failing to provide any meaningful assistance. For instance, a family defense attorney in Philadelphia recently discussed how under Family First, her clients can get parenting classes, but cannot access housing. The lack of meaningful preventative services and the lack of force behind the reasonable efforts requirement prior to removing children from their families and placing them into foster care are particularly harmful to homeless women. Without strict requirements to make efforts towards preserving family units, the funding system set up by federal child welfare law rewards states for separating families by placing children into foster care. Once a child is removed for neglect, the federal government will cover a substantial portion of the payments to the foster family to cover “room and board,” clothing, books, school supplies, and more. If a state wants to provide either long- or short-term housing for a homeless family rather than placing the children into foster care, the state must bear the cost without assistance from the federal government.

As Elenore Wade writes, “[t]his funding structure tells cash-strapped states that placing children in the custody of foster parents is, at the very least, less financially risky than making efforts at family preservation.”

Funding to preservation programs for homeless families is severely limited, although funding for foster care is basically uncapped. Ironically, “[t]his is true even if the same services are provided to a child in a foster care as would be provided to preserve the family of origin.” This perverse structure ultimately means that interventions that could potentially keep a family together “will cost the state far more money than will payments to a foster or

347 See Univ. of Pa. Carey L. Sch., supra note 310, at 54:30 (“[The] bucket of services that is funded is not the bucket of services that my clients need. So for instance, one of the things my clients can get under Family First as a prevention service is a parenting class. One of the things they can’t get is access to housing.”); see also Mathangi Swaminathan, Expand the Scope of Family First Act, and Its Clearinghouse, IMPRINT (May 4, 2020), https://imprintnews.org/opinion/expand-scope-family-first-act-its-clearinghouse/43074 [https://perma.cc/Z3VZ-XYDZ] (discussing the narrow scope of funded preventative services as a major flaw of the Family First Act, and noting that “issued such as lack of access to housing . . . will not be approved for funding”); cf. Fabiola Villalpando, Legislative Update, Family First Prevention Services Act: An Overhaul of National Child Welfare Policies, 39 CHILD’S LEGAL RTS. J. 283, 285 (2019) (discussing concerns that Family First’s prevention services “will not adequately meet the needs of at-risk families” and that “few families that need services will actually qualify for them”).
348 Wade, supra note 274, at 895-96.
349 Id. at 895.
350 Id. at 896.
351 Id. at 894.
adoptive family, which will be reimbursed by the federal government indefinitely and at a consistent rate.”

c. **Strict Behavioral Requirements**

Involvement with the child welfare system, whether through an investigation or through the individual’s request for resources (which may trigger an investigation), comes with “increased surveillance and strict behavioral compliance requirements.” These requirements may include regular drug and alcohol testing, regular court appearances, and regular therapy. While these requirements may be difficult for any parents to meet, they are particularly difficult for homeless parents.

Transportation to appointments can be expensive and difficult to arrange; one study of homeless and very low-income individuals in Erie County, New York, found that 53% of respondents had difficulty paying for transportation. In fact, 42% had turned down a job opportunity in the last year because they could not get transportation to the job. Without adequate transportation, parents may be late to or miss required appointments, or be forced to spend what little resources they do have on bus or other transit fare.

3. **Termination of Parental Rights**

Once a child is put in foster care, the child welfare system aims to place them quickly into adoptive homes and to terminate their birth parents’ parental rights at the disproportionate detriment of homeless families. In fact, one writer described the child welfare system as “stack[ing] the deck in favor of termination of parental rights in cases where the primary barrier to family reunification is a lack of safe housing.” Homeless parents face additional challenges to holding on to their parental rights and are more susceptible to termination of those rights than housed parents.


353 EUBANKS, supra note 44, at 161

354 Id. at 160 (“They don’t know what it’s like. Drug and Alcohol come to my house [for drug screenings] once a week. I go to court every three months. I have to go to therapy for me, and therapy for my kids.”); see also DUNCAN LINDSEY, THE WELFARE OF CHILDREN 44, 171 (2d ed. 2004) (identifying potential requirements of a child welfare “plan”).

355 LEFT BEHIND, supra note 39, at 7.

356 Id.

357 Wade, supra note 274, at 869.
As discussed earlier, the funding system created by child welfare law makes it so that homeless parents receive little to no meaningful assistance or help preserving their families, even as states enjoy uncapped funding for adoption planning and services. ASFA also allows states to engage in concurrent planning, meaning that states can simultaneously make the “reasonable efforts” required by law to reunite children with their families and plan for the adoption of those same children. Combined with the reasonable efforts requirements’ lack of bite and the disproportionate funding states receive for adoption versus preservation efforts, this system of concurrent planning forces homeless families to compete with adoption and adoptive families, with the deck stacked in favor of the latter.

This system has the potential to significantly hinder a homeless parent’s ability to win in a termination proceeding. Governed by the “best interests” of the child test, such proceedings often become a comparison of living conditions offered by the child’s biological parent and those offered by the child’s foster or adoptive home, rather than an objective assessment of the biological parent’s fitness to raise the child. Such comparisons are inherently unfair to homeless parents: the state has no financial incentive to provide them with the support needed to regain custody and retain their parental rights, and the reasonable efforts required of states are undefined, generally inadequate, and can be abandoned when they conflict with the permanency plan. In determining where the child’s long-term interests might best be served, a judge in such cases must compare a homeless parent to a foster or adoptive parent who has more personal wealth to provide for the child and whose efforts are supplemented and reimbursed by the state indefinitely. Under these conditions, a court is likely to find that it is in the best interests of a child to remain with a foster or adoptive parent, and may then terminate parental rights.

In Philadelphia, Pennsylvania, for example, according to one family defense attorney’s experiences in representing parents, housing is an issue in almost every case. In some situations, the alleged issue that prompted

358 See supra notes 348–52 and accompanying text.
359 Roberts, supra note 336, at 114.
360 Roberts, supra note 336, at 138–39 (detailing the use of the “best interest” of the child test to choose “foster and preadoptive parents over biological parents”).
361 42 U.S.C. §671(a)(15)(C) states that
if continuation of reasonable efforts . . . is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan (including, if appropriate, through an interstate placement), and to complete whatever steps are necessary to finalize the permanent placement of the child . . . .
362 Zoom Interview with Elizabeth Larin, Supervising Att’y, Cmty. Legal Servs. (Feb. 12, 2021).
investigation and removal is no longer a concern, but lack of housing prolongs or prevents the reunification of the family.\textsuperscript{363} Judges place a lot of value on parents having a house with a bed for their child to sleep in, and may be extremely reluctant to reunite children with their parents in a shelter.\textsuperscript{364} Although housing legally cannot be the sole basis for terminating parental rights, it is a basis for keeping families separated. And if appropriate housing is not eventually obtained, judges may find another reason to terminate parental rights, such as a “lack of parenting capacity.”\textsuperscript{365}

Additionally, federal law requires that the state must begin termination proceedings against a parent whenever a child has been in foster care for fifteen of the past twenty-two months.\textsuperscript{366} This so-called “length-of-time-out-of-custody” provision is a commonly used ground for termination.\textsuperscript{367} The provision is particularly damaging for homeless families; reunification is nearly impossible when the daily realities attendant to homelessness are the circumstances that led to the child’s removal. A child removed from a homeless parent due to lack of stable housing (or a symptom of that lack) may be placed in foster care even absent abuse, intentional harm, or neglect from their parent(s). The funding system created by ASFA diminishes a homeless parent’s chance at getting housing assistance from the state, and so a homeless parent is left with little to no support to find safe and adequate housing in a specific yet arbitrary period of time, or they risk losing their children. If they fail, termination proceedings are initiated even if they made “meaningful strides toward the child welfare agency’s goals for the family.”\textsuperscript{368}

III. IMPLICATIONS

In Part II, I examined constraints to reproductive autonomy imposed upon homeless individuals principally as a consequence of their homelessness. In this Section I explain the implications of this analysis for broader discussions of Reproductive Justice, reproductive rights, and constitutional guarantees of reproductive autonomy. Ultimately, I aim to make it clear that the regulations detailed above not only infringe upon individuals’ reproductive rights and

\textsuperscript{363} Id.

\textsuperscript{364} Id. In some situations, parents had housing originally but have lost it because their child was removed; removal of the child can cause the parent to lose certain benefits, thus losing housing and making it more difficult to reunify. Id.

\textsuperscript{365} Id.


\textsuperscript{367} Ayres Hand, supra note 366, at 1252.

\textsuperscript{368} Wade, supra note 274, at 898.
thwart Reproductive Justice, but that they do so while actively frustrating the goals of the child welfare system and harming children.

A. Reproductive Justice and Homelessness

Viewing constraints on the reproductive autonomy of the homeless through the lens of the Reproductive Justice framework reveals the stunning degree to which current laws and policies in the United States deny the homeless their rightful opportunity to make decisions about if, when, and how to have and raise a child. Ironically, the same legal and political system that limits the right of homeless individuals shamelessly and simultaneously attempts to limit affluent white individuals’ right to not have a child through limits on contraceptive and abortion care. If homeless individuals do have a child, they then face unique limits on their right to parent that child with dignity.369 It is important to remember that a homeless person’s reproductive choice “does not occur in a vacuum, but in the context of all other facets of [their] life, including barriers that stem from poverty, racism, immigration status, sexual orientation and disability.”370 Homeless individuals’ lack of housing, combined with barriers they may encounter based on their other identities, significantly curtails their reproductive options.

In many ways, homeless individuals are a perfect example of what the Reproductive Justice movement stands for. A movement that centers racial and social justice in the context of reproductive choice must seriously grapple with the lived experience of homeless people, who, in addition to being on the extreme end of poverty in our nation, are disproportionately Black, LGBTQ+, and disabled.371 These individuals face a myriad of assaults on their reproductive liberty and dignity: from the attacks on abortion and contraceptive access that also affect housed people to the unique barriers discussed due to their lack of housing, and, disproportionately, regulation and control based on race, sexual orientation, gender identity, and/or disability.

In addition, research suggests that homeless individuals have a higher pregnancy rate than the national average and are more likely to suffer from pregnancy complications and conditions,372 further highlighting the importance of centering these individuals and their experiences in the Reproductive Justice movement. Examining federal and state intrusions into

369 See Ketteringham et al., supra note 84, at 83 (“[Reproductive Justice] advocates . . . advocate[] for the realization of the full range of reproductive decisions, placing equal importance on the right to have a child, the right not to have a child, and the right to parent the children one has with dignity.”).
370 London, supra note 60, at 72.
371 Supra notes 12–14.
372 See supra notes 214–17 and accompanying text.
the right of reproductive autonomy from the experiential perspective of homeless individuals enhances our understanding of the government’s actions and conduct and provides new avenues for the Reproductive Justice movement in its fight for racial, social, and Reproductive Justice. Crucial to the movement’s goals is an understanding of how unhoused individuals, disproportionately Black, bear the brunt of punitive and regulatory policies on reproduction, as a continuation in the country’s legacy of devaluing poor and/or Black people’s livelihoods and parenting.

B. Constitutional Concerns

Under the Constitution, all people have a right to privacy, which encompasses a right to reproductive autonomy. In this Comment I have explored the limitations that United States’ law and policy place on this right when it comes to homeless individuals at various stages throughout their reproductive lives. Although the regulations and control efforts discussed above each pose distinct challenges, I now consider their cumulative effect. Since many homeless individuals encounter numerous of the limitations throughout their life, sometimes several at the same time, each individual limitation on their reproductive autonomy should not be considered in a vacuum but as part of one broader lived experience. While some may argue, considering the current state of privacy rights for the poor, that specific, individual provisions discussed above do not violate an individual’s right to reproductive autonomy, my Comment aims to situate the regulations within a larger systematic denial of reproductive autonomy. When considering the various kinds of reproductive regulation, and the nature of the events and factors that spring them into action, one discovers an interlocking system of mutually reinforcing components that, taken as a whole, renders the constitutionally protected rights of the unhoused as little more than fictitious promises, routinely ignored by the state.

Taken together, the experiences of homeless individuals are part of a broader attempt to prevent them from having and raising children. This is nothing less than an intrusion on a fundamental right of mankind—the right to choose freely whether or not to have a child, and to raise that child. Justice Brennan described this right in the 1972 Supreme Court case Eisenstadt v. Baird as the “right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Other Supreme

373 See supra notes 74–79 and accompanying text.
374 405 U.S. 438, 453 (1972) (emphasis omitted).
Court cases recognize and protect this constitutional right. In *Skinner v. Oklahoma*, the Court recognized the importance of the right to procreate, calling it “one of the basic civil rights of man.” In *Griswold v. Connecticut* (and *Eisenstadt v. Baird*), the Court recognized the importance of choosing whether or not to have a child, affirming the constitutional protection of the right to use contraception, regardless of marital status. In *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Whole Women’s Health v. Hellerstedt*, the Court affirmed that women have a constitutional right to choose abortion, even if that right is limited. These decisions protect individuals’ reproductive autonomy, the ability to decide whether to have a child, when to have a child, and with whom to have a child. The Court has further protected an individual’s right to raise that child, in *Troxel v. Granville*, *Meyer v. Nebraska*, and *Pierce v. Society of the Sisters*.

Yet as I have shown in this Comment, myriad laws and regulations weaken the rights of homeless individuals, diminishing or eliminating their reproductive autonomy. Homeless individuals, disproportionately relying on welfare, are heavily discouraged from becoming pregnant, potentially even losing crucial benefits in some cases if they decide to have a child. If they do get pregnant, they are subjected to increased criminalization—punishment—due to their status as pregnant and as unhoused. If they do give birth and decide to raise their child, the state is likely to interfere again, removing their child from their custody and/or terminating their parental rights. Through these processes, rules, and regulations, homeless individuals face numerous intrusions into their fundamental constitutional rights: their right to decide “whether to bear or beget a child,” and their right to parent said child.

The policies discussed in each of the three stages above also fail to advance any significant state interest. States and the federal government may try to justify the policies and regulations at issue by stating they are for child welfare. They may claim to focus on “helping” children, but fail to help mothers, assuming that the well-being of mother and child can and should be separated. Such thinking is based on outdated, racist, classist, and gendered

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378 *See* 530 U.S. 57, 63 (2000) (holding that mothers cannot be constitutionally forced to allow grandparent visitation).
379 *See* 262 U.S. 390, 399-400 (1923) (holding it unconstitutional to bar parents from allowing someone to teach their children in languages other than English).
380 *See* 268 U.S. 510, 534-35 (1925) (holding it unconstitutional to force parents to educate their children at public schools).
381 *Eisenstadt*, 405 U.S. at 453.
assumptions about poor single women, and a misguided belief that punitive government policies against homeless parents can help their children. But the best way to help children and reduce poverty, specifically homelessness, is to directly support their mothers. Eighty-four percent of homeless families are headed by women.\footnote{382} Supporting these women, rather than coercing, punishing, criminalizing, regulating, and devaluing them, would improve not only their well-being but also their children’s. This is the first meaningful step towards breaking the cycle of homelessness and eradicating child poverty.

1. Increasing Family Abuse and Entrenching Child Poverty

TANF policies and provisions, designed to promote marriage and discourage pregnancy, lead to damaging long-term outcomes for children: coercing homeless women into marriage may lead to higher rates of domestic violence and family abuse, and family cap laws have been found to further entrench rather than fight the poverty of children born to homeless individuals.

A wealth of literature addresses the damaging impacts of domestic violence on children, whose exposure to violence may be a specific outcome of TANF’s promotion of marriage. A comprehensive review of literature published between 1995 and 2006 found that “children and adolescents living with domestic violence are at increased risk of experiencing emotional, physical and sexual abuse, of developing emotional and behavioral problems and of increased exposure to the presence of other adversities in their lives.”\footnote{383} Domestic violence of a spouse is the most common context for child abuse; a 1995 study found that, in approximately 32–53% of families in which women were physically abused by their partner, children also experienced direct abuse from the same person.\footnote{384} In fact, marital abuse is directly related to child abuse and is a statistically significant predictor.\footnote{385}

Living with and witnessing violence in their household has a host of negative outcomes for children even if they do not directly experience abuse. Research shows clearly that witnessing abuse at home, typically towards their mothers, has intense negative impacts on children, “tantamount to emotional

\footnote{382} The AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, supra note 29.
\footnote{383} Stephanie Holt, Helen Buckley, & Sadhb Whelan, The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature, 32 CHILD ABUSE & NEGLECT 797, 797 (2008). Interestingly, the same study “also highlights a range of protective factors that can mitigate against this impact, in particular a strong relationship with and attachment to a caring adult, usually the mother,” which has further implications for the “post-birth” stage discussed in this comment, where children are routinely taken away from their mothers. Id.
\footnote{384} Marianne Hester, Chris Pearson & Nicola Harwin, Making an Impact: Children and Domestic Violence 42 (2d ed. 2007).
\footnote{385} Id. at 43.
abuse or psychological maltreatment.” These negative impacts manifest even when the child “witnessing” the abuse is not physically present in the room when it happens; “children can witness domestic violence in a number of ways, which extend beyond direct observation,” including overhearing violence or being aware that violence has happened. If the government has a vested interest in protecting children, surely policies that promote marriage across the board for welfare recipients, which may coerce women both to marry and to stay with their abusers, are contrary to that interest.

Family cap laws are also harmful to children, and actually increase their deep poverty rate. They have also been associated with “lifelong damage to [children’s] learning and development.” A study on New Jersey’s family cap law, the first enacted in the nation, found that the law barred around 20,000 children from receiving benefits between 1992 and 2016. In 2016, eight out of every ten children living in poverty in New Jersey did not receive public assistance.

Clearly, family cap laws not only fail in promoting child welfare, but they do the opposite, harming children and exacerbating their poverty. When people on welfare have children, family cap laws prevent them from getting needed assistance to provide for said children. For families who rely on assistance for daily survival, this denial of benefits may mean that the children go hungry, or cold, or live without such essentials as diapers, shoes, coats, and mittens. In short, the impacts of family cap laws can be catastrophic for homeless individuals who already occupy the extreme end of poverty.

Arguments that homeless individuals should not have children, critiqued at length in Part II, also fail on a more practical level; some welfare recipients still have children, either by choice or because they lack access to contraceptives and abortion. Laws passed to discourage them from having children are cruel when their practical effects are to deny children, once born, direly needed assistance. If states do not want children living in poverty, their interests are best served by providing meaningful support to poor people who need assistance, not creating policies to punish them and ultimately harm their children. Additionally, arguments that family cap laws put individuals on an

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386 Id. at 44.
387 Id. at 45.
388 Wiltz, supra note 3.
389 Under New Jersey’s plan, which was recently repealed, a family of three (two parents plus a child) would typically receive $424 a month in welfare benefits. Id. However, “[i]f a mother has her second child after she started receiving welfare, her assistance would only be $322 a month." Id.
391 Id. at 1; Wiltz, supra note 3.
“equal playing field” with others also fail. As Dorothy Roberts points out, “in no way does the child exclusion equalize the situation of middle-class citizens and those on welfare,” because “working families receive government benefits, in the form of earned income tax credits, tax exemptions, and child care credit, that subsidize the cost of an additional child.”

2. Deterring Prenatal Care, Imposing Economic Hardship, and Undermining Families

“Laws that criminalize pregnant drug use fail to recognize the intrinsic interconnectedness between a mother and her baby. While a baby is in utero and for the first few years after birth, it is impossible to punish a mother without also punishing her baby.”

The criminalization of pregnant homeless individuals is harmful to children in three main ways: it deters prenatal care, undermines the stability of children's families, and imposes economic hardship.

Professionals and scholars studying medicine and reproductive, maternal, and infant health have long recognized the importance of prenatal health and care to children's well-being. While substance use is associated with lower

392 See Wiltz, supra note 3 (“[Republican Gov. Chris Christie] said the caps provide for equal treatment of welfare recipients and other residents, ‘who do not automatically receive higher incomes following the birth of a child.’”).

393 Roberts, supra note 87, at 213.

394 I focus here on how these policies hinder state child welfare interests, since those are the concerns usually discussed when trying to justify the criminalization of pregnant women. However, criminalization frustrates another state interest: finances. Both the criminalization of pregnancy and of the homeless are incredibly expensive and cost taxpayers more than alternative, non-punitive solutions. When states criminalize pregnancy, instead of focusing on treatment for women with substance use issues, they are choosing a less effective and more costly approach. Switching from a punitive, criminalizing approach to increased access to treatment is more effective at decreasing drug use and increasing an individual's economic self-sufficiency. See Melissa Ballengee Alexander, Denying the Dyad: How Criminalizing Pregnant Drug Use Harms the Baby, Taxpayers and Vulnerable Women, 82 TENN. L. REV. 745, 782-83, 787 n.168 (2015). It is also cheaper, costing by some estimates less than a third of incarceration. Id. at 783 & n.169. Studies on the cost differences have estimated that "every dollar spent on drug treatment in the community is estimated to return" somewhere between seven and nineteen dollars in benefits to the community. Id. at 783. "In contrast, for every dollar spent on enforcement, society receives only half of that value—$0.52 in benefit." Id. The criminalization of the homeless is also incredibly costly—studies have shown that "it is far more expensive to criminalize poverty and homelessness than it is to pursue non-punitive alternatives such as permanent supportive housing.” Sara K. Rankin, Punishing Homelessness, 22 NEW CRIM. L. REV. 99, 109 (2019).

395 Alexander, supra note 394, at 780-81.

levels of prenatal care, there is some evidence that this association is due less to the substance use itself and more to the criminalization of pregnancy and specifically the criminalization of drug use during pregnancy. Pregnant people may be discouraged from accessing prenatal care because they fear that their drug use will be suspected and/or reported, leading to a criminal conviction and the loss of their child. For example, Tennessee’s 2014 fetal assault law led to pregnant people avoiding prenatal care due to fear of being thrown in jail. Criminalizing pregnancy, then, ultimately harms children by decreasing the amount of prenatal care pregnant people receive.

Michelle Ballengee Alexander, in her article on the criminalization of pregnant women, explains how the practice also harms children by undermining their family. Pushing back against the “fictitious, adversarial relationship between mother and fetus,” Alexander argues that the well-being of the parent and the baby are interconnected, both before and after birth. Incarcerating the parent, even if only for a short period, harms the baby. Incarcerated parents are separated from their infants, interfering with important bonding and potentially negatively impacting the baby’s development and well-being. If the parent is incarcerated and there is no family member to take care of their child, the criminalization of the parent may also lead to the child being placed in foster care, further undermining the family unit.

Maintaining family stability is important even when an infant exposed to substances in the womb, and born with them in their body, goes through withdrawal after birth. Research on cocaine and methamphetamine exposure in the womb finds that babies “can recover quickly and develop normally.” Doctors who treat babies born to pregnant people using opioids say that the infants “seem to recover fully within the first few months of life.” Increasingly, these doctors conclude that the best treatment is the one that is routinely taken away: their birth parent. Newborns with opioid dependence go through withdrawal, and many are separated from their birthing parent and taken “to hospitals hours away,” despite studies that have shown that such separation during the withdrawal process can slow their recovery and that “infants in

397 Stein et al., supra note 92, at 524–25.
398 See supra notes 231–34 and accompanying text.
399 See supra notes 231–38 and accompanying text.
400 Burke, supra note 233; Goldensohn & Levy, supra note 237.
401 Alexander, supra note 394, at 779.
402 Id. at 779–80.
403 Editorial, supra note 198.
404 Id.
405 Saint Louis, supra note 228 ("[A] growing body of evidence suggests that what [opioid-dependent] babies need is what has been taken away: a mother.").
withdrawal require less medication and fewer costly days in intensive care" when they are close to and in routine contact with their parents.406

Not surprisingly, criminalizing pregnant drug use harms the child financially. In the short term, incarceration and criminalization have “an immediate fiscal impact on the family due to lost wages, court costs, and probation costs. Accordingly, the practical effect of criminalizing pregnant drug use is that the baby has fewer available economic resources.”407 There are also long-term economic effects.408 Even after release, the formerly incarcerated parent will have a harder time finding a job and may have lower future earnings.

3. Frustrating the Goals of the Child Welfare System

The child welfare system claims to promote children’s well-being and find or keep them in a permanent, safe living situation whenever possible. However, as explained above, numerous flaws in the system make it into the lives of homeless families particularly cruel, putting homeless parents disproportionately at risk of losing their children to foster care or adoption. In addition to the harm to parents discussed in Part II, this system also frustrates its own goals and undermines the specific goals of AFSA by exacerbating the shortage of foster care families in the United States.

As Elenore Wade expertly documents, there is currently a “disparity between the number of children awaiting adoption and the available adoptive homes,” with the number of children in foster care continuing to outpace the number of potential adoptive placements.409 The current child welfare system, set up in such a way as to discourage the preservation of homeless families, intensifies this disparity:

[N]early a third of children in the care of the state could be reunited with their families if their parents could obtain stable housing, and returning these children to their families would eliminate a large portion of the demand for adoptive homes. . . . [This would] benefit . . . tens of thousands of other children waiting to be adopted.410

407 Alexander, supra note 394, at 781.
408 Id.
409 Wade, supra note 274, at 870.
410 Wade, supra note 274, at 880 (footnote omitted).
The flaws identified in Part II of this Comment, if addressed, could better serve the goals of Congress in passing the Adoption and Safe Families Act. When passing the act, Congress sought to eliminate a situation known as “foster care drift,” in which a child spends months and sometimes years in foster care before being adopted.

Congress . . . pointed the finger at the reasonable efforts requirement as the culprit. However, there is far more evidence that foster care drift persists because the number of available adoptive homes has never even come close to the number of children waiting to be adopted.411

Thus, by shifting its focus from removing children from otherwise fit parents to providing support to those parents, the child welfare system could likely increase its effectiveness at furthering its own stated goals, while also reducing the shortage of foster care families.412

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411 Id. at 890 (footnote omitted).

412 This Comment discusses the preservation of homeless families as furthering the goals of the child welfare system, including foster care for some children, to highlight why states may have a vested interest in correcting the reproductive regulations and intrusions laid out in Part II. However, some have argued for an abolition of the foster care system altogether, based in part on the systematic devaluation and separation of poor and Black families. See, e.g., Roberts & Sangoi, supra note 300 (“[F]oster care abolitionists recognize this institutionalized disruption of Black families as a key aspect of the expanding carceral state. They therefore seek to dismantle the current foster care system and replace it with a radically different approach centered on the needs, dignity, and equal humanity of families.”). Similarly, Erin Cloud argues that

[ultimately, the foster system does not achieve the laudable goal of family and child protection. The families involved have worse outcomes than those in the general population, including higher incarceration rates, poorer health, more instability, and greater incidence of behavioral issues. . . . Despite this reality we continue to rely on this harmful system as an intervention for underserved families who we categorize as neglectful and abusive. A call for abolition recognizes that this system is at best unhelpful, and more often incredibly violent.]

CONCLUSION

In this Comment, I have examined numerous ways that homeless individuals are subjected to nearly constant and far-reaching reproductive regulation, and the impact that their lack of housing has on their ability to meaningfully exercise reproductive choice due to government limitations of that right. Policies regulating homeless individuals’ reproduction are punitive in nature, seeking to prevent them from having children and punishing them if they do. Homeless individuals’ experiences with pregnancy and child-rearing are fraught with difficulty and danger; they are exposed to messages and coercion telling them not to have children and to disdain if they do become pregnant, more likely to have that pregnancy criminalized and be subsequently incarcerated, and more likely to have their children taken away through the child welfare agency.

In Part III, I examined how the policies and regulations that interfere with homeless individuals’ reproductive autonomy also hinder important state interests. Although Reproductive Justice advocates and policymakers often disagree on the role of government in people’s reproductive lives, there is one important common denominator to keep in mind: no one wants children to live in homelessness. At first glance, my advocacy in this Comment for the reproductive autonomy of homeless individuals, and particularly my criticism of government agencies with which the homeless must constantly interact, may seem to contradict that statement. It does not: my advocacy and criticisms are based on the understanding that the best way to prevent child homelessness, and reduce the cyclical nature of homelessness in the United States, is to help homeless people. By shifting from punitive measures to measures focused on assistance, no strings attached, the overall well-being of homeless families can be improved. Current efforts, often predicated on a false opposition between parents and their children, do not help either. Measures encouraging marriage to or relationships with potentially abusive partners do not help, nor do welfare caps that make it nearly impossible for parents to provide for their children. Incarceration and criminalization undermine the family unit and deter pregnant people from seeking prenatal care. Separating children from their parents does little else but make children’s lives harder. By increasing support for homeless parents and recognizing their reproductive autonomy and humanity, federal and state governments can promote child welfare and Reproductive Justice at the same time.

Pervasive threats to homeless individuals’ reproductive autonomy illustrate the importance of the Reproductive Justice movement, a movement that considers individuals’ reproductive choices not in a vacuum but in the context of their identities and the full range of barriers they face. Homeless
individuals, occupying the extreme end of poverty, are also more likely to be Black, LGBTQ+, and disabled. Their struggles occupy a nexus of economic justice and racial justice, the disability rights movement, and LGBTQ+ social movements. Through an examination of the lived experiences of the homeless, Reproductive Justice advocates can both identify and take direct action to mitigate the damaging effects of state control over these individuals’ reproductive autonomy. An understanding of how homeless people, disproportionately Black, bear the brunt of punitive and regulatory policies furthers an understanding of Reproductive Justice. Such an articulation also suggests where some advocates may continue focusing their already impressive efforts, and where others should begin to focus: welfare reform and eliminating punitive, coercive policies; fighting the criminalization of pregnancy with special attention on the increased criminalization of the homeless; advocating for changes to the child welfare system that specifically target the preservation of homeless families; and, perhaps most importantly, expanding and increasing the availability of government-funded affordable and subsidized housing.\footnote{For some examples of current housing justice advocacy, see, e.g., About, MOMS 4 HOUSING, https://moms4housing.org/aboutm4h [https://perma.cc/P4GT-K9T3], Matt Charnock, Property Occupied by Moms 4 Housing Activists Has Been Sold—and will Become Sanctuary for the Homeless, SFIST (Oct. 10, 2020), https://sfist.com/2020/10/10/property-occupied-by-moms-4-housing-activists-has-been-sold-and-will-become-sanctuary-for-the-homeless [https://perma.cc/MCR9-UNM4], and Press Release, Phila. Housing Action, Philadelphia Housing Action Claims Victory After 6 Month Direct Action Campaign Forces City to Relinquish 50 Vacant Lots to Community Land Trust (Sept. 26, 2020), https://philadelphiahousingaction.info/release-philadelphia-housing-action-claims-victory-after-6-month-direct-action-campaign-forces-city-to-relinquish-50-vacant-homes-to-community-land-trust [https://perma.cc/53U4-NQX4].}