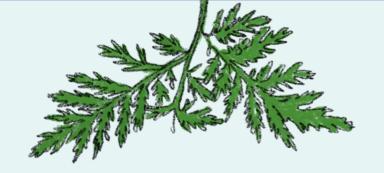
# DOBBS WAS NOT THE BEGINNING

A Guide on Pregnancy Criminalization







## Acknowledgements

This guide was developed by Community Justice Exchange and the Repro Legal Defense Fund as an expression of our shared commitment to exposing the ways in which systems of criminalization already police, surveil, incarcerate, and forcibly separate individuals and communities. This guide furthers our shared mission of lifting up lessons learned through our work with grassroots organizations on how systems of criminalization are and have been criminalizing people for their reproductive lives. It was written by Atara Rich-Shea and Em Lawler, in collaboration with Ana María Rivera-Forastieri, Farah Diaz-Tello, Jen Girdish, Kylee Sunderlin, Mariko Miki, Pilar Weiss, Rachel Foran, and Rafa Kidvai.

Illustrations by Mon Mohapatra, design layout and hand-lettering by Danbee Kim, and Spanish language translation by tilde Language Justice Collaborative.

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### Introduction

In June of 2022, the United States Supreme Court issued the <u>Dobbs v. Jackson</u> <u>Women's Health Organization</u> decision which overturned Roe v. Wade and ended the constitutional right to an abortion. Although meaningful access to abortion has always been inequitable, this decision changed the structural and legal landscape of abortion access in the U.S. overnight.

In the past few decades, medical advancements have ensured that multiple safe forms of abortion care exist, and will continue to exist, even in a post-Roe era. However, the seismic shift caused by the Dobbs decision and related state-level action has created a number of unknowns related to how individuals, their loved ones, community supporters and helpers, and medical providers will be criminalized for accessing abortion. This guide focuses on what is known; that criminalization for accessing abortion has already been happening for decades throughout the United States.

The criminal legal system, the deportation system, the family regulation system, and the probation and parole systems have targeted, arrested, deported, surveilled, forcibly separated, prosecuted, and incarcerated people for allegedly self-managing their abortion or helping someone do so. These systems will continue to target people who exercise their right to bodily autonomy. As criminalization increases and expands because of Dobbs, these systems will also be the mechanisms that enforce new state laws criminalizing abortion access. Through public education, advocacy, and solidarity, however, it is possible to mitigate the harm that is coming and to support people who are criminalized for accessing abortion care.

#### **SELF-MANAGED ABORTION**

Abbreviated and often referred to as SMA, is when someone ends their own pregnancy without the formal assistance of a health care provider.

This guide is designed for anyone interested in understanding the ways criminalization of abortion has manifested and harmed people in the past as a way to understand what we might expect in the post-Dobbs era. This guide specifically focuses on the current and anticipated increase of the criminalization of individuals who self-manage their abortion or are suspected of SMA. This guide does not address two areas of criminalization that remain unknown: (1) what will happen to individuals who travel to protected states from unprotected states seeking a clinical abortion, and (2) what will happen to medical providers and abortion access organizations that facilitate travel and access for individuals coming from unprotected states. These two areas are undoubtedly a threat, but they are still areas where the legal landscape is not clear (we recommend continuing to follow abortion funds and other abortion access organizations as updates become clearer). This guide also does not specifically address the legal landscape for those protesting the Dobbs decision and related state restrictions and possibly facing arrest and prosecution for their organizing. The National Bail Fund Network and the National Lawyers Guild provide guidance and support for protest bail and legal defense funds, available here.

This guide provides an overview of how SMA has been prosecuted over the past decades, despite an absence of laws explicitly criminalizing the practice. From there, it explains how criminalization from law enforcement and prosecution offices ensnares people, not only in the criminal prosecution system, but also in the intersecting probation and parole systems, the deportation system, and the family regulation system. This guide also identifies and provides guidance for three possible points of intervention and support that would benefit people being criminalized for SMA: criminal and other case support, monetary support, and publicity support. Finally, this guide provides further resources for understanding and intervening in the criminalization of SMA.

Through public education, advocacy, and solidarity, however, it is possible to mitigate the harm that is coming and to support people who are criminalized for accessing abortion care.

### Core Values & Definitions

We affirm the human rights of self-determination and bodily autonomy, including the right to abortion. People have the right to become pregnant, end a pregnancy, birth a child, have a family, and parent children. We affirm these rights are inherent, and must be exercised without surveillance, forcible separation, and criminalization by the state.

This document does not judge the means by which a pregnancy ends, but rather provides information, context, and insight as to how the state has responded, and will likely respond, to pregnancy loss and abortion. Understanding the ways in which any pregnancy outcome may lead to an arrest and prosecution is essential to fighting against the criminalization of individual people, as well as for collective change.

As stories of criminalization, arrest, and prosecution emerge, people may be tempted to react, jump in, share the very private story currently being publicized, and create new systems of support. Taking a moment to familiarize oneself with the legal landscape, learn what resources and supports already exist, and consider the implications of publicizing facts of the case, creates more thoughtful, personalized, and powerful advocacy systems.

Self-managed abortion is, and has always been, part of how people self-determine their reproductive lives. Self-managed abortion (SMA) is when a pregnant person ends their own pregnancy, without formally involving a health care provider. SMA is common and, especially with the advent of medication abortion, can be physically safe and effective. As clinic-based abortion care becomes less accessible throughout the United States, it is important that people know they have other options. There are logistical, legal, and community resources available to help people stay safe and supported throughout the process of ending a pregnancy. This is not a primary guide on to access abortion care, including self-managed abortion. If you find yourself in need of this guidance, we recommend *Abortion on Our Own Terms*.

#### The Criminalization of

## Self-Managed Abortions

A self-managed abortion (SMA) is an abortion that takes place outside the formal medical system, through any number of means, such as a medication regimen, herbs, or other long-standing cultural practices. Often supported by family, friends, or partners, people have been ending their pregnancies safely and autonomously with SMA forever. Unfortunately, as the reproductive justice movement has taught us, Roe was never enough. We know that Roe did not ensure meaningful abortion access for all. And, even while Roe was in effect, people were nevertheless prosecuted and incarcerated for ending their pregnancies or for allegedly causing a miscarriage or stillbirth.

SMA is currently legal in most states; only Nevada and South Carolina explicitly ban the practice. Nonetheless, police and prosecutors have targeted and criminalized people for SMA in 26 states, using a wide variety of criminal charges. In August of 2022, If/When/How released the report Self-Care, Criminalized: August 2022 Preliminary Findings, which details 61 cases of people who were criminally investigated or arrested for allegedly ending their own pregnancy, or helping someone else do so, from 2000 to 2020. As the researchers found, the prosecutions were not limited to states where SMA is specifically criminalized, but "[i]nstead, prosecutors applied criminal laws meant to address mishandling of human remains, concealment of a birth, practicing medicine without a license, child abuse and assault, and murder and homicide to allegations of self-managed abortion." Where SMA was not specifically illegal, police, prosecutors, and judges used existing laws meant to protect pregnant people and children to surveil, arrest, prosecute, and incarcerate the people these laws were ostensibly passed to protect.

Overzealous and politically-motivated prosecutors have abused their power to charge people with serious and incendiary crimes that carry heavy ramifications. Even district attorneys who publicly claimed they would decline to prosecute abortion cases after the fall of Roe, may prosecute people for SMA in the future by misusing laws that were never meant to address self-managed abortion. These charges often also carry disastrous side effects, from very high bails to family separation to extremely harmful publicity and stigma. For instance, where abortion stigma is still very strong, the publicity surrounding SMA criminalization can lead to loss of employment, housing opportunities, or family and community ostracization.

In addition to direct targeting and prosecution of SMA, a number of laws have been passed since the 1970's under the guise of protecting pregnant people and fetuses that have been and are currently being misused to criminalize people for SMA. Laws originally created with the alleged intent of protecting pregnant people from harm by others have been used to prosecute pregnant people who self-manage their abortions. For instance, prosecutors have used charges like concealment of a birth, child abuse and assault, and even murder and homicide to criminalize people for SMA. Similarly, laws intended to provide consumer protections via the regulation of prescription medications have been used against people self-managing abortion so that anyone who helps them do so, is charged with medical consultation without a license.

Because SMA happens in private, trusted people - like medical providers, social workers, family, and friends - sometimes alert law enforcement to a suspected SMA. Seeking medical care during or after a self-managed abortion; confiding in and asking for support from family or friends; and talking about ending a pregnancy on social media, put people who self-managed an abortion at risk for prosecution and incarceration. In the majority of cases identified for the lf/When/How report, law enforcement was made aware of the alleged self-managed abortion by someone in a relationship with the person, through a report from a care provider (health care or social work), or a family member, close friend, or acquaintance.

Arrest and prosecution for SMA impacts oversurveilled and criminalized communities more often and with more serious consequences. The If/When/ How report identified racial disparities in charging considerations, as well as less quantifiable repercussions as a result of arrest and prosecution. These ramifications included the loss of custody of children, deportation even after the case was dismissed, and community harassment, attacks, and ostracization. Arrest and prosecution for SMA, which is not illegal in most states, poses a real and harmful risk to people ending their own pregnancy. The repercussions of prosecution are felt not only through the criminal punishment system, but also in other intersecting systems that control, surveil, and restrict liberty and movement.

### Intersecting Legal Structures

Because the criminal legal system is a series of intersecting systems designed to ensnare people into multiple levels of coercion and control, people criminalized for pregnancy outcomes and self-managed abortion are often facing many different types of court involvement. Many people who are criminalized for SMA have a history of involvement with the courts. Prior involvement in the criminal legal system leaves people more vulnerable to prosecution - either explicitly through probation and parole, or implicitly through law enforcement tracking and surveillance. In other words, people who are already known to the system are more likely to be further targeted by the courts, potentially facing multiple cases in multiple courts with multiple attorneys.

People contending with a criminal case as a result of the criminalization of pregnancy are often facing other powerful and violent systems, putting them atrisk of entanglement in the deportation system or the family regulation system. Additionally, they may be contending with probation, parole, or other forms of carceral surveillance requirements. Facing multiple legal challenges is not uncommon and is the result of a system that ensnares Black, brown, Indigenous, LGBTQIA+, and poor and working class people. Part of the work of fighting these attacks on bodily autonomy includes learning to navigate these intersecting systems and recognizing that their intersection is an intentional feature of the system and not an anomaly.

The following sub-sections of the guide explains the mechanics of the immigration detention, deportation, and surveillance system, the family regulation system, and the probation, parole, and carceral surveillance system. These sub-sections also cover how each of these systems impact people criminalized for SMA and how these systems compound the harm experienced by people arrested and prosecuted for pregnancy outcomes.

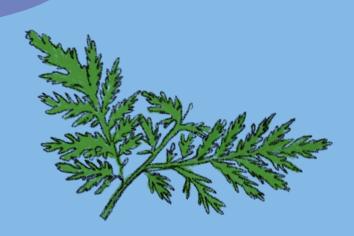
#### The Deportation System

Criminalization has a significant impact on the ability of noncitizens to navigate and survive the immigration detention and deportation system. Below, we describe three main ways that people who are not U.S. citizens, particularly undocumented people, are vulnerable to additional state violence as a result of criminalization through SMA.

First, any interaction with law enforcement could initiate an automated criminalization process that ranges from direct communication between local law enforcement and Immigration and Customs Enforcement (ICE) to computer-level data sharing processes that notify ICE of information about the person, including their current location. Simply sharing information about a person who is not a U.S. citizen makes them particularly vulnerable to arrest and deportation whether or not the person is ultimately jailed pretrial, prosecuted, or convicted. For people held in jail or prison pretrial, the risks of ICE arrest and incarceration are even higher. Although many cities and states have passed laws that curtail official communication between local police and ICE, impacted communities have been sounding the alarm about the surveillance of criminal courts by ICE, coupled with cooperation by officers regardless of these laws. Generally, the longer someone is held in jail or prison the more likely it becomes that ICE will learn about their existence and decide to arrest them. For example, even if someone is set to be released, either through bail or at the end of a sentence, ICE can decide to take someone directly from a criminal jail or prison into ICE custody, leaving families and communities scrambling to find out where their loved one has been taken.

Second, the immigration consequences of an arrest and/or conviction on someone's deportation case are myriad and severe. If a person who is subject to deportation proceedings has been convicted in the past of what is considered a serious offense, they can be barred from accessing immigration relief and can be subject to mandatory detention before being deported. Because prosecutors often criminalize SMA using charges that carry both long sentences and are deemed "crimes of moral turpitude" (e.g. homicide and child endangerment), these criminal prosecutions put already vulnerable people at more risk. Immigration judges are already impacted by a bias against people with criminal charges, and the charges in SMA cases make it easier and more likely that judges will deny immigration relief and deport someone.

Lastly, travel restrictions, in the form of border checkpoints throughout southern states, controlled by Customs and Border Protection (CBP), severely limit the options for noncitizens to access abortion services. Noncitizens living in states where clinical abortion is no longer available are vulnerable to arrest by CBP should they choose to travel out of state for an abortion. With options for abortion care so limited, it is much more likely that noncitizens will need to self-manage their abortions, thereby making themselves more vulnerable to SMA criminalization.



#### The Family Regulation System

The family regulation system is the federal and state apparatus of child welfare and child protective agencies, foster care, and preventive agencies that surveil and control the families and children it claims to protect. Poverty is the largest predictor of involvement in the family regulation system. Additionally, Black, brown, and Indigenous children are far more likely to spend time in foster care than white children. Post-Dobbs, with the proliferation of abortion bans, the state has created even more reasons to police pregnant people and their families. Policing and surveillance will result in even more unnecessary and violent family separations.

An arrest or prosecution in criminal court is not required for a child welfare agency to open a case. Like some criminal prosecutions, many family regulation system cases begin with a call from a mandated reporter. However, unlike criminal prosecutions, they can continue regardless of court involvement. Similar to prosecutors, case workers often abuse their discretion on what cases to bring, who to supervise, and which children are removed from their homes.

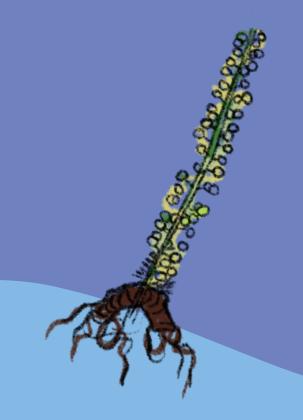
Stigma around abortion, and the legal landscape that criminalizes abortion, makes it likely that parents who self-manage their abortion have an increased risk of family regulation system involvement and an increased risk of their children being removed. In a post-Dobbs landscape, a parent helping their child access abortion care in anti-abortion states puts them at greater risk of family regulation system involvement as well. Fighting to change mandated reporting laws and education for mandated reporters on their legal and ethical responsibilities is necessary in the fight for abortion access.

#### **FAMILY REGULATION SYSTEM**

First coined by Emma Williams, and further developed and defined by Dorothy Roberts, refers to the system of regulation, intrusive investigation, monitoring, and forcible removal of children from their homes, that has commonly been referred to as the "child welfare system."

Family regulation system cases have a profound impact on parental autonomy. Once a case is opened, family surveillance intensifies as the state starts mandating various services to all or some members of the family, under threat of family separation and termination of parental rights. And once the state is able to monitor the internal workings of a family, the threat of abortion criminalization intensifies as workers in mandated service agencies are mandated to regularly report back to the court about their interactions with the family.

Fighting to change mandated reporting laws and education for mandated reporters on their legal and ethical responsibilities is necessary in the fight for abortion access.



# Probation, Parole & Carceral Surveillance

Direct intervention in the form of arrest and prosecution is not the only form of carceral control that law enforcement has over people who are criminalized for SMA. Systems of carceral surveillance, where a person is required by a court to submit to monitoring by law enforcement in the community over a period of time, are used extensively throughout both the criminal legal system and the deportation system. These systems of surveillance are forced on people who are being prosecuted for a criminal offense, who have been sentenced after a prosecution, and who are under threat of deportation by the immigration enforcement structure. This type of carceral surveillance can include being required to wear an ankle shackle, being required to submit to monitoring by phone apps like SmartLINK, being required to check in regularly with a court officer, and/or being prevented from leaving or entering an area by the courts.

People required to submit to carceral surveillance must access abortion services at heightened risk since they are already being actively monitored by the government. In states where clinical abortion is banned or inaccessible, people under carceral surveillance will be prevented from traveling to states where abortion is accessible, lest they alert their probation, parole, or immigration officer that they are traveling outside of their legally permitted travel area. SMA will likely be the abortion option most accessible to people under carceral surveillance, putting them at a risk for criminalization that people who can travel freely do not face.

There is also a heightened risk for people who are being surveilled by both the criminal legal and immigration enforcement systems. For example, in 2020, Texas Governor Greg Abbott enlisted courts and lay people to restrict the movement of undocumented people both within Texas and between Texas and other states. The deputization of non-law enforcement community members extends the reach of government surveillance and control and puts people in search of abortion care more at risk for criminalization.

SMA is a private act, which becomes public only when personal information is shared. People who are already under constant surveillance by law enforcement are regularly forced to provide personal information as a condition of their release. Law enforcement need only rely on the already existing surveillance mechanisms imposed on people on probation, parole, or other forms of carceral surveillance, in order to criminalize people for SMA.

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# Points of Intervention & Individual Support

The criminalization of SMA is enacted by the criminal punishment system, the deportation system, the family regulation, and all structures of carceral surveillance, including probation and parole. The stakeholders include police, prosecutors, judges, probation officers, ICE agents, the Department of Homeland Security, family court, "child welfare" and foster care agencies, and caseworkers. Intervening and supporting a person being criminalized requires an understanding of both the mechanisms of criminalization, as well as the moments and areas where intervention and support can be helpful. We identify three areas where support can be welcome and helpful: individual case support, monetary and material needs support, and publicity support.



#### Case Support

Individual case support for someone being prosecuted can look different depending on the person, their needs, and how they are being prosecuted. Criminalizing SMA attempts to strip people of their bodily autonomy and humanity, therefore any individual support offered must be done with consent and must center the person being prosecuted. The criminal legal structure will introduce significant challenges to communicating with the person being criminalized, making it all the more important that their voice, point of view, and desires should dictate the ways people can support and show up for them.

Understanding the path of a criminal case, from arrest to resolution, is the first step to being able to offer case support. Each city and state will implement criminal court proceedings differently, but once the process of criminalization is understood, other criminal case support tactics like <u>defense campaigns</u> and <u>participatory defense</u> can be implemented. Where legal representation is needed, but not provided, as in deportation proceedings, the person being criminalized will need assistance in finding legal representation and ensuring that all of their lawyers coordinate with each other.

#### UNDERSTANDING PATH OF A CRIMINAL CASE

Resources like <u>Beyond Criminal Courts</u> provide a general primer on criminal court proceedings where people can learn the general contours of a criminal case.

Part of identifying potentially supportive interventions includes mapping out the existing organizations that provide support to people criminalized for SMA. Legal services or bail fund organizations already exist, either nationally or in most states (information on those organizations is included in the resource section at the end of this guide). Even though these are often the first interventions supporters may think of, it is important to recognize that legal services and bail funds are often already doing the work in collaboration with other already existing organizing formations.

Instead of creating new structures, what is often most needed is to work with existing organizations to identify intervention points where gaps may exist. For example, a bail fund may understand the bail structure and have capacity to post bail, but may need assistance fundraising for a very high bail. Additionally, conditions of release (such as requiring a person wear an electronic monitor or restrictions on travel), other holds from previous or existing open cases, and the general brutality of bureaucracy, may make release take an extended period of time. A bail fund or legal defense fund may need people to support with rides or accompaniment regardless of timeline.

Sometimes no amount of legal work, fundraising, or organizing will be enough to convince the carceral structure to release someone. Additionally, for noncitizens, paying bail involves considerations for the person's risk for ICE contact, arrest, and deportation and may mean continued incarceration. However, support remains critical and there are many ways to continue being in relationship with people behind bars. Communication directly (through letter writing, phone calls, or email communion where available) or indirectly, through family or the person's legal team, ensure that the person knows there is a community of people who care, love, and support them. Putting money on someone's books (commissary), allowing them to purchase what is available behind bars, can help alleviate some of the suffering caused by incarceration. Preparing and continuing to advocate for release also continues even as the person remains incarcerated.

#### Monetary and Material Needs

Funds will likely need to be raised to meet material and other needs of the person being criminalized. While there are organizations (bail funds, legal defense funds) that can likely help cover legal costs and the cost of bail, these are a few guiding principles we can follow when setting up a fundraiser for someone being criminalized:

- Get explicit permission: Do not start a fundraiser unless you get explicit
  permission from the person or their family. Once you have their permission,
  ensure that their words and point of view are used to describe the situation and
  the request for funds and that efforts are not duplicated. Make sure there is a
  safe and secure way for the funds to get to the person who needs them.
- Solidarity, not charity: Fundraising ventures should be grounded in <u>mutual</u> <u>aid</u> principles, which include a belief in community solidarity and its structures of networks, reciprocity, cooperation, and collective liberation.
- Fundraise generally, allocate specifically: Material and other financial needs are often unpredictable and money raised should be flexible so that the person can make their own decisions around their use of funds.
- Be aware of tax implications: Online fundraiser platforms (like GoFundMe or FundRazr) as well as cash apps (like Venmo or PayPal) all report cash transfers to the Internal Revenue Service (IRS). Donations made through fundraiser platforms are likely to be considered gifts, but that is not a given. Consult a tax professional on the best way to protect the person you are raising funds for from unnecessary stressful IRS letters and tax penalty payments.

#### **Publicity Support**

SMA cases can garner a lot of local or national publicity. The media rarely reports the story correctly. It's even rarer to see the media center and include the criminalized person's point of view and words. Part of individual support can include, after coordinating consent with the person and their other support team members, talking to the media or posting on social media. Here are some guiding principles when coordinating publicity support:

- Center the desires and safety of the person who is being criminalized: If their preference is no publicity, respect that wish. Understand that for noncitizens or other vulnerable populations, publicity around their case may put them in more danger of criminalization and deportation. People who live in small communities are at risk for ostracization.
- Focus on the system, not the individual: The focus of your messages and storytelling should be about the judges, prosecutors, or other system stakeholders that are abusing people and violating privacy, not on the person who is being criminalized. Use storytelling to build power and not further someone's exploitation. Avoid system-legitimizing language, like describing the charges as "serious," "dangerous," or "violent."
- Set the terms of the discussion by using humanizing language rather than the language of the police and courts: Refusing to engage in the language of the carceral system reminds us that abortion is an act of care and humanity.

- Get permission: If speaking to traditional media or on social media, in addition to the above points, also ensure you have explicit permission from the person to speak on their behalf and that you have coordinated with the rest of their support team. Ensure that the privacy and dignity of the person is discussed and avoid revealing personal or explicit information unless authorized.
- Don't assume the pregnancy outcome at issue is an abortion or name it as such, unless the person who is being criminalized identifies it that way: Many people who have been criminalized for self-managed abortion do not necessarily think of it as an abortion or are being criminalized for a miscarriage or stillbirth. Generally, you can refer to it as "being criminalized for a pregnancy outcome." This also includes not posting or commenting about details and methods of the abortion.
- Avoid using mugshot images or other images that the person has not consented to have shared: The more someone's picture is in the media, the more it creates an inescapable public record.
- Avoid sharing unsubstantiated claims and narratives, especially those created by police and prosecutors: Every claim is unsubstantiated until the person confirms it. When you repeat law enforcement narratives, it essentially tries someone's case in the media without an opportunity for the person being criminalized to provide the facts.
- If the person being criminalized identifies as having self-managed their abortion, don't use negative or stigmatizing frames or messages about self-managed abortion or the people who self-manage: This includes avoiding words like "illegal abortion" or "unsafe abortion," or characterizing their actions or decisions as motivated by desperation or a desire for secrecy or concealment.

### Conclusion

The Dobbs decision upended the past 50 years of constitutional protections for abortion, leaving many questions about its effect on peoples' ability to access abortion care without threat and fear of criminalization. However, we know that abortion has already been criminalized for the past decades. People who have chosen to end their own pregnancies have been arrested, prosecuted, incarcerated, deported, and forcibly separated from their families. Abortion criminalization cases will not have easily identifiable labels; in fact they may not say anything about abortion on their face, and instead will use stigmatizing language and charges that carry severe penalties to criminalize and punish people. Understanding the methods and mechanisms already in place for criminalizing people for ending their pregnancies will help predict and defend against the oncoming onslaught of new criminalizations.

### **Further Resources**

This guide is not meant to be an exhaustive document, but rather a starting point for understanding and working against the criminalization of SMA and other pregnancy outcomes. The landscape of abortion accessibility and criminalization is still changing rapidly and will continue to evolve as political leadership changes at the federal and state levels. We hope to update resources as more information becomes available and conditions continue to change.

Below are a sample of organizations related to interventions discussed in this guide. If you have questions or additional resources to add, please be in touch at info@communityjusticeexchange.org

Reproductive Justice Resources

Sister Song All Above All

Abortion Access Organizations
State-by-state guide via Abortion Finder
National Network of Abortion Funds
Apiary - local practical support organizations
The Brigid Alliance

Bail & Legal Defense Resources

National Bail Fund Network

If/When/How

Repro Legal Defense Fund at If/When/How

Repro Legal Helpline at If/When/How

Legal Defense Fund Guide from the National

Lawyers Guild and the National Bail Fund Network

Pregnancy Justice

Organizing Against Criminalization
Generally:
Beyond Criminal Courts

Domestic & Sexual Violence Survival
Survived & Punished

Abortion

Interrupting Criminalization's Decriminalize Abortion resource

Family Regulation System

Movement for Family Power

upEND

Individual Campaign Resources

Defense Campaigns:

Defense Campaign Toolkit from Survived & Punished

National Participatory Defense Network

Mutual Aid Resources
Big Door Brigade