

A Legislator's Guide to Confronting Pregnancy Criminalization

What is pregnancy criminalization?

Pregnancy criminalization refers to the punishment or prosecution of individuals based on actions alleged to be harmful to their own pregnancies, including actions that would be otherwise considered legal. NAPW has documented more than 1,700 cases of pregnant people being arrested, detained, prosecuted, or forced to undergo medical interventions because of their status as pregnant people from 1973 through 2020.¹ While some cases involve negative birth outcomes like miscarriage or stillbirth, many cases involve substance use and healthy birth outcomes that nonetheless result in incarceration and devastating family separations. For example, pregnant people have been charged with child abuse, endangerment, or neglect (see *Ex parte Ankrom*²), and murder, manslaughter, or feticide.³ State legislators can combat this criminalization by proactively banning mandatory toxicology tests, clarifying CPS guidelines, and opposing fetal personhood and feticide laws.

Background

Pregnancy criminalization intersects with nearly all broader social justice issues, namely mass incarceration, the War on Drugs, family policing,⁴ racial injustice, economic inequality, and gender inequity. Because the social and political forces that drive these injustices also drive pregnancy criminalization, low-income individuals and people of color are most impacted by pregnancy criminalization.⁵ The criminalization of pregnancy is adamantly opposed by all major medical associations, which are in agreement that substance use and pregnancy should be considered through a public health lens, rather than a punitive one.⁶ And now in a post-*Roe* world, there will likely be an increase in criminal laws applying to pregnancy under fetal personhood and feticide laws.

Pregnancy criminalization is deeply intertwined with drug policy and restrictions on abortion. Contrary to popular belief, there is no clear scientific evidence that prenatal exposure to illicit substances causes unique or certain harm, and yet pregnant people who use substances can face criminal consequences for being pregnant and using drugs, even when there would not typically be criminal intervention for using a drug in the same way.⁷ In most cases, there is no actual harm to the fetus; the majority of cases documented by NAPW involving substance use resulted in healthy birth outcomes. Pregnant people are frequently drug tested without their consent and then reported to law enforcement or CPS; depending on the state code, they can be charged criminally, flagged by the family policing system for future investigation after birth, or be impacted in another

¹ "Confronting Pregnancy Criminalization: A Practical Guide for Healthcare Providers, Lawyers, Medical Examiners, Child Welfare Workers, and Policymakers." *National Advocates for Pregnant Women*, 5 July 2022, <https://napw.org/confronting-pregnancy-criminalization/>.

² *Ex parte Ankrom*, 152 So. 3d 397 (Ala. 2013).

³ NAPW, *When Fetuses Gain Personhood: Understanding the Impact on IVF, Abortion, Criminal Law, Tort Law, Child Custody, and Beyond*, August 17, 2022, <https://www.nationaladvocatesforpregnantwomen.org/when-fetuses-gain-personhood-understanding-the-impact-on-ivf-abortion-criminal-law-tort-law-child-custody-and-beyond/>

⁴ The family policing system (FPS) is the preferred language when referring to the so-called "Child Welfare System". This language makes the explicit distinction that contrary to its name, this system does not prioritize child welfare and instead focuses on policing families in a punitive and unethical way, particularly for those most impacted like black and brown communities.

⁵ Paltrow, Lynn M, and Jeanne Flavin. "Arrests of and forced interventions on pregnant women in the United States, 1973-2005: Implications for women's legal status and public health." *Journal of Health Politics, Policy and Law* vol. 38,2 (2013): 299-343. doi:10.1215/03616878-1966324

⁶ "Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women." *National Advocates for Pregnant Women*, 1-June-2021, https://www.nationaladvocatesforpregnantwomen.org/medical_and_public_health_group_statements_opposing_prosecution_and_punishment_of_pregnant_women_revised_june_2021/.

⁷ See Terplan et al., *The Effects of Cocaine and Amphetamine Use During Pregnancy on the Newborn: Myth versus Reality*, 30 J. Add. Dis. 1 (2011); Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001), 1621.1

devastating capacity. As a result of state mandatory reporting laws, healthcare providers are forced to act as an arm of the state surveillance system, which includes both law enforcement and the family regulation system, undermining patient-provider trust and deterring patients from seeking care.

In addition to criminal consequences, pregnant people who use drugs can face repercussions in the family policing system, such as family separation or the termination of their parental rights. Criminal cases and cases in the family policing system can occur simultaneously and follow similar patterns. Also in the civil setting, prenatal conduct can be used to justify forced medical interventions, which strip pregnant people of the right to make decisions about their medical care.

Trends in State Legislation

There are two main categories of laws that harm pregnant people: fetal personhood laws, which elevate fetuses to the status of ‘persons,’ and feticide laws, which expand homicide laws to include fetuses.

What are fetal personhood laws and how are they harmful?

Fetal personhood laws expand state statutory codes to include embryos or fetuses in the definition of “child” or “person.” Granting fetuses personhood means stripping it away from people with the capacity for pregnancy. In conjunction with criminal law and civil regulation, it can be misapplied to regulate and punish pregnant people.⁸ Eleven states have broad fetal personhood provisions that could be read as general rules of construction applying to all state laws, five states define a “person” or “individual” to include a fetus throughout the state criminal code, three states have expanded “child” in criminal child abuse statutes to include a fetus, and 27 states include personhood or personhood-adjacent language (e.g., “member of the species homo sapiens”) in anti-abortion laws.

What are feticide laws and where are they still on the books?

Feticide laws create a specific crime for the intentional end of a pregnancy by action against the pregnant person. At least 38 states have fetal homicide laws that were passed under the premise that they would protect pregnant people from physical harm inflicted by others. However, they have been used to criminalize pregnant people’s actions or non-actions that prosecutors allege risk harm to the fetus. At least 29 states apply these laws from the earliest stages of pregnancy, applying penalties for harm after “conception” or “fertilization.”^{9, 10}

Recommendations

- Oppose or repeal fetal personhood laws, feticide laws, and any other statutes that establish independent personhood status or victimhood status for a fetus.
- Oppose or repeal drug testing requirements and mandatory reporting of positive toxicology tests.
- Treat family separation as a last resort for CPS and clarify that prenatal conduct does not serve as an indication of child abuse or neglect.
- Ban forced medical interventions against pregnant women and codify pregnant women’s rights to information about their medical care.
- Resist efforts by other states to extend their own laws criminalizing pregnancy and pregnancy outcomes across state borders.¹¹

⁸ Bernice Bird, *Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability Among Fetal Pain and Fetal Homicide Laws*, 25 Hastings Women’s L.J. 39 (2014).

Available at: <https://repository.uchastings.edu/hwlj/vol25/iss1/4>

⁹ “State Laws on Fetal Homicide and Penalty-Enhancement for Crimes against Pregnant Women.” *National Conference of State Legislators*, 1 May 2018, <https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>.

¹⁰ The 29 states include: AL, AK, AZ, AR, FL, GA, ID, IL, IN, KS, KY, LA, MA, MI, MN, MS, MO, NE, NC, ND, OH, OK, PA, SC, SD, TN, TX, UT, WV, WI.

¹¹ For more detailed information see: “Confronting Pregnancy Criminalization: A Practical Guide for Healthcare Providers, Lawyers, Medical Examiners, Child Welfare Workers, and Policymakers.” <https://napw.org/confronting-pregnancy-criminalization/>.