

RECOMMENDATIONS

Over the past two decades, the criminal legal system has increasingly treated pregnancy-related issues as inherently criminal matters to be addressed by a carceral state rather than by long-vetted public health, medical, and harm reduction mechanisms. In effect, by separating pregnant people from their communities, families, and support and health systems, pregnancy criminalization exacerbates poor maternal, fetal, and child health outcomes, disproportionately affecting those already marginalized across race and class lines. Without action, the number of pregnancy criminalization cases could increase exponentially post-*Dobbs* under the guise of fetal protection. Below, we outline the steps needed to curb this alarming trend and protect pregnant people across the country.

1 **Repeal** Fetal Personhood Legislation

6 **Restore and Protect** Abortion Rights

2 **Promote** Pregnant People's Personhood

7 **Ensure** Criminalized Pregnant People Have a Robust Defense

3 **Follow** the Scientific Evidence

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9 **Connect** Pregnancy Criminalization to the Maternal Health Crisis

5 **Support** Pro-Active Approaches to Decouple Healthcare and Policing

1

Repeal Fetal Personhood Legislation

Fetal personhood laws enshrine the logic of a dual personhood into our legal and political systems. In effect, these laws subordinate a pregnant person's legal rights to those of a fetus. Pregnant people are surveilled, stripped of their parental rights, subjected to invasive family regulation investigations, coerced into medical treatments, and threatened with criminal arrest and incarceration—all in apparent service to the needs of a fetus.

Ending pregnancy criminalization will require opposing or repealing fetal personhood laws, feticide laws, and any other statutes that could attach criminal liability to pregnant people's conduct with respect to their own health. Given the strong association between the number of pregnancy criminalization cases and state-level judicial decisions and laws that expand definitions of child abuse to include fetuses, fertilized eggs, and embryos, repealing these statutes is crucial to healing the harms exposed in this report.

2

Promote Pregnant People's Personhood

The repeal of fetal personhood statutes alone is not enough. It is equally essential to advocate for the unequivocal recognition of a pregnant person's own personhood and affirmative equal protection laws that would ensure that pregnant people do not continue to face discrimination and heightened surveillance by state actors.

Pregnant people and parents from low-income backgrounds already experience a diminished expectation of privacy. The threat of state intervention looms large in their communities, homes, and everyday lives, as various state agencies intrude into their reproductive and familial decision-making. It is critical to have statutory language that enshrines that pregnant people and people with the capacity for pregnancy have the same and equal rights as everyone else, particularly in the context of the policing of poverty.

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Follow the Scientific Evidence

Law enforcement, healthcare providers, and family regulation system workers should be trained to view substance use disorder not as a crime but as a public health issue, as the medical community has understood for decades. Substance use disorder is a treatable mental disorder with genetic components that can and should be managed by healthcare providers, not a criminal issue warranting punishment.¹⁵¹ Medical and public health experts widely acknowledge that criminalization and incarceration are ineffective both in deterring substance use and in treating people with problematic drug dependency.¹⁵² Substance use disorder in pregnant and postpartum people should not be understood or treated any differently.

This report found that most pregnancy criminalization cases started with law enforcement learning that a pregnant person tested positive for drugs or suspecting them of substance use. This is based in the dual stigma of substance use¹⁵³ and pregnancy,¹⁵⁴ compounded by a stubborn refusal of policymakers and the criminal legal system to recognize the medical research showing that controlled substances do not pose unique harms to fetal or child development.¹⁵⁵ Indeed, scientific evidence compellingly refutes beliefs that such substances cause either fetal harm or pregnancy loss, and shows that associated risks are no greater or less than those for commonly used legal substances¹⁵⁶ or poverty.¹⁵⁷ Treatment options surrounding pregnancy and substance use situated within public health and harm reduction systems, and that fundamentally center pregnant people's autonomy, reflect the most recent and robust scientific evidence base.

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Ensure Pregnant People Are Included in Drug Decriminalization Efforts

In recent years, drug decriminalization efforts have made heartening progress.¹⁵⁸ But without specific language ensuring they are protected, pregnant people will continue to face criminalization even for using legal and regulated substances—a legal risk that does not exist for any other category of people. Broader drug decriminalization efforts must also include specific language preventing the family regulation system from penalizing pregnant people for substance use.

5

Support Pro-Active Approaches to Decouple Healthcare and Policing

The hospital-to-prison pipeline must be dismantled. This means extricating law enforcement from healthcare systems. Too often, pregnant and postpartum people confide in medical professionals or seek care only to have their confidential discussions and medical records turned over to law enforcement. Our findings show that some medical professionals and hospital-based family regulation workers have played a role in pregnancy criminalization, either by directly reporting to law enforcement or by contributing to investigations against pregnant people.

Typically, criminal investigations are based on a single positive toxicology test result. The fact of pregnancy itself is not a medical justification for drug testing. Research also shows that Black people are much more likely to be drug tested.¹⁵⁹ Medical professionals and family regulation workers have a key part to play in disentangling carceral systems from healthcare and in removing incentives to report the co-occurrence of pregnancy and substance use.

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End Mandated Reporting of the Co-occurrence of Substance Use and Pregnancy Alone

Mandated reporting results in the disproportionate over-policing and incarceration of communities marginalized across race and class.¹⁶⁰ It also forms a direct link between hospitals and law enforcement. The hospital-to-prison pipeline cannot be dismantled without first ending the mandated reporting structures that help sustain it.

Until that happens, healthcare professionals should be familiar with their state’s mandated reporting laws and applicable hospital guidance on drug testing. They should also understand the potentially grave consequences of reporting drug test results to state authorities, and should therefore avoid reporting beyond state requirements. For example, care professionals should be aware that the federal Child Abuse Prevention and Treatment Act and the Comprehensive Addiction and Recovery Act do not require the reporting of substance-exposed newborns to family regulation agencies. Rather, these laws require only de-identified, aggregate data about the number of children born who fall under the relevant categories. This data collection should be performed in a way that does not make families vulnerable to family regulation involvement.

Improve, Promote, and Expand Informed Consent Laws

Pregnant people should be empowered to know their rights throughout the entire timeline in which they could face pregnancy criminalization, and patient protections must be further expanded. Non-consensual drug testing can result in pregnancy criminalization and traumatic family separation. It can also have a chilling effect on healthcare uptake due to the threat of law enforcement involvement. Legislation is necessary to require that healthcare providers obtain informed consent before drug testing pregnant and postpartum people and newborns. Such legislation must also ensure pregnant and postpartum patients do not face retaliation or penalization for refusing to consent. This should include a private right of action for pregnant people who face non-consensual drug testing or retaliation for refusing to provide consent.

6

Restore and Protect Abortion Rights

Codifying abortion rights would go a long way to stem the tide of pregnancy criminalization. While *Roe* had major flaws, it explicitly rejected the argument that zygotes, embryos, and fetuses may be treated as separate constitutional persons, holding that fetuses at any stage of development do not have rights competitive with the constitutional rights of pregnant people.¹⁶¹ Before the *Dobbs* decision, when pregnancy criminalization prosecutions were challenged, many cases were dismissed by trial courts, eventually dropped by prosecutors, or deemed unlawful in state appellate decisions under the principles articulated in *Roe* and *Casey*.¹⁶² Without *Roe*, the risk of further entrenching fetal personhood through pregnancy criminalization is a serious threat. Legislative and judicial steps toward restoring and protecting abortion rights are imperative to prevent the criminalization not only of abortion but of pregnancy in general, regardless of outcome.

Further, state legislatures should embrace the practice of requiring impact statements from pregnant people and people with the capacity for pregnancy for any bill regulating abortion or addressing fetal rights. Given abortion policies' lifelong ramifications for individuals and their families,¹⁶³ it is vital that pregnant people are given a venue where they can be heard. Just as financial statements analyze a bill's cost and economic impact, statements from the people who abortion and fetal rights regulations affect are necessary to show legislators the real public health, legal, social, and economic impacts of such laws.

7

Ensure Criminalized Pregnant People Have a Robust Defense

In many pregnancy criminalization cases, the charge is based on an erroneous assumption that a person engaged in acts or omissions that harmed the fetus. Defense attorneys can challenge these prosecutions in several ways. First, they must challenge the supposed *causal* link between the alleged behavior and the alleged harm in as many ways as possible. Miscarriages and pregnancy loss are extremely common and can be caused by myriad factors.¹⁶⁴ None of the criminalized drugs are abortifacients, and most do not have a plausible pathway by which they could theoretically end a pregnancy. Proving causation between any act or omission and a pregnancy loss such as a miscarriage or stillbirth is virtually impossible, and a court should be made aware of this in no uncertain terms as early and often in the process as possible. This could include obtaining experts like forensic pathologists, OBGYNs, and perinatal epidemiologists to challenge any alleged *causal* links. Obtaining the client's medical records is essential both to show the lack of causation and to highlight other potential causes for adverse fetal health outcomes.

It is also critical to challenge the expertise of the opposing expert and file *Daubert* motions to address the relevance and reliability of their opinions.¹⁶⁵ Law enforcement officials are not medical experts and should not be allowed to give opinions on medical and scientific facts.¹⁶⁶ Nor is the average medical doctor, including a pediatrician, a trained researcher who is qualified to say a certain drug caused a certain outcome.¹⁶⁷ The prosecution's purported scientific evidence can carry substantial weight, and, if unchallenged, may dangerously prejudice the client.

Criminal defense attorneys representing pregnant people should always consider Fourth Amendment arguments citing *Ferguson v. City of Charleston*¹⁶⁸ if their client faces drug testing used to collect evidence against them, as well as the threat of a Health Insurance Portability and Accountability Act violation if a hospital retaliates against a pregnant person for refusing to give consent.

8

Expand HIPAA Protections

The Health Insurance Portability and Accountability Act (HIPAA) should be expanded to further reduce the risk of criminalization, by barring disclosures related to pregnancy and substance use as well as self-managed abortion,¹⁶⁹ by creating explicit protections against disclosures to law enforcement related to pregnancy and substance use, and by narrowing the exception for child abuse reports to ensure perinatal patients are not criminalized for acts or omission during pregnancy.¹⁷⁰ Without these essential changes, HIPAA will continue to leave the most marginalized pregnant patients at outsized risk of criminalization and other punitive state actions.

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Connect Pregnancy Criminalization to the Maternal Health Crisis

Any efforts to confront the United States' maternal mortality crisis must account for the ways in which abortion bans and the threat of pregnancy criminalization, family regulation system involvement, and family separation impact and exacerbate maternal health disparities and adverse maternal health outcomes. Efforts to address this crisis should include a call for an end to the healthcare-to-family regulation system-to-prison pipeline.¹⁷¹