



Guidelines for Law Enforcement— Police & Prosecutors

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Law enforcement in general, and prosecutors in particular, are uniquely positioned to effect change given the latitude they have to exercise discretion over which cases to investigate and charge.

The role of the prosecutor is one of a “problem-solver,”¹¹¹ responsible for “pursuing justice in individual cases and in the criminal justice system as a whole.”¹¹² Leading organizations and associations of prosecutors including the American Bar Association, the Association of Prosecuting Attorneys, and Fair and Just Prosecution, as well as individual elected prosecutors across the country, have taken the position that the criminal prosecution of people based on pregnancy outcomes and healthcare decisions undermines justice.¹¹³

Law enforcement officials have subjected pregnant and postpartum women to trauma, family separation, and incarceration for completely innocent and noncriminal acts, such as falling down the stairs, seeking medical help, and experiencing a stillbirth. These cases send the dangerous message to pregnant women that any and all acts, omissions, or statements during pregnancy could be misconstrued and subject them to criminalization, and that they should therefore be wary of seeking social services and medical help. Far from serving the interests of justice, these prosecutions deter pregnant women from seeking necessary care and thus jeopardize both maternal and infant health. Even when charges are ultimately dismissed, arrests alone can cause lasting harm to women and their families.

The ability of law enforcement to exercise discretion in criminal cases is a critical tool

that can be used to disrupt and prevent the penalization of pregnant and postpartum women on the basis of pregnancy outcomes or for actions that are perceived as harmful to their pregnancies. In particular, a prosecutor’s position in the criminal justice system, coupled with their discretion, empowers them to implement policies and practices that can change the way in which prosecutions on the basis of pregnancy are handled by the larger law enforcement community. By declining to accept certain cases, prosecutors can influence the way police investigate and make arrests.

Together, prosecutors and police can send a powerful message and safeguard the rights and wellbeing of pregnant women and their families by declining to investigate, arrest, and prosecute these types of cases. In exercising this discretion, law enforcement actors should consider the following guidelines:

- 1. Consider the fact that substance use disorder is a health issue, not a crime, and oppose efforts to use the criminal system as a path to substance use treatment.**
 - » From the outset, it is important to understand that not all individuals who use substances, prescribed or not, are “addicted” or need treatment. A positive drug test cannot determine whether a person: occasionally uses a drug; has a diagnosable substance use disorder; or is more or less likely, if they are parents, to abuse or neglect their children.¹¹⁴ Even when treatment is needed, there is a lack of family-friendly treatment options readily available to women that would suit their needs.¹¹⁵
 - » The medical community has understood for decades that addiction, or substance use disorder, is a public health issue—a treatable mental disorder with genetic components that can and should be managed by healthcare providers—not a criminal issue

warranting punishment.¹¹⁶ Medical and public health experts have also widely acknowledged that criminalization and incarceration are not effective in deterring substance use or treating people with drug dependency problems.¹¹⁷ Substance use disorder in pregnant and breastfeeding women should not be understood nor treated any differently.

- » Every major medical and public health organization opposes punitive approaches to address the issue of pregnancy and drug use because it is dangerous to maternal, fetal and child health.¹¹⁸ The threat of arrest or prosecution makes pregnant women afraid to access health and medical services, which puts pregnant and postpartum women and their babies at increased risk of harm.¹¹⁹ In fact, “[f]or pregnant substance users, the receipt of adequate prenatal care is especially critical. Several studies have reported that increasing the adequacy of prenatal care utilization in pregnant substance users reduces risks for prematurity, low birth weight, and perinatal mortality.”¹²⁰
- » The fear of law enforcement involvement also dissuades people from having open and honest conversations with their healthcare providers about drug use. This can result in substance use disorders going undetected and interferes with the ability of healthcare providers to determine appropriate treatment options.¹²¹ For example, “[t]he standard of care for treating pregnant women with substance use disorder is often medication-assisted treatment,” which cannot be implemented by healthcare providers when their patients are too afraid to speak openly about their substance use.¹²²
- » Marginalized communities are disproportionately affected in these

cases, which exacerbates racial disparities in punishment.¹²³ Pregnant women of color are disproportionately drug tested despite the fact that drug use occurs at approximately the same rate by Black and white women in the United States.¹²⁴ For example, a study in the *New England Journal of Medicine* documented that throughout a six-month period Black women in Pinellas County, Florida were reported to health authorities for substance use during pregnancy at approximately 10 times the rate of white women—despite similar rates of substance use.¹²⁵

2. Review the science behind pregnancy loss and the risks associated with substance use during pregnancy.

- » There are many misconceptions about pregnancy risks and harms that are not supported by scientific evidence. When prosecutors are evaluating and considering the strength of evidence in cases involving pregnancy loss or perceived harm to a fetus, it is important that the evidence is supported by accurate and reliable medical science.
- » Pregnancy loss is extremely common. Miscarriages, defined as pregnancy losses before 20 weeks of gestation, occur in an estimated 10% to 15% of all clinically confirmed pregnancies.¹²⁶ This number is even higher when accounting for all pregnancies, with an estimated 26% of all pregnancies ending in miscarriage.¹²⁷ Miscarriage is often a random event entirely beyond a woman’s control. About half of all miscarriages are caused by chromosomal abnormalities, which usually happen by chance.¹²⁸ Stillbirths, defined as pregnancy losses after 20 weeks, are less common, but still occur in 1 in 160 deliveries in the United States

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and are one of the most common adverse pregnancy outcomes.¹²⁹ It is difficult to determine the cause of a stillbirth; in most cases, even where an autopsy examination occurs, stillbirths remain unexplained.¹³⁰

- » No type of illicit substance exposure causes pregnancy loss. Scientific research does not support the belief that prenatal exposure to drugs causes miscarriage or stillbirth. Certain risks, like inadequate nutrient support and fetal growth restriction, have been found to be more common in pregnancies involving substance use; however, medical studies have acknowledged that many of the socioeconomic factors associated with those who use substances may actually be the cause of these risks.¹³¹ For example, “those who consume substances are more likely to not seek adequate prenatal care, suffer from mental illness, have a lower socioeconomic status, experience intimate partner violence and trauma, or inflict maternal self-harm.”¹³² All of these variables are exacerbated when women are too afraid to seek help from medical or social services for fear of law enforcement involvement.
- » Substance exposure does not directly cause specific impairments to children who are prenatally exposed. Certain risks, like low birth weight, do not have long-term negative health impacts when properly addressed.¹³³ Some newborns prenatally exposed to opioids, legal or illegal, may experience withdrawal symptoms. These symptoms are treatable and temporary, and these babies do not develop any differently from other children.¹³⁴ Such withdrawal symptoms are no different than those that have been recognized in newborns following exposure to certain SSRIs,¹³⁵ which are taken by or prescribed to approximately 6% to 8% of pregnant women in the United States.¹³⁶
- » Social determinants of health (such as poverty, racism, and lack of access

to adequate healthcare prior to pregnancy) are far more indicative of pregnancy outcomes than anything a pregnant woman does or does not do during pregnancy.¹³⁷

- » Testing positive for a substance is not the same as having been harmed or even affected by the substance. The U.S. Department of Justice has stated that “[d]rug tests detect drug use but not impairment. A positive test result, even when confirmed, only indicates that a particular substance is present in the test subject’s body tissue. It does not indicate abuse or addiction; recency; frequency, or amount of use; or impairment.”¹³⁸
- » The U.S. Department of Health and Human Services likewise states, “[a] diagnosis of NAS [neonatal abstinence syndrome] or NOWS [neonatal opioid withdrawal syndrome] does not imply harm, nor should it be used to assess child social welfare risk or status. It should not be used to prosecute or punish the mother or as evidence to remove a neonate from parental custody.”¹³⁹

3. Consider the impacts of arrest and incarceration.

- » Women are more likely than men to be the primary caregivers of their children.¹⁴⁰ Caregiving responsibilities are rarely taken into consideration when determining the length of incarceration, as sentencing guidelines generally do not factor in a defendant’s parental status.¹⁴¹ Separation from an incarcerated parent can compromise and have lasting effects on children’s health and development.¹⁴²
- » As fewer female facilities exist, incarcerated women are likely to be further pulled away from their families.¹⁴³ This distance can damage family structures and relationships. Importantly, “incarceration and physical separation from children are grounds for termination of parental rights in 25 states.”¹⁴⁴

- » Even if a person is not ultimately charged or convicted, arrest alone has damaging effects. Individuals who pass through the criminal system experience increased levels of chronic stress over their lifetimes,¹⁴⁵ stigma in society,¹⁴⁶ lowered income and employability,¹⁴⁷ and can be financially impacted by bail fees, legal fees, and lost wages.¹⁴⁸

4. Consider collaborating with and seeking input from additional stakeholders.

- » As required by the ABA, prosecutors must “be knowledgeable about, consider, and where appropriate, develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases.”¹⁴⁹ Additionally, “prosecutor[s] should be familiar with the services and resources of other counties and agencies, public or private, that might assist in the evaluation of cases for diversion or deferral from the criminal process.”¹⁵⁰ To fulfill these obligations, it is critical for law enforcement to seek input from other stakeholders, including public health agencies and other medical actors, defense attorneys, community-based organizations, and people who have been victimized by laws that seek to punish them based on their pregnancy status.
- » Prosecutors should also consider seeking input and collaborating with associations of prosecutors that oppose the prosecution of pregnancy loss, like Fair and Just Prosecution and the Association of Prosecuting Attorneys (“APA”), for resources and insight on alternative approaches used to address pregnancy and substance use. The APA has launched a platform as part of its new initiative, “Addressing Disparities to Reproductive Health,” to provide medical information and scientific research on reproductive health,

including pregnancy loss, in an effort to reduce reproductive health-related investigations and prosecutions. This platform is accessible through APA’s website here.¹⁵¹

- » Prosecutors and police should consider working together in their efforts to prevent the criminalization of pregnancy. Well-established channels of communication among law enforcement on the issues implicated in these cases are a vital tool for educating all law enforcement actors involved. When law enforcement leadership comes to a consensus, officers are more likely to respond. Additionally, open communication ensures law enforcement resources are being used efficiently. For example, if a prosecutor’s office establishes a policy against prosecuting certain cases, that policy should be communicated to police so officers do not continue to make arrests and recommend criminal charges for cases that the prosecutor’s office will not pursue.
- » Attorneys General should also consider engaging with stakeholders to identify criminal statutes that have been or may be misapplied as “punitive tools against those experiencing pregnancy loss.”¹⁵² In January 2022, California Attorney General Rob Bonta issued a legal alert to all California district attorneys, police chiefs, and sheriffs making clear that California’s murder statute, which includes the killing of a fetus, “was intended to hold accountable those who inflict harm on individuals who are pregnant, resulting in fetal death, not to punish people who suffer the loss of their pregnancy.”¹⁵³ In April 2022, Attorney General Bonta issued a letter to fellow democratic Attorneys General across the country, encouraging them to conduct a review of the laws in their states and issue similar legal alerts to district attorneys, police chiefs, and sheriffs making clear that state law does not criminalize pregnancy outcomes.¹⁵⁴