Interrupting Punitive Responses to Substance Use and Pregnancy

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PREGNANCY JUSTICE

Vital Strategies

Introduction

Overdose has become a leading cause of death during and shortly after pregnancy.[1] Among pregnant and postpartum people, drug overdose mortality increased by approximately 81 percent from 2017 to 2020.[2]

At the same time, pregnant people are uniquely and increasingly vulnerable to criminalization in ways that do not exist for other groups. Simply by virtue of being pregnant, they are at risk of criminal charges, ranging from criminal child abuse or endangerment based on their actions while pregnant, to murder or manslaughter if they experience a pregnancy loss.[3] There have been over 2,000 instances of pregnancy criminalization since 1973, with the most recent data showing that 9 out of 10 cases involve allegations of substance use.[4] Although pregnancy often presents a natural "window of opportunity" to address numerous health needs, including those related to substance use,[5] the fear of criminal charges is a barrier to getting prenatal care and substance use treatment, worsening health outcomes.[6] While many criminal legal system actors genuinely want to help, longstanding misinformation and stigma surrounding the "war on drugs," along with the proliferation of junk science on substance use and pregnancy, have pushed a punitive response rather than a public health-oriented one.

A NOTE ON GENDER AND LANGUAGE:

Throughout this toolkit, we use the terms "pregnant woman/women," and "pregnant person/people." This is because it is important to emphasize the personhood of the person who is pregnant and recognize that not everyone who becomes pregnant identifies as a woman. In recognition of these complexities, we use certain terms depending on the context and as appropriate when describing data or research.

This toolkit addresses criminalization due to alleged substance use during pregnancy. As a resource, this toolkit will provide concrete strategies for criminal legal practitioners that reflect a public health approach, emphasizing practical, evidence-based solutions rather than punitive measures. It goes beyond big-picture principles

to offer actionable guidance that practitioners can integrate into their daily practice and decision-making. By adopting these strategies, criminal legal stakeholders can help create safer, healthier communities, and promote better outcomes for pregnant individuals and their families. Together, we can transform how the criminal legal system responds to substance use during pregnancy, fostering an environment where health and dignity are prioritized over punishment.

WHAT IS PREGNANCY CRIMINALIZATION?

For the purposes of this toolkit, pregnancy criminalization refers to arrest, prosecution, and imprisonment based on allegations related to pregnancy, pregnancy loss, or birth. It also refers to the application of harsher or different penalties (e.g., sentence enhancement or supervision revocation) to someone for being pregnant, even if the underlying charge is not connected with their pregnancy.

See Pregnancy Justice's *Pregnancy as a Crime: A Preliminary Report on the First Year After Dobbs* (2024) and *The Rise of Pregnancy Criminalization: A Pregnancy Justice Report* (2023).[7]

Pregnancy Justice, with funding and technical assistance from public health organization Vital Strategies, has developed this toolkit for key stakeholders in the criminal legal system to serve as a comprehensive resource on current best practices and to promote a shift towards a public health approach that prioritizes the health and dignity of pregnant individuals and their families. It was developed with input from prosecutors, community corrections, physicians, attorneys, and people with lived experience.

This toolkit has been specifically designed for:

- Members of law enforcement
- Prosecutors
- Judges, including those in drug courts
- Probation officers

A NOTE TO KEY CRIMINAL LEGAL STAKEHOLDERS:

Fostering a network of support and care for pregnant individuals requires a holistic and collaborative effort, including for those in need of resources related to substance use. When aligned with public health principles, you can play an important role in connecting individuals to supportive services in your community, as well as advocating for more resources and services to be available.

Your decisions and actions in these cases are crucial to reducing the harms of pregnancy criminalization and implementing alternative strategies focused on health, safety, and community well-being. These efforts can help break a multi-generational cycle by avoiding the trauma of family separation and the range of negative outcomes associated with child welfare involvement for children/youth, including overrepresentation in the criminal legal system down the road.[8]

It is our shared goal and responsibility across all fields to safeguard the health and well-being of pregnant individuals and their children. By adopting a public health approach, together we can advance a more just and supportive environment for pregnant individuals, their families, and communities.

Pregnancy Criminalization Is Harmful, Unfair, and Rooted in Racism, Stereotypes, and Misplaced Judgment

People have long been charged with crimes related to pregnancy and pregnancy outcomes. Pregnant and postpartum individuals have faced criminal charges for experiencing miscarriages and stillbirths, when suspected of self-managed abortion, for using both illicit and lawfully prescribed substances, and for engaging in other acts or omissions perceived as creating a risk of harm to their pregnancies.

The origins of pregnancy criminalization can be traced back to the 1980s, when prosecutors began charging Black women who used crack cocaine during pregnancy with child abuse. The justification for these prosecutions rested on a 1985 *New England Journal of Medicine* study[9] of 23 women that linked smoking crack while pregnant to "a panoply of catastrophic effects on infants."[10] The small study, the findings of which were ultimately discredited,[11] spawned hysteria and encouraged the move toward criminalization of pregnancy. The impact of that single study and its surrounding hysteria continues to this day.[12]

The evidence is now clear that, rather the drug use itself, the *stigma* of using cocaine during pregnancy can have detrimental effects on a fetus. In qualitative studies with mothers who engage in cocaine use, stigma and a fear of involvement with criminal and civil authorities and separation from their child were identified as barriers to treatment for both substance use disorder and routine prenatal care.[13] These patterns are now being replicated with other substances, including methamphetamines, marijuana, and opioids, in which stigma and stereotypes prompt a punitive response, rather than a health-based response grounded in evidence-based best practices. By contrast, the response to the overdose crisis for non-pregnant people has increasingly shifted to one that is more health-focused and less punitive.

The impact of substance use on pregnancy is not generally understood. The fact that a baby was exposed to a certain drug in utero does not mean the baby was harmed due to that exposure. In other words, substance exposure on its own does not necessarily mean toxicity.[14] Moreover, existing research clarifies that the risks presented to a pregnancy by use of substances are not any greater than risks associated with many other conditions and activities common in the lives of many people. Socioeconomic

factors and environmental stressors, including poverty, maternal education levels, stress, family history, family separation, use of legal substances like tobacco and alcohol, exposure to domestic violence, housing instability, and lack of social support all can negatively impact maternal and fetal health, and individuals with such stressors are more likely to engage in substance use.[15]

Pregnancy criminalization has not occurred evenly across our society—Black people and poor white pregnant people bear the brunt of pregnancy criminalization,[16] even though Black individuals do not use drugs any more than white individuals or any other demographic group.[17] Black women represented over 18 percent of arrests in the U.S. due to pregnancy criminalization from January 2006 to June 2022, despite making up only 13 percent of the population.[18] In a preliminary 2024 post-*Dobbs* review of cases of pregnancy criminalization, 163 out of the 210 cases reviewed were low-income women.[19] These disparities are deeply rooted in the long-standing "war on drugs" and are exacerbated by common myths about in-utero drug exposure.[20]

Pregnancy criminalization does not address the underlying factors that can, but do not always, accompany challenges with substance use, such as addiction, mental health issues, and other circumstances like poverty and trauma. Instead, criminalization perpetuates cycles of stigma, discrimination, and incarceration that ultimately block individuals' access to necessary care and support.

The Impact of Pregnancy Criminalization on Maternal and Infant Health

While many of these laws and practices have the stated goal of protecting fetal health, the scientific evidence base shows that they achieve the opposite. This is at least partly because the threat of criminalization causes people to avoid essential prenatal care.[21]

Prenatal care is the care that someone receives when they are pregnant. Newborns whose mothers had no prenatal care are nearly five times more likely to die than babies whose mothers had access to early prenatal care.[22] No or few prenatal visits are also associated with maternal death and severe maternal morbidity.[23]

Policies that criminalize substance use during pregnancy, consider it grounds for civil commitment, or treat it as civil child abuse or neglect, are associated with significantly greater rates of neonatal abstinence syndrome (NAS), also known as neonatal opioid withdrawal syndrome (NOWS).[24]

States with the highest rates of pregnancy criminalization have some of the worst maternal mortality rates in the country.[25] All five of the states with the most pregnancy criminalization cases—Alabama, South Carolina, Tennessee, Oklahoma, and Mississippi—rank among the top 11 states in maternal mortality rates.[26]

CASE STUDY: TENNESSEE'S FETAL ASSAULT LAW[27]

In 2014, Tennessee became the first state to specifically criminalize drug use during pregnancy by passing a unique law to address such conduct, called a "fetal assault" law. Authorities prosecuted over 100 women under the statute before the law lapsed under a sunset provision in 2016. In just those two years that the law was enforced, there were approximately 60 more infant deaths than in prior years. Fortunately, the increase in infant deaths has since abated after the law lapsed.

Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care* (2022)[28]

In addition to the stark data on how pregnancy criminalization negatively affects fetal and maternal health, it also often leads to parental separation of newborns from their families—such as through incarceration and/or termination of parental rights—which can pose deep and long-lasting harms to the entire family.

The Impact of Pregnancy Criminalization on Children, Families, and Communities

Separating a child from their parent or parents has detrimental, long-term emotional and psychological consequences to the child that can be far worse than remaining at home with their birth family.[29] This is often due to the trauma of removal itself, as well as the unstable nature of, and high rates of abuse in, foster care. This is especially true for Black children, who are overrepresented in each phase of the child welfare system and less likely to be reunited with their families.[30] Data also shows that separation can lead to worse health outcomes for the pregnant person as well, including increased maternal mortality,[31] increased risk of overdose,[32] and worse outcomes in subsequent pregnancies.[33]

Even if charges are ultimately dismissed, arrest alone can cause lasting harm to a pregnant individual and their family. Individuals, especially people of color, who pass through the criminal system experience increased levels of chronic stress over their lifetimes, stigma in society, lowered income and employability, and can be financially impacted by bail fees, legal fees, and lost wages.

CASE STUDY: ALABAMA'S CHEMICAL ENDANGERMENT LAW

"Alabama's 'chemical endangerment' law was passed in 2006 as a means to protect children from environments where they could be exposed to drugs or controlled substances. However, individual prosecutors and the Alabama Supreme Court have interpreted the law to apply to pregnant women themselves. We spoke to women who were arrested while they were pregnant and one who was handcuffed as she was taking her newborn son home from the hospital. One woman told us she was charged with 'chemical endangerment' even though she was unaware she was pregnant and another was planning to get an abortion at the time she was arrested. Advocates and researchers have documented 479 such prosecutions between 2006 and 2015, more than have been documented under any other single law. Of these women, 89% were unable to afford their own lawyers."

Amnesty International, *Criminalizing Pregnancy: Policing Pregnancy Women Who Use Drugs in the USA* (2021)[34]

Further, the majority of women incarcerated in U.S. prisons and jails are mothers,[35] which can cause emotional and psychological distress for their children. This disruption often extends to economic hardships, as women may lose their jobs, face difficulties finding employment and housing, or lose custody of their children post-arrest due to the stigma attached to a criminal record.[36]

It is critical for key criminal legal stakeholders—police, prosecutors, judges, and community supervision officials—to recognize that punitive responses to a pregnant individual's alleged substance use can have significant and long-lasting implications, not only for the health and well-being of that individual but also that of their families and communities.

Criminalizing People for Being Pregnant and Using Substances Is Deeply Unpopular

In a recent survey of likely voters conducted for Pregnancy Justice and National Women's Law Center,[37] voters across key demographic groups agree that it is important for pregnant people with a substance use disorder to be able to seek care without fear of being punished by law enforcement.

About two-thirds of voters oppose specific policies and practices that criminalize pregnant people for substance use.

- **Voters acknowledge that substance use during pregnancy is a problem, but they have little appetite to punish people and believe in health care solutions. They believe that criminalization will make things worse, not better.**
- **Voters across key demographic groups agree that it is important for pregnant people with a substance use disorder to be able to seek care without fear of being punished by law enforcement.** About nine in ten (87%) voters agree that it is important for pregnant people with a substance use disorder to be able to seek care without fear of being punished by law enforcement (60% strongly agree). Across subgroups, voters agree by massive margins.
- **About two-thirds of voters oppose specific policies and practices that criminalize pregnant people.**
  - Confidential information that pregnant people share with their doctors about substance use disorder would be shared with the police—68% oppose, 52% strongly oppose
  - Pregnant people who seek treatment for substance use disorder would be criminally charged with child endangerment or neglect—67% oppose, 46% strongly oppose.
  - Every pregnant person would be drug tested when they give birth and if the drug test is positive, the test results would be shared with the police and used to charge the pregnant person with child endangerment or neglect—60% oppose, 42% strongly oppose.

The strongest statements against criminalizing pregnant people with substance use disorder orient the problem as a health crisis that can be met through health care.[38]

Incarceration Causes Serious Harm to the Health of Pregnant People and their Pregnancies

When criminal legal stakeholders encounter someone who is using drugs during their pregnancy, a common assumption may be that incarceration is safer for that person and their pregnancy than remaining in the community. Alternatively, criminal legal stakeholders may believe that the threat of incarceration can be a reasonable tool to encourage pregnant people who use drugs to enter treatment.

These assumptions are based in part on widespread overestimation of the consequences of substance use during pregnancy, but also a failure to recognize how incarceration or the threat of criminalization seriously threatens the health of pregnant people.

But isn't sending someone to jail safer than doing nothing?

No. Incarceration during pregnancy or the postpartum period has been associated with increased risk of fatal overdose.[39] Incarcerated pregnant individuals are more likely to receive inadequate prenatal care and to have newborns with low birthweight.[40] Additionally, incarceration is associated with a higher likelihood of premature birth and admission of a newborn to a Neonatal Intensive Care Unit.[41]

Data is scarce on pregnancy in carceral settings, but an analysis by the Pregnancy in Prison Statistics study between 2016 and 2017 estimated that approximately 3,000 pregnant people enter prisons[42] and 55,000 enter jails[43] in the United States each year. The same project found that 26% of pregnant people admitted to prisons and 14% admitted to jails had an opioid use disorder (OUD).[44]

At the same time, many prisons and jails do not provide agonist medications for opioid use disorder (i.e., methadone or buprenorphine, commonly referred to as MOUD or

MAT) to pregnant people in their custody,[45] which is the well-established standard of care for treatment of OUD in pregnant individuals.[46] Even among those facilities that do offer MOUD, many have a policy of discontinuing medication treatment once someone's pregnancy ends, which is known to increase the risk of fatal and nonfatal overdose.[47] In one study, a significant majority of correctional facilities offering MOUD (two-thirds of prisons and three-fourths of jails) discontinued it in the postpartum period.[48] Moreover, research has shown missed opportunities for referral of pregnant and postpartum women to community-based MOUD by correctional institutions at release.[49]

This represents a critical gap because opioid-related maternal mortality is highest[50] in the postpartum period and use of medications is strongly protective against death from overdose.[51] It is therefore no surprise that incarceration during pregnancy or the postpartum period has been associated with increased odds of fatal overdose.[52]

Incarceration of pregnant people who use drugs has broader negative health impacts than increased risk of fatal overdose. Policies and services for pregnant people vary widely in prisons and jails,[53] and there is a general lack of oversight and standards for prenatal and postpartum care.[54] Generally, incarcerated pregnant individuals are more likely to receive inadequate prenatal care and to have newborns with low birthweight.[55] Additionally, incarceration is associated with a higher likelihood of premature birth and admission of a newborn to a Neonatal Intensive Care Unit.[56] Those who give birth while incarcerated may face the trauma of shackling during labor,[57] a dehumanizing practice that compromises safe healthcare according to the American College of Obstetricians and Gynecologists,[58] and is opposed by the federal Bureau of Prisons.[59]

Among the most significant harms of incarcerating a pregnant person is the separation from their newborn after birth.[60] For a newborn, skin-to-skin contact with their mother and support for breastfeeding are essential for the infant's immediate survival, health, growth, and development.[61] Separation at birth can also result in numerous and severe harms down the road. Later in life, this can include low self-esteem, less successful relationships, and difficulty coping with life stressors.[62] For the person giving birth, removal of their child may be associated with increased substance use, mental illness, and death from overdose.[63]

But isn't telling someone they can go to jail a good motivator for them to seek treatment?

No. Evidence does not support forced or compulsory drug treatment.[64] Services are most effective when they are voluntary, supportive, and person-centered. Using the threat of punishment as a way to motivate pregnant people to seek drug treatment is not the answer.

Even if a pregnant person who uses drugs is not incarcerated, the threat of criminalization can prevent them from seeking prenatal care or treatment for a substance use disorder.[65] In other words, pregnancy criminalization pushes people *away* from support and care, which ultimately makes people and their pregnancies less safe.

Leading Medical and Scientific Authorities Oppose Punitive Responses to Substance Use During Pregnancy

Criminalizing substance use in pregnancy contradicts the medical consensus that doing so deters pregnant people from seeking health care and increases risks to maternal, child, and fetal health.[66]

National authorities like the American Medical Association, American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the American Society of Addiction Medicine oppose punitive responses to substance use during pregnancy.[67] These expert organizations recognize that pregnancy criminalization can deter individuals from seeking necessary medical care and undermines the trust needed in patient-clinician relationships.

> Threatening patients with criminal punishment erodes trust in the medical system, making people less likely to seek help when they need it. Criminalization makes people less safe and harms the confidential patient-practitioner relationship by creating uncertainty as to whether law enforcement will become involved.
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> American College of Obstetricians and Gynecologists, *Statement of Policy: Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period* (2020).[68]

Misconceptions about pregnancy and substance use can significantly impede access to necessary care and services and worsen the stigma around substance use. Research on the impact of substance use and pregnancy consistently shows the effects often attributed to substance use are impossible to disentangle from systemic issues, like poverty, homelessness, lack of access to prenatal care, and intimate partner violence.[69] By challenging these myths and misconceptions, those working in the criminal legal system can play a pivotal role in shifting toward a more compassionate and informed understanding of substance use in pregnancy.

Substance Use During Pregnancy Does Not Mean Someone Cannot Parent Safely

Pregnant people, particularly Black people,[70] are more likely to be drug tested without their consent or knowledge during pregnancy, placing them at particular risk of unnecessary criminal intervention even after just a single test.[71]

One positive drug test cannot determine whether a person occasionally uses a drug, has a substance use disorder, or is more or less likely to abuse or neglect their children. Drug testing on its own simply cannot and does not assess child risk and safety.

CASE STUDY: NEW JERSEY MOMS INVESTIGATED AFTER FALSE POSITIVES[72]

In 2022, two new mothers in New Jersey sued hospitals in Hackensack and Voorhees, NJ after they were drug tested during labor without their knowledge or consent. Both women's drug tests falsely came back as "positive" for opiates because they had both eaten bagels with poppy seeds on the day they gave birth. The hospitals reported the women to the state for possible child neglect due to the false test results, subjecting the mothers to months-long investigations. There was no medical justification for the hospitals to perform these tests; they did so only because the patients were pregnant.[73]

In 2024, the New Jersey State Attorney General took action against hospitals for discriminating against patients in violation of the state Law Against Discrimination (LAD), violating patients' fundamental right to privacy, and failing to obtain informed consent prior to mandatory drug testing.[74]

The Case for a Public Health Approach

This is a serious public health crisis and criminal legal stakeholders can play an essential role in reversing it by supporting non-punitive approaches to substance use by pregnant people. Far too many pregnant individuals avoid accessing available services out of fear of arrest or other negative outcomes.[75]

The public health community has understood for decades that substance use is a public health issue,[76] which means it should be met with care and support, not a criminal issue warranting punishment. Reducing reliance on criminalization can encourage more pregnant people to seek the care and services they need, ultimately improving health outcomes for both those individuals and their children.

Accordingly, the Office of National Drug Control Policy described several important values in its report, *Substance Use Disorder in Pregnancy: Improving Outcomes for Families* (2022):[77]

- Having a substance use disorder (SUD) while pregnant is not, by itself, child abuse or neglect.
- Criminalization of SUD during pregnancy discourages people from seeking and receiving the help they need.
- Those with an SUD or who are using substances during pregnancy should be encouraged to access support and care, and barriers to access should be addressed.
- Improving coordination across public health, criminal legal, treatment, and early childhood systems can improve outcomes and reduce disparities.

CASE STUDY: MOMS DO CARE PROGRAM IN MASSACHUSETTS[78]

Between 2015 and 2022, the Moms Do Care (MDC) Program in Massachusetts established or expanded 11 co-located medical and behavioral health teams in locations across the state. These teams provided trauma-informed primary and obstetrical health care, substance use disorder treatment and recovery services, parenting support, and case management for approximately 1048 pregnant, parenting, and postpartum individuals. Because MDC prioritizes trauma-informed integrated care and peer recovery and addresses the inequities and stigma that come with substance use disorder, this program is a promising alternative to pregnancy criminalization.

Glossary of Terms

Maternal mortality: The death of a woman while pregnant or within 42 days of the end of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes.[79]

Miscarriage: Generally considered a pregnancy loss before 20 weeks of pregnancy.[80]

Pregnancy criminalization: Arrest, prosecution, and imprisonment based on allegations related to pregnancy, pregnancy loss, or birth. It also refers to the application of harsher or different penalties on someone for being pregnant, even if the underlying charge is not connected with their pregnancy.

Public health: the science of protecting and improving the health of people and their communities.[81]

Stillbirth: A pregnancy loss after 20 weeks of pregnancy.[82]

Substance Use Disorder (SUD): A chronic medical condition where the recurrent use of alcohol and/or drugs causes clinically significant impairment, such as health problems, disability, or failure to meet responsibilities at work, school, or home.[83]

Trauma-Informed Care (TIC): An approach to care that acknowledges that healthcare organizations and care teams need to have a complete picture of a patient's life situation—past or present—to provide effective health care services with a healing orientation.[84]

Toolkit Partners

Pregnancy Justice is a non-partisan legal advocacy organization that advances and defends the rights of pregnant people, no matter if they give birth, experience a pregnancy loss, or have an abortion, focusing on those most likely to be targeted for investigation, arrest, detention, or family separation—poor people, people of color, and people who use drugs. Pregnancy Justice advances its mission in four ways: by providing criminal defense, by advocating for legal and policy change, by publishing cutting-edge research, and by equipping partners in the field with analysis, training, and narrative framing.

Vital Strategies is a global health organization that believes every person should be protected by a strong public health system. The overdose prevention program works to strengthen and scale evidence-based, data-driven policies and interventions to create equitable and sustainable reductions in overdose deaths.

Advisory Board

A multidisciplinary advisory board was convened to support the creation of this toolkit. The lived and professional experiences of its members span prosecution, community supervision, healthcare, and more.

- **April Billet**, Deputy District Court Administrator, Chief Probation Officer in York County, Pennsylvania
- **Beth Merachnik**, Project Director of the Association of Prosecuting Attorneys (APA) Addressing Disparities to Reproductive Health Project
- **Chauntel Norris and Ashley Lovell**, Program Co-Directors for the Alabama Prison Birth Project
- **Dinah Ortiz-Adames**, a lived expert and advocate on behalf of people who use drugs and pregnant and parenting people
- **Lisa Newman-Polk**, lawyer, licensed certified social worker, and advocate for prison reform and ending the criminalization of addiction
- **Dr. Jamila Perritt**, President and CEO of Physicians for Reproductive Health, board-certified in obstetrics and gynecology
- **Dr. Mishka Terplan**, board-certified physician in obstetrics and gynecology and in addiction medicine

External Reviewers

Pregnancy Justice and Vital Strategies are grateful for the expertise of external reviewers.

- **Joelle Puccio**, Director of Education at the Academy of Perinatal Harm Reduction
- **Najja Morris-Frazier**, Director of the LEAD Support Bureau

Countering Pregnancy Criminalization: Tools for Law Enforcement

Law enforcement personnel do much of their work in the community and are responsible for the initial steps of criminal investigations and arrests. In this sense, law enforcement serves as a "gatekeeper" to the criminal legal system and is often responsible for the first stages of a pregnant individual's criminal legal involvement related to substance use.

> "Police officers, as gatekeepers of the criminal justice system, hold almost exclusive authority—by way of citations, arrests, and even physical force—to enforce and regulate the law. And they have increasingly been asked to do this in situations that involve societal problems that would be better resolved in the community—problems like homelessness, mental illness, and substance use."
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> Vera Institute of Justice, *Gatekeepers: The Role of Police in Ending Mass Incarceration* (2019)[85]

Police and law enforcement officials have an important role to play in mitigating the harms of pregnancy criminalization for pregnant people and their families. For many pregnant people, interactions with the police are traumatic due to the reasonable fear of family separation and/or incarceration. A better understanding of criminalization as a barrier to seeking help for substance use during pregnancy can help law enforcement adopt more supportive responses, including advocating for the expansion of evidence-based, voluntary services delivered by unarmed staff, allowing for more appropriate allocation of law enforcement resources.

This toolkit is designed to educate and guide police and law enforcement officials toward a public health approach that recognizes substance use as a complex health issue, requiring empathy, education, and often specialized care and interventions.

RECOMMENDATIONS

Policies and practices should reflect that substance use is an issue that cannot be properly addressed by law enforcement, and that the best conduits to care and services are those based in the community.

Substance use disorder (SUD), like other health conditions, deserves compassionate, evidence-based care and services rather than punishment—just as we would not criminalize someone for choosing not to get a vaccine during their pregnancy, we should not punish them for experiencing addiction.

Addressing SUD in pregnancy as a health issue rather than a crime allows for supportive services and recovery, benefiting a pregnant individual, their family, and the wider community. Law enforcement can help dismantle barriers to supportive services and prioritize more appropriate uses of their time and resources by declining to intervene in this and other public health issues.

In the pursuit of a public health approach that prioritizes the health and dignity of pregnant individuals and their families, law enforcement officials are encouraged to adopt the following key recommendations:

- **Advocate for investment of resources** in evidence-based, voluntary services delivered by unarmed staff, allowing for more strategic allocation of law enforcement resources.
- **Promote Compassionate Interaction**: When engaging with pregnant individuals who use(d) substances, officers should approach situations with compassion and empathy, particularly in sensitive contexts such as pregnancy loss or traumatic birthing experiences. Interactions with law enforcement can sometimes exacerbate trauma, making empathetic communication essential. Whenever possible, law enforcement should ask the pregnant person if they would prefer to speak to someone else, express compassion for their situation, and make an immediate and direct handoff to a trusted provider, instead of taking them into custody.
- **Recognize Diversity in Grief and Trauma Responses:** People react to traumatic events like miscarriage or stillbirth in vastly different ways, especially when observed by strangers. There is no “normal” response, and officers should avoid making assumptions based on someone’s behavior in these circumstances. Acceptance of this variability is crucial to ensuring compassionate and nonjudgmental interactions.
- **Exercise Discretion in Pursuing Investigations**: As gatekeepers to the criminal legal system, law enforcement officers have a unique opportunity to use discretion in deciding whether to recommend prosecution, request an arrest warrant, or determine the extent of an investigation. If there would not be an investigation or arrest of an individual who is not pregnant under identical circumstances, there

should not be if they are. For example, not seeking medical care for a medical condition is not a crime. Not seeking prenatal care as a pregnant person is also not a crime.

- **Avoid Misinterpretation of Toxicology Tests**: Do not pursue criminal charges based on the mere presence of a positive toxicology test. In most states, a positive toxicology test does not establish a crime, and a pregnant person should not be treated differently. Given testing inaccuracies,[86] a positive toxicology test may not even indicate illicit drug use. Moreover, an instance of illicit drug use does not provide any meaningful information about the pregnant person, the health of their pregnancy, or their ability to parent.
- **Know the Laws on Substance Use and Pregnancy in Your Jurisdiction:** It is important to be familiar with the laws in your jurisdiction when it comes to substance use during pregnancy, especially when handling cases with a positive toxicology screen. This helps ensure police are responding within legal parameters.
- **Seek Education and Training**: Ongoing education and training related to the basics of substance use disorders (SUD), the connection to trauma, and evidence-based treatment options can be pursued to enhance understanding and effectiveness in addressing these challenging issues.
- **Understand Community Resources**: Officers can familiarize themselves with the network of available resources, services, and providers—including harm reduction resources—in the community that can support pregnant individuals dealing with substance use issues. In line with a growing trend, law enforcement can allow emergency medical services to respond to medical or behavioral health emergencies and encourage dispatchers to refer callers to more appropriate community-based services for non-emergencies.[87]

Countering Pregnancy Criminalization: Tools for Probation Officers

Probation officers can play a pivotal part in supporting pregnant individuals entangled in the criminal legal system due to substance use. Probation officers' responsibilities often extend beyond supervision; officers serve as a vital point of contact for individuals who may be navigating not just legal challenges but also potentially significant obstacles related to pregnancy and substance use.

In a comprehensive study of nearly 1,400 cases of pregnancy-related criminalization across the U.S. between 2006 and 2022, Pregnancy Justice found that nearly one in five cases involving parole or probation resulted in revocation, often due to non-compliance with time-consuming supervision conditions.[88] Supervision rules that can trigger revocation include not completing a drug treatment program, missing a meeting with their probation officer, or testing positive for controlled substances. This indicates that even a return to use or "relapse"—a natural and expected aspect of recovery–can lead to harsh consequences, including family separation and intensified surveillance. The study also identified cases of parole and probation revocation based on an individual's status as pregnant despite being under supervision for a charge unrelated to pregnancy.[89]

Additionally, if supervision conditions regularly limit where and when people can travel, it can severely restrict a person's access to necessary health care services, both for pregnancy needs and substance use services. This creates a complex dynamic where the very supervision ostensibly intended to support rehabilitation can instead become a roadblock to receiving necessary care. Further, because people who have faced pregnancy criminalization often have very young children, supervision conditions that ignore the realities of caregiving and/or the requirements parents must meet because of ongoing child welfare cases will set pregnant and/or postpartum individuals up to fail.

Fortunately, a different approach is possible. Probation officers are uniquely positioned to make referrals to voluntary services and treatment staffed by qualified professionals trained to assist a pregnant individual in their recovery process. The discretion officers exercise, from setting supervision terms to determining what, if any, sanctions to impose for violations, can greatly impact access to appropriate care for pregnant individuals, particularly those who use(d) substances.

The use of evidence-based practices in probation can lead to more successful outcomes for all individuals under court-ordered supervision. This is especially critical for pregnant people due to the impact of incarceration on the individual and their family, so tailoring approaches to each individual's unique situation is an important tool.

For example, over-supervising low-risk individuals can often lead to negative outcomes, so it's crucial to base supervision on a validated risk and needs assessment. Motivational interviewing can help officers to work with those they supervise to identify the types of boundaries and restrictions likely to promote or impede achievement of optimal health and recovery goals. Supervision case planning can help individuals set and achieve goals, taking manageable steps toward lasting change.

The increased use of specialized drug courts and diversion initiatives for people facing substance-related charges also often means increased interactions with supervision officers administering those programs. This places probation officials in a position to have a significant impact on the health, life, and well-being of pregnant individuals, their newborns, and their families.

When supervising pregnant or postpartum individuals charged with drug-related offenses, probation officers must apply a nuanced understanding of the particular vulnerabilities that pregnant and postpartum people face as they uphold legal requirements of their supervisory role and ensure probation requirements do not impede access to other service providers.

By adopting a supportive rather than punitive approach, probation officers can champion healthier outcomes for pregnant and postpartum individuals, ensuring they have the unhindered access to resources, respect, and pathways to support within the complex landscape of the criminal legal system.

RECOMMENDATIONS

Probation officers can play a critical role in creating an environment where pregnant and postpartum individuals feel safe to seek the services they need. This approach not only ensures that tailored, compassionate care is readily accessible but also strengthens the broader fabric of community support.

In the pursuit of a public health approach that prioritizes the health and dignity of pregnant individuals and their families, community supervision officials are encouraged to adopt the following key recommendations:

- **Advocate for investment of resources** in s evidence-based, voluntary case management services provided by qualified professionals, allowing for more strategic allocation of probation resources.

- **Narrowly Tailor Supervision Conditions:** Narrowly tailor supervision conditions to people's individual needs, capabilities, and goals. Ensure that conditions do not interfere with people's employment, education, housing, vocational training, caregiving, or other responsibilities or opportunities. Given that return to use (or "relapse") is a normal and expected part of recovery, avoid or minimize conditions that detect, prohibit, or punish the consumption of alcohol or drugs.

- **Avoid Punitive Responses and Emphasize Positive Reinforcement:** Avoid incarceration or other punitive measures for minor infractions such as a positive drug test or missed appointments. Overly restrictive conditions, like frequent in-person meetings or curfews, can hinder an individual's capacity to maintain employment or fulfill caregiving responsibilities. Instead, focus on incentives that motivate individuals toward change. Incentives should be given at a 4:1 ratio to sanctions.[90]

  Research indicates that positive reinforcement can be more effective than punitive approaches in community supervision.[91] Implementing incentives can also help meet the material needs of those under supervision, such as offering transportation assistance or gift cards. Develop guidelines to reward positive behavior by people under supervision, including completing programming, graduating from high school or college, seeking or keeping a job, or caregiving for family members or others.

- **Limit the Number of Supervision Conditions**: Overloading individuals with too many conditions can overwhelm the individual and result in probation officers spending excessive time monitoring compliance with conditions. Conditions of supervision should be clear, achievable, realistic, enforceable, and connected to the individual's needs. Probation officers should focus most of their interactions on behavioral change efforts and supporting positive change as defined by the individual, while incorporating graduated responses in coordination with community-based providers of case planning and skill-building tools.

- **Minimze Drug Testing:** Reduce reliance on frequent drug testing as a supervisory measure. Remember that in most states, a positive toxicology test does not establish a crime, and a pregnant person should not be treated differently. Moreover, a positive toxicology test is not diagnostic of substance use disorder, nor is it indicative on its own of someone's health status or their ability to safely parent. It's also essential to recognize that recovery is often a non-linear process that may, and often does, include returns to use (or "relapse"). Individuals just coming into supervision are often in early recovery and the expectation that they will be abstinent from substances is unrealistic. Delaying or avoiding testing altogether during the initial phases of supervision and beyond can help build trust and engagement with a pregnant individual which will more likely lead to positive outcomes during supervision.

- **Understand Treatment Efficacy:** The effectiveness of treatment programs is influenced by various factors, including whether participation is voluntary, aligns with evidence-based practices, and is supported by adequate social connections. Officers should be mindful that penalizing individuals for the failure of inaccessible and ineffective treatment models to enforce abstinence is generally counterproductive. Instead, focus on incentivizing small steps toward an individual's own goals for their substance use and recovery.

- **Ensure Access to Medications:** It is crucial not to restrict access to medications for opioid use disorder (MOUD) or other evidence-based treatments, as doing so can cause harm and violate anti-discrimination laws. Instead, discuss the use of MOUD, of which agonist options methadone and buprenorphine are the standard of care during pregnancy,[92] to educate individuals about the potential benefits. This may mean coordinating with medical professionals to provide fact sheets or other resources to the individual as misconceptions about MOUD persist in the community.

- **Do Not Engage in Medical Oversight:** Probation officials are not health care providers and should refrain from mandating or prohibiting specific clinical services or medications. Instead, they should focus on building strong partnerships with local providers to facilitate voluntary care and other services for those in need.

- **Consider Specialized Caseloads and Peer Support Models:** Consider the establishment of specialized caseloads for specific populations, such as pregnant or postpartum women, to provide tailored support. Further, incorporating peer support can enhance health and supervision outcomes by fostering a sense of community and shared experience among individuals on supervision. Consider resources available and accessible in your jurisdiction and do not impede people's access to voluntary, community-based resources.

- **Implement Trauma-Informed Practices Across all Levels of Community Supervision**: These include regular training, creating an environment both physical and emotional where individuals can feel safe, considering an individual's behavior through the lens of trauma and tailoring responses accordingly, implementing trauma assessment tools to assist with avoiding triggers, avoiding confrontation, and training staff on verbal de-escalation skills.

- **Pursue Continuous Education and Understand Efficacy, Accessibility and Acceptability of Community Resources:** Continuous education and training on substance use disorders and evidence-based approaches—including harm reduction resources—are essential for enhancing the effectiveness and sensitivity of community supervision practices. Officers should also actively seek to understand the network of community resources, services, and providers available to support those under supervision.

Countering Pregnancy Criminalization: Tools for Prosecutors

Prosecutors' power, discretion, and authority are particularly significant when it comes to cases involving pregnancy and substance use. The decisions prosecutors make can profoundly impact access to social determinants of health for the pregnant person as well as their child, their family, and the broader community.

As noted earlier in this toolkit, the American Medical Association (AMA) and other leading health organizations agree that criminalizing substance use during pregnancy deters individuals from seeking medical care and other services they may need.[93] This creates a cycle where the fear of legal repercussions can prevent pregnant people from accessing essential health services, which endangers maternal, fetal, and child health.

> "The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action."
>
> American Bar Association, *Criminal Justice Standards for the Prosecution Function* (2017)[94]

The decisions prosecutors make in pursuing these cases can have long-lasting implications. Criminal records, incarceration, and the loss of parental rights can destabilize families and increase the risk of poor outcomes for children.

Prosecutors have the power to prioritize health, compassion, and community safety over punishment to help break the cycle of criminalization that can devastate families and communities.

RECOMMENDATIONS

By prioritizing health-centered approaches, prosecutors can minimize the harms of pregnancy criminalization and better ensure that tailored, compassionate support and services are accessible to those who need them.

To implement a public health approach that prioritizes the health and dignity of pregnant individuals and their families, prosecutors are encouraged to adopt the following key recommendations:

- **Advocate for a response** to substance use led by qualified professionals providing evidence-based, voluntary health and social services, allowing for more strategic allocation of prosecutor resources.
- **Seek Education and Training**: Ongoing education and training related to the basics of substance use disorders (SUD) and evidence-based treatment options should be pursued to enhance understanding and effectiveness in addressing these complex issues.
- **Exercise Discretion in Prosecution**: Promote office policies that use discretion to decline prosecution for substance use during pregnancy. Pregnant individuals need access to resources and support; thus, the focus should be on treating this issue as a public health concern rather than a criminal one. If you would not prosecute an individual who is not pregnant under identical circumstances, you should not do so if they are. For example, not seeking medical care for a medical condition is not a crime. Not seeking prenatal care as a pregnant person is also not a crime.
- **Avoid Misinterpretation of Toxicology Tests**: Conduct an independent assessment based on a thorough review of the individual's case file, and consult with trained medical professionals, rather than solely following law enforcement recommendations. Remember that in most states, a positive toxicology test does not establish a crime, and a pregnant person should not be treated differently. Drug use does not inherently endanger a child or fetus. Moreover, a positive toxicology test is not diagnostic of substance use disorder, nor is it indicative on its own of someone's health status or their ability to safely parent.
- **Timely Action on Charges**: Act promptly on charges brought by law enforcement related to substance use during pregnancy. Delays in decision-making can adversely affect the well-being of pregnant individuals, their families, and their livelihoods.
- **Set Proactive Priorities**: Prioritize affirmative practices, similar to those in Minnesota (see below), that help ensure your office will not prosecute individuals solely for substance use during pregnancy.
- **Know Your Community Resources**: Prosecutors should understand and promote the network of community resources, services, and providers—including harm reduction resources—that can support individuals during pregnancy and substance use recovery.

CASE STUDY: MINNESOTA

Hennepin County, which includes the state's largest city of Minneapolis, announced in July 2024 that the County Attorney's Office would no longer criminally charge pregnant people who engage in drug use to encourage pregnant people to seek supportive services without fear of arrest. Under the new policy, the County Attorney's Office also dismissed any pending cases and committed to support petitions for expungement for anyone previously charged.

"Instead of stopping people who struggle with addiction from using drugs, punitive policies make them afraid to seek the crucial prenatal care, health care, and drug treatment they need. This office is changing the way we handle these cases to treat addiction as a health issue to encourage people to seek care and keep infants and parents safe."
—Hennepin County Attorney Mary Moriarty (July 2024).[95]

Countering Pregnancy Criminalization: Tools for Judges

Judges play a pivotal role in shaping the outcomes for pregnant individuals in the criminal legal system due to substance use and can significantly impact the lives of individuals in court and the broader health and well-being of whole families and communities. As judges navigate these complex cases, it is crucial to thoughtfully exercise discretion and avoid automatic reliance on punitive responses.

Substance use during pregnancy requires a nuanced approach, and it is critical that judges recognize this as a health issue that requires compassion and support rather than criminalization. Criminalizing substance use during pregnancy is counterproductive to public safety and healthy outcomes for pregnant people, infants, and families.

Zero-tolerance approaches, for example, particularly in cases of substance use during pregnancy, can have devastating effects. Not considering the complexities of individual cases can lead to outcomes that are not only unjust but also detrimental to the health of the pregnant person and their pregnancy. Zero-tolerance policies serve to dissuade pregnant people from seeking prenatal care or addiction treatment for fear of legal repercussions.[96] By exercising judicial discretion, judges can mitigate the harms of zero-tolerance policies while prioritizing health and safety.

There is sometimes an assumption that pregnant people warrant harsher scrutiny, leading to disproportionately severe consequences. Judges are in a unique position to counteract these biases by ensuring that pregnant individuals receive fair and equitable treatment, grounded in justice rather than assumptions or stereotypes about pregnancy and motherhood.

Finally, it is important that judges recognize they are not medical professionals. Judges' role is not to diagnose, prescribe, or prohibit treatment but to weigh the legal merits of a case. Evidence and best practices in the medical field related to substance use disorder and pregnancy are best directed by medical professionals practicing shared decision making with their patients and substance use treatment is not one-size-fits-all. Judicial decisions should reflect an overall awareness of the variability in medical and therapeutic responses and defer to medical expertise for treatment decisions and prioritization of evidence-based interventions.

RECOMMENDATIONS

By exercising discretion and prioritizing health-centered approaches over harmful forms of punishment, judges can ensure that tailored, health-promoting support is accessible to those who need it. This ultimately strengthens the broader fabric of community support and promotes positive outcomes for both individuals and their families.

In the pursuit of a public health approach that prioritizes the health and dignity of pregnant individuals, judges are encouraged to adopt the following key recommendations:

- **Advocate for a response** to substance use led by qualified professionals providing evidence-based, voluntary health and social services, allowing for more strategic allocation of judicial resources.
- **Exercise Judicial Discretion**: Approach cases involving substance use during pregnancy with caution. Avoid reliance solely on drug tests to assess guilt for child abuse, neglect, or endangerment, and instead engage with scientific evidence and listen to medical experts.
- **Understand the Effects of Substance Use**: As noted in the introduction of this toolkit, prevailing assumptions about substance use during pregnancy are often not supported by current scientific evidence. Make decisions taking into account that substance use in pregnancy does not imply harm to a pregnancy.
- **Recognize Implicit Bias:** Ensure that pregnant individuals receive equitable treatment and are not receiving harsher punishment for substance use simply because they are or become pregnant while before the court.
- **Set Reasonable Bonds:** Be mindful of the financial constraints faced by many pregnant individuals and their families. Avoid imposing unreasonable bonds that may undermine the ability of pregnant defendants to defend themselves, while maintaining adequate resources to care for themselves and their families. If the bond isn't set to protect the public from imminent harm, consider whether bond is appropriate at all, especially if there aren't adequate medical and supportive services in jail.
- **Engage Peer Support and Include Voices of Those with Lived Experience**: Incorporating voices of individuals with lived experience into the criminal legal process through peer support programs or as part of specialized courts can help inform better decision-making.
- **Seek Education and Training**: Pursue continuing education and training related to the basics of substance use disorders (SUD) and consult with qualified professionals regarding evidence-based treatment to enhance understanding and effectiveness in addressing these complex issues.
- **Be Aware of Community Resources**: Promote the network of community resources, services, and providers—including harm reduction resources—that can support individuals during pregnancy and substance use recovery.

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> [Health Response] We can agree that pregnant people with a substance use disorder need support. Have a substance disorder is not a crime. The American Medical Association, American Academy of Pediatrics, March of Dimes, the American College of Obstetricians and Gynecologists, and the National Organization on Fetal Alcohol Syndrome have all similarly strongly critiqued punishing pregnant people because it makes pregnant people too scared to seek help and leads to worse outcomes for the mother and the fetus. Health care and mental health treatment result in better outcomes for both moms and babies.
>
> [Imagine] Imagine a world where pregnant people with substance use disorder aren't treated differently or locked away for having a disease but offered health care treatment and other support. Where law enforcement is interested in making sure pregnant women get better, not locked up. Where they can keep their family, regain their footing in life, and thrive. As a country, we can make this a reality, but it depends on us ensuring pregnant people with substance abuse disorders are treated with kindness and compassion, not suspicion and handcuffs.
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