

Guidelines for Legislators and Policymakers

State legislators and policymakers hold direct authority over CPS agencies, law enforcement, and medical facilities, and therefore wield tremendous front-end power over key areas of intervention for pregnancy criminalization. Legislation used to criminalize pregnant women has taken the form of fetal personhood laws that redefine existing statutory codes to include fetuses as legal persons, feticide laws intended to protect women from violence caused by another, manslaughter and murder laws, mandated drug testing laws, mandated reporting laws, abortion bans, and child abuse or neglect statutes.²⁹⁷

Under these laws, women are exposed to civil and criminal liability for conditions and acts that are entirely legal for non-pregnant persons. Women are subjected to incarceration, CPS actions and termination of parental rights, forced medical interventions including drug testing and cesarean surgery, and the loss of autonomy over their own bodies and health care.

Proactive legislation and agency guidance is integral to protecting pregnant women and their families from inappropriate and harmful state or medical practitioner interventions. Legislators should oppose and repeal any statutes that subject pregnancy outcomes or prenatal conduct to law

enforcement or CPS scrutiny. Policymakers at state health and social services agencies should issue formal guidance and rules that constrain the authority of physicians and CPS workers to subject pregnant women to surveillance and control. Finally, legislators and policymakers alike should proactively push for codification and clarification of the rights of pregnant women and the limits of state or medical practitioner authority over them—especially where federal law remains silent. In passing legislation and issuing policies to protect the rights and health of pregnant women, legislators and agency policymakers should consider the following guidelines:

- 1. Oppose or repeal fetal personhood laws, feticide laws, and any other statutes that attach criminal liability to the conduct of pregnant women with respect to their own health, and pass laws that prohibit the detention of pregnant and postpartum women who are awaiting trial.**
 - » Health outcomes for newborns are not improved by incarcerating mothers,²⁹⁸ nor can the health of fetuses be separated from that of pregnant women who frequently do not receive adequate medical attention while incarcerated.²⁹⁹ Legislators should work to prohibit the criminalization of pregnancy outcomes, including abortion, stillbirth, and miscarriages, and create a private right of action allowing pregnant women to bring civil suits against those who violate their rights.³⁰⁰
 - » In particular, legislators should unequivocally oppose fetal personhood legislation. The treatment of fetuses of any gestational age as full legal persons essentially alters a state's entire body of criminal law, thereby creating unheard-of avenues for prosecuting pregnant women for acts well beyond the intended scope of such statutes.³⁰¹ Women suffering pregnancy loss have faced criminal charges under these statutes after experiencing physical trauma, including for being shot by someone else,³⁰² falling down stairs,³⁰³ getting into a car

accident,³⁰⁴ having a substance use disorder,³⁰⁵ and attempting suicide.³⁰⁶

- » Legislators should likewise oppose and repeal feticide statutes. Although these statutes were passed under the premise that they protect pregnant women from physical violence committed by others, feticide laws have been weaponized against pregnant women for any action or inaction that is perceived as creating a risk to fetal health. This is true even when statutes have explicitly excluded the actions of pregnant women in relation to their own pregnancies.³⁰⁷ Feticide statutes have the potential to expose women to criminal liability for even the most innocuous behavior, including medication use, exercise, diet, missing prenatal care appointments, or choosing not to follow a doctor’s advice.
- » Even if a woman is not ultimately found guilty of the charges leveled against her, the time spent in jail awaiting trial can cause lasting harm to her and her family. Women who are incarcerated while awaiting resolution of their cases commonly accept guilty pleas just to get out of jail.³⁰⁸ Legislation should be passed to prohibit the detention of pregnant women or women with newborns under six months of age—at any stage of the criminal justice process prior to entry of judgment.

2. Limit unnecessary reporting of pregnancy outcomes and prenatal conduct to CPS and law enforcement.

- » Legislators should endeavor to disentangle the work of healthcare providers from law enforcement and family regulation systems. Healthcare providers play a significant role in the criminalization of pregnant women because they routinely engage in practices that expose pregnant and postpartum women to law enforcement and child welfare authorities. These practices include drug testing pregnant patients and infants without

consent, relaying sensitive medical information to CPS as evidence of abuse or neglect, physically detaining patients and newborns at hospitals to assist in the seizure of children,³⁰⁹ and wielding the threat of CPS reports and potential family separation as intimidation tools to impose medical procedures upon unwilling patients.³¹⁰

- » Legislators can reduce the involvement of healthcare professionals by limiting mandatory reporting obligations with respect to pregnant women. Legislators should ensure that mandatory reporting laws do not cover fetuses or the acts or omissions of pregnant people. Specifically, state statutes should not mandate reporting of drug tests administered on pregnant women and infants to law enforcement.³¹¹ Mandatory reporting of prenatal conduct backed by the threat of state action has significant negative effects on maternal and neonatal health.³¹² Medical groups such as the American College of Obstetricians and Gynecologists (“ACOG”),³¹³ American Medical Association (“AMA”),³¹⁴ and the National Perinatal Association³¹⁵ have denounced the reporting of prenatal conduct, in particular substance use, to law enforcement and CPS, and have warned that it discourages pregnant women from seeking timely medical treatment and being forthcoming with their physicians.³¹⁶ Such reporting erodes patient-provider confidentiality and renders pregnant women even more vulnerable to unnecessary and distressing intervention from the carceral and family regulation systems.³¹⁷
- » State agencies receiving federal funding under the Child Abuse Prevention and Treatment Act (“CAPTA”) and the Comprehensive Addiction and Recovery Act (“CARA”)³¹⁸ should clarify the scope and purpose of the notification requirements.³¹⁹ CAPTA/CARA requires

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states, in order to receive federal child abuse prevention funds, to develop policies for the “notification” to child welfare agencies of infants who are (i) affected by substance abuse; (ii) affected by withdrawal symptoms resulting from prenatal substance exposure; or (iii) have Fetal Alcohol Spectrum Disorder. The purpose of this requirement is to provide support to infants and their parents, not to terminate parental rights or bring criminal charges. However, it has been conflated by medical professionals with a requirement of testing and referral for an abuse investigation.³²⁰ In reality, notification under CAPTA/CARA only requires de-identified, aggregate data about the number of children born who fall under the relevant categories and should be done in a way that does not make the family vulnerable to child welfare involvement.

- » Legislators can also take steps to ensure that CAPTA/CARA is not being used as a justification to over-report families to child welfare authorities. Legislators should ensure that their state statutes: (1) do not mandate the filing of abuse and neglect reports for the infants who are subject to CAPTA/CARA’s notification requirement; (2) clarify that the notification requirement does not apply to infants who are exposed to, but not affected by, prenatal substance use; (3) do not mandate reporting of positive toxicology to child welfare or law enforcement authorities; and (4) separate the process for receiving notifications under CAPTA/CARA from the process of reviewing and investigating reports of child abuse and neglect.³²¹
- » Legislators should also delegate the management of “plans of safe care” for substance-affected newborns under CAPTA/CARA to local community support organizations to further minimize the involvement of CPS.

State-arranged “plans of safe care” do not require CPS implementation or monitoring³²² and can instead be carried out through community organizations, family members, or other local support systems that are typically provided to new parents upon discharge from the hospital.³²³ This is an important step to prevent child welfare authorities from treating plans of safe care as mechanisms to investigate parental competence.

3. 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.

- » Child welfare laws can be essential points of intervention to protect pregnant women and their families from intrusive state intervention.³²⁴ Policymakers should restrict the use of family separation to only the most extreme circumstances or after exhaustion of all other remedies and support. Legislators should likewise work to repeal state laws that specifically allow or facilitate the termination of parental rights or the separation of families where a controlled substance is used during pregnancy.³²⁵ Despite the well-documented and devastating consequences of removal on families and children,³²⁶ including newborns, family separation continues as the default intervention deployed by CPS agencies in the United States. Such agencies spend more than three times as much money removing children from their parents’ care than they do supporting in-home preventive services.³²⁷
- » Agencies should set clear standards for what constitutes reasonable suspicion of child abuse or neglect. These standards should specify that fetuses are not “children” within the meaning

of such statutes and definitions of “abuse” or “neglect” do not encompass acts or omissions of pregnant women with respect to their own health, regardless of fetal benefit or harm. Additionally, agencies should: (1) issue guidance on the unreliability of positive toxicology reports³²⁸ and the myth and history surrounding “crack babies”;³²⁹ (2) mandate dismissal of child abuse or neglect reports that are based on pregnant women’s refusal to consent to drug testing; (3) clarify that substance use disorders can be sufficiently managed for healthy pregnancy outcomes;³³⁰ and (4) prohibit the separation of newborns from mothers on the basis of prenatal substance use.³³¹

4. Ban forced medical interventions against pregnant women and codify pregnant women’s rights to information about their medical care, including consent rights and the mandatory reporting obligations of healthcare providers.

- » All patients have a right to access or refuse any medical treatment without facing state scrutiny as to whether those decisions are in the best interest of another. For pregnant women, this right is severely undermined by state

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intervention into their private medical choices based on a purported concern for fetal welfare. Pregnant women are forced to face medical interventions that are unthinkable outside the context of pregnancy, and which have serious negative repercussions on women’s health and no discernable improvement on pregnancy outcomes.³³²

- » No statute should force pregnant women into detention facilities for drug dependency treatment, and laws requiring drug testing on pregnant women or otherwise criminalizing prenatal substance use should be repealed.³³³ Substance use disorder is a health condition that requires treatment and can be managed during pregnancy. It should not be treated as a crime and does not require physical detention or punitive action, and it cannot be effectively managed in jail.³³⁴ Pregnant women with substance use disorders have been forced into involuntary detention and treatment programs³³⁵ and subjected to statute-mandated, nonconsensual drug testing where a healthcare professional suspected prenatal drug use.³³⁶
- » Another important point of legislative intervention is the issue of court-ordered cesarean surgeries and criminal investigations into patients who opt not to have one. No individual should be forced to undergo serious and invasive medical procedures, like surgery, or face being incarcerated. However, doctors have not only threatened to procure court orders forcing women to undergo cesarean surgery, but have actually succeeded in doing so.³³⁷ Pregnant women dealing with the heartbreak and trauma of pregnancy loss have faced homicide charges for refusing or delaying cesarean surgery.³³⁸ While some state appellate courts have ruled against lower court orders mandating cesarean surgeries,³³⁹ relying on court intervention does not offer the same protections as a statutory ban given the

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protracted, emotional, and financially challenging nature of appealing such court orders. Furthermore, and most importantly, appeals are not likely to happen until after the woman has already suffered medical violence.³⁴⁰

- » Hospital policies allowing doctors to override a pregnant woman’s decision to refuse medical procedures should also be legislatively banned.³⁴¹ Policies like this have been unequivocally denounced by the AMA and ACOG, regardless of whether proceeding without patient consent would be beneficial to the fetus.³⁴² State health departments can also issue guidance and directives denouncing these policies as violations of patients’ rights. For example, in 2018, the New York State Department of Health denounced a hospital’s “Managing Maternal Refusals” policy as a violation of New York’s Patients’ Bill of Rights.³⁴³
- » Legislators should create or amend, as applicable, the State’s patient bill of rights to explicitly require the informed consent of pregnant women with respect to delivery room procedures, such as cesarean surgery,³⁴⁴ and in all instances of drug testing, including the testing of their newborns.³⁴⁵ These rights should also include the right to in-depth disclosures, both oral and written, of a hospital’s policies with respect to drug testing, mandatory reporting, and the procedures and protocols used by doctors for managing pregnancies and labor (which should be given well in advance of actual delivery).
- » Legislators can further protect pregnant women by imposing professional sanctions or malpractice liability on healthcare providers who fail to obtain informed consent, or who threaten pregnant women with CPS or law enforcement involvement if they do not submit to a medical procedure.

6. Resist efforts by other states to extend their own laws criminalizing pregnancy and pregnancy outcomes across state borders.

- » With the anticipated end of the constitutional right to abortion, certain states will work quickly and aggressively to expand the criminalization of pregnancy outcomes far beyond their own borders. For example, a bill has been introduced in Missouri to prevent pregnant women from seeking abortion care in neighboring states by creating a private right of action against anyone involved in facilitating this care.³⁴⁶ Legislators should actively resist efforts by other states to extend their own laws criminalizing pregnancy and pregnancy outcomes, including abortion, across state borders.
- » Laws governing extradition and cooperation with out-of-state law enforcement activities should be amended to bar the extradition of women who have sought reproductive healthcare legally administered in-state.³⁴⁷ To the extent possible, legislators should also direct their courts and public agencies not to issue summonses or expend resources in helping out-of-state law enforcement find and extract people from their state who are facing criminalization on the basis of pregnancy.³⁴⁸