Physicians for Reproductive Health

Memorandum in Support

A.860 (Rosenthal) / S.45 (Salazar)
Maternal Health, Dignity, & Consent Act

Introduction

Physicians for Reproductive Health (PRH) is a physician-led national advocacy organization working to ensure access to equitable, comprehensive reproductive health care for the communities we serve. Our network includes physicians of various specialties from across the country, including New York, committed to meeting the needs of the patients they serve.

As doctors, we know that trust is the foundation of the patient-provider relationship, and that it is our job to earn and maintain that trust. Conversely, we know that breaches of this trust, whether unintended or intended, can have devastating impacts for the health and wellbeing of our patients and their families. This is especially true for our Black, Latine and Indigenous patients, who have borne the brunt of the impacts of historical and president day racism in medical practice.[1]

Across New York State, health care providers unnecessarily drug test pregnant, birthing and postpartum people, and their infants, without their knowledge, let alone their informed consent. They screen and test them for substance use without context for why or how their responses will be used. Healthcare providers often report the results of these unconsented and often medically unnecessary drug tests to the family regulation system[2] (more popularly known as the child welfare system or the child protection system), subjecting families to harmful surveillance and separation.

This practice, herein referred to as "test and report", has eroded that trust between many reproductive healthcare providers and the communities they purport to serve. It is not an evidence-based intervention but rather arose during the war on drugs and from racialized fearmongering about the effects of drug use on pregnancy and parenting. This practice has caused enormous harm to patients and their families. Our Black, Indigenous, and Latine patients are disproportionately targeted for test and report and disproportionately harmed by this practice. Test and report undermines the dignity and autonomy of our patients over their bodies and lives, and contributes to the legal and policy infrastructure that anti-choice advocates are building to control the reproductive health of birthing people.

We support the work of the Informed Consent Coalition, a coalition of people impacted by the family regulation system, organizers, activists, doulas, physicians, nurses, social workers, public defenders, civil rights and reproductive health, rights, and justice organizations, in calling on the Legislature to pass and the Governor to sign the Maternal Health, Dignity, & Consent Act (A.860/S.845). The Maternal Health, Dignity, & Consent Act requires health care providers obtain written and verbal specific informed consent before drug testing and screening pregnant and birthing people, and their newborns. It clarifies for healthcare providers their duty to respect and affirm pregnant people's bodily autonomy, and it breaks down a key barrier to prenatal care access by supporting patients to be engaged in critical decision-making around their and their family's' autonomy and wellbeing.

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[1] Jamila Perritt, M.D., M.P.H., *#WhiteCoatsForBlackLives — Addressing Physicians' Complicity in Criminalizing Communities*, New England J. of Medicine (Nov. 5, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2023305?query=recirc_inIssue_bottom_article.

[2] Many, including scholar Professor Dorothy Roberts, have come to refer to the so-called "child welfare" system as the family regulation system, given the harms historically and currently perpetuated by the system. See e.g., Dorothy Roberts, "Abolishing Policing Also Means Abolishing Family Regulation," The Imprint (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480

Drug Testing of Pregnant and Birthing People and Newborns Is Rarely Medically Indicated

Drug testing of newborns is rarely medically indicated, and the information obtained is of limited value.[3] For the overwhelming majority of newborns, including those who are substance exposed, drug tests are not necessary to inform their course of care. Identifying and treating newborns exposed to opioids in utero, for example, can occur without drug testing. The Department of Health and Human Services provides a standardized clinical definition of opioid withdrawal in neonates which requires in utero opioid exposure, which would be assessed specifically "by history", and not necessarily toxicology testing, and the presence of distinct withdrawal signs.[4] Identifying and treating most newborns exposed to cannabis, cocaine, methamphetamines, and many other illicit substances, does not require a drug test. The most well designed prospective studies demonstrate at best subtle outcomes linked to neonatal substance exposure, outcomes that are not different from other environmental stressors such as poverty, and outcomes that respond well to simply providing a supportive environment to the maternal/infant dyad.[5] For example, one such neonatal outcome is low birth weight, which is more strongly associated with lack of prenatal care,[6] and appropriate management need not be informed by a drug test. Drug testing of newborns occurs vastly disproportionately to the degree to which it is needed to inform care.

Drug testing of pregnant and birthing people is also rarely clinically indicated. For the overwhelming majority of pregnant and birthing patients, conversations with a trusted health provider is not just sufficient but preferred to inform the course of care including referrals for substance use disorder treatment.[7] It is rare that the biochemical reaction of a medicine administered during anesthesia, for instance, could react with an illicit substance such that it is necessary to know if that illicit substance is in the person's system. In most clinical situations, for example when an individual presents with concern for acute intoxication or withdrawal, the appropriate treatment is initiated prior to drug test results, thus reflecting their limited utility.

As the practice of test and report and involvement of the family regulation system comes under increasing scrutiny, hospital systems are revisiting their drug testing practices and policies. Hospital systems are concluding that the devastating legal consequences a single positive drug test can lead to, such as a call to the family regulation system, are not worth the information obtained from the test. Yale New Haven Health in Connecticut, for example, only drug tests newborns when the information needed cannot be obtained any other way and will inform their course of care—a rare occurrence. They have found no increase in infant hospitalizations for any indication, including delayed withdrawal.[8] Several other hospital systems, such as University of Massachusetts Memorial Medical Center and the University of

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[3] Terplan M. (2022). Test or Talk: Empiric Bias and Epistemic Injustice. *Obstetrics and gynecology*, *140*(2), 150–152, https://www.nnepqin.org/wp-content/uploads/2023/04/Test_or_Talk__Empiric_Bias_and_Epistemic_Injustice.4.pdf

[4] Jilani, Shahla M. et al., Standardizing the Clinical Definition of Opioid Withdrawal in the Neonate, The Journal of Pediatrics, Volume 243, 33 – 39, https://doi.org/10.1016/j.jpeds.2021.12.021

[5] Terplan M, Kennedy-Hendricks A, Chisolm MS. Article Commentary: Prenatal Substance Use: Exploring Assumptions of Maternal Unfitness. Substance Abuse: Research and Treatment. 2015;9s2. doi:10.4137/SART.S23328

[6] US Department of Health and Human Services, Office on Women's Health, Prenatal Care, https://womenshealth.gov/a-z-topics/prenatal-care

[7] Terplan M. (2022). Test or Talk: Empiric Bias and Epistemic Injustice. *Obstetrics and gynecology*, *140*(2), 150–152, https://www.nnepqin.org/wp-content/uploads/2023/04/Test_or_Talk__Empiric_Bias_and_Epistemic_Injustice.4.pdf

[8] Sharon Ostfeld-Johns, MD, Yale New Haven Children's Hospital Experience Developing and Instituting an Objective Protocol for Newborn Toxicology Testing: Collaboration for Health Equity, available at https://portal.ct.gov/-/media/dmhas/adpc/presentations/adpc-presentation-newborn-toxicology-testing-6723.pdf

Colorado Health System, to name a few, are also revising their policies to decrease the amount of medically unnecessary drug testing that occurs.[9]

The Information Obtained from the Vast Majority of Drug Tests Administered Is Not Reliable

In addition to being rarely medically indicated, the information obtained from the drug tests most providers administer is not reliable. In our conversations with hundreds of providers across the country, we have learned that most drug tests hospitals administer to pregnant and birthing patients are presumptive drug tests, the most common being a urine drug test. Presumptive drug tests are designed for rapid results and have high rates of false positives.[10] They do not differentiate between licit and illicit substances—there are many reports of drug tests showing fentanyl positives, and hospitals reporting patients to child protective services despite having administered the epidural that caused the fentanyl positive.[11] They are not appropriate diagnostic tools for determining if a patient has substance use disorder and/or chaotic substance use, let alone whether a drug metabolite is even certainly in a patient's body.[12] Additionally, the American Society of Addiction Medicine's Clinical Use of Drug Testing guidelines state that drug tests should be used as a tool for supporting substance use disorder treatment rather than exacting punishment.[13] Hospital care providers using any drug test, let alone presumptive drug tests, to surreptitiously collect information about patients and report that information to the family regulation system contravenes established guidelines on how drug testing should be used.

Drug Screens and Tests Are Not Appropriate Gauges of Child and Family Safety and Wellbeing

A drug test is not a parenting test.[14] Detection of illicit substance use during pregnancy should not be considered child maltreatment.[15] Drug tests cannot detect whether a person is using occasionally, recreationally, therapeutically, or chaotically and problematically. A positive drug test says nothing about a parent's capacity to parent their child or a parent's love for their child.

Reviews of the scientific literature examining the relationship between drug use and parenting have found that no study has been able to isolate the effects of drug use on parenting,[16] and that the literature contains methodological flaws, such as not having consistent measures of parenting or child maltreatment.[17]

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[9] Shoshana Walter, Why Some Doctors Are Pushing to End Routine Drug Testing During Childbirth, Mother Jones, August 2025, https://www.motherjones.com/politics/2025/04/drug-testing-during-childbirth/

[10] Clinical Drug Testing in Primary Care, Substance Abuse and Mental Health Services Administration, HHS Publication (SMA) 12-4668 at 5 (2012), available at https://store.samhsa.gov/sites/default/files/sma12- 4668.pdf.

[11] Shoshana Walter, Hospitals Gave Patients Meds During Childbirth, Then Reported Them For Positive Drug Tests, The Marshall Project, Dec 2024, https://www.themarshallproject.org/2024/12/11/pregnant-hospital-drug-test-medicine.

[12] American Society for Addiction Medicine, The Appropriate Use of Drug Testing in Clinical Addiction Medicine, Adopted April 5 2017, https://downloads.asam.org/sitefinity-production-blobs/docs/default-source/guidelines/the-asam-appropriate-use-of-drug-testing-in-clinical-addiction-medicine-full-document.pdf?sfvrsn=700a7bc2_0.

[13] Id.

[14] We credit this quote to several activists who have been fighting test and report for years, including Lynn Paltrow and Ericka Brewington.

[15] Nora D. Volkow, Biden Director of The National Institute of Drug Abuse,Pregnant people with substance use disorders need treatment, not criminalization*,* Statnews, Feb.8 2023, https://www.statnews.com/2023/02/08/addiction-pregnancy-treatment-not-criminalization/

[16] Michele Staton-Tindall, Ginny Sprang, James Clark, Robert Walker, and Carlton D. Craig, "Caregiver Substance Use and Child Outcomes: A Systematic Review," Journal of Social Work Practice in the Addictions 13, no. 1 (January 2013): 6–31, https://doi.org/10.1080/153325 6X.2013.752272.

[17] Cathy Banwell & Gabriele Bammer, "Maternal habits: Narratives of mothering, social position and drug use," 17 International Journal of Drug Policy 504-513 (2006). ("Studies on parenting attitudes and behaviours use inconsistent measures and definitions of parenting making it difficult to identify any distinct patterns in terms of drug-use and mothering.")

Another consistent feature of the social science literature claiming associations between drug use and child maltreatment is that it suffers from circular logic: the literature determines child maltreatment has occurred if a family regulation agent says it has occurred, and a family regulation agent determines child maltreatment has occurred if they find evidence of substance use.[18] For these reasons and more that will be elucidated below, the U.S. Department of Health and Human Services and leading medical organizations all concur that positive tests do not imply and should not be used to assess whether a child is at risk of maltreatment let alone used to separate children from their families.[19]

This is not to say that chaotic and problematic drug use by a caretaker can never pose a risk of harm to a child. Rather, it is to say that there is no evidence base for healthcare providers and family regulation agents using the results of a positive drug test to make determinations about child safety and family unity.

The Practice of Test and Report Turns Places Where People Seek Healthcare Into Places Where People Face Surveillance and Criminalization, Thus Dissuading People From Seeking Healthcare

The practice of "test and report" violates pregnant and postpartum people's sense of safety and trust in their medical care and drives people away from seeking the health care they want and need. As has been reported on extensively,[20] and as the experience of our patients illustrates, health care providers calling the family regulation system results in traumatic investigations, family scrutiny and surveillance, and unnecessary family separation in the critical days following birth. It does not lead to referrals to supportive and/or rehabilitative services that many providers seek when they make the report.

Instead of connecting the pregnant or parenting person to treatment when needed or desired, newly parenting people are met by a family regulation agent at their bedside. They are interrogated, sometimes mere hours after giving birth, only to be separated from their newborn shortly thereafter pending the outcome of the investigation. Our patients have been traumatized by these experiences. Our providers feel the secondary trauma of witnessing this violence

Numerous studies and reports document how the practice of test and report dissuades people from seeking prenatal and post-partum care due to their well-founded fear of being subjected to family surveillance and separation.[21] It is critical that health care providers help inform the course of care for pregnant people

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[18]Lawrence M. Berger et al., "Caseworker-Perceived Caregiver Substance Abuse and Child Protective Services Outcomes," 15 Child Maltreatment 199-210 (2010).The authors state that "The reliance on child welfare data at this stage of the investigative process is equally disturbing. Entry of data by child welfare workers lacks validity or reliability as well as specificity. Thus even sophisticated analysis of secondary data is likely working from poor data sources that will not allow exploration of complex associations, let alone cause and effect inferences."

[19] "HSS Announces a Standard Clinical Definition for Opioid Withdrawal in Infants," U.S. Department of Health and Human Services (January 31, 2022). https://www.hhs.gov/about/news/2022/01/31/hhs-announces-standard-clinical-definition-for-opioid-withdrawal-in-infants.html and American College of Obstetricians and Gynecologists, Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period, Dec. 2020, https://www.acog.org/opposition-criminalization-ofindividuals-pregnancy-and-postpartum-period.

[20] Andy Newman, Mother Wins $75,000 After New York Took Her Baby Over Marijuana Use, NY Times, April 2023, https://www.nytimes.com/2023/09/07/nyregion/mother-legal-marijuana-settlement.html; Shoshana Walter, Hospitals Gave Women Medications During Childbirth—Then Reported Them for Using Illicit Drugs, Reveal News, December 2024, https://revealnews.org/author/shoshana-walter/; Eli Cahn, These Moms Smoked Weed Legally. Then Their Kids Were Taken Away, Rolling Stone, Sept. 2024, https://www.rollingstone.com/culture/culture-features/mothers-weed-breastfeeding-children-removed-family-separation-laws-1235108222/

[21] Roberts, S. C. M., & Pies, C. (2011). Complex calculations: how drug use during pregnancy becomes a barrier to prenatal care. Maternal and Child Health Journal, 15(3),333–341. https://doi.org/10.1007/s10995-010-0594-7 ; Amnesty International. (2017). Criminalizing pregnancy: policing pregnant women who use drugs in the USA. Amnesty International; Bowers, O., Stewart, J., & Scott, C. (2014). Tennessee's fetal assault law: Understanding its impact on marginalized women. https://www.sisterreach.org/uploads/1/3/3/2/133261658/full_fetal_assault_rpt_1.pdf.

who use controlled substances, and this is best done through open dialogue that respects the patient's personal autonomy and decision-making. This is part of the reason why the American College of Obstetricians and Gynecologists (ACOG) opposes non-consensual drug testing and punitive responses to drug use during pregnancy such as family surveillance and separation. ACOG states

> "Seeking obstetric–gynecologic care should not expose a woman to criminal or civil penalties, such as incarceration, involuntary commitment, loss of custody of her children, or loss of housing. These approaches treat addiction as a moral failing. Addiction is a chronic, relapsing biological and behavioral disorder with genetic components. The disease of substance addiction is subject to medical and behavioral management in the same fashion as hypertension and diabetes. Substance abuse reporting during pregnancy may dissuade women from seeking prenatal care and may unjustly single out the most vulnerable, particularly women with low incomes and women of color. Although the type of drug may differ, individuals from all races and socioeconomic strata have similar rates of substance abuse and addiction."[22]

The Practice of Test and Report Feeds Newborns into a System of Family Separation and Does Enormous Harm to Infants and Their Families

The result of "test and report" is that parents whose newborns test positive for controlled substances, both licit and illicit, are prevented by hospital staff and family regulation agents from leaving the hospital with their babies, something known as a "hospital hold". Newborns and their parents are separated from their parents during a critical time of maternal-infant bonding. This separation is violent, traumatic, and has long-lasting consequences for children[23] and parents.[24] It also contravenes recommended healthcare for substance exposed babies: skin to skin contact and bonding time with the new parent, known as "eat, sleep and console".[25] Separating a child from their parents can cause a "monsoon of stress hormones" to "flood the brain and body," and prolonged exposure to high levels of these hormones can "increase the risk of lasting, destructive [health and mental health] complications.[26] This is especially true for newborns, for whom the first stages of life impact infant-parent attachment, development, and the child's sense of security.[27] Mothers whose children are forcibly separated from them have greater odds of having

[22] Substance abuse reporting and pregnancy: the role of the obstetrician–gynecologist. Committee Opinion No. 473. American College of Obstetricians and Gynecologists. Obstet Gynecol 2011;117:200–1, https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy-the-role-of-the-obstetrician-gynecologist

[23] Kimberly Howard et al., Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families, Attach Hum Dev. (January 2011). https://pmc.ncbi.nlm.nih.gov/articles/PMC3115616/

[24] Rosa Furneaux, Forcibly Separating Children From Their Mothers Doesn't Just Hurt the Kids, Mother Jones. (June 2018), https://www.motherjones.com/politics/2018/06/trump-forced-family-separation-children-devastating-effects-mothers-1/.

[25] Abrahams, R. R., MacKay-Dunn, M. H., Nevmerjitskaia, V., MacRae, G. S., Payne, S. P., & Hodgson, Z. G. (2010). An evaluation of rooming-in among substance-exposed newborns in British Columbia. *Journal of obstetrics and gynaecology Canada : JOGC = Journal d'obstetrique et gynecologie du Canada : JOGC*, *32*(9), 866–871. https://doi.org/10.1016/S1701-2163(16)34659-X

[26] See Allison Eck, Psychological Damage Inflicted by parent-Child Separation is Deep, Long-Lasting, NOVA (June 20. 2018), https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/?utm_source=FBPAGE&utm_medium=social&utm_term=20180620&utm_content=1603761016&linkId=53285432&utm_source=FBPAGE&utm_medium=social&utm_term; see also Trauma Caused by Separation of Children From Parents, American Bar Association (Last updated Jan. 2020), available at https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf;

[27] See Emma Ketteringham et al., Healthy Mothers Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster Care Pipeline," 20 CYNY L.R. 77, 100-101 (2016)

a postpartum depression or anxiety diagnosis,[28] and higher rates of maternal mortality.[29] To put it succinctly, test and report is toxic for children and families.[30]

The Practice of Test and Report Disproportionately Impacts and Harms Black, Indigenous and Latine People and Exacerbates Reproductive and Maternal Health Inequities

The concerns around test and report are greatly exacerbated when considering the racism and racial inequities rife in our healthcare delivery system. New York, and indeed the whole country, is grappling with the racial disparities present in our health care system.[31] We are seeing a reexamination of how some health care practices erode patients' trust, increase health inequities, and cause trauma and harm to people who are seeking care in the very system tasked with providing support. Among the practices receiving additional attention and concern is the targeting of pregnant people, new parents, and their newborns for drug testing. Despite research showing equivalent rates of substance use across racial demographics, research consistently shows that healthcare providers disproportionately test[32] and report Black, Latine, and Indigenous patients, and patients living on low-incomes, regardless of whether or not they meet hospital guidelines for testing. Even though Black and white pregnant people use substances at similar rates, research consistently shows that health care providers report Black newborns to the family regulation system four to 10 times more often than they report White newborns, with about 10% of Black newborns reported in one study.[33] Medical professional reports are a significant contributor to the stark racial inequities in child welfare investigations both in general and specifically related to substance use.[34] This is of course only exacerbated by well documented racism families within the family regulation system face.[35]

Routine Drug Testing of Pregnant Patients and Their Newborns Emerged Not From An Evidence Base but from the War on Drugs

Hospital drug testing of pregnant and birthing people and their newborns, and reporting those test results to the family regulation

[28] Wall-Wieler, E., Roos, L. L., Brownell, M., Nickel, N. C., Chateau, D., & Nixon, K. (2018). Postpartum Depression and Anxiety Among Mothers Whose Child was Placed in Care of Child Protection Services at Birth: A Retrospective Cohort Study Using Linkable Administrative Data. *Maternal and child health journal*, *22*(10), 1393–1399. https://doi.org/10.1007/s10995-018-2607-x

[29] Wall-Wieler, Elizabeth & Roos, Leslie & Nickel, Nathan & Château, Dan & Brownell, Marni. (2018). Mortality Among Mothers Whose Children Were Taken Into Care by Child Protection Services: A Discordant Sibling Analysis. American journal of epidemiology. 187. 10.1093/aje/kwy062.

[30] Nguemeni Tiako MJ, Sweeney L. The Government's Involvement in Prenatal Drug Testing May Be Toxic. Matern Child Health J. 2022 Apr;26(4):761-763. doi: 10.1007/s10995-020-03110-2;

[31] Jamila Perritt, M.D., M.P.H., #WhiteCoatsForBlackLives — Addressing Physicians' Complicity in Criminalizing Communities, New England J. of Medicine (Nov. 5, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2023305?query=recirc_inIssue_bottom_article.

[32] Marc A. Ellsworth, BS, Timothy P. Stevens, MD, MPH, and Carl T. D'Angio, MD, Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns, Pediatrics, (May 17, 2010) (Finding: Infants born to Black mothers were more likely than those born to white mothers to be screened for illicit drugs, regardless of whether they met hospital guidelines for screening.), https://pubmed.ncbi.nlm.nih.gov/20478941/; https://drive.google.com/file/d/1ZVi1M6i1CcinTkq0NWruDAqCo8FwJafz/view

[33] Roberts, S. C. M., Thompson, T. A., & Taylor, K. J. (2021). Dismantling the legacy of failed policy approaches to pregnant people's use of alcohol and drugs. International Review of Psychiatry, 33(6), 502–513. https://doi.org/10.1080/09540261.2021.1905616.

[34] Frank Edwards, Sarah C.M. Roberts, Kathleen S. Kenny, Mical Raz, Matty Lichtenstein, & Mishka Terplan, Medical Professional Reports and Child Welfare System Infant Investigations: An Analysis of National Child Abuse and Neglect Data System Data, (2023)

[35] Lloyd Sieger, Margaret. (2020). Reunification for young children of color with substance removals: An intersectional analysis of longitudinal national data. Child Abuse & Neglect. 108. 104664. 10.1016/j.chiabu.2020.104664.

system, is a widespread and longstanding practice. However, it is not a practice that has ever been backed by any evidence.[36] In fact, despite being widely implemented since at least the early 1980's, no research examining its effects was published until recently.

The growing body of research that is examining the effects of test and report practices finds no reductions in alcohol and drug use and no improvements in birth outcomes associated with these policies.[37] A comprehensive legal epidemiology study examining the causal link between 40 years of state pregnancy-specific alcohol policies and birth outcomes and prenatal care use found that multiple policies including test and report led to thousands of infants born low birth weight or preterm each year.[38] Other research suggests that criminalization policies such as considering in utero substance exposure grounds for child maltreatment actually increases rates of newborns experiencing neonatal abstinence syndrome.[39]

As has been extensively documented by legal scholars[40] and advocacy organizations[41], test and report emerged as a practice in the 1980's during the height of the war on drugs, when hysteria about the "crack baby," a concept later debunked as racist and junk science, captured the American imagination. Crack babies were depicted as drains on public resources who would go on to terrorize their communities by becoming super predators. Alleged crack cocaine related child abuse and neglect was a focus of the 1988 election season and lawmakers and conservative pundits were unrelenting in their vicious attacks on low-income Black women and their children. Black women and their children became scapegoats for the social ills plaguing society. Hospitals and family regulation agencies responded in turn by sharply increasing the numbers of newborns drug tested at birth and separated from their families, a practice that has endured to the present day, expanding each time the country experienced a real or perceived spike in drug use.

Test and Report Undermines Our Patients' Bodily Autonomy and Dignity, and Bolsters the Claims of Anti-Choice Advocates Who Also Seek to Undermine Our Patients' Bodily Autonomy and Dignity

Non-consensual drug testing of pregnant people, new parents, and their newborns is a violation of individual bodily integrity, undermines maternal-fetal health, and unnecessarily exposes new families to the risk of criminalization and traumatic family separation which is harmful to families. Test and report normalizes the violation of the bodily autonomy of pregnant and birthing people for the sake of alleged protection of their fetus/newborn. It depicts the birthing person as a threat to the pregnancy and fetus, as though the maternal/infant dyad have opposing interests. It pits the pregnant and birthing person against

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[36] Roberts, S. C. M., Thompson, T. A., & Taylor, K. J. (2021). Dismantling the legacy of failed policy approaches to pregnant people's use of alcohol and drugs. International Review of Psychiatry, 33(6), 502–513. https://doi.org/10.1080/09540261.2021.1905616.

[37] Id.

[38] Subbaraman, M. S., Thomas, S., Treffers, R., Delucchi, K., Kerr, W. C., Martinez, P., & Roberts, S. C. M. (2018). Associations between state-level policies regarding alcohol use among pregnant women, adverse birth outcomes, and prenatal care utilization: Results from 1972 to 2013 Vital Statistics. Alcoholism: Clinical and Experimental Research, 42(8), 1511–1517. https://doi.org/10.1111/acer.13804

[39] Faherty LJ, Kranz AM, Russell-Fritch J, Patrick SW, Cantor J, Stein BD. Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome. JAMA Netw Open. 2019;2(11):e1914078. doi:10.1001/jamanetworkopen.2019.14078

[40] Roberts, D. E. (2022). *Torn apart: how the child welfare system destroys Black families--and how abolition can build a safer world.* First edition. Basic Books.

[41] Movement for Family Power. Whatever they do, I'm her comfort, I'm her protector: how the foster system has become ground zero for the U.S. drug war. 2020 (https://www.movementforfamilypower.org/ground-zero).; Drug Policy Alliance: Uprooting the Drug War in the Child Welfare System, 2021, https://uprootingthedrugwar.org/wp-content/uploads/2021/02/uprooting_snapshot_PDF_childwelfare_01.26.21_v1.pdf.

their own bodies and families and is undergirded by the belief that the fetus is a separate person from the pregnant person—a radical and dangerous concept called fetal personhood.[42]

Non-consensual "test and report" violates pregnant people's bodily autonomy, privacy, and equality at a time when these rights are under unprecedented attack and at a time when fetal personhood is becoming more and more a legal reality. As with abortion bans, attempts to surveil and punish people for their conduct during pregnancy, including substance use, sublimate the rights of the pregnant person to the rights of the fetus. Whether wittingly or not, through the practice of test and report, healthcare systems and providers have contributed significantly to erecting the legal and policy apparatus that lays the groundwork for abortion care bans and for fetal personhood.

The Maternal Health, Dignity, and Consent Act Builds on New York State Department of Health Clinical Guidelines to Protect Pregnant and Birthing Peoples' Rights and Promote Patient-Provider Trust.

New York must affirm that pregnant people have every right to consent to all aspects of medical care, including drug testing of their own bodies or the bodies of their newborns, and make clear that pregnancy and child birth is no reason to surveil and punish a person through test and report.

Informed consent is a core component of providing care that acknowledges the dignity and bodily autonomy of the pregnant person. It can contribute to building person centered and compassionate care. This is especially true for care during and following pregnancy. Ensuring that patients are fully informed of the consequences of prenatal/postpartum drug testing and screening as well as the medical reason for testing and screening allows the decision regarding disclosure of substance use to be a fully informed one. Although New York Public Health Law and Civil Rights Laws set forth general informed consent requirements in the health care setting, pregnant people, new parents, and their newborns are nevertheless drug tested without notice, much less explicit informed consent.

This legislation codifies the principles contained in existing New York State Department of Health clinical guidelines that call for collaborative informed decision-making with pregnant and postpartum patients before substance use screening due to the potential legal and social consequences of a positive result.[43] Collaborative informed decision-making promotes transparency and trust between pregnant and postpartum people and their health care providers by ensuring that meaningful, informed consent is a standard component of drug testing and screening.

Despite these guidelines, hospitals in New York lack standard practices, oversight, and accountability mechanisms with respect to substance use screening and testing, leading this practice to be arbitrary, discretionary, and subject to bias that negatively impacts countless pregnant people and their families.

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[42] Pregnancy Justice, Unpacking Fetal Personhood: The Radical Tool that Undermines Reproductive Justice (2024), https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Fetal-personhood.pdf

[43] New York State Department of Health AIDS Institute: Substance Use Screening, Risk Assessment, and Use Disorder Diagnosis in Adults. (May 2024), https://www.ncbi.nlm.nih.gov/books/NBK565474/pdf/Bookshelf_NBK565474.pdf . NYS DOH clinical guidelines have called for informed consent before screening a pregnant person for substance use. NYS DOH recommends that "[i]t is essential to engage patients in shared and informed decision-making before screening is performed," which "includes clear discussion and confirmed patient understanding of the benefits, potential harms, and consequences of screening." Current guidelines specify that, for pregnant patients, this conversation should address the confidentiality of the patient's medical information, the risk of being reported to CPS, and the patient's ability to refuse drug screening without repercussions, except when screening is mandated by an employer or by the court.

New Yorkers deserve a statewide solution to a statewide problem, not the current patchwork approach to maternal-fetal care.

The Maternal Health, Dignity, & Consent Act will create a standard practice in New York that respects pregnant people's right to make decisions about their and their infant's bodies. This legislation will codify in statute and build upon the Department of Health clinical guidelines by requiring medical providers to obtain oral and written consent from pregnant and perinatal people before performing biological drug tests on them or their newborns. Importantly, this legislation also requires health care providers to obtain oral and written consent from pregnant and perinatal people in a hospital setting, and oral consent in a non-hospital setting, prior to providing verbal screening. This is not outside the standard of care for many procedures performed when individuals are seeking care. The inclusion of infants is essential, since we have seen that drug testing infants at birth has been used as a backdoor way of testing the pregnant person. This occurs even when the newborn is healthy and there is no medical need for a drug test. Parents have a right to consent to their child's medical care and should be given the opportunity to consent before their infant is drug tested.

The bill is carefully crafted to ensure that the consent process does not create a delay in care in cases of medical emergencies. Recognizing that there are certain emergency circumstances in which drug testing may be medically necessary, yet the provider cannot obtain written and verbal information without putting the patient's health or life at risk. Under these limited circumstances, this legislation would allow providers to test or verbally screen individuals without their specific and informed consent. Obtaining specific and informed consent prior to administering a drug test is recommended by several leading medical associations, including the American College of Obstetricians and Gynecologists (ACOG)[44], and the American Academy of Pediatrics.[45]

Conclusion

We urge the New York State Legislature to pass the Maternal Health, Dignity, & Consent Act (A.860/S.845) to guarantee that pregnant and parenting people have, at a minimum, the ability to make an informed decision about their family's health at a critical moment. Receiving information about what is being done to your body or your child's body, the medical reason for the procedure and the consequences—medical or otherwise—that may result are critical pieces of information that make for well-informed patients and good health care.

We urge the Governor and the Legislature to prioritize maternal and fetal health and prevent the destruction of families by supporting the Maternal Health, Dignity, & Consent Act.

Respectfully,

Dr. Jamila Perritt, MD, MPH, FACOG
President and CEO
Physicians for Reproductive Health

[44] American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period, Statement of Policy (Dec. 2020), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period.
[45] American Academy of Pediatrics, A Public Health Response to Opioid Use in Pregnancy (2017), https://publications.aap.org/pediatrics/article/139/3/e20164070/53768/A-Public-Health-Response-to-Opioid-Use-in.