

If You Really Care about Criminal Justice, You Should Care about Reproductive Justice!

What is Reproductive Justice?

The Reproductive Justice (RJ) movement places reproductive health and rights within a social justice and human rights framework.¹ The movement supports the right of individuals to have the children they want, raise the children they have, and plan their families through safe, legal access to abortion and contraception. In order to make these rights a reality, the movement recognizes that RJ will only be achieved when all people have the economic, social, and political power to make healthy decisions about their bodies, sexuality, and reproduction.²

Working towards a more progressive criminal justice system is an important part of furthering the cause of reproductive justice. A criminal justice system that makes communities safer, protects personal liberty and limits abuses of power by governmental authorities will also further the cause of reproductive justice. Those who support a progressive criminal justice system will identify several common areas of advocacy with the Reproductive Justice movement. These include: opposing the criminalization of behaviors that are closely tied to unmet social service needs, especially mental health and substance abuse services; rejecting mass incarceration and the use of the criminal justice system to address problems better addressed through adequate social services; ensuring procedural safeguards, discouraging selective prosecution and protecting the constitutional rights of the accused; and advocating for fair, appropriate and humane sentences for those convicted of crimes.

Why is Reproductive Justice a Criminal Justice issue?

A progressive Criminal Justice system requires the restrained use of state power, identifies alternatives to incarceration and recognizes that criminalization is not a solution to society's problems.

Across the nation, women have faced prosecution for their drug use during pregnancy. Charges have included child endangerment, delivery of a controlled substance, and homicide. Women have also been imprisoned or otherwise held captive in order to keep them from using drugs or alcohol while pregnant.

Despite evidence to the contrary,³ some judges and prosecutors claim that such actions are in the interest of discouraging drug use, “forcing” pregnant women into treatment programs and improving maternal and fetal health outcomes. The Reproductive Justice movement opposes these measures, rejecting claims that punitive measures improve

public health or do anything to address the serious problem of addiction. While drug use during pregnancy is a serious concern and an important matter of public health, it should not be handled as a criminal matter.

A fear of prosecution or other governmental interference causes pregnant women to avoid prenatal care, drug treatment or open communication with their health care providers. Improving access to both prenatal care and comprehensive, family-based drug treatment programs tailored to meet the needs of pregnant and parenting women are proven and appropriate public health interventions. While it would be reasonable to assume that pregnant women would be given priority access to drug treatment, this is not the case. Some drug treatment centers are not willing to take pregnant clients because of the special concerns raised by the pregnancy,⁴ making access to treatment difficult for pregnant women.

This intrusion on a woman's reproductive rights extends beyond the realm pregnant women who use illegal drugs. State legislatures have proposed bills that would allow a woman to be prosecuted for "causing" her miscarriage.⁵ At least one court has already declared that a woman could be held criminally liable for a stillbirth if it is determined that the woman did *anything* that could harm her pregnancy.⁶ This included the use of both *legal* and illegal substances, missing prenatal appointments, and not obtaining "adequate" healthcare.⁷

A woman's right to refuse to give birth by cesarean section⁸ and a woman's right to have a home birth⁹ have been the subject of state intervention. An Iowa "feticide" law was used to justify the arrest of a pregnant woman who fell down the stairs when she confided in a nurse that she had been uncertain about carrying her pregnancy to term.¹⁰ Prosecutors have even brought charges against a woman who attempted suicide while pregnant.¹¹ This type of broad overreach represents a misuse of state power and an infringement upon the most basic liberties of bodily autonomy and integrity.

A progressive criminal justice system protects the constitutional rights of the accused by ensuring procedural safeguards and discouraging selective prosecutions.

Pregnant women have been prosecuted based only on evidence of positive drug tests of their newborn infants. Women's pregnant status, and the biological fact of pregnancy, therefore subjects these women to prosecution in instances where non-pregnant women or men would not be.¹² Because the law punishes pregnant women differently based on their status and gender, such prosecutions violate their right to equal protection of the laws under the Fourteenth Amendment of the Constitution. Additionally, a pregnant woman who has used drugs and is threatened with prosecution could only avoid criminal charges by terminating her pregnancy.¹³ These prosecutions therefore violate the right to be free from government intrusion in making reproductive choices, which is protected under the Fourteenth Amendment's guarantee of liberty.

While women of all socioeconomic classes use drugs, those who are low-income and Women of Color are more likely to be prosecuted for drug use. Women who have access

to private health care providers and do not receive public assistance are far less likely to have their drug use detected by enforcement authorities and prosecuted. As a result of these practices, certainly classes of women escape legal scrutiny while others face the full force of the law. This constitutes selective prosecution, and violates the equal protection clause of the Fourteenth Amendment.

Women have no reason to know that their drug use could result in criminal charges based on the fact that they are pregnant. Because the laws used to prosecute women do not make it clear that using drugs while pregnant could be included in their scope, women are not given adequate notice that their acts may violate the law. Also, women are charged under criminal statutes that were not intended to cover their alleged acts, rendering such prosecutions in violation of their right to due process under the Fifth Amendment of the Constitution. Likewise, women do not use drugs in order to pass them along to or cause harm to their fetuses. Because women do not have any criminal intent, prosecutions for crimes such as drug distribution or child endangerment deprive women of their right to due process under the Fifth Amendment of the Constitution.

A progressive criminal justice system opposes cruel and inhumane punishment, and seeks fair and appropriate sentences for those convicted of crimes.

In Robinson v. California, 370 U.S. 660 (1962), the Supreme Court held that punishing addiction is the equivalent of punishing illness, and is therefore cruel and unusual punishment under the Eighth Amendment of the Constitution. Yet, this is exactly what happens when pregnant women are prosecuted for drug use. Moreover, this is not the only means through which individuals' reproductive capacities are criminalized.

Courts have ordered, as a condition of probation or parole, that individuals curtail their sexual and reproductive acts. These courts have placed restrictions on childbearing and sexual activity as a means of punishing people for drug use, child abuse and nonsupport. For example, a Wisconsin court upheld a probation agreement that prohibited a man who failed to pay child support from having sexual intercourse with any woman until his probation officer believed it was appropriate for him to do so.¹⁴ In New York, a court ordered a woman who had lost custody of her child due to her drug addiction not get pregnant.¹⁵ And in California, a court found it reasonable to require a woman convicted of child abuse to avoid conceiving a child during her probationary period.¹⁶ Moreover, a California court even tried to make a woman's probation dependent on her "consent" to use a potentially dangerous method of long-acting birth control.¹⁷

Such attempts to criminalize individuals' decision to engage in sexual activity or bear children are an affront to reproductive justice. Moreover, these "punishments" do nothing to address the underlying causes of these individuals' involvement with the criminal justice system. Instead these actions trample on individuals' constitutional rights and compromise their basic right to bodily autonomy.

How you can support Reproductive Justice and Criminal Justice

Advocate for solutions that actually improve the health of pregnant women who are drug dependent, including family-based substance abuse treatment and adequate access to pre-natal care.

Urge prosecutors to exercise appropriate restraint and to refrain from bringing criminal charges that violate due process and exceed the legislature's intent.

Advocate for police and prosecutor education and demand repercussions for misconduct and abuses of power.

Demand that the state not interfere with women's bodily autonomy and integrity under the guise of advancing maternal, fetal and infant health.

Reject criminal sentences, conditions of probation or conditions of parole that infringe upon the reproductive decision-making of individuals. Denounce these punishments as human rights violations.

¹ Sistersong, What is Reproductive Justice?, http://www.sistersong.net/index.php?option=com_content&view=article&id=141&Itemid=81 (last visited Oct. 21, 2011).

² Asian Communities for Reproductive Justice, Mission and Vision, <http://reproductivejustice.org/mission-and-vision> (last visited Oct. 21, 2011).

³ For example, South Carolina -- the only state in which a court has ruled that viable fetuses were included in the definition of children in the child endangerment statute -- has led the nation in such prosecutions, but has actually seen an increase in infant mortality. See *Infant Mortality on Rise in '97*, POST & COURIER, Feb. 19, 1999, at B1; See THE ANNIE E. CASEY FOUNDATION, KIDS COUNT DATA BOOK 160 (2001), <http://www.eric.ed.gov/PDFS/ED454945.pdf> (reporting that infant mortality decreased from 11.7 in 1990 to 8.4 in 1996, but increased to 9.6 for 1997 and 1998, the two years following the *Whitner* decision).

⁴ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION OFFICE OF APPLIED STUDIES, WOMEN IN SUBSTANCE ABUSE TREATMENT: RESULTS FROM THE ALCOHOL AND DRUG SERVICES STUDY (ADSS) (Thomas M. Brady & Olivia Silber Ashley, eds.), <http://oas.samhsa.gov/womenTX/womenTX.pdf> (2005).

⁵ [Utah Code Ann. § 76-5-201 et seq.](#) (2010).

⁶ See *McKnight v. South Carolina*, 576 S.E.2d 168 (2003) (South Carolina woman who was prosecuted with homicide when her stillborn child tested positive for drugs. State's highest court noted that women could be guilty of murder if they did anything to harm their fetus. Court found that this included using both legal and illegal substance, missing prenatal appointments, and not obtaining "adequate" healthcare).

⁷ *Id.* at 174.

⁸ Richard L. Berkowitz, *Should Refusal to Undergo A Cesarean Section Be A Criminal Offense?*, 104 OBSTETRICS & GYNECOLOGY 1220 (2004). See also *In re A.C.*, 573 A.2d 1235 (D.C. 1990), *rev'g en banc*, *In re A.C.*, 533 A.2d 611 (D.C. 1987).

⁹ *Pemberton v. Tallahassee Memorial Regional Medical Center*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999).

¹⁰ See Lee Rood, *I never said I didn't want my baby: Mom won't be prosecuted*, DES MOINES REGISTER, Feb. 10, 2010, at A1. (Pregnant woman arrested after she fell down stairs. Charges were dropped only because mother was in her second trimester).

¹¹ *Bei Bei Shuai v. Indiana*, Court of Appeals of Indiana, Case No. 49A02-1106-CR-00486, on Appeal from the Marion Superior Court, Cause No. 49G03-1103-MR-014478.

¹² DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* 159 (1997).

¹³ Numerous courts dismissing prosecutions against women who gave birth despite an addiction problem have recognized the possibility of coerced abortions, and this same rationale could apply to pregnant women facing major depression. See, e.g., *Johnson v. Florida*, 602 So. 2d 1288, 1296 (Fla. 1992) ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."); *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991) ("Potential criminal liability would also encourage addicted women to terminate or conceal their pregnancies."). Indeed, a policy of prosecution may have resulted in at least one coerced abortion. Gail Stewart Hand, *Women or Children First?*, GRAND FORKS HERALD, July 12, 1992, at 1 (a woman obtained an abortion twelve days after being arrested for sniffing paint fumes while pregnant).

¹⁴ *Wisconsin v. Henriksen*, 690 N.W.2d 885 (Wis. Ct. App. 2004); *Ohio v. Talty*, 814 N.E.2d 1201 (2004) (man who failed to pay child support was required to avoid procreating during term of his probation).

¹⁵ *In re Bobbjean*, 46 A.D.3d 12 (N.Y. App. Div. 2007).

¹⁶ *California v. Pointer*, 151 Cal.App.3d 1128 (Cal. Ct. App. 1984).

¹⁷ *People v. Johnson*, No. 29390 (Cal. Super. Ct., Jan. 2, 1991).