



## FACT SHEET

# 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.<sup>1</sup> 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.<sup>2</sup>

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: rejecting mass incarceration and the use of the criminal justice system to address problems better addressed through adequate social services (especially mental health and substance abuse 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?

Across the nation, women have faced prosecution for their actions during pregnancy.<sup>3</sup> Prosecutions of pregnant women penalize women for being pregnant but impose a different standard on pregnant women than all other individuals. "Pregnancy crimes" are status crimes, because they only apply to a small subset of people: pregnant women.<sup>4</sup> Prosecutions of pregnant women tend to fall in three different categories: prosecutions of drug-dependent women; prosecutions for failing to follow a doctor's orders or taking other actions deemed "harmful" during pregnancy; and prosecutions for self-harm.<sup>5</sup>

## *Prosecutions of Drug Dependent Women*

Charges brought against drug dependent pregnant women 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.

- Regina McKnight was charged with homicide by child abuse in South Carolina after she suffered an unexpected stillbirth.<sup>6</sup> The state alleged that cocaine use had caused the stillbirth. After only 15 minutes of deliberation, the jury found her guilty.<sup>7</sup> Her conviction was overturned by the South Carolina Supreme Court in 2008.<sup>8</sup> According to the court, the research used by the state was "outdated" and McKnight's trial counsel should have called

experts to testify that “recent studies show[] that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor.”<sup>9</sup> McKnight ultimately pled guilty to manslaughter in order to avoid a retrial and a possible longer sentence. She was released from prison after having served eight years of her original sentence.<sup>10</sup>

- Martina Greywind, a homeless woman, was arrested in North Dakota and charged with reckless endangerment when she was approximately twelve weeks pregnant.<sup>11</sup> The state claimed she was inhaling paint fumes, creating a substantial risk of serious bodily injury or death to her fetus. After two weeks in jail, Greywind obtained a release for a medical appointment where she received an abortion.<sup>12</sup> Greywind then filed a motion to dismiss the charges and the state agreed, stating that because Greywind terminated the pregnancy, “the controversial legal issues presented are no longer ripe for litigation.”<sup>13</sup>

Despite evidence to the contrary,<sup>14</sup> 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 the use of criminal sanctions against women who use drugs during pregnancy. Punitive measures do nothing to improve public health or 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.

### ***Prosecutions for Failing to Follow a Doctor’s Orders or Taking Other Action Deemed “Risky” or “Harmful” During Pregnancy***

The intrusion on a woman’s reproductive rights extends beyond the realm of pregnant women who use illegal drugs. Utah’s criminal code, for example, allows a woman to be prosecuted for “causing” her miscarriage.<sup>15</sup> 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.<sup>16</sup> This included the use of both legal and illegal substances, missing prenatal appointments, and not obtaining “adequate” healthcare.<sup>17</sup>

- A woman’s right to refuse to give birth by cesarean section<sup>18</sup> and a woman’s right to have a home birth<sup>19</sup> 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.<sup>20</sup> Laura Pemberton was taken into custody in Florida while in active labor and forced to go to a hospital against her will because she was attempting to have a vaginal birth after having had a previous cesarean surgery (VBAC). Doctors sought and were granted a court order, forcing her to undergo a caesarean against her will. Although the fetus was represented by counsel, Pemberton and her husband were not allowed legal representation but were only allowed to “express their views” while Pemberton was being prepped for surgery.<sup>21</sup> Pemberton subsequently sued, claiming that the forced surgery violated her First, Fourth, and Fourteenth Amendment rights. A district court held that the state’s interest in preserving the life of the fetus outweighed Pemberton’s constitutional rights.<sup>22</sup>
- The Butts County Superior Court in Georgia ordered Jessie Mae Jefferson to undergo a cesarean surgery after she was diagnosed with placenta previa,<sup>23</sup> a condition in which the placenta partially or completely covers the woman’s cervix. Jefferson and her husband refused the surgery on religious grounds believing that “the Lord has healed her body and that whatever happens to the child will be the Lord’s will.”<sup>24</sup> Before the surgery could be performed, Jefferson’s placenta shifted, allowing her to give birth without intervention.<sup>25</sup>
- Pamela Rae Stewart was diagnosed with placenta previa, put on bed rest, and instructed to avoid sexual intercourse. After having sex with her husband, Stewart began to bleed. She returned to the hospital and gave birth to her son, who died five weeks later. Doctors concluded that the bleeding caused her son to be born brain dead<sup>26</sup> Stewart was arrested and charged under California’s criminal child neglect statute, which expressly covers fetuses. The charges brought against Stewart were based on alleged drug use, engaging in sexual intercourse with her husband, and her alleged failure to go to the hospital immediately after the bleeding started. A San

Diego judge held that Stewart had been charged under the wrong statute.<sup>27</sup>

### ***Prosecutions Because of Self-Harm***

Prosecutors have even gone so far as to bring charges against a woman who attempted suicide while pregnant.

- Bei Bei Shuai was prosecuted in Indiana, charged with murder and feticide after attempting to commit suicide. Pregnant and alone, Shuai ingested rat poison after her boyfriend ended their relationship. Friends persuaded Shuai to go the hospital where she was treated. Shuai's daughter, Angel, was born several days later through a cesarean surgery. Although Angel survived the birth, she died days later. Shuai was charged with murder and feticide, and eventually pled guilty to criminal recklessness. She was sentenced to time served.<sup>28</sup>

This type of broad overreach represents a misuse of state power and an infringement upon the most basic liberties of bodily autonomy and integrity.

### **These Prosecution of Pregnant Women are Unconstitutional**

**These prosecutions violate the Equal Protection Clause of the Fourteenth Amendment.** A woman's pregnant status and the biological fact of her pregnancy should not subject her to prosecution in instances where non-pregnant women or men would not be.<sup>29</sup> Because these prosecutions seek to punish 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.

These prosecutions also constitute selective prosecution and, thus, violate the Equal Protection clause of the Fourteenth Amendment. One study found that 59% of women prosecuted for pregnancy crimes were women of color.<sup>30</sup> African-American women, in particular, are over-represented in prosecutions for pregnancy crimes, particularly in the South. For example, African-Americans comprise only 30% of the population in South Carolina. However, 74% of the pregnancy crimes cases in the state were brought against African-American women.<sup>31</sup> Not only are women prosecuted for pregnancy crimes more likely to be women of color, they are overwhelmingly economically disadvantaged.<sup>32</sup> 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. Hospitals that serve the poor are more likely to test for drug use<sup>33</sup> and, thus, report that drug use to authorities.

**Prosecuting a woman based on her pregnancy outcome penalizes her for carrying her pregnancy to term, violating the Fourteenth Amendment.** A pregnant woman who has used drugs and is threatened with prosecution could only avoid criminal charges by terminating her pregnancy.<sup>34</sup> 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.<sup>35</sup>

**These prosecutions violate the Due Process Clause of the Fifth Amendment and the requirement of fair notice.** 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.<sup>36</sup> 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.

### **Prosecutions of Pregnant Women Are Bad Policy and Must be Stopped**

Pregnant women are already subjected to a "highly demanding set of expectations," due to the widespread perception that their every action affects the fetus and that these actions (or inactions) alone determine the fetus's health and development.<sup>37</sup> At different points in time, various legal activities, such as alcohol use, eating fish and

even eating salad, have been declared by the popular press, medical organizations, or the government to be beneficial, harmless, or harmful to pregnancy outcomes.<sup>38</sup> States have already demonstrated a willingness to prosecute women for legal and constitutionally protected activities, like refusing to undergo surgery, that they deem to be “harmful” to the fetus.

Conversely, some illegal substances, such as crack cocaine, widely believed to be uniquely harmful, have later turned out to be far less harmful than believed, and certainly no more harmful than a range of legal behaviors, such as smoking, in which far more women engage.<sup>39</sup> In fact, prosecutions of pregnant women are often unsupported by scientific evidence. It can be impossible to identify a single causal factor of a miscarriage or stillbirth.<sup>40</sup> Many things, including random chance, affect pregnancy outcomes. Drug-dependent women, for example, are more likely to be poor, lack education, smoke, and use alcohol—all things that can harm pregnancy outcomes.<sup>41</sup> When prosecutors claim that drug use—or any single behavior—caused a negative pregnancy outcome they willfully ignore all the other factors, including a woman’s life circumstances that can affect a pregnancy.

The prosecution of pregnancy crimes discourages women from seeking prenatal care and undermines the doctor-patient relationship. Health care providers may disclose private patient information to authorities which can lead to arrests and bedside interrogations.<sup>42</sup> After Anita Gail Watkins told her doctor that she had used cocaine before the birth of her son, the doctor reported her to the Department of Human Services (DHS). Watkins was arrested and charged with reckless endangerment.<sup>43</sup> According to the doctor who reported her, “our goal from the medical standpoint is the best outcome for the infant. When there is evidence of drug use, we notify DHS. Where the trail goes from there is not up to us.”<sup>44</sup> Sally Hughes DeJesus asked for help from her midwife when she used cocaine after eleven months of abstinence. The midwife informed the hospital where DeJesus was having the baby. Doctors there performed a drug test on the healthy newborn and called the police when they found that the baby had been exposed to cocaine prenatally. Sheriffs interrogated her in her hospital room and charged her with felonious child abuse.<sup>45</sup> Such actions discourage drug dependent women from informing their health care providers about their drug use or seeking help for fear that they will be prosecuted.

Prosecutions of pregnancy crimes are discriminatory and unconstitutional. They violate a pregnant woman’s right to equal protection, liberty, and due process. They impermissibly treat pregnant differently under the law based on their status as pregnant women. Not only are prosecutions of pregnancy crimes unconstitutional but they are bad policy. They are not grounded in scientific fact and they discourage women from seeking needed health care. Reproductive Justice demands that prosecutions of pregnancy crimes be stopped.

## 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](http://www.sistersong.net/index.php?option=com_content&view=article&id=141&Itemid=81) (last visited Sept. 16, 2013).
- 2 Asian Communities for Reproductive Justice, *What is Reproductive Justice?*, <http://strongfamiliesmovement.org/what-is-reproductive-justice> (last visited Sept. 19, 2013).
- 3 See, e.g., Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 306 (2013), available at <http://jhpl.dukejournals.org/content/38/2/299.full.pdf>.
- 4 Kira Proehl, *Comment: Pregnancy Crimes: New Worries to Expect When You're Expecting*, 53 SANTA CLARA L. REV. 661, 664 (2013).
- 5 *Id.*
- 6 Paltrow & Flavin, *supra* note 3, at 306.
- 7 *Id.*
- 8 *McKnight v. State*, 661 S.E. 2d 354, 366 (S.C. 2008).
- 9 *Id.* at 358 n.2, 361.
- 10 Paltrow & Flavin, *supra* note 3, at 306.
- 11 *Id.* at 308.
- 12 *Id.*
- 13 *Id.*
- 14 For example, South Carolina -- the only state other than Alabama 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.
- 15 Under the statute, however, a woman is only guilty of criminal homicide of her fetus if her act is intentional or knowing, but not if it is merely criminally negligent or reckless. See Utah Code Ann. § 76-5-201 et seq. (2010).
- 16 See *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003) (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).
- 17 *Id.* at 174.
- 18 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, 1263 (D.C. 1990) (finding that because the dying pregnant patient was not "a trained physician," a D.C. hospital could forcibly perform a cesarean section on her without her consent in an attempt to save the life of the fetus), *rev'd en banc*, *In re A.C.*, 533 A.2d 611 (D.C. 1987).
- 19 *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999).
- 20 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, available at [http://www.momlogic.com/2010/02/i\\_never\\_said\\_i\\_didnt\\_want\\_my\\_b.php](http://www.momlogic.com/2010/02/i_never_said_i_didnt_want_my_b.php) (Pregnant woman arrested after she fell down stairs. Charges were dropped only because mother was in her second trimester).
- 21 *Pemberton*, 66 F. Supp. 2d at 1250.
- 22 *Id.* at 1252.
- 23 See Brent T. Stanyer, *Court-Ordered Cesarean Sections: An Example of the Dangers of Judicial Involvement in Medical Decision Making*, 28 GONZ. L. REV. 121, 122 (1992).
- 24 *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 247 S.E.2d 457, 459 (Ga. 1981).
- 25 Proehl, *supra* note 4, at 670.
- 26 *Id.* at 671.
- 27 Elizabeth Thompson, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawyers*, 64 IN. L. J. 357, 358 (1989).
- 28 *Bei Bei Shuai Pleads Guilty In Baby's Death*, HUFFINGTON POST (Aug. 2, 2013), [http://www.huffingtonpost.com/2013/08/02/bei-bei-shuai-guilty\\_n\\_3698383.html](http://www.huffingtonpost.com/2013/08/02/bei-bei-shuai-guilty_n_3698383.html).
- 29 DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 159 (1997).
- 30 Paltrow & Flavin, *supra* note 3, at 311. Women of color included African-American, Hispanic/Latina and Native American and Asian Pacific Islander women.
- 31 *Id.* at 312. These numbers are from the study period of 1973-2005.
- 32 *Id.*
- 33 Dorothy E. Roberts, *Punish Drug Addicts Who Have Babies: Women of Color, Equality & the Right of Privacy*, 104 HARV. L. REV. 1419, 1432-33 (1991).
- 34 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., *Ex Parte Ankrom*, 2013 WL 135748 at 25 (AL Jan. 11, 2013) (Malone, J. dissenting) ("[T]he chemical-endangerment statute will now supply women who have, either intentionally or not, run afoul of the proscriptions of the statute a strong incentive to terminate their pregnancy."); *Johnson v. State*, 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).
- 35 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (plurality opinion) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).
- 36 See, e.g., *Ankrom*, *supra* note 34, at 2 (reviewing the defendant's argument that she had no notice of her alleged crime because there was no language in the statute to demonstrate that Alabama's chemical endangerment law applied to women who ingested chemical substances while pregnant).
- 37 See RACHEL ROTH, *MAKING WOMEN PAY: THE HIDDEN COST OF FETAL RIGHTS* 17 (2000). See also Renee I. Solomon, *Future Fear: Prenatal Duties Imposed By Private Parties*, 17 AM. J.L. & MED. 411, 420-21, (1991) (health club owner canceled membership of woman upon finding out she was 10 weeks pregnant, enforcing "unwritten rule" and expressing concern for the fetus).
- 38 Julie Moskin, *The Weighty Responsibility of Drinking for Two*, N.Y. TIMES, Nov. 29, 2006, at F1 (describing public reactions to pregnant women engaging in acts presumed to be harmful in pregnancy, including eating cheese or salad, or drinking coffee). Most recently, eating fish, which had been strongly discouraged during pregnancy because of its mercury content, is now urged to enhance fetal brain development. Sally Squires, *Pregnant? Say Yes to Seafood*, WASH. POST, Feb. 20, 2007, at HE1 (examining the benefits of fish to fetal development), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/16/AR2007021602259.html>.
- 39 See, e.g., Susan Oakie, *The Epidemic That Wasn't*, N.Y. TIMES, Jan. 27, 2009, at D1, available at <http://www.nytimes.com/2009/01/27/health/27coca.html?pagewanted=all&r=0>.
- 40 See, e.g., Proehl, *supra* note 4, at 685.
- 41 *Id.*
- 42 Paltrow & Flavin, *supra* note 3, at 327.
- 43 *Id.* at 328.
- 44 *Id.*
- 45 *Id.*