



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.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: 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?

Women across the nation have been prosecuted for their actions during pregnancy.³ These prosecutions penalize women for being pregnant. "Pregnancy crimes" are status crimes because they only apply to a small subset of people: pregnant women.⁴ 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.⁵

Prosecutions of Drug Dependent Women

Drug dependent pregnant women have been charged with crimes ranging from child endangerment, delivery of a controlled substance, and homicide. Pregnant women have also been imprisoned or confined in order to keep them from using drugs or alcohol.

- After Regina McKnight suffered an unexpected stillbirth, she was charged with homicide by child abuse. The state of South Carolina claimed that cocaine use caused the stillbirth. After only 15 minutes of deliberation, the jury found McKnight guilty.⁶ Her conviction was overturned by the South Carolina Supreme Court in 2008.⁷ 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.”⁸ McKnight 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.⁹

- Martina Greywind, a homeless woman, was arrested in North Dakota and charged with reckless endangerment when she was approximately twelve weeks pregnant.¹⁰ The state claimed she inhaled paint fumes, which could cause serious bodily injury or death of the fetus. After two weeks in jail, Greywind obtained an abortion.¹¹ Greywind then filed a motion to dismiss the charges and the state agreed, stating that because Greywind was no longer pregnant, “the controversial legal issues presented are no longer ripe for litigation.”¹²
- Typically, many of these women are charged under state fetal harm and child endangerment laws, but in April 2014 Tennessee passed a law making it a crime to use drugs while pregnant. This law is the first of its kind, and it was passed despite opposition from major medical groups, including the American Medical Association, the American Academy of Pediatrics, and the American College for Obstetrics and Gynecology.¹³ Under the law, a woman may be charged with assault, or even homicide, for using narcotics during pregnancy.¹⁴ Within a week of going into effect, the law was used to charge Mallory Loyola with assault for amphetamine use during pregnancy. Amphetamine is not a narcotic and does not result in Neonatal Abstinence Syndrome.¹⁵ Loyola could face up to a year in jail and a fine of \$2,500.¹⁶ This is just one example of the harmful implications and overreach of laws that criminalize drug use during pregnancy like that passed in Tennessee.

Despite evidence to the contrary,¹⁷ some judges and prosecutors claim that these prosecutions discourage drug use by; “forcing” pregnant women into treatment programs and improving maternal and fetal health outcomes. In reality, they do nothing to improve public health or address the serious problem of addiction. The Reproductive Justice movement opposes the use of criminal sanctions against women who use drugs during pregnancy. While drug use during pregnancy is a serious public health concern, 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

Women who use illegal drugs are not the only pregnant women who have been targeted by criminal prosecutions. Utah’s criminal code, for example, allows a woman to be prosecuted for “causing” her miscarriage.¹⁸ At least one court has stated that a woman could be held criminally liable for a stillbirth if she does anything that could harm her pregnancy,¹⁹ including the use of both legal and illegal substances, missing prenatal appointments, and not obtaining “adequate” healthcare.²⁰ Women have been detained for refusing a cesarean section²¹ and trying to have a home birth.²²

- A pregnant woman who fell down the stairs was arrested under an Iowa “feticide” law when she told a nurse that she had been uncertain about wanting the pregnancy.²³ In Florida, Laura Pemberton was taken into custody while in active labor and forced to go to a hospital against her will because she wanted 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 and were only able to “express their views” while Pemberton was being prepped for surgery.²⁴ 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.²⁵
- The Butts County Superior Court in Georgia ordered Jessie Mae Jefferson to undergo a cesarean surgery after she was diagnosed with placenta previa,²⁶ 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.”²⁷ Despite her objections, the Supreme Court of Georgia ordered Jefferson undergo a cesarean. Before the surgery could be performed, Jefferson’s placenta shifted, allowing her to give birth without surgery.²⁸

- 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 dead²⁹ 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, sexual intercourse with her husband, and her alleged failure to go to the hospital immediately after the bleeding started. A San Diego judge dismissed the case because Stewart had been charged under the wrong statute.³⁰

Prosecutions Because of Self-Harm

Prosecutors have even brought charges against a woman who attempted suicide while pregnant.

- In Indiana, Bei Bei Shuai was charged with murder and feticide after attempting to commit suicide. Shuai ingested rat poison after her boyfriend broke up with her.³¹ Friends persuaded Shuai to go to 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.³²

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

Harsher sentencing Because of a Woman's Pregnancy Status:

In some cases, judges have imposed harsher sentences on women simply because they were pregnant.

- In 2009, Quinta Layin Tuleh, who was pregnant, was convicted for possessing false documents. Even though both the defense counsel and the prosecutor requested Tuleh be sentenced only to her time already served, the judge made sure Tuleh would remain in prison past her due date.³³ Tuleh was HIV positive and the judge argued, "[m]y obligation is to protect the public from further crimes of the defendant, and that public, it seems to me at this point, should likely include the child she's carrying. I don't think the transfer of HIV to an unborn child is a crime technically under the law, but it is as direct and as likely as an ongoing assault."³⁴ Tuleh was imprisoned, not because of the crime she committed, but because of her pregnancy status. The health care provided to women, particularly pregnant women, in prison is often woefully inadequate,³⁵ making it unlikely that Tuleh would even receive appropriate care.
- In July 2014, Lacey Weld was convicted of conspiracy to manufacture methamphetamine. Because Weld was pregnant at the time of the offense, the prosecution argued that Weld exposed her "unborn" child to "a substantial risk of harm". Weld was given an enhanced sentence of more than 12 years in prison because she was pregnant at the time she committed the crime.³⁶ The enhanced penalty violates fundamental constitutional principles requiring equal treatment under the law.

The Reproductive Justice Movement opposes this profoundly discriminatory treatment.

These Prosecutions of Pregnant Women are Unconstitutional

These prosecutions violate the Equal Protection Clause of the Fourteenth Amendment. Just because a woman is pregnant should not subject her to prosecution in situations where non-pregnant women or men would not be.³⁷ Because these prosecutions punish pregnant women differently based on their biological status and gender, they violate their right to equal protection of the laws.

One study found that 59% of women prosecuted for pregnancy crimes were women of color.³⁸ In particular, African-American women, are over-represented in prosecutions for pregnancy crimes, especially in the South. For

example, only 30% of the population of South Carolina is African American, but 74% of South Carolina women charged with pregnancy crimes were African-American.³⁹ Not only are women prosecuted for pregnancy crimes more likely to be women of color, they are overwhelmingly economically disadvantaged.⁴⁰ 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 use⁴¹ 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.⁴² 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.⁴³

These prosecutions violate the Due Process Clause of the Fifth Amendment and the requirement of fair notice. Women often do not know that their drug use could result in criminal charges because they are pregnant. Because the laws used to prosecute women do not make it clear that it is a violation to use drugs pregnant, women are not given adequate notice that their acts may violate the law.⁴⁴ 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 held to a "highly demanding set of expectations," there is widespread perception that every action a pregnant woman takes affects the fetus and that these actions (or inactions) alone determine the fetus's health and development.⁴⁵

At different points in time, various legal and common 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.⁴⁶ States have already prosecuted women for legal and constitutionally protected activities, like refusing to undergo surgery, that they deem to be "harmful" to the fetus.

Some illegal substances, such as crack cocaine, once widely considered uniquely harmful, have turned out to be far less harmful than believed. Many, including cocaine use, are no more harmful than a range of far more common legal behaviors, such as smoking.⁴⁷ 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.⁴⁸ Many things, including random chance, affect pregnancy outcomes. For example, drug-dependent women, are more likely to be poor, lack education, smoke, and use alcohol—all things that can harm pregnancy outcomes.⁴⁹ 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.⁵⁰ 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.⁵¹ 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."⁵² 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 DeJesus in her hospital room and charged her with felonious child abuse.⁵³ 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 women differently under the law based on their status as pregnant women. Not only are prosecutions of pregnancy crimes unconstitutional, 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. These include family-based substance abuse treatment and adequate access to pre-natal care.

Urge prosecutors to exercise appropriate restraint and 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. *What is RJ?*, SISTERSONG, http://www.sistersong.net/index.php?option=com_content&view=article&id=141&Itemid=81 (last visited Sept. 4, 2014).
2. *What is Reproductive Justice?*, ASIAN COMMUNITIES FOR REPRODUCTIVE JUSTICE, <http://strongfamiliesmovement.org/what-is-reproductive-justice> (last visited Sept. 4, 2014).
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://jhppl.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, 663-64 (2013).
5. *Id.* at 664.
6. *Id.*
7. *McKnight v. State*, 661 S.E.2d 354, 366 (S.C. 2008).
8. *Id.* at 358 n.2, 361.
9. Paltrow & Flavin, *supra* note 3, at 306.
10. *Id.* at 308.
11. *Id.*
12. *Id.*
13. All of these groups have issued statements opposing the prosecution of pregnant women who use drugs. *Medical and Public Health Statement Addressing Prosecution and Punishment of Pregnant Women*, NATIONAL ADVOCATES FOR PREGNANT WOMEN, http://advocatesforpregnantwomen.org/medical_group_opinions_2011/Medical%20Group%20Positions%202011.pdf (last visited Sept. 4, 2014).
14. TENN. CODE ANN. § 39-13-107 (West 2014).
15. Farh Diaz-Tello, *First Arrest Demonstrates Failure of Tennessee's Fetal Assault Law*, NATIONAL ADVOCATES FOR PREGNANT WOMEN, http://advocatesforpregnantwomen.org/blog/2014/07/first_arrest_demonstrates_fail.php (July 11, 2014).
16. *Id.*
17. 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.
18. 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. (West 2010).
19. See *State v. McKnight*, 576 S.E.2d 168, 174 (S.C. 2003).
20. *Id.*
21. See Richard L. Berkowitz, *Should Refusal to Undergo A Cesarean Section Be A Criminal Offense?*, 104 OBSTETRICS & GYNECOLOGY 1220 (2004) available at http://kofinasperinatal.org/files/Woman_s_right_to_refusal.pdf; 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'g en banc*, *In re A.C.*, 533 A.2d 611 (D.C. 1987).
22. *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999) (holding that compelling the woman to submit to a caesarean section did not violate her constitutional rights).
23. 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.
24. *Pemberton*, 66 F. Supp. 2d at 1250.
25. *Id.* at 1252.
26. 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).
27. *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457, 459 (Ga. 1981).
28. Proehl, *supra* note 4, at 670.
29. *Id.* at 671.
30. Elizabeth Thompson, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawyers*, 64 IND. L.J. 357, 358 (1989).
31. *Bei Bei Shuai, Woman Accused of Killing Unborn Baby By Eating Rat Poison, Says Life is 'Difficult'*, HUFFINGTON POST (April 25, 2013), http://www.huffingtonpost.com/2013/04/25/bei-bei-shuai-woman-accus_n_3158961.html.
32. *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.
33. *Woman Jailed Because She is Pregnant and HIV-Positive*, FEMINISTE (June 3, 2009), <http://www.feministe.us/blog/archives/2009/06/03/woman-jailed-because-she-is-pregnant-and-hiv-positive/>.
34. *United States v. Tuleh*, No. 1:09-cr-00019-JAW 13, 20, 30-31 (D. Me. May 14, 2009).
35. NAT'L WOMEN'S LAW CTR, *MOTHERS BEHIND BARS* 11 (2010), available at <http://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>.
36. Press Release, *Manufacturing and Smoking Methamphetamine while Pregnant Results in Enhanced Sentence*, U.S. Dep't. of Justice (July 15, 2014).
37. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 159 (1997).
38. Paltrow & Flavin, *supra* note 3, at 311. Women of color included African-American, Hispanic/Latina and Native American and Asian Pacific Islander women.
39. *Id.* at 311-12. These numbers are from the study period of 1973-2005.
40. *Id.* at 311. This is indicated by the fact that 71 percent of the women in the study qualified for indigent defense.
41. 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).
42. 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 when a woman obtained an abortion twelve days after being arrested for sniffing paint fumes while pregnant. Paltrow & Flavin, *supra* note 3, at 306.
43. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (plurality opinion) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (stating "Our cases recognize 'the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child'").
44. See, e.g., *Ankrom*, *supra* note 42, 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).
45. 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).
46. Julie Moskin, *The Weighty Responsibility of Drinking for Two*, N.Y. TIMES, Nov. 29, 2006, at F1 available at <http://www.nytimes.com/2006/11/29/dining/29preg.html?pagewanted=all> (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>.
47. 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>.
48. See, e.g., Proehl, *supra* note 4, at 685.
49. *Id.*
50. Paltrow & Flavin, *supra* note 3, at 326-27.
51. *Id.* at 328.
52. *Id.*
53. *Id.*