



## USA: TENNESSEE “FETAL ASSAULT” LAW A THREAT TO WOMEN’S HEALTH AND HUMAN RIGHTS

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“I gave birth on the side of the road trying to avoid going to a Tennessee hospital”

Brittany Hudson, charged under the “fetal assault” law; Patient Coordinator at Renaissance Recovery Group, Knoxville



In April 2014, Tennessee enacted the first law of its kind in the United States to explicitly authorize assault charges against women who illegally use a narcotic drug during pregnancy.<sup>1</sup> While this “fetal assault” law was intended to reduce drug use during pregnancy, the criminal provision poses grave health and human rights implications for women in Tennessee. It deters women from seeking health care services, in particular vital prenatal care. Fetal and newborn health is not promoted but rather placed in jeopardy when pregnant women face criminal charges and incarceration. The law punishes women who have been unable to access drug treatment, which is practically unavailable for many in Tennessee, and particularly for pregnant women. It has a discriminatory impact on women who already face poverty and marginalization, forcing women with limited means to pay large amounts in court costs.

Criminalization of drug use during pregnancy is the wrong response to address a public health issue. The authorities should instead ensure accessible and adequate drug treatment services for pregnant women. **Amnesty International, therefore, calls on Tennessee legislators to allow this law to expire in 2016 (as provided for in the law) and oppose any new measure that would amend or extend its provisions.**

Amnesty International researchers have been investigating the impact of the Tennessee law since its inception. In addition to legal and public health research, they conducted two field missions in January and March 2015 and interviewed 20 physicians, nurses, drug treatment providers, and public health experts. They also conducted a focus group interview with 8 mothers at a residential drug treatment facility. Most requests to speak with government officials were declined.

Amnesty International will release a full report on the human rights impacts of laws that criminalize pregnant women in the United States in 2016.

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<sup>1</sup> Chapter 820 of the Public Acts of 2014, which amends Tenn. Code Ann. § 39-13-107.



The right to health is at stake when threat of criminal sanctions drives pregnant women away from health care services, particularly vital prenatal care.

## DETERRENCE FROM PRENATAL HEALTH CARE

The Tennessee law poses a myriad of grave implications on women's health and human rights. Foremost among them is that the threat of criminal punishment for drug use during pregnancy drives pregnant women away from health care, in particular vital prenatal care and drug treatment. In addition to negatively impacting women's access to care, this law erodes their trust in health care providers who may report them to child welfare and law enforcement officials. As such, the government has created direct barriers to women's access to care in violation of the human right to health.

*"The problem with the law is that it discourages women from seeking treatment. I've seen higher no-show rates for the first appointment. Patients are showing up later in their pregnancies for care. Patients are telling me they are considering delivering out of state. Some women may decide they have to self-detox at home because they don't want it on their record."*

Dr. Jessica Young, Obstetrician-Gynecologist treating pregnant women with drug dependence, Nashville

*"The pregnancy criminalization law has struck fear in the hearts of women who have sought treatment, causing undue stress in women who are pregnant. These are women who want to do what's right; what was best for them and for their developing fetus."*

Zac Talbott, Director, NAMA Recovery of Tennessee & North Georgia

*"Since the law passed, we've seen a three-fold increase in admissions to the neonatal intensive care unit of babies with a diagnoses of neonatal abstinence syndrome and whose mothers did not have any prenatal care."*

Public Health expert commenting on data collected by East Tennessee Children's Hospital, Knoxville

Neonatal abstinence syndrome is an expected and treatable health condition that follows prenatal exposure to opioids, a class of drugs that includes prescription pain relievers and medications used to treat opioid dependence.<sup>2</sup>

The UN Special Rapporteur on the Right to Health, an independent expert appointed by the United Nations has specifically called upon states to suspend the application of existing criminal laws to various forms of conduct during pregnancy, noting that such restrictions can "infringe human dignity by restricting the freedoms to which individuals are entitled under the right to health, particularly in respect of decision-making and bodily integrity."<sup>3</sup>

**"Those who use drugs may avoid seeking medical attention for fear that information regarding their drug use will be shared with authorities, which could result in arrest, imprisonment or treatment against their will."<sup>4</sup>**

## LACK OF ACCESS TO DRUG TREATMENT

Another devastating impact of the Tennessee law is punishing, or threatening to punish, women who have been unable to access drug treatment, which is practically unavailable for many women throughout

<sup>2</sup> American College of Obstetricians and Gynecologists Committee Opinion Number 524, "Opioid Abuse, Dependence, and Addiction in Pregnancy," May 2012; ACOG Toolkit on State Legislation, "Pregnant Women & Prescription Drug Abuse, Dependence and Addiction."

<sup>3</sup> Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, 3 August 2011, UN Doc. A/66/254, p.2.

<sup>4</sup> Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 6 August 2010, UN Doc. A/65/255, para 20.



the state. As a whole, the Tennessee government has failed to ensure accessible and adequate drug treatment services for pregnant women. Only two of Tennessee's 177 drug dependence treatment facilities provide prenatal care on site and allow older children to stay with their mothers, and only 19 provide any care for pregnant women.<sup>5</sup> Tennessee has less than one third of the residential treatment slots they would require to meet the need among pregnant women with opioid dependence.<sup>6</sup>

*"Nobody would take my insurance. I kept getting decline letters. TennCare would send me letters saying they would let me go and pay out-of-network, then they could call back and say no. I was kind of thrown away at the wayside."*

Brittany Hudson, charged under the law

*"Access is the problem. Patients travel as long as 2-3 hours for their appointments with us. There are few options for these women. Many addiction programs don't treat pregnant women, and don't take insurance. Our waiting list is long, 6-8 weeks, too long for pregnant women."*

Dr. Jessica Young, Obstetrician-Gynecologist treating pregnant women with drug dependence, Nashville

*"I've been in this field for over 20 years. I've always been trying to get people into treatment. It's not as simple as when someone is willing, they just call and then get in. There's always going to be a pushback from the insurance. There's a million ways to get rejected from services. In fact, pregnancy is an exclusionary criteria. It's in the admissions policies, meaning pregnant women are not eligible for most rehab facilities"*

Evan Sexton, Program Director, Renaissance Recovery Group, Knoxville

## The right to equality and non-discrimination is at stake when governments pass and enforce criminal laws that only apply to pregnant women.

### DISCRIMINATORY APPLICATION OF CRIMINAL LAW AGAINST PREGNANT WOMEN

States are required to ensure people are treated equally under the law.<sup>7</sup> Application of laws that are deliberately discriminatory or that have a disproportionate impact on certain groups contravene the right to equality and non-discrimination.<sup>8</sup> Criminalizing women for certain behaviors during pregnancy has been shown to have a disproportionate impact on women who are already marginalized due to multiple, intersecting factors including poverty, ethnic or racial discrimination, and a lack of access to health care which is itself associated with poor health status.<sup>9</sup> In turn, the effect of these laws is to impose criminal sanctions solely on pregnant and formerly pregnant women and to leave those in the most marginalized positions at heightened risk of prosecution and punishment.

#### TRACKING IMPACT: WEST TENNESSEE

Shelby County, where the city of Memphis is located, has some of the lowest rates of babies born with a diagnosis of neonatal abstinence syndrome,<sup>10</sup> but among the highest documented rates of arrested

5 Rebecca Terrell, Healthy & Free Tennessee, "Tell Gov. Haslam: Veto TN Pregnancy Criminalization Law" Available at: <http://healthyandfreetn.org/news/veto-tn-pregnancy-criminalization-law>

6 Statistics compiled by Tennessee Association of Drug & Addiction Services (TAADAS); See Mary-Linden Salter, TAADAS, "Opportunities to address pregnancy, drug use and the law," December 2015. Available at: <http://taadas.org/TAADAS%20White%20Paper%202015.pdf>

7 Article 26 of the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, for example states: "All persons are equal before the law and are entitled without discrimination to the equal protection of the law."

8 See Nadege Dorzema and others v. Dominican Republic. IACTHR, para. 235.

9 Lynn Paltrow & Jeanne Flavin, 2013, "Arrests of and forced interventions on pregnant women in the United States (1973-2005): The implications for women's legal status and public health," Journal of Health Politics, Policy and Law; Center for Reproductive Rights, "Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care: A Shadow Report for the UN Committee on the Elimination of Racial Discrimination," 2014. Available at: [http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CERD\\_Shadow\\_US\\_6.30.14\\_Web.pdf](http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CERD_Shadow_US_6.30.14_Web.pdf)

10 Tennessee Department of Health, Drug Dependent Newborns (Neonatal Abstinence Syndrome) Surveillance Summaries, published weekly, available at <https://tn.gov/health/topic/nas>; Tennessee Department of Mental Health & Substance Abuse Services, "Prescription for Success: Statewide Strategies to Prevent and Treat the Prescription Drug Abuse Epidemic in Tennessee."



women under this law.<sup>11</sup> Based on an analysis of 24 women who were arrested between July 2014 and November 2015, nearly all qualified as indigent and were unable to afford their own legal representation.<sup>12</sup> During the time when Amnesty international was investigating the impact of the “fetal assault” law, 13 of these women had already been sentenced to jail time after their initial arrest, and more could be incarcerated over the course of court-supervised treatment if they are to relapse.

*“We’re talking about poor women who do not have the resources to navigate the court system or child protection services. We’re also talking about women, particularly women of color affected by this law, who were already mothers and have no way of maintaining the life of their families while participating in this punitively driven program. Poor women will not have resources for proper representation. So if you are poor and struggle with addiction in Tennessee, you lose everything with no sound plan to ever get your life back. That’s what this law has done to Tennessee mothers and families.”*

Cherisse A. Scott, Founder & CEO, SisterReach, Memphis

**“Six months. This is a massive sentence for a first offense misdemeanor assault... Especially considering as a man, I could never ever be treated this way for an assault charge in Tennessee. Ever.”**

Josh Spickler, Executive Director, Just City, Memphis

#### TRACKING IMPACT: EAST TENNESSEE

East Tennessee reports the highest rates of opioid dependence and infants born exposed to opiates in Tennessee.<sup>13</sup> However, due to the lack of drug treatment facilities, and in particular, licensed opioid substitution therapy providers, patients must travel as much as two hours each way to have access to such treatment. The challenges of finding treatment and the financial burdens of overcoming an assault charge are particularly acute for women who lack financial resources.

*“If they’re active in addiction they have lost a lot. They may not have a job, and have limited resources. Add the fact that they just had a baby, and little means to take care of a baby and themselves. Now you throw them into the court system, there are going to be court costs. There’s a woman now who got probation. She owes over \$5000 in court costs. You’re pushing them even further down in their struggles. If she doesn’t pay she’s worried she’s going to get arrested.”*

Public health expert, Knoxville

*“Remember, a lot of them have past histories where their perception is that the law is not going to be their friend. They understand that there is a law. That if you deliver they are going to take your baby and throw you in jail.”*

Evan Sexton, Program Director, Renaissance Recovery Group, Knoxville

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<sup>11</sup> Survey of District Attorneys prepared by Commissioner Bill Gibbons of the Department of Safety & Homeland Security. This survey is not comprehensive, as only 27 of the 31 district attorneys responded, and it only covers cases initiated for prosecution from the law’s enactment on April 24, 2014 until December 31, 2014; Information on women arrested in Shelby County have been collected by Josh Spickler, Executive Director, Just City, a criminal justice reform organization in Memphis.

<sup>12</sup> Information collected by Josh Spickler, Executive Director, Just City, a criminal justice reform organization in Memphis.

<sup>13</sup> Tennessee Department of Health, Drug Dependent Newborns (Neonatal Abstinence Syndrome) Surveillance Summaries, published weekly, available at <https://tn.gov/health/topic/nas>; Tennessee Department of Mental Health & Substance Abuse Services, See “Prescription for Success: Statewide Strategies to Prevent and Treat the Prescription Drug Abuse Epidemic in Tennessee.”



## CRIMINALIZING A HEALTH ISSUE IS NOT THE ANSWER

Criminalization of drug use during pregnancy is the wrong response to address a public health issue. Such punitive approaches deter women from seeking health care services, in particular vital prenatal care and drug treatment, have a discriminatory impact on often already marginalized individuals and groups, and reinforces stigma and discrimination against people who use drugs, which in turn may increase health risks<sup>14</sup>—all to the detriment of pregnant women’s human rights. Furthermore, fetal and newborn health is not promoted but rather placed in jeopardy when pregnant women face criminal charges and incarceration.

The UN Special Rapporteur on the Right to Health has called on states to suspend the application of existing criminal laws to various forms of conduct during pregnancy, given the human rights implications at stake and that such punitive approaches as a means to achieving certain public health outcomes is often ineffective and disproportionate.<sup>15</sup>

In the end, what pregnant women who are dependent on drugs need are support, assistance and access to health care and drug treatment services, which currently remain largely inaccessible for them, rather than punishment. The Tennessee legislature should heed public health and human rights research and evidence which affirms the negative impact of its “fetal assault” law and allow the law to expire.

### Recommendations to the Tennessee Legislature

- Allow the “fetal assault” law to expire in 2016 (as provided by the law)
- Oppose HB 1660 or any other measure that would amend or extend the “fetal assault” law
- Ensure access to affordable drug dependence treatment, harm reduction, and other drug-related health care for all women, including treatment that meets the particular needs of pregnant women.

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<sup>14</sup> See Report of the U.N. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 6 August 2010, UN Doc. A/65/255 at para. 24.

<sup>15</sup> These restrictions can “infringe human dignity by restricting the freedoms to which individuals are entitled under the right to health, particularly in respect of decision-making and bodily integrity. Moreover, the application of such laws as a means to achieving certain public health outcomes is often ineffective and disproportionate.” Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 3 August 2011, UN Doc. A/66/254, p.2.