



# CRIMINALIZING PREGNANCY

POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA  
EXECUTIVE SUMMARY

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First published in 2017  
by Amnesty International Ltd  
Peter Benenson House, 1 Easton Street  
London WC1X 0DW, UK

**Index: AMR 51/6435/2017**  
**Original language: English**

**[amnesty.org](http://amnesty.org)**



*Cover photo: CM, pictured in a drug treatment unit at a juvenile detention center in the USA. She is 16 years old and 8 months pregnant.*  
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# EXECUTIVE SUMMARY

**“If I had known that you go to the doctor and get a positive drug screen, I would not have gone to the doctor. I’d let nobody know. Especially not the doctor. Especially not the people who say they want to help. I really wanted the help. But now I feel that my help is punishing me. It hurts and it’s scary as hell that I’ve got to walk around carrying this baby and not know if I’m going to get charged.”**

Nikki, pregnant woman at a residential drug treatment center in Birmingham, Alabama

Throughout the USA, women become subject to unique forms of regulation when they become pregnant. While pregnant women remain subject to the same laws as anyone else, an additional set of legislation targets pregnant women, particularly those who are marginalized and those who use drugs, based on a belief that they have caused or risked harm to their fetus. Often known as “fetal assault”, “chemical endangerment” or “personhood” laws, these measures have been used to arrest and prosecute women who experience pregnancy complications and conditions such as drug dependence. A patchwork of evolving laws and practices impact women in every region and state.

This is an area of active legislative change and judicial review. In January and February 2017, 17 state legislatures introduced measures like the ones discussed in this report. These proposals come amidst an onslaught of measures designed to limit access to sexual and reproductive healthcare and a presidential administration that has ushered in a backlash against human rights, particularly those related to women’s bodily integrity and sexual and reproductive freedom.

Laws policing pregnant women’s actions and circumstances are collectively referred to as pregnancy criminalization laws throughout this report. The report provides a basic overview of the implications of these laws on women’s human rights and access to pregnancy related healthcare across the USA and focuses on specific criminal laws in two states: Alabama and Tennessee.

## TENNESSEE’S “FETAL ASSAULT” LAW

In April 2014, Tennessee amended its “fetal assault” law, becoming the first state to introduce a criminal law explicitly making it a crime to give birth to a child showing symptoms of prenatal exposure to narcotics. Beyond this, any unlawful act or omission a pregnant woman engaged in had the potential to be considered an assault against her own embryo or fetus. About 100 women have been charged under the “fetal assault” law since 2014, mostly in rural eastern Tennessee, an area severely lacking in drug treatment facilities, and in Memphis, a majority African-American city.

Tennessee's amended "fetal assault" law contained a clause that specified the end date as 1 July 2016. Amnesty International researched the impacts of this law during the two years in which it was in effect and contributed to local advocacy ensuring that this change to the law was not made permanent. State legislators proposed a new bill that would have eliminated the termination date in 2016, but this bill failed. However, the threat to women's rights is ongoing. In February 2017, Tennessee introduced Senate Bill 1381, containing the same language as the previous law, illustrating that similar legislation may be reenacted.

## **ALABAMA'S "CHEMICAL ENDANGERMENT" LAW**

Alabama's "chemical endangerment" law was passed in 2006 as a means to protect children from environments where they could be exposed to drugs or controlled substances. However, individual prosecutors and the Alabama Supreme Court have interpreted the law to apply to pregnant women themselves. We spoke to women who were arrested while they were pregnant and one who was handcuffed as she was taking her newborn son home from the hospital. One woman told us she was charged with "chemical endangerment" even though she was unaware she was pregnant and another was planning to get an abortion at the time she was arrested. Advocates and researchers have documented 479 such prosecutions between 2006 and 2015, more than have been documented under any other single law. Of these women, 89% were unable to afford their own lawyers.

## **NATIONAL CONTEXT OF PREGNANCY CRIMINALIZATION**

All of the cases discussed in this report, and the majority that have been documented by researchers and advocates, involve women who were dependent on drugs while pregnant. However, most of the state laws that criminalize pregnant women are not specific to drug use but are more general "fetal assault" laws which include fetuses within the legal definition of a "victim" of assault. Laws identifying fetuses as potential "victims" can have the effect of putting pregnant women's rights at risk, regardless of the law's intended purpose. Most "fetal assault" laws do not exempt pregnant women from committing crimes in relation to their own pregnancies. As a result, the laws have been used to prosecute women who miscarried or were believed to have harmed their fetus.

Advocacy groups and scholars have documented cases in which pregnant women have been arrested for otherwise legal activities such as refusing medical interventions including caesarean surgery or even for attempting suicide. For this reason, key legal advocates told Amnesty International that regardless of their intended aim, the laws can have the effect of punishing women for their pregnancy status.

Pregnant women may also receive more severe punishments for crimes if their embryo or fetus is considered to be a legally separate "person." For example, driving without a seatbelt may be punishable by a small fine, but in one case in Tennessee it was considered felony "reckless endangerment" because a court interpreted a woman's fetus as a legally separate "person." The vague and overbroad nature of pregnancy criminalization laws mean that almost any behavior perceived as harmful can be criminalized, inviting discriminatory application against women in marginalized positions.

There is no comprehensive data on the exact number of women who have been charged with a crime related to their pregnancy. State governments do not collect this information, and even identifying these cases is complicated due to the number of different laws that may be applied. Researchers, advocates and investigative reporters told us that since 2005, approximately 500 women have been charged with "chemical endangerment" in Alabama, 100 with "fetal assault" in Tennessee, and over 100 with unlawful conduct or neglect in South Carolina. According to National Advocates for Pregnant Women (NAPW), the leading national advocacy organization working to secure the civil and human rights of pregnant women, hundreds of others across the country have also been charged.

## **HOW AMNESTY INTERNATIONAL CONDUCTED THE RESEARCH**

Over the course of three years, Amnesty International conducted desk-based research to analyze the human rights impacts of laws and policies that criminalize pregnant women. Amnesty organized a series of four meetings with key national legal experts, consulted with a Human Rights and Gender Justice Law Clinic and obtained pro bono assistance from a law firm to analyze a dossier of 84 cases in ten different states.

Amnesty International researchers conducted two field research missions to Alabama and Tennessee from 18-31 January and 22-27 March 2015 and a follow-up visit from 1-3 October 2015. Amnesty maintained ongoing communication with local advocates and conducted additional phone interviews over the course of

2016. Amnesty International conducted 20 individual in-person interviews with women impacted by relevant laws in Alabama and Tennessee and spoke to 34 women in informal focus group settings at two residential drug treatment facilities specifically for pregnant and postpartum women. The research team participated in 20 interviews and meetings with national and local NGOs, 17 interviews and meetings with state and local government officials including police, prosecutors, child welfare, drug court and public health authorities and 19 interviews with healthcare providers and employees at drug treatment facilities. Amnesty International sent a summary of their findings to the Governor of Tennessee and law enforcement officials in Alabama on 25 January 2017 and requested a response. Amnesty had not received a response at the time of publishing this report.

## DETERRENCE FROM PRENATAL CARE

While the government officials who promote and interpret pregnancy criminalization laws may be doing so with the intention of promoting maternal and infant health, the laws do not achieve this stated aim. Women in residential drug treatment centers and healthcare providers told Amnesty that the threat of criminal punishment for drug use during pregnancy drives pregnant women away from healthcare, prenatal care and even drug treatment, in violation of their right to health. Healthcare providers told Amnesty International that women were forgoing prenatal care and in some cases attempting to drive to neighboring states to seek medical care or give birth to avoid prosecution. Zac Talbott, a drug treatment advocate in East Tennessee said:

**“Everybody that we’ve asked has been fearful of the ‘fetal assault’ law. Three recent referrals to my drug treatment facility have not even sought obstetrical (OB) care. They have avoided OB care because of this law. 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.”**

Rather than promoting healthy pregnancies, Amnesty International found that a criminal justice approach pushes pregnant women who are dependent on drugs to avoid healthcare. In addition to negatively impacting women’s access to healthcare, women who used drugs while pregnant told Amnesty that fear of punishment erodes their trust in healthcare providers. Some women feared coming into contact with the healthcare system because they had previous involvement with the child welfare system and knew they would be tested for drugs during their prenatal appointments or in the hospital at the time of delivery. Others were unaware they were being tested. Amber, a woman at a residential drug treatment center in Birmingham, Alabama told Amnesty International:

**“Nope, they didn’t tell me anything about any drug tests or that I was positive for anything until the day it was time for us to leave the hospital and they told me I couldn’t take my babies with me and I’m going to jail.”**

Alarming, most of the women we spoke to did not give informed consent for drug testing, interfering with the right to privacy. Some women did not know they were tested until child welfare officials informed them. Child welfare officials explained to Amnesty that prenatal clinics and hospitals call their offices to report positive drug tests. Child welfare officials then investigate and decide whether to open a case and whether to pass their findings on to law enforcement. According to Alabama police, prosecutors and child welfare officials, the process is not uniform and differs based on the priorities of the officials in each county. Information released by prosecutors and legal advocates in Tennessee indicates that some prosecutors were enforcing the law much more aggressively than others.

## CRIMINALIZATION IN THE ABSENCE OF DRUG TREATMENT

In the context of public concern over high rates of drug dependence, states are failing to provide access to healthcare services, and instead responding with punishment. The healthcare systems in both Alabama and Tennessee rank in the bottom quartile in terms of access and affordability and they have not taken steps to expand insurance coverage for low-income residents.

Public health experts and healthcare providers described a lack of access to drug treatment facilities for pregnant women and this absence is magnified for those with low incomes and in rural areas. In Alabama, there is only one program that provides specialized, evidence-based treatment for pregnant women and postpartum women with children, accepts everyone regardless of ability to pay and does not have a waiting list.

In Tennessee, the state-funded insurance program for people with low incomes does not cover any of the costs of methadone maintenance treatment, considered a “standard of care” for pregnant women

dependent on opioid drugs. Rather, these expenses must be borne out-of-pocket, at a price of approximately US\$4,500 per year. Healthcare providers and officials told Amnesty International that many women are unable to pay or travel to the closest appropriate drug treatment facility, and left without treatment as a result. Brittany, a woman who was charged under the Tennessee “fetal assault” law, said that after her arrest she tried to get into treatment for three months. She told Amnesty International:

**“Nobody would take my insurance. I kept getting decline letters. TennCare [the state insurance] would send me letters saying they would let me go and pay out-of-network [to a doctor outside of the insurance plan], then they could call back and say no. I was kind of thrown away at the wayside.”**

## **DRUG COURT PROGRAMS AND MANDATORY TREATMENT**

Almost all of the women Amnesty International spoke to in Alabama were in residential treatment centers mandated by the terms of drug court. Drug courts are intended to offer court-supervised treatment for drug dependence as an alternative to prison for certain drug-related offenses. There is no single model, but these programs typically oversee offenders outside of jail or prison, and maintain legal authority to enforce sanctions. A law enforcement official and a counselor at one of the centers explained that they have a close working relationship. The treatment center will often negotiate with the judge to pick up women directly from jail, and similarly, if a woman violates the terms of the treatment program, law enforcement will take her back. Prosecutors told us that judicial intervention serves as leverage to get women into treatment and rehabilitation which they would not otherwise seek.

Criminal justice advocates criticize the fact that the model allows judges to essentially make medical treatment decisions, such as how long treatment is necessary, and what types of treatment are allowed. Several of the women Amnesty International spoke to raised concerns about the right to a fair trial, such as inadequate legal counsel and a lack of information on their case and how long they would be in treatment through drug court.

## **DISCRIMINATION AGAINST THOSE MOST IN NEED OF SERVICES**

The Convention on the Elimination of All Forms of Discrimination against Women is the foremost human rights treaty that calls for the elimination of all forms of discrimination against women and achievement of gender equality. The Committee on the Elimination of All Forms of Discrimination against Women, the body tasked with interpreting the Convention, has explicitly critiqued governments that criminalize healthcare services that only women need and punish women for accessing such services. It has also repeatedly called on states to prevent gender discrimination in access to healthcare.

Laws that directly criminalize or indirectly discriminate against pregnant women violate the right to equal protection under the law without discrimination. On top of this, these laws tend to be disproportionately enforced against low-income women and women of color - people who are often already facing multiple levels of discrimination and who may already be involved in the criminal justice or child welfare system. The effect is that certain classes of women are at heightened risk of prosecution if they become pregnant. The largest systematic study of these cases, analyzing 413 arrests and forced interventions over the course of 30 years, found that 71% of cases were brought against low-income women who qualified for indigent defense, and 52% of the cases were brought against African-American women.

Based on cases tracked by advocates in Tennessee, about a quarter of arrests occurred in Shelby County, a county that is over half African-American, and yet according to health data, has among the lowest rates of babies born exposed to opioid drugs. Nearly all of the arrested women had low-incomes and qualified for indigent defense. Arrests were also concentrated in East Tennessee, a region that particularly lacks access to scientific evidence-based drug treatment facilities for pregnant women. The challenges of finding treatment and the financial burdens of overcoming an assault charge are particularly acute for women who lack financial resources.

In Alabama, enforcement rates vary widely between counties, with prosecutors holding a large degree of discretion. Child protective service workers, healthcare professionals and women involved in these systems explained that a lack of state oversight intensifies the disparate impact the “chemical endangerment” law has on low-income and marginalized women. Similarly, advocates voiced concern about the potential for discrimination in drug testing practices, which is backed up by scientific studies. Of the women Amnesty International interviewed, almost all came from low income backgrounds and most spoke about personal histories which included trauma or physical and mental health conditions.

## **CONCLUSIONS AND RECOMMENDATIONS**

In the USA, pregnant women lie at the center of a contested battleground over their sexual and reproductive rights and for some, this intersects with a stigmatizing and punitive state response to drug use. However, neither the condition of pregnancy nor one's drug use justify the violation of individuals' human rights. Laws and policies that render women vulnerable to criminalization simply because they have become pregnant have a profound impact on the health and lives of women, their children and their families.

Promoting women's health during pregnancy is a legitimate aim, but using criminal laws to promote public health goals is the wrong approach as it promotes fear and does not encourage healthy pregnancies or expand access to healthcare and other social services. Instead, punitive approaches deter women from seeking healthcare services, have a discriminatory impact on marginalized individuals and effectively criminalize pregnancy for certain classes of women, violating their human rights.

States have an obligation to promote the health and well-being of pregnant women through adequate maternal healthcare, goods and services. Pregnant women who are dependent on drugs need support and access to healthcare including evidence-based drug treatment services, which currently remain largely inaccessible to many.

States must amend or repeal laws that criminalize women for actions in relation to their own pregnancies, including drug use. States should also ensure access to affordable, scientific evidence-based, gender-appropriate drug dependence treatment and sexual and reproductive healthcare services without discrimination. Policy-makers should issue guidelines on drug testing practices to ensure pregnant women are not tested without their knowledge or consent and their autonomy and privacy are respected.

# RECOMMENDATIONS TO STATE & FEDERAL AUTHORITIES

## HEALTHCARE SERVICES

- Ensure that healthcare information and services, including sexual and reproductive healthcare, are available, accessible, acceptable and of good quality throughout an individual's lifetime.
- Ensure that gaps in the healthcare system are eliminated so that all communities have access to comprehensive, quality treatment and services.
- Expand access to healthcare through increased funding for public healthcare systems.
- Ensure that no one is denied access to healthcare services by policies or practices that have the purpose or effect of discriminating on grounds such as gender, race, ethnicity or the ability to pay.
- Adopt guidelines to increase awareness about informed consent to ensure the requirements of informed consent are observed in all treatment settings, including with regard to the right to refuse treatment and to not be subjected to coerced or compulsory treatment.
- Implement training and guidelines to raise awareness of healthcare providers about patients' human rights, including respect for sexual and reproductive health and women's autonomy and decision-making.

## DRUG TESTING AND TREATMENT

- Design drug treatment programs to prioritize access to pregnant women and disadvantaged groups.
- Ensure access to affordable, gender-responsive drug dependence treatment, harm reduction, and other drug-related healthcare for women without discrimination.
- Implement training and guidelines to ensure drug testing of pregnant women is only conducted with informed consent, including an explanation of the potential ramifications of a positive test.
- Ensure that drug treatment and rehabilitation programs for people who use drugs are evidence-based, voluntary and safeguarded by informed consent.
- Conduct a thorough analysis of drug policies to assess the potential discriminatory effect on pregnant women and marginalized and disadvantaged communities. Accordingly, amend or repeal laws and practices that reinforce stigma and discrimination against people who use drugs.
- Develop specific guidelines and training for healthcare professionals and administrators on drug treatment during pregnancy, highlighting the obligation to treat all patients with respect and without discrimination and to ensure the right to privacy.
- Ensure pregnant women in treatment programs have access to fair trial rights including timely access to legal representation.

## CHILD WELFARE POLICIES

- Amend child welfare policies and procedures on the basis of evidence with the aim to promote health and human rights.
- Assess definitions of child abuse and neglect to ensure they are based in evidence rather than the presumption that prenatal drug exposure is child abuse short of any other indication.
- Expand access to residential drug treatment centers that prioritize admission of pregnant women and allow children to stay with their mothers.



## RECOMMENDATIONS TO FEDERAL AUTHORITIES

- Ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol.
- Ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol.
- Review maternal healthcare policies and practices and the health system more broadly to ensure compliance with human rights standards.
- Increase federal funding for drug prevention and treatment programs that are evidence-based and respect patient autonomy and safeguard against discrimination.

## RECOMMENDATIONS TO STATE AUTHORITIES

- Repeal or amend “fetal assault” and similar laws that do not exempt women from liability for conduct in relation to their own pregnancies.
- Repeal or amend laws criminalizing pregnant women for their use of drugs and other acts in relation to their own pregnancies.
- Assess all laws that have been used to punish women for conduct in relation to their own pregnancies and amend the laws to ensure that they cannot be used in this way.

## RECOMMENDATIONS TO TENNESSEE AUTHORITIES

- Repeal the “fetal assault” law.
- Increase funding for and access to drug dependence treatment, including funding for family residential treatment programs which admit pregnant women and accommodate their children.
- Issue guidelines on drug testing practices to ensure pregnant women are not tested without their knowledge or consent and are aware of the ramifications of a positive test.
- Conduct human rights education and training for law enforcement, medical providers, and child protective services staff.

## RECOMMENDATIONS TO ALABAMA AUTHORITIES

- End the use of the “chemical endangerment law” against women in relation to their own pregnancies. Limit enforcement of this law to its original intent by halting the law’s application against pregnant women for drug use during pregnancy.
- Increase funding for and access to drug dependence treatment, including funding for family residential treatment programs which admit pregnant women and accommodate their children.
- Issue guidelines on drug testing practices to ensure pregnant women are not tested without their knowledge or consent and are aware of the ramifications of a positive test.
- Conduct human rights education and training for law enforcement, medical providers, and child protective services staff.

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# CRIMINALIZING PREGNANCY

## POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA EXECUTIVE SUMMARY

In the USA, pregnant women lie at the center of a contested battleground over their sexual and reproductive rights. A series of laws police the behavior of pregnant women and particularly impact those who are marginalized and those who use drugs. Collectively called pregnancy criminalization laws, this report provides a basic overview of the impact of these laws on women's human rights and access to healthcare across the USA, and specifically focuses on two criminal laws in Alabama and Tennessee.

Pregnancy criminalization laws violate women's rights to health, privacy, equality and non-discrimination. Punitive approaches deter women from seeking healthcare services and have a discriminatory impact on low-income women and women of color.

Amnesty International is asking the authorities to repeal these laws. Instead of relying on punishment, states must ensure they are meeting their human rights obligations including ensuring access to healthcare.