

Vera Institute of Justice

Criminal Justice Issues and Prisoners' Rights

<https://www.vera.org/blog/gender-and-justice-in-america/reproductive-justice-should-be-included-in-reform-efforts>

Public Facing Advocacy Writing

After decades of mass incarceration, policymakers around the country are realizing the unintended consequences of using the criminal justice system to deal with the social and public health problems of homelessness, drug use, mental illness, and poverty. Despite the advances of criminal justice reform, however, there are increasing efforts to criminalize pregnant women who are at risk for negative birth outcomes, particularly targeting women who use drugs, low-income women, and women of color.

Most notably, regulations that make fetuses a distinct class of victim often put in place to protect [pregnant women and their fetuses](#) against violence through harsher penalties for their attackers [are instead being used](#) to make women criminally responsible for their fetus's well-being and establish fetal personhood. This is in fact detrimental to the health of pregnant women and often targets the most marginalized groups, including women who are themselves victims of violence.

According to the [Guttmacher Institute](#), Tennessee explicitly allows a pregnant woman to be charged with assault against her unborn child for using certain substances. Eighteen other states consider substance abuse during pregnancy to be child abuse under civil child welfare statutes, 15 states require health care professionals to report suspected prenatal drug abuse, and four require them to test for drugs if they suspect abuse.

In these instances, state authorities are typically not required to provide expert testimony or scientific evidence to prove that a pregnant woman's actions, inactions, or circumstances would, or in fact did, cause the harm for which they were charged. In the majority of cases where pregnant women were arrested for drug use, [no adverse pregnancy outcome](#) was reported.

According to [peer-reviewed](#) research, testing for drug use with the threat of child welfare intervention actually [undermines](#) maternal, fetal, and child health by [detering women](#) from seeking prenatal care and in-hospital births. Indeed, the leading risk factors for miscarriage, stillbirth, and infant death are not drug use but low levels of prenatal care and poverty.

Moreover, according to [a study](#) by the Correctional Association of New York, the arrest and incarceration of pregnant women and new mothers leads to conditions of physically and emotionally damaging childbirth such as insufficient nutrition, substandard reproductive care, serious delays in accessing gynecological services, solitary confinement, and even shackling during pregnancy.

These policies have contributed, in part, to [a sevenfold increase](#) in the number of women in prison since 1980 and [more than doubling](#) of the number of children under 18 with a mother in prison between 1991 and 2007.

They also disproportionately target low-income women and women of color. African American mothers are more likely to be tested for drug use, according to the [Journal for Womens Health](#), even though there is no association between race and a positive toxicology report. Additionally, African American mothers who tested positive for illicit drugs were 10 times more likely to be reported to child protective services.

Medical and public health associations have [publicly opposed](#) the prosecution and punishment of pregnant women. Addiction is a public health issue and treatment or punishment should not be determined by a woman's pregnancy status. Rather than incarceration, there should be an increase in community treatment capacity for drug treatment services to keep families healthy.

While some states stipulate that women who accept treatment for drug use will not be detained, there are [far too few existing services](#) relative to need. This is particularly true in Tennessee, where only two of 177 addiction treatment facilities [provide services for pregnant women](#). However, 19 states have created or funded drug treatment programs specifically targeted to pregnant women, such as Delaware's [New Expectations program](#), and 11 provide pregnant women with priority access to state-funded drug treatment programs. Four states prohibit publicly funded drug treatment programs from discriminating against pregnant women. If more states adopt programs and policies like these, they can better promote public health and prevent the over-incarceration of pregnant women.

Through the [Gender & Justice in America](#) blog series, Vera will explore issues facing justice-involved women and girls in the fields of adult corrections, youth justice, immigration, victimization, substance use, and mental health.

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