



## Tennessee's Fetal Assault Law: Understanding its impact on marginalized women

### The case of Tennessee

Deaths in Tennessee due to drug overdose involving opioids have risen each year, from 754 in 2013 to 1,186 in 2016.<sup>1</sup> The prescription drug epidemic in the state coincided with a rising incidence of neonatal abstinence syndrome (NAS), a temporary non-fatal condition experienced by infants exposed to opiates or other narcotics while in utero.<sup>2</sup> In 2014, a bill (S.B. 1391) was passed that allowed the state to arrest pregnant women for the illegal use of narcotics during pregnancy if the child was born addicted to or harmed by the drug.<sup>3</sup> Those arrested and charged under the Fetal Assault Law faced a penalty of up to fifteen years in prison and loss of child custody.<sup>4</sup> Of the women arrested, the majority were low-income or lived in poorly-resourced areas.<sup>5</sup> Reasons for these arrests included: 1) giving birth to a child who tested positive for a non-narcotic drug;<sup>6</sup> 2) giving birth to a child who tested positive for a narcotic or other kind of drug but who was not determined to be “addicted” to or “harmed” by exposure;<sup>7</sup> 3) risking harm to a fetus by driving while pregnant without a seat belt and for fleeing from the police while pregnant;<sup>8</sup> and 4) attempting to have an unsafe abortion.<sup>9</sup> Despite the initial findings that more women opted for treatment than were prosecuted,<sup>10</sup> criminalization had harmful, unintended consequences for women and families in Tennessee. An investigative report documented that the 2014 law had a profound effect on pregnant women who feared arrest. Pregnant women reported avoiding prenatal care, fleeing Tennessee to give birth in neighboring states, and giving birth at home rather than hospitals.<sup>11</sup> In other cases, fear of incarceration prompted substance-using pregnant women to seek an unwanted abortion.<sup>12,13</sup>

To inform lawmakers, medical providers, and the public about the implementation and repercussions of this law, SisterReach conducted a study to document the experiences of marginalized women, *defined as women with limited financial assets or living in rural areas of the state*, impacted by the law.

### What we found

Through in-depth interviews and focus groups discussions, SisterReach staff spoke with 41 women impacted by the law. These women were impacted either directly through arrest or indirectly through decisions that enabled them to avoid arrest. A snapshot of our study participants reveals women who are not only low-income but who had experienced financial hardship in the last 12 months and had at some point engaged in transactional sex to support themselves and/or their drug habit. These women were predominantly unemployed, had more than one child, and had a family history of substance use.

### **Experience of women directly impacted by the Fetal Assault Law**

Twenty-eight women in the study reported being arrested and charged under the Fetal Assault Law. Narratives focused on their experiences with the judicial system, as well as drug court and treatment program. From their stories, we learn that the time of arrest after NAS diagnosis or blood/urine drug screen varied, leaving many feeling confused and vulnerable. Women's experiences with drug court and the treatment program were mixed, with some citing benefits to participation and others highlighting the inadequacies of the program. *“Access to treatment should be improved definitely. That’s what’s so annoying is you see people like, they should go to treatment. Well, if it was that easy they would be there if they wanted to. It’s just hard. If you’re not just dying from benzos and alcohol, you can get in fairly easier. But on opiates, they’re – that’s just like, you’ll be fine in four or five days, you don’t need it. And people don’t understand that it’s not – 28 days is not gonna cure somebody.”* (IDI, directly impacted)



The Fetal Assault Law had an indelible impact on women's families, health, and economic well-being. Under the law, women with children born addicted to opiates would be charged and her children removed and placed under the custody of the Department of Children's Services (DCS), foster care, or the care of a relative. Regaining custody was dependent on successful completion of the treatment program and an ability to show that she was sufficiently able to care for the child. Approximately 47% (n=13) of the women arrested and charged with the Fetal Assault Law reported losing custody of their children because of the arrest. The loss of a child was distressing and resulted in some women resuming drug activity to cope with the stress of loss. *“When they took my kids, instead of stop getting high it stressed me out more to get high, because I was upset about my kids being gone, took from me.”* (FGD, Mixed Impact). Few women in the study were able to regain custody of their children. In conjunction with custody loss, women charged with fetal assault reported a delay or complete avoidance of prenatal care as well as diminished quality of life as measured by gains in employment and housing.

### **Experience of women indirectly impacted by the Fetal Assault Law**

Fear of arrest or drug testing drove some substance-using women to use different strategies to avoid arrest, including delivering outside of the state. Two of the 13 women in our sample who avoided arrest under the Fetal Assault Law elected to deliver in Alabama and Mississippi. Other strategies to avoid arrest include having an abortion, avoiding prenatal care, and attempting to detox. Two women in our sample were able to avoid arrest because they miscarried early in the pregnancy and therefore had no contact with the medical system. Maintaining custody of their child(ren) was the main concern for women attempting to avoid arrest under the law. *“My doctor told me the first time I tested positive and they found marijuana in my system, I guess in my urine – she told me that I could be arrested. And I started to think of a plan of how I could either treat myself or how I could get out of being arrested. I didn’t want them to take my baby from me. That was my main concern.”* (FGD, indirectly impacted).



The objective of the Fetal Assault Law was to reduce the use of opioids during pregnancy and the number of infants born with NAS. However, an increase in NAS diagnoses during the enactment period<sup>2</sup> reveals that the law was ineffective, and evidence from this study shows that the law was actually detrimental to the health of many women and their families. In particular, the law endangered the lives of substance-using pregnant women and their infants, as many women delayed or went without prenatal care due to fear of arrest and custody loss.<sup>11</sup> Some substance-using pregnant women also attempted to detox on their own, a dangerous decision since sudden opioid withdrawal can lead to respiratory depression (which can cause the child to not get adequate amounts of oxygen) and maternal anxiety and depression.<sup>14</sup>

Our conversations with women impacted by the law show that the law was widely applied to substance-using pregnant women residing in Tennessee and that the use of criminal penalties is counterproductive to the wellbeing of women and their families.<sup>15,16</sup> Approximately 46% of women in the study reported experiencing permanent custody loss of one or more of their children. The most cited reason for loss or delay in reunification was an inability to get in contact with the assigned DCS caseworker. Women able to connect with a caseworker and receive a plan for reunification faced other challenges—a lack of reliable transportation to get to visits with their child(ren) or parenting classes, stable housing, or resources to facilitate successful completion of a treatment program.

Despite research showing that women able to retain child custody while in treatment are more likely to remain in treatment,<sup>17</sup> the vast majority of treatment centers in Tennessee do not accommodate children, and few even accept pregnant women. In 2015, only 19 of the 177 treatment facilities in Tennessee listed themselves as serving pregnant women, and only two were equipped to provide prenatal care on site or allow older children to stay with their mothers.<sup>5</sup> Findings from a study of mothers who abused drugs but were not incarcerated and received help found that these mothers had more favorable outcomes in retaining custody and improving overall life conditions for themselves and their children; 60% of the women who received social services and treatment were caring for their index child (the child they were carrying during the study) and had secured further stabilizations (remained clean, secured better housing, employment, support systems) for three years beyond initial contact.<sup>18</sup> Limited options for women to stay connected with their children or receive assistance diminishes the chance that treatment programs in Tennessee will be successful.

## Recommendations

Currently, 38 states have some version of a Fetal Assault Law,<sup>19</sup> and while the specific details of these laws vary greatly from state to state, the results of this study strengthen arguments against enacting laws that criminalize pregnant women. Instead we recommend that:

- Lawmakers, law enforcers, and the medical community (both maternal and behavioral health) adopt and apply a reproductive justice lens to analyses before crafting, passing, or enforcing policy
- The medical community provide patient-centered and patient-informed treatment. We recommend that behavioral health and maternal health providers incorporate patients' voices to inform treatment and recovery needs and concerns
- The medical community include a comprehensive reproductive and sexual health education component to treatment and counseling, with information on the full range of birth control options (without focusing on or pressuring patients into using one particular method over another)
- Lawmakers expand behavioral health and treatment programs that include housing specifically for low-income women who are pregnant and women who already have children to decrease the rate of recidivism in rehabilitation programs and to keep families together

“We’re talking about poor women who do not have the resources to navigate the court system or child protective 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

- Lawmakers support policies and programs that provide counseling and social support to impacted children and families while mothers participate in rehabilitation programs

### Specific recommendations from women impacted by the law

Women in our study suggested several actions the community can take to help individuals struggling with drug addiction, including:

- Making more programs available and/or strengthening existing programs for recovering addicts. For example, churches and courthouses could serve as additional locations for recovery meetings
- Directly provide and/or connect women recently release from jail or who have recently finished a treatment program with support services, including parenting classes and marriage counseling
- Increase public knowledge about addiction as a disease to reduce stigma. Churches can also make an effort to welcome individuals struggling with addiction to decrease stigma
- Provide more resources or programs that could lessen the economic burden of legal fees, transportation costs, and expenses associated with child support

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