

HEALTH LAW

Effects of Substance Use Disorder Criminalization on American Indian Pregnant Individuals

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Abstract

Individuals with substance use disorders (SUDs) are at markedly elevated risk of involvement in the criminal legal system. Over the past 30 years, substance use during pregnancy has been criminalized through laws on the federal, state, and tribal level. American Indian (AI) individuals are disproportionately affected by these laws due to their race, socioeconomic status, and limited access to SUD treatment. This article aims to educate readers on laws criminalizing substance use during pregnancy and on how AI individuals are disproportionately affected by these laws. It also discusses how these laws conflict with the ethical principles of autonomy, nonmaleficence, and justice. Finally, this article recommends that clinicians advocate for the decriminalization of SUDs during pregnancy and for improvement in access to comprehensive, evidence-based SUDs care.

Criminalization of Substance Use Disorder in Pregnancy

Approximately 1 in 10 individuals in the United States will develop a substance use disorder (SUD).¹ Between 1999 and 2016, drug overdoses increased dramatically,² and, in 2017, overdose was the leading cause of accidental death in the United States.² American Indians (AIs) have been hit particularly hard, with a prevalence of SUD exceeding that of other racial and ethnic groups in the United States.³ Tribes across the country have declared treatment of SUD a public health priority.⁴

The nation's drug laws place individuals with SUD at high risk of involvement with the criminal legal system. It is estimated that over 65% of individuals under correctional supervision meet criteria for SUD.⁵ Pregnant people with SUD face prosecution, given state laws that specifically criminalize drug use during pregnancy.⁶⁻⁸ Pregnant AI individuals are disproportionately affected by these laws due not only to their race and gender, but also their lower socioeconomic status and the compounded **government surveillance** under federal, state and tribal laws.

In the 1980s, during the "war on drugs," the US government focused on crack cocaine, demonizing people of color who used this drug while pregnant and laying the foundation for federal, state, and tribal laws **criminalizing substance use during pregnancy**.⁹ The

Child Abuse Prevention and Treatment Act of 1974, for example, requires states that accept federal grant funding to have policies and procedures for notifying child protective services agencies of infants who are identified as being affected by maternal substance use.¹⁰

States have passed a variety of laws criminalizing substance use during pregnancy. Twenty-three states and the District of Columbia have laws proclaiming that drug exposure during pregnancy constitutes child abuse.¹¹ Twenty-five states and the District of Columbia require health professionals to report suspected prenatal drug use, with 8 requiring testing for and reporting of prenatal drug exposure if they suspect drug use.¹¹ Some states have also passed laws related to “fetal personhood,” “fetal assault,” and “chemical endangerment” and used these laws to prosecute people who use drugs during pregnancy.¹² In Tennessee, for instance, a fetal assault law makes giving birth to a newborn showing signs of prenatal exposure to illicit substances a crime punishable by imprisonment.¹³

Tribes have their own legal approaches to substance use during pregnancy. Each of the 573 federally recognized tribes has its own laws, court systems, and facilities to detain tribal members convicted of certain offenses within reservations.¹⁴ Because of their nationhood status, tribes have a government-to-government relationship with the United States. On Indian reservations, AIs are typically subject to tribal and federal law only, not state laws. However, as US citizens, AIs are additionally subject to state law when outside of a reservation and on state land.¹⁵ For tribes whose laws were available for review, substance use during pregnancy is consistently criminalized, with varying levels of punishment. Some tribes (Navajo Nation, White Earth Nation) mandate substance use treatment programs, while others (Little River Band of Ottawa Indians, Standing Rock Sioux Tribe) identify substance use during pregnancy as child abuse and require child protective services involvement.^{16,17,18,19}

The number of pregnant people who have been criminalized for substance use is unknown. One report documented 413 arrests, detentions, forced medical interventions, and separations of newborns and mothers between 1973 and 2005 for pregnant people of all races and ethnicities, the majority (84%) of which involved substance use during pregnancy.²⁰ Given the difficulty in identifying cases, the authors suspect hundreds, if not thousands, were missed.²⁰

American Indian Vulnerability to Criminalization in Pregnancy

AI individuals are particularly vulnerable to criminalization during pregnancy for several reasons.

First and foremost is the impact of racism. AI women are jailed and imprisoned at higher rates than their white counterparts relative to their share of the general population.²¹ In South Dakota, of the 558 women in custody in January 2020, more than 50% (297) were AI, although AIs constitute 8% of the state population.²² Racism also has a significant impact within health care. One national survey showed that 23% of AIs reported experiencing discrimination in a health care setting.²³ Numerous studies document how racial and ethnic minorities receive less access to and lower quality of health care and have worse health outcomes.^{24,25} For pregnant people of color, discrimination is acutely evident. Black people are 1.5 times more likely to get tested for drug use during pregnancy than other people,²⁶ and, if they test positive, 10 times more likely to get a positive result reported to child protective services.²⁷ AI individuals are

often overlooked in public health and policy research, largely because of their small population and frequent racial misclassification. While more research is needed, it is clear that AI individuals are not exempt from racism and likely experience its hardships uniquely.

Second, AIs are one of the most impoverished populations in the country, increasing their vulnerability to criminalization during pregnancy. They are more likely to be involved with state-sponsored public health and social services programs²⁸ and subsequently more likely to be subject to public reporting. Additionally, when AI people on tribal land become pregnant, they're often shuttled between the **Indian Health Service** (IHS) and state-funded agencies, including state hospitals and social services, because the IHS has limited obstetric capacity. Shuffling between health care settings on and off reservations results in exposure to rules and regulations of tribal, state, and federal jurisdictions and the potential to be prosecuted under the authority of all three.

Finally, AI people are particularly affected by the criminalization of substance use during pregnancy because of their minimal access to SUD treatment, due largely to shortages and limited resources of reservation-based treatment programs, stigma associated with SUD, and lack of SUD training among health care professionals who work on reservations, especially among those working with pregnant patients.² In particular, the IHS is perilously underfunded; despite the high disease burden in AI communities, the agency receives less funding per person than Medicare or Medicaid, making it difficult to establish and strengthen SUD treatment.²⁹ With limited access to care, AI individuals with SUD often are not treated for their disease and remain at high risk of ongoing drug use during pregnancy.

Ethical Considerations

Legal, political, and medical structures that create disparate risk for AI individuals seeking pregnancy care undermine core ethical principles. By adversely affecting pregnant AI individuals seeking prenatal care, these structures are unjust. Furthermore, in preventing pregnant people from controlling their health information and in violating their confidentiality, laws mandating clinician reporting of substance use violate the ethical principle of respect for autonomy.

Numerous professional medical associations, including the American College of Obstetricians and Gynecologists,³⁰ have recognized SUD as a chronic, relapsing disease. However, SUD remains highly stigmatized. Instead of receiving treatment, people with SUD—particularly those who are pregnant—are treated as moral failures by society and criminalized, with severe health consequences. Individuals who use drugs are understandably fearful of seeking health care because of risk of arrest, imprisonment, or loss of child custody if their health care professional suspects or concludes that they are using illicit drugs. Fear of punishment decreases participation in health care, particularly prenatal care, and erodes trust in physicians.^{31,32} The documented harm from these laws violates the ethical principle of nonmaleficence.

Laws criminalizing drug use during pregnancy place physicians in the untenable position of being legally required to help enforce these laws. Health care professionals, whose professional and ethical priority is to provide competent, compassionate care, are mandated to abide by laws that are detrimental to their patients' health. These circumstances necessitate that health care professionals advocate for decriminalization

of substance use during pregnancy and for increased access to comprehensive, evidence-based treatment for SUD.

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