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Drug Policies and
Arbitrary Detention in
the United States:
Racial and Gender
Impacts

Submission for Working Group on Arbitrary
Detention (WGAD) Study: Arbitrary Detention
Relating to Drug Policies

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INTRODUCTION

This submission addresses arbitrary detention relating to drug policies in the United States (U.S.), focusing on its racial and gender dimensions. Part I provides an overview of punitive drug policy in the U.S., its human rights implications, and disparate impacts on ‘racial minorities,’¹ low-income people, and women. Part I further contextualizes intersecting discrimination and the compounded disadvantages faced by women who use drugs who are also low-income and/or belong to a racial minority group. Part II analyzes particular drug policies in the U.S. that result in the arbitrary detention of pregnant women, including their impact on health and human rights. Part II specifically responds to question # 13 of the Working Group on Arbitrary Detention’s document, “Issues that Stakeholders may wish to include in their replies”: *“Does your State provide for the involuntary detention of pregnant women who use drugs in circumstances where such drug use has been deemed to constitute a danger to the foetus, and where voluntary attempts by health professionals to work with the pregnant woman have failed? Please describe the legislative basis and applicable procedural guarantees in case of such an involuntary detention.”*

PART I: U.S. Over-Incarceration for Drug Offenses and its Disparate Impacts in the U.S.

A. The U.S. Punitive Approach to Drug Use

The U.S.’ criminal justice system as it stands today has been shaped in part by the 1970s and 1980s “tough on crime” model of criminal justice and the “war on drugs.” This rhetoric resulted in increased policing, increased arrests, and harsher sentences for non-violent crimes. In 1981, 560,000 people were arrested for “drug crimes,” whereas in 2006, 1.9 million people were arrested for “drug crimes.”² Today, the U.S. maintains the highest prison population and prison population rate in the world.³

In 2007 the Federal Bureau of Investigation's Uniform Crime Reports (UCR) estimated that there were about 1,841,200 state and local arrests for drug abuse violations in the U.S..⁴ The UCR defines “drug abuse violations” as “state and/or local offenses relating to the unlawful possession, sale, use, growing, manufacturing, and making of narcotic drugs including opium or cocaine and their derivatives, marijuana, synthetic narcotics, and dangerous nonnarcotic drugs such as

¹ The term racial minority(ies) in this submission refers to non-whites in the United States. Per the 2019 U.S. Census data, white people make up 76% of the population in the United States of America. Other racial categories include: Black or African American, American Indian and Alaska Native, Asian, Native Hawaiian and Other Pacific Islander, Two or More Races, and Hispanic or Latino. *QuickFacts, Table, Population estimates, July 1, 2019 (V2019)*, United States Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/PST045218>.

² *Incarceration’s Front Door: The Misuse of Jails in America*, Vera Institute of Justice, (February 2015/updated July 29, 2015), p. 9, *citing* Howard N. Snyder and Joseph Mulako Wangota, Arrest Data Analysis Tool, (Washington, DC: Bureau of Justice Statistics, 2013), selecting Drug Abuse Violation—Total at www.bjs.gov, (accessed Nov. 29, 2014), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf.

³ *Highest to Lowest- Prison Population Rate*, World Prison Brief, Institute for Crime & Justice Policy Research, & Birbeck University of London, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All.

⁴Bureau of Justice Statistics, *Drugs and Crime Facts* (page last revised on March 27, 2020) <https://www.bjs.gov/content/dcf/enforce.cfm>.

barbiturates.” More than 80% of drug law violation arrests are for possession (as opposed to sale/trafficking or manufacture).⁵

The overuse of incarceration for non-violent crimes that do not pose a public safety threat implicates several human rights including the rights to: (1) life, liberty, and security of the person;⁶ (2) freedom of movement;⁷ (3) freedom from arbitrary arrest/detention;⁸ (4) to privacy;⁹ (5) freedom from torture or inhumane treatment or punishment;¹⁰ (6) to health.¹¹ Violations of the right to health in U.S. jails and prisons, including through overcrowding, are of particular concern in light of the global Coronavirus Disease-2019 (COVID-19) pandemic. The Center for Disease Control and Prevention (CDC) recommends “social distancing” and that people remain six feet apart from one another in order to protect themselves and others from contracting COVID-19.¹² This is not possible for people being detained in jails or prisons, where over-crowding may be severe.¹³ As panic about COVID-19 mounts, prison staff in the U.S. has received little direction or resources, and many have resorted to calling out of work to protect themselves from contracting the virus.¹⁴ The health implications of over-incarceration and overcrowding of prisons are not new:

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has specifically noted the link between overincarceration, overcrowding and infringements upon the right to health, especially in relation to the spread of infectious and communicable diseases... This poses risks not only to the health of other detainees, but also to the staff and even the general population once prisoners are being released.¹⁵

However, the U.S.’ failure to de-carcerate non-violent offenders is particularly serious as COVID-19 spreads throughout corrections facilities and needlessly harms vulnerable inmates posing no threat to public safety.¹⁶

⁵ *Drugs and Crime Facts*, Bureau of Justice Statistics, (page last revised on March 27, 2020) <https://www.bjs.gov/content/dcf/enforce.cfm>.

⁶ Universal Declaration of Human Rights (“UDHR”) art. (3); International Covenant on Civil and Political Rights (“ICCPR”) art. (9), *adopted* Dec. 16, 1966, *ratified by the United States* June 8, 1992, 999 U.N.T.S. 171.

⁷ UDHR, Art. 13(1); ICCPR, Art. 12.

⁸ UDHR, Art. 9; ICCPR, Art. 9.

⁹ UDHR, Art. 12; ICCPR, Art. 17.

¹⁰ UDHR, Art. 5; ICCPR, Art. 7.

¹¹ International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) art. (12), *adopted* Dec. 16, 1966, *signed by the United States* October 5, 1997, 993 U.N.T.S. 3. Although the U.S. has not ratified ICESCR, the U.S. is signatory to ICESCR. Therefore, the U.S. must refrain from actions that would defeat its object and purpose. Restatement (Fourth) of The Foreign Relations Law of the United States § 304 (Am. Law Inst. 2018).

¹² *How to Protect Yourself*, Corona Virus Disease-2019, Center for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

¹³ Gaby Galvin, *Underfunded, Overcrowded: State Prisons Struggle with Reform*, U.S. News, (July 2016) <https://www.usnews.com/news/best-states/articles/2017-07-26/understaffed-and-overcrowded-state-prisons-crippled-by-budget-constraints-bad-leadership>; *See also* Dana Liebeison, *18 States Packed Their Prisons Over Maximum Capacity*, Huffington Post, https://www.huffpost.com/entry/18-states-have-packed-prisons-over-maximum-capacity_n_55fb3025e4b0fde8b0cd9ea1.

¹⁴ Cassidy McDonald, *Federal Prison Workers Say Conflicting Orders on Coronavirus Response is Putting Lives at Risk*, CBS News, (March 19, 2020) <https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-orders-putting-lives-at-risk-2020-03-19/>.

¹⁵ *Human rights implications of overincarceration and overcrowding*, Human Rights Council, thirtieth session, (10 August 2015), para. 17.

¹⁶ A letter to the Trump Administration by the American Civil Liberties Union and others called for the release of vulnerable populations from prisons in light of growing public health concerns. ACLU and others, *Bipartisan*

B. Disparate Impacts of Drug Policies on Racial Minorities, Low-Income People, and Women

The U.S.’ highly punitive approach to drug policy disparately impacts low-income people, racial minorities, and women. These groups are more likely to be arrested for non-violent crimes in the first place, are less likely to afford bail, and are likely to face harsher sentences. Race and gender are statistical indicators of the likelihood that a person in the U.S. will be arrested, charged, and sentenced to incarceration for a drug-related crime. The systematic and institutional oppression of minorities and women through drug policy violates the human rights to equality and non-discrimination.¹⁷

Low-income people are disparately impacted by the cash bail system in the U.S., which requires most people who are arrested to pay a certain amount of money to be released before trial. This fee is supposed to guarantee that the arrestee will return to court for future hearings related to the arrest. However, if arrestees are unable to pay, they will be detained until the case is resolved or dismissed—sometimes months or years.¹⁸ According to available data, the average bail amount is approximately \$10,000 for felony defendants.¹⁹ Meanwhile, the median annual income of people in jail is only \$15,109 prior to their incarceration.²⁰ With the U.S. poverty guideline for a two-person household at \$15,930, these calculations highlight the over-policing of low-income people in the U.S.²¹ People who can afford to do so pay a bail bondsman a non-refundable fee of 10%.²² Then, the bondsman pays the entire bail amount, and is reimbursed by the court when the arrestee shows up for their court date.²³

Because of the way the cash bail system functions, mostly low-income people are held in pre-trial detention. The U.S. jail system, as opposed to the prison system, ‘houses’ people in pre-trial

coalition calls on President Trump to commute federal prison sentences for populations most vulnerable to COVID-19, (March 24, 2020) <https://www.sentencingproject.org/publications/bipartisan-coalition-calls-on-president-trump-to-commute-federal-prison-sentences-for-populations-most-vulnerable-to-covid-19/>.

¹⁷ UDHR, Art. 2, Art. 7 and ICCPR, Art. 2 (providing for equality and non-discrimination on the basis of race and sex); ICESCR, Art. 2; International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), art. 2(1)(a)(c), art. 5(a), *adopted* 16 Aug. 1990, *ratified by the United States* October 21, 1994, 660 U.N.T.S. 195. (providing for equality and non-discrimination on the basis of race); UDHR, Art. 7; ICCPR, Art. 3 and ICESCR, Art. 3; Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) art. (2, 3, 5, 6, 7, 15), *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13. (providing for equality and non-discrimination on the basis of sex). Although the U.S. has not ratified CEDAW, the U.S. became a signatory to CEDAW on July 17, 1980. Therefore, the U.S. must refrain from actions that would defeat its object and purpose. Restatement (Fourth) of The Foreign Relations Law of the United States § 304 (Am. Law Inst. 2018).

¹⁸ Bernadette Rabuy, Daniel Kopf, *Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time*, Prison Policy Initiative, (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html>.

¹⁹ *Id.*

²⁰ *Id.* (noting the calculations were made by adjusting the 2014 information for inflation. In 2014 dollars, people in prison had a median annual income of \$19,185 prior to their incarceration. According to the Bureau of Labor Statistics’ CPI inflation calculator, this is equivalent to \$19,208 in 2015 dollars. Therefore, in 2015 dollars, the median annual income of a person in a local jail was, prior to their incarceration, 79% of the median pre-incarceration income for a person in state prison).

²¹ *2015 Poverty Guidelines*, “2015 Poverty Guidelines for the 48 Contiguous States and the District of Columbia,” U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (ASPE), (September 2, 2015), <https://aspe.hhs.gov/2015-poverty-guidelines#thresholds>.

²² Bernadette Rabuy, Daniel Kopf, *supra* note 18.

²³ *Id.*

detention.²⁴ In the prison system, there are approximately 73,750 people being detained for drug offenses,²⁵ whereas approximately 148,000 people on any given day are detained in jail, 30,000 of whom are not un-convicted.²⁶ The number of people cycled through U.S. jails each year is a staggering 12 million.²⁷ Six out of every 10 people in U.S. jails (approximately 500,000 people on any given day) are being detained pre-trial; in other words, they are not convicted of any crime.²⁸

Likewise, racial minorities are more likely to be held in pre-trial detention than whites because they are more likely to be arrested, they are more likely to be held on bail, and they are likely to receive higher bail amounts. Black men are more likely than white men to be arrested in the first place for drug crimes, despite the fact that black men and white men use drugs at about the same rate.²⁹ Some calculations (based on Census data combined with data from the FBI) estimated that, at the state level, black people are 6.5 times more likely to be incarcerated for drug-related crimes.³⁰ People belonging to racial minority groups in the U.S. are likewise disparately impacted by bail and pre-trial detention: African Americans³¹ face higher bail amounts and are less likely to be released on pre-trial supervision rather than a cash bail.³² Compared to white men charged with the same crime and with the same criminal histories, African-American men receive bail amounts 35% higher; for Hispanic men, bail is 19% higher than white men.³³

Additionally, women are more likely to be incarcerated for drug offenses and are less likely to afford bail than men. The U.N. Special Rapporteur on violence against women reported that drug laws and policies, “are a leading cause of rising rates of incarceration of women around the world” and expressed concern that, “women who commit relatively low-level drug crimes . . . are more likely to be given longer prison sentences than men who commit major trafficking offenses.”³⁴ This holds true in the U.S., where approximately one in four women incarcerated in state prisons in the U.S. was convicted of a non-violent drug offense, a substantially higher ratio than that of

²⁴ *Id.*

²⁵ *Id.*

²⁶ Wendy Sawyer, Peter Wagner, Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2019*, Infographic: “76% of people held by jails are not convicted of any crime,” (March 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

²⁷ Vera Institute of Justice, *Incarceration’s Front Door: The Misuse of Jails in America*, (February 2015/updated July 29, 2015), p. 4, *citing* Minton and Golinelli, 2014 https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf.

²⁸ *Why We Need Pretrial Reform*, Pretrial Justice Institute, <https://www.pretrial.org/get-involved/learn-more/why-we-need-pretrial-reform/>.

²⁹ Ram Subramanian, Ruth Delaney, Stephen Roberts, Nancy Fishman, Peggy McGarry, *Incarceration’s Front Door: The Misuse of Jails in America*, Vera Institute of Justice, (February 2015/updated July 29, 2015), p. 15, https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf.

³⁰ *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, The Hamilton Project, (October 21, 2016) https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

³¹ The author of this submission refers to “African American” populations or “black” populations based on the description that is used by the data being cited. The descriptions are not intended to be interchangeable, and they may refer to different demographics, depending on how people self-identify or how they are identified by data gatherers.

³² Pretrial Justice Institute, *supra* note 28.

³³ *Id.*

³⁴ Rashida Manjoo (U.N. Special Rapporteur on violence against women), *Pathways to Conditions and Consequences of Incarceration Amongst Women*. U.N. Doc. A/68/340 (Aug. 21, 2013).

their male counterparts.³⁵ The percentages of women in federal prison for drug crimes compared to their male counterparts is 56 percent and 47 percent, respectively.³⁶ Women are also more likely to be held in pre-trial detention simply because they cannot pay their bond. A study found that women in jail before trial earned scarcely more per year than the average bond amount of \$10,000.³⁷

Moreover, women who belong to a racial minority are at higher risk of incarceration than white women. Although black women represent a mere 13% of the population of women in the U.S., 30% of all incarcerated women are black.³⁸ Hispanic women represent 11% of the population of women in the U.S. but represent 16% of all incarcerated women.³⁹

While some recent reforms have led to a decrease of the total prison population since 2009, the rates of incarceration for women in state prisons has remained stagnant.⁴⁰ Some possible explanations for the slower progress of de-carceration efforts for women include: (1) fewer diversion programs are available to women (some “boot camp”/rehabilitation programs that offer alternatives to incarceration for mostly non-violent crimes are available to men only); (2) women typically have “lower rankings” in the drug trade than their male counterparts and, therefore, have less information on drug trafficking to offer the State in exchange for a favorable plea deal that results in a shorter sentence.⁴¹

PART II: Pregnant Women Who use Drugs and Arbitrary Detention in the U. S.

A. Criminalization of Pregnant Women Who Use Drugs in the U.S.

During the 1980’s, the U.S. increased the criminalization of women who use drugs’ pregnancies, as a result of repressive drug policies, resistance to women’s access to abortion, and stigmatization of urban poverty.⁴² During this period, the media spread images of babies born, harmed by their mothers’ cocaine use during pregnancy.⁴³ This sensationalized perception of “crack-babies” not

³⁵ U.S. Commission on Civil Rights, Briefing Report, *Women in Prison: Seeking Justice Behind Bars*, (February 2020) <https://www.usccr.gov/pubs/2020/02-26-Women-in-Prison.pdf> citing Department of Justice, *Prisoners in 2016*, (2016), p. 3.

³⁶ *Id.* at 3.

³⁷ Bernadette Rabuy, Daniel Kopf, *supra* note 18.

³⁸ *Facts About the Over-Incarceration of Women in the United States*, American Civil Liberties Union, (2020), <https://www.aclu.org/other/facts-about-over-incarceration-women-united-states>.

³⁹ *Id.*

⁴⁰ Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Growth*, Prison Policy Initiative, (January 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html#statelevel.

⁴¹ *Women in Prison: Seeking Justice Behind Bars*, U.S. Commission on Civil Rights, Briefing Report, (February 2020) Chapter 1, p.11; *See also Id.*; *See also* Kasia Malinowska-Sempruch and Olga Rychkova, Open Society, *The Impact of Drug Policy on Women*, (Sept. 28, 2016), p. 7 (noting the increased number of women in prison for drug crimes in the U.S., Latin America, Spain, Estonia, Latvia, Italy, Tajikistan, and Ecuador); Rashida Manjoo *supra* note 33, at para. 26, (noting that women may be subjected to harsher penalties for drug crimes than their male counterparts because they do not have access to “insider information” that allows men to plea-bargain or make deals with the prosecutors in exchange for lighter sentences).

⁴² Amnesty International, *Criminalizing Pregnancy, Policing Pregnant Women Who use Drugs in the USA* (2017), at 22.

⁴³ *Id.*

only dehumanizes pregnant women who use drugs but is also scientifically unsound. While there are correlations between pregnant women's use of drugs and certain pregnancy outcomes, there is no proven causal relationship.⁴⁴ Additionally, criminalization of pregnant women who use drugs stigmatizes and puts blame on an already vulnerable population, instead of highlighting solutions to ensure women's well-being. It further violates the rights to liberty and security of person,⁴⁵ equality and non-discrimination,⁴⁶ privacy,⁴⁷ health,⁴⁸ and family.⁴⁹

The criminalization of pregnant women is a central issue pertaining to arbitrary detention in the U.S., with pregnant women making up a significant portion of the incarcerated population. According to statistics from the Bureau of Justice Statistics, in 2002 about 5% of female jail inmates were pregnant at the time of admission.⁵⁰ A more recent study from the *American Journal of Public Health* analyzed data from 22 U.S. state prison systems and all U.S. federal prisons and found that about 3.8% of women were pregnant when entering prison between 2016-17.⁵¹ This section analyzes the various laws which criminalize the pregnancies of women who use drugs in the U.S. and their impact on the health and well-being of both the pregnant woman and fetus.

B. Laws Criminalizing the Pregnancies of Women Who Use Drugs in the U.S.

There are three different legal mechanisms through which the U.S. commits women who use drugs to involuntary detention: direct criminalization, indirect criminalization, and over-policing and

⁴⁴ Jeanne Flavin & Lynne M. Paltrow, *Punishing Pregnant Drug-Using Women, Defying Law, Medicine, and Common Sense*, 29 *Journal of Addictive Diseases* 231, 236 (2010).

⁴⁵ ICCPR, Art. 9(1); UDHR, Art. 3.

⁴⁶ ICCPR, Arts. 3, 26, ("The State Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant," "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law"); CEDAW, Art. 2 ("States Parties condemn discrimination against women in all its forms"); ICESCR, Art. 2(2) ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind"); UDHR, Art. 7. Because women are generally the ones in society who can become pregnant, laws that criminalize the pregnancies of women who use drugs are by nature discriminatory against women. The CEDAW Committee has upheld that discriminating against pregnant women is inherently sex discrimination in *Alyne v. Brazil*, when it found that Brazil, in denying an Afro-Brazilian woman necessary maternal health services ultimately leading to her death, had discriminated against her for her sex. Center for Reproductive Rights, *Case of Alyne da Silva Pimentel Teixeira v. Brazil, Reproductive Rights Factsheet*, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/LAC_Alyne_Factsheet_0.pdf

⁴⁷ ICCPR, Art. 17, ("No one shall be subjected to arbitrary or unlawful interference with his privacy..."); UDHR, Art. 12.

⁴⁸ ICESCR, Art. 12(1), ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"); CEDAW, Art. 12 ("State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care services, including those related to family planning... State Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation"); UDHR, Art. 25.

⁴⁹ ICCPR, Art. 23; ICESCR, Art. 10; CRC, Art. 9(1).

⁵⁰ Laura M. Maruschak, *Medical Problems of Jail Inmates, Bureau of Justice Statistics Special Report*, U.S. Department of Justice (2006).

⁵¹ Carolyn Sufrin, Lauren Beal, Jennifer Clarke, Rachel Jones, & William D. Mosher, *Pregnancy Outcomes in US Prisons, 2016-2017*, *American Journal of Public Health* (April 10, 2019), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305006>.

drug testing of marginalized communities.⁵² Direct criminalization consists of criminal laws that explicitly punish pregnant women for their drug use. Indirect criminalization uses general criminal laws to disproportionately punish pregnant women who use drugs.⁵³ Additionally, marginalized communities are subject to higher levels of policing, as discussed in Part I, as well as drug testing in healthcare settings—for instance, a hospital may drug test pregnant women solely based on suspicion.⁵⁴

The laws that directly criminalize pregnant women for their drug use in the U.S. include measures recognizing fetal personhood, fetal assault laws, criminal child abuse laws, laws defining substance use during pregnancy as child abuse, and civil commitment laws, described below. These laws are widespread, as 45 states have documented cases in which pregnancy was a necessary factor leading to attempted as well as actual deprivations of liberty, 38 states have fetal assault laws, 18 states consider substance abuse during pregnancy to be child abuse, and four states consider drug use during pregnancy to be grounds for civil commitment or involuntary detention in a treatment facility.⁵⁵

Fetal personhood laws contribute to the arbitrary detention of pregnant women in the U. S., thereby violating their fundamental human rights. Fetal personhood measures are attempts to “establish fertilized eggs, embryos and/or fetuses as ‘legal persons’ (separate from pregnant women) with equal rights to others.”⁵⁶ Fetal assault laws, also known as “chemical endangerment” laws, or “personhood” laws are laws in which, the “victim” of a crime can include a fetus, and exist in 38 states—23 of the states apply these laws so broadly that they apply at any stage of gestation.⁵⁷ These laws also are often very broad in their application—for instance, in Alabama, a chemical endangerment law that was intended to protect children from exposure to environments with drugs or controlled substances, has also been used to prosecute pregnant women who use drugs.⁵⁸ These laws have been used to prosecute women of color of low socioeconomic status.⁵⁹

While opponents of women’s access to abortion often support fetal personhood measures, emphasizing the importance of protecting the fetus, pro-choice advocates point to the harms these laws inflict on pregnant women.⁶⁰ Importantly, the international human right to life does not apply prenatally. Negotiations surrounding Article 1 of the Universal Declaration of Human Rights⁶¹ indicate that specifying the word “born,” was intentional, so as to exclude a prenatal interpretation of the human rights listed in the declaration.⁶² In interpreting the right to life under the International

⁵² Amnesty International, *supra* note 40, at 16.

⁵³ *Id.* at 16.

⁵⁴ *Id.*

⁵⁵ *Id.* at 15.

⁵⁶ *Id.* at 17.

⁵⁷ *Id.*

⁵⁸ *Id.* at 7.

⁵⁹ Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *Harvard Law Review* 1419, 1421 (1991).

⁶⁰ National Conference of State Legislatures, *State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women* (March 1, 2018), <https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>.

⁶¹ UDHR, Art. 1, “All human beings are born free and equal in dignity and rights...”

⁶² U.N. GAOR 3rd Comm., 99th mtg. at paras. 110-124, U.N. Doc. A/PV/99 (1948); *see also* Center for Reproductive Rights, *Whose Right to Life? Women’s Rights and Prenatal Protections under Human Rights and Comparative Law* at 5.

Covenant on Civil and Political Rights (“ICCPR”), the Human Rights Committee (“HRC”) stated that abortion laws must not, “result in violation of the right to woman or girl, or her other rights under the Covenant,” signifying that the rights of pregnant women are a priority.⁶³ In fact, the HRC criticized the Constitution of the Republic of Ireland which gave the right to life equally to pregnant women and to unborn children.⁶⁴ Moreover, the Committee on Economic, Social and Cultural Rights (“the CESCR Committee”) and the Committee on the Elimination of Discrimination Against Women (“the CEDAW Committee”) have recognized that prenatal health and development can be ensured through protecting the health of pregnant women.⁶⁵

Criminal child abuse laws applied to criminalize women who use drugs’ pregnancies result in their arbitrary detention, thereby violating their fundamental human rights. Criminal child abuse laws applied to fetuses in Alabama and South Carolina permit prosecutors to interpret the word “child” to charge women for their actions during their pregnancies.⁶⁶ An attorney from South Carolina explained, “Since 1996, every third trimester fetus has been considered a child for child protection and criminal law. For a pregnant woman, everything she might do that might potentially be seen as dangerous might set her up for arrest. Every pregnant woman is a walking disaster.”⁶⁷ Additionally, eighteen states under their civil laws consider substance use during pregnancy to be a form of child abuse.⁶⁸ In these states, substance abuse during pregnancy may result in investigation and even loss of the child after birth.⁶⁹

Lastly, five states, Wisconsin, Minnesota, Oklahoma, North Dakota, and South Dakota, have civil commitment laws that enable child protection or public health and safety laws to detain pregnant women.⁷⁰ Wisconsin specifically permits a court to claim jurisdiction over an unborn child if a pregnant woman, “lacks self-control in the use of alcohol beverages” or “controlled substances.”⁷¹ This UN Working Group on Arbitrary Detention, after visiting the US in 2016, commented that, “[t]his form of deprivation of liberty is obviously gendered and discriminatory in its reach and application—combined with the presumption of drug or substance abuse—is the determining factor for involuntary treatment.”⁷²

While courts have often dismissed cases where criminal laws are used to charge pregnant women for harm to the fetus due to a lack of legislative intent for such charges, this is not always the case,

⁶³ Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* (Oct. 30, 2018), at para. 8.

⁶⁴ Human Rights Committee, Concluding observations on Ireland, UN Doc. CCPR/C/IRL/CO/4, para. 9; Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2324/2013 Amanda Mellet v Ireland*. UN Doc. CCPR/C/116/D/2324/2013, (Nov. 17, 2016).

⁶⁵ See Committee on Economic, Social and Cultural Rights, General Comment 14, (August 11, 2000), UN Doc. E/C.12/2000/4 at para. 14; CEDAW General Recommendation 24, UN Doc. A/54/38/Rev.1, 1999, para. 31(c).

⁶⁶ Amnesty International, *supra* note 40, at 19.

⁶⁷ *Id.*

⁶⁸ Amnesty International, *supra* note 40, at 19.

⁶⁹ *Id.*

⁷⁰ *Id.* at 21.

⁷¹ *Id.*

⁷² Working Group on Arbitrary Detention: Preliminary Findings from its visit to the United States of America (11-24 October 2016), www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E.o

and judicial criminalization seems to be increasing.⁷³ Recently, in *U.S. v. Flute*,⁷⁴ the Eighth Circuit upheld the first federal manslaughter charge against a woman who used drugs during her pregnancy, as one *Harvard Law Review* article noted, “The decision in *Flute* escalates to the federal level the state judicial trend of using broad interpretations of statutes designed for other purposes to criminalize prenatal conduct. In doing so, *Flute* grants the federal government sweeping discretion to punish the conduct of pregnant people under its jurisdiction.”⁷⁵ The article additionally noted, “Despite the public health consensus that prenatal drug use should be treated medically and not criminally, judicial criminalization appears to be increasing. The interpretation in *Flute*, like those of state courts, expands criminality beyond what legislators have ordered. The elastic criminalization gives unchecked discretion to prosecutors, medical providers, and courts to choose what conduct—and whose conduct—is found criminal.”⁷⁶ Furthermore, *Flute* may be used to target poor women of color, particularly American Indian women, because Native Americans on reservations may be charged directly with federal crimes.⁷⁷ Moreover, whether or not the criminal charges are ultimately upheld, they take a drastic mental and physical toll on pregnant women who use drugs, deterring them from pursuing necessary healthcare services, as discussed below.⁷⁸

C. The Negative Impacts of Criminalization on the Health of the Woman and Fetus

The criminalization of pregnant women who use drugs in the U.S., negatively impacts the health and well-being of women, as well as their fetus. As an initial matter, women reported that the threat of criminal punishment for drug use during pregnancy discourages them from seeking healthcare, prenatal care, and drug treatment.⁷⁹ According to Amnesty International, healthcare providers reported that pregnant women who use drugs avoid prenatal care and sometimes travel to neighboring states for medical care, or even to give birth, in fear of prosecution in their home state.⁸⁰ Moreover, sometimes women are arrested despite their voluntary participation in drug treatment.⁸¹ Ultimately, the threat of punishment does not deter drug use, and only exacerbates issues surrounding substance abuse.⁸²

Furthermore, once incarcerated, pregnant women in the U.S. do not receive adequate care, resulting in an unhealthy environment for both mother and child.⁸³ The National Commission on

⁷³ *Criminalization of Pregnancy – Eighth Circuit Upholds Manslaughter Charge against Pregnant Woman for Death of Baby Based on Prenatal Drug Use – United States v. Flute*, 929 F.3d 584 (8th Cir. 2019), 133 *Harvard Law Review*, 1087, 1087 (2010).

⁷⁴ *United States v. Flute*, 929 F.3d 584 (8th Cir. 2019).

⁷⁵ *Harvard Law Review*, *supra* note 71, at 1088.

⁷⁶ *Id.* at 1094.

⁷⁷ *Id.* at 1088.

⁷⁸ *See* Amnesty International, *supra* note 40, at 9.

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health*, 38 *Journal of Health Politics, Policy and Law*, 299, 332 (2013).

⁸² Lynn M. Paltrow, *Punishment and Prejudice: Judging Drug-Using Pregnant Women*, National Advocates for Pregnant Women (1999), <http://www.advocatesforpregnantwomen.org/articles/ruddick.htm>.

⁸³ UN Office of the High Commissioner, *Sexual and reproductive health and rights*, <https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>

Correctional Health and Care provides standards for the treatment and care of pregnant incarcerated women,⁸⁴ but individual states often fail to make their policies publicly available or write guidelines.⁸⁵ Prison Policy initiative tracked states' standards of care for incarcerated pregnant women, finding, "The data show that the lack of codified protocols for the care of pregnant women in state prisons is a widespread issue, and even policies that do exist frequently do not include provisions for basic medical needs."⁸⁶ In some states, over 20% of prison pregnancies resulted in miscarriages, and in other states, preterm birth rates exceeded the national average.⁸⁷

CONCLUSION

In the U.S., punitive drug policy contributes to arbitrary detention and violates fundamental human rights, including the right to life, liberty, and security of the person, freedom of movement, freedom from arbitrary arrest/detention, freedom from torture or inhumane treatment or punishment, privacy, equality and non-discrimination, health, and family. U.S. drug policy disparately impacts racial minorities, low-income populations, and women. These human rights violations are only compounded when one takes an intersectional approach and considers low-income and/or minority women. Pregnant women who use drugs are particularly vulnerable to arbitrary detention under legal frameworks that criminalize the pregnancies of women who use drugs, which negatively impacts the health and wellbeing of both woman and fetus.

⁸⁴ National Commission on Correctional Health Care, *Women's Health Care in Correctional Settings*, <https://www.ncchc.org/womens-health-care>.

⁸⁵ Furthermore, the documentation of pregnancies and pregnancy care within prisons is extremely sparse, anecdotal, and difficult to generalize on a national level. There therefore remains significant gaps in information about the treatment of pregnant incarcerated women in the U.S. Roxanne Daniel, *Prisons neglect pregnant women in their healthcare policies*, Prison Policy Initiative (Dec. 5, 2019), <https://www.prisonpolicy.org/blog/2019/12/05/pregnancy/>.

⁸⁶ *Id.*

⁸⁷ Carolyn Sufrin, Lauren Beal, Jennifer Clarke, Rachel Jones, & William D. Mosher, *Pregnancy Outcomes in US Prisons, 2016-2017*, *American Journal of Public Health* (April 10, 2019), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305006>.