
October 2015

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Recommended Citation

Katherine Sikich, *Peeling Back the Layers of Substance Abuse During Pregnancy*, 8 DePaul J. Health Care L. 369 (2005)

Available at: <https://via.library.depaul.edu/jhcl/vol8/iss2/4>

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PEELING BACK THE LAYERS OF SUBSTANCE ABUSE DURING PREGNANCY

*Katherine Sikich**

INTRODUCTION

When she was fourteen years old, Cornelia Whitner, an African American from South Carolina, witnessed her mother's unexpected death.¹ This loss was especially devastating to Cornelia because her mother had been her only support system.² Feeling lost and alone following her mother's death, Cornelia turned to marijuana, alcohol, and other drugs.³ By the time Cornelia turned fifteen years old, she dropped out of school and became pregnant.⁴ Cornelia went on to have two more children, the youngest of whom was born with cocaine in his system.⁵ Even though the boy was healthy, Cornelia was arrested, charged, and convicted of child abuse because of her cocaine use during pregnancy.⁶ On appeal, the Supreme Court of South Carolina upheld Cornelia's conviction, making her the first woman to be punished by the highest court of her state for substance abuse during pregnancy.⁷

Similar to Cornelia Whitner, many pregnant women experience personal difficulties causing them to turn to drugs.⁸ Yet, applying

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¹ Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALA. L. REV. 999, 1029-30 n.158 (1999).

² *See id.* at 1030.

³ *See id.* (quoting and discussing Arlene Levinson, *S.C. Law on Crack Moms May be Heard in High Court*, ROCK HERALD (S.C.), Mar. 15, 1998, at 1A).

⁴ *See id.*

⁵ *See id.*

⁶ *See Paltrow, supra* note 1, at 1030.

⁷ *See Whitner v. State*, 492 S.E.2d 777, 777-788 (S.C. 1997).

⁸ *See, e.g.*, LINDA CHAMBERLAIN, MAKING THE CONNECTION: DOMESTIC VIOLENCE AND PUBLIC HEALTH slide 89 (The Family Violence Prevention Fund, 2004) (presenting findings from a study done on physical abuse during pregnancy in JA

punitive measures against pregnant substance abusers is society's way of avoiding the social ills these women often face, such as abusive partners, poverty, poor health care, and racism.⁹ Through its application of punitive measures, society fails to peel back all layers of problems pregnant substance abusers face.¹⁰

Many attempts have been made to reduce substance abuse during pregnancy.¹¹ There are two prevailing methods used to address the problem: punitive measures and non-punitive measures.¹² Proponents of a punitive approach argue that punitive measures serve as a deterrent for other pregnant women, protect children's welfare, and hold individual pregnant women responsible for substance abuse during pregnancy.¹³ On the other hand, those who support non-punitive measures believe that pregnant women who abuse drugs should be rehabilitated and receive prenatal care.¹⁴ Proponents of this approach argue that both the United States Supreme Court and the health community have long recognized that drug addiction is an illness that should be overcome with treatment.¹⁵

This paper argues that non-punitive measures are more effective than punitive approaches at reducing drug abuse among pregnant women. Part II of this paper reveals the number of women who abuse drugs during pregnancy and the effects illegal drugs, legal drugs, and other activities may have on both the pregnant woman and her fetus. Part III explores how punitive measures are applied to pregnant substance abusers. Part IV argues against the punitive approach because of its many failures. Part V suggests that the preferable method for addressing the problems of substance abuse during

Gazmarian et al., *Prevalence of Violence Against Pregnant Women*, 275 JAMA 1915-20 (1996)).

⁹ See Dorothy E. Roberts, *Punishing Drug Addicts who have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1436 (1991).

¹⁰ See *id.*

¹¹ See Lynn M. Paltrow, et al., Year 2000 Overview: Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs, Report of the Women's Law Project and National Advocates for Pregnant Women, available at www.advocatesforpregnantwomen.org/articles/index.htm (2000).

¹² See *id.*

¹³ Lisa Eckenwiler, *Why Not Retribution? The Particularized Imagination and Justice for Pregnant Addicts*, 32 J. L., MED. & ETHICS 89, 90 (2004).

¹⁴ See, e.g., Paltrow et al., *supra* note 11; see also Page McGuire Linden, *Drug Addiction During Pregnancy: A Call for Increased Social Responsibility*, 4 AM. U. J. GENDER & L. 105, 134-39 (1995) (suggesting that society has an obligation to assist pregnant substance abusers).

¹⁵ See Paltrow, *supra* note 11.

pregnancy is non-punitive measures, such as offering treatment and increasing access to prenatal care. This part also examines the barriers pregnant substance abusers face when attempting to seek treatment. Part VI outlines concerns for the future if punitive measures continue to be used to address substance abuse during pregnancy.

I. EXTENT AND EFFECTS OF SUBSTANCE ABUSE DURING PREGNANCY

It is helpful to consider the percentages of pregnant women who abuse various substances and the effects those substances may have on both the fetus and the woman.¹⁶ Importantly, a discussion of substance abuse during pregnancy should not be limited to illegal drugs¹⁷ because they are not the only substances that may cause harm during pregnancy.¹⁸ Instead, a thorough examination must include consideration of both legal and illegal drugs.¹⁹

A. Statistics

The National Household Survey on Drug Abuse (NHSDA) is a survey conducted by the Substance Abuse and Mental Health Services Administration (SAMHSA).²⁰ The federal government has performed this survey annually since 1971.²¹ In order to collect data, the NHSDA uses questionnaires in face-to-face interviews at the homes of a representative sample of the population.²² The survey “document[s] past-month, past-year, and lifetime use of alcohol and other drugs.”²³

¹⁶ See Shelly F. Greenfield et al., *Epidemiology of Substance Use Disorders in Women*, 30 OBSTETRICS AND GYNECOLOGY CLINICS OF N. AM. 413 (2003); Jay M. Bolnick & William F. Rayburn, *Substance Use Disorders in Women: Special Considerations During Pregnancy*, 30 OBSTETRICS AND GYNECOLOGY CLINICS OF N. AM. 545 (2003); Krzysztof M. Kuczkowski, *Anesthetic Implications of Drug Abuse in Pregnancy*, 15 J. OF CLINICAL ANESTHESIA 382 (2003); Luis B. Curet & Andrew C. Hsi, *Drug Abuse During Pregnancy*, 45 CLINICAL OBSTETRICS & GYNECOLOGY 73 (2002); Michelle D. Mills, Comment, *Fetal Abuse Prosecutions: The Triumph of Reaction over Reason*, 47 DEPAUL L. REV. 989 (1998).

¹⁷ See, e.g., Margaret P. Spencer, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 393, n. 1 (1993) (limiting discussion to drugs listed in the Controlled Substances Act, 21 U.S.C.A. 801-802 (West 1981 & Supp. 1992), and excluding a discussion of marijuana, which is also in that list).

¹⁸ See Mills, *supra* note 16, at 1001.

¹⁹ See *id.* at 999-1005.

²⁰ Greenfield, et al., *supra* note 16, at 416 (describing the NHSDA survey).

²¹ *Id.*

²² *Id.*

²³ *Id.*

One specific area the survey investigated was the data regarding women who used various substances, including illicit drugs, alcohol, and cigarettes.²⁴ Women surveyed ranged from fifteen to forty-four years old.²⁵

The survey found that in 2000 and 2001 a smaller percentage of pregnant women within the fifteen to forty-four year old age range had used illicit drugs in the month prior to the interview (3.7%) than their non-pregnant counterparts (8.3%).²⁶ However, the percentage of pregnant women in the fifteen to seventeen year old age group who had used illicit drugs (15.1%) was actually higher than the percentage of non-pregnant women in this age group (14.1%).²⁷ These statistics are alarming because they reveal that not only are more young people use illicit drugs than older age groups, but also that more pregnant women in this age group use illicit drugs than non-pregnant women.²⁸

The survey also collected data for alcohol use during 2000 and 2001 and was also quite revealing.²⁹ While fewer pregnant women consumed alcohol (12.9%) than non-pregnant women (49.8%), there were still a substantial percentage of women who drank alcohol during their pregnancy.³⁰ Also, the data shows that the percentage of women who were binge drinkers during their pregnancy was high (4.6%), but still lower than the percentage of non-pregnant women who were binge drinkers (20.5%).³¹

Finally, the survey also collected data on the number of women who smoked cigarettes during 1999, 2000, and 2001.³² While the percentage of women who smoked during their pregnancy has gone down from 30% in 1999 to 19.8% in 2000-2001, the percentage is still high.³³ As a comparison, 31% of non-pregnant women smoked in 1999 and 29.5% smoked cigarettes in 2000-2001.³⁴

Therefore, the statistics reveal that pregnant women are using illicit drugs, alcohol, and cigarettes during their pregnancies.³⁵ Next, it

²⁴ See *id.* at 416, 431, 420, 434.

²⁵ Greenfield, et al., *supra* note 16, at 420.

²⁶ *Id.* at 431.

²⁷ *Id.*

²⁸ See *id.*

²⁹ See *id.* at 420.

³⁰ Greenfield, et al., *supra* note 16, at 420.

³¹ *Id.*

³² See *id.* at 434.

³³ *Id.*

³⁴ *Id.*

³⁵ See generally Greenfield, et al., *supra* note 16, at 413.

is important to explore whether the various substances they are using have effects on either themselves or their fetuses.

B. Effects

As a preliminary matter, this paper limits its discussion to the effects illegal and legal drugs may have on the woman and the fetus, and not the potential long-term effects these substances may have on the infant.³⁶ The potential effects discussed are by no means the only ones that have been reported or studied. Instead, the discussion that follows is merely intended to serve as a brief overview.

1. Illegal Drugs

This discussion will examine the effects that marijuana, opiates, and cocaine may have on the woman and the fetus. Marijuana use by women is connected with “respiratory and pulmonary diseases.”³⁷ However, the effects marijuana may have on the fetus exposed during pregnancy are inconsistent.³⁸ A reduced length of gestation resulting in decreased birthweight has been documented,³⁹ but overall “no significant relationship has been found” between marijuana use and reduced birthweight.⁴⁰

Opiate use may cause infections in women who use shared needles.⁴¹ These infections could include “HIV, hepatitis B and C, and *Staphylococcus aureus*.”⁴² Exposure to opiates during pregnancy may negatively affect the fetus, resulting in “abruptio placentae, eclampsia, premature labor, stillbirth, intrauterine growth retardation” and “respiratory distress.”⁴³

Research indicates that women who abuse cocaine are at an increased risk for “heart attack, stroke, brain seizures,” and other possible neurological disorders.⁴⁴ Also, smoking crack cocaine may cause “respiratory and pulmonary diseases.”⁴⁵ On the other hand, the effect of a fetus’s exposure to cocaine during pregnancy is a very

³⁶ See, e.g., Greenfield, et al., *supra* note 16, at 413 (discussing several possible long-term effects of substance abuse during pregnancy).

³⁷ Curet & Hsi, *supra* note 16, at 74.

³⁸ *Id.*

³⁹ Bolnick & Rayburn, *supra* note 16, at 547 tbl.1.

⁴⁰ Curet & Hsi, *supra* note 16, at 74.

⁴¹ Greenfield, et al., *supra* note 16, at 427.

⁴² *Id.*

⁴³ Curet & Hsi, *supra* note 16, at 75.

⁴⁴ *Id.* at 74.

⁴⁵ *Id.*

controversial topic, both medically and socially.⁴⁶ Potential effects cocaine exposure may have on the fetus include “low birthweight, preterm delivery, and abruptio placentae.”⁴⁷ However, many of the studies suggesting that these conditions are associated with cocaine use ignore external variables that may also be very harmful to the fetus, such as the woman’s “use of additional drugs, cigarettes, and alcohol and her socioeconomic status.”⁴⁸ Also, several of the cocaine studies fail to note the fact that pregnant women who abuse substances “often receive little or no prenatal care and may be malnourished.”⁴⁹ Yet, these studies receive much exposure in the media, and as a result, “the public has a distorted perception of the risks of maternal cocaine use.”⁵⁰ Therefore, studies which examine cocaine exposure during pregnancy need to control for external factors to better understand the nature and extent of harm that it causes.⁵¹

2. Legal Drugs

Exposure to legal drugs, particularly alcohol and tobacco, during pregnancy may also have negative effects on the woman and the fetus.⁵² Alcohol use by women possibly “increases their risk for suicide, depression” and accidents caused by the influence of alcohol.⁵³ Also, women who drink alcohol may suffer from “circulatory and cardiovascular disorders, liver cirrhosis...and possibly breast cancer.”⁵⁴ In addition, exposure to alcohol during pregnancy has been shown to negatively affect the fetus.⁵⁵ It can result in Fetal Alcohol Syndrome (FAS),⁵⁶ which is the “leading known preventable cause of mental retardation.”⁵⁷ Also, exposure to alcohol may lead to “low birthweight, developmental and behavior abnormalities, spontaneous abortion, and stillbirth.”⁵⁸

Women who smoke tobacco have an increased risk for “lung,

⁴⁶ See, e.g., Roberts, *supra* note 9, at 1429-30.

⁴⁷ Curet & Hsi, *supra* note 16, at 74.

⁴⁸ Roberts, *supra* note 9, at 1429-30.

⁴⁹ *Id.* at 1430.

⁵⁰ *Id.*

⁵¹ See *id.*

⁵² See, e.g., Curet & Hsi, *supra* note 16.

⁵³ *Id.* at 73-74.

⁵⁴ *Id.*

⁵⁵ See Kuczkowski, *supra* note 16, at 388 (discussing Fetal Alcohol Syndrome).

⁵⁶ *Id.*

⁵⁷ Greenfield, et al., *supra* note 16, at 420.

⁵⁸ Curet & Hsi, *supra* note 16, at 74.

oral, esophageal, and invasive cervical cancers.”⁵⁹ Also, women who smoke cigarettes may be more likely to suffer from heart disease and strokes.⁶⁰ Fetuses of women who smoke cigarettes during pregnancy may be negatively affected by reduced birthweight and preterm birth.⁶¹ Also, cigarettes may result in placenta previa or placental abruption⁶² and spontaneous abortions.⁶³ Therefore, various legal drugs, such as alcohol and tobacco, potentially result in negative effects on both the woman and the fetus.

C. Other Health Considerations

In addition to illegal and legal drugs, other health considerations may also negatively affect the fetus.⁶⁴ Although not exhaustive, this section discusses additional health factors that are important to consider during a woman’s pregnancy.

Caffeine exposure during pregnancy may result in spontaneous abortion or low birthweight when the woman consumes more than 150 mg of caffeine a day.⁶⁵ Depending on its strength, a cup of coffee contains anywhere from 29 to 176 mg of caffeine.⁶⁶ Thus, even a cup of coffee each day during pregnancy may result in negative effects on the fetus.⁶⁷

Another health factor to consider is untreated iron deficiency.⁶⁸ Circumstantial evidence suggests that maternal anemia may result in premature delivery and lower birthweight.⁶⁹ It may also result in higher maternal mortality.⁷⁰ However, more research is needed to examine iron deficiency during pregnancy because many pregnant women are anemic, and most current evidence is only circumstantial.⁷¹

Relatively recently, exposure to mercury has become a topic of

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Bolnick & Rayburn, *supra* note 16, at 547 tbl. 1.

⁶² *Id.*

⁶³ Kuczkowski, *supra* note 16, at 389.

⁶⁴ *See, e.g., id.* at 390 (discussing caffeine exposure during pregnancy).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ *See, e.g.,* Lindsay H. Allen, *Pregnancy and Iron Deficiency: Unresolved Issues*, 55 *Nutrition Reviews* 91, 91 (1997).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

interest.⁷² Women can be exposed to mercury by eating large amounts of certain types of seafood, living in areas of high mercury use or production, or working in certain job environments.⁷³ Mercury toxicity during pregnancy may result in fetal neurological damage and mental retardation.⁷⁴

Another important health consideration that is often overlooked is the effect the father's habits can have on the woman and the fetus during pregnancy.⁷⁵ A father who uses drugs, smokes cigarettes, or drinks alcohol before the fetus's conception could possibly have a negative effect on the fetus.⁷⁶ Also, during pregnancy, a father may batter his pregnant partner, which could result in harms to both the woman and the fetus.⁷⁷ In addition to battering his pregnant partner, the father may be the one who provides the pregnant woman with drugs.⁷⁸ It has been shown that "women who use illicit drugs are most likely to be supplied those drugs by men, as part of an intimate or sexual relationship."⁷⁹ Thus, the father may play a major role in substance abuse during pregnancy.⁸⁰

D. Preliminary Arguments

Many substances, activities, and other external factors potentially cause harm to the fetus during pregnancy.⁸¹ However, the substances that receive the most attention, such as cocaine, may not be deserving of such publicity because the studies regarding their effects on the fetus lack reliability.⁸² Assuming for the sake of argument that certain substances do harm an exposed fetus, goals must be set. If the goal is to protect the fetus, then not only will illegal substances have to be

⁷² See Emily C. Evans, *The FDA Recommendations on Fish Intake During Pregnancy*, 31 JOGNN 541, 541 (2002) (discussing the effects of mercury exposure during pregnancy).

⁷³ *Id.* at 545.

⁷⁴ *Id.*

⁷⁵ See Mills, *supra* note 16, at 1005 (discussing the effects of the father's lifestyle on the fetus's health).

⁷⁶ See Mills, *supra* note 16, at 1005; see also Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 608 (1992).

⁷⁷ See Mills, *supra* note 16, at 1005.

⁷⁸ See Renee M. Popovits, *Criminalization of Pregnant Substance Abusers: A Health Care Perspective*, 24 J. HEALTH & HOSP. L. 169, 173 (1991).

⁷⁹ *Id.*

⁸⁰ See *id.*

⁸¹ See, e.g., Mills, *supra* note 16, at 999-1006.

⁸² See Roberts, *supra* note 9, at 1429-30.

restricted, but so will legal substances that negatively affect the fetus.⁸³ Following from that, it may be argued that many other activities during pregnancy must be restricted.⁸⁴ This could result in many enforcement problems as well as extreme control over pregnant women.⁸⁵ Additionally, it would be unfair to hold pregnant women solely responsible for negative effects on their fetuses when the father's conduct, and an infinite number of other factors, could contribute to harm the fetus.⁸⁶

II: PUNITIVE MEASURES

In response to the harms associated with maternal substance abuse, several forms of punitive measures designed to prevent harm to the fetus have been suggested, including civil child welfare laws,⁸⁷ protective incarceration,⁸⁸ criminalization of substance abuse during pregnancy by proposed statutes,⁸⁹ and criminal prosecution through the use of existing statutes.⁹⁰ However, whether these punitive measures actually succeed in preventing harm to fetuses is debatable.⁹¹

⁸³ See *Whitner*, 492 S.E.2d at 788 (Moore, A.J., dissenting) (suggesting harm to the fetus could result from failure to seek prenatal care or failure to quit smoking or drinking).

⁸⁴ See *Whitner*, 492 S.E.2d at 788 (Moore, A.J., dissenting) (explaining that the holding puts pregnant women at risk to be punished criminally for many activities).

⁸⁵ See *Whitner*, 492 S.E.2d at 788 (Moore, A.J., dissenting) (discussing how the legislature did not mean to criminalize the many activities pregnant women may be found criminally liable for as a result of the holding).

⁸⁶ See *Mills*, *supra* note 16, at 1005; See, e.g., *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (suggesting that even a pregnant woman who drives without her prescription glasses or contacts could cause harm to the fetus).

⁸⁷ See *Paltrow*, et al., *supra* note 11, at 1-2.

⁸⁸ See, e.g., *Roberts*, *supra* note 9, at 1431 (discussing *United States v. Vaughn*, Crim. No. F 2172-88 B (D.C. Super. Ct. Aug. 23, 1988)).

⁸⁹ See, e.g., Lisa M. Noller, *Taking Care of Two: Criminalizing the Ingestion of Controlled Substances During Pregnancy*, 2 U. CHI. L. SCH. ROUNDTABLE 367 (1995).

⁹⁰ See, e.g., *Whitner*, 492 S.E.2d at 777.

⁹¹ See generally *Sheriff v. Encoe*, 885 P.2d 596, 599 (Nev. 1994); *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995); *Collins v. State*, 890 S.W.2d 893 (Tex. Ct. App. 1994); *State v. Gethers*, 585 So.2d 1140 (Fla. App. 1991); *Welch*, 864 S.W.2d at 280; *People v. Morabito*, 580 N.Y.S.2d 843 (City of Geneva Ct. 1992); Cheryl M. Plambeck, *Divided Loyalties Legal and Bioethical Considerations of Physician-Pregnant Patient Confidentiality and Prenatal Drug Abuse*, 23 J. LEGAL MED. 1, 22 (2002); See generally *Roberts*, *supra* note 9, at 1432-36; *Paltrow*, et al., *supra* note 11, at 6; *Linder v. United States*, 268 U.S. 5 (1925); *Robinson v. California*, 370 U.S. 660, 667-8 (1962).

A. Civil Punishments: Civil Child Welfare Laws

One form of punitive measures used in an attempt to deter substance abuse during pregnancy is civil punishments.⁹² This discussion of civil punishments will focus on describing civil child welfare laws.⁹³ These laws, however, fail to solve the problem of substance abuse during pregnancy.⁹⁴

Several states' civil child welfare laws have been amended to address substance abuse during pregnancy.⁹⁵ In some such states, a pregnant woman's drug use creates a presumption of neglect or is a factor considered during a proceeding to terminate her parental rights.⁹⁶

Even though civil child welfare laws provide for civil rather than criminal penalties, they nevertheless represent a type of punitive measure.⁹⁷ The Supreme Court of the United States has acknowledged that termination of parental rights is an extreme state action because it is severe and irreversible.⁹⁸ It is thus a drastic punitive measure to terminate a woman's parental rights because of her substance abuse during pregnancy.⁹⁹

A state may also petition for temporary custody of an infant who was exposed to drugs during pregnancy.¹⁰⁰ Women who abused substances during pregnancy are often deprived of custody of their children as a result of "positive neonatal toxicologies," which "often raise a strong presumption of parental unfitness."¹⁰¹ Thus, civil punishments, whether permanent or temporary, are punitive measures and can often be quite drastic.

⁹² See Paltrow, et al., *supra* note 11, at 1-2 (discussing civil child welfare laws); See Linden, *supra* note 14, at 121-134 (calling involuntary civil commitment a "Band-Aid Solution).

⁹³ See Paltrow, et al., *supra* note 11, at 1-2.

⁹⁴ See Linden, *supra* note 14, at 120 (suggesting that neither criminal nor civil punishments fulfill the goals of cultural feminism).

⁹⁵ See Paltrow, et al., *supra* note 11, at 1-2, n.20 (listing Arizona, Colorado, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, and Wisconsin).

⁹⁶ See *id.* at 2.

⁹⁷ See *Santosky v. Kramer*, 455 U.S. 745 (1982); Roberts, *supra* note 9, at 1430.

⁹⁸ See *Santosky*, 455 U.S. at 759 (1982).

⁹⁹ See Marcy Tench Stovall, *Looking for a Solution: In re Valerie D. and State Intervention in Prenatal Drug Abuse*, 25 CONN. L. REV. 1265, 1284 (1993).

¹⁰⁰ See Roberts, *supra* note 9, at 1430-31.

¹⁰¹ *Id.* at 1431.

B. Criminal Punishments

1. Protective Incarceration

In order to protect the fetus by preventing maternal drug use, several courts have also incarcerated pregnant women who abuse substances.¹⁰² Judges have carried out this “protective” incarceration by considering a pregnant woman’s substance abuse during the course of her sentencing for a crime unrelated to her drug use.¹⁰³ For example, a judge in Washington D.C. sentenced Brenda Vaughn “to jail for the duration of her pregnancy” following her guilty plea for forging checks.¹⁰⁴ The judge made it known that he was putting Brenda in jail because he wanted to protect the fetus from the woman’s substance abuse.¹⁰⁵ In fact, it appears as though this D.C. judge is not alone; a pregnant woman’s “drug use during pregnancy often affects judges’ sentencing decisions.”¹⁰⁶ Such protective incarceration is yet another punitive attempt to prevent maternal drug use.

2. Proposed Statute to Criminalize Substance Abuse During Pregnancy

Currently, no state has any statute specifically criminalizing substance abuse during pregnancy.¹⁰⁷ However, this approach has been suggested by several commentators.¹⁰⁸ One commentator proposes a statute that would criminalize substance abuse during pregnancy based on the theory that a pregnant substance abuser distributes drugs to her fetus.¹⁰⁹ The author believes that “current laws do not deter because the penalties are not strong enough to alter behavior,” and thus, suggests that the statute should call “for strict criminal penalties.”¹¹⁰ Interestingly, while arguing for the creation of a statute to punish pregnant substance abusers, the commentator also concedes that any punitive measure “should include a rehabilitative element.”¹¹¹ This concession reveals the inadequacy of the punitive approach to substance abuse during pregnancy.

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.* (discussing *United States v. Vaughn*, Crim. No. F 2172-88 B (D.C. Super. Ct. Aug. 23, 1988)).

¹⁰⁵ *See Roberts, supra* note 9, at 1430-31.

¹⁰⁶ *Id.*

¹⁰⁷ *See Paltrow, et al., supra* note 11, at 1.

¹⁰⁸ *See, e.g., Noller, supra* note 89.

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

3. Criminal Prosecution

Given that there are no state laws that specifically criminalize substance abuse during pregnancy, prosecutors have used a variety of existing criminal laws to prosecute pregnant women for this behavior.¹¹² Prosecutors have used criminal child abuse or neglect laws to charge pregnant women for substance abuse during pregnancy.¹¹³ Also, they have argued, quite cleverly, that when a pregnant woman gives birth with drugs in her system, she delivers drugs to a minor, the newborn, through her umbilical cord.¹¹⁴ Other prosecution theories used include possession of a controlled substance, corruption of a minor, assault with a deadly weapon, homicide or feticide, consumption of alcohol, and failure to follow a physician's order.¹¹⁵

Criminal prosecution discussion in this paper will focus on the child abuse theory.¹¹⁶ Fortunately, most appellate courts have rejected the theory that maternal substance abuse constitutes child abuse.¹¹⁷ Unfortunately, women are first being convicted by the lower courts and thus, are serving time in prison while awaiting their appeals; that is if they even appeal.

Most courts reject the theory that substance abuse during pregnancy constitutes child abuse for a variety of reasons.¹¹⁸ Some courts believe that it is the responsibility of the legislature, and not the

¹¹² Emily Figdor & Lisa Kaeser, *Concerns Mount over Punitive Approaches to Substance Abuse Among Pregnant Women*, 1 The Guttmacher Report on Public Policy (1998), at <http://www.guttmacher.org/pubs/journals/gr010503.html>.

¹¹³ Center for Reproductive Rights, *Punishing Women for Their Behavior During Pregnancy: An Approach that Undermines Women's Health and Children's Interests* (2000), at <http://www.reproductiverights.org/>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Prosecution of pregnant substance abusers based on child abuse theory because it is the only criminal prosecution theory that has been argued successfully. See *Whitner*, 492 S.E.2d at 777; Michelle Oberman, *Symposium: Substance Use During Pregnancy: Legal and Social Responses: Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 530 (March 1992) (presenting and dismissing John Robertson's argument for punishing pregnant substance abusers under child abuse laws - that once a woman decides not to have an abortion she has a duty to bear a healthy child).

¹¹⁷ See, e.g., *Encoe*, 885 P.2d at 599; *Reinesto*, 894 P.2d at 735-6; *Collins*, 890 S.W.2d at 897-8; *Gethers*, 585 So.2d at 1143; *Welch*, 864 S.W.2d at 283.

¹¹⁸ See, e.g., *Encoe*, 885 P.2d at 599; *Reinesto*, 894 P.2d at 735-6; *Collins*, 890 S.W.2d at 897-8; *Gethers*, 585 So.2d at 1143; *Welch*, 864 S.W.2d at 283.

courts, to criminalize this behavior.¹¹⁹ For example, the Court of Appeals of Arizona in *Reinesto v. Superior Court* refused to hold pregnant substance abusers responsible for child abuse, observing that the legislature had rejected bills that proposed amending the state's child abuse statute in order to criminalize substance abuse during pregnancy.¹²⁰

Several courts have rejected criminalizing substance abuse during pregnancy, determining that to do so would be bad public policy.¹²¹ One example is the Court of Appeal of Florida in *State v. Gethers*.¹²² In its decision, the court stated that criminalizing substance abuse during pregnancy would deter pregnant women from seeking care.¹²³

Some courts note that this behavior should not be criminalized because it would lead to prosecution of pregnant women for legal activities.¹²⁴ The Supreme Court of Kentucky stated that criminalizing substance abuse during pregnancy would open the door to punishing the use of alcohol, nicotine, or over-the-counter drugs.¹²⁵ The court noted that this could reach all the way to criminalizing pregnant women who downhill ski.¹²⁶

The City Court of New York raised another argument against criminalization.¹²⁷ In *People v. Morabito*, the court stated that criminalizing maternal substance abuse would violate a pregnant woman's right to due process¹²⁸ because she would not be on notice that the statute can be applied to criminalize her substance abuse during pregnancy.¹²⁹

Lastly, in *Collins v. State*, the Court of Appeals of Texas looked at "whether Texas' injury to a child statute permits the prosecution of a woman for conduct committed while pregnant which causes injury to her subsequently-born child."¹³⁰ The court held that the statute could not be used in this way because the "definitions of 'child', 'person',

¹¹⁹ See, e.g., *Encoe*, 885 P.2d at 599; *Reinesto*, 894 P.2d at 738; *Collins*, 890 S.W.2d at 898.

¹²⁰ 894 P.2d at 738.

¹²¹ See, e.g., *Gethers*, 585 So.2d at 1143.

¹²² 585 So.2d at 1142-3.

¹²³ *Id.* at 1143.

¹²⁴ See, e.g., *Welch*, 864 S.W.2d at 283.

¹²⁵ *Welch*, 864 S.W.2d at 283.

¹²⁶ *Id.*

¹²⁷ *Morabito*, 580 N.Y.S.2d at 847.

¹²⁸ *Id.*

¹²⁹ See *id.*

¹³⁰ *Collins*, 890 S.W.2d at 895.

and ‘individual’” in its state penal code do not encompass the fetus.¹³¹

While most courts have rejected prosecution based on the child abuse theory, the Supreme Court of South Carolina applied the state’s child abuse statute in *Whitner v. State*,¹³² where the defendant ingested cocaine during the third trimester of her pregnancy.¹³³ Her infant was born with cocaine in its system.¹³⁴ The court held that “the word ‘child’ as used in” the state’s child abuse and endangerment statute “includes viable fetuses.”¹³⁵ The court reasoned that it had been the legal tradition in South Carolina to define a viable fetus as a person in both wrongful death actions and in the criminal murder statutes, and thus, there was no reason not to define a viable fetus as a person under the child abuse statute.¹³⁶ Accordingly, the court upheld the defendant’s conviction under the child abuse statute and sentenced her to eight years in prison.¹³⁷ Additionally, the court suggested that the child abuse statute could even be applied to legal acts of pregnant women if “the acts actually or potentially endanger the ‘life, health or comfort’” of the viable fetus.¹³⁸

According to Lynn Paltrow, the executive director of National Advocates for Pregnant Women, there are several problems with the *Whitner* decision.¹³⁹ First, the decision “went far beyond the plain meaning of the child endangerment statute and its clear legislative intent.”¹⁴⁰ Second, the decision violates a woman’s right to privacy and due process and it may violate the equal protection clause and the “prohibition against cruel and unusual punishment.”¹⁴¹ Third, the decision contradicts the approach the public health community suggests should be taken to solve substance abuse during pregnancy: treatment.¹⁴² Fourth, the *Whitner* court violated “*Roe v. Wade* and its progeny” by declaring that the viable fetus is a person.¹⁴³

¹³¹ *Id.* at 897-98 (quoting Acts 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex.Gen.Laws 3586, 3589, 3622).

¹³² *See* 492 S.E.2d at 777.

¹³³ *Whitner*, 492 S.E.2d at 778-79.

¹³⁴ *Id.*

¹³⁵ *Id.* at 778 (discussing S.C. Code Ann. § 20-7-50 (1985)).

¹³⁶ *Id.* at 780.

¹³⁷ *Id.* at 779.

¹³⁸ *Id.* at 782.

¹³⁹ *See* Paltrow, *supra* note 1, at 1038; *see also* Paltrow, *supra* note 11.

¹⁴⁰ Paltrow, *supra* note 1, at 1038.

¹⁴¹ *Id.*

¹⁴² *See id.* at 1039.

¹⁴³ *Id.* at 1038.

C. Substance Abuse During Pregnancy Within the Context of Abortion

Whitner raises the question of whether substance abuse during pregnancy should be discussed within the context of abortion. The easy answer to this question is that the “use of *Roe*’s holding is inappropriate, since *Roe v. Wade* dealt with a woman’s right to terminate her pregnancy, not with her duties toward a fetus whom she intended to carry to term.”¹⁴⁴ This argument is correct in that substance abuse during pregnancy is very distinguishable from abortion. However, if the United States Supreme Court were to consider maternal substance abuse beyond *Ferguson v. City of Charleston*,¹⁴⁵ which is discussed in Part IV, then it would most certainly consider *Roe v. Wade*¹⁴⁶ and *Planned Parenthood v. Casey*.¹⁴⁷ If the Court chose to extend its decisions in *Roe* and *Casey* to substance abuse during pregnancy, its reasoning may resemble the following discussion.

In *Roe v. Wade*, the Supreme Court of the United States held that statutes prohibiting a woman from having an abortion infringe upon her fundamental right to privacy.¹⁴⁸ In order to infringe on this right, the state must have a compelling interest.¹⁴⁹ During the first trimester, the state is not able to interfere with the woman’s abortion at all, and after the first trimester, the state has a compelling interest to protect the health of the woman, and therefore can place restrictions on the performance of abortions.¹⁵⁰ However, the state has no interest in protecting potential life until viability, at which point the state may “regulate, and even proscribe, abortion” unless the procedure is necessary to save the mother’s life.¹⁵¹

The Court narrowed this holding in *Planned Parenthood v. Casey*.¹⁵² It reaffirmed viability as an important point of consideration.¹⁵³ However, now a state may restrict abortions before viability as long

¹⁴⁴ See Oberman, *supra* note 116, at 530 (explaining that *Roe* has been used to justify medical treatment that is forced on pregnant women).

¹⁴⁵ *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

¹⁴⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁴⁷ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹⁴⁸ See Spencer, *supra* note 17, at 418 (discussing the holdings in *Roe v. Wade* and *Planned Parenthood v. Casey*); see also *Roe*, 410 U.S. at 153-54 (1973).

¹⁴⁹ See *Roe*, 410 U.S. at 155 (1973) (quoting *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

¹⁵⁰ See *Roe*, 410 U.S. at 164-65 (1973).

¹⁵¹ *Id.*

¹⁵² See Mills, *supra* note 16, at 1025-26; see also *Casey*, 505 U.S. at 833 (1992).

¹⁵³ See *Casey*, 505 U.S. at 870 (1992).

as doing so will not place an undue burden on the woman's decision to have an abortion.¹⁵⁴ The undue burden standard requires a woman to demonstrate that the state placed a "substantial obstacle" in the way of her decision to abort a nonviable fetus.¹⁵⁵

Applying *Roe* and *Casey* to the area of substance abuse during pregnancy, one can argue that a woman is free to abuse substances during pregnancy as long as she does so before viability of the fetus; however, past the point of viability, the state has a compelling interest to protect potential life and can justify restricting substance abuse by appropriate means. In addition, the state could set restrictions on a woman's substance abuse prior to viability as long as it does not unduly burden her decision to give birth.¹⁵⁶

However, if the Court attempted to apply *Roe* and *Casey* to substance abuse during pregnancy in this way, obstacles would arise.¹⁵⁷ For example, maternal substance abuse can harm the fetus before viability.¹⁵⁸ If the goal in criminalizing substance abuse during pregnancy is to protect a fetus, then choosing viability as the determining point would not achieve that goal.¹⁵⁹

Another problem is that drawing the line at viability raises due process problems.¹⁶⁰ A woman may drink alcohol or participate in harmful activities past the point of viability without even knowing she is pregnant.¹⁶¹ Thus, a woman could be prosecuted without notice that she was breaking the law.¹⁶² Based on these obstacles, extending the reasoning of *Roe* and *Casey* to the issue of substance abuse during pregnancy is inappropriate.¹⁶³

¹⁵⁴ See *id.* at 874.

¹⁵⁵ *Id.* at 877.

¹⁵⁶ See Mills, *supra* note 16, at 1026 (suggesting that prosecuting substance abuse during pregnancy would not create an undue burden on a woman's right to an abortion but would unduly burden her decision to have a child which the *Casey* Court would agree a state is not allowed to do).

¹⁵⁷ See Caroline S. Palmer, Article, *The Risks of State Intervention in Preventing Prenatal Alcohol Abuse and the Viability of an Inclusive Approach: Arguments for Limiting Punitive and Coercive Prenatal Alcohol Abuse Legislation in Minnesota*, 10 HASTINGS WOMEN'S L.J. 287, 338 (1999).

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See Palmer, *supra* note 157, at 338.

¹⁶³ See *id.*

D. *Whitner* Extended

Even though *Whitner* may have been wrongly decided,¹⁶⁴ the decision has been extended to other areas.¹⁶⁵ In fact, it appears as though many authorities in South Carolina are actively seeking out pregnant substance abusers.¹⁶⁶ The state has moved from prosecuting pregnant substance abusers for child abuse to prosecuting them for homicide by child abuse.¹⁶⁷ In *State v. McKnight*, the South Carolina Supreme Court affirmed Regina McKnight's conviction of homicide by child abuse because a pathologist determined that Regina had exposed the stillborn fetus to cocaine and had ruled the death a homicide.¹⁶⁸ The court reasoned that the legislature intended the homicide by child abuse statute to apply to the stillbirth of the fetus because the legislature had not acted to change the law since the court's decision in *Whitner*.¹⁶⁹ As a result, the court affirmed the woman's sentence of twenty years in prison.¹⁷⁰

South Carolina has also started prosecuting pregnant substance abusers for their use of drugs other than cocaine.¹⁷¹ First, the state has arrested one woman "after her newborn daughter tested positive for marijuana."¹⁷² Second, the state has shifted from illegal drugs to legal drugs.¹⁷³ Specifically, South Carolina has already arrested one woman for her use of alcohol during her pregnancy.¹⁷⁴ Therefore, the South Carolina's Supreme Court decision in *Whitner* has provided the state an opportunity to seek out pregnant women in order to prosecute them for various activities during their pregnancies.¹⁷⁵

Fortunately, most courts have disagreed with the outcome in *Whitner*, and many have held that a woman who abuses substances during her pregnancy may not be convicted under child abuse

¹⁶⁴ See Paltrow, *supra* note 1, at 1038.

¹⁶⁵ See *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003) (affirming homicide by child abuse conviction of a woman who gave birth to a stillborn fetus).

¹⁶⁶ See Paltrow, *supra* note 1, at 1042-43.

¹⁶⁷ See *McKnight*, 576 S.E.2d at 168.

¹⁶⁸ See *id.* at 171.

¹⁶⁹ See *id.* at 175.

¹⁷⁰ See *id.* at 171 (affirming trial court's decision to sentence Regina McKnight to twenty (20) years, "suspended upon service of twelve years").

¹⁷¹ See Paltrow, *supra* note 1, at 1042.

¹⁷² *Id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

statutes.¹⁷⁶ As was previously mentioned, these decisions are based on a variety of reasons, such as a lack of legislative intent,¹⁷⁷ bad public policy,¹⁷⁸ and violation of due process.¹⁷⁹

III: CRITICISM OF PUNITIVE MEASURES

A. Failures of Punitive Measures

In addition to the reasons cited by the courts, there are several further arguments against applying punitive measures to the problem of substance abuse during pregnancy. Such measures often depend on mandatory reporting statutes for notifying law enforcement about pregnant substance abusers.¹⁸⁰ Under many mandatory reporting laws, physicians are not the only persons required to report child abuse.¹⁸¹ Many state laws require a “wide range of health care professionals...to report suspected child neglect to the state.”¹⁸² Additionally, health care professionals are specifically required to report suspected substance abuse by pregnant women in nine states.¹⁸³ Also, four states require health care professionals to test pregnant women for drugs if they suspect substance abuse.¹⁸⁴

The use of such mandatory reporting statutes may have many negative consequences.¹⁸⁵ Health care professionals are required to act as police informants against pregnant women.¹⁸⁶ By reporting to the

¹⁷⁶ See, e.g., *Encoe*, 885 P.2d at 596; *Reinesto*, 894 P.2d at 733; *Collins*, 890 S.W.2d at 898; *Gethers*, 585 So.2d at 1142-3; *Welch*, 864 S.W.2d at 280; *Morabito*, 580 N.Y.S.2d at 843.

¹⁷⁷ See *Collins*, 890 S.W.2d at 898.

¹⁷⁸ See *Gethers*, 585 So.2d at 1143.

¹⁷⁹ See *Morabito*, 580 N.Y.S.2d at 847.

¹⁸⁰ See *Oberman*, *supra* note 116, at 520.

¹⁸¹ See *id.* at 522.

¹⁸² *Id.*

¹⁸³ *The Allan Guttmacher Institute State Policies in Brief: Substance Abuse During Pregnancy* (2004), at http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf (listing Arizona, Illinois, Iowa, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, and Utah).

¹⁸⁴ *Id.* (listing Iowa, Minnesota, North Dakota, and Virginia).

¹⁸⁵ See *Mills*, *supra* note 16, at 1022; see generally *Moses Cook, Note: From Conception until Birth: Exploring the Maternal Duty to Protect Fetal Health*, 80 WASH. U. L.Q. 1307, 1336 (2002); David C. Brody & Heidee McMillin, Article, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN'S L.J. 243, 252 (2001); *Plambeck*, *supra* note 91, at 22.

¹⁸⁶ See *Mills*, *supra* note 16, at 1037.

police, health care professionals may be violating the woman's right to privacy and confidentiality.¹⁸⁷ Also, requiring health care professionals to report or test suspected substance abuse intrudes upon the physician-patient relationship.¹⁸⁸ This intrusion may result in patient mistrust of health care providers.¹⁸⁹ As a result, pregnant substance abusers may not disclose their addiction to their health care providers, or worse yet, the women may be deterred from seeking any prenatal care.¹⁹⁰

One hospital's reporting policy came under scrutiny in *Ferguson v. City of Charleston*.¹⁹¹ The Medical University of South Carolina (MUSC) implemented a drug testing policy that required its medical personnel to test pregnant women suspected of cocaine use.¹⁹² Under this policy, thirty women were arrested.¹⁹³ While all of the charges were eventually dropped, several of the women had already served jail time.¹⁹⁴ Ten of the women arrested under the hospital's policy filed a joint civil suit against the city of Charleston, certain city law enforcement officials, and MUSC employees.¹⁹⁵ After the Supreme Court of the United States granted certiorari, it held that the drug tests administered under the hospital's policy were unreasonable searches if the pregnant women did not consent to them.¹⁹⁶ The Fourth Amendment requires that the government obtain a warrant based on probable cause in order to search a person.¹⁹⁷ However, there is a special needs exception that allows warrantless searches when there is an interest served beyond law enforcement.¹⁹⁸ The defendants argued that the interest served was the health of the women and the fetuses.¹⁹⁹ Yet, the Court reasoned that the special needs exception did not apply

¹⁸⁷ See *id.* at 1022.

¹⁸⁸ Cook, *supra* note 185, at 1336.

¹⁸⁹ See Brody & McMillin, *supra* note 185, at 252.

¹⁹⁰ See Plambeck, *supra* note 91, at 22; *But see* Nova D. Janssen, Note, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741, 764 (2000) (suggesting that the fear that criminal punishments may deter pregnant women from seeking prenatal care may be exaggerated because there are other possible explanations for why these women do not seek care).

¹⁹¹ 532 U.S. at 67.

¹⁹² *Ferguson*, 532 U.S. at 70-76.

¹⁹³ Linda Greenhouse, *Program of Drug-Testing Women Draws a Review by the Supreme Court*, N.Y. TIMES, Feb 29, 2000, at A12.

¹⁹⁴ See *id.*

¹⁹⁵ *Ferguson*, 532 U.S. at 73.

¹⁹⁶ *Id.* at 76-86.

¹⁹⁷ See Center for Reproductive Rights, *Ferguson v. City of Charleston: A Case Summary*, at http://www.reproductiverights.org/crt_preg_ferguson.html.

¹⁹⁸ *Ferguson*, 532 U.S. at 76 n.7.

¹⁹⁹ *Id.* at 81.

to the hospital's policy because "the immediate objective of the searches was to generate evidence *for law enforcement purposes*."²⁰⁰ Thus, the hospital's policy was contrary to the Fourth Amendment.²⁰¹

Another issue arose from the MUSC's mandatory reporting policy. Of the ten women who filed suit in this case, nine were African American.²⁰² This exemplifies the fact that criminal punishments for substance abuse during pregnancy have a disparate impact on African Americans.²⁰³ Poor women are disproportionately African American and are "generally under greater government supervision – through their associations with public hospitals, welfare agencies, and probation officers."²⁰⁴ As a result, "their drug use is more likely to be detected and reported."²⁰⁵ Health care professionals, through drug screenings, more often test and report African Americans.²⁰⁶ For example, a study done in Florida showed that despite "similar rates" of drug prevalence between African American and white women, African American women were ten times more likely to be reported after positive drug screens.²⁰⁷

In addition to health care professionals targeting African American pregnant women, as was done at MUSC, certain types of drug tests, in general, are more likely to implicate African American women.²⁰⁸ For example, it has been shown that traces of drugs remain longer in dark, thick hair than in brown or blond, thin hair.²⁰⁹ This results in more African American women being targeted by various drug tests.²¹⁰ Also, certain drug tests single out cocaine, which African American women are more likely to abuse than white women, who abuse other kinds of drugs, such as marijuana.²¹¹

With the assistance of health care professionals, prosecutors

²⁰⁰ *Id.* at 82-84.

²⁰¹ *See id.* at 82-86; *See also* Lawrence O. Gostin, *The Rights of Pregnant Women: The Supreme Court and Drug Testing*, 31 HASTINGS CENTER REP. 8 (2001) (stating public hospital's policy violated the Fourth Amendment).

²⁰² Greenhouse, *supra* note 193.

²⁰³ *See* Roberts, *supra* note 9, at 1432-36.

²⁰⁴ *Id.* at 1432.

²⁰⁵ *Id.*

²⁰⁶ *See id.* at 1432-33.

²⁰⁷ *See* IJ Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1202-04 (1990).

²⁰⁸ *See* Popovits, *supra* note 78, at 177; Chasnoff, et al., *supra* note 207.

²⁰⁹ Popovits, *supra* note 78, at 177.

²¹⁰ *See id.*

²¹¹ *See* Chasnoff, et al., *supra* note 207.

perpetuate the discriminatory practices against African American women.²¹² Prosecutors have focused primarily on cocaine use.²¹³ However, as mentioned earlier, several other drugs may cause more harm to the fetus than cocaine and thus, prosecution for cocaine use is not justified by “the extent of the harm to the fetus.”²¹⁴ Instead, one commentator argues that focusing on African American pregnant substance abusers serves two social goals: (1) degradation of “women whom society views as undeserving to be mothers and to discourage them from having children” and (2) diversion of the public’s “attention from social ills such as poverty, racism, and a misguided national health policy,” implying “instead that shamefully high Black infant death rates are caused by the bad acts of individual mothers.”²¹⁵ Arguably, it would be possible for an African American pregnant substance abuser who is prosecuted in an area with discriminatory practices to “make out a prima facie case of unconstitutional racial discrimination by showing that a disproportionate number of those chosen for prosecution” are African American.²¹⁶

Punitive measures are also criticized because the health care community and the United States Supreme Court have recognized drug addiction as an illness that requires treatment, and not punishment.²¹⁷ In *Linder v. United States*, the Supreme Court stated not only that drug addiction is an illness, but also that those addicted should receive medical treatment for their illness.²¹⁸ The Court held in *Robinson v. California* that it is unconstitutional to make drug addiction a crime because it is an illness, and criminalizing it is “cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”²¹⁹ Thus, prosecuting pregnant women for substance abuse may also violate the Eighth and Fourteenth Amendments.²²⁰

In addition, the “compulsive nature” of drug addiction “underscores the weakness of punishment as a deterrent.”²²¹ Pregnant women addicted to substances “may not weigh costs and benefits

²¹² See Roberts, *supra* note 9, at 1434-36.

²¹³ See *id.* at 1434.

²¹⁴ *Id.*

²¹⁵ *Id.* at 1435-36.

²¹⁶ *Id.* at 1453.

²¹⁷ See Paltrow, et al., *supra* note 11, at 6; See, e.g., *Linder*, 268 U.S. at 18; *Robinson*, 370 U.S. at 666-7.

²¹⁸ 268 U.S. at 18.

²¹⁹ See 370 U.S. at 666.

²²⁰ See Paltrow, *supra* note 1, at 1038.

²²¹ Stovall, *supra* note 99, at 1279.

rationally, as the deterrence model posits.”²²² Therefore, punishing women who abuse substances during pregnancy fails to treat drug addiction as an illness and thus fails to deter drug use.²²³

Following *Whitner*, *McKnight*, and *Ferguson*, several changes have occurred in South Carolina that lend credibility to arguments against using punitive measures to address maternal substance abuse. First, infant mortality has increased.²²⁴ Second, there has been a 20% increase in abandoned children.²²⁵ Third, there has been a significant decline in drug treatment admissions by women in South Carolina.²²⁶ Fourth, the court decisions have driven pregnant women away from seeking prenatal care and drug treatment.²²⁷ Fifth, a permanent distrust for medical providers has been reported.²²⁸ All of these changes suggest that the fears of those who oppose criminalizing substance abuse during pregnancy are being realized in South Carolina.

Similar to criminal punishments, civil punishments should not be used against pregnant substance abusers,²²⁹ and for many of the same reasons. Some courts that have considered civil punishments have decided not to apply them to women who abused drugs during pregnancy because of a lack of legislative intent.²³⁰ For example, one court rejected a civil prosecution involving termination of parental rights because “the legislature did not intend for the termination statute to apply to prenatal parental conduct that harmed the child.”²³¹

Additionally, the fear of losing custody or parental rights may deter pregnant women from either seeking prenatal care or revealing

²²² See *id.*

²²³ See *Linder*, 268 U.S. at 18.

²²⁴ See, e.g., *Infant Mortality on Rise in '97*, POST AND COURIER, Feb. 19, 1999, at B1.

²²⁵ *Discarded Children Increasing*, POST AND COURIER, Apr. 19, 1999, at B1.

²²⁶ See South Carolina Advocates for Pregnant Women, at <http://www.scapw.org/facts/myths.htm>; See Plambeck, *supra* note 91, at 33 (quoting Bryony J. Gagan, *Ferguson v. City of Charleston, South Carolina: “Fetal Abuse,” Drug Testing and the Fourth Amendment*, 53 Stan. L. Rev. 491, 500 (2000)).

²²⁷ Daniel N. Abrahamson, et al., *Amicus Curiae Brief: Cornelia Whitner v. The State of South Carolina*, 9 HASTINGS WOMEN’S L.J. 139, 152 (1998).

²²⁸ See Center for Reproductive Rights, *Ferguson v. City of Charleston*, at www.reproductiverights.org (quoting Lori Griffin, one of the plaintiffs in *Ferguson v. City of Charleston* who stated that she “will never trust a doctor again” because “they tormented” her).

²²⁹ See *Linden*, *supra* note 14, at 120.

²³⁰ See, e.g., *In re Valerie D.* 613 A.2d 748, 764 (Conn. 1992).

²³¹ *Linden*, *supra* note 14, at 119 (describing *In re Valerie D.* 613 A.2d 748, 764 (Conn. 1992) where the Connecticut Supreme Court reversed the lower court decisions to terminate parental rights due to prenatal cocaine exposure).

their drug use to their physicians or other health care providers.²³² If a woman does seek prenatal care and discloses her drug use, she risks being reported by her physician under mandatory reporting statutes and consequently risks losing her child.²³³ As mentioned earlier, this may violate the pregnant woman's right to privacy.²³⁴ Also, discrimination problems surface again because African American women are more likely to be reported than Caucasian women.²³⁵ The discriminatory application of mandatory reporting statutes may result in potential violations of the African American woman's right to equal protection.²³⁶

B. Theoretical Explanations of the Failures of Punitive Measures

The paper has thus far revealed examples of how punitive measures fail to prevent maternal substance abuse. Yet, one question that remains unanswered is why do punitive measures fail to prevent substance abuse during pregnancy? The following two (2) theories provide some insight to this question: cultural feminism and status regime. Cultural feminism suggests that the law should not force a pregnant woman to compete with her fetus for rights. Additionally, the status regime theory posits that society uses punitive measures against pregnant substance abusers because society is unwilling to help these women so that it may be able to maintain the current gender and race status regimes.

1. Cultural Feminism vs. Rights Analysis

Carol Gilligan, the original cultural feminist, felt that psychology's understanding of humans was incomplete because it excluded women from the development stage of its theories.²³⁷ To complete psychology's understanding of humans, she chose to study the woman's point of view or "voice," and noticed clear distinctions between how men and women speak.²³⁸ Carol Gilligan's observations

²³² See Oberman, *supra* note 116, at 520.

²³³ See *id.*

²³⁴ See Mills, *supra* note 16, at 1022.

²³⁵ See Chasnoff, et al., *supra* note 207, at 1202-04.

²³⁶ See Roberts, *supra* note 9, at 1453.

²³⁷ Carol Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 3-4 (1982).

²³⁸ *Id.* at 1-2.

led to the birth of cultural feminism.²³⁹ Since then, some feminists have used cultural feminism to explain the problems women face in society.²⁴⁰

One area that has raised major concern for cultural feminists is the law.²⁴¹ Cultural feminism suggests that, within the context of moral reasoning, women are “oriented toward relationships,” whereas men focus more on peoples’ rights.²⁴² Our laws, however, are generally concerned with rights and not relationships.²⁴³ Therefore, some cultural feminists argue that the “the law is masculine” and ignores the woman’s voice, which is exactly what cultural feminism set out to stop.²⁴⁴ In order to be fair, the law should provide a forum from which the female voice can be heard.²⁴⁵

The law’s masculinity can be seen within the context of substance abuse during pregnancy. Often, the discussion of substance abuse during pregnancy boils down to a competition between the rights of the pregnant woman and the state’s interest in protecting the potential life of the fetus.²⁴⁶ While this exemplifies the male-oriented rights analysis, it ignores the female-oriented relationship analysis.

Cultural feminist theory suggests that ignoring the woman’s voice in this way is one explanation for the failures of punitive approaches used against pregnant substance abusers. One commentator argued that cultural feminism aims to achieve two goals within the context of substance abuse during pregnancy: (1) “maintaining the mother-child relationship” and (2) “promoting healthy births.”²⁴⁷ Yet, male-oriented criminal and civil punishments fail to satisfy these goals.²⁴⁸ Criminal punishments do not achieve either goal because prison separates the mother from the child and is an after-the-fact

²³⁹ See Linda J. Lacey, Article, *Mimicking the Words, But Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence*, 35 B.C. L. REV. 1 n.118 (1993).

²⁴⁰ See, e.g., Naomi R. Cahn & Marie Ashe, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993) (discussing cultural feminism within the context of child abuse).

²⁴¹ See Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKLEY WOMEN’S L.J. 191, 200 (1990).

²⁴² Cahn & Ashe, *supra* note 240, at 103 n. 134.

²⁴³ See Cain, *supra* note 241, at 200.

²⁴⁴ *Id.*

²⁴⁵ See *id.*

²⁴⁶ See Linden, *supra* note 14, at 112.

²⁴⁷ *Id.* at 120.

²⁴⁸ See *id.*

solution that does not promote healthy births.²⁴⁹ Civil child welfare laws achieve the first goal because they are intended to ultimately reunite the mother with her child; however, these laws, as with criminal statutes, do not achieve the second goal because the state typically becomes involved only after the birth and such “responses do not prevent harm to the child caused by prenatal substance abuse.”²⁵⁰

In order to replace the failures of punitive measures with successes, the woman’s voice must be heard. Instead of forcing the woman and the fetus to compete against each other, as the rights analysis-punitive measures approach does, cultural feminism suggests that the relationship between the woman and the fetus should be strengthened. While the male-oriented “rights analysis does not leave room for compromise,” female-oriented solutions “would meet the needs and interests of both” the woman and the fetus.²⁵¹ Non-punitive measures can mediate both the interests of the woman and the fetus. Therefore, rather than approaching substance abuse in an adversarial, male-oriented way, non-punitive measures would solve the problem in a facilitative, female-oriented way.²⁵²

2. Status Regime: The Politics of Substance Abuse During Pregnancy

Another possible explanation for the failure of punitive measures to deter pregnant substance abusers is that society is not truly willing to help these women. Instead, society is trying to maintain two status regimes: (1) men’s dominance over women and (2) Caucasian dominance over African Americans and minorities.

The law reinforces these two status regimes.²⁵³ Professor Reva Siegel explains that throughout history, transformations in the law have resulted from struggles to reform various status regimes, but the changes are “not always the kind...advocates seek.”²⁵⁴ She argues, “[a] status regime is modernized (or deformalized) when, despite changes in its rules and rhetoric, it continues to distribute material and dignitary privileges (‘social goods’) in such a way as to maintain the distinctions that comprise the regime (e.g., constitute ‘race’ or ‘gender’) in

²⁴⁹ See *id.*

²⁵⁰ *Id.*

²⁵¹ Linden, *supra* note 14, at 112.

²⁵² *Id.* at 114.

²⁵³ See generally Reva B. Siegel, Article, “The Rule of Love”: Wife Beating as *Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

²⁵⁴ *Id.* at 2119.

relatively continuous terms.”²⁵⁵ Professor Reva Siegel calls this dynamic “preservation-through-transformation.”²⁵⁶

While civil rights movements “alleviate certain dignitary or material aspects of the inequalities that subordinated groups suffer,” they also cause the legal system to justify the “residual social inequalities among status-differentiated groups.”²⁵⁷ For example, the women’s rights movement resulted in a modification of common law coverture.²⁵⁸ Prior to the modifications, a husband owned his wife’s “person, labor, and property” upon marriage.²⁵⁹ Following status regime changes, women were allowed to own property and keep their earnings.²⁶⁰ Yet, while women were able to bring suit against others for injuries, courts still barred them from suing their battering husbands, which the courts justified through public policy reasons.²⁶¹ Thus, men, through marriage and with the support of the legal system, maintained control over women.

African Americans have also gone through several status regime reforms, most notably emancipation from slavery.²⁶² However, this modification of the status regime led to segregation, which may have brought about equality in civil and political rights, but did not result in equality of social rights.²⁶³ As Professor Reva Siegel explains, “[s]ocial rights were those forms of association that, white Americans feared, would obliterate status distinctions and result in the ‘amalgamation’ of the races.”²⁶⁴

Today, the status regimes of men’s dominance over women and Caucasian dominance over African Americans and minorities have been preserved through various transformations. On the one hand, the legal system will strike down laws that discriminate on the basis of race

²⁵⁵ *Id.* at 2184.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Reva Siegel, Symposium, *The Critical Use of History: Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1116 (1997) (explaining that in the common law a husband had “rights in his wife’s person, labor, and property” in exchange for “a duty to support his wife and to represent her in the legal system.”).

²⁵⁹ *Id.*

²⁶⁰ See *id.* at 1117.

²⁶¹ See *id.* at 1117-18 (suggesting courts wanted to maintain “marital harmony” and privacy).

²⁶² See *id.* at 1119-20.

²⁶³ See Siegel, *supra* note 258, at 1119-1128.

²⁶⁴ *Id.* at 1120.

or gender.²⁶⁵ On the other hand, the legal system has made it extremely difficult “to prove ‘discriminatory purpose’” because the legislature can argue “socially benign (or at least, nonmalicious) reasons for policies they adopt that may ‘incidentally’ perpetuate status” regimes.²⁶⁶

Status regimes of male dominance over females and Caucasian superiority over African Americans and minorities currently remain in transformed versions. The legal system’s treatment of substance abuse during pregnancy exemplifies the dynamic of preservation-through-transformation. Race and gender regimes are preserved through both the law and selective law enforcement. As Professor Reva Siegel suggests, “[t]oday, government rarely classifies by race or gender, but it conducts a ‘war on drugs’...in ways that often perpetuate, or aggravate, historic patterns of race...inequality.”²⁶⁷ Taking this argument a step further, the war against substance abuse during pregnancy modernizes both race and gender regimes.

The legal system maintains the male-dominated status regime by focusing solely on the pregnant substance abuser, rather than considering the many factors that contribute to drug abuse. Specifically, the law has not addressed fathers who encourage and facilitate drug use and who use drugs themselves. As one author states, “[a]dversarial government actions directed at women who use drugs and alcohol during pregnancy represent another context in which only women have been penalized, despite evidence that alcohol and drug use—as well as smoking—by men can cause harm to their future children through the negative effect on sperm.”²⁶⁸ Thus, even though evidence suggests that fathers may negatively affect the fetus, the legal system selectively attacks pregnant women for the same behavior.

Just as gender regimes remain today, Caucasian-dominated status regimes continue to exist. As the legal system disproportionately enforces the war on drugs against African Americans, it also unequally punishes African American pregnant substance abusers. For example, African Americans “constitute approximately 12% of the United States’ population and approximately 13% of its drug users, but account for 33% of all drug-related arrests, 62% of drug-related

²⁶⁵ See Siegel, *supra* note 253, at 2189.

²⁶⁶ *Id.*

²⁶⁷ Siegel, *supra* note 258, at 1145–46.

²⁶⁸ Johnsen, *supra* note 76, at 608 (discussing 3 newspaper articles supporting the notion that fathers can negatively affect the fetus – Sandra Blakeslee, *Research on Birth Defects Shifts to Flaws in Sperm*, N.Y. TIMES, Jan. 1, 1991, at A1; Devra L. Davis, *Fathers and Fetuses*, N.Y. TIMES, Mar. 1, 1991, at A27; *Father’s Smoking May Damage Sperm*, WASH. POST, Jan 25, 1991, at A8).

convictions, and 70% of drug-related incarcerations.”²⁶⁹ Likewise, as previously suggested, more African American women are punished than Caucasian women. African American women “were ten times as likely to be reported to child welfare agencies for prenatal drug use (even though the same proportion of Black and White American women use drugs while pregnant).”²⁷⁰

The media has played a role in creating the perception that drug abuse is predominantly a problem in African American communities. In the 1970s, before the war on drugs, Caucasian use of both powder and freebasing cocaine was a problem, and yet, the media chose to ignore it.²⁷¹ It was not until the 1980s that the media began reporting on drug addiction, coincidentally around the same time crack cocaine had become a problem for African Americans and minorities, especially in urban areas.²⁷² It was also around this time that the media highly publicized “crack babies.”²⁷³ Ignorance of the social problems surrounding pregnant African Americans, such as poor nutrition and lack of prenatal care, facilitated the crack baby myth.²⁷⁴ As a result, the problem “became the fault of irresponsible Black mothers, rather than the fault of the American social structure.”²⁷⁵

Applying punitive measures to pregnant substance abusers is not effective. As was previously explained, the punitive approach fails in many ways. Yet, society continues to implement criminal and civil punishments within this context. Such behavior suggests that society is not truly willing to help pregnant substance abusers overcome their addictions. Society would rather maintain its current gender and racial status regimes. However, if society intends to prevent maternal substance abuse, it must break away from its current status regimes and make way towards actual equality. This goal could be achieved through the implementation of non-punitive measures.

²⁶⁹ Kathleen R. Sandy, Commentary, *The Discrimination Inherent in America's Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack*, 54 ALA. L. REV. 665, 671 (2003) (arguing that critical race theory requires society to examine the overlap of race and the War on Drugs).

²⁷⁰ *Id.* at 672.

²⁷¹ *See id.* at 681.

²⁷² *See id.*

²⁷³ *See id.* at 684-85.

²⁷⁴ *See Sandy, supra* note 269, at 685-86.

²⁷⁵ *Id.* at 686.

IV: NON-PUNITIVE MEASURES

Cultural feminism and status regime are two independent theories, but when the theories are applied to the problem of substance abuse during pregnancy, both suggest that society needs to develop and implement effective non-punitive measures by encouraging drug treatment, rather than continuing to apply punitive measures, in order to help pregnant substance abusers.²⁷⁶ Unlike punitive measures, non-punitive measures have the potential to protect the woman as well as the fetus.²⁷⁷ As Dorothy Roberts observes, “[a] policy that attempts to protect fetuses by denying the humanity of their mothers will inevitably fail,”²⁷⁸ and thus, there is a need for a drug policy that recognizes both the mother and the fetus. Cultural feminist theory argues that society has a “duty to aid” pregnant substance abusers.²⁷⁹ By helping the pregnant woman through non-punitive channels, society would fulfill its duty to the woman and recognize that she is as valued as the fetus.²⁸⁰ At the same time, non-punitive measures would protect the fetus because society would be facilitating a pregnant substance abuser’s decision to seek effective treatment.²⁸¹

Additionally, by implementing non-punitive measures for substance abuse during pregnancy, punitive measures could no longer be used to either maintain current status regimes or manipulate public opinion in order to disguise the underlying problems of abusive partners, poverty, racism, and non-existent or severely lacking health care.²⁸² Instead, non-punitive measures would protect the fetus by addressing these problems.²⁸³ Non-punitive measures would also provide the pregnant substance abuser with the social support that she needs in order to cease her dependence on drugs.

A. Treatment Model

Arguably, pregnancy may be the point in a woman’s life when she is “most motivated to seek treatment for drug addiction” and most willing

²⁷⁶ See generally Linden, *supra* note 14; Stovall, *supra* note 99; Mills, *supra* note 16; See Roberts, *supra* note 9, at 1436.

²⁷⁷ See Linden, *supra* note 14, at 120.

²⁷⁸ Roberts, *supra* note 9, at 1481.

²⁷⁹ Linden, *supra* note 14, at 106.

²⁸⁰ See *id.* at 120-21, 134-35.

²⁸¹ See *id.* at 121.

²⁸² See Roberts, *supra* note 9, at 1436.

²⁸³ See *id.*

to make changes in her life for the better.²⁸⁴ This motivation and willingness provides the government²⁸⁵ and the health community with an opportunity to facilitate a pregnant woman's quest to overcome substance abuse. In order to assist the woman and the fetus, society should develop "a comprehensive health care system that includes prenatal care as well as gender-sensitive drug treatment programs."²⁸⁶ Also, society should take a preventive approach by creating drug treatment programs for non-pregnant women that would help them develop coping skills so that they could solve, or at least self-manage, the problems contributing to their substance abuse.²⁸⁷

There are several additional reasons why treatment is a better solution to the problem of substance abuse during pregnancy than punitive measures. Each exemplifies the fact that treatment would protect both the woman and the fetus, and thus, falls in line with the goals of cultural feminist theory.²⁸⁸

First, treatment would properly classify and handle drug addiction as an illness.²⁸⁹ As previously mentioned, the health care community and the Supreme Court recognize that drug addiction is an illness that requires treatment.²⁹⁰ The Court acknowledged in *Robinson v. California* that drug addiction "is apparently an illness which may be contracted innocently or involuntarily."²⁹¹ The Court then compared drug addiction to a cold and concluded that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."²⁹² In other words, it would be wrong to use punitive measures to address an illness because often times the substance abuser is innocent.²⁹³

Second, treatment would encourage pregnant substance abusers to seek prenatal care.²⁹⁴ If a pregnant woman is assured that her physician will keep her substance abuse confidential, as required by the

²⁸⁴ *Id.* at 1450.

²⁸⁵ *See id.*

²⁸⁶ Linden, *supra* note 14, at 135.

²⁸⁷ *See id.*

²⁸⁸ *See id.* at 120.

²⁸⁹ *See Linder*, 268 U.S. at 18.

²⁹⁰ *See Paltrow, et al., supra* note 11, at 6; *See, e.g., Linder*, 268 U.S. at 18; *Robinson*, 370 U.S. at 667.

²⁹¹ 370 U.S. at 667.

²⁹² *Robinson*, 370 U.S. at 667.

²⁹³ *See Oberman, supra* note 116, at 512-13 (suggesting that addicted women have often experienced abusive relationships throughout their lives resulting in them having less ability to control situations in their lives).

²⁹⁴ *See Plambeck, supra* note 91, at 22.

physician-patient relationship, then she will fear neither going to the physician nor revealing her substance abuse problem.²⁹⁵ Once the woman is in the physician's office, the physician can educate her about the harms of substance abuse and explain to her drug treatment options.²⁹⁶ Therefore, if the fear of punitive measures is removed, then pregnant substance abusers will be more likely to seek prenatal care and drug treatment, which are essential to the health of both the women and the fetuses.²⁹⁷

Third, treatment would be cost effective and successful.²⁹⁸ Money would be much better spent towards treatment for pregnant substance abusers than towards investigating and prosecuting them.²⁹⁹ In fact, the cost effectiveness and success "of treatment has been documented in the few existing prenatal drug treatment programs."³⁰⁰ These prenatal drug treatment programs have resulted in lower intensive care costs, more drug-free infants delivered, and less need for foster care.³⁰¹

B. Improvement of the Treatment Model

While some treatment programs have been developed, pregnant substance abusers still face many barriers when they seek treatment.³⁰² These barriers to treatment need to be removed in order to properly implement effective non-punitive measures.³⁰³

In general, society lacks "specialized treatment programs for women" and it has been very slow to develop "gender-sensitive and culturally relevant treatment models."³⁰⁴ Moreover, treatment facilities usually do not offer coordinated services³⁰⁵ as recommended by health

²⁹⁵ See *id.*

²⁹⁶ See Linden, *supra* note 14, at 136.

²⁹⁷ See Spencer, *supra* note 17, at 407; See also Linden, *supra* note 14, at 134 (stating negative effects of substance abuse during pregnancy are improved by providing prenatal care and drug treatment).

²⁹⁸ See Spencer, *supra* note 17; Charles Marwick, *Physician Leadership on National Drug Policy Finds Addiction Treatment Works*, 279 JAMA 1149 (1998); Paltrow, et al., *supra* note 11.

²⁹⁹ See Spencer, *supra* note 17, at 406.

³⁰⁰ *Id.* (describing success stories in Baltimore, Chicago, and New York City treatment programs).

³⁰¹ See *id.*

³⁰² See, e.g., Curet & Hsi, *supra* note 16, at 75-76.

³⁰³ See *id.* at 76.

³⁰⁴ *Id.* at 75-76.

³⁰⁵ *Id.* at 76.

experts.³⁰⁶ Such coordinated services would include prenatal care,³⁰⁷ “prevention education, early intervention, and available, effective treatment programs.”³⁰⁸ Additionally, due to fear of legal liability, many programs refuse to accept pregnant women.³⁰⁹ These treatment facilities are afraid to admit pregnant women with drug addictions because they are high-risk patients susceptible to complications that may lead to lawsuits against the treatment provider.³¹⁰

Additionally, pregnant substance abusers who lack private insurance have very limited treatment options.³¹¹ As a result, these women are placed on long waiting lists,³¹² which can be detrimental to the health of both the woman and the fetus.³¹³ Further, many treatment programs are unable to provide child care,³¹⁴ transportation,³¹⁵ or safe housing.³¹⁶

CONCLUSION

Society must implement improved treatment programs instead of applying punitive measures if it truly wants to eliminate the problem of substance abuse during pregnancy. Ideally, society will discontinue punishing pregnant substance abusers and begin implementing barrier-free treatment programs. Unfortunately, at this time, this ideal solution appears to be on the back-burner.

South Carolina’s Supreme Court decisions that treat substance abuse during pregnancy as child abuse³¹⁷ raise several concerns for the future. First, courts in other states may join South Carolina in recognizing a viable fetus is a person because it is recognized as such in other areas of the law, such as wrongful death actions and murder.³¹⁸ Second, taking an example from civil child welfare laws, legislatures

³⁰⁶ See Mills, *supra* note 16, at 998.

³⁰⁷ Curet & Hsi, *supra* note 16, at 76.

³⁰⁸ Mills, *supra* note 16, at 998.

³⁰⁹ Curet & Hsi, *supra* note 16, at 76.

³¹⁰ *Id.*

³¹¹ See Oberman, *supra* note 116, at 516.

³¹² See *id.*

³¹³ See *id.* at 514 (stating that research shows a fetus’s chance of survival increases the sooner the pregnant woman seeks prenatal care).

³¹⁴ See *id.* at 516-17.

³¹⁵ Martha A. Jessup, et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, J. of Drug Issues 285, 286 (2003).

³¹⁶ Curet & Hsi, *supra* note 16, at 86.

³¹⁷ See *Whitner*, 492 S.E.2d at 777; *McKnight*, 576 S.E.2d at 168.

³¹⁸ See *Eckenwiler*, *supra* note 13, at 89.

might begin enacting criminal laws that specifically classify substance abuse during pregnancy as child abuse.³¹⁹ Third, there may be attempts to increase the number of judges appointed to the bench who will decide to recognize substance abuse during pregnancy as child abuse.³²⁰

All of these concerns are particularly relevant today because the use of punitive measures to address substance abuse during pregnancy does not seem to be losing momentum in South Carolina.³²¹ Proponents of non-punitive measures must therefore work together to stop the spread of punitive attacks against pregnant women.³²² Society must peel back the layers surrounding pregnant substance abusers by implementing non-punitive measures, such as prenatal care and drug treatment programs.

³¹⁹ See Eckenwiler, *supra* note 13, at 89; Paltrow, et al., *supra* note 11.

³²⁰ See Eckenwiler, *supra* note 13, at 89; Neil A. Lewis, *The Bush Record: Mixed Results for Bush in Battles Over Judges*, N.Y. TIMES, OCT. 22, 2004.

³²¹ See *McKnight*, 576 S.E.2d at 168; See Paltrow, *supra* note 1, at 1042.

³²² See Paltrow, *supra* note 1, at 1005 (arguing that prosecuting pregnant women for substance abuse is “a significant threat to reproductive freedom” and that “the response from the pro-choice and progressive communities has been disturbingly muted”).

