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GOVERNMENTAL RESPONSES TO PREGNANT WOMEN WHO USE ALCOHOL OR OTHER DRUGS

Lynn M. Paltraw*

BACKGROUND

Throughout the 1980s and into the 1990s the media gave extraordinary coverage to the war on drugs.¹ News reports were typically presented in extremely alarmist terms, reporting crack as "'a plague' that was 'eating away at the fabric of America.'"² Such claims were routinely made despite the lack of evidence to support them.³

Unsupported and misleading stories highlighting the effects of prenatal exposure to cocaine received widespread coverage.⁴ These sensational and often inaccurate news reports convinced many that the use of cocaine during pregnancy inevitably caused significant and irreparable damage to the developing fetus.⁵ Today, dozens of

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¹ A review of media reporting in 1986, when issues of crack cocaine reached a new high, revealed that "six of the nation's largest and most prestigious news magazines and newspapers had run more than one thousand stories about crack cocaine. *Time* and *Newsweek* each ran five 'crack crisis' cover stories. . . . [T]hree major network television stations ran 74 stories about crack cocaine in six months . . . Fifteen million Americans watched CBS' prime-time documentary '48 Hours on Crack Street.'" Laura E. Gómez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* 14 (1997); Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in America's Latest Drug Scare*, in *Crack in America: Demon Drugs and Social Justice* 18, 20-24 (Craig Reinerman & Harry G. Levine eds., 1997).

² Reinerman & Levine, *supra* note 1, at 21.

³ *See id*; *see also* Drew Humphries, *Crack Mothers: Pregnancy, Drugs And the Media* 19-36 (1999) (discussing images associated with crack mothers).

⁴ *See* Reinerman & Levine, *supra* note 1, at 23 (noting that "in 1988 and 1989, the drug war commanded more public attention than any other issue"); Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 154-59 (1997) (discussing the surge of news coverage about maternal drug abuse in 1988 when the National Association for Perinatal Addiction Research and Education published results of a study estimating the number of substance-exposed infants born each year and noting that "[a] review of newspaper accounts of the drug exposure data reveal[ed] a stunning instance of journalistic excess").

⁵ As Drew Humphries explains:

carefully constructed studies establish that the impact of cocaine on the developing fetus has been greatly exaggerated and that other factors are responsible for many of the ills previously attributed to pregnant women's use of cocaine.⁶

Indeed, a 1999 study found that poverty has a greater impact than cocaine on a child's developing brain. According to the study's lead author, "[a] decade ago, the cocaine-exposed child was stereotyped as being neurologically crippled—trembling in a corner and irreparably damaged. But this is unequivocally not the case. And furthermore, the inner-city child who has had no drug exposure at all is doing no better than the child labeled a 'crack-baby.'"⁷

Nevertheless, spurred on by the media barrage concerning pregnant women and drugs,⁸ legislators in the mid 1980s began introducing numerous legislative proposals addressing the subject.⁹

The network news called crack/cocaine babies the newest, most innocent victims in the crack epidemic, and for most Americans the phrase appropriately described irreparable harm visited upon babies by their mothers. What the news reports failed to tell the American public, however, was that the medical research was too limited or poorly conducted to yield any reliable results. When the networks covered the story, they simplified, overstated and mystified harms, creating the distortions that escalated concerns about maternal cocaine use to the level of legal threat.

Humphries, *supra* note 3, at 65.

⁶ Much of the current research is summarized in The Lindesmith Center's and Women's Law Project's *Amicus Curiae* Brief in *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998). See Daniel N. Abrahamson et al., *Amicus Curiae Brief: Cornelia Whitner v. The State of South Carolina*, 9 Hastings Women's L.J. 139 (1998); The Lindesmith Ctr., *Research Brief: Cocaine & Pregnancy*.

⁷ Alan Mozes, *Poverty Has Greater Impact Than Cocaine on Young Brain*, Reuters Health, Dec 6, 1999 (citing Hallum Hurt, 20 J. Dev. & Behav. Pediatrics 418-19 (1999)).

⁸ See Gómez, *supra* note 1, at 32 (describing a legal and sociological study concluding that "media coverage of the 'crack baby crisis' caused a flurry of legislative interest").

⁹ See, e.g., Carol S. Larson, *Overview of State Legislative and Judicial Responses*, in *The Future of Children* 72, 72-84 (Richard F. Behrman ed., 1991) (reviewing actions by state legislatures and courts in response to the problem of drug exposed newborns); Kary Moss, *Substance Abuse During Pregnancy*, 13 Harv. Women's L.J. 278, 292-93 (1990) (summarizing recent developments in state laws regarding pregnant substance abusing women); Alison B. Marshall, *Perinatal Addiction Research & Education Update* (Dec. 1993) (on file with authors) (providing a state by state survey of legislation pertaining to perinatal substance use considered during 1993).

Proposed legislation ranged from bills that would increase services and treatment to pregnant women and their children to ones that would create new criminal penalties for drug using pregnant women. Sterilization or forced Norplant implantation also surfaced as proposed solutions to the problems of substance use and pregnancy.¹⁰

During the late 1980s and 1990s, legislatures rejected the most punitive approaches. For example, in 1990, thirty-four states debated bills relating to prenatal exposure to drugs.¹¹ Of these, fourteen states passed bills designed to help pregnant women through preventive and educational programs, six states established studies to determine the extent of the problem, and eight states considered but failed to pass legislation that would make it a crime to be addicted and be pregnant.¹² Currently, no state legislature has passed a law specifically criminalizing drug use during pregnancy or mandating sterilization.¹³ Despite repeated attempts to pass such legislation, strong opposition by leading medical and public health groups has played a significant role in dissuading legislators from taking such action. These organizations,

¹⁰ Significantly, some of the bills proposed over the last decade specifically called for controlling certain women's reproductive capacity. See Kary Moss & Kitty Kolbert, ACLU, Update of State Legislation Regarding Drug Use During Pregnancy 1, 1-14 (Memorandum, May 22, 1990) (surveying legislation in the 50 states, the District of Columbia and Puerto Rico); see also Cheri Hass, *State v. Gray: De-Criminalization of Maternal Drug Abuse or a Momentary Reprieve?*, 25 U. Tol. L. Rev. 1013 (1995) (discussing a 1991 Ohio bill proposing to make maternal drug abuse a felony, punishable by temporary forced sterilization). In 1992, another bill proposed in Washington State would require a woman who gave birth "to a child with fetal alcohol syndrome to have the contraceptive Norplant involuntarily inserted in her." First Quarterly Overview of 1992 State Legislative Activity 2 (Geo. Wash. Univ. Legislative Tracking Serv., 1992).

¹¹ See *States Focus on: Pregnant Women Using Drugs*, The Nation's Health (Sept. 1990).

¹² *Id.* See also Rachel Roth, Making Women Pay, The Hidden Costs of Fetal Rights 163-183 (2000) (providing an overview and critique of state laws regarding pregnant, drug using women as of 1992); Dan Steinberg and Shelly Gehshan, State Responses to Maternal Drug and Alcohol Use: an Update, National Conference of State Legislatures (Jan. 2000)(discussing some options states have in addressing pregnant women who use alcohol and other drugs and providing an overview of recent statutory and judicial developments).

¹³ As discussed in detail below, South Carolina has by judicial decision expanded the scope of its pre-existing criminal child neglect statute, concluding that a viable fetus is a "child" and that any behavior by a pregnant woman, including use of an illegal drug that may endanger the fetus' health constitutes criminal neglect punishable by ten years in jail. See *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), cert. denied, 523 U.S. 1145 (1998); see also *infra* text accompanying notes 142-163.

such as the American Medical Association¹⁴, the American Academy of Pediatrics¹⁵, the American Public Health Association¹⁶, the American Nurses Association¹⁷, the American Society on Addiction Medicine¹⁸, and the March of Dimes¹⁹, have opposed the prosecutions of substance-using pregnant women in part because of the expectation that such prosecutions would deter women from obtaining necessary health care and would thus cause harm to both maternal and fetal health.

While bills proposing criminal penalties have failed, eighteen states have amended their civil child welfare laws to address

¹⁴ "Pregnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment." American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990).

¹⁵ "The American Academy of Pediatrics is concerned that [arresting drug addicted women who become pregnant] may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment." American Academy of Pediatrics, Committee on Substance Abuse, *Drug Exposed Infants*, 86 Pediatrics 639, 641 (1990).

¹⁶ The American Public Health Association's Policy recognizes that:

. . . that pregnant drug-dependent women have been the object of criminal prosecution in several states, and that women who might want medical care for themselves and their babies may not feel free to seek treatment because of fear of criminal prosecution related to illicit drug use . . . [the Association] recommends that no punitive measures be taken against pregnant women who are users of illicit drugs when no other illegal acts, including drug-related offenses, have been committed.

Am. Pub. Health Ass'n, *Public Policy Statement No. 9020, Illicit Drug Use by Pregnant Women*, 8 Am. J. Pub. Health 240 (1990).

¹⁷ "[The American Nurses Association] recognizes alcohol and other drug problems as treatable illnesses. The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems." American Nurses Association, Position Statement on Opposition to Criminal Prosecution of Women for Use of Drugs While Pregnant and Support for Treatment Services for Alcohol and Drug Dependent Women of Childbearing Age (1991) (on file with NAPW).

¹⁸ "Criminal prosecution of chemically dependent women will have the overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing, rather than preventing, harm to children and to society as a whole." American Society of Addiction Medicine, Public Policy Statement on Chemically Dependent Women and Pregnancy 47 (1989) (on file with NAPW).

¹⁹ "The March of Dimes believes that targeting substance-abusing pregnant women for criminal prosecution is inappropriate and will drive women away from treatment." March of Dimes, Statement on Maternal Drug Abuse (1990) (on file with NAPW).

specifically the subject of a woman's drug use during pregnancy.²⁰ These laws vary considerably: in some states a pregnant woman's drug use is supposed to trigger only an evaluation of parenting ability and the provision of services, whereas in others it provides the basis for presuming neglect or qualifies as a factor to be considered in terminating parental rights.

For example, in South Carolina, a newborn child is presumed to be neglected and "cannot be protected from further harm without being removed from the custody of the mother" if there is a positive toxicology test of either the mother or the child at birth that indicates the presence of any amount of a controlled substance.²¹ By contrast, California law mandates that "any indication of maternal substance abuse shall lead to an assessment of the needs of the mother and child" but specifically clarifies that "a positive toxicology screen at the time of the delivery of an infant is not in and of itself a sufficient basis for reporting child abuse or neglect."²² Reports may only be made where there are "other factors . . . present that indicate risk to a child."²³ If a report is filed and "relates solely to the inability of the parent to provide the child with regular care due to the parent's substance abuse," the report "shall be made only to county welfare departments and not to law enforcement agencies."²⁴

The states also vary in what evidence of drug use or exposure is required to bring a fetus or child within the reach of the child welfare system. Some states, such as South Carolina, rely on a positive drug

²⁰ The eighteen states that address the issue of a pregnant woman's use of drugs in their civil child welfare statutes are: Arizona, California, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, and Wisconsin. *See* Ariz. Rev. Stat. Ann. § 13-3620(B); Cal. Penal Code § 11165.13; Fla. Stat. Ann. § 39.01(30)(g); 325 Ill. Comp. Stat. 5/7.3b; Ind. Code § 31-34-1-10, 11; Iowa Code Ann. §§ 232.68(2)(f), 232.77(2); Md. Code Ann., Fam. Law § 5-313(d)(1)(iv); Mass. Gen. Laws Ann. ch. 119, § 51A; Mich. Comp. Laws § 722.623a; Minn. Stat. Ann. § 626.5561-5563; Nev. Rev. Stat. Ann. § 432B.330(1)(b); Okla. Stat. Ann. tit. 10, § 7103(A)(2); R.I. Admin. Code § 03-040-420.II.D.4.a; *id.* § 03-141-000.II.F.2.c.1.; S.C. Code Ann. § 20-7-736; Tex. Fam. Code Ann. § 261.001(1) & (7); Utah Code Ann. § 62A-4-404; Va. Code Ann. §§ 54.1-2403.1, 63.1-248.3(A1); Wis. Stat. Ann. § 146.0255.

²¹ S.C. Code Ann. § 20-7-736(G). *See also* American Civil Liberties Union, *Drug Testing A Bad Investment* (1999) (addressing the costs of drug testing and incidents of false positives and innocent positives in the workplace setting).

²² Cal. Penal Code § 11165.13.

²³ *Id.*

²⁴ *Id.*

test;²⁵ others, such as Florida, mandate reporting newborns who are "demonstrably adversely affected" by prenatal drug exposure;²⁶ still others, such as Texas, rely on terms such as born "addicted" to an illegal substance.²⁷ Some states combine these factors.

Another variation found in the statutes is which substances are covered. Most states focus only on drugs defined to be illegal. Even then, some states appear to limit which illegal drugs are covered. For example, Maryland's civil child welfare statute creates a presumption that a child is not receiving ordinary and proper attention if the "child was born addicted to or dependent on cocaine, heroin, or a derivative thereof," thus implicitly excluding marijuana from the statute's coverage.²⁸ In addition, several states also include fetal alcohol syndrome or evidence of the pregnant woman's alcohol use in their definitions of neglected children.²⁹

Although it is clear that drug tests performed on newborns reveal information about the mother, some states also specifically mandate reporting or testing of women while they are still pregnant. Minnesota's child abuse statute defines neglect to include a positive toxicology test of the mother at delivery³⁰ and thus mandates reporting a positive drug test on the pregnant woman.³¹ Wisconsin similarly defines child abuse to include a woman's "habitual" drug or alcohol use at any point in her pregnancy.³² And, in South Carolina, drug tests on the woman herself may be the basis for a presumption of child neglect.³³ In addition, as a result of a judicial decision, the state's mandatory child abuse reporting statute has been interpreted to require reporting of a pregnant woman's actions that may endanger a viable

²⁵ S.C. Code Ann. § 20-7-736(G).

²⁶ Fla. Stat. Ann. § 39.01(30)(g).

²⁷ Tex. Fam. Code Ann. § 261.001(8).

²⁸ Md. Code Ann., Fam. Law § 5-313(d)(1)(iv); *see also* Bonnie I. Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 Stan. L. Rev. 745, 771-76 (1990) (arguing for universal testing and reporting to the child welfare system, but excluding reports for marijuana because of lack of evidence regarding marijuana use and interference with parenting ability).

²⁹ *See, e.g.*, Ind. Code §§ 31-34-1-10, -11; Utah Code Ann. § 62A-4a-404; Wis. Stat. Ann. § 48.02(1).

³⁰ *See* Minn. Stat. Ann. § 626.556(2)(c)(7).

³¹ *See* Minn. Stat. Ann. § 626.5562(1), (2).

³² Wis. Stat. Ann. § 48.02(1).

³³ *See* S.C. Code Ann. § 20-7-736(G).

fetus.³⁴ In three states, the testing or screening for prenatal drug exposure is itself mandatory in some circumstances.³⁵

In some states that have not amended their laws, government officials have, by regulation or practice, extended existing civil child abuse laws to pregnant women despite the lack of legislative intent or specific authority to do so.³⁶ For example, for a period of time in the 1980s, New York City, as a matter of policy, began reporting and treating as abused all newborns that tested positive for illegal drugs.³⁷ The costly policy was eventually stopped when it became apparent that it was not consistent with existing state legislation and was instead filling hospital nurseries with healthy infants and overwhelming an already overburdened child protective system with unnecessary referrals.³⁸ Similarly, from March 1997 to August 1998, child welfare administrators in Sacramento, California, responding to a series of

³⁴ See Abrahamson, *supra* note 6, at 142-43 (discussing S.C.Code 20-7-510(A)); Jonathan Dube, *S.C. Drug Counselors Wrestling with Pregnancy-Reporting Law*, Post & Courier (Charleston, S.C.), Apr. 12, 1998 (discussing memo to drug treatment center directors from the state Department of Alcohol and Other Drug Abuse Services instructing counselors to report drug use by third-trimester pregnant women to authorities); Attorney General Charles M. Condon, Office of the Attorney General of South Carolina, Intervention Protocol for Drug-Impaired Infants 4 (1998) (stating unequivocally that "[w]ith the decision in *Whitner v. State*, holding viable fetuses to be persons for purposes of Sec.20-7-50, the reporting requirements of S.C. Code Ann. Sec. 20-7-510 are now clearly applicable to cases of suspected abuse or neglect involving unborn, yet viable fetuses, defined as 24 weeks gestation with an illegal drug in their system").

³⁵ See Survey, *infra* (listing statutes for Iowa, Minnesota, and Virginia).

³⁶ Cf. Wendy Chavkin et al., *Efforts to Reduce Perinatal Mortality, HIV, and Drug Addiction: Surveys of the States*, 50 J. Am. Med. Assoc. 164, 164-165 (1995); Letter from Susan V. Demers, Deputy Commissioner and General Counsel of the New York State Department of Social Services, to Karen Goldstein (Aug. 17, 1990).

³⁷ See Laura Lassar, *When Success Is Not Enough: The Family Rehabilitation Program and the Politics of Family Preservation* (unpublished manuscript on file with NAPW); Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 Am. J. Pub. Health 483 (1990).

³⁸ See Lassar, *supra* note 37, at 7 (describing how "a backlog in investigations and foster care placements caused hundreds of infants to be held in New York City hospitals for as long as several months after they were medically ready for discharge); Diane Duston, *Boarder Babies Straining Hospitals' Resources*, Associated Press, June 23, 1992 (quoting David Liederman, executive director of the Child Welfare League, who asserts that the government should help families in distress solve their problems, instead of focusing on punishment for drug use); see also Denise Paone & Julie Alpern, *Pregnancy Policing: Policy of Harm*, 9 Int. J. of Drug Policy 101, 104 (1998) (noting that as a result of being kept in hospitals for extended periods of time "these children may be condemned to living conditions that pose greater harm to their well-being than the ones from which they were removed"); Demers *supra* note 36.

newspaper articles, drastically changed their child welfare policy and removed more than 7,000 children from their families based on evidence of past parental drug use. Many of those families affected included women who had used drugs while pregnant.³⁹

In some instances, individual cases are reported to authorities and become the basis for legal challenges. The two state supreme courts that have faced such action in the absence of legislative change have refused to treat women who used drugs while pregnant as presumptively neglectful.⁴⁰ Another state supreme court, however, has held, despite the lack of legislative action, that a newborn's "addiction and symptoms of withdrawal" at birth along with the mother's continuing failure to provide care satisfies one prong of a four prong test to terminate parental rights.⁴¹

Although many states already have special provisions for the civil commitment of drug users, two states have amended their laws to

³⁹ John McCarthy, *The CPS Drug Use Dilemma: Balancing the Right of Children to Protection Against the Right of Children to Their Parents*, Sacramento Medicine, Nov. 1998, at 11-12.

⁴⁰ See *In re Valerie D.*, 613 A.2d 748 (Conn. 1992) (holding that plain language and legislative history do not support application of civil child abuse statute where child was born with positive toxicology and other symptoms after mother had injected cocaine several hours prior to giving birth and distinguishing numerous lower sister state court decisions reaching the opposite conclusion); *In re Nassau County Dep't of Soc. Serv.*, 661 N.E.2d 138 (N.Y. 1995) (noting that a finding of neglect as to a newborn and a newborn's older sibling may not be based solely on the newborn's positive toxicology for a controlled substance); see also *In re Appeal in Pima County Juvenile Severance Action No. S-120171*, 905 P.2d 555 (Ariz. 1995) (ruling that a finding of neglect as to a newborn and a newborn's older sibling may not be based solely on the newborn's positive toxicology for a controlled substance); *In re Adoption of Katherine*, 674 N.E.2d 256 (Mass. App. Ct. 1997) (refusing to permit adoption of children without the biological parent's consent and concluding that "[i]n the absence of a showing that a cocaine-using parent has been neglectful or abusive in the care of that parent's child, we do not think a cocaine habit, without more, translates automatically into legal unfitness to act as a parent"); *State ex. rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997) (refusing to allow detention of pregnant woman under statute allowing state to take protective custody of a "child" because legislature did not intend to include fetus within the definition of child).

⁴¹ See *In re Guardianship of K.H.O.*, 736 A.2d 1246 (N.J. 1999) ("[T]he child's addiction and symptoms of withdrawal, coupled with her mother's failure to provide continuing care for her child or to take any measures to help her child overcome her suffering, satisfy the [endangerment to child's health and development] prong of the statutory test [for termination of parental rights]."). In Ohio, the intermediate court of appeals held that a fetus is a "child" under the state's civil child abuse statute. See *In re Baby Boy Blackshear*, No. 99CA00018, 1999 WL 770788, at *3, (Ohio Ct. App. Sept. 7, 1999). An appeal is currently pending before the Ohio Supreme Court.

authorize the civil commitment of a woman who uses drugs during her pregnancy⁴² and another state permits civil detention of such a woman.⁴³ Constitutional requirements for civil commitment require at least clear and convincing evidence that an individual is mentally ill and dangerous to herself or others before she may be committed to a treatment facility for some period of time.⁴⁴ Accordingly, efforts to civilly commit pregnant drug users have been based on the claim that a woman is a danger to another person – the fetus.⁴⁵ At least one court, however, has rejected the interpretation of the word "other" to include the fetus, finding that to commit a woman "solely because she is, in the state's view, a danger to her fetus" violates the woman's rights to liberty and equal protection.⁴⁶

Many states have taken non-punitive steps to improve their understanding of the problem and to increase access to information and treatment. For example, some states have created task forces to study the problem of substance abuse and pregnancy,⁴⁷ established treatment programs or coordinated services,⁴⁸ given pregnant women priority access to treatment,⁴⁹ encouraged health care practitioners to identify substance-abusing pregnant women and to refer them to treatment,⁵⁰ or mandated increased education—of the public and medical providers—on substance abuse and pregnancy.⁵¹ Some states have also passed

⁴² Minn. Stat. Ann. § 626.5561(2) (permitting emergency commitment of pregnant women); S.D. Codified Laws § 34-20A-63 (permitting "emergency commitment" of pregnant women who abuse alcohol or drugs). See generally Sandra Anderson Garcia & Ingo Keilitz, *Involuntary Civil Commitment of Drug-Dependent Persons With Special Reference to Pregnant Women*, 15 *Mental Physical Disabilities L. Rep.* 418, 419 (1991) (discussing the 1989 amendments to the Commitment Act of 1982).

⁴³ Wis. Stat. Ann. §§ 48.133, 48.135, 48.981(3) (amending the Children's Code to extend regulatory control over the behavior of pregnant women).

⁴⁴ See Garcia & Keilitz, *supra* note 42, at 420-421.

⁴⁵ See *id.* at 419 (noting that as of 1991, except for Minnesota, no state policy articulated the specific goal of involuntarily committing pregnant drug users based solely on a state's interest in protecting the fetus).

⁴⁶ See *In re Tanya P.*, No. 530069/93, slip. op. at 18-22 (N.Y. Sup. Ct. N.Y. Cty. Feb. 24, 1995).

⁴⁷ See, e.g., Ky. Rev. Stat. Ann. § 222.021; La. Rev. Stat. Ann. §§ 40:2018, 46:2511; N.H. Rev. Stat. Ann. § 132:20; Or. Rev. Stat. § 430.910.

⁴⁸ See, e.g., Pa. Stat. Ann. tit. 71 § 553.

⁴⁹ See, e.g., Ga. Code Ann. § 26-5-20; Kan. Stat. Ann. § 65-1, 165; Mo. Ann. Stat. § 191.731.

⁵⁰ See, e.g., Colo. Rev. Stat. § 26-4-508.2(1).

⁵¹ See, e.g., Del. Code Ann. tit. 16, § 190; Mo. Rev. Stat. §§ 191.725. See also Roth, *supra* note 12, at 166-75, 176, observing that many of the provisions for education and treatment do not in fact guarantee funding for those services and that the

measures that prohibit discrimination against pregnant women seeking drug treatment,⁵² removed barriers to methadone treatment for pregnant women,⁵³ ensured that pregnant women in certain health maintenance organizations can receive substance abuse treatment,⁵⁴ and enhanced criminal penalties for people who sell or give drugs to pregnant women.⁵⁵ Many states, as part of prevention and education efforts, have also passed laws requiring places that sell alcoholic beverages to post warnings about fetal alcohol syndrome and fetal alcohol effects directed to pregnant women who drink.⁵⁶

A very recent trend affecting pregnant women who use drugs is the adoption of some form of "Drug Dealer Liability Act." Under the typical statute, the legislature creates a cause of action allowing any "individual who was exposed to an illegal drug in utero" to "bring an action for damages caused by use of an illegal drug by an individual."⁵⁷ The statutes typically enumerate against whom such an action can be

effectiveness of these non-punitive approaches "depends on the strength of the state's commitments as measured by allocation and duration of funds; its enforcement of policies guaranteeing access; the breadth and depth of treatment offerings and so on."

⁵² See, e.g., Iowa Code § 125.32A; Kan. Stat. Ann. § 65-1, 165. Some states have also passed laws requiring that prospective adoptive parents receive information about a birth mothers' drug use history and the results of an infant drug toxicology test. See Me. Rev. Stat. Ann. tit 18-A, § 9-304(b); Mich. Comp. Laws Ann. § 710.27(b); N.Y. Dom. Rel. Law § 112(2-a); Okla. Stat. Ann. tit. 10 § 7504-1.1(B)(2)(b)(3), (10) & (11); Or. Rev. Stat. § 418.325; Vt. Stat. Ann. tit. 15-A, § 2-105; Wyo. Stat. Ann. § 1-22-116; see also Cal. Welf. & Inst. Code § 16135 (establishing services for adoptive parents of infants presumed to have been affected by prenatal drug exposure.).

⁵³ See Or. Rev. Stat. § 430.920.

⁵⁴ Md. Code Ann. Health-Gen § 15-103(b)(9)(vi).

⁵⁵ See, e.g., 720 Ill. Comp. Stat. Ann. 570/407.2; N.J. Stat. Ann. § 2C:35-8.

⁵⁶ See, e.g., 235 Ill. Comp. Stat. Ann. 5/6-24a(a) & (b) ("The General Assembly finds that there is a need for public information about the risk of birth defects (specifically Fetal Alcohol Syndrome) when women consume alcoholic liquor during pregnancy. . . . Every holder of a retail license, whether the licensee sells or offers for sale alcoholic liquors for use or consumption on or off the retail license premises, shall cause a sign with the message 'GOVERNMENT WARNING: ACCORDING TO THE SURGEON GENERAL, WOMEN SHOULD NOT DRINK ALCOHOLIC BEVERAGES DURING PREGNANCY BECAUSE OF THE RISK OF BIRTH DEFECTS' to be framed and hung in plain view."); see also D.C. Code Ann. § 25-147; Ga. Code Ann. § 3-1-5; Minn. Stat. Ann. § 340A.410, Subd. 4b (3) N.J. Stat. Ann. § 33:1-12a; Or. Rev. Stat. § 471.551; Tenn. Code Ann. § 57-1-211; Wash. Rev. Code Ann. § 66.16.110; W.Va. Code § 60-6-25.

⁵⁷ See, e.g., Okla. Stat. Ann. tit. 63, § 2-424; see also Survey, *infra* (detailing other Drug Dealer Liability Acts).

brought, a list that includes the distributor or marketer of the illegal drug, but not the mother of the newborn.⁵⁸

Trends in drug policy at all levels also have a significant impact on pregnant women. American drug policy in general is "based on prohibition and the vigorous application of criminal sanctions for the use and sale of illicit drugs."⁵⁹ As a result, today "[m]ore than 400,000 people are behind bars for drug crimes—and nearly a third of them are locked up for simply possessing an illicit drug."⁶⁰

This approach has had a major impact on mothers. As a report from Amnesty International summarized, "[m]ore than 80,000 women in prisons and jails are mothers of children under 18; they have about 200,000 children aged under 18."⁶¹ Furthermore, "[m]any women enter jail and prison pregnant. In 1997-98, more than 2,200 pregnant women were imprisoned and more than 1,300 babies were born in prisons."⁶² Beyond state law, there are numerous federal statutes that directly and indirectly address the issue of drug using pregnant women. Most federal statutes addressing the issue directly do so by providing grant money for organizations that assist drug using pregnant women in some way.⁶³ Congress has also focused on fetal alcohol syndrome by creating programs whereby the Secretary of the Interior addresses fetal alcohol syndrome through the Bureau of Indian Affairs⁶⁴ and by creating the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect.⁶⁵

⁵⁸ *Id.*

⁵⁹ Ernest Drucker, *Drug Prohibition and Public Health, 25 Years of Evidence*, 114 Pub. Health Rep. 14, 18 (1999).

⁶⁰ *The Drug War Backfires*, N.Y. Times, Mar. 13, 1999, at A14 (noting that this is not because Americans use more drugs than people in other nations and that "[s]urveys now show . . . that the use of crack, by about 600,000 people annually, has not changed in 10 years. Nor has the general level of illegal drug use.").

⁶¹ Amnesty International, "Not Part of My Sentence": Violations of the Human Rights of Women in Custody 15 (1999).

⁶² *Id.* at 22; see Catherine Conly, U.S. Dep't of Justice, *The Women's Prison Association: Supporting Women Offenders and Their Families* 3 (1999) (detailing the dramatic rise in the number of women imprisoned in federal and state prisons on drug offenses).

⁶³ See, e.g., 25 U.S.C. § 1665g (permitting "grants to Indian tribes and Indian organizations to establish fetal alcohol syndrome and fetal alcohol effect programs"); 42 U.S.C. § 280c-6 (establishing grants for home visiting services for at-risk families); 42 U.S.C. § 290bb-1(a) (grants "for the purpose of providing to pregnant and postpartum women treatment for substance abuse").

⁶⁴ See 21 U.S.C. § 1665d(b).

⁶⁵ See 42 U.S.C. § 280f(d).

Other federal statutes also affect drug using pregnant women. As a recent report explains:

[The 1996 welfare law] creating the Temporary Assistance for Needy Families program⁶⁶ contains three specific provisions that will have particular impact on applicants and recipients with history of alcohol and drug problems. . . .

Section 115⁶⁷ makes individuals with drug felony convictions ineligible for TANF and food stamps – unless the state enacts legislation to opt out of or modify the ban. . . .

Section 408 (a)(9),⁶⁸ 821,⁶⁹ 202,⁷⁰ and 903⁷¹ (respectively) make individuals in violation of a condition of their parole or probation ineligible for TANF, food stamps, Supplemental Security Income (SSI), and public housing, leaving open the possibility that a drug relapse will constitute a violation. . . .

Section 902⁷² authorizes but does not require states to test welfare recipients for illegal drug use and sanctions those who test positive.⁷³

Each of these provisions could have serious consequences for women—including pregnant women who use drugs:

Without welfare and food stamps, some women and children would not be able to afford basic living necessities, including food, shelter, and health care. Each of these provisions also has the potential to reduce available funding for alcohol and drug treatment for women on welfare and their families. Alcohol and drug treatment programs, particularly residential programs, have historically used a family's welfare and food stamps to help fund services. If these funds are no

⁶⁶ Personal Responsibility And Work Opportunity Reconciliation Act Of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of U.S.C.).

⁶⁷ Codified at 21 U.S.C. § 862a.

⁶⁸ Codified at 42 U.S.C. § 608.

⁶⁹ Amending 7 U.S.C. § 2015.

⁷⁰ Amending 42 U.S.C. § 1382(e).

⁷¹ Amending 42 U.S.C. § 1437d.

⁷² Codified at 21 U.S.C. § 862b.

⁷³ Legal Action Center, *Steps to Success, Helping Women with Alcohol and Drug Problems Move From Welfare to Work 2* (May 1999); *see also* Drug Strategies, *Keeping Score, Women and Drugs: Looking at the Federal Drug Control Budget 22* (1998) (discussing the federal TANF laws and noting that "[o]ver 90 percent of the 3 million households receiving TANF funds in 1998 are headed by women"). *See also*, Corinne A. Carey, *Crafting A Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State Responses as the Most Recent Chapter in the War on Drugs*, 46 Buffalo L. Rev. 281 (1998)

longer available, programs could be forced to reduce services or close if they cannot offset losses.⁷⁴

Another federal statute affecting drug using women is the Adoption and Safe Families Act.⁷⁵ This act, intended to promote the adoption of children in foster care, creates a 12-month time frame for making decisions about a child's permanent placement⁷⁶ and a 15-month time frame for petitioning for termination of parental rights.⁷⁷ These time frames however are difficult to reconcile with the time pregnant women and new parents need to address addiction and substance abuse problems. As a report on this act noted, services in some communities may be inadequate -- nonexistent, inaccessible, or with long waiting lists -- thus preventing parents from getting the help they need to make sufficient progress within the time frame. Also, the nature of the condition may require longer term treatment, and for those suffering from a drug or alcohol addiction, treatment and recovery may require ongoing support services and include periods of relapse.⁷⁸

To a large extent, as discussed above, legislative action has occurred in response to the extensive media attention given to the issue of pregnant drug using women. Because the issue touches on such highly controversial issues as drugs and the politics of abortion,⁷⁹ it is likely that this issue will remain a subject of ongoing legislative proposals and battles.⁸⁰ The entire catalog of statutes and regulations

⁷⁴ Legal Action Center, *supra* note 73, at 2.

⁷⁵ Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

⁷⁶ 42 U.S.C. § 675(5)(C).

⁷⁷ 42 U.S.C. § 675(5)(E).

⁷⁸ Jan McCarthy, et al., *The Adoption and Safe Families Act: Exploring the Opportunity for Collaboration Between Child Mental Health and Child Welfare Service Systems: A Resource Guide* 37 (1999).

⁷⁹ *See, e.g.*, Dan Baum, *Smoke and Mirrors: The War on Drugs and the Politics of Failure* 267-72 (1996) (noting that "the movement to prosecute drug-using mothers gets much of its steam from the anti-abortion movement."); Humphries, *supra* note 3, at 69 ("Knowing a declaration that legal life begins at conception is beyond them, right-to-life jurists have tried to work around the edges, using related issues like maternal drug use to advance their cause.").

⁸⁰ The issue remains current in the media, as it has devoted substantial coverage to the Children Require a Caring Kommunity (CRACK) program, a program that offers drug-users \$200 to get sterilized or use long-term contraception. *See* Anne-Marie O'Neill & Kelly Carter, *Desperate Measure*, People, Sept. 27, 1999, at 145 (describing founder Barbara Harris's program offering \$200 to stop crack addicts from having more babies); *see also* Children Require a Caring Kommunity Home Page, (visited May 3, 2000) (official web site of the CRACK program that discusses alleged harms to drug exposed newborns); Lynn Paltrow & Robert Newman,

directly addressing this issue is included in the attached Survey. Below is a more detailed discussion of recent trends in criminal and child dependency laws.

DISCUSSION

A large portion of the statutes and regulations described above take punitive approaches toward drug using pregnant women. Whether through the civil child welfare system or the criminal child abuse laws, punitive approaches raise troubling public health, reproductive rights, and drug policy issues.

A. Civil Child Neglect and Dependency Laws.

Child welfare experts agree that the purpose of civil child welfare laws is to protect children from future harm and not to punish parents for past wrongdoing.⁸¹ Nevertheless, as a response to the media-created crisis of drug using pregnant women many legislatures have revised civil child welfare laws by defining civil child neglect or abuse as including using drugs during pregnancy. This approach seems to have been based more on a desire to punish than on any reliable evidence that such use was in fact causing harm or was a reliable predictor of future harm. Indeed, states that have adopted such laws appear to have based their decisions on a series of unfounded assumptions analyzed below. Significantly, it appears that no state that has defined drug use during pregnancy as civil child neglect has engaged in any systematic study to determine the effects of the new law, such as the cost of testing or the degree to which foster care and other child welfare interventions have occurred.

1. Assumption: All drug-exposed children are seriously damaged at birth.

In a preamble to legislation including drug-exposed newborns in its child welfare statute, the Illinois legislature stated: "the abuse of cannabis and controlled substances . . . causes death or severe and often irreversible injuries to newborn children."⁸² Such a broad and alarmist statement would be hard to support in the scientific literature, yet it

Treatment, Not Sterilization, Is the Way to Help Addicted Moms, Houston Chron., Jan. 30, 2000, at C4 (arguing that program is based on numerous medical and social myths).

⁸¹ See Robin-Vergeer, *supra* note 28, at 748-50.

⁸² 740 Ill. Comp. Stat. Ann. 20/2(a).

reflects many assumptions underlying similar legislation across the country.

It is certainly true that some newborns exposed prenatally to some drugs do suffer adverse short- or long-term consequences—as do infants whose mothers lacked access to quality prenatal care and adequate nutrition, smoked or drank while pregnant, or used fertility-enhancing medications that cause multiple births associated with prematurity and other life-threatening hazards.⁸³ But as experts in the field have noted, "the public outcry for the punishment of substance-using mothers and the disenfranchisement of their children as [an] unsalvageable almost demonic 'biologic underclass' rests not on scientific findings but upon media hysteria fueled by selected anecdotes."⁸⁴ As discussed above, careful research has clarified that children exposed to cocaine may not be harmed and that cocaine is but one of a number of potentially harmful substances that may affect pregnancy outcome.⁸⁵ Indeed, healthy children born to women with drug problems may face a different threat of harm; stigmatization based on myths perpetuated by media coverage.⁸⁶

2. Assumption: Women who use drugs could simply stop, and failure to do so indicates disregard for the future child's well-being. Legislators often act based on an incorrect understanding of the nature of drug use and addiction. Some women who use drugs during pregnancy are not addicted and may, like some people who drink

⁸³ See e.g., Ezekiel J. Emanuel, *Eight is Too Many*, New Republic, Jan. 25, 1999, at 8, 10 (discussing the numerous medical problems resulting from large multiple births including prematurity, low-birthweight and death).

⁸⁴ D.A. Frank et al., *Maternal Cocaine Use: Impact on Child Health and Development*, 40 *Advances in Pediatrics* 65 (1993).

⁸⁵ See Abrahamson, *supra* note 6, at 147; see also The Lindesmith Ctr., *supra* note 6; Gómez, *supra* note 1, at 23-25 (discussing the failure of longitudinal studies to find statistically significant differences between cocaine-exposed children and non-exposed children).

⁸⁶ See Paone & Alpern, *supra* note 38, at 104 (citing Thurman et al., *Prenatally Exposed to Cocaine, Does the Label Matter?*, 18 *J. of Early Intervention* 119 (1994) and Woods et al., *Pygmalion in the Cradle: Observer Bias Against Cocaine Exposed Infants*, 17 *Infant Behav. & Dev.* 1020 (1994)); see also Delacey Skinner, *Body Politics*, Point (South Carolina), Fall 1999, at 8, 9 ("For Knight and her son, though, the most painful result of their ordeal are the social consequences Brandon has faced from the labels used in the media. After a picture of Knight and Brandon opposite a picture of a 'crack baby' ran in *Source* magazine last year, Brandon was teased at school. Kids started calling him a 'crack baby.'").

alcohol or smoke cigarettes, use drugs only on an occasional basis.⁸⁷ Other women, however, may be addicted. As the United States Supreme Court⁸⁸ and the health community⁸⁹ have long recognized, drug addiction is an illness that generally cannot be overcome without treatment. The American Medical Association has unequivocally stated: ". . . it is clear that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors. It is properly viewed as a disease, and one that physicians can help many individuals control and overcome."⁹⁰

Many legislators, nevertheless view drug use and addiction as a moral failing for which there should be "zero tolerance." The zero tolerance approach, however, is in sharp contrast to the public health approach also known as "harm reduction".⁹¹ This approach recognizes that: "[O]vercoming drug addiction is usually a difficult and gradual process."⁹² It favors "providing drug abusers with information and assistance that can help them reduce drug consumption and minimize the risks associated with their continuing drug use."⁹³ This approach emphasizes "drug treatment over imprisonment and favor[s] broadening drug treatment to include non-abstinence-based models."⁹⁴

⁸⁷ See Robin-Vergeer, *supra* note 28, at 771-72.

⁸⁸ See *Linder v. United States*, 268 U.S. 5, 18 (1925) ("[Addicted persons] are diseased and proper subjects for [medical] treatment."); *cf.* *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (holding unconstitutional a state law making narcotic addiction a crime).

⁸⁹ See Charles Marwick, *Physician Leadership on National Drug Policy Finds Addiction Treatment Works*, 279 JAMA 1149 (1998); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 176 (4th ed. 1994) ("The essential feature of substance dependence is a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues use of the substance despite significant substance related problems. There is a pattern of repeated self-administration that usually results in tolerance, withdrawal, and compulsive drug-taking behavior.").

⁹⁰ *Amicus Curiae* Brief of the American Medical Association in *Ferguson, et. al. v. City of Charleston et. al.*, in the United States Supreme Court, No. 99-936, at 7 *citing* American Medical Association, *Proceedings of the House of Delegates: 137th Annual Meeting, Board of Trustees Report* NN 236, 241 (June 26-30, 1988).

⁹¹ Drucker, *supra* note 59, at 16, 28 (noting that in the United States, "the very use of the term harm reduction is still banned from the Federal policy lexicon and denied funding because it is seen as 'condoning drug use'").

⁹² See Sheigla Murphy & Marsha Rosenbaum, *Pregnant Women on Drugs: Combating Stereotypes and Stigma* 100 (1999).

⁹³ *Id.*

⁹⁴ *Id.*

Understanding the nature of addiction, and the reasons why pregnant women become addicted provides a good foundation for developing policies that will in fact improve the health and lives of women and children. Fortunately, an increasing amount of information is now available about the particular problems faced by pregnant and parenting women who suffer from drug and alcohol addiction and how those problems impact attempts to recover from addiction. For example, research has found that many drug-using women were sexually abused as children or are currently being abused.⁹⁵ Thus, many experts believe that it is likely that women who are abused "self medicate" with alcohol, illicit drugs, and prescription medication to alleviate the pain and anxiety of living under the constant threat of violence.⁹⁶ Treatment that does not address these underlying traumas often fails.⁹⁷ Similarly, pregnant women often have family responsibilities that make it difficult for them to go to programs that were designed for men and that do not provide childcare and other supportive services.⁹⁸ The federal government's Center for Substance Abuse Treatment provides well-developed guidelines and protocols for treating effectively pregnant and parenting drug using women.⁹⁹

As the California Medical Association found: prenatal substance abuse by an addicted mother does not reflect willful maltreatment of a fetus, nor is it necessarily evidence that the mother will abuse her child after birth. A woman with a substance abuse problem may genuinely desire to terminate the use of such substances prenatally

⁹⁵ See Marsha Rosenbaum, *Women: Research and Policy*, in Williams & Wilkins, Substance Abuse 654-65 (1997) ("Researchers have consistently found high levels of past and present abuse in the lives of women drug users. Many have suggested that there is a relationship, if not absolutely causal, between violence experienced by women and drug use.").

⁹⁶ See, e.g., Hortensia Amaro et al., *Violence During Pregnancy and Substance Abuse*, 80 Am. J. Pub. Health 575, 578 (1990); Teri Randall, *Domestic Violence Begets Other Problems of Which Physicians Must Be Aware*, 264 JAMA 940, 943 (1990).

⁹⁷ See Center for Substance Abuse Treatment, *Pregnant, Substance-Using Women* 6 (1993) (U.S. Dept. of Health & Human Servs. Publication No. (SMA) 93-1998) (discussing the services needed to address successfully the treatment of drug using women, noting that it "is imperative that programs include services designed specifically for women, particularly pregnant women").

⁹⁸ *Id.* at 6-8.

⁹⁹ See *Pregnant, Substance-Using Women*, *supra* note 97. See also Center for Substance Abuse Treatment, *Practical Approaches in the Treatment of Women Who Abuse Alcohol and Other Drugs* 124-26 (1994) (U.S. Dept. of Health and Human Servs. Publication No. (SMA) 94-3006), (providing guidance to treatment providers to meet the specific needs of women with substance abuse problems).

but may be unable, without access to substance abuse treatment programs, to act on her desire.¹⁰⁰

Treatment for drug addiction works and is cost-effective.¹⁰¹ Research shows that comprehensive treatment programs that do not separate mothers from their children help women and their families.¹⁰² They are also cost-effective, especially when one compares their price tag to the staggering financial and social costs of separating mother and child.¹⁰³ Indeed, New York City's experience with Family Rehabilitation Programs proves this point well. This program, launched in 1989 to prevent dissolution of those families at highest risk for foster care placement by combining family-aimed drug treatment services with close child safety monitoring and other social services, demonstrated significant success.¹⁰⁴ Despite the success, the program

¹⁰⁰ *Amicus Curiae* Brief of California Medical Association & American College of Obstetricians and Gynecologists, District 9, at 3-4, *In Re Adrianna May H.*, No. 3 Civil CO14203 (Cal. Ct. App. 3d filed June 17, 1993); see also Center for the Future of Children, *Recommendations, in The Future of Children* 8 (Richard F. Behrman ed., 1991) ("[A]n identified drug exposed infant should be reported to child protective services only if factors in addition to prenatal drug exposure show that the infant is at risk for abuse or neglect.").

¹⁰¹ See Marwick, *supra* note 89 (The Physician Leadership on National Drug Policy reviewed more than 600 peer-reviewed research articles and found that addiction to illicit drugs can be treated with as much success as other chronic illnesses like diabetes, asthma, and hypertension).

¹⁰² See e.g., Stephen Magura et al., Effectiveness of Comprehensive Services for Crack-Dependent Mothers with Newborns and Young Children (1998) (discussing New York City's experience with the Family Rehabilitation Program and citing numerous studies describing how comprehensive, coordinated, holistic treatment are better at engaging pregnant and parenting women); Pregnant, Substance-Using Women, *supra* note 97; Claire McMurtrie et al., *A Unique Drug Treatment Program for Pregnant and Postpartum Substance-Using Women in New York City: Results of a Pilot Project, 1990-1995*, 25 *Am. J. Drug & Alcohol Abuse* 701, 701-02 (1999) (describing a comprehensive model of drug treatment for pregnant and postpartum women that included children and did not view relapse as a failure, concluding that it "seem[ed] to improve mother's lives, fetal drug exposure, and birth outcome significantly"). See also Practical Approaches, *supra* note 99 at 68, 97-98.

¹⁰³ See Marwick, *supra* note 89, at 1149 (discussing the fact that drug "treatment costs ranged from \$1800 per patient for outpatient treatment to \$6800 for long-term residential care," which is far less expensive than the \$25,900 per year it costs to keep one person in prison); see also the Future of Children, *supra* note 100, at 14 (noting that "it is extraordinarily costly for government to rear children through foster care, with costs typically around \$3,000 per year per child, but reaching as high as \$35,000 or even double that when the children have special medical complications").

¹⁰⁴ See Lassar, *supra* note 37, at 3 (discussing the elimination by New York City Mayor Rudolph Giuliani of city funding for the Family Rehabilitation Program); Magura, *supra* note 102; Charisse Jones, *A Casualty of Deficit: Center for Addicts*,

has struggled for survival, facing a near total cut in funding, in 1995, from New York City for the drug treatment component of the program.¹⁰⁵

Despite the proven efficacy of treatment programs, and notable attempts to improve access to treatment, the lack of adequate treatment for women is a significant and ongoing problem that has been well documented by a variety of measures.¹⁰⁶ In fact, numerous state commissions have found that their states have inadequate services.¹⁰⁷ Although, on a national level funding for women's treatment improved in the 1980s, it decreased again in the early 1990s.¹⁰⁸ "Federal categorical programs targeted at pregnant and parenting women have been phased out of the budget of the Center for Substance Abuse Treatment (CSAT). Funding will end this fiscal year for the majority of grantees."¹⁰⁹

N.Y. Times, Jan. 14, 1995, at A27 (noting the dwindling numbers of treatment programs in New York City); Alma J. Carten, *Mothers in Recovery: Rebuilding Families in the Aftermath of Addiction*, 41 Nat'l Ass'n of Soc. Workers 37 (1996).

¹⁰⁵ See Lassar, *supra* note 37, at 3.

¹⁰⁶ See, e.g., Wendy Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, 266 JAMA 1556 (1991); Julie Petrow, *Addicted Mothers, Drug Exposed Babies: The Unprecedented Prosecution of Mothers Under Drug-Trafficking Statutes*, 36 N.Y.L. Sch. L. Rev. 573, 604-06 (1991) (arguing for an increase in federal and state funding for drug treatment programs for women); Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. Rev. L. & Soc. Change 277, 292-303 (1987) (discussing the lack of access to adequate health care); Wendy Chavkin et al., *National Survey of the States: Policies and Practices Regarding Drug-Using Pregnant Women*, 88 Am. J. Pub. Health 117 (1998); Legal Action Center, *Steps to Success 3* (May 1999); Drug Strategies, *Keeping Score, Women And Drugs: Looking at the Federal Drug Control budget 16-17* (1998); Vicki Breitbart et al., *The Accessibility of Drug Treatment for Pregnant Women: A Survey of Programs in Five Cities*, 84 Am. J. Pub. Health 1658 (1994); see also Elaine W. v. Joint Diseases N. Gen. Hosp., Inc., 613 N.E.2d 523, 524 (N.Y. 1993) (discussing a New York hospital's refusal to admit pregnant women into its drug detoxification program).

¹⁰⁷ See, e.g., 2 State Council on Maternal, Infant & Child Health, 1991 South Carolina Study of Drug Use Among Women Giving Birth: Prevention and Treatment Services 2, 10 (1992) (reporting that "specific resources designed to meet the needs of women of childbearing age, especially pregnant women, are not widely available" and that lack of child care and transportation are seemingly insurmountable obstacles to treatment for many women); Substance Abuse & Pregnancy Work Group, *A Report to The Secretary of the Kentucky Cabinet for Human Resources And the Legislative Research Commission 17* (1994) (noting the lack of treatment services "especially those that provide specific services for pregnant women").

¹⁰⁸ Legal Action Center, *supra* note 73, at 6.

¹⁰⁹ *Id.*

Along with the lack of adequate treatment programs, pregnant women face other barriers to care and recovery. If they seek help for the abuse in their lives, they are likely to find that shelters do not accept women with drug problems.¹¹⁰ If they seek reproductive health services, they may find that abortion services are unavailable or unfunded or that they cannot access prenatal care services without risking loss of custody of their children.¹¹¹

Despite all of the obstacles, studies have found that pregnant drug using women do all that they can to take responsibility for their drug use and life circumstances, making efforts, for example, to stop or reduce their drug use and to improve their own health for the sake of the pregnancy.¹¹²

3. Assumption: A woman's use of drugs while pregnant indicates that she would be unable to care for her child once born. A common misconception is that drug use during pregnancy means that a woman will neglect or abuse her child after birth. However, a single positive drug test cannot determine whether a person occasionally uses a drug, is addicted, or suffers any physical or emotional disability from that addiction. It does not identify the amount of alcohol or drugs the woman ingested during pregnancy nor the frequency of use. Most importantly, a single drug test simply is not predictive of a person's parenting ability.

In fact, Susan C. Boyd, in her recent book *Mothers and Illicit Drugs: Transcending the Myths*, found no significant difference in childrearing practices between addicted and non-addicted mothers.¹¹³

¹¹⁰ Amy Hill, *Applying Harm Reduction to Services for Substance Using Women in Violent Relationships*, Harm Reduction Communication, Spring 1998, at 7-9 (discussing the reasons why the development of services for battered, substance-abusing women is limited).

¹¹¹ See Chavkin, *supra* note 106, at 1559 (explaining that the risks involved in seeking treatment deter addicted mothers from getting the help they need); see also *State v. Ashley*, 701 So. 2d 338, 342-43 (Fla. 1997) (dismissing homicide charges against a woman who shot herself in the stomach after discovering that Medicaid would not cover the expense of an abortion); Shelly Gehshan, *Missed Opportunities for Intervening in the Lives of Pregnant Women Addicted to Alcohol or Other Drugs*, 50 J. Am. Med. Women's Ass'n 165, 166 (1995) (discussing a study of 181 addicted pregnant women in the South and finding that "45% did not have a regular source for family planning services").

¹¹² See Murphy & Rosenbaum, *supra* note 92, at 100.

¹¹³ Susan C. Boyd, *Mothers and Illicit Drugs: Transcending the Myths* 14-16 (1999) (listing at least fourteen studies demonstrating that women who use illicit drugs can be adequate parents).

A 1994 study focusing solely on cocaine-using mothers came to the same conclusion: mothers who use cocaine have been found to look after and care adequately for their children.¹¹⁴ A book produced by the Foster Care Project, National Legal Resource Center for Child Advocacy and Protection of the American Bar Association observes that: ". . . many people in our society suffer from drug or alcohol dependence yet remain fit to care for a child. An alcohol or drug dependent parent becomes unfit only if the dependency results in mistreatment of the child, or in a failure to provide the ordinary care required for all children."¹¹⁵ The National Council of Juvenile and Family Court Judges agrees: "Juvenile and family court proceedings are not necessary, and probably not desirable, in most situations involving substance-exposed infants."¹¹⁶

Of course, as with parents who do not use drugs, there are instances of drug using mothers and fathers who are neglectful parents. That is something, however, that needs to be determined on a case-by-case basis rather than based on unsupported assumptions that treat any and all drug use as synonymous with neglectful parenting.

4. Assumption: Presuming neglect and requiring child welfare intervention will protect children and improve their health.

Protecting children and improving their health is a leading reason for the changes in civil child abuse laws. However, the changes made in the name of protecting children may produce the opposite result because fear of losing custody of a child deters women from seeking the prenatal health care and drug treatment that can improve both their and their children's health. Research by the Southern Regional Infant Mortality Project on barriers to substance abuse treatment for pregnant women found that "fear of losing their children" was the greatest deterrent to women.¹¹⁷

¹¹⁴ M. Kearney et al., *Mothering on Crack Cocaine: A Grounded Theory Analysis*, 38 Soc. Sci. & Med. 351, 355 (1994).

¹¹⁵ American Bar Association, Foster Care Project, national Legal Resource Center for Child Advocacy and Protection, *Foster Children in the Courts*, 206 (Mark Hardin ed. 1983).

¹¹⁶ Nat'l Council of Juvenile and Family Court Judges, *Permanency Planning for Children Project, Protocol for Making Reasonable Efforts to Preserve Families in Drug Related Dependency Cases* 17 (1992).

¹¹⁷ Shelly Gehshan, *A Step Toward Recovery* ii (1993).

Studies have also found that removing children from their parents' care can unnecessarily inflict grave harm on the children.¹¹⁸ As a result of the newly expanded civil neglect laws, "thousands of women have lost custody of their children."¹¹⁹ One comprehensive survey of the effects of foster care concluded that "[r]emoving a child from his family may cause serious psychological damage—damage more serious than the harm intervention is supposed to prevent."¹²⁰ Research has also shown that "the increasing placement of drug-exposed children in foster care is coupled with poor growth outcomes in the physical, mental and emotional development of these children."¹²¹

Treating drug use during pregnancy as presumptive neglect—the harshest response taken in only a few states—has been shown to have devastating consequences. For a period of time, New York City, as a matter of policy, adopted this approach. Hundreds of newborns were kept as boarder babies in hospitals where they languished.¹²² Complicating matters further, many women had their newborns removed because of false positive drug tests—they had not used drugs at all—and others had positive drug tests for drugs administered while in the hospital.¹²³ Still other women had their children removed because they had smoked marijuana once, despite unanimous recommendations

¹¹⁸ See, e.g., Bonita Evans, *Youth in Foster Care: The Shortcomings of Child Protection Services* (1997); Scott J. Preston, Note, "Can You Hear Me?": *The United States Court of Appeals for the Third Circuit Addresses the Systemic Deficiencies of the Philadelphia Child Welfare System in Baby Neal v. Casey*, 29 Creighton L. Rev. 1653 (1996).

¹¹⁹ Paone & Alpern, *supra* note 38, at 101.

¹²⁰ Michael Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 Stanford L. Rev. 985 (1975).

¹²¹ Michelle Jackson & Gordon Berry, *Motherhood and Drug Dependency: The Attributes of Full-time Versus Part-time Responsibility for Child Care*, 29 Int'l J. Addictions 1521 (1994).

¹²² Lassar, *supra* note 37, at 7 (describing how "a backlog in investigations and foster care placements caused hundreds of infants to be held in New York City hospitals for as long as several months after they were medically ready for discharge"); Duston, *supra* note 38; Paone & Alpern, *supra* note 38, at 104 (noting that as a result of being kept in hospitals for extended periods of time "these children may be condemned to living conditions that pose greater harm to their well-being than the ones from which they were removed.").

¹²³ Jan Hoffman, *Challenge Drug Tests*, The Village Voice, July 10, 1990, at 11; see also Class Action Complaint, *Ana R. v. New York City Dep't of Social Services* (S.D.N.Y. filed on June 7, 1990) (describing numerous cases of children removed without notice based on false positives or positive test results for drugs administered by physicians during labor).

concerning their parenting ability.¹²⁴ These results and numerous other examples of families separated based on false positive tests or evidence of drug use unrelated to parenting ability¹²⁵ demonstrate the significant drawbacks of policies that treat a pregnant woman's drug use as evidence of neglect or abuse.

5. Assumption: Statutes relying on drug tests as sufficient evidence of neglect and abuse can be administered fairly.

Statutes that mandate reporting based only on drug use have been shown to be applied in a highly discriminatory fashion. For example, in Florida, researchers found that while white and African-American women used illegal drugs at about the same rate (white women use at a slightly higher rate) African-American women were ten times more likely to be reported as child abusers.¹²⁶

One proposed solution to this discriminatory effect has been to require "universal" testing of all pregnant women or newborns.¹²⁷

¹²⁴ Cathy Singer, *The Pretty Good Mother*, Long Island Monthly, Jan. 1990, at 46 (reporting that a mother who had smoked marijuana to ease labor pain lost custody of her baby even though the mother had acted responsibly throughout her entire pregnancy).

¹²⁵ See e.g., Associated Press, *Woman Given Labor Sedative Loses Custody Of Children*, The Sacramento Bee, Feb. 11, 2000 (describing a California woman who lost custody of her newborn and other children for three months based a drug test of the newborn that reflected a sedative given to the woman during labor); Cathy Zollo, *When Policy Meets Reality*, Times Record News (Wichita Falls, Texas), Nov. 11, 1999 (reporting a case in where the state took into emergency custody a newborn and three older siblings based on a single positive marijuana test on the newborn); Melissa Hung, *Reefer Madness? Angela Took A Hit. And CPS Took Her Babies Away*, Houston Press, Nov. 4, 1999, at 8 (reporting another Texas case in which the child welfare agency removed custody of a newborn and a one year old sibling based solely on a positive drug test for marijuana). See also, Abigail English, *Prenatal Drug Exposure: Grounds for Mandatory Child Abuse Reports?*, Youth Law News, 1990, at 3-8 (arguing that laws that rely on positive drug tests are both too narrow and too broad and fail to give children greater protection than individual assessments of parenting ability); Youth Law News, July-Oct. 1995, at 1-40 (revising and reprinting the Special Issue from 1990).

¹²⁶ Ira Chasnoff et al., *The Prevalence of Illicit-drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 N. Eng. J. Med. 1202, 1202-06 (1990); see also Roberts, *supra* note 4, at 172-76; Renee I. Solomon, Note, *Future Fear: Prenatal Duties Imposed by Private Parties*, 17 Am. J.L. & Med. 411, 418 (1991) (arguing that "70% of those arrested for drug-related fetal abuse have been African-American" because "[r]ace and poverty biases make it easy to blame the victim").

¹²⁷ See, e.g., Robin-Vergeer, *supra* note 28, at 796-97 n.237 (advocating a more selective process for screening infants); Lawrence J. Nelson & Mary Faith Marshall,

However, "universal" testing is not universal because it reveals only women's drug use and subjects only women to government searches that can result in termination of parental rights and loss of government benefits; simply put, "universal" testing proposals do not reveal drug use by potential fathers or address the role that men play in women's substance abuse problems. The millions of dollars spent on drug and alcohol tests¹²⁸ could much more wisely be spent on the comprehensive treatment programs that women and families need and want.

Finally, selecting certain drugs over others makes no sense from a child protection point of view. Although not included in many states' definitions of civil child neglect, alcohol use during pregnancy is the leading preventable cause of mental retardation.¹²⁹ Likewise, neglect and abuse statutes do not cover a woman's continued use of cigarettes during pregnancy even though evidence of harm from cigarettes is far better established than harm from drugs, even cocaine.¹³⁰ A variety of activities not covered by any testing legislation, including failure to take folic acid—which prevents neural tube defects—to eat adequately, and to obtain prenatal care, also pose risks.¹³¹ On the other hand, by

Ethical and Legal Analyses of Three Coercive Policies Aimed at Substance Abuse by Pregnant Woman 95-120, 169-76 (1998).

¹²⁸ Memorandum from Dr. Wendy Chavkin to Jane Spinak and Danny Greenberg: *Position Paper on Government Action of In Utero Drug or Alcohol Exposure* (May 24, 1996) (on file with NAPW) (asserting that proposed universal urine drug screening of newborns in New York State would cost 26.1 million dollars annually and alcohol and confirmatory drug tests would cost 95.9 million dollars annually).

¹²⁹ Fetal Alcohol Syndrome is the leading cause of preventable mental retardation in the United States. L.P. Finnegan & S.R. Kandall, *Maternal and Neonatal Effects of Alcohol and Drugs in Substance Abuse, A Comprehensive Textbook* 513, 529 (J.H. Lowinson et al. eds., 1997). See also Janet Golden, "An Argument That Goes Back to the Womb": *The Demedicalization of Fetal Alcohol Syndrome 1973-1992*, 33 *J. of Social History* 269 (1999) (describing how FAS came to the public's attention and how public sympathy for the victims of FAS transformed to public scorn for their mothers, then to fear of those with the syndrome).

¹³⁰ Joseph R. DiFranza & Robert A. Lew, *Effect of Maternal Cigarette Smoking on Pregnancy Complications and Sudden Death Syndrome*, 40 *J. of Fam. Prac.* 385 (1995) (Cigarette smoking has been linked to as many as 141,000 miscarriages and 4,800 deaths resulting from perinatal disorders, as well as 2,200 deaths from sudden infant death syndrome nationwide.).

¹³¹ For example, the Committee to Study the Prevention of Low Birthweight found numerous behaviors and risk factors besides the use of illegal substances that increase the chances of bearing a low birthweight infant, which is considered to be the greatest single determinant of infant mortality in the United States. Comm. to Study the Prevention of Low Birthweight, Div. of Health Promotion and Disease Prevention, Inst. of Med., *Preventing Low Birthweight - Summary* 1, 1-7. Among the behavioral and environmental factors that contribute to low birth weight are smoking cigarettes,

including all illegal drugs in the screening process, the legislation includes marijuana use, despite a dearth of evidence relating its use to either harm or interference with parenting ability.¹³²

B. Criminal Prosecutions

Prosecutions of drug using pregnant women, like the legislative proposals detailed above, proliferated when the Reagan-Bush war on drugs and the unprecedented media coverage of the "crack crisis" coincided with the ever-increasing battle to end legal abortion.¹³³ Drug using pregnant women became appealing targets for law enforcement officials who were losing the war on drugs and for the anti-choice forces who were attempting to develop "fetal rights" superior to and in conflict with the rights of women.¹³⁴

Although no state has passed a law criminalizing pregnancy and drug use, an estimated 200 women in more than 30 states have been prosecuted around the country on theories of "fetal abuse."¹³⁵ Police and prosecutors have attempted to expand the reach of existing crimes, such as child abuse, drug delivery, manslaughter, homicide, and assault

poor nutritional status, exposure to occupational hazards, and living at a high altitude. *See id.* at 7; *see also* March of Dimes, *Folic Acid Fact Sheet* (visited May 3, 2000) <<http://www.march-of-dimes.com/Programs2/FolicAcid/FASheet.htm>> (explaining that research demonstrates that women who consume the recommended amount of folic acid, reduce their risk of having a baby with Neural Tube Defects including anencephaly, a fatal condition in which a baby is born with a delivery underdeveloped brain and skull and spina bifida, a leading cause of childhood paralysis).

¹³² *See* Robin-Vergeer, *supra* note 28, at 745-46; *see also* Zollo, *supra* note 125 (reporting that research involving "controlled studies on 12,000 live-birth babies [found that marijuana had] no impact on fetal health or fetal size").

¹³³ *See* Gómez, *supra* note 1, at 1-3 ("The convergence of the war on drugs with the abortion debate at fever pitch propelled 'crack babies' into the public imagination.").

¹³⁴ *See, e.g.*, Baum, *supra* note 79; Mike Gray, *Drug Crazy* 108-10 (1998); Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, *Science*, Sept. 1, 1989, at 939 (discussing various drug legalization and decriminalization plans); Anthony Lewis, *Abroad at Home: Futility of the Drug War*, *N.Y. Times*, Feb. 5, 1996, at A15 ("80 years of prohibition have been a disastrous failure.").

¹³⁵ *See* Loren Siegel, *The Pregnancy Police Fight the War on Drugs, in Crack in America* 249, 249 (Craig Reinerman & Harry G. Levine eds., 1997) ("During the late 1980s, as the specter of 'crack babies' haunted American political rhetoric, more than two hundred criminal prosecutions were initiated against women in almost twenty states."); *see also* Lynn Paltrow, *Criminal Prosecutions Against Pregnant Women: National Update and Overview* (1992) (documenting 167 arrests nationwide as of 1992).

with a deadly weapon, and use them against women to cover drug use during pregnancy.¹³⁶

Women who drink alcohol and fail to get bed rest during pregnancy have also been arrested,¹³⁷ making clear that it is pregnancy and not just the illegality of the substance that makes women vulnerable to state control and punishment. Nevertheless, the prosecutions of pregnant women have focused largely on those women who use illegal drugs even though many more children are at risk of harm from prenatal exposure to cigarettes and alcohol.¹³⁸

Until 1997, no appellate court that considered the legality of prosecuting a pregnant woman upheld such a prosecution. Courts unanimously rejected attempts to expand existing criminal statutes, finding that their application to fetuses and pregnant women went beyond the legislature's intent.¹³⁹ In some cases, courts found that the

¹³⁶ See Lynn M. Paltrow, *Punishing Women for Their Behavior During Pregnancy: An Approach that Undermines the Health of Women and Children*, in *Drug Addiction Research and the Health of Women* 467 (1998). In California, prosecutors continue to arrest pregnant drug users despite the fact that the legislature not only explicitly rejected criminal approaches, but specifically adopted a comprehensive remedial approach as an alternative. See also Gómez, *supra* note 1, at 50-59, 75-91 (discussing legislative attempts to deal with drug-addicted pregnant women and the treatment these women receive from prosecutors).

¹³⁷ See, e.g., *State v. Zimmerman*, No. 96-CF-525, 1996 WL 858598 (Wis. Ct. App. Sept. 18, 1996) (denying motion to dismiss first degree intentional homicide and reckless conduct charges brought against a woman who was pregnant and an alcoholic), *rev'd*, *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. 1999); Katharine Collins, *Prenatal Child Abuse Charged*, *Casper Star Tribune*, July 2, 1998, at A1, A10 (discussing *State v. Pfannenstiel*, a 1989 case in which child abuse charges, brought against a pregnant woman accused of excessive drinking during pregnancy, were ultimately dismissed); Brian Maffly, *'Fetal Abuse' Charges Give Rise to Debate; Mothers-to-be Need Help, Not Fear, Critics Say*, *The Salt Lake Trib.*, Dec. 1, 1997, at D1 (describing felony child abuse charges brought against Julie Garner, 26, who used alcohol during her pregnancy).

¹³⁸ See, e.g., Deanna S. Gomby & Patricia H. Shiono, *Estimating the Number of Substance-Exposed Infants*, in *The Future of Children* 19, 21 (Richard F. Behrman ed., 1991) (discussing the prevalence of various forms of substance abuse among pregnant women and finding that significantly more children are exposed to alcohol and cigarettes than to illicit drugs).

¹³⁹ See, e.g., *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995) (dismissing child abuse charges against pregnant woman who allegedly used heroin, finding that expansion of the statute to include fetuses would violate legislative intent, offend due process notions of notice, and render statute impermissibly vague); *Reyes v. Superior Court*, 75 Cal. App. 3d 214 (Ct. App. 1977) (dismissing child abuse charges filed against a woman who was pregnant and addicted to heroin and finding that the statute was not intended to include a woman's alleged drug use during pregnancy and that to conclude otherwise would offend due process notions of

prosecutions violated the Constitution's guarantee of due process and right to privacy.¹⁴⁰ Some courts also acknowledged the overwhelming

fairness and render statute impermissibly vague); *Johnson v. State*, 602 So. 2d 1288, 1290, 1297 (Fla. 1992) (reversing conviction of a woman who used cocaine during pregnancy for "deliver[ing] cocaine to a minor" and finding that application of the statute to fetuses and pregnant women violated legislative intent); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges brought for prenatal drug use on the grounds that such an application would be at odds with the public policy of the state regarding child abuse and neglect, including the intent to preserve the family life of parents and children whenever possible); *State v. Luster*, 419 S.E.2d 32, 34-35 (Ga. Ct. App. 1992) (holding that a statute proscribing distribution of cocaine from one person to another did not apply to pregnant women and fetuses and to interpret otherwise would deprive pregnant women of fair notice); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (affirming reversal of child abuse conviction of a pregnant woman who used illegal drugs and concluding that applying the statute would violate the plain meaning of the statute, deprive the woman of constitutionally mandated due process notice, and render the statute unconstitutionally vague); *People v. Hardy*, 469 N.W.2d 50, 52-53 (Mich. Ct. App. 1991) (holding that the application of the state's drug delivery statute to a pregnant woman who "delivered" cocaine to her child through the umbilical cord violates legislative intent and the constitutional proscription that "a penal statute must be sufficiently definite and explicit to inform those who are subject to it what conduct will render them liable to its penalties"); *Sheriff, Washoe County, Nev. v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (holding that application of child endangerment statute to a pregnant woman who uses an illegal substance would violate the plain meaning of the statute, deprive the woman of constitutionally mandated due process notice, and render the statute unconstitutionally vague); *People v. Morabito*, 580 N.Y.S.2d 843 (Geneva City Ct. 1992) (dismissing child endangerment charges against woman who used cocaine while pregnant); *State v. Gray*, 584 N.E.2d 710, 713 (Ohio 1992) (holding that a child neglect statute could not be used to prosecute pregnant woman for substance addiction because neither the statutory language nor the legislative history indicated its applicability to such conduct); *Collins v. State*, 890 S.W.2d 893 (Tex. App. 1994) (dismissing injury to a child charges against a woman who allegedly used drugs during pregnancy and finding that applying statute to prenatal conduct violates due process); *State v. Dunn*, 916 P.2d 952, 955 (Wash. Ct. App. 1996) (dismissing child mistreatment charges, finding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as person under eighteen years of age"); *State v. Osmus*, 276 P.2d 469, 475 (Wyo. 1954) (ruling that a woman whose newborn died as a result of her negligent failure to obtain proper prenatal care or medical care at birth could not be guilty of manslaughter). A complete list of published and unpublished opinions and orders in cases involving the criminal prosecution of pregnant women is available from the National Advocates for Pregnant Women.

¹⁴⁰ See *Welch*, 864 S.W. at 283 (ruling that if the state's child endangerment statute were construed to permit the prosecution of pregnant women because they endangered the health of the fetus, it would "lack fair notice and violate constitutional due process limits against statutory vagueness"); *Encoe*, 885 P.2d at 598 (holding that the application of child endangerment statute to a pregnant woman who uses an

opposition of medical and health groups as a consideration in dismissing charges or overturning trial court convictions.¹⁴¹

On October 27, 1997, the South Carolina Supreme Court radically deviated from its sister state courts and decided *Whitner v. State of South Carolina*.¹⁴² In *Whitner*, the state supreme court declared that viable fetuses are "person[s]" under the state's criminal child endangerment statute.¹⁴³ As a result of that conclusion, the court reversed an appellate court's granting of post-conviction relief for a pregnant woman who had used cocaine during her pregnancy.¹⁴⁴ In so ruling, the court took an unprecedented legal leap, apparently recognizing legal personhood for viable fetuses under all of the state's laws. Although *Whitner* involved a woman who had used cocaine while pregnant, the majority specifically found that applying the state's child endangerment statute to other conduct by pregnant women—such as smoking cigarettes and drinking alcohol—would also be consistent with the application of that statute to the facts of *Whitner*.¹⁴⁵ And, in fact since the decision, prosecutors in South Carolina have arrested on child abuse charges a woman who used alcohol while pregnant,¹⁴⁶ a woman who suffered a stillbirth possibly unrelated to any drug use,¹⁴⁷ and the parents of a 13-year-old who suffered a miscarriage.¹⁴⁸

illegal substance would deprive the woman of due process); *Commonwealth v. Pelligrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990) (holding that the rights to reproductive privacy and personal autonomy, as well as due process, do not permit the application of a drug delivery statute to women who use drugs while pregnant).

¹⁴¹ See, e.g., *Luster*, 419 S.E.2d at 35 (viewing addiction during pregnancy as a disease and addressing the problem through treatment rather than prosecution as the approach "overwhelmingly in accord with the opinions of local and national medical experts"); *Johnson*, 602 So. 2d at 1297 (noting the opposition of medical groups to the prosecution of pregnant women under a drug delivery statute and concluding that "[t]he Court declines the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread").

¹⁴² 492 S.E.2d 777 (S.C. 1997), cert. denied, 523 U.S. 1145 (1998).

¹⁴³ *Id.* at 780.

¹⁴⁴ See *id.* at 786.

¹⁴⁵ See *id.* at 781-82 (recognizing that a parent may be prosecuted for a legal act if it endangers the child).

¹⁴⁶ See Melissa Manware, *Infant Born Drunk: Intoxicated Mom is Facing Charges*, *The State* (Columbia, S.C.), Sept. 24, 1998, at A1 (reporting that a new mother was charged with unlawful conduct toward a child based on evidence that she had been drinking alcohol while pregnant).

¹⁴⁷ A woman who suffered a stillbirth was arrested and charged with homicide by child abuse. Police reports showed that the child was not "killed by cocaine" and no other evidence of drug use was reported; nevertheless, the prosecutor insisted that the stillbirth was a "crime" for which the woman had to take responsibility. Kathy Ropp,

By concluding that viable fetuses are persons under state law,¹⁴⁹ the court in *Whitner* provided local politicians with a new basis for attacking *Roe v. Wade*.¹⁵⁰ Indeed, according to the South Carolina Office of the Attorney General, *Whitner* creates a basis for treating at least some abortions as murder and for executing the women who have them and the people who provide them.¹⁵¹

The decision also conflicts in principle with *Robinson v. California*.¹⁵² In that case, the United States Supreme Court overturned a California statute that treated drug addiction as a misdemeanor

Mothers Charged with 'Homicide by Child Abuse' The Horry Independent Newspaper (Conway, S. C.), Aug. 19, 1999, at A-1.

¹⁴⁸ When a thirteen-year-old girl experienced a stillbirth her parents were arrested: One charge was for unlawful conduct to a child—because they had allegedly "failed to get proper care for the fetus." Associated Press, *Three People Face Charges in Stillbirth*, The Post and Courier (Charleston, S.C.), July 22, 1999, at 6-B.

¹⁴⁹ In *Roe v. Wade*, the United States Supreme Court held that pregnant women have a right to decide whether or not to terminate a pregnancy. An essential element of that decision was the Court's specific conclusion that fetuses—even after viability—are not persons under the Fourteenth Amendment. 410 U.S. 113, 153, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

¹⁵⁰ The conservative punditry also used *Whitner* to advocate for the overturning of *Roe*. See, e.g., Rick Bragg, *Defender of God, South and Unborn*, N.Y. Times, Jan. 13, 1998, at A10 (reporting on the pursuit of South Carolina Attorney General Charles M. Condon, who argued that a "fetus is a fellow South Carolinian" and succeeded in convincing the highest court in South Carolina that "a viable fetus is a person under the states child abuse laws," and noting that "[s]ome fear that the prosecutions could be expanded so that a woman who aborted a fetus . . . could be charged in the death of a child"); George Will, *Fetuses as Carolinians*, Newsweek, June 8, 1998, at 78 (criticizing the Supreme Court for not using *Whitner* as an opportunity to review *Roe v. Wade* and "the peculiar logic of the abortion policy that has been created by judicial fiat"); see also Lyle Denniston, *Supreme Court Shields Police from Lawsuits Related to Chases*, The Baltimore Sun, May 27, 1998, at 3A ("The National Right to Life Committee, while satisfied with the Supreme Court's order, said the justices should have used the case for a ruling that would have barred women from aborting fetuses.").

¹⁵¹ See *State v. Ard*, 505 S.E.2d 328, 330 (S.C. 1998) (upholding application of death penalty to Ard, who was convicted of two murders: the murder of his pregnant girlfriend and the murder of their "unborn but viable son"); Audiotope of Oral Argument in *State v. Ard* (State agreeing that its interpretation of *Whitner* would be applicable to the state's abortion laws, making post viability abortions punishable as murder and the women who have them and all those who assist them potentially subject to the death penalty) transcribed in part in Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 Albany L. Rev., 999, 1035-1038 (1999) (discussing *State v. Ard* and oral argument addressing the relationship between *Whitner* and South Carolina's abortion laws).

¹⁵² See *Robinson v. California*, 370 U.S. 660 (1962).

punishable by imprisonment and held that criminalizing drug addiction was cruel and unusual punishment in violation of the Eighth Amendment.¹⁵³ In overturning the statute, the Court cited *Linder v. United States*,¹⁵⁴ a 1925 case in which the Court recognized narcotic addiction as an illness and those experiencing it as in need of medical treatment.¹⁵⁵ The Court compared punishing someone for drug addiction to punishing someone "for the 'crime' of having a common cold."¹⁵⁶ *Whitner's* effect on pregnant women and new mothers who are addicts contradicts *Robinson* because one group—pregnant women—may now be punished for their status as addicts.

Although *Whitner* is now being challenged in a federal habeas corpus proceeding, it remains in effect while that case is pending. As such, it appears to be having devastating consequences on women and families. Since the highly publicized prosecution of Cornelia Whitner and the South Carolina Supreme Court's original decision upholding her conviction in 1996,¹⁵⁷ drug treatment programs in South Carolina that give priority to pregnant women have reported precipitous drops in admissions of pregnant women.¹⁵⁸ Furthermore, in line with the warnings of leading medical and public health groups who have opposed the prosecutions of pregnant women in part because of the expectation that they would deter women from obtaining health care and thus harm both maternal and fetal health,¹⁵⁹ South Carolina's 1997 infant mortality figures "increased for the first time this decade."¹⁶⁰

¹⁵³ See *id.* at 666-67.

¹⁵⁴ See *Linder v. United States*, 268 U.S. 5 (1925).

¹⁵⁵ See *Robinson*, 370 U.S. at 667 n.8.

¹⁵⁶ *Id.* at 667.

¹⁵⁷ The *Whitner* opinion was first announced on July 15, 1996. The court then granted Ms. Whitner's Petition of Rehearing and issued a re-filed and final opinion on October 27, 1997.

¹⁵⁸ See e.g., Abrahamson, *supra* note 6, at 140-141; Bragg, *supra* note 150 (Brendan Dawkins, who runs a treatment program at the Keystone Substance Abuse Services Center in Rock Hill, South Carolina, also reported that "[h]er center usually has about 20 pregnant women addicted to drugs, usually crack. Now there are only 10. She believes others are passing up counseling and prenatal care because they are afraid of being arrested. 'I think they're going over the state line to North Carolina to have their babies.'").

¹⁵⁹ See discussion *supra* notes 14-19 and accompanying text (discussing widespread opposition to punitive approaches by leading medical groups because of the likelihood of deterring women from health care during pregnancy).

¹⁶⁰ *Infant Mortality on Rise in '97*, Post & Courier (Charleston, S.C.), Feb. 19, 1999, at B1.

Similarly, the state is now seeing a twenty percent increase in abandoned babies.¹⁶¹

Although prosecutors in other states have expressed the hope that their states would follow *Whitner*,¹⁶² that decision is, by its own description, based on law unique to South Carolina.¹⁶³

C: Recent Events and Legislative Action

The newest state legislation appears to continue in the vein of punitive and restrictive responses. After *Whitner*, Wisconsin and South Dakota significantly expanded civil statutes to permit extraordinary control over pregnant women's bodies and lives.¹⁶⁴ The Wisconsin legislation in particular passed despite the strong opposition of leading medical groups¹⁶⁵ and despite the lack of any funding in the bill for needed treatment services.¹⁶⁶

In 1997, the Wisconsin legislature substantially revised its Children's Code¹⁶⁷ to create a new category of "unborn child" abuse.¹⁶⁸ The purpose of the revision was to "recognize that unborn children have certain basic needs which must be provided for, including the

¹⁶¹ Associated Press, *Discarded Children Increasing*, Post & Courier (Charleston, S.C.), April 19, 1999.

¹⁶² See, e.g., Linda Martin, *Fetus Is Ward of State*, Tulsa World, Sept. 3, 1999 (reporting that an Oklahoma prosecutor came up with a legal strategy to have a fetus declared dependent after learning about *Whitner*).

¹⁶³ *Whitner*, 492 S.E.2d at 782-83 (distinguishing numerous decisions from other states, noting specifically with regard to a Massachusetts case that "the rationale underlying our body of law—protection of the viable fetus—is radically different from that underlying the law of Massachusetts").

¹⁶⁴ See Wis. Stat. Ann. §§ 48.01 - .989; S.D. Codified Laws § 34-20A-63.

¹⁶⁵ See Gómez, *supra* note 1, at 41-42, 47, 49-50 (describing role of medical groups in defeating punitive legislation in California); Steven Walters, 'Coke Mom' Bill Passed in Assembly, Milwaukee J. Sentinel, Nov. 20, 1997, at 1, 1-2 (noting that opponents of the bill "cited opposition by treatment professionals and public health officials" and quoting one state representative as saying, "[t]his is the worst form of lawmaking we can engage in. . . . We are refusing to listen to the people who are experts in this area. . . . I don't know why we think we know better.").

¹⁶⁶ See Walters, *supra* note 165, at 2 (noting that a Milwaukee facility (Meta House) treating addicted pregnant women had its state subsidy cut despite a long waiting list and that the bill included no additional money to pay for treatment programs); Richard P. Jones, *Cocaine Mom, Feticide Bills OK'd Debate Turns Emotional Over Measures Aims At Protecting Fetuses*, Milwaukee J. Sentinel, May 2, 1998, at 1 (reporting that Sen. Gwen Moore (D-Milwaukee) tried "several times to include funding for treatment," saying, "Ain't a dime in this bill, not one dime to make this happen.").

¹⁶⁷ See Wis. Stat. Ann. §§ 48.01-989.

¹⁶⁸ See Wis. Stat. Ann. §§ 48.01, 48.02(1)(am).

need to develop physically to their potential."¹⁶⁹ The new provisions permit the state to intervene to protect an "unborn child" from serious physical harm inflicted on the unborn child, and the risk of serious physical harm to the child when born, caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.¹⁷⁰

The Wisconsin statute defines an "unborn child" as a "human being from the time of fertilization to the time of birth."¹⁷¹ The law permits the state to take jurisdiction over pregnant women in a variety of circumstances.¹⁷² For example, a law enforcement officer can take a pregnant woman into custody if he or she believes that the woman's use of alcohol is posing a "substantial risk to the physical health of the unborn child."¹⁷³ Thus, a zealous police officer who observes a pregnant woman drinking cocktails at a bar may take the woman into immediate custody if the officer believes that the woman's drinking poses a severe risk to her fetus.¹⁷⁴

The revised Wisconsin code also permits counties to appoint juvenile court commissioners to oversee cases and conduct hearings applicable to "unborn children," but only allows lawyers with "a demonstrated interest in the welfare of . . . unborn children" to be eligible for appointment to such positions.¹⁷⁵ Additionally, pursuant to the Code, guardians ad litem may be appointed "for any unborn child alleged or found to be in need of protection or services."¹⁷⁶ Because "unborn children" are defined as existing from the moment of fertilization,¹⁷⁷ a guardian could be appointed even for pre-embryos. The guardian is required to advocate for the "best interests" of the

¹⁶⁹ Wis. Stat. Ann. § 48.01(1)(am).

¹⁷⁰ *Id.* § 48.02(1)(am).

¹⁷¹ *Id.* § 48.02(19).

¹⁷² *See id.* § 48.193(1).

¹⁷³ *Id.* § 48.193(1)(d)(2).

¹⁷⁴ *See id.* § 48.193(2). Indeed, the legislation went into effect without any guidelines or standards as to how to interpret or apply the law. *See* Linda Hisgen, State of Wis. Dep't of Health and Fam. Serv's, 1997 Wisconsin Act 292, at 1-2 (Memorandum, July 23, 1998). "Act 292 creates a new area of responsibility for child welfare, and, as such, there are no existing protocols, policies, assessment tools or guidelines that define child welfare's role." *Id.* Similarly, the state notes that determining under the statute whether the woman's drug use poses serious physical harm "would have to be done on speculation, since fetal impact research is not conclusive." *Id.*

¹⁷⁵ Wis. Stat. Ann. § 48.065(1).

¹⁷⁶ *Id.* § 48.235(1)(f).

¹⁷⁷ *See id.* § 48.02(19).

"unborn child."¹⁷⁸ Consequently, if a woman decided to have an abortion while her case was pending, the guardian would undoubtedly be expected to oppose the abortion in the "best interests" of the "unborn child."

Guardians are also required to "assess the appropriateness and safety of the environment of the . . . unborn child."¹⁷⁹ The pregnant woman is thus reduced by statutory terms to an "environment" for a fetus. The statutorily defined term "unborn child" is included throughout the comprehensive child welfare legislation revising Wisconsin's Children Code. And, even though its provisions purport to apply only where the expectant mother risks harm through drug or alcohol use, the re-definition of "child" to include the "unborn" invites new interpretations and applications far beyond the drug and alcohol abuse context.¹⁸⁰

Perhaps in response to the widespread opposition of medical groups, the Wisconsin statute does not include a mandatory reporting provision. Thus while doctors in South Carolina must report as child abuse pregnant women's behavior that endangers the fetus,¹⁸¹ reporting becomes mandatory in Wisconsin only after the birth of a child.¹⁸² As a result, the law appears to have thus far been applied only rarely.¹⁸³

In addition to Wisconsin's wholesale revision of its laws, South Dakota passed a law permitting judges to confine pregnant alcohol or drug users to treatment centers for as long as nine months.¹⁸⁴ Neither the law itself nor the South Dakota procedure manuals provide a clear definition of "abusing alcohol or drugs."¹⁸⁵ The individual judges are

¹⁷⁸ *Id.* § 48.235(3).

¹⁷⁹ *Id.* § 48.235(3)(b)1.

¹⁸⁰ See generally Hisgen, *supra* note 174, at 1 (noting that the statute "provides for interventions to protect unborn children that parallel the protections for children throughout [the child welfare code]"); see also Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin's Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J. Law Med. & Ethics 332, 338 (1999); Mary Faith Marshall, *Commentary: Mal-Intentioned, Willful Ignorance, and Fetal Protection Laws: Is There a Lexicologist in the House?*, 27 J. Law Med. & Ethics 343 (1999).

¹⁸¹ S.C. Code Ann. § 20-7-510 (A); see also Abrahamson, *supra* note 6, at 142-43.

¹⁸² Wis. Stat. Ann. § 48.981(2).

¹⁸³ See Tom Kertcher, 'Cocaine Mom' Law Invoked in Attempt to Detain Woman: Racine Case Thought to be First Time Law Is Used Without Other Crime, Milwaukee Journal Sentinel, Nov. 5, 1999.

¹⁸⁴ See S.D. Codified Laws § 34-20A-63 (Michie 1998) (stating that the grounds for emergency commitment of intoxicated persons includes pregnant women who are abusing drugs or alcohol).

¹⁸⁵ *Id.* § 34-20A-63(3).

left to decide how much alcohol is "'too much' for pregnant women."¹⁸⁶

Similar actions to restrict pregnant women and new mothers in the guise of drug control measures, including new arrests and cases seeking to terminate parental rights of pregnant women have also been brought.¹⁸⁷ While new prosecutions continue to be filed, decisions post-Whitner, in both trial and appellate courts indicate that *Whitner* remains the exception to the rule.¹⁸⁸

CONCLUSION

New legislative proposals on the subject of drug using pregnant women appear each year throughout the country at both the federal and state levels. Unfortunately, legislators continue to introduce highly punitive bills proposing to criminalize pregnancy and addiction, to mandate sterilization of women who give birth despite addiction problems, and to treat a single positive drug test as presumptive child neglect.¹⁸⁹

Those concerned with this issue should be fully informed and should promote those efforts likely to improve the health and well-being of women, children, and their families. In addition to considering the many statutes presented in the Survey that offer positive and

¹⁸⁶ § 34-20A-63; see Elizabeth Walsh, *New South Dakota FAS Laws Threaten Women's Rights*, Wicozanni Wowapi: Newsletter of the Native Am. Women's Health Ed. Resource Ctr., Oct. 7, 1998, at 1.

¹⁸⁷ Vince Beiser, *Fetal Abuse*, MoJoWire, June 14, 2000 at http://www.motherjones.com/news_wire/fetal.html (describing new criminal prosecutions in Georgia, North Carolina, Pennsylvania and Texas).

¹⁸⁸ *Herron v. State*, slip op. for publication, Cause No. 71D01-9906-DF-709 (Indiana Ct. of Appeals)(June 7, 2000) (reversing lower courts denial of a motion to dismiss criminal neglect of a dependent charges filed against a woman who gave birth to a child with cocaine present in its system, finding that the statute's plain language and legislative intent did not permit the expansion of the word dependent to include an unborn child); *State v. Deborah J.Z.*, 596 N.W. 2d 490, 49091 (Wis. Ct. App. 1999) (dismissing attempted homicide and reckless injury charges against a woman who ingested alcohol late in her pregnancy and finding that the plain language of the statutes does not apply to actions directed against an unborn child), *rev. denied* 604 N.W.2d 570 (Wis. 1999); *State v. Farrell*, CR-98-75 slip op. (Wy. Third Judicial District Oct. 2, 1998). (dismissing criminal child abuse charges against Kelly Farrell who admitted using marijuana and tobacco during her pregnancy and gave premature birth to an infant who tested positive for methamphetamines. Distinguishing *Whitner*, holding that court could not expand the scope of criminal laws without violating Ms. Farrell's constitutional right to fair notice.)

¹⁸⁹ See Corinne A. Carey, Proposed and Recently Adopted Legislation Criminalizing Maternal Drug Use and Affecting Child Custody (visited May 3, 2000) <http://www.familywatch.org/library/legis.htm>.

constructive approaches, policymakers and activists should also consider the recommendations of leading child advocacy and medical groups.

Keeping the family intact should be the primary goal. Accordingly, the staff of the Center for the Future of Children has recommended that "[a]n identified drug-exposed infant should be reported to child protective services only if factors in addition to prenatal drug exposure show that the infant is at risk for abuse or neglect."¹⁹⁰

The recommendations from the Coalition on Alcohol and Drug Dependent Women and Their Children are very useful and thorough: Provide that pregnant women may not be subjected to arrest, commitment, confinement, incarceration, or other detention solely for the protection, benefit, or welfare of her fetus or because of her prenatal behavior. Any person aggrieved by a violation of such a provision should be allowed to maintain an action for damages.

Provide that positive toxicologies taken of newborns at birth may be used for medical intervention only, not for removal without additional information of parental unfitness, which assesses the entire home environment.

Provide that child abuse reporting laws may not be triggered solely on the basis of alcohol or drug use or addiction without reason to believe that the child is at risk of harm because of parental unfitness.

Provide that alcohol and drug treatment programs may not exclude pregnant women, and increase appropriations for comprehensive alcohol and drug treatment programs.

Utilize existing funds for the prevention and treatment of alcoholism and drug dependency among women and their families. Review agency services, and propose the coordination of related programs between alcohol and drug treatment, social services, [including domestic violence programs] education, and the maternal health and child care field in order to improve maternal and child health.¹⁹¹

Intervention by the judicial system based solely on a single drug test evidencing drug use during pregnancy constitutes a significant assault on family integrity, women's rights, and children's rights and should not occur in the absence of evidence that the child's home environment is seriously inadequate. Such a standard would protect

¹⁹⁰ The Future of Children, *supra* note 100, at 8.

¹⁹¹ See Coalition on Alcohol and Drug Dependent Women and Their Children 15 (1991) (on file with NAPW).

women and their reproductive rights, as well as children and family integrity. In virtually every state, existing statutes and regulations, when properly administered, provide the protection children need from those parents who are unable to care for their children. Services, including appropriate and comprehensive drug treatment, should be fully supported and available for all individuals and families who want and need them.