Punishing Women for Their Behavior During Pregnancy: An Approach That Undermines the Health of Women and Children

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INTRODUCTION

For more than a decade, law enforcement personnel, judges, and elected officials nationwide have sought to punish women for their actions during pregnancy that may affect the fetuses they are carrying (Gallagher 1987). Women who are having children despite substance abuse problems have been a particular target, finding themselves prosecuted for such nonexistent crimes as "fetal abuse" and delivery of drugs through the umbilical cord. In addition, pregnant women are being civilly committed or jailed, and new mothers are losing custody of their children even when they would be capable parents. Meanwhile, State legislators have repeatedly introduced substance abuse and child welfare proposals that would penalize only pregnant women with addiction problems.

Some proponents of these efforts are motivated by the misguided belief that they are promoting fetal health and protecting children (Johnsen 1986, 1989; Pollitt 1990; Hoffman 1990, p. 11). Others hope to gain legal recognition of "fetal rights"—the premise that a fetus has separate interests that are equal to or greater than those of a pregnant woman (Johnsen 1986, 1989; Pollitt 1990; Hoffman 1995, pp. 33, 57). Recognition of such rights would require women to subordinate their lives and health—including decisions about reproduction, medical care, and employment—to the fetus.[1] In fact, doctors and hospital officials have already relied on this theory to seek court orders to force pregnant women to undergo cesarean sections or other medical procedures for the alleged benefit of the fetus.[2] Some advocates of fetal rights have argued that children should be able to sue their mothers for "prenatal injuries."[3] In some industries, employers have adopted "fetal protection" policies,

which bar fertile women of childbearing age from certain high-paying, unionized jobs.[4]

Women's and children's advocates agree that women should engage in behaviors that promote the birth of healthy children. Nevertheless, they recognize that a woman's substance abuse involves complex factors that must be addressed in a constructive manner.[5] Punitive approaches fail to resolve addiction problems and ultimately undermine the health and well-being of women and their children. For this reason, public health groups and medical organizations uniformly oppose measures that treat pregnant women with substance abuse problems as criminals. Moreover, courts have repeatedly rejected attempts to prosecute women under existing criminal laws for their prenatal actions, impose restrictions on women's activities because they are fertile or pregnant, or coerce women to undergo medical procedures to benefit their fetuses. Some of these decisions have explicitly recognized that the fetal rights theory poses a significant threat to women's reproductive rights and the best interests of children.

CRIMINAL PROSECUTION

Although no State has enacted a law that specifically criminalizes prenatal conduct, prosecutors have used statutes prohibiting abuse or neglect of children to charge women for actions that potentially harm the fetus.[6] Some also have argued that pregnant women "delivered" drugs to "minor" children—fetuses—through the umbilical cord.[7] In addition, a mother's or newborn's positive drug test has led to charges of assault with a deadly weapon (cocaine), contributing to the delinquency of a minor, and possession of a controlled substance.[8] In cases in which infants tested positive and died soon after birth, women have been charged with homicide or feticide.[9] Some women even have been prosecuted for drinking alcohol,[10] failing to follow a doctor's order to get bed rest, or refraining from sexual intercourse during pregnancy.[11]

Estimates based on court documents, news accounts, and data collected by attorneys representing pregnant and parenting women indicate that at least 200 women in more than 30 States have been arrested and criminally charged for their alleged drug use or other actions during pregnancy (Paltrow 1992; Center for Reproductive Law and Policy 1996.) The majority of women prosecuted have been low-income women of color (Kolata 1990, p. A13), despite the fact that

most women who use illicit drugs while pregnant are white (Mathias 1995).[12] According to one analysis, "[p]oor Black women have been selected for punishment as a result of an inseparable combination of their gender, race, and economic status" (Roberts 1991). Often, information indicating possible drug use has been provided to law enforcement officials by medical personnel—possibly in violation of constitutional and statutory guarantees of confidentiality.[13] In many of the cases, women have been pressured into pleading guilty or accepting plea bargains, some of which involved jail time.[14] However, women who have challenged their charges have succeeded in almost every case in reversing penalties imposed on them for their prenatal conduct.[15] In fact, every appellate panel and most trial courts to reach a final judgment on the use of existing criminal statutes to punish women for their conduct during pregnancy have found that these prosecutions are without legal basis, are unconstitutional, or both.[16]

Most courts reviewing criminal charges and guilty verdicts based on a woman's prenatal conduct have ruled on grounds of "statutory construction"—the principle that criminal statutes must be strictly construed in favor of defendants and that words such as "child" may not be expanded to include fetuses. In cases in which women were charged with violating child abuse laws, courts have consistently found that those statutes cover only children already born, not fetuses.[17] As one judge noted, "[n]o appellate court in our nation has interpreted its child abuse laws to apply to a woman who takes illegal drugs during pregnancy."[18] Similarly, appeals courts have unanimously held that drug delivery laws apply solely to circumstances in which drugs are transferred between two persons already born.[19] In evaluating unlawful possession charges based only on a woman's or newborn's positive drug test, several courts have held that drug use alone is not proof of the crime.[20] Courts also have refused to apply murder or feticide statutes in such cases, concluding that those laws were never intended to punish a woman for prenatal conduct affecting her fetus or to hold a woman criminally liable for the outcome of her pregnancy.[21]

Criminal charges based on prenatal conduct also raise serious constitutional concerns (Johnsen 1986; Paltrow 1993). In dismissing these cases, some courts have recognized that the prosecutions violated women's rights to due process and privacy. Due process prohibits prosecutors and courts from interpreting or applying an existing law in an

unforeseeable or unintended manner. A number of courts have thus found that the unprecedented application of statutes—such as child abuse provisions—to prenatal conduct violates due process guarantees because women did not have the required notice that such laws would be applied to fetuses or prenatal conduct.[22] Other courts have recognized that interpreting a child abuse statute to include prenatal conduct would render the measure unconstitutionally vague because women would not know what behavior would be criminal.[23] As one appellate court explained:

> Many types of prenatal conduct can harm a fetus, causing physical or mental abnormalities in a newborn. For example, medical researchers have stated that smoking during pregnancy may cause, among other problems, low birth weight, which is a major factor in infant mortality. Drinking alcoholic beverages during pregnancy can lead to fetal alcohol syndrome, a condition characterized by mental retardation, prenatal and postnatal growth deficiencies, and facial [sic] anomalies.
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> A pregnant woman's failure to obtain prenatal care or proper nutrition also can affect the status of the newborn child. Poor nutrition can cause a variety of birth defects . . . Poor prenatal care can lead to insufficient or excessive weight gain, which also affects the fetus. Some researchers have suggested that consuming caffeine during pregnancy also contributes to low birth weight.
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> Environmental hazards, such as exposures to solvents used by painters and dry cleaners, can cause adverse outcomes. The contraction of or treatment for certain diseases, such as diabetes and cancer, also can affect the health of the fetus.
>
> Allowing the state to define the crime of child abuse according to the health or condition of the newborn child would subject many mothers to criminal liability for engaging in all sorts of legal or illegal activities during pregnancy. We cannot, consistent with the dictates of due process, read the statute that broadly.[24]

Prosecutions of women for their behavior during pregnancy also implicate the right of privacy, which includes the right to decide

whether to have a child, the right to bodily integrity, and the "right to be let alone."[25] Thus, both coerced abortions and the imposition of criminal penalties for going through with a pregnancy violate the right to procreate. Several courts have already recognized that criminal sanctions could compel women to terminate their pregnancies to avoid arrest. As one court noted, "[p]rosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."[26] Some courts also have held explicitly that application of drug delivery statutes to prenatal drug use would unconstitutionally infringe on the broader right to privacy that protects all people from improper State interference in their personal lives.[27] As one court stated, "[b]ecause of the intrusion required by this prosecution; namely, the state's attempt to reach and deter behavior during pregnancy, [the woman's] privacy rights are seriously threatened."[28] The court further found that the State could protect fetal health through less restrictive means, "such as education and making available medical care and drug treatment centers for pregnant women."[29]

Some courts that have overturned prosecutions based on prenatal conduct have indicated that these punitive measures are also counterproductive or run contrary to public policy. One State high court has observed that "rather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected."[30] Similarly, another court concluded that criminal prosecution of women for their conduct during pregnancy fosters neither the health of the woman nor her future offspring; indeed, it endangers both. Criminal prosecution cruelly severs women from the health care system, thereby increasing the potential for harm to both mother and fetus. Pregnant women threatened by criminal prosecution already have avoided the care of physicians and hospitals to prevent detection.[31]

CASE STUDY: CHARLESTON, SC [32]

Most criminal charges filed against women for their behavior during pregnancy are the result of an individual prosecutor who pursues one or two cases (Hoffman 1995, pp. 33, 57). However, in 1989, the city of Charleston, SC, went a step further and established a collaborative effort among the police department, the prosecutor's office, and a State

hos-pital, the Medical University of South Carolina (MUSC), to punish pregnant women and new mothers who tested positive for cocaine. Under the policy, the hospital provided the city prosecutor's office with information on these pregnant and postpartum women. The prosecutor's office then maintained detailed lists that contained a woman's name, drug test result, and other sensitive information, including whether she "had AIDS" or had had an abortion. With the hospital's assistance, police arrested women days or even hours after delivery, removing them from their hospital beds in handcuffs and, in some cases, in shackles. Some women were taken to jail while still bleeding from giving birth. Others were arrested and jailed while they were pregnant, even though the prison could not provide prenatal care or drug treatment. When the incarcerated women went into labor, they were returned to the hospital in shackles. One woman was handcuffed to her bed during labor.

Approximately 6 months after the policy was instituted, it was revised so that women would be threatened with arrest but also told that they could avoid being charged if they immediately stopped using drugs and entered the single drug treatment program available to them. At the time, MUSC's own inpatient treatment did not accept pregnant women. The program that did enroll pregnant women failed to provide services designed to meet the needs of pregnant and parenting women. When MUSC's facility was finally opened to pregnant women, the policy forced some women to enter without receiving a civil commitment hearing or any other proceeding to protect their rights. One woman, who was threatened with arrest if she did not immediately go to MUSC's program, was denied the use of a telephone to make arrangements for someone to meet her son after school. Another woman was unable to comply with a nurse's order that she enter MUSC's 2-week program because she had no one to care for her older children. Although she repeatedly explained her child care problem and requested an outpatient referral, she was arrested because she could not go to the inpatient treatment.

The prosecutor sought to justify the reporting and arrests by claiming that he was merely enforcing the State's child abuse laws. Yet the policy was implemented only at the State hospital, which serves a low-income population that is predominantly African-American. At that institution, the practice affected only certain patients. Nearly all the

women who were reported to the police and arrested were African-American. Moreover, the hospital was using these women—without their consent—in an ill-conceived experiment to test the hypothesis that threats of prosecution would stop pregnant women from using drugs and would improve fetal health. Contrary to the publicly stated goals of the policy, the hospital's own initial research and reports from women affected show that the coordinated effort ultimately frightened many pregnant women away from prenatal care and the little drug treatment that was available. Those who did obtain medical attention at MUSC were placed in the impossible position of choosing between inappropriate treatment and jail.

In October 1993 two women challenged the Charleston policy in Federal court, alleging that it was racially discriminatory and violated a number of constitutional guarantees, including the right to privacy in medical information, the right to refuse medical treatment, and the right to procreate.[33] Three months later, the women filed a complaint with the National Institutes of Health (NIH), asserting that MUSC had engaged in research on human subjects without obtaining the necessary institutional review and patient consent. The Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services subsequently began to investigate MUSC for possible violations of Title VI, the Federal law that prohibits race discrimination by programs receiving Federal funds. Apparently to avoid a full-scale inquiry, in September 1994 MUSC signed an agreement with OCR to discontinue most of the policy.[34] Later that month, the separate NIH investigation found that MUSC had violated Federal regulations designed to protect human subjects of research.[35] The Federal lawsuit is still pending.

TERMINATION OF PARENTAL RIGHTS OR TEMPORARY LOSS OF CUSTODY

Currently, only a few States have modified their civil child protection laws to mandate reporting to child welfare authorities or to define child neglect to encompass cases in which a newborn is "physically dependent on"[36] or tests positive for[37] an illicit drug. A few of these States also require reporting of fetal alcohol syndrome or evidence of alcohol use,[38] and only one State mandates reporting a positive drug test prior to birth.[39] In some instances, such a report may trigger only an evaluation of parenting ability and the provision of services; in others,

it may become the basis for temporarily removing custody of the newborn (Wilford and Morgan 1993, pp. 34-47). One State specifically prohibits the use of a single positive drug test as the basis for a report to child welfare authorities,[40] and several others prohibit basing criminal proceedings solely on a positive toxicology.[41] Another State, recognizing that such reporting raises serious issues of doctor-patient confidentiality, provides reporting to the health department for "service coordination," but only if the woman consents.[42] Still another State provides that, if a woman is informed, health care providers may test new mothers and newborns for alcohol and other drugs but allows physician discretion in determining whether abuse or neglect has occurred and reporting is required.[43]

Nevertheless, many women across the country have had their children taken away from them because of positive drug tests (English 1990; Chavkin et al. 1992; Hoffman 1990, p. 11). As in the criminal context, women of color have been particularly vulnerable to losing their children, even though most pregnant women who use drugs are white. One study conducted in Pinellas County, FL, found that black women were 10 times more likely than white women to be reported to civil authorities if an infant was prenatally exposed to an illicit drug (Chasnoff et al. 1990).

Although the government should clearly intervene to protect a child from someone who cannot parent, a single positive drug test should not be used as a substitute for an evaluation of parenting ability. Drug tests are sometimes inaccurate, do not measure the severity of drug dependence, and fail to predict parental fitness. Public health groups, such as the California Medical Association and a division of the American College of Obstetricians and Gynecologists, oppose relying on such tests, explaining:

> 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 but may be unable, without access to substance abuse treatment programs, to act on her desire. However, after the child is born, the mother may be able to provide the child with an adequate home environment. In

> the absence of tangible evidence that she will be unable to do so, she should be permitted to raise her child, with the assistance of family, friends and voluntary social services . . . . If a health care provider or hospital social worker reasonably suspects from a parent's current behavior or past conduct that a child's home environment, including, but not limited to, the parent's or parents' substance abuse, poses a danger, that person is authorized . . . to report the facts to a child protective agency for further investigation . . . .[44]

Indeed, existing provisions of civil child abuse laws already mandate reporting in those cases in which it is necessary and appropriate (English 1990, p. 3). However, when the law has allowed a drug test to be the basis for requiring reporting, some women have lost custody of their children based on false-positive test results.[45] In one known case, a positive test resulted from drugs administered by the woman's doctor during labor.[46]

State statutes mandating reporting a newborn's positive drug test to civil authorities have yet to be challenged. As for the reported court opinions regarding prenatal application of civil child abuse statutes, all apply to measures that were not specifically amended to include newborns exposed to drugs (Center for Reproductive Law and Policy 1996). A majority of the lower court opinions have upheld termination of parental rights or temporary loss of custody based on drug use during pregnancy. However, the only two State Supreme Courts to address this issue have explicitly refused to terminate a woman's parental rights solely because of her prenatal drug use.[47]

CIVIL COMMITMENT, EMERGENCY PROTECTIVE CUSTODY, AND HARSHER SENTENCES

Only one State has specifically amended its laws to authorize civil commitment of a woman who engages in the "habitual and excessive use" of drugs during pregnancy.[48] Yet pregnant women in other States continue to face attempts to civilly commit them for the sole purpose of protecting their fetuses from some potential harm (Chavkin 1991). According to constitutional requirements for civil commitment statutes, there must be 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 limited period.[49] Efforts to civilly commit pregnant drug addicts have been based on the claim that a woman is a danger to an "other" person—the fetus. At least one court 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 her rights to liberty and equal protection.[50]

Some officials also have attempted to treat the fetus as a "dependent child" over whom the State could exercise jurisdiction through the juvenile court system. In one proceeding, fetal rights advocates filed a dependent child petition after a prosecutor found that a pregnant woman did not fit the criteria for civil commitment and dropped efforts to have her committed to a psychiatric facility. Although the juvenile court declared the fetus a dependent child and ordered the mother detained for the 2 months until birth, a State appellate court ultimately held that a fetus is not a child for purposes of dependency laws.[51]

Finally, although rarely recorded in written opinions, some judges have sought to use the sentencing phase of a criminal trial to incarcerate a pregnant substance-dependent woman to protect her fetus (Becker and Hora 1993; Becker 1991). For example, in a check-forging case, a judge sentenced a woman to 6 months in prison, admitting that he gave her jail time rather than the customary probation because she was pregnant and had reportedly used cocaine.[52] The judge stated that the length of the sentence was necessary "to be sure she would not be released until her pregnancy was concluded . . . because of . . . concern for the unborn child . . . ."[53] None of the sentences based on fetal protection has been challenged in the courts.

LEGISLATIVE EFFORTS CONCERNING SUBSTANCE ABUSE AND PREGNANT WOMEN

In numerous States, legislators have introduced measures that would provide prosecutors and courts with explicit authorization to penalize pregnant and parenting women with substance abuse problems. To date, no State has expanded its criminal code to punish women who are pregnant and use drugs, and only a handful have revised their civil child protection laws to require reporting of a newborn's positive drug test.[54]

The failure to pass any criminal statutes and the limited adoption of prenatal drug use as evidence of civil child neglect reflects, in part, the overwhelming opposition by the medical community and recognition of the extreme shortage of drug treatment for pregnant women.[55] As a result, States have been far more likely to pass legislation to set up task forces to study the problem of substance abuse and pregnancy,[56] establish treatment programs or coordinate services,[57] provide pregnant women priority access to treatment,[58] encourage health care practitioners to identify substance-abusing pregnant women and to refer them to treatment,[59] or mandate increased education—of the public or medical providers—on substance abuse and pregnancy.[60] Some States also have passed measures to prohibit discrimination against pregnant women seeking drug treatment,[61] remove barriers to methadone treatment for pregnant women,[62] increase access to child care for pregnant addicts seeking treatment,[63] ensure that pregnant women in certain health maintenance organizations can receive substance abuse treatment,[64] and enhance criminal penalties for people who sell or give drugs to pregnant women.[65]

The Coalition on Alcohol and Drug Dependent Women and Their Children recommends the following legislative action to improve maternal and child health:

- 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, education, and the maternal health and child care field in order to improve maternal and child health.[66]

PUNITIVE APPROACHES FAIL TO PROTECT CHILDREN

Leading public health organizations, including the American Medical Association (AMA), American Academy of Pediatrics (AAP), American Nurses Association, American Society of Addiction Medicine, National Association for Perinatal Addiction Research and Education, National Council on Alcoholism and Drug Dependence, and American Public Health Association, oppose the prosecution of pregnant women who use drugs. These groups recognize that such an approach undermines maternal and fetal health because the threat of criminal charges and the fear of losing their children deter women from seeking prenatal care and drug treatment. The U.S. Institute of Medicine similarly asserts:

> Pregnant women who are aware that their life-styles place their health and that of their babies at risk may also fear seeking care because they anticipate sanction or pressure to change such habits as drug and alcohol abuse, heavy smoking, and eating disorders. Substance abusers in particular may delay care because of the stress and disorganization that often surround their lives, and because they fear that if their use of drugs is uncovered, they will be arrested and their other children taken into custody (Brown 1988, p. 79).

Government and private researchers also have concluded that punitive approaches frighten women away from needed care.[67] One Federal report found that "women are reluctant to seek treatment if

there is a possibility of punishment," civil or criminal, noting that "some women are now delivering their infants at home in order to prevent the state from discovering their drug use."[68] Moreover, fear of being reported to the authorities discourages women from communicating honestly about their addiction problems to health care professionals who need that information to provide appropriate medical care to both the woman and her newborn.[69]

Many groups that are primarily concerned with the health and rights of children, such as AAP, the Center for the Future of Children, and the March of Dimes, also recommend against punitive approaches to substance abuse and pregnancy. As AAP has stated, "[p]unitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health."[70] In fact, studies indicate that drug-using women who receive prenatal care have healthier children (Racine et al. 1993).

In addition, prosecutions have focused particularly on women who allegedly use cocaine during their pregnancies, reflecting a reliance on exaggerated and inaccurate media reports on the "epidemic" of "crack babies" (Reinarman and Levine 1989, p. 115) rather than sound medical findings.[71] Researchers have concluded that "available evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the course and outcome of child growth and development" (Mayes et al. 1992).

Moreover, the effect of substances on fetal development depends on dose, timing and duration of exposure, genetic or other biological factors, as well as other influences (Zuckerman 1991). As one court noted when it refused to civilly commit a pregnant woman, "A hospital simply cannot present clear and convincing evidence that [cocaine] use during pregnancy, particularly during the third trimester of pregnancy, is certain or even likely to cause fetal injury."[72] Thus, although reports in the scientific literature provide ample ground for concern about the potential health effects of cocaine use during pregnancy—and form an appropriate basis for additional research—the data do not justify prosecuting pregnant women and new mothers, committing them to mental institutions, or automatically removing their children.[73]

Furthermore, focusing on cocaine ignores the potential impact of other drugs, such as nicotine and alcohol. It is estimated that

2 to 4 percent of pregnant women have used cocaine and approximately 27 percent of pregnant women smoke cigarettes (Gomby and Shiono 1991). A meta-analysis of the effect of smoking during pregnancy concluded that the use of tobacco products is responsible for an estimated 32,000 to 61,000 low-birth-weight infants born annually and 14,000 to 26,000 infants who require admission to neonatal intensive care units.[74] Currently, research does not shed much light on the subject of which particular substances contribute to which later disability. Polydrug exposure, impoverished home life, and chaotic communities make it impossible to attribute developmental effects to one particular drug. The research has not controlled for other important variables, such as the role of the father, the mother's personality, her health, and her access to social supports (Kronstadt 1991).

ADDRESSING THE TRUE CRISIS: LACK OF DRUG TREATMENT

Both the World Health Organization and the American Psychiatric Association classify substance abuse as a disease.[75] The AMA explains that "addiction is not simply the product of a failure of individual willpower. [It] is caused by complex hereditary, environmental, and social factors" (American Medical Association Board of Trustees 1990). Substance abuse is difficult to overcome, even for pregnant addicts who are especially motivated to stop (Chavkin 1991, p. 1,559). Moreover, according to experts, such factors as a history of abuse specifically affect a woman's drug use and thus raise important issues for treatment (Kilpatrick 1990, p. 7). In one study, up to 74 percent of alcohol- and other-drug-dependent women reported that they had experienced sexual abuse.[76] In another survey of pregnant women, 70 percent reported that they had been beaten as adults.[77] Many specialists in the field believe 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.[78]

As the National Association for Perinatal Addiction Research and Education points out: "These women are addicts who become pregnant, not pregnant women who decide to use drugs . . . ."[79] Their substance abuse is best addressed through treatment, not punishment (Chavkin

1990). One court that ruled against criminal prosecution of women for alleged prenatal drug use also has acknowledged that treating addiction during pregnancy as a disease and addressing the problem through treatment rather than prosecution is the approach "overwhelmingly in accord with the opinions of local and national medical experts."[80]

Despite the fact that drug treatment programs tailored for pregnant and parenting women help them overcome their addiction problems, greatly improve birth outcomes, and are cost-effective, such programs are extremely rare and overburdened.[81] The 1991 U.S. General Accounting Office report found that the most critical barrier to women's treatment "is the lack of adequate treatment capacity and appropriate services among programs that will treat pregnant women and mothers with young children. The demand for drug treatment uniquely designed for pregnant women exceeds supply."[82]

A 1989 study of 95 percent of the drug treatment programs in New York City found that 54 percent refused to treat any pregnant women, 67 percent would not accept pregnant women on medicaid, and 87 percent refused to treat pregnant women on medicaid who were addicted to crack cocaine.[83] Although many programs now say they will accept pregnant women, a review of drug treatment programs in Southern States found that pregnant women make up less than 1 percent of the patients actually served.[84] A recent survey also suggests that few physicians or nurses detect substance abuse problems in pregnant women or make referrals to treatment (Gehshan 1995). Even when programs do accept women, there are numerous barriers to successful treatment. For example, if a program does not provide child care services, that fact "effectively precludes the participation of women in drug treatment" (Chavkin 1989, p. A21). Similarly, despite significant evidence that long-term (12 to 18 months) residential care may be the most effective for chronic alcohol- or other-drug-dependent pregnant and parenting women, such services are virtually nonexistent.[85] Moreover, when women are imprisoned during their pregnancies or shortly after giving birth, they and their children are even less likely to receive appropriate care. Putting women in jail—where drugs may be available (Malcolm 1989, p. 1) but treatment and prenatal care are not—jeopardizes the health of pregnant women and their future children and does little to solve the underlying problem of addiction.[86]

CONCLUSION

Punitive approaches to the problem of substance abuse during pregnancy threaten the health of women and children and seriously erode a woman's right to privacy. Furthermore, they ignore the serious shortage of drug treatment programs for pregnant and parenting women and fail to address the overall lack of access to reproductive health care services. Policymakers, legislators, and those who purport to care about the well-being of women and their children must work to find better ways to address the needs of women with alcohol and other drug abuse problems. As the author of a recent study on the effectiveness of mandatory treatment concluded, "the children of drug-using mothers may be most effectively served by the development of available, efficacious, and welcoming services for women and families" (Chavkin 1991, p. 1560).

NOTES

1. See *infra* notes 2, 3, 4.
2. See *In re* A.C., 573 A.2d 1235 (D.C. 1990) (*en banc*) (reversing court-ordered cesarean section that contributed to the death of both the fetus and the woman); *Doe* v. *Doe*, 632 N.E.2d 326 (Ill. 1994) (courts may not balance whatever rights a fetus may have against the rights of a competent woman; her choice to refuse medical treatment as invasive as a cesarean section must be honored even if the choice may be harmful to her fetus); Thornton and Paltrow (1991).
3. See, e.g., *Stallman* v. *Youngquist*, 531 N.E.2d 355 (Ill. 1988) (child cannot maintain lawsuit against mother for unintentional infliction of injuries suffered while in the womb); Shaw (1984).
4. See *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991) ("fetal protection" policy violated Title VII's prohibition on sex discrimination). *See also* Samuels (1995) and Williams (1981).
5. For example, a pregnant woman who is addicted to heroin faces a catch-22. If she stops "cold turkey," as some advocates urge, the resulting withdrawal can cause fetal death. If she continues to use heroin or if she switches to methadone, the child will still undergo withdrawal because both substances are addictive for the newborn. *See* Center for Substance Abuse Treatment (1993, p. 19).

6. See, e.g., *Commonwealth* v. *Welch*, 864 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction finding that to construe the child abuse statute to apply to a woman's prenatal conduct would make the statute impermissibly vague and violate legislative intent); *Sherriff* v. *Encoe*, 885 P.2d 596, 598 (Nev. 1994) (child abuse statute inapplicable to a woman who used methamphetamines during pregnancy; to hold otherwise would "open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins"); *Commonwealth* v. *Kemp*, 75 Westmoreland L.J. 5 (Pa. Ct. C.P. 1992), *aff'd*, 643 A.2d 705 (Pa. Super. Ct. 1994) (affirming dismissal of charges of recklessly endangering another person or endangering the welfare of a child against a pregnant woman who allegedly ingested cocaine while pregnant; finding that neither "child" nor "person" includes an unborn "fetus").
7. See, e.g., *Johnson* v. *State*, 602 So. 2d 1288 (Fla. 1992) (reversing a woman's convictions for "delivering drugs to a minor" via the umbilical cord); *People* v. *Hardy*, 469 N.W.2d 50 (Mich. Ct. App.) (statute prohibiting delivery of cocaine to children was not intended to apply to pregnant drug users), *leave to appeal denied*, 471 N.W.2d 619 (Mich. 1991).
8. See, e.g., *State* v. *Inzar*, Nos. 90CRS6960, 90CRS6961 (N.C. Super. Ct. Robeson Cty. Apr. 9, 1991), *appeal dismissed*, No. 9116SC778 (N.C. Ct. App. Aug. 30, 1991) (dismissing charges against a woman who allegedly used "crack" during her pregnancy under statutes prohibiting assault with a deadly weapon and delivery of a controlled substance because a fetus is not a person within the meaning of the statutes); *State* v. *Alexander*, No. CF-92-2047, Transcript of Decision (Okla. Dist. Ct. Tulsa Cty. Aug. 31, 1992) (dismissing charges of unlawful possession of a controlled substance and unlawful delivery of a controlled substance to a minor brought against a woman who ingested illicit drugs while pregnant, finding that the presence of drugs in defendant's system does not constitute possession and transfer of the drug through the umbilical cord is not "volitional").
9. See *People* v. *Jones*, No. 93-5, Reporter's Transcript (Cal. Juv. Ct. Siskiyou Cty. July 28, 1993) (dismissing homicide charges against a woman whose newborn died allegedly as a result of prenatal drug

use, finding that legislative history did not support application of murder statute to fetus' death); *Jaurigue* v. *Justice Court*, No. 18988, Reporter's Transcript (Cal. Super. Ct. San Benito Cty. Aug. 21, 1992) (dismissing fetal homicide charges against a woman who suffered stillbirth allegedly as a result of her prenatal drug use, finding that neither legislative history nor the statute's language suggested that a mother could be prosecuted for murder for her fetus' death), *writ denied*, (Cal. Ct. App. 1992); *State* v. *Barnett*, No. 02D04-9308-CF-00611 (Ind. Super. Ct. Allen Cty. Feb. 11, 1994) (notice accepting State's motion to withdraw child abuse charges and dismissing homicide charges brought against a woman whose infant tested positive for cocaine and died shortly after its premature birth).

10. See *State* v. *Pfannenstiel*, No. 1-90-8CR (Wyo. Cty. Ct. Albany Cty. Jan. 5, 1990) (pregnant woman charged with child abuse for drinking alcohol); Little (1991, p. 3A) (a woman was charged with second-degree assault and child endangerment after her son was allegedly born with signs of fetal alcohol syndrome).

11. See *People* v. *Stewart*, No. M508197, Reporter's Transcript, at 4 (Cal. Mun. Ct. San Diego Cty. Feb. 26, 1987) (pregnant woman charged under a criminal child support statute for failing to follow doctor's advice to get bed rest, abstain from sexual intercourse, and seek prompt medical attention when she experienced bleeding).

12. As Gehshan (1993, p. 1) concluded:

    Newspaper reports in the 1980s sensationalized the use of crack cocaine and created a new picture of the typical female addict: young, poor, black, urban, on welfare, the mother of many children, and addicted to crack. In interviewing nearly 200 women for this study, a very different picture of the typical chemically dependent woman emerges. She is most likely white, divorced or never married, age 31, a high school graduate, on public assistance, the mother of two or three children, and addicted to alcohol and one other drug. It is clear from the women we interviewed that substance abuse among women is not a problem confined to those who are poor, black, or urban but crosses racial, class, economic, and geographic boundaries.

13. One Federal law provides that, except under limited circumstances, "[R]ecords of the identity, diagnosis, prognosis, or treatment of any

patient . . . maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States, shall . . . be confidential . . .” 42 U.S.C. § 290dd-2 (1995). *See also* Legal Action Center (1991, 1994).

14. See, e.g., *State* v. *Whitner*, 92-GS-39-670, Transcript of Record, (Pickens County, S.C., Court of G.S., April 20, 1992) (Guilty Plea hearing); *State* v. *Whitner*, 93-CP-39-347, Transcript of Record (Pickens County, S.C., Court of C.P., November 1, 1993) (Postconviction relief hearing).

15. See, *State* v. *Reinesto*, 182 Ariz. 190, 894 P.2d 733. Order (Ariz. Ct. App. March 14, 1995) (dismissing on special appeal, child abuse charges against a woman based on her alleged use of heroin during pregnancy); *Collins* v. *State*, No. 08-93-00404, slip op. (Tex. Ct. App., Dec. 22, 1994) (dismissing injury to a child charges against a woman who allegedly used drugs during pregnancy, finding that applying statute to prenatal conduct violates due process); *Sherriff* v. *Encoe*, 885 P.2d 596 (Nev. 1994) (holding that to interpret statute criminalizing child endangerment to apply to a woman who used methamphetamine while pregnant would be a radical incursion on existing law); *Commonwealth* v. *Kemp*, 75 Westmoreland L.J. 5 (Pa. Ct. C.P. 1992), *aff'd* 643 A.2d 705 (Pa. Super. Ct. 1994) (affirming dismissal of charges of recklessly endangering another person or endangering the welfare of a child against a pregnant woman who allegedly ingested cocaine while pregnant; finding that neither “child” nor “person” includes an unborn “fetus”); *Commonwealth* v. *Welch*, 864 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction, finding that to construe the child abuse statute to apply to a woman's prenatal conduct would make the statute impermissibly vague and violate legislative intent); *Johnson* v. *State*, 602 So. 2d 1288 (Fla. 1992) (reversing a woman's conviction for “delivering drugs to a minor” via the umbilical cord); *State* v. *Gray*, 584 N.E.2d 710, 713 (Ohio 1992) (mother cannot be convicted of child endangerment based solely on prenatal substance abuse, finding that the plain meaning of statute does not extend to fetuses or prenatal conduct); *People* v. *Morabito*, 580 N.Y.S.2d 843 (Geneva City Ct.

1992) *aff'd* slip op. (Ontario County Ct. 1992) (dismissing child endangerment charges against a woman who allegedly smoked cocaine during her pregnancy, because the court may not extend the reach of the statute to allow a fetus to be included within the definition of "child," and because public policy and due process considerations militate against such prosecutions); *State* v. *Carter*, 602 So. 2d 995 (Fla. App. 1992) (affirming the trial court's decision to dismiss charges of child abuse against a woman who allegedly used illicit drugs while pregnant); *State* v. *Luster*, 419 S.E.2d 32 (Ga. App. 1992), *cert. denied*, S92C1020 (June 4, 1992) (statute proscribing delivery/distribution of cocaine did not encompass prenatal transmission); *State* v. *Gethers*, 585 So. 2d 1140 (Fla. App. 1991) (dismissing child abuse charges on grounds that such application misconstrues the effect of the law and violates public policy of preserving family life); *People* v. *Hardy*, 469 N.W.2d 50, (Mich. App. 1991), *appeal denied*, 471 N.W.2d 619 (Mich. 1991) (statute prohibiting delivery of cocaine to children was not intended to apply to pregnant drug users); *Reyes* v. *Superior Court*, 75 Cal. App. 3d 214 (1977) (child endangering statute does not refer to an unborn child or include a woman's alleged drug use during pregnancy). *See also* *State* v. *Osmus*, 276 P.2d 469 (Wyo. 1954) (criminal neglect statute cannot be applied to the woman's prenatal conduct). *See also* trial court opinions: *State* v. *Padgett*, CC-94-2650 (Ala. Cir. Ct. Montgomery Cty. Aug. 14, 1995); *Sullivan* v. *State*, No. 93-CP-23-3223, slip op. (S.C. Ct. C.P. Dec. 19, 1994) (granting postconviction relief to a woman who pled guilty to child abuse for her use of cocaine during pregnancy); *Crawley* v. *Evatt*, No. 94-CP-04-1280, slip op. (S.C. Anderson Oct. 17, 1994) (granting habeas corpus petition for a woman who pled guilty to child abuse after her newborn tested positive for cocaine); *Rickman* v. *Evatt*, 94-CP-04-138, slip op. (S.C. Anderson Sept. 9, 1994) (granting habeas corpus relief to reverse conviction under the State's child neglect law of a woman who used drugs while pregnant); *State* v. *Dunn*, 93-1-00043-2, Transcript of Record (Wash. Super. Ct. April 1, 1994) (dismissing child mistreatment charges, finding that the legislature never intended the child mistreatment statute to apply to a woman's prenatal conduct); *State* v. *Crawley*, 93- GS-04-756, slip op. (S.C. Anderson Nov. 29, 1993) (quashing indictment under State child neglect statute of a woman who allegedly used drugs while pregnant,

finding that the plain and ordinary meaning generally given to the word "child" does not include "fetus"); *Lester* v. *State*, 93-CP-23-2984 (S.C. Greenville Nov. 22, 1993) (granting postconviction relief of a woman who pled guilty to child abuse charges based on her use of drugs while pregnant); *Tolliver* v. *State*, No. 90-CP-23-5178, slip op. (S.C. Greenville Aug. 10, 1992) *cert. denied* (S.C. Mar. 10, 1993) (granting postcon-viction relief for a woman who pled guilty to child neglect under a finding that application of statute to a woman who used drugs while pregnant violated statute's plain meaning and legislative intent); *State* v. *Jones*, No. 93-5, Transcript of Record (Cal. J. Ct. Siskiyou Cty. July 28, 1993) (dismissing homicide charges against a woman whose newborn died allegedly as a result of prenatal drug use, finding that the legislative history did not support application of murder statute to the death of the woman's fetus); *State* v. *Arandus*, No. 93072, slip op. (Neb. Dist. Ct. June 17, 1993) (quashing indictment on child abuse because application of the statute to unborn children is not supported by legislative intent); *People* v. *Jaurigue*, No. 18988, slip op. (Cal. Super. Ct. Aug. 21, 1992), *writ denied*, (Cal. App. 1992) (dismissing fetal homicide charges against a woman who suffered a stillbirth allegedly as a result of her prenatal drug use, finding that neither legislative history nor the statute's language suggested that a mother could be prosecuted for murder for the death of her fetus); *State* v. *Alexander*, No. CF-92-2047, slip op. (Okla. Dist. Ct. Aug. 31, 1992) (dismissing charges of unlawful possession of a controlled substance and unlawful delivery of a controlled substance to a minor brought against a woman who ingested illicit drugs while pregnant, finding that the presence of a drug in the defendant's system does not constitute possession and that transfer of the drug through the umbilical cord is not "volitional"); *Commonwealth* v. *Wilcox*, No. A-44116-01, slip op. (Va. Dist. Ct. Oct. 9, 1991) (dismissing child abuse charges against a woman who allegedly used cocaine during pregnancy, finding that application of the statute to these facts would extend it by means of creative construction to acts not intended by the legislature); *Commonwealth* v. *Smith*, No. CR-91-05-4381, slip op. (Va. Cir. Ct. Sept. 16, 1991) (dismissing child abuse charges against a woman who allegedly used drugs during pregnancy, finding that the child abuse statute is not intended to apply to fetuses or to prenatal conduct); *Commonwealth* v. *Turner*,

No. 91-054382, slip op. (Va. Cir. Ct. Sept. 16, 1991); *State* v. *Inzar*, Nos. 90CRS6960, 90CRS6961, slip op. (N.C. Super. Ct. Apr. 9, 1991), *appeal dismissed*, No. 9116SC778 (N.C. App. Aug. 30, 1991) (dismissing charges against a woman who allegedly used crack during her pregnancy under a statute prohibiting assault with a deadly weapon and delivery of a controlled substance, finding that a fetus is not a person within the meaning of the statutes); *People* v. *Bremer*, No. 90-32227-FH, slip op. (Mich. Cir. Ct. Jan. 31, 1991), *appeal dismissed*, No. 137619 (Mich. App. July 14, 1992) (dismissing drug delivery charges on principles of statutory construction, due process, and privacy, holding that the interpretation of the drug delivery law to cover ingestion of cocaine by a pregnant woman would be a radical departure from existing law); *Commonwealth* v. *Pellegrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990) (right to privacy and principles of statutory construction, due process, and separation of powers do not permit extension of drug delivery statute to women who give birth to substance-exposed newborns); *People* v. *Cox*, No. 90-53454 FH, slip op. (Mich. Cir. Ct. July 9, 1990), *aff'd*, No. 131999 (Mich. App. Feb. 28, 1992) (granting motion to dismiss, finding that drug delivery statute is not intended to regulate prenatal conduct and that prosecution would not be in the best interest of public health, safety, and welfare); *State* v. *Andrews*, No. JU 68459, slip op. (Ohio C.P. June 19, 1989) (child endangerment statute is not intended to apply to any situation other than that of a living child placed at risk by actions that occurred after its birth); *People* v. *Stewart*, No. M508197, slip op. (Cal. Mun. Ct. Feb. 26, 1987) (criminal child support statute that explicitly covered "a child conceived but not yet born" is not intended to impose additional legal duties on pregnant women); *Whitner* v. *State*, 93-CP39347, slip op. (S.C. Ct. C.P. Nov. 22, 1993) *cert. granted* (June 30, 1994) (granting postconviction relief to a woman who pled guilty to child neglect based on her use of cocaine during pregnancy), *reversed Whitner* v. *State*, No. 24468, 1996 WL 393164 (S.C. July 15, 1996) (interpreting the State's child abuse statute to apply to any behavior by a pregnant woman that risks harm to a fetus); *Petition for Rehearing* filed July 25, 1996. *See also* Dubler 1996.

16. See *supra* note 15.

17. See *supra* note 6.
18. *Whitner* v. *State*, 93-CP-39347, slip op. at 3 (S.C. Ct. C.P. Nov. 22, 1993), *cert. granted*, [no case number] (S.C. June 30, 1994).
19. See *supra* note 7.
20. See, e.g., *State* v. *Padgett*, Nos. CC-94-2650, CC-94-2651, slip op. at 6 (Ala. Cir. Ct. Montg. Cty. Aug. 14, 1995) (positive drug screen on a newborn provides "absolutely no evidence, direct or circumstantial, to support the possession count"); *State* v. *Thronsen*, 809 P.2d 941, 942 (Alaska Ct. App. 1991) (defendant could not be convicted of possession of cocaine in his body because he no longer had control over the cocaine once he ingested or injected it); *State* v. *Vorm*, 570 N.E.2d 109, 110 (Ind. Ct. App. 1991) (unless there is additional evidence, the presence of cocaine metabolites in a urine sample does not constitute prima facie evidence of knowing and voluntary possession of cocaine); *State* v. *Flinchpaugh*, 659 P.2d 208, 211 (Kan. 1983) ("[o]nce a controlled substance is within a person's system, the power of the person to control, possess, use, dispose of, or cause harm is at an end"); *State* v. *Lewis*, 394 N.W.2d 212, 217 (Minn. Ct. App. 1986) (mere presence of a controlled substance in a person's urine is insufficient circumstantial evidence to prove, beyond a reasonable doubt, prior possession by defendant); *State* v. *Alexander*, No. CF-92-2047, Transcription of Decision, p. 8 (Okla. Dist. Ct. Tulsa Cty. Aug. 31, 1992) (crime of possession did not occur "while defendant had knowledge of the presence of the drug as she ingested it and knew or should have known that it would pass to the fetuses," because "she had no control or power over its passage after ingestion"); *Jackson* v. *State*, 833 S.W.2d 220, 223 (Tex. Ct. App. 1992) (test for drugs in bodily fluids does not satisfy the elements for the offense of possession, nor can presence of residual drugs in an infant be grounds for charging the mother with possession); *State* v. *Hornaday*, 713 P.2d 71, 75 (Wash. 1986) (once a controlled substance is ingested into the body, it is no longer under the person's dominion and control for possession purposes). Only one court has allowed a possession charge based on a newborn's positive drug test to proceed to trial. *See Jackson* v. *State*, 430 S.E.2d 781 (Ga. Ct. App. 1993), *cert. dismissed*, 436 S.E.2d 632 (Ga. 1993). Appeal was impossible because the charges were dropped.
21. See *supra* note 9.

22. See, e.g., *People* v. *Morabito*, 580 N.Y.S.2d 843, 847 (City Ct. 1992), *aff'd*, [no case number] (N.Y. Cty. Ct. Ontario Cty. Sept. 24, 1992).
23. See, e.g., *State* v. *Reinesto*, 182 Ariz. 190, 894 P.2d p. 733 (Ariz. Ct. App. May 14, 1995).
24. *State* v. *Reinesto*, 182 Ariz. 190, 894 P.2d, p. 736 (internal citations omitted).
25. *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See also Planned Parenthood* v. *Casey*, 112 S. Ct. 2791 (1992).
26. *Johnson* v. *State*, 602 So. 2d 1288, 1296 (Fla. 1992). *See also State* v. *Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991); *Commonwealth* v. *Pellegrini*, No. 87970, slip op. at 9 (Mass. Super. Ct. Plymouth Cty. Oct. 15, 1990); *People* v. *Bremer*, No. 90-32227-FH, slip op. at 14 (Mich. Cir. Ct. Muskegon Cty. Jan. 31, 1991), *appeal dismissed*, No. 137619 (Mich. Ct. App. July 14, 1992); *People* v. *Morabito*, [no case number] slip op. at 4 (N.Y. Cty. Ct. Ontario Cty. Sept. 24, 1992); Hand (1992, p. 1). (In February 1992, Martina Greyhound was charged with reckless endangerment for allegedly sniffing paint fumes while pregnant. After her arrest, she obtained an abortion, and the charges were subsequently dropped.)
27. See, e.g., *Commonwealth* v. *Pellegrini*, No. 87970 (Mass. Super. Ct. Plymouth Cty. Oct. 15, 1990); *People* v. *Bremer*, No. 90-32227-FH (Mich. Cir. Ct. Muskegon Cty. Jan. 31, 1991), *appeal dismissed*, No. 137619 (Mich. Ct. App. July 14, 1992).
28. *Commonwealth* v. *Pellegrini*, No. 87970, slip. op. at 7 (Mass. Super. Ct. Plymouth Cty. Oct. 15, 1990).
29. See *supra* note 28, p. 8.
30. *Johnson* v. *State*, 602 So. 2d 1288, 1295-96 (Fla. 1992).
31. *Commonwealth* v. *Kemp*, 75 Westmoreland L.J. 5, 11 (Pa. Ct. C. P. 1992), *aff'd*, 643 A.2d 705 (Pa. Super. Ct. 1994).
32. This case study is based on public court papers and published articles, including: Jos and colleagues (1995), Marshall and coworkers (1995), Fumo (1994), Green (1994, p. B1), Hilts (1994*a*, p. A12; Hilts 1994*b*, p. 67; Hilts 1994*c*, p. B9), Siegel (1994, p. 14), and Sturgis (1993, p. 14); Plaintiffs' Memorandum in Support of Their Partial Cross-Motion for Summary Judgment and in

Opposition to Defendants' Motion for Summary Judgment, *Ferguson* v. *City of Charleston*, No. 2:93-2624-2 (D.S.C.).

33. See *Ferguson* v. *City of Charleston*, No. 2:93-2624-2 (D.S.C. filed Oct. 5, 1993).
34. See Settlement Agreement between Medical Center of the Medical University of South Carolina and Office for Civil Rights, U.S. Department of Health and Human Services (Sept. 8, 1994) (on file with author).
35. See letter from J. Thomas Puglisi, Ph.D., Chief, Compliance Oversight Branch, Division of Human Subject Protections, Office for Protection From Research Risks, National Institutes of Health, to Dr. James B. Edwards, President, Medical University of South Carolina (Sept. 30, 1994) (on file with author).
36. See, e.g., Fla. Stat. ch. 415.503 (1995); Mass. Ann. Laws ch. 119, § 51A (Law. Co-op. 1995); Okla. Stat. tit. 63, § 1-550.3(A) (1995); Utah Code Ann. § 62A-4a-404 (1995).
37. See, e.g., Ill. Comp. Stat. Ann. ch. 325, para. 5/3 (1995); Ind. Code § 31-6-4-3.1(a)(1)(B) (1995); Iowa Code § 232.77(2) (1995); Minn. Stat. § 626.5562(2) (1995). A survey of State maternal/child health and drug treatment agency directors found that other States may, as a matter of policy, require reporting to child protective authorities of pregnant women or infants with positive toxicology results and/or define a positive result as evidence of child neglect
or abuse (Chavkin et al. 1995).
38. See, e.g., Ind. Code § 31-6-4-3.1(a)(1) (1995); Utah Code Ann. § 62A-4a-404 (1995).
39. See Minn. Stat. § 626.5662(2) (1995).
40. See Cal. Penal Code § 11165.13 (1995).
41. See, e.g., Iowa Code § 232.77(2) (1995); Ky. Rev. Stat. Ann. § 214.160(5) (1995).
42. See Kan. Stat. Ann. § 65-1, 163 (1994).
43. See Ky. Rev. Stat. Ann. § 214.160 (1991).
44. *Amicus Curiae* Brief of California Medical Association and American College of Obstetricians and Gynecologists, District 9, at 3-4, *In re Adrianna May H.*, No. 3 Civil CO14203 (Cal. Ct. App. 3d

App. Div. filed June 17, 1993). *See also* Center for the Future of Children (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.")

45. See, e.g., *Ana R., et al.* v. *New York City Department of Social Services, et al.*, 90-CIV-3863 (MGC) Class Action Complaint (U.S. Dist. Ct. S.D. N.Y. June 7, 1990); *see also* Hoffman (1990, p. 11).
46. See *supra* note 45.
47. See *Nassau County Dep't of Social Serv.* v. *Denise J.*, No. 209, 1995 N.Y. LEXIS 4436, at *1 (N.Y. Nov. 30, 1995) (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 Valerie D.*, 613 A.2d 748, 765 (Conn. 1992) (Legislative history does 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.)
48. See Minn. Stat. § 253B.02 (1995). *See also* Steven and Ahlstrom (1991) and *supra* note 44, p. 15.
49. See *Addington* v. *Texas*, 441 U.S. 418, 431-34 (1979). *See generally* Garcia and Keilitz (1991) and Hafemesiter and Amirshahi (1992).
50. See *In re Tanya P.*, No. 530069/93, slip op. at 1, 18-22 (N.Y. Sup. Ct. N.Y. Cty. Feb. 24, 1995).
51. See *In re Steven S.*, 178 Cal. Rptr. 525, 527-28 (1981); *cf. State ex rel. Angela M.W.* v. *Kruzicki*, 541 N.W.2d 482 (Wis. Ct. App. 1995) (upholding juvenile court's authority to adjudicate a "child in need of protection" proceeding involving a pregnant woman who allegedly used cocaine), *cert. granted*, No. 95-2480-W (Wisc. Jan. 23, 1996).
52. See *United States* v. *Vaughn*, 117 Daily Washington L. Rep. 441, No. F-2172-88B (D.C. Super. Ct. Aug. 23, 1988).
53. See *supra* note 52.
54. See *supra* note 37.
55. See generally Mandelbaum (1994) and Marshall (1993); Wilford and Morgan (1993).

56. See, e.g., Ky. Rev. Stat. Ann. § 222.021 (1995); La. Rev. Stat. Ann. §§ 40:2018, 46:2511 (1995); N.H. Rev. Stat. Ann. § 132:19 (1994); Okla. Stat. tit. 63, § 1-239 (1995); Wis. Stat. § 51.025. *See also* Or. Rev. Stat. § 430.910 (1994) (assigning the Oregon Department of Health the task of studying the problem of substance abuse in pregnancy).
57. See, e.g., Conn. Rev. Gen. Stat. § 19a-4F (1994); N.H. Laws 182 (1994); Ohio Rev. Code Ann. § 3793.15 (1995); Or. Rev. Stat. § 430.925 (1994); Pa. Stat. Ann. tit. 71 § 553 (1995); Va. Code Ann. § 2.1-51.15:1 (1995).
58. See, e.g., Ga. Code Ann. § 26-5-20 (1995); Kan. Stat. Ann. § 65-1,165 (1994); Mo. Rev. Stat. § 191.731 (1994).
59. See, e.g., Colo. Rev. Stat. § 26-4-508.2 (1995).
60. See, e.g., Del. Code Ann., tit. 16, § 190 (1995); Mo. Rev. Stat. §§ 191.725, 191.727 (1994); R.I. Gen. Laws § 15-2-3.1 (1994).
61. See, e.g., Iowa Code § 125.32A (1995); Kan. Stat. Ann. § 65-1,165 (1994).
62. Or. Rev. Stat. § 430.560(2) (1994).
63. 1991 Me. Resolves Ch. 49 (HP 174/LD 259).
64. Md. Code Ann. Health-Gen. § 15-103(d) (1995).
65. See, e.g., Ill. Comp. Stat. Ann. Ch. 720, para. 507/407.2 (1995); N.J. Stat. Ann. § 2C:35-8 (1994).
66. See Coalition on Alcohol and Drug Dependent Women and Their Children (1991, p. 15). *See also* Thompson (1989); Gehshan (1993), *supra* note 12.
67. See U.S. General Accounting Office (1991, p. 20); Poland and colleagues (1993). (A survey of women's attitudes regarding punitive laws found that substance-abusing pregnant women would go underground and avoid treatment for fear of incarceration.) *See also* Center for Health Policy Research (1993, p. 78).
68. See U.S. General Accounting Office (1990, pp. 20, 37). Many women's treatment experts "contend that as stigma, rejection, and blame increase, drug-abusing women's feelings of guilt and shame increase. This leads to lowered self-esteem, increased depression, immobilization, and isolation. As societal stigma increases, willingness to enter treatment decreases." *See also* Kumpfer (1991).

69. See Curry (1989). *See also* National Association for Perinatal Addiction Research and Education (1990). ("If a woman does go for prenatal care or delivery, she will be less likely to disclose her drug or alcohol use to her health care provider if she believes she will be subject to criminal prosecution. Thus, her doctor or nurse will not have all of the information he or she needs to treat the woman and her subsequently born child. Again, this will only serve to impede the long-term goal of ensuring the health and well-being of mothers and babies.")

70. See American Academy of Pediatrics (1990). *See also* Center for Substance Abuse Treatment (1993, p. 2), *supra* note 5. ("There is no evidence that punitive approaches work.")

71. As one recent article notes:

    > Expectations of universal and permanent damage to children prenatally exposed to cocaine rest not on scientific findings but on media "hype" fueled by selective anecdotes. For example, the early reports of adverse effects of prenatal exposure to cocaine, including neurobehavioral dysfunction, a remarkably high rate of SIDS (Sudden Infant Death Syndrome), and birth defects, were initial observations that constitute the legitimate first step in the scientific process. However, these unreplicated findings were uncritically accepted by scientists and lay media alike, not as preliminary, and possibly unrepresentative, case reports but as "proven" facts . . . . For example, the initial report of a high rate of SIDS was never peer reviewed. The "fact" that prenatal cocaine exposure greatly increases the risk of SIDS continues to be disseminated in the lay and medical media in spite of subsequent peer-reviewed studies that did not confirm this finding. Even scholarly reviews and the introductions to scientific papers present a litany of adverse effects without any methodologic critique or qualifications (Frank and Zuckerman 1993, pp. 298, 299, citations omitted).

72. See *supra* note 50, p. 23.

73. See *Amici Curiae* Brief of M. Douglas Anglin et al., *Commonwealth* v. *Kemp*, 75 Westmoreland L.J. 5 (Pa. Ct. C.P. 1992), *aff'd*, 643 A.2d 705 (Pa. Super. Ct. 1994). *See also* Mayes and colleagues (1992).

74. DiFranza and Lew (1995). ("Tobacco use is also annually responsible for an estimated 1,900 to 4,800 infant deaths, resulting from perinatal disorders and 1,200 to 2,200 deaths from sudden infant death syndrome.")

75. See *United States* v. *Southern Managment Corp.*, 955 F.2d 914, 921 (4th Cir. 1992).

76. Finkelstein and colleagues (1990, p. 244) (citing Wilsnack [1984]). This finding is consistent with anecdotal reports, from programs that specialize in treating pregnant addicted women, stating that 80 to 90 percent of their clients have been victims of rape or incest. Leff (1990, pp. E1, E4); *cf.* Martin (1990, p. B1).

77. Regan and colleagues (1987). This same study indicated that 19 percent of the women had been severely beaten as children; 15 percent had been raped as children and 21 percent as adults. Overall, 70 percent reported that they had also been beaten as adults. *See also* Gehshan (1993), *supra* note 12. (One-third of women interviewed cited abusive or violent relationships, which prevented them from entering treatment sooner.)

78. Amaro and colleagues (1990), Randall (1990), Paone and Chavkin (1993), Walker (1991, p. 106), and Finkelstein and colleagues (1990, pp. 243-255), *supra* note 76.

79. National Association for Perinatal Addiction Research and Education (1990).

80. *State* v. *Luster*, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992), *cert. denied*, 1992 Ga. LEXIS 467 (Ga. June 4, 1992).

81. See Center for Substance Abuse Treatment (1995, pp. 5-15). (Drug treatment costs significantly less than imprisonment and reduces costs associated with medical care and welfare.)

82. U.S. General Accounting Office (1991, p. 4), *supra* note 67. "One 1990 survey estimates that less than 14 percent of the 4 million women needing drug treatment receive such treatment." Center for Substance Abuse Treatment (1995, p. 1).

83. Chavkin (1990). *See also Elaine W.* v. *Joint Diseases North Gen. Hosp.*, 613 N.E.2d 523 (N.Y. 1993) (invalidating hospital policy barring pregnant women from drug detoxification services in absence of showing of medical necessity for such policy under New York Human Rights Law); McNulty (1989).

84. Gehshan (1993, p. 3), *supra* note 12.

85. U.S. General Accounting Office (1990, p. 37), *supra* note 68.

86. According to Ellen Barry, Director of San Francisco's Legal Services for Prisoners with Children, "Incarceration of a pregnant woman is a potential death sentence to her unborn child" (McNulty 1987-88). *See also* Barry (1991).

REFERENCES

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