Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures

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[M]y Antie . . . she say dat she skacely call to min' he e'r whoppin' her, 'case she was er breeder woman en' brought in chillum ev' y twelve mont's jes lak a cow bringin' in a calf . . . . He orders she can't be put to no strain 'casen uv dat.¹

While chattel slavery flourished in this country, the one exception to the usual rule of physical abuse and cruelty visited upon slaves in the ordinary course of business was the insidious solicitude towards the "breeder" slave, whose physical health generally, and reproductive health particularly, had to be preserved by the slavemaster to facilitate her role as supplier of future generations of slaves. Then, as now, economic considerations played a significant role in dictating the bounds of behavior towards the woman with reproductive capacity. The "breeder" slave's reproductive capacity was so important that the ordinary physical abuse was withheld to preserve her ability to procreate.² Today, economic considerations are promoting a different policy towards some pregnant women—a policy of punishing them for engaging in activities during pregnancy believed to be harmful to fetuses, and of systematically discouraging them from giving birth at all.

Between 1925 and 1942, the United States Supreme Court recognized,

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² Cf. United Auto Workers v. Johnson Controls, 886 F.2d 871 (7th Cir. 1989), cert. granted, 58 USLW 3609 (March 27, 1990).
for the first time, that addiction is a disease, not a moral weakness, and that forced sterilization is an unconstitutional exercise of state power. The next three decades of constitutional litigation reaped significant advances in the recognition and development of the rights of women, poor people, and people of color. Today, however—after many decades of progress—we are faced with a chilling return to a by-gone period. The treatment of drug- and alcohol-addicted pregnant women today is a throwback to an earlier era, when governmental willingness to control the most private of individual choices was unabashed, and racial and economic justifications for governmental coercion were more socially acceptable.

A bill pending in the Ohio General Assembly provides that any woman who "use[s] during pregnancy . . . a drug of abuse . . . [that] cause[s a] child to be addicted at birth to a drug of abuse" may be prosecuted as a felon. In addition to the prison terms ordinarily authorized as punishment for felony offenses, the legislation authorizes several alternative sentences. A court may sentence any woman pleading guilty to, or convicted of, the offense to "elect" to "successfully complete a drug addiction program"; to "undergo a tubal ligation"; or to "participate in a five-year program of monitored contraceptive use approved by the court . . . and during the five-year period to abstain from the addictive use of drugs of abuse." A repeat offender has only two "choices" under the proposed legislation: she may "undergo a tubal ligation" or participate in the monitored contraceptive program described above. Either a first or repeat offender "who elects to participate in a program of contraceptive use . . . shall file a report with the court at the end of the five-year period. If she is not able, to the satisfaction of the court, to show that she has abstained from the addictive use of drugs of abuse, the court shall sentence her to undergo a tubal ligation."

Although this legislation was recently introduced, the ideas it contains are not new—they date to at least the 1930's, when Margaret Sanger proposed compulsory sterilization of "dope fiends." While perhaps more subtle than the Ohio forced sterilization bill, other current efforts to

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5. S. 324, 118th Ohio General Assembly, Regular Session 1989-90 (introduced by Senator Cooper Snyder).
criminalize maternal conduct during pregnancy reflect the belief that the economic and social costs of allowing women, particularly drug- and alcohol-addicted women, to decide to bear children are too enormous. While refusing to furnish treatment for their addictions during pregnancy and making safe termination of pregnancy an increasingly less accessible choice for women, many policy makers are nonetheless frighteningly willing to punish women who use drugs during pregnancy, rather than recognizing drug addiction as a medical problem that requires treatment. More savvy legislators, judges, and prosecutors preserve the illusion of individual choice to soften the unconscionably harsh results that this policy approach achieves.

For example, a Washington, D.C. jurist, sentencing a woman guilty of second degree theft, jailed her for “a long enough term . . . to be sure she would not be released until her pregnancy was concluded,” based upon his belief that she had used, and would continue using, cocaine during her pregnancy. The judge justified his sentence on the following grounds:

[T]he court was horrified that Ms. Vaughn was using cocaine when she was pregnant. . . .

. . . The court has . . . weighed [the defendant’s] rights . . . and concluded that protection of the public counted more heavily [than Ms. Vaughn’s rights]. In this judge’s mind that “public” included an unborn child and the taxpaying public who would undoubtedly have to pay for, and perhaps support in a very long-term way, a child who could have severe and expensive problems at birth and/or developmental and permanent damage if its mother repeated her cocaine abuse before its birth. Preventing such an outcome was “her business,” she abdicated it, and it became this public official’s business.

. . . Ms. Vaughn became pregnant and chose to bear the baby who, like most criminal defendants the court sees so frequently, will start with one other severe strike against it—no father is around. Arguably Ms. Vaughn should have demonstrated even greater responsibility toward her child.

It is clear that the judge is concerned not only with Ms. Vaughn’s drug

use, but also with her status as a single parent. He professes concern for her baby's health, but expresses equal, if not greater, consternation about the size of public expenditures he anticipates will be required to sustain the child during its lifetime. He suggests that both addiction and continuing the pregnancy to term were Ms. Vaughn's "choices." However, his opinion belies how very little choice remains for a woman like Ms. Vaughn, deprived of control over the most fundamental decisions in her own life, in the guise of the public interest.

With popular attention focused upon the use of "crack" cocaine and other illegal drugs, legislators, prosecutors and other governmental officials at both the national and local levels have advanced a myriad of proposals to address the problem. The spectre of drug-exposed newborns has generated particularly intense public response, which has led some lawmakers and law enforcement officials to resort to taking punitive measures against women on the basis of their conduct during pregnancy. One particularly disturbing trend among the plethora of governmental responses has been the effort to sanction, through criminal proceedings, the behavior of women during their pregnancies. This effort is a myopic response to an important public health issue. It frequently compromises or sacrifices important civil rights and liberties, while undermining the most promising solution to the problem: the provision of adequate prenatal and neonatal health care, including drug treatment tailored to meet any special needs of the pregnant or postpartum woman.

Some lawmakers, prosecutors, and other public officials have proposed

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9. They came telling us not to have children, and not to have children, and sweep up, and all that. There isn't anything they don't want to do to you, or tell you to do. They tell you you're bad, and worse than others, and you're lazy, and you don't know how to get along like others do. . . . Then they say we should look different, and eat different-use more of the protein. I tell them about the prices, but they reply about 'planning'-planning, planning, that's all they tell you. The worst of it is they try to get you to plan your kids, by the year; except the truth is, they don't want you to have any, if they could help it. . . . They'll tell you we are 'neglectful'; we don't take proper care of the children. But that's a lie, because we do until we can't any longer, because the time has come for the street to claim them, to take them away and teach them what a poor nigger's life is like. 


10. The National Law Journal recently reported that the perception of escalating drug abuse is not entirely borne out by existing statistical evidence. The use of crack has actually declined rather than risen among high school seniors in the past two years. "Crack use was first tracked [in a National Institute of Drug Abuse survey of high school seniors] in 1986 at 4.1%; last year it declined 25% to 3.1% of the survey." Strasser, It's Not as Bad As People Think, National L.J., Aug. 7, 1989, at S16.

 draconian "solutions" to this problem, have opted to pursue sensational, but shortsighted legislation and prosecutions, or have undermined otherwise commendable programs with unnecessary punitive measures. In every instance, the impact of such legislation and law enforcement efforts falls most harshly upon women. Often, the programs for detection of maternal drug use target primarily, if not exclusively, the conduct of poor women who are dependent upon government financed health care programs.

While the urban core has clearly been affected by drug use among pregnant women, the phenomenon is not confined to the inner cities. Both rural and suburban areas have been described in press reports as encountering difficulties with drug-exposed infants similar to those of the central cities. According to recent press reports, women in Hennepin County, Minnesota, Hollywood, Florida, and Artesia, New Mexico have also admitted to, or been accused of, using drugs during their pregnancies. The Director of the High Risk Infant Follow-Up Program at the Martin Luther King-Charles Drew Medical Center stated in her testimony before the California legislature that the estimated ten percent rate of maternal drug use has been found "in . . . urban-minority communit[ies] . . . in . . . government financed . . . hospital[s] . . . [as well as among infants] born to . . . middle-class white wom[e]n delivering in . . . suburban, private, insurance-only facil[ities]." Thus, the phemonema of maternal drug use and drug-affected infants occur irrespective of socioeconomic class or geography. Nevertheless, proposed remedies have in principle and in practice been closely linked to race, sex, and class. Therefore, they warrant careful scrutiny. The first woman successfully criminally prosecuted on charges stemming from her addiction during pregnancy is Jennifer C. Johnson, an African-American woman. The twenty-three year old Johnson was convicted of two counts of delivery of a controlled substance to a minor, and received a sentence of fifteen years probation after giving birth to two infants testing positive for cocaine. A study conducted by the National Association for Perinatal Addiction Research and Education in Johnson's home state found that white


13. Testimony of Xylina Bean, M.D. before the California Legislature, Senate Select Subcommittee on Substance Abuse, Interim Hearings on Parental Substance Abuse and Its Effects on the Fetus and Children at 8 (October 24, 1988) [hereinafter Bean testimony].

women were slightly more likely to test positive for alcohol, marijuana, cocaine, and/or opiate use during pregnancy than African-American women, but that African-American women were ten times more likely than white women to have their positive toxicology results turned over to government officials.\textsuperscript{15} If widespread, such racially discriminatory prosecutorial patterns clearly run afoul of the principle of equal protection of the law.\textsuperscript{16} Moreover, the threat of discriminatory prosecution is particularly great in this area since there are few "explicit standards" for the prosecutors and other government officials filing and pursuing these types of criminal cases to apply as checks against selective enforcement.\textsuperscript{17}

Prosecutors across the country have attempted to prosecute women who have given birth to infants testing positive for the presence of illegal substances.\textsuperscript{18} In many instances, prosecutors attempted to apply existing laws concerning child abuse or drug trafficking in wholly unprecedented ways to criminalize the behavior of women during their pregnancies.\textsuperscript{19} In the case of Pamela Rae Stewart, a woman was prosecuted on the basis of her alleged failure to furnish necessary care to her "pre-born" child.\textsuperscript{20}

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\item \textsuperscript{16} \textit{Cf.} Yick Wo \textit{v.} Hopkins, 118 U.S. 356 (1886) (invalidating racially discriminatory pattern of enforcement of local ordinance).
\item \textsuperscript{17} \textit{Cf.} Grayned \textit{v.} City of Rockford, 408 U.S. 104, 108 (1972) ("If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."); \textit{accord} Kolender \textit{v.} Lawson 461 U.S. 352 (1983).
\item \textsuperscript{19} \textit{See, e.g.}, State of Florida \textit{v.} Gethers, No. 89-4454 CF10A (Cir. Ct., Broward Co., Fla. 1989) (criminal child abuse charge based upon alleged maternal cocaine use and delivery of child testing positive for cocaine dismissed on ground that statutory definition of person did not include fetus); Indictment, State of Georgia \textit{v.} Coney, No. 14/403-404 (Super. Ct., Crisp Co., GA, filed Nov. 6, 1989) (charging woman with distribution of cocaine to fetus on account of her alleged cocaine use during pregnancy); State of Ohio \textit{v.} Andrews, No. JU 68459 (Ct. C.P., Stark Co., OH, June 19, 1989) and State of Ohio \textit{v.} Gray, No. CR88-7406 (Ct. C.P., Lucas Co., OH, July 13, 1989) (rejecting prosecutorial efforts to apply child endangerment statute to reach conduct of women during pregnancy); \textit{see also} Reardon, \textit{Grand Jury Won't Indict Mother in Baby's Death}, \textit{Chicago Tribune}, May 27, 1989, at 1, col. 5 (discussing unsuccessful prosecution of Melanie Green, a twenty-four year old African-American woman charged with manslaughter following the death of her child that was allegedly linked to her cocaine use during pregnancy).
\end{itemize}
Her prosecution was triggered, at least partially, by a positive test for amphetamines in the urine of her newborn son. However, the prosecutor identified other behavior which he asserted contributed to the death of her infant including her “refusal” to follow her physician’s orders, which included advice to stay off of her feet. There is no indication that the district attorney, in pursuing this novel theory of criminal liability, considered that the woman was a mother and primary caretaker of two small children. Nor did he appear to consider that the woman’s poverty prevented her from paying for child care for the duration of her pregnancy. In short, the prosecution proceeded with the case even though this woman could only comply with the physician’s recommendation to “stay off of her feet” during her pregnancy if she was willing to abandon her care for her children.

There is no logical stopping point for efforts to police maternal behavior during pregnancy. While the bulk of recent public attention has been focused upon illegal drug use by women during pregnancy, other legal substances, including tobacco and alcohol, have also been demonstrated to have the potential to injure the fetus. It is not mere speculation that pregnant women may be subjected to punitive measures for lawful, as well as unlawful conduct that they engage in during pregnancy, if this conduct allegedly injures the fetus. There are already reported cases where women have been punished for precisely such activity. For example, a news report discussed the prevalence of fetal alcohol syndrome among children born to Native American women, and noted that a tribe “once locked up a pregnant women who could not stop drinking.” In addition, at least two states have enacted legislation in recent months authorizing state intervention upon the birth of a child afflicted with fetal alcohol syndrome. It is neither unrealistic nor inconceivable to anticipate a

21. When charges against Stewart were dismissed for failure to state an appropriate charge under the California Criminal Code, a state legislator promptly moved to “correct” what he perceived to be the deficiencies of the existing law that allowed Stewart’s conduct to go unpunished. See Carson, Bill Offered Based on Pamela Rae Stewart Baby Case, San Diego Union, Mar. 7, 1987, at A3, col 1.


24. IND. CODE ANN. § 31-6-4-3.1 (Burns 1987) provides that a child born with fetal alcohol syndrome may be considered a “child in need of services” for purposes of removal from its natural parent(s). In Utah, medical personnel must report the birth of any child with fetal alcohol syndrome to the Division of Family Services. UTAH CODE ANN. § 62A-4-504 (1989). Willful failure to report such birth is a misdemeanor in the state. UTAH CODE ANN. § 62A-4-511 (1989).
future effort to prosecute a woman for smoking cigarettes during her pregnancy, or an attempt to ban alcohol sales to pregnant women.

While the behavior of pregnant women has, in some cases, led to criminal prosecution, there have been no prosecutorial efforts against men for damage that their illegal drug use may cause to a fetus. Men have not been required to avoid exposure to chemicals known to cause damage to the sperm, but employers have attempted to prevent women of child-bearing age from engaging in employment that would involve such exposure. Nor have the male partners of pregnant battered women been targeted by prosecutors for their infliction of injuries to the fetus in the course of physically abusing the women. And in *Stewart*, prosecutors targeted a woman, but not her male companion, despite the fact that one of the woman's allegedly harmful actions toward the fetus was to engage in sexual intercourse. Thus, the behavior of pregnant women is subjected to governmental scrutiny and punishment, but men are spared exposure to criminal sanctions for behavior which is equally or more harmful to the fetus.

Legislative efforts, like prosecutorial efforts, have frequently adopted a punitive approach to this difficult issue, or undermined laudable objectives by incorporating punitive measures to achieve them. For example, on the federal level, Senator Pete Wilson of California introduced legislation in 1989 that would have awarded grants to the states for the development and implementation of pilot projects for “outreach, education and treatment services concerning substance abuse to pregnant ... [and/or] postpartum females and their infants.” While the Senator's proposal was laudable in its provision of funding for education and treatment programs for addicted women and their children, it was, regrettably, accompanied by punitive provisions which would, if enforced, undermine the positive features of the proposal. For example, the bill provided that in order to qualify for funding, a state must “certify[y] that ... it is a crime in such State to abuse a child, and that such abuse includes giving birth to an infant who is addicted or otherwise injured or

impaired by the substance abuse of its mother during pregnancy."  

Governmental programs for detecting drug exposure in infants are often objectionable because they target women who rely upon public health facilities. In addition, one study suggests that women of color are especially vulnerable to identification as drug users and subsequent criminal prosecutions founded upon their conduct during pregnancy. In a number of jurisdictions, women in government-subsidized facilities are routinely tested for drug use when women who can afford private health care are not tested under similar circumstances. This system violates the privacy rights of numerous women (the vast majority of whom are not drug users) and discriminates against poor women by exposing them to testing and possible detection and prosecution not imposed upon affluent women. 

Criminal investigations and prosecutions conducted under these circumstances also undermine the woman’s relationship to her health care providers and destroy the confidentiality of this relationship. It is obviously important to facilitate honesty between physician and patient; people must feel free to reveal all information necessary to ensure that their physicians can render appropriate and complete medical treatment. Certainly, if an individual fears that information rendered to a health care provider or facility could be revealed to law enforcement officials, her willingness to reveal potentially incriminating information will be greatly diminished. Predictably, in areas where women face criminal prosecutions on account of alleged drug use during pregnancy, health care providers and facilities report that some patients lie to them, and others simply refuse to obtain prenatal and other necessary health care. This chilling effect will have particularly devastating reprecussions for women of color, who more commonly receive inadequate prenatal care, even absent the threat of prosecution. 

Despite the spread of punitive measures to address this issue, the available evidence suggests that this is precisely the wrong approach. While

28. Id.  
considerable press attention has been devoted to the relationship between maternal drug use and newborn health, far less attention has been devoted to the more general and widespread problem of inadequate prenatal care. There is an undeniable nexus between race and infant mortality. The Children's Defense Fund reported that in 1986, Black infants were twice as likely as white infants to die in their first year of life, and in some cities, nearly three times as many Black infants than white infants died in the first year of life. The lack of prenatal health care is by far the biggest threat to infant health. “The infants most likely to die tend to have been born prematurely, and to weigh less than normal babies; their mothers, often in their teens, tend to have had little or no prenatal care.”

Many segments of the medical community view government’s efforts to control women’s conduct during pregnancy with great alarm and concern. The American College of Obstetricians and Gynecologists’ Committee on Ethics has noted that “[a]ctions of coercion to obtain consent [for a treatment refused by a pregnant woman] or force a course of action limit maternal freedom of choice, threaten the doctor-patient relationship, and violate the principles underlying the informed consent process,” and concludes that “resort to the courts [to obtain permission to perform procedures or furnish treatment refused by a pregnant woman] is almost never justified.” It logically follows that reliance upon criminal sanctions and reporting to prosecutors or other law enforcement officials as a method of coercing discontinuation of substance use during a pregnancy is similarly undesirable, from a medical perspective. The National Medical Association, a professional organization of African-American physicians, participated as amicus curiae in the appeal of Jennifer Johnson’s conviction, stating that its interest in the case was founded in its support for “the medical premise that addiction is an illness which can be cured only by necessary and proper treatment, and not by a punitive criminal justice system.” The American Public Health Association, a 50,000 member national organization of health care


34. Id.


professionals, also supported the amicus effort in the Johnson case, asserting its "belie[f] that criminalizing the use of drugs by women in pregnancy is a dangerous policy . . . [that] destroys a patient's trust in the confidentiality of the physician-patient relationship and threatens to drive pregnant women at high risk of complications during pregnancy away from the health care system."  

Although there are indications that the incidence of maternal drug use and births of drug-exposed infants is increasing, there is no parallel increase in the number of drug treatment facilities for pregnant women.  

Reportedly, in New York City alone, "the number of birth certificates indicating maternal substance use has tripled from 730 in 1981 . . . to 2586 . . . in 1987."  

A survey conducted in New York City revealed that over half of the drug treatment facilities in the city refuse to treat pregnant women under any circumstances, and two-thirds refuse to treat pregnant Medicaid recipients. Moreover, nearly ninety percent of New York City's drug treatment programs refused to accept pregnant Medicaid recipients who were addicted to crack. The National Institute for Drug Abuse recognized over a decade ago that the inability to obtain child care prevents many women from participating in drug treatment programs. Nevertheless, only two of eighty-seven drug treatment programs in New York City had child care facilities for their patients.

In a three-year period in Los Angeles County, California, "the number of fetal deaths associated with the ingestion of chemicals . . . [rose] from 9 in 1985 to 56 in 1987."  

Nevertheless, in San Diego County, California there are only twenty-six treatment slots in a residential facility that permits women to live with their children during the treatment period, and the wait for admission to one of these slots can be as much as six

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41. Id.
42. Bean testimony, supra note 13, at 9.
months. Given the paucity of treatment facilities available to women in such large urban centers, one can imagine the difficulty that a pregnant drug addict must encounter in attempting to obtain treatment in more remote locations. The unavailability of treatment facilities nationwide is a particularly urgent problem in light of the increased use of criminal sanctions to punish women for their conduct during pregnancy.

There are humane alternatives to the punitive measures appearing in the public responses to the problem of maternal drug use and fetal drug exposure. The late Member of Congress Mickey Leland was a chief sponsor of legislation to extend Medicaid coverage to more poor women and infants; he recognized that this measure would help reduce the incidence of infant mortality. Senator Bill Bradley has sponsored the Healthy Birth Act of 1989, which would address many of the prenatal, neonatal, postpartum, and pediatric health care needs of poor people. Congress has also approved increased funding for the supplemental food program for women, infants and children. A number of state legislatures are beginning to recognize the advantages of treatment, rather than punishment, and have taken steps to ensure that access to drug treatment is facilitated for pregnant addicts. Pending litigation filed by the ACLU Women's Rights Project attempts to eliminate barriers to access to drug and alcohol treatment facilities for pregnant alcoholics and drug addicts, by challenging the exclusion of these women under the state's Human Rights Law.

Those genuinely concerned about the fate of pregnant women who use drugs, and the children borne by these women, must let elected officials know that they approve of humane, rather than punitive measures, and that they want additional funding directed towards drug treatment generally, and treatment for pregnant women particularly. Such sensible, humane, and responsible public policy will undoubtedly do more for women and their children than prosecution and incarceration.


44. In many cases that have resulted in criminal prosecutions, the women faced with criminal charges were frustrated in their efforts to locate drug treatment facilities that would accept them. See, e.g., State v. Johnson, No. 89-1765 (Cir. Ct., 18th Jud. Dist., Seminole Co., Fla., July 13, 1989), appeal pending sub nom. Johnson v. State, No. 89-1765 (D. Ct. App., 5th Dist.); see generally Moss, Recent Developments in the Law, 13 HARV. WOMEN'S L.J. (forthcoming 1990).