Concerns Mount over Punitive Approaches to Substance Abuse Among Pregnant Women

By Emily Figdor and Lisa Kaeser

In the first ruling of its kind by a state's highest court, the South Carolina Supreme Court in late 1997 upheld the criminal conviction of a woman charged with child abuse for using crack cocaine during her pregnancy. Finding that a viable fetus is a "child" under the state's child abuse law, the court ruled that "maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus" could constitute child abuse. The South Carolina decision—which the United States Supreme Court recently declined to review—has unleashed a full-scale debate that had been simmering in the states for several years, as policymakers grapple with the agonizing issue of prenatal substance abuse.

While few would disagree that drug use during pregnancy poses substantial risks to both the pregnant woman and her fetus, policymakers are at odds as to how to approach the problem. Some contend that forcing substance-abusing pregnant women into treatment—or even incarcerating them—is necessary in order to ensure infant and child health. They argue that most substance-abusing women do not voluntarily seek services, remain in treatment or stay free from drugs.

Critics—including not only women's health and reproductive rights activists, but also the bulk of the public health and medical establishment—argue that, in practice, punitive measures of this type are counterproductive to protecting infant health. They warn that such policies, which disproportionately affect low-income and minority women, only create obstacles to drug treatment and prenatal care. As a result, the rights of the woman are compromised, largely at the expense of both her health *and* the health of her fetus.

Prochoice advocates further point out that by granting legal rights to the fetus at various stages of development, such policies—intentionally or not—lay the legal groundwork for making abortion illegal.

Trends in the States

The majority of states do not have laws explicitly penalizing prenatal substance use. Several states, however, do mandate reporting of substance-abusing pregnant women and/or drug-exposed newborns; in many cases, the infants are reported as abused or neglected children. Reports may trigger an assessment of the needs of the mother and child, or may become the basis for the temporary removal of the infant from the mother's custody.

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In the absence of explicit laws on this issue, prosecutors have relied on a wide range of statutes already on the books to attack prenatal substance use. Women across the country have been arrested and charged with crimes, ranging from the possession of an illegal substance to child abuse and neglect to manslaughter, for using drugs (and in a few cases for using alcohol) during pregnancy. Other women have been forced into drug treatment, and many have either temporarily or permanently lost custody of their children. When cases have been appealed to state supreme courts, however, efforts to prosecute women under existing state laws have been blocked—with the exception of the recent case in South Carolina.

In fact, South Carolina has long been at the forefront of the movement to criminalize prenatal substance abuse, using a broad range of laws to enforce a policy that began at one or two hospitals in the state and, over time, has expanded to a statewide initiative.

Efforts in the state to prosecute women for prenatal drug use date back to 1989, when health care professionals from the Medical University of South Carolina (MUSC), a state hospital in Charleston, sought assistance from local law enforcement officials in response to a perceived increase in cocaine use among pregnant women. Soon after, in a collaborative effort between MUSC, the police department and the local prosecutor's office, the Interagency Policy on Management of Substance Abuse During Pregnancy was instituted in the obstetrics clinic at the hospital.

The policy required pregnant women suspected of cocaine use to be tested for criminal justice purposes. During the first several months of the policy, those with a positive test were arrested. Later, an attempt was made to provide women the option of pursuing drug treatment and prenatal care or facing criminal sanctions. Women who refused services, failed drug treatment or delivered an infant testing positive for drugs were arrested and charged with possession of an illegal substance, distribution of an illegal

substance to a minor or child abuse, depending on the stage of the pregnancy. A similar protocol has since been implemented statewide.

One of the women arrested under the policy, Cornelia Whitner, appealed her case to the state supreme court; she had been charged with child abuse and sentenced to eight years

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imprisonment for ingesting crack cocaine during the third trimester of her pregnancy. Whitner argued that her prenatal behavior was not covered under the child abuse law. The South Carolina Supreme Court, however, disagreed; it ruled that a viable fetus is a "child," and that the state's child abuse law, therefore, encompasses prenatal behavior after the point of viability. Earlier this year, the U.S. Supreme Court chose not to consider the case, thereby letting the ruling stand.

Actions This Year

Having largely failed in the courts—but inspired by South Carolina's upheld statewide initiative—states increasingly are looking to develop legislation allowing officials to detain substance-abusing pregnant women, either in the state's criminal justice or social service system. This year alone, two states passed such laws. Nearly one-third of the states, meanwhile, considered a range of measures explicitly targeting prenatal substance abuse.

In Wisconsin, where the state's high court ruled in 1997 that under existing law the state could not detain a pregnant woman in order to protect the woman's fetus from her cocaine use, a measure dubbed the "cocaine mom bill" was enacted earlier this summer. The new law revises the entire child protection code to make it applicable to pregnant women and fetuses. It defines an "unborn child" as "a human being from the time of fertilization to the time of birth," and allows authorities to take a pregnant woman suspected of substance abuse into physical custody—against her will—for the purpose of treatment, if "there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered" by the woman's substance use. The woman may be held at a hospital, residential treatment facility, physician's office, public treatment facility or in the home of an adult relative or friend.

Lawmakers in South Dakota also enacted a law this year to authorize the "civil commitment" of pregnant substance abusers. The South Dakota law further requires reporting of drug-exposed infants under the threat of criminal sanctions, including imprisonment, and allows such reports to be made to law enforcement, rather than social service, officials.

Wide-Ranging Concerns

At a recent congressional hearing on prenatal substance abuse before the House Subcommittee on National Security, International Affairs and Criminal Justice, South Carolina Attorney General Charles Condon defended his state's policy. "Our approach," he explained, "allows health-care experts to control the destiny of cooperative women—while law enforcement officials wait in the wings, prepared to act only in worst-case scenarios."

Arguing against South Carolina's approach, State Senator Joanne Huelsman, who sponsored the Wisconsin law, countered, "The criminal code cannot come into play until the baby is born and the damage has already been done. We believe the social service system is better prepared than the criminal justice system to help the unborn children of addicted mothers." While many would agree with Huelsman's priority on social service interventions, critics maintain that, whether lodged in the social service or the criminal justice system, punitive approaches to prenatal substance abuse are fundamentally flawed.

Such measures, opponents believe, radically miss their stated goal of protecting infant and child health, by deterring pregnant women from a wide range of health and social service. While drug treatment and prenatal care have proven to be effective interventions, they say, substance-abusing pregnant women will avoid seeking services if they risk being taken into custody, losing their children or facing criminal sanctions. In fact, according to the South Carolina Association of Alcoholism and Drug Abuse Counselors, drug treatment programs in South Carolina experienced as much as an 80% decline in the admission of pregnant women in the year following the state supreme court's highly publicized decision.

Brenda Wheeler Dawkins, director of a women's drug treatment facility in South Carolina, explains: "Women

Opponents say punitive measures deter pregnant women from seeking health and social services.

are doing one of three things. They're getting abortions, having babies over the North Carolina state line or not seeking prenatal care."

In any case, observers note that treatment programs are often reluctant or unable to accept pregnant women—many of whom need unique services, such as prenatal care, parenting skills instruction, child care and transportation, in conjunction with drug treatment. In a 1991 study, the General Accounting Office found that the demand for drug treatment

programs for pregnant women greatly exceeds supply. While the availability of services for pregnant women has improved in recent years, those programs are currently being threatened by funding cuts.

Critics also point to documentation of racial and socioeconomic biases in how these policies are applied—namely, in who is targeted and for what behaviors. The latest data from the National Institute on Drug Abuse (NIDA) indicate that while black women have higher *rates* of illicit drug use, most women who use illegal drugs during pregnancy are white. Yet, of the 42 women arrested in Charleston under the original South Carolina policy, 41 were black; all had tested positive for crack cocaine. Women in the hospital's private obstetrics practice were not affected by the protocol. This trend is not unique to South Carolina. A 1990 study of prenatal drug use and mandatory reporting requirements in Pinellas County, Florida, found that black women were 10 times more likely than white women to be reported to the authorities, despite similar rates of substance use among the two groups.

According to the NIDA study, U.S. women are almost 20 times more likely to drink alcohol or smoke cigarettes than to use cocaine during pregnancy; indeed, researchers from the Centers for Disease Control and Prevention have reported a dramatic increase in recent years in the prevalence—and amount—of alcohol consumption among pregnant women. And while the harmful effects of prenatal alcohol and tobacco use are well established, the effects of prenatal cocaine use may be less dramatic than previously thought. A recent analysis of all the published studies on the subject, supported by the Robert Wood Johnson Foundation, concluded that the effects are "mild and subtle, not severe." For many people, this begs

Should failure to obtain prenatal care be illegal? Failure to quit smoking or drinking?

the question of why there has been an almost exclusive focus on prenatal use of crack cocaine, which is used by many fewer women than either alcohol or tobacco but whose use is confined largely to low-income, black communities.

Moreover, despite the focus on crack cocaine, critics point to the real potential—at least in South Carolina—for the law to reach even further into the lives of pregnant women. According to the South Carolina decision, reports of child abuse are mandated in any case in which a pregnant woman engages in a behavior that may "adversely affect" the health or welfare of her viable fetus. In his dissent, South Carolina Supreme Court Justice J. Moore notes the Pandora's box of possible implications. "Is a pregnant woman's failure to obtain prenatal care unlawful?" he asks. "Failure to quit smoking or drinking? …[T]he impact of today's decision is to render a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize."

Impact on Abortion

Finally, prochoice activists are alarmed at the unprecedented expansion of fetal rights inherent in these prenatal substance abuse policies. They argue that, having failed to ban abortion outright, the antiabortion movement's strategy of incrementalism—the gradual chipping away of abortion rights—is very much fueling this debate.

By defining the fetus as a person under state law, they say, policies such as those in South Carolina and Wisconsin can be seen at least indirectly to challenge the legality of abortion. Lynn Paltrow, who represented the plaintiff in the South Carolina case, warns, "While this has not yet played out politically, it would appear that after the South Carolina decision, a postviability abortion—for any reason—would not only be considered illegal, but murder."

The Wisconsin law, which was strongly supported by antiabortion activists in the state, goes even further by conferring rights on a fetus throughout pregnancy—and even on a fertilized egg before a pregnancy is established (see related story, page 1). By doing so, reproductive rights supporters contend, it has the potential to affect women who drink alcohol or use substances before they are—or know that they are—pregnant. At the same time, it could certainly be seen to undermine the legal status of abortion or even contraception. At the very least, they say, these considerations compound an already difficult issue.