State Responses to Substance Abuse Among Pregnant Women

With the U.S. Supreme Court considering a high-profile case involving the prosecution of pregnant substance abusers, policymakers and advocates once again are confronted with the decade-old question of how best to deal with pregnant women who use drugs. State laws now vary considerably in their approach to the problem, reflecting a deep division in public opinion. For many lawmakers, the issue comes down to the difficult task of balancing a woman's right to bodily integrity with society's interest in ensuring healthy pregnancies, and the question of whether punitive approaches will foster—or hinder—healthy outcomes for women and children.

By Cynthia Dailard and Elizabeth Nash

On October 4, the U.S. Supreme Court heard oral arguments in *Ferguson v. City of Charleston*, a case brought by 10 women who were secretly tested for cocaine use while seeking routine prenatal care at a South Carolina public hospital. Women who tested positive were reported to local prosecutors and then arrested or threatened with arrest for criminal child abuse. The Court is considering whether the practice of testing pregnant women for drug use without either a warrant or consent and reporting them to law enforcement authorities violates their Fourth Amendment right to be free from unreasonable searches.

For many Americans, *Ferguson* is about much more than the technical application of Fourth Amendment protections; instead, it raises the question of how society can best deal with the agonizing problem of prenatal substance abuse—a problem that poses serious risks to both a pregnant woman and her fetus. This question has plagued state lawmakers since the late 1980s, and many remain at odds over how to approach the problem. Some states have attempted to criminalize prenatal drug use or treat it as grounds for terminating parental rights, while others have placed a priority on making drug treatment more readily available to pregnant women. But the issue—perhaps more than any other—vividly demonstrates the difficulty policymakers face in attempting to balance the autonomy and bodily integrity of pregnant women with society's interest in ensuring the birth of healthy children. For advocates of women's reproductive rights, it raises the question of whether the state can ever be justified in regulating a pregnant woman's behavior in the interest of protecting her fetus and whether such policies potentially undermine the legality of abortion ("Concerns Mount over Punitive Approaches to Substance Abuse Among Pregnant Women," *TGR*, October 1998, page 3).

State Activity

Criminal Law

While no state has enacted a law specifically criminalizing drug use during pregnancy, prosecutors have relied on a host of criminal laws already on the books to attack prenatal substance abuse. Women across the nation have been arrested and charged with a wide range of crimes, including possession of a controlled substance, delivering drugs to a minor (through the umbilical cord), corruption of a minor, and child abuse and neglect. Others have been charged with assault with a deadly weapon and manslaughter.

Women who have appealed their convictions to their state supreme court have prevailed in all but one instance. Typically, courts have overturned these convictions on the grounds that a fetus could not be considered a child or person under criminal child abuse statutes, or that the legislature did not intend for an existing criminal statute to apply to a pregnant woman and her fetus. Other courts have found such convictions to be unconstitutional violations of women's rights to due process (because the state applied the law in a way that could not be foreseen by the pregnant woman) and privacy. Only in South Carolina has the state supreme court, in the 1997 case *Whitner v. South Carolina,* upheld the conviction of a woman charged with criminal child abuse for using cocaine during pregnancy. In that case, the court held that a viable fetus is a "person" under the state's criminal child endangerment statute, and that "maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus" could constitute child abuse.

Child Welfare Laws

Meanwhile, several states have expanded their child welfare laws to address prenatal drug exposure (treating the issue as a matter of civil rather than criminal law). These laws vary considerably in their scope and approach. Laws in 12 states (see table, page 4) specify either that a child born exposed to drugs is presumed to be abused or neglected or that positive results from a

Laws Pertaining to Pregnant Women Who Use Drugs

State	Civil Child Welfare*	Reporting Requirements	Testing Requirements	Civil Commitment	Drug Treatment†
Alabama					
Alaska					
Arizona		X			X
Arkansas					X
California					X
Colorado					X
Connecticut					X
Delaware					
Florida	X				X
Georgia					X
Hawaii					
Idaho					
Illinois	X	X			X
Indiana	X				
Iowa		X	X		
Kansas					X
Kentucky					X
Louisiana					X
Maine					
Maryland	X				X
Massachusetts		X			
Michigan		X			
Minnesota	X	X	X	X	X
Mississippi					
Missouri					X
Montana					
Nebraska					X
Nevada	X				
New Hampshire					
New Jersey					
New Mexico					
New York					X
North Carolina					X
North Dakota					
Ohio					X
Oklahoma					X
Oregon					X
Pennsylvania					X
Rhode Island	X				
South Carolina	X				
South Dakota	X			X	
Tennessee					
Texas	X				X
Utah		X			
Vermont					
Virginia	X		X		X
Washington					X
West Virginia					
Wisconsin	X			X	X
Wyoming					

*In addition, an Oklahoma statute deems an infant as "deprived" if it tests positive for a controlled substance and "is determined to be at risk of *future exposure* to such substances" (emphasis added). In Iowa, grounds for terminating parental rights include the fact that an "illegal drug is present in a child's body as a direct and foreseeable consequence of the acts or omissions of the person responsible for the care of the child"; this statute, however, does not appear to be directed at pregnant women. †A Tennessee state law stipulates that the state may provide treatment services to pregnant women. In South Carolina, women who participate in the state-funded Family Independence Program and give birth to an infant who tests positive for drugs must participate in a drug rehabilitation program approved by the state.

toxicology test performed on a newborn or signs of prenatal drug exposure in newborns constitute evidence of child abuse or neglect. In these states, such evidence provides grounds for removing the infant from the mother's custody and qualifies as a factor in determining whether to terminate parental rights. Under the South Carolina law, for example, a newborn is presumed to be neglected and "cannot be protected from further harm without being removed from the custody of the mother" if there is a positive drug test on either the mother or the child at birth.

Additionally, the Ohio Supreme Court, in its October decision *In re Baby Boy Blackshear,* found that a newborn testing positive for drug exposure is per se an abused child under the state's civil child abuse law, even though the law makes no mention of prenatal drug exposure. The law defines an "abused child" as one who suffers "physical or mental injury that harms or threatens to harm the child's health or welfare." Unlike the lower court, the supreme court said that it need not address whether a fetus is a child under the state's child abuse law, since a "postbirth" drug test indicated that drug exposure, and therefore abuse, had occurred. Accordingly, the state was justified, the court said, in its decision to terminate parental rights. State supreme courts in Connecticut and New York, however, have refused to treat pregnant women who used drugs as presumptively neglectful, while the New Jersey Supreme Court held that a newborn's addiction and symptoms of withdrawal, *combined with a mother's failure to provide care,* could be considered as a factor in terminating parental rights.

Other states require health care professionals to report or test for prenatal drug exposure—information that the state may use as evidence in child welfare proceedings. Health care professionals in seven states are required to report to the state if a newborn tests positive for drug exposure or if a pregnant woman shows evidence of drug use. In Iowa, Minnesota and Virginia, health care professionals are required to test some or all pregnant women or newborns for prenatal drug exposure. Kentucky law says that provided a woman is given notice, a physician may screen her for drug use and then determine whether to make a report to the state. In Iowa and Kentucky, however, test results may not be used as prosecutorial evidence.

Civil Commitment

Constitutional requirements for civil commitment require clear and convincing evidence that an individual is mentally ill and dangerous to herself or others. Three states have enacted laws specifically authorizing the civil commitment (or detention in a noncriminal setting) of women who use drugs during pregnancy; these statutes are based on the notion that the fetus is an endangered person. Minnesota and South Dakota authorize the emergency admission of pregnant women for mandatory drug treatment, including inpatient treatment, for as long as the duration of a pregnancy. The Wisconsin children's code, as amended in 1998, goes so far as to grant the state's juvenile court "exclusive jurisdiction" over an unborn child when a pregnant woman "habitually lacks self-control" with regard to alcohol or controlled substances. Because the statute defines an "unborn child" as a "human being from the time of fertilization to the time of birth," the state may intervene and detain a woman throughout her pregnancy if she poses a "substantial risk to the physical health" of her fetus.

Drug Treatment

A number of states have opted for nonpunitive approaches designed to improve both short- and long-term outcomes for the mother and her baby through drug treatment and other support services. For example, 25 states have responded to the traditional dearth of drug treatment slots available to pregnant women by creating and funding treatment programs for this population or by giving pregnant women priority access to treatment.

Statutes in three states facilitate the delivery of social services to pregnant substance abusers. Colorado law encourages health care providers to refer women at risk of poor birth outcomes due to substance abuse for a needs assessment, and Kansas health care providers may, *upon consent,* refer a woman at risk for prenatal substance abuse to the local health department for service coordination. In California, "any indication of maternal substance abuse shall lead to an assessment of the needs of the mother and child." The statute specifies, however, that "a positive toxicology screen at the time of the delivery of an infant is not in and of itself a sufficient basis for reporting child abuse and neglect."

Grappling with the Issues

The wide range of approaches to prenatal drug use reflects deep division among policymakers about how best to address the problem. Those who support incarcerating women or forcing them into treatment contend that such measures are necessary to ensure infant health. They argue that most substance-abusing women do not voluntarily seek services, remain in treatment or stay away from drugs. Similarly, those who advocate the termination of parental rights contend that drug use during pregnancy implies that a woman will be unable to care for her child once it is born.

Critics, however, counter that such punitive measures run contrary to the stated goal of protecting infant health because they deter pregnant women from seeking important health and social services. Women who fear that they will be taken into custody, lose their children or face criminal sanctions if their drug use is

detected, the argument goes, will avoid seeking critical prenatal care and drug treatment services they need for a healthy pregnancy. For this reason, leading medical and public health groups—such as the American Academy of Pediatrics, the American Medical Association, the American Public Health Association and the March of Dimes—all oppose punitive responses to prenatal drug use.

The critics note that, at least historically, pregnant substance abusers have faced tremendous difficulty obtaining treatment. Many programs have refused to accept pregnant women or have been unable to provide important services they need, such as prenatal care, parenting skills instruction, child care and transportation. Indeed, critics point to statistics from the South Carolina Association of Alcoholism and Drug Abuse Counselors, which indicate that in the year following the *Whitner* decision, drug treatment programs in the state experienced as much as an 80% decline in admissions of pregnant women. The impact of *Whitner*, they say, can also be seen in South Carolina's infant mortality rate, which increased in 1997 for the first time since at least 1990.

Opponents of punitive policies also point to evidence indicating that racial and socioeconomic biases affect their application. Data from the National Institute on Drug Abuse (NIDA) reveal that while black women have higher rates of illegal substance use during pregnancy than white women, a greater number of white than black women use illegal drugs while pregnant. However, South Carolina's experience between 1989 and 1994—when the program to test women and their newborns for illicit substances was suspended because of allegations of racial discrimination—tells a different story. Of the 42 women who were arrested, 41 were black, and all tested positive for cocaine use. (Additionally, nine of the 10 *Ferguson* plaintiffs are black.) The South Carolina program also did not test women in private obstetric practices, but included only indigent women seeking prenatal care.

According to critics, such biases explain why prosecutors focus almost exclusively on crack cocaine, which is used largely in low-income black communities, even though far more women use alcohol or tobacco while pregnant. Notably, NIDA has found higher rates of alcohol and cigarette use during pregnancy among white women than among black women, and the Centers for Disease Control and Prevention reports a sixfold increase in the incidence of fetal alcohol syndrome between 1979 and 1993. And while the harmful effects of prenatal alcohol and tobacco use are well documented, the effects of cocaine use during pregnancy may have been overstated in the past. For example, the Robert Wood Johnson Foundation has concluded that although children born exposed to cocaine may be at higher risk than others for developmental delays and behavioral problems, the effects of the exposure are likely to be "mild and subtle, not severe."

Reproductive Rights

Advocates of reproductive rights are also concerned about the law's potential—at least in South Carolina—to interfere with a pregnant woman's autonomy. They note that the *Whitner* opinion went beyond the question of prenatal substance abuse when it found that pregnant women could be held criminally liable for any behaviors potentially harmful to a fetus—such as smoking or drinking—under the state's child endangerment statute. And according to the Women's Law Project in Philadelphia, since the *Whitner* decision, prosecutors in South Carolina have relied on the law to arrest pregnant women for behaviors other than prenatal drug use.

Prochoice advocates are also alarmed by what they see as an unprecedented expansion of fetal rights inherent in some prenatal substance abuse policies, and its implications for abortion rights. For example, by defining the fetus as a person under South Carolina law, the *Whitner* decision can be viewed as a challenge to *Roe v. Wade*. The Wisconsin statute goes even further by creating a new category of "unborn child" abuse and conferring rights on a fetus throughout pregnancy—even on a zygote or a fertilized egg. The law also stipulates that "the best interests of the…unborn child shall always be a paramount consideration." In so doing, the law can be viewed as potentially undermining a woman's right to choose an abortion.

Clearly, much is at stake for the reproductive rights community in its ongoing fight to protect the bodily integrity of a pregnant woman who uses drugs. Yet many reproductive rights advocates are quick to point out that the community has an equally strong interest—and even an obligation—to work toward ensuring healthy pregnancy outcomes for these women. Says Amy Allina, director of public policy for the National Women's Health Network, "We need to be concerned both with protecting the autonomy of women and with providing pregnant drug users with the full range of services that they need. This means collaborating with service providers, policymakers and others at the state and local level to ensure that pregnant women have access to safe and appropriate drug treatment, prenatal care, and other health and social services." Allina continues, "A comprehensive approach will help women both overcome their substance abuse problems and achieve healthy outcomes for themselves and their children."

For a comprehensive listing of civil and criminal laws that directly address pregnant women's use of alcohol and other drugs, readers may wish to consult Year 2000 Overview: Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs, *by Lynn M. Paltrow, David S. Cohen and Corinne A. Carey, published by the Women's Law Project (overview@womenslawproject.org) and National Advocates for Pregnant Women (napw1@aol.com).*