

Introduction begins  
with the pro-life  
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## **Introduction**

In the United States, 11% of women abuse different substances one time or another during their pregnancy period[1]. The effects of substance abuse on unborn babies have been highly documented, the focus being on the immediate effects and possible long-term effects that may affect the child. Due to the alarming rates of substance abuse amongst pregnant women, various states have imposed laws that aim to protect the fetus from the mother's actions during pregnancy. The use of punitive legal courses of action has sparked a great debate on whether it is the best way to deal with pregnant women with substance abuse problems.

Substance abuse refers to the overindulgence and reliance on either chemicals or drugs that may harm the user or other people[2]. Substance abuse also involves the use of prescription drugs in a manner not intended nor prescribed by a physician. In the past few years, vigorous debates have arisen on what course of action is appropriate to deal with substance abuse during pregnancy.

The two opposing sides have presented their views on the matter but the solution to this matter has been elusive. The main argument for legal punitive action is that the fetus is an individual requiring protection by the law. Those arguing against punitive actions claim it is inappropriate and that the fetus cannot be viewed as a legal entity thus cannot be accorded legal protection. Various states have been prosecuting women based on their actions while pregnant with the aim of protecting the unborn fetus.

The issue at hand therefore is analyzing the various legal procedures in practice and proposing a valid course of action that is beneficial to both the fetus and the mother.

## **Fetus under the Law**

In order to engage in the analysis of existing legal proceedings against pregnant women with substance abuse problems, it is essential to determine how the law views the fetus. The fetus is described as a developing child after conception and before birth. The current laws do not confer any rights to the fetus and as such the mother can make any decision on whether or not to carry a baby to term or to terminate it[3]. Various arguments have been held as to when life begins with the pro-life activists holding the view that life begins at conception while the pro-choice activist arguing that life begins at birth. The debate is generally based on moral values and personal interpretations of life with no legal backing. According to the Roe ruling of 1973, a fetus rights cannot override a woman's right to privacy or her right to terminate a pregnancy until the point of viability which was given as 24 weeks[4].

Various rulings have given the limit with which a fetus cannot be aborted but no rights have been granted to the fetus. Due to this, many courts have interpreted and expanded child protection laws to cover the fetus.

## **Use of Criminal Proceedings and Its Limitations**

Under the law, criminal acts can only be carried out to persons born alive. This forms the basis of the born alive rule and as such criminal proceedings cannot be held for unborn babies. The born alive rule was adopted from the

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common laws of England and was based on the presumption that it was impossible to judge if a child was alive or not in the womb hence making it impossible to protect it under the country's legal laws.

However, due to current advances in technology, it is now possible to determine the status of the baby in the womb and as such various arguments have arisen about the validity of this rule. Currently, only 23 states in the United States apply the rule, some to a greater extent than others[5]. Although no law has been enacted to criminalize actions during pregnancy that may endanger the child, it has been reported that about 200 women have been charged for causing in-utero harm to the unborn babies as a result of their actions during pregnancy. Most women who appealed these convictions based on prenatal conduct have successfully reversed their sentences[6].

This thus shows that there is a serious problem with the current legal responses being taken. There are various issues that appellate courts have raised to overturn charges based on prenatal conduct. The first reason that has been given for overturning penalties is that of statutory construction. Statutory construction takes into account the born alive rule and as such a fetus cannot be labeled as a child. It is impossible to charge a woman for violating child abuse laws as the laws only cover children who are alive and not those still in the womb.

Some courts have charged pregnant women for supplying drugs to the fetus. They argue that a woman is legally accountable for drugs that enter the fetus system from her own blood system through the umbilical cord[7]. This

however has been negated by the appellate system as drug delivery can only be carried out between two people who are already born[8]. The second reason why criminal proceedings are ineffective is violate a woman's right to privacy. Cases brought against a substance abusing pregnant woman are deemed to be a violation of her due process and right to privacy[9]. The application of child abuse laws to prosecute these women goes against their rights to due process as these laws were not meant to be used in this manner. The use of these laws in such a manner would also lead to the vagueness of the constitution since the full extent of what is criminal would be unclear[10]. Criminal proceedings against a pregnant woman on the premise of prenatal neglect are also against a woman's right to privacy.

A woman has the right to decide whether to carry a pregnancy to term, thus criminal proceedings due to prenatal actions goes against this right and could lead to the woman aborting. Due to the intrusion required to prove that a woman is indeed using drugs while pregnant, there is an infringement on the right to privacy aimed at protecting all citizens from interference by the state in their personal lives. Another reason why criminal proceedings fail is because they are largely counterproductive. A woman facing being arrested due to her substance abuse problems when pregnant will opt not to seek medical treatment or help. Most of these women hide from medical institutions due to the fear of being arrested or losing their children. By criminally prosecuting pregnant women who are substance abusers, the state unwillingly creates fear in other pregnant women with similar problems leading to them delivering their babies in unsanitary conditions that endanger both the life of the child as well as the mother's[11]. Criminal

proceedings usually lack a strong basis of argument. The effect of drugs on fetal development has been found to be dependent on many factors and as such it is impossible for hospitals to prove without a doubt that substance use alone can cause injury to the fetus.

Although various scientific tests have been carried out, and many concerns about substance use on the development of the fetus have been raised, the current information on the issue cannot justify taking punitive legal actions against the woman. Another issue that arises from these is that prosecutions usually focus on cocaine and neglect other types of substances e. g. nicotine and alcohol. While the percentage of pregnant women addicted to cocaine is only 4%, it is estimated that 27% of women smoke cigarettes while pregnant[12].

Various researches have shown that cigarette smoking is responsible for low birth weights babies who are at a very high risk of dying. The reliance on cocaine as a major substance abuse problem is usually in response to over exaggerated facts about “ crack babies” than on substantive medical proof. Crack cocaine which has been linked to crack babies is usually available in low income areas thus discrimination issues have arisen whereby prosecutors are said to be biased against African American women addicted to crack cocaine.

It has been noted that more white women than black women abuse alcohol and cigarettes during pregnancy. Due to excessive focus on cocaine, the result is that more black women are victimized under law than white women[13]. This discrepancy on the application of substance abuse

treatment during pregnancy proves the failure of criminal proceedings against pregnant women with substance abuse.

## **Punitive Legal Courses of Action**

Several states have imposed civil commitment of pregnant mothers with substance abuse problems. The justification of this action is that the fetus is an endangered person and requires the state's protection.

Civil commitment involves detaining a woman in a non criminal setting for the full duration of her pregnancy[14]. The constitution only justifies the detention of individuals if they are mentally ill or pose a danger to themselves or the society. In order to apply this law, the states have thereby given the fetus a legal identity as an individual to be protected under law which is unconstitutional. Civil commitment has several disadvantages and may pose serious risks to both the pregnant woman and the fetus it is intended to protect. The major disadvantage of this course of action is that most of the centers where the women are detained lack sufficient treatment programs and child care options. A woman may have several other children whom are dependent on her thus detaining her may not be a viable option.

In Wisconsin, the state has given its juvenile court exclusive jurisdiction over the fetus in case the mother has a substance abuse problem and is deemed to lack self control. This means that according to the state's interpretation of self control, it can intrude on the woman's life and further more dictate what she does for the whole period of her pregnancy. Another consequence of criminal proceedings is jail terms. This may be during pregnancy or after the birth of the child. Several states have prosecuted and jailed pregnant women

due to their substance abuse problems. Many women's right activists have raised their voice against this course of action as it has many consequences[15]. First and foremost, most women are subjected to humiliating procedures during arrest. Women are handcuffed despite being pregnant which is not only humiliating but potentially dangerous.

Pregnant women usually suffer from balance problems and handcuffs may make the situation worse. The woman may lose balance and fall which poses a serious risk both to her and the baby. Another problem is that jails have no drug treatment programs and thus the woman is removed from the society where she can seek and acquire help and placed in a setting that is stressfully, unsanitary and lacks proper support for the pregnant mother. The risk of going to jail also causes women to hide their problems from doctors who usually need these details to effectively help the woman and her unborn baby. If the court system in a given state uses jail as a detention center for pregnant women, more babies may die due to neglect and fear.

A legal tactic also employed is the use of threats to deter pregnant mothers from using controlled substances[16]. This is usually a collaborative technique by medical practitioners and the legal system where a woman discovered to have a substance abuse problem is bullied into quitting.

Medical practitioners release details about pregnant women with potential substance abuse problems to local authorities who then threaten the women with possible litigation or simply jail sentences. This tactic may work in several cases but can be highly ineffective since substance abuse is usually not a choice by the mother but an existing condition. Criminal proceedings sometimes end with the termination of parental rights by the state. Certain <https://assignbuster.com/introduction-begins-with-the-pro-life-activists-holding/>



states have modified their child welfare rights to allow medical practitioners report cases whereby a child is born with drug dependencies or has a positive drug test at birth.

These reports are then used to terminate a mother's parental right on the basis that she is a danger to the child due to her present condition. This however has raised many debates ranging from the accuracy of the drug test to the ability to conclude that a woman is not a fit parent based on a single factor[17]. The act of reporting toxicology test to state agencies is a violation of the patient doctor confidentiality agreement and thus this practice is also usually against the law. It has been noted that most of the women who lose their children due to toxicology reports are black and thus the issue of discrimination arises. Most hospitals that are required to report to the state are usually state funded public hospitals that usually serve low income families usually African-American in nature[18]. An issue raised about termination of parental rights is that prenatal substance abuse cannot be solely used to judge the ability of a woman to raise the child.

Substance abuse during pregnancy does not mean that the woman is intentionally harming the fetus and hence cannot prove that the woman will mistreat the child once born. Terminating the parental rights due to a toxicology report during childbirth is thus unconstitutional and unfair. Punitive measures to substance abuse during pregnancies only create fear and do not help the mother or the child in any significant way.

The use of the law to punish drug addicted pregnant women may in fact cause more problems than it solves and hence cannot be justified[19]. The

use of medical toxicology reports during child birth can only be used for medical intervention and is not an evidence of the mother's unfitness as a parent. Using such reports to terminate parental rights of a woman is both cruel and unconstitutional.

It is also impossible to judge whether a woman is unfit to parent based solely on drug test. Several factors influence parenting capabilities and unless the state is able to prove that the woman indeed cannot parent due to her drugs use it is unjustifiable to terminate her parental rights.

### **Appropriate Course of Action**

The current legal measures being undertaken have been proven to be highly ineffective and have been shown to contain many problems. In view to this it is important to find a better way to curb this problem once and for all. The issue of substance abuse has been highly investigated and several descriptions are given on its nature. The American Medical Association has noted that substance abuse does not arise due to an individual's lack of willpower but arises due to many different complex factors that include environmental, hereditary and social factors[20].

Most women that resort to substance abuse are usually those with a history of physical abuse and by neglecting their history one cannot help them face this situation. In order to effectively treat a woman with a substance abuse problem it is necessary to understand and offer treatment rather than resort to punishment. Addiction is not a choice but a disease and no punitive legal action can be justified against a pregnant woman with a substance abuse problem.

For any individual with a substance abuse problem, the best course of action is through education and drug treatment. Most women with substance abuse problems when pregnant try to quit their addictions but are usually unable. The country at the moment lacks effective drug treatment programs geared for pregnant women. According to[21], drug treatment programs have the capabilities of helping pregnant and parenting women to overcome substance abuse and improve the outcome of the pregnancy. At the moment, the demand for drug treatment programs cannot be met in the country thus leaving pregnant women with little chance for help. A study carried out in 1989 covering 95% of drug treatment programs in New York City portrayed the problems facing pregnant women seeking help. According to the study, 54% of the treatment centers refused to admit pregnant women. Pregnant women on Medicaid suffered more with 67% of the centers refusing to admit them and 87% of the centers refusing to admit those women on Medicaid with a cocaine addiction[22].

Several changes have occurred between then and now but most centers still refuse to admit pregnant mothers and many difficulties face pregnant mothers seeking help. Most medical practitioners are unaware when a woman needs help due to substance abuse and due to fear women have on being judge, they receive no referrals for treatment. Another problem facing women is that most existing drug treatment facilities do not offer child care services. It is impossible for a woman to participate in these treatments if the well being of her children is not considered. Drug treatments usually take a long time (up to 18 months) thus the absence of child care facilities is a big deterrent. Drug treatment centers are usually understaffed and have no

facilities to effectively serve pregnant women which results to these centers turning away pregnant women or women leaving due to the difficulties that arise from their stay. Most drug treatment centers lack appropriate parent skills instructors thus cannot effectively help a woman undergoing treatment.

Due to prolonged drug use, most of these women lack appropriate parenting skills thus even after completing their treatment face major difficulties in raising the child which might lead to a relapse[23]. In order to be effective, appropriate services necessary to a pregnant or parenting mother need to be provided by these centers. Another course of action the state could institute is enhancing penalties to individuals who supply drugs and other chemicals to pregnant mothers. The state can effectively curb two problems at once by removing these drug peddlers from the street i. e. less illegal substances available on the street and reduced access to illegal substances by pregnant women.

By imposing harsher sentences on individuals supplying drugs to pregnant women, the state will create a sense of fear on these individuals causing them to refrain from supplying these substances to pregnant women.

Another legal course of action is by instituting frequent social services visits. This will aim at identifying and solving problems that these women may be facing making them turn to substance abuse[24]. Social services visits will also aim at ensuring that the woman is indeed not a threat to the child due to her addiction problem.

Finally education is a very important aspect in solving this problem. The state could set up a method to educate the public on the effects of substance abuse on pregnancies and also ensure that medical practitioners are educated on ways of identifying and helping those women with substance abuse tendencies.

## **Conclusion**

The issue of prenatal substance abuse raises many feelings on the legal action to take to curb it. Disciplinary courses of actions have been supported by some people on the basis that most pregnant women are unwilling to change their ways and refuse to volunteer to treatments. Those supporting legal disciplinary actions argue that the fetus has rights and actions being taken by the mother infringe on those rights. However, various arguments against punitive legal solutions have been provided. The legality of the state prosecuting pregnant women due to prenatal activities has been questioned and found to be wanting. Criminal proceedings against a pregnant woman with substance abuse problems are largely unconstitutional as they violate the born alive rule.

For one to receive the benefits accorded by law, he/she must be born alive. This thus means that prosecution of pregnant women according to what they do during pregnancy on the premise of protecting the fetus is unconstitutional. The act of prosecuting pregnant mothers with a substance abuse problem also violates some of their constitutional rights. Rights such as those to privacy, due process and the right to be let alone are violated when the state prosecutes these women. A woman has the right to decide

whether to carry a pregnancy to term and thus prosecuting here on the basis of what she does while pregnant infringes upon this right.

The act of prosecution also requires evidence that need intrusion to the private lives of these women. In so doing the state violates the right to privacy of the women which is constitutionally endowed to all citizens. Prosecution of pregnant women on the basis of child welfare violation is against the right to due process. The rules set up for child protection do not include fetus and thus when the courts apply them in this manner, due process is violated. After prosecution the state has to figure out what course of action to take concerning pregnant mothers with substance abuse problems. Several actions are usually taken and they include jailing, civil confinement and the termination of the parental rights of the mother.

These courses of actions are counterproductive as they defeat the main purpose they were intended for and that is ensuring the well being of the fetus as well as the mother. The problems posed by these courses of actions vary from scaring the mothers from seeking help while pregnant to placing the pregnant women in potentially harmful conditions that have no capabilities of supporting a pregnant woman. In view to these limitations posed by punitive legal measures, it is thus important for the various states to strengthen their capabilities of drug treatment and other supportive measures. The only cost effective way to help pregnant women facing drug addictions is to provide education and drug treatment options. Without the threat of prosecution and arrest, many pregnant women will be ready to seek medical help.

These can be provided by the state by setting up centers with ample facilities to take care of pregnant women. Punitive legal actions cannot help the situation and rehabilitation of these women is the only effective way of solving the problem of substance abuse during pregnancy.

## Endnotes

Paltrow, L. M.

(1998). Punishing women for their behavior during pregnancy: An approach that undermines the health of women and children. In C. L. Wetherington & A. B.

Roman (Eds.), Drug addiction research and the health of women (pp. 467-501).

Rockville, M. D: DIANE Publishing Walker, L, E. (1991). Abused mothers, infants and substance abuse: Psychological consequence of failure to protect. In P.

R. Magrab (Ed.), Mothers, Infants and Substance Abuse (pp. 46-58). Minneapolis, MN: Georgetown University Press.

In the case of the State V. Inzar, (N. C.

Robeson Cty. Ct. 9 April 1991), the court dismissed a case whereby the plaintiff sought to have a woman convicted of Assault with a deadly weapon to her unborn fetus with the deadly weapon being the crack cocaine she was consuming while pregnant. The court ruled that the fetus is not “ a person

within the meaning of existing laws” Walker 47 Dailard, C. & Nash, E. (2000). State Response to Substance Abuse among Pregnant Women.

The Guttmacher Report. pp. 1-4 Paltrow 469 Hoffman, J. (1995, August 19). Pregnant addicted-and guilty? The New York Times Retrieved from <http://www.nytimes.com> In the appeal case of Johnson V.

State, 602 So. 2d 1288, The appellate ruled against the conviction of the woman who was charged with delivering harmful drugs to a “ minor” via the umbilical cord. Dailard & Nash, 3 In the case of the People V. Hardy (Mich. Ct. App.

) the appellate court stated that the laws prohibiting supplying of cocaine and other illegal drugs to minors was not meant for pregnant drug users. Kolata, G. (1990, July 20). Bias seen against pregnant addicts. The New York Times. Retrieved from <http://www.nytimes.com> DiFranza and Lew (1995).

Their study also showed that tobacco use causes between 1900 to 4800 infant deaths yearly as a result of perinatal disorders and is also responsible for about 1800 deaths from sudden infant death syndrome. Gomby, D. S. & Shiono, P. (1991). Estimating the numbers of substance exposed infants.

Future Child, 1, 17-25. Dailard & Nash, 2 Hoffman, 33 Dailard & Nash, 2 Paltrow, 472 Gomby & Shiono, 20 Paltrow, 468 See American Medical Association board of Trustees, 1990 ^ Paltrow, 470 Chavkin, W. (1990) She took to investigate the treatments various women face in receiving prenatal drug treatment for substance abuse. In her paper between a rock and a hard place she recounts on the suffering women with substance abuse problems

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undergo both under the hands of the law and also under medical practitioners.

Kolata, 1990 Paltrow, 478