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## **Punishment and Prejudice: Judging Drug-Using Pregnant Women**

Throughout the late 1980s and still today, “crack moms” and “crack babies” have been the subject of vigorous public debate.<sup>1</sup> Much of this public discussion has been governed by speculation and medical misinformation reported as fact in both medical journals and the popular press and has been extremely judgmental and punitive in many instances. The harshest response has been the call for the arrest and prosecution of women who use cocaine during pregnancy.

In a country that had come to learn that certain drugs, such as thalidomide and DES, can cause serious damage to a child exposed to them prenatally, it is not surprising that people are concerned about the possible effects of prenatal exposure to cocaine. But a concern that could have become the basis for rational scientific inquiry as well as compassionate and constructive discussion quickly became a conclusion that all children exposed prenatally to cocaine would be damaged irrevocably and that their mother’s selfish and irresponsible drug-taking behavior is to blame for a national health tragedy.

One key question is why was there such a “rush to judgment” both about the medical effects of cocaine and about the women who used it while pregnant.<sup>2</sup> While there is no one simple answer, it is clear that the issue of drugs and pregnancy touches on some of the most highly charged and deeply entrenched political issues of our day. It involves America’s long tradition of punishing drug use rather than providing treatment and education.<sup>3</sup> Because the problem of cocaine use in pregnancy was presented predominantly as a problem of the African American community it is deeply intertwined with issues of race, race discrimination, and the legacy of slavery:<sup>4</sup> while illicit substance abuse crosses all race and class lines, this particular debate has focused on low-income African-American women, many of whom rely on welfare.

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Because it involves women and pregnancy, the issue of drugs and pregnancy is inseparable from issues concerning the status of all women as well as with sex and sexuality.<sup>5</sup> Finally, the issue of pregnant women’s drug use has been shaped by claims of fetal rights that are at the heart of today’s abortion debate.<sup>6</sup>

It is not possible to address all of these influences here. But identifying them helps to explain why rational and compassionate discussion of the issue is so difficult. For example, if the issue of drug use does not trigger an emotional response, the issue of race or women’s rights is bound to. As a result, there is little room for meaningful exploration of what the medical risks of cocaine use during pregnancy really are and what might actually help pregnant women and drug-exposed infants.

It also means that there is virtually no room to discuss complex ideas that take into account a range of human responses and possibilities. If I say cocaine may not be as damaging as once thought, people interpret that to mean that I am saying that it is perfectly fine to take cocaine.<sup>7</sup> If I oppose prosecution of pregnant women then I am heard to be saying that such women have no responsibility for their actions. If I say that fetuses should not be treated as persons under the law, I am accused of denying that they have any value at all. None of these assumptions or misinterpretations is correct.

The fact that cocaine may not be more damaging than cigarettes doesn’t mean that pregnant women should now be urged to use it. Rather, it means that an unprecedented legal response to pregnant women who use cocaine can’t be justified by claims of this particular drug’s unparalleled or exceptional harm. Opposition to prosecution and other punitive responses does not mean that pregnant women lack responsibility for their actions. In our current political climate, however, prosecution and imprisonment appear to be the only mechanisms people recognize for holding people accountable for their actions. But they are not the only ways to encourage responsible behavior. In fact punishment in some circumstances can be the least effective social response.

Furthermore, to oppose the recognition of fetal personhood as a matter of law is not to deny the value and importance of potential life as matter of religious belief, emotional conviction, or personal experience. Rather, by opposing such a new legal construct, we can avoid devastating consequences to women’s health, prenatal health care and women’s hope for legal equality.

Exploring some of the real issues involving cocaine and pregnancy and how our discussion of it has been shaped or manipulated by the

media coverage of these issues can help bring some sensible and informed thought to the discussion. With luck it might also make room for compassion and understanding.

## The Villain Cocaine

In the late 1980s and 1990s newspapers, magazines, and television were full of stories documenting the devastating effects of cocaine and predicting a lost generation irredeemably damaged by the effects of their mothers' cocaine use. For example, in 1991 *Time* magazine ran a cover story on the subject.<sup>8</sup> Bold yellow letters read “Crack Kids” followed by the headline: “Their mothers used drugs, and now it’s the children who suffer.” The face of a tearful child filled the page beneath the words.

Inside, on the table of contents, another photograph appears. This one is of a tiny infant’s head, so small that a grown man’s hand engulfs it almost completely. Next to the picture it reads: “A mother’s sad legacy: Can the innocent legacies of drug use be rescued?” The inside story begins: “Innocent victims: Damaged by the drugs their mothers took, crack kids face social and educational hurdles and must count on society’s compassion.” This time a menacing picture of a distraught Black child accompanies the text. In fact, as the photographs become more sinister the subjects’ skin color becomes darker.

The same year the *New York Times* ran a front page story entitled “Born on Crack and Coping with Kindergarten.”<sup>9</sup> The story is accompanied by a photograph of a school teacher surrounded by young children. Underneath the caption reads: “I can’t say for sure it’s crack, said Ina R. Weisberg, a kindergarten teacher at P.S. 48 in the Bronx, but I can say that in all my years of teaching I’ve never seen so many functioning at low levels.”

Throughout these years medical and popular journals, public school teachers and judges alike were willing to assume that if a child had a health or emotional problem and he or she had been exposed prenatally to cocaine, then cocaine and cocaine alone was the cause of the perceived medical or emotional problem. Rather than wait for careful research and evaluation of the drug’s effect there was, as several researchers later criticized, a “rush to judgment” that blamed cocaine for host of problems that the research simply has not borne out.<sup>10</sup>

Indeed, an article in the medical journal *Lancet* in 1989 found that scientific studies that concluded that exposure to cocaine prenatally had adverse effects on the fetus had a significantly higher chance of being

published than more careful research finding no adverse effects.<sup>11</sup> The published articles, delineating the harmful effects on infants prenatally exposed to cocaine, reported brain damage, miscarriages, genito-urinary malformations and fetal demise as just a few of the dire results of a pregnant woman’s cocaine use. Infants that survived the exposure were described as inconsolable, unable to make eye contact, emitting a strange high-pitched piercing wail, rigid and jittery. These early studies, however, had numerous methodologic flaws that made generalization from them completely inappropriate. For example, these studies were based on individual case reports or on very small samples of women who used more than one drug. Researchers often failed to control for the other drugs and problems the mother might have, and/or failed to follow-up on the child’s health.<sup>12</sup> The articles describing these studies were nevertheless relied upon to show that cocaine alone was the cause of an array of severe and costly health problems.

Like alcohol and cigarettes, using cocaine during pregnancy can pose risks to the woman and the fetus. More carefully controlled studies, however, are finding that cocaine is not uniquely or even inevitably harmful. For example, unlike the devastating and permanent effects of fetal alcohol syndrome, which causes permanent mental retardation, cocaine seems to act more like cigarettes and marijuana, increasing certain risks like low birth weight but only as one contributing factor and only in some pregnancies.<sup>13</sup> Epidemiological studies find that statistically speaking many more children are at risk of harm from prenatal exposure to cigarettes and alcohol. In fact, one recent publication on women and substance abuse has created the label “Fetal Tobacco Syndrome” to draw attention to the extraordinarily high miscarriage and morbidity rates associated with prenatal exposure to cigarette smoke.<sup>14</sup>

By the late 1980s, it was already becoming clear to researchers in the field that the labels “crack babies” and “crack kids” were dangerous and counter productive.<sup>15</sup> If one read far enough in the *Time* article —past the pictures of premature infants and deranged children—the story reported that:

[a]n increasing number of medical experts, however, vehemently challenge the notion that most crack kids are doomed. In fact, they detest the term crack kids, charging that it unfairly brands the children and puts them all into a single dismal category. From this point of view, crack has become a convenient explanation for problems that are mainly caused by a bad environment. When a kindergartner

from a broken home in the impoverished neighborhood misbehaves or seems slow, teachers may wrongly assume that crack is the chief reason, when other factors like, poor nutrition, are far more important.

Even the *New York Times* article about the crack-exposed children in kindergarten eventually revealed that researchers “after extensive interviews [found] the problems in many cases were traced not to drug exposure but to some other traumatic event, death in the family, homelessness, or abuse, for example.”<sup>16</sup> And despite the fact that school administrators “rarely know who the children are who have been exposed to crack...and the effects of crack are difficult to diagnose because they may mirror and be mixed up with symptoms of malnutrition, low birth-weight, lead poisoning, child abuse and many other ills that frequently afflict poor children,” the article resorts to crack as the only reasonable explanation for an otherwise seemingly inexplicable phenomenon.

In fact, the outcry about cocaine and damaged children occurred at the end of eight years of Reagan-era budget cuts, many of them in social programs for poor women and children. As researchers Banks and Zerai noted,

Resources for women and children were seriously affected. Between 1977 and 1984, maternal and child health block grants were reduced by one-third. As a result federally mandated comprehensive health clinics including well-baby, prenatal and immunization clinics were eliminated. Community and Migrant Health Centers were cut by one third and the National Health Service Corps’ budget was reduced by 64% (between 1981-1991). The WIC program did not sustain budget cuts, but by 1989 it still only served one-half of those eligible.<sup>17</sup>

Reports from the Children’s Defense Fund for these years described the devastating consequences of increasing poverty, linking it to a dramatic decline in children’s health and safety.<sup>18</sup>

When the headlines might more accurately have been “Born in Poverty and Coping with Kindergarten” and the real news was there is no such thing as a “crack kid,” *Time*, the *New York Times*, and other leading news outlets continued to report cocaine in pregnancy as the primary threat to children’s well-being. Even groups like the Center on Addiction

and Substance Abuse at Columbia University, lead by Joseph Califano, in an otherwise tempered Annual Report that described their research on the cost of substance abuse to society, referred to newborns exposed to alcohol and especially cocaine as “a slaughter of innocents of biblical proportions.”<sup>19</sup>

These stories and characterizations were not lost on the public officials looking at the question of substance abuse and pregnancy. One judge, assuming a knowledge of cocaine’s effects that he simply did not have, and revealing his evident racial bias, admonished a woman accused of having a “cocaine baby”:

You know, we’ve got enough trouble with normal children. Now this little baby’s born with crack. When he is seven years old, they have an attention span that long [holding his thumb and index finger an inch apart]. They can’t run. They just run around in class like a little rat. Not just black ones. White ones too.<sup>20</sup>

## The Public Responds

The public response to the media and medical journal reports was largely one of outrage. The harshest response was the call for the arrest of the pregnant women and new mothers who used drugs. Numerous states considered legislation to make it a crime for a pregnant woman to be pregnant and addicted.<sup>21</sup> Although not a single state legislature passed a new law creating the crime of fetal abuse, individual prosecutors in more than thirty states arrested women whose infants tested positive for cocaine, heroin, or alcohol. Many of these women were arrested for child abuse, newly interpreted as “fetal” abuse. Others, like Jennifer Johnson in Florida, were charged with delivery of drugs to a minor.<sup>22</sup> In that case, the prosecutor argued that the drug delivery occurred through the umbilical cord after the baby was born but before the umbilical cord was cut. Still other women were charged with assault with a deadly weapon (the weapon being cocaine), or feticide (if the woman suffered a miscarriage), or homicide (if the infant, once born, died). Some women were charged with contributing to the delinquency of a minor.

While arrests were almost always the result of the action of an individual prosecutor, in the state of South Carolina there was unprecedented coordination between health care providers, the prosecutor’s office, and the police.

In 1989, the city of Charleston, South Carolina, established a collaborative effort among the police department, the prosecutor's office, and a state hospital, the Medical University of South Carolina (MUSC), to punish pregnant women and new mothers who tested positive for cocaine. Under the policy, the hospital tested certain pregnant women for the presence of cocaine. Women were tested for the presence of cocaine to further criminal investigations, but the women never consented to these searches and search warrants were never obtained.

While the hospital refused to create a drug treatment program designed to meet the needs of pregnant addicts, or to put a single trained drug counselor on its obstetrics staff, it did create a program for drug-testing certain patients, their in-hospital arrest, and removal to jail (where there was neither drug treatment nor prenatal care); the ongoing provision of medical information to the police and prosecutor's office; and tracking for purposes of ensuring their arrest. Some women were taken to jail while still bleeding from having given birth. They were handcuffed and shackled while hospital staff watched with approval. All but one of the women arrested were African-American. The program itself had been designed by and entrusted to a white nurse who admitted that she believed that the "mixing of the races was against God's will."<sup>23</sup> She noted in the medical records of the one white woman arrested that she lived "with her boyfriend who is a Negro."<sup>24</sup>

While a civil suit in federal court challenging the Charleston practice failed at the trial level, it is now on appeal. However, the women who sued were successful in stopping the arrests. The National Institutes of Health found that research relating to the arrests violated federal law regarding research on human subjects; and the hospital agreed to stop facilitating the arrest of patients in a settlement agreement with the Office of Civil Rights which had been investigating it for race discrimination violations.<sup>25</sup>

As for other legal challenges, courts in twenty-four states have held that prosecutions of pregnant women are beyond the intent of the law, and in some cases beyond federal constitutional limits on state power. Only one court, the South Carolina Supreme Court, has upheld such prosecutions in a case called *Whitner v. State*.<sup>26</sup>

### **Who Are These Mothers?**

As a report from the Southern Regional Project on Infant Mortality

observed:

Newspaper reports in the 1980's 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.<sup>27</sup>

African-American women have been disproportionately targeted for arrest and punishment, not because they use more drugs or are worse mothers, but because, as Dorothy Roberts explains, "[t]hey are the least likely to obtain adequate prenatal care, the most vulnerable to government monitoring, and the least able to conform to the white middle-class standard of motherhood. They are therefore the primary targets of government control."<sup>28</sup>

Beyond the stock images and prejudicial stereotypes, the media has given the public little opportunity to meet or get to know the pregnant women on drugs. If we never learn who they are it is inevitable that their drug use will seem inexplicably selfish and irresponsible. Yet, if we could meet them and learn their history, we might be able to begin to understand them and the problems that need to be addressed.

Let me give an example. In the popular television show *NYPD Blue* we get to know the irascible Detective Sipowicz. While he is neither handsome nor charming, we come to care for him. We learn that he is an alcoholic who is able to stop drinking and improve his life. When he has a massive relapse and behaves outrageously, effectively abandoning his new wife and their newborn son, committing crimes of violence and countless violations of his responsibilities as a police officer, we nevertheless want to forgive him and give him another chance.

We are able to sympathize, at least in part because we have been given the information about why he has relapsed. His first son, whom he has finally reconnected with, is murdered, and Sipowicz, who can't handle it

emotionally, turns back to the numbing, relief-giving effects of alcohol.

Sipowicz, in the end, is supported by his police colleagues who cover up for him and give him yet another chance. By contrast, when the same program did an episode involving a heroin-addicted pregnant woman, whose drug habit leads her two older sons to a life of crime, we never get to know why she has turned to drugs. We do not know as we did with Sipowicz what could have driven her to this behavior. The viewer can only assume that her drug use is purely selfish, stemming from a thoughtless hedonism. Thus, she is not entitled to understanding, sympathy, or the many second chances Sipowicz's character routinely gets.

But like Sipowicz, pregnant women who use drugs also have histories and complex lives that affect their behavior and their chances of recovery. We know that substance abuse in pregnancy is highly correlated with a history of violent sexual abuse.<sup>29</sup> In one study 70 percent of the pregnant addicted women were found to be in violent battering relationships. A hugely disproportionate number, compared to a control group, were raped as children. Drugs appear to be used as a means to numb the pain of a violent childhood and adult life. Like Vietnam veterans who self-medicated with drugs for their post-traumatic stress disorders, at least some pregnant women also use drugs to numb the pain of violent and traumatic life experiences.<sup>30</sup>

Are their difficult childhoods or their experiences with violence an excuse for drug use? No. But the information begins to provide some idea of root causes that might need to be taken into consideration when trying to imagine the appropriate societal reaction. Will the threat of jail remove the trauma and pain that in many instances prompted the drug use and stands in the way of recovery? It is not that a woman who uses drugs is not responsible, but rather that we have to hold her responsible in a context that takes into account the obstacles, internal and external, that stand in the way of recovery.

Let me give a few examples. In the Jennifer Johnson case, Judge Eaton, who initially found Johnson guilty of delivery of drugs to a minor and sentenced her to eighteen years of probation and court supervision if she ever became pregnant again, said the following at her sentencing: "The choice to use or not to use cocaine is just that—a choice."<sup>31</sup> The judge ignored, as most people do, the physiologically addictive nature of cocaine. Despite the medical evidence as well as long-standing Supreme Court decisions recognizing that addiction is a chronic disease, marked by numerous relapses on the road to recovery, judges and the public continue to treat it as purely volitional behavior that is simply a matter of

willpower.

Because addiction has both physiological and psychological components, achieving total abstinence or even successfully reducing the harms associated with drug use is difficult to overcome without help. Indeed the judge viewed Ms. Johnson's drug use alone as punishable under the law, despite the fact that the United States Supreme Court has recognized that addiction is a disease and that to punish someone for being an addict violates the Constitution's prohibition on cruel and unusual punishment.<sup>32</sup> Perhaps, however, the judge in the Jennifer Johnson case assumed that treatment was available for this disease. Unfortunately, then and now, pregnant women are routinely turned away from drug treatment programs. When Britta Smith, a woman in the state of Virginia, discovered that she was pregnant, she looked in the yellow pages for a drug treatment programs that could help her with her cocaine problem. She was told none took women who depended on Medicaid for payment. Instead of being able to get the treatment she wanted, she was arrested on charges of child abuse.<sup>33</sup>

All pregnant women, not just poor ones are routinely denied access to the limited drug treatment that exists in this country. In a landmark study in 1990, Dr. Wendy Chavkin surveyed drug treatment programs in New York City. She found that 54 percent flat out refused to take pregnant women.<sup>34</sup> Sixty-seven percent refused to take women who relied on Medicaid for payment and 84 percent refused to take pregnant crack-addicted pregnant women.

One hospital in New York was sued for excluding women from drug treatment. The program argued that its exclusion of all women was justified and no different from its medical judgment to exclude all psychotics.<sup>35</sup> While New York State courts found that such exclusion violated state law, this did automatically increase needed services. During the Dinkins' administration, however, new programs for women and children that proved cost-effective and successful were created. When Mayor Guillian took office, however, he promptly shut down the new programs.<sup>36</sup> Nationally, most of the new programs that have been developed for pregnant women and mothers are funded only as demonstration projects and primarily with federal dollars. Funding is unlikely to be renewed in the coming years. Most of the other existing programs, as numerous studies have shown, are not designed to meet the needs of women.<sup>37</sup> They are based on studies about male drug users and many rely on an extremely confrontational model that does not work for women, whose profiles generally include guilt and extremely low self-

esteem. Furthermore, male-oriented programs do not take into account women's child care and family responsibilities. Many people, however, like Judge Eaton, think women should be punished for failing to get non-existent treatment. Others disguise punitive policies of arrest as fair punishment for women who unreasonably refuse offers of voluntary treatment, when in fact, the "offer" is coerced under the threat of arrest and the treatment itself often inappropriate or inadequate to help the woman.

Other barriers also exist. Judge Eaton ruled that "the defendant also made a choice to become pregnant and to allow those pregnancies to come to term." The prosecutor argued that "[w]hen she delivered that baby she broke the law." By saying this, the judge makes clear that it was having a child that was against the law. If Ms. Johnson had had an abortion she would not have been arrested—even for possessing drugs.<sup>38</sup> But this statement not only reveals a willingness to punish certain women for becoming mothers, it also reflects a host of widely held beliefs and assumptions about access to reproductive health services for women.

For example, implicit in this statement is the assumption that Ms. Johnson had sex and became pregnant voluntarily. Given the pervasiveness of rape in our society, assuming voluntary sexual relations may not be justified. Perhaps, though, the judge, like many others, simply thought that addicts have no business becoming pregnant in the first place. A South Carolina judge put it bluntly: "I'm sick and tired of these girls having these bastard babies on crack cocaine." Apparently concerned about his candor, he later explained: "They say you're not supposed to call them that but that's what they are. . .when I was a little boy, that's what they called them."<sup>39</sup>

On call-in radio talk shows someone inevitably asks why these mothers can't just be sterilized or injected with Depo Prevera until they can overcome their drug problems and, while they are at it, their low socio economic status. The consistency of this view should not be surprising given our country's history of eugenics and sterilization abuse. Indeed, the U.S. Supreme Court has declared sterilization of men unconstitutional, but has never overturned its decision upholding the sterilization of women perceived to be a threat to society.<sup>40</sup>

The suggestion of sterilization, however, is particularly attractive if there is no explanation about why a pregnant woman with a drug problem would want to become pregnant or to have a child in the first place. But drug-using women become pregnant and carry to term for the same range of reasons all women do. Because contraception failed. Because they

fell in love again and hoped this time they could make their family work. Because they are "pro-life" and would never have an abortion. Because when they found out the beloved father of the baby was really already married, they thought it was too late to get a legal abortion. Because they do not know what their options might be. Because they have been abused and battered for so long they no longer believe they can really control any aspect of their lives including their reproductive lives. Because they wanted a child. Because their neighbors and friends, despite their drug use, had healthy babies and they believed their's would be healthy too.

Threat of sterilization is just another punitive response that denies the humanity of the women themselves. Although Judge Eaton did not propose sterilization as part of the sentence he imposed on Ms. Johnson, as some judges in related cases have,<sup>41</sup> he undoubtedly assumed that Ms. Johnson could decide, once pregnant, whether or not to continue that pregnancy to term. Since 1976, however, the United States government has refused to pay for poor women's abortions and few states have picked up the costs.<sup>42</sup> In Florida, like most other states, the "choice" Judge Eaton spoke of does not exist for low-income women.

It was in Florida, after all, where Dr. Gunn was hunted down and murdered for providing abortions to those women who could afford them. It was also where Kawana Ashley, discovered she was pregnant. Ms. Ashley was already raising a child as a single parent and felt she could not responsibly have another one. Her boyfriend promised to help pay for the abortion. After waiting and waiting until weeks had passed, she realized he was not going to help her. She went to a clinic where she found out that she was already in her second trimester of her pregnancy. The abortion was prohibitively expensive and neither the state nor the clinic would provide one for free. Ms. Ashley, in an act of desperation, took a gun and shot herself in the stomach. She survived. The fetus, weighing two pounds, two ounces was delivered by cesarean section with a wound to its wrist. It lived briefly but did not survive. Ms. Ashley was charged with murder.<sup>43</sup> Even assuming that Ms. Johnson's religious and ethical belief's would have allowed her to end her pregnancy, she, like Kawana Ashley, would have found that her "choices" were much more limited than Judge Eaton assumed.

Lack of access to abortion services is only one of the many barriers that exist for a drug-addicted pregnant woman who attempts to make responsible "choices." There are many other barriers that make it extremely difficult for pregnant women on drugs to get the kind of help and support they need. Access to services for drug-addicted women

who are physically abused is also limited. For example, many battered women's shelters are set up to deal with women who have experienced violence, but are not equipped to support a woman who has become addicted to drugs as a way to numb the pain of the abuse.<sup>44</sup> Other barriers include lack of housing, employment, and access to prenatal care. As one of the few news stories to discuss these woman's dilemmas explained:

Soon after she learned she was pregnant, [Kimberly] Hardy [who was eventually prosecuted for delivery of drugs to a minor] convinced she had to get away from her crowd of crack users as well as her crumbling relationship with her [boyfriend] Ronald, took the kids home to Mississippi for the duration of her pregnancy. But by moving, she lost her welfare benefits, including Medicaid. Unable to pay for clinic visits, she had to go without prenatal care.<sup>45</sup>

And what about the men in their lives? Their contribution to the problem, physiologically and socially, are ignored or deliberately erased. Rarely in the media do we know what has happened to the potential fathers. Their drug use, abandonment, and battering somehow miraculously disappear from view.

Nevertheless, men often do play a significant role. For example, in California Pamela Rae Stewart was arrested after her newborn died. One of her alleged crimes contributing to the child's ultimate demise was having sex with her husband on the morning of the day of the delivery. Her husband, with whom she had had intercourse, was never arrested for fetal abuse. Indeed, the prosecutor's court papers argued that Ms. Stewart had "subjected herself to the rigors of intercourse," thereby totally nullifying the man's involvement or culpability.<sup>46</sup>

Prosecutors in South Carolina also managed to ignore the male culpability, even when it is the father who is supplying the pregnant woman with the cocaine or other potentially harmful substances. Many women arrested in this state were not identified as substance addicted until after they had given birth, a point at which their drug use could not even arguably have a biological impact on the baby. Prosecutors argued that arrest was still justified because evidence of a woman's drug use during pregnancy is predictive of an inability to parent effectively. But fathers identified as drug users are not automatically presumed to be incapable of parenting. Indeed, when a man who happens to be a father is arrested for drunk driving, a crime that entails a serious lack of judgment and the use

of a drug, he is not automatically presumed to be incapable of parenting and reported to the child welfare authorities. Prosecutors nevertheless rely on biological differences between mothers and fathers, arguing that a man's drug use could not have hurt the developing baby in the first place. However, studies indicate that male drug use can affect birth outcome: Studies on male alcohol use have demonstrated a relationship between male drinking and low birth weight in their children and a study of cocaine and men suggests that male drug use can also affect birth outcome.<sup>47</sup>

We continue to live in a society with double standards and extremely different expectations for men and women. Drug use by men is still glorified, while drug use by women is shameful, and by pregnant women a crime. This could not have been better demonstrated than by an advertising campaign by Absolut vodka. On Father's Day, as a promotional gimmick, Absolut sent 250,000 free ties with copies of the *New York Times* Sunday edition. Scores of little sperm in the shape of Absolut vodka bottles swim happily on the tie's blue background. So while many call for arrest when a pregnant woman uses drugs or alcohol, fathers who drink are celebrated and, in effect, urged to "tie one on."

Of course, none of these arguments are made to suggest that women are not responsible for their actions or that they are unable to make any choices that reflect free will. Rather, it is to say that popular expectations of what acting responsibly looks like and notions of "choice" have to be modified by an understanding of addiction as a chronic relapsing disease, of the degree to which our country has abandoned programs for poor women and children, and of the time, strength and courage it takes for a drug-addicted woman to confront her history of drug use, violence, and abandonment. Compassion and significantly more access to coordinated and appropriate services will not guarantee that all of our mothers and children will be healthy. But medical experts and both children's and women's rights advocates agree that such an approach is far more likely to improve health than are punishment and blame.

Some people argue, however, that a woman who "chooses" to become pregnant, and does not end that pregnancy, should be held legally accountable for her actions. Much of the problem with this argument has already been addressed above. How do we know that a woman chose to become pregnant? Or that she could have ended her pregnancy? Even assuming that at least some women's choices are completely free, totally conscious, and completely funded, the consequences of such a standard of accountability would result in a level of state surveillance and scrutiny of women's lives that is not only dangerous but also completely

unprecedented under our system of law. As the Illinois Supreme Court explained in rejecting the argument that a child should be able to sue its mother for injuries caused by her behavior during pregnancy:

It is the firmly held belief of some that a woman should subordinate her right to control her life when she decides to become pregnant or does become pregnant. Anything which might possibly harm the developing fetus should be prohibited and all things which might positively affect the developing fetus should be mandated under penalty of law, be it criminal or civil. Since anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus, any act or omission on her part could render her liable to her subsequently born child. While such a view is consistent with the recognition of a fetus having rights which are superior to those of its mother, such is not and cannot be the law of this state.

A legal right of a fetus to begin life with a sound mind and body assertable against a mother would make a pregnant woman the guarantor of the mind and body of her child at birth. A legal duty to guarantee the mental and physical health of another has never before been recognized in law. Any action which negatively impacted on fetal development would be a breach of the pregnant woman's duty to her developing fetus. Mother and child would be legal adversaries from the moment of conception until birth.

If a legally cognizable duty on the part of mothers were recognized, then a judicially defined standard of conduct would have to be met. It must be asked, by what judicially defined standard would a mother have her every act or omission while pregnant subjected to state scrutiny? By what objective standard should a jury be guided in determining whether a pregnant woman did all that was necessary in order not to breach a legal duty to not interfere with her fetus' separate and independent right to be born whole? In what way would prejudicial and stereotypical beliefs about the reproductive abilities of women be kept from interfering with a jury's determination of whether a particular woman was negligent at any point during her pregnancy?

As the court recognized, to hold women legally accountable would depend on the "legal fiction" that the fetus is "a separate person with rights hostile and assertable against its mother." As the court explained:

The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type possible at the risk of her own life, in order to bring forth an adversary into the world. It is after all, the whole life of the pregnant woman which impacts on the development of the fetus. As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which for better or worse shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault: it is a fact of life.

The court concluded that it could not treat women as strangers to their own bodies, recognizing that "[j]udicial scrutiny into the day-to-day lives of pregnant women would involve an unprecedented intrusion into the privacy and autonomy of the citizens " of its state.<sup>48</sup>

### **But What About the Fetus?**

Many, however, feel that protection of women's privacy and autonomy ignores the rights of the fetus. This argument has been borrowed from the rhetoric and legal grounds developed by the anti-abortion movement in its efforts to gain legal recognition of fetal personhood and to outlaw abortion. Prosecutors trying women for their behavior during pregnancy borrow wholesale from the anti-choice legal arguments on behalf of the fetus.

These prosecutors assert that by promoting fetal rights and the view that a mother's drug use is the same as child abuse, they are somehow protecting fetuses and children. But just the opposite is true. As every leading health group has pointed out, threatening punishment of pregnant addicts will accomplish only one thing—detering women from health



care, including prenatal care, that can ameliorate problems of substance abuse even if a woman can't stop her drug use altogether.<sup>49</sup> It will also deter women from obtaining what little drug treatment is available. In fact, since the highly publicized Whitner decision, some drug treatment programs in South Carolina saw a drop of 80 percent in the number of pregnant women seeking drug treatment.<sup>50</sup> Punishment could have even more far-reaching deterrent effects: It might deter pregnant women from seeking the food they need during pregnancy. While low-income women can use the federal Women, Infant and Child (WIC) program that provides nutritional supplements to pregnant women, such programs are required to determine if a woman is using drugs. Public health workers including those employed by the WIC program are mandatory child abuse reporters under the South Carolina law. As a result, a pregnant woman using drugs in South Carolina might not even be able to get the food she needs without the risk of arrest.

The effect of treating a pregnant drug user as a child abuser will not help fetuses or children. It will, however, further an agenda to undermine women's rights. Few people realize that women are not yet recognized as full persons under the law: In a series of cases, the United States Supreme Court has recognized that the Constitution provides women with protection against certain forms of discrimination on the basis of sex. This protection, however, applies only in certain areas such as employment and education, and then only to a limited extent.<sup>51</sup> Significantly, the Supreme Court has held that the Constitution itself does not provide protection to women in many areas involving pregnancy and abortion.<sup>52</sup> For example, the Court found that it was not a constitutional violation to provide male state employees with health benefits for all of their health problems but to exclude coverage for women with health problems associated with pregnancy. The Supreme Court held that this was discrimination between pregnant persons and non-pregnant persons, not discrimination between men and women. The Court views a woman's capacity for pregnancy as something that makes her different from men, and extends constitutional protection against employment discrimination only where women are similarly situated to, or in fact, exactly like men. As long as the Supreme Court continues to hold that discrimination against pregnant women is not sex discrimination, women will not be equal under the law.<sup>53</sup>

The problem with treating the fetus as a person is that women will not simply continue to be less than equal, they will become non-persons under the law. No matter how much value we place on a fetus's potential life, it is still inside the woman's body. To pretend that the pregnant woman is

separate is to reduce her to nothing more than, as one radio talk show host asserted, a "delivery system" for drugs to the fetus.

It is only by treating the pregnant woman as a stranger to her own body that people can compare her drug use to a parent who feeds cocaine to her two-year-old child. It allows people to ignore the pregnant woman's mental and physical state and the physiological addiction that compels her to take drugs. As many authors have noted, pregnant women do not become pregnant and turn to drugs, but are already addicted when they become pregnant.<sup>54</sup>

Nevertheless, some argue that the drug-addicted pregnant woman should be treated as if her drug use is the same as child abuse and at least one state supreme court has apparently accepted that view. The Supreme of South Carolina, distinguishing itself from courts in twenty-four other states, has declared that at least inside the borders of South Carolina a viable fetus is a person and a pregnant woman who endangers its health can be found guilty of child abuse.<sup>55</sup>

The South Carolina court could not fathom the difference between a stranger who attacks a pregnant woman and the woman herself. The court argued if the fetus is not treated as a child under the law, then, "there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same acts."

But in order for a mother to "stab" or "shoot" the unborn child, she must first cut through her own flesh, rip apart her own body. Her actions thus have vastly different physiological and psychological implications than those of a third party who commits violence, not against his own body, but against that of another person.

Moreover, a parent addicted to drugs can avoid child abuse charges by providing for her child's needs and by ensuring that the child does not take drugs him or herself. Because the fetus is inside the woman's body, a drug-addicted pregnant woman may be a criminal no matter what she does. This is especially clear for a woman who is pregnant and addicted to heroin. If she stops using heroin, the ensuing effects of withdrawal could cause fetal death, in which case she would be guilty of murder. If she seeks a late-term abortion she could be arrested for having an illegal abortion or committing murder. Alternatively, if she continues her pregnancy and gives life to a child despite her addiction problem, she could go to jail for ten years as a child abuser. Because the fetus is in her body, every option available to her is a crime.

If the fetus is a person, there are no limits on the state's power to police

and punish pregnant women and on the power of husbands and putative fathers and even complete strangers to interfere with women's freedom.

Pregnant women could be prosecuted for drinking alcohol. It has already happened. Pregnant women could be prosecuted for failing to get sufficient bed rest or endangering the fetus by having sexual intercourse late in pregnancy. Remember, that too has already happened. Self-appointed guardians for the fetus could seek to prevent a pregnant woman with cancer from having chemotherapy that might endanger the fetus. It has already happened. Courts could order pregnant women to undergo cesarean sections for the benefit of the life of the fetus, even when such surgery could cause the woman herself to die. Unfortunately, this has already happened as well.<sup>56</sup>

In 1987 Angela Carder, who was approximately twenty-five weeks pregnant, found out that she had a tumor the size of a football in her lungs. At thirteen she had been diagnosed with a rare form of bone cancer. She defied predictions of her death and lived despite chemotherapy and the removal of an entire leg and half her pelvis. Eventually she married and became pregnant.

When she realized she was having a recurrence of the cancer she made clear to her doctors and family that above all she wanted to live. Her family felt the same way and her doctors did not believe they could do anything to save the pregnancy. A neonatologist at the hospital, however, decided that the fetus ought to be rescued from Angela's body. The doctor went to the hospital's lawyers, who in turn called a judge to decide what should be done in terms of the fetus.

A lawyer was appointed for the fetus, and she, along with another lawyer who appeared on behalf of the fetus, argued that what Angela wanted did not matter since the fetus had a right to life. Angela's doctors testified that the cesarean section could kill her and that none of them were willing to perform the surgery.

In the end the cesarean was ordered and performed. The decision rested entirely on the view that the fetus had a right to life. The fetus was so premature that it lived only for a few hours. Angela died two days later, with the cesarean section listed as a contributing factor in her death.

Although the order was eventually overturned, Angela's case is but one of many examples of distorted and inhumane health care resulting from the creation of fetal rights. A husband has sought a court order for visitation of his "child" to keep his estranged pregnant wife from leaving town. Juvenile courts have taken custody of the drug-exposed fetus and ordered "it" into drug treatment. In Colorado, state officials terminated

a woman's parental rights to a child before it was even born, arguing that she was an "unfit" pregnant woman. Furthermore, in South Carolina, despite official claims that the purpose of prosecution is not to punish women who seek help and take care of their children, one woman, who had been able to stop using drugs, and who was working and home-raising her three young, healthy children, was forced to serve a five-year jail sentence for child abuse based on a positive cocaine test at the birth of her son.

The possibilities for denying women's freedom are not the fantasies of lawyers engaged in slippery slope arguments, but rather current trends in the ever increasing effort to win legal recognition of the fetus and to undermine and ultimately abolish women's rights.

The truth is that we do not have to pit the woman against the fetus to promote healthy pregnancies or to value life. In fact, creating fetal personhood hurts both women and the possibilities for healthier pregnancies. We could treat addiction for what it is, a health problem. We could fund programs designed to meet women's needs not only during pregnancy, but throughout their lives because we value women as whole persons. We could respect people's different values regarding fetuses without creating the legal fiction that fetuses are separate persons. We could commit to ending poverty, the greatest threat to children's health. We could attempt to develop a sane drug policy and ensure that health care and reproductive freedom are realities for all people.

Most people think these goals are too unrealistic to fight for. But is it exactly because we have given up these goals that there is now so much room for arguments for punishment, and the protection not of life or health in general but only of fetal life alone.

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