

# Punishing Women for Their Behavior During Pregnancy

## An Approach That Undermines Women’s Health and Children’s Interests

*For more than a decade, law enforcement personnel, judges, and elected officials nationwide have sought to punish women for their actions during pregnancy which may affect the fetus they’re carrying.<sup>1</sup> Women who are having children despite substance abuse problems have been a particular target, finding themselves prosecuted for such non-existent crimes as “fetal” abuse and delivery of drugs through the umbilical cord. In addition, pregnant women are being civilly committed or jailed, and new mothers are losing custody of their children even when they would be capable parents. Meanwhile, state legislators have repeatedly introduced substance abuse and child welfare proposals that would penalize only pregnant women with addiction problems.*

Some proponents of these efforts are motivated by the misguided belief that they are promoting fetal health and protecting children. Others hope to gain legal recognition of “fetal rights” — the premise that a fetus has separate interests that are equal to or greater than those of a pregnant woman. Creation of such rights would require women to subordinate their lives and health — including decisions about reproduction, medical care, and employment — to the fetus. In fact, doctors and hospital officials have already relied on this theory to seek court orders to force pregnant women to undergo cesarean sections or other medical procedures for the alleged benefit of the fetus.<sup>2</sup> Some advocates of fetal rights have argued that children should be able to sue their mothers for “prenatal injuries.”<sup>3</sup> In some industries, employers have adopted “fetal protection” policies, which barred fertile women of childbearing age from certain high-paying, unionized jobs.<sup>4</sup>

Women’s and children’s advocates agree that women should engage in behaviors that promote the birth of healthy children. Nevertheless, they recognize that a woman’s substance abuse involves complex factors that must be addressed in a constructive manner. Punitive approaches fail to resolve addiction problems and ultimately undermine the health and well-being of women and their children. For this reason, public health groups and medical organizations uniformly oppose measures that treat pregnant women with substance abuse problems as criminals. Moreover, with one notable exception,<sup>5</sup> courts have repeatedly rejected attempts to prosecute women under existing criminal laws for their behavior during pregnancy that poses a risk of harm to the fetus, or to coerce women to undergo medical procedures to benefit their fetuses. Some of these decisions have explicitly recognized that the fetal rights theory poses a significant threat to women’s reproductive rights and the best interests of children.

### **CRIMINAL PROSECUTION**

Although no state has enacted a law that specifically criminalizes conduct during pregnancy, prosecutors have used statutes prohibiting abuse or neglect of children to charge women for actions that potentially harm the fetus.<sup>6</sup> Some have also argued that pregnant women “delivered” drugs to “minor” children — fetuses — through the umbilical cord.<sup>7</sup> In addition, a mother’s or newborn’s positive drug test has led to charges of assault with a deadly weapon (cocaine), contributing to the delinquency of a minor, and possession of a controlled substance.<sup>8</sup> In cases in which infants tested positive and died soon after birth, women have been charged with homicide or feticide.<sup>9</sup> Some women have even been prosecuted for drinking alcohol<sup>10</sup> or failing to follow a doctor’s order to get bed rest or refrain from sexual intercourse during pregnancy.<sup>11</sup>

Estimates based on court documents, news accounts, and data collected by attorneys representing pregnant and parenting women indicate that at least 200 women in more than thirty states have been arrested and criminally charged for their alleged drug use or other actions during pregnancy.<sup>12</sup> The majority of women prosecuted have been low-income women of color,<sup>13</sup> despite the fact that rates of illegal drug use are similar across race and class lines.<sup>14</sup> According to one analysis, “[p]oor Black women have been selected for punishment as a result of an inseparable combination of their gender, race, and economic status.”<sup>15</sup> Often, information indicating possible drug use has been provided to law enforcement officials by medical personnel — possibly in violation of constitutional and statutory guarantees of confidentiality.<sup>16</sup> In some of these cases, charges have been dropped before trial; in many of the cases, women have been pressured into pleading guilty or accepting plea bargains, some of which involve jail time.

In 21 of the 22 states in which women have challenged their charges, courts have rejected those charges or reversed penalties imposed on women for their behavior during pregnancy.<sup>17</sup> These courts, which include the Supreme Courts of Florida, Kentucky, Nevada, Ohio and Wyoming,<sup>18</sup> have held that prosecutions under existing criminal statutes to punish women for their conduct during pregnancy are without legal basis, unconstitutional, or both. Most courts reviewing criminal charges and guilty verdicts based on a woman’s behavior during pregnancy have ruled on “statutory construction” grounds. Relying on the principle that criminal statutes must be strictly construed in favor of defendants, many courts have held that words such as “child,” “person,” or “human being” may not be expanded to include fetuses, and that the legislature never intended criminal statutes punishing harm to a person to apply to a pregnant woman’s behavior that may harm her fetus.<sup>19</sup> Similarly, courts have held that drug delivery laws apply solely to circumstances in which drugs are transferred between two persons already born.<sup>20</sup> In rejecting these prosecutions, some courts have recognized that women were immune from prosecution for their behavior during pregnancy at common law and that any change in the common law must be clearly stated by the legislature. As the Florida Supreme Court noted in *State v. Ashley*, 701 So. 2d 338, 342-43 (1997),

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we must decline the State Attorney’s invitation to join in this fray. This Court cannot abrogate willy-nilly a centuries-old principle of the common law – which is grounded in the wisdom of experience and has been adopted by the legislature – and install in its place a contrary rule bristling with red flags and followed by no other court in the nation.

Criminal charges based on conduct during pregnancy also raise serious constitutional concerns.<sup>21</sup> In dismissing these cases, some courts have recognized that the prosecutions violated women’s rights to due process and privacy. Due process prohibits prosecutors and courts from interpreting or applying an existing law in an unforeseeable or unintended manner. A number of courts have thus found that the unprecedented application of statutes — such as child abuse provisions — to behavior during pregnancy violates due process guarantees because women did not have the required notice that such laws would be applied to fetuses or conduct during pregnancy.<sup>22</sup> Other courts have recognized that interpreting a child abuse statute to include conduct during pregnancy would render the measure unconstitutionally vague because women would not know what behavior would be criminal.<sup>23</sup> As one appellate court explained:

Many types of prenatal conduct can harm a fetus, causing physical or mental abnormalities in a newborn. For example, medical researchers have stated that smoking during pregnancy may cause, among other problems, low birth weight, which is a major factor in infant mortality. Drinking alcoholic beverages during pregnancy can lead to fetal alcohol syndrome, a condition characterized by mental retardation, prenatal and postnatal growth deficiencies, and facial [sic] anomalies.

A pregnant woman’s failure to obtain prenatal care or proper nutrition also can affect the status of the newborn child. Poor nutrition can cause a variety of birth defects. . . . Poor prenatal care can lead to insufficient or excessive weight gain, which also affects the fetus. Some researchers have suggested that consuming caffeine during pregnancy also contributes to low birth weight.

Allowing the state to define the crime of child abuse according to the health or condition of the newborn child would subject many mothers to criminal liability for engaging in all sorts of legal or illegal activities during pregnancy. We cannot, consistent with the dictates of due process, read the statute that broadly.<sup>24</sup>

Prosecutions of women for their behavior during pregnancy also implicate the right of privacy, which includes the right to decide whether to have a child, the right to bodily integrity, and the “right to be let alone.”<sup>25</sup> Thus, both coerced abortions and the imposition of criminal penalties for going through with a pregnancy violate the right to procreate. Several courts have already recognized that criminal sanctions could compel women to terminate their pregnancies in order to avoid arrest. As one court noted, “[p]rosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion.”<sup>26</sup> Some courts have also explicitly held that application of drug delivery statutes to drug use during

pregnancy would unconstitutionally infringe on the broader right to privacy that protects all people from improper state interference in their personal lives.<sup>27</sup> As one court stated: “[b]ecause of the intrusion required by this prosecution; namely, the state’s attempt to reach and deter behavior during pregnancy, [the woman’s] privacy rights are seriously threatened”;<sup>28</sup> the court further found that the state could protect fetal health through less restrictive means “such as education and making available medical care and drug treatment centers for pregnant women.”<sup>29</sup>

Some courts that have overturned prosecutions based on conduct during pregnancy have indicated that these punitive measures are also counterproductive or run contrary to public policy. The Florida Supreme Court observed that “[r]ather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected.”<sup>30</sup> Similarly, another court concluded that:

[c]riminal prosecution of women for their conduct during pregnancy fosters neither the health of the woman nor her future offspring; indeed, it endangers both. Criminal prosecution cruelly severs women from the health care system, thereby increasing the potential for harm to both mother and fetus. Pregnant women threatened by criminal prosecution have already avoided the care of physicians and hospitals to prevent detection.<sup>31</sup>

Thus, the Florida Supreme Court noted, “[m]edical science prescribes rehabilitation, not imprisonment, for the offender. . . . This prescription for rehabilitation applies to not just the mature woman, but the wayward teenager as well.”<sup>32</sup>

Despite the unanimous rulings from these courts, in 1997, the South Carolina Supreme Court upheld a prosecution of a pregnant woman for her behavior during pregnancy. In *Whitner v. South Carolina*, 492 S.E.2d 777 (1997), *cert. denied*, 523 U.S. 1145 (1998), the court held that a viable fetus was a “child” under the state’s criminal child endangerment statute. Rather than limiting its decision to the facts of the case before it, which involved a woman’s use of illegal drugs during her pregnancy, the court went out of its way to hold that any behavior during pregnancy that was potentially harmful to the fetus, whether illegal or legal, could be the basis for a charge of criminal child endangerment. *Whitner* remains the only standing appellate court decision in the nation that upholds criminal charges filed against a woman for behavior during pregnancy posing a risk of harm to her fetus.

The implications of the *Whitner* decision go beyond the area of drug use during pregnancy. Not only have state officials interpreted the decision to require reporting by obstetricians and drug treatment counselors of a pregnant woman’s drug use in her third trimester of pregnancy, Attorney General Condon, *Intervention Protocol for Drug-Impaired Infants* (1998), arguably the decision requires reporting of *any* behavior during pregnancy that could pose a risk of harm to a fetus. Moreover, the State’s Attorney General issued an opinion indicating his belief that the decision in *Whitner* allowed him – even in the absence of statute – to ban certain methods of abortion when used to

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perform post-viability abortions, without exception for the preservation of a woman’s life or health.<sup>33</sup> Although the South Carolina Supreme Court’s interpretation of the state’s criminal laws is currently being challenged in federal court in a habeus corpus proceeding, the interpretation is in effect and women are being arrested based on the ruling.<sup>34</sup>

### **TERMINATION OF PARENTAL RIGHTS OR TEMPORARY LOSS OF CUSTODY**

While no state has enacted specific legislation criminalizing behavior during pregnancy that poses a risk of harm to the fetus, many states have modified their civil child protection laws to mandate reporting to child welfare authorities or to define child neglect to encompass cases in which a newborn is “physically dependent on,” tests positive for, or was harmed by an illegal drug and/or by consumption of alcohol.<sup>35</sup> One state statute specifically provides that a lone positive drug test at the time of delivery is not in and of itself a sufficient basis for reporting child abuse or neglect,<sup>36</sup> and several others prohibit basing criminal proceedings solely on a positive toxicology.<sup>37</sup> Another state, recognizing that such reporting raises serious issues of doctor-patient confidentiality, provides reporting to the health department for “service coordination,” but only if the woman consents.<sup>38</sup> Still another state provides that, if a woman is informed, health care providers may test new mothers and newborns for alcohol and other drugs, but allows a physician discretion in determining whether abuse or neglect has occurred and reporting is required.<sup>39</sup>

Nevertheless, hundreds, if not thousands, of women across the country have had their children taken away from them because of a single positive drug test.<sup>40</sup> As in the criminal context, women of color have been particularly vulnerable to losing their children, even though white women use illegal drugs at the same rate as women of color. One study conducted in Pinellas County, Florida, found that black women were ten times more likely than white women to be reported to civil authorities if an infant was prenatally exposed to an illegal drug.<sup>41</sup>

### **CIVIL COMMITMENT AND EMERGENCY PROTECTIVE CUSTODY**

Three states, Minnesota, Wisconsin and South Dakota, have specifically amended their laws to authorize civil commitment or detention of a woman who has used a controlled substance during pregnancy.<sup>42</sup> The Wisconsin and South Dakota statutes also authorize civil commitment or detention for women who “lack self-control” in the use of alcohol.<sup>43</sup> Moreover, pregnant women in other states have faced attempts to civilly commit them for the sole purpose of protecting their fetuses from some potential harm.<sup>44</sup> According to constitutional requirements for civil commitment statutes, there must be at least clear and convincing evidence that an individual is mentally ill and dangerous to herself or others before she may be committed to a treatment facility for some limited period of time.<sup>45</sup> Efforts to civilly commit pregnant drug addicts in these states are based on the claim that a woman is a danger to a separate “person” or “child” — the fetus. At least three courts have rejected the application of civil commitment statutes to a pregnant woman based on the potential danger to the fetus.<sup>46</sup>

**PUNITIVE APPROACHES FAIL TO PROTECT CHILDREN**

Leading public health organizations, including the American Medical Association and the American Public Health Association, oppose the prosecution of pregnant women who use drugs. These groups recognize that such an approach undermines maternal and fetal health because the threat of criminal charges and the fear of losing their children deter women from seeking prenatal care and drug treatment. The Institute of Medicine similarly asserts:

Pregnant women who are aware that their life-styles place their health and that of their babies at risk may also fear seeking care because they anticipate sanction or pressure to change such habits as drug and alcohol abuse, heavy smoking, and eating disorders. Substance abusers in particular may delay care because of the stress and disorganization that often surround their lives, and because they fear that if their use of drugs is uncovered, they will be arrested and their other children taken into custody.<sup>47</sup>

Government and private researchers have also concluded that punitive approaches frighten women away from needed care.<sup>48</sup> One federal report found that “women are reluctant to seek treatment if there is a possibility of punishment,” civil or criminal, noting that “some women are now delivering their infants at home in order to prevent the state from discovering their drug use.”<sup>49</sup> Moreover, fear of being reported to the authorities discourages women from communicating honestly about their addiction problems to health care professionals who need that information to provide appropriate medical care to both the woman and her newborn.<sup>50</sup>

Many groups that are primarily concerned with the health and rights of children, such as the American Academy of Pediatrics, the Center for the Future of Children, and the March of Dimes, also recommend against punitive approaches to substance abuse and pregnancy. As the American Academy of Pediatrics has stated, “[p]unitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health.”<sup>51</sup> In fact, studies indicate that drug-using women who receive prenatal care have healthier children.<sup>52</sup>

In addition, prosecutions have focused particularly on women who allegedly use cocaine during their pregnancies, reflecting a reliance on exaggerated and inaccurate media reports on the “epidemic” of “crack babies”<sup>53</sup> rather than sound medical findings.<sup>54</sup> Focusing on cocaine ignores the potential impact of poverty, as well as other drugs, such as nicotine and alcohol. A recent study of the impact of *in utero* cocaine exposure found that children raised in the inner-city are at risk for suffering cognitive deficits regardless of *in utero* cocaine exposure.<sup>55</sup> Moreover, it is estimated that between two to four percent of pregnant women have used cocaine and approximately twenty-seven percent of pregnant women smoke cigarettes.<sup>56</sup> A meta-analysis of the effect of smoking during pregnancy concluded that the use of tobacco products is responsible for an estimated 32,000 to 61,000 low-birthweight infants born annually, and 14,000 to 26,000 infants who require admission to neonatal intensive care units.<sup>57</sup> As one study noted,

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[research] does not shed much light on the subject of which particular substances contribute to which later disability. Polydrug exposure, impoverished home life, and chaotic communities make it impossible to attribute developmental effects to one particular drug. The research has not controlled for other important variables, such as the role of the father, the mother's personality, her health, and her access to social supports.<sup>58</sup>

### **ADDRESSING THE TRUE CRISIS: LACK OF DRUG TREATMENT**

Both the World Health Organization and the American Psychiatric Association classify substance abuse as a disease.<sup>59</sup> The American Medical Association explains that "addiction is not simply the product of a failure of individual willpower. [It] is caused by complex hereditary, environmental, and social factors."<sup>60</sup> Substance abuse is difficult to overcome, even for pregnant addicts who are especially motivated to stop.<sup>61</sup> Moreover, according to experts, such factors as a history of abuse specifically affect a woman's drug use and thus raise important issues for treatment.<sup>62</sup> In one study, up to seventy-four percent of alcohol- and drug-dependent women reported that they had experienced sexual abuse.<sup>63</sup> In another survey of pregnant women, seventy percent reported that they had been beaten as adults.<sup>64</sup> Many specialists in the field believe that women who are abused self-medicate with alcohol, illicit drugs, and prescription medication to alleviate the pain and anxiety of living under the constant threat of violence.<sup>65</sup> As the National Association for Perinatal Addiction Research and Education points out: "These women are addicts who become pregnant, not pregnant women who decide to use drugs . . . ."<sup>66</sup> Their substance abuse is best addressed through treatment, not punishment.<sup>67</sup>

Despite the fact that drug treatment programs tailored for pregnant and parenting women help them overcome their addiction problems, greatly improve birth outcomes, and are cost-effective, such programs are extremely rare and overburdened.<sup>68</sup> The 1991 Federal General Accounting Office (GAO) Report found that the most critical barrier to women's treatment "is the lack of adequate treatment capacity and appropriate services among programs that will treat pregnant women and mothers with young children. The demand for drug treatment uniquely designed for pregnant women exceeds supply."<sup>69</sup>

A 1989 study of ninety-five percent of the drug treatment programs in New York City found that fifty-four percent refused to treat any pregnant women, sixty-seven percent would not accept pregnant women on Medicaid, and eighty-seven percent refused to treat pregnant women on Medicaid who were addicted to crack cocaine.<sup>70</sup> Although many programs now say they will accept pregnant women, a review of drug treatment programs in southern states found that pregnant women were less than one percent of the patients actually served.<sup>71</sup> A recent survey also suggests that few physicians or nurses detect substance abuse problems in pregnant women or make referrals to treatment.<sup>72</sup> Even when programs do accept women, there are numerous barriers to successful treatment. For example, if a program does not provide child care services, that fact "effectively precludes the participation of women in drug treatment."<sup>73</sup> Similarly, despite significant evidence that long-term (twelve to eighteen months) residential care may be the most effective for chronic alcohol or

drug dependent pregnant and parenting women, such services are virtually nonexistent.<sup>74</sup> Moreover, when women are imprisoned during their pregnancies or shortly after giving birth, they and their children are even less likely to receive appropriate care. Putting women in jail — where drugs may be available<sup>75</sup> but treatment and prenatal care are not — jeopardizes the health of pregnant women and their future children and does little to solve the underlying problem of addiction.<sup>76</sup>

### **CONCLUSION**

Punitive approaches to the problem of substance abuse during pregnancy threaten the health of women and children and seriously erode women's rights to privacy. Further, they ignore the serious shortage of drug treatment programs for pregnant and parenting women and fail to address the overall lack of access to reproductive health care services. Policymakers, legislators, and those who purport to care about the well-being of women and their children must work to find better ways to address the needs of women with drug and alcohol abuse problems. As the author of a study on the effectiveness of mandatory treatment concluded, "the children of drug-using mothers may be most effectively served by the development of available, efficacious, and welcoming services for women and families."<sup>77</sup>

### **APPENDIX A:**

#### ***Excerpts from Statements by Public Health And Public Advocacy Groups***

**American Academy of Pediatrics:** "The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant." Committee on Substance Abuse, *Drug-Exposed Infants*, 86 Pediatrics 639, 642 (Oct. 1990).

**American Medical Association:** "Pregnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment." Board of Trustees Report, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990).

**American Nurses Association:** "ANA . . . opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants. ANA recognizes alcohol and other drug problems as treatable illnesses. The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems." Task Force on Drugs and Alcohol Abuse/Addictions Position Statement (Apr. 5, 1991).

**American Public Health Association:** The APHA "recommends that no punitive measures be taken against pregnant women who are users of illicit drugs when no other ille-

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gal acts, including drug-related offenses, have been committed.” Policy Statement No. 9020, *Illicit Drug Use by Pregnant Women* (reprinted in 81:2 *Am. J. Pub. Health* 253 (1991)).

**American Society of Addiction Medicine:** “The imposition of criminal penalties solely because a person suffers from an illness is inappropriate and counterproductive. Criminal prosecution of chemically dependent women will have the overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing, rather than preventing, harm to children and to society as a whole.” Board of Directors, *Public Policy Statement on Chemically Dependent Women and Pregnancy* 47 (Sept. 25, 1989).

**Association of Family and Conciliation Courts:** “Many poor parents, particularly single mothers, have been partially abandoned by our medical, legal and political system. These parents are more likely to consume alcohol and other drugs in a manner that creates an unacceptable risk of harm to their present and future children . . . . Our national failure to provide comprehensive, universal pre and post-natal care for women and their babies constitutes systemic child neglect . . . . AFCC finds that . . . criminalization of maternal substance abuse is not in the best interests of the child . . . .” *Maternal Substance Abuse Policy and Recommendations* (May 9, 1992).

**Center for Substance Abuse Treatment, U.S. Department of Health and Human Services Consensus Panel on Pregnant, Substance-Using Women:** “The Consensus Panel strongly supports the view that the use of alcohol and other drugs by women during pregnancy is a public health issue, not a legal problem . . . . The panel does not support the criminal prosecution of pregnant, substance-using women. Furthermore, there is no evidence that punitive approaches work.” *Pregnant, Substance-Using Women*, DHHS Pub No. (SMA) 93-1998 (1993).

**Center for the Future of Children:** “A woman who uses illegal drugs during pregnancy should not be subject to special criminal prosecution on the basis of allegations that her illegal drug use harms the fetus. Nor should states adopt special civil commitment provisions for pregnant women who use drugs.” *Recommendations 1 The Future of Children* 8, 9 (1991).

**Coalition on Alcohol and Drug Dependent Women and Their Children:** “[T]he interests of women and their children are best served through the health care and social service systems. Women should not be singled out for punitive measures based solely on their use of alcohol and other drugs during pregnancy.” *Coalition Statement of Purpose* (passed by Coalition Jan. 23, 1990).

**The March of Dimes:** “The March of Dimes is concerned that legal action, which makes a pregnant woman criminally liable solely based on the use of drugs during pregnancy, is potentially harmful to the mother and to her unborn children . . . . [W]e call

upon the American people to work together to support efforts that will . . . [m]ake available upon demand the comprehensive therapeutic interventions which meet the specific needs of the pregnant woman suffering from the disease of addiction.” *Statement on Maternal Substance Abuse* (Dec. 1990).

**National Association for Perinatal Addiction Research and Education:** Criminalization of prenatal drug use “will deter women who use drugs during pregnancy from seeking the prenatal care which is important for the delivery of a healthy baby . . . . The prospect of criminal prosecutions . . . also places health care practitioners in a conflict position, forcing them to choose between maintaining their patient’s confidentiality or reporting them, ultimately to the police, a position many doctors and nurses find intolerable . . . . [these women] do not want or intend to hurt their unborn children by using drugs. But, they need help, not threats, to overcome their problems . . . . The key to intervention will be access to health care for high risk women, not the threat of criminal prosecution.” NAPARE Policy Statement No. 1, *Criminalization of Prenatal Drug Use: Punitive Measures Will Be Counter-Productive* (July 1990).

**National Association of Public Child Welfare Administrators:** “If a jurisdiction elects to mandate drug testing of pregnant women, such testing must be universal (i.e., testing would be conducted on all pregnant women and newborns at all medical facilities and not targeted at specific populations.) Test results should be used only to identify families in need of treatment and make referrals. Positive test results should not be used for punitive action.” *Guiding Principles For Working With Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response* (Jan. 1991).

**National Council on Alcoholism and Drug Dependence:** “[A] punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the best interests of infants and children . . . . Moreover, there is increasing evidence of disparities regarding the screening and reporting of positive toxicologies of newborns, with women of color, poor women and women receiving care in public hospitals having the greatest likelihood of being subject to drug testing and subsequent reporting to legal authorities.” *Policy Statement, Women, Alcohol, Other Drugs and Pregnancy* (1990).

**Southern Legislative Summit on Healthy Infants and Families:** “[S]tates should adopt, as preferred methods, prevention, intervention, and treatment alternatives rather than punitive actions to ameliorate the problems related to perinatal exposure to drugs and alcohol.” Policy Statement, *High Risk Pregnancies/Substance Abuse* (Oct. 1990).

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### **APPENDIX B**

Courts in the following cases (in 21 of 22 states) rejected prosecutions of women for behavior during pregnancy that posed a risk of harm to the fetus, usually drug or alcohol use. These courts include the supreme courts of five states: Florida, Kentucky, Nevada, Ohio, and Wyoming. The only standing appellate court decision upholding such a prosecution is *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997), *cert denied*, 523 U.S. 1145 (1998).

#### **ARIZONA:**

*State v. Reinesto*, 894 P.2d 733 (Ariz. Ct. App. 1995) (dismissing child abuse charges against woman based on her alleged use of heroin during pregnancy).

#### **CALIFORNIA:**

*Reyes v. Superior Court*, 75 Cal. App. 3d 214 (1977) (child endangerment statute does not refer to an unborn child or include a woman's alleged drug use during pregnancy).

*People v. Jones*, No. 93-5, Transcript of Record (Cal. J. Ct. Siskiyou County July 28, 1993) (finding that the legislative history did not support application of murder statute to death of woman's newborn caused by drug use during pregnancy).

*Jaurigue v. People*, No. 18988, slip op. (Cal. Super. Ct. Aug. 21, 1992) (dismissing fetal homicide charges against a woman who suffered a stillbirth allegedly as a result of her drug use during pregnancy, finding that neither legislative history nor the statute's language suggested that a mother could be prosecuted for murder for the death of her fetus), *writ denied*, (Cal. App. 1992).

*People v. Stewart*, No. M508197, Transcript of Hearing (Cal. Mun. Ct. Feb. 26, 1987) (criminal child support statute that explicitly covered "a child conceived but not yet born" is not intended to impose additional legal duties on pregnant women).

#### **FLORIDA:**

*State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (dismissing homicide prosecution of woman who shot herself in abdomen while pregnant, causing death of fetus 14 days after it was born alive).

*Johnson v. State*, 602 So. 2d 1288 (Fla. 1992) (reversing conviction for "delivering drugs to a minor" where woman had taken drugs shortly before giving birth).

*State v. Gethers*, 585 So. 2d 1140 (Fla. App. 1991) (dismissing child abuse charges against woman for drug use during pregnancy on ground that such application misconstrues the effect of the law).

*State v. Carter*, No. 89-6274, slip op. (Fla. Cir. Ct. July 23, 1990) (dismissing charges of child abuse against woman who allegedly used illegal drugs while pregnant), *aff'd*, 602 So. 2d 995, 996 (Fla. App. 1992).

**GEORGIA:**

*Hillman v. State*, 503 S.E. 2d 610 (Ga. Ct. App. 1998) (dismissing criminal abortion charge brought against women who shot herself in abdomen, causing death of near-term fetus).

*State v. Luster*, 419 S.E.2d 32 (Ga. Ct. App. 1992) (statute proscribing delivery/distribution of cocaine did not encompass transmission between woman and her fetus), *cert. denied*, 1992 Ga. LEXIS 467 (Ga. June 4, 1992).

**INDIANA:**

*State v. Barnett*, No. 02D04-9308-CF-611, Order (Ind. Super. Ct. Feb. 11, 1994) (dismissing reckless homicide charges against woman who allegedly used drugs during pregnancy where baby was born alive and then died; upholding charges of possession and failure to pay substance excise tax).

**KENTUCKY:**

*Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction, finding that to construe the child abuse statute to apply to a woman's conduct during pregnancy would make the statute impermissibly vague and violate legislative intent).

**MASSACHUSETTS:**

*Commonwealth v. Pellegrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990) (right to privacy and principles of statutory construction, due process, and separation of powers do not permit extension of drug delivery statute to women who give birth to substance-exposed newborns).

**MICHIGAN:**

*People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App.) (statute prohibiting delivery of cocaine to children was not intended to apply to pregnant drug users), *leave to appeal denied*, 437 Mich. 1046, *amended*, 471 N.W.2d 619 (Mich. 1991).

*People v. Bremer*, No. 90-32227-FH, slip op. (Mich. Cir. Ct. Jan. 31, 1991) (dismissing drug delivery charges on principles of statutory construction, due process, and privacy, holding that the interpretation of the drug delivery law to cover ingestion of cocaine by a pregnant woman would be a radical departure from existing law), *appeal dismissed*, No. 137619 (Mich. Ct. App. July 14, 1992).

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*People v. Cox*, No. 90-53454 FH, slip op. (Mich. Cir. Ct. July 9, 1990) (granting motion to dismiss, finding that drug delivery statute is not intended to regulate conduct during pregnancy and that prosecution would not be in the best interest of public health, safety, and welfare), *aff'd*, No. 131999 (Mich. App. Feb. 28, 1992).

### **NEBRASKA:**

*State v. Arandus*, No. 93072, slip op. (Neb. Dist. Ct. June 17, 1993) (quashing indictment on child abuse charge based on alcohol use during pregnancy because application of the statute to unborn children is not supported by legislative intent).

### **NEW JERSEY:**

*New Jersey v. Barker*, No. 96-02-605, Tr. of hearing at 30-41 (N.J. Super. Ct. Jan. 3, 1997); *id.*, supplemental letter opinion (N.J. Super. Ct. Feb. 14, 1997) (dismissing manslaughter and child endangerment charges brought against woman who used drugs while pregnant).

### **NEW YORK:**

*People v. Morabito*, slip op. (N.Y. Ont. Cty. Ct. Sept. 24, 1992), *aff'g*, 580 N.Y.S.2d 843 (Geneva City Ct. Jan. 28, 1992).

*People v. Morabito*, 580 N.Y.S.2d 843 (Geneva City Ct. Jan. 28, 1992) (dismissing child endangerment charges against woman who allegedly smoked cocaine during her pregnancy, because the court may not extend the reach of the statute to allow a fetus to be included within the definition of "child," and because public policy and due process considerations militate against such prosecutions), *aff'd*, slip op. (N.Y. Ont. Cty. Ct. Sept. 24, 1992).

### **NEVADA:**

*Sheriff, Washoe County, Nevada v. Encoe*, 110 Nev. 1317, 885 P.2d 596 (Nev. 1994) (child endangerment statute does not apply to mother's substance abuse during pregnancy which results in the transmission of illegal substance to child through the umbilical cord during the time after the child leaves the womb).

### **NORTH CAROLINA:**

*State v. Inzar*, Nos. 90CRS6960, 90CRS6961, slip op. (N.C. Super. Ct. Apr. 9, 1991) (dismissing charges against a woman who allegedly used crack during her pregnancy under statute prohibiting assault with a deadly weapon and delivery of a controlled substance, finding that a fetus is not a person within the meaning of the statutes), *appeal dismissed*, No. 9116SC778 (N.C. App. Aug. 30, 1991).

**OHIO:**

*State v. Gray*, 584 N.E.2d 710 (Ohio 1992) (mother cannot be convicted of child endangerment based solely on substance abuse during pregnancy, because plain meaning of statute does not extend to fetuses or behavior during pregnancy).

*State v. Andrews*, No. JU 68459, slip op. (Ohio C.P. June 19, 1989) (child endangerment statute is not intended to apply to behavior during pregnancy that may be harmful to a fetus, but is only intended to apply to a living child placed at risk by actions that occurred after its birth).

**OKLAHOMA:**

*State v. Alexander*, No. CF-92-2047, Transcript of Decision (Okla. Dist. Ct. Aug. 31, 1992) (dismissing charges of unlawful possession of a controlled substance and unlawful delivery of a controlled substance to a minor brought against a woman who ingested illegal drugs while pregnant, finding that the presence of drug in defendant's system does not constitute possession and transfer of the drug through the umbilical cord is not "volitional").

**PENNSYLVANIA:**

*Commonwealth v. Kemp*, No. 114-Pitt-1993, Judgment, slip op. (Pa. Super. Ct. Feb. 22, 1994), *aff'g*, 75 Westmoreland L.J. 5, slip op. (Pa. Ct. C.P. Dec. 16, 1992) (dismissing charges of recklessly endangering another person or endangering the welfare of a child against a pregnant woman who allegedly ingested cocaine while pregnant; finding that neither "child" nor "person" include an unborn "fetus").

*Commonwealth v. Kemp*, 75 Westmoreland L.J. 5, slip op. (Pa. Ct. C.P. Dec. 16, 1992) (dismissing charges of recklessly endangering another person or endangering the welfare of a child against a pregnant woman who allegedly ingested cocaine while pregnant; finding that neither "child" nor "person" include an unborn "fetus"), *aff'd* 643 A.2d 705 (Pa. Super. Ct. 1994).

**TEXAS:**

*Collins v. State*, 890 S.W.2d 893 (Tex. Ct. App. 1994) (dismissing injury to a child charges against a woman who allegedly used drugs during pregnancy, finding that applying statute to conduct during pregnancy violates due process).

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### **VIRGINIA:**

*Commonwealth v. Wilcox*, No. A-44116-01, slip op. (Va. Dist. Ct. Oct. 9, 1991) (dismissing child abuse charges against a woman who allegedly used cocaine during pregnancy, finding that application of the statute to these facts would extend it by means of creative construction to acts not intended by the legislature).

*Commonwealth v. Smith*, No. CR-91-05-4381, slip op. (Va. Cir. Ct. Sept. 16, 1991) (dismissing child abuse charges against a woman who allegedly used drugs during pregnancy, finding that child abuse statute is not intended to apply to fetuses or to conduct during pregnancy).

*Commonwealth v. Turner*, No. 91-054382, slip op. (Va. Cir. Ct. Sept. 16, 1991).

### **WASHINGTON:**

*State v. Dunn*, 82 Wash. App. 122, 916 P.2d 952 (Wash. App. 1996) (dismissing child mistreatment charges, finding that the legislature never intended the child mistreatment statute to apply to a woman's conduct during pregnancy), *review denied*, 130 Wash.2d 1018, 928 P.2d 413 (1996).

### **WISCONSIN:**

*State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. App. 1999) (dismissing charge of attempted murder and reckless injury filed against woman who consumed alcohol while she was pregnant with a viable fetus).

### **WYOMING:**

*State v. Osmus*, 276 P.2d 469, 475 (Wy. 1954) (woman whose newborn died as a result of her negligent failure to obtain proper prenatal care or medical care at birth could not be guilty of manslaughter).

*But see:*

### **SOUTH CAROLINA:**

*Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997) (upholding conviction under child endangerment statute of woman for drug use during pregnancy because viable fetus is a "child" under the statute), *cert denied*, 523 U.S. 1145 (1998).

**Endnotes**

1. *See, e.g.*, Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 Harv. Women's L.J. 9, 10-14 (1987).
2. *See In re A.C.*, 573 A.2d 1235 (D.C. 1990) (*en banc*) (setting aside trial court decision ordering cesarean section that contributed to the death of both the fetus and the woman because "in virtually all cases, the decision of the patient, albeit discerned through the mechanism of substituted judgment, will control"); *Doe v. Doe*, 632 N.E.2d 326 (Ill. 1994) (competent woman's choice to refuse medically-advised cesarean section must be honored, even if choice may be harmful to fetus).
3. *See, e.g.*, *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988) (child cannot maintain lawsuit against mother for unintentional infliction of injuries suffered while in the womb); Margorie Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. of Legal. Med. 63 (1984).
4. *See International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) ("fetal protection" policy violated Title VII's prohibition on sex discrimination). *See also* Suzanne Uttaro Samuels, *Fetal Rights, Women's Rights: Gender Equality in the Workplace* (1995); Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 Georg. L.J. 641 (1981).
5. *See Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998).
6. *See, e.g.*, *Sherriff v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (child abuse statute inapplicable to woman who used methamphetamines during pregnancy; to hold otherwise would "open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins"); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction, finding that to construe the child abuse statute to apply to a woman's conduct during pregnancy would make the statute impermissibly vague and violate legislative intent); *Commonwealth v. Kemp*, 75 Westmoreland L.J. 5 (Pa. Ct. C.P. 1992) (dismissing charges of recklessly endangering another person or endangering the welfare of a child brought against a pregnant woman who allegedly ingested cocaine while pregnant; finding that neither "child" nor "person" include an unborn "fetus"), *aff'd*, 643 A.2d 705 (Pa. Super. Ct. 1994).
7. *See, e.g.*, *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992) (reversing a woman's convictions for "delivering drugs to a minor" via the umbilical cord); *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App.) (statute prohibiting delivery of cocaine to children was not intended to apply to pregnant drug users), *leave to appeal denied*, 471 N.W.2d 619 (Mich. 1991).
8. *See, e.g.*, *State v. Inzar*, Nos. 90CRS6960, 90CRS6961 (N.C. Super. Ct. Robeson Cty. Apr. 9, 1991) (dismissing charges of assault with a deadly weapon and delivery of a controlled substance brought against a woman who allegedly used "crack" during her pregnancy because fetus is not a person within the meaning of the statutes), *appeal dismissed*, No. 9116SC778 (N.C. Ct. App. Aug. 30, 1991); *State v. Alexander*, No. CF-92-2047, Transcript of Decision (Okla. Dist. Ct. Tulsa Cty. Aug. 31, 1992) (dismissing charges of unlawful possession of a controlled substance and unlawful delivery of a controlled substance to a minor brought against a woman who ingested illegal drugs while pregnant, finding that the presence of drugs in defendant's system does not constitute possession and transfer of the drug through the umbilical cord is not "volitional").
9. *See State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (dismissing homicide charges against woman who shot herself in the abdomen while pregnant and gave birth to premature infant who died 14 days after birth); *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. Ct. App. 1999) (dismissing charges of attempted murder and reckless injury filed against woman who consumed alcohol while she was pregnant with a viable fetus); *People v. Jones*, No. 93-5, Reporter's Transcript (Cal. Juv. Ct. Siskiyou Cty. July 28, 1993) (dismissing homicide charges against woman whose newborn died allegedly as a result of prenatal drug use, finding that legislative history did not support application of murder statute to fetus's death); *Jaurigue v. Justice Court*, No. 18988, Reporter's Transcript (Cal. Super. Ct. San Benito Cty. Aug. 21, 1992) (dismissing fetal homicide charges against woman who suffered stillbirth allegedly as a result of her prenatal drug use, finding that neither legislative history nor the statute's language suggested that a mother could be prosecuted for murder for her fetus's death),

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- writ denied, (Cal. Ct. App. 1992); *State v. Barnett*, No. 02D04-9308-CF-00611 (Ind. Super. Ct. Allen Cty. Feb. 11, 1994) (notice accepting state's motion to withdraw child abuse charges and dismissing homicide charges brought against woman whose infant tested positive for cocaine and died shortly after its premature birth).
10. See *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. Ct. App. 1999) (dismissing charge of attempted murder and reckless injury filed against woman who consumed alcohol while she was pregnant with a viable fetus); *State v. Pfannenstiel*, No. 1-90-8CR (Wyo. Cty. Ct. Albany Cty. Jan. 5, 1990) (pregnant woman charged with child abuse for drinking alcohol); Joan Little, *Woman Jailed After Baby Is Born Intoxicated*, St. Louis Post-Dispatch, Nov. 26, 1991, at 3A (woman was charged with second-degree assault and child endangerment after her son was allegedly born with signs of fetal alcohol syndrome).
  11. See *People v. Stewart*, No. M508197, Reporter's Transcript, at 4 (Cal. Mun. Ct. San Diego Cty. Feb. 26, 1987) (pregnant woman charged under a criminal child support statute for failing to follow doctor's advice to get bed rest, to abstain from sexual intercourse, and to seek prompt medical attention when she experienced bleeding).
  12. Lynn M. Paltrow, *Criminal Prosecutions Against Pregnant Women: National Update and Overview* (1992); The Center for Reproductive Rights, *In the Courts: Decisions Involving Penalties Imposed Against Women for Their Conduct During Pregnancy* (Feb. 1996).
  13. Gina Kolata, *Bias Seen Against Pregnant Addicts*, N.Y. Times, July 20, 1990, at A13.
  14. As a survey by the Southern Regional Project on Infant Mortality concluded:

Newspaper reports in the 1980s 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.
- Shelly Gehshan, Southern Regional Project on Infant Mortality, *A Step Toward Recovery 1* (1993).
15. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, And the Right of Privacy*, 104 Harv. L. Rev. 1419, 1424 (1991).
  16. One federal law provides that, except under limited circumstances, "[r]ecords of the identity, diagnosis, prognosis, or treatment of any patient . . . maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall . . . be confidential . . ." 42 U.S.C. § 290dd-2 (1995). See also Legal Action Center, *Confidentiality: A Guide to the Federal Laws and Regulations* (1991); Legal Action Center, *Dispelling the Myth: Legal Issues of Treatment Programs Serving Pregnant Addicts* (1994).
  17. See Appendix B for a listing of cases.
  18. See *State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (dismissing homicide charges against woman who shot herself in the abdomen while pregnant and gave birth to premature infant who died 14 days after birth); *Sherriff v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (child abuse statute inapplicable to woman who used methamphetamines during pregnancy; to hold otherwise would "open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins"); *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993) (affirming reversal of child abuse conviction, finding that to construe the child abuse statute to apply to a woman's conduct during pregnancy would make the statute impermissibly vague and violate legislative intent); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992) (rejecting child endangerment charge against woman who used drugs during pregnancy because statute did not apply to harm to fetus); see also *State v.*

- Osmus*, 276 P.2d 469 (Wy. 1954) (dismissing manslaughter charge filed against women whose newborn died as a result of her failure to obtain proper prenatal care or medical care at birth).
19. See *supra* note 6 and 9.
  20. See *supra* note 7.
  21. Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 Yale L.J. 599 (1986); Lynn M. Paltrow, *Winning Strategies: Defending the Rights of Pregnant Addicts*, *The Champion*, Aug. 1993, at 19.
  22. See, e.g., *People v. Morabito*, 580 N.Y.S.2d 843, 847 (City Ct. 1992), *aff'd*, [no case number] (N.Y. Cty. Ct. Ontario Cty. Sept. 24, 1992). But see *Whitner*, 492 S.E.2d 777.
  23. See, e.g., *State v. Reinesto*, 894 P.2d 733, 736 (Ariz. Ct. App. 1995).
  24. *Id.* at 8-9 (internal citations omitted).
  25. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). See also *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).
  26. *Johnson v. State*, 602 So. 2d 1288, 1296 (Fla. 1992). See also *State v. Gethers*, 585 So. 2d 1140, 1143 (Fla. Dist. Ct. App. 1991); *Commonwealth v. Pellegrini*, No. 87970, slip op. at 9 (Mass. Super. Ct. Plymouth Cty. Oct. 15, 1990); *People v. Bremer*, No. 90-32227-FH, slip op. at 14 (Mich. Cir. Ct. Muskegon Cty. Jan. 31, 1991), *appeal dismissed*, No. 137619 (Mich. Ct. App. July 14, 1992); *People v. Morabito*, [no case number] slip op. at 4 (N.Y. Cty. Ct. Ontario Cty. Sept. 24, 1992); Gail Stewart Hand, *Women or Children First?*, *Grand Forks Herald*, July 12, 1992, at 1 (In February 1992, Martina Greyhound was charged with reckless endangerment for allegedly sniffing paint fumes while pregnant. After her arrest, she obtained an abortion and the charges were subsequently dropped.)
  27. See, e.g., *Commonwealth v. Pellegrini*, No. 87970 (Mass. Super. Ct. Plymouth Cty. Oct. 15, 1990); *People v. Bremer*, No. 90-32227-FH (Mich. Cir. Ct. Muskegon Cty. Jan. 31, 1991), *appeal dismissed*, No. 137619 (Mich. Ct. App. July 14, 1992).
  28. *Commonwealth v. Pellegrini*, No. 87970, slip op. at 7 (Mass. Super. Ct. Plymouth Cty. Oct. 15, 1990).
  29. *Id.* at 8.
  30. *Johnson v. State*, 602 So. 2d 1288, 1295-96. (Fla. 1992).
  31. *Commonwealth v. Kemp*, 75 Westmoreland L.J. 5, 11 (Pa. Ct. C. P. 1992), *aff'd*, 643 A.2d 705 (Pa. Super. Ct. 1994).
  32. *State v. Ashley*, 701 So. 2d 338, 342 (Fla. 1997); see also *State v. Luster*, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992), *cert. denied*, 1992 Ga. LEXIS 467 (Ga. June 4, 1992).
  33. See Attorney General's Opinion, 1997 WL 87887 (S.C.A.G. Jan. 10, 1997). But see *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).
  34. See *The Year 2000 Report*, forthcoming publication from National Advocates for Pregnant Women and the Women's Law Project.
  35. See, e.g., Ill. Comp. Stat. Ann. ch. 325, para. 5/3 (1998); Ind. Code § 31-34-1-10 (1998); Iowa Code § 232.77(2) (1997); Mass. Gen. Ann. ch. 199, § 51A (1998); Mich. Comp. Laws § 722.623a (1997); Minn. Stat. § 626.5562 (1997); Okla. Stat. tit. 10, § 7103(A)(2) (1997); S.D. Codified Laws § 26-8A-2(9) (1998); Utah Code Ann. § 62A-4a-404 (1997); Va. Code Ann. § 63.1-248.3 (A1) (1999); Wis. Stat. Ann. § 48.02(1)(am) (1999). For a comprehensive review of state and federal statutes and regulations in the area, see *The Year 2000 Report*, forthcoming publication from National Advocates for Pregnant Women and the Women's Law Project.
  36. See Cal. Penal Code § 11165.13 (West 2000).
  37. See, e.g., Iowa Code § 232.77(2) (1997); Ky. Rev. Stat. Ann. § 214.160(5) (Michie 1996); Mo. Rev. Stat. § 191.737(5) (1997).
  38. See Kan. Stat. Ann. § 65-1,163 (1997).
  39. See Ky. Rev. Stat. Ann. § 214.160 (Michie 1998).
  40. At least two courts have held that a mother's parental rights cannot be terminated based solely on drug use during pregnancy. *Adoption of Katherine*, 674 N.E.2d 256 (Mass. Ct. App. 1997); *In re Valerie D.*, 613 A.2d 748 (Conn. 1992). But see *In re Troy D.*, 215 Cal. App. 3d 889 (1989); *In re Solomon L.*, 190 Cal. App. 3d 1106 (1987); cf. *In re Baby Boy Blackshear*, 1999 WL 770788 (Ohio Ct. App. Sept. 7, 1999), *appeal allowed*, 723 N.E.2d 120 (Ohio 2000).
  41. Ira J. Chasnoff *et al.*, *The Prevalence of Illicit*

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42. See, e.g., Minn. Stat. §§ 253B.02 & 626.5561(1) & (2) (1995); Wis Stat. § 48.133; S.D. Codified Laws Ann. §34-20A-63. The Wisconsin statute was enacted after the state Supreme Court, in a celebrated case, refused to allow the determination of a pregnant woman under a statute allowing the state to take protective custody of a "child" because the legislature did not intend to include fetuses within the definition of "child." See *Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997).
  43. Wis. Stat. §48.133; S.D. Codified Laws Ann. §34-20A-63.
  44. Wendy Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, 266 JAMA 1556 (1991).
  45. See *Addington v. Texas*, 441 U.S. 418, 431-34 (1979). See generally Sandra Anderson Garcia & Ingo Keilitz, *Involuntary Civil Commitment of Drug-Dependent Persons with Special Reference to Pregnant Women*, 15 MPDLR 418 (1991); Thomas L. Hafemesiter & Ali John Amirshahi, *Civil Commitment For Drug Dependency: The Judicial Response*, 26 Loy. L.A. L. Rev. 39 (1992).
  46. See *Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997); *In re Tanya P.*, No. 530069/93, slip op. at 1, 18-22 (N.Y. Sup. Ct. N.Y. Cty. Feb. 24, 1995); *In re Steven S.*, 178 Cal. Rptr. 525, 126 Cal. App.3d 23 (1981).
  47. Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 79 (Sarah S. Brown, ed., 1988).
  48. See U.S. General Accounting Office, GAO/HRD-91-80, *ADMS Block Grant, Women's Set-Aside Does Not Assure Drug Treatment for Pregnant Women* 20 (1991); Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 Drug and Alcohol Dependence 199 (1993) (survey of women's attitudes regarding punitive laws found that substance abusing pregnant women would go underground and avoid treatment for fear of incarceration); Center for Health Policy Research, George Washington University, *An Analysis of Resources to Aid Drug-Exposed Infants and Their Families* 78 (1993).
  49. U.S. General Accounting Office, GAO/HRD-90-138, *Drug-Exposed Infants, A Generation At Risk* 20, 37 (1990). Many women's treatment experts "contend that as stigma, rejection, and blame increase, drug-abusing women's feelings of guilt and shame increase. This leads to lowered self-esteem, increased depression, immobilization, and isolation. As societal stigma increases, willingness to enter treatment decreases." Karol L. Kumpfer, *Treatment Programs For Drug-Abusing Women*, 1 *The Future of Children* 50, 55-56 (1991).
  50. See Mary Ann Curry, *Nonfinancial Barriers to Prenatal Care*, 15 *Women & Health* 85 (1989). See also National Association for Perinatal Addiction Research and Education, NAPARE Policy Statement No. 1, *Criminalization of Prenatal Use: Punitive Measures Will be Counter-Productive* (1990) ("If a woman does go for prenatal care or delivery, she will be less likely to disclose her drug or alcohol use to her health care provider if she believes she will be subject to criminal prosecution. Thus, her doctor or nurse will not have all of the information he or she needs to treat the woman and her subsequently born child. Again this will only serve to impede the long-term goal of ensuring the health and well-being of mothers and babies.")
  51. American Academy of Pediatrics, Committee on Substance Abuse, *Drug-Exposed Infants*, 86 *Pediatrics* 639, 641 (1990). See also Center for Substance Abuse Treatment, *Pregnant, Substance-Using Women*, *supra* note 5, at 2 ("there is no evidence that punitive approaches work").
  52. See, e.g., Andrew Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 *JAMA* 1581 (1993).
  53. See Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in America's Latest Drug Scare*, in *Images of Issues* 115 (Joel Best ed., 1989).
  54. As one article notes:
    - expectations of universal and permanent damage to children prenatally exposed to cocaine rest not on scientific findings but on media "hype" fueled by selective anecdotes. For example, the early reports of adverse effects of prenatal exposure to cocaine, including neurobehavioral dysfunction, a remarkably high rate of SIDS

[Sudden Infant Death Syndrome], and birth defects, were initial observations that constitute the legitimate first step in the scientific process. However, these unrepeated findings were uncritically accepted by scientists and lay media alike, not as preliminary, and possibly unrepresentative case reports, but as “proven” facts . . . . For example, the initial report of a high rate of SIDS was never peer reviewed. The “fact” that prenatal cocaine exposure greatly increases the risk of SIDS continues to be disseminated in the lay and medical media in spite of subsequent peer-reviewed studies that did not confirm this finding. Even scholarly reviews and the introductions to scientific papers present a litany of adverse effects without any methodologic critique or qualifications.

Deborah A. Frank & Barry S. Zuckerman, *Children Exposed to Cocaine Prenatally: Pieces of the Puzzle*, 15 *Neurotoxicology and Teratology* 298, 299 (1993) (citations omitted).

55. Hallam Hurt *et al.*, *Children with In Utero Cocaine Exposure Do Not Differ From Control Subjects on Intelligence Testing*, 151 *Arch. Ped. Adolesc. Med.* 1237 (1997).
56. Deanna S. Gomby & Patricia H. Shiono, *Estimating the Number of Substance-Exposed Infants*, 1 *The Future of Children* 17 (1991).
57. Joseph R. DiFranza & Robert A. Lew, *Effect of Maternal Cigarette Smoking on Pregnancy Complications and Sudden Infant Death Syndrome*, 40 *J. Family Practice* 385 (1995) (“Tobacco use is also annually responsible for an estimated 1900 to 4800 infant deaths resulting from perinatal disorders, and 1200 to 2200 deaths from sudden infant death syndrome”).
58. Diana Kronstadt, *Complex Developmental Issues of Prenatal Drug Exposure*, 1 *The Future of Children* 36, 46 (1991).
59. See *United States v. Southern Management Corp.*, 955 F.2d 914, 921 (4th Cir. 1992).
60. American Medical Association Board of Trustees Report, *Legal Interventions During Pregnancy: Court Ordered Medical Treatment and Legal Penalties For Potentially Harmful Behavior by Pregnant Women*, 264 *JAMA* 2663, 2667 (1990).
61. Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, *supra* note 53, at 1559.
62. Dean G. Kilpatrick, *Violence as a Precursor to Women’s Substance Abuse: The Rest of the Drug-Violence Story 7*, Paper Presented Before the American Psychological Association, 98th Annual Convention (Aug. 1990).
63. Norma Finkelstein *et al.*, *Getting Sober, Getting Well: A Treatment Guide for Caregivers Who Work With Women* 244 (1990) (citing Sharon Wilsnack, *Drinking, Sexuality, and Sexual Dysfunctions*, in *Alcohol Problems in Women* (Sharon Wilsnack & Linda Beckman eds., 1984)). This finding is consistent with anecdotal reports from programs that specialize in treating pregnant addicted women that eighty to ninety percent of their clients have been victims of rape or incest. Lisa Leff, *Treating Drug Addiction with the Woman in Mind*, *Wash. Post*, Mar. 5, 1990, at E1, E4; cf. Douglas Martin, *Big Bribe Helps Mothers Fend Off Allure of Crack*, *N.Y. Times*, Mar. 7, 1990, at B1.
64. Dianne O. Regan *et al.*, *Infants of Drug Addicts: At Risk for Child Abuse, Neglect and Placement in Foster Care*, 9 *Neurotoxicology & Teratology* 315 (1987). This same study indicated that nineteen percent of the women had been severely beaten as children; fifteen percent had been raped as children, twenty-one percent as adults. Overall, seventy percent reported that they had also been beaten as adults. See also Gehshan, *supra* note 14 (one-third of women interviewed cited abusive or violent relationships which prevented them from entering treatment sooner).
65. See Hortensia Amaro *et al.*, *Violence During Pregnancy and Substance Use*, 80 *Am. J. Pub. Health* 575, 578 (1990). See also Teri Randall, *Domestic Violence Begets Other Problems of Which Physicians Must Be Aware To Be Effective*, 264 *JAMA* 940, 943 (1990); Denise Paone & Wendy Chavkin, *From the Private Family Domain to the Public Health Forum: Sexual Abuse, Women and Risk for HIV Infection*, *Siecus Report* 13 (April/May 1993); Lenore E. Walker, *Abused Mothers, Infants and Substance Abuse: Psychological Consequences of Failure to Protect*, in *Mothers, Infants and Substance Abuse* 106 (Phyllis R. Magrab & Diane M. Doherty, eds. 1991); Finkelstein, *supra* note 92, at 243-255.
66. National Association for Perinatal Addiction

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- Research and Education, *supra* note 76.
67. Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 Am. J. Pub. Health 483 (1990).
68. See Center for Substance Abuse Treatment, U.S. Department of Health and Human Services, *Producing Results: A Report to the Nation* 5-15 (1995) (drug treatment costs significantly less than imprisonment and reduces costs associated with medical care and welfare).
69. U.S. General Accounting Office, *ADMS Block Grant, Women's Set-Aside Does Not Assure Drug Treatment for Pregnant Women*, *supra* note 74, at 4. "One 1990 survey estimates that less than 14 percent of the 4 million women needing drug treatment received such treatment." *Id.* at 1.
70. Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, *supra* note 96. See also *Elaine W. v. Joint Diseases North Gen. Hosp.*, 613 N.E.2d 523 (N.Y. 1993) (invalidating hospital policy barring pregnant women from drug detoxification services in absence of showing of medical necessity for such policy under New York Human Rights Law).
71. Gehshan, *supra* note 14, at 3.
72. Shelly Gehshan, *Missed Opportunities for Intervening in the Lives of Pregnant Women Addicted to Alcohol or Other Drugs*, 50 JAMWA 160 (1995).
73. Wendy Chavkin, *Help, Don't Jail, Addicted Mothers*, N.Y. Times, July 18, 1989, at A21.
74. U.S. General Accounting Office, *Drug-Exposed Infants, A Generation at Risk*, *supra* note 75 at 37.
75. Andrew H. Malcolm, *Explosive Drug Use Creating New Underworld in Prisons*, N.Y. Times, Dec. 30, 1989, at 1.
76. According to Ellen Barry, Director of San Francisco's Legal Services for Prisoners with Children, "incarceration of a pregnant woman is a potential death sentence to her unborn child." Molly McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. Rev. of L. & Soc. Change 277, 308 n. 209 (1987-88). See also Ellen Barry, *Pregnant, Addicted and Sentenced: Debunking the Myths of Medical Treatment in Prison*, J. of Crim. Justice (Winter 1991).
77. Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, *supra* note 53, at 1560.

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