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By Juan A. Ortiz Salazar

REPRODUCTION AS A CRIME:
STATE INTERVENTION DURING PREGNANCY

Emily Spacek

Abstract

This paper briefly examines the actions by states that criminalize substance use during pregnancy through a critical lens that grants attention to the reasons for and implications of punishing pregnant women for specific actions taken during pregnancy. It first embarks on a case study into a particular Alabama law that has warranted the arrests of hundreds of women since its implementation in 2006. Then, using qualitative research, this paper investigates broader state intervention into the lives of pregnant, substance using women via criminal prosecution and the termination of parental rights. Results indicate that current punitive policies have often developed without appropriate consideration of the negative outcomes of criminalization. This includes the effects on the health, well-being, and reproductive autonomy of women. Lastly, I argue that the most effective way to approach the issue at hand will be from a perspective that accounts for women's own voices and social locations, including wholesome public health approaches that emphasize harm reduction, treatment, and a dedication to reproductive freedom.

Introduction

The issue of drug use during pregnancy has provoked countless debates surrounding public health, welfare, criminal justice, and women's and fetal rights during the last three to four decades. Since 1973, forty-five different U.S. states have sought to persecute new and expecting mothers for drug use during pregnancy and have successfully arrested hundreds of women.¹ This intervention has existed historically in the U.S. in the name of averting a public health crisis. However, contrary to approaching policy as a means to help women in regards to their health or living situations, approaches by states have been to persecute and punish pregnant women for their substance use. Scholars have increasingly been granting attention to how the modern criminal justice system is criminalizing aspects related to pregnancy.² Part of this attention can be attributed to explaining the current trends of increasing numbers of women in prison. According to the ACLU, "women are the fastest growing segment of the incarcerated population increasing at nearly double the rate of men since 1985."³ The recent actions of states to criminalize and prosecute new and expecting mothers for substance use during pregnancy certainly contributes to this problem.

The possible severity of the implications of criminalizing mothers as opposed to taking other policy approaches warrants an investigation into how states have reacted towards substance using mothers across the United States. Research begins in the next section by briefly framing the issue of substance use

¹ Leticia Miranda, Vince Dixon, and Cecilia Reyes, "How States Handle Drug Use During Pregnancy," *ProPublica*, September 30, 2015.

² Denbow Jennifer, "Reproduction and the Carceral State," Cal Poly San Luis Obispo (lecture, November 8, 2017).

³ American Civil Liberties Union and the ACLU Foundation, "Facts About The Over-Incarceration Of Women In The United States," (online source, 2018).

during pregnancy. It is proceeded by a case study of a recent Alabama law that is being used to criminalize pregnant women in the state. Through investigating the activity of state legislatures and courts via criminal law and the termination of parental rights, I will analyze how policies have often developed without adequate consideration of the likely negative outcomes criminalization entails. I will focus on the implications of how these reactions affect the reproductive liberties and rights of women across the United States.

Framing the Issue

Substance use during pregnancy can pose serious risks to both a pregnant woman and her fetus. The U.S. Department of Health and Human Services estimates that each year 400,000-440,000 infants are affected by prenatal alcohol or illicit drug exposure.⁴ According to a document prepared by the National Center on Substance Abuse and Child Welfare, "Prenatal exposure to alcohol, tobacco, and other drugs has been potentially linked to a wide spectrum of physical, emotional, and developmental problems for these infants".⁵

As Figure 1 shows, rates of usage by pregnant women vary by type of substance. While laws mainly target other illicit substance use during pregnancy, alcohol and tobacco use are much more prevalent. The expressed reasoning for laws that specifically target illicit drug usage is often that these drugs are perceived to have more harmful effects for children and mothers, however the factuality of this claim is actually debated.⁶ It is important to recognize, too, that there has been limited scientific knowledge about prenatal exposure to certain

⁴ Nancy Young, Sid Gardner, Cathleen Otero, Kim Dennis, Rosa Chang, Kari Earle, and Sharon Amatetti, "Substance-Exposed Infants: State Responses to the Problem," *Substance Abuse and Mental Health Services Administration* (2009).

⁵ *Ibid.*

⁶ Barry Lester, Lynne Andreozzi, and Lindsey Appiah, "Substance use during pregnancy: time for policy to catch up with research," *Harm Reduction Journal*, Vol. 1, no. 5 (April, 2004).

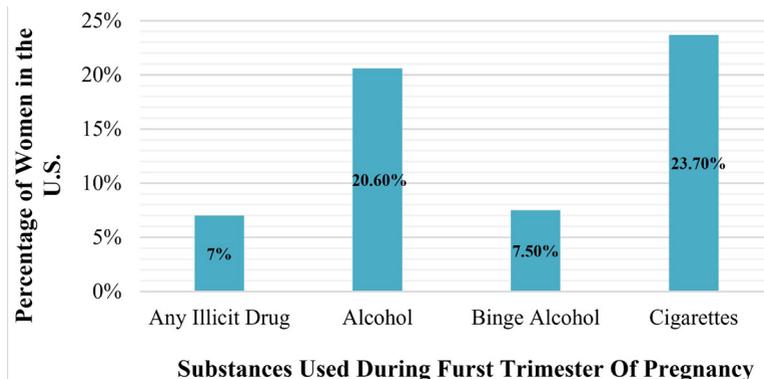


Figure 1: Display of the 2004 to 2005 annual averages of substances used by pregnant women based on an annual survey conducted by the National Survey on Drug Use and Health. This data suggests that among substances used by pregnant women, cigarettes are used slightly more commonly than alcohol, but three times more than other illicit drugs. Although the figure separates alcohol and binge alcohol usage, if both forms of drinking alcohol were to be combined, this number would indicate that just under 30% of women surveyed drank alcohol during their first trimester of pregnancy. It is clear that alcohol and cigarette use is much higher than illicit drug use amongst pregnant women.

substances. While strong evidence exists about the maternal and fetal effects of substances like alcohol and tobacco, less is known about the effects of other substances.⁷ Rather, it is difficult to develop strong evidence-based conclusions by attributing certain observed outcomes to specific drugs.⁸ In fact, poverty, environment, violence, poor nutrition, and other risk factors have been known to influence children's development and health as much as, or more than prenatal exposure to drugs.⁹ Existing policies regarding substance use during pregnancy focus on the single factor of prenatal drug exposure as the explanation for all negative outcomes to child

⁷ *op. cit.*, fn. 6

⁸ *Ibid.*

⁹ Jeanne Flavin, *Our bodies, our crimes: the policing of women's reproduction in America* (New York: New York University Press, 2009).

development and health.¹⁰ Affective approaches to promoting the health of children take a more holistic approach, combatting the various significant factors that affect their development. In actuality, current state policies that resort to punitive measures divert attention away from the focus of creating substantial efforts to support pregnant or parenting women who struggle with addiction or fall into drug use. They do little to target the significant, more systemically based reasons drug usage occurs.

The Case of Alabama

As previously noted, the last two to three decades have seen increasing state attention towards reproduction as a focus for criminal punishment in the U.S.¹¹ Alabama's chemical endangerment law, added to the state's legal code in 2006, is one prime example of such attention through the intervention into the lives of new and expecting mothers. Section 26-15-3.2 of the code makes exposing a child to a controlled substance or to an environment in which a controlled substance is produced a crime.¹² Although not explicitly intended, this law has since been the means of criminalizing hundreds of Alabama mothers. On September 23, 2015, ProPublica reported on the results of an in-depth investigation into the Alabama chemical endangerment law, revealing that it has prompted the criminal prosecutions of at least 479 women since its implementation in 2006.¹³ The article brings to light one mother's particular confrontation with the law in August of 2014 which had resulted in her arrest and a prolonged legal battle to regain custody of her two children. According to the article, after testing positive for drugs in a routine blood test during labor, Casey Shehi was reported to authorities and charged with "knowingly, recklessly or intentionally"

¹⁰ *op. cit.*, fn. 6

¹¹ Dorothy Roberts, *Killing the Black Body* (New York: Vintage Books, 1997).

¹² *Alabama Code Title 26. Infants and Incompetents § 26-15-3.2.*

¹³ Martin Nina, "Take a Valium, Lose Your Kid, Go to Jail," *ProPublica*, September 23, 2015.

causing a child to be exposed to an illicit substance.¹⁴ Despite her newborn being born substance-free, Shehi was being prosecuted under the rationale that she had exposed her fetus to substances in utero. This unfortunate, burdensome situation was due to Shehi having taken an unprescribed Valium (a medication commonly used to treat anxiety disorders) one evening during her pregnancy to help with sleep.¹⁵ Stories like Casey Shehi's and other Alabama mothers' demonstrate the downfalls of the criminalization approach to solving issues of drug use in Alabama.

Alabama's implementation of the chemical endangerment law illuminates one controversial way in which state law and the criminal justice system is targeting pregnancies – the prosecution of substance-using pregnant women.¹⁶ During the 1980s, the issue of prenatal substance use first gained substantial attention from state lawmakers and prosecutors. Since then, the effort to address prenatal substance use has continued under a variety of different state laws. Most state legislatures, at one time or another, have attempted to criminalize prenatal drug use or to treat it as grounds for terminating parental rights.¹⁷ As exemplified in Casey Shehi's case, when mothers or newborns in Alabama test positive for any illegal drugs or misused prescription drugs, the mother can be criminally prosecuted by the state.¹⁸ The law that legitimizes these prosecutions originally aimed to combat the so-called methamphetamine epidemic in

¹⁴ *op. cit.*, fn. 13; 14

¹⁵ *op. cit.*, fn. 14

¹⁶ I use “pregnant women” in this paper to refer to individuals who are pregnant or are biologically capable of becoming pregnant. Therefore, this may include individuals who do not identify as women.

¹⁷ Jean Reith Schroedel and Pamela Fiber, “Punitive Versus Public Health Oriented Responses to Drug Use by Pregnant Women,” *Yale Journal of Health Policy, Law, and Ethics*, Vol. 1, no. 1, Article 15 (2001): 217-236.

¹⁸ Leticia Miranda, Vince Dixon, and Cecilia Reyes, “How States Handle Drug Use During Pregnancy,” *ProPublica*, September 30, 2015.

Alabama during the early 2000's. Initially, it intended to target parents who were producing methamphetamine in their homes in an attempt to protect children from drug exposure.¹⁹ Soon, however, prosecutors and courts began applying the law to pregnant women who exposed their embryo or fetus to illicit substances during pregnancy. The penalties have been severe – one to ten years in prison if a woman's infant suffers no ill effects, ten to twenty years if an infant shows signs of exposure, and ten to ninety-nine years if there occurs an infant death.²⁰ As seen in Shehi's case, because the law considers chemical endangerment a form of child abuse, a woman prosecuted for exposing her baby to drugs in utero may also lose custody of all children she has.

According to civil rights attorney Rachel Suppé, “Medical, pro-choice, and anti-poverty groups have challenged use of [Alabama's statute] in this manner, arguing that the law was not intended to criminalize women whose fetuses are exposed to controlled substances in utero.”²¹ In 2013, Hope Akrom, a mother who had been arrested and charged with chemical endangerment of a child due to her substance use during pregnancy, attempted to appeal her conviction to the Alabama Court of Criminal Appeals.²² Hope argued that she could not be guilty under the code because it applied to children, not fetuses.²³ The court ruled against her, determining that her conviction was in fact correct. In its certiorari, *Ex parte Ankrom*, the Alabama Supreme Court fortified that the term “child” in the chemical endangerment statute does legally apply to fetuses.²⁴ Thus, the

¹⁹ Martin Nina, “How Some Alabama Hospitals Quietly Drug Test New Mothers - Without Their Consent,” *ProPublica*, September 30, 2015.

²⁰ *op. cit.*, fn. 14

²¹ Rachel Suppé, “Pregnancy on Trial: The Alabama Supreme Court's Erroneous Application of Alabama Chemical Endangerment Law in *Ex parte Ankrom*,” *Health Law & Policy Brief*, Vol. 7, no. 2 (2014): 49-75.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

court has legitimized the criminalization approach based on the recognition of the fetus as having rights distinct from its mother's.

Alabama's punitive response to the issue of substance use during pregnancy, under the rationale of fetal protection, carries the potential to infringe upon the autonomy and integrity of pregnant women. For one, there has been an increased rate in cases where drug tests are conducted without consent or appropriate warning of the consequences that a positive test necessitates.²⁵ During her investigation, reporter Nina Martin reviewed hundreds of post-2006 court records in Alabama, revealing that drug testing across Alabama counties is ubiquitous, varied, and often not based on clear hospital policy.²⁶ Some hospitals seem to test only on a case-by-case basis. As pointed out by Martin, these variable hospital policies likely lead to health care workers' own prejudice influencing decisions on who gets tested.²⁷ For example, based on the criteria that expecting mothers who use drugs are more likely to go without prenatal care, some hospitals have decided to single out which mothers to test based on whether the mother has or has not received prenatal care.²⁸ This, however, promotes the unfair targeting of certain women. Poor women, especially those who live in more rural areas, are less likely to obtain proper prenatal care.²⁹ These discriminatory health policy practices are especially relevant in states like Alabama with significant underserved populations, where, in 2016, 18.2% of women aged 18 to 64, fell below the poverty line.³⁰ The

Alabama chemical endangerment statute is strategically being

²⁵ *op. cit.*, fn. 20

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Talk Poverty, "Alabama Report – 2017," *American Center For Progress* (2017).

used to criminalize mothers in the state of Alabama. It is one of many cases across the country that is contributing to the trend of greater state intervention into the lives of pregnant women.

State Activity: Criminal Law

The social context and criminal response to prenatal substance exposure changed drastically in the 1980s and has since become a controversial policy debate. Prior to the 1980s, charges of prenatal crime in the U.S. were few and far between, occurring only twice a decade.³¹ During the mid-1980s, however, "Media attention on the problems of 'crack babies' combined with technological advances in in utero fetal health monitoring [created] a public outcry against pregnant substance abusers".³² The focus of not only the public, but legislators, policymakers, judges, and lawyers shifted from protecting children to protecting fetuses, and sanctions via both the criminal justice system and the child protective system have been prevalent in the U.S. since.³³

According to research by Leticia Miranda and Christine Lee, the Guttmacher Institute, and the National Advocates for Pregnant Women, forty-five U.S. states have attempted to prosecute women for drug use during pregnancy since 1973 (Table I).³⁴ The only states which have not prosecuted women for drug use during pregnancy include Delaware, Iowa, Maine, Rhode Island, and Vermont.³⁵ Tennessee is the only state to have enacted a law explicitly making drug use during pregnancy a crime and proceeded to expire the law in July 2016 only two

³¹ *op. cit.*, fn. 12

³² *op. cit.*, fn. 18

³³ Darla Bishop, Liz Borkowski, Megan Couillard, Amy Allina, and Susanna Baruch, "Bridging the Divide White Paper: Pregnant Women and Substance Use: Overview of Research & Policy in the United States," *Jacobs Institute of Women's Health* (February 13, 2017).

³⁴ *op. cit.*, fn. 19

³⁵ *Ibid.*

years after passage.³⁶ Still, in other states, prosecutors have been able to use various existing state criminal laws to attack women for substance use during pregnancy. In Alabama substance use during pregnancy constitutes child abuse under the chemical endangerment law. Pregnant women across the nation have been arrested and charged with a wide range of crimes, including possession of a controlled substance, delivering drugs to a minor, corruption of a minor, child neglect, assault with a deadly weapon, and manslaughter.³⁷ For example, an Oklahoma mother was charged with second-degree murder and sentenced to spend fifteen years in prison after the stillbirth of her meth-exposed baby in 2004.³⁸

Table I: Substance Use and Pregnancy: State Responses

	Women have been prosecuted for drug use during pregnancy	Substance abuse during pregnancy is child abuse	Health care workers must report drug abuse during pregnancy
YES	45	18	15
NO	5	-	-
NO SPECIFIC LAW	-	32	35

The criminal prosecutions of pregnant women across the country have taken place most often under the rationale of protecting the fetus.³⁹ There is much debate in society about the status of the human embryo and fetus. The debate revolves around questions of personhood and resulting legal and moral rights – contested rights that underlie the use of fetal protection measures against pregnant women.⁴⁰ It continues to be a partisan, politically driven debate as well. For example, a 2016 Pew survey reports that 62% of Republicans believe abortion should

³⁶ Liss-Schultz Nina, “Tennessee’s War on Women Is Sending New Mothers to Jail,” *Mother Jones* (March 14, 2016).

³⁷ Cynthia Dailard and Elizabeth Nash, “State Responses to Substance Abuse Among Pregnant Women,” *Guttmacher Institute* (December 1, 2000).

³⁸ *op. cit.*, fn. 19

³⁹ *op. cit.*, fn. 12

⁴⁰ April L. Cherry, “Shifting our focus from retribution to social justice: An alternative vision for the treatment of pregnant women who harm their fetuses,” *Journal of Law and Health*, Vol. 28, no. 1 (Spring, 2015): 5-61.

be illegal in all or most cases with only 18% of Democrats sharing this view.⁴¹ The politicization of the debate carries its own implications. Today, thirty-eight states have passed fetal homicide laws or have amended their murder statutes to include the unborn.⁴² In *Roe v. Wade*, the U.S. Supreme Court rejected the claim that fetuses are separate legal persons with rights independent of their pregnant mothers. However, *Roe* also establishes a trimester framework that allows states to take an interest in fetal life and protection during the third trimester of pregnancy. Prosecutors and judges, consistent with the goals of personhood measures, continue to claim that *Roe* establishes legal rights of fetuses fully separate from those rights of pregnant women.⁴³ Subsequently, states adopt what they view as an obliged role of protecting these separate entities from their potential perpetrators – that is, their mothers.

To uncover a framework that underlies the connection between state infringement on pregnancies and reproductive decision-making, acclaimed scholar Dorothy Roberts identifies two key factors at stake. First, criminal prosecutions of drug addicted mothers impose severe penalties on women for choosing to complete pregnancies.⁴⁴ In other words, women are actually penalized for choosing to have their babies as opposed to choosing to terminate their pregnancies. Restricting a woman’s right to have children, regardless of society’s view of her responsibility as an expected mother, is an infringement on her reproductive freedom and bodily autonomy. Second, the state is interfering with women’s reproductive liberties

⁴¹ Fingerhut Hannah, “Women drive increase in Democratic support for legal abortion,” *Pew Research Center* (November 3, 2016).

⁴² Lynn M. Paltrow, and Jeanne Flavin, “Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women’s Legal Status and Public Health,” *Journal Of Health Politics, Policy & Law*, Vol. 38, no. 2 (2013): 299-34.

⁴³ *Ibid.*

⁴⁴ *op. cit.*, fn. 12

by imposing a certain “standard for procreation” – that some women do not deserve to have children.⁴⁵ The state often infringes on the lives of pregnant women with criminal sanctions based these concealed sentiments: that certain women are inferior, immoral, and should not be granted the same liberty as other “well-deserving” women. This dangerous ideology, frighteningly similar to that of the eugenics movement in the late 19th century, has historically led to the justification of ill practices such as forced sterilizations across the nation.

Further, criminalizing substance use during pregnancy arguably infringes on a woman’s liberty to seek medical care.⁴⁶ There are many medical reasons that health care professionals should be aware of drug use, such as ensure necessary prenatal care or to help prevent pregnancy complications.⁴⁷ Criminal laws, however, create an atmosphere of fear for women. In actuality, penal sanctions discourage effective public health approaches to the issue. These measures discourage women from obtaining prenatal care at all, avert them from following through with medical appointments, and cause women to withhold important information from their doctors.⁴⁸ The purpose of punitive measures backed by a criminal justice system is to establish actions as crimes and then punish the guilty individuals. This, however, is not the correct solution for every societal ill. Policymakers must confront the negative effects of criminalizing situations that often stem from systemic issues. Effective approaches, at the very least, should look to promote women’s health, liberty, and success.

⁴⁵ *op. cit.*, fn. 12

⁴⁶ *op. cit.*, fn. 38

⁴⁷ *op. cit.*, fn. 6

⁴⁸ Rebecca Stone, “Pregnant women and substance use: fear, stigma, and barriers to care,” *Health & Justice*, Vol. 3, no. 2 (February 2015).

State Activity: Termination of Parental Rights

Many states have also expanded their child welfare statutes to address prenatal drug exposure, treating the issue as a matter of civil law.⁴⁹ Eighteen states have laws dictating that drug use during pregnancy equates to child abuse (Table I).⁵⁰ In these states, signs of prenatal drug exposure can provide grounds for removing the infant from the mother’s custody and can cause the termination of a mother’s parental rights. Further, of the eighteen states that determine substance use during pregnancy as child abuse, seven of them – Minnesota, Iowa, Illinois, Oklahoma, Louisiana, Virginia, and Rhode Island – have laws which require health care workers to report to authorities if they suspect a pregnant woman is abusing drugs (Table I).⁵¹ These reports can be used as convicting evidence by the state in child welfare proceedings to terminate parental rights. Unfortunately, a major reason women do not disclose their drug use to a medical facility and seek treatment in the first place is because they fear their children may be immediately removed from their homes and they will lose parental rights and custody.⁵²

Equating drug use to child abuse may also initiate the severing of families without review of adequate, case-by-case evidence that it is indeed the best course of action to take for the benefit of the children and mothers. In fact, there is an, “extraordinary consensus by public health organizations, medical groups, and experts that such actions undermine rather than further maternal, fetal, and child health”.⁵³ While it may be important to investigate if a home situation and environment is healthy and supportive for children, these laws take a one-size-fits-all approach that substance using mothers are not worthy of parenting.

⁴⁹ *op. cit.*, fn. 34

⁵⁰ *op. cit.*, fn. 19

⁵¹ *Ibid.*

⁵² *op. cit.*, fn. 6

⁵³ *op. cit.*, fn. 44

The view that some pregnant women are not worthy of being mothers is therefore crucial to legitimizing the state's interfering in women's pregnancies. Dominant cultural notions of motherhood contribute to the idea and practices of controlling women with regard to childbirth and child raising.⁵⁴ These notions and norms have been promoted by the state as legal duties, and thus pregnant women who do not conform to these social norms are considered to be willfully immoral, bad mothers.⁵⁵ By imposing certain standards for procreation, based on specific societal norms, it interferes with a woman's reproductive liberty. For most of U.S. history, these norms determine notions of good versus bad motherhood that are based on the idea that bad mothers are those who do not express traditional family values. This, however, is problematic because it undermines true respect for women's control of their own bodies, a respect that makes up, "the backbone to an equal society".⁵⁶

It is also important to understand that the devaluing and demeaning of certain pregnant women rests on the rhetoric of "choice" that policy preferences of neoliberalism promote. These policy preferences, which focus on the defunding of social programs, promote the idea of personal responsibility and choice over the potential needs and barriers of the collective.⁵⁷ In the 1990s, courts began to implement policies and practices that emphasized personal responsibility and punishment – one example being that while public funding for assistance and education are being cut, prison funds have actually gone

⁵⁴ Lisa C. Ikemoto, "The Code of Perfect Pregnancy: At The Intersection Of The Ideology Of Motherhood, The Practice Of Defaulting To Science, And The Interventionist Mindset Of Law," *Ohio State Law Journal*, Vol. 53, no. 5 (1992): 1205-1306.

⁵⁵ Harris Pamala, "Compelled Medical Treatment of Pregnant Women: The Balancing of Maternal and Fetal Rights," *Cleveland State Law Review*, Vol. 49, no. 1 (2001): 133-161.

⁵⁶ *Ibid.*

⁵⁷ Angela Y. Davis, and Cassandra Shaylor, "Race, Gender, and the Prison Industrial Complex California and Beyond," *Meridians: Feminism, Race, and Transnationalism*, Vol. 2, no. 1 (2001): 1-25.

up.⁵⁸ Although the 1995 Personal Responsibility Deregulation Act failed in Congress, it is a perfect example of such proposed legislation. Its purpose was to "end the dependence of needy parents on government benefits by promoting work and marriage; and discourage out-of-wedlock births."⁵⁹ Expanding child welfare statutes in order to address prenatal drug exposure as a means of terminating parental rights works in a similar manner to penalize pregnant women for seeming to make "bad choices". Oftentimes use is perpetuated by addiction, poverty, abuse, or other factors that "bad choice" rhetoric ignores. Further, separating families solely based on evidence of substance use during pregnancy, should not be a policy solution to rely on for creating healthy families.

Implications

Despite the importance of stated concerns for the health and safety of children, it is crucial to analyze the implications that result from according fetal rights over the rights of the women who carry them. The common justification for criminalizing women based on their substance use is that it is an active attempt to promote the health and well-being of both mothers and children. However, based on my findings, the threat of punitive measures does much to damage the health of drug using women and their fetuses because it discourages them from obtaining necessary help or medical care. In fact, in many cases it is necessary to challenge if these actions are responses to a social health problem or are attempts to strategically further the agendas of fetal personhood. When this is indeed the case, these prosecutions, arrests, and laws must be criticized and examined as potentially undermining women's reproductive autonomy and

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

freedom. Additionally, with the rates of incarcerated women in the U.S. increasing by the year, policymakers should think more critically about their contributions to this phenomenon. Society must not unwarily accept the normalization of criminalizing this issue to an extent such that even medical workers, who's number one concern should be the promotion of health and well-being for these mothers, are expected to participate in their persecutions. Lastly, criminalization also normalizes negative social norms such as the stigmatization and discrimination of certain women, most often those of marginalized groups.

Conclusion

As put by the director of the National Advocates for Pregnant Women, Lynn Paltrow, "The truth is that we do not have to pit the woman against the fetus to promote healthy pregnancies or to value life".⁶⁰ To approach the issue of pregnant women whose behavior might have the potential to cause harm to their fetus, I argue that we should focus on the pregnant women's social locations rather than focus on fetal harm and protection. These social locations tend to include poverty, violence, need, and sometimes helplessness.⁶¹ Blaming and prosecuting individual women without understanding their distinct circumstances makes the goal of promoting the best situations possible for both mother and child difficult, if not impossible.

In contrast to punitive measures, public health approaches to substance use during pregnancy promote harm reduction and treatment. While substance use may have negative health consequences, imposing legal and criminal punishments on mothers very often leads to worse outcomes for both the mother and child.⁶² Effective treatment has the

⁶⁰ Julia Hanigsberg and Sara Ruddick, *Mother Troubles: Rethinking Contemporary Maternal Dilemmas* (Boston: Beacon Press, 1999).

⁶¹ *op. cit.*, fn. 42

⁶² *op. cit.*, fn. 34

potential to actually better the health of women and children, while punitive approaches can make it less likely that women will receive any healthcare services.⁶³ This means that how the situation is currently being handled in some states hinders the possibility of women seeking not only prenatal care for their fetus, but for treatment and care of their own substance use. Further, women's own perspectives should be incorporated in policy solutions. In one study, where researchers conducted in-depth interviews with pregnant drug using mothers, it was undoubtedly concluded that punitive policies have severe effects on women's abilities and decisions to seek help for their drug use.⁶⁴ There should be numerous widely available and accessible treatment options. There should be more support for keeping women in treatment for not only the duration of their pregnancy, but for as long as they need to and wish to receive help.

Thus, if policymakers want to most effectively tackle issues of substance use during pregnancy, they should incorporate women's voices about what the barriers to help are and come up with the necessary and helpful state-supported programs. They should focus on creating humane, evidence-based drug policies and ensuring that adequate health care and reproductive freedom is accessible to all. Now more than ever, it is crucial to challenge health care workers, law enforcement, child welfare officials, social workers, judges, and policy makers to examine the role they play in the intervention of the liberties of pregnant women and look to change what we know to be harmful.

⁶³ *Ibid.*

⁶⁴ *op. cit.*, fn. 50