

Selected, Edited, and with Issue Framing Material by:
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ISSUE



Should a Pregnant Woman Be Punished for Exposing Her Fetus to Risk?

YES: Liles Burke, from *Hope Elisabeth Ankrom v. State of Alabama*, Circuit Court of Coffee County (2011)

NO: Lynn M. Paltrow, from "Punishment and Prejudice: Judging Drug-Using Pregnant Women," in Julia A. Hanigsberg and Sara Ruddick, eds., *Mother Troubles: Rethinking Contemporary Maternal Dilemmas*, Beacon Press (1999)

Learning Outcomes

After reading this issue, you will be able to:

- Discuss the implications of maternal responsibility during pregnancy.
- Discuss how environmental factors may affect a person's well-being and a person's responsibility for their behavior.
- Discuss how the debate about abortion is affecting public policy on other issues, including substance abuse and child welfare.

ISSUE SUMMARY

YES: Liles Burke sets out the majority opinion of the Alabama Court of Criminal Appeals in a case involving a pregnant woman who was found to have used cocaine while pregnant. Burke argues that Alabama law that forbids adults from exposing children to controlled substances applies in cases involving pregnant women and their fetuses.

NO: Attorney Lynn M. Paltrow argues that treating drug-using pregnant women as criminals targets poor, African American women while ignoring other drug usage and fails to provide the resources to assist them in recovery.

In 1989, fueled by the specter of an epidemic of drug use resulting in the birth of thousands of "crack babies," the Medical University of South Carolina established a program that required drug-using pregnant women to seek treatment and prenatal care or face criminal prosecution. This program applied only to patients attending the university's obstetric clinic, primarily poor black women, and not to private patients. Patients enrolled in the clinic saw a video and were given written information about the harmful effects of substance abuse during pregnancy. The information warned that the police, the court system, and

child protective services in Charleston, South Carolina might become involved if illegal drug use were detected.

Women who met certain criteria were required to undergo periodic urine screening for drugs. A patient who had a positive urine test or who failed to keep scheduled appointments for therapy or prenatal care could be arrested and placed in custody. If a woman delivered a baby who tested positive for drugs, she would be arrested immediately after her medical release and her newborn taken into protective custody. If the drug use was detected within the first 27 weeks of gestation, the patient was charged with possession of an illegal substance; after that date, the charge

was possession and distribution of an illegal substance to a minor. If the drug use were detected during delivery, the woman would be charged with unlawful neglect of a child.

This stringent policy was developed as a result of clinicians' concern about the harmful effects of drug use on fetal development and prosecutors' desires to take a strong public stand condemning drug use. The Supreme Court of South Carolina upheld the law in a 1997 decision involving a woman, Cornelia Whitner, who admitted to using cocaine during pregnancy and whose baby was born with cocaine metabolites in his system. The court wrote that, "The abuse or neglect of a child at any time during childhood can exact a profound toll on the child herself as well as on society as a whole. However, the consequences of abuse or neglect that takes place after birth often pale in comparison to those resulting from abuse suffered by the viable fetus before birth."

Critics argued, however, that the law punished women without helping them correct their behavior. Although the law's stated goal was to get women into treatment, there were few places that women could receive treatment and the necessary support, such as transportation and child care. At the time, there was no women-only residential treatment center for substance-abusing pregnant women anywhere in the state.

The program was discontinued in September 1994 as the result of a settlement with the Civil Rights Division of the federal Department of Health and Human Services. By then, 42 pregnant women had been arrested. In recent years, however, similar cases have been tried in other states. In Alabama, prosecutors began filing charges against women under the state's 2006 chemical endangerment law, whose explicit goal was to prevent adults from bringing children to methamphetamine laboratories and other places where illegal substances are produced or distributed. Prosecutors argued that the law also applied to fetuses exposed to drugs while in the uterus. A long list of medical, legal, and public organizations filed legal briefs arguing against their interpretation of the law, but their prosecutors' position has been upheld by the Alabama Court of Criminal Appeals. Over 60 women have now been charged under the law.

In *Hope Elisabeth Ankrom v. State of Alabama*, Justice Liles Burke explains why a majority of the court's justices found that the state's chemical endangerment law includes a fetus within its definition of "child." Lynn Paltrow argues, however, that criminalization of drug use is a punitive response that rejects the humanity of the women who are denied treatment and support for recovering from their addiction.



YES

Liles Bur

Hope Elisabeth Ankrom v. State of Alabama

Hope Elisabeth Ankrom pleaded guilty to chemical endangerment of a child, a violation of [Section 26-15-3.2 of the Code of Alabama]. . . . The trial court sentenced Ankrom to three years in prison, but the court suspended that sentence and placed her on one year of supervised probation. Ankrom appealed her conviction. We affirm.

Facts and Procedural History

At the guilty-plea hearing, the parties stipulated to the following facts:

"On January 31, 2009, the defendant, Hope Ankrom, gave birth to a son, [B.W.], at Medical Center Enterprise. Medical records showed that the defendant tested positive for cocaine prior to giving birth and that the child tested positive for cocaine after birth.

"Department of Human Resources worker Ashley Arnold became involved and developed a plan for the care of the child. During the investigation the defendant admitted to Ashley that she had used marijuana while she was pregnant but denied using cocaine.

"Medical records from her doctor show that he documented a substance abuse problem several times during her pregnancy and she had tested positive for cocaine and marijuana on more than one occasion during her pregnancy."

On February 18, 2009, Ankrom was arrested and charged with chemical endangerment of a child. On August 25, 2009, the grand jury indicted Ankrom. The indictment stated that Ankrom "did knowingly, recklessly, or intentionally cause or permit a child . . . to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260 of the Code of Alabama. . . .

Discussion

Ankrom alleges that based on the facts of this case cannot be convicted of violating § 26-15-3.2(a)(1), Ala.Code 1975. . . . [T]he issue before this Court is whether a mother who ingested a controlled substance during pregnancy, may be prosecuted under § 26-15-3.2(a)(1), Ala.Code 1975, if at birth the infant tests positive for a controlled substance. We answer that legal question in the affirmative, and we conclude that based on the facts of this case, Ankrom's conviction was proper. . . .

Turning to the merits of the present case, § 26-15-3.2(a)(1), Ala.Code 1975, provides:

"(a) A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she does any of the following:

"(1) Knowingly, recklessly, or intentionally causes or permits a child to be exposed to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in Section 13A-12-260. A violation under this section is a Class C felony."

Ankrom alleges that the term "child" in § 26-15-3.2(a)(1), Ala.Code 1975, does not include a viable fetus. The state responds that the plain meaning of the term "child" used in the statute, includes an unborn child.

. . . The legislature has stated that "[t]he public policy of the State of Alabama is to protect life, born or unborn. This is particularly true concerning unborn children that is capable of living outside the womb." . . . Section 15 of Title 26, Ala.Code 1975, does not define the term "child." However, Chapters 14 and 16 of Title 26, Ala.Code 1975, define a "child" as a "person" under the age of 18 years. . . .

Also, the Alabama Supreme Court has interpreted the term "minor child" in Alabama's wrongful-death-of-minor statute to include a viable fetus that received prenatal injuries causing death before a live birth. . . . Specifically, the Court held that "the parents of an eight and one-half month old stillborn fetus [are] entitled to maintain an action for the wrongful death of the child"; thus, the Court explicitly recognized the viable fetus as a "child." Eich, 293 Ala. at 100, 300 So. 2d at 358.

Furthermore, the dictionary definition of a word provides the meaning ordinary people would give the word. . . . According to Merriam-Webster's Collegiate Dictionary 214 (11th ed.2003), the word "child" is defined as "an unborn or recently born person." The word "child" is defined in Black's Law Dictionary 254 (8th ed.2004), as "[a] baby or fetus." . . .

. . . [W]e do not see any reason to hold that a viable fetus is not included in the term "child," as that term is used in § 26-15-3.2, Ala.Code 1975. Not only have the courts of this State interpreted the term "child" to include a viable fetus in other contexts, the dictionary definition of the term "child" explicitly includes an unborn person or a fetus. In everyday usage, there is nothing extraordinary about using the term "child" to include a viable fetus. For example, it is not uncommon for someone to state that a mother is pregnant with her first "child." Unless the legislature specifically states otherwise, the term "child" is simply a more general term that encompasses the more specific term "viable fetus." If the legislature desires to proscribe conduct against only a "viable fetus," it is necessary to use that specific term. However, if the legislature desires to proscribe conduct against a viable fetus and all other persons under a certain age, the term "child" is sufficient to convey that meaning. In fact, proscribing conduct against a "child" and a "viable fetus" would be redundant.

The term "child" in § 26-15-3.2, Ala.Code 1975, is unambiguous; thus, this Court must interpret the plain language of the statute to mean exactly what it says and not engage in judicial construction of the language in the statute. Also, because the statute is unambiguous, the rule of lenity does not apply. We do not see any rational basis for concluding that the plain and ordinary meaning of the term "child" does not include a viable fetus.

Ankrom advances three main arguments against interpreting the term "child" in § 26-15-3.2, Ala.Code 1975, to include a viable fetus: (1) The legislature has specifically included the term "fetus" or "unborn child" in other statutes when the legislature's intent was for the statute to apply to a fetus; (2) most courts from other jurisdictions have held that mothers could not be criminally prosecuted for prenatal substance abuse on the statutory theories of child abuse/endangerment or drug distribution;

and (3) the legislature has declined to amend § 26-15-3.2, Ala.Code 1975, to explicitly include an unborn child in the definition of the term "child." We will address each argument in turn.

Contrary to Ankrom's argument, the fact that the legislature has included the term "fetus" or "unborn child" in other statutes does not mean that the term "child" in § 26-15-3.2, Ala.Code 1975, does not include a viable fetus. Ankrom specifically points to § 26-23-3, Ala.Code 1975, as an example to support her argument. Section 26-23-3, Ala.Code 1975, provides: "Any physician who knowingly performs a partial-birth abortion within this state and thereby kills a human fetus shall be guilty of a Class C felony and upon conviction thereof shall be punished as prescribed by law." Ankrom states that "[t]here is no doubt in the plain meaning of that statute of which class it is designed to protect: human fetuses." . . . Ankrom then reasons that "[i]f the legislature had intended for § 26-15-3.2(a) to apply to a fetus, then the legislature would have specifically included that language as it has in other statutes." . . . However, the flaw in Ankrom's reasoning is that she misses the distinction between the use of the more specific term "human fetus" and the more general term "child." As stated earlier, the general term "child" encompasses the more specific term "fetus." Statutes such as § 26-23-3 can only apply to a fetus or unborn child because it is impossible to perform an abortion after a live birth has been completed, so using the more general term "child" in such a statute would be nonsensical. On the other hand, statutes such as § 26-15-3.2 may proscribe conduct against born and unborn children; thus, the more general term "child" is necessary. Therefore, Ankrom's first argument is without merit.

Next, we acknowledge the many decisions from appellate courts in other states holding that a mother cannot be criminally prosecuted for prenatal substance abuse under those states' child abuse/endangerment or drug-distribution statutes. . . . However, we find that those cases are either distinguishable from the present case or unpersuasive.

Some of the cases from other jurisdictions involved prosecutions under statutes forbidding delivery of a controlled substance and, unlike the present case, depended on statutory construction of the term "deliver." . . . In other cases, the courts noted that their states' homicide statutes did not apply to a fetus, unlike Alabama's homicide statute, which does apply to unborn children. . . .

In Collins, the Texas Court of Appeals held that, divergent from Alabama, "the [Texas] Penal Code does not proscribe any conduct with respect to a fetus, and the Legislature, by its definitions of 'child,' 'person,' and 'individual,' has specifically limited the application of our penal laws to conduct committed against a human being who has been

born and is alive." . . . Similarly, in *Dunn*, the Washington Court of Appeals held that "[n]o Washington criminal case has ever included 'unborn child' or fetus in its definition of person." . . .

In *Gray*, unlike the present case, the mother was prosecuted under a statute that stated, in relevant part: "No person, who is the parent of a child under eighteen years of age shall create a substantial risk to the health of safety of the child, by violating a duty of care, protection, or support." . . . Noting that criminal statutes must be strictly construed, the Ohio Supreme Court interpreted that statute by defining the terms "parent" and "child" to apply only to the relationship between mothers and fathers and their born infants. . . .

Other courts have worried about the implications of holding a mother criminally liable under a child-endangerment statute for conduct harmful to her fetus. Specifically, other courts have worried that holding a mother liable under such statutes would open the proverbial floodgates to prosecution of pregnant women who ingest legal toxins, such as alcohol or nicotine, or engage in any behavior that could conceivably injure the fetus. . . . In *Wade*, the Missouri Court of Appeals stated that the logic of allowing prosecutions to protect the interest of the fetus "would be extended to cases involving smoking, alcohol ingestion, the failure to wear seatbelts, and any other conduct that might cause harm to a mother's unborn child. It is a difficult line to draw and, as such, our legislature has chosen to handle the problems of pregnant mothers through social service programs instead of the court system." . . . However, in the present case, we need not worry about such unlimited extensions because we are not dealing with a general endangerment statute. Section 26-15-3.2(a)(1), Ala.Code 1975, the only statute we are asked to construe, concerns only conduct involving controlled substances or drug paraphernalia. It does not concern conduct involving smoking, alcohol ingestion, failure to wear seatbelts, or any other potentially harmful conduct that does not involve controlled substances.

Other courts have examined policy issues, legislative history, or other extrinsic materials to reach their conclusions that a mother cannot be criminally prosecuted for prenatal substance abuse under those states' child-abuse/endangerment statutes. . . . However, we are not at liberty to engage in such a review because we hold that § 26-15-3.2(a)(1), Ala.Code 1975, is unambiguous on its face. See *Pinigis v. Regions Bank*, 977 So.2d 446, 451 (Ala.2007) (holding that "courts may examine extrinsic materials, including legislative history, to determine [legislative] intent" only "[i]f the statutory language is ambiguous").

Again, we find the cases from other states hold that a mother cannot be criminally prosecuted for prenatal substance abuse under those states' child-abuse/endangerment or drug-distribution statutes to be distinguishable from the present case. To the extent that they are indistinguishable, we find that their reasoning is unpersuasive.

Ankrom's final argument against interpreting the term "child" in § 26-15-3.2, Ala.Code 1975, to include a viable fetus alleges that we should not interpret the "child" to include a viable fetus because the legislature recently attempted to amend § 26-15-3.2, Ala.Code 1975, to explicitly state that the term "child" includes a child in utero at any stage of development, but the amendment failed. However, " 'failed legislative proposals' are not a particularly dangerous ground on which to rest an interpretation of a prior statute." . . . *Baney v. State*, 42 So.3d 174 (Ala.Crim.App.2009) . . . In the present case, we do not need to speculate as to why the proposed amendment failed. Again, we hold that § 26-15-3.2, Ala.Code 1975, is unambiguous on its face; thus, we must construe the statute to mean exactly what it says. . . .

Finally, Ankrom argues that § 26-15-3.2, Ala.Code 1975, as applied in the present case, is void for vagueness because, she says, the statute did not give her fair notice that her conduct was proscribed. See *Vann v. State*, 880 So.2d 1178, 1195 (Ala.Crim.App.2003), holding that "the void-for-vagueness doctrine requires that a statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," but that the prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision" because "any statutes will have some inherent vagueness." . . . In most English words and phrases there lurk uncertainties. Specifically, Ankrom alleges that "[t]he plain language of the statute does not give notice that its criminal prohibition applies to fetuses exposed to controlled substances; for that reason, Ms. Ankrom is being deprived of her procedural right to fair notice of what conduct is impermissible." . . . However, as we held above, the plain meaning of the term "child," as found in § 26-15-3.2, Ala.Code 1975, includes a viable fetus. Therefore, Ankrom had fair notice that her conduct was proscribed; thus, her constitutional argument is without merit.

LILES BURKE is a justice on the Alabama Court of Criminal Appeals.

Lynn M. Paltrow



Punishment and Prejudice: Judging Drug-Using Pregnant Women

The Villain Cocaine

In the late 1980s and into the 1990s newspapers, magazines, and television were full of stories documenting the devastating effects of cocaine and predicting a lost generation irredeemably damaged by the effects of their mothers' cocaine use. For example, in 1991 *Time* magazine ran a cover story on the subject.¹ Bold yellow letters read "Crack Kids" followed by the headline: "Their mothers used drugs, and now it's the children who suffer." The face of a tearful child filled the page beneath the words. . . .

The same year the *New York Times* ran a front page story entitled "Born on Crack and Coping with Kindergarten."² The story is accompanied by a photograph of a school teacher surrounded by young children. Underneath the caption reads: "I can't say for sure it's crack, said Ina R. Weisberg, a kindergarten teacher at P.S. 48 in the Bronx, but I can say that in all my years of teaching I've never seen so many functioning at low levels."

Throughout these years medical and popular journals, public school teachers and judges alike were willing to assume that if a child had a health or emotional problem and he or she had been exposed prenatally to cocaine, then cocaine and cocaine alone was the cause of the perceived medical or emotional problem. Rather than wait for careful research and evaluation of the drug's effect there was, as several researchers later criticized, a "rush to judgment" that blamed cocaine for a host of problems that the research simply has not borne out.³

Indeed, an article in the medical journal *Lancet* in 1989 found that scientific studies that concluded that exposure to cocaine prenatally had adverse effects on the fetus had a significantly higher chance of being published than more careful research finding no adverse effects.⁴ The published articles, delineating the harmful effects on infants prenatally exposed to cocaine, reported brain damage, genitourinary malformations, and fetal demise as just a few of the dire results of a pregnant woman's cocaine use. Infants that survived the exposure were described as inconsolable, unable

to make eye contact, emitting a strange high-pitched piercing wail, rigid and jittery. These early studies, however, had numerous methodologic flaws that made generalization from them completely inappropriate. For example, these studies were based on individual case reports or on very small samples of women who used more than one drug. Researchers often failed to control for the other drugs and problems the mother might have, and/or failed to follow up on the child's health.⁵ The articles describing these studies were nevertheless relied upon to show that cocaine alone was the cause of an array of severe and costly health problems.

Like alcohol and cigarettes, using cocaine during pregnancy can pose risks to the woman and the fetus. More carefully controlled studies, however, are finding that cocaine is not uniquely or even inevitably harmful. For example, unlike the devastating and permanent effects of fetal alcohol syndrome, which causes permanent mental retardation, cocaine seems to act more like cigarettes and marijuana, increasing certain risks like low birth weight but only as one contributing factor and only in some pregnancies.⁶ Epidemiological studies find that statistically speaking many more children are at risk of harm from prenatal exposure to cigarettes and alcohol. In fact, one recent publication on women and substance abuse has created the label "Fetal Tobacco Syndrome" to draw attention to the extraordinarily high miscarriage and morbidity rates associated with prenatal exposure to cigarette smoke.⁷

By the late 1980s it was already becoming clear to researchers in the field that the labels "crack babies" and "crack kids" were dangerous and counterproductive.⁸ If one read far enough in the *Time* article—past the pictures of premature infants and deranged children—the story reported that

[a]n increasing number of medical experts, however, vehemently challenge the notion that most crack kids are doomed. In fact, they detest the term crack kids, charging that it unfairly brands the children and puts them all into a single

dismal category. From this point of view, crack has become a convenient explanation for problems that are mainly caused by a bad environment. When a kindergartner from a broken home in the impoverished neighborhood misbehaves or seems slow, teachers may wrongly assume that crack is the chief reason, when other factors, like poor nutrition, are far more important.

Even the *New York Times* article about crack-exposed children in kindergarten eventually revealed that researchers "after extensive interviews [found] the problems in many cases were traced not to drug exposure but to some other traumatic event, death in the family, homelessness, or abuse, for example."⁹ And despite the fact that school administrators "rarely know who the children are who have been exposed to crack . . . and the effects of crack are difficult to diagnose because they may mirror and be mixed up with symptoms of malnutrition, low birth-weight, lead poisoning, child abuse and many other ills that frequently afflict poor children," the article resorts to crack as the only reasonable explanation for an otherwise seemingly inexplicable phenomenon. . . .

The Public Responds

The public response to the media and medical journal reports was largely one of outrage. The harshest reaction was the call for the arrest of the pregnant women and new mothers who used drugs. Numerous states considered legislation to make it a crime for a woman to be pregnant and addicted.¹⁰ Although not a single state legislature passed a new law creating the crime of fetal abuse, individual prosecutors in more than thirty states arrested women whose infants tested positive for cocaine, heroin, or alcohol. Many of these women were arrested for child abuse, newly interpreted as "fetal" abuse. Others, like Jennifer Johnson in Florida, were charged with delivery of drugs to a minor.¹¹ In that case, the prosecutor argued that the drug delivery occurred through the umbilical cord after the baby was born but before the umbilical cord was cut. Still other women were charged with assault with a deadly weapon (the weapon being cocaine), or feticide (if the woman suffered a miscarriage), or homicide (if the infant, once born, died). Some women were charged with contributing to the delinquency of a minor.

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

In 1989, the city of Charleston, South Carolina, established a collaborative effort among the police department,

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

While the hospital refused to create a drug treatment program designed to meet the needs of pregnant addicts, or to put even a single trained drug counselor on its obstetrics staff, it did create a program for drug-testing certain patients, their in-hospital arrest, and removal to jail (where there was neither drug treatment nor prenatal care); the ongoing provision of medical information to the police and prosecutor's office; and tracking for purposes of ensuring their arrest. Some women were taken to jail while still bleeding from having given birth. They were handcuffed and shackled while hospital staff watched with approval. All but one of the women arrested were African American. The program itself had been designed by and entrusted to a white nurse who admitted that she believed that the "mixing of races was against God's will."¹² She noted in the medical records of the one white woman arrested that she lived "with her boyfriend who is a Negro."¹³ . . .

Who Are These Mothers?

As a report from the Southern Regional Project on Infant Mortality observed:

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.¹⁴

African American women have been disproportionately targeted for arrest and punishment, not because they use more drugs or are worse mothers, but because

as Dorothy Roberts explains, "[t]hey are the least likely to obtain adequate prenatal care, the most vulnerable to government monitoring, and the least able to conform to the white middle-class standard of motherhood. They are therefore the primary targets of government control."¹⁵

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

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

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

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

But like Sipowicz, pregnant women who use drugs also have histories and complex lives that affect their behavior and their chances of recovery. We know that substance abuse in pregnancy is highly correlated with a history of violent sexual abuse.¹⁶ In one study 70 percent of the pregnant addicted women were found to be in violent battering relationships. A hugely disproportionate number, compared to a control group, were raped as children. Drugs appear to be used as a means to numb the pain of a violent childhood and adulthood. Like Vietnam veterans who self-medicated with drugs for their post-

traumatic stress disorders, at least some pregnant women also use drugs to numb the pain of violent and traumatic life experiences.¹⁷

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

All pregnant women, not just poor ones, are routinely denied access to the limited drug treatment that exists in this country. In a landmark study in 1990, Dr. Wendy Chavkin surveyed drug treatment programs in New York City. She found that 54 percent flat out refused to take pregnant women.¹⁸ Sixty-seven percent refused to take women who relied on Medicaid for payment, and 84 percent refused to take crack-addicted pregnant women.

One hospital in New York was sued for excluding women from drug treatment. The program argued that its exclusion of all women was justified and no different from its medical judgment to exclude all psychotics.¹⁹ While New York State courts found that such exclusion violated state law, this did not automatically increase needed services. . . .

Other barriers also exist. [In the case of Jennifer Johnson, a pregnant Florida woman,] Judge Eaton ruled that "the defendant also made a choice to become pregnant and to allow those pregnancies to come to term." The prosecutor argued that "[w]hen she delivered that baby she broke the law." By saying this, the judge makes clear that it was having a child that was against the law. If Ms. Johnson had had an abortion she would not have been arrested—even for possessing drugs.²⁰ But this statement not only reveals a willingness to punish certain women for becoming mothers, it also reflects a host of widely held beliefs and assumptions about access to reproductive health services for women.

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

supposed to call them that but that's what they are . . . when I was a little boy, that's what they called them."²¹

On call-in radio talk shows someone inevitably asks why these mothers can't just be sterilized or injected with Depo Provera until they can overcome their drug problems and, while they are at it, their low socioeconomic status. The consistency of this view should not be surprising given our country's history of eugenics and sterilization abuse. Indeed, the U.S. Supreme Court has declared sterilization of men unconstitutional, but has never overturned its decision upholding the sterilization of women perceived to be a threat to society.²²

The suggestion of sterilization, however, is particularly attractive if there is no explanation about why a pregnant woman with a drug problem would want to become pregnant or to have a child in the first place. But drug-using pregnant women become pregnant and carry to term for the same range of reasons all women do. Because contraception failed. Because they fell in love again and hoped this time they could make their family work. Because they are "prolife" and would never have an abortion. Because when they found out the beloved father of the baby was really already married, they thought it was too late to get a legal abortion. Because they do not know what their options might be. Because they have been abused and battered for so long they no longer believe they can really control any aspect of their lives including their reproductive lives. Because they wanted a child. Because their neighbors and friends, despite their drug use, had healthy babies and they believed theirs would be healthy too.

The threat of sterilization is just another punitive response that denies the humanity of the women themselves. Although Judge Eaton did not propose sterilization as part of the sentence he imposed on Ms. Johnson, as some judges in related cases have,²³ he undoubtedly assumed that Ms. Johnson could decide, once pregnant, whether or not to continue that pregnancy to term. Since 1976, however, the United States government has refused to pay for poor women's abortions and few states have picked up the costs.²⁴ In Florida, like most other states, the "choice" Judge Eaton spoke of does not exist for low-income women. . . .

Lack of access to abortion services is only one of the many barriers that exist for a drug-addicted pregnant woman who attempts to make responsible "choices." There are many other barriers that make it extremely difficult for pregnant women on drugs to get the kind of help and support they need. Access to services for drug-addicted women who are physically abused is also limited. For example, many battered women's shelters are set up to deal with women who have experienced violence, but

are not equipped to support a woman who has become addicted to drugs as a way to numb the pain of the abuse.²⁵ Other barriers include lack of housing, employment, and access to prenatal care. As one of the few news stories to discuss these women's dilemmas explains:

Soon after she learned she was pregnant, [Kimberly] Hardy [who was eventually prosecuted for delivery of drugs to a minor], convinced she had to get away from her crowd of crack users as well as her crumbling relationship with her [boy-friend] Ronald, took the kids home to Mississippi for the duration of her pregnancy. But by moving, she lost her welfare benefits, including Medicaid. Unable to pay for clinic visits, she had to go without prenatal care.²⁶

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

Nevertheless, men often do play a significant role. For example, in California Pamela Rae Stewart was arrested after her newborn died. One of her alleged crimes contributing to the child's ultimate demise was having sex with her husband on the morning of the day of the delivery. Her husband, with whom she had had intercourse, was never arrested for fetal abuse. Indeed, the prosecuting court papers argued that Ms. Stewart had "subjected herself to the rigors of intercourse," thereby totally nullifying the man's involvement or culpability.²⁷

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

that a man's drug use could not have hurt the developing baby in the first place. However, studies indicate that male drug use can affect birth outcome: Studies on male alcohol use have demonstrated a relationship between male drinking and low birth weight in their children and a study of cocaine and men suggests that male drug use can also affect birth outcome.²⁸

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

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

The problem with treating the fetus as a person is that women will not simply continue to be less than equal, they will become nonpersons under the law. [To oppose the recognition of fetal personhood as a matter of law is not to deny the value and importance of potential life as a matter of religious belief, emotional conviction, or personal experience. Rather, by opposing such a new legal construct, we can avoid devastating consequences to women's health, prenatal health care, and women's hope for legal equality.—L.P.] No matter how much value we place on a fetus's potential life, it is still inside the woman's body. To pretend that the pregnant woman is separate is to reduce her to nothing more than, as one radio talk show host asserted, a "delivery system" for drugs to the fetus.

Notes

1. *Time Magazine* (13 May 1991).
2. Suzanne Dale, "Born on Crack and Coping with Kindergarten," *New York Times* (7 February 1991), A1.
3. Linda C. Mayes, R. H. Granger, M. H. Bornstein, and B. Zuckerman, "The Problem of Cocaine Exposure, A Rush to Judgment," *Journal of the American Medical Association* 267 (1992): 406.
4. Gideon Koren, Karen Graham, Heather Shear, and Tom Einarson, "Bias Against the Null Hypothesis: The Reproductive Hazards of Cocaine," *Lancet* (1989): 1, 1440-1442.
5. Mayes, "The Problem of Cocaine Exposure"; B. Lutiger, K. Graham, T. R. Einarson, and G. Koren, "Relationship Between Gestational Cocaine Use and Pregnancy Outcome: A Meta-Analysis," *Teratology* (1991): 44, 405-414.
6. Barry Zuckerman et al., "Effect of Maternal Marijuana and Cocaine Use on Fetal Growth," *New England Journal of Medicine* 320, no. 12 (23 March 1990): 762-768; Deborah A. Frank and Barry S. Zuckerman, "Children Exposed to Cocaine Prenatally: Pieces of the Puzzle," *Neurotoxicology and Teratology* 15 (1993): 298-300; Deborah A. Frank, Karen Breshahn, and Barry Zuckerman, "Maternal Cocaine Use: Impact on Child Health and Development," *Advances in Pediatrics* 40 (1993): 65-99.
7. Center on Addiction and Substance Abuse at Columbia University, *Substance Abuse and the American Woman* (1997); Joseph R. DiFranza and Robert A. Lew, "Effect of Maternal Cigarette Smoking on Pregnancy Complications and Sudden Death Syndrome," *Journal of Family Practice* 40 (1995): 385. Cigarette smoking has been linked to as many as 141,000 miscarriages and 4,800 deaths resulting from perinatal disorders, as well as 2,200 deaths from sudden infant death syndrome, nationwide.
8. American Academy of Pediatrics, Committee on Substance Abuse. Drug Exposed Infants, *Pediatrics* 86 (1990): 639.
9. Dale, "Born on Crack."
10. Allison Marshall, 1992, 1993, 1994 Legislative Update, in *National Association for Families and Addiction Research and Education Update* (Chicago, 1993, 1994, 1995).
11. *Johnson v. State*, 602 So.2d 1288 (Fla. 1992).
12. Brown Trial Transcript, *Ferguson et al. v. City of Charleston et al.*, U.S. District Court for the District of South Carolina, Charleston Division, C/A No. 2:93-2624-1 at 5:18-21 (Dec. 10, 1996).
13. Plaintiffs' Exhibit 119, *Ferguson et al. v. City of Charleston et al.*, U.S. District Court for the District

EXPLORING THE ISSUE



Should a Pregnant Woman Be Punished for Exposing Her Fetus to Risk?

Critical Thinking and Reflection

1. The well-being of children is surely vitally important; how does the value attached to their well-being compare, as a matter of public policy, against the value of a woman's freedom and privacy?
2. Avoiding exposure to dangerous substances is about creating a good environment for the child; what is the responsibility of a person to make good decisions when environmental factors in their own life may not have helped them acquire good decision-making skills?
3. Does recognition that a child's well-being can be impaired by things that happen before the child is born lead one to conclude that a fetus is a person?
4. In your view, is protection of persons-to-be best achieved by criminalizing bad behavior or by fostering good behavior in mothers (and fathers)?

Is There Common Ground?

State policies similar to that developed by Alabama prosecutors remain highly contested. In New Mexico in May 2007, the Supreme Court struck down a law expanding the state's criminal child abuse law to drug-using pregnant women and fetuses. Courts in many other states have ruled similarly on this issue. However, according to the Guttmacher Institute, 15 states consider substance abuse during pregnancy to be child abuse under civil child-welfare statutes, and three consider it grounds for civil commitment. Some states also require health care professionals to report suspected prenatal drug abuse or to test for prenatal drug exposure if they suspect abuse. In 2012, *Ankrom v. State* and a similar case concerning a woman named Amanda Kimbrough were appealed from the Alabama Court of Criminal Appeals to the Supreme Court of Alabama. As of this writing, a ruling had not been issued.

Personhood laws have been introduced in a number of states. The measures have been struck down in Colorado, South Dakota, California, and Mississippi, but a bill signed into law in Oklahoma in February 2012 states that the laws of the state "shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development all the rights, privileges, and immunities available to other persons, citizens, and residents of this state." Virginia lawmakers have suspended consideration of a similar law until at least 2013.

The approach tried in South Carolina to criminalize substance abuse in pregnancy has been limited by privacy concerns. In March 2001, the U.S. Supreme Court ruled in the case of *Ferguson v. City of Charleston* (121 S.C. 1281) that the Medical University of South Carolina's program to require drug-using pregnant women to seek treatment and prenatal care or face criminal prosecution was unconstitutional. The Court reversed the decision of the lower Fourth Circuit Court of Appeals and sent the case back to the circuit court for a factual determination of whether the women had actually consented to the search that led to their arrest and imprisonment. The circuit court had ruled that the searches were not "unreasonable searches" (prohibited under the Fourth Amendment to the Constitution) because of the "special need" to protect women and children from the consequences of cocaine use in pregnant women. The Supreme Court rejected this claim. But the Court's decision did not settle the public policy and ethical challenges that remain concerning drug use and pregnant women.

Additional Resources

An amicus brief filed in support of Hope Ankrom and Amanda Kimbrough on behalf of a list of organizations and individuals by the Drug Policy Alliance, National Advocates for Pregnant Women, and the Southern Poverty Law Center is available at http://advocatesforpregnantwomen.org/featured/in_the_alabama_supreme_court_1.php.