October 2015

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PEELING BACK THE LAYERS OF SUBSTANCE ABUSE DURING PREGNANCY

Katherine Sikich*

INTRODUCTION

When she was fourteen years old, Cornelia Whitner, an African American from South Carolina, witnessed her mother’s unexpected death. This loss was especially devastating to Cornelia because her mother had been her only support system. Feeling lost and alone following her mother’s death, Cornelia turned to marijuana, alcohol, and other drugs. By the time Cornelia turned fifteen years old, she dropped out of school and became pregnant. Cornelia went on to have two more children, the youngest of whom was born with cocaine in his system. Even though the boy was healthy, Cornelia was arrested, charged, and convicted of child abuse because of her cocaine use during pregnancy. On appeal, the Supreme Court of South Carolina upheld Cornelia’s conviction, making her the first woman to be punished by the highest court of her state for substance abuse during pregnancy.

Similar to Cornelia Whitner, many pregnant women experience personal difficulties causing them to turn to drugs. Yet, applying

* J.D. Candidate, May 2006, DePaul University College of Law, Chicago, IL; B.S., May 2003, University of Illinois, Urbana-Champaign, IL. I would like to thank Professor Michele Goodwin, Karine Morin, and Professor Alicia Aiken for all of their thoughtful insights and helpful suggestions. Additionally, I would like to thank Rebecca Traen and Melissa Junge for their feedback and encouragement. Lastly, I would like to thank Dr. Arthur Elster for all of his support throughout the presentation and writing process.

2 See id. at 1030.
3 See id. (quoting and discussing Arlene Levinson, S.C. Law on Crack Moms May be Heard in High Court, ROCK HERALD (S.C.), Mar. 15, 1998, at 1A).
4 See id.
5 See id.
6 See Paltrow, supra note 1, at 1030.
8 See, e.g., LINDA CHAMBERLAIN, MAKING THE CONNECTION: DOMESTIC VIOLENCE AND PUBLIC HEALTH slide 89 (The Family Violence Prevention Fund, 2004) (presenting findings from a study done on physical abuse during pregnancy in JA
punitive measures against pregnant substance abusers is society’s way of avoiding the social ills these women often face, such as abusive partners, poverty, poor health care, and racism. Through its application of punitive measures, society fails to peel back all layers of problems pregnant substance abusers face.

Many attempts have been made to reduce substance abuse during pregnancy. There are two prevailing methods used to address the problem: punitive measures and non-punitive measures. Proponents of a punitive approach argue that punitive measures serve as a deterrent for other pregnant women, protect children’s welfare, and hold individual pregnant women responsible for substance abuse during pregnancy. On the other hand, those who support non-punitive measures believe that pregnant women who abuse drugs should be rehabilitated and receive prenatal care. Proponents of this approach argue that both the United States Supreme Court and the health community have long recognized that drug addiction is an illness that should be overcome with treatment.

This paper argues that non-punitive measures are more effective than punitive approaches at reducing drug abuse among pregnant women. Part II of this paper reveals the number of women who abuse drugs during pregnancy and the effects illegal drugs, legal drugs, and other activities may have on both the pregnant woman and her fetus. Part III explores how punitive measures are applied to pregnant substance abusers. Part IV argues against the punitive approach because of its many failures. Part V suggests that the preferable method for addressing the problems of substance abuse during pregnancy.

10 See id.
12 See id.
15 See Paltrow, supra note 11.
pregnancy is non-punitive measures, such as offering treatment and increasing access to prenatal care. This part also examines the barriers pregnant substance abusers face when attempting to seek treatment. Part VI outlines concerns for the future if punitive measures continue to be used to address substance abuse during pregnancy.

I. EXTENT AND EFFECTS OF SUBSTANCE ABUSE DURING PREGNANCY

It is helpful to consider the percentages of pregnant women who abuse various substances and the effects those substances may have on both the fetus and the woman.\textsuperscript{16} Importantly, a discussion of substance abuse during pregnancy should not be limited to illegal drugs\textsuperscript{17} because they are not the only substances that may cause harm during pregnancy.\textsuperscript{18} Instead, a thorough examination must include consideration of both legal and illegal drugs.\textsuperscript{19}

A. Statistics

The National Household Survey on Drug Abuse (NHSDA) is a survey conducted by the Substance Abuse and Mental Health Services Administration (SAMHSA).\textsuperscript{20} The federal government has performed this survey annually since 1971.\textsuperscript{21} In order to collect data, the NHSDA uses questionnaires in face-to-face interviews at the homes of a representative sample of the population.\textsuperscript{22} The survey "document[s] past-month, past-year, and lifetime use of alcohol and other drugs."\textsuperscript{23}


\textsuperscript{18} See Mills, supra note 16, at 1001.

\textsuperscript{19} See id. at 999-1005.

\textsuperscript{20} Greenfield, et al., supra note 16, at 416 (describing the NHSDA survey).

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id.
One specific area the survey investigated was the data regarding women who used various substances, including illicit drugs, alcohol, and cigarettes. Women surveyed ranged from fifteen to forty-four years old.

The survey found that in 2000 and 2001 a smaller percentage of pregnant women within the fifteen to forty-four year old age range had used illicit drugs in the month prior to the interview (3.7%) than their non-pregnant counterparts (8.3%). However, the percentage of pregnant women in the fifteen to seventeen year old age group who had used illicit drugs (15.1%) was actually higher than the percentage of non-pregnant women in this age group (14.1%). These statistics are alarming because they reveal that not only are more young people use illicit drugs than older age groups, but also that more pregnant women in this age group use illicit drugs than non-pregnant women.

The survey also collected data for alcohol use during 2000 and 2001 and was also quite revealing. While fewer pregnant women consumed alcohol (12.9%) than non-pregnant women (49.8%), there were still a substantial percentage of women who drank alcohol during their pregnancy. Also, the data shows that the percentage of women who were binge drinkers during their pregnancy was high (4.6%), but still lower than the percentage of non-pregnant women who were binge drinkers (20.5%).

Finally, the survey also collected data on the number of women who smoked cigarettes during 1999, 2000, and 2001. While the percentage of women who smoked during their pregnancy has gone down from 30% in 1999 to 19.8% in 2000-2001, the percentage is still high. As a comparison, 31% of non-pregnant women smoked in 1999 and 29.5% smoked cigarettes in 2000-2001.

Therefore, the statistics reveal that pregnant women are using illicit drugs, alcohol, and cigarettes during their pregnancies. Next, it

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24 See id. at 416, 431, 420, 434.
26 Id. at 431.
27 Id.
28 See id.
29 See id. at 420.
31 Id.
32 See id. at 434.
33 Id.
34 Id.
35 See generally Greenfield, et al., supra note 16, at 413.
is important to explore whether the various substances they are using have effects on either themselves or their fetuses.

B. Effects
As a preliminary matter, this paper limits its discussion to the effects illegal and legal drugs may have on the woman and the fetus, and not the potential long-term effects these substances may have on the infant. The potential effects discussed are by no means the only ones that have been reported or studied. Instead, the discussion that follows is merely intended to serve as a brief overview.

1. Illegal Drugs
This discussion will examine the effects that marijuana, opiates, and cocaine may have on the woman and the fetus. Marijuana use by women is connected with "respiratory and pulmonary diseases." However, the effects marijuana may have on the fetus exposed during pregnancy are inconsistent. A reduced length of gestation resulting in decreased birthweight has been documented, but overall "no significant relationship has been found" between marijuana use and reduced birthweight.

Opiate use may cause infections in women who use shared needles. These infections could include "HIV, hepatitis B and C, and Staphylococcus aureus." Exposure to opiates during pregnancy may negatively affect the fetus, resulting in "abruptio placentae, eclampsia, premature labor, stillbirth, intrauterine growth retardation" and "respiratory distress."

Research indicates that women who abuse cocaine are at an increased risk for "heart attack, stroke, brain seizures," and other possible neurological disorders. Also, smoking crack cocaine may cause "respiratory and pulmonary diseases." On the other hand, the effect of a fetus’s exposure to cocaine during pregnancy is a very

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36 See, e.g., Greenfield, et al., supra note 16, at 413 (discussing several possible long-term effects of substance abuse during pregnancy).
37 Curet & Hsi, supra note 16, at 74.
38 Id.
39 Bolnick & Rayburn, supra note 16, at 547 tbl.1.
40 Curet & Hsi, supra note 16, at 74.
42 Id.
43 Curet & Hsi, supra note 16, at 75.
44 Id. at 74.
45 Id.
controversial topic, both medically and socially.\textsuperscript{46} Potential effects
cocaine exposure may have on the fetus include “low birthweight,
preterm delivery, and abruptio placentae.”\textsuperscript{47} However, many of the
studies suggesting that these conditions are associated with cocaine use
ignore external variables that may also be very harmful to the fetus,
such as the woman’s “use of additional drugs, cigarettes, and alcohol
and her socioeconomic status.”\textsuperscript{48} Also, several of the cocaine studies
fail to note the fact that pregnant women who abuse substances “often
receive little or no prenatal care and may be malnourished.”\textsuperscript{49} Yet,
these studies receive much exposure in the media, and as a result, “the
public has a distorted perception of the risks of maternal cocaine
use.”\textsuperscript{50} Therefore, studies which examine cocaine exposure during pregnancy
need to control for external factors to better understand the nature and
extent of harm that it causes.\textsuperscript{51}

2. Legal Drugs
Exposure to legal drugs, particularly alcohol and tobacco, during
pregnancy may also have negative effects on the woman and the
fetus.\textsuperscript{52} Alcohol use by women possibly “increases their risk for
suicide, depression” and accidents caused by the influence of alcohol.\textsuperscript{53}
Also, women who drink alcohol may suffer from “circulatory and
cardiovascular disorders, liver cirrhosis...and possibly breast
cancer.”\textsuperscript{54} In addition, exposure to alcohol during pregnancy has been shown to
negatively affect the fetus.\textsuperscript{55} It can result in Fetal Alcohol Syndrome
(FAS),\textsuperscript{56} which is the “leading known preventable cause of mental
retardation.”\textsuperscript{57} Also, exposure to alcohol may lead to “low birthweight,
developmental and behavior abnormalities, spontaneous abortion, and
stillbirth.”\textsuperscript{58}

Women who smoke tobacco have an increased risk for “lung,

\textsuperscript{46} See, e.g., Roberts, supra note 9, at 1429-30.
\textsuperscript{47} Curet & Hsi, supra note 16, at 74.
\textsuperscript{48} Roberts, supra note 9, at 1429-30.
\textsuperscript{49} Id. at 1430.
\textsuperscript{50} Id.
\textsuperscript{51} See id.
\textsuperscript{52} See, e.g., Curet & Hsi, supra note 16.
\textsuperscript{53} Id. at 73-74.
\textsuperscript{54} Id.
\textsuperscript{55} See Kuczkowski, supra note 16, at 388 (discussing Fetal Alcohol Syndrome).
\textsuperscript{56} Id.
\textsuperscript{57} Greenfield, et al., supra note 16, at 420.
\textsuperscript{58} Curet & Hsi, supra note 16, at 74.
oral, esophageal, and invasive cervical cancers."\(^5^9\) Also, women who smoke cigarettes may be more likely to suffer from heart disease and strokes.\(^6^0\) Fetuses of women who smoke cigarettes during pregnancy may be negatively affected by reduced birthweight and preterm birth.\(^6^1\) Also, cigarettes may result in placenta previa or placental abruption\(^6^2\) and spontaneous abortions.\(^6^3\) Therefore, various legal drugs, such as alcohol and tobacco, potentially result in negative effects on both the woman and the fetus.

### C. Other Health Considerations

In addition to illegal and legal drugs, other health considerations may also negatively affect the fetus.\(^6^4\) Although not exhaustive, this section discusses additional health factors that are important to consider during a woman’s pregnancy.

Caffeine exposure during pregnancy may result in spontaneous abortion or low birthweight when the woman consumes more than 150 mg of caffeine a day.\(^6^5\) Depending on its strength, a cup of coffee contains anywhere from 29 to 176 mg of caffeine.\(^6^6\) Thus, even a cup of coffee each day during pregnancy may result in negative effects on the fetus.\(^6^7\)

Another health factor to consider is untreated iron deficiency.\(^6^8\) Circumstantial evidence suggests that maternal anemia may result in premature delivery and lower birthweight.\(^6^9\) It may also result in higher maternal mortality.\(^7^0\) However, more research is needed to examine iron deficiency during pregnancy because many pregnant women are anemic, and most current evidence is only circumstantial.\(^7^1\)

Relatively recently, exposure to mercury has become a topic of discussion.\(^6^9\)

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\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Bolnick & Rayburn, supra note 16, at 547 tbl. 1.

\(^{62}\) Id.

\(^{63}\) Kuczkowski, supra note 16, at 389.

\(^{64}\) See, e.g., id at 390 (discussing caffeine exposure during pregnancy).

\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) See id.


\(^{69}\) Id.

\(^{70}\) Id.

\(^{71}\) Id.
Women can be exposed to mercury by eating large amounts of certain types of seafood, living in areas of high mercury use or production, or working in certain job environments. Mercury toxicity during pregnancy may result in fetal neurological damage and mental retardation.

Another important health consideration that is often overlooked is the effect the father’s habits can have on the woman and the fetus during pregnancy. A father who uses drugs, smokes cigarettes, or drinks alcohol before the fetus’s conception could possibly have a negative effect on the fetus. Also, during pregnancy, a father may batter his pregnant partner, which could result in harms to both the woman and the fetus. In addition to battering his pregnant partner, the father may be the one who provides the pregnant woman with drugs. It has been shown that “women who use illicit drugs are most likely to be supplied those drugs by men, as part of an intimate or sexual relationship.” Thus, the father may play a major role in substance abuse during pregnancy.

D. Preliminary Arguments

Many substances, activities, and other external factors potentially cause harm to the fetus during pregnancy. However, the substances that receive the most attention, such as cocaine, may not be deserving of such publicity because the studies regarding their effects on the fetus lack reliability. Assuming for the sake of argument that certain substances do harm an exposed fetus, goals must be set. If the goal is to protect the fetus, then not only will illegal substances have to be

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73 Id. at 545.
74 Id.
75 See Mills, supra note 16, at 1005 (discussing the effects of the father’s lifestyle on the fetus’s health).
77 See Mills, supra note 16, at 1005.
79 Id.
80 See id.
81 See, e.g., Mills, supra note 16, at 999-1006.
82 See Roberts, supra note 9, at 1429-30.
restricted, but so will legal substances that negatively affect the fetus.\textsuperscript{83} Following from that, it may be argued that many other activities during pregnancy must be restricted.\textsuperscript{84} This could result in many enforcement problems as well as extreme control over pregnant women.\textsuperscript{85} Additionally, it would be unfair to hold pregnant women solely responsible for negative effects on their fetuses when the father's conduct, and an infinite number of other factors, could contribute to harm the fetus.\textsuperscript{86}

\textbf{II: PUNITIVE MEASURES}

In response to the harms associated with maternal substance abuse, several forms of punitive measures designed to prevent harm to the fetus have been suggested, including civil child welfare laws,\textsuperscript{87} protective incarceration,\textsuperscript{88} criminalization of substance abuse during pregnancy by proposed statutes,\textsuperscript{89} and criminal prosecution through the use of existing statutes.\textsuperscript{90} However, whether these punitive measures actually succeed in preventing harm to fetuses is debatable.\textsuperscript{91}

\textsuperscript{83} See Whitner, 492 S.E.2d at 788 (Moore, A.J., dissenting) (suggesting harm to the fetus could result from failure to seek prenatal care or failure to quit smoking or drinking).

\textsuperscript{84} See Whitner, 492 S.E.2d at 788 (Moore, A.J., dissenting) (explaining that the holding puts pregnant women at risk to be punished criminally for many activities).

\textsuperscript{85} See Whitner, 492 S.E.2d at 788 (Moore, A.J., dissenting) (discussing how the legislature did not mean to criminalize the many activities pregnant women may be found criminally liable for as a result of the holding).

\textsuperscript{86} See Mills, supra note 16, at 1005; See, e.g., Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993) (suggesting that even a pregnant woman who drives without her prescription glasses or contacts could cause harm to the fetus).

\textsuperscript{87} See Paltrow, et al., supra note 11, at 1-2.


\textsuperscript{89} See, e.g., Lisa M. Noller, Taking Care of Two: Criminalizing the Ingestion of Controlled Substances During Pregnancy, 2 U. CHI. L. SCH. ROUNDTABLE 367 (1995).

\textsuperscript{90} See, e.g., Whitmer, 492 S.E.2d at 777.

A. Civil Punishments: Civil Child Welfare Laws

One form of punitive measures used in an attempt to deter substance abuse during pregnancy is civil punishments.92 This discussion of civil punishments will focus on describing civil child welfare laws.93 These laws, however, fail to solve the problem of substance abuse during pregnancy.94

Several states' civil child welfare laws have been amended to address substance abuse during pregnancy.95 In some such states, a pregnant woman's drug use creates a presumption of neglect or is a factor considered during a proceeding to terminate her parental rights.96

Even though civil child welfare laws provide for civil rather than criminal penalties, they nevertheless represent a type of punitive measure.97 The Supreme Court of the United States has acknowledged that termination of parental rights is an extreme state action because it is severe and irreversible.98 It is thus a drastic punitive measure to terminate a woman's parental rights because of her substance abuse during pregnancy.99

A state may also petition for temporary custody of an infant who was exposed to drugs during pregnancy.100 Women who abused substances during pregnancy are often deprived of custody of their children as a result of "positive neonatal toxicologies," which "often raise a strong presumption of parental unfitness."101 Thus, civil punishments, whether permanent or temporary, are punitive measures and can often be quite drastic.

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92 See Paltrow, et al., supra note 11, at 1-2 (discussing civil child welfare laws); See Linden, supra note 14, at 121-134 (calling involuntary civil commitment a "Band-Aid Solution).
93 See Paltrow, et al., supra note 11, at 1-2.
94 See Linden, supra note 14, at 120 (suggesting that neither criminal nor civil punishments fulfill the goals of cultural feminism).
95 See Paltrow, et al., supra note 11, at 1-2, n.20 (listing Arizona, Colorado, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, and Wisconsin).
96 See id. at 2.
100 See Roberts, supra note 9, at 1430-31.
101 Id. at 1431.
B. Criminal Punishments

1. Protective Incarceration

In order to protect the fetus by preventing maternal drug use, several courts have also incarcerated pregnant women who abuse substances. Judges have carried out this "protective" incarceration by considering a pregnant woman's substance abuse during the course of her sentencing for a crime unrelated to her drug use. For example, a judge in Washington D.C. sentenced Brenda Vaughn "to jail for the duration of her pregnancy" following her guilty plea for forging checks. The judge made it known that he was putting Brenda in jail because he wanted to protect the fetus from the woman's substance abuse. In fact, it appears as though this D.C. judge is not alone; a pregnant woman's "drug use during pregnancy often affects judges' sentencing decisions." Such protective incarceration is yet another punitive attempt to prevent maternal drug use.

2. Proposed Statute to Criminalize Substance Abuse During Pregnancy

Currently, no state has any statute specifically criminalizing substance abuse during pregnancy. However, this approach has been suggested by several commentators. One commentator proposes a statute that would criminalize substance abuse during pregnancy based on the theory that a pregnant substance abuser distributes drugs to her fetus. The author believes that "current laws do not deter because the penalties are not strong enough to alter behavior," and thus, suggests that the statute should call "for strict criminal penalties." Interestingly, while arguing for the creation of a statute to punish pregnant substance abusers, the commentator also concedes that any punitive measure "should include a rehabilitative element." This concession reveals the inadequacy of the punitive approach to substance abuse during pregnancy.

102 See id.
103 See id.
105 See Roberts, supra note 9, at 1430-31.
106 Id.
107 See Paltrow, et al., supra note 11, at 1.
108 See, e.g., Noller, supra note 89.
109 See id.
110 Id.
111 Id.
3. Criminal Prosecution

Given that there are no state laws that specifically criminalize substance abuse during pregnancy, prosecutors have used a variety of existing criminal laws to prosecute pregnant women for this behavior.\(^1\) Prosecutors have used criminal child abuse or neglect laws to charge pregnant women for substance abuse during pregnancy.\(^2\) Also, they have argued, quite cleverly, that when a pregnant woman gives birth with drugs in her system, she delivers drugs to a minor, the newborn, through her umbilical cord.\(^3\) Other prosecution theories used include possession of a controlled substance, corruption of a minor, assault with a deadly weapon, homicide or feticide, consumption of alcohol, and failure to follow a physician’s order.\(^4\)

Criminal prosecution discussion in this paper will focus on the child abuse theory.\(^5\) Fortunately, most appellate courts have rejected the theory that maternal substance abuse constitutes child abuse.\(^6\) Unfortunately, women are first being convicted by the lower courts and thus, are serving time in prison while awaiting their appeals; that is if they even appeal.

Most courts reject the theory that substance abuse during pregnancy constitutes child abuse for a variety of reasons.\(^7\) Some courts believe that it is the responsibility of the legislature, and not the

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\(^3\) Id.

\(^4\) Id.

\(^5\) Prosecution of pregnant substance abusers based on child abuse theory because it is the only criminal prosecution theory that has been argued successfully. *See* Whitner, 492 S.E.2d at 777; Michelle Oberman, *Symposium: Substance Use During Pregnancy: Legal and Social Responses: Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 530 (March 1992) (presenting and dismissing John Robertson’s argument for punishing pregnant substance abusers under child abuse laws - that once a woman decides not to have an abortion she has a duty to bear a healthy child).

\(^6\) *See, e.g.*, Encoe, 885 P.2d at 599; Reinesto, 894 P.2d at 735-6; Collins, 890 S.W.2d at 897-8; Gethers, 585 So.2d at 1143; Welch, 864 S.W.2d at 283.

\(^7\) *See, e.g.*, Encoe, 885 P.2d at 599; Reinesto, 894 P.2d at 735-6; Collins, 890 S.W.2d at 897-8; Gethers, 585 So.2d at 1143; Welch, 864 S.W.2d at 283.
courts, to criminalize this behavior.\textsuperscript{119} For example, the Court of Appeals of Arizona in \textit{Reinesto v. Superior Court} refused to hold pregnant substance abusers responsible for child abuse, observing that the legislature had rejected bills that proposed amending the state’s child abuse statute in order to criminalize substance abuse during pregnancy.\textsuperscript{120}

Several courts have rejected criminalizing substance abuse during pregnancy, determining that to do so would be bad public policy.\textsuperscript{121} One example is the Court of Appeal of Florida in \textit{State v. Gethers}.\textsuperscript{122} In its decision, the court stated that criminalizing substance abuse during pregnancy would deter pregnant women from seeking care.\textsuperscript{123}

Some courts note that this behavior should not be criminalized because it would lead to prosecution of pregnant women for legal activities.\textsuperscript{124} The Supreme Court of Kentucky stated that criminalizing substance abuse during pregnancy would open the door to punishing the use of alcohol, nicotine, or over-the-counter drugs.\textsuperscript{125} The court noted that this could reach all the way to criminalizing pregnant women who downhill ski.\textsuperscript{126}

The City Court of New York raised another argument against criminalization.\textsuperscript{127} In \textit{People v. Morabito}, the court stated that criminalizing maternal substance abuse would violate a pregnant woman’s right to due process\textsuperscript{128} because she would not be on notice that the statute can be applied to criminalize her substance abuse during pregnancy.\textsuperscript{129}

Lastly, in \textit{Collins v. State}, the Court of Appeals of Texas looked at “whether Texas’ injury to a child statute permits the prosecution of a woman for conduct committed while pregnant which causes injury to her subsequently-born child.”\textsuperscript{130} The court held that the statute could not be used in this way because the “definitions of ‘child’, ‘person’,

\begin{footnotesize}
\begin{itemize}
  \item See, e.g., \textit{Encoe}, 885 P.2d at 599; \textit{Reinesto}, 894 P.2d at 738; \textit{Collins}, 890 S.W.2d at 898.
  \item 894 P.2d at 738.
  \item See, e.g., \textit{Gethers}, 585 So.2d at 1143.
  \item 585 So.2d at 1142-3.
  \item \textit{Id.} at 1143.
  \item See, e.g., \textit{Welch}, 864 S.W.2d at 283.
  \item \textit{Welch}, 864 S.W.2d at 283.
  \item \textit{Id.}
  \item \textit{Morabito}, 580 N.Y.S.2d at 847.
  \item \textit{Id.}
  \item See \textit{id.}
  \item \textit{Collins}, 890 S.W.2d at 895.
\end{itemize}
\end{footnotesize}
and "individual" in its state penal code do not encompass the fetus.\textsuperscript{131}

While most courts have rejected prosecution based on the child abuse theory, the Supreme Court of South Carolina applied the state’s child abuse statute in \textit{Whitner v. State},\textsuperscript{132} where the defendant ingested cocaine during the third trimester of her pregnancy.\textsuperscript{133} Her infant was born with cocaine in its system.\textsuperscript{134} The court held that "the word ‘child’ as used in” the state’s child abuse and endangerment statute “includes viable fetuses.”\textsuperscript{135} The court reasoned that it had been the legal tradition in South Carolina to define a viable fetus as a person in both wrongful death actions and in the criminal murder statutes, and thus, there was no reason not to define a viable fetus as a person under the child abuse statute.\textsuperscript{136} Accordingly, the court upheld the defendant’s conviction under the child abuse statute and sentenced her to eight years in prison.\textsuperscript{137} Additionally, the court suggested that the child abuse statute could even be applied to legal acts of pregnant women if “the acts actually or potentially endanger the ‘life, health or comfort’” of the viable fetus.\textsuperscript{138}

According to Lynn Paltrow, the executive director of National Advocates for Pregnant Women, there are several problems with the \textit{Whitner} decision.\textsuperscript{139} First, the decision “went far beyond the plain meaning of the child endangerment statute and its clear legislative intent.”\textsuperscript{140} Second, the decision violates a woman’s right to privacy and due process and it may violate the equal protection clause and the “prohibition against cruel and unusual punishment.”\textsuperscript{141} Third, the decision contradicts the approach the public health community suggests should be taken to solve substance abuse during pregnancy: treatment.\textsuperscript{142} Fourth, the \textit{Whitner} court violated “\textit{Roe v. Wade} and its progeny” by declaring that the viable fetus is a person.\textsuperscript{143}

\footnotesize{\textsuperscript{131} Id. at 897-98 (quoting Acts 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex.Gen.Laws 3586, 3589, 3622).}  
\footnotesize{\textsuperscript{132} See 492 S.E.2d at 777.}  
\footnotesize{\textsuperscript{133} \textit{Whitner}, 492 S.E.2d at 778-79.}  
\footnotesize{\textsuperscript{134} Id.}  
\footnotesize{\textsuperscript{135} Id. at 778 (discussing S.C. Code Ann. § 20-7-50 (1985)).}  
\footnotesize{\textsuperscript{136} Id. at 780.}  
\footnotesize{\textsuperscript{137} Id. at 779.}  
\footnotesize{\textsuperscript{138} Id. at 782.}  
\footnotesize{\textsuperscript{139} See Paltrow, supra note 1, at 1038; see also Paltrow, supra note 11.}  
\footnotesize{\textsuperscript{140} Paltrow, supra note 1, at 1038.}  
\footnotesize{\textsuperscript{141} Id.}  
\footnotesize{\textsuperscript{142} See id. at 1039.}  
\footnotesize{\textsuperscript{143} Id. at 1038.}
C. Substance Abuse During Pregnancy Within the Context of Abortion

Whitner raises the question of whether substance abuse during pregnancy should be discussed within the context of abortion. The easy answer to this question is that the "use of Roe's holding is inappropriate, since Roe v. Wade dealt with a woman's right to terminate her pregnancy, not with her duties toward a fetus whom she intended to carry to term."144 This argument is correct in that substance abuse during pregnancy is very distinguishable from abortion. However, if the United States Supreme Court were to consider maternal substance abuse beyond Ferguson v. City of Charleston,145 which is discussed in Part IV, then it would most certainly consider Roe v. Wade146 and Planned Parenthood v. Casey.147 If the Court chose to extend its decisions in Roe and Casey to substance abuse during pregnancy, its reasoning may resemble the following discussion.

In Roe v. Wade, the Supreme Court of the United States held that statutes prohibiting a woman from having an abortion infringe upon her fundamental right to privacy.148 In order to infringe on this right, the state must have a compelling interest.149 During the first trimester, the state is not able to interfere with the woman’s abortion at all, and after the first trimester, the state has a compelling interest to protect the health of the woman, and therefore can place restrictions on the performance of abortions.150 However, the state has no interest in protecting potential life until viability, at which point the state may "regulate, and even proscribe, abortion" unless the procedure is necessary to save the mother's life.151

The Court narrowed this holding in Planned Parenthood v. Casey.152 It reaffirmed viability as an important point of consideration.153 However, now a state may restrict abortions before viability as long

144 See Oberman, supra note 116, at 530 (explaining that Roe has been used to justify medical treatment that is forced on pregnant women).
148 See Spencer, supra note 17, at 418 (discussing the holdings in Roe v. Wade and Planned Parenthood v. Casey); see also Roe, 410 U.S. at 153-54 (1973).
151 Id.
152 See Mills, supra note 16, at 1025-26; see also Casey, 505 U.S. at 833 (1992).
as doing so will not place an undue burden on the woman's decision to have an abortion. The undue burden standard requires a woman to demonstrate that the state placed a "substantial obstacle" in the way of her decision to abort a nonviable fetus.

Applying Roe and Casey to the area of substance abuse during pregnancy, one can argue that a woman is free to abuse substances during pregnancy as long as she does so before viability of the fetus; however, past the point of viability, the state has a compelling interest to protect potential life and can justify restricting substance abuse by appropriate means. In addition, the state could set restrictions on a woman's substance abuse prior to viability as long as it does not unduly burden her decision to give birth.

However, if the Court attempted to apply Roe and Casey to substance abuse during pregnancy in this way, obstacles would arise. For example, maternal substance abuse can harm the fetus before viability. If the goal in criminalizing substance abuse during pregnancy is to protect a fetus, then choosing viability as the determining point would not achieve that goal.

Another problem is that drawing the line at viability raises due process problems. A woman may drink alcohol or participate in harmful activities past the point of viability without even knowing she is pregnant. Thus, a woman could be prosecuted without notice that she was breaking the law. Based on these obstacles, extending the reasoning of Roe and Casey to the issue of substance abuse during pregnancy is inappropriate.

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154 See id. at 874.
155 Id. at 877.
156 See Mills, supra note 16, at 1026 (suggesting that prosecuting substance abuse during pregnancy would not create an undue burden on a woman's right to an abortion but would unduly burden her decision to have a child which the Casey Court would agree a state is not allowed to do).
158 See id.
159 See id.
160 See id.
161 See id.
162 See Palmer, supra note 157, at 338.
163 See id.
D.  *Whitner* Extended

Even though *Whitner* may have been wrongly decided,\(^{164}\) the decision has been extended to other areas.\(^{165}\) In fact, it appears as though many authorities in South Carolina are actively seeking out pregnant substance abusers.\(^{166}\) The state has moved from prosecuting pregnant substance abusers for child abuse to prosecuting them for homicide by child abuse.\(^{167}\) In *State v. McKnight*, the South Carolina Supreme Court affirmed Regina McKnight’s conviction of homicide by child abuse because a pathologist determined that Regina had exposed the stillborn fetus to cocaine and had ruled the death a homicide.\(^{168}\) The court reasoned that the legislature intended the homicide by child abuse statute to apply to the stillbirth of the fetus because the legislature had not acted to change the law since the court’s decision in *Whitner*.\(^{169}\) As a result, the court affirmed the woman’s sentence of twenty years in prison.\(^{170}\)

South Carolina has also started prosecuting pregnant substance abusers for their use of drugs other than cocaine.\(^{171}\) First, the state has arrested one woman “after her newborn daughter tested positive for marijuana.”\(^{172}\) Second, the state has shifted from illegal drugs to legal drugs.\(^{173}\) Specifically, South Carolina has already arrested one woman for her use of alcohol during her pregnancy.\(^{174}\) Therefore, the South Carolina’s Supreme Court decision in *Whitner* has provided the state an opportunity to seek out pregnant women in order to prosecute them for various activities during their pregnancies.\(^{175}\)

Fortunately, most courts have disagreed with the outcome in *Whitner*, and many have held that a woman who abuses substances during her pregnancy may not be convicted under child abuse

\(^{164}\) See Paltrow, *supra* note 1, at 1038.

\(^{165}\) See *State v. McKnight*, 576 S.E.2d 168 (S.C. 2003) (affirming homicide by child abuse conviction of a woman who gave birth to a stillborn fetus).

\(^{166}\) See Paltrow, *supra* note 1, at 1042-43.

\(^{167}\) See *McKnight*, 576 S.E.2d at 168.

\(^{168}\) See *id*. at 171.

\(^{169}\) See *id*. at 175.

\(^{170}\) See *id*. at 171 (affirming trial court’s decision to sentence Regina McKnight to twenty (20) years, “suspended upon service of twelve years”).

\(^{171}\) See Paltrow, *supra* note 1, at 1042.

\(^{172}\) *Id*.

\(^{173}\) *See id*.

\(^{174}\) *See id*.

\(^{175}\) *See id*. 
statutes. As was previously mentioned, these decisions are based on a variety of reasons, such as a lack of legislative intent, bad public policy, and violation of due process.

III: CRITICISM OF PUNITIVE MEASURES

A. Failures of Punitive Measures

In addition to the reasons cited by the courts, there are several further arguments against applying punitive measures to the problem of substance abuse during pregnancy. Such measures often depend on mandatory reporting statutes for notifying law enforcement about pregnant substance abusers. Under many mandatory reporting laws, physicians are not the only persons required to report child abuse. Many state laws require a "wide range of health care professionals...to report suspected child neglect to the state." Additionally, health care professionals are specifically required to report suspected substance abuse by pregnant women in nine states. Also, four states require health care professionals to test pregnant women for drugs if they suspect substance abuse.

The use of such mandatory reporting statutes may have many negative consequences. Health care professionals are required to act as police informants against pregnant women. By reporting to the

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176 See, e.g., Encoe, 885 P.2d at 596; Reinside, 894 P.2d at 733; Collins, 890 S.W.2d at 898; Gethers, 585 So.2d at 1142-3; Welch, 864 S.W.2d at 280; Morabito, 580 N.Y.S.2d at 843.
177 See Collins, 890 S.W.2d at 898.
178 See Gethers, 585 So.2d at 1143.
179 See Morabito, 580 N.Y.S.2d at 847.
180 See Oberman, supra note 116, at 520.
181 See id. at 522.
182 Id.
184 Id. (listing Iowa, Minnesota, North Dakota, and Virginia).
186 See Mills, supra note 16, at 1037.
police, health care professionals may be violating the woman’s right to privacy and confidentiality. This intrusion may result in patient mistrust of health care providers. As a result, pregnant substance abusers may not disclose their addiction to their health care providers, or worse yet, the women may be deterred from seeking any prenatal care.

One hospital’s reporting policy came under scrutiny in *Ferguson v. City of Charleston.* The Medical University of South Carolina (MUSC) implemented a drug testing policy that required its medical personnel to test pregnant women suspected of cocaine use. Under this policy, thirty women were arrested. While all of the charges were eventually dropped, several of the women had already served jail time. Ten of the women arrested under the hospital’s policy filed a joint civil suit against the city of Charleston, certain city law enforcement officials, and MUSC employees. After the Supreme Court of the United States granted certiorari, it held that the drug tests administered under the hospital’s policy were unreasonable searches if the pregnant women did not consent to them. The Fourth Amendment requires that the government obtain a warrant based on probable cause in order to search a person. However, there is a special needs exception that allows warrantless searches when there is an interest served beyond law enforcement. The defendants argued that the interest served was the health of the women and the fetuses. Yet, the Court reasoned that the special needs exception did not apply.

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187 See id. at 1022.
188 Cook, supra note 185, at 1336.
189 See Brody & McMillin, supra note 185, at 252.
190 See Plambeck, supra note 91, at 22; But see Nova D. Janssen, Note, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy,* 48 DRAKE L. REV. 741, 764 (2000) (suggesting that the fear that criminal punishments may deter pregnant women from seeking prenatal care may be exaggerated because there are other possible explanations for why these women do not seek care).
191 532 U.S. at 67.
192 *Ferguson,* 532 U.S. at 70-76.
194 See id.
195 *Ferguson,* 532 U.S. at 73.
196 Id. at 76-86.
198 *Ferguson,* 532 U.S. at 76 n.7.
199 Id. at 81.
to the hospital's policy because "the immediate objective of the searches was to generate evidence for law enforcement purposes."\textsuperscript{200} Thus, the hospital's policy was contrary to the Fourth Amendment.\textsuperscript{201}

Another issue arose from the MUSC's mandatory reporting policy. Of the ten women who filed suit in this case, nine were African American.\textsuperscript{202} This exemplifies the fact that criminal punishments for substance abuse during pregnancy have a disparate impact on African Americans.\textsuperscript{203} Poor women are disproportionately African American and are "generally under greater government supervision – through their associations with public hospitals, welfare agencies, and probation officers."\textsuperscript{204} As a result, "their drug use is more likely to be detected and reported."\textsuperscript{205} Health care professionals, through drug screenings, more often test and report African Americans.\textsuperscript{206} For example, a study done in Florida showed that despite "similar rates" of drug prevalence between African American and white women, African American women were ten times more likely to be reported after positive drug screens.\textsuperscript{207}

In addition to health care professionals targeting African American pregnant women, as was done at MUSC, certain types of drug tests, in general, are more likely to implicate African American women.\textsuperscript{208} For example, it has been shown that traces of drugs remain longer in dark, thick hair than in brown or blond, thin hair.\textsuperscript{209} This results in more African American women being targeted by various drug tests.\textsuperscript{210} Also, certain drug tests single out cocaine, which African American women are more likely to abuse than white women, who abuse other kinds of drugs, such as marijuana.\textsuperscript{211}

With the assistance of health care professionals, prosecutors

\textsuperscript{200} Id. at 82-84.
\textsuperscript{201} See id. at 82-86; See also Lawrence O. Gostin, The Rights of Pregnant Women: The Supreme Court and Drug Testing, 31 HASTINGS CENTER REP. 8 (2001) (stating public hospital's policy violated the Fourth Amendment).
\textsuperscript{202} Greenhouse, supra note 193.
\textsuperscript{203} See Roberts, supra note 9, at 1432-36.
\textsuperscript{204} Id. at 1432.
\textsuperscript{205} Id.
\textsuperscript{206} See id. at 1432-33.
\textsuperscript{207} See IJ Chasnoff, et al., The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida, 322 NEW ENG. J. MED. 1202, 1202-04 (1990).
\textsuperscript{208} See Popovits, supra note 78, at 177; Chasnoff, et al., supra note 207.
\textsuperscript{209} Popovits, supra note 78, at 177.
\textsuperscript{210} See id.
\textsuperscript{211} See Chasnoff, et al., supra note 207.
perpetuate the discriminatory practices against African American women.\textsuperscript{212} Prosecutors have focused primarily on cocaine use.\textsuperscript{213} However, as mentioned earlier, several other drugs may cause more harm to the fetus than cocaine and thus, prosecution for cocaine use is not justified by “the extent of the harm to the fetus.”\textsuperscript{214} Instead, one commentator argues that focusing on African American pregnant substance abusers serves two social goals: (1) degradation of “women whom society views as undeserving to be mothers and to discourage them from having children” and (2) diversion of the public’s “attention from social ills such as poverty, racism, and a misguided national health policy,” implying “instead that shamefully high Black infant death rates are caused by the bad acts of individual mothers.”\textsuperscript{215} Arguably, it would be possible for an African American pregnant substance abuser who is prosecuted in an area with discriminatory practices to “make out a prima facie case of unconstitutional racial discrimination by showing that a disproportionate number of those chosen for prosecution” are African American.\textsuperscript{216}

Punitive measures are also criticized because the health care community and the United States Supreme Court have recognized drug addiction as an illness that requires treatment, and not punishment.\textsuperscript{217} In \textit{Linder v. United States}, the Supreme Court stated not only that drug addiction is an illness, but also that those addicted should receive medical treatment for their illness.\textsuperscript{218} The Court held in \textit{Robinson v. California} that it is unconstitutional to make drug addiction a crime because it is an illness, and criminalizing it is “cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”\textsuperscript{219} Thus, prosecuting pregnant women for substance abuse may also violate the Eighth and Fourteenth Amendments.\textsuperscript{220}

In addition, the “compulsive nature” of drug addiction “underscores the weakness of punishment as a deterrent.”\textsuperscript{221} Pregnant women addicted to substances “may not weigh costs and benefits

\textsuperscript{212} See Roberts, \textit{supra} note 9, at 1434-36.
\textsuperscript{213} See \textit{id.} at 1434.
\textsuperscript{214} Id.
\textsuperscript{215} Id. at 1435-36.
\textsuperscript{216} Id. at 1453.
\textsuperscript{217} See Paltrow, et al., \textit{supra} note 11, at 6; See, \textit{e.g.}, \textit{Linder}, 268 U.S. at 18; \textit{Robinson}, 370 U.S. at 666-7.
\textsuperscript{218} 268 U.S. at 18.
\textsuperscript{219} See 370 U.S. at 666.
\textsuperscript{220} See Paltrow, \textit{supra} note 1, at 1038.
\textsuperscript{221} Stovall, \textit{supra} note 99, at 1279.
rationally, as the deterrence model posits." Therefore, punishing women who abuse substances during pregnancy fails to treat drug addiction as an illness and thus fails to deter drug use.

Following Whitner, McKnight, and Ferguson, several changes have occurred in South Carolina that lend credibility to arguments against using punitive measures to address maternal substance abuse. First, infant mortality has increased. Second, there has been a 20% increase in abandoned children. Third, there has been a significant decline in drug treatment admissions by women in South Carolina. Fourth, the court decisions have driven pregnant women away from seeking prenatal care and drug treatment. Fifth, a permanent distrust for medical providers has been reported. All of these changes suggest that the fears of those who oppose criminalizing substance abuse during pregnancy are being realized in South Carolina.

Similar to criminal punishments, civil punishments should not be used against pregnant substance abusers, and for many of the same reasons. Some courts that have considered civil punishments have decided not to apply them to women who abused drugs during pregnancy because of a lack of legislative intent. For example, one court rejected a civil prosecution involving termination of parental rights because "the legislature did not intend for the termination statute to apply to prenatal parental conduct that harmed the child." Additionally, the fear of losing custody or parental rights may deter pregnant women from either seeking prenatal care or revealing

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222 See id.
223 See Linder, 268 U.S. at 18.
228 See Center for Reproductive Rights, Ferguson v. City of Charleston, at www.reproductiverights.org (quoting Lori Griffin, one of the plaintiffs in Ferguson v. City of Charleston who stated that she “will never trust a doctor again” because “they tormented” her).
229 See Linden, supra note 14, at 120.
230 See, e.g., In re Valerie D. 613 A.2d 748, 764 (Conn. 1992).
231 Linden, supra note 14, at 119 (describing In re Valerie D. 613 A.2d 748, 764 (Conn. 1992) where the Connecticut Supreme Court reversed the lower court decisions to terminate parental rights due to prenatal cocaine exposure).
their drug use to their physicians or other health care providers.\textsuperscript{232} If a woman does seek prenatal care and discloses her drug use, she risks being reported by her physician under mandatory reporting statutes and consequently risks losing her child.\textsuperscript{233} As mentioned earlier, this may violate the pregnant woman's right to privacy.\textsuperscript{234} Also, discrimination problems surface again because African American women are more likely to be reported than Caucasian women.\textsuperscript{235} The discriminatory application of mandatory reporting statutes may result in potential violations of the African American woman's right to equal protection.\textsuperscript{236}

B. Theoretical Explanations of the Failures of Punitive Measures
The paper has thus far revealed examples of how punitive measures fail to prevent maternal substance abuse. Yet, one question that remains unanswered is why do punitive measures fail to prevent substance abuse during pregnancy? The following two (2) theories provide some insight to this question: cultural feminism and status regime. Cultural feminism suggests that the law should not force a pregnant woman to compete with her fetus for rights. Additionally, the status regime theory posits that society uses punitive measures against pregnant substance abusers because society is unwilling to help these women so that it may be able to maintain the current gender and race status regimes.

1. Cultural Feminism vs. Rights Analysis
Carol Gilligan, the original cultural feminist, felt that psychology's understanding of humans was incomplete because it excluded women from the development stage of its theories.\textsuperscript{237} To complete psychology's understanding of humans, she chose to study the woman's point of view or "voice," and noticed clear distinctions between how men and women speak.\textsuperscript{238} Carol Gilligan's observations

\textsuperscript{232} See Oberman, \textit{supra} note 116, at 520.
\textsuperscript{233} See id.
\textsuperscript{234} See Mills, \textit{supra} note 16, at 1022.
\textsuperscript{235} See Chasnoff, et al., \textit{supra} note 207, at 1202-04.
\textsuperscript{236} See Roberts, \textit{supra} note 9, at 1453.
\textsuperscript{237} Carol Gilligan, \textit{In a Different Voice: Psychological Theory and Women's Development} 3-4 (1982).
\textsuperscript{238} \textit{Id.} at 1-2.
led to the birth of cultural feminism.\textsuperscript{239} Since then, some feminists have used cultural feminism to explain the problems women face in society.\textsuperscript{240}

One area that has raised major concern for cultural feminists is the law.\textsuperscript{241} Cultural feminism suggests that, within the context of moral reasoning, women are “oriented toward relationships,” whereas men focus more on peoples’ rights.\textsuperscript{242} Our laws, however, are generally concerned with rights and not relationships.\textsuperscript{243} Therefore, some cultural feminists argue that the “the law is masculine” and ignores the woman’s voice, which is exactly what cultural feminism set out to stop.\textsuperscript{244} In order to be fair, the law should provide a forum from which the female voice can be heard.\textsuperscript{245}

The law’s masculinity can be seen within the context of substance abuse during pregnancy. Often, the discussion of substance abuse during pregnancy boils down to a competition between the rights of the pregnant woman and the state’s interest in protecting the potential life of the fetus.\textsuperscript{246} While this exemplifies the male-oriented rights analysis, it ignores the female-oriented relationship analysis.

Cultural feminist theory suggests that ignoring the woman’s voice in this way is one explanation for the failures of punitive approaches used against pregnant substance abusers. One commentator argued that cultural feminism aims to achieve two goals within the context of substance abuse during pregnancy: (1) “maintaining the mother-child relationship” and (2) “promoting healthy births.”\textsuperscript{247} Yet, male-oriented criminal and civil punishments fail to satisfy these goals.\textsuperscript{248} Criminal punishments do not achieve either goal because prison separates the mother from the child and is an after-the-fact

\textsuperscript{242} Cahn & Ashe, supra note 240, at 103 n. 134.
\textsuperscript{243} See Cain, supra note 241, at 200.
\textsuperscript{244} Id.
\textsuperscript{245} See id.
\textsuperscript{246} See Linden, supra note 14, at 112.
\textsuperscript{247} Id. at 120.
\textsuperscript{248} See id.
solution that does not promote healthy births.\textsuperscript{249} Civil child welfare laws achieve the first goal because they are intended to ultimately reunite the mother with her child; however, these laws, as with criminal statutes, do not achieve the second goal because the state typically becomes involved only after the birth and such “responses do not prevent harm to the child caused by prenatal substance abuse.”\textsuperscript{250}

In order to replace the failures of punitive measures with successes, the woman’s voice must be heard. Instead of forcing the woman and the fetus to compete against each other, as the rights analysis-punitive measures approach does, cultural feminism suggests that the relationship between the woman and the fetus should be strengthened. While the male-oriented “rights analysis does not leave room for compromise,” female-oriented solutions “would meet the needs and interests of both” the woman and the fetus.\textsuperscript{251} Non-punitive measures can mediate both the interests of the woman and the fetus. Therefore, rather than approaching substance abuse in an adversarial, male-oriented way, non-punitive measures would solve the problem in a facilitative, female-oriented way.\textsuperscript{252}

2. Status Regime: The Politics of Substance Abuse During Pregnancy

Another possible explanation for the failure of punitive measures to deter pregnant substance abusers is that society is not truly willing to help these women. Instead, society is trying to maintain two status regimes: (1) men’s dominance over women and (2) Caucasian dominance over African Americans and minorities.

The law reinforces these two status regimes.\textsuperscript{253} Professor Reva Siegel explains that throughout history, transformations in the law have resulted from struggles to reform various status regimes, but the changes are “not always the kind...advocates seek.”\textsuperscript{254} She argues, “[a] status regime is modernized (or deormalized) when, despite changes in its rules and rhetoric, it continues to distribute material and dignitary privileges (‘social goods’) in such a way as to maintain the distinctions that comprise the regime (e.g., constitute ‘race’ or ‘gender’)

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{249} See id.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Linden, supra note 14, at 112.
\item \textsuperscript{252} Id. at 114.
\item \textsuperscript{253} See generally Reva B. Siegel, Article, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117 (1996).
\item \textsuperscript{254} Id. at 2119.
\end{enumerate}
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relatively continuous terms.” Professor Reva Siegel calls this dynamic “preservation-through-transformation.”

While civil rights movements “alleviate certain dignitary or material aspects of the inequalities that subordinated groups suffer,” they also cause the legal system to justify the “residual social inequalities among status-differentiated groups.” For example, the women’s rights movement resulted in a modification of common law coverture. Prior to the modifications, a husband owned his wife’s “person, labor, and property” upon marriage. Following status regime changes, women were allowed to own property and keep their earnings. Yet, while women were able to bring suit against others for injuries, courts still barred them from suing their battering husbands, which the courts justified through public policy reasons. Thus, men, through marriage and with the support of the legal system, maintained control over women.

African Americans have also gone through several status regime reforms, most notably emancipation from slavery. However, this modification of the status regime led to segregation, which may have brought about equality in civil and political rights, but did not result in equality of social rights. As Professor Reva Siegel explains, “[s]ocial rights were those forms of association that, white Americans feared, would obliterate status distinctions and result in the ‘amalgamation’ of the races.”

Today, the status regimes of men’s dominance over women and Caucasian dominance over African Americans and minorities have been preserved through various transformations. On the one hand, the legal system will strike down laws that discriminate on the basis of race

255 Id. at 2184.
256 Id.
257 Id.
258 See Reva Siegel, Symposium, The Critical Use of History: Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 STAN. L. REV. 1111, 1116 (1997) (explaining that in the common law a husband had “rights in his wife’s person, labor, and property” in exchange for “a duty to support his wife and to represent her in the legal system.”).
259 Id.
260 See id. at 1117.
261 See id. at 1117-18 (suggesting courts wanted to maintain “marital harmony” and privacy).
262 See id. at 1119-20.
263 See Siegel, supra note 258, at 1119-1128.
264 Id. at 1120.
or gender. On the other hand, the legal system has made it extremely difficult "to prove 'discriminatory purpose'" because the legislature can argue "socially benign (or at least, nonmalicious) reasons for policies they adopt that may 'incidentally' perpetuate status" regimes.

Status regimes of male dominance over females and Caucasian superiority over African Americans and minorities currently remain in transformed versions. The legal system's treatment of substance abuse during pregnancy exemplifies the dynamic of preservation-through-transformation. Race and gender regimes are preserved through both the law and selective law enforcement. As Professor Reva Siegel suggests, "[t]oday, government rarely classifies by race or gender, but it conducts a 'war on drugs'...in ways that often perpetuate, or aggravate, historic patterns of race...inequality." Taking this argument a step further, the war against substance abuse during pregnancy modernizes both race and gender regimes.

The legal system maintains the male-dominated status regime by focusing solely on the pregnant substance abuser, rather than considering the many factors that contribute to drug abuse. Specifically, the law has not addressed fathers who encourage and facilitate drug use and who use drugs themselves. As one author states, "[a]dversarial government actions directed at women who use drugs and alcohol during pregnancy represent another context in which only women have been penalized, despite evidence that alcohol and drug use-as well as smoking-by men can cause harm to their future children through the negative effect on sperm." Thus, even though evidence suggests that fathers may negatively affect the fetus, the legal system selectively attacks pregnant women for the same behavior.

Just as gender regimes remain today, Caucasian-dominated status regimes continue to exist. As the legal system disproportionately enforces the war on drugs against African Americans, it also unequally punishes African American pregnant substance abusers. For example, African Americans "constitute approximately 12% of the United States' population and approximately 13% of its drug users, but account for 33% of all drug-related arrests, 62% of drug-related

265 See Siegel, supra note 253, at 2189.
266 Id.
267 Siegel, supra note 258, at 1145-46.
convictions, and 70% of drug-related incarcerations." Likewise, as previously suggested, more African American women are punished than Caucasian women. African American women "were ten times as likely to be reported to child welfare agencies for prenatal drug use (even though the same proportion of Black and White American women use drugs while pregnant)."

The media has played a role in creating the perception that drug abuse is predominantly a problem in African American communities. In the 1970s, before the war on drugs, Caucasian use of both powder and freebasing cocaine was a problem, and yet, the media chose to ignore it. It was not until the 1980s that the media began reporting on drug addiction, coincidentally around the same time crack cocaine had become a problem for African Americans and minorities, especially in urban areas. It was also around this time that the media highly publicized "crack babies." Ignorance of the social problems surrounding pregnant African Americans, such as poor nutrition and lack of prenatal care, facilitated the crack baby myth. As a result, the problem "became the fault of irresponsible Black mothers, rather than the fault of the American social structure."

Applying punitive measures to pregnant substance abusers is not effective. As was previously explained, the punitive approach fails in many ways. Yet, society continues to implement criminal and civil punishments within this context. Such behavior suggests that society is not truly willing to help pregnant substance abusers overcome their addictions. Society would rather maintain its current gender and racial status regimes. However, if society intends to prevent maternal substance abuse, it must break away from its current status regimes and make way towards actual equality. This goal could be achieved through the implementation of non-punitive measures.

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269 Kathleen R. Sandy, Commentary, The Discrimination Inherent in America’s Drug War: Hidden Racism Revealed by Examining the Hysteria over Crack, 54 ALA. L. REV. 665, 671 (2003) (arguing that critical race theory requires society to examine the overlap of race and the War on Drugs).
270 Id. at 672.
271 See id. at 681.
272 See id.
273 See id. at 684-85.
274 See Sandy, supra note 269, at 685-86.
275 Id. at 686.
IV: NON-PUNITIVE MEASURES

Cultural feminism and status regime are two independent theories, but when the theories are applied to the problem of substance abuse during pregnancy, both suggest that society needs to develop and implement effective non-punitive measures by encouraging drug treatment, rather than continuing to apply punitive measures, in order to help pregnant substance abusers. Unlike punitive measures, non-punitive measures have the potential to protect the woman as well as the fetus. As Dorothy Roberts observes, "[a] policy that attempts to protect fetuses by denying the humanity of their mothers will inevitably fail," and thus, there is a need for a drug policy that recognizes both the mother and the fetus. Cultural feminist theory argues that society has a "duty to aid" pregnant substance abusers. By helping the pregnant woman through non-punitive channels, society would fulfill its duty to the woman and recognize that she is as valued as the fetus. At the same time, non-punitive measures would protect the fetus because society would be facilitating a pregnant substance abuser's decision to seek effective treatment.

Additionally, by implementing non-punitive measures for substance abuse during pregnancy, punitive measures could no longer be used to either maintain current status regimes or manipulate public opinion in order to disguise the underlying problems of abusive partners, poverty, racism, and non-existent or severely lacking health care. Instead, non-punitive measures would protect the fetus by addressing these problems. Non-punitive measures would also provide the pregnant substance abuser with the social support that she needs in order to cease her dependence on drugs.

A. Treatment Model

Arguably, pregnancy may be the point in a woman's life when she is "most motivated to seek treatment for drug addiction" and most willing

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276 See generally Linden, supra note 14; Stovall, supra note 99; Mills, supra note 16; See Roberts, supra note 9, at 1436.
277 See Linden, supra note 14, at 120.
278 Roberts, supra note 9, at 1481.
279 Linden, supra note 14, at 106.
280 See id. at 120-21, 134-35.
281 See id. at 121.
282 See Roberts, supra note 9, at 1436.
283 See id.
to make changes in her life for the better.\textsuperscript{284} This motivation and willingness provides the government\textsuperscript{285} and the health community with an opportunity to facilitate a pregnant woman’s quest to overcome substance abuse. In order to assist the woman and the fetus, society should develop “a comprehensive health care system that includes prenatal care as well as gender-sensitive drug treatment programs.”\textsuperscript{286} Also, society should take a preventive approach by creating drug treatment programs for non-pregnant women that would help them develop coping skills so that they could solve, or at least self-manage, the problems contributing to their substance abuse.\textsuperscript{287}

There are several additional reasons why treatment is a better solution to the problem of substance abuse during pregnancy than punitive measures. Each exemplifies the fact that treatment would protect both the woman and the fetus, and thus, falls in line with the goals of cultural feminist theory.\textsuperscript{288}

First, treatment would properly classify and handle drug addiction as an illness.\textsuperscript{289} As previously mentioned, the health care community and the Supreme Court recognize that drug addiction is an illness that requires treatment.\textsuperscript{290} The Court acknowledged in Robinson v. California that drug addiction “is apparently an illness which may be contracted innocently or involuntarily.”\textsuperscript{291} The Court then compared drug addiction to a cold and concluded that “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”\textsuperscript{292} In other words, it would be wrong to use punitive measures to address an illness because often times the substance abuser is innocent.\textsuperscript{293}

Second, treatment would encourage pregnant substance abusers to seek prenatal care.\textsuperscript{294} If a pregnant woman is assured that her physician will keep her substance abuse confidential, as required by the

\begin{thebibliography}{99}
\bibitem{284} Id. at 1450.
\bibitem{285} See id.
\bibitem{286} Linden, supra note 14, at 135.
\bibitem{287} See id.
\bibitem{288} See id. at 120.
\bibitem{289} See Linder, 268 U.S. at 18.
\bibitem{290} See Paltrow, et al., supra note 11, at 6; See, e.g., Linder, 268 U.S. at 18; Robinson, 370 U.S. at 667.
\bibitem{291} 370 U.S. at 667.
\bibitem{292} Robinson, 370 U.S. at 667.
\bibitem{293} See Oberman, supra note 116, at 512-13 (suggesting that addicted women have often experienced abusive relationships throughout their lives resulting in them having less ability to control situations in their lives).
\bibitem{294} See Plambeck, supra note 91, at 22.
\end{thebibliography}
physician-patient relationship, then she will fear neither going to the physician nor revealing her substance abuse problem.\textsuperscript{295} Once the woman is in the physician's office, the physician can educate her about the harms of substance abuse and explain to her drug treatment options.\textsuperscript{296} Therefore, if the fear of punitive measures is removed, then pregnant substance abusers will be more likely to seek prenatal care and drug treatment, which are essential to the health of both the women and the fetuses.\textsuperscript{297}

Third, treatment would be cost effective and successful.\textsuperscript{298} Money would be much better spent towards treatment for pregnant substance abusers than towards investigating and prosecuting them.\textsuperscript{299} In fact, the cost effectiveness and success “of treatment has been documented in the few existing prenatal drug treatment programs.”\textsuperscript{300} These prenatal drug treatment programs have resulted in lower intensive care costs, more drug-free infants delivered, and less need for foster care.\textsuperscript{301}

**B. Improvement of the Treatment Model**

While some treatment programs have been developed, pregnant substance abusers still face many barriers when they seek treatment.\textsuperscript{302} These barriers to treatment need to be removed in order to properly implement effective non-punitive measures.\textsuperscript{303}

In general, society lacks “specialized treatment programs for women” and it has been very slow to develop “gender-sensitive and culturally relevant treatment models.”\textsuperscript{304} Moreover, treatment facilities usually do not offer coordinated services\textsuperscript{305} as recommended by health

\begin{enumerate}
\item See id.
\item See Linden, supra note 14, at 136.
\item See Spencer, supra note 17, at 407; See also Linden, supra note 14, at 134 (stating negative effects of substance abuse during pregnancy are improved by providing prenatal care and drug treatment).
\item See Spencer, supra note 17; Charles Marwick, \textit{Physician Leadership on National Drug Policy Finds Addiction Treatment Works}, 279 JAMA 1149 (1998); Paltrow, et al., supra note 11.
\item See Spencer, supra note 17, at 406.
\item Id. (describing success stories in Baltimore, Chicago, and New York City treatment programs).
\item See id.
\item See, e.g., Curet & Hsi, supra note 16, at 75-76.
\item See id. at 76.
\item Id. at 75-76.
\item Id. at 76.
\end{enumerate}
Such coordinated services would include prenatal care, “prevention education, early intervention, and available, effective treatment programs.” Additionally, due to fear of legal liability, many programs refuse to accept pregnant women. These treatment facilities are afraid to admit pregnant women with drug addictions because they are high-risk patients susceptible to complications that may lead to lawsuits against the treatment provider.

Additionally, pregnant substance abusers who lack private insurance have very limited treatment options. As a result, these women are placed on long waiting lists, which can be detrimental to the health of both the woman and the fetus. Further, many treatment programs are unable to provide child care, transportation, or safe housing.

CONCLUSION

Society must implement improved treatment programs instead of applying punitive measures if it truly wants to eliminate the problem of substance abuse during pregnancy. Ideally, society will discontinue punishing pregnant substance abusers and begin implementing barrier-free treatment programs. Unfortunately, at this time, this ideal solution appears to be on the back-burner.

South Carolina’s Supreme Court decisions that treat substance abuse during pregnancy as child abuse raise several concerns for the future. First, courts in other states may join South Carolina in recognizing a viable fetus is a person because it is recognized as such in other areas of the law, such as wrongful death actions and murder. Second, taking an example from civil child welfare laws, legislatures

306 See Mills, supra note 16, at 998.
307 Curet & Hsi, supra note 16, at 76.
308 Mills, supra note 16, at 998.
309 Curet & Hsi, supra note 16, at 76.
310 Id.
311 See Oberman, supra note 116, at 516.
312 See id.
313 See id. at 514 (stating that research shows a fetus’s chance of survival increases the sooner the pregnant woman seeks prenatal care).
314 See id. at 516-17.
316 Curet & Hsi, supra note 16, at 86.
317 See Whiner, 492 S.E.2d at 777; McKnight, 576 S.E.2d at 168.
318 See Eckenwiler, supra note 13, at 89.
might begin enacting criminal laws that specifically classify substance abuse during pregnancy as child abuse. Third, there may be attempts to increase the number of judges appointed to the bench who will decide to recognize substance abuse during pregnancy as child abuse.

All of these concerns are particularly relevant today because the use of punitive measures to address substance abuse during pregnancy does not seem to be losing momentum in South Carolina. Proponents of non-punitive measures must therefore work together to stop the spread of punitive attacks against pregnant women. Society must peel back the layers surrounding pregnant substance abusers by implementing non-punitive measures, such as prenatal care and drug treatment programs.

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319 See Eckenwiler, supra note 13, at 89; Paltrow, et al., supra note 11.
321 See McKnight, 576 S.E.2d at 168; See Paltrow, supra note 1, at 1042.
322 See Paltrow, supra note 1, at 1005 (arguing that prosecuting pregnant women for substance abuse is “a significant threat to reproductive freedom” and that “the response from the pro-choice and progressive communities has been disturbingly muted”).