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The Criminalization of Pregnant People: Should Prenatal Drug Use be Treated as a Crime or Cry for Help?

I. INTRODUCTION

Pregnant people are being prosecuted for using drugs across the United States. Their punishments include sentences of imprisonment. The question whether pregnant people using drugs should face punishment or be given treatment is an issue that garners diverse opinions not only within society but in our legal system. This paper will explain that prenatal drug use is a public health crisis that requires treatment, and that the punitive actions taken have not been beneficial in achieving the overarching goal of preserving the health of the pregnant person and unborn child. This reasoning comes from a comprehensive look at prenatal drug use, which will explain the punitive and treatment-based approaches, then analyze the legislation, case law, outcomes, and the opinions of the medical community on both.

Currently, there are laws that mandate punitive measures as well as laws that mandate treatment and protect pregnant people from criminal penalties for their drug use. The former has enabled Courts to criminalize pregnant people by using statutes that prohibit child endangerment, child abuse, and child neglect to prosecute cases of prenatal drug use. In these cases, the Courts clearly misinterpret the corresponding Legislature's intent. The constitutionality of the implementation and misapplication of these general criminal laws to criminalize prenatal drug is questionable which is another reason that punitive based approach to prenatal drug use is flawed.

Furthermore, when analyzing the merits of the treatment-based and punitive approaches, there is more evidence to support treatment as the correct combatant to prenatal drug use. The punitive approach is supposed to function as a deterrent to pregnant drug users that invokes fear of the criminal penalty. Statistics do not support a showing that the punitive approach is

effective as a deterrent, or even affective at all. However, areas that have employed treatment-based approaches have seen a decline in children born with disorders directly linked to fetal drug exposure.

Tennessee's Fetal Assault Law is one of greatest examples of the punitive approach to prenatal drug use, and it failed to function as a deterrent. In the two years the Fetal Assault Law was in effect, the number of children born with fetal drug exposure did not decrease. It did, however, deter pregnant people using drugs from seeking prenatal treatment. The primary goal of both the punitive and treatment-based approach to prenatal drug use is said to be the protection of the fetus and the health of the pregnant person. The Fetal Assault Law essentially had the adverse effect when it caused a decrease in the number of pregnant people receiving healthcare. The punitive approach relies on the criminal justice model that threat of punishment acts a deterrent for the perpetrator of the crime. In this instance, this model is especially ineffective because of the many implications of substance abuse, that include impulsivity and impaired decision-making abilities.

Medical experts believe that treating prenatal drug use as a crime and pregnant drug users as criminals is a faulty approach because they define addiction as a disease which, in turn requires treatment to overcome. Treatment based approaches work toward the goal of lessening the number of children exposed to drugs in the womb by prioritizing the health of the pregnant person. When reviewing the outcomes of punitive and treatment-based approaches to prenatal drug use, different forms of treatment have had more success in managing the issue long-term. The solutions that garner the most favorable results for the pregnant person, the child, and society are treatment based.

II. BACKGROUND

A. Prenatal Drug Use

“Addiction is defined as a chronically relapsing disorder characterized by compulsive drug taking, an inability to limit the intake of drugs, and the emergence of a withdrawal syndrome during cessation of drug taking (dependence).”¹ In 2013 it was estimated that 4.4% of pregnant women abused one or more substances during pregnancy.² More specifically, the number of women with opioid-related diagnoses documented at delivery increased by 131% from 2010 to 2017.³ In 2017, the Healthcare Cost and Utilization Project (HCUP), which is managed by the U.S. Agency for Healthcare Research and Quality, produced data that revealed seven newborns were diagnosed with Neonatal Abstinence Syndrome (NAS) for every 1,000 newborn hospital stays.⁴ The statistics show that prenatal drug use is an ongoing issue that has become a public health crises in the United States.

Prenatal substance use has a direct effect on the health of the fetus.⁵ Examples of negative effects of prenatal drug use include NAS, Sudden Infant Death Syndrome (SIDS), low birth weight, and short body length.⁶ Healthy fetuses, healthy pregnant people, and lower infant mortality rates are important and are understandably a priority to government officials, public

¹ Sana Loue, *The Criminalization of the Addictions: Toward a Unified Approach*, 24 J. LEGAL MED. 281, 282 (2003).

² Andria D. Wendell, *Overview and Epidemiology of Substance Abuse in Pregnancy*, *Clinical Obstetrics and Gynecology*, 91 (2019).

³ Ashley Hirai, Jean Ko, Pamela Owens; et al, *Neonatal Abstinence Syndrome and Maternal Opioid-Related Diagnoses in the US, 2010-2017*, *JAMA*, (Jan. 12, 2021), <https://jamanetwork.com/journals/jama/fullarticle/2774834>.

⁴ HCUP Fast Stats - Map of Neonatal Abstinence Syndrome (NAS) Among Newborn Hospitalizations, HCUP-US.AHRQ.gov, <https://www.hcup-us.ahrq.gov/faststats/NASMap>.

⁵ Seetha Shankaran et al., *Association Between Patterns of Maternal Substance Use and Infant Birth Weight, Length, and Head Circumference*, 114 *PEDIATRICS* e226, e226-e234 (2004).

⁶ *Id.*

health officials, and society. Prenatal drug use should be taken seriously and handled in the way that will create the most positive outcome for parent, child and public.

Opinions on the correct approach to combat prenatal drug use are divided with little uniformity in the law and the public health sector across the United States. Many physicians and addiction specialists assert that addiction is a chronic disease, and that drug addicts are essentially victims of their illness. They believe that prenatal drug use is the domain of medical professionals, and treatment is the most suitable response to put an end to substance abuse whether the addict is pregnant or not.⁷ In contrast, those that believe in the efficacy of the punitive approach argue that prenatal drug use is a crime and a matter for the criminal justice system.

1. Treatment-Based Approach

Generally, treatment-based approaches to prenatal drug use include behavioral counseling, evaluation services and substance abuse treatment along with treatment for co-occurring mental health issues such as depression and anxiety and long-term follow-up to prevent relapse.⁸ More specifically, The National Center on Substance Abuse and Child Welfare (NCSACW) lists the appropriate steps in intervention treatment at the prenatal stage using the Five Points of Family Intervention developed by the Substance Abuse and Mental Health Services Administration (SAMHSA).⁹ The Five Points of Family Intervention provides strategies

⁷ *Id.*

⁸ Treatment Approaches for Drug Addiction DrugFacts, National Institute on Drug Abuse: Advancing Addiction Science (January 17, 2019), <https://nida.nih.gov/publications/drugfacts/treatment-approaches-drug-addiction>.

⁹ Infants with Prenatal Substance Exposure and Their Families: Five Points of Family Intervention, National Center on Substance Abuse and Child Welfare, <https://ncsacw.acf.hhs.gov/files/five-points-family-intervention-infants-with-prenatal-substance-exposure-and-their-families.pdf>.

that agencies can employ to successfully meet the needs of pregnant substance users to attempt to combat prenatal substance exposure.¹⁰ The comprehensive list is broken down into parts that include pre-pregnancy, prenatal, birth, neo-natal, infancy, and postpartum, and childhood adolescence.¹¹ For purposes of this paper, pre-pregnancy, prenatal, and birth are only discussed.

The pre-pregnancy portion focuses on prevention through education.¹² It recommends the promotion of awareness of the effects of substance use during pregnancy along with various pregnancy prevention methods, specifically to people who can potentially become pregnant as well as the public at large.¹³ At the prenatal stage the approach focuses on evaluating the individual's drug use through an evidence-based assessment and implementing a substance use disorder treatment that would be most effective.¹⁴ It suggests a plan be developed which could include healthcare, home visiting, and or other community services to be shared with the pregnant substance user to guide them in becoming healthy and delivering a healthy child.¹⁵ Finally, at the birthing stage the list suggests the new parent be educated on how to support the infant, what constitutes a safe home environment, parenting skills, home visitation, and enrollment status in pediatric and childcare.¹⁶ At this stage, it is also advised to develop a plan using the collaborative approach that would continue treatments as necessary to ensure the person that gave birth remains healthy or is continuing to work toward becoming healthy.¹⁷

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

2. Punitive Approach

The punitive approach to prenatal drug use necessitates that the court attempt punishment to inflict punishment on the pregnant substance user for giving birth to a child with drugs in its system. For purposes of this paper, the punishment analyzed is limited to criminal penalties, specifically imprisonment.

B. Legislation

To determine whether the laws that mandate punitive measures are a satisfactory response to prenatal drug use, the history, intent, and constitutionality of said laws should be examined. However, only one state has been successful at passing a law that specifically addressed prenatal drug use. In the absence of successful targeted legislation, prosecutors employ general criminal laws, such as child endangerment, child neglect, and child abuse statutes to criminalize pregnant people for using drugs.

1. Tennessee Fetal Assault Law

Tennessee is the single state that succeeded in passing a law that specifically criminalized using drugs while pregnant. The Tennessee state statute called the Fetal Assault Law was passed in 2014.¹⁸ It amended Tenn. Code Ann. § 39-13-101 which stated, “A person commits assault who intentionally, knowingly, or recklessly causes bodily injury to another person.”¹⁹ The Fetal Assault Law identified the fetus as a victim. It stated that, “another,” “individuals,” and “another person” included a human embryo or fetus at any stage of gestation in utero.”²⁰ This amended the Tennessee Code to permit criminal prosecution of a person for assault for the illegal use of a

¹⁸ Tenn. Code Ann. § 39-13-107 (2014).

¹⁹ Tenn. Code Ann. § 39-13-101 (2010).

²⁰ Tenn. Code Ann. § 39-13-107 (2014).

narcotic drug while pregnant if their child is born addicted to or harmed by the narcotic drug.²¹ The law included a sunset clause which left it in effect for two years while the General Assembly studied its impact.²²

As the sole piece of legislation that specifically criminalized prenatal drug use the Tennessee Fetal Assault Law failed to solve the issue of the increased number of children being born with NAS.²³ It had the opposite effect because it deterred pregnant people from seeking prenatal care and impeded access to medical treatment for pregnant drug users due to fear of prosecution and imprisonment.²⁴ This is exemplified in the documented increase in patients delaying prenatal care and fleeing Tennessee because they feared arrest once the Fetal Assault Law went into effect.²⁵ As a result, the Tennessee General Assembly decided not to extend the law beyond July 1, 2016.²⁶

2. Interpretation and Misapplication of General Criminal Laws

Currently, there is no law that specifically criminalizes prenatal drug use. As a result, prosecutors in several states are using existing criminal laws to prosecute pregnant people in lieu of specific laws that punish prenatal drug use. In Alabama and South Carolina, the highest courts in each state have interpreted existing child endangerment statutes to allow prosecution for prenatal drug abuse.”²⁷ The Courts have demonstrated a lack of regard for the plain meaning of

²¹ *Id.*

²² *Id.*

²³ Amnesty International, USA: Tennessee “Fetal Assault” Law A Threat to Women’s Health and Human Rights 1-5 (2016).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Legislative Fact Sheet, American Civil Liberties Union, Tennessee’s Fetal Assault Law Sunsets July 1, 2016 (2018), <https://www.aclu-tn.org/wp-content/uploads/2016/09/Fetal-Assault-Legal.pdf>.

²⁷ Leticia Miranda, Vince Dixon, Cecilia Reyes, How States Handle Drug Use During Pregnancy, Journalism in the Public Interest (2015).

child endangerment and child abuse statutes that has permitted pregnant substance users to be tried for crimes that the State Legislatures did not intend.

In Alabama, statute 26-15-3.2 states that, “A responsible person commits the crime of chemical endangerment of exposing a child to an environment in which he or she... knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance,... and a child suffers serious physical injury...or contact results in the death of the child.”²⁸ This law was successfully used to convict and sentence a young woman to three years of imprisonment for chemical endangerment because her son was born with cocaine in his system as a result of her cocaine usage while pregnant.²⁹ The Alabama Supreme Court reasoned that the term “child” in the chemical endangerment statute was unambiguous, thus they were tasked with interpreting the plain language of the statute to mean exactly what it said and not to engage in judicial construction of the statute’s language.³⁰ They deduced that the plain and ordinary meaning of the term “child” included unborn children for three reasons: the dictionary definition of the term "child" explicitly included an unborn person or a fetus, the everyday usage of the word “child” included a viable fetus, and other courts in Alabama had interpreted the term "child" to include a viable fetus in other contexts.³¹ The ruling set a precedent that enabled prosecutors to continue to charge people who used drugs while pregnant with chemical endangerment of a child throughout the state of Alabama.

²⁸ Code of Ala. § 26-15-3.2 (2012).

²⁹ Ex parte Hicks, 153 So. 3d 53 (Ala. 2014).

³⁰ *Id.*

³¹ *Id.*

The South Carolina Supreme Court used S.C. Code Ann. § 20-7-50 to set the precedent that pregnant people could be charged with unlawful conduct towards a child for prenatal drug use. S.C. Code Ann. § 20-7-50 states that it is unlawful for a parent to do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered.³² In *Whitner v. State*, the South Carolina Supreme Court held that S.C. Code Ann. § 20-7-50 encompassed maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus.³³ The court reasoned that because they previously held in *State v. Horne* that the word "person" as used in South Carolina's murder statute included viable fetuses, that it would be absurd not to follow suit for purposes of statutes proscribing child abuse.³⁴ In *Whitner*, the defendant was sentenced to eight years in prison pursuant to S.C. Code Ann. § 20-7-50 for causing her baby to be born with cocaine metabolites in its system by reason of her ingestion of crack cocaine during the third trimester of her pregnancy.³⁵

The South Carolina Supreme Court has gone as far as to use the Homicide by Child Abuse law that states that a person involved in “circumstances manifesting an extreme indifference to human life” that results in the death of children younger than eleven years of age can render a homicide prosecution as a vehicle to hold pregnant people criminally liable for their prenatal drug use.³⁶ In *State v. McKnight*, a pregnant person was sentenced to twelve years in prison pursuant to the Homicide by Child Abuse law for causing her baby to be born stillborn by taking cocaine during her pregnancy. The Supreme Court of South Carolina held that in the

³² S.C. Code Ann. § 20-7-50 (1985). Section 20-7-50 was amended in 1993 to make violation of the section a felony and to make the maximum term of imprisonment conform to the new crime classification system. See S.C. Code Ann. § 20-7-50 (Supp. 1994).

³³ *Whitner v. State*, 492 S.E.2d 777 (S.C. 1996).

³⁴ *Id.*

³⁵ *Id.*

³⁶ S.C. CODE ANN. § 16-3-85 (2003).

context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death.³⁷ The interpretation of general criminal laws to permit the prosecution of prenatal drug use is pervasive in case law and continues to negatively impact the pregnant substance user and her child.

3. Cases Won through Statutory Interpretation

The child abuse and endangerment laws enacted to protect living children are being used to take punitive action against pregnant people for using drugs. The plain meaning of statutes, and further, the legislative intent demonstrate that said laws were meant to punish people who committed violence against the pregnant person and in turn the fetus.

“Whether strictly or liberally construed, a penal statute must be sufficiently definite and explicit to inform those who are subject to it what conduct will render them liable to its penalties. A person is not required, at peril of life, liberty, or property, to speculate concerning the meaning of criminal statutes.”³⁸

Courts often determine that general criminal laws are not appropriate vehicles for prosecuting prenatal drug use when they analyze the plain meaning and legislative intent of the statutes. In Ohio, prosecutors attempted to use R.C. 2919.22(A) and R.C. 2925.02(A)(4)(b) to prosecute pregnant people when their children were born with drugs in their system. R.C. 2919.22(A) states that no person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.³⁹ R.C.

³⁷ State v. McKnight, 352 S.C. 635, 576 S.E.2d 168, 2003 S.C. LEXIS 23.

³⁸ People v Dempster, 396 Mich. 700, 715; 242 NW2d 381 (1976).

³⁹ Ohio Rev. Code Ann. § 2919.22(A).

2925.02(A)(4)(b) states that a person shall not knowingly induce or cause a juvenile who is at least two years the offender's junior to use a controlled substance.⁴⁰

In 1992, in *State v. Gray*, the Supreme Court of Ohio held that a parent may not be prosecuted for child endangerment under R.C. 2919.22(A) for substance abuse occurring before the birth of the child because the apparent intention of the drafters "was to punish a breach of statutory duty, when the breach results in a substantial risk to the health or safety of a child."⁴¹ The Court reasoned that under the common usage of the term "parent," Gray did not become a parent until the birth of the child. Furthermore, the child did not become a "child" within the contemplation of the statute until she was born.⁴² The Court also added that the Ohio legislative body previously had specifically indicated the unborn child where concerns of the fetus were at issue and would have done so in this instance if their intent was to include the unborn child within the meaning of child in R.C. 2919.22(A).⁴³ In *State v. Clemmons*, decided in 2013, the 4th District Ohio Court of Appeals decided not to convict a pregnant woman of child endangerment when her baby tested positive for marijuana, and oxycodone at birth.⁴⁴ The Court reasoned that the two counts of corrupting another with drugs, in violation of R.C. 2925.02(A)(1) and (A)(3) could not be applied to prenatal drug use because the plain language of the statute did not explicitly refer to the unborn child.⁴⁵

Furthermore, it is the function of the legislative body to create laws to address prenatal drug use, not the job of the Courts to place a weak construction on general criminal laws to

⁴⁰ Ohio Rev. Code Ann. § 2925.02(A)(4)(b).

⁴¹ *State v. Gray*, 584 N.E.2d 710 (Ohio 1992).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *State v. Clemons*, 996 N.E.2d 507 (Ohio Ct. App. 2013).

⁴⁵ *Id.*

charge pregnant people for crimes that they are not guilty of per the plain meaning of the statute. In *Clemmons*, the court also stated that the legislature in Ohio had been grappling with whether the punitive or treatment-based approach to prenatal drug use was proper since the decision in *Gray*, yet no addition or clarification to any of the child endangerment or abuse offenses had been made.⁴⁶ It is the opinion of the Court of Appeals of Ohio that the Ohio legislature's failure to amend or clarify that any of the general criminal laws encompassed the conduct of a pregnant woman in relation to her unborn child was an implication that it was never their intention.⁴⁷ "A court should not place a tenuous construction on a statute to address a problem to which the legislative attention is readily directed and which it can readily resolve if in its judgment it is an appropriate subject of legislation."⁴⁸ In *Stallman v. Youngquist*, the Supreme Court of Illinois stated, "that if a legally cognizable duty on the part of pregnant women to their developing fetuses is to be recognized, the decision must come from the legislature only after thorough investigation, study and debate."⁴⁹

Looking further at legislative intent, in *Cochran v. Commonwealth* decided in 2010, the Supreme Court of Kentucky concluded that the criminal abuse statutes did not apply to a woman's conduct during pregnancy because the legislature did not intend criminal sanctions for prenatal use of drugs.⁵⁰ In the decision, the Supreme Court of Kentucky cited the Maternal Health Act of 1992, which stated that punitive actions taken against pregnant substance abusers would have created additional problems, including discouraging those individuals from seeking the essential prenatal care and substance abuse treatment necessary to deliver a healthy

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *People v. Gilbert*, 324 N.W.2d 834 (Mich. 1982).

⁴⁹ *Stallman v. Youngquist*, 126 Ill. Dec. 60, 531 N.E.2d 355 (1988).

⁵⁰ *Cochran v. Commonwealth*, 315 S.W.3d 325 (Ky. 2010).

newborn.⁵¹ The Court reasoned that it was not at liberty to ignore the legislative intent of the General Assembly of the Commonwealth of Kentucky that was expressed in the Maternal Health Act.⁵² The Act sought expanded access to prenatal care and substance abuse treatment and education programs because it recognized that punitive actions against pregnant drug users would discourage individuals from seeking the prenatal care and substance abuse treatment necessary to deliver a healthy newborn.⁵³ The Supreme Court of Kentucky recognized the Maternal Health Act was focused on the health of the child and parent, and aimed to provide treatment to pregnant people using drugs, not to take the punitive approach and impose criminal sanctions or penalties to punish.⁵⁴

The following cases focus on the plain meaning of the general criminal laws used to prosecute pregnant people for using drugs which have resulted in the convictions being overturned on appeal. In *Arms v. State*, a pregnant woman was charged under Arkansas Code 5-13-210(b), for taking methamphetamines during her pregnancy.⁵⁵ Under Arkansas Code Annotated 5-13-210(b), it is a crime to "administer or cause to be ingested, inhaled or otherwise introduced" a controlled substance into another person unless the drug has been prescribed.⁵⁶ On appeal, the Arkansas Supreme Court found that the statute used to prosecute the defendant was misapplied because it did not expressly criminalize the passive bodily processes that results in a mother's use of a drug entering her unborn child.⁵⁷ The courts cannot, through construction of a

⁵¹ *Id.*

⁵² *Id.*

⁵³ Maternal Health Act of 1992, H.B. 192, Ch. 442, Ky. Acts (1992).

⁵⁴ *Cochran v. Commonwealth*, 315 S.W.3d 325 (Ky. 2010).

⁵⁵ *Arms v. State*, 471 S.W.3d 637 (Ark. 2015).

⁵⁶ Ark. Code Ann. § 5-13-210(b) (2010).

⁵⁷ *Arms v. State*, 471 S.W.3d 637 (Ark. 2015).

statute, create a criminal offense that is not in express terms created by the Legislature, therefore, the woman did not violate criminal law by using methamphetamine during her pregnancy.⁵⁸

In a similar case in Hawaii, a pregnant woman was charged with recklessly causing the death of her newborn son in violation of Hawaii Revised Statute § 707-702(1)(a).⁵⁹ The Hawaii Supreme Court concluded that the manslaughter prosecution of the defendant for prenatal conduct that caused the death of her son subsequently born alive was not consistent with the plain meaning of the Hawaii Penal Code, because at the time she used the methamphetamine, her unborn son was a fetus, not a person as required by the statute to constitute manslaughter.⁶⁰

4. Constitutionality

“A principle of criminal law recognizes that due process prohibits courts and prosecutors from interpreting or applying existing law in an unforeseeable or unintended manner.”⁶¹ The use of general criminal laws by prosecutors to bring charges against pregnant people for prenatal drug use that result in punitive consequences for the pregnant person is not the intended outcome of the legislation nor is it foreseeable by the person incurring the penalties.⁶² The Due Process Clause of the Fourteenth Amendment guarantees that, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁶³ Prosecutors are construing and

⁵⁸ *Id.*

⁵⁹ *State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005).

⁶⁰ *Id.*

⁶¹ Carol Jean Sovinski, Comment, The Criminalization of Maternal Substance Abuse: A Quick Fix to a Complex Problem, 25 PEPP. L. REV. 107, 118 (1997).

⁶² Meghan Horn, Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse, 14 Wm. & Mary J. Women & L. 635 (2008).

⁶³ U.S. Const. amend. XIV, § 1.

or modifying general criminal laws to apply them to instances of prenatal drug use. The legislative intent is lacking to conclude that state legislative bodies foresaw or aimed for general criminal laws such as child endangerment and homicide laws to be the basis for criminal prosecution for people who use drugs while pregnant.⁶⁴ Prosecutors' use of said statutes to criminalize prenatal drug use is so inventive as to be constitutionally problematic because along with creating unintended consequences, pregnant substance users are completely unaware that the statutes apply to their conduct.⁶⁵ Therefore, if the state legislature did not intend for these results when it drafted the statutes and pregnant substance users could not foresee these results when they engaged in drug use while pregnant, then the constitutionality of the misapplication of the general criminal laws can be called into question.⁶⁶

Prosecutors' most inventive and constitutionally problematic means of attempting to prosecute prenatal drug use are under statutes proscribing the delivery of controlled dangerous substances, and child abuse statutes.⁶⁷ In *Johnson v. State*, the Florida Circuit Court convicted a woman under a drug trafficking law for delivering a controlled substance to her minor child when it was born with cocaine in its system.⁶⁸ The Court reasoned that the fetus was a person under Florida law and transmission of cocaine from the mother to the child by way of the umbilical cord constituted a violation of the statute.⁶⁹ Ultimately, the Florida Supreme Court reversed the lower court's decision because they believed the application of the drug trafficking

⁶⁴ Meghan Horn, Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse, 14 Wm. & Mary J. Women & L. 635 (2008).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Johnson v. State*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991).

⁶⁹ *Id.*

statute to prenatal drug use was illogical.⁷⁰ However, the use of drug trafficking statutes to prosecute people for giving birth to a child with drugs in its system has due process implications that can continue to effect pregnant substance users. “A pregnant person of ordinary intelligence will not read a drug delivery statute and believe she could be prosecuted for taking drugs because there is technically "delivery" to her "minor" (fetus) via the umbilical cord.”⁷¹ A deprivation of liberty exists where a person can be imprisoned for a crime that she would reasonably have no knowledge applied to her conduct because it was so absurdly applied by a prosecutor and the court.⁷²

In cases that pregnant substance users are charged under child abuse statutes, it is unlikely foreseen by the pregnant person that the fetus constitutes a child for purposes of the statute or is protected by the child abuse statute equally the way a child living outside the womb would be.⁷³ The child abuse prosecutions generally fail because of the lack of legislative intent and the language that does not expressly include a fetus, however some pregnant people have not only been charged under child abuse statutes for their prenatal drug use but imprisoned as well. Revisiting *Whitner v. State*, the defendant was convicted of child neglect for causing her child to be born with cocaine in its system and sentenced to eight years of imprisonment.⁷⁴ The Supreme Court of South Carolina determined that a viable fetus is a person, therefore they decided that the defendant was guilty of not taking proper care of the health of the child pursuant to the child neglect statute. There is an argument that the defendant in *Whitner* suffered a constitutional

⁷⁰ Johnson v. State, 602 So. 2d 1288 (Fla. 1992).

⁷¹ Kellam T. Parks, Protecting the Fetus: The Criminalization of Prenatal Drug Use, 5 Wm. & Mary J. Women & L. 245, 248 (1998).

⁷² *Id.*

⁷³ Meghan Horn, Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse, 14 Wm. & Mary J. Women & L. 635 (2008).

⁷⁴ Whitner v. State, 492 S.E.2d 777 (S.C. 1997).

violation.⁷⁵ The argument is that the defendant's due process rights were violated because of the severe criminal penalty incurred for a crime that she did not receive the required notice would be applied to fetuses and or prenatal conduct.⁷⁶ Serious constitutional issues regarding the right to due process arise when prosecutors and courts charge pregnant people under criminal child abuse and drug delivery statutes for prenatal drug use resulting in the child being born with drugs in its system because they are not the intended nor reasonably foreseen consequences.

III. ANALYSIS

A. Ineffectiveness of Criminal Penalties

Criminalizing prenatal drug use is ineffective because it fails in its function as a deterrent to pregnant drug users. The effect of criminal penalties also runs counter to the goal of ensuring the health of the child because it deters pregnant drug users from seeking prenatal care.⁷⁷

Criminal law is supposed to employ punitive measures that deter criminal activity and act as vehicles for rehabilitation.⁷⁸ However, due to the nature of drug use, addicts and drug dependent persons do not function as typical people in society and, in turn do not respond as classical deterrence theory anticipates.⁷⁹ In theory, the threat of punishment acts a deterrent to the commission of the crime for the typical person.⁸⁰ "Both neuroscience researchers and behaviorists agree that over time, drug use causes a change in the reward center of the brain that makes continued drug use substantially reinforcing."⁸¹ Long-term addicts can have cognitive

⁷⁵ Carolyn Coffey, *Whitner v. State: Aberrational Judicial Response or Wave of the Future for Maternal Substance Abuse Cases?*, 14 J. Contemp. Health L. & Pol'y 211 (1998).

⁷⁶ *Id.*

⁷⁷ Linda C. Fentiman, *Rethinking Addiction: Drugs, Deterrence, & the Neuroscience Revolution*, 14 U. Pa. J.L. & Soc. Change 233 (2011).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 266.

impairments that weaken rationality, decreasing the likelihood that the threat of a criminal sanction will significantly foster the choice to discontinue the use of drugs.⁸² The inability of drug users to appreciate that if they do not use drugs they will be free of criminal penalties such as freedom from imprisonment makes the battle to reduce the rate of pregnant people using drugs difficult and slow using the punitive approach.⁸³

Deterrence research stresses that deterrence is perceptual. Pregnant drug users may not appreciate the risk that criminal penalties carry because of the irrational preoccupation with their addiction.⁸⁴ Research has shown that drug users who become pregnant are seldom deterred unless they perceive that using drugs while pregnant will involve a substantial chance they will be charged, convicted, and incur a punishment.⁸⁵ The mere belief that a prosecutor could charge the drug user with a crime for prenatal drug use would not suffice as a deterrent to a drug addicted person because the belief has less impact on actual behavior than the typical person. As shown above, the criminal penalties for prenatal drug use vary and the laws that impose the penalties are not uniformly applied. The threat of possible imprisonment if a child is shown to have been born with drugs in its system may have a relatively small effect on the behavior of pregnant drug users unless potential offenders learn that the sanction for a particular criminal statute that is used to punish prenatal drug use has been increased, and that law enforcement efforts to apprehend have been expanded.⁸⁶ Additionally, for the drug user to be aware of the

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

heightened level of punishment and prosecution, they would need to be abreast of legislation and case law to appreciate the severity of the consequences, which is unlikely.⁸⁷

The implementation of criminal penalties also fails from a rehabilitation perspective. Generally, the goal of rehabilitation is to reform the offender and to decrease the rate of recidivism. Viewing pregnant drug users and drug users alike, numerous studies like the ones below have concluded that treatment is more effective than imprisonment at decreasing drug use because recidivism is likely for drug users who do not receive treatment. In a 1999 study conducted on 478 inmates at a state prison, the outcome revealed that seventy-five percent of prisoners who were not involved in a drug treatment program while incarcerated returned to prison within three years, while only twenty-seven percent of inmates who were involved in a program returned to prison.⁸⁸ In another study, that was conducted to determine whether punitive state policies had an effect on the NAS rate, researchers concluded that punitive policies did not cause a decline in NAS rates, on the contrary the punitive policies may have been associated with an increase in rates of NAS.⁸⁹

It was discovered that “in a cross-sectional study of nearly 4.6 million births in 8 states, policies that criminalized substance use during pregnancy, considered it grounds for civil commitment, or considered it child abuse or neglect were associated with significantly greater rates of NAS in the first full year after enactment and more than 1 full year after enactment.”⁹⁰ The researchers went on to say that because the punitive policies were unsuccessful in decreasing

⁸⁷ *Id.*

⁸⁸ Harry K. Wexler et al., 3-year reincarceration outcomes for amity in-prison therapeutic community and aftercare in California, 79 *The Prison Journal* 321, 321(1999).

⁸⁹ Lara J. Flaherty et al., Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome, *JAMA Netw. Open* 1, 1 (Nov. 13, 2019).

⁹⁰ *Id.*

the rates of NAS, and unsuccessful at increasing the rate of treatment received for opioid-related complications in pregnant women, the policy makers seeking to reduce rates of NAS should contemplate treatment based approaches favored by public health experts that aim to prevent drug use.⁹¹

The implementation of criminal penalties is also ineffective because it deters pregnant drug users from seeking and obtaining medical treatment during their pregnancy due to fear of prosecution.⁹² Amnesty International conducted twenty individual in-person interviews with women impacted by legislation used to punish prenatal drug use in Alabama and Tennessee, and spoke to thirty-four women in informal focus group settings at two residential drug treatment facilities specifically for pregnant and postpartum women.⁹³ The women in the residential drug treatment centers and healthcare providers asserted that the risk of criminal penalties for prenatal drugs use caused pregnant substance users to neglect healthcare, prenatal care and drug treatment.⁹⁴ Returning to Tennessee's Fetal Assault Law, it is the most extreme example of the punitive approach to prenatal drug use in the United States and failed to achieve any success at lowering the rate of pregnant people using drugs while pregnant.⁹⁵ Medical experts opposed the law because they foresaw the counter-productive effect a law specifically criminalizing prenatal drug use would have. As the Medical Community expected, the fear of interrogation, arrest, and prosecution while seeking health care services and medical treatment created a barrier to

⁹¹ *Id.*

⁹² Fentiman, *supra* at 240.

⁹³ Amnesty International, *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA*, 1 (2017).

⁹⁴ *Id.*

⁹⁵ Legislative Fact Sheet, American Civil Liberties Union, *Tennessee's Fetal Assault Law Sunsets July 1, 2016* (2018), <https://www.aclu-tn.org/wp-content/uploads/2016/09/Fetal-Assault-Legal.pdf>.

accessing care. Corroborating that conclusion, a drug treatment advocate in East Tennessee during the implementation of the Fetal Assault Law stated that:

Everybody that we've asked has been fearful of the 'fetal assault' law. Three recent referrals to my drug treatment facility have not even sought obstetrical (OB) care. They have avoided OB care because of this law. Remember, a lot of them have past histories where their perception is that the law is not going to be their friend. They understand that there is a law. That if you deliver they are going to take your baby and throw you in jail.⁹⁶

Criminal penalties fail to deter pregnant people from using drugs, lower the rate of children born with drugs in their system, rehabilitate pregnant substance users so they do not continue using drugs, but succeed at preventing pregnant substance users from seeking health care services during their pregnancy. Criminal penalties are ineffective at achieving the overarching goal of a child born healthy to a healthy parent.

B. Opinions of the Medical Community

According to the medical community, treatment is the correct approach to prevent and reduce prenatal drug use.⁹⁷ Many public health organizations denounce the punitive approach to prenatal drug use because, as explained earlier, it is shown to act as a deterrent to seeking medical treatment for pregnant drug users due to the fear of criminal penalties.⁹⁸ Medical experts agree that the treatment-based approach yields better outcomes for the pregnant drug user and the unborn child because it focuses on the health of pregnant person by addressing their need for drug treatment to overcome their drug use issues. The March of Dimes, Amnesty

⁹⁶ Amnesty International, *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA*, 1, 9 (2017).

⁹⁷ Emma Coleman, *Many States Prosecute Pregnant Women for Drug Use. New Research Says That's a Bad Idea*, Child Health Policy VUMC (Dec. 5, 2019), <https://www.vumc.org/childhealthpolicy/news-events/many-states-prosecute-pregnant-women-drug-use-new-research-says-thats-bad-idea>.

⁹⁸ Horn, *supra* at 650.

International, the American College of Obstetricians and Gynecologists, and the National Organization on Fetal Alcohol Syndrome have all similarly condemned legislation that has the effect of deterring pregnant substance users readiness to seek assistance they may require.⁹⁹

When public health experts weigh any possible benefit to criminalization against the danger of deterring prenatal care many conclude that such laws are more likely to hurt a baby than help.¹⁰⁰

The National Perinatal Association explained that threats of incarceration and discrimination were prevailing deterrents to seeking appropriate prenatal care, and perinatal providers promote better practices when they implement language and behaviors that reduce stigma and promote honest and open communication about perinatal substance use.¹⁰¹ More specifically, organizations such as the American Academy of Pediatrics Committee on Substance Abuse, believe adequate treatment- based approaches include prevention by educating women of childbearing age about the dangers drugs have on fetuses to encourage drug avoidance and increasing visibility by ensuring there are enough treatment programs that are readily available to pregnant women who need them.¹⁰²

The medical community rejects the punitive approach and endorses the treatment-based approach to addressing prenatal drug use because it is a public health issue that requires treatment-based solutions to effectively make a difference in the rate of pregnant people using drugs and the number of children born with drugs in their system and drug related issues.

⁹⁹ Coleman, *supra*, at 1.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

C. Current Treatment Based Solutions to Prenatal Drug Use

The treatment-based approach to prenatal drug use does not act as deterrent nor does it ignore that addiction is a medical condition. It addresses the underlying issue of health of the pregnant person to work at lowering the rate of people using drugs while pregnant, and in turn, the number of children born with drugs in their system. Currently, nineteen states have created treatment programs specifically for pregnant substance users, and seventeen of those states give pregnant substances users priority access to regular drug treatment programs.¹⁰³ Different treatment- based approaches used throughout the country include home based interventions, inpatient, and outpatient programs. Some states have also employed the collaborative method to administering treatment by employing several state agencies to maximize the number of resources available, which is shown to aid in better results for the health of the child and pregnant substance user.¹⁰⁴

In Texas, the Health and Human Services Department developed an intervention program called the Pregnant and Parenting Intervention Program that provides services to reduce the impact, severity and cost associated with a substance-exposed pregnancy for the pregnant person, child, and their families.¹⁰⁵ The program is eligible to all pregnant people who are Texas residents with a past or present substance use disorder.¹⁰⁶ In North Carolina, the Substance Use

¹⁰³ The Guttmacher Institute, State Policies on Substance Use During Pregnancy (May 2022), <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy>.

¹⁰⁴ Becky Normile et al. State Options for Promoting Recovery among Pregnant and Parenting Women with Opioid or Substance Use Disorder, National Academy for State Health Policy (2018), <https://www.nashp.org/wp-content/uploads/2018/10/NOSLO-Opioids-and-Women-Final.pdf>.

¹⁰⁵ Texas Health and Human Services, Pregnant and Parenting Intervention (2016), <https://www.hhs.texas.gov/services/mental-health-substance-use/adult-substance-use/pregnant-parenting-intervention>.

¹⁰⁶ *Id.*

Network (SUN) Project uses the treatment guideline described earlier, “SAMHSA Guide on How to Develop a Collaborative Approach to the Treatment of Pregnant Women with Opioid Use Disorders” to ensure they are setting pregnant substance users and their families up to achieve success.¹⁰⁷ The SUN Project also uses the collaborative method to substance use treatment by utilizing Atrium Health Behavioral Health Services, Cabarrus Health Alliance, and Cabarrus Partnership for Children as resources for their treatment model.¹⁰⁸

Reaching Families Early is a home-based intervention program that uses outreach and case-management services which has shown to be highly effective in working with a group of prenatal substance users who were predominantly underprivileged, single African-American women.¹⁰⁹ The home case-management visits were associated with less drug use and more drug-use treatment.¹¹⁰

Some of the major cities in the country that offer treatment-based solutions in the form of inpatient and outpatient programs for pregnant substance users are Chicago, Cincinnati, Pittsburgh, Miami, and Los Angeles.¹¹¹ Access Community Health Network in Chicago operates ten clinics that provide services to pregnant women with chemical dependency, that provide weekly visits with psychiatrists, group support sessions, behavioral health services and counseling, as well as basic health care services.¹¹² First Step Home in Cincinnati allows

¹⁰⁷ Atrium Health Collaborative, *Compassionate Care Helps Mothers with Addiction Deliver Healthy Babies*, (2022), <https://atriumhealth.org/dailydose/2022/01/13/collaborative-compassionate-care-helps-mothers-with-addiction-deliver-healthy-babies>.

¹⁰⁸ *Id.*

¹⁰⁹ Lauren M. Jansson et al. *Effectiveness of Child Case Management Services for Offspring of Drug-Dependent Women*, 38 *Subst. Use Misuse* 1933 (2003).

¹¹⁰ *Id.*

¹¹¹ *Treatment centers and resources for pregnant substance-using women and girls*, <https://www.apa.org/pi/women/resources/treatment-resources-pregnant-women.pdf> (last visited May 7, 2022).

¹¹² *Id.*

pregnant substance users with children up to the age of twelve to recover from addiction with what they call wrap-around services.¹¹³ Perinatal Hope Program in Pittsburgh provides individualized treatment and support for pregnant substance users by aiding them in acquiring the medical, social, and educational services they need to deliver healthy children in four different locations.¹¹⁴ Shields for Families in Los Angeles provides outpatient and inpatient treatment for adult pregnant substance users that includes comprehensive case management, individual, group, and family counseling, educational and vocational services, life skills classes, drug and alcohol education, child development and parenting, and urinalysis testing.¹¹⁵ The continued expansion and collaborative effort in increasing the amount and quality of treatment programs available to pregnant substance users will continue to have a positive effect on the family unit.

IV. CONCLUSION

The criminalization of pregnant people through punitive measures to end prenatal drug use is ineffective because it fails as a deterrent to use drugs but succeeds at deterring pregnant substance users from seeking medical treatment. Punitive measures that enforce criminal penalties are flawed and arguably unconstitutional because they require inventive constructions of general criminal laws by prosecutors and the courts and inflict unforeseeable consequences on the pregnant person. Prenatal drug use is a public health crisis that requires continued expansion of the various treatment-based approaches for society to remain on the path to healthy, drug free pregnancies, parents, and children. Unity between the medical community, the state legislative bodies, and the court system on the benefits of the treatment-based approach to prenatal drug use

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

would be beneficial in decreasing the rate of prenatal drug use and continuing to nurture the health of the family unit.