# MA – Pregnancy AC

## Advantage [Robby]

**The illegal use of drugs by pregnant individuals is currently a matter of criminal justice – criminalization deters them from seeking necessary treatment and care, resulting in suffering and rights abuses.**

**Amnesty International**, Global Human Rights Charity, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA Summary, **2017**, https://www.amnestyusa.org/reports/criminalizing-pregnancy-policing-pregnant-women-use-drugs-usa/ ///AHS PB

**A set of laws which claim to promote maternal and infant health are in fact driving pregnant women away from vital health services, jeopardizing their well-being and violating their right to health**, according to a new report published by Amnesty International. Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA, highlights the impact of **pregnancy criminalization laws**, especially those which **are used to arrest and prosecute women who use drugs based on a belief that they are harming their fetuses. Fear of these laws is deterring pregnant women from accessing healthcare, prenatal care and even drug treatment.** “Across the USA, the heavy-handed policing of pregnant women’s behavior is shattering patient trust in health services with devastating consequences. These laws put pregnant women in a double bind, forcing them to choose between risking their health and risking punishment,” said Carrie Eisert, Policy Adviser at Amnesty International, who authored the report. “**Drug dependence is a health condition but U.S. authorities are treating it as a crime, failing to ensure treatment is available for pregnant women and then punishing them for their ongoing condition. These harsh and discriminatory laws are making pregnancy more dangerous and trampling on human rights in the process.**” An ongoing assault The report pays particular attention to the impact of the ‘chemical endangerment’ law in Alabama, the state that has carried out the most prosecutions against pregnant women; and Tennessee’s ‘fetal assault’ law, which between 2014 and 2016 made it a crime to give birth to a child showing symptoms of drug exposure. However, **most states have some sort of ‘fetal assault’ law in place, and the trend is growing. In the 2017 legislative session, states introduced more than 300 measures to restrict sexual and reproductive rights**, emblematic of a dangerous and ongoing assault on women’s rights **which has escalated during** the first 100 days of **the Trump administration.** One woman told Amnesty International how she was charged under Alabama’s ‘chemical endangerment’ law upon suspicion of using drugs, despite being unaware she was pregnant. Another described how the threat of punishment had deterred her from seeking healthcare: **“In my town, I was worried about going to the doctor because if you test positive [for drugs], bam, you’re slapped with a ‘chemical endangerment’ charge.” In Tennessee, one woman told Amnesty International how she had given birth on the side of the road trying to avoid going to a hospital, where she feared prosecution under the ‘fetal assault’ law.** Although the ‘fetal assault’ law in Tennessee ended in 2016, it is still in the state code and is likely to be introduced again. The same woman described how she subsequently spent months trying to find drug dependence treatment, but was unable to find any available services that would accept her insurance. Treatment costs are greater than $4500 per year in Tennessee. Amnesty International has highlighted how **this narrow focus on punishment, in the absence of increased funding or provisions to expand drug treatment services, means these laws are failing in their stated aim of promoting** healthy pregnancies. They are also violating women’s rights to **health**, privacy, equality and non-discrimination.

**Incarceration results in harmful long term effects that would not have happened otherwise.**

Cortney E. **Lollar**, University of Kentucky College of Law, Criminalizing Pregnancy, Summer **2017**, <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1614&context=law_facpub> ///AHS PB

**In the vast majority of cases, exposure to drugs in utero does not result in the negative long-term effects legislators, and most of us, presume**.14 Despite recent increases in methamphetamine and heroin use, cocaine remains the drug used most by pregnant women who come to the attention of authorities." Yet a recent longitudinal study concluded that children exposed to cocaine in their mother's womb did not exhibit long-term developmental consequences, even in adulthood."1 Other similar studies on the effects of marijuana and opiate exposure in utero produced substantially similar results." In fact, many behaviors in which pregnant women engage have been documented and shown to be far more damaging to a developing fetus than using illegal drugs. For example, the lawful behaviors of smoking cigarettes, taking certain prescription drugs under the supervision of a physician, and in some women, drinking alcohol, each have an equal or greater negative effect on a developing fetus than illegal drugs. Likewise, **environmental factors** such as household violence **have a more significant impact than any drug, legal or illegal, on the health and development of a fetus** and child. **The collateral consequences attributable to criminalizing a mother's use of illegal drugs are substantial. The prosecution of a woman for her behavior while pregnant tends to result in greater harm to the child**, rather than less. **If a pregnant woman using illegal drugs comes to the attention of law enforcement and prosecutorial authorities, odds are great that immediately after birth, her child will be taken away** from her, in the name of the safety and protection of the child. **Ample scientific and social science studies indicate that this removal of the child, without any evidence of actual harm, consistently results in poorer outcomes for that child, tending to cause greater long-term damage. To the extent a newborn experiences short-term withdrawal symptoms, taking her from her mother only cements the potential harmful effects of the drug.**

**Thus, the plan – Resolved: The United States ought to treat the illegal use drugs by pregnant individuals as a matter of public health, not of criminal justice.**

Seema **Mohapatra summarizes the plan**, Indiana University Robert H. McKinney School of Law Tenured Associate Professor research interests include the intersection of biosciences and the law, international family and health law, health care disparities in the United States, and informed consent. She has authored articles and book chapters on topics such as international surrogacy laws, inequality in healthcare coverage, and has earned media attention from the New York Times, Times of India, Huffington Post and National Public Radio, Prior to teaching, Professor Mohapatra practiced health law in Chicago at Sidley & Austin and Foley & Lardner. She earned a J.D. degree from Northwestern University School of Law and has a master’s degree in Public Health with a concentration in Chronic Disease Epidemiology from Yale University. She earned a bachelor of arts in Natural Sciences (with a minor in Women's Studies) from Johns Hopkins University, Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy, 2011, <https://lawpublications.barry.edu/cgi/viewcontent.cgi?article=1043&context=facultyscholarship> ///AHS PB

In **the United States**, states have taken various approaches to the issue of drug use during pregnancy. Common approaches include incarceration, confinement, detention, or treatment.87 America‘s ―War on Drugs‖ **has emphasized law enforcement, arrest, prosecution, and imprisonment.88 If we are serious about combating drug use amongst pregnant women**, we cannot focus on punitive measures such as confinement and detention. **Punishment** alone **does nothing to further the goal of reducing such drug use. It also ignores** the reality that women do not abuse drugs in a vacuum. There are a variety of **societal factors, such as poverty**, domestic violence, lack of social support and education, **related to drug use.**89 Additionally, after a woman is already addicted to drugs, she may not just will herself to stop even if she is pregnant. **Women need access to effective treatment options to properly overcome their addictions**. Without addressing these societal factors, a criminal model fails in helping the woman or her baby. **A public health model is broader in scope and addresses these concerns**.90 The purpose of this article is to introduce to a legal audience what a public health approach may entail. **For a public health approach to work, pregnant women cannot continue to face the risk that they will be arrested, committed, incarcerated, confined, or otherwise detained due to drug use during pregnancy**.91 The legal community needs to follow the advice of the medical and public health community for this approach to work. **If drug use during pregnancy were discovered, a public health model would utilize treatment and harm reduction efforts, not criminal penalties. This article does not advocate the decriminalization of all drug use. However, in the context of drug use during pregnancy, women cannot continue to be criminally targeted merely for being drug addicts**. In Robinson v. California, the Supreme Court held that it was unconstitutional to criminalize the status of addiction.92 In fact, Justice Douglas wrote in his concurrence that treating a drug addict as a criminal merely due to his or her addiction amounts to ―cruel **and** unusual punishment.‖ 93 Despite such guidance, prosecutors and judges have used law in creative ways to do just that—punish a woman for becoming **pregnant** when she is addicted to drugs. **For a public health approach to work, this type of punitive measure cannot exist.**

**The plan solves and is preferable to alternative models – preventative measures and harm reduction result in necessary education and treatment, in addition to removing punitive barriers to care.**

Seema **Mohapatra**, Indiana University Robert H. McKinney School of Law Tenured Associate Professor research interests include the intersection of biosciences and the law, international family and health law, health care disparities in the United States, and informed consent. She has authored articles and book chapters on topics such as international surrogacy laws, inequality in healthcare coverage, and has earned media attention from the New York Times, Times of India, Huffington Post and National Public Radio, Prior to teaching, Professor Mohapatra practiced health law in Chicago at Sidley & Austin and Foley & Lardner. She earned a J.D. degree from Northwestern University School of Law and has a master’s degree in Public Health with a concentration in Chronic Disease Epidemiology from Yale University. She earned a bachelor of arts in Natural Sciences (with a minor in Women's Studies) from Johns Hopkins University, Unshackling Addiction: A Public Health Approach to Drug Use During Pregnancy, **2011**, <https://lawpublications.barry.edu/cgi/viewcontent.cgi?article=1043&context=facultyscholarship> ///AHS PB

**Prevention is a key component of any public health based policy**.173 **One of the justifications used for criminalizing drug use during pregnancy** via fetal protection statutes or similar laws **is that the threat of punishment will have a deterrent effect on such drug use.**174 **However, there is no evidence to this assumption.** Rather, **if anything, it appears that the numbers of infants exposed to drugs and alcohol in utero is increasing.**175 Additionally, those who work with pregnant women with addiction issues report that fears of criminalization result in these women avoiding prenatal care and lying about their drug use.176 Furthermore, a criminal-law-based approach only deals with the drug use after it has occurred. This does not make sense from a public health point of view.177 **A public-health-centered approach to this issue focuses on preventing drug and alcohol abuse, especially among women of childbearing age**.178 **This method moves from ―reacting to** [a problem] to a focus on **changing the** social, behavioral, and environmental factors that cause [the problem].‖ 179 In order to identify **the root causes of drug and alcohol use amongst pregnant women**, it is necessary to examine both individual risk factors for such drug use and the role of societal factors.180 A key facet of prevention is early **intervention and education** by schools, community groups, and health care providers.181 Prevention may include the use of peer programs in elementary and middle schools.182 Mentoring **programs have also been shown to benefit high-risk populations**, such as those likely to abuse drugs and alcohol.183 In fact, **one study found that youths** with mentors **were 46 percent less likely to start using drugs** and 27 percent less likely to start using alcohol.184 The study showed that the effects were even more dramatic amongst minority youth.185 Another tool for prevention may be educational campaigns in schools and community-wide about the health, social, and criminal consequences of drug use.186 Members of law enforcement, prosecutors, and even judges could play a role in educating community members about the criminal consequences of illicit drug use. **By focusing on prevention, the hope is that fewer individuals begin to use drugs and, therefore, fewer need to face the criminal justice system. The public health model can be effectively implemented by state and federal legislatures.** At least sixteen states have legislation requiring education of women about the ill effects of drug use during pregnancy.187 Many states have legislation requiring medical providers to inform pregnant women of the adverse effects of drug use on the fetus during pregnancy.188 As a public health tool, this is of limited use.189 It does not address the real concern that drugaddicted women are not seeking prenatal care due to fear of punitive sanctions. Such an educational campaign occurs too late. However, other legislative proposals are good models for states to implement. For example, Arizona has legislation that requires middle- and high-school students to be educated on ―the nature and harmful effects of alcohol, tobacco, narcotic drugs, marijuana . . . and other dangerous drugs on a human fetus.‖ 190 Such legislation allows young girls to learn about the dangers of such drug use, hopefully before they become pregnant or use drugs. A public health approach to prevention is bolstered by legislation such as this. **Additionally, a public health approach to prevention requires a comprehensive analysis on what societal, economic, educational, and health policies lead to certain populations being more likely to abuse drugs**.191 More studies linking law enforcement policy towards drug use and outcomes would aid in such analysis. Such an analysis is necessary to address the root causes of drug use in general and among pregnant women specifically. Some states have legislation that requires research to be conducted about substance abuse during pregnancy.192 This article gives examples of tools that may be used to prevent drug use, but it is only a starting point. The main purpose of this discussion is to demonstrate the importance of focusing on prevention, rather than criminal penalties, when dealing with the complex issue of drug use during pregnancy. D. Harm Reduction **A public health approach to drug use during pregnancy would also focus on harm reduction**.193 Harm reduction refers to the process of reacting to the problem (drug use) once it has occurred and trying to minimize the effects as much as possible.194 An important facet of harm reduction is **accepting drug use as a health or medical issue, rather than a criminal issue**.**195 Those who favor a harm reduction approach realize that drug-abusing women need support, treatment, and family friendly policies, not jail time**.196 Scholars have suggested that a harm reduction approach would require judges and law enforcement to stop removing newborn infants and other children from a pregnant substance abuser‘s custody without other evidence of harm or neglect.197 Those who abuse drugs may be able to take care of their children better than the foster care system.198 **Allowing a mother to keep custody of her children while seeking treatment may cause more women to seek out treatment**.199 **Some states, like California, currently have legislation** that states that drug use alone cannot be the basis of a finding of child abuse or neglect.200 However, this is the exception. Under a harm reduction model, legislation like California‘s would be required, coupled with treatment opportunities giving mothers a chance to recover from their addiction. **One of the most important facets of a successful harm reduction approach would be availability of appropriate and comprehensive drug treatment**.201 There is a need for more drug treatment programs **aimed at pregnant women.**202 Further, there is a need for more women-only drug treatment programs, which have been shown to be more effective.203 Even when there is a desire to provide treatment to addicted pregnant women, a ―cure‖ may be difficult. Drugtreatment is a costly, time consuming, and complicated endeavor. **In cases of addicted women who are pregnant, barriers to treatment include distrust of the medical community, lack of support systems, and lack of childcare for other children.204 Advocates in this area note that even when a pregnant woman realizes she needs help for her addiction, she may not seek such treatment because of the concern that her baby or other children will be taken away from her and put into the foster care system.205 Treatment must be a viable option for pregnant women**. Although women are as likely, if not more likely, as men to suffer from drug addiction, they represent a small fraction of those receiving treatment.206 One of the reasons for this is likely the lack of childcare at treatment centers.207 In fact, one survey found that only 0.1 percent of those in treatment had access to childcare services.208 **Many treatment facilities refuse to accept pregnant women due to fears of liability** if drug-affected children are born to these women.209 Legislation that limits such liability may be effective in allowing for more access to such facilities to pregnant women. One way the legal system has attempted to incorporate drug treatment into the criminal justice system is by utilizing ―**drug courts**.‖ 210 The first official drug court was established in Florida in 1989.211 In 2004, there were over 1600 drug treatment courts in the United States.212 Such courts embrace the concept that addiction is a disease and attempt to place drug-addicted offenders into a treatment program.213 While this is certainly a better approach to drug use than a purely criminal model, it **do**es **not address the unique case of drug use during pregnancy. In most cases where women are arrested for drug use during pregnancy, the drug use is not incidental—it is actually the ―crime.**‖ That is, the woman is being brought on criminal neglect, child abuse, manslaughter, or even murder charges merely due to the fact that she used drugs during pregnancy.214 **Therefore**, although laudable, **drug courts are not an appropriate method to deal with the issue of drug use during pregnancy.** Additionally, even if it is not possible to ―cure‖ or even stop pregnant women from drinking or using alcohol, there are steps that can be taken to reduce the harm of such use. For example, improving the nutritional status of these women has been shown to result in better outcomes for the babies these women are carrying.215 To reduce harm, women must be provided with education about how to best take care of themselves and their children, even when facing addiction issues.216 In order to be successful, such topics require sensitivity and trust.217 **A public health approach requires a nonjudgmental, respectful attitude towards women who may be using drugs or alcohol during their pregnancy**.218 Both governmental and non-governmental communitybased organizations should aim to work together to reduce harm in these situations. Food for Thought, a community-based project in **Saskatchewan, Canada**, funded by Canada‘s Prenatal Nutrition Program,219 **is a good example of how community and government efforts may aid in harm reduction**. Food for Thought is designed ―to assist low income, high-risk pre- and post-natal women to achieve an optimal level of health.‖ 220 It works with several organizations, including an inner-city health clinic, social services, addiction services, and a pregnancy outreach program to help achieve this goal.221 **They have several community sites and work with women who are pregnant and mothers whose children are less than six months of age.222 Food for Thought provides transportation, on-site childcare, and afternoon sessions to help women**.223 Such sessions include a nurse, a nutritionist, and past graduates (―peer leaders‖) of the program.224 Even if these **women** do not stop drinking or using drugs during pregnancy, they **are offered support and education** about prenatal care and nutrition.225 These types of efforts are necessary on a large scale to reduce harm. There are some reports of smaller scale efforts in communities **in the United States** to help pregnant women seek help for drug addiction.226 However, **these efforts are not on a macro level**. These types of harm reduction endeavors need to become more commonplace for a public health approach to drug use during pregnancy to succeed. **In an ideal harm reduction model, legislation would be enacted to allow for the treatment of drug addiction during pregnancy without punitive measures. This would involve removing legal obstacles that drug-abusing women may face in terms of treatment**. This may include addressing the issue of child custody. Some have suggested that creating family drug courts that would allow a woman to keep her children as long as she is attending treatment and testing clean may reduce harm.227 Under a harm reduction approach, judges and prosecutors would not punish women for suffering from drug addiction while pregnant by incarcerating them or removing their children from them without other proof of neglect or harm. Ideally, women‘s drug addiction would be dealt with in the medical and public health realm.

## Advantage [Perry]

**The illegal use of drugs by pregnant individuals is currently a matter of criminal justice.**

**Amnesty International**, Global Human Rights Charity, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA Summary, **2017**, https://www.amnestyusa.org/reports/criminalizing-pregnancy-policing-pregnant-women-use-drugs-usa/ ///AHS PB

**A set of laws which claim to promote maternal and infant health are in fact driving pregnant women away from vital health services, jeopardizing their well-being and violating their right to health**, according to a new report published by Amnesty International. Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA, highlights the impact of **pregnancy criminalization laws**, especially those which **are used to arrest and prosecute women who use drugs based on a belief that they are harming their fetuses**. Fear of these laws is deterring pregnant women from accessing healthcare, prenatal care and even drug treatment. “Across the USA, the heavy-handed policing of pregnant women’s behavior is shattering patient trust in health services with devastating consequences. These laws put pregnant women in a double bind, forcing them to choose between risking their health and risking punishment,” said Carrie Eisert, Policy Adviser at Amnesty International, who authored the report. “**Drug dependence is a health condition but U.S. authorities are treating it as a crime, failing to ensure treatment is available for pregnant women and then punishing them for their ongoing condition**. These harsh and discriminatory laws are making pregnancy more dangerous and trampling on human rights in the process.” An ongoing assault The report pays particular attention to the impact of the ‘chemical endangerment’ law in Alabama, the state that has carried out the most prosecutions against pregnant women; and Tennessee’s ‘fetal assault’ law, which between 2014 and 2016 made it a crime to give birth to a child showing symptoms of drug exposure. However, **most states have some sort of** ‘fetal assault’ **law in place, and the trend is growing. In the 2017 legislative session, states introduced more than 300 measures** to restrict sexual and reproductive rights, emblematic of a dangerous and ongoing assault on women’s rights **which has escalated during** the first 100 days of **the Trump administration**. One woman told Amnesty International how she was charged under Alabama’s ‘chemical endangerment’ law upon suspicion of using drugs, despite being unaware she was pregnant. Another described how the threat of punishment had deterred her from seeking healthcare: “In my town, I was worried about going to the doctor because if you test positive [for drugs], bam, you’re slapped with a ‘chemical endangerment’ charge.” In Tennessee, one woman told Amnesty International how she had given birth on the side of the road trying to avoid going to a hospital, where she feared prosecution under the ‘fetal assault’ law. Although the ‘fetal assault’ law in Tennessee ended in 2016, it is still in the state code and is likely to be introduced again. The same woman described how she subsequently spent months trying to find drug dependence treatment, but was unable to find any available services that would accept her insurance. Treatment costs are greater than $4500 per year in Tennessee. Amnesty International has highlighted how **this narrow focus on punishment, in the absence of increased funding or provisions to expand drug treatment services, means these laws are failing in their stated aim of promoting** healthy pregnancies. They are also violating women’s rights to **health**, privacy, equality and non-discrimination.

**The criminal justice approach deters pregnant individuals from seeking necessary treatment and care, leaving them with little to no help – empirically proven in South Carolina.**

Deborah L. **Rhode**, American jurist. She is the Ernest W. McFarland Professor of Law at Stanford Law School, the director of the Stanford Center on the Legal Profession, and the director of Stanford's Program in Law and Social Entrepreneurship, The Terrible War on Pregnant Drug Users, July 17, **2014**, <https://newrepublic.com/article/118681/law-protect-fetuses-actually-punishes-minority-women> ///AHS PB

**Virtually every leading health organization**, including the American Medical Association, the American Academy of Pediatrics, the American Public Health Association, and the American Society on Addiction Medicine, **has opposed prosecution**. As they note, the primary effect of punitive policies is to force substance abuse underground and to deter women from seeking drug treatment and prenatal care. A case **in** point comes from **South Carolina**, after the State Supreme Court upheld a woman’s child abuse conviction for using cocaine while pregnant. In the year following the decision, **the state’s drug treatment programs witnessed an 80 percent drop in the admission of pregnant women**. As the director of one treatment facility explained, “**Women are doing one of three things. They’re getting abortions, having babies over the ... state line or not seeking prenatal care.” Incarcerating pregnant women also does little to ensure a healthy birth because drugs are often available in prison, and prenatal care is frequently inadequate**. Experts universally agree that **a preferable alternative is** a **public health** approach that stresses education and treatment. **Yet some women have even been arrested despite the fact that they were voluntarily participating in drug treatment**. In other cases, women facing prosecution had sought assistance but were unable to find a program that would accept them. In one New York study, 87 percent of drug treatment programs rejected pregnant Medicaid patients addicted to crack cocaine, even though these were the women most at risk for prosecution. Although recent federal legislation has expanded subsidies for drug treatment programs, including those that target substance abuse during pregnancy**, much more needs to be done. Funding is often minimal even though treatment is more effective and less expensive than incarceration**. Only nine states require drug treatment facilities to give priority to pregnant women, and only four prohibit facilities from discriminating against those women. That has to change, and a promising approach is to integrate substance abuse treatment into standard prenatal programs. Society has a compelling interest in protecting fetal health, but the most effective way to do so is by respecting the needs of women as well.

**The criminalization of pregnant individuals perpetuates violence against women of color.**

Cortney E. **Lollar**, University of Kentucky College of Law, Criminalizing Pregnancy, Summer **2017**, <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1614&context=law_facpub> ///AHS PB

**A** more recent **study**, analyzing data from 1973 until 2005, was published in 2011.34 Lynn Paltrow and Jeanne Flavin reviewed data from legal, medical, news, and other periodical databases and obtained additional information through their own involvement with cases as well as through conversations with lawyers, judges, and health care providers.35 Paltrow and Flavin **identified** 413 women against whom state action had been taken due to their behavior during pregnancy.36 Not all of these cases involved allegations of drug use, but the majority did-approximately 84%.37 These cases took place in every state except six, as well as at the federal level.3 8 More than two-thirds of the cases came from ten states, again led by South Carolina and then Florida." **Approximately 71% of the women were economically disadvantaged, and approximately 59% were women of color**.4 0 **African American women constituted 52% of those subject to state intervention in their pregnancies, whereas they constitute approximately 6-7% of the general population. 4 1 Strikingly, in the majority of cases, no evidence of harm to the fetus or newborn was present. 42 Rather, in many cases, the criminal charges relied on a positive drug test or an identified "risk of harm." Often, that "risk of harm" never evolved into an actual harm."** Even in cases where harm was alleged, the causal link between the pregnant woman's action or inaction and the identified harm often could not be established.45

**Criminalization hurts the fetus more and results in worse long term effects.**

Cortney E. **Lollar**, University of Kentucky College of Law, Criminalizing Pregnancy, Summer **2017**, <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1614&context=law_facpub> ///AHS PB

**In the vast majority of cases, exposure to drugs in utero does not result in the negative long-term effects legislators, and most of us, presume**.14 Despite recent increases in methamphetamine and heroin use, cocaine remains the drug used most by pregnant women who come to the attention of authorities." Yet a recent longitudinal study concluded that children exposed to cocaine in their mother's womb did not exhibit long-term developmental consequences, even in adulthood."1 Other similar studies on the effects of marijuana and opiate exposure in utero produced substantially similar results." In fact, many behaviors in which pregnant women engage have been documented and shown to be far more damaging to a developing fetus than using illegal drugs. For example, the lawful behaviors of smoking cigarettes, taking certain prescription drugs under the supervision of a physician, and in some women, drinking alcohol, each have an equal or greater negative effect on a developing fetus than illegal drugs. Likewise, **environmental factors** such as household violence **have a more significant impact than any drug, legal or illegal, on the health and development of a fetus** and child. **The collateral consequences attributable to criminalizing a mother's use of illegal drugs are substantial. The prosecution of a woman for her behavior while pregnant tends to result in greater harm to the child**, rather than less. **If a pregnant woman using illegal drugs comes to the attention of law enforcement and prosecutorial authorities, odds are great that immediately after birth, her child will be taken away from** her, in the name of the safety and protection of the child. **Ample scientific and social science studies indicate that this removal of the child, without any evidence of actual harm, consistently results in poorer outcomes for that child, tending to cause greater long-term damage. To the extent a newborn experiences short-term withdrawal symptoms, taking her from her mother only cements the potential harmful effects of the drug.**

**Criminalization and going cold turkey hurts the fetus and results in lost pregnancy.**

**NAPW**, National Advocates for Pregnant Women (NAPW) is a non-profit organization that works to secure the human and civil rights, health and welfare of all people, focusing particularly on pregnant and parenting women, and those who are most likely to be targeted for state control and punishment - low income women, women of color, and drug-using women, Article cites scientific and empirical studies, **No Date**, <http://www.advocatesforpregnantwomen.org/facts/what.htm> ///AHS PB BRACKETED FOR CLARITY

Laws that make it a crime to be pregnant and addicted undermine women’s and children’s health and seriously threaten women’s reproductive rights. Moreover, they are based on a number of unsubstantiated and costly myths. Myth #1: All Drug-Exposed Children Are Seriously Damaged At Birth. **Some newborns exposed prenatally to some substances do suffer adverse short or long-term consequences**. These infants include those whose mothers lacked access to quality prenatal care and adequate nutrition, smoked or drank while pregnant, or used fertility-enhancing medications that cause multiple births associated with prematurity and other life-threatening hazards. **However, sensational, inaccurate, and misleading news reports**, especially about crack/cocaine, **have convinced many people of the necessity of punitive responses to the problem of drug-exposed children. Today**, dozens of carefully constructed studies establish that the impact of cocaine on newborns has **been greatly exaggerated** and that other factors are responsible for many of the ills previously associated with cocaine use -- with poverty chief among them. Myth #2: Women Who Use Drugs Could Simply Stop. **Women who are addicted to drugs cannot simply stop their use**. Addiction is a chronic relapsing disease whose recovery takes time. Nevertheless, addiction is frequently regarded as a moral failing, **and** pregnant addicted women are presumed to be selfish and uncaring. Many of these women, however, were sexually abused as children or beaten as adults, and turned to drugs to numb the pain of the abuse and trauma they were experiencing. Then, they become addicted. Once addicted, pregnant women face numerous barriers to getting help. The lack of adequate treatment for women in Oklahoma and nationwide has been well documented, despite evidence of drug treatment’s success and cost-effectiveness. Research shows that comprehensive treatment programs that do not separate mothers from their children help women and their families. They are also cost-effective, especially when one compares their price tag to the staggering financial and social costs of imprisonment and separating mother and child Relapse, however, is a part of the disease. Even when there is meaningful treatment available recovery is a process that occurs over time. Pregnant women should not be jailed and punished when they exhibit symptoms of a disease. Similarly, pregnant women should not be singled out for a form of medical vigilantism that requires them to accept and comply with treatment that may not even be medically appropriate for them or face arrest and imprisonment. Myth #3: Threatening Pregnant Women Who Use Drugs With Criminal Penalties Will Protect Their Children And Improve Their Health Far from protecting children, the threat of prosecution deters women from seeking prenatal care and what little drug treatment may be available. That is why every leading health group to address the question has opposed the use of criminal laws to address this public health question. These organizations include the American Medical Association, the American Academy of Pediatrics, the American Public Health Association, the American Nurses Association, and the American Society on Addiction Medicine. Similarly organizations such as the Center for the Future of Children and The March of Dimes that are concerned specifically with children’s health oppose the use of criminal laws in this area. As the March of Dimes explains: "targeting substance-abusing pregnant women for criminal prosecution is inappropriate and will drive women away from treatment. Fortunately, **research demonstrates that even when women can’t abstain completely from drugs, they can nevertheless have healthy pregnancies if they get prenatal care and help** for other problems, especially those associated with poverty. **Putting women in jails and prisons where health care is notoriously inadequate and where drugs are nevertheless often available, is certainly not child protective. Similarly forcing a pregnant woman [them] to go cold turkey in prison or out of fear of arrest can in some cases cause her to lose the pregnancy**. Finally, there already exist numerous laws criminalizing drugs. Clearly criminilzation has not been a successful strategy in curing addiction. There is no evidence that yet another drug law will work any better. Myth 4: Prosecuting Pregnant Drug Users Will Not Interfere With Women’s Reproductive Rights. The premise underlying criminal laws that punish drug using pregnant women is that fetuses may be viewed as separate legal entities with rights hostile to and in conflict with those of the pregnant woman. Each decision that recognizes such interests eats away at the basic premise of Roe v. Wade and the health and interests of women and their future children. Moreover, for some women, an unwanted abortion may be the only way to avoid arrest and imprisonment for continuing a pregnancy to term despite a drug problem. Coerced abortions violate the fundamental constitutional right to procreate. South Carolina: A Lesson To Learn From **In 1997, the South Carolina** Supreme Court **held** that viable fetuses are persons under state law, and as a result, that **a pregnant woman who uses an illicit drug, or engages in any other behavior that might endanger a viable fetus, may be prosecuted as a child abuser**. Shortly after the decision, the S.C. Attorney General's Office explicitly stated that the case provides a basis for prosecuting women who have post-viability abortions -- for any reason and regardless of method -- with murder and imposing the death penalty on the women as well as their physicians. **Since the decision: Infant mortality in the state has increased for the first time in a decade. The state has also seen a twenty percent increase in abandoned babies. Drug treatment programs providing services to women have seen a dramatic decline in the number of women seeking drug treatment.**

**Thus, the plan: Resolved – The United States ought to treat the use of illegal drugs by pregnant individuals as matter of public health, not of criminal justice.**

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In **the United States**, states have taken various approaches to the issue of drug use during pregnancy. Common approaches include incarceration, confinement, detention, or treatment.87 America‘s ―War on Drugs‖ **has emphasized law enforcement, arrest, prosecution, and imprisonment.88 If we are serious about combating drug use amongst pregnant women**, we cannot focus on punitive measures such as confinement and detention. **Punishment** alone **does nothing to further the goal of reducing such drug use. It also ignores** the reality that women do not abuse drugs in a vacuum. There are a variety of **societal factors**, such as poverty, domestic violence, lack of social support and education, **related to drug use**.89 Additionally, after a woman is already addicted to drugs, she may not just will herself to stop even if she is pregnant. **Women need access to effective treatment options to properly overcome their addictions**. Without addressing these societal factors, a criminal model fails in helping the woman or her baby. **A public health model is broader in scope and addresses these concerns**.90 The purpose of this article is to introduce to a legal audience what a public health approach may entail. **For a public health approach to work, pregnant women cannot continue to face the risk that they will be arrested, committed, incarcerated, confined, or otherwise detained due to drug use during pregnancy**.91 The legal community needs to follow the advice of the medical and public health community for this approach to work. **If drug use during pregnancy were discovered, a public health model would utilize treatment and harm reduction efforts, not criminal penalties. This article does not advocate the decriminalization of all drug use. However, in the context of drug use during pregnancy, women cannot continue to be criminally targeted merely for being drug addicts**. In Robinson v. California, the Supreme Court held that it was unconstitutional to criminalize the status of addiction.92 In fact, Justice Douglas wrote in his concurrence that treating a drug addict as a criminal merely due to his or her addiction amounts to ―cruel **and** unusual punishment.‖ 93 Despite such guidance, prosecutors and judges have used law in creative ways to do just that—punish a woman for becoming **pregnant** when she is addicted to drugs. **For a public health approach to work, this type of punitive measure cannot exist.**

**The plan solves – it’s preventative, results in treatment instead of jail time, and makes pregnant individuals more likely to seek care.**

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**Prevention is a key component of any public health based policy**.173 One of the justifications used for criminalizing drug use during pregnancy via fetal protection statutes or similar laws is that the threat of punishment will have a deterrent effect on such drug use.174 However, there is no evidence to this assumption. Rather, if anything, it appears that the numbers of infants exposed to drugs and alcohol in utero is increasing.175 Additionally, those who work with pregnant women with addiction issues report that fears of criminalization result in these women avoiding prenatal care and lying about their drug use.176 Furthermore, a criminal-law-based approach only deals with the drug use after it has occurred. This does not make sense from a public health point of view.177 **A public-health-centered approach to this issue focuses on preventing drug and alcohol abuse, especially among women of childbearing age**.178 **This method moves from ―reacting to** [a problem] to a focus on **changing the** social, behavioral, and environmental factors that cause [the problem].‖ 179 In order to identify **the root causes of drug and alcohol use amongst pregnant women**, it is necessary to examine both individual risk factors for such drug use and the role of societal factors.180 A key facet of prevention is early **intervention and education** by schools, community groups, and health care providers.181 Prevention may include the use of peer programs in elementary and middle schools.182 Mentoring **programs have also been shown to benefit high-risk populations**, such as those likely to abuse drugs and alcohol.183 In fact, **one study found that youths** with mentors **were 46 percent less likely to start using drugs** and 27 percent less likely to start using alcohol.184 The study showed that the effects were even more dramatic amongst minority youth.185 Another tool for prevention may be educational campaigns in schools and community-wide about the health, social, and criminal consequences of drug use.186 Members of law enforcement, prosecutors, and even judges could play a role in educating community members about the criminal consequences of illicit drug use. **By focusing on prevention, the hope is that fewer individuals begin to use drugs and, therefore, fewer need to face the criminal justice system. The public health model can be effectively implemented by state and federal legislatures.** At least sixteen states have legislation requiring education of women about the ill effects of drug use during pregnancy.187 Many states have legislation requiring medical providers to inform pregnant women of the adverse effects of drug use on the fetus during pregnancy.188 As a public health tool, this is of limited use.189 It does not address the real concern that drugaddicted women are not seeking prenatal care due to fear of punitive sanctions. Such an educational campaign occurs too late. However, other legislative proposals are good models for states to implement. For example, Arizona has legislation that requires middle- and high-school students to be educated on ―the nature and harmful effects of alcohol, tobacco, narcotic drugs, marijuana . . . and other dangerous drugs on a human fetus.‖ 190 Such legislation allows young girls to learn about the dangers of such drug use, hopefully before they become pregnant or use drugs. A public health approach to prevention is bolstered by legislation such as this. **Additionally, a public health approach to prevention requires a comprehensive analysis on what societal, economic, educational, and health policies lead to certain populations being more likely to abuse drugs**.191 More studies linking law enforcement policy towards drug use and outcomes would aid in such analysis. Such an analysis is necessary to address the root causes of drug use in general and among pregnant women specifically. Some states have legislation that requires research to be conducted about substance abuse during pregnancy.192 This article gives examples of tools that may be used to prevent drug use, but it is only a starting point. The main purpose of this discussion is to demonstrate the importance of focusing on prevention, rather than criminal penalties, when dealing with the complex issue of drug use during pregnancy. D. Harm Reduction **A public health approach to drug use during pregnancy would also focus on harm reduction**.193 Harm reduction refers to the process of reacting to the problem (drug use) once it has occurred and trying to minimize the effects as much as possible.194 An important facet of harm reduction is **accepting drug use as a health or medical issue, rather than a criminal issue**.**195 Those who favor a harm reduction approach realize that drug-abusing women need support, treatment, and family friendly policies, not jail time**.196 Scholars have suggested that a harm reduction approach would require judges and law enforcement to stop removing newborn infants and other children from a pregnant substance abuser‘s custody without other evidence of harm or neglect.197 Those who abuse drugs may be able to take care of their children better than the foster care system.198 **Allowing a mother to keep custody of her children while seeking treatment may cause more women to seek out treatment**.199 **Some states, like California, currently have legislation** that states that drug use alone cannot be the basis of a finding of child abuse or neglect.200 However, this is the exception. Under a harm reduction model, legislation like California‘s would be required, coupled with treatment opportunities giving mothers a chance to recover from their addiction. One of the most important facets of a successful harm reduction approach would be availability of appropriate and comprehensive drug treatment.201 There is a need for more drug treatment programs aimed at pregnant women.202 Further, there is a need for more women-only drug treatment programs, which have been shown to be more effective.203 Even when there is a desire to provide treatment to addicted pregnant women, a ―cure‖ may be difficult. Drugtreatment is a costly, time consuming, and complicated endeavor. **In cases of addicted women who are pregnant, barriers to treatment include distrust of the medical community, lack of support systems, and lack of childcare for other children.204 Advocates in this area note that even when a pregnant woman realizes she needs help for her addiction, she may not seek such treatment because of the concern that her baby or other children will be taken away from her and put into the foster care system.205 Treatment must be a viable option for pregnant women**. Although women are as likely, if not more likely, as men to suffer from drug addiction, they represent a small fraction of those receiving treatment.206 One of the reasons for this is likely the lack of childcare at treatment centers.207 In fact, one survey found that only 0.1 percent of those in treatment had access to childcare services.208 **Many treatment facilities refuse to accept pregnant women due to fears of liability** if drug-affected children are born to these women.209 Legislation that limits such liability may be effective in allowing for more access to such facilities to pregnant women. One way the legal system has attempted to incorporate drug treatment into the criminal justice system is by utilizing ―drug courts.‖ 210 The first official drug court was established in Florida in 1989.211 In 2004, there were over 1600 drug treatment courts in the United States.212 Such courts embrace the concept that addiction is a disease and attempt to place drug-addicted offenders into a treatment program.213 While this is certainly a better approach to drug use than a purely criminal model, it does not address the unique case of drug use during pregnancy. In most cases where women are arrested for drug use during pregnancy, the drug use is not incidental—it is actually the ―crime.‖ That is, the woman is being brought on criminal neglect, child abuse, manslaughter, or even murder charges merely due to the fact that she used drugs during pregnancy.214 Therefore, although laudable, drug courts are not an appropriate method to deal with the issue of drug use during pregnancy. Additionally, even if it is not possible to ―cure‖ or even stop pregnant women from drinking or using alcohol, there are steps that can be taken to reduce the harm of such use. For example, improving the nutritional status of these women has been shown to result in better outcomes for the babies these women are carrying.215 To reduce harm, women must be provided with education about how to best take care of themselves and their children, even when facing addiction issues.216 In order to be successful, such topics require sensitivity and trust.217 **A public health approach requires a nonjudgmental, respectful attitude towards women who may be using drugs or alcohol during their pregnancy**.218 Both governmental and non-governmental communitybased organizations should aim to work together to reduce harm in these situations. Food for Thought, a community-based project in **Saskatchewan, Canada**, funded by Canada‘s Prenatal Nutrition Program,219 **is a good example of how community and government efforts may aid in harm reduction**. Food for Thought is designed ―to assist low income, high-risk pre- and post-natal women to achieve an optimal level of health.‖ 220 It works with several organizations, including an inner-city health clinic, social services, addiction services, and a pregnancy outreach program to help achieve this goal.221 **They have several community sites and work with women who are pregnant and mothers whose children are less than six months of age.222 Food for Thought provides transportation, on-site childcare, and afternoon sessions to help women**.223 Such sessions include a nurse, a nutritionist, and past graduates (―peer leaders‖) of the program.224 Even if these **women** do not stop drinking or using drugs during pregnancy, they **are offered support and education** about prenatal care and nutrition.225 These types of efforts are necessary on a large scale to reduce harm. There are some reports of smaller scale efforts in communities **in the United States** to help pregnant women seek help for drug addiction.226 However, **these efforts are not on a macro level**. These types of harm reduction endeavors need to become more commonplace for a public health approach to drug use during pregnancy to succeed. **In an ideal harm reduction model, legislation would be enacted to allow for the treatment of drug addiction during pregnancy without punitive measures. This would involve removing legal obstacles that drug-abusing women may face in terms of treatment**. This may include addressing the issue of child custody. Some have suggested that creating family drug courts that would allow a woman to keep her children as long as she is attending treatment and testing clean may reduce harm.227 Under a harm reduction approach, judges and prosecutors would not punish women for suffering from drug addiction while pregnant by incarcerating them or removing their children from them without other proof of neglect or harm. Ideally, women‘s drug addiction would be dealt with in the medical and public health realm.