e Criminalization of Pregnant Women and the Illusion of Maternal-Fetal Con ict

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In the mid-1980s, the criminalization of pregnant drug-addicted women came to light as a significant prosecutorial trend, with an emphasis on crack-cocaine (Hirschenbaum 2001). Between 1985 and 1995, prosecutors charged more than 200 women with taking drugs while pregnant. Many of these women spent time in prison as a result of their arrest and some lost custody of their children (Toscano 2005; Lim 2008). The offenses ranged from delivering drugs to a minor via the umbilical cord to child abuse and child endangerment (Gustavsson and MacEachron 1997; Lim 2008). According to Nora S. Gustavsson (1991), the War on Drugs amounted to nothing more than a war on women, in particular African American women.

Prosecutors cloak their efforts to criminalize women with numerous philosophical justifications. Utilitarianism presupposes that legal remedies will protect the fetus from harm and motivate drug-addicted women to seek treatment; the favored outcomes justify the prosecutorial means (Lim 2008; Toscano 2005). Arguments for deterrence assume that drug-addicted women engage in free and rational decision-making analyses and that fear of prosecution will tip the scales in favor of drug-abstention. In contrast, Lisa Eckenwiler (2004) succinctly suggests that "keen attention to the particulars of these women's lives reveals that freedom is not a fully realized ideal" (p.91). Vicki Toscano (2005) draws the distinction that retributive justifications apply not just to the form of sentencing imposed on convicted women, but also to the effects the sentencing has on public discourse concerning pregnant women's responsibilities toward their unborn baby. Criminalization transforms a moral responsibility into a legal responsibility and promotes the idea that pregnant women who take drugs have abandoned this responsibility, are intentionally inflicting harm on their unborn baby, and deserve punishment Toscano 2005).

The attempts to rationalize prosecution emphasize how criminalization flourishes within an emergent social discourse that conceptualizes maternal and fetal rights in conflict. Criminalizing pregnant women characterizes mothers as "agents of harm" and considers the interests of the fetus separate to those of the mother (Gustavsson 1991:65). The belief in mother and fetus as separate entities represents a critical element in the ability of prosecutors to charge and convict women for crimes against their unborn child.

The social construction of maternal-fetal conflict effectively individualizes women's responsibility for producing healthy babies and ignores structural problems that infringe upon their ability to do so (Eckenwiler 2004). This discourse produces a variety of negative outcomes for both mothers and babies. Research indicates that prosecutions discourage pregnant women from seeking treatment for their addiction and prenatal care (Gustavsson and MacEachron 1997; Toscano 2005). Moreover, fear of prosecution represents a motivating force for drug-addicted women to consent to sterilization (Lim 2008).

In perhaps the most striking example of belief in maternal-fetal conflict, a non-profit organization named Children Requiring a Caring Kommunity (CRACK) emerged during the height of the War on Drugs in the mid-1990s and continues to offer drug-addicted women $300 upon proof of sterilization. Based in California, CRACK claims 39 chapters across the mainland United States (CRACK 2009). Although ostensibly offering cash to both men and women, their most recent data indicate that CRACK paid a total of 912 women in return for sterilization compared with 29 men (CRACK 2009). At least part of the reason for this discrepancy can be found in the prosecutorial bias towards women and the lack of attention paid to the effects of male drug taking on the developing fetus (Gustavsson and MacEachron 1997; Solomon 1991; Toscano 2005). Men have little to fear that would convince them to permanently trade their reproductive ability for such a paltry sum of money.

This paper reviews the media obsession and questionable scientific literature that underlies the prosecutorial trend of the past two decades and the concurrent establishment of maternal-fetal conflict. The maternal-fetal conflict will be revealed as a false dichotomy and CRACK exposed as misguided and discriminatorily punitive. A paradigm shift is recommended towards recognition of the intrinsically shared interests of mother and baby and that a better alternative to prosecution involves the reallocation of resources to treatment programs and prenatal health services.

The prosecution of pregnant drug-addicted women is

intimately connected with the manner in which the media framed the rise in crack-cocaine. Various media outlets depicted drug-addicted women as promiscuous prostitutes whose consumption of crack destroyed their maternal instinct while they simultaneously produced multitudes of substance-exposed babies (Lim 2008; Roberts 2005; Toscano 2005). Dorothy Roberts (2005) highlights how the media wove a disparaging stereotype of black women into their portrayal of the crack epidemic by linking it with high rates of black infant mortality – despite the fact that high infant mortality rates were recorded long before widespread use of crack. Racial biases channeled blame for a complex social problem onto the individual backs of poor African American women who were prosecuted at a disproportionately high rate (Roberts 2005; Solomon 1991).

Media attention pressured the scientific literature to support the idea that prenatal drug exposure represented an urgent problem even though the effects on infants were not conclusive (Toscano 2005). Nora Gustavsson and Ann MacEachron (1997) reviewed studies that attempted to ascertain the incidence and prevalence of prenatal drug exposure and found that the rates are unclear. Most research was conducted in public hospitals that attend to poor and minority women. A survey of 36 urban hospitals in 1989 reported an average perinatal illicit drug rate of 11%. A Florida study in 1990 attempted to remove the class and ethnic bias found in prior studies and discovered that little difference exists between illicit drug rates for white and black women (Gustavsson and MacEachron 1997).

Composite data from numerous studies show that 2 – 3% of infants suffer from prenatal cocaine exposure annually (Gustavsson and MacEachron 1997). The precise causal effects of cocaine on the developing fetus are not conclusively established (Bono et al. 2007). Earlier studies indicate that cocaine may cause premature birth, a small head circumference, and abnormality of the urinary tract (Gustavsson and MacEachron 1997). Additional research suggests that cocaine-exposed infants may suffer disproportionately from certain types of stress, shortened attention span, and slight problems in language development (Bono et al. 2007). Some studies do not find any significant differences between infants exposed to cocaine *in utero* and those that were not (Gustavsson 1991; Gustavsson and MacEachron 1997). Moreover rampant methodological concerns in many of the early studies illustrate that caution is warranted when trying to draw conclusions; for example, studies did not control for confounding environmental factors or the presence of other drugs in the pregnant woman's system and often relied on small, non-representative samples (Gustavsson 1991; Gustavsson and MacEachron 1997). Gustavsson and MacEachron (1997) assert that much of the research published during the height of the War on Drugs supports particular political ideologies by focusing on women's role in reproduction only. Studies that did not establish connections between maternal prenatal drug use and poor fetal outcomes were less likely to receive publication (Gustavsson and MacEachron 1997; Toscano 2005).

Recent research indicates that few infant health problems can be confidently attributed to prenatal cocaine exposure (Bono et al. 2007; Toscano 2005). Systemic issues such as lack of access to prenatal medical care, inadequate housing, poor nutrition, and persistent poverty affect pregnancy outcomes (Gustavsson and MacEachron 1997; Toscano 2005). In particular, living with male partners that are substance abusers or violent (or both) is a predictor of poor pregnancy outcomes (Gustavsson and MacEachron 1997). An analysis of 36 peer-reviewed studies on the teratogenic impact of cocaine found no conclusive evidence for negative effects on physical or cognitive development (Bono et al. 2007). Studies which found otherwise usually indicate minimal damage when environmental factors are controlled for. Indeed, Katherine E. Bono et al. (2007) report that characteristics of the home environment impact cognitive development more consistently than does prenatal cocaine exposure.

Nonetheless, prosecutors relied on the speculative risks of prenatal drug exposure to use a combination of child abuse and drug-related statutes to criminalize pregnant drug-addicted women (Lim 2008). Appellate courts largely overturned prosecutorial attempts but nonetheless legal precedence for criminalizing pregnant women exists (Gustavsson and MacEachron 1997; Lim 2008). In one of the earliest cases attempted, a Florida court convicted a woman of delivering cocaine to a minor via her umbilical cord immediately after birth. The Florida Supreme Court later overturned the decision but nonetheless it paved the way for future prosecutions (Gustavsson and MacEachron 1997; Hirschenbaum 2001). In 1985 California prosecutors charged Pamela Rae Stewart-Monson with child neglect for failing to follow her doctor's orders to refrain from smoking marijuana and having sexual intercourse while pregnant. She was arrested after her infant, suffering from brain-damage, died aged six-weeks (Solomon 1991; Toscano 2005). Notably, prosecutors chose not to charge her husband, even though he participated in the proscribed activities and had a history of violent behavior. Results from a medical exam suggested that physical abuse against the mother potentially caused the baby's death Toscano 2005). Prosecutors eventually dropped the charges but not before the case received widespread media publicity (Solomon 1991).

Courts in South Carolina appear especially willing to convict drug-addicted pregnant women. In Whitner v. State, a South Carolina court convicted Cornelia Whitner of

criminal child neglect for consuming cocaine during pregnancy when traces of the drug were found in her infant's system, even though the infant did not suffer any apparent effects (Hirschenbaum 2001; Toscano 2005). The South Carolina Supreme Court upheld her eight-year sentence (Toscano 2005). The same court upheld Regina McKnight's conviction and twelve-year sentence for homicide by child abuse after prosecutors successfully argued that her cocaine use during pregnancy led to the infant being stillborn (Eckenwiler 2004).

There is scant support in the literature to suggest that prosecuting pregnant women promotes healthy fetal outcomes. In a related argument, George Schedler (1991) contends that society maintains the right to force pregnant drug-addicted women to undergo abortions. His utilitarian justification argues that the perceived social and economic costs of caring for substance-exposed babies outweigh the benefits, even though harmful effects are far from certain. CRACK relies on a similar argument to suggest that its program of sterilization alleviates social costs incurred by taxpayers that would otherwise be spent on the care and raising of children born to drug-addicted women (CRACK, 2009). In both cases, the solution to a social problem is sought by regulating women's reproduction (Toscano 2005). However, more than two decades of prosecuting pregnant drug-addicted women has not produced lower rates of drug use during pregnancy (Lim 2008).

In fact, the criminalization of pregnant drug-addicted women precipitates actions that are harmful to both mother and baby. A judge in the District of Columbia sentenced a cocaine-addicted woman convicted of forgery to prison solely on the basis of her pregnancy, allegedly to protect her unborn fetus. His misguided rationale ignored evidence that illicit drugs are rampant in correctional institutions and that rates of miscarriage are far higher than the national average (Gustavsson 1991; Gustavsson and MacEachron 1997). Endangering women's health by placing them in prison endangers the fetus; it further discourages other pregnant drug-addicted women from seeking the healthcare and treatment that is vital to fetal and maternal wellbeing (Gustavsson and MacEachron 1997; Toscano 2005). Following the South Carolina Supreme Court's decision in Whitner v. State, local treatment clinics reported significantly lower pregnant female admission rates (Toscano 2005).

The attempt to separate maternal and fetal interests for the purpose of criminalizing drug use and promoting fetal wellbeing is counterproductive. Toscano (2005) draws attention to the contradiction inherent in maternal-fetal conflict: the unborn fetus is considered legally separate from the mother but it is the dependant nature of the relationship between the two that is used to justify prosecution. Consideration of the mutual interests of the mother and fetus will result in better pregnancy outcomes and is more cost effective than incarceration. Assisting pregnant women to carry their infants to term is far less expensive than providing care for a premature baby (Gustavsson and MacEachron 1997). This approach recognizes that drug-use among pregnant women warrants a public health response, not a criminal response; especially in light of the fact that many women self-medicate the effects of depression through the use of illicit drugs (Eckenwiler 2004; Lester 2000).

A British study conducted from 1999 – 2006 provides evidence for the success of encouraging prenatal healthcare amongst pregnant drug-addicted women. Pregnancy outcomes such as birth weight, gestational period, and breast feeding rates were measured and found to substantially improve in cases where the mother received support from a midwife (Leggate 2008). Pregnant mothers responded to the personal care and as a result were more compliant with prenatal advice (Leggate 2008). Results such as these highlight the positive agency drug-addicted women use to limit the harmful effects of prenatal drug exposure and present a strong case for "empowering [pregnant] women instead of punishing them" (Eckenwiler 2004:91). Pregnant women and their children benefit when the distribution of resources recognizes the mutuality of maternal-fetal existence.

CRACK raises a number of serious ethical concerns. It stratifies reproduction by classifying the reproductive capacity of certain groups of women as undesirable, often in a racially-biased manner (Roberts 2005). A prominent quote on the CRACK website singles out African Americans to support the organization (CRACK 2009). The dollar value assigned to child-bearing implicitly derogates some women's reproductive potential and reinforces a reproductive hierarchy (Roberts 2005). It artificially reduces complex social problems to reproductive capacity instead of highlighting systemic issues in women's drug addiction, and perpetuates the idea that women can and should be held responsible for ameliorating a social problem (Lim 2008; Roberts 2005; Solomon 1991; Toscano 2005). CRACK reinforces the discourse that supports criminalization through their controversial bill-board advertisements: "Prevent Child Abuse… [$300] cash for drug-addicts who participate in long-term birth control" (Hirschenbaum 2001:327) and continues the historic trend of monitoring women's sexual and reproductive behavior. Fundamentally, CRACK represents an extreme form of maternal-fetal conflict by actively promoting the idea that certain women should permanently suffer the loss of their reproductive capacity.

The criminalization of pregnant drug-addicted women provides the fertile soil necessary for programs like CRACK to emerge. While there are many divisive elements within the CRACK program, it powerfully illustrates the oppressive nature

of the separation of maternal and fetal interests; indeed, any interest in maternal wellbeing is noticeably absent.

The American Public Health Association (APHA) charges that CRACK relies upon unsound data concerning the effects of prenatal cocaine-exposure and ignores the far more widespread incidence of alcohol-exposure in its racially-biased campaign to sterilize women (APHA 2001). In doing so, it violates basic human and civil rights by "attacking the reproductive capacity of women rather than the conditions of oppression under which poor women live" (APHA 2001:517). CRACK does not provide social or financial support to women that seek drug treatment. Barry Lester (2000) suggests that the societal stigma attached to drug use inhibits the provision of treatment options. CRACK reinforces this stigma which is especially harmful given the dearth of drug treatment programs for pregnant drug-addicted women and the dire need for additional resources. In a survey of drug-treatment programs conducted in 1990, 54% excluded pregnant women; 67% excluded women under Medicaid; and fully 87% excluded pregnant cocaine-addicted Medicaid patients; all categories of women in which CRACK clients are likely to fall (Hirschenbaum 2001; Solomon 1991).

Social problems are collectively created and defined. The social construction of the myth of the perpetually pregnant crack-addicted woman reflected public anxiety and imbued itself into the early scientific literature. Both provided the foundation for criminalizing pregnant drug-addicted women and formed the scaffolding for the conceptualization of maternal-fetal conflict. Prosecutors around the country seized upon the idea of maternal-fetal conflict to hold mothers singularly responsible for negative pregnancy outcomes out of the mistaken belief that punishing mothers would herald better outcomes for babies. Although convictions have been overturned in most states with the exception of South Carolina, this has not translated into a rejection of the philosophies underlying criminalization (Toscano 2005).

Maternal-fetal conflict represents a dangerous illusion that depicts mothers as agents of harm and inhibits those most in need of pregnancy care from seeking it. CRACK reifies this illusion and reinforces the social discourse that blames women for the complex social problem of pregnant drug-addiction. Their willingness to pay women for sterilization makes it easier to demote support for services that assist pregnant drug-addicted women; services that are proven to promote healthy babies.

A better alternative is to recognize that women's drug use evolves in response to a myriad of personal and environmental factors, including depression, physical and emotional abuse, entrenched poverty and the concomitant absence of adequate housing, nutrition, or healthcare. Moreover all of these factors contribute to poor pregnancy outcomes. Acknowledging this means that society has a collective responsibility to provide services aimed toward healthy reproduction. Abandoning the falsehood of maternal-fetal conflict is a necessary step in the direction of healthy mothers and healthy babies.

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*CRACK is now known as "Project Prevention."