It is generally agreed that a woman's behavior during pregnancy can dramatically affect the health of the fetus she is carrying. Over the past few decades, experts have repeatedly documented the adverse effects of prenatal drug and alcohol use on fetal health. Legal and illegal drugs, including cocaine, alcohol and tobacco, can cause a variety of mental and physical birth defects. Children exposed to toxic substances while in the womb are often born premature, and prenatal drug exposure can result in visual and hearing impairments, chronic illness--such as mental retardation and cerebral palsy--and even death.

Despite the serious risks that drug, alcohol and cigarette exposure pose to a fetus, many women still participate in such behavior while pregnant. According to the most recent national survey, conducted by the National Institute on Drug Abuse (NIDA) in 1992, a little more than 1% of pregnant women use cocaine during pregnancy, nearly 19% drink alcohol, and nearly 20% smoke cigarettes. And while smoking among pregnant women is in decline, in recent years health experts have seen an increase in the number of women who drink alcohol while pregnant, according to the March of Dimes, a non-profit organization concerned with infant health.

Although most people agree that prenatal exposure to drugs, alcohol and cigarettes is detrimental to the health of unborn children, there is a great deal of debate about what role the government should play in curbing such behavior. Many people disagree about whether the government has a right to intervene in the way a woman conducts herself during pregnancy, or to hold a woman criminally accountable for putting her fetus at risk. In addition, there is debate about whether the fetus can be considered an entity separate from the woman carrying it, and whether the fetus therefore has independent rights and interests that merit protection.

Currently, no U.S. state has enacted laws specifically criminalizing women’s conduct during pregnancy. However, women in some 30 states have been prosecuted for their behavior while pregnant under statutes that prohibit abuse and neglect of children.

In addition, pregnant drug and alcohol users have been charged with several other violations. Those violations include delivery of drugs through the umbilical cord (delivering drugs to a minor), contributing to the delinquency of a minor and assault with a deadly weapon (cocaine). The punishments women face under such fetal-abuse prosecutions vary in type and severity. While some women are forced into drug treatment, others are incarcerated, and many lose custody of their children.

Most experts agree, however, that the legal issues involved in such cases are unclear. For the most part, when challenged, charges regarding such behavior have been reversed and penalties voided.
The one exception is South Carolina, which is the only state in the U.S. that has explicitly extended its criminal child abuse laws to cover fetuses. As a result, South Carolina and its fetal-abuse policies are at the epicenter of the debate about prosecutions for substance abuse during pregnancy. (Also, three states—Minnesota, Wisconsin and South Dakota—have amended their laws to allow judges to force pregnant substance abusers into civil treatment or detention centers.)

Proponents of fetal-abuse prosecutions argue that states have a right and a responsibility to protect unborn children from exposure to harmful substances. Such measures are effective in promoting fetal health and in protecting unborn children, they say. Furthermore, advocates of fetal-abuse policies say that a woman who chooses to carry her fetus to term has an obligation to provide a safe environment for that fetus. If a woman does not fulfill her obligation, she should be held responsible and punished accordingly, they argue.

In addition, proponents argue that fetal-abuse prosecutions are effective in deterring women from using harmful substances while pregnant. Unless addicted women are forced to stop using such substances—or are frightened into stopping—they will continue to put the health of their fetuses at risk, some observers say. Although punitive measures may seem harsh, proponents argue, they are in fact in the best interest of substance-abusing pregnant woman and their fetuses.

Meanwhile, opponents argue that the courts have no right to dictate a woman's actions. Prosecuting women for certain behavior during pregnancy is unconstitutional, and infringes on their privacy and bodily integrity, critics say. Furthermore, many women's rights advocates are concerned that if a woman can be prosecuted for endangering her unborn child through drug use, then she could also potentially be prosecuted for a host of other actions that could affect a fetus, such as not eating well or not exercising. Such a situation would seriously compromise a woman's rights and freedoms, critics argue.

In addition, critics say that punishment-oriented approaches to the problem of prenatal substance abuse are counterproductive. Such policies undermine the goal of promoting fetal health because they scare women away from seeking prenatal care. It would be much more effective, they say, to provide addicted women with treatment options.

The issue of fetal abuse also has serious implications in the abortion debate, most observers say. Many pro-choice advocates—people who believe that a woman has a right to choose whether or not to have an abortion—are troubled by fetal-abuse prosecutions. By declaring a fetus a child, and granting rights to a fetus for the purpose of fetal-abuse prosecutions, courts are slowly eroding women's reproductive rights, activists argue.

Meanwhile, many pro-life advocates—people who oppose abortion and believe that a fetus has rights separate from the woman carrying it—support fetal-abuse prosecutions. A fetus is a child who has the right not to be abused through drug use, just as it

Jeremy Eagle
has the right not to be aborted, they say.

Is there such thing as “fetal abuse”? Do the courts have a right to intervene in a woman’s decisions about how she conducts herself during pregnancy in order to protect the well-being of her fetus?

**Prosecutions for Fetal Abuse**

Women have been prosecuted for a variety of prenatal activities, but primarily for the use of legal and illegal drugs. Many experts say that such prosecutions began in earnest in the late 1980s and early 1990s, in response to the so-called crack epidemic. (Crack is a highly purified, inexpensive form of cocaine.)

As levels of crack use skyrocketed, particularly in inner cities and other poverty-stricken communities, many people became alarmed by the rise in the number of “crack babies” born to addicted mothers. Those children, born with cocaine in their systems, were often reported to be unresponsive to outside stimuli, and to have serious behavioral and mental problems. In an effort to find solutions to the “crack epidemic,” many legislators and litigators began looking for ways to prosecute women for using drugs while pregnant, observers say.

At least 200 women in some 30 states have been arrested and criminally charged for drug use or other behavior during pregnancy, according to the Center for Reproductive Law and Policy (CRLP), a law and advocacy organization concerned with reproductive rights. In appeals to higher courts, the vast majority of those charges have been voided, having been deemed either without legal basis or unconstitutional.

The state supreme courts of Florida, Kentucky, Nevada, Ohio and Wisconsin and many lower courts have consistently voided fetal-abuse rulings. In fact, in 21 of the 22 states in which women have challenged fetal-abuse or neglect charges, courts have reversed the penalties or rejected the charges.

The one notable exception is South Carolina, where the state Supreme Court has twice upheld a lower court ruling in the case of *Whitner v. South Carolina*. In 1992, Cornelia Whitner was arrested for “endangering the life of an unborn child” after she used crack during her final month of pregnancy. Whitner pleaded guilty to child neglect and was subsequently sentenced to eight years in prison. In the wake of her sentencing, Whitner appealed the decision to the South Carolina state Supreme Court, arguing that her prenatal behavior was not covered under the state’s child abuse laws.

Despite vocal criticism from women’s rights groups, the court has ruled twice—once in July 1996 and again in October 1997—that Whitner’s sentence should stand. In the October 1997 ruling, the court held that a viable fetus is a “child” under South Carolina’s child-endangerment statute. As a result, the state court found that any prenatal behavior that is potentially harmful to a fetus could be the legitimate basis of a criminal child-endangerment charge.

*The decision in Whitner* remains the only standing appellate court decision in the nation that upholds criminal charges filed against a woman for prenatal behavior that poses a risk to her fetus.

In May 1998, Whitner appealed her case to the U.S. Supreme Court. She and her supporters were hopeful that the Supreme Court would overturn the South Carolina court’s decision, thus voiding what they considered a dangerous precedent. However, the Supreme Court declined to hear the *Whitner* case, letting the prior decision stand.

**Ferguson v. Charleston**

Although the Supreme Court declined to hear the *Whitner* case, in February 2000 it agreed to hear another South Carolina case, *Ferguson v. Charleston*, which addresses some similar issues. *Ferguson*, like *Whitner*, revolves around questions of whether the state has a right to intervene in the lives of pregnant women on behalf of their fetuses.

In 1989, the police department of Charleston, S.C. and the Medical University of South Carolina (MUSC), a public hospital in Charleston, instituted a program called Interagency Policy on Cocaine Abuse in Pregnancy. The program called for the hospital to test pregnant women for cocaine if they met one of several criteria, including experiencing unexplained pre-term labor, having a history of drug or alcohol abuse and undergoing no prenatal care.

Under the policy, pregnant women were tested without a warrant and without their consent, and if they tested positive, they were arrested and prosecuted under a variety of charges. Those charges included distribution of drugs to a minor and unlawful neglect of a minor. The Charleston program came under attack for a series of reasons. Critics claimed that it was unconstitutional, ineffective and racist. The program was ultimately abandoned in October 1994.

MUSC dropped the program after the Civil Rights Division of the U.S. Department of Health and Human Services began investigating whether the hospital had violated the civil rights of African-American patients by implementing the cocaine-testing policy. (Of the at least 30 women arrested under MUSC’s policy, all but one were African-American.) However, despite the fact that MUSC’s cocaine-testing policy no longer exists, it continues to be the subject of heated moral and legal debate.

In 1993, 10 women who were prosecuted under MUSC’s policy brought a case against the hospital for violating their rights under the Fourth Amendment, which protects against unreasonable searches. The women charged that the hospital unlawfully searched them for drugs without warrant or consent. In September 1997, the U.S. District Court for the District of South Carolina ruled against the plaintiffs.
The women then brought their case before the U.S. Fourth Circuit Court of Appeals in Richmond, Va. However, in July 1999, the court held that the women's rights had not been violated because MUSC's policy fell within the "special needs" exception to the Fourth Amendment. (The clause exempts the requirement of a warrant and probable cause for a search when a search policy serves a special need beyond the normal needs of law enforcement.)

The 10 women appealed the case to the Supreme Court. The court heard arguments in Ferguson in October 2000, but has yet to issue a decision. Many people on both sides of the fetal abuse debate are eagerly awaiting the ruling because, they say, it will set an important precedent. "It's a bellwether," says Catherine Weiss of the American Civil Liberties Union's Reproductive Freedom Project. "From it, we will be able to tell how much the [Supreme Court] thinks a state can intervene in the lives of pregnant women."

**Protecting the Unborn**

Proponents of South Carolina's policies and other punitive measures for drug use during pregnancy say that it is the state's responsibility to intervene in cases where a fetus is at risk. Prosecuting women for their behavior while pregnant is sometimes necessary in order to promote fetal health and protect unborn children, they say. "I just want the babies to be safe," says Tommy Pope, a prosecutor in South Carolina. "We try to use prosecutions as a last resort. But you run into situations where a woman has had five kids, and they've all tested positive for crack. Where do you draw the line?"

Underlying the argument that unborn children need protection is a belief in "fetal rights"--that the fetus is an entity with autonomous rights, and is in that respect separate from the mother. Fetuses are also defenseless, and society therefore has a right and a responsibility to make sure that they are not victimized, proponents say. "Who are we protecting?" asks Robert Hood, a Charleston lawyer defending South Carolina and its drug-testing policy before the Supreme Court. "The woman, so she can kill her baby? Or is society going to step up to the plate and protect that baby?"

Proponents of fetal-abuse prosecutions argue that children who were exposed to toxic substances as fetuses often have lasting health problems. It is unfair to subject a child to a life of pain when such suffering is completely preventable, they say. Fetal-abuse policies serve the purpose of preventing future suffering, proponents argue, and are therefore a moral and medical necessity.

Furthermore, many people who advocate prosecuting pregnant women who use drugs point out that most U.S. states have fetal-homicide laws, which allow a third party to be prosecuted for inflicting harm that causes injury to or loss of a fetus. If, in the eyes of the law, a fetus has the right to be protected from a third party, then a fetus should likewise be protected from acts carried out by the mother, they say.

Advocates also argue that once a woman decides to carry her child to term, she has an obligation to provide a healthy environment for that fetus. "A pregnant women, if she chooses not to end the pregnancy, takes on a moral and perhaps a legal obligation to refrain from clearly harmful prenatal conduct," says John Robertson, a professor of law and bioethics at the University of Texas.

If a woman does not fulfill that obligation, observers say, then she should be punished. "We're here to say there's a consequence for your behavior," says Catherine Christophillis, the assistant deputy attorney general in South Carolina in charge of the Whitner prosecutions. "There comes a point when the state must intervene...to solve a problem. We're just using the law to help that process along."

Often, drug-addicted pregnant women will not seek treatment for their actions voluntarily and the only way to prevent further substance use is to force them into treatment or incarcerate them, critics say. "Unless addicts are forced to stop, they won't," says Hood. The threat of prison, he says, "has a very good deterrent effect." Punitive measures may seem harsh, proponents admit, but in a situation where a pregnant woman is abusing drugs, such measures are often the only effective means of preventing further destructive behavior.

**Policing Women**

Yet opponents of prosecuting women for their behavior during pregnancy argue that fetal-abuse prosecutions are both ineffective and counterproductive. Threatening women with incarceration does not protect the health of children, they say. In fact, such policies undermine their goal of producing healthier babies because they scare women away from seeking prenatal care or treatment for their addictions, some observers argue.

Opponents point out that, for example, according to the South Carolina Association of Alcoholism and Drug Abuse Counselors, the number of pregnant women seeking admission to drug treatment programs in South Carolina in the year following the highly publicized decision in Whitner declined by more than 80%. "Women are doing one of three things. They're getting abortions, having babies over the North Carolina state line or not seeking prenatal care," says Brenda Wheeler Dawkins, director of a women's drug treatment facility in South Carolina.

In reality, opponents say, fetal-abuse policies do not decrease drug use among pregnant women. Such policies merely decrease the number of women seeking prenatal care, they contend.

Critics also contend that programs like the one in South Carolina erode the patient-doctor confidentiality agreement by requiring medical personnel to report prenatal drug use or else face legal prosecution. Such policies therefore threaten the ability of
doctors and health care providers to obtain important, sensitive information from patients, they argue. Many women are unwilling to implicate themselves and risk legal prosecution by disclosing information about their drug use. As a result, doctors are often forced to make treatment decisions without having important information from the patient, which in turn makes treatment less effective, observers say.

Furthermore, putting pregnant women in jail, where there is no treatment and where drugs are often available, does not solve any problems and, in fact, often heightens addiction, critics say. In reality, it would be much more effective to provide addicted pregnant women with access to treatment and rehabilitation facilities, they say.

Critics further argue that punitive approaches ignore a central problem that society needs to address: the lack of adequate treatment facilities for pregnant women with addictions. It is easier for legislators to pass laws criminalizing maternal behavior than it is to find ways to devote funds to productive measures such as child care, health care and education, they say.

Not only are punitive measures ineffective and counterproductive, opponents say, but they pose a serious threat to women's reproductive rights. Granting the fetus status as a child for purposes of applying child abuse laws is dangerous, and has far-reaching implications, opponents say.

"If a fetus is a person, everything a pregnant women does is potentially child abuse, abortion is murder, and women lose the right to make medical decisions on their own behalf during pregnancy," says Lynn Paltrow, a reproductive-rights lawyer from New York City and the director of National Advocates for Pregnant Women, an organization dedicated to protecting the rights of pregnant women. "The effect of declaring fetal personhood is to declare the pregnant woman's non-personhood."

Opponents of punitive fetal-abuse policies also say that incarcerating women for fetal abuse raises serious constitutional concerns. Such measures violate women's constitutional right to due process, opponents say. (The right to due process holds that a law cannot be interpreted or applied in a manner not intended by the law.) For example, they say, the law that prohibits the distribution of drugs to a minor was not intended to apply to distribution through the umbilical cord.

Fetal-abuse policies also violate the right to privacy, critics contend. Pregnant women have the same right to make private decisions about how they behave and how they treat their bodies as do any other individuals, they say. "Women have a right to make decisions regarding their own bodily integrity, [and] that does not stop when they become pregnant," says Paltrow.

If women can be charged for endangering a fetus by taking illegal drugs or smoking, critics warn, then women could potentially be subject to prosecution for a wide range of legal and illegal behavior, including not eating well or not exercising. Almost any action could be subject to prosecution, critics say, and that would create a virtual police state for pregnant women.

In addition, many critics question how race and class affect which women are prosecuted for fetal abuse. The majority of fetal-abuse cases, they point out, have focused on women who use cocaine. Cocaine--particularly when in the form of crack--tends to be used in inner cities by women of color, they say, and fetal-abuse policies therefore target poor and minority women. Other drugs, such as methamphetamines (which are often used by white rural and suburban women) are potentially just as harmful to a fetus as is cocaine, critics say. Yet women are rarely prosecuted for using such drugs while pregnant.

Some critics also say that fetal-abuse policies are unfair because they exclusively target women. Men can also participate in behavior that is detrimental to a fetus, they say. For example, experts say that drug use by men can cause sperm abnormalities that could result in birth defects. In addition, some say, secondhand smoke from a nearby smoker could be harmful to a fetus. However, virtually no one advocates prosecuting people for smoking near a pregnant woman.

A Far-Reaching Debate

The issues involved in the fetal-abuse debate are far-reaching and could potentially affect both the abortion debate and the debate over drug policy in the U.S. Given the highly controversial, and highly visible, nature of both of those issues, fetal-abuse prosecutions are likely to receive continued attention in the future, according to many observers.

Critics of punitive measures vow to continue challenging fetal-abuse convictions throughout the country. They hope that the courts will continue voiding such convictions, and that eventually prosecutors will cease bringing charges against women for their behavior while pregnant. Critics hope that, in the future, legislators will focus their efforts on treatment and rehabilitation of addicted women, rather than on punishment.

Meanwhile, proponents of fetal-abuse prosecutions are confident that the Supreme Court will uphold the Ferguson ruling, and thereby set an important precedent for substance-abusing pregnant women. They hope that in the future women will be less inclined to expose their fetuses to toxic chemicals for fear of legal prosecution. As a result, proponents hope, the quality of life for addicted pregnant women and their fetuses will improve.

There is little doubt that the U.S. will continue to struggle with questions about fetal rights, drug policy and the reproductive rights of women in the years to come. The debate over fetal abuse falls squarely at the intersection of these controversial issues, and as a result many different people—including policy makers, medical practitioners, legal experts and women's rights activists—will most likely continue to follow the issue.

Bibliography


**Additional Sources**

Additional information about fetal abuse can be found in the following sources:


**Contact Information**

Information on how to contact organizations that are either mentioned in the discussion of fetal abuse or can provide additional information on the subject is listed below:

**March of Dimes Foundation**
1275 Mamaroneck Avenue
White Plains, N.Y. 10605
Telephone: (888) 663-4637
Internet: [www.modimes.org](http://www.modimes.org)

**National Institute on Drug Abuse**
6001 Executive Boulevard, Room 5213
Bethesda, Md. 20892-9651
Telephone: (301) 443-1134
Internet: [www.nida.nih.gov](http://www.nida.nih.gov)

**Center for Reproductive Law and Policy**
120 Wall Street
New York, N.Y. 10005
Telephone: (917) 637-3600
Internet: [www.crlp.org](http://www.crlp.org)

**Keywords and Points**

For further information about the ongoing debate over fetal abuse, search for the following words and terms in electronic databases and other publications:

- Fetal rights
- *Whitner v. South Carolina*
- Prenatal health
- Fetal Alcohol Syndrome
- *Ferguson v. Charleston*

**Fetal Abuse Update (May 2009)**

Since ICOF last covered fetal abuse in February 2001, the Supreme Court ruled on mandatory drug testing for pregnant women, scientists have gathered new evidence on the effects of drug use while pregnant and prosecutors in Utah charged a
mother with infanticide. Among the key events:

- The Supreme Court issued a decision in the South Carolina case Ferguson v. City of Charleston on March 21, 2001, ruling that public hospitals could not require pregnant patients to submit to illegal drug testing done to gather evidence for law enforcement purposes. Ten pregnant women who had been arrested after testing positive for illegal drugs while patients at the Medical University of South Carolina in Charleston had filed a civil suit against the hospital for violating their civil rights. The justices ruled, 6-3, that the "special needs" doctrine, which was sometimes used by courts to bypass the Fourth Amendment, did not apply in the case. [See 2001 Facts On File: Supreme Court: Maternity Patient Drug Testing Struck Down]

- The use of cocaine by pregnant mothers was found not to produce developmental problems or brain abnormalities in the child as previously theorized by doctors, according to a paper published in the March 28, 2001, issue of the Journal of American Medical Association. The study found that prenatal exposure to the drug would produce effects comparable to exposure to alcohol or marijuana. The researches noted that the motor impairment seen in some infants who had been exposed to cocaine corrected itself after the first six months. [See 2001 Facts On File: Medicine and Health: News in Brief]

- In a July 2003 paper published in the American Heart Association's journal Stroke, researchers from the University of Southampton in Great Britain and the Medical University of South Carolina in Charleston partially attributed the high rate of strokes among elderly people in some regions of England and the U.S. to malnutrition among pregnant females in previous generations. The research, combined with other studies, pointed to evidence that inadequate prenatal care may sometimes not noticeably affect offspring until later in their lives. One proposed theory, named the "fetal origins of adult disease" (FOAD) hypothesis, suggested that conditions in utero could cause adult illnesses for people otherwise suffering from no genetic defects or history of disease in their families. [See Today's Science: Mother's Health Affects Child for Life]

- In the first known case of its kind, Salt Lake City, Utah, prosecutors charged Melissa Ann Rowland with first-degree murder on March 11, 2004, after one of her twin babies died two days before birth. Rowland had allegedly disregarded advice given by her doctors to give birth by cesarean section. Women's rights advocates protested the murder charge, citing concerns that it would set a precedent for elevating the rights of the fetus over the rights of the mother. On April 7, Rowland had pleaded guilty to drug-related third-degree felony child endangerment charges, admitting that she had used cocaine while pregnant. [See 2004 Facts On File: Crime: Woman Charged for Refusing C-Section]

- On April 1, 2004, President George W. Bush (R) signed a fetal protection bill that designated harming or killing the "unborn child" of a pregnant woman a separate federal crime. The Senate had approved the legislation in March after the House passed an identical version in February. Democratic senator Dianne Feinstein (Calif.) sought an alternative version of the bill that would introduce increased penalties for crimes against pregnant women but would not have given legal status to the fetus. [See 2004 Facts On File: Legislation: Senate Clears, Bush Signs Fetal Protection Bill]

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American Psychological Association (APA)
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See the American Psychological Association (APA) Style Citations for more information on citing in APA style.