

DEBATE 11

**INTERVENING WITH
DRUG-DEPENDENT
PREGNANT WOMEN**

- *Should the state have the right to intervene when a pregnant woman is found to be dependent on drugs or alcohol?*

EDITORS' NOTE: Babies born with drugs, usually crack cocaine, in their systems have received a great deal of publicity and evoked a huge public response. Although most of the concerned public believes that the mothers are acting irresponsibly, there is a lively debate on what the legal response should be, and when it should be invoked. The Florida judge who jailed a drug-addicted pregnant woman forced the issue. Those who agreed with his decision claimed the mother was guilty of child neglect as well as drug possession. They would argue that the appropriate child protective measure is to restrict the mother's intake of drugs, even if that means imprisonment. Opponents of the action claim that criminal child neglect statutes apply when the child is born. Furthermore, under *Roe v. Wade*, the mother has control over the fetus until the third trimester, and even then the intervention of the state is limited to abortion issues. The argument is further confused by the fact that not all babies born with drugs in their systems are at risk of impaired development. An even more complicated issue is alcohol addiction. Although the damaging effects of fetal alcohol syndrome have been identified for many years, there has been little attempt, until recently, to control alcoholic pregnant women. The predictable effect of maternal alcoholism on the fetus is even less clear-cut than with maternal drug addiction. In addition, there are accusations that there is a class bias in favor of alcoholism, given that there are more middle-class alcoholic mothers than drug abusers. Our authors are

in agreement on many aspects of this problem, but disagree about the most sensitive issue, the timing of the intervention.

John E. B. Meyers says YES. He is Professor of Law at the University of the Pacific, McGeorge School of Law. His specialty is family law, and he has published numerous articles on legal aspects of child abuse and neglect.

Douglas J. Besharov argues NO. He is a lawyer and a resident scholar at the American Enterprise Institute for Public Policy Research. He has published widely on child abuse and neglect. An earlier version of his argument here appeared as "Whose Life Is It Anyway?" in the *National Law Journal*. It is reprinted with the permission of *The National Law Journal*, copyright 1992, The New York Law Publishing Company.

YES

JOHN E. B. MEYERS

Someone is about to poison a 6-month-old baby! Does society have authority to intervene? Of course. Society has the moral as well as the legal authority to prevent adults from hurting children. Thus a police officer may physically restrain the adult, and, if help does not arrive in time, the adult may be prosecuted and sent to prison.

Now, consider a different situation. Suppose a woman is 6 months pregnant and is about to inject crack cocaine into her arm. The cocaine will circulate in the woman's blood and will pass through the placenta into the unborn child, where the cocaine may damage or kill the child. For the unborn child, cocaine is poison. Society has authority to protect the 6-month-old baby; does society have authority to protect the 6-month-old fetus? May the pregnant woman be stopped before she injects the cocaine? If the woman injects the cocaine and the child is handicapped or stillborn, should the woman be prosecuted?

These are difficult questions, and the answers are far from clear. Yet society can no longer ignore the moral and legal issues raised by maternal drug abuse during pregnancy. As many as 1 baby in 10 is born with side effects from illegal drugs taken by the mother during pregnancy. It is estimated that 300,000 infants are born annually to women who use crack cocaine during pregnancy. An additional 10,000 babies are born each year to women using opiates such as heroin. Use of drugs such as cocaine and heroin during pregnancy inflicts serious short- and long-term harm on thousands of children (Bays, 1990).

How should society respond to this tragic problem? Few would disagree that the most promising and humane response to maternal drug abuse during pregnancy is increased medical and social services for women. There is a desperate need for more drug treatment programs and prenatal medical care, particularly for poor women. Yet some women are not interested in treatment. Moreover, the incredible craving caused by crack cocaine and heroin so overpowers some users that they simply cannot stop. Because there are pregnant women who cannot or will not take advantage of voluntary services, society must ask whether the law has a role to play in preventing harm to unborn children.

Some argue that because the legal system is inherently coercive, the law cannot play a constructive role in responding to maternal drug abuse during pregnancy ("Symposium," 1990). Although the argument against such intervention has merit, opponents of legal intervention ignore the harsh reality of

drug abuse and its effects on children. So long as the primary emphasis remains on increased voluntary services, the law can play a valuable subsidiary role.

The law can respond in two ways to maternal drug abuse during pregnancy: First, women whose drug abuse harms their unborn children may be prosecuted; second, rather than prosecute women *after* the harm of drug abuse occurs, the law may intervene during pregnancy to *prevent* harm.

Prosecution After the Child Is Born

A defensible argument can be made for prosecution of some women whose drug use during pregnancy harms their unborn children. The argument for prosecution begins with the well-accepted premise that society has authority to punish individuals who seriously harm others (Feinberg, 1984; Mill, 1859/1982). The criminal justice system is founded on this premise. Maternal drug use during pregnancy carries a high risk of serious harm to unborn children. Although there is some uncertainty regarding the legal status of the fetus, there is no denying that the unborn child has the *potential* to become a "person" in every sense of the word. This potential deserves the law's protection. Thus society has a strong interest in protecting unborn children from the ravages of maternal drug abuse. Moreover, opponents of prosecution cannot argue that prosecution infringes on the rights of pregnant women because there is *no* right to take illegal drugs.

Although prosecution can be defended on moral as well as legal grounds, prosecution is not a viable response to drug abuse during pregnancy. There is a very real likelihood that the threat of prosecution will frighten drug-abusing women away from the prenatal care they desperately need. Thus the social utility of prosecution is low. As I have noted elsewhere, "The ultimate irony of prosecuting maternal drug use during pregnancy could be that the state harms more children than it helps" (Myers, 1991, p. 758).

Juvenile Court Intervention Before the Child Is Born

Everyone is familiar with the highly visible criminal justice system. Fewer people are aware of the equally important juvenile court system. The primary responsibility of the juvenile court is to protect abused and neglected children. When abuse or neglect comes to the attention of police, social workers, doctors, or teachers, proceedings are commenced in juvenile court to protect

the child. The juvenile court judge has authority to remove children from their homes and to order parents to obtain counseling and other assistance. Proceedings in juvenile court are less adversarial than in criminal court cases. In juvenile court, parents are not prosecuted, and the goal is not to punish, but to protect children and help parents learn more effective ways to interact with their children. Although the juvenile court system is terribly overburdened and underfunded, the juvenile court helps many families.

Although prosecution is not an effective response to maternal drug abuse during pregnancy, the juvenile court can play a constructive role. Involvement of the juvenile court is possible at two times: shortly following the birth of a drug-affected baby and prior to birth. It is clear that once a drug-affected baby is born, the juvenile court has authority to intervene if the mother is unable to care for the child. The more difficult question is whether the juvenile court should be allowed to intervene *prior to birth* in order to stop drug abuse that threatens to harm the unborn child.

If the unborn child could speak, the child would certainly favor intervention during pregnancy, *before* drugs do their dirty work. In addition to the child's unspoken desires, society has a strong interest in protecting unborn children. Thus the interests of society and those of the child dovetail. The pregnant woman has no right to take illegal drugs, particularly when such conduct may cause serious harm to the unborn child. Thus at first blush it is difficult to find a reason to deny juvenile court judges authority to intervene prior to birth. But reasons there are. Suppose a juvenile court judge orders a pregnant woman to stop abusing drugs, but the woman disobeys the judge's order? How is the judge to enforce the order? With some women, particularly addicts, the only way to stop drug abuse is to deprive the woman of her liberty—to lock her up! Thus, with some women, authorizing juvenile court intervention prior to birth is certain to infringe on the fundamental right to physical liberty. Is society justified in depriving a woman of her liberty in order to protect her unborn child? When the potential harm to the child is considered, the answer is yes. Limited juvenile court intervention during pregnancy is morally and legally defensible.

The prospect of government interference in the lives of pregnant women is frightening, and it is clear that strict limits must be placed on intervention. Moreover, the enthusiasm to protect unborn children must be tempered with caution. As Justice Brandeis of the U.S. Supreme Court warned long ago, "Experience should teach us most to be on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding" (*Olmstead v. United States*, 1928, p. 479).

Despite the fact that juvenile court intervention will impair women's civil liberties, the brutal truth is that in the time it took to read this essay, a drug-affected baby was born. Because the baby's mother used illegal drugs, the baby may be robbed of a full and meaningful life. Society does not ask too much when it insists that women refrain from drug abuse during pregnancy, and when a woman's abuse of drugs endangers her unborn child, society is justified in temporarily compromising the woman's liberty to save the child. Indeed, it is morally bankrupt to suggest that society is powerless to act. When voluntary help is refused, the juvenile court is the child's last best hope.

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Five years after the first crack babies appeared in inner-city hospitals, we are still arguing about whether a pregnant woman's use of drugs constitutes child abuse. Although no one wants to see endangered children go unprotected, many fear that equating prenatal exposure to illegal drugs with child abuse could be a first step toward legal recognition of the fetus as a person, thus undermining abortion rights. These concerns are misplaced.

The issue is important: Some drug-using mothers want help for their children and treatment for their addictions. But many others do not. For them, only a report of suspected child abuse will initiate a social work investigation to see whether the child can safely be sent home with the mother and whether the family needs supportive social services.

In 1991, from 30,000 to 50,000 children were born after having been exposed to illegal drugs in their mothers' wombs. Perhaps twice that number of older children live at home with drug addicts (Besharov, 1989). Prenatal drug exposure can cause serious injury and even death to the developing fetus. Pregnant women who use heroin, methadone, cocaine, or large quantities of barbiturates or alcohol—or, as is common, a combination of these drugs—are much more likely to give birth to children with severe problems. Crack, for example, constricts the blood vessels in the placenta and the fetus, thus cutting off the flow of oxygen and nutrients and creating a higher probability of miscarriages, stillbirths, and premature and low-birth-weight babies, often with various physical and neurological problems. Death rates may be twice as high for crack babies as for others (Gordon Avery, Children's Hospital, Washington, DC, personal communication, March 27, 1989; see also Whitaker, 1988).

Labeling drug use while pregnant as child abuse makes many women's rights and abortion rights advocates apprehensive, as they see it as a potential narrowing of reproductive freedoms. Their opposition—and threats of litigation—has led some jurisdictions to circumscribe sharply their efforts to protect drug babies. For example, speaking for the New York State Department of Social Services, Susan Demers (1990), deputy commissioner and general counsel, has argued that "child protective statutes were not intended to apply, nor can they constitutionally be applied, to prenatal conduct by a woman in relation to a fetus." She contends that "although there was a fetus, there was no child in existence at the time the woman committed the acts. Furthermore,

such prenatal conduct falls within the woman's constitutional right to privacy and to bodily integrity."

Such arguments are strengthened by the fact that the harmful effects of prenatal drug exposure are only probabilities. Rough estimates are that only about a third of exposed babies suffer serious damage. Although medical studies have yet to develop specific measures of prediction, it appears that the existence and severity of symptoms are functions of the timing, type, dosage, and regularity of drug use, the mother's metabolism, and a host of other, little-understood factors.

One can understand the concerns about abortion rights, but they have not been borne out by experience. For example, in the past five years, at least eight states have passed laws making prenatal drug exposure subject to mandatory child abuse reporting statutes. Each of these laws is carefully drafted to apply only after the child is born.

Similarly, in states without legislation specifically aimed at prenatal drug exposure, many courts have held that a mother's use of illegal drugs while pregnant falls under existing statutory definitions of child abuse or child neglect, based on the harm or threatened harm to the developing fetus. These court decisions also have been careful to distinguish between their rulings and any restriction on abortion rights. Thus in one case, the court explained: "We are concerned here not with a woman's privacy right in electing to terminate an unwanted pregnancy, but with the protection of the child who is born when a woman has elected to carry that child to term and deliver it" (*In re Stefanel C.*, 1990, p. 285). Even the few criminal prosecutions that have taken place, which many oppose on policy as well as constitutional grounds, involve live births.

For those who might say that it is only a matter of time before such rulings are twisted to undermine abortion rights, it is worth remembering that, since 1974, courts in New York City and other jurisdictions have held that "a newborn baby having withdrawal symptoms is *prima facie* a neglected baby" (*In re Vanesa F.*, 1974, p. 340). Through all these years, no one has seriously argued that these laws and court decisions are a backdoor recognition of the fetus as a living person. In short, there is no slippery slope here.

Another concern has been that drug-using mothers—for fear of being reported—will not come into hospitals to deliver their babies. But there is no evidence that this is happening. Since 1986, about 20,000 drug-exposed newborns have been reported in New York City alone. In hospitals such as Harlem Hospital, drug testing of newborns is routine. And yet there is no evidence that more mothers are having their babies at home.

A greater possibility is that some drug-using mothers will not come in for prenatal care because they fear the legal consequences. Unfortunately, they

do not come in anyway, regardless of reporting policy. In Boston, prenatal care is free for all low-income mothers, and pregnant women who use drugs are not reported by the clinics. And yet, between August 1988 and February 1989, of the 38 babies born at Boston City Hospital to mothers who had not obtained prenatal care, 37 tested positive for cocaine (Elizabeth Brown, personal communication, December 12, 1990).

Nevertheless, given the unease that so many feel about basing government action on harm (or threatened harm) to the fetus, it is important to recognize that there is a second basis for deciding that a child prenatally exposed to drugs should be considered abused or neglected—a basis totally independent of the legal status of the fetus.

The tragic nature of their condition has focused most media attention on crack babies while they are still in the hospital. But these children face even greater dangers when they leave and go home with their parents. Severe prenatal drug abuse (or alcohol abuse, for that matter) can so strikingly impair a parent's judgment and ability to cope that serious harm to the child becomes likely. Parents suffering from such severe drug habits that they are unable to care for themselves cannot care for their children. Moreover, drug use can make parents more violent toward their children. The author of a Ramsey County, Minnesota, Department of Human Services report, after reviewing 70 cases of "cocaine-attached" households in mid-1988, found that these parents are "extremely volatile with episodes of 'normal' behavior interspersed with episodes of unpredictable, dangerous and even violent behavior" (Douglas, 1989). In 1989, 70% of child abuse fatalities in which the situations were already known to New York City's child protective agency were drug related.

The home situations of heavy drug users need to be investigated even if the newborn child has suffered no damage in utero. For a newborn to evidence the symptoms of drug exposure—even to have a positive toxicology when born—means the mother was probably a regular user while pregnant. And, as a New York court held, "Repeated past behavior is a substantial predictor of future behavior" (*In re Milland*, 1989, pp. 998-999). This in turn would establish the possibility of serious harm to the baby when he or she goes home with the addicted mother. A Michigan appeals court put it succinctly: "Prenatal treatment can be considered probative of a child's [future] neglect" (*In re Baby X*, 1980, p. 739).

Waiting until the children of severe drug and alcohol abusers show signs of actual abuse or neglect would unreasonably endanger many children. In the absence of suitable arrangements, state intervention is essential and foster care may be necessary, even if such children have not yet been harmed and even if they have never been in their parents' custody.

Yet the presumption of heavy drug use during pregnancy is only that: a presumption. A parent's drug abuse does not necessarily mean that the child must be removed from parental custody. If an investigation determines that the home is safe and the mother can adequately care for her new child, then, of course, the baby should go home. In many cases, supportive services provided by the child protective agency or another public or private agency may enable the parents to care for their children.

The point is, we can help protect the children of addicts without subverting abortion rights—and we should. Rather than being diverted by an unnecessary controversy over a remote threat to reproductive freedom, we should focus on what needs to be done to protect the children of addicts—and to treat their mothers. Both desperately need our help.

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DOUGLAS J. BESHAROV RESPONDS

Professor Myers has presented a straightforward and moving argument for why we should be concerned about drug use by pregnant women. As I hope is clear from my own contribution to this volume, I share his distress about the effects on children of their exposure to drugs in utero.

Professor Myers also says that he opposes criminal prosecution of pregnant addicts because, even though constitutionally allowable under *Roe v. Wade*, it would be of low "social utility." Again, I agree on both counts.

Where we disagree is in what he says next: Although there should not be criminal prosecutions, "the juvenile court should be allowed to intervene prior to birth in order to stop drug abuse that threatens to harm the unborn child." Giving the juvenile court such jurisdiction would be the functional equivalent of authorizing criminal prosecution, for, as Myers himself recognizes, "the only way to stop drug abuse is to deprive the woman of her liberty—to lock her up!"

No matter how great the need, incarcerating pregnant drug addicts raises serious practical and ethical concerns. First, although drug use during pregnancy unquestionably endangers the child and the mother, the plain truth is that many drug-exposed babies escape any serious harm. Some, in fact, are asymptomatic. Unfortunately, medical science has no way of predicting which drug-using pregnant women pose actual versus potential danger to their children.

Second, any plan that seeks to enforce court orders by locking up uncooperative women is not likely to work, because the possibility of incarceration would be so remote. There are not enough prison cells available now for serious criminals, and any new ones that are built will not be used for pregnant drug users. One is reminded, for example, of the outcome of a Washington, D.C., case of a pregnant woman awaiting trial on theft charges. Because she had tested positive for cocaine use, the judge ordered her to remain in jail until she delivered her baby. Jail overcrowding, however, forced officials to release her weeks before she was due to give birth ("Pregnant?" 1988).

Finally, there is a real danger that, when faced with the possibility of court-ordered treatment enforced by incarceration, many more pregnant drug users will not seek prenatal care.

Therefore, I am afraid that, however attractive, using courts to impose treatment on pregnant addicts is not a realistic option. To find solutions to this terrible problem, we must look in other places.

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JOHN E. B. MYERS RESPONDS

Mr. Besharov and I agree that the state should have authority to protect drug-affected babies. However, Mr. Besharov does not go far enough. He defends legal intervention after a drug-affected baby is born, but he appears to stop short of defending intervention *before birth*. Yet intervention before birth is the *only* way to protect infants from the ravages of maternal substance abuse during pregnancy. Although legal intervention prior to birth is a frightening prospect, settling for anything less consigns thousands of children to harm that could be prevented. Parents have no right to abuse their children, *before* or *after* they enter the world.

DEBATE 12

CORPORAL PUNISHMENT
BY PARENTS

➤ *Should the use of corporal punishment by parents be considered child abuse?*

EDITORS' NOTE: Corporal punishment (i.e., any hitting of children, in any form) is common in this country as well as in many others. Is it a form of abuse, or is it a necessary option for parents to use in socializing their children? Is it the reflection of cultural differences in parenting practices that should be respected? In this debate, two authors provide arguments against considering corporal punishment child abuse, one an academic and one the director of an organization called the Center for Affirmative Parenting.

Murray A. Straus, Ph.D., says YES. He is Professor of Sociology and Co-Director of the Family Research Laboratory at the University of New Hampshire. He has served as president of the National Council on Family Relations (1972-1973), the Society for the Study of Social Problems (1988-1989), and the Eastern Sociological Society (1990-1991). In 1977, he received the Ernest W. Burgess Award of the National Council of Family Relations for outstanding research on the family. He is the author of many articles and author or coauthor of 15 books, including the *Handbook of Family Measurement Techniques* (3rd ed., 1990) and *Physical Violence In American Families* (1990). He is currently writing a book on corporal punishment titled *Beating the Devil Out of Them: Corporal Punishment in American Families*.

Robert E. Larzelere, Ph.D., argues NO. He is Director of Residential Research at Boys Town, where he is doing research on treatment of childhood sex abuse victims and on parental discipline. He is the author of the methodology chapter in *The Handbook of Marriage and the Family* and has published 17 articles in a variety of social scientific journals.

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