



SCHOOL OF LAW  
CASE WESTERN RESERVE  
UNIVERSITY

**Health Matrix: The Journal of Law-  
Medicine**

---

Volume 18 | Issue 1

---

2008

# Protecting the Unborn as Modern Day Eugenics

Stephanie Yu Lim

Follow this and additional works at: <https://scholarlycommons.law.case.edu/healthmatrix>



Part of the [Health Law and Policy Commons](#)

---

## Recommended Citation

Stephanie Yu Lim, *Protecting the Unborn as Modern Day Eugenics*, 18 *Health Matrix* 127 (2008)

Available at: <https://scholarlycommons.law.case.edu/healthmatrix/vol18/iss1/6>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in *Health Matrix: The Journal of Law-Medicine* by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# PROTECTING THE UNBORN AS MODERN DAY EUGENICS

*Stephanie Yu Lim*<sup>†</sup>

Over the last fifteen years, prosecutors in at least thirty-four states used child abuse or drug-related statutes to punish pregnant women who use illegal drugs, charging these women with a range of offenses, including child abuse, child neglect, child endangerment, and delivery of drugs to a minor.<sup>1</sup> Although there are no criminal statutes specifically targeting substance abuse during pregnancy, states successfully prosecuted over 200 pregnant women using these strategies.<sup>2</sup> Some women received jail sentences, while others were institutionalized against their will, and still others lost custody of their child after birth.<sup>3</sup>

Opponents of such punitive measures push for a public-health oriented response to drug use by pregnant women instead, arguing that a punitive approach is flawed because of its negative impact on the doctor-patient relationship,<sup>4</sup> its discriminatory effects on African Ameri-

---

<sup>†</sup> J.D. 2007, UCLA School of Law; B.A. 2000, Yale University.

<sup>1</sup> See *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992) (reversing conviction of a pregnant woman for delivering drugs to a minor through the umbilical cord); *State v. Gray*, 584 N.E.2d 710, 710 (Ohio 1992) (affirming order denying prosecution of a woman for child endangerment after she took cocaine while pregnant); *Whitner v. State*, 492 S.E.2d 777, 778-79 (S.C. 1997) (finding that a fetus was a person under the South Carolina child neglect statute and, thus, finding the pregnant woman who took crack cocaine in her third tri-mester guilty of criminal child neglect); *People v. Hardy*, 469 N.W.2d 50, 51 (Mich. Ct. App. 1991) (stating that the circuit court had found that the evidence presented was insufficient to prove “that defendant’s ingestion of cocaine, while pregnant, caused serious physical harm to her child,” and therefore did not constitute second-degree child abuse). Drinking alcohol during pregnancy might lead to similar charges, however, drinking presents different issues and is beyond the scope of this article.

<sup>2</sup> Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1002 (1999).

<sup>3</sup> Jean Reith Schroedel & Pamela Fiber, *Punitive Versus Public Health Oriented Responses to Drug Use by Pregnant Women*, 1 YALE J. HEALTH POL’Y L. & ETHICS 217, 221 (2001).

<sup>4</sup> Cheryl M. Plambeck, *Divided Loyalties: Legal and Bioethical Considerations of Physician-Pregnant Patient Confidentiality and Prenatal Drug Abuse*, 23 J. LEGAL MED. 34 (2002) (arguing that the protection of the fetus by the physician under the two-patient model disrespects the mother patient and will likely discourage her from seeking medical help).

can women;<sup>5</sup> and its failure to treat drug addiction as an illness.<sup>6</sup> Since prosecutions of drug-using women tends to deter those women from seeking health care during their pregnancies, thus harming both mother and fetus, a number of prominent groups, among them the American Medical Association, the American Academy of Pediatrics, the American Public Health Association, the American Nurses Association, the American Society on Addiction Medicine and the March of Dimes, oppose this type of criminal prosecution.<sup>7</sup> Moreover, most appellate courts that have addressed the issue rejected the theory that maternal substance abuse constitutes child abuse, finding either that the statutes do not apply on technical grounds or that criminalization would promote bad public policy and could lead to the criminalization of other legal activities, as well as violate a woman's due process rights.<sup>8</sup>

Despite these precedents, prosecutors continue to utilize child abuse and neglect laws against pregnant women who use drugs, arguing that criminal interventions are necessary in order to protect fetal and newborn lives,<sup>9</sup> to "encourage" pregnant women to seek treat-

---

<sup>5</sup> Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1425 (1991) (arguing that punishing drug addicts who choose to carry their fetuses to term helps to perpetuate a racist hierarchy in our society).

<sup>6</sup> See, e.g., *Linder v. United States*, 268 U.S. 5, 18 (1925) (recognizing that drug addiction is an illness which requires medical treatment); *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (holding that it is unconstitutional to make drug addiction a crime because it is an illness, and criminalizing it is cruel and unusual punishment under the Eighth and Fourteenth amendments).

<sup>7</sup> LYNN M. PALTROW, DAVID S. COHEN, & CORINNE A. CAREY, YEAR 2000 OVERVIEW: GOVERNMENTAL RESPONSES TO PREGNANT WOMEN WHO USE ALCOHOL OR OTHER DRUGS 1 (2000), [http://advocatesforpregnantwomen.org/file/gov\\_response\\_review.pdf](http://advocatesforpregnantwomen.org/file/gov_response_review.pdf).

<sup>8</sup> *State v. Gethers*, 585 So. 2d 1140, 1142-43 (Fla. Dist. Ct. App. 1991) (finding that criminalizing pregnant drug addicts conflicted with the public policy underlying Florida's child welfare law of preserving the family life of parents and children); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (finding that the criminal abuse statute in question did not intend to criminalize pregnant women using controlled substances); *People v. Morabito*, 580 N.Y.S.2d 843, 847 (N.Y. Crim. Ct. 1992) (dismissing the charges against the pregnant woman for child endangerment on the grounds that a fetus is not a person and finding that criminalization maternal substance abuse would violate a pregnant woman's due process rights because she would not be on notice that the statute can be applied to criminalize her substance abuse during pregnancy); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (noting that criminalizing substance abuse during pregnancy would open the door to punishing for the use of alcohol, nicotine, or over-the-counter drugs).

<sup>9</sup> In *Roe v. Wade*, the Supreme Court recognized that the state has an "important and legitimate," even "compelling," interest in the life of the fetus after viability. 410 U.S. 113, 163 (1973); see also John Robertson, *Procreative Liberty and the*

ment, and to change their behavior.<sup>10</sup> The continued prosecution of pregnant women is a modern form of eugenicism in that it amounts to a policy of reducing the spread of “bad” traits by preventing a certain class of women from reproducing. Accordingly, such prosecutions must stop, and more resources should be devoted to health initiatives targeted at helping these women overcome their drug addiction.

According to Sir Francis Galton, the founder of the eugenics movement, “[e]ugenics is the science which deals with all influences that improve the inborn qualities of a race; also with those that develop them to the utmost advantage.”<sup>11</sup> Influenced in large part by Mendelian genetics, eugenicism promoted the theory that society could be improved by creating superior classes of specimens through a process of selection, and elimination of certain traits.<sup>12</sup> Essentially, eugenicists believed that encouraging those with desirable traits to marry and reproduce, while preventing carriers tainted with undesirable traits from procreating could result in a reduction of socially problematic behaviors. Thus, eugenics offered the appealing vision of a world where social problems could be eliminated by purging those with “bad seeds” from the gene pool.

In the United States, at least 30 states embraced this theory, and started their own eugenics programs, sterilizing roughly 70,000 Americans pursuant to state order.<sup>13</sup> These programs targeted a variety of groups, sterilizing people for such reasons as mental illness, imbecility, promiscuity, criminality, and even laziness.<sup>14</sup> Although the last of these programs ended in the 1970s and states have begun to make reparations to those individuals subject to these inhumane or-

---

*Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 438 (1983) (arguing that “once the mother decides not to terminate the pregnancy, the viable fetus acquires rights to have the mother conduct her life in ways that will not injure it”); Dawn Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L. J. 599, 612 (1986) (arguing that the recognition of the fetus as a person who had protectable constitutional rights apart from the woman could be used against the pregnant woman).

<sup>10</sup> See Rachel Roth, Note, *The Perils of Pregnancy: Ferguson v. City of Charleston*, 10 FEMINIST LEGAL STUD. 149, 151 (2002).

<sup>11</sup> Francis Galton, *Eugenics: Its Definition, Scope, and Aims*, 10 AM. J. SOC., 1, 1 (1904).

<sup>12</sup> See *id.* at 1-3.

<sup>13</sup> Rebecca Sinderbrand, *Eugenics in America*, NEWSWEEK, Mar. 19, 2005, <http://web.archive.org/web/20050327143804/http://www.msnbc.msn.com/id/7242649/site/newsweek>.

<sup>14</sup> *Id.*

ders,<sup>15</sup> eugenics programs are still constitutional under *Buck v. Bell*,<sup>16</sup> a 1927 Supreme Court decision, which remains good law.

In the 1980s, the media focused national attention on the "crack epidemic," documenting the destructive effects of cocaine abuse among young pregnant women, and predicting a lost generation irredeemably damaged as a result of their mothers' cocaine use.<sup>17</sup> Magazines, newspapers, and television news reports portrayed pregnant drug-addicted women as "non-mothers," women who were completely under the spell of their addiction, who, as a result of their drug use, had increased sex drives, and who turned to prostitution to feed their habits.<sup>18</sup> In addition, the media perpetuated the image that crack addiction damaged women's "maternal instincts," that it left users in despair, and stripped them of "every shred of human dignity."<sup>19</sup> The sensationalist coverage fueled the belief that pregnant, drug-addicted women were unfit to be mothers, and prompted prosecutors across the nation to crack down on the problem, prosecuting women for a range of offenses under the child abuse, neglect, and drug distribution statutes.

Over time, however, the media's portrayal of drug-addicted women as "bad mothers" has proven largely a myth. In fact, contrary to their depiction in the media, most of these women are desperate to kick their habits, and like other "good" mothers, want to provide the best they can for their babies.<sup>20</sup> One study focusing solely on cocaine-using mothers found that these mothers look after, and care adequately for their children.<sup>21</sup> Specifically, the study found these women valued motherhood highly, and held firm standards for child-rearing.<sup>22</sup> Another more recent study reported similar findings, con-

---

<sup>15</sup> *Id.*

<sup>16</sup> 274 U.S. 200 (1927).

<sup>17</sup> For example, one article in *The New York Times* stated that pregnant women were "producing a new generation of innocent addicts," erroneously implying that babies exposed prenatally to crack are all born hooked on the drug. Jane E. Brody, *Widespread Abuse of Drugs by Pregnant Women is Found*, N.Y. TIMES, Aug. 30, 1988, at A1; see PALTROW, COHEN & CAREY, *supra* note 7, at 1.

<sup>18</sup> DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 156 (1997) (describing the media's caricature of the pregnant addict as "an irresponsible and selfish woman who put her love for crack above her love for her children . . . who sometimes traded sex for crack, in violation of every conceivable quality of a good mother").

<sup>19</sup> *Id.* at 155.

<sup>20</sup> *Id.* at 156.

<sup>21</sup> Margaret H. Kearney et al., *Mothering on Crack Cocaine: A Grounded Theory Analysis*, 38 SOC. SCI. & MED. 351, 355 (1994).

<sup>22</sup> *Id.*

cluding there was no significant difference in childrearing practices between addicted, and non-addicted mothers.<sup>23</sup>

Unfortunately, even though both the media and scientific community have since acknowledged that there is no clear correlation between drug abuse during pregnancy and parenting abilities, prosecutions against these women have not abated. According to a 2000 survey of the civil and criminal laws directly addressing pregnant women's use of alcohol and other drugs, recent legislation continues in the vein of punitive and restrictive responses.<sup>24</sup> In addition, the Supreme Court has not definitely held that prosecutions such as these are unconstitutional. Although the Court, in 2001, held that involuntary drug testing of pregnant women was a constitutional violation, they did so on Fourth Amendment grounds, finding such testing an unreasonable search and seizure.<sup>25</sup> In *Ferguson*, the Court avoided addressing the question of whether a fetus fits the legal definition of a person.<sup>26</sup> Thus, the Court left open the possibility that prosecutors could continue to take legal action against women for delivering drugs to their fetuses.<sup>27</sup>

Prosecutors argue that a punitive approach is the most efficacious means of pushing these women to seek treatment for their addiction.<sup>28</sup> However, punitive approaches have failed to reduce both the incidence and the harmful effects of drug use during pregnancy.<sup>29</sup> With no definitive evidence showing that prosecutions have improved the problem of drug addiction during pregnancy, these strategies no longer serving the original purpose, and instead have become a means for furthering other ends. In particular, some states use these prosecutions to control the reproductive choices of a class of women deemed

---

<sup>23</sup> SUSAN C. BOYD, *MOTHERS AND ILLICIT DRUGS: TRANSCENDING THE MYTHS* 14-16 (1999) (listing at least fourteen studies demonstrating that women who use illicit drugs can be adequate parents).

<sup>24</sup> PALTROW, COHEN & CAREY, *supra* note 7, at 9.

<sup>25</sup> *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

<sup>26</sup> *Id.*

<sup>27</sup> Schroedel & Fiber, *supra* note 3, at 227.

<sup>28</sup> Roth, *supra* note 10, at 151.

<sup>29</sup> See, e.g., Dawn Johnsen, *Shared Interests: Promoting Healthy Births without Sacrificing Women's Liberty*, 43 HASTINGS L. J. 569, 601-02 (1992) (citing evidence and opinion that penalties directed at women who use illegal drugs during pregnancy are counterproductive to the government's objective of promoting healthy births and therefore do not serve a compelling interest); Katherine Sikich, *Peeling Back the Layers of Substance Abuse During Pregnancy*, 8 DEPAUL J. HEALTH CARE L. 369, 391-96 (2005) (arguing that the failure of punitive measures to successfully reduce drug use in pregnant women is due to the fact that the woman's voice is ignored in a paternalistic model which prioritizes the fetus over the mother and due to the fact that society is not really willing to help these women).

socially undesirable. In this way, such prosecutions are a pretext for eugenicism.

The criminalization of drug-addicted pregnant women under the child-abuse and neglect statutes is premised on the notion that the woman is harming the fetus by taking drugs. The justification for punishment is as follows: because they harm their fetuses, these women are bad mothers, thus they deserve to be punished. This laudable rationale, however, masks eugenicist beliefs regarding the social value of certain traits in women and children. With the continued prosecution of drug using pregnant women, the prosecutions themselves have become a legitimating force, validating eugenicist beliefs, and furthering the notion that these women should not be having children.

First, categorizing drug use while pregnant as a deliberate act of child abuse legitimates the idea that these women are categorically “bad” mothers. By classifying substance abuse as a “bad” trait, the addiction becomes a lapse in judgment and self-control, not a chronic disease. Thus, because drug use is supposedly within the individual’s power, substance abuse is a reflection of the individual’s lack of morality, responsibility, and ability as a parent. This feeds the belief that addicts are unfit mothers, and should not be getting pregnant in the first place. According to Lynn Paltrow, “[o]n call-in radio talk shows someone inevitably asks why these mothers can’t just be sterilized or injected with Depo-Provera until they can overcome their drug problems and, while they are at it, their low socio economic status.”<sup>30</sup> The idea that addicts should not be having children because they are “unfit” mothers is a eugenicist over-generalization because it is based on the grossly mistaken presumption that substance abuse is a “bad” trait. Not only does it overlook studies which have proven the contrary, but it seeks to prevent those with “bad” traits from procreating.

Another effect of categorizing drug addicts “unfit” mothers is that it perpetuates the belief that “bad” traits will be passed on through bad parenting. The rationale is that women who are “unfit” mothers will fail at child-rearing. Implicit in this thinking is the assumption that the children of these women will invariably become problems for society because they have not been exposed to good parenting. Thus, society would be better off if someone else raised these children. Attempts by the state to prevent further reproduction by such “unfit”

---

<sup>30</sup> Lynn M. Paltrow, *Punishment and Prejudice: Judging Drug-Using Pregnant Women*, in *MOTHER TROUBLES: RETHINKING CONTEMPORARY MATERNAL DILEMMAS* (Julia E. Hanigsberg and Sara Ruddick, eds., 1999), available at <http://www.advocatesforpregnantwomen.org/articles/ruddick.htm>.

mothers is also eugenicist because it embraces the belief that social problems can be precluded by preventing the spread of socially unfavorable traits from one generation to the next.

In addition, criminal prosecution of pregnant drug addicts for fetal abuse, or other similar crimes is eugenicist because it reinforces the classification of certain babies as more desirable than others on the basis of traits society supposedly deems valuable. Prosecutors justify punishment of these women for child abuse on the assumption that they are inflicting some harm on the fetus. However, research has shown that cocaine – the drug most often at the center of these prosecutions – is not uniquely, or even inevitably harmful to fetal development.<sup>31</sup> Continued prosecutions, in spite of these findings, perpetuates the myth that cocaine causes permanent physical and mental damage to the child. Justifying prosecutions on the basis of potential physical and mental damage to fetal development legitimates the belief that babies born from women who use drugs necessarily have defects, and that babies without defect are more “valuable.” This inferential chain is, ultimately eugenicist because it makes a subjective determination as to what traits are “good” and “bad,” and thereby reinforces the societal perception of those traits.

Over time, continued prosecutions of drug-addicted pregnant women for child abuse legitimates these eugenicist beliefs and has become one means of furthering policies pressuring these women to get abortions, long-term birth control, or sterilizations. Thus, the prosecutions have effectively become a modern eugenics program. Although prosecutors argue that prosecutions are meant to incentivize women to seek treatment, and not to pressure them to seek abortions

---

<sup>31</sup> Research has yet to determine that drug exposure will always harm the fetus. Epidemiological studies find that, statistically speaking, many more children are at risk of harm from prenatal exposure to cigarettes and alcohol than cocaine. Barry Zuckerman et al., *Effect of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 *NEW ENG. J. MED.*, 762 (1990); Deborah A. Frank and Barry S. Zuckerman, *Children Exposed to Cocaine Prenatally: Pieces of the Puzzle*, 15 *NEUROTOXICOLOGY AND TERATOLOGY* 298, 298 (1993); Deborah A. Frank, Karen Bresnahan & Barry S. Zuckerman, *Maternal Cocaine Use: Impact on Child Health and Development*, 40 *ADVANCES IN PEDIATRICS* 65-99 (1993). Unlike fetal alcohol syndrome, which causes permanent mental retardation, cocaine seems to act more like cigarettes and marijuana, increasing certain risks like low birth weight, but only as one contributing factor and only in some pregnancies. CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, *SUBSTANCE ABUSE AND THE AMERICAN WOMAN* (1996); Joseph R. DiFranza & Robert A. Lew, *Effect of Maternal Cigarette Smoking on Pregnancy Complications and Sudden Infant Death Syndrome*, 40 *J. FAM. PRAC.* 385 (1995).



or other forms of birth control,<sup>32</sup> the unavailability of drug treatment programs for these women belies their argument.

In 1992, Wendy Chavkin conducted a national survey of state directors of substance abuse services to assess nationwide policies and practices regarding the issues of criminal prosecutions, charges of child abuse, and treatment options for pregnant drug-using women.<sup>33</sup> The results revealed a gap between criminalization and treatment efforts, as well as a lack of coordination with other public health initiatives directed at reproductive and infant health.<sup>34</sup> Although there was marked improvement in the availability of drug treatment programs for pregnant women between 1989 and 1993, researchers found that pregnant women still faced other institutional barriers to accessing drug treatment programs.<sup>35</sup> By 1995, the situation had actually worsened. According to a follow-up study conducted by Chavkin and her team, by 1995, more states were prosecuting pregnant women for substance abuse than before, and more states had implemented mandatory reporting of positive toxicology results of newborns to the criminal justice system, child protective services, or the Department of Health.<sup>36</sup> Unfortunately, the increase in state intervention was not met with a similar increase in resources to provide adequate treatment for

---

<sup>32</sup> Roth, *supra* note 10, at 151.

<sup>33</sup> Wendy Chavkin, Vicki Breitbart, and Paul Wise, *Efforts to Reduce Perinatal Mortality, HIV, and Drug Addiction: Surveys of the States*, 50 J. AM. MED. WOMEN'S ASSOC. 164, 164 (1995).

<sup>34</sup> *Id.* at 164-65. Chavkin found that 45% of the maternal child health centers interviewed had reported that criminal prosecution of drug-using pregnant women had transpired in their state. Only 7 of the states at the time had legislation specifying that drug treatment or prevention services be provided to women. *Id.* at 164. In addition, only 41% reported that their states' initiatives to reduce infant mortality had formal links to substance abuse treatment, and only 43% of the states that involved the child protection services when pregnant women or newborns showed evidence of illicit drug involvement had formal links between the infant mortality reduction programs and substance abuse treatment programs. *Id.* at 165.

<sup>35</sup> Vicki Breitbart et al., *The Accessibility of Drug Treatment for Pregnant Women: A Survey of Programs in Five Cities*, 84 AM. J. PUB. HEALTH 1658, 1661 (1994). Through simulated calls to 294 drug treatment programs in five cities, this study investigated access for pregnant women and compared New York City's provision of services in 1989 to that in 1993. In all sites, the majority of programs accepted pregnant women. In addition, there was a marked improvement in the availability of services in New York City. However, options were more limited for Medicaid recipients and women needing child care, and an appointment or referral for prenatal care was usually not offered. *Id.* at 1658-1661.

<sup>36</sup> Wendy Chavkin, Vicki Breitbart, Deborah Elman, & Paul H. Wise, *National Survey of the States: Policies and Practices Regarding Drug-Using Pregnant Women*, 88 AM. J. PUB. HEALTH 117, 117-18 (1998).

these women. In fact, in the national drive to adopt Medicaid managed care, the trend has been in the direction of reduced services, with competition between needy groups for diminished resources.<sup>37</sup>

These studies suggest that women have few viable options when confronted with a potential criminal prosecution. They can either face the severe penalties which come with criminalization or can avoid having their drug use detected by not seeking medical care during the course of their pregnancy or by choosing to get an abortion. For women who are not already pregnant, but are suffering from drug addiction, the fear of criminal prosecution may drive many of them to seek long-term methods of birth control or, even sterilization. Thus, criminal prosecutions have the perverse effect of controlling these women's reproductive choices, and can ultimately prevent a whole group of women from reproducing.

Upon closer examination of the profiles of the women being prosecuted, the effects of these criminal prosecutions tell a sobering story. The women prosecuted are almost always Black and poor. And because every one of them abuses illegal drugs, every one of them is a "criminal." Hence, the prosecutions basically prevent poor, Black criminals from reproducing. Historically, society classifies all three traits historically as "bad," and all three were once targets of the eugenics movement. It is not mere happenstance that the prosecutions against this particular class of pregnant women bear the hallmarks of eugenicism. Rather, when a policy methodically attempts to root out a class of people with "bad" traits by preventing them from procreating, it *is* eugenicism.

The eugenics movement of the early twentieth century provides "a graphic example of how a blinkered belief, even when peppered with good intentions, can go woefully wrong, [and when] predicated on evil intentions ... takes us down the road to genocide."<sup>38</sup> Nonetheless, even though eugenics has long been discredited as a recognized science, and today is widely considered "politically incorrect," eugenicist thinking continues to pervade societal values. One of the most influential legacies left behind by the eugenics movement is the way it influenced social values and how, as a society, we define what is "good" or "bad." These value judgments can, and do silently permeate social policy, with devastating effects. In many ways, this invis-

---

<sup>37</sup> Chavkin, *supra* note 36, at 119. My research did not turn up any more recent surveys on this and there is no research which shows that this trend has reversed significantly in the last 10 years.

<sup>38</sup> Elaine E. Sutherland, *Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?* 82 OR. L. REV. 1033, 1063 (2003).

ble manifestation of eugenicism is even more insidious than eugenics movements of the past because it lulls us into believing that it is not there.

The prosecution of pregnant women who use drugs for crimes of child abuse is an example of how prosecutions can become a legitimating force, validating eugenicist beliefs, which can result in pressuring an entire class of women to terminate their pregnancies. Because these prosecutions are not as blatantly inhumane as Nazism, or a policy which mandates the sterilization of imbeciles, they are less likely to offend the public's conscience, as would an otherwise patently obvious eugenicist policy. Moreover, because the women being prosecuted are drug users, and, therefore, criminals, they engender less sympathy. Irregardless, neither are valid justifications for any kind of eugenicist policy.

Eugenicism tends to attribute the cause of social problems to certain individuals, and assumes that these problems will go away if these individuals are removed from the gene pool. This process is exemplified in the way the state has dealt with the problem of addiction among pregnant women by prosecuting them. Rather than addressing the true causes of drug addiction among pregnant women, the state has used prosecutions as a method to rid society of a group perceived as delinquents. Not only is this approach overly simplistic, inaccurate, and morally suspect, but it provides the state a means to escape its responsibility of having to figure out the true source of the problems. Society must own up to being part of the problem, rather than blame-shifting to one group of individuals. Thus, rather than blaming these women for their addiction, the state should devote greater resources to public health interventions more respectful of women's rights, and tailored to meet the healthcare needs of these mothers, and their fetuses. It is only in this way will we more effectively combat the problem of drug addiction in pregnant women.