

March 4, 1991

Who's Life is it Anyway: Pregnant Crack Users Act as Child Abusers

By **DOUGLAS J. BESHAROV**

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. While 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 the 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.

Last year, 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.

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 a child 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.

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 -- have 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, 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 concern 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 *In the Matter of Stefanel C.*, 157 A.D.2d 322, 556 N.Y.S.2d 280, 285 (1st Dept., 1990), 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." 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." 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.

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 parental 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. A Ramsey County, Minn., 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." In 1989, 70 percent 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." This, in turn, would establish the possibility of serious harm to the baby when it 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."

To wait 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 the investigation determines that the home is safe and that 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 treat their mothers. Both desperately need our help.