

## Response to: How Should We Respond to Pregnancy and Substance Use?

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We begin our reply by asking the reader to consider this typical case taken from Professor Vandervort's current practice. It is one of several similar cases currently being handled by the clinic he works in and similar to many dozens—perhaps hundreds—of cases handled over the past 30 years:

Recently, a baby tested positive for opioids at birth, exhibited symptoms of withdrawal, and spent a week in neonatal intensive care. His mother told medical providers that in addition to cocaine, she used heroin, methadone (unprescribed), alcohol, and cigarettes while pregnant. Her older child, who also tested positive for illicit drugs at birth, was twice removed from her care due to her substance abuse, and twice returned to her custody before being placed permanently with his father. The mother has a 16-year history of polysubstance abuse. She has been convicted seven times of various petty crimes ranging from larceny to drug possession, and at this writing is in jail for domestic violence. The baby's father, a 34-year-old drug addict who began using heroin by age 16, facilitated the mother's drug use during the pregnancy and used drugs with her. He also has an extensive history of petty crime, has never maintained employment, is currently homeless, and has refused to seek legitimate treatment for his diagnosed mental illness despite its availability at public expense.

Professor Guggenheim and Ms. Paltrow first try to link our arguments to the abortion debate and the efforts by some to declare a fetus a "person" entitled

to constitutional protections. Later they argue that acknowledging prenatal use of illicit drugs as child abuse is merely an effort to control or oppress women.

We have no quarrel with a woman exercising her right to choose to terminate her pregnancy, a right we support. Nor do we care to oppress or control the lives of women. Once, however, a woman has exercised her constitutional rights to become pregnant and to bring that pregnancy to term, the law imposes duties upon her. Duties to the child to which she gives birth, who also has rights, and duties to the broader community. This is no different from the exercise of any other constitutional right.

In a flash of rhetorical glibness, our counterparts label as "radical" a policy that is anything but. Even in *Roe v. Wade*, the Supreme Court made clear that late in pregnancy the public has important interests at stake. Congress and the states have long required that prenatal substance abuse result in a CPS referral. While the fathers of these children are often complicit in the mothers' prenatal drug use, the law recognizes that women are uniquely situated in relation to pregnancy.

Next, our counterparts advance the poverty trope, suggesting that child protection is a means of oppressing the poor. Tragically, 20% of America's children are born into poverty. Most women living in poverty do not use illicit drugs during pregnancy. Most pregnant women who live in poverty work at low-paying jobs and do everything within their power to obtain necessary health care and birth

healthy children. The community helps through programs like WIC, Medicaid, Section 8 housing, home visitor programs, SNAP, and TANF.

As the case above illustrates, many pregnant women who use illicit drugs—certainly those whose children must be removed—face a multiplicity of problems in addition to their addiction. These include mental illness, developmental delay, long histories of petty criminality to support their drug habit, domestic violence, and homelessness. Many have multiple children, some previously born drug dependent, some not.

Guggenheim and Paltrow correctly point out the harms of alcohol and nicotine. We agree these substances are dangerous when used during pregnancy. They are frequently used in combination with other drugs and, unfortunately, magnify the harm to the child. Polysubstance abuse also makes it extremely difficult for researchers to determine the precise impact of a particular illicit drug on a newborn child. Of course, from the child's perspective, it doesn't matter that her neurodevelopmental disabilities are caused by heroin alone, heroin in combination with alcohol, or by nicotine and methamphetamine. Still, alcohol and nicotine are legal. Unlike heroin or cocaine, their use does not come with the criminality and violence that so often envelops the illicit drug trade and presents additional risk to children. Prenatal alcohol exposure can be difficult to detect at birth, manifesting only later. Nevertheless, when detected, we believe prenatal alcohol exposure should be considered child abuse. Every bottle of alcohol contains a warning and, in many states, establishments that serve alcohol must post signs warning about the harms of use during pregnancy. Mothers know these harms.

Guggenheim and Paltrow suggest a revisionist history of the “crack baby” epidemic. In fact, research is quite clear that cocaine use during pregnancy is harmful and may be devastating. The fact that most of the children of that period

recovered (undoubtedly with residual effects) is true of most child abuse—with treatment, broken bones may heal, but if a parent breaks his or her child's bones, we would still call this child abuse.

Guggenheim and Paltrow argue for a “public health” approach to substance abuse during pregnancy. They write, “only those willing to risk that pregnant women who use drugs will be forbidden from ever having custody of their children should endorse treating pregnancy and drug use as child abuse.” The child protection system is, of course, part of the public health response to the unique challenges of child maltreatment, including prenatal exposure. There are some women who use drugs during pregnancy who should never regain custody.

Indeed, there are some for whom the default should be termination of parental rights from the initial legal filing. Fortunately, when CPS becomes involved with drug-exposed newborns, removal occurs in fewer than 15% of cases, typically only after family preservation efforts prove unsuccessful (Rebbe 2019). But the child protection system has limited resources, and in the case above and ones like it, it may not make sense to use them for reunification when termination of parental rights would serve the child's interests. Recognizing such cases as what they are, harm inflicted upon children at the hands of their parent, allows society, through its agents, to preserve and protect the child's right to safely grow and develop for the benefit of the child, the family, and the community.

## About the Authors

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## Response to: How Should We Respond to Pregnancy and Substance Use? (pg. 28-29)

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