

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

NO. 114 PGH 1993

COMMONWEALTH OF PENNSYLVANIA,

Appellant

vs.

MICHELLE L. KEMP,

Appellee

BRIEF FOR AMICI CURIAE CENTER FOR REPRODUCTIVE LAW & POLICY;
WOMEN'S LAW PROJECT; COALITION ON ADDICTION, PREGNANCY AND
PARENTING; NATIONAL PERINATAL ASSOCIATION, PENNSYLVANIA NURSES
ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC.,
MATERNITY CARE COALITION OF GREATER PHILADELPHIA, AMERICAN NURSES
ASSOCIATION, NATIONAL BLACK WOMEN'S HEALTH PROJECT; NATIONAL
WOMEN'S HEALTH NETWORK; DRUG POLICY FOUNDATION; AND OPERATION
PAR, INC.

Brief in Support of Appellee, on Appeal from the Order of Court
Entered December 16, 1992 by the Honorable Charles H. Loughran,
In the Court of Common Pleas of Westmoreland County,
No. 2707-C-1991.

LYNN M. PALTROW
SUSAN J. WEILER
The Center for Reproductive
Law & Policy
120 Wall Street
New York, NY 10005
(212) 514-5534

CAROL E. TRACY
I.D. No. 40258
SUSAN FRIETSCHÉ
Women's Law Project
125 S. Ninth Street
Suite 401
Philadelphia, PA 19107
(215) 928-9801

NADINE TAUB
(Of Counsel)
Rutgers University
School of Law
15 Washington Street
Newark, NJ 07012
(201) 648-5637

Attorneys for Amici Curiae

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF AUTHORITIES	ii
ORDER IN QUESTION	1
STATEMENT OF INTEREST OF <u>AMICI CURIAE</u>	2
PRELIMINARY STATEMENT	11
SUMMARY OF ARGUMENT	14
ARGUMENT	15
I. THE COMMONWEALTH'S CONSTRUCTION OF PENNSYLVANIA'S CRIMINAL STATUTES LEADS TO ABSURD RESULTS THAT ARE IRRATIONAL, COUNTERPRODUCTIVE AND AT ODDS WITH SOUND PUBLIC HEALTH POLICY	15
A. Addiction During Pregnancy Is a Medical Problem Appropriately Addressed by the Public Health Authorities, Not the Criminal Justice System.	16
B. Substance Abuse and Addiction Are Caused by Complex Social and Psychological Factors.	19
C. In Light of The Acute Shortage of Drug Treatment Programs for Pregnant Women, It Is Absurd to Suggest That Legitimate State Interests Are Served by Punishing Them	22
D. The Commonwealth's Interpretation of Pennsylvania's Criminal Laws Threatens To Drive Women at High Risk Out of The Health Care System	28
CONCLUSION.	32

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Commonwealth v. Kemp</u> , No. 2707 C 1991 (Pa. C.P., Westmoreland County, Dec. 16, 1992)	12
<u>Commonwealth v. Lurie</u> , 524 Pa. 56, 569 A.2d 329 (1990)	15
<u>Commonwealth v. Pellegrini</u> , No. 87970 (Mass. Super. Ct., Plymouth County, Oct. 15, 1990)	12
<u>Commonwealth v. Smith</u> , No. CR-91-05-4381 (Va. Cir. Ct., Franklin County, Sept. 16, 1991).	2,13
<u>Commonwealth v. Turner</u> , No. CR-91-05-4382 (Va. Cir. Ct., Franklin County, Sept. 16, 1991)	13
<u>Commonwealth v. Wilcox</u> , No. A-44116-01 (Va. Norfolk Juv. & Dom. Rel. Dist. Ct. Oct. 9, 1991).	13
<u>Elaine W. v. Joint Diseases North General Hospital</u> , No. 6230-90 (N.Y. May 6, 1993)	3,24
<u>Jaurigue v. People</u> , No. 18988 (Cal. Super. Ct., San Benito County, Aug. 21, 1992), <u>writ denied</u> (Cal. Ct. App. Nov. 10, 1992)	11
<u>Johnson v. State</u> , 602 So. 2d 1288 (Fla. 1992)	2,11,13,15
<u>Linder v. United States</u> , 268 U.S. 5 (1925)	16
<u>People v. Bremer</u> , No. 90-32227-FH (Mich. Cir. Ct., Muskegon County, Jan. 31, 1991), <u>appeal dismissed</u> , No. 137619 (Mich. Ct. App. July 14, 1992)	12
<u>People v. Cox</u> , No. 90-53454-FH (Mich. Cir. Ct., Jackson County, July 9, 1990), <u>affirmed</u> , No. 131999 (Mich. Ct. App. Feb. 28, 1992)	12
<u>People v. Hardy</u> , 469 N.W.2d 50 (Mich. Ct. App.) <u>leave to appeal denied</u> , No. 91-346 (Mich.), <u>amended</u> , 471 N.W.2d 619 (Mich. 1991)	2,12
<u>People v. Morabito</u> , (N.Y. Ontario County Ct. Sept. 24, 1992).	12
<u>People v. Stewart</u> , No. M508197 (Cal. Mun. Ct., San Diego County, Feb. 26, 1987)	2,11
<u>Planned Parenthood of Southeastern Pennsylvania v. Casey</u> , 112 S. Ct. 2791 (1992)	2

<u>Reyes v. Superior Court</u> , 75 Cal. App. 3d 214 (Ct. App. 1977).	11
<u>Robinson v. California</u> , 370 U.S. 660 (1962)	16
<u>State v. Alexander</u> , No. CF-92-2047 (Okla. Dist. Ct., Tulsa County, Aug. 31, 1992)	12
<u>State v. Andrews</u> , No. JU 68459 (Ohio C.P., Stark County, June 19, 1989)	12
<u>State v. Arandus</u> , No. 93072 (Neb. Dist. Ct., Adams County, June 17, 1993).	12
<u>State v. Carter</u> , 602 So. 2d 995 (Fla. Dist. Ct. App. 1992) .	2,11
<u>State v. Gethers</u> , 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991).	11
<u>State v. Gray</u> , 584 N.E.2d 710 (Ohio 1992)	12
<u>State v. Osmus</u> , 276 P.2d 469 (Wyo. 1954)	13
<u>State v. Inzar</u> , No. 90CRS6960, 90CRS6961 (N.C. Super. Ct. Div., Robeson County, Apr. 9, 1991), <u>appeal</u> <u>dismissed</u> , No. 9116SC778 (N.C. Ct. App. Aug. 30, 1991) .	12
<u>State v. Luster</u> , 419 S.E.2d 32 (Ga. Ct. App. 1992)	2,11,13
<u>Toilliver v. State</u> , No. 90-CP-23-5178 (S.C. Ct. C.P., Greenville County, Aug. 10, 1992), <u>cert. denied</u> (S.C. Mar. 10, 1993)	13
<u>Webster v. Reproductive Health Services</u> , 492 U.S. 490 (1989).	2
<u>Welch v. Commonwealth</u> , No. 90-CA-1189-MR (Ky. Ct. App. Feb. 7, 1992), <u>discretionary review granted</u> , 92-SC-490-G (Dec. 22, 1992)	11
<u>Zimmerman v. O'Bannon</u> , 497 Pa. 551, 442 A.2d 674 (1982) . .	15

RULES AND STATUTES

Pennsylvania Rules of Appellate Procedure, Rule 531	11
1 Pa. Cons. Stat. Ann. § 1922(1) (1991)	15
18 Pa. Cons. Stat. Ann. § 2705 (1983)	14,19
18 Pa. Cons. Stat. Ann. § 4304 (1983 & Supp. 1992)	14,19
Pa. Stat. Ann. tit. 35, § 780-113(a)(30) (1983)	14,19

OTHER AUTHORITIES

Amaro et al., Violence During Pregnancy and Substance Abuse,
80 Am. J. Pub. Health 575 (1990) 20

Lisa Brennan, Probe Into Treatment for Women,
Legal Intelligencer, Oct. 28, 1992, at 1 24

Bureau of Maternal and Child Health Services,
Pennsylvania Department of Health, Draft Block Grant
Application (1993) 26,27

Wendy Chavkin, Drug Addiction and Pregnancy: Policy
Crossroads, 80 Am. J. Pub. Health 483 (1990) 16,25

Drug Policy Foundation, 19 Drug Policy Letter (1993) 16

N. Finkelstein et al., Getting Sober, Getting Well:
A Treatment Guide for Caregivers Who Work with Women (1990). 20,21

Loretta Finnegan, Special Currents: Maternal Addiction (1990). 16

GAO, ADMS Block Grant: Women's Set-Aside Does Not Assure
Drug Treatment for Pregnant Women (1991) 25,29

GAO, Drug-Exposed Infants: A Generation at Risk (1990) 26,29,30

Gentry, Angry Doctors Cut Tests After Police Interview Moms,
St. Petersburg Times, May 13, 1989, at 1B 31

The George Washington Univ. Ctr. for Health Policy Research,
An Analysis of Resources to Aid Drug-Exposed Infants and
Their Families (1993) 18,19,26

Deanna S. Gomby et al., Estimating the Number of Substance-
Exposed Infants, in The Future of Children 17
(Richard F. Behrman ed., 1991) 26

Hilberman, Overview: The Wife-beater's Wife: Reconsidered,
137 Am. J. Psychiatry 1336 (1980) 21

Institute of Medicine, Prenatal Care (1988) 29

Interdepartmental Human Services Planning Committee,
Pennsylvania Departments of Aging, Health, and Public
Welfare, County Planning Data Kit (1992 Supp.). 27

Stephen Kandall & Wendy Chavkin, Illicit Drugs in America:
History, Impact on Women and Infants and Treatment
Strategies for Women, 43 Hastings L.J. 615 (1992) 24,25

D. Kilpatrick, <u>Violence as a Precursor to Women's Substance Abuse: The Rest of the Drug-Violence Story</u> (American Psychological Association, 98th Ann. Conv., Aug. 1990).	19
Karol L. Kumpfer, <u>Treatment Programs for Drug-Abusing Women, in The Future of Children</u> 50 (Richard F. Behrman ed., 1991)	22,24,30
Leff, <u>Treating Drug Addiction with the Woman in Mind</u> , Wash. Post, Mar. 5, 1990, at E1	20
Martin, <u>Big Bribe Helps Mothers Fend Off Allure of Crack</u> , N.Y. Times, Mar. 7, 1990, at B1.	20
Linda C. Mayer et al., <u>The Problem of Prenatal Cocaine Exposure: A Rush to Judgment</u> , 267 JAMA 406 (1992)	18
Miller, <u>Chrysalis Offered What Mother and Baby Needed</u> , Annapolis Capital, June 7, 1990, a A7	26
<u>Missing Links: Coordinating Federal Drug Policy for Women, Infants and Children: Hearings Before the Senate Comm. on Governmental Affairs, 101st Cong., 1st Sess. (1989)</u>	21,30
National Association for Perinatal Addiction Research and Education, Policy Statement No. 1, <u>Criminalization of Prenatal Drug Use: Punitive Measures Will Be Counter-Productive</u> (July 1990).	21
National Association of State Alcohol and Drug Abuse Directors, <u>Survey of State Alcohol and Drug Agency Use of FY 1989 Federal and State Funds</u> (1990)	23,25
Office of Drug and Alcohol Programs, Pennsylvania Department of Health, <u>The Pennsylvania State Plan for the Control, Prevention, Intervention, Treatment, Rehabilitation, Research, Education and Training Aspects of Drug and Alcohol Abuse and Dependence Problems</u> (FY 1992-93).	27
Office of Drug and Alcohol Programs, Pennsylvania Department of Health, <u>Annual Report</u> (FY 1990-91)	28
President's Commission on Law Enforcement and Administration of Justice, <u>The Challenge of Crime in a Free Society</u> (1967).	23
<u>Public Hearing on Alcohol and Drug Addicted Mothers and Their Children Before the House Comm. on Youth and Aging, 1989-90 Sess. (1989)</u>	17
Randall, <u>Domestic Violence Begets Other Problems of Which Physicians Must Be Aware To Be Effective</u> , 264 Med. News & Persp. 940 (1990)	21

Beth Glover Reed, <u>Drug Misuse and Dependency in Women: The Meaning and Implications of Being Considered a Special Population or Minority Group</u> , 20 Int'l J. Addictions 13 (1985)	22,24
Beth Glover Reed, <u>Developing Women-sensitive Drug Dependence Treatment Services: Why So Difficult?</u> 19 J. Psychoactive Drugs 151 (1987)	23,24
Marian Sandmaier, <u>The Invisible Alcoholics: Women and Alcohol Abuse in America</u> (1980)	16,22
State Health Data Center, Pennsylvania Department of Health, <u>Data from the Annual Hospital Questionnaire</u> (reporting period July 1, 1990-June 30, 1991, Rep. 14)	27
Frederic Suffet et al., <u>Treatment of the Pregnant Addict: A Historical Overview, in Pregnant Addicts and Their Children: A Comprehensive Care Approach</u> 13 (Richard Brotman et al. eds., 1985).	23
U.S. Department of Health and Human Services, Pub. No. (ADM) 87-1177, <u>Treatment Services for Drug Dependent Women</u> (1981).	20
Lenore Walker, <u>Abused Mothers, Infants and Substance Abuse: Psychological Consequences of Failure To Protect</u> (Jan. 19-20, 1990) (unpublished manuscript) (prepared for American Psychological Association Division on Clinical Psychology and Georgetown University Child Development Mid-Winter Conference on Mothers, Infants and Substance Abuse, Scottsdale, Arizona)	19,20
Lenore Walker, <u>The Battered Woman Syndrome</u> (1984)	20
Donna R. Weston et al., <u>Drug Exposed Babies: Research and Clinical Issues in Zero to Three</u> 4 (Jeree Pawl ed., 1989).	25
The White House, <u>National Drug Control Strategy Report</u> (1990)	17

ORDER IN QUESTION

The order in question in this appeal was entered by the Honorable Charles H. Loughran, Jr., on December 16, 1992, and is as follows:

AND NOW, to wit, this 16th day of December 1992, after review of the briefs submitted in support of oral arguments,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant's Motion for Habeas Corpus is hereby granted and more specifically the Defendant's Motion to Dismiss all charges of Recklessly Endangering Another Person, Recklessly Endangering the Welfare of Children, and Delivery of Cocaine are hereby granted.

BY THE COURT:

Charles H. Loughran, J.

STATEMENT OF INTEREST OF AMICI CURIAE

The **CENTER FOR REPRODUCTIVE LAW & POLICY** was founded on June 1, 1992, by an acclaimed group of reproductive rights attorneys and activists. Through litigation, legislative expertise, and public education, the Center is dedicated to preserving and securing women's reproductive freedoms in the United States and throughout the world and ensuring that all women have access to effective and freely-chosen reproductive health care.

The Center embodies a wealth of knowledge and experience unique among reproductive rights advocates. During the past twenty years, Center attorneys have been counsel in virtually every major United States Supreme Court case about reproductive rights, including Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), and Webster v. Reproductive Health Services, 492 U.S. 490 (1989), and have been involved as lead or co-counsel in many of the cases involving prosecutions of pregnant women including Johnson v. State, 602 So. 2d 1288 (Fla. 1992); People v. Stewart, No. M508197 (Cal. Mun. Ct., San Diego County, Feb. 26, 1987); People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991); Commonwealth v. Smith, No. CR-91-05-4381 (Va. Cir. Ct. Franklin County, Sept. 16, 1991); State v. Carter, 602 So. 2d 995 (Fla. Dist. Ct. App. 1992); and State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992).

The **WOMEN'S LAW PROJECT** is a non-profit, feminist legal advocacy organization in Pennsylvania. Founded in 1974, the Law

Project works to advance the legal and economic status of women and their families through litigation, public policy development, and education. Throughout the past eighteen years, the Law Project has played a leading role in the struggle to eliminate discrimination against women based on pregnancy and reproductive capacity.

The Women's Law Project strongly believes that the prosecution of women with addiction problems is unjust and contrary to public health. The Law Project believes that a more fair and effective approach to solving the substance abuse problems of pregnant women is to make appropriate treatment available to them. As part of its campaign to eradicate the widespread discrimination against pregnant women seeking substance abuse treatment, the Law Project has filed a complaint with the Philadelphia Human Relations Commission challenging the discriminatory policies of public and private substance abuse treatment providers who bar pregnant women as a class from their programs. The Law Project has compiled a resource manual listing substance abuse programs in Philadelphia that will admit pregnant women and parenting women with their children. With the Center for Reproductive Law & Policy, the Law Project was counsel for amici curiae in support of plaintiffs-appellants in Elaine W. v. Joint Diseases North General Hospital, No. 6230-90 (N.Y. May 6, 1993), in which the Court of Appeals held that in the absence of a proven medical justification, the defendant hospital's policy of excluding all pregnant women from its drug detoxification program constituted illegal sex discrimination.

The **NATIONAL PERINATAL ASSOCIATION (NPA)** is an organization comprised of approximately 4,500 members of existing multidisciplinary regional or state perinatal organizations and an at-large caucus. Member organizations include representatives from all perinatal health professionals and administrative disciplines as well as consumers. The NPA believes that health is influenced by all factors in the human life cycle which affect the well-being of the family from prior to conception through the next generation. The National Perinatal Association respects the right of each individual to a wholesome, full life. The NPA and its member organizations are dedicated to promoting perinatal health by fostering delivery of optimal care, education, research and ordering of national priorities. This appeal raises issues of grave concern to the NPA as its members are responsible for providing medical care during pregnancy and childbirth, and for developing health care policies to support pregnant women and their fetuses. NPA believes that criminalizing the use of drugs by women in pregnancy is a dangerous policy as it endangers the physician/patient relationship of trust and could keep women at a high risk of complications from lack of proper care during pregnancy.

The **COALITION ON ADDICTION, PREGNANCY AND PARENTING (CAPP)** is a non-profit organization committed to the development of a continuum of comprehensive services for alcohol and drug dependent women and their families throughout Massachusetts. CAPP is committed to establishing collaborative models of service delivery, integrating the relational model of the psychology of

women with substance abuse treatment, fostering family-centered services, and advancing a multi-cultural perspective to all levels of prevention and intervention. CAPP services include education, consultation and technical assistance, and policy planning and advocacy.

CAPP firmly believes that addiction is an illness requiring treatment, not a crime requiring punishment. We know firsthand the fears pregnant, substance-abusing women have regarding prosecution and loss of child custody, causing them to be reluctant to seek prenatal care and substance abuse treatment. Prosecution of pregnant women only serves to keep women out of treatment, thereby endangering the health and well-being of more women and children.

The **NATIONAL BLACK WOMEN'S HEALTH PROJECT (NBWHP)** was founded as a self-help and health advocacy organization to improve the chronic poverty and declining health status of Black women and their families. Today it consists of a network of eighty-eight developing and established chapters in twenty-four states, serving a broad-based constituency of almost 2,000 members. The NBWHP is deeply concerned about recent studies indicating that Black pregnant women are disproportionately reported (and therefore prosecuted) for substance abuse, even though abuse is equally prevalent between the races. The NBWHP is further concerned that the fear of prosecution will deter women from seeking needed medical care, thereby exacerbating the already poor health status of Black women and their families. As it is, Black people suffer the highest rate of infant mortality

and neo-natal deaths in the Western world. The NBWHP joins this amici curiae brief to voice its opposition to the harmful and counterproductive policy of prosecuting pregnant women for becoming pregnant and giving birth despite a substance abuse problem.

The **NATIONAL WOMEN'S HEALTH NETWORK (The Network)** is a national advocacy group representing 500,000 women through its individual and organizational members. The Network's goals include ensuring that all women have access to appropriate prenatal, delivery and post-partum care. Toward these goals, the Network works to eliminate cultural, economic, educational, and legal barriers to health care for women. We oppose criminal prosecution of pregnant addicts, which threatens to create yet another barrier to health care that will endanger the health of women and their future children.

The **DRUG POLICY FOUNDATION** is a privately-funded, tax-exempt, non-profit organization which provides a forum for the development of effective drug policies. The Foundation was founded in 1987 and is made up of thousands of individuals from a variety of professions involved with the drug issue from the United States and around the world. Among the Foundation's advisory board members are individuals who have been leading officials in federal, state and local drug law enforcement agencies, as well as eminent researchers and physicians in the field of drug use. The Foundation is concerned that prosecuting women who give birth while addicted will do more harm than good in that women will be discouraged from seeking prenatal care due

to the fear of prosecution. The resources spent on such counterproductive prosecutions could be better spent on making prenatal care and drug treatment more easily accessible to pregnant addicted women.

OPERATION PAR, INC. (Parental Awareness and Responsibility) was originally founded in 1970 by State's Attorney James T. Russell and former Pinellas County, Florida Sheriff Don Genung for the purpose of assisting Pinellas County residents who had problems resulting from drug and alcohol abuse. In the years since its founding, PAR has developed the largest and most comprehensive non-profit system of drug and alcohol abuse prevention, education and treatment services in the southeastern United States.

Operation PAR has experienced great success in developing intervention programs for pregnant and post-partum women who abuse drugs. Operation PAR has special Maternal Substance Abuse Services, including the Child and Family Guidance Center; PAR Village; the Maternal Substance Abuse Team; the Day Treatment Program; and the Comprehensive Child Abandonment Intervention Project. These programs have been scientifically studied and have demonstrated that they "work." However, if it were ever to come to pass that women like Michelle L. Kemp were prosecuted in our community, Operation PAR is certain that much of our good work would be undone.

Operation PAR holds the strongest belief that prosecuting pregnant women who use drugs and give birth to substance-exposed newborns holds grave danger for both these women and their

children. We have found through our clinical experience that many women are likely to "go underground" and not access the prenatal and other medical care that they require. This prenatal care is vital and the key to reducing the high incidence of child mortality and morbidity that we have in our country.

In sum, Operation PAR joins in this amici curiae brief because we believe the prosecution of Michelle L. Kemp is dangerous and counterproductive.

The **MATERNITY CARE COALITION OF GREATER PHILADELPHIA (MCC)** is a non-profit organization founded in 1980 whose mission is to decrease the rates of preventable infant mortality and low-birthweight babies in Philadelphia by improving the accessibility and quality of health care for low-income pregnant women and their babies. To achieve its goal of reducing infant mortality, MCC has pioneered public-private initiatives including the MOMobile Project and the Community Maternity Project. The MOMobile is a mobile outreach van that visits targeted low-income neighborhoods, identifies pregnant women, and assists them in obtaining prenatal care and related social services. The Community Maternity Project is an outreach and education program that identifies pregnant women through door-to-door outreach and community contacts. Many of the women served by MCC are dependent upon drugs or alcohol and desperately in need of substance abuse treatment. Access to care for them is critical for their own well-being. MCC believes that the criminal prosecution of pregnant women with substance abuse problems would

frustrate our outreach and education efforts and harm women and their babies.

The **NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC. (NASW)** is the largest association of professional social workers in the world with over 144,000 members in fifty-five chapters throughout the United States and abroad. Founded in 1955 from a merger of seven predecessor social worker organizations, NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. The Pennsylvania Chapter of NASW has over 5,900 members.

NASW believes that criminal prosecution of women who used drugs during their pregnancy is inimical to family stability and counter to the best interests of the child. The needs of society are better served by treatment of addiction, not punishment of the addict.

The **PENNSYLVANIA NURSES ASSOCIATION (PNA)** serves as the professional organization for registered nurses in Pennsylvania. PNA believes that criminal prosecution of substance-abusing, pregnant women does not promote the welfare of the women or their unborn children. PNA further believes that the actual or perceived risk of criminal prosecution will cause women who need treatment to discontinue or not seek treatment during pregnancy. PNA advocates accessible, available and effective chemical dependency treatment as the means for serving the best interest of both women and their children.

The **AMERICAN NURSES ASSOCIATION** is the only full service professional organization for the nation's entire registered nurse population. From the halls of Congress and federal agencies to board rooms, hospitals, and other health care facilities, ANA is a strong voice for the nursing profession.

ANA is spokesperson for the nation's two million registered nurses through its fifty-three constituent state and territorial associations. As the leader in the legislative arena and with the media on nursing issues, ANA serves as the official spokesperson for registered nurses. Another primary goal of the ANA is to serve as an advocate for quality patient care. Dedicated to ensuring that an adequate supply of highly-skilled and well-trained nurses is available, ANA is committed to meeting the needs of nurses as well as health care consumers. ANA and its constituents work at local, state and national levels, on issues such as the shortage of nurses, adequate reimbursement for nursing services, health and safety, and more.

Through its political and legislative program, ANA has taken firm positions on everything from AIDS policies and a patient's right to self-determination to access to health care and adequate reimbursement for health care services.

ANA takes an equally firm position against the prosecution of pregnant substance abusers, and therefore joins this brief as an amicus curiae.

PRELIMINARY STATEMENT

Because the Commonwealth's attempt to prosecute women like Michelle Kemp will have adverse effects on the public health and welfare of women and their future children, particularly on poor women and women of color and their children, amici submit this brief pursuant to Pennsylvania Rules of Appellate Procedure, Rule 531, in support of the appellee, Ms. Kemp, and in opposition to the Commonwealth's appeal of the lower court's December 16, 1992 order which quashed the information against her.

Every court in the country to rule on the validity of criminal statutes to punish women who become pregnant and give birth despite an addiction problem has held that such prosecutions are without legal basis, unconstitutional or both.¹

¹ See Reyes v. Superior Court, 75 Cal. App. 3d 214 (Ct. App. 1977) (child endangering statute does not refer to unborn child or include woman's alleged drug use during pregnancy) (no further appeal taken); Jaurique v. People, No. 18988 (Cal. Super. Ct., San Benito County, Aug. 21, 1992) (dismissing fetal homicide charges against woman who suffered stillbirth allegedly as result of her prenatal drug use, finding that neither legislative history nor statute's language suggested that mother could be prosecuted for murder for death of her fetus), writ denied (Cal. Ct. App. Nov. 10, 1992); People v. Stewart, No. M508197 (Cal. Mun. Ct., San Diego County, Feb. 26, 1987) (criminal child support statute that explicitly covered "a child conceived but not yet born" is not intended to impose additional legal duties on pregnant women); Johnson v. State, 602 So. 2d 1288 (Fla. 1992) (reversing woman's conviction for "delivering drugs to a minor" via umbilical cord); State v. Carter, 602 So. 2d 995 (Fla. Dist. Ct. App. 1992) (affirming trial court's decision to dismiss charges of child abuse against woman who allegedly used illegal drugs while pregnant); State v. Gethers, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges on ground that criminal prosecution conflicts with purpose of state's child welfare laws: preserving family life of parents and children); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992) (statute proscribing delivery/distribution of cocaine did not encompass prenatal transmission); Welch v. Commonwealth, No. 90-CA-1189-MR (Ky. Ct. App. Feb. 7, 1992) (reversing criminal abuse conviction finding that statute does not include fetuses and refusing to

presume legislative intent to expand class of persons treated as victims) discretionary review granted 92-SC-490-G (Dec. 22, 1992); Commonwealth v. Pellegrini, No. 87970 (Mass. Super. Ct., Plymouth County, Oct. 15, 1990), no appeal filed re: distribution (right to privacy and principles of statutory construction, due process, and separation of powers do not permit extension of drug delivery statute to women who give birth to substance-exposed newborns); People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App.) (statute prohibiting delivery of drugs not intended to be used against pregnant women who use drugs), leave to appeal denied, No. 91-346 (Mich.), amended 471 N.W.2d 619 (Mich. 1991); People v. Bremer, No. 90-32227-FH (Mich. Cir. Ct., Muskegon County, Jan. 31, 1991) (dismissing drug delivery charges on principles of statutory construction, due process, and privacy, holding that interpretation of drug delivery law to cover ingestion of cocaine by pregnant woman would be radical departure from existing law), appeal dismissed, No. 137619 (Mich. Ct. App. July 14, 1992); People v. Cox, No. 90-53454 FH (Mich. Cir. Ct., Jackson County, July 9, 1990) (granting motion to dismiss, finding that drug delivery statute is not intended to regulate prenatal conduct and that prosecution would not be in the best interest of public health, safety, and welfare), affirmed, No. 131999 (Mich. Ct. App. Feb. 28, 1992); State v. Arandus, No. 93072 (Neb. Dist. Ct., Adams County, June 17, 1993) (dismissing child abuse charges on grounds that legislature did not intend to include unborn child or fetus under statute); People v. Morabito (N.Y. Ontario County Ct. Sept. 24, 1992) (affirming dismissal of child endangerment charges against woman who allegedly smoked cocaine during pregnancy, because statute does not include fetus within definition of "child"); State v. Inzar, No. 90CRS6960, 90CRS6961 (N.C. Super. Ct. Div., Robeson County, Apr. 9, 1991) (dismissing charges against woman who allegedly used crack during pregnancy under statute prohibiting assault with a deadly weapon and delivery of a controlled substance, finding that fetus is not person within meaning of statutes), appeal dismissed, No. 9116SC778 (N.C. Ct. App. Aug. 30, 1991); State v. Gray, 584 N.E.2d 710 (Ohio 1992) (mother cannot be convicted of child endangerment based solely on prenatal substance abuse as plain meaning of statute does not extend to fetuses or prenatal conduct); State v. Andrews, No. JU 68459 (Ohio C.P., Stark County, June 19, 1989) (child endangerment statute is not intended to apply to any situation other than that of living child placed at risk by actions that occurred after its birth); State v. Alexander, No. CF-92-2047 (Okla. Dist. Ct., Tulsa County, Aug. 31, 1992) (dismissing charges of unlawful possession of controlled substance and unlawful delivery of controlled substance to minor brought against woman who ingested illegal drugs while pregnant, finding that passage of the drug through umbilical cord is not "volitional"); Commonwealth v. Kemp, No. 2707 C 1991 (Pa. C.P., Westmoreland County, Dec. 16, 1992) (dismissing charges of recklessly endangering another person or endangering welfare of child for allegedly ingesting cocaine while pregnant; finding that "person" does not include "fetus" or

Many of these courts have also found that these prosecutions are contrary to public policy and public health. See, e.g., Johnson v. State, 602 So. 2d 1288, 1297 (Fla. 1992) ("[t]he Court declines the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread"). There is no reason why this Court should uphold a prosecution that every other court has rejected, and every leading public health group opposes. See, e.g., State v. Luster, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992) (viewing addiction during pregnancy as disease and finding that treatment rather than prosecution is approach "overwhelmingly in accord with the opinions of local and national medical experts").

"live birth"); Tolliver v. State, No. 90-CP-23-5178 (S.C. Ct. C.P., Greenville County, Aug. 10, 1992), cert. denied (S.C. Mar. 10, 1993) (overturning conviction for child abuse and neglect, finding that woman's alleged child abuse does not constitute violation of statute and that fetus is not person within statute's meaning); Commonwealth v. Wilcox, No. A-44116-01 (Va. Norfolk Juv. & Dom. Rel. Dist. Ct. Oct. 9, 1991) (dismissing child abuse charges against woman who allegedly used cocaine during pregnancy, finding that application of statute to these facts would extend it by means of creative construction to acts not intended by legislature); Commonwealth v. Smith, No. CR-91-05-4381 (Va. Cir. Ct., Franklin County, Sept. 16, 1991) (dismissing child abuse charges against woman who allegedly used drugs during pregnancy, finding that child abuse statute is not intended to apply to fetuses or to prenatal conduct); Commonwealth v. Turner, No. CR-91-05-4382 (Va. Cir. Ct., Franklin County, Sept. 16, 1991); State v. Osmus, 276 P.2d 469 (Wyo. 1954) (criminal neglect statute cannot be applied to woman's prenatal conduct).

SUMMARY OF ARGUMENT

This brief's examination of the nature of addiction, the reasons why women take drugs, and the obstacles preventing women from getting help, illustrates that prosecuting pregnant substance abusers actually undermines legitimate public health efforts to address the problem of drug use during pregnancy.

The unprecedented, distorted interpretation of Pennsylvania's criminal statutes, 18 Pa. Cons. Stat. Ann. § 2705 (1983), 18 Pa. Con. Stat. Ann. § 4304 (1983 & Supp. 1992), and Pa. Stat. Ann. tit. 35, § 780-113(a)(30) (1983), urged by the Commonwealth in this case threatens to deter confidential physician-patient communications and to drive pregnant women who are addicted to drugs out of the health care system, thereby increasing the potential for harm to both woman and fetus. In sum, this Court should not adopt an unjustified and ultimately absurd statutory construction that creates serious negative health consequences for both women and their future children.

ARGUMENT

I. THE COMMONWEALTH'S CONSTRUCTION OF PENNSYLVANIA'S CRIMINAL STATUTES LEADS TO ABSURD RESULTS THAT ARE IRRATIONAL, COUNTERPRODUCTIVE AND AT ODDS WITH SOUND PUBLIC HEALTH POLICY.

It is a fundamental rule of statutory construction that the General Assembly is presumed not to intend a result that is absurd or unreasonable. See 1 Pa. Cons. Stat. Ann. § 1922(1) (1991); Commonwealth v. Lurie, 524 Pa. 56, 569 A.2d 329 (1990); Zimmerman v. O'Bannon, 497 Pa. 551, 442 A.2d 674 (1982). Applying Pennsylvania's criminal statutes to pregnant women with chemical dependency problems is so patently at odds with public health interests and sound public policy that the General Assembly can be presumed not to have intended such a radical expansion of the application of these laws.

Indeed, from a public health standpoint such an interpretation is not only counterproductive but ultimately absurd. As the Florida Supreme Court correctly noted, "prosecuting women for using drugs and 'delivering' them to their newborns appears to be the least effective response to this crisis. Rather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected." Johnson v. State, 602 So. 2d 1288, 1295-96 (Fla. 1992) (rejecting application of Florida's drug distribution statute to prenatal conduct).

A. Addiction During Pregnancy Is a Medical Problem Appropriately Addressed by the Public Health Authorities, Not the Criminal Justice System.

Using the proverbial cannon to kill a gnat, the District Attorney in Westmoreland County has used the muscle of the criminal justice system to go after the most vulnerable person in the complex chain of illegal drug supply and use--a pregnant woman. Such a person is an appealing target for law enforcement officials who are frustrated by the apparent ineffectiveness of the nation's "war on drugs". Drug Policy Foundation, 19 Drug Policy Letter 7 (1993).

Women who suffer from the disease² of substance abuse, particularly those who are mothers or who are pregnant, have been subjected to severe public censure and discrimination. From ancient Roman times when husbands could lawfully execute their wives for drinking, see Marian Sandmaier, The Invisible Alcoholics: Women and Alcohol Abuse in American (1980), to contemporary America where women are prosecuted for being pregnant while suffering from substance abuse, see supra note 1, women who abuse drugs or alcohol have been considered morally deficient and worthy of punishment.

2 The United States Supreme Court observed that addicts "are diseased and proper subjects for [medical] treatment." Linder v. United States, 268 U.S. 5, 18 (1925). Thirty-seven years later, the Supreme Court reaffirmed that addiction to drugs is a disease, and not a crime. Robinson v. California, 370 U.S. 660, 667 n.8 (1962). The medical community agrees that addiction is a disease best addressed through treatment rather than punishment. See Wendy Chavkin, Drug Addiction and Pregnancy: Policy Crossroads, 80 Am. J. Pub. Health 483, 484-85 (1990). Substance abuse is a chronic, relapsing disease. Loretta Finnegan, Special Currents: Maternal Addiction 1 (1990).

The punishment sought by the Commonwealth is not based on sound legal principles. Instead, the Commonwealth seeks to usurp the role of public health and welfare officials by imposing its unauthorized and inappropriate response to the health problem of substance abuse during pregnancy.

The clear weight of public health policy at both the national and state levels counsels against expanding criminal sanctions against pregnant women with addictions. Even the White House Office of National Drug Control Policy under then-President Bush, with its strong law enforcement stance, conceded that prosecutions of pregnant addicts had been unsuccessful and considered incarceration of pregnant women with addictions to be a "last resort." The White House, National Drug Control Strategy Report 53 (1990). In Pennsylvania, public health officials have resoundingly rejected any criminal sanctions against women who become pregnant and continue to term despite their addiction problem. See, e.g., Public Hearing on Alcohol and Drug Addicted Mothers and Their Children Before the House Comm. on Youth and Aging, 1989-90 Sess. 32 (1989) (testimony of John White, Secretary of Public Welfare and Vice-Chairman of the Governor's Drug Policy Council)(criminalizing drug use during pregnancy would be a "tragedy" particularly when treatment and services are not available); id. at 52 (testimony of Ron David, M.D., Deputy Secretary of Health Programs, Department of Health) (addiction is "extraordinarily resistant or totally unresponsive to coercive or punitive treatment"). In addition, virtually every leading public health and medical organization has rejected the

criminalization of drug use during pregnancy. See Brief for Appellee at 27-29.

Because pregnant women who abuse drugs are subjected to public scorn and stigma, it is not surprising that so much distorted and misleading information has been promulgated in the media about the harm of intrauterine drug exposure. However, recent studies suggest that the impact of drug use during pregnancy has been overstated in the media.³ In an article in the Journal of the American Medical Association, a team of research physicians decried the premature and inaccurate conclusions being drawn about the impact of in utero cocaine exposure. Their careful review of current scientific literature indicated that "available evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the course and outcome of child growth and development." Linda C. Mayer et al., The Problem of Prenatal Cocaine Exposure: A Rush to Judgment, 267 JAMA 406 (1992).

More recently, the Center for Health Policy Research of the George Washington University completed a two-year study which

3 Research indicates that the fetal effects of cocaine exposure are similar to the effects of paternal and maternal cigarette smoking. The George Washington Univ. Ctr. for Health Policy Research, An Analysis of Resources To Aid Drug-Exposed Infants and Their Families 3 (1993) (citing J.J. Volpe, Mechanisms of Disease: Effect of Cocaine Use on the Fetus, 327 New Eng. J. Med. 399 (1992); K.C. Schoendorf & J.L. Kiely, Relationship of Sudden Infant Death Syndrome to Maternal Smoking During and After Pregnancy, 90 Pediatrics 905 (1992); D.L. Davis, Parental Smoking and Fetal Health, 337 The Lancet 123 (1991)). However, there have been no attempts yet to prosecute cigarette-smoking fathers or mothers for fetal harm.

found consensus among researchers that most of the effects of prenatal drug exposure are temporary and treatable. The George Washington Univ. Ctr. for Health Policy Research, An Analysis of Resources To Aid Drug-Exposed Infants and Their Families (1993). [hereinafter CHPR].

Thus, the clear consensus of medical professionals and public health officials is to reject the counterproductive and ineffective policy proposed by the Commonwealth.

B. Substance Abuse and Addiction Are Caused by Complex Social and Psychological Factors.

Experts have identified several factors that affect a woman's drug use, none of which includes the desire to deliver drugs to their newborns or children-to-be, see Pa. Stat. Ann. tit. 35, § 780-113(a)(30), to recklessly endanger another person, see 18 Pa. Cons. Stat. Ann § 2705, or to endanger the welfare of a child, see 18 Pa. Cons. Stat. Ann. § 4304.

A history of victimization is a key predictor for a woman's substance abuse.⁴ Incest, sexual abuse, rape, and battering, which threaten all women, are disproportionately present in the lives of women who are drug dependent. In one study, up to 74% of alcohol- and drug-dependent women reported incidents of sexual

4 D. Kilpatrick, Violence as a Precursor to Women's Substance Abuse: The Rest of the Drug-Violence Story 7 (American Psychological Association, 98th Ann. Conv., Aug. 1990); see also L. Walker, Abused Mothers, Infants and Substance Abuse: Psychological Consequences of Failure to Protect 12 (Jan. 19-20, 1990) (unpublished manuscript) (prepared for American Psychological Association Division on Clinical Psychology and Georgetown University Child Development Mid-Winter Conference on Mothers, Infants and Substance Abuse, Scottsdale, Arizona) [hereinafter Abused Mothers].

abuse.⁵ In another study of pregnant addicted women, 19% were severely beaten as children, 15% were raped as children, and 21% were raped as adults. This was in addition to the 70% who reported that as adults they were also beaten.⁶ These studies are consistent with the anecdotal reports from the few programs that specialize in treating pregnant addicted women that 80-90% of their clients have been victims of rape or incest.⁷ Significantly, women are often pressured to use drugs in the first instance by the same men who are physically abusive of them.⁸

Thus, many experts believe that it is likely that women who are abused "self-medicate" with alcohol, illicit drugs, and prescription medication to alleviate the pain and anxiety of living under the constant threat of violence.⁹

5 N. Finkelstein, et al., Getting Sober, Getting Well: A Treatment Guide for Caregivers Who Work with Women 244 (1990) (citing S. Wilsnack, Drinking, Sexuality, and Sexual Dysfunctions in Women in Alcohol Problems in Women (S. Wilsnack & L. Beckman eds., 1984)) [hereinafter Getting Sober, Getting Well].

6 Abused Mothers at 8 (citing Regan, et al., Infants of Drug Addicts: At Risk for Child Abuse, Neglect and Placement in Foster Care, 9 Neurotoxicology & Teratology 315 (1987)).

7 Leff, Treating Drug Addiction with the Woman in Mind, Wash. Post, Mar. 5, 1990, at E1, E4; cf. Martin, Big Bribe Helps Mothers Fend Off Allure of Crack, N.Y. Times, Mar. 7, 1990, at B1.

8 The Women's Drug Research Project found that over 85% of the women who used drugs were living with male spouses or partners who were drug abusers. U.S. Department of Health and Human Services, Pub. No. (ADM) 87-1177, Treatment Services for Drug Dependent Women, 32-38 ("Characteristics of Drug Dependent Women") (1981); see also Getting Sober, Getting Well at 302.

9 Amaro, et al., Violence During Pregnancy and Substance Abuse, 80 Am. J. Pub. Health 575, 578 (1990) [hereinafter Violence During Pregnancy]; see also Lenore Walker, The Battered Woman

Given the reasons why many women begin to use drugs, the characterization of drug-dependent women as drug dealers with criminal intent worthy of punishment makes little sense. No legitimate state interest can be served by punishing acts that are not intended or desired.¹⁰ As the National Association for Perinatal Addiction Research and Education has stated, "these women are addicts who become pregnant, not pregnant women who decide to use drugs and become addicts. They do not want or intend to harm their unborn children by using drugs." NAPARE at 2.

Syndrome (1984); Hilberman, Overview: The Wife-beater's Wife: Reconsidered, 137 Am. J. Psychiatry 1336 (1980); Getting Sober, Getting Well at 302 (use of alcohol or drugs during pregnancy "may be defensive behavior on the part of the woman trying to cope with an intolerable situation"); Randall, Domestic Violence Begets Other Problems of Which Physicians Must Be Aware To Be Effective, 264 Med. News & Persp. 940, 943 (1990).

¹⁰ National Association for Perinatal Addiction Research and Education, Policy Statement No. 1, Criminalization of Prenatal Drug Use: Punitive Measures Will Be Counter-Productive 1 (July 1990) [hereinafter NAPARE].

As one parent testified:

I can tell you that drug addicts are human beings who have the same hopes and dreams that you do. Drug addicted mothers love their children just like any other mother. I love my children. But it is just not easy to stop using drugs. It has taken a long time and a lot of treatment for me to reach this point in my recovery. Recovering from any kind of addiction is a long-term process, fraught with relapse. It takes a tremendous support system.

Missing Links: Coordinating Federal Drug Policy for Women, Infants and Children: Hearings Before the Senate Comm. on Governmental Affairs, 101st Cong., 1st Sess. 1 (1989) (testimony of Elaine Wilcox).

C. In Light of the Acute Shortage of Drug Treatment Programs for Pregnant Women, It Is Absurd To Suggest That Legitimate State Interests Are Served by Punishing Them.

The Commonwealth in its brief suggested that the prosecution of Ms. Kemp was appropriate in part because she failed to get drug treatment during her pregnancy. No state interest can be furthered, however, by punishing women for failing to seek non-existent or inappropriate treatment for their drug-related problems. As discussed below, the shortage of drug treatment programs sensitive to women's needs creates insurmountable barriers for women seeking drug treatment. Karol L. Kumpfer, Treatment Programs for Drug-Abusing Women, in The Future of Children 50, 53 (Richard F. Behrman ed., 1991) [hereinafter Treatment Programs].

The shortage reflects the legacy of stigmatization and discrimination against women with substance abuse problems. Indeed, the image of women as alcoholics or addicts--particularly pregnant women or mothers--has been so socially unacceptable that the problem has until recently been rendered invisible. See Sandmaier, supra, at xiv-xv; Beth Glover Reed, Drug Misuse and Dependency in Women: The Meaning and Implications of Being Considered a Special Population or Minority Group, 20 Int'l J. Addictions 13 (1985) [hereinafter Drug Misuse and Dependency in Women]. Indeed, drug addiction has traditionally been considered a problem that primarily affects men. The 1967 Katzenbach Commission Report, a key federal report leading to the passage of the federal Drug Abuse Act, described an addict as "likely to be

male between the ages of 21 and 31, poorly educated and unskilled, and a member of a disadvantaged ethnic minority group." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967). The needs of women have been subsumed, ignored, or deemed to be "special" because they were different from men's. See Beth Glover Reed, Developing Women-sensitive Drug Dependence Treatment Services: Why So Difficult?, 19 J. Psychoactive Drugs 151 (1987) [hereinafter Developing Women-sensitive Drug Dependence Treatment Services]. As a result, women are greatly underrepresented in treatment. Approximately 80% of the treatment resources in this country are spent treating men. See National Association of State Alcohol and Drug Abuse Directors, Survey of State Alcohol and Drug Agency Use of FY 1989 Federal and State Funds tbl. 2 (1990) [hereinafter NASADAD Survey].

For almost two decades, scholarly literature¹¹ as well as government studies and reports have decried the failure of social and health care systems to identify women with alcohol and drug problems and to provide access to treatment for them.¹² The

11 Frederic Suffet et al., Treatment of the Pregnant Addict: A Historical Overview, in Pregnant Addicts and Their Children: A Comprehensive Care Approach 13, 18-19 (Richard Brotman et al. eds., 1985).

12 "In 1976 the need for special treatment services for women was recognized, and new federal legislation, P.L. 94-371, was enacted to increase such services. In addition, a network of women's task forces was created by the National Council on Alcoholism's Special Office on Women. However, by 1978 only 3% of programs funded by the National Institute on Alcoholism and Alcohol Abuse (NIAAA) (17 of 578 programs) were available to female alcoholics, and 20% of programs funded by NIDA were available to female heroin addicts. . . . In 1984 the National Council on Alcoholism and supporters in Congress again recognized

consensus that has emerged from this literature is that the medical, economic, and psycho-social needs of women had been ignored because most treatment modalities and policies are based on the experiences of male substance abusers.¹³ If the addicted woman's needs do not conform to the male model of treatment, she either does not gain access to treatment at all, or is perceived to be "difficult" to treat and is described as failing in treatment. Developing Women-sensitive Drug Dependence Treatment Services, supra, at 151-164.

Those most discriminated against by the drug and alcohol treatment system are pregnant women. See, e.g., Elaine W. v. Joint Diseases North General Hospital, No. 6230-90 (N.Y. May 6, 1993) (invalidating hospital policy barring all pregnant women from drug detoxification services in absence of showing of medical necessity for such policy under New York Human Rights Law); Lisa Brennan, Probe Into Treatment for Pregnant Women, Legal Intelligencer, Oct. 28, 1992, at 1 (reporting investigation by Philadelphia Human Relations Commission into alleged pregnancy discrimination by twenty Philadelphia drug and alcohol treatment providers). Many substance abuse treatment providers overtly
the problem of lack of treatment for women and enacted P.L. 98-509, known as the Five Percent Women's Set Aside, which required that 5% of the federal block grant to each state be set aside to provide treatment services for women. In 1988 this requirement was increased to 10%. Treatment Programs, supra, at 53-54.

13 See Drug Misuse and Dependency in Women, supra; Developing Women-sensitive Drug Dependence Treatment Services, supra, at 153; Treatment Programs, supra, at 50; Stephen Kandall & Wendy Chavkin, Illicit Drugs in America: History, Impact on Women and Infants and Treatment Strategies for Women, 43 Hastings L.J. 615 (1992).

refuse to treat pregnant women. See Wendy Chavkin, Drug Addiction and Pregnancy: Policy Crossroads, 80 Am. J. Pub. Health 483, 485 (1990). A national survey of state directors of drug and alcohol programs in 1989 showed that fewer than 12% of all pregnant women in need of treatment received it. NASADAD Survey, supra, at tbl. 3. Similarly, a 1989 survey of hospitals in large metropolitan areas by the Select Committee on Children and Youth of the United States House of Representatives revealed that two-thirds had no place to refer substance-dependent pregnant women for treatment. Donna R. Weston et al., Drug Exposed Babies: Research and Clinical Issues, in Zero to Three 4 (Jeree Pawl ed., 1989).¹⁴

Despite national recognition of the crisis of maternal substance abuse, the GAO reports that states are not even using the special Women's Set-Aside funds appropriately, see supra note 12, to meet the needs of pregnant women. GAO, ADMS Block Grant: Women's Set-Aside Does Not Assure Drug Treatment for Pregnant Women 2 (1991) [hereinafter GAO, ADMS Block Grant]. Moreover, according to the recent George Washington University Center for Health Policy Research, drug-exposed infants and their mothers

¹⁴ The denial of treatment to pregnant women is particularly problematic given the recent efforts of state prosecutors to prosecute addicted women for becoming pregnant and carrying their pregnancies to term. Similarly, child protective services officials have recently attempted to remove substance-exposed newborns from their mothers automatically, absent any other evidence regarding the fitness of the mother or the health status of the newborn. Major medical and public health organizations oppose these punitive measures because they fear such measures will keep pregnant, substance-dependent women away from needed care. See Kandall & Chavkin, supra, at 639.

still go largely untreated in spite of considerable increases in state and federal funding. CHPR at 1.

In Pennsylvania, as nationwide, there are not enough treatment programs for drug users who happen to be pregnant. Even though, as the United States General Accounting Office (GAO) reports, "[m]any health professionals believe that comprehensive residential drug treatment, including prenatal care, is the best approach to helping many women abstain from using drugs during pregnancy and assuring that the developing fetus has the best chance of being born healthy,"¹⁵ few such programs exist in Pennsylvania.

In Pennsylvania, the Bureau of Maternal and Child Health Services of the Department of Health estimates that as many as 25,000 women gave birth to substance-exposed¹⁶ infants. Bureau

15 GAO, Drug-Exposed Infants: A Generation at Risk 37 (1990) [hereinafter GAO, Drug-Exposed Infants]. As the GAO explains, Residential treatment allows for several needs to be addressed at the same time, thus reducing problems of fragmentation and inaccessibility of services. For example, the interconnected problems of homelessness, substance abuse, maternal and child health, and parenting are addressed in the few residential programs that exist. In addition, these programs limit access to drugs and remove women from the environments in which they became dependent. Id.

Those few programs that exist and have adopted this model have had remarkable success. Id. at 38. See also Miller, Chrysalis Offered What Mother and Baby Needed, Annapolis Capital, June 7, 1990, at A7 (describing successful birth outcome of baby born to first woman allowed to have her baby with her in Maryland's only residential drug treatment program for women); Martin, Big Bribe Helps Mothers Fend Off Allure of Crack, N.Y. Times, Mar. 7, 1990, at B1 (describing success of New York City's only residential drug treatment program that allows women to stay with their children).

16 It is important to remember that exposure does not necessarily mean harm. Deanna S. Gomby et al., Estimating the

of Maternal and Child Health Services, Pennsylvania Department of Health, Draft Block Grant Application 29 (1993). The Annual Hospital Questionnaire of the Pennsylvania Department of Health indicates that 3,150 infants are born exposed to illegal drugs.¹⁷

Regardless of what count is accurate, the need for treatment for pregnant women far exceeds Pennsylvania's capacity to treat. In 1991, there were seventeen mother-children residential programs in all of Pennsylvania with the capacity to serve 209 mothers and 253 children.¹⁸

In Westmoreland County, the treatment capacity in drug and alcohol programs increased by 37% between 1988-89 through 1990-91; however, the number of women in treatment decreased 9% between FY 1989-90 and FY 1990-91.¹⁹ In FY 1990-91 women represented only 29% of those admitted to treatment to drug and alcohol programs in Westmoreland County. Id. at 75.

Westmoreland is one of the six counties (out of sixty-seven) in Pennsylvania that provide no county funds for drug and

Number of Substance-Exposed Infants, in The Future of Children, supra, at 17, 23.

17 State Health Data Center, Pennsylvania Department of Health, Data from the Annual Hospital Questionnaire 9 (reporting period July 1, 1990 - June 30, 1991, Rep. 14) [hereinafter Hospital Questionnaire].

18 Office of Drug and Alcohol Programs, Pennsylvania Department of Health, The Pennsylvania State Plan for the Control, Prevention, Intervention, Treatment, Rehabilitation, Research, Education and Training Aspects of Drug and Alcohol Abuse and Dependence Problems 7 (FY 1992-93).

19 Interdepartmental Human Services Planning Committee, Pennsylvania Departments of Aging, Health, and Public Welfare, County Planning Data Kit 74-75 (1992 Supp.).

alcohol treatment, and is one of the two counties that do not receive drug and alcohol funds from sources other than the state.²⁰

To suggest, as the Commonwealth does, that drug and alcohol treatment in Westmoreland County was readily available if Ms. Kemp wanted it, flies in the face of the county's own statistics. Indeed, these data also undercut the Commonwealth's deterrence rationale for its unauthorized exercise of police power. It simply makes no sense to insist that the purpose of this conviction is to send a message to women drug addicts to seek help, when that help is not available or elusive at best.

D. The Commonwealth's Interpretation of Pennsylvania's Criminal Statutes Threatens To Drive Women at High Risk out of the Health Care System.

The prosecution of Ms. Kemp sends a dangerous message to drug-dependent women who are pregnant: stay away from the doctor and the hospital because your drug use will be discovered and you will be prosecuted regardless of whether your child is healthy. Women who do come forward and admit their drug dependence will be treated like drug pushers.

The unprecedented and distorted interpretation of Pennsylvania's drug delivery statute urged by the Commonwealth in this case threatens to drive pregnant women who are addicted to drugs out of the health care system entirely. As the GAO reports:

20 Office of Drug and Alcohol Programs, Pennsylvania Department of Health, Annual Report 43 (FY 1990-91).

[T]he increasing fear of incarceration and loss of children to foster care is discouraging pregnant women from seeking care. Women are reluctant to seek treatment if there is a possibility of punishment. They also fear that if their children are placed in foster care, they will never get the children back.

GAO, Drug-Exposed Infants at 37.

Indeed, as early as 1988, experts in the field of prenatal care observed that:

Pregnant women who are aware that their lifestyles place their health and that of their babies at risk may also fear seeking care because they anticipate sanction or pressure to change such habits as drug and alcohol abuse, heavy smoking, and eating disorders. Substance abusers in particular may delay care because of the stress and disorganization that often surround their lives, and because they fear that if their use of drugs is uncovered, they will be arrested and their other children taken into custody.

Institute of Medicine, Prenatal Care 79 (1988).

In 1991, the GAO conducted interviews (focus groups) with women who had been drug abusers while pregnant.²¹ "The focus groups sought the women's views and experiences on barriers that prevented them, or women they knew, from receiving drug treatment." Id. Based on these focus groups the GAO concluded that "[t]he threat of prosecution poses yet another barrier to treatment for pregnant women and mothers with young children. These women are reluctant to seek treatment if there is the possibility of punishment, which may include incarceration and losing their children to foster care." Id. at 20. In fact,

21 GAO, ADMS Block Grant at 4.

"some women are now delivering their infants at home in order to prevent the state from discovering their drug use."²²

It is not, however, only the fear of prosecution that deters women from seeking help but also the stigmatizing effect of labeling pregnant women with drug problems as criminals, child abusers, and drug dealers. Many women's treatment experts "contend that as stigma, rejection, and blame increase, drug-abusing women's feelings of guilt and shame increase. This leads to lowered self-esteem, increased depression, immobilization, and isolation. As societal stigma increases, willingness to enter treatment decreases." Treatment Programs at 55-56.

Moreover, for those women who are willing to risk contact with the health care system, the threat of prosecution is likely to discourage them from speaking honestly and openly to their health care providers. Indeed, even the suggestion that seeking health care will lead to criminal sanctions deters honest communication between patient and health care providers. In Florida, for example, after "[u]niformed officers wearing guns entered Bay Front Medical Center . . . to investigate new mothers suspected of cocaine abuse," doctors reported that they could no longer "depend on mothers to tell them the truth about their drug

22 GAO, Drug-Exposed Infants at 39. "[M]others--afraid of criminal prosecution--fail to seek the very prenatal care that could help their babies and them." Missing Links: Coordinated Federal Drug Policy for Women, Infants and Children (Press Release of July 31, 1989) [hereinafter Missing Links].

use. . . because word ha[d] gotten around that the police will have to be notified."²³

Good communication between health care providers and patients, particularly in the prenatal context, is crucial for both maternal and fetal health. The health care worker must be able to discuss fully with the pregnant woman many sensitive matters. Among these are whether she is at risk of herpes infection, whether she is taking legal or illegal drugs that may harm her fetus, or whether she and the fetus are at risk of AIDS due to unprotected sex or intravenous drug use. Such open dialogue is necessary to promote both maternal and fetal health. Thus, there are multiple reasons to take steps to enhance, rather than replace with threats of criminal prosecution, the confidentiality of the physician-patient dialogue concerning health risks, including illegal use of drugs.

Because prosecution of women like Ms. Kemp sends a dangerous message to pregnant addicts not to seek prenatal care or drug treatment, not to confide their addiction to health care professionals, and not to give birth in hospitals where they are likely to get "caught,"--or not to give birth at all--such prosecutions fail to serve any state interest, and in fact undermine the State's objectives of promoting maternal and fetal health.

²³ Gentry, Angry Doctors Cut Tests After Police Interview Moms, St. Petersburg Times, May 13, 1989, at 1B.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge this Court to affirm the judgment below in favor of Ms. Kemp.

Respectfully submitted,

Carol E. Tracy
I.D. No. 40258
Women's Law Project
125 S. Ninth Street, Suite 401
Philadelphia, PA 19107
215/928-9801

DATED: July 1, 1993