

## **Episode 1 Season 4 of THE BREACH**

*-JAY HARRIS: "DUE TO THE HIGH RATES REPORTED DRUG AND ALCOHOL USE BY PREGNANT EXPECTING MOTHERS IN BIG HORN COUNTY, THE BIG HORN ATTORNEY'S OFFICE IS ANNOUNCING AN IMMEDIATE CRACKDOWN POLICY OF CIVILLY PROSECUTING ANY EXPECTING MOTHERS FOUND TO BE USING DANGEROUS DRUGS OR ALCOHOL."*

*-ALLISON CONTI: "AND I WAS JUST LIKE, 'THERE'S NO WAY THIS CAN BE LEGAL, IT FOR SURE FEELS WRONG ETHICALLY.'"*

*-RECEPTIONIST: "PUBLIC DEFENDER'S OFFICE"*

*-RENEE: "I DON'T THINK I KNOW ONE PERSON THAT IS SOBER"*

WELCOME TO SEASON FOUR OF THE BREACH. THIS SEASON WE'VE DECIDED TO TAKE THE SHOW IN AN ENTIRELY NEW DIRECTION.

LAST YEAR, WE EXPLORED ABUSES OF POWER AND POLICY IN INTERVIEWS WITH NATIONAL EXPERTS.

THIS YEAR WE STARTED FOLLOWING ONE STORY BACK IN JANUARY. THAT STORY TOOK TURN AFTER TURN AND BROUGHT US SOMEWHERE WE NEVER EXPECTED TO END UP.

EVENTUALLY WE REALIZED, THIS STORY HAD TO BE THE STORY OF THE YEAR, AND THAT'S EXACTLY WHAT IT BECAME.

MY NAME IS LINDSAY BEYERSTEIN AND I'M AN INVESTIGATIVE JOURNALIST.

REWIRE.NEWS IS A NON-PROFIT NEWS OUTLET DEDICATED TO BRINGING YOU EVIDENCE-BASED REPORTING ON REPRODUCTIVE HEALTH, RIGHTS, AND JUSTICE.

THIS STORY IS ABOUT PREGNANCY AND DRUG ADDICTION.

IT'S ABOUT NATIVE PEOPLE AND THE MOST REMOTE PARTS OF RURAL MONTANA.

IT'S ABOUT THE LAW -- AND THE MISTAKES WELL-MEANING PEOPLE CAN MAKE WITHIN IT.

IT'S ABOUT COMMUNITY AND THE SEARCH FOR JUSTICE.

IN THE END, THOUGH, IT'S ABOUT WOMEN WHO ARE FIGHTING TO SURVIVE.

WE'RE GOING TO TAKE YOU ALONG FOR THE RIDE ON OUR ONGOING INVESTIGATION.

THIS IS THE FIRST THREE EPISODES OF WHAT WE HOPE WILL BE AN ONGOING DISCUSSION. FUTURE EPISODES WILL BE RELEASED AS MORE FACTS COME TO LIGHT.

IN THE FIRST EPISODE, WE'LL INTRODUCE YOU TO JAY HARRIS, A MONTANA COUNTY PROSECUTOR WHOSE RADICAL PROPOSAL TO COUNTER DRUG USE IN PREGNANCY FIRST DREW OUR ATTENTION AND SET US ON A PATH TO DISCOVER SOMETHING ENTIRELY UNEXPECTED.

IN THE SECOND EPISODE, WE'LL TALK ABOUT WHAT WE FOUND AND WHY IT MATTERS.

AND IN THE FINAL EPISODE OF THIS THREE-PART MINISERIES, WE'LL MEET SOMEONE WHOSE LIFE HAS BEEN PROFOUNDLY AFFECTED BY THIS REALITY AND LEARN ABOUT POSSIBLE ALTERNATIVES.

WHEN WE FIRST HEARD THAT A COUNTY PROSECUTOR WAS THREATENING TO SLAP PROTECTIVE ORDERS ON SUBSTANCE-USING PREGNANT PEOPLE, WE DIDN'T REALIZE WHERE THE STORY WOULD TAKE US...

OR WHAT A BIG ROLE NATIVE ISSUES WERE GOING TO PLAY IN IT.

WE LEARNED A LOT IN THE PROCESS OF REPORTING THIS STORY AND WE'RE STILL LEARNING.

WE TRAVELED WHENEVER WE COULD, BUT A LOT OF THIS INVESTIGATION WAS DONE ON THE PHONE...WHERE AUDIO QUALITY ISN'T ALWAYS PERFECT.

THAT'S BECAUSE WE NEEDED TO TALK TO A LOT OF DIFFERENT EXPERTS, FROM ALL OVER THE COUNTRY, TO MAKE SENSE OF WHAT WE UNCOVERED.

OUR STORY BEGINS IN BIG HORN COUNTY, ON THE WINDSWEPT [PLAINS OF SOUTHEASTERN](#), MONTANA.

IN [JANUARY OF 2018](#), JAY HARRIS, THE ELECTED PUBLIC PROSECUTOR OF BIG HORN COUNTY, MONTANA, ANNOUNCED THAT...

JAY HARRIS: Due to the high rates reported drug and alcohol use by pregnant expecting mothers in Big Horn County, the Big Horn attorney's office is announcing an immediate crackdown policy of civilly prosecuting any expecting mothers found to be using dangerous drugs or alcohol.

Under this approach the state will seek an order of protection restraining a pregnant female from any non-medically prescribed use of drugs or alcohol. In the event there are provable violations of any such protective court orders, the state will further prosecute on a contempt basis and seek incarceration in order to incapacitate the drug or alcohol addicted expecting mother.

OKAY, LET'S TALK ABOUT WHAT THAT MEANS....

HARRIS IS SAYING THAT IF HE GETS PROOF THAT A PREGNANT WOMAN IN BIG HORN COUNTY IS USING ALCOHOL OR DRUGS, HE WILL SEEK AN ORDER OF PROTECTION AGAINST HER THAT FORBIDS HER TO USE DRUGS OR ALCOHOL.

ORDERS OF PROTECTION ARE NORMALLY USED TO PROTECT VICTIMS OF DOMESTIC VIOLENCE OR STALKING.

A PERSON WHO FEELS THREATENED GOES TO COURT AND PRESENTS EVIDENCE THAT THEIR ABUSER OR STALKER MIGHT HURT THEM.

IF THE JUDGE IS SATISFIED WITH THE EVIDENCE, HE OR SHE GRANTS THE PROTECTIVE ORDER, WHICH IMPOSES WHATEVER RESTRICTIONS THE JUDGE THINKS ARE NECESSARY TO PROTECT THE PERSON AT RISK.

FOR EXAMPLE, AN ABUSER MIGHT HAVE TO STAY A CERTAIN DISTANCE AWAY FROM THEIR VICTIM, OR ATTEND SUBSTANCE ABUSE COUNSELING.

JAY HARRIS INTENDS TO TAKE A TOOL THAT IS NORMALLY USED TO PROTECT POTENTIAL CRIME VICTIMS AND REPURPOSE IT...

BY ASKING PREGNANT SUBSTANCE USERS TO TURN THEMSELVES IN:

JAY HARRIS: Expecting mothers acknowledging their own drug or alcohol addiction problems should immediately self report to the Department of Public Health and Human Services and enroll in voluntary daily substance abuse monitoring in order to avoid prosecution.

IF A JUDGE GRANTS THE ORDER, BUT THE PREGNANT PERSON DOESN'T STOP USING...

JAY HARRIS: Then our policy, the county's policy, would be to ask for incarceration as an incapacitation measure. It would be a fail safe at that point. I call it a safety net, a judicial safety net.

HARRIS ADDS THAT HE DOESN'T INTEND TO PROSECUTE WOMEN WHO CAN PROVE THEY ARE IN TREATMENT.

HARRIS WANTS TO SEEK PROTECTIVE ORDERS ON BEHALF OF EMBRYOS AND FETUSES, BASED ON A LEGAL THEORY THAT FETUSES AND EMBRYOS ARE PEOPLE UNDER SOMETHING KNOWN AS "[NATURAL LAW](#)."

JAY HARRIS: This policy rests upon a legal concept known as the natural law, which provides that all human beings are afforded inherent legal rights by virtue of their humanity.

NATURAL LAW IS A LEGAL THEORY ESPOUSED BY FORMER JUDGE AND [FREQUENT FOX NEWS GUEST ANDREW NAPOLITANO](#), AND FORMER ALABAMA SUPREME COURT JUSTICE ROY MOORE.

IT'S CLOSELY ASSOCIATED WITH ATTEMPTS TO IMPOSE CHRISTIAN THEOLOGY ON THE U.S. LEGAL SYSTEM.

LET'S TALK A BIT ABOUT BIG HORN COUNTY...

BIG HORN COUNTY IS A POOR, [RURAL](#) COUNTY IN [SOUTHEAST](#) MONTANA.

ACCORDING TO A [RECENT STUDY](#), BIG HORN COUNTY CAME IN SECOND TO LAST AMONG 47 RANKED COUNTIES IN THE STATE AMONG HEALTH OUTCOMES, WHICH INCLUDE THINGS LIKE PREMATURE DEATH.

ADDICTION CONTRIBUTES TO BIG HORN COUNTY'S HEALTH WOES.

[SUBSTANCE ABUSE](#) WAS THE MOST-CITED HEALTH ISSUE IN A SURVEY OF COUNTY RESIDENTS BY THE BIG HORN HOSPITAL ASSOCIATION.

WHEN ASKED TO NAME THE MOST SERIOUS HEALTH ISSUES FACING THEIR COMMUNITY, 88 PERCENT OF RESPONDENTS SAID DRUGS AND ALCOHOL

STATEWIDE, THE NUMBER OF KIDS IN FOSTER CARE HAS [MORE THAN DOUBLED SINCE 2011](#), WITH A MAJORITY OF REMOVALS LINKED TO PARENTAL SUBSTANCE ABUSE.

TWO YEARS AGO, JAY HARRIS DECLARED [METHAMPHETAMINE](#) "PUBLIC ENEMY NUMBER ONE" AND PROCLAIMED METH USERS TO BE A MENACE TO SOCIETY.

THE METH ANNOUNCEMENT PASSED LARGELY UNNOTICED IN THE OUTSIDE WORLD.

BUT HARRIS'S SUBSEQUENT ANNOUNCEMENT QUICKLY ROCKETED FROM THE LOCAL PAPER TO INTERNATIONAL HEADLINES.

["MONTANA PROSECUTOR WANTS TO JAIL PREGNANT WOMEN WHO DRINK ALCOHOL"](#) SCREAMED THE HEADLINE IN THE BRITISH TABLOID *THE DAILY MAIL*.

THE BACKLASH WAS SWIFT.

A GROUP OF NATIONAL ORGANIZATIONS REPRESENTING OB-GYNS, PEDIATRICIANS, AND ADDICTION MEDICINE SPECIALISTS [ISSUED A STATEMENT](#) CONDEMNING HARRIS'S PLAN IN QUOTE "THE STRONGEST POSSIBLE TERMS."

THEY SAID: "THERE IS A STRONG CONSENSUS AMONG MEDICAL AND PUBLIC HEALTH ORGANIZATIONS THAT A PUNITIVE APPROACH DURING PREGNANCY IS INEFFECTIVE AND HARMFUL TO BOTH MOTHERS AND CHILDREN."

THE ACLU OF [MONTANA VOWED](#) TO CHALLENGE HARRIS'S POLICY IN COURT IF HE ATTEMPTED TO ENFORCE IT.

THE MONTANA ATTORNEY GENERAL'S OFFICE SAID THEY WEREN'T SURE IF HARRIS'S PLAN WAS EVEN LEGAL.

"I DON'T THINK WE'VE SEEN A COUNTY ATTORNEY TAKE THIS APPROACH IN THE STATE OF MONTANA," [A SPOKESMAN FOR MONTANA ATTORNEY GENERAL TIM FOX](#) TOLD THE BILLINGS GAZETTE.

THE SPOKESMAN EXPLAINED THAT IT, IF THE ACLU CHALLENGED HARRIS'S POLICY, IT WOULD BE UP TO A COURT TO DECIDE IF HARRIS HAS THE POWER TO DO THIS.

"BUT AS FAR AS THE LEGAL GROUNDS THAT MR. HARRIS HAS PROMULGATED THIS POLICY ON," HE SAID, "THEY'RE QUITE DUBIOUS."

I CALLED MAYLINN SMITH, A LAW PROFESSOR AT THE UNIVERSITY OF MONTANA, TO ASK ABOUT JAY HARRIS'S PROPOSAL. WAS IT UNUSUAL TO SEEK AN ORDER OF PROTECTION ON BEHALF OF A FETUS OR EMBRYO?

MAYLINN SMITH: Well, that's a very controversial issue. I will say that the showing has to be that there is immediate irreparable harm. And so it's a fairly high standard. I'm not gonna say it doesn't happen, but it's not common, I guess. That's not normally how you use restraining orders or protective orders.

I ASKED MAYLINN IF THE EFFECTS OF DRUG USE IN PREGNANCY ARE THE KIND OF HARM THAT, LEGALLY SPEAKING, WOULD QUALIFY FOR AN ORDER OF PROTECTION.

MAYLINN SMITH: There's nothing in the law that says you can do that. You're basically making an argument that ... where it gets tricky is, what is the status of a fetus? At what point do they have the same status as an individual and are recognized as an individual?

NANCY ROSENBLOOM IS DIRECTOR OF LEGAL ADVOCACY AT NATIONAL ADVOCATES FOR PREGNANT WOMEN, ALSO KNOWN AS NAPW.

NAPW IS A NON-PROFIT [DEDICATED](#) TO DEFENDING THE CIVIL RIGHTS OF PREGNANT AND PARENTING PEOPLE.

THE GROUP HAS BEEN AT THE [FOREFRONT OF OPPOSITION](#) TO HARRIS'S POLICY.

NAPW WAS ALSO INVOLVED IN A HIGH-PROFILE CASE IN RAVALLI COUNTY, MONTANA.

IN 2014, THE RAVALLI COUNTY ATTORNEY TRIED AND FAILED TO PROSECUTE A YOUNG WOMAN FOR [FELONY CHILD ENDANGERMENT](#) FOR USING METH WHILE PREGNANT:

NANCY ROSENBLOOM: That was a case in which a woman was 12 weeks pregnant. It was a criminal charge that was brought against her for allegedly using drugs. It was a charge of criminal child endangerment. Her defense lawyer did a terrific job and got the case dismissed. The trial court threw it out, saying there's just no probable cause to even pursue this case, because the law says someone has to endanger a child, another person who's already born. And the court found that a 12-week fetus was not part of that law, was not another person.

LINDSAY BEYERSTEIN: And does that have implications for what Jay Harris is trying to do?

NANCY ROSENBLOOM: Absolutely it does. It's relevant. I mean, criminal cases and civil cases are different, but it's exactly the same principle at work. The reason it's relevant is because civil orders of protection are usually obtained by someone who is a victim of violence or is at risk of violence. And the order is obtained by a petitioner against a respondent, somebody who the petitioner feels is endangering that person. So there has to be someone in danger of harm seeking the order. So the same concept underlies both things, that there's another person involved, a person who is already born who is asking for the protection of the court.

IN OTHER WORDS, AN ORDER OF PROTECTION IS SOMETHING THAT ONE PERSON CAN SEEK AGAINST ANOTHER.

OR, SOMETHING THAT A PROSECUTOR CAN SEEK ON BEHALF OF A PERSON...

HARRIS IS TRYING TO EXPAND THE CONCEPT OF PERSONHOOD TO INCLUDE FETUSES AND EMBRYOS.

ROSENBLOOM ADDS THAT HARRIS'S STATED GOAL IS TO "INCAPACITATE" PREGNANT SUBSTANCE USERS BY PROSECUTING THEM FOR CONTEMPT IF THEY DON'T COMPLY WITH THE ORDER TO ABSTAIN.

SO, THE GOAL IS INCARCERATION, EVEN IF THE ORDER IS SOUGHT THROUGH THE CIVIL SYSTEM.

SO HOW DID WE GET HERE? LET'S LOOK BACK AT THE HISTORY OF ATTEMPTS TO PUNISH SUBSTANCE USE IN PREGNANCY.

PROSECUTIONS FOR DRUG USE IN PREGNANCY BECAME A [SIGNIFICANT TREND](#) IN RESPONSE TO THE CRACK COCAINE BOOM OF THE MID-80S.

FROM THE START, THE MEDIA DEPICTED CRACK AS A SCOURGE OF POOR BLACK NEIGHBORHOODS THAT WAS THREATENING TO SPILL OVER INTO WHITE SUBURBS.

FROM 1984-1991, THE NEW YORK TIMES AND THE THREE MAJOR NETWORKS RAN [OVER TEN THOUSAND STORIES ABOUT THE DRUG ISSUE](#), IGNITING A FULL-FLEDGED MORAL PANIC.

THE MEDIA USED CODED LANGUAGE ABOUT QUOTE UNQUOTE "GHETTOS," "INNER CITIES," AND "URBAN" VICTIMS TO LABEL CRACK AS A BLACK PROBLEM.

IN 1989, WASHINGTON POST OPINION WRITER CHARLES KRAUTHAMMER [PROCLAIMED](#) THAT QUOTE "THE INNER-CITY CRACK EPIDEMIC IS NOW GIVING BIRTH TO THE NEWEST HORROR: A BIO-UNDERCLASS, A GENERATION OF PHYSICALLY DAMAGED COCAINE BABIES WHOSE BIOLOGICAL INFERIORITY IS STAMPED AT BIRTH..." KRAUTHAMMER GOES ON TO QUOTE DOUGLAS BESHAROV, THE FORMER DIRECTOR OF THE NATIONAL CENTER ON CHILD ABUSE, WHO FIRST COINED THE TERM BIO-UNDERCLASS SAYING: 'THIS PERMANENT BRAIN DAMAGE. WHETHER IT IS FIVE PERCENT OR 15 PERCENT OF THE BLACK COMMUNITY, IT IS THERE...' UNQUOTE

"MORE CRACK BABIES ARE BORN TO MORE UNWED YOUNG WOMEN," WROTE ABE ROSENTHAL IN THE NEW YORK TIMES IN 1991, ADDING THAT "THE BABIES WILL PAY FOREVER. SO WILL TAXPAYERS; DRUG ADDICTION IS ALREADY A GENERATION-TO-GENERATION HERITAGE. DRUG GANGSTERS STILL CASUALLY KILL EACH OTHER, WHICH WOULD BE FINE EXCEPT THAT THEY TAKE WITH THEM THOSE WHO HAPPEN TO WALK BY." UNQUOTE

DOROTHY ROBERTS IS A [PROFESSOR OF LAW, SOCIOLOGY, AND AFRICANA STUDIES AT UNIVERSITY OF PENNSYLVANIA, AND THE DIRECTOR OF THE PROGRAM ON RACE, SCIENCE AND SOCIETY](#), AND THE AUTHOR OF THE BOOK [KILLING THE BLACK BODY](#).

ROBERTS ARGUES THAT POLICIES LIKE HARRIS'S ARE PART OF A LARGER PATTERN THAT SHE CALLS PREGNANCY CRIMINALIZATION.

SHE USES THE PHRASE "CRIMINALIZATION OF PREGNANCY" TO DESCRIBE ALL THE WAYS THAT WOMEN ARE BEING PUNISHED FOR CONDUCT THAT NEVER WOULD HAVE BEEN PROSECUTED IF THEY HADN'T BEEN PREGNANT.

ROBERTS [ARGUES](#) THAT WE CANNOT UNDERSTAND THE RISE OF PREGNANCY CRIMINALIZATION WITHOUT UNDERSTANDING HOW SYSTEMIC RACISM DEVALUED BLACK WOMEN AND BLACK MOTHERHOOD.

SHE NOTES THAT THE POLICING OF BLACK WOMEN'S REPRODUCTION STRETCHES ALL THE WAY BACK TO THE DAYS OF SLAVERY.

BLACK WOMEN WERE FORCED TO BEAR CHILDREN FOR THEIR ENSLAVERS. THEY WERE ALSO CHARGED WITH THE CARE OF WHITE CHILDREN.

ROBERTS NOTES THAT BLACK WOMEN WERE ROUTINELY BLAMED FOR HIGH RATES OF INFANT MORTALITY IN THE SLAVE COMMUNITY.

THIS KIND OF SCAPEGOATING PERSISTS TO THE PRESENT DAY, ROBERTS ARGUES.

DOROTHY ROBERTS: The idea that black women are to blame for the disadvantaged status of their children is born out in a whole slew of policies and myths like the Black Welfare Queen. Or I could just say Welfare Queen because she was depicted always as a black woman who had children just to get a welfare check and cheat hardworking American taxpayers and then waste the money on her own supposedly luxurious lifestyle.

THE MOTHERS OF THESE SO-CALLED "CRACK BABIES" BECAME IDEAL SCAPEGOATS:

DOROTHY ROBERTS: The idea that crack use somehow caused the peculiar type of illness in Black children that affected not only their bodies but also their very social consciousness, was a huge myth based on shoddy research, research today that has actually looked at outcomes for these children shows that their outcomes are really no different than those of other children in their neighborhoods whose mothers didn't use drugs during pregnancy. We now know that what was attributed to crack cocaine is actually the result of all sorts of harms to Black children from the structural barriers they face in the neighborhoods in which they live.



THE CRACK SCARE SET THE STAGE FOR PUNITIVE RESPONSES TO DRUG ADDICTION.

CRACK-USING MOTHERS WERE DEPICTED AS DEFICIENT IN MATERNAL INSTINCT AND PRONE TO ABANDON THEIR CHILDREN.

THE PHRASE "[BOARDER BABY](#)" ENTERED THE PUBLIC LEXICON TO DESCRIBE CRACK-EXPOSED BABIES ABANDONED AT HOSPITALS.

THAT'S BOARDER BABY AS IN "BOARDING HOUSE," NOT AS IN FRONTIER.

THESE BABIES WERE OFTEN CITED AS EVIDENCE THAT CRACK-USING WOMEN WERE BAD MOTHERS WHO DESERVED TO BE PUNISHED.

ANALYSTS LIKE DOUGLAS BESHAROV OF THE AMERICAN ENTERPRISE INSTITUTE CLAIMED THAT CRACK-USING MOTHERS WERE SO DAMAGED THAT THEY COULDN'T BE REFORMED BY [TREATMENT](#).

HE SAID THE ONLY SOLUTION WAS FOR THE STATE TO TAKE THEIR CHILDREN AWAY.

ROBERTS CONTINUES...

DOROTHY ROBERTS: [A]nother place where we can see that racism has affected the way in which women's conduct is regulated is in the area of child welfare. There's a long history of state and federal child welfare agencies removing en masse, the children of women of color. In the case of Native Americans, for example, the federal government had a policy for decades of deliberately taking children away from their families in order to make them assimilate into dominant U.S. culture and even to decimate entire tribes, and there's also a grossly disproportionate amount of child removal in Black communities.

REPORTERS AND PUNDITS CLAIMED THAT CRACK EXPOSURE DURING PREGNANCY CAUSES HORRIFIC BIRTH DEFECTS AND LIFELONG INTELLECTUAL DISABILITIES.

ONE OF THE MOST ALARMING CLAIMS WAS THAT BABIES COULD LITERALLY BE BORN ADDICTED TO DRUGS AFTER BEING EXPOSED TO THEM IN THE WOMB.

BEFORE WE GO ANY FURTHER, LET'S TAKE A MOMENT TO TALK ABOUT THE SCIENCE OF DRUG USE IN PREGNANCY.

[DR. HENDRÉE JONES IS A PROFESSOR OF OBSTETRICS](#) AND GYNECOLOGY AT THE UNIVERSITY OF NORTH CAROLINA CHAPEL HILL WHO SPECIALIZES IN TREATING PREGNANT WOMEN WITH SUBSTANCE USE DISORDERS.

I ASKED HER IF IT WAS POSSIBLE FOR A BABY TO BE BORN ADDICTED TO DRUGS.

HENDREE JONES: Babies by definition cannot be born addicted to a substance, if you look at the definition of addiction that is a chronic health disorder that is defined by using substances in spite of ongoing adverse negative consequences. Like, physical health consequences, or putting yourself in harm's ways, while driving under the influence as an example.

So by definition babies can't, don't have that life experience to meet the definition of addiction. Babies can be born dependent, physically dependent on a substance, and they can go through a withdrawal, but they cannot be born addicted.

DRUG WITHDRAWAL SYMPTOMS IN NEWBORNS ARE [TREATABLE](#).

[AND NOT ALL EXPOSED BABIES](#) SUFFER FROM WITHDRAWAL SYMPTOMS.

JONES SAYS THAT THE EFFECTS OF PRENATAL DRUG EXPOSURE TEND TO BE A LOT MORE SUBTLE AND VARIABLE THAN MOST PEOPLE THINK.

HENDREE JONES: So, I think in the 1980's there was a massive rush to judgment to overly attribute all negative behavioral and physical outcomes of children born prenatally cocaine exposed, to that cocaine exposure. We know today that the prenatal effects of cocaine are much more subtle than were originally thought to be. That's not to say that children have no effects of prenatal cocaine exposure, but the prenatal cocaine exposure effects are much more subtle than what was originally thought when it first was identified.

MUCH THE SAME IS TRUE OF PRENATAL METHAMPHETAMINE EXPOSURE, JONES SAYS.

IT'S IMPOSSIBLE TO SEPARATE THE EFFECTS OF DRUG EXPOSURE FROM THE EFFECTS OF POVERTY.

SEVERAL EXPERTS WE SPOKE TO SAID CHILDREN WHO ARE EXPOSED TO DRUGS IN UTERO MAY HAVE SUBTLE DEFICITS ON NEUROPSYCHOLOGICAL TESTS.

BUT IF YOU CONTROL FOR SOCIOECONOMIC STATUS, THEY'RE NO WORSE OFF THAN THEIR DISADVANTAGED PEERS WHO WEREN'T EXPOSED TO DRUGS.

ONE THING IS FOR CERTAIN, THOUGH: PRENATAL CARE IS VITAL FOR ALL PREGNANCIES.

HENDREE JONES: Prenatal care is critical for all women and one of the things that we know is that even if women are not able to stop or reduce their substance use, the mere act of getting prenatal care regularly can improve birth outcomes and actually mitigate

some of the more negative outcomes that we see with women that don't have prenatal care and that continue to use drugs. For example, we can have babies born at healthier birth weight, babies that are born on time, babies that are born that don't have to go in the NICU just from getting prenatal care.

LINDSAY BEYERSTEIN: Even if they don't stop using drugs?

HENDREE JONES: Even if they do not stop using drugs.

I ASKED JONES IF PUNITIVE POLICIES LIKE THE ONE JAY HARRIS ANNOUNCED DISCOURAGE PATIENTS FROM SEEKING PRENATAL CARE:

HENDREE JONES: The fetal protection laws have, I think, been a deterrent for women seeking either prenatal care and/or substance use disorder treatment. And we certainly know that being incarcerated as a pregnant woman is not necessarily the most protective place or most beneficial place for herself, for her fetus and then of course what happens after delivery when that child is removed from her care which disrupts child maternal bonding, which can create a vulnerability for a whole cascade of other adverse childhood events.

SO NOW THAT WE'VE HEARD ABOUT THE RACIST ORIGINS OF PREGNANCY CRIMINALIZATION...

AND NOW THAT WE'VE DISPELLED SOME MISCONCEPTIONS ABOUT THE EFFECTS OF DRUG USE IN PREGNANCY...

LET'S CONTINUE WITH THE HISTORY...

[IN JULY OF 1989, JENNIFER CLARISE JOHNSON, A 23-YEAR-OLD BLACK WOMAN](#) WITH A CRACK ADDICTION, BECAME THE FIRST PERSON TO BE CRIMINALLY CONVICTED FOR EXPOSING HER CHILDREN TO DRUGS DURING PREGNANCY.

BY 1992, [OVER 150](#) U.S. WOMEN HAD FACED CRIMINAL CHARGES FOR ALLEGEDLY ENDANGERING THEIR OWN PREGNANCIES, TYPICALLY BY USING DRUGS.

THERE WERE STILL [NO LAWS ON THE BOOKS](#) THAT CRIMINALIZED DRUG USE IN PREGNANCY PER SE.

INSTEAD, SOME PROSECUTORS STARTED INTERPRETING EXISTING LAWS IN WAYS THEY'D NEVER BEEN USED BEFORE.

FOR EXAMPLE, SOME PROSECUTORS TRIED TO PROSECUTE PREGNANT DRUG-USERS UNDER CHILD ENDANGERMENT STATUTES. FETUSES COUNTED AS CHILDREN, THEY CLAIMED.

SOME EVEN TRIED TO STRETCH MURDER OR MANSLAUGHTER STATUTES IN THE SAME WAY, EXTENDING THE DEFINITION OF A VICTIM TO INCLUDE FETUSES.

JUDGES GENERALLY REJECTED THESE GAMBITS, BUT THE ATTEMPTS CONTINUED TO ACCELERATE.

BETWEEN 1973 AND 2005, AT LEAST [413 WOMEN](#) WERE ARRESTED FOR ALLEGEDLY HARMING OR ENDANGERING THEIR OWN PREGNANCIES, ACCORDING TO RESEARCH BY NAPW.

EVEN WITHOUT SPECIFIC LAWS AGAINST DRUG USE IN PREGNANCY, PROSECUTORS HAVE TRIED TO PROSECUTE WOMEN FOR DRUG USE DURING THEIR PREGNANCIES IN AT LEAST 45 STATES.

THESE ATTEMPTS USUALLY FAIL.

BECAUSE JUDGES HAVE BEEN RELUCTANT TO REDEFINE CONCEPTS LIKE “CHILD” TO INCLUDE FETUSES AND EMBRYOS.

THE TWO NOTABLE EXCEPTIONS ARE ALABAMA AND SOUTH CAROLINA.

THE HIGH COURTS OF THESE STATES HAVE AGREED WITH PROSECUTORS WHO ARGUED THAT LAWS AGAINST “CHILD ENDANGERMENT” AND “CHEMICAL ENDANGERMENT OF A CHILD” APPLY TO FETUSES.

AS A RESULT, [AT LEAST 479](#) PEOPLE HAVE BEEN ARRESTED IN ALABAMA ALONE FOR DRUG USE DURING PREGNANCY.

IN 2014, TENNESSEE BECAME THE FIRST STATE TO PASS A SHORT-LIVED LAW THAT CRIMINALIZED DRUG USE BY PREGNANT PEOPLE EXPLICITLY.

THAT LAW WAS ALLOWED TO EXPIRE IN 2016, [DUE IN PART TO](#) CONCERNS THAT IT WAS DISCOURAGING PRENATAL CARE AND INCENTIVIZING ABORTION.

SO FAR, WE’VE BEEN TALKING ABOUT PROSECUTORS TRYING TO REDEFINE THE WORD “CHILD” TO MEAN FETUS OR EMBRYO IN THE CRIMINAL LAW.

MEANWHILE, BACK IN BIG HORN COUNTY, JAY HARRIS IS ATTEMPTING A SIMILAR REDEFINITION WITHIN CIVIL LAW.

AS MAYLINN SMITH AND NANCY ROSENBLOOM EXPLAINED, A PROTECTIVE ORDER A LEGAL TOOL THAT A *PERSON* CAN REQUEST FOR THEMSELVES.

OR SOMETHING A THIRD PARTY CAN SEEK ON BEHALF OF A *MINOR* WHO CAN'T ASK FOR THEMSELVES.

HARRIS WANTS TO STRETCH THE DEFINITION OF "PERSON" OR "MINOR" TO INCLUDE FETUSES AND EMBRYOS.

LEGALLY, HARRIS'S PROPOSAL MOST CLOSELY RESEMBLES SO-CALLED CIVIL COMMITMENT LAWS.

DRUG USE IN PREGNANCY IS GROUNDS FOR CIVIL COMMITMENT OR INVOLUNTARY CONFINEMENT TO A DRUG TREATMENT FACILITY IN AT LEAST THREE STATES.

OPPOSITION TO JAY HARRIS'S PLAN WAS BREWING IN HIS OWN BACKYARD.

JAY'S FORMER BAND TEACHER, DAVID GRABER, AND A GROUP OF HARM REDUCTION ACTIVISTS IN BIG HORN COUNTY REACHED OUT TO JAY TO TRY AND CHANGE HIS MIND.

DAVID GRABER IS OFTEN DESCRIBED AS A RENAISSANCE MAN BY HIS MANY FRIENDS, NEIGHBORS, COLLEAGUES, AND FORMER STUDENTS. HE'S A FORMER MUSIC TEACHER, A FARMER, A PIANO TUNER, A COMMUNITY ACTIVIST, AND EXPERT ON THE EFFECTS OF [CHILDHOOD TRAUMA](#).

I ASKED HIM WHAT HE THOUGHT WHEN HE FIRST READ JAY'S PROCLAMATION IN THE BIG HORN COUNTY NEWS

DAVID GRABER: I remember being in a quandary, in a puzzlement, because I know Jay to be a compassionate, honest, caring person. And then my first thought was, uh, yeah, I, I can remember this now. Who was he talking to that led him down this kind of a "Justice Issue" path to deal with what's really a, a very much a private family concern?

DAVID BELIEVES THAT JAY'S EMPHASIS ON THE LEGAL PUNISHMENT IS NOT WHAT VULNERABLE WOMEN NEED TO GET OFF TO THE BEST START WITH THEIR BABIES. THAT'S WHY HE'S WORKING TO EXPAND COMMUNITY-BASED TREATMENT OPTIONS IN BIG HORN COUNTY.

WE DECIDED TO DIG DEEPER INTO THE STORY... WHAT IMPACT WAS HARRIS'S ANNOUNCEMENT HAVING ON PREGNANT PEOPLE AND THEIR HEALTH CARE PROVIDERS?

I WONDERED IF MIDWIVES IN BIG HORN COUNTY WERE FEELING THE IMPACT OF JAY HARRIS'S ANNOUNCEMENT.

MIDWIVES ARE EXPERTS IN [PREGNANCY AND CHILDBIRTH](#).

THEY ARE ON THE FRONT LINES OF PRIMARY CARE AND THEY HAVE [A LONG HISTORY](#) OF CARING FOR UNDERSERVED WOMEN.

I REACHED OUT TO A PROFESSIONAL ORGANIZATION FOR MIDWIVES.

A MIDWIFE NAMED HONEY NEWTON PUT ME IN CONTACT WITH ALLISON CONTI, A NURSE MIDWIFE.

IN 2014, ALLISON TRAINED ON THE FORT PECK RESERVATION, A REMOTE AREA NESTLED IN THE NORTHEAST CORNER OF MONTANA.

SPECIFICALLY, ALLISON [TRAINED AT](#) NORTHEAST MONTANA HEALTH SERVICES, A NON-PROFIT THAT OPERATES TWO HOSPITALS ON THE FORT PECK RESERVATION.

I WAS ASTONISHED BY WHAT SHE TOLD ME NEXT!

ALLISON SAID SHE WAS FORCED TO DRUG TEST PREGNANT WOMEN WITHOUT THEIR CONSENT, AND THOSE WOMEN WERE PROSECUTED.

THE AUDIO QUALITY IN THIS CLIP IS NOT GREAT. YOU CAN HEAR ME TYPING FURIOUSLY IN THE BACKGROUND, BECAUSE, FRANKLY, I DIDN'T EXPECT TO HEAR ANY OF THIS!

ALLISON CONTI: I was at a site in northeast Montana that was an Assiniboine Sioux re reservation called the Fort Peck Reservation. And we were drug screening people without consent, without even telling them that we were drug screening them, and then we would like ... One of the midwives I was under, she would report people to the police and sometimes they would be jailed. And I was just appalled.

I was like, 'There's no way this can be legal. It for sure feels wrong ethically.' And so I kind of dove into this subject and I just read as much as I can. And I ended up writing my master's project about it and sure enough found that the most important thing with women who are substance using, whether it's amphetamines, opiates, alcohol, is just to get them into prenatal care and establish a relationship.

WHEN WE SPOKE, ALLISON WAS WORKING AS A MIDWIFE IN ANOTHER PART OF MONTANA, BUT SHE'D ALREADY HEARD OF WHAT WAS GOING ON IN BIG HORN COUNTY...

ALLISON CONTI: Now I understand that Big Horn, I saw on Facebook of all places, that Big Horn County is trying to jail substance using women, which is exactly what they tried to do up in northeast Montana at the Fort Peck Reservation I was at before. And it was, like, a massive failure.

THIS WAS NEW INFORMATION! THIS WAS FIRST-HAND CONFIRMATION THAT WOMEN HAD BEEN LOCKED UP FOR SUBSTANCE USE IN PREGNANCY AS RECENTLY AS 2014.

I ASKED ALLISON WHAT HAD HAPPENED IN FORT PECK WHEN THE HOSPITAL STARTED TESTING WOMEN FOR DRUGS:

ALLISON CONTI: People stopped coming to prenatal care. We had like over 50 percent no-show rate. [...] And I think we had a positive reputation in the community but once the midwives basically started playing policeman and you didn't know if you were being drug tested, maybe all of a sudden the police would come pick you up. And sometimes the midwives would go to testify against patients in tribal court.

I mean it was so, this was before I was licensed and while I was in school, if I didn't say that before. So again, I was just, the whole thing just really struck me as wrong. And so basically I did my project and then I presented it to two midwives. One was very pro, "We need to jail these women," and wasn't really open to new ideas and the other one was like, "What do we do? This problem's overwhelming. If this is what the research is saying that you're presenting us with let's try to do this." So it was consent with the drug testing and verbal screening rather than the urine screening was the thing, the direction that we ended up moving in. So we did stop urine drug screening while I was there which was good 'cause I couldn't order that on my patients without telling them. I just couldn't do that.

IT WASN'T CLEAR TO ME WHETHER THE FORT PECK RESERVATION WAS STILL CRIMINALIZING DRUG USE IN PREGNANCY IN 2018.

SO, I DECIDED TO START WITH THE PUBLIC DEFENDER'S OFFICE.

RESEARCH SHOWS THAT WOMEN WHO ARE AFFECTED BY THESE KINDS OF LAWS TEND TO BE [POOR](#).

THIS FITS WITH MY EXPERIENCE REPORTING ON TENNESSEE'S SHORT-LIVED FETAL ASSAULT LAW.

PUBLIC DEFENDERS REPRESENT SOME OF THE MOST VULNERABLE PEOPLE IN SOCIETY. SO, THEY'RE OFTEN GOOD SOURCES OF INFORMATION ON LAWS THAT AFFECT POOR PEOPLE.

I CALLED UP THE PUBLIC DEFENDER'S OFFICE AT THE FORT PECK TRIBAL COURT TO FIND OUT WHETHER PREGNANT WOMEN WERE STILL BEING LOCKED UP FOR USING DRUGS.

I WAS IN FOR AN EVEN BIGGER SURPRISE...

RECEPTIONIST: Public Defender's Office...

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