

# **Year 2000 Overview**

## **Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs**

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# Organizations:

The **Women's Law Project** is a nonprofit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, the **Law Project** works to advance the legal, economic, and health status of women and their families through litigation, public policy development, and education. The **Law Project** has served as counsel in a number of cases involving the punishment of pregnant women and new mothers who have given birth while suffering from untreated addictions to alcohol or other drugs. Through numerous initiatives, the **Law Project** also works to improve and expand treatment services for pregnant and parenting women and their children who are affected by drug and alcohol use.

The **National Advocates for Pregnant Women (NAPW)** is an organization dedicated to protecting the rights of pregnant and parenting women and their children. **NAPW** seeks to ensure that women are not punished for pregnancy and addiction and that families are not needlessly separated based on medical and public health misinformation. Pregnancy and addiction should be treated as public health issues not criminal justice issues. For more information, visit our web page at <http://www.napw.net>.

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Dear Reader:

This Overview surveys civil and criminal laws directly addressing pregnant women's use of alcohol and other drugs. It reveals a patchwork of policies, some oriented toward treatment, some purportedly focused on child protection, some frankly punitive. If there has been any trend in the law in this area, it is that states have generally chosen treatment, education, and prevention over criminal sanctions, regarding drug use during pregnancy as a public health problem rather than a crime. At the same time, there has been a clear trend toward defining civil child abuse to include conduct during pregnancy that affects fetuses, specifically treating children who as fetuses were exposed to alcohol and other drugs as neglected or abused within the civil child welfare system. This approach can be highly punitive for both the mother and the child as it can lead to unnecessary removals of the children, depriving them in many cases of the opportunity to bond and live with mothers who are in fact very capable of parenting.

Considering that much of the policies in this area first arose out of the media-fueled "crack baby" hysteria of the late 1980s, it is remarkable that most states have steered clear of a criminally punitive response to pregnant women's use of alcohol or other drugs. Listening to the wisdom of drug and alcohol counselors, medical professionals, researchers, social workers, and the women themselves, states have instead adopted a variety of strategies aimed at eliminating barriers to treatment, ranging from modestly expanding treatment opportunities for women with children to prohibiting pregnancy discrimination by treatment providers. Strategies that would have criminally punished pregnant women for seeking help for their addiction have—with a few notorious exceptions—been defeated.

This restrained policymaking is cause for hope, but not celebration. This issue is volatile and, as South Carolina and Wisconsin prove, can still be lost. More to the point, simply avoiding punitive actions against women, some of whom are suffering as a result of untreated addictions, is plainly not enough. While throwing them in jail or treating any evidence of drug use as a basis for presuming an inability to parent are not the answers, neither is ignoring the abysmal lack of access to treatment that has characterized the nation's policy toward women with addictions. Replacing anti-drug hysteria and totalitarian policing of pregnant women with an informed and compassionate concern for women's well-being before, during, and after pregnancy will require resources and a national commitment to developing a system of care that works for women with a variety of needs. Such a new approach would draw on the best of our developing knowledge about the dynamics of addiction, the physical and sexual abuse many of the women have experienced, the intersection of racism and poverty, the shortcomings of our public health system, and the ways in which women's reproductive choices are stigmatized and second-guessed by a culture still confined by gender stereotypes. Such a new approach would honor women's choices about childbearing and devote serious attention to treating the disease of addiction—not simply for the sake of promoting healthy pregnancies, but out of concern for the women themselves.

We hope to hear from you with feedback on this Overview and with news about developments in your state. Also, if you can, please take the time to complete the questionnaire at the end of this Overview. Your responses will help us better understand how the laws detailed in this Overview are affecting the lives of women. Thank you.

Sincerely,

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## I. INTRODUCTION

Throughout the 1980s and into the 1990s, the media gave extraordinary coverage to the war on drugs.<sup>1</sup> News reports were typically presented in extremely alarmist terms, reporting crack as “‘a plague’ that was ‘eating away at the fabric of America.’”<sup>2</sup> Such claims were routinely made despite the lack of evidence to support them.<sup>3</sup>

Unsupported and misleading stories highlighting the effects of prenatal exposure to cocaine received widespread coverage.<sup>4</sup> These sensational and often inaccurate news reports convinced many that the use of cocaine during pregnancy inevitably caused significant and irreparable damage to the developing fetus.<sup>5</sup> Today, dozens of carefully constructed studies establish that the impact of cocaine on the developing fetus has been greatly exaggerated and that other factors are responsible for many of the ills previously attributed to pregnant women’s use of cocaine.<sup>6</sup>

Indeed, a 1999 study found that poverty has a greater impact than cocaine on a child’s developing brain. According to the study’s lead author, “[a] decade ago, the cocaine-exposed child was stereotyped as being neurologically crippled—trembling in a corner and irreparably damaged. But this is unequivocally not the case. And furthermore, the inner-city child who has had no drug exposure at all is doing no better than the child labeled a ‘crack-baby.’”<sup>7</sup>

Nevertheless, spurred on by the media barrage concerning pregnant women and drugs,<sup>8</sup> legislators in the mid 1980s began introducing numerous legislative proposals addressing the subject.<sup>9</sup> Proposed legislation ranged from bills that would increase services and treatment to pregnant women and their children to ones that would create new criminal penalties for drug using pregnant women. Sterilization or forced Norplant implantation also surfaced as proposed solutions to the problems of substance use and pregnancy.<sup>10</sup>

During the late 1980s and 1990s, legislatures rejected the most punitive approaches. For example, in 1990, thirty-four states debated bills relating to prenatal exposure to drugs.<sup>11</sup> Of those, fourteen states passed bills designed to help pregnant women through preventive

and educational programs, six states established studies to determine the extent of the problem, and eight states considered but failed to pass legislation that would make it a crime to be addicted and be pregnant.<sup>12</sup>

Currently, no state legislature has passed a law specifically criminalizing drug use during pregnancy or mandating sterilization of addicted women.<sup>13</sup> Despite repeated attempts to pass such legislation, strong opposition by leading medical and public health groups has played a significant role in dissuading legislators from taking such action. These organizations, such as the American Medical Association,<sup>14</sup> the American Academy of Pediatrics,<sup>15</sup> the American Public Health Association,<sup>16</sup> the American Nurses Association,<sup>17</sup> the American Society on Addiction Medicine,<sup>18</sup> and the March of Dimes,<sup>19</sup> have opposed the prosecution of substance-using pregnant women in part because of the expectation that such prosecutions would deter women from obtaining necessary health care and would thus cause harm to both maternal and fetal health.

While bills proposing criminal penalties have failed, eighteen states have amended their civil child welfare laws to address the subject of a woman’s drug use during pregnancy.

While bills proposing criminal penalties have failed, eighteen states have amended their civil child welfare laws to address the subject of a woman’s drug use during pregnancy.<sup>20</sup> These laws vary considerably: in some states

a pregnant woman’s drug use is supposed to trigger only an evaluation of parenting ability and the provision of services, whereas in others it provides the basis for presuming neglect or qualifies as a factor to be considered in terminating parental rights.

For example, in South Carolina, a newborn child is presumed to be neglected and “cannot be protected from further harm without being removed from the custody of the mother” if there is a positive toxicology test of either the mother or the child at birth that indicates the presence of any amount of a controlled substance.<sup>21</sup> By contrast, California law mandates that “any indication of maternal substance abuse shall lead to an assessment of the needs of the mother and child” but specifically clarifies that “a positive toxicology screen at the time of the delivery of an infant is *not* in and of itself a sufficient basis for reporting child abuse or neglect.”<sup>22</sup> Reports may be made only where there are “other factors . . . present that indicate risk to a child.”<sup>23</sup> If a report is filed and “relates solely to the inability of the parent to

provide the child with regular care due to the parent's substance abuse," the report "shall be made only to county welfare departments and not to law enforcement agencies."<sup>24</sup>

The states also vary in what evidence of drug use or exposure is required to bring a fetus or child within the reach of the child welfare system. Some states, such as South Carolina, rely on a positive drug test;<sup>25</sup> others, such as Florida, mandate reporting newborns who are "demonstrably adversely affected" by prenatal drug exposure;<sup>26</sup> still others, such as Texas, rely on terms such as born "addicted" to an illegal substance.<sup>27</sup> Some states combine these factors.

Another variation found in the statutes is which substances are covered. Most states focus only on drugs defined to be illegal. Even then, some states appear to limit which illegal drugs are covered. For example, Maryland's civil child welfare statute creates a presumption that a child is not receiving ordinary and proper attention if the "child was born addicted to or dependent on cocaine, heroin, or a derivative thereof," thus implicitly excluding marijuana from the statute's coverage.<sup>28</sup> In addition, several states also include fetal alcohol syndrome or evidence of the pregnant woman's alcohol use in their definitions of neglected children.<sup>29</sup>

Although it is clear that drug tests performed on newborns reveal information about the mother, some states also specifically mandate reporting or testing of women while they are still pregnant. Minnesota's child abuse statute defines neglect to include a positive toxicology test of the mother at delivery<sup>30</sup> and thus mandates reporting a positive drug test on the pregnant woman.<sup>31</sup> Wisconsin similarly defines child abuse to include a woman's "habitual" drug or alcohol use at any point in her pregnancy.<sup>32</sup> And, in South Carolina, drug tests on the woman herself may be the basis for a presumption of child neglect.<sup>33</sup> In addition, as a result of a judicial decision, the state's mandatory criminal child abuse reporting statute has been interpreted to require reporting of a pregnant woman's actions that may endanger a viable fetus.<sup>34</sup> In three states, the testing or screening for prenatal drug exposure is itself mandatory in some circumstances.<sup>35</sup>

Some states have passed measures that prohibit discrimination against pregnant women seeking drug treatment, removed barriers to methadone treatment for pregnant women, and ensured that pregnant women in certain health maintenance organizations can receive substance abuse treatment.

In some states that have not amended their laws, government officials have, by regulation or practice, extended existing civil child abuse laws to pregnant women despite the lack of legislative intent or specific authority to do so.<sup>36</sup> For example, for a period of time in the 1980s, New York City, as a matter of policy, began reporting and treating as abused all newborns that tested positive for illegal drugs.<sup>37</sup> The costly policy was eventually stopped when it became apparent that it was not consistent with existing state legislation and was instead filling hospital nurseries with healthy infants and overwhelming an already overburdened child protective system with unnecessary referrals.<sup>38</sup> Similarly, from

March 1997 to August 1998, child welfare administrators in Sacramento, California, responding to a series of newspaper articles, drastically changed their child welfare policy and removed more than 7,000 children from their families based on evidence of past parental drug use. Many of

those families affected included women who had used drugs while pregnant.<sup>39</sup>

Individual legal cases in which judges are called upon to interpret already existing law also affect statewide policy. In some instances, states have sought to remove a child from his or her mother's custody based on the mother's drug use during pregnancy. Legal challenges to such actions have forced courts to decide whether existing child neglect laws can be expanded to include pregnant women and fetuses. The two state supreme courts that have addressed this issue in the absence of legislative change have refused to treat women who used drugs while pregnant as presumptively neglectful.<sup>40</sup> Another state supreme court, however, has held, despite the lack of legislative action, that a newborn's "addiction and symptoms of withdrawal" at birth *along with* the mother's continuing failure to provide care satisfies one prong of a four prong test to terminate parental rights.<sup>41</sup>

Although many states already have special provisions for the civil commitment of drug users, two states have amended their laws to authorize the civil commitment of a woman who uses drugs during her pregnancy,<sup>42</sup> and another state permits civil detention of such a woman.<sup>43</sup> Constitutional requirements for civil commitment require at least clear and convincing evidence that an

individual is mentally ill and dangerous to herself or others before she may be committed to a treatment facility for some period of time.<sup>44</sup> Accordingly, efforts to civilly commit pregnant drug users have been based on the claim that a woman is a danger to another person—the fetus.<sup>45</sup> At least one court, however, has rejected the interpretation of the word “other” to include the fetus, finding that to commit a woman “solely because she is, in the state’s view, a danger to her fetus” violates the woman’s rights to liberty and equal protection.<sup>46</sup>

Many states have taken non-punitive steps to improve their understanding of the problem and to increase access to information and treatment. For example, some states have created task forces to study the problem of substance abuse and pregnancy,<sup>47</sup> established treatment programs or coordinated services,<sup>48</sup> given pregnant women priority access to treatment,<sup>49</sup> encouraged health care practitioners to identify substance-abusing pregnant women and to refer them to treatment,<sup>50</sup> or mandated increased education—for the public and medical providers—on substance abuse and pregnancy.<sup>51</sup> Some states have also passed measures that prohibit discrimination against pregnant women seeking drug treatment,<sup>52</sup> removed barriers to methadone treatment for pregnant women,<sup>53</sup> ensured that pregnant women in certain health maintenance organizations can receive substance abuse treatment,<sup>54</sup> and enhanced criminal penalties for people who sell or give drugs to pregnant women.<sup>55</sup> Many states, as part of prevention and education efforts, have also passed laws requiring places that sell alcoholic beverages to post warnings about fetal alcohol syndrome and fetal alcohol effect directed at pregnant women who drink.<sup>56</sup>

A very recent trend affecting pregnant women who use drugs is the adoption of some form of “Drug Dealer Liability Act.” Under the typical statute, the legislature creates a cause of action allowing any “individual who was exposed to an illegal drug in utero” to “bring an action for damages caused by use of an illegal drug by an individual.”<sup>57</sup> The statutes typically enumerate against whom such an action can be brought, a list that includes the distributor or marketer of the illegal drug, but not the mother of the newborn.<sup>58</sup>

Trends in drug policy at all levels also have a significant impact on pregnant women. American drug policy in general is “based on prohibition and the vigorous application of criminal sanctions for the use and sale of illicit drugs.”<sup>59</sup> As a result, today “[m]ore than 400,000 people are behind bars for drug crimes—and nearly a third of them are locked up for simply possessing an illicit drug.”<sup>60</sup>

This approach has had a major impact on mothers. As a report from Amnesty International summarized, “[m]ore than 80,000 women in prisons and jails are mothers of children under 18; they have about 200,000 children aged under 18.”<sup>61</sup> Furthermore, “[m]any women enter jail and prison pregnant. In 1997-98, more than 2,200 pregnant women were imprisoned and more than 1,300 babies were born in prisons.”<sup>62</sup>

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Beyond state law, there are numerous federal statutes that directly and indirectly address the issue of drug-using pregnant women. Most federal statutes addressing the issue directly do so by providing grant money for organizations that assist drug-

using pregnant women in some way.<sup>63</sup> Congress has also focused on fetal alcohol syndrome by creating programs whereby the Secretary of the Interior addresses fetal alcohol syndrome through the Bureau of Indian Affairs<sup>64</sup> and by creating the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect.<sup>65</sup>

Other federal statutes also affect drug-using pregnant women. As a recent report explains:

[The 1996 welfare law] creating the Temporary Assistance for Needy Families program <sup>[66]</sup> contains three specific provisions that will have particular impact on applicants and recipients with history of alcohol and drug problems. . . . Section 115<sup>[67]</sup> makes individuals with drug felony convictions ineligible for TANF and food stamps—unless the state enacts legislation to opt out of or modify the ban. . . . Section 408(a)(9),<sup>[68]</sup> 821,<sup>[69]</sup> 202,<sup>[70]</sup> and 903<sup>[71]</sup> (respectively) make individuals in violation of a condition of their parole or probation ineligible for TANF, food stamps, Supplemental Security Income (SSI), and public housing, leaving open the possibility that a drug relapse will constitute a violation. . .

Section 902<sup>[72]</sup> authorizes but does not require states to test welfare recipients for illegal drug use and sanctions those who test positive.<sup>73</sup>

Each of these provisions could have serious consequences for women—including pregnant women who use drugs:

Without welfare and food stamps, some women and children would not be able to afford basic living necessities, including food, shelter, and health care. Each of these provisions also has the potential to reduce available funding for alcohol and drug treatment for women on welfare and their families. Alcohol and drug treatment programs, particularly residential programs, have historically used a family's welfare and food stamps to help fund services. If these funds are no longer available, programs could be forced to reduce services or close if they cannot offset losses.<sup>74</sup>

Another federal statute affecting drug-using women is the Adoption and Safe Families Act.<sup>75</sup> This act, intended to promote the adoption of children in foster care, creates a twelve-month time frame for making decisions about a child's permanent placement<sup>76</sup> and a fifteen-month time frame for petitioning for termination of parental rights.<sup>77</sup> These time frames, however, are difficult to reconcile with the time pregnant women and new parents need to address addiction and substance abuse problems. As a report on this act noted:

Services in some communities may be inadequate—nonexistent, inaccessible, or with long waiting lists—thus preventing parents from getting the help they need to make sufficient progress within the time frame. Also, the nature of the condition may require longer term treatment, and for those suffering from a drug or alcohol addiction, treatment and recovery may require ongoing support services and include periods of relapse.<sup>78</sup>

To a large extent, as discussed above, legislative action has occurred in response to the extensive media attention given to the issue of pregnant drug using women. Because it touches on such highly controversial matters as drugs and the politics of abortion,<sup>79</sup> this issue will likely remain a subject of ongoing legislative proposals and battles.<sup>80</sup> The entire catalog of statutes and regulations directly addressing this issue is included in

this Overview. Below is a more detailed discussion of the trends in recent criminal and child dependency laws.

## II. DISCUSSION

A large portion of the statutes and regulations described above take punitive approaches toward drug using pregnant women. Whether through the civil child welfare system or the criminal child abuse laws, punitive approaches raise troubling public health, reproductive rights, and drug policy issues.

### A. CIVIL CHILD NEGLECT AND DEPENDENCY LAWS

Child welfare experts agree that the purpose of civil child welfare laws is to protect children from future harm and not to punish parents for past wrongdoing.<sup>81</sup> Nevertheless, as a response to the media-created crisis of drug using pregnant women, many legislatures have revised civil child welfare laws by defining civil child neglect or abuse as including using drugs during pregnancy. This approach seems to have been based more on a desire to punish than on any reliable evidence that such use was in fact causing harm or was a reliable predictor of future harm. Indeed, states that have adopted such laws appear to have based their decisions on a series of unfounded assumptions analyzed below. Significantly, it appears that no state that has defined drug use during pregnancy as civil child neglect has engaged in any systematic study to determine the effects of the new law, such as the cost of testing or the degree to which foster care and other child welfare interventions have occurred.

#### 1. Assumption: *All drug-exposed children are seriously damaged at birth.*

In a preamble to legislation including drug-exposed newborns in its child welfare statute, the Illinois legislature stated: “the abuse of cannabis and controlled substances . . . causes death or severe and often irreversible injuries to newborn children.”<sup>82</sup> Such a broad and alarmist statement would be hard to support in the scientific literature, yet it reflects many assumptions underlying similar legislation across the country.

It is certainly true that some newborns exposed prenatally to some drugs do suffer adverse short- or long-term consequences—as do infants whose mothers lacked

access to quality prenatal care and adequate nutrition, smoked or drank while pregnant, or used fertility-enhancing medications that cause multiple births associated with prematurity and other life-threatening hazards.<sup>83</sup> But as experts in the field have noted, “the public outcry for the punishment of substance-using mothers and the disenfranchisement of their children as [an] unsalvageable almost demonic ‘biologic underclass’ rests not on scientific findings but upon media hysteria fueled by selected anecdotes.”<sup>84</sup> As discussed above, careful research has clarified that children exposed to cocaine may not be harmed and that cocaine is but one of a number of potentially harmful substances that may affect pregnancy outcome.<sup>85</sup> Indeed, healthy children born to women with drug problems may face a different threat of harm: stigma based on myths perpetuated by media coverage.<sup>86</sup>

**2. Assumption: *Women who use drugs could simply stop, and failure to do so indicates disregard for the future child’s well-being.***

Legislators often act based on an incorrect understanding of the nature of drug use and addiction. Some women who use drugs during pregnancy are not addicted and may, like some people who drink alcohol or smoke cigarettes, use drugs only on an occasional basis.<sup>87</sup> Other women, however, may be addicted. As the United States Supreme Court<sup>88</sup> and the health community<sup>89</sup> have long recognized, drug addiction is an illness that generally cannot be overcome without treatment. The American Medical Association has unequivocally stated that “it is clear that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors. It is properly viewed as a disease, and one that physicians can help many individuals control and overcome.”<sup>90</sup>

Many legislators nevertheless view drug use and addiction as a moral failing for which there should be “zero tolerance.” The zero tolerance approach, however, is in sharp contrast to the public health approach also known as “harm reduction.”<sup>91</sup> This approach recognizes that “overcoming drug addiction is usually a difficult and gradual process.”<sup>92</sup> It favors “providing drug abusers

with information and assistance that can help them reduce drug consumption and minimize the risks associated with their continuing drug use.”<sup>93</sup> Harm reduction emphasizes “drug treatment over imprisonment and favor[s] broadening drug treatment to include non-abstinence-based models.”<sup>94</sup>

“the public outcry for the punishment of substance-using mothers . . . rests not on scientific findings but upon media hysteria fueled by selected anecdotes.”

Understanding the nature of addiction and the reasons why pregnant women become addicted provides a good foundation for developing policies that will in fact improve the health and lives of women

and children. Fortunately, an increasing amount of information is now available about the particular problems faced by pregnant and parenting women who suffer from drug and alcohol addiction and how those problems impact attempts to recover from addiction. For example, research has found that many drug-using women were sexually abused as children or are currently being abused.<sup>95</sup> 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.<sup>96</sup> Treatment that does not address these underlying traumas often fails.<sup>97</sup> Similarly, pregnant women often have family responsibilities that make it difficult for them to go to programs that were designed for men and that do not provide childcare and other supportive services.<sup>98</sup> The federal government’s Center for Substance Abuse Treatment provides well-developed guidelines and protocols for effectively treating pregnant and parenting drug-using women.<sup>99</sup>

As the California Medical Association found:

Prenatal substance abuse by an addicted mother does not reflect willful maltreatment of a fetus, nor is it necessarily evidence that the mother will abuse her child after birth. A woman with a substance abuse problem may genuinely desire to terminate the use of such substances prenatally but may be unable, without access to substance abuse treatment programs, to act on her desire.<sup>100</sup>

Treatment for drug addiction works and is cost-effective.<sup>101</sup> Research shows that comprehensive treatment programs that do not separate mothers from their children help women and their families.<sup>102</sup> They are also cost-effective, especially when one compares

their price tag to the staggering financial and social costs of separating mother and child.<sup>103</sup> Indeed, New York City's experience with Family Rehabilitation Programs proves this point well. This program, launched in 1989 to prevent dissolution of those families at highest risk for foster care placement by combining family-aimed drug treatment services with close child safety monitoring and other social services, demonstrated significant success.<sup>104</sup> Despite the success, the drug treatment component of the program has struggled for survival, facing a near total cut in municipal funding in 1995.<sup>105</sup>

Despite the proven efficacy of treatment programs and notable attempts to improve access to treatment, the lack of adequate treatment for women is a significant and ongoing problem that has been well documented by a variety of measures.<sup>106</sup> In fact, numerous state commissions have found that their states have inadequate services.<sup>107</sup> Although on a national level funding for women's treatment improved in the 1980s, it decreased again in the early 1990s.<sup>108</sup> "Federal categorical programs targeted at pregnant and parenting women have been phased out of the budget of the Center for Substance Abuse Treatment. Funding will end this fiscal year for the majority of grantees."<sup>109</sup>

Along with the lack of adequate treatment programs, pregnant women face other barriers to care and recovery. If they seek help for the abuse in their lives, they are likely to find that shelters do not accept women with drug problems.<sup>110</sup> If they seek reproductive health services, they may find that abortion services are unavailable or unfunded or that they cannot access prenatal care services without risking loss of custody of their children.<sup>111</sup>

Despite all of these obstacles, pregnant women often do try to take responsibility for their drug use and life circumstances, making efforts, for example, to stop or reduce their drug use and to improve their own health for the sake of the pregnancy.<sup>112</sup>

### **3. Assumption: *A woman's use of drugs while pregnant indicates that she would be unable to care for her child once born.***

A common misconception is that drug use during pregnancy means that a woman will neglect or abuse her child after birth. However, a single positive drug test cannot determine whether a person occasionally uses a drug, is addicted, or suffers any physical or emotional disability from that addiction. It does not identify the amount of alcohol or drugs the woman ingested during pregnancy nor the frequency of use. Most importantly, a single drug test simply is not predictive of a person's parenting ability.

In fact, Susan C. Boyd, in her recent book *Mothers and Illicit Drugs: Transcending the Myths*, found no significant difference in childrearing practices between addicted and non-addicted mothers.<sup>113</sup> A 1994 study focusing solely on cocaine-using mothers came to the same

conclusion: mothers who use cocaine have been found to look after and care adequately for their children.<sup>114</sup> A book produced by the Foster Care Project of the American Bar Association observes that "many people in our society suffer from drug or alcohol dependence yet remain fit to care for a child. An alcohol or drug dependent parent becomes unfit only if the dependency results in mistreatment of the child, or in a failure to provide the ordinary care required for all children."<sup>115</sup> The National Council of Juvenile and Family Court Judges agrees: "Juvenile and family court proceedings are not necessary, and probably not desirable, in most situations involving substance-exposed infants."<sup>116</sup>

Of course, as with parents who do not use drugs, there are instances of drug-using mothers and fathers who are neglectful parents. That is something, however, that needs to be determined on a case-by-case basis rather than based on unsupported assumptions that treat any and all drug use as synonymous with neglectful parenting.

Despite the proven efficacy of treatment programs and notable attempts to improve access to treatment, the lack of adequate treatment for women is a significant and ongoing problem that has been well documented by a variety of measures.

#### **4. Assumption: Presuming neglect and requiring child welfare intervention will protect children and improve their health.**

Protecting children and improving their health is a leading reason for the changes in civil child abuse laws. However, the changes made in the name of protecting children may produce the opposite result because fear of losing custody of a child deters women from seeking the prenatal health care and drug treatment that can improve both their and their children's health. Research by the Southern Regional Project on Infant Mortality on barriers to substance abuse treatment for pregnant women found that "fear of losing their children" was the greatest deterrent to women.<sup>117</sup>

Studies have also found that removing children from their parents' care can unnecessarily inflict grave harm on the children.<sup>118</sup> As a result of the newly expanded civil neglect laws, "thousands of women have lost custody of their children."<sup>119</sup> One comprehensive survey of the effects of foster care concluded that "[r]emoving a child from his family may cause serious psychological damage—damage more serious than the harm intervention is supposed to prevent."<sup>120</sup> Research has also shown that "the increasing placement of drug-exposed children in foster care is coupled with poor growth outcomes in the physical, mental and emotional development of these children."<sup>121</sup>

Treating drug use during pregnancy as presumptive neglect—the harshest response taken in only a few states—has been shown to have devastating consequences. For a period of time, New York City, as a matter of policy, adopted this approach. Hundreds of newborns were kept as boarder babies in hospitals where they languished.<sup>122</sup> Complicating matters further, many women had their newborns removed because of *false* positive drug tests—they had not used drugs at all—and others had positive drug tests for drugs administered while in the hospital.<sup>123</sup> Still other women had their children removed because they had smoked marijuana once, despite unanimous praise for their parenting ability.<sup>124</sup> These results and numerous other examples of families separated based on false positive tests or evidence of drug use unrelated to parenting ability<sup>125</sup> demonstrate the significant drawbacks of policies that

Fear of losing custody of a child deters women from seeking the prenatal health care and drug treatment that can improve both their and their children's health.

treat a pregnant woman's drug use as evidence of neglect or abuse.

#### **5. Assumption: Statutes relying on drug tests as sufficient evidence of neglect and abuse can be administered fairly.**

Statutes that mandate reporting based only on drug use have been shown to be applied in a highly discriminatory fashion. For example, in Florida, researchers found that while white and African-American women used illegal drugs at about the same rate (white women use at a slightly higher rate), African-American women were ten times more likely to be reported as child abusers.<sup>126</sup>

One proposed solution to this discriminatory effect has been to require "universal" testing of all pregnant women or newborns.<sup>127</sup> However, "universal" testing is not in fact universal because it reveals only *women's* drug use and subjects only *women* to government searches that can result in termination of parental rights and loss of government benefits; simply put, "universal" testing proposals do not reveal drug use by potential fathers or address the role that men play in women's substance abuse problems. The millions of dollars spent on drug and alcohol tests<sup>128</sup> could much more wisely be spent on the comprehensive treatment programs that women and families need and want.

Finally, selecting certain drugs over others makes no sense from a child protection point of view. Although not included in many states' definitions of civil child neglect, alcohol use during pregnancy is the leading preventable cause of mental retardation.<sup>129</sup> Likewise, neglect and abuse statutes do not cover a woman's continued use of cigarettes during pregnancy even though evidence of harm from cigarettes is far better established than harm from drugs, even cocaine.<sup>130</sup> A variety of activities not covered by any testing legislation, including failure to take folic acid, which prevents neural tube defects, failure to eat adequately, and failure to obtain prenatal care, also pose risks.<sup>131</sup> On the other hand, by including *all* illegal drugs in the screening process, legislation includes marijuana use, despite a dearth of evidence relating its use to either harm or interference with parenting ability.<sup>132</sup>

## B. CRIMINAL PROSECUTIONS

Prosecutions of drug-using pregnant women, like the legislative proposals detailed above, proliferated when the Reagan-Bush war on drugs and the unprecedented media coverage of the “crack crisis” coincided with the ever-increasing battle to end legal abortion.<sup>133</sup> Drug-using pregnant women became appealing targets for law enforcement officials who were losing the war on drugs and for the anti-choice forces who were attempting to develop “fetal rights” superior to and in conflict with the rights of women.<sup>134</sup>

Although no state has passed a law criminalizing pregnancy and drug use, an estimated 200 women in more than thirty states have been prosecuted on theories of “fetal abuse.”<sup>135</sup> Police and prosecutors have attempted to expand the reach of existing crimes, such as child abuse, drug delivery, manslaughter, homicide, and assault with a deadly weapon, and use them against women to cover drug use during pregnancy.<sup>136</sup>

Women who drink alcohol and fail to get bed rest during pregnancy have also been arrested,<sup>137</sup> making clear that it is *pregnancy* and not just the illegality of the substance that makes women vulnerable to state control and punishment. Nevertheless, the prosecutions of pregnant women have focused largely on those women who use illegal drugs even though many more children are at risk of harm from prenatal exposure to cigarettes and alcohol.<sup>138</sup>

Until 1997, no appellate court that considered the legality of prosecuting a pregnant woman upheld such a prosecution. Courts unanimously rejected attempts to expand existing criminal statutes, finding that their application to fetuses and pregnant women went beyond the legislature’s intent.<sup>139</sup> In some cases, courts found that the prosecutions violated the Constitution’s guarantee of due process and right to privacy.<sup>140</sup> Some courts also acknowledged the overwhelming opposition of medical and health groups as a consideration in dismissing charges or overturning trial court convictions.<sup>141</sup>

On October 27, 1997, the South Carolina Supreme Court radically deviated from its sister state courts and decided *Whitner v. State of South Carolina*.<sup>142</sup> In

*Whitner*, the state supreme court declared that viable fetuses are “person[s]” under the state’s criminal child endangerment statute.<sup>143</sup> As a result of that conclusion, the court reversed an appellate court’s granting of post-conviction relief for a pregnant woman who had used cocaine during her pregnancy.<sup>144</sup> In so ruling, the court took an unprecedented legal leap. Although *Whitner* involved a woman who had used cocaine while pregnant, the majority specifically found that applying the state’s child endangerment statute to other conduct by pregnant women—such as smoking cigarettes and drinking alcohol—would also be consistent with the application of that statute to the facts of *Whitner*.<sup>145</sup> And, in fact since the decision, prosecutors in South Carolina have arrested on child abuse charges a woman who used alcohol while pregnant,<sup>146</sup> a woman who suffered a stillbirth possibly unrelated to any drug use,<sup>147</sup> and the parents of a 13-year-old who suffered a miscarriage.<sup>148</sup>

An estimated 200 women in more than thirty states have been prosecuted on theories of “fetal abuse.”

By concluding that viable fetuses are persons under state law,<sup>149</sup> the court in *Whitner* provided local politicians with a new basis for attacking *Roe v. Wade*.<sup>150</sup> Indeed, according to the South Carolina Office of the Attorney General, *Whitner* creates a basis for treating at least some abortions as murder and for executing the women who have them and the people who provide them.<sup>151</sup>

The decision also conflicts in principle with *Robinson v. California*.<sup>152</sup> In that case, the United States Supreme Court overturned a California statute that treated drug addiction as a misdemeanor punishable by imprisonment and held that criminalizing drug addiction was cruel and unusual punishment in violation of the Eighth Amendment.<sup>153</sup> In overturning the statute, the Court cited *Linder v. United States*,<sup>154</sup> a 1925 case in which the Court recognized narcotic addiction as an illness and those experiencing it as in need of medical treatment.<sup>155</sup> The Court compared punishing someone for drug addiction to punishing someone “for the ‘crime’ of having a common cold.”<sup>156</sup> *Whitner*’s effect on pregnant women and new mothers raises troubling issues about punishing addiction.

Although *Whitner* is now being challenged in a federal habeas corpus proceeding, it remains in effect while that case is pending. As such, it appears to be having devastating consequences on women and families. Since

the highly publicized prosecution of Cornelia Whitner and the South Carolina Supreme Court's original decision upholding her conviction in 1996,<sup>157</sup> drug treatment programs in South Carolina that give priority to pregnant women have reported precipitous drops in admissions of pregnant women.<sup>158</sup> Furthermore, in line with the warnings of leading medical and public health groups who have opposed the prosecutions of pregnant women in part because of the expectation that they would deter women from obtaining health care and thus harm both maternal and fetal health,<sup>159</sup> South Carolina's 1997 infant mortality figures "increased for the first time this decade."<sup>160</sup> Similarly, the state is now seeing a twenty percent increase in abandoned babies.<sup>161</sup>

Although prosecutors in other states have expressed the hope that their states would follow *Whitner*,<sup>162</sup> that decision is, by its own description, based on law unique to South Carolina.<sup>163</sup>

### C. RECENT EVENTS AND LEGISLATIVE ACTION

The newest state legislation appears to continue in the vein of punitive and restrictive responses. After *Whitner*, Wisconsin and South Dakota significantly expanded civil statutes to permit extraordinary control over pregnant women's bodies and lives.<sup>164</sup> The Wisconsin legislation in particular passed despite the strong opposition of leading medical groups<sup>165</sup> and despite the lack of any funding in the bill for needed treatment services.<sup>166</sup>

In 1997, the Wisconsin legislature substantially revised its Children's Code<sup>167</sup> to create a new category of "unborn child" abuse.<sup>168</sup> The purpose of the revision was to "recognize that unborn children have certain basic needs which must be provided for, including the need to develop physically to their potential."<sup>169</sup> The new provisions permit the state to intervene to protect an "unborn child" from

serious physical harm inflicted on the unborn child, and the risk of serious physical harm to the child when born, caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.<sup>170</sup>

The Wisconsin statute defines an "unborn child" as a "human being from the time of fertilization to the time of birth."<sup>171</sup> The law permits the state to take jurisdiction

over pregnant women in a variety of circumstances.<sup>172</sup> For example, a law enforcement officer can take a pregnant woman into custody if he or she believes that the woman's use of alcohol is posing a "substantial risk to the physical health of the unborn child."<sup>173</sup> Thus, a zealous police officer who observes a pregnant woman drinking cocktails at a bar may take the woman into immediate custody if the officer believes that the woman's drinking poses a severe risk to her fetus.<sup>174</sup>

The revised Wisconsin code also permits counties to appoint juvenile court commissioners to oversee cases and conduct hearings applicable to "unborn children," but only allows lawyers with "a demonstrated interest in the welfare of . . . unborn children" to be eligible for appointment to such positions.<sup>175</sup> Additionally, pursuant to the Code, guardians ad litem may be appointed "for any unborn child alleged or found to be in need of protection or services."<sup>176</sup> Because "unborn children" are defined as existing from the moment of fertilization,<sup>177</sup> a guardian could be appointed even for pre-embryos. The guardian is required to advocate for the "best interests" of the "unborn child."<sup>178</sup> Consequently, if a woman decided to have an abortion while her case was pending, the guardian would undoubtedly be expected to oppose the abortion in the "best interests" of the "unborn child."

Guardians are also required to "assess the appropriateness and safety of the environment of the . . . unborn child."<sup>179</sup> The pregnant woman is thus reduced by statutory terms to an "environment" for a fetus. The statutorily defined term "unborn child" is included throughout the comprehensive child welfare legislation revising Wisconsin's Children Code. And, even though its provisions purport to apply only where the expectant mother risks harm through drug or alcohol use, the re-definition of "child" to include the "unborn" invites new interpretations and applications far beyond the drug and alcohol abuse context.<sup>180</sup>

Perhaps in response to the widespread opposition of medical groups, the Wisconsin statute does not include a mandatory reporting provision. Thus while doctors in South Carolina must report as child abuse pregnant women's behavior that endangers the fetus,<sup>181</sup> reporting becomes mandatory in Wisconsin only after the birth of a child.<sup>182</sup> As a result, the law appears thus far to have been applied only rarely.<sup>183</sup>

In addition to Wisconsin's wholesale revision of its laws, South Dakota passed a law permitting judges to confine pregnant alcohol or drug users to treatment centers for as long as nine months.<sup>184</sup> Neither the law itself nor the South Dakota procedure manuals provide a clear definition of "abusing alcohol or drugs."<sup>185</sup> The individual judges are left to decide how much alcohol is "'too much' for pregnant women."<sup>186</sup>

Similar actions to restrict pregnant women and new mothers in the guise of drug control measures, including new arrests and cases seeking to terminate parental rights of pregnant women, have also been brought.<sup>187</sup> While new prosecutions continue to be filed, decisions post-*Whitner* in both trial and appellate courts indicate that *Whitner* remains the exception to the rule.<sup>188</sup>

### III. CONCLUSION

New legislative proposals on the subject of drug-using pregnant women appear each year throughout the country at both the federal and state levels. Unfortunately, legislators continue to introduce highly punitive bills proposing to criminalize pregnancy and addiction, to mandate sterilization of women who give birth despite addiction problems, and to treat a single positive drug test as presumptive child neglect.<sup>189</sup>

Those concerned with this issue should be fully informed and should promote those efforts likely to improve the health and well-being of women, children, and their families. In addition to considering the many statutes presented in this Overview that offer positive and constructive approaches, policymakers and activists should also consider the recommendations of leading child advocacy and medical groups.

Keeping a functioning family intact should be the primary goal. Accordingly, the staff of the Center for the Future of Children has recommended that "[a]n identified drug-exposed infant should be reported to child protective services only if factors in addition to prenatal drug exposure show that the infant is at risk for abuse or neglect."<sup>190</sup>

The recommendations from the Coalition on Alcohol and Drug Dependent Women and Their Children are very useful and thorough:

- Provide that pregnant women may not be subjected to arrest, commitment, confinement, incarceration, or other detention solely for the protection, benefit, or welfare of her fetus or because of her prenatal behavior. Any person aggrieved by a violation of such a provision should be allowed to maintain an action for damages.
- Provide that positive toxicologies taken of newborns at birth may be used for medical intervention only, not for removal without additional information of parental unfitness, which assesses the entire home environment.
- Provide that child abuse reporting laws may not be triggered solely on the basis of alcohol or drug use or addiction without reason to believe that the child is at risk of harm because of parental unfitness.
- Provide that alcohol and drug treatment programs may not exclude pregnant women, and increase appropriations for comprehensive alcohol and drug treatment programs.
- Utilize existing funds for the prevention and treatment of alcoholism and drug dependency among women and their families.
- Review agency services, and propose the coordination of related programs between alcohol and drug treatment, social services, [including domestic violence programs] education, and the maternal health and child care field in order to improve maternal and child health.<sup>191</sup>

Intervention by the judicial system based solely on a single drug test evidencing drug use during pregnancy constitutes a significant assault on family integrity, women's rights, and children's rights and should not occur in the absence of evidence that the child's home environment is seriously inadequate. Such a standard would protect women and their reproductive rights, as well as children and family integrity. In virtually every state, existing statutes and regulations, *when properly administered*, provide the protection children need from those parents who are unable to care for their children. Services, including appropriate and comprehensive drug treatment, should be fully supported and available for all individuals and families who want and need them.

# FEDERAL STATUTES AND REGULATIONS SPECIFICALLY ADDRESSING PREGNANT WOMEN WHO USE DRUGS OR ALCOHOL

## UNITED STATES

### **Criminal Statutes**

Under the Federal Sentencing Guidelines, two points are added to the offense level for drug offenses "directly involving a protected location or an underage or pregnant individual." 18 U.S.C. Appx § 2D1.2.

Except as authorized by statute, "it shall be unlawful for any person to knowingly or intentionally provide or distribute any controlled substance to a pregnant individual in violation of" Title 21 of the United States Code. 21 U.S.C. § 861(f).

### **Education and Awareness**

The Secretary of Education is authorized to spend funds for the improvement of education which includes "demonstrations that are designed to test whether prenatal and counseling provided to pregnant students may have a positive effect on pregnancy outcomes, with such education and counseling emphasizing the importance of prenatal care, the value of sound diet and nutrition habits, and the harmful effects of smoking, alcohol, and substance abuse on fetal development." 20 U.S.C. § 8001(b)(V).

Under statutes covering Indian Health Care, the Secretary of the Interior must provide instruction in the area of alcohol and substance abuse, including "the causes and effects of fetal alcohol syndrome," to the appropriate employees of the Bureau of Indian Affairs, school personnel, and supervisors of emergency shelters and halfway houses. 25 U.S.C. § 1665d(b).

Applicants for Head Start funding will be evaluated based on, among other things, the applicant's plan "to offer to parents of participating children substance abuse counseling . . . including information on drug-exposed infants and fetal alcohol syndrome." 42 U.S.C. § 9836(d)(4)(D). In order to be designated a Head Start agency, the agency must offer, as part of its enhanced parent involvement, such counseling. 42 U.S.C. § 9837(b)(6).

### **Education and Awareness—Oversight Committees, Task Forces, Research**

The Secretary of Health and Human Services must establish "a comprehensive Fetal Alcohol Syndrome and Fetal Alcohol Effect prevention, intervention, and services delivery program" that includes education and public awareness campaigns, prevention and diagnosis programs, and an applied research program. Congress has also mandated the establishment of a "task force to be known as the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect." 42 U.S.C. § 280f.

The Director of the National Institute on Alcohol Abuse and Alcoholism is authorized to make grants to organizations and individuals for research projects relating to, among other things, "the effects of alcohol use during pregnancy." 42 U.S.C. § 285n(b)(3)(B).

### **Funding**

Congress has established "fetal alcohol syndrome and fetal alcohol effect grants" that the Secretary of the Interior may grant to Indian tribes and tribal organizations to establish programs for training, education, prevention, identification, support, and intervention. 25 U.S.C. § 1665g.

Under legislation establishing Grants for Home Visiting Services for At-Risk Families, the Secretary of Health and Human Services "shall make grants to eligible entities to pay the Federal share of the cost of providing [home visiting services] to families in which a member is . . . a child less than 3 years of age . . . who has been prenatally exposed to maternal substance abuse." 42 U.S.C. § 280c-6(a)(1)(B)(ii).

The Secretary of Health and Human Services is also empowered to make grants for services for children of substance abusers. The grants are to be made to public and nonprofit private entities for the purpose of carrying out programs that, among other things, provide visits and support for substance abusers, "especially pregnant women,

who are receiving substance abuse treatment or whose children are receiving services." 42 U.S.C. § 280d(c)(1)(C).

Under the Secretary of Health and Human Services' Fetal Alcohol Syndrome Prevention and Services Program, the Secretary is empowered to make grants to governmental, academic, or non-profit organizations to carry out the program. 42 U.S.C. § 280f-1.

Congress appropriated \$27,000,000 to carry out the Fetal Alcohol Syndrome Prevention and Services Program for each fiscal year 1999 through 2003. 42 U.S.C. § 280f-2.

"The Director of the Center for Substance Abuse Treatment shall provide awards of grants, cooperative agreement, or contracts to public and nonprofit private entities for the purpose of providing to pregnant and postpartum women treatment for substance abuse" that complies with the requirements of the statute. 42 U.S.C. § 290bb-1(a).

The Secretary of Health and Human Services, acting through the Director of the Center for Substance Abuse Treatment, "shall make grants to establish projects for the outpatient treatment of substance abuse among pregnant and postpartum women, and in the case of conditions arising in the infants of such women as a result of such abuse by the women, the outpatient treatment of the infants for such conditions." The grants under this statute are to be used to "prevent substance abuse among pregnant and postpartum women." 42 U.S.C. § 290bb-2.

The Secretary of Health and Human Services and the Director of the Center for Substance Abuse Treatment "shall make a demonstration grant for the establishment, within the national capital area, of a model program for providing comprehensive treatment services for substance abuse." In order to receive the grant, an organization must agree, among other things, "to give priority to providing services to individuals who are intravenous drug abusers, to pregnant women, to homeless individuals, and to residents of publicly-assisted housing." 42 U.S.C. § 290gg(b)(4).

"In order to prevent and remedy the neglect and abuse of children, a State may use amounts paid under [the Social Security Act's Block Grants to States for Social Services] to make grants to, or enter into contracts with, entities to provide residential or nonresidential drug and alcohol prevention and treatment programs that offer comprehensive services for pregnant women and mothers, and their children." 42 U.S.C. § 1397f(b)(1).

Under the Congressional nutrition education program, state agencies receiving federal grants for nutrition education "shall ensure that nutrition education and drug abuse education is provided to all pregnant, postpartum, and breastfeeding participants in the program and to parents or caretakers of infant and child participants in the program." 42 U.S.C. § 1786(e)(1).

#### **Legislative Mandates, Findings, Declarations**

"It is the intent of the Congress that the Nation meet the following health status objectives with respect to Indians and urban Indians by the year 2000: . . . Reduce the incidence of fetal alcohol syndrome to no more than 2 per 1,000 live births." 25 U.S.C. § 1602(b)(30). By legislation enacted in November 1988, the goal was "one per one thousand live births." 25 U.S.C. § 1680d(3).

As part of the code section regarding adoption reform, Congress found that "an increasing number of infants are born to mothers who did not receive prenatal care, are born addicted to alcohol and other drugs, and exposed to infection with the etiologic agent for the human immunodeficiency virus, are medically fragile, and technology dependent." 42 U.S.C. 5111(a)(3).

#### **Services to Children**

Under the Social Security Act's Medicaid program, the requirements of statewideness and comparability, *see* 42 U.S.C. § 1396a(a)(1); 42 U.S.C. § 1396a(a)(10)(B), may be waived plans of care for children who are drug dependent at birth. 42 U.S.C. § 1396n(e).

**STATE BY STATE STATUTES  
AND REGULATIONS SPECIFICALLY  
ADDRESSING PREGNANT WOMEN  
WHO USE DRUGS OR ALCOHOL**

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## **ALABAMA**

No statutes found relating to pregnant women and the use of alcohol or illegal substances.

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## **ALASKA**

### **Education and Awareness**

Alaska passed joint resolutions in both its legislature and its Senate in the Spring of 1997 establishing “Alcohol-Related Birth Defects Awareness Week” during the weeks of both Mother’s Day and Father’s Day. The resolution began by recognizing that “fetal alcohol syndrome and fetal alcohol effects, which are birth defects related to alcohol consumption by pregnant women, can be prevented if pregnant women and women who plan to become pregnant abstain from alcohol consumption.” H. CON. RES. 6, 20TH LEG., 1ST SESS. (Alaska 1997). Similar resolutions were also passed in 1991 and 1994.

The Department of Health and Social Services shall prepare information about "fetal alcohol effects and the fetal health effects of chemical abuse and battering during pregnancy." The Department must make this information available to "public hospitals, clinics, and other health facilities in the state for distribution to their patients." ALASKA STAT. § 18.05.037.

The Department of Health and Social Services also must give the information about "fetal alcohol effects and the fetal health effects of chemical abuse and battering during pregnancy" to all marriage licensing officers for issuance along with any marriage license. ALASKA STAT. § 25.05.111.

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## **ARIZONA**

### **Education and Awareness**

The standard consent form for people undergoing methadone treatment contains a section entitled "Female Patients of Child-Bearing Age" that states that "methadone is transmitted to the unborn child and will cause physical dependence" but that its long-term effects are still unknown, although they may be "significant or serious." ARIZ. COMP. ADMIN. R. & REGS. 9-20-18.

### **Identification, Testing, Reporting**

Along with a general duty to report child abuse,

[a] health care professional who is [subject to the statute] and whose routine newborn physical assessment of a newborn infant's health status or whose notification of positive toxicology screens of a newborn infant gives the professional reasonable grounds to believe that the newborn infant may be affected by the presence of alcohol or a substance prohibited by chapter 34 of this title shall immediately report this information, or cause a report to be made, to child protective services in the department of economic security. For the purposes of this subsection “newborn infant” means a newborn infant who is under thirty days of age.

ARIZ. REV. STAT. ANN. § 13-3620(B).

### **Treatment Improvement/Priority Treatment for Pregnant Women**

The deputy director of the division of behavioral health has the authority and funding to establish educational, counseling, and research activities to prevent alcohol and substance addiction and to give priority to pregnant women seeking drug treatment. ARIZ. REV. STAT. ANN. § 36-141.

A “Child Protective Services expedited substance abuse treatment fund” was established to “provide expedited substance abuse treatment to parents or guardians with a primary goal of facilitating family preservation or reunification, including, if necessary, services that maintain the family unit in a substance abuse treatment setting.” ARIZ. REV. STAT. ANN. § 8-812(A), (C).

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## ARKANSAS

### **Third-Party Liability**

Any "individual who was exposed to an illegal drug in utero" can "bring an action in circuit court for damages caused by use of an illegal drug by an individual" against the persons enumerated in the statute. ARK. CODE ANN. § 16-124-104.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

The legislature has created a Family Treatment and Rehabilitation Program for Addicted Women and Their Children. The program is designed to

- (1) Develop a statewide program of treatment, rehabilitation, prevention, intervention, and relevant research for families affected by maternal addiction by coordinating existing health services, human services, and education and employment resources;
- (2) Develop resources for local treatment and rehabilitation programs for families affected by maternal addiction by providing policy research, technical assistance, and evaluation of program outcomes;
- (3) Identify gaps in service delivery to families affected by maternal addiction and propose solutions;
- (4) Enter into contracts for the delivery of services under the program;
- (5) Solicit, accept, retain and administer gifts, grants or donations of money, services or property for the administration of the program; and
- (6) Provide centralized billing for providers who agree to provide a comprehensive array of specialized coordinated services under or through the program.

ARK. CODE ANN. § 20-85-101.

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## CALIFORNIA

### **Adoption Statutes**

In 1998, a program was established "for special training and services to facilitate the adoption of children who are HIV positive or who have a condition or symptoms resulting from substance abuse by the mother and who are dependent children of the court or who have an adoption case plan and reside with a preadoptive or adoptive caregiver. . . . [P]readoptive parents trained by health care professionals may provide specialized in-home health care to children placed by the county pursuant to certain procedures." CAL. WELF. & INST. CODE § 16135; *see also Id.* § 16135.10 (establishing training and supportive services); *Id.* § 16135.13 (establishing special training curriculum for the adoptive parents).

### **Criminal Statutes**

California's penal code makes the sale or furnishing of controlled substances to pregnant women, among others, a "circumstance in aggravation of the crime" which could trigger an augmented sentence. CAL. PENAL CODE § 1170.82.

### **Education and Awareness**

The California Legislature found in 1990 that alcohol and drug treatment was not being accessed by "women, ethnic minorities, and other disenfranchised segments of the population" in proportion to the problems experienced by those communities and attributed this problem to, among other things, "lack of educational materials appropriate to the community . . . [l]anguage differences . . . [and l]ack of representation by affected groups employed by public and private service providers and policymakers." CAL. HEALTH & SAFETY CODE § 11781.

The State Department of Alcohol and Drug Programs must develop a brochure on care and treatment of infants exposed to drugs, and the brochure must include the following: "(1) The signs and symptoms of an infant who has been exposed to drugs[;] (2) The health problems of infants who have been exposed to drugs[;] (3) The special feeding needs of infants who have been exposed to drugs[; and] (4) The special care needs of infants who have been exposed to drugs. . . ." CAL. HEALTH & SAFETY CODE § 11868.5.

California's Business and Professional Code encourages the Division of Licensing for Medical Professionals to include within its requirements for continuing education two courses related to fetal exposure to alcohol and

controlled substances: “a course in the early detection and treatment of substance abusing pregnant women to be taken by those licensees whose practices are of a nature that there is a likelihood of contact with these women,” CAL. BUS. & PROF. CODE § 2191(f), and “a course in the special care needs of drug addicted infants to be taken by those licensees whose practices are of a nature that there is a likelihood of contact with these infants,” *id.* § 2191(g).

California’s Education Code provides for the development of a school plan to assist school personnel in dealing with children who may have been “prenatally substance exposed.” CAL. EDUC. CODE § 52853.

As part of the legislative findings that accompany California Business and Professions Code section 23320.6 (providing for the establishment of the Wine Safety Fund), the legislature noted that “[a]n industry-funded program already provides warnings advising pregnant women not to drink, utilizing point-of-sale and point-of-display notices that convey a uniform clear and reasonable warning message . . . .” 1993 Cal. Stats. 1025 § 1(e).

"Instruction on the effects of alcohol, narcotics, restricted dangerous drugs . . . and other dangerous substances upon prenatal development as determined by science shall be included in the curriculum of all secondary schools." CAL. EDUC. CODE § 51203.

Proposition 10, passed by the voters in 1998, created the California Children and Families Commission. One of the Commission's duties is to adopt guidelines to improve early childhood development, including "parent education and support services" that encompass, among others, the subject of "avoidance of tobacco, drugs, and alcohol during pregnancy." CAL. HEALTH & SAFETY. CODE § 130125.

### **Evaluation of Programs**

The Department of Health must submit a report to the state Legislature detailing:

- (a) An accounting of the incidence of high-risk pregnant or parenting adolescents who are abusing alcohol or drugs, or a combination of alcohol and drugs[;]
- (b) An accounting of the health outcomes of infants of high-risk pregnant and parenting adolescents including: infant morbidity, mortality, rehospitalization, low birth weight, premature birth, developmental delay, and other related areas[;]
- (c) An accounting of school enrollment among high-risk pregnant and parenting adolescents[;]
- (d) An assessment of the effectiveness of the counseling services in reducing the incidence of high-risk pregnant and parenting adolescents who are abusing alcohol or drugs, or a combination of alcohol and drugs[;]
- (e) The effectiveness of the component of other health programs aimed at reducing substance use among pregnant and parenting adolescents[; and]
- (f) The need for an availability of substance abuse treatment programs in the program areas that are appropriate, acceptable, and accessible to teenagers.

CAL. HEALTH & SAFETY CODE § 124195.

### **Funding—Education and Awareness**

As part of Proposition 10, approved by the voters in 1998, the California Children and Families Trust Fund was created with six percent of the funds to be deposited in a Mass Media Communications Account for use on "communications to the general public utilizing television, radio, newspapers, and other mass media on subjects . . . including . . . the prevention of tobacco, alcohol, and drug use by pregnant women . . . ." CAL. HEALTH & SAFETY CODE § 130105.

### **Identification, Testing, Reporting**

The legislature mandated that by July 1, 1991, the Health and Welfare Agency "develop and disseminate a model needs assessment protocol for pregnant and postpartum substance abusing women in conjunction with the appropriate professional organizations in the areas of hospital administration, substance abuse prevention and treatment, social services, public health, and appropriate state agencies." CAL. HEALTH & SAFETY CODE § 123600. The protocol would be used by local hospitals and agencies in the assessment of the needs of substance exposed infants with the purpose of identifying needed services for the mother, child, and family, determining the level of risk to the newborn, and gathering data for information and planning purposes. *Id.* § 123605.

The State Department of Health Services must report to the legislature and the governor by March 15 of every year the number of newborn babies with Fetal Alcohol Syndrome, the number of babies born with drug dependencies, and "[w]hether the mother smoked, consumed alcoholic beverages, or used controlled substances without a

prescription, during pregnancy." CAL. WELF. & INST. CODE § 14148.91(b).

#### **Identification, Testing, Reporting—Civil Child Abuse Statutes**

"[A] positive toxicology screen at the time of the delivery of an infant is not in and of itself a sufficient basis for reporting child abuse or neglect. However, any indication of maternal substance abuse shall lead to an assessment of the needs of the mother and child pursuant to Section 123605 of the Health and Safety Code. If other factors are present that indicate risk to a child, then a report shall be made. However, a report based on risk to a child which relates solely to the inability of the parent to provide the child with regular care due to the parent's substance abuse shall be made only to county welfare departments and not to law enforcement agencies." CAL. PENAL CODE § 11165.13.

#### **Legislative Mandates, Findings, Declarations**

California's Legislature passed a resolution in 1991 which declared

that there is a strong statistical relationship between early entry into prenatal care and healthy birth outcomes. An investment in early intervention is highly cost-effective and prevents untold suffering. . . . It is the intent of the Legislature that the goals of the program established pursuant to this article, in combination with other programs for pregnant women and children shall be: (1) To improve access to and quality of prenatal care by making existing programs serving poor women more accessible through outreach, coordination, and removal of barriers to care [and] (2) To combine efforts with other programs to measurably reduce the number of women who smoke, use drugs, or engage in other unhealthy practices during pregnancy. . . . In order to achieve these goals, it is the intent of the Legislature to improve and coordinate existing programs for pregnant women and infants and to remove barriers to care with an intense focus on women who are at high risk of delivering a low or high birth weight baby or a baby which will suffer from major health problems or disabilities.

CAL. WELF. & INST. CODE § 14148.9.

The legislation establishes a "focus on those target populations that are comprised of pregnant high risk women or potentially pregnant teenagers, pregnant women and women of childbearing age who are likely to become pregnant who smoke, consume alcoholic beverages, or use controlled substances, and Black, Hispanic, Native American, and Asian-Pacific Island women who are pregnant or of childbearing age, and uninsured women of childbearing age." CAL. WELF. & INST. CODE § 14148.9(d).

As part of the statutory requirement that each schoolsite council develop a school plan, the legislature found that "[t]here has been a rapid and alarming increase in the number of infants born in California who are affected by alcohol and other drugs during their mother's pregnancy. The Department of Alcohol and Drug Programs conservatively estimates that 70,000 of these infants are born in the state each year. Many children who have been exposed prenatally to drugs are now entering California's public school classrooms." 1991 Cal. Stats 251, § 1(b) (accompanying CAL. EDUC. CODE § 52853).

As part of the findings accompanying Proposition 10, the people of California found that "[c]igarette smoking and other tobacco use by pregnant women and new parents represent a significant threat to the healthy development of infants and young children." The findings listed as a purpose of Proposition 10 the development of community-based services that "include education and skills training . . . in avoidance of tobacco, drugs, and alcohol during pregnancy." Proposition 10 also had a purpose of educating "the public, using mass media, on the dangers caused by smoking and other tobacco use by pregnant women . . . ." Prop. 10, § 2(i), (m)(1), (m)(3).

#### **Legislative Mandates, Findings, Declarations— Oversight Committees, Task Forces, Research**

In 1990, California passed the Alcohol and Drug Affected Mothers and Infants Act, which established the Office of Perinatal Substance Abuse. CAL. HEALTH & SAFETY CODE § 11757.53. The Act was passed due to a legislative finding that there had been a "rapid and alarming increase in the number of infants born in California . . . affected by alcohol or other drugs during their mother's pregnancy." *Id.* § 11757.51(1). The legislature estimated that "there were 30,000 of these infants born in the state during the 1988-89 fiscal year." *Id.* § 11757.51(1). It estimated that "the average cost for an infant requiring admission into a neonatal intensive care unit is nineteen thousand dollars (\$19,000) and that those costs sometimes reach as high as one million dollars (\$1,000,000)." *Id.* § 11757.51(5). It also reported that the state had spent nearly \$104 million dollars during fiscal year 1986-87 to provide neonatal intensive care to these infants. *Id.* § 11757.51(5).

Recognizing that there was a need for “comprehensive prevention and treatment services for both mothers and infants,” the California legislature created an Interagency Task Force to “develop a coordinated state strategy for addressing the treatment needs of pregnant women, postpartum women, and their children for alcohol or drug abuse,” CAL. HEALTH & SAFETY CODE § 11757.55(c), and provided for training to professionals providing services to women of childbearing age and their children to improve their ability to identify those needing alcohol and drug treatment services and to provide referrals to those in need. *Id.* § 11757.57(a) & (b).

### **Third Party Liability**

Any "individual who was exposed to an illegal controlled substance in utero" can "bring an action for damages caused by an individual's use of an illegal controlled substance" against the persons enumerated in the statute. CAL HEALTH & SAFETY CODE § 11705.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

The state legislature provided funding to expand its pilot project, “Services for Alcohol and Drug Abusing Pregnant and Parenting Women and Their Infants” to various counties, and provided that such funding was to be used to provide "(A) Low-risk and high-risk prenatal care[;] (B) Pediatric followup care, including preventive infant health care[;] (C) Developmental follow-up care[;] (D) Nutrition counseling[;] (E) Methadone[;] (F) Testing and counseling relating to AIDS[;] (G) Monthly visits with a physician and surgeon who specializes in treating persons with chemical dependencies.” CAL. HEALTH & SAFETY CODE § 11757.59(b)(1).

The legislature also allowed for the provision of “nonmedical services” including the following:

“(A) Case management[;] (B) Individual or group counseling sessions, which occur at least once a week[;] (C) Family counseling, including, but not limited to, counseling services for partners and children of the women[;] (D) Health education services, including perinatal chemical dependency classes, addressing topics that include, but are not limited to, the effects of drugs on infants, AIDS, addiction in the family, child development, nutrition, self esteem, and responsible decision making[;] (E) Parenting classes[;] (F) Adequate child care for participating women[;] (G) Encouragement of active participation and support by spouses, domestic partners, family members, and friends[;] (H) Opportunities for a women-only treatment environment[;] (I) Transportation to outpatient treatment programs[;] (J) Followup services, which may include, but not be limited to, assistance with transition into housing in a drug-free environment[;] (K) Child development services[;] (L) Educational and vocational services for women[;] (M) Weekly urine testing[;] (N) Special recruitment, training, and support services for foster care parents of substance exposed infants[;] (O) Outreach which reflects the cultural and ethnic diversity of the population served.

CAL. HEALTH & SAFETY CODE § 11757.59(b)(2).

Counties that receive funding under the Act are required to establish “Perinatal coordinating councils” which are to evaluate the extent of the perinatal alcohol and drug abuse problem in the county, coordinate countywide efforts to provide services to affected women and infants, and promote community understanding of the issues surrounding perinatal alcohol and drug abuse. CAL. HEALTH & SAFETY CODE § 11757.61.

California requires all counties participating in the “Comprehensive Perinatal Outreach Program” to maintain systems that provide “early outreach, pregnancy screening, patient advocacy, targeted case management, health education, and referral to drug and alcohol treatment and perinatal care services to pregnant women.” Counties must also provide patient advocacy and education. CAL. HEALTH & SAFETY CODE § 104564.

Under the Pregnant and Parenting Women's Alternative Sentencing Program Act of 1994, the California Department of Corrections was required to use funding to construct or renovate facilities designed to “reduce drug use and recidivism.” In awarding funding to certain counties, the Department was to ensure that participating drug programs meet “standards for perinatal services.” Selected agencies were to receive funding based on “[a] demonstrated ability to provide comprehensive services to pregnant women or women with children who are substance abusers[.]” Proposals for funding were to include “a plan for the required 12-month residential program, plus a 12-month outpatient transitional services program to be completed by participating women and children.” CAL. PENAL CODE § 1174.2.

"[C]omprehensive coordinated substance abuse prevention, intervention, and counseling program[s]" must include programs that attempt to "reduce the incidence of high-risk pregnant or parenting adolescents." The programs must be in "coordination and collaboration with existing perinatal substance abuse programs." CAL. HEALTH & SAFETY CODE § 124190.

Under the Medi-Cal Benefits Program, the State Department of Health Services is to "assess the feasibility of applying to the federal Health Care Financing Administration for a Medicaid State Plan amendment to provide targeted case management to pregnant substance-abusing women and women who have given birth to a drug-exposed or alcohol-exposed infant." CAL. WELF. & INST. CODE § 14132.21.

The Medi-Cal Benefits Program also includes, "[t]o the extent that federal financial participation becomes available, residential care for alcohol and drug exposed pregnant women and women in the postpartum perinatal period . . . ." CAL. WELF. & INST. CODE § 14132.36. The program also provides for "day care habilitative services" and "outpatient drug free services" for alcohol and drug exposed pregnant women, even if those services for other patients is eliminated. *Id.* § 14132.90.

The Department of Alcohol and Drug Programs has promulgated special regulations for drug treatment counselors who discover that a patient is pregnant. CAL. CODE REGS. tit. 9, § 10360.

The Department of Corrections has created a special program called the Family Foundations Program (FFP). FFP is a "12-month residential substance abuse treatment program for pregnant and/or parenting female inmates who have been determined by the court to benefit from participation, recommended by the court for placement, and are accepted by the Department to participate. Female inmates in the program will be placed in a Family Foundations facility in the community as an alternative to serving their prison term in a State prison institution." CAL. CODE REGS. tit. 15, § 3074.3.

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## COLORADO

### Identification, Testing, Reporting

Colorado law directs that:

[t]he health care practitioner for each pregnant woman who is enrolled for services pursuant to section 26-4-508 or section 26-2-118 shall be encouraged to identify as soon as possible after such woman is determined to be pregnant whether such woman is at risk of a poor birth outcome due to substance abuse during the prenatal period and in need of special assistance in order to reduce such risk. If the health care practitioner makes such a determination regarding any pregnant woman, the health care practitioner shall be encouraged to refer such woman to any entity approved and certified by the department of health for the performance of a needs assessment. Any pregnant woman who is eligible for services pursuant to [the above sections] may refer herself for such needs assessment.

COLO. REV. STAT. § 26-4-508.2(1).

### Legislative Mandates, Findings, Declarations

The Colorado Legislature passed a declaration in 1991 which stated:

(1) The general assembly hereby finds and declares that the health and well-being of the women of Colorado is at risk; that such women are at risk of poor birth outcomes or physical and other disabilities due to substance abuse, which is the abuse of alcohol and drugs, during the prenatal period; that early identification of such high-risk pregnant women and substance abuse treatment greatly reduce the occurrence of poor birth outcomes; and that the citizens of Colorado will greatly benefit from a program to reduce poor birth outcomes and subsequent problems resulting from such poor birth outcomes in cases involving high-risk pregnant women through the cost savings envisioned by the prevention and early treatment of such problems. (2) In recognition of such problems, there is hereby created a treatment program for high-risk pregnant women.

COLO. REV. STAT. § 25-1-212.

### **Treatment for Pregnant Women**

Colorado has elected to receive federal financial participation for a list of "optional services under the medical assistance program," including "alcohol and drug counseling and treatment, including outpatient and residential care but not including room and board while receiving residential care" for "any pregnant woman who is enrolled for services pursuant to section 26-4-508 or who would be eligible for aid to families with dependent children . . . ." COLO. REV. STAT. § 26-4-302.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

In 1991, Colorado amended a statute relating to grants made by its Health Department to include grants made to public programs providing "services to pregnant women who are alcohol and drug dependent through demonstration and evaluation projects." COLO. REV. STAT. § 25-1-203(2)(g).

Section 25-1-213 of Colorado Revised Statutes provides that

[a]ny entity which qualifies to provide services pursuant to section 26-4-302 (1) (s), in regards to the treatment program for high-risk pregnant women, shall make available, in addition to alcohol and drug counseling and treatment: Risk assessment services; care coordination; nutrition assessment; psychosocial counseling; intensive health education, including but not limited to parenting education and education on risk factors and appropriate health behaviors; home visits; transportation services; and other services deemed necessary by the division of alcohol and drug abuse of the department of human services, the department of public health and environment, and the department of health care policy and financing.

COLO. REV. STAT. § 25-1-213.

Among the responsibilities of Colorado's Children's Trust Fund Board is a duty to "expend moneys of the trust for the establishment, promotion, and maintenance of prevention programs, including pilot programs, for programs to prevent and reduce the occurrence of prenatal drug exposure . . . ." COLO. REV. STAT. § 19-3.5-105(1)(f).

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## **CONNECTICUT**

### **Education and Awareness**

The Department of Public Health and Addiction Services promulgated a regulation requiring all local WIC agencies to "provide information on the dangers of drug, alcohol and tobacco use during pregnancy to each pregnant participant, and appropriate referrals shall be made." CONN. AGENCIES REGS. § 19a-59c-4(k)(3)(E).

### **Oversight Committees, Task Forces, Research**

The Department of Mental Health and Addiction Services must also establish a committee on substance-abusing pregnant women and their children to oversee treatment programs and their development. CONN. GEN. STAT. § 17a-711.

### **Treatment for Pregnant Women**

In 1991, the legislature provided for a three year demonstration program through the Department of Public Health and the Office of Health Care Access and the Department of Social Services to provide indigent uninsured pregnant women improved access to health care, including "substance abuse counseling, and other ancillary services which may include substance abuse treatment . . . ." CONN. GEN. STAT. § 19a-7e.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

The State Department of Mental Health and Addiction Services is required to develop comprehensive programs to provide treatment, education, medical care, vocational services, and housing to pregnant women who use drugs and their children, to the extent that private and public funds are available. The Department is required to submit an annual report to a legislative committee on the development of programs and statistical and demographic information about women seeking treatment and treatment availability. CONN. GEN. STAT. § 17a-710.

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## **DELAWARE**

### **Education and Awareness**

Professionals who treat, advise, or counsel pregnant women must post and give written and oral warnings about the effects of alcohol, cocaine, marijuana, heroin or other narcotics consumed during pregnancy on the fetus. DEL. CODE ANN. tit. 16, § 190 (1998); DEL. CODE ANN. tit. 24, § 1770.

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## **DISTRICT OF COLUMBIA**

### **Education and Awareness**

The District of Columbia Code requires any business selling alcoholic beverages to post a sign in a conspicuous place that reads: "Warning: Drinking alcoholic beverages during pregnancy can cause birth defects." D.C. CODE ANN. § 25-147.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

Although district residents are generally eligible for substance abuse treatment regardless of their ability to pay, "[a]ny minor, pregnant woman, or the parent, guardian, or other person who has legal custody of a minor . . . shall have priority for admission to the treatment facility over any single adult who does not have a minor child." D.C. CODE ANN. § 32-1602(b).

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## **FLORIDA**

### **Civil Child Abuse Statutes**

Among the definitions of "harm" to a child's health and welfare is when a "parent, legal custodian, or caregiver responsible for the child's welfare . . . Exposes a child to a controlled substance or alcohol. Exposure to a controlled substance or alcohol is established by: 1. Use by the mother of a controlled substance or alcohol during pregnancy when the child, at birth, is demonstrably adversely affected by such usage; or 2. Continued chronic and severe use of a controlled substance or alcohol by a parent when the child is demonstrably adversely affected by such usage." FLA. STAT. ANN. § 39.01(30)(g).

A guardian advocate must be appointed for one year for any child named in a petition who " (a) . . . is or was a drug dependent newborn . . . ; [and] (b) The parent or parents of the child have voluntarily relinquished temporary custody of the child to a relative or other responsible adult"; . . . (2) The appointment of a guardian advocate does not remove from the parents the right to consent to medical treatment for their child." FLA. STAT. ANN. § 39.828(1)(a) & (b), (2).

### **Education and Awareness**

The State Department of Health is authorized to use state and federal funds to conduct health outreach campaigns which recognize that alcohol consumption and substance abuse during pregnancy is "detrimental to public health." FLA. STAT. ANN. § 20.43(7)(b).

Clients and families utilizing birth centers in the state are to be provided information on the effects of smoking and substance abuse. FLA. STAT. ANN. § 383.311(2)(d).

### **Identification, Testing, Reporting**

The Marriage Preparation and Preservation Act, ch. 98-403, 1998 Fla. Sess. Law Serv. Ch. 98-403, § 173 repealed a 1997 law that provided that "[t]he parent of a newborn infant may not be subject to criminal investigation solely on the basis of the positive drug toxicology of a newborn infant." FLA. STAT. ANN. § 415.503(g).

### **Legislative Mandates, Findings, Declarations**

The Florida Legislature released a finding that indicated that services were needed to meet the increasing number of infants at risk due to parent risk factors, such as substance abuse, and other high-risk conditions. FLA. STAT. ANN. § 391.301. The finding also stated that it was "the intent of the Legislature to establish developmental evaluation and

intervention services . . . in order that families with high-risk or disabled infants may gain the services and skills they need to support their infants.” *Id.* § 391.301(2).

### **Services to Children**

A child is found to be in need of early childhood assistance and handicap prevention services if he or she is a “drug exposed child,” defined as: “any child from birth to 5 years of age for whom there is documented evidence that the mother used illicit drugs or was a substance abuser, or both, during pregnancy and the child exhibits: (a) Abnormal growth; (b) Abnormal neurological patterns; (c) Abnormal behavior problems; or (d) Abnormal cognitive development.” FLA. STAT. ANN. § 411.202(6). A “high-risk child” or “at-risk child” is defined as a “preschool child [whose] parent or guardian who is developmentally disabled, severely emotionally disturbed, drug or alcohol dependent, or incarcerated and who requires assistance in meeting the child's developmental needs [or] the child is drug exposed.” *Id.* § 411.202(9)(g) & (i).

Florida created a Children's Early Investment Program for “at risk” children. One of the stated goals of the program is to “reduce the numbers of cocaine babies born in [the] state.” The program was to be developed in high-risk areas around the state. FLA. STAT. ANN. § 411.232.

The legislature has created a "prekindergarten early intervention program" whose target population is children who come from low-income families. Also included in the target population are three- and four-year olds "who may not be economically disadvantaged but who are . . . prenataally exposed to alcohol or harmful drugs . . . ." FLA. STAT. ANN. § 230.2305 (2)(a)1.

### **Treatment for Pregnant Women**

Florida regulations for the Department of Health establish an elaborate system for reporting and treating physically drug dependent newborns and women who may give birth to them. The system includes giving out information about the adverse effects of prenatal exposure to alcohol and drugs, reporting pregnant drug users to the appropriate agencies, providing treatment to those women, and investigating the circumstances surrounding the pregnancy. The regulations require a reporting of abuse under the state's abuse registry. FLA. ADMIN. CODE ANN. r. 64F-4.001 - .010.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

The "Targeted Outreach for Pregnant Women Act of 1998" established a 2-year pilot program in five of the state's counties with the highest rates of HIV infection and the largest proportion of substance-exposed newborns of “targeted outreach program[s] for high-risk pregnant women who may not seek proper prenatal care, who suffer from substance abuse problems, or who are infected with human immunodeficiency virus (HIV), and to provide these women with links to much needed services and information.” FLA. STAT. ANN. §381.0045.

Each county's health department's primary care program cannot deny access to "[f]inancially eligible women at risk for adverse pregnancy outcomes due to any potential medical complication." Those include "alcohol abuse, drug abuse, or delay in obtaining prenatal care. The inability of the primary care program to provide funding for hospitalization or other acute services shall not preclude an eligible patient from obtaining prenatal services." FLA. STAT. ANN. § 154.011(4).

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## **GEORGIA**

### **Education and Awareness**

Georgia statute requires that any retailer of alcoholic beverages for consumption on the premises must post a warning that reads: "Warning: Drinking alcoholic beverages during pregnancy can cause birth defects." GA. CODE ANN. § 3-1-5.

### **Third Party Liability**

Any "person injured by an individual drug abuser may bring an action . . . for damages against a person who participated in illegal marketing of the controlled substance used by the individual abuser." Plaintiffs under the statute can include a "child whose mother was an individual abuser while the child was in utero." GA. CODE ANN. § 51-1-46.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

The Georgia legislature created a priority admissions policy at programs licensed and funded by the Department of Health which provides for “immediate access to services for [drug dependent pregnant females] applying for admission, which access shall be contingent only upon the availability of space.” GA. CODE ANN. § 26-5-20 (1998).

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## **HAWAII**

### **Third Party Liability**

In 1995, Hawaii enacted the "Drug Dealer Liability Act" which allows "[a]n individual who was exposed to an illegal drug in utero" to bring an action to recover damages against the distributors and marketers of the illegal drug actually used by the mother. HAW. REV. STAT. § 663D-3 (to be repealed on June 30, 2003).

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## **IDAHO**

### **Civil Child Abuse Statutes**

In an opinion by Idaho’s Attorney General, Idaho’s Child Protective Act, IDAHO CODE § 16-1603, “could be amended by the Idaho Legislature to provide specific legal rights and protections for the unborn,” as the state does have a compelling interest in protecting potential human life from gestational drug abuse, but the Act presently would not permit the state to intervene in the case of gestational drug abuse in order to protect the fetus and an action brought under the Act would in all likelihood be dismissed for lack of jurisdiction. 1991 Op. Att’y. Gen. Idaho 5.

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## **ILLINOIS**

### **Civil Child Abuse Statutes**

Illinois’ child abuse statute defines a “neglected child” as any child “who is a newborn infant whose blood, urine, or meconium contains any amount of a controlled substance . . . or a metabolite thereof, with the exception of a controlled substance or metabolite thereof whose presence in the newborn infant is the result of medical treatment administered to the mother or the newborn infant.” 325 ILL. COMP. STAT. ANN. 5/3, amended by 1998 Ill. Legis. Serv. 90-684; *see also* 705 ILL. COMP. STAT. ANN. 405/2-3 (same definition under juvenile court laws).

The list of grounds of unfitness for a parent in terms of his or her ability to care for a child includes the rebuttable presumption “that a parent is unfit . . . with respect to any child to which that parent gives birth where there is a confirmed test result that at birth the child’s blood, urine, or meconium contained any amount of a controlled substance . . . and the biological mother of this child is the biological mother of at least one other child who was adjudicated a neglected minor . . . .” 750 ILL. COMP. STAT. ANN. 50/1.D(k).

Prima facie evidence of abuse or neglect is established with a medical diagnosis of fetal alcohol syndrome, a medical diagnosis of a minor at birth of withdrawal symptoms from narcotics or barbiturates, or

(f) proof that a parent, custodian or guardian of a minor repeatedly used a drug, to the extent that it has or would ordinarily have the effect of producing in the user a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality . . .

(g) proof that a parent, custodian, or guardian of a minor repeatedly used a controlled substance . . . in the presence of the minor or a sibling of the minor is prima facie evidence of neglect. . . .

(h) proof that a newborn infant's blood, urine, or meconium contains any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act [720 ILL. COMP. STAT. ANN. 570/102, amended by 1998 Ill. Legis. Serv. 90-742.], or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of those substances, the presence of which is the result of medical treatment administered to the mother or the newborn, is prime facie evidence of neglect.

705 ILL. COMP. STAT. ANN. 405/2-18.

### **Criminal Statutes**

It is a Class 1 felony in Illinois to deliver a controlled substance to someone known to be pregnant. The perpetrator is subject to a term of imprisonment twice the maximum otherwise authorized under law. 720 ILL. COMP. STAT. ANN. 570/407.2.

It is a Class 2 felony to sell or deliver “for commercial consideration any item of drug paraphernalia to a woman” known to be pregnant. 720 ILL. COMP. STAT. ANN. 600/3.

### **Education and Awareness**

One of the functions of the “grandparent child care program,” which provides services to grandparents who have custody of their grandchildren, is to “establish an informational and educational program for grandparents and other relatives who provide primary care for children who are at risk of child abuse, neglect, or abandonment or who were born to substance-abusing mothers.” 20 ILL. COMP. STAT. ANN. 505/34.11.

The Department of Public Health is required to “conduct an ongoing, statewide education program to inform pregnant women of the medical consequences of alcohol, drug and tobacco use and abuse.” 20 ILL. COMP. STAT. ANN. 2310/55.54.

The legislature requires that every retailer of alcohol must display a sign with the following message: "GOVERNMENT WARNING: ACCORDING TO THE SURGEON GENERAL, WOMEN SHOULD NOT DRINK ALCHOLIC BEVERAGES DURING PREGNANCY BECAUSE OF THE RISK OF BIRTH DEFECTS." 235 ILL. COMP. STAT. ANN. 5/6-24a.

### **Funding**

Some fines collected pursuant to one statute under Illinois’ Controlled Substances Act are set aside “for the treatment of pregnant women who are addicted to alcohol, cannabis or controlled substances and for the needed care of minor, unemancipated children of women undergoing residential drug treatment.” 720 ILL. COMP. STAT. ANN. 570/411.2.

The legislature mandated the establishment of a Substance Abuse Services Fund in certain counties. Money from the fund must be used for "the establishment and maintenance of facilities and programs for the medical care, treatment or rehabilitation of all persons suffering from substance abuse problems, including the hospitalization of pregnant women who are addicted to alcohol, cannabis or controlled substances and for needed care of their newborn children." 55 ILL. COMP. STAT. ANN. 5/5-1086.1.

### **Identification, Testing, Reporting**

Individuals required to report child abuse are required to refer to treatment

any pregnant person in this State who is addicted . . . . The Department of Human Services shall notify the local Infant Mortality Reduction Network service provider or Department funded prenatal care provider in the area in which the person resides. The service provider shall prepare a case management plan and assist the pregnant woman in obtaining counseling and treatment from a local substance abuse service provider licensed by the Department of Human Services or a licensed hospital which provides substance abuse treatment services. The local Infant Mortality Reduction Network service provider and Department funded prenatal care provider shall monitor the pregnant woman through the service program.

325 ILL. COMP. STAT. ANN. 5/7.3b.

### **Legislative Mandates, Findings, Declarations**

Under the state's Cannabis and Controlled Substances Tort Claims Act, the legislature found that "the abuse of cannabis and controlled substances . . . causes death or severe and often irreversible injuries to newborn children." 740 ILL. COMP. STAT. ANN. 20/2.

### **Oversight Committees, Task Forces, Research**

Among the responsibilities of a state committee on substance abuse and pregnancy are: to provide guidance on the development and enhancement of “intervention, prevention and treatment objectives and standards, educational and

outreach programs, and support services specific to the needs of women;” and to assist the state in developing a plan to provide “child care services, at no or low cost, to addicted mothers with children who are receiving substance abuse treatment services.” 20 ILL. COMP. STAT. ANN. 301/10-25.

### **Third Party Liability**

In 1989, the legislature enacted the Drug Dealer Liability Act the purpose of which was "to provide a civil remedy for damages to persons in a community injured as a result of illegal drug use. These persons include . . . infants injured as a result of exposure to drugs in utero ('drug babies')." 740 Ill. Comp. Stat. Ann. 57/5. The Act lists among the persons who can bring an action for damages "individual[s] who [were] exposed to an illegal drug in utero." 740 ILL. COMP. STAT. ANN. 57/25.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

Illinois' comprehensive statute setting forth the responsibilities of the Department of Health with regard to pregnant women who use drugs requires the department to: conduct and report demographic research; seek funding for and establish effective outreach programs targeted to women at risk; maintain up-to-date referral lists of treatment providers; create and publish educational materials; create a manual for service providers to assist them in identifying women at risk, to ensure a “multidisciplinary delivery of services to addicted pregnant women, addicted mothers and their children,” and to instruct them about the “effects of substance abuse on infants and guidelines on the symptoms, care, and comfort of drug-withdrawing infants;” and maintain statistics on the number of drug-affected infants. 20 ILL. COMP. STAT. ANN. 301/5-10.

The Illinois Department of Health has the responsibility of maintaining an “exchange of referral information” among medical providers and substance abuse treatment providers, and an “updated and comprehensive list of medical and social service providers by geographic region.” The Department is to receive input from the state’s Committee on Women's Alcohol and Substance Abuse Treatment. Receipt of state grants and contracts is conditioned on substance abuse treatment providers’ acceptance of pregnant women. The Department is directed to “create or contract with” treatment providers geared towards the “care and treatment of low income pregnant women.” The statute also directs that priority be “given to addicted and abusing women who: (A) are pregnant, (B) have minor children, (C) are both pregnant and have minor children, or (D) are referred by medical personnel because they either have given birth to a baby addicted to a controlled substance, or will give birth to a baby addicted to a controlled substance.” 20 ILL. COMP. STAT. ANN. 301/35-5.

The Adolescent Family Life Program is designed to “document the incidence of and coordinate services to ‘high risk pregnant adolescents,’” defined as “a person at least 12 but not more than 18 years of age who uses alcohol to excess, is addicted to a controlled substance, or habitually uses cannabis and is pregnant.” 20 ILL. COMP. STAT. ANN. 301/35-10.

### **Treatment Improvement/Priority Treatment for Pregnant Women—Education and Awareness—Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

Health care providers are required to “recommend, to any pregnant woman who is being provided prenatal services and is suspected of drug abuse or is addicted . . . referral to a local substance abuse treatment provider licensed by the Department of Human Services or to a licensed hospital which provides substance abuse treatment services.” The Department of Health and the Department of Human Services may provide information about substance abuse during pregnancy in a public awareness campaign. The statute prohibits the Illinois Department of Public Aid and the Department of Human Services from sanctioning a recipient based solely on her substance abuse. 305 ILL. COMP. STAT. ANN. 5/5-5.

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## INDIANA

### **Civil Child Abuse Statutes**

Indiana law defines a “child in need of services” as a child who:

- (1) . . . (A) has an injury; (B) has abnormal physical or psychological development; or (C) is at a substantial risk of a life threatening condition; that arises or is substantially aggravated because the child’s mother used alcohol, a controlled substance, or a legend drug during pregnancy; and (2) the child needs care, treatment, or rehabilitation that the child: (A) is not receiving; or (B) is unlikely to be provided or accepted without the coercive intervention of the court.

IND. CODE. ANN. § 31-34-1-11.

A child is also deemed “in need of services if "(1) the child is born with: (A) fetal alcohol syndrome; or (B) any amount, including a trace amount, of a controlled substance or a legend drug in the child’s body; and (2) the child needs care, treatment, or rehabilitation that: (A) the child is not receiving; or (B) is unlikely to be provided or accepted without the coercive intervention of the court." IND. CODE ANN. § 31-34-1-10.

For the purposes of Indiana’s child abuse statutes, child abuse or neglect “refers to a child who is alleged to be a child in need of services.” IND. CODE. ANN. § 31-9-2-14.

When a child is found to be “in need of services,” a court may order a variety of remedies, including removing the child from the home, requiring the parents of the child or the child to receive services, fully emancipating the child, or entering a protective order on behalf of the child. IND. CODE ANN. § 31-34-20-1.

A law enforcement official may take into custody anyone who is believed to be “the alleged perpetrator of an act against a child who the law enforcement officer believes to be a child in need of services as a result of the alleged perpetrator's act.” The individual is to be taken into custody “only for the purpose of removing the alleged perpetrator from the residence where the child believed to be in need of services resides.” IND. CODE ANN. § 31-34-2-2.

### **Third Party Liability**

The Drug Dealer Liability Act allows "individual[s] who [were] exposed to an illegal drug in utero" to bring an action "for damages caused by an individual drug user's use of an illegal drug." IND. CODE ANN. § 34-24-4-2.

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## IOWA

### **Education and Awareness**

Among the information to be given to clients and families utilizing birth centers is information on the effects of smoking and substance abuse on a developing fetus. IOWA CODE. ANN. § 135G.9 (West 1998).

### **Identification, Testing, Reporting**

Health practitioners are required to perform a “medically relevant test” when s/he discovers in a child physical or behavioral symptoms of the effects of exposure to cocaine, heroin, amphetamine, methamphetamine, or other illegal drugs, or combinations or derivatives thereof, which were not prescribed by a health practitioner, or if the health practitioner has determined through examination of the natural mother of the child that the child was exposed in utero.

The practitioner is required to report any positive test result to the state, which begins an investigation upon receipt of the report. The governing statute provides that “[a] positive test result obtained prior to the birth of a child shall not be used for the criminal prosecution of a parent for acts and omissions resulting in intrauterine exposure of the child to an illegal drug.” IOWA CODE. ANN. §232.77(2).

Attending physicians may conduct a “medically relevant test” on suspected chemically exposed infants. Such a test is defined as "a test that produces reliable results of exposure to cocaine, heroin, amphetamine, methamphetamine,

or other illegal drugs, or combinations or derivatives thereof, including drug urine screen test." IOWA CODE. ANN. §232.73.

### **Oversight Committees, Task Forces, Research**

Iowa created a council on chemically exposed infants and children as a subcommittee of the committee on maternal and child health of the community health division of the Iowa department of public health “to help the state develop and implement policies to reduce the likelihood that infants will be born chemically exposed, and to assist those who are born chemically exposed to grow and develop in a safe environment.” IOWA CODE. ANN. § 235C.1. The Council is responsible for: collecting data on chemically exposed infants and the costs of caring for such infants; making recommendations on public awareness campaigns and training for medical providers; developing strategies for identification and intervention; seeking funding to enhance treatment services to women and children; developing strategies for identifying chemically exposed infants when they enter the school system and providing special services to them; assisting in expanding “appropriate placement options for chemically exposed infants and children who have been abandoned by their parents or cannot safely be returned home”; and determine whether treatment providers are discriminating against substance abusing pregnant women. *Id.* § 235C.3.

### **Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

State-funded substance abuse treatment programs are prohibited from discriminating against people seeking treatment solely because a person is pregnant, unless the program makes an appropriate referral to another program. IOWA CODE. ANN. § 125.32A.

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## **KANSAS**

### **Education and Awareness**

The Secretary of Health and Environment is required to provide educational materials and guidance to medical professionals who provide services to pregnant women about the services available to women and the “perinatal effects of tobacco, the use of alcohol, and the use of any controlled substance . . . for nonmedical purposes.” KAN. STAT. ANN. § 65-1,161. The Secretary is also required to develop an educational program for medical professionals which will assist them in: “(1) Assuring accurate and appropriate patient education regarding the effects of drugs on pregnancy and fetal outcome; (2) taking accurate and complete drug histories; and (3) counseling techniques for drug abusing women to improve referral to and compliance with drug treatment programs.” *Id.* § 65-1,162.

Kansas has a toll-free information line in the state to provide information on resources for substance abusing pregnant women. KAN. STAT. ANN. § 65-1,166.

### **Identification, Reporting, Testing— Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

The state Secretary of Health and Environment is required to develop a “risk assessment profile to assist health care providers [to] screen pregnant women for prenatal substance abuse.” A health care provider who identifies a pregnant woman at risk for prenatal substance abuse may refer the patient, upon consent, to the local health department for services, by providing her name to the department. The governing statute provides that “[t]here shall be no civil or criminal cause of action against a health care provider related to the rendering or failure to render any service under this section [and] referral and associated documentation . . . shall be confidential and shall not be used in any criminal prosecution.” KAN. STAT. ANN. § 65-1,163.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

Pregnant women referred for substance abuse treatment shall be given “first priority user of substance abuse treatment available through social and rehabilitation services.” The governing statute provides for the confidentiality of treatment records and reports and forbids publicly-funded treatment facilities from discriminating against women solely because they are pregnant. KAN. STAT. ANN. § 65-1,165.

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## KENTUCKY

### **Identification, Testing, Reporting— Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

In addition to conducting mandatory testing of all pregnant women for syphilis, attending health care practitioners may screen pregnant women for alcohol or substance dependency or abuse. Physicians

may administer a toxicology test to a pregnant woman [and/or her newborn infant] within eight (8) hours after delivery to determine whether there is evidence that [the mother] has ingested alcohol, a controlled substance, or a substance identified on the list provided by the [Cabinet for Human Resources], or if the woman has obstetrical complications that are a medical indication of possible use of any such substance for a nonmedical purpose.

The attending physician has the duty of evaluating positive test results and to determine whether to make a report to the state. The governing statute provides that “[n]o prenatal screening for alcohol or other substance abuse or positive toxicology finding shall be used as prosecutorial evidence.” Toxicology testing cannot be done without first providing notice to the woman upon whom the test will be conducted. KY. REV. STAT. ANN. § 214.160.

### **Oversight Committees, Task Forces, Research— Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

The state Cabinet for Human Resources is authorized to “conduct periodic anonymous surveys to determine the prevalence within the Commonwealth of drug and alcohol use during pregnancy. These periodic surveys may include, but are not limited to, toxicology tests to determine the presence of alcohol, controlled substances, or other drugs which have not been prescribed due to medical necessity.” Testing may be done without a physician’s order and without the consent of the patient or parent. Results of individual toxicology tests are confidential and are to be compiled in an anonymous, aggregate fashion. The governing statute provides that

[n]o test result obtained pursuant to this section shall be admissible in any court or other hearing as evidence in any proceeding, criminal or civil, against the individual subject of the test [and that no] hospital shall incur any liability, except for negligence, for performing any test . . . or for reporting the result of the test pursuant to any administrative regulation.

KY. REV. STAT. ANN. § 214.175.

Kentucky has created a Substance Abuse, Pregnancy and Women of Childbearing Age Work Group designed to plan and coordinate the activities of the state with regard to substance dependency and abuse during pregnancy. The Work Group will assess the extent of the problem; identify, develop, and coordinate resources for pregnant women at risk of alcohol and substance dependency or abuse and exposed infants and children; and submit a biennial report to the state. KY. REV. STAT. ANN. § 222.021.

### **Public Assistance**

The legislature has provided that “[a]ny public assistance recipient under Title IV of the Federal Social Security Act and any federal food stamp program recipient who has been convicted of a drug felony after August 22, 1996, may remain eligible for the program benefits if the recipient . . . is pregnant, and the recipient is otherwise eligible.” KY. REV. STAT. ANN. § 205.2005.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

The state’s Cabinet for Human Resources was authorized to establish four or more pilot projects within the state to demonstrate the effectiveness of different methods of providing community services to prevent alcohol and substance abuse by pregnant females; improving agency coordination to better identify the pregnant substance abuser and other females who have substance abuse problems; linking with community services and treatment for the chemically dependent woman, her children, and other family members; and gaining access to early intervention services for infants in need.

KY. REV. STAT. ANN. § 222.037.

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## LOUISIANA

### **Legislative Findings, Mandates, Declarations—Treatment Improvement/Priority Treatment for Pregnant Women— Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

In choosing a strategy to deal with the problem of perinatal exposure to alcohol and drugs, the Louisiana Legislature adopted “as the preferred methods, prevention, intervention, and treatment alternatives rather than punitive actions to ameliorate the problems related to . . . medical and social risk factors.” The legislature directed the Department of Health and Hospitals to “establish a program to provide addictive disorders services to eligible pregnant women. Such services shall ensure the availability of appropriate addictive disorders treatment programs that do not discriminate against pregnant women or women with young children.” The program is to: (1) ensure that addictive disorders treatment programs do not discriminate against pregnant women or women with young children; (2) increase public awareness about addictive disorders; (3) develop criteria giving pregnant women priority access to publicly funded addictive disorders treatment programs; (4) develop residential treatment programs designed for addiction-disordered women and children; and (5) encourage health care professionals to identify addiction-disordered pregnant women and make referrals to programs. LA. REV. STAT. ANN. § 46:2505.

### **Oversight Committees, Task Forces, Research**

A Commission on Perinatal Care and Prevention of Infant Mortality was created within the state’s Department of Health and Hospitals. The Commission was to research state laws that impact perinatal care, compile information about infant mortality, and “propose a plan for an equitable system of financing comprehensive health and social services for indigent pregnant women and infants.” The goal of the Commission was to reduce the prevalence of infant mortality in the state and to “[e]ducate women of child-bearing age to be able to choose food wisely and understand the hazards of smoking, alcohol, pharmaceutical products, and other drugs during pregnancy and nursing.” LA. REV. STAT. ANN. § 40:2018.

Louisiana created a Council to Prevent Chemically Exposed Infants within the Department of Health and Hospitals, division of alcohol and drug abuse. The goal of the Council is to “assist the state in developing policies to reduce the likelihood that infants will be born chemically exposed.” LA. REV. STAT. ANN. § 46:2511. A “chemically exposed infant” is defined as “an infant who shows evidence of exposure to or the presence of alcohol, cocaine, heroin, amphetamine, methamphetamine, or other illegal drugs or combinations or derivatives thereof which were not prescribed by a health professional.” *Id.* § 46:2505.

The Council is empowered to gather data on the prevalence of chemically exposed infants and the extent to which services are available to pregnant women who use drugs, and to “assist the state in developing policies to reduce the number of infants who are born chemically exposed.” The Council is directed to make recommendations “regarding state laws, policies, or programs to reduce the incidence of chemically exposed infants and to improve effective treatment services for pregnant women and chemically exposed infants;” about how to improve services to pregnant substance users; and on conducting a public education campaign aimed at the general public, healthcare professionals, and at-risk populations. LA. REV. STAT. ANN. § 46:2514.

### **Third Party Liability**

The Louisiana Drug Dealer Liability Act allows “[a]n individual who was exposed to an illegal controlled substance in utero” to “bring an action for damages caused by an individual’s use of an illegal controlled substance against” any of the people enumerated in the statute who were involved with the drug transaction. LA. REV. STAT. ANN. § 9:2800.63.

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## MAINE

### **Adoption Statutes**

Medical, psychological, and developmental histories of adoptable children are to be provided to prospective adoptive parents, including information about any drug or medication taken by the child’s biological mother during pregnancy and the biological parent’s history of drug and alcohol use. ME. REV. STAT. ANN. tit.18-A, § 9-30.4.

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## MARYLAND

### **Civil Child Abuse Statutes**

As a factor to be considered in a judicial determination for the termination of parental rights, a court is required to consider whether “a child was born . . . addicted to or dependent on cocaine, heroin, or a derivative thereof; or . . . with a significant presence of cocaine, heroin, or a derivative thereof in the child’s blood as evidenced by toxicology or other appropriate tests; and . . . the natural parent refuses admission into a drug treatment program or failed to fully participate in a drug treatment program . . .” MD. CODE ANN., FAM. LAW § 5-313(d)(1)(iv).

There is a presumption that a child is not receiving ordinary and proper care and attention if a “child was born . . . addicted to or dependent on cocaine, heroin, or a derivative thereof; or . . . with a significant presence of cocaine, heroin, or a derivative thereof in the child’s blood as evidenced by toxicology or other appropriate tests.” MD. CODE ANN., CTS. & JUD. PROC. § 3-801.1.

The Department of Child Services may

[p]romptly after receiving a report from a hospital or health practitioner of suspected neglect related to drug abuse and conducting an appropriate investigation . . . file a petition alleging that the child is in need of assistance[,] offer the mother admission into a drug treatment program[,] . . . initiate a judicial proceeding to terminate a mother’s parental rights, if the local department offers the mother admission into a drug treatment program under this subsection within 90 days after the birth of the child and the mother . . . does not accept admission to the program or its equivalent within 45 days after the offer is made . . . or fails to fully participate in the program or its equivalent.

MD. CODE ANN., FAM. LAW § 5-710(b).

Upon receipt of a report of “suspected neglect related to drug abuse,” the Department of children’s services is authorized to file a petition alleging that a child is in need of assistance. A proceeding to terminate a mother’s parental rights may be initiated if the mother has been offered admission to a drug treatment program within 90 days after the child is born and the mother “does not accept admission to the program or its equivalent within 45 days after the offer is made; or . . . fails to fully participate in the program or its equivalent.” MD. CODE ANN., FAM. LAW § 5-710(b).

### **Oversight Committee, Task Forces, Research**

Maryland developed a Task Force to Study Increasing the Availability of Substance Abuse Programs, charged with the task of developing a comprehensive strategy for funding substance abuse programs, and examining the availability of substance abuse programs designed for women, pregnant women, and women with children. MD. ANN. CODE, art. 41, § 18-316(a) & (d)(6).

### **Treatment Improvement/Priority Treatment for Pregnant Women**

Publicly-funded (either partially or in whole) substance abuse treatment programs are required to accept pregnant and postpartum women for treatment on a priority basis. Such programs must also have in place a referral system to medical services and are to be linked by referral agreements with local departments of health and social services. Postpartum means one year following the end of pregnancy. MD. CODE ANN., HEALTH-GEN. § 8-403.1.

### **Treatment Improvement/Priority Treatment for Pregnant Women—Civil Child Abuse Statutes**

The Departments of Human Resources and Health & Mental Hygiene are required to develop “intervention systems” in four of the state’s counties to provide “drug treatment for a mother of a child who is born drug exposed and supportive services for the family of the child.” Such intervention is to occur where: “(1) a child is born drug exposed; and (2) where medical personnel have determined that the child is at high risk of abuse or neglect.” Assistance in obtaining drug treatment and supportive services in order to maintain the family are offered to the mother of a drug exposed child. A drug exposed child is to be taken into state custody where: (1) the mother refuses or fails to complete drug treatment; (2) the mother is unable to provide adequate care for the child; and (3) the father is unable to provide such care. MD. CODE ANN., FAM. LAW § 5-706.3.

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## MASSACHUSETTS

### **Education and Awareness**

Funding for prenatal and maternal health programs from the state's Health Protection Fund is conditioned on such programs' "incorporat[ion of] smoking cessation assistance and guidance regarding the harmful effects of smoking on fetal development." MASS. GEN. LAWS ANN. ch. 29, § 2GG(c).

State regulations require all Department of Health operated and maintained birth centers to provide "a program of prenatal education that shall include the importance of nutrition, preparation for birth and breast feeding, and information on adverse effects of smoking, alcohol and other drugs." MASS. REGS. CODE tit. 105, § 142.620(E).

### **Funding**

The Division of Medical Assistance will pay for special substance abuse treatment services in treatment programs. Among those special services are services for pregnant women. MASS. REGS. CODE tit.130, § 418.410.

### **Identification, Testing, Reporting**

Massachusetts requires an immediate report if a child "is determined to be physically dependent upon an addictive drug at birth . . ." The Department of Public Welfare is then required to investigate the allegation and notify the parent of the "the social services that the department intends to provide to the child or his family" within sixty days of receiving the report. MASS. GEN. LAWS ANN. ch. 119, § 51A.

### **Treatment for Pregnant Women**

State regulations require all hospitals, as part of the licensing requirements, to have written protocols for their maternal-newborn services for "the hospital management and support of patients from identified groups in the population served by the facility, who have special needs, e.g., adolescents, and mothers with known cognitive impairments, psychiatric or substance abuse problems." MASS. REGS. CODE tit. 105, § 130.615(H).

All methadone treatment programs in the state must take precautions with pregnant women on methadone maintenance programs because of "all its attendant dangers during pregnancy." "Dosage levels shall be maintained as low as possible," and the treatment center must make "arrangements for the provision of pre-natal and delivery services." MASS. REGS. CODE tit. 105, § 750.720 (C)(5).

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## MICHIGAN

### **Adoption Statutes**

Prospective adoptive parents are to be notified of, among other things, "an account of the child's prenatal care; medical condition at birth; any drug or medication taken by the child's mother during pregnancy." MICH. COMP. LAWS ANN. § 710.27(b).

### **Funding**

The Michigan State Legislature appropriated "no less than \$200,000.00 to provide education and outreach to targeted populations on the dangers of neonatal addiction and fetal alcohol syndrome and further develop its infant support services to target families with infants with fetal alcohol syndrome or suffering from drug addiction" for the fiscal year 1999-2000. H.B. 4299, 90th Leg., Reg. Sess. (1999) (enacted).

### **Identification, Testing, Reporting**

A person required to report suspected child abuse "who knows, or from the child's symptoms has reasonable cause to suspect, that a newborn infant has any amount of alcohol, a controlled substance, or a metabolite of a controlled substance in his or her body shall report" this to the state agency for child protection. Such a report is not required if the presence of such substances is due to valid medical treatment of the mother or infant. A report under this provision leads to an investigation and possible forwarding of information to law enforcement officials. MICH. COMP. LAWS ANN. § 722.623a.

### **Third Party Liability**

As part of the state's Drug Dealer Liability Act, "[o]ther than an individual abuser, a person injured by an individual abuser may bring an action for damages against a person who participated in illegal marketing of the market area controlled substance used by the individual abuser." Among those who have standing to bring an action is "[a] child whose mother was an individual abuser while the child was in utero." MICH. COMP. LAWS ANN. § 691.1607.

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## **MINNESOTA**

### **Civil Child Abuse Statutes**

Neglect is defined as, among other things, "prenatal exposure to a controlled substance . . . used by the mother for a nonmedical purpose, as evidenced by withdrawal symptoms in the child at birth, results of a toxicology test performed on the mother at delivery or the child at birth, or medical effects or developmental delays during the child's first year of life that medically indicate prenatal exposure to a controlled substance." MINN. STAT. ANN. § 626.556(2)(c).

### **Civil Commitment/Involuntary Detention**

Upon receiving a report that a pregnant woman has used a controlled substance during her pregnancy, a local welfare agency "shall immediately conduct an appropriate assessment and offer services indicated under the circumstances [and] may also [seek] an emergency admission" of the pregnant woman under Minnesota's Civil Commitment Act (MINN. STAT. ANN. § 253B.05). MINN. STAT. ANN. § 626.5561(1) & (2).

### **Education and Awareness**

State statute requires that the "board of medical practice and board of nursing shall require by rule that family practitioners, pediatricians, obstetricians and gynecologists, and other licensees who have primary responsibility for diagnosing and treating fetal alcohol syndrome in pregnant women or children receive education on the subject of fetal alcohol syndrome and fetal alcohol effects, including how to: (1) screen pregnant women for alcohol abuse; (2) identify affected children; and (3) provide referral information on needed services." MINN. STAT. ANN. § 214.12.

Any place licensed for the retail sale of alcoholic beverages must post a sign that includes, among other things, "a warning statement regarding drinking alcohol while pregnant." MINN. STAT. ANN. § 340A.410.

### **Identification, Testing, Reporting**

A physician who suspects that obstetrical complications may be due to a pregnant woman's use of drugs is required to administer toxicology tests to both the pregnant woman and the infant within eight hours after delivery. The physician is required to report positive results as per the state's child abuse reporting statutes. "A negative test result does not eliminate the obligation to report under section 626.5561, if other evidence gives the physician reason to believe the patient has used a controlled substance for a nonmedical purpose." Confirmatory tests are required under this statute. MINN. STAT. ANN. § 626.5562.

Mandated reporters of child abuse and neglect must "immediately report to the local welfare agency if the person knows or has reason to believe that a woman is pregnant and has used a controlled substance for a nonmedical purpose during the pregnancy." MINN. STAT. ANN. § 626.5561.

By statute, "abuse of alcohol" includes the following: if a woman required alcohol detoxification during the pregnancy or if there is a positive result from an alcohol screening test. A person required to report under the state's child abuse reporting laws may either arrange for drug screening for a woman the reporter suspects is pregnant and abusing alcohol, or make a report to the local welfare agency or maternal substance abuse project. If the woman is referred for screening and fails to either complete screening or comply with the resulting recommendations, a report is required. Adult household members may also make a voluntary report. Local welfare agencies are required to react to such reports within five working days by conducting an assessment and offering services. The state will collect data on the number of reports and referrals and the number of women who receive or refuse services. MINN. STAT. ANN. § 626.5563.

As part of the statute that creates the Hennepin county medical examiner's office, the legislature requires that "all sudden or unexpected deaths and all deaths which may be due entirely, or in part, to any factor other than natural

disease" be reported to the medical examiner for evaluation. These deaths include, among others, "deaths of unborn or newborn infants in which there has been maternal use of or exposure to unprescribed controlled substances." MINN. STAT. ANN. § 383B.225 subd. 5(16).

#### **Oversight Committees, Task Forces, Research—Education and Awareness**

The state commissioner of health is charged with the duty of “design[ing] and implement[ing] a coordinated prevention effort to reduce the rates of fetal alcohol syndrome and fetal alcohol effects, and reduce the number of drug-exposed infants.” To do this, the commissioner is required to conduct research to determine the prevalence of the problem in the state and how best to address it, provide training to health care professionals and human services workers, and conduct a public awareness media campaign. MINN. STAT. ANN. § 145.9265.

#### **Treatment Improvement/Priority Treatment for Pregnant Women—Services to Children**

The state is to develop comprehensive maternal and child health and social service programs to address the needs of children exposed to controlled substances and alcohol at birth. The programs are to serve children through preschool years. Treatment programs are to be developed for children between the ages of 6 and 12 who are in need of chemical dependency treatment. Funding shall be made available to programs providing comprehensive drug treatment for pregnant women and women with children. Early intervention programs are to be developed to identify and provide services to children and families at risk due to substance abuse. MINN. STAT. ANN. § 254A.17.

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### **MISSISSIPPI**

No statutes found relating to pregnant women and the use of alcohol or illegal substances.

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### **MISSOURI**

#### **Education and Awareness**

Training shall be provided to social service and other civil servants dealing with pregnant women and children in issues affecting pregnant mothers and their babies, and developmental impairments of exposed infants and treatment resources for drug-abusing families. MO. ANN. STAT. § 191.735(2).

Physicians providing obstetrical or gynecological services are required to counsel all pregnant patients about the effects of cigarette smoking, and the use of alcohol and controlled substances on perinatal development. MO. ANN. STAT. § 191.725.

A program is to be created to provide education to physicians caring for pregnant women and providing gynecological care about: how to take complete drug histories from pregnant patients; the effects of cigarettes, alcohol, and controlled substances on pregnancy; and counseling techniques. MO. ANN. STAT. § 191.727.

The Department of Mental Health's Comprehensive Substance Treatment and Rehabilitation programs must provide clients basic information regarding the "[e]ffects of alcohol and other drug abuse upon pregnancy and child development." MO. CODE REGS. tit. 9, § 30-8.50(45)(F).

#### **Funding**

The legislature created a community grants program known as "Community 2000." The program is run through the division of alcohol and drug abuse within the department of mental health. One of the goals of the local commissions set up as part of the Community 2000 program must be "[t]he reduction of prenatal and perinatal exposure to alcohol and other drugs." MO. ANN. STAT. § 191.835.

#### **Identification, Testing, Reporting**

Protocols are to be developed based on a “risk assessment profile” to identify high risk pregnancies. Coordinated services are to be offered to a woman identified as having a high risk pregnancy. MO. ANN. STAT. § 191.741.

### **Identification, Testing, Reporting—Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

A physician may refer a woman to the Department of Health where there is medical documentation of symptoms consistent with fetal alcohol or controlled substance exposure, a positive toxicology for controlled substances performed on either the mother or child, and a written assessment made by the health care provider which documents the child as being at risk of abuse or neglect. A physician may report abuse and neglect absent the above factors consistent with the state's child abuse reporting laws. Services are to be offered to families that are the subject of such reports. The statute provides that "[r]eferral and associated documentation provided for in this section shall be confidential and shall not be used in any criminal prosecution." MO. ANN. STAT. § 191.737.

### **Oversight Committees, Task Forces, Research**

For the purposes of determining the extent of fetal exposure to alcohol and drugs in the state, the Department of Health is required to conduct periodic tests on samples of pregnant women and infants for the presence of alcohol and drugs. Such testing is to be done anonymously without "identifying information as to the donor." MO. ANN. STAT. § 191.745.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

The Department of Mental Health established minimum criteria for admission to methadone clinics but has excepted pregnant women from those criteria so that they can get treatment immediately. MO. CODE REGS. tit. 9, § 30-3.610.

### **Treatment Improvement/Priority Treatment for Pregnant Women—Criminal Statutes**

Pregnant women or women with custody of children under the age of 12 who either plead guilty or are found guilty of certain offense, and whose use of drugs contributed to the commission of the offense, may be required, as a condition of probation, to participate in the state's Alt-care program, which provides comprehensive substance abuse treatment, if there is space in such a program. MO. ANN. STAT. § 191.831.

### **Treatment Improvement/Priority Treatment for Pregnant Women—Identification, Testing, Reporting—Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

Physicians are required to inform women with high risk pregnancies about the availability of drug treatment and offer referrals. A report of high risk pregnancy is to be made by the physician to the department of health upon consent of the woman. The statute provides that "[r]eferral and associated documentation provided for in this section shall be confidential and shall not be used in any criminal prosecution." MO. ANN. STAT. § 191.743.

### **Treatment Improvement/Priority Treatment for Pregnant Women—Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

Missouri law provides that

[a] pregnant woman referred for substance abuse treatment shall be a first-priority user of available treatment. All records and reports regarding such pregnant woman shall be kept confidential. The division of alcohol and drug abuse shall ensure that family-oriented substance abuse treatment be available, as appropriations allow. Substance abuse treatment facilities which receive public funds shall not refuse to treat women solely because they are pregnant.

MO. ANN. STAT. § 191.731.

The state established a toll-free hotline for providing information on resources for substance abuse treatment and referrals for pregnant women. MO. ANN. STAT. § 191.733.

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## **MONTANA**

### **Treatment for Pregnant Women**

Montana Department of Commerce regulations prohibit a licensed direct entry midwife from accepting a woman with current drug or alcohol abuse or dependency as a client. MONT. ADMIN. R. 8.4.505(1)(a)(x).

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## NEBRASKA

### **Treatment Improvement/Priority Treatment for Pregnant Women**

Case management services are available for high risk pregnant women and their infants who are eligible for Medicaid. NEB. REV. STAT. § 68-1058.

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## NEVADA

### **Child Abuse Statutes**

A child is considered to be in "need of protection," meaning that the state will begin to investigate what social services the child needs, in Nevada if, among other things, "[h]e is suffering from congenital drug addiction or the fetal alcohol syndrome, because of the faults or habits of a person responsible for his welfare." NEV. REV. STAT. ANN. § 432B.330(1)(b).

### **Education and Awareness**

Nevada regulations require that all elementary school health programs include information about "the social causes contributing to the use of drugs and the effect of such use on society, such as babies suffering from fetal alcohol syndrome and babies who are born addicted to drugs." NEV. ADMIN. CODE ch. 389, § 330(18). High school health programs must also include information describing the effect of drugs on pregnancy. *Id.* § 389.454(14).

### **Oversight Committees, Task Forces, Research**

In 1999, the legislature created the Advisory Subcommittee on Fetal Alcohol Syndrome of the Advisory Board on Maternal and Child Health. The subcommittee's purpose is to develop and carry out programs relating to the prevention and treatment of fetal alcohol syndrome. S.B. 197, 70th Leg., Reg. Sess. (1999) (enacted) (to be codified at NEV. REV. STAT. ANN. § 442).

### **Public Assistance**

Although generally a person convicted of a drug felony after August 22, 1996, is not eligible to receive federal public assistance, a pregnant woman who has been convicted of a drug felony but who is participating in or has successfully completed a drug treatment program does not fall within that categorical exception. NEV. REV. STAT. ANN. § 422.29316.

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## NEW HAMPSHIRE

### **Education and Awareness**

No marriage license "shall be issued until a brochure prepared by the department of health and human services . . . concerning fetal alcohol syndrome has been given to both parties." N.H. REV. STAT. ANN. § 457:23.II.

### **Oversight Committees, Task Forces, Research**

The New Hampshire legislature created a task force to study the problems of prenatal exposure to alcohol, tobacco, and other drugs. The task force is empowered to conduct research and hold public hearings and is required to submit an annual report to the legislature and the governor. N.H. REV. STAT. ANN. § 132:20.

### **Treatment for Pregnant Women**

New Hampshire's Controlled Drug Act allows for the prescription of methadone to pregnant and postpartum heroin addicts. N.H. REV. STAT. ANN. § 318-B:10.VIII.(a).

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## **NEW JERSEY**

### **Adoption Statutes**

Adoption agencies are required to provide prospective adoptive parents with information concerning the child's background, including "the parent's complete medical histories, including conditions or diseases which are believed to be hereditary, any drugs or medications taken during pregnancy and any other conditions of the parent's health which may be a factor influencing the child's present or future health." N.J. STAT. ANN. § 9:3-41.1.

### **Civil Commitment/Involuntary Detention**

The statute that allows for the Division of Youth and Family Services to take custody of a child whose "safety or welfare will be endangered unless proper care or custody is provided" applies explicitly to "include an application on behalf of an unborn child . . ." N.J. STAT. ANN. § 30:4C-11.

### **Criminal Statutes**

Enhanced sentencing of twice the term of imprisonment, fine, penalty, or parole ineligibility is to be imposed on a person who is convicted of distributing controlled substances to a pregnant female or a person 17 years old or younger. It is no defense to the statute that the person so convicted did not know that the woman was pregnant. N.J. STAT. ANN. § 2C:35-8.

### **Education and Awareness**

Under the Alcoholic Beverage Control Act, anyone with a Class C license must post a notice warning "patrons that alcohol consumption during pregnancy has been determined to be harmful to the fetus and can cause birth defects, low birth weight and Fetal Alcohol Syndrome, which is one of the leading causes of mental retardation." N.J. STAT. ANN. § 33:1-12a.

### **Funding**

The New Jersey state legislature appropriated \$671,000 for residential substance abuse treatment for pregnant and postpartum women in 1998. S.B. 2000, 208th Leg., Reg. Sess. (N.J. 1998).

### **Identification, Testing, Reporting**

State regulations provide that any infant born in the state who is diagnosed with a birth defect must be reported to the State Department of Health, Special Child Health Services Program. The list of birth defects includes fetal alcohol syndrome and probable fetal alcohol syndrome. N.J. ADMIN. CODE tit. 8, § 20-1.2(a)1.i.(28).

### **Legislative Mandates, Findings, Declarations**

As part of a 1999 act establishing the "Fost-Adopt Demonstration Program for Boarder Babies and Children" as part of the Division of Youth and Family Services, the Legislature declared that "New Jersey is experiencing a serious problem regarding infants and young children living in hospitals beyond medical necessity, or 'boarder babies' and 'boarder children,' many of whom are at risk of physiological, developmental and emotional problems because of prenatal exposure to drugs, alcohol or the HIV virus." 1999 N.J. LAWS 86.

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## **NEW MEXICO**

### **Education and Awareness**

New Mexico requires an Alcohol Server Education program for persons employed in the alcoholic beverage service industry. The program includes the study of the prevention of fetal alcohol syndrome and is intended, among other things, to reduce the frequency of alcohol-related birth defects. N.M. STAT. ANN. § 60-6E-2.

### **Funding—Oversight Committees, Task Forces, Research**

The Legislature created the "DWI program fund" for the purposes specified in the statute, which include the appropriation of funds "to the school of medicine at the university of New Mexico for prevention, research and intervention in the field of fetal alcohol syndrome." N.M. STAT. ANN. § 6-4-8B(12).

### **Identification, Testing, Reporting**

When a child is placed in substitute care or presented to a substitute care provider for the purpose of placement in foster care, the provider shall be given various pieces of information about the child, including whether the child is "at risk for or diagnosed with Fetal Alcohol Syndrome." N.M. ADMIN. CODE tit. 8, § 27.3.24.1.1.

### **Services to Children**

One of the requirements for family infant toddler early intervention services is that the child is an "eligible" child. An "eligible" child is defined as one with an "established condition," which includes fetal alcohol syndrome. N.M. ADMIN. CODE tit. 7, § 30.8.7.25.

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## **NEW YORK**

### **Adoption Statutes**

Adoption agencies are required to provide prospective adoptive parents with information concerning the child's background, including the "health and medical history of the parents at the time of the birth of the adoptive child, including all available information setting forth conditions or diseases believed to be hereditary, any drugs or medication taken during the pregnancy by the child's mother." N.Y. DOM. REL. LAW § 112(2-a).

### **Education and Awareness**

Services provided to women receiving prenatal care may include prenatal risk assessment and health education regarding alcohol and tobacco use and substance abuse. N.Y. PUB. HEALTH LAW § 2522.

Any food product containing more than one-half of one per cent but not more than five per cent of alcohol by volume must bear the following statement: "Notice: This product contains alcohol used as a flavoring and, as with any product that contains alcohol: (I) women should not consume alcohol during pregnancy because of the risk of birth defects, and (ii) consumption of alcohol impairs your ability to drive a car or operate machinery, and may cause health problems." N.Y. AGRIC. & MKTS. § 200.13.

### **Services to Children**

Under the state's Early Intervention Program for Infants and Toddlers with Disability and Their Families, a child with a disability is defined to include any child with a "diagnosed physical or mental condition that has a high probability of resulting in developmental delay, such as . . . fetal alcohol syndrome." N.Y. PUB. HEALTH § 2541.5.

### **Treatment for Pregnant Women**

Any money received from the federal government under the Adoption and Safe Families Act of 1997's provision for Adoption Incentive Payments, *see* 42 U.S.C. § 673b, must be used to provide "preventive services" which include "substance abuse treatment services provided to pregnant women or a caretaker person in an outpatient, residential or in-patient setting." N.Y. SOC. SERV. § 409-a.10.

Under the Department of Health's Medical Assistance Benefits there is a program called "Pre-natal Care Assistance Program." The program requires that each pregnant woman have a care plan and that the care plan "encourage and assist the pregnant woman in obtaining necessary medical, nutritional, psychosocial, drug and substance abuse services appropriate to her identified needs and provide follow-up to ensure ongoing access to services." N.Y. COMP. CODES R. & REGS. tit. 10, § 85.40(e)(2)(ii).

Under the Department of Health's minimum standards for hospitals, hospitals are required to "assure the availability of prenatal childbirth education classes for all prebooked women which address as a minimum . . . the effects of smoking, alcohol and other drugs on the fetus . . ." N.Y. COMP. CODES R. & REGS. tit. 10, § 405.21(c)(8)(iii). Similar classes must be provided at birth centers. *Id.* § 754.7(b)(2).

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## **NORTH CAROLINA**

### **Criminal Statutes**

It is a Class D felony to sell or deliver a controlled substance to a pregnant woman or a child under the age of sixteen. It is no defense to the law that the person so convicted did not know that the recipient was pregnant. N.C. GEN. STAT. § 90-95 (e)(5).

### **Funding—Treatment for Pregnant Women**

The Division of Mental Health also administers a grant program for the federal Substance Abuse Prevention and Treatment Block Grant. To be eligible for the block grant funds, an area program must include substance abuse services for pregnant and parenting women and adolescents. N.C. ADMIN. CODE tit. 10, r. 14C.1156(c)(7).

### **Treatment for Pregnant Women**

The Department of Human Resources Division of Mental Health "shall administer a program to provide comprehensive services to substance abusing pregnant women . . . ." "Services" is defined as including "primary medical, prenatal and pediatric care immunization, child care, transportation, gender specific substance abuse treatment and therapeutic intervention for children that address their developmental needs." N.C. ADMIN. CODE tit. 10, r. 14C.1154(a),(b).

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## **NORTH DAKOTA**

### **Education and Awareness—Oversight Committees, Task Forces, Research**

The Legislature established a fetal alcohol syndrome center as part of the department of neuroscience at the University of North Dakota School of Medicine. Among other things, the center issues yearly reports on the syndrome in the state and develops prevention activities. N.D. CENT. CODE § 15-11-35.

### **Services to Children**

The Legislature established "a clinic to provide both initial diagnostic assessment and reevaluation of children with fetal alcohol syndrome" within the University of North Dakota Medical Rehabilitation Hospital's Child Evaluation and Treatment Program. The program also will "provide consultative services to schools, community agencies, and parents to assist in serving children diagnosed with fetal alcohol syndrome." N.D. CENT. CODE § 15-11-36.

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## **OHIO**

### **Identification, Testing, Reporting—Treatment Improvement/Priority Treatment for Pregnant Women**

All pregnant women receiving medical services through a managed care organization are required to be screened for drug and alcohol use during their first prenatal medical examinations. If a medical provider determines that a pregnant woman may have a substance abuse problem, the provider is required to refer the woman for an assessment to be conducted by the Department of Alcohol and Drug Addiction Services, and to inform the woman about the possible effects of alcohol and other drugs on the fetus. OHIO REV. CODE ANN. § 5111.017.

A comprehensive program is to be developed by the Department of Alcohol and Drug Addiction Services to: determine the number of addicted pregnant women in the state; determine a way to intervene to eliminate addiction during pregnancy; provide for the continued monitoring of addicted pregnant women after the birth of their children; determine the number of infants born drug-exposed; provide for drug rehabilitation for such children. OHIO REV. CODE ANN. § 3793.15.

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## **OKLAHOMA**

### **Adoption Statutes**

Adoption records must contain a record of the medical history of the adopted child, including relevant information concerning the medical and psychological history of the minor's biological parents and relatives, including information concerning: . . . the consumption of drugs, medication or alcohol by the biological father or the biological mother at the time of conception and by the biological mother during her pregnancy with the minor; . . . allergies, diseases, illnesses, and other medical history of biological parents, other children of either biological parent, biological grandparents and other biological relatives, including but not limited to diabetes, high blood pressure, alcoholism, heart disease, cancer, and epilepsy or predisposition thereto; . . . any addiction or predisposition to addiction to drugs or alcohol by the biological parents, other children of either biological parent, biological grandparents or other biological relatives.

OKLA. STAT. ANN. tit. 10, § 7504-1.1(b)(3), (10) & (11).

### **Civil Child Abuse**

A child is a “deprived child” if the child “is in need of special care and treatment because . . . [the] child [was] born in a condition of dependence on a controlled dangerous substance, and the child’s parents, legal guardian, or other custodian is unable or willfully fails to provide such special care and treatment.” Okla. Stat. Ann. tit. 10, § 7001-1.3A.14.c.

### **Education and Awareness**

Finding that there are a growing number of grandparents that are becoming the primary caretakers of children born exposed to drugs or alcohol, the Oklahoma state legislature established an educational program for grandparents to inform them of:

1. The problems experienced by children being raised by grandparents;
2. The problems experienced by grandparents providing primary care for children who have special needs;
3. The legal system as it relates to children and grandparents;
4. The benefits available to children and grandparents providing primary care; and
5. A list of support groups and resources located throughout the state.

OKLA. STAT. ANN. tit. 10, § 7220.

### **Funding**

Four hundred thousand dollars appropriated and continued in 1993, 1995, and 1997 to the Department of Mental Health and Substance Abuse Services for the Center for Pregnant Women with Substance Abuse was continued and reappropriated in 1999. Okla. H.B. 1580, 47th Leg., 1st Sess. (1999) (enacted).

### **Identification, Testing, Reporting**

Health care professionals “attending the birth of a child who appears to be a child born in a condition of dependence on a controlled dangerous substance shall promptly report the matter to the county office of the Department of Human Services in the county in which such birth occurred.” OKLA. STAT. ANN. tit. 10, § 7103(A)(2).

As part of court-ordered treatment and service plans implemented following the removal of a child from her natural family, the Oklahoma Department of Human Services

[m]ay require . . . that the father of the child, legal guardian, legal custodian, stepparent or other adult person living in the home who is a drug-dependent person . . . and whose conduct has contributed to the dependency of such child or mother on the controlled dangerous substance . . . complete a treatment program . . . prior to the return of the child to the home; and . . . [m]ay require testing for substance abuse of the mother, father, legal guardian, legal custodian, stepparent or other adult person living in the home, on a monthly basis for a twelve-month period following completion of the substance abuse program and after return of the child to the home. A positive test of any such person shall be presented to the Department of Human Services and the district attorney.

OKLA. STAT. ANN. tit. 10, § 7003-5.3(G)(2) & (3).

### **Oversight Committees, Task Forces, Research—Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

The state Department of Human Services maintains a “Record of Infants Born Exposed to Alcohol and Other Harmful Substances” for research purposes, which includes basic demographic information and information about treatment offered to the mother. Information collected pursuant to the law will not be used to compel further examination, treatment, or supervision of the mother or child. OKLA. STAT. ANN. tit. 63, § 1-550.3.

### **Third Party Liability**

As part of the Drug Dealer Liability Act, any "individual who was exposed to an illegal drug in utero" can "bring an action for damages caused by use of an illegal drug by an individual" against the persons enumerated in the statute. OKLA. STAT. ANN. tit. 63, § 2-424.

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## **OREGON**

**NOTE:** Within Oregon’s set of statutes dealing with the treatment of pregnant drug users, “substance” has the meaning of “controlled substance” as defined in Oregon, but also includes “alcoholic beverages or other substances with abuse potential.” OR. REV. STAT. § 430.900.

### **Adoption Statutes**

Prior to adoption , child care agencies must test children for “the hereditary or congenital effects of parental use of drugs or controlled substances.” A physician must advise prospective adoptive parents of such effects. OR. REV. STAT. § 418.325.

### **Education and Awareness**

Any county clerk issuing a marriage license must also give to the licensees "a pamphlet describing the medical condition known as fetal alcohol syndrome, its causes and effects." OR. REV. STAT. § 106.081. The pamphlet shall be provided by the Health Division of the Department of Human Resources. *Id.* § 431.825.

"Any person in possession of a valid retail liquor license, who sells liquor by the drink for consumption on the premises or sells for consumption off the premises, shall post a sign informing the public of the effects of alcohol consumption during pregnancy." OR. REV. STAT. § 471.551.

### **Funding**

Technical assistance is available to the state Office of Alcohol and Drug Abuse Programs on the “preparation of standards for county grant applications and to advise and assist counties and regions in planning for treatment of pregnant substance abusers.” OR. REV. STAT. § 430.950.

### **Identification, Testing, Reporting**

A standardized screening instrument to identify the use of substances during pregnancy is used by the Office of Alcohol and Drug Abuse Programs. Training is provided to health professionals who provide services to pregnant women on how to assess drug use in pregnancy. OR. REV. STAT. § 430.955.

A risk assessment is to be performed on all pregnant women during the first trimester of pregnancy to determine if the woman is using drugs or alcohol. If the assessment indicates that a woman is using drugs or alcohol, referrals are to be made by the health care provider. Demographic information about the outcome of risk assessments is to be compiled. The Oregon law also states: “The provider, if otherwise authorized, may administer or prescribe controlled substances that relieve withdrawal symptoms and assist the patient in reducing the need for unlawful controlled substances according to medically acceptable practices.” OR. REV. STAT. § 430.920.

### **Legislative Mandates, Findings, Declarations**

In order to minimize the cost to taxpayers of the increasing number of pregnant substance users and drug- and alcohol-affected infants, the Oregon legislature declared a need to adopt a “holistic approach” to addressing the needs of women, including medical, psychological, logistical, and educational needs. OR. REV. STAT. § 430.905.

### **Oversight Committees, Task Forces, Research**

An Advisory Committee within the Department of Human Resources is required to study “the problem of substance-using pregnant and postpartum women and their infants. The study shall focus on prevention, education and treatment located in community, inpatient, outpatient and residential settings.” The Committee is to develop a case management model for providing services that includes outreach, filling gaps in services, and creating new comprehensive services. OR. REV. STAT. § 430.910.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

Oregon developed pilot projects in local health departments designed to “alleviate the health related problems of pregnant and postpartum women and their infants which arise from substance use.” The programs are to promote comprehensive and coordinated services, increase the availability of treatment options, improve the way the substance using pregnant women are identified and referred to treatment; improve birth outcomes and reduce the severity of impairment among children born to substance-using women; and improve overall healthcare to at-risk pregnant women. OR. REV. STAT. § 430.925.

In order to prevent the need for protective services for an infant born to a drug using mother, health care providers are required to encourage and facilitate drug treatment for pregnant substance users. OR. REV. STAT. § 430.915.

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## **PENNSYLVANIA**

### **Education and Awareness**

The Department of Health will train staff of child protective services agencies and other state agencies to identify and refer pregnant women and mothers in need of drug or alcohol treatment and will establish referral networks between state agencies. PA. STAT. ANN. tit. 71, § 554.

### **Services to Children**

Under the Early Intervention Services System Act, a child under the age of three with fetal alcohol syndrome is included in the definition of “handicapped infants and toddlers.” PA. STAT. ANN. tit. 11, § 875-103.

Every hospital must maintain a written set of obstetrical services policies and procedures that includes “policies and procedures for the care and treatments of drug-dependent newborns.” 28 PA. CODE § 137.21(b)(12)

A hospital's “neonatal intensive care unit” cares for “high-risk infants and those otherwise in need of intensive care.” A “high risk infant” is defined to include “[a]n infant whose mother is drug addicted or habituated . . . .” 28 PA. CODE § 139.12(c)(4).

### **Treatment Improvement/Priority Treatment for Pregnant Women—Funding**

Grants are to be made by the Department of Health to provide comprehensive services to substance using pregnant women and mothers including residential treatment; therapeutic communities; substance abuse education; counseling for women and their children; support groups; parental skills training; job counseling; day care; and comprehensive referrals. The Department of Health will maintain and report statistics on the number of women referred to treatment, those denied treatment, and those placed on waiting lists. The statute includes a provision which ensures the “confidentiality of records regarding identifiable individuals enrolled in treatment programs.” PA. STAT. ANN. tit. 71, § 553.

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## **RHODE ISLAND**

### **Civil Child Abuse Statutes—Termination of Parental Rights**

In a trial to prove that a child has been abused or neglected, an expert may be used to show that the child has fetal alcohol syndrome or drug withdrawal symptoms at birth -- both of which would constitute a prima facie case of abuse or neglect. R.I. ADMIN. CODE § 03-040-420.II.D.4.a; *id.* § 03-141-000.II.F.2.c.1.

### **Education and Awareness**

Town clerks providing a marriage license must also "provide a pamphlet describing the causes and effects of fetal alcohol syndrome." R.I. GEN. LAWS § 15-2-3.1.

### **Identification, Testing, Reporting—Civil Child Abuse Statutes**

The Department for Children and Their Families has promulgated regulations governing situations when a prenatal clinic worker, professional, or other concerned individual calls the Child Abuse Hotline alleging that a pregnant woman is using drugs and/or alcohol. When such a call is made, "the information alleging drug and/or alcohol abuse is put into the [Child Abuse and Neglect Tracking System] computer as an Early Warning." Depending on whether there are "specific allegations" of abuse and/or neglect as well, an investigation may also be initiated. R.I. ADMIN. CODE § 03-040-430.

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## **SOUTH CAROLINA**

### **Criminal Statutes**

A person who has legal custody of a child, is the parent or guardian of a child, or who is responsible for the child's care and support may not "place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety" or "do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered." S.C. CODE ANN. § 20-7-50(A). By interpretation of the South Carolina Supreme Court, a fetus is a "child" under the statute; thus, the statute applies to pregnant women who use drugs. *See Whitner v. State*, 492 S.E.2d 777 (1997).

### **Public Assistance**

The South Carolina Family Independence Act of 1995 makes ineligible for financial assistance any person who "has been identified as requiring alcohol and other drug abuse treatment service or who has been convicted of an alcohol related offense or a controlled substance violation or gives birth to a child with evidence of the effects of maternal substance abuse and the child subsequently is shown to have a confirmed positive test performed on a suitable specimen within twenty-four hours of birth . . ." The statute allows for continued receipt of public assistance if such person "submits to random drug tests and/or participates in an alcohol or drug treatment program . . ." S.C. CODE ANN. § 43-5-1190.

### **Third Party Liability**

As part of the Drug Dealer Liability Act, any "individual who was exposed to an illegal controlled substance in utero" can "bring an action for damages caused by an individual's use of an illegal controlled substance" against the persons enumerated in the statute. S.C. S.B. 102, 113th Leg. (1999) (enacted) (to be codified at S.C. CODE ANN. § 44-54-40).

### **Treatment for Pregnant Women**

Participants in the state's Family Independence Program who give birth to a child who tests positive for drugs "shall participate in an alcohol or drug treatment program approved by the Department of Alcohol and Other Drug Abuse Services . . . as part of their Individual Self-Sufficiency Plan." S.C. CODE REGS. 114-1130.Q.

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## **SOUTH DAKOTA**

### **Civil Commitment/Involuntary Detention**

A pregnant woman who uses alcohol or drugs may be involuntarily committed to a treatment facility. S.D. CODIFIED LAWS ANN. § 34-20A-63.

A person can be committed upon the petition of a spouse, relative, physician, the administrator of a treatment facility, or any other "responsible" person. In order to commit a pregnant woman, the petition must allege that she is an alcoholic or drug abuser who habitually lacks self-control as to the use of alcoholic beverages or other drugs and that she is pregnant and currently abusing alcohol or drugs. S.D. CODIFIED LAWS ANN. § 34-20A-70.

### **Education and Awareness**

As part of the state's Prenatal Education Act, "[a]ny primary health care provider of obstetrical care to a pregnant woman and any counselor who provides services to a pregnant woman shall educate all pregnant patients as to the prenatal effects of drug and alcohol." S.D. CODIFIED LAWS ANN. § 34-23B-1. The Department of Health and the Department of Human Services are to create a prenatal educational program for such health care providers or counselors. *Id.* § 34-23B-2. Also under the Act, age-appropriate educational materials on the subject of "the physiological effects caused by the use of drugs and alcohol on the developing child before and after birth" are to be developed and included in drug and alcohol education programs in the schools. *Id.* § 34-23B-3. The Department of Health and the Department of Human Services also must "maintain a toll-free information line for the purpose of providing information on resources for substance abuse treatment and for assisting with referral for substance abusing pregnant women." *Id.* § 34-23B-4.

All premises licensed to sell alcoholic beverages must display a sign created by the Department of Human Services "explain[ing] the dangers faced by pregnant women who consume alcohol." S.D. CODIFIED LAWS ANN. § 35-4-100.

### **Identification, Testing, Reporting**

"The department of health and the department of human services shall develop screening materials and criteria and make them available for use by primary providers for identification of high- and moderate-risk drug and alcohol use during pregnancy." S.D. CODIFIED LAWS ANN. § 34-23B-5.

### **Third Party Liability**

Any "person who was exposed to an illegal drug in utero" can "bring an action for damages caused by another person's use of an illegal drug." S.D. CODIFIED LAWS ANN. § 34-20C-4.

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## **TENNESSEE**

### **Education and Awareness**

Any licensee who sells alcoholic beverages at retail shall post a sign "contain[ing] a warning that drinking alcoholic beverages during pregnancy can cause birth defects, including fetal alcohol syndrome and fetal alcohol effects." TENN. CODE ANN. § 57-1-211(a).

### **Treatment for Pregnant Women**

The commissioner of the Department of Health is "authorized to plan, establish, and administer pilot projects to develop effective and efficient prevention and treatment services for low-income, pregnant substance abusers." The pilot projects should provide public information, community outreach, residential beds for rehabilitation, outpatient slots for treatment, family intervention services, specialized support services, enhanced physician oversight, and documentation and recordkeeping. TENN. CODE ANN. § 68-24-104(e)(1).

### **Treatment Improvement/Priority Treatment for Pregnant Women**

Services for low-income pregnant substance abusers may be available through the state's health access program. TENN. CODE ANN. § 66-29-151(b).

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## **TEXAS**

### **Civil Child Abuse Statutes**

The use of a controlled substance constitutes child abuse where such use "results in physical, mental, or emotional injury to a child." A child is also abused under the statute if she or he was "born addicted to alcohol or a controlled substance" and "who, after birth as a result of the mother's use of the controlled substance or alcohol: (i) experiences observable withdrawal from the alcohol or controlled substance; (ii) exhibits observable or harmful effects in the child's physical appearance or functioning; or (iii) exhibits the demonstrable presence of alcohol or a controlled substance in the child's bodily fluids." TEX. FAM. CODE ANN. § 261.001(1) & (7).

### **Civil Child Abuse Statutes—Termination of Parental Rights**

Under the Family Code, a court "may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has . . . been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription." TEX. FAM. CODE ANN. § 161.001(1)(R).

### **Education and Awareness**

As part of high school health education, students are to be taught "the harmful effects of certain substances on the fetus such as alcohol, tobacco, other drugs, and environmental hazards such as lead." TEX. ADMIN. CODE tit. 19, § 115.32(b)(3)(C); *id.* § 115.33(c)(3)(C).

### **Treatment Improvement/Priority Treatment for Pregnant Women**

Drug and alcohol treatment programs within the Texas Commission on Alcohol and Drug Abuse must "implement procedures to identify members of priority populations and admit them before all others." At the top of the list are "pregnant injecting drug users" followed by "pregnant substance abusers." TEX. ADMIN. CODE tit. 40, § 144.522.

If a treatment program "does not have the capacity to admit an injecting drug user or pregnant female, the program shall make every effort to place the individual in another treatment facility or provide access to interim services." Interim services for pregnant women must "provide information and education about the effects of alcohol and drug use on the fetus and referrals for prenatal care." TEX. ADMIN. CODE tit. 40, § 144.525.

A facility providing chemical dependency treatment for "females of child-bearing age shall have at least one staff person with a documented knowledge of pregnant substance-abusing females and their care." TEX. ADMIN. CODE tit. 40, § 148.114(l); *id.* § 148.202(k).

### **Services to Children**

In order to receive Early Childhood Intervention case management services, the recipient must be eligible for Medicaid and have a developmental disability. A developmental disability includes "fetal alcohol syndrome or fetal alcohol effects." TEX. ADMIN. CODE tit. 25, § 32.404.

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## **UTAH**

### **Criminal Statutes—Identification, Testing, Reporting**

Failure to report fetal alcohol syndrome or fetal drug dependency of anyone required to report child abuse and neglect constitutes a class B misdemeanor. UTAH CODE ANN. § 62A-4a-411.

### **Identification, Testing, Reporting—Civil Child Abuse Statutes**

The state Division of Family Services "shall make a thorough investigation upon receiving either an oral or written report of alleged abuse, neglect, fetal alcohol syndrome, or fetal drug dependency, when there is reasonable cause to suspect [same]." UTAH CODE ANN. § 62A-4a-409(1). This statute also provides that written reports must be made to a "state central register," that an "interdisciplinary" and "team" approach to dealing with the investigation, and that "[a] division worker or child protection team member may, unless a parent or guardian of the child objects, take a child into temporary protective custody if there is reasonable cause to believe that the child is seriously endangered in its surroundings, that immediate removal is necessary for the protection of the child, and a peace officer is unavailable for assistance." *Id.* § 62A-4a-409(3), (4) & (8).

"When any person . . . determines that [a] child, at the time of birth, has fetal alcohol syndrome or fetal drug dependency . . . shall report that determination to the [Division of Family Services] as soon as possible." UTAH CODE ANN. § 62A-4a-404. Any licensed person attending the birth of a child or caring for a child is required to make a report if the child is born with fetal alcohol syndrome or fetal drug dependency. *Id.* § 62A-4a-404.

A report of fetal alcohol syndrome or fetal drug dependency is "confidential and may only be made available to: (a) a police or law enforcement agency investigating a report of known or suspected child abuse or neglect; (b) a physician who reasonably believes that a child may be the subject of abuse or neglect; (c) an agency that has

responsibility or authority to care for, treat, or supervise a child who is the subject of a report; . . . (f) an office of the public prosecutor or its deputies[.]” UTAH CODE ANN. § 62A-4a-412.

### **Third Party Liability**

Any "individual who was exposed to an illegal drug in utero" can "bring an action for damages caused by an individual's use of an illegal drug" against the persons enumerated in the statute. UTAH CODE ANN. § 58-37e-4.

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## **VERMONT**

### **Adoption Statutes**

Prospective adoptive parents must receive information about the background of an adoptive child, including information regarding the child’s prenatal care and medical condition at birth, “any drug or medication taken by the minor's mother during pregnancy;” and the parent’s “health and genetic history, including any known hereditary condition or disease, the current health of each parent, a summary of the findings of any medical, psychological, or psychiatric evaluation of each parent completed prior to placement [and the parent’s] history of use of drugs and alcohol.” VT. STAT. ANN. tit. 15A, § 2-105.

### **Public Assistance**

Under the state's Assistance to Needy Families With Children program, a pregnant woman is not deemed unable to work due to a high-risk pregnancy solely because of a "pattern of substance abuse on the part of the pregnant woman." VT. ADMIN. CODE 13-170-003 § 2242.

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## **VIRGINIA**

### **Civil Child Abuse Statutes—Identification, Testing, Reporting**

A child abuse report based on maternal drug use shall not be made in Virginia “if the mother sought substance abuse counseling or treatment prior to the child's birth.” VA. CODE ANN. § 63.1-248.6.

Preliminary protective order or emergency removal order may be made “[u]pon the filing of a petition, within twenty-one days of a child’s birth, alleging that an investigation has been commenced in response to a report of suspected abuse or neglect of the child” of perinatal addiction or fetal alcohol syndrome. VA. CODE ANN. § 16.1-241.3.

Among the reasons to suspect that a child is abused or neglected are:

- (i) a finding made by an attending physician within seven days of a child’s birth that the results of a blood or urine test conducted within forty-eight hours of the birth of the child indicate that the presence of a controlled substance not prescribed for the mother by the physician, (ii) a finding by an attending physician made within forty-eight hours of a child’s birth that the child was born dependent on a controlled substance which was not prescribed by a physician for the mother and has demonstrated withdrawal symptoms, (iii) a diagnosis by an attending physician made within seven days of a child’s birth that the child has an illness, disease or condition which, to a reasonable degree of medical certainty, is attributable to in utero exposure to a controlled substance which was not prescribed by a physician for the mother or the child, or (iv) a diagnosis by an attending physician made within seven days of a child’s birth that the child has fetal alcohol syndrome attributable to in utero exposure to alcohol.

VA. CODE ANN. § 63.1-248.3(A1).

### **Identification, Testing, Reporting**

Physicians providing care to pregnant women must screen their patients for substance abuse of both legal and illegal substances. Physicians are required to provide warnings and information about birth outcomes to women who are screened positive for substance abuse. VA. CODE ANN. § 54.1-2403.1.

### **Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination**

Results of any substance abuse assessment conducted by a physician during a pregnant woman's prenatal care is "not admissible in any criminal proceeding." VA. CODE ANN. § 54.1-2403.1(C).

### **Third Party Liability**

Under the Virginia Birth-Related Neurological Injury Compensation Act, "disability or death caused by . . . maternal substance abuse" is excluded from the definition of "birth-related neurological injury." VA. CODE ANN. § 38.2-5001.

### **Treatment for Pregnant Women**

To respond to the needs of substance abusing women and their children, the Secretary of Health and Human Services must develop criteria for "(i) enhancing access to publicly funded substance abuse treatment programs in order to effectively serve pregnant substance abusers, (ii) determining when a drug-exposed child may be referred to the early intervention services and tracking system available through Part H of the Individuals with Disabilities Education Act . . . , (iii) determining the appropriate circumstances for contact between hospital discharge planners and local departments of social services for referrals for family-oriented prevention services, when such services are available and provided by the local social services agency, and (iv) determining when the parent of a drug-exposed infant, who may be endangering a child's health by failing to follow a discharge plan, may be referred to the child protective services unit of a local department of social services." VA. CODE ANN. § 2.1-51.15:1.

The Department of Medical Assistance Services has established expanded prenatal care services that include residential substance abuse treatment services for pregnant and postpartum women. The program is a "comprehensive, intensive residential treatment [program] to improve pregnancy outcomes by eliminating the substance abuse problem." VA. ADMIN. CODE tit. 12, § 30-50-510.B.5. The program has various standards that must be followed and are listed at § 30-60-147, and in order for there to be Medicaid reimbursement, the criteria listed in § 30-130-565 must be met.

Under the Department of Mental Health, Mental Retardation and Substance Abuse Service's rules and regulations for the licensure of facilities and providers of mental health, mental retardation, and substance abuse services, "[i]f the provider offers substance abuse treatment services, the program description shall address the timely and appropriate treatment of substance abusing pregnant women." VA. ADMIN. CODE tit. 12, § 35-102-270.

### **Treatment Improvement/Priority Treatment for Pregnant Women**

The state Board of Mental Health, Mental Retardation and Substance Abuse Services is required to develop "regulations which ensure that programs licensed to provide substance abuse treatment develop policies and procedures which provide for timely and appropriate treatment for pregnant substance abusing women." VA. CODE ANN. § 37.1-182.1.

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## **WASHINGTON**

### **Education and Awareness**

Each state liquor store must have posted a notice "warning persons that consumption of alcohol shortly before conception or during pregnancy may cause birth defects, including fetal alcohol syndrome and fetal alcohol effects." WASH. REV. CODE § 66.16.110.

### **Identification, Testing, Reporting**

Screening criteria are to be developed to identify "pregnant or lactating women addicted to drugs or alcohol who are at risk of producing a drug-affected baby." The Department of Health is required to train medical professionals to identify and screen such women. WASH. REV. CODE § 70.83E.020.

The Department of Health and Safety "shall contract with the University of Washington fetal alcohol syndrome clinic to provide fetal alcohol exposure screening and assessment services." The services include training in diagnosis, development of educational materials, establishment of diagnostic clinics state-wide, and preparation of an annual report detailing information relating to diagnostic accuracy and reliability. WASH. REV. CODE § 70.96A.500.

### **Legislative Mandates, Findings, Declarations**

Finding that the use of alcohol and drugs during pregnancy may cause problems for women, children, and communities, the state legislature declared that:

the best way to prevent problems for chemically dependent pregnant women and their resulting children is to engage the women in alcohol or drug treatment. The legislature acknowledges that treatment professionals find pretreatment services to clients to be important in engaging women in alcohol or drug treatment. The legislature further recognizes that pretreatment services should be provided at locations where chemically dependent women are likely to be found, including public health clinics and domestic violence or homeless shelters.

The legislature called for the development of treatment programs able to serve pregnant women seeking treatment immediately “so that women who seek help are welcomed rather than ostracized.” WASH. REV. CODE § 70.83C.005.

### **Oversight Committees, Task Forces, Research**

The state plans to conduct a study to “measure the reduction in the birth rate of drug-affected infants among women and shall compare the reduction with the rate of birth of drug-affected infants born to women referred to chemical dependency treatment programs. The study shall identify the factors that promote or discourage the ability of women to avoid giving birth to drug-affected infants.” WASH. REV. CODE § 13.34.805. The study is to include alcohol-affected births as well. *Id.* § 13.34.8051.

### **Oversight Committees, Task Forces, Research—Identification, Testing, Reporting**

The Department of Health is required to investigate whether to test or screen newborns for exposure to alcohol and drugs, taking into consideration cost and whether testing should be mandatory or targeted. WASH. REV. CODE § 70.83E.030.

### **Services to Children**

The state Departments of Health and Social and Health Services is to develop a comprehensive plan to provide services to mothers who give birth to a drug or alcohol exposed infant and who constitute at-risk eligible persons under the law. In developing such a plan, the state is to “calculate potential long-term cost savings to the state resulting from reduced use of the medical, juvenile justice, public assistance, and dependency systems by children and mothers receiving services.” WASH. REV. CODE § 13.34.803.

### **Treatment for Pregnant Women**

A model project is to be developed “to provide services to women who give birth to infants exposed to the nonprescription use of controlled substances or abuse of alcohol by the mother during pregnancy.” WASH. REV. CODE § 13.34.800.

Under the Maternity Care Access Program, pregnant women who are substance abusers are considered "at-risk eligible persons." Also, "support services" are defined to include "alcohol and substance abuse treatment for pregnant women who are addicted or at risk of being addicted to alcohol or drugs." WASH. REV. CODE § 74.09.790.

### **Treatment for Pregnant Women—Services to Children**

"The department of social and health services, the department of health, the department of corrections, and the office of the superintendent of public instruction shall execute an interagency agreement to ensure the coordination of identification, prevention, and intervention programs for children who have fetal alcohol exposure, and for women who are at high risk of having children with fetal alcohol exposure." WASH. REV. CODE § 70.96A.510.

### **Treatment Improvement/Priority Treatment for Pregnant Women—Education and Awareness**

The Division of Alcohol and Substance Abuse is to develop “pretreatment projects” for women of child bearing age and to ensure that such projects are available in public health departments; that staff are trained in domestic violence issues and in identifying substance-abusing pregnant women; and that there are programs to educate women and agency staff about the effects of alcohol and drugs on health, pregnancy, and unborn children. Program staff are required to make referrals and advocate for women to enter drug and alcohol treatment facilities. WASH. REV. CODE § 70.83C.020.

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## WEST VIRGINIA

### Education and Awareness

All licensed establishments selling alcohol "shall display signs provided by the alcohol beverage control commissioner warning of the possible danger of birth defects which may result from the consumption of alcohol during pregnancy." W. VA. CODE § 60-6-25(a).

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## WISCONSIN

### Civil Child Abuse Statutes

Among the definitions of "abuse" of a child is the following:

When used in referring to an unborn child, serious physical harm inflicted on the unborn child, and the risk of serious physical harm to the child when born, caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree.

WIS. STAT. § 48.02(am).

### Civil Commitment/Involuntary Detention

The juvenile court has "exclusive jurisdiction over an unborn child alleged to be in need of protection or services." The statute empowers the court to order into custody a pregnant woman who

habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control. The court also has exclusive original jurisdiction over the expectant mother of an unborn child described in this section.

WIS. STAT. § 48.133; *see also id.* § 48.193 (procedures for taking a pregnant adult into custody); *id.* § 48.19(1)(cm) (procedures for taking a pregnant minor into custody); *id.* § 48.205(1m) (criteria for taking pregnant adult into custody); *id.* § 48.205(1)(d) (criteria for taking pregnant minor into custody); *id.* § 48.213(1)(b) (procedures for hearing for taking pregnant adult into custody); *id.* § 48.21(1)(b) (procedures for hearing for taking pregnant minor into custody).

### Education and Awareness

The Department of Health and Family Services "shall acquire, without cost if possible, pamphlets that describe the causes and effects of fetal alcohol syndrome and the dangers to a fetus of the mother's use of cocaine or other drugs during pregnancy and shall distribute the pamphlets free of charge to each county clerk in sufficient quantities so that each county clerk may provide pamphlets to marriage license applicants under § 765.12(1)." WIS. STAT. § 46.03.

"With each marriage license the county clerk shall provide a pamphlet describing the causes and effects of fetal alcohol syndrome." WIS. STAT. § 765.12(1).

### Funding

The Wisconsin legislature appropriated \$87,500 for fiscal year 1997-98, and \$175,000 for fiscal year 1998-99 "for a program to provide substance abuse day treatment services for pregnant and postpartum women and their infants." WIS. STAT. § 46.48.

The Department of Health and Family Services may "award not more than \$125,000 in each fiscal year as grants to counties and private nonprofit entities for treatment for pregnant women and mothers with alcohol and other drug abuse treatment needs." WIS. STAT. § 46.86.

### **Identification, Testing, Reporting**

If a hospital employee, social worker, or intake worker suspects that an expectant mother has "controlled substances or controlled substance analogs" in the blood stream or that "there is a serious risk that there are controlled substances or controlled substance analogs" in the blood stream because of drug use during pregnancy and that the "unborn child . . . may be adversely affected by the controlled substances or controlled substance analogs," that person may refer the expectant mother to a physician for testing. However, no testing under this statute may take place "without first receiving [the expectant mother's] informed consent to the testing." WIS. STAT. § 146.0255(2).

### **Legislative Mandates, Findings, Declarations**

In 1998 the Wisconsin State Legislature passed sweeping legislation amending its "Children's Code" to include numerous provisions protecting the rights of the "unborn child." One of the purposes of the legislation is as follows:

To recognize that unborn children have certain basic needs which must be provided for, including the need to develop physically to their potential and the need to be free from physical harm due to the habitual lack of self-control of their expectant mothers in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree. It is further recognized that, when an expectant mother of an unborn child suffers from a habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, in order to ensure that the needs of the unborn child, as described in this paragraph, are provided for, the court may determine that it is in the best interests of the unborn child for the expectant mother to be ordered to receive treatment, including inpatient treatment, for that habitual lack of self-control, consistent with any applicable law relating to the rights of the expectant mother.

WIS. STAT. § 48.01.

### **Treatment for Pregnant Women—Services to Children**

Under the definitions in the Children's Code, "special treatment or care" is defined to include "professional services which need to be provided to the expectant mother or an unborn child to protect the physical health of the unborn child and of the child when born from the harmful effects resulting from the habitual lack of self-control of the expectant mother in the use of alcohol, controlled substances or controlled substance analogs, exhibited to a severe degree." WIS. STAT. § 48.02(17m).

### **Treatment Improvement/Priority Treatment for Pregnant Women**

A county department of community programs must, within the limits of available funds, "provide for the program needs of persons suffering from mental disabilities, including mental illness, developmental disabilities, alcoholism or drug abuse." If, though, funds are "insufficient to meet the needs of all eligible individuals, [the county department must] ensure that first priority for services is given to pregnant women who suffer from alcoholism or alcohol abuse or are drug dependent." WIS. STAT. § 51.42(3)4m.

In privately operated alcohol or drug abuse treatment facilities, "first priority for services . . . is for pregnant women who suffer from alcoholism, alcohol abuse or drug dependency." WIS. STAT. § 51.46.

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## **WYOMING**

### **Adoption Statutes**

Prospective adoptive parents are to be provided with a medical history of a child subject to adoption which includes, among other things, "any drugs or medication taken during pregnancy by the child's natural mother and any other information which may be a factor influencing the child's present or future health." WYO. STAT. § 1-22-116.

## ENDNOTES

<sup>1</sup> A review of media reporting in 1986, when issues of crack cocaine reached a new high, revealed that “six of the nation’s largest and most prestigious news magazines and newspapers had run more than one thousand stories about crack cocaine. *Time* and *Newsweek* each ran five ‘crack crisis’ cover stories. . . . [T]hree major network television stations ran 74 stories about crack cocaine in six months . . . Fifteen million Americans watched CBS’ prime-time documentary ‘48 Hours on Crack Street.’” LAURA E. GÓMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 14 (1997); Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in America’s Latest Drug Scare*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 18, 20-24 (Craig Reinerman & Harry G. Levine eds., 1997).

<sup>2</sup> Reinerman & Levine, *supra* note 1, at 21.

<sup>3</sup> *See id.*; *see also* DREW HUMPHRIES, CRACK MOTHERS: PREGNANCY, DRUGS AND THE MEDIA 19-36 (1999) (discussing images associated with crack mothers).

<sup>4</sup> *See* Reinerman & Levine, *supra* note 1, at 23 (noting that “in 1988 and 1989, the drug war commanded more public attention than any other issue”); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 154-59 (1997) (discussing the surge of news coverage about maternal drug abuse in 1988 when the National Association for Perinatal Addiction Research and Education published results of a study estimating the number of substance-exposed infants born each year and noting that “[a] review of newspaper accounts of the drug exposure data reveal[ed] a stunning instance of journalistic excess”).

<sup>5</sup> As Drew Humphries explains:

The network news called crack/cocaine babies the newest, most innocent victims in the crack epidemic, and for most Americans the phrase appropriately described irreparable harm visited upon babies by their mothers. What the news reports failed to tell the American public, however, was that the medical research was too limited or poorly conducted to yield any reliable results. When the networks covered the story, they simplified, overstated and mystified harms, creating the distortions that escalated concerns about maternal cocaine use to the level of legal threat.

HUMPHRIES, *supra* note 3, at 65.

<sup>6</sup> Much of the current research is summarized in The Lindesmith Center’s and Women’s Law Project’s *Amicus Curiae* Brief in *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998). *See* Daniel N. Abrahamson et al., *Amicus Curiae Brief: Cornelia Whitner v. The State of South Carolina*, 9 HASTINGS WOMEN’S L.J. 139 (1998); The Lindesmith Ctr., *Research Brief: Cocaine & Pregnancy* (last visited Feb. 18, 2000) <[http://www.lindesmith.org/cites\\_sources/cites.html](http://www.lindesmith.org/cites_sources/cites.html)>.

<sup>7</sup> Alan Mozes, *Poverty Has Greater Impact Than Cocaine on Young Brain*, REUTERS HEALTH, Dec 6, 1999 (citing Hallum Hurt, 20 J. DEV. & BEHAV. PEDIATRICS 418-19 (1999)).

<sup>8</sup> *See* Gómez, *supra* note 1, at 32 (describing a legal and sociological study concluding that “media coverage of the ‘crack baby crisis’ caused a flurry of legislative interest”).

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<sup>9</sup> See, e.g., Carol S. Larson, *Overview of State Legislative and Judicial Responses*, in *THE FUTURE OF CHILDREN* 72, 72-84 (Richard F. Behrman ed., 1991) (reviewing actions by state legislatures and courts in response to the problem of drug exposed newborns); Kary Moss, *Substance Abuse During Pregnancy*, 13 *HARV. WOMEN'S L.J.* 278, 292-93 (1990) (summarizing recent developments in state laws regarding pregnant substance abusing women); Alison B. Marshall, *PERINATAL ADDICTION RESEARCH & EDUCATION UPDATE* (Dec. 1993) (on file with authors) (providing a state by state survey of legislation pertaining to perinatal substance use considered during 1993).

<sup>10</sup> Significantly, some of the bills proposed over the last decade specifically called for controlling certain women's reproductive capacity. See KARY MOSS & KITTY KOLBERT, *ACLU, UPDATE OF STATE LEGISLATION REGARDING DRUG USE DURING PREGNANCY* 1, 1-14 (Memorandum, May 22, 1990) (surveying legislation in the 50 states, the District of Columbia and Puerto Rico); see also Cheri Hass, *State v. Gray: De-Criminalization of Maternal Drug Abuse or a Momentary Reprieve?*, 25 *U. TOL. L. REV.* 1013 (1995) (discussing a 1991 Ohio bill proposing to make maternal drug abuse a felony, punishable by temporary forced sterilization). In 1992, another bill proposed in Washington State would require a woman who gave birth "to a child with fetal alcohol syndrome to have the contraceptive Norplant involuntarily inserted in her." *FIRST QUARTERLY OVERVIEW OF 1992 STATE LEGISLATIVE ACTIVITY* 2 (Geo. Wash. Univ. Legislative Tracking Serv., 1992).

<sup>11</sup> See *States Focus on: Pregnant Women Using Drugs*, *THE NATION'S HEALTH* (Sept. 1990).

<sup>12</sup> *Id.* See also RACHEL ROTH, *MAKING WOMEN PAY, THE HIDDEN COSTS OF FETAL RIGHTS* 163-183 (2000) (providing an overview and critique of state laws regarding pregnant, drug using women as of 1992); DAN STEINBERG AND SHELLY GEHSAN, *STATE RESPONSES TO MATERNAL DRUG AND ALCOHOL USE: AN UPDATE*, National Conference of State Legislatures (Jan. 2000) (discussing some options states have in addressing pregnant women who use alcohol and other drugs and providing an overview of recent statutory and judicial developments).

<sup>13</sup> As discussed in detail below, South Carolina has by judicial decision expanded the scope of its pre-existing criminal child neglect statute, concluding that a viable fetus is a "child" and that any behavior by a pregnant woman, including use of an illegal drug that may endanger the fetus' health constitutes criminal neglect punishable by ten years in jail. See *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998); see also *infra* text accompanying notes 142-163.

<sup>14</sup> "Pregnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment." American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 *JAMA* 2663, 2667 (1990).

<sup>15</sup> "The American Academy of Pediatrics is concerned that [arresting drug addicted women who become pregnant] may discourage mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment." American Academy of Pediatrics, Committee on Substance Abuse, *Drug Exposed Infants*, 86 *PEDIATRICS* 639, 641 (1990).

<sup>16</sup> The American Public Health Association's Policy recognizes that:  
. . . that pregnant drug-dependent women have been the object of criminal prosecution in several states, and that women who might want medical care for themselves and their babies may not feel free to seek treatment because of fear of criminal prosecution related to illicit drug use . . . [the Association] recommends that no punitive measures be taken

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against pregnant women who are users of illicit drugs when no other illegal acts, including drug-related offenses, have been committed. Am. Pub. Health Ass'n, *Public Policy Statement No. 9020, Illicit Drug Use by Pregnant Women*, 8 AM. J. PUB. HEALTH 240 (1990).

<sup>17</sup> “[The American Nurses Association] recognizes alcohol and other drug problems as treatable illnesses. The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems.” AMERICAN NURSES ASSOCIATION, POSITION STATEMENT ON OPPOSITION TO CRIMINAL PROSECUTION OF WOMEN FOR USE OF DRUGS WHILE PREGNANT AND SUPPORT FOR TREATMENT SERVICES FOR ALCOHOL AND DRUG DEPENDENT WOMEN OF CHILDBEARING AGE (1991) (on file with NAPW).

<sup>18</sup> “Criminal prosecution of chemically dependent women will have the overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing, rather than preventing, harm to children and to society as a whole.” AMERICAN SOCIETY OF ADDICTION MEDICINE, PUBLIC POLICY STATEMENT ON CHEMICALLY DEPENDENT WOMEN AND PREGNANCY 47 (1989) (on file with NAPW).

<sup>19</sup> “The March of Dimes believes that targeting substance-abusing pregnant women for criminal prosecution is inappropriate and will drive women away from treatment.” MARCH OF DIMES, STATEMENT ON MATERNAL DRUG ABUSE (1990) (on file with NAPW).

<sup>20</sup> The eighteen states that address the issue of a pregnant woman’s use of drugs in their civil child welfare statutes are: Arizona, California, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, and Wisconsin. *See* ARIZ. REV. STAT. ANN. § 13-3620(B); CAL. PENAL CODE § 11165.13; FLA. STAT. ANN. § 39.01(30)(g); 325 ILL. COMP. STAT. 5/7.3b; IND. CODE § 31-34-1-10, 11; IOWA CODE ANN. §§ 232.68(2)(f), 232.77(2); MD. CODE ANN., FAM. LAW § 5-313(d)(1)(iv); MASS. GEN. LAWS ANN. ch. 119, § 51A; MICH. COMP. LAWS § 722.623a; MINN. STAT. ANN. § 626.5561-5563; NEV. REV. STAT. ANN. § 432B.330(1)(b); OKLA. STAT. ANN. tit. 10, § 7103(A)(2); R.I. ADMIN. CODE § 03-040-420.II.D.4.a; *id.* § 03-141-000.II.F.2.c.1.; S.C. CODE ANN. § 20-7-736; TEX. FAM. CODE ANN. § 261.001(1) & (7); UTAH CODE ANN. § 62A-4-404; VA. CODE ANN. §§ 54.1-2403.1, 63.1-248.3(A1); WIS. STAT. ANN. § 146.0255.

<sup>21</sup> S.C. CODE ANN. § 20-7-736(G). *See also* AMERICAN CIVIL LIBERTIES UNION, DRUG TESTING A BAD INVESTMENT (1999) (addressing the costs of drug testing and incidents of false positives and innocent positives in the workplace setting).

<sup>22</sup> CAL. PENAL CODE § 11165.13 (*italics added*).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> S.C. CODE ANN. § 20-7-736(G).

<sup>26</sup> FLA. STAT. ANN. § 39.01(30)(g).

<sup>27</sup> TEX. FAM. CODE ANN. § 261.001(8).

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<sup>28</sup> MD. CODE ANN., FAM. LAW § 5-313(d)(1)(iv); *see also* Bonnie I. Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 771-76 (1990) (arguing for universal testing and reporting to the child welfare system, but excluding reports for marijuana because of lack of evidence regarding marijuana use and interference with parenting ability).

<sup>29</sup> *See, e.g.*, IND. CODE §§ 31-34-1-10, -11; UTAH CODE ANN. § 62A-4a-404; WIS. STAT. ANN. § 48.02(1).

<sup>30</sup> *See* MINN. STAT. ANN. § 626.556(2)(c)(7).

<sup>31</sup> *See* MINN. STAT. ANN. § 626.5562(1), (2).

<sup>32</sup> WIS. STAT. ANN. § 48.02(1).

<sup>33</sup> *See* S.C. CODE ANN. § 20-7-736(G).

<sup>34</sup> *See* Abrahamson, *supra* note 6, at 142-43 (discussing S.C.CODE 20-7-510(A)); Jonathan Dube, *S.C. Drug Counselors Wrestling with Pregnancy-Reporting Law*, POST & COURIER (Charleston, S.C.), Apr. 12, 1998 (discussing memo to drug treatment center directors from the state Department of Alcohol and Other Drug Abuse Services instructing counselors to report drug use by third-trimester pregnant women to authorities); ATTORNEY GENERAL CHARLES M. CONDON, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, INTERVENTION PROTOCOL FOR DRUG-IMPAIRED INFANTS 4 (1998) (stating unequivocally that “[w]ith the decision in *Whitner v. State*, holding viable fetuses to be persons for purposes of Sec.20-7-50, the reporting requirements of S.C. Code Ann. Sec. 20-7-510 are now clearly applicable to cases of suspected abuse or neglect involving unborn, yet viable fetuses, defined as 24 weeks gestation with an illegal drug in their system”).

<sup>35</sup> *See* Survey, *infra* (listing statutes for Iowa, Minnesota, and Virginia).

<sup>36</sup> *Cf.* Wendy Chavkin et al., *Efforts to Reduce Perinatal Mortality, HIV, and Drug Addiction: Surveys of the States*, 50 J. AM. MED. WOM. ASSOC. 164, 164-165 (1995); Letter from Susan V. Demers, Deputy Commissioner and General Counsel of the New York State Department of Social Services, to Karen Goldstein (Aug. 17, 1990).

<sup>37</sup> *See* Laura Lassar, *When Success Is Not Enough: The Family Rehabilitation Program and the Politics of Family Preservation* (unpublished manuscript on file with NAPW); Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM. J. PUB. HEALTH 483 (1990).

<sup>38</sup> *See* Lassar, *supra* note 37, at 7 (describing how “a backlog in investigations and foster care placements caused hundreds of infants to be held in New York City hospitals for as long as several months after they were medically ready for discharge); Diane Duston, *Boarder Babies Straining Hospitals’ Resources*, ASSOCIATED PRESS, June 23, 1992 (quoting David Liederman, executive director of the Child Welfare League, who asserts that the government should help families in distress solve their problems, instead of focusing on punishment for drug use); *see also* Denise Paone & Julie Alpern, *Pregnancy Policing: Policy of Harm*, 9 INT. J. OF DRUG POLICY 101, 104 (1998) (noting that as a result of being kept in hospitals for extended periods of time “these children may be condemned to living conditions that pose greater harm to their well-being than the ones from which they were removed”); Demers *supra* note 36.

<sup>39</sup> John McCarthy, *The CPS Drug Use Dilemma: Balancing the Right of Children to Protection Against the Right of Children to Their Parents*, SACRAMENTO MEDICINE, Nov. 1998, at 11-12.

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<sup>40</sup> See *In re Valerie D.*, 613 A.2d 748 (Conn. 1992) (holding that plain language and legislative history do not support application of civil child abuse statute where child was born with positive toxicology and other symptoms after mother had injected cocaine several hours prior to giving birth and distinguishing numerous lower sister state court decisions reaching the opposite conclusion); *In re Nassau County Dep't of Soc. Serv.*, 661 N.E.2d 138 (N.Y. 1995) (noting that a finding of neglect as to a newborn and a newborn's older sibling may not be based solely on the newborn's positive toxicology for a controlled substance); see also *In re Appeal in Pima County Juvenile Severance Action No. S-120171*, 905 P.2d 555 (Ariz. 1995) (ruling that a finding of neglect as to a newborn and a newborn's older sibling may not be based solely on the newborn's positive toxicology for a controlled substance); *In re Adoption of Katherine*, 674 N.E.2d 256 (Mass. App. Ct. 1997) (refusing to permit adoption of children without the biological parent's consent and concluding that "[i]n the absence of a showing that a cocaine-using parent has been neglectful or abusive in the care of that parent's child, we do not think a cocaine habit, without more, translates automatically into legal unfitness to act as a parent"); *State ex. rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997) (refusing to allow detention of pregnant woman under statute allowing state to take protective custody of a "child" because legislature did not intend to include fetus within the definition of child).

<sup>41</sup> See *In re Guardianship of K.H.O.*, 736 A.2d 1246 (N.J. 1999) ("[T]he child's addiction and symptoms of withdrawal, coupled with her mother's failure to provide continuing care for her child or to take any measures to help her child overcome her suffering, satisfy the [endangerment to child's health and development] prong of the statutory test [for termination of parental rights]."). In Ohio, the intermediate court of appeals held that a fetus is a "child" under the state's civil child abuse statute. See *In re Baby Boy Blackshear*, No. 99CA00018, 1999 WL 770788, at \*3, (Ohio Ct. App. Sept. 7, 1999). An appeal is currently pending before the Ohio Supreme Court.

<sup>42</sup> MINN. STAT. ANN. § 626.5561(2) (permitting emergency commitment of pregnant women); S.D. CODIFIED LAWS § 34-20A-63 (permitting "emergency commitment" of pregnant women who abuse alcohol or drugs). See generally Sandra Anderson Garcia & Ingo Keilitz, *Involuntary Civil Commitment of Drug-Dependent Persons With Special Reference to Pregnant Women*, 15 MENTAL PHYSICAL DISABILITIES L. REP. 418, 419 (1991) (discussing the 1989 amendments to the Commitment Act of 1982).

<sup>43</sup> WIS. STAT. ANN. §§ 48.133, 48.135, 48.981(3) (amending the Children's Code to extend regulatory control over the behavior of pregnant women).

<sup>44</sup> See Garcia & Keilitz, *supra* note 42, at 420-421.

<sup>45</sup> See *id.* at 419 (noting that as of 1991, except for Minnesota, no state policy articulated the specific goal of involuntarily committing pregnant drug users based solely on a state's interest in protecting the fetus).

<sup>46</sup> See *In re Tanya P.*, No. 530069/93, slip. op. at 18-22 (N.Y. Sup. Ct. N.Y. Cty. Feb. 24, 1995).

<sup>47</sup> See, e.g., KY. REV. STAT. ANN. § 222.021; LA. REV. STAT. ANN. §§ 40:2018, 46:2511; N.H. REV. STAT. ANN. § 132:20; OR. REV. STAT. § 430.910.

<sup>48</sup> See, e.g., PA. STAT. ANN. tit. 71 § 553.

<sup>49</sup> See, e.g., GA. CODE ANN. § 26-5-20; KAN. STAT. ANN. § 65-1, 165; MO. ANN. STAT. § 191.731.

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<sup>50</sup> See, e.g., COLO. REV. STAT. § 26-4-508.2(1).

<sup>51</sup> See, e.g., DEL. CODE ANN. tit. 16, § 190; MO. REV. STAT. §§ 191.725. See also ROTH, *supra* note 12, at 166-75, 176, observing that many of the provisions for education and treatment do not in fact guarantee funding for those services and that the effectiveness of these non-punitive approaches “depends on the strength of the state’s commitments as measured by allocation and duration of funds; its enforcement of policies guaranteeing access; the breadth and depth of treatment offerings and so on.”

<sup>52</sup> See, e.g., IOWA CODE § 125.32A; KAN. STAT. ANN. § 65-1, 165. Some states have also passed laws requiring that prospective adoptive parents receive information about a birth mothers’ drug use history and the results of an infant drug toxicology test. See ME. REV. STAT. ANN. tit 18-A, § 9-304(b); MICH. COMP. LAWS ANN. § 710.27(b); N.Y. DOM. REL. LAW § 112(2-a); OKLA. STAT. ANN. tit. 10 § 7504-1.1(B)(2)(b)(3), (10) & (11); OR. REV. STAT. § 418.325; VT. STAT. ANN. tit. 15-A, § 2-105; WYO. STAT. ANN. § 1-22-116; see also CAL. WELF. & INST. CODE § 16135 (establishing services for adoptive parents of infants presumed to have been affected by prenatal drug exposure.).

<sup>53</sup> See OR. REV. STAT. § 430.920.

<sup>54</sup> MD. CODE ANN. HEALTH-GEN § 15-103(b)(9)(vi).

<sup>55</sup> See, e.g., 720 ILL. COMP. STAT. ANN. 570/407.2; N.J. STAT. ANN. § 2C:35-8.

<sup>56</sup> See, e.g., 235 ILL. COMP. STAT. ANN. 5/6-24a(a) & (b) (“The General Assembly finds that there is a need for public information about the risk of birth defects (specifically Fetal Alcohol Syndrome) when women consume alcoholic liquor during pregnancy. . . . Every holder of a retail license, whether the licensee sells or offers for sale alcoholic liquors for use or consumption on or off the retail license premises, shall cause a sign with the message ‘GOVERNMENT WARNING: ACCORDING TO THE SURGEON GENERAL, WOMEN SHOULD NOT DRINK ALCOHOLIC BEVERAGES DURING PREGNANCY BECAUSE OF THE RISK OF BIRTH DEFECTS’ to be framed and hung in plain view.”); see also D.C. CODE ANN. § 25-147; GA. CODE ANN. § 3-1-5; MINN. STAT. ANN. § 340A.410, Subd. 4b (3) N.J. STAT. ANN. § 33:1-12a; OR. REV. STAT. § 471.551; TENN. CODE ANN. § 57-1-211; WASH. REV. CODE ANN. § 66.16.110; W.VA. CODE § 60-6-25.

<sup>57</sup> See, e.g., OKLA. STAT. ANN. tit. 63, § 2-424; see also Survey, *infra* (detailing other Drug Dealer Liability Acts).

<sup>58</sup> *Id.*

<sup>59</sup> Ernest Drucker, *Drug Prohibition and Public Health, 25 Years of Evidence*, 114 PUB. HEALTH REP. 14, 18 (1999).

<sup>60</sup> *The Drug War Backfires*, N.Y. TIMES, Mar. 13, 1999, at A14 (noting that this is not because Americans use more drugs than people in other nations and that “[s]urveys now show . . . that the use of crack, by about 600,000 people annually, has not changed in 10 years. Nor has the general level of illegal drug use.”).

<sup>61</sup> AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE”: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 15 (1999).

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<sup>62</sup> *Id.* at 22; *see* CATHERINE CONLY, U.S. DEP'T OF JUSTICE, THE WOMEN'S PRISON ASSOCIATION: SUPPORTING WOMEN OFFENDERS AND THEIR FAMILIES 3 (1999) (detailing the dramatic rise in the number of women imprisoned in federal and state prisons on drug offenses).

<sup>63</sup> *See, e.g.*, 25 U.S.C. § 1665g (permitting “grants to Indian tribes and Indian organizations to establish fetal alcohol syndrome and fetal alcohol effect programs”); 42 U.S.C. § 280c-6 (establishing grants for home visiting services for at-risk families); 42 U.S.C. § 290bb-1(a) (grants “for the purpose of providing to pregnant and postpartum women treatment for substance abuse”).

<sup>64</sup> *See* 21 U.S.C. § 1665d(b).

<sup>65</sup> *See* 42 U.S.C. § 280f(d).

<sup>66</sup> Personal Responsibility And Work Opportunity Reconciliation Act Of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of U.S.C.).

<sup>67</sup> Codified at 21 U.S.C. § 862a.

<sup>68</sup> Codified at 42 U.S.C. § 608.

<sup>69</sup> Amending 7 U.S.C. § 2015.

<sup>70</sup> Amending 42 U.S.C. § 1382(e).

<sup>71</sup> Amending 42 U.S.C. § 1437d.

<sup>72</sup> Codified at 21 U.S.C. § 862b.

<sup>73</sup> LEGAL ACTION CENTER, STEPS TO SUCCESS, HELPING WOMEN WITH ALCOHOL AND DRUG PROBLEMS MOVE FROM WELFARE TO WORK 2 (May 1999); *see also* DRUG STRATEGIES, KEEPING SCORE, WOMEN AND DRUGS: LOOKING AT THE FEDERAL DRUG CONTROL BUDGET 22 (1998) (discussing the federal TANF laws and noting that “[o]ver 90 percent of the 3 million households receiving TANF funds in 1998 are headed by women”). *See also*, Corinne A. Carey, *Crafting A Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State Responses as the Most Recent Chapter in the War on Drugs*, 46 BUFFALO L. REV. 281 (1998)

<sup>74</sup> Legal Action Center, *supra* note 73, at 2.

<sup>75</sup> Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

<sup>76</sup> 42 U.S.C. § 675(5)(C).

<sup>77</sup> 42 U.S.C. § 675(5)(E).

<sup>78</sup> JAN MCCARTHY, ET AL., THE ADOPTION AND SAFE FAMILIES ACT: EXPLORING THE OPPORTUNITY FOR COLLABORATION BETWEEN CHILD MENTAL HEALTH AND CHILD WELFARE SERVICE SYSTEMS: A RESOURCE GUIDE 37 (1999).

<sup>79</sup> *See, e.g.*, DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE 267-72 (1996) (noting that “the movement to prosecute drug-using mothers gets much of its steam from

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the anti-abortion movement.”); Humphries, *supra* note 3, at 69 (“Knowing a declaration that legal life begins at conception is beyond them, right-to-life jurists have tried to work around the edges, using related issues like maternal drug use to advance their cause.”).

<sup>80</sup> The issue remains current in the media, as it has devoted substantial coverage to the Children Require a Caring Kommunity (CRACK) program, a program that offers drug-users \$200 to get sterilized or use long-term contraception. See Anne-Marie O’Neill & Kelly Carter, *Desperate Measure*, PEOPLE, Sept. 27, 1999, at 145 (describing founder Barbara Harris’s program offering \$200 to stop crack addicts from having more babies); see also Children Require a Caring Kommunity Home Page, (visited May 3, 2000) <<http://www.cashforbirthcontrol.com>> (official web site of the CRACK program that discusses alleged harms to drug exposed newborns); Lynn Paltrow & Robert Newman, *Treatment, Not Sterilization, Is the Way to Help Addicted Moms*, HOUSTON CHRON., Jan. 30, 2000, at C4 (arguing that program is based on numerous medical and social myths).

<sup>81</sup> See Robin-Vergeer, *supra* note 28, at 748-50.

<sup>82</sup> 740 ILL. COMP. STAT. ANN. 20/2(a).

<sup>83</sup> See e.g., Ezekiel J. Emanuel, *Eight is Too Many*, NEW REPUBLIC, Jan. 25, 1999, at 8, 10 (discussing the numerous medical problems resulting from large multiple births including prematurity, low-birthweight and death).

<sup>84</sup> D.A. Frank et al., *Maternal Cocaine Use: Impact on Child Health and Development*, 40 ADVANCES IN PEDIATRICS 65 (1993).

<sup>85</sup> See Abrahamson, *supra* note 6, at 147; see also The Lindesmith Ctr., *supra* note 6; Gómez, *supra* note 1, at 23-25 (discussing the failure of longitudinal studies to find statistically significant differences between cocaine-exposed children and non-exposed children).

<sup>86</sup> See Paone & Alpern, *supra* note 38, at 104 (citing Thurman et al., *Prenatally Exposed to Cocaine, Does the Label Matter?*, 18 J. OF EARLY INTERVENTION 119 (1994) and Woods et al., *Pygmalion in the Cradle: Observer Bias Against Cocaine Exposed Infants*, 17 INFANT BEHAV. & DEV. 1020 (1994)); see also Delacey Skinner, *Body Politics*, POINT (South Carolina), Fall 1999, at 8, 9 (“For Knight and her son, though, the most painful result of their ordeal are the social consequences Brandon has faced from the labels used in the media. After a picture of Knight and Brandon opposite a picture of a ‘crack baby’ ran in Source magazine last year, Brandon was teased at school. Kids started calling him a ‘crack baby.’”).

<sup>87</sup> See Robin-Vergeer, *supra* note 28, at 771-72.

<sup>88</sup> See *Linder v. United States*, 268 U.S. 5, 18 (1925) (“[Addicted persons] are diseased and proper subjects for [medical] treatment.”); cf. *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (holding unconstitutional a state law making narcotic addiction a crime).

<sup>89</sup> See Charles Marwick, *Physician Leadership on National Drug Policy Finds Addiction Treatment Works*, 279 JAMA 1149 (1998); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 176 (4th ed. 1994) (“The essential feature of substance dependence is a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues use of the substance despite significant substance related problems. There is a pattern of repeated self-administration that usually results in tolerance, withdrawal, and compulsive drug-taking behavior.”).

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<sup>90</sup> *Amicus Curiae* Brief of the American Medical Association in *Ferguson, et. al. v. City of Charleston et. al.*, in the United States Supreme Court, No. 99-936, at 7 *citing* AMERICAN MEDICAL ASSOCIATION, PROCEEDINGS OF THE HOUSE OF DELEGATES: 137<sup>TH</sup> ANNUAL MEETING, Board of Trustees Report NN 236, 241 (June 26-30,1988).

<sup>91</sup> Drucker, *supra* note 59, at 16, 28 (noting that in the United States, “the very use of the term harm reduction is still banned from the Federal policy lexicon and denied funding because it is seen as ‘condoning drug use’”).

<sup>92</sup> See SHEIGLA MURPHY & MARSHA ROSENBAUM, PREGNANT WOMEN ON DRUGS: COMBATING STEREOTYPES AND STIGMA 100 (1999).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See Marsha Rosenbaum, *Women: Research and Policy*, in WILLIAMS & WILKINS, SUBSTANCE ABUSE 654-65 (1997) (“Researchers have consistently found high levels of past and present abuse in the lives of women drug users. Many have suggested that there is a relationship, if not absolutely causal, between violence experienced by women and drug use.”).

<sup>96</sup> See, e.g., Hortensia Amaro et al., *Violence During Pregnancy and Substance Abuse*, 80 AM. J. PUB. HEALTH 575, 578 (1990); Teri Randall, *Domestic Violence Begets Other Problems of Which Physicians Must Be Aware*, 264 JAMA 940, 943 (1990).

<sup>97</sup> See CENTER FOR SUBSTANCE ABUSE TREATMENT, PREGNANT, SUBSTANCE-USING WOMEN 6 (1993) (U.S. Dept. of Health & Human Servs. Publication No. (SMA) 93-1998) (discussing the services needed to address successfully the treatment of drug using women, noting that it “is imperative that programs include services designed specifically for women, particularly pregnant women”).

<sup>98</sup> *Id.* at 6-8.

<sup>99</sup> See PREGNANT, SUBSTANCE-USING WOMEN, *supra* note 97. See also CENTER FOR SUBSTANCE ABUSE TREATMENT, PRACTICAL APPROACHES IN THE TREATMENT OF WOMEN WHO ABUSE ALCOHOL AND OTHER DRUGS 124-26 (1994) (U.S. Dept. of Health and Human Servs. Publication No. (SMA) 94-3006), (providing guidance to treatment providers to meet the specific needs of women with substance abuse problems).

<sup>100</sup> *Amicus Curiae* Brief of California Medical Association & American College of Obstetricians and Gynecologists, District 9, at 3-4, *In Re Adrianna May H.*, No. 3 Civil CO14203 (Cal. Ct. App. 3d filed June 17, 1993); see also Center for the Future of Children, *Recommendations*, in THE FUTURE OF CHILDREN 8 (Richard F. Behrman ed., 1991) (“[A]n identified drug exposed infant should be reported to child protective services only if factors in addition to prenatal drug exposure show that the infant is at risk for abuse or neglect.”).

<sup>101</sup> See Marwick, *supra* note 89 (The Physician Leadership on National Drug Policy reviewed more than 600 peer-reviewed research articles and found that addiction to illicit drugs can be treated with as much success as other chronic illnesses like diabetes, asthma, and hypertension).

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<sup>102</sup> See e.g., Stephen Magura et al., Effectiveness of Comprehensive Services for Crack-Dependent Mothers with Newborns and Young Children (1998) (discussing New York City's experience with the Family Rehabilitation Program and citing numerous studies describing how comprehensive, coordinated, holistic treatment are better at engaging pregnant and parenting women); PREGNANT, SUBSTANCE-USING WOMEN, *supra* note 97; Claire McMurtrie et al., *A Unique Drug Treatment Program for Pregnant and Postpartum Substance-Using Women in New York City: Results of a Pilot Project, 1990-1995*, 25 AM. J. DRUG & ALCOHOL ABUSE 701, 701-02 (1999) (describing a comprehensive model of drug treatment for pregnant and postpartum women that included children and did not view relapse as a failure, concluding that it "seem[ed] to improve mother's lives, fetal drug exposure, and birth outcome significantly"). See also PRACTICAL APPROACHES, *supra* note 99 at 68, 97-98.

<sup>103</sup> See Marwick, *supra* note 89, at 1149 (discussing the fact that drug "treatment costs ranged from \$1800 per patient for outpatient treatment to \$6800 for long-term residential care," which is far less expensive than the \$25,900 per year it costs to keep one person in prison); see also THE FUTURE OF CHILDREN, *supra* note 100, at 14 (noting that "it is extraordinarily costly for government to rear children through foster care, with costs typically around \$3,000 per year per child, but reaching as high as \$35,000 or even double that when the children have special medical complications").

<sup>104</sup> See Lessor, *supra* note 37, at 3 (discussing the elimination by New York City Mayor Rudolph Giuliani of city funding for the Family Rehabilitation Program); Magura, *supra* note 102; Charisse Jones, *A Casualty of Deficit: Center for Addicts*, N.Y. TIMES, Jan. 14, 1995, at A27 (noting the dwindling numbers of treatment programs in New York City); Alma J. Carten, *Mothers in Recovery: Rebuilding Families in the Aftermath of Addiction*, 41 NAT'L ASS'N OF SOC. WORKERS 37 (1996).

<sup>105</sup> See Lessor, *supra* note 37, at 3.

<sup>106</sup> See, e.g., Wendy Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, 266 JAMA 1556 (1991); Julie Petrow, *Addicted Mothers, Drug Exposed Babies: The Unprecedented Prosecution of Mothers Under Drug-Trafficking Statutes*, 36 N.Y.L. SCH. L. REV. 573, 604-06 (1991) (arguing for an increase in federal and state funding for drug treatment programs for women); Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 292-303 (1987) (discussing the lack of access to adequate health care); Wendy Chavkin et al., *National Survey of the States: Policies and Practices Regarding Drug-Using Pregnant Women*, 88 AM. J. PUB. HEALTH 117 (1998); LEGAL ACTION CENTER, STEPS TO SUCCESS 3 (May 1999); DRUG STRATEGIES, KEEPING SCORE, WOMEN AND DRUGS: LOOKING AT THE FEDERAL DRUG CONTROL BUDGET 16-17 (1998); Vicki Breitbart et al., *The Accessibility of Drug Treatment for Pregnant Women: A Survey of Programs in Five Cities*, 84 AM. J. PUB. HEALTH 1658 (1994); see also *Elaine W. v. Joint Diseases N. Gen. Hosp., Inc.*, 613 N.E.2d 523, 524 (N.Y. 1993) (discussing a New York hospital's refusal to admit pregnant women into its drug detoxification program).

<sup>107</sup> See, e.g., 2 STATE COUNCIL ON MATERNAL, INFANT & CHILD HEALTH, 1991 SOUTH CAROLINA STUDY OF DRUG USE AMONG WOMEN GIVING BIRTH: PREVENTION AND TREATMENT SERVICES 2, 10 (1992) (reporting that "specific resources designed to meet the needs of women of childbearing age, especially pregnant women, are not widely available" and that lack of child care and transportation are seemingly insurmountable obstacles to treatment for many women); SUBSTANCE ABUSE & PREGNANCY WORK GROUP, A REPORT TO THE SECRETARY OF THE KENTUCKY CABINET FOR HUMAN RESOURCES AND THE LEGISLATIVE RESEARCH COMMISSION 17 (1994) (noting the lack of treatment services "especially those that provide specific services for pregnant women").

<sup>108</sup> LEGAL ACTION CENTER, *supra* note 73, at 6.

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<sup>109</sup> *Id.*

<sup>110</sup> Amy Hill, *Applying Harm Reduction to Services for Substance Using Women in Violent Relationships*, HARM REDUCTION COMMUNICATION, Spring 1998, at 7-9 (discussing the reasons why the development of services for battered, substance-abusing women is limited).

<sup>111</sup> See Chavkin, *supra* note 106, at 1559 (explaining that the risks involved in seeking treatment deter addicted mothers from getting the help they need); see also *State v. Ashley*, 701 So. 2d 338, 342-43 (Fla. 1997) (dismissing homicide charges against a woman who shot herself in the stomach after discovering that Medicaid would not cover the expense of an abortion); Shelly Gehshan, *Missed Opportunities for Intervening in the Lives of Pregnant Women Addicted to Alcohol or Other Drugs*, 50 J. AM. MED. WOMEN'S ASS'N 165, 166 (1995) (discussing a study of 181 addicted pregnant women in the South and finding that "45% did not have a regular source for family planning services").

<sup>112</sup> See MURPHY & ROSENBAUM, *supra* note 92, at 100.

<sup>113</sup> SUSAN C. BOYD, *MOTHERS AND ILLICIT DRUGS: TRANSCENDING THE MYTHS* 14-16 (1999) (listing at least fourteen studies demonstrating that women who use illicit drugs can be adequate parents).

<sup>114</sup> M. Kearney et al., *Mothering on Crack Cocaine: A Grounded Theory Analysis*, 38 SOC. SCI. & MED. 351, 355 (1994).

<sup>115</sup> AMERICAN BAR ASSOCIATION, FOSTER CARE PROJECT, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, FOSTER CHILDREN IN THE COURTS, 206 (Mark Hardin ed. 1983).

<sup>116</sup> NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, PERMANENCY PLANNING FOR CHILDREN PROJECT, PROTOCOL FOR MAKING REASONABLE EFFORTS TO PRESERVE FAMILIES IN DRUG RELATED DEPENDENCY CASES 17 (1992).

<sup>117</sup> SHELLY GEHSAN, *A STEP TOWARD RECOVERY* ii (1993).

<sup>118</sup> See, e.g., BONITA EVANS, *YOUTH IN FOSTER CARE: THE SHORTCOMINGS OF CHILD PROTECTION SERVICES* (1997); Scott J. Preston, Note, "*Can You Hear Me?*": *The United States Court of Appeals for the Third Circuit Addresses the Systemic Deficiencies of the Philadelphia Child Welfare System in Baby Neal v. Casey*, 29 CREIGHTON L. REV. 1653 (1996).

<sup>119</sup> Paone & Alpern, *supra* note 38, at 101.

<sup>120</sup> Michael Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 STANFORD L. REV. 985 (1975).

<sup>121</sup> Michelle Jackson & Gordon Berry, *Motherhood and Drug Dependency: The Attributes of Full-time Versus Part-time Responsibility for Child Care*, 29 INT'L J. ADDICTIONS 1521 (1994).

<sup>122</sup> Lassar, *supra* note 37, at 7 (describing how "a backlog in investigations and foster care placements caused hundreds of infants to be held in New York City hospitals for as long as several months after they were medically ready for discharge"); Duston, *supra* note 38; Paone & Alpern, *supra* note 38, at 104 (noting that as a result of being kept in hospitals for extended periods of time "these children may be

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condemned to living conditions that pose greater harm to their well-being than the ones from which they were removed.”).

<sup>123</sup> Jan Hoffman, *Challenge Drug Tests*, THE VILLAGE VOICE, July 10, 1990, at 11; *see also* Class Action Complaint, *Ana R. v. New York City Dep’t of Social Services* (S.D.N.Y. filed on June 7, 1990) (describing numerous cases of children removed without notice based on false positives or positive test results for drugs administered by physicians during labor).

<sup>124</sup> Cathy Singer, *The Pretty Good Mother*, LONG ISLAND MONTHLY, Jan. 1990, at 46 (reporting that a mother who had smoked marijuana to ease labor pain lost custody of her baby even though the mother had acted responsibly throughout her entire pregnancy).

<sup>125</sup> *See e.g.*, Associated Press, *Woman Given Labor Sedative Loses Custody Of Children*, THE SACRAMENTO BEE, Feb. 11, 2000 (describing a California woman who lost custody of her newborn and other children for three months based a drug test of the newborn that reflected a sedative given to the woman during labor); Cathy Zollo, *When Policy Meets Reality*, TIMES RECORD NEWS (Wichita Falls, Texas), Nov. 11, 1999 (reporting a case in where the state took into emergency custody a newborn and three older siblings based on a single positive marijuana test on the newborn); Melissa Hung, *Reefer Madness? Angela Took A Hit. And CPS Took Her Babies Away*, HOUSTON PRESS, Nov. 4, 1999, at 8 (reporting another Texas case in which the child welfare agency removed custody of a newborn and a one year old sibling based solely on a positive drug test for marijuana). *See also*, Abigail English, *Prenatal Drug Exposure: Grounds for Mandatory Child Abuse Reports?*, YOUTH LAW NEWS, 1990, at 3-8 (arguing that laws that rely on positive drug tests are both too narrow and too broad and fail to give children greater protection than individual assessments of parenting ability); YOUTH LAW NEWS, July-Oct. 1995, at 1-40 (revising and reprinting the Special Issue from 1990).

<sup>126</sup> Ira Chasnoff et al., *The Prevalence of Illicit-drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 N. ENG. J. MED. 1202, 1202-06 (1990); *see also* ROBERTS, *supra* note 4, at 172-76; Renee I. Solomon, Note, *Future Fear: Prenatal Duties Imposed by Private Parties*, 17 AM. J.L. & MED. 411, 418 (1991) (arguing that “70% of those arrested for drug-related fetal abuse have been African-American” because “[r]ace and poverty biases make it easy to blame the victim”).

<sup>127</sup> *See, e.g.*, Robin-Vergeer, *supra* note 28, at 796-97 n.237 (advocating a more selective process for screening infants); LAWRENCE J. NELSON & MARY FAITH MARSHALL, ETHICAL AND LEGAL ANALYSES OF THREE COERCIVE POLICIES AIMED AT SUBSTANCE ABUSE BY PREGNANT WOMAN 95-120, 169-76 (1998).

<sup>128</sup> Memorandum from Dr. Wendy Chavkin to Jane Spinak and Danny Greenberg: *Position Paper on Government Action of In Utero Drug or Alcohol Exposure* (May 24, 1996) (on file with NAPW) (asserting that proposed universal urine drug screening of newborns in New York State would cost 26.1 million dollars annually and alcohol and confirmatory drug tests would cost 95.9 million dollars annually).

<sup>129</sup> Fetal Alcohol Syndrome is the leading cause of preventable mental retardation in the United States. L.P. FINNEGAN & S.R. KANDALL, MATERNAL AND NEONATAL EFFECTS OF ALCOHOL AND DRUGS IN SUBSTANCE ABUSE, A COMPREHENSIVE TEXTBOOK 513, 529 (J.H. Lowinson et al. eds., 1997). *See also* Janet Golden, “An Argument That Goes Back to the Womb”: *The Demedicalization of Fetal Alcohol Syndrome 1973-1992*, 33 J. OF SOCIAL HISTORY 269 (1999) (describing how FAS came to the public’s

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attention and how public sympathy for the victims of FAS transformed to public scorn for their mothers, then to fear of those with the syndrome).

<sup>130</sup> Joseph R. DiFranza & Robert A. Lew, *Effect of Maternal Cigarette Smoking on Pregnancy Complications and Sudden Death Syndrome*, 40 J. OF FAM. PRAC. 385 (1995) (Cigarette smoking has been linked to as many as 141,000 miscarriages and 4,800 deaths resulting from perinatal disorders, as well as 2,200 deaths from sudden infant death syndrome nationwide.).

<sup>131</sup> For example, the Committee to Study the Prevention of Low Birthweight found numerous behaviors and risk factors besides the use of illegal substances that increase the chances of bearing a low birthweight infant, which is considered to be the greatest single determinant of infant mortality in the United States. COMM. TO STUDY THE PREVENTION OF LOW BIRTHWEIGHT, DIV. OF HEALTH PROMOTION AND DISEASE PREVENTION, INST. OF MED., PREVENTING LOW BIRTHWEIGHT - SUMMARY 1, 1-7. Among the behavioral and environmental factors that contribute to low birth weight are smoking cigarettes, poor nutritional status, exposure to occupational hazards, and living at a high altitude. *See id.* at 7; *see also* March of Dimes, *Folic Acid Fact Sheet* (visited May 3, 2000) <<http://www.march-of-dimes.com/Programs2/FolicAcid/FASheet.htm>> (explaining that research demonstrates that women who consume the recommended amount of folic acid, reduce their risk of having a baby with Neural Tube Defects including anencephaly, a fatal condition in which a baby is born with a delivery underdeveloped brain and skull and spina bifida, a leading cause of childhood paralysis).

<sup>132</sup> *See* Robin-Vergeer, *supra* note 28, at 745-46; *see also* Zollo, *supra* note 125 (reporting that research involving “controlled studies on 12,000 live-birth babies [found that marijuana had] no impact on fetal health or fetal size”).

<sup>133</sup> *See* GÓMEZ, *supra* note 1, at 1-3 (“The convergence of the war on drugs with the abortion debate at fever pitch propelled ‘crack babies’ into the public imagination.”).

<sup>134</sup> *See, e.g.*, BAUM, *supra* note 79; MIKE GRAY, DRUG CRAZY 108-10 (1998); Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, SCIENCE, Sept. 1, 1989, at 939 (discussing various drug legalization and decriminalization plans); Anthony Lewis, *Abroad at Home; Futility of the Drug War*, N.Y. TIMES, Feb. 5, 1996, at A15 (“80 years of prohibition have been a disastrous failure.”).

<sup>135</sup> *See* Loren Siegel, *The Pregnancy Police Fight the War on Drugs*, in CRACK IN AMERICA 249, 249 (Craig Reinerman & Harry G. Levine eds., 1997) (“During the late 1980s, as the specter of ‘crack babies’ haunted American political rhetoric, more than two hundred criminal prosecutions were initiated against women in almost twenty states.”); *see also* LYNN PALTROW, CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW (1992) (documenting 167 arrests nationwide as of 1992).

<sup>136</sup> *See* Lynn M. Paltrow, *Punishing Women for Their Behavior During Pregnancy: An Approach that Undermines the Health of Women and Children*, in DRUG ADDICTION RESEARCH AND THE HEALTH OF WOMEN 467 (1998). In California, prosecutors continue to arrest pregnant drug users despite the fact that the legislature not only explicitly rejected criminal approaches, but specifically adopted a comprehensive remedial approach as an alternative. *See also* GÓMEZ, *supra* note 1, at 50-59, 75-91 (discussing legislative attempts to deal with drug-addicted pregnant women and the treatment these women receive from prosecutors).

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<sup>137</sup> See, e.g., *State v. Zimmerman*, No. 96-CF-525, 1996 WL 858598 (Wis. Ct. App. Sept. 18, 1996) (denying motion to dismiss first degree intentional homicide and reckless conduct charges brought against a woman who was pregnant and an alcoholic), *rev'd*, *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. 1999); Katharine Collins, *Prenatal Child Abuse Charged*, CASPER STAR TRIBUNE, July 2, 1998, at A1, A10 (discussing *State v. Pfannenstiel*, a 1989 case in which child abuse charges, brought against a pregnant woman accused of excessive drinking during pregnancy, were ultimately dismissed); Brian Maffly, *'Fetal Abuse' Charges Give Rise to Debate; Mothers-to-be Need Help, Not Fear, Critics Say*, THE SALT LAKE TRIB., Dec. 1, 1997, at D1 (describing felony child abuse charges brought against Julie Garner, 26, who used alcohol during her pregnancy).

<sup>138</sup> See, e.g., Deanna S. Gomby & Patricia H. Shiono, *Estimating the Number of Substance-Exposed Infants*, in THE FUTURE OF CHILDREN 19, 21 (Richard F. Behrman ed., 1991) (discussing the prevalence of various forms of substance abuse among pregnant women and finding that significantly more children are exposed to alcohol and cigarettes than to illicit drugs).

<sup>139</sup> See, e.g., *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. Ct. App. 1995) (dismissing child abuse charges against pregnant woman who allegedly used heroin, finding that expansion of the statute to include fetuses would violate legislative intent, offend due process notions of notice, and render statute impermissibly vague); *Reyes v. Superior Court*, 75 Cal. App. 3d 214 (Ct. App. 1977) (dismissing child abuse charges filed against a woman who was pregnant and addicted to heroin and finding that the statute was not intended to include a woman's alleged drug use during pregnancy and that to conclude otherwise would offend due process notions of fairness and render statute impermissibly vague); *Johnson v. State*, 602 So. 2d 1288, 1290, 1297 (Fla. 1992) (reversing conviction of a woman who used cocaine during pregnancy for "deliver[ing] cocaine to a minor" and finding that application of the statute to fetuses and pregnant women violated legislative intent); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges brought for prenatal drug use on the grounds that such an application would be at odds with the public policy of the state regarding child abuse and neglect, including the intent to preserve the family life of parents and children whenever possible); *State v. Luster*, 419 S.E.2d 32, 34-35 (Ga. Ct. App. 1992) (holding that a statute proscribing distribution of cocaine from one person to another did not apply to pregnant women and fetuses and to interpret otherwise would deprive pregnant women of fair notice); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (affirming reversal of child abuse conviction of a pregnant woman who used illegal drugs and concluding that applying the statute would violate the plain meaning of the statute, deprive the woman of constitutionally mandated due process notice, and render the statute unconstitutionally vague); *People v. Hardy*, 469 N.W.2d 50, 52-53 (Mich. Ct. App. 1991) (holding that the application of the state's drug delivery statute to a pregnant woman who "delivered" cocaine to her child through the umbilical cord violates legislative intent and the constitutional proscription that "a penal statute must be sufficiently definite and explicit to inform those who are subject to it what conduct will render them liable to its penalties"); *Sheriff, Washoe County, Nev. v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (holding that application of child endangerment statute to a pregnant woman who uses an illegal substance would violate the plain meaning of the statute, deprive the woman of constitutionally mandated due process notice, and render the statute unconstitutionally vague); *People v. Morabito*, 580 N.Y.S.2d 843 (Geneva City Ct. 1992) (dismissing child endangerment charges against woman who used cocaine while pregnant); *State v. Gray*, 584 N.E.2d 710, 713 (Ohio 1992) (holding that a child neglect statute could not be used to prosecute pregnant woman for substance addiction because neither the statutory language nor the legislative history indicated its applicability to such conduct); *Collins v. State*, 890 S.W.2d 893 (Tex. App. 1994) (dismissing injury to a child charges against a woman who allegedly used drugs during pregnancy and finding that applying statute to prenatal conduct violates due process); *State v. Dunn*, 916 P.2d 952, 955 (Wash. Ct. App. 1996) (dismissing child mistreatment charges, finding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as person under eighteen years of age"); *State v. Osmus*, 276 P.2d 469,

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475 (Wyo. 1954) (ruling that a woman whose newborn died as a result of her negligent failure to obtain proper prenatal care or medical care at birth could not be guilty of manslaughter). A complete list of published and unpublished opinions and orders in cases involving the criminal prosecution of pregnant women is available from the National Advocates for Pregnant Women.

<sup>140</sup> See *Welch*, 864 S.W. at 283 (ruling that if the state’s child endangerment statute were construed to permit the prosecution of pregnant women because they endangered the health of the fetus, it would “lack fair notice and violate constitutional due process limits against statutory vagueness”); *Encoe*, 885 P.2d at 598 (holding that the application of child endangerment statute to a pregnant woman who uses an illegal substance would deprive the woman of due process); *Commonwealth v. Pelligrini*, No. 87970, slip op. (Mass. Super. Ct. Oct. 15, 1990) (holding that the rights to reproductive privacy and personal autonomy, as well as due process, do not permit the application of a drug delivery statute to women who use drugs while pregnant).

<sup>141</sup> See, e.g., *Luster*, 419 S.E.2d at 35 (viewing addiction during pregnancy as a disease and addressing the problem through treatment rather than prosecution as the approach “overwhelmingly in accord with the opinions of local and national medical experts”); *Johnson*, 602 So. 2d at 1297 (noting the opposition of medical groups to the prosecution of pregnant women under a drug delivery statute and concluding that “[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”).

<sup>142</sup> 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998).

<sup>143</sup> *Id.* at 780.

<sup>144</sup> See *id.* at 786.

<sup>145</sup> See *id.* at 781-82 (recognizing that a parent may be prosecuted for a legal act if it endangers the child).

<sup>146</sup> See Melissa Manware, *Infant Born Drunk: Intoxicated Mom is Facing Charges*, THE STATE (Columbia, S.C.), Sept. 24, 1998, at A1 (reporting that a new mother was charged with unlawful conduct toward a child based on evidence that she had been drinking alcohol while pregnant).

<sup>147</sup> A woman who suffered a stillbirth was arrested and charged with homicide by child abuse. Police reports showed that the child was not “killed by cocaine” and no other evidence of drug use was reported; nevertheless, the prosecutor insisted that the stillbirth was a “crime” for which the woman had to take responsibility. Kathy Ropp, *Mothers Charged with ‘Homicide by Child Abuse’* THE HERRY INDEPENDENT NEWSPAPER (Conway, S. C.), Aug. 19, 1999, at A-1.

<sup>148</sup> When a thirteen-year-old girl experienced a stillbirth her parents were arrested: One charge was for unlawful conduct to a child—because they had allegedly “failed to get proper care for the fetus.” Associated Press, *Three People Face Charges in Stillbirth*, THE POST AND COURIER (Charleston, S.C.), July 22, 1999, at 6-B.

<sup>149</sup> In *Roe v. Wade*, the United States Supreme Court held that pregnant women have a right to decide whether or not to terminate a pregnancy. An essential element of that decision was the Court’s specific conclusion that fetuses—even after viability—are not persons under the Fourteenth Amendment. 410 U.S. 113, 153, 158 (1973) (“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

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<sup>150</sup> The conservative punditry also used *Whitner* to advocate for the overturning of *Roe*. See, e.g., Rick Bragg, *Defender of God, South and Unborn*, N.Y. TIMES, Jan. 13, 1998, at A10 (reporting on the pursuit of South Carolina Attorney General Charles M. Condon, who argued that a “fetus is a fellow South Carolinian” and succeeded in convincing the highest court in South Carolina that “a viable fetus is a person under the states child abuse laws,” and noting that “[s]ome fear that the prosecutions could be expanded so that a woman who aborted a fetus . . . could be charged in the death of a child”); George Will, *Fetuses as Carolinians*, NEWSWEEK, June 8, 1998, at 78 (criticizing the Supreme Court for not using *Whitner* as an opportunity to review *Roe v. Wade* and “the peculiar logic of the abortion policy that has been created by judicial fiats”); see also Lyle Denniston, *Supreme Court Shields Police from Lawsuits Related to Chases*, THE BALTIMORE SUN, May 27, 1998, at 3A (“The National Right to Life Committee, while satisfied with the Supreme Court’s order, said the justices should have used the case for a ruling that would have barred women from aborting fetuses.”).

<sup>151</sup> See *State v. Ard*, 505 S.E.2d 328, 330 (S.C. 1998) (upholding application of death penalty to Ard, who was convicted of two murders: the murder of his pregnant girlfriend and the murder of their “unborn but viable son”); Audiotape of Oral Argument in *State v. Ard* (State agreeing that its interpretation of *Whitner* would be applicable to the state’s abortion laws, making post viability abortions punishable as murder and the women who have them and all those who assist them potentially subject to the death penalty) transcribed in part in Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALBANY L. REV., 999, 1035-1038 (1999) (discussing *State v. Ard* and oral argument addressing the relationship between *Whitner* and South Carolina’s abortion laws).

<sup>152</sup> See *Robinson v. California*, 370 U.S. 660 (1962).

<sup>153</sup> See *id.* at 666-67.

<sup>154</sup> See *Linder v. United States*, 268 U.S. 5 (1925).

<sup>155</sup> See *Robinson*, 370 U.S. at 667 n.8.

<sup>156</sup> *Id.* at 667.

<sup>157</sup> The *Whitner* opinion was first announced on July 15, 1996. The court then granted Ms. Whitner’s Petition of Rehearing and issued a re-filed and final opinion on October 27, 1997.

<sup>158</sup> See e.g., Abrahamson, *supra* note 6, at 140-141; Bragg, *supra* note 150 (Brendan Dawkins, who runs a treatment program at the Keystone Substance Abuse Services Center in Rock Hill, South Carolina, also reported that “[h]er center usually has about 20 pregnant women addicted to drugs, usually crack. Now there are only 10. She believes others are passing up counseling and prenatal care because they are afraid of being arrested. ‘I think they’re going over the state line to North Carolina to have their babies.’”).

<sup>159</sup> See discussion *supra* notes 14-19 and accompanying text (discussing widespread opposition to punitive approaches by leading medical groups because of the likelihood of deterring women from health care during pregnancy).

<sup>160</sup> *Infant Mortality on Rise in ‘97*, Post & Courier (Charleston, S.C.), Feb. 19, 1999, at B1.

<sup>161</sup> Associated Press, *Discarded Children Increasing*, POST & COURIER (Charleston, S.C.), April 19, 1999.

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<sup>162</sup> See, e.g., Linda Martin, *Fetus Is Ward of State*, TULSA WORLD, Sept. 3, 1999 (reporting that an Oklahoma prosecutor came up with a legal strategy to have a fetus declared dependent after learning about *Whitner*).

<sup>163</sup> *Whitner*, 492 S.E.2d at 782-83 (distinguishing numerous decisions from other states, noting specifically with regard to a Massachusetts case that “the rationale underlying our body of law—protection of the viable fetus—is radically different from that underlying the law of Massachusetts”).

<sup>164</sup> See WIS. STAT. ANN. §§ 48.01 - .989; S.D. CODIFIED LAWS § 34-20A-63.

<sup>165</sup> See GÓMEZ, *supra* note 1, at 41-42, 47, 49-50 (describing role of medical groups in defeating punitive legislation in California); Steven Walters, ‘Coke Mom’ Bill Passed in Assembly, MILWAUKEE J. SENTINEL, Nov. 20, 1997, at 1, 1-2 (noting that opponents of the bill “cited opposition by treatment professionals and public health officials” and quoting one state representative as saying, “[t]his is the worst form of lawmaking we can engage in. . . . We are refusing to listen to the people who are experts in this area. . . . I don’t know why we think we know better.”).

<sup>166</sup> See Walters, *supra* note 165, at 2 (noting that a Milwaukee facility (Meta House) treating addicted pregnant women had its state subsidy cut despite a long waiting list and that the bill included no additional money to pay for treatment programs); Richard P. Jones, *Cocaine Mom, Feticide Bills OK’d Debate Turns Emotional Over Measures Aims At Protecting Fetuses*, MILWAUKEE J. SENTINEL, May 2, 1998, at 1 (reporting that Sen. Gwen Moore (D-Milwaukee) tried “several times to include funding for treatment,” saying, “Ain’t a dime in this bill, not one dime to make this happen.”).

<sup>167</sup> See WIS. STAT. ANN. §§ 48.01-.989.

<sup>168</sup> See WIS. STAT. ANN. §§ 48.01, 48.02(1)(am).

<sup>169</sup> WIS. STAT. ANN. § 48.01(1)(am).

<sup>170</sup> *Id.* § 48.02(1)(am).

<sup>171</sup> *Id.* § 48.02(19).

<sup>172</sup> See *id.* § 48.193(1).

<sup>173</sup> *Id.* § 48.193(1)(d)(2).

<sup>174</sup> See *id.* § 48.193(2). Indeed, the legislation went into effect without any guidelines or standards as to how to interpret or apply the law. See Linda Hisgen, STATE OF WIS. DEP’T OF HEALTH AND FAM. SERV’S, 1997 Wisconsin Act 292, at 1-2 (Memorandum, July 23, 1998). “Act 292 creates a new area of responsibility for child welfare, and, as such, there are no existing protocols, policies, assessment tools or guidelines that define child welfare’s role.” *Id.* Similarly, the state notes that determining under the statute whether the woman’s drug use poses serious physical harm “would have to be done on speculation, since fetal impact research is not conclusive.” *Id.*

<sup>175</sup> WIS. STAT. ANN. § 48.065(1).

<sup>176</sup> *Id.* § 48.235(1)(f).

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<sup>177</sup> See *id.* § 48.02(19).

<sup>178</sup> *Id.* § 48.235(3).

<sup>179</sup> *Id.* § 48.235(3)(b)1.

<sup>180</sup> See generally Hisgen, *supra* note 174, at 1 (noting that the statute “provides for interventions to protect unborn children that parallel the protections for children throughout [the child welfare code]”); see also Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin’s Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J. LAW MED. & ETHICS 332, 338 (1999); Mary Faith Marshall, *Commentary: Mal-Intentioned, Willful Ignorance, and Fetal Protection Laws: Is There a Lexicologist in the House?*, 27 J. LAW MED. & ETHICS 343 (1999).

<sup>181</sup> S.C. CODE ANN. § 20-7-510 (A); see also Abrahamson, *supra* note 6, at 142-43.

<sup>182</sup> WIS. STAT. ANN. § 48.981(2).

<sup>183</sup> See Tom Kertcher, ‘Cocaine Mom’ Law Invoked in Attempt to Detain Woman: Racine Case Thought to be First Time Law Is Used Without Other Crime, MILWAUKEE JOURNAL SENTINEL, Nov. 5, 1999.

<sup>184</sup> See S.D. CODIFIED LAWS § 34-20A-63 (Michie 1998) (stating that the grounds for emergency commitment of intoxicated persons includes pregnant women who are abusing drugs or alcohol).

<sup>185</sup> *Id.* § 34-20A-63(3).

<sup>186</sup> § 34-20A-63; see Elizabeth Walsh, *New South Dakota FAS Laws Threaten Women’s Rights*, WICOZANNI WOWAPI: NEWSLETTER OF THE NATIVE AM. WOMEN’S HEALTH ED. RESOURCE CTR., Oct. 7, 1998, at 1.

<sup>187</sup> Vince Beiser, *Fetal Abuse*, MOJOWIRE, June 14, 2000 at [http://www.motherjones.com/news\\_wire/fetal.html](http://www.motherjones.com/news_wire/fetal.html) (describing new criminal prosecutions in Georgia, North Carolina, Pennsylvania and Texas).

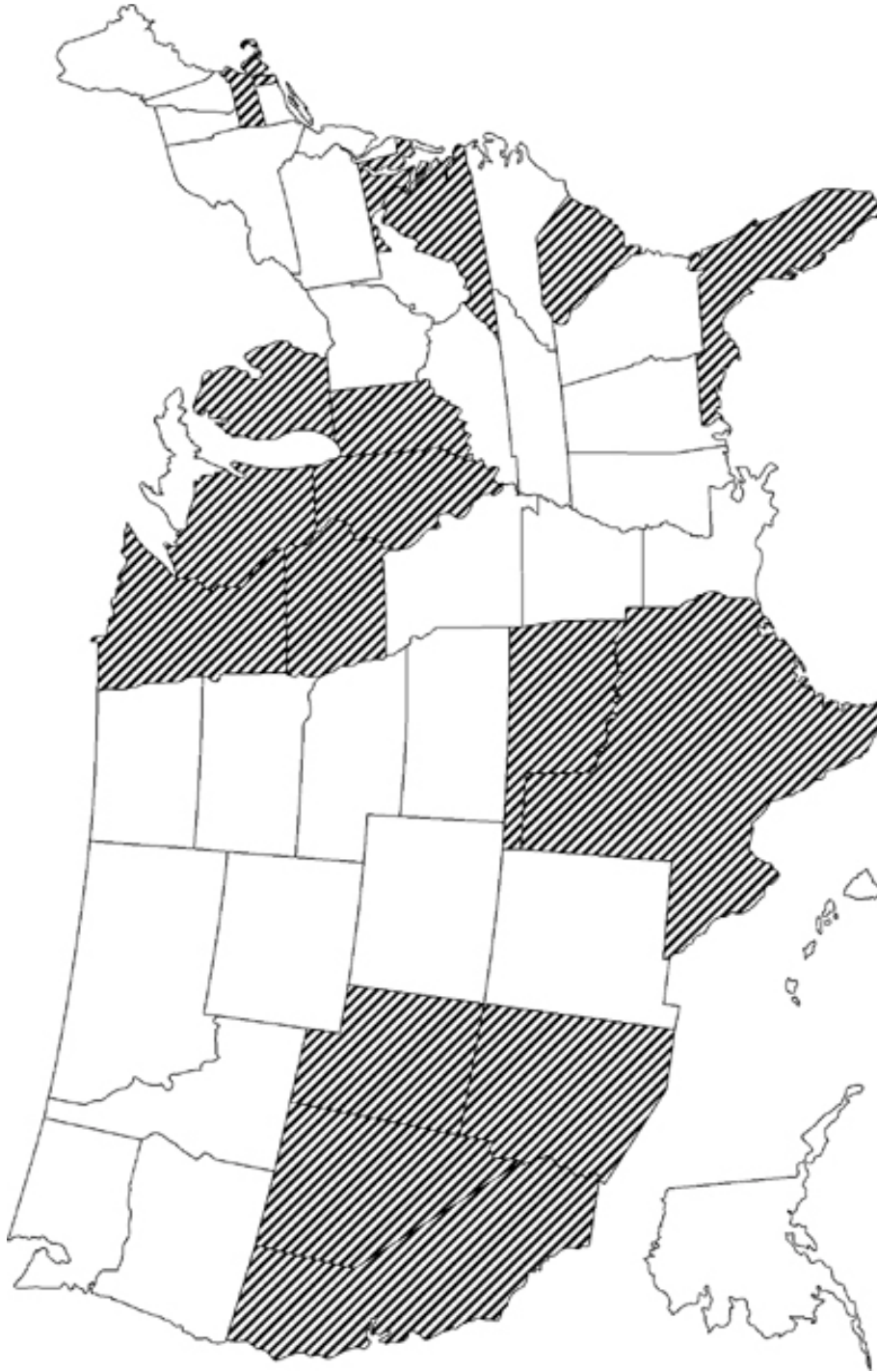
<sup>188</sup> *Herron v. State*, slip op. for publication, Cause No. 71D01-9906-DF-709 (Indiana Ct. of Appeals)(June 7, 2000) (reversing lower courts denial of a motion to dismiss criminal neglect of a dependent charges filed against a woman who gave birth to a child with cocaine present in its system, finding that the statute’s plain language and legislative intent did not permit the expansion of the word dependent to include an unborn child); *State v. Deborah J.Z.*, 596 N.W. 2d 490, 49091 (Wis. Ct. App. 1999) (dismissing attempted homicide and reckless injury charges against a woman who ingested alcohol late in her pregnancy and finding that the plain language of the statutes does not apply to actions directed against an unborn child), *rev. denied* 604 N.W.2d 570 (Wis. 1999); *State v. Farrell*, CR-98-75 slip op. (Wy. Third Judicial District Oct. 2, 1998). (dismissing criminal child abuse charges against Kelly Farrell who admitted using marijuana and tobacco during her pregnancy and gave premature birth to an infant who tested positive for methamphetamines. Distinguishing *Whitner*, holding that court could not expand the scope of criminal laws without violating Ms. Farrell’s constitutional right to fair notice.)

<sup>189</sup> See Corinne A. Carey, *Proposed and Recently Adopted Legislation Criminalizing Maternal Drug Use and Affecting Child Custody* (visited May 3, 2000) <<http://www.familywatch.org/library/legis.htm>>.

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<sup>190</sup> THE FUTURE OF CHILDREN, *supra* note 100, at 8.

<sup>191</sup> See Coalition on Alcohol and Drug Dependent Women and Their Children 15 (1991) (on file with NAPW).



EIGHTEEN STATES ADDRESS THE ISSUE OF A PREGNANT WOMAN'S USE OF DRUGS IN THEIR CIVIL CHILD WELFARE STATUTES. THESE STATES ARE: ARIZONA, CALIFORNIA, FLORIDA, ILLINOIS, INDIANA, IOWA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA, AND WISCONSIN.

## APPENDIX 1

## Questionnaire

Answering the questions below would greatly assist in our efforts to stay as current as possible with new developments involving pregnant women who use alcohol or other drugs. *Attach additional sheets if necessary.*

Your name: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Organization: \_\_\_\_\_

Title: \_\_\_\_\_

Do you know of any pending state legislation or new state statutes affecting pregnant women who use alcohol or other drugs? \_\_\_\_\_  
\_\_\_\_\_

Do you know of instances in your area of mothers having their newborns taken from them solely because they used alcohol or other drugs during their pregnancy? If so, please give details. \_\_\_\_\_  
\_\_\_\_\_

Does your local child welfare agency have a general policy regarding pregnant women who use alcohol or other drugs? \_\_\_\_\_  
\_\_\_\_\_

Do you know of any prosecutions of pregnant women that have occurred in your area? If so, please give details. \_\_\_\_\_  
\_\_\_\_\_

Does your local district attorney have a general policy that you know about regarding pregnant women who use alcohol or other drugs? \_\_\_\_\_  
\_\_\_\_\_

Are you aware of any model drug or alcohol treatment programs that are particularly suited to pregnant or parenting women? Are you aware of any programs that refuse to admit them? \_\_\_\_\_  
\_\_\_\_\_

Is there any other information about the treatment of pregnant women who use alcohol or other drugs in your area that you think is important? \_\_\_\_\_  
\_\_\_\_\_

Please send responses to:

Overview

Women's Law Project/NAPW

125 South 9<sup>th</sup> Street Suite 300

Philadelphia, PA 19107

overview@womenslawproject.org