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,

Carol E. Tracy
Women's Law Project

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National Advocates for Pregnant Women

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I. INTRODUCTION

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

Unsupported and misleading stories highlighting the effects of prenatal exposure to cocaine received widespread coverage.[4] 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.[5] 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.[6]

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.'"[7]

Nevertheless, spurred on by the media barrage concerning pregnant women and drugs,[8] legislators in the mid 1980s began introducing numerous legislative proposals addressing the subject.[9] 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.[10]

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.[11] 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.[12]

Currently, no state legislature has passed a law specifically criminalizing drug use during pregnancy or mandating sterilization of addicted women.[13] 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,[14] the American Academy of Pediatrics,[15] the American Public Health Association,[16] the American Nurses Association,[17] the American Society on Addiction Medicine,[18] and the March of Dimes,[19] 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.[20] 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.[21] 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."[22] Reports may be made only where there are "other factors . . . present that indicate risk to a child."[23] 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."[24]

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;[25] others, such as Florida, mandate reporting newborns who are "demonstrably adversely affected" by prenatal drug exposure;[26] still others, such as Texas, rely on terms such as born "addicted" to an illegal substance.[27] 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.[28] In addition, several states also include fetal alcohol syndrome or evidence of the pregnant woman's alcohol use in their definitions of neglected children.[29]

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[30] and thus mandates reporting a positive drug test on the pregnant woman.[31] Wisconsin similarly defines child abuse to include a woman's "habitual" drug or alcohol use at any point in her pregnancy.[32] And, in South Carolina, drug tests on the woman herself may be the basis for a presumption of child neglect.[33] 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.[34] In three states, the testing or screening for prenatal drug exposure is itself mandatory in some circumstances.[35]

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.[36] 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.[37] 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.[38] 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.[39]

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.

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.[40] 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.[41]

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,[42] and another state permits civil detention of such a woman.[43] 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.[44] 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.[45] 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.[46]

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,[47] established treatment programs or coordinated services,[48] given pregnant women priority access to treatment,[49] encouraged health care practitioners to identify substance-abusing pregnant women and to refer them to treatment,[50] or mandated increased education—for the public and medical providers—on substance abuse and pregnancy.[51] Some states have also passed measures that prohibit discrimination against pregnant women seeking drug treatment,[52] removed barriers to methadone treatment for pregnant women,[53] ensured that pregnant women in certain health maintenance organizations can receive substance abuse treatment,[54] and enhanced criminal penalties for people who sell or give drugs to pregnant women.[55] 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.[56]

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.”[57] 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.[58]

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.”[59] 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.”[60]

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.”[61] 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.”[62]

> An Amnesty International report found that “[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.”

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.[63] 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[64] and by creating the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect.[65]

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 [66] contains three specific provisions that will have particular impact on applicants and recipients with history of alcohol and drug problems. . . . Section 115[67] 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),[68] 821,[69] 202,[70] and 903[71] (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[72] authorizes but does not require states to test welfare recipients for illegal drug use and sanctions those who test positive.[73]

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.[74]

Another federal statute affecting drug-using women is the Adoption and Safe Families Act.[75] 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[76] and a fifteen-month time frame for petitioning for termination of parental rights.[77] 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.[78]

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,[79] this issue will likely remain a subject of ongoing legislative proposals and battles.[80] 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.[81] 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."[82] 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.[83] 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."[84] 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.[85] Indeed, healthy children born to women with drug problems may face a different threat of harm: stigma based on myths perpetuated by media coverage.[86]

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

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.[87] Other women, however, may be addicted. As the United States Supreme Court[88] and the health community[89] 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."[90]

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."[91] This approach recognizes that "overcoming drug addiction is usually a difficult and gradual process."[92] 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."[93] Harm reduction emphasizes "drug treatment over imprisonment and favor[s] broadening drug treatment to include non-abstinence-based models."[94]

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.[95] 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.[96] Treatment that does not address these underlying traumas often fails.[97] 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.[98] The federal government's Center for Substance Abuse Treatment provides well-developed guidelines and protocols for effectively treating pregnant and parenting drug-using women.[99]

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.[100]

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

their price tag to the staggering financial and social costs of separating mother and child.[103] 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.[104] Despite the success, the drug treatment component of the program has struggled for survival, facing a near total cut in municipal funding in 1995.[105]

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.[106] In fact, numerous state commissions have found that their states have inadequate services.[107] Although on a national level funding for women's treatment improved in the 1980s, it decreased again in the early 1990s.[108] "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."[109]

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.

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.[110] 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.[111]

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.[112]

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.[113] 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.[114] 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."[115] 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."[116]

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.

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.[117]

Studies have also found that removing children from their parents' care can unnecessarily inflict grave harm on the children.[118] As a result of the newly expanded civil neglect laws, "thousands of women have lost custody of their children."[119] 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."[120] 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."[121]

> 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.

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.[122] 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.[123] Still other women had their children removed because they had smoked marijuana once, despite unanimous praise for their parenting ability.[124] These results and numerous other examples of families separated based on false positive tests or evidence of drug use unrelated to parenting ability[125] demonstrate the significant drawbacks of policies that 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.[126]

One proposed solution to this discriminatory effect has been to require "universal" testing of all pregnant women or newborns.[127] 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[128] 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.[129] 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.[130] 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.[131] 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.[132]

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.[133] 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.[134]

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."[135] 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.[136]

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Women who drink alcohol and fail to get bed rest during pregnancy have also been arrested,[137] 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.[138]

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.[139] In some cases, courts found that the prosecutions violated the Constitution's guarantee of due process and right to privacy.[140] Some courts also acknowledged the overwhelming opposition of medical and health groups as a consideration in dismissing charges or overturning trial court convictions.[141]

On October 27, 1997, the South Carolina Supreme Court radically deviated from its sister state courts and decided *Whitner v. State of South Carolina*.[142] In *Whitner*, the state supreme court declared that viable fetuses are "person[s]" under the state's criminal child endangerment statute.[143] 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.[144] 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*.[145] And, in fact since the decision, prosecutors in South Carolina have arrested on child abuse charges a woman who used alcohol while pregnant,[146] a woman who suffered a stillbirth possibly unrelated to any drug use,[147] and the parents of a 13-year-old who suffered a miscarriage.[148]

By concluding that viable fetuses are persons under state law,[149] the court in *Whitner* provided local politicians with a new basis for attacking *Roe v. Wade*.[150] 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.[151]

The decision also conflicts in principle with *Robinson v. California*.[152] 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.[153] In overturning the statute, the Court cited *Linder v. United States*,[154] a 1925 case in which the Court recognized narcotic addiction as an illness and those experiencing it as in need of medical treatment.[155] The Court compared punishing someone for drug addiction to punishing someone "for the 'crime' of having a common cold."[156] *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,[157] drug treatment programs in South Carolina that give priority to pregnant women have reported precipitous drops in admissions of pregnant women.[158] 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,[159] South Carolina's 1997 infant mortality figures "increased for the first time this decade."[160] Similarly, the state is now seeing a twenty percent increase in abandoned babies.[161]

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

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.[164] The Wisconsin legislation in particular passed despite the strong opposition of leading medical groups[165] and despite the lack of any funding in the bill for needed treatment services.[166]

In 1997, the Wisconsin legislature substantially revised its Children's Code[167] to create a new category of "unborn child" abuse.[168] 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."[169] 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.[170]

The Wisconsin statute defines an "unborn child" as a "human being from the time of fertilization to the time of birth."[171] The law permits the state to take jurisdiction over pregnant women in a variety of circumstances.[172] 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."[173] 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.[174]

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.[175] 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."[176] Because "unborn children" are defined as existing from the moment of fertilization,[177] a guardian could be appointed even for pre-embryos. The guardian is required to advocate for the "best interests" of the "unborn child."[178] 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."[179] 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.[180]

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,[181] reporting becomes mandatory in Wisconsin only after the birth of a child.[182] As a result, the law appears thus far to have been applied only rarely.[183]

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.[184] Neither the law itself nor the South Dakota procedure manuals provide a clear definition of "abusing alcohol or drugs."[185] The individual judges are left to decide how much alcohol is "'too much' for pregnant women." [186]

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.[187] 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.[188]

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.[189]

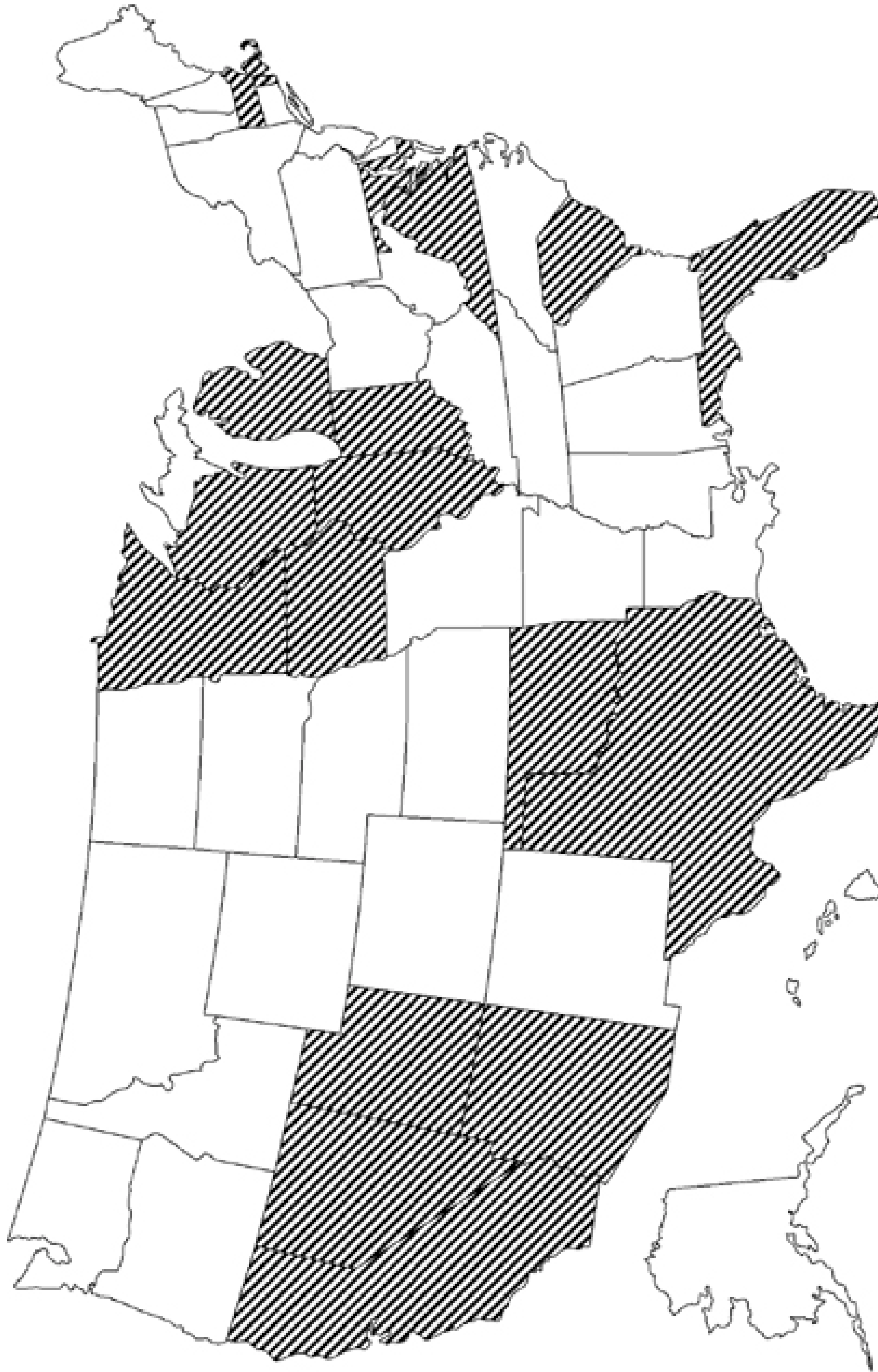
Those concerned with this issue should be fully informed and should promote those efforts likely to improve the health and well-being of women, children, and their families. In addition to considering the many statutes presented in this Overview that offer positive and constructive approaches, policymakers 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."[190]

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.[191]

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.



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:
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Women's Law Project/NAPW
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