

# Harming Fathers: How the Family Court System Forces Men to Regulate Pregnancy

*This report identifies and analyzes 56 cases in 14 states holding that a prospective father's failure to control a pregnant person during her pregnancy constituted civil child abuse or neglect on his part. The decisions represent a form of patriarchal control unprecedented in recent U.S.*

**“I don’t own her;  
she is not a pet.”**

*history. These cases also demonstrate judicial overreach by expanding the role of family courts, and depriving fathers, without legitimate basis, of their right to parent. At the same time, these cases reinforce false and inaccurate assumptions about pregnant people and dangerously stigmatize children as damaged or harmed. All of this is accomplished in the guise of responding to a set of medically and scientifically unsupported assumptions about the relative risk of drug use during pregnancy.*

## Introduction

In dozens of cases across the country, courts have found that a prospective father's failure to control his pregnant partner constitutes civil child abuse or neglect, and can result in the permanent termination of child-parent bonds. These cases are based on a prospective father's supposed failure to prevent the pregnant person from using drugs or engaging in other behavior that may pose some risk of harm to the pregnancy. They represent a confluence of several troubling factors: purposeful misinformation about drug use and pregnancy, driven by the failed War on Drugs and its extreme policing of people of color and poor people; the patriarchal belief that a man has a responsibility (and ability) to control the behavior of a pregnant woman<sup>1</sup>; and the unchecked, punitive

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<sup>1</sup> A note on language: we debated several possible linguistic frameworks for this document, and all carried pros and cons. Pregnancy Justice typically prefers the term "pregnant people" rather than "pregnant women." However, sexism based on the gender binary is a clear throughline in these cases, and the influence of the patriarchy, historic legal structures like coverture, and modern control of women must be acknowledged. Further, we use "he" pronouns to refer to the prospective father or father and "she" pronouns to refer to the pregnant person or prospective mother, though we know the pronouns and "father" and "mother" designations may not be fully accurate. We recognize that the gender binary itself

control exercised by the state against the poor through the so-called “child welfare” system, better called the family regulation system.<sup>2</sup> As one father said, “How am I supposed to force her to stop? I have been supportive and sent her to get help. I don’t own her; she is not a pet. I cannot force her. Even if I was married to her, I could not force her to stop using drugs.”<sup>3</sup> His protestations articulate some of the practical, moral, and legal wrongs exhibited by these cases. Further, it alludes to the different treatment of married and unmarried fathers; in many jurisdictions, an unmarried father is not automatically recognized as having rights,<sup>4</sup> and therefore these cases may impose obligations before the father is even recognized as a father. Finally, these cases undermine the health and safety of children and their families by deterring parents from obtaining healthcare for themselves or their existing children for fear of policing, forced separation from their children, even the destruction of their families.

Our research has found 14 states with 54 appellate-level decisions addressing whether prospective fathers can be found neglectful for failing to stop the pregnant partner from using controlled substances—or alcohol—during the pregnancy. Appellate court decisions set precedent for some or all of a state. Of the appellate cases identified across the nation, New York and Texas represent the greatest number. In New York, there are at least 14 mid-level appellate and two trial-level decisions in three of New York’s four appellate divisions dating back to 1991. There is only one appellate decision finding a prospective father cannot be found neglectful in this situation and it was the first case, but New York’s highest court has not yet addressed the issue. In Texas, there are at least 15 appellate decisions, starting in 1995. These numbers, and the cases documented

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contributes to systems of oppression and control and strive to dismantle that discrimination, while recognizing other systemic forms of discrimination as well. Finally, in this situation, it is important to recognize that the pregnant person is connected to a particular prospective father, and that relationship is what drives the case. At the same time, the two people may not be “partners,” working together as a couple or as co-parents, and the family court’s intervention in their lives often pits them against each other. In recognition of all of these complexities, we use the terms “pregnant partner,” “pregnant person,” and “pregnant woman” throughout this document, depending on the context.

<sup>2</sup> The term “family regulation” system was popularized by Professor Dorothy Roberts, and better represents the realities of what is often called the “child protective” or “child welfare” system. While the goal of this system is to protect children and promote their welfare, the reality is often state regulation and surveillance of children’s families that in fact harm children rather than help them. Accordingly, we will use the term “family regulation system” for the remainder of this document.

<sup>3</sup> *In re B.H.*, No. B285600, 2018 BL 171776 (Cal. Ct. App. 2d Dist. May 15, 2018).

<sup>4</sup> Samantha Lee, *Equal Right to Parent*, 41 N.Y.U. Rev. L. & Soc. Change 631, 636 nn. 17–22 (2017) (citing *Lehr v. Robertson*, 463 U.S. 248, 250, 262 (1983) (“[U]nwed fathers—unlike unwed mothers—were not automatically entitled to full parental rights. They have to assert paternity and take advantage of the opportunity to develop an attachment with their children.”); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (affirming California law that presumes husband is the father); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couple Era*, 86 B.U. L. Rev. 227, 234–35 nn. 34–37 (2006) (describing marriage presumption laws in the fifty states as of 2006)).

nationwide, are certainly undercounts, as very few family court trial-level decisions are public and only some state court, appellate-level decisions are published and therefore available for review.

This report will discuss the legal, social, structural, and scientific problems underlying these cases. It will then address the range of cases seen across the country. Finally, it will offer practitioners guidance on presenting factual and legal challenges to these cases. As we face the possibility that the Supreme Court may overturn *Roe v. Wade* and *Planned Parenthood v. Casey*, we must acknowledge that that change in law will implicate fundamental rights far beyond abortion, as demonstrated here, and will lead to an increase in cases against pregnant people and their partners.

## **I. The Harmful Social and Structural Beliefs Underlying These Cases**

### A. Patriarchal Control of Women

These cases—which require men to physically control women—elicit comparisons to the era of coverture, where women could only exist as wards of their fathers or their husbands.<sup>5</sup> These cases assume a man has power and authority over a pregnant woman and must force her to do something, or pressure her to do what he has decided is appropriate. It places women in relation to their male partners in a similar position as a parent to a child. As the Supreme Court articulated in *Planned Parenthood v. Casey*, “[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children.”<sup>6</sup> This is true even if the interference could possibly benefit the developing fetus or future child. While the Supreme Court recognizes that a prospective father may have some interest in the welfare of the fetus, that does not bestow him with power to control his pregnant partner or diminish her autonomy.<sup>7</sup>

### B. The Racist War on Drugs and the Family Policing System

An analysis and critique of family court cases, and specifically those that involve allegations of parental drug use, cannot be made without acknowledging the central role

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<sup>5</sup> Reva Siegel, *The Modernization of Marital Status Law*, 82 Geo. L.J. 2127 (1993) (“For centuries, the common law of coverture gave husbands rights in their wives’ property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or holding property in their own names.”); Reva Siegel, *“The Rule of Love”: Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117 (1995–1996) (“As master of the household, a husband could command his wife’s obedience, and subject her to corporal punishment or “chastisement” if she defied his authority.”).

<sup>6</sup> 505 U.S. 833, 898 (1992).

<sup>7</sup> *Id.*

that the racist and politically-motivated “War on Drugs” has played in destroying families of color through both the criminal legal system and the civil family regulation system.<sup>8</sup> Moral panic, alarmist language, and media frenzy surrounding the “crack baby” myth led to the heightened arrests and prosecutions of Black pregnant people and mothers. Prosecutors began to target black mothers, using a single positive toxicology as a basis to charge neglect or abuse.<sup>9</sup> The “crack baby” myth and the racist stereotypes intertwined with it led to parental rights of Black mothers being terminated, and Black children being removed and placed into foster care.<sup>10</sup> A positive toxicology test was—and still is today in many states and jurisdictions—enough for state agencies to justify opening investigations and surveillance measures to assess the presupposed threat of harm to a baby and a parent’s ability to adequately parent and ensure their child’s safety, and to take babies from their parents, terminate their legal bond, and make wanted and loved children into legal orphans.

The War on Drugs’ specific targeting of pregnant people has since expanded to include opioids, methamphetamine, cannabis, and other prescription drugs. Fear and misinformation continue to be weaponized to control, penalize, and criminalize pregnant people that use substances. For example, today, the opioid crisis has primarily led to a rise of targeting and arresting poor rural white women for giving birth to “oxytots,” another completely meaningless and harmful trope. These misguided prosecutions include appropriately prescribed opioids, medication for opioid use disorder, which is the recommended medical care for a pregnant person who has an opioid use disorder, and other opioid use.

In part because of the War on Drugs, the family policing system has evolved over time into a massive infrastructure that separates families at unparalleled rates,<sup>11</sup> with over one-third of U.S. children having been the subject of a child maltreatment investigation.<sup>12</sup>

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<sup>8</sup> Dorothy E. Roberts, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (New York: Pantheon Books, 1997); Dorothy E. Roberts, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE*, 15-16 (New York: Basic Books, 2001); Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 *Child Welfare* 125 (2008); Dorothy E. Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, *THE APPEAL* (Mar. 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/>.

<sup>9</sup> Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 *Michigan L. Rev.* 938, 951 (1997).

<sup>10</sup> See *supra* n. 8.

<sup>11</sup> Movement for Family Power, “*Whatever They Do, I’m Her Comfort, I’m her Protector*”: *How the Foster System Has Become Ground Zero for the U.S. Drug War* (June 2020), [bit.ly/groundzeroreport](http://bit.ly/groundzeroreport) (hereinafter “Ground Zero Report”); Shanta Trivedi, *The Harm of Child Removal*, 43 *N.Y.U. Rev. L. & Soc. Change* 523 (2019), [https://scholarworks.law.ubalt.edu/all\\_fac/1085/](https://scholarworks.law.ubalt.edu/all_fac/1085/); *SHATTERED BONDS*, *supra* note 8, pp. 15–16.

<sup>12</sup> Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 *Am. J. Pub. Health* 274 (2017).

These cases disproportionately involve Black and Indigenous children, and poor children.<sup>13</sup> Under the guise of a non-adversarial legal system, the system’s authority has allowed government employees to come into people’s homes without warrants and take children away before any adjudication of wrongdoing.<sup>14</sup> Between 2000 and 2019, the frequency with which parental alcohol or drug use was cited as a contributing factor for child removal more than doubled, from 18.5% to 38.9% nationwide.<sup>15</sup> Accounting for roughly 36% of all removals in 2017, parental substance use has become the “second most common circumstance associated with child removal.”<sup>16</sup>

Nonetheless, knowing that someone uses drugs tells us nothing about that person’s ability to parent.<sup>17</sup> That is even more true where the allegation is mere use—not an allegation of excess or the loss of control—or that a person did not stop the other parent from using drugs during pregnancy. While the threshold to indicate parental drug use as a reason for child removal varies by state, family regulation systems have increasingly normalized the practice of using parental drug use (often based on unproven allegations and speculation) as the sole reason to separate parent and child.

### C. Fetal Personhood

In virtually every case in which we could identify the legal basis for the court’s decision, we found it to be the same as that asserted by proponents of “fetal personhood”: namely, that the fertilized egg, embryo, or fetus should be treated as if it were completely legally separate from the pregnant woman herself. Prosecutors,<sup>18</sup> judges, and hospital personnel have argued that the legal authority for their actions came directly or indirectly from feticide statutes that treat the unborn as legally separate from pregnant women, state abortion laws that include language similar to personhood measures, and a misrepresentation of *Roe v. Wade* as holding that fetuses, after viability, may be treated

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<sup>13</sup> Ground Zero Report, 11–12.

<sup>14</sup> Diane L. Redleaf, *They Took the Kids Last Night: How the Child Protection System Puts Families At Risk* (Santa Barbara: Praeger, 2018).

<sup>15</sup> National Center on Substance Abuse & Child Welfare, *Parental Alcohol or Other Drug Abuse as an Identified Condition of Removal in the United States* (2019), <https://ncsacw.acf.hhs.gov/research/child-welfare-and-treatment-statistics.aspx>.

<sup>16</sup> Mihalec-Adkins et al., *Juggling Child Protection and the Opioid Epidemic: Lessons from Family Impact Seminars*, National Council on Family Relations Policy Brief (Aug. 18, 2020), <https://www.ncfr.org/policy/research-and-policy-briefs/juggling-child-protection-and-opioid-epidemic-lessons-family-impact-seminars>.

<sup>17</sup> Pregnancy Justice, *Parenting and Drug Use Issue Brief* (June 2022), <https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2022/05/Parenting-and-Drug-Use-Brief.pdf>.

<sup>18</sup> Note, in some states, local prosecutors represent the state against parents. In others, the state is represented by corporation counsel or other county civil attorneys.

as separate persons.

However, fetuses cannot be separated—legally or in the imagination—from the pregnant person. Attempting to do so ignores the reality that the fetus is entirely dependent on the pregnant person, and the pregnant person’s health and well-being—promoted through appropriate, confidential medical care—is also best for the health of the developing pregnancy. The stress of being policed by medical providers, one’s partner, or the state is only harmful.<sup>19</sup>

Trying to establish the fetus as a separate entity from the pregnant person obscures the real power play at hand, which is the pregnant person-state dyad: the effort to expand the state’s power to police and control pregnant people themselves. Cases punishing prospective fathers for not protecting the fetus from the mother are based on the factual impossibility of separating a fetus and a pregnant person and represent an expansion of the state’s police power to control pregnant people’s actions and an egregious overreach by the state calling for a form of patriarchal control unprecedented in recent U.S. history.

## **II. Limited Right to Counsel and its Effect on Publicly Available Case Information**

In family court cases, the right to counsel is severely limited. There is no federal civil right to counsel, and as a result, a patchwork of representation varies state to state, and sometimes even county to county.<sup>20</sup> Further, research has shown that multidisciplinary, robust organizations dedicated to this representation are highly effective, but that type of representation is not widely available and many for defense attorneys these cases are only a small part of their practice.<sup>21</sup> Availability of appellate counsel is also inconsistent. Additionally, family courts keep family regulation court records confidential, so even if the person was represented, it is hard to know if defense attorneys raised certain issues or arguments. Additionally, both family court and appellate level decisions on this subject are often unreported and so are not easily accessible.

All of this limits the publicly available information about these cases, the likelihood we would identify all or even most of the cases of this type, and the possibility that defense

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<sup>19</sup> See *infra* Part IV.B.

<sup>20</sup> Sankaran & Pollack, *A National Survey on a Parent’s Right to Counsel in State-Initiated Dependency and Termination of Parental Rights Cases*, National Coalition for a Civil Right to Counsel (October 2016), [http://civilrighttocounsel.org/uploaded\\_files/219/Table\\_of\\_parents\\_\\_RTC\\_in\\_dependency\\_and\\_TPR\\_cases\\_FINAL.pdf](http://civilrighttocounsel.org/uploaded_files/219/Table_of_parents__RTC_in_dependency_and_TPR_cases_FINAL.pdf).

<sup>21</sup> Lucas A. Gerber et al., *Effects of an interdisciplinary approach to parental representation in child welfare*, 102 *Children & Youth Servs. Rev.* 42 (2019), <https://doi.org/10.1016/j.chilgyouth.2019.04.022>.



counsel, if present, would have the capacity to bring a robust defense. Having a robust parent defense bar improves outcomes for children and for families, including decreasing the number of children in foster care, increasing the number of children returned to parents or relatives, and increasing family stability with children safe at home long-term.<sup>22</sup>

### **III. Several States Represent the Majority of Cases in which Courts Have Faulted Prospective Fathers for the Actions or Inactions of Pregnant People**

#### **A. New York**

New York leads the nation in reported cases of prospective fathers found to have neglected their child before the child was born based on the premise that they failed to control the behavior of the pregnant person.<sup>23</sup> Because, as compared to other parts of the country, New York's parent representation bar is relatively well-developed, well-resourced, and organized into full offices that support appellate work, it is possible that more of these cases are challenged and appealed than in other states, which results in more reported cases. However, that does not excuse New York's status as the state with the most cases in the country.

These cases exist despite the fact that, in New York, a fetus cannot be the subject of a family court petition.<sup>24</sup> To succeed in an abuse or neglect case, the state must show "the actual or threatened harm to the child is a consequence of the failure of the [parent] to exercise a minimum degree of care in providing the child with proper supervision or guardianship."<sup>25</sup> The father is supposed to exercise a minimum degree of care in

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<sup>22</sup> Family Justice Initiative, *Improving the Lives of Children and Families through High-Quality Lawyering* (Dec. 2021), <https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2022/02/FJI-Demonstration-Sites-Final-Report-2021.pdf>.

<sup>23</sup> *In re R.W. Children*, 658 N.Y.S.2d 597 (N.Y. App. Div. 1st Dep't 1997); *In re K. Children*, 677 N.Y.S.2d 379 (N.Y. App. Div. 2d Dep't 1998); *In re Kanika M.*, 704 N.Y.S.2d 669 (N.Y. App. Div. 2d Dep't 2000); *In re Cantina B.*, 809 N.Y.S.2d 539 (N.Y. App. Div. 2d Dep't 2006); *In re Carlana B.*, 877 N.Y.S.2d 197 (N.Y. App. Div. 2d Dep't 2009); *In re Niviya K.*, 933 N.Y.S.2d 356 (N.Y. App. Div. 2d Dep't 2011); *In re Kierra C.*, 955 N.Y.S.2d 526 (N.Y. App. Div. 2d Dep't 2012); *In re Stevie R.*, 97 A.D.3d 906 (N.Y. App. Div. 3d Dep't 2012); *In re Orlando R.*, 977 N.Y.S.2d 30 (N.Y. App. Div. 2d Dep't 2013); *In re Jamoori L.*, 985 N.Y.S.2d 114 (N.Y. App. Div. 2d Dep't 2014); *In re Ja'Vaughn Kiyaymonie S.*, 146 A.D.3d 422 (N.Y. App. Div. 1st Dep't 2017); *In re Thamel J.*, 76 N.Y.S.3d 56 (N.Y. App. Div. 1st Dep't 2018); *In re Camden J.*, 91 N.Y.S.3d 581 (3d Dep't 2018); *In re Elijah A.*, 37 Misc.3d 1228(A), 2012 WL 6062532 (Kings Cnty. Fam. Ct. 2012). See also *In re Alfredo S.*, 568 N.Y.S.2d 123, 172 A.D.2d 528 (N.Y. App. Div. 2nd Dep't 1991) (reversed and custody awarded to father); *In re M/B Child*, 8 Misc.3d 1001(a), 2005 WL 1388846 (N.Y. Fam. Ct. Kings Cnty. 2005) (dismissed petition against the father).

<sup>24</sup> See N.Y. Fam. Ct. Act § 1012(f)(i)(B) ("Neglected child" means a child less than eighteen years of age...whose physical, mental or emotional condition has been impaired or is in imminent danger..."); *Bryn v. N.Y.C. Health & Hosps. Corp.*, 31 N.Y.2d 194, 203 (1972) (when there is no legislative declaration that a fetus is a person, neither the federal or state constitution "confer[s] or require[s] legal personality for the unborn.").

<sup>25</sup> *Nicholson v. Scopetta*, 3 N.Y.3d 357, 368 (2004).

providing the child with proper supervision or guardianship. However, in these cases, the state attempts to shift his responsibility such that he is meant to supervise the pregnant person, on the theory that the fetus is contained within her uterus. Neither he nor the family court has jurisdiction to control the pregnant person, who is her own person, with independent civil and human rights.

Further, an early case on this subject recognized the “inequity in holding a father responsible for a mother’s prenatal drug use which resulted in an at-birth positive toxicology for cocaine in the child.”<sup>26</sup> In *Alfredo S.*, the Second Department noted, “we [cannot] attribute responsibility to the father for the mother’s prenatal drug use, her admitted addiction to cocaine, and the finding of neglect entered against her...”<sup>27</sup> While the court demonstrated the inaccurate view of the time that in utero cocaine exposure imposed long-term harm on a child<sup>28</sup> and failed to note that it had no ability to police behavior during pregnancy, it made clear that such alleged harm could not be attributed to the father, who could never have had control over the mother’s behavior during pregnancy nor any in utero exposure.

In *K. Children*, seven years later, the Second Department reversed itself, and in doing so, failed to address prior precedent or its reasoning. The court found that “despite having knowledge of the mother’s recent drug abuse, the father failed to exercise a minimum degree of care in ensuring that the mother did not abuse drugs during her pregnancy with the youngest child.”<sup>29</sup> This bewildering decision has been used to support a cascade of subsequent opinions holding fathers liable for their inability to control the behavior of their pregnant partners. These early decisions are based on two additional and fundamental flaws: first, they fail to distinguish a fetus from a child as required under New York law; and second, they assume in utero exposure to controlled substances is per se harm, which is both scientifically and legally unsupported.<sup>30</sup> Legally, a positive toxicology report for illicit substances at birth is not sufficient in itself for a finding of neglect because “it fails to make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment or imminent risk of impairment in the

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<sup>26</sup> *Alfredo S. v. Nassau Cty. Dep’t Soc. Servs.*, 568 N.Y.S.2d 123, 172 A.D.2d 528, 531 (N.Y. App. Div. 2d Dep’t 1991).

<sup>27</sup> *Id.* at 532.

<sup>28</sup> *Id.* at 533. See Deborah A. Frank et al., *Growth, development, and behavior in early childhood following prenatal cocaine exposure: a systematic review*, 285 JAMA 1613 (2001), doi:10.1001/jama.285.12.1613 (“there is no convincing evidence that prenatal cocaine exposure is associated with developmental toxic effects that are different in severity, scope or kind from [those of] multiple other risk factors” and the findings do not show a link between cocaine and those developmental effects.); see Part IV.A for further discussion.

<sup>29</sup> *In re K. Children*, 677 N.Y.S.2d at 379.

<sup>30</sup> *In re R.W. Children*, 658 N.Y.S.2d at 597; *In re K. Children*, 677 N.Y.S.2d at 379.



*newborn child.*<sup>31</sup> In *Dante M.*, the Court of Appeals affirmed a finding of neglect based on the mother’s drug use during pregnancy because that Court accepted as true that there was actual harm to the child—he was born prematurely with a low birth weight and required a specialized level of care—that was causally linked to the mother’s drug use.<sup>32</sup> However, current medical science is unable to establish causality in a particular case; low birth weight and perinatal complications occur with and without prenatal drug exposure. Therefore, there is no ability for the state to show actual harm, an essential proof can never be met, and the case must be dismissed.

Of the 13 appellate cases in New York, six provided only a rote recitation of the law: “The petitioner established by a preponderance of the evidence that the father neglected the subject child. Despite his knowledge that the mother continued to abuse marijuana during her pregnancy, he failed to exercise a minimum degree of care to protect the child.”<sup>33</sup> “The Family Court’s determination rested on the fact that the father knew or should have known of the mother’s drug use... and failed to exercise a minimum degree of care to ensure that the mother did not abuse drugs during her pregnancy.”<sup>34</sup> These cases assume that it is a father’s obligation and legal responsibility to control his pregnant partner, and rely on the father’s failure to stop the pregnant person’s use, which he had no ability to do.

The other seven cases go into more factual detail and rely on evidence that the father failed to notice the pregnant person’s drug use, that they did not in fact know the person used drugs during pregnancy, or that they “should have known” but not that they did. In one case, “[t]he petitioner proved by a preponderance of the evidence that the two subject children were neglected by the father... [in that] the father should have known that the mother was abusing drugs while she was pregnant with their younger child.”<sup>35</sup> The state did not even prove that he did in fact know she was using any drug. In another, the court found that “[g]iven that he lived with the mother during her pregnancy...he [knew] or should have known about her drug use during the pregnancy.” The court further noted that the father should have known his pregnant partner discontinued

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<sup>31</sup> *In re Dante M.*, 87 N.Y.2d at 79 (emphasis added).

<sup>32</sup> *Id.*

<sup>33</sup> *In re Jamoori L.*, 985 N.Y.S.2d at 114.

<sup>34</sup> *In re Kierra C.*, 101 A.D.3d at 994. Also, *In re Ja’Vaughn Kiaymonie S.*, 146 A.D.3d at 423 (replacing “drug use” with “narcotics”); *In re Nivija K.*, 89 A.D.3d at 1028 (replacing “subject child” with “infant daughter”); *In re Carlana B.*, 877 N.Y.S.2d at 197 (also stating that “the father was a substance abuser and that he failed to avail himself of drug rehabilitation therapy at the direction of the Nassau County Department of Social Services.”); *In re Kanika M.*, 704 N.Y.S.2d at 669 (“The petitioner proved by a preponderance of the evidence that the two subject children were neglected by the father... the father should have known that the mother was abusing drugs while she was pregnant with their younger child.”).

<sup>35</sup> *Id.*

prenatal care.<sup>36</sup> Of course, there is no legal requirement that a person have prenatal care and even if there were, sanctioning a father to control the actions of his pregnant partner or face punitive family regulation involvement violates the mother’s civil and human rights by dismissing her as a non-autonomous person.

These cases also highlight the ways in which the family regulation system is used to prosecute poverty and fails to recognize the capacity to parent of people who use drugs or even have substance use disorders. In *Orlando R.*, the court noted “notwithstanding his efforts to address her drug problem...he *placed* her in the home of a friend who he knew was a drug user... While this residence was a last resort, as the couple has been homeless and unemployed... the father’s intermittent incarceration and resulting separation contributed to his failure.... for the environment apparently contributed to her relapse during her pregnancy.”<sup>37</sup> First, the idea that the prospective father “placed” the pregnant person somewhere, like a bag or a doll, again reduces the pregnant person to a non-autonomous being. Second, the court notes that there was no other housing option and suggests by omission that homelessness would have been better for this pregnant person than being housed.

## B. Texas

Texas has the second highest number of reported cases of any state in the country with fifteen cases from 1995 to 2016. Further, Texas’ statute permits the legal termination of parent-child relationships in these cases, making it one of the most aggressive states in the country. Cases occur in all parts of the state.<sup>38</sup>

The Texas Family Code permits the involuntary termination of a parent-child relationship,

if the court finds by clear and convincing evidence that the parent has: ...

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<sup>36</sup> *In re Stevie R.*, 97 A.D.3d at 907–08.

<sup>37</sup> *In re Orlando R.*, 977 N.Y.S.2d at 30 (emphasis added).

<sup>38</sup> *Dupree v. Tex. Dep’t of Protective and Reg. Servs.*, 907 S.W.2d 81 (Tex. Ct. App. Dallas 1995); *Combs v. Dall. Cty. Child Protective Servs. Unit*, No. 05-96-00484-CV, 1997 WL 499689 (Tex. Ct. App. Dallas Aug. 25, 1997); *Edwards v. Tex. Dep’t of Protective and Reg. Servs.*, 946 S.W.2d 130 (Tex. Ct. App. El Paso 1997); *In re J.C.*, No. 05-96-01873-CV, 1998 WL 293724 (Tex. Ct. App. Dallas June 8, 1998); *In re M.J.M.L.*, 31 S.W.3d 347 (Tex. Ct. App. San Antonio 2000); *In re E.J.P.*, No. 06-04-00131-CV, 2005 WL 2138573 (Tex. Ct. App. Texarkana Sept. 7, 2005); *In re A.O.*, No.2-09-005-CV, 2009 WL 1815780 (Tex. Ct. App. Fort Worth June 25, 2009); *In re M.R.J.M.*, 280 S.W.3d 494 (Tex. Ct. App. Fort Worth 2009); *In re S.K.A.*, No. 10-08-00347-CV, 2009 WL 2645027 (Tex. Ct. App. Waco Aug. 19, 2009); *In re E.H.*, No. 2-09-134-CV, 2010 WL 520774 (Tex. Ct. App. Fort Worth Feb.11, 2010); *In re L.V.*, No. 13-10-283-CV, 2011 BL 79227 (Tex. Ct. App. Corpus Christi Feb. 24, 2011); *In re C.D.S. Jr.*, No. 02-11-00516-CV, 2012 WL 2135592 (Tex. Ct. App. Fort Worth May 2, 2013); *In re A.J.R.*, No. 07-11-00501-CV, 2012 WL 2005833 (Tex. Ct. App. Amarillo June 4, 2012); *In re W.D.*, No. 03-14-00581-CV, 2015 WL 513267 (Tex. Ct. App. Austin Feb. 5, 2015); *In re J.K.V.*, 490 S.W.3d 250 (Tex. Ct. App. Texarkana 2016).

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;  
(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child...<sup>39</sup>

Courts have wrongly interpreted this to encompass a prospective co-parent “knowingly allowing” a fetus to remain in utero or “knowingly placing” the fetus in utero while the pregnant person uses drugs, which the courts also wrongly presume is inherently dangerous.<sup>40</sup> But of course, a fetus is inseparable from a pregnant person. Pregnant people themselves do not have the ability to control all of the circumstances and conditions of their pregnancies nor can they or anyone else guarantee a healthy pregnancy outcome.<sup>41</sup> For the Texas courts to treat a pregnant person’s uterus as a “dangerous placement” ignores that biological reality. Further, as described *infra* Part IV.A, drug exposure does not pose the risks of the type, magnitude, or longevity that widespread drug misinformation—driven by the “War on Drugs”—suggests, and cannot be determined to be inherently “dangerous” in any individual case.

The Texas law pertains to the termination of parent-child legal bonds. Unlike the New York cases, which relate to an allegation of neglect—which result in family separation and trauma and have significant consequences for a parent’s job prospects—the Texas cases involve even more severe and immediate consequences. They determine whether children can maintain legal ties to their parents, and parents with their children, or whether a child will become a legal orphan. In *In re S.K.A.*, the father lost all legal ties and ability to maintain a relationship with his daughter because he “failed”—according to the court—to prevent the mother from using drugs during the pregnancy and thereby “knowingly allowed the child to remain in conditions or surroundings that endangered her physical well-being.”<sup>42</sup>

Texas courts have terminated the parent-child bond and created legal orphans in 13 additional cases. In *A.J.R.*, the father’s legal bond with his child was terminated even though he did not use drugs or have a history of use, completed recommended services and regular visits, provided diapers and toys for the child, and had a suitable home, but

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<sup>39</sup> Tex. Fam. Code § 161.001(b)(1)(D-E).

<sup>40</sup> See, e.g., *In re S.K.A.*, 2009 WL 2645027, at \*9 (citations omitted); *In re A.O.*, 2009 WL 1815780, at \*2.

<sup>41</sup> The National Institutes of Health recognize that every pregnancy has some risk of problems. The risks can stem from conditions a woman already has or conditions she develops while pregnant and can also include being pregnant with more than one baby, previous problem pregnancies, or being over age 35. Nat’l Insts. of Health, *Health Problems in Pregnancy* (July 2012), <http://www.nlm.nih.gov/medlineplus/healthproblemsinpregnancy.html>.

<sup>42</sup> *In re S.K.A.*, 2009 WL 2645027, at \*9-10.

only because he knew the mother used drugs during the pregnancy and “failed” to prevent her from doing so.<sup>43</sup> Similarly, in *Edwards*, the prospective father knew the prospective mother was using cocaine during pregnancy and “did nothing to stop it.”<sup>44</sup> Many cases described a history of poverty and trauma that continued unaddressed, with blame placed on the new parents, and used as a basis to terminate their legal relationship with their children. For example, in *E.H.*, both parents experienced violence as children and started using drugs as preteens. The father demonstrated protective behavior, using only when he was apart from the children. But both the clinical psychologist who interviewed him and the court had clearly already made a decision about him, saying, “he used some choice words, profanity... it demonstrated some of the lack of impulse control and the social mores that were not being demonstrated.”<sup>45</sup> As is typical in family court cases, these courts demand a white, middle-class standard of social mores. In another case, the fact that the father had an older child who got pregnant in the tenth grade and dropped out of high school was used as evidence that he could not safely parent a newborn.<sup>46</sup> The courts also demonstrated a misunderstanding of drug treatment. The fact that a mother was on methadone during her pregnancy—which is the appropriate treatment for a pregnant person with opioid use disorder—was used against both her and the father of her child to terminate his rights to a different child.<sup>47</sup> In only one case did a Texas appellate court reverse a termination. The court relied on unique facts that allowed the court to reverse while still embracing the problematic underlying premise of these cases, that the prospective father should have controlled the pregnant person. The court found that because the prospective father had no way to reach the prospective mother after the third month of pregnancy, and was out of the country without an ability to return, he could not have done anything to affect her actions during pregnancy and reversed the termination of his rights.<sup>48</sup>

### C. Arizona

Arizona’s six cases, while not as numerous as New York and Texas, demonstrate the lengths to which courts will go to vest fathers with impossible, and unconstitutional, responsibilities. In one case, the father originally lost his parental rights for failing to stop the mother’s drug use during pregnancy, when he did not know the mother was

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<sup>43</sup> *In re A.J.R.*, 2012 WL 2005833, at \*8.

<sup>44</sup> *Edwards*, 946 S.W.2d at 130 (standard of review used in this case was subsequently overturned; this area of law was not).

<sup>45</sup> *In re E.H.*, 2010 WL 520774, at \*4.

<sup>46</sup> *In re J.G.*, 1998 WL 293724, at \*6.

<sup>47</sup> *In re E.H.*, 2010 WL 520774, at \*8.

<sup>48</sup> *In re J.K.V.*, 490 S.W.3d at 260.

pregnant, did not have a relationship with her, and did not know he was going to become a father until after the birth.<sup>49</sup> In another case, the court, lacking direct evidence of the mother’s substance use, *inferred* her continued substance use and used that as a basis to find the father had an “inability to discern [her] use” and to terminate the parent-child bond.<sup>50</sup> In other words, the court terminated the father’s rights and created a legal orphan because the father failed to observe something the state could not prove existed. In another case, both parents’ rights were terminated based on the mother’s legal medical cannabis use.<sup>51</sup>

In only one case did an Arizona appellate court reverse a dependency finding against a father for alleged inaction during pregnancy. In *Willie J.*, the court found that the lower court offered no factual basis for the finding against the father, or evidence of any action by the father that endangered the child.<sup>52</sup> Even with that clear, essential deficiency—of *any* evidence to support the state’s position—this case proceeded for over a year, the first year of this baby’s life, with all of the associated stressful impacts for this parent, and was then remanded for further proceedings.<sup>53</sup>

Additional cases from California, Florida, Georgia, Idaho, Indiana, Louisiana, New Jersey, Oregon, Tennessee, Vermont, and West Virginia follow this pattern, subjecting fathers to separation from their children and loss of custody because of the fathers’ purported failure to control the behavior of another person, violating both parents’ constitutional rights to liberty, privacy, and freedom of speech, and impermissibly expanding child welfare law. These decisions have real, life-long consequences on the ability of fathers to maintain relationships with their children and children with their fathers, and on fathers’ ability to live life, seek work, and parent their children free from the stigma of having “neglected” a child. For more detail on these cases, see Appendix B, Additional Case Summaries.

#### IV. Factual Arguments

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<sup>49</sup> *Keith R. v. Dep’t of Child Safety*, No. 1 CA-JV 19-0206, 2019 BL 485989 (Ariz. App. Div. 1 Dec. 19, 2019) (finding the evidence insufficient on that allegation but affirming on other grounds).

<sup>50</sup> *Casey v. Dep’t of Child Safety*, No. 1 CA-JV 17-0346, 2018 BL 95125 (Ariz. App. Div. 1 Mar. 20, 2018).

<sup>51</sup> *Antony V. v. Dep’t of Child Safety*, No. 1 CA-JV 16-0510, 2017 BL 204729 (Ariz. App. Div. 1 June 13, 2017).

<sup>52</sup> *Willie J. v. Dep’t of Child Safety*, No. 1 CA-JV 16-0452, 2017 WL 1458767 (Ariz. App. Div. 1 Apr. 25, 2017).

<sup>53</sup> The final two Arizona cases were *Perry T. v. Ariz. Dep’t of Econ. Sec.*, No. 1 CA-JV 13-0298, 2014 BL 132979, ¶ 8 (Ariz. App. Div. 1 May 13, 2014) (“Father knew or should have known Mother was abusing illegal drugs while pregnant with A.T. The evidence also shows Father failed to intervene in Mother’s drug use, or take or attempt to take any measures to prevent such drug use...”); and *Edward B. v. Dep’t of Econ. Sec.*, No. 1 CA-JV 12-0254, 2012 BL 318602 (Ariz. App. Div. 1 Apr. 10, 2012) (neglect where father failed to protect the child from Mother’s substance abuse while pregnant with the child.).

Defense counsel should make robust fact-based arguments, as described below, to oppose these prosecutions. They should fully *voir dire* experts and request the local equivalent of a *Daubert* hearing.

#### A. Drug Use Does Not Pose a Unique Risk of Harm to Pregnancy

Prosecutors, public defenders, judges, and even many health care providers still believe that the use of controlled substances during pregnancy harms the fetus or even causes pregnancy loss. But media hype and stigma are not the same as science. It is the defense attorney's responsibility to demand actual evidence of harm. Carefully constructed, unbiased scientific research has not found that prenatal exposure to *any* criminalized drugs cause specific or unique harms to children prenatally exposed. While there are numerous studies reporting findings that certain substances *may* increase a particular risk of harm, such as lower birth weight, research has not found that any criminalized substances are abortifacients,<sup>54</sup> cause miscarriages or stillbirths,<sup>55</sup> or cause specific harms or impairments. In general, the risks associated with prenatal exposures to criminalized drugs such as cocaine, methamphetamine, and marijuana have been found to be less than or equal to the risks associated with substances that are more commonly used (and legal) such as alcohol or tobacco.<sup>56</sup> To the extent that a newborn does experience withdrawal or Neonatal Abstinence Syndrome, those symptoms are transitory and treatable.<sup>57</sup> Such treatment lasts just days, or at most a few weeks, and there is no evidence of long-term harm to the infant or child.<sup>58</sup> This further cements the absurdity of charging putative fathers for failing to control the behavior of a pregnant person: not only is it paternalistic and unrealistic, it is based on misinformation about the potential harms of substance use and pregnancy.

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<sup>54</sup> Pregnancy Justice, *Pregnancy and Drug Use* (September 2021), <https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/Pregnancy-and-drug-use-final.pdf>.

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., Mishka Terplan et al., *The Effects of Cocaine and Amphetamine Use During Pregnancy on the Newborn: Myth Versus Reality*, 30 *J. Addictive Diseases* 1 (2011), <https://doi.org/10.1080/10550887.2011.532048>; Ciara A. Torres et al., *Totality of the Evidence Suggests Prenatal Cannabis Exposure Does Not Lead to Cognitive Impairments: A Systematic and Critical Review*, *Frontiers in Psychology* (2020), <https://doi.org/10.3389/fpsyg.2020.00816>; Frank, *supra* note 28 (cocaine).

<sup>57</sup> Matthew R. Grossman et al., *An Initiative to Improve the Quality of Care of Infants With Neonatal Abstinence Syndrome*, 139(6) *Pediatrics* (May 2017), <https://doi.org/10.1542/peds.2016-3360>.

<sup>58</sup> Am. Coll. Obstetricians & Gynecologists ("ACOG"), *Comm. on Health Care for Underserved Women, Opioid Abuse, Dependence, and Addiction in Pregnancy*, Committee Op. No. 524 (May 2012) ("[NAS] is an expected and treatable condition that follows prenatal exposure to opioid agonists."); Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Human Servs., Pub. No. [SMA] 06-4124, *Methadone Treatment for Pregnant Women* (2006), <http://www.atforum.com/addiction-resources/documents/SAMHSAbrochurePregnantWomen2006.080904-39-5315-04-44.pdf> (neither NAS nor its treatment has been associated with long-term adverse consequences).



Scientific research regarding substance use and pregnancy is incomplete, and studies are often biased.<sup>59</sup> Ethical considerations preclude studies with randomized control groups because such tests on pregnant people are not permitted, so impacts of pregnancy and substance use are difficult to differentiate from other social determinants of health such as nutrition, poverty, and housing instability.<sup>60</sup> Additionally, recent studies have shown that social determinants of health (such as poverty, racism, and lack of access to adequate healthcare prior to pregnancy) are far more indicative of pregnancy outcomes than anything a pregnant person does or does not do during pregnancy.<sup>61</sup> Substance use does not always indicate substance abuse, and a drug test is not a parenting test. Additionally, taking punitive actions against pregnant people and new parents causes real and devastating health consequences by making them less likely to seek out healthcare.<sup>62</sup> In particular, the fear that medical providers will report their patients to civil “child welfare” authorities or criminal law enforcement deters pregnant women from seeking essential prenatal care or drug treatment services.<sup>63</sup>

The failure to recognize and consider the scientific and medical evidence can lead to disastrous consequences for families most in need of nonjudgmental support. In a California case, a father told the Department of Children and Families that “he ‘100%

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<sup>59</sup> See, e.g., Terplan, *supra* note 56 (“Current research on drug use in pregnancy operates in the uneasy legacy of the crack cocaine panic.”).

<sup>60</sup> See, e.g., *id.* (“randomized studies are unethical” and prior studies “point to the role of unmeasured confounders, such as cigarette smoking... [and] highlight problems in study design, in particular lack of adequate control groups and an absence of blinding”); Frank, *supra* note 28 (“Many findings once thought to be specific effects of in utero cocaine exposure are correlated with other factors, including prenatal exposure to tobacco, marijuana, or alcohol, and the quality of the child’s environment.”); Torres, *supra* note 56 (“tobacco use frequently occurred with cannabis use... mak[ing] it particularly difficult to disentangle the effects of tobacco from those of cannabis.”).

<sup>61</sup> See, e.g., Hallam Hurt & Michel Martin, *Decades Later, Drugs Didn’t Hold ‘Crack Babies’ Back*, NPR (July 31, 2013), <https://www.npr.org/templates/story/story.php?storyId=207292639> (“We evaluated our participants every 6 to 12 months, when they were young infants and children. What we found was that the cocaine exposed and the non-exposed didn’t differ from each other...” (citing Laura M. Betancourt et al., *Adolescents With and Without Gestational Cocaine Exposure: Longitudinal Analysis of Inhibitory Control, Memory and Receptive Language*, 33 *Neurotoxicol. Teratol.* 36 (2011)); Hallam Hurt & Laura M. Betancourt, *Effect of Socioeconomic Status Disparity on Child Language and Neural Outcome: How Early is Early?*, 79 *Pediatric Research* 148 (2016) (“Potentially malleable environmental factors (parenting and home environment) were more influential on [Full Scale IQ] than gestational exposure to cocaine in these ‘inner-city achievers.’”); Tanya Maria Golash-Boza, *RACE & RACISMS* 333-34, 337 (Oxford U. Press 2015) (disparate birth outcomes for Black women are attributable to racial residential segregation, environmental health, and weathering on the body due to constant exposure to discrimination and inequities in healthcare access and treatment).

<sup>62</sup> Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 *Georgetown L. J.* 475 (2021); Laura J. Faherty et. al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome*, *JAMA Open Network* (2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755304>;

<sup>63</sup> See Rebecca L. Haffajee et al., *Pregnant Women with Substance Use Disorders—The Harm Associated with Punitive Approaches*, 384 *N. Engl. J. Med.* 2364 (2021); Faherty, *supra* note 62; ACOG, *Statement of Policy: Opposition to Criminalization of Individuals During Pregnancy and Postpartum Period* (2020), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>.

support[ed] the Mother’s use of heroin during her pregnancy,’ as he believed it helped prevent Mother from getting sick and losing the baby.”<sup>64</sup> In fact, the mother had enrolled in a methadone treatment program once she found out she was pregnant but still got sick from withdrawal symptoms.<sup>65</sup> The father said doctors had told her to use any means to avoid sickness to protect the fetus, and he took that to mean she should use heroin to avoid sickness.<sup>66</sup> Opioid withdrawal has been recognized as creating a significant risk of pregnancy loss.<sup>67</sup> While treatment programs and prescribed methadone or buprenorphine are the preferred treatment protocol, the father was not wrong that doctors’ treatment goals typically include managing withdrawal, reducing cravings, and not ending use.<sup>68</sup> An abrupt end or withdrawal often leads to illicit opioid use, which increases risk of overdose.<sup>69</sup> The court failed to consider the complex medical landscape, the father’s attempt to do what was best for the pregnant person and fetus, or any scientific evidence on the subject, and held that the father neglected his child.

## B. Punitive Responses to Pregnancy and Drug Use Increase Risk of Harm to Children Rather Than Protecting Them

Defense attorneys should emphasize that every leading medical and public health association opposes punitive responses to pregnancy and substance use because such punitive approaches are dangerous to maternal, fetal, and family health.<sup>70</sup> The American

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<sup>64</sup> *In re C.B., San Diego Cty. Health & Human Servs. Agency v. Leonard B.*, No. D069774, 2016 WL 3644826 at \*6 (Cal. App. 4th Dist. June 30, 2016).

<sup>65</sup> This is a common phenomenon with providers who don’t know how to care for pregnant people. Pregnant people often need higher doses due to increased bloodflow, so the same pre-pregnancy dose might lead to withdrawal symptoms, a pregnant person seeking opioids elsewhere, and being found in violation of the program or even kicked out. See Substance Abuse & Mental Health Servs. Admin. (“SAMHSA”), U.S. Dep’t Health & Human Servs., *Clinical Guidance for Treating Pregnant and Parenting Women with Opioid Use Disorder and Their Infants*, HHS Publication No. (SMA) 18-5054 (2018) at 28, <https://store.samhsa.gov/sites/default/files/d7/priv/sma18-5054.pdf>.

<sup>66</sup> *In re C.B.*, 2016 WL 3644826, at 1.

<sup>67</sup> Nat’l Institutes of Health, Nat’l Institute on Drug Abuse, *Treating Opioid Use Disorder During Pregnancy* (Jul. 2017), <https://nida.nih.gov/publications/treating-opioid-use-disorder-during-pregnancy>; Substance Abuse & Mental Health Serv. Admin., U.S. Dep’t Health & Human Servs., *Treatment Improvement Protocol Series No. 2, Pregnant, Substance-Using Women* 19 (2002) (“Medical withdrawal of the opioid-dependent woman is not recommended in pregnancy because of the increased risk to the fetus of intrauterine death. Methadone maintenance is the treatment of choice.”).

<sup>68</sup> Terminating use without medical advice or supervision can be dangerous to both mother and fetus. ACOG, Comm. on Health Care for Underserved Women, *Nonmedical Use of Prescription Drugs*, Committee Opinion No. 538 (Oct. 2012), [https://www.acog.org/Resources\\_And\\_Publications/Committee\\_Opinions/Committee\\_on\\_Health\\_Care\\_for\\_Underserved\\_Women/Nonmedical\\_Use\\_of\\_Prescription\\_Drugs](https://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Nonmedical_Use_of_Prescription_Drugs); SAMHSA *Clinical Guidance*, *supra* note 65, at 25, (“pharmacotherapy is strongly recommended... treatment without any pharmacotherapy is complicated by poor fetal health, high rates of return to substance use, and the consequences such as risk of overdose”).

<sup>69</sup> ACOG, *Opioid Use in Pregnancy, Neonatal Abstinence Syndrome, and Childhood Outcomes*, 130 *Obstetrics & Gynecology* 10, 12, 15 (2017).

<sup>70</sup> Pregnancy Justice, *Medical and Public Health Group Statements Opposing Prosecution and*

Medical Association,<sup>71</sup> American Nurses Association,<sup>72</sup> American Psychological Association,<sup>73</sup> American Psychiatric Association,<sup>74</sup> and the American Academy of Pediatrics<sup>75</sup> unanimously conclude that punitive responses to the issue of pregnancy and drug use are harmful to the health of women and children, and diminish families' healthcare access. The American College of Obstetricians and Gynecologists states,

[t]he use of the legal system to address perinatal alcohol and substance abuse is inappropriate. Obstetrician-gynecologists should be aware of the reporting requirements related to alcohol and drug abuse within their states. In states that mandate reporting, policy makers, legislators, and physicians should work together to retract punitive legislation and identify and implement evidence-based strategies outside the legal system to address the needs of women with addictions.<sup>76</sup>

Penalizing parents through civil neglect petitions based on the pregnant person's drug use makes medical care less accessible as pregnant people are more afraid to seek help for fear of state involvement, losing custody of their children, or losing their parental

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*Punishment of Pregnant Women* (June 2018), <https://mk0nationaladvoq87fj.kinstacdn.com/wp-content/uploads/2019/10/Medical20and20Public20Health20Group20Statements20revised20June202018.pdf>

<sup>71</sup> Am. Med. Ass'n, *Policy Statement H-420.962: Perinatal Addiction-Issues in Care and Prevention* (last modified 2019) ("Transplacental drug transfer should not be subject to criminal sanctions or civil liability..."); Am. Med. Ass'n, *Policy Statement H-420.969: Legal Interventions During Pregnancy* (last modified 2018) ("Criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate. Pregnant substance abusers should be provided with rehabilitative treatment appropriate to their specific physiological and psychological needs.").

<sup>72</sup> Am. Nurses Ass'n, *Position Statement: Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017) ("Contrary to claims that prosecution and incarceration will deter pregnant women from substance use, the greater result is that fear of detection and punishment poses a significant barrier to treatment.").

<sup>73</sup> Am. Psychological Ass'n, *Pregnant and Postpartum Adolescent Girls and Women with Substance-Related Disorders* (updated: 2020) ("Punitive approaches result in women being significantly less likely to seek substance use treatment and prenatal care due to fear of prosecution and fear of the removal of children from their custody. This places both the mother and her children at greater risk of harm.").

<sup>74</sup> Am. Psychiatric Ass'n, *Position Statement: Assuring the Appropriate Care of Pregnant and Newly-Delivered Women with Substance Use Disorders* (2019) ("A public health response, rather than a punitive legal approach to substance use during pregnancy is critical.").

<sup>75</sup> Am. Acad. of Pediatrics, Committee on Substance Use and Prevention, *Policy Statement: A Public Health Response to Opioid Use in Pregnancy* (2017) ("The existing literature supports the position that punitive approaches to substance use in pregnancy are ineffective and may have detrimental effects on both maternal and child health...").

<sup>76</sup> ACOG, Committee on Health Care for Underserved Women, Committee Opinion No. 473 (Jan. 2011, affirmed 2014), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy-the-role-of-the-obstetrician-gynecologist>.

rights.<sup>77</sup> Simply put, punitive responses to drug use during pregnancy, either via the child welfare system or the criminal law system, generate negative health outcomes by deterring prenatal and postnatal care.<sup>78</sup>

Requiring a prospective parent to assist the state in policing a potential co-parent pits parents against each other before birth, thereby undermining family unity and crucial support systems and putting pregnant people at increased risk of harm. In one case, a father was punished for not reporting his pregnant partner to the police or to children's services when he knew she had tested positive for cocaine before becoming pregnant and during her pregnancy. "When appellant was asked what steps he took to assure that Stephanie would not use cocaine, appellant stated: 'Yes, I did with some arguments that we had. I just thought it wasn't good for her to leave home.' He also stated that he could not control Stephanie's drug use."<sup>79</sup> He knew, as is supported by peer-reviewed research, that people who are struggling with substance use disorder, if indeed his pregnant partner was, do better with non-judgmental support and with a stable home.<sup>80</sup> Perversely, in order to protect a prospective father from being exposed to possible liability, a pregnant person may feel compelled to hide her drug use and further isolate

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<sup>77</sup> "Leading medical organizations agree that a positive drug test should not be construed as child abuse or neglect" and that policing on the basis of a positive drug test "poses serious threats to people's health ... by eroding trust in the medical system, making people less likely to seek help when they need it." ACOG, *Opposition to Criminalization of Individuals During Pregnancy and Postpartum Period* (2020), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>. To the contrary, the current best practice for treating substance-exposed newborns is to keep the newborn and mother together because that improves medical outcomes, decreases length of hospital stay, and improves psychosocial outcomes. See, e.g., Kathryn Dee L. MacMillan, MD et al., *Association of Rooming-in With Outcomes for Neonatal Abstinence Syndrome, A Systematic Review and Meta-Analysis*, 172(4) JAMA Pediatr. (2018), doi: 10.1001/jamapediatrics.2017.515; Grossman et al., *supra* note 57; Ronald R. Abrahams et al., *Rooming-In Compared with Standard Care for Newborns of Mothers Using Methadone or Heroin*, 53 Can. Fam. Physician 1722 (Oct. 2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2231437/>. Furthermore, punitive action against these parents is counterproductive and in fact harms both the baby and the parents. See, e.g., Faherty, *supra* note 62; Daisy Goodman, DNP, MPH et al., *It's Time to Support, Rather Than Punish, Pregnant Women with Substance Use Disorder* (2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755302>.

<sup>78</sup> See, e.g., Haffajee, Faherty, Boone & McMichael, *supra* notes 62–63; *supra* notes 70–77 (medical associations' statements against punitive policies).

<sup>79</sup> *In re L.V.*, No. 13-10-283-CV, 2011 BL 79227 (Tex. Ct. App. Corpus Christi Feb. 24, 2011) (unpublished).

<sup>80</sup> Nat'l Harm Reduction Coal. & Acad. of Perinatal Harm Reduction, *Pregnancy and Substance Use: A Harm Reduction Toolkit*, at 1-2, <https://harmreduction.org/issues/pregnancy-and-substance-use-a-harm-reduction-toolkit/>; Lisa M. Cleveland et al., *The Mothering Experiences of Women with Substance Use Disorders*, 39 ADVANCES IN NURSING SCIENCE 119 (2016), <https://pubmed.ncbi.nlm.nih.gov/27149226/>; Iris Torchalla et al., 'Like a Lots Happened with My Whole Childhood': Violence, Trauma, and Addiction in Pregnant and Postpartum Women from Vancouver's Downtown Eastside, 11 Harm Reduction Journal 34 (2014), <https://harmreductionjournal.biomedcentral.com/articles/10.1186/1477-7517-12-1>.

herself from receiving any supportive services or assistance.<sup>81</sup>

### C. Demanding that Fathers Control Their Pregnant Partners Places Pregnant People and Their Developing Pregnancies at Risk

The obligation for putative fathers to control, report, or police pregnant people creates significant risks of exacerbating existing domestic violence or fostering new, unhealthy habits of control, which infringe on the fundamental rights and physical safety of pregnant people. Attempts by putative fathers to control women’s conduct or conditions during pregnancy have been expressed through violent behavior. In *Marquardt v. Maryland*, a husband—charged with brutally assaulting and falsely imprisoning his pregnant wife—argued that he was entitled to a necessity defense, claiming that he beat his wife with a baseball bat and choked her because he “just wanted to stop his wife from using crack cocaine” while pregnant.<sup>82</sup> The court rightly rejected this claim, recognizing that “rather than helping, his actions could have caused more serious harm to his wife and perhaps a miscarriage terminating her pregnancy.”<sup>83</sup> Creating an obligation for men to physically intervene in pregnant people’s drug use is not only without legal basis and ineffective; it may also make some men believe that any and all means to protect the fetus—including violence—would be justified. Thus, using any such “failure” to take those steps as a basis for filing neglect proceedings against prospective fathers could endanger both maternal and fetal health by exposing pregnant women to unnecessary control, fear, or even violence.<sup>84</sup>

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<sup>81</sup> Other kinds of coercive or punitive intervention including the threat of punishment or loss of child custody have been found to undermine rather than advance state interests in encouraging healthy pregnancies and improved birth outcomes. For example, studies of drug-dependent pregnant women have found that “fear and worry about loss of infant custody, arrest, prosecution, and incarceration for use of drugs during pregnancy” is “their primary emotional state.” See Martha A. Jessup et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 *J. Drug Issues* 285, 291–92 (2003); U.S. Gen. Accounting Office, *ADMS Block Grant: Women’s Set Aside Does Not Assure Drug Treatment for Pregnant Women*, 20 (1991) (identifying “the threat of prosecution” as a “barrier to treatment for pregnant women.”). In fact, the consensus of both criminal justice and medical professionals is that punitive measures create a much graver risk to fetal health than drug use during pregnancy. See also Carol Jean Sovinski, Comment, *The Criminalization of Maternal Substance Abuse: A Quick Fix to a Complex Problem*, 25 *Pepp. L. Rev.* 107 (1997).

<sup>82</sup> 882 A.2d 900, 913 (Md. Ct. Spec. App. 2005). *Cf. Washington v. Havens*, No. 35897-2-II, 2008 WL 2596218 (Wash. Ct. App. July 1, 2008) (appeal of a criminal conviction involving a man who claimed he was trying to get his son’s pregnant girlfriend arrested and jailed in order to stop her from using drugs); *Commonwealth v. Bullock*, 913 A.2d 207 (Pa. 2006) (appeal of criminal conviction of man who strangled his girlfriend after an argument regarding her use of cocaine during pregnancy).

<sup>83</sup> *Marquardt*, 882 A.2d at 925.

<sup>84</sup> See also *Casey*, 505 U.S. at 888–94 (intimate partner violence is a reason for striking down the spousal notification provision). See also Siegel, *supra* note 5.



These approaches fail to recognize an essential fact: that the health and safety of the fetus inherently depends on the health and safety of the person carrying the pregnancy. If state policies intend to promote maternal and child health, those policies should eliminate the risk that disclosing substance use to healthcare providers will lead to family separation, and should instead promote confidential medical care and voluntary, appropriate treatment.

#### D. A Lack of Knowledge of Pregnancy

State laws, rooted in the concept of fetal personhood from the “moment of conception,” are increasingly attempting to control the behavior of people with the capacity for pregnancy before they are even aware they are pregnant. Family court decisions are similarly imposing legal responsibility on prospective fathers before they are even made aware that they are prospective fathers. While they have had mixed success in various states, defense attorneys should not abandon these essential factual, causal, and jurisdictional arguments.

In *M.J.M.L.*, a father, Robert, tried to argue that he could not be held accountable for failing to control an expectant mother before he knew whether or not he contributed to the pregnancy.<sup>85</sup> His paternity was not determined until six months after the birth.<sup>86</sup> The court nevertheless held that “while knowledge of paternity is a prerequisite to a showing of knowing placement of a child in an endangering environment [subsection D], it is not a prerequisite to a showing of a parental course of conduct which endangers a child under section 161.001(1)(E).”<sup>87</sup> Such a distinction is nonsensical in this context, where a person could not know they needed to act to “protect” a fetus that they did not know they were tied to. Robert further argued that section 161.001(b)(1)(E) was unconstitutional because it was used to terminate his parental rights without required parental conduct as a basis, “to wit, ROBERT M. ORTEGA NEVER had possession or control of [M.J.M.L.], the child being taken from the mother at birth.”<sup>88</sup> The court, however, completely ignored this argument, focusing instead on his failure to argue a lack of causation.<sup>89</sup> But causation—or any actual harm to a child—seem irrelevant to this court, which clearly thought Robert had some ability to change Stephanie’s conduct or change the “placement” of the fetus. Robert’s right to parent his child was terminated based on his failure to control Stephanie or

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<sup>85</sup> *In re M.J.M.L.*, 31 S.W.3d 347, 351 (Tex. Ct. App. San Antonio 2000).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (citing Tex. Fam. Code).

<sup>88</sup> *Id.* at 353.

<sup>89</sup> *Id.*



change the “placement” of the fetus, all before he even became a parent—at birth.<sup>90</sup>

In Arizona, Keith R. faced a similar issue: he was denied custody of his child after the mother lost custody, attributed in part to his failure to prevent the mother’s drug use during the pregnancy, but he did not know about the pregnancy or the child until a few weeks after the birth.<sup>91</sup> Unlike in Texas, the Arizona appellate court acknowledged that Keith’s ignorance of the pregnancy negated his ability to prevent the mother’s drug use during the pregnancy and overturned a finding of dependency on that basis.<sup>92</sup> Keith further argued that the state had no right to interfere with his right to parent his child—and to have custody of her—absent a showing that the state needed to take custody of the child as a “dependent child.” The court affirmed the denial of Keith’s custody on other, post-birth grounds, that Keith did not comply with his required services. However, those services would not have been required absent the initial separation of Keith from his daughter based on his alleged failure to prevent the mother’s drug use during pregnancy, when he did not know she existed.

## **V. Legal Arguments**

### **A. Where A Fetus is Not a Child Under Relevant State Law—Lack of Subject Matter Jurisdiction & Notice**

Defense counsel should determine if their state’s relevant statute specifically asserts jurisdiction over fetuses and pregnant people, or only over children. While 24 states and the District of Columbia consider pregnancy and substance use to be child abuse or neglect under civil child welfare statutes, there are 26 other states in which defense counsel can and should argue that the statutes explicitly pertain only to children, born and separate from a pregnant person.<sup>93</sup> And even where state laws seemingly permit the application of child abuse statutes to fetuses, constitutional arguments may still be available.<sup>94</sup> If the statute only pertains to children, defense attorneys should argue that the court must dismiss the cause of action because it would require the court to impermissibly expand the law to treat fetuses in utero as “children” and expectant fathers as “parents.” Such an interpretation would be contrary to the plain meaning and purpose of those statutes.

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<sup>90</sup> See also *In re J.K.V.*, 490 S.W.3d 250 (Tex. Ct. App. Texarkana 2016) (discussed *supra* Part III.B).

<sup>91</sup> *Keith R. v. Dep’t of Child Safety*, No. 1 CA-JV 19-0206, 2019 WL 6918470 (Ariz. App. Div. 1 Dec. 19, 2019).

<sup>92</sup> *Id.* at ¶18.

<sup>93</sup> See Guttmacher Institute, *Substance Abuse During Pregnancy* (May 1, 2022), <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy>.

<sup>94</sup> See *infra* Part V.B-C.

Notwithstanding New York’s lead in the number of cases finding prospective fathers neglectful of their future child before that child is born, New York’s Family Court Act provides its courts with jurisdiction only over cases where there is an alleged “neglected child,” which is defined as “any person or persons” less than eighteen years of age.<sup>95</sup> Because statutes in New York should be given their plain meaning,<sup>96</sup> the term “person” should be given its plain meaning—a born person. A plain language analysis of the statute would not permit the court to interpret a fetus as a child or exercise jurisdiction over this matter.<sup>97</sup> Indeed, the New York Court of Appeals specifically held that when there is no legislative declaration that the term person includes a fetus, neither the federal or state constitution “confers or requires legal personality for the unborn.”<sup>98</sup> Moreover, throughout New York State law, the word “person” is understood as a born and alive human being.<sup>99</sup> Under established principles of statutory construction, courts must interpret statutes relating to the same subject matter “harmoniously and consistently.”<sup>100</sup> Therefore, New York courts should also find that the terms “person” and “child” in Article 10 of the Family Court Act do not include “fetus,” and only refer to a person or child born alive. Despite the cases cited herein that fail to recognize the limited reach of the New York Family Court Act, defense lawyers should continue to argue that the statute does not grant jurisdiction over fetuses and therefore does not grant jurisdiction over actions related to fetuses.

<sup>95</sup> N.Y. Fam. Ct. Act §§ 1012 (b); (f).

<sup>96</sup> *People v. Owusu*, 93 N.Y.2d 398, 401 (1999); *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998); *Makinen v. City of New York*, 30 N.Y.3d 81, 85 (2017).

<sup>97</sup> N.Y. Fam. Ct. Act §§1012(b); (f).

<sup>98</sup> *Bryn v. New York City Health and Hosps. Corp.*, 31 N.Y.2d 194, 203 (1972).

<sup>99</sup> See, e.g., N.Y. Penal Law § 125.05 (McKinney 2004) (defining “person” for purposes of homicide law as “a human being who has been born and is alive”); *In re Klein*, 538 N.Y.S.2d 274, 275 (App. Div. 2d Dept. 1989) (holding that a non-viable fetus is not a legally recognized “person” requiring appointment of a guardian for the purposes of proceedings to determine medical treatment of a comatose pregnant woman); *In re Tanya P.*, N.Y.L.J., Feb. 28, 1995, at 26 (Sup. Ct. N.Y. County 1995) (finding that section 913(b) of Mental Hygiene Law does not permit involuntary retention of a person for purposes of protecting welfare of a fetus because there was no indication of legislative intent to include fetuses as “persons”); *People v. Morabito*, 580 N.Y.S.2d 843 (Geneva City Ct. Jan. 29, 1992) (dismissing child endangerment charges against woman who used cocaine while pregnant on the ground that a fetus is not a “child” for purposes of that criminal provision), *aff’d slip op.* (Cty. Ct., Ont. County, Sept. 24, 1992); *People v. Gilligan*, Docket No. 5456 (N.Y. Sup. Ct. April 19, 2004) (dismissing child endangerment charges against woman who used alcohol while pregnant, stating that “the commonly accepted notion of a ‘child’ is a person who has been born,” not a fetus); *also cf. Sara Ashton McK. v. Samuel Bode M.*, 974 N.Y.S.2d 434, 436 (1st Dep’t 2013) (overturned dismissal, rejected family court theory that pregnant woman needed to somehow arrange her relocation to a new state during pregnancy, and confirmed putative fathers have neither the right nor the ability to restrict a pregnant woman from her constitutionally-protected liberty) (citing *Wilner v. Prowda*, 601 N.Y.S.2d 518, 519, 521 (Sup. Ct. N.Y. County 1993) (dismissing a petition for habeas and habeas corpus for a child detained by a husband to prevent his pregnant wife from moving away and noting that the court was unable to locate any New York case which held the fetus to be a person under N.Y. C.P.L.R. 7002)).

<sup>100</sup> *Alweis v. Evans*, 69 N.Y.2d 199, 204 (1987).

Additionally, where the statute does not include fetuses and prospective parents, defense counsel should bring a procedural due process argument for lack of notice that their conduct could be the subject of a family court case.

## B. Lack of Causation, Due Process

The pregnant person's own action is necessarily an intervening cause between any alleged possible action by the prospective father in relation to the fetus. Therefore, the state's theory necessarily lacks a nexus or causal link to the father's action and defense counsel should argue a lack of both factual and legal causation, and possibly a lack of jurisdiction or standing to bring a claim against the father. Further, because it is impossible for the state to show a causal link between the father's action and any alleged harm, any finding would necessarily violate his right to procedural due process. In many states, the state must show a connection or nexus between the defendant's action or inaction and some harm or imminent threat of harm to a child.<sup>101</sup> For example, in New York, to establish neglect, the state needs to show that "the actual or threatened harm to the child is a *consequence* of the failure of the respondent to exercise a minimum degree of care in providing the child with proper supervision or guardianship."<sup>102</sup> The petitioner, therefore, must establish *both* that: 1) the respondent's behavior fell below the minimum standard of care with regard to the subject child; and 2) the harm or risk of harm to the child was caused by respondent's failure to meet that minimum standard.<sup>103</sup> As previously discussed, factually, there is generally no harm that can be shown to have been caused by prenatal drug exposure.<sup>104</sup> Further, there cannot be a connection or nexus between the prospective father's action or inaction and any alleged harm. While evidence that a pregnant person knowingly ingested illicit substances may, according to some court rulings, be sufficient to establish a causal connection between the mother's conduct and an alleged harm to the baby once born, the connection between a prospective father's conduct and harm to the child is so attenuated it strains credulity.

A prospective father has no ability to dictate or control a pregnant person's behavior during pregnancy nor should he have such a broad and vague responsibility. Short of physical restraint or constant surveillance, it would be impossible for a prospective father to control every aspect of what a pregnant person puts in her body or does not put into her body. Further, no action taken by a prospective father can guarantee that a pregnant

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<sup>101</sup> Recall, there is no "child" in these cases, only fetuses. See Part V.A.

<sup>102</sup> *Nicholson*, 3 N.Y.3d at 368 (emphasis added).

<sup>103</sup> *Id.* at 369–371.

<sup>104</sup> *Supra* Part IV.A.

person would not have used drugs during her pregnancy, even if he reported her to law enforcement, refused to offer monetary assistance during the pregnancy, or attempted to force her into treatment. Any connection between a prospective father's alleged failure to take action to stop a pregnant person's drug use during her pregnancy and the alleged harm to a newborn is too attenuated to meet the causal requirement set forth by *Nicholson* in New York, or the causal requirement typical in other states.

In Texas, a father argued that his constitutional due process rights were violated because the Department terminated his parental rights but failed to show causation between his action and the alleged harm.<sup>105</sup> The court essentially dismissed this argument because it was not preserved at trial, and reaffirmed Texas' absurd position that a father "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child" because a pregnancy continued and the pregnant person engaged in some behavior the court did not like. Put another way, the only alternative would be for a prospective father to somehow force the pregnant person to have an abortion or deliver prematurely, which he absolutely does not have the right to do.<sup>106</sup>

Defense counsel should challenge such failures in causality and logic and request the case be dismissed. Defense counsel should also be sure to preserve all arguments for appeal.

### C. Infringement of Fundamental Rights

Defense lawyers should make additional constitutional arguments rooted in two key principles. First, the state may not impinge on a pregnant person's freedom because of pregnancy, and second, the state cannot demand that a prospective father interfere with a pregnant person's actions regarding their own body during pregnancy. Any state interference with pregnant people because of their status as pregnant is an unconstitutional infringement on their privacy, liberty, and equality. The rights to privacy,

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<sup>105</sup> *In re M.J.M.L.*, 31 S.W.3d 347 (Tx. Ct. App. San Antonio 2000), *supra* Part IV.D.

<sup>106</sup> *Casey*, 505 U.S. at 896 ("when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail... the woman"; "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

liberty, and equality include the right to procreation,<sup>107</sup> to parenting,<sup>108</sup> to family integrity,<sup>109</sup> to autonomy,<sup>110</sup> to bodily integrity,<sup>111</sup> and to medical decision-making.<sup>112</sup>

First, the Supreme Court has repeatedly affirmed that pregnant people are full constitutional persons, and—while government may take action to advance its interest in protecting potential life by limiting one procedure, abortion—government may not exercise state power to control the lives of pregnant people.<sup>113</sup> Women and people with

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<sup>107</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1953) (finding unconstitutional the compulsory sterilization of people found guilty of certain crimes) (“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.... [S]trict scrutiny...is essential....”). *But see Buck v. Bell*, 274 U.S. 200 (1927) (permitting the involuntary sterilization of people with intellectual disabilities), which is widely discredited but not overturned, see, e.g., Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 Pepp. L. Rev. 101 (2011); Disability Justice, *The Right to Self-Determination: Freedom from Involuntary Sterilization*, <https://disabilityjustice.org/right-to-self-determination-freedom-from-involuntary-sterilization/>.

<sup>108</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”).

<sup>109</sup> *Casey*, 505 U.S. at 848 (“It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood....”); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (“The Court has frequently emphasized the importance of the family.... [The] interest in retaining custody of his children is cognizable and substantial.”).

<sup>110</sup> *Casey*, 505 U.S. at 851 (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment....”); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt*, 405 U.S. 438; *Lawrence v. Texas*, 539 U.S. 558 (2003) (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.... Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

<sup>111</sup> *Casey*, 505 U.S. at 848 (“It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about...bodily integrity”); *Rochin v. California*, 342 U.S. 165, 172 (1952) (finding that a sheriff’s attempt to forcibly extract pills from a person’s mouth, through directing a physician to force an emetic solution through a tube into accused’s stomach to force him to vomit, and thereby obtain evidence from his vomit violated the Fourteenth Amendment’s Due Process clause) (“They are methods too close to the rack and the screw to permit of constitutional differentiation.”).

<sup>112</sup> *Cruzan v. Director, Mississippi Dept. of Health*, 497 U.S. 261, 279 (1990) (“[W]e assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”); see also *Washington v. Harper*, 494 U.S. 210, 229 (1990) (“The forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”).

<sup>113</sup> *Amicus Brief of Pregnancy Justice et al.*, Part I, in *Dobbs v. Jackson Women’s Health*, United States

the capacity for the pregnancy have rights to individual autonomy and bodily integrity.<sup>114</sup> Without that autonomy, “the state might as readily restrict a woman’s right to choose to carry a pregnancy to term as to terminate it.”<sup>115</sup>

Second, the state cannot demand that a prospective father interfere with a pregnant person’s actions regarding their own body during pregnancy, pursuant to *Planned Parenthood v. Casey*. In overturning a husband notification provision in a state’s abortion statute, the Court made clear that neither the state nor husbands (and thus putative fathers) may exercise certain types of control over pregnant women.<sup>116</sup> In arriving at its decision, the Court noted that if it did not overturn the statute at hand,

[p]erhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband’s interest in the fetus’ safety is a sufficient predicate for state regulation, the state could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol...smoking... using contraceptives or before undergoing any type of surgery that may have complications affecting the husband’s interest in his wife’s reproductive organs. And if a husband’s interest justifies notice in any of these cases, one might reasonably argue that it justifies...a requirement of the husband’s consent as well. *A State may not give to a man the kind of dominion over his wife that parents exercise over their children.*<sup>117</sup>

When the state demands that a prospective father interfere with a pregnant person or face state intervention and policing himself, it makes him an arm of the state and unconstitutionally interferes with the pregnant person through that conduit. Further, it revives patriarchal legal structures like coverture, which demanded that a woman surrender her liberties to her husband.<sup>118</sup>

The cases described herein go much farther than the spousal notification requirement found in *Casey* to be an unconstitutional infringement on women’s rights. They demand

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Supreme Court, Docket No. 19-1392, [https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/20210920133356568\\_19-1392-Amici-Brief.pdf](https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2021/09/20210920133356568_19-1392-Amici-Brief.pdf).

<sup>114</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>115</sup> *Amicus Brief, supra* note 113, citing *Casey*, 505 U.S. at 859; see also *Casey*, 505 U.S. at 896 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (“[S]tate regulation takes on a very different cast” before birth because it burdens the “bodily integrity of the pregnant woman,” and “the right of the individual...to be free from unwarranted governmental intrusion into matters so fundamentally affecting [that] person.”).

<sup>116</sup> 505 U.S. at 895-98.

<sup>117</sup> *Id.* at 898 (emphasis added).

<sup>118</sup> See Siegel, *supra* note 5.



that a prospective father actively intervene in a pregnant person’s decisions, actions, and bodily integrity, or face the possibility of losing custody of his child. The standard language in New York court decisions is that “the father knew of the mother’s drug use and failed to exercise a minimum degree of care to ensure that the mother did not abuse drugs during her pregnancy.”<sup>119</sup> To demand that a prospective father interfere with a pregnant person’s bodily integrity and control their actions is tantamount to giving any man who impregnates another person the right to control that person’s body and decisions. It places an impossible burden on a prospective father while simultaneously dismissing the humanity and autonomy of the prospective mother. In New York, these cases find prospective fathers neglectful because they did not directly violate a pregnant woman’s fundamental rights as conferred to her by the United States Constitution and the New York State Constitution.<sup>120</sup>

In addition to the arguments articulated in this section, defense counsel should consider if similar constitutional claims are available based on the relevant state’s constitution.

## 1. Equal Protection

Equal protection principles demand that prospective fathers be granted the same due process protections as prospective mothers. As stated above, at least 26 states have laws that do not permit a civil case for child neglect or abuse or termination of parental rights based on alleged actions or inactions of the pregnant person that might impact fetuses.<sup>121</sup> Therefore, in states in which such a case may not be brought against a pregnant person, equal protection principles should bar such a case against a prospective father. For example, as previously noted, New York’s Family Court Act only applies to children born

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<sup>119</sup> *In re Niviya K.*, 89 A.D.3d 1027 (2d Dep’t 2011); see *In re Carlena B.*, 61 A.D.3d 752 (2d Dep’t 2009), *In re Kierra C.*, 101 A.D.3d 993 (2d Dep’t 2012), *In re Jamoori L.*, 116 A.D.3d 1046 (2d Dep’t 2014); see also *In re Ja’Vaughn Kiyaymonie S.*, 146 A.D.3d 422 (1st Dep’t 2017) (“[T]he father had neglected the child because he knew or should have known that respondent mother was abusing narcotics while she was pregnant with the child, but failed to take any steps to stop her drug use.”); *In re Thamel J.*, 162 A.D.3d 507 (1st Dep’t 2018) (same, but cannabis).

<sup>120</sup> The New York State Constitution’s due process clause, which states that “no person shall be deprived of life, liberty or property without due process of law,” N.Y. CONST. art. I, § 6, has been held to include its citizens’ “freedom of choice, the broad general right to make decisions concerning oneself and to conduct oneself in accordance with those decisions free of governmental restraint or interference.” *Doe v. Coughlin*, 71 N.Y.2d 48, 52 (1987) (plurality opinion), cert. denied, 488 U.S. 879 (1988). Furthermore, New York’s due process clause protects the right to bodily autonomy, including the right to govern the course of one’s own medical treatment. See *Rivers v. Katz*, 67 N.Y.2d 485 (1986).

<sup>121</sup> Guttmacher Institute, *Substance Use During Pregnancy* (April 1, 2022), <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy>; University of Wisconsin Collaborative for Reproductive Equity, *Wisconsin’s Unborn Child Protection Act: Implementation and Consequences* (March 2022), Appendix A, [https://core.wisc.edu/wp-content/uploads/sites/1349/2022/03/Act-292\\_March-2022.pdf](https://core.wisc.edu/wp-content/uploads/sites/1349/2022/03/Act-292_March-2022.pdf).

alive and does not permit family regulation control of pregnant people. Further, the state’s highest court confirmed that a newborn’s positive toxicology report at birth, alone, is not sufficient for a finding of neglect against a mother.<sup>122</sup> There must be some other evidence of imminent risk *and* a nexus between the parent’s action or inaction and the actual harm or risk of harm to support a neglect finding.<sup>123</sup> Therefore, the Family Court Act cannot apply to prospective fathers during pregnancy, and post-birth, the state must show an actual or imminent risk of harm to a born child *and* a nexus between the father’s action and that harm.

Under the Fourteenth Amendment’s Equal Protection Clause, a state must provide an “exceedingly persuasive justification” for any distinction it draws between prospective mothers and fathers that must “not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>124</sup> Any sex-based classification “may not be used, as they once were, to perpetuate the legal, social, and economic inferiority of women.”<sup>125</sup> States like New York cannot provide any constitutional justification for permitting child neglect cases to be brought against prospective fathers for failing to control pregnant partners when such a case could not be brought against the pregnant person herself. Such a distinction rests on impermissible, archaic sex stereotypes about a prospective father’s right to control the actions of his pregnant partner, as if she is his child or pet rather than a co-equal citizen fully capable of independent decision-making. Any such claim necessarily “perpetuate[s] the legal, social, and economic inferiority of women.”<sup>126</sup> Therefore, defense attorneys should make the argument that it is a violation of equal protection to permit a father to be charged with neglect in New York solely based on a positive toxicology report given that a positive toxicology report, alone, is insufficient for a finding of neglect against a mother. Instead, a neglect finding for a prospective father—just like one for a prospective mother—must be based on a showing of actual or imminent risk of harm to a born child *and* a nexus between his action and that harm.

Of the 14 states in which prospective fathers have been found neglectful or had their legal relationship with their children terminated or disrupted because a court found they did not do enough to stop a pregnant person from consuming alcohol or drugs during pregnancy,<sup>127</sup> ten prohibit pregnant women from being found neglectful in relation to

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<sup>122</sup> *In re Dante M.*, 87 N.Y.2d 73 (1995).

<sup>123</sup> *Id.* at 73–74.

<sup>124</sup> *United States v. Virginia*, 518 U.S. 515, 531–33 (1996).

<sup>125</sup> *Id.* at 534 (internal citation omitted).

<sup>126</sup> *Id.*

<sup>127</sup> *Supra* Part III.

their pregnancy.<sup>128</sup> Therefore, in those states and under current case law, prospective fathers but not prospective mothers could lose a fundamental right—the right to parent—under these circumstances. In the other states, defense attorneys should make an equal protection argument with a slightly different posture: only prospective fathers are made legally responsible for the conduct of another autonomous human being; a similar obligation does not exist for prospective mothers.

## 2. First Amendment, Family Integrity, and the Right Not to Become an Arm of the State

Some courts have suggested that the father's neglect derived from failure to notify police or child welfare authorities of the pregnant person's drug use. Civil child neglect laws cannot be interpreted to require a prospective father to inform police or child welfare authorities that his pregnant partner is using drugs. Such a requirement would violate the father's First Amendment rights and his fundamental right to family integrity. "The right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. To force a person to speak, and compel participation, is a severe intrusion on the liberty and intellectual privacy of the individual."<sup>129</sup> An individual's First Amendment right not to speak includes the right not to become an informant to the government.<sup>130</sup> Imposing a duty on a prospective father to report the actions of the pregnant woman to the government, or otherwise risk his right to the care and custody of their child once born, forces an unconstitutional choice between the exercise of his right not to engage in government-compelled speech and his fundamental right to the care and custody of his child.<sup>131</sup>

In *In re L.V.*, prospective father Johnny Montalvo was placed in exactly this position.<sup>132</sup> In support of the termination of his rights, the court stated,

Appellant admitted that he was aware Stephanie tested positive for cocaine in

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<sup>128</sup> Appendix A, Case Chart, compared with Guttmacher Institute, *State Policies on Substance Use During Pregnancy* (updated Jan. 2022), <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy>.

<sup>129</sup> *Burns v. Martuscello*, 890 F.3d 77, 84 (2d Cir. 2018) (internal citations omitted).

<sup>130</sup> *Id.*; see also *David v. Hill*, 401 F. Supp. 2d 749 (S.D. Tex. 2005) (right not to participate in investigation). *But see Clark v. Reed*, 772 F. App'x 353, 355 (7th Cir. 2019) (finding that the question of whether refusing to become an informant for prison officials is "protected activity" under the First Amendment is currently ambiguous in the 7th Circuit).

<sup>131</sup> See, e.g., *Stanley*, 405 U.S. 645.

<sup>132</sup> No. 13-10-283-CV, 2011 BL 79227 (Tx. Ct. App. Corpus Cristi 2011).

October and December of 2005 and January of 2006. He also knew that she was using cocaine while she was pregnant with A.M.... He never called the Department or the police.... There was no evidence that appellant ever called either the police or the Department with respect to Stephanie’s drug use. In fact, he stated that he planned to marry Stephanie when she divorced her husband.<sup>133</sup>

The court clearly felt it was a salient fact that Mr. Montalvo had not called the police or the Department of Family and Protective Services on the mother of his children. However, such speech cannot or should not be compelled. The theory of the right not to speak is also recognized via spousal testimonial privilege, which precludes one spouse from testifying against the other in criminal or related proceedings. While the spousal privilege does not formally apply to unmarried partners, the theory does: it undermines the trust and protection of the family unit and partners who should be working together on behalf of their families when they are required to testify against each other or assist in the prosecution of the other.

Mr. Montalvo’s approach is more consistent with that of a supportive spouse and recognizes the real limitations of his ability to change another person’s behavior or control what they do with their own body. Mr. Montalvo “stated that he could not control Stephanie’s drug use.” “When...asked what steps he took to assure that Stephanie would not use cocaine, appellant stated: ‘Yes, I did with some arguments that we had. I just thought it wasn’t good for her to leave home.’”<sup>134</sup> He verbally attempted to stop her from using cocaine, and supported her safety by ensuring that she maintained a safe place to live.

Defense counsel should argue that not reporting is consistent with the father’s First Amendment right not to become an informant to the government, and is protective of the mother and child’s safety, if relevant.

### 3. Preserving Constitutional Defenses

Nothing supports the notion that a father has an obligation—or ability—to intervene in a pregnant woman’s life with regard to her drug use specifically, or with regard to any condition, behavior, or circumstance more generally that a pregnant woman experiences and that may pose a potential risk to a fetus. Rather, the clear guidance of the United States Constitution and most state constitutions militates against any such requirement

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<sup>133</sup> *Id.* at 2.

<sup>134</sup> *Id.*

as unconstitutional imposition on both prospective mother and prospective father. Therefore, any such prosecution should be dismissed.

Of the 56 cases we have identified, there was only one in which constitutional defenses were raised. Unfortunately, they were raised in the appellate court for the first time, and the court denied the appeal because such defenses had not been preserved.<sup>135</sup> It is essential that trial-level defense attorneys preserve these defenses for appeal.<sup>136</sup>

## VI. Conclusion

It is plainly shocking that family courts across the country demand that prospective fathers control the behavior of their pregnant partners or face neglect findings and even loss of parental rights. To require this, the state bestows fathers with power that threatens the legal protections, safety, and health of pregnant people, jeopardizes the family unit, and violates numerous constitutional rights. Not only do these decisions destroy families and familial relationships, irreparably harming children and communities, but they also entrench sexist, racist, and ableist beliefs about who has autonomy, who has control, and who is a worthy parent.

If *Roe* is overturned, punitive responses to pregnant people's actions will increase in both family and criminal courts, and therefore these cases against fathers will likely increase as well. The Supreme Court will implicate fundamental rights far beyond abortion, including pregnant people's right to try to carry a pregnancy to term and to retain bodily autonomy and independent decision-making; pregnant people and their partners' right to parent; and children's right to maintain legal relationships with their biological parents. In his leaked draft opinion, Justice Alito makes a heinous reference to the demand for adoptable infants as a justification for why abortion should be aggressively curtailed.<sup>137</sup> Babies are the most in demand for adoption; these actions free babies for adoption, even when they have loving parents who want them. Let's prepare to fight.

*We are grateful to the following Pregnancy Justice staff for working on this document:*

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<sup>135</sup> *In re M.J.M.L.*, 31 S.W.3d 347 (Tx. Ct. App. San Antonio 2000).

<sup>136</sup> As discussed *supra* in Part II, many states do not provide a lawyer to parents at risk of losing their parental rights or facing child abuse or neglect charges and there is no federal, constitutional guarantee of a lawyer in such cases.

<sup>137</sup> *First Draft, Dobbs v. Jackson Whole Women's Health Organization*, at 34, <https://www.documentcloud.org/documents/21835435-scotus-initial-draft>. For discussion, see Kelly Hayes' interview of Dorothy Roberts, *The End of "Roe" Will Lead to More Family Separation and Child Disappearance*, TRUTHOUT (May 12, 2022), <https://truthout.org/audio/the-end-of-roe-will-lead-to-more-family-separation-and-child-disappearance/>.

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*Samantha Lee (lead author); Afsha Malik, Purvaja Kavattur, Claire Shennan, Mario Kranjac and Natalie Bograd (research and writing support); Dana Sussman, Lynn M. Paltrow, Lindsey English Hull, Emma Roth, Katherine Fleming (editorial support).*



## **Appendix A: Case Chart** ***Fathers Accused of Neglect Based on Failure to Stop Mother's Drug Use During Pregnancy***

**States included within this research table (14):** AZ, CA, FL, GA, ID, IN, LA, NJ, NY, OR, TN, TX, VT, WV

**No court opinions were identified for (36):** AL, AK, AR, CO, CT, DE, HI, IA, IL, KS, KY, MA, MD, ME, MI, MN, MO, MS, MT, NC, ND, NE, NH, NM, NV, OH, OK, PA, RI, SC, SD, UT, VA, WA, WI, and WY.

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
1.	AZ	<i>Anthony V. v. Dep't of Child Safety</i> , No. 1 CA-JV 16-0510, 2017 BL 204729 (Ariz. App. Div. 1 June 13, 2017)	<ul style="list-style-type: none"> <li>Neglect where Father failed to protect R.S. from Mother's marijuana use while she was pregnant.</li> </ul>	Affirmed. Parental rights terminated.	Marijuana	Mother had a medical marijuana card for back pain.
2.	AZ	<i>Edward B. v. Dep't of Econ. Sec.</i> , No. 1 CA-JV 12-0254, 2012 BL 318602 (Ariz. App. Div. 1 Apr. 10, 2012)	<ul style="list-style-type: none"> <li>Neglect where father failed to protect the child from Mother's substance abuse while pregnant with the child.</li> <li>Father also forced mother to move out when she was eight months pregnant. The court found that this placed the mother in a position which, more than likely, compelled her to return to a drug environment and use drugs, which also increased the child's risk of drug exposure; <i>cf. In re L.V.</i>, Texas 2011, where part of the decision against the father was that he did not kick the mother out during pregnancy</li> </ul>	Affirmed. Dependency finding upheld against father.	Methamphetamine	Dependency finding also based on unrelated (poverty) incarceration where there was a high-functioning family arrangement without state intervention
3.	AZ	<i>Perry T. v. Ariz. Dep't of Econ. Sec.</i> , No. 1 CA-JV 13-0298, 2014 BL 132979 (Ariz. App. Div. 1 May 13, 2014)	<ul style="list-style-type: none"> <li>Neglect where father knew or should have known Mother was abusing illegal drugs while pregnant with A.T. and failed to intervene in Mother's drug use, or take or attempt to take any measures to prevent such drug use, while Mother was pregnant with A.T.</li> </ul>	Affirmed. Parental rights terminated.	Methamphetamine, opiates	<ul style="list-style-type: none"> <li>For the first time on appeal, Father argued he had no duty to protect A.T. prenatally. Because Father did not make this argument in superior court, this court declines to address the argument on appeal.</li> <li>Held responsible before paternity was established</li> </ul>

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
4.	AZ	<i>Keith R. v. Dep't of Child Safety</i> , No. 1 CA-JV 19-0206, 2019 BL 485989, (Ariz. App. Div. 1 Dec. 19, 2019)	<ul style="list-style-type: none"> <li>Mother lost custody of child due to her substance abuse. Father's request for custody was subsequently denied by the superior court after considering several factors, including his failure to prevent the mother's drug use.</li> <li>While the Appellate Division again denied the father's request, it rejected the superior court's finding that he neglected child by failing to protect her from Mother's drug use.</li> <li>Although Father knew Mother used drugs during their relationship, the evidence failed to prove that Father had knowledge that Mother was pregnant as he only found out about A.K.'s existence a few weeks after her birth.</li> </ul>	Affirmed termination on other grounds.	Undisclosed	Did not know child existed during pregnancy or when taken at birth, then had to prove fitness to get child out of system
5.	AZ	<i>Willie J. v. Dep't of Child Safety</i> , No. 1 CA-JV 16-0452, 2017 BL 139765, 2017 WL 1458767 (Ariz. App. Div. 1 Apr. 25, 2017)	<ul style="list-style-type: none"> <li>The juvenile court found DCS had proven child was dependent as to Father because he "knew or should have known Mother was using heroin and methamphetamine while she was pregnant." "The court did not explain the factual basis for its finding, however, and we are unable to determine from the record the specific evidence that would establish the basis for the juvenile court's conclusion."</li> </ul>	Reversed the juvenile court's dependency order and remanded to the juvenile court to determine whether C.J. is dependent as to Father..	Methamphetamine	<ul style="list-style-type: none"> <li>Only reversal found in Arizona</li> <li>Father coordinated functional family arrangement for the child without state support, and still faced lengthy state intervention.</li> </ul>
6.	AZ	<i>Casey v. Dep't of Child Safety</i> , No. 1 CA-JV 17-0346, 2018 BL 95125 (Ariz. App. Div. 1 Mar. 20, 2018)	<ul style="list-style-type: none"> <li>Neglect where the court, lacking direct evidence of the mother's substance use, <i>inferred</i> her continued substance use and used that as a basis to find the father had an "inability to discern [her] use" and to terminate the father-child relationship. The Court also determined that Father's denial that C.J.'s prenatal drug exposure caused her any ill effect called into question his willingness and ability to manage her health issues resulting from methamphetamine exposure, where there was no showing of ill effect.</li> </ul>	Affirmed. Parental rights terminated.	Methamphetamine	Complete lack of evidence ignored
7.	CA	<i>In re B.H.</i> , No. B285600, 2018 BL 171776 (Cal. App. 2d Dist. May 15, 2018)	<ul style="list-style-type: none"> <li>Neglect where substantial evidence indicated that father knew or should have known it was highly likely that mother would relapse during the pregnancy, and therefore he should have taken steps to protect his unborn child. Father demonstrated a desire to educate himself on how to deal with relatives who have substance abuse issues by attending Al Anon daily for five years. Nonetheless, the court could</li> </ul>	Affirmed neglect.	Heroin, methamphetamine, marijuana and alcohol	When asked about the petition allegation that he failed to protect B.H., father said, "How am I supposed to force her to stop? I have been supportive and sent her to get help. I don't own her, she is not a pet. I cannot force her even if I was married to her, I could not

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
			reasonably find on this record that, despite his exposure to substance abuse counseling, father turned a blind eye to mother's condition during her pregnancy.			force her to stop using drugs." He denied being aware that mother used alcohol and marijuana while pregnant and claimed he had never heard of methamphetamine. He admitted that before the pregnancy, once he "caught" mother injecting heroin in the kitchen. He said he really cannot recognize the effects or symptoms of heroin or methamphetamine use.
8.	CA	<i>In re Z.C.</i> , No. D068123, 2016 BL 18774 (Cal. App. 4th Dist. Jan. 25, 2016)	<ul style="list-style-type: none"> <li>Neglect father "permitted" mother's use of prescribed painkillers because he believed it had been condoned by doctors as a means of weaning off other prescriptions, but the court held he had enabled the mother's behavior without sufficient concern for the child</li> </ul>	Affirmed neglect.	Xanax, methodone, Klonopin, Vicodin	
9.	CA	<i>In re Bryana G.</i> , No. B252489, 2014 BL 152746 (Cal. App. 2d Dist. June 02, 2014)	<ul style="list-style-type: none"> <li>Neglect where Father conceded during trial that he is personally familiar with the behavior of drug addicts, but said he had never seen the mother use drugs. His statement was used as evidence that Father knew or reasonably should have known of Mother's meth use during pregnancy.</li> </ul>	Affirmed dependency and placement outside of the home	Methamphetamine	None
10.	CA	<i>In re J.C.</i> , 233 Cal.App.4th 1, 182 Cal.Rptr.3d 215 (App. 2d Dist. 2014)	<ul style="list-style-type: none"> <li>Parental rights terminated where Court found sufficient evidence that father knew mother was taking drugs while she was pregnant and did nothing to protect his unborn child from her conduct. Father also was a methamphetamine user who said he last used the drug together with the Mother in August 2013, when she was five months pregnant.</li> <li>Father claimed that he was unaware of his paternal status at the time and was separated from the mother during pregnancy, but the Court inferred that he had this knowledge based on his having been romantically involved with the Mother at the time of conception.</li> </ul>	Affirmed. Parental rights terminated	Methamphetamine	<ul style="list-style-type: none"> <li>Father contended there was insufficient evidence to support this finding because he and mother had separated, leading him to doubt whether the child was his and mother was in a drug rehab program during her pregnancy and told him she was no longer taking drugs.</li> <li>Based on this he told DCFS, "how am I supposed to protect the child when it was in the mother's womb and we weren't even together at the time. I was under the impression that she was not using anymore because that's what she was telling me. ... I didn't hear about any drug use until the [social worker] called</li> </ul>

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
						my dad and informed him that the baby was born."
11.	CA	<i>In re C.B.</i> , No. D069774, 2016 BL 211629 (Cal. App. 4th Dist. June 30, 2016)	<ul style="list-style-type: none"> <li>Neglect where father encouraged mother's heroin use during pregnancy, which resulted in the child's serious physical harm as a result of in utero heroin and methadone exposure. The Court believed the father's inaction demonstrated his inability to protect C.B. from physical harm.</li> </ul>	Affirmed dependency and placed child outside of the home	Heroin, methadone	<ul style="list-style-type: none"> <li>Father told the social worker he "100% support[ed] the mother's use of heroin during pregnancy," as he believed it helped prevent Mother from getting sick and losing the baby.</li> <li>"A parent's past conduct is a good predictor of future behavior." (In re T.V. (2013) 217 Cal.App.4th 126, 133.)</li> </ul>
12.	FL	<i>C.H. v. Dept of Children &amp; Families</i> , 744 So. 2d 1212 (Fla. 3d DCA 1999)	<ul style="list-style-type: none"> <li>Neglect where father failed to protect the child from his mother's drug use during pregnancy. Court believed that the father's involvement in the child's life would threaten the well being of the child and that father's parental rights should be terminated. Father also used drugs.</li> </ul>	Affirmed. Father's parental rights terminated.	Cocaine	
13.	GA	<i>In re J. M.</i> , 289 Ga. App. 439, 657 S.E.2d 337 (Ct. App. 2008)	<ul style="list-style-type: none"> <li>Abandonment where, despite of his knowledge that the mother used drugs during pregnancy and had an addiction problem, appellant failed to take any steps "to insure the safety of the child" during the pregnancy or immediately following the birth. The court noted he never contacted the police, DFCS, or any other social services agency to report the expecting mother's drug abuse problem in an effort to prevent harm to his unborn child and "failed to offer any prenatal support or other assistance to the mother during her pregnancy or in the months immediately following the child's birth in an attempt to contribute to the child's health and safety."</li> </ul>	Affirmed. Father's parental rights terminated.	Methamphetamine, amphetamine	"Our Supreme Court has stated that unwed fathers gain from their biological connection with a child an opportunity interest to develop a relationship with their children which is constitutionally protected."
14.	ID	<i>CASI Found., Inc. v. Doe</i> , 142 Idaho 397, 128 P.3d 934 (2006)	<ul style="list-style-type: none"> <li>Termination of parental rights where father encouraged Baby Doe's mother to take drugs while she was pregnant with Baby Doe.</li> </ul>	Affirmed. Father's parental rights terminated.	Methamphetamine	"Without having the opportunity to parent Baby Doe, he argues that a court cannot conclude that he has already neglected his daughter and the mere possibility of future neglect is not a sufficient ground to terminate his parental rights." But the court found it was, based on clearly biased information from the adoption agency, which had an adverse interest to have an adoptable baby.

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
15.	IN	<i>C.K. v. Ind. Dep't of Child Servs.</i> , 42 N.E.3d 172 (Ind. Ct. App. 2015)	<ul style="list-style-type: none"> <li>father's rights to two children were terminated based on the younger child's positive toxicology at birth, the father's likely awareness of the mother's drug use during her pregnancy, and his "failure" to complete a lengthy list of required "services" after the case was initiated, including "maintaining suitable housing and employment."</li> </ul>	Affirmed. Father's parental rights terminated.	Methadone, heroin, marijuana	The right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution. In re K.T.K., 989 N.E.2d 1225 , 1230 (Ind. 2013). "The parent-child relationship is one of our culture's most valued relationships." Id . Parental rights are not absolute and must be subordinated to the children's interests when determining the proper disposition of a petition to terminate parental rights. In re J.C., 994 N.E.2d 278 , 283 (Ind. Ct. App. 2013). Moreover, although the right to raise one's own children should not be terminated solely because there is a better home for the children, parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. Id.
16.	LA	<i>In re Baby A</i> , 241 So. 3d 1182 (La. App. 1st Cir. 2018)	<ul style="list-style-type: none"> <li>Termination of parental rights despite his attempts to support the mother with prenatal care and drug treatment during her pregnancy, finding that his own drug problem was too severe</li> </ul>	Affirmed. Father's parental rights terminated.	Methamphetamine and synthetic marijuana	In <i>Lehr v. Robertson</i> , 463 U.S. 248 , 261-262 , 103 S.Ct. 2985 , 2993 , 77 L.Ed.2d 614 (1983), the United States Supreme Court held that an unwed father who "demonstrates a full commitment to the responsibilities of parenthood" and "grasps that opportunity and accepts some measure of responsibility for the child's future," acquires substantial protection under the Due Process Clause of the United States Constitution. A mere biological link is insufficient; that link must be combined with a substantial parent-child relationship.
17.	NJ	<i>N.J. Div. of Youth v. R.D.</i> , No. A-1569-12T3, 2014 BL 165424 (N.J. Super. Ct. App. Div.	<ul style="list-style-type: none"> <li>Neglect where father failed to intervene in N.M. (Nancy)'s use of drugs while pregnant and failing to treat his own drug use after Leo was born in October 2011.</li> </ul>	Affirmed neglect.	Methadone, cocaine, heroin and "pills."	<ul style="list-style-type: none"> <li>Court acknowledges that a father may not generally be held responsible for not preventing the mother's pre-birth substance abuse and her</li> </ul>

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
		June 16, 2014)				<p>failure to seek prenatal treatment.</p> <ul style="list-style-type: none"> <li>• However, the Court also stated: "Most significantly, "[a] parent has the obligation to protect a child from harms that can be inflicted by another parent." Through his failure to intervene pre-birth, he contributed to his son's suffering after birth."</li> <li>• Court ignored the father's argument that the relevant definition of child abuse is not intended to apply to a fetus</li> </ul>
18.	NJ	<i>N.J. Div. of Youth &amp; Family Servs. v. G.A.</i> , No. A-2498-06T4, 2007 BL 288733 (N.J. Super. Ct. App. Div. Oct. 18, 2007)	<ul style="list-style-type: none"> <li>• Termination of a father's rights, finding he had "harmed the child because he did not take any steps to protect the child from [the mother's] drug use," and instead "turned a blind eye to...the harm it was having on the unborn child," where he did help her get in a detoxification program after the birth.</li> </ul>	Affirmed. Parental rights terminated	Heroin	None
19.	NJ	<i>New Jersey Div. of Youth and Family Servs. v. K.S.</i> , No. A-3971-08T4, 2009 BL 327434 (N.J. Super. Ct. App. Div. Dec. 15, 2009)	<ul style="list-style-type: none"> <li>• Termination where, despite knowing that Mother abused drugs prior to her pregnancy, and that he was child's father, Father did nothing to ensure that his son was born drug-free. Accordingly, the Court found that he shares in the responsibility and blame for the harm caused to the child.</li> </ul>	Affirmed. Parental rights terminated.	Cocaine, opiates, methadone and benzodiazepines	None
20.	NY	<i>In re Alfredo S.</i> , 568 N.Y.S.2d 123, 172 A.D.2d 528, (N.Y. App. Div. 2nd Dep't 1991)	<ul style="list-style-type: none"> <li>• "there is an "inequity in holding a father responsible for a mother's prenatal drug use which resulted in an at-birth positive toxicology for cocaine in the child...."</li> <li>• It is not legally sufficient to support a finding of paternal unfitness, to "attribute responsibility to the father for the mother's prenatal drug use, her admitted addiction to cocaine, and the finding of neglect against her ..." "in the absence of additional evidence to establish the father's own failure to exercise the requisite minimum degree of care to protect the child at birth."</li> </ul>	Reversed, custody transferred from the Department to the father.	Cocaine	<ul style="list-style-type: none"> <li>• First case in the state.</li> <li>• Unusual procedural posture because neglect was not alleged against the father, but the Department initially had "custody" of the newborn</li> </ul>
21.	NY	<i>In re R.W. Children</i> , 658 N.Y.S.2d 597 (N.Y.	<ul style="list-style-type: none"> <li>• Affirmed neglect of 7 children based upon "respondent mother's use of cocaine prior to birth of youngest child, respondent father's knowledge thereof and failure to protect child, and both parents'</li> </ul>	Affirmed neglect.	Cocaine	<ul style="list-style-type: none"> <li>• Decided despite <i>Alfredo S.</i> precedent, without discussion of the change, and despite lack of notice, citing a source</li> </ul>



No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
		App. Div. 1st Dep't 1997)	use of excessive corporal punishment against one child"			that assumed a prenatal drug exposure was automatic harm. <ul style="list-style-type: none"> <li>• Did not differentiate between child and fetus despite clear law to the contrary.</li> </ul>
22.	NY	Matter of K. Children, 677 N.Y.S.2d 379 (2d Dept 1998)	<ul style="list-style-type: none"> <li>• Neglect because despite having knowledge of mother's recent history of drug abuse, father failed to exercise minimum degree of care in ensuring that mother did not abuse drugs during her pregnancy with youngest child; also did not know case planner or preventative drug program "plan" or other recommended services, so court found derivative neglect of other children.</li> </ul>	Affirmed neglect.	Nondisclosed	<ul style="list-style-type: none"> <li>• Used as precedent in the subsequent 5 cases</li> </ul>
23.	NY	In re Kanika M., 704 N.Y.S.2d 669 (2d Dep't 2000)	<ul style="list-style-type: none"> <li>• neglect because father "should have known" that mother was abusing drugs while she was pregnant, without evidence that he did in fact know</li> </ul>	Affirmed neglect.	Nondisclosed	None
24.	NY	In re Cantina B., 809 N.Y.S.2d 539 (2d Dep't 2006)	<ul style="list-style-type: none"> <li>• father guilty of neglect because knew of mother's drug use and failed to exercise minimum degree of care to ensure that mother did not use drugs during her pregnancy, by negative inference where father did not appear or give evidence, where father stated to caseworker he had no knowledge of mother's cocaine use during pregnancy</li> </ul>	Affirmed neglect.	Cocaine	Father did not appear at fact finding and a negative inference was drawn against him.
25.	NY	In re Carlena B., 877 N.Y.S.2d 197 (2d Dep't 2009)	<ul style="list-style-type: none"> <li>• Neglect where evidence established that the father knew or should have known of the mother's drug use and "failed to exercise a minimum degree of care in ensuring that the mother did not abuse drugs during the pregnancy". Also, used drugs himself.</li> </ul>	Affirmed neglect.	Nondisclosed	None
26.	NY	In re Niviya K., 933 N.Y.S.2d 356 (2d Dep't 2011)	<ul style="list-style-type: none"> <li>• Father guilty of neglect because knew of mother's drug use and failed to exercise minimum degree of care to ensure that mother did not use drugs during her pregnancy, by negative inference where father did not appear or give evidence, where father stated to caseworker he had no knowledge of mother's cocaine use during pregnancy.</li> </ul>	Affirmed neglect.	Cocaine	Father did not appear at fact finding and a negative inference was drawn against him.
27.	NY	In re Kierra C., 955 N.Y.S.2d 526 (2d Dep't 2012)	<ul style="list-style-type: none"> <li>• father neglected subject child in that father knew or should have known of the mother's drug use and failed to exercise a minimum degree of care to ensure that the mother did not abuse drugs during her pregnancy</li> </ul>	Affirmed neglect.	Nondisclosed	None
28.	NY	In re Stevie R., 97 A.D.3d 906, 907-08 (3d Dep't 2012)	<ul style="list-style-type: none"> <li>• father neglected child "[g]iven that he lived with the mother during her pregnancy...he [knew] or should have known about her drug use during the pregnancy." The court further noted that the father</li> </ul>	Affirmed neglect.	Opiates, amphetamines	None

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
			should have known his pregnant partner discontinued prenatal care, and forced her to attend			
29.	NY	<i>In re Orlando R.</i> , 977 N.Y.S.2d 30 (2d Dep't 2013)	<ul style="list-style-type: none"> <li>“notwithstanding his efforts to address her drug problem...he placed her in the home of a friend who he knew was a drug user... While this residence was a last resort, as the couple has been homeless and unemployed... the father's intermittent incarceration and resulting separation contributed to his failure... for the environment apparently contributed to her relapse during her pregnancy.”</li> </ul>	Affirmed neglect.	Not specified	<ul style="list-style-type: none"> <li>Explicitly prosecuting poverty – homelessness and poverty-related incarceration</li> <li>Presence of alcohol in the home is explicitly criticized</li> </ul>
30.	NY	<i>In re Jamoori L.</i> , 985 N.Y.S.2d 114 (2d Dep't 2014)	<ul style="list-style-type: none"> <li>“Despite his knowledge that the mother continued to abuse marijuana during her pregnancy, he failed to exercise a minimum degree of care to protect the child.” “...the father's failure to appear at the fact-finding hearing permitted a strong negative inference against him”</li> </ul>	Affirmed neglect.	Cannabis	Father did not appear at fact finding and a negative inference was drawn against him.
31.	NY	<i>In re Ja'Vaughn Kiaymonie S.</i> , 146 A.D.3d 422 (1st Dep't 2017)	<ul style="list-style-type: none"> <li>Preponderance of the evidence supported family court's determination that father neglected his child, where father knew or should have known that mother was abusing narcotics while she was pregnant with their child, but failed to take any steps to stop her drug use.</li> </ul>	Affirmed neglect.	Undisclosed narcotics	None
32.	NY	<i>In re Thamel J.</i> , 76 N.Y.S.3d 56 (1st Dep't, 2018)	<ul style="list-style-type: none"> <li>found evidence sufficient to support finding that father neglected child; evidence indicated that father knew or should have known that mother was smoking marijuana while pregnant with child, but father failed to take any steps to stop mother's drug use, child had positive toxicology, low birth weight, and one-week stay in neonatal intensive care unit following birth, and father ignored his own failure to exercise a minimum degree of care with respect to his parenting responsibilities by smoking marijuana with mother while she was pregnant, including the day before child's birth, failing to comply with his service plan relating to another child, and failing to submit to drug testing.</li> </ul>	Affirmed neglect.	Marijuana	pos tox, low birth weight, 1wk in NICU sufficient to indicate harm, despite evidence that these do not have inherent long term effects.
33.	NY	<i>In re Camden J.</i> , 91 N.Y.S.3d 581 (3d Dep't 2018)	father was neglectful where he knew that throughout the mother's pregnancy with the child, she was using medication that had not been prescribed to her and that this placed the child at imminent risk of serious harm. (Post-revoked plea)	Affirmed neglect. Child removed from parents' custody.	Oxycodone, suboxone and opiates	based on admission secured through a settlement for supervision and dismissal, that was subsequently revoked
34.	NY	<i>In re Elijah A.</i> , 37 Misc.3d 1228(A), 2012 WL 6062532 (N.Y.	Father found neglectful also for his own cocaine use, but primarily for failure to stop mother's cocaine use during pregnancy. Lengthy discussion.	Neglect	Cocaine	None.

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
		Fam. Ct. Kings Cnty. 2012)				
35.	NY	In re M/B Child, 8 Misc.3d 1001(a), 2005 WL 1388846 (N.Y. Fam. Ct. Kings Cnty. 2005)	Dept failed to prove father neglectful at inquest for insufficient knowledge/facts, but court noted "A finding of neglect may properly be entered against a father who, knowing of the mother's substance abuse, fails to take steps that a reasonably diligent and prudent parent should take in order to prevent the child from being born with exposure to cocaine..." BUT "there is an "inequity in holding a father responsible for a mother's prenatal drug use which resulted in an at-birth positive toxicology for cocaine in the child..." in the absence of any other evidence that the father knew or should have known of the mother's substance abuse... [or] in the absence of additional evidence to establish the father's own failure to exercise the requisite minimum degree of care to protect the child at birth."	Dismissed petition against father	Cocaine	None
36.	OR	State ex rel. Dept. of Human Servs. v. J.S., 219 Or. App. 231, 182 P.3d 278 (Ct. App. 2008)	<ul style="list-style-type: none"> <li>Termination, where father failed to intervene while mother used methamphetamine during her pregnancy. Because the father did not intervene, the court concluded that one of two possible inferences must be true. Either (1) the father has not learned to recognize when the mother is using methamphetamine or (2) he was not being truthful about his knowledge of mother's continuing methamphetamine use. Under either scenario, the court believed it was clear that father cannot or will not protect child from mother.</li> </ul>	Reversed dismissal. Parental rights terminated.	Methamphetamine	None
37.	TN	In re Garvin M., No. E2013-02080-COA-R3-PT, 2014 BL 131036, 2014 Tn App Lexis 274, 2014 WL 1887334 (Tenn. Ct. App. May 09, 2014)	<ul style="list-style-type: none"> <li>affirmed termination of a father's rights to his two children after his pregnant partner gave birth to a third child who died a day later of pulmonary hypertension, allegedly due to prenatal drug exposure. Although a laundry list of charges were alleged in terminating the father's rights, the court deemed his failure to prevent the mother's drug use during pregnancy as sufficient justification for the termination of older children.</li> </ul>	Affirmed. Parental rights terminated.	Cocaine, marijuana, benzodiazepines, and opiates	"Parents have a fundamental constitutional interest in the care and custody of their children under both the United States and Tennessee constitutions"
38.	TN	In re Alexis C., No. E2013-02498-COA-R3-PT, 2014 BL 181872, 2014 WL 2917376	<ul style="list-style-type: none"> <li>affirmed termination where prospective parents planned to stop using morphine, but were told by a doctor at a Suboxone clinic that doing so would cause the fetus more harm than good, so the prospective father continued to support his partner's use of morphine to prevent withdrawal. He stated that "[w]e didn't just find out she was pregnant and say, oh, well,</li> </ul>	Affirmed. Parental rights terminated.	Suboxone, THC, amphetamines, opiates	None

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
		(Tenn. Ct. App. June 25, 2014)	we'd like to get the baby strung out too" and that he supported the mother in cutting back significantly, doing everything but quitting			
39.	TN	In re C.T., No. E2017-02148-COA-R3-JV, 2018 BL 349093 (Tenn. Ct. App. Sept. 26, 2018)	<ul style="list-style-type: none"> <li>a father was found to be neglectful of his twin children based on allegations that he failed to protect them from the mother's drug use while pregnant even though he knew that "such conduct was likely to cause serious bodily injury" to the children. Appeal challenged other issues only.</li> </ul>	Affirmed neglect.	Opioid pain medication (Opana, Hydrocodone), alcohol	None
40.	TX	Dupree v. Texas Dep't of Protective and Reg. Servs., 907 S.W.2d 81 (Tex. Ct. App. Dallas 1995)	<ul style="list-style-type: none"> <li>a jury may impute a mother's drug related conduct during pregnancy to the father</li> <li>termination where father knew or should have known of drug history and use during pregnancy</li> </ul>	Affirmed. Termination of parental rights.	Cocaine	None
41.	TX	Combs v. Dall. Cty. Child Protective Servs. Unit, No. 05-96-00484-CV, 1997 WL 499689 (Tex. Ct. App. Dallas Aug. 25, 1997) (unpublished)	<ul style="list-style-type: none"> <li>Termination where father knew mother was using drugs during pregnancy and "failed to seek help for her"</li> </ul>	Affirmed. Termination of parental rights.	Cocaine	kitchen sink allegations, but included failure to prevent use and force prenatal care
42.	TX	Edwards v. Tex. Dep't of Protective and Reg. Servs., 946 S.W.2d 130 (Tex. Ct. App. El Paso 1997)	<ul style="list-style-type: none"> <li>Termination affirmed where, according to the court, the father knew the prospective mother was using cocaine during pregnancy and "did nothing to stop it."</li> </ul>	Affirmed. Termination of parental rights.	Cocaine	None
43.	TX	In re J.G., No. 05-96-01873-CV, 1998 WL 293724 (Tex. Ct. App. Dallas June 8, 1998) (unpublished)	<ul style="list-style-type: none"> <li>Termination affirmed where father knew mother used drugs during pregnancy, failed to assist her in obtaining prenatal care, and the jury did not like "appellant's lifestyle," including supporting but not raising prior children, unstable employment, and participating in raising one child, who then got pregnant in 10th grade and dropped out of school</li> </ul>	Affirmed. Termination of parental rights.	Cocaine, cannabis	Kitchen sink allegations
44.	TX	In re M.J.M.L., 31 S.W.3d 347 (Tex. Ct. App. San Antonio 2000)	<ul style="list-style-type: none"> <li>Termination affirmed where father knew mother had a history of drug use, brought her to a rehabilitation clinic, knew she left before giving birth, and left himself during pregnancy to satisfy a Navy AWOL violation, but returned subsequently and sought custody</li> </ul>	Affirmed. Termination of parental rights.	Not specified	None

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
45.	TX	<i>In re E.J.P.</i> , No. 06-04-00131-CV, 2005 WL 2138573 (Tex. Ct. App. Texarkana Sept. 7, 2005) (unpublished)	<ul style="list-style-type: none"> <li>Termination affirmed in part because of father's failure to stop mother's drug use during pregnancy, and subsequently leaving the baby at home with the mother as he worked as a long-haul truck driver</li> <li>Other subsequent actions alleged, primarily related to drug use history</li> </ul>	Affirmed. Termination of parental rights.	Methamphetamine, cannabis	None
46.	TX	<i>In re A.O.</i> , No.2-09-005-CV, 2009 WL 1815780 (Tex. Ct. App. Fort Worth June 25, 2009) (unpublished)	<ul style="list-style-type: none"> <li>Termination affirmed in part because of father's failure to stop mother's drug use during pregnancy, thus leaving the fetus "in an endangering environment," the womb</li> <li>Allegations of father's own use, also</li> </ul>	Affirmed. Termination of parental rights.	Cocaine, cannabis	None
47.	TX	<i>In re M.R.J.M.</i> , 280 S.W.3d 494 (Tex. Ct. App. Fort Worth 2009)	<ul style="list-style-type: none"> <li>Termination where knew or should have known of mother's cannabis use during pregnancy, did nothing to prevent it, and other allegations including inability to pay child support, limited engagement with the child, and prior incarceration</li> </ul>	Affirmed. Termination of parental rights.	Cannabis, other unspecified	None
48.	TX	<i>In re S.K.A.</i> , No. 10-08-00347-CV, 2009 BL 177484, 2009 TX App Lexis 6535, 2009 WL 2645027 (Tex. Ct. App. Waco Aug. 19, 2009) (unpublished)	<ul style="list-style-type: none"> <li>Termination affirmed where father "failed" to stop mother's drug use during pregnancy, which was sufficient to establish that he "knowingly allowed the child to remain in conditions or surroundings that endangered her physical well-being," the womb.</li> </ul>	Affirmed. Parental rights terminated.	Cocaine, cannabis	<ul style="list-style-type: none"> <li>Father challenged deprivation of meaningful judicial review required under federal due process and Texas due course of law guarantees, because he was an indigent parent without counsel, despite a request for statutorily mandated appointed counsel</li> <li>fact of signing over rights to prior 5yo used against him</li> </ul>
49.	TX	<i>In re E.H.</i> , No. 02-09-134-CV, 2010 BL 31095, 2010 WL 520774 (Tex. Ct. App. Fort Worth Feb. 11, 2010) (unpublished)	<ul style="list-style-type: none"> <li>Termination affirmed where father had knowledge that a <u>different</u> mother of his child used <u>methadone</u> while pregnant; and "left" fetus in Mother's care (in the womb) knowing she had history of drug use and crime.</li> <li>Father had own history of substance use and criminal charges, though testified he always used drugs outside of the children's presence</li> <li>Court and counselor showed bias: "he used some choice words, profanity... it demonstrated some of the lack of impulse control and the social mores that were not being demonstrated."</li> <li>Same Dr. Wiggins as <i>In re C.D.S.</i></li> </ul>	Affirmed. Parental rights terminated.	Methadone, unspecified other	None
50.	TX	<i>In re L.V.</i> , No. 13-10-283-CV, 2011 BL 79227 (Tex. Ct. App. Fort Worth Aug. 11, 2011) (unpublished)	<ul style="list-style-type: none"> <li>Termination where father failed to stop mother's drug abuse during pregnancy and following birth</li> <li>Court found a pattern of drug use, including drug use during the pregnancy of another child, will</li> </ul>	Affirmed. Termination of parental rights.	Cocaine	None

No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
		Ct. App. Corpus Christi Feb. 24, 2011) (unpublished)	support a finding of conduct endangering a child even if there is no evidence that the drug use injured the child.			
51.	TX	In re C.D.S., No. 02-11-00516-CV, 2012 BL 148241, 2012 WL 2135592 (Tex. Ct. App. Fort Worth June 14, 2012) (unpublished)	<ul style="list-style-type: none"> <li>Termination where, among other reasons, Father knew that she was using methamphetamine while she was pregnant. Father did not present evidence that he made any attempt to abate Mother's drug use.</li> <li>Messy history used as further basis</li> <li>Same Dr. Wiggins as <i>In re E.H.</i></li> </ul>	Affirmed. Parental rights terminated.	Methamphetamine	The natural rights existing between a parent and his (her) natural child are of constitutional dimensions, and involuntary termination of parental rights statutes must be strictly construed in favor of the parent
52.	TX	In re A.J.R., No. 07-11-00501-CV, 2012 BL 139372, 2012 TX App Lexis 4454, 2012 WL 2005833 (Tex. Ct. App. Amarillo June 05, 2012) (unpublished)	<ul style="list-style-type: none"> <li>Termination affirmed even though father did not use drugs or have a history of use, completed recommended services and regular visits, provided diapers and toys for the child, and had a suitable home, but only because he knew the mother used drugs during the pregnancy and "failed" to prevent her from doing so.</li> </ul>	Affirmed. Father's parental rights terminated.	Cocaine	None
53.	TX	W.D. v. Tex. Dep't of Family & Protective Servs., No. 03-14-00581-CV, 2015 BL 28870, 2015 WL 513267 (Tex. Ct. App. Austin Feb. 05, 2015) (unpublished)	<ul style="list-style-type: none"> <li>Termination where father knew that the mother was using PCP while pregnant because of the drug's potent smell released during use. Based on this evidence, the Court found that Walter Sr. knowingly allowed the child to remain in conditions or surroundings that endangered the child's physical and emotional well-being.</li> </ul>	Affirmed. Termination of parental rights.	PCP	None
54.	TX	<i>In re J.K.V.</i> , 490 S.W.3d 250 (Tex. Ct. App. Texarkana 2016)	<ul style="list-style-type: none"> <li>Termination reversed where the prospective father had no way to reach the prospective mother after the third month of pregnancy, and was out of the country without an ability to return, so he could not have done anything to affect her actions during pregnancy</li> </ul>	Reversed termination of parental rights.	Not specified	<ul style="list-style-type: none"> <li>Only reversal found in the state</li> </ul>
55.	VT	In re I.B., 195 Vt. 662 (2014)	<ul style="list-style-type: none"> <li>Neglect where father failed to stop mother's drug use during pregnancy and failed to force her to obtain prenatal care</li> <li>Court found helped facilitate mother's trip to NY to give birth, which the court found was designed to avoid disclosure of her drug use while pregnant. The</li> </ul>	Affirmed neglect.	Opiates	Case indicates common family challenges where substance use disorder and poverty are present



No.	State	Case / Citation	Summary of the Case	Holding	Controlled Substances at Issue	Additional Notable Items / Arguments Surrounding Constitutional Rights
			<p>court cited this as one of multiple factors of neglect and "prediction" of the father's "likely future behavior."</p> <ul style="list-style-type: none"> <li>• Failure to complete prior mandated services like parenting classes or to maintain "suitable housing" also used against him</li> </ul>			
56.	WV	In re A.L.C.M., 239 W. Va. 382 (2017)	<ul style="list-style-type: none"> <li>• Neglect where father failed to stop Mother's illegal drug use during her pregnancy.</li> <li>• "When a child is born alive, the presence of illegal drugs in the child's system at birth constitutes sufficient evidence that the child is an abused and/or neglected child to support the filing of an abuse and neglect petition." That neglect or abuse can be imputed to the other parent.</li> </ul>	Affirmed neglect	Cocaine, opiates, codeine, Hydrocodone, Oxycodone	<ul style="list-style-type: none"> <li>• None</li> </ul>

## **Appendix B: Additional Case Summaries**

In California, there are five cases where a court found a father had neglected or failed to protect his child because, according to the court, the father failed to control a pregnant person. An appellate court affirmed findings that a father had neglected and failed to protect a child in two cases where a court held that the father should have known about the prospective mother's drug use during pregnancy or after birth. In one case, although the father stated he never saw the mother using drugs, the trial court told him "you better than anybody else should have been watching this lady," even if she was adept at hiding it.<sup>1</sup> In a second case, the court affirmed a finding that the father failed to protect his child, simply because he didn't realize the mother was using drugs, and that he needed to "gain insight regarding the severity" of the mother's drug use before he could be trusted to parent.<sup>2</sup>

In another two California cases, fathers were deemed neglectful for simply supporting their pregnant partner as she followed medical advice. In one instance, the father stated he had assisted in administering prescribed painkillers to the mother because he believed it had been condoned by doctors as a means of weaning off other prescriptions, but the court held he had enabled the mother's behavior without sufficient concern for the child.<sup>3</sup> In another case, a father told the Department of Children and Families worker that "he '100% support[ed] the mother's use of heroin during pregnancy,' as he believed it helped prevent Mother from getting sick and losing the baby."<sup>4</sup> In fact, the mother enrolled in a methadone treatment program once she found out she was pregnant but still got sick from withdrawal symptoms.<sup>5</sup> The father said doctors had told her to use any means to avoid sickness to protect the baby, and he took that to mean she should use heroin to avoid sickness.<sup>6</sup> Opioid withdrawal has been recognized as creating significant risk of pregnancy loss.<sup>7</sup> While treatment programs and prescribed methadone

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<sup>1</sup> *In re Bryana G.*, No. B252489, 2014 BL 152746, at \*3 (Cal. App. 2d Dist. June 4, 2014).

<sup>2</sup> *In re B.H.*, No. B285600, 2018 BL 171776, at \*2 (Cal. App. 2d Dist. May 15, 2018).

<sup>3</sup> *In re Z.C.*, No. D068123, 2016 BL 18774, at \*3 (Cal. App. 4<sup>th</sup> Dist. Jan. 25, 2016).

<sup>4</sup> *In re C.B.*, No. D069774, 2016 BL 211629, at \*6 (Cal. App. 4<sup>th</sup> Dist. June 30, 2016).

<sup>5</sup> This is a common phenomenon with providers who don't know how to care for pregnant people. Pregnant people often need higher doses due to increased bloodflow, so the same pre-pregnancy dose might lead to withdrawal symptoms and a pregnant person seeking opioids elsewhere and being found in violation of the program or even kicked out. See Substance Abuse & Mental Health Servs. Admin. ("SAMHSA"), U.S. Dep't Health & Human Servs., *Clinical Guidance for Treating Pregnant and Parenting Women with Opioid Use Disorder and Their Infants*, HHS Publication No. (SMA) 18-5054 (2018) at 28, <https://store.samhsa.gov/sites/default/files/d7/priv/sma18-5054.pdf>.

<sup>6</sup> *In re C.B.*, 2016 WL 3644826, at 1.

<sup>7</sup> *In re C.B.*, 2006 BL 211629, at 1.

<sup>7</sup> National Institutes of Health, National Institute on Drug Abuse, *Treating Opioid Use Disorder During Pregnancy* (Jul. 2017), <https://nida.nih.gov/publications/treating-opioid-use-disorder-during-pregnancy>;

or buprenorphine are the preferred treatment protocol, the father was not wrong that doctors' treatment goals typically include managing withdrawal, reducing cravings, and not ending use.<sup>8</sup> An abrupt end or withdrawal often leads to illicit opioid use, which increases risk of overdose.<sup>9</sup> The court failed to consider the complex medical landscape, the father's attempt to do what was best for the pregnant person and fetus, or any scientific evidence on the subject, and held that Leonard neglected his child.

Lastly, a father's rights were terminated in a California case despite the fact he was separated from the mother at the time of her pregnancy and she had told him she was not using drugs.<sup>10</sup> He asked the Department of Children and Families worker "how am I supposed to protect the child when it was in the mother's womb and we weren't even together at the time[?]"<sup>11</sup>

In Florida, a father's rights were terminated where the father "failed to protect" the child from his mother's drug use during pregnancy.<sup>12</sup> In Georgia, a father's rights were terminated in part because he "failed to take any steps to insure the safety of the child during pregnancy...in spite of his knowledge that the mother used drugs and had an addiction problem."<sup>13</sup> In Idaho, a father's rights were terminated after his daughter was placed with an adoption agency immediately at birth, with the mother's consent, based in part on an allegation that he encouraged the mother to take drugs during pregnancy.<sup>14</sup> "Without having the opportunity to parent Baby Doe, he argues that a court cannot conclude that he has already neglected his daughter and the mere possibility of future neglect is not a sufficient ground to terminate his parental rights."<sup>15</sup> But the court found it was, based on clearly biased information from the adoption agency, which had an adverse interest to have an adoptable baby.

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Substance Abuse & Mental Health Serv. Admin., U.S. Dept. Health & Human Serv., Treatment Improvement Protocol Series No. 2, Pregnant, Substance-Using Women 19 (2002) ("Medical withdrawal of the opioid-dependent woman is not recommended in pregnancy because of the increased risk to the fetus of intrauterine death. Methadone maintenance is the treatment of choice.").

<sup>8</sup> Terminating use without medical advice or supervision can be dangerous to both mother and fetus. Am. Coll. of Obstetricians and Gynecologists, Comm. on Health Care for Underserved Women, *Nonmedical Use of Prescription Drugs*, Committee Opinion No. 538 (Oct. 2012), [https://www.acog.org/Resources\\_And\\_Publications/Committee\\_Opinions/Committee\\_on\\_Health\\_Care\\_for\\_Underserved\\_Women/Nonmedical\\_Use\\_of\\_Prescription\\_Drugs](https://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Health_Care_for_Underserved_Women/Nonmedical_Use_of_Prescription_Drugs); SAMHSA Clinical Guidance, *supra* note 62, at 25, ("pharmacotherapy is strongly recommended... treatment without any pharmacotherapy is complicated by poor fetal health, high rates of return to substance use, and the consequences such as risk of overdose").

<sup>9</sup> American College of Obstetricians and Gynecologists, Opioid Use in Pregnancy, Neonatal Abstinence Syndrome, and Childhood Outcomes, 130 *Obstetrics & Gynecology* 10, 12, 15 (2017).

<sup>10</sup> *In re J.C.*, 182 Cal. Rptr. 3d 215, 218 (Cal. Ct. App. 2015).

<sup>11</sup> *Id.*

<sup>12</sup> *C.H. v. Dep't of Children & Families*, 744 So. 2d 1212 (Fla. 3d DCA 1999).

<sup>13</sup> *In re J.M.*, 289 Ga. App. 439, 443, 657 S.E.2d 337, 340 (Ct. App. 2008).

<sup>14</sup> *CASI Found., Inc. v. Doe*, 142 Idaho 397 (2006).

<sup>15</sup> *Id.* at 400.

In an example of the excessive and unrealistic requirements of the family court causing family separation, in Indiana, a father's rights to two children were terminated based on the younger child's positive toxicology at birth, the father's likely awareness of the mother's drug use during her pregnancy, and his "failure" to complete a lengthy list of required "services" after the case was initiated, including "maintaining suitable housing and employment."<sup>16</sup> If a person is impoverished and has been unable to obtain stable housing and employment before dealing with a court case, it is unreasonable to think they will solve all of those problems in addition to managing the stress and time of a court case, which typically interferes with maintaining regular work.<sup>17</sup>

In Louisiana, a court permitted an adoption over a father's objection despite his attempts to support the mother with prenatal care and drug treatment during her pregnancy, finding that his own drug problem was too severe.<sup>18</sup> Similarly, in Vermont, the state Supreme Court affirmed a neglect finding based in part on the fact that the father did not stop the mother's drug use during pregnancy, or force her to obtain prenatal care;<sup>19</sup> it focused on an allegation that the father facilitated the mother giving birth in New York in order to avoid disclosing her drug use, none of which were proper considerations.

In New Jersey, there are three cases where a father was found to have neglected his child, in some instances resulting in the termination of his rights, for failing to prevent a mother's drug use during pregnancy. In one instance, an appellate court affirmed the termination of a father's rights, finding he had "harmed the child because he did not take any steps to protect the child from [the mother's] drug use," and instead "turned a blind eye to...the harm it was having on the unborn child."<sup>20</sup> In another case, a father's rights were terminated for not ensuring his son was born drug-free; he was deemed to "share[] in the responsibility and blame for the harm."<sup>21</sup> The court acknowledged that while each parent is assessed individually, "the conduct of one parent can be relevant to an evaluation of the parental fitness of another parent."<sup>22</sup> Similarly, in a third case in New Jersey, the court stated a "parent has the obligation to protect a child from harms that can be inflicted by another parent" and held the father neglectful based on the mother's drug use while pregnant.<sup>23</sup> The court additionally ignored the father's argument that the

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<sup>16</sup> *C.K. v. Ind. Dep't of Child Servs.*, 42 N.E.3d 172, \*5 (Ind. Ct. App. 2015).

<sup>17</sup> See *supra* Part I.B.

<sup>18</sup> *In re Baby A.*, 241 So. 3d 1182, 1187 (La. App. 1st Cir. 2018).

<sup>19</sup> *In re I.B.*, 195 Vt. 662 (2014).

<sup>20</sup> *N.J. Div. of Youth and Fam. Servs. v. G.A.*, No. A-2498-06T4, 2007 BL 288733, at \*6 (N.J. Super. Ct. App. Div. Oct. 18, 2007).

<sup>21</sup> *N.J. Div. of Youth and Fam. Servs. v. K.S.*, No. A-3971-08T4, 2009 BL 327434, at \*6 (N.J. Super. Ct. App. Div. Dec. 15, 2009).

<sup>22</sup> *Id.* at \*5.

<sup>23</sup> *N.J. Div. of Youth and Fam. Servs. v. R.D.*, No. A-1569-12T3, 2014 BL 165424, at \*3 (N.J. Super. Ct. App. Div. June 16, 2014).

relevant definition of child abuse is not intended to apply to a fetus.<sup>24</sup>

In Oregon, an appellate court reversed the dismissal of a termination proceeding and terminated both parents' rights based on the mother's drug use during pregnancy and the father's "inability to recognize when mother was using, his failure to absorb information about the effects of drug use, and his poor judgment in continuing a relationship with mother after several children had been born drug affected."<sup>25</sup> The court promoted the inaccurate information that "methamphetamine-exposed children often suffer long-term learning-related effects and require higher than normal parental supervision and teaching," and found that "it is likely that he will exhibit additional symptoms [consistent with methamphetamine exposure] as he develops, and it does not appear that father has the capacity to parent a child with special needs."<sup>26</sup> There is no credible evidence that methamphetamine exposure in utero causes long term effects or intellectual disabilities.<sup>27</sup> This misinformation drives unnecessary family separation.

In Tennessee, there are three cases where a father's rights were terminated or he was found to have neglected his child based on the mother's drug use. In one case, a court affirmed the termination of a father's rights to his two children after his pregnant partner gave birth to a third child who died a day later of pulmonary hypertension, allegedly due to prenatal drug exposure.<sup>28</sup> The father was not only accused of failing to protect his newborn child, but this pregnancy loss was used to terminate his rights to his two older children.<sup>29</sup> The initial "failure" to control the mother's drug use led to an investigation and other charges, and ultimately to family separation.<sup>30</sup> Although a laundry list of charges were alleged in terminating the father's rights, the court deemed his failure to prevent the mother's drug use during pregnancy as sufficient justification for the termination.<sup>31</sup>

In another case, prospective parents planned to stop using morphine, but were told by a doctor at a Suboxone clinic that doing so would cause the fetus more harm than good, so the prospective father continued to support his partner's use of morphine to

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<sup>24</sup> *Id.* at \*2.

<sup>25</sup> *State ex rel. Dept. of Human Servs. v. J.S.*, 219 Or. App. 231, 265 (2008).

<sup>26</sup> *Id.* at 266.

<sup>27</sup> See, e.g., Robert M. Silver et al., *Workup of Stillbirth: A Review of the Evidence*, 196 Am. J. Obstetrics Gynecology 433, 438 (2007) ("despite widespread reports linking methamphetamine use during pregnancy with preterm birth and growth restriction, evidence confirming its association with an increased risk of stillbirth remains lacking"); ACOG, *Information About Methamphetamine Use in Pregnancy* (Mar. 3, 2006) (there "is no syndrome or disorder that can specifically be identified for babies who were exposed in utero to methamphetamine"), <http://www.rhrealitycheck.org/emailphotos/ACOGmethhtalkingpoints.pdf>.

<sup>28</sup> *In re Garvin M.*, No. E2013-02080-COA-R3-PT, 2014 BL 131036, at \*1 (Tenn. Ct. App. May 09, 2014).

<sup>29</sup> *Id.* at \*4.

<sup>30</sup> *Id.* at \*13-14.

<sup>31</sup> *Id.* at \*6-12.

prevent withdrawal.<sup>32</sup> He stated that “[w]e didn’t just find out she was pregnant and say, oh, well, we’d like to get the baby strung out too” and that he supported the mother in cutting back significantly, doing everything but quitting.<sup>33</sup> They would have continued to seek medical attention at the clinic as well, but it was not covered by Medicaid and they could not afford it otherwise.<sup>34</sup> The court terminated his rights, and additionally promoted the inaccurate narrative that there is “a great chance that if this child starts using drugs in the future that she could become addicted quite easily.”<sup>35</sup>

Lastly, in a third case, a father was found to be neglectful of his twin children based on allegations that he failed to protect them from the mother’s drug use while pregnant even though he knew that “such conduct was likely to cause serious bodily injury” to the children.<sup>36</sup> The trial court found that the father failed to stop the mother’s drug use during pregnancy and in fact facilitated the mother’s drug use and put her in danger while pregnant.<sup>37</sup> The father’s appeal was limited to challenging the mother’s testimony that the father had supplied her with drugs and used them with her, so the trial court’s initial decision remained, that the father had neglected his children by failing to prevent the mother’s drug use during pregnancy.<sup>38</sup>

In West Virginia, the state Supreme Court of Appeals created new law in response to a certified question, and found that “when a child is born alive, the presence of illegal drugs in the child’s system at birth constitutes evidence that the child is an abused and/or neglected child [under the statute]..., to support the filing of an abuse and neglect petition...”<sup>39</sup> It based this decision on a failure to differentiate action against a child and action during pregnancy, when a fetus is inseparable from the pregnant person,<sup>40</sup> and on statutory interpretation and misinformation about drugs, finding that a pregnant person who uses drugs during the pregnancy is “[a] parent... who knowingly... inflicts . . . physical injury . . . upon the child.”<sup>41</sup> Similarly, the court found that a father not stopping a mother from taking drugs herself, was equivalent to a “parent... who... knowingly allows another person to inflict... physical injury or mental or emotional injury... upon the child.”<sup>42</sup> On that basis, the court found that the abuse and neglect petition was proper against both

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<sup>32</sup> *In re Alexis C.*, No. E2013-02498-COA-R3-PT, 2014 BL 181872, at \*4 (Tenn. Ct. App. June 25, 2014).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at \*7.

<sup>35</sup> *Id.* at \*13.; Kylee Sunderlin & Laura Huss, *The Mythology of “Addicted Babies”: Challenging Media Distortions, Laws, and Policies that Fracture Communities*, 86 *DifferenTakes* 1, 2 (2014) (“there is no scientific evidence that prenatal exposure to opioids results in any kind of lasting harm”).

<sup>36</sup> *In re C.T.*, No. E2017-02148-COA-R3-JV, 2018 BL 349093, at \*2 (Tenn. Ct. App. Sept. 26, 2018).

<sup>37</sup> *Id.* at \*2.

<sup>38</sup> *Id.* at \*4.

<sup>39</sup> *In re A.L.C.M.*, 239 W. Va. 382, 384 (2017).

<sup>40</sup> *See infra* III.A.

<sup>41</sup> *Id.* at 391.

<sup>42</sup> *Id.* at 392.



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parents, for a positive toxicology at birth and the father not stopping the mother's use.<sup>43</sup>

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<sup>43</sup> *Id.*