Year 2000 Overview

Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs

Lynn M. Paltrow
David S. Cohen
Corinne A. Carey

WOMEN'S LAW PROJECT
125 SOUTH 9TH STREET, SUITE 300
PHILADELPHIA, PA 19107
215.928.9801 FAX: 215.928.9848
E:Mail: overview@womenslawproject.org

NATIONAL ADVOCATES FOR PREGNANT WOMEN
45 WEST 10TH STREET, # 3F
NEW YORK, NY 10011
212.475.4218 FAX: 212.254.9679
E-MAIL: napw1@aol.com

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Women's Law Project
125 South 9th Street, Suite 300
Philadelphia, PA 19107
(215)928-9801

Carol E. Tracy
Executive Director

National Advocates for Pregnant Women
45 West 10th Street, #3F
New York, NY 10011
(212)475-4218

Lynn M. Paltrow
Executive Director

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Organizations:

The **Women's Law Projec**t is a nonprofit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, the **Law Project** works to advance the legal, economic, and health status of women and their families through litigation, public policy development, and education. The **Law Projec**t has served as counsel in a number of cases involving the punishment of pregnant women and new mothers who have given birth while suffering from untreated addictions to alcohol or other drugs. Through numerous initiatives, the **Law Project** also works to improve and expand treatment services for pregnant and parenting women and their children who are affected by drug and alcohol use.

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

Authors:

Lynn M. Paltrow is Executive Director of the NAPW.

David S. Cohen is a Lindesmith Harm Reduction Fellow working as a staff attorney at the Women's Law Project.

Corinne A. Carey is a Soros Justice Fellow working as an attorney with the Legal Harm Reduction Project at the Urban Justice Center in New York City.

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Dear Reader:

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

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

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

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

Sincerely,

Carol E. Tracy
Women's Law Project

Lynn M. Paltrow
National Advocates for Pregnant Women

Table of Contents

Introduction 1

Discussion 5

Conclusion 11

Federal Responses 12

State Responses 14

Endnotes 50

Map .... Appendix 1/p69

Questionnaire .... Appendix 2/p70

I. INTRODUCTION

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

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

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

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

During the late 1980s and 1990s, legislatures rejected the most punitive approaches. For example, in 1990, thirty-four states debated bills relating to prenatal exposure to drugs.[11] Of those, fourteen states passed bills designed to help pregnant women through preventive and educational programs, six states established studies to determine the extent of the problem, and eight states considered but failed to pass legislation that would make it a crime to be addicted and be pregnant.[12]

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

While bills proposing criminal penalties have failed, eighteen states have amended their civil child welfare laws to address the subject of a woman's drug use during pregnancy.[20] These laws vary considerably: in some states a pregnant woman's drug use is supposed to trigger only an evaluation of parenting ability and the provision of services, whereas in others it provides the basis for presuming neglect or qualifies as a factor to be considered in terminating parental rights.

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

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

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

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

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

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

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

In some states that have not amended their laws, government officials have, by regulation or practice, extended existing civil child abuse laws to pregnant women despite the lack of legislative intent or specific authority to do so.[36] For example, for a period of time in the 1980s, New York City, as a matter of policy, began reporting and treating as abused all newborns that tested positive for illegal drugs.[37] The costly policy was eventually stopped when it became apparent that it was not consistent with existing state legislation and was instead filling hospital nurseries with healthy infants and overwhelming an already overburdened child protective system with unnecessary referrals.[38] Similarly, from March 1997 to August 1998, child welfare administrators in Sacramento, California, responding to a series of newspaper articles, drastically changed their child welfare policy and removed more than 7,000 children from their families based on evidence of past parental drug use. Many of those families affected included women who had used drugs while pregnant.[39]

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

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

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

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

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

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

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

An Amnesty International report found that "[m]any women enter jail and prison pregnant. In 1997-98, more than 2,200 pregnant women were imprisoned and more than 1,300 babies were born in prisons."

Beyond state law, there are numerous federal statutes that directly and indirectly address the issue of drug-using pregnant women. Most federal statutes addressing the issue directly do so by providing grant money for organizations that assist drug-using pregnant women in some way.[63] Congress has also focused on fetal alcohol syndrome by creating programs whereby the Secretary of the Interior addresses fetal alcohol syndrome through the Bureau of Indian Affairs[64] and by creating the National Task Force on Fetal Alcohol Syndrome and Fetal Alcohol Effect.[65]

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

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

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

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

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

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

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

To a large extent, as discussed above, legislative action has occurred in response to the extensive media attention given to the issue of pregnant drug using women. Because it touches on such highly controversial matters as drugs and the politics of abortion,[79] this issue will likely remain a subject of ongoing legislative proposals and battles.[80] The entire catalog of statutes and regulations directly addressing this issue is included in this Overview. Below is a more detailed discussion of the trends in recent criminal and child dependency laws.

II. DISCUSSION

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

A. Civil Child Neglect and Dependency Laws

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

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

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

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

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

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

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

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

Many legislators nevertheless view drug use and addiction as a moral failing for which there should be "zero tolerance." The zero tolerance approach, however, is in sharp contrast to the public health approach also known as "harm reduction."[91] This approach recognizes that "overcoming drug addiction is usually a difficult and gradual process."[92] It favors "providing drug abusers with information and assistance that can help them reduce drug consumption and minimize the risks associated with their continuing drug use."[93] Harm reduction emphasizes "drug treatment over imprisonment and favor[s] broadening drug treatment to include non-abstinence-based models."[94]

Understanding the nature of addiction and the reasons why pregnant women become addicted provides a good foundation for developing policies that will in fact improve the health and lives of women and children. Fortunately, an increasing amount of information is now available about the particular problems faced by pregnant and parenting women who suffer from drug and alcohol addiction and how those problems impact attempts to recover from addiction. For example, research has found that many drug-using women were sexually abused as children or are currently being abused.[95] Thus, many experts believe that it is likely that women who are abused "self medicate" with alcohol, illicit drugs, and prescription medication to alleviate the pain and anxiety of living under the constant threat of violence.[96] Treatment that does not address these underlying traumas often fails.[97] Similarly, pregnant women often have family responsibilities that make it difficult for them to go to programs that were designed for men and that do not provide childcare and other supportive services.[98] The federal government's Center for Substance Abuse Treatment provides well-developed guidelines and protocols for effectively treating pregnant and parenting drug-using women.[99]

As the California Medical Association found:

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

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

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

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

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

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

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

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

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

In fact, Susan C. Boyd, in her recent book *Mothers and Illicit Drugs: Transcending the Myths*, found no significant difference in childrearing practices between addicted and non-addicted mothers.[113] A 1994 study focusing solely on cocaine-using mothers came to the same conclusion: mothers who use cocaine have been found to look after and care adequately for their children.[114] A book produced by the Foster Care Project of the American Bar Association observes that "many people in our society suffer from drug or alcohol dependence yet remain fit to care for a child. An alcohol or drug dependent parent becomes unfit only if the dependency results in mistreatment of the child, or in a failure to provide the ordinary care required for all children."[115] The National Council of Juvenile and Family Court Judges agrees: "Juvenile and family court proceedings are not necessary, and probably not desirable, in most situations involving substance-exposed infants."[116]

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

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

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

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

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

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

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

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

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

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

B. Criminal Prosecutions

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

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

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

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

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

On October 27, 1997, the South Carolina Supreme Court radically deviated from its sister state courts and decided *Whitner v. State of South Carolina*.[142] In *Whitner*, the state supreme court declared that viable fetuses are "person[s]" under the state's criminal child endangerment statute.[143] As a result of that conclusion, the court reversed an appellate court's granting of post-conviction relief for a pregnant woman who had used cocaine during her pregnancy.[144] In so ruling, the court took an unprecedented legal leap. Although *Whitner* involved a woman who had used cocaine while pregnant, the majority specifically found that applying the state's child endangerment statute to other conduct by pregnant women—such as smoking cigarettes and drinking alcohol—would also be consistent with the application of that statute to the facts of *Whitner*.[145] And, in fact since the decision, prosecutors in South Carolina have arrested on child abuse charges a woman who used alcohol while pregnant,[146] a woman who suffered a stillbirth possibly unrelated to any drug use,[147] and the parents of a 13-year-old who suffered a miscarriage.[148]

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

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

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

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

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

C. Recent Events and Legislative Action

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

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

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

The Wisconsin statute defines an "unborn child" as a "human being from the time of fertilization to the time of birth."[171] The law permits the state to take jurisdiction over pregnant women in a variety of circumstances.[172] For example, a law enforcement officer can take a pregnant woman into custody if he or she believes that the woman's use of alcohol is posing a "substantial risk to the physical health of the unborn child."[173] Thus, a zealous police officer who observes a pregnant woman drinking cocktails at a bar may take the woman into immediate custody if the officer believes that the woman's drinking poses a severe risk to her fetus.[174]

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

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

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

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

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

III. CONCLUSION

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

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

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

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

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

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

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

UNITED STATES

Criminal Statutes

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

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

Education and Awareness

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

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

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

Education and Awareness—Oversight Committees, Task Forces, Research

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

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

Funding

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

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

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

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

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

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

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

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

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

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

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

Legislative Mandates, Findings, Declarations

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

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

Services to Children

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

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

ALABAMA

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

ALASKA

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

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

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

ARIZONA

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

Identification, Testing, Reporting
Along with a general duty to report child abuse,

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

ARIZ. REV. STAT. ANN. § 13-3620(B).

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

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

ARKANSAS

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

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

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

ARK. CODE ANN. § 20-85-101.

CALIFORNIA

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

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

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

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

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

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

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

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

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

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

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

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

CAL. HEALTH & SAFETY CODE § 124195.

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

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

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

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

Identification, Testing, Reporting—Civil Child Abuse Statutes

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

Legislative Mandates, Findings, Declarations

California's Legislature passed a resolution in 1991 which declared

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

CAL. WELF. & INST. CODE § 14148.9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COLORADO

Identification, Testing, Reporting

Colorado law directs that:

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

COLO. REV. STAT. § 26-4-508.2(1).

Legislative Mandates, Findings, Declarations

The Colorado Legislature passed a declaration in 1991which stated:

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

COLO. REV. STAT. § 25-1-212.

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

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

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

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

COLO. REV. STAT. § 25-1-213.

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

CONNECTICUT

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

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

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

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

DELAWARE

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

DISTRICT OF COLUMBIA

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

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

FLORIDA

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

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

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

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

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

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

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

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

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

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

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

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

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

GEORGIA

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

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

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

HAWAII

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

IDAHO

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

ILLINOIS

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

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

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

> (f) proof that a parent, custodian or guardian of a minor repeatedly used a drug, to the extent that it has or would ordinarily have the effect of producing in the user a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality . . .
> (g) proof that a parent, custodian, or guardian of a minor repeatedly used a controlled substance . . . in the presence of the minor or a sibling of the minor is prima facie evidence of neglect. . . .
> (h) proof that a newborn infant's blood, urine, or meconium contains any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act [720 ILL. COMP. STAT. ANN. 570/102, amended by 1998 Ill. Legis. Serv. 90-742.], or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of those substances, the presence of which is the result of medical treatment administered to the mother or the newborn, is prime facie evidence of neglect.

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

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

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

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

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

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

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

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

Identification, Testing, Reporting
Individuals required to report child abuse are required to refer to treatment

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

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

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

Oversight Committees, Task Forces, Research
Among the responsibilities of a state committee on substance abuse and pregnancy are: to provide guidance on the development and enhancement of "intervention, prevention and treatment objectives and standards, educational and

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

Third Party Liability

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

Treatment Improvement/Priority Treatment for Pregnant Women

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

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

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

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

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

INDIANA

Civil Child Abuse Statutes

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

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

IND. CODE. ANN. § 31-34-1-11.

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

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

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

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

Third Party Liability

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

IOWA

Education and Awareness

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

Identification, Testing, Reporting

Health practitioners are required to perform a "medically relevant test" when s/he

> discovers in a child physical or behavioral symptoms of the effects of exposure to cocaine, heroin, amphetamine, methamphetamine, or other illegal drugs, or combinations or derivatives thereof, which were not prescribed by a health practitioner, or if the health practitioner has determined through examination of the natural mother of the child that the child was exposed in utero.

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

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

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

Oversight Committees, Task Forces, Research

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

Prohibitions on Punitive Sanctions/Guarantees of Confidentiality or Nondiscrimination

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

KANSAS

Education and Awareness

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

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

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

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

Treatment Improvement/Priority Treatment for Pregnant Women

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

KENTUCKY

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

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

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

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

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

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

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

KY. REV. STAT. ANN. § 214.175.

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

Public Assistance

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

Treatment Improvement/Priority Treatment for Pregnant Women

The state’s Cabinet for Human Resources was authorized to establish four or more pilot projects within the state to

> demonstrate the effectiveness of different methods of providing community services to prevent alcohol and substance abuse by pregnant females; improving agency coordination to better identify the pregnant substance abuser and other females who have substance abuse problems; linking with community services and treatment for the chemically dependent woman, her children, and other family members; and gaining access to early intervention services for infants in need.

KY. REV. STAT. ANN. § 222.037.

LOUISIANA

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

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

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

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

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

MAINE

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

MARYLAND

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

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

The Department of Child Services may

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

MD. CODE ANN., FAM. LAW § 5-710(b).

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

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

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

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

MASSACHUSSETTS

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

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

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

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

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

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

MICHIGAN

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

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

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

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

MINNESOTA

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

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

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

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

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

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

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

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

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

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

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

MISSISSIPPI

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

MISSOURI

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

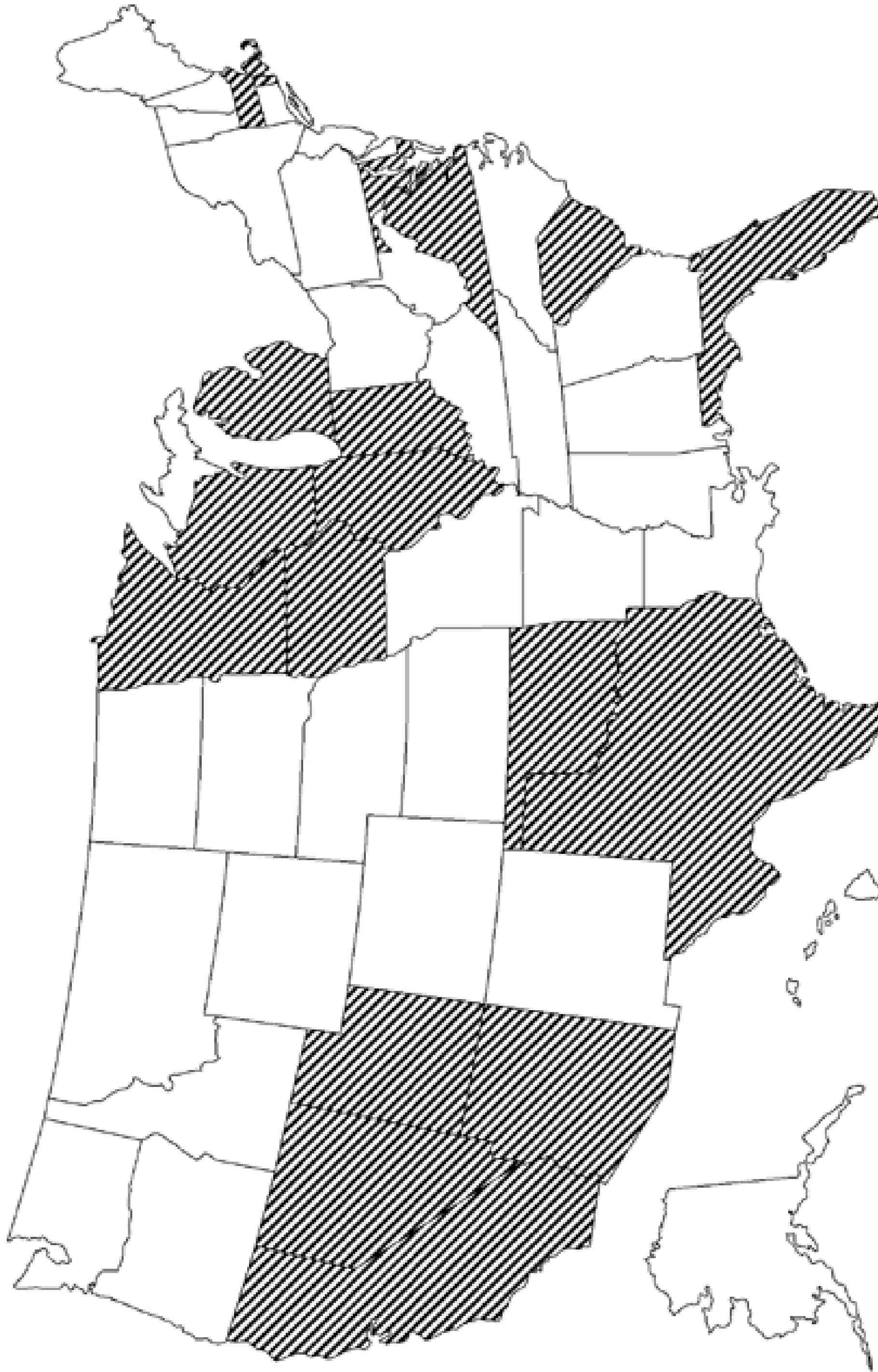
Physicians providing obstetrical or gynecological services are required to counsel all pregnant patients about the effects of cigarette smoking, and the use of alcohol and controlled substances on perinatal development. MO. ANN. STAT. § 191.725.

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

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

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

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



Eighteen states address the issue of a pregnant woman's use of drugs in their civil child welfare statutes. These states are: Arizona, California, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, and Wisconsin.

APPENDIX 1

Questionnaire

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

Your name: ______________________________

Address: ______________________________

____

Phone: ____________________ Fax: ____________________

Organization: ______________________________

Title: ______________________________

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

____

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

____

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

____

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

____

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

____

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

____

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

____

Please send responses to:
Overview
Women's Law Project/NAPW
125 South 9th Street Suite 300
Philadelphia, PA 19107
overview@womenslawproject.org