

# Prioritizing Oklahoma Mothers: Recommending Rehabilitation and Recovery Rather than Punishment for Pregnancy

## I. Introduction

A few months into her pregnancy, Amanda Beth Aguilar began struggling to provide nutrition for her growing fetus, battling intense nausea that made it difficult for her to eat.<sup>1</sup> Previously approved for a medical marijuana license by the Oklahoma Medical Marijuana Authority (“OMMA”), Amanda used medical marijuana to soothe her symptoms and increase her appetite.<sup>2</sup> Perhaps out of concern for her own health, or maybe to avoid criminal prosecution, she weaned herself off the medication during the third month of the pregnancy.<sup>3</sup> Despite taking this precaution, after Amanda’s son was born, hospital employees found traces of marijuana in his stool.<sup>4</sup> Amanda was promptly arrested and charged with felony child neglect by the Kay County District Attorney, Brian Hermanson.<sup>5</sup> Unfortunately, neither Amanda’s battle with extreme morning sickness<sup>6</sup> nor her fight with the Oklahoma criminal justice system is uncommon.

Criminal liability for prenatal substance exposure is not a novel concept in the United States. States with medical marijuana licensing laws similar to Oklahoma’s regulations, however, have rejected application of child neglect statutes to licensed medical marijuana patients.<sup>7</sup> Nearby southern states, such as Alabama, possess similar laws but still struggle to reach a consensus regarding prescription drug use, with prosecutors first bringing

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1. Brianna Bailey, *Oklahoma Is Prosecuting Pregnant Women for Using Medical Marijuana*, FRONTIER (Sept. 13, 2022), <https://www.readfrontier.org/stories/oklahoma-is-prosecuting-pregnant-women-for-using-medical-marijuana/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Among American mothers, “hyperemesis gravidarum is the most common cause of hospitalization during the first half of pregnancy . . . .” Viktoriya London et al., *Hyperemesis Gravidarum: A Review of Recent Literature*, PHARMACOLOGY, June 23, 2017, at 161, 165, <https://karger.com/pha/article-pdf/100/3-4/161/3406980/000477853.pdf>.

7. *Ridgell v. Ariz. Dep’t of Child Safety*, 508 P.3d 1143, 1144 (Ariz. Ct. App. 2022). The court held that Ridgell’s use of marijuana under the Arizona Medical Marijuana Act must be, in the words of the Act, “considered the equivalent of the use of any other medication under the direction of a physician.” *Id.* (quoting ARIZ. REV. STAT. ANN. § 36-2813(C) (2010)). Therefore, prenatal exposure of her infant to marijuana “did not constitute neglect under [section] 8-201(25)(c).” *Id.*

charges against pregnant women<sup>8</sup> for consuming prescription opioids,<sup>9</sup> only to later dismiss those charges after being rebuked by legislators.<sup>10</sup> Prosecutors there have increasingly adopted extreme measures to prevent prenatal marijuana exposure, like requiring county officials to hold pregnant women for extended periods, sometimes as long as three months—without trial, “to protect their pregnancies.”<sup>11</sup> Despite each state’s attempt to combat the problem, prenatal substance exposure has been on the rise across the nation, especially exposure to marijuana and opiates.<sup>12</sup> From 2002 to 2017, self-reported marijuana use among pregnant women more than doubled, with over 5% of pregnant women using marijuana during the first trimester, and 2.5% using marijuana during the second and third trimesters.<sup>13</sup> These statistics likely underestimate the reality of the situation, as pregnant women generally underreport drug use, due to both social stigma and the fear of possible criminal penalties.<sup>14</sup>

This trend of prenatal marijuana exposure will likely continue, and if states keep relying upon punitive deterrence measures—which ultimately discourage pregnant women from seeking comprehensive prenatal care—

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8. This article utilizes the terms “pregnant women” and “pregnant woman” throughout, reflecting the language used by much of the literature relied upon. However, the author recognizes that those terms fail to capture the range of individuals that can become pregnant.

9. Meryl Kornfield, *A Pregnant Woman Took a Prescribed Opioid for Her Chronic Pain. Now She’s Facing a Felony Charge*, WASH. POST (June 24, 2021, 7:00 AM), <https://www.washingtonpost.com/nation/2021/06/24/pregnant-woman-charged-prescription/>.

10. Cecilia Nowell, *Kim Blalock Took Lawfully Prescribed Pain Killers During Pregnancy—And Was Charged with a Felony*, ELLE (Apr. 6, 2022), <https://www.elle.com/culture/a39541235/kim-blalock-took-lawfully-prescribed-pain-killers-during-pregnancyand-was-charged-with-a-felony/> (describing a case in Alabama where the district attorney filed criminal fraud charges after a woman failed to disclose she was pregnant when refilling her opioid prescription).

11. Moira Donegan, *Alabama Is Jailing Pregnant Marijuana Users to ‘Protect’ Fetuses*, GUARDIAN (Sept. 12, 2022, 6:16), <https://www.theguardian.com/commentisfree/2022/sep/12/alabama-jailing-pregnant-marijuana-users-protect-fetuses> (detailing the story in which Ashley Banks was held without being charged for three months after police pulled her over and found her in possession of marijuana and a firearm while pregnant).

12. Ashley H. Hirai et al., *Neonatal Abstinence Syndrome and Maternal Opioid-Related Diagnoses in the US, 2010-2017*, 325 JAMA 146, 146 (2021) (finding that neonatal abstinence disorder—newborn opioid withdrawal—has almost doubled, and maternal opioid use disorder has more than doubled during the seven-year range).

13. Nora D. Volkow et al., *Self-Reported Medical and Nonmedical Cannabis Use Among Pregnant Women in the United States*, 322 JAMA 167, 168 (2019).

14. See Kelly C. Young-Wolff et al., *Trends in Self-Reported and Biochemically Tested Marijuana Use Among Pregnant Females in California from 2009–2016*, 318 JAMA 2490, 2490 (2017).

outcomes will likely worsen for Oklahoman children and women.<sup>15</sup> While some research suggests that prenatal marijuana exposure results in negative health outcomes for children, such as an increased rate of preterm birth,<sup>16</sup> more research should be conducted before state actors draw conclusions and levy excessive criminal penalties against struggling Oklahoma mothers.

To better serve those dealing with substance use disorder (“SUD”), as well as their children, Oklahoma must expand its social services, drug treatment, and rehabilitation programs.<sup>17</sup> Furthermore, the Oklahoma legislature ought to provide protection from criminal prosecution to pregnant women struggling with SUD to ensure they continue to seek prenatal, pregnancy, and postpartum care that is vital to the development of a healthy child.<sup>18</sup> Finally, given the political ambitions of some prosecutors,<sup>19</sup> charging decisions must be closely scrutinized to ensure continued commitment to the American Bar Association’s aspirational goal regarding prosecutorial discretion: “to do justice.”<sup>20</sup> Otherwise, by incarcerating women at twice the national average and placing children in foster care at an ever-increasing cost to the taxpayer, Oklahoma will further compound the consequences of the War on Drugs.<sup>21</sup>

This Comment endeavors to address prenatal marijuana exposure among Oklahomans by prioritizing rehabilitative care for pregnant women suffering from SUD while simultaneously promoting the best outcomes for children. Part II begins by contextualizing the issue through a broad

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15. Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 HEALTH & JUST., article no. 3:2, 2015, at 1, 13, <https://healthandjusticejournal.biomedcentral.com/counter/pdf/10.1186/s40352-015-0015-5.pdf>.

16. Daniel J. Corsi et al., *Association Between Self-Reported Prenatal Cannabis Use and Maternal, Perinatal, and Neonatal Outcomes*, 322 JAMA 145, 145 (2019).

17. See Emma Morris, *Enacting Recommended Expansion of Pregnancy, Postpartum Care Will Represent a Step Forward for Oklahoma Families*, OKLA. POL’Y INST. (Nov. 3, 2022), <https://okpolicy.org/enacting-recommended-expansion-of-pregnancy-postpartum-care-will-represent-a-step-forward-for-oklahoma-families/>.

18. See *infra* Part IV.

19. See Wendy Sawyer & Alex Clark, *New Data: The Rise of the “Prosecutor Politician”*, PRISON POL’Y INITIATIVE (July 13, 2017), <https://www.prisonpolicy.org/blog/2017/07/13/prosecutors/> (describing the tendencies of prosecutors to seek other political offices).

20. CRIM. JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-1.2(a)-(b) (AM. BAR ASS’N 4th ed. 2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/).

21. SUSAN F. SHARP, MEAN LIVES, MEAN LAWS: OKLAHOMA’S WOMEN PRISONERS 29-34 (2014).

overview of the historic criminalization of drugs in the United States. Following that overview, this part discusses recent research that showcases an increase in prenatal substance exposure and its related findings to prenatal marijuana exposure. Part III examines the criminalization of prenatal substance exposure across the United States and Oklahoma's treatment of mothers engaging in prenatal substance use, with a focus on Oklahoma's recent application of criminal penalties against pregnant women utilizing medical marijuana. Part IV discusses the reform measures necessary to modify Oklahoma legislation to align with data and outcomes from other states that prioritize the health and well-being of pregnant women and their offspring.

## *II. History and Science of Prenatal Substance Exposure in the United States*

### *A. U.S. History of Drug Prohibition*

To fully understand Oklahoma's recent application of child neglect statutes to prenatal medical marijuana exposure, one must first understand the history behind the criminalization of drugs in the United States. This section first discusses the prohibition of various substances in the United States and briefly mentions the xenophobic underpinnings of these prohibitions. It then emphasizes the failure of President Nixon's War on Drugs ("the War") to reduce the availability of these prohibited substances while simultaneously increasing the number of Americans behind bars. After that, this section discusses President Reagan's aggressive expansion of the War in response to bad science when crack cocaine use increased during the 1980s. Then, it presents a few nationwide statistics related to this expansive and aggressive approach to prohibited substances, paying special attention to the numbers related to pregnant women. Next, it introduces the devastating effects of the opioid epidemic that have been ravaging the United States since the late 1990s. Finally, this section describes the progressive policies of two recent presidents. After years of ineffectual policies, these presidents tried to shift focus away from enforcement, prosecution, and incarceration toward rehabilitation and support.

### 1. *The War on Drugs*

Humans, pregnant women necessarily included, have consumed various psychoactive substances for millennia.<sup>22</sup> Whether the substance was opium, alcohol, peyote, tobacco, cocaine, psilocybin, ayahuasca, coffee, or marijuana, many societies viewed these substances as medicine, with a respected or even sacred purpose.<sup>23</sup> The United States has taken a different view than much of the world, outlawing many of these substances over different periods of U.S. history, most notably banning the consumption of alcohol<sup>24</sup> and subsequently repealing that prohibition.<sup>25</sup> The first substance outlawed in America is a familiar enemy to those still waging the War on Drugs, but less are familiar with the xenophobic origin of America's prohibition on opium.<sup>26</sup> This prohibition was the first in a long line of prohibitions that, while not racially motivated on their face, had roots in racist ideals.<sup>27</sup>

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22. Nicholas R. Longrich, *When Did Humans Start Experimenting with Alcohol and Drugs?*, CONVERSATION (July 16, 2021, 11:42 AM), <https://theconversation.com/when-did-humans-start-experimenting-with-alcohol-and-drugs-161556> (suggesting that opium was used as early as 5,700 B.C., alcohol was invented in many permutations by various cultures as early as 7,000 B.C., and a multitude of psychedelics were used by indigenous Americans, including peyote buttons, San Pedro cactus, morning-glory, *Salvia*, Ayahuasca, and more than twenty other species of psychoactive mushrooms).

23. *Id.*

24. U.S. CONST. amend. XVIII, § 1 (prohibiting “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States”).

25. U.S. CONST. amend. XXI, § 1 (“The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”).

26. *See generally* Diana L. Ahmad, *Opium Smoking, Anti-Chinese Attitudes, and the American Medical Community, 1850–1890*, 1 AM. NINETEENTH CENTURY HIST., no. 2, 2000, at 53, 53-68.

27. Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/>. John Ehrlichman, Watergate co-conspirator, explained why the United States entangled itself in such an unsuccessful drug policy—the President's racist views and deplorable tactics:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

*Id.*

Since the beginning of the War on Drugs, drug use in America has continued to grow with the ever-expanding availability of drugs in various forms and potencies.<sup>28</sup> Despite sustained policy focus on law enforcement in all areas related to drugs, including child abuse,<sup>29</sup> the drug supply has counterintuitively ballooned. During this same period mass incarceration has multiplied the number of individuals imprisoned, pregnant women included.<sup>30</sup> After more than fifty years, the failures of the War on Drugs have led many to criticize its efficacy, suggesting that a better path forward would blend law enforcement, prevention, and public health strategies to reduce substance abuse.<sup>31</sup> To repair the damage done by Nixon's War, the public perception of substance users must be transformed to a view that individuals suffering from SUD have a diagnosable medical condition that demands treatment and care rather than incarceration and isolation from society.<sup>32</sup>

While Nixon initiated the War on Drugs, he is not solely responsible for the damage it has wrought. After a brief hiatus from the War, during which eleven states decriminalized marijuana possession and Jimmy Carter was elected—likely in no small part due to his views on decriminalization—Ronald Reagan became president in 1981.<sup>33</sup> Although Nixon's zeal began the War on Drugs, Reagan's efforts expanded its reach and increased the overall punitive nature of federal criminal enforcement both during his term and

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28. James Marson et al., *The Once and Future Drug War*, WALL ST. J. (Jan. 21, 2022, 5:00 PM), <https://www.wsj.com/articles/the-once-and-future-drug-war-11642780895>.

29. Nixon enacted the Child Abuse Prevention and Treatment Act ("CAPTA") in January of 1974, establishing a nationwide clearinghouse for child abuse information, and establishing funds for state police agencies to combat child abuse. *See* Child Abuse Protection and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101-5108, 5116). Critics have pointed out that CAPTA fails to provide fundamental support for low-income families, although addressing poverty is vital to decreasing instances of child abuse. Richard Wexler, *CAPTA Law Codifies Everything Wrong with How We 'Fight' Child Abuse*, YOUTHTODAY (Aug. 31, 2018), <https://youthtoday.org/2018/08/capta-law-codifies-everything-wrong-with-how-we-fight-child-abuse/>. Three years prior to CAPTA's passage, Nixon vetoed the Comprehensive Child Development Act, which provided for developmental day care and other services aimed at assisting low-income families. *Id.*

30. Marson, *supra* note 28.

31. *Id.* Accidental drug overdoses now kill more than 100,000 Americans every year, as instances have roughly doubled every decade since 1979. *Id.*

32. Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), <https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/>.

33. *War on Drugs*, HISTORY (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs>.

beyond.<sup>34</sup> Early medical studies into prenatal cocaine exposure vastly exaggerated the effects of the drug and failed to account for poverty or other environmental factors.<sup>35</sup> Newspapers were littered with headlines declaring *Studies: Future Bleak for Crack Babies*, *Crack's Toll Among Babies: A Joyless View*, and strikingly, *Cocaine: A Vicious Assault on a Child*.<sup>36</sup> Reagan vastly expanded the War on Drugs by harnessing both poorly controlled science and mass media hysteria in response to the nationwide crack-cocaine epidemic.<sup>37</sup> Leaning on the media, Reagan convinced Congress to allocate nearly two billion dollars to law enforcement measures and established mandatory minimum sentences for drug crimes with the enactment of the Anti-Drug Abuse Act of 1986.<sup>38</sup>

This allocation of funds and focus on deterrence through criminal incarceration resulted in an overwhelming increase in the American prison population, especially among African American males.<sup>39</sup> Although African American males bore the brunt of mass incarceration, women were not spared. From 1975 to 2019, the U.S. prison population increased from 240,593 to over 1.4 million Americans.<sup>40</sup> Over that same period, the growth rate of female incarceration outpaced the growth rate of male incarceration

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34. *War on Drugs*, BRITANNICA, <https://www.britannica.com/topic/war-on-drugs> (Aug. 22, 2023). Between 1980 and 1997, incarcerations for nonviolent drug offenses increased by eightfold, from around 50,000 initially to over 400,000 people behind bars. *Id.*

35. See Ira J. Chasnoff et al., *Cocaine Use in Pregnancy*, 313 *NEW ENG. J. MED.* 666, 666-69 (1985).

36. Susan Okie, *The Epidemic That Wasn't*, *N.Y. TIMES* (Jan. 26, 2009), <https://www.nytimes.com/2009/01/27/health/27coca.html>.

37. Deonna S. Turner, *Crack Epidemic*, BRITANNICA (Oct. 3, 2022), <https://www.britannica.com/topic/crack-epidemic>.

38. *Id.*; see also Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801). The mandatory minimum regulations enacted included massive disparities between the amount of powder cocaine compared to the amount of crack cocaine necessary to result in an excessively harsh penalty. A woman caught with five grams of crack cocaine was punished by the legal system as if she had possessed five hundred grams of powder cocaine, which can only be explained logically by the racial connection between the two forms—approximately 80% of crack users were African American.

39. See Turner, *supra* note 37 (stating while one in every four African Americans between the ages of twenty and twenty-nine was under some form of carceral control in 1989, by 1995 that same statistic had increased to one in three).

40. Aaron Morrison, *50-Year War on Drugs Imprisoned Millions of Black Americans*, ASSOCIATED PRESS (July 23, 2021, 12:35 PM), <https://apnews.com/article/war-on-drugs-75e61c224de3a394235df80de7d70b70>. Close to one in every five of those incarcerated between 1975 and 2019 “were incarcerated with a drug offense listed as their most serious crime.” *Id.*

by over 50%, which resulted in more than one million women either behind bars or under another form of carceral control.<sup>41</sup> While mass incarceration and the deleterious effects of the failed War on Drugs are racial justice issues, they pose an imminent threat to all American women.<sup>42</sup> As droves of women have been swept into the criminal justice system over the past four decades, America's children have been left to fend for themselves, posing a significant threat to the future health, safety, and wellbeing of our nation as a whole.<sup>43</sup> Pregnant women are no exception to this War: an estimated 58,000 expectant mothers are arrested and incarcerated each year.<sup>44</sup>

## 2. *The Opioid Crisis and Progressive Drug Policy*

In the late 1990s, a few of the nation's top pharmaceutical companies (including Purdue Pharma) began aggressively marketing prescription opiates such as OxyContin, claiming they had no knowledge of the addictive effects of the drugs.<sup>45</sup> Whether these claims were true or not, these companies successfully convinced doctors nationwide to prescribe opioid pain relievers at increased rates. By the time the addictive effects were realized among the medical community, it was too late.<sup>46</sup> Since then, opioid abuse has become one of the leading public health issues in America with more than 645,000 deaths attributable to opioid overdoses since 1999—greater than the number of American combat deaths in World War II, the Korean War, and the

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41. Charmaine Davis, *Mass Incarceration and Its Impact Are Devastating to Women*, VERA (Aug. 15, 2016), <https://www.vera.org/news/gender-and-justice-in-america/mass-incarceration-and-its-impact-are-devastating-to-women>.

42. Inimai M. Chettiar, *The Hidden Bearers of Mass Incarceration: Women*, BRENNAN CTR. FOR JUST. (July 18, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/hidden-bearers-mass-incarceration-women>. Drug crimes alone made up for 29% of the growth of the female prison population from 1986 to 2015. *Id.*

43. *Id.* Roughly 60% of incarcerated women are also mothers of children under eighteen years old, and more than 75% of those mothers are the primary or sole caretaker. *Id.* Even when women themselves escape the grips of criminal justice, they may still be burdened by the incarceration of a significant other. *Id.* It has been estimated that prison has produced nearly 200,000 single mothers, and between incarcerated mothers and fathers, over 2.7 million children nationwide are living with one parent locked up. *Id.*

44. Sylvia A. Harvey, *Incarceration Hits Women and Mothers Hard*, THIRTEEN: PBS (June 8, 2022), <https://www.thirteen.org/blog-post/incarceration-hits-women-and-mothers-hard/>. Most women are shackled during labor if still imprisoned at the time of birth. *Id.*

45. Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html>.

46. *Id.*



Vietnam War combined.<sup>47</sup> At the end of 2021, the overall number of deaths from drug-related overdoses reached over one million, in part due to the prevalence of the powerful synthetic opioid, fentanyl, which is responsible for a significant number of deaths in recent years.<sup>48</sup> This carnage led legislators to amend CAPTA<sup>49</sup> in the early 2000s through passage of the Keeping Children and Families Safe Act of 2003, which required states to develop “policies and procedures to address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure.”<sup>50</sup> Despite the implementation of reporting protocols on medical care providers, rates of prenatal substance exposure continue to increase, and addiction treatment remains inaccessible to many who are willing to receive it.<sup>51</sup>

Although the War on Drugs’s focus on punitive measures has increased the number of incarcerated individuals at an overwhelming rate, the United States has yet to see a decrease in drug-overdose deaths.<sup>52</sup> This continued failure to reduce illicit drug use or associated overdose deaths has caused national leaders to attempt alternative strategies to these failed punitive programs. For example, during his first campaign for president, Barack Obama defended medical marijuana, stating his intention to direct federal prosecutors to focus efforts elsewhere rather than waste the Department of Justice’s resources on conduct that complied with state laws.<sup>53</sup> The Biden

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47. See *Understanding the Opioid Overdose Epidemic*, CDC, <https://www.cdc.gov/oaids/basics/epidemic.html> (last reviewed Aug. 8, 2023).

48. Brian Mann, *More Than a Million Americans Have Died from Overdoses During the Opioid Epidemic*, NPR (Dec. 30, 2021, 10:26 AM), <https://www.npr.org/2021/12/30/1069062738/more-than-a-million-americans-have-died-from-overdoses-during-the-opioid-epidemi>.

49. See Child Abuse Protection and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101-5108, 5116).

50. See Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800 (codified as amended at 42 U.S.C. §§ 5101-5108, 5116).

51. See Kristina D. West et al., *Prenatal Substance Exposure and Neonatal Abstinence Syndrome: State Estimates from the 2016–2020 Transformed Medical Statistical Information System*, MATERNAL & CHILD HEALTH J., May 23, 2023, at 2-3, <https://link.springer.com/content/pdf/10.1007/s10995-023-03670-z.pdf?pdf=core>; Larry S. Smith, *We Must Break Down Barriers to Addiction Treatment*, NONDOC (Feb. 7, 2022), <https://nondoc.com/2022/02/07/improve-addiction-treatment-access/> (reporting in 2020, only 13% of those experiencing drug use disorder received any treatment, and fentanyl overdoses have become the leading cause of death for those between eighteen and forty-five years old).

52. See Morrison, *supra* note 40; see also Mann, *supra* note 48.

53. Ethan Nadelmann, *Reefer Madness*, N.Y. TIMES (Nov. 6, 2011), <https://www.nytimes.com/2011/11/07/opinion/reefer-madness.html>. When this article was published in

administration has similarly focused efforts on improving access to medicine, as it recently released a report that described how medication can prevent overdose-related deaths of pregnant women.<sup>54</sup> The report also outlined a few of the systemic barriers to prenatal care that women with SUD experience.<sup>55</sup> This report highlights a darkly ironic dichotomy—those struggling most are unlikely to have access to the care that they are incredibly motivated to receive.<sup>56</sup> According to Dr. Rahul Gupta, director of the White House Office of National Drug Control Policy, less than one in ten individuals struggling with SUD that request treatment receives it.<sup>57</sup> Given the many barriers pregnant women already face, it is likely their situation is even more dire.

### *B. The Science of Prenatal Substance Exposure*

With the broad historical underpinnings laid, this section turns to the science associated with prenatal substance exposure. First, this section, paying particular attention to the heightened proclivity for opioid abuse and many risk factors women specifically face, highlights the opioid epidemic's effects on women. Next, this section discusses neonatal abstinence syndrome, the side effects associated with diagnosis, national statistics, and Oklahoma statistics. Finally, this section explores the comparative effects of prenatal exposure to various substances and illustrates that marijuana is least harmful to the developing fetus of the five substances discussed.

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2011, marijuana was legal for medicinal purposes in sixteen states and D.C., with around 1,000 active dispensaries. *Id.* Since then, Oklahoma's medical marijuana market has exploded, with more than 2,000 dispensaries operating in the state in 2022, more than any other state. See Dale Denwalt, *Companies Attempt to Gobble Up Market Share as Oklahoma's Cannabis Industry Matures*, OKLAHOMAN (Feb. 20, 2022, 6:31 AM), <https://www.oklahoman.com/story/business/2022/02/10/cannabis-dispensaries-expand-new-sites-oklahomas-as-industry-grows/9314053002/>; see also Sam Tabachnik, *Cheap, Easy Entry Leads to Saturation of Oklahoma's Medical Marijuana Market*, J. REC. (Aug. 17, 2021), <https://journalrecord.com/2021/08/17/cheap-easy-entry-leads-to-saturation-of-oklahomas-medical-marijuana-market/>.

54. Emily Baumgaertner, *Biden Administration Offers Plan to Get Addiction-Fighting Medicine to Pregnant Women*, N.Y. TIMES (Oct. 21, 2022), <https://www.nytimes.com/2022/10/21/health/addiction-treatment-pregnancy.html>.

55. OFFICE OF NAT'L DRUG CONTROL POL'Y, EXEC. OFF. OF THE PRESIDENT, SUBSTANCE USE DISORDER IN PREGNANCY: IMPROVING OUTCOMES FOR FAMILIES 2 (2022).

56. *See id.*

57. Trinh Q. Truong & Debu Gandhi, *The Opioid Epidemic Demands Public Health Solutions, Not False Claims About Immigration*, CTR. FOR AM. PROGRESS (Oct. 31, 2022), <https://www.americanprogress.org/article/the-opioid-epidemic-demands-public-health-solutions-not-false-claims-about-immigration/>.

### *1. The Opioid Epidemic's Effect on Women*

The opioid epidemic has substantially impacted women, as they have been prescribed opiate painkillers in significantly greater numbers than men due to higher occurrences of acute pain.<sup>58</sup> More specifically, there is evidence that prescription opioid abuse among expectant mothers increased dramatically over the course of the epidemic.<sup>59</sup> For example, although the rate of pregnant women being admitted to drug treatment between 1992 and 2012 remained stable at 4%, the proportion of women reporting prescription opioid abuse jumped dramatically, from 2% to 28%.<sup>60</sup> Over that same period, among the 420,665 pregnant women admitted to treatment, the number of admissions reporting prescription opioids as the primary substance abused increased from 1% to 19%.<sup>61</sup> The largest regional increase in the United States during that period was seen in the South with a rate of prescription opioid abuse at nearly 38%.<sup>62</sup>

After women begin taking opiates, the risks they face increase significantly. One study found that after filling an opiate prescription, women are more likely to smoke tobacco and have depression and anxiety.<sup>63</sup> Once prescribed painkillers and dealing with substance abuse, women are less likely than men to seek treatment due to significant gendered barriers, including the fear of possible criminal prosecution if pregnant or loss of custody if a parent.<sup>64</sup> Although medication-assisted therapy is the prescribed standard of care in response to opioid abuse during pregnancy, roughly only one third of pregnant women receive such therapy.<sup>65</sup> This fact suggests that drastic improvements are necessary to ensure available treatment is meeting the needs of those struggling with addiction. Further studies have shown that increases in punitive laws and the adoption of criminal punishments for

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58. Teddy G. Goetz et al., *Women, Opioid Use and Addiction*, 35 FASEB J., article no. e21303, Feb. 2021, at 1, 3, <https://faseb.onlinelibrary.wiley.com/doi/epdf/10.1096/fj.202002125R>.

59. Caitlin E. Martin et al., *Recent Trends in Treatment Admissions for Prescription Opioid Abuse During Pregnancy*, 48 J. SUBSTANCE ABUSE TREATMENT, Jan. 2015, at 37, 37, <https://www.sciencedirect.com/science/article/pii/S0740547214001445?via%3Dihub>.

60. *Id.* at 38.

61. *Id.*

62. *Id.*

63. Stephen W. Patrick et al., *Prescription Opioid Epidemic and Infant Outcomes*, 135 PEDIATRICS 842, 844-45 (2015).

64. Lynn Falletta et al., *Perceptions of Child Protective Services Among Pregnant or Recently Pregnant, Opioid-Using Women in Substance Abuse Treatment*, 79 CHILD ABUSE & NEGLECT 125, 126 (2018).

65. See Martin et al., *supra* note 59, at 37.

substance use during pregnancy are associated with higher rates of neonatal abstinence syndrome.<sup>66</sup> Neonatal abstinence syndrome is the appearance of withdrawal symptoms in the recently born due to the sudden discontinuation of fetal exposure to substances used by the mother during pregnancy.<sup>67</sup>

## 2. *The Opioid Epidemic's Effect on Children – Neonatal Abstinence Syndrome*

The opioid epidemic's brutal effects are not merely limited to adults who willingly choose to consume opiates. Due to the widespread use of opiates across the country, and given that nearly one third of pregnant women prescribed opiate painkillers fill their prescription at least once, it seems inevitable that rates of neonatal abstinence syndrome in American children will continue to increase in coming years.<sup>68</sup> While most commonly caused by opiates, some physicians claim neonatal abstinence syndrome can also be caused by neonatal exposure to other classes of drugs—including benzodiazepines and even antidepressants—as the drugs are passed through the placenta to the fetus.<sup>69</sup> Side effects of the syndrome include increased likelihood of preterm birth, respiratory disease and seizures, and impaired adaptation of the critical regulatory functions that sustain life, including sleep, feeding, and autonomous functions like breathing.<sup>70</sup>

Between 2010 and 2017, the nationwide rate of maternal opiate-related diagnoses increased from 3.5 per 1,000 hospitalizations to 8.2, while the rate of neonatal abstinence syndrome increased from 4.0 per 1,000 hospitalizations to 7.3.<sup>71</sup> Despite the nationwide rise in neonatal abstinence syndrome, Oklahoma outpaced the rest of the country, save West Virginia, with a relative rate of increase of 283%, from 1.7 per 1,000 hospitalizations to 6.6.<sup>72</sup> In 1987, the Centers for Disease Control and Prevention began the Pregnancy Risk Assessment Monitoring System (“PRAMS”), an ongoing

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66. Laura J. Faherty et al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy with Rates of Neonatal Abstinence Syndrome*, 2 JAMA NETWORK OPEN, article no. e1914078, Nov. 2019, at 1, 7, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755304>.

67. Prabhakar Kocherlakota, *Neonatal Abstinence Syndrome*, 134 PEDIATRICS 547, 548, (2014); see also Lauren M. Jansson & Stephen W. Patrick, *Neonatal Abstinence Syndrome*, 66 PEDIATRIC CLINICS N. AM. 353, 355-56, 357 tbl.3 (2019) (listing symptoms such as irritability, increased muscle tone and activity, feeding problems, diarrhea, and seizures).

68. See Patrick et al., *supra* note 63, at 842.

69. *Id.* at 843.

70. *Id.* at 844.

71. See Hirai, *supra* note 12, at 146.

72. *Id.* at 152.

study that collects data on maternal experiences before, during, and after pregnancy.<sup>73</sup> A recent report published by PRAMS in February of 2022 indicated that prescription opiate use among expectant mothers in Oklahoma is significantly higher than across the Nation.<sup>74</sup>

### 3. *The Comparative Effects of Prenatal Marijuana Exposure*

Although prenatal marijuana exposure is not beneficial to a developing fetus, when compared with the results of exposure to other substances (prenatal alcohol exposure, for example, which goes unpunished in Oklahoma) the consequences are not nearly as injurious.<sup>75</sup> However, recent studies do suggest that prenatal marijuana exposure has negative effects on behavioral development, increasing the likelihood of certain mental health issues during adolescence and beyond.<sup>76</sup> Exposure to alcohol and other legal substances has considerable side effects on a growing fetus, but it is difficult to gauge the exact extent to which fetal harm is attributable to any specific substance.<sup>77</sup> Alcohol is the second most frequently used substance during

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73. *The Oklahoma Pregnancy Risk Assessment Monitoring System (PRAMS)*, OKLA. STATE DEP'T OF HEALTH, <https://oklahoma.gov/health/health-education/children---family-health/maternal-and-child-health-service/mch-assessment/pregnancy-risk-assessment-monitoring-system-prams.html> (last visited Sept. 28, 2023). The foremost purpose of PRAMS is to discover why some babies are born healthy, in an effort to increase the total number of healthy citizens. *Id.*

74. *Profile of Oklahoma Mothers Who Used Prescription Opioids During Pregnancy: 2016-2019*, OKLA. STATE DEP'T OF HEALTH (Feb. 2022), <https://oklahoma.gov/content/dam/ok/en/health/health2/documents/PRAMS-opiod-pregnancy.pdf>. Of nearly 12,000 survey recipients, a little more than half responded, with roughly 9.7% indicating that they were still using either hydrocodone, oxycodone, or codeine, over 3.1% higher than the nationwide rate of 6.6%. *Id.*; see also Jean Y. Ko et al., *Vital Signs: Prescription Opioid Pain Reliever Use During Pregnancy — 34 U.S. Jurisdictions, 2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 897, 900 (2020) (indicating a nationwide rate of 6.6%).

75. This Comment does not suggest that pregnant women who drink, smoke cigarettes, or otherwise expose their fetuses to substances which detrimentally affect development should be subject to criminal penalties for their actions. Rather, by illustrating the disparate treatment between pregnant women that drink alcohol and those that consume marijuana, this Comment intends to shed light on how morality, not science, motivates criminal punishment in Oklahoma.

76. David A. A. Baranger et al., *Association of Mental Health Burden with Prenatal Cannabis Exposure from Childhood to Early Adolescence: Longitudinal Findings from the Adolescent Brain Cognitive Development (ABCD) Study*, 176 JAMA PEDIATRICS 1261, 1262 (2022).

77. Debra Fulghum Bruce, *Drug Use and Pregnancy*, WEBMD, <https://www.webmd.com/baby/drug-use-and-pregnancy#1> (last visited Sept. 8, 2023).

pregnancy, following tobacco,<sup>78</sup> despite heavy prenatal alcohol exposure causing neurobehavioral consequences of varying degrees in approximately 70% of affected births.<sup>79</sup> Although initial studies into prenatal cocaine exposure overexaggerated effects of the drug,<sup>80</sup> children born after such exposure have low birth weights, smaller head circumferences, shorter body lengths, and are delivered prematurely more often.<sup>81</sup> While prenatal exposure to marijuana, alcohol, opiates, and methamphetamine have all been linked to low birth weight and fetal growth restriction, marijuana does not restrict growth in a similar manner when studies control for exposure to these other drugs.<sup>82</sup>

Research regarding prenatal drug exposure has largely centered on alcohol and supports a strong link between exposure and the presence of congenital anomalies, abnormal behavior among infants, and fetal growth problems.<sup>83</sup> In contrast, while there is evidence of subtle behavioral abnormalities in infants prenatally exposed to marijuana, studies have yet to show congenital anomalies or disruptions in growth.<sup>84</sup> Exposure to opioids limits fetal growth and causes the myriad of problems associated with neonatal abstinence syndrome.<sup>85</sup> Prenatal cocaine exposure also limits fetal growth, but there is limited evidence supporting a link between congenital abnormalities or any associated withdrawal symptoms.<sup>86</sup> While there are not enough studies on prenatal methamphetamine exposure to draw meaningful conclusions, there is some evidence that exposure significantly decreases body weight and length and head circumference at birth.<sup>87</sup>

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78. Ariadna Forray, *Substance Use During Pregnancy*, 5 F1000 RSCH., article no. Faculty Rev-887, May 13, 2016, at 1, 3, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4870985/pdf/f1000research-5-8232.pdf>.

79. Sarah N. Mattson et al., *Further Development of a Neurobehavioral Profile of Fetal Alcohol Spectrum Disorders*, 37 ALCOHOLISM: CLINICAL & EXPERIMENTAL RSCH. 517, 525 (2013), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1530-0277.2012.01952.x>.

80. See generally Chasnoff, *supra* note 35.

81. Mary A. Cain et al., *The Maternal, Fetal, and Neonatal Effects of Cocaine Exposure in Pregnancy*, 56 CLINICAL OBSTETRICS & GYNECOLOGY 124, 128 (2013).

82. Marylou Behnke et al., *Prenatal Substance Abuse: Short- and Long-Term Effects on the Exposed Fetus*, 131 PEDIATRICS 1009, 1012-13 (2013).

83. *Id.*

84. *Id.* at 1013.

85. *Id.*

86. *Id.*

87. Amy S. Oro & Suzanne D. Dixon, *Perinatal Cocaine and Methamphetamine Exposure: Maternal and Neonatal Correlates*, 111 J. PEDIATRICS 571, 571 (1987).

	Behavioral Abnormalities	Growth Disruptions	Congenital Anomalies
Marijuana	X		
Alcohol	X	X	X
Opiates	X	X	X
Cocaine		X	X
Amphetamines		X	

*Table 1.1 – Consequences of Fetal Substance Exposure*

### *C. Risks Faced by Women Struggling with Substance Use Disorder*

This section touches upon a disagreement in the scientific community before discussing the common risks faced by individuals struggling with SUD. These risks include a heightened risk of domestic violence, higher probabilities of preterm birth, and other dangerous conditions associated with incarcerated childbirth. Next, this section focuses on risks specific to Oklahoman women, such as administrative fraud, mandatory reporting by health-care professionals, unclear government messaging regarding prenatal marijuana exposure, and a failure to provide addiction treatment to those willing to seek it. Finally, this section considers reform measures that prioritize the health and safety of both mother and child, providing illustrations from several other states.

#### *1. Nationwide Risks*

Beyond the medical risks to both mother and child, there are many other hazards posed to pregnant women suffering from SUD. While the science around SUD and addiction is uncertain, these risks continue to steadily grow and now loom precariously over pregnant women seeking relief from SUD. Historically, substance use disorder was classified as a “chronic, relapsing brain disease,” and ever since, neuroscientists have been attempting to better understand the science of addiction.<sup>88</sup>

There are disagreements among the scientific community, with some neuroscientists suggesting that substance abuse and relapse are uncontrollable and that persons with SUD must avoid the people, places, and

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88. Nancy D. Campbell, “*Why Can’t They Stop?*” *A Highly Public Misunderstanding of Science*, in ADDICTION TRAJECTORIES 238, 238 (Eugene Raikhel & William Garriott eds., 2013).

things that originally drove them to use drugs.<sup>89</sup> Other scientists find this suggestion to be repugnant, as it not only misunderstands the science but reinjects issues of morality into discussions of substance abuse—a problem that plagued scholarship for years.<sup>90</sup> The first argument fails to properly educate those struggling with SUD on how to appropriately deal with their stressors, and it instead instructs those struggling to simply avoid them.<sup>91</sup>

While scientists disagree on the best path forward to decrease rates of prenatal substance exposure, a consensus has amassed in support of public health solutions, broadly focused on addressing all aspects of a mother's environment that incentivize substance use.<sup>92</sup> Support for this approach has coalesced as numerous studies have demonstrated that increases in punitive laws and the adoption of criminal punishments for substance use during pregnancy are in fact associated with higher rates of harmful conditions like neonatal abstinence syndrome.<sup>93</sup> Treatment solutions must be prioritized, and the consensus in the scientific community suggests that addiction care is most successful when voluntary.<sup>94</sup> To meet the growing needs of the victims from the failed War on Drugs, Oklahoma should focus efforts on providing affordable, evidence-based treatment and aftercare, along with coincidental services designed to address the structural and relational concerns behind the underlying substance use.<sup>95</sup>

Responses to prenatal substance exposure should not only address the struggle of the mother's addiction but should also deemphasize punitive measures like incarceration.<sup>96</sup> In U.S. jails and prisons, the cruelest consequence of the War on Drugs, the separation of mother and child, is realized. Any response to the issue of prenatal substance exposure must prioritize keeping family units intact. This is not merely a moral objective

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89. *Id.* at 239-40.

90. *Id.* at 244.

91. *Id.* at 239-40.

92. See Jean Reith Schroedel & Pamela Fiber, *Punitive Versus Public Health Oriented Responses to Drug Use by Pregnant Women*, 1 YALE J. HEALTH POL'Y, L. & ETHICS 217, 227 (2001).

93. Faherty et al., *supra* note 66, at 7.

94. Maia Szalavitz, *Why Forced Addiction Treatment Fails*, N.Y. TIMES (Apr. 30, 2022), <https://www.nytimes.com/2022/04/30/opinion/forced-addiction-treatment.html>. The Director of the National Institute on Drug Abuse, Nora Volkow, has recanted a 2018 document the organization published, now stating that data does not support “put[ting] someone in jail or in prison or forc[ing] them against their will to go to treatment.” *Id.*

95. See Jennifer J. Carroll et al., *The Harms of Punishing Substance Use During Pregnancy*, 98 INT'L J. ON DRUG POL'Y, article no. 103433, Dec. 2021, at 1, 2.

96. *Id.* at 4.



either. Incarceration and prenatal marijuana exposure similarly increase the risk of preterm birth,<sup>97</sup> but incarceration poses significant additional risks during childbirth.<sup>98</sup> When prisons provide expectant mothers with prenatal care, the risk of preterm birth decreases. This fact provides significant justification to improve the availability of medical care in prisons.<sup>99</sup> This has led several scholars to suggest that incarcerated women should receive counseling, extensive prenatal care, and delivery at community hospitals.<sup>100</sup> Unfortunately, when a pregnant individual is incarcerated, they will likely lack access to prenatal care, adequate nutrition, and other resources that enable a healthy childbirth experience.<sup>101</sup> Those pregnant women that are lucky enough to avoid incarceration are typically saddled with significant fines or excessive probation requirements and likely fair no better due to underlying trauma which is often left untreated.<sup>102</sup> Women struggling with SUD “often lack adequate social support systems, including . . . supportive husbands or boyfriends,” making the maintenance of probation terms and payment of high fines incredibly difficult.<sup>103</sup>

The lack of prenatal care and adequate nutrition for their unborn fetus is unlikely to be the first traumatic event in the life of an incarcerated pregnant woman.<sup>104</sup> The majority of incarcerated women are survivors of domestic

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97. See Corsi, *supra* note 16, at 145.

98. Jaquelyn L. Jahn et al., *County-Level Jail Incarceration and Preterm Birth Among Non-Hispanic Black and White U.S. Women, 1999–2015*, 250 SOC. SCI. & MED., article no. 112856, Apr. 2020, at 5, <https://www.sciencedirect.com/science/article/pii/S0277953620300757>. Younger pregnant women seem to be able to withstand these added risks of incarceration better, with odds of low birth weight and preterm birth increasing for those over thirty-nine years of age. Janice F. Bell et al., *Jail Incarceration and Birth Outcomes*, 81 J. URB. HEALTH: BULL. N.Y. ACAD. MED. 630, 638 (2004).

99. Bell et al., *supra* note 98, at 641.

100. See Leah Wang, *Unsupportive Environments and Limited Policies: Pregnancy, Postpartum, and Birth During Incarceration*, PRISON POL’Y INITIATIVE (Aug. 19, 2021), [https://www.prisonpolicy.org/blog/2021/08/19/pregnancy\\_studies/](https://www.prisonpolicy.org/blog/2021/08/19/pregnancy_studies/).

101. *Id.*

102. Barry R. Sherman & Laura M. Sanders, *Identification and Treatment of Traumatic Life Experiences*, in ADDICTION AND PREGNANCY: EMPOWERING RECOVERY THROUGH PEER COUNSELING 93 (Barry R. Sherman et al. eds., 1998).

103. Chau Trinh, *The Role of Social Support in the Lives of Pregnant Women in Recovery*, in ADDICTION AND PREGNANCY: EMPOWERING RECOVERY THROUGH PEER COUNSELING, *supra* note 102, at 107, 107.

104. This author recognizes there are a diverse range of gender identities represented in the U.S. criminal justice system, and the trauma inflicted by that system due to a lack of prenatal care is not limited to those identifying solely as women, but all those capable of pregnancy. While this Comment focuses on the experience of those that identify as women,

violence and come from poor and working-class backgrounds.<sup>105</sup> Despite these hardships, incarcerated women are not often given counseling to address such traumatic victimization.<sup>106</sup> While limited access to counseling does not cause substance use during incarceration, it might help explain why substance use among incarcerated women is extremely high, with nearly half of women incarcerated nationwide reporting daily drug use.<sup>107</sup> Although the lack of social support might have contributed to their first encounter with the American criminal justice system,<sup>108</sup> recently released women who turn to substance use to cope with chronic stress and hardships run the risk of returning to prison. To avoid this vicious cycle of violence against women, policymakers must fund the development of programming that teaches strategies to create healthy intimate-partner relationships that support continued abstinence from drugs.<sup>109</sup>

## 2. Oklahoma Specific Risks

While domestic violence outcomes could be significantly improved nationwide, the dangers that Oklahoman women encounter pose threats of a more severe degree. In 2020, Oklahoma saw a 44% increase in domestic violence-related deaths, up to 138 from the previous year.<sup>110</sup> Rates of reported intimate-partner violence in Oklahoma reached a twenty year high in 2020, with over 27,000 instances of domestic violence reported to law

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individuals of all gender identities ought to be provided safe reproductive care and access to rehabilitative treatment.

105. *Words From Prison – Did You Know...?*, ACLU (June 12, 2006), <https://www.aclu.org/documents/words-prison-did-you-know>.

106. See Danya Ziazadeh, *Inadequate Health Care: A Significant Problem Affecting Incarcerated Women*, UNIV. OF MICH. SCH. OF PUB. HEALTH (May 30, 2019), <https://sph.umich.edu/pursuit/2019posts/inadequate-healthcare-a-significant-problem-affecting-incarcerated-women.html>; Sherman & Sanders, *supra* note 102, at 93-94.

107. LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: WOMEN OFFENDERS 9 (Dec. 1999), <https://bjs.ojp.gov/content/pub/pdf/wo.pdf>.

108. See generally Trinh, *supra* note 103, at 107-08.

109. Chelsea Pallatino et al., *The Intersection of Intimate Partner Violence and Substance Use Among Women with Opioid Use Disorder*, 42 SUBSTANCE ABUSE 197, 201 (2021).

110. Deon Osborne, *Oklahoma's Domestic Violence Rates Second Highest in Nation*, BLACK WALL ST. TIMES (Jan. 4, 2023), <https://theblackwallsttimes.com/2022/11/07/oklahomas-domestic-violence-rates-second-highest-in-nation/>. The data from 2020 was the most recent available.

enforcement.<sup>111</sup> While these statistics shed some light on the issue, the sheer severity of violence is difficult to encapsulate; women are murdered by their male counterparts more often in Oklahoma than in forty-eight other states.<sup>112</sup> Given a rise in domestic violence homicides, the Oklahoma Domestic Violence Fatality Review Board recently recommended a collaborative approach to law enforcement training and resources, with hopes the approach might improve the police response to future instances of domestic violence.<sup>113</sup> This change in approach alone will not overcome certain challenges, however. A recent audit of federal funds awarded between 2015 and 2020 to the Oklahoma Coalition Against Domestic Violence and Sexual Assault revealed the executive director had squandered or mismanaged 98% of its grant money—a whopping \$886,495.<sup>114</sup> Even if the police tailor their responses and administrators curb fiscal waste related to domestic violence, Oklahoman women will continue to face other substantial risks. Among these is an increased rate of maternal mortality, with the statewide rate sitting at 23.5 deaths per 100,000 live births, considerably higher than the national rate of 20.1.<sup>115</sup> Oklahoman women also face much more frequent mental and physical distress of an increasingly high intensity.<sup>116</sup>

Pregnant women in Oklahoma face considerable risk when trying to support the health and safety of their unborn fetus by seeking prenatal care. Since passage of the Keeping Children and Families Safe Act of 2003, women have been arrested and had their children removed from their custody based on no more than a preliminary positive drug test at birth.<sup>117</sup> Shortly after federal enactment, the Oklahoma legislature passed supporting legislation, title 10A, section 1-2-101(B)(2) of the Oklahoma Statutes.<sup>118</sup>

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111. *Id.* It is important to note the distinction between rates of domestic violence and rates of reported domestic violence, because a failure to report violence might be explained by a number of factors other than increased instances of violence.

112. *Id.*

113. OKLA. DOMESTIC VIOLENCE FATALITY REV. BD., DOMESTIC VIOLENCE HOMICIDE IN OKLAHOMA: AN ANALYSIS OF 2019 DOMESTIC VIOLENCE HOMICIDES 21 (2020), [https://www.oag.ok.gov/sites/g/files/gmc766/f/2020\\_dvfrb\\_annual\\_report\\_official\\_0.pdf](https://www.oag.ok.gov/sites/g/files/gmc766/f/2020_dvfrb_annual_report_official_0.pdf).

114. Whitney Bryen, *Oklahoma Nonprofit Used Federal Funds for Vacations Instead of Victim Services*, OKLA. WATCH (May 17, 2022), <https://oklahomawatch.org/2022/02/10/oklahoma-nonprofit-used-federal-funds-for-vacations-instead-of-victim-services/>.

115. Emma Morris, *Enacting Recommended Expansion of Pregnancy, Postpartum Care Will Represent a Step Forward for Oklahoma Families*, OKLA. POL'Y INST. (Nov. 3, 2022), <https://okpolicy.org/enacting-recommended-expansion-of-pregnancy-postpartum-care-will-represent-a-step-forward-for-oklahoma-families/>.

116. *Id.*

117. *See* Stone, *supra* note 15, at 6.

118. 10A OKLA. STAT. § 1-2-101(B)(3) (2023) (effective July 1, 2019).

That statute requires every healthcare professional involved in prenatal care promptly report any positive test results for alcohol or drugs to the Oklahoma Department of Human Services.<sup>119</sup> Nationally, about half of the states require healthcare professionals to report any suspicion of prenatal drug use, with eight of those states requiring some kind of drug testing.<sup>120</sup> Such requirements make women justifiably scared to seek treatment.<sup>121</sup> As a senior official for the Oklahoma State Department of Mental Health and Substance Abuse Services observed, “Many women don’t seek treatment because they worry about criminal or child welfare involvement.”<sup>122</sup> Ultimately, no single policy can be blamed for Oklahoma’s rate of female incarceration, which happens to be the highest in the world.<sup>123</sup> When sentencing women, however, the Oklahoma judiciary consistently passes down sentences harsher than those imposed on similarly situated men.<sup>124</sup>

Despite this harshness, even the OMMA fails to fully warn registered medical marijuana patients that they risk legal liability if they prenatally expose their fetuses to drugs.<sup>125</sup> On the OMMA website’s Patient Rights and Responsibilities page pertaining to custody, it states that “there is no presumption of neglect or child endangerment for conduct allowed, unless the person’s behavior creates an unreasonable danger to the safety of the minor.”<sup>126</sup> Also included on the website, under the section pertaining to

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119. *Id.*

120. *Substance Use During Pregnancy*, GUTTMACHER INST., <https://www.gutmacher.org/state-policy/explore/substance-use-during-pregnancy> (last visited Sept. 10, 2023) (indicating the Oklahoma statute does not require any drug testing be performed).

121. Kassie McClung & Brianna Bailey, *More Women Face Charges for Drug Use During Pregnancy*, ENID NEWS & EAGLE (Jan. 18, 2022), [https://www.enidnews.com/news/state/more-women-face-charges-for-drug-use-during-pregnancy/article\\_a448d942-75b6-11ec-9283-bb87582d5f38.html](https://www.enidnews.com/news/state/more-women-face-charges-for-drug-use-during-pregnancy/article_a448d942-75b6-11ec-9283-bb87582d5f38.html).

122. *Id.*

123. Aleks Kajstura, *States of Women’s Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/women/2018.html> (reporting Oklahoma leads the twenty-seven other states that exceed the national average in female incarceration, locking up 281 women for every 100,000 people living in the state).

124. See Megan Lambert, *A Father Abuses His Children but Somehow Their Mother Goes to Prison for 30 Years*, ACLU (Jan. 31, 2018), <https://www.aclu.org/news/smart-justice/father-abuses-his-children-somehow-their-mother-goes-prison-30> (describing a case in which a father got probation after breaking his children’s bones, but their mother was sentenced to thirty years in jail).

125. *Patient Rights & Responsibilities*, OKLA. MED. MARIJUANA AUTH., <https://oklahoma.gov/omma/patients-caregivers/patient-rights-and-responsibilities.html> (last modified Aug. 1, 2023).

126. *Id.*

pregnancy and breastfeeding, is a requirement that labels include warnings that “using medical marijuana products during pregnancy can cause birth defects” and “[a]ccording to the CDC, evidence shows marijuana use during pregnancy can harm the baby in the womb.”<sup>127</sup> The warning on the back of medical cards is maybe the most stringent, but it still fails to warn about possible legal risks, simply commanding, “Do not use medical marijuana if you are pregnant or breastfeeding.”<sup>128</sup>

To even begin addressing the prenatal substance exposure problem, however, the Oklahoma Department of Mental Health & Substance Abuse must offer more available beds in treatment facilities across the state. The waitlist for state-run facilities in 2016 was between 600 to 800 total individuals.<sup>129</sup> For an individual suffering from SUD, delaying treatment by even a day, let alone weeks or even months, can directly cause a relapse.<sup>130</sup> One woman, Amanda Needham, remarked that it was easier in rural Oklahoma to find drugs than a job, and when she was bored, that was all she could ever think about.<sup>131</sup> When Needham finally went to rehab, she had to travel over two hours and 140 miles from her small town of Quinton to Oklahoma City to get a bed.<sup>132</sup> Recently, the Department of Justice announced an investigation into whether Oklahoma fails to provide mental health services to Oklahoma County residents, due to a considerable lack of community-based services in the state.<sup>133</sup> It is likely the lack of mental health and substance use-related care in Oklahoma is partially related to a failure to provide such community-based services.

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127. *Id.*

128. *Id.*

129. Clifton Adcock, *Where Addiction Holds a Grip but Treatment Lags*, OKLA. WATCH (Oct. 28, 2019), <https://oklahomawatch.org/2016/10/08/in-a-grip-of-addiction-with-barriers-to-treatment/>.

130. *Id.*

131. *Id.*

132. *Id.*

133. Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Justice Department Launches Investigation of Oklahoma’s Mental Health Service System and Oklahoma City’s and Oklahoma Police Department’s Response to Mental Health Crises (Nov. 17, 2022), <https://www.justice.gov/opa/pr/justice-department-launches-investigation-oklahoma-s-mental-health-service-system-and-see-also-Whitney-Bryen,-Oklahomans-Share-Their-Struggle-for-Mental-Healthcare-as-Feds-Investigate-Statewide-Treatment>, OKLA. WATCH (Jan. 4, 2023), <https://oklahomawatch.org/2022/12/28/oklahomans-share-their-struggle-for-mental-healthcare-as-feds-investigate-statewide-treatment/>.

### 3. *Better Paths Forward*

States like Colorado,<sup>134</sup> Kansas,<sup>135</sup> Oregon, Washington, and Montana provide a blueprint for what the prioritization of the health, safety, and well-being of both mother and child might look like. By adopting public health approaches, the health of the child and recovery of the mother are simultaneously prioritized. In the summer of 2016, President Barack Obama signed into law the Comprehensive Addiction and Recovery Act

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134. Back in April of 2010, Colorado's legislature enacted COLO. REV. STAT. § 27-80-112, which 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.

*Id.* Through this bill, the Colorado Legislature created multiple treatment programs for high-risk pregnant women, both recognizing the harm inflicted thus far and blueprinting a possible solution. *Id.*

135. Kansas provides for priority placement of pregnant women suffering from substance use disorder in substance abuse treatment facilities, with a requirement that "[t]he secretary for aging and disability services shall ensure that family oriented substance abuse treatment is available." KAN. STAT. ANN. § 65-1,165 (2022). Further, when health care providers identify a pregnant woman at risk of substance use disorder, they can only refer that woman to the local health department *with her consent*. *Id.* § 65-1,163. Once a woman has been referred to the local health department, law requires the department to coordinate social, health care, mental health, education, and rehabilitation services to both her and her family within 72 hours of the referral. *Id.* § 65-1,164. The state has gone further in protecting women through the establishment of agencies. The Kansas Department of Health and Environment has set up the Kansas Perinatal Quality Collaborative ("KPQC"), an effort by medical professionals and public health leaders to reduce maternal mortality and improve maternal health outcomes overall. *About the Kansas Perinatal Quality Collaborative*, KAN. PERINATAL QUALITY COLLABORATIVE, <https://kansaspqc.org/about-us/> (last visited Sept. 10, 2023). KPQC provides data and support to increase access to care through funding provided by the Health Resources and Services Administration of the U.S. Department of Health and Human Services. *Id.* Another state agency, the Kansas Department for Aging and Disability Services, is responsible for running eight Designated Women's Substance Abuse Treatment Programs, which provide the priority admission to pregnant women discussed above. *Kansas Designated Women's Substance Use Disorder Treatment*, *supra*.

(“CARA”),<sup>136</sup> which amended certain provisions of CAPTA.<sup>137</sup> Notably, CARA required states to remove the term “illegal” when addressing prenatal substance exposure, and more importantly, required states to address the needs of both infants and their families or caretakers by addressing the gap between requested and available addiction treatment.<sup>138</sup> Passage of CARA reflected a concerted effort on the part of both major political parties to combat prenatal substance exposure.<sup>139</sup> By looking holistically at what is best for a child born to a mother struggling with SUD and attempting to support mothers and families choosing recovery, CARA prioritized health.<sup>140</sup>

Not all states have responded in the same manner. Several states have gone above federal requirements by better prioritizing the health and safety of both mother and child.<sup>141</sup> For example, Colorado provides a model for limiting potential bias in discretionary reporting and enforcement decisions while still enabling the healthcare system to provide effective care to interested parties. The Colorado Children’s Code defines abuse, child abuse, or neglect as when a “child is born affected by alcohol or substance exposure, except when taken as prescribed or recommended and monitored by a licensed health-care provider, and the newborn child’s health or welfare is threatened by substance use.”<sup>142</sup> This means that if a baby tests positive for alcohol or a controlled substance—including marijuana—at birth they are considered abused and neglected as defined by Colorado law.<sup>143</sup>

However, Colorado women have a powerful protection which Oklahoman women are not afforded. Section 13-25-136 of the Colorado Statutes

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136. See Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (codified in scattered sections of 42 U.S.C. and other titles).

137. See Emmarie Huetteman, *Senate Approves Bill to Combat Opioid Addiction Crisis*, N.Y. TIMES (July 13, 2016), <https://www.nytimes.com/2016/07/14/us/politics/senate-opioid-addiction-bill.html>.

138. Richard G. Frank, *How Do We Finish the Job That the Comprehensive Addiction and Recovery Act Started?*, HEALTH AFFS.: FOREFRONT (Sept. 12, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160912.056506>.

139. Huetteman, *supra* note 137.

140. *Id.*

141. See BECKY NORMILE ET AL., NAT’L ACAD. FOR STATE HEALTH POL’Y, STATE STRATEGIES TO MEET THE NEEDS OF YOUNG CHILDREN AND FAMILIES AFFECTED BY THE OPIOID CRISIS (Sept. 2018), <https://nashp.org/wp-content/uploads/2018/09/Children-and-Opioid-Epidemic-1.pdf> (highlighting effective strategies by Kentucky, New Hampshire, and Virginia to support families affected by OUD).

142. COLO. REV. STAT. § 19-1-103(1)(a)(VII) (2023). The definition of a neglected or dependent child is similar and laid out at *id.* § 19-3-102(1)(g).

143. COLO. REV. STAT. §§ 18-18-203, -204 (2022) (listing the controlled substances in Colorado).

prohibits the admission of any information relating to substance use obtained during a pregnancy screening, other prenatal or postpartum medical care, or behavioral-health treatment.<sup>144</sup> The mandatory reporting provisions of section 19-3-304 require physicians, nurses, and other healthcare professionals involved in obstetric and gynecological care to disclose their reasonable suspicions of prenatal substance exposure to law enforcement.<sup>145</sup> Given the mandatory reporting requirements, protections were necessary to ensure pregnant women could not be unfairly punished for seeking medical care. Colorado legislators recognized this necessity over ten years ago,<sup>146</sup> providing protection that increases the likelihood of continued prenatal care regardless of an individual's struggles with SUD.

In Oregon, healthcare organizations have implemented more hopeful models of maternity care and SUD treatment for pregnant women with SUD. One program offers prenatal, postpartum, and inpatient maternity care to pregnant women struggling with substance use, as well as pediatric care to their infants.<sup>147</sup> The program, appropriately titled "Project Nurture," began in 2015, and it ensures pregnant women receive outpatient substance use treatment by certified alcohol and drug counselors as well as the medication necessary to mitigate opioid use disorder (commonly methadone or buprenorphine). The program also affords pregnant women the prenatal care those in more punitive jurisdictions are scared to seek out and receive.<sup>148</sup> Since its inception, the program has reduced placement of children in foster care, increased prenatal visits, and decreased child mistreatment.<sup>149</sup> While the program is still in its infancy, if these results continue, it could lead to a decrease in overall state-budget expenditures related to competent child care and future healthcare costs across Oregon.<sup>150</sup>

States closer to home, including Kansas, have similar family-centric programs that provide substance use treatment and care to pregnant women

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144. *Id.* § 13-25-136.

145. *Id.* § 19-3-304.

146. The general assembly recognized that while "pregnancy can be a time of increased motivation to address their addictions out of concern for their unborn child," H.B. 12-1100, 68th Gen. Assemb., 2d Reg. Sess. § 1(d) (Colo. 2012), "[r]elatively few pregnant women with substance use issues . . . participate in treatment programs *often because of fear of criminal prosecution*," *id.* § 1(e) (emphasis added).

147. K. John McConnell et al., *Project Nurture Integrates Care and Services to Improve Outcomes for Opioid-Dependent Mothers and Their Children*, 39 HEALTH AFFS. 595, 596 (2020).

148. *Id.* at 596.

149. *Id.* at 598.

150. *Id.* at 600.



and their children by collaborating across health care, social services, child welfare, child development, criminal justice, and SUD sectors.<sup>151</sup> For example, the KC Perinatal Recovery Collaborative provides access to neonatal, residential, and outpatient care, employment and vocational opportunities, and family-friendly recovery housing to women in the Kansas City area.<sup>152</sup> The support offered by KC Perinatal is vital to current and expectant mothers as they navigate the dual journey of parenting and recovery.<sup>153</sup> By working together to coordinate efforts, state agencies ensure the effective use of financial resources and support each other in combatting the otherwise overwhelming problem of SUD, specifically, opioid abuse.<sup>154</sup> Further, outcomes for mothers that remain with their children are far better than those who cannot, as mothers in recovery that live with their children stay sober more often.<sup>155</sup> The coordination of these efforts takes extra planning and preparation and can be costly on the front end. The outcomes, however, are far preferable to strictly punitive measures that criminalize pregnant women who openly admit their struggles with substance use to their obstetrician or gynecologist.

States further away like Washington approach the problem of prenatal substance exposure differently. By prioritizing the availability of substance use treatment for pregnant women that have Medicaid coverage and a documented medical history of SUD, healthcare providers are taking steps to battle the many negative health effects of the disorder.<sup>156</sup> If an individual fulfills those prerequisites, they are eligible to participate in an inpatient program of up to twenty-six days, referred to as the Substance Using Pregnant People (SUPP) Program.<sup>157</sup> The purpose of SUPP is to reduce the harm to both the fetus and the birthing parent when complications related to chemical dependence arise during prenatal, postpartum, or maternity care.<sup>158</sup>

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151. Alex Smith, *Keeping Families Together As Mothers Undergo Recovery: A New Approach to Drug Dependency*, KCUR (Aug. 8, 2018, 5:00 AM), <https://www.kcur.org/health/2018-08-08/keeping-families-together-as-mothers-undergo-recovery-a-new-approach-to-drug-dependency>.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Substance Using Pregnant People (SUPP) Program*, WASH. STATE HEALTH CARE AUTH., <https://www.hca.wa.gov/free-or-low-cost-health-care/i-need-medical-dental-or-vision-care/substance-using-pregnant-people-supp-program> (last visited Sept. 10, 2023) (formerly known as the Chemical Using Pregnant Women Program).

157. *Id.*

158. *Id.*

SUPP further aims to provide immediate access to care, substance use treatment, medical detoxification and stabilization, and medical treatment in a hospital setting to improve the health of the pregnant individual and the unborn fetus.<sup>159</sup>

Some northern states have gone even further than simply prioritizing the availability of care by also providing a safety valve for pregnant women with SUD that request assistance. In May of 2019, Montana Governor Steve Bullock signed into law Senate Bill 289, codifying a safe harbor provision for any pregnant individual who seeks substance use treatment or care related to SUD during pregnancy.<sup>160</sup> The bill amended section 50-32-609 of the Montana Code, acknowledging certain Good Samaritan protections, and prohibiting criminal prosecution for possession of dangerous drugs,<sup>161</sup> possession of precursor to dangerous drugs,<sup>162</sup> or possession of drug paraphernalia.<sup>163</sup> While the protections of section 50-32-609 were previously limited only to those seeking medical assistance during an overdose or for another person experiencing an overdose, Senate Bill 289 extended this protection to any “pregnant woman seeking or receiving evaluation, treatment, or support services for a substance use disorder.”<sup>164</sup> The amended statute adds clarity and protection even for those pregnant women experiencing SUD that do not seek or receive evaluation, treatment, or support for their disorder.<sup>165</sup> This safe harbor provision effectively protects women from prosecution related to prenatal, postpartum, or maternal care and allows them to seek medical care without concern that their struggle with SUD will subject them to criminal prosecution or their child to state-sanctioned violence.

Taken together, these measures illustrate the best path forward for Oklahoma, as they effectively prioritize the health and safety of both child

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159. Press Release, MultiCare, New Unit at Good Samaritan Hospital Supports Pregnant Patients with Substance Use Disorder in Getting Much-Needed Care (July 19, 2022), <https://www.multicare.org/newsroom/2022/07/new-unit-at-good-samaritan-hospital-supports-pregnant-patients-with-substance-use-disorder-in-getting-much-needed-care/>.

160. S.B. 289, 2019 Mont. Laws ch. 265 (amending MONT. CODE ANN. § 50-32-609).

161. MONT. CODE ANN. § 45-9-102 (2021).

162. *Id.* § 45-9-107.

163. *Id.* § 45-10-103.

164. *Id.* § 50-32-609.

165. *Id.*

and mother by providing protection from prosecution, ensuring continued prenatal care, and improving access to mental health and SUD treatment.<sup>166</sup>

### *III. The Criminalization of Prenatal Substance Exposure*

Since the late 1970s, states have punished mothers for prenatal substance use according to three theories: abuse of the fetus due to the mother's substance use while pregnant, possession of controlled substances in either the bloodstream or bodily fluids of the infant, or distribution of controlled substances through the umbilical cord to the fetus.<sup>167</sup> Part III begins by presenting each of these approaches in turn, first focusing on abuse charges, and then moving to a simultaneous discussion of possession and distribution. Next, this part briefly analyzes the Supreme Court's decision in *Ferguson v. City of Charleston*. Finally, this part examines Oklahoma's recent application of the felony child neglect statute to pregnant women—and even their partners—for prenatal substance abuse.

#### *A. Prosecution Based on Child Abuse or Endangerment Statutes*

The first appellate case to consider whether mothers could be criminally prosecuted for child endangerment from prenatal substance use arose in California.<sup>168</sup> Margaret Velasquez Reyes was using heroin<sup>169</sup> and was warned by a public health nurse that if she continued to use heroin while pregnant without seeking prenatal medical care, she would endanger the life and health of her unborn child.<sup>170</sup> Reyes continued using heroin and failed to seek prenatal care.<sup>171</sup> Subsequently, on October 31, 1976, Reyes gave birth to twin

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166. See generally Cara Angelotta & Paul S. Appelbaum, *Criminal Charges for Child Harm from Substance Use in Pregnancy*, 45 J. AM. ACAD. PSYCHIATRY & L. 193 (2017). In this article, written by two psychiatrists, the authors analyzed twenty-four judicial opinions published between 1977 and 2015 and found that charges were dismissed, or convictions were overturned, in 86% of cases. *Id.* at 194. Going a step further, the authors advocate for “treatment oriented” dispositions for those convicted, recommending that psychiatrists be employed by drug treatment programs “to ensure that any court-compelled treatment meets the complex medical and psychosocial needs of pregnant women with substance use disorders.” *Id.* at 202.

167. James G. Hodge, Annotation, *Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child*, 70 A.L.R. 5TH 461 § 1 (1999).

168. *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Ct. App. 1977).

169. *Id.* at 912.

170. *Id.* at 912-13.

171. *Id.* at 913.

boys suffering from heroin withdrawal<sup>172</sup> and was charged with two counts of felony child endangerment in violation of California law.<sup>173</sup> The California Court of Appeals for the Fourth District ultimately determined that “the word ‘child’ as used in Penal Code section 273a, subdivision (1) was not intended to refer to an unborn child,” and thus Reyes’ conduct could not constitute felonious child endangerment as contemplated by the statute.<sup>174</sup>

Over twenty years passed before a state recognized that a fetus could be considered a child under a child-neglect statute.<sup>175</sup> In South Carolina, Cornelia Whitner pled guilty to criminal child neglect after her baby was born with cocaine metabolites in its system due to Whitner’s ingestion of cocaine during the third trimester.<sup>176</sup> Whitner filed a petition for post-conviction relief, arguing that the court lacked subject matter jurisdiction to accept her guilty plea of a nonexistent offense.<sup>177</sup> As it was written, the child neglect statute provided for punishment of those who “refuse or neglect to provide . . . the proper care and attention . . . so that the life, health or comfort of such child or helpless person is endangered.”<sup>178</sup> The South Carolina Supreme Court rejected Whitner’s argument that fetuses fell outside the definition of “helpless person” or “child,” relying on previous rulings that construed a viable fetus as a person in the civil liability context.<sup>179</sup>

Six years prior, the Florida District Court of Appeal addressed the issue.<sup>180</sup> Cassandra Gethers was charged with aggravated child abuse for causing injuries to her unborn child by ingesting cocaine prior to birth.<sup>181</sup> Gethers moved to dismiss her charges, arguing that her conduct was not covered under the statute. She relied on *Love v. State*, a case in which the court determined an unborn fetus did not fall within the statutory definition of “person.”<sup>182</sup> The trial court agreed.<sup>183</sup> The appellate court concurred, relying

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172. *Id.*

173. *Id.* at 912.

174. *Id.* at 913 (construing CAL. PENAL CODE § 273a(1) (1965)).

175. *Whitner v. State*, 492 S.E.2d 777, 778 (S.C. 1997).

176. *Id.* at 778-79.

177. *Id.* at 779.

178. S.C. CODE ANN. § 20-7-50 (1985), *quoted in Whitner*, 492 S.E.2d at 779.

179. *See Whitner*, 492 S.E.2d at 780.

180. *State v. Gethers*, 585 So. 2d 1140, 1140-41 (Fla. Dist. Ct. App. 1991).

181. *Id.* (citing FLA. STAT. ANN. § 827.04 (1987)).

182. 450 So. 2d 1191, 1193 (Fla. Dist. Ct. App. 1984) (holding, in a case where a woman was seven-and-one-half months pregnant and her unborn fetus was struck with a bullet that caused fatal injury, that Florida’s then-existing battery statutes did not apply, as an unborn fetus was not definitionally considered a “person”), *cited in Gethers*, 585 So. 2d at 1141.

183. *Gethers*, 585 So. 2d at 1141.

on a law review article<sup>184</sup> that illustrated the legislature's intention was never "to arrest moms"<sup>185</sup> but rather to keep families intact "by enhancing the parental capacity for adequate child care."<sup>186</sup> Even though the article was written in the 1980s, the author recognized the destructive familial consequences of incarcerating a child's mother. The author also recognized a pregnant woman's justifiable motivation to avoid prenatal care or the termination of their pregnancy under dangerous circumstances<sup>187</sup>—factors which the court deemed notable enough to include in the record.<sup>188</sup>

Through a smattering of decisions in the early 1990s, various states fell in line, similarly holding that mothers could not be prosecuted under child neglect statutes for their prenatal substance use. In January 1992, the City Court of Geneva, New York, examined numerous definitions of "child"<sup>189</sup> and held that the legislature intended to exclude those "yet to be born" from application of New York's child abuse statute.<sup>190</sup> The following month, the Ohio Supreme Court affirmed a mother's motion to dismiss, concluding that the relevant child neglect statute did not create a duty which could be breached upon a parent's prenatal substance use.<sup>191</sup> Also in 1993, the Kentucky Supreme Court rejected application of its child neglect statute to prenatal substance use because the law required wanton abuse, and there was no evidence of intention accompanying the mother's prenatal substance abuse.<sup>192</sup> Just over a year later, the Nevada Supreme Court joined the likes of Ohio and Kentucky, holding that Nevada's child neglect law was not intended to "criminalize the conduct of women who ingest any substance"

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184. Brian C. Spitzer, *A Response to "Cocaine Babies"—Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent*, 15 FLA. ST. U. L. REV. 865 (1987).

185. *Id.* at 878.

186. *Gethers*, 585 So. 2d at 1143.

187. *See* Spitzer, *supra* note 184, at 881.

188. *Gethers*, 585 So. 2d at 1143.

189. *People v. Morabito*, 580 N.Y.S.2d 843, 844-45 (Geneva City Ct. 1992).

190. *Id.* at 847 (construing N.Y. PENAL LAW § 260.10 (McKinney 1990)) (rejecting application of child neglect statute to mother who smoked cocaine during late pregnancy).

191. *State v. Gray*, 584 N.E.2d 710, 713 (Ohio 1992) (construing OHIO REV. CODE ANN. § 2919.22 (West 1992)). Specifically, the Ohio Supreme Court held that the statute did "not apply where a mother abuses drugs during her pregnancy," *id.*, and that her child was not under "contemplation of the statute until she was born," *id.* at 711.

192. *Commonwealth v. Welch*, 864 S.W.2d 280, 280-83 (Ky. 1993) (construing KY. REV. STAT. ANN. § 508.110 (West 1982)) (detailing case in which mother was arrested during the execution of a search warrant on the house of a suspected drug dealer, in possession of oxycodone, syringes, and admittedly under the influence of intravenous oxycodone, having just injected a dose of the drug into her jugular vein).

that might harm her fetus.<sup>193</sup> Texas, through the Court of Appeals of El Paso, additionally determined that the state could not prosecute mothers for their prenatal ingestion of cocaine “even if it caused the fetus to suffer pain or impairment.”<sup>194</sup>

Applying similar reasoning in the mid-1990s, the Arizona Court of Appeals remarked that extending the state’s child neglect law to cover prenatal conduct that causes harm after birth would render the law impermissibly broad and ill-defined because “[m]any types of prenatal conduct can harm a fetus.”<sup>195</sup> Over ten years passed from that decision before Maryland considered the issue, turning to legislative intent when extending its murder and manslaughter statutes to a viable fetus.<sup>196</sup> Because the Maryland legislature explicitly decreed in the statute that “[n]othing in this section applies to an act or failure to act of a pregnant woman with regard to her own fetus,” the court found an express intent to reject criminalization of prenatal substance use.<sup>197</sup> In recent years, only two states have confronted the issue of prenatal substance use through child neglect or endangerment statutes. Both joined South Carolina, holding that their respective statutory definitions of “child” include unborn children—first Alabama in 2013,<sup>198</sup> and then Oklahoma in 2020, as discussed below.<sup>199</sup>

#### *B. Prosecution Based on Possession in or Distribution of Controlled Substances to a Fetus*

While some states were attempting to decrease prenatal substance use by prosecuting women for child neglect, overzealous district attorneys in other states were proceeding under the assumption that possession or distribution of controlled substances in the fetus could be grounds for criminal liability.

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193. *Sheriff v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (construing NEV. REV. STAT. ANN. § 200.508 (2015)). The court held also that child neglect charges, brought upon a mother’s prenatal ingestion of methamphetamines and resulting transmission of those and other toxic substances through the umbilical cord, were improper. *Id.*

194. *Collins v. State*, 890 S.W.2d 893, 898 (Tex. App. 1994).

195. *Reinesto v. Superior Court*, 894 P.2d 733, 736 (Ariz. Ct. App. 1995). The court listed a smorgasbord of possible activities which might constitute child neglect under such a definition—smoking, drinking, failure to obtain prenatal care, improper nutrition, insufficient or excessive weight gain, caffeine consumption, and exposure to environmental hazards, such as solvents. *Id.* at 736-37. The court also cited to relevant medical research supporting findings of fetal harm in each instance. *Id.*

196. *See Kilmon v. State*, 905 A.2d 306, 312-15 (Md. 2006) (construing MD. CODE ANN., CRIM. LAW § 2-103 (West 2013)).

197. *Id.* at 313 (quoting MD. CODE ANN., CRIM. LAW § 2-103).

198. *Ex parte Ankrom*, 152 So.3d 397 (Ala. 2013).

199. *State v. Green*, 2020 OK CR 18, ¶¶ 1-2, 474 P.3d 886, 891.

In 1993, the same year Kentucky rejected prosecution of prenatal substance use,<sup>200</sup> the Massachusetts Supreme Court recognized that mothers engaged in prenatal substance use could be prosecuted for drug possession if their children's urine had traces of narcotics at birth.<sup>201</sup> Two months after giving birth to a little boy, Josephine Pellegrini took her son to the hospital with small burns on his toes, which doctors determined were caused by extinguishing lit cigarettes on his skin.<sup>202</sup> During a subsequent grand jury indictment, the prosecutor presented evidence that Pellegrini admitted to police that she ingested cocaine while pregnant, and she was ultimately indicted for violating Massachusetts's child neglect law.<sup>203</sup> The trial judge dismissed the charge and ruled that evidentiary use of a newborn's urinalysis was improper outside of a child neglect proceeding.<sup>204</sup> The Massachusetts Supreme Court, however, rejected this ruling and overturned the dismissal, remanding the case for further proceedings.<sup>205</sup>

Of the other states that considered instituting a criminal penalty based on possession in or distribution of controlled substances to the fetus, none have ultimately stuck to that decision. Although a Florida trial court initially ruled that prosecution for delivery of cocaine through the umbilical cord was proper under Florida's drug distribution law, the Florida Supreme Court quashed that decision and remanded the case.<sup>206</sup> That same year, after Traci Jackson gave birth to a stillborn baby in the bathroom of a cocaine dealer's house, a Texas appellate court ruled that application of a Texas law, which prohibited the possession of cocaine, was inappropriate.<sup>207</sup> Like its southern neighbor, Georgia has not allowed prosecution under drug distribution laws, as they do not put mothers on notice that they will be prosecuted for conduct

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200. *Commonwealth v. Welch*, 864 S.W.2d 280, 281 (Ky. 1993).

201. *Commonwealth v. Pellegrini*, 608 N.E.2d 717, 718-19 (Mass. 1993).

202. *Id.* at 719.

203. *See id.* at 718-19 (citing MASS. GEN. LAWS ANN. ch. 94C, § 34 (West 1990)).

204. *Id.* at 718 (citing MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1990)).

205. *Id.* at 722.

206. *Johnson v. State*, 578 So. 2d 419, 419-20 (Fla. 1991), *rev'd*, 602 So. 2d 1288, 1297 (Fla. 1992) (construing FLA. STAT. ANN. § 893.13(1)(c) (1989)).

207. *Jackson v. State*, 833 S.W.2d 220, 221-22, 226 (Tex. App. 1992) (citing TEX. PENAL CODE ANN. § 1.07(a)(11)(B) (Vernon 1974)). The court opined on the difficulty of convicting someone of drug possession when the amount possessed cannot be seen or measured, reflecting that the .04 milligrams of cocaine in Traci's stillborn baby's liver was significantly less than the .6 milligrams found in *Campbell v. State* to be insufficient for "knowing" possession. *Id.* at 226 (citing *Campbell v. State*, 822 S.W.2d 776, 777 (Tex. App. 1992)).

such as ingesting cocaine while pregnant.<sup>208</sup> This is not merely a southern view, however, as just one year prior, Michigan held that the legislative intent behind its drug distribution law did not support prosecuting a mother for her prenatal ingestion of cocaine.<sup>209</sup>

From the overall treatment in various courts across the United States,<sup>210</sup> criminal prosecution for prenatal substance use appears unpopular among the legal community. At least five different state courts have found evidence of prenatal substance use to be prejudicial and inflammatory and thus inadmissible, as it is typically tenuously related to the case at hand.<sup>211</sup> As states have interpreted their child neglect statutes, a clear pattern of deference to mothers has emerged. This might be due to the similarity among various states' child neglect or endangerment statutes; however, given the substantial difference that exists from state to state, this is unlikely. It is more probable that the arguments raised by litigants are similar, which is causing courts to decide cases along similar lines of reasoning. For example, many litigants argue that the statutory definition of "child" does not include a fetus; thus, child neglect and endangerment statutes should not apply.<sup>212</sup> This commonly raised argument pushes judges to apply tools of statutory interpretation, which require judges to examine other state statutes defining children,<sup>213</sup> the ordinary meaning of "children," legislative history, or various dictionaries<sup>214</sup>

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208. See, e.g., *State v. Luster*, 419 S.E.2d 32, 33-34 (Ga. Ct. App. 1992) (construing GA. CODE ANN. § 16-13-30(b)).

209. See *People v. Hardy*, 469 N.W.2d 50, 52-53 (Mich. Ct. App. 1991) (construing MICH. COMP. LAWS § 333.7401(2)(a)(iv) (1989)).

210. In summary, only four states discussed herein—South Carolina, Massachusetts, Alabama, and Oklahoma—support criminal prosecution of prenatal substance use on some theory. Eleven other states—California, Kentucky, New York, Ohio, Nevada, Texas, Florida, Arizona, Maryland, Georgia, and Michigan—reject such criminalization of conduct by pregnant women.

211. *People v. Bedenkop*, 625 N.E.2d 123, 126 (Ill. App. Ct. 1993); *People v. Zaring*, 10 Cal. Rptr. 2d 263, 268-69 (Ct. App. 1992); *People v. Moten*, 280 Cal. Rptr. 602, 606 (Ct. App. 1991); see also *State v. Stegall*, 828 N.W.2d 526, 533 (N.D. 2013) (stating that a viable fetus is not a child for purposes of criminal prosecution of a mother who ingests a controlled substance during pregnancy); *State v. Eagle Hawk*, 411 N.W.2d 120, 125-26 (S.D. 1987) (stating that the admittance of evidence should require a probative value that exceeds its prejudicial effect).

212. *Reyes v. Superior Court*, 141 Cal. Rptr. 912, 913 (Ct. App. 1977); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993); *State v. Gray*, 584 N.E.2d 710, 711 (Ohio 1992); *Whitner v. State*, 492 S.E.2d 777, 778-80 (S.C. 1997).

213. *Reyes*, 141 Cal. Rptr. at 913; *Welch*, 864 S.W.2d at 284; *Gray*, 584 N.E.2d at 712; *Whitner*, 492 S.E.2d at 779-80.

214. *People v. Morabito*, 580 N.Y.S.2d 843, 846-47 (Geneva City Ct. 1992); *State v. Luster*, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992).



before coming to an ultimate decision as to whether “child” includes a fetus. With such heavy reliance placed on interpreting the meaning of the word “child,” fetal personhood laws, as discussed more fully in below, are expected to be the next battleground in this area of the law.<sup>215</sup>

### *C. Relevant Supreme Court Case Law*

Given the severity of the opioid epidemic, some law enforcement officials, state legislators, and even healthcare professionals might think it prudent to utilize drug screening results taken during prenatal, postpartum, or maternal care for later criminal prosecutions. As anxieties around the crack-cocaine epidemic reached new heights, medical providers at Charleston public hospital became concerned with an increase in cocaine use by patients receiving prenatal treatment.<sup>216</sup> Acting on this concern, the hospital formed a task force of hospital officials, police, and community representatives to address the issue.<sup>217</sup> When referring patients to substance use treatment and counseling proved unsuccessful, the task force instead began methodically identifying and testing patients suspected of drug use.<sup>218</sup> Patients that tested positive for cocaine had their urine samples retained for use in later criminal prosecutions, with hospital staff adhering to stringent chain-of-custody requirements, and even recommending prosecution for drug offenses and child neglect.<sup>219</sup>

Ten women who received care from the hospital and were subsequently arrested after testing positive for cocaine filed suit against members of the task force. They alleged both lack of consent and lack of a warrant violated fundamental Fourth Amendment protections.<sup>220</sup> Because the Charleston public hospital is a state hospital, the Court found the healthcare professionals performing the urine tests were government actors, and therefore the urine tests themselves were searches falling firmly within the Fourth Amendment’s warrant requirement.<sup>221</sup> Ultimately, the case was remanded to determine whether the petitioners ever provided informed consent to the hospital, as North Carolina’s special interest in deterring

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215. Madeleine Carlisle, *Fetal Personhood Laws Are a New Frontier in the Battle Over Reproductive Rights*, TIME (June 28, 2022, 4:40 PM), <https://time.com/6191886/fetal-personhood-laws-roe-abortion/>.

216. *Ferguson v. City of Charleston*, 532 U.S. 67, 70 (2001).

217. *Id.* at 71.

218. *Id.*

219. *Id.* at 71-72.

220. *See id.* at 73.

221. *Id.* at 76.

pregnant women from substance use could not be said to justify a special-needs departure relaxing the warrant requirement of the Fourth Amendment.<sup>222</sup> While *Ferguson* provides fundamental protections to pregnant women suffering from SUD, it neglects to shield women at private hospitals, women likely to provide informed consent without realizing the consequences, or women without other options for healthcare service.

*D. Expanded Application of Oklahoma's Felony Child Neglect Statute*

With the expansion of fetal-personhood legislation across the United States, various courts—including those in Oklahoma—have crafted rights of fetal personhood. Two years ago, the Oklahoma Court of Criminal Appeals interpreted the legislative purpose behind the felony child neglect statute to include not just the protection of vulnerable children but also the protection of vulnerable *unborn* children.<sup>223</sup> In 2017, Kathryn Juanita Green gave birth to a stillborn son, and she placed his body in a wooden box in a dumpster outside her home.<sup>224</sup> After police located the body, a medical examiner performed an autopsy, discovering signs of methamphetamine toxicity.<sup>225</sup> Green was charged with felony child neglect in violation of title 21, section 843.5(C) of the Oklahoma Statutes (“Oklahoma Child Neglect Statute”).<sup>226</sup> The State of Oklahoma alleged Green willfully or maliciously neglected her unborn child by failing to protect her fetus from exposure to illegal drugs.<sup>227</sup>

The Oklahoma Court of Criminal Appeals rejected the reasoning of the trial court, which placed significant emphasis on the Oklahoma Child Neglect Statute’s incorporation by reference to the definition of “neglect” laid out in title 10A, section 1-1-105(49) of the Oklahoma Statutes.<sup>228</sup> Title 10A is the “Children and Juvenile Code,” wherein neglect is defined a number of ways, including “the failure . . . to protect a child from exposure to . . . the use, possession, sale, or manufacture of illegal drugs.”<sup>229</sup> Relying on this reference, the lower court inferred that the Oklahoma legislature intended to incorporate the definition of “child” laid out therein as well—“any unmarried person under eighteen (18) years of age.”<sup>230</sup> But the Court of

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222. *Id.* at 86.

223. *State v. Green*, 2020 OK CR 18, ¶ 12, 474 P.3d 886, 891 (referencing 21 OKLA. STAT. § 843.5(C) (2021)).

224. *Id.* ¶ 3, 474 P.3d at 888.

225. *Id.*

226. *Id.* ¶ 1, 474 P.3d at 887.

227. *Id.*

228. *Id.* ¶ 6, 474 P.3d at 889.

229. 10A OKLA. STAT. § 1-1-105(49)(a)(2)(a) (2023).

230. *Green*, ¶ 7, 474 P.3d at 892 (quoting 10A OKLA. STAT. § 1-1-105(8) (2023)).

Criminal Appeals viewed this as an error.<sup>231</sup> According to the court, there is “no need to borrow or incorporate further definition of whom” the Oklahoma Child Neglect Statute protects because its unambiguous language defines child as anyone under eighteen years of age.<sup>232</sup>

With the statutory definition of “child” failing to support Green’s argument that she had not engaged in child neglect, she urged the court to review a case involving emergency custody and prenatal use of methamphetamine.<sup>233</sup> In that case, after Julie Starks was arrested for the manufacture and possession of methamphetamine, she was brought before the court and an emergency juvenile proceeding was held.<sup>234</sup> The proceeding ultimately resulted in the trial court taking “emergency custody of [Starks’s] viable fetus” due to the court’s belief that “[Starks’s] fetus potentially would be harmed if [Starks] were released from jail.”<sup>235</sup> Because the Oklahoma Children’s Code was devoid of any reference to a fetus or a pregnant woman, the Oklahoma Supreme Court found the legislature lacked the intent to so include either.<sup>236</sup>

In rejecting this argument, the Court of Criminal Appeals relied on another case, which it found controlling, where the defendant was charged with manslaughter after drunkenly driving her car into another woman who was nine months pregnant and due to give birth in just four days.<sup>237</sup> The court held that the legislature’s purpose in enacting title 21, section 691 of the Oklahoma Statutes was “to protect human life.”<sup>238</sup> Accordingly, the court held that a “viable human fetus is nothing less than human life” and that the term “human being” as contained in section 691 “includes a viable human fetus.”<sup>239</sup>

Searching for the legislative purpose behind the Oklahoma Child Neglect Statute, the court determined the purpose is “ultimately to protect [children] from abuse, neglect, or exploitation,” as they are especially vulnerable members of society.<sup>240</sup> Thus, because a fetus still “several weeks away from

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231. *Id.*

232. *Id.*

233. *Id.* ¶ 9, 474 P.3d at 890 (discussing the relevance of *Starks v. State*, 2001 OK 6, ¶ 3, 18 P.3d 342).

234. *Starks*, 2001 OK 6, ¶ 3, 18 P.3d at 343.

235. *Id.*

236. *Id.* ¶ 18, 18 P.3d at 347.

237. *Green*, ¶ 11, 474 P.3d at 890-91 (citing *Hughes v. State*, 1994 OK CR 3, ¶ 15, 868 P.2d 730, 734).

238. *Id.* (citing *Hughes*, 1994 OK CR 3, ¶ 15, 868 P.2d at 734).

239. *Id.* (citing *Hughes*, 1994 OK CR 3, ¶ 15, 868 P.2d at 734).

240. *See id.* ¶ 12, 474 P.3d at 891.

birth . . . is every bit as vulnerable to and in need of protection from neglect” as is a child who has been born for one minute, the court found the legislature likely intended fetuses to be included in the statutory definition of child.<sup>241</sup> Interpreting the Oklahoma Child Neglect Statute to deny protection to a fetus would thwart the tendency of Oklahoma law “to protect children, born and unborn, from potential harm.”<sup>242</sup>

Lastly, the Oklahoma legislature, clearing up any possible ambiguity, amended the definition of “human being” at issue in *Hughes* in 2006 to include “an unborn child.”<sup>243</sup> This amendment further describes the term “unborn child” through reference to another statutory provision where the term is defined as “the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo, and fetus.”<sup>244</sup>

Less than nine months after *Green*, the Oklahoma Court of Criminal Appeals expanded its holding, allowing for criminal liability to extend beyond the pregnant mother to the father of an unborn fetus.<sup>245</sup> Kelvin Allen and Tami Ware were both charged with felony child neglect and conspiracy to commit child neglect<sup>246</sup> for willfully or maliciously neglecting to protect their unborn daughter from prenatal exposure to illegal drugs.<sup>247</sup> Both parents admitted their knowledge of the harm methamphetamine use could have during pregnancy, and Allen admitted he purchased drugs for Ware while she was pregnant.<sup>248</sup> Thus, the Court of Criminal Appeals relied on and extended the holding of *Green*, finding that Allen willfully and maliciously neglected his child by subjecting her to illegal drugs prenatally.<sup>249</sup> Judge Lumpkin wrote a special concurring opinion to point out that, when applying Oklahoma’s criminal laws the Oklahoma Court of Criminal Appeals does not consider how the medical community describes the development of a child in the womb.<sup>250</sup>

Given the recent decision by the Oklahoma Court of Criminal Appeals in *Green* to expand the definition of child to include a fetus for purposes of the Oklahoma Child Neglect Statute, prosecutions against pregnant women for

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241. *Id.*

242. *Id.*

243. *Id.* ¶ 13, 474 P.3d at 891.

244. 63 OKLA. STAT. § 1-730(4) (2023), *quoted in Green*, ¶ 13, 474 P.3d at 891.

245. *See State v. Allen*, 2021 OK CR 14, ¶ 2, 8 492 P.3d 27, 28-29.

246. *Id.* ¶ 1, 492 P.3d at 28.

247. *Id.* ¶ 2, 492 P.3d at 28.

248. *Id.* ¶ 5, 492 P.3d at 29.

249. *Id.* ¶ 8, 492 P.3d at 29.

250. *Id.* ¶ 2, 492 P.3d at 30 (Lumpkin, J., specially concurring).

child neglect will likely increase. With the court's decision in *Allen*, however, criminal liability is no longer limited to women. Although Oklahoma has only charged pregnant women for prenatal use of medical marijuana, the probability is high that the State will soon charge fathers of substance-afflicted children or the romantic partners of those engaged in prenatal medical marijuana use. While pregnant women should not be prosecuted for their prenatal substance use, the connection between a father or boyfriend who supplies substances for a pregnant woman is even more tenuous. If the State of Oklahoma wishes to bring child neglect or endangerment charges under the Oklahoma Child Neglect Statute against a woman's romantic partner, it ought to be required to prove the individual intended for the woman to use the substance to harm the fetus. Although Oklahoma's spring special election for recreational marijuana did not pass,<sup>251</sup> and Oklahoma's marijuana licenses are limited to medical licenses, prenatal substance exposure to marijuana will likely continue to increase as more marijuana grown for the recreational market ends up in illicit markets.<sup>252</sup> Under current Oklahoma law, this increase in prenatal substance exposure will likely correspond to an increase in the number of criminal charges brought against pregnant women.

In the summer of 2018, State Question 788 passed by majority popular vote of Oklahoma citizens. This ballot initiative allowed for licensed medical professionals to prescribe medical marijuana to those in need of a prescription for some valid medical purpose.<sup>253</sup> By January of 2019, Oklahoma legislators began working on passage of House Bill 2612, otherwise known as the Oklahoma Medical Marijuana and Patient Protection Act.<sup>254</sup> This Act created the OMMA, the entity responsible for establishing

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251. J. David Goodman, *With a Marijuana Shop on 'Every Corner,' Oklahoma Rejects Full Legalization*, N.Y. TIMES (Mar. 7, 2023), <https://www.nytimes.com/2023/03/07/us/oklahoma-marijuana-ballot.html>.

252. CANNABIS PUBLIC POLICY CONSULTING, AN EMPIRICAL ASSESSMENT OF OKLAHOMA'S MEDICAL MARIJUANA MARKET (June 2023), <https://oklahoma.gov/content/dam/ok/en/omma/content/supply-and-demand-study/EmpiricalAssessmentofOklahomasMedicalMarijuanaMarket.pdf>. In this 2023 study commissioned by the Oklahoma Medical Marijuana authority, the supply-to-demand ratio of regulated medical marijuana supply to regulated medical cannabis demand was found to be 64 to 1. *Id.*

253. Nick Hazelrigg, *Oklahoma Gov. Mary Fallin Releases Statement Following Passage of Medical Marijuana State Question*, OU DAILY (June 27, 2018), [https://www.oudaily.com/news/oklahoma-gov-mary-fallin-releases-statement-following-passage-of-medical-marijuana-state-question/article\\_f04fd744-79b3-11e8-8d81-3fab52f1891.html](https://www.oudaily.com/news/oklahoma-gov-mary-fallin-releases-statement-following-passage-of-medical-marijuana-state-question/article_f04fd744-79b3-11e8-8d81-3fab52f1891.html).

254. H.B. 2612, 57th Leg., Reg. Sess. (Okla. 2019).

and controlling the regulatory framework for medical marijuana.<sup>255</sup> House Bill 2612 was ultimately signed into law on March 14, 2019 by Governor Kevin Stitt.<sup>256</sup> Remarkably vacant from the Oklahoma Medical Marijuana and Patient Protection Act is any carve out providing protection for pregnant women suffering from SUD.<sup>257</sup>

#### IV. Proposed Reform Measures

If the Oklahoma Court of Criminal Appeals was correct in *Green*, then the legislative purpose behind Oklahoma's Child Neglect Statute is "to protect [children] from abuse, neglect, or exploitation," and all of Oklahoma law tends "to protect children, born and unborn, from potential harm."<sup>258</sup> While that is an admirable purpose, incarcerating pregnant women for utilizing medical marijuana under a physician's recommendation fails to meaningfully advance that purpose. The opposite is true, and, by incarcerating those individuals, Oklahoma is committing acts of state-sanctioned violence through the harm inflicted on children born in carceral facilities.<sup>259</sup> The opioid epidemic caused valid concerns among healthcare professionals, lawmakers, and the general public regarding prenatal substance exposure.<sup>260</sup> Those concerns are best addressed, however, by prioritizing the health and safety of mother and child through increased access to addiction treatment and medical care,<sup>261</sup> not continued adherence to the failed and deleterious War on Drugs.<sup>262</sup> Finally, Oklahoma's unique medical marijuana framework necessitates that the Oklahoma legislature continue to implement statutes that protect patients.<sup>263</sup>

This final segment discusses solutions to the problem posed by the Oklahoma Child Neglect Statute considering State Question 788's unique enactment and the lack of any subsequent legislation providing patients with

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255. *Id.*

256. See David Dishman, *Stitt Signs Unity Bill Regulating Oklahoma Medical Marijuana Industry*, OKLAHOMAN (Mar. 15, 2019), <https://www.oklahoman.com/story/business/columns/2019/03/15/stitt-signs-unity-bill/60467230007/>.

257. See generally H.B. 2612, 57th Leg., Reg. Sess. (Okla. 2019). A review of the legislative history does not show any evidence such a protection was contemplated or discussed, as no mention of pregnancy appeared in any of the six versions of the bill presented.

258. *State v. Green*, 2020 OK CR 18, ¶ 12, 474 P.3d 886, 891.

259. This harm is inflicted by way of increased risk of negative potential birth outcomes. See *supra* notes 92-95 and accompanying text.

260. See *supra* Sections II.A.2, II.B.1, II.B.2.

261. See *infra* Section IV.D.

262. See *supra* Section II.A.1.

263. See *infra* Section IV.B.

necessary protections. First, as the nationwide view shifts away from drug addiction being immoral, in line with what healthcare professionals agree is appropriate, Oklahomans who agree with that view must continue to voice this view at the polls. Next, state law should afford protections to pregnant women utilizing medical marijuana and those suffering from SUD so they are not disincentivized from seeking vital prenatal, postpartum, and maternal care. More specifically, those providing such necessary and vital care ought not be deputized into serving as evidence collectors for the State of Oklahoma. Finally, Oklahoma must improve the availability of mental health resources inside and outside of prison and reserve space specifically for pregnant women attempting to seek treatment; only then can Oklahoma effectively prioritize the health and safety of its mothers and children.

*A. Continue Showing Up at the Polls*

As exhibited in June of 2018, a considerable portion of Oklahomans no longer consider the use of marijuana to be immoral, or, at least, they are willing to allow for such behavior when limited to medicinal purposes.<sup>264</sup> This view comports with that of healthcare professionals,<sup>265</sup> as well as the law in 37 other states, the District of Columbia, and four U.S. territories.<sup>266</sup> Simultaneously, prosecutors in rural counties of Oklahoma, such as Kay and Comanche, have reinjected morality into their prosecutorial decisions, and Oklahoman mothers and children are paying the price.<sup>267</sup> For example, Kay County District Attorney Brian Hermanson has stated that he “feels he is doing God’s work” as a prosecutor.<sup>268</sup> “God’s work” ostensibly includes prosecuting women for drug use during pregnancy; while Hermanson estimates that he has prosecuted only between twenty to thirty women for using drugs during their pregnancies in recent years, he charged at least seven women with child neglect for using marijuana while pregnant in 2020

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264. See Hazelrigg, *supra* note 253.

265. See Behnke et al., *supra* note 82, at 1012-13.

266. Marc Ramirez, *Biden Pardons Federally Convicted Marijuana Users. Here’s Where Marijuana Laws Stand in Each State*, USA TODAY (Oct. 7, 2022, 11:35 AM), <https://www.usatoday.com/story/news/nation/2022/10/06/how-many-states-have-legalized-marijuana-cannabis-laws-unpacked/8200166001/>. The four territories are Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. *Id.*

267. See *supra* notes 1-5 and accompanying text.

268. Emily Buchanan Hart, *Brian Hermanson Brings Service Leadership to His Role as 2023 OBA President*, OKLA. BAR J., Jan. 2023, at 35, 36.

alone.<sup>269</sup> At least some members of the Oklahoma legal community tolerate his view as Hermanson began serving as the Oklahoma Bar Association President on January 1, 2023,<sup>270</sup> a position that requires a nominating petition with the signatures of at least fifty members.<sup>271</sup>

Former Assistant District Attorney Christine Galbraith has similar views regarding prenatal substance use, arguing that a defendant with SUD “chose meth over” her child’s life after she miscarried between fifteen- and seventeen-weeks gestational age.<sup>272</sup> Not unlike Hermanson, Galbraith’s views have garnered tacit approval from her colleagues. She was recently appointed and sworn in as Special District Judge, a position that is chosen by the elected district judges in Comanche County from a list of qualified applicants.<sup>273</sup>

Despite Oklahomans unequivocally voicing their approval of medical marijuana through State Question 788, the legal community seems to have retained the view that prenatal substance exposure and, more specifically, prenatal marijuana exposure, remains immoral and demands carceral punishment. With State Question 820 failing to pass in March of 2023, Oklahoma citizens are not yet in favor of recreational marijuana use.<sup>274</sup> The recreational marijuana referendum need not have passed for legislators to amend the Oklahoma Child Neglect Statute, but it would have served as continued evidence that the people of Oklahoma do not approve of such prosecutions. In the wake of State Question 820’s failure, Oklahoma citizens

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269. Kassie McClung & Brianna Bailey, *She Was Charged with Manslaughter After a Miscarriage. Cases Like Hers Are Becoming More Common in Oklahoma*, FRONTIER (Jan. 7, 2022), <https://www.readfrontier.org/stories/she-was-charged-with-manslaughter-after-a-miscarriage-cases-like-hers-are-becoming-more-common-in-oklahoma/>. Hermanson claims he is enforcing the law according to the Oklahoma Court of Criminal Appeals. *Id.*

270. See Hart, *supra* note 268, at 35.

271. 5 OKLA. STAT. app. 2, art. III, § 1(c) (2023), OK ST BAR BYLAWS Art. 3, § 1 (Westlaw) (setting forth are the rules for election of the Oklahoma Bar Association’s officers) (“Not less than sixty (60) days before the opening of the annual meeting of the Association in each year, fifty (50) or more voting members of the Association may file with the Executive Director a signed petition nominating a candidate for the office of President-Elect . . .”). Also, the president is to be “elected each year in the manner prescribed by its Bylaws.” 5 OKLA. STAT. app. 1, art. V, § 1 (2023), OK ST BAR RULES Art. 5, § 1 (Westlaw).

272. McClung & Bailey, *supra* note 269.

273. *New Judges Take Oath in Comanche County*, LAWTON CONST. (Jan. 10, 2023), <https://perma.cc/8H5V-D9TE>; Scott Rains, *Sheperd Appointed Comanche County’s Newest Special District Judge*, LAWTON CONST. (Jan. 10, 2019), [https://www.swoknews.com/sheperd-appointed-comanche-countys-newest-special-district-judge/article\\_6080a191-fdee-5c98-bf26-899d36b88230.html](https://www.swoknews.com/sheperd-appointed-comanche-countys-newest-special-district-judge/article_6080a191-fdee-5c98-bf26-899d36b88230.html).

274. Goodman, *supra* note 251.



must consider their options carefully when voting in local elections if they would prefer to see different results. When considering options for local officials, electors ought to pay special attention to the policies of district attorney candidates as district attorneys wield immense discretion in prosecuting crime and hold their office for four-year terms.<sup>275</sup> The choices for district judge are no less important given their power during trials and ample discretion in sentencing criminal defendants.

*B. Provide Evidentiary and Prosecutorial Protections for People Seeking Pregnancy Care*

Fortunately for Oklahoma legislators, several states have already provided protection to pregnant women seeking medical care through various statutory means.<sup>276</sup> Colorado, for example, still includes exposure to alcohol and other substances at birth as one possible definition of child abuse.<sup>277</sup> Despite this inclusion, there is an exception when the substance is “taken as prescribed or recommended and monitored by a licensed health-care provider.”<sup>278</sup> Incorporating such language into Oklahoma’s statutory code would be an efficient means to prohibit prosecution for prenatal marijuana exposure in the short term. However, such language does not go far enough to protect Oklahomans capable of pregnancy. Under this language, a prosecutor could still bring charges by alleging marijuana use either exceeded a physician’s recommendation or was not being taken as prescribed.

Rather than leave individuals vulnerable to clever prosecutorial attacks, Oklahoma legislators must enact concrete evidentiary protections. By mirroring the prohibitions on admissibility laid out in section 13-25-136 of the Colorado Statutes, the legislature would encourage pregnant Oklahomans to continue seeking pregnancy care, regardless of any struggle with SUD or status as a medical marijuana patient.<sup>279</sup> Another possibility is to expand Oklahoma’s Good Samaritan provision to include protection for individuals seeking pregnancy or substance use treatment, as Montana has done.<sup>280</sup> Regardless of the form protections take, to actually “protect children, born and unborn, from potential harm,” pregnant Oklahomans must no longer fear criminal prosecution, as this fear deters them from seeking prenatal,

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275. 19 OKLA. STAT. § 215.20 (2023).

276. *See supra* notes 134-38, 150-58 and accompanying text.

277. *See supra* note 133 and accompanying text.

278. COLO. REV. STAT. § 19-1-103 (2023).

279. *Id.* § 13-25-136.

280. *See supra* notes 160-65 and accompanying text.

postpartum, maternal, and substance use-related care.<sup>281</sup> By providing protection from prosecution for pregnant women seeking addiction treatment, Oklahoma can reduce the incarcerated population while decreasing harm to children.<sup>282</sup>

### C. End Mandatory Reporting

Bringing an end to the mandatory reporting of positive alcohol or drug test results is another step necessary to protect women and their children from continued state-sanctioned harm. As discussed above, a portion of the Oklahoma Children's Code<sup>283</sup> requires healthcare professionals to inform the Oklahoma Department of Human Services, rather than any law enforcement agency, of positive test results. While this does not run afoul of *Ferguson's* Fourth Amendment protections, it provides a stronger incentive for patients to avoid vital medical care, as individuals struggling with SUD are likely to worry about the possibility of losing parental rights.<sup>284</sup> This is not mere conjecture; rather, it aligns with the observations of senior members of relevant Oklahoma agencies.<sup>285</sup> Further, studies have shown that medical evaluations of child abuse and neglect often incorporate the bias of the health care provider.<sup>286</sup> Oklahoma law may require mandatory reporting, but it remains unclear how much the conscious or unconscious bias of healthcare professionals is involved in such decisions. While the added protections Colorado provides citizens from criminal prosecution are commendable,<sup>287</sup> they are only half of the defense necessary to adequately incentivize pregnant women to seek prenatal care.

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281. See *supra* notes 14, 29 and accompanying text.

282. See Schroedel & Fiber, *supra* note 92, at 225.

283. 10A OKLA. STAT. § 1-2-101(B)(3) (2023) (effective July 1, 2019).

284. See *supra* notes 225-31 and accompanying text.

285. McClung & Bailey, *supra* note 121 (“Many women don’t seek treatment because they worry about criminal or child welfare involvement.”).

286. For example, in one such study, fifty-four of 173 children suffering from abusive head trauma had already been seen once by physicians, where the “diagnosis was more likely to be missed in young children from white, ‘intact’ families.” Vincent J. Palusci & Ann S. Botash, *Race and Bias in Child Maltreatment Diagnosis and Reporting*, PEDIATRICS, article no. e2020049625, July 2021, at 1, 1, <https://publications.aap.org/pediatrics/article/148/1/e2020049625/179923/Race-and-Bias-in-Child-Maltreatment-Diagnosis-and>; see also Carole Jenny et al., *Analysis of Missed Cases of Abusive Head Trauma*, 281 JAMA 621 (1999). In another study, underrepresented minority children were more likely to have injuries reported, leading researchers to conclude the possibility of bias “of mandated reporters may contribute to these differences.” Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1603 (2002).

287. See *supra* notes 141-45 and accompanying text.

*D. Increase Access to Medical Care*

There are several ways Oklahoma could improve access to medical care to combat prenatal substance exposure, but three specific areas offer substantial room for growth: increased access to substance use treatment, improved access to care while incarcerated, and prioritized beds for pregnant women with SUD. Given the recent waste of government funds in Oklahoma,<sup>288</sup> legislators ought to take special notice of the cost-saving and budget-friendly aspects of family-centric substance use treatment programs. By implementing programs like those in Kansas,<sup>289</sup> which provide treatment and care as well as family-friendly recovery housing to pregnant women, Oklahoma legislators can reduce the fiscal expenditure related to placing removed children in adequate foster homes.

Another important measure to consider is implementing programs that improve the care provided to incarcerated women.<sup>290</sup> Recognizing that incarceration has similar effects on birth as prenatal substance exposure, providing medical treatment in a hospital setting to those incarcerated directly prevents potential harm to unborn children.<sup>291</sup> Preventing this harm by improving the availability of prenatal care, adequate nutrition, and substance abuse counseling services in Oklahoma's prison system further advances the purpose of all Oklahoma law.<sup>292</sup>

Like Washington,<sup>293</sup> Oklahoma could implement priority access to substance use care for pregnant women covered by Medicaid, making such care more affordable, and thus increasing availability and accessibility. With the long delays currently associated with receiving substance use treatment in Oklahoma, and the difficulty of remaining abstinent by willpower alone,

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288. See Bryen, *supra* note 114; see also Sean Murphy, *Watchdog: Oklahoma Tourism Deal Cost Taxpayers \$12.4M*, ASSOCIATED PRESS (May 12, 2022, 3:34 PM), <https://apnews.com/article/travel-oklahoma-parks-city-f06e549f668c5235030a67510711c053> (describing scandal involving lucrative contract for Swadley's Foggy Bottom Kitchen to build and operate restaurants at six state parks, to which two amendments were made which led to a \$12.4 million cost to state taxpayers).

289. See *supra* notes 150-54 and accompanying text.

290. See Bell et al., *supra* note 98, at 641; see also Zina T. McGee et al., *Inequality Among Female Offenders: Racial Disparities in Substance Abuse and Medical Treatment Among Mothers in Prison*, in *ACROSS THE SPECTRUM OF WOMEN AND CRIME: THEORIES, OFFENDING, AND THE CRIMINAL JUSTICE SYSTEM* 205, 205-06 (Susan F. Sharp et al. eds., 2016).

291. See Bell et al., *supra* note 98, at 641.

292. See *supra* notes 98, 100, and accompanying text; see also Diane M. Daane, *Pregnant Prisoners: Health, Security, and Special Needs Issues*, in *THE INCARCERATED WOMAN: REHABILITATIVE PROGRAMMING IN WOMEN'S PRISONS* 61, 67-69 (Susan F. Sharp ed., 2003).

293. See *supra* notes 155-58 and accompanying text.

making rooms available for pregnant women suffering from SUD is necessary to prevent further harm.<sup>294</sup> By approaching prenatal substance exposure through community health models—similar to those proven efficacious elsewhere—a better path forward is possible for the next generation of Oklahomans.<sup>295</sup> To successfully implement such programs, Oklahoma citizens must realize that protecting children—both born and unborn—requires considering the science associated with prenatal substance exposure<sup>296</sup> and implementing policy informed by that science.<sup>297</sup>

### *V. Conclusion*

Through continued adherence to failed law enforcement methods, a reliance on punitive prosecutorial measures, and rushed legislation regarding medical marijuana, Oklahoma has become the world's leading incarcerator of women. While this is an embarrassing title to bear, it provides policymakers with a prime opportunity to improve outcomes for Oklahoma citizens. Having carefully considered the knowledge of healthcare professionals, scientists, other state legislators, and historians, as well as the relevant law, the best path forward for Oklahoma is apparent. By providing protection from prosecution, putting an end to mandatory reporting, and increasing access to medical care, the health and safety of women and children like Amanda and her son can be effectively prioritized. If Oklahomans rebuke the failed strategies of the War on Drugs that helped to create the carceral state as it exists today, repairing the considerable damage wrought by punitive policies remains possible.

*Alex B. Cox*

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294. *See supra* notes 128-32 and accompanying text.

295. Mina Dixon Davis, Note, "Bad Moms" and Powerful Prosecutors: Why a Public Health Approach to Maternal Drug Use Is Necessary to Lessen the Hardship Borne by Women in the South, 25 GEO. J. ON POVERTY L. & POL'Y 305, 319-20 (2018).

296. *See supra* Section II.B.

297. *See discussion supra* Section II.C.3.