Beyond Bars: Drug War Ideology in the Civil Child Welfare System

by Jess Cochrane

Among drug policy reform activists, there is a consensus that punitive approaches should not constitute the bulk of our national strategy to reduce the harms associated with addiction and problematic use of drugs. Whether in recognition of its fiscal irresponsibility, its conflict with public health goals, or its disparate impact on brown, black, and poor communities, we agree that mass incarceration is not an appropriate solution to the problems caused by drugs themselves. We recognize the incoherence of a zero-tolerance, or "prohibitionist" approach to drug policy, and the futility of repressive tactics premised upon the total elimination of drugs from society. Unsurprisingly, many of us favor the decriminalization—replacement of criminal penalties with civil sanctions— of some drug offenses that are currently prohibited. On the state level, we have successfully lobbied to relax restrictions on cannabis use in 14 states and make it available for medical use in 20 states and the District of Columbia.[1] We fought to end the sentencing disparities between crack and powder cocaine (and have, at least, succeeded in reducing the disparities),[2] and continue to fight for sentencing reform, especially for nonviolent offenses. This work is crucial and must continue.

At the same time, we must integrate into our strategy an understanding that the criminal law is far from the *only* source of overreaching prohibitionist approaches. Running parallel to it are family courts and the civil child welfare system, which have become a major mechanism for enforcing prohibitionist policies in ways that are both discriminatory and scientifically unfounded. Actors within this system routinely treat testing positive for illegal drugs as the basis for findings of child neglect and parental unfitness, and collaborate with law enforcement in the criminal prosecution of pregnant women for child endangerment, drug delivery to a minor, and feticide. Child protective services (CPS) wields unbelievable power over families—especially poor families and families of color—and has the authority to remove a child from his parent's custody, place him in foster care or up for adoption, and potentially terminate the legal rights of the parent. CPS systems of reporting, investigation, and placement disproportionately regulate the behavior of women, especially single mothers and those who are pregnant.

This regulation occurs not only through enforcement of the criminal law, but also through state-administered CPS agencies, vested by authority under civil statute to protect vulnerable

children.[3] Mandated reporting laws, which have required certain professionals to report known or suspected child abuse or neglect, have in some states been expanded in recent years to include exposure of a newborn to illegal drugs as grounds for a CPS report.[4] Though health care providers are often motivated to identify patients who use substances by concerns about the clinical impact of maternal drug and alcohol abuse, mandated reporting laws force them to implement surveillance of their patients and breach their trust and privacy by informing the state of their illicit activity when children are involved. This transforms doctors and nurses into state investigators, who feel bound by the law to err on the side of over-reporting instances of parental drug use (especially drug use by pregnant women) even in the absence of any unique, much less discernible, harm to a child.

The trend of expanding child abuse and neglect laws to cover pregnant women's maternal drug use during the prenatal period illustrates what some have called a "fetal-maternal conflict," wherein the liberty interests of the pregnant woman are allegedly at odds with the liberty interests of the fetus. This is a false equivalency—first and foremost, the Supreme Court has held firmly that fetuses are *not* persons under the meaning of the Fourteenth Amendment—and in truth, reflects a desire to enhance the state's power over pregnant women. Those in favor of so-called "fetal personhood" have promoted using the "rights" of a fetus as a proxy to effectuate state interests. As support for the concept of "personhood" has gained traction nationally, some prosecutors, along with some CPS workers, have invoked the State's obligation to protect vulnerable children to frame fetus and mother as opposing parties in a balancing of liberty interests.[5] In developing the argument that the State may control and punish a pregnant woman for the alleged benefit of a fetus, a great deal of cases have involved the investigation and/or prosecution of a woman who used illegal drugs at some point during pregnancy.[6]

Indeed, the ugly caricatures that come to mind when the image of a pregnant drug user is invoked are fueled simultaneously by the twin moral panics of drug abuse and child abuse, which converged in the 1980s in the form of the "crack baby" myth. Though the claims of irreversible brain damage which fed the media frenzy are now understood to have been scientifically unfounded,[7] the "crack baby" image retains its power in the American conscience and continues to inform legal and regulatory schemes on the national, state, and local levels. Through chemical endangerment, feticide, and mandated reporting laws—particularly those designed to identify "substance-exposed newborns" ("SENs")—the prohibition of controlled substances collides with

heightened state scrutiny of families living in poverty to create a culture of surveillance and policing of pregnant women and low-income parents. As the reform movement gains traction within the states and nationally, advocates for liberalized drug laws must recognize the role played by child welfare authorities—in conjunction with, as well as independently from, criminal law enforcement—in carrying out the failed policies of the War on Drugs.

This essay explores political, legal, and ethical issues at the intersection of the U.S. War on Drugs, the politics of abortion access, and the administration of the modern welfare state. It begins by reviewing the use of criminal prohibition to eliminate societal ills, drawing crucial parallels between the prohibition of controlled substances and the criminalization of abortion. Next, it traces the expansion of state child protection agencies and evidence of their disproportionate intervention in the homes of low income, nonwhite families. SEN policies form the focal point of the discussion as a prominent example of the entanglement of the War on Drugs with regulation of reproduction and child welfare policy. In the final section, I promote the intentional inclusion of reproductive justice in the work of drug policy reform, in recognition of both ethical and practical intersections of these movements.

I. PROHIBITION AND CRIMINALIZATION

Starting from the notion that government has a duty to protect its citizens through the enforcement of the criminal code, some degree of regulation of individuals and industry is necessary to carry out this responsibility. The strictest form of regulation is criminal prohibition: the outright ban of a certain act or good—zero tolerance under the law (albeit not on the streets). Generally, serious violent crimes, such as murder and assault, are accepted as morally repugnant enough to fall within the prohibition of the criminal law. The influence of John Stuart Mill's harm principle on classic American liberalism provides easy justification for prohibition of conduct that directly causes harm to another individual. When a person's act threatens the life, liberty, or property of another person, it is widely accepted that government has the authority, both legal and moral, to enforce the criminal law against the actor.

Beyond prohibiting conduct that harms another individual, the criminal law has more controversially been employed to prohibit acts and items that are deemed morally harmful or dangerous to society at large, such as sex work and the use of certain substances. The debate over whether conduct that does *not* cause direct harm to another individual should be

"decriminalized" includes controversy over the perceived threat to public morality associated with these activities. Much of the discourse around reform of national drug policy has raised doubt regarding the wisdom of a policy regime that holds as its goal the complete eradication of an item or service for which there remains a demand. Prohibition—whether applied to illicit drugs, sex work, or abortion—does nothing to address the structural determinants that lead individuals to engage problematically in acts which have been condemned as immoral or dangerous. Some individuals use drugs (both legal and illegal) in ways that do *not* pose a substantial risk of harm and may even enhance quality of life, as harm reduction principles can be applied to minimize risk to the individual user. Those whose drug use *does* negatively interfere with their lives generally experience underlying disabling conditions, of which drug misuse and addiction are merely symptoms. The background conditions of poverty, lack of economic opportunity, and poor access to health care, which facilitate individuals becoming addicted, selling sex, or having an unwanted pregnancy, remain powerful structural determinants and ensure that the condemned behaviors will continue despite criminal prohibition.

Despite aggressive enforcement of prohibitionist laws resulting in the mass incarceration of Americans, illicit drug economies continue to flourish; and the powerful, organized criminal actors who benefit financially from trafficking in prohibited goods continue to operate with impunity in the U.S. and abroad. Currently, a momentum is building to abandon the use of the criminal law to prohibit possession and use of controlled substances. Proponents of reform argue that drug use harms only the individual, and that possession of an illicit substance should not result in criminal punishment. In recognition of the public health benefit and the fiscal prudence of emphasizing treatment for addiction over punitive sanctions, calls for decriminalization and even legalization grow louder by the day.

Though abortion, at present, is legal (albeit highly regulated) in the United States, it had been subject to criminal prohibition in every state at some point prior to the landmark 1973 Supreme Court decision, *Roe v. Wade*.[8] In holding that state laws criminalizing abortion violate due process and privacy protections of the Bill of Rights and the Fourteenth Amendment of the U.S. Constitution, Justice Blackmun noted that unlike many types of harmful conduct recognized under "natural law" as properly punishable within the realm of criminal prohibition, the criminalization of abortion was instead the product of a moral crusade that began during the 19th century:

> "It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century."[9]

Under the common law, the "born alive" rule barred the state from bringing criminal charges for the termination of a pregnancy prior to "quickening," the first recognizable movement of the fetus in utero.[10] Proponents of laws to criminalize abortion and advance the view that a fetus is a person—including anti-abortion activists from the medical profession[11]—successfully rallied many state legislatures to enact laws contrary to this tenet, creating through prohibition an underground, illegal "market" for abortion which forced vulnerable women seeking to terminate their pregnancies into the shadows of back-alleys.

Here we can begin to see the parallel between the illicit economy created by drug prohibition and the illicit economy created by criminalization of abortion. In both cases, prohibition did not (and cannot) eliminate the demand for the subject of the ban. Even when threatened with criminal prosecution, women continue to seek abortion, and unscrupulous actors willing to operate in the shadows step in to supply the illicit service. When legal avenues to terminate a pregnancy are not available, women turn to these black markets to obtain what they desperately need. Drug users, facing similar desperation and dearth of legal options, disregard the supposed deterrent of criminalization to obtain their drug of choice on the black market. Because black markets operate illegally, the products they sell are not required to adhere to any health and safety standards, making them inherently more dangerous than they are when subject to regulation.

At various times throughout American history, morality has been used to justify prohibiting acts and articles that some perceive to threaten the wellbeing of civil democratic society. Once, criminal prohibition was applied to sodomy between adults, gambling, and liquor—but this has become increasingly rare. Presently, most of these so-called "vices," along with medications, firearms, and pornography, are not prohibited completely, but instead regulated using the general police power of the several states. Controlled substances placed in Schedule I of the Controlled Substances Act of 1970[12] are a notable exception, one that defies both logic and science. Opponents of legal abortion, who in recent years have mounted campaigns to make termination of a pregnancy logistically impossible for many,[13] threaten to

turn back the clock to the days of criminal abortion, and turn abortion into one of the few goods and services subject to criminal prohibition in modern times.

Those who support regulating drugs that are currently illegal share with proponents of safe, legal abortion the goal of minimizing the dangers associated with these practices when conducted in an underground economy. Moreover, they share the recognition that participation in the most dangerous of these black markets is not equalized across race or class; just as wealthy, white Americans can freely access marijuana or cocaine and rarely face criminal prosecution for doing so, wealthy, white women seeking abortion can more readily terminate their pregnancies in relative safety and comfort, compared with their counterparts in low-income communities, often those of color.[14] Proponents of reproductive justice and proponents of drug legalization must be united in recognition of the logical incoherence of prohibition, and its deep social injustice.

II. BEYOND BARS: ENFORCING PROHIBITION THROUGH CIVIL LAW

The dual anti-prohibition movements of drug policy reform and safe abortion access have, understandably, focused on removing criminal penalties for drug possession and for abortion. Surely, moving away from the punitive model of incarceration is a step toward more sensible public policy. There is overwhelming evidence that criminalization, far from successfully addressing the problems associated with drug addiction, has in fact wreaked havoc on individuals and communities, without ameliorating the root causes.

Nevertheless, ending the injustices of the War on Drugs does not stop once criminal laws are repealed. The ideology of drug prohibition has expanded its reach beyond the criminal law and is reflected in the policies and practices of non-criminal legal entities: government agencies acting within the police power.[15] This authority, which enables government to enact legislation for the health, safety, and welfare of the public, encompasses vast swaths of American civil law. It is carried out not by criminal law enforcement, but by administrative agencies at the state and federal levels. It includes a wide array of governmental functions, including business and professional licensing, labor protections, motor vehicle safety, and food and drug inspection. In a few instances, conduct that violates regulation enacted using the police power is a criminal offense (for example, employing child labor or severe tax evasion). More common are non-

criminal violations, such as traffic offenses or building code violations, which are subject only to a civil fine.

The remainder of this essay focuses on one important governmental duty encompassed by the police power: that of protecting vulnerable children. Agencies tasked with ensuring the safety and well-being of American children operate mainly in the realm of civil law; though as we shall see, their investigatory authority and decision-making powers render the line between criminal and civil law enforcement somewhat indistinct. Since abortion was decriminalized under *Roe*, anti-abortion advocates have concentrated their efforts on restricting abortion access through civil regulation. The same will be true in a post-drug legalization America—prohibitionists will not give up the fight once criminal penalties for drug offenses are abolished. The ideology of the War on Drugs has permeated the operations of child protection agencies, and we will continue to see attempts to use the child welfare system to undermine progressive state laws liberalizing drug penalties. Unless we work to simultaneously dismantle prohibitionist policies in the child welfare system, its role in perpetuating the War on Drugs will continue beyond a post-criminalization regime. As advocates for decriminalization and legalization, we must be prepared to offer regulatory solutions that eliminate punitive, coercive state actions—even (or perhaps especially) when they are carried out by designated "non-criminal" agencies.

III. CPS AND MANDATED REPORTING

The modern era of child abuse and neglect laws began with the 1974 enactment of the federal Child Abuse Prevention & Treatment Act ("CAPTA"), which grants federal funding to state child protection agencies whose programs meet certain federal guidelines.[16] CAPTA requires states to provide child abuse prevention services, as well as procedures for screening and investigating reports of child abuse or neglect.[17] Concurrent with CAPTA's enhancement of child protective services ("CPS") was the proliferation of state "mandated reporting" laws, which impose a legal duty on certain categories of professionals to file a report with state CPS agencies for known or suspected instances of child maltreatment.[18] These laws vary by state, but virtually all of them cover social workers, doctors, nurses, teachers, childcare providers, and law enforcement officers. The rise of mandated reporting laws, along with CAPTA, resulted in a massive increase in the number of reports of child maltreatment—from just 10,000 nationally in 1967 to 669,000 in 1976[19] —and an accompanying surge in the number of investigations,

protective removals, and legal actions to terminate the parental rights of guardians deemed unfit parents.[20]

Because CPS investigations are not criminal, parents facing a substantiated finding of child abuse or neglect are not entitled to legal representation. The same is true when a child is removed from the home, or when the state seeks to terminate parental rights. And because the proceedings occur in either administrative hearings or in family courts, the criminal burden of proof—*beyond a reasonable doubt*—does not apply to the state's case. In most civil cases, the burden of proof is "preponderance of the evidence," which requires only a showing that the allegation, *more likely than not*, is true. Termination of parental rights, which is the most severe civil action that CPS can take against a parent, requires the slightly higher standard of "clear and convincing" evidence of parental unfitness.[21] The state bears a higher burden of proof to convict an individual of a crime than it does to take a child into protective custody or to terminate an individual's parental rights.

CPS employees, tasked with screening and assessing both mandated and non-mandated (anonymous) reports of child abuse and neglect, wield substantial discretion in deciding which reports warrant further attention and which types of cases to prioritize. In the years immediately following CAPTA, many children who were removed from their homes on the basis of alleged neglect came from impoverished families, often families of color, and were placed with white families.[22]

Black community leaders and Native American tribal representatives led the call to constrain the reach of CPS agencies. In 1972, the National Association of Black Social Workers ("NABSW") issued a statement in opposition to transracial adoption and foster care placements, calling this practice a form of genocide and criticizing it as a manifestation of white supremacy.[23] Similarly, calls for reform from Native American communities led to the 1978 passage of the Indian Child Welfare Act ("ICWA"),[24] which included the legislative finding that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions…"[25] Thus the expanded power of CPS agencies came with heavy costs for poor, nonwhite families, who faced increasing levels of surveillance and state oversight into their fitness to parent their own children.

B. Substance-Exposed Newborns ("SENs")

The highly-publicized moral panic over "crack babies" was fueled by an increase in newborns testing positive at birth for illegal drugs during the 1980s. Hospital staff as well as CPS agencies and law enforcement began to conceive of measures to address what was seen as a growing epidemic.[26] Early reports contained frightening and sensationalized descriptions of the desperation and lawlessness of crack users, as well as wildly exaggerated claims of the negative health impact of maternal crack use on a developing fetus and resulting child.[27] Poorly-designed studies declared that prenatal crack exposure accounted for a host of medical, developmental, and behavioral problems throughout childhood. These findings have not been born out by subsequent research. Tellingly, they failed to acknowledge greater risks, such as malnutrition, inadequate housing, domestic violence, poor healthcare access, and concurrent tobacco or alcohol use.[28] Recently, a 25-year longitudinal study concluded that poverty more precisely accounts for negative outcomes in children's lives than does prenatal substance exposure.[29]

Nevertheless, the terror associated with crack babies led to CPS and public health policies attempting to address newborn substance exposure. CAPTA continues to govern the conditions under which state CPS agencies receive federal funding for child abuse prevention, investigation, removal, and reunification, and adoption following termination of parental rights. Some of these conditions detail the circumstances under which mandated reporters must file an initial report of abuse or neglect. In 2003, this section was amended by the Keeping Children and Families Safe Act[30] to add a condition compelling state CPS programs to certify to the federal government that they have policies requiring mandated reporting by health care providers involved in the delivery or care of infants "identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure or Fetal Alcohol Spectrum Disorder"[31] (emphasis added).

Notably, CAPTA's requirement to identify and report newborns "affected by" illegal substance abuse is ambiguously worded, leaving unresolved whether Congress intended to mandate reports to CPS of *any* newborn identified as "substance-exposed," or only those cases wherein that exposure results in symptoms such as withdrawal or Fetal Alcohol Spectrum Disorders. It also conspicuously lacks a reporting requirement for newborns exposed in utero to

tobacco or alcohol not resulting in FASD, which—unlike cocaine or marijuana exposure—*have* been convincingly linked to negative birth outcomes.[32]

CAPTA as amended explicitly disclaims that it has created a definition of child abuse or neglect by drug use; states have therefore been free to interpret the meaning of what constitutes a newborn "affected by" maternal drug use. This has created substantial confusion among obstetricians and hospital staff about when a report is actually mandated; in many cases, hospital protocols and individual reporters "err on the side of caution" by routinely filing a CPS report whenever a newborn tests positive for an illegal drug, regardless of whether s/he exhibits any symptoms of harm that may be attributed to that exposure. It is then up to the state CPS agency to screen the report and decide whether to investigate it and take further action.

At least 19 states & D.C. have legislation requiring specific procedures for addressing the needs of infants who are either "substance exposed" or "substance affected," though there is wide variability in which drugs are considered substances for these purposes and whether the exposure must be accompanied by a manifestation of physical harm or dependence/withdrawal to constitute child abuse or neglect.[33] Approximately 12 states & D.C. include substance exposure at birth in their child abuse & neglect statutes.[34] Nevertheless, there is significant variability in the handling of these cases between states and even between different offices within the same state's CPS agency. The extent of the investigation and any ensuing CPS actions depends not only on whether the law of a given state includes substance exposure as child abuse or neglect, but also on the biases and practices of the hospital staff and CPS employees with whom the mother and child interact.[35]

The medical evidence suggests that maternal drug use, if it is harmful at all, is most likely to cause harm to a fetus during the first trimester.[36] Many women who use drugs cease or reduce consumption during pregnancy,[37] but this reality poses several practical challenges, since women may not realize they are pregnant during the first trimester or may not intend to carry to term. Once they become aware of the pregnancy, the damage may have already been done. Yet because most states (with the notable exceptions of judicially-enacted definitions in South Carolina[38] and Alabama[39]) have held that their criminal child abuse and neglect statutes do not apply to fetuses, no mandated report can be filed until birth. Mothers are often identified as substance users during prenatal care and flagged for drug testing in labor and delivery.[40] Neonatal drug testing is used in hospital nurseries to identify infants whose mothers used drugs

during pregnancy, and most hospitals report a positive neonatal test result for any illegal drug even when the baby is born completely healthy and discharged safely. One paradox of this sequence is that by the time the baby is born, there is no possible further risk of harm due to drug exposure, as the child is no longer in the mother's womb. Mandated reporting of SENs therefore cannot serve the preventive purpose of facilitating access to substance abuse treatment *during* pregnancy so that the newborn may *avoid* being born "substance-exposed."[41] [42]

IV. UNDERMINING DRUG POLICY REFORM THROUGH THE CPS SYSTEM

In advocating for liberalized drug laws, reformers and policymakers must consider the unique position of pregnant and parenting adults, whose lives are regulated not only by the criminal law but also by CPS agencies. For example, Massachusetts is one of a growing number of U.S. jurisdictions that has seen reforms of its marijuana laws, since voters decriminalized petty possession for adults in 2008 and created a medical marijuana program in 2012.[43] Since decriminalization, the onetime crime of simple marijuana possession has been reduced to the status of a civil "violation," now punishable only by a $100 fine and citation.[44] [45] Though most adults who possess marijuana for personal use are now subject to minimal state scrutiny (simple marijuana possession is no longer included in a CORI check, nor can it be used as a basis for denial of financial aid, adoption, or foster parenting), parenting adults still face the possibility that state child protective agencies will look unfavorably upon their use of marijuana and use it to support a finding of child neglect or endangerment, threatening custody of their children.

Surveillance of prenatal care patients and mandated SEN reporting laws through CAPTA create a role conflict for obstetric care providers and pediatricians,[46] who are legally required to investigate and disclose to the state use of illicit drugs by their patients or their patients' parents. Instead of encouraging the diagnosis of substance abuse disorders or requiring expanded access and referrals to treatment for drug users who are addicted, CAPTA instead results in the over-reporting of drug use not accompanied by actual *harm* to the child.[47] The ideology of the War on Drugs—that all use of illicit drugs is abuse—allows CPS agencies to avoid any inquiry into the extent to which a parent's drug use inhibits their ability to parent their child.[48] Instead, a positive drug test or admission of use can form the sole basis for an investigation, a finding of child abuse or neglect, or removal of a child from the home.[49]

V. LEAVING PROHIBITION IN THE PAST

As we move toward a model of legal regulation and away from criminal prohibition, a successful drug policy reform movement must adapt its strategies to incorporate reform of prohibitionist civil law including child welfare policy and practice. If a legal medical marijuana patient can face CPS intervention on the basis of drug use alone, we have not done enough to ensure that the policy solutions we offer include full protection of individual liberty. When use of a substance is legal or decriminalized for adults, yet pregnant women and parents stand to face findings of child neglect or even lose custody of their children based solely on a positive drug test result, we must ensure that this loophole is closed. Anticipating these issues, and planning for integration of non-criminal state agencies in the implementation of reform law and policy, means engaging with and supporting the work of advocates for the autonomy of pregnant women and parents, as well as striving for reproductive justice for all families.

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[35] Four examples of state SEN reporting protocols implemented under CAPTA are offered in Amy Price et al., *Implementing Child Abuse Prevention and Treatment Act (CAPTA) Requirements to Serve Substance-Exposed Newborns: Lessons from a Collective Case Study of Four Program Models*, 6 J. Pub. Child Welfare 149 (2012).

[36] G.A. Richardson et al., *Prenatal Alcohol and Marijuana Exposure: Effects on Neuropsychological Outcomes at 10 Years*, 24 Neurotoxicology & Teratology 309 (2002); M.D. Cornelius et al., *Prenatal Tobacco Exposure and Marijuana Use Among Adolescents: Effects on Offspring Gestational Age, Growth, and Morphology*, 95 Pediatrics 738 (1995); N.L. Day et al., *Prenatal Marijuana Use and Neonatal Outcome*, 13 Neurotoxicology & Teratology 329 (1991).

[37] Sarah C.M. Roberts and Amani Nuru-Jeter, *Women's Perspectives on Screening for Alcohol and Drug Use in Prenatal Care*, 20 Women's Health Issues 193 (2010), *available at* http://europepmc.org/articles/PMC2869475; Jeanne Flavin, *A Glass Half Full? Harm Reduction among Pregnant Women Who Use Cocaine*, 32 J. of Drug Issues 973 (2002), *available at* http://jod.sagepub.com/content/32/3/973.full.pdf+html.

[38] *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

[39] *Ex parte Ankrom*, 2013 WL 135748 (Ala. Jan. 11, 2013).

[40] American College of Obstetrics and Gynecologists, Committee on Health Care for Underserved Women, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (Committee Opinion) (2011), *available at* http://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co473.pdf?dmc=1&ts=20140404T1719251026.

[41] The many barriers to entering and completing substance abuse treatment for pregnant and parenting women include inadequate health insurance, no childcare alternatives, mental health comorbidities, lack of transportation, and more. *See generally* V. Breitbart et al., *The Accessibility of Drug Treatment for Pregnant Women: A Survey of Programs in Five Cities*, 84 Am. J. Pub. Health 1658 (1994), *available at* http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.84.10.1658, and http://www.gao.gov/assets/220/214348.pdf.

[42] Furthermore, adoption and foster care placement timeframes created by the Adoption and Safe Families Act of 1997 do not allow sufficient time for a parent whose children have been removed to complete substance abuse treatment in order to recover custody. Ian Vandewalker, *Taking the Baby Before It's Born: Termination of the Parental Rights of Women Who Use Illegal Drugs While Pregnant*, 32 N.Y.U. Rev. L. & Soc. Change 423 (2008).

[43] Article XLVIII of the Massachusetts Constitution allows voters to enact legislation through a ballot initiative process.

[44] Mass. Gen. Laws ch. 94C §§ 32L-32N (West 2012).

[45] In fact, this law defines possession to include "one ounce or less of marihuana or tetrahydrocannabinol and having cannabinoids or cannabinoid metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body."

[46] Ernest L. Abel and Michael Kruger, *Physician Attitudes Concerning Legal Coercion of Pregnant Alcohol and Drug Abusers*, 186 Am. J. Obstetrics & Gynecology 768 (2002).

[47] Ellen M. Weber, *Child Welfare Interventions for Drug-Dependent Pregnant Women: Limitations of a Non-Public Health Response*, 75 U.M.K.C. L. Rev. 789 (2007).

[48] As Dorothy Roberts wrote, "…a positive toxicology (which may be false) reveals only that the mother ingested drugs shortly before the delivery. It tells us nothing about the extent of the mother's drug use, any harm to the baby, or the mother's parenting abilities. Equating evidence of maternal drug use with child neglect circumvents the inquiry into the mother's competence to care for her child that is customarily necessary to deprive a parent of custody. This could mean that separating a mother from her newborn based on occasional—or even a single instance of—drug use." (p. 160)

[49] *See*, for example, *In re J.L.*, 919 N.E.2d 561 (Ind. Ct. App. 2009); but *cf. Matter of William N.*, 968 N.Y.S.2d 357 (N.Y. Fam. Ct. 2013); *P.D. v. Dep't of Children & Families*, 866 So. 2d 100 (Fla. Dist. Ct. App. 2004); *In re David M.*, 36 Cal. Rptr. 3d 411 (Cal. Ct. App. 2005).