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A Guiding Hand or a Slap on the Wrist: Can Drug Courts be the Solution to Maternal Opioid Use?

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A GUIDING HAND OR A SLAP ON THE WRIST: CAN DRUG COURTS BE THE SOLUTION TO MATERNAL OPIOID USE?

CARA O'CONNOR*

As the opioid epidemic has expanded its reach, the number of pregnant women addicted to opioids has increased exponentially in recent years. The increase in the number of opioid-addicted pregnant women has resulted in a drastic expansion in the number of newborns who experience Neonatal Abstinence Syndrome (NAS). Newborns affected with NAS experience painful withdrawal and cost more to care for due to their increased health needs. In an effort to address the growing number of pregnant women using opioids and babies born with NAS, some states have turned to the criminal justice system. Three states—Tennessee, South Carolina, and Alabama—have criminalized maternal drug use, either through construction of a new statute or by using existing statutes for this purpose, which has been upheld in their courts. Although high courts in many other states have continuously determined that such prosecutions are unlawful, women across the United States continue to face criminal charges for their substance use while pregnant.

This Comment addresses the concerns opioid addicted pregnant women pose to the criminal justice system and argues that drug courts are a crucial component to comprehensive reform. The drug court system needs to follow the lead of a recently established drug court in Buffalo, New York and embrace necessary reforms to better serve the health needs of pregnant women struggling with opioid addiction. This Comment argues the following reforms are necessary to effectively adjudicate cases involving pregnant drug use: expedited proceedings to begin treatment and avoid jailing; access to medication-assisted treatment; allowing women to spend time with their

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newborns; an appropriate sanctions system that recognizes the medical reality of relapse; and funding considerations that prevent women from having to pay for treatment. If drug courts are part of a comprehensive solution to treatment for opioid addiction, these reforms can contribute to better meeting the health care needs of women and their children.

TABLE OF CONTENTS

INTRODUCTION	104
I. THE OPIOID CRISIS	107
II. PREGNANT WOMEN AND THE CRIMINAL JUSTICE SYSTEM.....	112
III. HOW PREGNANT WOMEN AND MOTHERS ENTER THE CRIMINAL JUSTICE SYSTEM: CRIMINALIZATION OF DRUG USE AND DRUG-RELATED CRIMES	113
A. Current Needs Within the Criminal Justice System.....	119
IV. WHY INCARCERATION IS AN INAPPROPRIATE RESPONSE TO PREGNANT WOMEN ADDICTED TO OPIOIDS	120
V. DRUG COURTS.....	123
A. Background	123
B. Drug Courts and Pregnant Women Charged for Opioid Use	127
VI. SOLUTIONS IN ADDRESSING PREGNANT OPIOID USE .	128
A. Reporting Pregnant Women for Opioid Use.....	129
B. Necessary Reforms to Address the Needs of Pregnant Women in Drug Courts.....	130
CONCLUSION.....	135

INTRODUCTION

Within hours of being born, they cry out, convulsing. Their cries continue, despite attempts to placate them through feeding or consoling. These are babies born addicted to opiates or opioids,¹ a result of their

¹“Opioid” refers to drugs that do not come from natural plants, and usually are manufactured in a laboratory; examples include Oxycodone, Methadone, and Fentanyl. “Opiates,” however, are derived from natural plant matter, and include Opium, Morphine, and Heroin. In spite of these technical differences, current discourse tends to refer to both classes of drug as “opioids.” Alcohol and Drug Policy Commission, *“Opiates” or “Opioids” — What’s the Difference?*, OREGON.GOV, <https://www.oregon.gov/adpc/Pages/Opiate-Opioid.aspx> [<https://perma.cc/8CNB-UTT5>] (last visited Sept. 20, 2018). For this reason, and

mothers' drug use while pregnant. As newborns experience withdrawal, their mothers may be in the hospital with them, talking to doctors about treatment. Their mothers may receive their own treatment in another room. Or, depending on the state where these mothers delivered their babies, they may be arrested.

Women have been prosecuted for their drug activities while pregnant for the past fifty years.² However, only three states—Alabama, Tennessee, and South Carolina—have explicitly permitted these prosecutions.³ As the opioid epidemic grows, the increase in the number of women using opioids while pregnant raises the question of how best to address this subpopulation within the public health crisis.⁴ Criminal justice reforms must be part of a comprehensive response. There is considerable debate about whether pregnant women, unlike nonpregnant drug users, should be prosecuted for their drug use.⁵ High courts in many states have overturned pregnant drug use convictions, looking at legislative intent to determine that a fetus does not constitute a child or victim under various state statutes.⁶ Because women continue to be prosecuted for such crimes across the United States, however, and because pregnant women addicted to opioids may face other drug-related

because pregnant women may confront the challenges discussed in this Comment when taking either type of drug, I will refer generally to both categories as “opioids” throughout this paper.

² Leticia Miranda et al., *How States Handle Drug Use During Pregnancy*, PRO PUBLICA (Sept. 30, 2015), <https://projects.propublica.org/graphics/maternity-drug-policies-by-state> [<https://perma.cc/6HM6-ANME>]. This includes situations where women are initially charged, but then the case is thrown out because the particular state does not allow for such prosecutions; 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), <http://jaapl.org/content/45/2/193> [<http://jaapl.org/content/45/2/193>] (finding that in a survey of 19 states with prosecutions of 29 women, 86.2% of the women either saw the charges dropped or the convictions overturned).

³ *Id.*

⁴ See Susan Scutti, *Rate of Women Addicted to Opioids During Pregnancy Quadrupled in 15 Years, CDC Says*, CNN (Aug. 17, 2018), <https://www.cnn.com/2018/08/09/health/women-pregnancy-opioid-addiction-cdc/index.html> [<https://perma.cc/9RK5-JKHU>] (reporting that from 1999–2014, the rate of pregnant women addicted to opioids increased fourfold).

⁵ See generally Angelotta & Appelbaum, *supra* note 2 (noting the contrasting views between law enforcement and law-makers, who believe these types of charges may deter women from drug use while pregnant, and medical professionals who argue these charges are inappropriate because pregnant drug use should be treated as a medical condition).

⁶ See *id.* at 199; see also *Arms v. State*, 471 S.W.3d 637, 642–43 (Ark. 2015) (holding that the Arkansas criminal code only criminalized conduct related to homicide of an unborn child, and even then, the law does not apply in utero; furthermore, there was insufficient evidence to show that after birth, a transfer of the drug continued); *Cochran v. Commonwealth*, 315 S.W.3d 325, 329–30 (Ky. 2010) (finding that the legislature did not intend to criminalize pregnant drug or alcohol use, and reading the law to do so would have resulted in the statute being invalid for vagueness).

charges, this Comment focuses on how all states might apply a more effective approach to this population that is consistent with the demands of the opioid epidemic. Due to the nature of opioid addiction, in which access to treatment can be the difference between life and death, the public health crisis calls for a new solution to addiction, including how best to address the health needs of pregnant women and their newborn children. While many of these reforms can also combat pregnant addiction to substances other than opioids, the expanding reach of the opioid crisis offers an opportunity to reevaluate how best to address the needs of pregnant women addicted to drugs more generally.⁷

This Comment argues that reforming the drug court system to align with the treatment needs of pregnant women addicted to opioids is a crucial component of comprehensive reform in states that prosecute women for opioid use while pregnant. Part I situates pregnant women within the opioid epidemic. Part II discusses the presence of pregnant women in the criminal justice system more generally. Part III discusses the criminalization of women using drugs while pregnant. Part IV argues that incarceration is an improper setting for pregnant women struggling with opioid addiction. Part V explains how drug court systems function and the role that they have played in prosecutions of women for pregnant drug use. Finally, Part VI offers solutions to better address pregnant opioid use within the criminal justice system, such as advocating for universal drug screening for pregnant women, but reporting to law enforcement only when women refuse treatment, as well as various reforms within the drug court system in order to better address the unique needs of pregnant women, including: expedited proceedings to begin treatment and avoid incarceration; access to medication-assisted treatment; allowing women to spend time with their newborns; an appropriate sanctions system that recognizes the medical reality of relapse; and funding considerations that prevent women from having to pay for treatment. Although these reforms must exist within a broader, comprehensive response to the public health crisis, this Comment ultimately argues that these drug court reforms are a crucial component to such a comprehensive solution.

⁷ Various state legislatures are grappling with this question. In the spring of 2015, eight states introduced chemical endangerment bills. See Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PRO PUBLICA (Sept. 23, 2015), <https://www.propublica.org/article/when-the-womb-is-a-crime-scene> [<https://perma.cc/9RK5-JKHU>].

I. THE OPIOID CRISIS

The opioid epidemic, in part due to the connection between prescription and illicit drugs, has spanned many demographics.⁸ Opioids include illicit drugs like heroin and the synthetic drug fentanyl, as well as prescription painkillers such as oxycodone and hydrocodone.⁹ The relationship between painkillers and illicit opioids is heavily intertwined: as prescription pills began to flood the market, so did drugs like heroin, leading to a proliferation of both types of opioids.¹⁰ Although opioid addicts are most likely to be “white, male and middle-aged,”¹¹ the public health crisis crosses racial lines and is present in rural, suburban, and urban communities.¹² The epidemic also includes pregnant women. Approximately one in five women consume opioids, whether illicit or prescription, during their pregnancy.¹³ Furthermore, more than twice as many pregnant women received treatment for opioid addiction in 2012 than in the year 2000.¹⁴ Over 25% of women of reproductive age are prescribed painkillers each year,¹⁵ and prescription drugs significantly contribute to the prevalence of opioid use among pregnant women.¹⁶ At a clinic in Tennessee, for instance, an estimated two-thirds of patients became addicted after using a prescription drug.¹⁷ As a result of this

⁸ Joanna Walters, *America’s Opioid Crisis: How Prescription Drugs Sparked a National Trauma*, THE GUARDIAN (Oct. 25, 2017), <https://www.theguardian.com/us-news/2017/oct/25/americas-opioid-crisis-how-prescription-drugs-sparked-a-national-trauma> [https://perma.cc/9BVW-F9T4].

⁹ National Institute on Drug Abuse, *Opioids*, NATIONAL INSTITUTE OF HEALTH, <https://www.drugabuse.gov/drugs-abuse/opioids> [https://perma.cc/4DRM-LKRN] (last visited Dec. 10, 2017).

¹⁰ Nadja Popovich, *A Deadly Crisis: Mapping the Spread of America’s Drug Overdose Epidemic*, THE GUARDIAN (May 25, 2016), <https://www.theguardian.com/society/ng-inter-active/2016/may/25/opioid-epidemic-overdose-deaths-map> [https://perma.cc/RXM6-PZUB].

¹¹ *Id.*

¹² *Id.*

¹³ Hon. Nancy Corsones, *How Should Courts Respond to the Issues of Opiate Dependent Newborns? Finding Manageable Solutions in Agonizing Cases*, 41 VT. B.J. 33, 33 (2016).

¹⁴ Saskia de Melker & Melanie Saltzman, *The Opioid Epidemic’s Toll on Pregnant Women and Their Babies*, PBS (Jan. 9, 2016), <https://www.pbs.org/newshour/show/the-opioid-epidemics-toll-on-pregnant-women-and-their-babies> [https://perma.cc/Z5V8-4RTP].

¹⁵ *Id.*

¹⁶ See generally Elizabeth E. Krans & Stephen W. Patrick, *Opioid Use Disorder in Pregnancy: Health Policy and Practice in the Midst of an Epidemic*, 128 OBSTETRICS & GYNECOLOGY 4 (2016) (noting that many individuals who start off using prescription opioids and become addicted switch to heroin because it is cheaper and easier to access; furthermore, 66% of women on medication-assisted treatment reported having used heroin).

¹⁷ *Id.*; see, e.g., Matthew Torres, *Pregnant Women Face Stigma Over Opioid Addiction*, NEWS CHANNEL 5 (July 17, 2018), <https://www.newschannel5.com/news/pregnant-women-face-stigma-over-opioid-addiction> [https://perma.cc/3JRQ-BTQA] (reporting how one

increased use of legally prescribed and illicit opioids, “the prevalence of opioid use disorder (OUD) during pregnancy [in the United States] more than doubled between 1998 and 2011.”¹⁸ Opioid addiction varies by region across the United States, and the South tends to have even greater challenges with pregnant opioid use.¹⁹ The South also leads the way in criminal prosecutions for pregnant women who use opioids—or other drugs—while pregnant.²⁰

At the center of the debate regarding whether charges should be brought against pregnant drug users is the effect of such drug use on the fetus and the newborn. When a pregnant woman consistently uses an opioid, whether by prescription or illegally, there is a significant chance the baby will experience Neonatal Abstinence Syndrome (NAS) upon birth.²¹ Since 2000, cases of NAS have multiplied nearly fivefold due to an increase in opioid use during pregnancy.²² NAS is a withdrawal symptom that impacts newborns who were exposed to opioids in utero, and then are rapidly shut off from access to the drug at birth.²³ Effects often “include excessive high-pitched cry, reduced

pregnant woman became addicted after medication prescribed for her kidney surgery years earlier).

¹⁸ Barbara K. Zedler et. al., *Buprenorphine Compared with Methadone to Treat Pregnant Women with Opioid Use Disorder: A Systematic Review and Meta-analysis of Safety in the Mother, Fetus, and Child*, 111 *ADDICTION* 2115, (2016) (reporting a rate of 4 per 1000 deliveries for 2011).

¹⁹ Ronnie Cohen, *Pregnant Opioid Users Need Treatment, Not Jail, Pediatricians Say*, 12 *WESTLAW J. MED. MALPRACTICE* 8 (2017) (reporting that reasons for the South’s “particularly acute” problem with pregnant opioid use include lack of health insurance amongst women and fewer treatment programs, especially those with access to methadone). *But see* Sarah C. Haight et al., *Opioid Use Disorder Documented at Delivery Hospitalization — United States, 1999–2014*, 67 *MORBIDITY & MORTALITY WKLY. REP.* 845, 846 (reporting that of 28 states studied, Vermont and West Virginia had the highest rate of deliveries by women with opioid use disorder). Regardless of the rates of pregnant women with OUD, though, the South is the only region in the U.S. where charges against such women have been upheld (Alabama, South Carolina, and Tennessee). Because of this and the high rates of Neonatal Abstinence Syndrome in the South, this Comment largely focuses on the relationship between the health crisis and the criminal response in these southern states.

²⁰ *See* Miranda, *supra* note 2 (showing that only Tennessee, Alabama, and South Carolina have explicitly permitted prosecutions of pregnant women for drug use); AMNESTY INTERNATIONAL, *Criminalizing Pregnancy: Policing Pregnant Women Who Use Drugs in the USA*, 8, 2017 (stating that there have been more prosecutions of pregnant drug use under Alabama’s chemical endangerment law than “under any other single law,” with 479 prosecutions between 2006 and 2015).

²¹ Fran Smith, *Babies Fall Victim to the Opioid Crisis*, *NAT’L GEOGRAPHIC* (Sept. 2017), <https://www.nationalgeographic.com/magazine/2017/09/science-of-addiction-babies-opioids/> [https://perma.cc/3LUT-RNWQ].

²² Melissa Ballengee Alexander, *Denying the Dyad: How Criminalizing Pregnant Drug Use Harms the Baby, Taxpayers and Vulnerable Women*, 82 *TENN. L. REV.* 745, 753 (2015).

²³ Smith, *supra* note 21.

quality and length of sleep after a feeding, increased muscle tone, tremors, and convulsions . . . dysregulation ([including] sweating, frequent yawning and sneezing, increased respiration) and gastrointestinal signs ([such as] excessive sucking, poor feeding, regurgitation or vomiting, and loose or watery stools).”²⁴ Opioid exposure can also create consequences for the fetus’ regulatory system that result in “high rates of in utero fetal death.”²⁵

Despite these impacts, which can occur in utero or immediately upon birth, little research is available that demonstrates what impact, if any, pregnant opioid use or NAS has on long-term brain development.²⁶ Some studies suggest that elementary school children who were exposed to opioids in utero may exhibit “motor and cognitive impairments” and inattention or hyperactivity, including higher instances of Attention-Deficit/Hyperactivity Disorder.²⁷ However, the true impact of pregnant opioid use on children is difficult to determine because other confounding factors may be responsible for impairments manifesting in school-age children.²⁸ Furthermore, most of the research on the impact of opioids on brain development that is available was completed prior to the current “widespread use of highly potent synthetics, such as fentanyl.”²⁹ Uncertainty about the impact of pregnant opioid use has generated significant debate about the appropriateness of prosecuting pregnant women for drug use.³⁰

While the long-term impact of NAS on children’s health is uncertain, it is undisputed that the majority of newborns exposed to opioids in utero will experience withdrawal.³¹ In addition to the physical ailments associated with withdrawal, treating a fetus experiencing withdrawal increases costs to the

²⁴ Beth A. Logan, Mark S. Brown, & Marie J. Hayes, *56 Neonatal Abstinence Syndrome: Treatment and Pediatric Outcomes*, CLINICAL OBSTETRICS AND GYNECOLOGY 186, (2013).

²⁵ *Id.*

²⁶ Smith, *supra* note 21.

²⁷ Emily J. Ross et al., *Developmental Consequences of Fetal Exposure to Drugs: What We Know and What We Still Must Learn*, 40 NEUROPSYCHOPHARMACOLOGY REVS. 61, 68 (2015).

²⁸ See Smith, *supra* note 21 (explaining, for example, that income, stability, and chronic stresses may also contribute to effects on a child’s health).

²⁹ *Id.*

³⁰ Angelotta & Appelbaum, *supra* note 2 (explaining that criminalization of pregnant drug use is “fiercely debated.” Those in support of criminalization, which includes some policymakers and those in law enforcement, argue that these laws can help deter women using harmful substances; however, the public health and medical community generally opposes such measures).

³¹ *Id.*

health system.³² Children experiencing withdrawal often require more attention, and therefore tend to stay in the hospital longer than other newborns, with an average hospital stay of fifteen days compared to an average of three days for healthy newborns.³³ Estimates suggest that extended stays and the need for greater intensive care costs approximately five times more than caring for a baby that does not exhibit NAS symptoms.³⁴ NAS treatment cost approximately \$1.5 billion more in national health care charges in the year 2012 alone.³⁵ In Tennessee, caring for an “average” newborn costs \$8,369, while care for newborns with NAS costs \$62,324.³⁶

Furthermore, every twenty-five minutes a baby is born dependent on drugs.³⁷ Similar to the higher rates of addiction among pregnant women, the South, where three states have explicitly permitted pregnant drug use prosecutions, also has higher incidences of NAS.³⁸ Tennessee has declared NAS an epidemic, with at least 800 babies born with NAS in 2013.³⁹ Of the babies born with NAS, 42% of the cases involve mothers who had only used “substances prescribed for legitimate treatment.”⁴⁰ Likewise, a national study found that over 20% of women filled an opioid prescription while pregnant, most frequently for codeine and hydrocodone.⁴¹ From 2000 to 2015, the state of Tennessee saw a tenfold increase in cases of NAS.⁴² A North Carolina hospital noted a 119% increase in cases involving monitoring

³² *Pregnant on Opiates: When Following Doctors' Orders Breaks the Law*, NBC NEWS (May 9, 2014), <https://www.nbcnews.com/news/us-news/pregnant-opiates-when-following-doctors-orders-breaks-law-n100781> [https://perma.cc/8KHE-R9YF].

³³ *Id.*; *Neonatal Abstinence Syndrome*, MARCH OF DIMES, <https://www.marchofdimes.org/advocacy/neonatal-abstinence-syndrome.aspx> [https://perma.cc/TJ5L-8EYF] (last visited Jan. 25, 2019).

³⁴ NBC NEWS, *supra* note 32.

³⁵ Ballengee Alexander, *supra* note 22, at 753; *see also* Jean Y. Ko et al., *CDC Grand Rounds: Public Health Strategies to Prevent Neonatal Abstinence Syndrome*, 66 MORBIDITY & MORTALITY WKLY. REP. 242, 242 (2017) (reporting that “approximately 80% [of those costs] was financed by Medicaid programs”).

³⁶ Ko et al., *supra* note 35.

³⁷ *Doctors Applaud the End of Tennessee's Controversial Fetal Assault Law*, CHICAGO TRIBUNE (April 1, 2016), <http://www.chicagotribune.com/news/nationworld/ct-tennessee-fetal-assault-law-20160401-story.html> [http://perma.cc/72BW-B6WE].

³⁸ Dennis J. Hand et al., *Substance Use, Treatment, and Demographic Characteristics of Pregnant Women Entering Treatment for Opioid Use Disorder Differ by United States Census Region*, 76 J. SUBSTANCE ABUSE TREATMENT 58, 58 (2017).

³⁹ Erin D. Kampschmidt, *Prosecuting Women for Drug Use During Pregnancy: The Criminal Justice System Should Step Out and the Affordable Care Act Should Step Up*, 25 HEALTH MATRIX 487, 493 (2015).

⁴⁰ *Id.*

⁴¹ Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947, 972 (2017).

⁴² Ballengee Alexander, *supra* note 22, at 753–54.

of newborns for withdrawal from 2009 to 2012.⁴³ Estimates suggest that in 2009, across the United States, one infant was born with NAS every hour.⁴⁴ The South has a rate of NAS three times greater than the national average.⁴⁵ These costs and increased cases of NAS have led states to consider how to proceed when a newborn has been exposed to drugs. While federal law requires reporting infants born with harmful substances in their system to child protective services, the matter is not treated criminally, and reporting to law enforcement is not mandatory.⁴⁶ Thus, although the opioid epidemic and its effects are felt throughout the United States, the South has faced a particularly strong challenge, which has played a role in the criminal charges prosecutors can bring against pregnant women in Tennessee, South Carolina, and Alabama.

Medication-assisted treatment (MAT), along “with comprehensive behavioral and medical care, is the universally accepted and recommended treatment for opioid use disorder in pregnant women.”⁴⁷ Methadone and buprenorphine are two drugs commonly used in MAT.⁴⁸ In spite of this universal acceptance, there was a nearly 16% decrease in MAT for pregnant women using prescription opioids from 1992–2012.⁴⁹ Access to MAT is particularly limited in the South; whereas 48% or more of pregnant women battling opioid addiction were treated with MAT across the rest of the United States, only 31% of similarly situated southern women had treatment including MAT.⁵⁰ Pregnant women with OUD and their children often face

⁴³ Kampschmidt, *supra* note 39, at 493.

⁴⁴ Stephen W. Patrick et al., *Neonatal Abstinence Syndrome and Associated Health Care Expenditures: United States, 2000–2009*, 307 J. AM. MED. ASS’N 1934, 1937 (2012).

⁴⁵ Amy Yurkanin, *Can Big Data Help Babies and Mothers in Alabama?*, AL.COM (May 16, 2018), https://www.al.com/news/index.ssf/2018/05/can_big_data_help_mothers_and.html [<https://perma.cc/U5TT-XPVM>]; *see also* Amy Yurkanin, *A Grim and Growing Trend: Alabama Sees Increased Cases of Drug-Dependent Newborns*, AL.COM (Sept. 29, 2015), https://www.al.com/news/index.ssf/2015/09/a_grim_and_growing_trend_alaba.html [<https://perma.cc/XV2V-4GTZ>] (reporting that “[t]he number of cases of NAS covered by Medicaid in Alabama more than doubled from 170 cases in 2010 to 345 in 2013” and “[t]he region that includes Alabama, Mississippi, Tennessee and Kentucky has the highest rate in the country, with NAS occurring in 16.2 out of every 1,000 hospital births in 2012” (compared to 5.8 births per 1,000 as the national average at that time)).

⁴⁶ Child Welfare Services, *Substance Affected Infants: Change #06-2017*, North Carolina Division of Social Services (July 2017), <https://www2.ncdhhs.gov/info/olm/manuals/dss/csm-60/man/CS1439.PDF> [<https://perma.cc/QA4L-5X9Q>].

⁴⁷ Dennis J. Hand et al., *supra* note 38, at 58.

⁴⁸ *Id.*

⁴⁹ *Id.* at 59 (reporting that the percentage decreased from 44% to 37%).

⁵⁰ *Id.* at 60.

challenges in accessing services to meet their health care needs, and these challenges are even greater for incarcerated women.⁵¹

II. PREGNANT WOMEN AND THE CRIMINAL JUSTICE SYSTEM

The United States incarcerates more women than any other country in the world, with 219,000 women behind bars.⁵² The vast majority of these women are incarcerated for state-level offenses: 99,000 women are in state prisons and 96,000 women are in local jails.⁵³ Furthermore, the majority of detained women in both jails and prisons face nonviolent charges, mostly drug- and property-related.⁵⁴ Exactly how many of these women are pregnant is unknown, but studies from the early 2000s suggested that over 9,000 pregnant women are incarcerated each year.⁵⁵

Most women who enter the justice system, whether at the state or federal level, face challenges with drug addiction.⁵⁶ One study suggests that 82% of women in jails are dependent on drugs or alcohol, and a Bureau of Justice Statistics study found that over 60% of incarcerated women were dependent on or abusing drugs.⁵⁷ Approximately 6% of imprisoned women

⁵¹ Elizabeth E. Krans & Stephen W. Patrick, 128 *OBSTETRICS & GYNECOLOGY* 1, 4 (2016) (as of 2016, only nineteen states had treatment programs designed to meet the specific needs of pregnant women); *see also* Timothy Williams, *Opioid Users are Filling Jails. Why Don't Jails Treat Them?*, *N.Y. TIMES* (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/us/heroin-addiction-jails-methadone-suboxone-treatment.html> [<https://perma.cc/LJR4-ZLHE>] (reporting that “[o]f the nation’s 5,100 jails and prisons, fewer than 30 . . . offer opioid users the most proven method of recovery: administering methadone or buprenorphine.”)

⁵² Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2017*, *PRISON POL’Y INITIATIVE* (Oct. 19, 2017), <https://www.prisonpolicy.org/reports/pie2017women.html> [<https://perma.cc/2VCF-C8YW>].

⁵³ *Id.*

⁵⁴ *Id.* Of the women in local jails, 35,000 are convicted for drug or property-related offenses, and 52,100 in state prisons have drug or property-related convictions.

⁵⁵ Victoria Law, *Pregnant and Behind Bars: How the U.S. Prison System Abuses Mothers-to-Be*, *THE GUARDIAN* (Oct. 20, 2015), <https://www.theguardian.com/us-news/2015/oct/20/pregnant-women-prison-system-abuse-medical-neglect> [<https://perma.cc/JC8B-RY7B>].

⁵⁶ *Fact Sheet on Justice Involved Women in 2016*, NATIONAL RESOURCE CENTER ON JUSTICE INVOLVED WOMEN, <http://cjinvolvementwomen.org/wp-content/uploads/2016/06/Fact-Sheet.pdf> [<https://perma.cc/PJ5J-ZAU5>] (last visited Jan. 25, 2019).

⁵⁷ *Id.* Dependence or a diagnosis of OUD is determined by DSM-5 Diagnostic Criteria for OUD (previously DSM-IV); for the specific criteria, *see Module 5: Assessing and Addressing Opioid Use Disorder (OUD)*, Centers for Disease Control, <https://www.cdc.gov/drug-overdose/training/oud/accessible/index.html> [<https://perma.cc/5GGQ-WYMV>] (last visited Sept. 25, 2018). Research also suggests that, compared to men, women more often turn to substance use as a way to “medicate the pain of abusive histories and/or to obtain a relationship.” Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 *J. PERINATAL EDUC.*, no. 2, 2008, at 37, 38; *see also* Karen L. Cox, *Most Women in Prison Are Victims of Domestic Violence. That’s Nothing New*, *TIME* (Oct. 2, 2017), <http://time.com/>

are pregnant at the time of arrest,⁵⁸ which means each year, there are an estimated 9,430 pregnant women behind bars.⁵⁹ Thus, the opioid epidemic raises a concern throughout the criminal justice system: pregnant women arrested for their substance use need treatment, yet the state often fails to provide the necessary care for their pregnancies and addictions.⁶⁰

III. HOW PREGNANT WOMEN AND MOTHERS ENTER THE CRIMINAL JUSTICE SYSTEM: CRIMINALIZATION OF DRUG USE AND DRUG-RELATED CRIMES

In spite of the inconclusive research on the degree of harm pregnant drug use has on infants, pregnant women's use of illicit drugs continues to be an area of concern in the legal system. Whereas drug-related prosecutions among the general population are based on sale or possession, pregnant women have been prosecuted for illicit drug use in at least forty-five states since the 1970s.⁶¹ Although some of these prosecutions have been successfully challenged in state high courts, cases continue to be brought against women for pregnant drug use across the nation, even in jurisdictions where such convictions have been overturned.⁶² Tennessee, South Carolina, and Alabama are the only three states that have made pregnant illicit drug

4960309/domestic-violence-women-prison-history/ [https://perma.cc/CD99-S9VK] (reporting that 86% of imprisoned women have experienced sexual violence).

⁵⁸ Hotelling, *supra* note 57, at 37.

⁵⁹ Law, *supra* note 55 (considering statistics for federal and state prisons as well as jails).

⁶⁰ See generally National Women's Law Center, *Mothers Behind Bars: States are Failing*, NAT'L WOMEN'S L. CENTER (Oct. 21, 2010), <https://nwlc.org/resources/mothers-behind-bars-states-are-failing/> [https://perma.cc/8J5W-ZSJD] (reporting on the overwhelmingly inadequate care for incarcerated women, including:

Forty-one states do not require prenatal nutrition counseling or the provision of appropriate nutrition to pregnant women behind bars Thirty-four states do not require screening and treatment for women with high risk pregnancies. . . . Twenty-two states either have no policy at all addressing when restraints can be used on pregnant women or have a policy which allows for the use of dangerous leg irons or waist chains;

See also Lynn Hulsey, *Pregnant Inmates Have Local Jails Scrambling to Provide Care*, DAYTON DAILY NEWS (May 15, 2017), <http://www.mydaytondailynews.com/news/crime-law/pregnant-inmates-have-local-jails-scrambling-provide-care/iSYcVXihpmoVmoHzEVhNbO/> [https://perma.cc/6L34-7NS2] (reporting that one woman in jail gave birth to her child in the toilet of her cell).

⁶¹ See, e.g., Miranda et al., *supra* note 2 (providing examples of women who have been prosecuted for pregnant drug use, including: an Arizona woman who was convicted of manslaughter after her baby was born with crack cocaine in her system and died shortly after birth, and a Florida woman who was charged with child abuse due to her pregnant opioid use).

⁶² *Id.*

use a crime: Tennessee through a novel statute,⁶³ and South Carolina and Alabama through their high courts' interpretations of preexisting child endangerment laws.⁶⁴

While other states have been reluctant to prosecute pregnant women for their actions that might harm the fetus, these three states have sought to crack down on pregnant drug use. In Alabama, over 500 women were charged with crimes of fetal endangerment between 2006 and 2016.⁶⁵ Since 1989, South Carolina has arrested over eighty women based on their substance use during pregnancy.⁶⁶ The higher courts in fourteen states have overturned convictions for pregnant drug use, often finding that a fetus is not a child under the law, and thus women cannot be charged for their drug use while pregnant.⁶⁷ South Carolina and Alabama are the only states where the state supreme court has affirmed that pregnant women may be prosecuted for their *in utero* drug use.⁶⁸ Although Tennessee's highest court has not made this same ruling, the state did pass a statute that was used to prosecute pregnant women.⁶⁹ The "fetal assault" law amended the general assault statute to apply to the "illegal use of a narcotic by a pregnant woman if the child is born 'addicted to or harmed by' the *in utero* drug use."⁷⁰ The law expired in July

⁶³ TENN. CODE ANN. §§ 39-13-107, 39-13-214 (2014).

⁶⁴ Miranda et al., *supra* note 2; *see also* Whitner v. State, 492 S.E.2d 777, 780 (S.C. 1997), *reh'g denied* (1997), and *cert. denied*, 523 U.S. 1145 (1998) (holding that, because the court had previously determined a "viable fetus" is a person for purposes of homicide and wrongful death laws, the same interpretation must apply to the present case involving child abuse law, and furthermore, such an interpretation is consistent with the policies behind the Children's Code); *Ex parte* Hope Elisabeth Ankrom, 152 So. 3d 397, 405 (Ala. 2013) (noting that the South Carolina Supreme Court's reasoning in *Whitner* was "persuasive" and, through statutory interpretation and consideration of the legislature's intent, holding that the chemical endangerment statute, § 26-15-3.2, Ala.Code 1975, applies to unborn children).

⁶⁵ Nina Martin, *Alabama Lawmakers Limit Drug Prosecutions in Pregnancy*, PRO PUBLICA (May 4, 2016), <https://www.propublica.org/article/alabama-lawmakers-limit-drug-prosecutions-in-pregnancy> [<https://perma.cc/8PXU-LBJY>].

⁶⁶ *South Carolina: Leading the Nation in the Prosecution and Punishment of Pregnant Women*, NAT'L ADVOC. FOR PREGNANT WOMEN (July 17, 2006), http://advocatesforpregnantwomen.org/issues/punishment_of_pregnant_women/south_carolina_leading_the_nation_in_the_prosecution_punishment.php [<https://perma.cc/TM6M-WASF>].

⁶⁷ *See* Miranda et al., *supra* note 2. States that have overturned convictions include: Arkansas, California, Hawaii, Kentucky, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, Texas, and Washington; *see also, e.g.*, Reyes v. Super. Ct. of Cal., 141 Cal. Rptr. 912 (Cal. Ct. App. 1977).

⁶⁸ *Id.*; *see also* Whitner, 492 S.E.2d; Ankrom, 152 So. 3d.

⁶⁹ TENN. CODE ANN. §§ 39-13-107, 39-13-214 (2014).

⁷⁰ *Id.*; Sarah E. Smith, *No Safe Harbors: Examining the Shift from Voluntary Treatment Options to Criminalization of Maternal Drug Use in Tennessee*, 46 U. MEM. L. REV. 203, 219 (2015).

2016 because it was passed with a sunset provision.⁷¹ However, similar laws have been proposed in the state legislature since its expiration, and thus may be enacted in the future.⁷²

While some state legislatures have passed laws related to pregnant opioid use and state appellate courts have decided on the (in)validity of these prosecutions of pregnant women, the United States Supreme Court has not yet ruled on this issue. Although the vast majority of state courts have found these practices to be unlawful, the reasons vary.⁷³ Courts have often determined that criminal child abuse statutes cannot apply to a pregnant woman's drug use because a fetus is not a child under the law.⁷⁴ Courts have also looked at legislative intent and due process concerns when reversing pregnant drug use convictions.⁷⁵ An additional argument against these

⁷¹ *Id.* Although the Tennessee statute recently expired, because the discussion in this paper also involves laws and judicial interpretations currently in place in South Carolina and Alabama, I will refer to the statute and Tennessee's treatment of pregnant drug use as if the law and prosecutions are still currently in use.

⁷² Amnesty International, *supra* note 20, at 8; see *Tennessee Fetal Assault Bill (SB 1381)*, Rewire.News Legislative Tracker (Feb. 23, 2017), <https://rewire.news/legislative-tracker/law/tennessee-fetal-assault-bill-sb-1381/> [<https://perma.cc/V57S-JEBR>]. Proposed in February of 2017, the law would criminalize "illegal use of a narcotic while pregnant, if their child is born addicted to or harmed by the narcotic drug and the addiction or harm is a result of their illegal use of a narcotic drug taken while pregnant," and the law would contain affirmative defense options related to recovery programs.

⁷³ See *State v. Aiwohi*, 123 P.3d 1210, 1225 (Haw. 2005) (holding "a mother's prosecution for her own prenatal conduct, which causes the death of the baby subsequently born alive, is not within the plain meaning of" the statute); *State v. Gray*, 584 N.E.2d 710, 713 (Ohio 1992) (finding that the statute "does not apply where a mother abuses drugs during her pregnancy"); *Sheriff v. Encoe*, 885 P.2d 596, 597 (Nev. 1994) (determining the statute "does not apply to the transmission of illegal substances from mother to newborn through the umbilical cord"); *Commonwealth v. Welch*, 864 S.W.2d 280, 284 (Ky. 1993) (determining that the law in question was not intended "to punish the woman on the basis that she takes drugs while pregnant").

⁷⁴ Cynthia Dailard and Elizabeth Nash, *State Response to Substance Abuse Among Pregnant Women*, 3 GUTTMACHER POL'Y REV. 3, 3 (2000); see also *Aiwohi*, 123 P.3d at 1225 (determining that a fetus is not "[a] human being who has been born and is alive," as required by the text of the Hawaii Penal Code).

⁷⁵ *Id.*; see *People v. Morabito*, 580 N.Y.S.2d 843, 847 (N.Y. City Ct. 1992) (concluding that the statute was intended to apply to "children in being" and "[t]o hold otherwise would deny the Defendant her Constitutional right to due process as guaranteed by both Federal and State Constitutions"); see also *Welch*, 864 S.W.2d at 283 (looking at decisions from other state's high courts, noted: "if their state legislature intended to include a pregnant woman's self-abuse which also abuses her unborn child within the conduct criminally prohibited, it would have done so expressly," and the preamble to Maternal Health Act of 1992. H.B. 192, Ch. 442, Kentucky Acts (1992) shows that the law was intended to support public health and punish drug dealers, not women). Women have also alleged constitutional grounds to

convictions is that they violate the Fourteenth Amendment Equal Protection Clause, either due to gender- or race-based disparate impact.⁷⁶ Regardless of the legal reasoning behind the decision, courts within nineteen states have disfavored pregnant drug prosecutions in some way.⁷⁷

Despite this majority view, Alabama and South Carolina have continued to allow law enforcement officials to arrest and charge women for pregnant drug use, and Tennessee's statute codified permission to engage in a similar practice. In Alabama, the "chemical endangerment" law was initially passed in response to Alabama's prevalence of methamphetamine and aimed to protect children in "meth lab" environments.⁷⁸ While prosecutors openly admit that applying the law to fetuses was not the legislature's intent, they argue that the interpretation is still consistent with the goal of protecting children.⁷⁹ Prosecutors claim they began charging women under the law not in pursuit of imprisonment, but as an opportunity for women to "get clean."⁸⁰ Similarly, the South Carolina Supreme Court interpreted "person" to include a fetus for purposes of the state's child abuse statute and deemed the interpretation consistent with the legislature's intent to "prevent[] children's problems."⁸¹ The South Carolina Supreme Court determined that the State's interest in promoting fetal health was compelling.⁸² In contrast, the Tennessee government explained the intent of the fetal assault law was "to 'give law enforcement and district attorneys a tool to address illicit drug use among pregnant women through treatment programs,'" while law

invalidate their charges, and some lower courts have made their decision, in part, on constitutional grounds.

⁷⁶ Krista Stone-Manista, *Protecting Pregnant Women: A Guide to Successfully Challenging Criminal Child Abuse Prosecutions of Pregnant Drug Addicts*, 99 J. CRIM. L. & CRIMINOLOGY 823, 827 (2009).

⁷⁷ Angelotta & Appelbaum, *supra* note 2, at 194.

⁷⁸ Nina Martin, *This Law is Supposed to Protect Babies, But it's Putting Their Moms Behind Bars*, MOTHER JONES (Sept. 23, 2015), <http://www.motherjones.com/politics/2015/09/alabama-chemical-endangerment-drug-war/> [<https://perma.cc/9AWC-R98D>]; see also Katherine Koster, *Alabama's Chemical Endangerment Laws: Where the War on Drugs Meets the War on Women*, HUFFINGTON POST (Sept. 25, 2015), https://www.huffingtonpost.com/katherine-koster/alabamas-chemical-endange_b_8193196.html [<https://perma.cc/8MYF-VG7J>] (reporting that the "[v]iolation [of the chemical endangerment statute] is punishable with up to 10 years for mere exposure, 10–20 years for harm, and 10–99 for death").

⁷⁹ *Id.*

⁸⁰ *Id.* Phrase used to portray newfound sobriety.

⁸¹ Tara-Nicholle B. DeLouth, *Pregnant Drug Addicts as Child Abusers: A South Carolina Ruling*, 14 BERKELEY J. GENDER L. & JUST., 96, 101 (1999) (discussing the reasoning of *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997), *reh'g denied* (1997), and *cert. denied*, 118 S.Ct. 1857 (1998)).

⁸² *Id.* at 100.

enforcement expressed hope that the law would deter women from using harmful substances.⁸³ Under the statute, treatment can serve as a defense.⁸⁴

All three states that permit prosecuting women for use of harmful substances while pregnant, then, have expressed a strong interest in pursuing treatment for these women.⁸⁵ However, enforcement of the laws often works against this purpose. Many legal and medical professionals have expressed opposition to these laws because they tend to deter women from seeking prenatal care or treatment as opposed to deterring drug use.⁸⁶ Fear of facing charges, and the likelihood that they will lose custody of their children as a result, has led women to: avoid appointments, seek medical care later in their pregnancies, and even seek health care in other states.⁸⁷ Also, some women have been charged after the birth of their babies, even when the children are healthy, or when the drug used is a legal, prescribed medication.⁸⁸ Due to the nature of these laws, when reporting of any drug use is required, some women are prosecuted even if the drug use is a single or occasional occurrence, and the child does not experience any harm.⁸⁹

These kinds of prosecutions are inconsistent with the goal of helping women receive treatment and do not effectively deter women from using drugs.⁹⁰ Women who are addicted to substances do not simply take drugs by choice; addiction is a medical disease, and the women's bodies are reliant on the drugs.⁹¹ On the other hand, a woman who engages in occasional use of a

⁸³ Gillian Mohney, *First Woman Charged on Controversial Law that Criminalizes Drug Use During Pregnancy*, ABC NEWS (July 13, 2014), <http://abcnews.go.com/US/woman-charged-controversial-law-criminalizes-drug-pregnancy/story?id=24542754> [<https://perma.cc/7N6Q-YV7A>] (quoting a statement by the Tennessee governor, Bill Haslam, after signing the bill).

⁸⁴ *Id.*

⁸⁵ See Martin, *supra* note 78; DeLouth, *supra* note 81; Mohney, *supra* note 83.

⁸⁶ See Amnesty International, *supra* note 20, at 33–34.

⁸⁷ *Id.*

⁸⁸ See, e.g., Martin, *supra* note 7. But see Rebecca Seung-Bickley & Randall Marshall, *New Report Shows Alabama's Pregnancy Law Hurts, Not Helps*, ACLU ALA. (May 25, 2017), <https://www.aclualabama.org/en/news/new-report-shows-alabamas-pregnancy-laws-hurts-not-helps> [<https://perma.cc/4LSS-3B32>] (noting that the Alabama “law was amended in 2016 to exclude prescription drugs recommended by doctors or nurses”).

⁸⁹ See *id.*

⁹⁰ Committee on Health Care for Underserved Women, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, American College of Obstetricians and Gynecologists (Jan. 2011), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Substance-Abuse-Reporting-and-Pregnancy-The-Role-of-the-Obstetrician-Gynecologist> [<https://perma.cc/DA2K-6PCB>].

⁹¹ See Committee on Obstetric Practice, *Committee Opinion, Number 711*, American Congress of Obstetricians and Gynecologists (Aug. 2017), <https://www.acog.org/Resources->

substance is not addicted, and mild, occasional drug use does not have a significant impact on the health of the fetus or child.⁹² Yet charges for pregnant drug use are widely discretionary, and the laws do not differentiate repeated or temporary drug use, even though the impact on the fetus may vary greatly.⁹³ A woman who is prosecuted may face jail time while pregnant or postpartum, which neglects treatment needs, and may have her child taken.⁹⁴ This separation can hinder the mother's success in treatment, as well as neglect the potential benefit of the mother's presence to her child.⁹⁵ Also, detention following prosecution sometimes forces women to give birth in jail; unable to make it to the hospital in time, women are potentially without access to medical professionals in time for delivery.⁹⁶ Although fetal endangerment laws claim to protect children and families, removing a woman from her family can detrimentally impact the newborn as well as any other children she may have.⁹⁷

The criminalization of pregnant drug use has raised questions on the racial impact of these laws. Compared to other campaigns against drug use, prosecutions for pregnant opioid use have not raised the same concerns of disproportionate treatment based on race.⁹⁸ Research suggests that prosecutions for pregnant drug use have crossed racial, gender, and regional lines. In the late 1980s and early 1990s, African-American and urban populations were disproportionately prosecuted for crack cocaine, despite

And-Publications/Committee-Opinions/Committee-on-Obstetric-Practice/Opioid-Use-and-Opioid-Use-Disorder-in-Pregnancy [https://perma.cc/7LG7-L7NW].

⁹² See, e.g., Martin, *supra* note 7 (explaining that “[e]xposure to too much benzodiazepine during pregnancy can sometimes cause newborns to be fussy or floppy-limbed. But occasional, small doses of diazepam (the generic name for Valium) are considered safe”).

⁹³ See *id.*

⁹⁴ See Stephanie Chen, *Pregnant and Addicted, Mothers in South Carolina Find Hope*, CNN (Oct. 27, 2009), <http://www.cnn.com/2009/LIVING/10/23/south.carolina.pregnant.addicts/index.html> [https://perma.cc/SV4B-XUMH].

⁹⁵ See *id.*

⁹⁶ Hulseley, *supra* note 60.

⁹⁷ Catherine Devaney McKay et al., *Confronting Delaware's Heroin Epidemic in-Prison Treatment, Methadone Maintenance and Providing Post-Release Support and Counseling Can Reduce Recidivism and Discourage a Return to Addiction*, 33 DEL. LAW. 14, 17 (2015); see also Lauren Vogel, *Newborns Exposed to Opioids Need Mothers More than NICU, Say Pediatricians*, 190 CAN. MED. ASS'N J. E123, E123–24 (2018) (explaining that separation after birth can be harmful to bonding and attachment in newborns, which leads to complications with breastfeeding; breastfeeding may reduce the need for other drugs to be used to treat the infant's NAS, since they receive a small dose through breast milk).

⁹⁸ See Amnesty International, *supra* note 20, at 22 (noting that the crack cocaine “epidemic” led to disproportionate arrests of women of color, in spite of no higher usage rates of the drug).

similar usage rates by non-African-Americans.⁹⁹ The racial impact of opioid-related prosecutions, however, is less clear.¹⁰⁰ For example, in a study of Alabama prosecutions for in utero drug use, 75% were against white women and 24% were against African-American women, and “enforcement has been strongest in majority-white counties.”¹⁰¹ The study did not analyze the charges by type of drug and race, so it is difficult to determine the racial impact of opioid charges, specifically.

Just as the three states differ in the source of authority for prosecutions, the laws regarding reporting of pregnant drug use also differ amongst the states.¹⁰² Tennessee was the first state to require reporting of NAS.¹⁰³ In 2011, South Carolina developed a test for health care providers to screen patients’ substance use, referred to as “SBIRT,” or “screening, brief intervention and referral to treatment.”¹⁰⁴ However, SBIRT is not mandatory and has not resulted in significant increases in women seeking treatment for their addiction needs.¹⁰⁵ In contrast, in Alabama, reporting to child welfare authorities is mandatory, and these authorities then report pregnant women to law enforcement.¹⁰⁶

A. CURRENT NEEDS WITHIN THE CRIMINAL JUSTICE SYSTEM

Although a comprehensive solution is necessary to address the needs of pregnant women addicted to opioids, there are two key areas in which the criminal justice system can better implement the intent of these pregnant drug laws, as well as the needs of pregnant women. First, changes are necessary in how women are brought into the justice system so that pregnant women receive the treatment they need without prejudice or automatic referrals to law enforcement. Second, drug courts may serve as an effective way to

⁹⁹ *Id.*

¹⁰⁰ See Martin, *supra* note 7; Pro Publica, *How We Identified Alabama Pregnancy Prosecutions*, PRO PUBLICA (Sept. 23, 2015), <https://www.propublica.org/article/how-we-identified-alabama-pregnancy-prosecutions> [<https://perma.cc/KNX3-87GN>].

¹⁰¹ *Id.*

¹⁰² See Kampschmidt, *supra* note 39, at 491–92; Lauren Sausser, *Medical Test May Be Key to Reducing Infant Deaths in S.C.*, POST & COURIER (May 20, 2013), https://www.postandcourier.com/features/your_health/medical-test-may-be-key-to-reducing-infant-deaths-in/article_d1acc6ce-fd33-53cb-a72e-3fccf2515c61.html [<https://perma.cc/MZ87-9HED>]; Amy Yurkanin, *Alabama’s Crackdown on Pregnant Marijuana Users*, ALA. MEDIA GROUP (Mar. 15, 2017), http://www.al.com/news/birmingham/index.ssf/2017/03/alabamas_crack_down_on_pregnan.html [<https://perma.cc/W7KX-LXWZ>].

¹⁰³ Kampschmidt, *supra* note 39, at 491–92.

¹⁰⁴ Sausser, *supra* note 102.

¹⁰⁵ *Id.*

¹⁰⁶ Yurkanin, *supra* note 102.

address a woman's health care needs while also satisfying the intent of the laws. However, these drug courts must undergo significant reforms to address adequately the unique needs of pregnant women. By looking at best practices in some courts, such as Buffalo's new opioid court, it is evident that drug courts are better suited to address the concerns that led to the creation and enforcement of pregnant drug laws.¹⁰⁷ In addition to benefiting the few states that criminalize drug use, these reforms will benefit women in other states because most women who enter the justice system for any reason, whether at the state or federal level, face challenges with drug addiction.¹⁰⁸ Whether states are charging pregnant women specifically for their opioid use while pregnant, or for other opioid-related crimes like possession, pregnant women struggling with opioid addiction face the possibility of incarceration, which has detrimental consequences for the women, as well as for their fetuses.

IV. WHY INCARCERATION IS AN INAPPROPRIATE RESPONSE TO PREGNANT WOMEN ADDICTED TO OPIOIDS

Regardless of how pregnant women enter the criminal justice system, incarceration of such women fails to serve their health care needs or those of their fetuses and newborns.¹⁰⁹ According to the American College of Obstetricians and Gynecologists, women involved with the criminal justice system are some of "the most vulnerable in our society."¹¹⁰ Especially due to the high-risk nature of pregnancies among incarcerated women, access to prenatal care is essential for the health of the mother as well as her fetus.¹¹¹ States have failed to provide this vital care.

Specifically, according to a 2010 report analyzing policies and conditions for incarcerated pregnant women, thirty-eight states received

¹⁰⁷ See Michael Canfield, *Buffalo Opens Nation's First Opiate-Centered Court*, BUFF. BUS. NEWS (June 2, 2017), available at <https://www.bizjournals.com/buffalo/news/2017/06/02/buffalo-opens-nation-s-first-opiate-centered-court.html>. [<http://perma.cc/6FAU-YQE5>].

¹⁰⁸ NATIONAL RESOURCE CENTER ON JUSTICE INVOLVED WOMEN, *supra* note 56.

¹⁰⁹ National Women's Law Center, *Mothers Behind Bars: States are Failing*, NAT'L WOMEN'S L. CENTER (Oct. 21, 2010), <https://nwlc.org/resources/mothers-behind-bars-states-are-failing/> [<https://perma.cc/RFP9-37F5>].

¹¹⁰ Committee on Health Care for Underserved Women, *Committee Opinion, Number 511*, American College of Obstetricians and Gynecologists (Nov. 2011), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Care-for-Pregnant-and-Postpartum-Incarcerated-Women-and-Adolescent-Females> [<https://perma.cc/ZXN8-3G94>].

¹¹¹ National Women's Law Center, *supra* note 109.

failing grades.¹¹² Further, in more than forty states, prisons “do not require medical examinations as a component of prenatal care.”¹¹³ Nutrition is also an important element of prenatal care, but more than forty states do not require that incarcerated pregnant women receive adequate nutrition.¹¹⁴ Also, given that so many detainee pregnancies are high-risk, it is crucial that women receive appropriate medical care in hospitals during delivery, not in solitary confinement cells, as some women experience.¹¹⁵ While it is difficult to know just how many women deliver their babies within a jail or prison cell, there are plenty of individual instances in which a woman has been forced to give birth in an incarceration facility.¹¹⁶ In this vein, women should not be shackled while giving birth.¹¹⁷ Not only is the practice degrading and most often unnecessary—since the majority of imprisoned women are nonviolent offenders and there are no reports of attempted escapes related to delivery—but shackles can also prevent health providers from being able to fully evaluate and care for the woman and her fetus.¹¹⁸

After delivery, there are still significant health-related needs that must be met, yet incarcerated women rarely have access to the appropriate treatment and resources for these needs.¹¹⁹ One major issue that postpartum incarcerated women face is the often immediate separation of the woman

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Committee on Health Care for Underserved Women, *supra* note 110; Hotelling, *supra* note 57.

¹¹⁶ See Demarco Morgan, *Mich. Woman Says She was Forced to Give Birth on Jail Floor*, CBS NEWS (Feb. 8, 2017), <https://www.cbsnews.com/news/jessica-preston-says-she-was-forced-to-give-birth-on-jail-floor/> [<https://perma.cc/Y8Q4-VEFC>] (In 2016, Jessica Preston was forced to deliver her baby on the floor of a jail, without a doctor present, after asking to go to the infirmary and being denied three times); see also Eric Nicholson, *Woman Whose Infant Died After Birth in Prison Toilet is Suing Operator of Dawson State Jail*, DALL. OBSERVER (Mar. 11, 2013), <https://www.dallasobserver.com/news/woman-whose-infant-died-after-birth-in-prison-toilet-is-suing-operator-of-dawson-state-jail-7140500> [<https://perma.cc/2EM9-XN5X>] (Autumn Miller alleges in a lawsuit that in 2012, after she tried to seek medical treatment, she was left alone in a locked cell with only a menstrual pad and forced to deliver her baby in the toilet, who died four days later); Emily Zantow, *Third Woman Sues Sheriff Over Birth in Milwaukee Jail*, COURTHOUSE NEWS SERV. (Aug. 14, 2017), <https://www.courthousenews.com/third-woman-sues-sheriff-birth-milwaukee-jail/> [<https://perma.cc/D5P8-D3XP>] (Rebecca Terry, who in 2014 was forced to deliver within the jail and without medical treatment, becomes the third woman to file a lawsuit against a sheriff for pregnancy/delivery-related mistreatment at a Milwaukee jail.).

¹¹⁷ Committee on Health Care for Underserved Women, *supra* note 110.

¹¹⁸ *Id.*

¹¹⁹ See Kajstura, *supra* note 52.

from her child at birth.¹²⁰ In spite of the high number of pregnant women behind bars, only thirty-two states offer the opportunity for women to be sentenced to family-based treatment programs rather than prison,¹²¹ and only seven states have prison nursery programs.¹²² This separation harms both women and their newborns, and can make the withdrawal process more difficult.¹²³

Incarcerated pregnant women are a vulnerable population with particular needs. Jail and prison systems fail to meet these needs, which is detrimental to the health of both the mother and her fetus. Jails and prisons offer far-less-than-ideal conditions for these women, and yet so many are forced to remain detained, even those who are awaiting trial (and thus innocent), and those serving time for nonviolent crimes.¹²⁴ Exorbitant bonds may prevent pregnant women whom are otherwise eligible from being out in community pre-trial.¹²⁵ This inappropriate response to female inmates not only works to degrade incarcerated pregnant women, but it also misses a unique opportunity to support the women so that they may overcome some of the challenges that likely brought them to jail or prison. Both health care professionals and mothers who have previously been incarcerated note that pregnancy may serve as a particularly strong motivator for women to stay with their treatment programs and focus on positive choices.¹²⁶ Rather than

¹²⁰ Hotelling, *supra* note 57, at 38; *see also* Jeannette T. Crenshaw, *Healthy Birth Practice #6: Keep Mother and Baby Together—It's Best for Mother, Baby, and Breastfeeding*, 23 J. PERINATAL EDUC. 211, 212 (2014) (“Disrupting or delaying skin-to-skin care may suppress a newborn’s innate protective behaviors, lead to behavioral disorganization, and make self-attachment and breastfeeding more difficult. Lack of skin-to-skin care and early separation also may disturb maternal-infant bonding, reduce the mother’s affective response to her baby, and have a negative effect on maternal behavior.”).

¹²¹ National Women’s Law Center, *supra* note 91.

¹²² Melissa Santos, ‘I Really Want Him to Have a Different Life.’ *How Some Female Inmates are Raising Babies Behind Bars*, THE NEWS TRIBUNE (Mar. 25, 2017), <https://www.thenewstribune.com/news/politics-government/article140712783.html> [<https://perma.cc/S3A5-BN6S>].

¹²³ *See* Hotelling, *supra* note 57, at 38.

¹²⁴ *See* Kajstura, *supra* note 52.

¹²⁵ *See* Ryan J. Reilly & Nick Wing, *Alabama County Faces Lawsuit Over Pregnant Vet Jailed Because She Can’t Afford Freedom*, HUFFINGTON POST (May 18, 2017), https://www.huffingtonpost.com/entry/bail-lawsuit-pregnant-veteran-jailed_us_591de418e4b094cdba523b69 [<https://perma.cc/GF3E-XHPL>] (A pregnant woman was unable to afford the \$7,500 bail in order to avoid jail for forging a \$75 check, though a judge issued a temporary order so that she would not be forced to remain in jail at seven months pregnant.).

¹²⁶ *See* Ronnie Cohen, *Pregnant Opioid Users Need Treatment, Not Jail, Pediatricians Say*, 12 WESTLAW J. MED. MALPRACTICE 8 (2017) (Dr. Mary Beth Sutter has noted that “[i]f there ever was a time when it’s good to help people with substance abuse . . . it’s pregnancy.”);

seek to address these issues within the jails and prisons themselves, the criminal justice system might offer a more effective solution through an alternative program that prioritizes treatment and avoids unnecessary and harmful detention of pregnant women.

V. DRUG COURTS

Drug courts are specialized programs that offer an alternative criminal justice process for drug-dependent offenders.¹²⁷ While drug courts vary in approach, the system focuses on treatment over punishment and therefore is the most appropriate avenue for adjudicating cases of pregnant opioid use. Treating the recent opioid court in Buffalo as a model, the criminal justice system can better address the needs of pregnant women struggling with opioid use by creating a program that emphasizes treatment, and meets the specific needs of this group of women.

A. BACKGROUND

The first drug court opened in Miami in 1989, in response to concerns about high recidivism rates and subsequent costs of individuals struggling with substance abuse.¹²⁸ There are now more than 3,000 drug courts throughout all jurisdictions in the United States.¹²⁹ The drug court system has been found to lower recidivism rates and financial costs within the criminal justice system.¹³⁰ Drug courts incorporate treatment in the criminal justice system for individuals charged with drug-related, nonviolent crimes.¹³¹ Alabama has 121 drug courts,¹³² and nearly every county in Alabama has a court in operation.¹³³ Courts have different requirements for

see also Santos, *supra* note 122 (Candida Suarez and Skye Logue, two female inmates participating in a Residential Parenting Program, have expressed commitment to the program due to wanting a strong future for their children).

¹²⁷ NATIONAL INSTITUTE OF JUSTICE, *Drug Courts*, DEP'T OF JUST. (Jan. 10, 2017), <https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx> [<https://perma.cc/J2YM-W7XU>] (last visited Jan. 25, 2019).

¹²⁸ Seth W. Norman et al., *Drug Court Success Outcomes and Cost Savings of an Innovative Residential Drug Court Treatment Program for Felony Offenders*, 51 TENN. B.J. 16, 17 (2015).

¹²⁹ NATIONAL INSTITUTE OF JUSTICE, *supra* note 127.

¹³⁰ *Id.*; *see also* Thomas J. Walsh, *In the Crosshairs: Heroin's Impact on Wisconsin's Criminal Justice System*, 89 WIS. LAW. 32, 34 (2016).

¹³¹ Andrew Fulkerson, *How Much Process is Due in the Drug Court?*, 48 No. 4 CRIM. L. BULL. 655, 656 (2012).

¹³² National Drug Court Resource Center, *Find a Drug Court*, American University, <https://ndrc.org/map/> [<https://perma.cc/LMC4-DVE7>] (last visited Dec. 11, 2017).

¹³³ DRUG COURTS IN ALABAMA, ALABAMA JUDICIAL SYSTEM (Mar. 28, 2011), http://judicial.alabama.gov/docs/drug_court_map.pdf [<https://perma.cc/NX3A-FN25>].

admission into a drug court proceeding, but they generally require that the defendant be drug-dependent and facing a nonviolent charge related to drug use in some way.¹³⁴ At least some of the Alabama courts exclude persons charged with anything more serious than a misdemeanor from participation.¹³⁵ In Alabama, the criminalization of pregnant drug use has manifested through a charge of child endangerment, which is a felony.¹³⁶ Thus, women would be excluded from participation in some counties, leaving incarceration as the only alternative within the criminal justice system.¹³⁷ South Carolina has a total of forty-six drug courts,¹³⁸ and currently has legislation pending in the state senate committee that calls for creating drug court programs in each circuit, as well as creating other offices to support the drug courts' functions.¹³⁹ In Tennessee, there are seventy-three drug courts.¹⁴⁰ Consistent with the national trend, the number of drug courts in all three states has continued to increase over the past few years, with at least ten new courts operating in each state since 2015.¹⁴¹

Although there are various drug court models,¹⁴² there are distinguishing factors that tend to apply across all types. Drug courts focus on treatment, with "intensive supervision, random and frequent drug testing, regular court appearances, individual and group counseling, and participation in twelve-step treatment."¹⁴³ Although eligibility requirements vary by court, most courts consider: the drug dependency of the participant, the severity of the charge, and prior criminal history or probation concerns, and often prohibit admittance for violent crimes.¹⁴⁴ Drug courts may be pre-adjudication or post-adjudication.¹⁴⁵ In a pre-adjudication setting, the case is transferred to a drug court, and upon successful completion, charges are

¹³⁴ See Molly K. Webster, *Alternative Courts and Drug Treatment: Finding A Rehabilitative Solution for Addicts in a Retributive System*, 84 *FORDHAM L. REV.* 855, 869–70 (2015).

¹³⁵ Theresa Churchill, *Drug Court Returns to Macon County, Thanks to Federal Grant*, *HERALD & REV.* (Sept. 27, 2011), https://herald-review.com/news/local/drug-court-returns-to-macon-county-thanks-to-federal-grant/article_aeea02e2-e8c0-11e0-aecc-001cc4c002e0.html [<https://perma.cc/HN3E-CTMF>].

¹³⁶ ALA. CODE § 13A-13-6 (2013); Martin, *supra* note 78.

¹³⁷ *Id.*

¹³⁸ National Drug Court Resource Center, *supra* note 132.

¹³⁹ Drug Court Program Act, South Carolina, Session 122 § 0163 General Bill (2017).

¹⁴⁰ National Drug Court Resource Center, *supra* note 132.

¹⁴¹ *Id.*; but see National Association of Drug Court Professionals, *supra* note 133.

¹⁴² Fulkerson, *supra* note 131.

¹⁴³ *Id.* at 1.

¹⁴⁴ Webster, *supra* note 134, at 869–70.

¹⁴⁵ Fulkerson, *supra* note 131.

dismissed.¹⁴⁶ In a post-adjudication setting, the defendant first pleads guilty, and then through successful completion of the drug court program and satisfactory probation, the conviction is usually expunged.¹⁴⁷ Unsuccessful completion will result in removal from the drug court and lead to sentencing within the traditional court setting.¹⁴⁸ Although the threat of sentencing and imprisonment still exists for failure to complete the program, the drug court model is more team-based than adversarial, and graduated sanctions for program violations allow individuals to remain in the program, even if they fall short of requirements at times.¹⁴⁹

The first phase of the program focuses on detoxification from the abused substance, which occurs in the context of an independent, residential treatment program.¹⁵⁰ The treatment then usually proceeds to non-residential counseling, although those who still need more support in breaking their addiction may repeat the first phase.¹⁵¹ If the individual continues to progress through the program, she moves on to the stage designed to ensure her successful participation in society, which might include academic or occupational advising, and continued drug tests to demonstrate sobriety.¹⁵² The program typically lasts approximately twelve to eighteen months, and at the end of that period, charges will be dismissed or expunged, depending on the system.¹⁵³

Because of the costs of treatment for participants,¹⁵⁴ funding is a key issue in setting up a successful drug court program. There are a variety of sources of funding available for this purpose. Through the Drug Court Discretionary Grant (DCDG) Program, the federal government offers financial and technical support to state and local governments and courts.¹⁵⁵ Drug courts may also be funded through state legislation, such as California's various funding bills that have offered grants to state programs in order to

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Webster, *supra* note 134, at 870.

¹⁵¹ *Id.* at 870–71.

¹⁵² *Id.* at 871.

¹⁵³ *Id.* at 870–71.

¹⁵⁴ See NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, *Drug Courts – Grants and Funding*, DEPARTMENT OF JUSTICE, https://www.ncjrs.gov/spotlight/drug_courts/grants.html [<https://perma.cc/LF9B-B8LR>] (last visited Dec. 11, 2017).

¹⁵⁵ *Id.*

build a structure for the state's drug court system.¹⁵⁶ In Washington, drug courts have been funded through revisions of sentencing guidelines, which has saved money due to reduced incarcerations.¹⁵⁷ Idaho has created a specific fund for drug courts, paid for in part by a tax on alcohol.¹⁵⁸ Furthermore, drug court programs may be a more cost-effective way to address drug-related offenders. A National Institute of Justice study found that drug court programs on average cost \$1,392 less per participant than traditional proceedings within the criminal justice system.¹⁵⁹ Thus, there are various options for states to utilize in setting up drug court systems, and these programs may not only more effectively treat pregnant women with OUD, but also reduce costs.

Buffalo, New York recently opened the nation's first opioid court in May 2017 in response to the opioid crisis because the ordinary drug courts were ineffective.¹⁶⁰ In the court, "[a]dministering justice takes a back seat to the overarching goal of simply keeping defendants alive."¹⁶¹ Because of the severity of consequences of opioid addiction—overdoses and death—the court instated new policies to address the unique needs of opioid users who were unsuccessful in the traditional drug court model.¹⁶² First, defendants appear before the judge within a day of their arrest so that they can start treatment immediately.¹⁶³ After a month of treatment, defendants appear regularly before the judge so that he or she can check in on their progress

¹⁵⁶ National Drug Court Institute, *Ensuring Sustainability for Drug Courts: An Overview of Funding Strategies*, Monograph Series 8, 5 <http://www.ndci.org/sites/default/files/ndci/Mono8.Sustainability.pdf> [<https://perma.cc/7DCJ-8M6K>].

¹⁵⁷ *Id.* at 6.

¹⁵⁸ *Id.* at 7.

¹⁵⁹ NAT'L INST. OF JUSTICE, DO DRUG COURTS WORK? FINDINGS FROM DRUG COURT RESEARCH (May 1, 2018), <https://www.nij.gov/topics/courts/drug-courts/pages/work.aspx> [<https://perma.cc/CL4P-R54U>].

¹⁶⁰ Canfield, *supra* note 107; Associated Press, *First Opiate Court in the U.S. Focuses on Keeping Users Alive*, NBC NEWS (July 9, 2017), <https://www.nbcnews.com/storyline/americas-heroin-epidemic/first-opioid-court-u-s-focuses-keeping-users-alive-n781121> [<https://perma.cc/Q7NT-BM59>]; *see also* Hon. Janet DiFiore, NAT'L CTR. FOR STATE COURTS, NEW YORK STATE'S OPIOID INTERVENTION COURT 2 (2018), <https://www.ncsc.org/~media/Microsites/Files/Trends%202018/New-York-Opioid-Intervention-Courts.pdf> [<https://perma.cc/847Q-FVVZ>] (explaining that after deaths by opioid-overdose significantly increased in Erie County and within the Buffalo City Court, stakeholders from the Buffalo and Erie County judicial systems worked to find a new solution for addressing defendants addicted to opioids).

¹⁶¹ Associated Press, *supra* note 160.

¹⁶² *Id.*

¹⁶³ *America's First Opioid Court is Working Well*, ECONOMIST (Oct. 19, 2017), <https://www.economist.com/news/united-states/21730452-buffalo-new-york-has-history-pioneering-criminal-justice-innovations-americas-first> [<https://perma.cc/6GFQ-DS4U>].

(defendants are given multiple chances to successfully complete the program because the court recognizes that relapses are part of overcoming addiction).¹⁶⁴ The individual's case does not proceed until completion of treatment.¹⁶⁵ While the court shares some similarities with other treatment models,¹⁶⁶ it embraces an approach specific to the rehabilitative needs of individuals addicted to opioids by focusing on immediate treatment and more regular face-to-face communication with the judge to track progress.¹⁶⁷

B. DRUG COURTS AND PREGNANT WOMEN CHARGED FOR OPIOID USE

Although charges against women for pregnant opioid use are sometimes handled within the drug court system, there is no guarantee that adjudication will take place in a drug court rather than a traditional court. As discussed above, some drug court programs exclude individuals facing felony charges from participation, and women facing any degree of charges may also stay in jail initially while their cases are being considered.¹⁶⁸ Thus, even when women do have access to a drug court, they might still experience harmful detainment conditions.¹⁶⁹ The requirement of dependency for drug court admission raises a central question regarding eligibility of women to participate in these programs, because women are sometimes prosecuted for occasional, rather than chronic, drug use.¹⁷⁰ In Alabama, for instance, women have been prosecuted for child endangerment regardless of their level of use—even for amounts as small as one anti-anxiety pill, with no harm to the child.¹⁷¹

Although treatment is often a component of pregnant drug use prosecutions, health care of the woman and her fetus is not always given appropriate weight in the process. The traditional drug court system, for instance, does not guarantee that women who participate will not also face

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Eric Westervelt, *To Save Opioid Addicts, This Experimental Court is Ditching the Delays*, NPR (Oct. 5, 2017, 5:02 AM), <https://www.npr.org/sections/health-shots/2017/10/05/553830794/to-save-opioid-addicts-this-experimental-court-is-ditching-the-delays> [<https://perma.cc/3EAX-KEG3>].

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., Martin, *supra* note 78.

¹⁶⁹ See *id.*

¹⁷⁰ See, e.g., *id.* An expectant mother took one valium over the course of several days a few weeks before giving birth. Although her son was born healthy and without any drugs in his system, she was arrested and charged under Alabama's Chemical Endangerment Law. Although the charges were eventually dropped, her case dragged on for months and she was forced to pay a \$10,000 bond.

¹⁷¹ See *id.*

some time in jail, and this may delay a woman's treatment.¹⁷² Most counties in Alabama use the threat of jail as a way to bring pregnant women into the drug court system, which can then force women into treatment.¹⁷³ However, women who are forced to await their proceedings in jail, including those whose convictions are overturned, often face poor conditions for their health, and may need to pay exorbitant bonds in order to be released.¹⁷⁴ Even in Tennessee, where treatment can serve as a defense to fetal assault charges,¹⁷⁵ women may be initially jailed for their offense.¹⁷⁶

Another significant area of need in the drug court system is access to treatment that meets the unique needs of pregnant women. Although methadone is a medication used in treatment for opioid addiction, the majority of drug courts do not offer methadone in their treatment programs.¹⁷⁷ Further, although methadone is part of the "recommended . . . standard of care for pregnant women dependent on opioids," judges have discretion regarding the treatment offered through their courts, and some believe medication should not be used in treatment.¹⁷⁸ In addition, despite research suggesting that women attain higher treatment completion success rates when they are not separated from their children, a 2005 study found that only 3% of programs were specifically tailored to pregnant women, and only approximately 14% of treatment centers accepted women who were pregnant or had recently given birth.¹⁷⁹ Thus, the current drug court system is not properly equipped for cases involving pregnant women struggling with addiction.

VI. SOLUTIONS IN ADDRESSING PREGNANT OPIOID USE

Although drug courts offer potential promise for better adjudicating prosecutions of pregnant women addicted to opioids, the traditional drug court system has significant gaps that must be addressed in order to apply a

¹⁷² See, e.g., *id.*

¹⁷³ *Id.* The District Attorney in one Alabama county, for instance, noted that his goal in charging women for pregnant drug use was not imprisonment, but to compel treatment.

¹⁷⁴ *Id.* (reporting that women have faced bonds of \$7,500, \$10,000, and \$30,000).

¹⁷⁵ See Nina Liss-Schultz, *Tennessee's War on Women is Sending New Mothers to Jail*, MOTHER JONES (Mar. 14, 2016), <http://www.motherjones.com/politics/2016/03/tennessee-drug-use-pregnancy-fetal-assault-murder-jail-prison-prosecution/> [https://perma.cc/PVD8-7FB6].

¹⁷⁶ *Id.*

¹⁷⁷ Barbara Andraka-Christou, *Improving Drug Courts Through Medication-Assisted Treatment for Addiction*, 23 VA. J. SOC. POL'Y & L. 179, 190, 208 (2016).

¹⁷⁸ AMNESTY INT'L, *supra* note 20, at 33.

¹⁷⁹ Chen, *supra* note 94.

more treatment-based approach to pregnant women affected by the opioid epidemic.

A. REPORTING PREGNANT WOMEN FOR OPIOID USE

Drug testing raises concerns of discriminatory practice as well as violations of confidentiality.¹⁸⁰ One study found that in spite of similar rates of drug use, “black women were 1.5 times more likely to be tested for illicit drugs than non-black women”¹⁸¹ Even worse, another study found health care providers reported black women for substance abuse at ten times the rate they did white women.¹⁸² This disproportionate testing is often a result of health care providers’ own biases.¹⁸³ Testing also often targets low-income women—Medicaid recipients are more likely to be tested than those with private insurance,¹⁸⁴ and complications at birth, which are more common for women with lower incomes, frequently result in drug testing.¹⁸⁵

The American Congress of Obstetricians and Gynecologists (ACOG) recommends universal screening for substance use disorder as early as possible for pregnant women.¹⁸⁶ The screening is intended to better serve the health care needs of the woman and her fetus, and universal screening is recommended to avoid missed cases due to stereotyping and stigma.¹⁸⁷ Of course, women should be notified when they are being tested and informed of confidentiality and reporting policies. Consistent with ACOG’s intentions with universal screening,¹⁸⁸ the procedures for reporting pregnant women to law enforcement authorities should not be triggered automatically when a pregnant woman who is using drugs enters the health care system. If the goal of legislation is to protect the health of both the woman and the fetus,¹⁸⁹ the law must create a structure that fosters treatment for women as soon as possible and encourages, rather than discourages, addicted women to seek help. Laws criminalizing pregnant drug use have deterred many women from seeking the health care and rehabilitation they need. After Tennessee passed

¹⁸⁰ AMNESTY INT’L, *supra* note 20, at 24 (explaining that drug testing decisions are based on “highly discretionary ‘risk factors’” which leads to racially discriminatory testing).

¹⁸¹ *Id.* at 25.

¹⁸² See Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1202 (1990).

¹⁸³ *Id.* at 1206.

¹⁸⁴ AMNESTY INT’L, *supra* note 20, at 25.

¹⁸⁵ *Id.* at 24.

¹⁸⁶ Committee on Obstetric Practice, *supra* note 91, at 1.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1–2.

¹⁸⁹ See Martin, *supra* note 65; DeLouth, *supra* note 81; Mohney, *supra* note 83.

its “fetal assault law,” doctors noticed that women were less likely to show up to their first appointments, and often only sought care later into their pregnancies.¹⁹⁰ Such laws may also discourage pregnant women from seeking help regarding their addiction, deter them from going to a hospital to deliver their babies, and even lead to the decision to terminate pregnancies due to fears of prosecution.¹⁹¹

In order to avoid this detrimental impact and preserve the law’s intent to encourage women to seek treatment, pregnant women who are already seeking the care that they and their fetuses need should be given an opportunity to receive that care without fear of criminal action. If a pregnant woman has regularly shown up to her medical appointments, is seeking rehabilitation, and has already worked with her health care providers to address any needs for her pregnancy due to her substance use, there is no benefit to charging her with a crime. Such a charge will not deter future women from using drugs while pregnant, but rather will deter women from seeking health care and addiction treatment on their own accord.¹⁹² Thus, women who have already sought support should not be targeted by the law. Since treatment is the desired end result, there is no need to report women who are complying with a treatment program.

Likewise, prosecutions for one-time or occasional use do not accomplish the law’s intended goal to deter women from harming the fetus, or provide treatment to addicted women. Thus, Alabama, South Carolina, and Tennessee should only apply pregnant drug use laws when the health of the woman and her fetus are in danger due to opioid abuse—not an occasional use with no harmful effects.¹⁹³ This would ensure that women who are in need of treatment can receive it through the drug court system, while avoiding wasting time and resources by charging women when health needs do not demand such charges.

B. NECESSARY REFORMS TO ADDRESS THE NEEDS OF PREGNANT WOMEN IN DRUG COURTS

If prosecution becomes necessary after a pregnant woman has refused treatment, the case must proceed with consideration of the ultimate goal of

¹⁹⁰ AMNESTY INT’L, *supra* note 20, at 33–34.

¹⁹¹ *Id.* at 34.

¹⁹² *See id.* at 33–34.

¹⁹³ *See, e.g.,* Martin, *supra* note 7 (reporting about a woman who was arrested for taking a Valium pill split in half over two different occasions. When her urine tested positive for the drug, her son was taken for testing, but he was clean and did not exhibit any symptoms, and “occasional, small doses of [Valium] are considered safe.” Still, weeks later, she faced charges of “knowingly, recklessly, or intentionally” exposing her fetus to controlled substances).

providing the necessary care to the woman and her future child. Drug courts may serve a critical role in better addressing the needs raised by pregnant drug use laws because they offer the opportunity to encourage treatment,¹⁹⁴ rather than punishment, within the criminal justice system. The treatment-centered, team-based approach fits into the grander scheme of encouraging pregnant women to seek health care and treatment, and can help guide women struggling with their addiction. Effective treatment of pregnant women can be a cost-saving strategy as well; research suggests that delivery of “drug-free babies” may initially save \$250,000 in medical care costs, as well as up to \$750,000 throughout the life of the child.¹⁹⁵ While a variety of drug court models exist, courts that address addiction for pregnant women should apply some common approaches in order to most effectively provide treatment to pregnant women struggling with opioid addiction.

First, pre-adjudication programs, which allow women to avoid an actual criminal conviction, are most appropriate for pregnant drug use charges. The ability to avoid a conviction has enormous implications for the woman and her child, such as employment prospects and custody issues. The pre-adjudication approach combined with the rapid court appearance and admission into a treatment program, like the court in Buffalo, avoids unnecessary jailing and focuses on meeting the health needs of the woman and the fetus.¹⁹⁶ Likewise, with universal testing, women who refuse to seek out treatment should enter the drug court system earlier rather than later, and law enforcement should also seek to admit the women into drug court systems while they are still pregnant, rather than some time after giving birth.

Drug courts also must recognize that relapse is a natural part of the treatment process. Buffalo’s court, for example, allows participants multiple opportunities to successfully complete the program.¹⁹⁷ Because relapse is a reality of substance abuse recovery, the law should also take into consideration women who have voluntarily sought treatment but have struggled to follow their treatment program successfully. Even if a woman entered compulsory treatment through the legal system, relapses may occur. The National Institute on Drug Abuse, part of the National Institute of Health,

¹⁹⁴ See NATIONAL INSTITUTE OF JUSTICE, *supra* note 127 (explaining that drug court models incorporate treatment and rehabilitation).

¹⁹⁵ Norma Jaeger, *Where We Have Been and Where We Are Going: A Review of Idaho’s Drug and Mental Health Courts*, THE ADVOCATE (Oct. 2005), at 26.

¹⁹⁶ See Canfield, *supra* note 107 (showing that the Buffalo court is focused on getting the individual treatment first and foremost, and individuals will either receive inpatient rehab services or meet with the judge for 30–45 days, depending on the individual’s needs).

¹⁹⁷ See Westervelt, *supra* note 166 (reporting that “[n]o one gets indefinitely kicked out of the program for minor infractions, and [the judge] will let [participants] restart [their] treatment multiple times”).

explicitly states that relapse does not signify failed treatment, and that it is likely that someone battling substance abuse will relapse at some point.¹⁹⁸ There is a 40–60% relapse rate for drug addiction, and a majority of people undergoing treatment for a drug addiction will relapse within the first year of treatment, often in the initial weeks or months.¹⁹⁹ Since treatment is the ultimate goal,²⁰⁰ relapses should not result in automatic sanctions or exclusion from the program. In order to support participants during the treatment process while also holding them accountable, drug courts should create behavior contracts that explain potential sanctions as well as therapeutic responses for failing to comply with aspects of the program, which should be based on medical needs of the participant.²⁰¹

Drug courts also must be equipped to address the specific treatment and health needs of pregnant women. These needs range from seemingly obvious necessities, like access to proper medication, to more nuanced strategies that might encourage more successful completion of the program. One of the necessary components of a pregnant woman's treatment program is medication-assisted treatment. MAT is the universally accepted method of treatment for pregnant women addicted to opioids.²⁰² There are various reasons pregnant women who face charges for their opioid use may not have access to MAT. Some courts may not have the necessary resources, while others may not allow access to MAT because, although it is a step in helping the woman overcome addiction to opioids, it does expose the fetus to other forms of opioids, and therefore still leads to NAS at birth.²⁰³ However, an overwhelming majority of health professionals support MAT, as it has lower relapse rates.²⁰⁴ Additionally, without MAT or other treatment, women face

¹⁹⁸ NATIONAL INSTITUTE ON DRUG ABUSE, *Drugs, Brains, and Behavior: The Science of Addiction*, NATIONAL INSTITUTE OF HEALTH (2014), <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/treatment-recovery> [<https://perma.cc/Y6ZG-3C6W>]

¹⁹⁹ Rajita Sinha, *New Findings on Biological Factors Predicting Addiction Relapse Vulnerability*, 13 CURRENT PSYCHIATRY REPS. 398 (2011); NATIONAL INSTITUTE ON DRUG ABUSE, *supra* note 198.

²⁰⁰ See Martin, *supra* note 78; DeLouth, *supra* note 81, at 103; Mohny, *supra* note 83.

²⁰¹ Caitlinrose Fisher, *Treating the Disease or Punishing the Criminal?: Effectively Using Drug Court Sanctions to Treat Substance Use Disorder and Decrease Criminal Conduct*, 99 MINN. L. REV. 747, 777–78 (2014).

²⁰² Hand et al., *supra* note 38, at 58; see also Krans & Patrick, *supra* note 16, at 3 (explaining that MAT is preferable to withdrawal “due to [withdrawal’s] associations with decreased neonatal birth weight, illicit drug use relapse and resumption of high-risk behaviors such as intravenous drug use, prostitution and criminal activity”).

²⁰³ Smith, *supra* note 21.

²⁰⁴ AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, DISTRICT II, *Opioid Use Disorder in Pregnancy: Actionable Strategies to Improve Management & Outcomes in*

serious risks associated with withdrawal, such as miscarriages and preterm labor.²⁰⁵ Drug courts should consider the differences between methadone and buprenorphine, the two drugs commonly used in MAT, in developing treatment programs for participants.²⁰⁶ One important consideration is access to treatment centers; among southern women, for example, the ability to access treatment centers, whether voluntarily or through the drug court program, may be limited in more rural areas.²⁰⁷ As opposed to methadone, daily supervision of the buprenorphine is not necessary.²⁰⁸ Since the drug courts are meant to provide a treatment program where the participant can overcome addiction, courts should evaluate what type of program will best support a pregnant woman's successful completion of the program. If a woman wishes to remain close to home due to family or employment concerns, for instance, a judge might consider whether remote treatment with buprenorphine is a possibility.²⁰⁹ In the general population, buprenorphine has produced promising results; newborns whose mothers were treated with buprenorphine while pregnant required 89% less morphine when going through withdrawal after birth, and required 43% less time in the hospital.²¹⁰ Women who encounter the criminal justice system when addicted to opioids should have the same access to health care as women in the general population. Not only are the costs on society lower, but there can also be less suffering for the newborn.²¹¹ Regardless of which form of MAT a woman receives, the treatment must be part of an overall comprehensive treatment program, including: "individual and group counseling, case management, psychosocial education, peer support, coordination of prenatal care, and other services . . ."²¹² Furthermore, in addition to its treatment value, incorporating methadone into treatment for pregnant women may be

New York State 1, 2–3 (2017), available at, https://www.acog.org/-/media/Districts/District-II/Public/PDFs/OpioidUseDisorder_inPregnancyWhitePaper.pdf?dmc=1&ts=20171108T1927131249 [<https://perma.cc/D484-EZCJ>]; De Melker & Saltzman, *supra* note 14.

²⁰⁵ See generally AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 204.

²⁰⁶ See Hand et al., *supra* note 38, at 62. As stated earlier, buprenorphine does not require daily supervision of doses, so this drug may be more appropriate for a woman who is needed at home with her family or lives far away from the drug court.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See Krans & Patrick, *supra* note 16, at 4 ("Office-based administration liberates patients from the stigma associated with many methadone treatment facilities and increased flexibility may eliminate barriers for women with work or childcare responsibilities.").

²¹⁰ Patrick et al., *supra* note 44, at 1939.

²¹¹ See *id.*

²¹² See Hand et al., *supra* note 38, at 62.

cost-effective; research suggests “every dollar invested in methadone treatment saves society 38 dollars.”²¹³

Drug courts should seek to enroll women in treatment programs that mitigate relapse risks and triggers as much as possible. While Buffalo’s opioid court, which serves a wider range of people struggling with opioid use, requires daily visits between participants and the judge,²¹⁴ the needs of pregnant women differ and daily meetings may not be feasible or the best solution for women who are pregnant or recently gave birth. Separating a woman from her newborn baby, for example, may aggravate her vulnerability and make her more susceptible to relapse.²¹⁵ New mothers complete treatment more successfully when they are permitted to spend time with their newborns.²¹⁶ Newborns also benefit from spending time with their mothers; when newborns stay with their mothers, they require fewer days of treatment in the hospital, which can cut the cost of treating the baby in half.²¹⁷ Thus, for women who give birth during their treatment, they should have the option to spend time with their newborn child, should they want it.

To maintain the focus of drug courts on providing treatment, and not delivering punishment, courts should also utilize the various funding possibilities to ensure participants do not face financial burdens. Even when grants and funding are dwindling, there are opportunities to find new funding sources. Charleston County, South Carolina, for example, addressed funding concerns in part by doubling marriage license fees.²¹⁸ Critics of the drug court model cite the fees associated with treatment, which often disproportionately impact low-income participants.²¹⁹ Thus, the court’s sources of funding are a critical component of the program, and efforts should be made to reduce the costs to participants to the greatest extent possible. This will help support the goal of rehabilitating women and preparing them for productive and healthy lives upon the program’s completion.

Finally, drug courts must address the question of incarceration of women who are pregnant or have just given birth when they refuse treatment. As discussed, since the focus of courts should be on treatment and rehabilitation, incarceration is not only detrimental, but unnecessary. With universal testing, women will be identified more quickly, whether in receiving prenatal care or at the time of birth. Even if a woman is not

²¹³ Andraka-Christou, *supra* note 177, at 191.

²¹⁴ Canfield, *supra* note 107.

²¹⁵ Martin, *supra* note 78; Chen, *supra* note 94.

²¹⁶ Chen, *supra* note 94.

²¹⁷ Cohen, *supra* note 126, at 1.

²¹⁸ Reilly & Pierre-Lawson, *supra* note 156, at 25.

²¹⁹ Amnesty International, *supra* note 20, at 43.

identified or reported until after the birth, jail is inappropriate because treatment is still the primary concern, and the newborn may benefit from interacting with its mother. If states want to protect children and families, keeping the woman with her newborn while providing her treatment may be the best solution. Thus, following the opioid court in Buffalo, women should enter treatment immediately, with the drug courts focusing on health needs rather than punishment. Immediate entry into treatment also avoids the disparate impact that exists in the criminal justice system through bail or bond.²²⁰ Whereas in traditional drug courts, a defendant might not appear before a judge for several days, the opioid court allows for judges to see individuals within hours of arrest.²²¹

Just as the opioid court in Buffalo has created modifications to the traditional drug system in order to better address the needs of individuals addicted to opioids, South Carolina, Alabama, and Tennessee can create drug court treatment programs that better address the specific needs of pregnant women who use opioids. Such changes will better promote the health of the woman and her fetus and align more closely with the intentions of the law.

CONCLUSION

The opioid epidemic is a public health crisis that requires comprehensive reforms. In states that prosecute women for their drug use while pregnant, the response must include a drug court treatment program that accounts for the unique needs of pregnant women. In addition to these reforms within the criminal justice system, each state should seek to reduce the stigma of addiction and expand treatment programs to increase access to this much-needed care. Just as the opioid court in Buffalo has fostered change to prevent overdoses and get opioid addicts treatment as soon as possible, states can change their drug court systems to address the unique needs of pregnant women. These changes can promote better health outcomes for the women as well as their fetuses. Reforms to the drug court system can help ensure that women who are not already receiving prenatal and addiction care can get that care as soon as possible. Furthermore, the shift in focusing on treatment rather than punishment within the criminal

²²⁰ See generally Robin Steinberg, *Time for a National Fund that Chips Away at Money Bail and Stops Criminalizing Poverty*, USA TODAY (Nov. 28, 2017), available at <https://www.usatoday.com/story/opinion/policing/spotlight/2017/11/28/time-national-fund-chips-away-money-bail-and-stops-criminalizing-poverty/890484001/> [https://perma.cc/5EY6-P69B] (opining that “low-income women and communities of color bear the disproportionate impact of [the] profound injustice” of the bail/bond system).

²²¹ See Westervelt, *supra* note 166.

justice system can address concerns with deterring pregnant women from seeking addiction care.

One of the unique concerns of the opioid crisis, as opposed to other drugs, is the misuse of legal, prescription-based drugs. Whether individuals misuse prescription drugs or their use of legal painkillers becomes a gateway to illicit drugs like heroin,²²² the use of opioids in the United States is a public health crisis, and pregnant women are no exception to the devastating consequences. Multiple efforts are therefore needed to combat the prevalence of opioid abuse and overdose deaths, including for pregnant women. In addition to reforms within the criminal justice system, such as more effective drug courts, solutions for combatting overprescription are also needed.²²³ While potential solutions to these needs are beyond the scope of this Comment, the proposed drug court solutions can only be part of a more comprehensive solution to the needs of pregnant women and others who are battling opioid addiction. However, reforming the response to pregnant women who encounter the legal system as a result of their opioid use is a crucial component of such a comprehensive solution. By shifting the focus to treatment rather than punishment, these reforms to drug courts can provide the criminal justice system with an appropriate means of addressing the opioid epidemic.

²²² NATIONAL INSTITUTE OF HEALTH: NATIONAL INSTITUTE ON DRUG ABUSE, PRESCRIPTION OPIOID USE IS A RISK FACTOR FOR HEROIN USE (2015), <https://www.drugabuse.gov/publications/research-reports/relationship-between-prescription-drug-heroin-abuse/prescription-opioid-use-risk-factor-heroin-use> [<https://perma.cc/H583-BZ8V>].

²²³ See Popovich, *supra* note 10.