BETTER TOGETHER: TOWARD ENDING STATE REMOVAL OF SUBSTANCE-EXPOSED NEWBORNS FROM THEIR PARENTS

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ABSTRACT

The United States' child welfare system has long been an emperor with no clothes. The stated mission of the federal Children's Bureau is to strengthen families, prevent child abuse and neglect, and ensure permanency for children. This mission is impossible to critique in the abstract. But the reality is that this behemoth of a system—operating with an annual budget of nearly $10 billion and claiming custody over more than 650,000 foster children each year—often undermines child welfare, rather than promotes it. Under the guise of benevolence, this system routinely uses civil law to tear apart families, particularly Black, brown, and poor families. Activists and scholars increasingly question this punitive system and its failures, revealing that this emperor is not as clothed as it seems. This critical movement is rooted in, among others, Dorothy Roberts' 2002 seminal book, Shattered Bonds: The Color of Child Welfare, *and Marty Guggenheim's pioneering work in the family defense field. This Article centers itself in that past and present critical tradition.*

This Article critiques one particular phenomenon of the child welfare system: the systematic civil removal of newborn infants from people who have used substances during their pregnancy. With the help of state-enlisted agents (that is, healthcare workers who are mandated reporters of child abuse and neglect), the child welfare system routinely takes emergency custody of newborn infants when their parent has used substances at some point during their pregnancy. Even though prenatal drug use does not invariably harm a fetus, and the harms that do result can often be mitigated, the welfare system still responds by removing infants from their parents. These civil separations have devastating effects on individual parents and children and disproportionately affect Black, brown, and poor communities across generations. Federal law, state practice, and government funding backstop this enterprise of severance. This Article details the legal mechanics leading to separations and then goes on to propose something that is

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currently absent from legal scholarship—practical steps that can be taken by lawyers and legislators to challenge and prevent civil removals of infants. Ultimately, this Article pushes practitioners and policymakers to reimagine the nation's approach to parents who use substances during pregnancy by first understanding the connection between child wellbeing and family preservation.

I.
INTRODUCTION

The United States foster system[1] routinely separates newborn infants from their parents'[2] care. The foster system removed more than 47,000 children under the age of one in 2019 alone.[3] Foster system workers cited parental alcohol or drug use as a justification for half of these removals.[4] 23 states include prenatal exposure to substances in their definitions of child abuse and neglect.[5] Further, foster system workers hold immense discretion when determining what constitutes an emergency warranting removal in cases that are reported.[6] As the number of

1. In this Article, I use the Movement for Family Power's (MFP) abbreviated term "foster system" to describe the entire "child welfare and foster system." LISA SANGOI, MOVEMENT FOR FAMILY POWER, "WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR." HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR 127 n.8 (2020). MFP defines this system as "a civil legal system in the United States composed of child protective service agencies, foster care and adoption agencies, and family courts." *Id.* Advocates for parental rights suggest that, instead of the foster *care* system or the child *welfare* system, it should be "renamed the 'child removal system,' the 'child apprehension system,' 'the family separation system,' or the 'foster system.'" *Id.* at 127–28 n.8.

2. In this Article, I use the gender-neutral terms "parent" and "pregnant *person*," rather than "mother" or "pregnant woman," to include "all people with the capacity for pregnancy, across the gender spectrum." *See* MOVEMENT FOR FAM. POWER & NAT'L ADVOCS. FOR PREGNANT WOMEN, VIOLENCE AGAINST WOMEN IN THE MEDICAL SETTING: AN EXAMINATION OF THE U.S. FOSTER SYSTEM 11 n.1 (2019) (recognizing that "violations are perpetrated against all people with the capacity for pregnancy, across the gender spectrum," who seek reproductive healthcare, despite the report's mandate to focus on women's experience, and that "people outside the gender binary are all that much more vulnerable to . . . state intervention and control"). The role of non-gestational parents, their parental rights, and their possible substance use is worthy of research and scholarship but is beyond the scope of this Article. I have, however, kept gendered language when citing sources that use gendered language to not distort or misrepresent their research.

3. *Child Welfare and Alcohol and Drug Use Statistics*, NAT'L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE, https://ncsacw.samhsa.gov/research/child-welfare-and-treatment-statistics.aspx [https://perma.cc/GD3L-U6Q2] (last visited Jan. 9, 2022). Moreover, "[f]rom 2000–2018, the percentage of children under age 1 entering out-of-home care steadily increased . . . . Whereas children under 1 represented 13.4% of total removals in 2000, this has increased to close to a quarter (18.7%) of all removals in [2019]." *Id.*

4. *Id.* ("From 2000–2018, the percentage of children under age 1 who entered out-of-home care with parental alcohol or other drug (AOD) abuse as an identified condition of removal steadily increased. Data from Fiscal Year 2019 showed a slight decrease; a reduction of only 0.2%. [I]n 2000, 27.8% of children under age 1 had parental AOD as an identified condition of removal. This increased to 50.9% of children under age 1 in 2019.").

5. *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., PARENTAL SUBSTANCE USE AS CHILD ABUSE 2 (2020), https://www.childwelfare.gov/pubPDFs/parentalsubstanceuse.pdf [https://perma.cc/9N3V-DMXA] ("In 23 [s]tates and the District of Columbia, prenatal exposure to controlled substances is included in definitions of child abuse or neglect in civil statutes, regulations, or agency policies.").

6. *See, e.g.*, Diane DePanfilis, Child.'s Bureau, U.S. Dep't of Health & Human Servs., Child Protective Services: A Guide for Caseworkers 14 (2018), https://www.childwelfare.gov/pubPDFs/cps2018.pdf [https://perma.cc/2QMX-A5SW] (describing how, when a report of child abuse or neglect is "screened in"—that is, it "meets statutory and agency guidelines"—foster system caseworkers "[a]ssess [the] safety of [the] child and need for emergency removal or services").

infants separated from their parents continues to grow,[7] and as the foster system increasingly relies on substance use as a justification for removal,[8] this Article seeks to disrupt this trend and its implicit rationale—that prenatal drug use invariably harms infants and that these infants are better off in state custody than with their parents.

The effects of using substances, particularly cocaine, during pregnancy on newborns' health have historically been overstated by the media and politicians.[9] During the 1980s and 90s, media and policymakers spread racialized fear about how "'crack babies'—children exposed to crack cocaine in utero"—would grow up to be a generation of emotionally, mentally, and physically disabled children and adults who would put a lifelong strain on society and social services.[10] Later studies, however, failed to substantiate these severe narratives, finding no long-term disabilities in children due to their parent's prenatal cocaine use.[11] Modern scholarship also typically tempers its findings on the possible adverse effects of various prenatal substance use by adding the caveat that the adverse effects of certain drugs on child development are partially "mediated by childhood environment and adversity."[12]

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7. *Child Welfare and Alcohol and Drug Use Statistics*, *supra* note 3.

8. *Id.*

9. *See* Michael Winerip, *Revisiting the 'Crack Babies' Epidemic That Was Not*, N.Y. TIMES (May 20, 2013), https://www.nytimes.com/2013/05/20/booming/revisiting-the-crack-babies-epidemic-that-was-not.html [https://perma.cc/WL63-K7X6] ("This supposed epidemic . . . was kicked off by a study of just 23 infants that the lead researcher now says was blown out of proportion. And the shocking symptoms—like tremors and low birth weight—are not particular to cocaine-exposed babies, pediatric researchers say; they can be seen in many premature newborns.").

10. Michel Martin, *Crack Babies: Twenty Years Later*, NPR (May 3, 2010), https://www.npr.org/templates/story/story.php?storyId=126478643 [https://perma.cc/5FLH-SU73]; *see also* Editorial, *A Woman's Rights: Part 4, Slandering the Unborn*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html [https://perma.cc/5MM3-QS5G] (explaining how "[t]he idea of a mentally impaired 'crack baby' resonated with long-held racist views about black Americans" and citing Professor Dorothy Roberts' analysis of the media's depictions during that time of black women as stereotypically "monstrous") (quoting DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997)).

11. Martin, *supra* note 10 ("Two decades later, we're still learning about how drug and alcohol exposure by pregnant [sic] affects their children. But it turns out that children who are exposed to crack cocaine before birth are proving these worst-case scenarios [of lifelong disability] were all wrong.").

12. *See, e.g.*, Constance Guille & Rubin Aujla, *Development Consequences of Prenatal Substance Use in Children and Adolescents*, 29 J. CHILD & ADOLESCENT PSYCHOPHARMACOLOGY 479, 479 (2019) ("Prenatal tobacco or alcohol use has the most well-established adverse impact on child development, including an increased risk for behavioral problems and deficits in academic performance, resulting in significant functional impairment. Prenatal marijuana use is associated with deficits in executive and intellectual functioning among school-age children and adolescents. Prenatal opioid use and child development findings are conflicting, but treatment with opioid agonist therapy for opioid use disorder (e.g., methadone or buprenorphine) does not appear to have a negative impact on child growth, cognition, language abilities, sensory processing, or temperament. Prenatal amphetamine and cocaine use may have a negative impact on child development, but effects, in part, are mediated by childhood environment and adversity.").

When substance use does harm a newborn's health, separating newborns from their parents only layers on additional detrimental effects.[13] As Professor Khiara Bridges summarizes in her work on the criminalization of opioid use by pregnant people:

> NAS [neonatal abstinence syndrome] develops in some, but not all, infants exposed to narcotics in utero. Symptoms of NAS, which typically develop within twenty-four to seventy-two hours after birth, include uncontrollable shaking and seizures, constant crying, vomiting and diarrhea, and a rapid respiratory rate. Neonatologists have demonstrated that NAS symptoms can be reduced or eliminated by simply allowing babies to breastfeed and have skin-to-skin contact with their mothers.[14]

Thus, separating an infant from their parent hampers such treatments. Infants can also experience "toxic stress" from the separation itself that may result in various negative health outcomes later in life.[15] Parents themselves may experience anxiety and depression after separation.[16] Reunification after these civil separations is also not guaranteed.[17] Once separated, some states give a parent just six months to demonstrate that they have remained sober and have addressed each one of the foster system's demands.[18] One misstep, one relapse,

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13. *See infra* Section II.B.

14. Khiara Bridges, *Race, Pregnancy, and the Opioid Epidemic*, 133 HARV. L. REV. 770, 795–96 (2020) (footnotes omitted).

15. *See infra* note 84.

16. *See infra* note 81.

17. *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE STATISTICS 2019 5–6 (2021), https://www.childwelfare.gov/pubpdfs/foster.pdf [https://perma.cc/5A2X-VUKW] (stating that of the "estimated 423,997 children in foster care on September 30, 2019," only "55 percent had a goal of reunification with parent(s) or principal caretaker(s)" and that of the "estimated 248,669 children who exited foster care during FFY 2019" only "47 percent were reunited with parent(s) or primary caretaker(s)").

18. States vary on how long they give a parent to prove compliance with a case plan—the set of requirements that a state case worker or court has determined the parent must meet to prove their suitability as a parent—to get their child back. Focus on these case plans in conferences and in court inverts the legal onus, which is actually on the state to put forth "reasonable efforts" to reunify families. *See generally* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN (2019), https://www.childwelfare.gov/pubpdfs/reunify.pdf [https://perma.cc/2DE4-96LP] (detailing the laws in all states and U.S. territories with regard to how a state defines reasonable efforts and when reasonable efforts are required). California defines the reasonable efforts that the state must provide to parents as "reunification services," and include "counseling and other treatment." *Id.* at 10. However, if the child is under the age of three, reunification services "may not be offered [to the parent] for longer than a period of 6 months from the date the child entered foster care." *Id.*

and the steady march of hearings toward the termination of parental rights begins.[19]

Keeping a parent and newborn together and supporting the parent financially and holistically, however, can be beneficial for the child—a fact that even the Children's Bureau, the federal agency that orchestrates a national legislative framework geared towards separation,[20] acknowledges.[21] Remaining with one's birth family can mean avoiding the well-documented harms of foster care.[22] Family preservation may also bring "greater political and economic strength" for communities of color.[23]

This Article argues against the foster system's removal approach to parents who use substances during pregnancy and instead identifies supported family preservation as the best response to achieve child wellbeing.[24] In making this argument, this Article draws on Professor Lisa Eckenwiler's work positing that the state's current penalizing approach to pregnant people who use substances fails to account for the "particulars"—the particularized circumstances, experiences,

19. *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2 (2021), https://www.childwelfare.gov/pubpdfs/groundtermin.pdf [https://perma.cc/T6NE-KKPA] (listing various "grounds for termination of parental rights" and explaining that they "become grounds for terminating parental rights when the parent has failed to correct the conditions and/or parental behaviors that led to State intervention and is unable to provide a safe home for the child, despite reasonable efforts by the State agency to provide services to prevent out-of-home placement or to achieve family reunification after out-of-home placement"). "Reasonable efforts" is statutory language that describes the efforts states must make towards family preservation or reunification. *See infra* Section III.A.2.

20. For an overview of how federal law incentivizes adoption over reunification, *see* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 557–60 (2019). These statutes are also described *infra* Section III.A. The Children's Bureau oversees these laws through lobbying, funding, and regulation. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *What We Do*, https://www.acf.hhs.gov/cb/about/what-we-do [https://perma.cc/B269-D4KG] (last visited June 27, 2022) (listing as a part of its projects "providing guidance on federal law, policy and program regulations," "funding essential [child welfare] services," and "monitoring child welfare services").

21. *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., IN-HOME SERVICES TO STRENGTHEN CHILDREN AND FAMILIES 14 (2021), https://www.childwelfare.gov/pubPDFs/inhome_services.pdf [https://perma.cc/82AL-X7B7] ("It is often in a child's best interests to remain at home when safety can be controlled and services are provided, and it is important to avoid unnecessarily placing children in out-of-home care. Therefore, agencies must have a robust array of services and supports and collaborative systems of care to target the various family-specific challenges that are present in the communities they serve.").

22. *See* Trivedi, *supra* note 20, at 541–52 (detailing the harms foster care frequently entails, such as abuse, chronic instability, and insufficient medical care).

23. Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 179 (2003) ("Excessive state interference in black family life damages [B]lack people's sense of personal and community identity. Family and community disintegration weakens blacks' collective ability to overcome institutionalized discrimination and work toward greater political and economic strength.").

24. *See infra* Section IV.B.3.

and social pressures that lead to choices like using substances.[25] Particulars for pregnant people who use substances may include experiences involving poverty, racism, inadequate education, the loss of loved ones, physical and sexual abuse, depression, anxiety, and low self-esteem.[26] Just responses to a pregnant person who uses substances, Professor Eckenwiler argues, must reckon with the social and institutional context of that person's substance use and not just focus on their individual "inner states."[27] Once the larger context surrounding an individual parent is acknowledged and understood, the framing of the substance use shifts from a free choice deserving of punishment to a system-created emergency worthy of care and resources.[28] This Article uses the foundation of the particulars of a pregnant person's drug use, grounded in their institutional context, to begin to open the collective imagination of lawyers and legislators to a world in which newborns are not removed. In this world, the money once used to support the foster system is instead used to provide stability and recovery to help vulnerable families thrive.

This Article is organized into three parts. Part II describes how the foster system's treatment of pregnant people who use substances is born of a racist history and is based on the misconception that substance use is a personal moral failing and invariably harms fetuses. Part III details the current federal laws that create the scaffolding for state foster system policies and describes key aspects of California's foster system when it comes to responding to substance-exposed newborns. Finally, Part IV proposes litigation and policy strategies to address unjust removals of newborns from pregnant people who use substances, such as

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25. Lisa Eckenwiler, *Why Not Retribution? The Particularized Imagination and Justice for Pregnant Addicts*, 32 J. L. MED. & ETHICS 89, 90–91 (2004) (arguing that while "[f]reedom, or free agency, is a precondition for responsibility" under a retributive theory of punishment, it is "not a fully realized ideal" for pregnant individuals who use substances once one applies "particularized attention" to their circumstances).

26. *Id.* at 91 (elaborating on these "particulars").

27. *Id.* at 93, 96 ("[T]he emphasis on the inner life of the individual risks diverting attention from matters of social structure, including the policies and practices that make drug addiction more likely, *and* that compromise fair judgment concerning offenders."). Professor Eckenwiler describes the connection between understanding someone's particular choices and the institutional structures around them as follows:

> If it is to promote justice, or more minimally, not perpetuate injustice, particularized attention must reckon with economic structures, cultural norms, and communicative and decision making processes—which serve not only to shape subjectivities and agency, but also the whole of the process of arriving at judgments about persons—should precede *and follow* attention to individuals.

Id. at 95.

28. *See id.* at 94 ("[I]nstead of using appreciation of context for the purpose of understanding an individual and her mental states—Did she *know* that drugs were harmful? Did she *intend* to harm the fetus?—and promoting mercy for her, the equitable judge should, as well, seek out the meaning these cases hold for the legal system and society: what do they call for in promoting the social and institutional conditions for justice to flourish? . . . Rather than reading these women primarily as tales of personal hardship, then, moral agents with well-cultivated particularized attention should read the texts before them more as political manifestos, and thus envision a richer, more textured moral landscape and map for reform.").

requiring informed consent for drug-testing, removing mandated reporting requirements, demanding a more capacious definition of "reasonable efforts" to preserve families, and reallocating state funding away from the foster system and towards direct payments to families. The strategies are centered in activists' calls for responses to pregnant people who use substances that take place outside of the foster system.

II.
BACKGROUND

A. The U.S. Foster System's Treatment of Pregnant People Who Use Substances

The modern foster system in the U.S. "has been in operation since the 1960s and its power and reach have consistently expanded outward."[29] The statistics today are staggering. In 2019, there were over 670,000 youth who spent some amount of time in foster care in the United States.[30] 19% of those entering foster care in 2019 were less than one year old at the time of entry.[31] The U.S. also has the greatest number of children in the world who have lost their parents through the legal mechanism of parental rights termination.[32]

Black, Native, and Latinx families are disproportionately affected by foster system investigations, court determinations of maltreatment, and child

29. SANGOI, *supra* note 1, at 10.

30. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REP. (PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020 - NO. 27) 1 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf [https://perma.cc/39K8-WS55].

31. *Id.* at 2.

32. Chris Gottlieb, *The Lessons of Mass Incarceration for Child Welfare*, N.Y. AMSTERDAM NEWS (Feb. 1, 2018), http://amsterdamnews.com/news/2018/feb/01/lessons-mass-incarceration-child-welfare/ [https://perma.cc/8D2U-PGKU] ("Touted at the time as a victory for children, [the Adoption and Safe Families Act] has instead put America first in the world in the legal destruction of families. We are now the only country in the world that routinely pays people to adopt children whose birth parents want desperately to raise them. And we turn thousands of children who will never be adopted into legal orphans, dooming them to remain in foster care until they come of age."). *See also* Christopher Wildeman, Frank R. Edwards, & Sara Wakefield, *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32, 33 (2020) ("1 in 100 American children will experience the termination of parental rights . . . [and] "the risk of experiencing this event is highest in the first few years of life.").

removals.[33] For example, Alameda County, California (the county where this Article was researched and written), determined that Black children had been maltreated at a rate more than seven times greater than that of white children in 2020.[34] Underlying disparities like this one is the racist and classist presumption that the parents in these families are dysfunctional and inadequate parents.[35] Scholars and activists have argued that "[t]he reach of the foster system into the lives of people living in poverty and Black, American Indian and Latinx communities rivals [the reach of] the . . . criminal legal system."[36] Aspects of today's foster system structure can be linked to a variety of racist national policies—from forced family separation during chattel slavery, the removal of

33. A 2017 study of child maltreatment investigation prevalence showed that, in the United States, 53% of Black children, 32% of Hispanic children, 28.2% of white children, 23.4% of American Indian, and 10.2% of Asian/Pacific Islander children will be the subject of a child maltreatment investigation during their lifetimes. Hyunil Kim, Christopher Wildeman, Melissa Johnson-Reid, & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017). Another study displayed the disparities in reports of child maltreatment confirmed by state agencies. Christopher Wildeman, Natalia Emanuel, John M. Leventhal, Emily Putnam-Hornstein, Jane Waldfogel, & Hedwig Lee, *The Prevalence of Confirmed Maltreatment Among US Children, 2004–2011*, 168 JAMA PEDIATRICS 706, 709 (2014) (finding that the "risks for confirmed maltreatment differed by race/ethnicity" in that 20.9% of Black children, 14.5% of Native American children, 13% of Hispanic children, 10.7% of white children, and 3.8% of Asian/Pacific Islander children will be deemed to have experienced maltreatment by the age of eighteen). Disparities extend to removal as well. Between 2000 and 2011, the state removed 1 in 17 children overall from their parents' care but removed 1 in 9 Black children and 1 in 7 American Indian children. Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000 to 2011*, 9 PLOS ONE, March 2014, at 5.

34. ALAMEDA CNTY. PUB. HEALTH DEP'T, *Substantiated Child Abuse Rate by Race/Ethnicity*, https://www.healthyalamedacounty.org/indicators/index/view?indicatorId=10&localeId=238&localeChartIdxs=1%7C2%7C3 [https://perma.cc/7GZ3-3TTB] (last visited Feb. 3, 2022). Alameda County, California is home to the cities of Berkeley and Oakland.

35. *See* KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS 125 (2017).

36. SANGOI, *supra* note 1, at 11 (citing DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002)). *See also* Emma S. Ketteringham, Sara Cremer, & Caitlin Becker, *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline"*, 20 CUNY L. REV. 77, 94 (2016) ("The toxic intervention of the child protection system is analogous to what we see in the criminal legal system, which deals punitively with problems that also have their roots in poverty and racism. In the child protection system, however, parents are asked to meet unreachable standards of proper parenting and child-rearing while the children, rather than the parents, serve the time away from their families."); Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, APPEAL (Mar. 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color [https://perma.cc/NE2V-Q4AJ] (arguing that the child welfare system plays an "oppressive political role . . . in monitoring, regulating, and punishing poor families and Black, brown, and [I]ndigenous families," aspects of which "parallel[]" the criminal legal system in the U.S.).

Native children during the Assimilation Era, and modern separations of immigrant children from their parents at the border.[37]

In particular, the system's mistreatment of parents who use substances is linked to the height of the United States' War-on-Drugs era. During the late 1980s and the 1990s, the media stoked fears about prenatal exposure to cocaine.[38] Even though white and non-white people and people in different socioeconomic classes were using substances at similar rates, the War on Drugs panic largely "revolve[d] around the drug use of parents living in poverty, particularly low-income Black and Brown mothers."[39] The media perpetuated the nonscientific and stigmatizing term "crack baby" to describe the children of Black women who used crack cocaine.[40] In 1986 alone *Time* and *Newsweek* each ran multiple "crack crisis"

37. *See* Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist and What Can Be Done to Address Them?*, 692 ANNALS 253, 258–59 (2020) ("The domestic slave trade institutionalized the forced separation of Black families. Enslaved people were denied the right to form families and to keep them intact . . . . Given that the involuntary removal of children through foster care is not the first form of family separation to disproportionately impact Black families in this country, it should be understood that for Black families, the trauma of involuntary removal can be heightened by the legacy of forced family separation that was integral to slavery."); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 248–49 (2002) (describing the history of the impetus for the Indian Child Welfare Act of 1978 as redress for "a deliberate government campaign to wrongfully remove Indian children from their parents to place them in white homes and institutions" that "dated back to 1860, when federal authorities promoted boarding schools designed to strip Indian children of their customs and assimilate them into white culture"); Associated Press, *Deported Parents May Lose Kids to Adoption, Investigation Finds*, NBC NEWS (Oct. 9, 2018), https://www.nbcnews.com/news/latino/deported-parents-may-lose-kids-adoption-investigation-finds-n918261 [https://perma.cc/8CFW-9734] (describing how one family's separation at the border under the Trump administration's "zero-tolerance" immigration policy led to allegations of abuse and a decision of permanent removal by the Michigan state foster system).

38. Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 461–62 (2005). Legal scholarship from the same era was also not immune to the unfounded hysteria. For example, Julie Zitella's 1996 law review article, *Protecting Our Children: A Call to Reform State Policies to Hold Pregnant Drug Addicts Accountable*, opened with imagery of a baby "piercing the maternity ward's silence with a shrill scream," described her "pathetic shuddering," and predicted that the girl would be eating cigarette ashes by age two—a "peculiar habit" developed due to her prenatal exposure to cocaine. Julie Zitella, *Protecting Our Children: A Call to Reform State Policies to Hold Pregnant Drug Addicts Accountable*, 29 J. MARSHALL L. REV. 765, 765 (1996). The alarming scene has a subtle footnote explaining that what the author has created is only a rhetorical, "hypothetical example" based on "typical behavior patterns and complications a drug addicted infant experiences at birth," though it only references one newspaper article. *Id.* at 765 nn.1–2.

39. SANGOI, *supra* note 1, at 19.

40. *See* Vann R. Newkirk II, *What the 'Crack Baby' Panic Reveals About the Opioid Epidemic: Journalism in Two Different Eras of Drug Waves Illustrates How Strongly Race Factors into Empathy and Policy*, ATLANTIC (July 16, 2017), https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763 [https://perma.cc/SK2W-CYEQ] (describing the history of various prominent outlets that perpetuated the non-scientific term). The term "crack baby" also connotes a Black parent because "'crackheads' [were] routinely portrayed as Black" and Black people were disproportionately convicted and punished for "crack offenses." *Racial Double Standard in Drug Laws Persists Today*, EQUAL JUST. INITIATIVE (Dec. 09, 2019), https://eji.org/news/racial-double-standard-in-drug-laws-persists-today/ [https://perma.cc/76W7-XB88].

cover stories and major television stations cumulatively aired 74 segments about crack cocaine use.[41] This frequent and dramatic reporting "convinced many that the use of cocaine during pregnancy . . . caused significant and irreparable damage" to fetuses,[42] that drug use invariably incapacitated parents,[43] and that the disadvantaged children would soon overwhelm social service systems and schools.[44]

Since this era, however, researchers have demonstrated that previous studies about crack cocaine during pregnancy were exaggerated and inaccurate.[45] After decades of research, scientists have found no "recognizable long-term condition, syndrome or disorder" that they could trace to being a "crack baby."[46] Moreover, "although children born exposed to cocaine may be at higher risk than others for developmental delays and behavioral problems, the effects of the exposure are likely to be 'mild and subtle, not severe.'" [47] Research now points to socioeconomic factors like poverty and lack of quality healthcare as the true causes of effects once thought to be caused by cocaine use.[48] While substance-exposed infants "may experience withdrawal symptoms" and may require extra care immediately after birth, no "significant, long-term adverse effects" have been found in infants exposed prenatally to opiates, cocaine, crack, methamphetamine, or marijuana.[49]

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41. Paltrow, *supra* note 38, at 461 n.1 (quoting LAURA E. GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 14 (1997)).

42. *Id.* at 461.

43. *See, e.g.*, MOVEMENT FOR FAM. POWER & DRUG POL'Y ALL., FAMILY SEPARATION IN THE MEDICAL SETTING: THE NEED FOR INFORMED CONSENT 3 (2019) ("As women's drug use was under increased scrutiny, the reproductive rights and caregiver roles of women who use drugs was a subject of political debate. Most famously, anti-abortion advocate and figurehead of the 'Just Say No' campaign popularized this myth with propaganda that directly conflated parenting capacity and drug use with statements like, 'Drugs steal away so much . . . They take and take until finally every time a drug goes into a child, something else is forced out, like love, and hope, trust and confidence.'").

44. Laura B. Cohen, *Informing Consent: Medical Malpractice and the Criminalization of Pregnancy*, 116 MICH. L. REV. 1297, 1300–01 (2018) ("In the 1980s and 90s, a massive media frenzy endorsed the view that crack use during pregnancy would create an inferior generation that would burden social services, especially the education system.").

45. *See* MOVEMENT FOR FAM. POWER & DRUG POL'Y ALL., *supra* note 43, at 4 ("[T]he hysteria surrounding crack cocaine use . . . was found to be unsupported by science.") (citing Kristina B. Wolf, *Panic in the ER: Maternal Drug Use, the Right to Bodily Integrity, Privacy, and Informed Consent*, 39 POL. & POL'Y 679 (2011)); Susan Okie, *The Epidemic That Wasn't*, N.Y. TIMES (Jan. 26, 2009), https://www.nytimes.com/2009/01/27/health/27coca.html [https://perma.cc/Q243-ZT3X] ("Cocaine is undoubtedly bad for the fetus. But experts say its effects are less severe than those of alcohol and are comparable to those of tobacco—two legal substances that are used much more often by pregnant women, despite health warnings.").

46. Cohen, *supra* note 44, at 1301 n.39 (quoting AM. CONG. OF OBSTETRICIANS & GYNECOLOGISTS, TOOLKIT ON STATE LEGISLATION: PREGNANT WOMEN & PRESCRIPTION DRUG ABUSE, DEPENDENCE AND ADDICTION 2, https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/NASToolkit.pdf?la=EN [https://perma.cc/9KNH-E7FL]).

47. Cynthia Dailard & Elizabeth Nash, *State Responses to Substance Abuse Among Pregnant Women*, 3 GUTTMACHER REP. PUB. POL'Y 3, 6 (2000).

48. Cohen, *supra* note 44, at 1301 n.39.

49. *Id.* at 1301–02.

Despite its "debunk[ing]," the "crack baby" stereotype continues to inform policy and practices today.[50] The legacy of policy changes includes three main components: mandated reporting requirements for healthcare workers,[51] criminal prosecutions of pregnant people who use substances,[52] and expanded civil definitions of abuse and neglect which explicitly include substance use.[53] Each of these policies disproportionately affect Black women, the initial target of the stereotype in the 1980s and 90s.[54]

First, as mandated reporters, healthcare workers are enlisted as agents of the foster system to surveil pregnant people and to report substance use during pregnancy.[55] Healthcare workers are required by law to report symptoms of prenatal drug exposure in infants in 26 states and the District of Columbia.[56] Eight states mandate that healthcare workers "*test* for prenatal drug exposure if they suspect drug use."[57] Healthcare workers in six states are either required or permitted to report pregnant people—people who are not even parents yet—to the

50. *A Woman's Rights: Part 4, Slandering the Unborn*, *supra* note 10 (describing the continuing harms of the now disproven "'damaged generation' theory" and concluding that "[t]he story of the 'crack baby' shows how weak science, poorly informed crusaders and racist attitudes can work together to shape public policy").

51. *See infra* notes 55–64.

52. *See infra* notes 65–71.

53. *See infra* notes 72–76.

54. *See, e.g.*, Hillary Veda Kunins, Eran Bellin, Cynthia Chazotte, Evelyn Du, & Julia Hope Arnsten, *The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting*, 16 J. WOMEN'S HEALTH 245, 248–50 (2007) (determining that "Black women and their newborns, as compared with nonblack women, were 1.5 times more likely to be tested for illicit drugs," but finding "no association between race and a positive toxicology result"); Eckenwiler, *supra* note 25, at 94 (stating that Black women are "disproportionate[ly]" targeted for "drug testing, reports, arrests and [criminal] prosecutions"); Wildeman, Edwards, & Wakefield, *supra* note 32, at 35 (concluding that parents of Black and Native American children experienced the highest risk of having their parental rights terminated based on studies of national data on foster children in the United States from 2000–2016).

55. *See* MOVEMENT FOR FAM. POWER & NAT'L ADVOCS. FOR PREGNANT WOMEN, *supra* note 2, at 5 ("Medical providers are critical to feeding women and newborns into these systems through the following actions: routinely collecting evidence and private information from their unwitting patients without seeking specific and informed consent—including testing patients suspected of using controlled substances and their patients' newborns without their informed consent—breaking patient confidentiality and ethical and legal obligations they owe their patients by turning over this information to child protective services, and then assisting child protective services in seizing the patient's child from the new mother and prosecuting the mother for child maltreatment. Medical providers can even go so far as to prevent the mother and newborn from leaving the medical facility or from breastfeeding despite having questionable to no legal authority to do so."). *See also* MOVEMENT FOR FAM. POWER & DRUG POLICY ALL., *supra* note 43, at 3 (arguing that mandated reporting in medical settings enables the "womb to foster care pipeline").

56. CHILD.'S BUREAU, PARENTAL SUBSTANCE USE AS CHILD ABUSE, *supra* note 5, at 2.

57. *Substance Use During Pregnancy*, GUTTMACHER INST. (July 1, 2022), https://www.guttmacher.org/print/state-policy/explore/substance-use-during-pregnancy [https://perma.cc/XM3P-M4UV] (emphasis added) (stating that Indiana, Iowa, Kentucky, Louisiana, Minnesota, North Dakota, Rhode Island, and South Dakota mandate *testing*, in addition to reporting, for prenatal drug exposure).

foster system if suspected of using substances.[58] For example, depending on the state, the following are all possible grounds for reporting: positive toxicology tests during early prenatal checkups, positive toxicology tests administered directly before or after delivery, or observations of withdrawal symptoms in the infant after delivery.[59] Moreover, hospitals drug-test Black mothers at disproportionate rates,[60] putting them at an increased risk of being reported.[61] Other factors, such as whether a pregnant person's insurance is public or private, also affect testing rates.[62] Although some states have attempted to pull back strict mandated reporting requirements and their agencies' responses in these situations,[63]

58. CHILD.'S BUREAU, PARENTAL SUBSTANCE USE AS CHILD ABUSE, *supra* note 5, at 2 ("Illinois, Minnesota, North Dakota, Oregon, and Wisconsin require mandated reporters to report when they suspect that pregnant women are abusing substances so that the women can be referred for treatment. In Rhode Island, a report of substance use by a pregnant woman may be made, but an investigation will be conducted only if there is an allegation of abuse and/or neglect of the newborn or other children in the home.").

59. *See id.* at 6–9 (providing states' statutory grounds for mandated reporting of prenatal substance use).

60. *See, e.g.*, Kunins, Bellin, Chazotte, Du, & Hope, *supra* note 54, at 248 (finding that of 8,487 women with live births during 2002–2003, "Black women and their newborns, as compared with nonblack women, were 1.5 times more likely to be tested for illicit drugs").

61. *See id.* at 252–53 ("Drug testing in the peripartum setting carries the risk of exposing women and newborns to adverse consequences from intervention by legal or social service agencies, and this has been shown to be particularly true for [B]lack women. At least two studies have found racial disparities in the consequences of testing positive for illicit drugs. Florida investigators found that [B]lack parturient women and newborns testing positive for illicit drugs were 10 times more likely to be reported to child protective services than white and Hispanic counterparts, despite a state regulation requiring that all babies with positive toxicologies be reported. In another investigation, [B]lack children with urine toxicologies positive for cocaine were less likely to be discharged to their mother's care than nonblack (mainly Hispanic) children after adjusting for prior child welfare involvement, absent prenatal care, and homelessness."). *See also* MOVEMENT FOR FAM. POWER & DRUG POL'Y ALL., *supra* note 43, at 4 ("There is no greater example of structural stigma than the 'drug test' as proxy for 'good parenting.'").

62. Marginalized people are the ones who most rely on state subsidies for treatment, which often puts them in the position of being tested more frequently. *See* MOVEMENT FOR FAM. POWER & NAT'L ADVOCS. FOR PREGNANT WOMEN, *supra* note 2, at 1–2 (explaining how through nonconsensual drug-testing and "providing confidential medical information" to the state, "[m]edical care providers, especially those that provide medical care to patients who utilize public insurance, are critical to feeding families into the foster system" and how "stigma and discrimination attached to the pregnant woman or new mother's social marginalization, such as being poor, a racial minority, a substance user or having a disability, serves as the basis of state intervention and control"). *See, e.g.*, *id.* at 7 ("In 2014, in the process of applying for state subsidized health insurance, Tamara Loertscher was drug-tested and reported to government authorities, pursuant to [Wisconsin's Unborn Child Protection Act], before she was even certain that she was pregnant.").

63. Rhode Island's operating procedure declares that a report of prenatal substance use *during* pregnancy should only be investigated by child protective services "if there are specific allegations of abuse and/or neglect of children [currently] in the home." R.I. DEP'T OF CHILD., YOUTH AND FAMILIES, DEP'T OPERATING PROC. NO. 500.0080 (2018), https://dcyf.ri.gov/about-us/dcyf-policies-operating-procedures [https://perma.cc/M59Q-JSM8]. California, along with 12 other states and D.C., requires "agencies . . . in response to reports of substance-exposed infants . . . to complete an assessment of needs for the infant and for the infant's family and to make a referral to appropriate services," rather than separate the parent from the infant. CHILD.'S BUREAU, PARENTAL SUBSTANCE USE AS CHILD ABUSE, *supra* note 5, at 2–3.

healthcare workers in "nearly every State and U.S. territory" still face criminal financial penalties, imprisonment, and/or civil liability if they fail to report when they legally should have.[64]

In addition to mandated reporting statutes, some states also wield the criminal legal system against pregnant people who use substances. While illicit drug possession, but not drug use, is usually the crime, Professor Khiara Bridges argues that pregnancy converts drug use into a criminal act.[65] Tennessee was the only state with a statute specifically criminalizing the use of drugs during pregnancy, and though there were attempts to renew the statute, it was allowed to sunset in 2016 and is no longer in effect.[66] However, there have been "documented cases in which pregnancy was a necessary factor leading to attempted and actual

64. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF CHILD ABUSE AND NEGLECT: STATE STATUTES CURRENT THROUGH FEBRUARY 2019, 1–2 (2019), https://www.childwelfare.gov/pubPDFs/report.pdf [https://perma.cc/U6FQ-XSPG]. *But see, e.g.*, Beau Yarbrough, *If Child Abuse Is So Rampant, Why Are Prosecutions So Rare for Those Who Fail to Report It?*, SAN BERNARDINO SUN (May 11, 2018), https://www.sbsun.com/2018/05/11/if-child-abuse-is-so-rampant-why-are-prosecutions-so-rare-for-those-who-fail-to-report-it/ [https://perma.cc/GTZ7-ASL4] (reporting that Los Angeles, Orange, San Bernardino, and Riverside counties together prosecuted "fewer than a dozen workers" between 2012 to 2017 for failures to report suspected child abuse in violation of mandated reporting laws).

65. *See* Bridges, *supra* note 14, at 808 ("[B]ecause most states and the federal government criminalize substance *possession*, not *use*, criminalizing substance *use* during pregnancy represents an expansion of the criminal law. Further, it is an expansion of the criminal law that is reserved for people who can experience pregnancy—people who are primarily cisgender women."). Further, Professor Dorothy Roberts has observed that "[c]harging someone with a crime for giving birth . . . seem[s] to fit into the legacy of devaluing Black mothers." Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 938 (1997). Professor Roberts draws connections between "the control of Black women's reproductive lives during slavery, the abusive sterilization of Black women and other women of color . . . , and the disproportionate removal of Black children from their families." Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1427, 1436–50 (1991).

66. *See* TENN. CODE ANN. § 39-13-107 (West, Westlaw through 2022 Legis. Sess.). The Tennessee law expanded "the legal definition of a 'victim' of assault" to "include[] fetuses" and "specifically authoriz[ed] criminal assault charges against women who give birth to a child showing symptoms related to exposure to a narcotic drug if the drug was used illegally during pregnancy." AMNESTY INT'L, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA 15, 27 (2017), https://www.amnesty.org/en/documents/amr51/6203/2017/en/ [https://perma.cc/AH2L-L3Y3]. During the law's existence, "[a]ssault charges were brought against at least 124 women." Caroline K. Darlington, Peggy A. Compton, & Sadie P. Hutson, *Revisiting the Fetal Assault Law in Tennessee: Implications and the Way Forward*, 22 POL'Y, POL., & NURSING PRAC. 93, 97 (2021) (citing Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809 (2019)). Since the law expired in 2016, Tennessee legislators have attempted to renew it three times, in 2016, 2017, and 2019, but were unsuccessful. *Id.*

deprivations of liberty" in at least 45 states under a "patchwork" of other laws.[67] For example, prosecutors have prosecuted pregnant people under laws prohibiting "delivering drugs to a minor (through the umbilical cord),"[68] drug trafficking,[69] and chemical endangerment.[70] The Alabama and South Carolina Supreme Courts have upheld convictions like these.[71] Moreover, efforts to expand laws criminalizing pregnant people have recently gained momentum. In 2017, 17 state legislatures proposed new criminal statutes to punish pregnant people for substance use.[72]

Finally, and most pertinent to the topic of this Article, several states over the last 30 years have added prenatal substance use to their *civil* child abuse and neglect laws.[73] These new definitions state that prenatal exposure to substances alone can justify immediate civil detention of children in addition to the eventual

67. AMNESTY INT'L, *supra* note 66, at 15–16. "There is no comprehensive data on the exact number of women who have been charged with a crime related to their pregnancy. State governments do not collect this information, and even identifying these cases is complicated due to the number of different laws that may be applied. Researchers, advocates, and investigative reporters told us that since 2005, approximately 500 women have been charged with 'chemical endangerment' in Alabama, 100 with 'fetal assault' in Tennessee, and over 100 with unlawful conduct or neglect in South Carolina." *Id.* at 8. See also Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), https://www.propublica.org/article/when-the-womb-is-a-crime-scene# [https://perma.cc/V653-VTQL] (finding that "at least 479 new and expecting mothers ha[d] been prosecuted" under Alabama's chemical endangerment law between 2006 and 2015).

68. Dailard & Nash, *supra* note 47, at 3.

69. *See* Dawn M. Korver, *Constitutionality of Punishing Pregnant Substance Abusers under Drug Trafficking Laws: The Criminalization of a Bodily Function*, 32 B.C. L. REV. 629, 654–56 (1991) (arguing that drug trafficking laws punish pregnant women for their addiction and thus violate the Eighth Amendment because the drug is transferred through a non-volitional bodily function (the placenta) that cannot constitute an act for which there should be criminal responsibility).

70. AMNESTY INT'L, *supra* note 66, at 37 ("In 2006, Alabama passed a law making it a crime to expose a child to an 'environment' in which they could be exposed to a 'controlled substance,' commonly referred to as the 'chemical endangerment' law (Alabama Code Section 26-15-3.2) . . . [P]rosecutors started using this law to charge women who tested positive for drugs while pregnant and delivered newborns with drugs in their systems. This was based on the premise that the term 'child' includes a fetus and that the womb was an 'environment.'") (footnote omitted).

71. The Alabama Supreme Court held that drug use while pregnant is considered chemical endangerment of a child. Hicks v. State, 153 So. 3d 53, 57 (Ala. 2014) (citing *Ex parte* Ankrom, 152 So. 3d 397 (Ala. 2013)) ("[T]he plain meaning of the word 'child,' as that word is used in the chemical-endangerment statute, includes an unborn child. Accordingly, . . . we hold that chemical-endangerment statute also applies to Hicks's conduct [of causing her unborn child to be exposed to, to ingest or inhale, or to have contact with a controlled substance]."). South Carolina's Supreme Court held that a viable fetus is a "person" under the state's criminal child-endangerment statute and that "maternal acts endangering or likely to endanger the life, comfort, or health of a *viable fetus*" constitute criminal child neglect. Whitner v. State, 492 S.E.2d 777, 779–80 (S.C. 1997).

72. AMNESTY INT'L, *supra* note 66, at 7. The efforts, while unsuccessful, reveal a concerning trend that is likely to continue to receive support and advocacy.

73. GUTTMACHER INST., *supra* note 57, at 1 (emphasis added).

termination of parental rights.[74] In some states, the foster system deems someone who used drugs during pregnancy an abuser or neglector, "even without any finding of actual harm to any children or fetuses or any finding of intent."[75] Minnesota, South Dakota, and Wisconsin go to an extreme by authorizing the forced civil commitment of a pregnant person to an inpatient treatment program if there is evidence of drug use.[76] But "[r]egardless of whether a state explicitly references drug use or substance use disorder in its [child maltreatment] statute, it is still used to place families under surveillance, take them to court, take away their children and terminate parental rights in every state in the country."[77]

B. The Effects of Separating Infants from Parents

The foster system continues to remove newborns from parents based on substance use, despite the widespread acknowledgement that forced separation has negative impacts on parents and children.[78] For parents, research has shown that the threat of criminal and civil interference deters pregnant people from seeking prenatal and postpartum care,[79] which increases the risk of adverse health

74. *See* Cohen, *supra* note 44, at 1303 ("States also use their civil child protective services (CPS) in a way that punishes women who use drugs during pregnancy . . . [W]hen a woman is labeled an abuser, she can lose custody of the children she already has or of the baby once it is born. Finally, in order to regain custody, a woman must navigate a complex and costly civil court system, often without the benefit of legal counsel, unless she can pay for it herself.") (footnote omitted).

75. *Id.*

76. Leticia Miranda, Vince Dixon, & Cecilia Reyes, *How States Handle Drug Use During Pregnancy*, PROPUBLICA (Sept. 30, 2015), https://projects.propublica.org/graphics/maternity-drug-policies-by-state [https://perma.cc/V88U-CU4U] ("The Wisconsin law is especially draconian: A woman can be detained against her will for the duration of her pregnancy, her fetus has its own court-appointed lawyer, she can lose custody of her baby after birth – and the proceedings are mostly secret."). The constitutionality of the Wisconsin law was challenged in 2017, but the Seventh Circuit ultimately dismissed the suit for mootness because the plaintiff no longer resided in Wisconsin. Loertscher v. Anderson, 893 F.3d 386, 394–95 (7th Cir. 2018). The following laws were still active as of early 2022: *See* MINN. STAT. ANN. §§ 253B.02, 253B.09, 253B.051 (West, Westlaw through 2022 Legis. Sess.); S.D. CODIFIED LAWS § 34-20A-63 (West, Westlaw through 2022 Legis. Sess.); WIS. STAT. § 48.133 (2022).

77. SANGOI, *supra* note 1, at 51.

78. *See generally* AM. CONG. OF OBSTETRICIANS AND GYNECOLOGISTS, TOOLKIT ON STATE LEGISLATION: PREGNANT WOMEN & PRESCRIPTION DRUG ABUSE, DEPENDENCE AND ADDICTION 3–5 (2012) (urging policymakers to rethink current "punitive drug enforcement policies" and ensure instead that seeking medical care does not expose a pregnant person to criminal or civil penalties, such as incarceration or loss of custody of children, because parents facing such penalties "are likely to avoid, delay, or emotionally disengage from needed prenatal care and drug treatment").

79. *See, e.g.*, Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 HEALTH & JUST. 2015, at 5 (finding in a study of 30 recently-pregnant women who had used alcohol or other drugs during their pregnancies that "[t]wenty-two women (73.3%) reported that during their pregnancies they had been afraid of being identified as substance-users" and that "[t]he scenarios of which they were most afraid were testing positive for substances at prenatal visits or after delivery, losing custody of their newborns and/or their older children, and experiencing criminal justice consequences for their substance use").

outcomes in infants.[80] Furthermore, "women whose first child was placed in care of CPS within their first week of life had greater odds of depression and anxiety diagnoses and higher rates of antidepressant use than mothers receiving services and mothers not involved with CPS."[81] Separation may also spur cuts to a parent's government benefits, such as food stamps and cash financial assistance based on household size.[82] On top of this financial hardship, parents may be responsible for *paying* child support to foster families caring for their children.[83]

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80. See Anthony M. Vintzileos, Cande V. Ananth, John C. Smulian, William E. Scorza, & Robert A. Knuppel, *The Impact of Prenatal Care on Neonatal Deaths in the Presence and Absence of Antenatal High-Risk Conditions*, 186 AM. J. OBSTETRICS & GYNECOLOGY 1011, 1015 (2002) (finding that a "[l]ack of prenatal care was associated with increased risks of neonatal death" and that Black women are more than three times as likely as white women not to receive prenatal care); Ji Yan, *The Effects of Prenatal Care Utilization on Maternal Health and Health Behaviors*, 26 HEALTH ECON. 1001, 1016 (2017) ("[P]oor utilization of prenatal care because of late care onset or low frequency of visits significantly increases the risks of the following adverse maternal outcomes: insufficient gestational weight gain, prenatal smoking, PROM [premature rupture of membranes], precipitous labor, no breastfeeding, postnatal underweight, and postpartum smoking.").

81. Elizabeth Wall-Wieler, Leslie L. Roos, Marni Brownell, Nathan C. Nickel, Dan Chateau, & Kendra Nixon, *Postpartum Depression and Anxiety Among Mothers Whose Child was Placed in Care of Child Protection Services at Birth: A Retrospective Cohort Study Using Linkable Administrative Data*, 22 MATERNAL & CHILD HEALTH J. 1393, 1398 (2018). *See also* MOVEMENT FOR FAM. POWER & NAT'L ADVOCS. FOR PREGNANT WOMEN, *supra* note 2, at 5 n.27 (referencing numerous similar studies).

82. Qualification for and the amount provided by government welfare programs often depend on the composition and number of people living together in a household, which means that when a child is placed out of the home, birth parents may receive reduced payments or may be disqualified from the programs entirely. Federal regulations define "household" as "a group of individuals who live together and customarily purchase food and prepare meals together." 7 C.F.R. §§ 273.1(a), 273.10(d). In California, for example, the food stamp program, CalFresh, distributes food benefits to "households" based on their size. Under the state's most recent guidelines, a single parent with a child in their custody (a two-person household) could receive $459 per month whereas a one-person household could receive only $250. Cal. Dep't of Soc. Servs., All County Information Notice No. I-78-21, at 2 (Sept. 24, 2021), https://www.cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACINs/2021/I-78_21.pdf?ver=2021-09-28-162658-287 [https://perma.cc/FG4A-3PXT]. California's cash assistance program for families (known as CalWORKs) allows a parent who has a child placed in foster care to continue to receive assistance for 180 days after removal. CAL. WELF. & INST. CODE § 11203(b)(1) (West, Westlaw through 2022 Legis. Sess.). However, a parent must have already been receiving CalWORKs aid when their child was taken, and the county must also determine that the ongoing receipt of aid is "necessary for reunification." *Id. See also* Jennifer L. Hook, Jennifer L. Romich, JoAnn S. Lee, Maureen O. Marcenko, & Ji Young Kang, *Trajectories of Economic Disconnection Among Families in the Child Welfare System*, 63 SOC. PROBS. 161, 176 (2016) (finding that "out-of-home placement precedes economic disconnection [i.e., an extreme case of economic exclusion in which families lack both employment and cash assistance] for up to one-third of families with children in out-of-home care, complicating efforts of parents to reunify their families").

83. When a child is in foster care and their foster family is receiving payments from the state, federal law requires that "where appropriate, all steps will be taken . . . to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments." 42 U.S.C. § 671(a)(17). Although these child support orders are intended to "offset government-incurred costs of foster care[,] . . . data suggests that establishing and enforcing child support orders against parents in the foster care system is not cost effective." ORANGE CNTY. DEP'T CHILD SUPPORT SERVS., CHILD SUPPORT AND FOSTER CARE 9 (July 2020), https://www.css.ocgov.com/sites/css/files/import/data/files/116568.pdf [https://perma.cc/939R-GKR3].

Removals also have negative impacts on infants. "Separations rupture the bond of a child to their primary attachment figure, disrupting brain architecture and triggering a proliferation of toxic stress, which evidence suggests can have acute and long-term adverse health effects."[84] Foster care can have negative impacts on children and is "particularly ill-advised" for infants, "whose caregivers serve as an extension of their own regulatory systems."[85] Infants tend to spend longer amounts of time in foster care than older children, especially infants "who enter care prior to the age of [three] months."[86] Infants also may not be able to properly regulate the stress they experience from multiple transitions in care.[87] This toxic stress "has potential to compromise most areas of [their] development, including emotions, behavior, cognitive functioning, and even health."[88] Overall, children who have been in foster care are more likely than other children to experience depression, exhibit behavioral problems, feel anxiety, have attention deficit disorder, and experience "speech or other language problems."[89] Finally, foster care can create a pipeline to prison: foster youth are more likely to experience arrests and convictions while in foster care and afterwards compared

84. MOVEMENT FOR FAM. POWER & NAT'L ADVOCS. FOR PREGNANT WOMEN, *supra* note 2, at 4. *See also* Jack P. Shonkoff & Andrew S. Garner, *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 PEDIATRICS e232, e236–38 (2012) (describing generally the science of how "toxic stress" affects "the developing brain" and the "early childhood roots of lifelong impairments in physical and mental health").

85. Ketteringham, Cremer, & Becker, *supra* note 36, at 98–100.

86. FRED WULCZYN, MICHELLE ERNST, & PHILIP FISHER, CHAPIN HALL, WHO ARE THE INFANTS IN OUT-OF-HOME CARE? AN EPIDEMIOLOGICAL AND DEVELOPMENTAL SNAPSHOT 3 (2011), https://fcda.chapinhall.org/wp-content/uploads/2012/10/2011_infants_issue-brief.pdf [https://perma.cc/R5YK-D8CT] ("[C]hildren who enter care prior to the age of 3 months spend 33 percent more time in care than infants who enter care between the ages of 3 and 12 months and they spend 50 percent more time in care than older children.").

87. *Id.* at 9 ("[T]here is evidence that infants and children show dysregulated cortisol levels [which developed brains normally release to regulate stress] immediately following a move between foster homes, or even a positive move from foster care to a permanent placement (such as being reunified with biological parents or adopted)." (citing Philip A. Fisher, Megan R. Gunnar, Patricia Chamberlain, & John B. Reid, *Preventive Intervention for Maltreated Preschool Children: Impact on Children's Behavior, Neuroendocrine Activity, and Foster Parent Functioning*, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1356 (2000))).

88. *Id.* (citing Jack P. Shonkoff, W. Thomas Boyce, & Bruce S. McEwen, *Neuroscience, Molecular Biology, and the Childhood Roots of Health Disparities: Building a New Framework for Health Promotion and Disease Prevention*, 301 JAMA 2252 (2009)).

89. Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, PEDIATRICS, Nov. 2016, at 1, 4.

to people who have not lived in foster care.[90] Avoiding the negative impacts of foster care almost certainly outweighs the risks that *may* or may not be associated with remaining with a parent who used substances during pregnancy—especially when a reimagined system surrounds a vulnerable family with concrete supports tailored to their needs.

C. Accounting for the Particulars: Understanding the Context of Substance Use During Pregnancy

Ultimately, current punitive practices treat pregnant people who use substances as having made a willful choice that warrants punishment and fail to acknowledge what Eckenwiler describes as "the moral landscape that lies beyond individuals"—or the "particulars."[91] The particulars experienced by pregnant people who use substances might be related to poverty, racism, low levels of education, socially-deprived environments, physical and sexual abuse, depression, anxiety, and low self-esteem.[92] Eckenwiler posits that when policymakers and judges account for the system-imposed particulars in someone's life, they can see that substance use during pregnancy is not a fully free choice deserving of punishment.[93] This Article adopts Eckenwiler's framing that an effective response to a pregnant person who uses substances must reckon with the social and institutional context of that particular person's substance use, and not focus on their individual "mental states" during substance use.[94]

Legislators, lawyers, judges, social workers, and healthcare workers can begin to understand this re-framing by looking at one of these particulars: domestic violence. How do experiences of domestic violence interact with both substance use and pregnancy? This "particular" is explored in the following

90. See Rachel Anspach, *The Foster Care to Prison Pipeline: What It Is and How it Works*, TEEN VOGUE (May 25, 2018), https://www.teenvogue.com/story/the-foster-care-to-prison-pipeline-what-it-is-and-how-it-works [https://perma.cc/N3WK-A9H6] ("According to the latest data [as of publication], there are 437,500 children in America's foster care system, who . . . face a disproportionate risk of being incarcerated. The problem is so severe that one-quarter of foster care alumni will become involved with the criminal justice system within two years of leaving care."). *See generally* MARK E. COURTNEY, AMY DWORSKY, ADAM BROWN, COLLEEN CARY, KARA LOVE, & VANESSA VORHIES, CHAPIN HALL, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 92 (2011), https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-Age-26.pdf [https://perma.cc/6EQA-CNFM] ("Nearly one-third of the young women and almost two-thirds of the young men [who were studied] reported spending at least one night in jail since they were 17 or 18 years old.").

91. Eckenwiler, *supra* note 25, at 90.

92. *Id.* at 91.

93. *Id.* ("[I]t must be granted that many [people who use substances] do exercise agency to some degree. They sometimes negotiate with men to reduce the risk and severity of violence directed toward them, and engage in economic activities . . . [M]any try to mitigate the effects of their drug use on the developing fetus, and take steps to avoid turning their children over to authorities. These activities can only properly be seen as reflecting agency, albeit under conditions of oppression. They also cast light on grounds for empowering these women instead of punishing them.").

94. *Id.* at 93.

section. Future research and scholarship, of course, could further interrogate other particulars and their intersection with pregnancy and substance use.

1. An Example: The Confluence of Domestic Violence, Pregnancy, and Substance Use

Domestic violence is "a pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship."[95] Behaviors may include "a pattern of assaultive and/or coercive behaviors, including physical, sexual, and psychological attacks, as well as economic coercion."[96] While domestic violence can affect people of any background, race, or socioeconomic status, people are uniquely vulnerable to violence if they experience multiple oppressions.[97] For example, poor women may not be able to gain independence from abusive partners without resources to pay for their own housing and necessities.[98] Women of color experiencing abuse may hesitate to reach out to formalized systems like law enforcement for help because of the real "threat [law enforcement poses] to themselves and their communities."[99] Members of the

95. NAT'L DOMESTIC VIOLENCE HOTLINE, *Understand Relationship Abuse*, https://www.thehotline.org/identify-abuse/understand-relationship-abuse/ [https://perma.cc/B5UF-QZM3] (last visited Nov. 3, 2020). *See also* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., DEFINITIONS OF DOMESTIC VIOLENCE 2–3 (2021), https://www.childwelfare.gov/pubPDFs/defdomvio.pdf [https://perma.cc/ZQ3U-9G2F] (listing civil, criminal, and child abuse laws defining domestic violence in each state).

96. *Understand Relationship Abuse*, *supra* note 95, at 1.

97. *See* NAT'L CTR. FOR INJ. PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 83 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/DTC7-23RD] ("Although no demographic group is immune to these forms of violence, consistent patterns emerged with respect to the subpopulations in the United States that are most heavily affected [including youth, women, and racial and ethnic minorities]."). The groundbreaking work on the theory of intersectionality is Kimberlé Crenshaw's *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1241 (1991), which considers how the experiences of women of color are the product of intersecting racism and sexism.

98. *See* Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339, 356–69 (2014) (describing the various ways financial dependence on an abusive partner may come about and the resulting choice the person experiencing abuse must make between their basic needs and safety); Susan Staggs & Stephanie Riger, *Effects of Intimate Partner Violence on Low-Income Women's Health and Employment*, 36 AM. J. CMTY. PSYCH. 133, 133 (2005) (discussing high rates of intimate partner violence and employment instability among female Illinois welfare recipients).

99. *See* ANANNYA BHATTACHARJEE, AM. FRIENDS SERV. COMM., WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT 26 (2001), https://www.afsc.org/sites/default/files/documents/whose%20safety.pdf [https://perma.cc/3MGH-SMLV] ("The growing tension between women of color and the mainstream women's anti-violence movement is not a question of who is 'included' in the movement, but rather reflects fundamentally contradictory understandings of the impact of collaboration with the state . . . . [T]he concerns of women of color, who are far more likely to experience law enforcement as a threat to themselves and their communities, have been marginalized. Some critics have argued that public pressure to increase arrests for domestic violence is inevitably translated into increased arrests of men of color.").

LGBTQ community may not seek help because of the possibility of violence from interacting with law enforcement.[100]

Domestic violence is also an issue for pregnant people.[101] Some estimates show that four to eight percent of pregnant women experience violence during their pregnancy.[102] The prevalence of physical abuse by a partner during pregnancy is higher among women who have less than 12 years of education and who are Medicaid recipients.[103] Violence against pregnant women can be physical or more pernicious: abusive partners may attempt to keep their partner in the relationship by getting them pregnant, interfering with their birth control methods, pushing for "a particular pregnancy outcome like abortion or birth," or being overly involved in prenatal visits.[104] Women who reported abuse in their

100. *See* TAYLOR N.T. BROWN & JODY L. HERMAN, THE WILLIAMS INST., UCLA SCH. L., INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE: A REVIEW OF EXISTING RESEARCH 19 (2015), https://williamsinstitute.law.ucla.edu/publications/ipv-sex-abuse-lgbt-people/ [https://perma.cc/6YXZ-MXLC] ("A number of studies found that LGBT people did not believe police to be helpful in addressing cases of [intimate partner violence]. This may be related to findings that LGBT people have reported experiencing discrimination and harassment by law enforcement."); Caroline Morin, *Re-Traumatized: How Gendered Laws Exacerbate the Harm for Same-Sex Victims of Intimate Partner Violence*, 40 NEW ENG. J. CRIM. & CIV. CONFINEMENT 477, 484 (2014) (describing how the "history of criminalized LGBTQ identities and activities," ongoing "police profiling" of trans and gender non-conforming people, and "hate violence" and "homophobia" by law enforcement officers "prevents many LGBTQ victims of IPV from seeking the assistance of law enforcement").

101. I continue to use the term "pregnant people" rather than the term "pregnant women," but I do note that researchers (including the ones cited in this paper) looking at domestic violence and pregnancy have focused on experiences of pregnant cisgender women and do not appear to account for the unique experiences of pregnant people of other genders. I have retained their gendered language to not distort the scope of their research.

102. Linda E. Saltzman, Christopher H. Johnson, Brenda Colley Gilbert, & Mary M. Goodwin, *Physical Abuse Around the Time of Pregnancy: An Examination of Prevalence and Risk Factors in 16 States*, 8 DEPAUL J. HEALTH CARE L. 497, 499 (2005) (citing Julie A. Gazmararian, Suzanne Lazorick, Alison M. Spitz, Terri J. Ballard, Linda E. Saltzman, & James S. Marks, *Prevalence of Violence Against Women*, 275 J. AM. MED. ASS'N 1915–1920 (1996)). *See* Jeanne L. Alhusen, Ellen Ray, Phyllis Sharps, & Linda Bullock, *Intimate Partner Violence During Pregnancy: Maternal and Neonatal Outcomes*, 24 J. WOMEN'S HEALTH 100, 100 (2015) (describing the majority of research as finding that three to nine percent of women experience intimate partner violence during pregnancy and up to 50% of low-income, predominantly single women experience intimate partner violence during pregnancy).

103. Saltzman, Johnson, Colley Gilbert, & Goodwin, *supra* note 102, at 508; Linda Bullock, *Abuse Disclosure in Privately and Medicaid-Funded Pregnant Women*, 51 J. MIDWIFERY & WOMEN'S HEALTH 361, 361 (2006) (finding that "the incidence of reported abuse was much higher among Medicaid-funded women (28.9%) than privately insured women (8.7%)").

104. *See* Shane M. Trawick, *Birth Control Sabotage As Domestic Violence: A Legal Response*, 100 CAL. L. REV. 721, 730–34 (2012) (defining various methods of "reproductive coercion"); FAMILY VIOLENCE PREVENTION FUND, NAT'L CONSENSUS GUIDELINES ON IDENTIFYING AND RESPONDING TO DOMESTIC VIOLENCE VICTIMIZATION IN HEALTH CARE SETTINGS 13, 43 (2004), https://www.futureswithoutviolence.org/userfiles/file/Consensus.pdf [https://perma.cc/7K7X-KQQE] (describing it as a warning sign of abuse when "a partner . . . comes into the examining room with the patient and controls or dominates the interview, is overly solicitous and will not leave the patient alone with [their] provider," and advising healthcare providers that they should not inquire into a patient's experiences of domestic violence if they cannot secure a private space, away from the person causing harm).

relationship were also more likely to report that their pregnancies were unintended.[105] Experiencing domestic violence during pregnancy is linked to parent depression, anemia, delay of prenatal care, first and second trimester bleeding, below optimal weight gain, and, importantly for this Article, substance use.[106] Pregnant women may have used substances in the past and continue to use them during their pregnancy "to cope with the pain of partner violence."[107]

Substance use can play a central role in abusive relationships.[108] The National Center on Domestic Violence, Trauma & Mental Health lists the ways substance use and domestic violence can interact:

> Abusive partners may: Undermine a survivor's efforts to achieve sobriety; Isolate a survivor from sources of support; Use a survivor's dependence on substances as a way to further their control; Use stigma around substance use to call a survivor's credibility into question, including in custody cases; [or] Implicate a survivor in illegal activities, thus limiting access to law enforcement[.][109]

105. Saltzman, Johnson, Colley Gilbert, & Goodwin, *supra* note 102, at 508.

106. BARBARA HART & ANDREW KLEIN, PRACTICAL IMPLICATIONS OF CURRENT INTIMATE PARTNER VIOLENCE RESEARCH FOR VICTIM ADVOCATES AND SERVICE PROVIDERS 53–54 (2013), https://www.ojp.gov/pdffiles1/nij/grants/244348.pdf [https://perma.cc/L7PJ-GVGH]; Sandra L. Martin, Jennifer L. Beaumont, & Lawrence L. Kupper, *Substance Use Before and During Pregnancy: Links to Intimate Partner Violence*, 29 AM. J. DRUG & ALCOHOL ABUSE 599, 613 (2003) ("After the women became pregnant, the links between women's experiences of intimate partner violence and their use of substances became stronger, with women who experienced each type of partner violence being more likely to use both alcohol and illicit drugs.").

107. Martin, Beaumont, & Kupper, *supra* note 106, at 613.

108. The co-occurrence of domestic violence and substance use is common. ECHO A. RIVERA, HEATHER PHILLIPS, CAROLE WARSHAW, ELEANOR LYON, PATRICIA J. BLAND, & ORAPAN KAEWKEN, NAT'L CTR. ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH, AN APPLIED RESEARCH PAPER ON THE RELATIONSHIP BETWEEN INTIMATE PARTNER VIOLENCE AND SUBSTANCE USE 4 (2015), http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2014/09/IPV-SAB-Final202.29.1620NO20LOGO-1.pdf [https://perma.cc/LU56-6S5G] ("[T]he data as a whole indicate a high prevalence of co-existing IPV and substance use or abuse. However, the exact prevalence rates of substance use or abuse among IPV survivors vary from 18%–72%, and the prevalence rates of IPV among people using substances vary from 31%–90%. This variance is related to a number of significant differences in methodologies among studies . . . .").

109. *Id.* at 16.

In some cases, abusive partners may also force their partner to use drugs or alcohol as a way of exerting power and control over them.[110] These behaviors are referred to as "substance use coercion."[111]

Survivors may also use substances without coercion. Survivors sometimes use substances in order to cope with physical and emotional pain that is a result of the abuse they have experienced.[112] They may sell drugs to make money for food and shelter or to save in anticipation of leaving their relationship.[113] Survivors may also use substances as an opportunity for "mutuality and shared power"—or intimacy and reciprocity—in their relationship.[114]

Both substance use and domestic violence were once considered to be private and individual issues, but they are increasingly portrayed and viewed as matters of public health, worthy of community education, support, and prevention initiatives.[115] Public understanding of substance use, and addiction in particular, has evolved in many medical professionals' views from a personal, "moral failing"

110. *See* CAROLE WARSHAW, ELEANOR LYON, PATRICIA J. BLAND, HEATHER PHILLIPS, & MIKISHA HOOPER, NAT'L CTR. ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH, MENTAL HEALTH AND SUBSTANCE USE COERCION SURVEYS: REPORT FROM THE NATIONAL CENTER ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH AND THE NATIONAL DOMESTIC VIOLENCE HOTLINE 10–11 (2014), http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2014/10/NCDVTMH_NDVH_MHSUCoercionSurveyReport_2014-2.pdf [https://perma.cc/6F8R-4Y9R] (finding that 27% of a survey of 3,025 callers to the National Domestic Violence Hotline had been "pressured or forced . . . to use alcohol or other drugs, or . . . use more than . . . wanted" by a "partner or ex-partner").

111. *See, e.g.*, *id. passim*.

112. RIVERA, PHILLIPS, WARSHAW, LYON, BLAND, & KAEWKEN, *supra* note 108, at 2. *See also* Shelby A. D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women from Leaving Abusive Relationships*, 12 TEX. J. WOMEN L. 451, 466 (2003) ("Where domestic violence is present in the home, battered women self-medicate—resorting to drug and alcohol abuse to cope with their depression, pain, and fear.").

113. Eckenwiler, *supra* note 25, at 91 ("[Pregnant women addicted to substances] engage in economic activities—in many cases underground ones related to drug use, such as prostitution and crack processing and distribution. These are often their best opportunities to make money for food and shelter . . . ."); Moore, *supra* note 112, at 466 ("[Women experiencing abuse] may sell drugs as a means of getting money to escape the abuse.").

114. Moore, *supra* note 112, at 469 (citing BETH E. RICHIE, COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BLACK BATTERED WOMEN (1966)).

115. *See, e.g.*, *Understanding Drug Use and Addiction DrugFacts*, NAT'L INST. DRUG ABUSE, https://nida.nih.gov/publications/drugfacts/understanding-drug-use-addiction [https://perma.cc/9MSC-MSPF] (last visited May 25, 2022) (explaining that while many people "may mistakenly think that those who use drugs lack moral principles or willpower and that they could stop their drug use simply by choosing to," "[i]n reality, drug addiction is a complex disease" caused by a "combination of factors"); *Intimate Partner Violence: Prevention Strategie*s, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/intimatepartnerviolence/prevention.html [https://perma.cc/KKV9-K2NM] (last visited Feb. 12, 2022) (describing domestic violence as a public health issue to which a socioecological prevention model can be applied).

to a "chronic illness" with biological, community, and societal factors.[116] Similarly, feminist activists in the late 1970s "push[ed] domestic violence . . . into the public realm" from its previous status as "a private, family problem."[117] Today, national health organizations like the Centers for Disease Control and Prevention view domestic violence as "a serious public health problem."[118] Pregnant people who fall at the intersection of these two issues—experiencing domestic violence and using substances—should thus not be seen as parents who are morally bankrupt and incapable of caring for children, but as parents our society has failed to support and prevented from thriving.

A public health lens is necessary when considering whether a pregnant person who is experiencing violence and using substances should retain custody of their newborn child. Knowing that substance use coercion can decrease a pregnant person's access to substance abuse treatment and social stability more generally[119] means knowing that a decision to use substances may not be as free of a choice as one might assume. Further, "[i]t is essential that substance use disorder treatment providers understand that abusive partners often actively undermine a survivor's efforts to achieve sobriety, isolate a survivor from sources of support, and use a survivor's dependence on substances as a way to further control them."[120] Researchers warn that if treatment programs fail to attend to survivors' unique safety concerns, the programs "may not be accessible or effective, or may even place survivors at greater risk for harm."[121] And if treatment is inaccessible—either for failing to adhere to best practices regarding domestic violence or for other reasons—then a pregnant person's failure to utilize it does not warrant the punitive response of removing their child.[122]

Domestic violence, of course, is just one "particular" that powerfully illustrates the cruelty and injustice of laws that facilitate removing infants from parents. While substance use tends to make parents "particularly unsympathetic

116. Vivek Murthy, *Preface to* U.S. DEP'T OF HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH, at v–vi (2016), https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf [https://perma.cc/6TW7-428R] (explaining that "there is a neurobiological basis for substance use disorders" and that treatment for such disorders often combines "medication, counseling, and social support. . . . tailored to fit the unique cultural values and psychological and behavioral health needs of the individual").

117. Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 225, 227 (2014).

118. *Intimate Partner Violence: Prevention Strategies*, *supra* note 115.

119. RIVERA, PHILLIPS, WARSHAW, LYON, BLAND, & KAEWKEN, *supra* note 108, at 17.

120. *Id.*

121. *Id.* at 15.

122. For other reasons why a treatment program may be inaccessible to pregnant people, *see infra* notes 291–93.

parties in abuse and neglect proceedings,"[123] understanding and explaining the experiences of domestic violence survivors who have used substances, and the context of the failed societal support systems around them, can begin to flip the script for lawyers, judges, and legislators.

III.
THE CURRENT LAW OF THE FOSTER SYSTEM

This Part describes current federal and state law and policy addressing substance use during pregnancy. Overall, the trend has been government mandates for increased reporting, infant removals, and adoptions. Section A lays out the federal laws that have developed over the last 50 years that affect pregnant people who use substances today. Section A also discusses the recent 2018 law, the Family First Prevention Services Act (FFPSA), which is intended to shift money from foster care and adoption to family preservation and analyzes why it does not appear to be bringing the sea change some had hoped. Section B zeroes in on one state, California, to describe how these federal policies play out on the ground.

A. Federal Statutes: The Framework of the Foster System

The story of how federal legislation affects the foster system is shaped by the interplay of state and federal powers.[124] States use their inherent governing powers, known as the police power and the *parens patriae* power, to operate their foster systems.[125] Police power is the broad authority of states to protect their

123. Moore, *supra* note 112, at 466 (quoting Jane C. Murphy & Margaret J. Potthast, *Domestic Violence, Substance Abuse, and Child Welfare: The Legal System's Response*, 3 J. HEALTH CARE L. & POL'Y 88 (1999)).

124. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., HOW FEDERAL LEGISLATION IMPACTS CHILD WELFARE SERVICE DELIVERY 2–7 (2022), https://www.childwelfare.gov/pubPDFs/impacts.pdf [https://perma.cc/9M5Y-WK78] (detailing how federal legislation triggers guidance and conditional funding from the Children's Bureau to the states and how states then implement child welfare services accordingly).

125. The U.S. Supreme Court has recognized that the Fourteenth Amendment guarantees the fundamental right to raise one's children. *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that a statute forbidding teaching of German impermissibly encroached on the liberty parents possess to raise children); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that Oregon could not require children to attend public schools because doing so interfered with the rights of parents to choose to send their children to private school). *Accord* Wisconsin v. Yoder, 406 U.S. 205 (1972), Troxel v. Granville, 530 U.S. 57 (2000). However, *Prince v. Massachusetts* held that parental authority is not absolute and that the government has authority to regulate the treatment of children. 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well-being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.").

residents from harm and to promote general welfare.[126] *Parens patriae* is a more specific authority aimed at protecting those who cannot act in their own best interests.[127] While these powers are limited to the states, the federal government uses its spending power to influence how state foster systems operate.[128] The federal government, through a series of statutes, offers funding to state foster systems that is contingent on those systems having certain structures and policies in place that the federal government sees as satisfactory.[129]

In fiscal year 2017, the federal government provided $9.3 billion to states to support foster systems.[130] $8.2 billion of this funding went specifically to foster care maintenance payments[131]—payments made to foster families for each child in their care "to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a children's personal incidentals, liability insurance with respect to a child, and reasonable travel for a child's visitation with family, or other caretakers"[132]—and adoption services.[133] Federal funds for the foster system are disbursed to states by the U.S. Children's Bureau, an agency within the Administration for Children and Families division of the U.S.

126. *See* U.S. CONST. amend. X (reserving to the states "powers not delegated to the United States by the Constitution"); United States v. Lopez, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."); United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime . . . .").

127. Black's Law Dictionary defines *parens patriae* as: "The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." *Parens patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019).

128. *See* CHILD.'S BUREAU, HOW FEDERAL LEGISLATION IMPACTS CHILD WELFARE SERVICE DELIVERY, *supra* note 124, at 6 ("The delivery of child protection and child welfare services to individual citizens is primarily governed by State laws, regulations, and policies or procedures. Federal laws provide standards and requirements for providing such programs and services to assist States that wish to obtain Federal funding for them.").

129. *Id.*; *see also* BRIAN T. YEH, CONG. RSCH. SERV., THE FEDERAL GOVERNMENT'S AUTHORITY TO IMPOSE CONDITIONS ON GRANT FUNDS 4 (2017) (describing Congress's Article I spending power), https://sgp.fas.org/crs/misc/R44797.pdf [https://perma.cc/2JZN-KFNG].

130. EMILIE STOLTZFUS, CONG. RSCH. SERV., CHILD WELFARE FUNDING IN FY 2018, at 1 (2018), https://sgp.fas.org/crs/misc/R45270.pdf [https://perma.cc/L2E8-Z2EH]. States also pull from their other federal grants that are not required to be spent on the foster system, such as TANF, Medicaid, and Social Security Block Grants, to help fund their foster systems. *See Child Welfare Financing*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/research/human-services/child-welfare-financing-101.aspx#IV-E [https://perma.cc/A7TH-G9DM] (last visited Oct. 3, 2023) (providing a state-by-state breakdown of how each state funds their foster system).

131. STOLTZFUS, *supra* note 130, at 1.

132. 45 C.F.R. § 1355.20(a) (2018) (defining "foster care maintenance payments" for purposes of the Social Security Act).

133. *See* STOLTZFUS, *supra* note 130, at 1. Title IV-E of the Social Security Act is the provision that funds this largest portion of state foster systems—providing funds "for the cost of foster care, adoption assistance, or kinship guardianship assistance, in addition to services for older youth who have aged out or emancipated from foster care." *See* NAT'L CONF. STATE LEGISLATURES, *supra* note 130.

Department of Health and Human Services, which also collects reporting data, ensures compliance, and provides technical assistance to states.[134]

Federal statutes create the framework in which state foster systems operate. These laws provide significant funding, but with a catch. As discussed below, they require states to have mandated reporting and specific policies regarding the response to prenatal substance use in order to qualify for federal funds—funds that must overwhelmingly be spent on foster care and adoption rather than on assistance for parents and family preservation.[135]

1. Child Abuse Prevention and Treatment Act (CAPTA)

The federal government's first legislation regarding the modern foster system arrived in 1974 when President Richard Nixon signed the Child Abuse Prevention and Treatment Act into law.[136] CAPTA is still in effect today.[137] It provides a small amount of financial assistance to states; in return, states must demonstrate that they have systems in place to prevent, identify, and treat child abuse and neglect and provide data from these systems.[138] CAPTA "has been reauthorized and amended many times" in the decades since it was enacted.[139] In 2003, CAPTA was amended to require states to have specific protocols in place for identifying and reporting substance-exposed newborns to the foster system.[140] In 2018, a large package of opioid and other substance-use-related legislation added even

134. CHILD.'S BUREAU, HOW FEDERAL LEGISLATION IMPACTS CHILD WELFARE SERVICE DELIVERY, *supra* note 124, at 3–9.

135. *See generally* NAT'L CONF. STATE LEGISLATURES, *supra* note 130 (describing how federal Title IV-E funds states by reimbursing costs related to foster care).

136. *See* Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974).

137. *See* 42 U.S.C. §§ 5101–06.

138. *Id.* at § 5106; *see also* SANGOI, *supra* note 1, at 43 ("Though not a particularly big source of money for states' foster system programs when compared with other sources of federal money, CAPTA has been very influential in shaping states' foster systems.").

139. *See* CASEY FAM. PROGRAMS, THE CHILD ABUSE PREVENTION AND TREATMENT ACT: KEEPING CHILDREN SAFE AND STRENGTHENING FAMILIES IN COMMUNITIES 6 (2019), https://caseyfamilypro-wpengine.netdna-ssl.com/media/CAPTA-Paper_web.pdf [https://perma.cc/AGN4-N98W] (last visited Mar. 15, 2022).

140. *See* Keeping Children and Families Safe Act, Pub. L. No. 108-36, 117 Stat. 809, 809 (2003) (inserting the following requirement into the law: "policies and procedures (including appropriate referrals to child protection service systems and for other appropriate services) to address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure, including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants."); *see also* CASEY FAM. PROGRAMS, THE CHILD ABUSE PREVENTION AND TREATMENT ACT: KEEPING CHILDREN SAFE AND STRENGTHENING FAMILIES IN COMMUNITIES, *supra* note 139, at 9.

stricter data collection requirements and emphasized reporting of substance-exposed newborns.[141]

CAPTA's amendments also command states to create "plan[s] of safe care" for infants exposed to substances prenatally.[142] As of 2016, Congress requires that these plans ensure the "safety and well-being" of a substance-exposed infant through

> addressing the health and substance use disorder treatment needs of the infant and affected family or caregiver; and [] the development and implementation by the State of monitoring systems . . . to determine whether and in what manner local entities are providing . . . referrals to and delivery of appropriate services for the infant and affected family or caregiver.[143]

In the years since this amendment, states have struggled to understand the "plan of safe care" requirement, and the Administration for Children and Families has received, in response to the confusion, special funding to provide technical assistance to fully implement it.[144]

Some states have understood CAPTA's reporting and plan-of-safe-care requirement to mandate healthcare providers to notify the local child protective

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141. Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. No. 115-271, § 7065, 132 Stat. 3894, 4026–27 (2018) (codified as 42 U.S.C. § 5106(a)) ("Each State that receives funds under [CAPTA], for each year such funds are received, shall submit a report to the [HHS] Secretary . . . with respect to . . . the number [of infants] who experienced removal associated with parental substance use[,] the number [of infants] who experienced removal and subsequently are reunified with parents, and the length of time between such removal and reunification . . . ."). The Act also allowed grant funds to be used for "[t]raining health professionals . . . in . . . State mandatory reporting laws . . . and the referral and process requirements for notification to child protective services when child abuse or neglect reporting is not mandated." *Id.* at 4025.

142. 42 U.S.C. § 5106a(b)(2)(B)(ii–iii).

143. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198 § 503 (2016) (emphasis added).

144. *See* ADMIN FOR CHILD. & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 139–40 (Fiscal Year 2020) (detailing the reasons for why additional money was needed), https://www.acf.hhs.gov/sites/default/files/documents/olab/acf_congressional_budget_justification_2020.pdf [https://perma.cc/P9KX-ZJLR]; ADMIN FOR CHILD. AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 150 (Fiscal Year 2022), https://www.acf.hhs.gov/sites/default/files/documents/olab/fy_2022_congressional_justification.pdf [https://perma.cc/2F38-NKHD] (explaining that Congress in fiscal year 2021 again appropriated additional funding to develop and implement the "plans of safe care" requirement). *See also* Emily Palmer & Jessica Huseman, *The Federal Government Has One Main Law to Prevent Child Abuse. No State Follows All of It*, BOS. GLOBE (Dec. 13, 2019), https://www.bostonglobe.com/metro/2019/12/13/cry-for-help/prT5xvp27BGZK6AZQWRNVL/story.html [https://perma.cc/Q6Q2-WJ9J] ("In addition to filing reports on child abuse, the law, known as CAPTA, requires states to create plans to protect infants affected by drugs . . . in order to receive federal dollars dedicated to child abuse prevention. But still, noncompliance runs rampant.").

services about each occurrence of an infant affected by prenatal drug exposure.[145] Advocates for parental rights, however, argue that CAPTA can instead be interpreted as simply requiring health care providers to report *aggregate* rates of substance-exposed infants to the state.[146] Advocates argue that plans of safe care do not necessarily require any foster system involvement, but can be developed and implemented by healthcare workers, hospital social workers, and community organizations.[147] This argument, however, has yet to catch on; most states currently default to foster system involvement as their plan of safe care.[148]

2. Adoption Assistance and Child Welfare Act (AACWA)

In 1980, Congress passed the Adoption Assistance and Child Welfare Act, which created a large federal funding structure for the foster system and assured the involvement of courts in overseeing the system.[149]

AACWA was passed in the wake of a large increase in the number of children in foster care. During the previous two decades, the number of children in foster care had exploded; in 1978 there were 503,000 children in foster care—nearly

145. *See* SAMHSA, U.S. DEP'T OF HEALTH & HUMAN SERVS., A COLLABORATIVE APPROACH TO THE TREATMENT OF PREGNANT WOMEN WITH OPIOID USE DISORDERS: PRACTICAL AND POLICY CONSIDERATIONS FOR CHILD WELFARE, COLLABORATING MEDICAL, AND SERVICE PROVIDERS 14 (2016), https://store.samhsa.gov/sites/default/files/d7/priv/sma16-4978.pdf [https://perma.cc/JBY5-BM3D] ("CPS agencies handle referrals of infants with prenatal substance exposure in ways that vary greatly by state and community . . . 15 states require providers to report women to CPS for suspected drug use during pregnancy (Guttmacher Institute, 2015). Different CPS agencies also make very different decisions regarding whether an infant remains in the custody of the mother.").

146. NAT'L ADVOCS. FOR PREGNANT WOMEN, UNDERSTANDING CAPTA AND STATE OBLIGATIONS 3 (2018), https://advocatesforpregnantwomen.org/wp-content/uploads/2020/07/CAPTA-requirements-for-states_NAPW.pdf [https://perma.cc/S52J-TGYU] ("Ideally, states should create a separate reporting and data collection outside the child welfare system to receive CAPTA reports . . . . At a minimum, separate reporting and data collection processes should include a separate database, separate staff, and a separate contact person/office.").

147. *See id.* at 2 ("It is up to individual states to determine when and if a plan is needed and which agency or entity (such as hospitals, community organizations, or a child protective services department that is established to receive CAPTA reports separate from reports of child neglect/abuse) is responsible for developing the plan of safe care.").

148. NAT'L CTR. SUBSTANCE ABUSE & CHILD WELFARE, HOW STATES SERVE INFANTS AND THEIR FAMILIES AFFECTED BY PRENATAL SUBSTANCE EXPOSURE: PLANS OF SAFE CARE DATA AND MONITORING 3 (2021), https://ncsacw.acf.hhs.gov/files/prenatal-substance-exposure-brief2.pdf [https://perma.cc/7CH8-RXTC] ("State and local child welfare agencies vary in how they monitor Plan of Safe Care implementation and fulfill the annual reporting requirements . . . . For a vast majority of states, child welfare provides the system- and case-level monitoring for families with an open child welfare case.").

149. Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, § 101, 94 Stat. 500, 506 (1980) (codified as amended in scattered sections of 42 U.S.C.) (describing the new payment plans and allotments to states); *id.* § 101, (codified as amended at 42 U.S.C. § 675) (including in a definition of "case review system" "procedural safeguards . . . to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction . . . no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care)").

three times the number of children in foster care in 1961 (177,000.)[150] The purported rationale for AACWA was to reduce the number of needless family separations that were happening.[151] The Act introduced the language of "prevention" to the foster system, urging states to "prevent[] the unnecessary separation of children from their families," such as by implementing "a preplacement preventive service program designed to help children remain with their families."[152]

Contrary to its stated policy goals, AACWA ended up creating perverse incentives for states by providing them limited, capped funding for in-home family preservation services while providing states with ample funds to cover foster care maintenance payments and adoption incentive payments.[153] The funding imbalance that AACWA created is still apparent in today's federal funding of the foster system, which is nearly 90% dedicated to foster care payments, guardian payments, and adoption services.[154]

More in line with its stated policy goals, AACWA also implemented the "reasonable efforts" requirement[155]—an important tool discussed later in this Article. Under this requirement, states must use "reasonable efforts" to avoid

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150 . *Children's Bureau Timeline*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/more-tools-resources/resources-from-childrens-bureau/timeline1/ [https://perma.cc/6Z5B-2CAH] (last visited May 17, 2022) (choose "1978" on the timeline).

151. Adoption Assistance and Child Welfare Act § 103, (codified as amended at 42 U.S.C. § 625) (adding a goal of child welfare services to be "preventing the unnecessary separation of children from their families"); *see generally* Douglas E. Dooley, An Historical Policy Examination of the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272) (Mar. 12, 1997) (M.S.W. thesis, Augsburg College) (describing the evolution of the foster system in this era as coming to focus on family preservation rather than child rescue).

152. Adoption Assistance and Child Welfare Act § 103 (codified as amended at 42 U.S.C. § 625); *id.* § 103, 94 Stat. at 520 (codified as amended at 42 U.S.C. § 627).

153. *See* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L. J. 259, 266–67 (2003) ("The Child Welfare Act created federally funded programs to support services at each point in the continuum of state intervention. These federally funded programs included part B of Title IV of the Social Security Act, known as the Child Welfare Services Program, and part E of Title IV, known as the Foster Care Maintenance Payments Program and the Adoption Assistance Program."). Foster care maintenance payments are payments made to foster families to cover the cost of caring for a foster child. Adoption Assistance and Child Welfare Act § 101, 94 Stat. at 503 (codified as amended in scattered sections of 42 U.S.C.). Adoption incentive payments are payments made to adoptive parents of children who qualify for government assistance or who have special needs. *Id.* at 504. These two Title IV-E payments were to receive as much "funds as may be necessary." *Id.* at 501. But the Title IV-B funds (for family preservation) were capped at $266,000,000. *Id.* at 516.

154. EMILIE STOLTZFUS, CONG. RES. SERV., CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, FUNDING 2 (2019) (reporting that of all federal child welfare funding in fiscal year 2019, $5.3 billion went to foster care (54%), $3.2 billion went to adoption and guardianship (33%), while $789 million went to prevention services (eight percent)).

155. Adoption Assistance and Child Welfare Act § 101, 94 Stat. at 503 (codified as amended at 42 U.S.C. § 671(a)(15)(A)(i)) ("In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary[, and] . . . [i]n each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.").

removing children from parents in the first place and, when removal is necessary, reasonable efforts to allow a child to be returned home.[156] Most states adopted this reasonable efforts requirement in their own statutory language.[157] The reasonable efforts requirement held great theoretical promise to put an onus on the foster system to prevent removal in the first place and reunite families it had separated.

However, some legislators and the media saw AACWA's requirement that states use "reasonable efforts" to ensure family preservation as dangerous.[158] Republican Senator Mike DeWine of Ohio bemoaned in 1997 that reasonable efforts had become "extraordinary efforts."[159] Furthermore, advocates used high-profile deaths of children who had been returned to their parents to push Congress to pass a new act, the Adoption and Safe Families Act (ASFA), which explicitly pushed for "permanency" through adoption.[160] Nevertheless, the reasonable efforts requirement that AACWA created remains a critical tool for attorneys engaged in family defense and is discussed further in Part IV.

3. Adoption and Safe Families Act (ASFA)

With the enactment of ASFA in 1997,[161] the "pendulum . . . swung decisively" back to promoting family separation.[162] The new Act saw child safety as distinct from family preservation, pushed for fast and permanent solutions, and incentivized adoption.[163] ASFA changed the timeline so that a permanency hearing, which determines a foster child's ultimate placement goal, such as

156. *Id.*

157. *See generally* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN (2019), https://www.childwelfare.gov/pubpdfs/reunify.pdf [https://perma.cc/6TWJ-W2YN] (detailing each state's statutes and codes defining reasonable efforts and when they are required).

158. Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2292 (1998) (describing the "backlash against family preservation"); Mike DeWine, *Children Are Suffering from a Misguided Law*, THE CHRISTIAN SCI. MONITOR (Jan. 23, 1997), https://www.csmonitor.com/1997/0123/012397.opin.opin.2.html [https://perma.cc/RDL5-YFA8].

159. DeWine, *supra* note 158.

160. ROBERTS, SHATTERED BONDS, *supra* note 37, at 106–07.

161. Adoption and Safe Families Act, Pub. L. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

162. ROBERTS, SHATTERED BONDS, *supra* note 37, at 105. Regardless of whether under the AACWA regime or the ASFA regime, the federal government has consistently provided more funding for foster care than for prevention services. In 1989, Title IV-E funding (for foster care and adoption) was 74%, and Title IV-B funding (for family preservation efforts) was 16%. Crossley, *supra* note 153, at 277. In 1999, Title IV-E funding was 73%, and Title IV-B funding was 10%. *Id. See* H. COMM. ON WAYS AND MEANS, 2016 GREEN BOOK figs. 11-7, 11-9 (2016) https://greenbook-waysandmeans.house.gov/2016-green-book/chapter-11-child-welfare [https://perma.cc/T7J4-VFNJ] (displaying the trend in Federal Title IV-E Spending by Program Component, FY1989-FY2016 in Figure 11-7 and the trend in Total Title IV-B Funding, FY1992-FY2018 in Figure 11-9).

163. ROBERTS, SHATTERED BONDS, *supra* note 37, at 105.

reunification or adoption, was required within the first 12 months of foster care.[164] ASFA also established the "15/22 rule," which required the foster system to petition for termination of parental rights whenever a child had spent 15 of the past 22 months in foster care.[165] Fifteen months is an especially fast timeline given that court delays alone might mean that a child spends years in foster care.[166] Finally, ASFA incentivized increasing adoptions by awarding $4,000 to states for every adopted child above a state's annual adoption average prior to 1997.[167]

ASFA retained the "reasonable efforts" language from AACWA but weakened the requirement by allowing the foster system to engage in "concurrent planning."[168] Concurrent planning—which is still allowed by law today—means that the foster system can be working toward an out-of-home permanent placement (family separation) just as it is supposed to be making "reasonable efforts" to reunify with birth parents "in case reunification efforts failed."[169]

ASFA seems designed to set parents up for failure, especially low-income parents struggling with substance use. A significant problem with the 15/22 rule is that it fails to account for the nature of addiction recovery, which includes relapses, lengthy treatment times, and long waitlists caused by a deficit of services.[170] The same year ASFA was enacted, Congress created the government

164. Adoption and Safe Families Act § 302, 111 Stat. at 2128. Before the enactment of the ASFA, AACWA required that a *dispositional* hearing be held within the first 18 months of custody. *See* Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, § 101, 94 Stat. 500, 506 (1980) (codified as amended in scattered sections of 42 U.S.C.).

165. Adoption and Safe Families Act § 103, 111 Stat. at 2118. States were excused from this if the child was living with a relative, if the state provided a compelling reason to maintain the parent relationship, or if the state failed to comply with reasonable efforts. *Id.*

166. *See* Martin Guggenheim & Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL'Y & L. 546, 549 (2005).

167. Adoption and Safe Families Act § 473A, 111 Stat. at 2122 ("Adoption Incentive Payments"). The Act also relaxed jurisdictional limits for adoptions, meaning that children could be adopted by families far from their birth parents' county and state. *Id.* § 202, 111 Stat. at 2125 ("Adoptions Across State and County Jurisdictions").

168. *Id.* § 101, 111 Stat. at 2117 ("[R]easonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts [to preserve and reunify families]."). The Act also exempts states from reasonable efforts when a parent has 1) "subjected the child to aggravated circumstances," 2) committed murder or voluntary manslaughter of their child, 3) "aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter," or 4) "committed a felony assault that results in serious bodily injury to the child or another child of the parent." *Id.* § 101, 111 Stat. at 2116. In these instances, the court must hold a permanency hearing within 30 days. *Id.* § 101, 111 Stat. at 2117. *See* CHILD.'S BUREAU, U.S. DEP'T HEALTH & HUMAN SERVS., CONCURRENT PLANNING FOR PERMANENCY FOR CHILDREN 1 (2016), https://www.childwelfare.gov/pubPDFs/concurrent.pdf [https://perma.cc/444Y-HPLR].

169. CHILD.'S BUREAU, CONCURRENT PLANNING FOR PERMANENCY FOR CHILDREN, *supra* note 168.

170. *See* MJ Hannett, *Lessening the Sting of AFSA: The Rehabilitation-Relapse Dilemma Brought about by Drug Addiction and Termination of Parental Rights*, 45 FAM. CT. REV. 524, 525–28 (2007). Notably, the War on Drugs campaign had emphasized allocating resources to law enforcement, while simultaneously there was a dearth of treatment programs. Eckenwiler, *supra* note 25, at 94.

program known as Temporary Assistance for Needy Families (TANF).[171] TANF changed public assistance by emphasizing a welfare-to-work principle,[172] adding work requirements,[173] setting time limits for receiving assistance,[174] and denying food stamps to those convicted of felony drug offenses.[175] Between ASFA and TANF, Congress asked parents struggling with substance use and involved in the foster system to do more with less.

CAPTA, AACWA, and ASFA together define the contours of the foster system that pregnant people struggling with substance use face: mandated reporting, funding for removal but not for support and preservation, and a nearly impossible timeline imposed on parents for reunification. A more recent law, The Family First Prevention Services Act, while promising family preservation, does not appear to create much change.

4. Family First Prevention Services Act (FFPSA)

The Family First Prevention Services Act of 2018[176] ushers in a major funding change to state foster systems. FFPSA allows a large portion of funds previously reserved for foster care maintenance and adoption assistance payments to be used by states for family preservation services.[177] FFPSA specifies three services that qualify for funding: mental health services, in-home parenting skills

171. The Temporary Assistance for Needy Families (TANF) block grant funds were created in the Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as 42 U.S.C. §§ 601–619 (2018)).

172. 42 U.S.C. § 601(a)(2) (2018) (stating that the purpose of the law is to "end the dependence of needy parents on government benefits by promoting . . . work").

173. 42 U.S.C. § 607 (2018).

174. Personal Responsibility and Work Opportunity Act § 408(a)(7), 110 Stat. at 2137 (limiting assistance to five years).

175. Personal Responsibility and Work Opportunity Act § 115, 110 Stat. at 2180. By now, most states have opted to end the ban on food stamps (SNAP benefits) for people with prior felony drug convictions. *See* Chesterfield Polkey, *Most States Have Ended SNAP Ban for Convicted Drug Felons*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/blog/2019/07/30/most-states-have-ended-snap-ban-for-convicted-drug-felons.aspx [https://perma.cc/9Q9Y-MTNC] (last visited Dec. 6, 2020).

176. Family First Prevention Services Act, Pub. L. No. 115-123 § 50702, 132 Stat. 64, 232 (2018) ("The purpose of this subtitle is to enable States to use Federal funds available under parts B and E of title IV of the Social Security Act to provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services.").

177. *Id.*; Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 783 (2021) ("[T]he Family First Act opened up IV-E funding for state family regulation system agencies to provide prevention services and programs to families with children who are deemed are [sic] 'candidates for foster care.' Unlike prior federal laws, under the Family First Act, family separation is no longer a prerequisite to states accessing Title IV-E funds.").

programming, and substance abuse treatment.[178] Eligible recipients include the parents of any child who would be a "candidate for foster care."[179] The overall goal of the new law is to keep children with their families and communities and out of state custody by front-loading services to parents.[180] The potential impact of FFPSA has not gone unnoticed—the American Bar Association reports that FFPSA has the "potential to radically change child welfare systems across the country."[181]

However, FFPSA does not appear to be a wholly perfect solution, due in part to restrictions placed on states when providing family preservation services, and in part because the new law does not imagine a response to families outside of the foster system. Specifically, states have noted challenges in following FFPSA's requirement that any program states use for prevention services must reach a certain accreditation level.[182] The same year FFPSA was passed, a national literature review could identify only four substance abuse treatment programs that met the accreditation standard.[183] States are also scrambling to implement structural changes so that they will be able to locate qualifying prevention services

178. Family First Prevention Services Act § 50711(e)(1), 132 Stat. at 233. The law also requires these services to be "trauma-informed." *Id.* The substance abuse treatment option is a hopeful turn of events after a long history of persecuting parents who use substances through federal policies. It is interesting to note that the change follows a decade-long increase in the number of children in the foster care system due in large part to the opioid epidemic, which primarily affects white families, suggesting that the government did not care to address this problem until it began to substantially affect white families. *See* Douglas Waite, Mary V. Greiner, & Zach Laris, *Putting Families First: How the Opioid Epidemic is Affecting Children and Families, and the Child Welfare Policy Options to Address It*, 9 J. APPLIED RSCH. CHILD. 1 (2018); Bridges, *supra* note 14, at 788–89.

179. Family First Prevention Services Act § 50711(a)(1), 132 Stat. at 232.

180. *Family First Prevention Services Act*, CAL. DEP'T SOC. SERVS., https://www.cdss.ca.gov/inforesources/ffpsa [https://perma.cc/6BB5-YWB5] (last visited Feb. 11, 2022) ("FFPSA will enhance support services for families to help children remain at home and reduce the use of unnecessary congregate care placements by increasing options for prevention services . . . .").

181. Jenny Pokempner, *Leveraging the FFPSA for Older Youth: Prevention Provisions*, AM. BAR ASS'N (Jan. 15, 2019), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/winter2019-leveraging-the-ffpsa-for-older-youth-prevention-provisions.html/ [https://perma.cc/H7Q3-EETX]. *See also Family First Prevention Services Act*, NAT'L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE, https://ncsacw.samhsa.gov/topics/family-first-prevention-services-act.aspx [https://perma.cc/58AA-VMSA] (last visited Oct. 6, 2022) ("The creation of the Title IV-E prevention program is an unprecedented step in recognizing the importance of working with children and families to prevent the need for foster care placement and the trauma of unnecessary parent-child separation. FFPSA presents a unique opportunity to support children and families experiencing substance use disorders.").

182. John Kelly, *List of States Seeking Family First Act Delay Is Up to At Least 27*, THE IMPRINT (May 28, 2019), https://imprintnews.org/youth-services-insider/list-of-states-seeking-family-first-act-delay-is-up-to-at-least-27/35239 [https://perma.cc/ZY9W-AX3Y].

183. CASEY FAM. PROGRAMS, INTERVENTIONS WITH SPECIAL RELEVANCE FOR THE FAMILY FIRST PREVENTION SERVICES ACT (FFPSA) (SECOND EDITION) vii (2018) https://caseyfamilypro-wpengine.netdna-ssl.com/media/Family-First-Interventions-Catalog.pdf [https://perma.cc/WXN9-M48K].

and thus utilize the new prevention services' funding.[184] In an attempt to aid the transition, Congress passed the Family First Transition Act in late 2019.[185] The Act provides one-time, flexible funding and temporarily softens the program accreditation requirement.[186] But regardless of the prevention service program the state uses under FFPSA or the Transition Act, foster system workers must still monitor parent compliance [187] —the threat of a regular-track removal and dependency proceeding only one misstep away.[188]

Other challenges with FFPSA stem from the differential treatment of children in foster care versus those who would otherwise be "candidates for foster care" and thus qualify for FFPSA prevention programming. If a child is in foster care, the child's foster family receives financial stipends for supplies, shelter, and food ("foster care maintenance payments" discussed above);[189] but if a child remains with their parents thanks to these FFPSA prevention services, their family receives none of that same financial support.[190] In other words, FFPSA could be setting families up for failure by expecting too much from resource-deprived families and still involving foster system oversight. In addition, it is unclear if FFPSA could effectively remove judicial oversight of "reasonable efforts" by the state to keep families together. [191] Because children are not technically in foster care when the foster system is paying for prevention services for their parents, it might mean that the state is not expected to put forth "reasonable efforts" towards family

184. *See, e.g.*, *Family First Prevention Services Act*, ACAD. FOR PRO. EXCELLENCE, https://theacademy.sdsu.edu/programs/cwds/ffpsa/ [https://perma.cc/C8SB-TG79] (last visited Dec. 6, 2020) (serving "as a hub for Southern Counties" in California trying to implement FFPSA).

185. Family First Transition Act, Pub. L. No. 116-94, § 602 (2019).

186. *Id.* §§ 602(b)–(c). Title IV-B funds will receive a $500 million increase; $52.8 million of which will go to California. *Id.* § 602(c); CONG. RSCH. SERV., ESTIMATED STATE ALLOCATIONS UNDER FAMILY FIRST TRANSITION ACT (2020), https://familyfirstact.org/sites/default/files/Estimated%20State%20Allocations%20Under%20Family%20First%20Transition%20Act.pdf [https://perma.cc/GHN2-YUTW].

187. *See generally* CHILD.'S DEFENSE FUND, IMPLEMENTING THE FAMILY FIRST PREVENTION SERVICES ACT: A TECHNICAL GUIDE FOR AGENCIES, POLICYMAKERS AND OTHER STAKEHOLDERS (2020), https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf [https://perma.cc/F3QG-6ZPP] (instructing foster system agencies on FFPSA's terms of eligibility, time limits, and reporting requirements).

188. *See* ADMIN. FOR CHILD. & FAMS., INFORMATION MEMORANDUM REGARDING FFPSA 8 (2018), https://www.acf.hhs.gov/sites/default/files/documents/cb/im1802.pdf [https://perma.cc/8P6D-HGFY] ("[T]he state will monitor and oversee the safety of children who receive services and programs, including through periodic risk assessments and reexamination of the child's prevention plan if the agency determines the risk of the child entering foster care remains high despite the provision of the services or programs.").

189. Family First Prevention Services Act § 50702, 132 Stat. 64, 232.

190. Family First Transition Act, Pub. L. No. 116-94, § 602 (including no provisions allowing for direct financial payments to families).

191. *Cf.* AM. BAR ASS'N, THE FAMILY FIRST PREVENTION SERVICES ACT OF 2018: A GUIDE FOR THE LEGAL COMMUNITY, 4–5 (2020), https://dev.americanbar.org/content/dam/aba/administrative/child_law/family-first-legal-guide.pdf [https://perma.cc/8ZW4-NHH5] (giving guidance to parent's counsel and judicial decision makers regarding FFPSA but not including the tool of reasonable efforts with regards to prevention service provision).

preservation in administering these FFPSA prevention services and thus that family defense lawyers would lose access to a critical tool for state accountability.[192]

Overall, FFPSA provides some hope for foster system funding reform by redirecting the policy conversation to the importance of preserving families. But it remains to be seen whether the FFPSA funding will bring about true change in the foster system. Activists posit that FFPSA will not deliver liberation for families who are experiencing poverty and substance use issues because it keeps foster system social workers involved and remains a fundamentally unchanged system.[193] Despite FFPSA, the restrictions set in place by CAPTA, AACWA, and AFSA remain.

B. State Foster Systems: A Look at California

In many ways, California is more progressive and less punitive than other states when it comes to how its foster system treats parents who use substances. Yet, the flawed federal system serves as a hard outer limit on the state's imagination. This Part examines how California's marginal reforms in dependency law still fail to fully support pregnant people who use substances. This failure, in turn, reveals the federal system's deep-seated and fundamental flaws. Understanding the on-the-ground reality of the dependency system that underfunded family defense lawyers face helps outline a path forward for what change would be needed to successfully challenge infant-parent separations.

Between 2008 and 2017, "the number of drug-exposed infants born per year nearly tripled in California."[194] In 2017 alone, California recorded 5,050 infants exposed to substances—nearly 14 per day.[195] While California has said its goal is to keep parents and substance-exposed babies together,[196] the data do not reflect this assertion. Although the total number of children in the California foster

192. *Id.*; *see* further discussion of "reasonable efforts" *infra* Section IV.A.

193. *See, e.g.*, Mack, *supra* note 177 at 791 ("Like the federal family regulation policy that preceded it, and in conformity with the prevention paradigm, the Family First Act embraces pathology and a behavior modification theory of change."); VICTORIA COPELAND & MAYA PENDLETON, SURVEILLANCE OF BLACK FAMILIES IN THE FAMILY POLICING SYSTEM, UPEND 8 (2021), https://upendmovement.org/wp-content/uploads/2021/12/upENDSurveillance2021.pdf [https://perma.cc/C9YV-CZ4W] ("FFPSA not only pushes certain children into [community surveillance] programs, it also mandates the continued use of risk assessments, the tracking of families, and the creation of new and shared databases.").

194. Teri Sforza, *Born on Drugs: Babies from Addicted Moms are Increasing at an Alarming Rate in California*, ORANGE CNTY. REG. (Dec. 27, 2018), https://www.ocregister.com/2018/12/27/born-on-drugs-babies-from-addicted-moms-are-increasing-at-an-alarming-rate-in-california/ [https://perma.cc/LCN5-QDL9].

195. *Id.*

196. *Mother & Baby Substance Exposure Initiative Toolkit*, CAL. MATERNAL QUALITY CARE COLLAB., CAL. DEPT. HEALTH CARE SERVS., https://www.cmqcc.org/resources-toolkits/toolkits/mother-baby-substance-exposure-initiative-toolkit [https://perma.cc/S5EH-6JQ2] (last visited May 17, 2022) (listing the statement that "[m]oms and babies should receive support to keep them together" as a key theme).

system was cut in half between 2000 and 2018, the number of infants (less than one year old) "shot up more than [nine] percent."[197] California remains wary of keeping substance-exposed newborns with their parents and continues to emphasize reporting and referring these newborns to the foster system.[198]

The foster system in California is governed by the California Welfare and Institution Code.[199] The Code defines the circumstances of abuse or neglect where a court can remove a child from their parent.[200] California's definition of neglect includes when a "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of . . . the inability of the parent . . . to provide regular care for the child due to . . . substance use."[201] California courts have clarified that substance use, without additional risk factors, is insufficient for continued justification of removal.[202] However, additional risk factors are nearly always identifiable in low-income households where family members have used substances.[203] Case workers may include anything from inadequate housing to an inability to put "food on the table."[204] In other words, the rule requiring something beyond substance use to justify removal of an infant is an inadequate safeguard.

California legislators have created several statutory safeguards to prevent unnecessary child removal when the parent's alleged neglect involves only substance use. For one, California requires that mandated reporters have at least "reasonable suspicion" of abuse or neglect before reporting.[205] However, the reasonable suspicion standard provides little barrier to reports flowing in. First,

197. Sforza, *supra* note 194.

198. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., PLANS OF SAFE CARE FOR INFANTS WITH PRENATAL SUBSTANCE EXPOSURE AND THEIR FAMILIES 14 (2019), https://www.childwelfare.gov/pubPDFs/safecare.pdf [https://perma.cc/X95A-4URZ] ("A health practitioner or a medical social worker, prior to the infant's release from the hospital, must perform the assessment of needs . . . . The assessment will identify the level of services and intervention necessary and may include a referral to the county welfare department for child welfare services . . . . When investigating a referral, the county child welfare agency must assess and identify any safety threats to the child, including any safety threat posed by the parent's substance abuse. This includes completion of a risk assessment.").

199. CAL. WELF. & INST. CODE §§ 100–1500 (West, Westlaw through 2022 Legis. Sess.) ("Children"); *id.* §§ 16500–16589 ("Services for the Care of Children").

200. *Id.* § 300.

201. *Id.*

202. *In re* Drake M., 211 Cal. App. 4th 754, 766 (2012). *See also In re* J.A., 47 Cal. App. 5th 1036, 1048 (2020) (holding that there was insufficient evidence that a mother's medical marijuana use while pregnant placed baby and toddler at risk of serious harm). *But cf. In re* R.T., 3 Cal. 5th 622, 634–35 (2017) (interpreting statutory justification for removal as not requiring any culpability on the part of the parent).

203. *See* ROBERTS, SHATTERED BONDS, *supra* note 37, at 27 ("[T]he public child welfare system equates poverty with neglect . . . . Children raised in poverty are more likely to be reported to child protective services, more likely to have the report substantiated, more likely to be removed from their homes, and more likely to remain in substitute care for long periods of time.").

204. *See id.* at 34 (quoting the head of the Los Angeles child welfare department).

205. CAL. PENAL CODE § 11166 (West, Westlaw through 2022 Legis. Sess.).

mandated reporters face penalties for failing to report. If a mandated reporter fails to report an incident later determined to have been child abuse or neglect, they face up to six months in jail and a $1,000 fine.[206] Moreover, supervisors are not allowed to inhibit reporting, the reporting party's identity is kept confidential, and the reporter enjoys immunity from liability for reporting.[207] State guidance counsels that the reasonable suspicion standard boils down to this: "if you suspect, report."[208]

California also instructs healthcare workers that a positive toxicology test of a parent or infant alone is not sufficient to trigger an abuse or neglect report.[209] Any positive test should, instead, lead to an assessment of needs and, if "other factors . . . that indicate risk to the child" are present, the healthcare provider must make a report to the foster system.[210] The list of "other factors" is broad and discretionary, including factors like a parent's "lack of prenatal care," "awareness of impact of drug/alcohol use on the child," "emotional and mental functioning and stability," "history of family violence," and "[u]nsafe home environment conditions."[211] Such an expansive view of indicators of risk removes any weight from the safeguard of requiring *more than* a positive toxicology test to mandate a report.

Finally, in accordance with AACWA, California also requires the foster system to provide "reasonable efforts" to prevent the need for the child's removal and to attempt to obviate the need for further detention.[212] The Code lists several services for judges to consider when assessing if the state has made reasonable efforts, including "case management, counseling, emergency shelter care, emergency in-home caretakers, out-of-home respite care, teaching and demonstrating homemakers, parenting training, transportation," and "referral to public assistance services."[213] Despite these theoretical safeguards, hospital social workers regularly report people who have used substances during their pregnancy

206. *Id.* § 11166(c).

207. ELIANA GIL, THE CALIFORNIA CHILD ABUSE & NEGLECT REPORTING LAW: ISSUES AND ANSWERS FOR MANDATED REPORTERS 6–7 (June 2012), https://mandatedreporterca.com /images/Pub132.pdf [https://perma.cc/WC6N-FBUV].

208. *Id.* at 6.

209. CAL. PENAL CODE § 11165.13 (West, Westlaw through 2022 Legis. Sess.).

210. *Id.*

211. *Id.*; CHILD.'S BUREAU, PLANS OF SAFE CARE FOR INFANTS WITH PRENATAL SUBSTANCE EXPOSURE AND THEIR FAMILIES, *supra* note 198, at 15.

212. CAL. WELF. & INST. CODE § 319(f)(1) (West, Westlaw through 2022 Legis. Sess.).

212. *Id.*

213. *Id.*

and the state regularly removes their infants before implementing any of these services.[214] After removal, courts get involved.

The field of family defense is complex and litigious—involving a series of conferences, hearings, and trials that cross constitutional law, federal law, state law, and local rules. In California, once a parent has come under the scrutiny of the foster system and a caseworker has determined that, per their assessment, removal is necessary, the case will generally follow a set course.[215] The first hearing after a removal is "detention,"—a particularly punitive phrase—to consider a state's petition to declare a child a dependent of the court and to justify continued state custody.[216] The detention hearing must be held no later than one day after the foster system files their petition to declare a removed child a dependent, which must be filed within two "court days" after removal.[217] If the child is declared dependent, the next hearing is the jurisdiction hearing, when the court makes "a factual determination about whether the child has been abused or neglected" under California law.[218] Jurisdiction hearings may be combined with disposition hearings—when a court decides where a dependent child is placed and what services are appropriate.[219] During the "reunification" period, the court conducts a status review hearing every six months to "address the safety of the child and the continuing necessity for placement, [and] the reasonableness of the social services agency's efforts to return the child to a safe home . . . ."[220] If the state denies or terminates reunification services, the court will then hold "a

214. While the "vast majority of calls to CPS result in 'nothing' and 'an offer of voluntary services,'" "many more reports connected to newborns (about 33 percent) translate into open cases." Teri Sforza, *Born on Drugs: For Moms Trying to Keep Kids and Stay Sober, They're at the Mercy of Child Protective Services*, ORANGE CNTY. REG. (Dec. 29, 2018), https://www.ocregister.com/2018/12/29/born-on-drugs-for-moms-trying-to-keep-kids-and-stay-sober-theyre-at-the-mercy-of-child-protective-services/ [https://perma.cc/N75C-X2N7]. Foster system workers responding to a report must decide "which babies are safe to stay with their parents, and which are not." *Id.* To do this, they use "a trademark-protected Structured Decision Making tool" that "assigns numeric values to each answer, ultimately placing families into one of four risk groups: low, medium, high or very high." *Id.* "[T]he assessment system is far from foolproof." *Id.* California also specifically singles out minors in hospitals as more easily removable by the state: "Any peace officer may, without a warrant, take into temporary custody a minor . . . [w]ho is in a hospital and release of the minor to a parent poses an immediate danger to the child's health or safety." CAL. WELF. & INST. CODE § 305 (West, Westlaw through 2022 Legis. Sess.).

215. *See generally* JUD. COUNCIL OF CAL., DEPENDENCY QUICK GUIDE: A DOGBOOK FOR ATTORNEYS REPRESENTING CHILDREN AND PARENTS (3d ed. 2017), https://www.courts.ca.gov/documents/dogbook.pdf [https://perma.cc/U3DU-Z2GH] (providing an extensive overview and attorney reference guide for juvenile dependency proceedings).

216. *Id.* at H-13.

217. *Id.*

218. *Id.* at H-45. "If the child is detained, the hearing must be set within 15 court days of the date that the order for detention was made . . . . The time limits are considered waived if counsel did not invoke them at the detention hearing . . . ." *Id.* at H-46.

219. *Id.* at H-85.

220. *Id.* at H-145.

selection and implementation hearing" to decide the plan that will, in its view, "best provide the child with a stable and permanent home."[221]

Given this gauntlet, the quality of a parent's attorney (or whether they have one at all) can make a dramatic difference in their case.[222] There is no constitutionally guaranteed right to counsel for all parents in dependency proceedings.[223] States are inconsistent in how they statutorily provide the right.[224] Some states afford discretion to the judge to appoint an attorney when appropriate; some do not appoint an attorney until the termination of the parental rights stage (too late in most cases to mount a full defense since the parties have already made critical decisions about whether the state will remove the child).[225] A few jurisdictions like New York City and Oakland, California, do assign counsel early on, but, at least in Oakland, attorneys may only be assigned minutes, hours, or one day before a hearing.[226] And while a handful of jurisdictions pay family defense attorneys well, the majority do not.[227] Attorneys are often "solo practitioners" with "no institutional backing," and some feel that their fee ceilings discourage robust representation.[228] California, in sum, has not been able to achieve its desired family preservation ethos because it is hindered by a separation-oriented federal legislative framework and by ineffective marginal reforms.

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221. *Id.* at H-175.

222. CASEY FAM. PROGRAMS, HOW DOES HIGH-QUALITY LEGAL REPRESENTATION FOR PARENTS SUPPORT BETTER OUTCOMES? 2 (2019), https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_Quality-parent-representation_fnl.pdf [https://perma.cc/5C2M-J58Z] (suggesting that quality legal representation for parents can support "[m]ore timely permanency," "[i]ncreased parental engagement and perceptions of fairness," "[m]ore individualized case plans and better access to services," and "[m]ore frequent and timely family visitation").

223. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (holding that the Due Process Clause of the Fourteenth Amendment does not require states, in all cases, to provide indigent parents with counsel in proceedings to permanently and irrevocably terminate their parental rights).

224. *See* Vivek S. Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1, 6–8 (2017) (describing various states' diverse statutory protections, or lack thereof).

225. *See id.*

226. *See id.* at 1; DEPENDENCY LEGAL SERVS., EAST BAY CHILD.'S L. OFFICES, & EAST BAY FAM. DEFENDERS, IMPROVING THE LIVES OF CHILDREN AND FAMILIES THROUGH HIGH-QUALITY LAWYERING 6–7 (Dec. 2021), https://eastbayfamilydefenders.org/wp-content/uploads/2022/01/FJI-Demonstration-Sites-Final-Report-2021-2.pdf [https://perma.cc/7CNJ-NDDE] ("High-quality representation involves clients having a meaningful opportunity to consult with their attorneys at the earliest possible moment. When child welfare authorities in California remove children from home, most families lack access to counsel until they appear in court days later. Families and their attorneys thus typically have little to no time to prepare to contest children's removal from home. In all three demonstration sites, counsel for children and parents obtain court filings *the day before the hearing*, affording slightly more time to connect with clients to prepare for the initial court appearance and to bring children home when possible.") (emphasis added).

227. *See* Sankaran, *supra* note 224, at 8.

228. *Id.* at 9.

IV.
CHALLENGING AND PREVENTING REMOVALS

This Part proposes immediate steps that can be taken to prevent and challenge the removal of infants from parents who have used substances, as well as long-term reforms. Section A focuses on steps family defense attorneys can take to mount more effective challenges to removals. Section B focuses on policy strategies that can prevent removal in the first place, such as requiring informed consent for drug-testing and removing mandated reporter requirements. Finally, Section B concludes with a broader proposal: defunding the foster system and reinvesting those funds towards direct and flexible financial payments to families.

A. Litigation

1. Using Particulars in Family Defense Practice

One of the most immediate changes lawyers can make to improve outcomes for pregnant people who use substances is to ensure that they have a full understanding of their clients' life situations. Knowing the "particulars"—as Eckenwiler describes them[229]—of a client's situation will lead to better advocacy in dependency proceedings and can move courts towards more just dependency decisions. For example, if a judge hears that a parent-defendant's substance use was to cope with past trauma, that it was entangled in the dynamics of a violent relationship, or that it was even forced, they can more readily see the person in front of them as someone in need of support and not punishment.

Understanding a client's full situation also helps attorneys build counternarratives for their clients to show the court.[230] Counternarratives push back against the idea of parents who use substances as self-interested lost causes by revealing details about the larger context of the parent's life. Counternarratives can rebut the stereotypes of substance use and domestic violence as personal, moral failings and instead portray them as products of larger societal forces.[231] Courts can rely on the state social worker's report[232] to learn the reasons for a child's removal, so attorneys need to spend the time finding out what is in between

229. *See* Eckenwiler, *supra* note 25, at 91.

230. While we cannot gather testimonial information from newborns, an interview with a teenager taken from her parents who had a heroin addiction is a revealing example of how the foster system shapes family narratives and how alternative narratives are possible. *See* Nico'Lee Biddle, *How Prevention Services Could Help Youth Avoid the Foster Care System*, TEEN VOGUE, (May 20, 2018), https://www.teenvogue.com/story/how-prevention-services-could-help-youth-avoid-the-foster-care-system [https://perma.cc/KZ6M-WLH7] (describing a teenager who was removed from her parents due to their substance use and how the foster system "only saw a missed appointment, or a positive drug test," and "abnormalities" rather than the love and support that was present).

231. *See* Eckenwiler, *supra* note 25, at 95–96 (stressing the importance of the "counter-stories" from defense attorneys, researchers who study substance use during pregnancy as a social and political problem, and, most importantly, the mother herself).

232. A social worker's report can be introduced as admissible hearsay in California. CAL. WELF. & INST. CODE § 355(b) (West, Westlaw through 2022 Legis. Sess.).

the lines of these reports to determine both the underlying structural forces and the moments of strength and resilience.[233] Attorneys should highlight their clients' capabilities. What has this person survived? What did they do to minimize substance use during pregnancy or mitigate its risk? What support systems do they have in place? However, given the high caseloads and fee ceilings discussed above,[234] lawyers often lack the time to do so. Thus, with properly funded and staffed family defense offices or panels, a new approach becomes possible.

Before beginning to ask questions about a client's history and relationships, attorneys who represent parents should also be funded to seek training and self-study on trauma-informed interviewing and care.[235] A trauma-informed approach involves recognizing trauma in clients and communities and mobilizing and responding in a way which works to address, rather than exacerbate, trauma.[236] Conversations like these take time and rapport.

A few promising programs model what expanded funding and institutional support for family defenders could look like when assisting parents of substance-exposed infants. The Bronx Defenders' Healthy Moms Healthy Babies (HMHB) program in New York is part of a public defender's office and includes social workers, doulas, and connections with abortion providers should participants determine they want to terminate a pregnancy.[237] The program is strengths-based and client-led and incorporates support groups for survivors of domestic violence.[238] Part of HMHB's work is assembling a "team of advocates" at the hospital during delivery to navigate and counter any anticipated foster system investigation and involvement. [239] East Bay Family Defenders (EBFD) in California was a holistic parent representation team that operated from 2018 to 2021 and partnered family defense attorneys with social workers and peer-parent advocates.[240] The EBFD team focused on "vigorous advocacy in the first three

233. *See* JUD. COUNCIL OF CAL., *supra* note 215, at H-17–18 (describing the "social worker's report").

234. *See* Sankaran, *supra* note 224.

235. *See* CASEY FAM. PROGRAMS, HOW DOES HIGH-QUALITY LEGAL REPRESENTATION FOR PARENTS SUPPORT BETTER OUTCOMES?, *supra* note 222, at 3 ("In addition to being experts in family law, parents' representatives must be well informed about the impact of trauma on parents' behavior and decision-making, as well as systemic bias and the ways that racial, social, and cultural differences may impact the attorney/client relationship.").

236. SAMHSA'S TRAUMA AND JUST. STRATEGIC INITIATIVE, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., SAMHSA'S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 9–11 (2014), https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf [https://perma.cc/39UV-TQV6].

237. Ketteringham, Cremer, & Becker, *supra* note 36, at 113, 120–21.

238. *Id.* at 116, 114.

239. *Id.* at 121.

240. *See* Ellie Dehghan, *The Parent Defender Model Heads West*, THE IMPRINT (May 13, 2019), https://imprintnews.org/featured/family-defender-model-new-york-city-heads-west-bay-area/34884 [https://perma.cc/7DY2-AGHM]. The organization lost its contract with the county in October of 2021. Jeremy Loudenback, *Parent Defender Firm Loses High-Profile Contract in California's East Bay*, THE IMPRINT (Oct. 27, 2021), https://imprintnews.org/top-stories/parent-defender-firm-loses-contract-in-californias-east-bay/59919 [https://perma.cc/Z6LX-G2B7].

months of a case," which statistically "has the highest impact on avoiding or shortening the need for foster care placement."[241] States should look to these interdisciplinary and robust models as ones that can be implemented and expanded.

2. Rethinking "Reasonable Efforts" to Fully Meet Family Needs

Attorneys may also be able to better use a parent's particularized history of hardship and its connection to their substance use to argue that the state has failed to put forth "reasonable efforts" to avoid removal.[242] Currently, "[t]he reasonable efforts provisions are not often invoked to leverage service delivery at the trial court or fair hearing level or at the appellate level . . . ."[243] And, even when they are, "many judges simply check a box stating that reasonable efforts have been offered by the agency or simply adopt the pre-printed findings prepared by the [foster system]."[244]

Attorneys could push for judicial definitions of reasonable efforts that include, for example, flexible financial supports for safe housing and transportation, substance abuse treatment that is trauma-informed, funds for childcare during treatment, and confidential therapy and peer support. These arguments together may help build an appellate record of more expansive judicial

241. Dehghan, *supra* note 240 (quoting East Bay Family Defenders co-founder Eliza Patten).

242. *See* Jerry Milner & David Kelly, *Reasonable Efforts as Prevention*, AM. BAR ASS'N (Nov. 5, 2018), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december-2018/reasonable-efforts-as-prevention/ [https://perma.cc/C6NB-VFMS] ("High-quality legal representation for parents . . . at all stages of child welfare proceedings is one of the most important systemic safeguards to . . . avoid unnecessary removal, overly long stays in foster care, and trauma to parents and children. Attorneys for parents, children, and the child welfare agency are charged with providing information to the judge to guide two critical judicial determinations: the determination that reasonable efforts have been made to prevent removal, and later, if out-of-home placement is deemed necessary, reasonable efforts to finalize the permanency plan. Exercised as statutorily intended, these two findings alone have the potential to dramatically reduce unnecessary family separation, decrease child and parent trauma, promote child and parent well-being, and expedite permanency."). *See also* Pokempner, *supra* note 181 ("We can use the excitement and attention around the FFPSA and the new tools it provides to reinvigorate legal advocacy through enforcement of existing laws.").

243. Pokempner, *supra* note 181.

244. Leonard Edwards, *Reasonable Efforts and the Adoption and Safe Families Act: A Judicial Perspective*, 1 FAM. INTEGRITY & JUST. 94, 97 (2022).

interpretations of "reasonable efforts."[245] Litigation in this area may also encourage state legislatures to statutorily define reasonable efforts.[246]

Defining "reasonable efforts," whether through judicial interpretation or statute, gives less discretion to foster system workers, who may skeptically see services as simply making parents dependent on the system, or who may be too swamped with large caseloads to provide the particular services appropriate for a parent.[247] In the end, the goal should be a body of case law or legislation which requires dependency courts to consider the particulars of a pregnant person's drug use when asking if truly reasonable efforts have been made towards family preservation and reunification. In response, state systems would be required to re-prioritize and possibly re-structure their foster systems to ensure compliance.

When considering reasonable efforts, courts should focus on the actions of the state agency, and not on the actions of the parent. For example, attorneys can point courts to the foster system's own guidance that acknowledges that parents who use substances often have "co-occurring" experiences of domestic violence or other traumas and inequities,[248] and then challenge whether the state's efforts to prevent separation were reasonable in light of this phenomenon. In addition to ensuring that services were provided, courts should also consider *how* they were provided and if the services were genuinely accessible for the parent. For example, if the state referred a parent to attend a substance use treatment program in a different town, did the state put gas in their car? If a parent's car was unsafe to commute, did the state pay to have new tires put on or lights replaced? Did the state work to help prevent the parent from losing their employment in order to attend treatment? These types of inquiries can become part of the "reasonable efforts" requirement. While U.S. legal culture views the state as having minimal affirmative responsibilities, asking the state to provide these things is eminently

245. *See id.* at 99 ("Unfortunately, there are still states with very few or no appellate decisions regarding reasonable efforts. These states include Florida, Idaho, Illinois, Mississippi, Nevada, South Carolina, Virginia, West Virginia, and Wisconsin. Some other states have only one such appellate decision.").

246. Some states have begun to create prescriptive formulas to guide implementation of "reasonable efforts" provisions and give less discretion to foster system workers. Iowa considers "type, duration, and intensity of services or support offered or provided to the child and the child's family." IOWA CODE § 232.102(10)(a)(1) (2022). Minnesota asks courts to consider if services were "relevant," "adequate," "culturally appropriate," "available and accessible," "consistent and timely," and "realistic under the circumstances." 2022 Minn. Laws 175.

247. *See* Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J. L. & PUB. POL'Y. 100, 129–30 ("[M]any of these front-line workers are undertrained and overworked . . . [and some hold the viewpoint] that providing such services fosters dependence and actually discourages parents from taking the lead in attending to their parental responsibilities.").

248. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., PARENTAL SUBSTANCE USE AND THE CHILD WELFARE SYSTEM 3 (2014) http://centerforchildwelfare.org/kb/subabuse/ParentSubAbuseAndCW.pdf [https://perma.cc/2TSB-B2UB].

reasonable in light of all the money and efforts government already expends on the opposite course—removal and foster care.[249]

Overall, when challenging "reasonable efforts," attorneys should include multiple considerations for the judge. First, attorneys should be prepared with empirical evidence of interventions that have been shown to work. While there is not an abundance of social science research regarding family preservation efforts, one recent research review noted that "intensive in-home services" and tangible, "concrete services, such as 'emergency cash, housing, medical care, food, transportation, assistance with gaining employment, . . . assistance with securing public assistance' . . . . [, and] lengthy treatment programs with well-trained and experienced staff" were key to successful family preservation.[250] Second, attorneys should direct courts to consider, as part of the reasonable efforts analysis, if the services to preserve or reunify were culturally competent.[251] And finally, attorneys should stress that courts must reject "boilerplate plans" as reasonable efforts.[252] "Boilerplate plans" are preservation or reunification plans that the foster system orders for each family, no matter the difference in their circumstances.[253] For example, the state may implement parenting classes for a parent who instead needs money for a babysitter so they can take a break every so

249 . EMILIE STOLTZFUS, CONG. RSCH. SERV., CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING 1 (Apr. 18, 2022), https://sgp.fas.org/crs/misc/IF10590.pdf [https://perma.cc/TW6Q-FHN9] (stating that in FY 2022, of the $11.7 billion of federal funding spent on "child welfare," nearly $6 billion went to foster care and over $4 billion went to adoption assistance).

250. Kaiser, *supra* note 247, at 136 (quoting Robert F. Kelly, *New Perspectives on Child Protection, Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L. Q. 359, 380 (2000)).

251. *See generally*, Nell Clement, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L. J. 397 (2008) (discussing the negative effect of removal of culturally diverse children from their families and communities and arguing for a "statutory recognition of culture" in the design of reunification services).

252. One promising precedent for this suggestion is a California case, *In re Victoria M.*, in which the judge held that there was insufficient evidence to support a finding that reunification services were specifically tailored to the case in part because a mother with a developmental disability with limited income was required to obtain a three-bedroom home before being considered a suitable and safe parent but was not assisted in acquiring the home. 255 Cal. Rptr. 498, 503–05 (Cal. Ct. App. 1989). There was also "nothing in the reunification plan [that] was tailored to [the mother's] intellectual needs." *Id.* at 503. *See also* Crossley, *supra* note 153, at 305 (arguing that reasonable efforts are often a "boilerplate" set of recommendations, but that courts should avoid "a litany of services unrelated to the conditions that gave rise to intervention" and should instead be "specifically tailored" to the family's situation).

253. Amy C. D'Andrade & Ruth M. Chambers, *Parental Problems, Case Plan Requirements, and Service Targeting in Child Welfare Reunification*, 34 CHILD. & YOUTH SERVS. REV. 2131, 2133 (2012).

often. Reasonable efforts should not become its own barrier to reunification as it often does.[254]

Apart from case-by-case litigation in dependency court, another possible vehicle for "reasonable efforts" litigation may be a civil class action in state court. This option was foreclosed in the federal arena by the Supreme Court in 1992.[255] A lawsuit was brought by children in the Illinois foster system who argued the state had not used "reasonable efforts" towards reunification.[256] The Supreme Court interpreted AACWA as granting enforcement power only to the Department of Health and Human Services to approve or reject state plans' definitions of reasonable efforts, and held that the AACWA does not permit private enforcement of reasonable efforts.[257] However, state courts may still be an option for a similar class action because most states, like California, have written reasonable efforts requirements into their state statutes, waiting to be enforced.[258]

254. *Id.* at 2136–37 ("[B]oth the number of service types ordered for parents, and the number of weekly service events at which attendance was required, were quite high. When we considered the relationship between weekly service events and total number of challenges, parents with more total concerns (problems and challenges combined) were ordered to attend more weekly service events on their case plans than were parents with fewer total concerns. A high number of service requirements may cause logistical difficulties . . . . [A]n 'everything but the kitchen sink' approach could be problematic.").

255. *See* Suter v. Artist M., 502 U.S. 347 (1992).

256. *Id.* at 351–52.

257. *Id.* at 364.

258. *See*, *e.g.*, CAL. WELF. & INST. CODE § 366.21(e)(8) (West, Westlaw through 2022 Legis. Sess.) ("If the child is not returned to his or her parent or legal guardian, the court shall determine whether reasonable services that were designed to aid the parent or legal guardian in overcoming the problems that led to the initial removal and the continued custody of the child have been provided or offered to the parent or legal guardian."). A class action in California state court under the Welfare & Institutions Code would likely need to rely on an "implied cause of action." *See* John H. Bauman, *Implied Causes of Action in the State Courts*, 30 STAN. L. REV. 1243, 1243 (1978). The case for an implied right may be especially strong if the plaintiffs could show that there is a lack of a state mechanism to enforce the reasonable efforts requirement—that is, if plaintiffs can show that the under-funded and patchwork network of family defense in the state is an inadequate regulatory regime—then they can argue that an implied private right of action is necessary to enforce the statutory reasonable efforts requirement. *See id.* at 1254 (discussing the "strongest case for implying a private cause of action" as when it "may be the only means to carry out the legislative intent").

B. Policy

1. Requiring Informed Consent for Drug-Testing

Removal of an infant from a parent who has used substances most often begins with a breach of trust by a healthcare provider.[259] Healthcare providers may not obtain fully informed consent before administering the test.[260] A doctor, nurse, or other worker then calls the local reporting line after a positive toxicology test.[261] This "'test-and-report' [model] normalizes the violation of pregnant people and their newborn's bodily autonomy."[262] The model can also be unconstitutional; in 2001 in *Ferguson v. Charleston*, the U.S. Supreme Court held that a state hospital's policy allowing involuntary and covert drug testing of pregnant women resulted in unreasonable searches that violated the Fourth Amendment.[263] For pregnant people who have experienced domestic violence, this dynamic can recreate patterns of control and deceit they experience in their relationships.[264] For people of color, it repeats and reinforces society's over-policing of them and their choices and deters them from seeking public services.[265]

One possible policy change to establish trust between pregnant people and their healthcare providers would be to heed activists' calls to pass federal or state laws requiring healthcare workers to secure "informed consent" from the pregnant

259. *See* MOVEMENT FOR FAM. POWER & THE DRUG POL'Y ALL., *supra* note 43, at 1 ("Every day low income and Black and Brown pregnant and parenting New Yorkers are separated from their children or threatened with family separation, based on accusations of drug use alone. These disruptions almost always begin with a call to Child Protective Services (CPS) by medical providers . . . ."). For Black parents this sharing of confidential information is perhaps not unexpected, but routine. *See* COPELAND & PENDLETON, *supra* note 193, at 5–6 ("Just as Browne describes the slave pass system as regulating Black mobilities by control through the media and other servants, the family policing system dispels its powers through narratives of protection, adoption incentives, and expansive mandated reporting laws.") (citing SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS (2015)). *See also* Kendra Hurley, *How the Pandemic Became an Unplanned Experiment in Abolishing the Child Welfare System*, THE NEW REPUBLIC (Aug. 18, 2021), https://newrepublic.com/article/163281/pandemic-became-unplanned-experiment-abolishing-child-welfare-system [https://perma.cc/E8GJ-NDSL] ("If you're poor and a person of color . . . you know that even the most routine trip to the doctor can trigger a child welfare investigation.").

260. *See, e.g.*, MOVEMENT FOR FAM. POWER & THE DRUG POL'Y ALL., *supra* note 43, at 5 (describing the story of Ms. FS and her experiences at the hospital).

261. *See id.* at 1.

262. *Id.* at 1.

263. Ferguson v. Charleston, 532 U.S. 67, 86 (2001).

264. *See* WASH. STATE COAL. AGAINST DOMESTIC VIOLENCE, MODEL PROTOCOL: ON CONFIDENTIALITY WHEN WORKING WITH BATTERED WOMEN 2 (2007), https://wscadv.org/wp-content/uploads/2015/06/Confidentiality-When-Working-with-Battered-Women.pdf [https://perma.cc/LR49-5ZUB] ("[C]onfidentiality is intricately linked to safety and self-determination.").

265. *See* COPELAND & PENDLETON, *supra* note 193, at 9 (describing the ways surveillance in the medical system occurs and why it "is specifically alarming for Black families who have to encounter a racist and anti-Black medical system").

person before performing drug tests on them.[266] Coercive testing followed by mandatory reporting "jeopardize[s] the therapeutic relationship between the [healthcare provider] and the patient" by making the healthcare provider an adversary.[267] But when healthcare providers achieve informed consent by fully describing a drug test and its consequences, they instead affirm autonomy, self-worth, and decision-making to their patients.

Informed consent also allows healthcare providers to ally with their patients. For example, if a parent has lost a child to the foster system before and is again pregnant, the healthcare provider can strategize with them about the implications of a positive *or* a negative result on a drug test. Some doctors have suggested to now-sober patients to proactively get a drug test in order to prove their non-use and/or recovering status to foster system workers who may otherwise leap to conclusions.[268]

Healthcare providers concerned that a pregnant person who declines a test will not receive adequate care have other ways to intervene beyond testing and reporting. Options for substance abuse interventions that do not require testing include: (1) "safe prescribing" practices, (2) encouraging healthy behavior through information and education, and (3) identifying and referring to treatment professionals.[269] Medical providers should reject becoming part of a punitive regime and should begin to implement these harm reduction tactics instead, which would be more aligned with their role as focused on patient health, not personal liability.

2. Removing Mandated Reporting Requirements for Healthcare Workers

Similarly to ending routine testing, states should heed activists' calls to implement a policy change that removes the requirement that healthcare workers who care for pregnant patients who use substances report those patients to the

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266. *See, e.g.*, MOVEMENT FOR FAM. POWER & NAT'L ADVOCS. FOR PREGNANT WOMEN, *supra* note 2, at 9 (calling seeking "informed consent prior to testing and screening the patient and parent permission for the newborn," "the best and most ethical approach"); Hurley, *supra* note 259 (describing a "parent-led collective urging New York State's Legislature to pass three bills that would narrow the 'front door' to the country's largest child welfare system," including one bill that would "bar[] medical providers from testing pregnant mothers and newborns for drugs or alcohol without a mother's consent"). Some have also suggested "litigants . . . use medical malpractice litigation to stop medical professionals from drug testing pregnant women without their informed consent." Cohen, *supra* note 44, at 1300.

267. AM. CONG. OF OBSTETRICIANS AND GYNECOLOGISTS, *supra* note 78, at 5.

268. *See, e.g.*, Zoë Julian, Department of Obstetrics and Gynecology and Department of Medicine, University of Alabama at Birmingham School of Medicine, Reclaiming Black Health: A Conversation on Law, Policy, and Justice, hosted by the Berkely Journal of Gender, Law & Justice (April 23, 2021), https://genderlawjustice.org/under-deconstruction/reclaiming-black-health-a-conversation-on-law-policy-amp-justice [https://perma.cc/6XDM-BGQG].

269. *See* AM. CONG. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 78, at 1, 8. Safe prescribing is "a process that recommends a medicine appropriate to the patient's condition and minimizes the risk of undue harm from it." J. K. Aronson, *Editors View: Balanced Prescribing*, 62 BRITISH J. OF CLINICAL PHARMACOLOGY 629, 629 (2006).

foster system.[270] The American College of Obstetricians and Gynecologists (ACOG) said in 2012 that the use of the legal system to address the issue of prenatal substance use is inappropriate.[271] The ACOG explained that "[r]eporting requirements actively put women and their pregnancies at risk by deterring women from seeking prenatal care [and treatment]."[272] The organization instead advocated for approaches focused on safe, affordable, efficacious, comprehensive alcohol and drug treatment with a special focus on pregnant people.[273]

Removing mandated reporting requirements will allow healthcare providers and hospital social workers to use more effective and creative responses when working with pregnant patients who have used substances. These alternative interventions may include "peer support," "counseling," twelve-step programs, and "mutual aid."[274] Healthcare providers should also keep in mind that there is "a high rate of unintended pregnancy" in patients who struggle with substance abuse, and they may consider providing "non-coercive contraceptive" counseling to the patient.[275]

3. Defunding the Foster System and Investing in Family Preservation

> It might be well to recognize that where we permit government-sanctioned agencies to make day-to-day judgments on which families shall remain together or be torn apart according to the value judgments of its concededly well-intentioned workers, we approach the tyranny described by the Second Circuit Court of Appeals in *Duchesne v. Sugarman*: "[o]f all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . [T]hose who torment us for our own good will torment us without end for they do so with the approval of their own conscience."[276]

The above proposals are ultimately transitional strategies. Indeed, legal responses and changes made within the foster system could be considered the "least defensible approaches to the problem of drug use during pregnancy."[277] While the medical field generally approaches substance use with goals of

270. SANGOI, *supra* note 1, at 110 (urging the repeal of CAPTA).

271. AM. CONGRESS OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 78, at 3–4.

272. *Id.* at 5.

273. *Id.* at 7–10.

274. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., CLINICAL GUIDANCE FOR TREATING PREGNANT AND PARENTING WOMEN WITH OPIOID USE DISORDER AND THEIR INFANTS 40–41 (2018), https://store.samhsa.gov/sites/default/files/d7/priv/sma18-5054.pdf [https://perma.cc/UV5C-X79F].

275. *Id.* at 54. For a discussion about why non-coercive contraception counseling is important, *see* Rachel Benson Gold, *Guarding Against Coercion While Ensuring Access: A Delicate Balance*, 17 GUTTMACHER POL'Y REV. 8 (2014).

276. *In re* Suzanne Y., 92 Misc. 2d 652, 663 (N.Y. Fam. Ct. 1977) (alterations in original) (quoting *Duchesne v. Sugarman*, 566 F.2d 817, 828 n.24 (2d Cir. 1977)).

277. *See* Eckenwiler, *supra* note 25, at 96.

identification, treatment, and prevention,[278] the law focuses on "punishment and deterrence."[279] When it comes to pregnant people, however, too often the medical field is drawn into the legal field through mandated reporting.[280] Professor Dorothy Roberts puts the choice this way: "[t]he government may choose either to help [people] have healthy pregnancies or to punish [them] for their prenatal conduct."[281]

Foster system budgets have become bloated, and, at the same time, critics of the system are increasingly calling for not simply reform, but abolition.[282] In the 2018 fiscal year, the U.S. spent $33 billion on the foster system, with about half coming from federal funds and half from state and local governments.[283] In 2021, approximately three-quarters of the federal funds were required to be spent on foster care, adoption placement, or guardianship payments as opposed to supporting family preservation.[284] To fund their foster systems, states often also pull from other federal programs not solely foster system-focused, such as TANF and the Social Services Block Grant, suggesting that these programs' main

278. U.S. DEP'T OF HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH 6-1 (2016), https://www.ncbi.nlm.nih.gov/books/NBK424857/pdf/Bookshelf_NBK424857.pdf [https://perma.cc/5ARE-LPEG] ("Effective integration of prevention, treatment, and recovery services across health care systems is key to addressing substance misuse and its consequences and it represents the most promising way to improve access to and quality of treatment.").

279. David McCollum, *Pregnancy, Domestic Violence, and the Law: The Interface of Medicine, Public Health, and the Law*, 8 DEPAUL J. HEALTH CARE L. 367, 368 (2005).

280. *See infra* notes 57–66.

281. Roberts, *Punishing Drug Addicts Who Have Babies*, *supra* note 65, at 1422.

282. *See* KRISTINA ROSINSKY, SARAH CATHERINE WILLIAMS, MEGAN FISCHER, & MAGGIE HAAS, CHILD TRENDS, CHILD WELFARE FINANCING SFY 2018: A SURVEY OF FEDERAL, STATE, AND LOCAL EXPENDITURES 2 (2021), https://www.childtrends.org/wp-content/uploads/2021/03/ChildWelfareFinancingReport_ChildTrends_March2021.pdf [https://perma.cc/H5GH-ZDYL] (reporting a six percent increase in total child welfare agency expenditures from SFY 2016 to SFY 2018 and an 11% increase in Title IV-E expenditures over the past decade in particular); Alan Dettlaff, Kristen Weber, Maya Pendleton, Bill Bettencourt, & Leonard Burton, *What It Means to Abolish Child Welfare as We Know It*, The Imprint (Oct. 14, 2020, 11:45 PM), https://imprintnews.org/race/what-means-abolish-child-welfare/48257 [https://perma.cc/7S8R-2DTZ] (laying out the upEND movement's reasons for wanting to abolish the foster system).

283. EMILIE STOLTZFUS, CONG. RSCH. SERV., CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING 1 (2021), https://sgp.fas.org/crs/misc/IF10590.pdf [https://perma.cc/8JWP-GCFD]. *See also* KERRY DEVOOGHT & HOPE COOPER, STATE POLICY ADVOCACY & REFORM CTR., CHILD WELFARE FINANCING IN THE UNITED STATES 2 (2012), https://childwelfaresparc.files.wordpress.com/2013/02/child-welfare-financing-in-the-united-states-final.pdf [https://perma.cc/47JH-6KDD] (illustrating the various ways that different states patch together federal, state, and local funding sources to sustain their foster systems).

284. *See* STOLTZFUS, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, FUNDING, *supra* note 283, at 1. These restricted funds come from the Title IV-E SSA funds; the Title IV-B SSA funds which provide more discretionary use are capped and only constitute about six percent of federal funds states receive. *See id.* at 2.

purposes—cash assistance and other social services—take a cut.[285] Like prison abolitionists who have increasingly called for defunding the police and other parts of the carceral state,[286] foster system abolitionists seek a radical transformation in thinking and funding when it comes to a societal response to families.[287] Foster system abolition does not mean simply dismantling the current system, but replacing it with a new approach centered on the needs, dignity, and equal humanity of families.[288] The key to foster system abolition is the recognition that the foster system is part of an institutionalized disruption and "devastat[ion]" of Black families and communities.[289]

Abolitionists see the massive funds in the foster system as better used to provide direct "financial and material supports" to parents and to invest in community mental health programs, public schools, and child care.[290] Direct and flexible financial support can provide parents with safe housing, supplies, mental health treatment, and other items that can stabilize families in crisis. There is also a dearth of substance abuse treatment programs that needs to be addressed—in 2021, only 19 states had drug treatment programs that were "specifically targeted to those who are pregnant" and only 17 states and the District of Columbia gave pregnant people priority on the waitlist.[291] Currently, pregnant people who do not receive treatment for drug dependence cannot be assumed to have rejected

285. *See id.* at 1; *What is TANF?*, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.hhs.gov/answers/programs-for-families-and-children/what-is-tanf/index.html [https://perma.cc/DZV5-8MZF] (last visited May 18, 2022); *Social Services Block Grant Program*, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.acf.hhs.gov/ocs/programs/ssbg [https://perma.cc/XJM7-5EBN] (last visited May 18, 2022).

286. *See, e.g.*, Mariame Kaba & John Duda, *Towards the horizon of abolition: A conversation with Mariame Kaba*, THE NEXT SYSTEM PROJECT (Nov. 9, 2017), https://thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba [https://perma.cc/H9NY-WM6U].

287. *See* Dettlaff, Weber, Pendleton, Bettencourt, & Burton *supra* note 282 (describing abolition as "giving families and communities access to mental health services, to jobs that pay living wages, to well-funded public schools, to health care, to homes—especially homes free from environmental toxins—to child care, and to community-based interventions to stop harm from occurring in the first place.").

288. *See* SANGOI, *supra* note 1.

289. Ketteringham, Cremer, & Becker, *supra* note 36, at 102 (describing the foster system as antithetical to communities because it causes community "[m]istrust" and "gossip about families in the system," and encourages neighbors to "handle grudges by threatening to report one another to the department") (quoting Mimi Abramovitz & Jochen Albrecht, *The Community Loss Index: A New Social Indicator*, 87 SOC. SERVS. REV. 677 (2013)).

290. *See* Dettlaff, Weber, Pendleton, Bettencourt, & Burton *supra* note 282 (calling for the "building [of] radically different systems of care that recognize the basic need of children to be with their families in safe and supportive communities").

291. GUTTMACHER INST., *supra* note 57. Ten states "prohibit publicly funded drug treatment programs from discriminating against pregnant people." *Id.*

treatment.[292] The treatment programs in the U.S. that do accept pregnant people often do not provide childcare and are not affordable.[293] Foster system budgets could instead go towards funding more affordable or free substance use disorder treatment programs with integrated prenatal care and free childcare.

In sum, there are new ways to reimagine how we use government funds to respond to pregnant people who use substances. We can begin by examining the particularized stories of pregnant people who have used substances: what do they and medical and social science say is needed to make them and their newborn thrive? Federal and state funds that currently pay for removal and maintenance payments can be directed instead to these new responses. Communities can re-envision what it looks like to support a family without foster care.

V.
CONCLUSION

Having their newborn child taken into temporary state custody is only one punishment that a parent who uses substances might experience.[294] They may eventually also have their parental rights permanently terminated and may be criminally prosecuted for their drug use.[295] When the civil and criminal legal systems punish pregnant people for drug use in these ways, they fail to administer justice. Rather, punishment makes these parents scapegoats of larger structural forces that gave rise to their drug use in the first place.

As Eckenwiler argues, the current punitive regime ignores the "particulars"—that is, the backgrounds, vulnerabilities, and hardships—of people who use substances during pregnancy.[296] This Article used the example of the intersection of domestic violence and substance use to illuminate one such particular. In the future, scholarship could also examine the intersection of mental health, incarceration, disability, or education with the experiences of pregnant people who use substances. Knowing the array of particulars is an important first step to understanding how current policies and practices are not simply ill-matched to the problem of substance use during pregnancy, but actually put parents and infants on a fast track to failure.

This Article proposed various solutions to prevent and challenge these early and devastating family separations. First, lawyers in family defense must themselves learn the particulars of their clients and have appropriately sized

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292. AM. CONG. OF OBSTETRICIANS & GYNECOLOGISTS, SUBSTANCE ABUSE REPORTING AND PREGNANCY: THE ROLE OF THE OBSTETRICIAN-GYNECOLOGIST 2 (2011), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy.pdf [https://perma.cc/U56G-DD24] ("The few drug treatment facilities in the United States accepting pregnant women often do not provide child care, account for the woman's family responsibilities, or provide treatment that is affordable.").

293. *Id.*

294. *See supra* Section II.A.

295. *See id.*

296. Eckenwiler, *supra* note 25.

caseloads, training, and resources to be able to do so. Second, lawyers must make better use of a crucial tool in their legal toolkit—the federal and state requirements that foster systems use "reasonable efforts" to preserve families before initiating removal. Lawyers can argue for expanded, precedential definitions of what reasonable efforts must entail before removal is allowed. Finally, federal and state policymakers can immediately implement a variety of changes. They can require informed consent for drug-testing, remove mandated reporting requirements for healthcare workers, and ultimately defund the foster system to instead fund direct and flexible financial support for families. Flexible funding can provide safe housing, treatment, and other items needed to stabilize families in crisis.

The foster system has long hidden behind the guise of benevolence. But looking at how the foster system treats people who use substances during pregnancy and their families quickly dissolves this guise. Ultimately, lawyers and legislators should reject separation as an acceptable response to pregnant people who use substances and should instead pour efforts into services that will keep families together and help them not simply survive but thrive. Understanding the particulars of those who use substances during pregnancy and listening to their needs opens the collective imagination to this new paradigm.