

DETOXING THE CHILD WELFARE SYSTEM

Allison E. Korn *

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This Article considers the varying reasons why drug policies informing child welfare interventions are not evolving as part of the drug policy reform movement, which has successfully advocated for initiatives that decrease mass incarceration, end mandatory minimums, and decriminalize or legalize marijuana use and possession. Many existing child welfare laws and policies that address parental drug use rely on the premise that prenatal exposure to a controlled substance causes inevitable harm to a child. Furthermore, they presume that any amount of drug use by a parent places a child in imminent danger, or is indicative of future risk of harm. Child welfare authorities will initiate investigations based on these assumptions, and once a case is opened in family court, the family is often split apart while drug-using parents are assessed, evaluated, and referred to inadequate substance abuse treatment by poorly trained caseworkers.

An analysis of evidence-based studies reveals that there is no scientific determination that exposure to substances like cocaine, methamphetamine, opiates, or marijuana will inevitably cause harm to a fetus. Additionally, research has shown drug use by a parent or parents does not on its own increase threats to child safety or predict future maltreatment. Furthermore, a review of data on court-mandated substance abuse treatment and other services finds that child protective services workers are severely limited in their assessment and evaluation of drug-using parents, and often overlook greater service needs at play, including domestic violence counseling and housing assistance.

Despite being borne out of the same false assumptions and outdated research, child protective services' response to drug-using parents remains disproportionately punitive while the criminal justice system's policies on drug offenders are softening. This Article argues that this dichotomy exists, in large part, because the media-spun image of drug offenders has evolved into one that is sympathetic and relatable, while the narrative surrounding drug-using parents remains stagnant: the selfish mother who loves drugs more than her baby. After exploring several reasons why this narrative persists, I suggest that, in addition to advocating for changes to state and federal policies that can positively impact child welfare system-involved families, the drug policy reform movement also must encompass changing public perceptions surrounding drug-using parents

through comprehensive family defense practice, domestic human rights documentation, and facts-driven journalism.

INTRODUCTION

AS of June 17, 2015, the War on Drugs has been waged for forty-four years. It began with President Nixon's declaration that "America's public enemy number one in the United States is drug abuse."¹ This domestic war has long been criticized for its trend toward policies that create punitive, enforcement-based anti-drug laws and programs, while at the same time slashing funding and research for compassionate, evidence-based treatment. As the war continues, however, a new wave of activism has sparked movements encouraging significant changes to drug policies, including decriminalization and the legalization of marijuana. "Good Samaritan" laws and programs supporting syringe exchange, as well as sentencing reforms and "ban the box" initiatives,² have also begun taking hold in jurisdictions nationwide. More recently, activists have brought the drug policy debate to Washington D.C., recognizing that state drug reforms can only go so far without acknowledgement from the federal government that policies producing the highest incarceration rate in the world, contributing to a growing number of deaths by drug overdose, and fracturing low-income families and communities of color must evolve.

While much of the conversation is centered on the criminal justice system, drug reformers are also using recognition of fiscal irresponsibility and conflict with public health strategies to review employment law, health care policies, and even economic regulations.³ There is, however, another system of laws that has not yet become part of the drug policy reform movement's advocacy strategy, despite many parallels regarding punitive policies and the disruption of families.⁴ This system—consisting of family courts and the child welfare system—has remained quiet when it comes to evolving current drug laws, challenging the stigma attached to drug users, and presenting new approaches to services provision and substance abuse treatment.

¹ Richard Nixon, President of the U.S., Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971).

² Ban the Box initiatives have been introduced at both the state and federal levels, allowing formerly incarcerated persons—an enormous number of whom were convicted of drug felonies—to fill out job applications without immediately reporting their convictions. The initiatives have spread over the last few years with the assistance of the Drug Policy Alliance, among other advocacy groups.

³ Jess Cochrane, BEYOND BARS: DRUG WAR IDEOLOGY IN THE CIVIL CHILD WELFARE SYSTEM 1, <http://flcalliance.org/wp-content/uploads/2014/04/Beyond-Bars-Long-Draft.pdf>.

⁴ *Id.*

The child welfare system, as it exists today, is best illustrated through the stories of three mothers who have experienced child protective investigations, abuse and neglect allegations, loss of custody to the state, and irrelevant or ineffective court-mandated services. Their experiences are not particularly sensational, nor do they illustrate extremes in behaviors or practices. However, they do help demonstrate why existing child protection practices are in need of reform.

Sarah, a Puerto Rican woman living in the Bronx, was raising her daughters, ages five and seventeen, despite being diagnosed with a terminal illness and living on government assistance, food stamps, and her older daughter's modest income.⁵ After an angry neighbor reported drug-use allegations to child protective services, an investigation was opened. Sarah admitted to occasional marijuana use and to taking Marinol, a prescribed medication and synthetic form of THC, daily to increase her appetite. She tested positive for THC, as expected, and child protective services filed a petition in family court alleging child neglect. Terrified of the foster care system, Sarah sent her younger daughter to live with her father in Florida; her older daughter moved in with her boyfriend's family after becoming pregnant. The case lasted for more than two years, and the only referral for services Sarah received was for substance abuse treatment. At trial, a finding of neglect was entered due to Sarah's marijuana use. But, the judge ruled that, since no children still lived in Sarah's home, she was not ordered to complete substance abuse treatment or receive any services as part of her disposition; she was free to go.

Y.N., a woman living in New Jersey, had developed a dependency on prescription painkillers—Percocet—when she learned that she was pregnant.⁶ She was informed that if she stopped taking the Percocet, she may experience withdrawal and cause harm to her unborn child.⁷ Y.N. enrolled in a methadone maintenance therapy (MMT) program to help her overcome her dependency and minimize any side effects that could impact her unborn child.⁸ A few weeks later, Y.N. gave birth to a full-term baby boy who was diagnosed with Neonatal Abstinence Syndrome, a possible side effect of MMT.⁹ He was successfully treated.¹⁰ Less than a month after Y.N. gave birth, the New Jersey Division of Youth and Family Services filed a complaint seeking care, custody, and supervision of her newborn son, which included allegations that he was abused or ne-

⁵ Sarah's and Dottie's stories are drawn from Professor Korn's personal experiences and observations as a practitioner in Bronx County Family Court in New York. Accordingly, their names are pseudonyms and factual assertions related to these stories are attributable to those experiences and observations.

⁶ *N.J. Div. of Child Prot. and Permanency v. Y.N.*, 220 N.J. 165, 169, 104 A.3d 244, 2014 N.J. LEXIS 1390 (N.J. 2014).

⁷ *Id.*

⁸ *Id.* at 170, 175.

⁹ *Id.* at 170.

¹⁰ *Id.*

glected because of his methadone withdrawal.¹¹ When Y.N. appealed the family court's finding of abuse and neglect, the Appellate Division affirmed the finding solely on the basis that Y.N. caused her child to suffer withdrawal symptoms due to her participation in a prescribed MMT program.¹²

Dottie, an African-American, single mother of a ten-month-old boy, suffered from a mental illness that had gone undiagnosed throughout her life. She used illegal drugs and friends' prescription medications to cope. Her son accidentally ingested a pill that he found on the floor and suffered grave damage. After child protective services filed a petition alleging child abuse and neglect, Dottie made an admission to the court and asked for help in seeking treatment. She was put on a waiting list for both a substance abuse rehabilitation program and for a mental health evaluation. None of the rehabilitation programs provided mental health counseling or treatment. Once she was admitted to a program and successfully completed a detox, the court allowed frequent visitation with her son, supervised by a relative. At the facility, Dottie experienced a brief psychotic episode where she fell and hurt her leg. When she was taken to a local hospital, the treating physician was not told of her previous dependency issues and provided her morphine. Dottie was discharged from the hospital and tested positive for opiates at her program. Child protective services was informed of her relapse, and they terminated her visitation with her son. Inconsolable, and still waiting for her mental health evaluation, Dottie left her program and began to use drugs once more. She never returned to court. After a few months, her parental rights to her son were terminated.

These stories illustrate how the present child welfare system, as it relates to drug-using parents, has been built on a foundation just as precarious as the overburdened criminal justice system, with little success in achieving its purported goal of safe and permanent homes for children. Many existing child welfare laws and policies that address parental drug use, as demonstrated by Sarah's experience, rely on the premise that any amount of drug use by a parent places a child in imminent danger, or is indicative of future risk of harm. Additionally, they presume that any controlled substance consumed by a pregnant woman, like Y.N., causes harm to her child.

Child welfare authorities will initiate investigations based on these assumptions, making no distinction between recreational drug use and significant indication of substance use disorder. Once a case is brought to family court, the family is often split apart while drug-using parents, whether they test positive for marijuana or present as chemically dependent on opiates, are inadequately assessed and mandated to complete underfunded substance abuse treatment, as illuminated by Dottie's case.

¹¹ *Id.* at 171.

¹² *Id.* at 173.

This Article examines child welfare laws and policies relating to drug-using parents—and the underlying assumptions that support them—in order to determine how the child welfare system can join drug reformers in re-shaping drug policies in the U.S., and in what ways the evolution of these laws and policies can provide better outcomes for families. In particular, this Article explores several theories that explain why child protective services' response to drug-using parents remains disproportionately punitive while the criminal justice system's policies on drug offenders are softening. This Article calls for advocates working in the child welfare system to seize upon the drug policy reform movement's momentum and to view recent challenges to existing drug policies in other contexts as opportunities to re-conceptualize the child welfare system at state and federal levels. It argues, however, that in order to effectuate systemic reform, drug policy reform must also encompass changing public perceptions about drug-using parents.

The Article proceeds in five main parts. Part I explores the development of drug laws and policies created during the War on Drugs, including child welfare laws and policies, such as states' definitions of abuse and neglect based on substance exposure and drug use. This section also looks at how federal child welfare regulations, such as the Adoption and Safe Families Act of 1997 (ASFA)¹³ and the Child Abuse Prevention and Treatment Act (CAPTA),¹⁴ have been created or amended to guide how states craft policies addressing substance exposure and drug use. Part II then provides a brief analysis on the most up-to-date studies examining the impact of pre-natal exposure to chemical substances, as well as research determining whether parental drug use is a probable indicator of future child maltreatment. This section also looks at how child welfare system officials and caseworkers implement policies that address parental drug use, and whether their assessment, evaluation, and services provisions achieve desired outcomes.

Part III seeks to understand why, despite the many parallels between families involved in the child welfare system and those adversely affected by punitive criminal drug laws, the drug policy reform movement has not yet included child welfare reform as part of its advocacy strategy. This section explores how evolved media reporting and public perceptions regarding the significant social and economic costs of criminal drug laws have effectuated policy reform, in stark contrast to those concerning drug-using parents, particularly poor women of color, which have not. The Article concludes with Part IV, which suggests that an opportunity exists for advocates in the child welfare system to be part of the larger national debate on drug policy reform. In particular, this section suggests that advocates in this context take cues from recent crimi-

¹³ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

¹⁴ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5107 (1996)).

nal justice reform and insist on law and policy changes at the federal level, such as amendments to ASFA and CAPTA, in order to ensure uniform and effective modifications among state child welfare systems. This section argues that in order to implement these sweeping reforms and move toward ending the War on Drugs, child welfare advocates and the drug policy reform movement must work together to introduce nuance, empathy, and understanding to the existing narrative about parents who use drugs and their children.

I. AMERICA'S WAR ON DRUGS & THE DRUG POLICY REFORM MOVEMENT

A. *Criminal Laws & Policies Resulting from the War on Drugs*

During the past four-plus decades of America's War on Drugs, a trend toward criminalization of drug users not only became the hallmark of political campaigns advocating for "law and order,"¹⁵ it also established the means by which rampant, drug-related ills would be cured in neighborhoods nationwide. This trend fueled the creation of laws that have not only brought more individuals into contact with the justice system than ever before, but have also drawn attention away from remedying systemic consequences of poverty, racial segregation, inadequate education, and poor healthcare. The core of the War on Drugs has been an increasing divide between prevention and enforcement; it has nurtured the idea that drug users are criminals who deserve only incarceration and punishment.

Drug policies borne from this idea became more punitive over time, and media appraisal of drug users informed American anxieties about drugs, crime, and "family values." In October 1982, President Reagan doubled down on the drug war, announcing his own administration's "War on Drugs."¹⁶ During his presidency, funding for antidrug enforcement increased by millions of dollars, while cuts to agencies involved in drug treatment, prevention, and education reached new depths.¹⁷ Legislation passed during the early 1980s established now-historic mandatory minimums for the distribution of cocaine — including minimum punishments for crack cocaine that were far more severe than previous sentencing options, especially in comparison to powdered cocaine.¹⁸

¹⁵ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 46 (rev. ed. 2012).

¹⁶ Ronald Reagan, President of the U.S., Radio Address to the Nation on Federal Drug Policy (Oct. 2, 1982), <http://www.presidency.ucsb.edu/ws/?pid=43085>.

¹⁷ ALEXANDER, *supra* note 15, at 49-50.

¹⁸ See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§1002-1302, 100 Stat. 3207 (1986).

News footage of drug raids and arrests helped justify punitive responses to drug use and military-style measures to combat the spread of crack cocaine. Reporters would follow police into “crack houses,” producing images of chaotic and filthy spaces that helped viewers identify with law enforcement. In 1989, Nancy Reagan came along with SWAT commandos on a “rock house” raid in south central Los Angeles. Famously, the first lady declared, “[t]hese people in here are beyond the point of teaching and rehabilitating.”¹⁹

This emerging public perception about crack cocaine and drug use justified both the Reagan administration’s decision to funnel more money into the drug crusade and new legislation as a way to criminalize drug users in the name of public health and safety. The Comprehensive Crime Control Act allowed for “Equitable Sharing” programs, wherein local police who seized money and other items from alleged drug traffickers were allowed to keep portions of the proceeds.²⁰ Federal benefits for drug offenders, such as student loans, were eliminated, and public housing authorities were permitted to evict tenants who allowed any form of drug-related criminal activity to occur on or near the premises.²¹ Mandatory minimum sentences also rose throughout the 1980s, as drug prevention and education programs became fewer and farther between.²²

When George H.W. Bush took office and made his first presidential address, he announced increased spending for law enforcement and jails, stating that, “this scourge will stop.”²³ Only 30% of the budget for his administration’s drug eradication strategy was devoted to prevention, education, and treatment.²⁴ Although the Bush administration eventually allocated more money for rehabilitation, very little was known about *how* to treat addiction, and few treatment facilities existed.²⁵ Although the first two years of Bush’s presidency saw a decline in drug use among

¹⁹ JIMMIE L. REEVES & RICHARD CAMPBELL, *CRACKED COVERAGE: TELEVISION NEWS, THE ANTI-COCAINE CRUSADE, AND THE REAGAN LEGACY* 135–36 (1994).

²⁰ Sarah Stillman, *Taken: Under Civil Forfeiture, Americans Who Haven’t Been Charged with Wrongdoing Can Be Stripped of Their Cash, Cars, and Even Homes. Is That All We’re Losing?*, *THE NEW YORKER* (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken>.

²¹ ALEXANDER, *supra* note 15, at 53.

²² See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 2022–6456, 102 Stat. 4181 (1988).

²³ Richard L. Berke, *No Change in Basics: Bush Rejects Any Fundamental Shift, Instead Vowing Unprecedented Vigor*, *N.Y. TIMES*, Sept. 6, 1989, at B7.

²⁴ See Bernard Weinraub, *President Offers Strategy for U.S. on Drug Control: Warns of Grave Threat*, *N.Y. TIMES*, Sept. 6, 1989, at A1.

²⁵ See Louis Kraar, *How to Win the War on Drugs*, *FORTUNE*, Mar. 12, 1990, at 75.

young people and the middle class, a series of Federal surveys showed that any downward trend had stalled by the early 1990s.²⁶

The number of incarcerated persons in the United States experienced unprecedented growth during this period, with an increase of 65% from 1984 to 1991.²⁷ As part of his presidential campaign in 1992, Bill Clinton “vowed that he would never permit a Republican to be perceived as tougher on crime than he.”²⁸ After he was elected, Clinton signed into law the Violent Crime Control and Law Enforcement Act, the largest crime bill in the history of the United States.²⁹ This law expanded the federal death penalty, increased funding for state and local law enforcement and prisons, and mandated life sentences without parole for certain three-time offenders.³⁰ Like Reagan, Clinton expanded the War on Drugs into welfare reform. For example, he imposed a lifetime ban on eligibility for welfare and food stamps for persons convicted of felony drug offenses.³¹ He also made it even more difficult for drug-using individuals and families to access public housing by endorsing a “One Strike and You’re Out” Initiative during his 1996 State of the Union address, stating that, “...the rule for [public housing] residents who commit crime and peddle drugs should be one strike and you're out.”³²

When George W. Bush arrived in the White House in 2001, he allocated even more money to fighting the War on Drugs. His administration increased funding for more student drug testing, but it also saw an unfortunate increase in overdose fatalities.³³ Another new layer added to drug policy during this era was the militarization of America’s police forces, resulting in an estimated 45,000 SWAT raids in 2001, as well as an increase in “corruption scandals, botched raids, and sloppy police work.”³⁴

By the mid-2000s, state-level drug policy reforms were beginning to take shape. President Barack Obama, however, who candidly discussed his prior drug use on the campaign trail, instituted a crackdown on medi-

²⁶ Joseph B. Treaster, *The 1992 Campaign: Candidates’ Records; Four Years of Bush’s Drug War: New Funds but an Old Strategy*, N.Y. TIMES, July 28, 1992.

²⁷ JENNI GAINSBOROUGH & MARC MAUER, THE SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990S 12 (2000), <http://www.prisonpolicy.org/scans/sp/DimRet.pdf>.

²⁸ ALEXANDER, *supra* note 15, at 56.

²⁹ Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

³⁰ *Id.*

³¹ ALEXANDER, *supra* note 15, at 57; Personal Responsibility and Work Opportunity Reconciliation Act, Publ. L No. 104-193, 110 Stat. 2105 (1996)

³² ALEXANDER, *supra* note 15, at 57; William Clinton, President of the United States, State of the Union Address (Jan. 23, 1996).

³³ NAT’L INST. ON DRUG ABUSE, OVERDOSE DEATH RATES (rev. Dec. 2015) <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates>.

³⁴ RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES 237, 247 (2013).

cal marijuana, where dispensaries became federal targets.³⁵ Under his administration, the Drug Enforcement Agency has conducted raids on doctors, pharmacies, and pain clinics suspected of overprescribing painkillers.³⁶ Additionally, he has funded federal programs that support law enforcement's continued use of SWAT teams and acquisition of military equipment.³⁷ The drug war, it would seem, is far from over.

B. The Drug Policy Reform Movement's Impact on Criminal Drug Laws & Policies

After enduring this domestic war for almost a half-century, it has become clear that most, if not all, of these punitive "law and order" policies are neither achieving the desired outcomes of prosecuting drug kingpins, nor are they creating fewer drug users or eradicating social problems, such as economic and healthcare disparities. The Drug Policy Alliance estimates that the amount of money spent annually in the U.S. on the War on Drugs is more than \$51 billion,³⁸ and the number of Americans currently incarcerated in federal, state, and local prisons and jails has doubled since 1990, giving the U.S. the highest incarceration rate in the world. Today, almost half of state prisoners are convicted of non-violent crimes, and more than half of federal prisoners are serving time for drug offenses.³⁹ State and federal drug policies disproportionately impact individuals living in poverty and people of color. According to Michelle Alexander, the United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid. African Americans serve virtually as much time for a drug offense as whites do for a violent offense.⁴⁰

Despite the high number of drug offenders behind bars, recent studies on incarceration show that it has had a negligible impact on the lessening of violent crime.⁴¹ A report by the *Brennan Center for Justice* found that "[i]ncarceration has been declining in effectiveness as a crime control tactic since before 1980. Since 2000, the effect on the crime rate of increasing incarceration, in other words, adding individuals to the

³⁵ Tim Dickinson, *Obama's War on Pot*, ROLLING STONE, Feb. 16, 2012.

³⁶ Mark Potter, *Drug Enforcement Administration Raids "Pill Mills" in Four Southern States*, NBC NEWS, May 20, 2015.

³⁷ BALKO, *supra* note 34, at 301.

³⁸ DRUG POLICY ALL., DRUG WAR STATISTICS, <http://www.drugpolicy.org/drug-war-statistics> (last visited Aug. 26, 2015).

³⁹ Inimai M. Chettiar, *The Many Causes of America's Decline in Crime*, THE ATLANTIC (Feb. 11, 2015), <http://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/>.

⁴⁰ *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Aug. 27, 2015).

⁴¹ Chettiar, *supra* note 38.

prison population, has been essentially zero.”⁴² While the prison populations have surged, illicit drug use in the United States also has been increasing, though there continues to be a “treatment gap.” In 2013, an estimated 22.7 million people needed treatment for drug or alcohol dependence, but only 2.5 million received it.⁴³ More people died of drug overdoses in 2014 than in any year on record.⁴⁴ Nationally, the death rates from opioid overdoses quadrupled during 1999-2010.⁴⁵

There are plain indicators that the drug war is not working, but ending it is not an easy task. Drug policies over the years have been predicated, in part, upon assumptions that are difficult to overcome, from Nancy Reagan’s idea of drug offenders’ incorrigibility to the idea of criminal masterminds’ connections to drug use.⁴⁶ Both elected leaders and popular culture reinforce these assumptions: drug users are immoral, criminals are dangerous, and arrest and imprisonment are necessary. There is no one law—or dozen laws—that can right the wrongs promulgated by drug policies created and enforced over nearly half a century, nor is there a political narrative that satisfies all of those who seek to introduce reforms or a public who will happily receive them. Issues like economic dysfunction, mass incarceration, states’ rights, institutional racism, and public health do not always run in overlapping circles.

1. State Reforms

The last decade, however, has seen a rise in momentum within the drug policy reform movement which, since the beginning of the War on Drugs, has the goal of reshaping drug policies in the United States to be based on science and human rights rather than perceptions of “law and order” and political hysteria.⁴⁷ Bipartisan efforts nationwide have led to successful medical marijuana legislation, sentencing reform for people who commit nonviolent drug law offenses, and access to syringe ex-

⁴² OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, THE BRENNAN CENTER FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 4 (2015), https://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf.

⁴³ NAT’L INST. ON DRUG ABUSE, *Drug Facts: Nationwide Trends*, <http://www.drugabuse.gov/publications/drugfacts/nationwide-trends> (last updated June 2015).

⁴⁴ NAT’L INST. ON DRUG ABUSE, *supra* note 43.

⁴⁵ *Id.*

⁴⁶ See, e.g., Philip Ross, *What Drugs was Dylann Roof on? Suboxone, A Powerful Narcotic, Found on Charleston Shooter in February Arrest*, INT’L BUS. TIMES (June 18, 2015), <http://www.ibtimes.com/what-drugs-was-dylann-roof-suboxone-powerful-narcotic-found-charleston-shooter-1973919>.

⁴⁷ Thomas Reed Heddleston, *From the Frontlines to the Bottom Line: Medical Marijuana, the War on Drugs, and the Drug Policy Reform Movement* 146–47 (June 2012) (unpublished Ph.D. dissertation, University of California, Santa Cruz), <http://escholarship.org/uc/item/1t7220hj#page-1>.

change and overdose prevention medication. Many jurisdictions have called for the decriminalization of some low-level drug offenses, and others still have legalized small quantities of marijuana for recreational use and possession.⁴⁸

But, drug reformers know that even a significant number of changes at the state level cannot by themselves eradicate the adverse impacts experienced by individuals and families who have come into contact with the justice system, resolve access to substance abuse treatment for those with drug dependencies, or overcome poverty and institutional racism. A federal commitment to ending the drug war is necessary to implement reforms that are widespread and meaningful.

2. Federal Reforms

The drug policy reform movement has, over the last few years, begun to make its way into the federal government. In 2010, Gil Kerlikowske, Director of the Office of National Drug Control Policy, made a point to say that he did not think it was appropriate to use the phrase “drug war.”⁴⁹ And, despite President Obama’s continuance of several overarching “law and order” policies, under his administration, the federal sentencing guidelines have seen some major reforms with respect to mandatory minimums for drug offenders.⁵⁰ The Department of Justice also deferred its right to challenge Washington and Oregon state laws legalizing marijuana.⁵¹ Outside of criminal justice reforms, the Affordable Care Act considers drug rehabilitation an “essential service,” requiring health care plans to provide such treatment and physicians to provide basic

⁴⁸ Niraj Chokshi, *Where Marijuana is Legalized, Decriminalized or on the November Ballot*, WASH. POST: GOVBEAT BLOG (Oct. 13, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/10/13/where-marijuana-is-legalized-decriminalized-or-on-the-november-ballot/>; *Where Pot is Legal*, CNN MONEY, <http://money.cnn.com/interactive/news/economy/marijuana-legalization-map/> (last visited Aug. 26, 2015).

⁴⁹ Gary Fields, *White House Czar Calls for End to “War on Drugs”*, WALL ST. J., May 14, 2009.

⁵⁰ The Fair Sentencing Act of 2010 was signed into law in August 2010, reducing the disparity between the amount of crack cocaine and powder cocaine needed to trigger federal criminal penalties, and eliminating the five-year mandatory minimum sentence for simple possession of crack cocaine. In support of the Act, Gil Kerlikowske, Director of the Office of National Drug Control Policy, challenged assumptions made by lawmakers and fueled by the media in the 1980s, stating, “There is no scientific basis for the crack/powder disparity” and “By promoting laws and policies that treat all Americans equally, and by working to amend or end those that do not, we can only increase public confidence in the criminal justice system and help create a safer and healthier nation for us all.” Press Release, The White House, Congress Passes Monumental Fair Sentencing Act and Restores Fairness to Cocaine Sentencing (July 28, 2010).

⁵¹ Press Release, Department of Justice, Justice Department Announces Update to Marijuana Enforcement Policy (Aug. 29, 2013).

screening for drug dependency.⁵² Medical researchers have seen a renaissance in clinical trials addressing the therapeutic potential of certain illicit substances, such as LSD and MDMA.⁵³

In addition to supporting mandatory minimum reforms, after receiving much criticism that he had granted fewer pardons and commutations than his predecessors, President Obama launched an executive Clemency Initiative, created to encourage low-level drug offenders serving a federal sentence in prison to petition to have their sentences commuted or reduced. More than 35,000 inmates have applied; Obama has pardoned eighty-nine to date.⁵⁴

⁵² Under the Affordable Care Act, passed in 2008, drug rehabilitation and treatment became part of “primary care,” and is now considered an “essential service.” This means that health plans are required to provide such treatment. The ACA aims to treat coverage of substance abuse disorders similarly to other chronic illnesses, such as hypertension, asthma, and diabetes. It requires government insurers, like Medicare and Medicaid, to cover physician visits, medications, and traditional “outpatient care,” where they traditionally focused only on inpatient services, like detox programs. Celia Vimont, *Affordable Care Act to Provide Substance Abuse Treatment to Millions of New Patients*, PARTNERSHIP FOR DRUG-FREE KIDS (Feb. 26, 2013), <http://www.drugfree.org/join-together/affordable-care-act-to-provide-substance-abuse-treatment-to-millions-of-new-patients/>.

⁵³ While the onset of the War on Drugs caused much research regarding potential benefits of controlled substances to come to a halt, the last decade has seen a renaissance in clinical trials addressing therapeutic potential of drugs like LSD, MDMA, and THC. Oddly enough, researchers are using psilocybin to treat persons with addictions of legal substances, like alcohol and tobacco. Michael Pollan, *The Trip Treatment: Research into Psychedelics, Shut Down for Decades, is Now Yielding Exciting Results*, THE NEW YORKER (Feb. 9, 2015), <http://www.newyorker.com/magazine/2015/02/09/trip-treatment>. Others are testing the potential of MDMA to treat veterans experiencing symptoms of post-traumatic stress disorder. Rachel Chason, *Studies Ask Whether MDMA can Cure PTSD*, USA TODAY (July 11, 2014), <http://www.usatoday.com/story/news/nation/2014/07/11/mdma-molly-therapy-ptsd-cure/10683963/>. And, although no formal research yet exists, parents of children with epilepsy are flocking to states that have legalized marijuana, as a particular strain of hemp oil has been found to ease the disease’s symptoms. David Gonzalez, *For Children’s Seizures, Turning to Medical Marijuana*, N.Y. TIMES: LENS BLOG (Mar. 26, 2015), <http://lens.blogs.nytimes.com/2015/03/26/medical-marijuana-eases-childhood-seizures/>.

⁵⁴ And just as recently, President Obama has issued a total of 43 commutations, shortening the prison sentences of persons convicted of drug crimes and given harsh sentences under the now-outdated guidelines. These commutations are part of the Obama administration’s Clemency Initiative, created to encourage eligible low-level drug offenders serving a federal sentence in prison to petition to have their sentences commuted or reduced. Press Release, Department of Justice, *Commutations Granted by President Barack Obama* (Apr. 15, 2014), <http://www.justice.gov/pardon/obama-commutations#apr2014>. More than 35,000 inmates (about 16 percent of the federal prison population) have applied

In Congress, the most recent legislative session included the historic introduction of the CARERS—Compassionate Access, Research Expansion, and Respect States—Act by both Republican and Democratic senators. The Act would allow states to legalize marijuana for medical use without federal interference and eliminate barriers to medical marijuana research, as well as reschedule marijuana from Schedule I to Schedule II under the Controlled Substances Act, thus acknowledging that the drug may have some benefits.⁵⁵

Layered upon the drug policy debate regarding fewer punitive responses to drug-related crimes, the “Black Lives Matter” movement, a response to police violence perpetrated upon unarmed black individuals, has brought national attention and a collective voice to what the *Washington Post* calls a “nascent political movement.”⁵⁶ This movement insists upon legal and political reforms that acknowledge and resolve the disproportionate impact of “law and order” policies on individuals and communities of color, such as “stop and frisk” and “broken windows” theories,⁵⁷ underfunded drug treatment and public defender programs, and collateral consequences of arrests and convictions, many of which have particular overlap with policies informed by the War on Drugs.⁵⁸

The drug policy reform movement and its allies have made considerable progress, though they are far from eliminating all problems perpetuated by the decades-old War on Drugs. But, the growing ranks and political power are changing the ways in which lawmakers and the general public view drug offenses. Indeed, myriad interests and unlikely bedfellows have converged to overhaul the harmful, punitive policies

to have their sentences shortened under this initiative. Sari Horwitz, *U.S. Clemency Effort, Slow to Start, will Rely on an Army of Pro Bono Lawyers*, WASH. POST, (Feb. 28, 2015), https://www.washingtonpost.com/world/national-security/us-clemency-effort-slow-to-start-will-rely-on-an-army-of-pro-bono-lawyers/2015/02/28/2ba8c6bc-bc42-11e4-8668-4e7ba8439ca6_story.html.

⁵⁵ Drug Policy All., *House Version of Federal Medical Marijuana Bill Introduced*, THE DAILY CHRONIC (Mar. 24, 2015), <http://www.thedailychronic.net/2015/41835/house-version-federal-medical-marijuana-bill-introduced/>.

⁵⁶ Janell Ross, *How Black Lives Matter Moved from a Hashtag to a Real Political Force*, WASH. POST (Aug. 19, 2015), <http://www.washingtonpost.com/news/the-fix/wp/2015/08/19/how-black-lives-matter-moved-from-a-hashtag-to-a-real-political-force/>.

⁵⁷ Broken windows theory is a concept introduced by James Q. Wilson and George L. Kelling that suggests that “disorder breeds crime,” or, that more serious crimes have evolved from minor infractions. Many police departments used this theory to inform their street-level police practices and, as a result, incarceration rates grew, particularly among nonviolent offenders. James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC (March 1982).

⁵⁸ Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequality in the Criminal Justice System*, THE SENTENCING PROJECT (2015), http://sentencingproject.org/doc/publications/rd_Black_Lives_Matter.pdf.

that emerged from the failed domestic war. These interests and reforms have stretched beyond the criminal justice system and into healthcare, financial regulation, and even property law.⁵⁹

C. *Child Welfare Drug Laws & Policies Resulting from the War on Drugs*

Although drug policy reform advocates have not yet recognized the child welfare system as fertile ground for change, family courts and child protective services have consistently created and enforced punitive drug war policies that have a disproportionate impact on communities of color.⁶⁰ Additionally, these policies were founded on outdated research and inaccurate assumptions; these policies, like those in the criminal justice system, separate poor families and cost state and federal governments millions of dollars.

Child welfare policy in the United States has reflected to varying degrees both a family-centered and a child-saving philosophy, with the sometimes-conflicting objectives of keeping troubled families together and protecting children from parental harm.⁶¹ The decades following the commencement of the War on Drugs found child welfare advocates grappling with simultaneous strategies for prevention, reunification, and permanency. The late 1980s initiated a substantial increase in the number of children placed in foster care.⁶² During this period, the rationale for increased child removal was largely based upon parental drug use that was seen as contributing to social ills, like sexual deviance, crime, and poverty. Even now, parents who use illegal drugs, whether recreationally or because of a dependency, are at risk of having their children removed from their custody and placed in foster care.

This is especially true for low-income mothers of color, like Sarah, Y.N., and Dottie. Parents who lose custody of their children through child protective services interventions face tremendous obstacles to reunifying with them: numerous court dates that, due to overburdened fami-

⁵⁹ See, e.g., Frank Bowman, Tanya Marsh, & Michael Widener, *Property and Pot: Implications of Marijuana Legalization for Real Property Lawyers*, AM. B. ASS'N (Dec. 10, 2014), http://www.americanbar.org/groups/real_property_trust_estate/events_cle/pcorner/property_and_pot_implications_of_marijuana_legalization_for_real_property_lawyers_2014_12_10.html.

⁶⁰ Alicia Summers, *Disproportionality Rates for Children of Color in Foster Care*, NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES (2013), <http://www.ncjfcj.org/sites/default/files/NCJFCJ%202013%20Dispro%20TAB%20Final.pdf>.

⁶¹ DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 104 (2002).

⁶² Eugene M. Lewit, THE FUTURE CHILDREN, *Child Indicators: Children in Foster Care*, HOME VISITING (v.3 n.3 Winter 1993) <http://futureofchildren.org/publications/journals/article/index.xml?journalid=64&articleid=434§ionid=2976>.

ly court systems, often span months and years; near-constant supervision by overburdened and undertrained caseworkers charged with both documenting fault and providing remedial services; and completion of a service plan, including substance abuse treatment that may not be scientifically sound, compassionate, or effective.⁶³ There is no fundamental, constitutional right to legal representation in child welfare proceedings, so many parents navigate these processes without the benefit of counsel. Families subjected to child welfare investigations also suffer the stigma of “bad parent” and “child abuser.” Even a mere report to child protective services, whether or not it is substantiated, is maintained in a central registry in each state, and remains on file for a period of years, often preventing an individual from certain employment opportunities.⁶⁴

The increase in the number of children placed in foster care during the 1980s and 90s mirrors the era’s increase in the prison population, and policies generated during that time that contributed to mass incarceration are also remarkably similar. For example, as lawmakers created new and harsh crimes for drug use and possession, many state child welfare systems expanded their civil definitions of child abuse and neglect to include substance abuse, escalating the removal of children from drug-using parents on allegations of “inadequate supervision,” “environmental neglect,” or “risk of harm.”⁶⁵

1. The Adoption & Safe Families Act of 1997 (ASFA)

In 1997, Congress and the Clinton administration attempted to address the increase in children being removed from their homes by establishing the Adoption and Safe Families Act (ASFA),⁶⁶ which tries to shorten the amount of time children spend in care. ASFA amended the existing federal Adoption Assistance and Child Welfare Act of 1980,⁶⁷ which encouraged states to focus on preventative and reunification programs in lieu of foster care. In contrast, ASFA fails to put substantial resources into preventative or family support services, nor does it contrib-

⁶³ Sheigla Murphy & Paloma Sales, *Pregnant Drug Users: Scapegoats of the Reagan/Bush and Clinton Era Economics*, 28 SOC. JUST. 72 (2001), <http://www.advocatesforpregnantwomen.org/articles/murphyandsales.htm>.

⁶⁴ CHILD WELFARE INFO. GATEWAY, DISCLOSURE OF CONFIDENTIAL CHILD ABUSE AND NEGLECT RECORDS (2013), <https://www.childwelfare.gov/pubPDFs/confide.pdf>.

⁶⁵ Ellen Weber, *Child Welfare Interventions for Drug-Dependent Pregnant Women: Limitations of a Non-Public Health Response*, 75 UMKC L. REV. 789, 797 (2007); Mark F. Testa & Brenda Smith, *Prevention and Drug Treatment*, 19 THE FUTURE CHILDREN 147, 154 (2009); Mark F. Testa & Brenda Smith, *The Risk of Subsequent Maltreatment Allegations in Families with Substance-Exposed Infants*, 26 CHILD ABUSE AND NEGLECT 97, 98 (2002).

⁶⁶ Adoption and Safe Families Act of 1997, *supra* note 11.

⁶⁷ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).

ute to the nation's overburdened family courts—two arguably essential tools for ensuring that children have permanent homes and families.⁶⁸ The law does, however, require a child welfare agency to commence termination of parental rights (TPR) proceedings in cases where children have been in foster care for fifteen out of twenty-two months. TPR is the most extreme measure judges can impose in child abuse and neglect cases: it severs the legal ties between parent and child, ending the parent's physical custody, "as well as the rights to even visit, communicate with, or regain custody of the child."⁶⁹

The Adoption and Safe Families Act's stringent timeline for initiating TPR proceedings does not contain any exception for parents in prison or for those dealing with addiction problems, particularly those in residential treatment programs. Parents frequently fail to get out of prison or treatment—or achieve sobriety—quickly enough to meet ASFA's deadlines.⁷⁰ ASFA offers substantial financial incentives to states to get more children adopted, but it does not provide comparable financial incentives to states to improve services aimed at reunifying parents and children.⁷¹ After the passage of ASFA, all fifty states passed legislation that was equal to or tougher than the federal requirements, and some jurisdictions imposed even shorter deadlines and expanded the grounds for severing biological ties.⁷² But even before ASFA became law, some state child welfare systems were responding to the panic created by stories of crack cocaine use among poor, pregnant, and parenting women by beefing up their mandatory reporting laws.

2. The Child Abuse Prevention and Treatment Act (CAPTA)

In 2003, Congress amended the Child Abuse Prevention and Treatment Act (CAPTA)⁷³ through the Keeping Children and Families Safe Act of 2003. The amendment requires health care providers involved in the delivery or care of infants affected by illegal substance abuse to notify child protective services.⁷⁴ This mandate "conditioned states' receipt of federal child abuse prevention funds on the adoption of this policy."⁷⁵ While ensuring the safety and well-being of children was CAPTA's main goal, it could be interpreted as depriving doctors and other medical per-

⁶⁸ Andrew White, *Against the Clock: The Struggle to Move Kids into Permanent Homes*, 15 CHILD WELFARE WATCH 2 (2008).

⁶⁹ ROBERTS, *supra* note 61, at 109.

⁷⁰ Nora McCarthy & Lynne Miller, *You Have to Get it Together: ASFA's Impact on Parents and Families*, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 38-41 (Dec. 2009).

⁷¹ ROBERTS, *supra* note 61, at 111.

⁷² ROBERTS, *supra* note 61, at 110.

⁷³ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. § 5101-07 (2003)).

⁷⁴ *Id.*

⁷⁵ Weber, *supra* note 65, at 792.

sonnel of their professional expertise. That is, instead of requiring physicians to evaluate and diagnose pregnant women's drug dependencies or substance use disorders and provide treatment where necessary, CAPTA instead obligates them "to participate in a seemingly punitive child welfare reporting practice after a child's birth."⁷⁶ In addition to regulating physician reporting, CAPTA requires states to develop a "plan of safe care" for infants affected by maternal drug use.⁷⁷ The term "drug-affected" is left undefined; states themselves must establish how health care providers will identify infants who will be reported to child protective services.⁷⁸

Prior to CAPTA's implementation, twenty states had already either required health care professionals to report infants who exhibited symptoms of drug exposure to child welfare officials, and/or expanded their definitions of child abuse and neglect to include prenatal exposure to drugs.⁷⁹ With CAPTA's new national standard for child protection interventions based on presumed substance abuse, today forty-seven states and the District of Columbia address prenatal exposure and parental substance use within their child welfare codes, with many stating that evidence of a controlled substance in a parent's or infant's system at birth is tantamount to abuse and neglect, without the consideration of other factors.⁸⁰ In fact, only nine states currently require a nexus of actual harm to a child in addition to a positive drug test in order to substantiate a report of child abuse or neglect or support a finding.⁸¹ This requirement of actual harm is not as anomalous when proving other grounds of abuse and neglect. For example, the state may establish a *prima facie* case of child abuse based on corporal punishment by showing harm through photographic evidence of marks and bruises, or medical documentation of treatment; they may be able to prove educational neglect through school attendance records and failing test scores.

These state and federal child welfare policies doubled the amount of children removed from their families and placed in foster care between 1985 and 1997,⁸² with continued high numbers today.⁸³ The increase of

⁷⁶ Weber, *supra* note 65, at 793.

⁷⁷ Weber, *supra* note 65, at 797-98.

⁷⁸ Weber, *supra* note 65, at 798-99.

⁷⁹ Weber, *supra* note 65, at 797.

⁸⁰ CHILD WELFARE INFO. GATEWAY, PARENTAL DRUG USE AS CHILD ABUSE (2015), <https://www.childwelfare.gov/pubPDFs/drugexposed.pdf>.

⁸¹ California, Florida, Maine, New York, Oregon, Rhode Island, Washington, West Virginia, and Wisconsin require a nexus of harm between a parent's drug use and any alleged child maltreatment in order to find abuse. *Id.*

⁸² Sandra Stukes Chipungu & Tricia B. Bent-Goodley, THE FUTURE CHILDREN, *Meeting the Challenges of Contemporary Foster Care*, CHILDREN, FAMILIES, AND FOSTER CARE: FIGURE 1 (v. 14 n. 1 Winter 2004) http://www.princeton.edu/futureofchildren/publications/figures-tables/figure_show.xml?fid=219.

foster care placements coupled with fewer family preservation services helped create a flood of child welfare class action litigation that has taken place over the last several decades, attempting to address states' failures in foster care, placements, investigation and reporting, provision of services, caseworker training, and visitation.⁸⁴ Recently, child welfare agencies have seen significant numbers of youth "aging out" of the foster care system, as their goals for "permanency" were never met.⁸⁵

State responses to federal child welfare mandates not only presume child maltreatment when a parent uses a drug, but they also suggest that child welfare systems are well-equipped to investigate and evaluate parents' drug use, assess drug-using parents' needs for treatment, and provide that treatment in an effective way that conforms to ASFA requirements.⁸⁶ Essentially, parents who are found abusive or neglectful based on their substance use not only must demonstrate that they are sober within fifteen months, but they also must trust that the child welfare authorities will provide the treatment necessary to achieve that goal, despite a number of state consent decrees illustrating the opposite.⁸⁷

3. Creeping Toward Reform

Despite the child welfare system's absence from mainstream drug policy reform debates, scholars and practitioners who study and practice child welfare law and policy have identified a need for reform. In fact, when it comes to policies related to drug-using parents, some states have begun to introduce pilot projects to try and improve responses to allegations based on drug use. These jurisdictions acknowledge that the existing "parental fault" model of child welfare systems may not be serving the best interests of families and children,⁸⁸ whether it is because of stagnant numbers of children in foster care or lacking permanency, inad-

⁸³ U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES,

ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT (July 2015), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf>.

⁸⁴ CHILD WELFARE LEAGUE OF AM., CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005 (2005), http://thehill.com/sites/default/files/consentdecrees_0.pdf.

⁸⁵ Angelique G. Day, Youth Aging Out of Foster Care: The Invisible Public Health Care Crisis Emergent Findings and Implications for Policy and Practice 33 (2013) (unpublished manuscript), http://works.bepress.com/angelique_day/6.

⁸⁶ Adoption and Safe Families Act § 101(d), 42 U.S.C. § 678 (2015); Weber, *supra* note 74, at 820.

⁸⁷ Weber, *supra* note 65, at 831–33; CHILD WELFARE LEAGUE OF AMERICA, *supra* note 84.

⁸⁸ Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 902–03 (2014).

equate services provision and completion, disproportionate and punitive responses to alleged maltreatment, or a combination of all three.

A number of states have incorporated some form of “differential response” into their child abuse and neglect reporting.⁸⁹ “Differential response” refers to a determination by child protective workers, upon a report of alleged child maltreatment, of whether to follow a traditional investigative path that includes court intervention and possible foster care placement, or to make an alternative assessment and response, which could involve preventive or remedial services. This approach involves shifting from an accusatorial investigation to an assessment that considers family needs and strengths—an assessment that may have beneficial effects, including a greater level of services provided and a smaller number of child removals.⁹⁰ Where allegations of drug use are involved, differential response models can help distinguish between parents who use drugs recreationally and are able to care for their children appropriately and those who are chemically dependent and require treatment interventions in order to parent.

Some child welfare systems are implementing “Family Treatment Courts” (FTC), which have emerged as family courts’ answer to drug court or diversion programs. The FTC model includes regular court hearings, intensive judicial monitoring, substance abuse treatment, frequent drug testing, and rewards or sanctions for compliance with a service plan.⁹¹ Another creative and relatively new response to system-involved parents with allegations of drug use is mother-child treatment programs that allow mothers with infants or young children to reside together as a family in an inpatient facility. In particular, these programs recognize that substance abuse cannot be viewed as a single issue, but rather entails multiple problems, all of which should be addressed in order to produce the desired outcome of family stability. They also remove the coercion element that insists upon parents completing a program in order to reunify with their children.⁹²

Some jurisdictions also support Nurse-Family Partnerships, which link community health nurses who conduct regular home visits and provide support and training to families identified as “high risk.” These

⁸⁹ CHILD WELFARE INFO. GATEWAY, DIFFERENTIAL RESPONSE TO REPORTS OF CHILD ABUSE AND NEGLECT (2014), https://www.childwelfare.gov/pubPDFs/differential_response.pdf.

⁹⁰ L. Anthony Loman, *Effects of Approach and Services Under Differential Response on Long Term Child Safety and Welfare*, 39 CHILD ABUSE & NEGLECT 86, 88 (2015).

⁹¹ U.S. DEP’T OF JUSTICE, FAMILY DEPENDENCY TREATMENT COURTS: ADDRESSING CHILD ABUSE AND NEGLECT CASES USING THE DRUG COURT MODEL 9-11 (Dec. 2004) <https://www.ncjrs.gov/pdffiles1/bja/206809.pdf>.

⁹² Valera Jackson, *Residential Treatment for Parents and Their Children: The Village Experience*, 2 SCI. & PRAC. PERSP. 44, 47 (2004), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2851019/>.

families include low-income, first-time mothers and mothers who have struggled with drug use or dependency. Nurse-Family Partnerships aim to improve pregnancy outcomes, child health and development, and economic self-sufficiency.⁹³ While home visits can continue from a child's infancy through age two or three, the scrutiny and judgment associated with child protective services supervision is far less. Furthermore, these partnerships recognize that early interventions that address drug use, parenting, and pregnancy can ensure healthy birth outcomes and provide resources that prevent future contact with child protective services.

Generally, these programs indicate significant steps toward a more compassionate, public health-based child welfare response to drug-related allegations; however, the field has yet to develop a clear vision for how the law could support such an approach to child protection nationwide.⁹⁴ That is, these new approaches in child welfare systems mirror the patchwork of drug policy reform in the criminal justice arena: jurisdictions that decriminalize and legalize certain drug offenses versus those that continue a zero-tolerance approach to all drug-related crimes. Advocates in the drug policy reform movement suggest that change at a federal level will have a greater impact on state and local policies;⁹⁵ similarly, if child welfare reformers are to successfully advocate for significant reforms to child welfare policies addressing drug-using parents, they must also find a way to tackle the set of federal laws that have most contributed to its existing structure: CAPTA and ASFA.

As the drug policy reform movement has illustrated, many "law and order" policymakers turned out to be wrong in their assumptions regarding drug use, manufacture, and sales and the appropriate punishments to abate them. The child welfare system's policies regarding parental drug use and prenatal drug exposure came from many of the same ideas: drug use is the result of immorality and bad choices, punishment and coercion will cause drug use to cease, and the justice systems are the best means to resolve these societal harms. As some child protective practices creep toward reform, could it be that there is a growing belief that drug policies in the child welfare system have been similarly misinformed?

⁹³ NURSE-FAMILY PARTNERSHIP, PUBLIC POLICY AGENDA: 114TH CONGRESS, 2ND SESSION (2016), <http://www.nursefamilypartnership.org/public-policy/2016-NFP-Public-Policy-Agenda.aspx>.

⁹⁴ Gupta-Kagan, *supra* note 88, at 902–03.

⁹⁵ Compassionate Access, Research Expansion, and Respect States Act, S. 683, 114th Cong. (2015); S. 683 CARERS Act, DRUG POLICY ALLIANCE (July 2015), http://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_CARERS_Act_Aug2015.pdf.

II. ASSUMPTIONS UNDERLYING CHILD WELFARE DRUG LAWS & POLICIES

A. Prenatal Exposure to Chemical Substances as Evidence of Child Abuse & Neglect

In the United States, despite the emergence of differential response programs, the majority of state-based child welfare systems allow child abuse and neglect to be substantiated with evidence of the presence of a controlled substance in a mother's or her newborn's body at birth. Implicit in this connection between substance exposure and child maltreatment is the "assumption that any amount of prenatal exposure to an illegal drug causes unique, severe, or even inevitable harm."⁹⁶ Even women who participate in medically-sound treatment in an effort to overcome a chemical dependency, like Y.N., for example, are subjected to this assumption.

There are certainly circumstances in which newborns are negatively impacted by conditions experienced by their mothers during pregnancy or through exposure to certain substances in the womb. For example, fetuses whose mothers receive no or inadequate healthcare or smoke cigarettes are at risk for premature birth, stillbirth, and increased infant mortality, as well as possible impaired cognitive functioning.⁹⁷ Additionally,

⁹⁶ National Advocates for Pregnant Women (NAPW), a New York-based advocacy organization that works on behalf of pregnant and parenting women, has amassed volumes of research on the intersection of pregnant women who use drugs and the criminal justice and child welfare systems. NAPW has organized several amicus briefs that challenge the assumption that pregnant women who use drugs inevitably harm their unborn babies. *See* Motion for Leave and Brief of Amici Curiae in Support of Petition of Hope Elisabeth Ankrom at 28, *Ex parte* Ankrom, 2013 Ala. LEXIS 219, 143 So. 3d 58 (Ala. 2013). *See also* Brief of Amici Curiae Experts and Advocates in Maternal and Fetal Health, Child Welfare, Public Health, and Drug Treatment in Support of Defendant-Petitioner at 3-4, *New Jersey Dept. of Children and Families, Div. of Youth and Family Servs. v. A.L.*, 213 N.J. 1, 59 A.3d 576, 2013 N.J. LEXIS 89, 2013 WL 440229 (N.J. 2013); Amended Brief of Amici Curiae Experts in Maternal and Fetal Health, Public Health, and Drug Treatment in Support of Defendant-Petitioner at 3, *New Jersey Div. of Youth and Family Servs. v. Y.N.*, 216 N.J. 13 (2013) (No. 072804); and Brief of Amici Curiae in Support of Appellant Astasia Clemons at 15, *State v. Clemons*, 2013-Ohio-3415, 996 N.E.2d 507, 2013 Ohio App. LEXIS 3504, 2013 WL 3988774 (Ohio Ct. App., Highland County 2013). NAPW has also challenged this assumption in its analyses of state bills that would impact pregnant and parenting women who use or have used controlled substances. *See* Emma Ketteringham, NATIONAL ADVOCATES FOR PREGNANT WOMEN, Analysis of Alabama SB 31 (March 15, 2012) <http://advocatesforpregnantwomen.org/Analysis%20of%20SB%2031.doc>

⁹⁷ *See generally* Sarah Partridge et al., *Inadequate Prenatal Care Utilization and Risks of Infant Mortality and Poor Birth Outcome: A Retrospective Analysis of 28,729,765 U.S. Deliveries over 8 Years*, 29 AM. J. PERINATOLOGY 787 (2012)

pregnant women who take certain medications, like Lithium⁹⁸ or Accutane,⁹⁹ may expose their babies to an increased risk of heart abnormalities or other significant birth defects. There are a number of activities and environmental conditions that can cause harm to a developing fetus; however, the assumption that prenatal exposure to illegal or unprescribed drugs causes inevitable harm is not well-founded.

For example, studies over the last two-plus decades have established that “[m]any findings once thought to be specific effects of in utero cocaine exposure can be explained in whole or in part by other factors, including . . . the quality of the child’s environment.”¹⁰⁰ Furthermore, after a review of seventy-four published studies on the effects of cocaine on a developing fetus or young child, researchers associated with the Boston University Schools of Medicine and Public Health concluded that “there is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity difference in severity, scope, or kind from the sequelae of many other risk factors.”¹⁰¹

Dr. Deborah A. Frank, an expert in child health and well-being, offered testimony in 2002 before the U.S. Sentencing Commission on the issue of cocaine and crack exposure, where she explained that the phenomena of “crack babies” is essentially a myth.¹⁰² The U.S. Sentencing Commission later endorsed the conclusions of Dr. Frank and other researchers in a report to Congress, noting that, “research indicates that the negative effects from prenatal exposure to cocaine, in fact, are significantly less severe than previously believed” and “[r]esearch on the impact of prenatal exposure to other substances, both legal and illegal, gen-

(concluding that risk of prematurity, stillbirth, and infant death increase linearly with decreasing prenatal care); see also Martha M. Werler, *Teratogen Update: Smoking and Reproductive Outcomes*, 55 *TERATOLOGY* 382 (1997); Kirsten Wisborg et al., *Exposure to Tobacco Smoke in Utero and the Risk of Stillbirth and Death in the First Year of Life*, 154 *AM. J. EPIDEMIOLOGY* 322 (2001).

⁹⁸ See Carrie Armstrong, *ACOG Guidelines on Psychiatric Medication Use During Pregnancy and Lactation*, 78 *AM. FAM. PHYSICIAN* 772 (2008) (finding that “[t]he use of lithium during pregnancy has been associated with congenital cardiac malformations, fetal and neonatal cardiac arrhythmias, hypoglycemia, premature delivery, and other adverse outcomes”).

⁹⁹ Soon Min Lee et al., *A Case of Suspected Isotretinoin-Induced Malformation in a Baby of a Mother Who Became Pregnant One Month after Discontinuation of the Drug*, 50 *YONSEI MED. J.* 445, 446 (2009) (noting that “approximately 25 to 30 percent of exposed fetuses had birth defects”).

¹⁰⁰ Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 *JAMA* 1613, 1624 (2001).

¹⁰¹ *Id.* at 1621–24.

¹⁰² *Cocaine Pharmacology, “Crack Babies,” Violence: Hearing Before the U.S. Sentencing Comm’n*, 14 *FED. SENT’G. REP.* 191, 199 (2002) (statement of Dr. Deborah A. Frank, Professor of Pediatrics, Boston University School of Medicine).

erally has reported similar negative effects.”¹⁰³ While the import of this research does not suggest that ingesting cocaine during pregnancy poses no risk, it does show that any abnormalities or defects present in newborns prenatally exposed to the drug have more to do “with other factors of high risk pregnancy that ‘cluster’ in drug users—particularly impoverished drug users who more often have poor diets and no prenatal care and who are more frequent victims of violence against women and other crimes.”¹⁰⁴

In addition to clarifying the impact of cocaine exposure on infants and children, medical and psychological researchers, as well as treatment providers and specialists who study addictions and addiction treatments, have also responded to concerns about prenatal exposure to methamphetamines, requesting that terms like “ice babies” and “meth babies” not be used by the media, as they “lack scientific validity.”¹⁰⁵ An expert panel convened in 2005 to address emerging concerns about the effects of amphetamines and methamphetamines on reproductive health and child development. The panel’s comprehensive report found that the data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans.¹⁰⁶ Additionally, the American College of Obstetrics and Gynecology (ACOG) has addressed methamphetamine use among women who are pregnant or likely to become pregnant, noting that “findings to date do not support an increase in birth defects with use of methamphetamine in pregnancy.”¹⁰⁷

There are also studies seeking to determine the impact of prenatal exposure to marijuana. This research found that a mother’s use of marijuana was essentially unrelated to miscarriage or stillbirth, preterm de-

¹⁰³ U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 68, 70 (2007), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

¹⁰⁴ John P. Morgan & Lynn Zimmer, *The Social Pharmacology of Smokeable Cocaine: Not All It’s Cracked Up to Be*, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 131, 153–54 (Craig Reinerman & Harry G. Levine eds., 1997).

¹⁰⁵ David C. Lewis et al., *Meth Science Not Stigma: Open Letter to the Media* (July 25, 2005), <https://groups.google.com/forum/#!topic/alt.support.child-protective-services/5sEZ7wYaE6c>.

¹⁰⁶ U.S. DEP’T OF HEALTH AND HUMAN SERVS., CENTER FOR THE EVALUATION OF RISKS TO HUMAN REPROD, NIH PUBLICATION NO. 05–4474, NTP-CERHR MONOGRAPH ON THE POTENTIAL HUMAN REPRODUCTIVE AND DEVELOPMENTAL EFFECTS OF AMPHETAMINES 189 (2005).

¹⁰⁷ AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, COMM. OP. NO. 479, COMMITTEE ON HEALTH CARE FOR UNDERSERVED WOMEN, METHAMPHETAMINE ABUSE IN WOMEN OF REPRODUCTIVE AGE 2–3 (2011), <http://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co479.pdf?dmc=1&ts=20150125T0902215746>.

livery, or required treatment in a neonatal intensive care unit.¹⁰⁸ A review of studies addressing marijuana and pregnancy concluded that, after controlling for other factors, pregnancy, fetal and child growth and development, and behavior during the infant and toddler stages appear “relatively unaffected by prenatal marijuana exposure.”¹⁰⁹ While some studies have found minor association between prenatal marijuana exposure and problem solving capacity in older children, this correlation changes depending on how often a mother used marijuana and whether researchers were successfully able to control for competing variables.¹¹⁰ Dr. Peter A. Fried, a respected researcher on the impacts of prenatal marijuana exposure, has participated as an expert in court matters involving drug-using women. He has stated, “to characterize an infant born to a woman who used marijuana during pregnancy as being ‘physically abused’ and/or ‘neglected’ is contrary to all scientific evidence.”¹¹¹

Prenatal exposure to opiates like heroin, morphine, and codeine, as well as common painkillers such as Oxycontin, also is not associated with “fetal malformations.”¹¹² Furthermore, researchers have found no significant effect on a child’s growth and brain development as a result of exposure to opiates.¹¹³ Like other studies addressing pregnant women’s use of chemical substances, those that collected data on opiate-exposed infants and children similarly concluded that prenatal care and home environment were “most predictive of intellectual performance and that the degree of maternal narcotic use was not a significant factor.”¹¹⁴

Experts have found that providing treatment to pregnant women who are chemically dependent on opiates can help decrease any possible negative effects on the baby. One of the most effective ways to treat opiate dependency is through methadone maintenance therapy, which is the

¹⁰⁸ David M. Fergusson et al., *Maternal Use of Cannabis and Pregnancy Outcome*, 109 BRIT. J. OBSTETRICS & GYNAECOLOGY 21, 26 (2002).

¹⁰⁹ Peter A. Fried, *The Consequences of Marijuana Use During Pregnancy: A Review of the Human Literature*, 2 J. OF CANNABIS THERAPEUTICS 83, 97 (2002).

¹¹⁰ *Id.* at 96.

¹¹¹ Nat’l Advocates for Pregnant Women, *Prenatal Exposure to Illegal Drugs and Alcohol: Media Hype and Enduring Myths are Not Supported by Science* (Mar. 24, 2010), http://advocatesforpregnantwomen.org/main/publications/fact_sheets/_prenatal_exp-sure_to_illegal_drugs_and_alcohol_media_hype_and_enduring_myths_are_not_supported_by_science.php (quoting Affidavit of Peter Fried, Ph.D. in Support of Defendants’ Answer to Complaint for S.C. Code § 63–7–1650 at ¶4–5, S.C. Dep’t Soc. Servs. v. Doe (S.C. Fam. Ct. July 13, 2009) (on file with National Advocates for Pregnant Women)).

¹¹² Gary D. Hembrecht & Siva Thiagarajah, *Management of Addiction Disorders in Pregnancy*, 2 J. ADDICTION MED. 1, 9 (2008).

¹¹³ *Id.* at 10.

¹¹⁴ *Id.*

treatment option Y.N. used in an effort to protect her unborn child. A pamphlet on substance abuse treatment during pregnancy published by the Substance Abuse and Mental Health Services Administration (SAMHSA) explains that methadone is an effective treatment for dependency on heroin or other opiates, and is good for the mother and her baby.¹¹⁵

Infants exposed prenatally to opiates, including legally prescribed methadone, may experience a syndrome at birth known as “Neonatal Abstinence Syndrome” (NAS). NAS is treatable and has not been associated with long-term consequences regarding a child’s growth and development.¹¹⁶ While some medical providers and child welfare specialists have deemed it necessary to separate infants diagnosed with NAS from their mothers, as they did in Y.N.’s case, research suggests that such separation runs counter to the best practices for treatment.¹¹⁷ For example, one study looked specifically at mothers whose newborns exhibited symptoms of opiate withdrawal or who were treated for symptoms of NAS.¹¹⁸ The findings from this study demonstrated that newborns that remained in their mothers’ care were less likely to require treatment for NAS or admission to the neonatal intensive care nursery.¹¹⁹ Moreover, these infants spent less time in the hospital and had a better chance of being discharged to their mothers’ custody.¹²⁰

Research devoted to the issue of prenatal exposure to chemical substances contradicts so many popular myths and baseless assumptions present in popular media and common understanding since the onset of the drug war. The findings oppose equating prenatal exposure to chemical substances with child abuse and neglect; in fact, they suggest that other factors, specifically poverty and poverty’s many adverse effects, are to blame for poor birth outcomes, such as low birth weight, miscarriage, stillbirth, and the presence of birth defects.

¹¹⁵ SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., METHADONE TREATMENT FOR PREGNANT WOMEN (2006), <http://advocatesforpregnantwomen.org/SAMHSA%20Brochure%20%2522Methadone%20Treatment%20for%20Pregnant%20Women%2522.pdf>.

¹¹⁶ *Open Letter to the Media and Policy Makers Regarding Alarmist and Inaccurate Reporting on Prescription Opioid Use by Pregnant Women*, NATIONAL ADVOCATES FOR PREGNANT WOMEN (Mar. 11, 2013), <http://advocatesforpregnantwomen.org/Opioid%20Open%20Letter%20-%20March%202013%20-%20FINAL.pdf>.

¹¹⁷ Ronald R. Abrahams et al., *Rooming-in Compared with Standard Care for Newborns of Mothers Using Methadone or Heroin*, 53 CAN. FAM. PHYSICIAN 1723, 1724 (2007).

¹¹⁸ *Id.* at 1724–25.

¹¹⁹ *Id.* at 1727.

¹²⁰ *Id.* at 1727–28.

B. Parental Drug Use as Evidence of Present or Future Child Abuse & Neglect

Child welfare laws and policies also rely on the notion that parents who use illegal drugs will harm their children or be unable, by virtue of their drug use, to provide them with a safe and adequate home. There is a common and accepted understanding that parental drug use of any kind causes, or is highly associated with, child abuse and neglect. This notion—that drug use inevitably harms a child—triggers child welfare interventions into families like Sarah’s.

The topic of parental drug use has driven significant public policy, but there exists little to support the assumption that a parent who uses an illegal drug or who is dependent on such drugs is likely to abuse or neglect her child.¹²¹ As noted by *amici curiae* in support of Defendant-Petitioner in *New Jersey Division of Youth and Family Services v. A.L.*, the source most often cited for the claim that drug use increases the likelihood of abuse is a self-published report from the National Center on Addiction and Substance Abuse at Columbia University (CASA), entitled “No Safe Haven: Children of Substance-Abusing Parents.”¹²² The report itself points out that those who were surveyed received grossly inadequate training in issues concerning drug use and addiction.¹²³ Further, in the appendix, CASA acknowledges that, “studies are inconsistent in defining whether substance involvement is the primary or causal reason for a parent’s involvement with the child welfare system, or whether substance involvement is an ancillary or co-occurring problem.”¹²⁴

Researchers have found that the “best evidence to date suggests that substance abusing parents pose no greater risk to their children than do parents of other children taken into child protective custody.”¹²⁵ One study that looked at drug-using mothers who had come into contact with the child welfare system found that those subjected to child protective investigations are more likely to require services addressing social isolation, poverty, mental health issues, and housing problems than drug

¹²¹ Mark F. Testa & Brenda Smith, *The Risk of Subsequent Maltreatment Allegations in Families with Substance-Exposed Infants*, 26 CHILD ABUSE AND NEGLECT 97, 98 (2002).

¹²² Brief of Amici Curiae Experts and Advocates in Maternal and Fetal Health, Child Welfare, Public Health, and Drug Treatment in Support of Defendant-Petitioner at 36 n.49, *N.J. Div. of Youth and Family Servs. v. A.L.*, (N.J. 2012) (No. 068542).

¹²³ *Id.*, citing National Center on Addiction and Substance Abuse at Columbia University, *No Safe Haven: Children of Substance-Abusing Parents* at 5 (1999).

¹²⁴ *Id.* at 36–37 (quoting National Center on Addiction and Substance Abuse at Columbia University, *No Safe Haven: Children of Substance-Abusing Parents* at 165 (1999)).

¹²⁵ Mark F. Testa & Brenda Smith, *Prevention and Drug Treatment*, 19 THE FUTURE CHILDREN 147, 162 (2009).

treatment—issues that are often obscured by a focus on substance use.¹²⁶ This study also suggested that substance use or even chemical dependence alone is not a sufficient reason for family court intervention.¹²⁷ Mark Hardin, former Director of Child Welfare at the American Bar Association's Center on Children and the Law, would agree, as he has stated:

[M]any people in our society suffer from drug or alcohol dependence, yet remain fit to care for a child. An alcoholic or drug dependent parent becomes unfit only if the dependency results in mistreatment of the child, or in a failure to provide the ordinary care required for all children.¹²⁸

Child welfare policies developed as a response to the War on Drugs bring more families into contact with child protective services, often needlessly. In Sarah's case, for example, the consequence of losing custody of her child, despite her demonstrated ability to care for her, was disproportionate to her screening positive for THC. A positive drug test cannot determine whether a person occasionally uses a drug, is addicted, or suffers any physical or emotional disability from that drug use or addiction.¹²⁹

C. The Child Welfare System's Ability to Assess, Evaluate, & Treat Substance Use Disorders

The studies addressing a possible correlation between drug use and child abuse and neglect have found that drug use as an entry point into the child welfare system often masks other co-occurring factors—such as depression, social isolation, homelessness, or domestic violence—that may be more directly responsible for potential child maltreatment. Child welfare interventions to evaluate, assess, and proscribe treatment for drug use should be attending to these other factors, but evidence suggests that they fall short.¹³⁰ One study that looked specifically at characteristics of mothers in substance abuse treatment found that those who had been involved in the child welfare system had an overall lower level of addiction severity, but had more problems related to economic stabil-

¹²⁶ STEPHANIE TAPLIN & RICHARD P. MATTICK, NAT'L DRUG & ALCOHOL RES. CTR., TECHNICAL REP. NO. 320, CHILD PROTECTION AND MOTHERS IN SUBSTANCE ABUSE TREATMENT 72 (2011).

¹²⁷ *Id.*

¹²⁸ AM. B. ASS'N, FOSTER CARE PROJECT, NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, FOSTER CHILDREN IN THE COURTS 206 (Mark Hardin ed. 1983).

¹²⁹ *Supra* note 122, at 33 n.45.

¹³⁰ Testa & Smith, *supra* note 125, at 152.

ity.¹³¹ It also noted that, given their more severe employment and economic problems, it may be difficult for child-welfare involved mothers to achieve long-term recovery in the absence of services directed at improving their ability to become self-supporting.¹³²

Child welfare laws addressing child abuse and neglect define “substance abuse” differently than drug treatment professionals. Drug treatment professionals look at parental drug use in terms of current use, lifetime use, abuse, or dependence, and measure these terms using uniform screening questions, such as those found in the Composite International Diagnostic Interview-Short Form (CIDI-SF).¹³³ Furthermore, drug professionals use “substance use disorder” to refer to detrimental or debilitating use of specific substances as compared to what is indicated from a single positive test or self-reported drug history.¹³⁴ In the child welfare system, however, parental drug use is measured far differently and less uniformly, and all illegal substances are considered to have the same effect on parenting. For example, parental drug use may be defined more often by impressions of caseworkers provided in phone surveys or by references to case files and progress notes instead of by parents’ scores on standardized measures such as the CIDI-SF. In research comparing reports of prevalence of parental substance abuse or current drug use to more standardized measures of drug abuse and dependency, findings suggest that only one-fourth of users of alcohol and other drugs who come to the attention of child protective services authorities present serious enough problems to warrant the designation defined by the DSM-V.¹³⁵

There are drug-using parents who do suffer from substance use disorder, and require interventions and treatment in order to successfully care for their children. These parents and their children, like Dottie and her son, would benefit from thoughtful, medically-appropriate services. Research on the issue of parents with substance use disorders, however, has established that, to date, child protective practices have not proved effective in identifying parental drug use problems among families in the child welfare system or in preventing subsequent maltreatment allega-

¹³¹ Christine E. Grella et al., *Do Drug Treatment Services Predict Reunification Outcomes of Mothers and their Children in Child Welfare?*, 36 J. SUBSTANCE ABUSE TREATMENT 278, 280 (2009).

¹³² *Id.* at 290.

¹³³ Gavin Andrews et al., *The World Health Organization Composite International Diagnostic Interview Short-Form (CIDI-SF)*, 7 INT’L. J. METHODS PSYCHIATRIC RES., 171 (1998).

¹³⁴ Am. Psychiatric Ass’n, *Substance-Related and Addictive Disorders*, <http://www.dsm5.org/documents/substance%20use%20disorder%20fact%20sheet.pdf>.

¹³⁵ Testa & Smith, *supra* note 125, at 149.

tions once families are investigated for child maltreatment.¹³⁶ Although identifying drug use problems and substance abuse treatment needs requires effort beyond simply asking caregivers about substance abuse, “child welfare caseworkers generally receive little to no training in how to recognize or assess such disorders.”¹³⁷

When substance abuse is indicated among drug-using parents, evidence also shows that child protective services is ineffective at linking drug-using parents to appropriate substance abuse services and treatment.¹³⁸ A study focusing on parents with substance use disorders found that only half actually received treatment; a significant percentage were offered treatment and never received it, and others were never offered treatment at all.¹³⁹

Of the parents who do enter substance abuse treatment through the child welfare system, few complete it. An Oregon-based study found that both before and after implementation of ASFA, only about one-third of mothers involved with the child welfare system who entered substance abuse treatment completed their first treatment episode; only about half completed any treatment episode within a three-year observation window. In 2016, another study revealed that, among drug-using parents with children in foster care mandated to complete drug treatment, only 22 percent did so.¹⁴⁰

Concerned with the low rates of mandated drug treatment completion, as well as corresponding consequences such as termination of parental rights or increased periods of time that children spend in foster care, researchers have looked at children whose caregivers were mandated to attend substance abuse treatment.¹⁴¹ The researchers tracked these caregivers’ participation and compliance for eighteen months.¹⁴² At the conclusion of their study, the data showed “no correlation between caregivers’ treatment compliance and subsequent child maltreatment.”¹⁴³ These findings, according to researchers, raised serious questions about

¹³⁶ Jeanne C. Marsh et al., *Integrated Substance Abuse and Child Welfare Services for Women: A Progress Review*, 33 CHILD AND YOUTH SERVICES REV. 466, 468; 471 (2011); Christine E. Grella et al., *Mothers in Substance Abuse Treatment: Differences in Characteristics Based on Involvement with Child Welfare Services*, 30 CHILD ABUSE & NEGLECT 55, 69 (2006).

¹³⁷ Emmeline Chuang et al., *Identifying the Substance Abuse Treatment Needs of Caregivers Involved with Child Welfare*, 45 J. SUBSTANCE ABUSE TREATMENT 118, 118 (2013).

¹³⁸ See e.g. Testa & Smith, *supra* note 125, at 155; Marsh et al., *supra* note 136, at 468; Grella et al., *supra* note 131, at 280.

¹³⁹ Testa & Smith, *supra* note 125, at 154.

¹⁴⁰ Sam Choi & Joseph P. Ryan, *Completing Substance Abuse Treatment in Child Welfare: The Role of Co-Occurring Problems and Primary Drug of Choice*, 11 CHILD MALTREATMENT 313, 317 (2006).

¹⁴¹ Testa & Smith, *supra* note 125, at 155.

¹⁴² *Id.*

¹⁴³ *Id.*

whether mandated treatment can prevent subsequent maltreatment and whether the treatment is of sufficient quality to help parents. They also suggest that child welfare caseworkers may rely too heavily on indications of caregiver treatment compliance and give too little attention to family functioning and other indicators of child safety.¹⁴⁴

Years of research on drug-using parents and the impacts of substance exposure and drug use on children, as well as the effectiveness of mandated services for parents, demonstrates that drug policies in the child welfare system, like those in the criminal justice system, are based upon outdated science and uninformed assumptions about the nature of drug use, dependence, and harm. Furthermore, child protective services' punitive responses to parental drug use are proven to be as unsuccessful as mass incarceration, government supervision, and coercive treatment at achieving the goals of health and safety—or “winning” the War on Drugs.

III. WHY CHILD WELFARE REFORM IS MISSING FROM THE DRUG POLICY REFORM MOVEMENT

With such striking similarities regarding how the War on Drugs has impacted individuals and families involved in the criminal justice and child welfare systems, and increasingly emerging needs for evidence-based policies that focus on prevention and treatment rather than punishment and supervision, it follows that child welfare advocates should take part in the drug policy reform movement and add their voices to the cause for change. So why have they not?

The drug policy reform movement consists of more than lawmakers, organizations, and constituents demanding changes to drug laws and policies; it also exists to increase awareness of the costs associated with disproportionately punitive responses to drug offenses and introduce nuance to public perceptions on appropriate drug laws. Throughout the history of the drug war, popular media has had a measurable effect on common understanding of illegal drugs and who they involve; that understanding, in turn, has impacted elected officials' political platforms and the policies they go on to support.

A. *The Drug Offender's Evolved Narrative*

In the 1980s, major television networks offered evening segments on crack cocaine, showing dramatic footage of black and Latino men being carted off in chains or of police breaking down so-called “crack house” doors.¹⁴⁵ Leading news magazines, including *Time* and *Newsweek*, de-

¹⁴⁴ *Id.* at 155.

¹⁴⁵ Harry G. Levine & Craig Reinerman, *The Crack Attack: Politics and Media in the Crack Scare*, in *CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE* 18, 20 (Craig Reinerman & Harry G. Levine eds., 1997).

voted five cover stories to crack and the “drug crisis” in 1986 alone.¹⁴⁶ News shows, such as *48 Hours*, aired specials like, “48 Hours in Crack Street,” advertising the program as a trip into the war zone—the war zone being a blighted neighborhood where drug dealers dwell.¹⁴⁷ This ever-present news cycle portraying crack cocaine and other drugs as a plague that was “eating away at the fabric of America” exacerbated a growing belief that “‘drugs’, especially crack, threatened all of the central institutions in American life—families, communities, schools, businesses, law enforcement, and even national sovereignty.”¹⁴⁸ The cultivators of this plague were selfish, morally corrupt drug addicts and peddlers; their victims were hard working, upstanding taxpayers who deserved to be delivered through “law and order.”

But over time, as more punitive drug policies overwhelmed police precincts, courtrooms, and prisons, these stories began to change, ever so slightly. Instead of hyperbolic headlines featuring drug-dealing and drug-using monsters, real-life stories became more frequently highlighted as a means to illustrate just how devastating an impact the enforcement model has had on individuals who come into contact with the criminal justice system. For example, popular newspapers and magazines have taken a candid look at low-level drug offenders who, because of mandatory minimum sentencing for drug offenses, find themselves in prison for most, if not all, of their lives. A piece in a 2015 issue of *Mother Jones* focused on Fate Vincent Winslow, a man sentenced to life imprisonment with no chance for parole for selling two “dimes” of marijuana to an undercover cop,¹⁴⁹ the *Washington Post* recently told the tale of Bruce Harrison, who is serving a fifty-year sentence for getting caught up in a drug sting in exchange for \$1,000.¹⁵⁰

The drug policy reform movement has given rise to advocacy organizations as well as politically savvy blogs that highlight testimonials from individuals and family members caught up in the criminal justice system due to drug addiction or criminal offenses involving the drug trade, using their collective strength to challenge mandatory minimum sentencing and increase opportunities for clemency.¹⁵¹ The media has

¹⁴⁶ *Id.*

¹⁴⁷ REEVES & CAMPBELL, *supra* note 19, at 176.

¹⁴⁸ Levine & Reinerman, *supra* note 145, at 21.

¹⁴⁹ Bryan Shatz, *Waiting to Die in Prison – for Selling a Couple of Bags of Pot*, MOTHER JONES (July/Aug. 2015), <http://www.motherjones.com/politics/2015/05/life-sentence-marijuana-pot-prison-commuted>.

¹⁵⁰ Sari Horwitz, *The Painful Price of Aging in Prison*, WASH. POST (Mar. 2, 2015), <http://www.washingtonpost.com/sf/national/2015/05/02/the-painful-price-of-aging-in-prison/>.

¹⁵¹ *See, e.g.*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/> (last visited Aug. 27, 2015); THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/index.cfm> (last visited Aug. 27, 2015).

gravitated toward these stories and ensured that more drug offender “victims” become household names. For example, when President Obama issued his most recent commutations of prison sentences, the *Washington Post* published the names and brief histories of the individuals impacted.¹⁵²

The New Yorker and *The Atlantic*, well-regarded for their even-handed reporting on stories involving the public interest, have featured profiles of sympathetic individuals who make up the nation’s non-violent, drug-offending prison population, but more often have introduced stories of lesser-known but equally compelling features of the War on Drugs, such as civil forfeiture and government recruitment of confidential informants.¹⁵³ These profiles increasingly bridge the gap between “upstanding Americans” and drug offenders, who had always been perceived as the “other.”

Along with print media, television programming has evolved since the early reporting about drug offenders and their seemingly well-deserved criminal consequences. The 1986 CBS News ratings grab, “48 Hours on Crack Street,” evolved in 2000 into *Frontline*’s two-part investigation, *Drug Wars*, exploring how the “battle has altered our criminal justice system, put millions of people in jail, and created a multibillion dollar, global drug industry.”¹⁵⁴ The 1980s drama *Miami Vice* nurtured the belief that South Florida was teeming with drug lords armed with more guns than most third-world armies, and cable television of the 1990s introduced the cop reality genre with shows like *Dallas SWAT* and *SWAT U.S.A.*, which emphasized confrontation and celebrated a culture of police militarization in the face of criminal drug offenders.¹⁵⁵ However, these portrayals of drug lords and almighty police were tempered when *The Wire* and *Breaking Bad* came on the scene, providing far more nuanced and empathy-inspiring scenarios to contend with: Hamsterdam, a successful if politically devastating legalized drug zone in inner-city Baltimore, and a chemistry-teacher-turned-drug-lord’s family’s balance of their fear and anger toward him with an ever-present realization of the consequences of involving law enforcement.

The wisdom and voices of those affected by drug laws and their punishments, as well as their portrayals through popular fictional characters,

¹⁵² *Here are the 46 People Whose Sentences Obama Just Commuted*, WASH. POST (July 13, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/07/13/here-are-the-46-people-whose-sentences-obama-just-commuted/>.

¹⁵³ Stillman, *supra* note 20; Sarah Stillman, *The Throwaways: Police Enlist Young Offenders as Confidential Informants. But the Work is High-Risk, Largely Unregulated, and Sometimes Fatal*, THE NEW YORKER (Sept. 3, 2012), <http://www.newyorker.com/magazine/2012/09/03/the-throwaways>.

¹⁵⁴ Gloria Goodale, ‘*Frontline*’ Investigates a 30-Year Battle: The Drug War, CHRISTIAN SCI. MONITOR (Oct. 6, 2000).

¹⁵⁵ BALKO, *supra* note 34, at 305–06.

have been effective in challenging mainstream assumptions about appropriate responses to those who use, deal, and manufacture drugs. Moreover, these personal, real-world experiences have helped establish a deeper connection with the scientists, researchers, public health scholars, and others who contribute to public policy; they have allowed elected officials to evolve on drug laws. Formerly incarcerated persons have helped reform mandatory minimum sentences. Families who have lost loved ones to drug overdose have helped pass laws to save future lives. Patients diagnosed with painful disease and debilitating disorders have helped researchers reveal the medical benefits of marijuana. As Tony Newman of the Drug Policy Alliance (DPA) has said, “If the people lead, the leaders will follow.”¹⁵⁶

The DPA has been a formidable leader in the drug policy reform movement for more than a decade, assembling a diverse coalition to use their experiences in the War on Drugs to call for significant changes to drug laws. In fact, in 2013, the DPA published a comprehensive federal legislative guide entitled, “An Exit Strategy for the Failed War on Drugs.”¹⁵⁷ This guide outlines seventy-four distinct recommendations for federal legislative reforms that will take significant steps to reduce both the harms of drug misuse and the collateral damage of U.S. drug policies.¹⁵⁸ These recommendations span a wide spectrum of issue areas: civil rights, enforcement and sentencing, reentry, prevention and treatment; however, specific reforms with respect to the child welfare system are noticeably missing.¹⁵⁹

B. The Drug-Using Parent’s Stagnant Narrative

Mass media in the 1980s and 90s, as it related to crack cocaine and strengthening the War on Drugs, did not limit its stories to a bird’s eye view of urban neighborhoods in crisis or over-developed character analyses of drug lords and their minions. In addition to covering the new so-called drug epidemic and communities in turmoil, numerous stories emerged about babies exposed to crack cocaine before they were born. Newspapers and television news shows “provided a steady diet of powerful images of inner-city neighborhoods with emaciated crack addicts and nurseries filled with premature infants screaming and shaking from cocaine withdrawal.”¹⁶⁰ Some of the headlines generated during this time

¹⁵⁶ Drug Policy All., *More Nails in the Drug War Coffin: Top Stories of 2014* (Dec. 16, 2014), <http://www.drugpolicy.org/blog/more-nails-drug-war-coffin-top-stories-2014>.

¹⁵⁷ Drug Policy All., *An Exit Strategy for the Failed War on Drugs: A Federal Legislative Guide* (May 16, 2013), <http://www.drugpolicy.org/exitstrategy>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Laura E. Gómez, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 15 (1997).

include, “Cocaine: A Vicious Assault on a Child,” “Crack’s Toll Among Babies: A Joyless View,” and “Studies: Future Bleak for Crack Babies.”¹⁶¹ These stories helped fuel a political movement not only to jail drug users, but also to take away their children.

During presidential campaigns in the 1990s, candidates Ross Perot and Bob Dole made references to the plight of “crack babies.”¹⁶² Rudolph Giuliani, during his tenure as Mayor of New York City, also bolstered a growing conviction that prenatal exposure to crack cocaine and other drugs was a burgeoning social problem, saying, “[w]e must change the ill-advised rule that a child born with drugs in its system is not considered an abuse victim, even though the child’s mother totally abandoned her responsibility by using drugs in the last weeks of her pregnancy.”¹⁶³

As hyperbolic headlines and political speeches about substance-exposed infants grew in number, the public began to direct its anger and indignation at women who chose to have children despite having a drug problem. The growing demonization of drug-using mothers made it easier not only to justify their arrest and criminal prosecution, but also to develop punitive child welfare interventions. Moreover, the burgeoning narrative of criminal, drug-using pregnant women diverted society’s attention from the underlying issues contributing to chemical dependency and child maltreatment: poverty, underfunded school systems, inadequate health care, and a severe lack of substance abuse treatment services.

Of course, not long after this media and political frenzy began, new research demonstrated that the “crack baby” crisis was greatly exaggerated and, in fact, the outcomes were not so hopeless for children of drug-using mothers. As these babies grew up, they were featured in stories that tried to dislodge previous understanding about the effects of prenatal substance exposure.¹⁶⁴ Children exposed to crack cocaine in the womb were portrayed as thriving: a far cry from the dismal futures they were expected to realize.¹⁶⁵ These counter-stories, however, did not have the widespread reach or sensationalizing impact of those that came before.

¹⁶¹ Liz Cox Barrett, *The Epidemic That Wasn’t (Even if We Said it Was)*, COLUM. JOURNALISM REV. (Jan. 27, 2009), http://www.cjr.org/the_kicker/the_epidemic_that_wasnt_even_i.php.

¹⁶² Gómez, *supra* note 160, at 3.

¹⁶³ Rudolph Giuliani, Mayor of New York City, State of the City (Jan. 11, 1996), <http://www.nyc.gov/html/records/rwg/html/96/city.html>.

¹⁶⁴ Gómez, *supra* note 160, at 18.

¹⁶⁵ Antwaun Garcia, *They Called Me a ‘Crack Baby,’* YOUTH COMM. (2004), <http://www.youthcomm.org/story/id/FCYU-2004-03-10a.html>; Susan Okie, *The Epidemic That Wasn’t*, N.Y. TIMES, Jan. 26, 2009, at D1, http://www.nytimes.com/2009/01/27/health/27coca.html?hp&_r=0; Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, PMC (2008), <http://www.ncbi.nlm.nih.gov/pubmed/11268270>.

While it was important to the media that one-time “crack babies” be reimagined in a more fact-based and empathetic light, the rhetoric surrounding their mothers’ stories continued unabated. The same narrative of “bad mom, helpless infant” still remains to support the arrest and prosecution of women for having used an illegal drug during pregnancy; it is also used to support allegations of child abuse, placement of children in foster care, and termination of parental rights. The blame directed at pregnant women and mothers for causing harm to their children underscores a commonly-held assumption that child welfare intervention and foster care placement constitute the best, and safest, course of action for drug-using parents and their children.

Public concern regarding the War on Drugs’ influence on mass incarceration, unfair sentencing laws, overbroad police practices, and diminished civil rights protections has grown over the last two decades. Although these issues have been increasingly illuminated in recent popular culture, when it comes to mothers, or parents more generally, who use drugs and come into contact with the child welfare system as a result of overly punitive drug policies, media portrayals and public perceptions have continued to present a troubling picture—one that fails to account for a disproportionate impact on poor families and communities of color.

As recently as a decade ago, media coverage of methamphetamine use consistently referred to “ice babies” and “meth babies,” using hyperbole instead of facts. Borrowing from 1980s reporting methods, “one Fox News station warned that ‘meth babies’ ‘could make the crack baby look like a walk in the nursery.’”¹⁶⁶ Just in the last few years, news coverage has described an epidemic of “oxytots,” referring to infants born with prescription opioids, like OxyContin, present in their systems.¹⁶⁷ These media outlets not only coin stigmatizing, pejorative terms for infants who, despite being exposed to illegal substances, are born without defect or with treatable syndromes, but also insist that they are born “addicted” to these drugs.¹⁶⁸ Addiction is a technical term that refers to compulsive behavior that continues despite adverse consequences; by

¹⁶⁶ David C. Lewis et al., *Open Letter From Doctors, Scientists, and Specialists, Urging Major Media Outlets Not to Create “Meth Baby” Myth*, NAT’L. ADVOCATES FOR PREGNANT WOMEN (July 27, 2005), <http://advocatesforpregnantwomen.org/%2522Meth%2522%20Open%20Letter%20-%20202005.pdf>.

¹⁶⁷ Laura Huss & Kylee Sunderlin, *The Mythology of “Addicted Babies:” Challenging Media Distortions, Laws, and Policies that Fracture Communities*, 86 DIFFERENT TAKES 2 (2014), https://www.scribd.com/fullscreen/241702225?access_key=key-8FZTgHn3sccC2P92eT0h&allow_share=true&escape=false&show_recommendations=false&view_mode=scroll.

¹⁶⁸ *Id.*

definition, babies cannot be addicted to methamphetamine, opioids, or anything else.¹⁶⁹

These stories continuing to blame selfish mothers who wreak havoc on their babies' delicate systems, like the crack baby narratives, have served to warrant an increase in arrests or forced interventions of pregnant women and mothers since 2005,¹⁷⁰ when other drug-related prosecutions began to taper off.¹⁷¹ As popular media's appraisal of drug-using mothers remains unchanged, no collective voice has emerged to offer a counter-illustration; no constituency gives permission to its elected leaders to propose alternative legislation.

The drug policy reform movement has been successful in capitalizing on a reframed image of drug-offenders as victims of disproportionately punitive drug laws. Their efforts have not yet introduced similar nuance to stories involving drug-using mothers whose children are in foster care. If the inaccurate myths about families involved in the child welfare system have kept parent-specific drug policies from evolving as part of the drug policy reform movement, what has prevented the public's perceptions about substance exposure and parental drug use from changing?

1. The Child Welfare System's Private, *Pro Se* Proceedings

Generally speaking, the child welfare system operates in secrecy. That is, while most civil and criminal proceedings are open to the public, and can become fodder for court TV or "ripped from the headlines" plots on *Law and Order*, family and juvenile courtrooms are often closed, particularly when the health or safety of children is at issue. Some state courts have routinely tried to shut down the reporting of family courtroom business, even from the parties themselves.¹⁷² In fact, most states do not make child welfare court hearings and records available to the

¹⁶⁹ David C. Lewis et al., *Top Medical Doctors and Scientists Urge Major Media Outlets to Stop Perpetuating "Crack Baby" Myth*, NAT'L. ADVOCATES FOR PREGNANT WOMEN (Feb. 25, 2004), <http://www.advocatesforpregnantwomen.org/articles/crackbabyltr.htm>.

¹⁷⁰ Libby Copeland, *Oxytots: Instead of Learning from the Unfounded Hysteria of the Crack Baby Era, We're Repeating It*, SLATE (Dec. 7, 2014), http://www.slate.com/articles/double_x/doublex/2014/12/oxytots_and_meth_babies_are_the_new_crack_babies_bad_science_and_the_rush.html.

¹⁷¹ Evan Perez, *Attorney General Eric Holder Sees Success in Fewer Drug Prosecutions*, CNN (Feb. 17, 2015), <http://www.cnn.com/2015/02/17/politics/attorney-general-eric-holder-drug-sentencing-prosecutions/>; Christopher Ingraham, *After Legalization, Colorado Pot Arrests Plunge*, WASH. POST (Mar. 26, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/03/26/after-legalization-colorado-pot-arrests-plunge/>.

¹⁷² Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 33 (2010); William Glaberson, *New York Family Courts Say Keep Out, Despite Order*, N.Y. TIMES, Nov. 18, 2011, at A1.

public or media.¹⁷³ Unless one has been involved in the child welfare system as a respondent, a child, or an advocate, it is an experience that remains unknown.¹⁷⁴ Whereas bold, rights-based organizing takes place on behalf of individuals and communities fighting against unjust drug policies in the criminal justice system, child welfare proceedings receive little attention from the public or from well-organized advocacy groups.

Unlike criminal cases, where defendants have the right to counsel guaranteed by the Sixth Amendment to the Constitution, no absolute federal constitutional right to counsel exists for parents involved in child welfare cases.¹⁷⁵ While many states provide counsel to parents in dependency and termination proceedings—some through institutional providers that provide high quality, holistic representation to parents—not all do so, and some limit their appointments to parents facing termination of parental rights hearings.¹⁷⁶ Even where states provide for the appointment of counsel for parents in child welfare matters, a number of challenges remain. In some jurisdictions, judges may appoint parents' counsel at their discretion; in others, even if appointment of counsel is mandatory, parents have inadequate remedies available when such a right is denied.¹⁷⁷ These shortcomings result in an underdeveloped record—one that is unlikely to detail the parents' interests or participation in the process, but also that is lacking the inclusion of the parents' defenses, through memorialized stories and experiences.¹⁷⁸

In addition to the fragility of parents' right to counsel nationwide, the inability to provide zealous advocacy and significant systemic shortcomings prevent many attorneys representing parents from engaging in a robust motions practice, engaging expert witnesses for hearings and trials, and bringing appellate challenges as a means to interpret law and change policies.¹⁷⁹ High caseloads and low pay, particularly in jurisdictions that lack institutional providers, allow poor child protective practices to continue at status quo. And, unfortunately for parents who are brought into court on abuse and neglect allegations based on drug use and cannot afford counsel, sophisticated legal arguments, expert testimony on updated research, and successful appeals are the best—and perhaps only—means to effectuate systemic change and change perva-

¹⁷³ Fraidin, *supra* note 172, at 30.

¹⁷⁴ Transcript, *Project Prevention, Child Welfare, and Junk Science* at 12 (Nov. 19, 2013) https://www.opensocietyfoundations.org/sites/default/files/project-prevention-child-welfare-and-junk-science-20131119_0.pdf.

¹⁷⁵ Vivek S. Sankaran, *Protecting a Parent's Right to Counsel in Child Welfare Cases*, 13 MICH. CHILD WELFARE L. J. 2, 3 (2009), http://chanceatchildhood.msu.edu/pdf/CWLJ_fa09.pdf.

¹⁷⁶ *Id.* at 4.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 5.

sive misperceptions about drug-using parents by making their experiences more accessible.¹⁸⁰

2. The Selfish Mother

While legal advocacy-oriented organizing in the criminal justice system has helped develop new policies that lessen punitive responses and reframe common misperceptions about drug users, dealers, and “criminals,” it is important to note that the reimagined victim of the drug war is, more often than not, male. This image is reinforced by popular media like *The Wire* and *Breaking Bad*, where addicts, “hoppers,” and kingpins are almost always men and boys. But, as studies on drug policies’ impacts accumulate, and are underscored by individuals’ stories, it is becoming clear that women’s lives are disproportionately affected by the War on Drugs. In the past four decades, the incarceration rate of men doubled; but, for women it rose nine-fold, due in great part to overly punitive drug laws.¹⁸¹

Women, particularly women of color, and mothers are especially impacted by drug laws that punish those unwilling to become confidential informants, by policies that preclude people with drug convictions from seeking public assistance and other benefits, and by a network of substance abuse treatment programs that are designed for men.¹⁸² Additionally, they are affected by the social stigma that follows these interventions. In *The New Jim Crow*, Michelle Alexander writes that “many offenders will tell you that the formal mechanisms of exclusion are not the worst of it. The shame and stigma that follows you for the rest of your life—that is the worst.”¹⁸³ For women and mothers who have served time in prison for drug-related offenses, as well as for those who have been found to be abusive or neglectful based on drug-use allegations, the shame and stigma is exacerbated by narratives depicting their children as “victims” of drug-using mothers. As a result, women are doubly punished by drug war policies: for drug violations and offenses and for being morally corrupt, “bad” mothers.

There have been far fewer popular media depictions of drug-using women than men as the unjust targets of harmful drug war policies. Female crack users were subjected to sexualized stereotypes claiming a link between prostitution and illegal drug use.¹⁸⁴ They were associated with female addictive behavior that, according to some misguided

¹⁸⁰ *Id.* at 3.

¹⁸¹ KASIA MALINOWSKA-SEMPRUCH & OLGA RYCHKOVA, OPEN SOCIETY FOUNDATION, *THE IMPACT OF DRUG POLICY ON WOMEN* 7 (2015), <https://www.opensocietyfoundations.org/reports/impact-drug-policy-women>.

¹⁸² DRUG POLICY ALL., *Women and Gender in the Drug War*, <http://www.drugpolicy.org/women-and-gender-drug-war> (last visited Aug. 27, 2015).

¹⁸³ ALEXANDER, *supra* note 15, at 161.

¹⁸⁴ SUSAN C. BOYD, *FROM WITCHES TO CRACK MOMS* 212-13 (2004).

myths, manifests in “sexual activity, under any circumstances, in private or in public, and with multiple partners of either sex.”¹⁸⁵

As the so-called crack epidemic was documented in news stories, female drug users were singled out as “presenting special concerns.”¹⁸⁶ In addition to the alleged link between drug use and prostitution or promiscuity, another theme suggested that using crack cocaine destroyed women’s “maternal instinct.”¹⁸⁷ From these notions came an understanding that women who use drugs are willing to do anything to obtain and use drugs, including selling their bodies and endangering their children.¹⁸⁸

The media reported on sensational stories of crack-dependent women and mothers, implying that they were representative of all female drug users. For example, a 1992 profile of a woman named Vickie Lynn Alexander was widely publicized as “a sad symbol of a lingering national crisis.”¹⁸⁹ Ms. Alexander had lost three newborn infants and given birth to six children who tested positive for cocaine at birth.¹⁹⁰ She had a lengthy arrest record, and a police detective assigned to her case said, “[e]very time we see that bitch, she’s pregnant and she’s still trickin.”¹⁹¹ Not only did Ms. Alexander’s portrayal confirm ideas of promiscuity and lost maternal instinct, it also named a perpetrator for a social epidemic that left communities broken and children helpless: women who use drugs.

Popular culture of the moment seized upon this new villain, through movies and television illustrating inner-city life impacted by drugs. In *Sugar Hill*, the protagonist Roemello Skuggs’ mother is introduced to heroin, and soon becomes an addict and a neglectful mother. Roemello and his brother Raynathan suggest that her drug use has made them “crazy.”¹⁹² *Boyz in the Hood* includes a scene where a baby is nearly hit by a car. When a male character, Tre, saves the child and brings him to the mother’s door, she is dirty and unkempt. As she takes the baby from Tre, she asks, “[y]ou got some blow?”¹⁹³ And the movie *Losing Isaiah*, which documents an adoption struggle between a poor African-American mother and a well-to-do white nurse, opens with a scene in which the mother puts her young son in a dumpster and leaves to solicit someone

¹⁸⁵ Natasha Du Rose, *THE GOVERNANCE OF FEMALE DRUG USERS: WOMEN’S EXPERIENCES OF DRUG POLICY* 30 (2015).

¹⁸⁶ Gómez, *supra* note 160, at 15.

¹⁸⁷ *Id.* at 15–16.

¹⁸⁸ *Id.* at 16.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *WOMEN AND THE MEDIA: DIVERSE PERSPECTIVES* 98 (Jane Campbell & Theresa Carilli eds., 2005).

¹⁹³ *Id.*

for crack. Through each of these scenes, drug-using, hyper-sexualized mothers are held to blame for their communities' woes.¹⁹⁴

An increasingly dark media portrayal of female drug users helped fuel legislative interest in pregnant women's use of illicit drugs and the criminal prosecution of their actions. Even while the drug reform movement is advocating for alternative responses to drug offenses—responses that ensure fewer people are arrested for low-level crimes and more are offered diversion programs or treatment—there continues to be a wave of arrests and prosecutions of women whose infants were prenatally exposed to controlled substances. In Mississippi, when a teenaged Rennie Gibbs experienced a stillbirth, her doctors told law enforcement that she had tested positive for cocaine while pregnant. She was charged with depraved heart murder, which carries a possibility of life imprisonment.¹⁹⁵

Astasia Clemons, an Ohio resident, gave birth to a healthy baby girl who nonetheless tested positive for THC, oxycodone, and morphine, and was charged with two counts of a felony crime: corrupting another with drugs.¹⁹⁶ Amanda Kimbrough's and Hope Ankrom's convictions for the crime of chemical endangerment, for ingesting illegal drugs during their pregnancies, were upheld by the Supreme Court of Alabama.¹⁹⁷ Tennessee¹⁹⁸ enacted a law that allows pregnant women to be charged with assault if they have a pregnancy complication after using drugs.¹⁹⁹ North Carolina²⁰⁰ and Oklahoma²⁰¹ offered up similar bills criminalizing drug use during pregnancy in the 2015 legislative session.²⁰²

¹⁹⁴ *Id.* at 96–98.

¹⁹⁵ Nina Martin, *A Stillborn Child, A Charge of Murder and the Disputed Case Law on 'Fetal Harm,'* PROPUBLICA (Mar. 18, 2014), <http://www.propublica.org/article/stillborn-child-charge-of-murder-and-disputed-case-law-on-fetal-harm>.

¹⁹⁶ Brief of Amici Curiae in Support of Appellant Astasia Clemons, Ohio v. Astasia Clemons, 2013 Ohio 3415 (Ohio Ct. App. 2013) (No. 12 CA9), <http://advocatesforpregnantwomen.org/Brief%20of%20Amici%20Medical%20and%20Public%20Health%20Experts.pdf>.

¹⁹⁷ Imani Gandy, *Hope Ankrom and Amanda Kimbrough: Victims of Alabama's Personhood Agenda,* REWIRE (Jan. 18, 2013), <http://rhrealitycheck.org/article/2013/01/18/hope-ankrom-and-amanda-kimbrough-victims-alabama-supreme-courts-zeal-to-protect-u/>.

¹⁹⁸ S.B. 1391, 108th Gen. Assemb. 2014 Tenn. Pub. Acts 820

¹⁹⁹ Rosa Goldensohn & Rachael Levy, *The State Where Giving Birth can be Criminal,* THE NATION (Dec. 10, 2014), <http://www.thenation.com/article/state-where-giving-birth-can-be-criminal/>.

²⁰⁰ S.B. 297, Gen. Assemb. (N.C. 2015).

²⁰¹ S.B. 559, 54th Leg. (Okla. 2015).

²⁰² See Chavi Khanna Koneru, *New Bill Would Criminalize Drug Use by Pregnant Women,* THE PROGRESSIVE PULSE BLOG (Mar. 18, 2015), <http://pulse.ncpolicywatch.org/2015/03/18/new-bill-will-criminalize-drug-use->

Although some media sources have tried to humanize women who have been prosecuted for their drug use and suggest a more public health-focused response, they are met with comments like, “[d]oing drugs during pregnancy not only ruins that child's future, but the cost continues to be paid by society—special ed, crime, lost productivity” and “[s]eems to me, given a woman's current ability to avoid becoming pregnant, she has the obligation to choose, either pregnancy or drug highs.”²⁰³ A popular Netflix series, *Orange is the New Black*, is the first to try and introduce realities of female drug offenders as sympathetic, with complicated backgrounds that contribute to their interaction with law enforcement. Critics of the show, however, have noted that it “underrepresents the nonviolent, low-level drug offenders, mothers, and abuse victims who dominate [our] prisons.”²⁰⁴

This longstanding narrative depicting drug-using women and mothers as worthy of blame, which is highlighted by both the “[p]rosecution of women for drug-related offenses . . . rarely takes into account the reasons why women may be involved with drugs in the first place, which may include pressure from a sexual partner, histories of domestic violence or other abuse, lack of mainstream livelihood opportunities, and a lack of accessible treatment programs and related social support.”²⁰⁵ Despite fitting into the same family of drug reforms as legalization, decriminalization, and diversion programs, policies that might address gender-specific issues and needs are stalled by the negative ideologies relating to drug-using women and mothers, whether they are involved in the criminal justice system, the child welfare system, or both.

3. The Child Victim

In popular media's evolved narrative about sympathetic drug offenders, not only is the target of punitive policies often male, he is also considered to be a “nonviolent” adult whose alleged wrongdoing is “victimless” in nature. The term “non-violent drug offender” appeared in the *New York Times* in the late 1980s, and has been used hundreds of times throughout the last two-and-a-half decades to distinguish those convicted of and incarcerated for drug crimes from persons committing offenses

by-pregnant-women/. These bills have not passed yet, and thus far, only Tennessee has passed such a law.

²⁰³ Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES (Apr. 25, 2012)(Magazine),<http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html>.

²⁰⁴ Amos Irwin, *How 'Orange is the New Black' Misrepresents Women's Federal Prison and Why it Matters*, THE HUFFINGTON POST (June 24, 2015) http://www.huffingtonpost.com/amos-irwin/how-orange-is-the-new-black-misrepresents-womens-federal-prison-and-why-it-matters_b_7547334.html.

²⁰⁵ MALINOWSKA-SEMPRUCH & RYCHKOVA, *supra* note 181, at 8.

like assault, rape, and murder.²⁰⁶ This descriptor was not limited to newspaper stories: “non-violent offender” has been used in court since 1983,²⁰⁷ and on an increasingly frequent basis as of the mid-1990s, which coincided with the beginning of substantive drug policy debates.

As the legal and social environments associated with drug offenders incorporated ideas of non-violence, the imagined perpetrator changed from monster to victim of a sadistic system. In child welfare policy, however, no terminology exists that would indicate that allegations of child abuse or neglect may exist without harm or violence. And, even worse, the alleged harm or violence is believed to have been committed against a child.

During the 1980s and 90s, foster care populations surged partly due to fear of widespread crack and other illegal drug use, but also because of increasing skepticism of social programs.²⁰⁸ In 1980, Congress enacted the Adoption Assistance and Child Welfare Act, which allocated money for preventive and reunification services, requiring child protective services to focus on preventing the separation of families and expediting the return of children in care to their biological parents.²⁰⁹ The Act devoted funds to these priority areas instead of creating more financial incentives for foster care placements; however, the Reagan Administration refused to fund these programs.²¹⁰ By the mid-1990s, child welfare reform was focused on what to do about the huge numbers of foster children who remained in care for extended periods of time.²¹¹

When ASFA was introduced in Congress in 1997 as a way to resolve this foster care issue through efficient adoptions and easier means by which to terminate parental rights, child welfare reformers brought headlines to major media outlets to establish their case.²¹² Proponents of ASFA blamed the foster care surge on ideas of family preservation and an emphasis on reunification of children in foster care with their families, and used “children’s rights” as a way to highlight their advocacy on behalf of kids awaiting permanent homes.²¹³ Child Welfare Scholar Dorothy Roberts notes that, during this period, the *Washington Post* said that ASFA put “a new and welcome emphasis on the children,” and a columnist from Milwaukee went so far as to say that the law was “to the

²⁰⁶ See Opinion, *Fight Drugs with Work Camps*, N.Y. TIMES (Feb. 11, 1987), <http://www.nytimes.com/1987/02/11/opinion/fight-drugs-with-work-camps.html> (“nonviolent drug offender” appears in the New York Times).

²⁰⁷ *People v. Patrick*, 683 P.2d 801 (Colo. App. 1983).

²⁰⁸ MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 189 n. 19 (citing DUNCAN LINDSEY, THE WELFARE OF CHILDREN 65-66).

²⁰⁹ *Id.* at 188.

²¹⁰ *Id.* at 188 n.15 (citing Onora O’Neill, *Children’s Rights and Children’s Lives*, 98 ETHICS, 445, 447 (1988)).

²¹¹ *Id.* at 190.

²¹² Roberts, *supra* note 61, at 107

²¹³ *Id.*

abused and neglected children in our nation's foster care system what the Voting Rights Act was to black Americans in 1965."²¹⁴

Beyond headlines supporting ASFA's protection of children's rights, advocates also published stories of family preservation gone wrong. *When Home is Hell*, which appeared in the *Washington Post*, painted a dark picture of how drug-exposed children inevitably suffer when the child welfare system's prime objective is family preservation.²¹⁵ "[T]he real culprit," said the author of that piece, Douglas J. Besharov, "is wishful thinking about parents and the efficacy of treatment."²¹⁶

Even after ASFA passed into law, the media continued to highlight stories of children killed on child protective services' watch—stories that resulted more often in increased removals of children from their parents and prolonged periods of foster care than in intensive caseworker training, funding for parental representation, family court judges, or preventive services.²¹⁷ In 2006, it was reported that seven-year-old Nixmary Brown died in her parents' custody in Brooklyn, New York.²¹⁸ Although the family had come to the attention of New York's Administration for Children's Services (ACS) before, those allegations had been unsubstantiated or otherwise left uninvestigated. "Caseworkers Missed Chances to Save Nixmary"²¹⁹ and "Desperate Effort in Vain: School Worker Begged ACS to Save Abused Girl"²²⁰ were headlines that provoked even more outrage toward child protective services about all the kids the public believed were surely left behind in their abusive parents' homes. In the year that followed, ACS placed 7,200 children in foster care; they had placed fewer than 5,000 children in foster care the year prior to Nixmary Brown's death.²²¹

²¹⁴ *Id.*

²¹⁵ Douglas J. Besharov, *When Home is Hell: We are Too Reluctant to Take Children from Bad Parents*, WASH. POST (Dec. 1, 1996), <http://www.washingtonpost.com/archive/opinions/1996/12/01/when-home-is-hell/34830167-44e7-4e46-9eae-703ac279b4e4/>.

²¹⁶ *Id.*

²¹⁷ *See id.*

²¹⁸ Kareen Fahim & Leslie Kaufman, *Girl, 7 Found Beaten to Death in Brooklyn*, N.Y. TIMES (Jan. 12, 2006), <http://www.nytimes.com/2006/01/12/nyregion/12child.html?gwh=A71EFE5ECA13AFAA34E76CC37A74C3F4&gwt=pay>.

²¹⁹ Mike McIntire & Jim Rutenberg, *Caseworkers Missed Changes to Save Nixmary, Report Says*, N.Y. TIMES (Jan. 31, 2006), <http://www.nytimes.com/2006/01/31/nyregion/31agency.html?pagewanted=all>.

²²⁰ Tracy Connor et al., *Desperate Effort in Vain: School Worker Begged ACS to Save Abused Girl*, N.Y. DAILY NEWS (Jan. 25, 2008), <http://www.nydailynews.com/news/crime/desperate-effort-vain-school-worker-begged-ac-s-save-abused-girl-article-1.346123>.

²²¹ Kathleen Carroll & Andrew White, *Disorder and Delay: Family Court in Crisis*, CITY LIMITS (Jan. 14, 2008), <http://citylimits.org/2008/01/14/disorder-and-delay-family-court-in-crisis/>.

Just three years ago, the *Denver Post* initiated an eight-day investigative series entitled “Failed to Death,” posting stories and pictures about children who died while in child protective services’ custody.²²² More recent headlines, like “477 Child Deaths: How Florida Preserved Families but Lost Kids”²²³ and “786 Abused Kids Died in Plain View of Authorities,”²²⁴ used gruesome child deaths and sensational numbers to reinforce the idea that an astonishing number of children need protection from their parents, thus supporting the notion that children’s rights stand firmly in opposition to family preservation.

The deeper the perceived divide between children’s and parents’ rights, the harder it becomes to paint child welfare system-involved families and parents in a less blameworthy light and to share their stories in a way that suggests a “harmless” or “victimless” act worthy of empathy and non-punitive responses. While there are countless interactions of families—especially low-income parents and women of color—with child protective services each day, clear obstacles to reframing the well-trod narrative of “bad mom and unloved child” persist. When real-world experiences are kept out of court records and the public realm, what the experts say about drug use, parenting, and mandated services is incapable of achieving reform on its own.

VI. BRINGING DRUG POLICY REFORM TO THE CHILD WELFARE SYSTEM

One of the most sobering conclusions supported by the latest research on parents who use drugs and their involvement with child protective services is that these families may have intensive needs for social services—just not the ones that system actors and judges have prescribed and mandated. The three cases in the Introduction demonstrate this conclusion: Sarah’s marijuana use was not causing harm or creating a substantial risk of harm to her children; Y.N.’s son did not suffer harm due to her use of drugs while pregnant; and Dottie succumbed to her addiction when her drug treatment program did not address her mental and physical health needs adequately.

Although in a large number of child welfare cases involving drug allegations, drug use does not rise to the level of a substance use disorder, a single positive test becomes a concrete piece of evidence that child protective services uses not only to allege wrongdoing or future risk of

²²² Jennifer Brown, Christopher N. Osher & Jordan Steffen, *Failed to Death: An Investigative Series*, THE DENVER POST (Nov. 11, 2012), <http://www.denverpost.com/failedtodeath>.

²²³ Audra D.S. Burch & Carol Marbin Miller, *477 Child Deaths: How Florida Preserved Families but Lost Kids*, TAMPA BAY TIMES (Mar. 16, 2014), <http://www.tampabay.com/news/politics/stateroundup/477-child-deaths-how-florida-preserved-families-but-lost-kids/2170381>.

²²⁴ Garance Burke & Holbrook Mohr, *786 Abused Kids Died in Plain View of Authorities: Report*, HUFFINGTON POST (Dec. 18, 2014), http://www.huffingtonpost.com/2014/12/18/ap-us-child-abuse_n_6346966.html.

harm, but also to support a finding of abuse and neglect and, in many cases, mandate substance abuse treatment. What lies beneath Sarah's, Y.N.'s, and Dottie's cases are issues that are too nuanced and complex for the child welfare system's simple formula: parental drug use plus child equals abuse and neglect.

In spite of child welfare experiences demonstrating that parental drug use is an ancillary issue or "red herring" in many cases, parents like Sarah, Y.N., and Dottie are on the receiving end of disproportionate, punitive responses to their alleged wrongdoing. As a result of their involvement in the child welfare system, Sarah and Y.N.'s ability to spend time with their children became severely limited, and Dottie and her son's familial ties have been severed permanently. Each of these mothers was subjected to frequent supervision and scrutiny and pushed to complete irrelevant or inadequate services to achieve an impossible, subjective standard of "perfect parent" through compliance rather than successful treatment. Furthermore, as women of color, they were not only more likely to enter the child welfare system than white parents, but they also could expect to fare the worst under the state's supervision.²²⁵ These mothers' stories are quite similar to individuals who come into contact with the criminal justice system for drug offenses; however, their experiences are seldom made public, and neither are countless system-involved families' experiences informed by the same policies.²²⁶ Furthermore, even if made public, a commonly-held assumption stemming from their mere involvement with child protective services, to say nothing of subsequent findings of child abuse and neglect, would be that they must be selfish mothers who are incapable of loving and providing for their children.

Marcia Robinson Lowry, the former Executive Director and founder of Children's Rights, Inc.,²²⁷ writes that the national child welfare system's

[P]ublic policy is that children should be with families whenever possible, and if families need services to maintain children safely in the home; then they should have those services. Children should come into state custody only if necessary, and once in state custody, they should be there for as short a time as possible. They should be returned to the families from which they were removed, with services as necessary, as quickly as possible. If they cannot be returned to their families, then they should be moved on to a new, permanent family.

²²⁵ Roberts, *supra* note 61, at 13.

²²⁶ Fraidin, *supra* note 172.

²²⁷ Press Release, Children's Rights, Leadership Change at Children's Rights (Aug. 14, 2014), <http://www.childrensrights.org/>.

While they are in state custody, they should be treated in a way that serves their needs.²²⁸

Ms. Lowry, however, does not believe there is a lot of doubt about whether or not the system is working to fulfill these goals.²²⁹

As state and federal policies addressing child welfare interventions have changed over the last thirty years, particularly during the onset of the War on Drugs, most lawmakers have viewed child abuse and neglect primarily as a defect in a particular family, with limited or nonexistent acknowledgment of larger societal issues as contributing factors. As a result, the most serious problems affecting families like Sarah's, Y.N.'s, and Dottie's are often ignored by child protective services;²³⁰ their policies, driven by ASFA and CAPTA, instead prioritize placing more than two hundred and fifty thousand children into foster care each year.²³¹

A. Reforms to CAPTA

Child welfare policies rely most heavily on these federal laws and regulations that determine not only investigative protocols but also funding streams into state-based systems. Even if a system is to adopt a more public health-centered approach to parental drug use—providing a mother-child treatment program, for example, or diverting a case to Family Treatment Court—child protective services is still subject to the mandates required by CAPTA and ASFA regarding reporting, investigating, removing children, and terminating parental rights.

As amended in 2003, CAPTA requires that health care providers involved in the delivery and care of infants notify child protective services of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure.²³² As illustrated by Y.N.'s case, many states interpret CAPTA's mandates quite broadly: to "test and report,"²³³ instead of to screen, test, diagnose, and provide options for services or treatment if necessary, and to report if harm or imminent risk of harm is present as a direct result of prenatal drug exposure.

²²⁸ Marcia Robinson Lowry, *Reforming the Child Welfare System*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 389, 389 (2005).

²²⁹ *Id.*

²³⁰ Martin Guggenheim, *Issues Surrounding Initial Intervention*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 359, 361 (2005).

²³¹ CHILD WELFARE INFO. GATEWAY, FOSTER CARE STATISTICS 2013 (2015), <https://www.childwelfare.gov/topics/systemwide/statistics/childwelfare-foster/#state>.

²³² Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 *et seq.* (2003).

²³³ See, e.g., Emma S. Ketteringham, *Test and Report: Bad for Children and Families*, THE HUFFINGTON POST (Apr. 25, 2014), http://www.huffingtonpost.com/emma-s-ketteringham/test-and-report-bad-for-children-and-families_b_5175106.html?utm_hp_ref=politics.

These broadly interpreted reporting requirements deprive physicians and other medical professionals of their expertise that, in part, may distinguish between drug use and substance use disorder. Instead, they place the obligations of evaluation, assessment, and treatment in the hands of overburdened and undertrained child protective workers. CAPTA does not provide for any funding of substance abuse programs serving women and mothers, training protocols for case workers conducting investigations of parental drug use, or aftercare for families reunifying post-treatment. Furthermore, the law does not direct uniform procedures for drug-testing, resulting in a substantial number of false positive tests.²³⁴ Perhaps most importantly, as stressed by the American College of Obstetricians and Gynecologists, CAPTA's mandated reporting measures "endanger the relationship of trust between physician and patient, place the obstetrician in an adversarial relationship with the patient, and possibly conflict with the therapeutic obligation."²³⁵

Effectuating successful, uniform reforms for child welfare systems nationwide and implementing policies that help to treat mothers who actively struggle with chemical dependencies, thus reducing the number of families unnecessarily separated by foster care due to alleged parental drug use, presents a compelling opportunity for child welfare activists to join the drug policy reform movement and advocate for a series of key changes to CAPTA.

First, CAPTA should adopt drug-testing standards similar to those adopted in the Federal Workplace Drug Testing Program, which includes split samples and confirmatory testing complete with very specific thresholds and collection protocols.²³⁶ Because, in most states, a single positive test is enough to substantiate claims of child maltreatment, parents facing child protective investigations should have the same benefits as persons seeking jobs in the federal government.²³⁷

Second, child welfare protocols determined by CAPTA must identify drug-testing as only one tool in a series that requires the professional assessment, evaluation, and diagnosis of any medically significant issue that exists in either mother or child as a result of drug use or chemical

²³⁴ Troy Anderson, *US CA: False Positives Are Common in Drug Tests on New Moms*, THE MEDIA AWARENESS PROJECT (June 28, 2008), <http://www.mapinc.org/drugnews/v08/n631/a06.html>.

²³⁵ AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMM. OP. NO. 422, AT RISK DRINKING AND ILLICIT DRUG USE: ETHICAL ISSUES IN OBSTETRIC AND GYNECOLOGIC PRACTICE 6 (2008), http://pregnancyanddrugs.org/wp-content/uploads/2013/11/At-Risk-Drinking-and-Illicit-Drug-Use_Ethical-Issues-in-Obstetric-and-Gynecologic-Practice-ACOG.pdf.

²³⁶ Mandatory Guidelines for Federal Workplace Drug Testing Programs, 73 Fed. Reg. 71,858, 71,860 (Nov. 25, 2008).

²³⁷ Sarah Arnold, *Child Protective Services & Family Court: The Last Gasp of the War on Cannabis*, LADYBUD MAGAZINE (Nov. 5, 2013), <http://www.ladybud.com/2013/11/05/child-protective-services-family-court-the-last-gasp-of-the-drug-war/.2013>).

dependency. Substance use disorder should be clearly defined and measured with the criteria specified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), and measured through uniform screening questions such as those in the Composite International Diagnostic Interview-Short Form (CIDI-SF).

Third, CAPTA should incentivize child protective agencies to support new mothers' access to prenatal care and facilitate disclosure of drug use or dependency at an early stage in pregnancy by assuring doctor-patient confidentiality. Open communication between drug-dependent pregnant women and their healthcare providers is especially important,²³⁸ as many "[h]ealth risks . . . can be mitigated through prenatal care, counseling, and continued medical supervision."²³⁹ Pregnant women who are threatened with prosecution or child abuse actions, such as child welfare interventions, are likely to be deterred from seeking critical health care.²⁴⁰ Putting an emphasis on healthcare, prevention, and treatment instead of mandatory child protective services intervention helps ensure positive birth outcomes.

Finally, CAPTA's mandate that children receive the assistance of a guardian ad litem in the child welfare system²⁴¹ should be expanded to require states to appoint counsel for indigent parents involved in child protection proceedings. Providing parents an absolute right to counsel will help ensure that their rights are protected while also assisting them in accessing effective and appropriate services. In addition to radically amending CAPTA to better achieve its goal of providing adequate services to ensure the health and safety of children and their families and to promote stability and permanency, drug policy reform advocates should identify ASFA as another opportunity for change.

B. Reforms to ASFA

The Adoption Assistance and Child Welfare Act of 1980 required states to make "reasonable efforts" to enable children to remain safely at home before placing them in foster care.²⁴² When it was passed in 1997,

²³⁸ A confidential relationship is a necessary precondition for "successful treatment." *See Jaffee v. Redmond*, 518 U.S. 1, 12 (1997).

²³⁹ American College of Obstetricians & Gynecologists et al., Letter to Texas Attorney General Greg Abbott Regarding Opinion No. 025-GO, (Aug. 23, 2004), http://www.drugpolicy.org/docUploads/ola_tx_letter.pdf.

²⁴⁰ AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, COMM. OP. NO. 321, MATERNAL DECISION MAKING, ETHICS, AND THE LAW (2005); AMERICAN PSYCHIATRIC ASSOCIATION, DOCUMENT REFERENCE NO. 200101, POSITION STATEMENT ON CARE OF PREGNANT AND NEWLY DELIVERED WOMEN ADDICTS (2007).

²⁴¹ Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106(b)(2)(B)(xiii) (2003).

²⁴² Adoption Assistance and Child Welfare Act, 42 U.S.C. § 671(a)(15)(B) (2014).

ASFA placed limits on the reasonable efforts mandate, narrowing the requirement by directing state authorities to make the health and safety of children in foster care their “paramount concern.”²⁴³ These limits have played a big part in creating child welfare protocols that allow caseworkers to overlook family service needs beyond overcoming a positive drug test.

ASFA’s strict timetable for family reunification and termination of parental rights offers little forgiveness for a recovery process that can take significantly longer and often involves periods of relapse.²⁴⁴ Although termination of parental rights exists in practice to allow the government to step in when a child’s parents are unfit to care for her, and involves grounds such as abandonment, permanent neglect, and severe and repeated abuse,²⁴⁵ judges have noted that the most common reason that courts use for termination of parental rights is a finding that a child has been in foster care for longer than the law allows.²⁴⁶ For parents mandated to substance abuse treatment and required to achieve sobriety, this timeline is particularly difficult.

Despite congressional declarations that ASFA “is putting children on a fast track from foster care to safe and loving and permanent homes,”²⁴⁷ each year, nearly twenty-four thousand children “age out” of foster care with no resources.²⁴⁸ One in five will become homeless after age eighteen, only half will be employed by age twenty-four, and less than three percent will receive a college degree.²⁴⁹ Seventy-one percent of women who “age out” of foster care will become pregnant by age twenty-one, and one in four former foster children will experience post-traumatic stress disorder.²⁵⁰ Poverty-related social issues, like inadequate housing and education, as well as untreated mental illness, often contribute to an individual’s drug use; therefore, ASFA-based policies may be perpetuating a cycle of foster care that continues for generations.

ASFA does allow states to exempt cases from the fifteen-month timeline where a child welfare agency did not make reasonable efforts

²⁴³ Roberts, *supra* note 61, at 108.

²⁴⁴ Stephanie S. Franklin, *A Practitioner’s Account of the Impact of the Adoption and Safe Families Act (ASFA) on Incarcerated Persons and their Families*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 100 (Christopher Mele & Teresa A. Miller, eds., 2004).

²⁴⁵ CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2013), <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf>.

²⁴⁶ Roberts, *supra* note 61, at 109.

²⁴⁷ *Id.*

²⁴⁸ Rita Soronen, *We are Abandoning Children in Foster Care*, CNN (Apr. 17, 2014), <http://www.cnn.com/2014/04/16/opinion/soronen-foster-children/>.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

toward family reunification²⁵¹; however, like “drug-affected” in CAPTA, “reasonable efforts” is not a term that is clearly defined. While reasonable efforts arguably should include adequate assessment of a family for necessary services and subsequent services referrals, there exists little guidance as to how judges determine whether reasonable efforts have been made.²⁵² Furthermore, because ASFA requires that children’s health and safety, as distinct from their parent or family, be the chief concern, parents’ and families’ needs are not prioritized or, in many cases, even addressed.

Clear reforms are necessary to redefine the Adoption Assistance and Child Welfare Act of 1980 and amend ASFA, particularly as they relate to child welfare practices where parental drug use is alleged. The following changes can be considered as part of the drug policy reform movement.

First, ASFA should be amended to provide a definition for reasonable efforts that includes, particularly for allegations of drug use, the requirement of evidence-based assessments and services aimed toward addressing family needs beyond perceived parental wrongdoing, from domestic violence and mental health diagnoses to unstable housing or employment. The use of uniform instruments where drug use is suspected will help ensure that reasonable efforts be held to a standard beyond mere referrals for drug testing or a provided listing of treatment programs for parents to contact.

Second, ASFA should alter the stringent reunification-within-fifteen-months requirement, particularly where there are allegations of drug use or diagnoses of substance use disorders. At the very least, the law should mandate an extension of the timeline where substance abuse treatment is underway, and should allow progress to be measured by means other than achieving complete sobriety within a designated time, as well as include allowances for relapse as part of the recovery process.

Third, ASFA’s financial incentives provision must be restructured to allow for federal enticements for successful family reunification, including flexible funding streams for family-based services and substance abuse treatment for women and mothers, in particular. The majority of financing available to state child welfare systems supports foster children, which financially encourages the placement of children in care. As a result, the reasonableness of efforts to prevent removal or encourage reunification may be defined by financial considerations rather than by a family’s needs. More flexibility of funding and incentives for “reasona-

²⁵¹ Adoption and Safe Families Act of 1997, § 103(a)(3)(E)(iii) Pub. L. No. 105-89, 111 Stat. 2115 (1997).

²⁵² Ernestine S. Gray, *Judicial Viewpoints on ASFA*, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 60 (Dec. 2009).

ble efforts” that support family reunification will allow child protective services agencies to better meet the needs of the families they serve.²⁵³

C. Evolving the Narrative

Sweeping changes to CAPTA and ASFA would provide a necessary push for state child welfare systems to incorporate more preventive and public health-focused policies into their investigations and services provision. Additionally, they would require medically sound state protocols for healthcare professionals who come into contact with drug-using parents, as well as establish evidence-based criteria for definitions of child abuse and neglect based on alleged drug use. Like drug policy reforms within the criminal justice system, however, changing child welfare policies requires more than updating the research and rewriting the laws. Before true systemic reform can be realized, the drug policy reform movement must work with child welfare advocates to evolve public perceptions of drug-using parents and hold child welfare systems accountable for more thoughtful and responsible practices, using similar efforts regarding criminal drug offenders and the criminal justice system as models for change.

To truly begin to reframe the narrative surrounding drug-using parents and their children, the drug policy reform movement must acknowledge that drug policies within the child welfare system have come from the same outdated research, self-serving politics, and misguided assumptions as those in the criminal justice system, with individuals and families impacted by these policies having very similar experiences. Beyond acknowledgment, the movement can use its power to advocate for the following policy changes in an effort to challenge beliefs about drug-using parents, their children, and how the child welfare system meets their collective needs.

First, reformers can insist on a right to counsel for parents involved in the child welfare system, from the point of investigation through termination of parental rights proceedings. Although a mandate from CAPTA that provides parents with an absolute right to counsel would go a long way in safeguarding their interests, advocacy through the drug policy reform movement can help ensure that attorney compensation models are fair, training is robust and consistent with changes to state and federal laws, and opportunities for interdisciplinary collaborations are available. Furthermore, the movement can rely on a growing body of parents’ attorneys, not only to hold judges and child welfare system actors to higher standards of practice and enforcement of the law, but also to bear witness to the day-to-day struggles of families subject to investigation and separation.

²⁵³ *Child Welfare Finance Reform Policy Statement* (2011), NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES, <http://www.ncjfcj.org/sites/default/files/childwelfarefinancereform.pdf>.

Marcia Robinson Lowry agrees that the child welfare system is largely invisible to the public, and makes the point that many necessary state reforms—where no one is paying attention to foster kids, or to budget needs, management, administration, or accountability—would not happen without class action litigation.²⁵⁴ As another layer upon advocacy for an absolute right to counsel and quality individual representation, a larger corps of parents' attorneys can join the drug policy reform movement in providing the application of external pressure through impact and class action litigation on behalf of families and their children.

Second, in addition to increasing the ranks of parents' attorneys in trial and appellate courtrooms, reformers may consider advocating for the dismantling of confidentiality laws regarding child protective proceedings, which too often suppress families' stories about their experiences in the system. Child welfare scholar Matt Fraidin discusses the confidential nature of child welfare hearings and closed family courts, arguing that a restriction on speech—even on system-involved families sharing their own experiences—perpetuates an ill-informed “master narrative” about child welfare, which paints foster care as a “safe haven” for “child victims” who must be delivered from “monstrous” and “deviant” parents.²⁵⁵ To evolve those perceptions, and their ill effects on child welfare practices nationwide, open courtrooms and public proceedings can help construct a counter-narrative, publicizing the stories that remain untold.²⁵⁶

Third, the drug policy reform movement must recognize the need for gender-specific options and policies in both the criminal justice *and* child welfare systems when it comes to pregnant women's and mothers' experiences with drug use, addiction, manufacture, and sale. In the same way journalists and scholars have reinvented nonviolent drug offenders as products of vulnerable communities, entrenched poverty, and institutional racism, they may also increase mainstream understanding of who comes into contact with the child welfare system due to drug use, and the social issues contributing to an overrepresentation of women and mothers, such as domestic violence-related trauma, inadequate education and economic opportunity, unstable housing, and lack of childcare or other social supports. Furthermore, the drug policy reform movement can also highlight the disconnect between these pervasive social issues and stereotypes about system-involved women, disassembling the insinuation that vulnerable, drug-using, poor single mothers of color are worthy of blame for society's problems.

But beyond recognition of unique and extensive social issues impacting women and mothers involved in the criminal justice and child welfare systems and a call for reforms, addressing the drug war's dramatic effect on women can be an opportunity for, as Dorothy Roberts

²⁵⁴ Lowry, *supra* note 228, at 393.

²⁵⁵ Fraidin, *supra* note 172, at 2–3.

²⁵⁶ *Id.* at 57–58.

suggests, “cross-movement strategies that can address multiple forms of systemic injustice to contest the overpolicing of women of color and expose how it props up an unjust social order.”²⁵⁷

Fourth, the drug policy reform movement can incorporate human rights documentation in its support for evolving drug policies within the child welfare system. Traditionally, human rights documentation involves collecting the stories of individuals in an effort to document claims of human rights abuses, particularly regarding violations of international law.²⁵⁸ Using this tool to collect stories of parents who have experienced first-hand the label of “child abuser” after a single positive drug test—who have lost their children to foster care or through termination of parental rights—could illuminate the glaring problems with the child welfare and family court systems’ responses to parental drug use, and justify change to federal and state laws.

In addition to its usefulness in assisting law reformers to achieve their legislative goals, this type of documentation also may empower voices that are too often “muted or silenced by the government and society.”²⁵⁹ *Something Inside So Strong*, a report produced by the Ford Foundation, explains that documenting stories like these adds visibility and credibility to abuses encountered by a community; it can be used as a way to raise public and media awareness about a problem, putting pressure on those responsible to change the situation.²⁶⁰ When considering drug policies impacting families, the situation requiring change, of course, not only calls for the rewriting of laws; it also benefits from the telling and re-telling of human experiences that are empathetic and relatable.

This type of human rights documentation has been used domestically to record difficulties in family court faced by women and mothers who have experienced domestic violence. *Battered Mothers Speak Out*, a report by the Wellesley Centers for Women, found that family courts in Massachusetts were committing a number of human rights violations, and called for reforms to adequately protect women and children from abuse.²⁶¹ Activists and organizations within the reproductive rights

²⁵⁷ Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1500 (2012).

²⁵⁸ Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers’ Testimony Project, Women’s Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 710, 727 (2005).

²⁵⁹ *Id.* at 729.

²⁶⁰ EUNICE CHO ET AL., U.S. HUMAN RIGHTS NETWORK, SOMETHING INSIDE SO STRONG: A RESOURCE GUIDE ON HUMAN RIGHTS IN THE UNITED STATES 48 (2003), http://www.ushrnetwork.org/sites/default/files/something_inside_so_strong.pdf.

²⁶¹ Lundy Bancroft et al., *Battered Mothers Speak Out: Participatory Human Rights Documentation as a Model for Research and Activism in the United States*, 11 VIOLENCE AGAINST WOMEN 1367, 1368–69 (2005).

movement have also used a form of human rights documentation to advocate for reproductive healthcare, including legal and accessible abortion services. For example, in the consolidated cases of *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*, determining the legality of the Partial Birth Abortion Ban Act of 2003, the Institute for Reproductive Health Access and fifty-two clinics and organizations filed an amicus brief in support of the respondents.²⁶² This amicus brief was created to provide stories of more than 150 individual women who obtained abortions in their second-trimester of pregnancy.²⁶³ While these accounts were not gathered to document human rights abuses, they were used to humanize and make visible the women and mothers experiencing a procedure that is politically and socially polarizing. Like these instances, the drug policy reform movement, particularly in the context of the child welfare system, can use human rights documentation as an opportunity not only to reform the law, but also to cast drug-using parents in a different light.²⁶⁴

Fifth, if the drug policy reform movement cannot take on the behemoth task of changing public perceptions about “child abuse” generally, it can begin to evolve the idea of “children’s rights” to encompass a child’s entitlement to family, community, and identity. For example, instead of framing children’s rights in immediate and constant opposition to the rights of their parents, advocates for systemic change can expand the notion of “best interests” to include a child’s: familiarity with surroundings and community; cultural identity; lasting connections to siblings and other extended biological family; right to dignity; right to individual history, including access to knowledge about his or her “whole parent;” and considerations about what he or she loses when parental rights are terminated.²⁶⁵

This framework would support Professor Josh Gupta-Kagan’s idea that a “child has a right to a relationship with his mother, however flawed she may be, unless strong evidence can show why she is unfit and why terminating the mother-child relationship is in the child’s best interests, considering the child in his full ecosystem.”²⁶⁶ Considering the needs and interests of children when intervening in their lives or placing them in foster care not only ensures thoughtful assessment of families’

²⁶² Brief of the Institute for Reproductive Health Access and Fifty-Two Clinics and Organizations as Amici Curiae, *Gonzales v. Planned Parenthood*, 550 U.S. 124 (2007) (No. 05-1382), 2006 WL 2736633.

²⁶³ *Id.*

²⁶⁴ Goodmark, *supra* note 258, at 757.

²⁶⁵ Michele Cortese & Sarah Katz, Discussion at the Fourth National Parent Attorney Conference: Re-Invigorating and Re-Imagining “Best Interests” (July 23, 2015).

²⁶⁶ Gupta-Kagan, *supra* note 88, at 927.

needs beyond drug use or dependency, but it also fulfills society's obligation to treat children well.²⁶⁷

Finally, beyond courtroom records and human rights documentation, the drug policy reform movement can collaborate with child welfare advocates to support the introduction of personal, child welfare-specific testimonies and experiences in magazine and newspaper profiles, documentary film, and character development in popular media.

Where media have consistently used inaccurate and stigmatizing terms like “crack baby,” “oxytot,” and “born addicted” to describe infants exposed to chemical substances, and have vilified parents—especially mothers—who decide to have children despite using drugs, advocates for reform can insist that reporters and journalists produce news that is ethical, fact-based, and grounded in medical research. Furthermore, reformers can encourage screenwriters and producers to pursue alternatives to the dominant narrative of selfish, promiscuous mothers who use drugs and their abandoned, unloved children, perhaps introducing another television drama phenomenon to follow the rise of the “antihero.” The drug policy reform movement has achieved great success in evolving media portrayals of who is impacted by criminal drug laws and how their lives are shaped as a result; the prevailing narrative about drug-using parents who encounter child protective services must change too, if there is any hope for thoughtful and effective child welfare reform.

²⁶⁷ Guggenheim, *supra* note 208, at 266.

