

# The Greatest Source of Wealth: Washington State’s Response to Prenatal Substance Abuse

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## I. INTRODUCTION

It has been over thirty years since President Nixon declared war on drugs, naming drug abuse “public enemy number one in the United States.”<sup>1</sup> It is a war that

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1. PBS, FRONTLINE, THIRTY YEARS OF AMERICA’S DRUG WAR: A CHRONOLOGY (2000), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron>. (last visited Dec. 27, 2004).

has taken an enormous toll on the nation's resources.<sup>2</sup> Caught in the crossfire is the staggering number of infants born each year in our country who have been exposed to the chemicals of illicit drugs, tobacco, and alcohol prior to birth. In fact, an estimated one of every ten babies born in the United States (roughly 375,000 per year) is exposed to one or more of these chemicals during pregnancy.<sup>3</sup>

There has been a considerable amount of medical research on the effects of chemical substances on the fetus.<sup>4</sup> It is undisputed amongst the authorities that prenatal substance abuse can be damaging and even fatal to the fetus.<sup>5</sup> In response, many states have taken the initiative to treat and prevent this problem.<sup>6</sup> A number of states have established programs to provide, *inter alia*, prenatal care and drug treatment to pregnant women seeking state assistance.<sup>7</sup> Others have taken a stronger stance, permitting the courts and treatment facilities to take custody of the expectant mother upon her refusal or failure to participate in drug treatment.<sup>8</sup> South Carolina has taken it a step further—becoming the only state that prosecutes prenatal substance abuse.<sup>9</sup>

Presently, Washington neither prosecutes nor takes custody of expectant mothers for abusing chemical substances.<sup>10</sup> The state's Division of Child and Family Services ("DCFS") receives reports from a variety of sources involving instances of prenatal substance abuse;<sup>11</sup> but only at the latter stage of pregnancy may DCFS's Child

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2. The Nixon, Reagan, Clinton, and Bush administrations spent \$65 million, \$1.65 billion, \$17.9 billion, and \$18.822 billion respectively on the war on drugs. COMMON SENSE FOR DRUG POLICY, DRUG WAR FACTS: ECONOMICS 49-60 (2004), available at <http://www.drugwarfacts.com/economi.pdf>.

3. U.S. DEP'T OF HEALTH AND HUMAN SERV. AND SAMHSA'S NAT'L CLEARINGHOUSE FOR ALCOHOL & DRUG INFO., BIRTH DEFECTS AND ADVERSE BIRTH OUTCOMES [hereinafter SAMSHA], <http://www.health.org/govpubs/phd627/birthdef.aspx> (last visited Dec. 27, 2004).

4. The National Institute on Drug Abuse (NIDA) offers a large number of statistics and studies. See NAT'L INST. ON DRUG ABUSE, ABOUT NIDA, at <http://www.drugabuse.gov/about/AboutNIDA.html>. The institute supports over 85 percent of the world's research on drug abuse and addiction. NAT'L INST. ON DRUG ABUSE, About NIDA: NIDA's MISSION, [http://www.drugabuse.gov/about/welcome/NIDA\\_movel.html](http://www.drugabuse.gov/about/welcome/NIDA_movel.html). In 1986, it became a division of the National Institute of Health, Department of Health and Human Services. *Id.*

5. SAMSHA, *supra* note 3.

6. See, e.g., COLO. REV. STAT. ANN. § 25-1-212 (West 2005); OKLA. STAT. ANN. tit. 63, § 1-546.4; WASH. REV. CODE ANN. § 74.09.770 (West 2004).

7. See, e.g., CONN. GEN. STAT. ANN. § 17a-710 (West 2005); OKLA. STAT. ANN. tit. 63, § 1-546.4 (West 2005); WASH. ADMIN. CODE § 388-533-0701, -0730 (2004).

8. See, e.g., OKLA. STATE ANN. tit. 63, § 1-5464 (West 2005); S.D. CODIFIED LAWS § 34-20A-81 (Michie 2004); WISC. STAT. ANN. § 48.193 (West 2005).

9. See *Whitner v. State*, 492 S.E.2d 777, 787 (S.C. 1997) (Moore, J., dissenting).

10. See *State v. Dunn*, 916 P.2d 952, 954-55 (Wash. 1996).

11. See WASH. STATE DEP'T. OF SOCIAL AND HEALTH SERVS., CHILDREN'S ADMINISTRATION PRACTICES AND PROCEDURES GUIDE 2-32, (2004), [http://www.dshs.wa.gov/CA/pubs/manuals\\_pp.asp](http://www.dshs.wa.gov/CA/pubs/manuals_pp.asp) (Feb. 9, 2004).

Protective Services (“CPS”) program conduct an investigation into the report and offer services to the expectant mother.<sup>12</sup> However, in October 2003, DCFS proposed a change to its prenatal substance abuse policy.<sup>13</sup> In finding that there is no correlation between prenatal drug abuse and long-term adverse effects on children, with the exception of alcohol, it was proposed that CPS would take no significant action until the child is born.<sup>14</sup>

This paper discusses the medical and economic impact of prenatal substance abuse. It will present the various policies a number of states have adopted to address the problem, and most importantly, will discuss Washington’s current policy, critique the proposed revision to this policy, and argue the need for earlier intervention. Part II of this paper identifies the damaging health effects of in utero drug exposure to a fetus. An overwhelming amount of medical research demonstrates that exposing a fetus to chemical substances could have irreparable and, in some cases, deadly health consequences.<sup>15</sup> Part III examines the various state responses to the problem. More specifically, it discusses state initiatives that have taken a more punitive approach, including criminal and civil commitment statutes, along with child welfare laws recognizing a newborn’s positive toxicology result as evidence of parental neglect. Part IV will detail both Washington’s current policy and its proposal to take a minimal involvement approach to prenatal substance abuse. It will critique both degrees of state initiatives, discussing the economic and social impact of both a punitive approach and a minimal involvement approach. In Part V, the author discusses the importance of early intervention—the necessity of offering prenatal care and drug treatment services on a voluntary basis at the earliest possible time when an expectant mother is suspected of abusing substances.

## II. IN UTERO DRUG EXPOSURE

According to the Department of Social and Health Services, between 8,000 and 10,000 infants born each year in Washington are exposed to drugs and alcohol.<sup>16</sup> Of those infants born each year, 800 to 1000 feel the adverse effects of such exposure.<sup>17</sup> Despite DCFS’s claim that “current medical research does not strongly support a

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12. *Id.* “The goal of CPS is to protect children from child abuse and/or neglect while preserving the family’s integrity and cultural and ethnic identity to the maximum extent possible, consistent with the safety and permanency needs of the children.” *Id.* at 2-1.

13. WASH. STATE DEP’T OF CHILD AND FAMILY SERVS., DRAFT POLICY, PRENATAL AND NEWBORN SUBSTANCE ABUSE POLICY AND PROCEDURE (2003) (see appendix).

14. *Id.*

15. See Kathryn Anderson Clark, *Treatment Compliance Among Prenatal Care Patients With Substance Abuse Problems*, 27 AM. J. DRUG & ALCOHOL ABUSE 121 (2001), [http://www.findarticles.com/p/articles/mi\\_m0978/is\\_1\\_27/ai\\_75119727/print](http://www.findarticles.com/p/articles/mi_m0978/is_1_27/ai_75119727/print).

16. WASH. STATE DEP’T OF HEALTH, MATERNAL SUBSTANCE ABUSE SCREENING, [http://www.doh.wa.gov/cfh/mch/drug\\_and\\_alcohol\\_screening.htm](http://www.doh.wa.gov/cfh/mch/drug_and_alcohol_screening.htm) (last visited Jul. 20, 2004).

17. *Id.*

cause and effect relationship between substance use during pregnancy and negative outcomes for children,”<sup>18</sup> a large number of studies indicate that children exposed prenatally to alcohol and drugs suffer prolonged and even permanent injuries.<sup>19</sup>

### A. Alcohol

The medical community has overwhelmingly acknowledged the devastating effect alcohol has on the developing fetus.<sup>20</sup> Fetal Alcohol Spectrum Disorder (“FASD”), a medical condition describing birth defects in children who have been prenatally exposed to alcohol, is believed to be the primary known cause of mental retardation.<sup>21</sup> Those with FASD suffer decreased capacities in their ability to use common sense, organize information, grasp concepts, and solve problems.<sup>22</sup> Along with mental retardation, facial malformations are also characteristics associated with the disorder.<sup>23</sup> Other characteristics include hypersensitivity of the senses, higher levels of explosive behavior, behavior problems in school, and problems maintaining employment.<sup>24</sup>

### B. Cocaine

In addition to alcohol, cocaine<sup>25</sup> use during pregnancy has been found to cause significant harm to unborn children.<sup>26</sup> Cocaine restricts fetal development by

18. WASH. STATE DEP’T OF CHILD AND FAMILY SERVS., *supra* note 13.

19. See Kathryn Page, *The Invisible Havoc of Prenatal Alcohol Damage*, 4 J. CENTER FOR FAMS., CHILD. & CTS. 67, 76-78 (2003), <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/CFCCJournal03.pdf>; MARCH OF DIMES, MEDICAL REFERENCES: DRINKING ALCOHOL DURING PREGNANCY [hereinafter MEDICAL REFERENCES], [http://www.marchofdimes.com/professionals/681\\_1170.asp](http://www.marchofdimes.com/professionals/681_1170.asp) (last visited Dec. 27, 2004); NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, FETAL ALCOHOL EXPOSURE AND THE BRAIN-ALCOHOL ALERT NO. 5 (2000), <http://www.niaaa.nih.gov/publications/aa50.htm>.

20. MEDICAL REFERENCES, *supra* note 19.

21. Page, *supra* note 19, at 76.

22. *Id.* Those who suffer from FASD lack the ability to grasp the “big picture,” having the tendency to “see only what is right in front of their noses at any given time.” *Id.* at 77. This would be what most people would interpret as being “irresponsible.” *Id.* at 78.

23. Clark, *supra* note 15.

24. Page, *supra* note 19, at 78-79.

25. Infants regularly exposed to cocaine in the womb sometimes have sleep disturbances, feeding difficulties, are irritable and jittery, and are easily disturbed, causing them to cry more easily than other babies. MARCH OF DIMES, QUICK REFERENCE: ILLICIT DRUG USE DURING PREGNANCY [hereinafter ILLICIT DRUG USE], <http://www.marchofdimes.com/professionals/14332-1169.asp> (last visited Aug. 13, 2004).

26. Robert Mathias, *Study Finds Significant Mental Deficits in Toddlers Exposed to Cocaine Before Birth*, NIDA NOTES, VOL. 17, NO. 5 (Jan. 2003), [http://www.drugabuse.gov/NIDA\\_notes/NNV017N5/Study.html](http://www.drugabuse.gov/NIDA_notes/NNV017N5/Study.html).

reducing the blood vessels, thereby decreasing the amount of nutrients and oxygen to the fetus.<sup>27</sup> Thus, babies exposed to cocaine in utero tend to have smaller heads.<sup>28</sup> A recent study of two-year old children found that those who were exposed prenatally to cocaine were “significantly poorer” in mental development than their unexposed counterparts.<sup>29</sup> Another study involving eight-year-old children focused on the long-term effects of prenatal cocaine and methamphetamine exposure.<sup>30</sup> The findings showed that children prenatally exposed to those drugs exhibited chemical abnormalities in the brain.<sup>31</sup> The study is consistent with other research that found that some prenatally “cocaine-exposed children are more impulsive and easily distracted than their peers.”<sup>32</sup> Furthermore, cocaine use raises the risk of miscarriage early in the pregnancy.<sup>33</sup>

The impact of prenatal cocaine exposure on a child’s development was also examined in another medical study that followed 415 cocaine-exposed infants born in Cleveland.<sup>34</sup> Results revealed that in utero cocaine exposure, while not affecting a child’s motor development, does affect a child’s cognitive development.<sup>35</sup> Researchers “also found that cocaine-exposed [children] had lower gestational age, birthweight, head circumference and length than non-exposed infants.”<sup>36</sup> In addition, the rate of mental retardation in those children at age two was 4.89 times higher than that of the general population.<sup>37</sup>

### C. Methamphetamine

In both Spokane and the rest of inland Washington, methamphetamine<sup>38</sup> use is becoming more prevalent, surpassing the estimated use of cocaine and heroin.<sup>39</sup>

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27. UNITED STATES SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS—COCAINE AND FEDERAL SENTENCING POLICY 47 (1995), <http://www.ussc.gov/crack/chap1-4.pdf>.

28. *Id.*

29. Mathias, *supra* note 26.

30. Robert Mathias, *Biochemical Brain Abnormalities Found in School-Age Children Prenatally Exposed to Cocaine*, NIDA NOTES, VOL. 16, No. 4 (Oct. 2001), [http://www.drugabuse.gov/NIDA\\_Notes/NNVVol16N4/biochemical.html](http://www.drugabuse.gov/NIDA_Notes/NNVVol16N4/biochemical.html).

31. *Id.*

32. *Id.*

33. MARCH OF DIMES, *supra* note 25.

34. CASE W. RES. U., AT TWO YEARS, COCAINE BABIES SUFFER COGNITIVE DEVELOPMENT EFFECTS (Apr. 16, 2002), <http://www.cocaine.org/crackbaby/cocaine-babies.html>.

35. *Id.*

36. *Id.*

37. *Id.*

38. Methamphetamine usage also makes a person “aggressive, belligerent, and mean,” increasing the likelihood for child abuse. Ken Olsen, *A Health Peril for All of Us: Users Face Many Grave Dangers, but the Drug Can Harm Anyone in its Path*, SPOKESMAN-REV., June 5, 2000, at A1, available at <http://msnbc.com/news/498826.asp?>.

When used during pregnancy, methamphetamine causes blood vessels in the placenta to constrict.<sup>40</sup> As a result, oxygen and nutrients supplied to the fetus are reduced.<sup>41</sup> The fetus' blood pressure may also rise, which can lead to prenatal strokes and major organ damage.<sup>42</sup> Babies prenatally exposed to the drug are more likely to develop central nervous system and cardiovascular system abnormalities, as well as other abnormalities.<sup>43</sup> Exposure to amphetamines<sup>44</sup> prior to birth often leads to low-birth-weight and fetal growth restriction.<sup>45</sup> Though research concerning methamphetamine and pregnancy is relatively new, and studies of its prenatal and long-term effects are limited, treatment remains vital since the likelihood of a healthy birth increases if the mother stops taking the drug during the last trimester.<sup>46</sup>

#### D. Tobacco

Though extremely harmful to the fetus, cigarette smoking unfortunately is also common among pregnant women.<sup>47</sup> Estimates show that at least twenty percent of pregnant women in the United States smoke throughout their pregnancies.<sup>48</sup> Smoking during pregnancy deprives the fetus of sufficient nutrients and oxygen.<sup>49</sup> It raises the risk of pregnancy complications, poor lung development, premature delivery, low-birth-weight infants, stillbirth, and sudden infant death syndrome ("SIDS").<sup>50</sup>

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39. Jonathan Martin, *A Drug's Innocent Victims*, SPOKESMAN-REV., June 6, 2000, at A1, available at <http://www.spokesmanreview.com/library/meth/methstory.asp?ID=s811934>.

40. KATHRYN WELLS, METHAMPHETAMINE AND PREGNANCY, <http://www.colodec.org/decpapers/documents/methandpregnancy.pdf>.

41. *Id.*

42. *Id.*

43. *Id.*

44. Methamphetamine is closely related chemically to amphetamines, except that it has a stronger effect on the central nervous system. NAT'L INST. ON DRUG ABUSE, INFO FACTS: METHAMPHETAMINE (2005), <http://www.nida.nih.gov/pdf/methamphetamine.pdf>.

45. Mark A. Plessinger, *Prenatal Exposure to Amphetamines: Risks and Adverse Outcomes in Pregnancy*, OBSTETRICS & GYNECOLOGY CLINICS N. AM., Vol. 25, No. 1, Mar. 1998, at 125.

46. WELLS, *supra* note 40.

47. See NAT'L INST. ON DRUG ABUSE, RESEARCH REPORT SERIES: NICOTINE ADDICTION, 5-6 (2001), <http://www.drugabuse.gov/pdf/nicotineRR.pdf>.

48. *Id.*

49. NEV. STATE HEALTH DIV., ALCOHOL, DRUGS & PREGNANCY, <http://www.health2k.state.nv.us/psap/AlcoholDrugs.htm> (last visited July 20, 2004).

50. CTR. FOR DISEASE CONTROL, THE HEALTH CONSEQUENCES OF SMOKING, A REPORT OF THE SURGEON GENERAL: IMPACT ON UNBORN BABIES, INFANTS, CHILDREN, AND ADOLESCENTS, (2004), [http://www.cdc.gov/tobacco/sgr/sgr\\_2004/Factsheets/1.htm](http://www.cdc.gov/tobacco/sgr/sgr_2004/Factsheets/1.htm).

Low birthweight occurs when the baby is either born too early, too small, or both.<sup>51</sup> It is the leading cause of death in infants, causing nearly 300,000 deaths annually in the United States.<sup>52</sup> The likelihood of giving birth to a low-birth-weight baby nearly doubles as a result of smoking during pregnancy.<sup>53</sup> These babies require special care and run a much higher risk of severe health problems or even death.<sup>54</sup> Also, the risk of preterm delivery (before thirty-seven weeks of gestation) is greater if the mother smokes during pregnancy.<sup>55</sup>

SIDS is the unexplained sudden death of an infant under the age of one.<sup>56</sup> It is the leading cause of death among infants between one month and one year of age and the third leading cause of death among infants under one year of age.<sup>57</sup> The Center for Disease Control reports that “babies exposed to secondhand smoke after birth are at twice the risk for SIDS, and infants whose mothers smoked before and after birth are at a three to four times greater risk.”<sup>58</sup> Other maternal risk factors include late or no prenatal care and alcohol and substance abuse.<sup>59</sup>

### III. GOVERNMENT RESPONSES TO PREGNANCY AND DRUG USE

Generally, state laws dictate some form of mandated reporting by healthcare, social, educational, and law enforcement professionals when any of those professionals have reason to believe that substance abuse is occurring during pregnancy.<sup>60</sup> However, states do not generally permit such reporting to be used for prosecutorial purposes.<sup>61</sup> For example, California’s child abuse and neglect reporting act states that in the event a newborn’s toxicology screen tests positive, “a report based on risk to a child which relates solely to the inability of the parent to provide the child with regular care due to the parent’s substance abuse shall be made only to a

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51. MARCH OF DIMES, QUICK REFERENCE: SMOKING DURING PREGNANCY (2004), [http://www.marchofdimes.com/professionals/681\\_1171.asp](http://www.marchofdimes.com/professionals/681_1171.asp).

52. CTR. FOR DISEASE CONTROL, *supra* note 50.

53. PHYSICIANS COMM. FOR RESPONSIBLE MEDICINE, BIRTH DEFECTS STATISTICS, <http://www.pcrn.org/resch/humres/birthdefects.html> (last visited Dec. 28, 2004).

54. MARCH OF DIMES, *supra* note 51.

55. *Id.*

56. NAT’L SIDS/INFANT DEATH RES. CTR., DEFINITION OF SUDDEN INFANT DEATH SYNDROME, <http://www.sidscenter.org/SIDSDEF.HTM> (last visited Dec. 24, 2004).

57. NAT’L SIDS/INFANT DEATH RES. CTR., WHAT IS SIDS? 1 (2004), <http://www.sidscenter.org/WhatIsSIDS.pdf>.

58. CENTER FOR DISEASE CONTROL, *supra* note 50.

59. NAT’L SIDS/INFANT DEATH RES. CTR., *supra* note 57, at 5.

60. *See, e.g.*, ME. REV. STAT. ANN. tit. 22, § 4011-B (West 2005); MINN. STAT. ANN. § 626.5561 (West 2005); S.C. CODE ANN. § 20-7-510 (Law Co-op. 2004).

61. *See, e.g.*, CAL. PENAL CODE § 11165.13 (West 2004); ME. REV. STAT ANN. tit. 22, § 4011-B (West 2005); MINN. STAT. ANN. § 626.5561 (West 2005).

county welfare or probation department, and not to a law enforcement agency.”<sup>62</sup> South Carolina, however, does not follow this general rule. In South Carolina reports may be made available to law enforcement agencies “investigating or prosecuting known or suspected abuse or neglect of a child or any other crime against a child.”<sup>63</sup> South Carolina also defines a child to include a viable fetus.<sup>64</sup> Failure to report usually constitutes a misdemeanor.<sup>65</sup> Although criminal prosecution is rare,<sup>66</sup> other forms of coercion exist in the form of civil commitments and presumptions of neglect under child welfare laws.<sup>67</sup>

### A. Criminal Prosecution

South Carolina is the only state that has criminalized drug use during pregnancy.<sup>68</sup> In October 27, 1997, South Carolina’s highest court held that a viable fetus is a child within the definition of the state’s child abuse and neglect statute.<sup>69</sup> In *State v. Whitner*, Ms. Cornelia Whitner was charged under the child abuse and neglect statute<sup>70</sup> when her newborn infant was born with cocaine metabolites in its system. Whitner confessed to using cocaine during the third trimester of the pregnancy.<sup>71</sup> The court explained, “[I]t would be absurd to recognize the viable fetus as a person for the

62. CAL. PENAL CODE § 11165.13.

63. S.C. CODE ANN. § 20-7-510.

64. *Whitner*, 492 S.E.2d at 778; S.C. CODE ANN. § 20-7-50.

65. *See, e.g.*, MINN. STAT. ANN. § 626.556(6)(a) (West 2004); WIS. STAT. ANN. § 48.981(G) (West 2005).

66. *See* Lisa H. Harris & Lynn Paltrow, *The Status of Pregnant Women and Fetuses in US Criminal Law*, JAMA, VOL. 289, NO. 13, Apr. 2, 2003, at 1697, 1698-99, <http://jama.ama-assn.org/cgi/content/full/289/13/1697>.

67. *Id.*

68. *Id.*; *Whitner*, 492 S.E.2d 777; S.C. CODE ANN. § 20-7-50.

69. *Whitner*, 492 S.E.2d 778.

70. § 20-7-50 for unlawful conduct towards a child reads:

It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 20-7-490(5) to:

- (1) place the child at unreasonable risk or harm affecting the child’s life, physical or mental health, or safety;
- (2) do or cause to be done unlawfully maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
- (3) willfully abandon the child.

(B) A person who violates subsection (A) is guilty of a felony and for each offense, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years, or both.

S.C. CODE ANN. § 20-7-50 (Law Co-op. 2004).

71. *Whitner*, 492 S.E.2d at 778.

purpose of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse.”<sup>72</sup> It concluded in “[its] holding in *Hall*<sup>73</sup> that a viable fetus is a person rested primarily on the plain meaning of the word ‘person’ in light of existing medical knowledge concerning fetal development.”<sup>74</sup> The court went on to explain that “the plain and ordinary meaning of the word ‘person’ has [not] changed in any way that would deny viable fetuses status as persons.”<sup>75</sup> Consequently, the court convicted Whitner and sentenced her to eight years imprisonment.<sup>76</sup>

Six years later, the stakes were raised in *State v. McKnight*.<sup>77</sup> In that case, a mother was charged and convicted of homicide by prenatal child abuse after giving birth to a stillborn baby girl.<sup>78</sup> An autopsy revealed evidence of cocaine exposure to the newborn.<sup>79</sup> Medical testimony determined the cause of death to be intrauterine fetal demise with mild chorioamnionitis, funisitis, and cocaine consumption.<sup>80</sup> A pathologist testified, declaring the death a homicide.<sup>81</sup> The mother moved for a directed verdict, challenging that she did not have the requisite criminal intent to commit homicide by abuse.<sup>82</sup> Under South Carolina law, “a person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under the circumstances manifesting an extreme indifference to human life.”<sup>83</sup> The state supreme court defined “extreme indifference” in the context of criminal prosecution to mean “the conscious act of disregarding a risk which a person’s conduct has created, or a failure to exercise ordinary or due care.”<sup>84</sup> The court held that under homicide by abuse standards, extreme indifference is a mental state equivalent to “intent characterized by a deliberate act culminating in death.”<sup>85</sup> It denied her motion for directed verdict.<sup>86</sup> The court further held it proper for the jury to determine the issue as to whether McKnight acted with extreme indifference to her child’s life when

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72. *Id.* at 780.

73. In *Hall v. Murphy*, the South Carolina Supreme Court found, “no difficulty in concluding that a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person.” 113 S.E.2d 790, 793 (S.C. 1960).

74. *Whitner*, 492 S.E.2d at 780.

75. *Id.*

76. *Id.* at 779.

77. 576 S.E.2d 168 (S.C. 2003)

78. *Id.* at 171.

79. *Id.*

80. *Id.*

81. *Id.*

82. *State v. McKnight*, 576 S.E.2d 168, 172 (S.C. 2003).

83. *Id.* at 172-73 (citing S.C. CODE ANN. § 16-3-85(A)).

84. *Id.* at 173.

85. *Id.*

86. *Id.*

she consumed cocaine, on numerous occasions, while pregnant.<sup>87</sup> Ultimately, the high court affirmed her sentence of twenty years, suspended to service of twelve years.<sup>88</sup>

### B. *Civil Commitment*

Although a majority of legislative bodies and courts have refused to criminalize prenatal substance abuse,<sup>89</sup> several states have permitted the civil commitment of a pregnant woman who refuses to seek drug treatment.<sup>90</sup> For example, the State of Minnesota defines one aspect of neglect as,

prenatal exposure to a controlled substance, . . . used by the mother for a nonmedical purpose, as evidenced by withdrawal symptoms in the child at birth, results of a toxicology test performed on the mother at delivery or the child at birth, or medical effects or developmental delays during the child's first year of life that medically indicate prenatal exposure to a controlled substance.<sup>91</sup>

Minnesota requires professionals in the practice of healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement who “knows or has reason to believe a child is being neglected or physically or sexually abused” to report the information.<sup>92</sup> Upon receiving a report, the local welfare agency must immediately conduct an assessment and offer services.<sup>93</sup> If the woman refuses recommended voluntary services or fails recommended treatment, the agency must take appropriate action by seeking emergency admission at a health care or treatment facility.<sup>94</sup> Minnesota's Emergency Admission statute states that “[a]ny person may be admitted or held for emergency care and treatment in a treatment facility [if] . . . the examiner is of the opinion, . . . that the person is . . . chemically dependent, and is in danger of causing injury to self or others if not immediately detained.”<sup>95</sup> A “chemically dependent person” is defined specifically to include “a pregnant woman who has engaged during the pregnancy in

87. *McKnight*, 576 S.E.2d at 173.

88. *Id.* at 177, 179.

89. Harris & Paltrow, *supra* note 66, at 1697-98 (finding South Carolina to be the only state to criminalize drug use during pregnancy).

90. See, e.g., MINN. STAT. ANN. § 626.5561 (West 2003); S.D. CODIFIED LAWS § 34-20A-70 (Michie 2004); WIS. STAT. ANN. § 48.193 (West 2003).

91. MINN. STAT. ANN. § 626.556, *amended by* 2005 Minn. Sess. Law Serv. 136 (West 2004).

92. § 626.556(3)(a) (The state also requires reporting by members of the clergy who receive information while engaged in ministerial duties).

93. § 626.5561.

94. *Id.*

95. MINN. STAT. ANN. § 253B.05 (West 2004).

habitual or excessive use, for a nonmedical purpose, of any of the following controlled substances or their derivatives: cocaine, heroin, phencyclidine, methamphetamine, or amphetamine.”<sup>96</sup>

South Dakota has a similar statute.<sup>97</sup> Its statute allows a spouse, guardian, relative, physician, an administrator of a treatment facility, or any other responsible person to petition the court to have a pregnant mother alleged to be abusing alcohol or drugs involuntarily committed.<sup>98</sup> The expectant mother may be held involuntarily for treatment for a maximum of ninety days.<sup>99</sup> After ninety days, the mother is automatically discharged.<sup>100</sup> However, if the treatment facility obtains a court order for recommitment, an additional ninety days may be imposed.<sup>101</sup>

Similarly, Wisconsin revised its Children’s Code<sup>102</sup> to recognize prenatal child abuse.<sup>103</sup> That Code states that the “court has exclusive original jurisdiction over an unborn child alleged to be in need of protection or services which can be ordered by the court whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs.”<sup>104</sup> Furthermore, the court also has original jurisdiction of the expectant mother.<sup>105</sup> Under Wisconsin law, an expectant mother may be taken into custody by order of the court if it is shown that:

[T]he adult expectant mother’s habitual lack of self control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, . . . [creates] a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the adult expectant mother is taken into custody and that the adult expectant mother is refusing or has refused to accept any alcohol or other drug abuse services offered to her or is not making or has not made a good faith effort to participate in any alcohol or other drug abuse services offered to her.<sup>106</sup>

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96. § 253B.02(2).

97. S.D. CODIFIED LAWS § 34-20A-70 (Michie 2003).

98. *Id.*

99. § 34-20A-81.

100. *Id.*

101. *Id.*

102. *See* WIS. STAT. ANN. §§ 48.01-.9985 (West 2004).

103. § 48.133; LYNN M. PALTROW ET AL., YEAR 2000 OVERVIEW, GOVERNMENTAL RESPONSES TO PREGNANT WOMEN WHO USE ALCOHOL OR OTHER DRUGS 8 (2000), [http://www.advocatesforpregnantwomen.org/articles/gov\\_responses\\_review.pdf](http://www.advocatesforpregnantwomen.org/articles/gov_responses_review.pdf).

104. WIS. STAT. ANN. § 48.133 (West 2004).

105. *Id.*

106. § 48.193(1)(C).

A hearing as to whether custody should continue must be held within forty-eight hours after the expectant mother is taken into custody.<sup>107</sup> If the judge or commissioner finds that custody should continue, the court must either release the mother and impose reasonable restrictions on such things as travel and association with persons or places,<sup>108</sup> or require the woman to be held at the home of an adult relative or friend of the woman, a licensed community-based residential facility, a treatment facility, or hospital.<sup>109</sup>

### C. Child Welfare Laws

In theory, the purpose behind child welfare laws is to protect children and not to punish parents for their past wrongful conduct.<sup>110</sup> However, state legislatures have amended their laws to include prenatal substance abuse in their child abuse and neglect statutes.<sup>111</sup> Thus, a presumption of unfitness on the part of the mother is presumed in the event a newborn's toxicology screen reveals the presence of chemical substances.<sup>112</sup> These amendments may be driven by the assumptions that a woman's decision to continue taking drugs during pregnancy is indicative of a lack of care for the health of the child, that these women will not be capable of providing adequate care once the child is born, and that child welfare intervention will protect and improve the health of the child.<sup>113</sup>

One state that has revised its child abuse and neglect statute in this fashion is Illinois.<sup>114</sup> Under the Illinois statute, a mother is presumed unfit with respect to any child to which that parent gives birth if a confirmed test of the child's blood, urine, or meconium shows traces of controlled substances and the mother is also a biological mother of another child previously adjudicated as a neglected minor.<sup>115</sup> The constitutionality of the statute was challenged in *In re O.R.* under equal protection and substantive due process grounds.<sup>116</sup> The appellate court applied strict scrutiny to both issues.<sup>117</sup> Regarding the equal protection claim, the law creates a classification

107. § 48.213.

108. "Reasonable restrictions may be placed upon the conduct of the adult expectant mother which may be necessary to ensure the safety of the unborn child and of the child when born." § 48.213(3)(a).

109. WIS. STAT. ANN. § 48.207(1m) (West 2004).

110. PALTROW ET AL., *supra* note 103, at 4.

111. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 50/1-1(D)(k) (West 2004); WIS. STAT. ANN. § 48.133 (West 2005).

112. 750 ILL. COMP. STAT. ANN. 50/1-1(D)(k) (West 2004).

113. PALTROW ET AL., *supra* note 103, at 4-7.

114. 750 ILL. COMP. STAT. ANN. 50/1-1(D)(k).

115. *Id.*

116. *In re O.R.*, 767 N.E.2d 872 (Ill. App. Ct. 2002)

117. *Id.* at 876-77 (to survive strict scrutiny, the law must be necessary to advance a

of mothers who abuse substances during pregnancy, give birth to infants with drugs in their systems, have at least one other child adjudicated neglected for having drugs in their systems at the time of birth, and have an opportunity to receive substance abuse treatment thereafter.<sup>118</sup> In order to find justification for this classification, the court turned to the purpose of the legislation.<sup>119</sup> The court found the legislature, as *parens patriae*, had a compelling interest in protecting children from abuse, both before and after the abuse occurs.<sup>120</sup> The classification was found necessary to promote that interest.<sup>121</sup> Furthermore, the statute was tailored narrowly to attain the legislature's goal.<sup>122</sup> Nevertheless, the mother still complained that she was treated unfairly.<sup>123</sup> She argued that the statute treats her more harshly than a mother who consumes drugs after birth or a mother who consumes drugs early in the pregnancy and the newborn does not test positive.<sup>124</sup> The court correctly responded to this claim by pointing out that such groups are not similarly situated.<sup>125</sup> The court explained that the statute focuses on a mother whose consumption of drugs during pregnancy directly harms the health of the child.<sup>126</sup> A mother who consumes drugs after birth does not directly harm the child.<sup>127</sup> The opinion went on to explain that simply because a toxicology screen may not identify a mother who consumes drugs early in the pregnancy, it does not render the classification system defective.<sup>128</sup> Thus, the court held that the statute did not violate equal protection rights.<sup>129</sup>

The mother also argued that the statute "imposes an impermissible irrebuttable presumption of unfitness because it does not give her the opportunity to rebut the presumption of unfitness with her current ability to discharge her parental responsibilities."<sup>130</sup> The court disagreed.<sup>131</sup> The statute was found to be narrowly tailored to meet the state's compelling interest in protecting a child from abuse.<sup>132</sup> The court wrote, "[t]he statute identifies the interest to be protected, provides a mother with notice after she harms a previous child by using drugs that passed to that

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compelling state interest and narrowly tailored to address that interest).

118. *Id.* at 876.

119. *Id.*

120. *Id.*

121. *In re O.R.*, 767 N.E.2d at 876.

122. *Id.* at 877.

123. *See id.*

124. *Id.*

125. *Id.*

126. *In re O.R.*, 767 N.E.2d at 877.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 878.

131. *Id.*

132. *In re O.R.*, 767 N.E.2d at 879.

child *in utero*, and provides an opportunity to correct the abuse before a mother passes drugs to another child through pregnancy.”<sup>133</sup> Hence, the court found no due process violation.<sup>134</sup>

Similarly, Ohio law regards the presence of chemical substances in a newborn’s toxicology test as child abuse.<sup>135</sup> Ohio statutes mandate that “an abused child includes any child who . . . because of the acts of his [or her] parents, . . . suffers physical or mental injury that harms or threatens to harm the child’s health or welfare.”<sup>136</sup> In *In re Baby Boy Blackshear*, the state’s highest court held that if a newborn child’s toxicology screen produces positive results for illegal drugs due to prenatal exposure, the newborn is “*per se* an abused child.”<sup>137</sup> In that case, the mother argued that a fetus was not a “child” under the statutory definition, therefore, the statute was inapplicable.<sup>138</sup> The court clarified that “the issue [was] not whether [the] fetus is a child but whether the plain language” of the statute was applicable to the child under the circumstances of the case.<sup>139</sup> The court held that it did.<sup>140</sup> Interestingly, the opinion noted that though “child” is defined as “a person who is under eighteen years of age,” the statute was silent as to the definition of “person.”<sup>141</sup>

#### D. Washington State’s Current Policy

In 1989, the Washington State Legislature recognized the importance of maternity care and established an access system to facilitate and promote the availability of maternity care for low-income families.<sup>142</sup> Known as the Maternity Care Access Act of 1989,<sup>143</sup> a component of that system addressed chemical-using or chemical-dependant expectant mothers and their fetuses by providing “immediate access to medical care . . . [to prevent] obstetric and prenatal complications related to chemical dependency.”<sup>144</sup> Services include “detoxification . . . and rehabilitation

133. *Id.*

134. *Id.*

135. *In re Baby Boy Blackshear*, 736 N.E.2d 462, 465 (Ohio 2000).

136. OHIO REV. CODE ANN. § 2151.031(D) (West 2004).

137. *In re Baby Boy Blackshear*, 736 N.E.2d at 465.

138. *Id.* at 464.

139. *Id.*

140. *Id.*

141. *Id.* The opinion brings to mind a similar discussion from the *Whitner* case, the only difference is that the *Whitner* court went a step further to define person to include a viable fetus. *Whitner*, 492 S.E.2d at 779-80.

142. Maternity Care Access Act, ch. 10, 1989 Wash. Legis. Serv. 1st Ex. Sess. 2667, 2668 (West 2005) (effective Aug. 9, 1989).

143. *Id.*

144. WASH. ADMIN. CODE § 388-533-0701 (West 2004).

treatment.”<sup>145</sup> In its finding, the legislature stated, “the investment in preventative health care programs, such as maternity care, contributes to the growth of a healthy and productive society and is a sound approach to health care cost containment.”<sup>146</sup>

Currently, Washington’s child abuse statute fails to recognize a fetus as a child.<sup>147</sup> As a result, expectant mothers may expose their unborn children to chemical substances without fear of criminal punishment.<sup>148</sup> In fact, CPS will take reports as “information only.”<sup>149</sup> It will document the expectant mother’s “use of alcohol or controlled substances that are not medically prescribed” and potentially harmful to the fetus.<sup>150</sup> It will then refer the reports to local social workers to assess the woman’s eligibility for the First Steps program.<sup>151</sup> If the report is made within four weeks of the expected date of birth, CPS must accept the referral and conduct an investigation if an expectant mother meets one of the following conditions:

- [1.] Refuses to get prenatal care and/or has made no provisions for the baby.
- [2.] Refuses to enter substance abuse treatment.
- [3.] Is mentally ill or seriously emotionally disturbed.
- [4.] Is without a social or financial support system.
- [5.] Has a history of prior CPS involvement where other children are in out-of-home care or where parental rights have been terminated.
- [6.] Is under the age of 18 and lacks a place to live.<sup>152</sup>

CPS may file a prenatal dependency petition if “the social worker believes it is necessary to assume immediate custody of the infant at birth.”<sup>153</sup> The purpose behind CPS’s prenatal involvement is to provide adequate time prior to birth to assess the parent’s ability to care for the child, identify relatives for placement in the event the mother lacks the capability to provide adequate care, encourage parental participation in treatment, and advise for possible post-birth CPS action.<sup>154</sup>

145. WASH. ADMIN. CODE § 388-533-0730(1)(a)-(c) (West 2004).

146. Maternity Care Access Act, ch. 10.

147. *See* State v. Dunn, 916 P.2d 952, 955 (Wash. Ct. App. 1996).

148. *See, e.g., id.* (explaining that no criminal case in the state of Washington has ever considered an “unborn child” or fetus to be a natural person).

149. WASH. STATE DEP’T SOCIAL AND HEALTH SERVS., *supra* note 11, at 2-31.

150. *Id.*

151. *Id.* First Steps is a government program tailored to help low-income pregnant women receive needed health and social services. WASH. STATE DEP’T OF SOCIAL AND HEALTH SERVS., GENERAL INFORMATION AND HOW TO APPLY, <http://fortress.wa.gov/dshs/maa/firststeps/What%20is%20First%20Steps.htm> (last visited Dec. 28, 2004).

152. WASH. STATE DEP’T OF SOCIAL AND HEALTH SERVS., *supra* note 11, at 2-32.

153. *Id.* (Prenatal petitions may only be filed after consultation with an assigned legal counsel).

154. *Id.*

## IV. PROBLEMS WITH CURRENT STATE RESPONSES

Policies advocating for criminal prosecution, civil commitments, and presumptions of unfitness on the part of the mother have been criticized as being counterproductive and founded on the mistaken assumption that substance-abusing women are capable of quitting and that their failure to do so reflects indifference to health of the fetus.<sup>155</sup> On the other hand, policies promoting voluntary chemical dependency treatment, though prudent, are wholly ineffective due to the minimal commitment by the state.<sup>156</sup> The two levels of state involvement both have their weaknesses. One is arguably counterproductive, deterring woman from seeking maternity care, and the other is ineffective due to the lack of state commitment.<sup>157</sup>

A. *The Danger in Punishing Substance-Abusing Expectant Mothers*

Prenatal medical care is crucial.<sup>158</sup> One of the obvious dangers of prosecuting or involuntarily committing expectant mothers for their drug use is that, by doing so, those mothers may be deferred from seeking maternity care.<sup>159</sup> This is especially true given that health care professionals are required to report cases of prenatal substance abuse to the appropriate child welfare or law enforcement agencies.<sup>160</sup> The American Medical Association has recognized this problem, stating, “[p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians’ knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.”<sup>161</sup> That is exactly what transpired in South Carolina, where the number of pregnant mothers seeking prenatal

155. See also David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN’S L.J. 243, 246-52 (2001).

156. See PALTROW ET AL., *supra* note 103, at 5-6. Of the estimated \$276 billion in total economic cost of alcohol and drug abuse in the United States, less than 4.3% was spent for treatment. *Id.* In 1998, ten percent of Washington’s government spending was related to the impact of substance abuse. *Id.* at 14. That is roughly \$248 per resident. *Id.* Of that \$248, only \$10 was spent on prevention and treatment. *Id.*

157. See also Brody & McMillin, *supra* note 155, at 250.

158. *Id.* at 256.

159. Motion for Leave to File Brief as Amici Curiae in Support of the Petition for Certiorari and Brief in Support of the Petition for Certiorari of the National Association of Alcoholism and Drug Abuse Counselors, et al, at \*16, *Whitner v. State*, 1998 WL 34103628 (1998) (No. 97-1562).

160. *Id.* at \*2-3. See also S.C. CODE ANN. § 20-7-510 (Law Co-op. 2004) (requiring that “physician[s], nurse[s], dentist[s], optometrist[s], medical examiner[s], or coroner[s] . . . must report in accordance with this section when in the person’s professional capacity the person has received information which gives the person reason to believe that a child has been or may be abused or neglected.”).

161. *Id.* at \*16. With 17,000 members nationwide, the National Association of Alcoholism and Drug Abuse Counselors is the largest organization of alcohol and drug counselors. *Id.* at \*1.

care dramatically decreased.<sup>162</sup> Admissions dropped in two programs that give priority to pregnant women.<sup>163</sup> Admissions to Women's Community Residence dropped a shocking eighty percent in a period of one year after the *Whitner* decision.<sup>164</sup> In addition, over the same time span, the admissions of pregnant women dropped by fifty-four percent at the Women's Intensive Outpatient program.<sup>165</sup> Clearly, the fear of criminal prosecution has resulted in a drastic decline in the number of expectant mothers seeking medical care. Unfortunately, since the *Whitner* decision, the infant mortality rate increased for the first time in that decade and the state saw a twenty percent increase in abandoned babies.<sup>166</sup>

*B. Minimal State Involvement: Costs Related to Drug-Exposed Babies*

Though Washington's current policy allows for CPS involvement in the last four weeks of pregnancy, it remains ineffective in preventing injury to the fetus.<sup>167</sup> As discussed below, the damage caused by substance abuse can be irreversible at this point.<sup>168</sup> Pursuant to the proposed policy change, if a substance-abusing expectant mother is reported to CPS, the report is treated as "informational only."<sup>169</sup> CPS simply refers the report to outside programs,<sup>170</sup> while the State's most powerful advocate for children does nothing.<sup>171</sup> This lack of involvement comes at a high price, not only with respect to the health of the child, but also to the State's budget.<sup>172</sup>

The cost of medical care for drug-exposed babies is astonishing. "It costs between \$30,000 and \$70,000 to raise a low-birth-weight [infant] to normal weight."<sup>173</sup> Additionally, each drug-exposed newborn costs this state around \$50,000 in the infant's first year alone.<sup>174</sup> As for the lifetime costs to a state, it can run as high

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162. *Id.* at \*2.

163. *Id.*

164. *Id.*

165. *Id.*

166. LYNN M. PALTROW ET AL., *supra* note 103, at 9.

167. WASH. STATE DEP'T. OF SOCIAL AND HEALTH SERV., *supra* note 11, at 2-32.

168. *See infra* notes 217-222 and accompanying text.

169. WASH. STATE DEP'T OF CHILD AND FAMILY SERV., *supra* note 13.

170. *Id.*

171. *Id.*

172. CHRISTOPHER J. KALOTRA, ESTIMATED COST RELATED TO THE BIRTH OF A DRUG AND/OR ALCOHOL EXPOSED BABY 5 (2002).

173. WASH. STATE DEP'T OF HEALTH, HEALTH EFFECTS AND COST BENEFITS, [http://www.doh.wa.gov/cfh/WIC/health\\_effects.htm](http://www.doh.wa.gov/cfh/WIC/health_effects.htm) (last visited Dec. 28, 2004) (outlining the health effects and cost benefits of Washington State's WIC program, a program dedicated to improving the health of mothers and children).

174. KALOTRA, *supra* note 172, at 5.

as \$1 million per child.<sup>175</sup> Washington, D.C. reflects one example of the financial burden this problem imposes on the community at large. The city spends at least \$5.9 million each year caring for these infants.<sup>176</sup> Moreover, these infants account for a significant number of boarder babies in hospitals.<sup>177</sup> Boarder babies are babies who remain hospitalized due to parental abandonment, child abuse investigations, and unavailability of foster care placements.<sup>178</sup>

Besides the significant burden on the healthcare system, prenatal substance abuse strains educational resources as well.<sup>179</sup> The nation spends roughly \$352 million a year in special education for children prenatally exposed to cocaine or crack.<sup>180</sup> In Florida, the state estimates that the average cost for preparing a crack-exposed infant for school is \$40,000 per year.<sup>181</sup> In Los Angeles, the average “cost of educating a child in the city’s pilot project for drug-exposed children is \$15,000 annually, while cost for a regular classroom is \$3,500 annually.”<sup>182</sup>

Furthermore, a lack of preventative and remedial measures can severely stretch a state’s foster care budget.<sup>183</sup> Studies estimate that ten to twenty percent of prenatally drug-exposed newborns enter the foster care system around the time of birth, with about a third entering within a few years.<sup>184</sup> As for expectant mothers receiving no treatment, research suggests that eighty percent of all identified prenatally drug-exposed babies will be placed in foster care within the first year of their lives.<sup>185</sup> The estimated costs of foster care for each child is \$25,000.<sup>186</sup> The substantial cost to the states comes in the form of monthly monetary compensation to foster parents used to pay for food, shelter, and clothing.<sup>187</sup> In 2000, Washington State’s foster care budget

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175. *Id.*

176. DRUG STRATEGIES, FACING FACTS, DRUGS AND THE FUTURE OF WASHINGTON, D.C. (1999), <http://www.drugstrategies.org/ff1999/health.html>.

177. Josephine Gittler, *Prenatal Substance Abuse: An Overview of the Problem*, CHILDREN TODAY, July-Aug. 1990, [http://www.findarticles.com/p/articles/mi\\_m1053/is\\_n4\\_v19/ai\\_9153202](http://www.findarticles.com/p/articles/mi_m1053/is_n4_v19/ai_9153202).

178. *Id.*

179. *Id.*

180. KALOTRA, *supra* note 172, at 9.

181. Gittler, *supra* note 177.

182. *Id.*

183. *Id.*

184. CHILD WELFARE LEAGUE OF AMERICA, ALCOHOL AND OTHER DRUGS ABUSE: A CRITICAL CHILD WELFARE ISSUE, <http://www.cwla.org/programs/bhd/AODFactSheet.htm> (last visited Dec. 22, 2004).

185. IRIS SMITH, COAS IN FOSTER CARE, A GROUP IN NEED OF ADVOCACY, <http://www.nacoa.net/foster.htm> (last visited Dec. 22, 2004).

186. COOK COUNTY SHERIFF’S OFFICE, MOM’S PROGRAM GIVES THANKS FOR DRUG FREE BABIES, Nov. 25, 2003, <http://www.cookcountysheriff.org/press/newspage.asp?id=159>.

187. MEDILL SCHOOL OF JOURNALISM, ON THE DOCKET: WASHINGTON STATE DEPT. OF SOCIAL AND HEALTH SERVICES, ET AL. V. KIEFFER, DANNY, June 23, 2004, <http://www.medill.northwestern.edu/~secure/docket/mt/archives/000656.php>.

comprised \$37.4 million in its own funds, coupled with an additional \$12.9 million in federal funds.<sup>188</sup>

It is evident that many prenatally drug-exposed children will be introduced into the foster system at some early point in their lives. This is more likely for those children whose drug-abusing mothers received little or no drug treatment during pregnancy.<sup>189</sup> Since these children require a greater amount of care, the hardship not only falls on the shoulders of a state, but also on those of the foster parents.<sup>190</sup> Nearly eighty percent of foster children are in jeopardy of suffering broad ranges of developmental and physical health problems as a result of their exposure to prenatal substance abuse.<sup>191</sup>

#### V. THE IMPORTANCE OF EARLY SUBSTANCE ABUSE INTERVENTION

“The children of the state of Washington are the state’s greatest resource and [its] greatest source of wealth.”<sup>192</sup> Those were the words of Washington’s legislature in 1985.<sup>193</sup> In October 2003, DCFS recommended revising its prenatal substance abuse policy.<sup>194</sup> Finding a lack of evidence of “a cause and effect relationship between substance use during pregnancy and negative outcomes of children, except in the case of alcohol,” the department proposed to take a step back in its involvement.<sup>195</sup> Though the department recognizes substance abuse during pregnancy as a “strong risk factor in future abuse [or] neglect of children,” it believes that “it is not an issue for CPS intervention prior to the birth of a child.”<sup>196</sup> Instead, CPS proposed to simply coordinate and work closely with community programs, rather than conduct an investigation, even during the late stages of pregnancy.<sup>197</sup>

In the face of such compelling evidence concerning the medical and economic consequences of prenatal substance abuse, it is troubling, to say the least, that the state would contemplate turning its back on these children. With the number of states taking a strong stance against the problem, it is perplexing why Washington’s DCFS would consider doing the opposite by taking a backseat on the issue. Though many states do not impose any degree of punitive sanctions against the expectant mother,

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188. *Id.*

189. *See SMITH, supra* note 185.

190. *Id.*

191. N.Y. OFF. OF ALCOHOLISM & SUBSTANCE ABUSE SERV., FACTS: SUBSTANCE ABUSE AND CHILD WELFARE, <http://www.oasas.state.ny.us/pio/publications/fs22.htm> (last visited Dec. 22, 2004).

192. 1985 Wash. Sess. Laws 887.

193. *Id.*

194. WASH. STATE DEP’T OF CHILD AND FAMILY SERVS., *supra* note 13.

195. *Id.*

196. *Id.*

197. *Id.*

they do more than simply document and refer reports of prenatal substance abuse to community programs.<sup>198</sup> Washington needs to do more.

*A. Ensuring a Healthy Birth: The Need for Immediate Drug Treatment*

Early intervention is crucial. Substance-abusing expectant mothers who have been able to get treatment tend to have healthier children than those who do not.<sup>199</sup> One finding in Washington shows that the fetal death rate for substance-abusing expectant mothers who received chemical dependency treatment was “one-third that of untreated substance abusing-pregnant women.”<sup>200</sup> Moreover, substance-abusing expectant mothers receiving significant chemical dependency treatment were much less likely to experience pre-term delivery than those receiving no treatment.<sup>201</sup>

In addition, medical studies show that the fetus’s susceptibility to drugs and alcohol starts early in the pregnancy and worsens as the fetus develops.<sup>202</sup> Most of the body organs and systems of the fetus are formed during the first stages of pregnancy.<sup>203</sup> During the first ten weeks, some drugs, especially alcohol, can cause malformations of the developing fetus in the heart, limbs, and facial features.<sup>204</sup> After ten weeks, the fetus’s growth rate quickens.<sup>205</sup> During this time, the eyes and the nervous system remain vulnerable to damage.<sup>206</sup> Also, continued drug and alcohol use raises the probability of miscarriage and premature delivery.<sup>207</sup> Obviously, early identification of these risks is vital and the immediate provision of services is necessary to prevent serious fetal damage.

On a positive note, some expectant mothers are taking responsibility for their drug use by attempting to reduce or quit for the sake of their unborn children.<sup>208</sup> Such initiatives by the expectant mother can have significant health benefits for the

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198. See CAL. DEP’T OF ALCOHOL AND DRUG PROGRAMS, PERINATAL SERVICES NETWORK GUIDELINES FALL 2004, available at <http://www.adp.cahwnet.gov/perinatal/perinatal.shtml>. See also MINN. STAT. ANN. § 626.556 (West 2003); S.D. CODIFIED LAWS § 34-20A-70 (Michie 1994).

199. See LAURIE CAWTHORN & KAREN WESTRA, FIRST STEPS DATABASE, SAFE BABIES-SAFE MOMS (2003), <http://www1.dshs.wa.gov/pdf/ms/rda/research/4/36/e.pdf>.

200. WASH. STATE DEP’T OF CMTY., TRADE & ECON. DEV., GOVERNOR’S COUNCIL ON SUBSTANCE ABUSE REPORT 15 (2002), available at [http://qa.cted.wa.gov/\\_cted/documents/ID\\_386\\_Publications.doc](http://qa.cted.wa.gov/_cted/documents/ID_386_Publications.doc).

201. WASH. STATE DEP’T OF SOCIAL AND HEALTH SERVS., *supra* note 11, at 238.

202. See NEV. STATE HEALTH DIV., ALCOHOL, DRUGS & PREGNANCY, <http://health2K.state.nv.us/psap/AlcoholDrugs.htm> (last visited Dec. 28, 2004).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. NEV. STATE HEALTH DIV., *supra* note 202.

208. See LYNN M. PALTROW ET AL., *supra* note 103, at 6.

infant.<sup>209</sup> For example, the risk of having a low-birth-weight baby is as low for those who quit smoking during the first trimester as for those who never smoked in the first place.<sup>210</sup> Quitting smoking as late as the third trimester can still improve the growth of the baby.<sup>211</sup> According to the American College of Obstetricians and Gynecologists, quitting smoking anytime up to the thirtieth week of pregnancy results in higher birth weights than those who smoked throughout their pregnancy.<sup>212</sup>

### B. Cost-Savings as a Result of Early Treatment

If the health of a child is not enough to justify immediate intervention on the part of DCFS, the substantial dollar savings as a result of early intervention is unquestionable.<sup>213</sup> The average Medicaid costs in Washington during the first two years of life were lower for infants born to women who received chemical dependency treatment in the prenatal period than for those born to substance-abusing women who received no such treatment—\$3,694.00 as compared to \$5477.00.<sup>214</sup> One study found that women in treatment had higher infant birth weights, resulting in lower costs in overall medical and drug treatment.<sup>215</sup> The average yearly hospital-related cost for low-birth-weight infants is \$21,000.<sup>216</sup>

The legal system may also play a crucial role in reducing healthcare, foster care, and educational costs related to prenatally drug-exposed children. Drug Court programs have proven successful in reducing costs related to the care of drug-exposed babies.<sup>217</sup> According to the Department of Justice's Office of Justice Program, 300 drug-free babies were reportedly born to female drug court participants enrolled in the program.<sup>218</sup> According to the report, "had these mothers continued to use drugs, . . . [the] care and treatment for each child would have cost a minimum of \$250,000" for the first few years after birth.<sup>219</sup> The total costs for hospital care, foster

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209. See MARCH OF DIMES, *supra* note 51.

210. *Id.*

211. *Id.*

212. QUIT WA, SMOKING AND YOUR BABY: A GUIDE FOR PREGNANT WOMEN OR MOTHERS 9 (2004), <http://www.quitwa.com/Interface/pdf/smoking-and-pregnancy.pdf>.

213. WASH. STATE DEP'T OF SOCIAL AND HEALTH SERVS., DIV. OF ALCOHOL AND SUBSTANCE ABUSE, TOBACCO, ALCOHOL, AND OTHER DRUG ABUSE TRENDS IN WASHINGTON STATE 5, (2003).

214. *Id.*

215. CAWTHORN & WESTRA, *supra* note 199.

216. PHYSICIANS COMMITTEE FOR RESPONSIBLE MEDICINE, *supra* note 53.

217. See U.S. Dep't of Justice, Office of Justice Program, *New Survey Documents Dramatic Rise in Drug Courts: Substantial Progress Reported*, Press Release, Nov. 24, 1997, <http://www.ojp.usdoj.gov/pressreleases/1997/OJP98011.htm>.

218. *Id.*

219. *Id.*

care, and special education could be as high as \$750,000 by the time the child reaches the age of 18.<sup>220</sup>

In 2001, Washington invested \$378.8 million in its criminal justice system to deal with the impact of substance abuse.<sup>221</sup> Accordingly, a study by Washington's Department of Social and Health Services showed that the arrest rates of pregnant and parenting women who received chemical dependency treatment decreased by more than fifty percent during the two years after treatment.<sup>222</sup> Such a significant drop strongly suggests that chemical dependency treatment for pregnant and parenting women are effective in deterring further contact with law enforcement.

Preventing drug use among expectant mothers is paramount. Along with ensuring the well being of our children, the enormous cost savings for the state is beyond question. The cost of care for drug-addicted babies is significant.<sup>223</sup> In comparison, the costs of prenatal drug treatment and medical care are comparatively small.<sup>224</sup>

### *C. A Model State Program: California's Office of Perinatal Substance Abuse*

Rather than taking a step back from the issue, DCFS should look to other states that have taken strong initiatives to address the problem.<sup>225</sup> One successful program is California's Department of Alcohol and Drug Program's ("ADP") Office of Perinatal Substance Abuse ("OPSA").<sup>226</sup> That office "oversees a statewide network of approximately 288 publicly funded perinatal alcohol and other drug treatment programs."<sup>227</sup> "To be eligible for perinatal funding, a program must serve women who are either pregnant and substance [abusing] or parenting and substance using

220. *Id.*

221. WASH. STATE DEP'T OF SOCIAL AND HEALTH SERVS., DIV. OF ALCOHOL AND SUBSTANCE ABUSE, *supra* note 213, at 14.

222. WASH. STATE DEP'T OF SOCIAL AND HEALTH SERV., FACT SHEET: CHEMICAL DEPENDENCY TREATMENT REDUCES CRIME IN WASHINGTON STATE (2004), [http://www.esd113.k12.wa.us/esd113\\_website\\_filemgr/documents/services/sap/TxReducesCrimeFactSheet-02.pdf](http://www.esd113.k12.wa.us/esd113_website_filemgr/documents/services/sap/TxReducesCrimeFactSheet-02.pdf).

223. *See* UNITED NATIONS INTERNATIONAL DRUG CONTROL PROGRAMME VIENNA, INVESTING IN DRUG ABUSE TREATMENT, A DISCUSSION PAPER FOR POLICY MAKERS 15-16 (2003), [http://www.unodc.org/pdf/report\\_2003-01-31\\_1.pdf](http://www.unodc.org/pdf/report_2003-01-31_1.pdf) (The cost of care provided for mothers and the babies averaged \$14, 500, including drug abuse treatment, whereas the cost for the same medical care for mothers and babies receiving no treatment for drug dependence averaged \$46,700.).

224. *Id.*

225. *See* CAL. DEP'T OF ALCOHOL AND DRUG PROGRAMS, *supra* note 198; S.D. CODIFIED LAWS § 34-20A-70 (Michie 1994).

226. CAL. DEP'T OF ALCOHOL AND DRUG PROGRAMS, FACT SHEET: PERINATAL PROGRAMS: ALCOHOL AND DRUG SERVICES 1 (2005), [http://www.adp.cahwnet.gov/factsheets/Perinatal\\_Programs\\_Alcohol\\_and\\_Drugs\\_Services.pdf](http://www.adp.cahwnet.gov/factsheets/Perinatal_Programs_Alcohol_and_Drugs_Services.pdf).

227. *Id.*

with a child [or children] birth through seventeen.”<sup>228</sup> Each county is responsible for ensuring each program’s compliance with policy requirements.<sup>229</sup>

The root of OPSA’s success is its ability to provide immediate<sup>230</sup> and comprehensive drug treatment and services.<sup>231</sup> Services may include: HIV and tuberculosis (“TB”) education, counseling, and referrals for testing; referrals for prenatal care; education on the effects of alcohol and drug use on the fetus; and referrals based on individual assessment. These referrals may include, but are not limited to: self-help recovery groups; pre-recovery and treatment support groups; sources for housing, food, and legal aid; case management; children’s services; medical services; and Temporary Assistance to Needy Families (“TANF”).<sup>232</sup>

The program has been very successful.<sup>233</sup> Babies born to women who go through prenatal treatment programs test negative for drugs and alcohol approximately seventy-one percent of the time.<sup>234</sup> Furthermore, the longer the length of treatment, the greater the success rate.<sup>235</sup> As for the children, therapeutic services have resulted in fewer school dropouts, less truancy, and reduced juvenile delinquency.<sup>236</sup> In addition, reunifications between the child and the mother increased while the child welfare involvement and the amount of time children spend in foster care decreased.<sup>237</sup>

#### D. Structuring a Sound Policy for Washington

According to the proposed change to CPS’s prenatal substance abuse policy, DCFS’s involvement seems to end once a referral is made to outside programs.<sup>238</sup> Again, the purposes behind prenatal CPS involvement are to assess the parent’s ability to provide adequate childcare, explore alternative placements if the expectant mother appears unlikely to be capable of providing adequate care, encourage the woman’s participation in treatment, and advise of possible CPS action at birth.<sup>239</sup>

228. CAL. DEP’T OF ALCOHOL AND DRUG PROGRAMS, *supra* note 198, at 1.

229. *Id.* at 6.

230. When a program does not have the capacity or offer the necessary services to admit a substance-abusing expectant mother, the program must make and document a referral to another program. *Id.* at 2. If no referral is made, interim services must be provided within 48 hours and the women are placed at the top of the waiting list for treatment program admission. *Id.*

231. *Id.* at 6-7.

232. CAL. DEP’T OF ALCOHOL AND DRUG PROGRAMS, *supra* note 198, at 2-3.

233. CAL. DEP’T OF ALCOHOL AND DRUG PROGRAMS, *supra* note 226.

234. *Id.*

235. *Id.*

236. *Id.* at 2.

237. *Id.*

238. WASH. STATE DEP’T. OF SOCIAL AND HEALTH SERVS., *supra* note 13.

239. WASH. STATE DEP’T. OF SOCIAL AND HEALTH SERVS., *supra* note 11, at 2-32.

That is precisely what needs to be done. Unfortunately, current CPS policy requires social workers to intervene no earlier than the last four weeks of pregnancy.<sup>240</sup> That is too late. Serious, irreparable developmental damage to the fetus could have already been done. In fact, the proposed policy change would eliminate CPS intervention all together prior to birth.<sup>241</sup> As a consequence, the objectives of CPS prenatal involvement are eliminated altogether.

CPS needs to get involved with these women. At the very least, the expectant mother should be advised by CPS, as early as possible, of the medical and legal consequences of her continued substance abuse. The expectant mother should then be encouraged to voluntarily participate in treatment and be educated on the harmful effects of chemical substances to her unborn child. If such encouragement turns out to be futile, she should be warned that a prenatal dependency petition may be filed prior to birth in the event it becomes necessary to take immediate custody of the child at birth.<sup>242</sup> CPS's authority to deal with children puts it in a unique position to impress on pregnant women the dangers associated with continued prenatal substance abuse.

Not only does prenatal involvement allow CPS workers to drive home the importance of abstaining from drug use during pregnancy, but it also allows social workers to plan ahead in the event the newborn screens positive for chemical substances. Having already looked into the expectant mother's circumstances and into alternative placements for the baby, CPS can develop a plan and act quickly to place the newborn in a safe and caring home. Prompt response reduces the burden on the medical community by cutting down the length of the infant's hospital stay.<sup>243</sup> As discussed earlier, the number of boarder babies stranded in hospitals because of post-birth CPS investigation or abandonment by the parents remains a concern for many hospitals.<sup>244</sup> A smooth and quick response can be accomplished if DCFS takes preemptive steps to develop an individualized plan in the event it becomes necessary to separate the mother from her child.

In addition to the continued monitoring of substance-abusing expectant mothers, DCFS should also establish a system such as OPSA to ensure that these expectant mothers receive needed services. Currently, the State has no similar structure in place to coordinate and oversee community programs.<sup>245</sup> However, Washington already possesses many of the types of programs in which OPSA oversees, such as WIC and First Steps.<sup>246</sup> Furthermore, the task of managing prenatal substance abuse cases can be placed in the hands of another agency other than CPS. A separate agency or the

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240. *Id.*

241. WASH. STATE DEP'T OF CHILD AND FAMILY SERVS., *supra* note 13.

242. WASH. STATE DEP'T OF CHILD AND FAMILY SERVS., *supra* note 11, at 2-32.

243. *See* Gittler, *supra* note 177 (demonstrating the impact of boarder babies on hospitals).

244. *See id.*

245. *See* WASH. STATE DEP'T OF SOCIAL AND HEALTH SERVS., *supra* note 11, at 2-32.

246. *See supra* notes 151, 173.

creation of a similar agency such as OPSA can alleviate any reservations women may have about working with CPS. CPS, however, should remain involved in case it becomes necessary to take legal action. Having CPS close at hand will serve to encourage chemical-abusing expectant mothers to seek and remain in treatment.

## VI. CONCLUSION

Early prenatal substance abuse intervention is essential to promote the health of children. An overwhelming number of studies demonstrate the harmful effects of prenatal drug exposure to fetuses at all stages of pregnancy. Undoubtedly, early treatment is the most effective means of addressing the problem. Research has shown that treatment does work.<sup>247</sup> Many states have taken an active role in this area, recognizing the need to act and the consequences of standing idle.<sup>248</sup> If Washington truly regards its children to be its greatest source of wealth, its DCFS must take a more active role in ensuring that each child has an opportunity to live a healthy, fulfilling life. That begins with the healthy development of the unborn child. CPS involvement is critical and DCFS should recognize the unique relationship CPS has with expectant mothers in need. CPS should not simply stand aside and allow these mothers to jeopardize the health of the child—continuing down a path that can only lead to heartache. The proposed revision to Washington's prenatal substance abuse policy is a huge step in the wrong direction. Rather than stepping back from the problem, DCFS should revise its policy to take more active role early in the pregnancy.

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247. See *supra* note 223.

248. See *supra* note 198.

## VII. APPENDIX

DRAFT Policy revised 10/30/03

## Prenatal and Newborn Substance Abuse Policy and Procedure

Current medical research does not strongly support a cause and effect relationship between substance use during pregnancy and negative outcomes for children; except in the case of alcohol. Substance abuse during pregnancy is recognized as a strong risk factor in future abuse/neglect of children, however it is not an issue for CPS intervention prior to the birth of a child. Referrals involving prenatal substance abuse and newborns exposed to such substances in utero shall be managed as outlined in the procedures below.

Each local DCFS office is encouraged to establish working agreements with programs in their communities that serve pregnant and parenting women who are abusing drugs or alcohol. Additionally each office shall identify a liaison to work with local First Steps programs to coordinate services and encourage collaboration with shared clients.

Expectations of CPS intake:

## Prenatal Referrals

1. Referrals which documents a pregnant woman's abuse of alcohol and/or a controlled substance not medically prescribed shall be taken as "information only".
2. Refer all "information only" prenatal referrals to First Steps programs or local prenatal support programs.
3. The referral should document all risk factors, which may include but are not limited to the following:
  - Refuses to get prenatal care.
  - Refuses to or has a history of refusing to enter or failing to complete substance abuse treatment.
  - Displays a mental, emotional, intellectual, or physical impairment believed to impair the ability to parent.
  - Is without adequate social and financial support system.
  - Has a history of prior CPS involvement where other children are in out-of-home care or where parental rights have been terminated.
  - Other environmental factors to include exposure to violence and/or drug manufacturing.

## Post-natal

1. Referrals at delivery involving a positive toxicology screen on either mother or infant shall be screened in if additional risk factors exist on the Intake Risk Assessment. They shall be assigned a CA/N code of Negligent Treatment or Maltreatment and a victim and subject shall be identified. This policy does not preclude accepting referrals that do not involve a positive toxicology screen. Those referrals should be screened using the sufficiency screen and intake risk assessment.

Decision Piece here: if referral only indicates a positive toxicology screen and no other risk factors are documented, how will those be addresses? Options:

- Accepted—low –assigned to ARS or other community agencies for assessment. How can this pass sufficiency screen under question 3 and remain inline with this policy?
  - Ingo only—refer to RIP.
  - Info only—refer to First Steps (Do people have to financially qualify for services through First Steps?)
2. At the time of delivery if a physician indicates that the newborn's medical condition was significantly harmed as a result of the mother's substance abuse during pregnancy, the referral shall be screened in for investigation. They shall be assigned a CA/N code of Negligent Treatment or Maltreatment and a victim and subject shall be identified. This scenario requires a new referral be generated even if a prenatal referral was previously input.

Expectations of CPS field staff:

CPS Field staff is to follow policy and procedure for a high standard of investigation.

