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"Bad Moms" and Powerful Prosecutors: Why a Public Health Approach to Maternal Drug Use is Necessary to Lessen the Hardship Borne by Women in the South

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I. INTRODUCTION

Their names are Amanda,[1] Casey,[2] Angel Dawn,[3] and Amber.[4] They hail from towns like Russellville, Alabama,[5] and Martinsburg, West Virginia; leafy hamlets once home to bustling industrial centers whose economic engines have since sputtered and stalled.[6] They soothe their infants' fussy cries; gobble their toddlers' chubby cheeks; cheer at their children's Little League games. And they are part of a growing population of U.S. women in the South and rural regions who confront aggressive legal actions tied to both their drug use and their mothering.[7]

As the opioid crisis ripples across the country and settles fiercely into the South and rural areas, [8] many states are grappling with how to treat women's substance use during pregnancy—but not for the first time. In the late 1980s, the crack "epidemic" made landfall in America's urban centers, accompanied by a tide of breathless reporting about the fate of so-called "crack babies,"[9] as well as a surge of cases treating maternal drug use as a crime.[10] The frenzy quieted as studies showed that many fears about children who had been exposed to crack were overblown, [11] and state appellate court after state appellate court overturned district-level criminal convictions against mothers.[12] Now, with a different drug as a focal point, the same drumbeat of legal scrutiny on mothers thrums again.

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1. Amanda is a white, 32-year-old mother of three who was charged with chemical endangerment of a child after her third child, Timmy Jr., passed away shortly after birth and Amanda tested positive for methamphetamine. Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. TIMES (Apr. 25, 2012), http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html.

2. Casey is a white, 37-year-old mother who heads a blended family with her boyfriend. Casey was charged with chemical endangerment following the birth of her son, James, when a drug screen turned up positive for benzodiazepines, a class of drugs that includes Xanax and Valium. Nina Martin, *This Law is Supposed to Protect Babies, But It's Putting Their Moms Behind Bars*, MOTHER JONES (Sept. 23, 2015), http://www.motherjones.com/politics/2015/09/alabama-chemical-endangerment-drug-war.

3. Angel Dawn is a white, 35-year-old mother of three who was "arraigned on felony charges of child neglect" after overdosing on heroin at her eldest daughter's baseball practice. Margaret Talbot, *The Addicts Next Door*, NEW YORKER (June 5, 2017), http://www.newyorker.com/magazine/2017/06/05/the-addicts-next-door.

4. Amber, 33, is African American and Native American. She is the mother of seven children and has been sentenced to "six years in prison and five on probation for felony child neglect" by use of methamphetamines during a pregnancy. Olga Khazan, *Into the Body of Another*, ATLANTIC (May 8, 2015), https://www.theatlantic.com/health/archive/2015/05/into-the-body-of-another/392522/.

5. *See* Calhoun, *supra* note 1 (describing Amanda's town. Russellville sits in rural northwest Alabama, where it was once a booming textile town. Following the industry's swift decline in the 1990s, the median household income at the time of this 2012 *Times* article was $13,213, and more than one-third of children lived in poverty).

6. *See* Talbot, *supra* note 3 (sharing the history of Angela's town. Martinsburg is in the Eastern Panhandle of West Virginia and was in past decades defined by its woolen mills, which employed thousands. Although the region is wealthier than many of its Appalachian neighbors, the state as a whole has suffered from "high rates of poverty and joblessness.").

7. *See* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 333 (2013).

8. *See infra* Part II.A.

9. *See infra* Part II.B.

10. *See infra* Part III.A.

11. S*ee infra* Part II.B.

12. *See infra* Part III.A.

The adoption of legal actions against maternal drug use is controversial.[13] Many leading medical professionals and advocates argue that the practice, in fact, leads addicted pregnant women to avoid prenatal care, thus leading to adverse outcomes for their babies.[14] Yet numerous politicians, prosecutors, and law enforcement officials champion laws that criminalize pregnant women, asserting that such laws properly address the crime of illegal drug use through the classic criminal law aims of retribution and deterrence.[15] In recent years, there has been an acceleration in prosecution and other punitive sanctions.[16] And the American tradition of prosecutorial discretion means that low-income women of color in the South are disproportionately feeling the burden of this trend toward punitive sanctions for maternal drug use.[17]

This Note argues that a public health approach to maternal drug use would help to reduce the particularly harsh penalties meted against mothers in the South by shifting discretion from local prosecutors and lawmakers to medical professionals better equipped to address the long-term wellbeing of mothers and their children. Part II of this Note will provide a brief overview of the nation's current battle with opioid addiction and how the country has struggled to treat the problem of maternal drug use in past decades. Part III will proceed by discussing the legal responses to maternal drug use and showing the trend toward punitive responses, especially in the South. Part IV will examine these legal responses and their consequences with an eye toward exploring whether such strident approaches in the South are a cultural reproach against women who defy stereotypes about how a mother should nurture and care. Finally, having concluded that punitive legal approaches disproportionately harm low-income women and women of color in the South and ultimately hurt the very children the approaches purport to protect, Part V of this Note will explore emerging best practices that tackle the underlying causes of drug use through public health models that offer mothers social, behavioral, and environmental support.

II. U.S. DRUG CRISES AND THE PROBLEM OF MATERNAL SUBSTANCE USE: A SHIFT TO THE SOUTH

Pick a poison and the U.S. can report a long history of its abuse[18]: Caffeine, tobacco, marijuana, alcohol, prescription drugs, and "street" drugs.[19] Legal or illegal, all addictive drugs manipulate brain cells in some capacity, tweaking the messages neurotransmitters send and creating feelings of pleasure.[20] The reasons for drug addiction are the subject of much debate, but on this much the science

13. *See infra* Parts III and IV.

14. *See infra* Part IV.A

15. *See infra* Part IV.B.

16. *See infra* Part III.

17. *See infra* Part III.

18. LINDA C. FENTIMAN, BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN'S HEALTH 109 (2017) [hereinafter BLAMING MOTHERS] (noting "Americans have had long had a love affair with drugs, and pregnant women are no exception."); *see also id*. at 115–16 (describing history and epidemiology of drug use).

19. *Id*. at 116 (including prescription drugs "put to an unauthorized use," hallucinogens, methamphetamine, heroin, and cocaine in the category of street drugs).

20. *Id*.

can agree: Addiction knows no prejudice,[21] and "the use of illicit drugs is common among pregnant women regardless of race and socioeconomic class," although the choice of drug may differ.[22] This Part will present the scope of the problem of maternal drug use, first by looking at the current opioid crisis, and then by looking at a brief history of maternal substance use in the 1980s.

A. Opioid Overdose and Neonatal Abstinence Syndrome Rates are Rising Rapidly in the South and Rural Regions

Opioids are a type of pain-relief drug.[23] The category includes drugs that are available by prescription, like oxycodone, as well as illegal drugs like heroin.[24] Prescriptions for opioids increased steadily in the late 1990s and early 2000s before surging in 2010,[25] and approximately three out of four new heroin users say they abused prescription opioids before turning to heroin.[26] In the past decade, heroin use has more than doubled in young people in the United States.[27] In 2015, then-Director of the Centers for Disease Control and Prevention (CDC) Tom Frieden declared, "Heroin use is increasing at an alarming rate in many parts of society, driven by both the prescription opioid epidemic and cheaper, more available heroin."[28] In 2016, the CDC reported that more than 300,000 Americans had died due to an opioid overdose since 2000. Frieden called for "[u]rgent action . . . to help health care providers . . . treat opioid use disorder effectively, support law enforcement strategies to reduce the availability of illicit opiates, and support states to develop and implement programs that can save lives."[29]

Data tracked during 2014-2015 showed significant increases across states in heroin and synthetic opioid death rates, with the greatest percent increases in

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21. GENE M. HEYMAN, ADDICTION: A DISORDER OF CHOICE 35–39 (2009) (summarizing studies that looked at the relationship between neighborhood and drug use as well as the relationship between income and drug use).

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

23. *Opioid Basics*, CTRS. DISEASE CTRL. & PREVENTION, https://www.cdc.gov/drugoverdose/opioids/index.html (last updated Aug. 24 2017). Opioids are commonly prescribed under names like OxyContin and Vicodin. *Id.*

24. *Id.*

25. *Opioid Prescribing*, CTRS. DISEASE CTRL. & PREVENTION, https://www.cdc.gov/vitalsigns/opioids/index.html (last updated July 6, 2017) (Noting that "the amount of opioids prescribed in the US peaked in 2010 and then decreased each year through 2015").

26. *Understanding the Epidemic, Heroin Use*, CTRS. DISEASE CTRL. & PREVENTION, https://www.cdc.gov/drugoverdose/epidemic/index.html (last updated Aug. 30, 2017) ("Among new heroin users, approximately three out of four report abusing prescription opioids prior to using heroin.").

27. *Today's Heroin Epidemic*, CTRS. DISEASE CTRL. & PREVENTION, https://www.cdc.gov/vitalsigns/heroin/index.html (last updated July 7, 2017) (citing data for the time period spanning 2002–2013: "Heroin use more than doubled among young adults ages 18–25 in the past decade").

28. Press Release, Ctrs. Disease Ctrl. & Prevention New research reveals the trends and risk factors behind America's growing heroin epidemic (July 17, 2015), https://www.cdc.gov/media/releases/2015/p0707-heroin-epidemic.html.

29. Press Release, Ctrs. Disease Ctrl. & Prevention, New data show continuing opioid epidemic in the United States (Dec. 16, 2016), https://www.cdc.gov/media/releases/2016/p1216-continuing-opioid-epidemic.html.

heroin death rates reported in South Carolina at 57.1%, North Carolina at 46.4%, and Tennessee at 43.5%.[30] Why this class of drugs, and why these regions? Experts point to multiple, overlapping factors, including the proliferation of opioid prescriptions.[31] They also cite the opportunistic shrewdness of cartels, which pushed high-potency heroin into rural areas at a low price.[32]

The opioid crisis's outsized effect on young people has not spared young women of reproductive age. Some studies have estimated that the percent of female drug users who are also of reproductive age is as high as ninety percent.[33] This means that as opioid use has exploded across the country, hospital neonatal units have begun sounding the alarm as mothers who used opioids while pregnant deliver babies who are born dependent on the drugs, thus causing the numbers of babies born with Neonatal Abstinence Syndrome (NAS) to rise quickly and without sign of abating.[34] NAS is a form of postnatal withdrawal that includes symptoms like irritability and feeding issues.[35] Babies born dependent on opioids require special care and increased resources.[36] One study found that NAS increased threefold from 2000 to 2012, with the most marked increases occurring in the East South (i.e., Kentucky, Tennessee, Mississippi and Alabama) and the West South (i.e., Oklahoma, Texas, Arkansas and Louisiana).[37] Another study further observed the distinction between rural and urban NAS rates, with rates of NAS in rural areas rising sevenfold between 2004 and 2013, while rates of NAS among urban infants rose fourfold during the same period.[38] Small community hospitals in states like Kentucky, where rural areas are overwhelmed by the high tide of addiction and need, are increasingly sending babies with NAS to larger treatment facilities, separating mom and baby.[39] What results, according to Dr.

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30. *Id.*

31. Christopher M. Jones et al., Ctrs. Disease Ctrl. & Prevention, *Vital Signs: Demographic and Substance Use Trends Among Heroin Users—United States, 2002–2013*, 64 MORBIDITY & MORTALITY WEEKLY REP. 719, 719 (July 10, 2015).

32. *See* Talbot, *supra* note 3 (citing Daniel Ciccarone, a professor at the U.C.-San Francisco School of Medicine who studies the heroin market. Ciccarone said cartels are "multinational, savvy, borderless entities. They worked very hard to move high-quality heroin into places like rural Vermont.").

33. Susan R.B. Weiss et al., *Emerging Issues in Gender and Ethnic Differences in Substance Abuse and Treatment,* 3 CURRENT WOMEN'S HEALTH REPS. 245, 247 (2003).

34. Jean Y. Ko et. al, Ctrs. Disease Ctrl. & Prevention, *Incidence of Neonatal Abstinence Syndrome —28 States, 1999–2013*, 64 MORBIDITY & MORTALITY WEEKLY REP. 799, 799.

35. *Id.*

36. S.W. Patrick et al., *Increasing Incidence and Geographic Distribution of Neonatal Abstinence Syndrome: United States 2009 to 2012*, 35 J. PERINATOLOGY 650, 650 (2015) (estimating hospital costs associated with treating opioid-exposed newborns to be $1.5 billion in 2013).

37. *Id.* at 651.

38. *See* Nicole L. G. Villapiano et. al, *Rural and Urban Differences in Neonatal Abstinence Syndrome and Maternal Opioid Use, 2004 to 2013*, 171 J. AM. MED. ASS'N PEDIATRICS 194, 194–96 (2017), http://jamanetwork.com/journals/jamapediatrics/article-abstract/2592302 (reporting disproportionate rise in maternal opioid use in rural areas compared to urban areas); *see also* Catherine St. Louis, *Rise in Infant Drug Dependence Is Felt Most in Rural Areas*, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/2016/12/12/health/rise-in-infant-drug-dependence-in-us-is-felt-most-in-rural-areas.html (citing increase to 7.5 per 1,000 from 1.2 per 1,000 in rural counties; 4.8 per 1,000 from 1.4 per 1,000 in urban areas).

39. Catherine St. Louis, *A Tide of Opioid-Dependent Newborns Forces Doctors to Rethink Treatmen*t, N.Y. TIMES (July 13, 2017), https://www.nytimes.com/2017/07/13/health/opioid-addiction-babies.html (discussing the challenges new mothers staying at hospitals in rural Kentucky—many of

Stephen Patrick, a neonatologist at Vanderbilt Children's Hospital, is that "some of the babies we see are not in drug withdrawal. It's mom withdrawal."[40]

B. Findings from the Abuse of Crack Cocaine in the 1980s Present Lessons for Today's Crisis

In the 1980s, the low-cost, potent drug dominating headlines was crack cocaine.[41] While powdered cocaine could command $50 for a gram and convey wealth and glamour to boot, the "rocks" formed from concentrated cocaine could be purchased for a fraction of that amount and guarantee an instantaneous high.[42] Like the opioid crisis that followed decades later, the abuse of crack cocaine rose to "epidemic proportions.[43]" Like the opioid crisis, hospitals saw a large number of newborns testing positive for drugs during the years when crack use skyrocketed.[44] But unlike the opioid crisis, it was cities—not rural regions—that were hit hardest by crack abuse.[45] And unlike the opioid crisis, it wasn't moms like Amanda, Casey, and Angel Dawn receiving media coverage.[46] Instead, the 1980s news media wove narratives featuring two "leading characters—the pregnant addict and the crack baby, both irredeemable, both Black."[47]

Time proved that the media reports of pregnant addicts were largely hyperbolic.[48] In fact, multiple longitudinal studies have shown that cocaine-exposed newborns did not experience qualitatively different harms than newborns who arrived prematurely for a variety of other reasons.[49] Instead, as a

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them poor and in need of treatment—face in traveling to the neonatal treatment centers where their babies have been transported after birth).

40. St. Louis, *Rise in Infant Drug Dependence*, *supra* note 38.

41. DOROTHY ROBERTS, KILLING THE BLACK BODY 154 (1997).

42. *Id.* at 155.

43. *Id.* at 154 (citing James A. Inciardi et al., WOMEN AND CRACK-COCAINE 1–13 (1993)).

44. *Id.* at 155; *see also* Marvin Dicker & Eldin A. Leighton, *Trends in the U.S. Prevalence of Drug-Using Parturient Women and Drug-Affected Newborns, 1979 through 1990*, 84 AM. J. PUB. HEALTH 1433 (1994).

45. *See* ROBERTS, *supra* note 41 at 154.

46. *Compare* notes 1–3, *supra* (portraying moms who use drugs sympathetically, as women who turned to pills to manage their psychic pain), *with* Cathy Trost, *Babies of Crack Users Crowd Hospitals, Break Everybody's Heart*, WALL STREET J. (July 18, 1989), http://digitalcollections.library.cmu.edu/awweb/awarchive?type=file&item=413418 (portraying addicted moms as selfish and willfully destructive).

47. *See* ROBERTS, *supra* note 41; *see also* Kit Roane, *From Crack Babies to Oxytots: Lessons Not Learned*, RETRO REP. (last updated July 21, 2015), https://www.retroreport.org/video/from-crack-babies-to-oxytots-lessons-not-learned/ (tracking the trajectory of how "crack babies" were portrayed in the media, from the first reports of a preliminary study that relied on a sample size of twenty-three cocaine-exposed infants, to exploiting images of undersize babies, to justifying cases charging pregnant drug users); *see also* Paltrow & Flavin, *supra* note 7, at 333–34.

48. *See* Roane, *supra* note 47 (featuring interviews with Dr. Claire Coles, whose study of infant behavior at Emory University dispelled the preliminary study of crack-exposed babies: "You're not seeing really broad scale severe developmental problems as was predicted. The schools have not been overwhelmed by the flood of cocaine-exposed children," says Dr. Coles.).

49. Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 J. AM. MED. ASS'N 1613, 1621–1624 (2001).

decades-long study concluded, poverty is the number one leading cause of developmental deficits.[50]

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Today, it is the legal and illegal forms of opioids that are capturing headlines; "oxytots" rather than "crack babies" who are inspiring fatalistic predictions.[51] But if one of the primary concerns about maternal drug use is that children suffer lasting developmental consequences from exposure to drugs during gestation, then the longitudinal data generated in the wake of the crack epidemic have already laid that fear to rest; the children are all right. Instead, the lessons learned from the crack epidemic suggest that treating addiction as a public health crisis—and perhaps focusing on the regions where addiction is most entrenched—would go a long way to improve long-term outcomes for children by supporting the mothers and communities who care for them.[52]

III. LEGAL APPROACHES TO MATERNAL DRUG USE: AN ACCELERATING TREND TOWARD PUNITIVE SANCTIONS

Scores of pregnant women have faced legal action based on their use of both legal and illegal drugs.[53] This Part will wend through the punitive sanctions pregnant women have faced, noting how prosecution has accelerated in recent years, especially in the South.

A. Thirty States Use Civil Commitment Laws to Confine Pregnant Women

Five states have enacted laws that authorize the detainment of pregnant women for their use of drugs and alcohol: Wisconsin,[54] Minnesota,[55] Oklahoma,[56] North Dakota,[57] and South Dakota.[58] In the 1990s, Minnesota was

50. *See* Laura M. Betancourt et al., *Adolescents with and without Gestational Cocaine Exposure: Longitudinal Analysis of Inhibitory Control, Memory and Receptive Language,* 33 NEUROTOXICOL. & TERATOL. 36, 36 (2011). For more on the link between poverty and adverse developmental effects, see Press Release, Colum. Univ. Mailman Sch. of Pub. Health, (May 10, 2016), https://www.mailman.columbia.edu/public-health-now/news/unequal-stress-how-poverty-toxic-children%E2%80%99s-brains (recapping a research symposium on poverty and the developing brain, including findings that suggest children who are poor are more likely to experience stresses that remake the part of the brain in charge of executive function and learning).

51. *See* Roane, *supra* note 47.

52. *See* Frank et al., *supra* note 49.

53. *State Laws and Policies: Substance Abuse During Pregnancy,* GUTTMACHER INST. (last updated July 1, 2017), https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy (displaying criminal, civil child welfare, and civil commitment laws states have used to penalize prenatal substance use since the 1980s).

54. WIS. STAT. § 48.193 (2017).

55. MINN. STAT § 253B.02(2) (2017).

56. OKLA. STAT tit. 63 § 1-546.5 (West 2017).

57. N.D. CENT. CODE § 12.1-04.1-22 (West 2017).

58. S.D. CODIFIED LAWS § 34-20A-63 (West 2017).

the first to adopt such a law,[59] followed by Wisconsin.[60] The remaining three states have enacted their laws more recently.

Such laws have been criticized as permitting an unconstitutional deprivation of liberty.[61] In 2013, a Wisconsin woman's confinement against her will brought national attention to civil commitment.[62] Alicia Beltran had shared with her physician that she had previously struggled with prescription painkillers, but used a prescription therapy to treat the addiction.[63] Pregnant, but now drug free, Alicia was nonetheless reported to the Department of Human Services, arrested, cuffed, and brought to court.[64] Alicia was then committed to an inpatient drug treatment program for 90 days and lost her job. Beltran's federal suit was dismissed for mootness,[65] but in April 2017, a federal court in Wisconsin concluded that the law violated mothers' right to due process of law and struck the law down.[66] The court asserted that the law "affords neither fair warning as to the conduct it prohibits nor reasonably precise standard for its enforcement."[67]

Despite this admonition from a federal court, in more than thirty states, pregnant women can be involuntarily committed for use of alcohol and drugs.[68] Typically, involuntary civil commitment is permitted under statutes that impose confinement on adults when they are "dangerous to others."[69] It is not known exactly how often these laws are enforced, but anecdotal evidence suggests they are imposed frequently, and it is often indigent women—women who cannot afford representation—who are subjected to civil commitment.[70] Meanwhile, many medical professionals decry the practice of forcing involuntary treatment, citing studies that show women are more likely to hide their drug use from their health care providers—and risk the potentially life-threatening consequences of detoxing without medical supervision—if threatened by possible incarceration.[71]

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59. Judith M. Nyhus Johnson, *Minnesota's "Crack Baby Law" Law: Weapon of War or Link in a Chain?* 8 L. & INEQ. 485, 486–87 (1990).

60. BLAMING MOTHERS, *supra* note 18, at 147.

61. AMNESTY INT'L, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA 21–22 (2017).

62. BLAMING MOTHERS, *supra* note 18, at 149.

63. AMNESTY INT'L, *supra* note 61, at 21.

64. *Id.*

65. Beltran v. Strachota, No. 13-C-1101, 2014 WL 4924668, at *7 (E.D. Wis. Sept. 30, 2014) (dismissing suit because Alicia was no longer pregnant and state proceedings had been dismissed).

66. Loertscher v. Anderson, 259 F. Supp. 3d 902 (W.D. Wis. 2017).

67. *Id*. at 905.

68. BLAMING MOTHERS, *supra* note 18, at 148.

69. *See* Linda C. Fentiman, *Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse is Not the Answer—A Comparative Legal Analysis,* 15 MICH. J. GENDER & L. 389, 422 (2009) [hereinafter *Pursuing the Perfect Mother*].

70. BLAMING MOTHERS, *supra* note 18, at 149.

71. *See id.* at 150 n.207 (citing Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 DRUG & ALCOHOL DEPENDENCE 199, 201–202).

B. Criminal Proceedings Against Pregnant Mothers Are Intensifying, Especially in the South

In 2014, Tennessee became the first state in the nation to pass a statute that explicitly, directly criminalized prenatal substance abuse.[72] But for four decades, prosecutors in dozens of states have brought charges against women for the use of drugs during pregnancy by relying upon generally applicable criminal statutes that target offenses like criminal neglect, involuntary manslaughter, and chemical endangerment of a child.[73]

Women who use substances while pregnant are often charged criminally under laws that intend to tackle offenses committed against children *after* they are born.[74] In *Reyes v. Superior Court*,[75] the first in this line of cases,[76] Margaret Reyes contested two counts of felony child endangerment charged against her for using drugs while pregnant with twin boys.[77] The California Court of Appeals held that Reyes's prenatal behavior was not covered by the child endangerment statute used to convict her.[78] The court emphasized that the language of the statute presupposed a *living* child and not conduct affecting an unborn child.[79] It then concluded that the legislative intent of the statute was clear and dismissed the case.[80] Likewise, cases that surfaced after *Reyes* and during the War on Drugs often took this route of alleging pregnant women were guilty of child abuse or delivering drugs to a "minor,"[81] only to be knocked down by state appellate courts.[82] More recently, however, two state appellate courts have upheld the criminal prosecutions of pregnant women: South Carolina and Alabama.[83]

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72. *State Laws and Policies*, *supra* note 53.

73. *See Pursuing the Perfect Mother*, *supra* note 69, at 399–411 (conceptualizing the criminal prosecution of women who used drugs while pregnant as occurring in three waves: (1) Late 1980s and early 1990s cases coinciding with the uptick in crack cocaine use, (2) Late 1990s focus on using homicide prosecutions to target women's behavior, and (3) Present-day use of child endangerment statutes).

74. Doretta Massardo McGinnis, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 505–06 (1990).

75. Reyes v. Superior Court, 75 Cal. App. 3d 214 (1977)

76. *See* BLAMING MOTHERS, *supra* note 18, at 126.

77. *Reyes,* 75 Cal. App. 3d at 216.

78. *Id*.

79. *Id*. at 218.

80. *Id*. at 219–20.

81. *See* McGinnis, *supra* note 74, at 532 (discussing the heightened focus on prosecution during the late 1980s and early 1990s, after the War on Drugs was launched); *see also* Paul A. Logli, *Drugs in the Womb: The Newest Battlefield in the War on Drugs*, 9 CRIM. JUST. ETHICS 23, 24 (1990).

82. *See, e.g.*, State v. Wade, 232 S.W.3d 663, 666 (Mo. Ct. App. W.D. 2007) (holding reckless endangerment conviction could not be applied to pregnant mother who used drugs); Kilmon v. Maryland, 905 A.2d 306, 315 (Md. 2006) (same); Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992) (holding cocaine passing from mother to unborn child did not constitute delivery of a controlled substance to a minor). *See generally* James G. Hodge, Jr., annotation, *Prosecution of Mother for Prenatal Substance Abuse Based on Endangerment of or Delivery of Controlled Substance to Child,* 70 A.L.R.5th 461 (1999) (collecting cases regarding prosecutions of mothers; finding most courts have not upheld convictions against mothers who were prosecuted under child endangerment or drug and delivery statutes).

83. *See* Cortney E. Lollar, *Criminalizing Pregnancy*, IND. L.J. 947, 956–58 (2017) (arguing that Whitner v. South Carolina, 492 S.E.2d 777 (S.C. 1997), marked a new era of criminal prosecutions when a state supreme court found that a child abuse and endangerment statute applied to viable fetuses and

Some prosecutors opt to charge women with homicide, including murder, and attempted intentional homicide. This shift to homicide prosecution, seen first in the late 1990s and early aughts, reflects a more aggressive approach to punitive sanctions against pregnant women.[84] Although state appellate courts do routinely strike, overturn, or stay convictions, prosecutors continue to escalate the kind of charges being brought, moving from low-level felonies like child abuse to more severe murder charges.[85]

States can also empower district attorneys to prosecute pregnant women for their conduct through statutes that explicitly make maternal drug use a crime. Tennessee amended its fetal assault statute in 2014 to do just that.[86] The new amendment allowed a pregnant woman to be prosecuted if her baby was born "addicted to or harmed by" an illegal drug.[87] Tennessee essentially created a new class of crime that uniquely affected pregnant women by enacting the first statute to "codify special crimes that only pregnant women can commit."[88] The Tennessee legislature called the law a "velvet hammer,"[89] noting it included an affirmative defense for women "actively enrolled in an addiction recovery program before the child is born, remained in the program after delivery, and successfully completed the program."[90] However, opponents were quick to point out that a lack of treatment programs in the state, plus lack of assistance to help women seek treatment meant the law was more "hammer" than cushion.[91] In March 2016, a legislative committee decided not to reauthorize the law, and it sunset in the summer of 2016.[92] Although the state did not develop a means to track the number of women arrested,[93] it is estimated that at least ninety-seven women were prosecuted in the two years the law was active.[94] It has also inspired legislatures in four other states: North Carolina, Oklahoma, Louisiana and Missouri to introduce similar bills.[95]

Criminal approaches against pregnant women who use drugs are ticking higher, even as they likely counter precedent set by *Robinson v. California*,[96] in

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used public policy arguments to do so. The Alabama Supreme Court, in *Ex parte* Ankrom, 152 So. 3d 397 (Ala. 2013), used the same rationale in a case with parallel facts).

84. BLAMING MOTHERS, *supra* note 18, at 129. For a discussion of how prosecutorial discretion contributes to aggressive charges in the South, see *infra* Part IV.A.

85. BLAMING MOTHERS*, supra* note 18, at 131–32.

86. *See* Abby Ohlheiser, *Tennessee Passes Legislation to Criminally Prosecute Drug-Addicted Pregnant Women*, WIRE (Apr. 9, 2014), http://www.thewire.com/politics/2014/04/tennesseepasses-legislation-to-criminally-prosecute-drug-addicted-pregnant-women/360424 .

87. TENN. CODE ANN. § 39-13-107(c)(2) (West 2014).

88. Eliza Duggan, *A Velvet Hammer: The Criminalization of Motherhood and the New Maternalism*, 104 CAL. L. REV. 1299, 1308 (2016).

89. Tony Gonzales, *Criminal Penalty for Prenatal Drug Use Passes House*, TENNESSEAN (Apr. 9, 2014), http://www.tennessean.com/ (quoting Tennessee State Representative Terri Lynn Weaver, who introduced the law).

90. § 39-13-107(c)(3).

91. *See* BLAMING MOTHERS*, supra* note 18, at 147–48; *see also* AMNESTY INT'L, *supra* note 61, 27–32 (discussing the law, its application, and interviews with advocates and physicians who asserted the criminal justice system was seeping into a health care issue).

92. *See* Duggan, *supra* note 88, at 1303.

93. AMNESTY INT'L, *supra* note 61, at 28.

94. *See* Lollar, *supra* note 83, at 949.

95. *Id.* at 964–65.

96. Robinson v. California, 370 U.S. 660, 667 (1962).

which the U.S. Supreme Court held that a state statute criminalizing drug addiction was unconstitutional because it inflicted cruel and unusual punishment in violation of the Fourteenth Amendment.[97] Additionally, a subsequent Supreme Court ruling regarding the arrests of South Carolina hospital obstetrics patients, *Ferguson v. City of Charleston*,[98] confirmed there is concern about the effect of criminalizing addiction, observing that penalizing addiction would likely dissuade those who needed help from seeking treatment.[99] This articulation of a public health concern also appears in lower courts, where most appellate courts in states where criminal proceedings have been brought have subsequently overturned criminal convictions, with courts expressing concern regarding the constitutionality of such cases, as well as expressly noting the detrimental effect on mom and baby.[100]

* * *

There is a worrisome trend toward punitive approaches that is concentrating in the South. A 2013 review of 413 state actions against women from 1973 to 2005 examined cases where women's arrests, detentions, and forced interventions were connected to their pregnancies.[101] Although the cases took place in forty-four states and the District of Columbia, quantitative findings from the review showed that fifty-six percent of the state actions originated in the South.[102] South Carolina had the largest number of cases, with ninety-three, followed by Florida with fifty-six, Missouri with twenty-nine, and Georgia with sixteen.[103] The next Part explores why this might be the case.

IV. FACTORS THAT UNDERGIRD ACCELERATING PROSECUTIONS IN THE SOUTH

As discussed in Part II of this paper,[104] pregnant drug users—like drug users generally—come from every race, socioeconomic background, and geographic region. And research shows that state interventions occur in every region of the country and affect all women.[105] Yet the South is increasingly a hotbed of these state actions, and low-income African-American women are disproportionately affected by the shift toward prosecution in this region.[106] The interplay between

97. *Id.* at 667.

98. Ferguson v. City of Charleston, 532 U.S. 67, 70 (2001).

99. *Id*. at 78 n.14. In *Ferguson*, obstetrics patients were arrested after medical tests showed positive results for cocaine. *Id.* at 67. The Court noted this practice intruded on patients' privacy interests in regards to medical testing and further observed that such practices "may have adverse consequences because it may deter patients from receiving needed medical care." *Id*. at 78 n.14.

100. *See* BLAMING MOTHERS, *supra* note 18, at 128.

101. Paltrow & Flavin, *supra* note 7, at 299.

102. *Id.* at 309.

103. *Id.*

104. *See supra* text accompanying notes 18–22.

105. *See* Paltrow & Flavin, *supra* note 7, at 311–12 (observing that in a study of pregnant women against whom state action was taken, fifty-nine percent of the women who had reported their race were women of color, and further noting that African American women in the South were particularly overrepresented in the study).

106. *Id.*

elected district attorneys and the cultural norms and histories of their electorate could be prompting intensifying prosecutions in the South.

A. Unchecked Discretion Allows Prosecutors to Exploit Maternal Drug Use as a Political Platform

The vast majority of American district attorneys are locally elected politicians.[107] They enjoy independent authority in applying state and local laws, and they wield tremendous, virtually unchecked discretion in deciding whether to bring criminal charges.[108] The local, politicized approach to prosecutorial discretion sets the United States apart from many other Western democracies;[109] Canada and France, for example, take a national approach that includes more supervisory checks.[110]

It is also not unusual for American prosecutors to later pursue higher political office.[111] In fact, many prosecutors embrace the position as just one stepping-stone in a political career.[112] This means that prosecutors have an incentive, or a political need, to prosecute the kind of cases the electorate wants to see prosecuted.[113] A public thirst to be "tough on crime," or enthusiasm for convictions, for example, is one reason why prosecutors mount campaigns that highlight their conviction rates.[114] By asserting drug use is a crime best "addressed by the classic criminal law armament of retribution and deterrence,"[115] and running on platforms that call for "taking a stand" against

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107. William J. Stuntz, *The Pathological Politics Of Criminal Law*, 100 MICH. L. REV. 505, 533 n.117 (2001) (estimating that more than ninety-five percent of local district attorneys are elected into office); *see also* Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, ATLANTIC (May 18, 2016), http://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/ ("In all but four states, prosecutors are elected to office—about 2,400 of them . . . .").

108. *See* Stuntz, *supra* note 107, at 547.

109. *See Pursuing the Perfect Mother*, *supra* note 69, at 459–60 (describing the development of America's prosecutorial system, beginning with "early innovation in the original thirteen colonies" that immediately separated it from Great Britain's system).

110. *Id.*

111. Fordham Law Professor Jed Shugerman is working on a project tracking the historical rise of the prosecutor's office as a pipeline to higher political office. Jed Shugerman, *"The Rise of the Prosecutor Politicians": Database of Prosecutorial Experience for Justices, Circuit Judges, Governors, AGs, and Senators, 1880-2017*, SHUGERBLOG (July 7, 2017), https://shugerblog.com/2017/07/07/the-rise-of-the-prosecutor-politicians-database-of-prosecutorial-experience-for-justices-circuit-judges-governors-ags-and-senators-1880-2017/. As a part of this project, Professor Shugerman shares a database of his research on prosecutor politicians, which is available at https://docs.google.com/spreadsheets/d/1E6Z-jZWbrKmit_4lG36oyQ658Ta6Mh25HCOBaz7YVrA/edit?usp=sharing.

112. *See* Shugerman's database of prosecutor politicians, *supra* note 111.; *see also* BLAMING MOTHERS, *supra* note 18, at 134 (indicating that Sens. Ted Cruz of Texas, Patrick Leahy of Vermont, and Claire McCaskill of Missouri all began their political careers as prosecutors); Emily Bazelon, *She Was Convicted of Killing Her Mother. Prosecutors Withheld the Evidence That Would Have Freed Her*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/2017/08/01/magazine/she-was-convicted-of-killing-her-mother-prosecutors-withheld-the-evidence-that-would-have-freed-her.html (noting that Amy Weirich, the first woman to be elected district attorney in Shelby County, Tennessee, ran on a "law-and-order" platform and had relatives speculating about when she would be "moving the family into the Governor's Mansion . . . one day").

113. *See* Stuntz, *supra* note 107, at 534.

114. *Id.*

115. BLAMING MOTHERS, *supra* note 18, at 113.

drug-using mothers who endanger "the unborn," prosecutors in conservative regions can gain favor—and votes.[116] Thus, it can be politically advantageous for southern prosecutors to advocate for the criminalization of maternal drug use as a campaign platform. This politically charged motivation to prosecute may help to explain why states where some of the toughest criminal sanctions have been lobbed against maternal drug users include southern states in which conservatives hold the most political power, such as Alabama, Missouri, Mississippi, and Oklahoma.[117]

Take, for example, Mitch Floyd, an Alabama prosecutor who decided to run for Marshall County district judge.[118] Floyd aggressively pursued chemical endangerment charges against women who took drugs while pregnant during his stint as a local prosecutor.[119] The chemical endangerment cases were a focal point of his campaign for judge, and he ran ads highlighting his tough stance.[120] In 2012, he was elected by a landslide.[121]

B. Cultural Expectations of Motherhood in the South Can Prompt Legislators, Courts to be More Punitive

Motherhood is "an icon, an institution, a role . . . , a status."[122] In the U.S., mothers are both "revered and regulated."[123] The link "between maternal reverence and reward is possible because of an understanding within American culture that there is a way that mothers are supposed to be."[124] This understanding creates a model of motherhood that then "becomes the essence of what mothers are about, an unstated reference point in the formation of public policy and the application of legal rules."[125] Thus, the South's trend toward embracing the justice system to address maternal drug use may also be informed by cultural expectations of how mothers should behave. "I think the idea of womanhood here is held up in a classic way," says David McLeod, an assistant professor of social work at the University of Oklahoma. "There are a lot of expectations around how a woman should nurture and care. When the courts see that the women don't fit those stereotypes, they can be more punitive."[126] And

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116. *Id.* at 134.

117. *Id.* at 135.

118. Calhoun, *supra* note 1 (observing Floyd's campaign message was "clear and uncomplicated: drug use during pregnancy is dangerous and criminal.").

119. *Id.* (claiming Floyd "has prosecuted chemical-endangerment cases against new mothers more aggressively than anyone else")

120. *Id.* (noting one ad featured a woman holding a baby and the text, "Mitch Floyd made sure I went to jail.").

121. *Id.*

122. Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 18 (1992).

123. *Id.* at 17.

124. *Id*. at 18.

125. *Id.* at 18; *see also* BLAMING MOTHERS, *supra* note 18, at 139–40 (explaining the "reasonable mother" phenomenon in courts). Fentiman argues that jurors in a criminal case are likely to judge the behavior of a pregnant by a "reasonable mother standard" in which a "reasonable mother" "does not neglect her children to pursue her own selfish pleasures." *Id.* "In a society in which drug use is seen as a chosen and hedonistic act rather than an illness, it is highly likely that a pregnant woman charged with acting negligently will be found guilty." *Id.* at 140.

126. Khazan, *supra* note 4.

indeed, Mitch Floyd, the Alabama prosecutor-turned-judge,[127] made his expectations clear: "[T]here's a force that's more powerful than [addiction] to me, and that is a child is helpless and God has put one person on this planet to be the last-line defense, to be the fiercest protector of that child, and that is its mother."[128] Floyd heavily prosecuted chemical endangerment cases against mothers.[129]

The view that fetuses and children are equivalent may also be more entrenched in the South.[130] It is a non-legal view in part advanced by the media and political forces,[131] yet this conflation of a fetus with a child makes it more likely that women will be charged for risking fetal harm.[132] It also provides fertile ground for "fetal assault" laws like the 2014 measure passed in Tennessee,[133] plus other legal actions targeting pregnant moms.[134] In South Carolina and Alabama, where legal action against pregnant mothers have been upheld,[135] child abuse has been interpreted to apply to fetuses.[136] Jessica Young, an obstetrician at the Vanderbilt Center for Women's Health in Tennessee, put it this way: "In the South, the fetus is everything."[137] She posited that this emphasis on the fetus is why pregnant women who use drugs are more likely to face punitive sanctions in the South.[138]

* * *

When cultural expectation and prosecutorial discretion brew together in a perfect storm, it creates a dangerous climate for women. Damning pregnant women who use drugs has public appeal that a powerful few are able to exploit for political gain. In the South, these social and political motivations are exacerbated by views on what motherhood should look like as well as the conflation of a child with a fetus, providing firm ground for prosecutions that do little to improve the long-term wellbeing of mothers and children to take root.

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127. See *supra* text accompanying notes 118–121.

128. Calhoun, *supra* note 1.

129. *Id.*; *see also* BLAMING MOTHERS, *supra* note 18, at 113.

130. Khazan, *supra* note 4.

131. BLAMING MOTHERS, *supra* note 18, at 73..

132. *See* BLAMING MOTHERS, *supra* note 18, at 137.

133. Tennessee's law included "a human embryo or fetus at any stage of gestation in utero" in its description of who could be considered a person for the purposes of its criminal assault statute. TENN. CODE ANN. § 39-13-107(a) (2017).

134. AMNESTY INT'L, *supra* note 61, at 48.

135. *See* Lollar, *supra* note 83, at 957.

136. AMNESTY INT'L, *supra* note 61, at 19.

137. Khazan, *supra* note 4.

138. *Id.*

V. WHAT A PUBLIC HEALTH APPROACH TO MATERNAL DRUG USE LOOKS LIKE: BEST PRACTICES:

Stakeholders share a common goal: Healthy babies.[139] But legal authorities,[140] medical professionals,[141] and advocates[142] alike have pointed out that shaming and blaming mothers incentivizes pregnant women to avoid care, or attempt to treat their addiction themselves,[143] which seriously undermines the goal of child health. The punitive approach also neglects the opportunity to improve the entire family's outcomes. But what does a public health approach to maternal drug use actually entail? First, a public health perspective recognizes that addiction is a disease.[144] Next, a public health approach to maternal drug use examines the root causes of disease and leverages "community partners, prevention programs, and harm reduction efforts" to change behavior.[145] This Part will showcase how on-the-ground local efforts, plus a federal initiative, are working to address children and families' long-term wellbeing through this public health lens.

A. The Community-Based Approach: Embracing Treatment Over Trauma

The National Institute on Drug Abuse suggests a recipe for treatment success will include a combination of approaches that address the whole patient, such as her "age, race, culture, sexual orientation, gender, pregnancy, [family structure,] housing and employment, as well as physical and sexual abuse."[146] Recent research also shows treatment works best when it is voluntary.[147] But there is a

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139. *See* Khazan, *supra* note 4 (quoting Caitlin Borgmann, a professor at the City University of New York School of Law: "Everybody wants to promote healthy mothers and healthy babies," Professor Borgmann says. "The question is how best to go about.").

140. *See* discussion accompanying notes 96–100, *supra.*

141. American College of Obstetricians and Gynecologists, *Committee Opinion: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist,* No. 473 (2011) (reaffirmed 2014), https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Substance-Abuse-Reporting-and-Pregnancy-The-Role-of-the-Obstetrician-Gynecologist.

142. *See* Paltrow & Flavin, *supra* note 7.

143. American College of Obstetricians and Gynecologists, *Committee Opinion: Opioid Abuse, Dependence, and Addiction in Pregnancy*, No. 711 (Aug. 2017), https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Obstetric-Practice/Opioid-Use-and-Opioid-Use-Disorder-in-Pregnancy. ACOG recommends medication-assisted treatment and counseling for pregnant women wishing to quit opioids. Pregnant women who quit "cold turkey" risk experiencing withdrawal that has adverse effects on their fetus. *Id.*

144. Ellen M. Weber, *Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities*, 57 RUTGERS L. REV. 631, 639 (2005) (establishing decades of research now backs the finding that addiction is a "brain disease: a condition caused by persistent changes in brain structure and function").

145. *See* Seema Mohapatra, *Unshackling Addiction: A Public Health Approach To Drug Use During Pregnancy*, 26 WIS. J. L. GENDER & SOC'Y 241, 245 (2011). For discussion of the theory behind the intersection of public health and the law, *see* Lawrence O. Gostin, *A Theory and Definition of Public Health Law*, 10 J. HEALTH CARE L. & POL'Y 1, 1 (2007).

146. NAT'L INST. ON DRUG ABUSE, NAT'L INSTS. OF HEALTH, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE 13–14 (1999).

147. BLAMING MOTHERS, *supra* note 18, at 151; *see also* Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 DRUG & ALCOHOL DEPENDENCE 199, 201–

severe lack of treatment facilities that offer programs that target the needs of pregnant and postpartum women.[148] A 2007 survey showed that out of 13,648 substance abuse facilities nationwide, only 1,926—or 14.1%—had programs focused on pregnant and postpartum women.[149] And women may face barriers in accessing these services, including cost, time, lack of support, and lack of child care.[150]

Community-based approaches meet women where they are and offer education, prevention programs, and treatment to help women overcome these barriers.[151] Such programs have been found to be most successful when they are comprehensive and capable of addressing a woman's most pressing challenges, such as transportation, housing, and child care.[152] For example, Amnesty International has recommended that community-based family residential treatment facilities be expanded in Alabama and Tennessee—two states where the organization found pregnant women face a higher risk of being criminally prosecuted—in order to eliminate barriers to treatment.[153] On a more micro-level, some rural community hospitals seeing an influx of babies with neonatal abstinence syndrome are embracing this model of care and harm reduction by implementing rooming-in programs, which keep mother and child together after baby's birth.[154] Resource-intensive treatment models can certainly be difficult to sustain due to the patchwork nature of their funding.[155] However, these approaches improve long-term outcomes for families by targeting health and wellbeing in addition to addiction. Thus, they do a far better job of supporting the goal of reducing maternal drug use and increasing the likelihood of healthy babies than the punitive and counterproductive approach of imprisoning mothers.

B. The Federal Approach: The Comprehensive Addiction and Recovery Act

Congress in July 2016 passed the Comprehensive Addiction and Recovery Act (CARA),[156] a bipartisan effort to curb the opioid crisis. In his presidential

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02 (finding women who were supported and encouraged to enter treatment voluntarily were more likely to stop using drugs).

148. Janet W. Steverson & Traci Rieckmann, *Legislating for the Provision of Comprehensive Substance Abuse Treatment Programs for Pregnant and Mothering Women*, 16 DUKE J. GENDER L. & POL'Y 315, 322–23 (2009).

149. *Id* at 323. Additionally, Amnesty International points out that at the time the Tennessee fetal assault statute was amended to criminalize the conduct of pregnant women—offering an affirmative defense only to women who were in treatment—only nineteen drug treatment facilities provided care for pregnant women. AMNESTY INT'L, *supra* note 61, at 30.

150. *See* Mohapatra*, supra* note 145, at 268.

151. *Strategy: Prenatal Care and Drug Abuse Treatment for Pregnant Women*, NAT'L CRIME PREVENTION COUNCIL, http://archive.ncpc.org/topics/drug-abuse/strategies/strategy-prenatal-care-and-drug-abuse-treatment-for-pregnant-women.html (last visited Mar. 7, 2018).

152. *See, e.g.*, Valera Jackson, *Residential Treatment for Parents and Their Children: The Village Experience*, 2 SCI. & PRAC. PERSP. 44, 44 (2004) (describing The Village, a residential treatment facility that accommodates those who are seeking treatment for addiction and their children).

153. *See* AMNESTY INT'L, *supra* note 61, at 67.

154. *See* St. Louis, *Tide of Opioid-Dependent Newborns*, *supra* note 39 (comparing model program to general practice of separating mothers and babies with NAS).

155. *See* Khazan, *supra* note 4 (describing "tight finances" of Oklahoma center called Just the Beginning, which must rely on volunteer services for psychiatric treatment).

156. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695.

message recognizing the law, President Barack Obama acknowledged the scope of the opioid crisis and conceded CARA's plan of action was comparatively modest, noting the law was a starting point and would require dedicated work on both sides of the aisle to ensure adequate funding.[157] Most importantly, he recognized the opioid epidemic is a "public health crisis."[158]

On the prevention side, the law specifies funding is allocated for an inter-agency task force among federal agencies, including the U.S. Department of Health and Human Services, U.S. Department of Veterans Affairs, Drug Enforcement Agency, U.S. Centers for Disease Control and Prevention, and more.[159] Community partners like addiction treatment organizations have also been invited to the table,[160] and the law additionally outlines a number of harm reduction efforts—including a stipulation that treatment for pregnant women should be prioritized.[161] "It's the first time to my knowledge that that population has been recognized as being underserved, and was targeted specifically, and I think it's real progress," said Mark Dunn, the director of public policy for the National Association of Addiction Treatment Providers.[162]

The law's call for expanded educational campaigns, research, first responder training, community coalitions, services for pregnant and postpartum women, and treatment take a distinctly public health—as opposed to law enforcement—point of view. As Mark Dunn noted, the law recognizes the unique challenges confronting pregnant and postpartum women. It also specifically legitimizes the challenges facing rural communities.[163] It both reauthorizes a grant program for residential treatment, plus gives states flexibility to create nonresidential treatment programs to address the "identified gaps in services furnished to [pregnant and postpartum] women along the continuum of care."[164] This emphasis on "care" supports reducing and ending drug use without threatening women. It also lifts the responsibility of addressing maternal drug use from the shoulders of law enforcement and places it on federal-private partnerships more knowledgeable about addiction, disease, barriers to care, and the needs of mothers and their children. Signed into law by President Obama, CARA has been allocated $1.3 billion in the Trump Administration's Fiscal Year 2018 Budget.[165]

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157. Statement by the President on the Comprehensive Addiction and Recovery Act of 2016, 2016 WL 3947274 (White House).

158. *Id.*

159. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, § 101, 130 Stat. 697–8.

160. *Id.*

161. *Id.* at § 501, 130 Stat. 701–02.

162. St. Louis, *Rise in Infant Drug Dependence*, *supra* note 38.

163. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, § 501, 130 Stat. 701–02.

164. *Id.*

165. Press Release, Exec. Office of the President, Office of Nat'l Drug Control Policy President Trump's First Budget Commits Significant Resources to Fight the Opioid Epidemic (May 23, 2017), https://www.whitehouse.gov/briefings-statements/president-trumps-first-budget-commits-significant-resources-fight-opioid-epidemic/. In October 2017, President Trump announced that the opioid crisis was a public health emergency, which is a type of national emergency declaration. Dan Merica, *What Trump's Opioid Announcement Means and Doesn't Mean*, CNN (Oct. 27, 2017), https://www.cnn.com/2017/10/26/politics/national-health-emergency-national-disaster/index.html. A public health emergency designation, unlike a national disaster declaration, does not immediately make funds available to combat

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A public health approach to maternal drug use focuses on identifying the root cause of drug use among pregnant women. While a criminal approach only addresses maternal drug use *after* the drug use occurs, the public health method embraces social, behavioral, and environmental factors that *cause* the drug use.[166]

This approach appropriately shifts the needle from punishment to treatment; prosecutorial power to professional care.

VI. CONCLUSION

This Note has argued that the acceleration in punitive sanctions against women who use drugs while pregnant is an inappropriate tool to address the problem of maternal addiction and does not support the shared stakeholder goal of healthy babies. The desire to help the children flooding community hospitals with symptoms of NAS is at odds with the cruelty of punishing their mothers. No one would suggest that mothers should use drugs while pregnant, but a public health approach to maternal drug use would mean that women like Amanda, Casey, Angela Dawn, and Amber would be given the opportunity to flourish beyond nine months of pregnancy.[167] Ultimately, a public health perspective is necessary to ensure that compassionate care and thriving families are not an accident of geography.

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the emergency. *Id*. The public health emergency declaration has been criticized for offering the promise of relief without backing that promise with any funding. Wayne Drash & Nadia Kounang, *Opioid Commission Member: Our Work is a 'Sham',* CNN (Jan. 24, 2018), https://www.cnn.com/2018/01/23/health/patrick-kennedy-opioid-commission-sham/index.html (quoting Patrick Kennedy, a member of the president's opioid commission, as saying: "The emergency declaration has accomplished little because there's no funding behind it. You can't expect to stem the tide of a public health crisis that is claiming over 64,000 lives per year without putting your money where your mouth is.").

166. *See* Mohapatra*, supra* note 145, at 265.

167. *See* notes 1–7 and accompanying text, *supra.*