NAS and the Law for the Non-Lawyer

80 Points of Light

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Setting the Stage

1. Prenatal opioid use/abuse is a complex public health problem.

2. Approximately 50% of opiates used during pregnancy are prescribed by an HCP- some for legitimate reasons - others may be over-prescribed.

3. Women may continue drug use/abuse while pregnant for many reasons including but not limited to: 1) ongoing need for pain management, 2) addiction, and 3) lack of effective, affordable and appropriate treatment.

4. There are other behaviors and exposures that pose risks to a fetus, including but not limited to nicotine use, alcohol consumption, poor nutrition, failing to lose or gain the appropriate amount of weight, failing to get enough exercise, exercising excessively, playing rigorous sports, failing to seek and obtain prenatal care, domestic violence, homelessness and the use of legal substances - which may present a higher risk than some of the illegal substances.

5. Dr. Carl L. Hart, an associate professor of psychiatry and psychology at Columbia University and a research scientist at the New York State Psychiatric Institute, believes that heavy alcohol use is potentially far more serious than a mother's use of opiates, cocaine or meth, because heavy alcohol may lead to delayed brain development and other lifelong issues while evidence linking opiate use/abuse to poor neurodevelopmental outcomes arguably is much weaker.

6. Many women who use illegal drugs have several of the risk factors noted above and many experts believe the social determinants of health - such as poverty- present more risk than the drug itself.

7. Many states are reporting a national trend of increasing numbers of newborns diagnosed with NAS.

8. *Location Location Location*: State laws determine the fate of substance-abusing pregnant women. Pay attention to your state laws but understand that sometimes the state may have a reasonable approach but a local county prosecutor will take an extreme punitive stand. You need to know the local position.

Relying on Science and Facts as Opposed to Myth and Discredited Assumptions

9. There is no place for myths and discredited assumptions in lieu of scientific evidence. Guessing and possibilities have no place in the courts. Mere speculation, conjecture, or presumption that a positive drug test demonstrates harm or risk of harm is insufficient to establish abuse or neglect. Scientific evidence must include expert testimony.

10. Witnesses should not be allowed to express opinions about medical/scientific facts unless they have the appropriate expert qualifications.

11. Inaccurate, overstated and misleading news reporting often demonize and sensationalize *in utero* opiate exposure. Although many of these media reports began in the cocaine era - they persist to date.

Punitive Measures Do Not Work

12. Responding to issues of drug use and pregnancy through punitive measures will likely yield worse outcomes for infants and children and are counterproductive.

13. On the flip side, programs that support and nurture women lead to improved outcomes in their infants. Nurture the mother … nurture the child.

14. Fear of losing a child and fear of punishment deters pregnant women from pursuing prenatal and labor and delivery care and from seeking treatment for drug addiction. It also discourages frank disclosure of critical medical information to health care providers.

15. The American College of Obstetricians and Gynecologists has weighed in: "…use of the legal system to address prenatal alcohol and substance abuse is inappropriate … In states that mandate reporting to civil child welfare authorities, policy makers, legislators, and physicians should work together to retract punitive legislation and identify and implement evidence-based strategies outside the legal system to address the needs of women with addictions." [American College of Obstetricians and Gynecologists, Committee On Health Care for Underserved Women, Committee Opinion 473, Substance Abuse Reporting and Pregnancy: The Role of Obstetrician-Gynecologist, 117 Obstetrics & Gynecology 200 (2011)].

16. The American Medical Association, the American Academy of Pediatrics, the American Nurses Association, as well as other public health organizations, medical groups and other experts oppose legislation that criminalizes maternal drug addiction.

17. Studies have shown that a woman's effort to change addictive behavior may be frustrated by child welfare interventions because the interventions typically are adversarial in nature and mandate unrealistic timetables.

18. The punitive approach incorrectly treats addiction as a moral failing. Instead, addiction, according to ACOG is a "chronic, relapsing, biological and behavioral disorder with genetic components … subject to medical and behavioral management in the same fashion as hypertension and diabetes." This definition is of critical importance because it means our mandate is to treat the drug-addicted mother- just as we would treat a mother with diabetes.

19. In 1994, the American Psychiatric Association diagnosed drug addiction as a mental disorder and it is included in DSM-IV. See also proposed changes to DSM-V.

20. Taking punitive measures undermines the physician-patient relationship.

21. The 2012 Florida Legislature adopted legislation creating a Statewide Task Force on Prescription Drug Abuse and Newborns, chaired by Attorney General Pam Bondi, to examine the extent of prescription drug abuse among expectant mothers, including costs of caring for babies with neonatal abstinence syndrome, long-term effects of the syndrome, and prevention strategies. I urge you to take a look at the February 2013 Final Report.

- **a.** One recommendation, for example is to add Neonatal Abstinence Syndrome to the list of Reportable Diseases and Events to Florida's Department of Health.
- **b.** The report further states, "Florida's response to NAS must … be a hybrid approach, combining a **law enforcement response** and public health-oriented response. [emphasis added] We must acknowledge that while the problem of drug abuse is a public health issue, law enforcement and the courts also have a vital role to play in ensuring that a person seeking treatment successfully follows through because most successful treatment outcomes involve a certain element of coercion. Unlike other health care problems, law enforcement must also be involved because an individual's addiction often has public safety ramifications. Oftentimes, without the aid of others, an addict will drop out of substance abuse treatment. A hybrid response is therefore effective precisely because it can leverage the criminal justice system to improve treatment compliance."
- **c.** Of note: several leading experts including but not limited to Robert G. Newman, MD, MPH, Lynn M. Paltrow, JD, Sharon Stancliff, MD, FAAFP and Mishka Terplan, MD, MPH, FACOG, Diplomate, ABAM, have been critical of the Florida Task Force's focus on punitive criminal justice and excessive child welfare interventions. See *Florida Statewide Task Force on Prescription Drug Abuse & Newborns, February 2013 Final Report: An Inadequate Assessment of the Needs of Women, Children, and Families.* You can download this file on the website for National Advocates for Pregnant Women (April 2, 2013).

Two Important Constitutional Issues

22. **Right to Privacy**: it has been argued that the prosecution of a pregnant drug-addicted woman infringes upon a woman's right to privacy as established in the United States Supreme Court case *Roe v. Wade*. In *Roe*, the United States Supreme Court held that the right to privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action ... or ... in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." A woman does not lose her right to privacy when she becomes pregnant except in South Carolina.

23. *Whitner v. South Carolina*, 492 S. E. 2d 777 (1997), *cert. denied*, 118 S. Ct. 1857 (1998):
    - **i.** In 1992, Cornelia Whitner pled guilty to criminal child neglect under section 20-7-50 of the South Carolina Code for ingesting crack cocaine during her third trimester and causing her baby to be born with cocaine metabolites in its system. She was sentenced to eight years in prison.
    - **ii.** On appeal, Whitner argued that the word "person" as used in the Children's Code should not have been interpreted to include viable fetuses. She also argued that the prosecution violated her constitutional right to privacy.
    - **iii.** The court disagreed on both counts. The Court noted that South Carolina has "long recognized that viable fetuses are persons holding certain rights and privileges," and held that the State had a compelling interest in protecting the life and health of a viable fetus. As far as Whitner's fundamental right to privacy the court stated, "it strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy."
    - **iv.** The South Carolina became the first high court to uphold such a conviction.
    - **v.** The United States Supreme Court refused to hear the case and the conviction still stands.
    - **vi.** What is interesting, and I urge you to read, is the dissent in this case. The dissents of both Chief Justice Finney and Justice Moore point out that the court is "bound by the rules of statutory construction to strictly construe a criminal statute in favor of the defendant [that would be Whitner] and resolve any ambiguity in her favor." Justice Moore states, "While the majority opinion is perhaps an argument for what the law should be, it is for the General Assembly, and not this Court, to make that determination by means of a clearly drawn statute. With today's decision, the majority not only ignores legislative intent but embarks on a course of judicial activism rejected by every other court to address this issue."

24. Fourth Amendment: The Fourth Amendment of the United States Constitution governs all searches and seizures conducted by government agents: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

25. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)

i. The Medical University of South Carolina (MUSC) - a state hospital (and therefore a government agent) - tested pregnant women for cocaine without their knowledge or consent. Urine tests were stored in compliance with 'chain of custody' requirements and police were notified about positive urine tests.

ii. The MUSC policy authorized testing when there was
    1. Separation of placenta
    2. Intrauterine fetal death
    3. No prenatal care
    4. Prenatal care only after 24 weeks
    5. Fewer than 5 prenatal visits
    6. Unexplained pre-term labor
    7. History of cocaine use
    8. Unexplained birth defects
    9. Unexplained IUGR

iii. Of note: South Carolina Medicaid did not pay for prenatal care prior to 19 weeks.

iv. Thirty (30) women were arrested and offered a deal: submit to arrest or comply with drug treatment recommendations.

v. Ten of these women brought suit arguing that the un-consented urine tests violated their **Fourth Amendment** rights against unreasonable search and seizure without probable cause.

vi. The State argued that the unconsented testing qualified as a "special needs" and was therefore permissible.

vii. The United States Supreme Court has recognized that under certain circumstances- very limited circumstances-there is an exception to the Fourth Amendment requirement for a warrant and probable cause known as the "special needs" exception. Special needs searches have been found permissible for example, in drug testing of public school students where the interests in deterring drug use and maintaining discipline outweigh a student's privacy interests. Of note: even if a special need is found to exist, it must be balanced against the privacy interest at stake and the character of the intrusion. The exception recognizes that a state's "special needs" exists when the objective serves "non-law enforcement ends."

viii. The City of Charleston (remember that MUSC was a state hospital) argued for the existence of a "special needs" exception in this case.

ix. The United States Supreme Court disagreed and found that the state hospital's drug testing program violated the women's' Fourth Amendment rights.

x. Focusing on the extensive law enforcement involvement at every stage of the program, and the hospital's obvious intent to arrest and prosecute, the Supreme Court determined that because the hospital worked hand-in-glove with the police, the "immediate objective" of this program was to "generate evidence for law enforcement purposes." Thus the MUSC testing program did not qualify under the "special needs" doctrine."

xi. Writing for the court, Justice John Paul Stevens said: "While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal."

26. Procedural Due Process: The Due Process Clause of the Constitution states that" [n]o State shall…deprive any person of life, liberty, or property, without due process of law." This means in part that courts must interpret and apply existing laws as intended by the legislature – which is why it is important to understand what the legislature intended.

Different Legal Approaches

27. States have attempted to punish pregnant woman who use illegal drugs by either a) prosecuting women under existing criminal laws; b) expanding the civil definition of child abuse or neglect to include prenatal substance abuse; or c) requiring involuntary civil commitment

Prosecuting Women Under Existing Criminal Laws

28. Many women are arrested or deprived of liberty by being forced into drug treatment based on existing criminal state laws that were never intended to punish women but have been reinterpreted [by prosecutors and lower state courts] to do so. I have identified criminal laws that have been used to prosecute women and provided a summary of some interesting cases. With the exception of South Carolina, state appellate courts have overturned these convictions reasoning that either the state legislature(s) never intended that the definition of "minor children" should include fetuses and/or that the legislature did not intend for the delivery of drugs to include express delivery via the umbilical cord. Other courts have found such convictions violate a woman's due process rights or her right to privacy.

29. Existing criminal laws may include (not an exhaustive list):

a. Felony Child Endangerment

i. In 1977 (California) Margaret Reyes was indicted on felony child endangerment charges for using heroin while pregnant, making her the first woman in the United States to be indicted for drug use while pregnant. In *Reyes v. Superior Court,* the California court found that a fetus is not a person under California's statutes involving murder, manslaughter, the failure to provide child support, or under a Fourteenth Amendment analysis, or the Social Security Act. The court further indicated that if the child abuse statute "were interpreted as being applicable to endangering a fetus, the rather absurd result would be that endangering a fetus was more severely punished than aborting it."

b. Manslaughter
    i. In *State v. Aiwohi*, 123 P. 3d 1210 (Hawaii 2005), Ms. Aiwohi, who smoked crystal Methamphetamine in her third trimester was prosecuted for manslaughter for recklessly causing the death of her newborn son who died two days after birth. The statute in question states, "[a] person commits the offense of manslaughter if . . . [h]e recklessly causes the death of another person." The court determined that the state's manslaughter statute applies only to the death of a person, and a person does not include a fetus under the law.
c. Homicide
d. Homicide by Child Abuse
    i. Regina McKnight (South Carolina): 21-year-old homeless African American woman, with an IQ of 72 and addicted to cocaine, suffered a stillbirth. South Carolina alleged the stillbirth was caused by McKnight's cocaine use and charged her with homicide by child abuse. McKnight claimed that she did not have the requisite criminal intent to commit homicide. After deliberating for 15 minutes a jury found her guilty and she was sentenced to prison despite no finding that McKnight intended to end her pregnancy. After she had served 8 years of her sentence, the South Carolina Supreme Court overturned her conviction (it was unanimous) finding that the attorneys had provided ineffective counsel and that the state's research presented at trial was outdated. To avoid a new trial, McKnight pled guilty to manslaughter and was released.
e. First Degree Murder
f. Felony Child Abuse/Neglect
g. Possession of a controlled substance
h. Depraved Heart Murder(killing with callous disregard for human life)
    i. Rennie Gibbs (Mississippi): In December 2006, Ms. Gibbs, a black sixteen-year-old addicted to cocaine suffered a stillbirth at thirty-six weeks gestation. She was subsequently arrested – despite the fact that there was no evidence showing that her drug use caused the stillbirth- and charged with depraved heart murder due to her cocaine use. Depraved heart murder in Mississippi carries a life sentence without possibility of parole until the age of 65.
i. Corruption of a minor
j. Chemical Endangerment

i. *Kimbrough v. Alabama* (2013): Amanda Kimbrough's third child was born at 25 weeks in 2008, weighing 2 pounds 1 oz. He lived for 19 minutes. Kimbrough tested positive for methamphetamine. Kimbrough was charged with chemical endangerment of a child, a Class A felony (because the infant died) carrying a mandatory sentence of 10 years to life. On the advice of her lawyers, she pleaded guilty and received the minimum sentence of 10 years even though the child endangerment statute did not specifically cover acts of potential harm to fetuses. The case was appealed to the Alabama Supreme Court. On January 11, 2013, the Alabama Supreme Court held that the child endangerment statute was intended to cover fetuses.

k. Assault with a deadly weapon
l. Violation of Feticide Laws
m. Reckless injury
n. Delivering drugs to a minor [through umbilical cord
    i. To avoid the issue of whether a fetus is a "person' under the law, some prosecutors have charged women with the crime of delivering drugs to a minor, claiming that drugs were transmitted from mother to infant via the umbilical cord *after* birth in those moments when the cord is still attached and the infant is alive. A significant problem with this approach is that typically, under the law, culpability requires proof of something called *mens rea*, or criminal intent. In other words, the prosecution must show that the woman intended to deliver drugs to the infant via the umbilical cord.

30. Demographics: In a study spanning 1973-2005 that included 413 women in 44 states, the following facts emerged: (See: *Arrests of and Forced Interventions on Pregnant Women in the United* States, 1973-2005: *Implications for Women's Legal Status and Public Health*, published in the **Journal of Health Politics, Policy and Law**, January 15, 2013)

a. Economically disadvantaged women were targeted
b. 71% qualified for indigent defense
c. African American women were more likely to be charged with felonies than white women.
d. Largest percentage of cases originated in the South (56%)
e. Cases tended to cluster around particular counties and even particular hospitals
f. Ten states accounted for more than two-thirds of the total number of arrests and forced interventions:
    i. South Carolina
    ii. Florida
    iii. Missouri
    iv. Georgia
    v. Tennessee
    vi. Wisconsin
    vii. Illinois
    viii. Nevada
    ix. New York

x. Texas

31. Many states have considered gender-specific laws making it a specific crime for a pregnant woman to use illegal drugs but no state has passed such a specific law that criminalizes drug use during pregnancy. However, as you will see below, several states have mandated reporting of substance-abusing pregnant women and/or newborns that are drug-exposed.

32. Every state appellate court with the exception of South Carolina has refused to expand existing state criminal laws to include pregnant women who use illegal drugs.

33. No state has specifically amended drug delivery laws to include the transmission of drugs through the umbilical cord.

Fetal Homicide Laws

34. There are fetal-homicide laws (also known as "unborn victims of violence" laws or feticide laws) in approximately 39 states. Although fetal homicide laws differ from state to state, each law is [ostensibly] designed to protect the mother and unborn fetus from third party harm. For example, a distressed boyfriend shoots and kills his pregnant girlfriend. Depending on the jurisdiction, he may be liable not only for the death of his girlfriend but also for the death of the fetus. States have established fetal homicide laws either via legislation (laws passed by legislators) or case law (courts). Of those states with fetal-homicide laws, some consider a fetus to be a victim without regard to gestational age and others acknowledge fetal victimhood only after the fetus attains a certain stage of development, such as the embryonic stage, quickening, or viability. These laws were intended – initially- to protect pregnant women and fetuses. However, in several states, including but not limited to California, Georgia, Tennessee, South Carolina and Utah, the women themselves have been charged under these laws when a fetus or newborn dies allegedly as a result of the pregnant woman's action or inaction.

35. At common law a fetus was not considered to be a separate victim (apart from its mother) if a crime was committed against the pregnant mother unless the fetus was delivered and later died because of the inflicted injuries. This was known as the "born-alive rule."

36. The common law view has shifted. For example, the federal Unborn Victims of Violence Act of 2004, provides that if a fetus is injured or killed during the commission of certain federal crimes against its mother, then the perpetrator is liable for crimes against two victims: the mother and the fetus. In other words, under this federal law, a fetus is regarded as a separate and distinct victim from its mother. The federal UVVA defines "child in utero" as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."

36. As far as the 39 state fetal homicide laws, a minority of states focus on the stage of pregnancy looking to viability or quickening to determine whether the fetus is a separate

victim : Arkansas; California ; Florida; Indiana; Iowa; Maryland; Massachusetts; Nevada; New York; Rhode Island; Tennessee; Washington.

37. The majority of jurisdictions have determined that unborn children become legally separate entities upon conception. In Minnesota, for example, in *State v. Merrill*, the state Supreme Court found that the perpetrator was criminally liable for killing a pre-viable, twenty-seven- to twenty-eight-day-old embryo.

Personhood Initiatives

38. No state has [yet] redefined the word person or personhood in their state constitutions to include fertilized eggs, embryos and /or fetuses despite the efforts of Personhood USA, a Colorado-based organization founded in 2008, seeking to establish fetal rights at the time sperm meets egg. Personhood USA has introduced initiatives and measures in legislatures in 22 states to add personhood amendments to state constitutions and define fetuses as persons. Personhood USA's efforts have failed in every state where they have been introduced.

39. In 2011 Mississippians voted against Proposition 26, a "personhood" measure that would have redefined the word person to include "every human being from the moment of fertilization, cloning, or the functional equivalent thereof."

40. In Colorado, Personhood USA's home state, voters rejected fetal-personhood initiatives twice in 2008 and 2010.

41. The American Society for Reproductive Medicine (ASRM) "is strongly opposed to measures granting constitutional rights or protections and "personhood" status to fertilized reproductive tissues." The Society describes a growing number of state measures that are "vaguely worded and often misleading, that would make commonly used birth control methods illegal, threaten a physician's ability to provide appropriate medical care for women with tubal pregnancies; and consign infertility patients to less safe and effective treatments.

Expanding the Civil Definition of Child Abuse/Neglect.

42. Some states have expanded their child welfare laws to include prenatal drug exposure so that prenatal drug exposure can provide grounds for terminating parental rights because of child abuse or neglect. These laws vary considerably and generally fall into two categories: punitive or public health oriented. Data below is provided via the Guttmacher Institute which is an incredible resource.

43. 17 states consider substance abuse during pregnancy to be child abuse under civil child-welfare statutes: Arkansas, Colorado, Florida, Illinois, Indiana, Iowa, Louisiana, Minnesota, Nevada, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wisconsin.

a. **South Dakota [pertinent part]:** " In this chapter and chapter 26-7A, the term, abused or neglected child, means a child:(9) Who was subject to prenatal exposure to abusive use of alcohol, marijuana, or any controlled drug or substance not lawfully prescribed by a practitioner as authorized by chapters 22-42 and 34-20B"
b. See notes below about CAPTA. Under CAPTA, healthcare providers must have policies and procedures in place to notify Child Protective Services of *all* infants born and identified as affected by illegal substance abuse, withdrawal symptoms resulting from prenatal drug exposure …BUT under CAPTA reports of prenatal substance exposure *shall not* be construed to be child abuse or neglect. [Emphasis added]. Thus states like South Dakota, by defining prenatal exposures as abuse/neglect, are taking legislative action that are separate and distinct from CAPTA.

44. 3 of the above-mentioned states consider it grounds for civil commitment: Minnesota, South Dakota, and Wisconsin. Civil commitment is a legal process that permits a court to impose treatment on a person, including hospitalization, over that person's objections. There are two constitutional limits to civil commitment: the person must have a mental condition or disorder; and the disorder must cause the person to be dangerous to self or others.

a. **Minnesota**: The definition of **chemically dependent person is: "**a pregnant woman who has engaged during the pregnancy in habitual or excessive use, for a nonmedical purpose, of any of the following substances or their derivatives: opium, cocaine, heroin, phencyclidine, methamphetamine, amphetamine, tetrahydrocannabinol, or alcohol." I am assuming that the mental condition is the chemical dependence and the danger is to the pregnant woman and her fetus. Thus if an "examiner" – i.e. a person who is knowledgeable, trained, and practicing in the diagnosis and assessment or in the treatment of the alleged impairment, and who is:(1) a licensed physician; (2) a licensed psychologist who has a doctoral degree in psychology or (3) an advanced practice registered nurse certified in mental health or a licensed physician assistant (see statute for specific details) determines that the pregnant woman is in danger of causing injury to self or others if not immediately detained, the woman "may be admitted or held for emergency care and treatment in a treatment facility."
b. **South Dakota**: Just about anyone can petition to have a pregnant woman committed involuntarily including the person's "spouse, guardian, relative, physician, an administrator of an approved treatment facility, *or any other responsible person."* In addition, there is no finite list of substances a pregnant woman must be using before she can be committed.
c. **Wisconsin**: Under the Children's Code *abuse* is defined in part as "When used in referring to an unborn child, serious physical harm inflicted on the unborn child, and the risk of serious physical harm to the child when born, caused by the habitual lack of self−control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree." A pregnant woman may be taken into custody by

order of a judge if she has already refused treatment or failed to make a good faith effort at treatment; and if the judge believes that "due to the adult expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs," there may be substantial risk to the unborn child. [I urge you to read the statutes in their entirety]

45. 14 states require health care professionals to report suspected prenatal drug abuse: Alaska, Arizona, Illinois, Iowa, Louisiana, Massachusetts. Michigan, Minnesota, Montana, North Dakota, Oklahoma, Rhode Island, Utah, Virginia (According to Guttmacher Institute a new Maryland law will take effect this year.)

a. **Virginia**: Attending physicians are required to immediately make a report to Child Protective Services (CPS) if any one of the following occurs: • Urine or blood toxicology conducted on the mother or infant, within 48 hours of birth, is positive. • A medical finding is made, within 48 hours of birth, of newborn dependency or withdrawal symptoms. • An illness, disease, or condition attributable to in utero substance exposure is diagnosed within seven (7) days of birth. • Fetal Alcohol Syndrome (FAS) is diagnosed within seven (7) days of birth.
b. **Arizona**: "A health care professional who is regulated pursuant to title 32 and who, after a routine newborn physical assessment of a newborn infant's health status or following notification of positive toxicology screens of a newborn infant, reasonably believes that the newborn infant may be affected by the presence of alcohol or a drug listen in section … shall immediately report this information, or cause a report to be made, to child protective services …"
c. **Minnesota:** Reports required**. "**(a) Except as provided in paragraph (b), a person mandated to report under section 626.556, subdivision 3, shall immediately report to the local welfare agency if the person knows or has reason to believe that a woman is pregnant and has used a controlled substance for a nonmedical purpose during the pregnancy, including, but not limited to, tetrahydrocannabinol, or has consumed alcoholic beverages during the pregnancy in any way that is habitual or excessive."

46. 4 states require testing for prenatal drug exposure if they suspect abuse: Iowa, Kentucky, Minnesota, North Dakota.

47. 18 states have either created or funded drug treatment programs specifically targeted to pregnant women, and 10 provide pregnant women with priority access to state-funded drug treatment programs.

48. 4 states prohibit publicly funded drug treatment programs from discriminating against pregnant women

49. In **Ohio**, The Greater Cincinnati Health Council, an organization that works with hospitals in the region and its member hospitals decided to implement universal drug testing of mothers during intake to the maternity ward before delivery as of September 2013. Scott Wexelblatt,

MD, Medical director of Regional Newborn Services at Cincinnati Children's Hospital Medical Center stated, "Universal testing is designed to help the family, the mother and the infant. It ensures that the hospital can monitor the infant after birth and provide the appropriate care if the infant begins to show withdrawal symptoms." Hospitals participating in the new drug testing policy include Cincinnati Children's, University of Cincinnati Medical Center, Bethesda North Hospital, Good Samaritan Hospital, Mercy Health Anderson, Mercy Health Fairfield and St. Elizabeth. The drug testing will become standard procedure for the hospitals but is not mandatory.

50. State laws that specifically address a woman's drug use during pregnancy vary considerably.

51. Compare the approach of South Carolina versus California:

i. In **South Carolina** if either the mother or infant tests positive for a controlled substance, there is a presumption of neglect: "It is presumed that a newborn child is an abused or neglected child as defined in Section 63-7-20 and that the child cannot be protected from further harm without being removed from the custody of the mother upon proof that: (a) a blood or urine test of the child at birth or a blood or urine test of the mother at birth shows the presence of any amount of a controlled substance or a metabolite of a controlled substance unless the presence of the substance or the metabolite is the result of medical treatment administered to the mother of the infant or the infant …

ii. In **California**, " …a positive toxicology screen at the time of the delivery of an infant is not in and of itself a sufficient basis for reporting child abuse or neglect. However, any indication of maternal substance abuse shall lead to an assessment of the needs of the mother and child pursuant to Section123605 of the Health and Safety Code. If other factors are present that indicate risk to a child, then a report shall be made. However, 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 county welfare or probation department, and not to a law enforcement agency."

52. Some states, like **New Hampshire** and **Vermont** have statutes mandating that health care providers (and a laundry list of other mandatory reporters), *shall report* reasonable suspicions of child abuse or neglect to child protective services. For example, in Vermont, a mandatory reporter "who has reasonable cause to believe that any child has been abused or neglected shall report or cause a report to be made in accordance with the provisions of section 4914 of this title within 24 hours." The Vermont definition of an abused child is as follows: "An "abused or neglected child" means [in pertinent part] a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare." Keep in mind that under the federal law CAPTA (see details below) healthcare providers must have policies and procedures in place to notify Child Protective Services of *all* infants born and identified as affected by illegal substance abuse, withdrawal symptoms resulting from prenatal drug exposure, or a

Fetal Alcohol Spectrum Disorder and to establish a plan of safe care for these newborns. The CAPTA report is separate and distinct from a duty to report abuse and neglect under the state child abuse/neglect law(s). Reporting under CAPTA shall not be construed to be child abuse or neglect and is intended to "identify infants at risk of child abuse and neglect so appropriate services can be delivered to the infant and mother to provide for the safety of the child."

Reflections

53. Scientific evidence does not support the idea that a positive drug test on a pregnant woman or newborn establishes that a mother will more likely than not abuse or neglect her child. In other words, evidence of prenatal drug exposure, on its own, does not establish harm or substantial risk of harm after birth.

54. Harms from prenatal exposure should not allow for a *per se* finding of abuse/neglect.

55. Addiction, as opposed to drug use, has both biological and genetic components and requires treatment- not threats.

56. Expanding abuse and neglect laws increases the chances for discrimination against low-income and women of color- especially African American women.

Reporting Requirements under Child Abuse Prevention and Treatment Act (CAPTA)
http://www.acf.hhs.gov/sites/default/files/cb/capta2010.pdf

57. First major federal legislation to address child abuse.

58. Provides federal funding to qualifying states in support of prevention, assessment, investigation, prosecution, treatment of child abuse/neglect.

59. Originally was signed into law on January 31, 1974 (P.L. 93-247). It was reauthorized in 1978, 1984, 1988, 1992, 1996, and 2003, and with each reauthorization, amendments have been made to CAPTA that have expanded and refined the scope of the law. The most recent reauthorization was on December 20, 2010, by the CAPTA Reauthorization Act of 2010 (P.L. 111-320).

60. Recognizes that parents have a fundamental liberty, protected by the Constitution, to raise their children as they choose. The law balances the rights and responsibilities among the parents, the child, and the State. If parents are unable or unwilling to protect the safety and well-being of their children, the State has the power and authority to take action to protect the child from harm. CAPTA is one piece of federal legislation that supports the States' duty and power to act on behalf of children when parents are unable or unwilling to do so.

61. Under CAPTA "the term 'child' means a person who has not attained the lesser of— A. the age of 18; or B. except in the case of sexual abuse, the age specified by the child protection law of the State in which the child resides."

62. Under CAPTA the term 'child abuse and neglect' means, "at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm."

63. Requires that states have procedures in place for receiving and responding to allegations of abuse or neglect and for ensuring children's safety.

64. Each state must have a statewide program, relating to child abuse and neglect that includes procedures for reporting abuse including certain mandatory reporting requirements as well as policies and procedures (including appropriate referrals to child protection service systems and for other appropriate services).

65. Healthcare providers must have policies and procedures in place to notify Child Protective Services of *all* infants born and identified as affected by illegal substance abuse, withdrawal symptoms resulting from prenatal drug exposure, or a Fetal Alcohol Spectrum Disorder and to establish a plan of safe care for these newborns. This is separate and distinct from the existing duty in all states to report suspected child abuse or neglect.

66. The law specifies that reports of prenatal substance exposure shall not be construed to be child abuse or neglect and shall not require maternal prosecution.

67. CAPTA Rationale: "identify infants at risk of child abuse and neglect so appropriate services can be delivered to the infant and mother to provide for the safety of the child.".

68. Remember: Primary responsibility for child welfare services rests with the States. Each State has its own legal and administrative policies and procedures that address the needs of children and families.

69. States vary in what evidence of drug exposure to fetus/newborn is needed to mandate a report to CPS

70. Some states have mandated reports of NAS to their state public health entity (this is different from Child Protective Services). In other words, these states have identified NAS as a reportable disease like Lyme Disease, HIV etc. This is not something that is mandated by CAPTA.

a. Tennessee: Effective January 1, 2013, all cases of NAS diagnosed among Tennessee resident births should be reported to the Tennessee Department of Health at the time of diagnosis. I urge you to check out the Tennessee Department of Health website where you can find a weekly NAS summary archive. *Reporting is for surveillance purposes only. Does not constitute a*

referral to any agency other than the Tennessee Department of Health. Does not replace requirement to report suspected abuse/neglect.

Hospital Policies

71. Reporting must be consistent. It is unacceptable to have a situation where the care received depends upon which physician or nurse practitioner is on call. In addition, given the fact that the issue of NAS spans pregnancy which is under the domain of Obstetrics, and the neonatal period, which is under the domain of the NICU or newborn nursery, it is vital to have communication between Obstetrics, Pediatrics and the NICU teams.

72. Now is a good time for your OB department and your pediatrics and neonatal teams to get together with Risk Management and hospital counsel if you have not done so already. If you have a child advocacy and protection team, include them.

73. Hospital counsel should provide the team with an overview of the pertinent laws in your state as well as pertinent federal law as a starting point so that you understand the parameters of the problem. Does your state law mandate infant drug testing?

74. Develop a patient and family centered interdisciplinary *plan of care* policy for babies born to women with suspected or documented illegal substance abuse. Collaborate with local/regional Child protective Services.

75. Policy should include guidelines for identifying intra-partum women and newborns at risk for withdrawal from substance use/abuse.

76. Maternal and infant drug testing should be based on specific evidence-based criteria and medical indicators to avoid discriminatory testing. Open-ended criteria such as "clinical suspicion" are inadequate.

77. All mothers should be informed about proposed drug testing prospectively (not *post hoc*) and the rationale for testing should be documented in the medical record. This should be an on-going discussion that begins prenatally and continues after birth. This is why it is so important for the obstetricians, pediatricians and neonatologists to communicate. The discussion should include the nature and purpose of the test and how testing will guide care.

a. I have read that some states/hospitals suggest that a woman's general consent to treatment upon admission would cover prenatal drug testing. While you need to

consult with your own legal counsel about this, I think it is a dangerous precedent to rely on a general consent to drug test mom.

b. The American Academy of Pediatrics /Newborn Screening Task Force recommends that parents be informed of drug testing prenatally or during immediate postpartum period.

78. If a woman refuses testing, document the refusal and do not test over her objection. Testing of the newborn, however, remains an option.

79. If you do all of the above, going forward the conversations with Moms will focus on your state laws and policies as well as follow-up, treatment and management.

80. Remember that all healthcare providers are mandated reporters of child abuse/neglect in all states and typically are required to report when there is a reasonable suspicion of abuse/neglect (but check the specifics of your state law(s)). In states where positive toxicology screens do not need to be reported, you may find that the combination of other risk factors plus the positive toxicology screen raise your level of suspicion and require a report.

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