

State Laws on Substance Use Treatment for Incarcerated Pregnant and Postpartum People

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ABSTRACT

BACKGROUND: Incarcerated perinatal populations report high rates of substance use in the United States (US). Despite this, substance use disorder (SUD) treatment is not routinely available in carceral settings and state policies related to the provision of substance use screening and treatment are unknown.

METHODS: We conducted a systematic search in WestLaw through the end of the 2020 legislative session combining the terms “pregnant” and “postpartum” with terms for incarceration and related terms. The search returned 453 statutes from 43 states. A deductive codebook of various maternal health topics was developed. Legislative texts related to SUD screening and treatment were extracted for textual analysis.

RESULTS: Of the 43 states identified as having at least 1 state statute pertaining to pregnant or postpartum incarcerated people, 7 states had statutes relevant to SUD screening and treatment. Statutes related to substance use screening, education, treatment and diversion programs, program eligibility, aftercare and release planning, and funding appropriations.

CONCLUSIONS: The majority of states across the U.S. lack legislation that address SUD screening and treatment among incarcerated perinatal populations. Given the known limited access to SUD treatment for perinatal populations in custody, increasing legislative statutes could increase access to essential care.

KEYWORDS: Incarceration, pregnancy, substance use, substance use treatment

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Introduction

While women comprise only 9% of incarcerated adults in the United States (U.S.), the rate of women’s incarceration increased by over 550% from 1980 to 2019.^{1,2} Over 60% are incarcerated for non-violent property, drug, and public order offenses, with drug-related charges (eg, possession, trafficking) being the most serious offense for a quarter of the population.³ Among the broader population of incarcerated women, nearly 4% are pregnant upon intake with ~3000 and ~55 000 entering prisons and jails each year, respectively.^{4,5} National estimates indicate that 70% of incarcerated women meet criteria for a substance use disorder (SUD),⁶ and one study of a sample of prisons and jails reported that 14% of pregnant people entering jails and 26% entering prison have opioid use disorder; thus a substantial number of pregnant incarcerated people need SUD treatment.⁷ Building upon a recent literature review of SUD treatment programs in carceral settings,⁸ we present the first

systematic legal review relevant to substance use screening and treatment for incarcerated pregnant and postpartum populations across the U.S.

Method

We conducted a systematic search in WestLaw through the end of the 2020 legislative session combining the terms “pregnant” and “postpartum” with terms for incarceration, including “prison,” “jail,” “incarceration” and its variations, “inmate,” “detainee,” and “corrections” and related terms. The search returned 453 statutes from 43 states. Through discussion, the interdisciplinary research team developed a deductive codebook of maternal health topics including those related to SUD screening and treatment. Two researchers independently coded each statute and met to resolve discrepancies. For this current report, we extracted for textual analysis legislative text related to SUD screening and treatment among pregnant and/



or postpartum incarcerated people. In our results, we use gender-inclusive language, such as “people” alternative to “women,” to acknowledge that not all pregnant persons identify as women and that pregnancy can overlap with multiple gender identities, including people who identify as trans or non-binary.⁹

Results

Of the 43 states identified as having at least 1 state statute pertaining to pregnant or postpartum incarcerated people, only 7 states had laws directly related to SUD screening and treatment among incarcerated pregnant populations. No states addressed SUD treatment for postpartum people. We identified and described 8 codes relevant to SUD screening and treatment for pregnant populations (See Table 1). Laws varied significantly by state. For example, Texas had statutes relevant to substance use screening, education, and treatment, but focused exclusively on pregnancies at risk for alcohol-related complications. California was the only state that had laws mandating both education and treatment for opioid use disorder (OUD), including access to medications for opioid use disorder (MOUD). Maryland was the only other state to have a law related to the provision of substance use treatment for incarcerated pregnant populations; there, each carceral facility must have a written policy regarding the medical care of people with high-risk pregnancies, including SUD. Although Massachusetts had no law regarding SUD treatment during incarceration, state law does specify that carceral medical staff must provide pregnant people with counseling and discharge planning to ensure continuity of care, which includes uninterrupted SUD treatment.

Regarding diversion programs, laws in California, Missouri, and New Jersey contained language that enable use of residential rehabilitation programs in pregnancy rather than incarceration—though eligibility criteria varied. In California, pregnant women were eligible only if they had an “established history of substance abuse.” Similarly, in Missouri, pregnant women are eligible for Alt-Care (ie, diversion program) if violated the provisions of the Drug Control Act (Chapter 195), whose controlled substance use contributed an offense, and is placed on probation. In New Jersey, pregnant people were permitted to enroll in residential drug treatment programs in lieu of incarceration “provided they meet the requirement of the program.” No specific eligibility requirements were listed within their statute.

Discussion and Conclusion

The majority of states across the U.S. lack legislation addressing SUD screening and treatment among incarcerated pregnant and postpartum populations. Notably, the few state laws that do exist are often characterized by stigmatizing language (eg, “female inmate, substance abusing pregnant women”). National clinical guidelines recommend screening all pregnant individuals, including those who are incarcerated, for

SUDs and facilitating appropriate referrals to care.^{10,11} However, it is unclear how many carceral settings are implementing SUD screening⁸ and referring to care. Although some states do have mandated screening procedures, our search returned no state laws that required carceral settings to provide a generalized SUD treatment program for incarcerated pregnant people.

We also found a lack of mandates for specialized SUD care, such as MOUD programs, which is notable given that opioid overdose is a significant cause of maternal mortality.¹² Evidence-based guidelines advise that pregnant persons with OUD should be on MOUD and avoid withdrawal.¹³ Recent studies show that many carceral settings continue pre-incarceration MOUD in pregnancy, but few initiate MOUD and provide both methadone and buprenorphine. Furthermore, at facilities that provide MOUD during pregnancy, the vast majority discontinue postpartum, despite that most OUD pregnancy deaths occur postpartum.^{8,14,15} Thus, the fact that no statutes in our study addressed postpartum SUD is concerning. Carceral institutions are constitutionally mandated to provide healthcare¹⁶ to those with “*serious medical need*”; however, there is significant ambiguity in the definition of “*serious medical need*” and whether SUD treatment, including MOUD for OUD, among pregnant populations legally constitutes a serious medical need.¹⁷ Given the variability and lack of clinical standardization, legislation can help ensure carceral facilities adhere to standard of care.

Federal statutes (34 U.S. Code §10591, 34 U.S. Code §10592) allocate grant funds for developing and implementing comprehensive and clinically-appropriate substance use treatment alternatives to incarceration for non-violent pregnant people. Thus, states should place greater emphasis on drafting legislation and utilizing federal funding to support programs that would divert perinatal populations from incarceration. For example, the Substance Abuse and Mental Health Services Administration (SAMHSA) provides grant funding dedicated to piloting and supporting existing evidence-based substance use treatment programs for pregnant and postpartum people. State programs that benefit from SAMHSA funds are likely to serve pregnant and postpartum populations impacted by the criminal legal system; however, these funds have not typically targeted this population. Given the complexities and variability of health care service delivery in jails and prisons, it is not required or guaranteed that carceral facilities will access these SAMHSA resources to directly address care for pregnant people in custody. Increased availability of state funding for programs could provide more opportunities for utilizing community-based residential treatment programs as alternative options to incarceration.

There are important limitations to note. First, our search does not include state laws that may divert pregnant persons early in the criminal legal system, such as after an arrest. Second, it is possible that our search missed laws related to SUD treatment, in general, as our search terms were specific to

Table 1. State laws by deductive code.

CODE	STATE	CITATION	LANGUAGE
Substance use screening	TX	Tex. Govt. Code Ann. §501.059 (effective 8/28/1995)	<ul style="list-style-type: none"> Establish a screening program to identify female inmates. . .at risk for having a pregnancy with alcohol related complications. . .
		Tex. Govt. Code Ann. §507.028 (effective 7/15/2007)	<ul style="list-style-type: none"> Establish and use a screening program in state jail facilities similar to §501.059
	CA	Cal. Penal Code §4002.5 (effective 1/1/2020)	<ul style="list-style-type: none"> Administrator of each county jail shall develop and implement an infant and toddler breastmilk feeding policy for lactating inmates. . .participation in the program upon the inmate undergoing drug screening.
Substance use education for incarcerated pregnant persons	TX	Tex. Govt. Code Ann. §501.059 (effective 8/28/1995)	<ul style="list-style-type: none"> Department shall provide an educational brochure describing the risks/dangers of consuming alcohol during pregnancy to all inmates
		Tex. Govt. Code Ann. §507.028 (effective 7/15/2007)	<ul style="list-style-type: none"> Provide all female defendants in a state jail felony facility an education brochure describing the risk/dangers of consuming alcohol during pregnancy
		Tex. Govt. Code Ann. §501.0215 (effective 9/1/2019)	<ul style="list-style-type: none"> Develop and provide educational programming relating to pregnancy and parenting including. . .the effects of prenatal exposure to alcohol and drugs on a developing fetus
	CA	Cal. Penal Code §4023.8 (effective 1/1/2021)	<ul style="list-style-type: none"> Incarcerated persons who have used opioids prior to incarceration. . .shall be provided information on the risks of withdrawal
Substance use staff education	MN	Minn. Stat. Ann. §145.9266 (effective 8/1/2007)	<ul style="list-style-type: none"> Shall develop materials about fetal alcohol syndrome for professional training of health care providers, social service providers, educators, and judicial and corrections systems professionals. The training shall increase knowledge and develop practical skills of professionals to help them address the needs of at-risk pregnant women. . .Training for. . .judicial and corrections professionals shall involve effective education strategies. . .and methods to identify available referral and community resources.
Provision of substance use treatment	TX	Tex. Govt. Code Ann. §501.059 (effective 8/28/1995)	<ul style="list-style-type: none"> Department shall provide a brief substance use intervention to all female inmates identified by the screening program as being at risk for having a pregnancy with alcohol-related complications. . .
	MD	Md. Code Ann., Corr. Law §9-601 (effective 5/8/2020)	<ul style="list-style-type: none"> Each correctional facility shall have a written policy in place regarding the medical care of pregnant inmates that addresses high-risk pregnancies, including maternal substance abuse disorder
	CA	Cal. Penal Code §4023.8 (effective 1/1/2021)	<ul style="list-style-type: none"> Incarcerated pregnant persons who have used opioids prior to incarceration. . .or who are currently receiving methadone treatment, shall be offered medication assisted treatment with methadone or buprenorphine
Diversion programs	MO	Mo. Ann. Stat. §191.831 (effective 7/1/2003)	<ul style="list-style-type: none"> The director of the division of alcohol and drug abuse and the director of the department of corrections shall develop and administer a pilot project to provide a comprehensive substance use treatment rehabilitation program as an alternative to incarceration, Alt-Care.
	NJ	N.J. Stat. Ann. §30:1B-6.9 (effective 8/1/2020)	<ul style="list-style-type: none"> The chief executive officer or warden of each correctional facility shall. . .allow all pregnant women and inmates who are primary caretaker parents to enroll in residential drug abuse and mental health programs provided they meet the requirements of those programs.
	CA	Cal. Penal Code §1174.1 (effective 5/9/1994)	<ul style="list-style-type: none"> “Program” means an intensive substance abusing pregnant and parenting women’s alternative sentencing program.

(Continued)

Table 1. (Continued)

CODE	STATE	CITATION	LANGUAGE
		Cal. Penal Code §1174.2 (effective 5/27/2013)	<ul style="list-style-type: none"> A demonstrated ability to provide comprehensive services to pregnant women or women with children who are substance abusers consistent with this chapter. Criteria shall include, but not be limited to, each of the following. . . each program proposal shall include a plan for the required 12-mo residential program, plus a 12-mo outpatient transitional services program to be completed by participating women and children. Agencies shall demonstrate an ability to provide [pregnant] offenders a continuing supportive network of outpatient drug treatment and other services upon the women's completion of the program and reintegration into the community.
		Cal. Penal Code §1174.3 (effective 5/9/1994)	<ul style="list-style-type: none"> The department shall ensure that the facility designs provide adequate space to carry out this chapter, including the capability for nonsecure housing, programing, child care, food services, treatment services, educational or vocational services, intensive day treatment, and transitional living skills services.
Program eligibility	CA	Cal. Penal Code §1174.4 (effective 4/4/2011)	<ul style="list-style-type: none"> Persons eligible for participation in this alternative sentencing program shall meet all of the following criteria: Pregnant women with an established history of substance abuse, or pregnant or parenting women with an established history of substance abuse who have one or more children under 6y old at the time of entry into the program. . .
	MO	Mo. Ann. Stat. §191.831 (effective 7/1/2003)	<ul style="list-style-type: none"> Any female who is pregnant or is the custodial parent of a child(ren) under the age of 12, who had plead guilty or found guilty of violating provisions of Chapter 195, and whose controlled substance abuse was a contributing factor in the commission of an offense, who is placed on probation, and may be required as a condition of probation, to participate in Alt-Care.
Aftercare and release planning	MA	Mass. Gen. Laws Ann. ch. 127, §118 (5/14/2014)	<ul style="list-style-type: none"> Prior to release, correctional facility medical staff shall provide a pregnant inmate with counseling and discharge planning in order to ensure continuity of pregnancy-related care, including uninterrupted substance abuse treatment.
Funding and appropriations	CA	Cal. Penal Code §1174.2 (effective 5/27/2013)	<ul style="list-style-type: none"> The sum of 15million dollars (\$15 000 000) is hereby appropriated to the Department of Corrections from the 1990 Prison Construction Fund for site acquisition, site studies, environmental studies, master planning, architectural programing, schematics, preliminary plans, working drawings, construction, and long lead and equipment items for the purpose of constructing facilities for pregnant and parenting women's alternative sentencing programs.
	MO	Mo. Ann. Stat. §191.831 (effective 7/1/2003)	<ul style="list-style-type: none"> Alt-Care shall be funded using money provided through the MO Medicaid program, the substance use service program (C-STAR) through the MO Department of Mental Health, and the division of alcohol and drug abuse's purchase system.

incarcerated pregnant people. We must also acknowledge that laws mandating diversion to community-based residential programs for incarcerated persons with young children could exist; however, do not provide specific language that includes pregnant persons eligibility.

Participation in residential treatment programs while under community supervision would provide greater opportunities to engage in comprehensive, integrated culturally-responsive treatment and support services that might not otherwise be accessible. At the same time, treatment of SUD

among pregnant and postpartum populations in carceral settings is inadequate and there is an urgent need for legislative accountability so that evidence-based standard SUD care can be implemented. Future federal and state legislative efforts should increase and standardize the oversight of carceral SUD treatment for pregnant and postpartum persons.

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Author Contributions

RS conceptualized and designed the study, coded data, and analyzed the data. RL assisted with coding. MSS drafted the initial manuscript and MZ revised and edited the initial manuscript. Thereafter, all authors provided revisions to the manuscript and approved the final version prior to submission.

Ethics Approval

Not applicable.

Consent to Participate

Not applicable.

Consent for Publication

Not applicable.

Availability of Data and Material

Not applicable.

Code Availability

Not applicable.

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