Stopping Fetal Abuse With No-Pregnancy and Drug Treatment Probation Conditions

Janet W. Steverson

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol34/iss2/1
STopping Fetal Abuse with No-pregnancy and Drug Treatment Probation Conditions

Janet W. Steverson*

Born 12 weeks premature to a woman who had been shooting cocaine into her body all during her pregnancy, the baby weighed 1 pound, 12 ounces at birth. At 9 days old, his intestines ruptured in two places, requiring hours of surgery and leaving the child with an egg-sized colostomy bag pinned to his stomach. Meanwhile, nearly microscopic blood vessels in his head had begun to hemorrhage. He required sedation almost from the minute he was born to relieve his almost constant tremors and tears.¹

Before becoming healthy and productive individuals, the current generation of American children will have to face and survive a host of dangers. This task will be more or less difficult, depending upon the circumstances of each child. If, however, someone “stacks the deck” against a child before he or she is ever born, this child’s task will be infinitely more difficult. When an addicted woman conceives a child, her use of drugs² and the circumstances of her being an addict “stack the deck” against her developing child. She enormously mag-


The author wishes to thank her research assistants, Lana Traynor and Karin McMichael, for their tremendous effort, energy, and input. The author also wishes to thank Sharon Pack for her outstanding work on the numerous drafts of this article. Further, the author wishes to thank Edward Brunet, M. Carr Ferguson, Douglas Newell, Dale Rubin, and Martha Spence for their input and advice concerning this article.


2. The term “drugs” is meant to encompass alcohol as well as licit and illicit drugs.
nifies the difficulties that her child must overcome in order to become a healthy and productive individual.

This “stacking of the deck” occurs through a variety of factors. It occurs because drug use, in and of itself, can cause serious physical harm to a developing child. This harm ranges from withdrawal symptoms to death. The “stacking of the deck” also occurs because drug use is, in many ways, detrimental to the health of the mother, which is also detrimental to a developing child. In addition, it occurs because an addicted person is unlikely to obtain proper prenatal care, which is needed to better ensure healthy children. The combination of these factors means that the drug-affected child, if it survives, often has a variety of special needs, including physical and developmental disabilities. If these special needs are met, while the road may still be more difficult, the child’s chances of developing “normally” may increase. Unfortunately, an addicted woman is often unable to meet the needs of her children, and the overburdened child protection system is ill-equipped to remedy that deficit. Further, a child born to an addicted woman may continue to be harmed because his or her mother’s continued drug abuse often leads to abandonment, abuse, or neglect.

As of 1991, it was estimated that 500,000 to 700,000 newborns were annually exposed to illicit drugs in utero. If these estimates are accurate, then by the end of 1993, at least 1.5 million children will have had their life’s opportunities seriously diminished by their mother’s drug use. What is extraordinary is that this number does not include the millions of children who have been and will be exposed to alcohol in utero.

3. See infra text accompanying notes 43-65.
4. See infra text accompanying notes 32-87.
5. See infra text accompanying notes 66-87.
6. See infra note 82.
7. See infra text accompanying notes 88-118.
8. See infra note 106.
9. See infra text accompanying notes 119-139.
10. See infra text accompanying note 140.
11. This number is reached by multiplying 500,000 newborns per year by three years.
12. See Phoebe Rinkel, Myths and Stereotypes About Long-Term Effects of Prenatal Alcohol and Other Drug Exposure (PADE), PERINATAL ADDICTION RES. & EDUC. UPDATE, June, 1992, at 1 (in a 1991 study, the National Institute of Alcohol Abuse and Alcoholism estimated that “women were 16 times more
In section I, the consequences of prenatal drug exposure are explored in great detail. An in-depth discussion is necessary in order to grasp the gravity and enormity of the consequences of prenatal drug exposure. This in-depth discussion is also needed in order to demonstrate that prenatal drug exposure is a serious and complex problem requiring a multidimensional solution. As outlined in Section II of this article, many commentators have written on the subject of how society should address the problem of harm caused to children by in utero drug exposure. Some have proposed punishment of pregnant substance abusers, others have sought to protect the child after birth by removing her from the custody of her mother, and still others have proposed treatment and help for pregnant substance abusers. While some of the proposals can and should be implemented, none adequately address the crucial and fundamental issue: what can society do now to protect children from in utero drug exposure so that the numbers of such exposures will begin to significantly decline?

Although some states have established programs designed to provide assistance for such women, substance-abusing women continue to conceive numerous children who are harmed in utero. Thus, while this author agrees that it is wrong as a matter of social policy to "focus on maternal misbehavior in isolation from the problems afflicting poor women," she posits that society cannot sacrifice its children while trying to address the myriad problems afflicting substance-abusing women. In addition, one must recognize that a large number of pregnant substance-abusers will not volun-

---

15. See infra text accompanying notes 157-261.
16. See infra text accompanying notes 204-215.
17. See infra text accompanying notes 250-254.
18. See infra text accompanying notes 159-163.
19. See infra text accompanying notes 163, 172.
20. See infra text accompanying notes 140-157.
tarily seek treatment for their addiction.\textsuperscript{22} Therefore, a somewhat coercive legislative solution that is designed to protect as many children as possible from prenatal drug exposure as soon as possible is proposed in Section III.\textsuperscript{23} Under the proposed legislation, states would make it a crime for anyone to abuse alcohol, licit substances, or illicit substances while pregnant.\textsuperscript{24} Since, however, the state will achieve its goal of maximum protection for children only if it assists rather than punishes the mothers,\textsuperscript{25} a woman who commits the crime should not be incarcerated if at all possible. Rather, if the woman gives birth to a drug-affected child and is convicted of the crime of criminal fetal abuse, the judge should give her a choice of prison or probation. If she chooses probation, two mandatory conditions of her probation should be obtaining drug treatment and not getting pregnant. Once the woman has begun to control her addiction, the no-pregnancy condition can be dropped. If the woman is pregnant when she is brought into the system, the judge must sentence her to civil commitment in a drug rehabilitation center. Fol-

\textsuperscript{22} See infra text accompanying notes 173-203.

\textsuperscript{23} See infra text accompanying notes 262-322.

\textsuperscript{24} From the perspective of this article, the problems of use and abuse of cocaine, other illicit drugs, licit drugs, or alcohol by pregnant women are interconnected, and therefore any legislative solution must encompass all types of substance use and abuse. In the interest of time and space, however, this article concentrates upon the use and abuse of illicit drugs, with special emphasis upon the use and abuse of cocaine.

One must not, however, lose sight of the fact that the conclusions reached in this article concerning the use and abuse of illicit drugs apply equally to the use and abuse of alcohol. It has been demonstrated that alcohol has a devastating effect upon the child \textit{in utero}. Experts recognize fetal alcohol syndrome (FAS) as the leading known cause of mental retardation in the United States, surpassing Down's syndrome and spina bifida. See Streissguth et al., \textit{supra} note 13, at 1961. Two thousand scientific reports confirm that "alcohol is a teratogenic drug capable of producing lifelong disabilities after intrauterine exposure." \textit{Id.} "Teratogenic" is defined as "causing disabling effects upon organ development." Janet R. Fink, \textit{Effects of Crack and Cocaine Upon Infants: A Brief Review of the Literature}, \textit{CHILDREN'S LEGAL RTS. J.}, Fall 1989, at 2, 3 (citations omitted). Not all individuals affected by alcohol \textit{in utero} will develop FAS. Rather, FAS "represents the severe end of the continuum of disabilities caused by maternal alcohol use during pregnancy." Streissguth et al., \textit{supra} note 13, at 1961. Studies reveal, however, that even social drinking can cause some damage \textit{in utero}. Some of the effects of social drinking include "IQ and achievement decrements (especially arithmetic), attentional and memory problems, and learning problems." \textit{Id.} These effects are less severe than similar effects found in FAS patients. \textit{Id.}

\textsuperscript{25} See infra text accompanying notes 222-249, 270-275.
lowing the birth of the child, the judge will review the situation to determine whether probation with its attendant conditions is necessary. The legislation is designed to be used in conjunction with other programs that focus on assistance for substance-abusing women and their children. Thus, if this legislation is to work effectively, the state must allocate resources to provide comprehensive drug treatment centers for pregnant and non-pregnant women. In addition, the state must ensure that pregnant women who want to obtain treatment voluntarily can do so.

The solution proposed in Section III raises a number of legal, constitutional, and policy issues that are addressed in Sections IV and V.

I. THE PROBLEM OF COCAINE USE BY PREGNANT WOMEN

The use of cocaine by pregnant women constitutes a multi-faceted problem. Such use causes physical harm to the child in utero, including withdrawal, respiratory problems, heart problems, congenital deformities, low birth weight, neurological damage, and death. Further, due to the neurological damage caused by in utero exposure to cocaine, the child will often have special needs that must be addressed if the child is to develop properly. Finally, due to the nature of drug use, many of the mothers cannot, or will not, properly care for their drug-exposed offspring. Thus, the children are often the victims of abuse and neglect.

A. Harm Caused to the Child In Utero by the Mother’s Use of Cocaine

Due to the increased incidence of cocaine use by women of childbearing age, much of the recent research in the area

26. See infra text accompanying notes 323-420.
27. See infra text accompanying notes 421-435.
28. The term “cocaine” is also encompasses crack cocaine.
29. See infra text accompanying notes 43-87.
30. See infra text accompanying notes 88-118.
31. See infra text accompanying notes 119-139
of substance abuse has focused on the effects of in utero exposure to cocaine. While it is sometimes difficult to isolate the effects of cocaine because many women use cocaine along with other harmful substances, “with a few exceptions, the studies have documented that cocaine and crack exposure places both mothers and infants at risk and that 'almost no cocaine-exposed baby fully escapes its damaging effects.'” In addition, studies show that “minor usage [of cocaine] in the first trimester, regardless of the amount, frequency or mode of ingestion, can produce harmful effects.”

As is explained in more detail below, once a pregnant woman ingests cocaine, it can physically harm the unborn child in three ways. First, because cocaine freely passes through the placenta, it directly affects the fetus and can therefore cause harm through its addictive and teratogenic qualities. Second, cocaine can adversely change the fetal environment. Third, cocaine often has a detrimental effect upon the pregnant woman, which can adversely affect the developing fetus. Further, any neurological harm that the child suffers in utero may adversely affect the child's growth and development after birth.

1. Physical Harm Caused by Cocaine Passing Through the Placenta

Since cocaine can pass freely through the placenta to the child in utero, it can directly harm the fetus through its ad-
dictive and teratogenic qualities. When cocaine passes through the placenta to the unborn child, its addictive quality can cause the child to become dependent upon the drug. Because of this dependence, whenever the child is denied access to the drug, whether in utero or upon delivery, he or she will suffer withdrawal symptoms. These withdrawal symptoms include the following: high-pitched crying, sweating, trembling, irritability, poor feeding, restlessness, upset stomach (including vomiting and diarrhea), and excessive tension. With cocaine, the withdrawal symptoms peak two to three weeks after delivery but may last four to six months. Since cocaine is so highly addictive, sixty to ninety percent of the infants who are exposed to cocaine shortly before birth will suffer withdrawal symptoms after birth.

In addition to being addictive, cocaine is also teratogenic. The teratogenicity of cocaine impedes the proper development of the child's organs. Because the child's brain and other vital organs develop during the first trimester of pregnancy, use of cocaine during this period causes the most severely disabling effects to the child. Cocaine-exposed infants suffer disproportionately from respiratory distress.

43. Fink, supra note 24, at 3; see also William T. Atkins, Cocaine: The Drug of Choice, in DRUGS, ALCOHOL, PREGNANCY AND PARENTING, supra note 34, at 91 (stating that cocaine is "one of the most powerfully addicting substances of human abuse").

44. See Chasnoff, Drug Use in Pregnancy, supra note 32, at 1405.

45. Id. The child will experience withdrawal in utero when the pregnant woman withdraws from the drug. Id. Withdrawal symptoms after birth occur "where the mother's last ingestion was close enough to the date of delivery so as to cause her to experience withdrawal." Fink, supra note 24, at 5.

46. Chasnoff, Drug Use in Pregnancy, supra note 32, at 1405; see also Fink, supra note 24, at 5 (disturbed behavior of a cocaine-exposed infant during the first several months after birth includes "tremulousness, . . . excessive tension, irritability, rapid mood swings, . . . shunning of eye contact, vomiting, rapid weight loss and diarrhea"). While withdrawal symptoms from cocaine do not appear to be as severe as withdrawal from a narcotic such as heroin, the actual symptoms can be similar. Id.

47. Fink, supra note 24, at 6.


49. Fink, supra note 24, at 3.

50. Id.

51. Id.; see also Cheryl J. Stephens Cherpitel, Infant Outcomes Associated With Alcohol Consumption and Material Risk, 1989 CONTEMP. DRUG PROBS. 265, 274-75 ("[T]he first weeks of gestation [are] one of the most teratogenically vulnerable times for fetal development."); Keith et al., supra note 34, at 24 ("The fetus is particularly susceptible to potentially teratogenic effects of drugs
pulmonary hypertension, abnormal and rapidly changing heartbeats, and cerebral infarctions. Further, doctors have observed congenital deformities such as malformed kidneys and genitals, lack of two middle fingers, ileal atresia (dead bowels), neural tube defects, and lack of small intestine.

While researchers have not yet established a definitive causal relationship between cocaine ingestion and the above congenital deformities, they have found an association between cocaine use and an increase in congenital anomalies. In particular, researchers in one study found an increased incidence of skull defects in cocaine-exposed infants. This increased incidence was consistent with previous studies that demonstrated "there was a definite period of susceptibility during development [of cocaine-exposed laboratory mice] to the occurrence of exencephaly and skeletal defects." In fact, the disabling effects of cocaine may be severe enough to cause spontaneous abortion or miscarriage.

Although a lot of the severe harm to the fetus occurs in the first trimester due to cocaine's teratogenicity, the ingestion of cocaine will continue to harm the fetus as the pregnancy progresses. As is explained below, this harm results when the ingestion of cocaine adversely affects both the fetal environment and the mother's health.

2. Physical Harm Caused When Cocaine Changes the Fetal Environment

In addition to affecting the fetus directly, cocaine can indirectly harm the fetus by adversely changing the fetal environment. Cocaine has "vasoconstrictive properties," which means that it can reduce the flow of blood and oxygen to the

during the first eight weeks of pregnancy. This period is critical for normal embryonic development.

52. Fink, supra note 24, at 5.
53. Id. See also Ira J. Chasnoff, Adoption of Drug-Exposed Infants and Children, Perinatal Addiction Res. & Educ. Update, June 1992, at 5 [hereinafter Chasnoff, Adoption of Drug-Exposed Infants and Children].
54. Fink, supra note 24, at 5.
55. Keith et al., supra note 34, at 28; see also Nesrin Bingol et al., Teratogenicity of Cocaine in Humans, 110 J. Pediatrics 93, 95 (1987).
56. Bingol et al., supra note 55, at 94.
57. Id. at 95.
58. See Fink, supra note 24, at 4.
59. See infra text accompanying notes 60-88.
60. See Keith et al., supra note 34, at 28.
Studies associate this insufficiency with the following problems: retarding in utero growth, causing fetal fatalities, and causing fetal intolerance to labor. In fact, studies have found low birth weight, below-average length, and below-average head circumference to be endemic among infants whose mothers used cocaine throughout the pregnancy.

3. Indirect Harm to the Child In Utero Caused by the Mother’s Addiction to Cocaine

Cocaine can indirectly place the fetus at risk through its detrimental effect upon the pregnant woman. This detrimental effect may cause the pregnant woman to give birth prematurely. In addition, cocaine in some way “affects the tissue of the placenta, weakening its hold on the wall of the uterus.” If the damage is severe enough, this weakening can lead to a condition known as abruptio placentae, which constitutes a tearing of the placenta from the uterine lining. The separation cuts off oxygen to the fetus and is associated with a high incidence of stillbirth and brain damage. While the primary cause of abruptio placentae is unknown, some researchers theorize that there is an association between cocaine-induced maternal hypertension and abruptio placentae. One researcher has found that fifty percent of the abruptio placenta cases that caused fetal death resulted

61. See Fink, supra note 24, at 3; see also Scott N. MacGregor et al., Cocaine Use During Pregnancy: Adverse Perinatal Outcome, 157 Am. J. Obstetrics & Gynecology 686, 689 (1987).
62. See Fink, supra note 24, at 4; MacGregor et al., supra note 61, at 689; Keith et al., supra note 34, at 28.
63. See Fink, supra note 24, at 4; see also Keith et al., supra note 34, at 28 (“[I]t is becoming increasingly obvious that the unique vaso-constrictive properties of cocaine predispose to early and mid-trimester pregnancy losses.”).
64. See MacGregor et al., supra note 61, at 689.
65. See Fink, supra note 24, at 4-5; see also Bingol et al., supra note 55, at 94; MacGregor et al., supra note 61, at 689.
66. See Fink, supra note 24, at 3-4.
67. See also Chasnoff, Adoption of Drug-Exposed Infants and Children, supra note 53, at 5.
68. Id.
69. See Bingol et al., supra note 55, at 94.
70. Id.; see Chasnoff, Adoption of Drug-Exposed Infants and Children, supra note 53, at 5.
71. See, e.g., Bingol et al., supra note 55, at 96; Fink, supra note 24, at 4; MacGregor et al., supra note 61, at 689 (explaining that maternal hypertension may increase the risks of abruptio placentae).
from maternal hypertension.\textsuperscript{72} In addition to causing stillbirths and brain damage, \textit{abruptio placentae} "may precipitate premature labor [and/or] placental hemorrhage."\textsuperscript{73} Sometimes the mother gives birth as early as twenty-four to twenty-six weeks.\textsuperscript{74}

"Premature infants are at risk for respiratory distress, low birth weight, delayed development and sudden infant death syndrome (SIDS)."\textsuperscript{75} Due in part to the high rate of prematurity among drug-affected babies, a greatly increased risk of mortality exists in early infancy; in fact, infant mortality in some areas "is estimated to be three times higher among children of substance abusers than others."\textsuperscript{76} It is known that low birth weight is a factor in increased rate of death in the first year.\textsuperscript{77} In addition, Sudden Infant Death Syndrome (SIDS) "is five to ten times more likely to occur among cocaine-exposed infants than drug-free babies."\textsuperscript{78}

Further, while it has been conclusively demonstrated that substance use and abuse in and of itself has a damaging effect upon the fetus,\textsuperscript{79} additional harm may be caused by maternal medical problems that often accompany such substance abuse. "As the addiction worsens, the need to procure larger quantities of the addictive agent and the need for more frequent use outweighs all other considerations of maternal

\begin{flushleft}
\textsuperscript{72} Bingol et al., \textit{supra} note 55, at 96 (citing \textit{Placental Abruption, in WILLIAMS OBSTETRICS} 395-407 (J.A. Pritchard et al. eds., 17th ed. 1985)).

\textsuperscript{73} Fink, \textit{supra} note 24, at 4.

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} Chasnoff, \textit{Adoption of Drug-Exposed Infants and Children, supra note} 53, at 5.

\textsuperscript{76} Fink, \textit{supra} note 24, at 4 (quoting J. Plaut & T. Kelley, \textit{CHILDWATCH: CHILDREN AND DRUGS} (1989) (relating to infant mortality in New York City)).

\textsuperscript{77} \textit{See} Chasnoff, \textit{Adoption of Drug-Exposed Infants and Children, supra note} 53, at 5.

\textsuperscript{78} Fink, \textit{supra} note 24, at 4. The Perinatal Center for Chemical Dependence demonstrated that with regard to SIDS, a 15\% incidence rate existed among cocaine-exposed infants as compared to a 4\% incidence rate among infants whose mothers used heroin and were then maintained on methadone during their pregnancies. \textit{Id.}

\textsuperscript{79} \textit{See} Bingol et al., \textit{supra} note 55, at 95-96. In a study that took into account smoking, ethnicity, alcohol abuse, and socioeconomic status, researchers found that "cocaine abuse by pregnant women significantly reduces birth weight, increases the stillbirth rate related to \textit{abruptio placentae}, and is associated with an increased congenital malformation rate." \textit{Id.} at 96. In addition, the study demonstrated that drug use in general significantly reduces \"[b]irth weight, length, and head circumference.\" \textit{Id.} at 93.
\end{flushleft}
health and fetal well-being . . . ."80 Thus, abusers often live in poverty due to the financial requirements of a heavy addiction.81 In addition, many abusers suffer from poor prenatal care,82 and "poorly timed pregnancies."83 Many abusers also do not receive adequate nutrition.84 This malnutrition generally stems from a cocaine-induced loss of appetite,85 and it can adversely affect the developing fetus.86 Finally, since many drug users share contaminated needles and engage in frequent unprotected sexual activity, the fetuses of drug-using women are exceptionally vulnerable to sexually transmitted and infectious diseases, especially syphilis and AIDS.87

B. After-Birth Problems Associated With Physical Damage Caused to the Child by In Utero Exposure

The harm to the unborn child that cocaine causes leads to other possible continuing problems for the drug-exposed infant. These continuing problems flow from the physical disabilities previously discussed. Of particular significance is the neurological damage that in utero exposure to cocaine can cause.88 Because of this physical damage, a large number of cocaine-exposed infants will have special needs that their

80. MacGregor et al., supra note 61, at 689; see also Finnegan, supra note 34, at 60 (stating that "the majority of drug-dependent women neglect general health care").
81. MacGregor et al., supra note 61, at 689.
82. Cocaine users have a serious and pervasive problem with lack of prenatal care. Fink, supra note 24, at 7. Studies demonstrate that such women are four times less likely than other women to obtain prenatal care. Id.; see also Keith et al., supra note 34, at 19, 24 ("The constant and recurring need to self medicate may interfere with regular clinic attendance. Unless the patient is enrolled in a highly structured program with a well-developed follow-up component, poor or non-existent [sic] care is the rule . . . [and] as many as 50-60% of addicts receive no prenatal care whatsoever."). This lack of prenatal care exacerbates an already high risk of low birth weight and infant mortality. Fink, supra note 24, at 7.
84. See Fink, supra note 24, at 7.
85. See Chasnoff, Adoption of Drug-Exposed Infants and Children, supra note 53, at 5; see also Bingol et al., supra note 55, at 95; Keith et al., supra note 34, at 20.
86. See Chasnoff, Adoption of Drug-Exposed Infants and Children, supra note 53, at 5; Bingol et al., supra note 55, at 95-96.
87. See Fink, supra note 24, at 5; Chasnoff, Adoption of Drug-Exposed Infants and Children, supra note 53, at 5.
88. See supra text accompanying notes 50-58; infra text accompanying notes 107-110.
caretakers must address in order to enable the children to live a healthy, productive life. Unfortunately, as the discussion below demonstrates, most drug-addicted parents cannot provide adequate care for a child who does not have special needs, and therefore, cannot hope to provide adequate care for their drug-exposed child. As a result, many of the drug-exposed children will suffer abuse and neglect from their addicted parent(s) after birth or will suffer the harm caused by a cycle of foster care.

1. The Special Needs of Drug-Exposed Children

As stated above, a large number of drug-exposed children will have special needs that flow from their in utero exposure to cocaine. In the first two to three months after birth, drug-exposed infants often have poor responses to their environment and are difficult to handle. For example, such children are often “[g]iven to spasms, trembling and muscular rigidity [and may] resist cuddling by arching their backs.” They also suffer from medical problems that, at least in the early months, require extensive monitoring and care from the parent. These medical complications may lead hospitals to separate the children from their mothers at birth, causing a lack of bonding between the mother and the child. Such lack of bonding “may increase the risk of future neglect or abuse.”

In addition, as one commentator has stated, “[t]he newborn cocaine-exposed infants . . . are almost never well-organized, fully functioning infants. Instead, they spend most of their time in states which shut them off from external stimulation, and their state changes tend to be abrupt and inappropriate for the level of stimulation encountered.” In the study that led to this conclusion, the researchers found that

89. See Fink, supra note 24, at 6 (noting that irritability and difficulty in handling often exist even up to four months of age).
91. Id. at 746.
92. Id. at 747.
93. Id.
the cocaine-exposed newborns exhibited four distinct types of emotional states in the first month after birth. Infants exhibiting the first type remained in a deep sleep no matter how much the researchers stimulated them (e.g., rocking, talking, and physical manipulation). Infants exhibiting the second type could not seem to go into a deep sleep; however, they also did not wake up when the researchers stimulated them. These infants whimpered, changed colors, breathed irregularly, and thrashed about. Infants exhibiting the third type responded to most stimulation by "mov[ing] abruptly from sleeping to agitated crying. As soon as the stimulation [was] terminated, they pull[ed] down into their sleep shelter again." Finally, infants exhibiting the fourth and most common state "use[d] both sleeping and crying to shut themselves off from excessive stimulation. These infants, however, if managed carefully by the examiner, [we]re able to reach very brief periods of alert responsiveness."

After one month the infants had improved, but many of them "still ha[d] very low thresholds for overstimulation and require[d] a great deal of careful handling and containment from the examiner in order to reach and/or maintain responsive states. Without examiner assistance, they often display[ed] abrupt, inappropriate state changes in response to the demands of the exam." Even after one month there were still some infants who could not handle even low levels of stimulation. These infants responded to such stimulation by continually crying until they fell into an exhausted sleep. The examiners were unable to do anything to soothe these infants.

Currently it is too soon to predict what neurological effect prenatal drug exposure will have as the children move beyond the newborn stage and into preschool and school

95. Id. at 106
96. Id.
97. Id. at 107.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id. at 107-08.
103. Id. at 108.
104. Id.
age. The information that is available, however, suggests that many of these children will experience developmental delays, and their special needs must be addressed if they are to lead productive lives.

As stated earlier, studies have found below-average head circumference to be endemic among infants whose mothers used cocaine throughout the pregnancy. Because "head size reflects intrauterine brain growth," a below-average head size puts the child at increased risk for developmental delays. Experts estimate that cocaine-exposed infants are forty times more likely to experience motor difficulties; such difficulties will impact the child's ability to explore and learn about his or her environment.

In addition, researchers have noted certain characteristics in drug-exposed infants: "normal, although low-range, intelligence . . . serious difficulties in relating and reacting to adults and their environments"; serious difficulties in "organizing creative play"; and similarities to "mildly autistic or personality-disordered children." Again, one must keep in mind that it is still too early to know whether the damage will be permanent. The permanence of the damage will probably depend in large part upon the special services provided to the child.

One study found that at up to one year of age, cocaine-exposed infants are apathetic toward toys and to their environment. After one year, however, they seemed calmer.

105. See Rinkel, supra note 13, at 1; see also Fink, supra note 24, at 5.
106. It is important to note that contrary to some myths and stereotypes in this area, there is no evidence that drug-exposed children are "'asocial and incapable of bonding,' 'missing the core of what it takes to be human,' 'oblivious to any affection,' [or] 'likely to be sociopaths.'" Rinkel, supra note 12, at 1 (citation omitted). These children are likely to have special needs. However, like other children with special needs, if properly cared for and provided with special services, these children have the potential to live healthy, happy, and productive lives. See Fink, supra note 24 at 6 (presenting information concerning programs designed to help mothers and infants to handle and perhaps correct developmental deficiencies).
107. See supra text accompanying note 65.
109. Fink, supra note 24, at 5.
110. Id.
111. See supra text accompanying notes 105-106.
112. See Fink, supra note 24, at 6.
and their motor skills had improved. A second study observed cocaine-exposed infants up to two years of age. The study found that up to this age, the children still have serious neuro-behavioral deficits, especially in terms of their ability "to initiate creative play, play by themselves, organize their responses and interact with other children."

Finally, the Department of Pediatrics at the University of California at Los Angeles compared eighteen cocaine-exposed infants with eighteen drug-free infants. All thirty-six infants were eighteen months old, had the same prematurity, the same lack of prenatal care, and the same socioeconomic status. The Department found that "the cocaine-exposed group appeared markedly deficient. For instance, they engaged in less representative play and were able to devise only 10 combinations of particular toys, as compared to 38 among infants in [sic] control group. They demonstrated a lack of self-organization, self-initiative and follow-through."

2. Harm Caused to the Child by the Drug-Addicted Parent's Inability to Provide Adequate Care

The special needs outlined above make caring properly for a drug-exposed child difficult for any parent. Such difficulty is multiplied if the parent involved is addicted to drugs, because continued use often impairs the parent's ability to care for her child adequately.

113. Id.
114. See id.
115. Id.
116. Id.
117. Id.
118. Id. Some commentators have stated that "researchers have been unable to isolate the impact of cocaine from the impact of other variables of poverty, such as poor nutrition, poor prenatal care, domestic violence, depression, lack of social support, use of alcohol and cigarettes." Gertner, supra note 22, at 27 (footnote omitted). However, as the preceding California study indicates, while variables of poverty, poor nutrition, etc. also have a negative effect upon the unborn child, cocaine use in and of itself has a significant adverse impact upon the unborn child. Id. For a discussion of how alcohol alone also has a significant adverse impact, see generally Streissguth et al., supra note 13.
119. See Robin-Vergeer, supra note 90, at 746 (suggesting that parents of drug-affected children "may be unable to meet their children's special needs").
120. See id. at 746 n.5, 747 (explaining that parents' drug use may impair their ability to care for their children).
When an infant has difficulty in responding to her environment in an organized fashion, as do most drug-exposed children,\textsuperscript{121} it is up to the parent to maintain the parent-child relationship by changing her response to the infant to fit the needs of the child.\textsuperscript{122} If the parent cannot do this, then "the infant is likely to be exposed repeatedly to experiences which overwhelm him/her and impede rather than facilitate his/her development."\textsuperscript{123} Unfortunately, cocaine-abusing women often cannot meet the infant's needs; therefore, the mother-infant relationship is nonfunctional, and often detrimental.\textsuperscript{124} As one commentator has stated, the combination of "often insecure, sometimes inadequate mothers"\textsuperscript{125} with "irritable, easily overloaded, unresponsive infants" often leads to pathological mother-infant relationships.\textsuperscript{126} These nonfunctional relationships can manifest themselves in a number of different ways: (1) situations in which the mothers "pay little or no attention to either their infants' behavior or the feedback provided to them concerning how to better care for their infants";\textsuperscript{127} (2) situations in which the mothers interpret their infants' unresponsive behavior as a rejection of them, which in turn may serve to confirm their beliefs that they are bad mothers and increase their feelings of depression and worthlessness;\textsuperscript{128} and (3) situations in which the mothers blame the infants for the infants' "rejection," which may lead

\begin{itemize}
\item \textsuperscript{121} See supra text accompanying notes 89-118.
\item \textsuperscript{122} See Griffith, supra note 94, at 105.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Drug-abusing mothers' insecurity and inadequacy stems from a combination of the following: feelings of guilt concerning the potential harm that they might have inflicted on their children; id. at 109; see also Amin N. Daghestani, Psychosocial Characteristics of Pregnant Women Addicts in Treatment, in Drugs, Alcohol, Pregnancy and Parenting, supra note 34, at 8 (stating that "the pregnant addict must deal with the additional sense of guilt and shame of 'hurting' her growing fetus as a result of drug use"); feelings of fear as to their ability to meet the demands of their children, Griffith, supra note 94, at 109; lower level of self-esteem and self-confidence, Daghestani, supra, at 8; and unrealistic expectations concerning the abilities of their child. Griffith, supra note 94, at 109.
\item \textsuperscript{126} Griffith, supra note 94, at 109.
\item \textsuperscript{127} Id. at 110.
\item \textsuperscript{128} Id. See also Daghestani, supra note 125, at 8 (stating that women drug abusers tend to have a higher level of depression and anxiety, and a higher sense of powerlessness).
\end{itemize}
the mothers to feel "ambivalent and sometimes hostile" towards their children.\footnote{129}

In addition to the difficulties of coping with a special-needs child, many addicted parents cannot adequately provide the necessities of life for their children, because any resources that an addict has must go to support her habit.\footnote{130} A full-blown cocaine habit may cost $200 to $400 a day.\footnote{131} This drain on family funds means that children in that family will suffer from inadequate nutrition, clothing, and shelter.\footnote{132} Further, many drug-affected newborns are left in hospitals as "boarder babies" either because their parents have abandoned them or because social workers have determined that the parents' abuse of drugs poses a danger to the child.\footnote{133}

Whether due to an inability to cope with the child's needs, the adverse side effects of a drug-induced lifestyle, or a combination of both, drug-abusing parents are much more likely to abandon, neglect, and/or abuse their children. One study estimates that one-half of all child abuse and neglect cases in New York City involve drug abuse.\footnote{134} The estimate rises to sixty-four percent if alcohol abuse is included.\footnote{135} Further, in a 1986 study conducted by the Illinois Department of Children and Family Services, the researchers evaluated a random sample of 385 children who were in foster care due to

\footnotesize
\begin{itemize}
\item 129. Griffith, supra note 94, at 110.
\item 130. See Keith et al., supra note 34, at 21.
\item 131. Id.
\item 132. See id. "The drain on family funds often initiates neglect and abuse of existing family members, especially children, whose nutrition may be first to suffer." Id.
\item 133. See J.C. Barden, Hospitals House "Boarder Babies," THE OREGONIAN, July 26, 1992, at D1. This newspaper article related the results of a study of seventy-two public and private hospitals by the Child Welfare League of America and the National Association of Public Hospitals. Id. The study "found that the hospitals were caring for more than 7,000 boarder babies a year . . . " Id. It estimated that 87% of the boarder babies stay in the hospital one month or less, 6% stay one to three months, and 7% stay more than three months. Id. When the boarder babies leave the hospital, "58 percent go into foster care while 21 percent go home to a parent. Most of the rest go to live with relatives or adoptive parents . . . ." Id; see also Laurie Rubenstein, Current Topics in Law and Policy, Prosecuting Maternal Substance Abusers: An Unjustified and Ineffective Policy, 9 YALE L. & POL'Y REV. 130, 136 (1991) ("Nearly half of eighteen hospitals surveyed in one study reported a problem with 'boarder babies.'").
\item 134. See Chasnoff, Drug Use in Pregnancy, supra note 32, at 1404.
\item 135. Id. (citing M. Marriot, Child Abuse Cases Swamping New York City's Family Court, N.Y. TIMES, Nov. 15, 1987, at A17).
\end{itemize}
parental abuse or neglect. The study found that one-half of the children came from parents or caretakers that the researchers knew or suspected to be substance abusers.

Another study estimated that "half of the addicted mothers not in drug treatment programs lose custody of their children by one year of age." A third study indicates that "[t]he researchers also suffered from the harms associated with a cycle of foster care.

C. Statistics Regarding the Number of Children Affected

It is difficult to determine exactly how many children are exposed in utero to illicit drugs and injured by such exposure. However, the following sample statistics will help to demonstrate the magnitude of the problem.

1. Number of Children Exposed In Utero

In 1991, the National Institute on Drug Abuse (NIDA) estimated that 500,000 to 700,000 newborns annually are exposed to illicit drugs in utero, which is fourteen to eighteen

136. Id.
137. Id.
138. See Fink, supra note 24, at 7.
139. Nolan, supra note 83, at 19. In a more specific study in Alameda County, California, researchers found:
68% of the 215 families with children entering the foster care system between June 24, 1987 and October 30, 1987 had parents described in court reports as substance abusers . . . . Of the 822 intake referrals of suspected child abuse or neglect reported to Child Protective Services in San Mateo County from January 1 to March 11, 1988, 217 (26.3%) were drug and/or alcohol related . . . . Of the 855 children who, as of 1988, were waiting to be placed or had been placed in a foster home, 57% involved parental alcohol/drug abuse as a factor in removal.

140. See Chasnoff, Adoption of Drug-Exposed Infants and Children, supra note 53, at 5. In addition, the following statistics specific to certain areas are available:

Boston: A study of 1600 women at Boston City Hospital demonstrated that "17% had used cocaine [during pregnancy] and 27% had used marijuana" during pregnancy. Robin-Vergeer, supra note 90, at 748 n.11.

California: A study released around the beginning of June 1991 "estimates that about 2% of the 4,000 babies born each month in Orange County have
percent of all newborns. 141 With regard to cocaine exposure, Dr. Ira Chasnoff142 conducted a survey in 1988 that indicated that each year "as many as 375,000 infants may be affected by maternal cocaine use during pregnancy." 143 Further, the number of drug-exposed children has risen. In 1989, the U.S. House Select Committee on Children, Youth and Families surveyed eighteen hospitals in the United States. 144 This committee learned that between 1985 and 1988, fifteen of the eighteen hospitals "(14 public and one private) experienced a three-to-four-fold increase in births of drug-exposed infants." 145 In addition, in 1989, the New York City Health Department estimated that during the past ten years there had been a 3000% increase of births by substance-abusing women. 146

Studies also measure the number of pregnant women who use drugs. "Based upon a survey of thirty-six hospitals
across the country, the National Association of Perinatal Addiction Research and Education (NAPARE) estimated that 11% of women use drugs during pregnancy.”

Unless something is done, the current trend indicates that the number of cocaine-affected babies will continue to rise. Cocaine abuse in general has risen dramatically in the past ten years, and cocaine use by pregnant women has similarly risen. Statistics demonstrate that large numbers of women of child-bearing age are using cocaine. While in general there has been a shift to cocaine by the drug-abusing population, the “shift towards crack has been especially pronounced among women, who have joined the ranks of the addicted in unprecedented numbers.”

Given the nature of drug use and addiction, it is likely that a significant number of these drug-using young women will continue to use drugs even if they become pregnant. A rise in the number of drug-affected babies will further strain a system that is already operating beyond its recommended capacity.

147. Id.
148. See MacGregor et al., supra note 61, at 686; see also Daghestani, supra note 125, at 18 (“[C]ocaine use among pregnant women has become increasingly common.

149. See Gay M. Chisum, Nursing Interventions with the Antepartum Substance Abuser, J. PERINATAL & NEONATAL NURSING, Apr. 1990, at 26 (“A 1986 National Institute of Drug Abuse (NIDA) survey revealed that 1 in 10 women of child-bearing age had used cocaine in the previous year.”); see also Chasnoff, Drug Use in Pregnancy, supra note 32, at 1403.

Although patterns of abuse of alcohol, marijuana, heroin, and other substances by women of childbearing age have changed very little over the last 10 years, the incidence of cocaine use in this special population has been rising rapidly, a reflection of cocaine’s increasing popularity among the general population of the United States.

Id; cf. Daghestani, supra note 125, at 7 (“As more high school and college women use drugs, the subpopulation of drug abusers of the child-bearing age is correspondingly increasing. Although accurate statistics are lacking, the subpopulation represents now the largest group among women addicts.

150. See Fink, supra note 24, at 2; see also infra text accompanying notes 180-208.

151. Fink, supra note 24, at 2.

152. See infra text accompanying notes 180-200.

153. See Fink, supra note 24, at 2 (New York City’s “neonatal intensive care units are already running at 108 percent of capacity, with some units, such as Harlem Hospital, running as high as at 200 percent of capacity.”)
2. Degree of Harm to Exposed Children

Little information exists concerning how many children will be adversely affected by in utero exposure to damaging substances, or how seriously they will be affected. The information that is available estimates that thirty to forty percent of children exposed to both legal and illegal substances in utero will be adversely affected by such exposure. This rate may rise in later years, because some of the adverse effects, such as central nervous system damage, may not manifest themselves until preschool or school age. One commentator believes that the rate with regard to cocaine exposure is already much higher than current studies show. This commentator suggests that very few infants who are exposed to cocaine in utero will fully escape damage.

II. THE EXISTING PROPOSED SOLUTIONS TO THE PROBLEM ARE INEFFECTIVE

The problem of substance-abusing pregnant women is complex. No one solution, proposal, or bill is likely to resolve the problem. However, as this article was being written, large numbers of children were being harmed due to exposure in utero to dangerously damaging substances. Thus, in spite of the complexity of the problem, there is a pressing need for the states to put in place some type of legislation that will protect as many children as possible and that will do so as soon as possible. While many commentators have written about the problem of prenatal drug exposure and proposed a variety of solutions, each proposed solution is incomplete in that, for one reason or another, it will not protect as many children as possible as soon as possible. Such protection is the focus of this article and is the guiding force for the proposal advocated in Section III. First, however, the article generally outlines the existing proposed solutions and the reasons each solution is incomplete.

154. See Rinkel, supra note 12, at 1 (citations omitted).
155. See Fink, supra note 24, at 2.
156. See id. at 3.
157. Id.
158. See supra text accompanying notes 10-12, 140-153.
A. More Drug Treatment Centers

Some commentators have asserted that the solution to the problem of substance-abusing pregnant women is for the state to provide additional comprehensive drug treatment centers for pregnant women; this plan is also known as the comprehensive drug treatment proposal. More specifically, one commentator has suggested that state legislatures enact statutes designed to do the following: (1) "provide early treatment intervention and child care services for parents while they undergo alcohol or drug treatment"; (2) "mandate that drug treatment programs not discriminate against pregnant women"; and (3) "provide increased funding of prenatal services for poor women." The commentator asserts that

159. See Fink, supra note 24 at 6-7 (Substantial initiatives are needed "to expand and replicate the small number of model programs in existence nationally to provide comprehensive, multidisciplinary treatment services to substance abusing pregnant women, mothers and their children." Such programs would help mitigate "some of the symptoms afflicting children who have already been exposed."); see also Kary Moss, Recent Development, Substance Abuse During Pregnancy, 13 HARV. WOMEN'S L.J. 278, 297 (1990) ("Forcing alcohol and drug treatment programs to admit pregnant women . . . is a more effective method of decreasing exposure to drugs in utero . . . than imposing criminal sanctions or depriving mothers of their custody rights."); Michelle Oberman, Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs, 43 HASTINGS L.J. 505, 546 (1992) (suggesting that the way to address the problem of pregnant substance abusers is to encourage addicted women to obtain treatment, but recognizing that "treatment that truly is designed to meet the needs of this population is only now being developed"); Lisa Janovy Keyes, Comment, Rethinking the Aim of the "War on Drugs": States' Roles in Preventing Substance Abuse by Pregnant Women, 1992 Wis. L. REV. 197, 217 ("States can attack perinatal substance abuse by providing drug treatment, prenatal care and other supportive services to those lacking resources of their own."); Michelle D. Wilkins, Comment, Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches, 39 EMORY L.J. 1401, 1401 (1990) ("[S]tates should concentrate on making education, prenatal care, and drug treatment facilities readily available to addicted women."); John E.B. Myers, A Limited Role for the Legal System in Responding to Maternal Substance Abuse During Pregnancy, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 747, 759 (1991) (advocating "vastly increased funding for drug treatment programs and prenatal care, coupled with expanded education programs to inform women about the dangers of drug use during pregnancy").

"[e]ach of these measures would go a long way toward improving the chances that pregnant addicts would conquer their addictions and obtain the health care they need, while taking the child's needs into account as well."\textsuperscript{161} She further indicates that Rhode Island and Washington have enacted legislation that she believes to be in line with her proposal.\textsuperscript{162} Rhode Island "has amended its Maternal and Child Health Services law to provide outpatient alcohol and drug treatment services, as well as childbirth and parenting preparation programs for pregnant women who meet certain financial requirements," and Washington "has increased its funding of alcohol and drug treatment programs."\textsuperscript{163}

In some ways this comprehensive drug treatment proposal is facially appealing, addressing an important fact. In the long term, the states need to provide better prenatal services for poor women, more drug treatment centers in general, and more treatment centers for pregnant women specifically. It is well documented that those women who become pregnant and want to rid themselves of their addiction often find that drug treatment for pregnant women is a scarce commodity.\textsuperscript{164} There are several reasons for this limited availability. In many cases, the existing drug treatment programs do not admit pregnant women,\textsuperscript{165} often "because they fear liability or lack obstetrical services."\textsuperscript{166} If you are poor and pregnant, the problem is exacerbated. A number of the programs do not provide services for pregnant women on Medicaid,\textsuperscript{167} and the

\textsuperscript{161} Moss, supra note 159, at 298.

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} See Dawn Johnsen, \textit{Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty}, 43 \textit{HASTINGS L.J.} 569, 605 (1992) ("[T]he vast majority of pregnant women seeking assistance to overcome drug dependency cannot obtain the help they need."); Oberman, supra note 157, at 518 (reporting that access to treatment for pregnant women addicted to drugs is limited).

\textsuperscript{165} See Johnsen, supra note 164, at 576; Fink, supra note 24, at 7.

\textsuperscript{166} Moss, supra note 159, at 287; see also Oberman, supra note 159, at 518 (explaining that physicians and treatment centers fear the greater legal liability that comes with high-risk pregnancies as well as the possibility of a lawsuit claiming that the withdrawal process harmed the child).

\textsuperscript{167} See Fink, supra note 24, at 7; see also infra note 169.
cost of most programs is prohibitively high. In addition, many of the drug treatment programs that do admit pregnant women are inadequate in that they do not provide prenatal care or family-centered services. The few family-centered services that do exist are inundated with inquiries from pregnant addicts who want help.

The programs that currently exist play an extremely important role in reducing substance abuse, and the need for more such programs cannot be over-stressed if the states hope to combat the problem of pregnant substance abusers causing harm to their children in utero. However, striving for the comprehensive drug treatment proposal as the only solution to in utero drug exposure is inadequate because, for several reasons, the proposal will have a very limited impact.

168. See Oberman, supra note 159, at 517 (stating that inpatient treatment is recommended for pregnant women, but that in an informal survey of inpatient programs in the Chicago area, it was found that the minimum cost was $12,000 per month and "none of them accepted Medicaid or offered any substantial financial assistance").

169. See Fink, supra note 24, at 7 ("Two-thirds of the hospitals surveyed by the House Select Committee on Children, Youth and Families reported that they had no drug treatment programs" to which they could refer pregnant patients, and none of the hospitals indicated the "availability of special programs geared to providing comprehensive drug treatment and prenatal care . . ."). In a survey by Dr. Wendy Chavkin from the Columbia University School of Public Health, of "78 drug treatment programs in New York City (95 percent of the City's programs) . . . 54 percent . . . categorically exclude pregnant women, 67 percent exclude pregnant women on Medicaid and 87 percent had no services for crack-addicted pregnant women, . . . [leaving only] (44 percent) [that] simultaneously provided pre-natal care." Id.

170. Id. See also Oberman, supra note 159, at 519 (stating that most treatment programs "are struggling for funding" and cannot provide the broad range of services needed by pregnant addicts).

171. See Fink, supra note 24, at 7; Johnsen, supra note 164, at 576.

172. See Fink, supra note 24, at 7 ("Several programs have reported marked success in treating infants and equipping their mothers to care for them . . ."); Wilkins, supra note 159, at 1438-40 (Northwestern Memorial Hospital in Chicago, Illinois has a comprehensive treatment program where 70% of the mothers in the program deliver drug-free babies and an estimated 25% to 50% of the women stop taking drugs permanently); Rubenstein, supra note 133, at 150 (Mandella House, a residential treatment program in Oakland, California, "teaches women how to manage their time, how to stay on a schedule, and how to care for their children." This program "has a 75% to 80% success rate.").
1. The Comprehensive Drug Treatment Proposal Will Reach Only a Limited Number of Women

First, even if the comprehensive drug treatment proposal works exactly as envisioned, a large number of substance-abusing women will not be reached, and many of the ones not reached will invariably continue to give birth to drug-affected children. By providing availability and access to needed services, the comprehensive drug treatment proposal will try to provide help for those who recognize that they have a drug problem and are trying to eliminate it. It will therefore reach only those women who voluntarily seek drug or alcohol treatment or who voluntarily seek prenatal services. It will not reach women who do not know that they are pregnant; women (pregnant or not) who do not recognize that they have a problem; or women (pregnant or not) who recognize their need for help, but who refuse to seek assistance for their substance-abuse problem.

Due to the nature of drug addiction, many drug-addicted women do not know they are pregnant until well into the pregnancy. In many instances, drug addiction interferes with a woman's menses, and therefore an addicted woman will often attribute missed menses to drugs rather than to pregnancy. Thus, even if pregnancy motivates a drug-addicted woman to seek drug treatment, she often will not do so until the third trimester. Since a significant amount of the

---

173. For an argument concerning the problems surrounding drug and alcohol treatment, see infra text accompanying notes 200-203.

174. See Oberman, supra note 159, at 512 (stating that due to a number of factors, addicted women “run a high risk of pregnancy”).

175. See, e.g., Daghestani, supra note 125, at 8 (“[F]emale addicts tend not to suspect their pregnancy early, sometimes not even until the pregnancy is in its second trimester.”); Keith et al., supra note 34, at 24 (“[A]ll too often women are unaware that they are pregnant during the first few weeks of embryonic life.”); Judy Howard, Chronic Drug Users as Parents, 43 Hastings L.J. 645, 649 (1992) (“[M]any substance abusing women may not realize they have conceived until well into their pregnancy . . . .”).

176. Daghestani, supra note 125, at 8; see also Keith et al., supra note 34, at 24 (“Depending to some extent on the agent of abuse, menstrual abnormalities are relatively common in substance-abusing women.”); Howard, supra note 175, at 648 (“[M]any chemically dependent women experience interferences with menstruation and may miss periods.”).

177. See Daghestani, supra note 125, at 8 (stating that “addicted pregnant women tend to seek help during their third trimester rather than during the first or second one”).
in utero harm occurs in the first trimester, and since the comprehensive drug treatment proposal is designed to help only pregnant women, the proposal can only hope to forestall additional harm to an existing unborn child.

Further, an addict often refuses to acknowledge that she has a drug problem. With regard to women addicts, the evidence indicates that while they are more likely than men to admit that they have a problem, "they are less likely to see their addiction as a major problem, since they view their habits as 'therapeutic' or coping devices." If a woman does not believe that she has a significant problem, she will not seek treatment, regardless of how many suitable drug treatment programs are available.

Finally, although commentators disagree about the degree of motivation that drug-addicted parents have to care for their children, the fact remains that a large number of parents and potential parents exist who cannot or will not seek help for their drug abuse. While some commentators contend that "[m]any chemically dependent women become highly motivated during pregnancy to make positive lifestyle changes [and that pregnant substance abusers] care deeply for their children and are anxious to get help in dealing with their addiction that often prevents them from being loving, responsible parents," the fact remains that a desire to change does not necessarily lead to a change. In addition, the commentators ignore the fact that there are large numbers of

178. See supra text accompanying note 51.
179. Of course, if the drug treatment program works, it might prevent harm to later children of this woman. It will, however, do so only to the extent that the woman is prevented from conceiving while she is still undergoing drug treatment.
180. Oberman, supra note 159, at 512.
181. See infra text accompanying notes 182-193.
182. Robin-Vergeer, supra note 90, at 766 (quoting Diane F. Reed, Comprehensive Family-Centered Plan for Chemically Dependent Women and Their Children 4, 8 (1988) (unpublished manuscript)); see also Myers, supra note 160, at 759 (stating that "virtually all women want to give birth to healthy babies"); cf. Robin-Vergeer, supra note 90, at 765 (stating that "drug-dependent parents usually have a strong desire to care for their child" (quoting Gunilla Larsson, Amphetamine Addiction and Pregnancy: Analysis of Basic Information Concerning Measures Taken by Social Welfare Agencies, 4 Child Abuse & Neglect 89, 97 (1980))).
pregnant women who lack the desire to voluntarily overcome their addiction.\footnote{183. See Beyond the Stereotype: Women, Addiction, and Perinatal Substance Abuse: Hearing Before the [House] Select Comm. on Children, Youth, and Families, 101st Cong., 2d Sess. 114-15 (1990) [hereinafter Hearing] (statement of Dr. Jing Ja Yoon, Chief of Neonatology at the Bronx Lebanon Hospital Center, Bronx, New York).}

As one commentator has stated:

Several discouraging things have become painfully evident in considering the child and the addicted parent: (1) Addicts do not alter their life style to accommodate a new child; (2) they fail to make responsible decisions concerning their children; and (3) they are incapable of acting in the best interests of their child or of meeting a child’s needs at the denial of their own.\footnote{184. Robin-Vergeer, supra note 90, at 765, (quoting Judianne Densen-Gerber & Charles C. Rohrs, Drug-Addicted Parents and Child Abuse, 2 CONTEMP. DRUG PROBS. 683, 687-88 (1973)).}

A 1986 study conducted by the Illinois Department of Children and Family Services demonstrated that a substantial number of substance-abusing parents might reject any services offered that might offer more of a chance to their children.\footnote{185. Chasnoff, Drug Use in Pregnancy, supra note 32, at 1404.} This study evaluated 385 children who were in foster care because of abuse or neglect.\footnote{186. Id.} One-half of the children “came from parents or caretakers who were known or suspected substance abusers.”\footnote{187. Id.} Fifty-five percent of the parents rejected offered social services, and sixty-eight percent “rejected substance abuse services.”\footnote{188. Id.}

This failure to voluntarily seek drug treatment does not mean that these women are ill-intentioned and evil, uncaring about the welfare of their children—they are not. Rather, it

Many cocaine-using mothers seem to have little concern about their babies. Heroin mothers 10 to 20 years ago always wanted to take their babies home . . . . Even though they go home and get heroin, they come back the next day, they want [sic] to know how the baby is and they wanted to take their babies home. Women on crack don’t. They sign themselves out on the same day of delivery or [sic] next day and they disappear. Babies are often left in the hospital and we cannot even locate their mothers in many occasions. They may come back next year or within six months or seven months to deliver another premature baby, and they disappear within one day again.\footnote{184. Robin-Vergeer, supra note 90, at 765, (quoting Judianne Densen-Gerber & Charles C. Rohrs, Drug-Addicted Parents and Child Abuse, 2 CONTEMP. DRUG PROBS. 683, 687-88 (1973)).}

\textit{Id.}
is because those parents eager to provide a good home for their child are often faced with insurmountable barriers. While one of the barriers is created by the lack of necessary services, the greatest barrier may be that drug addiction removes a person's desire for change. The nature of drug addiction is such that many drug-addicted women cannot, or will not, help themselves. This is true even though they generally care about their children and want to have healthy babies. “Addiction typically involves loss of control over use of the drug and continued involvement with the drug even when there are serious consequences.” Thus, the addict is controlled by the need for the drug or alcohol.

For example, Cindy Boyd is the mother of a child, Kayla, who was born addicted to drugs.

“I was taking methamphetamine,” she says. “I was doing like mega amounts, to the point that I wanted an abortion, but I was too far along. Then when I got out of jail, I got high three times. It's real sick. You're still an addict. It's there. I was having a hard time. . . . “One of the real strange, sick thoughts I would have when I was sticking the needle in me when I was pregnant was that I was sticking a needle in an infant's arm,” Cindy says. “It's a real hard thing to explain to someone who is not addicted. It's a real strange, hard thing. Because I love children so much.”

Cindy has three other children by her ex-husband. She says that “she understood what she was doing to her unborn child, and herself.” This did not, however, "translate into trying to turn her life around." She says that she did not

189. See supra text accompanying notes 164-171.
190. See Keith et al., supra note 34, at 19 (arguing that an addict's attempt “to control, reduce or eliminate addiction frequently [is] undertaken only in response to court orders or in the hope that such activity will be looked upon with favor by law enforcement agencies”).
191. See Moss, supra note 159, at 287; Robin-Vergeer, supra note 90, at 765-766.
192. Moss, supra note 159, at 287.
193. See Hearing, supra note 183, at 115 (statement of Dr. Jing Ja Yoon) (explaining that mothers on crack only care about getting crack; “that's their priority”).
194. See Klein, supra note 140, at E1.
195. Id.
196. Id.
197. Id.
know how. In addition, "she did not want any help. A few people suggested that it might be a good idea. But Cindy just wanted drugs."  

2. Many Women Will Not Complete a Drug Treatment Program  

In addition to reaching only a limited number of women, the comprehensive drug treatment proposal fails to recognize that even if a woman can get into a drug treatment program, there is no guarantee that, in the absence of coercive measures, she will complete the program. One study has demonstrated that only ten to fifteen percent of those who enroll in "traditional therapeutic drug communities complete the programs." In fact, one-half of those who drop out do so "in the first ninety days. Of those who complete the programs . . . 77 percent display significant reductions in drug abuse and criminal behavior and concomitant rises in employment rates . . . ." Yet, for a significant minority (twenty-three percent of those who complete the programs), the programs are ineffective. Thus, for those who enroll (ignoring for now the fact that there are large numbers of addicts who do not enroll and will never voluntarily enroll), only 7.7% to 11.55% will significantly decrease their drug use.  

B. Criminal Prosecution and Incarceration  

The second proposed solution to the problem of pregnant substance-abusers is criminal prosecution and incarceration. Included in this category are the attempts (generally unsuccessful) by a number of state prosecutors to use existing criminal statutes to prosecute substance-abusing women who harm their children in utero. Also included in this category are instances in which some judges have jailed sub-

198. Id.  
199. Id.  
200. Fink, supra note 24, at 8 n.8 (citing J. Plaut & T. Kelley, N.Y. INTERFACE DEV. PROJECT, INC., CHILDWATCH: CHILDREN AND DRUGS (1989)).  
201. Id.  
202. Id.  
203. Id. at 7.  
204. See Lynn M. Paltrow, AM. CIV. LIBERTIES UNION FOUND., CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW (1992). Paltrow gives a comprehensive listing of criminal prosecutions in this area. Id. This overview reports at least 167 such prosecutions. Id. at i & n.1.
stance-abusing pregnant women on the theory that such jailing will protect the unborn child. Such prosecutions and incarcerations fail to address effectively the problem of prenatal drug exposure for several reasons. First, the statutes that the prosecutors use were not designed to address substance abuse by pregnant women. Second, incarceration or punishment of pregnant substance abusers will not deter such conduct. Third, incarceration will harm, rather than protect, the unborn child. Finally, society needs to find ways to reduce, rather than increase, the prison population.

1. The Prosecutions

Two highly publicized cases exemplify the use of criminal prosecutions to alleviate prenatal drug exposure. In the case of People v. Green, Melanie Green, age twenty-four, gave birth to a child who died two days after it was born. The baby and the mother "tested positive for the presence of cocaine in their systems." The prosecutor charged Green with "Involuntary Manslaughter and Delivery of a Controlled Substance." The grand jury, however, refused to return an indictment. In Johnson v. State, a prosecutor in Florida creatively used a drug statute to prosecute Jennifer Johnson, who had given birth to a cocaine-affected baby. Johnson was charged with, and found guilty of, "deliver[ing] a con-

205. See Ellen M. Barry, Pregnant, Addicted and Sentenced: Debunking the Myths of Medical Treatment in Prison, CRIM. JUST., Winter 1991, at 22, 23 [hereinafter Barry, Pregnant, Addicted and Sentenced] ("[O]ver the last few years there has been an unmistakable and unfortunate trend toward incarcerating pregnant women who appear to be drug or alcohol-dependent at the time of sentencing."); see also, e.g., Catherine A. Kyres, Note, A "Cracked" Image of My Mother/Myself? The Need for a Legislative Directive Proscribing Maternal Drug Abuse, 25 NEW ENG. L. REV. 1325, 1335 (1991). Kyres reports that a Washington, D.C. Superior Court judge sentenced a pregnant woman to 180 days in jail after she was convicted of second-degree theft for issuing bad checks. Id. The time in jail was "subject to a motion to reduce her confinement after her baby's birth." Id. The judge contended that "the baby was in need of protection due to the mother's alleged drug use." Id.

207. See Logli, supra note 140, at 24.
208. See id.
209. Id.
210. Id.
212. Id.
trolled substance to a child.”213 Since the statute did not encompass unborn children, “delivery, for purposes of the statute, occurred through the umbilical cord” in the short space of time “after the birth of the child and before the cord was severed.”214 The Florida Supreme Court quashed the decision and remanded with directions to reverse.215

2. Flaws in Such Prosecutions

A number of problems plague prosecutors’ efforts in this area. The first problem relates to the criminal prosecutions themselves. The statutes that prosecutors are currently utilizing include the following: child endangerment, distribution of drugs to minors,216 criminal abuse and neglect, involuntary manslaughter, and drug use.217 These statutes, however, were generally not designed to encompass substance abuse by pregnant women;218 thus, such prosecutions are generally unsuccessful.219 Further, use of such statutes violates the mandate of strict construction, which requires “that criminal statutes generally be read against the state and in favor of the defendant.”220 The prosecutors’ failure to strictly construe the statutes discussed above means that potential offenders will not receive fair warning that their conduct constitutes a punishable crime.221 Of course, if legislatures pass

---

213. See Logli, supra note 140, at 24-25.
214. Id.
217. See Paltrow, supra note 205, at ii.
218. See Shona B. Glink, Note, The Prosecution of Maternal Fetal Abuse: Is This the Answer?, 1991 U. ILL. L. REV. 533, 547 (“[T]he majority of these statutes do not expressly include the fetus within their protection . . . . Even if the statute expressly protects ‘those conceived, but not yet born,’ it must be shown that the legislature intended that the statute apply to the mother’s conduct.” (footnote and citations omitted)). Id.
219. See id. 547-52 for a detailed discussion of the various prosecutions and their failures.
220. James Denison, Note, The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse, 64 S. CAL. L. REV. 1103, 1118 (1991) (citing Rewis v. United States, 401 U.S. 808 (1971)); see also Wilkins, supra note 159, at 1413 (“[T]he United States Supreme Court has held many times that criminal statutes must be strictly and narrowly interpreted, with any ambiguity resolved in favor of lenity.”).
221. See Denison, supra note 220, at 1118 (stating that the rationale for strict construction “lies . . . in avoiding interference with legislatures’ intended meanings and in providing fair warning to potential offenders”).
statutes designed to deal specifically with substance-abusing pregnant women, this problem becomes moot. There are, however, additional problems relating to incarceration that make the prosecutors' efforts unpalatable.

Incarceration for a crime is designed to serve at least two purposes—retribution/punishment and deterrence.222 However, various policy reasons exist to mandate against punishment of women for their conduct in this area. Currently, and as previously discussed, a number of these women do not have options in terms of comprehensive drug treatment.223 Therefore, the culpability that would warrant retribution is lacking in many cases.224 In addition, drug laws currently exist that are specifically designed to punish persons for drug use. Providing additional punishment for such drug use is unnecessary and duplicative.

With regard to deterrence, there are two types of deterrence that incarceration might promote. One type can be labeled "specific deterrence" and consists of deterring the woman from using drugs while she is pregnant by cutting her off from her supply.225 Another type, "general deterrence," consists of deterring the woman and others from using drugs while pregnant by giving them the message that if they engage in this type of activity, they may be caught and punished.226

Incarceration will not promote general deterrence, because, given the nature of drug addiction, the possibility of a jail term is unlikely to deter a woman from abusing substances while she is pregnant.227 The key to general deter-

222. See infra text accompanying note 288.
223. See supra text accompanying notes 164-171.
224. See Glink, supra note 218, at 573 (arguing that retribution is not justified with regard to substance-abusing pregnant women because avenues of self-help are closed).
225. See Denison, supra note 220, at 1120 (arguing that specific deterrence is preventing an individual from committing further offenses and that general deterrence is signaling to others that similar offenses will not be tolerated).
226. Id.
227. See Wilkins, supra note 159, at 1434; see also Keyes, supra note 159, at 207 ("[C]riminal sanctions are not general deterrents to perinatal substance abuse."); Myers, supra note 159, at 757 ("There is very little, if any, evidence that the threat of criminal punishment deters pregnant women as a group from using drugs."); Barry, supra note 205, at 24 ("Research and practical experience
rence is rational cost-benefit analysis.\textsuperscript{228} A person must be able to weigh the benefit of drug use against the cost of such drug use (incarceration) and find that the benefit is outweighed by the cost. An addict, however, is controlled by her need for the drug and does not rationally weigh costs and benefits.\textsuperscript{229} Even if the addict was able to weigh the costs and benefits rationally, the need for the drug is so strong that the benefit of drug use would always outweigh the cost.\textsuperscript{230} This inability to generally deter an addict is exemplified by the fact that laws already exist prohibiting the sale, possession, and use of drugs. Since these laws do not deter pregnant addicts from using drugs, it is highly unlikely that additional laws leading to incarceration will make a difference.\textsuperscript{231} Thus, to the extent that a woman is incarcerated under the theory that it will deter others from drug use while pregnant, such incarceration is ineffective.

Some judges, however, seek to specifically deter pregnant, addicted women by incarcerating them. The theory is that such incarceration will protect the unborn child.\textsuperscript{232} The evidence, however, overwhelmingly demonstrates that incarceration will not protect the unborn child, and in some cases, it will further harm the child.\textsuperscript{233} For various reasons, described below, jail or prison is generally an unhealthy environment, and harm to the mother in turn causes harm to the child \textit{in utero}. Due to overcrowding, women are often forced to sleep on thin mats on the floor of their cells.\textsuperscript{234} The women generally receive inadequate prenatal care and inadequate general medical care.\textsuperscript{235} They also cannot obtain adequate nutrition or exercise.\textsuperscript{236} Further, the belief that the unborn child will be protected because its mother cannot obtain

\begin{itemize}
\item \textsuperscript{228} See Wilkins, supra note 159, at 1434.
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Id.
\item \textsuperscript{231} Id.
\item \textsuperscript{232} See supra note 205.
\item \textsuperscript{233} See Denison, supra note 220 (arguing that prosecution does not protect the child, and prison conditions themselves may cause injury to developing fetuses).
\item \textsuperscript{234} See Ellen M. Barry, Recent Development, Pregnant Prisoners, 12 Harv. Women's L.J. 189, 189 (1989).
\item \textsuperscript{235} See id. at 190.
\item \textsuperscript{236} See id.
drugs is misplaced. Drugs are often available to a woman while she is incarcerated.\(^2\)\(^3\)\(^7\) In fact, in some places, illicit drugs are more readily available in the correctional facilities than on the streets.\(^2\)\(^3\)\(^8\) To the extent that the woman cannot obtain drugs and is required to withdraw from such usage, the correctional facility is not a suitable place for this withdrawal. Effective drug and alcohol detoxification is rarely available; thus, the women are generally forced to withdraw "cold turkey."\(^2\)\(^3\)\(^9\) Doctors never recommend that a pregnant woman withdraw "cold turkey" because it can cause the woman to miscarry or it can damage the unborn child.\(^2\)\(^4\)\(^0\)

If a woman is jailed after giving birth to a drug-affected child, such incarceration will prevent her from becoming pregnant while she is incarcerated, but it is highly likely that she will continue to use drugs if she receives no drug treatment while she is in jail. Thus, if she becomes pregnant again, the drug use will harm another child.\(^2\)\(^4\)\(^1\) In addition, such incarceration will injure the child to whom she has given birth. Incarceration deprives the child of its opportunity to bond with its mother.\(^2\)\(^4\)\(^2\) Further, it places the child in an already overburdened foster care system with its consequent harms.\(^2\)\(^4\)\(^3\)

Finally, given the current state of our criminal justice system, there is a need for alternatives to incarceration in appropriate cases. We have "increased prison and jail populations,"\(^2\)\(^4\)\(^4\) and there are "inadequate resources for American prisons and jails. Nationally, the prison system is virtually exploding with an inmate population in excess of 600,000. Research has demonstrated deleterious conditions to be a major source of inmate dissatisfaction and even prison ri-

\(^{237}\) See Barry, Pregnant, Addicted and Sentenced, supra note 205, at 26; Wilkins, supra note 159, at 1434.
\(^{238}\) See Barry, Pregnant, Addicted, and Sentenced, supra note 205, at 26.
\(^{239}\) See id. at 23-24.
\(^{240}\) See id.
\(^{241}\) See Denison, supra note 220, at 1130.
\(^{242}\) See Wilkins, supra note 159, at 1435; see also Joyce Lind Terres, Prenatal Cocaine Exposure: How Should the Government Intervene?, 18 Am. J. Crim. L. 61 (1990) ("Incarceration after the child is born isolates the mother from the newborn in the most essential stages of its development and does not enable the mother to become a more responsible parent.").
\(^{243}\) See infra text accompanying notes 259-261.
\(^{244}\) See Steven D. Dillingham et al., Probation and Parole in Practice 2 (2d ed. 1990).
ots." We have the problem of imprisoning an "ever-increasing number[] of offenders in prisons designed for far fewer occupants." There are also enormous monetary costs. "Recent research has estimated the operational cost of housing an inmate in the United States to be approximately $16,000 per year, in addition to the capital expenditures for each bed space that range between $50,000 and $100,000." While in many situations "incarceration is both cost-effective and deserved," in many situations it is not. "[N]ot all defendants or offenders pose equal dangers to the community. Indeed, a percentage are found to be nonviolent and possible candidates for alternative programs."249

C. Taking the Child Away and Placing the Child in Foster Care

As the above discussion illustrates, criminal prosecution coupled with incarceration is not a viable solution to the problem of prenatal drug exposure. Recognizing this, some jurisdictions have proposed or enacted legislation expanding the definition of a neglected child to include children who were exposed to drugs in utero. In addition, some courts have

245. Id.
246. Id.
247. Id.
248. Id.
249. Id. (citations omitted).
250. See, e.g., FLA. STAT. ANN. § 415.503(9)(a)(2) (West 1993) (Harm to a child can occur when a parent inflicts injury upon the child. Injury includes "[p]hysical dependency of a newborn infant upon any drug controlled in Schedule I or Schedule II"); ILL. ANN. STAT. ch. 37, para. 802-3(1)(c) (Smith-Hurd 1990):

Those who are neglected include: . . . any newborn infant whose blood or urine contains any amount of a controlled substance as defined in . . . the Illinois Controlled Substances Act, . . . or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of such substances, the presence of which in the newborn infant is the result of medical treatment administered to the mother or the newborn infant.

Id.; IND. CODE ANN. § 31-6-4-3.1(1)(A), (B) (Burns Supp. 1993) ("A child is a child in need of services if: (1) The child is born with: (A) Fetal alcohol syndrome; or (B) An addiction to a controlled substance or a legend drug . . . ." ); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1993) (stating that physicians need to report to the department of public welfare any child "who is determined to be physically dependent upon an addictive drug at birth"); MINN. STAT. ANN. § 626.556(2)(c) (West Supp. 1993):

Neglect includes prenatal exposure to a controlled substance, . . . used by the mother for a nonmedical purpose, as evidenced by withdrawal
found that a woman's use of alcohol or drugs during pregnancy constitutes child neglect or child abuse.\textsuperscript{251} Through such legislation and case law, the court can "assert jurisdiction over a newborn infant born drug-affected," without the state being required "to show either the addiction of the child or harmful effects on the child."\textsuperscript{252} Once the court has jurisdiction over the child, it can "remove the child from [its] drug-abusing mother."\textsuperscript{253} One commentator has suggested that, in addition to removing the child from the home, such legislation allows the prosecutors to "work with the mother in a rather coercive atmosphere to encourage her to enter into

\begin{quote}

symptoms in the child at birth, results of a toxicology test performed on the mother at delivery or the child at birth, or medical effects or developmental delays during the child's first year of life that medically indicate prenatal exposure to a controlled substance.

\textit{Id.; NEV. REV. STAT.} § 432B.330(1)(b) (1991) ("A child is in need of protection if: . . . (b) He is suffering from congenital drug addiction or the fetal alcohol syndrome, because of the faults or habits of a person responsible for his welfare . . . ."); \textit{OKLA. STAT. ANN. tit. 10, § 1101(4) (West 1987)}:

"Deprived child" means a child . . . who is a child in need of special care and treatment because of his physical or mental condition including a child born in a condition of dependence on a controlled dangerous substance, and his parents, legal guardian, or other custodian is unable or willfully fails to provide said special care and treatment . . . .

\textit{Id.; UTAH CODE ANN.} § 62A-4-509(1) (1989) ("The division shall make a thorough investigation upon receiving either an oral or written report of alleged abuse, neglect, fetal alcohol syndrome, or fetal drug dependency, when there is reasonable cause to suspect a situation of abuse, neglect, fetal alcohol syndrome, or fetal drug dependency.").

\textit{251. See, e.g., In re Fathima Ashanti K.J.,} 558 N.Y.S.2d 447, 449 (1990) (arguing that maternal drug abuse that harms fetus warrants "judicial intervention for the protection of the child"); \textit{In re Ruiz,} 500 N.E.2d 935, 939 (Ohio Ct. C.P. 1986) (holding that a viable fetus was a "child" and therefore harm to a viable fetus may constitute child abuse; "the natural mother[s] use of heroin so close to the birth of [the] child did create a substantial risk to the health of [the] child"); \textit{In re Smith,} 492 N.Y.S.2d 331, 335 (1985) (holding "that an unborn child is a 'person' " under the child abuse statute); \textit{In re Baby X,} 293 N.W.2d 736, 739 (Mich. Ct. App. 1980) (finding that "prenatal treatment [of a child] can be considered probative of a child's neglect," and thus when a newborn had narcotics withdrawal symptoms, the mother's conduct constituted neglect); \textit{In re Male R.,} 422 N.Y.S.2d 819, 822 (1979) (holding that when a newborn suffered drug withdrawal symptoms, the mother's drug use established a prima facie case of child neglect); \textit{In re Vanesa F,} 351 N.Y.S.2d 337, 340 (N.Y. Sur. Ct. 1974) ("A newborn baby having withdrawal symptoms is prima facie a neglected baby under the Family Court Act, Article 10 . . . .").

\textit{252. Logli, supra note 140, at 27.}

\textit{253. Id.}
The above-outlined approach is incomplete primarily because it fails to protect children from in utero drug exposure. The state intervenes only after the child has been born drug-affected. In addition, while it is hoped that the mother will obtain treatment, the abuse and neglect laws do not mandate such treatment. In fact, as previously discussed, the mother is unlikely to receive the treatment that she needs. Thus, the state does nothing to prevent the woman from having another child while she is still addicted.

In spite of the deficiencies in the abuse and neglect proposal, it would be viable as a less coercive proposal if, after removal from their mothers, the children were provided with a loving and nurturing environment where they would receive the care that they need to become healthy and productive individuals. Alternatively, the abuse and neglect proposal would be viable if the addicted mother was provided with and required to avail herself of the drug treatment and parenting training that she needs to become a fit parent. However, this is not the case. The services that the mother needs are “stretched, overburdened, or nonexistent.” Further, after removal from their mothers, the children are placed in a foster care system that “is in a state of crisis.” Case loads in child protection agencies have increased to the point where “[c]ase workers . . . are unable to supervise and protect the children in their care,” resulting in the placement

254. Id.; see also Nolan, supra note 83, at 20-21.

[S]ome analysts and legislators have proposed extending the model of child abuse and neglect into the fetal period. In theory, abuse and neglect laws function to protect the interests of both children and families, so that protecting fetuses and future children through this mechanism would seem to be less punitive or coercive than bringing either civil or criminal charges against women.

Id. (footnote omitted).

255. See supra text accompanying notes 164-203.

256. The evidence demonstrates that it is highly likely that the woman will have another child. See supra text accompanying note 174.

257. See Terres, supra note 242, at 84.

258. Id.

259. Oberman, supra note 159, at 524. See also Terres, supra note 242, at 84 (“In almost every area of the country, the child protection system is understaffed, underpaid, and often inexperienced to deal with the deluge of child abuse and neglect cases of recent years.”).
of children in overcrowded and dangerous shelters.\textsuperscript{260} This warehousing "is a common response to newborns who have tested positive for exposure to illicit substances."\textsuperscript{261} Thus, children are removed from an unhealthy situation, often only to be placed in a different unhealthy situation, with little hope of their predicament changing in the near future.

\section*{III. A Legislative Proposal}

\subsection*{A. The Proposed Legislation and Its Purpose}

As the preceding section demonstrates, for a variety of reasons, if states only implement the existing alternative solutions to alleviate prenatal drug exposure, such legislation will be ineffective and/or it will not produce significant results until well into the future. Thus, the states will fail to protect as many children as soon as possible. The comprehensive drug treatment proposal will have a very limited impact because it will reach only that small group of women who voluntarily submit to treatment and voluntarily stay in treatment. It does nothing to prevent the rest of the substance-abusing women from continuing to give birth to drug-exposed children. For drug treatment to be effective, a way must be found to bring the unwilling women into treatment and keep them there long enough to receive some benefit. Further, the substance-abusing women must stop getting pregnant until they can provide a drug-free environment to their developing children.

The second alternative solution, the current criminal prosecution scheme, is flawed because it does not protect children from prenatal drug exposure. Most of the prosecutions never lead to lasting convictions, because the statutes used are not designed to prohibit prenatal drug exposure. Further, the threat of prosecution will not deter pregnant substance abusers. Finally, if a woman is jailed, such incarceration does not protect the developing child from harm, nor does it prevent the woman from conceiving and prenatailly exposing another child to drugs upon her release. If criminal prosecution is to work, it must be done pursuant to a statute that specifically prohibits prenatal drug exposure. In addition, the legislation must be designed to assist the mother, because

\begin{footnotes}
\item[260] Oberman, \textit{supra} note 159, at 525.
\item[261] \textit{Id}.
\end{footnotes}
only by assisting the mother can the state protect the developing fetus and future children.

The last alternative solution is the abuse/neglect scheme. This scheme is incomplete because it also does not protect children from drug exposure. The scheme takes a child away after he or she is born and therefore provides no protection when the child is being prenatally exposed to drugs. Further, the scheme does not prevent the substance-abusing mother from conceiving another child after the first one is taken away.

The legislation proposed in this section is designed to fill the gaps left by the alternative solutions. In order to begin to address the problem of prenatal drug exposure, legislatures need to implement legislation encompassing the elements found in the following proposed legislation.  

Section 1. Criminal Fetal Abuse

Any person who knowingly, or with reckless disregard for the consequences, uses alcohol or uses controlled substances not prescribed by a physician or abuses controlled substances prescribed by a physician, where such use endangers the person or health of an unborn child, shall be guilty of criminal fetal abuse.

This statute does not encompass spontaneous abortion of an unborn child in the first trimester where such abortion is caused by substance use.

Section 2. Sentencing for Criminal Fetal Abuse

If a woman is found guilty of criminal fetal abuse, she shall be sentenced as follows:

262. The proposed legislation is not intended to serve as a model for how such a statute would ultimately be written. Rather, its purpose is to give a general idea of the basic provisions of such a statute.

263. Portions of Section 1 were inspired by a sample statute discussed in James Denison's article. See Denison, supra note 220, at 1121 ("Any person who, under circumstances or conditions likely to produce great bodily harm or death, knowingly or with reckless disregard for the consequences causes or permits the person or health of a child in utero to be endangered by substance abuse is guilty of criminal fetal abuse.").

264. Although one of the harms caused by substance abuse is spontaneous abortion, this is not included in the crime, because as long as the spontaneous abortion occurs within the constitutionally protected period, it is difficult to see how the state can enjoin such behavior, at least in terms of protecting the fetus. See Roe v. Wade, 410 U.S. 113 (1973). The state probably could enact regulations to protect the health of the woman (i.e., enjoin the obtaining of an abortion through the abuse of drugs or alcohol); however, discussion of such legislation is beyond the scope of this article.
(A) If she has given birth\textsuperscript{265} to an abused child, then she shall be given the choice of prison or probation.\textsuperscript{266} If she chooses probation, in addition to any other conditions that the judge deems appropriate, the judge shall condition the probation upon the following:

(1) enrollment in a drug treatment program; and

(2) no pregnancy.

(B) If she has not yet given birth, then she shall be civilly committed to an appropriate drug rehabilitation program. After the child is born, the judge shall review the treatment record and determine whether probation with its attendant mandatory conditions is necessary. If such probation is necessary, the judge shall sentence the defendant to a probation term.

Section 3. Enrollment in Drug Treatment Center

If a woman at the time of arrest is actively participating in an appropriate treatment center, such enrollment shall be a defense to the charge of criminal fetal abuse.

The proposed legislation has a very narrow focus. Its goal is to prevent any harm to the unborn child through maternal substance abuse and to start such prevention immediately. The state will achieve this first goal by targeting women who have had one substance-affected child and enjoining them from further pregnancies until they are free from their substance abuse problem.\textsuperscript{267} A subsidiary purpose is to forestall further harm in those cases where some harm has already occurred. The state will achieve this goal through civil commitment of pregnant substance abusers in a drug rehabilitation center.\textsuperscript{268}

The proposed legislation is not designed to punish women\textsuperscript{269} for engaging in fetal abuse, and therefore the state

\begin{footnotes}
\item[265.] The term "birth" is intended to encompass the birth of a stillborn child.
\item[266.] Instead of prosecution followed by probation, the legislature could allow the woman to choose deferred prosecution or pretrial diversion. For a discussion of both options, see infra note 293.
\item[267.] See proposed legislation Sections 1, 2(A), supra text accompanying notes 263-266.
\item[268.] See proposed legislation Sections 1, 2(B), supra text accompanying notes 263-266.
\item[269.] At a July 1990 conference of prosecutors, medical personnel, and treatment and social services professionals, a "conference report indicated, in part,
should make every effort to allow the affected non-pregnant women to retain their freedom and to allow all of the women to retain custody of their children. With such freedom, the women who have already given birth to a drug-exposed infant can take advantage of drug treatment and parenting classes in order to properly care for their drug-exposed children.

In implementing the proposed legislation, the state must keep in mind that the problem of prenatal drug exposure is a complex one requiring a multidimensional approach. Thus, it is paramount that the state view the legislation proposed in this article as part of a larger plan. It should go hand in hand with other programs to provide for the welfare of the woman, her children, and her prospective children. For example, if the legislation is to have any significant impact on prenatal drug exposure, the state must allocate resources such that women can obtain the help necessary to overcome their substance addiction prior to any pregnancy. In addition, once an addicted woman becomes pregnant, society should provide or make available at least the following: help for her addiction, prenatal care, and training to care for the special needs of her child once it is born. Finally, the proposed legislation cannot be implemented unless the state provides the drug treatment centers that are mandated within the legislation.

B. The Crime and the "Punishment"

To provide immediate protection for the unborn child, this article proposes that the state make it a crime for a pregnant woman to use illicit drugs or alcohol or to abuse licit drugs, where such use or abuse is likely to cause her to give

---

that prosecutors have an important positive role to play in developing and implementing strategies to combat parental drug abuse, but that any approach must be multidisciplinary and should be directed at treatment, not punishment, of pregnant women." Paul A. Logli, The Prosecutor's Role in Solving the Problems of Prenatal Drug Use and Substance Abused Children, 43 Hastings L.J. 559, 561-62 (1992).

270. It could be argued that ideally, humankind should strive for a society where people are not driven to substance use or abuse. However, the motivations that lead to substance use or abuse are so varied that it is unlikely that we will reach that point in the near future, if at all. It is also not clear to this author that society has the right to prevent people from using various substances as long as that use does not harm others.

271. See proposed legislation Sections 2(A)-(B), supra text accompanying notes 265-266.
birth to a child that has suffered identifiable harm (including stillbirths).\textsuperscript{272} By making such behavior a crime, the state is able to obtain jurisdiction over those women who will not or cannot voluntarily submit to treatment and who simultaneously cannot or will not take care of their contraceptive needs. It thus reaches those women whom the alternative solutions outlined in Section II miss.

As stated above, the purpose of the proposed legislation is not to punish the behavior, but rather to enjoin the behavior for the protection of the unborn. As such, it runs counter to "the almost universal misconception that 'prosecution' means 'punishment' or 'incarceration.'"\textsuperscript{273} Thus, the sentence for the crime does not necessarily include jail time. If the proposed legislation works as envisioned, it will not include jail time. In fact, the proposed legislation specifically provides that the woman is to be given a choice between jail and probation.\textsuperscript{274} The jail term should be significantly less than the probation term, thus providing the woman with a real, if difficult, choice. While allowing for such a choice might lead many women to choose jail, thus defeating the overall purpose of the legislation, as the further discussion will demonstrate, such a choice will forestall constitutional infringement by the proposed legislation. In addition, it is hoped, and experience tends to support this hope, that most women will choose probation with its all-important conditions.

The probation is subject to a no-pregnancy condition and a drug treatment condition.\textsuperscript{275} The no-pregnancy condition forbids the woman from getting pregnant. As is discussed

\textsuperscript{272} See proposed legislation Section 1, supra text accompanying notes 263-264. Some state legislatures have proposed legislation similar that proposed in this article. See, e.g., Logli, supra note 140, at 27-28 (discussing H.B. 2835, 86th General Assembly, State of Illinois (1989 and 1990)). The proposed "statute provides for a class 4 felony disposition upon conviction" of the crime of "Conduct Injurious To A Newborn" and that "[a] class 4 felony is a probationable felony" that can result in incarceration "from one to three years." \textit{Id.}

\textsuperscript{273} Logli, supra note 269, at 562.

\textsuperscript{274} "Probation is the suspension of the imposition of a defendant's sentence or the execution of that sentence prior to commitment." John C. Williams, Annotation, Propriety of Conditioning Probation on Defendant's Remaining Childless or Having No Additional Children During Probationary Period, 94 A.L.R. 3d 1218 (1979).

\textsuperscript{275} Proposed legislation Section 2(A), supra text accompanying notes 264-265.
more thoroughly below, through such conditions, the state will begin immediately to protect against prenatal drug exposure by delaying conception in appropriate circumstances until the affected woman has controlled her drug abuse. The following sections discuss the various elements of the proposed legislation in more detail.

1. The Crime

While the proposed legislation is not designed to punish the targeted women, it is coercive in nature and makes fetal abuse a crime. Such coercion is necessary in order to reach those women who cannot or will not seek assistance to protect their developing children. As previously demonstrated, simply providing drug treatment to substance-abusing women will not affect a large segment of the substance-abusing population, because most will not avail themselves of such services, or if they do avail themselves of such services, they will not complete the program. The drug controls their lives.

Opponents of criminalization of prenatal drug exposure in general argue that criminalization is based upon faulty assumptions. These alleged assumptions are: (1) "pregnant addicts are indifferent to the health of their fetuses, or, alternatively, . . . they willfully seek to cause them harm;"277 (2) "drug treatment is available and pregnant women willfully seek to avoid it;"278 and (3) "prosecution of pregnant drug users will deter such women from alcohol and drug use."279 The impetus for the criminalization of this conduct is not, however, based upon these assumptions.

In fact, the author does not believe that any of the assumptions noted are generally valid assumptions. It is not generally true that drug-addicted pregnant women are evil or ill-intentioned.280 Most of the women are addicted and unable to help themselves.281 It is also not generally true that drug treatment is available and pregnant women willfully seek to avoid it.282 Finally, as the proposed legislation recog-

276. See supra text accompanying notes 173-203.
277. See Moss, supra note 159, at 286.
278. Id. at 287.
279. Id. at 288.
280. See supra text accompanying notes 182, 189-193.
281. Id.
282. See discussion concerning the scarce supply of adequate treatment centers for pregnant women, supra text accompanying notes 164-171.
nizes and takes into account, it is unlikely that an addicted person will be generally deterred by criminalization of her conduct.\footnote{283}{See supra text accompanying notes 227-231.}

Criminalization is simply the most effective way to protect children from conduct that is seriously detrimental to the health of those children. The criminalization is based upon conduct that causes serious harm to another. Whether such conduct was motivated by “evil” intentions or malice is irrelevant.

Some may argue that the state should not make fetal abuse by a drug or alcohol-addicted woman a crime because the woman has not engaged in any voluntary conduct. They could posit that addiction, unlike an isolated use, is involuntary and that the state cannot punish a woman for involuntary conduct. While they might concede that her conduct would not necessarily be involuntary if drug treatment was freely available and she chose not to obtain drug treatment, they point out that drug treatment is not freely available.\footnote{284}{See Johnsen, supra note 164, at 606. “[I]t would be injustice to punish a pregnant woman for not receiving treatment for her substance abuse when treatment is not an available option to her.’” Id. (quoting Board of Trustees, Am. Medical Ass’n, Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women, 264 JAMA 2663, 2699 (1990)).}

Some commentators have argued that this conduct should not be criminalized because it would have a chilling effect upon the women, in that if the women fear prosecution, they would not seek prenatal care for themselves and their unborn children. See, e.g., Kandall & Chavkin, supra note 160, at 640 (arguing that the possibility of prosecution may deter a woman from seeking prenatal care); Schott, supra note 160, at 243 (stating that the “threat of criminal responsibility might drive women away from prenatal care”). The fears cited are probably a fear of incarceration rather than prosecution, and as such would not come into play because the proposed legislation would not lead to incarceration except in the most egregious circumstances. See supra text accompanying notes 273-274. Thus, since most of the women genuinely want to have healthy babies, see supra text accompanying note 191, and they need not fear incarceration, the proposed legislation is not likely to have the chilling effect predicted by the commentators. In addition:

[the concern that pregnant addicts will avoid obtaining health care for themselves or their infants because of the fear of prosecution cannot justify the absence of “state action” to protect the newborn. If the state were to accept such reasoning, then existing child abuse laws would have to be reconsidered since they might deter parents from obtaining medical care for physically or sexually abused children.]

Logli, supra note 140, at 27. In the author’s opinion, a concern for the unborn child’s welfare would in most instances override a drug-using woman’s fear of possible repercussions.
They reason that the state cannot justify coercion where a woman had no choice but to remain an addict because she could not obtain drug treatment. 285

As stated earlier, however, while the interest of the women in obtaining treatment for their addiction is very important, it is not paramount. The fact of a person's addiction does not mean that society should let that person engage in whatever conduct she chooses, no matter how harmful that conduct, simply because she is addicted. Therefore, if the choice is between exempting women from their conduct due to their inability to obtain treatment (and incidentally leaving them free to engage in conduct that is harmful to their children) and holding women liable for their conduct in order to protect the children, the choice should be made in favor of holding the women liable.

Further, the commentators' arguments ignore the purpose of the proposed legislation. The harm to the unborn child is the same whether the woman did not seek treatment or tried to obtain treatment and failed. Since the purpose of the legislation is to prevent recurrent births of drug-affected children, it cannot differentiate between the two classes of women in its coverage. 286 If the purpose of the legislation was punishment of the women, the legislation would need to differentiate between the two categories of women; however, that is not the case.

Second, critics would like us to treat pregnant substance abusers much differently than we treat other members of our society who harm individuals. The apparent philosophical basis for the views of many commentators in this field is to

285. See, e.g., Nolan, supra note 83, at 21:

It is worth considering whether any form of coercive state intervention can be justified in the absence of non-coercive alternatives. This question is particularly acute in terms of women and illegal drug use because early evidence from several truly comprehensive drug treatment programs holds out substantial promise for many women completing pregnancy drug-free.

Id.

286. Of course, the legislation could differentiate between the women subsequently in terms of violation of probation and penalties for such violations. In addition, ultimately the two categories of women would probably be differentiated because the women who want to get off drugs and retain custody of their children will comply with the program and eventually be free to become pregnant if they desire, while the women who are not interested will not comply with the program and will not be free of the probation condition.
protect the rights of the women involved at all costs. To the extent that these commentators seek to protect the rights of the women at the expense of the rights of the drug-exposed children, their philosophy is at odds with the philosophy of this article. This philosophy is that, to the extent that the women’s rights can be vindicated without sacrificing those of the children, those rights should be upheld. However, if the two rights or interests conflict and a choice must be made, the rights of the child should be protected over those of the woman. While the woman may be a victim, unlike the child involved, she is not an entirely blameless victim. Further, while it may seem harsh to justify taking charge of an addict who could not obtain treatment, our laws do this exact thing in a variety of circumstances. While society does not punish a person simply because she is an addict or an alcoholic, it does punish a person for harmful conduct that stems from that substance addiction or from other psychological or sociological problems. If such conditions absolved an individual of all responsibility for her conduct, almost all criminals would be absolved. Society does not allow drunk drivers to escape punishment because they demonstrate that they are alcoholics. It would also not let a person roam free if that person killed someone and blamed the killing on the fact that she was on drugs. It does not generally let a murderer escape commitment because she was insane at the time of the murder. While such illnesses may lead to civil commitment or treatment rather than punishment, they do not forestall the recognition, in some way, of a severe problem and a need to address that problem. While pregnant women and their unborn children do occupy a unique position that requires a unique approach commensurate with that position, this uniqueness should not and does not absolve these women from responsibility for their actions.

In our society, it is not sufficient to say that one should not be held responsible for her actions because society did not help her to resolve her sickness. While society is becoming more willing to address the problems that lead to many crimes, it still generally believes that, to a certain extent, people should be responsible for their actions and the consequences of those actions. At some point, our society may

---

287. For the views of such commentators see, e.g., supra notes 159-160.
reach utopia and be able to treat all criminals; however, we have not yet reached that point.

Finally, while it is arguable that substance use while addicted is involuntary, engaging in unprotected sex, knowing that there is a possibility of pregnancy, is not involuntary conduct. If that intentional conduct leads to a pregnancy where the child is harmed due to the woman's actions, the state should hold her accountable. Therefore, the proposed legislation requires all drug-using and -abusing women to take care of their contraceptive needs such that their use and abuse does not unintentionally lead to harm to an unborn child. If they nevertheless get pregnant, the proposed legislation requires them to do everything within their power to assure that the child suffers as little harm as possible. This includes stopping the use of drugs. Thus, those women who take care of their contraceptive needs are not liable under the proposed legislation. Further, those women who protect their child after they conceive are similarly not chargeable under the proposed legislation. A woman commits criminal fetal abuse only when she fails to take care of her contraceptive needs and then fails to protect the child that she conceives.

2. Probation

The key aspect of the proposed legislation is the option of probation. Most commentators, courts, and legislatures agree that one of the primary purposes of probation is rehabilitation.288 In addition, due to a variety of factors that

288. See, e.g., State v. Martin, 580 P.2d 536, 539 (Or. 1978) (stating that the "purposes of probation include rehabilitation and the freedom of the individual, as long as these are consistent with public safety"); ARTHUR W. CAMPBELL, LAW OF SENTENCING 100 (2d ed. 1991) (noting that the basic purpose of probation is to "deter crime by rehabilitating unhardened offenders"); Jon A. Brilliant, Note, The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions, 1989 DUKE L.J. 1357, 1358 (discussing the fact that probation has rehabilitation as its primary goal); Brian C. Erb, Development in the Law, Creative Probation Conditions: Putting the "Unusual" Back in "Cruel and Unusual" after Bateman, 24 WILLAMETTE L. REV. 1155, 1157 (1988) ("[O]ne of the primary purposes currently advanced by those favoring the imposition of probation is the furtherance of the rehabilitation of criminals."); Jeffrey C. Filcik, Recent Development, Signs of the Times: Scarlet Letter Probation Conditions, 37 WASH. U. J. URB. & CONTEMP. L. 291, 295 (1990) ("Traditionally, probation's purpose, justification and goal has been the defendant's rehabilitation.").

While our justice system believes that one of the purposes of incarceration is rehabilitation, another primary purpose of incarceration is punishment. See id. at 297 (arguing that a prison sentence is punishment, and the rationales for
often make probation more attractive than prison, probation has begun to be seen by some as a more humane alternative to prison.\textsuperscript{289} It is endorsed in those cases where a more severe sanction is unnecessary.\textsuperscript{290} "Thus, changing attitudes on probation suggest that, although rehabilitation remains a driving force, probation is evolving into a broad, flexible means of dispensing criminal justice. Likewise, criminal justice philosophy is expanding the use of probation as an affirmative correctional device and sentence."\textsuperscript{291}

As such, the use of probation in the proposed legislation is an ideal tool for the unique situation of the substance-abusing woman—a woman who needs to be specifically deterred but who poses no danger to society at large.

Created by statute, probation is an alternative to incarceration whereby the offender is not incarcerated, but her life is subject to certain terms and conditions.\textsuperscript{292}


\textsuperscript{289} See State v. Christopher, 652 P.2d 1031, 1033 (Ariz. 1982); DILLINGHAM ET AL., supra note 244, at 31 ("The use of probation has . . . experienced increasing acceptance as an alternative to incarceration. In 1980, of all adults processed through the criminal justice system, approximately 60 percent were given probation as opposed to the remaining 40 percent who were incarcerated.") (citation omitted).

\textsuperscript{290} See Christopher, 652 P.2d at 1033.

\textsuperscript{291} Filcik, supra note 288, at 300.

\textsuperscript{292} See United States Sentencing Commission, Federal Sentencing Guidelines Manual 283 (1991); see also State v. Culbertson, 563 P.2d 1224, 1228 (Or. Ct. App. 1977) ("Probation is a process of imposition of rehabilitative and protective conditions upon a convict in lieu of taking away his liberty by incarceration."); Erb, supra note 288, at 1156 ("State statutes generally authorize a trial court to grant probation as an alternative to the statutorily prescribed punishment. In most cases, the result is that probation is granted in lieu of a prison sentence.") (footnote omitted); Filcik, supra note 288, at 296 ("[S]ociety considers probation as an alternative to sentencing."); DILLINGHAM ET AL., supra note 244, at 6 ("Probation is a judicially-imposed disposition which suspends the imposition of an original sentence . . . .").

Commentators and various jurisdictions disagree as to whether probation is an alternative to sentencing or a sentence in and of itself. See Filcik, supra note 288, at 296 & n.20 (noting that a number of states treat probation as a sentence; e.g., Delaware, Illinois, Kansas, Nebraska, New Hampshire and New Jersey). "The American Bar Association has urged [that probation be] viewed as a sentence just like any other sentence." CAMPBELL, supra note 288, at 102 (quoting AMERICAN BAR ASSOCIATION STANDARDS RELATING TO PROBATION 25 (1970)). In addition, "[t]he Comprehensive Crime Control Act of 1984 makes
probationer remains subject to all the civil disabilities that normally flow from the conviction of a crime.293

The liberty allowed by probation and pretrial diversion is conditioned on professional supervision,294 and while most legislation does not require conditions of probation, it does authorize court-imposed conditions that usually accompany a grant of probation.295 Generally, if the probationer seriously violates any provision of probation, a court may revoke probation and send her to jail.296

Because probation is created by statute, it is a privilege rather than a right.297 Consequently, while a court may allow an offender to refuse probation,298 courts have great dis-

293. CAMPELL, supra note 288, at 105. In addition to probation, some states allow what is known as pretrial diversion. Id. Others allow for deferred prosecution. Id. at n.38. For purposes of this article, pretrial diversion and deferred prosecution are included as possible options for the woman charged under the proposed legislation. See supra text accompanying notes 263-266.

Under pretrial diversion the defendant enters a guilty plea, but unlike probation, the judge withholds "registering [the plea] as a formal judgment of conviction." CAMPELL, supra note 288, at 105. The accused is then placed in a diversion program that is similar to probation. Id. Pretrial diversion is attractive to a defendant because it allows her to avoid a criminal record if she complies with all the terms and conditions of the program. See id. (noting that if the accused completes the program, the court permits her to withdraw her guilty plea, and then the court dismisses the case).

"Deferred prosecution is a system under which a prosecutor refrains from filing a formal criminal charge if the alleged offender complies with certain conditions, such as a drug treatment program[,] parenting classes," or no pregnancy. Logli, supra note 269, at 563.

294. See Filcik, supra note 288, at 294; DILLINGHAM ET AL., supra note 244, at 6.

295. See CAMPELL, supra note 288, at 111-12; see also, e.g., UNITED STATES SENTENCING COMMISSION, supra note 292, § 5B1.4(a)-(b) (listing "standard" and "special" conditions of probation).

296. See Filcik, supra note 288, at 294; DILLINGHAM ET AL., supra note 244, at 6.

297. See Filcik, supra note 288, at 301; see also State v. Christopher, 652 P.2d 1031, 1034 (Ariz. 1982) (quoting State v. Smith, 542 P.2d 1115 (Ariz. 1975) (noting that probation is "a matter of grace and not of right"); CAMPELL, supra note 288, at 108-09 (arguing that the ability to receive probation is statutorily determined, and states can and do restrict probation to certain classes of offenders).

298. See CAMPELL, supra note 288, at 105 ("[T]he majority of states which have passed on the issue hold an offender has the right to refuse probation with its attendant constitutional restrictions and instead demand the customary alternative of incarceration."). But see State v. Lynch, 394 N.W.2d 651, 662 (Neb.
cretion in deciding who will receive probation and what the terms and conditions of that probation will be. This broad discretion is limited only by a statutory requirement of reasonableness, and in some cases, by constitutional concerns.

3. Conditions of Probation

As stated above, one of the purposes of probation is to rehabilitate the probationer. Thus, to aid the probationer in this process of successfully reforming herself and reintegrating herself into the community, courts impose probation conditions. Since, however, the probationer has threatened public safety by committing a crime, courts also design probation conditions to promote respect for the law, to deter further criminal conduct, and to protect the public from further crimes. Many state statutes provide for certain general and specific conditions that judges may impose upon a probationer. The condition of drug treatment is often one of the conditions provided for by statute. The statutes as well as case law also give the trial judges broad discretion to design probation conditions that are not specifically listed but are appropriate to the probationer's particular situation and promote rehabilitation or protect the public. A no-pregnancy condition falls into this latter category.

1986) (quoting State v. Kinney, 350 N.W.2d 552 (Neb. 1984) ("[P]robation is a sentence and not part of a quasi-contract wherein the court offers something which the defendant is free to accept or reject . . . ."); State v. Crites, 689 P.2d 353 (Or. Ct. App. 1984) (holding that defendant could not refuse probation).

299. See Filcik, supra note 288, at 301-02; Campbell, supra note 288, at 109.

300. See infra text accompanying notes 374-421.

301. See Filcik, supra note 288, at 295.

302. United States Sentencing Commission, supra note 292, at 283; see also Erb, supra note 288, at 1155 (noting that many judges are "aware of the need to control [probationers] who 'serve their sentence' while at large in society").

303. See United States Sentencing Commission, supra note 292, at § 5B1.4(a)-(b) (providing for "standard" conditions that are generally recommended and "special" conditions that are recommended, or required by law, or may be appropriate); Or. Rev. Stat. § 137.540(1)-(2) (1991) (explaining that probation is subject to certain "general conditions unless specifically deleted by . . . . court"); the court "may impose special conditions . . . for the protection of the public or reformation of the offender, or both"); see also Erb, supra note 288, at 1157.

304. See infra text accompanying note 373.

305. See, e.g., People v. Pointer, 199 Cal. Rptr. 357, 365 (Ct. App. 1994) (holding that "sentencing court has broad discretion to describe conditions of probation to foster rehabilitation and to protect the public to the end that justice may
be done”); Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Ct. App. 1979) (holding that the “[t]rial court[ ] ha[s] broad discretion to impose various conditions of probation” as long as such conditions are related to rehabilitation of the probationer); State v. Culbertson, 563 P.2d 1224, 1228 (Or. Ct. App. 1977) (holding that the generality of Oregon law “indicates an intention to grant to the court the broadest possible power to formulate appropriate conditions in each case”); see also, e.g., UNITED STATES SENTENCING COMMISSION, supra note 292, § 5B1.3(b) (“The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing and (2) involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing.”); ARK. CODE ANN. § 5-4-303(c)(10) (Michie 1987 & Supp. 1991) (explaining that the court may require defendant to “[s]atisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience”); COLO. REV. STAT. § 16-11-204(2)(l) (West 1986) (explaining that the court may require defendant to “[s]atisfy any other conditions reasonably related to his rehabilitation and the purposes of probation”); CONN. GEN. STAT. ANN. § 53a-30(a)(11) (West Supp. 1992) (noting that the court may require defendant to “satisfy any other conditions reasonably related to his rehabilitation”); HAW. REV. STAT. § 706-624(2)(n) (Supp. 1992) (explaining that a court may require defendant to “[s]atisfy other reasonable conditions as the court may impose”); IND. CODE ANN. § 35-38-2-2.3(a)(14) (Burns 1992) (explaining that a court may require defendant to “[s]atisfy other conditions reasonably related to the person’s rehabilitation”); ME. REV. STAT. ANN. tit. 17-A, § 1204(2-A)(M) (West 1983) (explaining that a court may require defendant to “satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience”); N.Y. PENAL LAW § 65.10(2)(l) (McKinney 1987) (explaining that a court may require defendant to “[s]atisfy any other conditions reasonably related to his rehabilitation”); N.C. GEN. STAT. § 15A-1343(b1)(10) (1992) (noting that a court may require defendant to “[s]atisfy any other conditions determined by the court to be reasonably related to his rehabilitation”); OR. REV. STAT. § 137.540(2) (1991) (explaining that a “court may impose special conditions of probation for the protection of the public or reformation of the offender, or both, including, but not limited to,” certain listed conditions); 42 PA. CONS. STAT. ANN. § 9754(c)(13) (1982) (noting that a court may require defendant to “satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience”); TENN. CODE ANN. § 40-35-303(d)(9) (Supp. 1992) (explaining that a court may require defendant to “[s]atisfy any other conditions reasonably related to the purpose of the offender’s sentence and not unduly restrictive of the offender’s liberty, or incompatible with the offender’s freedom of conscience, or otherwise prohibited by this chapter”); VT. STAT. ANN. tit. 28, § 252(b)(13) (1986) (noting that a court may require defendant to “[s]atisfy any other conditions reasonably related to his rehabilitation”).
a. No-Pregnancy Condition

An essential part of the proposed legislation is the no-pregnancy condition of probation. As previously demonstrated, a major gap in the alternative solutions is that they fail to prevent a woman from giving birth to a number of drug-exposed children. If society is to protect as many children as possible from any harm, it must prevent the birth of additional substance-exposed children while the woman is getting her substance abuse problem under control. The existence of a drug-exposed fetus or child is presumptive evidence that a drug-using woman either cannot or will not take care of her contraceptive needs while she is using drugs. Therefore, the state must assist her.

Apart from constitutional and policy concerns, a logistical problem exists concerning how to implement the no-pregnancy condition. Since the women cannot or will not take care of their contraceptive needs, simply imposing a no-pregnancy condition is unlikely to significantly reduce the number of drug-exposed children. There are two alternatives that a state could employ to ensure fewer violations of the no-pregnancy condition. The court could order a woman to receive a Norplant implant as a part of the condition, or it could give a woman a choice of contraceptives (including Norplant) that the state would provide to her free of charge. As the following discussion demonstrates, the latter alternative is currently the better one and the one that should become a part of the proposed legislation.


307. As one woman who had given birth to a drug-exposed infant commented, although she succeeded in getting off drugs on her own and loves motherhood, she states she did not:

have much faith that other addicts (would) follow her path. "I know women who have had numerous babies born addicted and they just let them go to the state or a relative, or they keep them so that they can get welfare," she says. "I feel that the courts should make these women use some kind of birth control, and if they don't, they should be fixed because it's the children who are going to suffer."

Klein, supra note 140, at E1.

308. See discussion infra parts IV and V.
(1) Norplant Implant

The Norplant contraceptive system “consists of six flexible Silastic capsules,” resembling match-stick-size straws, which “are surgically inserted into a woman’s upper arm.” Once inserted, the capsules release levonorgestrel, a synthetic hormone that is used in oral contraceptives. The implant costs between $500 and $700 and lasts for five years. Norplant “imparts a degree of protection against pregnancy that is comparable to sterilization,” yet the effects “stop immediately after removal.” Since Norplant is administered automatically, pregnancy cannot occur due to human error, as can occur with other contraceptives. Thus, Norplant is probably the most effective contraceptive currently on the market. Such effectiveness, coupled with the elimination of human error, makes Norplant very attractive in terms of preventing a drug-using woman from conceiving. In addition, an implant lasts five years and costs only approximately $750, further adding to its attractiveness.

However, Norplant is a relatively new contraceptive without a long history of use in the United States. Thus, the long-term effects of the implant are not known. In fact, many women's health groups have asserted that the Federal Drug Administration (FDA) should not have approved Norplant until it knew the drug's long-term effects. These factors raise serious policy concerns about ordering a woman to use such an implant, even if she chooses the probation option.

312. Id.; See also Huggins, supra note 309, at 3139.
314. See Rutten, supra note 311, at E1.
316. Id.
317. Id.
318. Id.
320. Denmark, supra note 313, at 23.
(2) Choice of Contraceptives Supplied by the State

The state can also ensure fewer violations of the no-pregnancy condition by providing the woman with a choice of contraceptives, including Norplant, free of charge. This solution is preferred because, if administered correctly, it can be almost as effective as the Norplant alternative, but it does not run afoul of the policy concerns raised by that alternative.

Under this alternative, the woman is not obligated to take any of the contraceptives offered. However, the court would apprise the woman of the harsh penalties (jail or civil commitment) that will arise if she becomes pregnant. The court would also inform the woman that it will impose the jail penalty even if the woman becomes pregnant and has an abortion. Since the condition is no pregnancy, it is not necessary for the woman to carry the pregnancy to term before the woman violates probation. Simply becoming pregnant is sufficient. Finally, the court would remind the woman that if she goes to jail, the state will place any children that she has in foster care. With all of this information, the woman can then make an informed choice as to what contraceptive, if any, will best suit her needs. Given this information, many women will decide that a Norplant implant best serves their needs, thus reducing the probable number of probation violations. With such self-selection, however, the state does not run into the problem of ordering a particular contraceptive.

Since a possibility of pregnancy exists with all contraceptives, the court will be faced with the question of what punishment, if any, follows a violation of probation. If the woman has decided to obtain an abortion, then there is no need to provide her with any special treatment. If, however, the woman has decided to carry the child to term, the unborn child may suffer harm if the woman is incarcerated. Therefore, the sentence for violation of probation in such a case should be civil commitment to a drug treatment center rather than incarceration. After the pregnancy ends, the woman should be freed from civil commitment, unless it is proven that she

321. Thus, a woman is unlikely to have an abortion simply to avoid incarceration. If she obtains an abortion, it will be because she wants one, not because she was coerced by the circumstances.
322. See supra text accompanying notes 233-243.
willfully violated the probation condition. In such a case, the civil commitment may be followed by a jail term.

b. Drug and/or Alcohol Treatment Condition

Another important part of the proposed legislation is the requirement that the probationer receive drug and/or alcohol treatment for her substance abuse problem. Without such treatment, it is unlikely that she will be able to overcome her substance abuse problem. In addition, without such treatment, it is likely that the birth of another substance-affected child will only be postponed and not prevented.

IV. STATUTORY AND CONSTITUTIONAL IMPLICATIONS OF THE LEGISLATIVE PROPOSAL

Making fetal abuse a crime arguably implicates a number of constitutional issues. In addition, imposing drug treatment and no-pregnancy conditions of probation arguably implicates a number of statutory and constitutional issues. The general framework of the constitutional debate in this area is "the proper balance between competing interests: the desire to protect individual liberties while recognizing a citizen's obligations to the community, and society's interest in encouraging, and in some instances forcing, responsible behavior."323 This balancing recognizes that while some rights are important, and in some instances fundamental, they do not exist in a vacuum. Rather, they are limited by their attendant responsibilities and the rights of others.324

The proposed legislation raises three constitutional questions. First, by making it a crime to use or abuse drugs while pregnant, does the state violate a woman's fundamental right to privacy as guaranteed by the Due Process Clause of the Fourteenth Amendment and/or the Equal Protection Clause of the Fourteenth Amendment?325 Second, by making it a crime to use or abuse drugs while pregnant, does the

324. See Robert C. Cetrulo & Amy E. Dougherty, The Right to Life: The Most Fundamental Right, KY. BENCH & B., Summer 1990, at 22, 28 ("All human 'rights' have correlative 'responsibilities.' The legitimate parameter of one's right to swing one's fist was always, prior to Roe v. Wade, the other person's nose").
325. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV § 1.
326. "[N]or deny any person . . . the equal protection of the laws." Id.
state violate a woman's right to equal protection of the laws? And third, does the state violate a woman's fundamental right to procreate by providing a no-pregnancy probation option under the proposed legislation?

Further, the proposed legislation raises the question of whether the probation conditions violate the statutory requirement of reasonableness.

In answering these questions, the discussion demonstrates that the proposed legislation is neither constitutionally nor statutorily infirm.

A. The Crime

1. Right to Privacy—Dimensions

Justice Louis Brandeis, in a dissenting opinion in Olmstead v. United States, stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

This right has been described as the right to privacy. While the Constitution does not expressly provide for a right to privacy, the judiciary has found such a right from a variety of sources. This right has been described as "a right to en-
gage in certain highly personal activities. More specifically, it currently relates to certain rights of freedom of choice in marital, sexual, and reproductive matters."333 While the right to privacy is a fundamental right, it is not an absolute right.334 Fundamental rights do not and cannot exist in a vacuum. In a civilized society, it has been generally recognized that in any place where more than one person exists, the rights and interests of different individuals will conflict. Thus, an essential corollary to the existence of one person's right is the right of others not to suffer harm through the exercise of that right.335 The state may therefore infringe upon fundamental rights if it does so in order to promote a compelling state interest. Thus, if the state's action infringes upon one of these rights, it will be upheld if it withstands strict scrutiny under either the Due Process Clause and/or, in appropriate cases, the Equal Protection Clause.336 That is, the state's action will pass constitutional muster if the state can demonstrate that a compelling interest for such a law exists and that the law is narrowly tailored to effectuate such interest.337

The legislation proposed in this article is constitutional because it does not infringe upon a woman's fundamental right to privacy. In addition, even if the legislation did infringe upon a woman's fundamental right to privacy, the legislation would pass constitutional muster because in the cir-

the Preamble, and [has] been held implicit in the eighth amendment's prohibition against cruel and unusual punishments.

Id.


334. See Tribe, supra note 330, § 15.3, at 1308:

[There is] a bleak conservatism, in designing and defending any absolute right. Any fundamental rights of personhood and privacy too precisely or inflexibly defined defy the seasons and are likely to be bypassed by the spring floods. The best we can hope for is to encourage wise reflection through strict scrutiny of any government action . . . that appears to transgress what it means to be human at a given time and place.

Id. (footnote omitted).

335. See supra text accompanying note 324; see also Phillip E. Johnson, The ACLU Philosophy and the Right to Abuse the Unborn, Crim. Just. Ethics, Winter/Spring 1990, at 48, 51 ("Rights are excellent concepts if placed within a larger framework of personal responsibility, but a philosophy that pays no attention to anything but rights is a license for self-indulgence.").

336. See Nowak & Rotunda, supra note 333, § 11.7, at 388.

337. See id. § 14.3, at 575.
cumstances covered by the proposed legislation, the state has a compelling interest in prohibiting the woman from exercising her rights in an irresponsible manner, to the serious detriment of her unborn child and her possible future children.

a. No Fundamental Right Involved

Some commentators have contended that a statute criminalizing a woman's conduct during pregnancy unconstitutionally infringes upon the woman's fundamental right to privacy. One commentator has gone as far as to argue that "any governmental action that ... plac[es] special restrictions on women based solely on their role in childbearing must be strictly scrutinized, even though the Constitution does not protect as fundamental the right to engage in many activities potentially affected." In arguing that the right to privacy is implicated, these commentators contend that the right to privacy encompasses either a fundamental right "to make decisions that affect the spheres of family, marriage, and procreation," or a fundamental right to "control one's own body." Contrary to the assertions of these commentators, however, the Court has not provided a general definition of the right to privacy. Thus, there does not exist a general fun-

338. See Glink, supra note 218, at 562 (arguing that the right to privacy is involved in criminal prosecutions of women for drug use during pregnancy); see also Note, Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse," 101 HARv. L. REV. 994, 998 (1988) ("Fetal abuse statutes should be subject to strict scrutiny because they infringe upon a woman's constitutionally protected right to privacy."); Schott, supra note 160, at 230 (arguing that a statute that proscribes fetal harm must be drawn narrowly enough to meet the constitutional requirements of Roe v. Wade).

339. Johnsen, supra note 164, at 586.

340. Note, Maternal Rights and Fetal Wrongs, supra note 338, at 998; see also Glink, supra note 218, at 562 (arguing that the fact that "[t]he right to privacy also includes the right to make decisions affecting the spheres of family and marriage free from government intrusion" means that the right to privacy would encompass a woman's decisions concerning her pregnancy).

341. Glink, supra note 218, at 562. (noting that one aspect of the right to privacy is "the right to control one's own body"); see also Wilkins, supra note 159, at 1420:

Although none of the[ ] Supreme Court cases involving the right to privacy directly addresses prenatal behavior (other than abortion), they indicate that, in certain arenas, the right to privacy prevents courts from substituting their own judgments for those of individuals. A woman's choices about what to do with her body during pregnancy should be accorded the same protection given to other decisions regarding reproduction and family life.

Id.
damental right to privacy or autonomy. Rather, the judiciary has carved out a number of constitutionally protected zones of privacy. The rights encompassed by these zones of privacy are deemed to be fundamental rights. In the author's opinion, because the conduct criminalized by the proposed legislation does not fall within any of the recognized zones of privacy, it does not infringe upon any fundamental right of privacy.

In the area of family matters, the Court has said that the right to privacy encompasses a parent's right to make certain decisions concerning his child's education. In addition, it has found that a fundamental right exists in the parent-child relationship such that "states must guarantee a parent significant procedural safeguards against improper termination of the parent-child relationship, including a requirement that the parental unfitness be proven by 'clear and convincing' evidence." Further, with regard to marriage, the Court has found that to a certain extent, freedom of choice concerning marriage or divorce is a fundamental right. The proposed legislation contains no provisions concerning education, termination of the parent-child relationship, or marriage. It therefore does not infringe upon the aspect of the right to privacy that relates to family matters or marriage.

In the area of procreation, the Court has recognized that "[t]he decision whether to beget or not to beget or bear a child

342. See Nowak & Rotunda, supra note 333, § 14.26, at 757 (The Court "has not recognized any general right to engage in sexual activities that are done in private. Instead, the justices have acknowledged the existence of a 'right' and defined it by very specific application to laws relating to reproduction, contraception, abortion, and marriage.").

343. See id. (explaining that the right to privacy currently encompasses "certain rights of freedom of choice in marital, sexual, and reproductive matters").

344. See Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding that a statute that required students to attend public rather than private schools violates the Due Process Clause); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (finding a statute forbidding the teaching of foreign languages in any school violates the Due Process Clause).


346. See Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (holding recognized the fundamental right to marry in invalidating divorce restrictions); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding a statute that prohibited white persons from marrying any non-white person violated the fundamental right to marry); see also Nowak & Rotunda, supra note 333, § 14.28 at 763-65.
is at the very heart of . . . [the] cluster of constitutionally protected choices” encompassed by the right to privacy. Thus, the Court has invalidated laws that authorized the sterilization of certain convicted criminals, laws that restricted the use of contraceptives by married persons, laws that restricted the distribution of contraceptives to married and unmarried persons, and laws that infringed upon a woman’s right to choose an abortion. In criminalizing fetal abuse, the proposed legislation does not authorize the sterilization of any woman, nor does it infringe upon a woman’s choice as to whether to get pregnant or whether to terminate a pregnancy. Rather, it provides that if a woman conceives a child, she has an obligation to refrain from using and/or abusing alcohol, licit drugs, and illicit drugs. As such, criminalization of fetal abuse does not infringe upon the right to privacy as it relates to procreation.

Finally, in terms of the right to control one’s own body, apart from the privacy cases discussed above, the only relevant cases would appear to be those that derive a right of bodily integrity from the Fourth Amendment’s prohibition against unreasonable searches and seizures. The proposed legislation does not, however, authorize any state intrusion into a woman’s body and therefore does not implicate the right of bodily integrity.

None of the above-enumerated interests are implicated by the crime of fetal abuse as outlined in the proposed legislation. Quite simply, the proposed legislation makes it a crime for a woman to use or abuse certain substances while pregnant. Because the Court has recognized neither a general fundamental right of personal autonomy nor a privacy right

352. The constitutional implications of the no-pregnancy probation condition are discussed infra text accompanying notes 399-421.
353. See, e.g., Schmerber v. California, 384 U.S. 757, 767-68 (1966) (holding that the Fourth Amendment protected against “intrusions into the human body” “which are not justified in the circumstances, or which are made in an improper manner”); Rochin v. California, 342 U.S. 165, 172-174 (1952) (holding that a conviction obtained through the use of evidence garnered by pumping the suspect’s stomach offended the Due Process Clause).
to abuse alcohol, to use illicit drugs, or to abuse licit drugs, the proposed legislation does not violate any constitutionally protected fundamental right. As one commentator has stated quite succinctly:

Both the state's interests in fetal life and in fetal health are legitimate and coexist prior to viability. Given the nature of the maternal rights against which these state interests are opposed, however, courts can give force to the state's interest in fetal health before they give force to the state's interest in fetal life.

Accepting the argument that a prenatal-duty rule would not violate a woman's right to abort, it also would not impinge upon the type of intimate decision making created by the right of privacy. The right of privacy protects women in their decisions not to conceive, or, having conceived, not to bear the child. The right to make these intimate decisions protects women from having to assume a responsibility which they may not desire to undertake. Regardless of one's personal view on the use of contraceptives and abortion, no one can deny that requiring a woman to bear a child against her will can have a lasting and potentially devastating impact upon her. By contrast, preventing a woman from acting in ways detrimental to her fetus does not protect her interests in such a fundamental manner. Whether or not a woman ultimately decides to bear a child, requiring her to insure that if born, her child will be healthy, is not detrimental to her long-

354. Development in the Law—Medical Technology and the Law, 103 Harv. L. Rev. 1519, 1580-81 (1990) [hereinafter Development in the Law]. See also Denison, supra note 220, at 1135 ("[T]he decision to abuse drugs does not qualify for [constitutional] protection."); Sam S. Balisy, Note, Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus, 60 S. Cal. L. Rev. 1209, 1220 (1987) ("[T]he use of alcohol, tobacco and illicit drugs are not fundamental rights. The use of alcohol and tobacco is a mere privilege, and the use of illicit drugs is a crime."); Keyes, supra note 159, at 228 ("[T]he Court is unlikely to view perinatal substance abuse as a part of a broad fundamental right to reproductive privacy. Instead, the Court might define the right at issue to be the right to abuse drugs and alcohol while pregnant, and discover no such right in history or tradition.").

The proposed legislation does not infringe upon a woman's right to an abortion, because "the issue arises only if the woman decides to continue the pregnancy." John Robertson, "Fetal Abuse": Should We Recognize It as a Crime?, A.B.A. J., Aug. 1989, at 38; see also In re Smith, 492 N.Y.S.2d 331, 334 (Fam. Ct. 1985). Roe v. Wade should not deny the state "the power to grant legal recognition to the unborn in non-14th Amendment situations." Id. (quoting John E.B. Myers, Abuse and Neglect of the Unborn: Can the State Intervene?, 23 Duq. L. Rev. 1, 15 (1984).
term self interest. In fact, the opposite is more likely to be true. A woman who is not prepared to raise a healthy child is even less prepared to raise one with a serious birth defect.\textsuperscript{355}

Recognizing that the case of fetal abuse does not fit within the fundamental rights recognized by the Supreme Court, some commentators have extrapolated from the privacy cases a fundamental right to make personal decisions in all areas related to reproduction.\textsuperscript{356} The Court has, however, expressed an unwillingness to "discover new fundamental rights imbedded in the Due Process Clause."\textsuperscript{357} Given this reluctance and the Court's history of defining fundamental rights in terms of specific narrowly defined categories, it is unlikely that the Court would recognize a fundamental right to make personal decisions in all areas related to reproduction, especially where that right would encompass the right to ingest harmful substances that serve no useful purpose and that would in fact be harmful to the pregnant woman and her unborn child.\textsuperscript{358}

b. A Compelling State Interest

Even if a fundamental right was implicated, the proposed legislation would still pass constitutional muster, because the state is pursuing a compelling state interest and the legislation is narrowly tailored to promote that interest. The Supreme Court has recognized that the state has a compelling interest in protecting potential life\textsuperscript{359} and that this interest exists throughout the pregnancy.\textsuperscript{360} As the preceding sections have demonstrated, the proposed legislation is

\textsuperscript{356} See, e.g., Note, Maternal Rights and Fetal Wrongs, supra note 338, at 998; Wilkins, supra note 159, at 1420.
\textsuperscript{358} See Keyes, supra note 159, at 228 ("The Court is unlikely to view perinatal substance abuse as a part of a broad fundamental right to reproductive privacy. Instead, the Court might define the right at issue to be the right to abuse drugs and alcohol while pregnant, and discover no such right in history or tradition.").
\textsuperscript{360} See supra note 359.
designed to further this interest by protecting unborn children from exposure to substances that can cause serious, and in some cases devastating, harm to those children—harm that may potentially affect such a child’s entire life. Balanced against this interest is the woman’s interest in using illicit drugs and abusing alcohol and licit drugs. The use of illicit drugs is a crime. Further, the abuse of alcohol and licit drugs is condoned rather than encouraged by the state. Therefore, given the nature of the interests involved, it is not difficult to see how the balance weighs heavily in favor of the state.\footnote{361. See Glink, supra note 218, at 568 (noting that the use of illegal drugs is a crime, not a fundamental right).}

Further, the proposed legislation is narrowly tailored to advance this interest. The legislation targets only women who abuse substances \textit{and} who do not take care of their contraceptive needs.\footnote{362. See supra section III.B.1.} In addition, as Section II of this article demonstrates, the alternative solutions are incomplete or flawed in many important ways; consequently, the proposed legislation is necessary if the state is to protect as many children as possible from \textit{in utero} drug exposure.

2. \textit{Equal Protection}

Women affected by the proposed legislation might contend that the law discriminates on the basis of gender and is therefore subject to heightened, or intermediate-level, scrutiny under the Equal Protection Clause.\footnote{363. See Craig v. Boren, 429 U.S. 190 (1976) (establishing intermediate scrutiny for gender-based discrimination); see also Oberman, supra note 159, at 527 (arguing that “if a law governing the use of controlled substances by [pregnant] women were challenged as discriminatory today, it would be reviewed under heightened (or intermediate level) scrutiny”).} In arguing against prosecution for prenatal drug exposure, one commentator contends that such prosecutions “directed at women who use drugs and alcohol during pregnancy represent another context in which only women have been penalized, despite evidence that alcohol and drug use ... by men can cause
harm to their future children through the negative effect on sperm.\textsuperscript{364}

Such an equal protection argument would fail for at least two reasons. First, the Supreme Court "has been skeptical of gender discrimination claims based on pregnancy."\textsuperscript{365} In \textit{Geduldig v. Aiello},\textsuperscript{366} the Court differentiated "between classifications based on gender and classifications based on biological differences such as pregnancy."\textsuperscript{367} Thus, discrimination on the basis of pregnancy does not constitute gender discrimination, but rather, discrimination between pregnant and non-pregnant persons.\textsuperscript{368} Therefore, because the proposed legislation seeks only to govern the conduct of pregnant substance abusers, it is unlikely that a court will find that the legislation discriminates on the basis of gender, whereby the legislation would be subjected to a heightened level of scrutiny.

In addition, even if it is agreed that the proposed legislation makes a gender classification, and even if it is assumed that a man's drug use can harm his sperm,\textsuperscript{369} the classification would not be discriminatory because, in terms of the conduct proscribed by the statute, men and women are not "similarly situated." The conduct that is prohibited by the statute is the ingestion of drugs while pregnant. Because men cannot become pregnant, they cannot engage in the same type of conduct and are therefore not "similarly situated."

Men and women could be "similarly situated" if research demonstrates that drug use damages both sperm and eggs. In such a case, if the law prohibited a woman from using drugs because of damage to her eggs, and did not prohibit men from engaging in similar conduct, men and women would then be "similarly situated" in terms of the statute, and gender discrimination would exist. This research, how-

\textsuperscript{364} Johnsen, supra note 164, at 608.
\textsuperscript{366} 417 U.S. 484 (1974).
\textsuperscript{367} Id.
\textsuperscript{368} See Glink, supra note 218, at 562.
\textsuperscript{369} This is a significant assumption, given that research is just beginning to be conducted concerning the impact of drug use on sperm. See Balisy, supra note 354, at 1232 ("There has been little conclusive evidence that a [correlation between fraternal substance abuse and fetal disorders] can be inferred from male substance abuse.").
ever, does not presently exist. The proposed legislation does not focus on genetic harm to eggs and sperm. Further, even if the proposed legislation was subject to heightened scrutiny, it would withstand such scrutiny, because, as previously discussed, the state's interests are not only important, but are compelling.

B. The Punishment

As stated earlier, an integral part of the proposed legislation is the option of probation with the dual conditions of no pregnancy and of drug treatment. It is likely that an offender will challenge this portion of the legislation as well, both on statutory and constitutional grounds. However, as the following section demonstrates, such probation conditions are legitimate both statutorily and constitutionally. In addition, granting probation accompanied by such conditions is desirable from a policy standpoint.

As discussed earlier, the conditions of probation that courts will impose pursuant to the proposed statute include a no-pregnancy condition and a drug treatment condition. Since the drug treatment condition is unlikely to meet much resistance, it will be discussed first.

If a probationer challenges such a condition, she would meet with little success. Many state statutes specifically provide for or recommend enrollment in a drug treatment program as a condition of probation for those probationers who have a substance abuse problem.

370. Whether the state could, in fact, constitutionally focus on such harm is beyond the scope of this article. If, however, the state could focus on such harm, and such harm did occur, any statute designed to address such conduct would need to cover both men and women.


372. See supra text accompanying notes 359-362.

373. See, e.g., UNITED STATES SENTENCING COMMISSION, supra note 292, § 5B1.4(b)(23).

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol, it is recommended that the court impose a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.
Unlike the drug treatment condition, however, the no-pregnancy condition is novel and controversial. Consequently, probationers will likely challenge it on both statutory and constitutional grounds.

1. Statutory Limitations

As stated earlier, the courts have broad discretion in imposing conditions of probation. Appellate courts generally overturn such conditions only when they fail to satisfy the traditional statutory requirement of relating reasonably to the purpose of the probation statute. As one commentator explains; “[p]erhaps the greatest restriction on permissible probation conditions is limited imagination. Appellate cases abound with the maxim that as long as conditions are sufficiently reasonable and specific, judges have broad latitude in designing them.”

A number of courts have adopted a three-prong test by which a court may test the reasonableness of a particular pro-

---

374. See supra text accompanying notes 299-300.
375. See Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Dist. Ct. App. 1979) (holding conditions “should be reasonably related to [probationer’s] rehabilitation and not unduly restrictive of his liberty or incompatible with his freedom of religion”) (quoting INSTITUTE OF JUDICIAL ADMINISTRATION, A.B.A., STANDARDS RELATING TO PROBATION § 3.2(b) (1970)); State v. Culbertson, 563 P.2d 1224, 1228-29 (Or. Ct. App. 1977) (holding that the court’s discretion is limited by the requirement that a condition of probation bear “a reasonable relationship to the treatment of the accused and the protection of the public”) (citing Porth v. Templar, 453 F.2d 330, 333 (10th Cir. 1971)); UNITED STATES SENTENCING COMMISSION, supra note 292, § 5B1.3(b) (noting that probation conditions must be “reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, ... the purposes of sentencing ... [and] involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing”); CAMPBELL, supra note 288, at 112; Filcik, supra note 288, at 307 (arguing that “[r]easonableness is the traditional standard of review for a probation condition, and thus “[t]he court’s discretion is limited only by the ‘reasonableness’ requirement”); see also supra note 305.
376. CAMPBELL, supra note 288, at 114. See also, e.g., People v. Dominguez, 64 Cal. Rptr. 290, 293 (Ct. App. 1967) (“The trial court has very wide discretion in setting the conditions of probation,” however, that discretion is limited by the requirement that the court exercise its discretion in an impartial manner, “guided by fixed legal principles, [and] exercised in conformity with the spirit of the law.”) (quoting People v. Wade, 348 P.2d 116, 127 (Cal. 1959)).
bation condition. The court examines the contested condition to determine whether it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." A court will declare the condition to be invalid if it meets each of the three parts of the test.

If a judge imposed a no-pregnancy condition pursuant to the proposed legislation, that condition would not meet the three-prong test of invalidity, and an appellate court would therefore uphold it as legally valid. The test is conjunctive. In other words, if any one of the three parts of the test is not met, a court will hold the condition to be valid. In this particular case, two of the three parts are not met. First, the condition does have a relationship to the crime of which the offender was convicted. The probationer's crime is harming a child in utero through substance use or abuse. The crime occurred because she became pregnant while using alcohol or illicit substances or began using such substances during her pregnancy. Thus, since the act of getting pregnant while using or abusing drugs is directly related to her crime, the no-pregnancy condition has a direct relationship to the crime.

Second, the condition does not require or forbid conduct that is not reasonably related to future criminality. As discussed above, if a woman gets pregnant while using or abusing substances, she will harm the child in utero and again commit a crime. Requiring that the woman not get pregnant will forestall her from committing any such additional crimes in the future. Thus, forbidding pregnancy is directly related to future criminality.

There are a limited number of cases in this area. As the following discussion of these cases demonstrates, however,


378. See Dominguez, 64 Cal. Rptr. at 293.

379. See, e.g., Pointer, 199 Cal. Rptr. at 364 (holding that where woman's extreme diet could adversely affect her children before birth, no-pregnancy condition was reasonably related to the crime of child endangerment).

380. See, e.g., id.
they support the preceding analysis. The cases also demonstrate that there is no per se rule as to the validity or invalidity of a no-pregnancy condition. Each case turns on the particular situation of the probationer and on whether the no-pregnancy condition relates reasonably to the purpose of the probation statute.

Only one appellate case exists that bears even a remote factual similarity to that covered by the proposed legislation. In *People v. Pointer*, the court found that the imposed no-pregnancy condition was reasonably related to the purpose of the probation statute. Pointer adhered to, and forced her two children (ages two and four) to adhere to, a strict macrobiotic diet. After repeated attempts to convince her of the dangers of the diet to her children, and after one child almost died, the State charged and convicted Pointer of the felony of child endangerment. The trial judge sentenced Pointer to five years' probation under the following conditions: (1) "she serve one year in county jail; [2] participate in an appropriate counseling program [3] not be informed of the permanent whereabouts of [her youngest child] (who was placed in foster care) and have no unsupervised visits with him [4] have no custody of any children, including her own, without prior court approval and [5] that she not conceive during the probationary period." The court found that the no-pregnancy condition was reasonable because it related to the crime of child endanger-

381. 199 Cal. Rptr. 357 (Ct. App. 1984).
382. Id. at 364.
383. Id.
384. Id. at 359-60. Section 273a of the California Penal Code encompasses the crime of child endangerment and provides in pertinent part:

(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 4, or 6 years.

385. *Pointer*, 199 Cal. Rptr. at 360. (upholding all parts of the sentence except the mandatory no-pregnancy condition which was reversed on constitutional grounds). See also infra text accompanying notes 411-433.
ment, of which the defendant was convicted.\textsuperscript{386} The court recognized that "cases in other jurisdictions have concluded that a condition of probation that a defendant not become pregnant has no relation to the crime of child abuse or to future criminality"; however, it pointed out that the cases relied heavily upon the fact that the state could avoid the abuse entirely by removing the children from the custody of the defendant.\textsuperscript{387} The same was not, however, true in this particular case, because the harm that the trial court sought to avoid could occur \textit{before birth} if the defendant continued her macrobiotic diet while pregnant.\textsuperscript{388} Since the record demonstrated that Pointer would continue to adhere to a strict macrobiotic diet, in spite of the harm that it would cause to an unborn child, the court found that the no-pregnancy condition was related to the crime of child endangerment and to the possibility of future criminality.\textsuperscript{389}

Like the situation encompassed by \textit{Pointer}, the harm of prenatal drug exposure will occur before birth if the women involved continue to use drugs. Further, the addicted women will most likely continue to abuse drugs. As such, a no-pregnancy condition is related to the crime of fetal abuse and to the possibility of future criminality.

In the remaining cases where a no-pregnancy condition was imposed, the court found that the no-pregnancy condition of probation was not reasonably related to the purpose of the probation statute.\textsuperscript{390} The cases, however, differ radically from the situation described in the proposed legislation and are therefore readily distinguishable. In both of the following cases, the no-pregnancy condition had no direct relationship to the crime committed.

\textsuperscript{386} \textit{Pointer}, 199 Cal. Rptr. at 364.
\textsuperscript{387} \textit{Pointer}, 199 Cal. Rptr. at 364.
\textsuperscript{388} \textit{Id}.
\textsuperscript{389} \textit{Id}. The court seemed to assume that the crime of child endangerment encompasses an unborn child. However, the statute does not specifically provide protection for an unborn child. If an unborn child is not covered by the statute, it is difficult to see how the woman's conduct \textit{during} pregnancy could relate to the crime of child endangerment or future criminality. Of course, the court's reasoning in this case would apply to the proposed legislation, since it applies only to conduct occurring during pregnancy.

In *Rodriguez v. State*, the defendant pled *nolo contendere* to a charge of aggravated child abuse. Among the conditions of her probation was a no-pregnancy condition. The appellate court found the no-pregnancy condition to be invalid under the three-prong test of reasonableness. It reasoned that since the trial court prohibited defendant from having custody of any minor children, the no-pregnancy condition “add[ed] nothing to decrease the possibility of further child abuse or other criminality.”

The defendant in *Thomas v. State* was convicted of grand theft and battery after she stole “six gold metal watches from a department store and... struggl[ed] with a store employee and a citizen.” The appellate court found that a no-pregnancy condition of Thomas’ probation was invalid under the three-prong test of reasonableness. The court, not surprisingly, stated that the special condition was “grossly erroneous on its face” and fell within the purview of each one of the three parts of the test.

2. Constitutional Limitations

In addition to mounting a statutory challenge to the no-pregnancy condition, probationers would probably challenge the no-pregnancy condition on constitutional grounds. They would likely argue that the condition violates a woman’s right to procreate. As explained below, such a constitutional challenge is also likely to fail.

---

392. *Id.* at 8.
393. *Id.*
394. *Id.* at 10.
396. *Id.* at 1114.
397. *Id.*
398. *Id.*
399. See Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (characterizing the right to reproduce as “one of the basic civil rights of man”).

Some might argue that it would be unconstitutional to offer an offender a choice between jail and conditional probation. However, if the probation option is invalidated, then we are essentially saying that the offender’s only choice is jail since it is not practical to allow the offender out in the community with no conditions attached and the state is not obligated to allow probation. Thus, while the choice between jail and conditional probation is a difficult one, it is better than no choice at all, which is the option that would be left if the probation option was invalidated. See John P. MacKenzie, *Whose Choice Is It, Anyway?*, N.Y. TIMES, Jan. 28, 1991, at A22. The proposed legislation presents the
Traditionally, appellate courts limited their review of probation conditions to the statutory "reasonableness" standard and were generally unconcerned with whether the conditions infringed upon any constitutional rights. In the past, courts often justified their unconcern by reasoning that since probation was a privilege, an "act of grace" by the state, judges were free to impose any legally authorized conditions upon the probationer. If the probationer was concerned with the limitations placed upon her civil liberties, she could reject probation and opt for the traditional prison sentence.

Although the "grace" theory of probation has lost some of its popularity, modern courts still tend to uphold condi-

400. See Brilliant, supra note 288, at 1376.
401. See People v. Pointer, 199 Cal. Rptr. 357, 363 n.7 (Ct. App. 1984). The court cited a line of federal cases that declared:

[Probation was] not a matter of right but a "privilege" or "act of grace" or "act of clemency." This characterization of probation has repeatedly been advanced as a reason, usually among others, to indulge the discretion of a sentencing court to impose conditions that limit constitutional rights. The theory suggests that, since a sentencing court may completely withhold the benefit of probation, it should therefore be permitted to encumber the benefit with even the most extreme conditions.

Id. (citations omitted). See also, e.g., People v. Blankenship, 61 P.2d 352, 353 (Cal. Ct. App. 1936) ("[P]robation is not a right . . . . It is 'an act of grace and clemency granted to a deserving defendant whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted.'") (quoting People v. Payne, 289 P. 909, 911 (Cal. Ct. App. 1930)); Brilliant, supra note 288, at 1366 n. 61 (citing Note, Judicial Review of Probation Conditions, 67 COLUM. L. REV. 181, 190 (1967)) (stating "act of grace' theory suggests that constitutional limitations upon conditions do not exist if the defendant is granted the privilege of probation.

402. See Blankenship, 61 P.2d at 353-54 (upholding condition that twenty-three-year-old male submit to a vasectomy, court noted that defendant was not compelled to submit to the operation; rather, "[h]e was permitted to elect whether he would comply with the condition and receive the clemency which he asked or decline . . . and accept the penalty which the law provides as punishment for his offense").

403. See People v. Pointer, 199 Cal. Rptr. at 363 n.7 ("Although some reviewing courts continue to give lip service to this [grace] theory, it was repudiated . . . by the United States Supreme Court.") (citations omitted). The Pointer court quoted Gagnon v. Scarpelli, 411 U.S. 778, 782 n.4 (1973), where the Supreme Court stated that "[i]t is clear at least after Morrissey v. Brewer, 408
tions of probation if they satisfy the "reasonableness" requirement, even if the conditions infringe upon constitutional rights.\textsuperscript{404} As one commentator has explained, "[w]hether probation is itself a sentence or it is granted upon suspension of a sentence, the probationer remains a convicted criminal. Therefore, probation may include conditions that would fail to pass constitutional muster if the government attempted to impose them on the citizenry at large."\textsuperscript{405}

In addition, although another commentator has suggested that the "act-of-grace theory has given way to the 'unconstitutional conditions' doctrine," this doctrine provides only that conditions imposed when a court grants a privilege or gratuity, such as probation, must be reasonable.\textsuperscript{406} Thus, because the proposed no-pregnancy condition satisfies the "reasonableness" requirement,\textsuperscript{407} a court may uphold the condition, refusing to be swayed by arguments that the condition infringes upon constitutional rights.

Some courts are, however, more sensitive to constitutional rights in the probation context and apply what one

\textsuperscript{404} See Filcik, supra note 288, at 309 ("Generally, courts will uphold conditions imposing on constitutionally protected rights if the condition is reasonably related to the crime committed or the defendant's future criminality."); see also, e.g., Gilliam, 159 Cal. Rptr. at 77 (holding that since conditions satisfied the Dominguez reasonableness test, they were valid even though they intruded on the defendant's constitutional rights).

\textsuperscript{405} Filcik, supra note 288, at 309.

\textsuperscript{406} See Brilliant, supra note 288, at 1366 n. 61 (citing Note, Judicial Review of Probation Conditions, 67 COLUM. L. REV. 181, 190-91 (1967)); see also Wiggins v. State, 386 So. 2d 46, 47 (Fla. Ct. App. 1980) ("Under Florida law, constitutionally protected rights can be abridged by conditions of probation if they are reasonably related to the probationer's past or future criminality or to the rehabilitative purposes of probation."); Rodriguez v. State, 378 So. 2d 7, 9 (Fla. Ct. App. 1979) (holding that "constitutional rights of probationers are limited by conditions of probation which are desirable for the purposes of rehabilitation," and thus the court has "no constitutional difficulty with the [no-pregnancy] condition[ ] imposed, if [it is] otherwise [a] valid condition of probation"); State v. Culbertson, 563 P.2d 1224, 1229 (Or. Ct. App. 1977) (explaining that conditions on or restrictions of a probationer's civil liberties are allowed as long as the condition "bear[s] a reasonable relationship to the reformation of the offender or the protection of the public").

\textsuperscript{407} See supra text accompanying notes 374-398.
commentator has labeled “the unconstitutional condition doctrine.”\(^{408}\) This doctrine is exemplified by the *ABA Standards*, which provide:

Conditions . . . should be reasonably related to the purposes of sentencing, including the goal of rehabilitation, and should not be unduly restrictive of the probationer's liberty or autonomy. Where fundamental rights are involved, special care should be taken to avoid overbroad restrictions or restraints which are so vague or ambiguous as to fail to give real guidance . . . \(^{409}\)

At least one court has held that a no-pregnancy condition, while reasonably related to the purposes of probation, was invalid because it unconstitutionally infringed upon the probationer's right to procreate.\(^{410}\)

In *People v. Pointer*,\(^{411}\) as previously discussed, the appellant was convicted of endangering her children by forcing them to adhere to a macrobiotic diet.\(^{412}\) The judge sentenced her to probation with a no-pregnancy condition.\(^{413}\) In this case, the California court recognized that “the government may impose conditions of probation which qualify or impinge upon constitutional rights when circumstances inexorably so require.”\(^{414}\) However, the court also found that because a no-pregnancy clause implicated the fundamental right to privacy, it would be upheld only if it withstood special scrutiny.\(^{415}\) More specifically, the condition must be narrowly drawn, and no alternatives must “exist which are less violative of a constitutional right and are narrowly drawn so as to correlate more closely with the purpose contemplated.”\(^{416}\) In applying this standard, the court found that less onerous alternatives to the no-pregnancy condition existed.\(^{417}\) For example, “upon becoming pregnant [appellant could] be re-

---


\(^{409}\) *ABA Standards for Criminal Justice* § 18-2.3(e)(iii) (2d ed. 1980).


\(^{411}\) *Id.*

\(^{412}\) *Id.* at 360.

\(^{413}\) *Id.*

\(^{414}\) *Id.* at 363.

\(^{415}\) *Id.* at 365.

\(^{416}\) *Id.* at 364-65.

\(^{417}\) *Id.*
quired to follow an intensive prenatal and neonatal treatment program monitored by both the probation officer and by a supervising physician."\textsuperscript{418} And if she gave birth, the child could be "removed from her custody and placed in foster care."\textsuperscript{419}

With regard to pregnant substance abusers, however, such alternatives are not feasible. As previously discussed, many addicted women do not know that they are pregnant until late in their pregnancy; therefore, a large part of the harm caused by \textit{in utero} drug exposure has already occurred. Further, due to the nature of our foster care system, removing the child from the woman's care will not generally provide much added protection for the already damaged child. In order to most effectively protect children from \textit{in utero} exposure, the state must try to stop as much drug use and abuse as possible \textit{before} a child is conceived. The proposed legislation is the least restrictive and most effective method of reaching this goal.

In addition, in \textit{Pointer} the defendant was sentenced to probation, and the probation conditions were imposed upon her by the state.\textsuperscript{420} Under the proposed legislation, the defendant is given a clear choice of jail or probation. If she chooses probation, she also necessarily chooses the probation conditions. Thus, this is not a situation where the state is imposing a no-pregnancy condition upon a woman. She is given a choice, albeit a difficult choice. As such, the no-pregnancy condition does not infringe upon the woman's fundamental right to procreate, because such an infringement occurs only where there is state action. Here, the woman is consciously waiving her right to procreate for the length of her probation term.

\section{V. Policy Concerns Relating to Probable Discriminatory Impact of the Proposed Legislation}

While this author is wary of the "slippery slope" and the potential horror of Margaret Atwood's \textit{The Handmaid's Tale},\textsuperscript{421} she believes that intelligent people can restrict legis-

\textsuperscript{418} \textit{Id.}
\textsuperscript{419} \textit{Pointer}, 199 Cal. Rptr. at 365.
\textsuperscript{420} \textit{Id.} at 360.
\textsuperscript{421} \textsc{ Margaret Eleanor Atwood}, \textit{The Handmaid's Tale} (1986) (the state designated certain women to bear children and regulated their pregnancies).
lation so as to avoid the slide down the slope. Our society must be wary of letting our legitimate fears freeze us into inaction that leads to harm to others. Currently, scholars are bouncing around the moral, constitutional, and philosophical dilemmas in the prenatal drug exposure area like so many balls. It is not likely that the dilemmas will be resolved in the near future; and while we sit in our pristine, drug-free, affluent ivory towers, trying to resolve the dilemma, drug-affected babies are being born and abandoned in droves. What is needed now is less debate and more action.

That is not to say that the complex issues in this area are not important. They are. However, they have been discussed thoroughly and will continue to be discussed. While the author has her own biases with regard to these issues, discussion of them is not the purpose of this article. Rather, the author's purpose is to propose a workable, realistic solution to a serious problem. This article proposes a solution with a bias toward protecting the exposed fetus, but also recognizes the need to place limitations to avoid having the solution taken up and abused by persons whose interests are actively hostile to the equality interests of women and minorities.422

One policy issue is significant enough to warrant discussion. There is a real concern among minorities that legislation of the type proposed will allow the dominant culture to control their reproduction again.423 For African-Americans, memories of such control during slavery and beyond remain clear and vivid. In addition, there is a correlative concern that such a proposal constitutes the eugenics movement all over again.424

422. The author also recognizes that large numbers of children are being harmed by "exposure to hazardous chemicals." Oberman, supra note 159, at 511. A lot of this harm takes place in the workplace; such harms, however, are beyond the scope of this article.

423. See Nolan, supra note 83, at 20.

When criminal prosecution takes the place of treatment and support, the symbolism that emerges is not only that women should not use drugs while pregnant, but that women who use drugs should not become pregnant. Since drug use is correlated with socioeconomic status and therefore with racial background, pursuing a criminal justice approach will obviously have a disparate impact on black and Hispanic as opposed to white communities.

Id.

424. Eugenics (i.e., selective breeding), led to government sterilization of prisoners, blacks, and immigrants. See generally, Patricia A. King, Helping Wo-
One response to such concerns is that the problem of substance-abusing pregnant women cuts across all socioeconomic levels. Therefore, the legislation is not intended to target only poor and/or minority women. However, although the legislation is not designed to target poor and minority women, given a past history of discriminatory reporting by hospitals of substance abuse, it is likely that this legislation will disparately impact poor and minority women.

The solution to the problem of discriminatory reporting and discriminatory enforcement of the proposed legislation lies not in prohibiting the passage of such legislation. Rather, it lies in addressing the discrimination itself. Mandatory reporting needs to be "based on objective medical criteria." "It is clear that standards based on medical criteria..." 

---


425. In a NAPARE "survey of 36 hospitals across the country," researchers found that use of drugs by pregnant women "was not confined to urban areas or particular racial or socioeconomic groups." Fink, supra note 24, at 2-3 (citations omitted); see also Logli, supra note 140, at 24.

Further, a population-based study in Pinellas County, Florida, conducted in 1989 by NAPARE, indicated that "the overall prevalence of drug or alcohol use... was similar among women who received care from private physicians and those cared for at public health clinics, [and that]... the rate of substance abuse by pregnant women... was similar for whites and blacks." 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, 1205 (1990).

426. The 1989 NAPARE study conducted in Pinellas County, Florida, see supra note 426, demonstrated that poor and African-American women in Pinellas County were much more likely to be reported to health authorities for substance abuse during pregnancy. Chasnoff et al., Drug Use in Pregnancy, supra note 32, at 1205-06. "During the six-month period [of the study] during pregnancy." Id. at 1202. From this sample the doctors learned that African-American women were "9.6 times more likely than... white wom[e]n to be reported, [and]... poor women were more likely than others to be reported." Id. at 1204, 1202. This racial difference in reporting persisted even when the numbers were analyzed in terms of whether the women received private or public health care. Id. Only 44% of the women at the public health center were African-American, yet 67% of the women reported from these centers were African-American. Id. In addition, while less than 10% of the women at private offices were African-American, 55% of those reported from private offices were African-American. Id. at 1204.

427. See Rinkel, supra note 12, at 1 ("[B]iases in testing and reporting... inaccurately suggest that more minority than white women abuse drugs during pregnancy and that prenatal substance abuse is largely restricted to lower socioeconomic urban populations.").

428. Chasnoff et al., Drug Use in Pregnancy, supra note 32, at 1202.
ria for the identification of intrauterine drug or alcohol exposure must be an integral part of all state legislation, especially when the reporting of such cases is required by state law." Reporting laws similar to Florida’s should be avoided. Florida’s regulation requires only that the person reporting have a “‘reasonable cause to suspect’ maternal drug or alcohol use.” Such a vague criterion “can lead to variations in reporting” and allows for discriminatory reporting.

Even if, despite all our efforts, the legislation is applied in a discriminatory fashion, this is not necessarily a negative result. While the use of crack is “not confined to any race or class, the popularity of crack among poor minority women has had particularly devastating effects.” Such effects are due to the fact that, according to the 1980 census, seventy percent of families in the poorest one-third of the African-American community are headed by women. Since parental drug abuse is often thought to “correlate[ ] to some degree with child neglect,” the state will often take custody of the children, thus putting them into the overburdened foster care system.

Thus, without some intervention, the African-American community will continue in the ever-escalating cycle of drug use and abuse and all of its associated evils. This cycle increasingly wreaks havoc upon the African-American community, threatening the continued viability of the community.

Of course, even with the above concerns the author would not advocate most forms of governmental intervention, especially since, in the author’s opinion, the legislation would be administered primarily by non-minority, middle-class individuals. However, it must be kept in mind that the proposed legislation is designed to be beneficial rather than punitive. Implementation of the proposed legislation, coupled with comprehensive drug treatment, prenatal care, and parenting classes, would allow minority and poor women to

429. *Id.* at 1206.
430. *Id.* at 1205
431. *Id.*
433. *Id.*
work to retain the child or children they already have and to have a good chance of later having healthy, substance-free children.

Unless all aspects of the proposed legislation and the larger plan are put in place, (if, for example, legislators tried to use the no-pregnancy component by itself), the balance would be tipped in the other direction and the policy concerns previously outlined would weigh against such legislation. If, however, society allocates the necessary resources, the proposed legislation is the best method of protecting as many children as possible from drug exposure and doing so as soon as possible.

VI. CONCLUSION

Millions of children have been, are being, and will continue to be harmed by prenatal drug exposure. The time for debate on what to do to alleviate the problem is long past. An effective solution needs to be implemented. All previously proposed alternatives lack one or more important features. The proposed legislation fills this gap and, as a result, is the best way to protect as many children as possible from any harm. It is designed to do so as soon as possible and with the least amount of infringement on a woman's rights as is possible under the circumstances. The proposed legislation will infringe upon some rights; however, in deciding which interests predominate, the balance weighs heavily in favor of the unborn child who cannot protect himself rather than in favor of the woman who is ingesting harmful substances and who, although she might be a victim herself, has at least some control over whether to engage in the prohibited conduct.