

Spring 1990

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Recommended Citation

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A PROPOSAL TO ILLINOIS LEGISLATORS: REVISE THE ILLINOIS CRIMINAL CODE TO INCLUDE CRIMINAL SANCTIONS AGAINST PRENATAL SUBSTANCE ABUSERS

Although prenatal substance abuse¹ is an old phenomenon,² the staggering rise in cocaine/crack-exposed newborns³ dramatically reveals that America must now confront this acute societal problem.⁴ Prenatal exposure to illicit drugs can cause lasting damage to

1. Prenatal substance abuse refers to maternal drug abuse during the time of fertilization until birth. Although "Prenatal" and "perinatal" are often used interchangeably, perinatal refers to the time period immediately preceding birth.

2. See Comment, *Maternal Substance Abuse: The Need To Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1217 & n.50 (1987) (prenatal drug abuse and fetal disorder concern of doctors for over 30 years).

3. See *Chicago Crisis: More Moms Pass Cocaine to Their Babies*, J. Star, July 8, 1988, at B6 (Peoria) [hereinafter *Chicago Crisis*]; Patner, *Handful of Prosecutors Start Treating Pregnant Drug Users as Child Abusers*, Wall. St. J., May 12, 1989, at A5F ("'cocaine-babies' is a rapidly growing phenomenon"). The number of cocaine-exposed babies has more than tripled in Cook County over a three-year period. In 1985-1986, there were 247 cases of drug-exposed babies under the age of one year in Cook County. In 1986-1987, the number increased to 433 cases. In the first ten months of 1988, however, there were 828 reported cases. In Illinois, for the same ten month period in 1988, there were 933 cases of drug-affected babies. *Chicago Crisis*, *supra*, at B6. In an eight month period of the 1989 fiscal year, Illinois reported more than 1,600 cocaine-exposed babies. Patner, *supra*, at A5F. Nearly all of these cases involved crack cocaine. Officials believe that crack-cocaine plays a major role in the rising numbers. Crack, a concentrated, smokeable form of cocaine, is cheap and extremely addictive. *Chicago Crisis*, *supra*, at B6.

This growing trend of cocaine-exposed infants is nationwide. See Diegmüller, *Passing a Legacy of Drug Addiction*, Insight, Sept. 4, 1989, at 22; Trost, *Born to Lose: Babies of Crack Users Crowd Hospitals, Break Everybody's Heart*, Wall St. J., July 18, 1989, at A1 (Midwest ed.). Half of the babies born at Washington, D.C.'s D.C. General Hospital are drug-exposed. In D.C., officials believe that the outrageous infant mortality rate of 23.2 deaths per 1000 babies is, in large part, attributable to maternal use of crack. Diegmüller, *supra*, at 22. In October, 1989, Detroit's Hutzel Hospital released the shocking results of an extensive study. Hundley, *Infants: A Growing Casualty of the Drug Epidemic*, Chicago Tribune, Oct. 16, 1989, § 1, at 1. Doctors were expecting to find that 20% of the babies delivered at Hutzel were exposed to drugs *in utero*. However, the study revealed that the real percentage of drug-exposed infants delivered there was 42.7%. *Id.* Chicago's Cook County Hospital estimates its percentage to be about 15-20%, but the hospital does not routinely test. *Id.* at 9. In addition, Hutzel estimates that 60% of the infants in its neonatal intensive care unit are there for drug disabilities. *Id.*

4. See *Chicago Crisis*, *supra* note 3, at B6. Cook County is facing an "epidemic" in the number of cocaine-exposed babies. The county also faces a "crisis" in foster care services for these infants. Several babies remain in hospitals even though they do not need medical treatment. The county simply has no foster parents available for them. *Id.*

the fetus⁵ which will impede the child's physical, emotional, and intellectual development.⁶ Maternal prenatal drug abuse also causes grave financial and intangible costs to society as a whole.⁷

As this fetal abuse⁸ increases, America has found itself faced with a dilemma: how can we protect the fetus from this prenatal maternal substance abuse? To date, America is unable to cope with the growing problem. In an effort to confront this prenatal problem, recent legislation and case law have extended state child abuse statutes to include the unborn, labelling drug-exposed infants as neglected or abused children.⁹ In addition, a few prosecutors have brought criminal charges against the mother for the fetal damage that her conduct has caused.¹⁰ Like these cases, the pivotal question involved in this comment is whether the state can criminalize prenatal illegal substance abuse¹¹ and force the mother to provide a drug-free environment for the fetus.

Although there may be no solution to prenatal substance abuse, this comment will attempt to provide a meaningful analysis of America's multi-faceted dilemma concerning the protection of the fetus from illegal drug exposure. First, this comment will examine the need for criminal statutes regulating the mother's conduct. In determining whether such a need exists, this comment will explore the incidence and effects of prenatal substance abuse along with the remedies available to date for addressing the growing problem of drug-exposed infants.

5. "Fetus" is a difficult term to define. See Comment, *Recovery for Prenatal Injuries: The Right of a Child Against its Mother*, X SUFFOLK U.L. REV. 582, 582 n.1 (1976) (collection of medical definitions). For the purposes of this comment, "fetus" is defined as "any individual of the human species from fertilization until birth." ILL. REV. STAT. ch. 38, ¶ 9-3.2(c)(1) (Supp. 1988). "Neonate" shall be defined as a newly born infant through two months of life.

6. For an examination of the adverse effects of prenatal drug use on the fetus/neonate, see *infra* notes 20-25 and accompanying text.

7. See Diegmüller, *supra* note 3, at 22 (community must bear financial and social costs). For a discussion of the financial and social costs to the public health and welfare resulting from prenatal drug abuse, see *infra* notes 36-54 and accompanying text.

8. Comment, *supra* note 2, at 1225 & n.99; Reardon & Pearson, *Baby's Drug Death Stirs Mothers' Rights Flap*, Chicago Tribune, May 10, 1989, § 1, at 1.

9. For a discussion concerning the extension of state civil child abuse and neglect statutes to the fetus, see *infra* notes 58-70 and accompanying text.

10. Patner, *supra* note 3, at A5F. For an examination of the few cases in which prosecutors have pressed charges, see *infra* notes 72-81 and accompanying text.

11. This comment addresses only prenatal use of illegal or controlled substances as defined in the Illinois' Controlled Substances Act, ILL. REV. STAT. ch. 56, ¶ 1102 (Supp. 1988) and the Cannabis Control Act, ILL. REV. STAT. ch. 56, ¶ 701 (Supp. 1988). Because of the alarming rise in cocaine use and births, this comment will particularly focus on cocaine.

This comment does not address prenatal use of other known teratogens such as alcohol, cigarette smoke, and caffeine. For a thorough discussion of the effects of prenatal alcohol ingestion and cigarette smoke, see Comment, *supra* note 2, at 1210-18.

Second, this comment will examine the constitutionality of criminalizing prenatal substance abuse. In determining the constitutionality of state regulation, this comment will identify the mother's constitutional rights which could be infringed by state legislation in the prenatal context. This comment will then examine the state's interests in criminalizing this conduct. Ultimately, this comment will conclude that the state may constitutionally impose criminal sanctions for prenatal substance abuse.

Finally, this comment will survey Illinois' existing statutory framework to determine the state's concern with drug use, maternal/fetal health, and fetal life. In conclusion, this comment will call for a revision of the Illinois criminal code to include criminal sanctions against prenatal substance abusers, coupled with coercive, comprehensive drug treatment.

I. THE NEED FOR CRIMINAL SANCTIONS TO COMPEL COMPREHENSIVE DRUG TREATMENT

A. Incidence and Demographics of Cocaine Use

Although drug users' abuse patterns for most illegal substances have remained constant or decreased since 1982,¹² cocaine use has increased at an alarming rate.¹³ Significantly, the increase in cocaine use among expectant mothers has paralleled the dramatic rise in use among the general populace.¹⁴ In 1988, approximately 11 percent of all newborns were exposed to illegal drugs *in utero*.¹⁵ Cocaine was involved in 75 percent of these cases.¹⁶ At least one authority esti-

12. Chasnoff, *Newborn Infants With Drug Withdrawal Symptoms*, 9 PEDIATRICS IN REVIEW 273, 273 (1988) [hereinafter *Drug Withdrawal Symptoms*].

13. In a 1977 National Drug Abuse survey, 1.6 million survey respondents admitted to cocaine use within the month prior to the survey. *Id.* In 1985, this figure had soared to 5.8 million. *Id.* at 274. Physicians now believe that approximately thirty million people have tried cocaine at least once and five million Americans use cocaine regularly. Chasnoff, Chisum & Kaplan *Maternal Cocaine Use and Genitourinary Tract Malformations*, 37 TERATOLOGY 201, 201 (1988) [hereinafter *Maternal Cocaine Use*]; Chasnoff, Burns, Schnoll & Burns, *Cocaine Use in Pregnancy*, 313 NEW ENGLAND J. OF MEDICINE 666, 668 (1985) [hereinafter *Cocaine Use*].

14. MacGregor, Keith, Chasnoff, Rosner, Chisum, Shaw, Minogue, *Cocaine Use During Pregnancy: Adverse Perinatal Outcome*, 157 AM J. OBSTET. GYNECOL. 686, 686, 688 (1987) [hereinafter *Adverse Perinatal Outcome*].

15. NATIONAL ASSOCIATION FOR PERINATAL ADDICTION RESEARCH AND EDUCATION (NAPARE), A First: National Hospital Incidence Survey (survey available from NAPARE at 11 E. Hubbard St., Ste. 200, Chicago, Illinois) [hereinafter *NAPARE Survey*]. NAPARE conducted a 36-hospital survey nationwide accounting for 154,856 births. *Id.* Based on the 11% figure, NAPARE's president, Dr. Ira Chasnoff, estimates that "as many as 375,000 infants may be affected each year." *Id.* For more statistical information on drug-exposed births, see *supra* note 3.

16. Trost, *supra* note 3, at A6 (citing Dr. Ira Chasnoff, Director of NAPARE). Two thirds of infants exposed to cocaine were victims of crack-cocaine. Lacayo, *Nobody's Children*, Time, Oct. 9, 1989, at 91, 92.

mates that one out of every ten newborns have suffered from *in utero* drug exposure.¹⁷

In addition to its alarming abuse pattern, cocaine has changed the traditional image of the drug abuser.¹⁸ Thousands of pregnant cocaine users are women from the middle and upper class.¹⁹ Although this increase in prenatal cocaine abuse is shocking, the effects of prenatal cocaine abuse on the child, mother and the public health and welfare are even more frightening.

B. Effects of Prenatal Cocaine Abuse

1. Cocaine's Effects on the Fetus and Neonate

Results of medical research conclusively demonstrate that maternal conduct and emotional well-being directly affect the fetal environment and subsequent fetal development.²⁰ The effects of *in utero* exposure to illegal drugs include fetal death, physical deformities, psychomotor abnormalities, and growth and mental retardation.²¹ Recent research results indicate that children exposed to drugs *in utero* are at risk for long-term developmental difficulties.²²

17. NAPARE Survey, *supra* note 15.

18. Chasnoff, *Perinatal Effects of Cocaine*, 10 CONTEMPORARY OB/GYN 163, 163 (1987) [hereinafter *Perinatal Effects*].

19. *Id.*

20. Comment, *Constitutional Limitations on State Intervention in Prenatal Care*, 67 VA. L. REV. 1051, 1065 (1981) [hereinafter *Constitutional Limitations*]. Remarkable advances in perinatology and fetal surgery have enabled the medical community to treat the fetus as a patient in its own right. See Comment, *supra* note 2, at 1230. Clinicians are now able to monitor the fetus and, consequently, research and study fetal development. See Comment, *The Fetal Patient and the Unwilling Mother: A Standard for Judicial Intervention*, 14 PAC. L.J. 1065 (1983) [hereinafter *Fetal Patient*]. Researchers have identified several dangerous substances which cause abnormal fetal development. Comment, *supra* note 2, at 1210. These agents, teratogens, are responsible for a great percentage of preventable cases of infant morbidity and mortality. Mackenzie, Collins & Popkin, *A Case of Fetal Abuse?* 52(4) AMER. J. ORTHOPSYCHIAT. 699, 700-01 (1982) [hereinafter *Fetal Abuse*]. Among teratogens, illicit drugs rank with the most dangerous. See Comment, *supra* note 2, at 1217.

21. See Comment, *supra* note 2, at 1210, 1217; Comment, *supra* note 5, at 602-03.

22. Chasnoff, Burns, Burns & Schnoll, *Prenatal Drug Exposure: Effects on Neonatal and Infant Growth and Development*, 8 NEUROBEHAVIORAL TOXICOLOGY AND TERATOLOGY 357, 361 (1986) [hereinafter *Prenatal Drug Exposure*] ("drug-seeking" family environment and "neurobehavioral deficits" put drug-affected infants "at high risk for developmental and school problems"). In a rare study on the developmental progress of children who had experienced intrauterine drug-exposure, physicians determined that drug-affected children maintained a smaller head circumference than unaffected children through the age of two years. *Id.*; Hundley, *supra* note 3, § 1, at 9. The smaller head size is an indicator for risk of long term developmental problems. *Prenatal Drug Exposure*, *supra*, at 361. The drug-affected two year olds also scored the poorest on tests which measure ability to concentrate, interact in groups, and function in an unstructured environment. Hundley, *supra* note 3, § 1, at 9. They have shorter attention spans and are easily distracted which puts them at risk in the classroom. *Id.* (quoting Dr. Ira Chasnoff).

Further, although drug-addicted infants are already "[b]orn to [l]ose,"²³ their withdrawal behavior puts them at risk for physical abuse.²⁴ Due to the alarming number of cocaine-exposed newborns, cocaine's effects on the fetus and neonate are now the perinatologist's and pediatrician's most serious concern.²⁵

23. Trost, *supra* note 3, at A1.

24. *Perinatal Effects*, *supra* note 18, at 176 (drug-exposed infants suffer increased incidence of abuse and neglect); Regan, Ehrlich & Finnegan, *Infants of Drug Addicts: At Risk for Child Abuse, Neglect, and Placement in Foster Care*, 9 *NEUROTOXICOLOGY AND TERATOLOGY* 315, 315 (1987) [hereinafter *Infants of Drug Addicts*] (mother may be abusive, irritable, and neglect to feed and clean infant); Reardon & Pearson, *supra* note 8, § 1, at 18.

The mother who must undergo her infant's withdrawal symptoms is subject to "a special torment." Trost, *supra* note 3, at A6. Usually cocaine-withdrawing neonates are extremely irritable, hyperactive, tense, and inconsolable. *Drug Withdrawal Symptoms*, *supra* note 12, at 274-75. They thrash about and tremble. *Id.* at 274. These infants have very poor "organizational response to environmental stimuli" (state control) and orientation. Schneider & Chasnoff, *Cocaine Abuse During Pregnancy: Its Effects on Infant Motor Development — A Clinical Perspective*, 2 *TOPICS IN ACUTE CARE & TRAUMA REHABILITATION* 59, 60 (1987) [hereinafter *Infant Motor Development*]. Some cannot even maintain an alert state. Chasnoff, Griffith, MacGregor, Dirkes, Burns, *Temporal Patterns of Cocaine Use in Pregnancy*, 261 *J.A.M.A.* 1741, 1743 (1989) [hereinafter *Temporal Patterns*]. Although these babies long to be cuddled, their damaged central nervous systems (CNS) make them hypersensitive to touch and audio/visual stimuli. Trost, *supra* note 3, at A6 (quoting Dr. Mehnur Abedin, a neonatologist and director of nursery at D.C. General, Washington, D.C.). Over-stimulation results in shrill, frantic crying confounded by an absence of self-calming capabilities. Brody, *Cocaine: Litany of Fetal Risks Grows*, *N.Y. Times Science*, Sept. 6, 1988, at 19, 23.

These infants also exhibit significant psychomotor impairment. *Infant Motor Development*, *supra*, at 60. Their muscle tone is very rigid and over-extended. *Id.* As a result, these infants are hard to feed and have poor sleeping habits. *Id.* In addition, they lose a lot of weight and have difficulty regaining birth weight level. *Prenatal Drug Exposure*, *supra* note 22, at 360.

The baby's withdrawal symptoms make bonding very difficult and frustrating for the mother. *Drug Withdrawal Symptoms*, *supra* note 12, at 275 (withdrawal symptoms interrupt normal attachment vital to early maternal/fetal relationship); *Perinatal Effects*, *supra* note 18, at 176 (bonding hindered by infant withdrawal). She may feel anger, rejection, guilt, and/or depression. *Perinatal Effects*, *supra* note 18, at 176; *Infants of Drug Addicts*, *supra*, at 315-16. All of these postnatal factors combine to place the baby at risk for physical abuse. *Infant Motor Development*, *supra*, at 60.

25. Although the effects of heroin and methadone on fetal development are fairly well-documented, the effects of prenatal cocaine abuse is a very new area of research. See *Temporal Patterns*, *supra* note 24, at 1741 (information sparse); *Adverse Perinatal Outcome*, *supra* note 14, at 686, 688 (few studies examining cocaine risk to mother and fetus). Recently, studies have illustrated that maternal prenatal cocaine abuse has wide-ranging effects on the fetus and neonate. Brody, *supra* note 24, at 19. Scientists now associate *in utero* exposure to cocaine with sudden infant death syndrome (SIDS), spontaneous abortions, premature birth, and seizures. *Id.* In one study, the rate of SIDS for cocaine-exposed infants was more than triple the rate for heroin/methadone-exposed infants. *Perinatal Effects*, *supra* note 18, at 176. Scientists also associate cocaine use in the first trimester with fetal genitourinary tract malformations. *Maternal Cocaine Use*, *supra* note 13, at 202; *Temporal Patterns*, *supra* note 24, at 1744. Maternal cocaine use causes fetal vasoconstriction which reduces the blood and oxygen to the fetus (fetal hypoxia) and results in fetal growth retardation. See *Temporal Patterns*, *supra* note 24, at 1743; *Maternal Co-*

2. Cocaine's Effect on Prenatal-Maternal Health

Not only does the pregnant mother's illicit drug use seriously jeopardize the fetus, its also imperils the mother herself.²⁶ Cocaine's effect on an individual's cardiovascular system is well-documented.²⁷ Cocaine use can cause maternal hypertension and soaring blood pressure which may lead to a seizure or stroke.²⁸ In addition, many women who have used cocaine in their third trimester report increased fetal activity and/or a sudden onslaught of uterine contractions within minutes of using the drug.²⁹ Prenatal cocaine use also results in complicated premature deliveries and is associated with abruptio placentae, a serious complication in which the placenta is literally torn from the uterine wall.³⁰ Maternal drug abuse also puts these women and the children they carry at high risk for infection by the AIDS virus.³¹

Cocaine abuse has deleterious psychological effects on maternal health as well as physiological complications. Cocaine has a unique ability to undermine the maternal instinct causing the mother to be completely oblivious to her fetus/newborn.³² Many of these women

caine Use, *supra* note 13, at 203. These babies are born with low birth weights, are small for gestational age, and have smaller head circumferences than drug-free neonates. *Temporal Patterns*, *supra* note 24, at 1743. In addition, drug-affected infants show significant impairment in neonatal neurobehavior and psychomotor development as well as symptoms of neonatal drug withdrawal syndrome. See *Prenatal Drug Exposure*, *supra* note 22, at 361. For a discussion concerning the latter three effects, see *supra* note 24.

26. *Adverse Perinatal Outcome*, *supra* note 14, at 689; *Perinatal Effects*, *supra* note 18, at 175-76.

27. Cocaine is a stimulant that impairs the proper functioning of an individual's CNS by blocking the reuptake of dopamine and norepinephrine (neurotransmitters) at the nerve cell's synapse. Schuckit, *Cocaine: An Update, Drug Abuse & Alcoholism Newsletter*, at 1-2 (newsletter available from the Vista Hill Foundation, 3420 Camino del Rio North, Ste. 100, San Diego, CA). This can cause over-stimulation of the nervous system which results in rapid heartbeat, elevated respiratory rate, and an elevated body temperature. Larger doses can lead to grand mal convulsions, extremely elevated blood pressure which may result in stroke, and a very high body temperature. These conditions lead to shock. In addition, cocaine use can induce a temporary psychosis very similar to schizophrenia, resulting in hallucinations and complex paranoid delusions. *Id.*

28. *Adverse Perinatal Outcome*, *supra* note 14, at 689 (extreme dangers of cocaine not grasped by public); Trost, *supra* note 3, at A6; Schuckit, *supra* note 27, at 2.

29. *Adverse Perinatal Outcome*, *supra* note 14, at 689. *Perinatal Effects*, *supra* note 18, at 175 (complications of pregnancy).

30. *Adverse Perinatal Outcome*, *supra* note 14, at 689. Abruptio placentae usually occurs within an hour of cocaine ingestion. *Perinatal Effects*, *supra* note 18, at 175.

31. *Drug Withdrawal Symptoms*, *supra* note 12, at 276; Comment, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 *DICK. L. REV.* 691, 708-10 & nn.112-25. The estimated number of newborns who will be infected with AIDS by 1991 is 20,000. Lacayo, *supra* note 16, at 91-92.

32. *Infants of Drug Addicts*, *supra* note 24, at 315 (maternal drug abuse critical factor in abuse, neglect, abandonment). Paramedics and hospital emergency staff

are so preoccupied with their drug habit that they abandon their newborns in hospitals (boarder babies), sometimes without even naming the baby.³³ Many mothers also indicate that they feel tremendous guilt over the physiological and psychological effects that their drug use has had on their child.³⁴ Currently, the ramifications of cocaine's psychological effects on maternal health are unknown. Certainly, the prognosis is quite negative.

3. *Effects of Prenatal Cocaine Abuse on Public Health and Welfare*

Aside from the immense suffering involved, prenatal drug abuse has generated an enormous financial burden for society. Medical treatment costs for distressed, disabled, and/or withdrawing newborns are very high.³⁵ In addition, hospital tabs for "boarder babies"³⁶ are astronomical.³⁷ Since Medicaid provides only \$6,100 max-

have seen the drug's psychological devastation firsthand. They relay horrifying stories of pregnant women rushed to the hospital in premature labor while desperately clinging to their crack, as if not even aware of her emergency situation. See Diegmüller, *supra* note 3, at 22; Trost, *supra* note 3, at A6. Cocaine's effect on the maternal instinct is difficult to comprehend. One nurse at San Francisco General Hospital explained that, "[t]he most remarkable and hideous aspect of crack cocaine use seems to be the undermining of the maternal instinct." Trost, *supra* note 3, at A6. Recently, the director of New York City's office of adoption services stated that she "used to have heroin mothers in court who could hold a family together. But crack mothers cannot." Lacayo, *supra* note 16, at 92.

33. Trost, *supra* note 3, at A6. These "boarder babies" languish in hospitals, suffering alone. These babies cannot be placed in the foster care system because of medical difficulties or overcrowding. Some boarder babies remain at hospitals, without visitors, for their entire first year of life. Older babies are often moved to pediatric wards. Sometimes, the nurses name the baby. When a baby dies, the hospital has to send a telegram to get the mother's signature for the post-mortem. Washington D.C.'s Howard Hospital director of nursery laments that he "cannot understand the mother not asking any questions about the baby, never coming again." *Id.*

Crack is the difference. Howard's first boarder baby appeared in May, 1988. Today, it is not unusual for Howard to have 20 boarder babies in any given week. Frequently, the mother disappears because she "need[s] a fix and need[s] to get back to the street." *Id.*

34. Glanton, *Recovery Center Offers Hope*, Chicago Tribune, Sept. 11, 1989, § 2, at 1. Repeatedly, recovering addict mothers state that "their biggest fears . . . are that their children won't recover from pain they have suffered because of their mother's addiction or that the children will someday abuse drugs." *Id.* One recovering mother stated that "[a]fter what I had done to them, they know I feel real bad." Trost, *supra* note 3, at A6.

35. Neonatal intensive care costs can run over \$1700 a day for some severely affected infants. Trost, *supra* note 3, at A6. Drug-addicted neonates require stabilization and nursing through withdrawal. *Id.* While the hospital stay for a healthy newborn is three days, cocaine babies have required hospital stays for as long as 42 days just for withdrawal. *Id.* Average medical treatment bills range from \$7,500 — \$31,000. Hundley, *supra* note 3, § 1, at 9. Some bills soar as high as \$150,000. *Id.* (quoting Charles Thorn, Hutzell Hospital's director of budget and reimbursement in Detroit).

36. For a discussion concerning boarder babies, see *supra* note 33.

37. The average hospital care cost per day for boarder babies is over \$300, with some generating tabs of \$500,000. Trost, *supra* note 3, at A6. One of Howard Hospi-

imum payment for these babies, the cost is passed on to private, insured patients and taxpayers.³⁸

Although these medical care costs are substantial, prenatal drug use has created even graver financial and social costs to the public health and welfare. One of these grave social costs is the impact of prenatal drug abuse in terms of stress on social institutions and existing structures. Throughout the nation, the dramatic rise in drug-exposed infants has overwhelmed America's medical community. A shortage of hospital staff,³⁹ space, and equipment to care for these newborns already exists and the numbers are still rising.⁴⁰ Soon, our current medical system will not be able to accommodate these babies.

The explosion of drug-affected infants has also overwhelmed America's child welfare system. Under child protection laws, some states have provided for postnatal state custody of infants born with illegal drugs or metabolites in their systems.⁴¹ Already facing a severe foster-care shortage, child welfare systems are unable to cope with the onslaught of drug-exposed babies.⁴² Caseworkers are already over-burdened with heavy caseloads.⁴³ Nevertheless, doctors

tal's babies was there for 245 days with a cost of \$250,000. *Id.*

38. Hundley, *supra* note 3, § 1, at 9; Trost, *supra* note 3, at A6. See Comment, *supra* note 2, at 1224 (majority of drug abusing women unable to bear cost of their conduct).

39. In addition to overt stress on our medical system, prenatal substance abuse also has an invidious psychological effect on much of our medical community. Paramedics, neonatologists, R.N.'s, obstetricians, pediatricians, and hospital emergency and nursery staff are increasingly exposed to complex moral, ethical, and psychosocial situations which affect their ability to cope with their professions. Fleischman & Rhoden, *Perinatal Law and Ethics Rounds*, 71 OBSTET. & GYNECOL. 790 (1988). Further, the immense suffering surrounding many drug-exposed births has caused these professions great anguish. D.C. General's director of nursery said, "[n]ever in my medical career have I seen so much suffering as cocaine has brought." Trost, *supra* note 3, at A6. In these tragic cases, the medical personnel "need ethical comfort and psychological support. . . ." Fleischman & Rhoden, *supra*, at 794. This anguish has a markedly negative effect on health professionals' morale, the consequences of which are yet unknown. One nurse, who must witness these tragedies daily, stated, "I know it sounds harsh, but I think we should offer these mothers a week's supply of free drugs if they would let us take out their uterus." Hundley, *supra* note 3, § 1, at 9.

40. Hundley, *supra* note 3, § 1, at 9. Hutzel and other Detroit hospitals' advanced care nurseries are so overcrowded that they have to transport neonates needing intensive care to other cities. *Id.* At D.C. General, the nursery cares for up to 70 babies in a space made to accommodate 56 bassinets. Trost, *supra* note 3, at A6. The overcrowding was so bad that "at one point last year doctors . . . couldn't find an empty neonatal intensive care bed in any hospital between Philadelphia and Richmond." *Id.*

41. See Sherman, *Keeping Baby Safe From Mom*, Nat'l Law J., Oct. 3, 1988, at 1. For a discussion concerning the extension of state child abuse and neglect statutes to include drug-exposed newborns, see *infra* notes 58-70 and accompanying text.

42. *Chicago Crisis*, *supra* note 3, at B6; Riley, *Md. Policy Would Cut Abuse Probes*, Wash. Post, March 14, 1989, at B4.

43. Schultz, *Big Rise Reported in 'Cocaine Babies'*, Chicago Sun-Times, July 6,

urge that these children will need extensive follow-up and their mothers will need extensive training in parenting and special handling of drug-affected offspring.⁴⁴ This immense burden on states' child welfare systems has caused at least one state to reverse its policy of taking custody over drug-exposed infants.⁴⁵

Of an equally grave nature, the financial and institutional stress that drug-affected children will place on America's educational system is unforeseeable. Doctors are already warning educators to begin to prepare for a new class of children who will require a specially structured educational environment.⁴⁶

Perhaps the singularly most devastating effect of maternal drug abuse, however, is the "drug cycle" and its intangible cost to the public welfare.⁴⁷ Among many prenatal substance abusers, doctors note a cycle of parental drug abuse and violence that spans generations.⁴⁸ Like their mothers before them, many of these infants will suffer through childhood in the "chaotic and transient nature of the drug environment."⁴⁹

Caught up in the drug environment, many of these children will not receive the special parental care that they need to avoid future developmental problems.⁵⁰ These children are at high risk for neg-

1988, at 8.

44. *Prenatal Drug Exposure*, *supra* note 22, at 361; Hundley, *supra* note 3, § 1, at 9 (quoting Dr. Ira Chasnoff). Dr. Chasnoff urges officials to establish special pediatric centers where the child can receive needed follow-up and the mother can receive drug treatment, special handling and parenting instruction. Address by Dr. Ira Chasnoff, NAPARE's National Training Forum on Drugs, Alcohol, Pregnancy, and Parenting (Sept. 17, 1989) (NAPARE press release, available from NAPARE, 11 E. Hubbard St., Ste. 200, Chicago, Illinois 60611) [hereinafter Forum on Drugs].

45. Riley, *supra* note 42, at B4 (Maryland).

46. Forum on Drugs, *supra* note 44. Dr. Chasnoff said the traditional classroom will be "an additional challenge for children who began life at risk because of their mothers' use of cocaine and other drugs during pregnancy. Educators face the challenge of providing these children with the kind of teaching and school environment that will allow them to reach their potential." These children will need a structured learning environment and one-on-one attention. *Id.*

47. See Trost, *supra* note 3, at A6 (many drug-affected babies return to a drug-using family environment, subject to "another cycle of poverty and dependence").

48. *Infants of Drug Addicts*, *supra* note 24, at 315-16. Studies on these women indicate that many of them have parents who are drug abusers. *Id.* Usually, these addicts were themselves childhood victims of a drug-seeking family environment. *Id.* In reference to this phenomenon, one reporter wrote, "[w]hen Brittany was born late last year, she already was gripped in a grim embrace: a drug dependency arcing back two generations to her grandmother." Trost, *supra* note 3, at A6. Washington D.C.'s hospital director frequently "sees grandmothers who are themselves substance abusers and who cannot readily step in." *Id.* (quoting Haynes Rice).

49. *Prenatal Drug Exposure*, *supra* note 22, at 361; Hundley, *supra* note 3, § 1, at 9; *Infants of Drug Addicts*, *supra* note 24, at 318. Brittany's mother, Cheryl, a recovering addict, explained that her mother was drug abuser.

50. Hundley, *supra* note 3, § 1, at 9 (infant's unfavorable odds exacerbated by "chaotic and transient environment"). Many of their mothers will be involved in prostitution and theft to support increasingly devastating drug habits. *Infants of*

lect, physical abuse, and/or placement in foster care.⁵¹ The odds are that many of these children will become drug abusing parents, only to go through the same pattern with their future offspring, perpetuating the "drug cycle."⁵²

Without state intervention and treatment, the grip of the "drug cycle" on both the mother and infant is probable.⁵³ This represents a loss to society of *two or more* productive citizens, depending on the number of children that the mother produces. When society's "double loss" is combined with the alarming incidence of drug-exposed neonates, the debilitating effect on the public health and welfare is incalculable.

Although the extent of the financial and social costs of prenatal cocaine abuse are unascertainable,⁵⁴ one thing is very clear: prenatal drug abuse is a serious menace to the public health and welfare. If society does not deal with this menace in a swift and comprehensive manner, prenatal drug abuse will greatly undermine America's future well-being.

C. Need for Criminal Sanctions

1. The Inadequacy of Available Remedies

To date, however, the remedies available to alleviate and/or cope with the prenatal drug abuse epidemic are inadequate. Noncoercive governmental programs such as public education, prevention campaigns, and voluntary treatment programs⁵⁵ are vital elements

Drug Addicts, *supra* note 24, at 316. Use of welfare money to buy drugs impoverishes the family and the mother may not obtain diapers and formula for the baby. *Id.*

51. *Infants of Drug Addicts*, *supra* note 24, at 318-19; Reardon & Pearson, *supra* note 8, § 1, at 18 (quoting Jo Warfield of Illinois Department of Children and Family Services).

52. See *Infants of Drug Addicts*, *supra* note 24, at 319 (failure to access risk and provide intervention may place future generation of children at risk). Cheryl, a recovering addict, explained that her mother was a drug abuser. Trost, *supra* note 3, at A6. She further explained that she "was trying not to be like her, but [she] turned out the same way." *Id.*

53. See *Infants of Drug Addicts*, *supra* note 24, at 319 (intergenerational transmission of abuse and neglect is well known); NATIONAL CENTER FOR THE PROSECUTION OF CHILD ABUSE (NCPCA), Drug-Using Moms Charged, 2(5) Update (May, 1989) (newsletter available from American Prosecutors Research Institute (APRI), 1033 N. Fairfax St., Alexandria, VA 22314) [hereinafter NCPCA May 1989]; see *supra* note 52.

54. Comment, *supra* note 2, at 1217, 1222.

55. Currently, there is a severe shortage of voluntary in-patient/out-patient prenatal drug treatment programs nationwide. Trost, *supra* note 3, at A6; Diegmüller, *supra* note 3, at 23. This is also true of drug treatment services for the general population. See Reardon & Pearson, *supra* note 8, § 1, at 18 (currently, best way for poor adult to get treatment is to be charged with a crime).

Established in 1977, the Perinatal Center for Chemical Dependency (PCCD) at

in a comprehensive national attack on prenatal drug abuse.⁵⁶ In light of the dramatic rise in drug-exposed births, however, a voluntary system of drug treatment alone appears to be largely ineffective in alleviating prenatal drug abuse.⁵⁷

With respect to available legal remedies, a few states have intervened in the prenatal drug abuse situation by way of civil child abuse and neglect statutes.⁵⁸ Under these statutes, some legislatures have extended their legal definitions of neglect to include drug-exposed and/or addicted neonates.⁵⁹ In addition, a few courts have held that neonatal drug withdrawal is probative of neglect under child abuse statutes.⁶⁰

Northwestern University Medical School and Northwestern Memorial Hospital offers a model program of voluntary drug treatment, obstetric, and psychiatric services to prenatal drug users. In addition, the program offers follow-up pediatric services and parenting and special handling education. *Infant Motor Development*, *supra* note 24, at 61. This comment urges legislative action and monetary allocations at both the federal and state level in order to implement a comprehensive system of voluntary drug treatment services similar to the PCCD.

56. Comment, *supra* note 2, at 1234-35.

57. Testimony by Jeffrey Parness, Professor of Law at Northern Illinois University College of Law, United States House of Representatives hearing, *Born Hooked: Confronting the Impact of Perinatal Substance Abuse* (April 27, 1989); Comment, *supra* note 2, at 1235. Moreover, voluntary in-patient treatment in a strictly controlled environment is far more effective than voluntary outpatient treatment. *Glanton*, *supra* note 34, § 2 at 4. The coercive elements in the in-patient program greatly improve the program's success. *Id.*

58. Sherman, *supra* note 41, at 1, 24 (statutes). See Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?* 23 DUQ. L. REV. 1, 28-29 (1984) (case law).

59. Currently, Florida, Oklahoma, Indiana and Illinois have neglect statutes that label drug-exposed infants as neglected children. Sherman, *supra* note 41, at 24. In each state, evidence of intrauterine drug-exposure trigger investigation and possible state custody of the neonate. *Id.* Florida and Oklahoma require actual newborn addiction to trigger scrutiny. *Id.* Illinois recently amended its legal definition of neglect to include infants with positive toxicology tests in order to speed the evidence-gathering process and allow authorities to intervene. Recktenwald, *Thompson Signs Bill to Hasten Treatment of Cocaine Babies*, Chicago Tribune, Aug. 25, 1989, § 2, at 2. The new law will require Juvenile Court-ordered drug treatment. *Id.* It became effective Jan. 1, 1990. *Id.* Pennsylvania is considering amending its child protection statute in this fashion. Sherman, *supra* note 41, at 24. The proposed Pennsylvania statute would allow for home investigation on the finding of a positive newborn toxicology test. *Id.*

In addition, Oklahoma and Utah have mandatory reporting laws which extend to children born with drug withdrawal. NCPA, *Cocaine Babies*, 2(3) Update (March, 1989) (newsletter available from APRI, 1033 N. Fairfax St., Alexandria, VA 22314) [hereinafter NCPA March 1989]. Oregon is considering a similar amendment to its reporting laws. *Id.* Minnesota is considering amending its reporting laws, child neglect statute, and enacting new legislation allowing for drug-testing of pregnant mothers after 24 weeks gestation. *Id.*

60. *In re Ruiz*, 27 Ohio Misc. 2d 31, 34, 500 N.E.2d 935, 939 (Mun. 1986) (prenatal heroin use during viability probative of child abuse); *In re Baby X*, 97 Mich. App. 111, 114, 293 N.W.2d 736, 739 (1980) (prenatal conduct causing neonatal heroin withdrawal probative of neglect); *In re Smith*, 128 Misc. 2d 976, 979, 492 N.Y.S.2d 331, 335 (Fam. Ct. 1985) (prenatal alcohol abuse tantamount to neglect); *In re Male R*, 102 Misc. 2d 1, 5, 422 N.Y.S.2d 819, 824 (Fam. Ct. 1979) (mother's prenatal/postnatal barbiturate abuse placed withdrawing infant in "imminent danger" sufficient

By extending the definition of neglect to include drug-exposed neonates, the state is able to take custody over the infants.⁶¹ As custodian, the state can either remove the infant from the mother at birth,⁶² investigate the infant's home life,⁶³ obtain court-ordered treatment and education for the mother,⁶⁴ and/or initiate contempt or permanent custody proceedings against her if she fails to comply.⁶⁵ Usually, the court makes mother/child reunification conditional on, *inter alia*, the mother's enrollment in a treatment program.⁶⁶

This policy of state custody over the drug-exposed child, however, is inadequate in several respects. First, as noted above, our child welfare system is too over-burdened to handle the rising number of cases.⁶⁷ Second, state intervention comes too late.⁶⁸ The physiological damage done to the baby occurs *in utero* when the pregnant mother uses the cocaine.⁶⁹ Third, custody is not a sufficiently coercive factor to compel many of these women to comply with court-ordered rehabilitation.⁷⁰ As a result, the state simply has one more foster child, no rehabilitated mother, and, most likely, more drug-exposed offspring in the future.

Frustrated by this inadequacy,⁷¹ a few prosecutors have brought

for finding of neglect). *But see* Cox v. Court of Common Pleas, 42 Ohio App. 3d 171, 175, 537 N.E.2d 721, 725 (1988) (probate court has no jurisdiction over unborn fetus); *In re* Dittrick Infant, 80 Mich. App. 219, 223, 263 N.W.2d 37, 39 (1977) (probate has no jurisdiction over unborn child); Reyes v. Superior Court, 75 Cal. App. 3d 214, 217, 141 Cal. Rptr. 912, 914 (1977) (penal child-endangering statute inapplicable to prenatal conduct).

61. Sherman, *supra* note 41, at 24; Recktenwald, *supra* note 59, §2, at 2.

62. Reardon & Pearson, *supra* note 8, § 1, at 18; Recktenwald, *supra* note 59, § 2, at 2. New York's Nassau County and California's Los Angeles County have emergency-removal policies upon the finding of a positive newborn toxicology test. Sherman, *supra* note 41, at 1.

63. Sherman, *supra* note 41, at 24.

64. Recktenwald, *supra* note 59, § 2, at 2.

65. Sherman, *supra* note 41, at 24.

66. See *In re* Ruiz, 27 Ohio Misc. 2d 31, 32, 500 N.E.2d 935, 936 (Mun. 1986); *In re* Smith, 128 Misc. 2d 976, 977, 492 N.Y.S.2d 331, 332-33 (Fam. Ct. 1985); *In re* Male R, 102 Misc. 2d 1, 3, 422 N.Y.S.2d 819, 821-22 (Fam. Ct. 1979).

67. For a discussion concerning prenatal drug use's effect on America's child welfare system, see *supra* notes 41-45 and accompanying text.

68. *In re* Dittrick Infant, 80 Mich. App. 219, 223, 263 N.W.2d 37, 39 (1977) (probate has no jurisdiction over unborn child); Comment, *supra* note 2, at 1223, 1228.

69. For a discussion of the physiological effects on the fetus of intrauterine drug-exposure, see *supra* notes 20-25 and accompanying text.

70. Many drug-dependent, new mothers do not comply with the conditions of reunification nor receive the treatment that they desperately need. See, e.g., Ruiz, 27 Ohio Misc. 2d at 32, 500 N.E.2d at 936 (mother failed to get treatment required under reunification plan); Smith, 128 Misc. 2d at 977, 492 N.Y.S.2d at 332-33 (same); Male R, 102 Misc. 2d at 3, 422 N.Y.S.2d at 821-22 (same).

71. Reardon & Pearson, *supra* note 8, § 1, at 18; NCPA May 1989, *supra* note 53; see *Drug Withdrawal Symptoms*, *supra* note 12, at 273 (addicted infants present new and frustrating challenge).

criminal charges against women for prenatal substance abuse.⁷² Although criminal legislation against the mother for prenatal drug abuse is currently non-existent,⁷³ these prosecutors are basing charges on innovative interpretations of existing criminal statutes.⁷⁴ The charges include criminal child abuse,⁷⁵ delivery of a controlled substance to a minor,⁷⁶ and involuntary manslaughter of an unborn

72. Lamb, *Two in Florida Face Cocaine Baby Charges*, *The Register Star*, May 17, 1989, at 2.

73. Comment, *supra* note 2, at 1225; NCPCA March 1989, *supra* note 59. Although California has a penal child abuse statute which by legislative definition includes the unborn, a California trial court held that an unborn child was not included in its scope and dismissed charges against the child's mother. Parness, *supra* note 57, at 4. Currently, Oregon is considering a statute that directly deals with prenatal substance abuse making it a Class A misdemeanor. Comment, *supra* note 31, at 704. The proposed legislation is designed to force the mother into treatment and protect the baby from the risks of a drug-seeking environment. *Id.*

74. AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, Grand Jury Will Not Indict Melanie Greene: ACLU Says Treatment, Not Prosecution Is the Answer, (press release, May 26, 1989) [hereinafter ACLU]; Reardon (unpublished article, May 19, 1989, available from the author at the Chicago Tribune). For a discussion of the charges brought and a few of the prosecutorial theories used, see *infra* notes 75-77 and accompanying text.

75. *Reyes v. Superior Court*, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977). In *Reyes*, the mother abused heroin prenatally and delivered addicted twins. The prosecutor brought charges against the mother for child endangering under § 273 a(1) of the California Penal Code. *Id.* at 216, 141 Cal. Rptr. at 912-13. The *Reyes* court held, however, that the statute only applied to harm caused to a child who had already been born. *Id.*

In 1986, the San Diego County district attorney's office brought charges against Pamela Rae Stewart under a California statute providing for *penal* sanctions for "willfully omit[ting], without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care." Bonavoglia, *The Ordeal of Pamela Rae Stewart*, Ms., July/Aug. 1987, at 92. The statute included unborn children within its scope. *Id.* Rae was charged with criminal liability for the birth of her brain-dead baby whose condition resulted from his mother's failure to abstain from drugs, sex, and to seek medical care when she began to hemorrhage. *Id.* at 95. The trial court dismissed the charges as inappropriate. *Id.* at 93; see *infra* note 81 for the trial court's statement.

In Fort Lauderdale, Florida, the state's attorney has brought aggravated child abuse charges by information against Cassandra Gethers for the delivery of her second cocaine baby. NCPCA March 1989, *supra* note 59. The trial was scheduled for October, 1989. Telephone interview with Dennis Bailey, Assistant State's Attorney prosecuting Gethers (Sept. 27, 1989). Recently, the Chief Deputy District Attorney of Jefferson County, Colorado also filed charges of misdemeanor child abuse against two women whose newborns had positive toxicology results. NCPCA, May 1989, *supra* note 53. He has also charged the women with felony drug abuse. *Id.*

76. In Seminole County, Florida, Assistant States Attorney, Jeff Deen, brought charges against two women who delivered cocaine-exposed neonates. Deen charged these mothers with delivery of controlled substances to a minor. NCPCA March 1989, *supra* note 59. One mother, Jennifer Johnson, had given birth to two cocaine-exposed babies. Lamb, *supra* note 72, at 2. The other mother, Toni Hudson, gave birth to a cocaine-addicted son who also had syphilis. *Id.* Because Florida law does not consider the fetus a person, Deen had to prove that, during the 1-2 minute period following birth while the umbilical cord remained intact, the mother delivered cocaine to the infant through the cord. Telephone interview with Deen, prosecuting attorney (Sept. 26, 1989). Seminole County Judge O.H. Eaton convicted both women, saying that "[p]regnant addicts have been on notice for years that taking cocaine may be harm-

child.⁷⁷ However, these prosecutorial attempts are meeting with limited success.⁷⁸

Like the other remedies available to address prenatal substance abuse, ad hoc prosecutorial attempts are inadequate for several reasons. The underlying problem concerning prosecutorial attempts is the lack of a criminal statute directly addressing this prenatal misconduct.⁷⁹ Because prosecutors are applying existing laws that were not meant to apply to prenatal conduct, there is an issue involving notice to the women that their conduct is subject to criminal sanctions.⁸⁰ Further, if it is not clear that delivery of drug-affected newborn will subject the mother to criminal sanction, there can be no deterrence factor. Third, without clear legislative provision, a court or grand jury may find that the statute does not apply, and the mother will not receive compulsory drug treatment.⁸¹ Finally, and most importantly, ad hoc, innovative prosecutions will not aid in the

ful to their children. This verdict gives further notice that pregnant addicts have a responsibility to seek treatment . . . prior to giving birth. Otherwise, the state may very well use criminal prosecution to force further compliance. . . ." Williams, *Mother Found Guilty of Delivering Drugs to a Minor via Umbilical Cord* (press release, Cox News Service, July 14, 1989).

77. Winnebago County State's Attorney, Paul Logli, has brought the most serious charges to date against a mother for intrauterine drug-exposure. Reardon & Pearson, *supra* note 8, § 1, at 1. Logli filed charges of involuntary manslaughter and delivery of a controlled substance to a minor by indictment against Rockford mother Melanie Green for the death of her two-day-old child. *Id.* He filed the involuntary manslaughter charge under Illinois' Involuntary Manslaughter of an Unborn Child, ILL. REV. STAT. ch. 38, ¶ 9-3.2 (Supp. 1988). Telephone interview with Paul Logli, prosecuting attorney (Sept. 26, 1989). However, the Illinois statute exempts the mother's conduct from its scope. ILL. REV. STAT. ch. 38, ¶ 9-3.2(c)(2). The grand jury refused to indict the woman. ACLU, *supra* note 74, at 1.

78. In the five prosecutions to have reached an initial determination, three have been dropped. In the two California cases, the court found that the statutes used were inapplicable to the woman for her prenatal drug use. For a discussion of these cases see *supra* note 75. In the Illinois case, the grand jury would not indict the mother. In addition, the Illinois statute for involuntary manslaughter to a fetus exempts the mother's conduct. ILL. REV. STAT. ch. 38, ¶ 9-3.2(c)(2). The two Seminole County, Florida cases, however, have resulted in convictions and are in the appellate stage. The future of these convictions at the appellate level is highly uncertain. In sentencing, the judge has placed these two women on probation with extensive drug treatment as a condition of probation. *Mother of Two Cocaine Babies Gets Probation*, Chicago Tribune, Aug. 26, 1989, § 1, at 2.

79. Paul Logli, the State's Attorney in the Green case, urges the enactment of a new law that specifically criminalizes prenatal illegal drug use. Reardon, *Drugs and Pregnancy Debate Far From Resolved*, Chicago Tribune, May, 28, 1989, § 2, at 1.

80. Patner, *supra* note 3, at A5F; Reardon, *supra* note 74, at 2 (quoting Mary Becker, University of Chicago Law Professor).

81. See *supra* notes 75, 77-78 for an illustration of factfinders' refusals to apply existing statutes to the mother's prenatal conduct and the resulting harm to the fetus/neonate. In the Rae case, *supra* note 75, the trial court granted Rae's attorney's motion to dismiss the charges. The trial court granted the motion on the grounds that she had been charged under an inappropriate statute. The court recommended that "the state legislature pass a more appropriate bill 'protecting the life of the unborn child under certain narrowly defined conditions.'" Bonavoglia, *supra* note 75, at 93.

establishment of a comprehensive, effective policy guided by the goals of deterrence and rehabilitation.

2. *Legitimate Need for Police Power Action*

While there is an "increasing willingness to use the legal system to force treatment"⁸² in the judicial and prosecutorial communities, only the legislature has the power to outline and establish a comprehensive, effective policy towards the menace of prenatal substance abuse. Under its police power, the state may *forbid* conduct that endangers the public health, welfare, and morals.⁸³

The purpose of criminal legislation is "[t]o announce to society that these actions are not to be done and to secure that fewer of them are done."⁸⁴ Criminal statutes establish standards of conduct "to encourage certain types of behavior and discourage others. . . ."⁸⁵ Criminalizing conduct serves the goals of deterrence and rehabilitation.⁸⁶ Criminal sanctions have a particular deterrent effect on the offender in that she will "think twice" about her future conduct.⁸⁷ In addition, penal sanctions have a general deterrent effect on the rest of society.⁸⁸ Further, through penal threat, the state can coerce treatment and rehabilitation.⁸⁹

It is appropriate to use the criminal system to avert this threat to society,⁹⁰ because prenatal drug use, as distinguished from drug use by non-pregnant individuals, causes harm to the actor, harm to society, and harm to a fetus.⁹¹ The advantage to explicitly criminal-

82. NCPA May 1989, *supra* note 53; see Reardon & Pearson, *supra* note 8, § 1, at 18 (growing campaign of using court to cut prenatal drug use).

83. *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 68-69 (1973) (state can prohibit public theatre from showing pornographic movies); *Powell v. Texas*, 392 U.S. 514, 532 (1968) (state may impose criminal liability for public drunkenness); *Robinson v. California*, 370 U.S. 660, 664-65 (1962) (state has broad power to prohibit activities involving illegal drugs).

84. H.L. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 6 (6th ed. 1984).

85. *Id.*

86. *Powell*, 392 U.S. at 540-41 (Black, J., concurring); HART, *supra* note 84, at 8; Comment *supra* note 31, at 715; NCPA May 1989, *supra* note 53.

87. H.L. HART, *supra* note 84, at 129.

88. *Id.* at 128-29.

89. *Robinson v. California*, 370 U.S. 660, 664-65 (1962). The state can coerce treatment by "exploit[ing] the opportunities presented by the conviction or compulsory detention of offenders." H.L. HART, *supra* note 84, at 26.

90. See *Robinson*, 370 U.S. at 664-65; Comment, *supra* note 2, at 1235 (advocating criminal sanctions against pregnant substance abusers). In *Robinson*, the United States Supreme Court noted that, under its police power, the state could impose criminal sanctions for the "use of dangerous and habit-forming drugs . . .", establish compulsory treatment programs, and impose "penal sanctions . . . for failure to comply with established compulsory treatment procedures." *Id.*

91. For a discussion concerning the harmful effects of prenatal substance abuse on the fetus/neonate, mother, and the public health and welfare, see *supra* notes 20-

izing prenatal drug use over and above illegal drug use in general is that this type of drug use is detectable by urinalysis testing⁹² on the newborn. The state can test the newborn but not the mother nor any other non-pregnant individual.⁹³

In this particular case, probable detection will be a good deterrence. Deterrence will be a weighty factor for pregnant women. They will know that they stand a greater chance of detection than the non-pregnant drug user. This risk alone will curb recreational users.⁹⁴ In addition, ones who continue to use *will* be detected and *will be treated*. Most importantly, because of the pregnant woman's unique situation,⁹⁵ *her* conduct causes suffering to all of us.⁹⁶ Certainly, it is in the interest of society to criminalize this conduct, thereby discouraging prenatal drug abuse and encouraging maternal/fetal health and family order.⁹⁷

54 and accompanying text.

92. Usually urinalysis requires two tests. Note, *National Treasury Employees Union v. Von Raab: A Broader "Special Needs" Warrant Exception Dilutes Fourth Amendment Protection*, 22 J. MARSHALL L. REV. 903, 906 n.6 (1989). The first test is usually an immunoassay screening test that eliminates negative samples. The second test is a highly sophisticated confirmatory test. *Id.*

93. Sherman, *supra* note 41, at 24.

94. In the context of prenatal cocaine use, general deterrence is very important. Researchers now believe that even a single dose of cocaine can cause lasting damage to the fetus. Brody, *supra* note 24, at 23. One woman, who had abstained from cocaine use throughout most of her pregnancy, ingested cocaine when she was near term. The cocaine precipitated premature labor and the baby suffered a cocaine-induced stroke shortly before birth. The baby was born with severe brain damage and limited use of his right limbs. *Id.*

95. Even the Supreme Court has noted the unique situation of a pregnant woman and remarked that "a pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus." *Roe v. Wade*, 410 U.S. 113, 159 (1973).

96. For the harmful effects of prenatal drug abuse on the fetus/neonate, the mother and the public health and welfare, see *supra* notes 20-54 and accompanying text. In reference to the babies who bear the consequences of their mother's prenatal drug use, one reporter wrote that "[t]hey are among the saddest victims of the nation's drug habit. Their shriveled bodies, sometimes weighing no more than a pound or two, bristle with tubes and wires connected to machines that breathe for them . . ." Hundley, *supra* note 3, § 1, at 9.

97. Although there is a universal consensus that swift, effective treatment intervention is needed in this situation, critics advance several arguments against criminalization of the mother's prenatal drug abuse. Some in the medical profession fear that criminal threat will drive these high risk patients underground, away from vital prenatal medical care. Reardon & Pearson, *supra* note 8, § 1, at 1 (quoting Dr. Ira Chasnoff of NAPARE). According to hospital personnel, however, the majority of these mothers do not receive any prenatal care anyway. Diegmüller, *supra* note 3, at 23. They simply go into the hospital to deliver the baby, sometimes in emergency cocaine-induced labor situations. *Id.* See *Perinatal Effects*, *supra* note 18, at 175 (doctors see many emergency deliveries induced by cocaine use). Even if prenatal drug use is criminalized, the majority of these mothers will still go to the hospital to deliver due to emergency or the general enormity, fear, and difficulty involved in the birth process. At this point, universal, mandatory toxicology testing of the newborns would enable the state to identify, charge, and effectively treat the woman, not only so that she can care for her offspring, but also so that she and others like her will not

In light of the rapid increase in drug-exposed births, the existing non-coercive remedies appear to be woefully ineffective in attacking this societal problem.⁹⁸ As a matter of policy, the state must take a strong interventionist stance by criminalizing prenatal substance abuse in order to contain its alarming practice.⁹⁹ Incarceration alone, however, would be extremely unwise. By itself, incarceration will not alleviate any of the complex social problems associated with maternal prenatal substance abuse.¹⁰⁰

In order to eliminate the drug cycle and reduce drug-exposed births, the state must rehabilitate offenders.¹⁰¹ The legislature must

abuse drugs while pregnant again.

If the woman already receives prenatal care, the doctor, upon probable cause, should be required to obtain a urinalysis result. Again, at this point, the state could identify, charge and treat the woman, with the added and most important benefit of halting *in utero* drug exposure to the fetus. See Comment, *supra* note 2, at 1223. In any event, providing effective prenatal care to a pregnant drug user who will probably continue to expose herself and the fetus to illegal teratogens is a medical impossibility.

Perhaps the most morally difficult argument advanced by critics, however, is that criminalization of the mother's conduct will encourage abortions. Sherman, *supra* note 41, at 24. As the cases of drug-damaged newborns increase, however, medical personnel are discovering that many of these women are trying to abort by using cocaine. Trost, *supra* note 3, at A6. Women who are determined to abort will do so regardless of whether there are criminal sanctions imposed for prenatal substance abuse or not. If prenatal substance abuse is criminalized for the resulting damage done to the newborn, those who are using cocaine as an abortifacient run the risk of live birth and subsequent criminal prosecution.

There remains, however, the possibility that criminalizing prenatal substance abuse may encourage more abortions. But, at this point, the state must decide whether, as a matter of policy, it will stand by in the midst of the invidious effects of maternal prenatal drug abuse for fear of this possibility or whether it will intervene for the sake of the public health and welfare. If there is even one drug-free, healthy birth which otherwise would not have been, then perhaps more abortions is not too great a sacrifice. See Comment, *supra* note 2, at 1234 (desired goal is a healthy child).

98. Parness, *supra* note 57, at 6; Comment *supra* note 2, at 1235.

99. Comment, *supra* note 2, at 1235; *Constitutional Limitations*, *supra* note 20, at 1052; Comment, *supra* note 31, at 710, 714-15.

100. See Reardon & Pearson, *supra* note 8, §1 at 18 (need to address reasons why mothers are using drugs).

101. Critics also argue that the criminalization of prenatal substance abuse would result in punishing the victim. Reardon, *supra* note 79, § 2, at 2. Incarceration alone might be guilty of this evil. However, criminalizing this conduct, combined with a policy of comprehensive rehabilitation, is surely beneficial to the mother herself and a legitimate state activity.

Nor is the mother blameless for her conduct. Given a strong motivating influence, people can overcome their compulsion to abuse drugs. The existence of ex-alcoholics and ex-drug users involved in voluntary drug treatment programs indicate that there is volition in recovery from drug abuse. Most ex-users have taken responsibility for their recovery and sought to change their drug abuse. See Glanton, *supra* note 34, § 2, at 1, 4. Although they know of voluntary treatment services, drug-users are avoiding this responsibility for their recovery. Those who choose not to seek treatment do, in fact, make a choice. As one ex-user put it, "you can change it if you want to, or if you *have* to."

Criminal sanctions may provide the strong motivating factor needed by many pregnant users to seek help voluntarily. The statute should exempt users who do seek

establish a comprehensive system for drug treatment, parenting skills, medical services, and education in order for these women and their children to become productive citizens. Criminal sanctions are necessary¹⁰² to this overall system to coerce the mother's responsible participation in the treatment, parenting, and educational programs.

Under the criminal system, the state can offer the pregnant substance abuser in-patient treatment as an alternative to incarceration. The woman can be placed on probation with treatment as a condition of probation. In addition, upon successful treatment outcome, the woman's post-treatment conduct can be monitored by drug screening while on probation. Her post-treatment conduct will be influenced by the probation requirements, supervision, and the penal consequences of violating probation. Moreover, there is evidence that legal threat may be a positive factor in successful treatment outcome.¹⁰³

In the face of this epidemic, the legislature must do *something* to attack prenatal drug abuse. The threat of criminal prosecution when combined with the alternative of compulsory in-patient treatment and probation may well be the most effective policy towards *reducing* the rising incidence of drug-exposed births.¹⁰⁴ State criminalization of the mother's prenatal drug abuse, however, is likely to infringe on several of the mother's constitutional rights. The constitutionality of the criminalization of prenatal drug use is considered in detail below.

II. CONSTITUTIONALITY OF CRIMINAL LEGISLATION IN THE PRENATAL CONTEXT

Discussion of the constitutionality of state regulation in the prenatal context implicates only the rights and/or interests of the mother and the state. Much to the chagrin of fetal rights advocates, the Supreme Court has definitely stated that, for constitutional purposes, the fetus is not a person protected by the fourteenth amend-

voluntary help. Those who remain undeterred "are by definition undeterr[able]." *Powell v. Texas*, 392 U.S. 514, 531 (1968). In their case, a criminal prosecution is good leverage for the state to coerce responsible treatment participation. Clearly, however, penal sanctions and a rehabilitative policy would not be *punishing* a victim.

102. Although the state could utilize existing civil commitment procedures to coerce treatment for prenatal drug users, this method has shortcomings. First, the civil commitment approach leaves the responsibility of initiating state intervention on individual citizens. Second, the commitment approach does not allow for continued, coercive monitoring of the woman's post-treatment conduct. *See generally Addington v. Texas*, 441 U.S. 418 (1979) (common procedures for civil commitment).

103. Comment, *supra* note 2, at 1236 & n.167 (citing Collins & Allison, *Legal Coercion and Retention in Drug Abuse Treatment*, 34 *HOSP. & COMMUNITY PSYCHIATRY* 1145, 1148 (1983)).

104. *See Constitutional Limitations, supra* note 20, at 1051 (intervention would be more effective).

ment.¹⁰⁵ Therefore, since the Bill of Rights applies to state action by incorporation through the fourteenth amendment's due process clause,¹⁰⁶ it is apparent that the fetus possesses no individual constitutional rights in and of itself.¹⁰⁷ The state's interest, however, in "potential life" represented by the fetus is of constitutional magnitude.¹⁰⁸ Accordingly, an elucidation and examination of the constitutional rights/interests of both the mother and the state are therefore fitting at this juncture.

A. *The Mother's Constitutional Right to Privacy*

Criminalization of prenatal drug abuse could implicate several of pregnant woman's constitutional rights.¹⁰⁹ Primarily, however, criminal sanctions in the prenatal context would implicate the woman's constitutional right to privacy. Unfortunately, constitutional privacy is a nebulous concept.¹¹⁰ There are several facets of privacy protected by both the fourth¹¹¹ and fourteenth amendments.¹¹² To-

105. *Roe v. Wade*, 410 U.S. 113, 158 (1973) ("the word 'person,' as used in the [fourteenth] amendment, does not include the unborn"); Comment, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAWYER 349, 350 (1971) (fetus has no legal right to life under due process clause); Myers, *supra* note 58, at 59-60 (same).

106. The first ten amendments are the Bill of Rights which explicitly apply to the federal government. See U.S. CONST. amend. I. The fourteenth amendment's due process clause incorporates the individual rights guaranteed by the Bill of Rights with respect to the federal government and, thereby, also guarantees these rights to the people with respect to state action. *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1971). For the text of the fourteenth amendment, see *infra* note 112.

107. Myers, *supra* note 58, at 60 (unborn child possesses no constitutional rights of privacy, bodily integrity, nor freedom from unreasonable government intrusion). For a discussion of a fetus' legal rights in other contexts, see Comment, *supra* note 105, at 351-54 (property), 354-60 (tort), 362-69 (criminal law). See generally, Comment, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. REV. 639 (1980) (prenatal tort law); Comment, *Recognizing a Cause of Action for Preconception Torts in Light of Medical and Legal Advancements Regarding the Unborn*, 53 UMKC L. REV. 78 (1984) (preconception tort law).

108. *Roe*, 410 U.S. at 154.

109. This type of legislation could implicate the woman's fifth amendment rights, eighth amendment rights, and her right to equal protection. This comment cannot address all of these issues. It is this author's belief, however, that in each instance, the state's interests at stake in prenatal substance abuse would overcome any individual constitutional claim.

110. The Court itself most eloquently wrote,

In varying contexts, the Court or individual Justices have, indeed, found at least the roots of [a right of personal privacy] in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.

Roe v. Wade, 410 U.S. 113, 152 (1973) (citations omitted).

111. The fourth amendment provides,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or

gether, these facets of privacy combine to form "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."¹¹³ Since an individual's privacy is protected by both the fourth and fourteenth amendments, this comment will consider each of these amendments respectively.

1. Fourth Amendment Privacy

The fourth amendment protects, *inter alia*, one's privacy in her person.¹¹⁴ She has the right to maintain bodily autonomy and to be free from unreasonable bodily intrusion (search) and physical restraint (seizure).¹¹⁵ However, one has a right to be secure in her person against only "unreasonable" state action.¹¹⁶ Under fourteenth amendment substantive due process analysis,¹¹⁷ state action that infringes on an individual's fourth amendment privacy rights (bodily privacy) is reasonable if it serves a compelling governmental goal.¹¹⁸ In addition, the governmental intrusion must be narrow in scope, addressing only the state's compelling goal.¹¹⁹

Criminalizing prenatal substance abuse would undoubtedly subject pregnant drug users to state intrusion into their bodily pri-

things to be seized.

U.S. CONST. amend. IV.

112. The fourteenth amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

113. *Olmstead v. United States*, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 353 (1967).

114. *E.g.*, *Terry v. Ohio*, 392 U.S. 1, 5 (1968); *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Constitutional Limitations*, *supra* note 20, at 1053-54 & n.12.

115. *E.g.*, *Terry*, 392 U.S. at 9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). See *Myers*, *supra* note 58, at 57-58; *Constitutional Limitations*, *supra* note 20, at 1053-54 & nn.12-13; *Fetal Patient*, *supra* note 20, at 1072.

116. *E.g.* *Skinner v. Railway Labor Executives' Ass'n.*, 109 S. Ct. 1402, 1414 (1989) (Federal Railroad Administration's drug and alcohol testing program); *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (Drug Enforcement's Agent's 20-minute detention of suspect); *Constitutional Limitations*, *supra* note 20, at 1053-54.

117. For an explanation of the fourteenth amendment's due process incorporation theory by which the fourth amendment applies to state action, see *supra* note 106.

118. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Griswold v. Connecticut*, 381 U.S. 475, 485 (1965).

119. *E.g.*, *Carey v. Population Serv. Int'l*, 431 U.S. 678, 686 (1977); *Roe*, 410 U.S. at 155. In *Carey*, the Court struck a state statute that prohibited distribution of contraceptives to anyone under 16 years old. *Carey*, 431 U.S. at 700-02. The Court stated, however, that even a burdensome regulation could be sustained if it served a "sufficiently compelling state interest." *Id.* at 686.

vacancy.¹²⁰ Under fourth amendment jurisprudence, the criminal nature of the statute¹²¹ and subsequent physical invasions required by a policy which includes urinalysis¹²² and compulsory treatment¹²³ are so intrusive as to require probable cause.¹²⁴ Despite this intrusiveness, the state can demonstrate a compelling need to impose criminal sanctions on pregnant drug users and thereby withstand fourth amendment analysis.¹²⁵

2. Fourteenth Amendment Due Process Privacy

The fourteenth amendment's due process clause guarantees implied personal privacy.¹²⁶ The implied privacy rights created by the fourteenth amendment (personal privacy) are "fundamental rights implicit in the concept of ordered liberty."¹²⁷ The due process clause protects "intimate relationship[s]."¹²⁸ The Court has ascertained that "[t]his privacy right encompasses and protects the personal in-

120. Myers, *supra* note 58, at 57-59 (prenatal regulation "runs directly afoul" of one's rights to bodily privacy); Comment, *supra* note 2, at 1229-31 (regulating prenatal conduct intrudes on maternal autonomy but no more than court-ordered caesarian section); *Fetal Patient*, *supra* note 20, at 1072-74 (forced fetal surgery intrudes on mother's bodily privacy).

121. State action for criminal purposes generally requires a search warrant and probable cause. *E.g.*, *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989); *United States v. Place*, 462 U.S. 696, 701 (1983); *Florida v. Royer*, 460 U.S. 491, 499 (1983).

122. The Court has already determined that urinalysis is an intrusive fourth amendment search. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989) (Customs Service's suspicionless urinalysis program for employees seeking promotion to certain positions upheld); *Skinner*, 109 S. Ct. at 1413 (Federal Railway Administration's urinalysis program for employees involved in accidents upheld).

123. Compulsory treatment would require detention of the woman. Such detention is a fourth amendment seizure because it would "amount to a meaningful interference with [her] freedom of movement." *Skinner*, 109 S. Ct. at 1412.

124. The probable cause standard is met "'where the facts and circumstances within their knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that a criminal offense had occurred.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 363-64 (1985) (Brennan, J., concurring in part and dissenting in part) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). It is a fluid and easily-applied common sense standard. *Id.* For a method of analysis to enable physicians to identify pregnant drug users, see *Perinatal Effects*, *supra* note 18, at 164-169.

125. Comment, *supra* note 2, at 1220; *Constitutional Limitations*, *supra* note 20, at 1056; *cf.* *Jefferson v. Griffin County Hosp. Authority*, 247 Ga. 86, 274 S.E.2d 457 (1981) (state's interest in fetal life justifies court-ordered caesarian section); *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 42 N.J. 321, 201 A.2d 527, *cert. denied*, 377 U.S. 985 (1964) (court-ordered blood transfusions against mother's religious belief justified by state's interest in maternal and fetal life). For an elucidation of the state's interests at stake in the prenatal drug abuse context, see *infra* notes 163-174 and accompanying text.

126. *E.g.*, *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-85 (1977).

127. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-66 (1973).

128. *Paris Adult Theatre I*, 413 U.S. at 66 n.13.

timacies of the home, the family, marriage, motherhood, procreation, and childbearing."¹²⁹ To make matters more confusing, these personal intimacies appear to overlap.

State action that intrudes into personal privacy is constitutional only if it serves a compelling governmental goal and is narrowly tailored.¹³⁰ Legislation in the prenatal context could conceivably implicate several facets of the pregnant woman's fourteenth amendment privacy.¹³¹ State regulation could intrude upon, *inter alia*, the woman's privacy in procreation, motherhood, and childrearing.¹³² However, in the context of prenatal drug abuse, the state has a compelling goal, which will override the woman's constitutional privacy.¹³³

In the prenatal context, privacy in procreation and motherhood appear to overlap. An individual has a personal privacy right to procreate.¹³⁴ In addition, individuals have a right to choose to practice contraception.¹³⁵ A pregnant woman's reproductive privacy has a further dimension: she may make the intimate choice of whether to carry the fetus to term.¹³⁶ Under the shaky¹³⁷ trimester framework of *Roe v. Wade*,¹³⁸ the woman's right to privacy in the abortion deci-

129. *Id.* at 65.

130. *E.g.*, *Carey*, 431 U.S. at 678; *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972).

131. *Myers*, *supra* note 58, at 53-59; *Constitutional Limitations*, *supra* note 20, at 1066.

132. *See Constitutional Limitations*, *supra* note 20, at 1053-64.

133. *See* sources cited *supra* note 125. For an examination of the state's compelling interests in the context of prenatal drug use, see *infra* notes 163-174 and accompanying text.

134. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942). In *Skinner*, the Court struck an Oklahoma statute that provided for sterilization of persons with three convictions for felonies involving moral turpitude. *Id.* at 536. The Court found that the statute violated the right to equal protection. *Id.* at 538. The Court, however, has consistently cited *Skinner* as guaranteeing a fourteenth amendment privacy right to procreate. *E.g.*, *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977); *Roe v. Wade*, 410 U.S. 113, 152 (1973).

135. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (unmarried persons' right to practice contraception); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (married couple's right to practice contraception).

136. *Thornburgh v. American College of Obstret.*, 476 U.S. 747, 759 (1986); *Roe*, 410 U.S. at 153; *Constitutional Limitations*, *supra* note 20, at 1058.

137. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989). Five justices in *Webster* indicated dissatisfaction over *Roe's* trimester framework and viability doctrine. *Id.* at 3056 (Rehnquist, J., White, J., Kennedy, J.), 3063 (O'Connor, J. concurring in part and in judgment), 3064 (Scalia, J., concurring in part and judgment). Justice Scalia would have explicitly overruled *Roe* in *Webster*. *Id.* at 3064 (Scalia, J., concurring in part and judgment). Justice O'Connor disposed of the constitutionality of Missouri's abortion statute on other grounds, and, therefore, felt that *Roe* need not be addressed. *Id.* at 3060 (O'Connor, J., concurring in part and judgment). She has expressed that the trimester framework is problematic. *Id.* at 3063. The remaining three justices would not squarely overrule *Roe* under the facts of *Webster*. *Id.* at 3058. They, however, abandoned the trimester framework as an "unworkable" "Proscrutean bed." *Id.* at 3055 & n. 14, 3056.

138. 410 U.S. 113 (1973).

sion is absolute until the second trimester.¹³⁹ At this point, there are certain governmental goals compelling enough to allow varying levels of intrusion into the woman's privacy in the abortion context.¹⁴⁰ Following viability, however, the state may criminally prohibit abortion.¹⁴¹

Criminalization of prenatal drug use, however, should apply throughout pregnancy without constitutional difficulty. There is a difference between the woman's right to choose whether to remain pregnant and her privacy decisions concerning "pregnancy management."¹⁴² Women who deliver drug-damaged neonates and pregnant women in their third trimester have already foregone their choice to abort.¹⁴³ Even at the stage of previability, no woman has the right to abort by way of felonious drug use.¹⁴⁴ Consequently, criminalizing prenatal drug use does not intrude on the woman's abortion right.¹⁴⁵ Therefore, criminalization of prenatal drug use would not be subject to the previability-viability dichotomy of *Roe's* trimester analysis.¹⁴⁶

Although state action would not infringe on the abortion choice, a woman's intimate decisions concerning "pregnancy management" may instead be protected by a personal right of privacy in motherhood.¹⁴⁷ In the prenatal context, privacy in motherhood and child-rearing also overlap. The Court affords great deference to parental autonomy and authority in the education and religious upbringing of one's offspring.¹⁴⁸ In addition, the parental privacy right in child-

139. *Id.* at 163.

140. At the beginning of the second trimester, the state has a compelling interest in *maternal* health and can enact regulation reasonably related to the state's interest in her well-being. *Id.*

141. The state's interest in "potential life" becomes compelling at fetal viability and the state may, therefore, prohibit post-viability abortions unless medically necessary. *Id.*

142. Robinson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 437 (1983) (discussion of distinction between maternal and fetal conflicts); Comment, *supra* note 31, at 713.

143. Patner, *supra* note 3, at A5F (child already born has indisputable rights).

144. Robinson, *supra* note 142, at 442-43 (no constitutional right to use psychoactive substances); Comment, *supra* note 31, at 714 (use of narcotics is a crime); Patner, *supra* note 3, at A5F (mother already committing a felony by using illegal drugs); *cf.* Comment, *supra* note 2, at 1226 n.108 (right to be free from intrauterine abuse deserves protection at all stages of the pregnancy).

145. Robinson, *supra* note 142, at 442 (prenatal regulations do not limit choice to "avoid procreation"); Comment, *supra* note 2, at 1220 (*Roe* is inapposite in the prenatal drug abuse context). Any prenatal drug abuse legislation, however, must take care to exempt lawful abortion from within its scope.

146. See Comment, *supra* note 2, at 1221, 1226 & n.108, 1228-29.

147. See *Constitutional Limitations*, *supra* note 20, at 1057 (*Griswold* establishes a right to autonomy in making certain personal decisions).

148. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish exempt from state's mandatory high school education requirement); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state cannot require all children to receive public education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state cannot prohibit schoolchildren from learning the German language); Comment, *supra* note 2, at 1231 & nn.138-39; *Constitutional Lim-*

rearing extends to the "sanctity of the family."¹⁴⁹ The Court is reluctant to allow state intrusion in the family home or regulation of family life.¹⁵⁰ Parents have the right to "assume the primary role in decisions concerning the rearing of their children."¹⁵¹

The right of parental authority, however, is accompanied by a parental duty¹⁵² to watch over the child's welfare and prepare her for "obligations the state can neither supply nor hinder."¹⁵³ Further, the Court has indicated that neither the realm of family privacy "nor [the] rights of parenthood are beyond limitation."¹⁵⁴ As in the previous facets of constitutional privacy, parental privacy will fall in the fact of a compelling governmental goal.¹⁵⁵

In the first instance, it is uncertain whether the right to parental privacy extends to the *prenatal* relationship.¹⁵⁶ If the Court finds that the mother's conduct towards her fetus falls within the constitutionally protected zone of parental privacy or motherhood, then

itations, supra note 20, at 1062. *But see* Prince v. Massachusetts, 321 U.S. 158 (1944) (parent may not allow minor to sell religious material in public).

149. Moore v. East Cleveland, 431 U.S. 494, 503 (1977). In *Moore*, the Court struck down a zoning ordinance because it interfered with the right of an extended family to live in the same household. *Id.* at 506. The Court explained that the Constitution protects the "sanctity of the family" because it is an institution "deeply rooted in this Nation's history and tradition." *Id.* The Court distinguishes between the family home and family life, calling the home "the seat of family life." *Id.* at 503 n.12.

150. See *Moore*, 431 U.S. at 494 (zoning ordinance that prohibits extended family from living together unconstitutional); Stanley v. Georgia, 394 U.S. 557 (1969) (obscenity statute that invades the home invalidated); Griswold v. Connecticut, 381 U.S. 479 (1965) (law which prohibits married couples from practicing contraception invades the "marital bedroom" and is invalid). *But see* Wyman v. James, 400 U.S. 309 (1971) (upheld law conditioning welfare benefits on recipient's consent to home visits).

151. *Moore*, 431 U.S. at 503 n.12.

152. Arguably, in the case of a mother towards her fetus, this duty would include abstinence from drugs. Comment, *supra* note 2, at 1226 n.108.

153. Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Comment, *supra* note 2, at 1231. In *Prince*, the Court upheld the state's conviction of a child's guardian for violating a child labor law. *Prince*, 321 U.S. at 170-71. In delineating the parental right and concomitant duty, the Court wrote that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder." *Id.* at 166.

154. *Prince*, 321 U.S. at 166. When the parent fails to fulfil her duty to the child, the state, as *parens patriae*, may step in to guard the child's well-being. *Id.* at 166-67.

155. *Id.* at 167. In *Prince*, the child's guardian took the child with her to distribute religious material on the public thoroughfare in violation of one of the state's penal provisions prohibiting child labor. *Id.* at 160-63. The Court upheld the law noting that the state had a compelling interest in its role as *parens patriae* to guard the child from "the crippling effects of child employment. . . ." *Id.* at 168.

156. Comment, *supra* note 2, at 1231 (parents *might* have parental right in the unborn). *But see* Myers, *supra* note 58, at 57, 59 (right of parental privacy applies to pregnant mother with full force). Arguably, a woman's privacy in her pregnancy management is a "fundamental right implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937).

state interference in the *prenatal* relationship would implicate the woman's constitutional right of privacy in parenthood.

Regardless of the Court's determination in the *prenatal* context, criminal charges combined with comprehensive drug treatment and parenting education clearly invade the woman's parental privacy rights in the *postnatal* context.¹⁵⁷ Further, post-treatment probation conditions would probably intrude on the women's childrearing decisions for some time. In either the prenatal or postnatal context, however, the state has compelling interests in imposing this intrusive legislation.¹⁵⁸

In summary, criminalization of prenatal drug use would impinge upon several facets of the woman's constitutional privacy.¹⁵⁹ It is also very intrusive in nature.¹⁶⁰ In the past, the Court has noticed *how many ways* legislation infringes on an individual's privacy.¹⁶¹ The intrusiveness of the state action is an important factor as well.¹⁶² In the context of prenatal drug abuse, however, the Court will find serious governmental interests at stake. An analysis of the governmental interests involved in this issue is required at this point.

B. State's Interests in Criminalizing Prenatal Drug Use

The state has two immediate goals in criminalizing prenatal drug use. Under its police power, state action against prenatal drug use would further the governmental goal of curbing yet another facet of drug use in America.¹⁶³ The Court has already stated that

157. This comprehensive rehabilitative policy would invade both the family home and the family life. See *Moore v. East Cleveland*, 431 U.S. 494 (1977).

158. Robinson, *supra* note 142, at 417-24; Comment, *supra* note 2, at 1221-23.

159. Myers, *supra* note 58, at 53-59; Comment, *supra* note 2, at 1232.

160. See *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1413 (1989) (highly intrusive nature of urinalysis); *United States v. Place*, 462 U.S. 696, 701 (1983) (criminal investigations require warrant and probable cause); *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (restraint of freedom to walk away is fourth amendment seizure).

161. Myers, *supra* note 58, at 59 (mother's privacy right at its strongest when parental right combines with personal right); see *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) ("two claimed liberties at stake": parental childrearing and religious freedom rights).

162. *Skinner*, 109 S. Ct. at 1413; *Winston v. Lee*, 470 U.S. 753, 761 (1985); Comment, *supra* note 2, at 1233.

163. The Court's most recent decisions concerning America's drug problem involve drug use in the workplace. See *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989); *Skinner*, 109 S. Ct. at 1402. In *Von Raab*, the Court upheld the Custom Service's suspicionless employee urinalysis program. *Von Raab*, 109 S. Ct. at 1396. Although the Court held that urinalysis is a very intrusive fourth amendment search, it concluded that the government's compelling goal in detecting and deterring drug users from promotion to certain positions justified the suspicionless search. *Id.* at 1397. The Court stated that, "[w]here . . . the possible harm against which the Government seeks to guard is substantial, the need to prevent its

"there can be [no] doubt that drug abuse is one of the most serious problems confronting our society today."¹⁶⁴ In addition, the Court has judicially noted that the state's right to "regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . ." is "manifest in the interest of the public health and welfare."¹⁶⁵ The state's interest in protecting the public health and welfare from the deleterious consequences of American drug abuse is so compelling that the state can impose criminal sanctions, involuntary confinement, and even compulsory treatment.¹⁶⁶

In the case of prenatal drug abuse, however, the state's interest is even more compelling. For in the case of prenatal drug use, the state's interest in the public health and welfare directly coincides with the state's compelling interest in the health and welfare of America's youth.¹⁶⁷ The child represents America's future. As the Court stated in *Prince v. Massachusetts*, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."¹⁶⁸

occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." *Id.* at 1395. In addition, in *Skinner*, the Court left open the possibility that the railroad employees' urinalysis results might be used for criminal prosecution purposes. *Skinner*, 109 S. Ct. at 1415 n.5.

164. *Von Raab*, 109 S. Ct. at 1395. In his dissent in *Von Raab*, Justice Scalia remarked that the issue in the case was the *steps* that can be constitutionally taken to detect drug use. *Von Raab*, 109 S. Ct. at 1398 (Scalia, J., dissenting). He wrote that the Court's opinion was a "symbolic opposition to drug use." *Id.* He indicated that he would have felt differently had there been any "concrete evidence of the severity of a problem" and if the "connection between whatever drug use may exist and serious social harm is [not] entirely speculative." *Id.* at 1400. In the case of prenatal drug use and the drug-damaged infants that are taxing America's social and value systems, Justice Scalia would certainly have to find many "*instances* in which . . . the speculated horrors actually occurred." *Id.*

165. *Robinson v. California*, 370 U.S. 660, 664 (1962). In *Robinson*, the Court struck a California statute that made it a crime to be an addict. *Id.* at 668-69. Throughout its decisions, however, the Court went to great pains to indicate that it was limited to the state court's construction of the statute. *Id.* at 666-67. The Court indicated that it would have upheld the statute if it had been construed to operate on "proof of the actual use of narcotics within the State's jurisdiction." *Id.* Drug-exposed newborns who yield positive toxicology tests are certainly "proof of the actual use of narcotics within" Illinois.

166. *Robinson*, 370 U.S. at 664-65.

167. See Myers, *supra* note 58, at 17-24 (state interests in potential life, general interest in youth, and interest in preservation of life in fetal abuse context); *Fetal Patient*, *supra* note 20, at 1077-78 (state has police power and *parens patriae* interests); Comment, *supra* note 2, at 1221-23 (same).

168. *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). In reference to the state's compelling interest in America's youth, the *Prince* Court wrote, "[i]t is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." *Id.* at 165. Cocaine-damaged infants will never get such a chance. Hundley, *supra* note 3, §1, at 1. In the words of Michigan's Director of Public Health, "[w]e already know that children who get off to a bad start tend to have problems later in life. These babies have lost the battle before they were even born. If there is a mental impairment or neurological damage, we are all in for a

In its role as *parens patriae*, the state "may secure [our youth's well-being] against impeding restraints and dangers within a broad range of selection."¹⁶⁹

The state's *parens patriae* role extends to the fetus and its interests in protecting maternal health and potential life.¹⁷⁰ Although the fetus has no right to life guaranteed by the due process clause,¹⁷¹ the state has a compelling interest in a healthy youth.¹⁷² In a non-abortion context, the state's goal of protecting children, and consequently America, from the *preventable*, life-long, health and intellectual anomalies associated with prenatal drug use is truly compelling throughout pregnancy.¹⁷³ When this compelling *parens patriae* goal is combined with the compelling police power goal of curbing drug use, the state's interest in criminalizing prenatal drug abuse would surely override the woman's privacy interests at stake and thereby withstand constitutional scrutiny.¹⁷⁴

In light of the constitutionality of and goals served by express criminalization of prenatal drug use, states should identify specific offenses concerning this conduct.¹⁷⁵ Illinois already has several related statutes which would facilitate the development of a comprehensive, coercive policy towards prenatal drug abuse. At this point, it is necessary to examine the Illinois statutory structure concerning

rough time." *Id.* (quoting Raj Wiener).

169. *Prince*, 321 U.S. at 168. The evil that the state was concerned with in *Prince* was "the crippling effects of child employment. . . ." *Id.* at 168. The Court wrote that the parent's right to practice religion did not include the right "to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166-67. In contrast, the "crippling effects" of prenatal drug abuse are truly devastating and the mother's right to privacy cannot include the right "to expose the community or the child to" AIDS, birth defects, prolonged suffering and slow death.

170. *Roe v. Wade*, 410 U.S. 113, 154, 162 (1973); Myers, *supra* note 58, at 23.

171. *Roe*, 410 U.S. at 158.

172. For a delineation of the state's compelling interest in America's youth, see *supra* notes 167-69 and accompanying text.

173. Comment, *supra* note 2, at 1237. See Parness, *supra* note 57, at 7 ("preventable birth defects are hard to forget or to forget about"). Criminalization of prenatal drug use does not invade the "decision whether to bear or beget a child." *Carey v. Population Serv. Int'l*, 431 U.S. 678, 687 (1977); see sources cited *supra* notes 142-146 and accompanying text. It would intrude on the mother's bodily privacy and her parental privacy. See *supra* notes 114-25, 147-60 and accompanying text. These privacy rights, however, are not unlimited. One does not have a privacy right "to do with one's body as one pleases. . . ." *Roe v. Wade*, 410 U.S. 113, 154 (1973). Certainly, the state's compelling interests in the prenatal drug abuse context are "sufficiently compelling state interest[s]" to justify "burdensome regulation." *Carey*, 431 U.S. at 686.

174. Myers, *supra* note 58, at 24; Comment, *supra* note 2, at 1223; see *Roe*, 410 U.S. at 162 (state interest in maternal health is "separate and distinct from interest in protecting the potentiality of human life). Concerning the state's authority in the prenatal context, one commentator wrote, "[w]hen these sources combine, they form a formidable defense for children." Myers, *supra* note 58, at 24.

175. However, the state must take care to provide for the abortion right and to narrowly tailor the legislation.

these related areas.

III. TO ILLINOIS LEGISLATORS: A PLEA FOR CRIMINALIZATION

The Illinois General Assembly has already spoken on many issues entwined in prenatal drug use. With regard to drugs in America, the General Assembly has legislatively recognized that "[t]he human suffering and social and economic loss caused by [drug abuse] are matters of grave concern to the people of Illinois."¹⁷⁶ Accordingly, the General Assembly enacted a comprehensive statutory scheme providing for, *inter alia*, treatment of drug abusers.¹⁷⁷ The scheme includes an election for drug treatment as an alternative to incarceration for certain criminal offenders.¹⁷⁸ The enactment of this comprehensive treatment strategy is aimed "to the end that persons who abuse or misuse . . . drugs be restored to good health and become productive citizens in the community."¹⁷⁹

In addition, with respect to maternal/fetal health, the General Assembly has recognized that early identification and management of high risk pregnant women is a "high priority."¹⁸⁰ In an effort to prevent development disabilities and prenatal mortality, Illinois' Prevention of Development Disability (PDD)¹⁸¹ outlines a comprehensive statutory scheme for "identification, screening, management and follow up" of high risk pregnancies.¹⁸² PDD establishes guidelines for a state-wide system of prenatal centers to service high risk pregnancies, including facilities for emergency delivery, care/transport of distressed newborns, and counseling/referral for parents with disabled infants.¹⁸³ The legislative aim of PDD is to "reduce the incidence of prenatal risk factors. . . ."¹⁸⁴ Its efforts will reduce not only the number of disabled infants but also state and private costs in maintenance of these disabled children.¹⁸⁵

Further, Illinois' criminal law regards the fetus as a person from the moment of conception.¹⁸⁶ Under its criminal law, Illinois protects fetal life extensively. To this end, the General Assembly has

176. ILL. REV. STAT. ch. 111½, ¶ 6351-2 (Supp. 1988).

177. Illinois Alcoholism and Other Drug Dependency Act, ILL. REV. STAT. ch. 111½, ¶¶ 6351-1 - 6360-3 (Supp. 1988).

178. *Id.* at ¶¶ 6360-1 - 6360-3. The election for treatment is allowed if the court finds that the offender "is an addict or alcoholic and is likely to be rehabilitated through treatment." *Id.* at ¶ 6360-2.

179. *Id.* at ¶ 6351-2.

180. ILL. REV. STAT. ch. 111½, ¶ 2101 (Supp. 1988).

181. ILL. REV. STAT. ch. 111½, ¶¶ 2101-2113 (Supp. 1988).

182. *Id.* ¶ 2108.

183. *Id.* ¶ 2103.

184. *Id.* ¶ 2101.

185. *Id.*

186. ILL. REV. STAT. ch. 38, ¶¶ 81-21, 9-3.2(c)(1) (Supp. 1988).

enacted a broad statutory scheme to protect the fetus from the conduct of third parties, ranging from intentional homicide to aggravated battery.¹⁸⁷ Illinois penalizes third parties for harm done to a fetus at *any* point in the pregnancy.¹⁸⁸

Ironically, the state exempts maternal conduct in each criminal provision.¹⁸⁹ It is understandable that the state would be wary of including the mother's conduct in the provision regarding intentional homicide since it might encroach upon the woman's right to abort. However, exempting reckless maternal conduct from the involuntary manslaughter¹⁹⁰ and battery provisions¹⁹¹ is objectionable. Reckless maternal conduct has nothing to do with the woman's abortion decision.¹⁹² Surely, the woman's right to abort does not include a right to subject the fetus to prolonged torture such as *in utero* drug exposure.¹⁹³

Perhaps the legislature exempted maternal conduct from these provisions out of concern for too much intrusion into the woman's day-to-day life, subjecting her to possible prosecution for many decisions that she makes throughout her pregnancy. The legislative history suggests this concern.¹⁹⁴ However, the state's compelling constitutional goals lie in stopping prenatal drug use. Legislation must be narrowly tailored to address only the state's interests of constitutional magnitude.¹⁹⁵ Legislative action intruding on the woman's privacy with respect to other decisions that the woman makes while pregnant run the risk of being too broad or un compelling.

Explicitly criminalizing prenatal drug use, however, is a very narrow state action aimed only at the compelling governmental goal of preventing its deleterious effects upon the child, mother, and the public health and well-being. Providing criminal sanctions would allow Illinois to rehabilitate the mother through its drug treatment system's election for offenders. In addition, the state prenatal centers could provide pregnant users with compulsory prenatal/postna-

187. ILL. REV. STAT. ch. 38, ¶ 9-1.2 (intentional homicide of unborn child), 9-2.1 (voluntary manslaughter of unborn child), 9-3.2 (involuntary manslaughter of unborn child), 12-3.1 (battery of unborn child), 12-4.4 (aggravated battery of unborn child) (Supp. 1988).

188. See, e.g., *id.* at 9-3.2 (c)(1)-(2).

189. See, e.g., *id.* at 9-3.2(c)(2) ("person" shall not include . . . pregnant woman whose unborn child is killed).

190. *Id.*

191. ILL. REV. STAT. ch. 38, ¶ 12-3.1(b)(2), 12-4.4(a) (Supp. 1988).

192. The provisions clearly exempt acts during lawful abortions. *E.g., id.* at ¶ 9-3.2(d). For an argument that prenatal legislation does not interfere with the woman's privacy in her abortion decision, see *supra* notes 142-46 and accompanying text.

193. See *supra* note 144 and accompanying text.

194. Illinois Senate Debate, 84th Cong., at 75-76, 77 (May 13, 1986) (discussion concerning whether mother would be prosecuted if she recklessly drove into a tree and the fetus died).

195. *Carey v. Population Serv. Int'l*, 431 U.S. 684, 686 (1977).

tal care, drug treatment, and extended parenting/special handling education. Certainly, reducing the amount of pregnant drug users will significantly reduce prenatal risk factors to infant mortality and morbidity.¹⁹⁶

It is in the interest of Illinois to squarely address the issue of prenatal drug use. Criminal legislation prohibiting this conduct would allow the state to deter it and to treat those who remain undeterrable. Although the financial costs of developing the comprehensive treatment system proposed here appear to be substantial, in reality this policy would require only an extension of Illinois' existing treatment strategies. To be sure, whatever the financial cost is, development of a comprehensive system will be "cost-effective" when compared to "[s]tate and private expenditures for the care and maintenance of those disabled from prenatal risk factors."¹⁹⁷

IV. CONCLUSION

Prenatal drug abuse has already taking a terrible toll on America's health, welfare, and morale. This conduct has brought great suffering and has already touched the lives of so many children. The consequences of maternal drug abuse in terms of financial, educational, and social costs are currently unforeseeable. What is ascertainable, however, is that the practice of using drugs while pregnant is spreading and a rising number of children are born with serious, *preventable* physical and intellectual anomalies each day. These children are our future. If we do not take a strong stand *now*, we may have no future. This comment strongly advocates the Illinois General Assembly to enact legislation criminalizing prenatal drug abuse. Criminal sanctions, however, must be accompanied by an election for comprehensive drug treatment, parenting, and educational opportunities. To this end, this comment's proposal for legislative provisions are set forth in the Appendix.

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196. See *Perinatal Effects*, *supra* note 18, at 179 ("[a]ny pregnancy complicated by substance abuse should be considered high risk"); Hundley, *supra* note 3, § 1, at 9.

197. ILL. REV. STAT. ch. 111 ½, ¶ 2101 (Supp. 1988).

Appendix

9-3.3. Mother's Involuntary Manslaughter and Reckless Homicide of an Unborn Child.¹⁹⁸

§ 9-3.3. Mother's Involuntary Manslaughter of her Unborn Child. (a) A pregnant mother who unintentionally kills her unborn child without lawful justification commits involuntary manslaughter of the unborn child if her acts which cause the death consist of the intentional or knowing ingestion of controlled substance as defined in the Controlled Substance Act and the Cannabis Control Act of 1989 during pregnancy and such act is likely to cause death or great bodily harm to the unborn child.

(b) Sentence.

(1) Involuntary manslaughter of an unborn child caused by maternal prenatal controlled substance abuse is a Class 3 felony.

(2) In lieu of a mandatory jail sentence of at least two years, the mother has the option of electing treatment under Para. 6360-1 of the Illinois Alcoholism and Other Drug Dependency Act.

(3) Probation under this option shall be for not less than three years. Failure to comply with the terms of probation will result in the imposition of the mandatory jail term along with drug treatment throughout the period of incarceration or until the mother is rehabilitated whichever occurs first.

(4) This option is only available once. A repeat offender will receive a mandatory jail sentence and drug treatment while incarcerated.

(c) For purposes of this Section, "unborn child" shall mean any individual of the human species from fertilization until birth.

(d) This Section shall not apply to acts which cause the death of an unborn child if those acts were committed during any abortion, as defined in Section 2 of the Illinois Abortion Law of 1975 to which the pregnant mother consents. This section shall not apply to acts which were committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

12-3.2. Mother's Battery of Her Unborn Child.¹⁹⁹

§ 12-3.2. Mother's Battery of Her Unborn Child. (a) A pregnant mother commits battery of her unborn child if she intentionally or knowingly without legal justification ingests controlled substances as

198. Much of the wording in this proposal is taken from ILL. REV. STAT. ch. 38, ¶ 9-3.2 (Supp. 1988).

199. Much of the wording in this proposal is taken from ILL. REV. STAT. ch. 38, ¶ 12-3.1 (Supp. 1988).

defined in the Controlled Substances Act or the Cannabis Control Act of 1989 during pregnancy which cause bodily harm to her unborn child.

(b) Sentence.

(1) Battery of an unborn child caused by maternal prenatal controlled substance abuse is a Class 4 felony.

(2) In lieu of a mandatory jail sentence of at least one year, the mother has the option of electing treatment under Para. 6360-1 of the Illinois Alcoholism and Other Drug Dependency Act.

(3) Probation under this option shall be for not less than three years. Failure to comply with the terms of probation will result in the imposition of the mandatory jail term along with drug treatment throughout the period of incarceration or until the mother is rehabilitated, whichever occurs first.

(4) This option is only available once. A repeat offender will receive the mandatory jail sentence and drug treatment while incarcerated.

(c) For purposes of this Section, "unborn child" shall mean any individual of the human species from fertilization until birth.

(d) This Section shall not apply to acts which cause bodily harm to an unborn child if those acts were committed during any abortion, as defined in Section 2 of the Illinois Abortion Law of 1975, as amended, to which the pregnant woman consents. This Section shall not apply to acts which were committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

12-4.5 Mother's Aggravated Battery of Her Unborn Child.²⁰⁰

(a) A mother who, in committing battery of her unborn child by prenatal controlled substance abuse, intentionally, knowingly, or recklessly causes great bodily harm, or permanent disability or disfigurement commits aggravated battery of her unborn child.

(b) Sentence.

(1) Mother's aggravated battery of her unborn child is a Class 3 felony with a mandatory jail sentence of at least two years.

(2) In lieu of this jail term, the mother may elect treatment in accordance with Section 12-3.2(b) (2), (3), (4) of this Act.

200. Much of the wording in this proposal is taken from ILL. REV. STAT. ch. 8, ¶ 12-4.4 (Supp. 1988).