

PRENATAL PROSECUTION: TAKING A STAND
FOR THE STATE AND THE WELL-BEING OF
ITS SOON-TO-BE CITIZENS

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I. INTRODUCTION

Deliberation regarding prosecuting pregnant women for harmful behavior has taken place for decades.¹ Courts, scholars, and legislators frequently have contemplated and analyzed the various constitutional, public policy, and practical issues entangled in the subject. It is time to move past the debate and take serious action to hold women accountable for the completely preventable and devastating burden that their poor choices place on their fetuses and the State. Although the proposal may be

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1. See generally Meghan Horn, *Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse*, 14 WM. & MARY J. WOMEN & L. 635 (2008) (addressing the constitutional implications of prosecution based on prenatal conduct); Margaret P. Spencer, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 393 (1993) (analyzing the legal response to prenatal drug use); Elizabeth L. Thompson, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357 (1988) (discussing the issues that surround the criminalization of maternal conduct).

unpopular, it is appropriate and necessary to prosecute women for the prenatal use of alcohol, drugs, and tobacco.

This Note will examine the surrounding issues and explain why women should be criminally prosecuted for using harmful substances while pregnant. First, it will address the effect of alcohol, drugs, and tobacco use on a fetus. Alcohol, drugs, and tobacco have all been directly linked to physical and mental defects that often last a child's lifetime.² While it is unclear exactly how much use it takes to cause such harm, it is clear that all three substances have great potential for harm when used in any amount.³ Additionally, while tobacco and alcohol are legal, evidence suggests that they can have more severe and longer lasting side effects than illegal substances such as cocaine.⁴

Second, this Note examines the actions already taken by the federal government and several states in an attempt to deter substance abuse by pregnant women. In 2003, the federal government amended the Child Abuse Prevention and Treatment Act to require mandatory reporting when a physician suspects a child is born addicted to controlled substances.⁵ However, that amendment did not provide any preventative measures to protect

2. See Cori S. Annapolen, *Maternal Smoking During Pregnancy: Legal Responses to the Public Health Crisis*, 12 VA. J. SOC. POL'Y & L. 744, 745–52 (2005) (discussing the effects of prenatal smoking); Sam S. Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1217 (1987) (stating that the link between drug abuse and fetal disorders has been a concern for decades); Janet R. Hankin, *Fetal Alcohol Syndrome Prevention Research*, 26 ALCOHOL RES. & HEALTH 58, 58–59 (2002) (discussing the consequences of drinking during pregnancy).

3. See Annapolen, *supra* note 2, at 745–52 (describing the physical and behavioral effects of maternal smoking during pregnancy); C. Antoinette Clarke, *FINS, PINS, CHIPS, & CHINS: A Reasoned Approach to the Problem of Drug Use During Pregnancy*, 29 SETON HALL L. REV. 634, 638–42 (1998) (explaining the effects of prenatal drug use); Alison M. Leonard, *Fetal Personhood, Legal Substance Abuse, and Maternal Prosecutions: Child Protection or "Gestational Gestapo"?*, 32 NEW ENG. L. REV. 615, 625–28 (1998) (discussing the effects of alcohol consumption during pregnancy).

4. Heather Flynn Bell, *In Utero Endangerment and Public Health: Prosecution vs. Treatment*, 36 TULSA L.J. 649, 671–72 (2001) (quoting JAMES A. INCIARDI ET AL., COCAINE-EXPOSED INFANTS SOCIAL, LEGAL AND PUBLIC HEALTH ISSUES 30 (1997)).

5. See Ellen M. Weber, *Child Welfare Interventions For Drug-Dependent Pregnant Women: Limitations of a Non-Public Health Response*, 75 UMKC L. REV. 789, 789 (2007) (citing 42 U.S.C. § 5101–5107 (2006)).

fetuses from the effects of such substances prior to birth. Several states have attempted to prosecute women with children affected by prenatal drug use under homicide, delivery to a minor, and abuse and neglect statutes.⁶ These prosecutions have largely failed because the statutes do not specifically prescribe jurisdiction over the unborn, and therefore, many courts have refused to apply them to a fetus.⁷ While many judges recognize the problem, they believe that the issue should be left to Congress and have declined to legislate from the bench.⁸

Third, this Note provides a model statute that all states should adopt in order to effectively deter or detain women who use alcohol, drugs or tobacco during pregnancy. Fourth, this Note examines the constitutionality of this model statute through consideration of privacy and equal protection concerns. Last, this Note addresses the social implications of such a statute.

II. THE FETAL EFFECTS OF ALCOHOL, DRUG, AND TOBACCO USE

The negative effects of a mother's alcohol, drug, and tobacco use on her fetus are well documented.⁹ Illegal drug abuse by pregnant women has received increased attention in recent years, likely because the proliferation of certain drugs—specifically methamphetamines—is wreaking havoc on communities across America.¹⁰ However, studies have concluded

6. John Stogner, *The War on Whiskey in the Womb: Assessing the Merit of Challenges to Statutes Restricting the Alcohol Intake of Pregnant Women*, 7 RUTGERS J.L. & PUB. POL'Y 259, 274–76 (2010) (citing *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992); *State v. McKnight*, 576 S.E.2d 168, 179 (S.C. 2003); *Whitner v. State*, 492 S.E.2d 777, 786 (S.C. 1997)); see also Horn, *supra* note 1, at 636–37 (stating that prosecutors rely on distribution of drugs to a child, child abuse, and manslaughter statutes).

7. See Lisa M. Noller, *Taking Care of Two: Criminalizing the Ingestion of Controlled Substances During Pregnancy*, 2 U. CHI. L. SCH. ROUNDTABLE 367, 368 (1995); see also Sam S. Kepfield, *Perinatal Substance Abuse: The Rhetoric and Reality of 'Rights,' and Beyond*, 1 CARDOZO WOMEN'S L.J. 49, 59 (1993).

8. Kepfield, *supra* note 7; see also Noller, *supra* note 7, at 380.

9. Kepfield, *supra* note 7, at 49.

10. See Linda C. Fentiman, *Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse is Not the Answer—A Comparative Legal Analysis*, 15 MICH. J. GENDER & L. 389, 396–97 (2009).

that in utero exposure to two legal drugs, alcohol and tobacco, actually can be more harmful to the unborn than illegal drug exposure.¹¹ Scholars and courts have considered prosecutions for prenatal drug and alcohol use most frequently, but the serious effects of tobacco have also received attention recently.¹² Therefore, because the goal of the statute proposed in this Note is to prevent harm to fetuses, the statute criminalizes the prenatal use of alcohol, illegal drugs, and tobacco.¹³

A. Alcohol

“Of all legal substances, alcohol poses the most dangerous risks to the mother and developing child.”¹⁴ Alcohol, a known teratogen, is responsible for numerous dangerous fetal effects.¹⁵ When alcohol is consumed during pregnancy, the effects can range from slight neurological disorders, usually called fetal alcohol effects (FAE), to serious structural and neurological abnormalities known as fetal alcohol syndrome (FAS).¹⁶ “FAS is a pattern of mental, physical[,] and behavioral defects”¹⁷ and is regarded as the primary cause of mental retardation.¹⁸ Children with FAS often exhibit physical deformities, “including almond-

11. *Id.* at 396.

12. *See* Annapolen, *supra* note 2, at 744 (discussing the fetal effect of tobacco use).

13. *See id.* at 773. “Because alcohol, cocaine, and tobacco all affect the fetus in a similar manner, a mother should face the same criminal liability for smoking tobacco while pregnant as she would for drinking alcohol or ingesting cocaine.” *Id.*

14. Shona B. Glink, *The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 1991 U. ILL. L. REV. 533, 543 (1991).

15. Tom Rickhoff & Curtis L. Cukjati, *Protecting The Fetus From Maternal Drug and Alcohol Abuse: A Proposal for Texas*, 21 ST. MARY'S L.J. 259, 267 (1989). A teratogen is “a drug or other substance capable of interfering with the development of a fetus, causing birth defects.” DICTIONARY.COM, <http://dictionary.reference.com/browse/teratogen> (last visited Aug. 19, 2011).

16. *See* James M. Wilton, *Compelled Hospitalization and Treatment During Pregnancy: Mental Health Statutes as Models for Legislation to Protect Children from Prenatal Drug and Alcohol Exposure*, 25 FAM. L.Q. 149, 151 (1991).

17. Charles Robert Burton IV, *Fetal Drug or Alcohol Addiction Syndrome: A Case of Prenatal Child Abuse?*, 25 WILLAMETTE L. REV. 223, 223 (1989).

18. Stogner, *supra* note 6, at 262.

shaped eyes . . . a thin upper lip, a pointed chin . . . a low nasal bridge . . . genital abnormalities, and stunted growth.”¹⁹ Further, children with FAS can have numerous mental and behavioral defects, including “difficulty demonstrating common sense, understanding concepts, solving problems, or organizing information,” as well as difficulty with “memory, attentiveness, and vision.”²⁰ Though some of these effects may be treated with medical care, they cannot be completely alleviated or reversed.²¹

Researchers do not know exactly what amount of alcohol must be consumed to cause FAS or FAE.²² Although doctors cannot predict the effects in individual cases, a wide range of drinking patterns have been associated with health risk to a fetus.²³ The effects of prenatal alcohol exposure are typically apparent after alcohol consumption equivalent to four to six drinks per week.²⁴ However, even children born to mothers who drink less during pregnancy have experienced difficulty with learning, difficulty maintaining attention, and a low intelligence quotient (IQ).²⁵ The American Academy of Pediatrics reports that alcohol exposure adversely affects the fetus throughout pregnancy and that there is no safe amount of, or time for, prenatal alcohol consumption.²⁶ However, studies have indicated

19. *Id.* at 261–62.

20. *Id.* at 261.

21. *Id.* at 265.

22. Leonard, *supra* note 3, at 627. “The AMA, former Surgeon General Koop, and a number of other experts have concluded that total abstinence is the only way to ensure no ill effects from alcohol consumption during pregnancy.” Helene M. Cole, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 J. AM. MED. ASS’N 2663, 2667 (1990).

23. See *Effects of Alcohol Consumption During Pregnancy: Hearing to Examine the Effects of Maternal Alcohol Consumption During Pregnancy Before the Subcomm. on Alcoholism and Drug Abuse of the S. Comm. on Labor and Human Res.*, 97th Cong. 81 (1982) (statement of Ruth E. Little, Director, Alcoholism & Drug Abuse Institute, University of Washington).

24. James Drago, *One For My Baby, One More For the Road: Legislation and Counseling to Prevent Prenatal Exposure to Alcohol*, 7 CARDOZO WOMEN’S L.J. 163, 163 (2001). The author notes that one drink is defined as one twelve-ounce can of beer, one five-ounce glass of wine or one and a half ounces of liquor. *Id.* at 163 n.3.

25. Fentiman, *supra* note 10, at 396.

26. See Am. Acad. of Pediatrics: Comm. on Substance Abuse and Comm. on

that discontinuing alcohol use before the third trimester can considerably reduce harm to the fetus.²⁷

FAS is an “increasing problem.”²⁸ In recent years, reported cases of FAS in the United States have increased six-fold.²⁹ Studies have estimated that 3.3% of all pregnant women consume two or more alcoholic beverages per day,³⁰ and 3.7% report engaging in binge drinking.³¹ The rate of FAS diagnosed in newborns is as high as two in every 1,000 live births,³² and “[a]s many as 50,000 babies per year suffer from fetal alcohol effects.”³³ Yet, due to the fact that FAS symptoms are often unreported, and therefore undiagnosed, these statistics fail to accurately depict the tragic frequency in which FAS occurs.³⁴

The costs associated with FAS and FAE underscore the excessive and avoidable strain that prenatal alcohol use places on the already overloaded “education, justice, and welfare systems.”³⁵ Exposure to alcohol in utero has serious and

Children with Disabilities, *Fetal Alcohol Syndrome and Alcohol-Related Neurodevelopmental Disorders*, 106 PEDIATRICS 358, 360 (2000). The Academy recommends abstinence from all alcohol for women who are pregnant or planning on becoming pregnant. *Id.*

27. Rickhoff & Cukjaki, *supra* note 15, at 268.

28. Drago, *supra* note 24, at 163; *see also* Leonard, *supra* note 3, at 626 (explaining that the number of children born with FAS in 1992 was four times the number in 1979).

29. Drago, *supra* note 24, at 163.

30. *Id.*

31. DEPT OF HEALTH AND HUMAN SERVS., RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 33 (2008) [hereinafter National Survey], *available at* <http://www.oas.samhsa.gov/nsduh/2k7nsduh/2k7Results.pdf>. Findings among pregnant women ages 15–44 based on are data from 2006–2007. *Id.*

32. Drago, *supra* note 24, at 163–64; *see also* *Alcohol Warning Labels: Hearing Before the Subcomm. on the Consumer of the S. Comm. on Commerce, Sci. and Transp.*, 100th Cong. 24 (1988) (statement of Dr. Enoch Gordis, Dir., Nat’l Inst. on Alcohol Abuse and Alcoholism, Dep’t of Health and Human Servs.) (stating that FAS occurs in 1.9 of every 1000 live births); Leonard, *supra* note 3, at 626 (indicating that FAS occurs in approximately one of every 750 births).

33. Drago, *supra* note 24, at 164.

34. Stogner, *supra* note 6, at 264.

35. *Id.* (finding that individuals with FAS “are often responsible for a disproportional number of crimes”).

enduring effects.³⁶ Many children born with FAS require lifelong treatment, which has been estimated to cost over \$1 million.³⁷ The expense to society for supporting such individuals, including “health care, welfare, education, and the criminal justice system” amounts to roughly \$5 million for each diagnosed individual during their lifetime.³⁸ Additionally, reports estimate that the cost of institutionalizing an FAS infant born with severe mental retardation is almost \$40 thousand per year.³⁹ In 1992, health care and other services associated with FAS cost the United States \$1.9 billion.⁴⁰ “Reducing the incidence of FAS by just one percent would save almost \$8 billion over the life of the next generation.”⁴¹ Perhaps the most troubling fact is that these disorders are undoubtedly avoidable.⁴²

B. Illegal Drugs

“Medical science has unequivocally established” that when a mother uses illegal drugs the toxins “enter the mother’s placenta and adversely affect the fetus.”⁴³ While scientists agree that drug use during pregnancy harms the fetus, they are uncertain about the exact severity and permanence of such harm.⁴⁴ Congenital defects, those present at or within one month of birth,

36. Rickhoff & Cukjati, *supra* note 15, at 269.

37. Stogner, *supra* note 6, at 264.

38. *Id.* (stating that reports suggest that individuals diagnosed with FAS are statistically more likely to commit a crime than individuals who do not have FAS).

39. HENRICK HARWOOD & DOUGLAS FOUNTAIN, THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE IN THE UNITED STATES 1992 4–32 (1998) (citing a study evaluating the cost of ten specific FAS-associated birth defects).

40. *Id.*; *see also* Leonard, *supra* note 3, at 626–27 (“It is estimated that FAS babies cost the United States \$2.7 billion per year, with lifetime care for one FAS child at approximately \$1.4 million.”).

41. Stogner, *supra* note 6, at 264.

42. *Id.* at 265.

43. Rickhoff & Cukjati, *supra* note 15, at 270.

44. *See generally* *Alcohol and Drugs*, MARCH OF DIMES, http://www.marchofdimes.com/pregnancy/alcohol_illicitdrug.html (last visited Aug. 19, 2011); *Using Illegal Street Drugs During Pregnancy*, AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/pregnancyhealth/illegaldrugs.html> (last visited Aug. 19, 2011) (discussing the effects of the use of various illegal drugs during pregnancy); *see also* Fentiman, *supra* note 10, at 395.

caused by drug use typically take place in the first three months, but the threat of organ damage subsists throughout the entire pregnancy.⁴⁵ Most studies have focused on crack, cocaine, and heroin-related substances. However, smoking marijuana just one time “leads to prolonged fetal exposure[,] . . . raises carbon monoxide levels in the fetus’s bloodstream[,] and impairs fetal oxygenation, which may lead to growth anomalies in weight, length, and head circumference.”⁴⁶ The National Survey on Drug Use and Health found that 5.2% of pregnant women used drugs between 2006 and 2007.⁴⁷ Other studies found that eleven percent of pregnant women have used illegal drugs during their pregnancy.⁴⁸ Some “researchers estimate that [the actual] figure is closer to fifteen to twenty percent in urban areas.”⁴⁹ In 1990, a survey estimated that 375 thousand children each year are born addicted to drugs, costing the health care system \$504 million each year.⁵⁰

1. Crack and Cocaine

“Cocaine, the [illegal] drug used most widely among pregnant women, has the most serious effects on the fetus.”⁵¹ Physicians have linked maternal use of cocaine, including the street drug “crack,” to “smaller brain circumference, fetal hypoxia, and suppressed appetite.”⁵² The use of cocaine also “increases the chances of in utero stroke, spontaneous abortion, abruptio

45. Rickhoff & Cukjati, *supra* note 15, at 271.

46. Noller, *supra* note 7, at 370.

47. National Survey, *supra* note 31, at 24. This figure is up from 3.9% between 2004–2005. *Id.* Among women ages 15–17, those who were pregnant had a higher rate of drug use at 22.6% than those who were not pregnant at 13.3%. *Id.*

48. Noller, *supra* note 7, at 370 (citing Cole, *supra* note 22, at 2666).

49. Clarke, *supra* note 3, at 635.

50. Kepfield, *supra* note 7, at 49.

51. Glink, *supra* note 14, at 542 (“[O]nce the cocaine crosses the placenta, it remains in the fetal tissues and is not immediately recirculated to the mother. The cocaine then gets caught in the system of the fetus, meaning that the fetus may get ten or more rushes each time the woman gets one.”).

52. Noller, *supra* note 7, at 370. Fetal hypoxia is a condition characterized by an inadequate supply of oxygen to the fetal tissue. *Id.* at 370 n.24.

placentae, and death during infancy.”⁵³ Additionally, children born to mothers using cocaine or crack may suffer from withdrawal symptoms, learning disabilities,⁵⁴ impaired motor control, weak muscle tone, limited movement patterns, under-developed reflexes,⁵⁵ and general irritability that makes them less likely to bond with others.⁵⁶

2. Heroin and Related Substances

The prenatal use of heroin and narcotics causes many of the same effects as crack and cocaine.⁵⁷ Drug-addicted infants usually experience withdrawal symptoms upon birth, which often persist for up to six months.⁵⁸ The harmful effects of heroin and heroin-related substances “include neurological and behavioral disorders, lack of attention span, cognitive defects, vomiting, shrill crying, seizures, and even death.”⁵⁹

Drug-addicted infants typically spend their first days of life in the neonatal intensive care unit.⁶⁰ A neonatal intensive care unit generally costs between \$3,000 and \$15,000 for one uncomplicated case of drug withdrawal.⁶¹ However, if prior to giving birth, a mother joins a heroin methadone maintenance program and receives persistent medical and nutritional care, she can minimize her newborn’s withdrawal symptoms and have an overall healthier pregnancy outcome.⁶² An additional concern associated with prenatal drug use is that intravenous drug users more frequently contract HIV/AIDS and, without treatment, can pass it to their newborns.⁶³ Roughly fifty percent of mothers with AIDS pass the virus to their fetuses, and half of those

53. *Id.* at 370.

54. *Id.* at 370–71.

55. Wilton, *supra* note 16, at 153.

56. Noller, *supra* note 7, at 370.

57. Wilton, *supra* note 16, at 153.

58. Rickhoff & Cukjati, *supra* note 15, at 271.

59. *Id.*

60. Balisy, *supra* note 2, at 1222.

61. *Id.*

62. Wilton, *supra* note 16, at 153–54.

63. *See* Noller, *supra* note 7, at 371.

infected babies die within fifteen months of birth.⁶⁴

C. Tobacco

“There is a clear and undeniable link between gestational tobacco smoking and egregious effects on children.”⁶⁵ Researchers have identified a significant relationship between tobacco use and prematurity, as well as death immediately before and after birth.⁶⁶ When a pregnant woman smokes tobacco, “over 2,000 harmful substances, including carbon monoxide, nicotine and hydrogen cyanide . . . cross the placenta and enter the fetus’s system” through the umbilical cord.⁶⁷ These chemicals reduce the quantity of oxygen that reaches the fetus by up to forty percent and slow down fetal breathing for up to ninety minutes after each cigarette.⁶⁸

Scientists have identified a connection between maternal smoking and several very serious conditions such as low birth weight, congenital deformities, fetal mortality, sudden infant death syndrome, cleft lips or palates, tumors of the central nervous system, decreased cognitive abilities, increased aggression, hyperactivity, and difficulty with speech, motor,⁶⁹ and emotional development.⁷⁰ Furthermore, tobacco-exposed children have an increased incidence of “criminality in adulthood” and tend to suffer from higher rates of substance abuse and depression when compared with unexposed children.⁷¹

64. *Id.* The author notes that according to the U.S. Public Health Service the majority of new cases of AIDS are among newborns who received the virus from their infected mother. *Id.* at 371 n.30 (citing PUBLIC HEALTH SERV., U.S. DEPT’ OF HEALTH AND HUMAN SERVS., *Caring for our Future: The Content of Prenatal Care* 20 (1989)).

65. Annapolen, *supra* note 2, at 765.

66. Rickhoff & Cukjati, *supra* note 15, at 273.

67. Annapolen, *supra* note 2, at 745 (quoting Kristin L. Johnson, Comment, *An Argument for Consideration of Prenatal Smoking in Neglect and Abuse Determinations*, 46 EMORY L. J. 1661, 1667 (1997)).

68. *Id.* at 745–46.

69. *Id.* at 746–52.

70. Rickhoff & Cukjati, *supra* note 15, at 273.

71. Monique Ernst et al., *Behavioral and Neural Consequences of Prenatal Exposure to Nicotine*, 40 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 630, 633 (2001).

Research indicates that sixty percent of smokers continue to smoke after becoming pregnant.⁷² Statistics for the year of 2006-2007 show that 16.4% of pregnant women used tobacco while pregnant.⁷³ Among pregnant females aged 15–17, 24.3% reported smoking cigarettes.⁷⁴ This statistic shows that prenatal smoking is not likely to decrease in the immediate future without intervention. The economic cost to society caused by prenatal smoking is currently undetermined, but birth defects resulting from tobacco use undoubtedly “carry significant costs.”⁷⁵

III. ALL STATES SHOULD CRIMINALIZE THE PRENATAL USE OF ALCOHOL, ILLEGAL DRUGS, AND TOBACCO

There is an undisputed connection between substance abuse during pregnancy and serious physical and mental defects in newborns.⁷⁶ Despite the cost and magnitude of the issue, many states have “no legal basis . . . to protect the health of the fetus.”⁷⁷ The State has a significant and compelling interest in deterring a mother’s harmful behavior and protecting the health of a fetus.⁷⁸ Therefore, the State must take action to criminalize such behavior in order to protect the unborn.

A statute imposing jail time on women who use alcohol, drugs, or tobacco while pregnant would resolve jurisdictional issues, send a strong message to mothers to avoid such behavior, and “provide[] a single source of law upon which both mothers and judges can rely.”⁷⁹ One of the main functions of criminal

72. Annapolen, *supra* note 2, at 766.

73. National Survey, *supra* note 31, at 45 (data collected for women ages 15–44).

74. *Id.* Only sixteen percent of *non-pregnant* 15–17 year olds reported smoking. *Id.*

75. Balisy, *supra* note 2, at 1223 (citing G. OSTER ET AL., THE ECONOMIC COSTS OF SMOKING AND BENEFITS OF QUITTING 4 (1984) (noting that the authors recognize the problems of smoking and pregnancy but do not attempt to measure the associated costs)).

76. *See* Cole, *supra* note 22, at 2666–67 (citing several examples of the link between substance abuse and abnormalities in newborns).

77. Wilton, *supra* note 16, at 149–50.

78. *Id.* at 156.

79. *See* Noller, *supra* note 7, at 369.

punishment is deterrence.⁸⁰ The goal of criminal sanctions is not only to deter future illegal actions of the offending individual but also to deter illegal actions of others who may commit a similar offense.⁸¹ A statute specifically prescribing criminal sanctions would provide the necessary guidance to attorneys and judges as well as appropriate notice to pregnant women that their actions may be subject to criminal sanctions.⁸² Consistent precedent would encourage mothers to act responsibly and refrain from harmful behavior in order to comply with the statute.⁸³ Under such a statute, if a pregnant woman did not change her behavior she could be sentenced to jail time where the State could ensure that she did not have access to harmful substances, thus giving her fetus a chance at a healthy life.

While the proposal of imprisoning pregnant women for substance abuse may be unpopular, incarceration may be the only way to consistently and thoroughly combat the prenatal substance abuse problem.⁸⁴ Criminal prosecution “is in the best interest of the thousands of children each year who are born from [unhealthy wombs].”⁸⁵ Less restrictive measures such as involuntary treatment or commitment⁸⁶ and mandated reporting have been proposed.⁸⁷ However, as detailed below, these propositions have proven ineffective and insufficient in addressing the problem.

80. ELLEN S. PODGER ET AL., CRIMINAL LAW: CONCEPTS AND PRACTICE 5 (2d ed. 2009).

81. *Id.*

82. Noller, *supra* note 7, at 380.

83. *Id.* at 379.

84. *Id.* at 368.

85. *Id.*

86. Horn, *supra* note 1, at 654–55.

87. Noller, *supra* note 7, at 374 (citing MINN. STAT. ANN. § 626.5562(1) (West 2003)).

IV. STATE AND FEDERAL ATTEMPTS TO REGULATE FETAL HARM CAUSED BY SUBSTANCE ABUSE

A. Mandated Reporting Is Insufficient Because It Is Remedial Rather than Preventative

Federal and state governments have attempted to combat maternal substance abuse in a variety of ways. In 2003, Congress amended the Child Abuse Prevention and Treatment Act to compel physicians to notify child protective services when a baby is born affected by illegal substances.⁸⁸ Additionally, several states have enacted mandatory reporting requirements, which compel physicians who suspect non-medical ingestion of a controlled substance to test the mother and report positive results to the State.⁸⁹ The State then makes an assessment of the mother's ability to care for the child and can assume custody of the child if it finds the level of care inadequate.⁹⁰ Under such statutes, physicians are often instructed to test a newborn if they suspect exposure to controlled substances in utero and to report positive results to the State.⁹¹

Such mandatory reporting policies are ineffective because they are remedial rather than preventative.⁹² While these reporting requirements may help to ensure that the child's needs are met after birth, they do nothing to prevent the harm in the first place.⁹³ In fact, studies show that alcohol has the greatest effect on a fetus in the first trimester.⁹⁴

88. See Weber, *supra* note 5, at 789 (citing 42 U.S.C. § 5101–5107 (2006)).

89. See Noller, *supra* note 7, at 374 (citing § 626.5562(1)); see, e.g., HAW. REV. STAT. §350-1(5) (West, Westlaw through 2011); R.I. GEN. LAWS ANN. §40-11-2 (1)(v) (West, Westlaw through 2011).

90. See, e.g., § 626.556(10).

91. See, e.g., WIS. STAT. ANN. § 146.0255 (West 2006).

92. Noller, *supra* note 7, at 374.

93. The harm associated with prenatal alcohol, drug, and tobacco use can occur throughout pregnancy. See *Drugs and Pregnancy, Facts for Parents*, AM. COUNS. FOR DRUG EDUC. (last visited Aug. 19, 2011), available at <http://www.acde.org/parent/Pregnant.htm>.

94. Noller, *supra* note 7, at 374; see also Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 289 (1990) (stating that alcohol "can harm a fetus even before a woman realizes she is pregnant").

Therefore, these reporting statutes are ill-equipped to address harm that may be caused by substance abuse during pregnancy.⁹⁵ In order to maximize prevention, intervention must occur as soon as possible after conception. Consequently, mandatory reporting does not provide adequate preventative measures to address the problem.

B. Mandated Treatment Is Not a Solution Because It Is Unavailable and Does Not End Addiction

Some states, Wisconsin and South Dakota, allow for civil confinement of pregnant women abusing alcohol as a preventative measure to avoid further harm to the fetus.⁹⁶ However, these states employ different procedures for commitment. Under the Wisconsin statute, the State can take custody of a mother if officials identify that she has a “habitual lack of self-control” in the use of alcohol that poses a risk to her unborn child.⁹⁷ In addition, the mother must have received warning of the State’s concern and failed to participate in a voluntary treatment program.⁹⁸ In South Dakota, the law permits a family member, physician, or other concerned adult to petition the court for the confinement of a pregnant woman abusing harmful substances.⁹⁹ The petitioner is assigned an attorney and must submit a report to the court within five days.¹⁰⁰ If the court decides that the claim has merit, it may detain the woman up to ninety days in a treatment program, hospital, or relative’s home.¹⁰¹ At the end of ninety days, “the holding institution may apply for a court order to have the

95. See Noller, *supra* note 7, at 374.

96. See, e.g., S.D. CODIFIED LAWS § 34-20A-70 (2004); WIS. STAT. ANN. § 48.193(1) (West 2008). Additionally, a Utah state legislator with FAS in the family introduced a bill in Utah that would trigger involuntary treatment against pregnant substance abusers. *State Lawmakers, Prosecutors Continue to Target Pregnant Substance Users*, 20 ALCOHOLISM & DRUG ABUSE WKLY., Mar. 24, 2008, at 1 [hereinafter *State Lawmakers*].

97. Stogner, *supra* note 6, at 267 (citing WIS. STAT. ANN. § 48.193(1)(c)).

98. *Id.*

99. *Id.* at 268 (citing S.D. CODIFIED LAWS § 34-20A-70).

100. *Id.*

101. *Id.* (citing §34-20A-81).

commitment extended if the woman has not given birth or still poses a risk.”¹⁰²

Several states have implemented educational programs to deter drug and alcohol abuse during pregnancy.¹⁰³ In states where women seeking treatment are not automatically enrolled in such a program, they must find one without assistance.¹⁰⁴ Finding a treatment program is often extremely difficult because programs are limited in number and are in high demand.¹⁰⁵ Estimates suggest that there are over one million addicts who would like to enroll in a counseling program but are unable to gain admittance.¹⁰⁶

In 1989, Michele Oberman and her assistant conducted a study in which she attempted to get treatment for her pregnant, drug-addicted, fictitious “friend.”¹⁰⁷ First, they contacted the Illinois Department of Alcoholism and Substance Abuse.¹⁰⁸ The department informed them that they were out of the treatment facilities list and that the new one would be available in six months for the purchase price of \$25.¹⁰⁹ Next, they contacted all twenty-seven treatment facilities in the area, but virtually every program they contacted referred them to other programs,¹¹⁰ some of which did not even accept pregnant women.¹¹¹ The cost for in-

102. *Id.* (citing §§ 34-20A-70, 34-20A-81).

103. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11757.59(b)(2)(D) (West 2007); FLA. STAT. ANN. § 396.1816 (West 2011) (repealed 1993); N.Y. PUB. HEALTH LAW § 2526 (McKinney 1993) (repealed 2009); *see also State Lawmakers, supra* note 96, at 6 (“[S]tate legislat[ure] adopted another measure that requires the Utah Department of Health to conduct a public education and outreach program to inform women of the risks of substance use during pregnancy and of available treatment options.”).

104. Noller, *supra* note 7, at 372.

105. *Id.*

106. *Id.* (citing Andrew H. Malcolm, *In Making Drug Strategy, No Accord on Treatment*, N.Y. TIMES, Nov. 19, 1989, <http://www.nytimes.com/1989/11/19/us/in-making-drug-strategy-no-accord-on-treatment.html?pagewanted=all&src=pm>).

107. Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 517 (1992).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 518.

patient treatment programs was roughly \$12,000 per month, and none of them accepted Medicaid or offered any financial assistance.¹¹² With regard to out-patient facilities, only eight of the fifteen accepted pregnant women, and only four of those eight accepted Medicaid.¹¹³ Overall, the study revealed that “treatment programs for pregnant drug users are almost non-existent”¹¹⁴ and that pregnant addicts are unlikely to receive the timely care they need in order to deliver a healthy baby.

Even if in-patient facilities were readily available and affordable, many still likely would reject pregnant women for several reasons.¹¹⁵ First, pregnant drug users miss about thirty-eight percent of their appointments.¹¹⁶ Second, pregnant substance abusers often experience high-risk pregnancies, and such facilities are concerned about legal liability and the corresponding financial and emotional costs.¹¹⁷ Third, pregnant addicts are more likely to have HIV or AIDS which makes their treatment more complicated and creates a risk of contraction for other patients in the facility.¹¹⁸ Last, pregnant patients are a greater responsibility and treatment programs are not prepared for the complex needs of pregnant addicts.¹¹⁹ The facility must care not only for the mother but also for the fetus and any pregnancy related complications, thus making treatment less efficient and available to fewer persons.

Additionally, even if treatment programs were available and readily treating pregnant women, mandatory treatment would not work because treatment often does not help patients who are required to enroll. Mandated participants do not spend their own money or participate willingly and therefore are often not enthusiastic about attending sessions and changing their

112. *Id.* at 517.

113. *Id.*

114. Spencer, *supra* note 1, at 404.

115. Noller, *supra* note 7, at 373.

116. Oberman, *supra* note 107, at 518.

117. *Id.*

118. *Id.* at 519. The author notes that “of 219 female intravenous drug users enrolled in a methadone treatment program, 37.4 tested HIV positive.” *Id.* at 519 n.62; *see also* Noller, *supra* note 7, at 373.

119. Oberman, *supra* note 107, at 519 (noting that many pregnant addicts are at a high risk of contracting HIV).

behavior.¹²⁰ Women in mandatory programs usually continue to abuse substances; consequently, the number of children affected by such hazardous behavior has not decreased.¹²¹

C. Prior Prosecution Attempts Often Have Failed Due to a Lack of Jurisdiction

South Carolina has implemented more punitive measures and has successfully pursued criminal charges against pregnant women under its child abuse statutes.¹²² In 1996, the South Carolina Supreme Court decided perhaps the most important decision in the area of fetal rights in *Whitner v. State*, in which the court affirmed the conviction of a woman who abused cocaine during the third trimester of her pregnancy.¹²³ The *Whitner* court held that, because a fetus in the third trimester is defined as a person for civil actions and homicide statutes, there is no reason that it could not be considered a person for abuse and neglect statutes.¹²⁴ The court rationalized that the word “person” as used in the criminal child neglect statute did include a viable fetus, that the criminal child neglect statute gave the defendant mother proper notice, and that the prosecution did not unconstitutionally burden her right to privacy.¹²⁵

Several other states have attempted to regulate prenatal alcohol use under child abuse standards. “Florida, Illinois, Indiana, Nevada, North Dakota, Oklahoma, Rhode Island . . . South Dakota, Texas, Utah, Virginia, and Wisconsin all consider exposing a fetus to harmful substances to be a form of either abuse or neglect.”¹²⁶ Other states have used statutes that make

120. See Noller, *supra* note 7, at 373.

121. *Id.* at 373–74.

122. See, e.g., *Whitner v. State*, 492 S.E.2d 777, 779–81 (S.C. 1997). The State successfully prosecuted a woman who pled guilty to using cocaine after her baby was born with cocaine metabolites in her system. *Id.* at 778.

123. *Id.* at 779–86.

124. Stogner, *supra* note 6, at 270 (citing *Whitner*, 492 S.E. 2d at 779–780 (“Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse.”)).

125. See *Whitner*, 492 S.E. 2d at 779–86.

126. Stogner, *supra* note 6, at 271.

it a crime to give controlled substances such as alcohol, drugs, and tobacco to a minor to address this issue.¹²⁷ Nevertheless, these prosecutions are almost never successful because “current laws do not specifically or adequately protect a fetus from its mother’s potentially harmful behavior.”¹²⁸ Consequently, prosecutors have attempted to use various civil or criminal statutes to impute liability for such behavior.¹²⁹ Abuse and neglect statutes and broader criminal statutes were not drafted to address this problem, and prosecutors therefore are often denied jurisdiction.¹³⁰ Further, prosecutors often voluntarily decline to bring such charges, anticipating a court will rule that they lack jurisdiction under a specific statute.¹³¹

For instance, Hawaii prosecutors “brought manslaughter charges against a woman whose two-day-old baby died after she smoked methamphetamines in the days leading up to its birth.”¹³² The defendant pled guilty but the conviction was reversed when the Hawaii Supreme Court refused to accept the State’s interpretation of the manslaughter statute to include a fetus.¹³³ As a result of such rulings, mothers in most jurisdictions can avoid criminal liability for injuring their unborn children, and their babies continue to suffer from the detrimental effects of their mothers’ poor choices.¹³⁴

The aforementioned attempts at regulation are either remedial, in that they take place after the birth and therefore cannot *prevent* the harm, or are unsuccessful due to jurisdictional and procedural obstacles. Nevertheless, due to the extensive detrimental effects on both the fetus and the cost to the State, prenatal alcohol, drug, and tobacco use demands legislative action. A statute specifically prescribing criminal sanctions for

127. *Id.* at 274 (citing *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992)).

128. Noller, *supra* note 7, at 368.

129. *Id.*

130. *See id.*

131. *See id.*

132. Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 883 (2010) (citing *State v. Aiwohi*, 123 P.3d 1210, 1210–11 (Haw. 2005)).

133. *Id.* at 883–84 (citing *Aiwohi*, 123 P.3d at 1224–25).

134. *See* Noller, *supra* note 7, at 368.

such prenatal behavior is necessary to prevent harm to fetuses and the enormous burden that substance-related birth defects place on the State.

V. CURRENT LAW RATIONALLY LEADS TO A STATUTE
DESIGNED TO PROTECT DEVELOPING LIFE FROM HARM
CAUSED BY ITS MOTHER

A. A Father's Right to Defend the Unborn

A statute specifically criminalizing a mother's prenatal use of alcohol, drugs, and tobacco is necessary and appropriate because a father has an interest in his unborn child, as well as a right to defend his fetus in utero. In the seminal case *Roe v. Wade*, the Supreme Court discussed a father's rights in the context of his offspring.¹³⁵ While Supreme Court precedent clearly establishes that a woman has the right to choose an abortion, the Court has given attention to the interests of *both* parents.¹³⁶ Shortly after *Roe*, the Supreme Court discussed a father's rights again in *Planned Parenthood of Central Missouri v. Danforth*.¹³⁷ In *Danforth*, the concurring opinion noted that a father's interest in his children has been recognized as a constitutionally protected freedom to "enjoy the association of his offspring."¹³⁸

In 2002, in *People v. Kurr*, the Michigan Court of Appeals implicitly recognized a father's interest in regard to his fetus, holding that an individual has a right to defend his or her unborn offspring.¹³⁹ The defendant in *Kurr*, a woman pregnant with twins, appealed her conviction for voluntary manslaughter and

135. 410 U.S. 113, 130 (1973); see Lawrence Estrada, *Defensive Mechanism: A Father's Right to Defend the Unborn*, 15 CARDOZO J.L. & GENDER 617, 624 (2009) (noting that the Court, although declining to formally recognize a father's right in the context of abortion, implied that fathers do have an interest in their unborn offspring).

136. Estrada, *supra* note 135, at 630.

137. 428 U.S. 52, 90 (1976) (Stewart, J., concurring).

138. *Id.* at 90.

139. 654 N.W.2d 651, 657 (Mich. Ct. App. 2002); see also Estrada, *supra* note 135, at 617 ("The *Kurr* decision—in addition to its implications regarding the rights of women and fetuses—produced an interesting and unique holding: fathers have a right to defend their own unborn offspring.").

requested a jury instruction on the defense of others. The defendant claimed that she stabbed her boyfriend to death in defense of her fetuses after he punched her twice in her stomach.¹⁴⁰ After reviewing Michigan's fetal homicide statute, the court allowed the defense and held that an individual may defend a fetus in danger of "great bodily harm" or "imminent death".¹⁴¹ The court's decision "reflects a public policy to protect even an embryo from unlawful assault or negligent conduct"¹⁴² and implies that fathers have an interest in protecting the life of their unborn offspring.¹⁴³ The *Kurr* court "recognized the right of an individual to use force in defense of a fetus regardless of viability. Logically, this classification [of 'individual'] includes fathers of such unborn children."¹⁴⁴

Collectively, the decisions in *Kurr*, *Danforth*, and *Roe* suggest that a father has an interest in his offspring and a right to protect his unborn child. While the *Kurr* court discussed the right to defend in the context of a third party assault on the mother, rather than the mother's own harmful behavior, such as prenatal alcohol, drug, or tobacco use, it remains the same that the decision reflects the public policy of protecting the unborn and implies a father's right to do so. Therefore, in the interest of defending his rights and protecting his unborn child, a father should be able defend his fetus against in utero harm caused by the mother herself.

In addition to a father's rights to his children, he also has responsibilities. A father can be ordered to pay child support, to provide health insurance, and to cover educational and medical expenses.¹⁴⁵ Therefore, it is fair and logical that a father's rights to protect his child in utero extend to protection from harm caused by the mother's prenatal alcohol, drug, or tobacco use. A statute specifically created to prevent such prenatal behavior is

140. *Kurr*, 654 N.W.2d at 652.

141. *Id.* at 657. The court framed the issue in terms of whether an individual—typically the mother—may defend the fetus therefore implying that other individuals, such as the father, may defend a fetus as well. *Id.*

142. *See Estrada*, *supra* note 135, at 630.

143. *Id.* at 617.

144. *Id.* at 628.

145. *See, e.g.*, S.C. CODE ANN. § 63-17-70 (West 2008).

necessary to protect a father's rights. Under the proposed statute, a father could bring prohibited prenatal behavior to the attention of the State and thereby prevent further harm to the health and safety of his unborn child.

B. The Law Has Long Recognized That
Children Must Be Protected

The protection of children is one of the cornerstones of modern American law. First, the Supreme Court recognized that potential life deserves protection in *Roe*.¹⁴⁶ Although the Court held that the right to privacy encompasses a woman's right to decide whether to terminate her pregnancy, the Court also held that this privacy right is not absolute and that some state regulations are permissible.¹⁴⁷ The Court rejected the notion that a woman has an unlimited right to do with her body as she pleases,¹⁴⁸ stating that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."¹⁴⁹

Second, current state child abuse and neglect statutes¹⁵⁰ reflect a nationwide interest in protecting children. These statutes are designed "to establish an effective system of protection of children from injury and harm . . ."¹⁵¹ Under *Roe*, a woman may choose to terminate her pregnancy,¹⁵² but if she forgoes that choice, child abuse and neglect statutes create a legal obligation for her to abstain from harming the child after birth.¹⁵³ The problem is that a mother's prenatal alcohol, drug,

146. 410 U.S. at 154.

147. *Id.*

148. *Id.* (citing *Buck v. Bell*, 274 U.S. 200 (1927) (discussing the right in terms of sterilization); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (discussing the right in the area of vaccination)).

149. *Id.*

150. *See, e.g.*, FLA. STAT. ANN. § 39.001 (West 2011); N.C. GEN. STAT. ANN. § 7B-1300 (West 2004); S.C. CODE ANN. § 63-7-10 (2008).

151. *See, e.g.*, S.C. CODE ANN. § 63-7-10(B)(5).

152. *Roe*, 410 U.S. at 155.

153. *See* S.C. CODE ANN. § 63-7-10; *see also* Spencer, *supra* note 1, at 420 ("Once [a woman] makes the decision to bring the child to term, then she must not abuse the future child.").

or tobacco use can substantially harm children before birth and such harm often lasts the child's lifetime.¹⁵⁴ Therefore, a mother's obligation not to endanger or neglect her child should begin before the birth of the child. Some courts have made this logical inference and held that a mother's consumption of drugs and alcohol during pregnancy constitutes child abuse.¹⁵⁵

Third, the United States Code reflects the policy that potential life must be protected. The statutory provision entitled "Protection of Unborn Children"¹⁵⁶ encompasses the idea that unborn children require legal protection by providing a separate criminal offense for anyone who causes death or bodily harm to a fetus.¹⁵⁷ However, the United States Code protects a fetus from everyone but its mother by specifically exempting a mother from prosecution for harming her own child.¹⁵⁸ "A child born suffering from injuries cause by the mother's prenatal acts is no less injured than a child born suffering from the prenatal acts of a third party."¹⁵⁹ Therefore, protection of the fetus' interests should be similar whether the harm is caused by the mother or a third person.¹⁶⁰

C. Public Policy Demands Protection

Last, in terms of public policy, because "[p]arents have the primary responsibility for and are the primary resource for their children,"¹⁶¹ they should be prohibited from behavior proven to harm their offspring at all stages of their lives and development, including as a fetus. By nature, children, especially fetuses, cannot protect themselves. Therefore, a statute should be enacted to protect children from harm at all stages of development, especially when the perpetrator is the individual primarily

154. See Noller, *supra* note 7, at 369; Kepfield, *supra* note 7, at 61.

155. See, e.g., *In re Baby X*, 293 N.W.2d 736, 739 (Mich. Ct. App.1980); *In re Smith*, 492 N.Y.S.2d 331, 335 (N.Y. Fam. Ct. 1985); *In re Ruiz* 500 N.E.2d 935, 939 (Ohio Com. Pl. 1986); see also Horn, *supra* note 1, at 642 n.39.

156. 18 U.S.C. § 1841 (2006).

157. *Id.* § 1841(a)(1).

158. *Id.* § 1841(c)(3).

159. Rickhoff & Cukjati, *supra* note 15, at 283.

160. *Id.*

161. S.C. CODE ANN. § 63-7-10(A)(1) (West 2008).

charged with their care.

VI. MODEL STATUTE

A. A pregnant woman is subject to criminal prosecution and/or civil commitment for the intentional consumption, in any amount, of any one of the following:

- (1) any illegal drug;
- (2) any alcoholic beverage; or
- (3) tobacco-containing products, as well as the intentional and/or conscious exposure to second-hand smoke.

B. For the purposes of this statute

(1) A woman is considered pregnant from the moment she knows or reasonably should know that she is pregnant. Pregnancy is terminated when the child is born or has been deemed not viable by a health care provider.

(a) A woman knows that she is pregnant when a health care provider confirms her pregnancy and the physician makes her aware.

(b) A woman reasonably should know that she is pregnant when she has a positive pregnancy test of any kind and/or has engaged in sexual intercourse within the past nine months, with or without contraception, and is experiencing symptoms of pregnancy as outlined by the American Pregnancy Association.¹⁶²

(2) Alcohol is defined as “ethyl alcohol, or ethanol, [] an intoxicating ingredient found in beer, wine, and liquor . . . [and] produced by the fermentation of yeast, sugars, and starches.”¹⁶³

162. See *Pregnancy Symptoms*, AM. PREGNANCY ASS'N., <http://www.americanpregnancy.org/gettingpregnant/earlypregnancysymptoms.html> (last visited Aug. 19, 2011); see also Christine Hunt, *Criminalizing Prenatal Substance Abuse: A Preventative Means of Ensuring the Birth of a Drug-Free Child*, 33 IDAHO L. REV. 451, 476 (1997) (suggesting that a statute should apply when a woman knows or should have known that she was pregnant).

163. *Alcohol and Public Health*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/alcohol/faqs.htm#whatAlcohol> (last visited Aug. 19, 2011).

(3) Illegal drugs include “cocaine, heroin, hydrocodone, inhalants, LSD, marijuana, MDMA, methamphetamine, oxycontin, steroids”¹⁶⁴ and any prescription drug not specifically prescribed for the individual’s use by a health care provider.

(4) Tobacco or “tobacco product” includes “any product manufactured from tobacco and intended for use by smoking, inhalation, chewing, sniffing or sucking.”¹⁶⁵

“Exposure to alcohol and cigarettes has been determined to have an equal or greater detrimental impact on [an] infant than exposure to [some illegal drugs].”¹⁶⁶ As discussed previously, the harmful effects of these products can take place when consumed in any amount and at any time during pregnancy. Therefore, in the interest of preventing unnecessary harm to potential life, the proposed statute prescribes criminal sanctions to the use of all three substances, in any amount and at any time during pregnancy. While a woman has the right to obtain an abortion, a woman must refrain from the use of alcohol, drugs, and tobacco until termination of the pregnancy in order to protect the State and the child from such harmful effects in the event that the mother has a change of heart and decides to carry the fetus to term.

While the model statute may be criticized for being overly broad and unduly harsh, less intrusive options have not worked. However, if necessary, a provision could be included to give women a chance to seek treatment before being prosecuted. Mandated treatment may be more effective if incorporated into a criminal statute. First, women may be motivated to take treatment seriously and discontinue their harmful behavior if failure to do so would lead to criminal prosecution.¹⁶⁷ Second, treatment programs for pregnant women could be made more

164. See *Drug Information Resources*, U.S. DRUG ENFORCEMENT ADMINISTRATION, <http://www.justice.gov/dea/concern/concern.htm> (last visited Aug. 19, 2011).

165. REPUBLIC OF S. AFR., ACT NO. 12, TOBACCO PRODS. CONTROL AMENDMENT ACT, 2.K. (1999), available at <http://www.doh.gov.za/docs/legislation/acts/1999/act12.html>.

166. Bell, *supra* note 4, at 671–72 (quoting INCIARDI, *supra* note 4, at 30).

167. See Spencer, *supra* note 1, at 402.

readily available by diverting funds that would normally go to the treatment of affected children to fund treatment centers, thereby preventing harm on the forefront.¹⁶⁸

VII. CONSTITUTIONAL CLEARANCE: THE PROPOSED LEGISLATION PASSES THE RATIONAL BASIS TEST AND THE INTERMEDIATE SCRUTINY TEST REQUIRED FOR A REGULATION TO SURVIVE BOTH PRIVACY AND EQUAL PROTECTION CONCERNS.

A. The Criminalization of Maternal Substance Abuse Does Not Violate a Woman's Right to Privacy

The right of an individual to be free from government control is granted through several constitutional amendments.¹⁶⁹ Individuals have a right to freedom of choice when making certain decisions, "particularly in matters regarding the course of his or her life."¹⁷⁰ However, the prosecution of substance-abusing pregnant women does not violate a fundamental privacy right, such as the woman's right to become pregnant or to terminate a pregnancy.¹⁷¹ Instead, it deals with the State's right to regulate alcohol, drug, and tobacco use.¹⁷² The use of such substances is not a fundamental right and, therefore, the regulation must pass only the rational basis test.¹⁷³

The rational basis test requires that the statute be reasonably related to a legitimate government interest.¹⁷⁴ It has long been established that the State has a legitimate and substantial interest in the health of its current and future

168. *See id.* at 405.

169. Stogner, *supra* note 6, at 273.

170. Drago, *supra* note 24, at 166 (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

171. *See* Stogner, *supra* note 6, at 276.

172. *See id.*

173. *Id.*; *see also* Spencer, *supra* note 1, at 421 ("There is no constitutional right to use drugs. The constitutional right at issue here is not the decision to procreate or the decision to abort, but the decision to use drugs after deciding to bear a child.").

174. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

citizens.¹⁷⁵ The Supreme Court specifically addressed this limitation of privacy in the context of pregnancy, stating that “[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, and . . . at some point in time another interest . . . that of potential human life becomes significantly involved.”¹⁷⁶ “Women who [use alcohol, drugs, and tobacco] expose their unborn children to a variety of health problems and deformities.”¹⁷⁷ Such effects may “impair a child’s ability to function [as a productive member] in society and cost the government millions of dollars” each year.¹⁷⁸ The prosecution of pregnant women who use alcohol, drugs, and tobacco, with the goal of preventing harm to future citizens, is rationally related to the government’s legitimate interest in the health of its citizens and therefore passes the rational basis test.

B. Criminally Prosecuting Pregnant Women for the Use of
Harmful Substances Does Not Violate
the Equal Protection Clause

The Fourteenth Amendment provides for equal protection of the law for all citizens and prevents the government from establishing separate protection for different categories of people without a sound governmental reason.¹⁷⁹ The proposed statute does not violate the Equal Protection Clause because the clause “does not prevent the government from creating legislation that separates” people into groups in order to achieve an important and legitimate governmental interest.¹⁸⁰ In *Geduldig v. Aiello*, the Supreme Court held that a pregnancy-based classification should not necessarily be considered gender-based discrimination.¹⁸¹ The Court reasoned that “[w]hile it is

175. See Stogner, *supra* note 6, at 277 (citing *Roe v. Wade*, 410 U.S. 113, 150 (1973)).

176. *Roe*, 410 U.S. at 159.

177. Stogner, *supra* note 6, at 276–77.

178. *Id.* at 277.

179. U.S. CONST. amend. XIV, § 1; *see id.*

180. Stogner, *supra* note 6, at 278–79 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

181. 417 U.S. 484, 494–97 (1974) (superseded on other grounds by statute); *see also* Stogner, *supra* note 6, at 279. Furthermore, “[the Supreme Court] has

true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification”¹⁸² Therefore, while the proposed legislation does create two separate groups under the law based on pregnancy status—pregnant women and persons who are not pregnant—these separate designations are not based solely on gender and therefore should not be classified as gender discrimination.¹⁸³

Even if a court were to find that the distinction between pregnant individuals and non-pregnant individuals constitutes gender discrimination, the statute would still survive the appropriate constitutional analysis. To be constitutional, statutes that discriminate based on gender must pass the intermediate scrutiny test, which requires that the regulation satisfy two prongs in order to pass constitutional muster.¹⁸⁴ First, the State interest must be important.¹⁸⁵ Second, the regulation must have a substantial relationship to that interest.¹⁸⁶

The first prong, the State’s interest, is clearly satisfied in this case. “Maternal substance abuse poses significant societal costs, including billions spent on medical and educational services for children suffering from FAS or other drug-related birth defects.”¹⁸⁷ It is well-recognized that the State has an important interest in protecting the health of its citizens and guarding against unnecessary suffering.¹⁸⁸ Additionally, “[t]he Supreme Court has acknowledged that states have more than a legitimate interest in the health of a viable fetus and individual states have

consistently upheld statutes where the gender classification is not individious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” Drago, *supra* note 24, at 180 (quoting *Michael M. v. Superior Court*, 450 U.S. 464, 468 (1981)).

182. *Geduldig*, 417 U.S. at 496 n.20.

183. Stogner, *supra* note 6, at 279.

184. 16B C.J.S *Constitutional Law* § 1140 (2005); *see also* *Rainey v. Chever*, 527 U.S. 1044, 1045 (1999) (Thomas, J., dissenting) (explaining that intermediate scrutiny is the appropriate standard for classification based on gender as well as the requirements for satisfying the standard).

185. *Rainey*, 527 U.S. at 1045.

186. *Id.*

187. *Rickhoff & Cukjati*, *supra* note 15, at 287.

188. Stogner, *supra* note 6, at 277.

the right to define when that right begins.”¹⁸⁹ “The state’s ‘important and legitimate interest in protecting the potentiality of human life’ would be severely undermined if it could require birth [after a certain point in the pregnancy] but do nothing to ensure that the life it saved was worth living.”¹⁹⁰ “Since a state may define a viable fetus as a person and grant that fetus rights, [the fetus’s] health is a legitimate government interest”¹⁹¹ The State’s interest in avoiding prenatal harm and the related costs are “sufficiently compelling to allow it to intervene when there is evidence of maternal substance abuse.”¹⁹²

The second prong of the intermediate scrutiny test requires that the proposed regulation be substantially related to the State’s goal.¹⁹³ Here, the State’s goal is to deter pregnant women from using alcohol, drugs and tobacco, thereby preventing harm to the State’s future citizens. “The threat of imprisonment is reasonably related to the prevention of forbidden actions”¹⁹⁴ A punishment of jail time confines the pregnant offender, prevents them from further alcohol, drug, or tobacco use, and thereby prevents further harm to the fetus, which is the goal of the statute. The statute’s effect of criminalizing such destructive prenatal behavior and the State’s goal of protecting potential life are substantially related, and thus the proposed statute passes the intermediate scrutiny test.

VIII. THE CONCERN OVER SOCIAL IMPLICATIONS

A. Deterrence of Medical Treatment

Several scholars have argued that even though legislation similar to the proposed statute may pass constitutional muster, pregnant women should not be criminally prosecuted because the

189. *Id.*

190. John E. B. Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1, 19 (1984) (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

191. Stogner, *supra* note 6, at 277.

192. Rickhoff & Cukjati, *supra* note 15, at 287.

193. 16B C.J.S *Constitutional Law* § 1140 (2005).

194. Stogner, *supra* note 6, at 277.

fear of criminal charges may deter women from seeking necessary prenatal care.¹⁹⁵ Some scholars and physicians fear that the threat of prosecution may undermine doctor-patient trust and cause pregnant women to hide their dependency problems instead of seeking help, due to a fear of being reported and losing their children.¹⁹⁶ While there may be some truth to such a belief, it should not deter the adoption of the proposed statute. Opponents of criminal prosecution for pregnant women often fail to recognize that reporting requirements designed to get women into treatment (with no criminal implications) also may lead women to withhold information for fear of forced treatment.¹⁹⁷ If pregnant women are just as likely to avoid medical care when threatened with treatment, not prosecution, the argument that criminal prosecution deters women from medical care has less resonance. This pervasive and detrimental issue cannot be ignored just because any action to prevent it may deter some women from treatment.

To the contrary, the proposed criminal statute may actually ensure that more pregnant women get appropriate treatment. Under the statute, women who avoid treatment due to the use of harmful substances may be detained, imprisoned, and given proper medical treatment. Criminal prosecution confines and ensures medical treatment for the women who do not comply with the statute, thus preventing them from causing further harm to their fetus.

Furthermore, reliance on the fear of imprisonment as an explanation for failure to seek care may be exaggerated.¹⁹⁸ There are several other reasons why women using these substances may not seek treatment while pregnant. One possible explanation is that substance abuse prevents the woman from

195. See, e.g., Tiffany M. Romney, *Prosecuting Mothers of Drug-Exposed Babies: The State's Interest in Protecting the Rights of a Fetus Versus the Mother's Constitutional Rights to Due Process, Privacy and Equal Protection*, 17 J. CONTEMP. L. 325, 342 (1991).

196. *Id.*

197. *Id.* (citing *Don't Punish the Troubled Mothers*, TEX. LAW., May 28, 1990 at 39).

198. Noller, *supra* note 7, at 388.

remembering responsibilities and keeping to a schedule.¹⁹⁹ It may be that such use generally leads to poor health habits, including not seeking health care when appropriate, or that women feel ashamed for not taking the best care of their baby, or that they use their income to buy drugs and do not have money to seek medical care.²⁰⁰ The argument that women would avoid prenatal care for fear of prosecution may have some merit, but it is nevertheless an inadequate reason to avoid enacting the proposed statute.²⁰¹

B. The Slippery Slope Debunked

Opponents of criminal prosecution have also argued that the frightening prospect of criminal prosecution leaves the door open to impose additional restrictions on a woman's behavior during pregnancy.²⁰² While the proposed legislation may pave the way for criminalization of other harmful behavior, such behavior would have to be proven to be directly linked to substantial prenatal harm as well as pass constitutional muster. Therefore, it is unlikely that many other behaviors could be sanctioned. However, if additional regulations were passed, it would be for the same legitimate and important reasons as discussed throughout this Note. The possibility of additional appropriate regulation created to protect a substantial state interest, as well as the lives of those who cannot protect themselves, should not be viewed as a negative consequence or a reason to avoid implementing such a statute.

Scholars have also expressed concern that the criminalization of prenatal behavior would subject the many women that suffer miscarriages each year to the possibility of being called into court to defend their behavior.²⁰³ This fear is unfounded because the proposed statute criminalizes the behavior of using the prohibited substances; it does not take into account the actual effect on the fetus in each case. The goal of

199. *Id.*

200. *Id.*

201. *Id.*

202. *See, e.g.,* Romney, *supra* note 195, at 343; Horn, *supra* note 1, at 644.

203. Romney, *supra* note 195, at 343–44.

the statute is to criminalize the behavior of alcohol, drug, and tobacco use while pregnant; it does not criminalize a woman for having a miscarriage or for giving birth to a child with any other fetal abnormalities. Proof of actual harm to the fetus as a result of the pregnant woman's abuse is not a requirement for a finding of liability. The purpose "is to deter or stop prenatal substance abuse *before* it causes harm" ²⁰⁴ Exactly how to enforce the proposed legislation is a topic for another article, but enforcement is intended to occur only when there is some evidence of the prenatal use of alcohol, drugs, or tobacco.

Compare the example of drunk driving. Drunk driving laws criminalize behavior because it is considered reckless and has the potential to cause harm. When caught, the drunk driver can be guilty regardless of whether someone is actually injured by his conduct. However, it does not follow that in every accident where someone is hurt that the driver is charged with drunk driving. There has to be at least some evidence that the driver was under the influence. Similarly, the use of such substances while pregnant is criminalized by the proposed legislation because it has potential to cause great harm. However, a mother will not be called into court under the statute just because her baby is born with abnormalities. The statute criminalizes the behavior of prenatal use of the prescribed substances, not the result.

IX. CONCLUSION

The criminalization of prenatal alcohol, drug and tobacco use is necessary to prevent completely avoidable harm to the State's future citizens and an unnecessary financial burden on the State. The law concerning the prenatal use of harmful substances is currently in disarray, and a uniform statute must be adopted in order to minimize the occurrence of these detrimental defects. Tackling the prenatal use of harmful substances has been discussed by courts, legislatures, and scholars for decades, but the problem persists. While exactly how the proposed statute would be enforced and whether it should be applied to pregnant

204. Hunt, *supra* note 162, at 477 (emphasis added).

minors must be analyzed in another article,²⁰⁵ swift action should be taken in the direction of implementation. The proposed statute should be adopted in order to reduce the prevalence of fetal alcohol, drug, and tobacco effects and thereby protect the State and its soon-to-be citizens.

205. As an example of a failed attempt to enforce, in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) the Supreme Court declared unconstitutional the Medical University of South Carolina's warrantless testing of the urine of pregnant patients suspected of drug use.