Combating Prenatal Substance Abuse: The State's Current Approach and the Novel Approach of Court-Ordered Protective Custody of the Fetus

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I. INTRODUCTION

Approximately one in every ten fetuses in the United States is exposed to cocaine in the womb, which in turn affects 375,000 babies a year. Estimates show that eleven percent of pregnant women use controlled substances during pregnancy. The severe long-term effects of cocaine and heroin on a baby, in addition to addiction and withdrawal at birth, include low birth weight, short body length at birth, smaller head circumference than normal infants, high incidence of physical abnormalities such as deformed kidneys and neural tube defects, and an increased likelihood of experiencing learning disabilities. The federal government calculates that an infant prenatally exposed to illegal drugs costs society about $1 million over its lifetime. Obviously these statistics suggest that prenatal substance abuse is of national concern. Individual states are searching for ways to approach and remedy this problem. The goal of the state in this crisis appears to be two-fold: (1) to penalize the mother for her illegal actions in an effort to deter the problem, and (2) to protect potential life from subsequent medical problems. In many states, prosecutors attempt to criminally charge mothers who have abused a controlled substance during pregnancy.
However, without a statute covering such actions, their efforts have been futile when reviewed by the courts. Although criminal prosecution of mothers achieves the state's goal of penalizing the mother, it is questionable how the state is promoting or protecting the health of the fetus by such actions. Therefore, a better way to achieve the state's goals must exist.

In September, 1995, the state of Wisconsin took a novel approach toward protecting potential life from subsequent medical problems. The approach was not criminal prosecution; rather, it was the assertion of civil child neglect and the request for court-ordered protective custody of a viable fetus whose mother had tested positive for controlled substances multiple times during her pregnancy. Upon review of the state's actions, the Wisconsin Court of Appeals upheld the court-ordered protective custody and found that a fetus was a child under the Wisconsin's Children's Code. Therefore, the state was able to both punish the mother and protect the health of the unborn fetus through protective custody in a local hospital.

This Comment examines the different approaches taken by states to remedy prenatal substance abuse and analyzes the effectiveness of each approach in attaining both of the states' previously mentioned goals. Part II of this Comment will discuss the constitutional and legal status of the fetus and consider the states' interest in protecting the fetus. Part III will then analyze the judicial and legislative reactions to state prosecutors' attempts at criminally charging women for substance abuse during pregnancy. Part IV addresses the novel approach taken by Wisconsin and the judicial response to this approach as reflected in State ex rel. Angela M.W. v. Kruzicki. Finally, Part V analyzes the merits of court-ordered detentions of substance-abusing pregnant women and argues that legislative reform is needed to effectuate the states' goals.

7. See State ex rel. Angela M.W. v. Kruzicki, 197 Wis. 2d 532, 541 N.W.2d 482 (Ct. App. 1995), cert. granted, 546 N.W.2d (Wis. 1996).
8. Id.
9. Id. at 571, 541 N.W.2d at 497. The Supreme Court of Wisconsin heard oral arguments on this case in October, 1996. At the time of publication, the Supreme Court had yet to issue an opinion affirming or rejecting the Court of Appeals decision. Chapter 48 of the Wisconsin Statutes is entitled "The Children's Code." WIS. STAT. ANN. § 48.01(1)(a) (West 1997).
10. 197 Wis. 2d 532, 541 N.W.2d 482.
II. CONSTITUTIONAL AND LEGAL STATUS OF THE FETUS AND THE STATES' INTEREST IN THE FETUS

Courts raise and consider many questions when looking at prenatal substance abuse. What power does the state have to protect the unborn fetus? Do states' rights outweigh the rights of the pregnant mother? To what extent can the state act to protect the fetus? To what extent can the state punish the mother for her use of an illegal substance during pregnancy that subsequently impairs the newborn? To answer these questions, the courts consistently review and apply the decision of Roe v. Wade and its progeny.1

The landmark case of Roe recognized a woman's constitutional right to an abortion, with constraints effectuated by a trimester framework. The Court held the woman's right to an abortion was not absolute:

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justification. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.1

Although the Court recognized the state's interest in protecting the fetus, the fetus was not considered a "person" under the Fourteenth Amendment and, therefore, the fetus was not accorded any constitutional rights.1

In 1992, the Supreme Court altered Roe's trimester framework and emphasized the state's interest in the promotion of potential life in

12. The state did not try to "protect" the fetus against a pregnant woman's actions until after the legalization of abortion in Roe and the anti-abortion movement created thereafter. CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS 3 (1993).
13. See Roe, 410 U.S. at 163. The trimester framework was used to balance the competing interests of a woman's right to choose an abortion and the state's interest in promoting the potential life of a fetus. In the first trimester, a woman has the absolute right to an abortion. In the second trimester, the state may regulate the abortion in ways reasonably related to the health of the mother. In the third trimester, after viability, the state may absolutely prohibit the fetus from being aborted, unless the mother's life is threatened by the fetus. Id.
14. Id. at 163-64.
15. Id. at 158.
Planned Parenthood v. Casey.16 These two Supreme Court decisions have been used as a basis for fetal rights, but debate exists between women’s rights advocates and fetal rights advocates over whether the state’s interest can be interpreted to extend beyond the scope of an abortion.

Women’s rights advocates interpret Roe and its progeny narrowly, arguing that the state’s right to intervene exists only in circumstances of an abortion.17 These advocates believe the Supreme Court set out the life and health of the mother as a limiting factor on the state’s interest in potential life.18 Even if Roe can be read to say that fetal rights exist, women’s rights advocates claim that the Supreme Court decisions19 always subordinate fetal rights to a woman’s right to health and safety.20 Therefore, the women’s rights advocates hold the view that “any rights a fetus may have are simply not compelling enough to override the pregnant woman’s clear and uncontested rights in making decisions about her pregnant body.”21

On the other hand, fetal rights advocates broadly interpret Roe as implying that the state’s interest in potential life exists at conception, not just upon viability.22 Based on the decisions in Webster v. Reproductive Health Services23 and Planned Parenthood v. Casey,24 these advocates believe the view that the fetus’ independent legal rights exist before

16. 505 U.S. 833 (1992). Justice O'Connor reasoned that it must be remembered that Roe v. Wade speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." That portion of the decision in Roe has been given too little acknowledgment and implementation by the Court in its subsequent cases. Id. at 871.
18. Id. at 945-46.
19. These advocates rely on Thornburgh v. American College of Obstetricians & Gynecologists and Colautti v. Franklin which stand for the proposition that a "trade-off" between the life of the mother and the life of the fetus is impermissible. Ouellette, supra note 17, at 946-47 (citing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Colautti v. Franklin, 439 U.S. 379 (1979)). See generally Nelson et al., supra note 3, at 749-52.
20. Ouellette, supra note 17, at 947.
21. Id. at 948.
22. DANIELS, supra note 12, at 23.
23. 492 U.S. 490 (1989). Webster upheld a provision in a Missouri statute which granted the fetus "all the rights, privileges, and immunities available to other persons, citizens and residents of this state." Id. at 504 (quoting MO. REV. STAT. § 1.205.2 (1986)).
viability was affirmed by the Supreme Court.\textsuperscript{25} In addition, such advocates look at the rights already afforded to a fetus\textsuperscript{26} as justification for extending fetal rights in other circumstances.\textsuperscript{27}

Furthermore, fetal rights advocates believe that by choosing to carry the pregnancy to term, the state’s interest in protecting the fetus causes “the woman [to lose] the [legal autonomy] to act in ways that would adversely affect the fetus.”\textsuperscript{28} One human rights advocate, who supports restricting a substance-abusing pregnant woman’s rights, claimed that a woman does not have the right to “inflict a lifetime of suffering on her future child simply in order to satisfy a momentary whim for a quick fix . . . . [The woman’s] right to abuse [her] own body stops at the border of [her] womb.”\textsuperscript{29}

Obviously, in cases brought by the state against a woman for her prenatal substance abuse, the state accepts the broad approach and argues it has a compelling interest in protecting the potential life of the fetus from its substance-abusing mother. Therefore, in order for the state to permissibly intervene and alleviate the prenatal substance abuse problem, the courts must be willing to accept the broad approach when balancing the state’s compelling interest in protecting potential life against a woman’s privacy rights during pregnancy.

\textbf{A. Current Rights Afforded an Unborn Fetus}

States have increasingly afforded the fetus rights and legal status under many statutes, despite the fetus’ lack of full constitutional protection.\textsuperscript{30} For purposes of inheritance in property law, states treat an unborn child as a legal entity from the time of conception.\textsuperscript{31} Currently,

\begin{itemize}
\item \textsuperscript{25} Daniel, supra note 12, at 23-24.
\item \textsuperscript{26} See infra notes 30-36 and accompanying text.
\item \textsuperscript{27} Daniels, supra note 12, at 13.
\item \textsuperscript{28} Id. at 25 (citation omitted). The view is that a woman has a duty or obligation to care for the fetus and insure the birth of a healthy baby if the woman keeps the pregnancy. Therefore, the woman’s body becomes the body of the state and the woman may no longer resist state intrusion. \textit{Id}.
\item \textsuperscript{29} Id. at 26 (quoting Alan Dershowitz, Drawing the Line on Prenatal Rights, L.A. \textsc{Times}, May 14, 1989, at V5).
\item \textsuperscript{30} Roe v. Wade, 410 U.S. 113, 158-60 (1973); see also supra note 15 and accompanying text.
\end{itemize}
every state recognizes a cause of action for tortious prenatal injury. In the criminal context, eight states recognize the killing of a viable fetus to be homicide, five others have enacted feticide statutes, and thirty states, by judicial decision, have adopted the common law “born alive” rule that if the child is born alive and dies, it is considered a homicide. Furthermore, the fetus has attained the right to assert a federal civil rights claim under 42 U.S.C. section 1983. Although several specific rights have been granted to the fetus, many conflicts and inconsistencies exist as to when a fetus should be afforded rights where the legislature has failed to specifically grant and define those rights. The question then raised in the courts is whether the fetus is a “person” or a “child” within the meaning of a particular statute.

III. CRIMINAL PROSECUTIONS AS A REMEDY

State prosecutors have increasingly attempted to criminally charge women for their prenatal substance abuse after the woman has given birth. Some of these charges include involuntary manslaughter, assault with a deadly weapon, child endangerment, child abuse, criminal neglect, possession of a controlled substance, and delivery or distribution to a minor. The principal issues for the court to consider in most of these cases are whether a fetus is a child or person under the applicable statute and whether the statute applies to substance abuse that occurred before the birth of the child.

A. Judicial Responses

When reviewing criminal convictions, the courts consistently have

32. Hartsoe, supra note 31, at 206-07. For an exhaustive listing of the states and the supporting cases, see id. at n.200. One commentator contends that tortious recovery “focuses on the need for compensation of a living person wrongfully injured rather than on the legal status of the fetus.” Nelson et al., supra note 3, at 733.
33. Hartsoe, supra note 31, at 211-12. Of the eight states that recognize the unborn fetus as a person for a homicide statute, three, Massachusetts, South Carolina, and Wisconsin, are based on the state supreme courts’ interpretations of the statutes to include the fetus. Id. at 212 n.235. The other five states, California, Illinois, Minnesota, New York, and Utah, have enacted statutes directly addressing the killing of a fetus as homicide. Id. at 212 n.236.
34. Id. at 212-13. Instead of charging a person with homicide for killing a fetus, the states with “feticide” statutes charge the person with manslaughter. The states that have these statutes include Arizona, Florida, Nevada, Rhode Island, and Georgia. Id. at 213 n.237.
35. Id. at 211-12. For the judicial decisions of these thirty states, see id. at 212 n.233.
held that a fetus is not considered a child or person under the applicable criminal statute. The court seldom considers the state’s compelling interest in protecting the fetus.

1. Child Abuse/Neglect/Endangerment

Over the past ten years, prosecutors have attempted to bring criminal charges of child neglect, child abuse, or child endangerment against new mothers. One of the first reported cases criminally charging a woman with child abuse for her prenatal substance abuse was In re Ruiz. In 1986, the Ohio Court of Common Pleas, Juvenile Division, held that a "child" under the child abuse statute included a viable fetus. Therefore, a child born addicted to heroin could be considered abused within the meaning of the statute. However, since no appeal was made, no higher court ever reviewed the decision. As a result, in 1992, the Ohio Supreme Court did not apply the reasoning of In Re Ruiz when interpreting a similar statute. Instead, the court held that the criminal child endangerment statute did not apply to women whose substance abuse occurred before the birth of the child. The court reasoned that "[t]o construe the statute in this manner would mean that every expectant woman who ingested a substance with the potential of harm to her child, e.g., alcohol or nicotine, would be criminally liable under [the child endangering statute]." The court did not believe the state legislature intended this result.

A recent review of a criminal child abuse case occurred in Reinsto v. Superior Court, which involved a newborn who tested positive for heroin, experienced heroin withdrawal symptoms, and remained in a special care facility until it was one month old. The state of Arizona

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38. 500 N.E.2d 935 (1986).
39. Id. at 939.
40. Id. at 939. The court looked at the common law and its refusal to give a fetus legal protection. However, it then determined that in Ohio a fetus is given intestate rights, and is allowed to recover in a prenatal injury action if subsequently born alive or still, or in a wrongful death action. Id. at 936-37. In addition, the court broadly interpreted Roe v. Wade and argued that "the state's interest in the potential human life at the time of viability... compelled a holding that a viable unborn fetus... be considered a child under the provisions" of the child abuse statute. Id. at 938.
42. Id. at 713. The court interpreted the term "parent" in the statute and claimed that Gray did not become a parent until the child was born alive. Id. at 711.
43. Id. at 712.
44. Id.
46. Id. at 734.
alleged that the mother violated the Arizona criminal child abuse statute by knowingly causing an injury to her child that was likely to produce death or serious injury through her ingestion of heroin during pregnancy. The Arizona Court of Appeals opined that if the legislature, while drafting the child abuse statute, intended to include activities of the mother that affect a fetus and which ultimately does harm to the child after birth, it would have done so specifically. Since the court found the statute did not apply under these circumstances, it did not reach the constitutional issue raised by the mother that the charges brought against her invaded her right to privacy.

In Collins v. Texas, the Texas Court of Criminal Appeals held that a woman charged with reckless injury to a child for voluntarily ingesting cocaine during pregnancy could not be so charged, since she had no notice that such conduct could subject her to prosecution when her child exhibited symptoms of cocaine withdrawal at birth. The court applied the "void for vagueness" doctrine, which requires that a penal statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Since the Texas penal code did not proscribe any conduct with respect to a fetus and the legislature's definitions of "child," "person," or "individual" limited the penal laws to conduct committed against a living human being who was born, the reckless injury to a child statute was impermissibly vague as it applied to the mother's conduct. The Texas court resolved the issue on non-constitutional grounds and never ruled on the constitutional challenges raised by the mother.

The above cases, and many other similar cases brought in different
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jurisdictions, express the courts’ view that it is improper to uphold a criminal conviction of a woman for criminal child abuse, neglect, or endangerment absent the legislature’s specific intent to include the fetus or the mother’s conduct within the meaning of the applicable statute.

However, the courts’ conclusion that a woman is not put on notice that her conduct could be considered criminal is debatable. Although a woman may not know that her actions would specifically be criminal within a prosecutor’s stretched interpretation of some statutes, she inevitably knows that what she is doing constitutes a crime. Actual use or ingestion of a controlled substance already incurs criminal penalties. Also, based on the extensive medical information available to pregnant women concerning the potential hazardous effects associated with the woman’s prenatal behavior, the woman knows that ingesting the controlled substance during pregnancy will impair the health and welfare of her child.

In 1996, the Supreme Court of South Carolina became the first highest court of a state to uphold criminal child neglect prosecution of a woman for her ingestion of cocaine during pregnancy. Despite the trend set by the previously mentioned jurisdictions, the court held that “the word ‘child’ as used in [the child abuse and endangerment] statute[s] includes [a] viable fetus.” Based on the previous case law in South Carolina recognizing a viable fetus as a person in the homicide laws and wrongful death statutes, the court stated it would be absurd not to recognize the viable fetus as a person for purposes of child abuse.

55. See, e.g., Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993) (holding criminal child abuse statute did not apply to use of controlled substances during pregnancy as intended by the legislature; criminal prosecution would violate due process right of fair notice since unconstitutionally vague); People v. Morabito, 580 N.Y.S.2d 843 (1992) (stating legislature did not intend to include acts endangering unborn fetus in endangering welfare of child statute, so charging mother would violate her constitutional due process right to fair notice).
56. See, e.g., Collins, 890 S.W.2d at 893; Welch, 864 S.W.2d at 280.
57. See Legal Interventions, supra note 3, at 2667-68.
58. See generally Nelson et al., supra note 3, at 711-12 (discussing the effects of maternal behavior with respect to nutrition, cigarette smoking, alcohol and illegal substance intake on fetal development).
59. Whitner v. State, No. 24468, 1996 WL 393164, at *1 (S.C. July 15, 1996) (this opinion had not been released for publication in the permanent law reports and until released, is subject to revision or withdrawal).
60. Id. This case came before the Supreme Court of South Carolina after a woman had pleaded guilty to the charges of child abuse and was already serving a seven year sentence for such crime. Id.
2. Delivery and Possession

Two other types of criminal charges that have been brought against a woman who ingests controlled substances during her pregnancy are delivery of an illegal substance to the newborn and possession of an illegal substance based on the presence of residual drug metabolites in the newborn’s urine sample.

The Supreme Court of Florida undertook an extensive examination of prosecuting a mother for delivery of a controlled substance to her newborn in *Johnson v. Florida.* First, the court reviewed the legislative history, intent, and purpose of the delivery statute and concluded that the legislature never intended to include women who take illegal drugs and deliver these drugs to an unborn child through the umbilical cord. Then, the court recognized the prenatal substance abuse crisis and acknowledged that the Florida legislature had chosen to deal with the crisis by placing a child into the custody of protective services, rather than by criminally prosecuting the mother. In conclusion, the court examined multiple medical reports searching for possible ramifications of criminal prosecutions. The court found that prosecutions are the least effective response to the crisis because

[r]ather than face the possibility of prosecution, [many women] may simply avoid prenatal or medical care for fear of being detected. Yet the newborns of these women are, as a group, the most fragile and sick, and most in need of hospital neonatal care. A decision to deliver these babies “at home” will have tragic and serious consequences.

Michigan’s courts have also reviewed convictions for delivery of

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61. *Id.* at *3. The Children’s Code, with respect to the child neglect statutes, in no way suggests that it be applied only to born children, or those with a birthdate. *Id.* at *6 (distinguishing the dissent’s reliance on another South Carolina case that stated a child in the adoption context must be born because the date of birth requirement on the consent form could only be fulfilled after the birth of the child).
63. *Id.* at 1292–94. Since the legislature had strictly set out a statute which provided that a parent could not be subject to criminal investigation based solely on a newborn’s drug dependency, the court concluded that the legislature obviously never intended criminal prosecution for general delivery under these circumstances. *Id.*
64. *Id.* at 1295.
65. *Id.* at 1295–96. The court looked at reports from the American Medical Association, the California Medical Association, and Florida’s Secretary of Health and Rehabilitative Services to reach its conclusion. *Id.*
illegal substances to newborns and have concluded that such activity was not intended to be covered by the legislature when it enacted the delivery statute.\textsuperscript{66} When reviewing criminal convictions of possession, many courts consider the evidence of the metabolites in the newborn's urinalysis to be insufficient to constitute possession, and, therefore, fail to find the women guilty of possession.\textsuperscript{67}

The effort taken by state prosecutors to criminalize prenatal substance abuse is apparent from the extensive steps taken to interpret criminal statutes to include a woman's behavior during pregnancy. These efforts deserve credit because the state clearly acknowledges the problem and is desperately seeking a way to hold these women accountable for their actions. However, it is understandable why, absent specific legislation criminalizing a woman's behavior during pregnancy, the courts are unwilling to independently expand statutes to include this behavior. Deciding these criminal cases on nonconstitutional grounds has allowed the courts to avoid the constitutional issue of whether the state's compelling interest to protect the potential lives that sustain harmful injuries from the mother's use of illegal substances outweighs the mother's constitutionally protected privacy right. The courts and legislatures are well aware of the prenatal substance abuse crisis, but perhaps, by not affirming criminal convictions, the courts are sending a message to the legislature to specifically define the word "person" or "child" in the statutes.

B. Legislative Response

Some states have passed legislation expressing the principle that drug addiction in a newborn constitutes child abuse or neglect.\textsuperscript{68} It is clear

\textsuperscript{66} People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991); People v. Bremer, No. 90-3222-7-FH (Mich. Cir. Ct. 1991) (interpreting the delivery statute to cover ingestion of cocaine by a pregnant woman would be a "radical incursion" upon existing law since a person may not be punished for a crime unless the acts committed fall clearly within the statute's language).

\textsuperscript{67} See Jackson v. State, 833 S.W.2d 220, 223 (Tex. Crim. App. 1992) (holding presence of residual drugs in an infant cannot be grounds for charging mother with possession). See also Commonwealth v. Pellegrini, 608 N.E.2d 717, 720 n.7 (Mass. 1993) (recognizing the majority rule that absent other evidence, presence of a controlled substance in one's body does not constitute criminal possession) (citations omitted).

\textsuperscript{68} See, e.g., FLA. STAT. ANN. § 415.503(9)(g)(1) (West 1993 & Supp. 1997) (stating drug dependency of newborn is ground for suspicion of child abuse and neglect, but cannot be the sole basis of the criminal investigation); MINN. STAT. ANN. § 626.556(2)(c) (1997) (defining neglect to include prenatal exposure to a controlled substance used by mother detected by withdrawal symptoms, results of a toxicology test on child or mother after delivery, or developmental delays during the child's first year).
from the express provisions of these statutes that the legislature specifically intended to criminalize such conduct. For example, a Massachusetts statute requires hospital personnel to notify the Department of Social Services immediately if the physician reasonably believes that a child is physically dependent on a drug at birth.\textsuperscript{69} The presence of drug addiction in the newborn constitutes child abuse.\textsuperscript{70}

A few state legislatures have proposed, but failed to pass, novel legislation to combat the prenatal substance abuse crisis. For example, in Ohio, legislation was proposed, but never enacted, to temporarily sterilize a woman with Norplant\textsuperscript{®} if she was convicted of fetal abuse.\textsuperscript{71} Also, in Idaho, the governor introduced, but later withdrew, a bill to have drug-dependent pregnant women civilly committed.\textsuperscript{72}

In response to the decisions in \textit{Reinstein}\textsuperscript{73} and \textit{In the Matter of the Appeal in Pima County Juvenile Severance Action},\textsuperscript{74} an Arizona senator is proposing a bill to allow state or county health officials to prosecute pregnant women who use illegal drugs or "harmful" amounts of alcohol as criminal child abusers.\textsuperscript{75} Therefore, it appears that the courts' requests for specific legislation on these matters are finally being addressed.

\textbf{C. Possible Ramifications}

State prosecutors contend that criminally prosecuting women who have used controlled substances during pregnancy will remedy the prenatal substance abuse problem in this country. They argue that these

\textsuperscript{69} MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1990).

\textsuperscript{70} \textit{Pellegrini}, 608 N.E.2d at 720-22. Upon review of a criminal indictment of a mother for possession of cocaine in a newborn, the Supreme Judicial Court of Massachusetts remanded the case to the Superior Court and recognized that the evidence of the drug metabolites found in the newborn's urine may not constitute possession, but is probative of neglect under MASS. GEN. LAWS ANN. ch. 119, §51A. \textit{Id}.

\textsuperscript{71} DANIELS, \textit{supra} note 12, at 105. Norplant is the most effective reversible prescription birth control method used today, in which six soft capsules are inserted under the skin of the woman's upper arm. The benefit of Norplant is that it will be effective birth control for five years, or until it is clinically removed. \textsc{John Knowles, Facts About Birth Control} 6-8 (1995).

\textsuperscript{72} DANIELS, \textit{supra} note 12, at 105.


\textsuperscript{74} 905 P.2d 555 (Ariz. Ct. App. 1995) (holding that a pattern of substance abuse does not suggest unfitness, inability to parent, or justification to terminate parental rights).

\textsuperscript{75} Howard Fischer, \textit{Bill Would Target Pregnant Drug, Alcohol Abusers}, \textsc{The Arizona Daily Star}, Jan. 27, 1996, at 1B, \textit{available in} 1996 WL 4980308. The Bill would only require health officials to prove by a preponderance of the evidence that the life or health of an unborn child is imperiled. \textit{Id}.
criminal convictions will punish women for their illegal conduct, generally deter future substance abuse by women during pregnancy, and prevent damage to fetal health.\textsuperscript{76} However, the American Medical Association has extensively examined the potential ramifications of instituting postnatal criminal sanctions, and it has concluded not only that the goals of the state will not be achieved, but also that criminal prosecutions may exacerbate the problem.\textsuperscript{77}

The states first contend that criminal sanctions will punish pregnant women and work effectively to deter substance abuse during pregnancy. However, although penalties already exist for using illegal substances, pregnant women currently do not seem to be deterred.\textsuperscript{78} Therefore, any additional penalties may also be disregarded.\textsuperscript{79} In addition, delivering a healthy child is a general incentive for most pregnant women to refrain from potentially harmful behavior. If that incentive is not sufficient to prevent harmful behavior, "it is questionable that criminal sanctions would provide the additional motivation needed to avoid behaviors that may cause fetal harm."\textsuperscript{80}

Second, states assert that fetal health will be protected by these criminal sanctions. However, incarceration of a pregnant woman will not ensure fetal health. Typically, prisons have inadequate health care facilities and resources and consequently, women will be placed into conditions that are hazardous to fetal health.\textsuperscript{81} Finally, if a woman is incarcerated after she becomes pregnant, the damage to the fetus might have already occurred, so the fetal health goal will not be attained.

Although public opinion favors prosecuting and incarcerating a new mother if her substance abuse impairs her child,\textsuperscript{82} it is clear that criminal prosecutions are not remedying the prenatal substance abuse crisis. Courts, without specific legislative guidance, fail to consider the

\begin{itemize}
\item \textsuperscript{76} Legal Interventions, supra note 3, at 2667.
\item \textsuperscript{77} Id. The problem will be exacerbated because it will lead women to avoid prenatal or medical care for fear of being detected and criminally charged. Id.
\item \textsuperscript{78} See, e.g., supra notes 1-5 and accompanying text.
\item \textsuperscript{79} Legal Interventions, supra note 3, at 2668.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Id. at 2667. The hazardous environment for fetal health includes the unsanitary environment, improper diet, and minimal access to exercise or physical activity received in prison. In addition, drugs are readily available in prisons, so incarceration would not necessarily prevent the woman's drug use. Id.
\item \textsuperscript{82} See Edward Tivnan, Life and Death Decisions: Should Child Abusers Be Sterilized? The New Moral Dilemmas, FAM. CIRCLE MAG., Mar. 10, 1992, at 99, 102 (discussing telephone survey of 768 randomly selected people indicating that most favored criminal prosecution and incarceration of prenatal substance abusing mothers).
\end{itemize}
fetus a person with respect to the criminal statutes and fail to extend the reach of criminal statutes to a woman's prenatal substance abuse. In addition, few state legislatures have responded by expanding criminal statutes to include prenatal substance abuse despite the courts' request to re-examine and re-define such statutes. Furthermore, the possible ramifications of these criminal prosecutions prove that the goals of the state, including the state's ultimate goal—protecting the potential life of the child—will not be achieved. If criminal prosecution will not achieve the state's goals, what will? A solution to this national crisis must exist.

Until 1995, no state had successfully approached the crisis of prenatal substance abuse by court-ordered protective custody of the fetus. This action would detain a viable fetus in a local hospital for treatment and protection from its substance abusing mother. However, Wisconsin applied this approach through its Children's Code, and the Wisconsin Court of Appeals upheld the protective custody order in State ex rel Angela M.W. v. Kruzicki.

III. THE NOVEL APPROACH: STATE EX REL. ANGELA M.W. V. KRUZICKI

A. The Wisconsin Approach

In State ex rel. Angela M.W. v. Kruzicki, instead of trying to criminally prosecute the unborn child's mother for her consistent use of drugs, Wisconsin used its Children's Code to physically detain the fetus and mother before birth. The Waukesha County Department of Health and Human Services ("The County") sought a protective custody

83. However, the Supreme Court of Georgia affirmed a juvenile court order which gave the county social welfare agency temporary custody of a fetus as a "deprived child without proper parental care necessary for his or her physical health." Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457, 459 (Ga. 1981). The result was attained after the woman refused, based on religious reasons, to have a Cesarian section that would save the fetus. Id.
84. 197 Wis. 2d 532, 541 N.W.2d 482 (Ct. App. 1995), cert. granted, 546 N.W.2d 468 (Wis. 1996).
85. Id.
86. Id.
87. Chapter 48 of the Wisconsin Statutes is entitled "The Children's Code." WIS. STAT. ANN. §§ 48.01-48.999 (West Supp. 1997). The Children's Code is intended to be liberally construed and its paramount goal is to "protect children, to preserve the unity of the family, whenever appropriate, by strengthening family life through assisting parents, whenever appropriate, in fulfilling their parental responsibilities." WIS. STAT. ANN. § 48.01(1)(a) (West 1997).
order in juvenile court over the viable fetus when an obstetrician reported the possibility of child abuse by a pregnant patient, Angela M.W., who repeatedly tested positive for cocaine during her pregnancy. The juvenile court subsequently granted the protective custody order. The County subsequently filed a Children in Need of Health and Protective Services (CHIPS) petition with the juvenile court, which alleged the fetus was in need of protection because its "parent . . . neglects, refuses or is unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child." The juvenile court conducted a detention hearing to determine whether the fetus and mother should continue to be held in custody. Angela, by counsel, objected to the jurisdiction of the juvenile court. However, the court denied the jurisdictional challenge, entered a denial on Angela's behalf at the initial hearing, and scheduled a jury trial.

B. The Wisconsin Court of Appeals Response

Angela responded by bringing an original action in the court of appeals seeking a writ of habeas corpus releasing her from the protective custody. In the alternative, she sought a supervisory writ barring the juvenile court from exercising jurisdiction in the pending CHIPS petition.

88. The juvenile court is authorized to take a child into custody by "[a]n order of the judge if made upon a showing satisfactory to the judge that the welfare of the child demands that the child be immediately removed from his or her present custody." Wis. Stat. § 48.19 (1)(c)(1993-94).
89. Angela M.W., 197 Wis. 2d at 539-541, 541 N.W.2d at 485. The obstetrician originally advised Angela to seek voluntary inpatient treatment when four different drug-screening tests confirmed the presence of cocaine or other drugs in Angela's blood, but Angela declined. Id. The obstetrician's duty to report is based on Wis. Stat. § 48.981(2)(1993-94), which generally requires a physician to report instances of suspected child abuse or neglect; such instances must be based on reasonable cause. Wis. Stat. § 48.981(2)(1993-94).
90. Angela M.W., 197 Wis. 2d at 540, 541 N.W.2d at 485.
91. Id. at 541, 541 N.W.2d at 485 (quoting Wis. Stat. § 48.13(10) (1993-94)). Included with the petition was an affidavit reflecting Angela's treating obstetrician's opinions and concerns. Angela M.W., 197 Wis. 2d at 541, 541 N.W.2d at 485.
92. Id. at 542, 541 N.W.2d at 485. Since Angela presented herself for inpatient drug treatment, the original order allowed her to choose the treatment facility, but stated that if she left the facility, she and the fetus would be held at Waukesha Memorial Hospital. Therefore, to continue such custody, the court held the detention hearing pursuant to Wis. Stat. § 48.21 (1)(a) (1993-94).
93. Angela M.W., 197 Wis. 2d. at 542, 541 N.W.2d at 485.
94. Id. at 542-43, 541 N.W.2d at 485-86.
proceeding.\textsuperscript{95}

As an issue of first impression in Wisconsin, the court of appeals examined whether the juvenile court had CHIPS jurisdiction over Angela or her viable fetus, and whether the protective custody order violated Angela’s constitutional due process and equal protection rights.\textsuperscript{96} The underlying issue raised in the case was whether a viable fetus was a child within the meaning of the Children’s Code.\textsuperscript{97}

1. Jurisdictional Review

The court considered both the subject matter and personal jurisdiction of the juvenile court over Angela and her fetus.\textsuperscript{98} In reviewing the subject matter jurisdiction, the court had to determine whether a viable fetus was considered a “child” as defined in the Children’s Code. The court held that “reasonable minds could differ as to whether the statutory definition of a child applic[ed] to a viable fetus in a CHIPS proceeding.”\textsuperscript{99} Therefore, based on public policy expressed by (1) the United States Supreme Court in \textit{Roe} and its progeny,\textsuperscript{100} (2) the Wisconsin legislature when enacting the Children’s Code and defining its purposes,\textsuperscript{101} and (3) the Wisconsin Supreme Court as addressed in its approach to the legal status of a fetus,\textsuperscript{102} the court concluded that a

\textsuperscript{95} \textit{Id.} at 543, 541 N.W.2d at 486.
\textsuperscript{96} \textit{Id.} at 544, 541 N.W.2d at 486-87.
\textsuperscript{97} \textit{Id.} at 547-60, 541 N.W.2d at 488-93.
\textsuperscript{98} \textit{Id.} at 546-63, 541 N.W.2d at 487-494. The juvenile court has “exclusive original jurisdiction over a child alleged to be in need of protection or services.” \textsc{Wis. Stat.} § 48.13 (1993-94).
\textsuperscript{99} \textit{Angela M.W.}, 197 Wis. 2d at 549, 541 N.W.2d at 488.
\textsuperscript{100} The majority adopted the broad interpretation of \textit{Roe v. Wade}, failing to accept the dissent’s narrow reading of \textit{Roe} that it only be applied to abortions. \textit{Id.} at 551, 541 N.W.2d at 489; \textit{see also supra} notes 22-29 and accompanying text.
\textsuperscript{101} Since \textit{Roe} was on the books when the Children’s Code legislation was adopted, the court concluded that “the constitutional way had been cleared for the Wisconsin legislature to enact legislation, . . . to promote and protect the potential life represented by a viable fetus.” \textit{Angela M.W.}, 197 Wis. 2d at 551, 541 N.W.2d at 489. Furthermore, the court rejected the narrow analysis of \textit{Roe} as applied to the CHIPS statute since the purpose of the CHIPS statute is to protect children from the risk of physical harm. “That [purpose] can hardly be achieved if the potential life of a viable fetus, a legitimate compelling state interest under \textit{Roe}, is not provided a safe environment in the womb of its mother and is beyond the reach of the state in a CHIPS proceeding.” \textit{Id.} at 551-52, 541 N.W.2d at 489.
\textsuperscript{102} \textit{Id.} at 554-59, 541 N.W.2d at 490-93. The court analyzed three main Wisconsin Supreme Court cases: State v. Black, 188 Wis. 2d 639, 526 N.W.2d 132 (1994) (recognizing the states ability to enact and enforce laws to protect the fetus); Puhl v. Milwaukee Auto Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959) (holding a viable fetus has the ability to assert a claim after birth since it can exist independently); and Kwaterski v. State Farm Mut. Auto Ins. Co. 34 Wis. 2d 14, 148 N.W.2d 107 (1967) (holding a viable fetus is a person for purposes of the
viable fetus was a child under the Children’s Code. As a result, a viable fetus is entitled to the protection and services of the CHIPS statute and the juvenile court had subject matter jurisdiction in the CHIPS proceeding.

To determine whether the juvenile court had personal jurisdiction, the court examined personal jurisdiction over both the fetus and over Angela. Since the guardian ad litem, appointed to appear in the action for the fetus, had not objected to jurisdiction, all requirements were satisfied for the viable fetus. When reviewing the personal jurisdiction of the juvenile court over Angela, the court noted that “the statute neither confers nor requires original jurisdiction over a parent as a prerequisite to a CHIPS proceeding.” Since Angela and her fetus were “physically and biologically one,” the court addressed the issue of whose interests and rights should prevail when answering the constitutional arguments made by Angela.

2. Constitutional Due Process and Equal Protection Review

The court set forth the rule of law that a state is required to show both a compelling interest and a narrowly drawn means to carry out this interest, if the state is depriving a person of his or her fundamental right to physical liberty. Angela argued that the state did not have a compelling interest to restrain her under the circumstances because, if granted a compelling interest in this circumstance, the state could assert this right when the risk to the fetus is minimal. She also argued that, if such an interest exists, the steps taken by the juvenile court were too extreme. The court rejected both of Angela’s contentions.

The court acknowledged that under Roe and its progeny, the state is
granted a compelling interest in the life of the viable fetus.\textsuperscript{112} The statistics, which reveal the substantial number of drug-exposed newborns, establish the state’s compelling interest, and \textit{Roe} reinforces the state’s right of intervention.\textsuperscript{113} The court then recognized that the various scenarios embodied in the CHIPS statute only authorize the state’s right to protect a child in "egregious situations in which a child is at substantial or serious risk."\textsuperscript{114} Furthermore, the allegations made in CHIPS proceedings must be supported by reliable and credible information and there must be probable cause for the juvenile court to exercise its jurisdiction.\textsuperscript{115}

As to Angela’s argument that the means used by the state in ordering confinement were too extreme and coercive, the court responded by acknowledging that the Children’s Code explores all the possibilities of less coercive means and only uses protective custody orders in urgent situations.\textsuperscript{116} Therefore, the court believed that the compelling interest of the state in protecting Angela’s viable fetus outweighed both her constitutional due process and equal protection rights.\textsuperscript{117}

3. The Dissent

The \textit{Angela M.W.} dissent is divided into four different sections. First, the dissent contends the argument made by the County—that although the state does not have a statute for fetal abuse it can extend child abuse to cover fetal abuse—is an “erroneous analogy.”\textsuperscript{118} Second, the dissent rejects the majority’s opinion that the statute is ambiguous on its face or as applied.\textsuperscript{119} Since the statute defines “child” as a “person who is less than 18 years of age,”\textsuperscript{120} the legislature created a floor of birth and

\begin{itemize}
  \item \textsuperscript{112} \textit{Id.} at 565, 541 N.W.2d at 495. The court considered the fact that \textit{Roe} did not grant any constitutional right to the fetus, but nonetheless based its holding on the Supreme Court conclusion in \textit{Roe} that “nonconstitutional interests were sufficient, after viability, to override the constitutional right to choice.” \textit{Id.} (citing \textit{Roe v. Wade}, 410 U.S. 113, 158-59 (1973)). The court concluded that the state has a compelling interest in situations involving a viable fetus that override the mother’s privacy interest. \textit{Angela M.W.}, 197 Wis. 2d at 565, 541 N.W.2d at 495.
  \item \textsuperscript{113} \textit{Id.} at 565-66, 541 N.W.2d at 495.
  \item \textsuperscript{114} \textit{Id.} at 566, 541 N.W.2d at 495.
  \item \textsuperscript{115} \textit{Id.} at 566-68, 541 N.W.2d at 495-96.
  \item \textsuperscript{116} \textit{Id.} at 568-70, 541 N.W.2d at 496-97.
  \item \textsuperscript{117} \textit{Id.}
  \item \textsuperscript{118} \textit{Id.} at 572-73, 541 N.W.2d at 498 (Anderson, P.J., dissenting) (citing James J. Nocon, \textit{Physicians & Maternal-Fetal Conflicts: Duties, Rights & Responsibilities}, 5 J.L. & HEALTH 1, 31-32 (1990-91)).
  \item \textsuperscript{119} \textit{Angela M.W.}, 197 Wis. 2d at 573-74, 541 N.W.2d at 498 (Anderson, P.J., dissenting).
  \item \textsuperscript{120} \textit{WIS STAT.} § 48.02(2) (1993-94).
\end{itemize}
ceiling of 18 for the exclusive jurisdiction of the juvenile court.121

In addition, the dissent argues that viability is not a fixed event, so the juvenile court must determine if the fetus has actually reached the developmental stage of viability, whereas no uncertainty exists if the floor is at the fixed point of birth.122 There is some question as to when viability actually occurs, but the Supreme Court, in deciding Roe v. Wade,123 settled on the twenty-four to twenty-eight week period of viability, allowing the attending physician to determine viability within this timeframe.124 Also, increased medical advances since Roe have allowed physicians to more accurately determine when a fetus has reached viability and can survive on its own.125 Therefore, the juvenile court would only have to consult a woman's physician to determine if viability has been reached.

The dissent adopts the narrow approach of Roe and its progeny that the state's interest is not absolute and the rights of the mother must be carefully guarded,126 and agreed with one commentator's view that "when the health interests of a woman and her fetus conflict, the state appears to be constitutionally bound to place the woman's interests above the fetus'."127

In the third and fourth sections, the dissent focuses on the consequences and ramifications128 that the majority's decision may have and uses them to acknowledge that there are "issues which cannot be adequately raised, studied, debated and decided in the adversarial arena."129 The legislature is thought to be the best forum to decide the issue since it is better equipped to deal with maternal-fetal conflicts and

121. Angela M.W., 197 Wis. 2d at 574, 541 N.W.2d at 498-99 (Anderson, P.J, dissenting). Applying the common law approach of calculating age, the dissent claimed that the statute is not ambiguous since "age is measured from the time of birth, not conception, not quickening and not viability, and one cannot be a child by definition until he or she has been born and his or her age has begun to accrue." Id. (citing In re Valerie D., 613 A.2d 748, 760 (Conn. 1992)).
122. Id. at 574-75, 541 N.W.2d at 499 (Anderson, P.J., dissenting).
124. Id.
125. See generally DANIELS, supra note 12, at 17-19 (suggesting that despite hopes of being able to consider the fetus viable prior to the twenty-third or twenty-fourth week, fetal survival is based on lung capacity which does not develop until this time).
126. See supra notes 17-21 and accompanying text.
127. Angela M.W., 197 Wis. 2d at 580, 541 N.W.2d at 501 (citation omitted).
128. The fourth section looked extensively at the American Medical Association's discussion concerning the consequences of intervention in response to prenatal substance abuse. Id. at 586-92, 541 N.W.2d at 503-06.
129. Id. at 593, 541 N.W.2d at 506.
issues of statewide concern.\footnote{130} However, the judiciary has discretionary decision-making powers and the ability to decide issues of statewide concern by interpreting and giving purpose to the legal rules based on public policy.\footnote{131} It is, as the majority explains, the judiciary's obligation, in the interest of justice, to decide the cases based on the applicable facts and law.\footnote{132} The crisis of prenatal substance abuse concerns the child's welfare, and if such statutes exist to protect that welfare, \textit{i.e.}, The Children's Code, it is unconscionable to refrain from action prior to birth when the child's health and welfare is most vulnerable and ultimately at stake.

Although it is argued that judicial intervention is not always appropriate, one state supreme court has concluded that if the woman's behavior is egregious, placing her viable fetus at great risk, and the desired treatment holds little or no danger to the woman, then the court must intervene to preserve the life of the fetus.\footnote{133} In Angela's case, it is apparent that her conduct, abusing cocaine, was egregious and placed a great risk on her child. The court-ordered protective custody not only produced a clear-cut benefit for Angela's fetus, protecting it from Angela's cocaine use, it also benefitted Angela in that she refrained from taking controlled substances.

\section*{V. COURT-ORDERED PROTECTIVE CUSTODY AND THE NEED FOR LEGISLATIVE REFORM}

Although court-ordered protective custody may appear extreme and unnecessary to some, the state has previously been granted the power to confine an individual for the benefit of a third person. For example, quarantine regulations have existed to prevent the spread of communicable diseases and to preserve the public health.\footnote{134} The quarantine statutes allow the government to hold an individual against his will for the protection of a third party.\footnote{135}

Similar to the protective custody at issue, courts have also previously ordered confinement of a pregnant woman and her fetus when the

\begin{itemize}
\item \footnote{130} \textit{Id.} at 581, 541 N.W.2d at 501. The dissent believes that, "[a] court which seeks the truth through the adversarial process is ill-equipped to make public policy in the sensitive areas surrounding maternal-fetal conflicts." \textit{Id.}
\item \footnote{131} \textit{Id.} at 544, 541 N.W.2d at 486.
\item \footnote{132} \textit{Id.}
\item \footnote{133} Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981).
\item \footnote{134} 42 U.S.C.S. §§ 264-271 (Law. Co-op. 1994).
\item \footnote{135} \textit{See id.}
\end{itemize}
woman refused to comply with lifesaving medical treatment for the fetus.\footnote{136} This form of custody requires the woman to undergo major surgery,\footnote{137} in addition to being admitted to a hospital. Although some courts have granted such forced medical treatment and confinement,\footnote{138} others fail to require the mother to bear any increased risk to her health in order to save her viable fetus.\footnote{139}

Therefore, since people have previously been held against their will for the protection of a third party, it seems only logical to allow the state to protect an unborn viable fetus from the dangerous controlled substances his or her mother may be ingesting.

\textit{A. Merits of Court-Ordered Protective Custody}

If a state has a compelling interest over the life of a fetus, such that a court may order confinement of a woman who tests positive for controlled substances during pregnancy, both of the state’s goals in combating prenatal substance abuse—protecting the fetus and punishing the mother—may be attained. Since the woman could be hospitalized during viability, the fetus would be protected from exposure to controlled substances up until birth. Although some damage may already have been done, due to exposure to these controlled substances prior to viability,\footnote{140} the chances of delivering a healthy child increase when the child is not exposed in the last stage of pregnancy.\footnote{141}

One of the merits of court-ordered protective custody prior to birth is determined by considering the costs incurred by an unhealthy infant, including the emotional and psychological burdens and monetary costs on the parents, insurance companies, hospitals, and society.\footnote{142} It is believed that most of the women likely to be prosecuted for prenatal substance abuse are those from lower economic backgrounds, who are


\footnote{137} See id. The most common form of such confinement comes by emergency cesarean section orders. Instead of giving birth vaginally, the woman must undergo a surgery, a cesarean section. These orders come despite the view that most cesarean operations are unnecessary. \textit{Id.} at 149.


\footnote{139} See generally Steinbock, supra note 136, at 150-63.

\footnote{140} Legal Interventions, supra note 3, at 2666-67.

\footnote{141} See Volpe, supra note 3, at 404. The baby is less likely to be addicted when not exposed to controlled substances during the last two months of the pregnancy, and therefore will not go through withdrawals when born.

\footnote{142} Cahalane, supra note 31, at 216.
often uninsured or underinsured.\textsuperscript{143} Therefore, the state and society incur financial burden of these women's pregnancies.

Protective custody of a woman in a hospital prior to labor has a relatively low cost compared to the high costs of treating an unhealthy newborn. For example, the average rate of a hospital room is $400 per day, but based on the needs of a newborn addicted to a controlled substance, the average neo-natal intensive care unit rate is $4,000 per day.\textsuperscript{144} Therefore, protective custody at viability\textsuperscript{145} for prenatal substance abuse would cost approximately $33,600, compared to the $120,000 incurred by an addicted and seriously ill newborn who may need to stay in the neo-natal intensive-care unit for a month. These figures suggest that court-ordered protective custody will keep the costs of health care down for substance abusing pregnant women and their newborns. This, in turn, will decrease the cost incurred by society and the state.

Although the AMA Board of Trustees believes that judicial intervention is inappropriate in most cases, they have released the statement that

[i]f an exceptional circumstance could be found in which . . . treatment poses an insignificant—or—no health risk to the woman, entails a minimal invasion of her bodily integrity, and would clearly prevent substantial and irreversible harm to her fetus, it might be appropriate for a physician to seek [court ordered protective custody].\textsuperscript{146}

This exceptional circumstance clearly exists with respect to substance-abusing pregnant women. No health risk is posed on the pregnant woman. In fact, if the woman is treated for her addiction while in custody, she may benefit from the hospital confinement by overcoming her addiction. All of the potential effects of controlled substances are

\textsuperscript{143} See \textit{Legal Interventions}, supra note 3, at 2668.

\textsuperscript{144} Average neo-natal intensive care unit rates are divided into three different levels. Level I, with an average cost of $2,710 a day, is normally used for an infant with a low birth weight that needs more care than is provided in the typical nursery. Level II, with an average cost of $3,230 a day, is used for an infant who does not require a ventilator but is somewhat ill and needs to be monitored for general health and weight gain. Level III, which costs an average of $5,300 a day, is used for those babies who continuously require a ventilator, may need surgery, and may have brain damage. Telephone Interview with Kate Richards, Patient Accounting Clerk at Lucille Slater Pachard Children's Hospital of Stanford, Cal. (Feb. 23, 1996).

\textsuperscript{145} See \textit{supra} note 123 and accompanying text. For purposes of this example, the twenty-fourth week was considered viability.

\textsuperscript{146} See \textit{Legal Interventions}, supra note 3, at 266.
not known at this time, but the fetus will naturally benefit from the confinement, since it will not be born addicted to the substances. Clearly if both the mother and the fetus benefit from the confinement, it is an appropriate remedy.

Allowing states to confine pregnant women may have the same possible ramifications that criminal prosecutions have, including causing pregnant women to reject medical or prenatal care.\(^{147}\) However, the above mentioned benefits and justifications of court-ordered confinement far outweigh the possibilities that these women may avoid medical treatment.

**B. A Call for Legislative Reform**

Since no statute in Wisconsin specifically allowed the state protective custody over a viable fetus, the Wisconsin Court of Appeals was placed in the position of creating and giving meaning to the law when it interpreted The Children’s Code.\(^{148}\) One commentator has suggested that in prenatal drug addiction cases,

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\text{[w]}\text{hen there are no rules, the probability of discretionary decisionmaking is greatly enhanced. Moreover, when child welfare is at issue, and medical and legal uncertainties continue to surround maternal fitness at various stages of addiction and recovery, judges are sometimes left no alternative but to “legislate,” by creating new rules or ignoring existing laws.}\(^{149}\)
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Why should the courts be placed in such a precarious position of having to define these terms? To ensure that the courts are not placed in this situation, state legislatures need to specifically define the applicability of the Children’s Code to a viable fetus.

The legislature, as the dissent points out in *State ex. rel Angela M.W. v. Kruzicki*, is well equipped to deal with this issue. If the legislatures spoke clearly and specifically identified the approach to be taken by the courts, the courts would not have to guess how the legislature intended

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147. *See supra* note 72 and accompanying text.
148. *State ex rel. Angela M.W. v. Kruzicki*, 197 Wis. 2d 532, 541 N.W.2d 482 (Ct. App. 1995), *cert. granted*, 546 N.W.2d 468 (Wis. 1996). Similarly, in the criminal context, only one supreme court has upheld the criminal prosecution of a woman who ingested cocaine during her pregnancy, and this court interpreted other law from the state to suggest the particular statute included a viable fetus. *Whitner v. State*, No. 24468, 1996 WL 393164, at *1 (S.C. July 15, 1996) (this opinion had not been released for publication in the permanent law reports and until released, is subject to revision or withdrawal).
the statute to be interpreted. Many states, like Wisconsin, already have the ability to take a child, presumably a newborn, into protective custody and ensure its health when a toxicology test on the child is positive for controlled substances. In these states, the legislature would need to define the term "child" to include a viable fetus to allow the state to take action. Similarly, a clearly drawn statute could designate when the state was able to take action, i.e., before or after viability, or what week during the pregnancy, and under what circumstances the state could take action, i.e., upon multiple positive testings for controlled substances or alcohol in the system.

Court-ordered protective custody appears to be the only solution suggested thus far that attains the states' goals. If the legislatures continue to avoid the issue, the courts have no alternative but to define the statutes as they see fit.

VI. CONCLUSION

Estimates suggest that by the year 2000 about 4,000,000 Americans will have been exposed to controlled substances in utero. The magnitude of prenatal substance abuse is not diminishing. Something must be done to protect potential lives from hazardous controlled substances.

States have continuously tried to remedy the problem by criminal prosecutions, but this fails to attain the goal of protecting the fetus. In addition, courts have been unwilling to affirm any conviction if no specific legislation covers the woman's prenatal conduct. Since criminal prosecution has failed to remedy the problem, more states need to use the Wisconsin approach of court-ordered protective custody to protect the health and welfare of the fetus prior to birth.

It is only logical that the state be able to intervene at viability to

150. See, e.g., 705 ILL. COMP. STAT. ANN. 405/2-3(1)(c) (West 1992 & Supp. 1997) (defining neglected or abused minor as "any newborn infant whose blood or urine contains any amount of a controlled substance. . ."); IND. CODE. ANN. §31-6-4-3.1 (Burns Supp. 1996) (defining "child in need of [protective] services" as a child born "addicted to a controlled substance"); NEV. REV. STAT. ANN. § 432B.330(1)(b) (Michie 1996) (defining a "child in need of protection" as any child "suffering from congenital drug addiction or fetal alcohol syndrome"); FLA. STAT. ANN. § 415.503(9) (West 1992) (defining a "harm" to a child's health as "physical dependency of a newborn infant" to a controlled dangerous substance); OKLA. STAT ANN. tit. 10, §7001-1.3(10)(a)(3) (West 1992) (defining "deprived child" as a child in need of special care or treatment as a result of being "born in a condition of dependence on a controlled dangerous substance").

151. Siegel, supra note 1, at 14.
ensure that the fetus' health is protected. If the purpose of CHIPS statutes is to protect the children from substantial harm, then if that substantial harm occurs before birth and after fetal viability, the state should be able to intervene at that time.

The optimal approach is for legislatures to create statutes which specifically incorporate a viable fetus into the existing child protective custody statutes. However, without such legislation, other courts, when reviewing similar confinements, should follow the lead of the Wisconsin Court of Appeals, and accept the broad approach of *Roe* by properly weighing the state's compelling interests in protecting the viable fetus over the rights of the mother. The state will therefore attain the goal of protecting the health and welfare of the fetus, and the number of babies born each year addicted to a controlled substance will inevitably fall.

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