FINS, PINS, CHIPS, & CHINS: A Reasoned Approach to the Problem of Drug Use During Pregnancy

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INTRODUCTION

America is losing the War on Drugs.[1] Media reports of drug-related crime and violence have become so commonplace today that they no longer have the power to shock. Users are younger and the drugs[2] are not only more potent, but are also more readily available than at any time in recent memory.[3] Despite increased awareness of the problem, improved community education and outreach, and stiffer penalties, one segment of the population remains a costly casualty of that War: the drug-exposed infant.

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[1] *See generally* Lisa Janovy Keyes, Comment, *Rethinking the Aim of the "War On Drugs": States' Roles in Preventing Substance Abuse by Pregnant Women*, 1992 WIS. L. REV. 197 (1992). The War on Drugs denotes the efforts of the various presidential administrations to address the growing drug crisis. *See generally id.*

[2] As used in this Article, the term "drugs" includes all controlled substances but excludes alcohol or prescribed medications. Although the ingestion of substances such as alcohol and prescription medication may present the same types of problems with respect to potential harm to the fetus, I exclude these substances because court intervention on behalf of infants whose mothers have engaged in lawful activity involves a substantial intrusion into the mothers' rights of autonomy and privacy, which are beyond the scope of this Article. This focus on illegal substances creates a bright line that is useful in developing a scheme for state intervention on behalf of these children.

[3] *See generally* Patricia Davis & Pierre Thomas, *In Affluent Suburbs, Young Users and Sellers Abound*, THE WASH. POST, Dec. 14, 1997, at A1; Susan Snyder, *Drug Use Rebounding, Scaring Adults, Snaring Teens*, THE MORNING CALL (ALLENTOWN), Nov. 23, 1997, at A1.

Approximately ten percent of all fetuses in the United States are exposed to some form of controlled substance[4] while in the womb — most often crack cocaine[5] — affecting some 375,000 babies per year.[6] Researchers estimate that this figure is closer to fifteen to twenty percent in urban areas.[7] Based on the current trend, by the year 2000 there will be roughly four million children in the United States who were exposed to drugs in utero.[8]

Reactions to the "drug baby" problem in this country have been varied, and individual states are still searching for ways to approach and remedy the crisis. States appear to have two distinct goals: to punish the mother for her harmful conduct and to protect potential life from future medical problems. State intervention in the maternal-fetal relationship, however, raises a number of issues. As a threshold matter, when a state legislature has not specifically provided for intervention, a court must interpret existing statutes and decide whether they permit the challenged state action.

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[4] Controlled substances are defined as "[a]ny drug so designated by law whose availability is restricted; *i.e.*, so designated by federal or state Controlled Substances Acts . . . . Included in such classification are narcotics, stimulants, depressants, hallucinogens, and marijuana." BLACK'S LAW DICTIONARY 329 (6th ed. 1990). *See also* Thomas Bewly, *Over-reaction to Drug Dependence — A Changing Menace*, 53 MEDICO-LEGAL J. 70, 70-86 (1985) (discussing the history and development of drug use).

[5] Crack cocaine is a cheap, potent, and highly addictive smokable form of cocaine, deemed the "junk food" of street drugs. Unlike other illegal substances, crack cocaine attracts equal numbers of male and female addicts. *See generally* Louis G. Keith, et al., *Substance Abuse in Pregnant Women: Recent Experience at the Perinatal Center for Chemical Dependence of Northwestern Memorial Hospital*, 73 OBSTETRICS & GYNECOLOGY 715 (1989); Katherine Kaye et al., *Birth Outcomes for Infants of Drug Abusing Mothers*, 89 N.Y. ST. J. MED. 256 (1989). Using crack cocaine during pregnancy may be even more dangerous than using other forms of cocaine. *See* Kaye, *supra*, at 258, 261.

[6] *See* Anastasia Toufexis, *Innocent Victims*, TIME, May 13, 1991, at 57; *see also* Page Mcguire Linden, *Drug Addiction During Pregnancy: A Call for Increased Social Responsibility*, 4 AM. U. J. GENDER & L. 105, 107 (1995) ("[A]pproximately eleven percent of all pregnant women have used illegal drugs while pregnant . . . ."); Julie J. Zitella, Note, *Protecting Our Children: A Call To Reform State Policies to Hold Pregnant Drug Addicts Accountable*, 29 J. MARSHALL L. REV. 765, 766-67 (1996); Barry Siegel, *In the Name of the Children*, L.A. TIMES (Magazine), Aug. 7, 1994, at 14. The most frequently cited national estimate of the number of drug-exposed newborns is based on a 1988 survey conducted by the National Association of Perinatal Addiction, Research and Education. *See* Siegel, *supra*, at 14.

[7] *See* Linden, *supra* note 6, at 107 ("In urban areas, the rate of newborn addiction has quadrupled since 1985. Hospitals in such areas estimate that more than twenty percent of the babies born in their facilities are exposed to drugs in utero." (footnotes omitted)); Toufexis, *supra* note 6, at 57 (stating that in New York City, Los Angeles, Detroit, and Washington, D.C., many hospitals have reported that the percentage of newborns with signs of exposure to drugs in utero is 20% or higher).

[8] *See* James Andrew Freeman, *Prenatal Substance Abuse: Texas, Texans and Future Texans Can't Afford It*, 37 S. TEX. L. REV. 539, 545 n.26 (1996).

States have used manslaughter, child abuse/endangerment/neglect, and drug delivery statutes to prosecute women who used drugs while pregnant. Dispositions range from temporary removal of the drug-exposed infant from his mother to court-ordered detention of pregnant, drug-using mothers to imprisonment of women whose drug use during pregnancy contributed to the extreme injury or death of their infants.[9] Despite increases in the number of criminal prosecutions of pregnant substance abusers, however, the criminal law is an inappropriate response to drug use during pregnancy. Most of the traditional justifications for punishment fail to support criminal liability in this area.[10] Criminalization of prenatal drug use also raises some difficult constitutional and public policy issues, and courts have consistently found such efforts futile without a statute expressly permitting the actions. Moreover, while the criminal prosecution of the mother achieves the state's goal of penalizing her for undesirable conduct,[11] it is doubtful that the state is truly promoting or protecting the health of the fetus by such actions.[12]

Criminal prosecution is not the only method states have employed in an attempt to reach women who put their unborn children at risk by using drugs during pregnancy. State officials have also used child custody statutes — which provide for the temporary and permanent removal of children abused or neglected by their parents — to separate mothers from their children at birth, based solely on evidence of gestational drug use.[13] However, civil prosecution has also met with little success.

Gestational drug use presents a quandary for the child welfare system. Although the child welfare system is accustomed to dealing with post-birth parental conduct, gestational substance use forces the system to evaluate the implications of prenatal parental conduct with an eye toward predicting future parental behavior — that is, whether the prenatal substance use supports the belief that the child is in imminent danger of future harm; provided, of course, that the court interprets the relevant statute to include the unborn, a track that courts seem reluctant to take. Moreover, these terminations often result in

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[9] *See infra* notes 107-67 and accompanying text.

[10] *See infra* notes 172-81 and accompanying text.

[11] Although a wide variety of maternal conduct may impact the health and potential life of the fetus, this Article does not address such behaviors as the consumption of nicotine, caffeine, or alcohol. Rather, this Article focuses on maternal behavior that subjects a fetus to extreme health risks, such as the ingestion of illegal substances.

[12] *See infra* notes 181-87 and accompanying text.

[13] *See infra* notes 197-219 and accompanying text.

foster care for the drug-exposed newborn, if not for the other children of the drug-user. The foster care system in this country, though, is in a state of crisis, and can no longer be relied upon as a solution to prenatal drug use.[14]

The most recent salvo in the War on Drugs has been the application of child protective statutes such as FINS (Families In Need of Services), PINS (Persons In Need of Supervision), CHIPS (Children in Need of Protection and Services), and CHINS (Children In Need of Supervision) to assert the juvenile court's jurisdiction over the fetus as a child lacking the protection of his parents.[15] Although the exercise of the juvenile court's jurisdiction was ultimately found inappropriate based upon statutory construction grounds,[16] a Wisconsin court's decision to apply the CHIPS statute to prenatal substance use was sound.

This article examines the different approaches various state governments have taken to remedy prenatal substance use and analyzes the efficacy of each approach in promoting all the relevant interests involved. Section I discusses the effects of drug use during pregnancy, and the historical development of the constitutional and legal status of the fetus. Section II addresses states' attempts at criminal prosecution of drug use during pregnancy, the judicial reactions to those efforts, and some of the rationales proffered for the failure of those efforts. Section III undertakes a similar examination of civil prosecution (i.e. termination of parental rights) as a result of gestational drug use. Section IV considers the unique approach taken by Wisconsin and the judicial response to this approach. Section V analyzes the use of the juvenile court's child protective powers to address the problem of drug use during pregnancy and concludes that the use of this power is not only constitutionally permissible, but desirable from a public policy standpoint.

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[14] *See infra* notes 238-45 and accompanying text.

[15] *See infra* notes 246-94 and accompanying text. Many of these statutes premise the juvenile court's jurisdiction over the child on the *child's* behavior — the so-called "status offenses" of truancy, incorrigibility, and running away. Some jurisdictions, however, permit the juvenile court to assert jurisdiction when the *family* needs the services of outside professionals to address problems that affect the entire family unit, absent any wrongdoing on the part of the child. It is submitted that the inclusion of the unborn in these statutes, whether by legislative action or judicial fiat, presents a reasoned approach to the problem of drug use during pregnancy. *See infra* notes 295-357 and accompanying text.

[16] *See* State *ex rel.* Angela M.W. v. Kruzicki, 561 N.W.2d 729, 731 (Wis. 1997).

I. BACKGROUND

A. *The Effects of Gestational Drug Use*[17]

The physiological consequences of drug use during pregnancy can often be severe, including stillbirth; premature birth, or low birthweight; withdrawal symptoms including sleeplessness, irritability, and jitteriness; permanent damage such as skull malformations, neurological disorders, developmental problems, and Sudden Infant Death Syndrome (SIDS).[18] The cost of caring for these "drug babies" is enormous. One recent study estimates that cocaine-exposed newborns are in the hospital approximately five times longer than unexposed babies and will frequently require costly neonatal intensive care.[19] The federal government calculates that an infant exposed to drugs in utero costs society more than one million dollars over the course of his life.[20]

Although prenatal drug use does not seriously harm all children, those affected may become "problem children" for their parents, who in turn may be unable to meet their children's special needs.[21] These children frequently reject human contact, making it

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[17] This Article use the phrase "drug use" instead of "abuse" because it is unclear at what point the use of an illicit substance constitutes abuse of that substance. Most commentators use the two terms interchangeably, particularly with respect to drug ingestion during pregnancy. It is at least arguable, however, that drugs can be used in moderation. Without specific information regarding a user's frequency, amount, and type of substance ingested, it cannot be said that drug use necessarily constitutes abuse. *But see* Sue Miller, *Moms: No 'Safe' Time for Cocaine*, L.A. TIMES, Nov. 28, 1989, at E1 (stating that the physiological response from a single dose of cocaine may cause devastating injury to the fetus).

[18] *See generally* Sherry Deren, *Children of Substance Abusers: A Review of the Literature*, 3 J. SUBSTANCE ABUSE TREATMENT 77, 80-85 (1986); Shona B. Glink, *The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 1991 U. ILL. L. REV. 533, 542 (1991); Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Won't Go Away*, 25 ST. MARY'S L.J. 623, 626-27 (1994). *See also* Joseph J. Volpe, *Mechanism of Disease, Effect of Cocaine Use on the Fetus*, 327 NEW ENG. J. MED. 399, 399-404 (1992); Toufexis, *supra* note 6, at 60.

[19] Toufexis, *supra* note 6, at 57. In a California study, drug-exposed newborns stayed in the hospital five times as long as normal newborns. *See id.* Many were born prematurely and required intensive care. *See id.* The cost of caring for these infants was 13 times as expensive as that of normal infants — $6,900 versus $522. *See id.*

[20] *See* Freeman, *supra* note 8, at 551. "Senator Christopher J. Dodd, Chairman of the Senate Subcommittee on Children, Families, Drugs and Alcoholism estimates that: '[a]t a minimum, cocaine-exposed children will cost this nation $100 billion in remedial medical and developmental costs over the next decade.'" *Id.* (alteration in original); *see also* Richard Whitmire, *Drug-Using, Pregnant Women: Medical or Criminal Problem?*, GANNETT NEWS SERVICE, MAR. 30, 1994, at 1.

[21] *See* Kathleen Coulborn Faller & Marjorie Ziefert, *Causes of Child Abuse and Neglect*, *in* SOCIAL WORK WITH ABUSED AND NEGLECTED CHILDREN 32, 43-44 (K.C. Faller

difficult for their mothers to bond with them.[22] Those who are separated from their mothers while undergoing medical treatment for defects or problems caused by gestational substance abuse may encounter additional bonding difficulties. This loss of attachment may increase the risk of future abuse or neglect.[23] Furthermore, the mother's continued drug use may itself contribute to her inability to care for her newborn, even if the child has no special needs resulting from his exposure to gestational substance abuse.[24]

As these children grow older, some become withdrawn, aggressive, moody, disruptive, or impulsive.[25] These types of behavioral traits may exclude these children from mainstream day care centers and schools.[26] In addition, many of these children exhibit learning disabilities and delayed development[27] and would likely benefit from

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ed., 1981). Parents may find it especially difficult to satisfy their children's need for special attention if their own drug use impairs their ability to function. Infants exposed to drugs during gestation may be particularly at risk for neglect in the future, for not only may they require special attention beyond that of the child born without any exposure to drugs, but their very deficiencies may make them the natural victims of parental neglect. *See id.*; Joseph Mayer & Rebecca Black, *Child Abuse and Neglect in Families with an Alcohol or Opiate Addicted Parent,* 1 CHILD ABUSE & NEGLECT 85, 87 (1977).

[22] *See* Toufexis, *supra* note 6, at 60. The author notes that:

> Caring for such infants is frustrating. "You don't do things that come naturally," notes Diane Carleson, a foster mother . . . . "The more you bounce them and coo at them, the more they arch their backs to get away. Their poor mothers want so badly to make contact, yet they are headed for rejection unless they learn how not to overstimulate them."

Id. This problem is further aggravated by the fact that "[a]n inability to distinguish between mothers and strangers is another hallmark of crack-exposed youngsters." *Id.*

[23] *See* Deren, *supra* note 18, at 83; Faller & Ziefert, *supra* note 21, at 43-44. As Faller and Ziefert explain:

> [T]hese children may be less responsive to comfort and nurturance because of their special conditions and their problems may necessitate a separation from the parent . . . . Such factors can interfere with bonding between parent and child. Bonding, or attachment, is a phenomenon of major importance in inhibiting the maltreatment of children. Proper attachment compels parents to nurture and care for children even under difficult circumstances, such as when the parent is tired or stressed. A parent trying to handle a child who is hard to care for and with whom there is incomplete attachment is more likely to abuse or neglect the child.

Faller & Ziefert, *supra* note 21, at 45.

[24] Although the father's presence and fitness are relevant factors in considering whether or not the state should intervene to protect the child exposed to drugs in utero, many drug-addicted mothers are single. *See* Deren, *supra* note 18, at 83.

[25] *See* Toufexis, *supra* note 6, at 60; *see also* Freeman, *supra* note 8, at 552.

[26] *See* Toufexis, *supra* note 6, at 56, 60.

[27] *See id.* at 60. One commentator explained:

costly special education.[28] Current studies indicate that approximately thirty to fifty percent of these children end up in state-supervised foster care.[29] Thus, society inherits not only the financial, but also the psychological costs of caring for these children. The plight of these children

> inspires both pity and fear. Pity that they are the innocent victims of society's ills. Pity that the odds will be stacked against them at home, on the playground and in school. Fear that they will grow into an unmanageable multitude of disturbed and disruptive youth. Fear that they will be a lost generation.[30]

Further, some experts fear that children exposed to drugs in utero are, in effect, addicts who face a lifetime of recovery.[31] Their brains will never forget cocaine. While they may be completely unaware of their addiction at an intellectual level, they are still likely to experience the same dysphoria — thought and mood disorders experienced by any recovering addict — but without the knowledge or support that is necessary for them to stay sober. Thus:

> A two-year study of 263 two-year-old children at a Chicago clinic for pregnant drug [users] indicated that the children scored poorly on developmental tests that measured the ability to concentrate, interact with others in groups, and cope with an unstructured environment. The study suggests that when these children enter school, they will require a highly structured learning environment and one-on-one attention from teachers to achieve their learning potential.

Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1403 (1990).

[28] *See* Toufexis, *supra* note 6, at 57-58, 59. Cocaine-exposed children respond better and show more signs of improvement with teachers who are specially trained to handle drug-exposed children. *See id.* at 58-60. "In Boston a year of special education for a drug exposed child can cost $13,000, compared with $5,000 spent per youngster at a regular school." *Id.* at 59. The New York State comptroller's office estimated in 1991 that it would spend about $765 million over the next decade on special education for children exposed to crack cocaine in utero. *See id.* at 57-58.

[29] Freeman, *supra* note 8, at 552. Between 1983 and 1992, the number of children in the foster care system increased from 269,000 to 442,000. *See id.* At least one commentator has argued that given the state of the overburdened foster care system and the shuffling of children between foster homes, foster care may be more detrimental to drug-exposed children than remaining with their mothers. *See* Barry M. Lester et al., *Keeping Mothers and Their Infants Together: Barriers and Solutions*, 22 N.Y.U. REV. L. & SOC. CHANGE 425, 434-35 (1996); *see also* Toufexis, *supra* note 6, at 57 (reporting that foster care costs in New York City rose from $320 million in 1985 to $795 million by 1991, a period during which the use of crack cocaine became widespread, and that annual placements of drug-affected babies increased from 750 before crack cocaine became popular to approximately 3500 by 1991).

[30] Toufexis, *supra* note 6, at 56-57.

[31] *See* Courtland Milloy, *A Time Bomb in Cocaine Babies*, WASH. POST, Sept. 17, 1989, at B3.

> [T]he child of cocaine becomes a prime candidate for drug abuse — which would constitute a unique and devastating "relapse."
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> Exposure to any psychoactive, mood-altering substance later in life is certain to have negative effects . . . . Should that substance be cocaine, the stage is set for a terrifying emotional and neurobiological disaster as the brain is reacquainted with its 'old friend.'[32]

Experts now warn that children exposed to drugs in utero "will present a host of new challenges to the juvenile justice system."[33] The president and medical director of the National Association for Families and Addiction Research and Education, Dr. Ira Chasnoff, just completed a study that directly linked prenatal drug exposure to long-term behavior problems for these children.[34] Chasnoff has found that "crack children have a multitude of problems, including high rates of anxiety and depression, short attention spans, inadequate social skills, abnormal thought processes, and aggressive behavior."[35] Anecdotal evidence points to an inability on the part of these children to control themselves, even if the children truly desire to comply with policies and procedures.[36] According to one expert, these children "'just can't do it. [They do not] have the control . . . . Even kids with the intellectual skills have medical issues directly related to control.'"[37] Another expert notes that once crack children reach their threshold for frustration, their negative behaviors escalate quickly.[38] Thus, "If a child is demonstrating bizarre behavior and someone punishes him, the behavior worsens."[39]

Prenatal drug exposure is not always determinative of a child's future involvement in the juvenile justice system. Even Dr. Chasnoff

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[32] *Id.* (quoting Dr. J. Harold Nickens, chair of the D.C. Chapter of the American Society of Addiction Medicine).

[33] Debra Baker, *The New Delinquents, Influx of "Crack" Kids Forces the Juvenile Justice System to Find Ways to Adapt*, A.B.A. J., Apr. 1998 at 18.

[34] *See id.* at 18, 19.

[35] *Id.* at 18-19.

[36] *See id.* at 19.

[37] *Id.* (quoting Tony Garrett, director of the Lucas County, Ohio, Child Study Institute).

[38] *See* Baker, *supra* note 33, at 19

[39] *Id.* Behavior changes that demonstrate that a crack child has exceeded his or her frustration level include "'screaming, hitting, aggression, tantrums, throwing things, a lot of aggressive types of acting out[.]'" *Id.* (quoting Dr. Amy Anson, a clinical psychologist). According to Dr. Chasnoff, this "heightened response to punishment is more prevalent in crack children because they lack self-control and have increased anxiety." *Id.*

admits that not all drug-exposed children are going to become violent offenders.[40] However, he explains, "What the research has shown is that [the traits] I've described are predictors of children who become involved in the criminal justice system."[41] Thus, the price to society for drug-exposed children keeps increasing.

B. The Recognition of the State's Interest in the Fetus

Historically, American law did not recognize the fetus as a legal entity distinct from the pregnant woman carrying it.[42] More than one hundred years ago, Justice Oliver Wendell Holmes declared that the unborn child was inseparable from the mother.[43] Recognition of the fetus as a legal entity under the common law occurred first in only narrowly delineated contexts under tort[44] and probate law.[45]

These initial laws did not in any sense create independent "fetal rights," but, rather, were aimed at protecting the interests of people, including those of the pregnant woman.[46] The expansion of fetal

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[40] *See id.*

[41] *Id.* (alteration in original).

[42] *See* Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 279-80 (1987-1988); Elizabeth L. Thompson, Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357, 359 (1988/1989). *But see* McNulty, *supra*, at 291 n.89 (listing cases in which courts have determined that unborn children have a right to gestation free from wrongful injury).

[43] *See* Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 17 (1884). In *Dietrich*, a pregnant woman miscarried her five-month-old fetus after she slipped and fell on a city sidewalk. *See id.* at 14-15. Maintaining that the sidewalk had been negligently maintained, she brought a wrongful death suit against the city. *See id.* Justice Holmes disallowed recovery, stating: "[A]s the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by [the mother]." *Id.* at 17.

[44] *See* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946). *Bonbrest* was the first case to extend tort protection to viable fetuses and to reject the common law view that a fetus is so intimately united with its mother that it is a part of her. *See id.* at 140. For an in-depth discussion of this case, see McNulty, *supra* note 42, at 280-82.

[45] *See* Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 601 (1986). The legal fiction of considering a fetus to be a person if a child is subsequently born alive was first adopted for the purposes of inheritance law. *See id.* For an extensive discussion of the history of the development of the legal status of the fetus, see *id.* at 600-13.

[46] *See* CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE, STATE POWER AND THE POLITICS OF FETAL RIGHTS 3 (1993). For example, because a fetus is a physical part of a woman, third parties can tortiously harm fetal development only by physically injuring a pregnant woman. The state did not try to "protect" the fetus against a *pregnant woman's* actions until after the legalization of abortion in *Roe v. Wade*, 410 U.S. 113 (1973), and the development of the anti-abortion movement. *See* DANIELS, *supra*, at

protections under civil law ostensibly represents a willingness by society and the courts to hold people responsible for conduct that harms fetal development.[47] Current trends in legislation and prosecution seem to be leaning toward conferring upon the fetus *qua* fetus the plethora of rights, privileges, and immunities afforded to personhood.[48]

Interestingly, it was the Supreme Court's extension of Fourteenth Amendment privacy rights in *Roe v. Wade*[49] that laid the groundwork for the current legal treatment of the unborn. *Roe* is the landmark case regarding the state's interest in the pregnant woman and the fetus.[50] The decision established two distinct and compelling state interests in the abortion context: "protecting the health of the pregnant woman" and "protecting the potentiality of human life."[51]

According to the Court, the state's interest in protecting maternal health becomes compelling at the start of the second trimester of a woman's pregnancy.[52] The government's interest in "potential life" becomes compelling only during the third trimester of the pregnancy — after the point of fetal viability.[53] It is this compelling inter-

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3. Arguably, the threat of legal action deters such tortious acts and therefore directly benefits both pregnant women and their future children.

[47] *See, e.g.*, Margaret P. Spenser, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 393 (1993) (advocating criminal prosecution of pregnant drug users who refuse to enter treatment programs); Lisa M. Noller, Comment, *Taking Care of Two: Criminalizing the Ingestion of Controlled Substances During Pregnancy*, 2 U. CHI. L. SCH. ROUNDTABLE 367 (1995) (arguing that criminal statutes with strict penalties are necessary to provide a consistent and effective approach to drug use during pregnancy).

[48] *See infra* note 98 and accompanying text; *see also* Gerard M. Bambrick, Note, *Developing Maternal Liability Standards for Prenatal Injury*, 61 ST. JOHN'S L. REV. 592, 593 (1987); Johnsen, *supra* note 45, at 599 (asserting that, in recent years, courts and legislatures have "increasingly granted fetuses rights traditionally enjoyed by persons.")

[49] 410 U.S. 113 (1973).

[50] *See id.* at 158. The Court concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn" and determined that the fetus is not constitutionally protected. *See id.* Accordingly, it is the *state's* interest in fetal life, rather than any right belonging to the fetus, that must be examined in the abortion context. *See id.* at 162.

[51] *Id.* at 162.

[52] *See id.* at 163. A trimester is between 12 and 13 weeks, or approximately 1/3 of the woman's pregnancy. *See id.* The state's interest becomes compelling at the beginning of the second trimester because it is at that point that an abortion becomes more dangerous to the health of the mother than carrying the fetus to full term. *See id.*

[53] Viability denotes the point at which the fetus is able to survive outside the womb. *See id.* at 163. Before abortion legislation was enacted in the United States, courts referred to British common law and held that a fetus did not exist at law until it had "quickened." *See id.* at 133. "Quickening" occurred when the pregnant

est that justifies prohibiting a woman from intentionally aborting the viable fetus.[54] The state's ability to promote its interest in the unborn, however, is constitutionally constrained: Even after viability the government may prohibit abortion[55] only if the pregnancy creates no threat to the woman's physical or mental health.[56]

In recent years, the Court has considerably narrowed women's ability to choose abortions. The Court has moved away from the strict trimester structure espoused in *Roe* toward a view that gives states more power to protect the potential life of the fetus. For example, states can permissibly restrict the ability of minors to choose abortion. In *Planned Parenthood v. Danforth*[57] and *Belotti v. Baird*,[58] the Supreme Court set out guidelines for valid parental consent requirements.[59] In *H.L. v. Matheson*,[60] the Court also upheld a statute requiring a physician to notify the parents of a dependent, unmarried minor before performing an abortion.[61]

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woman herself first perceived fetal movement. *See id.* at 132-33; JAMES C. MOHR, ABORTION IN AMERICA 3-4 (1978). Physicians were prohibited by common law from performing an abortion after "quickening." *See* MOHR, *supra*, at 3. Before it "quickened," the fetus was considered a potential for human life, but not a human being, and the law did not interfere with the woman's abortion decision before that time. *See id.* at 3-4; *see also Roe*, 410 U.S. at 132 ("It is undisputed that at common law, abortion performed *before* 'quickening' — the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy — was not an indictable offense.") (emphasis added) (footnote omitted)).

[54] *See Roe*, 410 U.S. at 163-64. "[T]he state's dual interest[s] in the health of the pregnant woman and the potential life of the fetus were deemed sufficient to justify substantial regulation of abortions in the second and third trimesters." Maher v. Roe, 432 U.S. 464, 472 (1977) (discussing Roe v. Wade, 410 U.S. 113 (1973)). Note that the *Roe v. Wade* decision created only a narrow exception to the general rule of individual reproductive autonomy first articulated in *Griswold v. Connecticut*, 381 U.S. 479 (1965). The more general holding in *Roe* is that the fundamental right to privacy guarantees individuals freedom from state interference in childbearing matters. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

[55] In the non-abortion context, viability is immaterial. The woman in such cases does not intend to remove the fetus; rather, she plans to carry the fetus to term, and presumably to act in its best interests. *See* Johnsen, *supra* note 45, at 612. In the abortion context, the state has a compelling interest in preventing the death of a viable fetus. However, prenatal drug use is far less likely to bring about the death of a fetus than an abortion. Therefore, under the *Roe* rationale, the state is proportionately less justified in protecting fetal life when mere injury, as opposed to death, is likely to occur. The state's interest in the *health* of future life was not articulated in *Roe*. Consequently, the *Roe* viability standard fails in the prenatal neglect context.

[56] *See Roe*, 410 U.S. at 163-64.

[57] 428 U.S. 52 (1976).

[58] 443 U.S. 622 (1979).

[59] At the same time, the Court invalidated the states' schemes for requiring parental consent. *See Danforth*, 428 U.S. at 55; *Belotti*, 443 U.S. at 643.

[60] 450 U.S. 398 (1981).

[61] *See id.* at 409-10.

States can likewise indirectly restrict the ability of poor women to choose abortion. In *Maher v. Roe*,[62] a state welfare regulation that authorized Medicaid reimbursement for medical services related to childbirth, but not for those related to non-therapeutic abortions, was held constitutionally permissible.[63] In *Poelker v. Doe*,[64] the Court allowed the City of St. Louis to impose the same type of economic restrictions when it held that there was "no constitutional violation . . . in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions."[65] The federal government may properly refuse Medicaid funds to states for abortions "except where the life of the mother would be endangered if the fetus were carried to term[.]"[66]

In the late 1980s, a broader range of restrictions on women's reproductive rights was upheld. In *Webster v. Reproductive Health Services*,[67] the Court upheld a statute that restricted governmental aid for nontherapeutic abortions by eliminating financial support, along with counseling services and facility access for recipients of public assistance.[68] The statute also required doctors to perform a "viability test" if they suspected that a woman was twenty or more weeks pregnant.[69] Claiming that the trimester framework has proven to be "'unsound in principle and unworkable in practice[,]'"[70] the three-Justice plurality in *Webster* called for the abandonment of the entire trimester system established by *Roe*.[71]

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[62] 432 U.S. 464 (1977).

[63] *See id.* at 474.

[64] 432 U.S. 519 (1977).

[65] *Id.* at 521.

[66] Harris v. McRae, 448 U.S. 297, 302 (1980).

[67] 492 U.S. 490 (1989).

[68] *See id.* at 509. The Court determined that, although the right to an abortion may exist, the government has no obligation to confer financial aid for abortions, even if financial aid is provided for full-term pregnancies. *See id.*

[69] *See id.* at 519-20. The Court found that viability testing "permissibly further[ed] the State's interest in protecting potential human life," even though the testing did not reasonably relate to maternal health. *Id.*

[70] *Id.* at 518 (citations omitted).

[71] *See id.* at 506-07. Justices Rehnquist, White, and Kennedy by concluded that the state interest in protecting potential life exists throughout a woman's pregnancy, and not just after the point of viability. *See id.* at 519. Justice Scalia, writing in a separate concurring opinion, advocated overturning *Roe* completely. *See id.* at 532-37. Dissenting, Justice Blackmun, author of the *Roe* opinion, lamented:

> Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation, and casts into darkness the hopes and visions of every woman in this country who had come to believe the Constitution guaranteed her the right to exercise some control over

The impact of *Webster* on the problem of prenatal drug use redounds not only from the questions decided by the Court, but from those questions left undecided as well. *Webster* did not re-examine the question of whether a fetus is a person for purposes of the Fourteenth Amendment, nor did it address whether the fetus should be given any constitutional rights in the nonabortion context.[72]

Applying the same line of reasoning to *Rust v. Sullivan*,[73] the Court similarly upheld regulations that limited the ability of Title X projects[74] to provide abortion services.[75] The restrictions prevented any counseling concerning the use of abortion as a method of family planning, even in the face of a specific request for information about abortion providers.[76] The regulations did require, however, that every client be referred to "'appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child.'"[77] These restrictions on abortion, according to the Court, left Title X clients "in no worse position than if Congress had never enacted Title X."[78]

In 1992, the Supreme Court officially rejected the *Roe* trimester framework[79] and ultimately relegated a woman's right to reproductive choice to something less than fundamental. In *Planned Parenthood v. Casey*,[80] the Court held that the state can impose regulations that

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her unique ability to bear children.

Id. at 557 (Blackmun, J., dissenting).

[72] *See id.* at 501. The *Webster* Court avoided the issue of whether a fetus should be considered a "person" under the 14th Amendment by holding that the preamble of the Missouri statute at issue, which says that life "'begins at conception and that 'unborn children have protectable interests in life, health, and well-being[,]'" simply reflected the state's exercise of its right to make value judgments about when life begins. *Id.* (quoting MO. REV. STAT. § 1.205.1(a)(2)(1986)). According to the Court, states are free to make such "'value judgment[s] favoring childbirth over abortion.'" *Id.* at 500 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)). Thus, the Court refused to address the constitutionality of the Missouri preamble because it did not eliminate a woman's right to choose to obtain an abortion. *See id.*

[73] 500 U.S. 173 (1991).

[74] Title X provides federal funding for family planning services, which include medical care and health information. *See* 42 U.S.C. §§ 300-306 (1988). President Clinton suspended the regulations on January 22, 1993. *See* 42 C.F.R. § 59 (1994).

[75] *See Rust*, 500 U.S. at 203.

[76] *See id.* at 199-203.

[77] *Id.* at 179 (quoting 42 C.F.R. § 59.8 (a) (2) (1994)).

[78] *Id.* at 203.

[79] *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992). In discarding the trimester scheme, the Court stated that the point of viability was continually being pushed back as a result of advances in modern medicine. Consequently, the state's interest in potential life was occurring earlier than contemplated by *Roe*. *See id.* at 860.

[80] 505 U.S. 833 (1992).

promote the state's interest in protecting the woman's health *and* potential life so long as the regulations do not have the "purpose or effect [of] plac[ing] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[81] According to Justice O'Connor:

> [I]t must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the women'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.[82]

These two watershed decisions — *Roe* and *Casey* — have been used as a foundation for arguing for the recognition of fetal rights generally. These decisions permit a state to intervene in a woman's pregnancy in order to protect "potential" life. In *Roe*, this "potential" life exists only in the third trimester.[83] In *Casey*, the Court held that state intervention may occur much earlier — although the actual time remains undefined[84] — thus creating an inevitable conflict between a woman's right to determine her own behavior during her pregnancy and the right of the fetus to begin life free from physical harm.[85]

The maternal-fetal conflict is at the center of the debate 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.[86] Women's rights advocates interpret *Roe* and its progeny

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[81] *Id.* at 878.

[82] *Id.* at 871 (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

[83] *See Roe*, 410 U.S. at 163.

[84] *See Casey*, 505 U.S. at 860.

[85] *See* David H. Montague & Sharon E. McLauchlin, *Drug Exposed Infants:* En Ventre Sa Mere — *And in Need of Protection*, 44 BAYLOR L. REV. 485, 504 (1992) (noting that the interests of the state and the child are complementary — the child in being born healthy, and the state in guaranteeing that its future citizens are born "healthy, drug-free, and unaffected by any form of maternal substance abuse"); Note, *Maternal Rights and Fetal Wrongs: The Case Against Criminalization of 'Fetal Abuse,'* 101 HARV. L. REV. 994, 997-98 (1988); *see also* Greater S.E. Community Hosp. v. Williams, 482 A.2d 394, 398 (D.C. 1984) (recognizing that a viable fetus has a right under the common law to be born free of tortious injury); Jarvis v. Providence Hosp., 444 N.W.2d 236, 238-39 (Mich. Ct. App. 1989) ("[J]ustice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body.") (alteration in original) (citations omitted); *In re* Baby X, 293 N.W.2d 736, 739 (Mich. Ct. App. 1980) (stating that a child has a "right to begin life with a sound mind and body"); In Re Ruiz, 500 N.E.2d 935, 939 (Ohio C.P. 1986) (finding that "a child has a right to begin life with a sound mind and body").

[86] The *Roe* decision has been challenged by commentators, scholars, and legislatures. Many of these challenges appear to be based on the belief that the fetus is a person deserving of legal protection. *See generally* Shannon K. Such, Note, *Lifesaving*

narrowly and argue that the state's right to intervene exists only in circumstances of an abortion.[87] They contend that the Supreme Court set forth the life and health of the mother as a limiting factor on the state's interest in potential life.[88] These advocates rely on *Thornburgh v. American College of Obstetricians & Gynecologists*[89] and *Colautti v. Franklin*,[90] which stand for the proposition that a "trade-off" between the life of the mother and the life of the fetus is impermissible.[91] Accordingly, 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 constitutional rights in making decisions about her pregnant body."[92]

In contrast, fetal rights advocates interpret *Roe* broadly, and find in the Court's language an implication that the state's interest in potential life begins at conception, not just upon viability.[93] Relying on *Webster* and *Casey*, these advocates believe that the unborn possessed independent legal rights long before the common law concept of viability was affirmed by the Supreme Court.[94] In addition, these advocates look at the rights already afforded a fetus as justification for extending fetal rights in other circumstances.[95] Fetal rights advocates further believe that by choosing to carry the pregnancy to term the woman loses the legal autonomy "to act in ways that would adversely affect the fetus."[96] One supporter of restrictions on pregnant drug users — a human rights advocate — claims 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

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Medical Treatment for the Nonviable Fetus: Limitations on State Authority under Roe v. Wade, 54 FORDHAM L. REV. 961 (1986); Heather M. White, Comment, *Unborn Child: Can You Be Protected*, 22 U. RICH. L. REV. 285 (1988). Some of the more direct federal challenges to the *Roe* decision include a proposal for a "human life amendment" which would broaden the definition of "person" under the 14th Amendment to include the fetus from the point of conception. *See* Such, *supra*, at 961 n.3.

[87] *See* Alicia Ouellette, *New Medical Technology: A Chance to Reexamine Court-Ordered Medical Procedures During Pregnancy*, 57 ALB. L. REV. 927, 945-48 (1994).

[88] *See id.* at 945-46.

[89] 476 U.S. 747 (1986).

[90] 439 U.S. 379 (1979).

[91] *See* Ouellette, *supra* note 87, at 946-47.

[92] *Id.* at 948.

[93] *See* DANIELS, *supra* note 46, at 23.

[94] *See id.* at 23-24.

[95] *See id.* at 13.

[96] *Id.* at 25. The view is that a woman has a duty to care for the fetus and to ensure the birth of a healthy baby if the woman decides to complete the pregnancy and that the woman may not resist state intervention, if warranted. *See id.*

woman's] right to abuse [her] own body stops at the border of [her] womb.'"[97]

In recent years, courts and legislators have responded to the question of fetal status by broadening the scope of protection afforded the fetus.[98] This expansion of liability for fetal injuries arguably reflects an increasing sensitivity to the independent legal rights of fetuses. Lawmakers have begun to acknowledge and act on the medical and legal beliefs that a fetus/child has a right to be born healthy[99] and that expectant mothers have a concomitant duty to refrain from conduct that jeopardizes that right.[100] Where actions are

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[97] Alan Dershowitz, *Drawing the Line on Prenatal Rights*, L.A. TIMES, May 14, 1989, at V5. Another interesting argument raised by fetal rights advocates is that privacy rights under the 14th Amendment are not applicable when dealing with drug use during pregnancy, because no constitutional right exists to abuse controlled substances. *See* Wilkins, *supra* note 27, at 1424. Consequently, it is argued, the state may intervene in a pregnancy to protect the possibility of future life without offending the 14th Amendment. Opponents of this view assert that the right to use controlled substances is not at issue. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1462 (1991). Rather, the relevant privacy interest is a woman's right to carry a pregnancy to term while addicted to drugs. *See id.*

[98] Despite the Supreme Court's failure to recognize full constitutional protections for the unborn, states have increasingly afforded the fetus rights and legal status under both civil and criminal statutes. For example, some states treat an unborn child as a legal entity from the time of conception for inheritance purposes. *See* Tony Hartsoe, *Person or Thing — In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 CAMPBELL L. REV. 169, 237 (1995). Currently, every state recognizes a cause of action for tortious injury to a fetus. *See id.* at 206-07 n.200 (listing the states and the supporting cases). In the criminal context, eight states have deemed the killing of a viable fetus a homicide. *See id.* at 212. Massachusetts, South Carolina, and Wisconsin base this determination on their state supreme court's interpretation of the relevant statutes to include a fetus. *See id.* at 212 n.235. The other five states — California, Illinois, Minnesota, New York, and Utah — have all enacted statutes expressly establishing the killing of a fetus as homicide. *See id.* at 212 n.236. Five states have enacted "feticide" statutes, which permit the state to charge a person with manslaughter if he or she kills a fetus. *See id.* at 212-13. The states that have these statutes include Arizona, Florida, Nevada, Rhode Island, and Georgia. *See id.* at 213 n.237. Finally, the fetus has been accorded the right to file a federal civil rights claim under 42 U.S.C. § 1983. *See generally*, Richard P. Shafer, Annotation, *Fetus as Person on Whose Behalf Action May be Brought Under 42 U.S.C.A. § 1983*, 64 A.L.R. FED. 886 (1983).

[99] *See* Roberts, *supra* note 97, at 1460 n.207; John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 438, 445-47 (1983); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1326-28 (1990).

[100] As two scholars have asserted:

> A child born suffering from injuries caused by the mother's prenatal acts is no less injured than a child born suffering from the prenatal acts of a third party; therefore, protection of fetal interests should be similar in both circumstance.

brought by the state against a woman for her drug use during pregnancy, the state is essentially accepting this broader interpretation of *Roe*, and asserting a compelling interest in protecting the potential life of the fetus from its substance-abusing mother. In order for such actions to be successful, however, the courts must also adopt this broad interpretation. As demonstrated in the following Parts, courts have not yet found a satisfactory way to afford the fetus the requisite protection within the parameters of existing statutes.

II. THE FAILURE OF THE PUNITIVE APPROACH — THE CRIMINAL MODEL

There is little precedent for controlling a pregnant woman's behavior[101] through the imposition of legal penalties on choices that fail to promote the state's interest in fetal health. State-sanctioned regulation of a woman's pregnancy has become increasingly acceptable, however, because of the danger that prenatal drug use poses to the fetus.[102] Over the past decade women have been prosecuted for a variety of crimes that all amount to the same offense: behavior during pregnancy that creates risk or harm to the fetus. The criminal statutes chosen to achieve this goal vary from state to state and from county to county. Statutes relating to abuse and neglect,[103] delivery or distribution of controlled substances to minors,[104] involuntary manslaughter,[105] and even attempted murder[106] have all been used in an

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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, 283 (1989). Some courts have responded by recognizing a duty on behalf of an expectant mother to avoid behavior that would injure her fetus. *See* Robertson, *supra* note 99, at 441.

[101] *See* Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1206, 1235-61 (1992). A state can regulate a woman's behavior during pregnancy either directly or indirectly. *See id.* at 1235. Direct regulations give the woman little to no choice in her behavior; the state mandates medical intervention during the pregnancy despite the woman's decision to refuse treatment or to follow her doctor's dictates. *See id.* at 1239-40. Direct regulations occur most often in the areas of forced cesarean sections, forced hospital delivery, forced life support, and forced prenatal treatment. *See id.* at 1240-47. In contrast, indirect regulations suggest that the woman has a choice in her behavior, but impose "legal penalties if the woman makes the 'wrong' choice." *Id.* at 1235. Indirect regulations do not necessarily involve medical intervention. *See generally* Martha A. Field, *Controlling the Woman to Protect the Fetus*, 17 LAW MED. & HEALTH CARE 114 (1989).

[102] *See supra* notes 17-41 and accompanying text; *see also* Ira J. Chasnoff, *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 JAMA 1741, 1743-44 (1989).

[103] *See infra* notes 125-46 and accompanying text.

[104] *See infra* notes 107-24 and accompanying text.

[105] *See infra* notes 147-60 and accompanying text.

attempt to impose criminal liability for a woman's (wrongful) choices during pregnancy. As the examples below demonstrate, success under these statutes has been limited.

A. *The Drug Delivery Cases*

Florida was the first state successfully to prosecute a woman for drug use during pregnancy. In *State v. Johnson*,[107] Jennifer Johnson was convicted of delivery of drugs to a minor, in violation of section 893.13(1)(c) of the Florida Statutes.[108] This was the first time that a statute, normally used to convict drug dealers, was applied successfully in this context.[109] The prosecutor argued that while giving birth to twins Johnson had delivered a derivative of cocaine through the umbilical cord to her children during the sixty to ninety seconds after each child's birth, but before the cord was severed.[110] The Circuit Court for Seminole County subsequently convicted Johnson.[111]

The District Court of Appeal of Florida, Fifth District, affirmed the conviction in a two-to-one split,[112] stating:

> We have spent the necessary time and effort considering the many arguments of appellant and her supporters who argue the mother's rights to her body and the analogies to the abortion cases .... We have considered other arguments, such as what pregnant mothers might resort to if they know they may be charged with this crime; we were singularly unimpressed with those latter arguments.[113]

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[106] *See infra* notes 161-67 and accompanying text.

[107] 578 So. 2d 419 (Fla. Ct. App. 1991). An earlier attempt to impose criminal liability on a woman for drug use during pregnancy arose in *People v. Pamela Rae Stewart*, No. M508197 (San Diego Mun. Ct. 1987). In that case, Stewart was charged under a California child support statute for failing to follow her doctor's orders while pregnant. Although the national media focused on the allegation that she had used illegal drugs during her pregnancy, the prosecution emphasized other aspects of her prenatal behavior. The San Diego Municipal Court dismissed the case on the grounds that the child support statute was designed to assure financial support for children, not to control a mother's behavior during pregnancy. *See Stewart*, No. M508197, Slip Op. at 9-11.

[108] *See Johnson*, 578 So. 2d at 419, 420.

[109] *See* Mike Williams, *Mother Found Guilty of Delivering Drugs to a Minor Via the Umbilical Cord*, Cox News Service, July 14, 1989, at 2 (New York Times Wire Service); *Mother of Two Cocaine Babies Gets Probation*, A.P. Service (Sanford, Fla., Aug. 26, 1989) (LEXIS, Nexis Library, Current File).

[110] *See Johnson*, 578 So. 2d at 420.

[111] *See id.* at 419.

[112] *See id.*

[113] *Id.* at 420. The decision of the lower court was not without dispute. In her dissenting opinion, Judge Sharp noted that prosecuting women for using drugs and "delivering" them to their newborns is an ineffective response to the problem of sub-

The Florida Supreme Court overturned Johnson's conviction and held that the Legislature did not intend to encompass maternal drug use within the aegis of section 893.13(1)(c).[114] Further, the court asserted that prosecution of maternal drug users could lead to avoidance of doctors and other health care workers, thereby decreasing prenatal care and, similarly, that prosecution could lead to an increase in abortions.[115] As a result, the Florida Supreme Court determined that prosecuting pregnant women for drug use was "inappropriate."[116]

In *State v. Hardy*,[117] a Michigan court of appeals held that Michigan's drug delivery statute[118] did not apply to the movement of cocaine after birth through the umbilical cord.[119] According to the court, "it could not infer that the State Legislature intended its drug-delivery laws, normally applied to drug dealers, to apply to women who ingest drugs while pregnant."[120] Further, the court noted that the law in Michigan (as in Florida) provides that a fetus is not a person entitled to protection under the law.[121]

In *State v. Luster*,[122] a Georgia court of appeals held that the statute proscribing delivering and distributing cocaine did not encompass the transfer of cocaine metabolites to a fetus as a result of the

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stance abuse by pregnant women:

> Rather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected .... Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion.

Id. at 426-27 (Sharp, J., dissenting) (internal citations omitted). The Florida Supreme Court's decision cites Judge Sharp's dissent extensively. *See* State v. Johnson, 602 So. 2d 1288, 1290 (Fla. 1992).

[114] *See id.* at 1296. The court also stated that the medical testimony given during the trial did not sufficiently prove that delivery of the drug occurred during, rather than before, the birthing process. *See id.* at 1292. Had the transfer occurred before birth, Ms. Johnson could not have been convicted for delivering controlled substances to a minor, because under Florida's criminal statutes, a child must be born alive to be deemed a minor. *See id.* The clear implication was that a fetus was not a "child" for purposes of the delivery statute.

[115] *See id.* at 1295-96.

[116] *See id.* at 1296; *see also* Dorothy E. Roberts, *Victory for Jennifer Johnson, Lesson for New Jersey*, N.J. L.J., Oct. 26, 1992, at 20 (discussing the *Johnson* case).

[117] 469 N.W.2d 50 (Mich. Ct. App. 1991).

[118] *See* MICH. COMP. LAWS ANN. § 333.7401(1) (West 1992).

[119] *See Hardy*, 469 N.W.2d at 50, 53. Hardy was also charged with criminal child abuse. *See id.* at 51. The state alleged that she had caused serious physical harm to her minor child by ingesting cocaine while pregnant. *See id.*

[120] *Id.* at 52.

[121] *See id.* at 54 (Reilly, J., concurring).

[122] 419 S.E.2d 32, 34 (Ga. Ct. App. 1992).

mother's drug use during her pregnancy.[123] According to the court, a fetus is not a person within the meaning of the statute at the time such a transfer takes place.[124]

As these cases demonstrate, despite popular support for the promotion of fetal rights, appellate courts are reluctant to equate pregnant drug users with drug dealers. And these courts, in dicta if not expressly, voiced reservations about expanding the definition of "child" to include the unborn.

B. The Criminal Child Abuse, Neglect, and Endangerment Cases

Because states have a compelling interest in protecting the lives of children, parental conduct that substantially threatens a child's welfare is a legitimate basis for state intervention on behalf of the child.[125] The vast majority of child endangerment, child abuse, and child neglect laws, however, are designed to protect already-born children from parental neglect or abuse and, thus, do not include the fetus in the definition of "child."[126] Prosecutions under these statutes have not been successful in eliminating or preventing prenatal drug use because courts traditionally have been unwilling to stretch criminal child endangerment and child support statutes beyond their most obvious purposes — to protect already-born children. Only a handful of courts and legislatures have begun to interpret or expand these statutes to include the unborn.[127]

In *State v. Morabito*,[128] the State of New York charged Melissa Morabito with "endangering the welfare of a child," her fetus, due to prenatal use of cocaine.[129] The *Morabito* court, while conceding that this was a case of first impression in New York, refused to extend sec-

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[123] *See id.* at 35.

[124] *See id.* at 34.

[125] *See* Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not To Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257, 293 (1982) (asserting that state action, including termination of parental rights, is valid when directed at parental behavior that significantly threatens the welfare of the child).

[126] *See* Sam S. Balisy, Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1225 (1987) (noting that virtually no laws exist that protect a fetus from the acts of its parents); *see also* Kentucky v. Welch, 864 S.W.2d 280, 285 (Ky. 1993) (affirming a court of appeals determination that the offense of criminal child abuse did not extend to defendant's use of drugs while pregnant); *In re* Dittrick Infant, 263 N.W.2d 37, 39 (Mich. 1977) (explaining that the legislature did not intend the definition of "child" in its statute to include a fetus); Reyes v. Superior Ct., 141 Cal. Rptr. 912, 913 (Cal. Ct. App. 1977) (holding that prenatal heroin abuse is not punishable under child endangerment statute).

[127] *See infra* notes 304-37 and accompanying text.

[128] 580 N.Y.S.2d 843 (N.Y. Civ. Ct. 1992).

[129] *See id.* at 843; *see also* N.Y. PENAL LAW § 260.10 (McKinney 1998).

tion 260.10 of the New York Statutes to encompass a fetus.[130] Again, the court's reasoning was that the plain meaning of the statutory language, combined with the Legislature's intent in enacting section 260.10, did not extend to a fetus.[131]

California, Arizona, and Ohio courts have interpreted their criminal child endangerment statutes in a similar manner. In *Reyes v. Superior Court of San Bernardino County*,[132] a California court of appeals held that the word "child," as used in the California child endangerment statute, was not meant to include a fetus.[133] In *Reinesto v. Superior Court*,[134] a child abuse indictment was dismissed after an Arizona court determined that the state's child abuse statute does not encompass using drugs during pregnancy.[135] In *State v. Gray*,[136] the Ohio Supreme Court refused to uphold the prosecutor's charge of child endangerment, and the court affirmed the trial court's determination that the child endangerment statute did not create a duty of care to a fetus.[137]

In a case of first impression in Texas, the court in *Collins v. State*[138] similarly held that the relevant Texas child endangerment/abuse statute did not allow prosecutions based on the mother's ingestion of illegal drugs during pregnancy.[139] According to the court, in all other instances in Texas, the Legislature had limited the definitions of "child," "person," and "individual" to a born and living human being.[140] Thus, the mother's act of smoking crack and harming her unborn fetus was not a crime under Texas law.[141]

In *Sheriff, Washoe County v. Encoe*,[142] a mother was charged with child endangerment when her newborn tested positive for ampheta-

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[130] *See Morabito*, 580 N.Y.S.2d at 846.

[131] *See id.*

[132] 141 Cal. Rptr. 912 (Cal. Ct. App. 1977).

[133] *See id.* at 914.

[134] 894 P.2d 733 (Ariz. Ct. App. 1995).

[135] *See id.* at 737.

[136] 584 N.E.2d 710 (Ohio 1992).

[137] *See id.* at 711.

[138] 890 S.W.2d 893 (Tex. 1994).

[139] *See id.* at 898.

[140] *See id.* at 897-98.

[141] *See id.* at 898. The court further held that the fact that the child suffered from cocaine withdrawal after its birth was insufficient to find against the mother pursuant to the Texas child endangerment statute. *See id.*; *see also* Reinesto v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995) (dismissing child abuse indictment because a fetus is not within the statue that protects a child).

[142] 885 P.2d 596 (Nev. 1994).

mines.[143] The Nevada Supreme Court, interpreting the Nevada statute for willful endangerment to a child, concluded that "prosecuting a mother for the delivery of a controlled substance to her child through the umbilical cord is a strained and unforeseen application of [the statute]."[144] The court went on to articulate that an interpretation of the statute in this manner would be a

> radical incursion upon existing law.... [T]o hold otherwise ... would open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a [large] range of miscellaneous, otherwise legal, toxins ... [which] if validated, might lead to a "slippery slope" whereby the law could be construed as covering the full range of a pregnant woman's behavior ....[145]

Thus, prosecutors have found little success under criminal child neglect and endangerment statutes. These statutes, according to the courts, are simply not intended to regulate pregnant women. However, the willingness to punish pregnant women for behavior during pregnancy is the prevailing spirit. Some of the judges who refuse to apply these statutes to pregnant women have called upon their legislatures to provide appropriate means of penalizing drug- or alcohol-addicted women who have babies.[146]

C. *The Involuntary Manslaughter Cases*

The most dramatic and serious charge stemming from a woman's behavior during pregnancy is manslaughter. As early as 1954, a woman was charged with manslaughter when her child was stillborn.[147] The prosecution alleged that the reason for the stillbirth was the defendant's failure to seek medical assistance during delivery.[148] According to the Wyoming Supreme Court, this failure was insufficient to sustain a manslaughter conviction, absent a legal duty of care to the fetus.[149]

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[143] *See id.* at 597.

[144] *Id.* at 598.

[145] *Id.; see also* State v. Gethers, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991) (holding that the child abuse statute did not reach an unborn fetus and, therefore, the defendant could not be prosecuted for child abuse based on the introduction of cocaine into her own body during the gestation period of her unborn child).

[146] *See* State v. Gray, No. L-89-239, 1990 Ohio App. LEXIS 3782, at *6 (Ohio Ct. App. Aug. 31, 1990). *But see* Johnson v. State, 578 So. 2d 419, 426 (Fla. Dist. Ct. App. 1991) ("Prosecuting women for using drugs and 'delivering' them to their newborns appears to be the least effective response to this crisis.").

[147] *See* State v. Osmus, 276 P.2d 469 (Wyo. 1954).

[148] *See id.* at 474.

[149] *See id.* at 479.

Thirty-five years later, prosecutors in Rockford, Illinois charged Melanie Green with involuntary manslaughter because her baby was born with cocaine in her system and then died.[150] The grand jury refused to indict Green on the ground that the Legislature did not intend for the manslaughter statute to impose criminal liability on women for the death of a fetus.[151]

Another manslaughter charge was brought against Kawana Ashley, a nineteen-year-old Florida resident.[152] Ashley shot herself in the stomach, mortally wounding her unborn child.[153] The infant died after an emergency Cesarean section.[154] Ashley was originally charged with third degree felony murder and manslaughter.[155] The trial court permitted the manslaughter charge to stand but dismissed the murder charge.[156] The district court of appeal affirmed the decision of the trial court and certified questions to the Supreme Court of Florida.[157]

The Supreme Court of Florida quashed the decision, finding it questionable whether an expectant mother's self-induced abortion by gun shot was intended to be regulated by the relevant criminal abortion statute.[158] According to the court, although third parties could be held criminally liable for causing injury or death to a fetus, the pregnant woman herself could not be.[159] The statutes under which

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[150] *See* Patrick Reardon, *Grand Jury Won't Indict Mother in Baby's Death*, CHI. TRIB., May 27, 1989, at 1.

[151] *See id.*

[152] *See* State v. Ashley, 701 So. 2d 338 (Fla. 1997).

[153] *See id.* at 339.

[154] *See id.*

[155] *See id.* at 339-40.

[156] *See id.* at 340.

[157] *See* State v. Ashley, 670 So. 2d 1087 (1996). The district court of appeal certified the following questions to the Supreme Court of Florida:

> 1. May an expectant mother be criminally charged with the death of her born alive child resulting from self-inflicted injuries during the third trimester of pregnancy?
>
> 2. If so, may she be charged with manslaughter or third-degree murder, the underlying predicate felony being abortion or attempted abortion?

Id. at 1093.

[158] *See Ashley*, 701 So. 2d at 339.

[159] *See id.* at 340. According to the court, "'At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body . . . . It was in truth a crime which, in the nature of things, she could not commit.'" *Id.* (citation omitted). This common law immunity from prosecution was "grounded in the 'wisdom of experience,'" *id.*, and was designed to protect the woman, not punish her. *See id.* at 341.

Ashley was charged were not intended to alter the common law immunity granted to pregnant women who injure their unborn children. Thus, "an expectant mother [may not] be criminally charged with the death of her born alive child resulting from self-inflicted injuries during the third trimester of pregnancy[.]"[160]

D. The Attempted Murder Case

To date, the only charge of attempted murder based on a woman's prenatal conduct was brought in Wisconsin — a prosecution that earned national headlines.[161] The state brought charges against Deborah Zimmerman, an alcoholic woman who went on a drinking binge shortly before she was due to give birth.[162] At the time of her baby's birth, Zimmerman's blood alcohol level was triple the legal intoxication level.[163] According to prosecutors, Zimmerman had tested positive for alcohol during a prenatal doctor's visit and had been warned about the effects of alcohol and smoking on the fetus. She was also informed that the baby was suffering from ultrauterine growth retardation and was small for its age. After much resistance from Zimmerman, her baby was delivered — drunk[164] — by emergency Cesarean section.[165]

At the preliminary hearing, a medical technician at the hospital where the baby was delivered by Cesarean section testified that Zimmerman screamed obscenities at her and told her, "If you don't keep me here, I'm just going to go home and keep drinking and drink myself to death and I'm going to kill this thing because I don't want it anyways."[166] According to Priscilla Smith, a lawyer with the Center for Reproductive Law and Policy, "this prosecution is only a culmination of the various attempts across the country to punish pregnant women for the disease of drug abuse or alcohol abuse."[167] The case is pending.

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[160] *See id.* at 339.

[161] *See* Dave Daley, *Racine Case Embodies Debate Over Fetal Rights*, MILWAUKEE J. SENTINEL, Sept. 8, 1996, at 1; Anne Marie O'Neill et al., *Under the Influence—Drunk While Pregnant, a Woman Is Charged with Trying to Kill Her Baby*, PEOPLE, September 9, 1996, at 53; Edward Walsh, *In Case Against Alcoholic Mother, Underlying Issue is Fetal Rights*, WASH. POST, October 6, 1996, at A4;.

[162] *See* O'Neill et al., *supra* note 161, at 53.

[163] *See* Scot Lehigh, *Common Sense or a New Way to Ban Abortion?*, BOSTON GLOBE, Sept. 15, 1996, at D1.

[164] The baby's blood alcohol level was 0.199, almost twice the legal limit for adults in Wisconsin. *See* O'Neill et al., *supra* note 161, at 53.

[165] *See* Walsh, *supra* note 161, at A4.

[166] *See* Lehigh, *supra* note 163, at D1.

[167] Don Terry, *Wisconsin Says Drinking by Mom-to-be Was Attempt At Murder*, COM.

E. The Failure of the Criminal Model

Prosecuting women for drug use during pregnancy raises a plethora of difficult ethical, moral, and legal questions,[168] some of a constitutional vein, others relating to public policy. The foremost constitutional objection to prosecuting a mother for prenatal drug use is that criminalizing prenatal drug use violates a mother's privacy interest guaranteed by the United States Constitution[169] and offends the mother's due process rights. Due process requires reasonable notice that the act in question constitutes a crime.[170] Statutes penalizing homicide, child abuse, and delivery of drugs to minors fail to address gestational drug use specifically, thus, they deny pregnant users notice that their conduct could be criminal.[171] The woman does not have "fair warning" that her conduct constitutes a crime for which she could be prosecuted.

Even if due process concerns are alleviated, the criminal law is still an inappropriate context in which to evaluate prenatal drug use. Most of the traditional justifications for punishments under the criminal law — incapacitation, general and specific deterrence, and rehabilitation[172] — do not support the imposition of criminal liability for drug use during pregnancy.

The goal of incapacitation — preventing the woman from further drug use while pregnant — can be achieved only if the law moves quickly enough to incarcerate her while she is still pregnant. Moreover, once the baby is born, the mother's punishment does nothing to improve its condition. Unlike children who are physically

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APPEAL, Aug. 17, 1996, at 5A.

[168] *See, e.g.*, Mark Curriden, *Holding Mom Accountable*, 76 A.B.A. J. 50 (Mar. 1990) ("These measures [criminalization] have met with strong opposition from the American Civil Liberties Union and women's rights groups, who say that the criminal sanctions are not authorized by statute and violate the [mother's] rights to privacy and due process."); 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, 330 (1991).

[169] *See* Romney, *supra* note 168, at 330. Under the Due Process Clause of the Fourteenth Amendment, a mother has an implied right to privacy, which encompasses: (1) the right to be free from unwarranted government interference; (2) the right to conceive a child regardless of her marital status; (3) the right to terminate her pregnancy; and (4) the rights of personal autonomy and bodily integrity. *See* Johnsen, *supra* note 45, at 614-20; Montague & McLauchlin, *supra* note 85, at 508.

[170] *See, e.g.*, Colautti v. Franklin, 439 U.S. 379 (1979); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). *See generally*, W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 2.3(b) (2d. ed. 1986).

[171] Although possession of illegal drugs is already a crime, unless the statute specifies that it includes the unborn, a pregnant addict has no notice that her pregnant status allows the state to impose additional punishment.

[172] *See generally* W. LAFAVE & A. SCOTT, *supra* note 170, at § 1.5.

or emotionally abused by their parents, whose abuse stops when the parent is removed from the home, the harm inflicted on drug-exposed babies ceases when the baby is born.

Due to the nature of addiction, the goal of deterrence will not be met by criminal prosecution of pregnant drug users. Current penalties for drug possession and use include prolonged imprisonment and steep fines. Enforcement of these laws does not deter addicts from using drugs during pregnancy; it is unrealistic to believe that heavier penalties will make a difference.[173] Addiction is not a moral weakness curable by jail time.[174]

Retribution is perhaps the least persuasive reason to impose criminal liability on pregnant substance abusers, but it can be accomplished, at least, in a cosmetic way. The woman who harmed her child is punished, and the social balance that her wrongful act upset is restored. The justification of retribution, however, is questionable in this context. It is questionable whether retribution can provide the sole and sufficient justification for punishment.

Under a retribution theory, society is justified in punishing people who deserve punishment, by virtue of their unlawful actions, whether or not the act of punishing serves some other goal such as deterrence or rehabilitation.[175] This theory, however, involves an ideal model of society that is so different from the actual character of society as to render it practically useless. Where a society is comprised of responsible individuals of approximate equality, bound together by freely adopted and commonly accepted rules that benefit everyone, including the criminal as a citizen, such a scheme makes sense. Not all societies are quite so utopian, however. Many people neither benefit from nor participate in the rulemaking, but rather operate at a built-in economic or racial disadvantage. Many criminals are drawn from these classes, and they utterly fail to correspond to the model that underlies the retributive theory.[176]

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[173] *See* A. Morgan Cloud, *Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 750 (1989) (stating that an addict will continue to use cocaine despite the threat of criminal sanctions sufficient to deter most individuals).

[174] *See* UNIFORM ALCOHOL AND INTOXICATION TREATMENT ACT, §§ 1, 9(1), 19 U.L.A. 83, 104-05 (1988). The Uniform Act states that the mere condition of alcoholism is not criminal conduct. Similarly, a state may not criminalize the condition of drug addiction. *See* Robinson v. California, 370 U.S. 660 (1962).

[175] *See generally* JOEL FEINBERG, DOING AND DESERVING 101-05 (1970); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (1797); JEFFRIE MURPHY, RETRIBUTION, JUSTICE AND THERAPY 82-90 (1989).

[176] *See* MURPHY, *supra* note 175, at 82-90.

Punishing the mother will not help the drug-exposed baby, but funding a treatment program for the mother and child would help. Since government time and money are limited, states should consider carefully whether the benefits of prosecuting the pregnant addict, and thereby soothing society's offended sensibilities, outweigh the considerable cost.

Although rehabilitation is the strongest justification for holding pregnant substance abusers criminally liable, it too fails. The criminal justice system is an ineffective way to provide rehabilitative treatment for an addict. The jail may not be drug free,[177] and addicts would be most willing to take whatever risks are necessary to get drugs.[178] Furthermore, states may be under no duty to provide jail inmates with the same types of addiction treatment programs available to civilians.[179] Penal incarceration could thus prevent a woman from getting the same treatment available to non-inmates.[180]

A public policy issue that arises in the context of the criminalization of gestational drug use is that not only will prosecution not restore the damaged fetus, but in many instances the effect of these prosecutions on the women and their families is so damaging that it outweighs any societal benefit.[181] Accordingly, such prosecutions fail to accomplish the intended purpose of promoting and protecting fetal health.

According to the American Academy of Pediatrics:

> Punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits to infant health. Such involuntary measures are likely to discourage

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[177] "Jail [is] no place to get away from drugs." Catherine Foster, *Fetal Endangerment Cases Increase,* CHRISTIAN SCI. MONITOR, Oct. 10, 1989, at 8 (quoting Walter Connolly Jr., attorney for the National Association for Perinatal Addiction Research and Education).

[178] *See* Cloud, *supra* note 173, at 778 n.232.

[179] *See* Aripa v. Department of Social and Health Services, 588 P. 2d 185 (Wash. Ct. App. 1978) (deciding that Washington's version of the Uniform Act does not give prisoners a right to treatment under the Act).

[180] *See* UNIF. ALCOHOLISM & INTOXICATION TREATMENT ACT, §§ 9, 9(l), 14(h) U.L.A. 91, 101 (1988).

[181] Such prosecutions are bad policy choices because they give too little weight to the excuse of drug addiction, the effects of addiction, history, and current life circumstance on childbearing choices, and the ability of poor and minority addicted women to provide for themselves and their children. The preferred policy would be to create safe harbors for these disenfranchised women and their families. *See generally* M. EDELMAN, FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE 83-94 (1987) (suggesting that society needs to develop better family support systems); Janet L. Dolgin, *The Law's Response to Parental Alcohol and Crack Abuse,* 56 BROOK. L. REV. 1213 (1991).

> mothers and their infants from receiving the very medical care and social support systems that are crucial to their treatment.[182]

Further, prosecution and incarceration of pregnant women can be directly detrimental to fetal health.[183] Thus, criminalization may likely turn the mother away from prenatal care.[184] As at least one commentator has noted:

> Those who argue against [criminalization] say it is bad law, bad medicine and bad public policy. The approach is bad law, they say, because it's based on a misreading of abortion-rights cases as giving the state an affirmative right to intervene on behalf of the fetus. It's bad medicine, they say because it risks driving women away from proper prenatal care and hospital delivery. And it's bad public policy because it ignores more pervasive problems pregnant women face: inadequate access to prenatal care, limited treatment programs for substance abuse, and the host of socio-economic conditions that make it difficult for women to care for themselves and their fetuses during pregnancy.[185]

When a pregnant woman is confronted with possible prosecution for her use of illicit drugs, it is unlikely that she will obtain any prenatal care, which will lead to greater burdens on taxpayers.[186] If the mother has not sought any medical treatment, her pregnancy will go unmonitored and any potential harm cannot be minimized, thus increasing the potential for harm to the fetus.[187] The baby that could have been helped by prenatal care will be denied this care.

Criminal prosecution of drug use during pregnancy may also raise some concerns about discriminatory application of the law. As a result of the medical community's arbitrary reporting process to the

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[182] Abigail English, *Prenatal Drug Exposure & Pediatric AIDS: New Issues for Children's Attorneys*, 24 CLEARINGHOUSE REV. 452, 454 (1990).

[183] Stress caused by prosecution may harm fetal development. Imprisonment may actually increase harm to fetal development. *See* Ikemoto, *supra* note 101, at 1273 n.355.

[184] *See* Curriden, *supra* note 168, at 51 ("[The American Civil Liberties Union and women's rights groups] claim that punitive measures will deter poor women from seeking prenatal care, and that a better solution is making more drug rehabilitation programs available to pregnant women.").

[185] Kenneth Jost, *Mother Versus Child*, 75 A.B.A. J. 84 (Apr. 1989).

[186] *See supra* notes 19-21 and accompanying text.

[187] The Board of Trustees of the American Medical Association fears that potential state intervention will discourage a pregnant woman from seeking prenatal care or will dissuade her from providing accurate information to her physician for fear of self incrimination. *See* AMA Board of Trustees, *Legal Intervention During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behvior by Pregnant Women*, 264 JAMA 2663, 2669 (1990). This, in turn, "could increase the risks to herself and her baby." *See id.* at 2669.

authorities,[188] the targets of such prosecutions may be chosen based upon their race, gender, and class.[189] It has been estimated that cocaine use among African-American women and Euro-American women occurs at the same frequency in all economic classes,[190] but African-American women are ten times more likely to be reported. In one study done by the American Medical Association, in eighty-one percent of the cases in which court-ordered intervention was sought, the woman was a member of a minority group.[191]

Another concern that arises when drug use during pregnancy is criminalized is the fear of increasing the overall number of abortions. A statute that criminalizes a mother's behavior while pregnant could not only deter the mother from seeking prenatal care, but could encourage her to have an abortion in order to avoid punishment.[192] A woman who is pregnant, addicted to drugs, and afraid of possible prosecution is left with the choice: seek prenatal care and run the risk of imprisonment, or obtain an abortion with little if any risk of imprisonment.

The last argument raised by opponents of criminalization of a mother's gestational drug use is the ubiquitous "slippery slope" argument. Once prenatal drug use is criminalized, the argument goes, the state could then, in the name of the fetus, prosecute the mother for other actions that may prove harmful to the fetus. This argument has at least superficial merit. Physical and mental deformities in a newborn can be attributed to many types of legal conduct during

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[188] *See* Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1206 (1990).

[189] *See, e.g.*, Dolgin, *supra* note 181, at 1228; Roberts, *supra* note 97, at 1424; Gina Kolata, *Racial Bias Seen on Pregnant Addicts*, N.Y. TIMES, July 20, 1990, at A13 (reporting that the majority of women who are prosecuted for using drugs while pregnant are members of racial minorities, despite the fact that the problem is just as severe among white, middle class women).

[190] *See* Kary Moss, *Substance Abuse During Pregnancy*, 1 HARV. WOMEN'S L.J. 278, 290 (1990) (noting that white women were 1.09 times more likely to abuse substances than black women); *see also* Chasnoff, et al., *supra* note 188, at 1205.

[191] *See* AMA Board of Trustees, *supra* note 187, at 2665:

> [Cocaine] use by white respondents (9 percent) was similar to that of black respondents (12 percent). Although they make up only 25 percent of the overall cases of positive drug tests in the survey, black women represented 87 percent of the cases referred to [the Department of Children and Family Services]. White women, who represented 62 percent of positive drug tests, represented only 9 percent of DCFS referrals.

Id.

[192] *See* Cheri Hass, Note, State v. Gray: *De-criminalization of Maternal Drug Abuse or a Momentary Reprieve?*, 25 U. TOL. L. REV. 1013, 1023 (1995).

pregnancy, including smoking, which can cause low birthweight; drinking alcohol, which can cause fetal alcohol syndrome;[193] improper diet, which can cause eye abnormalities, impaired vision, premature births, and low birthweight; and consuming caffeine, which contributes to low birthweight.[194] Absent some "bright line" for distinguishing between the behaviors that can cause fetal harm — lawful or unlawful — and/or the level of harm inflicted — substantial or minimal — the legislatures will face a difficult task in crafting a statute that will be neither overinclusive nor underinclusive.

The cumulative effect of these criticisms leads to the conclusion that the criminal prosecution of drug-using pregnant women is of little benefit to any of the parties whose interests are at issue — not the mother, not the fetus, and not the state. Given the limited success in sustaining convictions for drug use during pregnancy, it would appear that the judiciary agrees.

III. THE FAILURE OF THE CHILD-WELFARE APPROACH — THE CIVIL MODEL

States have also attacked the problem of drug use during pregnancy on a civil front, using child welfare statutes.[195] The summary removal of drug-exposed children from their mothers — pending an investigation of parental fitness — is becoming an increasingly popular choice for prosecutors. The cases in which a drug-using mother is deprived of custody of her children as a result of her drug use involve somewhat different issues than criminal prosecutions. The syllogism, however, remains the same: If a woman uses drugs during pregnancy, the state steps in to protect the fetus or infant. The funda-

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[193] A fetus diagnosed with Fetal Alcohol Syndrome will characteristically suffer from mental and physical growth retardation, impairment of intellectual and behavioral development skills, and several other related developmental disorders. *See* Rickhoff & Cukjati, *supra* note 100, at 267-68; Sam S. Bulisy, Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1211-12 (1987).

[194] *See* Sheriff of Washoe County v. Encoe, 885 P.2d 596, 598 (Nev. 1994); Reinesto v. Superior Court, 894 P.2d 733, 736 (Ariz. Ct. App. 1995).

[195] As used in this article, "child welfare statutes" are those statutes that permit a state to intervene in the family relationship in order to protect children from abusive or neglectful custodians. *See, e.g.*, ARK. CODE ANN. § 9-27-303 (Michie 1993). In order for a court to establish "neglect" or "abuse" sufficient to terminate the parental relationship, the court generally must find the parent "unfit." *See* Moss, *supra* note 190, at 290; Bonnie I. Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 751-52 (1990).

mental theory behind these actions is that a woman's conduct during pregnancy is probative of future mistreatment.[196]

In re Baby X[197] was one of the first cases in which a court held that "a new-born suffering narcotic withdrawal symptoms as a result of prenatal maternal drug addiction may properly be considered a neglected child."[198] In that case, the Michigan Supreme Court terminated a mother's custody of her child after the child was born addicted to heroin. According to the court, "a child has a legal right to begin life with a sound mind and body."[199] Thus, an inquiry into any parental conduct impacting on that right is relevant to the determination of the best interests of the child. The court concluded that since prior treatment of one child can support neglect allegations concerning another child, prenatal conduct should likewise be considered probative of child neglect.[200]

Since the *Baby X* decision, some California courts have also held that evidence of withdrawal symptoms provides sufficient evidence of

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[196] *See* Moss, *supra* note 190, at 290. In at least two cases, courts have said that prenatal conduct alone is insufficient to support a finding of neglect. However, these courts went on to use the fact that the women were not enrolled in rehabilitation programs as the additional factor necessary to sustain a finding of neglect. In *In re "Male" R.*, 422 N.Y.S.2d 819 (N.Y. Fam. Ct. 1979), the court found that a mother's continued drug use rendered her unable to care properly for her child, despite the fact that "[i]t is far from clear that such impairment [withdrawal symptoms upon birth], caused as it was by pre-natal maternal conduct, would be sufficient, standing alone, to support a finding of neglect." *Id.* at 824. In *In re Stefanel Tyesha C.*, 556 N.Y.S.2d 280 (N.Y. App. Div. 1990), the Family Court dismissed the neglect petitions "because prenatal conduct cannot form the basis for a finding of neglect." *Id.* at 282. The appellate division reversed and held that "the petitions sufficiently alleged causes of action for neglect based on the mothers' admitted use of drugs during their pregnancies, the children's positive toxicology for cocaine at birth and the failure of mothers to be enrolled in a drug rehabilitation program at the time the petitions were filed." *Id.*

[197] 293 N.W.2d 736 (Mich. 1980).

[198] *Id.* at 739.

[199] *Id.* Assertions about a child's right to begin life with a sound mind and body were first articulated in *Smith v. Brennan*, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960). However, this contention is of arguable validity. Since the pregnant woman and fetus can be viewed as "one biological and social unit," rights conferred upon the fetus to be free from various kinds of maternally inflicted harms are inevitably rights denied to the mother. In view of the mother's rights to privacy, autonomy, and bodily integrity, granting the fetus rights at its mother's expense is of highly questionable legitimacy. *See* Barbara Katz Rothman, *When a Pregnant Woman Endangers Her Fetus: Commentary*, HASTINGS CENTER REP., Feb. 1986, at 25. For a complete discussion of the impact of the recognition of fetal rights on the mother's constitutional rights, see generally Johnsen, *supra* note 45; Dawn E. Johnsen, *A New Threat to Pregnant Women's Autonomy*, HASTINGS CENTER REP., Aug.-Sept. 1987, at 33.

[200] *See Baby X*, 293 N.W.2d at 739.

neglect. In *In re Troy D.*,[201] a California court of appeals upheld a lower court order declaring that an infant born with a positive toxicology for morphine, methamphetamine, and amphetamines was a "neglected" child.[202] The court acknowledged that its jurisdiction was limited to situations in which there was evidence of current neglect. However, in determining that current neglect existed, the court considered only the mother's behavior during pregnancy, finding that "the mother conducted herself in a manner that was dangerous to the child prior to the child's birth, but with full knowledge that the child would be born."[203] Similarly, in *In re Solomon L.*,[204] a mother's use of drugs during pregnancy was deemed child neglect for purposes of a termination action.[205]

In *In re Ruiz*,[206] an Ohio court held that "a finding that a child is abused may be predicated solely upon the prenatal conduct of the mother."[207] In that case, Nora Ruiz admitted using heroin in the last two weeks of her pregnancy.[208] Baby Luciano was born prematurely, and his urine screen revealed cocaine and opiates in his system.[209] The court looked to the Ohio Constitution to determine whether an unborn child should be accorded a cause of action for harm suffered by way of the mother's conduct.[210] The court reasoned that "the essence of *Roe*, the state's interest in the potential human life at the time of viability, in conjunction with Ohio's developing case law, compels a holding that a viable unborn fetus is to be considered a child."[211] Moreover, since a child has a right to "begin life with a sound mind and body," any harm to the fetus would constitute child abuse.[212]

Two Connecticut courts arrived at the same conclusion in *In re Valerie D.*[213] In *Valerie D.*, both the Connecticut trial court and the Connecticut court of appeals held that proving prenatal substance abuse was sufficient to terminate the parental rights of a child's

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[201] 263 Cal. Rptr. 869 (Cal. Ct. App. 1989).
[202] *See id.* at 874.
[203] *Id.*
[204] 190 Cal. App. 3d 1106 (Cal. Ct. App. 1987).
[205] *See id.* at 1111.
[206] 500 N.E.2d 935 (C.P. Ohio 1986).
[207] *Id.* at 935-36.
[208] *See id.* at 936.
[209] *See id.*
[210] *See id.* at 936-37.
[211] *Id.* at 938.
[212] *See Ruiz*, 500 N.E.2d at 939.
[213] 613 A.2d 748, (Conn. 1992).

mother.[214] In determining that parental rights should be terminated, the trial court compared the drug use of the mother to the actual injection of cocaine into the newborn's blood stream — conduct that would unquestionably constitute child abuse.[215] Since the statute would apply without question to the latter example, the trial court determined that maternal drug use similarly violated the statute.[216] The Supreme Court of Connecticut reversed the lower courts' holdings,[217] interpreting the word "parent" in the statute to mean a natural or adoptive parent, which would require that a child be born alive.[218] As a result, the statutory language did not allow prosecution of prenatal drug use in *Valerie D.*[219]

The Failure of the Civil Model

A state's choice to punish a mother's gestational drug use by terminating her parental rights has met with more success than criminal prosecution[220] but still does not represent the best solution to the problem. Regardless of whether such statutes are intended to include the unborn in the definition of "child,"[221] such prosecutions represent a misguided approach to prenatal drug use for a variety of reasons.

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[214] *See id.* at 752.

[215] *See id.*

[216] *See id.*

[217] *See id.*

[218] *See id.* at 752-53. Similarly, the word "child" is defined as someone under the age of 16. *See id.* Therefore, the court reasoned that the fetus did not become a child until the moment of her birth, because until then, she had no age. *See id.*

[219] *See Valerie D.*, 613 A.2d at 752-53.

[220] *See* Ikemoto, *supra* note 101, at 1275. According to Professor Ikemoto:

> The real difference between the criminal prosecution and the civil neglect cases is that the courts are more willing to recognize fetal personhood for purposes of civil neglect cases. Consequently, the state has a higher success rate in the courtroom, and women have a greater chance of losing their children and their liberty.

Id.

[221] Many states have enacted statutes specifically addressing the use of illegal drugs during pregnancy in the context of child abuse or neglect or endangerment, all of which can support the termination of parental rights to the child. *See, e.g.*, FLA. STAT. ANN. § 415, 503(8) (West 1989) (definition of "harm" to child's health [for purposes of neglect or abuse finding] includes a newborn infant's physical dependency on a controlled drug); MINN. STAT. § 626.556 (1988) (definition of "neglect" includes prenatal exposure to a controlled substance as evidenced by withdrawal symptoms at birth or toxicology test results from either mother or child); OKLA. STAT. ANN. tit. 10, § 1101 (West 1989) (definition of "deprived child" includes a child in need of special care or treatment as a result of being born dependent on a controlled dangerous substance).

The child welfare system predicates coercive intervention on behalf of a purported neglected or abused child based on the belief that the child faces imminent and serious harm.[222] The critical inquiry is whether the child has actually suffered serious harm as a result of parental action or inaction, and, perhaps more importantly, whether the child faces a risk of future harm.[223] A requirement that *specific* harm be threatened before intervention may be justified is consistent with the presumption in favor of parental autonomy.[224] Thus, our legal system refuses to intervene on behalf of children who have not been "harmed" in a legal or concrete sense, even though they might be better off in another home.[225] One rationale for this non-intervention mindset is that there is "[n]o national consensus . . . concerning what constitutes a 'healthy' adult[, and] we really know very little about how to raise a child to make him 'healthy' — however 'healthy' may be defined."[226] Because of such uncertainty, fiscal and administrative infeasibility, and the traditional deference to parental autonomy and discretion in childrearing:

> [Our] society does not transfer children from parents to nonparents just because the child might do "better," in some aspects of development, in a new home. In addition to concern over the impact of separation from the child's perspective, our society defers to biological ties because of the importance of children to parents and in order not to impose majoritarian notions about rearing children, and because as a society we value cultural, social, and political diversity.[227]

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[222] *See, e.g.*, ARK. CODE. ANN. § 9-27-303 (Michie 1997) (defining "dependent-neglected child" as "any juvenile who as a result of abandonment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness is at substantial risk of serious harm"); CAL. WELF. & INST. CODE § 300(a) (West 1984) (requiring a substantial risk of harm to support a finding of neglect); WIS. STAT. ANN. § 48.13 (West 1997) (standing for the same proposition).

[223] *See* DOUGLAS J. BESHAROV, CHILD ABUSE AND NEGLECT REPORTING AND INVESTIGATION: POLICY GUIDELINES FOR DECISION MAKING 6 (1988) ("The purpose of child protective intervention is also to protect children from *future* injury."); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1004 (1975) [hereinafter Wald I] ("Neglect statutes should be drafted in terms of *specific harms* that a child must be suffering or extremely likely to suffer, not in terms of desired parental behavior.").

[224] *See* Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 651 (1976) [hereinafter Wald II].

[225] *See* Wald I, *supra* note 223, at 992.

[226] *Id.*

[227] MICHAEL S. WALD ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN 188 (1988). By focusing on specific harms and restricting intervention to those occa-

Past parental conduct will support a finding of neglect or abuse only if a court determines that a child is likely to face future harm. It is the *prediction* that a child is likely to come to harm in the future that underlies the decision to intervene, not the past parental conduct itself. Thus, state intervention is appropriate only when the likelihood of future harm to the child is great — that is, when past parental conduct correlates strongly with future conduct that is likely to cause specific harm to the child.[228] However, "[e]ven when the focus is on specific harm to children, it is difficult to make long-term predictions. Since prediction is so difficult, the danger of overintervention, *i.e.*, intervention harmful to the child, is increased by focusing solely on parental behavior."[229] Child protective service agencies and courts that decide to intervene on behalf of drug-exposed infants, regardless of the degree to which their mothers' parenting ability is affected, ignore current principles guiding intervention. Whether prior parental conduct is blameworthy or repulsive should *not* be of concern to the child welfare system.

Making predictions about the risk of future harm to a child is a profoundly more difficult undertaking when the parental behavior in question no longer poses a direct risk of injury to the child.[230] Such is the case with prenatal drug use. After the child's birth a mother's continued drug use cannot directly harm her child, thus any inter-

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sions when the child's welfare absolutely demands it, the child's interests are protected without offending the "basic tenet of our laws that parents have broad freedom with regard to childrearing." Wald I, *supra* note 223, at 989, 992-93.

[228] Physical harm inflicted by a parent on a child is usually not considered abusive if accidentally inflicted. *See, e.g.*, ARK. CODE ANN. § 9-27-303(4)(A)(ii)(b) (Michie 1997) (excluding accidental physical or mental injury from the statutory definition of "abuse"); CAL. WELF. & INST. CODE § 300(a) (West 1989) ("[S]erious physical harm inflicted nonaccidentally upon the minor by the minor's parent or guardian" is not grounds for court jurisdiction.). Intervention may be based on accidental parental conduct, or on parental failure to prevent the child from accidentally injuring herself, but only when there is sufficient reason to conclude that the child is at risk of future harm. *See* Wald I, *supra* note 223, at 1010 n.136, 1011 n.143 (maintaining that the likelihood that injuries to the child will recur is a more important consideration than the parent's culpability or participation in the injury).

[229] Wald I, *supra* note 223, at 1002 n.103 (internal citations omitted) ("[I]t is very difficult or impossible to correlate parental behavior to specific detriment to the child, especially if one is trying to predict long-term harm to the child's development."); *see also* BESHAROV, *supra* note 223, at 6.

[230] *See* BESHAROV, *supra* note 223, at 6; Wald I, *supra* note 223, at 1003 n.109 ("Using parental behavior as an indicator of the likelihood of future harm, *given the existence of a present harm*, is far different from predicting a future harm based solely on parental behavior. The latter is not impossible; it only increases the chances of error."); *id.* at 1010 n.136 ("There is evidence that 'abusing' parents are likely to continue to abuse a child."); Wald II, *supra* note 224, at 654 ("When a child has been injured nonaccidentally, reinjury can take place rapidly.").

vention on behalf of drug-exposed newborns must be predicated upon a likelihood of future harm to the child because of some parental behavior other than drug use. In other words, intervention on behalf of drug-exposed newborns must rest on a strong correlation between maternal drug use and neglectful behavior.

Rather than relying on empirical evidence tending to establish this alleged "strong correlation," however, the participants in the child welfare system simply equate drug use during pregnancy with parental unfitness, regardless of whether such behavior supports a claim of future harm. For example, physicians, child welfare social workers, and courts all presume that drug use during pregnancy is indicative of future neglectful behavior,[231] without undertaking an examination of the specifics of the case.

In addition, courts emphasize the fetal harm resulting from the mother's conduct — rather than the mother's ability to care for her child — when determining whether to assert jurisdiction over a child born addicted to drugs. Unless a fetus is considered a "child" for purposes of these statutes, however, any focus on the harm inflicted on the child in utero — equating it with harm inflicted on an already-born child — is clearly misplaced, except as it bears on the mother's ability to care for her child in the future. Rather than presume neglect on behalf of these children by attaching special significance to the fact that the mother consumed drugs during her pregnancy, state intervention into the family should be predicated only on a known correlation between child neglect and general maternal drug use.[232]

Some mothers of drug-exposed babies may be occasional users. Occasional users may also be fully functioning parents. Pregnancy does not suddenly render them incapable of raising their other children. Moreover, any analysis of the significance of a mother's drug use during pregnancy must consider the degree and type of drug use. Different conclusions are likely to ensue for the weekend marijuana-

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[231] *See* Jost, *supra* note 185, at 88. These agencies have been criticized for establishing policies that "arbitrarily equate evidence of drugs in the baby's system with risk of imminent harm without making a case-by-case examination of the dangers." *Id. But see In re* Appeal in Pima County Juvenile Severance Action, 905 P.2d 555, 557 (Ariz. Ct. App. 1995) (chronic usage of drugs or alcohol during the mother's pregnancy in and of itself does not reflect parental inability that would justify severance of a parent's rights on the ground of abuse of the children in utero).

[232] Unfortunately, there may be little correlation between the effect of prenatal drug use on the infant and the extent of the mother's drug problem. Due to idiosyncrasies in mothers' and infants' metabolisms, the effects of prenatal drug exposure may vary from infant to infant without necessarily correlating with the extent of the mother's use. *See* Ira J. Chasnoff, *Drug Use In Pregnancy: Parameters of Risk*, 35 PEDIATRIC CLINICS OF N. AM. 1403, 1404 (1988).

smoking pregnant woman as opposed to the chronic cocaine or narcotic abuser. It cannot be assumed that *anyone* who uses *any* kind of drug, regardless of frequency, is likely to be an unfit parent.

Further, the argument that a woman who uses drugs during her pregnancy demonstrates a proclivity toward neglect also lacks validity. The attitude underlying this proposition is that the pregnant user is at root a child abuser because she has engaged in conduct clearly dangerous to the fetus in order to fulfill her own selfish desires. Such an inability to engage in self-restraint for the sake of her unborn child is likely to carry over into the mother's future relationship with her child after birth. Intervention on behalf of children exposed to drugs in utero is thus premised on the notion that the infant has *already* been abused because he suffered physical damage as a result of his prenatal exposure to drugs. The infliction of injury upon the drug-exposed infant, however, is a guaranteed one-time event, even if the mother continues to use drugs after birth. Without evidence of the risk of some other future harm, parental rights should not be terminated solely on the basis of drug use during pregnancy.

The automatic removal of drug-exposed infants presumes that *all* mothers who use drugs during pregnancy are unfit parents.[233] Drug-using mothers with certain characteristics, or risk factors,[234] might well merit a rebuttable presumption of parental unfitness, but presuming every mother who has used drugs during her pregnancy is unfit, regardless of the type, quantity, or frequency of consumption, is unreasonable.

Another reason for the failure of the civil model is that it benefits neither the mothers nor the children. Inappropriate removal from the home can harm both the child and the family.[235] Early

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[233] *See* Mary S. Lawson & Geraldine S. Wilson, *Parenting Among Women Addicted to Narcotics*, 59 CHILD WELFARE 67 (1980) (delineating risk factors in narcotics-addicted mothers that forecast abuse or neglect).

[234] These risk factors can be categorized as maternal, infant, and interactional factors. Maternal risk factors can include neglect of other children, prior child protective services history, failure to seek drug treatment, facts suggesting that the mother lives a "street" life, and lack of a social or economic support system. *See id.* at 75. The fragility of the newborn infant's health as a result of withdrawal symptoms, low birthweight, or other drug-related problems constitutes an infant risk factor to be considered. Finally, interactional risk factors may be present if the mother ignores her infant or if there is a clear lack of bonding between mother and child. *See id.*

[235] *See* Marjorie R. Freiman, Comment, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 264 (1982) (arguing that a child should be removed from the home only upon a showing that the child is in imminent danger and that insufficient time exists to obtain a court order).

separations of mother and child can cause bonding problems and impair the mother-infant relationship.[236] Any consequential guilt of the mother and negative reactions she may receive from medical staff for having delivered an addicted baby may contribute further to difficulties in the mother-infant relationship.[237]

Moreover, removing infants from mothers who use drugs results in the "warehousing" of infants to the detriment of both mother and child.[238] Some of these children remain in foster homes for weeks, even months, awaiting the completion of the investigation. Thus, foster care becomes a crucial issue when discussing the policy implications of removing children from their mothers on the basis of drug use during pregnancy.

Nationally, the foster care system is in a state of crisis.[239] Child welfare agencies have encountered an "unprecedented surge" in the number of children removed from parental care and placed into foster care.[240] Unsurprisingly, areas experiencing the highest rates of crack addiction account for the greatest increases.[241] Child protection agencies are so overwhelmed as a result of the increase in the number of children in foster care that they are unable to ensure a child's safety.[242] The inadequate number of foster homes has resulted in "warehousing" children in shelters that are dangerous and overcrowded.[243]

A majority of pregnant addicts who would be affected by criminal or civil sanctions for drug use during pregnancy already have children.[244] Many of these women remain fertile and capable of re-

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[236] *See id.* at 264-65.

[237] *See* Deren, *supra* note 18, at 83.

[238] *See* Jost, *supra* note 185, at 88. "'They're warehousing babies all over [New York] city . . . . That's not benefiting the mother and it's certainly not benefiting the child.'" *Id.* (quoting Dr. Chasnoff).

[239] *See* Wendy Chavkin et al., *Drug Abuse and Pregnancy: Some Questions on Public Policy, Clinical Management, and Maternal and Fetal Rights*, 18 BIRTH 107, 111 (1991).

[240] *See* Douglas J. Besharov, *Crack Children in Foster Care*, 19 CHILDREN TODAY 21, 23 (1990).

[241] *See id.* The following states account for 66% of all children in foster care: California, Florida, Georgia, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, and Pennsylvania. *See id.* at 24. One study in Los Angeles found that 13 children who were in a foster care program because they had been exposed to drugs in utero had been placed in a total of 35 foster homes before reaching the age of three. *See* J.C. Barden, *Foster Care System Reeling, Despite Law Meant to Help*, N.Y. TIMES, Sept. 21, 1990, at 1.

[242] *See* Chavkin et al., *supra* note 239, at 111.

[243] *See id.*

[244] *See* Josephine Gittler & Merle McPherson, *Prenatal Substance Abuse*, 19 CHILDREN TODAY 3, 4 (1988) (noting that demographic characteristics of women who

peating the cycle with another drug abusing pregnancy.[245] Regardless of whether the mother is imprisoned or admitted into a treatment program, the issue of how her other children are to be cared for remains to be addressed. Traditionally, society turned to the welfare system to care for these children. We may no longer be able to do so.

IV. CHILD PROTECTIVE STATUTES AND THE WISCONSIN APPROACH

Prior to 1995, only one state had successfully addressed the problem of gestational drug use by applying the juvenile court's child-protection powers.[246] In *State ex rel. Angela M.W. v. Kruzicki*,[247] the Wisconsin lower courts attempted to protect potential life from future medical problems through court-ordered protective custody[248] of the fetus, using the state's Children's Code.[249]

In that case, a pregnant patient, Angela M.W., repeatedly tested positive for cocaine during her pregnancy.[250] Her obstetrician subse-

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use drugs during pregnancy indicates that the women are in their twenties and thirties, and are not first time mothers).

[245] *See id.*

[246] In 1981, the Supreme Court of Georgia affirmed a juvenile court order that 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). This determination was reached after the mother refused, based on religious convictions, to have a Cesarean section that would save the fetus. *See id.* *But see* Cox v. Court of Common Pleas, 537 N.E.2d 721 (Ohio Ct. App. 1988) (holding that a court may not assume jurisdiction over a pregnant adult for purposes of regulating her lifestyle to protect the fetus); C.S. v. Racine County, 404 N.W.2d 79 (Wis. Ct. App. 1987) (holding that CHIPS statute does not empower the juvenile court to order the parent of a neglected child into an inpatient drug treatment program.)

[247] 541 N.W.2d 482 (Wis. Ct. App. 1995), *rev'd*, 561 N.W.2d 729 (Wis. 1997).

[248] Court-ordered protective custody would detain a viable fetus in a local hospital for treatment and protection from its substance abusing mother. The juvenile court is authorized to take a child into custody by "an 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. ANN. § 48.19(1)(c) (West 1997).

[249] WIS. STAT. ANN. §§ 48.01-48.999 (West 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).

[250] *See Angela M.W.*, 541 N.W.2d at 485. M.W.'s obstetrician originally advised her to seek voluntary inpatient treatment after four different drug-screening tests confirmed the presence of cocaine or other drugs in her blood, but she refused. *See id.* After she failed to appear at two scheduled appointments, her doctor reported his concerns to the Waukesha County Department of Health and Human Services. *See id.* The obstetrician's report was filed pursuant to section 48.981(2) of the Wisconsin Statutes Annotated, the statute that generally requires a physician to report instances of suspected child abuse or neglect, based on reasonable cause. *See id.* Be-

quently reported his findings to the Waukesha County Department of Health and Human Services (the County), which, in turn, sought an emergency order from the juvenile court requesting that the court place the viable fetus into protective custody.[251] The County filed a Children in Need of Protection and Services (CHIPS) petition with the juvenile court, alleging that 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.'"[252] The juvenile court issued the protective custody order, which resulted in the detention of M.W.[253]

In accordance with the CHIPS statute, the juvenile court held a detention hearing to determine whether the fetus should remain in protective custody under the court order.[254] After M.W. unsuccessfully objected to the juvenile court's jurisdiction, she petitioned the court of appeals for a writ of habeas corpus,[255] claiming that she was being illegally detained.[256] Rejecting M.W.'s application, the court of appeals examined the juvenile court's jurisdiction over M.W. and her fetus under the CHIPS statute and determined whether the order

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fore this case, however, no judicial interpretation of the Wisconsin child abuse and neglect statutes made the reporting requirements applicable to a viable fetus.

[251] *See Angela M.W.*, 541 N.W.2d at 485.

[252] *Id.* at 485 (quoting WIS. STAT. ANN. § 48.13(10) (West 1997)). Included with the petition was an affidavit reflecting M.W.'s treating obstetrician's opinions and concerns. *See id.*

[253] *See id.*

[254] Pursuant to WIS. STAT. ANN. § 48.21, the juvenile court must conduct a detention hearing within 24 hours of placing a child into protective custody (exclusive of weekends and holidays), in order to determine whether the child should remain in custody or should be returned to the parent or guardian. *See* WIS. STAT. ANN. § 48.21(1)(a) (West 1997). At this hearing, the parent is entitled to the assistance of counsel. *See id.* § 48.21(3)(d). If the court finds that probable cause exists to believe that the child is within the court's jurisdiction, and that the parent is unable, unwilling, or unavailable to provide adequate supervision and care, the court may order that the child remain in protective custody. *See id.* § 48.21(4)(b).

[255] The writ of habeas corpus is designed to "protect and vindicate the petitioner's right of personal liberty by releasing the petitioner from illegal restraint." *Angela M.W.*, 541 N.W.2d at 487 (citing State *ex rel.* Zcanczewicz v. Snyder, 388 N.W.2d 612, 614 (Wis. 1986)).

[256] M.W. raised three challenges to her detention under the emergency protective custody order: (1) that the juvenile court lacked jurisdiction because a fetus was not a child for purposes of the CHIPS statute (subject matter jurisdiction); (2) that the CHIPS statute granted the juvenile court jurisdiction only over children and thus did not permit the court to detain an adult (personal jurisdiction); and (3) detention under the CHIPS statute was a violation of her constitutional rights to due process and equal protection. *See id.*.

violated M.W.'s constitutional due process and equal protection rights.[257]

A. The Jurisdictional Concerns

In order to determine whether the juvenile court's exercise of jurisdiction[258] over this matter was proper, the court first had to determine whether a viable fetus was considered a "child" as defined by the Children's Code.[259] The court concluded that, although "reasonable minds could differ as to whether the statutory definition of a child applied to a fetus in a CHIPS proceeding,"[260] a viable fetus was a child under the Children's Code.[261]

In arriving at this conclusion, the court looked first to the public policy expressed by the United States Supreme Court in *Roe* and its progeny.[262] Adopting the broader interpretation of *Roe*,[263] the court reasoned:

> In light of *Roe*, which forbids the abortion of a viable fetus and which empowers the states to protect the potential life of such a fetus, it would be incongruous for us to conclude that the CHIPS statute does not empower the state to take the very large steps *Roe* expressly envisioned . . . . The clear purpose of the CHIPS statute is to protect children from the risk of physical harm. That goal can hardly be achieved if the potential life of a viable fetus, a legitimate and compelling interest under *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.[264]

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[257] *See id.*

[258] The juvenile court has "exclusive original jurisdiction over a child alleged to be in need of protection or services." WIS. STAT. ANN. § 48.13 (West 1997).

[259] *See Angela M.W.*, 541 N.W.2d at 488-93. A "child" is defined in the Children's Code as "a person who is less than 18 years of age." *See* WIS. STAT. ANN. § 48.02(2) (West 1990). M.W. claimed that by having no "age," a fetus cannot be a person who is less than 18 years of age, and the word "child" must mean a person born alive. *See Angela M.W.*, 541 N.W.2d at 488.

[260] *Id.* at 487-94.

[261] *See id.* at 493.

[262] *See id.* at 489. Acknowledging that the issues raised in this case were both delicate and difficult, the court asserted that it found it unnecessary to "dwell at length" on the extensive literature written on the subject of state intervention into the maternal-fetal relationship or on the case law of other states. *See id.* at 486.

[263] *See supra* notes 93-97 and accompanying text. The court rejected the narrower interpretation, claiming that it would be illogical to permit the state to intervene in an abortion decision after viability, even over the wishes of the mother, but not to allow it to intervene in situations when the mother's conduct "presents the same risk and portends the same result — the death of the viable fetus." *Angela M.W.*, 541 N.W.2d at 489.

[264] *Id.*

The court also examined the public policy concerns articulated by the Wisconsin Legislature when enacting the Children's Code and defining its purposes,[265] and those of the Wisconsin Supreme Court as addressed in its approach to the legal status of a fetus.[266] Accordingly, the court held that a viable fetus was entitled to the protection and services of the CHIPS statute and that the juvenile court had subject matter jurisdiction over the CHIPS proceeding.[267]

With regard to the claim that the juvenile court lacked personal jurisdiction over the fetus, the court decided that personal jurisdiction over the fetus was not an obstacle. The fetus had been represented by a guardian ad litem who had neither objected to jurisdiction nor indicated that the fetus was under the proper jurisdiction of any place other than Wisconsin.[268]

Asserting jurisdiction over M.W. was more problematic, however. While the court agreed that the CHIPS statute did not provide the juvenile court with jurisdiction over parents, it also noted that the statute did not require original jurisdiction over a parent as a prerequisite to a CHIPS proceeding.[269] Accordingly, the juvenile court need not have original jurisdiction over M.W. at all, and the court could order the viable fetus into protective custody despite a lack of control over the mother.[270]

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[265] The Children's Code was enacted in 1977, nearly five years after the decision in *Roe v. Wade*. *See* 1977 Wis. Laws 354. Because of *Roe*, 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." *Angela M.W.*, 541 N.W.2d at 489. Furthermore, the court rejected the narrow analysis of *Roe* as applied to the CHIPS statute, since the purpose of the CHIPS statute is to protect children from the risk of physical harm. *See id.* at 489.

[266] *See id.* at 490-93. The court analyzed three main Wisconsin Supreme Court cases: *State v. Black*, 526 N.W.2d 132 (Wis. 1994) (recognizing the state's ability to enact and enforce laws to protect the fetus); *Kwaterski v. State Farm Mutual Auto Insurance Co.*, 148 N.W.2d 107 (Wis. 1967) (holding that a viable fetus is a person for purposes of the wrongful death statute); and *Puhl v. Milwaukee Auto Insurance Co.*, 99 N.W.2d 163 (Wis. 1959) (holding that a viable fetus has the ability to assert a claim after birth since it can exist independently).

[267] *See Angela M.W.*, 541 N.W.2d at 493. The court's interpretation of the CHIPS statute to include the unborn was the basis on which the Wisconsin Supreme Court overturned this decision. *See* State *ex rel.* Angela M.W. v. Kruzicki, 561 N.W.2d 729, 733 (Wis. 1997).

[268] *See Angela M.W.*, 541 N.W. 2d at 493.

[269] *See id.* at 493. In addition, the court noted that the protective custody order over the fetus also required custody of M.W., not because the juvenile court asserted jurisdiction over M.W., but because M.W. and her fetus were "physically and biologically one." *Id.* at 493-94.

[270] *See id.* at 493.

The *Angela M.W.* court concluded that the CHIPS statutory scheme provided the juvenile court with control over the mother by virtue of its jurisdiction over the fetus and distinguished *C.S. v. Racine County*.[271] In *C.S.*, the court of appeals had determined that the CHIPS statute did not permit a juvenile court to order the parent of a neglected child into involuntary inpatient treatment.[272] Instead, the court concluded that the state must follow the civil commitment procedures dictated by the Wisconsin statute governing alcohol and substance abuse commitments.[273] The court explained that, because the juvenile court did not have jurisdiction to order the commitment of an adult under the commitment statute,[274] any attempt to address child neglect and abuse in this manner must necessarily fail.[275]

The *Angela M.W.* court dismissed *C.S.* as inapplicable because, unlike C.S., M.W. had not been ordered into an involuntary inpatient treatment program.[276] Rather, it was the fetus, not the mother, that had been ordered into protective custody. Thus, the juvenile court's lack of jurisdiction over M.W. was not relevant to the legality of the protective custody order.[277] Perhaps realizing the inherent weakness of this argument, the majority stated:

> The fact that Angela and her viable fetus are physically and biologically one triggers the legal dilemma posed by this case, and it runs through all of the issues before us. This fact requires this court to squarely decide whose interests shall prevail. However, we conclude that the answer to this delicate question does not lie in any inquiry as to the juvenile court's purported personal jurisdiction over Angela. Rather, we properly address this question in

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[271] 404 N.W.2d 79 (Wis. Ct. App. 1987).

[272] *See id.* at 83. In that case, the mother admitted to the CHIPS petition, and agreed to enter a drug treatment center, whereupon the court entered an order to that effect. The mother left the facility before completing the program, however, and did so each time the juvenile court ordered her to return. *See id.* at 81. After several such instances, the juvenile court held the mother in contempt, issued an order requiring her to enter a specified drug and alcohol program, and directed that "during those periods that [C.S.] was not in said program, she shall be committed to Racine County jail for up to six months, or for as long as her contempt continues, whichever is shorter." *Id.* at 80.

[273] *See id.* at 83.

[274] *See id.*

[275] *See id.* The court stated, "We do not question the juvenile court's belief that C.S.'s parenting abilities might be significantly enhanced and that the Family Code's overriding goal of family unity would be served by C.S.'s obtaining the treatment ordered. However, we know of no law which permits legislative policy to serve as the altar upon which constitutional rights governing involuntary commitment are to be sacrificed.

[276] *See Angela M.W.*, 541 N.W.2d at 494.

[277] *See id.*

the context of Angela's constitutional argument — a matter to which we now turn.[278]

B. *The Constitutional Concerns*

The constitutional claims raised in *Angela M.W.* were advanced on due process[279] and equal protection grounds.[280] The gravamen of M.W.'s argument was that the state had failed to demonstrate an interest compelling enough to justify the deprivation of her fundamental right to physical liberty.[281] She also alleged that the statute was not the least intrusive means by which to achieve the state's goal,[282] because confinement under the statute was extremely harsh. Moreover, M.W. argued that application of the statute in this context would be counterproductive because it would force women to avoid prenatal medical care, substance abuse treatment, and hospital deliveries, a result that would ultimately hinder rather than promote the state's interest.[283]

The court acknowledged that under *Roe* and its progeny, a state possesses a compelling interest in the potential life of a viable fetus.[284]

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[278] *Id.*

[279] The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. The Supreme Court has long recognized that due process has both substantive and procedural components. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992). When state action intrudes upon a fundamental right such as physical liberty, a proper substantive due process analysis subjects the state's action to strict scrutiny. To survive this scrutiny, the state must demonstrate that a compelling state interest justifies the burden imposed and that the means chosen by the state are the least restrictive means available to carry out that objective. *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

[280] Although M.W. raised both due process and equal protection claims, the *Angela M.W.* court addressed only due process. *See* State *ex rel.* Angela M.W. v. Kruzicki, 541 N.W.2d 482 (Wis. Ct. App. 1995). The court noted that because these claims rested on the same arguments, separate treatment was unnecessary. *See id.* at 497 n.18. The court also failed specifically to address procedural due process. Although it is not entirely clear that a procedural due process claim was made, the court did discuss the procedural safeguards contained in the CHIPS statute as part of its substantive due process analysis. *See id.* at 495.

[281] *See id.* at 494. She also claimed that the state's interest identified in *Roe* was not compelling because it presented a "slippery slope" that could permit the detention of women whose conduct presented a minimal, even nonexistent, risk to the fetus, such as cigarette smoking or social drinking. *See id.* at 495.

[282] *See id.* at 496.

[283] *See id.*

[284] *See id.* at 495. Although *Roe* did not grant any constitutional rights to the fetus, the Court did assert that a state's nonconstitutional interests in the fetus could override the woman's constitutional right to choose to terminate her pregnancy. *See* Roe v. Wade, 410 U.S. 113, 158-59. The *Angela M.W.* court apparently interpreted this

The state's goal of protecting this fetus, the court concluded, overrode M.W.'s privacy interests as well as her due process and equal protection rights.[285] The court also found that the CHIPS statute was sufficiently narrow.[286] Focusing on the legislative purpose of "preserving the unity of the family whenever possible," and "assist[ing] parents in changing any circumstances in the home which might harm the child or . . . require the child to be placed outside the home," the court determined that the CHIPS statute "clearly conveys that protective custody orders should be used sparingly" and that "voluntary drug treatment for pregnant women should be explored."[287] Although the record did not demonstrate that the state had entertained these lesser options for M.W., the court noted that M.W.'s doctor recommended voluntary drug treatment and that it was M.W.'s failure to follow her doctor's advice that prompted him to report her drug use to county officials.[288] Accordingly, the protective custody order was constitutionally tailored to further the state's compelling interest in promoting and protecting the life of a viable fetus.[289]

On appeal, the Wisconsin Supreme Court considered only one of M.W.'s contentions: that a fetus is not a "child" within the meaning of the CHIPS statute and thus the juvenile court lacked subject matter jurisdiction.[290] Stressing that the analysis of this case did not involve "the propriety or morality of the petitioner's conduct,"[291] nor her "constitutional right to reproductive choice guaranteed under *Roe v. Wade*," the Wisconsin Supreme Court reversed the court of appeals decision on the grounds of statutory construction.[292]

The court first determined that the word "child" as used in section 48.02(2) of the Children's Code was an ambiguous term.[293] The

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language to mean that a state's interest in a viable fetus did override the mother's privacy interest. *See Angela M.W.*, 541 N.W. 2d. at 495. The court added that statistics indicating widespread drug use during pregnancy "factually establish the compelling need for state intervention, and *Roe* legally establishes the state's right to do so." *Id.* (citing Keyes, *supra* note 1, at 201 (reporting that 10-15% of all babies born in Milwaukee County had been exposed to cocaine in utero, mirroring national statistics)).

[285] *See Angela M.W.*, 541 N.W.2d at 494-97.

[286] *See id.* at 497.

[287] *Id.*

[288] *See id.*

[289] *See id.*

[290] *See* State *ex rel.* Angela M.W. v. Kruzicki, 561 N.W.2d 729, 733 (Wis. 1997).

[291] *Id.* at 733.

[292] *Id.* at 733.

[293] According to the court, "statutory language is ambiguous if reasonable minds could differ as to its meaning." *Id.* at 734 (internal citations omitted). The court

court then looked to the legislative history of the Children's Code and the other contexts in which the word "child" is used in the Code[294] in order to construe the term. The court stated:

> Our search to ascertain and carry out the legislature's intent results in the conclusion that the legislature did not intend to include fetus within the definition of "child." The legislative history sounds in silence . . . [and] there is no record of any dialogue or consideration of the issue. A reading of § 48.02(2) in context with other relevant provisions of the Children's Code, supports the conclusion that the legislature intended "child" to mean one born alive. Despite ample opportunity, the legislature has not expressly provided that a fetus is a "child" under the Code. We decline the guardian ad litem's invitation to "take on this burden" to fill the legislative void.[295]

Despite the failure of the child protective model in this instance, the use of the juvenile court's child protective powers to address the problem of drug use during pregnancy remains a valid approach. As discussed in the following Part, the juvenile court's broad discretion to intervene in the family and provide the expertise and services necessary to transform a troubled family into a functioning unit makes it a uniquely appropriate forum for these cases. In addition, juvenile court intervention will serve to promote the interests of all the participants in a way the other approaches cannot.

V. THE SUCCESS OF THE CHILD PROTECTIVE APPROACH — THE JUVENILE COURT MODEL

By looking to the juvenile courts[296] as the solution to the problem of gestational drug use, the Wisconsin lower courts arrived at a strategy that may indeed constitute the only reasoned response to the

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found compelling that different courts had arrived at different interpretations of statutory language strikingly similar to that contained in Wisconsin's Children's Code. *See id.* (citing State v. Gray, 584 N.E.2d 710, 713 (Ohio 1992) (holding that a third trimester fetus is not a "child under eighteen" as provided in Ohio's child endangerment statute); Whitner v. State, 492 S.E.2d 777, 780 (S.C. 1997) (concluding that a viable fetus is a "person under the age of eighteen" pursuant to South Carolina's child abuse and endangerment statute)).

[294] *See Angela M.W.*, 561 N.W.2d at 734-40.

[295] *Id.* at 740. The court also stated that the lower courts' reliance on *Roe* and its progeny was inappropriate in that it begged the question. *See id.* at 737. Although *Roe* arguably provides that the state has a compelling interest in the well-being of a viable fetus, the case only establishes a state's *power* to act. *See id.* at 737-38. The decision "sheds no light on the question of whether our legislature *has in fact so acted.*" *Id.* at 737 n.12 (emphasis added).

[296] Although civil neglect and abuse proceedings are also heard by juvenile courts in most jurisdictions, those proceedings have proved inadequate to address the problem of gestational drug use. *See supra* notes 220-45 and accompanying text.

problem. The juvenile court is perhaps the only forum that is capable of furthering all the relevant interests: the mother's interest in freedom from arbitrary interference in her pregnancy; the state's interest in preserving and protecting fetal health; and the fetus' interest, should such an independent interest exist, in being born whole and sound. Perhaps more importantly, the juvenile court also promotes and protects the *family*. Although the protective custody order in *Angela M.W.* was held to be an impermissible exercise of the juvenile court's jurisdiction, that case does not resolve the ultimate question of whether a juvenile court's exercise of jurisdiction over a fetus, pursuant to the court's child protective powers and effected in accordance with a statute that includes the proper procedural safeguards, is constitutional.

Juvenile courts are uniquely situated to deal with the problem of drug use during pregnancy. These courts are generally granted exclusive original jurisdiction over children alleged to be — among other things — abused, neglected, or dependent.[297] Thus, the juvenile court would be authorized to act on a complaint that claims an unborn child is abused, neglected, or dependent, provided, of course, that the word "child" as used in the relevant jurisdictional statute includes an unborn child.

The operation of the juvenile court involves much more than the judicial treatment of cases at the bar. Juvenile courts may also have responsibilities for a variety of nonjudicial activities, such as prevention programs, diversion, crisis intervention, shelter care, vocational training, and youth counseling.[298] As recognized by the *Angela M.W.* appellate court, the paramount goal of the juvenile court is "'to provide for the care, protection, and wholesome mental and physical development of children, *preserving the unity of the family whenever possible.*'"[299] Neither criminalization of prenatal conduct[300] nor termina-

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[297] *See, e.g.*, ARK. CODE ANN. § 9-27-306 (Michie 1993) (granting exclusive original jurisdiction over children alleged to be delinquent, dependent-neglected, or in need of services); IND. CODE ANN. § 31-30-1-1 (Michie 1997) (same); NEV. REV. STAT. ANN. § 62.040 (Michie 1991) (same); OHIO REV. CODE ANN. § 2151.23 (Anderson 1994) (same); WIS. STAT. ANN. § 48.01 (West 1997) (same).

[298] *See* CLIFFORD E. SIMONSEN, JUVENILE JUSTICE IN AMERICA 234 (1991).

[299] State *ex rel.* Angela M.W. v. Kruzicki, 541 N.W. 2d 482, 497 (Wis Ct. App. 1995) (quoting WIS. STAT. ANN. § 48.01(1)(a)) (emphasis added); *see also* ARK. CODE ANN. § 9-27-302 (Michie 1993) (explaining that the purpose of the juvenile code is that all juveniles brought to the court's attention receive the guidance, care, and control, preferably in each juvenile's home, which will best serve the emotional, mental, and physical welfare of the juvenile and the best interest of the state); NEV. REV. STAT. ANN. § 62.031 (Michie 1991) (noting that the purpose of the chapter is to provide care, guidance and control of children, preferably in their own homes, as will be

tion of parental rights[301] operates to preserve the unity of the family. Rather, the end result of such prosecutions is the destruction of the family relationship by separating mother from child.

Moreover, many juvenile courts are empowered to "assist parents in changing any circumstances in the home which might harm the child," in order to "provide children with permanent and stable family relationships."[302] This assistance can include a court order "restraining or otherwise controlling the conduct of any parent, guardian, or other custodian . . . if the court finds that such an order is necessary . . . ."[303] The broad authority contained in the statutory language gives the juvenile court options outside of incarcerating the pregnant woman in order to protect the health and potential life of her fetus. This laudable purpose was acknowledged by the Wisconsin Supreme Court, but it ultimately held that the juvenile court's power to protect *children* does not extend to fetuses, absent express legislative intent.[304]

A. *Expansion of Current Statutes to Include the Unborn*

The Wisconsin Supreme Court is not alone in its reluctance to expand the definition of "child" to include the unborn, absent express statutory language.[305] One state, however, recently undertook just such an expansion, asserting that there was "[no] rational basis for finding a viable fetus is not a 'person' in the [child protective] context."[306] In what has been touted as "a landmark decision for pro-

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conducive to the child's welfare and the best interest of the state); OHIO REV. CODE ANN. § 2151.01 (Anderson 1994) (maintaining that the purpose of the juvenile court is to "provide for the care, protection, and mental and physical development of children . . . [i]n a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety").

[300] *See supra* notes 168-94 and accompanying text.

[301] *See supra* notes 220-45 and accompanying text.

[302] *Angela M.W.*, 541 N.W.2d at 497 (quoting WIS. STAT. ANN. § 48.01).

[303] OHIO REV. CODE ANN. § 2151.359 (Anderson 1994).

[304] *See* State *ex rel.* Angela M.W. v. Kruzicki, 561 N.W.2d 729, 740 (Wis. 1997).

[305] *See, e.g.*, Johnson v. State, 602 So. 2d 1288 (Fla. 1992); Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993); People v. Hardy, 471 N.W.2d 619 (Mich. 1991); State v. Gray, 584 N.E.2d 710 (Ohio 1992); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992), *cert. denied*, (Ga. 1992); Reyes v. Superior Court, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977); Commonwealth v. Kemp, 643 A.2d 705 (Pa. Super. Ct. 1994). As these cases demonstrate, prosecutions for a mother's prenatal conduct have become more common, but most appellate courts have dismissed such charges. *See* Stephanie Stone, *Conduct During Pregnancy Harming Fetus May Be Prosecuted, South Carolina High Court Holds*, WEST'S LEGAL NEWS, July 22, 1996, *available in* 1996 WL 405681.

[306] Whitner v. State, 492 S.E.2d 777, 780 (S.C. 1997).

tecting children,"[307] the South Carolina Supreme Court held that the plain meaning of "person," as set forth in that state's child abuse and endangerment statute, includes the viable fetus.[308]

In *Whitner v. State*,[309] the court rested its position, in large part, upon existing medical information regarding fetal development.[310] Noting that South Carolina law had long recognized that viable fetuses were entitled to certain protections and privileges under the law,[311] the court stated that "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."[312] The court reasoned that injuries sustained while a fetus is in the mother's womb can often be far more serious than those sustained after birth.[313] In order to encompass all children in need of protection — both the born and the unborn — the court interpreted the statute very broadly.[314]

Other courts should follow the example set by the South Carolina Supreme Court.[315] The *Whitner* decision represents the gradual erosion of narrowly construed and outdated statutes and seeks to include fetal rights within the scope of such laws.[316] Although oppo-

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[307] *Abuse of Viable Fetus Ruled a Crime*, NAT'L L.J., July 29, 1996, at A8 (quoting South Carolina State Attorney General Charlie Condon).

[308] *See Whitner*, 429 S.E.2d at 780-81.

[309] 492 S.E.2d 777 (1997).

[310] *Id.* at 780; *see also* Joseph Wharton, *Drugs in Pregnancy Amount to Abuse*, 82 A.B.A. J., Nov. 1996, at 43.

[311] *See Whitner*, 429 S.E.2d at 779-80 (citing Hall v. Murphy, 113 S.E.2d 790 (S.C. 1960) (wrongful death); Fowler v. Woodward, 134 S.E.2d 42 (S.C. 1964) (same); State v. Horne, 319 S.E.2d 703 (S.C. 1984) (feticide)). According to the court, these cases were decided primarily on the meaning of "person" as understood "in light of existing medical knowledge," rather than on any policy of protecting the relationship between the mother and child, with an eye toward protecting the state's interest in potential life. *See Whitner*, 429 S.E.2d at 783.

[312] *Whitner*, 429 S.E.2d at 783.

[313] *See id.* at 780

[314] *See id.* at 781

[315] Only four other courts of last resort have considered the question of imposing liability for a mother's prenatal conduct: Nevada, Florida, Kentucky, and Ohio. All have ruled against criminalizing maternal conduct before the birth of the child. *See generally* Stone, *supra* note 305. A total of 200 women in 30 different states have been prosecuted for their prenatal conduct, but only Whitner's conviction has been upheld. *See* Marilyn Kaufus, *Pregnancy Negligence Not Prosecuted/Law: Taking Speed and Other Drugs Might Be Bad for the Body*, ORANGE COUNTY REG., Aug. 11, 1996, at B7.

[316] While *Whitner* may represent a case of judicial activism on behalf of the expansion of fetal rights under criminal law, a number of state legislatures have also adopted new criminal statutes expressly imposing liability for fetal harms. *See* CAL. PENAL CODE § 187 (West 1988); 38 ILL. COMP. STAT. ANN. § 9-1.1 (West 1980); IOWA CODE ANN. §707.7 (West 1979); MISS. CODE ANN. § 97-3-37 (1973); N.H. REV. STAT.

nents suggest that child protective statutes should be strictly construed and would require a specific statutory reference to the protection of fetuses before such statutes are applied to the unborn,[317] the *Whitner* court believed that an expansive interpretation of "person" was necessary to effectuate appropriately the Legislature's intent.[318] Given that juvenile codes are to be liberally interpreted and construed,[319] a strong argument can be made in favor of including the viable fetus exposed to drugs in utero in the scope of the court's protection. After all, what better time to facilitate the wholesome mental and physical development of children[320] than during pregnancy — arguably the most critical stage of human development? And what better behavior to target than maternal drug use?

The use of drugs during pregnancy creates a substantial risk of harm to an unborn child. Although this article advocates court intervention only after the point of viability, the child is placed at risk at the time of the drug use. Whether the drug use occurs in the first, second, or third trimester, the fetus is susceptible to the harmful effects of the drugs.[321] Thus, in order to prevent continued harm throughout the duration of the pregnancy, the child should be afforded the protection of the juvenile law from the moment the state's interest in fetal health outweighs the woman's privacy interests. It would be an anomaly indeed if the court could obtain custody of a newborn based on prenatal drug use,[322] yet deny that same child the protective custody of the court prior to birth. In light of the fact that the same prenatal maternal conduct is at issue in either circumstance,[323] such a result would frustrate the purpose of the juvenile code.

ANN. § 585:13 (1986); OKLA. STAT. ANN. tit. 21, § 713 (West 1983); UTAH CODE ANN. § 76-5-201 (1992); WIS. STAT. ANN. § 940.04 (West 1982).

[317] *See Whitner*, 492 S.E.2d at 787 (Finney, J., dissenting) ("[I]t is for the General Assembly, and not this court" to criminalize prenatal conduct and to craft legislation to specifically target fetuses.).

[318] *See id.* at 780-81.

[319] *See, e.g.*, ARK. CODE ANN. § 9-27-302 (Michie 1993); NEV. REV. STAT. ANN. § 62.031 (Michie 1991); OHIO REV. CODE ANN. § 2151.01 (Anderson 1994); WIS. STAT. ANN. § 48.01 (West 1997).

[320] *See, e.g.*, ARK. CODE ANN. § 9-27-302 (Michie 1993); NEV. REV. STAT. ANN. § 62.031 (Michie 1991); OHIO REV. CODE ANN. § 2151.01 (Anderson 1994); WIS. STAT. ANN. § 48.01 (West 1997).

[321] *See* Janet R. Fink, *Effects of Crack and Cocaine upon Infants: A Brief Review of the Literature*, 10 CHILDREN'S LEGAL RTS. 2, 2 (1989). "Maternal cocaine usage during pregnancy, whether confined to the first trimester or continuous throughout, creates serious hazards for both fetus and mother." *Id.*

[322] *See supra* notes 195-219 and accompanying text.

[323] "'If the mother after birth intentionally caused brain damage to her child, she'd be prosecuted for child abuse. Why should it matter that she did the same

Moreover, it may be unrealistic to expect legislatures to change laws specifically to include fetuses, particularly in an area as controversial as that of reproductive rights.[324] Until legislators consider such fetal rights issues, it is the role of prosecutors to test the limits of state statutes and the role of judges to set those limits. If a state has not specifically addressed a mother's prenatal drug use, prosecutors must necessarily "creatively manipulate statutes that do not expressly address the issue in order to charge mothers whose drug addiction harms the fetus."[325] Prosecutors attempt to "find" or "manufacture" liability for women who then claim lack of notice because the statutes do not clearly proscribe the ingestion of drugs while pregnant.[326] A rigid construction of such statutes denies a court the flexibility to modify traditional rules, flexibility which is necessary to accommodate the changing times. As stated by the *Angela M.W.* appellate court:

> If the common law has any vitality, . . . it should be elastic enough to adapt itself to current medical and scientific truths so as to function as an efficient rule of conduct in our modern, complex society.[327]

No one would seriously dispute that a well-crafted statute from the legislature would be the ideal solution.[328] If the legislature has not yet spoken, on whom can viable fetuses rely for protection but the judiciary? Clearly not the parent, for the parent is the source of the harm. Justice demands judicial activism in this area.

Once the jurisdictional threshold has been passed, the juvenile court has myriad options for protecting unborn children from prenatal drug use,[329] options that may not be available in the criminal or

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thing a month before birth?'" Robin-Vergeer, *supra* note 195, at 773 n.119 (quoting Jost, *supra* note 185, at 84, 89).

[324] Opponents fear that "the expansion of fetal rights may deny the fundamental right of reproduction to a particular class of sick women [drug addicts] whose symptoms [compulsive drug use] may injure their fetuses." Doretta Massardo McGinnis, *Prosecution of Mothers of Drug Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 520 (1990).

[325] Noller, *supra* note 47, at 376.

[326] *See id.*

[327] State *ex rel.* Angela M.W. v. Kruzicki, 541 N.W.2d 482, 488 (Wis. Ct. App. 1995); *see also* K. Christopher Shen, *The Lack of a Judicial Policy Addressing Maternal Substance Abuse Cases:* Commonwealth v. Welch, *864 S.W.2d 280 (Ky. 1993)*, 17 HARV. J.L. & PUB. POL'Y 929, 937 (1994).

[328] The child protective statute in expressly addresses the protection of the unborn. *See* NEV. REV. STAT. ANN. § 432B.330 (Michie 1991) (including in the definition of a "child in need of protection," any child suffering from congenital drug addiction or fetal alcohol syndrome).

[329] For example, a statutory scheme permitting the court to order "services" for the family in need could allow for court-ordered, mandatory outpatient drug treat-

termination proceedings. For example, pursuant to the Wisconsin Children's Code, the juvenile court may order individual and family counseling,[330] may obtain "necessary services" for the child and the child's family,[331] may require alcohol and drug counseling,[332] and any other obligations that would "tend to ensure the child's rehabilitation, protection, or care."[333] The court may exercise its authority to control the conduct of outside parties, where such control is consistent with the best interests of the child, by placing "reasonable restrictions" on the parent, guardian, or custodian.[334] The court may restrain or control a pregnant woman's drug use because such behavior is not in the best interest of the child. Requiring the pregnant drug user to obtain adequate prenatal care or to participate in a drug rehabilitation program would be a "reasonable restriction" because it directly addresses the conduct that does not comport with the child's best interest — drug use. The disposition that seems to create the greatest public outcry, however, is the involuntary confinement of the pregnant woman in an effort to protect her fetus.

Court-ordered protective custody may appear draconian, but it is not without precedent. Nonetheless, an important distinction must be made between civil commitment and criminal prosecution and incarceration. Criminal prosecution represents an attempt to allocate blame for the horrifying reality that many women injure and sometimes kill their children by using drugs during pregnancy. Civil commitment attempts to alleviate the problem while promoting the health and welfare of both child and mother.

States currently have the power to confine an individual for the benefit of a third person.[335] Similar to the protective custody at issue

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ment when the mother refuses to seek voluntary treatment. Such orders could be enforced through a contempt provision that would enable the court to order the woman into an inpatient program, should she fail to comply with the original order. This scheme would be less restrictive than the court-ordered protective custody applied in *Angela M.W.*, in that it would allow the woman to avoid confinement by participation in an outpatient program.

[330] *See* WIS. STAT. ANN. § 48.069(1)(b) (West 1997).

[331] *See id.* § 48.069(1)(c) (West 1997).

[332] *See id.* § 48.245 (West 1997).

[333] *Id.*

[334] *See id; see also* OHIO REV. CODE ANN. § 2151.349 (Anderson 1994).

[335] For example, quarantine regulations were enacted to prevent the spread of communicable disease and to preserve the public health. These regulations permit the government to hold an individual against her will for the protection of a third party. *See* 42 U.S.C.S. §§ 264-271 (Law. Co-op. 1994). Civil commitment is generally "justified by two state powers: police power, which allows state action to protect the community from dangerous persons, and the *parens patrie* power, which requires state action to protect individuals who are unable to protect or care for themselves." James A. Wilton, *Compelled Hospitalization and Treatment During Pregnancy: Mental*

in *Angela M.W.*, courts have ordered confinement of a pregnant woman and her fetus when the woman refused to comply with lifesaving medical treatment for the fetus.[336] Because people have previously been held against their will for the protection of a third party, it would appear logical to allow the state to protect an unborn viable fetus from the dangerous controlled substances his or her mother may be ingesting. Such measures cannot, however, be the first line of attack on prenatal drug use. As the *Angela M.W.* court noted:

> The goal of preserving the family unit clearly conveys that protective custody orders should be used sparingly. That goal also conveys that the option of voluntary drug treatment for pregnant women should be explored. And, the juvenile code has provisions incidental to the intake process where options short of formal juvenile court intervention and a protective custody order can be explored.[337]

B. *Constitutional Concerns Raised by the Confinement of Pregnant Women*

Critics argue that the confinement of a pregnant woman for the protection of her fetus raises some troubling concerns. An examination of the arguments in *Angela M.W.* amply demonstrates the constitutional hurdles faced by any court attempting to address the issue of prenatal drug use through the involuntary confinement of the pregnant woman.[338] Such intervention infringes on a woman's physical liberty and her right to bodily integrity.[339] These rights are not absolute, however, and must be balanced against compelling state interests.[340] State intervention is justified when state interests outweigh the individual's interest in being free from intrusion.

Health Statutes as Models for Legislation to Protect Children from Prenatal Drug and Alcohol Exposure, 25 FAM. L.Q. 149, 163-64 (1991). States have used this method to confine the mentally ill for more than 150 years. *See id.*

[336] *See* BONNIE STEINBOCK, LIFE BEFORE BIRTH 146, 146-50 (1992). The most common form of such confinement occurs as a result of emergency Caesarean section orders. *See id.* at 148-50. Instead of giving birth vaginally, the woman must undergo major surgery. *See id.* These orders come despite the view that most Caesarean operations are unnecessary. *See id.* at 149.

[337] State *ex rel.* Angela M.W. v. Kruzicki, 541 N.W.2d 482, 497 (Wis. Ct. App. 1995).

[338] *See supra* notes 279-89 and accompanying text.

[339] These rights are implicated in cases involving the involuntary commitment of pregnant drug users because such women are deprived of their physical liberty and forced to submit to drug-testing and treatment. *See* Wilton, *supra* note 335, at 160.

[340] *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

The state's interest in protecting the health and potential for life of a viable fetus is compelling under the aegis of *Roe* and its progeny. According to the *Angela M.W.* appeals court:

> By recognizing that a state may intervene in an abortion decision after viability, *Roe* necessarily recognizes the right of the state to protect the potential life of the fetus over the wishes of the mother to terminate the pregnancy. Why then cannot the state also protect the viable fetus from maternal conduct which functionally presents the same risk and portends the same result — the death of the viable fetus?[341]

Moreover, the state has at least a "legitimate" interest in both maternal and fetal health that arises at the outset of the pregnancy.[342] Accordingly, statutes aimed at furthering that interest need only be narrowly tailored to pass constitutional muster.[343] As long as the state has provided the proper procedural safeguards, along with appropriate care and treatment for the pregnant drug user, confinement for the duration of pregnancy is arguably a reasonable intrusion to safeguard the state's interest in protecting potential life and promoting maternal health.[344] Some bodily intrusions may be involved, such as compulsory drug-testing, but these minor intrusions are likewise justified by the state's interest in both maternal and fetal health.

Effective treatment serves the state's interest in the pregnant woman's health, while benefiting the woman by improving her health and treating her dependency.[345] Commitment holds out the promise of reduced infant mortality and fewer stillbirths and miscarriages. The birth of a healthy baby, rather than one who may bear the scars of gestational drug exposure,[346] can only be termed a "benefit" to the baby, the mother, and the state.

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[341] State *ex rel.* Angela M.W. v. Kruzicki, 541 N.W.2d 482, 489 n.11 (Wis. Ct. App. 1995).

[342] *See* Roe v. Wade, 410 U.S. 113, 158 (1973).

[343] *See Zablocki*, 434 U.S. at 388.

[344] *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").

[345] *See* David F. Chavkin, *"For Their Own Good": Civil Commitment of Alcohol and Drug-Dependent Women*, 37 S.D. L. REV. 224, 247-48 (1991/1992) (discussing studies indicating that mandatory treatment can be effective, depending on the characteristics of the program, and noting that, even if treatment is not a permanent cure, a period of abstinence during pregnancy will benefit the health of both mother and child).

[346] *See* Volpe, *supra* note 18, at 404 (asserting that 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 withdrawal when born).

Opponents of state intervention based on the mother's drug use during pregnancy also argue that the interference into the lives of pregnant women violates their privacy rights.[347] However, as noted by Justice Blackmun, the author of the majority opinion in *Roe*:

> The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in this Court's decision. The Court has refused to recognize an unlimited right of this kind in the past.[348]

Individuals do not have unfettered discretion with regard to their own bodies in the name of privacy. The law already prohibits conduct such as suicide and the ingestion of controlled substances. Thus, the law can logically recognize a woman's autonomy in the decision to terminate her pregnancy and still prohibit a woman from damaging a fetus that she has chosen not to abort. As long as the intervention is narrowly tailored to prevent conduct that has been shown to be extremely detrimental to the fetus and does not interfere with a woman's right to choose to terminate the pregnancy, courts should uphold such action against privacy challenges.

C. *Efficacy Concerns About the Confinement of Pregnant Women*

Constitutional concerns aside, opponents argue that confinement may not achieve any of the "compelling" interests involved. Fear of confinement may cause drug-dependent women to abort, or to avoid prenatal health care, in order to avoid detection.[349] In the extreme case, the woman may even attempt to deliver her child outside a medical setting for fear of the consequences.[350] While these fears must be acknowledged by any court considering the confinement of pregnant drug users, they cannot justify the failure to apply what could prove to be a very effective measure for advancing the relevant interests absent some empirical proof that these fears have become reality.

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[347] *See, e.g.*, Roberts, *supra* note 97, at 1462-80.

[348] Roe v. Wade, 410 U.S. 113, 154 (1973).

[349] *See* Wendy Chavkin, *Between a "Rock" and a Hard Place: Perinatal Drug Abuse*, 85 PEDIATRICS 223, 224 (1990).

[350] *See id.* Data indicates that this fear may be well-founded. Criminal prosecutions of women who use drugs during pregnancy may have resulted in an increase in the number of unsupervised births taking place outside hospitals. *See id.* A similar increase in the number of births at home, in taxis, and in bathrooms has been noted. *See* Susan E. Rippey, Note, *Criminalizing Substance Abuse During Pregnancy*, 17 CRIM. & CIV. CONFINEMENT J. 69, 88 (1991).

The merits of court-ordered protective custody are substantial. If the mother is confined during fetal viability, the fetus is protected from exposure to drugs up until its birth. Although some damage may already have been done, due to drug exposure pre-viability, the chances of delivering a healthy child increase when the child is not exposed in the last stage of pregnancy.[351] Additionally, the cost to taxpayers for protective custody is relatively low compared to the high costs of treating an unhealthy newborn.[352] Thus, treating the pregnant drug user will keep the costs of health care down.

Perhaps the biggest hurdle to be faced by any court attempting to address the problem of gestational drug use through confinement of pregnant women is the lack of facilities available for drug treatment for pregnant addicts. Although drug addiction afflicts women from all socio-economic backgrounds, many are single parents with little education or income[353] who have great difficulty in securing prenatal care. Residential treatment is the preferred method of treatment for drug use.[354] However, residential treatment is the most expensive and difficult to obtain.[355] Most drug treatment centers refuse to treat pregnant women who are dependent on drugs.[356] Accordingly, any use of confinement and treatment as a possible solu-

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[351] *See* Volpe, *supra* note 18, at 404.

[352] *See* Cynthia L. Glaze, Comment, *Combating Prenatal Substance Abuse: The State's Current Approach and the Novel Approach of Court-Ordered Protective Custody of the Fetus*, 80 MARQ. L. REV. 793, 813-14 (1997). Citing a telephone interview with a patient accounting clerk in a California hospital, Glaze estimates total cost for protective custody, beginning at viability, to be $36,000 as compared to the $120,000 cost of maintaining damaged infants in neo-natal intensive care. *See id.*

[353] *See* McNulty, *supra* note 42, at 300-01 (identifying women substance abusers).

[354] *See* Nora S. Gustavsson, *Drug Exposed Infants and Their Mothers: Facts, Myths, and Needs*, 16 SOC. WORK IN HEALTH CARE, 87, 97 (1992).

[355] *See id.* For example, Massachusetts has only 15 statewide residential placements available. *See id.* Congress attempted to address the inadequacy of drug treatment for women by requiring states to spend 10% of alcohol, drug use, and mental health funds for women. *See id.* However, Congress did not clarify "what constitutes a program for women." *Id.* As a result, residential services designed for women are rare. *See id.* Treatment programs designed specifically for pregnant women do not exist in many areas of the country. *See id.*

[356] *See* Susan Diesenhouse, *Drug Treatment Scarcer than Ever for Woman*, N.Y. TIMES, Jan. 7, 1990, at 26 (discussing exclusion of pregnant women from drug rehabilitation programs as well as general lack of adequate facilities). Babies born of pregnant drug users are likely to be born with birth defects, thereby exposing the facility to liability. *See id.* It is a fear of liability that prompts facilities to turn away pregnant addicts. *See id.* The American Civil Liberties Union's Women's Rights Project brought a series of lawsuits on behalf of pregnant crack addicts and alcoholics against private drug rehabilitation programs for refusing to treat pregnant women. *See* Moss, *supra* note 190, at 297.

tion to drug use during pregnancy necessarily requires available facilities designed to assist the pregnant drug addict.

Additionally, the treatment programs must be comprehensive. The solution to the problem of drug use during pregnancy does not consist of only one step. A variety of different service components available to pregnant women would ensure that they receive a range of needed services.[357] Comprehensive treatment programs would include such things as education on the prevention of drug use, drug treatment, pediatric care, and parenting training.

Even the staunchest critics of judicial intervention into the lives and behaviors of pregnant women believe that court-ordered protective custody may be appropriate. The Board of Trustees of the American Medical Association has stated 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].[358]

VI. CONCLUSION

Society's interest in the birth of healthy babies is undeniable, as is its desire to stop drug use in this country. It seems only logical then for society somehow to express displeasure with drug use during pregnancy and to become involved with the lives of future human beings who may suffer from exposure to drugs in utero. The various approaches tried by states have failed, however, to reduce the incidence of prenatal drug use, simply because these approaches do not work. Criminalizing the behavior serves only to exact revenge on pregnant drug users for their "bad" behavior. Criminalization does not protect maternal health and does not protect or promote the fetus. Termination of parental rights similarly fails, because the end result is the destruction of the family, without a corresponding benefit to the child. The use of the juvenile court's child-protective powers is a novel tactic and one that may well prove the only reasoned approach to the problem of drug use during pregnancy.

Intervention by the juvenile court allows the problem to be addressed as early as constitutionally permissible in order to prevent continued harm to the unborn child. Dealing with the problem

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[357] *See* Gittler & McPherson, *supra* note 244, at 3, 7.

[358] Glaze, *supra* note 352, at 814 (citations omitted) (alterations in original).

while the child is still in the womb furthers the underlying purpose of juvenile law: "to provide for the care, protection, and development of children."[359] However, vesting the juvenile court with authority to gain custody of a fetus based on prenatal drug use is an empty gesture if the court's authority to restrain or otherwise control maternal conduct is stymied by an inability to confine the pregnant drug user.

The judiciary cannot simply ignore the crisis as it progressively worsens, waiting for the legislative branch to tackle the issue. Courts must act now if society is ever to eradicate the use of controlled substances by pregnant women. Otherwise, drug use, dependency, and other drug-related problems will be the legacy of the next generation.

[359] WIS. STAT. ANN. § 48.01 (West 1997).