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Whitner v. South Carolina: Prosecution for Child Abuse Extends into the Womb

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STUDENT WORKS

WHITNER V. SOUTH CAROLINA: PROSECUTION FOR CHILD ABUSE EXTENDS INTO THE WOMB

I. INTRODUCTION

In *Whitner v. State*[1] the South Carolina Supreme Court extended the meaning of the term "child" in the State's child abuse statute to include viable fetuses.[2] In April of 1992, Cornelia Whitner pled guilty to criminal child neglect in violation of the South Carolina Children's Code.[3] The basis for the charge was her use of crack cocaine while pregnant. Cornelia's baby was born with cocaine metabolites in its system. She had endangered the life and health of her child.[4] Whitner's appointed counsel did not advise her that she had been indicted under a statute that had not previously been applied to fetuses.[5] Ms. Whitner pled guilty and was sentenced to eight years in prison.[6] In May of 1993, Whitner applied for Post-Conviction Relief on the grounds that the circuit court lacked subject matter jurisdiction to accept a guilty plea to a nonexistent offense.[7] She also claimed ineffective assistance of counsel based on her attorney's failure to advise her that she was being prosecuted under a statute that had not previously been applied to prenatal drug use.[8]

II. BACKGROUND

In an opinion written by Justice Jean Toal, the court first examined the lack of subject matter jurisdiction claim and determined that the circuit court did indeed have subject matter jurisdiction if the term "child" in the Children's Code included viable fetuses.[9] In South Carolina, viable fetuses are considered persons who are able to recover under wrongful death statutes.[10] Viable

1. No. 24468, 1996 WL 393164 (S.C. July 15, 1996).
2. Id. at *6.
3. S.C. Code Ann. § 20-7-50 (Law. Co-op. 1976).
4. Id.
5. Brief of Respondent at 1-2.
6. Whitner v. State, No. 24468, 1996 WL 393164 at *1 (S.C. July 15, 1996).
7. Id.
8. Id.
9. S.C. Code Ann. § 20-7-490(A) (Law. Co-op. 1976).
10. *Whitner*, No. 24468, *2 (citing Hall v. Murphy, 236 S.C.252, 113 S.E.2d 790 (1960); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964)) (citing State v. Horne, 282 S.C.

fetuses are also considered persons for imposing criminal liability.[11] As a result, the court found 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."[12]

The court also relied on the policies set forth in the Children's Code that state "[i]t shall be the policy of this State to concentrate on the prevention of children's problems as the most important strategy which can be planned and implemented on behalf of children and their families."[13] Because the consequences of abuse or neglect can have profound effects on the child and on society as a whole, the court found that the policy of prevention supported a reading that the word "person" includes viable fetuses.[14] Additionally, the Children's Code applies "to all children who have need of services"[15] and thus lends further support to including viable fetuses as persons.

Ms. Whitner argued that the introduction of several bills to the legislature concerning the criminalization of substance abuse by pregnant women proved that the original statute was not intended to encompass viable fetuses.[16] This argument was rejected because rules of construction demand that "the legislature's subsequent acts 'cast no light on the intent of the legislature which enacted the statute being construed.'"[17]

Whitner went further in urging that an interpretation of the statute to include viable fetuses would be contrary to legislative intent. The defense stressed that such an interpretation could lead to absurd results, such as prosecution of parents for acts that are legal but might endanger the child's well-being, including smoking or the consumption of alcohol.[18] The court rejected this argument because parents of children who are born could conceivably be prosecuted for otherwise legal acts (like excessive alcohol consumption) if such acts are endangering the health or lives of the children. The court further stated that the potential absurd results need not be addressed because "[w]e need not decide any cases other than the one before us."[19]

Whitner continued to focus on legislative intent, urging that the language used in the Children's Code demonstrated a contrary meaning. For example, the Children's Code refers to placement of children "in care away from their

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444, 319 S.E.2d 703 (1984) (applying S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1976)).

11. *Id.*

12. *Id.* at *3.

13. S.C. CODE ANN. § 20-7-20(C) (Law. Co-op. 1976).

14. *Id.*

15. S.C. CODE ANN. § 20-7-20(B) (Law. Co-op. 1976).

16. *Whitner*, No. 24468, at *3.

17. *Id.* at *3 (quoting Home Health Servs., Inc. v. DHEC, 298 S.C. 258, 262 n.1, 379 S.E.2d 734, 736 n.1 (Ct. App. 1989)).

18. *Whitner*, No. 24468, at *4.

19. *Id.*

homes" and "remov[al] from their homes."[20] Because "removal" of a "child" cannot occur if it is a viable fetus, then the legislature could not have intended the Children's Code to extend to viable fetuses.[21] Additionally, including viable fetuses under adoption and child custody procedures would not make sense because one cannot "deter abduction" of a fetus[22] or provide a date or place of birth for birth certificates.[23]

The court addressed Whitner's argument by distinguishing the recent South Carolina decision of *Doe v. Clark*.[24] *Doe* interpreted another provision of the Children's Code and found the term "child" to mean a "child in being and not a fetus."[25] *Doe* was distinguished because it turned on language in the consent provisions of the Adoption Act. Since consent to an adoption must be given after birth, consent is not valid when obtained before birth, or when a fetus is viable. The court refused to extend the holding in *Doe*, stating "[w]e did *not* hold that the term "child" excludes viable fetuses, nor do we think our holding in *Doe* can be read so broadly."[26] Further distinguishing cases in other states that have held that prenatal maternal conduct is not a criminal act under child abuse statutes or drug distribution statutes, the court stated that those states have either an entirely different body of case law from South Carolina or otherwise limit the independent rights of viable fetuses.[27]

Finally, because the circuit court had subject matter jurisdiction over Whitner's guilty plea, the court found that Whitner's lawyer was not deficient for failing to advise her of the statute's possible inapplicability. Whitner was, therefore, not denied effective assistance of counsel.[28]

Chief Justice Finney and Justice Moore dissented in separate opinions. Chief Justice Finney argued that "[a] plain reading of the entire child neglect statute demonstrates the intent to criminalize only acts directed at children, not those which may harm fetuses."[29]

Justice Moore argued that the majority ignored legislative intent and embarked "on a course rejected by every other court to address the issue."[30] He felt that the decision to include viable fetuses in the child abuse statute rendered the statute vague and made problematic the task of determining unlawful conduct. Justice Moore found that the majority's broad reading could

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20. S.C. CODE ANN. § 20-7-20(D) (Law. Co-op. 1976).
21. Brief of Respondent at 14.
22. S.C. CODE ANN. § 20-7-784 (Law. Co-op. 1976).
23. *Id.* § 20-7-1790 (1976 & Supp. 1995).
24. 318 S.C. 274, 457 S.E.2d 336 (1995).
25. *Whitner*, No. 24468, 1996 WL 393164, at *6.
26. *Id.*
27. *Id.*
28. *Id.* at *7.
29. *Id.* at *8.
30. *Id.* at *9.

lead to prosecuting women for failing to take prenatal vitamins, smoking, drinking, and many more acts that are not in themselves criminal.[31] He also felt that ignoring the potential sweeping impact of such an important decision could have on pregnant women was unrealistic.[32]

Justice Moore also argued the inequity of women being immune from prosecution for the first twenty-four weeks of gestation. The first twenty-four weeks are the most important time in fetal development, but as long as the mother quits the behavior in question before viability, she will not be prosecuted.[33] Furthermore, he noted a sentencing inconsistency: a pregnant woman who has an illegal abortion will receive a two year sentence for killing her viable fetus, but she can be sentenced for up to ten years for violating the statute in question.[34]

III. ANALYSIS

A. Arguments for Criminal Prosecution

While not specifically articulated in the State's argument in *Whitner*, policy arguments exist that support criminal prosecution of mothers who endanger or harm their viable fetuses through drug abuse. First, viable fetuses have recognized legal rights and those rights should be protected. In South Carolina, a civil action for wrongful death may be brought when a viable fetus dies because, under the wrongful death statute, the fetus is construed as a person.[35] Similarly, the death of a viable fetus may also give rise to criminal charges.[36] If a viable fetus is considered a "person" that can be murdered under the South Carolina homicide statute,[37] then it logically follows that such a person can also be abused.

Second, women who are harming or endangering their fetuses need a deterrent. Theoretically, the threat of up to ten years in prison should get an abuser's attention and effectively deter her from using drugs and endangering or harming her fetus.

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964).

36. In *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984), the defendant husband was convicted of voluntary manslaughter after stabbing his pregnant wife and causing the death of their viable fetus. The court found that it would be "grossly inconsistent . . . to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Id.* at 447, 319 S.E.2d at 704.

37. "'*Murder*' is the killing of any person with malice aforethought, either express or implied." S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1976).

Third, the costs imposed upon society are very great, and abusers should be punished for creating those costs. Because women who use drugs during pregnancy often do not have private insurance, society ultimately pays some of the costs of intensive care, continuing rehabilitation, and general health care that some of these infants will require, even well into childhood.[38] Society also pays the indirect costs of lost employment and reduced productivity that these infants will have as adults.[39]

Fourth, a desire exists to "do something." In other words, a we're-mad-and-we're-not-going-to-take-it-anymore mentality exists. The problem with "crack babies" is very much in the public eye, and citizens are both sad and angry. The thought of incarcerating the mother to combat the rising problem of drug addicted babies provides a more immediate gratification than does the option of increasing counseling and rehabilitation centers. The public perceives incarceration as a punishment, whereas treatment programs for unwilling participants are viewed as futile and costly.

Finally, drug addicted babies are innocent children, many of whom are beginning life at a disadvantage. After birth, these babies may experience a type of "withdrawal" from the drugs their mothers abused.[40] Drug addicted infants are often jittery or irritable, they cry at the slightest sound or touch, and often they are difficult to console.[41] This behavior can impair mother-child bonding and further increase the risk of child abuse.[42] It cannot be questioned that the innocent and helpless children deserve to be protected.

The above policy arguments are initially very appealing. Good intentions go only so far, however, and charging women with criminal child abuse for abusing their viable fetuses does not remedy the underlying social and medical problems. Even at the height of their deterrent force, criminal charges in this

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38. A great number of the women prosecuted for criminal offenses for giving birth to babies who test positive for drugs are both poor and minorities. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1420-21 (1991). These women generally do not have private insurance, and Medicaid pays only a portion of the hospital bill. 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, 295-96 (1987). The U.S. Department of Health and Human Services has estimated that there are more than 100,000 cocaine-exposed infants born each year. Additionally, there may be up to four million cocaine-exposed infants by the turn of the century. Some are born with serious health problems such as mental retardation, cerebral palsy, and visual and hearing impairment. *Public Health Education Information Sheet: Cocaine Use During Pregnancy* (March of Dimes Birth Defects Found., White Plains, N.Y.) Dec. 1992.

39. Sam S. Balisy, Note, *Maternal Substance Abuse: The Need To Provide Legal Protection For the Fetus*, 60 S. CAL. L. REV. 1209, 1222 (1987).

40. *Public Health Information Sheet: Cocaine Use During Pregnancy* (March of Dimes Birth Defects Found., White Plains, N.Y.) Dec. 1992.

41. *Id.*

42. *Id.*

context treat the symptoms, but they do not provide a cure. Moreover, including viable fetuses as children to be protected under the child abuse statutes raises constitutional and practical problems when the statute is actually enforced.

B. Arguments Against Criminal Prosecution: Constitutional Issues

According to the court, Whitner failed to raise constitutional issues in her Post-Conviction Relief hearing.[43] Thus, constitutional arguments were not preserved on appeal, and the supreme court did not consider them.[44] Nonetheless, the enforcement of a criminal child abuse claim for injuries caused to viable fetuses implicates, at the very least, the constitutional problems of equal protection and privacy rights incursions.

1.Equal Protection

The Equal Protection Clause of Fourteenth Amendment[45] ensures that similarly situated persons will be treated similarly. Because pregnant women are being singled out as the abusers, a classification based upon gender exists. For a gender based classification to withstand judicial review, it must survive intermediate level scrutiny. That is, there must be important government objectives at stake, and the regulatory means chosen to serve those objectives must be substantially related to the objectives themselves.[46]

Extending the child abuse statute to include viable fetuses essentially holds women to a higher health care standard than men.[47] Because the fetus is dependent on the mother while *in utero*, virtually every action taken by a pregnant woman could potentially affect her fetus.[48] While men obviously cannot have this same *kind* of effect on a fetus, "paternal smoking, drug use, battering, and other behavior can adversely affect fetal health."[49] Both men and pregnant women have the capacity to harm the fetus after viability in various ways; they are similarly situated yet treated differently.

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43. The opinion states that "*none* of these [constitutional] arguments were even raised to the PCR court. . . . Having failed to raise the issue below, Whitner cannot raise it before this Court." *Whitner*, No. 24468, 1996 WL 393164, at *7. However, constitutional issues were raised in Whitner's application for Post Conviction Relief: "[T]he interpretation of § 20-7-50 under which Ms. Whitner was convicted violates due process and the right to privacy." Brief of Petitioner at 25. Perhaps this apparent inconsistency will be clarified if a rehearing is granted.

44. *Whitner*, No. 24468, 1996 WL 393164 at *7.

45. U.S. CONST. amend. XVI, § 1.

46. United States v. Virginia, 116 S. Ct. 2264, 2275 (1996).

47. McNulty, *supra* note 38, at 316.

48. *Id.*

49. Barrie Becker, *Judicial Considerations When Sentencing Pregnant Substance Users* 10 (Peggy Hora ed. 1996).

One way to avoid this disparate treatment of pregnant women would be to apply the statute with equal measure to fathers as well as mothers.[50] This, however, would raise problems with proving the source of the harm to the fetus because the mother's adverse behavior generally has a more direct and measurable effect on the fetus than does the father's. It would seem unlikely that mother and father could ever receive truly equal portions of justice.

A more fundamental problem with the equal protection analysis is that men and women arguably are *not* similarly situated. If the classes are not similarly situated, then equal protection does not apply. Obvious biological differences counsel against any conclusion that men and women should be viewed as similarly situated—men cannot carry or bear children. Additionally, in *Geduldig v. Aiello*,[51] the Court found that pregnancy is not a gender based distinction[52] and a state action only needs to satisfy the "mere rationality" test to pass scrutiny.[53] Thus, the prosecution of only women under the statute in question might well survive an equal protection analysis.

Even if men and women were deemed to be similarly situated, it is not a foregone conclusion that criminalizing a mother's post-viability abuse would fail intermediate scrutiny. In attempting to protect viable fetuses, the State's objective is the protection of human life. This objective is obviously important. The means of punishing women who give birth to drug addicted babies, incarceration, is, in this author's view, substantially related to that objective. Because the mother is in the best position to protect her unborn fetus, controlling her behavior is the best way to effect protection of the child.[54] Thus, the State's interests would likely pass intermediate scrutiny.[55]

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50. There is no evidence that men are being prosecuted for child abuse inflicted post viability when the fetus is injured through abuse of the mother or by other means.

51. 417 U.S. 484 (1974).

52. The Court found that potential recipients of health care benefits were either pregnant women or non-pregnant persons. Pregnant women are exclusively female, but non-pregnant persons include members of both sexes. *Id.* at 496 n.20.

53. "[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

54. Julia Elizabeth Jones, *State Intervention In Pregnancy*, 52 LA. L. REV. 1159, 1168 (1992).

55. Because the State's interest can survive intermediate scrutiny as described above, it is surely adequate to satisfy the lesser scrutiny required in *Geduldig*. *See supra* notes 51-53 and accompanying text.

2. Fundamental Right to Privacy

An argument that the holding in *Whitner* violates a woman's right to privacy has a better chance for success than does an equal protection challenge. A woman has a fundamental right to have an abortion before viability without undue interference from the State.[56] Because the right to have an abortion before viability is a fundamental right, strict scrutiny analysis must be applied to any intrusion upon that right.[57]

Extending the definition of "child" to include a viable fetus may place an undue burden on a woman's fundamental right to decide whether or not to have an abortion before viability.[58] The threat of a prison sentence could force a drug addicted mother to decide between either carrying her infant to term and facing up to ten years in prison or having an abortion and avoiding criminal prosecution.[59] In essence, she must choose between drugs and the life of her unborn child.

Because the addict's craving for drugs is so strong, an addicted woman may opt to remain pregnant and continue to use drugs. The threat of criminal prosecution may cause such women to avoid detection rather than seek help. Accordingly, pregnant drug addicts may forgo prenatal care. Without prenatal care, neither the fetus nor the mother will be medically supervised, and the possibility of beneficial intervention will be lost.[60]

The second option for the drug addicted mother is to have an abortion before fetal viability in order to avoid criminal prosecution for child abuse. There is an odd inconsistency about a law that forces this result.[61] On the one hand, the State professes an interest in fetal health throughout pregnancy.[62] Yet threatening criminal prosecution in this instance could actually *encourage*

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56. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

57. The government must show there is a compelling state interest and the state action must be narrowly tailored to express only the legitimate state interests at stake. Roe v. Wade, 410 U.S. 113, 155 (1973).

58. A state may not place an undue burden in the path of a woman seeking an abortion. *Casey*, 505 U.S. at 878. Perhaps *Casey* does not control when the state applies pressure in favor of abortion, but for the sake of argument, this author assumes any interference with "choice" is an obstacle.

59. Arguably there is a third choice for a pregnant addict—treatment. However, the realities of drug treatment centers and their general scarcity virtually nullifies this option. *See infra* notes 85-90 and accompanying text.

60. "Recent studies show that early identification of pregnant women at risk, anticipatory guidance and rapid initiation of treatment can prevent birth defects, developmental disabilities and provide significant positive effects in the health of the infant." *Position Statement on Opposition to Criminal Prosecution of Women for Use of Drugs While Pregnant and Support for Treatment Services for Alcohol and Drug Dependent Women of Childbearing Age* (American Nurses Assoc., Washington, D.C.) Apr. 5, 1991, at 2.

61. *Id.*

62. *See supra* note 13 and accompanying text; *see also Casey*, 505 U.S. at 846 (recognizing the validity of such a state's interest).

an abortion. By making a woman choose between drugs and her unborn child, the State defeats the very interest it claims to serve.

While an independent interest in decreasing drug use in pregnant women may be compelling, including viable fetuses as children for purposes of child abuse statutes and incarcerating pregnant mothers does not seem to be the least restrictive means to deter such drug use. Less restrictive alternatives such as education and rehabilitation could be employed to decrease substance abuse in pregnant women. Preventative methods could help addicts before they become pregnant or rehabilitate them while pregnant. Simply put, incarceration does not directly address the problem of addiction.[63] Also, convicting drug addicted, pregnant women for endangering the life or health of the fetus could be construed as punishing drug abusers because of their status as addicts. The United States Supreme Court has held that a state law that punishes someone based on the status of addiction inflicts a cruel and unusual punishment and violates the Fourteenth Amendment.[64]

The *Whitner* decision raises other potential privacy problems. First, the decision does not specify what activity is considered child abuse. Does the decision encompass only illegal drug use or abuse? Or is the decision so broad as to include *any* activity by the mother that could have an adverse effect on her fetus? If the broad reading prevails, a pregnant woman could be prosecuted for smoking cigarettes, consuming alcohol, going on amusement park rides in spite of warning signs, disobeying doctor's orders for bed rest or abstinence of sexual intercourse, not taking prenatal vitamins, refusing to eat properly, and the list goes on.[65] If all of these acts are included, then the State's reach into the womb is unprecedented and would infringe upon a woman's fundamental right to procreate or to abstain from unwanted medical procedures.[66]

A counter-argument that supports the ability of the State to restrict all potentially harmful activities is that a narrow application of *Whitner,* including only illegal drug use, may under-emphasize deterrence of equally harmful behavior. Supporters of this argument point to the fact that the consumption

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63. Ideally, incarceration does indirectly confront addiction in that it prevents inmates from obtaining illegal drugs. In reality, drugs may be obtained and used by inmates through various sources. The presence of drugs in jail is, however, a problem of enforcement separate from the ideal goals of the facility.

64. Robinson v. California, 370 U.S. 660 (1962).

65. James Denison, Note, *The Efficacy and Constitutionality of Criminal Punishment For Maternal Substance Abuse*, 64 S. CAL. L. REV. 1103, 1122 (1991).

66. Procreation is indeed a fundamental right: "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). The right of a competent adult to refuse medical treatment is also a fundamental right. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 278 (1990).

of alcohol and smoking have been proven to have adverse effects on unborn fetuses and should therefore be included.[67] Additionally, the consumption of alcohol, tobacco, or illegal drugs is not a fundamental right.[68] Thus, it is argued that because the fundamental right to abortion is not absolute,[69] the State should have the power to restrict lesser rights or privileges when their exercise presents a serious risk of injury to the fetus.[70]

Finally, proponents of *Whitner's* logic assert that if third parties can be held responsible for fetal death under tort and criminal laws, then mothers should also be responsible for fetal harm or death.[71] While fetal rights

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67. Moderate or even light drinking can harm the fetus. Each year, approximately 5,000 babies are born with Fetal Alcohol Syndrome (FAS), which is a combination of mental and physical birth defects that includes mental retardation, low birth weight, and congenital heart defects. *Public Health Information Sheet: Drinking During Pregnancy* (March of Dimes Birth Defects Found., White Plains, N.Y.) Feb. 1995. Almost 50,000 infants are born each year with Fetal Alcohol Effects (FAE). FAE is a condition that has some, but not all of the effects of FAS. *Id.* Cigarette smoking by expectant mothers can result in spontaneous abortion, low birth weight, premature birth, and may have adverse effects on subsequent growth and development. LAW AND MEDICINE/BOARD OF TRUSTEES REPORT, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2666 (1990). In addition, many over-the-counter and prescription medications can cross through the placenta and effect fetal health. *Id.*

68. Balisy, *supra* note 39, at 1220.

69. A state may proscribe or restrict abortions after viability as long as the law contains exceptions for pregnancies that endanger the health of the mother and the life of the fetus. *Casey*, 505 U.S. at 846 (1992).

70. Balisy, *supra* note 39, at 1221. However, "[i]f the statute does not concern alcohol abuse or other activities detrimental to fetuses, one question that arises is whether the justification really stems from fetal rights or primarily from societal disapproval of crack addicts who become pregnant." Denison, *supra* note 65, at 1123. If this is the case, an equal protection problem may arise because similarly situated women (pregnant women harming their fetuses by smoking crack and pregnant women harming their fetuses by engaging in other detrimental activities) are being treated differently with little justification. *See supra* note 67 and accompanying text.

Furthermore, while crack addicts are not a suspect class protected by strict scrutiny analysis, state action that is based purely on animosity toward the group may be subject to a minimal scrutiny "with teeth" review. Romer v. Evans, 116 S. Ct. 1620 (1996) (applying rational relation "with teeth" scrutiny because the desire to harm a politically unpopular group could not be a legitimate state interest). With minimal level scrutiny, a state action is valid if supported by a "reasonably conceivable state of facts that could provide a rational basis for the classification." Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307, 313, (1993). Great deference is given to the state's actions. But with minimal level scrutiny "with teeth," deference to the state's actions is not as great, and a state action that would have passed minimal level scrutiny could fail under this heightened test. Limiting the application of the child abuse statute to pregnant crack addicts could be viewed as bias and animosity toward the group, and the State's justification could be found insufficient. Thus, if *Whitner* is limited to crack addicted mothers, it could be found to be unconstitutional under a minimal scrutiny "with teeth" analysis. Because the scope of activities that are considered to endanger the life or health of a fetus is unclear under *Whitner*, clarification is needed.

71. Susan E. Rippey, *Criminalizing Substance Abuse During Pregnancy*, 17 NEW ENG. J.

legislation appears desirable, the problem with this analysis is that it undermines the mother's privacy rights of reproduction and bodily integrity.[72] Additionally, pregnant women are distinguishable from third parties. Mothers differ from third parties because whatever a mother does to her fetus she does to herself. In damaging the fetus, she invariably damages her own body and must literally live with the consequences.

By criminalizing the mother's activity during pregnancy, the State subordinates her liberty interests to those of her fetus, and a maternal/fetal conflict arises. The Supreme Court has not expressly accorded the rights and protections provided to a "person" under the Fourteenth Amendment to a fetus;[73] therefore, the fundamental rights of a mother arguably outweigh the rights of her fetus. "While it is true that the recognition and expansion of fetal rights could lead to increased resources available to pregnant women, placing the focus on fetal rights often results in changes made at the expense of the pregnant woman herself."[74] With the exception of a very few circumstances, the mother should be the appropriate person to make decisions regarding the welfare of her fetus.[75]

C. Problems with Application or Enforcement

An initial problem with a full force application of the *Whitner* decision is that it may greatly increase the work load of local child protective agencies without commensurately increasing their funding. By extending the child abuse statute to include viable fetuses, *Whitner* enlarges the number of children for whom the State is responsible. Concerned friends, neighbors, and strangers can now report suspected fetal abuse by pregnant women. Accordingly, the number of reports of child abuse are likely to increase.[76] Local child protective agencies are required to investigate each report of child abuse within twenty-four hours.[77] At the very least, it is likely that the increased work load without a concomitant increasing of staff will result in less than adequate investigations in even the most deserving of cases.

CRIM. & CIV. CONFINEMENT 69, 82-83 (1991).

72. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding procreation is a fundamental right); Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 278 (1990) (finding that a competent adult has a fundamental right to refuse medical treatment).

73. "[T]he unborn have never been recognized as persons in the whole sense." Roe v. Wade, 410 U.S. 113, 162 (1973).

74. Cheryl E. Amana, *Maternal-Fetal Conflict: A Call For Humanism and Consciousness In A Time Of Crisis*, 3 COLUM. J. GENDER & L. 351, 362 (1992).

75. *Id.*

76. This assumes a public embrace of *Whitner's* logic.

77. S.C. CODE ANN. § 20-7-650(C) (Law. Co-op. 1976 & Supp. 1995).

Whitner has already had an effect on abortions in South Carolina. Currently, a woman may have an abortion in her third trimester to preserve her life or health.[78] In a recent opinion citing *Whitner* as authority,[79] the Attorney General of South Carolina stated that his office would prosecute for homicide any physician performing partial birth abortions on viable, unborn fetuses that are not absolutely necessary to protect the life or health of the mother.[80] The Attorney General further stated that "[i]n almost no instance which I can envision would this procedure fall within this exception."[81]

The Attorney General explains that because this procedure is arguably detrimental to the life and health of the mother,[82] its use cannot be justified on the basis of protecting the mother's health and life except in the most extreme cases.[83]

The Attorney General's opinion is just one short step from criminalizing all abortions post-viability, even those deemed medically necessary. After *Whitner*, a viable fetus is considered a child and a person protected by the State's civil and criminal laws. That person's life is being intentionally extinguished by the mother and her physician. While Supreme Court decisions and the South Carolina abortion statutes have long allowed medically necessary abortions in the third trimester, they now seem to be inconsistent with the child abuse statutes as interpreted under *Whitner*. How can treatment of a viable fetus as a "person" who is protected by civil and criminal laws be reconciled with a statute that allows the fetus to be put to death under certain circumstances? Thus, *Whitner* leaves the legality of third trimester abortions in some question.[84]

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78. *Id.* § 44-41-20(c).

79. 1997 Op. S.C. Att'y Gen. No. ___ (forthcoming opinion issued on Jan. 10, 1997).

80. Partial birth abortions have come into recent controversy. The procedure entails "delivering" the body of the fetus while the skull remains in the birth canal. The physician then enters the base of the skull and suctions out the brain, enabling the empty skull to collapse, thereby rendering an easier extraction of the fetus. *Id.* at 4 (citing Women's Med. Prof. Corp. v. Voinovich, 911 F. Supp. 1051, 1066 (S.D. Ohio 1995)).

81. 1997 Op. S.C. Att'y Gen. No.___, at 17. As discussed above, a state can regulate and even proscribe abortions after viability except where necessary to protect the life or health of the mother. Roe v. Wade, 410 U.S. 113, 164-65 (1973). Presently, the State is proscribing partial birth abortions in wholesale fashion. While this action appears initially suspect, it likely would withstand constitutional scrutiny because other, less controversial methods of performing abortions would still be available to women in need. While the Attorney General limits his opinion to the protection of viable fetuses, regulating partial birth abortion *before* viability would most probably pass constitutional muster under the *Casey* "undue burden" standard because there are other safe methods of abortion available. A woman can still obtain an abortion, just not this type of abortion. *See supra* notes 56-58 and accompanying text.

82. According to some authorities, the partial birth abortion may pose health risks to the mother, such as hemorrhage and uterine rupture. 1997 Op. S.C. Att'y Gen. No. ___, at 16.

83. *Id.* at 17.

84. Making third trimester abortions absolutely illegal raises constitutional problems. "For

Furthermore, do all third trimester miscarriages or still births need to be investigated for the possibility of a murder prosecution? The thought seems absurd, but it is in keeping with the notion that a viable fetus is a person who can be abused and murdered.

Beyond the abortion dilemma, there is the question of where do pregnant women get help should they want it? There are few available drug rehabilitation programs that will accept pregnant women.[85] Generally, the treatment facilities fear liability.[86] One cannot fault them for recognizing the medical risk associated with even a healthy pregnant mother. Illustrating the magnitude of the fear, eighty-seven percent of New York City's drug abuse programs refused to treat drug addicted pregnant women.[87] Similarly, less than twenty percent of the drug treatment facilities in the Washington, D.C. area will accept pregnant women.[88] And in 1990, there were only fifteen beds available for addicted pregnant women in Massachusetts.[89] If a pregnant woman decided to get help, she would probably have to get on a waiting list. Ultimately, her baby could be born before she received any assistance. Furthermore, there are usually no arrangements for housing the children that the pregnant addict may already have. Thus, a lower-income, drug-addicted pregnant woman without family, friends, or some childcare support must choose between losing her existing children to foster care or protecting her unborn child by receiving treatment.[90]

As previously mentioned, the *Whitner* decision may deter addicted pregnant women from seeking prenatal care or drug treatment for fear of criminal prosecution.[91] *Whitner* places doctors and nurses in a policing role that undermines the trust and confidentiality that is necessary to ensure a patient's free disclosure and proper medical care.[92] South Carolina law

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the stage [of pregnancy] subsequent to viability, the State . . . may . . . regulate, and even proscribe, abortion *except where it is necessary . . . for the preservation of the life or health of the mother.*" Roe v. Wade, 410 U.S. 113, 164-65 (1973) (emphasis added). Thus, a woman has a fundamental right to a medically necessary abortion in the third trimester that the State cannot proscribe.

85. Jones, *supra* note 54, at 1175.

86. *Id.*

87. *Id.* Unfortunately, there seem to be no statistics available for South Carolina's drug abuse centers.

88. *Id.*

89. *Id.*

90. Paige Mcguire Linden, *Drug Addiction During Pregnancy: A Call For Increased Social Responsibility*, 4 AM. U. J. GENDER & L. 105, 133 (1995).

91. *Position Statement on Opposition to Criminal Prosecution of Women for Use of Drugs While Pregnant and Support for Treatment Services for Alcohol and Drug Dependent Women of Childbearing Age* (American Nurses Assoc., Washington, D.C.) Apr. 5, 1991, at 2.

92. Shawn N. Randolph, Note, *Pregnancy and the Criminalization of Perinatal Substance Abuse: Unethical, Unconstitutional, and Poor Public Policy*, 2 S. CAL. REV. L. & WOMEN'S

requires any physician or nurse that has reason to believe "that a child's . . . health or welfare has been or may be adversely affected by abuse or neglect" to report such suspected abuse.[93] If forced to report drug use by pregnant women as child abuse, health care professionals will be placed in a type of adversarial relationship with their patients. Taking the matter a step further, would the risk of self-incrimination that arises when a woman admits to drug use require health care professionals to read a pregnant addict her *Miranda* rights before discussing the pregnancy?[94]

This risk of self-incrimination and prosecution in general seriously impairs a physician's ability to treat either a mother or her fetus.[95] Once it becomes known that physicians are reporting drug use, addicted women may avoid getting prenatal care altogether. If a pregnant addict did choose to receive prenatal care, she might lie about her drug use in an attempt to avoid being reported. The result, fewer women seeking prenatal care or lying about their drug use, would at least hinder health care providers' ability to counsel women about the importance of treatment and abstaining from drug use. Understandably, many health care groups are opposed to the criminalization of drug use by pregnant women.[96] In addition, many health care professionals stress that the problem is a health care issue rather than a legal issue.[97] "The criminal justice system cannot solve problems of education, treatment, rehabilitation and family support. The efforts of state and local government are best spent on developing community prevention and treatment services."[98]

Finally, the threat of criminal prosecution may not be an effective deterrent to drug use by pregnant women. After all, the use of illegal substances already carries criminal penalties, and these existing penalties obviously did not deter pregnant women. For the same reasons that pregnant

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STUD. 375, 394 (1992).

93. S.C. CODE ANN. § 20-7-510 (Law. Co-op. 1976 & Supp. 1995).

94. Miranda v. Arizona, 384 U.S. 436 (1966).

95. LAW AND MEDICINE, *supra* note 67, at 2666.

96. A recent South Carolina study of drug use in women identified some of the objectors:

> In addition to the AMA, the following groups have adopted policy statements which oppose criminal prosecution of pregnant women who use alcohol and other drugs: the American College of Obstetrics and Gynecology, the American Academy of Pediatrics, the American Society of Addiction Medicine, the American Public Health Association, the National Association for Perinatal Addiction Research and Education, the National Association of Public Child Welfare Administrators, the March of Dimes, the National Council on Alcoholism and Drug Dependence and the Southern Legislative Summit on Healthy Infants and Families.

State Council on Maternal, Infant and Child Health, 2 1991 South Carolina Study of Drug Use Among Women Giving Birth, February, 1992, at 11.

97. *Id.*

98. *Id.* at 10.

women ignore penalties already in force, they are likely to ignore any additional penalties.[99] Addicted individuals have impaired abilities to make decisions about the use of the substance.[100] As such, pregnant addicts do not mean to harm their fetuses; they ingest drugs to satisfy both a psychological and physical need.[101] Neither a pregnant woman's knowledge that her fetus is being harmed nor the threat of criminal prosecution can deter her craving for the illegal substance. She simply needs medical help that the legal system cannot provide.

IV. CONCLUSION

The State's goal of deterring drug use in pregnant women is commendable. A well intentioned, paternalistic interest in promoting fetal health does not, however, validate constitutional infringements. Moreover, the practical problems created by *Whitner* illustrate that its means of addressing the problem are not adequately tailored to the ends.

The legislature should clarify its intent as to whether viable fetuses should be considered children that are protected by the child abuse statutes. Clarification will provide guidance for courts, law enforcement, and social services in determining who they may prosecute for child abuse. Short of legislative correction, the supreme court should clarify, at its earliest opportunity, the scope of the *Whitner* holding. Pregnant women deserve some notice as to whether or not their otherwise legal activities may subject them to charges of child abuse. Notwithstanding judicial or legislative action, the root of the problem should be addressed. The only practical solution to drug use by both men and women is continuing education and strict enforcement of current criminal and civil sanctions.

Finally, the State should provide more assistance to those already addicted and pregnant. For these women, the State should focus on prevention and assistance, not criminal punishment. Rehabilitation and treatment beds (especially ones that accommodate their unique needs) should be made available to pregnant women. If pregnant, drug abusers are simply thrown in jail, the source of the problem—addiction—will remain. Skeptics might argue that increasing resources for pregnant women is too expensive, but when compared to the extraordinary cost of providing necessary medical care and special education for children born addicted to drugs, the added costs cannot be rejected.

Donna L. Casto

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99. LAW AND MEDICINE, *supra* note 67, at 2668.

100. *Id.* at 2667.

101. *Id.*