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COMMENTS

EXTENDING CHILD ABUSE PROTECTION TO THE VIABLE FETUS: *WHITNER* v. *STATE OF SOUTH CAROLINA*

INTRODUCTION

Systems of law serve to protect individual rights from unlawful intrusions by the state. Arguably, the most fundamental aspect of such legal regimes is the protection from physical harm. As the most vulnerable members of society, children are guaranteed protection from child abuse inflicted upon them by all adults, including their own parents. The only entity more vulnerable than a child is a fetus. Although an entirely separate being, the fetus is completely dependent upon the woman who conceived it.¹ The fetus' inability to protect itself from any type of harm raises the issue of whether those fundamental protections afforded to a child under existing laws should originate before birth. Recently, in *Whitner v. State of South Carolina*,² the South Carolina Supreme Court held that a viable fetus was a "person" within the meaning of the Children's Code and could be the victim of criminal child neglect just as any child could after birth.³ It is the scope of such child abuse protection that is presently in dispute.

¹ See Ariela R. Dubler, *Monitoring Motherhood*, 106 YALE L.J. 935, 939 (1996). While a fetus may, with medical assistance, survive outside the womb as early as the end of the second trimester, fetal viability prior to this point is highly doubtful. DAVID F. MOFFETT, ET AL., *HUMAN PHYSIOLOGY* 736 (1993).

² No. 24468, 1996 S.C. LEXIS 120 (S.C. July 15, 1996).

³ *Whitner*, 1996 S.C. LEXIS 120, at *21.

Cornelia Whitner was a 28-year old woman from Pickens County, South Carolina with a minimal education and a serious drug addiction.⁴ In 1992, Whitner continued abusing crack cocaine during her third trimester of pregnancy and subsequently gave birth to a child with cocaine residue in his system.⁵ Whitner, who had prior convictions for theft and cocaine possession,⁶ was charged with criminal child neglect for using an illicit drug during the later stages of her pregnancy.⁷ Whitner was sentenced to eight years in prison after her guilty plea, but gained release just nineteen months later when the ACLU learned of her case.⁸ At that time, a state court judge ruled that the child neglect law did not apply to prenatal drug use and issued an order for Post Conviction Relief for Whitner.⁹ The South Carolina Supreme Court, however, reinstated Whitner's conviction for criminal child neglect in July of 1996, reversing the prior decision for Post Conviction Relief.¹⁰

⁴ Lyle Denniston, *Abortion, Fetus Rights on Legal Collision Course, Protections for Unborn Head for Test in Fla.*, BALTIMORE SUN, Nov. 4, 1996, at 1A.

⁵ *Id.*; John Carlson, *State Law Fails to Protect Fetus from Chemical Abusing Mother*, NEWS TRIB., July 24, 1996, at A9; 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.

⁶ Carlson, *supra* note 5, at A9.

⁷ *Whitner*, 1996 S.C. LEXIS 120, at *3; see also Carlson, *supra* note 5, at A9; Marilyn Kaufus, *Pregnancy Negligence Not Prosecuted/Law: Taking Speed and Other Drugs Might Be Bad for the Body, but in California It's Typically Not Treated As a Crime*, ORANGE COUNTY REG., Aug. 11, 1996, at B7.

⁸ *Whitner*, 1996 S.C. LEXIS 120, at *3; see also Carlson, *supra* note 5, at A9. The ACLU challenges these types of prosecutions under the theory that child abuse statutes were meant to include children and not fetuses. Brian Maffly, *Prosecuting Fetal Abuse Isn't Easy, County is Bucking Odds Prosecuting Fetal Abuse*, SALT LAKE TRIB., May 7, 1996, at A1. The ACLU contends that prosecutions have decreased because cases usually end with acquittals or reversals on appeal. *Id.* Prosecutors have a lesser burden when proving criminal child abuse than when proving a homicide. *Id.* In a child abuse case, the state need only prove that the pregnant mother knew that her conduct could be harmful; in a homicide prosecution, however, the state must show that the baby's death was a direct result of exposure to drugs. *Id.*

⁹ *Whitner*, 1996 S.C. LEXIS 120, at *3.

¹⁰ *Id.* at *2. The statute at issue prescribes the legal obligation of an individual.

Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

Id. at *5 (citing S.C. CODE ANN. § 20-7-50 (1985)). The South Carolina statute

The *Whitner* court held, in a 3-2 decision, that Cornelia Whitner's prenatal drug use constituted criminal child neglect.¹¹ Facing the issue of when a fetus is entitled to protection, the court held that a viable fetus was a "person" for purposes of the Children's Code.¹² It is submitted that the Supreme Court of South Carolina correctly decided that a viable fetus was a "person" entitled to protection from criminal child neglect.

The South Carolina Supreme Court rested its position, in large part, upon existing medical information regarding fetal development.¹³ It is well documented that maternal cocaine use during pregnancy can cause serious harm to the viable fetus.¹⁴ The causal connection between Cornelia Whitner's drug use and the injury to her child was not in dispute. The court reasoned that injuries sustained while a fetus is in its mother's womb can often be far more serious than those sustained after birth.¹⁵ The Supreme Court of South Carolina interpreted the statute very broadly to encompass all those children, born and unborn, in need of protection.¹⁶

Originally, fetal rights were interpreted as merely protecting unborn children from third parties; the legislatures and the courts did not initially imagine the mother as a potential offender.¹⁷ The *Whitner* court boldly defied this an-

wielded a maximum penalty of ten years in prison for abuse to a fetus. This provision has been amended twice since Ms. Whitner's 1993 conviction. See S.C. CODE ANN. § 20-7-50 (Law Co-op. 1996 Supp.).

¹¹ *Whitner*, 1996 S.C. LEXIS 120, at *25; see also Stone, *supra* note 5.

¹² *Whitner*, 1996 S.C. LEXIS 120, at *9; see also Stone, *supra* note 5.

¹³ *Whitner*, 1996 S.C. LEXIS 120, at *9; see also Joseph Wharton, *Drugs in Pregnancy Amount to Abuse*, 82 A.B.A. J., Nov. 1996, at 43 (stating that *Whitner* court's reasoning was based mainly on existing medical knowledge instead of on relationship between mother and child).

¹⁴ See *infra* notes 54-58; See generally Joseph J. Volpe, M.D., *Effect of Cocaine Use on the Fetus*, 327 NEW ENG. J. MED. 666 (1985).

¹⁵ *Whitner*, 1996 S.C. LEXIS 120, at *10.

¹⁶ *Id.*

¹⁷ A precedent case in the area of fetal rights was *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960), which declared that a child had the right to be protected in utero from negligence or harm. This court, however, only intended liability to extend to third parties. CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE* 12 (1993). The most difficult cases arise when the mother, not a third party, has injured the fetus because the courts must balance the privacy interests of women and the state's interest in protecting life. Tony Mauro, *Rights of the Unborn Abortion Battle, Medical Gains Cloud Legal Landscape*, USA TODAY, Dec. 12, 1996, at 1A. Today, it is recognized

tiquated notion, however, to achieve justice for the woman's neglected newborn. Accordingly, the court concluded that Cornelia Whitner was guilty of criminal child neglect.¹⁸

While the use of certain drugs by any person has been criminally actionable throughout the twentieth century,¹⁹ accountability for such illicit substances' effects on one's child treads a historically less traveled path but elevates the status of the child inside the womb to that of a child outside the womb. *Whitner* was a "landmark decision for protecting children,"²⁰ in which the South Carolina Supreme Court became the first state high court in the nation to uphold a conviction of a mother for endangering the life of her fetus through her prenatal conduct.²¹ Jurisdictions are split regarding the issue of whether viable fetuses are persons entitled to legal protection under child abuse statutes. The critical inquiry has been the status of fetal rights, specifically in relation to the rights of the mother.²² Criminal

that a woman who injures her own viable fetus should receive the same penalty as a third party inflicting the same damage and that legislative bills must not exempt the mother from liability. See Philip C. Thornberg, Letter to the Editor, *Woman Abusing Fetus Ought to be Penalized*, COLUMBUS DISPATCH, May 11, 1996, at 13A (writing in response to Ohio "feticide" legislation, Senate Bill 239, which allows prosecution of third parties but exempts abusive behavior by mothers).

¹⁸ *Whitner*, 1996 S.C. LEXIS 120, at *25.

¹⁹ KENNETH J. MEIER, *THE POLITICS OF SIN: DRUGS, ALCOHOL, AND PUBLIC POLICY* 22 (1994).

²⁰ *Abuse of Viable Fetus Ruled a Crime*, NAT'L L.J., July 29, 1996, at A8 (quoting South Carolina State Attorney General, Charlie Condon).

²¹ Stone, *supra* note 5. Stone explains that, in recent years, prosecutions for a mother's prenatal conduct have become more common but most appellate courts have dismissed such charges. *Id.* Criminal charges are usually brought under statutes prohibiting child abuse or distribution of drugs to a minor. *Id.* Stone states that only four other high courts in the nation have considered this question (Nevada, Florida, Kentucky, and Ohio) and all have ruled against criminalizing maternal conduct before the birth of a child. *Id.* A total of 200 women in 30 different states have been prosecuted for such prenatal conduct but only Cornelia Whitner's conviction has been upheld. Kaufus, *supra* note 7, at B7. Despite strong opposition, the South Carolina Supreme Court believed case law and the plain language of the child neglect statute supported its landmark decision. See *Whitner*, 1996 S.C. LEXIS 120, at *9 (holding plain meaning of "person" as set forth in prior decisions includes viable fetus).

²² See generally DANIELS, *supra* note 17, at 3-4 (describing fetus "as the newest 'social actor' in the American conservative imagination"); Robin Blumner, *Drunk Fetus Cases Endanger Abortion Choice*, MILWAUKEE J. SENTINEL, Sept. 22, 1996, available in 1996 WL 11293503 (analyzing impact of extension of fetal rights on abortion debate). The debate over the existence of fetal rights involves questions about the maternal-fetal relationship, moral obligations owed to the fetus, and a pregnant woman's right to privacy. See DANIELS, *supra* note 17, at 3-7; BONNIE

courts have struggled with the question of whether the fetus should be considered an independent legal entity or simply an appendage of its mother.²³

Part One of this Comment traces the evolution of a fetus' legal status throughout history, focusing on the development in South Carolina's jurisprudence. Part Two asserts that viability is the birthplace of fetal rights. Part Three posits that a woman's freedom of choice concerning abortion is preserved and can exist alongside fetal rights under the *Whitner* analysis. Part Four establishes limits on the extent of a pregnant mother's criminal liability, confining liability to illegal activities undertaken during pregnancy. Ultimately, this Comment concludes that child abuse protection must be extended to all viable "persons" whether their physical locations are inside or outside of the womb.

I. *WHITNER* MARKS NEXT STAGE IN EVOLUTION OF FETAL RIGHTS

Historically, birth, when the child became physically separate from its mother, was the origin of legal rights.²⁴ Over time, however, courts began recognizing that legal rights precede one's debut into the external environment. Nineteenth-century property law concerning inheritance marked the earliest recognition of fetal rights. Under such law, a fetus existing at the time of the testator's death was entitled to receive an inheritance.²⁵ The fetus was granted the status of a person for this limited purpose, provided that the fetus was born alive.²⁶

STEINBECK, LIFE BEFORE BIRTH 128-163 (1992) (concerning maternal-fetal conflict).

²³ See VALERIE GREEN, *DOPED UP, KNOCKED UP, AND ... LOCKED UP?* 37-60 (1993) (tracing trend extending criminal laws to protect fetus); see also Blumner, *supra* note 22 (citing examples from Florida, South Carolina, and Wisconsin where states determined that criminal and civil laws applied to viable fetus).

²⁴ See Patricia A. Sexton, *Imposing Criminal Sanctions on Pregnant Drug Users: Throwing the Baby Out With the Bath Water*, 32 WASHBURN L.J. 410, 414 (1993) ("Historically, the legal system treated the fetus as part of the woman.").

²⁵ See, e.g., *Cowles v. Cowles*, 13 A. 414, 417 (Conn. 1887) (holding that child will be considered "in being" from conception when it benefits child). The right of inheritance vested with the fetus in recognition of parent's presumed desire to provide for children conceived but not yet born at the time of their death. See *Christian v. Carter*, 137 S.E. 596, 597 (N.C. 1927).

²⁶ See *Medlock v. Brown*, 136 S.E. 551, 553 (Ga. 1927) ("A child en ventre sa mere, after it becomes quick, is to be regarded as a child in esse, or a child then liv-

Tort law was the next legal arena to afford rights to the fetus. After the 1946 decision in *Bonbrest v. Kotz*,²⁷ fetuses gained the right to recover for tortious injuries inflicted upon them in utero.²⁸ The *Bonbrest* decision marked a major advance in the development of fetal rights; the fetus was no longer merely afforded protection from the opportunistic conduct of others but it was also given standing to seek redress for its injuries in court.²⁹

While case law continued to expand notions of fetal rights in the civil law context, criminal statutes have not displayed the same flexibility.³⁰ A fetus was first declared a person for purposes of criminal liability in the landmark decision *Commonwealth v. Cass*.³¹ In *Cass*, the Massachusetts court concluded that a fetus, who died as a result of a car accident, constituted a "person" within the meaning of the state's vehicular homicide statute.³² This pronouncement afforded fetuses relief in the criminal realm as well as the civil one.

While individual states have struggled with the issue of whether a fetus is a "person" under the criminal law, courts such as *Cass* and *Whitner* represent the gradual erosion of narrowly construed and outdated criminal statutes and seek to include fetal rights within the scope of such criminal laws.³³

ing.").

²⁷ 65 F. Supp. 138 (D.C. Cir. 1946).

²⁸ *Id.* at 142 (allowing recovery when child was injured through professional malpractice during delivery). "The absence of precedent should afford no refuge to those who by their wrongful act ... have invaded the right of an individual ... in their professional capacities." *Id.* While the *Bonbrest* decision did establish fetal rights under tort law, the court maintained that a fetus did not receive separate recognition until it passed the point of viability. DANIELS, *supra* note 17, at 11. Furthermore, the court held that such rights were not conferred until the fetus was born alive. *Id.*

²⁹ See James Andrew Freeman, Comment, *Prenatal Substance Abuse: Texas, Texans and Future Texans Can't Afford It*, 37 S. TEX. L. REV. 539, 567-68 (1996) (noting that court recognized fetus as separate legal entity having right of action).

³⁰ Many states follow the Model Penal Code which defines a "human being" as "a person who has been born and is alive." MODEL PENAL CODE § 210.0 (1) (1985).

³¹ 467 N.E.2d 1324 (Mass. 1984).

³² *Id.* at 1325, 1329.

³³ While *Cass*, *Whitner*, and other recent cases represent 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 Sexton, *supra* note 24, at 415.

South Carolina's legal protection of viable fetuses as persons holding certain legal rights and privileges began in the 1960's when the state Supreme Court first declared that a fetus was a person for the purposes of civil actions under the state's wrongful death statute.³⁴ Several years later, South Carolina extended protection to viable fetuses in the criminal context by recognizing that homicide laws afford protection to the unborn child in *State v. Horne*.³⁵

In *Horne*, the defendant stabbed his wife in the abdomen when she was nine months pregnant.³⁶ He was charged and convicted of assault and battery and voluntary manslaughter in connection with the stabbing of his wife and the resulting death of the full-term viable fetus.³⁷ The South Carolina Supreme Court unanimously held that a viable fetus was a "person" within the meaning of the state's murder statute.³⁸ Through the application of tort-based fetal rights in this criminal context, as well as the finding of fetuses as persons in the civil realm, the court laid the groundwork for the state's further extension of fetal rights in *Whitner*.

Several other states have joined the fetal rights movement, supporting South Carolina's belief that the fetus is an independent legal entity entitled to protection under criminal statutes.³⁹ Other states, however, have held that a

³⁴ See *Fowler v. Woodward*, 138 S.E.2d 42, 44 (S.C. 1964) (determining that viable fetus need not be born alive because administrator can maintain action for wrongful death of fetus). The *Fowler* court said that a viable child constituted a "person" even before it left the womb. *Id.* at 43; see also *Hall v. Murphy*, 113 S.E.2d 790, 793 (S.C. 1960) (holding that fetus capable of life apart from its mother is person).

³⁵ 319 S.E.2d 703, 704 (S.C. 1984) ("From the date of this decision henceforth, the law of feticide shall apply in this state.").

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 704. "It would be grossly inconsistent for us 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.* Despite its holding that a fetus would be considered a person, the *Horne* court reversed defendant's conviction for voluntary manslaughter based on the absence of such criminal law at the time of defendant's action. *Id.* The court firmly held, however, that the law of feticide would apply henceforth in South Carolina. *Id.*

³⁹ See *Commonwealth v. Cass*, 467 N.E.2d 1324, 1325 (Mass. 1984); *Mone v. Superior Judicial Ct. of Mass.*, 331 N.E.2d 916, 920 (Mass. 1975) (holding that viable fetus was "person" under state wrongful death statute); *State v. Knapp*, No. WD 44098, 1991 Mo. App. LEXIS 1883 (Mo. Ct. App. Dec. 3, 1991) (declaring that fetus

fetus is not a "person" within their criminal statutes.⁴⁰ Opponents argue for strict construction of child abuse statutes asserting that a fetus is fundamentally different from a child and, therefore, a statute must have a specific reference to the protection of "fetuses" for it to apply to the unborn.⁴¹ The *Whitner* court, however, believed that an ex-

is "person" under involuntary manslaughter statute); *In re Ruiz*, 500 N.E.2d 935, 939 (Ohio Ct. C.P. 1986) (stating that fetus was "abused child" when mother used heroin dangerously close to child's birth); *Hughes v. State*, 868 P.2d 730, 734 (Okla. Ct. Crim. App. 1994) (stating that "[a] viable human fetus is nothing less than human life").

Since fetal rights are established in civil law allowing unborns to inherit and in criminal law allowing third parties to be prosecuted for harming a fetus, holding mothers accountable for harming a fetus is a logical extension of this evolution. Jean Davidson, *Pregnant Addicts Drug Babies Push Issue of Fetal Rights*, L.A. TIMES, Apr. 25, 1989, at 1.

⁴⁰ "Nearly half the states still don't recognize the killing of a fetus as murder unless the child is born alive and then dies." Mauro, *supra* note 17, at 1A. This illustrates the traditional "born alive" rule. Historically, many homicide statutes did not cover feticide cases. See *State v. McCall*, 458 So. 2d 875, 877 (Fla. Ct. App. 1984) (declaring that individual cannot be convicted of murder or manslaughter of viable fetus); *Billingsley v. State*, 360 S.E.2d 451, 452 (Ga. Ct. App. 1987) (holding that "person" does not include fetus within vehicular homicide statute); *State v. Trudell*, 755 P.2d 511, 517 (Kan. 1988) (holding that "person" does not include fetus within vehicular homicide statute); *State v. Gyles*, 313 So. 2d 799, 802 (La. 1975) (refusing to include fetus as "person" under murder statute); *State v. Beale*, 376 S.E.2d 1, 4 (N.C. 1989) (refusing to include fetus as "person" under murder statute).

⁴¹ See *Whitner*, 1996 S.C. LEXIS 120, at *30 (Finney, C.J., and Moore, A.J., dissenting) (stating that "it is for the General Assembly, and not this court" to criminalize such conduct and craft legislation to specifically target fetuses); see also *Vo v. Superior Ct. of Ariz.*, 836 P.2d 408, 419 (Ariz. Ct. App. 1992) (refusing to extend common law rule that viable fetus can recover in wrongful death action to justify including feticide under murder statute). The *Vo* court believed that common law authority was not sufficient; only the legislature could define criminal penalties. *Id.*; see also *Carlson*, *supra* note 5, at A9 (discussing dismissal of criminal case where pregnant woman used cocaine and heroin and stating that "if Washington state legislators wanted viable fetuses protected by child abuse laws they should've written that protection specifically into the statute"). In a criminal context, courts tread very carefully because an individual's liberty and constitutional rights are at stake. See, e.g., *McCall*, 458 So. 2d at 877 (citations omitted) ("Penal statutes must be strictly construed. In most circumstances, substantive changes in long-standing common law rules are best left to the legislature."); see also Timothy Lynch, *At Issue: Is the Prosecution of 'Fetal Endangerment' Legitimate?*, A.B.A. J., Dec. 1996, at 72 (arguing that prosecutorial and judicial lawmaking infringes upon constitutional rights); see *Murphy S. Klasing, The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933, 952 (1995).

As a consequence, there are often inconsistencies in court decisions; a court may deem a viable fetus a "person" within the civil context but not within the criminal context. *Id.* at 959. The Arizona Supreme Court, for example, determined that a viable fetus was a person under the wrongful death statute, but not under the mur-

pansive interpretation of "person" to include fetuses was necessary to appropriately effectuate the legislature's intent.⁴² Moreover, it is unrealistic to expect legislatures to change laws to specifically include fetuses, especially in an area as controversial as that of reproductive rights.⁴³ Until legislators consider such fetal rights issues, it is the role of prosecutors to test the limits of state criminal statutes.⁴⁴ A rigid construction of such statutes denies a court the flexi-

der statute. Compare *Summerfield v. Superior Ct.*, 698 P.2d 712, 724 (Ariz. 1985), with *Vo*, 836 P.2d at 419 (explaining that Arizona became code state and thus court did not have power to expand criminal law through changing common law principles as in *Summerfield*). North Carolina has exhibited the same inconsistency. Compare *Beale*, 376 S.E.2d at 4 (holding fetus was not "person" under murder statute), with *DiDonato v. Wortman*, 358 S.E.2d 489, 495 (N.C. 1987) (stating that viable fetus was "person" under wrongful death statute). To ensure fairness, there must be uniformity of interpretation among the courts.

⁴² See *supra* note 16 and accompanying text. The intent of the legislature is often determinative in a court's ruling. See, e.g., *California v. Stewart*, No. M508197, slip. op. at 1-11 (Cal. Mun. Ct. 1987) (stating that intent of child abuse statute was to ensure financial support of children by their fathers).

⁴³ See *Mauro*, *supra* note 17, at 1A. Opponents fear that "expansion of fetal rights may deny 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). McGinnis argues that pregnant women with cancer require drugs that harm fetuses and such right to procreate must extend to drug users. *Id.* The distinct difference, however, is that cancer drugs are legal and serve a valuable societal purpose, unlike the drug cocaine. Therefore, distinctions should be made so that a pregnant woman indulging in otherwise legal activities, such as smoking, drinking alcohol, or taking prescription drugs, would not be subject to criminal liability for any potential harms such legal acts cause to the fetus. *But see, e.g., Drunken Fetus Charges Stay*, NAT'L L.J., Sept. 30, 1996, at A8 (highlighting pending Wisconsin case of *People v. Zimmerman* where mother was charged with intentional homicide and reckless conduct after giving birth to child with blood-alcohol content of 0.199%).

⁴⁴ *But see McGinnis*, *supra* note 43, at 513 (asserting that legislatures, not courts, must define criminal offenses because it is unconstitutional to ignore legislative intent and create new crimes). To date, no state has specifically criminalized a mother's prenatal drug use. As a result, prosecutors must "creatively manipulate statutes that do not expressly address the issue in order to charge mothers whose drug addiction harms the fetus." Lisa M. Noller, *Taking Care of Two: Criminalizing the Ingestion of Controlled Substances During Pregnancy*, 2 U. CHI. L. SCH. ROUNDTABLE 367, 376 (1995). The result is inconsistent precedents on which to rely. Prosecutors try to "find" or "manufacture" liability and women may claim lack of notice because the statutes do not clearly proscribe their ingestion of drugs while pregnant. *Id.* Punishment under such a system is too discretionary and based on the subjective and discriminatory leanings of public officials rather than firm statutory language. Louise Marlane Chan, *S.O.S. from the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199, 213 (1993).

bility to modify traditional rules in order to accommodate the changing times.⁴⁵ While a statute well crafted by the legislature would be the ideal solution, viable fetuses may only have the judiciary on which to rely for protection. Justice demands judicial activism in this area.

A corollary to a fetus' legal standing as a "person" in the criminal law is the implication on the mother's legal rights. Opponents argue that maternal conduct before the birth of a child does not give rise to criminal responsibility.⁴⁶ Since no statute specifically proscribes maternal drug use, states have attempted to prosecute such cases under many different statutes, including those for child abuse and neglect, drug delivery and distribution to minors, involuntary manslaughter, and pure drug use.⁴⁷

South Carolina's historic decision resurrected the balancing of a woman's rights with those of her fetus. With the advance of technology, there has been increasing support for a fetus' legal rights.⁴⁸ By necessity, however, ex-

⁴⁵ See 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. POLICY 929, 937 (1994).

⁴⁶ Critics of *Whitner* have extensive case law to support their position. See *Johnson v. State*, 602 So. 2d 1288, 1296 (Fla. 1992) (reversing mother's conviction for child abuse for ingesting cocaine while pregnant); *State v. Gethers*, 585 So. 2d 1140, 1140 (Fla. Ct. App. 1991) (explaining that introduction of cocaine into woman's own body did not amount to child abuse); Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993) (holding that drug abuse by mother when she injected oxycodone into her jugular vein while pregnant cannot be included within criminal child abuse statute). The *Welch* court drew a distinction between protecting a child from abuse and from death when it stated that "common law intended definition of 'person' to vary depending on [the] type of crime committed." Shen, *supra* note 45, at 935. The difference is that criminal child abuse, unlike homicide, is not a common law crime; so, legislative intent (not common law) is binding and demands that the court not apply such statutes to prenatal injuries inflicted by the mother. *Welch*, 864 S.W.2d at 282-83. The *Welch* analysis incorrectly focused on the particular consequences and not the act itself.

⁴⁷ See Shona B. Glink, *The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 1991 U. ILL. L. REV. 533, 546 (1991).

⁴⁸ Sheilah Martin & Murray Coleman, *Judicial Intervention in Pregnancy*, 40 MCGILL L.J. 947 (1995) (relating both sides of struggle for superiority of interests between mother and child). Additionally, with a growing number of infants injured by prenatal drug addiction each year, both sides agree that prosecutions based on old laws will increase. Jean Davidson, *Newborn Drug Exposure Conviction a Drastic First*, L.A. TIMES, July 31, 1989, at 1 (reporting on *Johnson v. State*, first U.S. conviction of pregnant woman who gave birth to drug exposed newborn in Florida (later reversed by Florida Supreme Court) on "delivery" theory that woman passed drugs to infant in one minute time period between birth and cutting of umbilical cord). "As

tensions of fetal rights compromise the freedoms of pregnant women.⁴⁹

Past recognition of the legal rights of unborn viable fetuses in South Carolina has facilitated the court's extension of fetal protection from wrongful death and murder statutes to this criminal child neglect statute. *Whitner* establishes a significant turning point in the direction of greater fetal rights and serves as a model to which courts may look in justifying future convictions.⁵⁰

many as 15% of all pregnant women ingest illegal drugs during their pregnancies." Margaret P. Spencer, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 393, 393 (1993). Recognition of fetal rights simply illustrates that the law is keeping pace with medical science; the evolving protections afforded the unborn have paralleled scientific knowledge about the fetus. Scot Lehigh, *Court Cases Pit Fetus' Rights Against Abortion Rights, The Issue: When Does it Become a Living Person?*, PLAIN DEALER, Sept. 22, 1996, at 31A.

Birth was formerly the dividing line between rights recognized by the law and those not recognized. See Mauro, *supra* note 17, at 1A. With advances in technology, however, legally recognized life begins inside the mother's womb at some point between conception and birth. *Id.* Fetal monitoring and surgery, even fetal autopsies, have given prosecutors the tools they need to prove the elements of a crime. *Id.* It is possible to see that the fetus was alive and healthy when the injuries from drug ingestion took place; in comparison, under the early common law standards, it was difficult to tell if a woman was even pregnant and more difficult to tell if the child was healthy. *Id.*

⁴⁹ Mauro, *supra* note 17, at 1A. "A woman's freedom to control her body is circumscribed by the obligation she incurs to her fetus." DANIELS, *supra* note 17, at 25. "A pregnant woman represents the interdependence of life." *Id.* at 139. But see Margaret Phillips, *Umbilical Cords: The New Drug Connection*, 40 BUFF. L. REV. 525, 527, 553 (1992) (arguing that prosecuting pregnant drug addicts is merely mechanism to subjugate women and that their biological connection to fetuses subjects their actions to far greater punishment than actions of men).

Phillips claims that the criminal prosecution of pregnant addicts will reinforce the gender hierarchy in which women do not have their own identity but rather, are viewed in relation to their fetuses. *Id.* at 557. Prosecutors, she argues, are just inventing crimes of which only women can be guilty. *Id.* at 562. This argument raises a possible Equal Protection question. The *Whitner* prosecution, however, survives the equal protection challenge. Because women are found in both the deprived class (drug abusing women) and the class receiving benefits (all other pregnant women), the law does not discriminate based on gender. James Denison, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1103, 1133 (1991). Even if the law was gender specific, it would pass the applicable constitutional test, intermediate scrutiny, because protecting fetuses from drug addiction serves an important state interest. *Id.*; cf. Michael M. v. Superior Ct., 450 U.S. 464, 469 (1987) (upholding statutory rape law which held only men liable in interests of preventing teen pregnancy).

⁵⁰ The landmark decision in *Whitner* will have an effect on pending cases involving a mother's substance abuse that has injured her fetus.

In Wisconsin, a state appeals court, in *State ex rel. Angela M.W. v. Kruzicki*, 541 N.W.2d 482 (Wis. Ct. App. 1995), stated that a pregnant woman's rights were

II. VIABILITY: THE BIRTHPLACE OF FETAL RIGHTS

The viability stage, defined as the time when the fetus can live apart from its mother, has been designated as the "birth" of fetal rights entitled to constitutional protection.⁵¹ The court, in *Bonbrest v. Kotz*,⁵² declared that viability was the decisive factor in determining when protection from various harms begins.⁵³ It is submitted that the devastating physiological effects of cocaine⁵⁴ upon the viable fetus

not violated by a "protective custody" order, which detained her for three weeks in a drug treatment center, because only the fetus was ordered detained. Denniston, *supra* note 4, at 1A. In this case, the court construed the child welfare statute to include "fetus" within statutory definition of "child" and issued the order for the viable fetus, citing *Roe's* holding that the state's interest in potential life becomes compelling at viability. This was the first appellate court in the nation to make such a ruling, evidencing the march toward greater fetal rights. See A. Michael Lee, *State ex rel. Angela M.W. v. Kruzicki: the Wisconsin Court of Appeals Introduces a Dangerous New Weapon in Battle over "Fetal Rights,"* 30 GA. L. REV. 1183 (1996). This case has been appealed to the Wisconsin Supreme Court on the issue of the constitutionality of such state detention. Even though the custody order was for the fetus, the mother, being physically attached to the fetus, was also detained. Cary Segall, *Court to Hear Case of Woman Held to Protect Fetus, the Wisconsin Supreme Court Will Decide Whether the State Had the Right to Detain a Waukesha Woman Who Used Drugs While Pregnant*, WIS. ST. J., Oct. 27, 1996, at 1A.

Another case is that of Kawana Ashley, a 19-year old girl in Florida who shot herself in the stomach resulting in the death of her infant. *Florida: Manslaughter Trial Goes before State Supreme Court*, AM. POL. NETWORK, Nov. 7, 1996. The infant died of organ failure after an emergency cesarean section after the gunshot wound. *Id.* Ashley was originally charged with third-degree felony murder and manslaughter, but the courts dismissed the manslaughter charge. *Id.* Both sides have appealed to the Florida Supreme Court. *Id.*

The timing of the *Whitner* decision was critical; as the first state high court to criminalize maternal drug use, it sent a prominent message that abuse to the unborn child will not be tolerated.

⁵¹ Viability is "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life supportive systems." BLACK'S LAW DICTIONARY 1565 (6th ed. 1990); see, e.g., *Roe v. Wade*, 410 U.S. 113, 162 (1973) (declaring that women have constitutional right to abortion under Fourteenth Amendment up to point of fetus' viability after which time state has compelling interest in life of fetus); see also DANIELS, *supra* note 17, at 17-18. In the medical community, the third trimester fetus is called the "unborn patient" upon whom surgical and therapeutic procedures can be performed. KEITH L. MOORE & TVN PERSAUD, *THE DEVELOPING HUMAN* 105 (1993). On a practical level, viability is a workable demarcation because it is often difficult to prove causation in early stages of pregnancy. See Kaufus, *supra* note 7, at B7.

⁵² 65 F. Supp. 138 (D.C. Cir. 1946).

⁵³ *Id.* at 140; cf. *Kelly v. Gregory*, 125 N.Y.S.2d 696, 698 (1953) (stating that legal entity begins at conception and can recover for tortious injury occurring anytime after then). The *Kelly* court posited that viability is immaterial and focus should be solely on child's survival after birth. *Id.*

⁵⁴ Cocaine is one of the most commonly used drugs among women of childbear-

qualify as child abuse.⁵⁵ Civil statutes have already acknowledged this reality.⁵⁶ Child abuse does have criminal sanctions; if child abuse includes drug dependent children, as specifically enumerated in the civil law, then such criminal sanctions should also be imposed upon mothers.

ing age. Dr. Claudia A. Chiriboga, *Fetal Effects*, 11 NEUROLOGIC CLINICS 3, 707-22 (Aug. 1993). It is a teratogen, an "agent that can produce a congenital anomaly or raise the incidence of an anomaly in the population." MOORE & PERSUAD, *supra* note 51, at 153. Crack is an alkaline form of cocaine that can be 95% pure. Zeev N. Kain, et al., *Cocaine Abuse in the Parturient and Effects on the Fetus and Neonate*, 77 ANESTHESIA & ANALGESIA 4, 835-42 (Oct. 1993). It is a relatively inexpensive drug and a "hit" takes under one minute and lasts five to ten minutes. *Id.* The drug then enters the fetus' system where it is converted into the more potent substance, narcocaine. Julie J. Zitella, *Protecting our Children: A Call to Reform State Policies to Hold Pregnant Drug Addicts Accountable*, 29 J. MARSHALL L. REV. 765, 767 (1996). The fetus experiences a "rush" when the drug is transferred by enzymes through the umbilical cord. Freeman, *supra* note 29, at 546. The drug is not immediately recirculated to the mother's bloodstream; it is absorbed in the fetal tissue where its deadly effects are compounded. *Id.* After birth, the child actually suffers physical withdrawal from the drug and its brain "never forgets cocaine," increasing the likelihood that the child will become an addict in later life. *Id.* at 550. The effects of cocaine follow a child through his/her early development as well. Physically, infants exposed to cocaine while in the womb may have deformities; physiologically, they may have different organizational responses and different interactive behavior. Chiriboga, *supra*, at 716-17. They often experience difficulty feeding and sleeping. *Id.* "[C]ocaine affects the excitability and central pathways of the developing brain, especially of the brain stem." *Id.* at 718. Women who use cocaine are more likely to give birth prematurely, thereby increasing the chances that the child will suffer respiratory and developmental problems. Davidson, *supra* note 39, at 1. Even if these babies are carried to full term, there is still a greater risk of physical and neurological defects. *Id.* They are also more prone to sudden infant death syndrome. *Id.*

⁵⁵ "[W]hen a mother feeds her fetus crack cocaine through its umbilical cord just hours before it is born, and it is born as a crack addicted child, it is clearly an abused child." Thornberg, *supra* note 17, at 13A. 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] right to abuse [her] own body stops at the border of [her] womb." DANIELS, *supra* note 17, at 26. (quoting Alan Dershowitz). "We must now have a presumption that a child [born with drugs in his or her system] is the victim of abuse." Alex Adwan, *Coke Babies and Their Mothers*, TULSA WORLD, Jan. 21, 1996, at G1 (quoting New York City Mayor Rudolph Guiliani, regarding proposal making it easier to take crack addicted babies away from their drug addicted mothers). In New York, as Oklahoma, the law does not specifically include drug exposure to a fetus as child abuse. *Id.* Oklahoma, however, does allow the state to take custody, an alternative to prosecution of the mother, when it is for the safety of the newborn. *Id.*

⁵⁶ Some states have enacted civil laws that clearly define prenatal drug use as evidence of child abuse or neglect. MINN. STAT. ANN. § 626.556(2)(c) (West 1995) (stating that "prenatal exposure to a controlled substance" constitutes "neglect"); NEV. REV. STAT. § 432.330(1)(b) (1991) (declaring that drug addicted child is in need of protection); OKLA. STAT. tit. 10, § 7001-1.34(a)(3) (1995) (stating that child born drug dependent is "deprived" and in need of treatment).

The fetus sustains varying degrees of damage, depending upon the extent of the mother's drug use.⁵⁷ Critics of fetal rights claim that most of this damage takes place during the early stages of pregnancy when the fetus is developing its organ systems.⁵⁸ Insulating mothers from liability during this pre-viability period, they posit, fails to prevent the fetal harm.⁵⁹ This simplistic view of fetal development, however, ignores the continuing biological development and tremendous growth that takes place in the third trimester, after the point of viability. For example, beginning in the sixth month of pregnancy there is substantial weight gain.⁶⁰ The fetus accumulates a store of fat, up to fourteen grams a

⁵⁷ A medical analysis reinforces viability as the origin of a mother's liability. Studies indicate that the timing of the cocaine ingestion is important. See Kain, et al., *supra* note 54, at 835-42. Cocaine ingestion during later stages of pregnancy causes lower birth weight and retarded intrauterine growth. *Id.* at 840. One study found that exposure to cocaine in the first trimester had no effect. *Id.* The pattern of cocaine use - the frequency as well as the timing - is critical in assessing the danger to the fetus. D.W. Rurak, *Fetal Behavioral States: Pathological Alterations with Drug/Alcohol Abuse*, 16 SEMINARS IN PERINATOLOGY 4, 239-51 (Aug. 1992). A child has time to recover if cocaine is taken in early pregnancy but severe, permanent damage is often done after the point of viability. Third trimester cocaine use may cause immediate contractions, heightened fetal activity, and premature labor. Kain, et al., *supra* note 54, at 838. A dangerous consequence can be abruptio placentae, "the vasoconstrictive effect of cocaine caus[ing] disruption in placental adherence to the uterine wall." *Id.* This condition could be fatal for both mother and child. *Id.* In addition, there is a greater chance of a fetal stroke resulting from an intracranial hemorrhage from late cocaine use; this is evidenced by findings that newborns had increased cerebral blood flow from "recent cocaine exposure." Chiriboga, *supra* note 54, at 717.

⁵⁸ See Denison, *supra* note 49, at 1112; Glink, *supra* note 47, at 564 (claiming that fetus is most susceptible to harm by drug use during first trimester); Kristen Rachele Lichtenberg, *Gestational Substance Abuse: A Call for a Thoughtful Legislative Response*, 65 WASH. L. REV. 377, 380 (1990) (asserting that majority of fetal damage from cocaine use occurs during first trimester and cannot be reversed by ceasing to use drug). The author explains that urogenital malformations are also associated with first trimester drug usage. *Id.* at 379 n.25.

⁵⁹ Critics argue that a "maternal duty model," allowing for state intervention in the first trimester would be most sensible, because this is when most of the damage to the fetus occurs. Lichtenberg, *supra* note 58, at 389. It is conceded, however, that a policy of prosecuting a woman for acts which harm her fetus but allowing her to end her pregnancy at the same stage would clash with *Roe v. Wade*. *Id.* A conflict arises when abortion law overlaps with child abuse law.

⁶⁰ MOORE & PERSUAD, *supra* note 51, at 96. Because of the rapid growth during this time, fetal demands for proper and sufficient nutrition are enormous. MOFFETT, ET AL., *supra* note 1, at 738. Doctors advise pregnant women to consume an excessive amount of calories during the first trimester to have a supply for this growth spurt. *Id.*

day in the last weeks of gestation, that is critical to survival after delivery.⁶¹ Additionally, this period is vital for proper organ development that continues throughout pregnancy, such as the development of the fetal brain and nervous system.⁶² Furthermore, in the later stages of gestation, the fetus builds up the necessary tissue and prepares its organ systems to facilitate the transition from the inside of the mother's womb to the outside environment.⁶³

The period after viability is a critical stage during which serious damage may be prevented. Thus, state intervention after viability would prevent substantial harm to the fetus and long term effects upon the child.⁶⁴ Cocaine's long-term effects, including fine and gross motor skill delay and retarded physiological maturity,⁶⁵ are no less brutal than the effects of starving or beating a child. Child abuse must not be distinguished based upon when or where it takes place; it is the nature and effects of the abusive treatment that must be examined when assessing criminal

⁶¹ Fat develops rapidly during the last six to eight weeks of development, giving the fetus a smooth, plump appearance which transforms the wrinkled form characteristic of early gestation. MOORE & PERSUAD, *supra* note 51, at 109. Low birth-weight is the classic result of cocaine use. See Kain, et al., *supra* note 54, at 840.

⁶² MOFFETT, ET AL., *supra* note 1, at 738. "The development of each individual organ system can be thought of as a thread that is woven together with other threads to generate an organism that, as development goes forward, is increasingly capable of independent life." *Id.* at 736. The sixth month also marks the beginning of rapid eye movements and blink startle responses by the fetus. MOORE & PERSUAD, *supra* note 51, at 96. The fetal nervous system develops continuously throughout gestation and is not complete even at birth. MOFFETT, ET. AL., *supra* note 1, at 738. Substance abuse by pregnant women, therefore, can have a devastating effect on the fetus' nervous system at any time during pregnancy. *Id.* In addition, while the brain endures its most intensive development in the first 3-16 weeks, it continues to develop throughout pregnancy and the first two years after birth. MOORE & PERSUAD, *supra* note 51, at 154.

⁶³ MOORE & PERSUAD, *supra* note 51, at 109.

⁶⁴ See, e.g., Glink, *supra* note 47, at 572 (explaining that "[b]y criminalizing illegal substance abuse during pregnancy, society would seek to prevent the resulting injury that such conduct inflicts on the fetus and to place a value on society's interest in condemning maternal substance abuse").

⁶⁵ See *supra* notes 54-58. These children also become a great economic burden on society. When drug addicted children are separated into special classrooms, it costs approximately \$15,000 a year to educate them compared to about \$3,500 a year for a normal child. Thornberg, *supra* note 17, at 13A. Cocaine causes children to be rowdy, disorganized, and violent in school and also affects language production and comprehension, necessitating the separation. Zitella, *supra* note 54, at 768.

liability. The child's physical location is irrelevant.⁶⁶ A mother must not evade responsibility for abusing her child at the child's most vulnerable stage, its fetal stage.

III. ABORTION RIGHTS SURVIVE

Opponents seek an answer to a seemingly illogical implication of *Whitner*: if abortion, the killing of a fetus, is legal, then how can abusing or neglecting a fetus be illegal?⁶⁷ The fear is that *Whitner's* extension of fetal rights will endanger the abortion rights guaranteed to women under *Roe v. Wade*.⁶⁸ Critics of fetal rights believe that fetuses are not children in need of protection and that a mother's conduct before the birth of her child is protected under a constitu-

⁶⁶ Mary E. Roper, *Reaching the Babies Through the Mothers: The Effects of Prosecution on Pregnant Substance Abusers*, 16 LAW & PSYCHOL. REV. 171, 220 (1992); see, e.g., *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981) (declaring that viable fetus survival rights must be placed ahead of mother's privacy rights). This reflects the "parent-child" test which asks whether the conduct of pregnant women would be "wanton" in the context of parent and child instead of mother and fetus; if the conduct fails to meet this test, it is not punishable. Shen, *supra* note 45, at 940. It is asserted that, ultimately, there is no difference between transferring cocaine via the umbilical cord and injecting a young child with cocaine. *But see* Michael A. Shekey, Note and Comment, *Criminal Liability of a Prospective Mother for Prenatal Neglect of a Viable Fetus*, 9 WHITTIER L. REV. 363, 388 n.220-21 (1987) (positing "geography" argument: mother and fetus are social unit and, while baby is in womb, mother cannot be prosecuted for actions that harm fetus). The author posits that pregnant mothers are held to a lower standard than parents of children already born. *Id.* at 363 n.1 (citing *California v. Stewart*, No. M508197 (San Diego Mun. Ct. 1987))(stating that pregnant women cannot be equated with parents of children). Just moments, however, separate the two statuses and the liability line must be drawn at viability. Child abuse law ought to conform to other systems of law where the line is drawn at viability, a marker that has both logical and biological justifications. See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

⁶⁷ See Blumner, *supra* note 22. Opponents to maternal criminalization for drug use during pregnancy claim that part of the pro-life agenda is to put the fetus on an equal plane with its mother. Lehigh, *supra* note 48, at 31A. Abortion foes, however, are also opposed to such criminalization for the very reason that it will give women greater incentive to have an abortion. See *Whitner*, 1996 S.C. LEXIS 120, at *33 (Finney, C.J., and Moore, A.J., dissenting) (stating that, from a liability standpoint, woman would be better off illegally aborting third trimester fetus and facing two-year sentence rather than giving birth to baby after ingesting cocaine and facing 10-year sentence).

⁶⁸ 410 U.S. 113 (1973). Before 1973, courts seemed willing to grant protection to the viable fetus. See GREEN, *supra* note 23, at 8. Courts also made clear, however, that an unviable fetus could never achieve rights greater than the mother's right to privacy. *Id.* A pregnant woman can even have an abortion in the third trimester if it is performed to save her life. *Id.* at 12; *Roe*, 410 U.S. at 163.

tional right to privacy.⁶⁹ They argue further that drug addiction during pregnancy is a health problem, not a legal one.⁷⁰

Whitner is consistent with *Roe v. Wade* and its progeny. Both areas of law, fetal and reproductive rights, address the interests of women, fetuses, and the State. The constitutional right to privacy under the Due Process Clause of the Fourteenth Amendment includes a woman's right to have an abortion.⁷¹ This right is not absolute, however, and the State may infringe upon it in the interests of safeguarding health and protecting potential life.⁷² When state interests are triggered, an abortion is no longer available to a

⁶⁹ See, e.g., Kaufus, *supra* note 7, at B7 (stating that, in California, criminal laws do not protect fetuses and women are generally not prosecuted for taking drugs while pregnant); see also Davidson, *supra* note 39, at 1 (noting that, although great number of children are taken into custody in California because of abuse or neglect due to mothers' drug ingestion, state has not further criminalized taking drugs while pregnant because fetus is not legally recognized as person). But see Glink, *supra* note 47, at 568 (asserting that statute prosecuting maternal drug use would be justifiable because drug dependent babies are serious problem and criminalizing already illegal conduct is minimal intrusion upon woman's right to privacy).

⁷⁰ Roper, *supra* note 66, at 187; Kaufus, *supra* note 7, at B7.

⁷¹ *Roe*, 410 U.S. at 153. "A fundamental right to privacy protects a decision to abort, but not a decision to abuse drugs or alcohol." Lichtenberg, *supra* note 58, at 388. Abortion rights have evolved through the *Roe* line of cases. The *Roe* Court stated that a fetus was not a "person." While the Court would not explicitly address the issue of when life begins, it indirectly determined that life begins at viability. See Klasing, *supra* note 41, at 966. After the point of viability, the state can intervene and regulate abortion. *Id.* at 967. Abortion was declared a fundamental right requiring "strict scrutiny" to infringe upon it. *Id.* at 966-70. "Strict scrutiny" demands a "compelling state interest" to regulate an activity, and this regulation must be "closely tailored" to achieve that interest through the least restrictive means possible. *Id.* The term "viability" came alive in the legal field following the *Roe* decision. *Id.* The line of viability was moved back from 28 weeks to 20 weeks in *Webster v. Reproductive Health Services*, 492 U.S. 490, 515-16 (1989), marking a move towards greater fetal rights as modernized medicine enabled a fetus to survive at an earlier stage. See Klasing, *supra* note 41, at 968. The Supreme Court, in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), declared that abortion is no longer a fundamental right, replaced "strict scrutiny" with an "undue burden" test, and rejected the three trimester approach. *Id.* at 836. This approach effectively allows state regulation of abortion throughout pregnancy as long as it does not create an "undue burden" on a woman. *Id.* Although Court decisions evolved to keep pace with modern science, leading to an increase in fetal rights, the Supreme Court continues to maintain the core holding of *Roe* which established the viability line. In doing so, the Court maintains a consistent line of demarcation in circumscribing criminal liability. It is the mother, not the fetus, who is protected under the Fourteenth Amendment right to privacy. Glink, *supra* note 47, at 562; Noller, *supra* note 44, at 386.

⁷² Glink, *supra* note 47, at 563-66.

woman. While the historic decision by the Justices in *Roe* protect a woman's freedom of choice in the initial stages of her pregnancy, it also permits state intervention in the pregnancy's final stages.⁷³ In the past, states have even ordered invasive medical procedures during late pregnancy, such as cesarean sections and blood transfusions, over the objections of women in order to protect a fetus.⁷⁴ Such cases evidence the drive toward greater fetal rights, illustrating that the health of the fetus often takes precedence over a woman's right to bodily autonomy.⁷⁵ Compared to such invasive surgical procedures, proscribing maternal drug use during pregnancy is a minimal intrusion upon a woman's rights.

Cornelia Whitner could have exercised her constitutional right to have an abortion, but she did not. By deciding to carry her fetus to term, Whitner accepted the greater duty imposed upon her by law to ensure the delivery of a healthy child.⁷⁶ A viable fetus is a "presently existing per-

⁷³ Nancy Grace, *Individual Rights: Is the Prosecution of "Fetal Endangerment" Illegitimate?*, A.B.A. J., Dec. 1996, at 72-73; see also Davidson, *supra* note 39, at 1 (explaining that *Roe* ruling permits state intervention after first trimester, making restrictions after this time constitutional).

⁷⁴ See *In re A.C.*, 533 A.2d 611, 617 (D.C. 1987) (ordering cesarean section against wishes of terminally ill mother); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 459-60 (Ga. 1981) (ordering cesarean section over mother's religious objection); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 201 A.2d 537, 538 (N.J. 1964) (ordering that woman receive blood transfusions despite religious beliefs); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (N.Y. Sup. Ct. 1985) (same). The *Jefferson* court declared that the "state's interest in protecting potential life outweighed mother's right to bodily integrity and to practice her religion." *Id.* States have also ordered such procedures to protect individual and public health. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 38-39 (1905) (weighing individual's right to refuse vaccinations against state interest in public health).

⁷⁵ See Timothy Sean McBride, *Criminal Law - Should States Criminally Prosecute Mothers for Delivering Drugs to Their Newborns During the Birthing Process?*: *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992), 27 SUFFOLK U. L. REV. 251, 253 (1993).

⁷⁶ See *Greater S.E. Community Hosp. v. Williams*, 482 A.2d 394, 398 (D.C. 1984) (stating that every child has right to be born healthy); *Jarvis v. Providence Hosp.*, 444 N.W.2d 236, 238-39 (Mich. Ct. App. 1989) (declaring that every child has right to be born with healthy mind and body); *In re Baby X*, 293 N.W.2d 736, 739 (Mich. Ct. App. 1980) (same); *Department of Social Servs. v. Felicia B.*, 543 N.Y.S.2d 637, 638 (N.Y. Fam. Ct. 1989) (holding mother liable for ingesting cocaine during pregnancy because of "the legal right of every human being to begin life unimpaired by physical, mental, or emotional defects resulting from the neglectful acts of the parent"); McBride, *supra* note 75, at 253; *Carlson*, *supra* note 5, at A9 (implying that carrying pregnancy to term entails responsibilities); see also *Denniston*, *supra* note

son" and thereby entitled to legal protection.⁷⁷ Public policy considerations dictate that courts treat prenatal substance abuse consistently with abortion law by only allowing state intervention after the first trimester.⁷⁸ While the Constitution does not prohibit first trimester intervention in drug abuse, it is logically consistent for states to follow *Roe* and not intervene until the point of viability.⁷⁹ The viability line maintains the separateness of the two areas of law; otherwise, "the ostensibly culpable conduct of abuse would go unpunished if a woman exercised her right to abortion during the same time period."⁸⁰ Thus, adhering to the constitutional dividing line of viability allows the *Whitner* and *Roe* line of cases to peacefully coexist.

IV. CRIMINAL LIABILITY CONFINED TO ILLEGAL ACTIVITIES

A recurring argument posited by *Whitner* opponents is that liability for cocaine ingestion during pregnancy would then extend to liability for smoking or drinking during pregnancy or even failing to seek proper medical care.⁸¹ A

4, at 1A (stating that "[w]hen there is a child who is to be born and is not going to be aborted, and when there is a direct and severe threat to the health or life of the child, the state can intervene to protect the child") (quoting Clarke Forsythe, president of the Chicago-based Americans United for Life). Once a woman chooses to continue a pregnancy she is charged with a "duty to care" for the fetus in her womb to ensure that it is born with a "sound mind and body." DANIELS, *supra* note 17, at 3 (citing *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960)); Noller, *supra* note 44, at 387. An analogy can be made to the Good Samaritan rule in tort law: there is no obligation to help but once you begin assisting, you have a duty to continue. Denison, *supra* note 49, at 1127.

⁷⁷ Shekey, *supra* note 66, at 368 (citing *Vaillancourt v. Medical Ctr. Hosp. of Vt., Inc.*, 425 A.2d 92 (Vt. 1980)).

⁷⁸ See, e.g., *Lichtenberg*, *supra* note 58, at 377. *But see Glink*, *supra* note 47, at 564 (declaring that state has greater interest in preventing future suffering of those who will be born than it does in deciding whether baby will be born so state should have power to regulate maternal conduct through entire term of pregnancy). *Glink* asserts that, while *Roe* addresses the right to life, child abuse cases address the right to quality of life. *Id.*

⁷⁹ See *Lichtenberg*, *supra* note 58, at 388.

⁸⁰ *Denison*, *supra* note 49, at 1126. *But see Chan*, *supra* note 44, at 233 n.231 (positing fairness argument which posits that state cannot prosecute addicts in late pregnancy but not prosecute pregnant addicts who have abortions because the latter absolve themselves of liability while causing even greater harm to child than former).

⁸¹ See *Whitner*, 1996 S.C. LEXIS 120, at *30-33 (Finney, C.J., and Moore, A.J., dissenting); see also *Reinesto v. Superior Ct. of Ariz.*, 894 P.2d 733, 737 (Ariz. Ct. App. 1995) (holding that child abuse statute does not apply to prenatal conduct [heroin use] that harms fetus); *Sheriff of Washoe County v. Encoe*, 885 P.2d 596,

more absurd argument is that further criminalizing drug use opens the door to the extension of liability for all potentially harmful maternal conduct such as jogging, eating fattening or high cholesterol foods, or reckless driving.⁸²

Drugs are illegal. Drinking, smoking, and eating fattening foods are not. Opponents argue that, if the purpose of criminal prosecution is to prevent fetal harm, then alcohol use and other harmful conduct by pregnant women must also be outlawed.⁸³ Drinking is a socially acceptable vice, they argue, whereas drug abuse is narrowly viewed as a plague of the urban poor that must be eradicated.⁸⁴ These critics, however, fail to see the slippery slope that they have created with such arguments. Illegal activities constitute clearly defined categories, thereby satisfying the due process requirement of fair notice.⁸⁵ True discrimination would

597 (Nev. 1994) (concluding that it would be overbroad interpretation of child endangerment statute to prosecute mother for delivering drugs to fetus through umbilical cord). The *Encoe* court feared that such a construction would include all of a pregnant woman's conduct, including use of legal substances like alcohol and nicotine. *Id.* at 597. "Any further extension of legal protection for the unborn, even for fetuses in the latter stages of pregnancy, is seen as a slippery slope that will erode a pregnant woman's ability to make her own decisions." See Carlson, *supra* note 5, at A9 (comparing *Whitner* outcome to factually similar case that was dismissed in Washington and calling for state to model South Carolina decision).

⁸² See, e.g., Anne Marie O'Neill, et al., *Under the Influence*, PEOPLE, Sept. 9, 1996, at 53-55 (commentary on Deborah Zimmerman case).

⁸³ See Lichtenberg, *supra* note 58, at 387 (explaining that state must treat abuse of alcohol same as abuse of drugs because both involve maternal addictions that endanger fetus). Smoking can cause low birth weight; alcohol consumption can cause fetal alcohol syndrome which is characterized by mental retardation and growth deficiencies; an improper diet can cause premature births; and caffeine can cause low birth weight. Freeman, *supra* note 29, at 556. Critics fear such activities may also be subject to judicial scrutiny.

⁸⁴ See McGinnis, *supra* note 43, at 535. As a consequence, opponents argue, prosecutors discriminate based on class. *Id.* Additionally, low income, minority women are reported far more frequently than their prosperous counterparts because medical personnel often administer drug tests based on such class presumptions. See Sexton, *supra* note 24, at 427.

⁸⁵ See Glink, *supra* note 47, at 570 (explaining that statute proscribing all potentially harmful conduct, including legal activities, would be too vague, but one narrowly proscribing conduct that is already illegal would satisfy constitutional requirements). "The state should be able to invade a woman's right to bodily integrity and personal autonomy only when conduct being regulated is illegal. To conclude otherwise would allow a state to deny a pregnant woman the right to make choices that affect her body." *Id.*; see, e.g., *California v. Stewart*, No. M508197 (San Diego Mun. Ct. 1987) (dismissing charge against pregnant woman who disobeyed her doctor's orders by engaging in sexual intercourse). But see Denison, *supra* note 49, at 1125 (arguing that legislatures have every right to declare activities legal in one

occur if criminal liability extended to activities like smoking and drinking. These are activities which the general population enjoys and they cannot be denied to a woman simply because she is pregnant.⁸⁶ There exists a clear line between harmful and unlawful conduct.

Opponents also assert that criminalizing maternal drug use would discourage women from seeking prenatal care for fear of being prosecuted.⁸⁷ This ignores the reality, however, that, for crack addicts, medical care, for themselves or their unborn children, is not a priority.⁸⁸ Other reasons exist, such as shame or lack of money to spare from their expensive habit, which may prevent such addicted women from seeking proper prenatal care.⁸⁹ Criminal prosecutions of these women are the only true deterrent to maternal drug abuse.⁹⁰

context and illegal in another, for example, public nuisance or drunk driving). Critics believe that a law declaring smoking or drinking illegal under the attendant circumstance of pregnancy would parallel these existing, non-vague statutes. *Id.*

⁸⁶ See Glink, *supra* note 47, at 568. An individual cannot be punished for his status as an addict under the 8th Amendment, absent a criminal act. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962).

⁸⁷ See *Abuse of Viable Fetus Ruled a Crime*, *supra* note 20, at A8. Patients will be distrustful of health care personnel and will not speak openly about drug use. Roper, *supra* note 66, at 180. Further, a mandatory reporting requirement would undermine the confidential doctor/patient relationship. Glink, *supra* note 47, at 546.

⁸⁸ See Noller, *supra* note 44, at 388 (stating that substance abuse is one of many poor health habits of addicted women, as well as failure to seek adequate medical care).

⁸⁹ *Id.*

⁹⁰ See Deborah Ann Bailey, *Maternal Substance Abuse: Does Ohio Have an Answer?*, 17 DAYTON L. REV. 1019, 1034 n.137 (arguing that civil penalties, such as taking custody of child after birth, are inadequate because damage occurs in utero but criminal prosecution can take place during pregnancy); Elizabeth L. Thompson, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357, 367 n.83 (1988) (positing morality argument as justification for imprisonment because such punishment is "concrete expression of society's disapproval of an act [which] helps to form and to strengthen the public's moral code and thereby creates conscious and unconscious inhibitions against committing crimes"). Bailey further explains that the threat of losing custody of a child is not enough to deter women from using drugs. *Id.* But see Freeman, *supra* note 29, at 556 (explaining that criminal prosecutions will increase abortions which, although legal, are counterproductive to state interest in preserving life); Glink, *supra* note 47, at 572 (stating that incarceration serves no purpose because woman's past drug use poses no danger to society); Lichtenberg, *supra* note 58, at 378 (stating that civil commitment of mother after first trimester is better solution because it lacks punitive aspects of imprisonment and is long-term solution); McGinnis, *supra* note 43, at 539 (arguing that money would be better spent prosecuting drug dealers, source of problem); Phillips, *supra* note 49, at 557 (stating that reme-

Liability from a policy standpoint must be confined to illegal activities. Women have no legal right to use illicit drugs,⁹¹ such as cocaine; they do, however, have a legal right to drink or smoke after a certain age.⁹² Illegal drug use, on its own, is criminally actionable.⁹³ Voluntary drug use⁹⁴ that injures a viable fetus must, therefore, also be

dies for pregnant drug abusers must be combination of prenatal care and drug treatment in order to reflect interdependence between woman and fetus); Roper, *supra* note 66, at 171 (suggesting criminal statute mandating drug rehabilitation for pregnant drug addicts and imposing incarceration only upon refusal); Thompson, *supra*, at 370-71 (relating societal costs which include: imposing affirmative duty on doctors to report patients who fail to follow advice, effectively making fetus more important patient than woman; and destroying family unit by putting mother in jail); Zitella, *supra* note 54, at 795 (stating that less intrusive means than imprisonment can protect fetuses, such as education and drug treatment programs for pregnant women). The American Medical Association believes that drug addiction is an illness and should not be prosecuted. See Roper, *supra* note 66, at 176; Carlson, *supra* note 5, at A9; cf. GREEN, *supra* note 23, at 86 (1993) (stating that criminalizing maternal drug use will only push women away from drug treatment, not scare them into seeking treatment). "Deterrence assumes an ability to change behavior through rational choice - the actor weighs the costs and benefits of his actions in an effort to determine whether or not to act." Roper, *supra* note 66, at 178; Thompson, *supra*, at 366 (emphasizing utility of imprisonment as both general deterrent, causing general population to follow law, and specific deterrent, preventing further harmful activity from this particular individual). The threat of mandatory drug treatment or education will not deter drug users. *Id.* But see McGinnis, *supra* note 43, at 523 (positing that drug addiction is involuntary and that involuntary conduct cannot be deterred). The only behavior that will be deterred is the "voluntary" decision to seek medical care, precisely the opposite aim of prosecutors. Roper, *supra* note 66, at 180; Zitella, *supra* note 54, at 790 (claiming that criminal prosecutions cannot practically serve as deterrent because crack addicts cannot control their addictions).

⁹¹ See *State v. Murphy*, 570 P.2d 1070, 1073 (Ariz. 1977) (declaring that marijuana use is not fundamental right); Freeman, *supra* note 29, at 563. Freeman emphasizes the importance of this argument by comparing the competing interests of abortion and cocaine use. He explains that a woman has a legal right to an abortion before viability and that a state must balance the interests of protecting the fetus and preserving the mother's right to privacy. *Id.* Since there is no legal right to use cocaine, the balancing test set forth by the Supreme Court need not take place. *Id.* (citing *State v. Gray*, 584 N.E.2d 710, 714 (Ohio 1992) (Wright, J., dissenting)).

⁹² See Sam S. Bailey, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209 (1987) (noting that all women have equal rights to consume alcohol and smoke cigarettes).

⁹³ Prosecutors would simply be clarifying a statute that already applies to every individual. Currently, no one may make, dispense, or possess controlled substances. 21 U.S.C.S. § 841 (West 1994).

⁹⁴ See Bailey, *supra* note 92, at 1041 (positing that "a woman's initial use of cocaine, with the knowledge that she is pregnant, is a voluntary act and, therefore, she may be subject to prosecution"); Chan, *supra* note 44, at 232 (confirming that pregnant women who abuse drugs make deliberate choice and cannot use excuse that drug addiction is disease). "While rapists, shoplifters, and other offenders may

punished criminally and society cannot rely upon current drug laws alone.⁹⁵

CONCLUSION

Society's most precious commodity is its children. The alarming increase in infants born addicted to drugs necessitates severe penalties for those individuals who are responsible for such suffering. Tragically, mothers comprise this class of abusive individuals. Thus, the alleviation of such suffering necessitates the criminalization of maternal drug use. Simply relying upon current drug laws for use or possession, laws that focus purely on an addict's self abuse, have not only proven ineffective, but they also ignore the crime perpetrated on another individual, the fetus. A pregnant drug abuser must not be treated the same as any other drug abuser. From a biological standpoint, a woman's liability must begin at viability of the fetus. Drawing the line at viability enables the courts to prevent substantial fetal harm while at the same time respecting the abortion rights established in *Roe v. Wade*. Criminal prosecutions of pregnant drug abusers will promote three societal values: punishing knowing criminal conduct that injures another, protecting a viable fetus from further harm, and most importantly, deterring other pregnant women from taking that first hit of cocaine. Only by fostering such values can society hope to protect all viable children from the effects of drug abuse. There is strong support for the court's holding in *Whitner* that a fetus is a person under child abuse law. This will likely spark a continued march in the direction of fetal rights.

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have a mental or psychological 'disease,' this does not affect society's mandate to prosecute such people and criminalize their conduct." *Id.*; Sexton, *supra* note 24, at 411 (declaring that real issue is accountability and drug addiction must not be valid excuse for behavior damaging fetus).

⁹⁵ *But see Roper, supra* note 66, at 187 (stating that focus must be on preventing drug use in general because this would ultimately decrease numbers of all drug addicts, including pregnant women).

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