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Whitner v. State: Aberrational Judicial Response or Wave of the Future for Maternal Substance Abuse Cases?

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NOTE

WHITNER v. STATE: ABERRATIONAL JUDICIAL RESPONSE OR WAVE OF THE FUTURE FOR MATERNAL SUBSTANCE ABUSE CASES?

I. INTRODUCTION

> If a woman can be prosecuted for drinking while pregnant—which, by the way, is not illegal—could another be prosecuted for smoking cigarettes and birthing an underweight baby? For endangering her unborn child by failing to heed a doctor's bed rest orders? For becoming pregnant while obese, thus doubling, or in the case of the extremely obese even quadrupling, the chance of neural tube defects?[1]

Prosecutors criminally charged over 200 women in 30 states with drug use or other actions, such as consuming alcohol, that endangered their fetuses during pregnancy.[2] Most prosecutors brought these criminal charges under existing drug delivery and distribution statutes, as well as child abuse and endangerment statutes.[3] States have resorted to these punitive actions in a frustrated attempt to deal with a rapidly growing problem that appears to have no solution: substance abuse by pregnant women, resulting in a baby born addicted to, or impaired by, drugs and/or alcohol. While no one can deny the gravity of the problem, is criminal prosecution a legally permissible, and socially responsible, solution?

It is estimated that anywhere from 40,000 to 375,000 drug-exposed babies are born each year.[4] These numbers may be seriously underesti-

1. Robin Abcarian, *A New Strategy for Pregnancy Police?*, L.A. TIMES, Sept. 18, 1996, at E2.

2. *Punishing Women for their Behavior During Pregnancy*, REPROD. FREEDOM IN FOCUS (Center for Reprod. Law & Pol'y, New York, N.Y.), Feb. 14, 1996, at 2 [hereinafter *Punishing*].

3. *Id.*

4. *Alcohol and Other Drug-Related Birth Defects*, NCADD FACT SHEET (Nat'l Council on Alcoholism and Drug Dependence, Inc., New York, N.Y.), Feb. 1994, at 2 (these numbers include maternal use of only illegal drugs, and would be greater if they reflected alcohol and nicotine as well) [hereinafter *Alcohol*].

mated due both to the lack of systematic hospital procedures that identify these infants and the imperfect methods of substance detection.[5] For example, urine analysis can detect drug ingestion by the mother that occurred only within the past twenty-four to seventy-two hours.[6] The effects of maternal drug use on a fetus can be devastating. Although the long-term effects of cocaine on children exposed in utero are not firmly established, findings show obstetrical complications, low birth weight, smaller head circumference, abnormal neonatal behavior, and cerebral infarction at birth may result.[7] As they grow, these children are easily distracted, exhibit passive behavior, experience a myriad of visual-perception problems, and encounter difficulties with fine motor skills.[8]

Alcohol abuse by a pregnant woman can be just as devastating to the fetus as cocaine, heroin, or other illicit drug use.[9] Fetal alcohol syndrome ("FAS") is a major cause of mental retardation,[10] and has been linked to such congenital birth defects as prenatal and postnatal growth deficiency, small head circumference, flattened midface, sunken nasal bridge, and flattened and elongated philtrum.[11] Central nervous system dysfunction and varying degrees of major organ system malformations also have been observed in FAS babies.[12] As they get older, children with FAS experience problems with learning, attention, memory, problem solving, physical coordination, impulsiveness, hearing, and speech.[13]

An FAS rate of 3.7 per 10,000 births has been reported, but these numbers may be low.[14] Making an FAS diagnosis at birth is difficult because the facial characteristics of newborns are hard to discern, and behavioral and cognitive functioning problems are not observable until the child is

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5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. AMERICAN MEDICAL ASSOCIATION BOARD OF TRUSTEES REPORT, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatment and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2666-667 (1990) [hereinafter AMERICAN MEDICAL ASSOCIATION].
10. *Alcohol*, *supra* note 4, at 1 (fetal alcohol syndrome ("FAS") can be prevented by abstaining from alcohol consumption during pregnancy).
11. *Id.* "Philtrum" is the vertical furrow between the nose and upper lip. Francis Flaherty, *Odds and Ends*, THE ATLANTIC, Feb. 1993, at 41.
12. *Alcohol*, *supra* note 4, at 1.
13. *Id.* at 2.
14. *Id.* at 1. Many babies also suffer from fetal alcohol effects ("FAE"), which includes the same basic symptoms of FAS, but with less severity. Characteristics include low birth weight, subtle behavior problems, or a partial display of the FAS physical malformations. *Id.*

older.[15]

Children born impaired by drugs or alcohol impose both short- and long-term costs on society, not all of which are strictly financial in nature. Hospital stays of newborns who are exposed, prenatally, to drugs and/or alcohol are on average three times longer than the stays of newborns of non-substance-abusing mothers.[16] The total annual cost of treating birth defects caused by FAS was estimated at $1.6 billion in 1985.[17] A 1995 estimate placed the lifetime cost of caring for one person with FAS at $1.4 million.[18]

Drug-exposed and FAS children will require numerous state services to meet their special medical, educational, and emotional needs.[19] As adults, many of these children will perpetuate the cycle of substance abuse and dysfunctional behavior that they observed and experienced when they were young.[20] Many of the women will abuse substances while pregnant, just as their own mothers did.[21] In addition, many of these prenatally harmed individuals are likely to engage in criminal activity to support the drug lifestyles that they have adopted from their parents.[22]

Almost all experts agree that education and treatment are the ultimate answers to maternal substance abuse.[23] In reality, however, this solution is neither practical nor readily implemented. Most treatment centers use traditional treatment methods that are not geared towards the specialized needs of pregnant women.[24] They also hesitate to accept pregnant women due to liability concerns.[25] Finally, even if adequate treatment is

15. *Id.* Fetal alcohol effects is found much more frequently than full-blown FAS. Whether a baby has FAE or FAS depends on the stage of fetal development in which the alcohol consumption occurred, biological and environmental variables, and the frequency and quantity of the mother's alcohol consumption. *Id.*

16. *Id.*

17. *Id.* at 2 (for persons over 21 years old, the cost was $1.3 billion, and neonatal intensive care for growth retardation due to FAS accounted for $118 million).

18. Robert L. Bratton, M.D., *Fetal Alcohol Syndrome: How You Can Help Prevent It*, POSTGRADUATE MED., Nov. 1995, at 197.

19. Judy Howard, *Substance Use During Pregnancy: Legal and Social Responses: Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 648 (1992).

20. *Id.* at 651.

21. *Id.* at 651-52.

22. *Id.* at 652.

23. AMERICAN MEDICAL ASSOCIATION, *supra* note 9, at 2668.

24. *Id.* at 2669. Most substance abuse treatment centers use an adult male-centered model, which is not designed to address problems specific to women's psychological or physiological needs. Consequently, a woman may feel alienated and find her chances for successful treatment hindered. *Id.*

25. *Id.*

available, many drug and/or alcohol dependent women do not have the financial resources to pay for these treatment centers.[26]

Due to the infeasibility of the treatment center option, as well as overall frustrations with the complexity of the maternal substance abuse problem, states have turned to both criminal and civil actions. Until *Whitner v. State*,[27] all attempts at criminal conviction of a mother for endangering the life of her child in utero failed.[28] Serious constitutional issues regarding the right to privacy, due process, and equal protection arise when prosecutors charge women under criminal child abuse and endangerment statutes, or drug delivery and distribution statutes.[29]

Civil penalties, where women are either placed in protective custody[30] or civilly committed[31] to protect the unborn fetus, or where the state intervenes in a neglect proceeding after the child is born, have been more successful for the states than the implementation of criminal sanctions.[32] Generally, civil penalties are less violative of a woman's constitutional rights than criminal penalties.

In *Whitner*, the mother had ingested crack cocaine during the third trimester of her pregnancy, causing her baby to be born with cocaine metabolites in his bloodstream.[33] She pleaded guilty to criminal child

26. Ann C. McGinley, *Aspirations and Reality in the Law and Politics of Health Care Reform: Examining a Symposium on (E)qual(ity) Care for the Poor*, 60 BROOK. L. REV. 7, 11-12 (1994).

27. Whitner v. State, No. 24468, 1996 S.C. LEXIS 120, at *1 (Sup. Ct. S.C. July 15, 1996).

28. *See* Reinesto v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995); Reyes v. Superior Court, 75 Cal. App. 3d 214 (Ct. App. 1977); Johnson v. State, 602 So. 2d 1288 (Fla. 1992); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992); Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993); State v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991); State v. Morabito, 580 N.Y.S.2d 843 (City Ct. 1992); and State v. Gray, 584 N.E.2d 710 (Ohio 1992).

29. *Punishing*, *supra* note 2, at 2-3.

30. BLACK'S LAW DICTIONARY 1223 (6th ed. 1990) ("[p]rotective custody" is "[t]he condition of one who is held under authority of law for his own protection as in the case of . . . a person who because of mental illness or drug addiction may harm himself or others.").

31. *Id.* at 245. ("[c]ivil commitment" is "[a] form of confinement order used in the civil context for those who are mentally ill, incompetent, alcoholic, drug addicted, etc.").

32. *See* In re Troy D., 215 Cal. App. 3d 889 (Ct. App. 1989); In re Solomon L., 190 Cal. App. 3d 1106 (Ct. App. 1987); United States v. Vaughn, 117 Daily Washington L. Rep., Mar. 7, 1989, at 441 (D.C. Super. Ct. Aug. 23, 1988); In re Baby X, 293 N.W.2d 736 (Mich. Ct. App. 1980); In re Stefanel Tyesha C., 556 N.Y.S.2d 280 (A.D. 1 Dept. 1990); In re Smith, 492 N.Y.S.2d 331 (Fam.Ct. 1985); and In re Ruiz, 500 N.E.2d 935 (Ohio C.P. Ct. 1986).

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

neglect and was sentenced to eight years in prison.[34] In upholding Whitner's conviction, the Supreme Court of South Carolina held that the criminal child neglect statute under which she was charged applied to viable fetuses.[35]

Whitner's conviction represents a major jurisprudential shift towards upholding the criminal prosecutions of women who ingest drugs while pregnant. A recent Wisconsin case may extend the *Whitner* holding to situations where pregnant women abuse alcohol, a legal substance.[36] In September 1996, Deborah Zimmerman went on a drinking binge shortly before delivering her baby, who was subsequently born with FAS.[37] She was charged with both attempted murder and attempting to cause great bodily harm.[38] If this prosecution is successful, it will mark the first time that a woman has been criminally convicted for endangering her fetus in utero while using a legal substance.[39]

If *Whitner* and *State v. Zimmerman* signify a trend towards holding maternal substance abusers criminally liable, then it might not be long before new criminal laws specific to prenatal conduct are enacted. Such laws have been referred to as "fetal abuse statutes," and would create new crimes with which women could be charged.[40] Undoubtedly, such new laws would make it much easier to convict pregnant alcohol and drug abusers.

This Note will examine the law as it applies to maternal substance abuse, and discuss the success of civil and criminal actions in this context. First, this Note will look at the *Whitner* case in detail, and examine the effect the court's holding may have on other states. Second, this Note will place special emphasis on *State v. Zimmerman*. Third, this Note will delve into the real issue behind these cases: the rights of the fetus versus the rights of the mother. The genesis of both abortion rights and fetal rights will be discussed, along with the constitutional and policy considerations of both civil and criminal actions. Finally, this Note concludes that while substance abuse education and treatment are ideal long-term solu-

34. *Id.*

35. *Id.* at *2.

36. Edward Walsh, *In Case Against Alcoholic Mother, Underlying Issue Is Fetal Rights*, WASH. POST, Oct. 7, 1996, at A4.

37. *Id.*

38. *Id.*

39. Telephone Interview with Andrea Miller, Director of Education and Communications, Center for Reprod. Law & Pol'y in New York, N.Y. (Oct. 24, 1996).

40. Note, *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1580 (1990).

tions, they are not presently feasible answers to a problem that requires immediate attention. Criminalizing maternal substance abuse is simply not acceptable, due both to the constitutional issues raised and to the simple fact that these women need treatment, not punishment. The best short-term solution presently available, therefore, is the existing civil remedy of the state taking temporary custody of the child after it is born, with the mother regaining custody once she is able.

II. PRIOR CASE LAW

States have used both civil and criminal statutes to address maternal substance abuse. Civilly, states have used neglect and abuse statutes after the child is born, and protective custody and civil commitment orders while the woman is pregnant. Criminally, women are being charged under child endangerment, and drug delivery and distribution statutes.

A. Civil Actions

1. Child Abuse and Neglect Proceedings Successfully Used

States most frequently use child abuse and neglect statutes because they are generally the most successful of the various measures aimed at combatting maternal substance abuse.[41] Some states mandate procedures for hospitals to follow in situations when a delivering mother's physician suspects her of drug or alcohol abuse.[42] If drugs and/or alcohol are found in the newborn's system, then the state asserts temporary custody of the child.[43] In more serious cases, the state may attempt to permanently terminate parental rights,[44] based on the theory that the mother's prenatal conduct is probative of future mistreatment of the child.[45] For the state to succeed in these cases, "unborn child" must be included within the definition of the word "person" or "child" as used in the par-

41. Michelle Oberman, *Substance Use During Pregnancy: Legal and Social Responses: Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 519 (1992).

42. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, And the Right of Privacy*, 104 HARV. L. REV. 1419, 1430 (1991). Such mandatory reporting procedures are especially common in hospitals that receive public funding. *Id.* at 1432-33.

43. *Punishing*, *supra* note 2, at 5.

44. Marcy Tench Stovall, *Looking for a Solution: In re Valerie D. and State Intervention in Prenatal Drug Abuse*, 25 CONN. L. REV. 1265, 1284 (1993). When a state assumes custody of a child, the goal is to reunite the family and termination of parental rights is viewed as a last resort. *Id.*

45. AMERICAN MEDICAL ASSOCIATION, *supra* note 9, at 2669.

ticular abuse and neglect statute.[46]

Although a Michigan court did not rely expressly on a determination that a fetus is a person, the court found that a fetus could be considered neglected under the state's child neglect statute. In *In re Baby X*, a case where the infant exhibited signs of drug withdrawal twenty-four hours after birth, the state petitioned the court for temporary custody of the infant due to the mother's neglect of her child through substance abuse.[47] The Michigan court examined the issue of whether a mother's prenatal behavior is relevant to a determination of a newly born child's neglect,[48] and concluded that "prenatal treatment can be considered probative of a child's neglect . . . . [A] newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child."[49] In ruling that temporary custody of the child was proper, the court made the broad statement, "a child has a legal right to begin life with a sound mind and body,"[50] thus leaving the door open to the furtherance of fetal rights in Michigan.

Five years after *Baby X*, the New York court system confronted a similar situation. *In re Smith* dealt with an alcoholic mother who gave birth to a baby exhibiting signs of FAS.[51] The court first questioned whether or not the mother's prenatal abuse of alcohol and refusal to seek treatment, along with her failure to seek proper medical care during her pregnancy, constituted neglect.[52] The court concluded that the evidence was insufficient to establish that the mother's prenatal alcohol consumption caused FAS. However, the court found neglect on the part of the mother, holding that her behavior contributed to a finding of "imminent danger" to the unborn child.[53]

After finding neglect, the court then had to determine whether an un-

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46. *Punishing*, *supra* note 2, at 2.

47. In re Baby X, 293 N.W.2d 736, 738 (Mich. Ct. App. 1980).

48. *Id.*

49. *Id.* at 739.

50. *Id.* "[T]he court went on to state however, that it made no determination whether prenatal drug use by the mother would alone be enough permanently to deprive a parent of custody." In re Troy D., 215 Cal. App. 3d 889, 899 (Ct. App. 1989).

51. In re Smith, 492 N.Y.S.2d 331, 332 (Fam.Ct. 1985).

52. *Id.* at 333.

53. *Id.* at 334.

> [T]he New York court relied on a rule of law which allows the court to presume that a child of a person who repeatedly uses alcohol to an extent of impairment of judgment is a neglected child. The presumption may be rebutted by showing the fact of enrollment in a recognized rehabilitative program.

In re Ruiz, 500 N.E.2d 935, 939 (Ohio C.P. Ct. 1986).

born child is a "person" under New York's Family Court Act.[54] The Act provides "[t]he purpose of Article 10 of the Family Court Act was '. . . to establish procedures to help protect *children* from injury or mistreatment and to help safeguard their physical, mental and emotional well being.'"[55] In holding that an unborn child is a person and thereby entitled to the protection of the act,[56] *In re Smith* relied on *Roe v. Wade*.[57] The United States Supreme Court in *Roe* said that the state has an "important and legitimate interest in protecting the potentiality of human life."[58] The *In re Smith* court concluded that the state's interest becomes paramount to the parent's interest at the point the fetus is considered viable; thus, in this case, temporary custody of the child was appropriate.[59]

An Ohio court in *In re Ruiz* also predicated its holding on *Roe*.[60] It declared that a viable fetus was a child under Ohio's existing child abuse statute, and that injury to the fetus after that point constituted abuse.[61] In *Ruiz*, the court examined whether a finding of child abuse could be predicated solely on the prenatal conduct of the mother after a woman gave birth to a child born addicted to cocaine and heroin.[62] The statute at issue prohibited "any parent or guardian from creating 'a substantial risk to the health or safety of the *child*, by violating a duty of care, protection, or support.'"[63] The statute also defined a "child" as a "person who is under the age of eighteen years."[64] In finding that a viable fetus was a child under the statute, the court stated "the essence of *Roe*, [which is] the state's interest in the potential human life at the time of viability . . . compels a holding that a viable unborn fetus is to be considered a child under the [statute]."[65] Consequently, the *Ruiz* court concluded that the state should assert custody of the child.[66]

Thus, in states where child abuse and neglect proceedings have been used successfully against maternal substance abusers, the fetus has come

54. *Smith*, 492 N.Y.S.2d at 335.
55. *Id.* (emphasis added).
56. *Id.* (emphasis added).
57. Roe v. Wade, 410 U.S. 113 (1973).
58. *Id.* at 162.
59. *Smith*, 492 N.Y.S.2d at 334.
60. In re Ruiz, 500 N.E.2d 935, 937 (Ohio C.P. Ct. 1986).
61. *Id.* at 939.
62. *Id.* at 935-36.
63. *Id.* at 936.
64. *Id.*
65. *Id.* at 938.
66. *Id.* at 939.

under the protection of the statute when it has been imported into the definition of "child" or "person."

2. Child Abuse and Neglect Proceedings Unsuccessfully Used

Although many states have successfully used the child abuse and neglect statutes,[67] particularly when states assert temporary custody of the child, courts also have refused to consider a woman's substance abuse during pregnancy as a basis for permanent termination of her parental rights. In a Connecticut case, *In re Valerie D.*, a woman ingested cocaine after her water had broken, some eight to ten hours before delivery.[68] Her daughter Valerie was born exhibiting many of the classic signs of cocaine withdrawal; a urine test revealed cocaine in the infant's bloodstream.[69] Consequently, the state sought to terminate the mother's parental rights on the basis that her prenatal substance abuse resulted in the child being denied the "care, guidance or control necessary for [her] physical, educational, moral or emotional well being," and, further, that the child had "sustained a nonaccidental or inadequately explained serious injury."[70]

The trial court found Valerie to be a neglected child under the statute and terminated the mother's parental rights, stating "[t]he fact that the act resulting in the detriment to the child occurred prior to birth does not require the conclusion that the child's condition at birth was other than that of a neglected child."[71] The appellate court declined to upset the trial court's holding, finding that "a petition for neglect or termination of parental rights can be based solely on a mother's prenatal conduct."[72]

67. *See* In re Baby X, 293 N.W.2d 736 (Mich. Ct. App. 1980); In re Smith, 492 N.Y.S.2d 331 (Fam. Ct. 1985); and In re Ruiz, 500 N.E.2d 935 (Ohio C.P. Ct. 1986). *See also* In re Solomon L., 190 Cal. App. 3d 1106 (Ct. App. 1987) (mother's use of drugs during pregnancy constituted neglect for purpose of termination action); In re Troy D., 215 Cal. App. 3d 889 (Ct. App. 1989) (mother's prenatal use of dangerous drugs is probative of future child neglect and shows that child is at risk and needs the court's protection); and In re Stefanel Tyesha C., 556 N.Y.S.2d 280 (A.D. 1 Dept. 1990) (mother's prenatal use of cocaine is sufficient to bring a cause of action for neglect and may be considered as a basis for termination of parental rights; court also found that the state's child abuse and neglect statute includes unborn children).

68. In re Valerie D., 613 A.2d 748, 756 (Conn. 1992).

69. *Id.* at 757. "At birth the child was pale, had poor muscle tone and required oxygen .... At times, she was extraordinarily jittery and shaky, had a piercing cry, was unable to make eye contact, and required special care, such as swaddling, vertical rocking and elimination of all stimuli." *Id.*

70. *Id.* at 755.

71. In re Valerie D., 595 A.2d 922, 923 (Conn. App. Ct. 1991).

72. *Id.* at 925.

The Connecticut Supreme Court later reversed the appellate court, however, basing its holding on the traditional rules of statutory interpretation and legislative intent.[73] The court also relied on state and federal court decisions that hold parents have a fundamental liberty interest in their children.[74] Of primary concern to the court was whether the legislature intended the language of the termination statute to reach prenatal parental conduct that harmed a child even shortly before its birth.[75] In making its determination, the supreme court adopted a strict construction approach, looking at specific definitions of "parent" and "child."[76] The court concluded that, when looked at in its entirety, the statute clearly was intended to apply to a child who already had been born.[77] The court also looked at the legislative history of two proposed bills that dealt with the problem of prenatal substance abuse[78] and concluded that the legislature favored a rehabilitative rather than a punitive approach.[79]

The Connecticut court's deference to legislative intent was followed in a recent Arizona case. In *In re Appeal No. S-120171*,[80] the trial court severed parental rights on the grounds of abuse and neglect due to the mother's consumption of alcohol during pregnancy and the father's apparent unwillingness to intervene.[81] The court found that the legislature did not intend the term "child" as it appeared in the severance statute to include a fetus, and thus the mother's consumption of alcohol during pregnancy could not be the basis for a finding of abuse.[82] As in *Valerie D.*, the court in *In re Appeal No. S-120171* touched on the fundamental right of a parent to retain custody and control of his or her child.[83] Con-

73. In re Valerie D., 613 A.2d 748, 753, 759 (Conn. 1992).

74. *Id.* at 759.

75. *Id.*

76. *Id.* at 760. " '[P]arent' means a natural or adoptive parent . . . . 'Child' means any person under sixteen years of age . . . . [this] suggests a limitation on the applicability of that definition to a person who has been born, since that is the ordinary beginning point of one's 'age.'" *Id.*

77. *Id.* "Thus, until the moment of birth, Valerie was not a 'child' within the meaning of [the statute] and, therefore, the 'act . . . of parental commission that took place before that moment cannot be considered to be parental conduct that 'denied [her] . . . the care . . . necessary for [her] physical . . . well-being.' " *Id.*

78. *Id.* at 762, 764.

79. *Id.* at 762, 765.

80. In re Appeal No. S-120171, 905 P.2d 555 (Ariz. Ct. App. 1995).

81. *Id.* "It is undisputed that A. and T. were harmed by the mother's ingestion of alcohol during pregnancy. T. suffers from fetal alcohol syndrome; A.'s condition is somewhat less severe but he also suffered some fetal alcohol effects." *Id.* at 556-57.

82. *Id.*

83. *Id.* *See also* Santosky v. Kramer, 455 U.S. 745 (1982) (holding that proof of neglect

sequently, the severance statute should not be broadly construed to include an unborn child.[84] The court concluded that "chronic substance abuse during pregnancy in and of itself does not reflect an inability to parent that would justify severance of a parent's fundamental rights."[85]

3. *Protective Custody/Civil Commitment Orders*

States have used another civil action to deal with maternal substance abuse: the protective custody/civil commitment order, whereby a pregnant woman is placed in protective custody to prevent further harm to the fetus.[86] Courts generally have been more reluctant to grant these than temporary custody orders in neglect proceedings because custody/civil commitment orders are more violative of a woman's constitutional liberty interests. The protective custody of the fetus obviously requires concurrent custody of the mother,[87] whereas temporary custody orders only require custody of the child.

Most of the early civil commitment cases involved a woman's objection to a cesarean section or a blood transfusion, and in these contexts, the courts generally have ordered women to comply with medical advice to prevent harm to their fetuses.[88] This judicial willingness to intervene and override maternal autonomy has led some states to attempt to use protective custody orders in the maternal substance abuse area.[89]

In *Jefferson v. Griffin Spalding County Hospital*, a Georgia woman in her thirty-ninth week of pregnancy had complete placenta previa, a condition in which the placenta blocks the birth canal and prevents vaginal delivery.[90] She refused a cesarean delivery on religious grounds, even though there was a ninety-nine percent chance of death for the fetus and

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by clear and convincing evidence is constitutionally required before state may terminate parental rights).

84. *In re Appeal*, 905 P.2d at 558.

85. *Id.*

86. BLACK'S LAW DICTIONARY 245 (6th ed. 1990) ("[c]ivil commitment" is "[a] form of confinement order used in the civil context for those who are mentally ill, incompetent, alcoholic, drug addicted, etc."). *Id.* at 1223 ("[p]rotective custody" is "[t]he condition of one who is held under authority of law for his own protection as in the case of . . . a person who because of mental illness or drug addiction may harm himself or others.").

87. State v. Kruzicki, 541 N.W.2d 482, 484 (Wis. Ct. App. 1995).

88. Patricia A. King, *Helping Women Helping Children: Drug Policy and Future Generations*, 69 THE MILBANK Q. 595, 606 (1991).

89. *See Kruzicki*, 541 N.W.2d at 482; and United States v. Vaughn, 117 Daily Wash. L. Rep., Mar. 7, 1989, at 441 (D.C. Super. Ct. Aug. 23, 1988).

90. Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457, 458 (Ga. 1981).

a fifty percent risk of death for the mother.[91] The court found that the state's interest in the life of the unborn child outweighed the intrusion into the life of the parents, and granted temporary custody of the fetus to the county Department of Family and Children Services.[92] The agency was authorized to do whatever the physicians deemed necessary to save the child.[93]

A District of Columbia case provides a sharp contrast to the holding in *Jefferson.* In *In re A.C.*, the trial court ordered a District of Columbia woman who was dying of lung cancer to undergo a cesarean section that would likely save the life of her twenty-six-week-old fetus.[94] Although the surgery was performed, both the mother and child died.[95] In reversing the opinion of the trial court, the appellate court stated the common tenet of informed consent which is "that any person has the right to make an informed choice, if competent to do so, to accept or forego medical treatment."[96] The court concluded that a competent pregnant woman can refuse any and all medical interventions, even at the risk of death or damage to the fetus,[97] and that to rule otherwise would not only erode the trust between doctor and patient, but serve to drive women out of the health care system.[98] It went on to say that "a fetus cannot have rights . . . superior to those of a person who has already been born."[99] In a related case in Illinois, a twenty-two-year-old woman refused a drug-induced or cesarean delivery for her thirty-six-week-old fetus whose life was in danger due to placental insufficiency.[100] The mother believed that God's healing powers would produce the best result.[101] Like the *A.C.* court, the *Mother Doe* court held that a woman has the right to refuse medical treatment, even if doing so endangers the life or health of her

91. *Id.*

92. *Id.*

93. *Id.* at 459-60. The woman left the hospital against court orders and subsequently delivered a healthy baby naturally. John J. Paris, S.J., *The Case of Mother versus Fetus: Planning on a Miracle*, THE CHRISTIAN CENTURY, Mar. 9, 1994, at 244.

94. In re A.C., 573 A.2d 1235, 1237 (D.C. 1990).

95. *Id.*

96. *Id.* at 1243.

97. *Id.* at 1237.

98. *Id.* at 1248.

99. *Id.* at 1244.

100. Doe v. Doe, 632 N.E.2d 326, 327 (Ill. App. Ct. 1994). "The failure of the placenta—which acts as the fetus' lungs, digestive system and kidneys—can result in death or irreversible brain damage to the fetus." Paris, *supra* note 93, at 244.

101. *Doe*, 632 N.E.2d at 327.

viable fetus.[102]

A Wisconsin juvenile court and appellate court in *State v. Kruzicki* extended the *Jefferson* holding to a maternal substance abuse case.[103] During her pregnancy, the mother was screened for drugs by her obstetrician after he suspected that she was abusing cocaine.[104] After the tests confirmed the presence of cocaine,[105] the mother refused to seek voluntary inpatient treatment, as counseled by her doctor.[106] Pursuant to mandatory reporting requirements, the doctor conveyed his concerns to the appropriate authorities,[107] and the protective custody action ordering inpatient treatment and protection ensued.[108]

In ordering protective custody of the mother, the *Kruzicki* court held that her viable fetus was a child within the meaning of the statute, and that the state has a legitimate and compelling interest under *Roe* to provide protection to the fetus.[109] Because such an order also requires custody of the mother, the court looked at whether a protective custody order of a viable fetus is violative of the mother's constitutional due process and equal protection rights.[110] Again, using *Roe* as support for protection of the fetus, the Wisconsin lower courts determined that no violation of the mother's rights occurred, and that the order was constitutional.[111] Two years later, the Supreme Court of Wisconsin reversed the appellate court's decision on the basis of statutory construction, stating that the legislature did not intend to include a fetus within the statute's

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102. *Id.* at 326. "Doe vaginally delivered an apparently normal and healthy, although somewhat underweight, baby boy on December 29, 1993." *Id.* at 329.

103. State v. Kruzicki, 541 N.W.2d 482 (Wis. Ct. App. 1995).

104. *Id.* at 485.

105. *Id.*

106. *Id.*

107. *Id.* The following are statements from the reporting affidavit of the mother's obstetrician:

> 10. As a licensed obstetrician, it is my opinion that [Angela's] active cocaine usage presents a real and immediate danger to the health[,] safety and continued viability of her unborn child. 11. It is my opinion that without intervention forcing [Angela] to cease her drug use that she will continue using cocaine and other drugs with the following likely effects on her unborn child: low weight gain, abruptio placentae, increased infectious diseases, hypertension and tachycardia, preterm labor and delivery, possible precipitous delivery, and increased risks for pregnancy loss, including spontaneous abortion and still birth, SIDS, congenital malformations, intraventricular hemorrhage and precipitous labor.

Id.

108. *Id.*

109. *Id.* at 484.

110. *Id.*

111. *Id.*

definition of "child."[112] The court was clear that it was not basing its decision on the propriety or morality of the mother's conduct, nor was it examining her constitutional right to reproductive choice.[113]

Thus, while civil remedies for the maternal substance abuse problem are available, they are sometimes difficult to apply due to constitutional concerns. Also, even when civil actions are used, they are often applied inconsistently among the states, with little uniformity between neighboring jurisdictions. Because civil remedies have not yielded the desired results in reducing the scope of the maternal substance abuse problem, states have turned to criminal sanctions to deter this conduct.[114]

B. Criminal Actions

Prosecutors in some states have been very creative in molding existing criminal statutes to address substance abuse by pregnant women. Prosecutors have used most frequently the criminal child endangerment and abuse statutes, and the delivery and distribution of drugs statutes. Until *Whitner*, however, even when the lower courts convicted women under these statutes as applied to their prenatal drug use, the cases ultimately failed on appeal.[115]

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112. State v. Kruzicki, 561 N.W.2d 729, 731-32 (Wis. 1997).

> [W]e find a compelling basis for concluding that the legislature intended a 'child' to mean a human being born alive. Code provisions dealing with taking a child into custody, providing parental notification, and releasing a child from custody would require absurd results if the . . . definition of 'child' included a fetus. Each of the provisions addresses a critical juncture in a [child custody] proceeding. Yet, each also anticipates that the 'child' can at some point be removed from the presence of the parent. It is manifest that the separation envisioned by the statute cannot be achieved in the context of a pregnant woman and her fetus.

Id. at 736.

113. *Id.* at 733.

114. *See generally* Note, *Rethinking Motherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1329 (1990). One of the earliest criminal prosecutions of a woman for her prenatal conduct was a charge against Pamela Rae Stewart, a California woman, for willfully omitting to furnish medical services to her fetus. Her allegedly abusive conduct included disregarding her physician's advice to discontinue amphetamine use during her pregnancy, to abstain from sexual intercourse because her placenta had detached, and to seek immediate medical attention if she began to hemorrhage. Her child suffered brain damage and died six weeks after birth. In dismissing the charges against Stewart, the judge held that the statute under which she had been charged was not intended to criminalize a woman's conduct during pregnancy, but instead was intended to enforce parents' financial responsibilities to their children. *Id.*

115. *Punishing*, *supra* note 2, at 2.

1. Child Endangerment and Abuse Statutes

> A person is guilty of Endangering the Welfare of a Child when he knowingly acts in a manner likely to be injurious to the physical, mental, or moral welfare of a *child less than seventeen years old* or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health.[116]

This New York child endangerment statute[117] typifies those being used by prosecutors in many states to convict women for their prenatal substance abuse.[118] It is crucial to the successful application of these statutes to prenatal substance abuse that an unborn child be included in the definition of "child."[119] For example, in *Reyes v. Superior Court*, the court held that the word "child" in California's felony child endangering statute did not refer to an unborn child; thus, the mother's prenatal conduct was not within conduct contemplated by the statute.[120]

In *Reinesto v. Superior Court*, the prosecutor did not even attempt to argue that the word "child" in the statute at issue included a fetus, because that argument was foreclosed by a prior holding.[121] Instead, the state focused exclusively on the conduct of the mother and stated that "by ingesting heroin during her pregnancy, the mother knowingly caused injury to a child under circumstances likely to produce death or serious physical injury in violation of Arizona Revised Statutes Annotated . . . section 13-3623.B.1, a class 2 felony."[122] In holding that the child abuse statute did not apply to the mother's prenatal ingestion of heroin, the

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116. State v. Morabito, 580 N.Y.S.2d 843, 844 (City Ct. 1992) (emphasis added).

117. *Id.*

118. *See* Reinesto v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995); Reyes v. Superior Court, 75 Cal. App. 3d 214 (Ct. App. 1977); Johnson v. State, 602 So. 2d 1288 (Fla. 1992); Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993); State v. Morabito, 580 N.Y.S.2d 843 (City Ct. 1992); and State v. Gray, 584 N.E.2d 710 (Ohio 1992).

119. *Punishing*, *supra* note 2, at 2.

120. *Reyes*, 75 Cal. App. 3d at 216. Reyes was pregnant and addicted to heroin. She was warned by a public health nurse that if she continued using heroin and failed to seek prenatal medical care, the life and health of her child would be in danger. Nevertheless, during the last two months of her pregnancy, Reyes continued to use heroin and failed to seek prenatal care. She gave birth to twin boys addicted to heroin who subsequently suffered withdrawal. *Id.*

121. *Reinesto*, 894 P.2d at 735.

> In *Vo*, the state charged the defendant with two counts of first degree murder for the deaths of a pregnant woman and her unborn fetus. After considering the language of the statute, public policy, legislative intent, and the holdings in other jurisdictions, this court held that the first-degree murder statute, A.R.S. section 13-1105, does not apply to the death of an unborn fetus.

Id.

122. *Id.* at 734 (her child was born addicted to heroin).

court looked to the plain language of the statute and determined that when the legislature intended to refer to an unborn child or fetus, it had done so specifically.[123] Because the legislature did not include a specific reference to the unborn in § 13-3623.B.1, the *Reinesto* court stated it did not intend for the child abuse statute to apply to "situations in which harm to a fetus subsequently affects the newborn."[124]

In its examination of the due process issue, the Arizona court focused on the "fair notice" requirement that a person be informed that his or her contemplated conduct is statutorily forbidden.[125] "Because the statutory reference to 'child' does not include a fetus, petitioner could not reasonably have known she could be prosecuted for child abuse because of her prenatal conduct."[126] The *Reinesto* court saw a danger in interpreting the statute too broadly, with the result being that many mothers would possibly be subjected to "criminal liability for engaging in all sorts of legal or illegal activities during pregnancy."[127]

The *Reinesto* holding was also based on the principle that criminal statutes should focus on the conduct of the accused, not on the status of the alleged victim.[128] The court stated, "If we adopt the state's position, we would be focusing not on petitioner's conduct of ingesting heroin—conduct for which the state brought no criminal charge—but rather on the

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123. *Id.* at 735.

> For example, the manslaughter statute expressly prohibits 'knowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child which would be murder if the death of the mother had occurred.' A.R.S. @ 13-1103. The legislature also has elected to use the death of an unborn child as an aggravating factor in criminal sentencing.

Id.

124. *Id.* at 736.

125. *Id.*

126. *Id. See also* State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992) (finding pregnant woman could not have known use of illegal drugs that affected the fetus could subject her to criminal prosecution).

127. *Reinesto*, 894 P.2d at 737. *See also* Commonwealth v. Welch, 864 S.W.2d 280, 283 (Ky. 1993) (citing Commonwealth v. Kemp, 75 Westmoreland L.J. 5, 12 (Pa. C.P. Ct. 1992), *aff'd*, 643 A.2d 705 (Pa. Super. Ct. 1994)). The trial court in *Kemp* stated:

> If the statutes at issue are applied to women's conduct during pregnancy, they could have an unlimited scope and create an indefinite number of new 'crimes'. . . . In short, the District Attorney's interpretation of the statutes, if validated, might lead to a 'slippery slope' whereby the law could be construed as covering the full range of a pregnant woman's behavior—a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.

Kemp, 75 Westmoreland L.J. at 12.

128. *Reinesto*, 894 P.2d at 736.

child's status as heroin-addicted."[129]

In *State v. Gray*, a woman was charged under Ohio's child endangerment statute for ingesting cocaine during the third trimester of her pregnancy.[130] As in *Reinesto*, the court interpreted the plain language of the words "parent" and "child" and determined that Gray did not become a parent until her baby was born, and her "child did not become a 'child' within the contemplation of the statute until she was born."[131] Thus, Gray could not be charged with child endangerment prior to the live birth of her child.[132] The *Gray* court also confronted the issue of fetal rights by stating that when the legislature intended to address the concerns of the unborn, it had referred to them specifically.[133] By ruling in favor of the state, the court would be creating fetal rights, which was clearly not the express intent of the legislature.[134]

Gray is significant because it suggests that legislation could be passed that would broaden the scope of Ohio's child endangerment statute to cover prenatal substance abuse.[135] The *Gray* court is not alone in its viewpoint that the legislature is the best place to decide whether a particular statute should include the unborn.[136]

In *Commonwealth v. Welch*, the Supreme Court of Kentucky explored many of the same issues as the *Gray* and *Reinesto* courts.[137] *Welch* involved a pregnant woman who was dependent on the drug oxycodone.[138] Eight months into her pregnancy, she was arrested at a drug dealer's home and found in possession of oxycodone and syringes.[139] At the time of the arrest, Welch had just injected oxycodone into her veins.[140] Approximately one month later, she gave birth to a boy who suffered from

129. *Id.*

130. State v. Gray, 584 N.E.2d 710 (Ohio 1992).

131. *Id.* at 711.

132. *Id.*

133. *Id.*

134. Cheri Hass, *State v. Gray: De-Criminalization of Maternal Drug Abuse or a Momentary Reprieve?*, 25 U. TOL. L. REV. 1013, 1030 (1995).

135. *Id.* at 1013.

136. *See* Reyes v. Superior Court, 75 Cal. App. 3d 214 (Ct. App. 1977); Johnson v. State, 602 So. 2d 1288 (Fla. 1992); Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993); and State v. Morabito, 580 N.Y.S.2d 843 (City Ct. 1992).

137. *Welch*, 864 S.W.2d at 280.

138. *Id.* "Oxycodone hydrochloride" is a semi-synthetic narcotic analgesic with actions similar to morphine. It can produce physical dependence. SAUNDERS DICTIONARY & ENCYCLOPEDIA OF LABORATORY MEDICINE AND TECHNOLOGY, 1126 (1984).

139. *Welch*, 864 S.W.2d at 280.

140. *Id.*

neonatal abstinence syndrome.[141] Welch was subsequently charged with drug possession and criminal child abuse.[142]

The trial court found Welch guilty on all charges, but the appellate court vacated her conviction on the criminal child abuse charge.[143] In affirming the appellate court's decision that the criminal child abuse statute did not apply to the mother's use of a controlled substance during pregnancy, the supreme court looked at legislative intent regarding prenatal harm to a fetus and stated that the "courts cannot presume a legislative intent to expand the class of persons treatable as victims of criminal activity."[144]

Like the *Reinesto* court, *Welch* expressed concern with criminalizing maternal substance abuse:

> The mother was a drug addict. But, for that matter, she could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self abuse by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury . . . [w]hat if a pregnant woman drives over the speed limit, or as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the dangers of the road?[145]

The *Welch* court concluded that while the mother's possession of drugs is a punishable offense, her punishment is not to be increased because she happens to be pregnant, nor should she be punished for the harmful results of her conduct to her baby.[146] The court determined that to hold otherwise would contravene the legislature's intention.[147]

Thus, before *Whitner*, child endangerment and abuse statutes have not been used successfully by prosecutors to punish the maternal substance abuser. In these cases, the courts have examined the intent of the legislature, and consistently held that because the criminal statute at issue does

141. *Id.* Neonatal abstinence syndrome is characterized by mild temperature, irritability, tremulousness, jittery movements, crying, and some mottling of the skin. Serious complications can occur such as convulsions and seizures which could cause a cessation in breathing and result in permanent brain damage or death. *Id.*

142. *Id.*

143. *Id.* at 280-81.

144. *Id.* at 282.

145. *Id.* at 283.

146. *Id.* at 284.

147. *Id.*

not specifically refer to the unborn, the pregnant woman did not have fair notice that her conduct was violating the law.

2. Delivery and Distribution of Drugs Statutes

Prosecutors in Massachusetts, Florida, Georgia, and Michigan have used statutes intended to punish drug dealers to charge maternal substance abusers with the crime of delivering drugs to a minor.[148] In an attempt to avoid the emotionally charged and complex debate over when a fetus becomes a person, prosecutors have focused on the one-to-two minute interval between the time the baby is delivered and the moment when the umbilical cord is cut and the child is separated physically from the mother.[149] The theory is that in these brief minutes the child has been born and is now a "person" under the statute, and the mother is actively "delivering" the drug through the unsevered umbilical cord.[150]

Probably the most well-known drug delivery case is *Johnson v. State*,[151] where a Florida mother ingested cocaine prior to giving birth to her two children, each of whom tested positive for the drug.[152] Consequently, the state brought charges against the mother for delivering a controlled substance to both of her children in violation of the delivery statute.[153]

148. *See* Johnson v. State, 602 So. 2d 1288 (Fla. 1992); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992); Commonwealth v. Pellegrini, 608 N.E.2d 717 (Mass. 1993); and State v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991). *See also infra* notes 150-55 and accompanying text.

149. Stovall, *supra* note 44, at 1269.

150. *Id.*

> [A] mother's blood passes nutrients, oxygen and chemicals to an unborn child by a diffusion exchange at the capillary level from the womb to the placenta. The umbilical cord then circulates the baby's blood (including the exchange from its mother) between the placenta and the child. Metabolized cocaine derivatives in the mother's blood thus diffuse from the womb to the placenta, and then reach the baby through its umbilical cord. Although the blood flow is somewhat restricted during the birthing process, a measurable amount of blood is transferred from the placenta to the baby through the umbilical cord during delivery and after birth.

Johnson, 602 So. 2d at 1291.

151. *Id.* at 1288.

152. Timothy Sean McBride, *Should States Criminally Prosecute Mothers for Delivering Drugs to Their Newborns During the Birthing Process?*, 27 SUFFOLK U. L. REV. 251, 251 (1993) (the children were born in October 1987 and January 1989).

153. *Id.*

> At trial, medical experts disagreed as to whether the cocaine from the mother's blood had passed to the children before birth or during the sixty- to ninety-second period after birth but before the umbilical cord was cut, a significant distinction since the delivery statute only applies to children after birth.

Id.

The trial court held that Johnson violated the state statute which prohibits adults from delivering controlled substances to minors.[154] The appellate court upheld the convictions, and the supreme court overturned them, holding that the legislature did not intend for the term "delivery" to apply to mothers passing controlled substances via the umbilical cord to their babies after birth.[155] The supreme court also held that the medical evidence did not sufficiently prove that drugs were in fact delivered to the infants via the umbilical cord during the sixty- to ninety-second interval immediately after birth.[156]

Stating that "[l]egislative intent is the polestar by which the courts must be guided,"[157] the *Johnson* court concluded that the legislature expressly chose to treat maternal substance abuse as a public health problem and rejected imposing criminal sanctions on these women.[158] Recognizing the real-life implications of criminalizing maternal substance abuse, the Florida court said:

> [P]rosecuting women for using drugs and 'delivering' them to their newborns appears to be the least effective response to this crisis. Rather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected. Yet the newborns of these women are, as a group, the most fragile and sick, and most in need of hospital neonatal care. A decision to deliver these babies 'at-home' will have tragic and serious consequences.[159]

In strong language, the court concluded its holding by stating that it "declines the state's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread."[160]

In the related case of *State v. Hardy*, a Michigan woman ingested crack

154. *Id.* at 252.

155. *Id.*

156. *Id.* The supreme court adopted the appellate court analysis concerning the insufficiency of the evidence to support Johnson's conviction and the legislative intent of the dissent by Judge Sharp. The supreme court felt that Judge Sharp's application of strict construction was correct, but that she did not apply the rule of lenity regarding the use of the word "delivery" in the statute. The rule of strict construction demands that courts strictly construe criminal statutes, and that when ambiguities exist, the statute shall be construed most favorably to the accused. Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992). The rule of lenity "provides that where there is ambiguity in the language of a statute concerning multiple punishment, ambiguity should be reserved in favor of lenity in sentencing." BLACK'S LAW DICTIONARY 902 (6th ed. 1990).

157. *Johnson*, 602 So. 2d at 1293.

158. *Id.*

159. *Id.* at 1295-96.

160. *Id.* at 1297.

less than thirteen hours before giving birth, resulting in cocaine metabolites in her child's urine.[161] She was charged with child abuse and delivery of cocaine to her child.[162] The circuit judge dismissed the child abuse charge, but upheld the delivery of cocaine charge.[163] On appeal, the court determined that the legislature did not intend the statute to reach the conduct of this mother.[164] Recalling the fair notice issue raised in *Reinesto*, the Michigan court stated that "[a] person is not required, at peril of life, liberty, or property, to speculate concerning the meaning of criminal statutes."[165]

The *Hardy* concurrence focused directly on the fetal rights issue.[166] The concurrence stated that the delivery statute used the word "person," which is, in essence, a legal entity; thus, it reasoned, since a fetus is not a legal entity, the law cannot be applied to an unborn child.[167] Basing its holding on *Roe*,[168] the concurrence declared: "[a]lthough an unborn fetus is considered to be a 'potential human being,' entitled to protection in its advanced stage of development, it is not afforded the full rights and obligations of a person, an individual, or a legal entity."[169]

State v. Luster also addressed the issue of fair notice in deciding whether the prenatal conduct of the mother was encompassed by Georgia's drug delivery statute.[170] One day after the woman's daughter was born, a urine sample was taken from the child which tested positive for cocaine metabolites.[171] Based on the test results, Luster was charged with delivery and distribution of cocaine to her daughter.[172] The court concluded that Luster did not receive fair warning that her use of illegal drugs while pregnant, which subsequently affected her fetus, would subject her to criminal prosecution.[173]

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161. State v. Hardy, 469 N.W.2d 50, 51 (Mich. Ct. App. 1991).
162. *Id.*
163. *Id.* at 52.
164. *Id.* at 53.
165. *Id.* at 52.
166. *Id.* at 53-54.
167. *Id.* at 53.
168. Roe v. Wade, 410 U.S. 113 (1973).
169. *Hardy*, 469 N.W.2d at 54.
170. State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992).
171. *Id.* at 33.
172. *Id.* (note that the defendant was also charged with possession of cocaine, and that this charge was not dismissed).
173. *Id.* at 34 (the *Luster* court is citing Waldroup v. State, 30 S.E.2d 896 (Ga. 1944): "The unambiguous words of a criminal statute are not to be altered by judicial construction so as to punish one not otherwise within its reach.").

As with the child endangerment and abuse cases, the states also have failed to prosecute successfully maternal substance abusers under delivery and distribution of drugs statutes. The cases have been decided on the basis of legislative intent, in that the word "delivery" does not apply to the mother-umbilical cord-child context. The fair notice issue also has been raised, and the courts stated that the legislature did not intend to reach the conduct of a maternal substance abuser when it created these statutes.

III. THE IMPACT OF THE *WHITNER* DECISION

A. Background of the Case

In *Whitner v. State*, the South Carolina Supreme Court became the first in the nation to hold that a pregnant woman can be criminally liable for endangering a fetus through her prenatal substance abuse.[174] Accordingly, the court found that a viable fetus can be considered a "person" under the state's child abuse and endangerment statute.[175]

In 1989, the City of Charleston, South Carolina, established a collaborative effort among the police department, the prosecutor's office, and a state hospital to punish pregnant women and new mothers under the state's child abuse laws if they tested positive for cocaine.[176] Women who met these criteria were threatened with arrest but told that they could avoid it if they stopped using drugs and entered a drug treatment program.[177] The problem was that only one drug treatment facility was available that would admit pregnant women, but it was not designed to meet their special needs.[178] As a result, women who obtained medical attention at the state hospital and tested positive for cocaine were given essentially the "non-choice" of inappropriate treatment or jail.[179]

In February 1992, at a state hospital, Cornelia Whitner gave birth to a baby who tested positive for cocaine but was otherwise healthy.[180] She was charged with criminal child neglect, to which she pleaded guilty and

174. Whitner v. State, No. 24468, 1996 S.C. LEXIS 120, at *1 (Sup. Ct. S.C. July 15, 1996).

175. *State's Highest Court Asked to Rehear Case on Prenatal Conduct; Medical and Health Groups Stress Wide Implications of Ruling*, Center for Reprod. Law & Pol'y, at 1 (July 30, 1996) [hereinafter *Prenatal Conduct*].

176. *Punishing*, *supra* note 2, at 4.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Prenatal Conduct*, *supra* note 175, at 2.

was sentenced to eight years in prison.[181] After serving approximately nineteen months in jail, Whitner filed a motion for post-conviction relief, arguing that she was wrongly charged and convicted, and given ineffective assistance of counsel.[182] The motion was granted.[183] In November 1993, the Court of Common Pleas found that South Carolina's child neglect statute was not intended to apply to the unborn; thus, it could not be used to prosecute a woman for prenatal conduct towards her fetus.[184] Consequently, "Whitner had pleaded guilty to and was convicted of a nonexistent crime."[185]

In July 1996, the South Carolina Supreme Court reversed the Court of Common Pleas' decision, and at the time of this writing, Whitner is waiting to see if she will be returning to prison to finish her sentence.[186] Whitner filed a petition in July 1996, asking the state's high court to reconsider its ruling.[187]

B. The Supreme Court of South Carolina's Decision

South Carolina's child abuse and endangerment statute reads:

> Any person having the legal custody of any *child or helpless person*, who shall, without lawful excuse, refuse or neglect to provide . . . 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.[188]

The state argued that this statute included actions and conduct by the mother that endangered, or were likely to endanger, the life, comfort, or health of a viable fetus.[189]

In deciding whether a viable fetus is a person for purposes of the statute, the court looked at "not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the

181. *Id.*
182. Whitner v. State, No. 24468, 1996 S.C. LEXIS 120, at *3 (Sup. Ct. S.C. July 15, 1996) (Whitner stated that had her attorney advised her that the statute did not expressly apply to her prenatal conduct she would never have pleaded guilty and been convicted).
183. *Id.*
184. *Prenatal Conduct*, *supra* note 175, at 2.
185. *Id.*
186. *Id.*
187. *Id.*
188. Whitner v. State, No. 24468, 1996 S.C. LEXIS 120, at *5 (Sup. Ct. S.C. July 15, 1996) (emphasis added).
189. *Id.*

purpose of the whole statute and the policy of the law."[190] The court also considered the way South Carolina law treats the unborn in other contexts, and found that the word "person" as used in both wrongful death and homicide statutes includes viable fetuses.[191] Thus, the court reasoned "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."[192] Although the statute does not expressly apply to viable fetuses, the court determined that the overall purpose of the South Carolina Children's Code, with its emphasis on prevention, indicated that the legislature intended for viable fetuses to be protected.[193]

Whitner made several arguments to the court stating why the words "child" and "person" did not include viable fetuses. First, Whitner argued that several bills introduced in the state legislature specifically addressed maternal substance abuse, including some that would criminalize such conduct.[194] Whitner claimed because so many bills had been introduced on this subject, legislators must have believed that no existing legislation addressed the issue.[195] Thus, she asserted that the legislature did not intend the child abuse and endangerment statute to encompass abuse or neglect of a viable fetus.[196]

The court rebutted her argument by saying that the statutory language, not subsequent legislative acts, is the clearest guide to legislative intent.[197] The court also referred to the existing tort and criminal law to bolster its conclusion that the statutory meaning of the word "person"

190. *Id.* at *6.

191. *Id.* at *9. Although neither § 15-51-10 ("[c]ivil action for wrongful act causing death") or § 16-3-10 ("'[m]urder' defined") of the Code of Laws of South Carolina specifically mention the word "fetus," the majority opinion in *Whitner* cited three cases which held that the word "person" as used in a statute includes viable fetuses. S.C. CODE ANN. §§ 15-51-10, 16-3-10 (Law Co-op. 1976). In *State v. Horne*, the defendant stabbed his pregnant wife in the abdomen, resulting in the viable fetus' death. The defendant was convicted of voluntary manslaughter (feticide), with the court holding that the word "person" as used in a criminal statute includes viable fetuses. State v. Horne, 319 S.E.2d 703 (S.C. 1984). *Hall v. Murphy* said that a civil wrongful death action lies where the fetus is injured while viable, is subsequently born alive, and then dies as a result of the prenatal injuries. Hall v. Murphy, 113 S.E.2d 790 (S.C. 1960). Similarly, in *Fowler v. Woodward*, the South Carolina Supreme Court held that a viable fetus injured before birth may, after birth, through another, maintain a civil wrongful death action for such prenatal injuries. Fowler v. Woodward, 138 S.E.2d 42 (S.C. 1964).

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

193. *Id.* at *10.

194. *Id.* at *10-11.

195. *Id.* at *11.

196. *Id.*

197. *Id.*

included viable fetuses.[198]

Second, Whitner argued that applying the statute to viable fetuses "would lead to absurd results obviously not intended by the legislature."[199] Whitner argued that if the word "child" is interpreted to include viable fetuses, then all conduct, legal or illegal, by a pregnant woman that endangers, or is likely to endanger, a fetus would constitute neglect.[200]

The court was unpersuaded by this argument. Under the current statute, a parent could be prosecuted for both legal and illegal acts if the child was being actually or potentially endangered by the conduct.[201] The court saw no reason to make a distinction between "child" and "viable fetus" as to the repercussions of a parent's harmful conduct.[202] The court also said that it did not have to address "this potential parade of horribles,"[203] because it was concerned only with Whitner's ingestion of crack during her third trimester, which unequivocally "endangered the life, health, and comfort of her child."[204]

Both of the dissenting opinions in *Whitner* strongly disagreed with the majority opinion that a viable fetus constitutes a "child" and/or a "person" under the statute.[205] Whereas the majority believed the statutory language was unambiguous, the dissent found that ambiguities were created by the court's reliance on case holdings in two entirely different fields of law: civil wrongful death and common law feticide.[206] The dissent stated that when ambiguities are present "we are bound by the rules of statutory construction to strictly construe a criminal statute in favor of the defendant."[207]

The dissent also argued that the words "legal custody" in the statute precluded a finding that a viable fetus is a child, as the concept of legal custody is not applicable to the unborn.[208] In addition, the dissent was concerned with the scope of maternal conduct that now would be grounds for neglect: "the impact of today's decision is to render a pregnant woman potentially criminally liable for myriad acts which the legislature has

198. *Id.*
199. *Id.*
200. *Id.* at *12-13.
201. *Id.* at *13.
202. *Id.*
203. *Id.* at *14.
204. *Id.*
205. *Id.* at *27, *31.
206. *Id.* at *29.
207. *Id.* at *30.
208. *Id.* at *28, *31.

not seen fit to criminalize. To ignore this 'down-the-road' consequence in a case of this import is unrealistic."[209]

C. *Extension of* Whitner *to Maternal Abuse of a Legal Substance:* State v. Zimmerman

It is difficult to discern whether the radical departure *Whitner* takes, in holding a woman criminally liable for her prenatal substance abuse, represents only an aberrational response or a significant judicial trend. The *Whitner* court made it clear that its holding applied to legal as well as illegal substances.[210] This may explain the recent Wisconsin case of *State v. Zimmerman*,[211] where the defendant became the first woman in the country to be charged with attempted murder for drinking alcohol while pregnant.[212]

In March 1996, Deborah Zimmerman, who was nine months pregnant, consumed large quantities of alcohol and was taken to the hospital by her mother.[213] After a fetal heart tone monitor and an ultrasound detected fetal abnormalities, doctors informed Zimmerman that her only chance to save the baby's life was to have a cesarean section.[214] Although she vehemently protested, the cesarean was performed and she gave birth to

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209. *Id.* at *31-32.

210. *Id.* at *13.

> After the birth of a child, a parent can be prosecuted under section 20-7-50 for an action that is likely to endanger the child without regard to whether the action is illegal in itself. For example, a parent who drinks excessively could, under certain circumstances, be guilty of child neglect or endangerment even though the underlying act—consuming alcoholic beverages—is itself legal.

Id.

211. Decision and Order Den. Mot. to Dismiss, State v. Zimmerman (Wis. Cir. Ct. Sept. 18, 1996) (No. 96-CF-525).

212. Abcarian, *supra* note 1, at E2. On March 24, 1997, Zimmerman was sentenced to four years in prison and nine years of probation "for violating the bail terms by drinking." She was sentenced for violating a probation requirement that she cease drinking alcohol and undergo treatment. While out on bail, Zimmerman did not return to an alcohol treatment program, and she even drank vodka during a caseworker's visit. As of this writing, Zimmerman is still facing the criminal charges of attempted first degree intentional homicide and first degree reckless conduct concerning her daughter. American Political Network, *Wisconsin: Woman Charged with Feticide Violates Bail Terms*, ABORTION REP., Mar. 26, 1997, at 2.

213. Anne Marie O'Neill et al., *Under the Influence: Drunk While Pregnant, a Woman is Charged with Trying to Kill Her Baby*, PEOPLE WEEKLY, Sept. 9, 1996, at 53.

214. Decision and Order Den. Mot. to Dismiss at 2-3, State v. Zimmerman (Wis. Cir. Ct. Sept. 18, 1996) (No. 96-CF-525).

a baby girl with a blood alcohol level of .199%[215] and who exhibited signs of FAS.[216]

Zimmerman was charged with attempted first degree intentional homicide "by conduct which included knowingly consuming a near-lethal amount of alcohol in the hours prior to [the infant's] birth."[217] She was also charged with "first degree reckless conduct arising out of the same course of behavior."[218] The court found the necessary mens rea for the criminal charges from Zimmerman's statement to the nurse at the hospital: "I'm going to kill this thing because I don't want it anyways."[219]

Zimmerman can be distinguished from the other maternal substance abuse cases because she clearly stated her intention to harm her fetus. In cases like *Whitner*, on the other hand, the defendant engaged in harmful prenatal conduct but never expressed harmful intent. In denying Zimmerman's motion to dismiss, the circuit court judge said, "The instrumentality of the attempted homicide in this case was not the shooting of a bullet or the plunging of a knife. Instead, it was the massive consumption of a potentially deadly quantity of alcohol."[220]

Even though the *Zimmerman* case deals with an attempted murder charge, instead of a child endangerment or a drug delivery charge, the underlying issues are the same: is a fetus a child, what are the mother's rights as balanced against the fetus', and how far will states go in regulating a pregnant woman's conduct? If the *Zimmerman* prosecution is successful, it means that *Whitner* will have been taken one step further in holding a pregnant woman criminally liable for acts that harm her baby in utero—that step being the extension of liability to abuse of a legal substance, alcohol. Such a decision by the *Zimmerman* court undoubtedly

215. *Id.* at 3-4. This is almost twice the level required to be legally intoxicated in Wisconsin. O'Neill, *supra* note 213, at 53.

216. Decision and Order Den. Mot. to Dismiss at 3-4, State v. Zimmerman (Wis. Cir. Ct. Sept. 18, 1996) (No. 96-CF-525).

217. *Id.* at 1.

218. *Id.*

219. *Id.* at 8-9.

220. *Id.* at 8. The judge continued, stating:

> It remained active in the defendant's body long enough for the defendant's child to be born with a .199 percent blood alcohol reading. The convergence in time of the instrumentality of murder (alcohol) with the victim being born was not instantaneous such as when a bullet is fired from a gun toward a human target. Nevertheless, the convergence occurred and the elements of the crime have been established for probable cause purposes.

Id.

would pave the way for attempts to regulate further a pregnant woman's conduct.

D. Extension of Whitner *to Creation of "Fetal Abuse Statutes"*

Not only has the *Whitner* holding given prosecutors in other states the "green light" to continue to apply creatively existing criminal statutes to maternal substance abusers, it may lead to appellate courts ruling differently in these cases, as well as state legislatures enacting specific fetal abuse statutes. Although no state has yet enacted a fetal abuse statute, state legislatures have introduced numerous bills criminalizing harmful maternal behavior.[221] If such laws are passed, then clearly *Whitner* was not simply an aberrational judicial response, but, indeed, the "wave of the future" for maternal substance abuse cases.

IV. CAN *WHITNER* WITHSTAND CONSTITUTIONAL SCRUTINY?

Critical to a proper analysis of *Whitner*, or any other maternal substance abuse case, is the recognition that there are three parties in interest: the mother, the fetus, and the state. The law has accorded each different rights and interests, and when these collide there are no easy answers. However, in this complex and ever-changing area of the law, one thing is certain: over two decades ago, the United States Supreme Court, in *Roe v. Wade*, recognized that women have a significant privacy right.[222] This privacy right has profoundly influenced the way women view themselves in society, and has affected women's decisions and how they order their lives.[223] If states are going to intervene in situations where a fetus is being harmed by the prenatal conduct of its mother, they should tread carefully.

A. The Woman's Right of Privacy

While the United States Constitution does not explicitly mention any right of privacy, a line of Supreme Court decisions recognizes certain "zones of privacy" that are regarded as fundamental.[224] Included in these zones of privacy are personal rights that bear some connection to marriage,[225] procreation,[226] contraception,[227] family relationships,[228] or child

221. *Punishing*, *supra* note 2, at 2, 7.
222. Roe v. Wade, 410 U.S. 113 (1973).
223. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 856 (1992).
224. *Roe*, 410 U.S. at 152-53.
225. Loving v. Virginia, 388 U.S. 1 (1967).

rearing and education.[229] The state may not impose restrictions on these fundamental rights unless it has a compelling interest in doing so.[230]

In the landmark case of *Roe v. Wade*, the Supreme Court extended these zones of privacy to encompass a woman's decision, through consultation with her physician, to terminate her pregnancy.[231] The Court found this privacy right posited in the Fourteenth Amendment; however, it also held that the right to terminate a pregnancy is not absolute.[232] At viability, the Court reasoned, the fetus presumably has the capability of meaningful life outside the mother's womb.[233] Thus, at the point the fetus becomes viable, the state has a compelling interest in protecting potential life.[234]

The *Roe* Court clearly stated "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[235] On the one hand, the Court recognized that after fetal viability the state has an interest in potential life, which surpasses the right of the mother to terminate her pregnancy.[236] On the other hand, however, *Roe* is clear that a fetus is

226. Skinner v. Oklahoma, 316 U.S. 535 (1942).

227. Eisenstadt v. Baird, 405 U.S. 438 (1972).

228. Prince v. Massachusetts, 321 U.S. 158 (1944).

229. Pierce v. Society of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923).

230. Roe v. Wade, 410 U.S. 113, 155 (1973). A "compelling state interest" is "one which the state is forced or obliged to protect." BLACK'S LAW DICTIONARY 282 (6th ed. 1990).

231. *Roe*, 410 U.S. at 154.

232. *Id.* at 153-54.

233. *Id.* at 163. *Roe* has been heavily criticized, largely due to the faulty reasoning of the trimester framework. As medical science has advanced the point of viability ever-closer to the time of conception, the *Roe* trimester framework has become increasingly illogical. While the Court in *Webster* did not expressly overrule *Roe*, it did reject its trimester framework when it held that the state has a compelling interest *whenever* the fetus becomes viable, not just during the third trimester. Webster v. Reproductive Health Serv., 492 U.S. 490, 518, 521 (1989).

234. *Roe*, 410 U.S. at 163. The state has an interest in protecting women's health, and it also has an interest in protecting potential human life. *Id.* As one commentator notes:

> Under *Roe*, during the first trimester of pregnancy, the state's interests are never compelling, and the state may not intervene in a woman's decision to abort. After the first trimester, the state has a compelling interest in women's health, which it may protect by regulating abortion. At viability—which the Roe court considered the beginning of the third trimester—the state's interest in protecting potential human life becomes compelling, and the state may prohibit abortions not necessary to save the life or health of the woman.

Kristen Rachelle Lichtenberg, *Gestational Substance Abuse: A Call for a Thoughtful Legislative Response*, 65 WASH. L. REV. 377, 382 (1990).

235. *Roe*, 410 U.S. at 158.

236. *Id.* at 163.

not a person under the Fourteenth Amendment.[237]

B. The Fetus' Developing Rights

Early common law considered the mother and fetus one entity.[238] Legal protection was bestowed on the fetus at birth, because it was only then that it was considered to be capable of surviving independently of its mother.[239] Today "[v]iability has come to be understood as the level of developmental maturity at which a fetus will continue to live and develop even if physically separated from its mother."[240] The development of "fetal rights," the concept that a fetus has separate interests equal to or greater than those of a pregnant woman, reflects an increasing awareness in our society of the individuality of the unborn.[241]

Today fetuses have definitive rights under both property and tort law.[242] Under traditional tort rules, a fetus had to be born alive if there was to be recovery for injury.[243] But in most jurisdictions today, wrongful death suits may be brought on behalf of fetuses, with recovery usually limited to those cases where the fetus was viable at the time of the tort.[244]

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237. *Id.* at 158. While the *Roe* court did not recognize Fourteenth Amendment rights for fetuses, it left unanswered the question whether they could claim other types of rights. As one commentator suggested, "the states [should have] the power to grant legal recognition to the unborn in non-14th Amendment situations." John E. B. Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 3, 15 (1984).

238. In re Ruiz, 500 N.E.2d 935, 936 (Ohio C.P. Ct. 1986).

239. *Id.*

240. *Id.* at 938.

241. *Id.* at 936.

242. *Id.* at 937. Under property law, fetuses have the right to inherit, and under tort law, all jurisdictions allow a child to sue a third party for the consequences of prenatal injuries. *Lichtenberg, supra* note 234, at 383.

243. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 369-70 (5th ed. 1984) (discussing the development of the live birth requirement).

244. Note, *Material Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994, 1004 (1988). Seven states have held that a nonviable fetus can be considered a person in wrongful death claims. In a recent South Dakota case, the court allowed a woman a wrongful death recovery when she contracted salmonella poisoning from a food company's chicken dish and subsequently lost her seven-week-old fetus. The food company argued that it was legally inconsistent to allow a wrongful death action for a nonviable fetus when state law permits a woman to abort her fetus up to the twenty-fourth week of pregnancy. Declaring that "the concept of viability is outmoded in tort law," the court held that the fetus, viable or not, was a person for the purpose of the civil action. Scot Lehigh, *Common Sense, Or a New Way to Ban Abortion?*, THE BOSTON GLOBE, Sept. 15, 1996, at D3. Another recent case occurred in West Virginia, where the court held that an 18-week-old fetus qualified as a person under the state's wrongful death statute, thus permitting a man who lost his wife and unborn child in a car accident to seek damages for both. *Id.*

Currently in all fifty states, a fetus that is subsequently born alive can, through a representative, bring a tort action against a third party for prenatal injuries.[245] Only one state has allowed the mother herself to be held civilly liable for prenatal tortious conduct which harms her baby.[246]

Fetal rights under criminal law are not nearly as broad as they are under civil law. Under traditional common law principles, "murder was limited 'to the killing of one who has been born alive.'"[247] The Model Penal Code, after which many states pattern their own criminal codes,[248] follows this common law rule and does not mention "fetus" anywhere in its criminal homicide section.[249] Indeed, the Model Penal Code specifically defines "human being" as "a person who has been born and is alive."[250] In some jurisdictions, third parties may be held liable for intentional acts that harm a fetus.[251] These third parties are usually charged

245. Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Won't Go Away*, 25 ST. MARY'S L. J. 623, 638 (1994).

246. Grodin v. Grodin, 301 N.W.2d 869, 871 (Mich. Ct. Cl. 1980) (child sued his mother for negligence in failing to seek proper prenatal medical care, alleging that her continued ingestion of tetracycline during pregnancy caused his teeth to turn brown). A later Illinois case criticized the *Grodin* court and refused to hold a mother liable for prenatal injuries her child suffered in a car accident allegedly caused by her negligence. Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988).

247. Commonwealth v. Welch, 864 S.W.2d 280, 281 (Ky. 1993). The "born alive doctrine" as used in the criminal common law can be traced back to the writings of Sir Edward Coke, who was appointed Lord Chief Justice of the King's Bench by King James I in 1613. He stated:

> If a woman be quick with childe, and by potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison, and no murder; but if the childe be born alive and dieth of the potion, battery, or other cause, this is murder.

State v. Ashley, 670 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1996) (citing Sir Edward Coke's writings on the "born alive doctrine").

248. *Welch*, 864 S.W.2d at 281.

249. MODEL PENAL CODE § 210.1 (1962).

250. *Id.* at § 210.0. This definition was challenged in a California case where the state charged the defendant with murder when he punched the mother in the abdomen, resulting in her baby being stillborn with a fractured skull. The court held that an unborn, viable fetus was not a human being for the purposes of California's murder statute. Keeler v. Superior Court, 470 P.2d 617 (1970). California Penal Code § 187(a) originally read "[m]urder is the unlawful killing of a human being, with malice aforethought," but after the *Keeler* decision the legislature amended the statute to read "[m]urder is the unlawful killing of a human being, *or a fetus*, with malice aforethought." CAL. PENAL CODE § 187(a) (West Supp. 1997) (emphasis added).

251. Lichtenberg, *supra* note 234, at 384. Statutes that specifically mention harm to a fetus are CAL. PENAL CODE § 187(a) (West Supp. 1997); and WASH. REV. CODE ANN. § 9A.32.060(1)(b) (West 1988) which states that a person is guilty of first degree manslaughter when "[h]e intentionally and unlawfully kills an unborn quick child by inflicting

under either homicide or feticide statutes, but such criminal liability has not been invoked often and is usually limited to viable fetuses.[252]

Thus, it appears that courts are more likely to find that the fetus has rights under civil law rather than criminal law. But in both areas, the rights of the unborn are primarily afforded when the fetus is viable, and only then as to harms caused by non-maternal third parties.

C. When Maternal and Fetal Rights Collide

Pregnancy is a unique condition in which two entities are physically joined. When the rights of the mother are viewed as entirely separate from the rights of the fetus, the two are forced into an adversarial role that does not encourage a healthy relationship.[253] When the state's interest in protecting potential human life is thrown into the mix, the situation becomes even more complicated. Within this maze of confusion, courts across the country are looking for answers, with disparate results.

1. Constitutional and Policy Concerns Regarding Civil Actions Against Maternal Substance Abusers

In general, the civil sanctions that states have used against prenatal substance abusers are less constitutionally violative than criminal prosecutions. The use of child abuse and neglect proceedings, which may result in temporary loss of custody or the termination of parental rights, are predicated on the theory that prenatal substance abuse is probative of future mistreatment.[254] Evidence shows that a high correlation exists between parental substance abuse and child abuse.[255] The problem is exacerbated by the fact that children who have ingested harmful substances in utero are often difficult to care for and require above average parenting skills.[256]

Civil child abuse and neglect proceedings deal with the child after he or she is born; thus, they do not implicate the same constitutional issues of privacy, bodily integrity, and personal autonomy that are raised when

any injury upon the mother of such child." *Id.* Quickening is "[t]he first motion of the fetus in the womb felt by the mother, occurring usually about the middle of the term of pregnancy." BLACK'S LAW DICTIONARY 1247 (6th ed. 1990).

252. Note, *supra* note 244, at 1004-05. Courts have been split regarding whether to read implied protection for the unborn into statutes that do not expressly mention fetuses. *Id.* at 1005.

253. AMERICAN MEDICAL ASSOCIATION, *supra* note 9, at 2669.

254. *Id.*

255. *Id.*

256. *Id.*

mother and child are one entity.[257] One constitutional problem that is raised, however, is that these proceedings are not being applied equally to all women.[258] Women of color are having their children taken away from them at a higher rate than Caucasian women, even though the prevalence of illegal drug usage is the same between the two groups.[259] This discrepancy may exist because minority women are more frequently patients at state hospitals than Caucasian women and more subject to mandatory reporting requirements.[260] Thus, apparently an economic bias factors into the application of these statutes.

In addition to this equal protection concern, another important issue that is raised by maternal substance abusers, especially regarding the termination of parental rights, is the fundamental right a parent has in the care and custody of his or her child.[261] The Supreme Court has upheld the rights of parents regarding the care and custody of their children in several contexts, including education,[262] religion,[263] and child rearing.[264] Furthermore, in all child abuse cases, not just those involving substance abuse, the state's primary responsibility is to reunite the family, not dislocate its members.[265] Consequently, it is extremely difficult to terminate parental rights in most states.

The other civil penalty that states use to deal with the pregnant substance abuser is forced detention through protective custody orders or civil commitment.[266] These methods are much more violative of a woman's constitutional right to liberty. Obviously, by placing the fetus in

257. *Id.*

258. *Punishing*, *supra* note 2, at 5.

259. *Id.* *See also* Ira J. Chasnoff, M.D. et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990) (black women were approximately 10 times more likely than white women to be reported to civil authorities if an infant was prenatally exposed to an illegal drug). *See generally* Roberts, *supra* note 42, at 1419 (for a discussion on the racial bias present in the punishment of maternal substance abusers).

260. *Id.* at 1432.

261. *See* In re Appeal No. S-120171, 905 P.2d 555 (Ariz. Ct. App. 1995); and In re Valerie D., 613 A.2d 748 (Conn. 1992).

262. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923).

263. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); and Pierce v. Society of Sisters, 268 U.S. 510 (1925).

264. Prince v. Massachusetts, 321 U.S. 158 (1944).

265. Stovall, *supra* note 44, at 1284-85.

266. *Punishing*, *supra* note 2, at 6. Only the state of Minnesota has specifically amended its laws to authorize civil commitment of a woman who habitually and excessively uses drugs during pregnancy. *Id.*

protective custody, the mother is also detained.[267] Like neglect proceedings, equal protection violations arise because civil commitment/protective custody orders are applied much more frequently and successfully against minority women.[268]

Usually, pregnant substance abusers come to the attention of the courts through a drug-related crime they have committed, with the judge jailing them through the "back door" to protect the fetus.[269] For example, in *United States v. Vaughn*, a District of Columbia court sentenced a woman to six months in prison for check forgery, admitting she was given jail time rather than the customary probation because she was pregnant and had allegedly used cocaine.[270] The court stated the six-month sentence was necessary to ensure Vaughn would not be released until her pregnancy was concluded, and that it was acting out of concern for the unborn child.[271]

Unfortunately, incarcerating a mother for the benefit of the fetus is often useless. Prisons, in general, have inadequate health care resources and lack the specialized protocol and staff that a pregnant woman and her fetus require.[272] Along with a lack of proper prenatal care, incarcerated pregnant women are subject to such fetal health hazards as overcrowding; complete lack of exercise and fresh air; a dirty and unsanitary environment; and exposure to such communicable diseases as hepatitis, measles, and tuberculosis.[273] Finally, drugs are readily available in prison, so imprisonment does not guarantee that the maternal substance abuser will not continue—and perhaps increase—her habit.[274]

One positive aspect of the forced detention situation, at least where the woman is placed in a treatment center as opposed to a jail, is that the woman is being treated and not punished. However, oftentimes when a judge orders a stay in a treatment center, one is simply not available. Of those that are, few of them are geared to the particularized needs of the pregnant addict.[275] Moreover, many treatment centers do not want to accept pregnant women due to liability concerns, and those that do ac-

267. State v. Kruzicki, 541 N.W.2d 482, 484 (Wis. Ct. App. 1995).
268. Roberts, *supra* note 42, at 1432-36.
269. Swenson & Crabbe, *supra* note 245, at 635.
270. *See Punishing*, *supra* note 2, at 6-7; and United States v. Vaughn, 117 Daily Wash. L. Rep., Mar. 7, 1989, at 441, 446 (D.C. Super. Ct. Aug. 23, 1988).
271. *Id.* at 441.
272. AMERICAN MEDICAL ASSOCIATION, *supra* note 9, at 2667.
273. *Id.*
274. *Id.*
275. *Id.* at 2669. In addition to prenatal care, most treatment centers do not offer assist-

cept them have long waiting lists.[276] Finally, even if enough treatment centers were available that could handle the special needs of pregnant substance abusers, most of these women could not pay for these programs nor does Medicaid typically cover this cost.[277]

In short, even when court-ordered, obtaining treatment is not currently a practical alternative for the maternal substance abuser. Some believe that punishing a pregnant woman for not obtaining treatment for her substance abuse problem is an injustice when treatment is simply not available to her.[278]

2. *Constitutional and Policy Concerns Regarding Criminal Prosecutions Against Maternal Substance Abusers*

Major constitutional concerns arise when a state, using either drug delivery laws or child endangerment statutes, elects to hold a woman criminally liable for her prenatal conduct towards a fetus. In these cases, defendants argue that their due process, equal protection, and privacy rights are being violated.[279] Even though the mothers in these cases generally raise one or more constitutional claims, the courts almost always refuse to consider them, instead basing their holdings on strict statutory construction.[280]

Except for the glaring exception of *Whitner v. State*, when women have been charged with violating criminal child abuse laws, the courts have found that the statutes only apply to children already born, not fetuses.[281] Similarly, in the drug delivery cases, the courts have determined that the statutes only apply to situations where drugs are transferred between two persons already born.[282]

Some constitutional scholars claim that criminal prosecutions of maternal substance abusers violate due process because prosecutors and courts

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ance with these women's day care needs for their older children, or provide counseling for the victims of spousal or partner abuse. *Id.*

276. *Id.*

277. McGinley, *supra* note 26, at 12.

278. AMERICAN MEDICAL ASSOCIATION, *supra* note 9, at 2669.

279. *Punishing*, *supra* note 2, at 2-3.

280. Whitner v. State, No. 24468, 1996 S.C. LEXIS 120, at *24 (Sup. Ct. S.C. July 15, 1996). An exception to this was seen in *In re Valerie D.*, where the court held that parents have a fundamental liberty interest, posited in the United States Constitution, in their children. It must be noted, however, that this was a civil case, which may explain why the court was more willing to explore the constitutional issues raised. In re Valerie D., 613 A.2d 748 (Conn. 1992).

281. *Punishing*, *supra* note 2, at 2.

282. *Id.*

are applying the existing statute in an unforeseeable or unintended manner.[283] In so doing, the pregnant woman's due process rights are violated because she did not receive the required notice that the statute would be applied to fetuses and/or prenatal conduct.[284] In addition, such statutes may be found unconstitutionally vague because women have no way of knowing what conduct is considered criminal.[285]

Prosecuting pregnant substance abusers also violates equal protection on the basis of race and gender.[286] Despite the fact that the use of illegal drugs is similar along race and class lines, the majority of women prosecuted have been low income women of color.[287] As one commentator states: "[p]oor Black women have been selected for punishment as a result of an inseparable combination of their gender, race, and economic status."[288] It has also been argued that maternal substance abuse prosecutions raise a gender bias, in that men who abuse drugs or alcohol damage their sperm and, like substance-abusing women, place their future children's health and well-being at risk.[289] Yet, to date, no men have been criminally charged for such conduct.[290]

Perhaps the most serious constitutional violation that is implicated when women are held criminally liable for their prenatal conduct is the right to privacy, which includes the right to procreate, the right to bodily integrity,[291] and the "right to be let alone."[292] In a rather unusual move, the Massachusetts Superior Court, in *Commonwealth v. Pellegrini*, directly confronted the violation of a woman's right to privacy.[293] Dismissing the mother's indictment for possession of cocaine, traces of which

283. *Id.* at 3.

284. *Id. See* Reinesto v. Superior Court, 894 P.2d 733, 735 (Ariz. Ct. App. 1995); State v. Luster, 419 S.E.2d 32, 34 (Ga. Ct. App. 1992); and State v. Hardy, 469 N.W.2d 50, 51 (Mich. Ct. App. 1991).

285. *Reinesto*, 894 P.2d at 736. *See also* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (holding vagrancy ordinance void for vagueness because of lack of notice and resulting unfettered police discretion).

286. South Carolina Supreme Court Decision, Operation PAR, Inc., at 2 (July 23, 1996) [hereinafter *South Carolina*].

287. *Punishing*, *supra* note 2, at 2. *See also* Chasnoff, *supra* note 259, at 1204.

288. Roberts, *supra* note 42, at 1424.

289. *South Carolina*, *supra* note 286, at 2.

290. *Id.*

291. Page McGuire Linden, *Drug Addiction During Pregnancy: A Call for Increased Social Responsibility*, 4 AM. U. J. GENDER & LAW 105, 127 (1995) (the "right to bodily integrity" is the right of every individual to the possession and control of his or her own person).

292. *Punishing*, *supra* note 2, at 3.

293. Commonwealth v. Pellegrini, 608 N.E.2d 717, 718 (Mass. 1993).

were found in her child's urine shortly after birth, the lower court held that the mother had an overriding privacy interest in her child's medical records.[294] The Supreme Judicial Court of Massachusetts subsequently ruled that the mother had no privacy right in her child's medical records, and that such a holding could be adverse to the child's best interests.[295]

The right to procreate is violated when a woman elects to continue her pregnancy and then is criminally penalized once she gives birth to a substance-addicted or impaired child.[296] Conversely, a woman who feels compelled to terminate her pregnancy in order to avoid arrest also experiences a violation of her right to procreate.[297] Ironically, while the alleged purpose of these prosecutions is to protect the fetus, the end result may be an abortion, a complete and permanent end to the pregnancy. As the court in *Johnson v. State* said, "[p]rosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."[298]

Related to the woman's right to privacy, specifically the right under *Roe* to terminate a pregnancy, is the claim by some that "once a pregnant woman forgoes her right to have an abortion she has a 'legal . . . duty to bring the child into the world as healthy as is reasonably possible.'"[299] This duty to the fetus is compared to the duty of care that a parent has for a child under tort law.[300] However, unlike the duty of care that a parent owes a born child, this "fetal" duty of care would impose restrictions on a woman that might severely limit her freedom of action and possibly lead to forcible bodily intrusion.[301]

Furthermore, imposing a fetal duty on a woman who chooses to continue with her pregnancy assumes that she has "waived" her constitutional rights to bodily integrity and privacy.[302] Unless this waiver takes place before a judge, it cannot be valid; the simple "fact that a woman does not abort her fetus cannot be construed as the willing forfeiture of her constitutional rights."[303] While a mother may have a moral responsibility to ensure fetal health, this does not translate into a legal obligation.

294. *Id.* at 721.
295. *Id.*
296. *Punishing*, *supra* note 2, at 3.
297. *Id.*
298. Johnson v. State, 602 So. 2d 1288, 1296 (Fla. 1992).
299. AMERICAN MEDICAL ASSOCIATION, *supra* note 9, at 2669.
300. *Id.* at 2664.
301. *Id.* at 2669.
302. *Id.*
303. *Id.*

Prosecutors and courts have wrestled with other thorny issues in their attempts to punish criminally the pregnant substance abuser. One such issue is that it may be difficult, if not impossible, to prove that the woman had the mens rea to intentionally harm her fetus.[304] Some drug- and alcohol-addicted women's lives are so chaotic and disorganized that they may not even realize they are pregnant until they are well along in their pregnancy.[305] Additionally, the prenatal substance abuser may genuinely not know that what she is ingesting may cause harm to her fetus.[306] As one court noted: "[i]n virtually all instances, a user specifically does not want to harm her fetus, yet she cannot resist the drive to use the drug. Thus, it is not plausible to attribute to drug-using women a *motive* of causing harm to the fetus."[307]

However, in *State v. Zimmerman*, the mother exhibited the required mens rea for an attempted murder charge when she said, "I'm going to kill this thing because I don't want it anyways."[308] But note that when a woman harms her in utero baby, she is also harming herself, which lends further credence to the viewpoint that these self-destructive women need help, not punishment.[309] What prosecutors in the *Zimmerman* case failed to mention to the media is that the mother also said she was "going to go home and keep drinking . . . *myself* [emphasis added] to death."[310]

Yet another concern raised when maternal substance abusers are charged criminally is that the state is deliberately misconstruing existing statutes to create new offenses, in contravention of legislative intent. Legislatures convey their intentions expressly when writing laws,[311] and to allow renegade prosecutors to draw their own judgments about the meaning and application of a statute is an abuse of power. Furthermore, in situations where the prosecutor deliberately misapplies a statute, the

304. Johnson v. State, 602 So. 2d 1288, 1296 (Fla. 1992).

305. Howard, *supra* note 19, at 649-50.

306. Linden, *supra* note 291, at 136.

307. *Johnson*, 602 So. 2d at 1296 (emphasis added).

308. Decision and Order Den. Mot. to Dismiss at 3, State v. Zimmerman (Wis. Cir. Ct. Sept. 18, 1996) (No. 96-CF-525).

309. AMERICAN MEDICAL ASSOCIATION, *supra* note 9, at 2669.

310. O'Neill et al., *supra* note 213, at 53.

311. *See* In re Appeal No. S-120171, 905 P.2d 555 (Ariz. Ct. App. 1995); Reinesto v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995); In re Valerie D., 613 A.2d 748 (Conn. 1992); Johnson v. State, 602 So. 2d 1288 (Fla. 1992); Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993); State v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991); State v. Gray, 584 N.E.2d 710 (Ohio 1992); and Whitner v. State, No. 24468, 1996 S.C. LEXIS 120, at *1 (Sup. Ct. S.C. July 15, 1996).

judge must exercise judicial restraint[312] and dismiss the charge. To act otherwise is a clear abuse of judicial discretion.[313]

An example of both prosecutorial and judicial overreaching can be found in *Whitner v. State*.[314] One of the dissenting opinions noted that the majority reached its holding of criminal liability despite state legislative and agency action that clearly demonstrated South Carolina's criminal child neglect statute was designed to protect children once they are born, not before.[315]

D. Where Is Whitner *Leading the States?*

The World Health Organization and the American Psychiatric Association define substance abuse as a disease.[316] In addition, the American Medical Association states that "addiction is not simply the product of a failure of individual willpower. [It] is caused by complex hereditary, environmental, and social factors."[317] Furthermore, the United States Supreme Court has forbidden an individual to be punished based on his status as an addict.[318] Finally, other public health groups and medical organizations uniformly oppose treating pregnant substance abusers as criminals, instead recommending education and treatment.[319] So how can *Whitner v. State* be explained?

Although states have been trying aggressively to prosecute maternal substance abusers for the last decade or so, and property and tort law accord the fetus more rights, *Whitner* likely will be viewed as an aberrational decision. *Whitner* radically deviates from the prior holdings, and underlying reasoning, of every other state appellate or supreme court that has examined the issue.[320] The constitutional issues of due process, equal

312. BLACK'S LAW DICTIONARY 849 (6th ed. 1990) ("Judicial self-restraint" is defined as "[s]elf-imposed discipline by judges in deciding cases without permitting themselves to indulge their own personal views or ideas which may be inconsistent with existing decisional or statutory law.").

313. *Id.* at 10 ("Abuse of discretion" is "[a] discretion exercised to an end or purpose not justified by and clearly against reason and evidence. Unreasonable departure from considered precedents and settled judicial custom, constituting error of law.").

314. Whitner v. State, No. 24468, 1996 S.C. LEXIS 120, at *1 (Sup. Ct. S.C. July 15, 1996).

315. *Id.* at *30.

316. *Punishing*, *supra* note 2, at 9.

317. *Id.*

318. Robinson v. State of California, 370 U.S. 660 (1962) (striking down a California statute which criminalized addiction).

319. *Punishing*, *supra* note 2, at 1.

320. *See* Whitner v. State, No. 24468, 1996 S.C. LEXIS 120, at *5 (Sup. Ct. S.C. July 15,

protection, and particularly, the right to privacy, which the *Whitner* decision raises,[321] will probably prevent *Whitner* from being used successfully as a springboard for other state's prosecution efforts. No state has passed a law specifically providing for criminal penalties against a woman who uses drugs during pregnancy, in spite of the introduction of such bills in many state legislatures.[322] Thus, *Whitner* likely will remain a deviation in the law.

The long-term solution to the maternal substance abuse problem—education and treatment—is currently not feasible due to the lack of adequate facilities;[323] therefore, the civil methods that the states have been using, especially actions based on the abuse and neglect statutes, will continue to provide a short-term solution to the problem. When the state asserts temporary custody of the born child, the needs of both mother and child are served. In this manner, the mother can get the treatment she needs, provided it is available, and the child is removed from a potentially abusive and neglectful environment, with the ultimate goal being family reunification where reasonable.

Whatever remedy the state uses to deal with the prenatal substance abuser, the state should treat both illegal drugs and alcohol equally under the law. Since both illegal and legal substances cause serious harm to the fetus,[324] to select one over the other for purposes of punishment is unjust. The *Zimmerman* case may represent a shift towards equality of punishment for abusers of illegal and legal substances that harm a fetus.

V. Conclusion

Maternal substance abuse is a public health problem, not a legal one. As such, the pregnant women who are prenatally harming themselves and their fetuses should be treated as patients, not criminals. As much as the conduct of these women offends traditional notions of moral responsibility, they cannot be held criminally liable for their actions with respect to the fetus. To do so results in placing not only the mother and her unborn

1996); Reinesto v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995); Reyes v. Superior Court, 75 Cal. App. 3d 214 (Ct. App. 1977); Johnson v. State, 602 So. 2d 1288 (Fla. 1992); State v. Luster, 419 S.E.2d 32 (Ga. Ct. App. 1992); Commonwealth v. Welch, 864 S.W.2d 280 (Ky. 1993); State v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991); State v. Morabito, 580 N.Y.S.2d 843 (City Ct. 1992); and State v. Gray, 584 N.E.2d 710 (Ohio 1992). *See also supra* notes 149-50, 152-56 and accompanying text.

321. *Punishing*, *supra* note 2, at 2-3.

322. *Id.* at 7.

323. *See supra* notes 23-26, 272-78 and accompanying text.

324. American Medical Association, *supra* note 9, at 2666-667.

child in an adversarial relationship, but also the mother and her physician, if he or she is required to report a pregnant woman's substance abuse. If the woman may be held criminally liable, she either may entirely avoid obtaining prenatal care, out of fear of being arrested, or may provide inaccurate or incomplete information to her physician, thus preventing effective treatment.[325]

The physician and the woman should work in concert, not at cross-purposes, to ensure the health of both the mother and the child. As one court stated:

> [c]riminal prosecution of women for their conduct during pregnancy fosters neither the health of the woman nor her future offspring; indeed, it endangers both. Criminal prosecution cruelly severs women from the health care system, thereby increasing the potential for harm to both mother and fetus. Pregnant women threatened by criminal prosecution have already avoided the care of physicians and hospitals to prevent detection.[326]

Due to the severe constitutional and policy concerns *Whitner* raises, it is unlikely that it will lead to many future prosecutorial successes in maternal substance abuse cases or trigger the creation of specific fetal abuse statutes. If a state were ever to enact a fetal abuse law, challengers would likely succeed on constitutional grounds.

Through *Roe* and its progeny, women have been accorded liberty interests and privacy rights that have allowed them to advance in society. While many people see the *Whitner* holding as simply punishing a "bad" woman for "bad" conduct that harmed her innocent, unborn child, in actuality it represents an attempt to turn the clock back on the progress women have made through the right of reproductive choice. A solution is desperately needed for the maternal substance abuse problem, but the answer is not to advance the rights of the unborn to the point where the rights of all living, breathing women are severely jeopardized.

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325. *Id.* at 2669.

326. *Punishing*, *supra* note 2, at 4 (quoting Commonwealth v. Kemp, 75 Westmoreland L.J. 5, 11 (Pa. Ct. C. P. 1992), *aff'd*, 643 A.2d 705 (Pa. Super. Ct. 1994)).